The Payment Order of Antiquity and the Middle Ages

A Legal History

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THIS CHAPTER DISCUSSES fundamentals; namely, money, payment in money, and the order to pay money; the latter underlies a non-cash payment by means of a payment mechanism. The discussion in this chapter draws primarily on the common law; it is designed to provide an overall approach to these concepts, rather than to trace their exact evolution in each legal system or even in a broader comparative context. The objective is to lay down the conceptual framework for the legal analysis that follows later in the book. The legal analysis is carried out in the following chapters in the context of the contemporary institutional arrangements and the various legal systems which are relevant in each part of the period under discussion. The entire period extends from Antiquity, through the Middle Ages, up to the dawn of the modern era.

In the present chapter, to the extent possible,[1] 'money' is used in its strictest sense, referring exclusively to monetary objects which, currently, are banknotes and coins.[2] In this sense, 'money' is interchangeable with 'cash' or 'currency' and is to be distinguished from 'monetary value'. The latter addresses both the function of 'money' as a standard unit of value and its possible abstract form, typically as a credit to an account. In that latter sense, 'monetary value' is usually convertible to 'money' in its concrete form, viz to banknotes and coins. Stated otherwise, 'monetary value' is formed by a claim to 'money'. Thus, payment in money entails the physical delivery of banknotes and coins. At the same time, to the extent it is not applied in the exercise of a bilateral set off between a debtor and creditor,[3] the payment in 'monetary value' is necessarily by means of a 'payment mechanism'. It is to that end that the juxtaposition of 'money' and 'monetary value' is helpful for the purpose of the present chapter.

Section 2 examines 'money' as consisting of physical objects. Section 3 examines 'payment in money' as the delivery of such physical objects and further highlights practical difficulties inherent in a method for the discharge of monetary debts premised on the physical delivery of money. Section 4 sets out the nature of a payment mechanism as a method for the discharge of monetary debts by means of a transfer of 'monetary value', initiated by a payment order. As such, this chapter lays down the framework for the ensuing historical discussion of the book.

2. MONEY

> Money has not been generated by law. In its origin it is a social and not state institution. . . . On the other hand, however, by state recognition and state regulation, the social institution of money has been adjusted to the manifold and varying needs of an evolving commerce.[4]

This section outlines both the function and essence of money as it evolved.

Money is said to be a medium of exchange, a store of value,[5] and a unit of account.[6] Fulfilling these functions, money is essential to the smooth operation of an exchange economy as well as to the accumulation of wealth it allows. Money both facilitates the exchange and 'acts as a measure . . . making things commensurable.'[7] At the same time, money is not needed in a society consisting of self-sufficient economic units;[8] nor is it required in an utopian society in which products 'are not exchanged, bought or sold' but rather are 'stored in the communal warehouses, and are subsequently delivered to those who need them.'[9] For an exchange economy, however, money is the lifeline.[10]

In modern times, economists take the narrow 'monetary base' of a country to consist of the obligations of its central bank, both on banknotes it issues and on deposits it holds for commercial banks in their settlement (or reserve) accounts. The broader 'money-supply' in the hands of the public is taken to consist of such banknotes issued by the central banks (plus coins for small change issued either by the central bank or a government agency), together with demand deposits, held by the public in commercial banks. It is this 'money supply' that reflects the purchasing power of a given society.[11]

At the same time, both economists and lawyers have been looking for definitions that transcend contemporary institutional arrangements, and that capture instead the concept of 'money' as it evolves. 'Money' is thus defined in a leading English case to be 'that which passes freely from hand to hand throughout the community in final discharge of debts . . . being accepted equally without 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'.[12] This judicial definition is in line with an economist's perspective, according to which money is anything that is widely accepted in payment for goods, used as a medium of exchange, and expressed as the standard unit in which prices and debts are measured.[13]

Viewing this position as nevertheless too broad for the lawyer, FA Mann drew a distinction 'between money in its concrete form and the abstract conception of money.'[14] This juxtaposition echoes and confirms a distinction already made in the study on the origins of money. That is, money as an abstraction, meaning a unit of value in which prices and penalties are set, preceded the coin, or in fact any particular object, as the physical embodiment of such a unit of value or a medium of exchange in a specified denominated value.[15] Moreover, despite its immense contribution to the facilitation of exchange, it may well be that 'money', not only in its concrete form as a medium of exchange,[16] but also as a uniform measure of value, may not necessarily have emerged or been invented to improve commerce. This is so notwithstanding the mythology to the contrary.[17] Rather, as a uniform measure of value, its roots may be traced to the practice of *wergeld*, 'that of paying compensation primarily for the killing of a man but . . . by extension [also] for injuries to himself or his family and household.'[18] Certainly, however, commerce and the exchange economy account for the improvement and further development of money.

Ancient texts support the existence of 'money' as an abstract unit of value, ahead of its emergence in a concrete form as a universal medium of exchange. The abstract unit could originally be a standard item of value by reference to which the value of other objects, that may have been bartered, was measured.[19] Gradually, the standard unit of value became a specified weight of a generic item such as staple or precious metal.[20]

Indeed, the period covered by the Hebrew Bible[21] is well before the appearance of coined money.[22] Nevertheless, the Hebrew Bible is full of references to 'money'. True, in Hebrew, one word, '*kessef*', denotes both 'silver' and 'money'. Furthermore, in ancient times, units of account for payment and unit of weights[23] were interchangeable.[24] On occasion, it is obvious that a biblical reference to '*kessef*', even as a means of payment, is made to silver, to be weighed. This is so, for example, when the Patriarch Abraham weighs to Ephron 400 'shekel *kessef*' in payment of the Cave of the Machpela in Hebron.[25] However, elsewhere, the Hebrew Bible is more ambiguous in referring to '*kessef*' as well as to units of which it consists as a medium of exchange for buying and selling,[26] as well as something which is lent,[27] in which valuation is made[28] and both prices[29] and penalties[30] are set and payments are to be made.[31] There is also a reference to '*kessef*' as something that, at least compared to agricultural produce, is easily bundled and hence portable.[32] At one point '*kessef*' is described as countable, hence, passing by tale.[33] It is also referred to as something that is more liquid than other items of property.[34] Hence, there is a reference to a system of valuation as well as possibly to diverse and not always identified objects assessed according to such a system and used as a medium of exchange at the value they denote.

The documentary evidence from Ancient Mesopotamia supports the existence of an extensive monetary system without specific objects serving exclusively as money. Thus, under a complex monetary system, various commodities served as both units of account and means of payment. Such commodities first served as a basis for a price system, based on their comparative or relative value. Second, such commodities served as actual means or money of payment. Principal commodities were grain and precious metal, usually barley and silver.[35] Commodities of this type have both (i) actual use value or intrinsic utility, and (ii) economic value facilitating their use to provide a standardized means for both the measurement of the value of other commodities as well for paying exist, where the debtor is bound to pay a fixed, certain specific, or liquidated sum of money'.63 'Payment' thus signifies the '[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation'.64 Specifically, it is 'a transfer of money from one person (the payer) to another (the payee).65 When made in pursuance of a debt or obligation it is sometimes called payment in satisfaction.'66

'Payment' may be carried out by the physical delivery of cash, that is, currency, consisting of banknotes and coins. Typically, each country designates banknotes and coins, usually denominated in its own national currency, as 'legal tender';67 the latter is money that, at least in the absence of an agreement to the contrary, a debtor may offer and the creditor must accept in discharge of a debt.68 However, 'money . . . is not necessarily legal tender';69 parties may agree on payment in foreign currency.70 They may also agree on payment by means of a non-cash payment mechanism.71 Payment in foreign currency may be agreed to be executed either in cash or by means of a non-cash payment mechanism.

The present discussion is on payment in fact, that is, the 'actual payment from the payer to the payee',72 in the discharge of a debt. This section is concerned exclusively with payment as a transfer of money in the form of the delivery of cash, whether in domestic or foreign currency, and whether in legal tender or not. Payment by means of a non-cash payment mechanism initiated by an order to pay money is the subject-matter of the concluding section (section 4) of this chapter.

3.2 Tender of Money

'Payment' is quite different from 'tender of money'. In *Dixon v Clark (1848)*,73 Wilde CJ explained that 'the principle of the plea of tender' is a matter of defence to an action for a debt. As such it means that:

> [T]he defendant has been always ready . . . to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready . . . , but must be accompanied by [an offer in court] of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt . . . , yet he will answer the action74

Tender is an 'attempted performance', denoting a stage where the debtor has done everything which does not require the creditor's co-operation towards performance.75 To make a successful tender plea, the defendant-debtor must show that 'the plaintiff [creditor] himself precluded a *complete performance* by refusing to receive it' (emphasis added).76 An unaccepted tender is an answer to an action alleging breach by non-performance of the payment obligation;77 it precludes the non-accepting creditor from bringing an action against the tendering debtor for damages caused by the breach of the payment obligation.78 'Tender' is, however, not as good of a plea as 'payment', which discharges the debt.79

A plea of tender must be supported by 'an offer of the specific sum due, unqualified by any circumstance whatever.'80 Nevertheless, a bare offer does not suffice. It is not enough for the debtor to say that 'he had [the money] in his pocket.'81 Rather, an effective tender is 'an offer to pay, by producing the money.'82 'Production' means 'exhibition'. Thus, where the debtor offered payment, 'then put his hand into his pocket, but before he could take out the money the [creditor] left the room', the plea of tender failed.83 On the other hand, it was a sufficient tender where the debtor had the money twisted up in his hand, although not exposed, and he stated the amount offered.84

There is some ambiguity as to the adequacy of production of money in bags. This can be traced to *Sucklinge v Coney* (1598).85 In that case:

> [U]pon payment for a redemption of a mortgage, the mortgager comes at the day and place of payment, and said to the said mortgagee, Here I am ready to pay you the 200l. which was of due money, and yet held it all time upon his arms in baggs. And ajudg'd no tender; for it might be counters or base [coin] for anything appeared.

3.3 The Process of Payment: Completion, Risk and Remedies

The process of payment in cash can be analogized to the process under which property passes under a sale of unascertained goods by description; in the latter case, under the law that governs the sale of goods, property passes to the buyer when goods meeting the contract description 'are unconditionally appropriated to the contract . . . by the seller with the assent of the buyer'.120 Similarly, payment in cash typically begins by the payer's selection, or 'ascertainment' of the specific coins or banknotes to be handed over to the payee.121 It continues with the payer's 'unconditional appropriation' in the form of tender of delivery, and culminates in the payee's 'assent' upon the delivery of the money.122 Payment is thus 'a bilateral act which requires the [payee] to accept the [payer]'s act of tender';123 payment is made on the passage of possession in the money124 when the payee takes delivery, thereby manifesting the acceptance of the tender.125 In this process, the payer and payee, respectively, are in the position of a seller and buyer of money as unascertained goods.

Depending on the circumstances, an examination and counting by the payee of money tendered to him is consistent with either previous or subsequent passage of property. Where it is mutually agreed that conformity with the correct amount is to be deferred to the completion of counting and examination, and counting and examination takes place either in the payer's presence, or in other circumstances which secure the segregation of the payer's money, passage of property is postponed until the ascertainment of the correct amount and the unconditional appropriation of specific coins and banknotes have been completed. Usually, however, parties intend to time the passage of property to the delivery stage. Hence, an examination and counting of money tendered, whether made upon delivery or diligently thereafter, is to be treated as occurring in the post payment stage, so as to facilitate the timely exercise of rejection rights, if necessary. Needless to say, a payee who examines and counts the money after delivery, and not in the payer's presence, may fail to establish diligence, and may also fail to put forward reliable evidence supporting the alleged shortfall. Similarly, a payer alleging a mistaken overpayment, who is entitled in principle to recover the excess from the payee, may face difficulties in proving his case after the payee took the money and left.

Usually, the loss of the right to reject a nonconforming tender of money results in the loss of the rights to sue the payer for damages for any shortfall. This is so for the following reasons. First, once money has been accepted and commingled, there is likely to be evidentiary difficulty in identifying the payment tendered by the payer. Second, lack of diligence which bars rejection is likely to constitute failure on the payee's part to mitigate the loss. However, inasmuch as the useful value of bad money is nil, there is no difference between the amount recovered upon the rejection of bad money, and the amount recovered in an action for damages for breach.

There is some direct authority confirming the preceding analysis as to the identification of the point of payment as well as to the existence of post-payment rejection rights. As will be seen below, pertinent cases were concerned with irreversibility and passage of risk.

Chambers v Miller (1862)126 was an action for an assault and false imprisonment. The plaintiff presented a cheque for payment at the defendants' banking-house. The defendants were the drawees of the cheque. The plaintiff acted on behalf of his employer, the holder of the cheque. The defendants' cashier counted out the amount in notes, gold and silver, and placed it on the counter. The plaintiff took it and counted it. He was counting it the second time, when the cashier, who had discovered an overdraft in the drawer's chequing account, demanded the money back. Upon the plaintiff's refusal to return the money, the cashier detained him and took the money from him by force.

The decision was in favour of the plaintiff on the basis of the passage of property in the money upon the completion of payment. Erle CJ thought that '[t]he ordinary rule of law' under which 'property in a chattel passes according to the intention of the parties' applied also to a payment. In this case there was an appropriation of the money to be delivered to the plaintiff: '[The banker's clerk] counted out the notes and gold and placed them on the counter for the robbery. Its position was that 'when its employee placed the cash on the counter in front of the teller with the intention that the money should be banked',137 there passed to the bank both the possession of and property in that money so that the bank was then liable to account to the plaintiff although the money was in fact taken by the robbers. On the other hand, the defendant-bank 'denie[d] that the possession of or property in the money had passed.'138 Alternatively, the bank submitted that it 'had the money under a bailment for the limited purpose of counting it and that property in an article bailed does not pass to the bailee.'139

In the course of his duties, a teller was required 'to count any notes presented by a customer for deposit and then to check the figures recorded on the banking sheet completed by the customer.' Then, '[i]f the figure on the banking sheet coincided with the counted money, the banking slip was . . . receipted and the customer's copy stamped in the same manner.'140 In the case at bar, this process had not been completed. However, the plaintiff-depositor alleged, primarily on the basis of *Chambers v Miller* (1862),141 that 'possession of and property in the money had passed to the bank upon it being placed in front of the teller for counting.'142

McMullin J treated 'legal possession' as determined by the amount of occupation or control capable of excluding others, accompanied by '*animus possidendi*.'143 He explained *Chambers v Miller* (1862) on the basis of the fact that 'the banker's clerk had done all that was possible to pass the property in the money to the plaintiff'144 and thus distinguished it from the case at bar:

> In the present case there was never full legal possession of the money in the bank to the exclusion of the plaintiff. At any time before the money had been counted, and it may be until the banking slip had been receipted, the plaintiff's employee could have called for a return of the money placed on the counter145

Possession of the money on the counter could have been 'a joint factual possession shared with the plaintiff.' This fell short of the required 'legal possession' in the defendant's hands as occupation and control exercised by it did not exclude the plaintiff's employee from interfering. Furthermore, even if possession had passed to the bank, it did not follow that passage of ownership resulted:

> Although property in currency generally passes with its possession, this is not necessarily so and the principle must remain that property in currency passes when it is intended by the parties that it shall pass.146

Accordingly, judgment was given for the defendant-bank.

Chambers v Miller (1862)147 involved an appropriation on behalf of the paying banker and as assent given by the payee. In other words, there was a tender of delivery and acceptance. The case is a classic application of the principles governing the payment of money. Also, the existence of adjusting post-payment rejection and restitution rights is highlighted in the judgments.148 A less convincing part of the decision is the view that payment was achieved as soon as the money had been laid by the paying banker on the counter. Arguably, at that point 'appropriation' had been achieved, although not necessarily 'assent'.149 Nevertheless, in that case it was the payee who came to the payer specifically to obtain payment. Under those circumstances, an advance assent to the appropriation of any money tendered might be inferred.

Balmoral (1974)150 must be understood in light of the specific nature of a depositor's payment into his own bank account. Unlike payment in pursuance of a payment obligation, such a payment does not involve an unconditional appropriation or tender of a specific amount. At any point before certain recordings are made, notwithstanding even delivery of the money to the banker, the depositor may change his mind and walk away with all the money or part of it. Counting and examination by the payee-banker takes place in the prepayment stage where the final amount, as well as the identity of the individual coins and notes to be deposited must be agreed upon. In that respect, the payment of money in a bag into a bank account is very much like the sale of '[all] the bark stacked at Redbrook at 9.5s. per ton' in *Simmons v Swift* (1826).151 It was held in that case that the property did not pass until the bark had actually been appropriated by ascertaining its weight and price. It seems to follow that in *Balmoral* (1974), had the money in the teller's hand also been robbed, such money would still have been of the paying depositor and not of the payee-bank.

4. THE ORDER TO PAY MONEY: THE CONCEPT OF A PAYMENT MECHANISM

4.1 Transmission of Monetary Value: General Framework

(i) The Basic Model

As pointed out in the previous sections of this chapter, in its simplest sense, the payment of a debt contemplates payment of money in specie, or cash, namely, the physical delivery of monetary objects – presently being banknotes and coins – from debtor to creditor. This method of payment requires the availability of the monetary objects in the debtor's hands, and their physical delivery or transportation to the creditor. Together with paper money, payment mechanisms have developed as a response to the scarcity of coins as exclusive monetary objects;[152] however, payment mechanisms evolved also as means to reduce, or even to eliminate altogether, costs and risks involved in the transportation of monetary objects, being coins or banknotes, in payment of debts. Furthermore, as demonstrated in section 3 above, payment in cash is cumbersome; its proof may invoke evidentiary issues; moreover, payment in cash may give rise to situations in which the application of the law is not always clear and predictable. Obviously, the emergence of non-cash payment mechanisms for the transmission of monetary value in payment of debts is bound to bypass all such difficulties. Finally, from the perspective of the modern state, payment mechanisms are fiscally advantageous, as they provide records for transactions.

When investigating the origins of payment mechanisms, a kind of chicken-and-egg problem arises: historians are unsure whether (i) scarcity of monetary objects produced payment mechanisms that resulted in the reduction of the transportation of monetary objects, or (ii) payment mechanisms were consciously set up to reduce the transportation of monetary objects so as to bring about a reduction in the amount of actual money in circulation. Historically, the emergence of payment mechanisms addressed both concerns. In any event, even if their emergence was necessitated by the scarcity of monetary objects, the development and growth of payment mechanisms enhanced the objective of reduction or avoidance of the carriage or transportation of monetary objects. In the final analysis, this objective has served as the primary raison d'être of payment mechanisms.

Physical transportation of money in specie has two serious drawbacks. First, large quantities of monetary objects are bulky and require space. This raises difficulties and increases costs in connection with storage as well as with transportation in commerce. Second, transportation of monetary objects gives rise to risks of accidental loss and theft. The cumbersome nature and potential uncertainties associated with payment in cash as set out in the previous section have been linked to these two drawbacks, inherent in the possession of money in specie. All this has been met in connection with payment of debts by the emergence and development of payment mechanisms.

A payment mechanism can be broadly described as any method involving a third party other than the debtor and creditor,[153] facilitating the transmission of monetary value in the payment of a debt,[154] which enables the debtor to avoid the transportation of money in specie and its physical delivery to the creditor in the discharge of the debt. Physical transportation and delivery of money in specie is avoided by shifting the risks and administration involved therein to a third party. This third party may or may not be one who is in the business of taking such risks. Payment may or may not be in specie. In any event, as explained below, such payment may discharge more than one debt, thereby reducing instances of physical transportation of money in specie and the risks and costs involved in this endeavour.

A payment mechanism does not involve the physical delivery of a bag of money from the debtor to the creditor via a third party carrier. Coins and banknotes, of which money consists, are fungible chattels. As such they are mutually interchangeable, namely replaceable by equal quantities and equal qualities.155 For that reason, transmission of monetary value via a payment mechanism is not identical to the physical transfer (or transportation) of money in specie. Coins and banknotes that may be delivered by the third party to the creditor need not be set aside or earmarked by the debtor.156

The operation of a payment mechanism is premised on the discharge of a debt by virtue of an authorized payment made by a third party, frequently a debtor's debtor. Besides discharging the original debt, this payment discharges the debt of the debtor's debtor. Alternatively, where there is no such pre-existing debt owed by the third party to the debtor, this payment, besides discharging the original debt, creates a new debt owed by the original debtor to the third party. The specific mechanics, and the mode by which the physical transportation of money is avoided or eliminated by those specific mechanics, will be discussed in this section.

(ii) The Three-party Payment Mechanism

A payment mechanism is fundamentally a three-party arrangement.157 Thereunder, where **Debtor** owes money to **Creditor**, **Debtor**'s discharge is to be effected by a third-party **Paymaster**'s payment to **Creditor**, made with **Debtor**'s authority. This payment either creates a new debt owed by **Debtor** to **Paymaster**, or discharges **Paymaster**'s existing debt to **Debtor**. In the latter case, one actual payment, made by **Paymaster** to **Creditor**, discharges two debts: one owed by **Debtor** to **Creditor** and the other owed by **Paymaster** to **Debtor**. This is one instance whereby the carrying of money in specie is avoided. Further reduction in the transportation of money is achieved where **Paymaster** is a depository of money owing **Debtor** on account of money **Debtor** entrusted with **Paymaster**. In such a case, payment by **Paymaster** to **Creditor** need not necessarily be made in specie. Rather, it can be accomplished by a mere bookkeeping entry, namely by the creation of a new debt running from **Paymaster** in favour of **Creditor**, in lieu of the old debt owed by **Paymaster** to **Debtor** for that sum of money.158 In such a case, it is the face value of money, rather than money itself, that has been transmitted via the payment mechanism.

The three-party model contains the basic elements of all payment mechanisms. This can be demonstrated by fitting into the model all types and classes of payment mechanisms presently used.159 In connection with the discussion that immediately follows, it is useful to keep in mind that terminology which has developed in connection with modern payment mechanisms contemplates that both **Debtor** and **Creditor** have bank accounts, that payment is accomplished by debiting **Debtor**'s account and crediting **Creditor**'s,160 that **Paymaster** is a depository institution where **Debtor** has his bank account, and that **Creditor** has a bank account either with **Paymaster** or another depository institution.161 Nevertheless, this general description of modern payment mechanisms, while helpful in understanding the terms, is not required for establishing the terminology.162

Payment mechanisms are either credit or debit transfers. Where **Debtor**'s instructions are communicated directly to **Paymaster**, there is a credit transfer. Where **Debtor**'s instructions are communicated to **Paymaster** indirectly, namely via **Creditor**, there is a debit transfer. In the former, **Debtor**'s instructions communicated to **Paymaster** 'push' funds to **Creditor**. In the latter, **Creditor**'s communication to **Paymaster** 'pulls' or 'draws' funds from **Debtor**.163 To that end, in a debit transfer, it is not **Debtor**'s instructions which are dealt with by the banking system; rather, it is **Creditor**'s instructions, initiated on the basis of **Debtor**'s authorization, which are processed. Indeed, as a matter of banking operation, a credit transfer commences with a debit to **Debtor**'s account and is completed with a credit posted to **Creditor**'s account. Conversely, a debit transfer may commence with a credit posted (albeit