COMPULSORY CIRCULATION OF THE BANKNOTE IN FRANCE*

The banknote, which has acquired such great importance in all modern states, has had a different legal significance at different periods under the influence of economic and political circumstances. At certain times, it has been regarded as only a bill of exchange payable at sight, signed by a bank enjoying a reputation for responsibility. At the outset, such was the case in our country with the notes of the Bank of France, an institution which for a long time has held a monopoly in the issue of notes for continental France. The law of the 25th of Germinal, year XI (April 14, 1803), which created this powerful financial company and gave it the right to issue notes, simply declared by Article 36 that the forgoing or the falsification of notes issued would be deemed counterfeiting. Also, a short time thereafter, an opinion of the *Conseil d 'État* of the 30th of Frimaire, year XIV (December 21, 1805), declared that "the holder of a bill of exchange has the right to demand payment in specie. Banknotes established for the convenience of trade, are only credit." This system held its own in France almost continuously until 1870. But a second system, that of the legal currency of the banknote has been applied occasionally. Under it the banknote, as a means of payment, is regarded as having the same value as metal money, so that a debtor can compel a creditor to accept it. But in theory, the latter can always apply to the Bank of France and exchange the note for specie. This system was introduced in France by the law of August 12, 1870, Article 1 of which provided, "From the day of the promulgation of the present law, the notes of the Bank of France shall be accepted as legal tender by the Government and by citizens." [1]

In troublous times, however, the legal currency of banknotes can culminate in the compulsory circulation of such bills. In France, during a revolutionary epoch, the decree of March 15, 1848, established such compulsory circulation for the first time, and this lasted until the law of August 6, 1850. Later, at the time of the Franco-Prussian War, the same measure was enacted by Article 2, of August 12, 1870. It terminated January 1, 1878. Finally, to-day, we have compulsory circulation by virtue of Article 3 of the law of August 5, 1914. Similarly, the compulsory circulation of notes has had to be introduced in other countries

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[1] This system was re-enacted by article 14 of the law of Nov. 17, 1897. The same system has been applied to the notes of colonial banks; Bank of Algeria (law of April 3, 1880, art. 2); Bank of Indo-China (decree of Feb. 28, 1888, art. 3).

on various occasions; in the United States from 1861 to 1879, in Italy from 1866 to 1883 and in 1894, and in England from 1797 to 1820. Many states had to resort[2] to this measure during the last war whether they were belligerents, or peoples not directly involved in the war, as, for example, Denmark[3] and Egypt.[4]

Often the provisions establishing compulsory currency are very loose. Adopted hastily, to meet emergencies, they cannot anticipate the difficulties of detail. Thus on three occasions, the French law established the compulsory circulation of banknotes by this simple provision: "Until otherwise provided by law, the Bank of France shall be excused from refunding its notes in specie."

What significance have these provisions with respect to the relations between individuals? Two methods of approach present themselves. The first method is by dealing with these legal provisions from a purely logical point of view; inasmuch as they are in derogation of the common law they can have no other consequences than those flowing from the language itself. On the other hand, the second method is to emphasize the economic considerations which have caused the passage of the particular law, and consequently to interpret it more liberally. This is an application of a more general desire to adapt the whole body of law to the changed circumstances. This method, therefore, is based especially upon the spirit of the provision and upon its true character as a measure of public welfare. This method of interpretation also appears to us as the happier, and it is toward it that French jurisprudence inclines. The solutions which one can reach by means of this method have a general value and are of a kind adaptable to all countries where compulsory circulation has been temporarily established, whenever they do not conflict with formal provisions of law. Thus scientifically they have an international value.

Whenever the legal circulation of banknotes is decreed, and *a fortiori* where there is compulsory circulation, it is patent that whenever there is occasion to make a payment, such a payment is regular when the debtor tenders banknotes to the creditor instead of specie.[5] But when there is mandatory circulation, may payment in banknotes be refused when the contract stipulates payment in gold? An affirmative answer has been suggested on the theory that where there is ambiguity, one must assume that there was no intention to derogate from the freedom of contract; that such an agreement is just as permissible as contracting for payment in one metal in preference to another.

Jurisprudence has nevertheless given a negative answer. It is based

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[2] See Arnauné, *La Monnaie, le Crédit et le Change* (3d ed. 1906) III.
[3] Law of Aug. 2, 1914.
[4] Decree of Aug. 2, 1914.
[5] See Court of Cassation, Chambre Civile, Dec. 28, 1887, Recueil de Sirey 1888 I, 205; Tribunal of Verdun, Jan. 18, 1887, *ibid.* 1887 II, 144.

precisely on the spirit of this law. The aim of the law [6] is to avert an imminent economic crisis. Therefore it partakes of the character of police laws and laws guaranteeing order. Thus interpreted, it undoubtedly affects the public welfare and consequently its operation may not be encroached upon by private agreements. In fact, we believe that the exemption granted to the bank from refunding its notes is merely a special application of a very general concept. The crisis necessitates important issues of notes which it is impossible to redeem at sight. *Ipso facto,* this tends to depress the notes as against metallic money. It is necessary to prevent this depreciation from becoming aggravated by freeing those who in normal times promised payment in gold from the obligation of procuring gold at all costs.

It has been objected that it would be just as permissible to stipulate payment in gold as it is permissible, at a time when there are no notes, to stipulate payment in a certain currency, for example, silver. But this is again depending on deductive logic, and not on considerations of economic necessities. Obligatory currency not only tends to relieve the bank from the obligation of refunding its notes; it also tends to maintain the value of the notes.

M. Boistel [7] believed, nevertheless, that compulsory circulation of notes of itself considerably reduces the use of gold since cash payments and payments where the money to be remitted has not been specified, may be made in notes. But modern economic convulsions can acquire such intensity that it becomes necessary to battle against anything which might depreciate the notes, and particularly against the clauses which lawyers readily insert providing for payment in metal.

To these arguments of a general nature which are applicable to all countries where there is compulsory circulation, the French law has added a more specific one: Section 1895 of the Civil Code provides that

"The obligation flowing from a loan of money is always limited to the numerical sum set forth in the contract. If there has been appreciation or depreciation in specie, before the time for payment, the debtor should repay the numerical sum loaned and should repay this sum only in such money as is in circulation at the time for payment."

This language implies that money, although it may be a commodity the value of which fluctuates, may always be given at its nominal value as soon as it becomes legal tender. But this argument of itself is of little weight. The question is to ascertain whether this language prevails

[6] Court of Cassation, Chambre Civile, Feb. 11, 1873, Receuil de Sirey 1873 I, 97; Court of Appeal of Aix, Nov. 23, 1871, *ibid.* 1872 II, 161; Tribunal of the Seine, March 17, 1919, Recueil de la Gazette des Tribunaux 1920 II, 3; *cf,* Court of Cassation, April 7, 1856, Recueil de Sirey 1857 I, 103 which already impliedly gives the same answer.

[7] Note in Dalloz 1873 I, 177.

against the clause "payable in gold," if there is compulsory circulation. It can be held to prevail only by construing it liberally for economic reasons and by saying that under the regime of compulsory circulation, payment in currency is always sufficient. One is, therefore, driven back to the arguments already presented.

In support of the position which we are attacking, Section 143 of the French Code of Commerce has been cited: "A bill of exchange should be paid in the currency which it calls for." But this does not determine what should be decided in the exceptional case where there is obligatory circulation. It is dangerous to give to language more than its intended meaning. Moreover, had this Section contemplated the case of obligatory circulation, it might be contended that it should apply only to bills of exchange which are subject to exceptional rules. It might be added that Section 143 was drafted particularly to cover the case where a bill of exchange is payable in foreign money.

A further objection to our view has been raised, that by Article 4, the law of September 12, 1790 declared that the acceptance of *assignats* was compulsory "notwithstanding any provision or clause to the contrary"; that the present laws providing for the compulsory circulation of banknotes, in failing to re-enact this formula, must therefore have intended to reject it. But in addition to the fact that the *assignat* differs from the banknote, it must not be overlooked that ordinarily measures providing for compulsory circulation are hastily adopted without time to anticipate the details.[8]

The construction adopted by us is also that shared by the majority of French authors.[9] Without doubt it is correct in the case of contracts providing for payment in gold which are entered into after obligatory circulation has been decreed. But it applies with equal force in the case of contracts made previous to the mandatory circulation of notes, and which provide for subsequent payments. The principle of the non-retroactivity of laws cannot be raised as an objection.[10] The nature of the law as to obligatory currency as a public measure makes it affect all payments, even of prior debts. Otherwise, this measure would not produce its intended results. It was in a case of this kind that the Court of Cassation made a decree on February 11, 1873.

If our position is sound, and if it is admitted that the provision for obligatory payment in gold is valid in times when the currency of banknotes is simply legal, the following are the practical consequences. During the period of obligatory circulation, the clause will not be adjudged

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[8] Foreign law when confronted with analogous provisions, favors the denying of demands for payment in gold. See Milan, May 1, 1895 [1898] Journal de Clunet 516. *Cf.* Athens, Nov. 14, 1895 [1897] *ibid.* 193.

[9] 27 Demolombe, *Cours de Code Napoléon* (1881) 262; 4 Aubry and Rau, *Droit Civil* (5th ed. 1902) 261; Vainberg, *Le cours forcé du billet de banque,* [1875] Revue Critique 501; 17 Laurent, *Droit Civil* 560n.

[10] See Laurent, *loc. cit.*

absolutely null and void, but only suspended for the time being. If the contract compels periodic payments of money like a lease, the clause becomes effective again on the very day the obligatory circulation ends.[11]

If, in times of obligatory circulation, all payments may be made in bills, may a creditor at least stipulate that he be paid not the nominal amount of the debt but the equivalent in bills of the sum provided for in gold? If the answer to this question is yes, then if the bill undergoes a depreciation of ten per cent as against gold, one hundred and ten francs in bills could be demanded in payment of a debt of one hundred francs.

The law may anticipate this situation. Thus in Italy, Article 1 of the decree of February 28, 1916 says:

"During the term of the war, all payments to be made in the performance of contracts containing provisions for payment in gold or any other equivalent clause, are to be made in the legal money at the official exchange rate on the due date. However, the creditor may demand that payment in the medium stipulated in the contract, be remitted six months following the declaration of peace. In this event, the debtor will be bound to pay interest in Italian money over the period corresponding to the delay calculated at four per cent annually on the sum due."

But when the legislator has not anticipated the question, how must it be answered? Here we again confront the two theories already pointed out. The first limits the effects of obligatory currency in holding that a note is a commodity similar to any other and can be taken by a creditor at its face value only. The second theory depends to a greater extent upon the economic exigencies of the moment. According to this theory the note being legally the equivalent of coin, is its equivalent in value. To permit the banknote to be less valued as a medium of payment would be to sanction its depreciation which is precisely what is sought to be avoided.[12] This is the theory which the Court of Cassation has adopted. "The law" says the court, "attributes to the note a value obligatorily equivalent to that of metallic money." Without doubt this holding cannot prevent the depreciation of the note abroad, and the fluctuation of exchange, but it can serve to counteract the depreciation of notes at home.

In opposition to this policy it has been contended that, in the past, after periods of abuse in the issue of paper money, it became necessary to establish a scale of depreciation for paper so as to regulate payment so made differently from payment in coin. But if at times a legislator is forced in crises to recognize an existing situation and sanction a drastic method of dealing with it, he should go no further than necessary. From this point of view one can distinguish between various countries

[11] See 8 Huc, *Droit Civil* 39n.

[12] Feb. 11, 1873, *supra*, footnote 4; see also Tribunal of the Seine, March 17, 1919, *supra*, footnote 4; 4 Lyon-Caen and Renault, *Traité de Droit Commercial* (2d ed. 1893) 762 n. 1.

and times. If there is an abuse of the issue of paper money and there is no sufficient effort made to remedy this financial situation within a few years, then the banknote tends to depreciate to such an extent as to get beyond control. But if obligatory circulation proceeds from exceptional conditions and attempts are made to restrict the issue of notes, then since there is merely a relative abuse, the tendency of notes to depreciate can be resisted. This was the situation in France in 1870 and 1914 when compulsory circulation was introduced because of war only, and as a temporary measure.

In the French Law, Section 1895 of the Civil Code seems firmly to establish the parity of different monies, be they metal or paper. If Section 338 of the Code of Commerce says that "Every bill of exchange given as indemnity in insurance, where the face value of the policy is in terms of foreign money, is to be taken at the value of the money agreed upon, in terms of French money as at the time of signing the policy," this language, which applies merely to foreign money, simply means that the object insured is taken at its actual value in France, which goes without saying. The proof of this is that foreign money is appraised at its value on the day of signing the policy, and not on the day when payment of the insurance money is made. In the controversy, Section 1243 of the Civil Code has again been invoked. It reads, "A creditor cannot be compelled to receive anything except that which is owed to him." It is said that this provision should be encroached upon as little as possible. But we believe precisely this provision should be disregarded to whatever extent required by economic exigencies.

Objection has been raised that the exemption from paying the difference in actual value between the banknote and gold, will deter people from engaging in transactions giving rise to debts payable in France. The argument would be valid if it did not overlook the fact that modern wars affect a great number of states and require extraordinary measures. Even the best organized states are reduced to this extremity.

For the War of 1914 with respect to this question see the law of February 12, 1916, which makes punishable every purchase of money above its legal value in times of war. Without doubt this language is not directed specifically to our case, but it indicates the need of discouraging anything which contributes to the depreciation of notes.[13] We would, moreover, consider illicit a clause inserted in a contract after compulsory circulation has been decreed, providing that if payment is made in notes, a bonus will be paid equal to the depreciation of the note as against gold.[14] The case would be the same with respect to the following clause:

[13] But see on this question, Valéry, [1916] Journal de Clunet 1132 and Droit International Privé 697 n.; Polacco, *Obbligazioni* (1898) 78 n.; Despagnet and de Boeck, *Droit International Privé* (1910) 311 n. *Cf.* Pillet, [1896] Journal de Clunet 15, which moreover does not examine the case of obligatory circulation; see likewise, 2 Rolin, *Droit International Privé* (1897) § 968.

[14] *Contra,* de Folleville, 32 Revue Pratique 445.

"The price shall be one thousand francs if paid in gold and twelve hundred if paid in notes." In our opinion, compulsory circulation, as a measure of public welfare, demands that no stipulation shall be countenanced, which sanctions the depreciation of the note as against gold. When a country is straining all its energies to defend its liberty it cannot tolerate these little devices of *bourgeois* who refuse to put up with any deprivations. *Salus populi suprema lex.* In the last hypothetical case, since the promise of one thousand francs in gold is transformed into an obligation to pay this sum in notes by the law imposing compulsory circulation, a creditor can only demand one thousand francs in notes.

A new aspect of the question of payments in gold was presented recently in our law. A foreign corporation, in this case an American corporation, promises payment in gold in France, and the due date comes at a time when there is compulsory circulation. Can payment in gold be insisted upon? The logical application of dispensing with payment in gold has been supported. M. Lyon-Caen[15] holds that the dispensation is a general one whosoever the debtor may be, the law making no distinction. But the Court of Cassation has adopted a contrary view:[16]

"The agreement entered into with a foreigner, the performance of which should result in a return of gold money to France, is in no sense in contradiction with the law which, as a welfare measure, compels a creditor in France to receive payment of his debt in paper enjoying a compulsory circulation at a legal value equivalent to the money provided for in the contract. On the contrary, such an agreement looks directly to the end sought by the lawmaker, the public welfare, resting solely on considerations of national interest, concerning itself with compulsory circulation only in so far as it involves payments made in France by Frenchmen, and the foreign debtor owing money fixed by agreement cannot claim the benefit of compulsory circulation in France."

This decision appears to us to draw correct conclusions from the stern necessities which the war and compulsory circulation, which is the consequence of the war, have brought about. One is excused from paying in gold only in so far as such payment would effect a withdrawal of gold from circulation in France, and indirectly depreciate banknotes. But a payment which effects a return of gold to France in accordance with a provision to that effect may always be exacted. The decision is in no way inspired by hostility to foreigners. It even favors them. In as much as the clause "payable in gold" is irrevocable as to them, people will be more likely to contract with them in the future. Besides, it applies merely to those foreigners who have retained their residence abroad, or if the question is one of a company, its place of business. A foreigner located in France who no longer retains a residence in his own country may in any case pay in notes. The same would follow in the case of a

[15] Recueil de Sirey 1920 I, 193.
[16] Chambre des Requêtes, June 7, 1920, Recueil de Sirey 1920 I, 193.

company having its place of business in France, which was a branch of a company having its main office abroad. On the contrary, a Frenchman, residing abroad, who had promised to make a payment in France in gold, would be subjected to the rule adopted by the Court of Cassation. In a word, according to a man's residence, he who can easily pay, should pay in gold. The same solution should not be adopted in the case of one who, having a residence in France, has simply a subordinate residence abroad where he can obtain gold, for he might be tempted to obtain gold in France. In addition, one must avoid too complicated excursions into fact. Under the same principle a foreigner of a country where compulsory circulation is in force, who would thus have difficulty in obtaining gold, may pay in bills. These solutions which will put in different situations debtors in originally equal amounts, are the result of the general character which we attach to compulsory circulation.

Conversely, if French courts were called upon to interpret a clause stipulating payment abroad in French gold, this clause which would probably result in a withdrawal of gold from France could not be declared applicable during the duration of the compulsory circulation. Here there are reasons based on national interest which lead to this conclusion. As a matter of fact, this solution follows from the decree of July 3, 1915 which prohibits the exportation of gold money. While of course there is French gold abroad, it would be too likely that the debtor would seek to pay by withdrawing gold from France.

Compulsory circulation in states which are poorly organized financially, may become a permanent condition owing to shortsighted administration. Under such circumstances the expounders of compulsory circulation may seek to limit its effects. But when in a well-organized and modern state, compulsory currency is decreed on account of war, with the will to end it as soon as possible, it is a measure of financial mobilization for the public welfare. It should, therefore, be construed in this spirit: It is absolutely necessary to make the employment of gold useless, and to fight as far as possible against the depreciation of notes.[17]

If considerations of public welfare dominate the solution of the difficulties arising when the banknote enjoys compulsory circulation, it is otherwise when the note constitutes merely legal tender. At such times contracting parties may provide that any payment be made in gold. The Court of Cassation in its decision of February 14, 1873, admitted that this clause was valid and binding and this view is shared by the majority of writers.[18] Since the money was then a true commodity, one

[17] I say as far as possible for obviously the law cannot do everything. But it should discourage the open sanction of this depreciation which would aggravate it even further.

[18] See 2 Baudry-Lacantinerie and Barde, *Obligations* 1495 n.; 27 Demolombe, *op. cit.* 264; Boistel, *Droit Commercial* (1884) 669 n.; 4 Lyon-Caen and Renault, *op. cit.* 762; Boistel, note in Dalloz 1873 I, 177; de Folleville, 32 Revue Pratique 426; *contra,* Aubry and Rau, *loc. cit.*

could even provide that payment be in one amount if made in gold, and in another amount if in silver. No principle of public welfare qualifies the freedom of contract under the circumstances.[19]

Similarly, under the system of legal tender, parties may agree that a payment in France be made in foreign money. Such a provision is in no respect in conflict with public welfare,[20] for foreign currency is never more than a commodity in France. The objection cannot be raised that Section 475 of the Penal Code punishes the refusal to accept money which is legal currency. This provision merely covers the case where the kind of money in which the debt is to be paid has not been specified. The result will be that an obligation to pay in foreign money will remain binding in France even when the banknote enjoys compulsory circulation in France. The only modification allowed as a matter of convenience is that a creditor, in the absence of proof to the contrary, is presumed to be willing to accept payment in French money at the rate of exchange on the foreign country.[21]

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[19] See Polacco, *loc. cit*, for the rate of exchange between the two kinds of money; but see 2 Baudry-Lacantinerie and Barde, *op. cit.* 1574; 27 Demolombe, *op. cit.* 259 n.; 4 Vivante, *Droit Commercial* § 1568.

[20] Court of Cassation, Chambre des Requètes, Nov. 18, 1895, Recueil de Sirey 1899 I, 270; 4 Aubry and Rau, *op. cit.* 260; 4 Baudry-Lacantinerie and Barde 1577 n.; 8 Huc. *op. cit.* 51 n.; 2 Planiol, *Droit Civil* § 424; Valéry [1916] Journal de Clunet 1132.

[21] Court of Cassation, Chambre des Requètes, July 11, 1917; Recueil de Sirey 1918 I, 215.