The JUDICIAL INTERPRETATIONS of the TERM the business of banking

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LL.M. RESEARCH PAPER

THE JUDICIAL INTERPRETATIONS OF THE TERM "the business of banking" WITH SPECIAL REFERENCE TO THE CASE OF U.D.T.

RESEARCH PAPER IN BANKING
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(A) Introduction

The object of this paper is primarily to examine a selected number of leading cases which had purported to interpret what is a 'banker' and the 'business of banking'. These two terms are actually synonymous because to be a banker, as the proceeding will show, one must be in the business of banking.

There is no one useful statutory definition as to who is a banker or what constitute the banking business. It is a notorious fact that statutory definitions for these two terms have been very elusive. Thus, it is only by turning to case law, much of it between fifty and even a hundred years old, that one might probably be able to discern some useful understanding as to what the terms may mean in the legal sense.

Generally speaking, banking system in New Zealand can be classified into three groups, namely, the Central Bank; the Commercial Banks; and the Savings Banks. Commercial banks may be divided into trading Banks and merchant Banks while Savings Banks comprise of the Post Office Savings Bank, Trustee Savings Bank and the Private Savings Bank. Savings Banks do offer cheque facilities nowadays. It is with the legal aspects of the business of the trading and savings Banks that this paper is concerned with. It necessarily excludes the Central Bank and the Merchant Banks.

With respect to Merchant Banks, it has been said that the very term "Merchant Banker" is something of a

misnomer, for he is neither a 'Merchant' nor a 'Banker'. It has been likened to the Holy Roman Empire, which is neither Holy, nor Roman nor an Empire. It was said that:[1]

> " The merchant bank is certainly not a merchant, and despite its resources not a bank either, yet it is a key element in the financial establishments. Its basic function is to fulfil, and where possible to anticipate, the needs of industry over the whole spectrum of financial services. Its main business is not lending money or the custody of deposits, but the mobilisation of money, its management and strategic deployment based on specialist knowledge of national and international financial markets. "

No doubt they offer a wide range of investor services, including advisory services, research and the underwriting of shares as well as lending money for expansion to growing companies.[2] Admittedly, as a result, they do overlap to some extent with that of trading banks. Nevertheless, they may be distinguished in that merchant banks do not open accounts for any member of the public who chooses to apply, and do not ordinarily issue cheque-books to their customers.[3]

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1 V. Kanapathy, The Law, Commercial Banking and Malaysia's New Economic Policy : A Paper presented at the 2nd Malaysian Law Conference, 1973., at p.16.

2 1974 N.Z. Yearbook p.823.

3 Chorley, Law of Banking 1974 (6th ed.) p.3.

(B) Some Statutory Definitions

One of the most important statutes relating to Banking Law is certainly the Bills of Exchange Act 1908 (N.Z.).[1] Together with its very important corollary, the Cheques Act of 1960[1], it is the dominant statutory influence in a banker's life. Under the Bills of Exchange Act the definition:

> " 'Banker' includes a body of persons, whether incorporated or not, who carry on the business of banking.[2]"

Who or what is a banker can only successfully be defined otherwise than by reference to the business of banking. What is meant by the 'business of banking' is regrettably not defined although it has been said that its meaning may vary from time to time and from place to place.[3]

Morover the word 'includes' can itself be ambiguous. It would enlarge the definition or could be the equivalent of 'means'. The word 'includes' suggests that it is possible to be a banker without carrying on a banking business, which to Lord Chorley "seems to be nonsense".[4] Authorities appear to be in agreement[5] that the word 'includes' is clearly equivalent to 'means' and this interpretation it is submitted is correct.

The definition in section 2 of the Banking Act 1908 states that Bank "means any person, partnership, corporation or company carrying on in New Zealand the business of banking."

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1 Bills of Exchange Act 1882 and Cheques Act 1957 U.K.

2 Section 2 of respective N.Z. and U.K. Bills of Exchange Act.

3 Bank of Chettinad, Ltd. of Colombo v. Commissioner of Income Tax, Colombo [1948] A.C.378 at p.383.

4 Chorley, op.cit. p.30.

5 E.g. Paget, Law of Banking 1972 (8th ed.) p.8.

Though the word 'means' is used instead of 'includes', what is the 'business of banking' is again not defined. Interestingly, a similar definition is given in section 76 of the Stamp and Cheque Duties Act 1971.

Indeed, there are no statutory definitions of any value. All that the above-mentioned statutes, and a number of other statutes to be noted in the subsequent section of this paper, attempted to do was to define a banker as one carrying on the banking business, a definition which merely begs the question. Therefore, it is hardly surprising that this sort of statutory definition has been a subject of ridicule ever since. One writer has likened it to "a person who will lend you an umbrella when the sun is shining and ask for it back when it commenced to rain."[6] It is reminiscent of the witty but uninstructive definition of an archdeacon as a person who performs archidiaconal functions.

Probably, as Lord Chorley suggested, the answer need not and indeed cannot consist of an all embracing definition as banks do undertake a great variety of functions. "It is rather a question of description than of definition, of fact than of law."[7] What has to be sought, therefore, is an essential minimum activity which in the eyes of the law constitutes a basic test for determining what is "the business of banking".

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[6] H. Young, The Duties & Responsibilities of the Paying Banker and the Collecting Banker., Monograph published by The Bankers' Institute of Australasia 1966.

[7] Chorley, op. cit. p.31.

(C) The Need to Know the Meaning

The term 'banker' or 'business of banking' or rather, its essential characteristics is of considerable practical importance for so many problems turn to the meaning of the term.

In the first place, the meaning of the term 'banker' or 'the business of banking' has practical significance to the banker-customer relationship. If – but only if – one party to a contract is a banker certain wellknown implications result, whereas if that party is only a near-banker as for instance a finance-house and not within the definition, none of the usages that otherwise automatically arise will be applicable.[1] In other words, there are certain implied terms which only the banker and/or the customer can rely in the course of their business dealing. The relation between banker and customer is that of debtor and creditor; but one of the terms of the implied contract is that money lent to the banker is not payable except on demand : Foley v. Hill.[2]

The implications of this unique banker-customer contractual relationship is epitomised in the oft-quoted judgment of Atkin L.J. in Joachimson v. Swiss Banking Corporation :

> " I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides .... The bank undertakes

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[1] F.R. Ryder, The Business of Banking (Practical Aspects of the Legal Definition) Gilbart Lectures on Banking 1970 at p.3.

[2] (1848) 2 H.L. Cas. 28.

> " to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer, addressed to the Bank at the branch, and as such written order may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at which the current account is kept."[3]

And in the second place, there are provisions in many statutes which expressly confer special rights and obligations, or what Lord Denning M.R. said 'privileges' only on bankers or those in the business of banking. In United Dominions Trust Ltd v. Kirkwood[4], a case which will be examined in detail in due course, the Master of the Rolls has enumerated twelve instances of privileges which Parliament has accorded to bankers but has never defined who a banker is or what is the business of banking.[5] It is proposed to look at a few analogous instances in the New Zealand context so as to show why it is necessary to know the meaning.

Under section 20 of the Banking Act 1908, a banker shall not, in any legal proceedings to which the bank is not party, be compellable to produce any books of the bank or to

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[3] [1921] 3 K.B. 110 at p.127.

[4] [1966] 1 Q.B. 783 High Court; 1966 2 Q.B. 431 Court of Appeal.

[5] ibid Court of Appeal, per Lord Denning M.R. at p.442.

appear as a witness in Court unless by order of a judge made for special cause. No definition is given of Banker save that it means 'any person, partnership, or company carrying on in New Zealand the business of Banking'.

Wherever the word 'cheque' appears the meaning of bank is relevant. If the drawee is not a Banker the document is not a cheque since a cheque can only be drawn on a banker.[6] A banker must pay his customer's crossed cheques only to other bankers. If the presenting firm is not generally recognised as a bank, and the cheque is refused, the banker will have broken his contract with his customer if the firm is shown to be, in fact, a Bank, while if he pays the cheque and the firm is not a bank he will lose his statutory protection : sections 79, 80 Bills of Exchange Act 1908. Perhaps the most important in practice is that resultant upon section 5 of the Cheques Act 1960. This section replaced section 82 of the Bills of Exchange Act 1908 in providing protection to bankers who had converted cheques by collecting them for customers but who could establish that they came within the requirements of being "in good faith and without negligence". It may be observed that unlike the repealed section 82 Bills of Exchange Act 1908 which covered only crossed cheques, section 5 of the Cheques Act 1960 protects a banker who deals with all cheques – crossed and uncrossed. Thus, if the person suing for conversion can establish that the "order" that has been converted was not given to a banker, the ordinary remedies

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[6] S.73 Bills of Exchange Act 1908 of N.Z.

for conversion are available and the Collecting banker is vulnerable. The draft may be drawn on a finance house that in good faith erroneously considers itself within the definition; then bankers collecting these drafts will be bereft of their statutory protection against conversion. In short, if the drawee is not a banker there is no protection.

The corollary appears to be that an institution paying a draft but failing to satisfy the definition of Banker will lose the protection afforded by the complementary provisions of sections 60 and 80 of the Bills of Exchange Act and by section 2 of the Cheques Act. All these are available only to paying bankers.

Yet, no definition is given of banker save that it 'includes a body of persons, whether incorporated or not, who carry on the business of banking': section 2 Bills of Exchange Act 1908.

Bankers are also given special exemption from registration under the Moneylenders Act 1908 and from all the stringent provisions therein. Section 2 states :

> " 'Moneylender' includes every person (whether an individual, a firm, a society, or a corporate body) whose business is that of moneylending .....; but does not include –
>
> (d) Any person bona fide carrying on the business of banking ..... "

This paragraph in section 2 expressly protects bankers from being subject to the heavy penalties and restrictions contained in the Act itself.

The consequences of non-compliance with the provisions of the Moneylenders Act, if the institution concerned is not a bank or otherwise fail to come within such an exemption (under paragraph (d)) can make debts irrevocable and securities worthless as well as giving rise to direct penalties earlier mentioned. These serious implications will be appreciated when we come to discuss the well-known case United Dominions Trust v. Kirkwood.[7] In the meantime, suffice to quote from Lord Denning M.R. in this regard :

> " Parliament seems to think that it is possible for a moneylender readily to know whether he is carrying on a banking business or not, because if a moneylender publishes an advertisement implying that he is carrying on a banking business, he is guilty of a criminal offence : See section 4 of the Moneylenders Act, 1927. Yet Parliament does not attempt to define what a banking business is. "[7]

Finally, reference may also be made to the Industrial and Provident Societies Act 1908, an Act relating to the registration of industrial and provident societies. Section 2(1) of its 1923 Amendment Act states : "A society which may be registered under the Principal Act is a society for carrying on any industry, business, or trade, whether wholesale or retail .... but except the business of banking. " Again, there is no definition of what is 'the business of banking'.

Though these examples are by no means exhaustive, they are sufficient, for our purpose, to show the need to know the meaning of the term "business of banking". In other words what is a banker and what constitutes the banking business has real and practical commercial consequences. It is precisely because of the lack of any satisfactory statutory definition that one has to turn to case law for possible guidance.

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[7] op.cit. per Lord Denning M.R. p 443 (emphasis supplied). Se also S.7 of N.Z.'s Moneylenders Amendment Act 1933.

(D) Judicial Interpretations

In the proceeding discussion of case law the writer proposes to adopt, as far as possible, a historical or sequential approach culminating at the 1966 U.D.T. case, a case which is generally regarded as the modern decision of the meaning business of banking. Incidentally such approach would also enable one to have a better appreciation on the development of judicial thinking in this aspect of the law which is never static. It is, however, not intended to delve in any depth those older authorities especially those of the late 19th century. The reasons are that our main concern is to attempt to deduce the essential characteristics of banking as it exists today and, when the 'business of banking' varies from one generation to another it is obvious that one must be cautious of the value of old cases. And secondly, it will be clear from the immediate discussion that they were, in any event, lacking in any consistency on the interpretations of the very term 'business of banking'.

(i) The Earlier Decisions :-

In one of the earliest English cases Re District Savings Bank, Ltd., Ex parte Coe (1861)[1] a savings bank formed to receive deposits and conduct emigration operations was held not a banking company since money could not be withdrawn on demand or by cheque. Turner L.J., said :

> " Even that branch of the Company's business which has the most resemblance to banking differs materially from the ordinary business of banking, for the company

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[1] (1861) 3 De. G.F. & J. 335 cited in Paget p.10 op. cit. See too [1862] 5 L.T. 566.

" did not honour cheques payable on demand or drawn upon themselves. "[1]

His Lordship said that the Company not only did not pay moneys received by them upon cheques payable on demand, but was in the habit of paying into other bankers the money which it so received from depositors, just as if it were an individual customer of those bankers, and it withdrew such moneys by means of cheques.[2]

Yet, thirty years later, a society that only took loans on deposits was said to be in reality carrying on the business of banking. In re Bottomgate Industrial Co-operative Society (1891)[3] the society registered under the Industrial and Provident Societies Act 1862 received money on deposit and paid it out in very much the same way as a trustee savings bank receives money on deposit. The said Act, however, prohibited such registered society from carrying on banking business. A.L. Smith J., said : "the business embarked on by the society when it took loans on deposit was in reality a banking business prohibited by the statute. It is not necessary, in our judgment, in order to constitute a banking business prohibited by the statute, that the society should carry on every part of a business carried on by some bankers; it is sufficient to bring the business within the prohibition, if the society carried on what is the principal

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1 (1861) 3 De. G.F. & J. 335 cited in Paget p.10 op. cit. See too [1862] 5 L.T. 566.

2 [1862] 5 L.T. 566 at p.568.

3 [1891] 65 L.T. 712 at p.714.

" part of the business of a banker, viz., receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying interest on the amounts standing on deposit. "[3]

It has been thought that the above decision has the approval of a more recent English Court of Appeal case of R v. Industrial Disputes Tribunal; Ex parte East Anglian Trustee Savings Bank 1954[4] where Lord Goddard C.J., was noted to say that "although the trustee savings bank .... does not carry on the business of banking in the same ways as one of the Big Five banks in the sense of issuing cheque books to its customers and performing various services for them, but it nevertheless carries on the business of banking."[4] It must, however, be observed that the question in issue in that case was not whether the party was a bank, but whether it was engaged in "a trade" or "an undertaking" so as to attract the authority of an Industrial Disputes Tribunal to settle a wage dispute between the trustee savings bank and its employees. The reference to the Bottomgate Society's case by the Chief Justice was incidental and, with respect, unnecessary to the decision which was not even averted to by the other two Court of Appeal judges – Cassels and Slade J.J. The Chief Justice's reference was therefore no more than mere obiter since it seems clear that the Court's attention was never directed to the question whether the said savings bank was carrying on the business of banking.

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[3] (1891) 65 L.T. 712 at p.714.

[4] [1954] 1 W.L.R. 1093 per Goddard C.J. at p.1096.

Although these older English decisions appear to be in conflict there seem to be more emphasis on the need to have current accounts where money deposited would be withdrawable by cheques. On the other hand, Irish and Australian decisions of the contemporary period tended to stress more on mere deposits as sufficient banking business. These decisions are relevant because they have generally modelled their law upon the English common and statutes law.

Thus, in a 1900 Irish case Re Shield's Estate,[5] it was held that acceptance of money on deposit account not subject to withdrawal by cheques makes the acceptor or institution a bank. The facts were as follows. Business was carried on by one Michael Shields in two rooms house in three towns and attendance being one day per week in each of these places. Money was lent on promissory notes, payable in twelve weeks, with interest at the rate of ½d in the £1 per week. Advances were also made on mortgages. Large sums were received on deposit for which, first promissory notes payable three months after date and later deposit receipts were issued. Small sums up to £5 were also lent without taking any security. The books kept were primitive and cheques, passbooks, letters of credit or discount bills were not issued or dealt with. Nor were there current accounts being kept with the firm. However, evidence given showed that the firm was commonly known as a bank in their business dealing and officials of the Bank of Ireland had also called the firm bankers.

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[5] [1901] 1 I.R. 172.

The parties to the case were the petitioners the Bank of Ireland which became the respondents in the Court of Appeal. The Trustees of Michael Shields' firm were the Appellant in the Appeal Court. The point of the case was as to the validity of certain mortgages given to the Petitioners the Bank of Ireland by the Appellants' firm to secure advances. Under the Irish statute of 33 George 2, C.14 those mortgages must be registered if the Appellants' firm was a banker or else it would be void as against the mortgages the Bank of Ireland. The purpose of the Act 33 Geo. 2, C.14 (Ireland) was said to have been shown in its preamble which recited that the trade and manufacture of the state were mainly carried on by promissory notes and accountable receipts, given by bankers, and that the credit and currency of their notes would be better promoted by giving more effectual securities to the creditors of such bankers than they have hitherto. It made void conveyance of real estate by bankers if not registered within a month after execution : and in section 8 it was enacted that in case a banker stopped payment all his real and personal estate would be liable to the payment of debts without regards to priority other than debts secured by conveyance registered as aforesaid.[6]

The question for decision was – was Michael Shields a banker within the meaning of 33 Geo. 2, C.14 (Ireland) or a mere moneylender ?

Ross J. in the Court of 1st instance emphatically held that Shields was not a banker since the primal element in banking was wanting, namely, the paying out of money on cheques.

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[6] ibid per Ashbourne, C. at p.193.

His Honour said: "The importance of this element is dwelt by Turner L.J. in Ex parte Coe (3 De Gex. F. & J. 338) where he deals with the branch of the company's business that had most resemblance to banking; he says it differed most materially from the ordinary "business of banking", for the company did not honour cheques payable on demand and drawn upon themselves. This element of the business is to the ordinary mind the primal – the most notorious and the best understood – of all the services the banker renders to society, and it is hard to imagine how the ordinary commercial man could look on any establishment as a bank when current accounts, pass-books, and cheque-books are unknown."[7]

The decision of Ross, J. was, however, reversed by an unanimous decision of the Court of Appeal comprising of four judges.[8] It was not clear what the ratio decidendi was except it was held that Michael Shields was a banker within the meaning of 33 Geo. 2, C.14, and that the mortgages created, not having been registered, were levelled. Nevertheless, it has been widely considered that this case was authority for the proposition that the receipt of deposits and the payment of interest thereon is sufficient to be considered as in the business of banking.[9] Thus, Holmes L.J. said : "Whatever be the attractions offered to the public, the real business

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[7] ibid per Ross J. at p.187.

[8] ibid. Before Lord Ashbourne, C. and FitzGibbon, Walker and Holmes, L.JJ.

[9] E.g. Counsels' submissions in U.D.T. case.

" of the banker is to obtain deposits of money which he may use for his own profit by lending it out again."[10] Perhaps the decision is epitomised by the dictum of FitzGibbon L.J. who said that – "If he keeps open shop for the receipt of money from all who choose to deposit it with him; if his business is to trade for profit in money deposited with him for that purpose, he answers the description of a 'banker'.... those who take money "on deposit account" are just as much bankers as those who hold it "on current account". "[11]

It is noteworthy that FitzGibbon L.J. and to a lesser extent Holmes L.J., were the only two judges in the Court of Appeal who had specifically dealt with the characteristics of banking in general.

It is respectfully submitted that, contrary to the admittedly established view, the case on closer analysis could not be regarded as authority for the above proposition that a company would be a banker and in the business of banking if it only accepts money on deposit and lends out same for profit. It was a decision which turned solely on an interpretation of a specific statute which was about 150 years old by the time the case came before the Court of Appeal but, nevertheless, was still in force. 33 Geo. 2, C.14, (Ireland) passed in 1759 and was a statue which was based on certain public policy of the time. In the writer's opinion the primary reasonings and, consequently, decisions of all

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[10] op. cit. per Holmes L.J. at p.207.

[11] op. cit. per FitzGibbons L.J. at p.198.

the judges were actually directed in satisfying the very purpose in which the statute was originally enacted.

Moreover, the Court of Appeal's decision was also further influenced by the particular facts of that case in that the petitioners the Bank of Ireland had all along, consistently, until the litigation, recognised the appellants' firm as a bank and in the business of banking. It was only at the litigation that the Bank of Ireland, somewhat oddly, attempted to argue that Shields' firm was not a bank but a moneylending company. Indeed, it would seem that on this very point, the petitioner the Bank of Ireland would have been estopped from turning back to argue what they otherwise recognised as a bank.

The writer's contention can best be supported by reference to some of the relevant passages of the four respective judges.

Lord Ashbourne, C. :-

Thus, after setting out the facts the learned Lord Chancellor proceeded to note that Mr Shields was described in the books of the Bank of Ireland as a banker. He said:

> " The letter of Mr Johnston, their agent at Omagh, is entitled to great weight, because it indicates unmistakably how their trained and experienced officials, before any litigation had occurred, deliberately described the firm. It is entitled to great weight in considering the question whether Michael Shields at the time when the equitable mortgages were created, was a banker within the meaning of the statue 33 Geo. 2, C14 (Ireland). " [12]

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[12] op. cit. per Ashbourne, C. at pp 192 and 195-6 respectively (emphasis added).

In another passage, his Lordship continued to stress on this recognition character as well as showing, quite clearly, that his decision really centred on the statute in question :

> " They called themselves bankers, were called so by the customers, and are entered on the very books of the petitioners themselves as such. Are they to be declared not to be bankers, because they kept no current accounts ? This is the main contention of the respondents.
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> " The Bank of Ireland urged that the primal element in banking is the paying out money on cheques. This might be urged possibly now with some plausibility, but I do not think it could be so argued at the date of the passing of 33 George 2, C.14 ..... Cheques were not at all as common then as now. We must remember the mischief against which 33 Geo. 2, C.14, was directed. We must consider what banks were then, and I do not think that at that date a bank which performed the other duties of a bank, but which did not pay cheques, would be less regarded as a bank. "[12]

Walker L.J. :-

In almost similar vein to Lord Ashbourne C., Walker L.J. began by posing the question which was "whether Michael Shields was a banker within the meaning of 33 Geo. 2, C.14." His Lordship then said :-

> " The ... contention (of the Bank of Ireland) was that the omission to have current accounts with customers, and consequent omission to give cheque-books ..... deprived Shields of the position of banker ....
>
> " What we have to consider is whether the omission affects the application of 33 Geo. 2, C.14. The right to draw in respect of current account arises from the desposit of money with bankers at call, which the depositor by contract can draw upon his order, called the usage of bankers, his cheque. The difference in this contract and that contained in the ordinary deposit receipts, is one only of terms, and the evil struck at in favour of depositors with a banker by the statute equally applies."[13]

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[12] op. cit. per Ashbourne, C. at pp 192 and 195-6 respectively

[13] op. cit. per Walker L.J. at p.204.

Holmes, L.J. :-

The mischief against which the statute attempted to be directed to was well brought out by Holmes, L.J. His Lordship's words that "the real business of the banker is to obtain deposits of money which he may use for his own profit by lending it out again"[14] has always been taken out of its context by scholars and lawyers as authority for the proposition that the essential feature of banking was merely the acceptance of deposits from customers. In fact, when his Lordship uttered these words, he has the particular statute in mind for immediately after that utterance, he proceeded to say in a long passage :

> " Let me now see whether it is possible to ascertain from the language of the statute of 1759, whether this is the conception of a banker to be found therein. Its title .... shows its object to be to provide a better means than previously existed for the security and payment of debts due by bankers – that is to say, of the debts the incurring of which is the principal feature in a banker's business. If appears from the preamble and other portions of the statute that the debts in contemplation were debts secured or evidenced by promissory notes and accountable receipts; the former being debts due in respect of the note issue, and the latter being debts due in respect of money deposited ... the mischief they were intended to counter-act was the false credit arising from the apparent possession of property that had been made the subject of secret charge or disposition – a mischief which would be specially operative in the case of those whose lodgments or deposits were not intended to be speedily withdrawn. Thus .... the legislature contemplated persons who, as the essential part of their business, obtained money and credit from the public, and that this is the class designated as bankers. " [14]

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[14] op. cit. per Holmes L.J. at p207.

FitzGibbon L.J. :-

His Lordship seems to be the only member of the Court who has explicitly defined the terms 'Banker' and 'the business of banking' for general purposes, independent of and apart from the meaning attributed to them under the 1759 statute. In his Lordship's view, if a person's business "is to trade for profit in money deposited with him for that purpose, he answers the description of a 'Banker'. " After holding that Shields was a banker in the ordinary sense in which that term is said to mean, his Lordship also concluded that Shields was a banker under the said Act which, being unrepealed, was still applicable - "The Shields were old-fashioned bankers, and the old-fashioned Act is all the more applicable to them on that account." [15]

Putting the writer's contention and the above passages in support aside, we have nevertheless noted that the Shields' Estate's case has always been taken as authority for the proposition earlier mentioned by subsequent cases when appropriate.[16] In a 1915 High Court of Australia's case Commissioners of the State Savings Bank of Victoria v. Permewan Wright & Co. Ltd[17] it was said that payment of cheques was not a necessary part of the business of banking. In that case, a savings bank was held to be a banker within the meaning of the Bills of Exchange Act 1909.

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[15] op. cit. per FitzGibbon L.J. at pp 198 and 200 respectively.

[16] E.g. Commercial Bank v. Hartigan (1952) 86 I.L.T. 109, but case turned solely on the interpretation of the Central Bank Act 1942.

[17] (1915) 19 C.L.R. 457.

The facts were these. The Plaintiffs/Respondents Permewan Wright & Co handed some 58 crossed cheques to their clerk to be drawn on the Royal Bank of Victoria as payment for customs duties. The clerk, however, fraudulently paid all into his own account at one of the Appellants' savings banks. This was possible because these cheques though crossed, were nevertheless written to be paid to "Duties or bearer". The Appellants' savings bank as the collecting banker received payment from the Royal Bank and credited them to the clerk's account. The Plaintiffs thereupon sought to recover the total sums of the cheques plus damages from the Appellants for conversion. The Appellants argued that they were protected from liability under section 88 of the Bills of Exchange Act 1909.

Two issues were raised for determination in the High Court, namely: (1) Whether the Appellants' savings bank was a bank and in the business of banking for the purpose of the Bills of Exchange Act, and (2) If it is, has it been so negligent as to be disentitled for relief under section 88 ? The second issue, of course, does not call for further discussion in this paper. As to the first issue, four out of five members of the Court held that the Appellants' savings bank was indeed a bank within the meaning of the Bills of Exchange Act.[18] To the majority, the mere fact that the savings bank only accept deposits repayable when or as agreed was sufficient to constitute the banking business. To them, bankers were not bound in law to provide current accounts.

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[18] Australian Bills of Exchange Act 1909. Majority judges were Issacs, Gavan Duffy, Rich and Powers J.J. while Griffith C.J. dissented.

The question of what is "carrying on banking business" was dealt with in the principal judgment of Issacs J. wherein the other majority members fully concurred. In a rather lengthy passage, but worthy of quote, his Honour said:

> " The fundamental meaning of the term is not, and never has been, different in Australia from that obtaining in England ..... The essential characteristics of the business of banking are, however, all that are necessary to bring the appellants within the scope of the amendments; and these may be described as the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required. These are the essential functions of a bank as an instrument of society. It is, in effect, a financial reservoir receiving streams of currency in every direction, and from which there issue outflowing streams where and as required to sustain and fructify or assist commercial, industrial or other enterprises or adventures.
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> " If that be the real and substantial business of a body of persons, and not merely an auxillary or incidental branch of another business, they do carry on the business of banking. The method by which the functions of a bank are effected — as by current account, deposit account at call, fixed deposit account, orders, cheques .... and any other modes — are merely accidental and auxilliary circumstances any of which may or may not exist in any particular case. I agree as to this with what was said by FitzGibbon L.J. in re Shields' Estate. "[19]

On the other hand, the sole dissentient Griffith C.J. was equally emphatic in holding that the Commissioners were not carrying on banking business because depositors could not operate upon their accounts by cheques, to wit, current accounts. The Chief Justice in an important passage said :

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[19] op. cit. per Issacs J. at pp 470-471.

" In Halsbury's Laws of England (Vol. I p.568) it is said that 'the business of banking, strictly speaking, is the receipt of money from or on account of a customer, to be repaid on demand or when drawn on by a cheque. In the case of banks lawfully issuing bank notes such issue is part of banking business; and in a note it is added – the collection of crossed cheques, being a statutory necessary, is part of the business of banking, but is included in the above definition. The numerous other functions undertaken by modern bankers, such as payment of domiciled bills, custody of valuables, and discounting bills, do not come within the strict definition of banking business. The judicial recognition of the banker's lien – Brandon v. Barnett 12 CL & F., 787 – implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers.' I do not know of any better or more authoritative definition. In my opinion an institution upon which it is not lawful to draw a cheque is not a banker within the meaning of the Bills of Exchange Act. "[20]

Although the views of Griffith C.J. were not accepted by the other members of the High Court, it was nevertheless significant. It echoed what once had been admitted by Ashbourne C. in Re Shields' Estate on the importance of cheques transactions. More importantly, it directed attention to the Bills of Exchange Act wherein it was pointed out that the duties and privileges of bankers especially in regard to cross cheques "show that the bankers intended were persons whose business includes the honouring of cheques drawn upon them by their customers and dealing with crossed cheques, both by way of paying such cheques drawn upon them and collecting cheques cross generally or crossed specially to themselves." [21]

Indeed, the idea that the acceptance of deposits with interest and repayment on demand is sufficient to

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[20] op. cit. per Griffith C.J. at p.465.

[21] ibid at p.464. With the introduction of the Cheques Act 1960 (N.Z.) especially S.5, this point becomes the more stronger.

constitute a banking business is also difficult to reconcile with textbooks' authorities. Paget's Law of Banking, 5th ed. (1947) at page 5 states the position as follows :

" Some of the older dicta seems to give undue prominence to the deposit side of banking. In view of the provisions of the Bills of Exchange Act, and the latter affirmation of cheque business as the leading feature of a bank concern, the scale would appear to have turned.

" Again, looking at the crossed cheques sections of the Bills of Exchange Act, the consequent restriction on the encashment of crossed cheques save through a banker, and the universal and legally encouraged use of crossed cheques, the collection of such cheques must be regarded as an inherent part of a banker's business. It is therefore a fair deduction that no one and no body, corporate or otherwise, can be a 'banker' who does not :

1. take deposit accounts;

2. take current accounts;

3. issue and pay cheques drawn on himself;

4. collect cheques for his customers. "

Hart's Law of Banking 4th ed. (1931) at page 1 provides the following definition :

" A Banker or Bank is a person or company carrying on the business of receiving moneys, and collecting drafts, for customers subject to the obligations of honouring cheques drawn upon them from time to time by the customers to the extent of the amounts available in their current accounts. "

These authorities emphasize what no doubt for most people is the main function of a bank, namely, the honouring of customers' cheques to the extent of the credits in their accounts. It was the absence of this function which led to Griffith C.J.'s dissenting judgment in the Australian Savings Bank's case.

(ii) Recent Decisions :-

In a more recent leading case of Bank of Chettinad, Ltd, of Colombo v. Commissioner of Income Tax, Colombo (1948)[1] the Judicial Committee of the Privy Council has lent emphasis to the need for current accounts as being essential to the business of banking. The Appellant bank at the material time had its Head Office at Rangoon, Burma and a branch in Ceylon. In the course of carrying on its business in Ceylon the Ceylon branch paid a sum of money to the Head Office by way of interest on money advanced by the Head Office. The Bank claims that the sum should be allowed as a deduction under Rule 1 of the Board of Income Tax Rules it being a 'bank'. This rule contemplates a Ceylon branch of a non-resident banker.

The relevant definitions in Rule 1(1) are as follows : " 'Bank' means any non-resident banker within the meaning of those expressions as defined in section 2 of the Income Tax Ordinance. 'Ceylon Branch' means the business carried on in Ceylon by any such bank." 'Banker' in section 2 of the Income Tax Ordinance was said to carry the matter no further for it defines a banker as "any company or body of persons carrying on the business of banking."

Nevertheless, in order to succeed in its claim the Bank has to show that it was carrying on the business of baking in Ceylon. What is meant by the 'business of banking' fell on the Court to decide.

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[1] (1946) 47 N.L.R. 25 Supreme Court of Ceylon; [1948] A.C. 378 P.C. See too a Canadian case which also stressed on honouring customers' cheques and drafts : Re Bergethaler Waisenamt [1949] 1 D.L.R. 769.

In the Supreme Court of Ceylon, Counsel for the Bank relied on a dictum of FitzGibbon L.J. in Re Shields' Estate wherein his Lordship interpreted 'Banker' as one "who traffics with the money of others for the purpose of making profits" even though he issued no cheque books and did not honour drafts on demand. This dictum was however rejected by the Ceylon Court for Rose J. said :

> " Whatever may be the position under Irish Law, it seems to me that that is too wide a conception of a bank according to the Law of England and Ceylon. "[2]

His Honour sought the assistance of section 330 of the Companies Ordinance of 1938 in interpreting the terms 'Banker' and 'Business of Banking". A "banking company" according to section 330 "means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order .... " In his Honour's judgment (which the Acting Chief Justice Soertsz concurred) it was said that section 330 though came into force six years later then the Income Tax Ordinance of 1932, "merely crystallised what was already the legal conception of a 'bank' in Ceylon."[3]

This was implicitly approved by the Privy Council for in their Lordships' view, "a valuable guide to the meaning of these words (i.e. Banker and Banking business) is afforded by S.330 of the Companies Ordinance of 1938." "Moreover," their Lordships added, "the definition in S.330 in no way conflicts with the meaning attached to the work 'banker' in England in 1932." [4] Accordingly, their Lordships

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[2] (1946) 47 N.L.R. 25 per Rose, J. at p.27.

[3] ibid at p.28 and in P.C. at p.383 op. cit.

[4] op. cit. at p.383.

formulated the test for determining whether a person or body was engaged in the business of banking to consist in "the accepting of deposits of money on current account or otherwise, subject to the withdrawal by cheque, draft or order."[4] Applying this to the Appellant Bank's in Ceylon, it was held that "there was no evidence that any moneys on deposit could have been withdrawn by cheque, draft or order."[5] Consequently the appeal was dismissed.

Admittedly, the decision turned on an ascertainment of the meaning "business of banking" for the purposes of the Income Tax Ordinance and not directed to the Bills of Exchange Act or any other statute. And admittedly too, it relied on a statute, the Companies' Ordinance, which has specifically defined the term 'business of banking'. However, it is respectfully submitted that the decision is persuasive authority for the view that some form of current accounts is essential in the business of Banking and especially so for the purposes of the Bills of Exchange Act 1882 (UK). That this is so could indirectly be inferred from their Lordships' statement that the definition in S.330 of the Ceylon Companies' Ordinance 1939 "in no way conflicts with the meaning attached to the work 'banker' in England in 1932". Presumably their Lordships have in mind the Bills of Exchange Act 1882 wherein the word 'banker' appears. Arguably therefore, it could similarly be applicable to the Bills of Exchange Act especially when one recalls that 'banker' in the Bills of Exchange Act is defined as : "includes a body of persons .... who carry

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[4] op. cit. at p.383.

[5] ibid p.384

on the business of banking" whereas section 2 of the Ceylon Income Tax Ordinance was defined as : "means any company or body of persons carrying on the business of banking."

The Judicial Committee's view has subsequently found favour with the Court of Appeal in England in the most recent and much discussed case of United Dominions Trust Ltd v. Kirkwood (1966).[6] It is not intended to delve into a detail analysis of the sort of business transactions that gave rise to the dispute. Nor is it intended to discuss the point related to bona fide for it has been clear from the case that there has been no suspicion of mala fide on the part of the United Dominions Trust Ltd. What the writer will examine is the substantive question : the meaning of business of banking.

The relevant facts were as follows. The plaintiffs/ Respondents United Dominions Trust Ltd (hereinfafter called U.D.T.) lent £5000 to the Lonsdale Motors Ltd Company and in return the said company accepted five bills of exchange, each for £1000 drawn on them by U.D.T. The defendant/ appellant, Mr Kirkwood, who was Managing Director of the company, endorsed them. The bills were not met on presentation and notice of dishonour was given to the defendant. Since the company was in liquidation, U.D.T. brought this action against Mr Kirkwood as endorser. It was not in dispute that Kirkwood has no defence whatever except under the Moneylenders' Act 1900. He pleaded that U.D.T. were unregistered moneylenders, and therefore, could not recover the sum claimed.

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[6] United Dominions Trust Ltd v. Kirkwood [1966] 1 Q.B. 783 H.C.
[1966] 2 Q.B. 431 C.A.

U.D.T. however argued that they came within the first limb of exception (d) to section 6 of the Moneylenders Act 1900. The material words of the section provide that "the expression 'moneylender' in this Act shall include every person whose business is that of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include ... (d) any person bona fide carrying on the business of banking."

In support of their claim, U.D.T. produced evidence that they receive money on deposit, and pay interest on it, and that they operate 'current accounts', on which customers draw cheques which passed through the clearing system and are paid on presentation. They had no difficulty in showing too that they are widely regarded as bankers by other bankers of established standing and, inter alia, by the Inland Revenue, which has permitted them to account for stamp duty on cheques by composition fee, and allowed tax repayment claims in respect of interest charged without deduction of tax, both of which were only applicable to bankers.

Mocatta J. in the High Court considered this evidence satisfactory and held that the defendant's debts were therefore enforceable. With regard to the peculiar nature of the current accounts criticised by the defendant's counsel, his Lordship was nevertheless of the view that the mutual rights and liabilities of banker and customer in relation to them were the same as arose in the case of current accounts with the joint stock banks. [7] Consequently, there

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[7] ibid per Mocatta J. at p.795.

there was "no valid gound for disregarding them in determining whether on the evidence the plaintiffs carry on the business of banking within the definition."[7]

Though Mocatta J. tends to accept Paget's definition of the business of banking, it must however be noted that he has confined his decision to the facts before him and has expressly refrained from deciding that any particular activity is an essential characteristic of the Banker.[8]

Against this decision, the defendant appealed to the Court of Appeal. The interest of the appeal lies in the wide ranging discussion in the three judgments delivered on the nature of the business of banking. While the result was that by a majority, the appeal was dismissed, the approach of each of the majority judges differed from each other (and from Mocatta J.); and it seems that if the evidence given at the trial had been more fully probed – as it well might be if U.D.T. were to bring an action against some other borrower – the result could have been the other way. Lord Denning M.R. held that U.D.T.'s reputation suffice to qualify them as bankers whereas Diplock L.J. considered that they were bankers, but the reasoning which led him to this conclusion was quite different from the Master of the Rolls. Harman L.J. was of the opinion that U.D.T. were not bankers and that the defendant was entitled to succeed. It is the writer's humble belief that the three judgments delivered warrant special examination with the hope that a consensus opinion of the Court could be deduced on the meaning 'the business of banking'.

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[7] ibid per Mocatta j. at p.795

[8] ibid at p.790

The Judgment of Lord Denning M.R.

Earlier in his judgment Lord Denning noted that 'bankers are a privileged class .... They are an exclusive circle to which entry is limited.'[9] He then listed twelve instances of privileges afforded to bankers under the English legislations. In none of the statutes is any definition of a banker vouchsafed, beyond the common one of "a person carrying on the business of banking", which business is itself undefined. Lord Denning then went on to consider the characteristics of a modern banker. Observing that the march of time has taken us beyond the stage where in 1914 the High Court of Australia in Permewan Wright & Co. Ltd, was able to hold that the absence of cheque accounts did not prevent the State Savings Bank from being a Banker, the Master of the Rolls said:

> " Money is now paid and received by cheque to such an extent that no person can be considered a banker unless he handles cheques as freely as cash. Whereas in the old days it was a characteristic of a banker that he should receive money for deposit, it is nowadays a characteristic that he should receive cheques for collection on behalf of his customer. Whereas in the old days he might withdraw it on production of a passbook and no cheque, it is nowadays a characteristic of a bank that the customer should be able to withdraw it by cheque, draft or order."[10]

The two characteristics here mentioned, viz. (1) accepting money from and collecting cheques for their customers; and (2) honouring cheques drawn on them by their customers, bring with them, in Lord Denning's view, a third characteristic of bankers, viz. (3) the keeping of current accounts, or something similar, in which the appropriate credits and debits are recorded. These three characteristics were acknowledged

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[10] ibid p.446. [9] ibid p.442

to be much the same as those appearing in the then current edition of Paget (6th ed. 1961 p.8): "No-one and nobody, corporate or otherwise, can be a 'banker' who does not (i) take current accounts; (ii) pay cheques drawn on himself; (iii) collect cheques for his customers."[11]

Testing U.D.T.'s business against these characteristics alone, Lord Denning found that it would not have qualified as a banker.[12] To conduct hire-purchase finance by means of discounting bills or promissory notes, to accept deposits repayable after fixed periods, to make loans of all sorts, all of which U.D.T. did in common with many bankers, would not have been enough. Nor would the keeping of certain accounts which were called 'current accounts', but which amounted to little more than a record of a customer's borrowings and which were completely uncharacteristic of an ordinary banker's current accounts. "But", said Lord Denning M.R.,

> " it must be remembered that a recital of usual characteristics is not equivalent to a definition. The usual characteristics are not sole characteristics. There are other characteristics which go to make a banker. In particular stability, soundness and probity .... A banker is easier to recognise than to define. In case of doubt it is, I think, permissible to look at the reputation of the firm amongst ordinary intelligent commercial men. " [13]

'Reputation,' said the Master of the Rolls, 'may exclude a person from being a banker: so also it may make him one.' "Our commercial law has been founded on the opinion of merchants. Lord Mansfield himself used to have his own special jurymen of the city of London who sat regularly with him. He took

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[11] ibid p.447.

[12] ibid p.453.

[13] ibid pp.453-4.

their opinion as to what was the practice : and laid down the law accordingly."[14] The Master of the Rolls said he would follow Lord Mansfield's example. Thus, on the basis that U.D.T. had long been recognised in responsible quarters as a bank and had been afforded the privileges of a banker, such as clearing house facilities and permission to print 'duty paid' on its cheques, Lord Denning concluded that the Court should not now declare it not to be a bank. Lord Denning was of course fully conscious (or over cautious ?) of the inconvenience and serious implications to U.D.T. if the decision was to be against them.[15]

The Judgment of Harman L.J.

Harman L.J. dissented. His Lordship approved the definition applying in Ceylon — Bank of Chettinad case — in which the Privy Council indicated did not conflict with the meaning of bank in England in 1932, namely:

> " a company which carries on as its principal business the accepting of deposits of money on current account or otherwise subject to withdrawl by cheque, draft or order. "[16]

Like the Master of the Rolls, Harman L.J. also observed that U.D.T. had no deposit accounts in the relevant sense.[17] Though large sums of money were deposited with it, they were repayable only at stated times and not on notice. In other words, they were merely 'short-term loans' and 'if this sort of transaction constituted a banker, the building societies would be bankers, which admittedly they are not.'[17] Again, like the Master of the Rolls, his Lordship also concluded

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14 ibid p.454.
15 ibid pp.455-6
16 op. cit. per Harman L.J. at p.457.
17 ibid p.458.

that U.D.T. had no current accounts either. Those so-called 'current accounts' numbered some 1400 all of them except about 90 were with traders conducting business with U.D.T. which were called Traders' accounts. The 90 were called private accounts but were not explored before the court. The accounts with traders, as it appeared to the Court, were used (a) to receive as credits amounts provided as finance by U.D.T. and (b) to pay out against the traders' cheques amounts drawn against his finance. Cheques drawn by traders in this way were paid into the credit of their accounts with one or other of the clearing banks. U.D.T. were at all times prepared to pay cheques drawn on these accounts and payable to third parties. However, in His Lordship's view, these accounts were merely vehicles for providing finance.[18]

And again, like Lord Denning M.R., Harman L.J. was also of the view that it was essential for a person claiming to be a banker to show that he collects cheques on behalf of his customers —

> " It seems to me that nowadays when payment by cheque has become the recognised way of discharging day-to-day debts that the collection of cheques on a customer's behalf is as essential a part of the service provided by a banker as is receipt of cash from the customer."[18]

Up to this point there was no marked divergence between the views of the Master of the Rolls and Harman L.J. The divergence came in relation to the question of reputation, a matter which was decisive in the favour of U.D.T. according to Lord Denning. Harman L.J. could not accept that reputation could save U.D.T. for "reputation alone is not enough." [19]

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[18] ibid pp 459-60.

[19] ibid p 461.

His Lordship, however, did recognise the serious consequences of his decision, found against U.D.T.

The Judgment of Diplock L.J.

Although he agreed with Lord Denning M.R. in dismissing the appeal, Diplock L.J. shared with Harman L.J. the view that a person could not be a banker merely because commercial men and bankers so regarded him. Of importance was not what the person did with the money – for instance, lending it at interest – but the terms on which be obtained it. It was therefore essential that a banker should accept from his customer

> " loans for an indefinite period upon running account, repayable as to the whole or any part thereof upon demand by the customer either without notice or upon an agreed period of notice. " [20]

Such loans are repayable on the customer's cheque, draft or order.[20] Diplock L.J. was inclined to agree with the Master of the Rolls that today it is also essential that the banker should be bound to honour cheques drawn upon him by his customers payable to third parties and to collect cheques on his customers' behalf.[20] However, his Lordship proceeded to qualify his words that it was, nevertheless, not necessary for him to decide whether it would still be possible to carry on the business of banking without undertaking the payment of cheques drawn on the customer's account.[21]

Like the other two judges, Diplock L.J. also came to the conclusion that the two basic essentials, namely deposit

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[20] op. cit. per Diplock L.J. at p.465.

[21] ibid p.466.

accounts and current accounts were lacking in the business of U.D.T. As regard the former his Lordship said: "What U.D.T. calls 'deposit accounts' are short-term loans of money of agreed duration .... not withdrawable upon notice but are repayable without notice by either side at the end of the agreed period."[22] As regard the latter, his Lordship pointed out that in the cross-examination of Mr Garrett (a director of U.D.T.), all that emerged was that not more than twenty per cent of traders had 'current accounts' at all, that of those with current accounts, 'not very many' used them for payment of cheques drawn in favour of third parties or collection of cheques drawn by third parties, and that even those that did, the extent to which they did so was 'small I imagine'.[23] Once one eliminates the kinds of transaction recorded in the 'current accounts' of Lonsdale Motors Ltd as not being in the legal nature of banking transaction at all, the evidence of Mr Garrett left, in his Lordship's view, a "complete lacuna" whether or not the banking transactions which the U.D.T. carried out constituted more than a negligible part of their business.[23]

Was that lacuna capable of being filled by evidence of the reputation which U.D.T. enjoyed in banking and commercial circles of being itself a 'banker' ?[23] After anxious reflection and still professed to be in 'considerable doubt' his Lordship, nevertheless, concluded, but for reasons which differed from Lord Denning M.R., that reputation might be enough to fill the lacuna arising from the fact that the

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[22] ibid pp 467-8.

[23] ibid p.473.

evidence did not disclose that U.D.T. were actually carrying on the business of banking –

> " Unless the grounds of the witnesses' belief were probed in cross-examination and shown to be mistaken, such evidence in an ordinary case might be sufficient in itself to establish a prima facie case that U.D.T. was bona fide carrying on the business of banking."[24]

U.D.T. : An Evaluation

It is proposed here to look into two broad aspects of the case as arose from the foregoing discussion – firstly, the case itself and how far the three judgments, viewed as a whole have contributed to clarifying or settling the term 'the business of banking; and secondly, the decision of the case as to how far it is compatible with the reasoning of the majority judges, especially Lord Denning M.R.

Although the case really relates to the interpretation of 'bona fide carrying on the business of banking' for the purposes of the Moneylenders Acts and, therefore, strictly speaking, would apply only to the definition in that particular statute, it is, nevertheless, clear that the judgments were directed more to the nature of banking business generally. In other words, the case has in fact produced a number of significant dicta, however obiter, on the meaning of the term 'business of banking' which are highly persuasive for general purposes and in particular, in respect to the Bills of Exchange Acts.

It appeared that all three judges in the Court of Appeal agreed that the basic characteristics of a banker were those as set out in the then current adition of Paget's Law

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[24] ibid p.474.

of Banking (1961) 6th ed. at page 8, namely: (1) take current accounts, (2) pay cheques drawn on himself and (3) collect cheques for his customers.[25]

More significant was the fact that all three judges were of the opinion that testing U.D.T.'s business upon the above basic characteristics, U.D.T. could not be said to have been carrying on the business of banking. The Court was in agreement that U.D.T. had neither dealt with deposit accounts nor current accounts. Nor was there any evidence that U.D.T. had collected cheques. One would have thought that having reached such a stage and in such a state of unanimity, the Court would have determined the case against U.D.T. That was, of course, not so, for by a majority decision, it ended in favour of U.D.T. on the basis of reputation. It is here that we turn to the decision particularly the decision of Lord Denning M.R.

Indeed, it was precisely at this point that Harman L.J. departed from his brethren and decided not to proceed any further. Harman L.J. concluded that U.D.T. could not succeed on the ground of their reputation and so the appeal by Kirkwood ought to be allowed. While allowing the appeal his Lordship also noted that he was fully aware of the serious implications his decision would have had on U.D.T.[26]

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[25] Lord Denning M.R. clearly approved it at p.447F; Diplock L.J. was inclined to agree though said it was not necessary to decide; and Harman L.J. has pointed out characteristics which were clearly identical to Paget's requirements, see for e.g., at p.457 E on current accounts; p458 line 3 and p.459 G on the Collecting of cheques and Payment of same.

[26] op. cit. per Harman L.J. at p.461.

Admittedly, Harman L.J.'s reasonings and conclusion were the most consistent amongst the three judgments delivered. It is, nevertheless, suggested that its consistency was because of the adherence to strict legal principles. In the writer's view, a 'legalistic approach' or legalism without due regard to commonsense and the reality of the situation may sometimes be undesirable and, unfortunate, as Harman L.J. himself has recognised. It is the writer's respectful submission that the majority decision, Lord Denning's in particular, was preferable and could be justified in the circumstances of the case. As noted previously, Paget's definition of the term 'business of banking', with which all members of the Court of Appeal were apparently in agreement, was not a definition which was expressly directed to the Moneylenders Acts. In fact it was a definition capable of general application. If there is to be any specific statute to which the definition could be argued to be of more relevance, it would certainly be the Bills of Exchange Acts. It is suggested that Harman L.J.'s "legalistic approach" has fallen into this trap for his Lordship has failed, in the writer's opinion, to examine the very object behind the Moneylenders Acts before applying any seemingly established principles of law.

On the other hand, Lord Denning M.R. was able to direct his mind, ultimately, to the very statute in issue – the Moneylenders Acts – and examine the purpose for which such statute was created. This is vital because there are many statutes, noted in the beginning, which are concerned with bankers and the business of banking, and they are concerned

with them for widely differing purposes. It may well be that a definition which would be satisfactory in connection with one statute would be unsuitable, if not misleading, for the purposes of another. It was primarily because of this recognition that the Master of the Rolls was able to come to the decision he made. This was evident in the concluding part of his judgment when he said:

> " The ultimate question is : Is U.D.T. to be classed as a banker and accorded the privileges attaching to that status; or is it to be classed as an unregistered moneylender and treated as an outlaw unable to recover the debts due to it ? U.D.T. is not the sort of person against whom the Moneylenders Acts were directed. It is not rapacious, extortionate or unmerciful. It is sensible, moderate and reasonable. "[27]

It is also suggested that Lord Denning's decision could be rationalised from a broader angle – that is, through the general principle of "equity of fairness". Thus one prominent authority on Banking Law[28] has noted that the decision of the Court of Appeal in this U.D.T. case was "a vivid exemplification of the judicial functions" shown at its best. The proper nature of this judicial function was believed to have been succinctly made by Mr Justice Cardozo who has demonstrated that although Judges are bound by precedent they are often able to differentiate between the facts before them and the principles of an earlier age thereby maintaining an element of flexibility. In the words of Mr Justice Cardozo :

> " Uniformity ceases to be good when it becomes the uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against

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[27] op. cit. per Lord Denning M.R. at pp 455-6.

[28] F.R. Ryder, Gilbert lectures 1970. op. cit. at p.16.

> " the social interest served by equity and fairness or other elements of social welfare. These may enjoin the judge upon the duty of drawing the line at another angle, of staking a path along a new course, of marking a new point of departure from which others who come after him will set out upon their journey. "[29]

It may be said that Lord Denning did not, by his decision, purport to set any new path "from which others who come after him will set out upon their journey" for this was certainly not necessary. What the decision did was merely to see that 'equity and fairness' did in the end prevail over the other party, which, even Harman L.J. has recognised as one that "is wholly without merit".[30] Indeed Lord Denning has been very cautious to see that his decision should not be used blindly as precedent for he has warned other similar companies like U.D.T. to ask the Board of Trade for a certificate if they should wish to be regarded as Bankers. In short, Lord Denning's decision could also be justified on the ground that the defendant's case was wholly devoid of any equitable merits and depends for its success solely upon a particular construction of certain provisions of the Moneylenders Acts.

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[29] Cardozo, The Nature of the Judicial Process, cited in Ryder ibid p.2.

[30] op. cit. per Harman L.J. at p.461.

Conclusion

Two observations may be made from the preceding examination of case law. Firstly, it will be appreciated that those old cases[1] which maintained the views that mere acceptance of deposits and the lending out of same would be sufficient to constitute 'the business of banking' had clearly been discredited by subsequent cases like the Bank of Chettinad[2] and of course U.D.T.[2] The Court of Appeal in this latter case has expressly disapproved three old cases which have earlier been discussed in this paper. "If they were still the law, it would mean that the building societies were all bankers."[3] The corollary to this appears to be that those contrary views, especially in the minority, that considered deposits withdrawable on demand and by cheque, draft or order as essential characteristics of the business of banking have at last gained acceptance : In re District Savings Bank Ltd., Ex parte Coe, per Turner L.J.[4], In re Shields' Estate, per Lord Ashbourne[5] and Permewan Wright & Co. Ltd, per Griffith C.J.[6]

Secondly, it will be noted that the cases we have so far considered relate to a variety of specific statutes.[7]

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[1] E.g. In re Bottomgate Industrial Co-operative Society (1891) 65 L.T. 712; In re Shields' Estate [1901]1. I.R. 172; Permewan Wright & Co. Ltd. (1915) C.L.R. 457.

[2] [1948] A.C. 378 and [1966]2 OB 431 respectively.

[3] ibid per Lord Denning M.R. p.446 and cases in note 1 above.

[4] (1861)3 De G.D & J. 335 per Turner L.J. at p.338.

[5] op.cit. per Lord Ashbourne C. at p.195.

[6] op.cit. per Griffith C.J. at p.465.

[7] Thus for instance, In re Bottomgate the Industrial & Provident Societies Act 1862; In re Shields the Irish statute of 33 George 2, C.14.

Interestingly, with the exception of the Permewan Wright & Co. Ltd case, there did not seem to have been any cases which have dealt specifically with the term 'banker' or 'business of banking' for the purposes of the Bills of Exchange Acts. Strictly speaking, therefore, those decisions were only legally binding in relation to the respective statutes they were dealing with. Yet, a perusal of those cases revealed that the Courts, in interpreting the term 'banker' or 'business of banking', have rarely confined their interpretations to the specific statute in question. Instead, they have somehow (perhaps inevitably) interpreted the term business of banking in its wider connotation, and have invariably, though with varying degrees, made reference to the Bills of Exchange Acts.

Thus, for instance, in the Bank of Chettinad case, a case which relates to the Ceylon Income Tax Ordinance of 1932, the Privy Council was able to say that 'the definition in S.330 (of the Ceylon Companies Ordinance 1938) in no way conflicts with the meaning attached to the word 'banker' in England."[8] As the writer has suggested, their Lordships clearly had in mind the English Bills of Exchange Act when uttering those words for the word 'banker' appears therein.

The best example is still the U.D.T. case. Though that case was dealing essentially with the question as to the requirements of the Moneylenders Act 1900 in relation to the business of banking, we have already seen that there were

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[8] op. cit. at p.383.

significant dicta of the Court of Appeal which were clearly intended to allude to the essentials of banking in relation to a wider sphere than the interpretation of section 6 of the Moneylenders Act 1900. Lord Denning M.R. from the beginning of his judgment has explicitly referred to the Bills of Exchange Act and accepted Paget's three criteria as the basic characteristics of the business of banking.[9] Indeed Lord Denning's allusion to the banking business in general could also be inferred from the evidence, which he relied, given by the City bankers, in that those evidence were not given as to the meaning of 'bona fide carrying on the business of banking' for the purpose of the Moneylenders Act but was general as to whether U.D.T. were regarded as bankers without any limitation to the aforesaid statute.[10]

Similarly, Harman L.J., after quoting the headnote of the Permewan Wright & Co. Ltd case, a case which relates specifically to the Australian Bills of Exchange Act 1909, added that he thought that collection of cheques was an additional requirement of the business of banking.[11] An obvious reference to the English Bills of Exchange Act and the Cheques Act. Likewise, Diplock L.J. at p.463 said: "The second question is : what are the essential characteristics of the business of banking ? Apart from exemption from the requirements of the Moneylenders Acts, the statute law recognises a number of immunities and privileges peculiar to bankers." His Lordship then alluded to the crossed cheques sections of the Bills of Exchange Act, which, as

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[9] op. cit. per Lord Denning M.R. at pp 445-6.

[10] ibid pp 454-6.

[11] op. cit. per Harman L.J. at pp 457-8.

we have seen, could only be utilised amongst bankers. Then he proceeded to discuss a number of old cases and in particular expressly considered the dicta of Holmes L.J. in In re Shields' Estate and Isaacs J. in Permewan Wright & Co. Ltd as adopting too wide a definition of banking. And without particularising in any way the Moneylenders Act, within the next few paragraphs he reached his comments on the Paget definition with which he was 'inclined to agree' as correctly stating the essentials of the business of banking.[12]

Thus, it is submitted that all the dicta in the U.D.T. case could indeed be regarded as relating to 'banking' in its wider connotation and especially in relation to the Bills of Exchange (as well as Cheques) Acts, except where a judgment specifically alluded to the definition in the Moneylenders Act. Those dicta, put in a nutshell, were an endorsement of Paget definition which could reasonably be concluded as the basic characteristics of the business of banking today for the purposes of the Bills of Exchange Act and the Cheques Act — taking money on current accounts; payment and the collection of cheques. On these criteria, all Trading Banks and Savings Banks in New Zealand would clearly be in 'the business of banking' for the purposes of the Bills of Exchange Act. The former have long provided

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[12] op. cit. per Diplock C.J. at p465.

current accounts while the latter have since 1974 been allowed to offer cheque facilities.[13]

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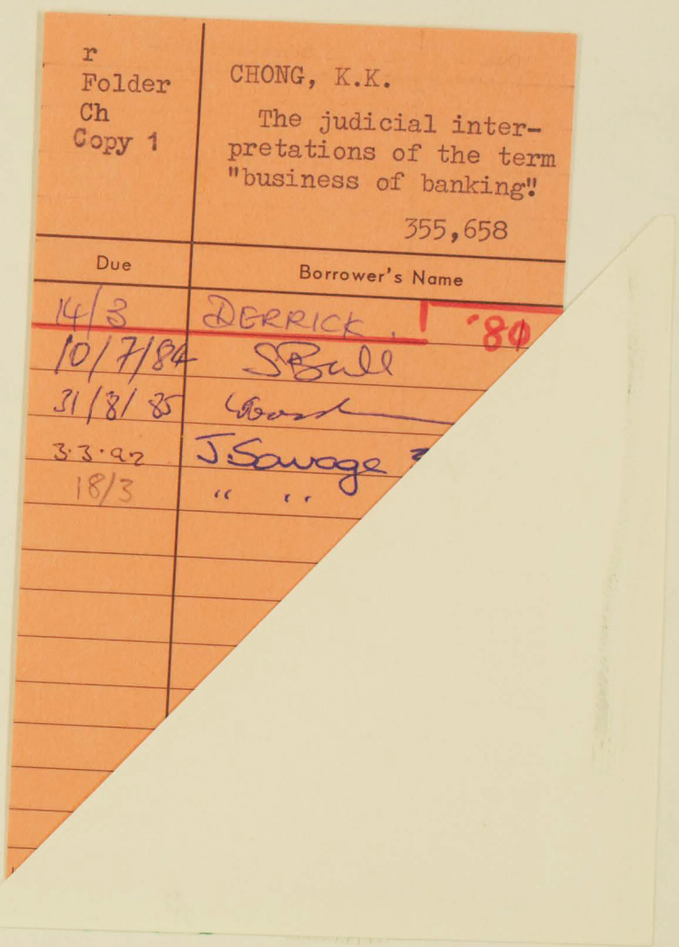
[13] It seems that Savings Banks have since 1964 been statutorily considered to be in the business of banking for the purposes of the Bills of Exchange Act 1908 and certain enactments of the Banking Act 1908. See: Private Savings Bank Act 1964 section 24; Trustee Savings Bank Act 1948 section 38A and Post Office Act 1959 section 118A. But prior to 1964, the position was not at all clear as to whether savings banks are bankers and in the business of banking when they did not operate current accounts or provide complete chequing facilities. However, according to the writer's colleague Mr L.B. Roper, a legal officer attached to the P.O.S.B. Wellington, the contemporary view was that the New Zealand Courts would follow the Permewan Wright & Co. Ltd case.



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