The Bank and its Current Account Customer

Prior to the decision of **Foley v. Hill**[1] legal opinion was mixed as to what was the exact relationship which existed between a bank[2] and its customer. Originally it was the custom for a customer to leave his coin and plate with a goldsmith for safekeeping, to be delivered up **in specie** upon demand. Out of this practice arose the opinion that the goldsmith was a bailee of the goods. Later the goldsmith varied his business. Instead of letting the money deposited with him lie idle he put it to work in earning money for himself; he also commenced to refer to himself as a "banker". Eventually, the conception arose that this "banker" occupied the position of an agent or trustee in relation to his customer-principal and as such was obliged to handle deposits in a fiduciary manner. The nature of the relationship finally was decided by the House of Lords in the case of **Foley v. Hill**[1].

In delivering the judgment of the House, the Lord Chancellor[3] declared that the banker and customer relationship is that of debtor and creditor; once a customer deposits money in his bank the ownership immediately passes to it. His Lordship also pointed out that as a result of acquiring the ownership the bank is free to use the money as it sees fit and is not obliged to inform its customer how the deposit is employed.[4]

It is doubtful if the banking business would have survived if the House of Lords had found a fiduciary relationship existing between a bank and its customer. Certainly banking would not have obtained its present day position in the commercial world if such had been the decision. A fiduciary relationship would have restricted a bank to trustee investments only; employment of deposits in other ventures would have made the bank liable for actions for breach of trust. Instead of being in the banking business the bank would have become a trust company.

The debt incurred by a bank in taking its customer's deposit upon a current account is no ordinary debt. At common law, unless there is an agreement to the contrary, a debtor must seek out his creditor and pay him, otherwise the debtor is in default. Also, a debt usually accrues due upon a specified date or upon the occurrence of a certain event. The debt which a bank owes to its customer, however, is not governed by these rules.

In delivering judgment in the case of **Joachimson v. Swiss Bank Corporation**[5] the English Court of Appeal declared that the debt incurred

1. (1848), 2. H. L. Cas. 28.
2. English cases usually refer to a "banker" because the banking business in England is carried on largely by individuals, partnerships and incorporated companies. As the banking business in Canada is carried on only by incorporated companies. (See The Bank Act, R. S. C., 1952, c. 12, s. 4) Canadian cases refer to a "bank".
3. Lord Cottenham, L. C.
4. At pp. 36-37.
5. [1921] 3 K. B. 110.

by a bank is not due until its customer has made a valid demand for repayment. Otherwise, as the Court pointed out, the debt would be due as soon as a customer made a deposit. From this would then arise the absurd situation in which the bank would have to return the deposit immediately or be in default; and if the customer was not available the bank would have to seek him out, which would mean that the bank could close the account without first giving notice to its customer. In a like fashion, a customer could bring an action for the credit amount of his account before he first made a demand for its repayment; the bank's first indication that a customer wanted his money returned would be the service of a writ of summons. Under these circumstances, the Court declared that an implied term of the relationship which exists between a bank and its current account customer is that a demand should be made first for repayment before the debt becomes due. That is, the debt is not due until the customer has made a demand upon his bank for repayment of the deposit or part of it.

In the **Joachimson** case the plaintiff, acting on behalf of his firm, made no demand for repayment of the balance of a current account held by the defendant before bringing an action to enforce repayment. Consequently the Court dismissed the proceedings; a cause of action only arises when a demand has been made and it is dishonoured.

In delivering judgment in the **Joachimson** case, Atkin L. J. pointed out that as a result of the Court's decision the statutory time in which to bring an action for repayment of the deposit does not run from the time the deposit is made, but rather from the time a valid demand is made for repayment and it is refused.[6] This means that a bank would be obliged to honour a demand for repayment of a deposit which had remained dormant for, say, fifty years. If the bank refused to repay, the statutory period in which a customer could bring an action would then commence to run. To avoid the accumulation of dormant accounts in Canadian banks, however, The Bank Act[7] provides that after an account has remained dormant for 10 years the amount of the account and any interest thereon is to be transferred to the Bank of Canada. After that a customer's right to demand repayment from his own bank is barred. His demand must then be directed to the Bank of Canada, although no statutory time runs against him as to when such demand may be made.

Considerable thought also was given in the **Joachimson** case to the effect of its decision in regard to the attachment of a garnishee order upon a current account. The common law rule is that a garnishee order cannot attach a debt until it is due or accruing due. Therefore, if a current account is not due until a demand is made upon it, how can a garnishee order attach the account before the demand has been made? In answer to this, Bankes L. J. expressed the opinion of the Court when he

6. At p. 131.
7. R. S. C., 1952, c. 12, s. 92.

said that a garnishee order was a sufficient demand by operation of law to satisfy the bank's right to have a demand before the credit amount of the account became due".[9]

When a customer opens a current account, he enters into a contract[10] with his bank. It is very seldom, however, that the actual terms of the contract are expressly set out. Consequently, the Court often is called upon (such as in the above-mentioned **Joachimson** case) to declare what the terms are. Of course, a Court will neither make nor alter a contract: that is the duty and right of the parties to it. If a term of a contract is lacking, however, which is obviously a necessary term and which both parties must have intended to be in the contract but have not expressed it because its necessity was so obvious that it was taken for granted, a Court will not hesitate to declare that term to be an implied term of the contract.[11] It is in this manner that most of the terms, which now are known to comprise the contract between a bank and its customer, have come to light.

The bank, on its part, undertakes to honour immediately its customer's mandate[12] to the extent that there is a credit balance owing to that customer.[13] Upon payment, the bank is entitled to debit the account to that extent.[14] However, if the bank pays a mandate upon which a customer's signature has been forged as the drawer, the bank has no right to debit the account. The bank is estopped from debiting the account, not because the bank has failed to notice that the signature does not belong to the customer indicated, but because there is in fact no mandate upon which to act: the ostensible mandate is merely a valueless piece of paper. At one time it was the considered opinion that a bank was under a duty to know its customer's signature[15], and failure to observe a forgery was negligence for which the bank had to stand the loss of the amount so paid. This fallacy was corrected by Mathew J. **in London and River Plate v. Bank of Liverpool**[16] where he pointed out that a forgery could be so cleverly executed that it would be impossible for a bank using ordinary care to detect it.[17]

The bank further undertakes to receive and to collect bills for the account; the money so received being borrowed by the bank with the undertaking that it shall be repaid upon demand.[18] It is agreed, how-

8. At p. 121.
9. In the case of an account where more than a demand is required before a credit amount becomes due, a garnishee order cannot attach: **Bagley v. Winsome, (National Provincial Bank, Ltd., Garnishee)** [1952] 2 Q. B. 236.
10. **London Joint Stock Bank, Ltd. v. Macmillan** [1918] A. C. 777, per Viscount Haldane at p. 814; **Joachimson v. Swiss Bank Corporation** [1921] 3 K.B. 110, per Atkin L. J. at p. 127. In **Foley v. Hill** (1848) 2 H. L. Cas. 28, a "superadded obligation" is referred to rather than a contract.
11. **Re Comptoir Commercial Anversois v. Power, Son & Co.** [1920] 1 K.B. 868, per Scrutton L. J. at pp. 899-900.
12. As the current account is the topic under discussion in this article the mandate usually takes the form of a cheque.
13. **London Joint Stock Bank, Ltd. v. Macmillan** [1918] A. C. 777, at p. 814.
14. Loc. cit., at p. 830.
15. **Smith v. Mercer** (1815) 6 Taunt. 76.
16. [1896] 1 Q. B. 7.
17. At pp. 10-11.
18. **Joachimson v. Swiss Bank Corporation** [1921] 3 K. B. 110, at p. 127.

ever, that the demand must be made at the branch at which the account is kept; a customer cannot expect repayment at any branch.[18] It is also agreed that, as a customer's mandate may be outstanding for several days in the ordinary course of business, the bank will not close an account which is in credit except upon reasonable notice; the notice will depend upon the nature of the account and the facts and circumstances of the case.[19]

During the operation of an account a bank cannot help but become intimate with a customer's business dealings and private affairs. For this reason there is imposed upon a bank in relation to its customer a confidence similar to that existing between an agent and his principal.[20] Information pertaining to a customer which is gathered by a bank in its capacity as a bank and during the currency of the account must be held in strict secrecy. Disclosure of such information to a third party could give rise to an action against the bank for breach of the implied contract not to disclose confidential matters.[21]

This duty of secrecy applies not only to the condition of the account and other facts gathered from the account's operation, but also to information pertaining to the customer which is gathered from other sources, such as someone else's account, provided it is gathered by the bank while acting in its official capacity.[21] It is doubtful if the bank's duty to remain silent about information already gathered ceases the moment an account is closed, although it is unlikely that the duty extends to information gathered after the account is in fact closed.[22]

However the above duty of secrecy is not absolute. As Banks L. J. pointed out in **Tournier v. National Provincial and Union Bank of England**[23], there appear to be four qualifications when disclosure is justified. These qualifications are:

(a) where disclosure is under compulsion by law;
(b) where there is a duty to the public to disclose;
(c) where the interests of the bank require disclosure;
(d) where the disclosure is made by the express or implied consent of the customer.[24]

At the time a customer opens an account he impliedly agrees on his part to exercise reasonable care in executing his mandates so as not to mislead the bank.[25] If he issues a mandate which contains a patent ambiguity the bank is justified, indeed it would almost appear to be a duty, in delaying payment until the true facts are ascertained because the bank's duty to honour a mandate is correlative to the customer's to

19. **Prosperity, Limited v. Lloyds Bank, Limited** (1923) 39 T. L. R. 372.
20. Although it has been pointed out, supra, that no fiduciary relationship exists between a bank and its customer, the former in handling the latter's transactions comes in several respects under the obligations of an agent.
21. **Tournier v. National Provincial and Union Bank of England** [1921] 1 K. B. 461.
22. Loc. cit., per Bankes L. J. at p. 473.
23. [1924] 1 K. B. 461.
24. At p. 473.
25. **London Joint Stock Bank v. Macmillan** [1918] A. C. 777, at p. 789.

first drawing it in an unambiguous form.[26] If the ambiguity is latent, however, and the bank bona fide acts upon the wrong meaning, there seems little doubt but that the bank has the right to debit its customer's account for the amount so paid because the error has occurred due to the customer's negligence in not issuing a clear order.[27]

The customer further undertakes to exercise reasonable care in executing his mandate so as not to facilitate forgery.[25] If a customer issues a mandate containing gaps in it so that the fraudulent alteration of the amount is facilitated, he is bound by the instrument as altered if the bank honours it bona fide. It is a breach of a customer's duty to issue such a mandate and forgery is a natural and direct consequence to be anticipated when a mandate is so drawn.[25] There are some authorities who feel that in such a case the true basis for allowing the bank to debit the account is that the customer has estopped himself by his conduct from denying the validity of the altered cheque.[28] But it seems to be generally accepted, however, that the true grounds are based upon the customer's failure to carry out properly his contractual duty.[29]

As already indicated, the duties set out in the foregoing discussion have been established judicially as implied obligations. What other obligations exist in the relationship must await further elucidation by the Court as it is improbable that the practice will ever arise whereby an express comprehensive contract will be entered into by a customer at the time of opening an account. Of course, if such a contract is entered into, an express term therein will bar the application of any incompatible implied obligation as herein set out.[30]

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26. Loc. cit., at p. 814.
27. **Ireland v. Livingston** (1872) L.R. 5 H. L. 395.
28. Hart, **Law of Banking**, 4th Ed., pp. 384-389.
29. Chorley, **Law of Banking**, 3rd Ed., p. 78.
30. **Joachimson v. Swiss Bank Corporation** [1921] 3 K.B. 110, per Atkin L. J. at p. 132.