

BANKING LAW AND BANKING PRACTICE IN THEIR CONCEPTUAL AND HISTORICAL PERSPECTIVES

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I. SINGAPORE THEN AND AT PRESENT

When I first arrived in Singapore, in 1961, the retail banking world was dominated by British-based banks. The leading players were the Chartered Bank and the Hong Kong and Shanghai Banking Corporation.¹ The local banks known to me were the Chung Khiaw Bank, the Lee Hwa Bank and the Overseas-Chinese Banking Corporation (“OCBC”). United Overseas Bank—UOB—had not as yet opened its doors. The same applies to OUB—Overseas Union Bank—which much later, in the nineties, merged with UOB.²

Singapore was not a centre of international banking. Neither Japanese nor American banks had arrived. Citibank, as known to us today, operated under another name: International Banking Corporation. In 1962, the Bank of America opened its doors; I had safe box number one. BNP arrived in 1971.³

Today, in 2013 (which means 52 years after my initial arrival), the scene has changed altogether. Singapore has become—or rather has turned itself into—a

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¹ Licensing of banks in Singapore at that time was governed by the Singapore *Banking Ordinance 1962* (No. 1 of 1962), which was modelled after the Malayan *Banking Ordinance 1958* (No. 62 of 1958). This was followed by the Malaysian *Banking (Amendment and Extension) Act* (No. 17 of 1965). Under s. 13 of the *Republic of Singapore Independence Act* (1985 Rev. Ed. Sing.), No. 9 of 1965, the local Ordinance continued to apply after Singapore separated from Malaysia. Currently banks have to be licensed by the Monetary Authority of Singapore (“MAS”): see the *Banking Act* (Cap. 19, 2008 Rev. Ed. Sing.). As regards MAS, see the *Monetary Authority of Singapore Act* (Cap. 186, 1999 Rev. Ed. Sing.). See generally, Sandra Annette Booyesen, “The Meaning of ‘Banking Business’ in Singapore: Is It Time for an Update?” [2011] 26 *Journal of International Banking Law and Regulation* 248.

² As yet, there were no books on the banking law of Singapore and Malaysia. In other Commonwealth countries, banking law was taught and studied. See Francis Alfred Alison Russell, *The Law Relating to Banker and Customer in Australia*, 2nd ed. (Sydney: Law Book Co., 1925), Preface. As regards the history of banking in England, see William John Lawson, *The History of Banking with a Comprehensive Account of the Origin, Rise, and Progress of the Banks of England, Ireland, and Scotland*, 1st American ed. by J. Smith Homans (Boston: Gould & Lincoln, 1852); Richard David Richards, *The Early History of Banking in England* (New York: A.M. Kelley, 1965), being a reprint of the original edition of 1929. A general source is Glyn Davies, *A History of Money: From Ancient Times to the Present Day*, 3rd ed. (Cardiff: University of Wales Press, 2002).

³ Banque Nationale de Paris Paribas.

financial hub. Indeed, the number of banks is impressive. Altogether we have about 200 commercial banks, merchant banks and representative offices.⁴ All local banks and some foreign banks have their head offices in Singapore; others will follow suit. This explosion in Singapore is not unique. The number of banks has escalated in many parts of the world, especially in Tokyo, Hong Kong and other Asian cities.

My object is to trace how banking law (mainly in common law systems) and banking practice have changed over the years and where they stand at present. There is, of course, a conceptual problem with respect to the nature of a 'bank' and of 'banking practice'. As the terms are not static and as their meanings change over the years, it will be necessary to consider both the conceptual issue and the historical developments. Regrettably, I have to confine myself to the practice of Western banks.

II. THE CONCEPTUAL ISSUE

A. *Practice and Law*

'Banking practice' refers to the type of business banks carry on in the West. Naturally, banks are bound to follow the commands of the law. However, I shall strive to show that in the field of banking and finance, the law usually adapts itself so as to accommodate practice.⁵ Still, in certain areas, it continues to apply its time-honoured principles⁶ and doctrines to the new facets of banking practice. Where this is the case, practice changes so as to meet the needs of the period but, of course, it has to reckon with the existing legal principles, such as usury laws which had been applicable in medieval Europe and regulatory provisions which are currently in operation. I pause to add that the need to toe the legal line applies in particular to draftsmen of bank documentation.⁷ They always have to reckon with the law applicable when they do their work; at present the 'compliance department' seeks to see to that. The law, though, seeks to accommodate.

To illustrate the point, let us take the bank's role as an adviser.⁸ The doctrines applied to situations arising in the present era remain well-known principles of the law of contract, the law of torts and the law of trusts.⁹ However, these have to be applied subject to statutory provisions such as the *Unfair Contract Terms*

⁴ See the list of institutions found online at MAS, "Types of Institutions", online: MAS <<http://www.mas.gov.sg/Singapore-Financial-Centre/Types-of-Institutions.aspx>>.

⁵ For current practice, see Stephen G. Cecchetti & Kermit L. Schoenholtz, *Money, Banking and Financial Markets*, 3rd global ed. (New York: McGraw-Hill, 2011).

⁶ Such as the doctrines with respect to the law of agency and the doctrines pertaining to fiduciary duties and misrepresentation.

⁷ Occasionally, they are not successful. I have seen forms of local branches of Continental banks applying specific provisions of their foreign law without spelling them out. Can one expect the customer to know what such a provision is all about?

⁸ Notably, in *Woods v. Martins Bank Ltd.* [1959] 1 Q.B. 55 (Leeds Assizes), the bank argued that advice on financial transactions did not constitute banking business. Salmon J. rejected the argument, holding that the banking practice of any period had to be proven, and observing that its components changed from time to time.

⁹ E.P. Ellinger, Eva Lomnicka & C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th ed. (New York: Oxford University Press, 2011) at 268-299, 736 *et seq.*

*Act 1977*¹⁰ and, in Singapore, the provisions of the *Banking Act*.¹¹ In addition, the legal doctrines involved, for instance the law of misrepresentation¹² and of constructive trust, are revised or refined by the courts of law.

Generally, the law is not proactive but reactive. In my experience, which stretches over 50 years, the law does not in itself generate change. However, where traditional precedents or principles are no longer acceptable to a practice which seeks to accommodate the needs of a period (or of everyday life), the principles undergo a metamorphosis. As already indicated, they may be changed by a new statute or may be revised by the courts.

The *UCTA* illustrates the former. As most contractual documents are drafted by the law departments of banks (or other powerful corporations), the Act seeks to combat unfair terms produced by the draftsmen. Two earlier examples are worth mentioning. The first, which takes us back to the 16th century, is Henry VIII's Act which permitted the charging of interest of up to ten per cent per annum.¹³ Usury was prohibited but nevertheless was rampant in the 16th century. The Act sought to combat excessive rates by providing a legally permitted rate. The second Act dates to the reign of Queen Elizabeth I. It is known as the *Act to Annul Fraudulent Conveyances*.¹⁴ Debtors who used goods as a security occasionally tried to convey them out of the creditor's reach by executing a 'gift' predating the charge or mortgage. The purpose of the Act was to combat this sharp practice.

The latter type of case, that is, changes introduced by courts, is best illustrated by a modern case, namely, the judgment of the House of Lords in *Hedley Byrne & Co. v. Heller & Partners* decided in 1964.¹⁵ Prior to this case, the remedy for a negligent (but not fraudulent) misrepresentation was confined to rescission of the contract. The House of Lords held that the injured party was, in addition, entitled to claim damages for his loss. In effect, the Lords rewrote the law of contract.

Another local example is the Court of Appeal's decision in *Als Memasa v. UBS*.¹⁶ Prior to this case, authorities in Singapore took the view that a person was bound by a document signed by him even if he was unaware of its contents. The Court of Appeal has indicated that the doctrine may have to be reconsidered.

It may be asked—and rightly so—what is meant by 'law'. Up to now, I have referred to judge-made law and statutory law. More accurately, the law covers 'written' or 'enacted' laws (which includes statutory law, subsidiary legislation and ratified international regimes given effect to locally), judge-made law and, to a limited

¹⁰ (UK), 1977, c. 50 [*UCTA*]. Its application to banking transactions is considered in Ellinger, Lomnicka & Hare, *ibid.* at 161 *et seq.*, especially 165; in Singapore, see Poh Chu Chai, *Banking Law*, 2nd ed. (Singapore: LexisNexis, 2011) at 742 *et seq.*

¹¹ *Supra* note 1; and note especially s. 4 which provides for licensing and ss. 4A-4B which license the taking of deposits from the public; and see the *Banking Regulations* (Cap. 19, Reg. 5, 2004 Rev. Ed. Sing.). Notably, the Act itself does not impose on banks any express duties as regards advice given to customers.

¹² The law of constructive trusts and fiduciary duties was, in many ways, revised in the landmark case of *Barclays Bank v. O'Brien* [1994] 1 A.C. 180 (H.L.).

¹³ *Usury Act, 1545* (UK), 37 Hen. VIII, c. 9 [*Act Against Usury*].

¹⁴ *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz. I, c. 5 [*Act to Annul Fraudulent Conveyances*]; discussed below.

¹⁵ [1964] A.C. 465.

¹⁶ [2012] 4 S.L.R. 992; and see Pillai J.'s recent decision in *Deutsche Bank v. Chang Tse Wen* [2012] SGHC 248.

extent, the influence of academic analysis of existing law. In addition, attention must be paid to international developments and rulings of international organisations.

The development of Singapore illustrates the point. In 1961, when I arrived, both the International Monetary Fund (“IMF”) and the World Bank were in existence but their effect on Singapore banking law and practice was negligible. Local banking law was heavily influenced by English law and practice, and licensing was governed by colonial legislation. Nowadays the position differs.

True, English law remains of predominant influence in Singapore. The *Application of English Law Act* sees to this.¹⁷ But both English law and our own law have to take note of the changes in international banking practice which often reflects international agreements or conventions. The Uniform Customs and Practice for Documentary Credits (“UCP”) illustrate the point. In 1961, the UK and most Commonwealth countries followed the English practice. Then, in 1962, the UK and most other Commonwealth countries (including Singapore) adopted the third revision of the UCP (*i.e.* the UCP-1963). At present, Singapore embraces the UCP-600¹⁸ and its practice is guided by it.

Another significant example concerns remittances. In 1961, Singapore banks had to take into account provisions with respect to exchange control, although in most regards money transfers were covered by a general licence. Then exchange control was repealed in the UK¹⁹ and throughout the Commonwealth. Currently, the only caveat on freedom of money transfers is presented by legislation seeking to combat money laundering.²⁰

This brief analysis highlights the fact that, like the law, banking practice is reactive and not proactive. It adapts itself so as to meet the needs of society and to draw the maximum benefit from social (or political) and technological changes. The current speed of communications (be it by telephone or by email) is, of course, of major importance. As is well-known, it is but one of the consequences of the electronic revolution.

B. *Meaning of ‘Bank’*

Up to this point I have treated the words ‘bank’ and ‘banker’ as self-explanatory, without seeking to trace the origin of the word.²¹ In the next part of this discussion,

¹⁷ Cap. 7A, 1994 Rev. Ed. Sing.

¹⁸ Which came into effect in 2007; ICC Brochure No. 515, 516; and see the International Standard Banking Practice (known as “ISPB”), ICC Brochure 645.

¹⁹ Initially by statutory instruments being granted a general exemption from the provisions of the *Exchange Control Act, 1947* (UK), 10 & 11 Geo. II, c. 14 and then by its repeal by the *Finance Act 1987* (UK), 1987, c. 16, Part XI of Sch. 16.

²⁰ MAS, Notice 626, “Prevention of Money Laundering and Countering the Financing of Terrorism—Banks” (2 July 2007), online: MAS <<http://www.mas.gov.sg/~media/MAS/Regulations%20and%20Financial%20Stability/Regulations%20Guidance%20and%20Licensing/Commercial%20Banks/Regulations%20Guidance%20and%20Licensing/Notices/MAS%20Notice%20626%20Revised%20Notice%20Banks.pdf>>. See also MAS, “Guidelines to MAS Notice 626 on Prevention of Money Laundering and Countering the Financing of Terrorism”, online: MAS <http://www.mas.gov.sg/~media/resource/legislation_guidelines/aml/626%20Banks_GCO%20vetted.pdf>.

²¹ Actually, the origin of the word is uncertain. One view is that it stems from an Italian practice, under which banks carried on their business at benches in an exchange house. When such a banker was unable

I strive to show that this word, too, has metamorphosed over the years. This is so because, in reality, we face a tautology: a 'bank' carries on 'banking business', which is the type of business carried on by banks. Where we face this type of *definitum per definare* the best way out is to find the constant or non-variable element in the words.

Essentially, this involves a conceptual problem. The existing definitions, laid down in the *Bills of Exchange Act*²² and the *Banking Act*,²³ do not shed light on the problem. They define a 'bank' as an institution which carries on banking business and as a company that holds a banking licence respectively.²⁴ In the *Banking Act*, 'banking business' is defined on the basis of the type of business transactions carried on by retail banks during the 20th century.²⁵ The payment and collection of cheques is highlighted. Further, under s. 4, any institution which seeks to carry on banking business has to be licensed.

However, as already mentioned 'banking practice' does not have a fixed or exhaustive meaning; it changes from time to time. An institution, though, is a bank only insofar as it carries on contemporary banking business. It follows that an institution that may have been considered a bank at one time may not be so considered under the practice prevailing in a different period. For instance, would a Venetian bank, which adhered to its core business of trading, financing and lending, be considered a bank today? Similarly, a 'building society' may not have been considered a bank during the last two decades of the 20th century but may have been deemed a 'bank' later on. A historical survey is bound to shed light on the issues involved.

III. HISTORICAL SURVEY

A. Origin

Modern European banking can be traced back to its origin in the Italian merchant states, meaning principally Rome, Venice and Genoa which were on the Italian fringes of the Holy Roman Empire. Names such as the Medici's, the Datini's and Soucini's ring a bell.²⁶ All of these were originally merchants involved in mercantile ventures and in the financing of undertakings and commercial pursuits of others. In addition, they lent money to other tradesmen and even to monarchs and governments.

A major political development that affected medieval banking was the commencement of the Crusades at the end of the 11th century.²⁷ The conquest of Jerusalem,²⁸ and the establishment of the Frankish Kingdoms in the Near East had a major effect

to meet his obligation, his 'bench' or 'bank' was broken, which indicated that he was a bankrupt: Lawson, *supra* note 2 at 19. Two other possible explanations are that the word is derived from 'brogger' (or wool merchant) or implies that customers sought a safe place (*i.e.* banks) for their reserves. See generally, Richards, *supra* note 2 at 18, 19; Davies, *supra* note 2 at 249.

²² Cap. 23, 2004 Rev. Ed. Sing.

²³ *Supra* note 1.

²⁴ See *ibid.*, s. 2(1); and *Bills of Exchange Act*, *supra* note 22, s. 2.

²⁵ *Banking Act*, *ibid.*, s. 2(1).

²⁶ The oldest bank still in existence is Mone dei Paschi di Siena (founded 1472). The Medici Bank was founded in 1397.

²⁷ Commencing with the Papal Bull of Urban II, adopting the recommendation of the meeting in Clermont in November 1095. The First Crusade was launched a year later.

²⁸ On 15 July 1099.

on trade and commerce. Weapons had to be manufactured and sold, raw materials had to be purchased, armies had to be deployed and fed, horses had to be supplied and, in general, new administrative systems had to be introduced.²⁹ Further, money had to be transferred, goods had to be supplied and shipped, and the means of raising credit had to be modernised.

But these attainments were subject to the technology then available. For instance, due to the slowness of communications in that period,³⁰ the Crusaders were unable to get timely support from the West and were eventually defeated.³¹ Still, the contacts between the East and West survived.

Throughout the Crusades, the Knights Templars played an important role.³² They acted as the financiers and money managers of the Franks. In addition, the Templars were amongst the earliest West European scribes—a term meaning “copiers and composers of documents”. Printing had not arrived and, in any event, the majority of the population was illiterate; you needed a scribe or a ‘scribe’ in order to compose your documents. They, of course, had studied standard forms used for commercial transactions.

The role of all early financiers (including the Templars), or the types of transaction in which they engaged, were: (i) the exchange of money (currencies); (ii) the lending of money or provision of credit, the financing of commercial ventures, such as the financing of a crusade or the construction and the equipment of ships required for military or trading purposes; and (iii) the transmission of money.

Money-changing has remained a profitable business right to our own days. As is well-known, a moneychanger must be able to tell a valid note from one which is fake or genuine but no longer in use. The medieval moneychangers too needed expertise. They had to know which coins were current and could be readily used and which coins were out of circulation, superseded, suspended or faked. Naturally, they had to deal in coins minted of gold, silver or copper. We have to bear in mind that, as yet, paper money was unknown in Europe.

Lending is, of course, a time-honoured type of business. Indeed, lending, borrowing, pledges and mortgages were known in antiquity. The need for a supply of money, and attempts to bargain for excessive gains, explain, *inter alia*, the stringent laws against usury found in the Bible and in canon law. Later on, in medieval times, we find groups, often described as ‘usurers’, which made a living by providing loans or other credit facilities.

Securities such as pledges and guarantees were also known in antiquity. Later on, in medieval Europe, mortgages over ships built on credit were introduced and

²⁹ The Knights Templars, for instance, needed four support persons (*e.g.* administrators) for each armed man.

³⁰ Letters had to be delivered personally by messenger!

³¹ Jerusalem fell in 1187, after Saladin’s victory at Hattin. Still, the coastal areas remained independent until Acre fell to the Mameluks in 1291. Notably, the Franks could have saved themselves by getting help from the Mongols but communications were too slow for speedy negotiations. See generally, Wikipedia, “Franco-Mongol Alliance”, online: Wikipedia <http://en.wikipedia.org/wiki/Franco-Mongol_alliance>; Theo Pavlidis, “Chapter 12: Crusaders and Mongols” in *A Concise History of the Middle East* (3 December 2011), online: Theo Pavlidis <<http://theopavlidis.com/MidEast/part40.htm>>.

³² For the financial role of the Templars, especially in France, see Malcolm Barber, *The New Knighthood—A History of the Order of the Temple* (Cambridge: Cambridge University Press, 1994), especially at 296-299.

known as ‘bottomry agreements’³³; these effectively created a pledge of the ship. They became fashionable when rulers (such as Elizabeth I) entered into joint ventures with pirates.

In medieval Europe, though, lenders had to reckon with the canon law. One of the ways of sidestepping this problem was to lend to or borrow from Jews, whose usury laws did not apply to dealings with gentiles. When the Jews were exiled from England by Edward I in 1291,³⁴ their role was taken over by merchants from Lombardy (and Florence)³⁵ who lent their name to Lombard Street.³⁶ The Lombards (as well as the Templars) used many schemes to circumvent usury laws. They were disliked but, all the same, managed to stay put. In any event, in England, the charging of interest of not more than ten per cent per annum was legitimised by Henry VIII.³⁷

Borrowing money was of course not the only or even the main source of revenue. Taxation and other levies often sufficed. However, if a monarch wished to impose new forms of taxation, he had to reckon with political practicalities.

The third type of business transacted by early bankers, namely money transfers, was again essential. Travelling on land was by coach or on horseback and sea travel was by sailing ships. Highwaymen and pirates were common. To avoid the risk of carrying coins or gold, a traveller could obtain a letter in which a businessman or financier in his place asked a correspondent to provide a certain amount of money to the addressee or his agent.

As already indicated, during the 11th to the 14th centuries (the period of the Crusades) the major role was—it is believed—played by the Knights Templar, who comprised devotees from amongst the European nobility as well as adventurers. One of the many schemes they used to circumvent usury laws was to obtain a mortgage of a crusader’s land, take possession of it and let it out for a profit or rent. If they shared the profits with the crusader, they paid the amount due over to him or kept it to the credit of his account. In such cases they acted at one and the same time as principals (*viz.* lenders) and as wealth managers.³⁸

Like paper money, fully negotiable bills of exchange or notes were as yet unknown. Some instruments, though, were used to arrange for the price of goods to be paid not to the seller but to a person named as the payee of the bill.³⁹ The instrument, thus, acted as an assignment of a debt (due from the buyer to the seller). It did not assume the role of currency. Originally, the Templars provided transfers by issuing letters of credit, in which the Temple at the place of issue asked the Temple at some other destination (often in Palestine) to make payment to the nominee or to his assignee.

³³ C.F. Trenerry, *The Origin and Early History of Insurance, Including the Contract of Bottomry* (London: P.S. King & Son, 1926).

³⁴ In 1275, Edward I of England passed *The Statutes of Jewry* (UK), Edw. I, which made usury illegal. The *Edict of Expulsion* was executed in 1290. The monarch’s benefit from the expulsion was that all debts due to the expelled Jews were vested in the Crown.

³⁵ Note that the Florentine House of Frescobaldi opened an office in London *circa* 1270 and was active in financing Edward’s extensive wars. The House was also appointed collectors of taxes imposed for the Crusades and constituted the assignee of debts due to the Crown. The House collapsed in the 14th century but continued operations in Italy in respect of joint ventures.

³⁶ For a brief history of their arrival in England, see Lawson, *supra* note 2 at 19 *et seq.*

³⁷ *Supra* note 13. The Act was passed so as to obtain finances from reluctant merchants.

³⁸ In 1312, the Templars were disbanded and declared heretics by a Papal Bull of Clement V instigated by Henry IV of France who was unable to repay loans granted to him by the Templars.

³⁹ Lawson, *supra* note 2 at 22, 23.

Similar instruments were issued by financial institutions in Italian city ports, such as Venice and Genoa.

What we see is the existence of chains of correspondents, who drew on each other on the basis of mutual trust. Funding came from trading or, in the case of the Orders, from donations. The Templars, in particular, obtained large donations from knights who joined their ranks as well as from monarchs.⁴⁰

It is important to pause at this point and consider two major developments. One in respect of taxation, and the other relates to the method of bookkeeping. Both had a major effect on the history of banking in the West.

The development which affected taxation took place in England when the *Magna Carta* was signed by John Lackland in 1215. Under it, the English monarch had to get the approval of Parliament to levy taxes.⁴¹ This meant that when an English monarch sensed that Parliament would decline the levy of taxes, he had to turn to merchants prepared to lend him money.

The other development—affecting bookkeeping—had a major effect on banking practice in general. Until its introduction, credit and debit entries, maintained in separate columns, were unknown. This meant that the use of running accounts was difficult. Before you entered, say, a donation and set it off against outgoings, you had to strike a balance in the single available column.

It is not clear when ‘double column accounting’ was invented. The first extant record of a double entry comes from the records of Florentine merchants at the end of the 13th century.⁴² Some scholars, though, argue that the invention can be traced back to the Templars, which might push its introduction back to the 11th or 12th century. There are no extant records.

The new bookkeeping system enabled a lender or merchants to form a clear and instant picture of his counterparty’s financial position. Wealth was, generally, assessed on the basis of the borrower’s real property, gold and expectancies (such as likely inheritance or anticipated tax revenues or donations). A merchant or lender could assess his counterparty’s standing by comparing his assets to his liabilities.

Yet another important development took place during this period. This was the gradual development of the two major negotiable instruments: the promissory note and the bill of exchange. Initially, they appeared, again, in Italy but by the end of the 14th century and the beginning of the 15th century, they were used extensively in the European world.⁴³

⁴⁰ For instance, Henry II of England granted them substantial land holding all over Britain. The dissolution of the Templars left a void in European banking. The Hospitallers (or Knights of the Hospital) were unable to take over the financial role of the Templars.

⁴¹ See *Magna Carta of 1215*, cls. 14, 16. The English barons insisted on these clauses as many of them had to pay taxes imposed by Henry II and Richard I (Coeur de Lion) to cover the expenses of their military exploits in Palestine and in France.

⁴² These records were kept by the merchant, Amatino Manucci; another extant record is of a merchant in Nimes, who lent money to the Archbishop of Arles. The first book on the subject was published in Italy in 1496. English translations saw light in 1543 and in 1553. See Davies, *supra* note 2 at 235.

⁴³ Lawson, *supra* note 2 at 22, 23 for reprints of forms of writings obligatory (early promissory notes) used respectively in the 13th and 16th centuries. Both are too complex to be commanded to the draftsmen’s memory. They must be based on standard forms available to scribes.

B. Rise of the Low Countries

In the 15th century, Antwerp became a new centre of trade and commerce, mainly because of the involvement of merchants residing there in the sugar and spices trade. Antwerp also benefited from three important political developments. The first was the persecution of the Huguenots in France.⁴⁴ The second was the exile of the Jews and Muslims from Spain,⁴⁵ and the third was the Reformation.⁴⁶

Some of the merchants who survived the ensuing calamities and civil unrests fled to the Netherlands; so did wealthy merchants who fled from Italy to escape the plague, which did not break out in the Netherlands until the beginning of the 17th century.⁴⁷

Antwerp went from strength to strength and became the first base from which Dutch banking eventually moved to England.⁴⁸ Under the law of Antwerp, bills of exchange and promissory notes could be transferred by indorsement from person to person. Bills could be readily traded at the bourse. Further, Antwerp houses financed commercial ventures (both for local trade and for international deals) and lent the money needed therefore. Many foreign banks had branches there.

The man who studied banking practices in Antwerp and imported its concept to London was Sir Thomas Gresham.⁴⁹ Gresham became a financial advisor of Henry VIII, who needed loans for the building of ships for the navy and for his fortification ventures in England. Gresham initially remained in Antwerp where he acted as an agent (Commissioner) of the Crown.⁵⁰ On the personal side, he played the markets to considerable advantage.⁵¹ He also saved the Pound Sterling (the English coinage) from decline and in due course was appointed advisor to Edward VI, Mary Tudor and later on to Queen Elizabeth I. He is rightly regarded as the father of English banking and banking practice. Before his time, the function of bankers was performed mainly by Continental bankers settled in London.⁵²

⁴⁴ The St. Bartholomew massacre took place in 1572; in 1598, Henry IV of France proclaimed the *Edict of Nantes*, which sought to restore freedom of religion. All the same, unrests continued through the remainder of the 16th century and, eventually in 1685, Louis XIV revoked the *Edict of Nantes*. During the entire period, Huguenots (most of whom accepted the teachings of Calvin) migrated from France to other countries including the Netherlands.

⁴⁵ This happened in 1492, when Spain came under the rule of King Ferdinand of Aragon and Queen Isabella of Castile.

⁴⁶ Sparked by Martin Luther in 1517. Other central figures in the reformation were Erasmus of Rotterdam (1466-1536), Melancthon (1497-1560) and, of course, Calvin (1509-1564).

⁴⁷ The plague broke out in the Italian city states from around the middle of the 14th century.

⁴⁸ A decline in the position of the Italian banks was exacerbated by the eternal squabbles between Venice and Genoa, and from the fear inspired by the Inquisition (founded in the 12th century but reinforced by Pope Paul III in 1542) which became active in Italy, France and Spain in the wake of the Reformation.

⁴⁹ 1519-1579. His premises in London were in Lombard Street under "the sign of the Grasshopper": "Four Centuries of Banking", online: Martins Bank Archive Project <<http://www.martinsbank.co.uk/History.htm>>. His bank was eventually taken over by Martins Bank.

⁵⁰ He raised loans for the Crown from foreign banks, such as the Fuggers—a German (Augsburg) bank that opened a branch in Antwerp in 1508. See Richards, *supra* note 2 at 4, 5.

⁵¹ As some of Elizabeth's ministers were quick to learn. For instance, Sir Francis Walsingham bought out outstanding acceptance of Genoese bankers so that they were not in a position to finance Philip II of Spain; the Armada had to be delayed by two years. See Davies, *supra* note 2 at 233.

⁵² Davies, *ibid.* at 248 *et seq.*

Gresham, who had premises in Lombard Street, belonged to the group of goldsmith-bankers. Initially, the goldsmith-bankers were lapidaries but over the years they accumulated great wealth. Many became moneylenders and financed ventures of the Crown.⁵³ Another class that provided finance was the scribes although their role diminished when printed standard forms became available.

Two specific projects of Gresham need to be mentioned. The first was the founding of the Royal Exchange in 1566.⁵⁴ It provided a meeting place for merchants and wealthy investors or, in other words, a centre for the negotiation and the execution of business transactions.⁵⁵ In effect it was a bourse. The second project—the founding of Gresham College—was provided for in Gresham’s will. Notably, the first extant book on banking law comprised Paget’s lectures, delivered in 1903 under the joint auspices of King’s College and the Institute of Bankers, which, in turn, was closely associated with Gresham College.⁵⁶

C. The 16th Century and the Rise of the Goldsmith-Bankers

Usury was rampant during the entire 16th century. The practices are described by Shakespeare in *The Merchant of Venice*.⁵⁷ True, the story takes place in Venice but we can safely assume that the audience was familiar with the financial practices mentioned in the play.

In general terms, the 16th century saw growth in trade and commerce. Shady practices were common. People would borrow from a number of lenders, offer the same security, and then induce a scrivener to produce a pre-dated deed in which the security—chattels or land—was ‘conveyed’ to a third party. The *Act to Annul Fraudulent Conveyances*,⁵⁸ passed during the Reign of Elizabeth, mirrors many of the sharp practices of the period.

Regrettably, many of the 16th century ventures are hard to trace because of events that took place in the next century. The Plague of 1665⁵⁹ and the Great Fire of London in 1666 led to the destruction of many 16th century records. In particular, the fire ravaged Cheapside where many goldsmith-bankers and scribes had premises.

In general terms, the goldsmith-bankers provided safekeeping for gold and coins belonging to customers.⁶⁰ Originally, these involved bailment agreements, in which

⁵³ Some goldsmith-bankers became members of the Company of Merchant Adventurers of London (the merchants’ guild; founded in 1553) or of an inn of court. It is understood that in Elizabethan slang, the word “goldsmith” was a synonym of moneylender.

⁵⁴ Opened by Queen Elizabeth I in the next year.

⁵⁵ Note the speedy communications by telegrams or telephones were not available. Dealings had to take place *inter partem*.

⁵⁶ Sir John Paget, *The Law of Banking*, 1st ed. (London: Butterworth, 1904) [*Paget’s Law on Banking*].

⁵⁷ William Shakespeare, *The Merchant of Venice*, ed. by Lindsay M. Kaplan (New York: Palgrave, 2002).

⁵⁸ *Supra* note 14. This statute was augmented by the Act passed in 1585: *Fraudulent Conveyances Act, 1584* (UK), 27 Eliz. I, c. 4. Discussed in detail in *Twyne’s Case* (1601) 3 Co. Rep. 80, 76 E.R. 809 (Star Chamber). The topic is discussed and explained by Charles Ross, *Elizabethan Literature and the Law of Fraudulent Conveyances* (Burlington, V.T.: Ashgate, 2003), especially at c. 5. See also Michael Saenger, *The Commodification of Textual Engagements in the English Renaissance* (Burlington, V.T.: Ashgate, 2006), especially at 69 in which the author suggests that ‘conveyance’ may be based on the idea of conveying (or getting out) a gift from the jurisdiction.

⁵⁹ Houses in which the plague was detected were burnt down.

⁶⁰ Richards, *supra* note 2 at 37.

the customer undertook to pay a fee for the safeguarding. However, in due course the goldsmith-bankers started to pay interest for coins deposited with them, a development which, in all probability, is the origin of the current account.

Naturally, the goldsmith-bankers also benefited from the new usury law,⁶¹ which sanctioned the charging of up to ten per cent per annum, as well as from two new developments. One was the invention of moving prints by Gutenberg in Mainz.⁶² Before long, printing houses were founded all over Europe. In London, treatises on law could be printed and marketed at affordable prices.⁶³ Documentation of complex mercantile transactions and grants in respect of land still had to be drafted and copied by scribes. When printing became common, blank forms of standard contracts could be found in collections of forms and precedents.

The second development was political. In 1534, Henry VIII broke off with the Catholic Church and founded the Church of England.⁶⁴ Many Catholic monasteries were pillaged and their land and other holdings were acquired by the Crown. One of the consequences was a dramatic decline of land values. Cunning investors bought land cheap and sold it for higher prices.⁶⁵ Many needed safe places for the deposit of the money they earned and made use of the facilities offered by the goldsmith-bankers. It can be safely concluded that in the course of the 16th century, the goldsmith-bankers became both depositories of wealth and financiers. Many of them were also engaged in the discount of bills and in moneylending.

In the business of lending they were still rivalled by the scribes, who accepted deposits of smaller amounts on the express understanding that the money would be re-lent. The scribes, though, were destined to metamorphose into mere copiers of documents.⁶⁶ First, and as already mentioned, their profession was adversely affected by the invention of the moving print. Secondly, the number of transactions over land, which had to be effected by deeds, kept declining after the Tudor reformation. Thirdly, after *Slade's Case*,⁶⁷ the scribes' services were no longer required

⁶¹ *Act Against Usury*, *supra* note 13. The permitted rate was changed from time to time.

⁶² Gutenberg invented the moving print in 1453 but the initial books printed were mainly Classical works, and religious and political tracts. Still, Davies, *supra* note 2 at 178, takes the view that "the development of money as we know it would have been impossible without the printing press".

⁶³ In London, a press was set up William Caxton in 1476. However, collections of statutes, year books and general treatises on the law saw light only in the course of the 16th century. See Henry N. Ess III, "Sixteenth Century English Lawyer's Library" (Speech given to the Association of the Bar of the City of New York, delivered at Harvard Law School, 28 November 1978), online: Harvard Law School Library <http://www.law.harvard.edu/library/special/collections/rare_books/16th-century-english-lawyer-s-library.html>.

⁶⁴ *Act of Supremacy, 1534* (UK), 26 Hen. VIII, c. 1. It is maintained that Henry's reforms were due to the Pope's refusal to annul his marriage to Catherine of Aragon. Indeed, this may have been the immediate cause. Henry's main concern though was the challenge to his sovereignty and the need to inject funds into his Exchequer. See also the *Act of Supremacy, 1558* (UK), 1 Eliz. I, c. 1, defeating Mary Tudor's attempt to restore Catholicism as the official religion.

⁶⁵ Sir Thomas Gresham—that financial wizard—purchased large plots of land in London and sold them (for a sound profit) when he initiated the building of the Royal Exchange. Another successful speculator was the monarch's main advisor, Thomas Cromwell, who had encouraged the breakaway from the Catholic Church. He was also a moneylender.

⁶⁶ For the type of work undertaken by scribes during the 19th century, see Herman Melville, "Bartleby, the Scrivener" in *Billy Budd Sailor* (New York: Bantam Books, 1981) at 95 *et seq.* It was influenced by Charles Dickens' *Bleak House* (London: Bradbury and Evans, 1853).

⁶⁷ (1602) 4 Co. Rep. 92b, 76 E.R. 1074; also reported *sub. nom. Slade v. Morley* (1602) Moo. K.B. 608, 72 E.R. 677.

in respect of mercantile transactions: a promise given by one person to another for good consideration and with the intention of being bound was held to be legally enforceable. A bargain could be concluded at the Royal Exchange, or anywhere else, without the need for the execution of a document.⁶⁸

Historically, the 16th century is rightly described as the “Age of the Tudors”,⁶⁹ which saw the rise of the goldsmith-bankers. The last monarch of the dynasty, Queen Elizabeth I, died in 1604 and was succeeded by James I—the first Stuart monarch. James was succeeded by Charles I, who was executed in 1649. The ensuing republic (described as “Commonwealth”) lasted for some 11 years and was followed by the Restoration in 1660.

D. The 17th Century and the Bank of Amsterdam

The 17th century was an age of turmoil and political unrest but, fortunately, good records are extant. Edward Backwell,⁷⁰ for instance, was a lender to both Oliver Cromwell and Charles II.⁷¹ His pupil-master—Viner⁷²—had financed Charles I.

An important political development of the 17th century was the Thirty Years War (1618-1648) in Central Europe and the 80 years struggle of the Low Countries (starting in the previous century) against the Habsburgs and France. This led to the move of the business centre from Antwerp (which is currently in Belgium and which has remained Catholic) to Protestant Amsterdam (in the Netherlands).

In 1609, the financiers of Amsterdam set up the Vissel Bank (also known as the Bank of Amsterdam).⁷³ The function of this bank was to accept coins from customers and to issue receipts thereof. Customers could sell the receipts and the transferee could demand delivery of the bullion or coins covered. In this way the Bank of Amsterdam created the precursor of paper money. The Bank also discounted bills of exchange,⁷⁴ issued acceptance credits, which empowered the recipient to draw on

⁶⁸ Even today, poll-deeds are used where a promise, such as guarantee, is made to all holders of bonds or of an issue.

⁶⁹ Henry VII (1485-1509); Henry VIII (1509-1547); Edward VI (1547-1553), Mary Tudor (*i.e.* Bloody Mary) (1553-1558) and then Elizabeth I (1558-1604).

⁷⁰ (1618-1683). Another House traceable to the 17th century is Child & Co., which succeeded the business of the goldsmith-banker of Robert Blanchard. The still extant house of Hoare & Co. was founded in 1672.

⁷¹ The records of his financial transactions during the Protectorate are extinct but his ledgers from the Restoration period are intact. His role is vividly described by Samuel Pepys, who was one of his clients: see *e.g.*, Samuel Pepys, *The Diary of Samuel Pepys* (23 June 1660), online: The Diary of Samuel Pepys <<http://www.pepysdiary.com/diary/1660/06/>>. And see, as regards the extent of Backwell’s dealings, Richards, *supra* note 2 at 29.

⁷² Viner, too, was the scion of a family of merchants and goldsmith-bankers and had financed some ventures of Elizabeth I.

⁷³ “Exchange Bank”; also known as the Bank of Amsterdam. For its close work with London goldsmith-bankers, see Richards, *supra* note 2 at 37.

⁷⁴ An oddity of the law then prevailing in Amsterdam was its refusal to recognise that a chain of indorsements conferred rights on the transferees. This led to the adoption of a French device—the *aval*—in which a third party guarantees the performance of the drawer or of the drawee. Under s. 56 of both the *Bills of Exchange Act, 1882* (UK), 45 & 46 Vict., c. 61, and *Bills of Exchange Act, supra* note 22, England and Singapore uphold the duty imposed on a security-indorser; but they have not adopted the *aval*.

the bank up to a given ceiling,⁷⁵ and created transferable bank products,⁷⁶ including derivatives.⁷⁷

London banking developed in a different manner. The local goldsmith-bankers needed a safe place to store the plate and coins deposited with them. They chose the Exchequer, which was actually the Crown's Treasury. In 1640, Charles I, who was in dire need of money to finance his wars, confiscated the gold so deposited and issued receipts. These sold for about a quarter of the gold value represented. Eventually Charles I returned some bullion to certain goldsmith-bankers but the damage had been done: there was a crisis of trust.

A similar incident took place in 1665 during the reign of Charles II. By then the Exchequer issued bills carrying interest. They could be issued even for amounts as low as £20. When Charles realised he was no longer able to meet his obligations, he "stopped the Exchequer" or in other words defaulted.⁷⁸ As most paper was held by goldsmith-bankers, many collapsed.⁷⁹

In summary, the goldsmith-bankers of the 17th century carried on most types of business currently undertaken by the modern banking community. They granted loans to the government of the day,⁸⁰ financed commercial ventures and frequently participated in them; they issued bonds based on the value of government debts purchased by them; they were engaged in the management of customer's wealth; and they discounted and issued bills of exchange and undertakings to pay money.⁸¹ They also opened current accounts and paid cheques drawn on them.⁸² Further, notes issued by goldsmith-bankers circulated and passed from hand-to-hand on the basis of the trust invoked by the issuer.⁸³

But there is no evidence to show that the goldsmith-bankers looked after the interest of the ordinary man of the street; their services were available only to customers of substance, so there was still a need for banks that would accept the minute savings of the workingman.⁸⁴ Schemes modelled after Continental banks of this nature

⁷⁵ Having an effect similar to the granting of an overdraft.

⁷⁶ Davies, *supra* note 2 at 550 *et seq.*, relying on Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations, Book IV* (London: Methuen & Co., 1776) at 422 [*The Wealth of Nations*]. The Bank of Amsterdam's liberality in financing the Dutch East India Company led to the Bank's bankruptcy in 1791 and its final closure in 1819.

⁷⁷ The tulip mania of the Netherlands of 1635-1637 is a case in point.

⁷⁸ Davies, *supra* note 2 at 252 *et seq.*; J. Keith Horsefield, "The 'Stop of the Exchequer' Revisited" (1982) 35 *Economic History Review* 511.

⁷⁹ Davies, *ibid.*; cf. Richards, *supra* note 2 at 230 *et seq.*

⁸⁰ Oliver Cromwell was frequently financed by Backwell and Viner, both of whom were goldsmith-bankers: Richards, *supra* note 2 at 38-41. The author also observes (at 228) that the deposits held by the goldsmith bankers "formed a great monetary pool from which the mercantile enterprises of the later Stuarts were financed". But it has to be recalled that some enterprises were financed by Louis XIV.

⁸¹ For the 'engraved' forms (*viz.* blank forms to be filled in) of Child & Co., see Richards, *supra* note 2 at 41.

⁸² Thomas Mun, *England's Treasure by Forraign Trade* (London: Thomas Clark, 1664) [Mun, *England's Treasure*] writes (at 69):

The Bankers are always ready to receive such sums of [money] as are put into their hands by men of all degrees, who have no skill or good means themselves to manage the same upon the [Royal] exchange to profit. It is likewise true that the Bankers do repay all men with their own, and yet reserve good gain to themselves...

Contextually, it is clear that Mun refers to men of some substance.

⁸³ Lawson, *ibid.* at 26.

⁸⁴ Although Richards, *supra* note 2 at 229, suggests that small amounts could be deposited with some of these bankers in the days of Cromwell at three per cent interest.

were presented to Oliver Cromwell,⁸⁵ but none came to fruition. His protectorate was, as we know, of a very short period.⁸⁶ Charles II and his successor, James II, showed little interest in the subject. James II, who was constantly short of money, was financed by Louis XIV of France who supplied him with bills of exchange drawn on merchants in London (under mercantile contracts) and bound to be accepted as a matter of course.⁸⁷

E. *The Glorious Revolution, the Bank of England and the Rise of London as a Banking Centre*

The Stuarts' reign came to its end in 1688, when the Stadholder (*i.e.* Ruler) of Holland, William of Orange, took over the monarchy by invading England at the invitation of Parliament. His achievements—known as the “Glorious Revolution”—are vividly described by Lord Macaulay.⁸⁸

William was burdened with the debts created during the reign of the Stuarts. On the advice of his ministers, he capitalised these debts in 1692 and sold them off in the form of government bonds. Then, in 1694, William founded the Bank of England,⁸⁹ with the declared purpose of financing his prolonged war with Louis XIV.⁹⁰

The Bank had its own charter and was an independent institution. Initially, it issued transferable bonds carrying a rate of interest of eight per cent. In due course, the Bank issued notes which became legal tender. They practically replaced coinage.⁹¹ Further, the Bank managed the national debt.

This, then, is the background of banking in England. Some leading bankers came to London in the wake of the Glorious Revolution. In addition, the banking community in London gained strength when earlier in the century (in 1653 or in 1656), Oliver Cromwell sanctioned Jewish migration to England.⁹² The new migrants included a number of bankers, whose headquarters had been in the Low Countries.⁹³ They

⁸⁵ And to Charles I before him: Richards, *ibid.* at 95. The object of such a bank for the unwealthy was to get them out of the clutches of usurers.

⁸⁶ The Protectorate commenced in 1549; Cromwell was constituted Protector in 1553. The Restoration took place in 1559.

⁸⁷ See the vivid description of Lord Macaulay, *The History of England*, ed. by Hugh Trevor-Roper (London: Penguin Classics, 1979) at 80; Macaulay's feelings can be assessed by his constant reference to Louis XIV as “Lewis”.

⁸⁸ *Ibid.* at 249 *et seq.*

⁸⁹ Under the *Ways and Means Act 1694*, known as the *Bank of England Act, 1694* (UK), 5 & 6 Will. & Mar., c. 20. Earlier on, schemes for a national bank were presented to Charles II: see Richards, *supra* note 2 at 102, 103. For the history of the early years of the Bank of England, see James E. Thorold Rogers, *The First Nine Years of the Bank of England* (Oxford: Clarendon Press, 1887) and, generally, Henry Warren, *The Story of the Bank of England: A History of English Banking and a Sketch of the Money Market* (London: Jordon & Sons, 1903) and Sir John Harold Clapham, *The Bank of England: a History*, (Cambridge: Macmillan, 1945). See also Richards, *supra* note 2 at c. 5.

⁹⁰ William III died in 1702 and was succeeded by Queen Anne, in whose reign the Spanish Succession War (1701-1714) went on. The end was predictable after Marlborough's victories at the battles of Blenheim fought in 1704 and of Oudenarde fought in 1708.

⁹¹ In the course of the 18th and 19th centuries, the Bank of England opened a few branches in leading towns but, by and large, the mercantile requirements outside London remained in the domain of the country bankers.

⁹² Lucien Wolf, *The Re-Settlement of the Jews in England* (London: Jewish Chronicle Office, 1893).

⁹³ Charles II and his successors did not change the law as they too required finance.

and Huguenot bankers who had fled to London from France joined forces with the local goldsmith-bankers. Many other bankers moved to London during the War of the Spanish Succession, in the course of which the Low Countries were adversely affected.

Thus, by the end of the 17th century, London became the new centre of international banking. One major factor for this development was that under William of Orange—and the *Bill of Rights of 1689*⁹⁴—England became a safe haven: the powers of the monarchy were subjected to a rule of law by Parliament. This contrasted with the absolutism of European monarchies. Further, the Low Countries—another place of tolerance—continued to be embroiled in the wars of Europe and, of course, nobody could foretell the final outcome.

Political developments that took place during the 16th and 17th century explain why London was becoming the leading European centre of international banking law. The period was also marked by significant advances in literature and in philosophy. It was the period of Enlightenment. In addition, scientific studies and experiments left an impact. True, many were developments of earlier inventions, such as progress made in the printing process, in printing ink and in the manufacturing of paper.⁹⁵ Other innovations were in the nature of ‘first step’ or, in other words, were conceived in the 16th or 17th century but came to commercial fruition later on. These include printed newspapers,⁹⁶ pens and nibs,⁹⁷ optics,⁹⁸ and adding machines.⁹⁹

Of particular importance to the development of English banking law were the works of Gerard de Malynes,¹⁰⁰ who has provided details about the mercantile world

⁹⁴ *Bill of Rights [1688]* (UK), 1 Will. & Mar. Sess. 2, c. 2. The Bill adopted the principles of the Declaration of Rights placed before William and Mary on 13 February 1689 when Parliament invited them to take up the monarchy of England.

⁹⁵ Paper was produced in Italy as from the 12th century. The first English paper mill was set up in 1490 but the first commercial enterprise was John Spilman’s mill in Kent in 1588. By the middle of the 17th century, the process was much improved.

⁹⁶ The first newspaper in the English language was published in Amsterdam in 1620. In London, the *Carante*, or “weekly newes” appeared in 1622. The first newspaper, in German, appeared in 1609. Prior to printing, relevant news about commerce and other events were published as handwritten pamphlets with minimal circulation.

⁹⁷ Quills remained in general use until the end of the 17th century. John Milton wrote his poetry with a quill. Still, Samuel Pepys, *supra* note 71, refers in an entry of 5 August 1663 to a ‘silver pen [to] carry inke in’ which suggests the invention of a fountain pen. Metal pens were advertised in the London Times in 1792.

⁹⁸ Eyeglasses developed slowly over the centuries. The earliest were used in 13th century Italy; later on, Amsterdam became the centre of optics. Two useful websites are:

1. Wikipedia, “Glasses”, online: Wikipedia <http://en.wikipedia.org/wiki/Glasses#Invention_of_eyeglasses>; and

2. On-Line Museum and Encyclopaedia of Vision Aids, *Eyeglasses Through the Ages*, online: Antique Spectacles <http://www.antiquespectacles.com/history/ages/through_the_ages.htm>.

The mathematical analysis in point is attributable to Johannes Kepler (1571-1630).

⁹⁹ The mechanical calculator (or adding machine) was invented by Blaise Pascal in 1642 but came into widespread use only towards the end of the 19th century. These machines were replaced in the US by modern calculators at the beginning of the 20th century.

¹⁰⁰ (Born in Antwerp 1586; died in London in 1641). Malynes was an unsuccessful businessman and parts of his first book were written when he was imprisoned by his creditors. Still, his expertise in coinage and in currency exchanges enabled him to rise in later years. He was appointed advisor to Queen Elizabeth I and also to James I. His most important work is *Consuetudo, vel lex mercatoria, or, The Ancient Law-Merchant* (London: Adam Islip, 1622); another treatise in point is Wyndham Beawes, *Lex Mercatoria Rediviva* (London: J Moore, 1752). And see W. Mitchell, *An Essay on the Early History of the Law Merchant*

in London of the 17th century. Malynes appreciated the need for combating both usury and the unrestrained exchange of currencies.¹⁰¹ He explained the practice relating to negotiable instruments and to other facilities such as letters of credit. Notably, and although he himself had been apprenticed to a goldsmith-banker, his writings do not discuss the law of banking as a separate genre.¹⁰²

To sum up: by the end of the 17th century, London had become the leading centre of international banking operations.¹⁰³ Transactions which used to be finalised in Amsterdam were frequently negotiated and concluded in London. The bankers of the day were engaged in commercial ventures and provided finance by means of loans and other credit facilities. They were also wealth managers.

At the same time, the goldsmith-bankers—or bankers—were still elitists. They handled the affairs of well-off people or the nobility. Their services were not available to the population in general. As yet, savings banks were not in existence. Another lacuna lay in books on banking law. Whilst books in respect of specific legal topics, such as bills of exchange, were published,¹⁰⁴ a generic treatment of banking law as a separate legal discipline was conspicuous by its absence.

F. The 18th and 19th Centuries

The position remained largely unchanged throughout the 18th century. This is not to say that the 18th century was stale. Undeniably, some technological innovations,

(London: Cambridge University Press, 1904). Another interesting work of Malynes is *A Treatise of the Canker of Englands Common Wealth* (London: Richard Field, 1601).

¹⁰¹ Malynes bemoans the depreciation in the value of the local currency resulting from free foreign trade; his views are analysed in Jonathan Gil Harris, *Sick Economies: Drama, Mercantilism, and Disease in Shakespeare's England* (Philadelphia: University of Pennsylvania Press, 2004) at 7, 83-85. Other 17th century authors regard free trade as essential: e.g., Edward Misselden, *Free Trade or the Meanes to Make Trade Flourish* (London: Theatrum Orbis Terrarum, 1622) cited by Harris, *ibid*.

¹⁰² Malynes opposed free trade and was a fierce believer in metalism, or mercantilism. Further, he demonstrated that the fixation of predetermined exchange rates often disguised usury.

¹⁰³ Useful early texts on the subject are Lewes Roberts, *The Merchants' Map of Commerce*, 4th ed. (London: Thomas Horne, 1700) and Giles Jacob, *Lex Mercatoria, or the Merchant's Companion*, 2nd ed. (London: E. Nutt *et al*, 1729).

¹⁰⁴ John Marius, *Advice Concerning Bills of Exchange* (London: I.G., 1651); and see Peter Lovelass, *A Full, Clear and Familiar Explanation of the Law Concerning Bills of Exchange, Promissory Notes, and the Evidence on a Trial by Jury Relative Thereto* (London: P. Uriel, 1789); Stewart Kid, *A Treatise on the Law of Bills of Exchange and Promissory Notes*, 2nd ed. (London: 1791); Sir John Bayley, *Summary of the Law of Bills of Exchange, Cash Bills and Promissory Notes*, 6th ed. by George Morley Dowdeswell (London: Benning & Co.; and Stevens & Norton, 1849). The first edition appeared in 1789. The seminal texts: Nicholas Elliot, John Odgers & Jonathan Mark Phillips, eds., *Byles on Bills of Exchange and Cheques*, 28th ed. (London: Sweet & Maxwell, 2007) was first published in 1829; Sir Mackenzie Chalmers, *A Digest on the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities*, 1st ed. (London: Stevens and Sons, 1878) [*Chalmers on Bills of Exchange*]; the current edition is that of Anthony Gordon Guest, ed., *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes*, 17th ed. (London: Sweet & Maxwell, 2009) [*Chalmers and Guest on Bills of Exchange*]. A succinct treatment is to be found in Bertram Jacobs, *A Short Treatise on the Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally*, 2nd ed. (London: Sweet & Maxwell, 1924). In the US, see Joseph Story, *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America: With Occasional Illustrations from the Commercial Law of the Nations of Continental Europe*, 4th ed. (Boston: Little, Brown & Co., 1860) (covering history but preceding current law).

such as Benjamin Franklin's lightning rod,¹⁰⁵ took place. Science,¹⁰⁶ philosophy,¹⁰⁷ literature and the arts made significant progress. Adam Smith wrote *The Wealth of Nations* in 1776.¹⁰⁸

The innovations in banking practice were, however, limited and related solely to local practice. Thus, printed cheque forms started to be used in England at the beginning of the 18th century, and the clearing system was modernised and standardised.¹⁰⁹ In due course, the clearing house was set up at 10 Lombard Street.¹¹⁰ Country banking, too, made its first appearance.¹¹¹ Obviously, the maintenance of accounts became a necessity for ordinary businessmen because payment by cheques became a common manner for settling accounts. Communications, though, had remained slow and unsafe. Merchants active in towns such as Gloucester, Hull or Lincoln required local banking services because dependence on faraway London was unrealistic.¹¹² The growth of country banks benefited the bankers in London as most country bankers kept accounts with the emerging financial giants of London.¹¹³ Saving banks, too, started to come into existence,¹¹⁴ and kept their accounts in London. Originally, the trustee savings banks were regional institutions looking after the savings of small businessmen. They sprang up all over the country but were constituted as a net of Trustee Savings Banks ("TSB"). Eventually the net merged with Lloyds Bank, becoming Lloyds TSB Bank plc.¹¹⁵

The rise of London as a centre of banking practice is, accordingly, best understood on the basis of the political events of the 17th century and the decline of the Low Countries. Notably, it was not based on two developments that took place in the 18th

¹⁰⁵ In 1749. His enthusiastic views on paper money are stated in Benjamin Franklin, *A Modest Enquiry into the Nature and Necessity of a Paper Currency* (Philadelphia: 1729).

¹⁰⁶ Sir Isaac Newton's *Philosophiæ Naturalis Principia Mathematica* (Mathematical Principles of Natural Philosophy) was first published in London, 1687, but his work's prominence took place in the 18th century, so did the works of Gottfried Leibniz (1646-1716) on calculus.

¹⁰⁷ Kant's major work, the *Critique of Pure Reason* (*Kritik der reinen Vernunft*), appeared in Germany, 1781.

¹⁰⁸ Smith, *The Wealth of Nations*, *supra* note 76.

¹⁰⁹ For a succinct description of the London clearing system, see Lawson, *supra* note 2 at 122-124.

¹¹⁰ Philip W. Matthews, *The Bankers' Clearing House: What It Is and What It Does* (London: Sir Isaac Pitman & Sons, 1921) at 8, 9 points out that the clearing house was established in rooms at 10, Lombard Street in 1773. Prior to that, bank clerks exchanged cheques in public houses, notably Lloyds Public House, and later at Change Alley. In 1858, the clearing house further settled exchanges between country bankers. And see James Graham Cannon, *Clearing Houses: Their History, Methods, and Administration* (London: Smith, Elder, & Co., 1901). At the turn of the 19th century, clearing was divided into town, metropolitan and country clearing. Some major towns, such as Manchester, had their own clearing houses. And note that clearing was introduced in major towns in the US. The New York Clearing House, for instance, was established in 1853. See also E.P. Ellinger, "Negotiable Instruments" in *International Encyclopedia of Comparative Law*, vol. IX (Hamburg: Max-Planck Institute of Comparative Law, 2000) at 27.

¹¹¹ Country bankers could be incorporated under the *Country Bankers Act, 1826* (UK), 7 Geo. IV, c. 46. One of the first to be established was the Bank of Manchester: Richards, *supra* note 2 at 197, 198.

¹¹² See generally, Lawson, *supra* note 2 at c. VIII, especially at 150-153.

¹¹³ For the history of mergers, especially in the UK, see E.P. Ellinger, "Fifty Years of Banking Law" (2008) 23 B.F.L.R. 377 at 387 *et seq.* [Ellinger, "Fifty Years"].

¹¹⁴ For a concise history of savings banks in England, see Lawson, *supra* note 2 at 315 *et seq.*

¹¹⁵ The TSB can be traced back to a savings bank founded by Henry Duncan in Ruthwell, Dumfriesshire in 1810. The TSB chain was created by an Act of Parliament—*Trustee Savings Bank Act 1985* (UK), 1985, c. 58—merging virtually all the local savings banks.

century, namely the American War of Independence,¹¹⁶ and the rise of the Dutch East India Company (“VOC”) and the British East India Company (“BEI”).¹¹⁷

Actually, the mercantile empires built up by these two entities might even have hindered the development of banking practice. The two corporations had monopolies over the trade with the East—especially the silk, spices and exotic drugs trade—so that smaller merchants were unable to compete and did not finance ventures in this part of the World.¹¹⁸ In the long run, though, the BEI laid the foundation for the British Empire, which exported English law and London’s banking practice to most parts of the Commonwealth of Nations. Notably, Sir Stamford Raffles, the founder of Singapore, started his career as a clerk at the BEI’s headquarters in London.¹¹⁹

Another important development was the close intellectual contact that sprang up between the judiciary and prominent businessmen magnates. Judges used to consult the eminent members of the business community on aspects of business practice in general. Far from depending on expert evidence, distinguished judges such as Chief Justice Holt,¹²⁰ and Lord Mansfield¹²¹ had discussions with magnates of the business world when issues of practice arose in cases heard by them. In the next century, the bankers’ lien was given legal effect because it was a facet of banking practice.¹²²

The gradual developments of the 18th century were disrupted by the French Revolution which broke out in 1789. The turmoil created by it came to an end only after Napoleon’s defeat in Waterloo in 1815. By then, the world had undergone significant changes. Monarchies and empires were replaced by republics and federations. The map of the New World had changed beyond recognition. Human rights ceased to be a mere slogan or political declaration. In one regard, though, the world had failed to develop. Communications had remained slow and stultified. Travel over land was still by horses and by carriages,¹²³ and ships were still propelled by wind.

The slow speed of communications is best illustrated by an extreme case involving the discount of a bill of exchange.¹²⁴ Suppose a bill was drawn at around 1830 by

¹¹⁶ (1775-1783). Notably, New York was founded as a Dutch trading post named “New Amsterdam” in 1626. The city was renamed “New York” in 1664 after it came under English control.

¹¹⁷ The British East India Company was founded in 1600 and the VOC in 1602. Both were incorporated in a manner resembling a modern joint stock corporation. The shares were held by wealthy merchants. The VOC ceased operations in 1791 and the BEI was taken over by the Crown in 1858. The common law system was adopted in many countries which came under the BEI’s influence.

¹¹⁸ A defence of the BEI’s free trade policy was written by Thomas Mun, a widely travelled merchant who was appointed a director of BEI in 1615. His two major works are: Thomas Mun, *A Discovrse of Trade* (London: Iohn Pyper, 1621) and Mun, *England’s Treasure*, *supra* note 82; notably Mun is critical of the immoderate use of foreign goods, such as tobacco; and see Harris, *supra* note 101 at 168-170.

¹¹⁹ In 1795. In 1805 he was sent to Penang.

¹²⁰ See *e.g.*, *Clerke v. Martin* (1702) 2 Ld. Raym. 757, 92 E.R. 6 (K.B.).

¹²¹ For Lord Mansfield’s general role in the reception of the *lex mercatoria* into the common law, see Clive Macmillan Schmitthoff, “International Business Law: A New Law Merchant” in Ronald St. J. Macdonald, ed., *Current Law and Social Problems*, vol. 2 (Toronto: University of Toronto Press, 1961) 129 at 137.

¹²² In *Brandao v. Barnett* (1846) 12 Cl. & F. 787, 8 E.R. 1622 (H.L.) (the existence of banking as an industry is well understood by the court).

¹²³ Paved roads as known at present were constructed as from the beginning of the 20th century. Earlier on, roads were mainly based on stones placed over mud. Modernisation started at about the middle of the 18th century.

¹²⁴ The illustration is based on *Mackersy v. Ramsays, Bonars & Co.* (1843) 9 Cl. & F. 818, 8 E.R. 628 (H.L.).

a creditor in Edinburgh on a debtor on Calcutta. The bill would be discounted by a banker in Edinburgh, who would dispatch it to his correspondent in London. This segment of the trip could easily take up to a week. The London correspondent would then dispatch the bill to his own correspondent in Calcutta. The ship carrying the bill would travel down the African coast and around the Cape of Good Hope to India. After the receipt of the bill by the correspondents in Calcutta, it would be presented for acceptance and later on for payment to the drawee. An advice of fate would reach the bank in Edinburgh after 12 to 18 months. The process could take even longer if the drawee lived in Batavia. Faster dispatches of diplomatic messages by the use of carrier pigeons are described in 'historical' novels and displayed on cinema screens. But, up to now, I have been unable to find evidence establishing the advance of international banking practice by the use of winged messengers.

In reality, Europe had remained in an undeveloped state. The roads were often pressed mud tracks.¹²⁵ Candles were used for lighting, and coal and charcoal for heating. Sanitation was just as it had been in Rome. In London, the Thames served as a rubbish dump.

Banking law, though, saw two important developments. First, the House of Lords defined the relationship between a banker and customer.¹²⁶ Rejecting the argument that it was a relationship of trustee and beneficiary, the Lords held that the relationship between a banker and customer constituted a contract between a debtor and creditor. Money deposited with a bank by a customer became the bank's money.

The second development was the appearance of books devoted to all aspects of banking law. In 1856, James Grant published *A Treatise on the Law Relating to Bankers and Banking*.¹²⁷ Still, his work did not seek to deal with banking law as a discipline. His object was "to compile the law relating to the business of banking, as gathered as well from Statutes as from the decisions at Common Law, in Equity and in Bankruptcy."¹²⁸ The author further mentioned that the book was written for a class of people, namely "the professional advisers of the great Banking interest of this country".¹²⁹

Grant's work, as well as another English book discussing banking law, held their ground until well into the 20th century.¹³⁰ But they continued to deal largely with

¹²⁵ Dickens gives a vivid and reliable description of the period. See, in particular, *David Copperfield* (London: Bradbury & Evans, 1850) and *The Posthumous Papers of the Pickwick Club* (London: Chapman and Hall, 1837).

¹²⁶ *Foley v. Hill* (1848) 2 H.L.C. 27, 9 E.R. 1002 (H.L.). A tacit recognition of banking as a separate profession is implicit in *Young v. Grote* (1827) 4 Bing. 253, 130 E.R. 764 (Common Pleas) and even in cases decided in the 19th century; but note that in *Bishop v. Countess of Jersey* (1854) 2 Drew. 143, 61 E.R. 673 (Vice-Chancellor's Courts) it was held that it was "not within the scope of business of bankers to seek or make investments generally for their customers" (at 163); and see *Dundonald (Earl of) v. Masterman* (1869) L.R. 7 Eq. 504 per James V-C at 516.

¹²⁷ (London: Butterworths, 1856).

¹²⁸ *Ibid.* at iii. Grant (1808-1863) was a barrister. The book was first published in London by Butterworths and, in 1857, in Philadelphia by T. & J. W. Johnson & Co.

¹²⁹ *Ibid.* The same approach is evident in the Scottish textbook which appeared about 40 years later, William Wallace & Allan M'Neil, *Banking Law*, 1st ed. (Edinburgh: W. Green & Sons, 1894); 2nd rev. and enlarged ed. (Edinburgh: W. Green & Sons, 1899). The first edition did not include an appendix of forms.

¹³⁰ Heber L. Hart, *The Law of Banking*, 1st ed. (London: Stevens & Sons, 1904). The last edition, the fourth edition was published in 1931. Like Grant, Hart was a barrister. For an interesting treatment of securities obtained by bankers, see Arthur Reginald Butterworth, *Bankers' Advances on Mercantile Securities Other*

bills of exchange, cheques and general commercial subjects like the law of pledges, of mortgages and of charges.¹³¹ Modern types of banking business, such as the law of letters of credit and portfolio management, were given scanty treatment.¹³²

The first effort to treat banking law as a distinct discipline was, actually, undertaken in the sixth edition of Grant's work, which appeared in 1910. Referring to the departures from the original work, the editors explained: "the whole of the Work has been rewritten and remodelled with such expansion as was necessary to cover the wide area of Law, *over which the modern practice of Banking has extended.*"¹³³ Like previous editions of the seminal work, a substantial part of it is devoted to cheques and other negotiable instruments. Significantly though, the new edition includes chapters on the current account¹³⁴ (using this term rather than the outdated 'running account') and on restitution.¹³⁵ Another innovation is the detailed treatment of the relationship between bankers and their correspondents.¹³⁶ This new and excellent edition presents the first discussion of international banking law and practice.

IV. MODERN BANKING LAW AND PRACTICE

A. *The Advances in Communication and Local Bank Mergers; Rise of New York*

Banking, as known presently, had arrived in the course of the last two decades of the 19th century and the early 20th century. Indeed, the English Institute of Bankers¹³⁷ and the British Bankers Association¹³⁸ were then in place. Banking had become an economic force and has been recognised as a tool of international financial practice.

In themselves, these attainments would have been of local rather than international significance. The major advances affecting bankers were in communications. The traditional view is that this took place in the course of two separate periods: the industrial revolution of the second half of the 19th century and the electronic revolution which started after World War II. To me—speaking as banking lawyer—we

Than Bills of Exchange and Promissory Notes (London: Sweet & Maxwell, 1902) and especially forms of warehouse receipts included in it.

¹³¹ The leading work, *Chalmers on Bills of Exchange*, *supra* note 104, was published in 1878. See the current 17th edition, *Chalmers and Guest on Bills of Exchange*, *supra* note 104. The enactment of the *Bills of Exchange Act, 1882*, *supra* note 74, was foreshadowed in Sir Mackenzie Chalmers, "On the Codification of Mercantile Law with Special Reference to the Law of Negotiable Instruments" [1880] 2 *Journal of the Institute of Bankers* 113. The first volume of the journal was published in June 1879.

¹³² Even *Paget's Law of Banking*, *supra* note 56, which continues to appear in fresh editions to the present day, deals mainly with the bank's role as a paymaster. It was first published in 1904, and for the latest edition, see Mark Hapgood, ed., *Paget's Law of Banking*, 13th ed. (London: LexisNexis Butterworths, 2007).

¹³³ James Grant, *A Treatise on the Law Relating to Bankers and Banking Companies*, 6th ed. by A.M. Langdon & Herbert Jacobs (London: Butterworths, 1910) at v [emphasis added].

¹³⁴ *Ibid.* at c. 22.

¹³⁵ *Ibid.* at c. 31.

¹³⁶ *Ibid.* at c. 35. And note the fine discussion of the rule of appropriation of payments in c. 30 at 246-263.

¹³⁷ The Chartered Institute of Bankers ("CIB") was founded in 1879. Its object was to serve the interests of the banking profession in the UK. In 1997, it was renamed the "Institute of Financial Services".

¹³⁸ The British Bankers' Association was established in 1919. Its effective predecessors were the Committee of London Clearing Banks (established in 1821), the Central Association of Bankers (established in 1895) and the Association of English Country Bankers (established in 1874).

are amidst a technological evolution which started when the world recovered from the Napoleonic wars. Banking as we know it today is the product of significant improvements of communications.

The period following the Napoleonic wars, which ended in 1914 with the outbreak of World War I, was a period of innovation. To start with, travel over land underwent a dramatic change when railways came into existence.¹³⁹ Travel by sea, too, changed in its entirety when ships of the line, propelled by engines,¹⁴⁰ replaced sailing vessels.¹⁴¹ Further, the Suez Canal was opened in 1869.¹⁴² As from that year, the entire world could be circumnavigated by land and sea trips without the need to cross the Cape of Good Hope.¹⁴³

Office administration underwent a change. The typewriter, the telegraphy system, the calculator and the telephone started to be used.¹⁴⁴ The most important innovation, though, was the electric bulb and the general practical use of electricity. The man to whom we are indebted is Thomas Alva Edison (1847-1931): an admirable inventor and a master of mass production.

The less said about the World War I (1914-1918) the better. Three significant events took place after its conclusion. First, the *Treaty of Versailles* was signed in June 1919. Germany and its allies undertook to pay reparations denominated in the German currency (the Reichsmark). The resulting hyperinflation was one of the factors contributing to the outbreak of the World War II.

The second significant development of the post-war period took place on 21 September 1931: the UK abandoned the gold standard.¹⁴⁵ The Pound Sterling notes, in which the Bank of England undertook to pay the bearer a quantity of silver, lost its metalistic meaning.

The third and most significant development as regards banking practice was the rise of commercial aviation. The first airlines were founded around 1920.¹⁴⁶ On 15 May 1918, the first airmail service was established in the US.¹⁴⁷ Aviation services went rapidly from strength to strength. Regular flights and airmail were in place well before the outbreak of World War II. Cars and trucks, too, became common.

These advances in communications triggered off another development. All over Europe and the US, small banks were taken over by bigger ones. The birth of banking

¹³⁹The process was a slow one as land for the tracks had to be acquired. Thus, the first American transcontinental railroad system was opened in 1869.

¹⁴⁰The earliest steamships travelled along the Mississippi and the engines were fuelled by wood.

¹⁴¹The first ship to cross the Atlantic was S.S. Savannah, making her maiden voyage in 1819. Steamships did not become commercially viable for at least another 20 years. Some 19th century vessels were propelled by both the wind and a steam engine. Steamships were used commercially on North American rivers throughout the 19th century and were used in the American Civil War (1861-1865).

¹⁴²Initially the construction was financed by French entrepreneurs who obtained a charter from the Egyptian government. In 1875, Benjamin Disraeli purchased a major stake on behalf of the British Government.

¹⁴³Jules Verne, *Le tour du monde en quatre-vingts jours* [Around the World in 80 Days] (Paris: J. Hetzel et Compagnie, 1873) demonstrates that the trip was still a slow one.

¹⁴⁴The inventions of the period are traced in my professorial lecture: Ellinger, "Fifty Years", *supra* note 113 at 394 *et seq.*

¹⁴⁵A provisional standard applied from 1925 to 1931. Effectively, when currencies were allowed to float freely, the US dollar ceased to be directly or indirectly pegged to gold. The gold standard was expressly abandoned in the US in 1971 by President Nixon.

¹⁴⁶KLM (Royal Dutch Airlines) and some American airlines were the pioneers.

¹⁴⁷Between New York, N.Y., and Washington, D.C., with a stop at Philadelphia, Pa., for the exchange of mails or plane.

giants—(such as the Barclays or the Royal Bank of Scotland) albeit mainly spreading nationally rather than expanding globally—had started.¹⁴⁸ The old image of bankers, operating from well-known premises and having few branches, was overtaken by the emergence of country-wide retail banks.

World War II put a stop to the evolution of banks. When the Bretton Woods Agreement was signed as the horror was drawing to its end,¹⁴⁹ the US dollar became the currency for world trading. This, and the eclipse of the empires built up during the 19th century, aided the shift of the centre of international banking from London to New York.¹⁵⁰ The period that followed—meaning the second half of the 20th century and the beginning of the 21st—were marked by further phenomenal advances in communications.

B. Office Practice in the 20th Century

To drive the point home it is useful to compare the working conditions that prevailed during my own university days with what we have at present. My *alma mater* had a reasonable library but our chances of using it were poor. We were not given reading lists, and law books were expensive and rare. Further, in a pluralistic system of law you had to attend lectures so as to work out the applicable law and to decide what to read. Photocopying pages of books was impossible. As yet, there were no Xerox machines! And if you went to the library, the relevant books had always been ‘borrowed’. Taking lecture notes, too, could be a problem. If your fountain pen ran out of ink (or leaked) you were done for unless you managed to borrow the notes of a friend.

Some of us made a business out of our poor resources. Manual typewriters were, fortunately, available, so you could ‘cut’ notes into a waxed paper known as a “stencil”. To do so you had to remove the ribbon from your typewriter and press each key hard so as to ensure that its impact penetrated the stencil. Naturally, you had to use a special liquid—which was quite costly—in order to clean the keyboard after typing out some four pages. Worse still: you could use another liquid to rectify two or three typing errors per page. But if you were a poor typist (like yours truly) you often had to start again by cutting a new stencil.

Once you finished this hard task, the stencil was placed on a Gestetner machine and rolled over so as to produce copies. Theoretically, you could roll as many copies as you desired. In our case, some 80 classmates were ready to buy copies. Unfortunately, a stencil often tore in the course of rolling. The result was simple: you had to start all over again. I must confess that, by and large, my colleague and I made good money from the ‘publication’ effort. But it was tiresome work.

¹⁴⁸The history of bank mergers is discussed in detail in my professorial lecture: Ellinger, “Fifty Years”, *supra* note 113 at 387 *et seq.* See especially, the details with respect to the history of Barclays Bank.

¹⁴⁹On 22 July 1944. Setting up, *inter alia*, the IMF and the International Bank for Reconstruction and Development. These organisations became operational in 1945 after a sufficient number of countries had ratified the agreement. See International Monetary Fund, *Articles of Agreement of the International Monetary Fund* (Washington D.C.: International Monetary Fund, 2011), online: IMF <<http://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>>, for the latest version of this agreement.

¹⁵⁰Wall Street was founded in the late 18th century. By the middle of the 19th century it had become a trading hub.

Worse still: on one occasion we presented a ‘copy’ to our venerated lecturer. When he finished reading it, he asked: “Did I really deliver this rubbish?”

Office practice had its own hiccups. My pupil master was a martinet. I recall how, on one occasion, I assumed the courage to dispute with him on the ‘justice’ of an exemption clause drafted on the instructions of a banking client. Bewildered, my boss wanted to know what was the source of ‘justice’ I was referring to. When I cited a biblical passage, he promised to look it up when he had time to spare and then “come back to me”. The incident took place some 55 years ago. Well, my good old boss met his appointed day long before answering the question. Obviously, he remained a busy man to the end.

Another problem concerned calculations. Only one man in the office was proficient in using the adding up machine: our Financial Manager. Then the boss ordered calculators and—suddenly—everybody knew how to calculate ‘marvels’ such as compound interest. The Financial Manager alone viewed the calculators lugubriously. “Don’t you think they are wonderful. Now we’ll not come to bother you with mathematical problems. Surely, the calculators are good!”—I ventured. “Not for me,” he replied sadly.

Typing presented another problem. We had only manual typewriters. They were used, together with carbon paper,¹⁵¹ to produce as many copies as possible. An average typist could produce an original plus three copies. If there was a need for more copies, the page had to be typed twice (and a hapless pupil had to check both type-outs). The only secretary able to produce eight copies in one go was working for the boss. Whenever we saw her proceeding to his office with a determined expression we knew our currency had been devalued and that she was determined to get a salary increase commensurate with her attainment. Usually she came out smiling happily! Eventually we got the new—‘modern’—electric typewriters. Now every typist could produce eight copies. Before long, the boss appointed a new secretary.

Very little had changed when I took up my first appointment as an Assistant Lecturer in Singapore in 1961. Reading lists were produced by cutting stencils. Students could read the designated authorities but many of them—I know the name of at least one culprit—either hid the books so that no one else could discover them or simply cut out the pages with the relevant reports. Then—eventually—photocopy machines became commercially available. Before long we started to produce Xerox copies of reading materials for our classes.

C. Modernity

Two major developments took place during the last 30 years. The first is the phenomenal increase in the speed of communications. At about 1980, even I started to use a dedicated word processor. Then, in 1982, the personal computer came into existence. Many typewriter producers were no longer able to compete and, in due course, went bust.

¹⁵¹Michael H. Adler, *The Writing Machine* (London: George Allen & Unwin, 1973), traces the history of typewriters and carbon paper.

My own first computer was an Apricot: an Apple was too expensive. As you all know, time did not stand still. Today the laptop, the Kindle and other e-book readers, the handphone (or videophone) are commonplace. So are emails and the internet.

Side by side with this speed of communications came the global (or cross-border) bank mergers. Examples are the acquisitions of foreign banks all over Europe. Notably, even in Singapore, a local bank, OCBC acquired the private banking sector of ING,¹⁵² a European bank. Moreover, quite a number of financial institutions which perform the functions of a bank, do not include the word “bank” in their name. Occasionally, it is difficult to know where a bank has its headquarters or the place where major decisions are being made. In point of fact, banking and business in general are globalised.

An important side effect of these mergers is the increase in the number of lawyers specialising in banking law and in the growth of in-house legal departments of most banks. This has led to the problem of ‘over-killing’ in bank documentation. Some of the clauses currently in use are draconian. Will our courts continue to give them effect?

Be this as it may, the global mergers, online banking and the use of ATMs¹⁵³ and credit cards have rendered branch banking practically obsolete. Personally, I go to the branch (where years ago I had opened my account) only if I need to go to the safe. A Visa card, for instance, enables me (and any other holder) to get money in most countries in the Western world. Travellers’ cheques are no longer common. Like other forms of negotiable instruments, they are of limited use in practice. Actually, the days in which the payment and collection of cheques were described as the essence of banking are, in my opinion, long over.¹⁵⁴

Similarly, travellers’ letters of credit—which were still used 60 years ago—are unknown today. Indeed, most payments are made by the use of credit cards, which are accepted all over the world. Remittances, too, can be effected by email or over the phone. In addition, the banking world has its own communication system—SWIFT¹⁵⁵—which is slowly but steadily overtaking tested telexes and monitored business calls.

Today, the word “bank” is used mainly to describe multi-national corporations, such as Citibank, which carry on all facets of banking business. We get our housing loans from banks, businesses get their overdraft and credit lines from banks and, in our minds, the words “deposit” and “bank” are linked together. Period payments and direct debits—effected by GIRO¹⁵⁶—are slowly but surely replacing payment by cheque. It is strange to realise that today’s giants can be traced back to the medieval merchants of Italy.

All the same, I have some concerns about future developments. First and foremost is the issue of the development of practice and of law. I am satisfied that practice

¹⁵² Internationale Nederlanden Groep.

¹⁵³ Automated Teller Machines.

¹⁵⁴ As treated by the English Court of Appeal in *United Dominions Trust Ltd. v. Kirkwood* [1966] 2 Q.B. 431.

It is believed that the definition of “banking business” in the local *Banking Act*, *supra* note 1, s. 2, ought to be reconsidered.

¹⁵⁵ Society for Worldwide Interbank Financial Communications; its headquarters are in Brussels and, accordingly, it is governed by Belgian law.

¹⁵⁶ General Interbank Recurring Order.

adapts itself so as to meet the needs of a developing society. The Visa card, the GIRO system and SWIFT underscore my point. Regrettably, the law is slow to follow. Many of the authorities on which we rely were decided long before our time; and many of our statutes are becoming obsolete. The *UCTA*—mentioned earlier on—is but one example of an outdated statute.¹⁵⁷ The UK has augmented it by regulations.¹⁵⁸ Regrettably, we lag behind.

Another telling example of the slow development of legal concepts is presented by the rule of *Dearle v. Hall*.¹⁵⁹ It was laid down early in the 19th century, well before the steam engine became commercially feasible. *Dearle v. Hall*, which determines priorities applicable in the case of conflicting assignments, was decided before assignments became a tool of banking law. How relevant ought the rule be today? Actually, I can think of many other instances of this type. My fear is that both practice and law will lag behind sociological developments.

Second, I remain unimpressed by the arguments about international controls. How can we hope to develop such a system when there is no agency endowed with the power of enforcing rules created by it? The issue is discussed in many papers; but where are the results? Here again, I have a telling example in point. At present there is a drive to separate ‘investment banking’, which means the bank’s own trading activities, from ‘private banking’, which refers to the bank’s role in advising customers as regards the investments of funds. In the long run though, would such a split not encourage investment banks from undermining products recommended by private banks (often associated with them)?

Third, our current system is based on two pillars: the acceptance of the US dollar as the world’s trading currency and the use of speedy communications effected electronically. If either of them were shaken, the consequences would be far reaching. Can we be certain that these two pillars will remain as they are? I have my doubts. Let me tell you of the panic that gripped me when my own computer was affected by a power breakdown in our condominium. Fortunately, I had both a backup and a hard copy. But suppose I had not; and suppose all of us were to lose information due to a general breakdown.

Fourth, would the advent (and the constant increase) in the use of internet banking and of the internet itself eventually affect the security of our data and perhaps even our privacy? I know that some computer users have raised issues of this sort as regards the opening of Facebook accounts. Further, how safe is information available through the internet, for instance details of your bank account or of remittances you transmit as email attachments? I do not know the answers; but I am concerned.

Finally, I have seen too many reversals in history to believe that any development, or trend, can simply move indefinitely from strength to strength. All empires I know had a rise and fall. Is our world different? I do believe that we are amidst an evolution. I do hope it will continue for the time being. All the same, I am worried by the fact that banks are losing their customers’ trust. The scandals that took place during the last few years, such as a certain global bank undermining products recommended by it, did not pass unnoticed. In 1601, *Twyne’s Case*¹⁶⁰ emphasised the importance

¹⁵⁷ *Supra* note 10.

¹⁵⁸ *Unfair Terms in Consumer Contracts Regulations 1999*, S.I. 1999/2083.

¹⁵⁹ (1828) 3 Russ. 1, 38 E.R. 475 (Ch.).

¹⁶⁰ *Supra* note 58.

of confidence and integrity in commercial dealings. Do our bankers still enjoy their customers' trust?

I was privileged to study banking law and practice during my long employment in Singapore. I am deeply grateful for the opportunities given to me. Still, I am unable to provide answers to the questions raised by me just now. Hopefully, a new generation of lawyers will be able to reassure us. All I was able to do was to raise the issues.