THE BANKER-CUSTOMER RELATIONSHIP: PERSPECTIVES ON NIGERIAN BANKING LAW

I. INTRODUCTION

A. *An Overview*

The Nigerian financial system, as we know it today, has evolved out of at least, eighty-four years of economic growth, financial policy experimentation and twenty-four years of legislative control. Admittedly, however, the present institutional framework of our financial system is exotic, not only in Nigeria but Africa as a whole. The first bank to appear in Nigeria was the Bank of British West Africa in 1894.[1] Notwithstanding the emergence of westernized form of banking in the latter part of the nineteenth century, there was no special banking regulation until 1952.[2]

The constitutional changes that took place between 1952 and 1962 also brought about substantial changes in the socio-economic structure of the country, thereby facilitating the growth and development of the banking industry. A sweep of the eye over that period reveals an unfolding pattern of banking institutions: new banks rose to prominence, some regional banks were established, some of those well established slip into insignificance. As a result, a new Banking Act was enacted in 1958.[3]

The Banking Act, 1958 played a part in shaping the pattern of the Nigerian banking industry until 1969 when a comprehensive banking legislation was enacted.[4] That legislation is today the basic law controlling the banking industry. Under it, the actual control of the banking industry is in the hands of the Central Bank of Nigeria.[5] The Central Bank has the power to set standards of conduct, and management for other banks. It also prescribes the national banking policies. In practice, this is done by means of directives to the commercial banks.

[1] That was the precusor of the former Bank of West Africa, now known as the Standard Bank of Nigeria. It was the only bank until 1917 when the Colonial Bank, which later became part of Barclays Bank DCO in 1925 was established. See, Brown, C.V., *The Nigerian Banking System* (1966), p. 23.

[2] See, The Banking Ordinance, Laws of the Federation of Nigeria, Cap. 15, 1952. The Ordinance in essence provided for the regulation and licensing of banking business.

[3] Banking Act, 1958, Cap. 19, Laws of the Federation of Nigeria, as amended by the Banking Act, 1962.

[4] Banking Decree No. 1, 1969 as amended by Banking Decree No. 30, 1970 and Banking Decree No. 45, 1972.

[5] See the Central Bank of Nigeria Act, 1958, Cap. 38.

B. *Definitional Problems: "Banker" and "Customer"*[6]

"Bank" is a term so frequently used that one is apt to overlook its inherent difficulties and to forget that its multitude of functions may lead to a multitude of meanings. Yet, the troublesome question, what is a bank or who is a banker has so constantly engaged the minds of legislators, judges and academicians that in a study of this nature its definition is a *desideratum.*

One writer has described a bank and a banker as —

> "a person or company carrying on the business of receiving moneys, and collecting drafts for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customer to the extent of the amounts available on their current accounts."[7]

The term received a similar but much wider meaning in *Halsbury's Laws of England* where a banker was defined as "an individual, partnership or corporation, whose *sole or predominating business is banking,* that is, the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer."[8] Here, the court must ascertain without prejudice to other businesses of the company, person or corporation, which is its predominating or primary business, and it must be the banking business. In other words, if the banking business is subsidiary to another major business or other businesses carried on by the same concern, that concern is not a banker.[9]

Another definition is that supplied by Paget.[10] In his view, "no one and nobody, corporate or otherwise can be a banker who does not conduct current accounts, pay cheques drawn on himself and collect cheques for his customers." Even the courts have grappled with a working definition of a banker as well. Probably the best that can be said is that they have re-affirmed the traditional view that no one may be considered a banker unless he pays cheques drawn on himself.[11]

The above definitions, though sound, are too restrictive, they do not embrace, for example, the Post Office Savings Bank, etc. Besides, they relate only to deposit banking. In the writer's view they have merely defined the boundary of a banker's permitted business.

[6] For the purposes of banking law, the word "bank" and "banker" are frequently used synonymously. The Nigerian Evidence Act in s. 2(1) recognized this when it stated: "Bank" and "banker" mean any person, persons, partnership or company carrying on the business of bankers and also include any savings bank established under the Savings Bank Act, and also any banking company incorporated under any Charter heretofore or hereafter granted or under any Act heretofore or hereafter passed relating to such incorporation."

[7] Hart, H.L., *The Law of Banking* (1931, 4th ed.), Vol. 1, p. 1.

[8] Emphasis mine.

[9] A leading case on this view, is *Re Sheilds Estate* [1901] I.L.R. 172 at 192. Here, one Laberto, carried on several classes of business, stock-broking, agency and money broking, including some banking business. It was held that banking was not his chief business but was only ancillary to it, and therefore he was not a banker. See also, *Halifax Uman* v. *Wheelwright* (1875) L.R. 10 Exch. 183; *Richardson* v. *Bradslaw* (1752) 1 AIK 128; *United Dominion Trust* v. *Kirkwood* [1966] 2 Q.B. 431; *Straggard* v. *Henry* (1850) 121 Eq. R.

[10] *Paget's Law of Banking,* eds. Megrah & Ryder, (1972, 8th ed.), p. 4.

[11] See, *United Dominions Trust Ltd.* v. *Kirkwood* [1966] 1 Q.B. 783; *R.* v. *Industrial Disputes Tribunal* [1954] 1 W.L.R. 1093.

In general, the Nigerian Banking Decree[12] adopts the terminology of the common law by its use of the word "bank". Section 41(1), modelled upon the (United Kingdom) Bills of Exchange Act, 1882,[13] defines a bank as meaning "any person who carries on banking business and includes commercial bank, an acceptance house, the discount house and financial institutions." Naturally, the legal mind thirsting for precise definition raise the vital enquiry as to what may be included in "banking business." In contrast with the position in United Kingdom, Canada and New Zealand, the Nigerian Banking Decree provides particular guidelines for the determination of banking business.[14]

Some versions see this definition as raising some serious problems. One has asked whether the receiving of monies from outside sources without payment and acceptance of cheques for customers is enough to make an institution a bank in Nigeria.[15] Admittedly, such an institution would be a "bank". But, this approach, it is submitted, appears to beg the issue and is indeed unrealistic. Purely legal definitions of a bank *in concreto* generally include characteristics relating to acceptance of deposits withdrawable by cheque.

The Banking Decree recognizes this problem. Thus it draws a practical distinction between the various types of banks and assigned different meanings to each category. For example, section 41(1) defines a commercial bank as —

> "any person who transacts banking business in Nigeria and whose business includes the acceptance of deposits withdrawable by cheque."

Besides, under the Decree, no person other than a licensed commercial bank can use the word "bank" or its derivatives as part of its title or description.[16] Similarly, only licensed commercial banks are permitted to issue advertisements inviting the public to deposit money with it.[17]

The implications flowing from these provisions are plain. Firstly, commercial banks are entirely a distinct category of banker with unique legal characteristics and peculiar *modus operandi;* secondly, unlike a discount house, an acceptance house or other financial institutions, they must in their day-to-day operations comply with the basic banking rules relating to confidentiality of the relationship between a banker and a customer, and must be guided by the rule that demand by a customer is a prerequisite to the banker's liability for failure to pay the customer's debt. Finally, only commercial banks are permitted to

12 See *supra,* footnote 4.

13 S. 2. According to that section, a "banker includes a body of persons whether incorporated or not who carry on the business of banking."

14 "Banking Business" according to s. 41(1) means "the business of receiving monies from outside sources as deposits irrespective of the payment of interest or the granting of money loans and acceptance of credits or the purchase of bills and cheques or the purchase of and sale of securities for account of others or the incurring of the obligation to acquire claims in respect of loans prior to their maturity or the assumption of guarantees and other warranties for others or the effecting of transfers and clearings, and such other transactions as the Commissioner may, on the recommendation of the Central Bank, by order published in the Federal Gazette, designate as banking business."

15 Adesanya, S.A., "A Legal Aspect of Banking — The Duties of a Collecting Banker in Nigeria", *Nigerian Lawyers Quarterly,* Vol. VII, p. 3.

16 Banking (Amendment) Decree, 1970, Decree No. 3, s. 1(1).

17 Banking Decree, *op.cit.,* s.27(1).

receive money as deposits from the public at large, and accept cheques drawn upon it by the depositors.

A further dimension to the definitional problems in banker-customer relationship relates to the nature of the legal personality of a banker. Under section 1(1) of the Decree, only a company, duly incorporated in accordance with section 15(1) of the Companies Decree[18] can operate a bank. Additionally the company must obtain a valid licence from the Commissioner of Finance authorising it to carry on the business of banking.

Aside from the statutory provisions, the Nigerian case law on the nature of a "banker's" legal personality is very instructive: In *Akwule and Ten Others* v. *R.*[19] the issue was whether Akwule, a bank manager was a "banker" within the meaning of section 315 of the Northern Nigerian Penal Code Law, 1959. The Federal Supreme Court held that from the provisions of section 3(1) of the then Banking Act,[20] "it is clear that a bank can operate in Nigeria only by a company or body corporate. The use of the word "person" in the definition of a bank above is therefore used primarily in the sense of a corporation." According to the Court, Akwule is "no more than an official of the bank carrying out the bank's instructions as to the method its business should be carried out.... The word 'banker' does not in our view include a person who is a mere employee of the bank." The same principle was applied in *Sunday Oyinlola* v. *Commissioner of Police.*[21]

The position in Nigeria is in sharp contrast with that in the United Kingdom. There is no legal prohibition which prevents a private individual other than a "moneylender"[22] from setting up business as a banker. But the Registrar may refuse to register a name which includes the word "bank" or "banking" on the ground that in his opinion the name would be "undesirable."[23] A different position however exists in Canada. Unlike the situation in Nigeria, a commercial bank cannot be incorporated under ordinary company legislation. Canadian commercial banks are subject to the Bank Act,[24] a detailed legislation governing their incorporation, powers, liabilities, administration and other incidental matters. Additionally, the Act deals with their mode of raising capital and capital structure, the election of directors, their powers and responsibilities, the calling of meetings, the transfer of shares and the position of shareholders.

Who is a Customer?

Notwithstanding the importance and the invaluable role of customers in the banking system there is no statutory definition of the

18 The Companies Decree, 1968, Decree No. 70.
19 [1963] 1 All N.L.R. 193.
20 The Banking Act, 1958, Cap. 19 Laws of the Federation of Nigeria.
21 Unreported *Kano State Appeal* No. K/16CA/74.
22 S. 4(3) of (U.K.) Moneylenders Act 1927 makes it an offence for a moneylender no publish a document implying that he carries on a banking business.
23 S. 14 (U.K.) Registration of Business Names Act, 1916. *Cf.* s. 12 Nigerian Registration of Business Names Act, 1961.
24 14-15-16, Eliz. 11. C. 87.

term.[25] Even when section 82 of the Bills of Exchange Act, 1882 which protects a banker collecting cheques on behalf of a customer was drafted, no attempt was made to define what constitutes a customer. Reference must therefore be made to decided cases to appreciate the legal interpretation of what constitutes a customer.

From the scanty authority available, it seems probable that a customer is any person, whether incorporated or not who has "some sort of account", either deposit or current account with a banker.[26] Thus if a banker renders to a person services incidental to but not peculiar to the business of banking he does not thereby constitute that person a customer. In ordinary sales transaction, the term "customer" usually denotes a relationship resulting from habit or continued dealings. An isolated purchase cannot qualify the buyer as a customer. But in the banking industry, the word "customer" connotes something different from the ordinary understanding of the term.

Can the first transaction with a person sufficiently constitute that person to be a customer? In other words is duration an essence in attaining the status of a "customer" in a banking transaction? Up to 1914, it was generally believed that there must be some continuity of custom, to be a bank customer. Thus in *Matthews* v. *Brown and* Co.[27] the decision of the Divisional Court was to the effect that the word "customer" involves something of use and habit, and that the device of collecting a cheque for a person by crediting it to "sundry customer's account" is not sufficient to make that person a customer. But this decision is no longer sound in law as it does not represent the contemporary view. *Ladbroke and Co.* v. *Todd*[28] altered the position. There, it was held *inter alia* that "the relation of banker and customer begins as soon as the first cheque is paid in and accepted for collection and not merely when it is paid." Similarly, in *Commissioner of Taxation* v. *English Scottish and Australian Bank Ltd.*[29] it was held that the word "customer" signifies a relationship in which duration is not of the essence. Thus, habit or continued dealings will not make a party a customer unless there is an account in his name.

In Nigeria, the word "customer" was a subject of judicial examination in *Ademiluyi* v. *African Continental Bank Ltd.*[30] One of the issues determined in that case was whether the plaintiffs were "customers of the defendants at all times material to this case?". The Court held that the "banker accepted the plaintiffs as their customers

[25] This contrasts sharply with the position in the United States where s. 4 — 104(l)(e) of the Uniform Commercial Code defines a customer as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying on account with another bank."

[26] *Great Western Railway Co. Ltd.* v. *London and County Banking Co. Ltd.* [1901] A.C. 414.

[27] (1894) 10 T.L.R. 386.

[28] (1914) 30 T.L.R. 433.

[29] [1920] A.C. 687. In that case, an account was opened with a stolen cheque, the endorsement of which was forged by the thief. One of the questions raised was whether the thief could be a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, when he opened the account with the cheque in question. According to the Court, "It is not necessary that the person should have drawn on any money or even that he should be in a position to draw any money" before he could be a customer of the bank.

[30] (1969) 3 A.L.R. (Comm.) 10.

the day, they opened an account in their joint names, and still remain their customers because the account opened by the plaintiffs was never closed." The clear message here is that maintenance of some sort of account with the banker is the primary factor in the determination of who is a customer.

Given the state of the case law and the nature of the Nigerian banking system, there is no substantive reason why the principles enunciated in *Commissioner of Taxations* case as followed by *Ademiluyi's* case, regarding the definition of a customer with its pedigree and a pragmatic approach stressing concern for reality in the banking transaction should not be followed by the Nigerian Courts.

Having discussed the salient issues involved in the definitional matrix of the relationship, attention will now be focused on the legal nature of the relationship. This article is therefore an attempt to outline the legal structure of the relationship, and the implications arising therefrom. It will also attempt to provide some insight into the content of the implied contractual obligations in banker-customer relationship.

II. NATURE OF THE RELATIONSHIP

The fundamental legal relationship in banking is that which exists between a banker and a customer under which the latter makes deposits and withdrawals in account with the former. In legal theory, the relationship is a contractual one. But a remarkable feature of its creation, in Nigeria and in most common law countries, is that its terms are not usually embodied in any written agreement executed by the parties. In practical banking therefore, there is no formal agreement which provides that a banker must maintain strict secrecy concerning his customers' account. But, when certain accounts are opened, such as joint accounts or the accounts of limited companies, a mandate may be executed which usually gives the bank express instructions concerning operations on the account. Even there, no comprehensive list of rights and duties of the parties are expressly itemized.

Occasionally, a piece of valuable or jewellery may be lodged with a bank for safe keeping. Here, the legal status of the bank is that of a bailee. Under this transaction the jewellery remains the property of the depositor. The bank is obliged to return the property in due course to the owner or deal with it otherwise in accordance with the terms of the bailment. Failing that, the bank is liable as a bailee for the value of the goods specifically received for safe keeping and then lost.[31] There may also be the bailment of coins where it is the intention of the bailor and bailee, that is, the depositor and the banker, that the identical physical things will be returned.

But money is currency and as such has legal characteristics which do not belong to tilings in possession.[32] When bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subject of specific title as chattels.[33] Thus the business

[31] *Johnson (Liquidator of Merchant Bank Limited)* v. *Sobaki* (1968) 3 A.L.R. (Comm.) 241.
[32] Mann, F.A., *The Legal Aspects of Money* (1953), esp. pp. 5-7.
[33] *Sinclair* v. *Brougham* [1914] A.C. 398 at p. 418.

intention and purpose of bank deposit is neither to create the banker as a bailee, an agent nor a trustee for the money. In other words, it is not the aim of banker-customer relationship that the *res* shall be returned nor that the banker shall account to the customer for any profit made by the use of money or be subject to the law relating to trusts and trustees in the manner in which he invests or otherwise employs the money.

The view that the relationship is neither that of a principal and agent, nor trustee and beneficiary seems sound. For any contrary operational philosophy would hamper the basics of effective banking operations. A trustee for example is usually restricted in the use to which he may put trust funds and may be confined to invest in particular enterprises, thus devoid of complete freedom as to the use of the money in commerce. Arguably, a banker may be regarded as an agent to use his principal's money as he sees fit. But it is submitted that the imposition of the agency law doctrines of "accountability for secret profits", and "no commingling of funds" on banker-customer relationship would destroy the much needed built-in flexibility in banking operations. By the nature or language of the transaction however, banks may and do occasionally assume instead the status of bailee, as for safety deposit vaults, or of agent, as in the receipt of bills of exchange and cheques not as holder but strictly for collection; then the respective rights and liabilities are those appropriate to the special status rather than those as between debtor and creditor.

Status of the Relationship

Although the business of banking had been firmly established before the end of the seventeenth century, there does not appear to be any recorded case law on the exact status of the relationship. Possibly *Can* v. *Carr*[34] was the earliest case in which the matter was considered. In that case, a testator made a bequest of "whatever debts might be due to [him]... at the time of his death," The issue was whether "a cash balance due to him on his banker's account passed by his bequest." The Court held that it did. According to the Court, "money paid in generally to a banker could not be considered a *depositum,* when money is paid into a banker's, he always opens a debtor and creditor account with the payer. The banker employs the money himself, and is liable merely to answer the drafts of his customer to that amount."[35] This decision has parallel in the latter case of *Devaynes* v. *Noble*[36] where it was held that "money paid into a banker's becomes immediately a part of his general assets; and he is merely a debtor for the amount."

The spirit of both the *Carr* and *Devanyness* cases was accepted in *Sims* v. *Bond.*[37] Thus Denman, C.J., had no doubts in holding that "sums which are paid to the credit of a customer with a banker though usually called deposits, are, in truth, loans by the customer to the banker."[38]

34 (1811) 1 Mer. 541.
35 *Ibid.* at 543.
36 (1816) 1 Mer. 529.
37 (1833) 5 B & Ad. 389.
38 *Ibid.* at 392-3.

The clearest statement on the legal status of banker-customer transaction appears in the judgement of the House of Lords in *Foley* v. *Hill*:[39]

> "Money" slated Lord Cottenham "when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the bank, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into a banker is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal when demanded, a sum equivalent to that paid into his hands.... That being established to be the relative situations of banker and customer, the banker is not an agent or factor but he is a debtor."

Several implications flow from *Foley* v. *Hill* principle. The first is that the basic meaning of a bank deposit is that it is a loan of money by the depositor to the bank. Once lodged with the bank, it becomes the property of the bank to use as it sees fit within the scope of its legal powers. At that point, the customer has no *jus in re* in the money. Unlike most real property rights the customer has no right which is effective against everyone. It is therefore misleading to regard the customer as having any rights of property in money after it has been deposited and passed into the hands of the bank. Lord Dunedin recognized this in *Sinclair* v. *Brougham* when he said "where money is in question under modern conditions.... there never will be a *jus in re,* there can at most be only a *jus ad rem."* The Supreme Court's decision in *Asuquo Ekpeyong* v. *The Republic*[40] is the most authoritative pronouncement in Nigeria on this principle. According to Biramian, J.S.C. "when a person has an account which is in credit, the bank is his debtor to the extent of the credit balance and when he draws money on his account the money he is paid is the money of the bank."

A further implication is that since the banker's primary obligation is to repay the deposit according to the contract, and "repayment" means return of an equivalent amount of currency, the customer's right is merely in "contract for repayment", of the credit balance outstanding in his account. But once this is denied, his remedy is a claim for "repayment of a debt." It must be noted however, that the general principle that money paid into a bank ceases altogether to be the customer's money applies strictly and solely to the relationship between

[39] (1848) 2 H.L. Cas. 28 at p. 35. In this case, a customer brought an action against a banker to account for monies received, claiming that the relationship was equitable, akin to that of principal and agent, and that he was entitled on that basis to know what had happened to his money and what profits had been derived from it.

[40] (1968) N.M.L.R. 25.

a banker and a customer. It does not affect the rights of a third party to recover money paid into a bank under a mistake of fact.[41]

More pointed still, on the legal nature of the relationship is the decision in *Joachimson* v. *Swiss Bank Corporation.*[42] The theme of the decision is that the contract of banker and customer is not just a simple contract of debtor and creditor. It is a contract of loan into which implied terms are imported by custom. The words of Lord Atkin aptly summarises it:

> "... I think there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides, and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money, and to collect bills for its customers' account. The proceeds so received are not to be held in trust for the customer but the bank borrows the proceeds and undertakes to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except on reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery."[43]

This observation is important because it not only clarifies the content of the banker-customer relationship, it shows that the usual nature of the relationship is based originally upon the customs and usages of bankers as recognized by the Courts. Besides, from a practical point of view, when a new customer with a minimum of formality opens a bank account, he hardly realizes that he is entering into a contract, the implied terms of which would, if reduced into writing, run into several pages.

Of particular importance is the fact that the Nigerian case law has accepted the line of reasoning in those decisions. *Official Receiver and Liquidator* v. *Moore*[44] is instructive. Dickson, J., had no hesitation applying *Foley* v. Hill, and the *Swiss Bank Corporation* cases, noting that:

> "It is quite clear that the relationship between a banker and customer is peculiar, and of necessity there must be superadded obligations. The mutability of commerce and industry and their modern complexity are bound to give rise to superadded obligations in relation between banker and customer."

Similarly, decisions in *Merchant Bank Ltd.* v. *Onigbanjo*,[45] *Agbonmagbe Bank Ltd, v. C.F.A.O.*[46] and *National Bank of Nigeria Ltd.* v. *Maja*[47] have been based on the acceptance of the principles enunciated in *Foley* and the *Swiss Bank Corporation* cases.

41 *Standard Bank of Nigeria Ltd.* v. *Attorney-General of the Federation* (1970) 1 A.L.R. (Comm.) 181. See also, *Attorney-General of Ghana* v. *Bank of West Africa,* [1965] 2 A.L.R. (Comm.) 214. (Ghana Supreme Court).
42 [1921] 3 K.B. 110.
43 *Ibid.* at 127.
44 (1959) Lagos L.R. 46.
45 (1969) 2 A.L.R. (Comm.) 273.
46 (1966) 2 A.L.R. (Comm.) 238.
47 (1967) 2 A.L.R. (Comm.) 327.

Having established that the legal nature and status of the relationship between a banker and a customer is generally that of a debtor and creditor, subject to certain superadded obligations imported by custom, we shall now examine some of the contents of the relationship.

III. SELECTED CONTENTS OF THE SUPERADDED OBLIGATIONS

A. *Deposits are Repayable only after a Demand by the Customer*

Credit Account

The effect of this obligation is best appreciated by comparing the customer's position with that of an ordinary creditor. In an ordinary credit transaction, be it consumer or commercial, and in the absence of any express agreement to the contrary, it is the responsibility of the debtor to tender repayment when the due date arrives. The creditor or lender need not go to the debtor seeking payment nor need he make a demand for his money in order to make payment due. The usual and practical implication is that the debtor is bound to tender payment at the creditor's residence or place of business.

In the banker-customer relationship the position is substantially different. An express demand by the customer, *albeit* the creditor, is a condition precedent to the accrual of the right to recovery of the debt from the banker, that is, the debtor. The emphasis upon the significance of "demand before repayment" became the foundation of the Court's decision in *Schroeder* v. *Central Bank of London Ltd.*[48] There, it was held *inter alia:*

> "There was no debt on which an action against the defendants could be founded until a sum was demanded and that when this cheque was drawn there was no debt which could be assigned, and consequently there can be no debt owing by the defendant to the plaintiff."

A recent and a leading case on the subject is *Joachimson* v. *Swiss Bank Corporation.*[49] *A* partnership was dissolved by death on August 1, 1914, and there remained a credit balance of £2,321 on current account in the name of the firm. The survivor, who was unable to operate on the account by reason of the intervention of the Great War brought an action in 1921 to recover the balance. The question was whether, in the absence of any demand for repayment, there was an immediately recoverable debt on August 1, 1914, affording to the firm a cause of action against the bank for money lent or money had and received. If so, the balance was statute barred and irrecoverable. The Court of Appeal decided unanimously that a demand was necessary before the right of action arose. According to the Court, where money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement, a demand by the customer is a necessary ingredient in the course of action against the banker for money lent.

While it must be noted that there is a distinct lack of Nigerian authority bearing directly on the Swiss Bank Corporation decision, its practical implications for the commercial banks are significant. Look-

[48] (1876) 34 L.T. 735 at p. 736.
[49] [1921] 3 K.B. 110.

ing at the banking industry from a functional approach and as a foster of economic and social development, the application of principles governing ordinary credit transactions to the banker-customer loan contract would cause considerable inconvenience to the banking business. From a practical point of view, it would be unrealistic to expect banks to be continuously seeking out each depositor and tendering repayment. Besides, if deposits were to become due immediately it was made, and without demand for repayment by the customer, then, the limitation period stipulated by the Statute of Limitations would commence to run from the time of making the deposit. Moreover, the customer would be able to issue a writ on the bank for repayment without prior demand for repayment. Aside from these problems, the customer's freedom to draw cheques would be curtailed; if the bank could repay credit balance at any time without previous notice, any cheque drawn by a customer but not yet presented would be in jeopardy.

Debit Account

On the other hand, where an overdraft is given to the customer the banker has no right of action until notice is given and a demand is made. This principle is established by the decision in *Hartland v. Jukes,*[50] where it was urged that the six years began to run in favour of a guarantor as soon as the debtor incurred an overdraft. But the Court held that, as no balance was struck and no claim had been made by the bank, the debt could not be accruing due and "we think the mere existence of the debt unaccompanied by any claim from the bank would not have the effect of making the statute run from that date."

Similarly, in *Rouse* v. *Bradford Banking Co.*[51] the decision was to the effect that:

> "If *bankers* have agreed to give an overdraft they cannot refuse to honour cheques or drafts within the limit of that overdraft, which have been drawn and put into circulation before notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn .. . it is obvious that neither party would have in contemplation that when the bank had granted an overdraft, it would immediately, without notice, proceed to sue for money: and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the utmost serious nature."[52]

Affirming the principle laid down in *Hartland* v. *Jukes,* and *Bradford Banking Co.* UpJohn, J., in *Lloyds Bank Ltd,* v. *Margolis and others*,[53] held that by the terms of the bank's mortgage, the overdraft was only repayable upon demand and the limitation period did not begin to run until formal demand for repayment had been made.

Unlike the position in credit account cases, there is a respectable although few, Nigerian cases on whether a demand is clearly necessary before a right of action arises in debit account transactions. Indeed, *The Official Receiver and Liquidator* v. *Moore*[54] is leading authority

50 (1863) 3 L.J. Ex. 162.
51 [1894] A.C. 586 at p. 596.
52 Emphasis mine.
53 [1954] 1 All E.R. 734.
54 (1959) Lag. L.R. 46.

on the question of overdrafts and its repayment. There, the plaintiff gave overdraft facilities to the defendant. In an action by the bank to recover the money outstanding on the overdrawn accounts, the defendants maintained that their claim was barred under the Statute of Limitation since the last advance was made more than six years before. The issue was when does a cause of action accrue against a customer, as opposed to a guarantor, who has been given an overdraft by a banker. The bank contended that it is proper to finance business ventures by overdrafts, and if banks as creditors were free to issue writs for repayment in those circumstances without prior notice to the debtor *albeit* the customer, business undertakings would be ruined. Furthermore, there is an implied term in the banker-customer loan contract that notice is a condition precedent to repayment of overdrafts.

Dickson, J., in an extension of the principles laid down in *Swiss Bank Corporation,* rejected the doctrine of "immediate recoverable right." The pith of Dickson J.'s opinion lies in his conclusion that "it would be unreasonable for a bank, after having granted an overdraft, to immediately proceed to sue for it without making a demand and giving the customer a reasonable time to pay. I can hardly think that it would be in contemplation of a customer to whom an overdraft was given that a bank would without warning, issue a writ. If banks were at liberty to act that way, commerce and industry would be greatly handicapped."

Again, the *Merchant Bank Ltd.* v. *Onigbanjo* case[55] is instructive. The Court had no hesitation in noting its approval of the principle of demand before the issue of writ in overdraft cases. Thus it held *inter alia:*

> "... for practical purposes there is an implied term between a customer and banker that where an overdraft is given there should be no right of action until notice is given and demand made, and therefore that the particular debt was not statute barred since there had been no demand by the bank."

Similarly, in *Johnson (Liquidator of Merchants) Bank Ltd.* v. *Odeku*,[56] it was held that a right of action accrues when notice is given or a demand is made for payment under a contract or a quasi-contract and time then begins to run for the purpose of section 7 of the Limitation Decree, 1966.

But in the latter case of *National Bank of Nigeria Ltd. et al* v. *Peters and other* [57] the Court arrived at the opposite results. The plaintiff brought an action against the defendant to recover the balance of an overdraft and accrued interest. On the sixth anniversary of the date when the interest was last debited and more than six years after the defendants had last drawn on the accounts or made any payment into them, the plaintiff instituted an action to recover the amount due on the accounts. The defendants pleaded the Statute of Limitation.[58]

55 (1969) Nig. Comm. L.R. 1.
56 (1967) 3 A.L.R. (Comm.) 282.
57 [1971] 1 A.L.R. (Comm.) 262 at p. 270.
58 According to the then s. 4 of Western Nigeria Limitation Law, Cap. 64,
(i) actions founded on simple contract or tort;
(ii) actions for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

Johnson, J., held that a banker cannot recover a dormant overdraft more than six years after the last advance, if the Statute of Limitation is pleaded, nor can he recover interest which even within six years has, in accordance with the ordinary banker's practice, been added to the principal from time to time and become part of the principal sum due. The rationale according to the judge is clearly stated in the judgement of the Court of Appeal in *Parr's Banking Company* v. *Yates:*[59]

> "One would have expected that a banker would not allow an overdrawn account to lie dormant for six years or more, even from the date of the earliest advance without some payment on account of interest or some other acknowledgement sufficient to bar the Limitation Law."

Comparing the implications of these conflicting decisions, it is clear that both the *Merchant Bank* case, and *Official Receiver's* case command more consistent and loftier support. Accordingly, it is arguable that the Courts should attach significant weight to the economic and business rationale underlying the decisions in those cases. Moreover, in a developing economy, bank credit, be it consumer or commercial, overdraft or secured, is an instrument of rapid economic growth. In the language of Professor A.N. Allott, "Credit is the life blood of the economy."[60] Thus one may underline the decisions in those cases by suggesting that modern business transactions provide a compelling policy rationale for encouraging overdrafts.

Plainly, the Court in *National Bank* case[61] did not look beyond the purely legal issues and reasonings involved in the case. From both practical and philosophical aspects of the banking business *viz-a-viz* its benefits to the economy, the development of judicial mercantilism as shown in *Official Receiver* v, *Moore,* and *Merchant Bank Ltd.* v. *Onigbanjo* is a step in the right direction.

In sum, the doctrine of demand before payment is a two-edge sword. It must however be noted that in practice, the customer's demand may be made in writing by means of a cheque but an oral demand by the customer at the branch where his account is kept is sufficient.

B. *Banking Hours*

A banker must pay cheques drawn on him by his customers in legal form[62] on presentation during banking hours or within a reasonable margin after the bank's advertised time provided the customer has sufficient funds in his account or the cheques are within the limits of an agreed overdraft and there are no legal bars to payment. It is the nature of banking transaction that a customer must know when he may expect his business to be dealt with. The banker does not owe this duty to the public at large but to his customers only. He may close his door when he likes, but if he closes on any day during any period in which he has led his customers to believe that they may

[59] [1898] 2 Q.B. 460.
[60] "Legal Development and Economic Growth in Africa" — A Paper delivered to the London Symposium on Changing Law in Developing Countries, 1962.
[61] *Supra,* footnote 56.
[62] "Legal Form" means *inter alia* that the cheque mast not be post-dated, words and figures must tally, and as a general rule it must not be crossed to more than one banker.

transact business, he is in breach of his contract with them. As a general rule therefore, as far as banking hours are concerned, there is no contract with customers other than that which is implicit in the custom varied from time to time by agreement and notice.

Payment outside the bankers advertised hours is not in the ordinary course of business. In practice, however, presenters reaching the bank premises or office before the closing time are usually answered within a reasonable time after the normal banking hours. Thus in *Baines* v. *National Provincial Bank Ltd.*[63] a cheque was paid at 3.05 p.m., closing time being 3 p.m. Lord Hewart held that such a payment was good and proper. But according to him, the factors which define "the limits of time within which a bank may conduct business is a large question."[64]

Some interesting legal problems may arise out of a bill whose last day of grace falls on Saturday, for, in Nigeria, generally, banks do not transact business on Saturdays. Yet, the provisions of section 14 of the Bills of Exchange Act,[65] do not exclude Saturday in the computation of time of payment. *Stricto sensu,* such a bill is legally due and payable on the Saturday. If the collecting banker does not present the bill for payment on the Saturday, then, *prima facie,* the drawer and endorsers will be discharged. But it is submitted that the collecting banker would be excused provided he can convince the court that the delay in presentment for payment was caused by circumstances beyond his control, and not imputable to his default, misconduct or negligence. That is the purport of section 46(1) of the Bills of Exchange Act.

C. *Branch Banking*

Commercial banks usually have a tremendous network of branches scattered through all the States and practically all communities with a branch of at least one bank in each major urban centre.[66]

The legal relation between the branches of a bank and the head office is that, in principle and in fact, they are agencies of one principal banking corporation or firm.[67] Indeed, the broad proposition that each commercial bank, as an aggregate with all its branches constitutes one legal entity may seem to overstate the integration. The decision in *Standard Bank (Nigeria) Ltd., Ikare Branch* v. *Onabanjo,*[68] *et al*, on this is very instructive. The words "Ikare Branch" attached to the plaintiff whether in brackets or not, were held to be an adjectival phrase or epithet qualifying or describing "Standard Bank (Nig.) Ltd." In the instant case it was held that if the words "Ikare Branch" are removed, Standard Bank (Nigeria) Ltd. still stands as a legal person if it was so incorporated.

For special purposes however, such as venue of causes, and in some jurisdictions, local taxation, the individual branch has received

[63] [1927] 96 L.J.K.B. 801.
[64] *Ibid.* at 802.
[65] *Laws of the Federation of Nigeria and Lagos,* 1958, Cap. 21.
[66] Central Bank of Nigeria, *Developments in the Nigerian Economy During the First Half of 1976.*
[67] *Henry Prince* v. *Oriental Bank Corporation* (1877-78) 3 App. Cas. 325.
[68] Unreported *Bendel State High Court,* Auchi Suit No. HAU/20/72.

separate recognition.[69] Similarly, transactions, such as stop payment orders, and notices of dishonour of negotiable paper, given to one branch are not regarded as simultaneously affecting all other branches.[70] In law and fact, when a customer draws a cheque, he does not draw it upon the bank generally, but upon the particular branch at which he keeps his account. One branch is therefore not compelled to pay a cheque drawn upon another branch. But if one branch does cash a cheque drawn upon another branch, it does so on the credit of the person presenting the cheque and not as the banker of the drawer. Hence if the cheque is subsequently dishonoured when duly presented at the branch on which it is drawn, the banker is entitled to recover from the presenter the money paid.[71] Thus, while the banker has a right to combine two current accounts for the purpose and to the extent of paying a cheque, if the balance on the account on which it is drawn is insufficient, the customer has no corresponding right to accounts kept at different branches so as to draw cheques indiscriminately,[72]

In practice, credits may be paid in at any branch or sub-branch. The customer must, however, allow sufficient time for advice of the credit to reach the branch at which his account is kept. A banker is not liable for dishonouring a cheque before receiving the advice of any credit from another branch. As a corrollary, full details of all credits must be sent to the branch concerned. Failure to do so has been held in *Savory & Co.* v. *Lloyds Bank Ltd.*[73] to constitute negligence sufficient to deprive the bank of its protection under section 60 of the Bills of Exchange Act.

Finally, it must be noted that the single entity concept was developed to identify the debtor status *vis-a-vis* the customers as being that of the entire aggregate not just that of a particular branch dealt with, despite credit transfers internal to the system, and may perhaps exhaust its functions in that context.

D. *Dishonour of Cheques*

As a general rule, the moment a bank places money to its customer's credit, the latter is entitled to draw upon it, unless something occurs to deprive him of that right.[74] Thus failure by a bank to honour a valid cheque drawn by a customer when there is a large enough balance at credit is a breach of banker-customer contract.[75] Apart from this contractual obligation, or as a consequence thereof, the customer's credit may be seriously injured by the return of his

[69] *Rex* v. *Lovitt* [1912] A.C. 212; *Bank of Toronto* v. *Pickering,* 46 Ont. L.R. 289 (1919).

[70] See *supra* footnote 64, s. 49(l)(m); *London Provincial and South-Western Bank, Ltd.* v. *Buszard* (1918) 35 T.L.R. 142.

[71] *Woodland* v. *Fear* 5 W.R. 624.

[72] *Ibid; Garnett* v. *McKewan* (1872) L.R. 8 Exch. 10; *McNaughten* v. *Cox* (1921) The Times, May 11; *Per* Atkin, L.J. in *Swiss Bank Corporation* case, *op. cit.*

[73] [1932] 2 K.B. 122.

[74] *Capital and Counties Bank v. Gordon* [1903] A.C. 249.

[75] *Oyewole* v. *Standard Bank of West Africa Ltd.* (1968) 2 A.L.R. (Comm.) 111; *Ashubiojo* v. *A.C.B.* (1966) 2 A.L.R. 78; *Adedayo* v. *Co-operative Bank Ltd.* Unreported *Ibadan High Court Suit* 1/269/76.

cheque dishonoured.[76] Indeed the smaller the cheque the greater the possible damage to credit. The decision in *Marzetti* v. *Williams*[77] is a case in point. In that case, Lord Tenterden said, *inter alia,* that "it is a discredit to a person and therefore injurious in fact to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer."[78]

The customer is, however, entitled to damages for such a breach. But the type of damage depends upon whether or not the customer is a trader. It is a well-established rule that in an action for breach of contract against a bank for wrongfully dishonouring a trader's cheque, the plaintiff is entitled to recover substantial, though temperate and reasonable damages for injury to his commercial credit without the necessity of alleging and proving any actal damage.[79] Seemingly, damage to credit in the case of a trader is considered to arise naturally from the refusal of the cheque. The most authoritative judicial pronouncement on this in Nigeria to date is in *Ashubiojo's* case. There, Chief Justice Taylor said: "In the case before me, that the plaintiff is a trader is well proven, and it would seem on the authority of *Gibbons'* case that he is entitled to substantial damages without even pleading and proving actual damage."[80]

On the other hand, a customer who is not a trader may only recover nominal damages, unless there is proof of special loss. In *Evans* v. *London and Provincial Bank.*[81] the wife of a naval officer sued for the wrongful dishonour of a cheque. Lord Reading, L.C.J. directed the jury that the only question was what amount of damages was due to the lady for the mistake the bank had undoubtedly made, though she had not suffered any special damage. The jury returned a verdict of one shilling damages. According to the jury, Mrs. Evans had suffered nothing more than annoyance. Perhaps the most concise explanation of this principle is that of Lawrence, J. in *Gibbons* v. *Westminster Bank Ltd.:*[82]

> "That a person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque unless the damage which he has suffered is alleged and proved as special damage."

But the courts have not thrown much light on what is meant by a "trader" in this connection. One writer has suggested that it should be taken in a fairly, broad sense to include professional men, commercial agents and brokers and businessmen as well as persons engaged in buying and selling goods.[83] The Nigerian case of *Oyewole* v. *Standard*

76 *Paget's Law of Banking, op.cit.,* p. 312.

77 109 E.R. 845.

78 *Ibid.*

79 *Ashubiojo* v. *A.C.B., supra,* 74; *Adedayo* v. *Co-operative Bank, supra; Gilbons* v. *West Minster Bank Ltd.* [1939] 2 K.B. 888.

80 See, *supra,* footnote 75 at p. 83. In that case, the plaintiff was a trader with credit facilities from a large company. On two separate occasions the plaintiff's cheques drawn in favour of that company were dishonoured by the defendant bank. The plaintiff brought an action against the defendant to recover damages for wrongful dishonour of his cheques, since he had sufficient funds in his account to meet the cheques.

81 The Times, March 1, 1917.

82 [1939] 2 K.B. 882 at p. 888. See also, *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488.

83 Baxter, I.F.G., *The Law of Banking and the Canadian Bank Act., op. cit.,* p. 20.

Bank of West Africa Ltd.[84] has, however, rejected the inclusion of professional men. In that case, the plaintiff who was a legal practitioner had a business and a savings account with the defendants. When he requested overdraft facilities on his business account to cover a cheque drawn in excess of his funds in both accounts and his existing overdraft limit, an employee of the bank acting within the scope of his authority, authorized the overdraft. When the plaintiffs cheque was presented for payment, the defendants dishonoured it. Plaintiff sued for breach of contract to recover general damages. The plaintiff contended that as a legal practitioner he was a businessman entitled as such to a substantial measure of general damages in respect of the injury to his credit. The Court rejected this argument and held that a legal practitioner does not come within the exempted cases under the category of businessman. It further held that the word "trader" as used in *Gibbons case* "is an appellation" which the court hopes "will not describe a member of this honourable profession." The plaintiff received nominal damages.

Similarly, an accountant was held in *R.F. Adedayo* v. *Co-operative Bank Ltd.*[85] not to be a trader or a businessman. If the plaintiff can however establish that he had suffered more than nominal damages as a result of the bank's wrongful dishonour of his cheque, the court would examine the nature of the damage alleged. In *Adedayo's* case, the plaintiff, an accountant with the University of Ibadan, instituted an action against the defendant for the wrongful dishonour of his cheque. When the Bursar of the University of Ibadan received back the dishonoured cheque, he wrote a letter to the plaintiff stopping the latter from exchanging his cheque in the bursary. The Court held that the "deprivation of the facility of exchanging cheque for cash in the Bursary of the University constitutes, to some extent, actual damage suffered by the plaintiff for which he should be compensated," Although the loss was not quantified, the court awarded damages for the sum of one hundred and fifty naira.

Necessarily, it must be noted that in most cases, the distinction between a trader and a non-trader is not of practical importance, because if a non-trader's cheque is wrongfully dishonoured, he will usually be able to claim damages for libel against the drawee bank. In *Gibbons'* case there was no claim for libel. Also, in *Oyewole* and *Ashubiojo* libel was not pleaded.

Finally, it is submitted from a practical point of view, that if a banker discovers that it has wrongfully dishonoured a customer's cheque, it should act immediately with a view to minimising the damage suffered by the customer. A letter of apology to the payee or his banker suffices. This consideration is dictated not only by the sound rule that if one makes a mistake to the detriment of others, one should as a matter of courtesy tender an apology immediately, but also by the clear indication given by the courts that any omission by the bank to acknowledge its mistake may increase the damages awarded against the bank. Thus in *Baker* v. *Australia and New Zealand Bank,*[86] the Supreme Court of New Zealand said:[87]

[84] *Supra,* footnote 75.
[85] *Supra,* footnote 86.
[86] (1958) N.Z.L.R. 907.
[87] *Ibid.* at 911.

> "the matters to be taken into consideration in assessing damages are the position and standing of the plaintiff, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology ...."

Similarly in *Davidson* v. *Barclays Bank Ltd.*[88] the Court took into consideration the fact that the bank had omitted to write a letter acknowledging its mistake in wrongfully dishonouring a bookmakers cheque.

IV. CONCLUSION

A survey of Anglo-Commonwealth banking law suggests that statutory efforts in the field of banking have been directed towards the creation and maintenance of an economically powerful banking system capable of maintaining a strong competitive position *vis-à-vis* other financial institutions; the relationship between the banker and the customer has been of only incidental concern. The result has been that the development of the law governing the relationship between banker and customer is based on case law or custom and usages in the banking industry. Three features of the legal position of the relationship are worthy of note. The first is that its conceptual framework is sufficiently malleable to allow the injection of the bankers' as well as customers' perspectives. Secondly, judges who have been faced with litigations arising from the relationship have been prepared to recognize that fact and to respond with judgments which show a considerable degree of banking business sensitivity. As suggested in the discussion on the requirement of demand, there is room for rethinking by judges. Given the elements of substantive flexibility and judicial responsiveness permitted by the legal position of the relationship, change is by no means impossible. Finally, it can be said that the way in which most Nigerian courts have approached the cases arising from the relationship suggests that they are ready to use decisional law to innovate and create *inroads* in banking law without the sort of outdated scrupples which still affect some Nigerian business transaction laws.

This is by no means to suggest that the case law approach is the elixir of the problems arising from banker-customer relationship. There are obvious shortcomings to a system which deals with such an intricate relationship on an incidental and piecemeal basis. While litigation is not going to solve the total problems arising from the relationship, it is one instrument which can be used in the absence of statutory regulation, in situations where there is clearly definable problems.

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[88] [1940] 1 All E.R. 316.

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