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Recent Development in Case Law

Presented by

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1. Introduction

I am asked to discuss "recent developments in case law" in the field of Banking law and practice. A lawyer who is presented with that function at once sets out to limit his (or her) task by asking irritating questions, such as What counts as "recent"?; and What, in any event, constitutes "Banking law and practice"?.

In the end, I have taken a fairly broad view of both questions, while confining my remarks primarily and parochially to recent Australian decisions. In carving up the planet in this way, my colleague from New Zealand has cheerfully agreed to take on the Rest of the World.

The approach adopted in this paper is to discuss each of the cases chosen for analysis in the context of the legal principles which it serves to illustrate. This seems to me to be preferable to treating them in isolation as if each of them was completely divorced from the others. As will be suggested at the end, the common thread that is visible in all of them is just how much the courts tend to view banking law and practice as essentially a system of recording the credits and debits produced by transactions on an account, and the implications capable of being derived from them.

2. "Property" in bank accounts

Over 150 years ago it was settled by a decision of the House of Lords in 1848 that the relation of a banker and a customer operating a current account is ordinarily that of debtor and creditor.[1] To the extent that the account is in credit, the banker is in law considered as having borrowed the customer's money on a promise to repay the balance on demand and in the meantime to carry out mandates of the customer to pay at his direction[2] communicated either in the form of cheques drawn on the bank or more often nowadays in the form of electronic commands. The customer has a claim or right of action to enforce the banker's indebtedness, which in technical legal language is a chose in action.[3] Because the relationship is one of debtor and creditor, the banker is not a trustee for the creditor of the amount of the money that

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1. *Foley v Hill* (1848) 2 HLC 28.

2. *Joachimson v Swiss Bank Corporation* [1921] 3 K.B. 110, 118, 127-128. *National Australia Bank Ltd v KDS Construction Services Pty Ltd.* (1987) 163 CLR 668, 676.

3. *R v Davenport* [1954] 1 WLR 569, 571.

is deposited to the credit of the customer's account in the usual way.[4] The money itself becomes the property of the banker when deposited,[5] and the bank is, of course, legally free to do with it as it wishes. To claim "I have money in the bank" is simply a colloquial way of saying that I have a credit in my account on which I can draw.

It is noteworthy that many of the cases in which this relationship has recently been considered in detail have arisen out of charges of criminal offences. A number of Australian States, including Victoria[6] and Queensland,[7] have enacted statutory provisions, modelled wholly or partly on the English *Theft Act* 1968, making it an offence, analogous to larceny or stealing, to misappropriate the property of or belonging to another person. The definitions of "property" (which includes choses in action) and "belonging to another" are very wide and have been applied in a number of criminal cases in deciding offences concerning bank accounts. The decision in *Parsons v The Queen* (1998)[8] is an example. It was referred to in passing in a paper delivered in 1999 by one of my colleagues;[9] but it does, I think, merit closer consideration in the present context.

Parsons pleaded guilty in Victoria to an offence of dishonestly obtaining property of another by deception. It then occurred to his legal advisers that what he had obtained might not be "property" at all. His conviction was taken on appeal to the Victorian Court of Appeal, which confirmed the conviction.[10] From there, a further appeal went to the High Court.

In simplified terms, what Parsons did was this. He was the manager of a company engaged in importing pens and copy paper for supply to newsagents, who made substantial prepayments to Parsons in the expectation of receiving the paper. Those payments were made by cheque, some of which were bank cheques, which ought to have been paid into the company's account with a branch of the ANZ Bank. Instead, Parsons misappropriated them to his own use.

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4. *Foley v Hill* (1848) 2 HLC 28.

5. *R v Davenport* [1954] 1 WLR 569, 571.

6. Vic. *Crimes Act* 1958, s.72(1), which has been adopted, wholly or in part, in ACT *Crimes Act*, s.94, and NT Criminal Code s.94. See Lanham *et al*, *Criminal Fraud*, 67-80 (1987.

7. Qld. Criminal Code, s.408C.

8. 195 CLR 619.

9. Hon. P. de Jersey C.J., *Recent Developments*, 11 June 1999.

10. *R v Parsons* [1998] 2 V.R. 478.

The High Court held, affirming the Victorian Court of Appeal, that the cheques were "property belonging to another", meaning by that that they were the property of the newsagents who had given the cheques to Parsons.[11] The argument for the appellant was that they were simply choses in action, which, because they created "new property rights", could never have belonged to the newsagents,[12] who had drawn (or in the case of the bank cheques[13] obtained) and delivered the cheques by which the prepayments were to be made. In rejecting this argument, the High Court held: (1) that the cheques, considered as pieces of paper, were "property" of the newsagents at the time when Parson obtained the cheques from them;[14] and (2) that the law imputed to them a value beyond their character or quality as mere pieces of paper.[15] In response to the argument that the private cheques would, when honoured, ultimately be returned to the newsagent as drawer, their Honours pointed out that "in Australia banks have asserted the right to retain possession of paid cheques apparently on the footing that this is an ordinary incident in this country of the relationship of banker and customer".[16] This was, it was acknowledged, a respect in which Australian and English banking practices had diverged.[17]

3. Electronic recording of indebtedness.

The appeal by Parsons would probably not have been instituted had it not been for the decision of the House of Lords in *R v Preddy*.[18] Preddy was charged under the *Theft Act* 1968 with what was described as "mortgage fraud". It involved obtaining loans from building societies on the false representation that the loan was required to complete the purchase of property. The loan money was paid by the building society to the bank account of a solicitor, who apparently then credited it to his client Preddy; but the purchase in question was never completed. Preddy, so far as one can gather from the report, simply took and kept the money.

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11. (1999) 195 CLR 619.

12. 195 CLR 619, 624.

13. The judgment contains a useful discussion of the nature of bank cheques in Australia.

14. 195 CLR 619, 632-633.

15. Ibid.

16. 195 CLR 619, 634.

17. 195 CLR 619, 633.

18. [1996] AC 815.

The House of Lords held that he had not obtained "property belonging to another" within the meaning of the *Theft Act* 1968.

It should be observed that Preddy was not charged with obtaining the cheques by means of which the loan was paid by the building society to the solicitor or by him to Preddy[19] but with obtaining the "loans" or "advances" themselves. In fact, many of the loans were not paid by cheque but by telegraphic or electronic transfer, which involved a debit entry in the bank account of the lender (the building society) and a corresponding credit entry in the payee's bank account or that of his solicitor.[20] The question was whether this involved the obtaining of property "belonging to another". The House of Lords held it did not. The reason given was that debiting the bank account of the lender (the building society) and crediting the bank account of Preddy's solicitor did not involve obtaining another's property. What, it was said, Preddy or his solicitor acquired was a "new" credit in his account, which did not come into existence until the transfer took place, and (when it did) which could not be identified as the same "property" as the building society had lost.[21] It was a new chose in action subsisting between different parties.

It is, to my mind, not at all surprising that, at least as regards cheques, the High Court in *R v Parsons* did not follow the decision of the House of Lords in *R v Preddy*.[22] The question of how far, if at all, that decision may represent the law of Australia in relation to electronic transfers remains to be considered by courts in this country. On one view, it may perhaps conflict with an unreported decision of the Queensland Court of Appeal in *R v Peter Raymond Smith*[23] decided in 1997. Smith was the manager of the Lending Services Division of the Commonwealth Bank in Brisbane. He was convicted of misapplying the property of another contrary to s.408C of the Criminal Code. What he did was to take part in a fraud perpetrated by a Mrs Avenell, who for this purpose called herself Lady Avenell of New Guinea. She was a director of a company entitled Noble Promotions Pty Ltd, which maintained a general account with the Brisbane CBA. She prevailed on a Mr McNeill of Fairfax International to transfer US$250,000 from the First Interstate Bank in Oregon USA to a special "escrow" account in the name of Noble Promotions with the CBA in Brisbane. This transfer was carried out by SWIFT

19. [1996] A.C. 815, 833.

20. [1996] A.C. 815, 829.

21. [1996] A.C. 815, 834.

22. [1996] A.C. 815, 835-837.

23. CA 567 of 1996. April 18, 1997 (Qld. C.A.)

wire (Society for Worldwide Interbank Financial Title Communications) from Oregon. At the Brisbane end, Mr Smith instead misapplied it by crediting the sum received to two other accounts with the Bank, from which it was quickly withdrawn by Mrs Avenell. The Court of Appeal had no difficulty in concluding that, both before and after its transmission from Oregon, the sum of US$250,000 was the property of Fairfax International. The question was therefore not quite identical with that considered in *R v Preddy* because in *R v Smith* the money was first credited in Brisbane to the escrow account in the name of Noble Promotions for which it was destined, and only then transferred from there to another account. Would the result have been different, I wonder, if the transfer had been credited direct to the Noble Promotions general account? On the authority of *R v Preddy*, it might have been, although it seems odd to say that it was not the same chose in action in Brisbane as that which had been despatched from Oregon.

4. Correcting errors in bank accounts

This analysis of bank accounts and banking may be pursued by reference to another criminal case decided in Queensland. It is *R v Capewell*,[24] which illustrates a further peril of electronic transmissions in the banking industry. Mr and Mrs Hughes, who had an account with Metway Bank in Bundaberg, arranged to transfer $4,000 from it to the account of Mr Hughes at the Kippa-Ring branch of the Bank in Brisbane. By some error, the money was credited to an account with that branch that had a slightly different number. It was an account in the name of Fleur Capewell (who was the 13 year old daughter of Mrs Capewell) which, before the $4,000 was deposited in it, was in credit to the extent of only 68 cents. Mrs Capewell had a separate account in her own name at that branch, to which she soon arranged to transfer $3,500 from Fleur's account and then drew it out for her own purposes over the next few days. She was charged and convicted under s.408C of the Criminal Code of misapplying "a chose in action of the value of $3,500 belonging to" her daughter Fleur.

On appeal against that conviction the question for the Court was whether the amount of $3,500 which Mrs Capewell transferred to her account did in law belong to her daughter Fleur (and not to the Bank) when she transferred it to her own account. Two of the three judges of appeal decided that it did. It is true that it got there by mistake, and to that extent Fleur had no right to claim it; but until the Bank reversed the entries (which it was entitled to and in due course did), the money was, on the face of it, acknowledged by the Bank to be the amount in which her account was in credit, and Fleur could therefore have drawn upon it, as she did when

24. [1995] 2 Qd.R. 64.

the sum of $3,500 was transferred to Mrs Capewell's account. As against the bank, entries in the account are prima facie evidence having the effect of admissions that a balance was due to the customer and of its amount.[25]

To reach that conclusion, it was necessary to distinguish or disagree with an English decision that suggested that credit entries effected in an account by means of fraud are nullities, meaning they are to be treated simply as if they are not there at all.[26] The English case concerned fraudulent entries creating a credit balance in Kuwait, which was then transmitted to a bank in England. To my mind, that result is inconsistent with the well settled rule that, once the account is credited, the customer is entitled to draw on it "unless something occurs to deprive him of that right".[27] In *R v Capewell*, something did occur when the Bank discovered the error and put the matter to rights by rectifying the entires in the accounts of both Mrs Capewell and her daughter Fleur. It would cause the utmost confusion if any other approach were to be adopted by the banker or the law. The accounts of Fleur and of Mrs Capewell, which on the face of it would appear to have been in credit, would (unknown to anyone but the Capewells) really have been considerably in debit. The $4,000 credited to Fleur's account could, it is clear, not have been property that belonged to Mr or Mrs Hughes. The Bank owed that sum to the Hughes, but the credit in Fleur's and in Mrs Capewell's accounts was not property belonging to Mr or Mrs Hughes. Nor, on the face of it, did that credit or chose in action belong to the Bank, at least not before the rectifying entries were made in the two accounts. Until that happened, the Bank continued to make an admission that it owed money to Fleur or, after the transfer, to Mrs Capewell. There is no doubt that the Bank was ultimately entitled to recover the amount from Mrs Capewell; but, until it reversed the entries in the accounts, Fleur initially, and then Mrs Capewell, had, according to the Bank's own records, an acknowledged chose in action against the Bank.

5. Combining or consolidating accounts

R v Capewell demonstrates how closely the whole process of banking and the rights that flow from it are related to accounting records. English decisions in the 19th century recognised the right of the banker (or the customer) to combine or consolidate two or more

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25. *Holland v Manchester v Liverpool District Banking Co.* (1909) 14 Com.Cas. 241, 245-246. See *Paget on Banking* (11th ed.), at 164-165, where there is a discussion of the power of a bank to correct clerical errors in bank statements or passbooks.

26. *R v Thompson* [1984] 1 WLR 962.

27. *Capital & Counties Bank v Gordon* [1903] A.C. 240, 249.

accounts of the customer with the same bank,[28] whether or not maintained at the same branch of that bank.[29] Superficially, those decisions ascribe to the right to consolidate a rather wider ambit than it has probably enjoyed since 1918.[30] A banker's right at common law to combine or consolidate is probably now effectively confined to current accounts. The right to consolidate may be displaced or altered by the character or purpose of the account; conversely, it is capable of being enlarged by agreement so as to extend it to other non-current accounts, and in practice it almost invariably is so extended by provisions in the banking documents that the customer signs on opening the account. The courts accept that the question is primarily one of agreement or intention, to be gathered from the banking agreement or arrangement entered into when the accounts were opened,[31] as varied by any later agreement or arrangement.

The question (or one of them) that arose in the Court of Appeal in *Cinema Plus Ltd v ANZ Banking Group Ltd* (2000)[32] was whether the banker's right to combine accounts confers on the Bank a "charge" on property. If it does, then in *Cinema Plus* the Bank was precluded from giving effect to the right to consolidate because the company went under administration, and, by s.440B of the Corporations Law, a person cannot enforce a charge on property of a company during its administration. In *Cinema Plus* the company had a deposit account which, when it went under administration on 30 May 2000, was in credit to the extent of $1.293 million; by 29 June had increased to $1,452,000. The company also had loan accounts with the Bank, which were designed to cover various specific liabilities to the Bank, including a liability under a chattel leasing agreement. By the terms of that agreement the Bank had the power to accelerate payment of the full amount due, which incidentally was held to be compensatory, and as such not a penal forfeiture which would have been unenforceable in equity.[33] All up, the company's liabilities on various accounts totalled some $965,000 which, when deducted from the amount in the deposit account on 6 June 2000, left a credit balance of only some $487,000.

June 6, 2000, was the date on which a notice was given by the Bank to the company's administrator that, with effect from 30 June, the Bank would be consolidating the indebtedness

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28. *Re European Bank, Agra Bank's Claim* (1872) 8 Ch.App. 41.

29. *Prince v Oriental Bank Corporation* (1878) 3 App.Cas. 325.

30. *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833.

31. Ibid, at 839, 843, 847.

32. 49 NSWLR 513

33. *Cinema Plus Ltd v ANZ Banking Group* (2000) 49 NSWLR 513.

on the loan accounts with the credit in the current account. At common law that consolidation would not have been possible because the accounts served different purposes.[34] But cl.21 of the Bank's general conditions expressly authorised it to combine, consolidate etc. any credit balance on an account with any other, and it was this power that it exercised by giving the notice on 6 June 2000. Among various other advantages conferred on companies under administration, s.437D of the Corporations Law prohibits a person from entering into a transaction or dealing affecting the company's property; but this prohibition was held not to apply to the consolidation effected on 6 June because s.437D is confined to transactions and dealings entered into "on behalf of" the company, and the Bank had not given the consolidation notice on behalf of anyone but itself.[35] It was therefore not affected by the prohibition in s.437D.

6. Was there a "charge"?

This left for decision two questions, one of which was whether by giving the notice of consolidation the Bank was enforcing a charge on the current account. The Court of Appeal held that it was not. That was essentially because the right to consolidate was viewed as no more than the exercise of a contractual right conferred by cl.21 of the general conditions, which simply extended its common law right to consolidate or combine the accounts.[36] It therefore retained the character of a contractual right and not a right of property such as is conferred by a charge. At most it conferred a right of set-off between the various accounts with the Bank.[37] Perhaps even set-off is not the correct description; for what cl.21 conferred was really a right in the Bank to treat the several accounts as one, which, Sheller JA explained, is "a matter of account rather than of set-off".[38]

The Court considered, but did not in the end decide, the second question raised by the Bank. If, as is accepted on all sides, a credit balance in a bank account makes the bank a debtor to its customer, how can a debtor have a charge over money that the debtor (the bank) itself owes to the creditor (the customer)? That is said to be a "conceptual impossibility": you cannot give yourself a mortgage or charge over something you owe to someone else. The idea that such a result cannot be achieved in law had been accepted in several English and

34. Ibid., at 543, 549.

35. Ibid., at 525, 548-549.

36. At 543.

37. Ibid.

38. Ibid., at 543.

Australian decisions[39] until the question reached the House of Lords in *Re Bank of Credit & Commerce International SA (No. 8)*,[40] where it was held it was not an impossibility at all. In the *Cinema Plus* case, Spigelman CJ was disposed to think that, in an appropriate case, it might be found that the intention of the parties overrode any such "impossibility".[41] On my reading of the judgments, Sheller and Giles JJA did not find it necessary to decide the question. It is therefore doubtful at this stage whether a bank in Australia can validly take a charge over a customer's deposit with the bank. One reason for advising caution about rushing in to amend bank securities to try to create such a charge is that it would then fall foul of s.437D, as well as other provisions of the Corporations Law requiring company charges to be registered.

7. The administrator's indemnity

So far, the Bank in *Cinema Plus* had been winning all the way. That was until it encountered s.443F of the Corporations Law. It confers on a company administrator a priority lien on company property to support his right to remuneration together with the indemnity that is conferred on the administrator by ss.443D and 443E in respect of debts and liabilities incurred in the course of the administration. The Court of Appeal held that this lien or security might already be attached to the credit in the company's current account when the consolidation notice was given by the Bank.[42] To the extent of that right of indemnity, the credit in the current account was not available for consolidation and set-off. Precisely what debts of the administrator were covered by the lien is a matter that is yet to be determined in the *Cinema Plus* case;[43] but I notice from the editorial note of the report of the case that the Bank has applied for leave to appeal to the High Court from this aspect of decision against it[44].

8. Freezing bank accounts

This is a convenient place to pass on to the action of a bank in "freezing" the account of a customer by preventing further operations on it. As a general rule a banker is not entitled

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39. *Broad v Commissioner of Stamp Duties* [1980] 2 NSWLR 40, 46. *Wily v Rothschild Australia Ltd* [1999] 47 NSWLR 555, 564-565. *Re Charge Card Services Ltd* [1987] Ch. 150. *Jackson v Esanda Finance Corporation Ltd* (1992) 59 SASR 416, 418. *Re Bank of Credit & Commerce International (No 8)* [1996] Ch. 545, CA.

40. [1998] A.C. 214

41. [1998] A.C. 214.

42. Ibid., at 528 (Spigelman CJ); at 546 (Sheller JA); at 550 (Giles JA).

43. Ibid., at 546.

44. 49 NSWLR 513 (editorial footnote)

to terminate its relationship with a customer without first giving reasonable notice.[45] In *State Bank of New South Wales v Currabubula Holdings Pty Ltd.* (2001),[46] the Bank was held liable in damages at first instance for freezing the company's bank account in breach of what was found to be an implied term, said to arise from the relation of banker and customer, which was that reasonable notice should first have been given of the intention to do so. In fact, notice had been given but of intention to effect an immediate closure of the customer's current account coupled with an invitation to open new current accounts. The Bank therefore could not be said to have terminated its relationship of banker with the customer. This action by the Bank was taken under a provision in the agreement with the customer that the Bank might by notice declare that the finance facilities be cancelled forthwith in the event of any circumstances giving reasonable grounds for the Bank's opinion that there had been a material change in the financial condition of the customer. The Bank in that instance had in fact reason to think the company was insolvent. Reversing the decision at first instance, the Court of Appeal decided, however, that no term requiring reasonable notice to close the accounts could be implied in the relationship of banker and customer.

9. Insolvent companies

The decision calls for closer study than can be offered here; but what is interesting is the brief discussion that appears in the reasons for judgment of Giles JA about why it was thought necessary for the Bank to freeze the current accounts of corporate customers and open new ones. One suggestion was that payments into the account might amount to voidable preferences. My strong suspicion is that it was because of s.468 of the Corporations Law, which has the effect of invalidating dispositions of company property retrospectively to the commencement of the winding up, which is when the application to wind up is made. Banks have long been haunted by a passage in *Paget's Law of Banking*[47] to the effect that honouring a cheque on a corporate customer's accounts involves a disposition by the bank of company property falling within the scope of the prohibition in s.468, and that banks should therefore freeze the customer's account once notice of an application to wind up is received. Basing myself on the decision of Street CJ in Eq. in *Re Mal Bower's Macquarie Electrical Centre*,[48] I

45. *Joachimson v Swiss Bank Corporation* [1921] 3 K.B. 110, 127 (Alkin LJ).

46. Unreported Butterworths Cases (BC 20010099).

47. See 11th ed. (1996), at 207.

48. [1974] 1 NSWLR 254

held in *Re Loteka Pty Ltd*[49] in 1989 that paying such a cheque did not involve a disposition *by the bank* of corporate property so as to disentitle the bank from debiting the customer's account. In England, the courts continued to follow *Paget* and, in *Hollicourt (Contracts) Ltd v Bank of Ireland*,[50] Blackburne J declined to follow my decision and other Australian decisions[51] that had applied it, and instead found support for his conclusion in a decision of the Hong Kong Court of Appeal.[52]

The decision of Blackburne J. has now been reversed by the Court of Appeal in England.[53] In doing so, the Court referred with approval to two passages in the reasons for judgment in *Re Loteka Pty Ltd*, which described the effect of the bank's paying the customer's cheque in such circumstances. They are as follows:

> "The amount standing to the credit of the customer's account is simply diminished thus reducing pro tanto the indebtedness of the bank to the customer. It is the payee of the cheque that receives the benefit of the proceeds of the cheque. All that happens between customer and the banker is an adjustment of entries in the statement recording the accounts between them";

and later

> "although there was a disposition of property of the company, it took place not when the cheques were paid but on the date or dates on which each cheque was issued; and the disponee in each case was not the bank but the particular creditor in whose favour the cheque was drawn and delivered ... [It] is therefore only against those creditors as disponees, and not against the bank, that the disposition of company property is avoided by the operation of [section 468]."

Before leaving the English decision *Hollicourt*, I should offer a word of warning. In *Re Loteka* I was careful to confine my remarks to a customer's account which was in credit at the time the cheque was presented and paid by the bank. In the English case, the Court of Appeal said *obiter* that the same result would follow even if the account was overdrawn. That is so where the bank debits an overdrawn account with payment of a cheque drawn in favour of

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49. [1990] 1 Qd.R. 322; (1989) 15 ACLR 620; (1989) 7 ACLC 998.

50. [2000] BCLC 171; but see *Coutts & Co. v Stock* [2000] 1 WLR 906.

51. *Tasmanian Primary Distributors Pty Ltd v R.C. & M.B. Steinhards Pty Ltd.* (1994) 3 Tas R (NC) N3; (1994) 13 ASCR 92. *Baker v Microdos Computers Australia Pty Ltd* (1996) 132 FLR 129. *Wiley v Commonwealth* (1996) 66 FCR 206.

52. *Bank of East Asia Ltd v Rogeriou Fu Sang Lam* [1988] 1 HKLR 181.

53. [2000] 2 WLR 290.

another person. It is a different matter where a cheque or payment is deposited to the credit of the customer's account, so that the payment is made *into* and not *out of* the account. Such a payment into an overdrawn account reduces the indebtedness of the customer to the bank in the amount of the cheque or payment deposited and to that extent it involves a payment by the customer of its debt to the bank. In Australia the ambit of the voidable preference provisions in insolvency are wider than they are in England (where it is necessary to prove an intention to prefer), and such a reduction in indebtedness to the bank is capable in this country of constituting a voidable preference in the insolvency of a company that is or goes into liquidation.[54] It also constitutes a disposition in favour of the bank of property of the company. That is a potential difference to be borne in mind when considering the English decision in *Hollicourt v Bank of Ireland*,[55] although it does not affect the general thrust of what the Lords Justices of Appeal said in that case about the status of a payment out of an overdrawn account. One should, however, also bear in mind that, in the ordinary way, once a liquidator takes control, the power of directors and others to draw and deliver cheques on the company's account is brought to at an end. Most (but not all) of the cases in point have been concerned with cheques drawn and delivered before, but not presented for payment until after, the commencement of winding up.

10. Conclusions

From the few cases discussed here, it is possible to draw some general conclusions that are perhaps worth mentioning. One is that decisions affecting banker and customer frequently turn up not only in litigation between those parties as such, but also in criminal, and it may be added in taxation and other, cases to which banks are not themselves parties. It is desirable therefore, that banks and those who advise them should keep a watchful eye on decisions of that kind in order to follow current developments in banking law. A second point to be kept firmly in mind is that banking law is primarily a branch of the law of contract and, subject to consumer protection legislation, is capable of being varied in accordance with the express or implied agreement between the banker and the particular customer in question.

A third matter, which is related to the second and which I think bears scrutiny, is that there is a tendency for the banking practices, especially in the keeping of customer accounts, to assume an independent existence of their own, which is capable on occasions of producing

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54. *Re Maran Distributors Pty Ltd* [1994] 2 Qd.R. 45.

55. *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] 2 WLR 190, 301.

a distortion of the true character of what is taking place. Legally speaking, a prominent feature of banking business is that it is a system of continuous recording of credits and debits which is maintained by the banker as evidence of the state of the indebtedness from time to time between banker and customer. This was perhaps more obvious at a time when bankers' books were painstakingly written up by hand than it is now, or is going to be in the future when electronic media completely replace other methods of recording transactions.

It would be a pity if the relative simplicity of banking law, as it is now understood, ends up being obscured by the benefits of the new technology, which, after all, is nothing more than a more efficient method of transmitting and recording the effect of transactions which produce successive credits and debits in the account. That is why I am inclined to deprecate decisions like *R v Preddy*, which seem to approach the processes of electronic recording as if they make a difference of substance to the underlying legal principles involved.