CHAPTER FOUR

A. COMBINING ACCOUNTS

The relationship between banker and customer involves mutual obligations and duties. The duties and obligations are largely implied from an unwritten contract between the parties. Paget[1] aptly summarised the legal nature of banker and customer relationship. He said that the relationship of banker and customer was one of contract even though for a long time that way of looking at the matter seemed not have attracted much attention from the courts.[2]

This relationship consists of a general contract which is basic to all transactions together with special contracts which are brought into being by express acts or implied intentions of the parties. The special contracts include the contract of debtor and creditor,[3] contract of bailor and bailee,[4] trustee and beneficiary,[5] and

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1 M. Megra & Another (Ed) *Paget's Law of Banking* (Butterworths, London 1972 8th Ed.) p.69

2 The contractual relationship was recognised in inter alia. *Sudan Commercial Bank v. El Sadiq Mohammed El Sadiq* 1967 (1). A.L.R Comm 35, *Woods v. Martins Bank Ltd.* [1959] 1 Q.B. 55, *Burnett v. Westminster Bank Ltd.* [1967]3 All E.R. 81. *National Bank of Nigeria Ltd. v. Manja & Others* 1967 (2) A.LR., Comm 327, *National Bank of Nigeria v Fasro (1977)3 OYSHC Part I* p.21. *Esso Petroleum Co. Ltd.* v. *Uganda Commercial Bank*, Civil Appeal No. 14 of 1992, Supreme Court, unreported.

3 *Foley v. Hill* (1948) 2 HL Case 28, *Joachimson v. /Swiss Bank Corporation* [1921] 3 K.B. 110, *Official Receiver and Liquidator v. Moore* (1959) L.L.R. 46, *Johnson (Liquidator of Merchant Bank) v. Odeku* 1967 (3) A.LR. Comm 282 *National Bank of Nigeria v. Adewale Thompson* [1962] 2A All N.L.R. (Part 2-4)36, *London Joint Stock Bank Ltd. v. MacMillan & Another* [1918] A.C. 777.

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principal and agent.[6] The general contract is said to be simple and indivisible and with many facets.[7] It arises the moment the parties agree to enter into contractual relations with each other and continues until brought to an end by consent; by revocation by either party or by the happening of an event that terminates it.[8] It is a contract which is *unwritten and undefined by the parties.* It is only implied. In other words it is a *quasi*-contract.

As Paget[9] went on to explain the exact contents of the contract cannot be stated with certainty and may contain elements which may not be in the contemplation of the customer. But he doubted whether the reverse applied, because the banker must be presumed to be aware of the obligations imposed on him in his own business. From this, can it be said then, that one of the terms of this unwritten contract, which may not be in the contemplation of the customer, *is that the banker has an automatic right to combine or consolidate his customer's accounts*? The corollary to this can also

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4 *Langtry v. Union Bank of London* (1896) J.I.B. Vol. XVII p. 338 1 L.D.B. 209 *B.W.A. v. Boloji Odusomo* (1976) 11 S.C. 55, *Adetoyin & Others v. Bank of the North* (1976)3 O.Y.S.H.C. Part 1, 217

5 *Selangor United Rubber Estates Ltd. v. Cradock* (No.3) [1968 2] All E.R. 1073, *Karak Rubber Co. Ltd v. Burden* (No.2) (1972) 1 All E.R. 1210, *Re Watermans Will Trust, Lloyds Bank v. Sutton* [1952] 2 All E.R. 1954.

6 *Bank of West African v. Balogun* [1970] 1 All N.L.R. 50, *Khartoum v H.W.A.L. & B.W.A. Ltd.* (1961) 1 All N.L.R. 318.

7 *Joachimson v. Swiss Bank Corporation supra* note 3, *Woods v. Martins Bank & Another* [1958]3 All E.R. 166.

8 *Inter alia* death, bankruptcy, insanity and liquidation of a company. See Chapter 10 on termination of Banker and Customer relationship.

9 Megra & Another (Ed.) *Paget's Law of Banking op.cit.* p.69

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be posed as a question. Is there any obligation or duty imposed on the banker to keep his customer's accounts separate?

Lord Denning has given an emphatic positive answer to the first question, and, therefore, by implication a negative one to the second question, in *Halesowen Presswork and Assemblies Ltd. v. Westminister Bank Ltd.*[10] He said:-

> ...suppose a customer has one account in credit and another in debit. Has a banker the right to combine the two accounts? So that he can set-off the debit against the credit and be liable only for the balance? The answer to this question is, Yes. The banker has a right to combine the two accounts whenever he pleases and to set-off one against the other unless he has made some agreement, express or implied to keep them separate.[11]

Prof. Oretuyi[12] reproduces Lord Denning's words with unreserved approval. Swift J. in *Greenhalgh v Union Bank of Manchester*[13], took the opposite view stating that:-

> If a banker agrees with his customer to open two or more accounts, he has not, in my opinion, without the assent of the

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10 [1970] 3 W.L.R. 625

11 *Ibid.* p. 634.

12 S.A. Oretuyi "The Right of A Banker to Combine a Customer's Accounts (1984-1985)2 & 3 *A.B.U.L.J.I*

13 [1924] 2 K.B. 153.

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> customer, any right to move either assets or liabilities from the one to the other; the very basis of his agreement with his customer is that the accounts shall be kept separate.[14]

Since these views have been competing for supremacy, I will examine their validity and, either, reconcile them or ascertain the 'true' legal position. However, it may be that part of the confusion in this area of the law is attributable to the use of legal terms in wrong contexts. This can be illustrated by the statements from the learned authors of *Halsbury's Laws of England.*[15] Under the heading "Combination of Different Accounts" the authors state:-

> Unless precluded by agreement express or implied from the course of business the banker is entitled to combine different accounts kept by the customer in his own right, even though at different branches of the same bank and to treat the balance, as the only amount really standing to his, if any, credit.[16]

Later, under the heading "The banker's lien" the following appears:-

> The general lien of bankers is part of the law merchant as judicially recognised and attaches to all securities deposited with them and to money paid in by or to the account of a customer unless there is a

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14 *Ibid* p.164

15 *Halsbury's Laws of England* 3rd Ed Vol.2

16 *Ibid* p. 172 Para. 322.

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contract express or
with lien.[17]

And under the heading "Set-off or lien on Deposit and Current Accounts" the authors say:-

> Unless precluded by agreement or course of business, a banker is entitled to combine all accounts kept in the same right by the customer whether at the same branch or different branches and to exercise his lien or set-off for the resulting balance.[18]

But the authors have a footnote to the effect that:-

> Money, is however, not usually the subject of a lien not being capable of being earmarked and that bankers' claim in such cases probably more rightly be referred to as set-off.[19]

It is submitted, `combination', `set-off', and 'lien' are erroneously used as synonymous and the rights of set-off and combination have been regarded as examples of a banker's lien. But the two conceptions are not the same.[20] The distinction between them was judicially recognised by Lord Denning M.R. in *Halesowen*

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17 *Halsbury's Laws of England op.cit.* p. 210 Para 390

18 Ibid at p. 213 Para 395.

19 *Ibid* p. 210 (footnote)

20 Smart P.E. (Ed.) Chorley & Smart *Leading Cases in the Law of Banking op.cit.* p. 235.

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Presswork and Assemblies Ltd v. Westminster Bank Ltd[21] when he said:-

> Seeing that the banker's lien is no true lien, in order to avoid confusion ...we should discard the use of the word lien in this context and speak simply of a banker's right to combine accounts or a right to "set-off" one account against the other.[22]

Although Lord Denning differentiated between a banker's lien on one hand and 'set-off' and 'combination' on the other, it is submitted that, the last two terms are not synonymous either. In the words of Buckley L.J. in the same case:-

> Where the relationship of the banker and customer is embodied in a number of accounts, the situation is not a situation of lien at all. A lien postulates property of the debtor in possession of or under the control of the creditor. Nor is it a set-off situation which postulates mutual but independent obligations between the two parties. It is an accounting situation in which the existence and amount of one party's liability to the other can be ascertained by discovering the ultimate balance of their mutual dealings.[23]

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21 [1970] 3 W.L.R. 625.

22 *Ibid* p.634

23 *Ibid* p.645.

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B. BANKER'S LIEN

A lien is the right to retain property belonging to a debtor until he has discharged a debt due to the retainer of the property.[24] A lien may be particular or general. The former arises from a specific transaction which is connected with the property subject to the lien while the latter arises from both the particular transaction and also out of the general dealing between the parties in regard to other transactions of a similar nature. This being the case, the use of the word ought to be restricted to the bankers' right over *securities* deposited with bankers to secure a customer's indebtedness. It is not a common law right but part of the law merchant which has been judicially recognised.[25] Generally, the banker's lien does not require express agreement but is implied from the business relations of the parties.

I have suggested[26] that the use of the word lien should be restricted to securities deposited with the bankers to secure advances to customers. The reason is that "a banker does not have nor can have a lien over a customer's credit balance".[27] Money is not a subject of a lien because it is not capable of being earmarked.[28] Thus in *Re Morris Coneys v. Morris*[29] the Court specifically held

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24 See Drover & Another (Ed.) *Sheldon's Practice and Law of Banking* (Mcdonald & Evans London 1972)10th Ed. P.328.

25 *Davis v Bowsher* (1794) S.T.L. 480, *Holland v. Bygraves* (1825) RY & M270, *Giles v. Perkins* (1807)9 East 12.

26 Above.

27 Drover and another [Ed.] *Sheldon's Practice and Law of Banking op.cit* 330.

28 *Halsbury's Laws of England* p.210 *Paget's Law of Banking op.cit* p. 504.

29 (1922) I.I.R. 136

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that a banker *has no lien* in respect of a customer's account. Similarly, in *Giles v. Perkins*[30], Lord Ellenborough stated that if a banker *discounts a bill* or advances money upon its credit, he acquires the entire property in it or has a lien upon it for his advance. Sir Charles Abbott C.J. took the same stand in *Bolland v. Bygraves*[31] that a banker has a lien upon any securities of a customer which may for any purpose be placed in his hands, and he has a right to retain them to countervail the liabilities he has so incurred on his behalf till those liabilities have ceased. The House of Lords, albeit *obiter*, expressed similar views in the leading case of *Brandoa v. Barnett*.[32] It was said that the bankers have a general lien *on all securities* deposited with them as bankers by a customer unless there is an express contract or circumstance which is inconsistent with a lien. In other words, the banker has a lien on securities *and not on money*. As Buckley L.J., in *Halesowen Presswork and Assemblies Ltd. v. Westminster Bank*,[33] said:-

> "It has long been recognised that a banker has a general lien on all securities deposited with him as a banker by a customer unless there be an express contract or circumstances that show an implied contract inconsistent with lien. The term 'securities' is no doubt here used in a wide sense, but it

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30 (1825) RY & M272 at 273.

31 (1846)3 C.B. 519 (H.L.) See also *Davis v Bowsher* 1794 S.T.L 480

32 [1843-60] All E.R. Rep. 719.

33 *Halesown Presswork & Assemblies v. Westminister bank* [1970]3 WLR 625.

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> does not... extend to the banker's own indebtness.[34]

Lord Cross of Chelsea in the House of Lords explained the origin of the banker's lien in the following passage:-

> It may be that as a matter of history the recognition by the courts of the right of the banker to treat several accounts as one was influenced by earlier recognition that in the absence of agreement to the contrary a banker had a lien on all securities in his hands for the general balance owing to him on all accounts. But to describe the right to consolidate several accounts as an example of the banker's lien is a misuse of language.[35]

In view of what has been said above, Lord Hatherley's *obiter dictum in Curie V. Misa*[36] cannot be correct in law. In that case[37] his Lordship said:-

> Misa must have been perfectly well aware that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker may be subject, on the banker's part to a lien in

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34 *Westminster Bank v. Halesowen Presswork & Assemblies Ltd.* [1972] 2 W.L.R. 45 pp.468-469.

35 (1876) App. Cases. 554.

36 (1876) 1 App. Cases. 554

37 [1970] 3 W.L.R. 625.

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> respect of balance that may be due to him from his customer.[38]

A lien attaches to instruments deposited with the banker as security and not the customer's balances. In fact Lord Hatherley's statement had been questioned by Paget. When commenting on *Curie v. Misa*[39], he said:-

> It is somewhat difficult to see how in ordinary cases money could be the subject of a lien, it would usually be incapable of identification; or if earmarked would be deposited either for safe custody or as specific security, conditions equally excluding the idea of lien. And the application of the principle of lien to money paid to the bank is complicated by the consideration that such money when paid in constitutes a mere debt of equivalent amount from the bank to the customer, and a debt is not a suitable subject for a lien. The money is the banker's to do as he likes with but he is under an obligation to repay the debt on demand.[40]

Paget's views have now received judicial backing. In *Halesowen Pressworks and Assemblies Ltd. v. Westminster Bank,*[41]

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38 *Ibid* at p.560, Also *Mayesi v. National Bank of Commerce* (1976) 2 A.L.R. COMM. 25 at p. 29.

39 Megra & Anor (Ed) *Paget's Law of Banking op.cit.* 504.

40 *Ibid*

41 (1970) 3 W.L.R. 625.

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there is a strong *obiter dictum* by Buckley L.J. to the effect that:-

> Money or credit which the bank obtained as a result of clearing the cheque became the property of the bank not the property of the company. No man can have a lien on his own property and consequently no lien *can have* arisen affecting that money or that credit.[42]

Another case which is often cited as establishing a banker's general lien is *Barclays Bank Ltd. v. Astley Industrial Trust Ltd*[43] But, this case decided *inter alia*, that the plaintiffs who were the bankers of the payee had by the implication of the law a lien on all cheques coming into their possession from the payee to the extent of the payee's indebtedness to them. Therefore, by virtue of Section 27(3) of the *Bills of Exchange Act*_1882 (U.K.) the plaintiffs were deemed holders of the cheque for value to the extent of the payee's overdraft. The case of *Re Keever*[44] which is also often cited in support of the banker's lien is not a case of a lien at all but one of set off; and it will be discussed later. Two other cases should be mentioned here because of their importance in illustrating the confusion in the use of the words `lien', 'set-off' and 'combination'. The first one is in *Re European Bank, Agra Bank Claim*[45] In this case the Oriental Commercial Bank had kept three separate accounts at Agra Bank, namely a loan account, a discount account and a general account. They from time to time received advances from Agra Bank which were entered in the loan account and to meet which they deposited securities with Agra Bank. In the course

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42 *Ibid* at p.645.

43 [1970] 2 Q.B. 527.

44 [1967] Ch. 182.

45 (1872) 8 Ch. App. 41.

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of the transactions the Oriental Commercial Bank deposited three bills of exchange with Agra Bank. The Bills were accompanied by a letter stating that they proposed to draw upon them for £10,500, but that their credit would not afford a margin to that extent. They sent the bills as collateral security. The bank became insolvent and was wound up. The *ratio* of the case is contained in the following passage of Sir W.M. James L.J:-

> But when we look at the books it is clear that there was no particular reason for treating these three accounts as distinct matters. It was only for convenience that the loan account was kept separately. It was admitted by the appellant that the bills in question might have been applied to discharge the basics of the loan account without regard to the particular transaction in respect of which they were deposited. In truth *as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account* and it is not open to the customer, in the absence of some special contract to say that the securities which he deposited are only applicable to one account.[46]

It is *unfortunate* that the underlined words are the ones often quoted to support the proposition that the banker has a right to combine a customer's accounts. But the context in which they appear and the circumstances of the case do not give those words the interpretation often put on them. It is also stated in the headnote that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien

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46 *Ibid* at p.44. Emphasis added.

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on the securities deposited by the customer for the general balance. And that the balance of the loan account being satisfied the Agra Bank could retain the bills for the balance for the general account. There is nothing in this case which suggests that the banker has an automatic right to combine accounts or that he has a lien on the customer's balances but that, *a banker has lien on the securities deposited with him to cover the customer's indebtedness.* In any case the customer was insolvent so that the bank had a legal right of set-off. Therefore, with the greatest respect, Lord Denning was not correct when he cited[47] this case to support his generalised proposition of the banker's automatic right to combine the customer's account whenever he pleases.

The terminological confusion between a 'banker's lien' and `set-off' is brought out more glaringly in *T. & H. Greenwood Teate O. Williams v. Williams Brown & Co.*[48] The plaintiffs, solicitors, had three accounts. An office account, deposit account, and a private account. The deposit account was to be for clients' money. Subsequently, it was closed down and transferred to the office account into which they paid clients' money. The office account was overdrawn. The plaintiffs brought an action for money had and received by the defendants to the use of the plaintiffs. But strangely enough the question arose as to whether the banker had a right of set-off'. In answering this question, Wright J. held that apart from the exceptions which he stated, a banker with whom several accounts are kept has a `lien' upon all the accounts. The case totally confused the term `lien', `set-off' and "combination of accounts". In view of what has been discussed above regarding a banker's lien and what will be discussed below; and in view of the decision in

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47 *Halesowen Pressworks and Assemblies Ltd. v. Westminster Bank op.cit* at p. 634.

48 (1894 -1895) 11 T.L.R. 56.

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Halesowen Pressworks and Assemblies Ltd, v. Westminster Bank,[49] this case seems no longer to be good law. With due respect to Lord Denning, *T. & H. Greenwood Teate v. Williams Brown & Co.*[50], was not an appropriate authority for the proposition that a banker has an automatic right to combine accounts whenever he pleases[51], and it is not a good authority for the banker's lien or right of set-off.

C. SET-OFF

A set-off is a legal right according to which a debtor will take into account a debt owing to him by a creditor when he is required to settle the debt. Or, as it was put by Lord Cross of Chelsea:-

> ...when there have been 'mutual dealings' between the debtor and someone who claims to prove as a creditor an account of mutual dealings shall be taken, there shall be set-off of the sums mutually owing and it is only the balance that the creditor is to pay or prove for as the case may be.[52]

He went[53] on to explain that the rule of set-off, in bankruptcy, is a rule for the benefit of the man who has had mutual

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49 [1972] 2 WLR 455.

50 *Ibid.*

51 *Ibid.*

52 *Halesowen Presswork and Assemblies Ltd. v. Westminster Bank op.cit* p. 634.

53 *Westminster Bank v. Halesowen Presswork and Assemblies Ltd.* [1972] 2 W.L.R. 455 at pp.468-469.

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dealings with the bankrupt. The rule arose to prevent injustice of such a man having to pay in full what he owed in respect of such dealings while only receiving a dividend on what the bankrupt owed him in respect of them. It was a rule which was applied by commissioners in bankruptcy before it received statutory sanction. As can be gathered from its history the right of set-off was developed by bankruptcy courts as part of the common law and it is now a statutory right. It is therefore, not a rule which is peculiar to bankers. Every debtor has this right as far as mutual dealings between him and an insolvent creditor are concerned. It is submitted that it would reduce confusion in the law, if the right of set-off is restricted to insolvent customers; whether natural or legal persons.

Upon a receiving order being made[54] or less certainly, but what in practice should be the case, upon the commission of an act of bankruptcy,[55] the bank is entitled to terminate the banker and customer relationship and exercise his right of set-off. In fact some of the cases that are said to be based on the banker's lien or right to consolidate or combine accounts are merely instances of the banker exercising his legal right of set-off.

Lord Denning cited the case of *in Re Keever (Bankrupt)*[56] in support of his proposition that a banker has an automatic right to combine accounts. They can combine accounts on bankruptcy. That the banker's lien applied in respect of the balance on all accounts between the bank and the customer including a loan account when the bankruptcy of a customer had intervened. But actually the court is using the words 'combine' and 'lien' to mean set-

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54 *Ibid* p. 471

55 *Re City Equitable Fire Insurance Co.* (1930)2 Ch. 293 at 310.

56 *Halesowen Presswork Case op.cit* p.634.

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off. The banker was simply exercising his statutory right of set-off. Similarly, the case of *In Re European Bank Agra Bank Claim*[57] could have been treated as one of set-off. But in the circumstances of that case the use of a banker's lien was also appropriate as the case involved securities deposited to cover the indebtedness of a customer that had become insolvent. A good example of set-off is provided by the case of *Mutton v. Peat*.[58] Stockbrokers had a loan account and a current account with their bank. When they went bankrupt their current account was in credit and the loan account in debit. It was held that the two accounts should be treated as one so they could use the securities to satisfy the difference between those two balances.

Similarly, in winding up of company customers bankruptcy rules apply by virtue of Section 314 of the *Companies Act*[59] This can be illustrated by *British Guiana Bank v. Official Receiver*[60] and *Halesowen Presswork and Assemblies v. Westminster Bank*[61]. In the first case a company which was indebted to a bank on a current account opened another account under a written agreement which provided that the bank would not, without the consent of the company, appropriate any of the funds which might at any time be standing to the credit of the new account in reduction of the debit then due to the bank.

A few years later the company wound up. A large sum was still outstanding on the original account and there was a substantial

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57 (1872) 8 Ch. App. 41.

58 [1900] 2 Ch. 79.

59 Cap. 85.

60 (1911) 104 LT. 754.

61 [1970] 3 WLR 625.

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balance on the second account. Despite the agreement, the Privy Council held that the bank had the right of set-off of one account against the other. And according to the second case the parties cannot contract out of this statutory right.

It is suggested that the banker's right of set-off ought to be confined to the cases of bankruptcy for the following reasons. The Bankruptcy Act[62] provides that where there has been mutual credits or other mutual dealings between the debtor against whom a receiving order has been made and another person who proves or claims to prove a debt under the receiving order, an account must be taken of what is due from each party to the other in respect of such mutual dealings and the respective sums being set-off one against the other, the balance can be claimed. Since this section is mandatory and parties cannot contract out of it, it means that all accounts including a loan account,notwithstanding any agreement to the contrary, can be set-off one against the other. The only exceptions would be a trust account and less certainly a joint account which, would, to the knowledge of the bank contain money belonging to a third party. In these cases it would be difficult to say that the account constitutes mutual credits or mutual deadlings. The banker, according to the Act, will only lose the benefit of set-off if at the time when he gave credit to the debtor had notice of an available act of bankruptcy committed by the person. Therefore, even though it has been judicially decided that the right of set-off arises on the date of the receiving order,[63] an available act of bankruptcy will in practice, stop the accounts[64]. In the absence of a

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62 Cap. 71. S. 35.

63 *T & H. Greenwood Treat v. Williams and Williams Brown* (1894)-1895)11 T.L.R. 56, *Barclays Bank Ltd. v. Qusitclose Investments* [1970]A.C. 567 *Re Cross, Exparte Kingston* (1871)6 Ch. App. 63, *Re Kayford Ltd.* [1975]1 W.L.R. 279.

64 *Re City Equitable Fire Insurance Co.* [1930]2 Ch. 293 at 310.

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receiving order or at least an available act of bankruptcy, it is not easy to see how a banker can have a right of set-off.

A customer gets an advance either by the bank opening a loan account for him or permitting him to overdraw his account. The bank cannot, without the consent of the customer[65] and/or the giving of due notice, move assets from a current account which is in credit to cover liabilities on the loan account[66] unless an event has intervened to stop the accounts.[67] In the case of an overdraft, where there is an express agreement for it, the banker must adhere to the terms of that agreement because a party to a contract cannot unilaterally vary its terms.[68] Therefore, a banker could not on his own adjust his customer's accounts because that will amount to withdrawal of overdraft facilities, and, therefore a breach of contract.[69] Where there is an implied agreement for an overdraft[70] the banker cannot move assets from one account to meet the liabilities in another without first making a demand. A demand is a

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65 *Bradford Old bank v. Sutcliff* [1918]2 K.B. 833 at 247.

66 *Buckingham & Co. v. London and Midland Bank Ltd.* (1895) 12 T.L.R. 70.

67 *In Re Keever* [1967] Ch. 182.

68 *Rouse v. Bradford Banking Co. Ltd.* [1965]3 All E.R. 81, *National Bank of Nigeria Ltd. v. Manja & Others* (1967) (2) A.L.R. Comm. 327. *National Bank of Nigeria v. Fasoro* (1977)3 O.Y.S.H.C. Part 1, 21.

69 *Burnett v. Westminster bank Ltd.* [1965]3 All E.R. 81, *National Bank of Nigeria v. Fasoro (1977)3 O.Y.S.H.C. Part 1, 21.*

70 *National Bank of Nigeria v. Fasoro op.cit., Oyewole v. Standard Bank of West Africa* [1968]2 All N.L.R. 32.

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condition precedent to the liability to pay[71]. Under these circumstances, it is submitted, the bank, in the absence of a receiving order or at least an available act of bankruptcy, has no right of set-off. Therefore, those who have asserted that the banker's, right over a customer's credit balance is right of set-off, are not strictly speaking legally correct. Such a right, if it exists at all, should be called combination or consolidation of accounts.

D. COMBINATION OR CONSOLIDATION OF ACCOUNTS

The words combination or consolidation of accounts in banking law have yet to receive a satisfactory judicial definition. But according to Buckley L.J. "It is an accounting situation in which the existence and amount of one party's liability to the other can be ascertained by discovering the ultimate balance of their mutual dealings".[72] The use of the phrase `mutual dealings' which belongs to the law of bankruptcy, might cause confusion by equating combination of account with set-off. Therefore, combination or consolidation of accounts ought to be limited to *an accounting situation whereby a banker might treat two or more accounts opened between his customer and himself as though they were one whole account, entirely under his control by reason of "which he might remove assets from one account to meet deficiencies in the other*"[73]. Using this definition, as a guide, an attempt will be made to answer the question posed earlier on whether a banker has an automatic right to combine or consolidate his customer's accounts.

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71 *Cutbert v. Roberts, Lubbock & Co.* (1909)2 Ch. 226 at 233 *African Continental Bank v. Babayemi & Ogunlende* 1969 N.C.L. 176 *African Continental Bank v. Eke* 1969 N.C.L.R. 292.

72 *Halesowen Pressork and Assemblies Ltd v. Westminster Bank Ltd op.cit* p.645

73 *Halesowen Presswork and Assemblies Ltd. v. Westminster Bank op.cit* at p. 645.

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It must be emphasised, however, that the general contract between a banker and a customer is implied. It follows that its terms are also implied largely from trade usage or custom if they have not been expressly or impliedly excluded by a written contract. A trade usage, in this case bankers custom, is a particular course of dealing between parties who are in a business relationship.[74] That course of dealing has to be so generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of dealing and to have incorporated it into their contractual relationship unless by agreement it is expressly or impliedly excluded.

Therefore, before one can say that the bank has a right to combine accounts, it must be proved that the custom of bankers recognises such a right and is incorporated into the contract between a banker and customer unless expressly or impliedly excluded.[75] It is submitted that the same result would be achieved if it could be proved that the law merchant (bankers custom) placed no obligation or duty on the banker to keep his customer's accounts separate. The proof of one excludes the other. Lord Chorley is of the view that *prima facie*, the banker has a right to combine.[76] The learned author of Halsbury's Laws of England[77] say that in the absence of express or implied agreement to the contrary the banker is *entitled* to combine different accounts kept by the customer. This is endorsed by Prof. Oretuyi.[78] Sheldon[79] is more circumspect and

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74 *Ibid.* Per Winn L.J. at p. 639.

75 *Harilala Shah & Another v. Standard Bank Ltd.*, 1967 A.L.R. Comm. 209.

76 Lord Chorley Law of Banking (6th Ed. 1974) p.218

77 *Haalsbury's Laws of England op.cit* p.172 para 322

78 S.A. Oretuyi *Supra* note 12.

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merely says that a banker apart from all express or implied agreement to the contrary may combine accounts. He further qualifies his statement by adding that *as it might be difficult to prove that there was no implied agreement to keep the accounts separate*, it is advisable for the banker to make an agreement authorizing him to combine at any time without notice. Paget[80] leaves the question open. He says that whether there is any agreement or obligation to keep the accounts separate is a matter of evidence. In the absence of the evidence to the contrary, the right to combine without notice should be insisted upon for the necessity for combination derives from some act or omission on the part of the customer. He further states that a customer may insist on his account being kept separate and can hardly complain if he fails to exercise the right, and the banker combines because the matter is essentially within the customer's control.

Paget[81] and Sheldon[82] seem to recognise that the banker is under an implied duty or obligation to keep the customer's accounts separate. According to Sheldon[83], it may be difficult to negative this duty but if it can be negatived the banker will have a right to combine. According to Paget[84], it is up to the customer to enforce his right to have his accounts kept separate. If by commission or

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79 Drover & Anor Ed. *Sheldon's Practice and Law of Banking op.cit* p.91.

80 Megra & Another (Ed) *Paget's Law of Banking op.cit* pp.634-635.

81 *Ibid.*

82 Drover and Another (Ed.) *Sheldon's Practice and Law of Banking op.cit* p.91.

83 *Ibid.*

84 Megra & Anor (Ed) *Paget's Law of Banking op.cit* p. 139

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omission, he does not insist on his right, the banker can combine. Whether the banker in any particular case will combine or keep the accounts separate will depend on the facts of each case to be proved by calling the necessary evidence. If there is no express or implied agreement, then it has to be proved like any other trade usage or custom (law merchant). In fact, Paget and Sheldon's views seem to find support in the words of Bramwell B. in *Garnet v. Mckewan*[85] who implied that "Combination of accounts" was allowed in that case because the customer neglected to enforce his right to keep his accounts separate. They are also supported by Swift J.'s dictum in *Greenhalgh & Sons v. Union Bank of Manchester*.[86] In this case it was argued, *inter alia*, that the relation of banker and customer entitled the banker to deal with different accounts of the customer as being one whole and entirely under his control on the basis that the banker has a 'lien' over all assets so that he might remove assets from the one account to meet deficiencies in another. The learned judge in answer to this submission said:-

> I cannot accept this proposition. If a banker agrees with his customer to open two or more accounts, he has not, in my opinion, without the assent of the customer any right to move either assets or liabilities from the one to the other, the very basis of his agreement with his customer is that the two accounts shall be kept separate.[87]

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85 See (1861 - 73) All E.R. 686 at p.691.

86 [1924] 2 K.B. 153.

87 *Ibid*. p. 164.

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This *dictum* was commented upon approvingly by the Nigerian Federal Supreme Court in *British and French Bank Ltd. v. Opeleya*[88]:-

> "Apparently, as one may infer from the opening part of that passage, the agreement to keep the two accounts distinct and separate is inherent in the fact that the banker agreed with his customer to open two or more accounts."[89]

However, Lords Winn[90], Denning[91] and Kilbrandon[92] and Prof. Oretuyi[93] take the view that this is incorrect or at least doubtful. Winn L.J. said that Swift J's *dictum*, though emphatic is of considerably less weight. Lord Denning said:- "I do not think that dictum is correct. It is quite contrary to the long line of cases which show that a banker is entitled to combine two accounts unless there is an agreement to keep them separate. The mere opening of two accounts does not do it"[94]. Lord Denning's views were endorsed by Lord Kilbrandon[95] in the House of Lords and he is supported by Prof. Oretuyi[96]. The long line of cases referred to by

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88 [1962] 1 All N.L.R. (Part I) 26.

89 *Ibid.*

90 *Halwsowen Presswork and Assemblies Ltd.v. Westminster Bank op.cit* p. 639.

91 *Ibid* at p. 635.

92 *Halesowen Presswork and Assemblies Ltd. v. Westminster Bank op.cit.*

93 Oretuyi *op.cit* passim

94 *Supra* note 90

95 *Supra* note 91. The other Law Lords Profferred no comments.

96 *Supra* note 12.

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Lord Denning consists of in *Re European Bank Agra Bank Claim*,[97] *T. & H. Greenwood Teate v. Williams and Williams Brown & Co.*[98] , *Re Keever*[99] *and Garnet v. Mckewan*[100]

With the greatest respect to *the Learned Law* Lords and Prof. Oretuyi, those cases are of doubtful authority. *European Bank Agra Bank Claim*[101] is not a case of combination of accounts but a case of set-off in accordance with the rules of bankruptcy and *the banker's lien on securities* deposited to cover an indebtedness. *T & H. Greenwood Teate v. Williams and Williams Brown & Co*[102] was wrongly decided in so far as the court seems to think that a banker's lien attaches to money. It has already been argued above, that a lien only attaches to securities or documents which come into the hands of the banker in the ordinary course of business. It is also worth noting that the action was for money had and received by the defendant to the use of the plaintiffs. In *Re Keever*[103] is another case of bankruptcy and therefore, strictly speaking, the court there was talking about the banker's, legal right of set-off and not combination or consolidation of accounts. Before discussing *Garnet v.Mckewan*[104] a few other cases deserve a comment because they are often cited in connection with the banker's right to combine

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97 (1872) 8 Ch. App.41

98 (1894-95) 11 T.L.R. 56.

99 [1967] Ch. 182.

100 (1872) L.R. s Ex. 10, 27 L.T., 560 [1816 - 73] All E.R. 686.

101 *Supra* note 97.

102 *Supra* note 98.

103 *Supra* note 99.

104 *Supra* note 100.

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accounts. One such case is Re [illegible] case rested upon an agreement express or implied which was held to be valid to control the relationship between the banker and the customer, that the banker should not for his own purposes treat two accounts (one of which was frozen) as though they were one or take the money from one account to pay himself in respect of another. This decision is difficult to understand and can be criticised on a number of grounds.[106] In any case, as the case involved the winding up of a company customer the decision is of doubtful authority, for although the banker could not combine, he had a statutory right of set-off, notwithstanding any agreement between the parties.

In *Halesowen Pressworks and Assemblies Ltd v Westminster Bank Ltd*[107], where there was a similarly frozen current account, the House of Lords said that the bank was entitled to set-off a frozen account "with the active current account when the banker customer relationship was ended by winding up of the company"

The other cases that are always cited in this connection are *Brandford Old Bank Ltd. v. Sutcliffe*[108] *and Buckingham & Co. Ltd. v. London Bank Ltd.*[109]. But in these two cases the bank was precluded by the course of business from combining the loan accounts and current account. In *Bradford Old Bank Ltd. v.*

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105 [1962] Ch. 21. See also *Roxburghe v.Cox* (1881) Ch. D. 520.

106 See. Smart (Ed) *Chorley & Smart. Leading Cases in the Law of Banking op.cit* p. 379

107 [1972] 2 W.L.R. 455.

108 Smart (Ed.) op.cit.233.

109 (1918) 2 K.B.N. 833.

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Sutcliffe[110], which has been quoted with approval by Prof. Oretuyi, Scrutton LJ said:

> The sums paid into the current account are appropriated to that account and cannot be used by the bank in discharge of the loan account without the consent of the customer. No customer could otherwise have any security in drawing a cheque on his current account if he has a loan account greater than his credit balances on the current account[111]

Actually there is no reason why it should make any difference whether the account is a loan account or not. The above statement restates, the general law as to appropriation of payments as laid down by Lord Shaw of Dunfermaine in *Deeley v. Lloyds Bank Ltd.*[112] that:-

> According to the law (of England) the person paying the money has the primary right to say what account it should be appropriated, the creditor if the debtor makes no appropriation, has the right to appropriate; and if neither exercise the right of appropriation, one can look on the matter as a matter of account and see how the creditor has dealt with the payments in order to ascertain how in fact he did

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110 (1918) 2 K.B. 833.

111 Oretuyi S.A. *op.cit*. 2:

112 [1912] A.C 756 at p.783.

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appropriate it. And if there is not more than a current account, or a particular account, kept by the creditor and he carries the money to that account, then the court concludes that the appropriation has been made, and having been made, it is made once for all and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation.[113]

In fact, it is submitted, that it should not lie in the mouth of the debtor unless an event intervenes to stop the accounts, to seek to vary the appropriation. It has been argued, quoting *In Re European Bank, Re Agra Bank Claim*[114], that as "between banker and customer whatever number of accounts are kept in the books the whole is really but one account done for the convenience of the customer. That, therefore, the mere opening of two accounts does not impose a duty on the banker to keep the accounts separate.[115]

The same reason, "Convenience", is given to justify the bank insisting on paying the customer's cheques at the branch of the bank where he keeps his account and according to the Privy Council, quoting *Garnet v. Mckewan*[116], in *Prince v. Oriental Bank Corporation*;[117]

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113 *Ibid.*

114 (1872) 8 Ch. App. 41, But in *Mutton v. Peat* (1902)2 Ch. 79, L.T. 441 at 441. It was said "as between banker and customer all accounts make but one account (which is true for certain purposes)".

115 *Garnet v. Mckewan* (1872) L.R. 8 Ex. 10 at 14.

116 *Ibid*

117 (1878) App. Cas. 325.

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> The position of branch banks is that in principle and in fact they are agencies of one principal banking corporation or firm notwithstanding that they be regarded as distinct for special purposes that of entitling the banker to refuse payment of a customer's cheque except at the branch where he keeps his account[118]

From what has been said above, it would appear that the law on appropriation of payments presupposes an obligation on the part of the banker to keep the accounts separate for by combining he would be varying the creditors appropriation. The rationale for keeping the customers loan account and current account separate applies with equal force to other types of accounts. After ruling that the agreement to keep accounts separate is inherent in the fact that the banker agrees to open two or more accounts, the Federal Supreme Court of (Nigeria) gave the following plausible justifications;

> If he may merge them without notice, one can see that it may do him great harm. Suppose for example, that the customer has a private account and a business account; that the business account has funds but the other is in debit; the customer not knowing what the bank has done or will do gives cheques on his business account to pay trade debts, say for goods bought, if the bank does not honour them on presentment, it will do him harm.[119]

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118 *Ibid* at pp.332-333.

119 *British and French bank Ltd. v. Opeleye op.cit* at pp.29-31.

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Prof. Oretuyi[120] rejects this argument by quoting Bramwell B's words in *Garnet v. Mckewan*[121] that the refusal of the bank to honour cheques is more apparent than real because to limit a customer's drawing to his total actual balance is no hardship on him for he always knows and can always if he wishes to know, the state of his account as a whole. But, a similar argument can also be advanced in respect of a loan account and a current account. As Sir W.M. James said it is also for convenience that the loan account is kept separate.[122] In any case Dr. Oretuyi's objections do not seem to take into account the fact that it is an implied duty of the banker to keep the customer's statement of account accurate[123] and the customer is under no obligation to check his passbook or statement of account.[124] If Prof. Oretuyi's[125] assertion that the 'customer knows' or at least ought to know the state of his accounts is correct in law, then the cases which have decided that the bank cannot debit the customer's account who has drawn money from a negligently over credited account were wrongly decided. It is submitted that even the loan account and current account are kept separate for convenience. As W.M. James L.J. said:

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120 Oretuyi *op.cit* p.5.

121 (1872) L.R. 8 Ex. 10 at p.15

122 *In Re European Bank Agra claim Bank* (1872-73)2 Ch. App.41 at p.44.

123 *Holland v. Manchester & Liverpool District Banking co. Ltd.* (1909) 25 T.L.R. 386, *Skyring v Greenwood* (1824-34) All E.R. Rep. 1104 *Lloyds Bank Ltd.* v. *Brooks* (1950) L.D.B. 161.

124 *Chatterton v. Londong and Country Bank*, e & s (5th Ed.) 152, *Kepitigalla Rubber Estates Ltd. v. National Bank of India Ltd.* [1909] 2 K.B. 1010 *Nigerian Advertising Service v. U.B.* 1968 (1) A.L.R. Comm.6.

125 *Supra* note.

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> But when we look at the books, it is clear that there was no particular reason for treating these three accounts as distinct matters. It was only for convenience that the loan account was kept separately.[126]

Therefore, a customer should not be inconvenienced by a banker arbitrarily combining his accounts. A banker advances money to the customer either by allowing him to overdraw his account or by borrowing on a separate account known as a loan account. It is submitted that there is no good reason for treating the two forms of borrowing differently. Unless, of course, the loan account is opened only for businessmen and overdraft is granted largely to non-trading customers. But that this is not the case was clearly pointed out by the Lord Cross when he said:

> If the banker permits his customer to have two accounts one sometimes called a loan account which records the indebtedness of the customer to the banker in respect of advances made to him and the other a current account which the customer keeps in credit and *uses for the purposes of his trade or business or ordinary expenses then unless the bank makes it clear to the customer that it is retaining the right any moment to apply the credit on current account in reduction of the debt on the loan* account it will be an implied term of the arrangement that the bank will not as long as it lasts consolidate the two accounts.[127]

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126 *Re European Bank, Agra Bank claim* (1872) 8 Ch. App. 41 at p.44.

127 *Westminster Bank Ltd. v. Halesown Presswork & Assemblies op.cit* at p. 467-68.

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It ought to be emphasised here, that Lord Denning's statement that there must be an agreement to keep the accounts separate and that the "mere opening of the accounts does not do it"[128] is, with due respect, widely stated. As the above passage says the opening of a loan account and current account implies keeping them separate unless expressly agreed otherwise. Furthermore Lord Denning's and Prof. Oretuyi's[129] assertion that the banker has an automatic right to combine accounts at any time, in the absence of an agreement to the contrary, seems to be denying, albeit impliedly, that it is an implied duty that the banker will not cease to do business with the customer except upon reasonable notice[130] and after making satisfactory provisions for outstanding cheques before closing an account[131]. This point was clearly discussed by Lord Cross, whose words deserve to be quoted in full:-

> The choice as I see it lies between a notice taking immediate effect and no notice obliged to honour cheques drawn up to the limit of the apparent credit balance before the company became aware that the bank was consolidating the accounts and so it might be said that notification to the customer was not a condition precedent to the exercise by the bank of its right of consolidation but only a measure of precaution which the bank might take to end its liability to honour cheques. But as counsel for the company pointed out, until the company knew that

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128 *Halesowen Presswork and Assemblies Ltd. v. Westminster Bank Ltd. op.cit* at 635.

129 Lord Denning *Ibid* at 634, Oretuyi *op.cit* R.L.

130 *Westminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd. op.cit* at p.468.

131 *Re European Bank Ltd, Agra Bank claim* (1872)8 Ch. App. 41

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the bank was putting an end to the agreement might go on paying cheques into the account which it would have paid into an account at some other banks if it was aware of the true position. So, for my part, I incline to the view favoured by Buckley L.J... that the bank could not consolidate the accounts on a material change of circumstances in four months' period without notifying the company that it was doing so and also subject to the liability to honour cheques drawn up to the limit of the credit balance before the company received notification.[132]

Smart makes the following pertinent observations on the issue of notice:[133]

It is true that the customer usually knows well and often before the banker of his act or omission that justifies combining; it is true also that a banker will often have difficulty with customers who issue cheques after receiving notice, taking care to antedate them. But Lord Cross's view, although strictly *obiter*, must carry great weight, and it seems unlikely that bankers can rely in the future on the authority of *Garnet's* case in this matter of notice.[134]

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132 *Westminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd.* *op.cit* at p.468

133 Smart *Chorley and Smart Leading Cases in the Law of Banking* 5th Ed *op.cit* p.223.

134 Smart P (Ed) *Chorley & Smart Leading cases in the Law of Banking* op.cit p. 223?

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If the banker has to give notice before he can combine a customer's accounts, then it cannot be said that he has an automatic right to combine. Notice becomes a condition precedent to combination which also recognises the banker's duty not to cease to do business with the customer except upon notice; unless of course an event intervenes to stop the accounts.[135]

The most important case in Lord Denning and Prof. Oretuyi's 'long line of cases is *Garnet v Mckewan*.[136] *Garnet v. Mckewan*[137] is a curious decision. The facts given by textbook writers[138] and the headnote to the case are that a customer drew cheques against his credit balance at one branch of the bank. At another branch he was indebted to an amount almost as great as the credit balance at the first branch and the bank without notice to him combined the balances and dishonoured the cheques. The court held that they were entitled to do so.

If these were the actual facts this case would be an unassailable authority for the proposition that a banker in the absence of an agreement or course of dealing to the contrary is entitled to combine the customers' accounts even at different branches of the same bank. But it is difficult to understand how the court could have decided that the plaintiff's accounts could be

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135 For example insanity, see *Bradford Old Bank Ltd. v. Sutcliffe* [1918]2 K.B.833. And the rule as to loan accounts does not apply in Bankruptcy, see *Re Keever* [1967] Ch. 182. But this will not be combination of accounts but a set-off: And See *Westminster Bank Ltd. v. Halesowen Presswork and Assemblies Ltd. op.cit* Per Lord Cross at p.477; *Roxburghe v. Cox* (1881)17 Ch. D. 520.

136 (1872) L.R. s Ex 10

137 *Ibid.*

138 See *inter alia*, Holden *op.cit* p.51, Smart (5th Ed.) *op.cit* 222.

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combined when he had *only one* account with the bank. On the basis of the facts of that case there could not be any question of combination of accounts (not even a lien or a set-off).

The facts, as found by Branwell B. sitting as a trial judge and which were not disputed on appeal, were as follows. The plaintiff opened an account in 1866 at Buckingham branch of the County Banking Company. The account was overdrawn in June 1868 and was *closed* in August of the same year when there was a debit balance of £42:15s:11d. Three years later in 1871 the plaintiff opened another account with the same company at their Leighton Buzzard Branch. Some transactions followed on the new account and by 31st January 1872 the account had a credit balance of $42:18s:10d. Three cheques presented that day were dishonoured. On 1st February 1872, the plaintiff received a letter telling him that on that day the company had charged his account £42:15:11d due to the Buckingham branch.

Now, in law,[139] if a customer wishes to close his current account at the time when it is overdrawn he has to repay the overdraft together with bank charges. The banker may, arguably, close an account which is in debit at any time[140]. Once the account has been closed by either party the relationship of banker and customer comes to an end. Both parties are released from their contractual obligations with the important exception of the bankers duty of secrecy which continues long after the termination of the

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139 Holden *op.cit* p.89

140 *Prosperity Ltd. v. Lloyds Bank Ltd. op. cit.* But Holden questioned this proposition. He says that depending on circumstances, a bank may be entitled to demand repayment of an overdraft but this is very different from closing the account, it is one thing to call in an overdraft; it is quite another matter to withdraw banking facilities without giving the customer sufficient notice to enable him make other arrangements - See Holden *op.cit* p.89.

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relationship. Therefore, in the circumstances of *Mckewan*, it must be assumed that it was the a banker who closed the account and terminated the banker and customer relationship in August, 1868. As from that time the plaintiff had no account at the Buckingham branch. The account he opened at Leighton branch could not have revived the closed account. Accordingly, by the time of the action the plaintiff had one account and therefore there could not be any question of combining accounts.

Surprisingly this case was cited with approval by the Privy Council in *Prince v. Oriental Bank Corporation*[141] and the Court of Appeal and Kilbrandon in the House of Lords, in *Halesowen Presswork Assemblies Ltd, v. Westminster Bank.*[142] But the equally strange case of *Barclays Bank Ltd. v. Okenarhe*[143] which relied directly on *Garnet v. Mckewan*[144] has received scanty attention from Textbook writers and subsequent cases. Despite the judicial approval given to Garnet v. Mckewan[145], all the statements of law contained therein are mere *obiter* as they went far beyond the facts of the case. The most important statement for our present purposes is:-

> There is no duty on the part of the banker to keep the accounts separate.[146]

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141 (1878) App. Cas. 325 at 332-333

142 [1972] 2 W.L.R. 455 at 477, the other three Lords did not give their comments on Lord Denning's observation.

143 [1966] 2 Lloyds Rep. 87

144 (1872) L.R. sex.10

145 *Ibid.*

146 *Ibid* at p.14

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This statement by Paget B. was supported by Bramwell B., although he prefaced his judgment by admitting that his opinion was, "not a confident one,"[147] and treated the issue as a banker's right of set-off.

There is no direct authority, if cases on banker's lien and right of set-off are excluded, as they should be, that a banker has an automatic right to combine accounts. Since the *dicta* in *Garnet V Mckewan*[148] and in *Greenhalgh v. Union Bank of Manchester*[149] cannot be reconciled, it is submitted that courts are still free to choose one of them.

E. THE CHOICE BETWEEN GARNET V. MCKEWAN AND GREENHALGH V. UNION BANK OF MANCHESTER

Some writers have noticed that the rules in the two cases cannot coexist. For example Paget says:-

> If the *Greenhalgh* decision cannot be considered of general application and if *Garnet v. Mckewan* is still good law the question arises as to what will deprive a banker the right to combine without notice.[150]

Holden commenting on *Garnet v.Mckewan* says:

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147 *Ibid.*

148 *Ibid*

149 [1924] 2 KB 153

150 Megra & another (Ed). *Paget's Law of banking op.cit* p.138

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> Although certain passages in the judgments in this case conflict with *dicta* of Swift J. in *W.P. Greenhalgh & Sons v. Union Bank of Manchester*... it is submitted that the principle laid down in *Garnet's* case is still the law today.[151]

Sheldon expresses the view that:

> As it might in any event be difficult to prove that there is no implied agreement to keep the accounts separate, it is advisable where he (banker) is relying on the right of set-off (combination) a credit balance against a debit balance to take an agreement from the customer authorising him to combine the accounts at any time... Alternatively, the banker can give his customer reasonable notice to the same effect... In view of the conflicting opinions the safer course, which is becoming more common, is to take an agreement. The fact that agreements are now so often taken might make it more difficult for a banker safely to rely on set-off (combination) in the absence of such an agreement[152]

It is not easy to choose between the two cases. First, because the decision in *Garnet v. Mckewan*[153] is not based on the

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151 Holden *op.cit* p.51 note 95

152 Drover & Anor (Ed) *Sheldon's Practice and Law of Banking* op.cit pp.192-3

153 (1872) L.R. sEx. 10.

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facts of the case and in *Greenhalgh v. Union Bank of Manchester*[154] the facts were rather special. Secondly, both cases suffer from the serious defect that no evidence was called to prove the course of dealing which allowed a banker to combine accounts or imposed a duty on him to keep the accounts separate. That such proof is required can be illustrated by the cases on the banker's right to charge interest on overdrafts.

In *Pappoe v. Bank of West Africa*,[155] it was decided that the custom of charging interest had acquired notoriety to be judicially noticed. The plaintiffs in *Missri v. Bank of West Africa*[156] argued, relying on the above case, that it was the custom of bankers in Nigeria, Ghana and England to charge interest. The Nigeria Supreme Court rejected this contention saying that merely because evidence was apparently given in 1933 that the same custom applied in Nigeria without any determination by the West African Court of Appeal in this respect, could not establish that courts in Nigeria must take judicial notice of the custom. The Supreme Court restated this position in *Enahoro Co. Ltd. & Enahoro v. Bank of West Africa.*[157] The court stated that reliance on English banking custom, as established by the decisions of English courts, was inappropriate. The custom of bankers in Nigeria must be proved by evidence until judicially noticed. The court refused to allow interest on an overdraft because no evidence had been called on the banking custom in Nigeria; neither had the custom been judicially noticed.

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154 [1924] 2 K.B. 153

155 (1933) 1 W.A.C.A. 287.

156 1967 (1) A.L.R. Comm. 427.

157 1971 (1) A.L.R. Comm. 180 see also *Harilah Shah v Standard Bank Ltd* 1967 (1) ALR Comm 94 (EACA)

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The judgement in *National Bank of Nigeria Ltd. v. Manja and Ors*[158] is to the same effect.

Before a course of dealing can become a banker 'custom or trade usage, it must be well known to the persons' who would be affected by it.[159] It has to be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and *does not depend on the whims* of the other party. It must be reasonable in the sense that the course of dealing is such that reasonable people would adopt it in the circumstances of the case; and, it must not be contrary to legislation or to some fundamental principle of law.

A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent that the usage exists; and, has been acted on generally by persons affected by it. A usage cannot be proved merely by evidence of persons who benefit from it unsupported by other evidence. Once a particular usage has acquired general or local notoriety, judicial notice may be taken of it. Where a trade usage is proved to exist, then, unless expressly or impliedly excluded it is presumed to have been incorporated into the contract between the parties, and this is so, even though one of the parties may in fact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it.[160]

If evidence had been called, it is submitted that, the *dictum* in *Greenhalgh Union Bank of Manchester*[161] would, a *priori*, have

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158 1967 (1) A.L.R. Comm.327

159 This statement of law and what follows below is largely based on *Harilah Shah v Standard Bank Ltd.* 1967 (1) A.L.R. Comm. 94

160 *Ibid.*

161 [1924] 2 K.B. 153

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satisfied the above stringent conditions for a trade usage. Under it, the position of the customer does not depend on the whims of the banker; keeping the accounts separate is not only for convenience, but is reasonable in that people who open several accounts expect them to be kept separate. Otherwise there may be no need for a customer to open several accounts in his private capacity if at the option of the banker they can be treated as one. *Garnet v. Mckewan*[162] is contrary to many fundamental principles of law of banking.

These include, interalia, that a banker should not cease to do business with the customer except upon reasonable notice;[163] it is a duty of the banker to honour cheques to the amount standing on the customer's account or within the limits of an agreed overdraft unless there is a legal reason for not doing so;[164] that the banker's advance is repayable after demand[165] and the banker cannot arbitrarily withdraw overdraft facilities;[166] a banker must keep his customers accounts accurate[167] and the customer has no obligation to check

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162 (1872) L.R. s Ex.10.

163 *Joachimson v. Swiss Bank Corporation, Berry v. Halifax Commercial Banking Co., Buckingham & Co. V. London Midland Bank. supra.*

164 For example if there is a Garnishee order. *See Rogers v. Whitley* [1892] A.C. 118

165 *Joachimson v. Swiss Bank Corporation supra, Johnson v. Odeku* 1967 (30 A.L.R. Comm. 282 at 287, *Doaku v. A.C.B. Ltd.* (1976)11 S.C. 261.

166 *Oyewole v. Standard Bank of West Africa* [1968]2 All N.L. 32, *Harilah Shah v. Standard Bank Ltd.* 1967 (1) A.L.R. Comm. 209 *National Bank of Nigeria Ltd v. Fosoro* (1977)3 O.Y.KS.H.C. Part I p.21.

167 See note 122

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his statement of account or passbook. It also conflicts with the law about appropriation of payments[169] and the fundamental rule of contract that no party to an agreement can unilaterally vary its terms.[170] *Greenhalgh v. Union Bank of Manchester*[171] does not offend against these legal principles and is also in line with the leading textbook writers who have said that there is an implied duty on the bank to keep his customers accounts separate.[172] And in any case Swift J:s *dictum* in *Greenhalgh v. Union Bank of Manchester*[173] was in answer to a specific argument on the issue of combination whereas *Garnet v. Mckewan*[174] was an exercise in judicial speculation upon manufactured facts. It may be worthwhile to quote in extension the words of Kayode ESO, J.S.C.[175]

> Notwithstanding all these, law should only be applied to facts of a case. It is not for a court to manufacture facts or work from law backwards to facts on the pretext of justice. That would amount to judicial anarchy. It is the establishment of facts that comes first, and later the application thereto

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168 See note 123

169 *Deeley v. Lloyds Bank Ltd.* |1912| A.C. 75 *Mutton v. Peat* [1900] 2 Ch. 79 82 L.T. 440

170 See note 123

171 (1924) 2 K.B. 153.

172 See Notes 76-80

173 (1924) 2 K.B. 153

174 (1872) L.R. s Ex.10

175 *Trans Bridge Company Ltd. v. Survey International Ltd.* [1986] 4 N.W.L.R. 576

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> of the principles of law. Indeed, I consider this as the only legal process by which justice could be arrived at[176]

In fact, it is important in all commercial transactions that the courts must proceed cautiously and avoid creating rights through mere acts of indulgence. It is submitted that *Garnet v. Mckewan*[177] and the cases that have applied it, especially the strange decision in *Barclays Bank Ltd. v. Okenerhe*[178], have done exactly this. I, therefore, respectfully agree with the decision of the Nigeria Federal Supreme Court in *British and French Bank v. Opeleye*[179] which adopted and applied Swift J.'s *dictum* in *Greenhalgh v. Union Bank of Manchester*[180]

In answer to Paget's doubts, it is submitted that the decision in *Greenhalgh*[181] seems to be of general application. *Garnet v Mckewan*[182] is no longer good law, and the question to be answered is not what will deprive the banker of the right to combine without notice but rather what will give him such right.

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176 Ibid at pp. 596-7

177 (1872) L.R. 8 Ex.10, (1861-73) All E.R. 686

178 [1966] 2 Lloyds Rep.87

179 [1962] 1 All N.L.R. Part 1 26

180 [1924] 2 K.B. 153

181 *Ibid*

182 (1872) L.R. 8 Ex.10.

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