CHAPTER THREE

SPECIAL CUSTOMERS AND ACCOUNTS OF CUSTOMERS

Before looking at the accounts generally, there is a need to look briefly at accounts of some of the special customers that a banker may have to deal with.

A: SPECIAL CUSTOMERS

1. Unincorporated Associations:

The capacity of members of an unincorporated association or body is the sum total of their capacities as limited by any restraint to which they agree to subject themselves. That is to say that the capacity of the body is the same as the capacity of the members who compose it. The law on this subject was exhaustively stated in *African Continent Bank v. Balogun*,[1]

> "Where however, the body contracting is unincorporated...the matter ceases to be straightforward. In such a case the body as such cannot be a contracting body as it lacks the necessary legal personality. As the association cannot, therefore, contract as an entity, whether by itself or by means of an agent, some other legal principle must be found. In the absence of a legal personality clothing the association itself, a principal can in law be constituted only by the members themselves. It will thus be apparent that the contractual relations of a

[1] 1969 (1) ALR Comm 386

Scanned with MOBILE SCANNER

> voluntary society do not involve any questions of capacity (for the society has none), but rest purely on the basis of agency. What is a subsidiary issue in dealing with contracts of a corporate body, becomes a vital question if that body is unincorporated. The main reason why a contracting party should wish to establish that his contract was with the association and not with the particular individual who in fact entered into the agreement, is, of course, to be able to obtain redress if necessary against the association's fund. But if the society is unincorporated so that it is no more than a collective name for the body of members, and therefore can only be reached if the transaction in question had the authority of all the members. Without that authority the contract can at the most be with such of the members as did in fact authorise it, but though their personal liability may thus be established the collective funds will not be available.[2]

A distinction should be made between an unincoprorated society and a club.

> The rule that members will not generally be held personally liable in respect of obligations incurred on the behalf of the club seems never to have been expressly extended to other unincorporated societies. Indeed the judgment in *Wise's* case went on the footing of the special character of clubs.

---

[2] *Ibid* at p. 393

Scanned with MOBILE SCANNER

> Clubs...are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay the funds of the society or *to any one else* any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has often been judicially recognised. One thing at any rate is clear, and that is that in the case of any society in the nature of a partnership or an association for gain the members cannot lawfully exempt themselves from personal liability by merely inserting a provision to that effect in the rules.[3]

The powers of the club or association are those which the members agree to exercise in concert or common or to delegate for convenience to those people deputed to act on their behalf.[4] And this is largely a question of agency. In *Flemyng v. Hector*[5] the court stated it thus;

> It appears to me that this case must stand upon the ground on which the defendant puts it, as a case between principal and

---

3 *Ibid* at pp.393 - 394 see also *Wise v Perpetual Trustees Co* (1903) A.C 139

4 *Bradley Egg Farm Ltd v Clifford* [1943] 2 *All E.R* 378

5 (1835-42) All E.R. REP 463.

Scanned with MOBILE SCANNER

agent...It is therefore a question here how far the committee who are to conduct the affairs of the club as agents are authorised to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large, and that depends on the constitution of the club, which is to be found in its rules.

Where the association is a club the liability of members is generally limited to the amount of their subscription.[6] The property of a club or association may be vested in a council or committee. Any bank wishing to lend against a charge on property must satisfy itself that there is power to borrow on behalf of the members, that signatories to the charge have the authority, and that the purpose of borrowing is within their authority.[7] The bank must always bear in mind that it is the officers rather than the members of unincorporated associations who are normally liable for the debts and contracts of the association.[8]

In *African Continental Bank v Balogun and Ors*,[9] the plaintiff bank sued members of an unincorporated trading company to recover an overdraft. The court held that they were personally, jointly and severally liable as having received the money.

---

6 *African Continental Bank Ltd v Balogun & Ors op.cit*. p. 394 quoting *Wise v Perpetual Trustees op.cit*

7 See Hapgood Mark (Ed) *Paget's Law of Banking op.cit* 153

8 *Cutts & Co. v Irish Exhibition in London* (1891)7 TLR 313

9 1969 (1) ALR Comm 386

Scanned with MOBILE SCANNER

In *Coutts v The Irish Exhibition in London*[10] promoters of a company opened an account with an arranged overdraft. Later the company was incorporated. The promoters proposed to pass the responsibility of the account to the company contending that, throughout the transactions it was not the intention of the bank to look to them personally for the amount. It was held that the company could not be liable and the promoters were personally liable for the debts which they incurred in the name of the association.

Another issue that deserves mention is that the banker who has a charge on club property may find that the security has been diminished if there are changes in the club because the club can only contract on behalf of existing members only. Thus it was held in *Abbatt v Treasury Solicitor*[11] that once the old club had ceased to function the rights of existing members crystallised, and that the club belonged to and was distributable amongst the members of the club as at that date and the personal representatives of those members who had died since that date.[12] But the banker can protect himself by insisting that there should be a rule which requires new club members on joining the club to signify their consent to previous contracts.

2. Limited Companies

A Limited Company must not engage in *ultra vires* transactions. *Ultra vires* transaction is one which it is beyond the capacity of a company to enter into. The rule was laid down in the

---

10 (1891) 7 TLR 313

11 [1969] 1 All E. R 52

12 See Hapgood Mark (Ed) *Paget's Law of Banking* op.cit p. 153

Scanned with MOBILE SCANNER

landmark case of *Ashbury Railway Carriage Co. v Riche*.[13] It provides that a company can lawfully do only acts as it was formed to do as set out in its memorandum of association in the objects clause.

According to *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*[14] a company has the capacity to do those acts which fall within its objects as set out in its memorandum of association or are reasonably incidental to the attainment or pursuit of those objects. Consequently the question whether a particular transaction is within or outside its capacity must depend on the true construction of the memorandum. If a particular act is of a category which on the true construction of the company's memorandum, is capable of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered *ultra vires* the company merely because in a particular instance, its directors, in performing the act in its name, are in truth doing so for purposes other than those set out in its memorandum. Subject to any express restrictions on the relevant power which may be contained in the memorandum, the state of the mind or knowledge of the persons managing the company's affairs or of the persons dealing with it is irrelevant in considering the questions of corporate capacity. While due regard must be paid to any express conditions attached to or limitations on powers contained in a company's memorandum, such as a power to borrow only up to a specified amount; the court will not ordinarily construe a statement in the memorandum that a particular power is exercisable for purposes of the company as a condition limiting the company's corporate capacity to exercise the power; it will regard it as simply imposing a limit on the authority of the directors.[15]

---

13 (1875) L R7 HL 653

14 [1986] ch 246

15 *Ibid* at 295

Scanned with MOBILE SCANNER

A corporation every time it wishes to borrow cannot be called upon by the bank to expose all its affairs, so that the bank can say "Before I lend you anything, I must investigate how you carry on business, and I must know why you want the money, and how you apply it and when you have it I must see you apply it in the right way. It is perfectly impossible to work out such a principle".[16] But according to *Re Introductions Ltd* v *National Provincial Bank Ltd*[17] it is still the law that a company's borrowing must be for a purpose consistent with the company's objects as set out in the company's objects contained in the memorandum.

A person dealing with a company which is registered must satisfy himself that the proposed transaction is not inconsistent with the memorandum and articles of association and that the person acting for the company is not one to whom power so to deal is unlikely to have been delegated; but he need not inquire whether all the necessary steps have been taken to make the matter complete and regular. For example the model articles in Table A to the *Companies Act*[18] provides:

> "The directors may exercise all the powers of the company to borrow money, and to mortgage or charge its undertaking, property and uncalled capital, or any part thereof, and to issue debentures, debenture stock, and other securities whether outright or as security for any debt, liability or obligation of the company or of any third party."

---

16 *David Payne Case* [1904] 2 Ch 608 at 613

17 [1970] Ch 199 at P.209

18 Cap 85 Table A article 79.

Scanned with MOBILE SCANNER

Provided that the amount for the time being remaining undischarged of moneys borrowed or secured by the directors as aforesaid (apart from temporary loans obtained from the company's bankers in the ordinary course of business) shall not any time, without the previous sanction of the company in general meeting, exceed the nominal amount of the share capital of the company for the time being issued, but nevertheless no lender or other person dealing with the company shall be concerned to see or inquire whether this limit is observed. No debt incurred or security given in excess of such limit shall be invalid or ineffectual except in the case of express notice to the lender or the recipient of the security at the time when the debt was incurred or security given that the limit hereby imposed had been or was thereby exceeded".

For example under such an article it is clear that the bank is not supposed to inquire whether this limit has been exceeded.

If the acts of the company are otherwise *intra-vires* but are entered into in furtherance of an improper purpose are largely determined by the law of agency. The principles to be considered were set down in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation.*[19] At least in default of the unanimous consent of all the shareholders the directors of the company will not have

---

19 [1986] Ch 246 pp. 295-296

Scanned with MOBILE SCANNER

actual authority from the company to exercise any express or implied power other than for the purposes of the company as set out in its memorandum of association. A company holds out its directors as having ostensible authority to bind the company to any transaction which falls within the powers express or impliedly conferred on it by its memorandum of association. Unless he is put on notice to the contrary a person dealing in good faith with a company which is carrying on intra vires business is entitled to assume that the directors are properly exercising such powers for the purpose of the company as set out in its memorandum. A person in such circumstances can hold the company to any transaction of this nature. If, however, a person dealing with the company is on notice that the directors are exercising the relevant power for purposes other than the purposes of the company, he cannot rely on the ostensible authority of the directors and on ordinary principles of agency, cannot hold the company to the transaction.[20]

The conditions which should be taken into consideration were laid down in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*[21] by Diplock L.J.

> If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown (1) that a representation that the agent had authority to enter on behalf of the company

---

20 *The Royal British Bank v Turquand 119 ER 886, Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964]Q.B. 480

21 (1964) Q.B. 480.

Scanned with MOBILE SCANNER

into a contract of the kind sought to be was made to the contractor; (2) that such a representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates; (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

The confusion which, I venture to think, has sometimes crept into the cases is in my view due to failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (a) that the only "actual" authority which is relevant is that of the persons making the representation relied on and (b) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to questions:

(i) whether condition (2) is fulfilled, and

(ii) whether condition (4) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant

Scanned with MOBILE SCANNER

iii) as part of the representation on which the contractor relied.[22]

It is clear, therefore, that subject to limitations which may be contained in the memorandum, a company has the capacity to open and operate a bank account and to borrow money and give security over any of its property. However, before opening an account, generally a current account, in the name of a limited liability company, it is normal banking practice to take up references on the directors, and to require the production of the certificate of incorporation of the company and copies of the memorandum and articles of association and a resolution of the board setting out how the account is to be operated, together with specimen signatures of the persons who are to operate it; and in the case of a public company the Registrar of companies certificate that the company is entitled to commence business should also be produced in addition.[23]

The *Companies Act*[24] details how a company can contract and particularly in regard to negotiable instruments. It provides

> s.35 A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company, if made accepted or endorsed in the name of or by or on behalf or account of, the company by any person acting under its authority express or implied.

---

22 For the application of these principles see *Charterbridge Ltd v. Lloyds Bank* Ltd *(197)* Ch. 62.

23 See *Bewac Ltd v African Continent Bank Ltd* 1973(3) ALR Comm 352

24 Cap 85

Scanned with MOBILE SCANNER

The effect of this section is that a bill of exchange or promissory note may be made (i.e drawn) accepted or endorsed by a company in either of two ways. The first is the signing of the company's name without more. Bankers are of the opinion that the mere name of a company is sufficient endorsement in law but regard it in practice as irregular. The second way is to sign by or on behalf of or on account of the company. Where a person wishing to sign in a representative capacity omits to use such wording or equivalent as "per pro" he may be held personally liable on the instrument.[25]

Similarly a banker must make sure that section 109 of the *Companies Act*[26] is complied with or else it may find that the company is not liable and recourse may be had to the person who signed the instrument. The section provides inter alia:

> s.109 Every company-
>
> (a) .....
>
> (b) .....
>
> (c) shall have its name mentioned in legible roman letters in all business letters of the company and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company.

Non-compliance fixes personal liability on the director. In *S.J. Patel (Zambia) Ltd v Cinamon*[27] the plaintiffs supplied goods

---

25 Hapgood Mark (Ed) *Paget's Law of Banking op.cit.* pp. 140-141.

26 Cap 85

27 1970(1)ALR Comm 260. See also *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968]2 Q.B. 839 see also *Hendon v Adelman* (1973) 117 *Sol. Jo* 631, *British Airways Board v Parish* (1979)2 Lloyds Rep.361, *Maxform SPA v Mariani & Goodville Ltd* (1979)2 Lloyds 385.

Scanned with MOBILE SCANNER

to a limited liability company named Longacres Stores Ltd. Cheques issued for and on behalf of the company for payment for the goods were signed by the defendant over a rubber stamp reading "Longacres Stores". The court held that the company directors personal liability to the holder of a cheque or other order for money signed by a director on behalf of the company wherein the company's name is not mentioned in the prescribed manner, arises when the name used varies in any way whatever from the registered name, whether by omission of the word limited or otherwise. The rationale for this strict rule was stated to be:

> The word limited is included in a company's name by way of description and not identification. Accordingly a generally accepted abbreviation will serve this purpose as well as the word in full. The rest of the name, by contrast, serves as a means of identification and may be compounded of or include initials or abbreviations. The use of abbreviation of the registered name is calculated to create problems of identification which are not created by an abbreviation of "Limited". I should therefore be prepared to hold that no abbreviation was permissible of any part of a company's name other than Ltd" for "Limited" and possibly the *ampersand* for "and". However it is not necessary to go as far as this.[28]

---

28 *Durham Fancy Goods Ltd v Michael Jackson (Fancy* Goods) Ltd [1968]2. Q.B. 839 at 846

Scanned with MOBILE SCANNER

In *Durham Fancy Goods Ltd v. Michael Jackson (Fancy Goods) Ltd*[29] the plaintiffs drew a bill of exchange on a company called Michael Jackson (Fancy Goods) Ltd but addressed to "M. Jackson (Fancy Goods) Ltd and inscribed the words of acceptance "Accepted payable.... For and on behalf of M.Jackson (Fancy Goods) Ltd, Manchester". On receiving the bill, the second defendant who was a director and secretary of the company merely signed his name and returned the bill. The bill was dishonoured upon maturity and the company went into liquidation. The plaintiffs claimed against the second defendant on the grounds that he had become personally liable on the bill for signing it on behalf of the company contrary to the provisions of the Companies Act, as the bill did not mention the proper name of the company. It was held that 'M' was not an acceptable abbreviation for 'Michael' and that accordingly the second defendant had committed an offence and was liable to the plaintiffs who were holders of the bill of exchange. But the plaintiffs could not enforce that liability for they had inscribed the words of acceptance and had chosen the wrong words, thereby implying that acceptance of the bill in that form would be or would be accepted by them as, a regular acceptance of the bill; in seeking to rely on their own error coupled with the second defendants failure to detect and remedy it as entitling them to relief, they were bound by the equitable principle of promissory estoppel.

The general principle of the law seems to be that a plaintiff who seeks to make a company director personally liable upon a cheque or other order for money signed by the director on behalf of the company wherein the company's name is not mentioned in the prescribed manner, will be prevented by the equitable principle of promissory estoppel from enforcing the liability in a case where the misdescription and non-compliance with the statutory provision

---

29 *Ibid.*

Scanned with MOBILE SCANNER

results primarily from the plaintiffs own error.[30] Otherwise the statutory provision was intended to ensure extreme strictness in regard to the use of the registered name of the company, not only in enforcing the use of the word `limited' but in all respects.[31] Moreover a creditor who seeks to prove in a company winding up for the amount of a dishonoured cheque wherein the company's name is not mentioned in the prescribed manner is not thereby disentitled from recovering the amount from the director who signed the cheque contrary to section 109 of the companies Act[32]

3. Local Governments

Local governments are analogous to companies. The *Local Governments Act*[33] provides that;

> s.7 Every Local Government Council shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name.

And *the Constitution of the Republic of Uganda 1995* provides;

> A Local government shall be based on a council which shall be the highest political authority in its area of jurisdiction and which shall have legislative and executive

---

30 S.J. *Patel (Zambia) Ltd v Cinamon* 1970 (1) ALR Comm. 260 at 266 following *Atkins & Co. v Wardle* 6 I L.T. 23 on appeal 5.TLR 734

31 *Atkins & Co. v Wardle* 5. T.L.R 734

32 S.J. *Patel (Zambia) Ltd v Cinamon op.cit* at 266

33 ACT No.1 of 1997

Scanned with MOBILE SCANNER

> powers to be exercised in accordance with the Constitution.[34]

The executive powers of the council are vested in the executive committee;

> There shall be an executive committee which shall perform the functions of the council.[35]

And it is further provided that;

> Subject to the provisions of this constitution and with the approval of government, a local government may, for the carrying out of its functions borrow money or accept and use any grant or assistance as Parliament shall prescribe.[36]

Parliament has already prescribed the borrowing powers of the council in the *Local Governments Act*[37] which provides;

> s. 85 For purposes of article 195 of the Constitution a Local Government may borrow money or accept and use a grant or assistance as is provided in the Fifth Schedule.

---

34 article 180 (1).

35 article 186 (1).

36 article 195

37 No.1 of 1997

Scanned with MOBILE SCANNER

In that schedule regulations 20 gives the Local Government Council power, from time to time, to raise loans by way of debenture, issue of bonds, or any other method, in amounts not exceeding twenty five percent of the locally generated revenue provided that the Local Government Council demonstrates ability to meet its statutory requirements. The borrowing powers are exercisable by the Local Government with the approval of the Minister responsible for Local Governments if the amount to be borrowed exceeds ten percent of the total amount the Local Government Council is eligible to borrow. It is also dependent on whether the Auditor General has certified the books of accounts of the preceding financial year and his report is not qualified. The funds must be intended for investment in priority activities as identified by the council. Moreover the Executive Committee must give a guarantee to the effect that repayment of the loan shall not adversely affect the operations of the Local Government Council and in particular meeting the statutory obligations including paying of salaries. All the loans approved by the Minister must be published in the Gazette.

The District or Urban Council can raise temporary loans and overdraft which are not subject to ministerial approval. Thus regulation 21 provides that if such a council has lawfully incurred expenditure which has been provided for in its approved estimates it may;

(a) pending revenue receipts or

(b) pending the raising of a loan as provided under regulation 20; and which has been duly approved by the council; obtain advances of money not exceeding ten percent of the approved budget by way of temporary loan or overdraft and as part of the total amount to be borrowed for purposes of defraying that expenditure.

Scanned with MOBILE SCANNER

Moneys advanced under this regulation may be secured upon any property of the council obtaining the advance. However, such security does not include office and residential buildings and furniture therein, rolling stock and engineering plant.

It is clear that a Local Government as a body corporate can open and operate a bank account. Therefore, what the banks need to worry about are the council's authority to borrow and create security and also the authority of the persons purporting to act on behalf of the Local Government. When the borrowing is authorised by the Minister and published in the Gazette the banker can assume that all the conditions attached to the borrowing powers have been satisfied. As for temporary borrowing, the banker should insist on the resolution of the council approving such borrowing and should demand for the council's budget to make sure that the limit on the borrowing is not exceeded.

4. Executors and Administrators

The *Succession Act*[38] defines an executor as a person appointed in the last will of a deceased person to execute the terms of the will and an administrator is a person appointed by a court to administer the estate of a deceased person when there is no executor. Section 179 of the Act stipulates that the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him. And section 191 provides that letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after his death.

Executors and administrators in law constitute only one person. In the absence of express provisions any one as executor or

---

38 Cap. 139 as amended by *Succession (Amendment) Decree* No.22 of 1972. S.3

Scanned with MOBILE SCANNER

administrator can operate executive or administrative account with the bank. A bank account as a chose in action or an incorporeal right is property[39] and vests in the executor or administrator as legal representatives of the deceased. The death or resignation of one of them does not necessitate any modification of the course of business. Borrowing by an executor is always his personal responsibility and, if it is unauthorised, the estate of the deceased cannot be made liable for it.[40]

5. Partners

In partnership accounts, one partner has a *prima facie* right to draw cheques in the firm's name. He also has implied authority to bind the firm by the cheques so drawn but he has no mandate to postdate them. According to *Alliance Bank v Kearsley*[41] a partner has no implied authority entitling him to open an account in his own name so as to bind the partnership. A partner has authority to stop or countermand a cheque, in accordance with s.75 of the *Bills of Exchange Act*,[42] drawn in the firm's name by another partner. The *Partnership Act*[43] provides that in the absence of an agreement to the contrary, the death of one partner marks the dissolution of the partnership though the surviving partners have power to bind the firm and to continue business so far as is necessary for winding up of its affairs. Therefore, the banker in such cases is safe in dealing

---

39 *Rendall-Day v Republic* 1967 (3) ALR Comm. 17 at 40

40 *Farhall v Farhall* (1871) 7 Ch. App 123

41 (1871) LR 6 C.P 433

42 Cap 76.

43 Cap 86, s. 37

Scanned with MOBILE SCANNER

with the surviving partners only to such extent as is clearly for this purpose.[44]

The bankruptcy of one partner also dissolves the partnership unless the partnership deed provides otherwise.[45] It follows that the bankrupt partner has no authority to bind the firm.

6. Trustees

The purpose of appointing several trustees is to ensure that the trust property is under their combined control. Delegation of these powers to a single trustee is not allowed when such a delegation involves exclusive dealing with the property. It follows that the signatures of all trustees should be required on all cheques unless the modification of this rule is fully authorised by the terms of the trust. The *Trustees Act*[46] authorises the appointment of agents for specific purposes which are outlined[47] but does not include the signing of cheques. Therefore trustees cannot appoint one of their number to sign cheques.

A special trust account is exemplified by the *Advocates Act*[48] which require all practising advocates to keep an account known as a "clients' account". In a sense this is a trust account although the advocate will be the sole trustee and has powers to operate the account as if it was his own. However the fact that the account is impressed with a trust certain consequences follow. The

---

44 *Re Bourne, Bourner Bourne* (1906)2 ch 427

45 Cap. 86, 9.37 this will be discussed fully in the chapter on Termination of Banker and Customer Relationship

46 Cap 142. s 24 (1)

47 s. 24 (2)

48 No.22 of 1970; Rules made thereunder

Scanned with MOBILE SCANNER

most important being that the bank cannot combine the clients account with the advocates personal account.

In the case of a trust account, a banker must recognise the person from whom or for whose account he has received the money in an account as the proper person to draw on it; and cannot set up *jus tertii* or the claim of a third person as against that of his customer; whether the customer holds the account in his own right or as trustee, and in the latter case even though he draws on it for the purpose of breach of trust, the banker is bound to honour the customer's order with respect to money belonging to the customer in his hands. But he may show that he did not receive the money from or for the account of the customer or that it does not belong to the customer, as where the proceeds of the cheque paid in for the credit of a third person's account have been credited to the customers account held in the customer's own right and not in trust for the third person.[49]

A person whose money has been accepted by a bank on the footing that the bank undertakes to honour cheques up to the amount standing to that person's credit is a customer of the banker and the position is unaffected by the banker's belief that the account is held in trust, nor does that make the supposed *cestui que* trust a customer.[50]

The other important rule is that a beneficiary of a trust fund is entitled to an authority of the trustee to enable him to verify from a bank whether statements of account filed by the trustees tally with

---

49 *Ademilnyi v African Continental Bank* Ltd 1969 (3) ALR Comm. 10 at pp 17 and 18

50 *Ademiluyi v African Continental Bank Ltd* op.cit pp 11-15 and 17 and 18

Scanned with MOBILE SCANNER

the bank book entries. This rule was formulated by Chitty J.in *In re Tillot*.[51]

> The general rule, then, is...that the trustee must give information to his *cestui que* trust as to the investment of the trust estate. Where a portion of the trust estate is invested in Consols, it is not sufficient for the trustee merely to say that it is so invested, but his *cestui que* trust is entitled to an authority of the trustee to enable him to make proper application to the bank, as has been done in this case, in order that he may verify the trustee's own statement.[52]

7. Children

A child, for purposes of contracting, is any person under the age of eighteen years.[53] There have been arguments that a child cannot open and operate a bank account.[54] These arguments, which have been termed fallacious,[55] are only imaginary and academic.[56] There is no good legal reason why a child cannot operate a bank

---

51 [1892] 1 Ch 86 following *In re Marshifield* (1886)32 ch D499 quoted with approval in *Williams v Bankole* 1966(2) ALR Comm. p.371 at p.375

52 At [1892] 1 Ch. p.88

53 See Contract Act Cap. 75, *Children's Statute* No. 6 of 1996. s.3. *The Constitution of the Republic of Uganda 1995 article 257*

54 Hapgood Mark Ed *Pagets Law of Banking op.cit* p 146

55 *Ibid*

56 *Ibid*

Scanned with MOBILE SCANNER

account. However a child should under no circumstances be given an overdraft.

According to *Blackburn Building society v Cunliffe Brooks & Co.*[57] overdrafts are money lent and as such could not be recovered against the child under the *Infants Relief Act 1874*.[58] And in *Nottingham Permanent Benefit Building Society v Thurstan*[59] any security given by a child for such overdraft would be void.[60] But if the money was spent on necessaries, the bank may be subrogated to rights of the suppliers.[61]

The law is that the liability of a surety under a contract of guarantee arises when the principal debtor makes a default, and except as otherwise agreed notice of the default need not be given to the surety and he is liable without being requested to pay.[62] It follows, therefore, that a guarantor could not be held liable on the child's debt. Since a child cannot incur the liability to pay; it follows that the guarantor can never be called upon to pay. This is because the guarantor's liability only arises after the principal debtor has failed to pay. A child can never be called upon to pay. Therefore the guarantor's liability will never arise.[63]

---

57 (1882) 22 Ch. D61 affirmed (1884)9 App cas 857

58 37 & 38 vict., c62

59 [1903] A.C.6

60 *Infants Relief Act op.cit* s.1

61 *Nottingham Permanent Building Society v Thurstan op.cit*

62 *African Continental Bank Ltd v Kembi* 1974(1) ALR Comm. 282 at pp. 283-284

63 *Coutts & Co. v Browne - Lecky* (1947) K.B 104

Scanned with MOBILE SCANNER

But now the question of contracts with children in Uganda has been thrown into disarray by the Supreme Court's decision in *Uganda Motors Ltd v Wavah Holdings Ltd.*[64] In that case the appellant contended that the *Fires Prevention (Metropolis) Act* 1771[65] did not apply as an act of general application. For the respondent it was asserted that the Act of 1774 applied. The court accepted that this was an Act of general application. But it observed that the *Judicature Act 1967*[66] omitted to mention the application of Acts of general application, and said:-

> The conclusion can only be that the Acts of general application no longer have any place in the jurisdiction of the High Court and that is perhaps as it should be. On that basis then, the appellant's arguments fell on the ground as based on the Act of 1774.[67]

Though not cited, this conclusion is supported by the opinion of Lord Halsbury in *Bank of England v. Vagliano Brothers*,[68] when he said;

> "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of constuction, and I am wholly unable

---

64 Civil Apeal No. 19 of 1991 Unreported

65 14 Geo 3 c 78

66 No. 11 of 1967 *The Judicature Act*, 1996 also omits Acts of general application.

67 Per Platt JSC with Nanyindo D.C.J and ODER JSC Concurring.

68 [1891] AC 107.

Scanned with MOBILE SCANNER

> to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.[69]

These observations, though on a code, apply to statutes generally, except interpretation of written constitutions. The court in *Wavah's* case further said;

> At the common law, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter in an action brought for such injury, would not be bound in the first instance to show how the fire began, but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house.(see Lord Tenderden C.J. in *Becquet vs McCarthy set out in Mason vs Levy Auto Plarts* [1967]2 ALL ER and *Colonial Stores* [1936]3 All E.R 200, 203). The common law, therefore, held the person upon whose premises the fire originated liable if he was negligent, and presumed him negligent if the cause was not known, unless that person could show that the fire was caused by a stranger or an act of God. On the other hand the Act of 1774 relieved him of liability if the fire started accidentally. There is no burden on the defendant of disapproving negligence. If the Act of 1774

---

69 *Ibid* at p. 20.

Scanned with MOBILE SCANNER

> did not apply there would be a burden of disapproving negligence on the part of the defendant, the plaintiff being able to rely on the doctrine.[70]

What this passage means is that if the Statutes of general application do not apply then one has to resort to the common law before such a statute was enacted. This is in line with s.3(2) of the *Judicature Act*,[71] which provides in part that the jurisdiction of the High Court shall be exercised:

> (b) subject to any written law and in so far as the same does not extend or apply and in conformity with
>
> (i) The common law and the doctrines of equity.
>
> (3) The applied law, the common law and doctrines of equity shall be in force in so far as the circumstances in Uganda and of its people permit and subject to such qualifications as the circumstances may render necessary.

This should be contrasted with the repealed *Judicature Act 1962*[72] which provided in section two.

> (b) subject to such written laws and in so far as the same do not extend or apply-
>
> (i) in conformity with the substance of the common law, the doctrines of equity and

---

70 Civil Appeal No. 19 of 1991 unreported at p. 6.

71 Act No. 11 of 1967. The *Judicature Statute* 1996 is, in the same terms

72 Cap. 34.

Scanned with MOBILE SCANNER

> statutes of general application in force in England on the 11th August 1902.

S.2 (c) provided that the said common law, doctrines of equity and statutes of general application shall be in force in Uganda only so far the circumstances of Uganda permit and subject to such qualifications as local circumstances may render necessary.

The differences in wording led the Supreme Court of Uganda to conclude;

> The reference to Acts of general applicability was deleted from 1967 Judicature Act. Such Acts consequently no longer apply to Uganda.[73]

The recent Judicature statute has not changed the law as declared in Wavah's case. Section 16(2) provides that the jurisdiction shall be exersised;

> (a) in conformity with the written law in force immediately before the commencement of this statute;
>
> (b) subject to any written law and in so far as the written law does not extend or apply, in conformity with:-
>
> (I) the common law and the doctrines of equity;
>
> (ii) any established and current custom or usage; and
>
> (iii) the powers vested in, and the procedure and practice observed by, the High Court

---

73 *Uganda Motors Ltd v Wavah Holdings Ltd op.cit.* p.8. The *Judicature Statute* 1996 No. 13 of 1996 has not filled this *Lacuna* in the Law

Scanned with MOBILE SCANNER

immediately before the commencement of this Statute in so far as such jurisdiction is consistent with the provisions of this Statute; and

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity and good conscience.

In this connection one may be reminded of the words of the Earl of Selborne in *Bank of England v. Vagliano Brothers*[74] when commenting S.7(3) of the *Bills of Exchange Act* 1882:

> "I cannot, however, agree with the opinion, that in cases which do fall within [S.7(3)] knowledge on the part of the acceptor that the payee is fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in may judgement be implied from earlier authorities which treated knowledge as necessary. *Those authorities were no doubt within the view of the legislature, and all reference to necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and there is no sound principle on which what is so omitted can be supplied by construction.*[75]

It follows that the law applicable to children is the common law prior to 1874 when the *Infants Relief Act* was enacted. For

---

74 *Judicature Statute* No. 13 of 1996 298 [1891] A.C. 107.

75 *Ibid* at pp. 129-130.

Scanned with MOBILE SCANNER

purposes of banking one may only look at the position of loans to infants. Treitel[76] states the law in these terms;

> "At common law a person who spends money in buying necessaries for a minor is entitled to recover it from the minor. One who lends money to a minor to enable him to buy necessaries cannot recover it at law, but can in equity recover such part of the loan as was actually used by the minor to discharge his liability for necessaries supplied of him. A promise in a mortgage deed to repay such a loan is ineffective since the minor is not bound by his deed. The law leaves the lenders for necessaries in somewhat precarious position - perhaps because a loan of money can more easily be misapplied than actual supply of necessaries.[77]

At common law, other than loans for necessaries, other loans are absolutely void. It appears that the basic principle is that the law must protect the child against his inexperience, which may enable the adult to take unfair advantage of him, or to induce him to enter into a contract which, though in itself fair, is simply improvident. This principle is the basis of the general rule that a child is not bound by his contracts. The second principle is that the law should not

---

76 Treitel G.H: *The Law of Contract* (London, Sweet & Maxwell, 1995) 9th Ed p. 498. See Also *Cheshire* & Fifoot's *Law of Contract* 8th Ed. pp. 389-390.

77 *Ibid* quoting *Ellis v Ellis* (1689) Comb 482, Earle v Peale (1712) 10 Mod 67, *Marlow v Pitfeild* (1719) 1 P.wms 558, Re *ational Permanent Benefit Society* (1869) L.R. Ch. App. 309, *Martin v Gale* (1876)4 ch.D 428.

Scanned with MOBILE SCANNER

cause unnecessary hardship to adults who deal fairly with children. Under this principle some contracts with children are valid such as those for necessaries.[78]

8. Joint Accounts

In ordinary joint accounts, there is a rebuttable presumption that all those in whose names the account stands must combine in drawing the mandate or authorise one or more of their number to do so. On the death of a joint account holder the survivor or survivors is or are under normal circumstances entitled to the whole amount either under the law of devolution between joint owners or by custom of bankers or by express or implied agreement.[79] The rule on survivorship as applied to joint accounts can be rebutted.[80] Nevertheless the banker secures a good discharge by paying the survivor or survivors. Also where customers are indebted to the bank jointly, and not jointly and severally upon the death of one, his estate will be free from liability.

If the mandate under which the account was opened allows the bank to act on the signature of either account holder it does not make it less a joint account.[81] But where the bank is required to act on the signatures of all the account holders, it must not act on the signature of one of them. Thus in *Catlin v Cyprus Corporation (London) Ltd*,[82] the plaintiff and her husband had a joint account

---

78 Treitel *The Law of Contract op.cit* 494

79 See Hapgood Mark. *Paget's Law of Banking op.cit* p.145

80 *McEvoy v Belfast Banking Co.Ltd* [1935] A.C. 24 at p.50

81 *Hirschorn v Evans* [1938] 2 K.B. 801

82 [1983] 1 ALL ER 809

Scanned with MOBILE SCANNER

with the defendants on the terms that cheques were to be signed by both of them. The bank paid the husband all the money on the account on his signature alone. The wife sued the bank. The bank argued that their obligation was to the two account holders jointly and the plaintiff could not bring an action by herself. The court said:-

> "The defendants agreed to honour instructions signed by both account holders. This no doubt imported a negative duty not to honour instructions not signed by both account holders. This duty also could, in theory, have been owed jointly but it must (to make sense) have been owed to the account holders severally, because the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other. A duty on the defendants which could only be enforced jointly with the party against the possibility of whose misconduct a safeguard was sought, and where the occurrence of such misconduct through the negligent breach of mandate by the defendants would deprive the innocent party of any remedy, would in practical terms be worthless. Indeed it would be worse than worthless because a customer would reasonably rely on the two signature safeguard and refrain from active supervision of the account, only to find when loss (allegedly irresperable) has resulted that the reliance was misplaced.[83]

---

83 *Ibid* at p. 816

Scanned with MOBILE SCANNER

When the joint account holders are husband and wife, on the death of the husband the rule on survivorship depends on the intentions of the parties. That is whether the method of keeping and working the account was for the sake of convenience or for the purpose of providing for the wife in case she was the survivor. But as the decisions in this area depend on the particular facts of each case the precedents are rather conflicting and confusing[84]. Nevertheless in *Marshall v Crutwell*[85] the husband was in bad health at the time of opening the joint account. When he died, it was held that the intention was not to make provision for the wife but merely to manage the husband's affairs conveniently and therefore she had no claim to the balance of the joint account.

If either the husband or the wife become mentally disabled it would not be safe for the banker to part with the money to the other party. This is also true in all other joint accounts. The mental disorder of any party revokes any mandate he may have given, if the disorder is such that he does not know or understand what he is doing.

Where there is borrowing by husband and wife on a joint account and it is necessary to sue them, they must be sued jointly unless joint and several liability is established. For the holders of a joint account, they have a joint and several right of action against the bank.[86]

---

84 See *Williams v Davies* 10 LT 583, *Husband v Davis* (1851)10 CB 645, Hall v Hall (1911)1 ch 487 *Re Bishop, National Provincial Bank v Bishop* [1965] Ch 450

85 (1875) LR 20 Eq 328

86 *Jackson v White and Midland Bank Ltd* [1967]2 Lloyd's Rep. 68

Scanned with MOBILE SCANNER

B. TYPES OF ACCOUNTS

Generally speaking there are only two types of accounts. These are demand deposits where the deposits are payable on demand and are withdrawable by cheque, draft, order or by other means.[87] This is generally referred to as a current account or mercantile account or running account. The other one is a time deposit which means deposits repayable after a fixed period or after notice and includes a savings account.[88] This is popularly known as a deposit account.

1. CHARACTERISTICS OF A CURRENT ACCOUNT

It has to be remembered that when a person pays money into his bank account that money becomes the property of the bank and the relationship between banker and customer becomes that of debtor and creditor with the addition that the banker promises to honour the customers cheques, on demand. But this demand is not unqualified.

The law is that a banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose or provided the cheques are within an agreed overdraft, and may so pay them within a reasonable margin after the bank's advertised closing time. The funds must not only be sufficient, but must also be available. In the case of cheques, the banker is entitled to a reasonable time for clearing or collection according to their respective nature. Mere crediting as cash is not sufficient to entitle the customer to draw against the cheque before clearing. There must be an agreement

---

87 *Financial Institutions Statute No.4* of 1993 s.2

88 *Ibid*

Scanned with MOBILE SCANNER

express or implied to permit the customer to draw. Sufficiency of funds refers to actual cash in the customer's account and does not include cheques the fate of which has not been determined.[89] But at the moment when the banker places money to the credit of the customer, the customer is entitled to draw on it unless something, like a garnishee, occurs to deprive him of that right.[90] There must be cash on the account or an agreed overdraft.[91]

Banks normally do not pay interest on a current account. But some banks sometimes pay interest in order to compete with other savings institutions. Banks charge commissions on the current account for services rendered.

REFERENCES

It is the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customers standing; failure to do so at the opening the account might well prevent the banker from establishing his defence under s.82 of the *Bills of Exchange Act*[92] if a cheque was converted subsequently in the history of the account because in establishing whether the banker acted without negligence one has to look at all the circumstance antecedent and present. Such antecedents include

---

89 *Onyechi v National Bank of Nigeria Ltd* 1977(1) ALR Comm 83 at P.91, *Joachimson v Swiss Bank Corporation* (1921)3 K.B. 110 at p.127, *Ashumbiojo v African Continental Bank Ltd* 1966 (2) ALR Com. 78 at pp 80-81

90 *Ashubiojo v African Continental Bank Ltd* 1966(2) ALR Comm 78 at p 80, *Ayuba v Ogunleye & Onor: Bank of West Africa*; Garnishee 1970 (2) ALR Comm 21

91 *Onyechi v National Bank of Nigeria Ltd* 1977 (1) ALR Comm 83

92 Cap. 76.

Scanned with MOBILE SCANNER

the issue of whether or not the banker took references before opening the account.

> "When an application is made to a bank to open an account in the names of a private individual, there are four principal matters for consideration regarding the prospective customer, namely (a) whether he has authorised the opening of an account in his name (b) whether he is the person he claims to be and (c) whether he is employed by someone else and, if so, the name of the employer.[93]

If a third party claims to have the authority to open an account in another person's name the banker should be very cautious indeed. In *Robinson v Midland Bank Ltd*[94] there was a blackmailing conspiracy against a foreign dignitary who had been discovered in compromising circumstances with the wife of the plaintiff. The plaintiff was not a party to the conspiracy. The dignitary issued a cheque for £150,000 to prevent the plaintiff from bringing divorce proceedings, and the conspirators, without the plaintiffs knowledge, opened an account with the defendants in the names of the plaintiff. They paid into this account the cheque in question and later drew out the proceeds. The plaintiffs action for money had and received failed because *inter alia*, it was held that the bank was dealing with a fictitious customer not withstanding the use of the plaintiff's name.

---

93 Holden Milnes J: *The Law and Practice of Banking* (London, Pitman Publishers 1996) 5th Ed p.392

94 (1924) 41 TLR 170

Scanned with MOBILE SCANNER

A banker who fails to take references and cross check the identity of an intending customer will be negligent and lose the protection afforded to paying bankers under the *Bills of Exchange Act.*[95] Thus in *United Nigeria Insurance Co. v Muslim Bank (West Africa) Ltd*[96] the Supreme Court of Nigeria said,

> "It is the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; and a banker who without doing so opens an account for a new customer and shortly afterwards collects a cheque crossed "not negotiable" - A/C payee only" which is paid in by the customer, and was drawn in favour of a payee of the same name on the date before the account was opened, will be unable to establish the statutory defence, that he acted in good faith and without negligence, in answer to a claim by the true owner of the cheque and will be liable on the claim if it is in negligence.[97]

In that case the facts were that the appellants brought an action in the High Court of Lagos against the respondent bank claiming damages for negligence in collecting a cheque drawn by the appellants. The appellants drew a cheque for £550, crossed and endorsed "Not negotiable - A/C Payee only," and posted it to the payee, who did not receive it. A week later a new customer opened

---

95 CAP. 76.

96 1972 (2) ALR Comm. 8 at p.17-18

97 Ibid

Scanned with MOBILE SCANNER

a savings account with the respondent bank in the same name as the payee's, with a small cash deposit. Two days later he paid in the appellants' cheque with a forged indorsement of the payee's signatures, and the respondents credited the savings account with the amount of the cheque and collected it from the appellants' bank. A week later the customer withdrew £250, and was not seen again.

The appellants instituted proceedings to recover damages for the respondents' negligence when opening the account, collecting the cheque, and parting with the proceeds. In their particulars they pleaded, *inter alia*, that the respondents had failed to obtain necessary references, and to follow necessary banking practice, on opening the savings account. They adduced no evidence of the custom or practice of bankers in general in regard to these and other matters complained of. The respondents, by their defence, denied negligence and claimed all the protection afforded by the *Bills of Exchange Act* to collecting bankers, and offered no evidence.

The High Court found that negligence had not been proved, and gave judgment that the respondents were not liable to the appellants for the amount claimed.

On appeal, the appellants contended that (a) it was the recognised practice of bankers not to open accounts for new customers without seeking references and making inquiries; and (b) the respondents had been negligent in collecting the cheque for a new customer without having taken references or made inquiries. The respondent bank contended that it had acted without negligence. The appeal was allowed.

Therefore, the banker when opening a new account has a duty to ascertain the name of the customer and the customer's

Scanned with MOBILE SCANNER

employer in addition to obtaining suitable references. This case followed *Lloyds Bank v E.B. Savoy & Co.*[98] where the court said;

> "It is true that the question of absence of negligence must be considered separately in regard to each cheque but it is also true that the matter must be considered, as Lord Dunedin says in *Commissioners of Taxation V English, Scottish and Australian Bank* [1920] A.C. 638, 689), in view also of all the circumstances antecedent and present. There may *thus be relevant negligence in connection with the opening of the customer's account by the banker. It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining of reference and without inquiry as to the customers standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under S. 82 if a cheque were converted subsequently in the history of the account;*[99]

This rule was also applied in *Ladbroke & Co. v. Todd*[100] where the bank was held negligent because they did not make inquiries about a

---

98 [1933] A.C. 201

99 *Ibid* at pp. 230-231 emphasis added by the Author.

100 (1924) 111 L.T. 430, 30 T.L R 433 See also *Turner v. London and Provinvial Bank* Ltd (1903)2 L.D.B. 33 c.f.: *Hampstead Guardians v. Barclays bank Ltd* (1923) 39 TLR 229, *Harding v London Joint Stock Bank Ltd* (1914) 3 LDAB 81, *Marfani & Co. Ltd v. Midland Bank Ltd* (1968) 1WLR 956.

Scanned with MOBILE SCANNER

proposing customer which was an ordinary precaution that other banks took.

The authorities show that the banker has to show that he acted with reasonable care in all material respects in opening the account and clearing the cheques. He will be unable to do so where the customer is a new customer and the banker has opened an account for him without obtaining references and making inquiries about him or has generally failed to observe normal banking practice in opening the account, or where the banker has notice as to the money not being the customer's, from the form of the cheque or from irregularity in its endorsement and which would obviously arouse suspicion.[101]

The normal banking practice regarding prerequisites for opening a current account for a company are:

> "to take up references on the directors, and to require the production of the certificate of incorporation of the company and copies of the memorandum and articles of association and a resolution of the board setting out how the account is to be operated, together with specimen signatures of the persons who are to operate it, and in the case of public company the Registrar of Companies' certificate that the company is

---

Motor Traders Guarantee Corp. Ltd v. Midland Bank Ltd [1937] 4 All ER 90, *Taxation Commissioners v. English, Scottish & Australian Bank Ltd* [1920] A.C. 683, *Nu Stilo Footwear Ltd v. Lloyds Bank Ltd* (1956)7 LDAB121.

101 *Bewack Ltd v. African Continental Bank Ltd* 1972(1) L.R. Comm. 88 See pp. 35, 360, 365, 366 and 368.

Scanned with MOBILE SCANNER

> entitled to commence business should be produced in addition.[102]

When a banker is opening an account for a customer or collecting a cheque for him, the test of negligence is whether the transaction of paying a cheque coupled with the circumstances antecedent and present, is so out of the ordinary course that it ought to have aroused reasonable doubts and suspicions in the banker's mind and caused him to make inquiries. If he fails to make inquiries he should have made there is at the very least a heavy burden on him to prove that such inquiries could not have led to any action which could have protected the true owner's interests.[103] Nevertheless if a banker allows an account to be opened in any particular name and the persons with whom the holder of the account had dealings learn through him of the account's existence, he cannot be treated as having made some implied representation to those persons as to the holders integrity or true identity.[104] But a banker's negligence in receiving payment on a cheque is not a ground of action in itself and the plaintiff must prove that he has another ground of action before s.82 of the *Bills of Exchange Act*, the statutory exception to the rule that a bankers negligence is immaterial to his liability, can be raised as a defence by the banker.[105]

---

102 *Ibid* at p. 358.

103 *Attorney General of Northern Nigeria v African Continental Bank Ltd.* 1964 (1) ALR Comm. 232 reversed by Supreme Court on other grounds.

104 *African Continental Bank v A-G of Northern Nigeria* 1967(1) ALR Comm. 108 at 113

105 *Ibid* at p.112

Scanned with MOBILE SCANNER

OVERDRAFT

A customer of the banker with a current account may be granted an overdraft. A customer may borrow from his banker by way of overdraft. Drawing a cheque or accepting a bill payable at the bankers where there are no sufficient funds to meet it amounts to a request for an overdraft.[106] But in the absence of an agreement, express or implied from a course of business and supported by good consideration, a banker is not bound to allow his customer to overdraw his account.[107] Overdrawing a banking account is borrowing money.[108] The overdraft is payable only on demand.[109] Therefore, it can be said that it is an implied term in the relationship between a banker and his customer that where (a) overdraft facilities are provided to the customer; or (b) money is standing to the credit of the customer on his current account and in the absence of special agreement, a demand by either party is a necessary prerequisite to an action by the other for money lent.[110] But the issue of a writ is sufficient demand.[111]

---

106 *Odumosu v African Continental Bank Ltd* 1976 (1) ALR Comm.53 at p.56 (Supreme Court of Nigeria)

107 *Ibid*

108 *African Continental Bank v Babyemi & Anor* 1970(1) 1970 (1) ALR Comm 326 at p.333

109 *Odumosu v African Continent Bank* op.cit p.56 Delalu v Okapo & Anor 1967(1) ALR Comm 200 at p.205

110 *Ibid,* see also *Delalu v Akappo* 1967 (1) ALR Comm 201

111 *Merchants Bank Ltd v. Onigbanjo* 1969 (1) ALR Comm 278.

Scanned with MOBILE SCANNER

In Uganda, the rules of application for overdrafts have been thrown in confusion by the provisions of the *Penal Code*.[112] The *Penal Code*[113] was amended in 1990 to, among other things, prohibit the issuing of false cheques. It provides;

> s.364(1) Any person, including a public officer in relation to public funds who:-
>
> (a) without reasonable excuse, proof of which shall be on him, issues any cheque drawn on a bank where there is no account against which the cheque is drawn; or
>
> (b) issues any cheque in respect of any account with any bank and when he has no reasonable ground, proof of which shall be on him, to believe that there are funds in the account to pay the amount specified on the cheque within the normal course of banking business or
>
> (c) with intent to defraud stops the payment of or countermands any cheque previously issued by him, is guilty of any offence.

Under this law if one issues a cheque when there are no sufficient funds to meet it is not an application for an overdraft but a commission of an offence. This law is absurd and has been

---

112 Cap 106 as Amended by the *Penal Code (Amendment) Act* No.4A of 1990

113 Cap 106

Scanned with MOBILE SCANNER

condemned by the judges. There is no need to criminalise contractual obligations. In any case part of the functions of bills of exchange such as a cheque is to afford credit facilities.

INTEREST

In *Yourell v Hibernian Bank Ltd*[114]; Lord Atkinson said;

> "The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between bank and customer."

A similar view was taken in *National Bank of Nigeria Ltd v Manja and Ors*[115] where Alexander J said;

> The rate of interest on an overdrawn account must be fair and reasonable in accordance with a well recognised custom of bankers and well known to the customer

The author of *Paget's Law of Banking* says that the law remains that a claim for interest is justified by the customer's acquiescence in the charging of interest. And such acquiescence will justify the charging of compound interest or interest with periodic rests so long as the relation of banker and customer exists.[116] These remarks are supported by the case of *National Bank of Greece S.A v Pinios Shipping Co. (No. 1): The Maira*[117] where Nicholls L.J said -

---

114 [1918] A.C. 372

115 1967 (2) ALR Comm 327 at p. 330

116 Hapgood Mark Ed *Paget's Law of Banking op.cit* p.249

117 [1988] 2 LLoyds Rep. 126

Scanned with MOBILE SCANNER

> To facilitate the use of compound interest by banks despite the usury laws, ..., the courts resorted to the fiction that a fresh agreement for the payment of interest was made on the occasion of each rest in a customers' account. An agreement, express or implied, to pay compound interest made when a customer opened an account with the bank would have been unlawful. But if on each occasion when the bank charged or credited interest on an account, the parties were to enter into a new agreement that the balance then struck would bear interest, that agreement would be lawful; because it would provide only for the payment of simple interest on an agreed sum. Thus on this analysis, over a period of years there would be a series of separate agreements between banker and customer made at intervals of one year, six months or whenever, depending upon the manner in which the bank kept its accounts. The notion, of each debiting or crediting of interest being the subject of a separate, fresh agreement, was fundamental to the lawfulness of this practice. There was a succession of agreements, implied from the customer's acquiescence in the practice of the bank regarding the debiting and crediting of interest.[118]

---

118 *Ibid* at p.147

Scanned with MOBILE SCANNER

In *Harilal Shah v Standard Bank*[119] the Court of Appeal for Eastern Africa said:-

> It is, however, generally notorious that banks charge compound interest on overdrawn mercantile accounts and I consider that the notoriety of that general usage is such that judicial notice can be taken of it.[120]

In the result the court held that a banker is legally entitled by trade usage to charge compound interest on an overdrawn mercantile (current) account on daily balances with monthly rests, and such a usage must be implied into all overdraft agreements unless expressly or impliedly excluded.[121] Charging interest on daily balances with monthly rests is to increase the burden on the borrower. But the court was of the opinion that such practice appears to be certain, and despite the dislike of the law of compound interest, not contrary either to legislation or to any fundamental principle of law. The practice is also reasonable in the sense that reasonable people may well adopt it.[122]

In fact the *Bank of Uganda Statute*[123] recognises the banks right to charge interest by providing;

---

119 1967 (1) ALR Comm 209

120 *Ibid* at p.221

121 at pp 221, 222 and 229

122 *Ibid* at p.221.

123 Statute No.5 of 1993

Scanned with MOBILE SCANNER

> s.40(1) The Bank may, in consultation with the Minister, by statutory instrument; prescribe.....
> (d) the maximum or minimum rates of interest and other charges which in the transaction of their business financial institutions may pay on any type of deposit or other liability and *impose on credit extended in any form* (emphasis added).

When interest is charged on daily balances with monthly rests, it means that the interest is compounded monthly.[124] The bank cannot unilaterally vary the rate of interest without the express or implied agreement of the borrower, although it may call for repayment for the amount outstanding and then continue the overdraft at a higher rate of interest if the borrower agrees.[125] Thus in *Harilal Shah v Standard Bank Ltd*[126] where the bank varied interest without the express or implied consent of the borrower, the court held that;

> "A trade usage allowing banks to vary charges imposed on customers without prior consent of, or notification to, those customers is contrary to the law of contract, unreasonable, oppressive, unjust and therefore of no legal effect.[127]

---

124 *Harilal Shah v Standard Chartered Bank op.cit* at 219

125 *Ibid* at pp. 222, 223, 228 and 229

126 1967 (1) A.L.R Comm 209

127 *Ibid* at p. 216 and 223

Scanned with MOBILE SCANNER

A bank is only entitled to fair and reasonable interest on an overdraft where the parties have not expressly or impliedly agreed to the rate of interest payable.[128] However, where a person receives periodic statements on which it is shown that compound interest was charged on the amount of his overdraft and he does not dispute the accuracy of those statements he is deemed to have accepted that interest should be charged at the rate.[129] The position seems to be that simple interest can be charged by banks as a matter of course. But compound interest is only chargeable when the customer has expressly or impliedly agreed to it or when a trade usage of charging compound interest has been proved or is so notorious that courts take judicial notice of it. And according to *Harilal Shah v Standard Bank Ltd.*[130]

> "Before a course of dealing can become an enforceable trade usage and be implied into a contract, it must be; (a)so well known to those affected, that when entering a contract affected by it they must be presumed to have intended to be bound by it; (b) certain so that the position of each party affected by it is capable of ascertainment:- (c) reasonable in the circumstances of the case; (d) not contrary to legislation or any fundamental principle

---

128 *Ibid* at 228

129 *African Continental Bank Ltd v Yesufu* 1977 (1) A.L.R. Comm 212 at 235-236.

130 1967 (1) ALR Comm 209.

Scanned with MOBILE SCANNER

> of law; and (e) consistent and not dependent on an individual's whim.[131]

If a party to a contract bases his claim on a trade usage, the pleadings should clearly aver not only the fact but also the precise nature of the trade usage on which the claim is founded.[132]

Finally it needs to be repeated that banks have no power to charge a penal rate of interest on overdrafts or to change the method of calculating what is reasonable rate of interest without the consent of their customers.[133]

BANK STATEMENTS

The bank is under an obligation to provide periodic statements of the account. But as the author of *Paget's Law of Banking says:-*

> The relationship of banker and customer does not give rise either in contract (by way of implied terms) or in tort to a duty owed by the customer to the bank to check his monthly (or other periodic) bank statements so as to be able to notify the bank of any items which were not; or may not have been authorised by him.[134]

---

131 *Ibid* Headnote see also *National Bank v Peters*_1971(1) A.L.R Comm 263 and *Enahoro & Co Ltd v Bank of West Africa Ltd* 1971(1) ALR Comm 180

132 *National Bank of Nigeria v Manja op.cit* p.331

133 *Harilal Shah v Standard Bank op.cit.* p. 233

134 Hapgood Mark Ed *Paget's Law of Banking* op.cit p.172

Scanned with MOBILE SCANNER

This statement is backed by weighty authorities. In *Chatterton v London and County Banking Co. Ltd*[135] an opinion was expressed that customers were not bound to examine their pass books. This statement was approved and applied *in Kepitigalla Rubber Estates v National Bank of India.*[136] The Privy council adopted the same rule in *Tai Hing Cotton Mill Ltd v Lin Chong Hing Bank Ltd and others*[137] holding that in the absence of express agreement to the contrary, the duty of care owed by the customer to his banker in the operation of his current account is limited to a duty to refrain from drawing a cheque in such manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as the customer becomes aware of it. But there was no duty on the customer to check his bank statements.[138]

Nevertheless a customer should check the statements and if any errors are detected they should be brought to the attention of the banker. There are two situations whereby a mistake might occur either in favour of the customer or in favour of the banker. These are known respectively as over-crediting and over-debiting.

OVER CREDITING

In the case of a customer whose account has been over credited, if the customer honestly believes that the money is his and alters his position in reliance on the statement, then the banker is

---

135 1890 The Miller 5th May 1890

136 [1909]2 K.B. 1010

137 [1986]A.C 80

138 Smart P.E. Ed Chorley & Smart: Leading cases in the Law of Banking op.cit p.94

Scanned with MOBILE SCANNER

estopped from recovering the money from the customer.[139] Thus in *Lloyds Bank Ltd v Brooks*[140] it was held that there was a duty on the banker not to over credit the customer's account and there is a duty on the bank not to induce the customer by representations contained in the statements of account to draw money from the account to which the customer is not entitled. The amount credited to the customer's account will be treated as being due to him. But the estoppel only operates after the customer has acted upon the representation.[141]

OVER-DEBITING

Over-debiting generally occurs as a result of fraud or forgeries. In *Kepitingalla Rubber Estates Ltd v National Bank of India Ltd*,[142] the secretary of a company forged cheques drawn on the company's account over a period of two months. Statements had been given to the company but the directors had not examined them. The court held that the bank could not charge the company with the amounts paid out on forged cheques and the plaintiffs were under no duty to organise their business in such a way that forgeries of cheques could not take place.

Similarly in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank and others*[143] a fraudulent accounts clerk forged signatures on over 300 cheques to the tune of HK$5.5 million drawn on the

---

139 *Holland v Manchester and Liverpool District Banking* Co. (1990) 25 T.LR 386

140 (1950) 72 J.I.B 114

141 *Holland v Manchester and Liverpool District Banking co. op.cit* see also *British and North European Bank v Zalzstein* [1927] 2 KB. 92

142 [1909] 2 K.B. 1010

143 [1986] A.C. 80

Scanned with MOBILE SCANNER

company's accounts over a period of five years. The Privy Council held that the banks which had paid on the forged cheques were not entitled to debit the company's accounts. That the duty owed by the customer to the banker in the operation of the account was limited to the duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any forgery of a cheque purportedly on the account as soon as he became aware of it. The bank's submission that the customer owes a duty of care to his bank to take such precautions a reasonable customer would take to prevent forged cheques being presented to his banker for payment and to examine his statements for unauthorised items was rejected.

2. DEPOSIT ACCOUNTS

In law these accounts are also known as time deposits.[144] These deposits are repayable after a fixed period or after notice and include savings accounts. Because the balances on the deposit account are payable after a stated notice, the customer has no right to draw cheques on the account. And normally no cheque book is given for such an account. The money placed on a deposit account is the banker's money:-

> he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places or the principal and a small rate of interest according to the custom of bankers in other places.[145]

---

144 *Financial Institutions Statute* No. 4 of 1993 s.2

145 *Folley v HILL* (1848) 9 E.R.110 see pp. 105-106

Scanned with MOBILE SCANNER

However, it is generally recognised that the banker pays interest on deposit accounts. The banker does not charge a commission. A banker gives a pass book which shows debits and credits. But a pass book is not admissible as evidence of the state of the owner's account or any payments or withdrawals he may have made; these can only be proved by a copy of the relevant entries made at the bank's headquarters.[146]

A variation of a deposit account is a savings account which was intended to encourage savings from small savers.

3. OTHER ACCOUNTS

There are other accounts such as a loan account and a personal loan account which are variations of a current account but are opened for the specific purpose of lending money to the customer. Special note should be made of an account known as a suspense account. This account is used for items which, for one reason or another cannot be passed at once into the account to which they ought to go. They are, in the meantime, debited or credited, as the case may be, to a suspense account. A cheque which is sent direct by one bank to another for collection and payment over, is, in some banks, debited to such an account until advice of the payment is received.[147]

The usual practice of bankers where limited orders are issued in garnishee proceedings is to transfer the amount of the judgment debt and costs plus a round sum for possible garnishee costs from a current account to a suspense account to await the

---

146 *R v Ezekiele* 1967 (3) ALR Comm 10 at p.12.

147 *Ayuba v Ogunleyke* 1970 (2) ALR Comm 21 at 24

Scanned with MOBILE SCANNER

hearing. This permits the current account to be carried on.[148] There is also an account known as a loan account.

Generally on a loan account interest is calculated on a declining balance and therefore the customer will not know the full extent of his obligations until he has liquidated the debt. But on a personal loan account the interest is calculated ahead of time and the customer is aware of the full extent of his obligations before he starts paying.

4. APPROPRIATION OF PAYMENTS

The case of *Devaynes v Noble, Clayton's case*[149] decided that when a current account is kept between parties as in the case of accounts between bankers and their customers, if there is no express intention to the contrary and no circumstances from which such an intention can be implied, the account rendered is evidence that the payments in on one side are appropriated to the payments out on the other side in the order in which they take place. That is to say that the first item on the debit side is discharged or reduced by the first item on the credit side.[150] (FIFO: First in First Out) As Smart puts it in the case of a current account, payments in are, in the absence of any express indication to the contrary by the customer, presumed to have been appropriated to the debit items in order of date.[151]

---

148 *Ibid*

149 (1816) Mer 527 (see also 35 E.R 781)

150 See Interpretation of Clayton's case in *Mohamed Osman Hamra v Sudan Commercial Bank* 1967 (1) ALR Comm 389 at 393 - 393

151 Smart P.E. *op.cit*. 150

Scanned with MOBILE SCANNER

It is up to the customer to appropriate. This was made clear in *Deeley v Lloyds Bank Ltd*[152] where the court said;

> the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor had dealt with payment, in order to ascertain how he did in fact appropriate it. And if there is nothing than a current account kept by the creditor, or a particular account kept by the creditor and he carries the money to that particular 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.[153]

The rule in *Clayton's case* is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case by evidence going to show that it was not the intention of the parties that it should be applied.[154]

Nevertheless the fact is that the party who pays money has a right to appropriate that payment as he thinks fit. If there are several debts due from him he has a right to say to which of those

---

152 [1912] A.C 756

153 *Ibid* at p 783

154 Ibid at p 771 see also *The Mecca* (1897) A.C 286

Scanned with MOBILE SCANNER

hearing. This permits the current account to be carried on.[148] There is also an account known as a loan account.

Generally on a loan account interest is calculated on a declining balance and therefore the customer will not know the full extent of his obligations until he has liquidated the debt. But on a personal loan account the interest is calculated ahead of time and the customer is aware of the full extent of his obligations before he starts paying.

4. APPROPRIATION OF PAYMENTS

The case of *Devaynes v Noble, Clayton's case*[149] decided that when a current account is kept between parties as in the case of accounts between bankers and their customers, if there is no express intention to the contrary and no circumstances from which such an intention can be implied, the account rendered is evidence that the payments in on one side are appropriated to the payments out on the other side in the order in which they take place. That is to say that the first item on the debit side is discharged or reduced by the first item on the credit side.[150] (FIFO: First in First Out) As Smart puts it in the case of a current account, payments in are, in the absence of any express indication to the contrary by the customer, presumed to have been appropriated to the debit items in order of date.[151]

---

148 *Ibid*

149 (1816) Mer 527 (see also 35 E.R 781)

150 See Interpretation of Clayton's case in *Mohamed Osman Hamra v Sudan Commercial Bank* 1967 (1) ALR Comm 389 at 393 - 393

151 Smart P.E. *op.cit*. 150

Scanned with MOBILE SCANNER

It is up to the customer to appropriate. This was made clear in *Deeley v Lloyds Bank Ltd*[152] where the court said;

> the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither of them exercises the right, then one can look on the matter as a matter of account and see how the creditor had dealt with payment, in order to ascertain how he did in fact appropriate it. And if there is nothing than a current account kept by the creditor, or a particular account kept by the creditor and he carries the money to that particular 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.[153]

The rule in *Clayton's case* is not a rule of law to be applied in every case, but rather a presumption of fact, and that this presumption may be rebutted in any case by evidence going to show that it was not the intention of the parties that it should be applied.[154]

Nevertheless the fact is that the party who pays money has a right to appropriate that payment as he thinks fit. If there are several debts due from him he has a right to say to which of those

---

152 [1912] A.C 756

153 *Ibid* at p 783

154 Ibid at p 771 see also *The Mecca* (1897) A.C 286

Scanned with MOBILE SCANNER

debts the payments shall be appropriated. The debtor's intention to appropriate may be shown by the course of dealing or other circumstances, but an entry in the debtor's book is not itself evidence of appropriation by him. If the right of appropriation is exercised by the creditor he may appropriate to a debt which is statute barred. But such an appropriation does not revive the debt. He cannot, however, appropriate to an illegal debt.

The creditor need not exercise the right of appropriation at the time of payment. This can be done later. But once he has made an appropriation it is made once and for all. Nevertheless money paid into a bank account to meet a particular bill or cheque must be applied accordingly.[155]

The author of *Paget's Law of Banking* is of the opinion that a creditor's right of appropriation is exercisable up to the very last moment, even when there is a current account, accounts rendered being only rebuttable evidence of such exercise. A creditor's appropriation does not bind him unless it is communicated to the debtor.[156]

According to *Hallet's*[157] case the rule in *Clayton's case* does not apply to trust money on the account because equity gives priority to the beneficiary where trust money is mixed with personal money. Whatever balance is on the account would represent trust money and the beneficiary would be able to claim a charge on the sums in the hands of the banker.

---

155 c.f *Greenlagh & Sons v Union Bank of Manchester* [1924] 2 K.B. 153

156 Hapgood Mark Ed 10th Ed. *op.cit* p 243

157 *Re: Halletts, Knatchbull v. Hallett* (1880) 13 Ch.D. 696.

Scanned with MOBILE SCANNER

In *Re Yeovil Glove Co. Ltd*,[158] it was said that if a customer has more than one account the rule in *Clayton's case* must be applied to each account separately.

Bradford Old Bank v Sutcliffe[159] is an authority for the view that the rule in *Clayton's case* cannot normally be used for the purpose of settling the items in a current account against items in another account kept for the same customer.

In this case a customer had a loan account and a current account with the banker. It was held that payments to the credit of the current account must be appropriated to that account and therefore a guarantor for the loan account cannot claim that such payments should be taken in reduction for the loan.

However, it was thought that in exceptional circumstances the rule may apply to two accounts. This doubtful exception is supposedly based on *Re. E.J. Morel 1934 Ltd.*[160] In this case the company maintained two accounts with the bank. One was a wages account and there was a number two account. The understanding with the customer was that enough money should be kept on number two account to cover withdrawals on the wages account. In these special circumstances the court held that the two accounts were actually one and the rule in *Clayton's case* applied with the result that the banker became an unsecured creditor for the monies advanced on the wages account. But this case should have been a case of a statutory set-off as the company was being wound up.[161]

---

158 [1965] Ch. 148

159 [1918] 2 K.B. 833

160 [1962] 1 ch 21

161 see a detailed discussion on this issue in chap.4 ante

Scanned with MOBILE SCANNER

Clayton's case applies only where the payments out of the account continue to be made and this is illustrated by the facts in Clayton's case itself. Clayton had a current account with a banking firm. One of the partners died and at the time of his death there was a balance standing to the credit of the customer's account. Later the bank failed. Between the date of the partner's death and the date of failure of the bank the customer withdrew sums in excess of the credit balance but he also paid in sums sufficient to put the account more in credit than it had been when the partner died. The customer claimed that the payments in should be appropriated against the withdrawals so as to leave intact the balance at the time of the partner's death as a claim against his estate.

The court held that the credit balance being a liability for the continuing fund had been extinguished by the withdrawals since items in the current account were presumed to be set against each other chronologically. Thus the customer had no claim against the estate of the deceased partner. By continuing to make payments into the account and withdrawing from the account he lost his claim against the estate of the deceased partner.

There are some instances where the rule in *Clayton's case* will work against the banker and it may be necessary for the banker to stop the account when it is overdrawn especially in the case of death, bankruptcy, winding up or insanity of a joint account holder. In such a case further transactions should be carried out on a new account. Failure to do so may involve the banker in heavy losses. Thus in *Royal Bank of Scotland v Christie*[162] a partnership was borrowing money from a bank and a partner had executed a mortgage of his land by way of security. That partner died and then further advances were made to the partnership which continued in business. Later on sums were paid into the account sufficient to cover the indebtedness at the date of his death. The House of Lords

---

162 8. E.R. 84

Scanned with MOBILE SCANNER

held that payments in had repaid the debt outstanding at the time of the partner's death and consequently the further advances were unsecured.

In *Mohamed Osman Hamra v Sudan Commercial Bank*[163] the respondent bank brought an action against the applicant for recovery of a cash loan, plus interest made in consideration of discounting bills. The applicant who was a customer was granted a money loan by them "in consideration of bills discounted". Later a number of promissory notes drawn by third parties in favour of the applicant were endorsed by the latter to the respondents. The respondents accepted these bills for discounting in the normal course of their business as bankers and, infact, did discount them. The respondents claimed a settlement of the amount claimed and, although he did not contest the claim, the applicant merely replied in two letters that he would negotiate with them. The respondents instituted proceedings to recover the principal plus interest. The applicant maintained that he had infact repaid it and that the settlement of later bills was evidence of settlement of earlier ones. The lower courts gave judgment for the respondent. In allowing the application, the Court of Appeal of the Sudan, said that in an appropriation by law, payments in are appropriated to payments out in the order in which they take place and it is not then open to the banker to contend that the value of later bills was paid first.

Finally, if a banker gets notice of the creation of a second mortgage then he should immediately stop the account and further transactions should be conducted through a new account. Failure to do this will involve the banker in losses as, infact, happened in *Deeley v Lloyds Bank*.[164]

---

163 1967 (1) ALR Comm 389 at p. 393

164 [1912] A.C. 756.

Scanned with MOBILE SCANNER