CHAPTER TWO

A DEFINITION OF BANK, BANKER AND CUSTOMER

Lord Denning M.R remarked, in *United Dominions Trust Ltd. V Kirkwood*,[1] that like many other beings a banker is easier to recognise than to define.[2] It is very difficult to give a general definition of the word bank or banker because of the different functions performed by specialized banks. For example savings banks generally do not issue cheque books but give passbooks and normally the customer's deposit is drawn on application. For merchant banks, their main function is to facilitate trade and accordingly, they are heavily engaged in discounting bills and opening letters of credit. These transactions involve very little money. And because of this any definition of the word bank or banker should only be looked at as a sort of guide rather than an exhaustive one.

A. STATUTORY DEFINITIONS.

An important statute which defines the word bank or banker is the *Bills of Exchange Act*[3] which provides:-

S. 2. In this Act, unless the context otherwise requires,
"banker" includes a body of persons whether incorporated or not who carry on the business of banking.

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1 [1966] 2Q B. 431

2 *Ibid* at p 454

3 Cap. 76

This Act makes no attempt to define the business of banking.

The *Evidence (Bankers Books) Act*[4] provides;

> "bank or banker" means any person carrying on the business of banking in Uganda (including the Post Office Savings Bank established under the provisions of the Post Office Savings Bank Act).

The *Stamps Act*[5] also gives a very unhelpful definition.

> S.2 In this Act unless the context otherwise requires,
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> `banker' includes a bank and any person acting as a banker.

The *Bank of Uganda Act*[6] defines a "Bank" to mean the Bank of Uganda established Under the Act. In Section 5(2) it mandates the Bank to be a banker to financial institutions. A financial institution is defined in section two.

> "Financial institution" includes a bank, credit institution, building society and any other institution classified as a financial institution by the Bank.

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4 Cap. 44

5 Cap. 172

6 No.5 of 1993

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A much more comprehensive definition of the words 'bank' or 'banker' and the phrase 'banking business' is contained in the *Financial Institutions Statute*[7] which provides;

S.2 In this Statute unless the context otherwise requires;

"bank means any company licensed to carry on banking business as its principal business and includes all branches and offices of that company in Uganda.

"Banking business" means the business carried on as a principal business of;

a) accepting deposits of money from the public repayable on demand or at the expiry of a fixed period or after notice.

b) employing such deposits wholly or partly by lending or other means for the account of and at the risk of the person accepting such deposits.

c) presenting to another bank for payment, cheques, drafts or orders received from customers.

The Statute in the same section also defines a company to mean;

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"Company registered under the Companies Act and includes:

a) Uganda Commercial Bank established under the Uganda Commercial Bank Act;

b) The Co-operative Bank established under the Co-operative Societies Act;

c) Uganda Development Bank established under the Uganda Development Bank Decree;

d) Building society duly registered under the Building Societies Act;

e) Any institution classified as a financial institution under this statute.

A financial institution is also defined in Section 2 and includes;

" a bank, credit institution, a building society and any institution which by statutory instrument is classified as a financial institution.

The distinction between a bank and a credit institution is not made any clearer by the

statute's definition of a "credit institution." contained in section 2

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> "Credit Institution" means any company licensed to carry on credit institution business as its principal business.

And "credit business" means

> "the business of accepting deposits of money from the public repayable after a fixed period or after notice and of employing such deposits wholly or partly by lending or any other means for the account of and at the risk of the person accepting deposit."

Before commenting on the above statutory provisions it may be pertinent to highlight the distinction between a bank and a money-lender. *The Money-Lenders Act*[8] provides that a money-lender:-

> "Includes every person whose business is that of money-lending or who advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from other sources other than that of lending money and whether or not that person carries on the business as a principal or agent but shall not include:-
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> a) any person *bonifide* carrying on the business of banking or insurance or

8 Cap. 264, S.2

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bonafide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money;

b) any society registered under the Co-operative Societies Act;

c) any body corporate incorporated or empowered by a special Act to lend money in accordance with that Act.

A building society under the Financial Institutions Statute[9] is defined in Section.2 to mean:-

> "a society formed for the purposes of raising subscription of members, a stock or fund from which to make advances to members registered in accordance with the provisions of the Building Societies Act."

Finally, section 4 of the *Financial Institutions Statute*[10] clearly states that only companies can be licensed under it to carry out banking business. In order to qualify for a license a local company wishing to carry out banking business must have a minimum paid up capital of 500 million shillings while a foreign company needs a minimum paid up capital of one billion shillings. In the case of a credit institution the local and foreign company require a minimum paid up capital of 300 million shillings and 500 million shillings

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9 No.4 of 1993 S.2

10 No.4 of 1993

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respectively. A building society needs a minimum paid up capital of 300 million shillings.

The Statutory provisions lead to a number of observations as far as definition of `bank' `banker' and `banking business' are concerned.

(i). In order to be a `bank' or `banker' to be licensed to carry out banking business the person must be a company incorporated under the *Companies Act*[11] with the prerequisite paid up minimum capital. It is only a Company which meets these conditions which can call itself a bank as required by S.47(2) of the *Financial Institutions Statute*[12] which provides:-

> "No company shall carry on the business of banking unless it uses as part of its name the word "bank" or one of its derivatives."

Any other person is prohibited from using the word bank by S.47(1)(a) and (b) which provide:-

> No person shall except a person licensed under this statute, without the consent of the Central Bank;
>
> a) use the word `bank' or any of its derivatives in any language or any other word indicating the transaction of banking business in the name, description of title under

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11 Cap. 85

12 No. 4 of 1993

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which such person is transacting business;

b) make or continue to make any representation indicating the transaction of banking business in any billhead, letter-paper, notice, advertising or in any matter whatsoever.

Consequently, the definition of banker as contained in the *Bills of Exchange Act*[13] in so far as it includes unincorporated persons should be taken to have been modified. Unincorporated persons cannot carry on the business of banking. It follows, therefore, that in the absence of a specific statutory provision, unincorporated persons cannot take advantage of Ss.60, 73-77-79 and 80 of the *Bills of Exchange Act*[14]. As P.E. Smart points out in regard to Section 2 *Bills of Exchange Act 1882*;

> "The purpose of that section was, not to define the business of banking, but to make it clear at a time when *Joint stock banks* were still not as familiar as they are today that companies and firms as well as individuals, could be bankers."[15]

With the prohibition of the use by anyone except a licensed company, of the words indicating that the user is a `bank' or

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13 Cap. 76

14 *Ibid*

15 Smart P.E. (Ed) Chorley & Smart, *Leading Cases In The Law of Banking*. (London, Sweet & Maxwell 1990) p.28 [emphasis added]

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indicating transaction of "banking business" means that individuals and firms cannot be bankers. These comments apply *mutatis mutandis* to the definition of the word "banker" contained in the *Stamps Act*.[16] It is stated by S.55 of the *Financial Institutions Statute*[17] that it takes precedence over other Acts that relate to banking.

(ii) *The Financial Institutions Statute*[18] spells out the characteristics of a banker. These are basically (a) accepting deposits of money which is to be repaid, (b) using the deposit to lend to borrowers at the bank's risk (c) collecting cheques, drafts or orders for the customer. It is also significant that part (a) of the definition of banking business in the *Financial Institutions Statute*[19] differs significantly from part (a) of the repealed *Banking Act*[20] on the same issue. It is important to reproduce the two provisions.

(a) *Banking Act*[21].

S.2: In this Act, unless the context otherwise requires:

banking business means the business carried on as a principal business of

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16 Cap. 172

17 No. 4 of 1993

18 No. 4 of 1993 s.2

19 *Ibid*

20 No. 16 0f 1969

21 *Ibid*

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a) accepting deposits of money from the public repayable on demand or after a fixed period, or after notice *and which are withdrawable by cheque*.

b) Financial Institutions Statute[22]

S.2 In this statute, unless the context otherwise requires;

banking business means the business carried on as a principal business of

a) accepting deposits of money from the public repayable on demand or at the expiry of a fixed period or after notice.

The repealed *Banking Act*[23] by including the words "and *which are withdrawable by cheque*" had unnecessarily restricted the definition to current accounts or demand deposits. The *Financial Institutions Statute*[24] by dropping those words has opened up the definition to cover current accounts or demand deposits and time deposits including savings accounts. This is implicitly recognized in section 2 of the statute where demand deposits are defined as deposits which are payable on demand and withdrawable by cheque, order or by other means and time deposits are said to be deposits repayable after a fixed period or after notice and includes saving deposits.

It should be noted that what these definitions do is to give the essential characteristics of the business of banking.

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23 No. 16 of 1969

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But a statement of the essentials of business is not, without more, exhaustive of all that is ordinary in that business. The essentials tell us what a banker does but they do not tell us everything that a banker does. In the words of Lord Denning MR.

> It must be remembered that a recital of usual characteristics is not equivalent to a definition. The usual characteristics are not the sole characteristics. There are other characteristics which go to make a banker.[25]

(iii) The definition of banking business emphasizes that a banker has to employ the deposits wholly or partly by lending. But a banker is not a money-lender. Persons bona fide carrying on the business of banking are specifically excluded from the operation of the *Money-Lenders Act*.[26] The words `*bona fide*' connote that (a) the transaction relied upon as constituting the acceptance of money from customers must be genuinely of this legal nature and not a mere disguise for transactions of a different legal nature; and (b) the banking transactions must not be negligible in size when compared to the rest of the business. Indeed the

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25 *United Dominions Trust Ltd V Kirkwood* [1966]2 QB 431 at 453-54, see also *Royal Bank of Canada V IRC* [1972] Ch. 665 at 679.

26 Cap. 264 S. see also *Ojikutu V Agbonmagbe Bank Ltd* 1966(2) A.L.R Comm 433 at 438-439 High Court of Lagos, Nigeria, *DUA V Afriyie & Ors* 1971(1) ALR Comm 311 Court of Appeal of Ghana.

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Financial Institutions Statute[27] stipulate that a company to be a bank must carry on banking business as its *principal* business. Therefore, there is no way that the banking transactions would be negligible in size when compared to the rest of the business.

(iv) It has been noted that only a Company can be licensed to carry out banking business as stipulated by Section 4 of the *Financial Institutions Statute*.[28] Statutory Corporations and building societies would therefore not qualify for a license. This has been taken care of by the definition of a company in the Statute to include statutory corporations and building societies.

(v) The Post Office Savings Bank is not a bank for purposes of the *Financial Institutions Statute*[29]. It is not included[30] in the definition of a company under the *Financial Institutions Statute*[31] and therefore cannot be licensed under S.4 of the Statute to carry on banking business. It does not qualify as a bank under the statute because accepting deposits of money from the public is not the principal business of the post office. The Post Office Savings Bank is not allowed by the Act establishing it to

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27 No. 4 of 1993

28 No. 4 of 1993.

29 *Ibid.*

30 It was not even included under the repealed *Banking Act* 1969 No.16 of 1969.

31 No. 4 of 1993.

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employ its deposits wholly or partly by lending.[32] Its deposits are supposed to be invested in treasury bills and other securities approved by the Secretary to the Treasury.[33] And if there is any loss such loss is chargeable on the consolidated fund.[34] Therefore, the Post Office Savings Bank does not have any risk. The only characteristics it shares with banks is presenting cheques to other banks for collection, use of the word `bank' in its name and being a bank for purposes of the *Evidence (Bankers Books) Act*.[35]

B. CASE LAW DEFINITION OF `BANK'

Case law, like the statutes, had not defined the word bank but had defined the characteristics of banking business. In the leading case of *United Dominions Trust Limited v Kirkwood*,[36] Lord Denning M.R said:-

> There are therefore two characteristics usually found in bankers today: (i) They accept money from, and collect cheques for, their customers and place them to their credit; (ii) They honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third,

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32 Cap. 89 s.12(1)

33 *Ibid* and s. 8

34 Cap. 89 s.14

35 Cap. 44

36 (1966) 2 QB. 431

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namely (iii) they keep current accounts or something of that nature, in their books in which the credits and debits are entered. Those characteristics are much the same as those stated in Paget's *Law of Banking* (6th ed. 1961)p.8 "No-one and nobody, corporate or otherwise can be a `banker' who does not (i) take current accounts; (ii) pay cheques drawn on himself; (iii) collect cheques for his customers.[37]

Lord Diplock agreed that an essential characteristic of banking business is the conduct of current accounts and then went on to say:-

> I am inclined to agree with the Master of the Rolls and the author of the current edition of Paget on Banking (6th ed, 1961)p.8 that to constitute the business of banking today the banker must also undertake to pay cheques drawn upon himself (the banker) by his customers in favour of third parties up to the amount standing to their credit in their "current accounts" and to collect cheques for his customers and credit the proceeds to their current accounts.[38]

Lord Denning M.R. was of the view that there are other characteristics which go to make a banker. He said that such characteristics include soundness, stability and probity. And in the case of doubt; one should look at the reputation

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37 *Ibid* at p.447

38 *Ibid* at p.465

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of the firm amongst intelligent commercial men.[39] In other words the banking community should know a banker when they see one.

These other characteristics are of less importance because of the provisions of the *Financial Institutions Statute*.[40] Moreover, the prohibition[41] of the use by any one except a licensed bank of words indicating that the user is a bank or carrying on banking business has gone a long way to meet the danger of such a word being used to mislead the public as to the standing of less reputable business. It seems clear that a person must satisfy the requirement of the law and be registered as a banker in order to have the intelligent commercial men to recognise him as a banker.

Lastly, it was said in *Re Shield's Estate, Governor and Co. of Bank of Ireland, Petitioners*[42] that the real business of the banker is to obtain deposits of money which he may use for his profit by lending it out again.

Under the common law, according the authorities discussed above the usual characteristics of a banker or bank are:-

a) conducting accounts on which they deposit money from customers and which shows debits and credits;

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39 *Ibid* at 435-454

40 Act No.4 of 1993

41 *Financial Institutions Statute* No.4 of 1993 s.47

42 (1901)1 & R 172 at 182 per Holmes L.J.

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b) lending out money deposited with it for its profit;
c) collecting cheques, or orders for customers;
d) payment of cheques drawn on the bankers;

The common law characteristics of a banker are largely in accord and must have guided the draftsperson in defining the words `banking business' as contained in the *Financial Institutions Statute*.[43] A banker or bank is a licensed company whose sole or predominating business is banking, that is, receipt of money on demand deposit or time deposit or savings deposit accounts and the payment of cheques drawn by and the collection of cheques paid in by the customer.

C. CUSTOMER

Similar to the words 'bank' or 'banker', it is not easy to define the word customer with exactness. However, it seems that the major factor determining whether or not a person is a customer must depend on whether or not such a person has or will have an account with the bank. There must be some sort of account, either a deposit or current account or a similar relationship to make a person a customer of the banker. Thus in *Great Western Railway Co. v London and County Banking Co. Ltd*[44] in holding that a person was not a customer of the bank the House of Lords said:-

> ... but he had no account of any sort with the bank. Nothing was put to

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43 No.4 of 1993

44 [1901] A.C 414

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his debit or credit in any book or paper kept by the bank.[45]

This case is also authority for the proposition that if a person has no account with the bank and is not about to open an account with the bank; the fact that a bank renders some casual service for him that alone will not make him a customer. In this particular case where a man had for some years been in the habit of getting crossed cheques exchanged for cash at the bank where he had no account and for which service he was not charged anything was held not to be a customer.

However, it seems that one need not have opened an account to qualify as a customer. An agreement to open an account is sufficient to constitute a person a customer of the bank. Like in all contracts one has to find a *consensus ad idem*. In *Ladbroke v Todd*[46] where it was argued that a person does not become a customer of the bank until the first cheque is collected, the court said:

It is true that it was the first transaction that had taken place between them; but I have to look at the relationship between the parties created by the receipt of the cheque. Was he a customer of the bank when he handed the cheque to the defendant? I think he was. There must be a time when he began to be a customer. *In my opinion a person becomes a customer of a bank when he goes to the bank with money or cheque and asks to have an account opened in his*

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45 At p.425

46 [1914] 19 Com.Cas 256

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name, and the bank accepts the money or cheque and is prepared to open an account in the name of that person; after that he is entitled to be called a customer. I do not think it is necessary that he should have drawn any money or even that he should be in a position to draw money. *I think such a person becomes a customer the moment the bank receives the money or cheque and agrees to open an account*[47].

Similarly in *Woods v Martins Bank Ltd*[48] a bank accepted instructions from the plaintiff to collect money, pay part to a company he was going to finance and retain to his "order the balance of the proceeds". He had no account with the bank. It was held that an agreement to open an account is sufficient to constitute the person the customer of the bank. As the author of *Paget's Law of Banking* explains:-

> There was the likelihood that an account would be opened ... There were early negotiations from which it could normally be inferred that Woods would open an account with the bank and that the bank was willing for him to do so, so that a contract was concluded between them.[49]

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47 at p.261 emphasis added by the author

48 [1959] 1QB 55

49 Hapgood Mark *Paget's Law of Banking* (London Butterworths 1989) 10th Ed. p.132

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Duration is not of the essence in the relationship of the banker and his customer as clearly stated in *Commissioners of Taxation v English, Scottish and Australian Bank*[50].

> ...the word customer signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is ... a customer of the bank ... irrespective of whether his connection is of short or long standing. The contrast is not between a *habitue* and a newcomer, but between a person for whom the bank performs a casual service, such as for instance cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank.[51]

D. NATURE OF THE RELATIONSHIP OF BANKER AND CUSTOMER

The relationship of a banker and his customer is one of contract. *In Sudan Commercial Bank V EL Sadiq Mohammed El Sadiq*,[52] the Court of Appeal of the Sudan said;

> "The relationship of banker to customer is one of contract. ... The relationship consists of a general contract which is basic to all

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50 (1920) A.C 683

51 *Ibid* at p. 687

52 1967 (1) ALR Comm 35

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> transactions, together with special contracts (such as the contract of borrowing and lending) which arise only as they are brought into being by the express or perhaps implied acts of the parties.[53]

The High Court of Lagos took a similar view in *National Bank of Nigeria Ltd v Maja & Ors.*[54] In the headnote it is stated that;

> The relationship of banker and customer is contractual, consisting of a general contract and special contracts arising from particular requirements, the express terms of which, in so far as they conflict with implied terms of the general contract override them and, in the event of their breach give raise to a claim in damages.[55]

In *Esso Petroleum Co. v Uganda Commercial Bank*, the Supreme Court of Uganda has held that the relationship of a banker and a customer is contractual.[56] The court said that the respondent was in "breach of his duty emanating from the contractual relationship of banker/customer" Similarly in *Mobil (U) Ltd v Uganda Commercial Bank*[57] Kato Ag. J. held that the banker and customer relationship was contractual.

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53 At pp. 37-38

54 1967 (2) ALR Comm 327

55 Ibid at p. 327

56 Civil Appeal NO. 14 OF 1992

57 1982 H.C.B 64 similar views were expressed in *Major John Kazoora v Uganda* Crim Appeal No. 51 of 1991 (Unreported)

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In *Babalola v Union Bank of Nigeria Ltd*[58] the court stated emphatically that the *entire* relationship between a banker and customer is contractual."[59]

This is a development from an *obiter* of Lord Campbell in *Foley v Hill*[60] that the relationship between a banker and a customer was one of contract. This view was subsequently endorsed by Lord Atkin in *Joachimson v Swiss Bank Corporation*[61] where he said;

> I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statements. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking

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58 1980 (1) ALR Comm 201

59 At 207

60 (1848) 2 H.L. Cas 28; (1848) 9 E.R 1002

61 [1921] 3KB 110

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> hours. It includes a promise to repay any part of the amount due against the written order of the customer, addressed to the bank at the branch, and such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine.[62]

The relationship of a banker and customer is that of contract. It is an implied contract whose terms are not written but depend on the custom of bankers. The contract carries with it superadded obligations which however do not affect the main contract. The superadded obligations are those duties and obligations which arise in the ordinary course of business such as the relationship of debtor and

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62 *Ibid* at p.127

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creditor. One of the fundamental terms of the contract between a banker and a customer is that the banker undertakes to borrow money from the customer as and when the customer lends it to him when he deposits it. It was said in *Foley v Hill*[63] that;

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

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(1848) 9 E.R. 1002

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> repay to the principal, when demanded a sum equivalent to that paid into his hands...the banker is not an agent or factor but he is debtor.[64]

These views have held sway in all common law jurisdictions. Thus in *Chilala v Republic*[65] the Court of Appeal of Malawi said:-

> When a person pays his 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.[66]

An an earlier Malawi case of *Rendall-Day v Republic*[67] had stated the law in the same terms:

> When a person pays money into his bank account that money becomes the property of the bank, the relationship between banker and customer becomes that of a debtor and creditor with the addition that

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64 at pp 1005 -1006

65 1973 (2) ALR Comm 240

66 *Ibid* at pp 244, 245, 250 and 251

67 1967 (3) ALR Comm 17

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> the banker promises to honour the customers cheques on demand.[68]

In *Rwebangira v Republic*[69] the High Court of Tanzania decided that:-

> A bank customer has no claim of right to any particular money in the bank, money standing to his credit in his account is not his money, but the bank's and the credit balance merely confers on him the right to withdraw as much from the bank's money as is shown in the account; and thus a cheque drawn on a bank by its customer does not represent the customers money but the bank's and if the cheque is paid into another bank the money it represents becomes that other banks money not the money of the customer whose account the amount of the cheque is credited.[70]

And in *Attorney-General of Ghana v Bank of West Africa Limited*[71] it was stated by the Supreme Court that the general principle that money paid into a bank cease

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68 *Ibid* at pp 39-40

69 1974 (3) ALR Comm 386 pp 393, 394 and 395

70 *Ibid*

71 1965 ALR Comm 214 at p.220

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altogether to be the money of the principal applies solely to the relationship between banker and customer and does not affect the right of a third party to recover money paid into a bank under a mistake of fact.

Although the bank is usually the debtor it may also happen that the customer becomes the debtor. Therefore, the relationship of debtor and creditor is not always fixed. Part of the bankers business is to borrow and lend money. Can it be said then that the banker is a money-lender?

A banker and a money-lender are the same in all respects. The main distinguishing feature between a banker and any other borrower who undertakes to pay on demand is that for the banker the demand or repayment is made against a written order or mandate which is exemplified by a cheque: This is clearly brought out by the *Bill of Exchange Act*[72] and the *Stamps Act*.[73] The former Act defines a cheque as "a bill of exchange drawn on a banker payable on demand". The later Act goes a step further and defines a cheque as "a bill of exchange drawn on a specified bank and not expressed to be payable otherwise than on demand." A cheque cannot be drawn on any other borrower.

Another distinguishing feature of banker from any other borrower was stated by Bankes L.J. in *Joachimson v Swiss Bank Corporation*[74] He said;

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72 Cap. 76 S.73

73 Cap. 172 S.2

74 [1921] 3 K.B 110

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> Having regard to the peculiarity of that relation there must be, I consider, quite a number of implied superadded obligations beyond the one specifically mentioned in *Foley v Hill*[75] and *Pott v Clegg*.[76] Unless this were so, the banker, like any ordinary debtor, must seek out his creditor and repay him his loan immediately it becomes due - that is to say, directly after the customer has paid the money into his account - and the customer like any ordinary creditor, can demand repayment of the loan by his debtor at any time and place ... It seems to me impossible to imagine the relation between the banker and customer as it exists today without the stipulation that if the customer seeks to withdraw his loan he must make an application to the banker for it.[77]

The law for the general debtors is that the debtor must look for his creditor and pay him. In the case of a banker as debtor, there is no obligation on the part of the particular debtor to seek out his creditor and to pay him. His obligation is only to pay a particular creditor when the creditor makes a demand for payment or directs him to pay either the creditor or some other person nominated by the creditor; and for the payment to be made, there must be money standing to the credit of the creditor, and where there is no fund there should be a special agreement for such

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75 (1848) 9 E.R 1002

76 (1847) 153 E.R 1212.

77 [1921] 3 K.B 110 at p 119-121

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payment to be made.[78] In the case of the banker it is actually the creditor who looks for the debtor to demand payment. *In Osawaye v National Bank of Nigeria Limited*[79] it was said:-

> The relationship of banker and customer is one of debtor and creditor with the additional feature that there is no obligation on the part of the banker, as debtor, to seek out his creditor, the customer, and pay him; his obligation is only to pay the customer, or some person nominated by the customer, when the customer makes a demand or gives direction for payment".[80]

Another distinguishing feature is that in Uganda Money-Lenders are regulated by the *Money-Lenders Act*[81] which does not apply to banks. The Act defines a money-lender but says that it does not include "any person bonafide carrying on the business of banking". In fact a money-lender or any other person, other than a company licensed to carry on the business of banking as its principal business cannot use the word "bank" as part of its name.[82]

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78 *Ibid* at pp 127-129 Per Atkin L.J., *Osawaye v National Bank of Nigeria* 1973 (3) ALR Comm 116 at 122.

79 1973 (3) ALR Comm 116

80 *Ibid* at p.122

81 Cap. 264

82 *Financial Institutions Statute* No.4 of 1993 S.47

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E. DUTIES OWED BY THE CUSTOMER TO HIS BANKER

In *Joachimson v Swiss Bank Corporation*[83] Lord Atkin L.J said that it is a term of the contract between the bank and its customer that:-

> The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery"[84]

This duty had already been recognised in the case of *London Joint Stock Bank v Macmillan and Arthur*[85] where the House of Lords said:-

> A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque and if he does so in a manner which facilitates fraud, he is guilty of breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty.

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83 (1921) 3 K.B.110

84 *Ibid* at p. 127

85 [1918] A.C. 77

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.... As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery ... if the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount of forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence.[86]

A similar decision was reached in *Mobil (U) Ltd v Uganda Commercial Bank*[87]. In this case a cheque drawn for Shs. 10,301 was altered to read Shs. 40,301. The High Court of Uganda held that;

> A customer and a banker being under a contractual relationship the customer in drawing a cheque, is bound to take usual and reasonable precautions to prevent forgery. If a cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery, if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this discription.[88]

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86 Per Lord Finlay at pp 789-790

87 (1982) H.C.B. 64

88 *Ibid* at p.64

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Not only must a customer draw his cheques in such a way as not to facilitate forgery but he also has a duty to inform the bank if he knows that a cheque on his account has been forged. In *Greenwood v Martins Bank Ltd*,[89] the plaintiff had an account with the defendant bank. The wife had over a period of time forged her husband's name. On the wife's request the husband had refrained from notifying the bank of the frauds. When the husband threatened to notify the bank the wife committed suicide. The husband afterwards brought an action against the bank for the amount paid by them on forged signatures.

The Court of Appeal said:

> There is a continuing duty on either side to act with a reasonable care to ensure the proper working of the account. It seems to me that the banker, if a cheque were presented to him which he rejected as forged, would be under a duty to report this to the customer to enable him to inquire into and protect himself against the circumstances of the forgery. This, I think would involve a corresponding duty on the customer, if he became aware that forged cheques were being presented to his banker, to inform his banker in order that the banker might avoid loss in future. If this is correct there was in the present case

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89 [1932] 1 K.B. 371

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> silence, a breach of duty to disclose.[90]

The House of Lords upheld the decision[91] of the Court of Appeal holding that the deliberate abstention from speaking in those circumstances amounted to a representation that the forged cheques were in fact in order and assuming that detriment to the banker followed there were present all elements essential to estoppel. It may be noted in passing that the essentials of estoppel are (a) a representation (b) an act or omission resulting from that representation by the person to whom it was made and (c) detriment suffered by him as a result.

Although the cases talk of "guilty - of breach of duty" this does mean that the parties owe each other a duty of care in tort. This was made clear by the Privy Council's decision in *Tai Hing Cotton Mill Ltd v LIU Chong Hing Bank Ltd & Others.*[92] In delivering the judgement Lord Scarman stated:-

> The argument for the banks is, when analysed no more than that the obligations of care placed on banks in the management of the customer's account which the courts have recognised have become with the development of banking business so burdensome that they should be met by reciprocal increase in responsibility imposed on the customer.... One can fully understand the comments of Cons J.A that the banks today must look for protection. So be it.

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90. *Ibid* at p. 381

91. [1933] A.C. 51

92. [1986] A.C. 80

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They can increase the severity of their terms of business, and they can use their influence... to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change.

...Their Lordships do not believe that there is anything the advantage of the law's development in searching for liability in tort where the parties are in contractual relationship. This is particularly so in a commercial relationship although it is possible as a matter legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of a banker and customer either as matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, *their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to contractual analysis; on principle because it is a relationship in which the parties have subject to a few exceptions, the right to determine their obligations to each other, and for avoidance of confusion because different consequences do follow*

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according to whether liability arises from contract or tort e.g limitation of action.[93]

It has never been the law that a person who had the choice of suing in contract or tort can fail in contract, yet nevertheless succeed in tort. One cannot rely on the law of tort to provide him with greater protection against the bank than that for which, expressly or impliedly, he has contracted with the bank.[94]

However, the author of *Pagets Law of Banking*[95] is of the view that there could be situations in which the principle does not preclude the imposition of a duty of care in tort between parties who stand in a contractual relationship. Such situations are;

1. One contracting party may be liable in tort to another for misrepresentations or misstatements made before the signing of the a written agreement (as in *Esso Petroleum Co. Ltd. v Mardon*[96]), or the entering into a general contractual relationship such as that of a banker and customer. (as in *Woods v Martins Bank Ltd.*[97])

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93. See pp. 105-107 Emphasis was added by the author.

94. *National Bank of Greece S.A. v Pinios Shipping Co.* (No.1) *1ALL ER* 213 Per Lloyd L.J at 223 and Per Nicholls L.J at P. 232.

95. op.cit pp. 164-165

96 [1976] QB 801

97 [1959] 1 QB 55

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2. In a large class of cases it always has been and probably remains possible for a plaintiff to sue either in contract or tort; in such cases, liability in tort is co-extensive with liability in contract.

3. A duty of care in tort may be held to exist where the events which give raise to the duty are simply outside the range of matters which can realistically be treated as within the scope of the contract.[98]

A customer owes his bank no duty to take precautions in his business to prevent forged cheques from being presented for payment. His duty is to inform the bank of what he knows. The law on this topic is well summarised in the case of *Nigeria Advertising Service Ltd. v United Bank for Africa Ltd*[99] where Adedipe J. held that;

> A bank customer who knows that his signature is being forged on cheques has a duty to his bank to inform it of the fact without waiting until the bank's position is altered for the worse, and if he fails to carry out this duty, he will be estopped from contending against the bank that payment should have been made on later forged cheques; but if the customer is merely silent for a period after learning of the forgery of his signature, during which time the position of the bank is not altered, his conduct

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98. Hapgood Mark Ed Pagets Law of Banking op. cit. pp. 164 -165

99. [1968] (1) ALR Comm 6

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> cannot be held to be an admission or adoption of liability or an estoppel.[100]

The Supreme Court of Zambia stated the law in similar terms in *Bank of Zambia v Attorney General for Zambia*.[101]

> A person who knows or has reasonable ground for believing that a forged instrument purporting to be his is likely to be presented to a bank for payment must warn the bank; and failure to do so will estop him from denying that the instrument is his or may amount to a ratification of the forgery entitling the bank to charge him for the payment; if he discovers a forgery after the bank has paid on the instrument but fails to inform the bank, thus depriving it of the opportunity of recovering the money from the forger, he may be liable if his conduct amounted to adoption of the forgery and was the proximate cause of the loss; in either case, however, negligence on the part of the bank may disentitle it from debiting the customers account.[102]

A bank may be entitled to charge a customer with a payment made on a forged cheque if the customer's negligent conduct was the proximate cause of the loss, being such that it induced the bank to pay on the forgery; carelessness facilitating the theft and forgery of

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100. *Ibid* headnote at p.6

101. 1974 (2) ALR Comm. 225

102. *Ibid* at pp 227 and 229

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the cheque is not sufficient to justify charging the customer.[103] If a bank pays on a forged cheque the fact that it did not act nelgigently is no defence because its liability in such circumstances is based on the fact that money has been paid without the authority of the customer.[104]

It seems clear that in the absence of express agreement, whose provisions are "clear and unambiguous", the duty of care owed by a customer to his bank in the operation of a current account is limited to a 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 unauthorized cheques purportedly drawn on the account as soon he, the customer, becomes aware of it. The courts are not willing to extend the customer's duties to his banker beyond what is stated in *London Joint Stock Bank Ltd v Macmillan & Arthur*[105] and *Greenwood v Martins Bank Ltd*[106] as exemplified by the decision in *Tai Hing Cotton Mill v Liu Chong Hing Bank Ltd and others*.[107] The duties of the customer to his banker not to facilitate fraud or forgery and to disclose any forgeries does not include a duty on the part of the customer to examine his bank

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103 See *Bank of England v Vagliano Bros.* [1891] A.C. 107 at P.115 Per Lord Halsbury L.C., *Bank of Ireland v Evan Trustees* 10 E.R. 950 at P. 959, *Bank of Zambia v Attorney General for Zambia op.cit* at P. 228 per Baron D.C.J

104. *Bank of Zambia v Attorney General of Zambia* op.cit. at P/229, *London & Rila Plate Bank Ltd. Bank of Liverpool* Ltd. [1896] 1.Q.B 7.

105 [1918] A.C. 77

106. [1918] A.C. 77

107. [1986] A.C. 80

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statements or to take precautions in his business to prevent forged cheques being presented for payment.[108]

Because the contract between the banker and customer is an implied one, it is not possible to tell in advance, what, on the facts of each case, will be held to be implied terms. A term will be implied into a contract if it is proved to be a trade usage.[109]

A trade usage is a particular course of dealing between parties who are in a business relationship, which course of dealing is 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. In other words 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 infact be unaware of the usage so long as the circumstances are such that he ought to have been aware of it. Before a course of dealing can acquire the character of a trade usage it must satisfy certain conditions.

First, it must be so well known to the persons who would be affected by it that any such a person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it. Secondly, it has to be certain in the

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108. *Tai Hing Cotton MIU Ltd v Liu Chong Hing Bank Ltd.* and others [1986] A.C. 80, *Chattenrton v Londong & County Banking* Co. Ltd., Unreported; The Miller Feb 2, 1891, Lawes Sanitary Steam Laundry Co. Ltd. v Barclay & Co. Ltd. (1906)95 L.T. 444 *Kepitigalla Rubber Estates Ltd National Bank of India Ltd.* [1909]2 K.B. 1010.

109. *Harilah Shah & Anor v Standard Bank Ltd* 1967(1) ALR Comm. 209 at P.220, [1967] E.A P.512 at PP 216-217 Per Newbold P. Court of Appeal for East Africa.

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sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other party. Thirdly, it must be reasonable that is, that the course of dealing is such that reasonable persons would adopt it in the circumstances of the case. And finally it must be such as is not 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 trade usage exists as a fact and is well known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence. Where a trade usage has acquired sufficient general or local notoriety, judicial notice may be taken of it.[110]

F. DUTIES OWED BY THE BANKER TO A CUSTOMER

The duties owed by the banker to a customer largely relate to carrying out the customer's payment instructions, dealing with securities deposited with the bank and the way the banker handles information concerning the affairs of the customer.[111] The first two will be discussed when discussing the rights and duties of bankers and securities for banker's advances respectively. Presently, it is intended to discuss information concerning the dealings of the customer which is generally known as the duty of secrecy.

It is an implied term of the contract that the banker enters into a qualified obligation not to disclose information concerning the customers affairs without his consent. This is a legal duty arising out

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110. *Harilah Shah & Anor v Standrad Bank Ltd* 1967(1) A.L.R Comm 209 at p 220 [1967] E.A 512 at pp 516-517

111. See Hapgood Mark Ed *Paget's Law of Banking* 10th Ed op.cit. 163

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of the contract between the banker and a customer. The law was clearly stated in *Tournier v National Provincial and Union Bank of England*.[112] In his judgment Bankes L.J said:

> ... it may be asserted with confidence that the duty [of non-disclosure] is a legal one arising out of contract and that the duty is not absolute, but qualified. It is not possible to frame any exhaustive definition of the study.... On principle, I think that the qualifications can be classified under four heads (a) where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose (c) where the interests of the bank require disclosure; and (d) where the disclosure is made by the express or implied consent of the customer.[113]

Bankes L.J extended the duty not only to information derived from the account but from other sources. He was of the view that information gained during the currency of the account remains confidential unless released under circumstances bringing the case within one of the classes of qualification referred to above.[114] Scrutton L.J. did not want to extend this duty to knowledge which the banker acquires before the relation of bank and customer was in contemplation or after it ceased or to knowledge derived from other sources during the continuance of the relationship.[115]

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112. [1924] 1 KB 461

113. *Ibid* pp 471-473

114. *Ibid* At pp 471-473

115. *Ibid* At p 473

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But Lord Atkin L.J. was not prepared to accept such a restriction and he said:

> The first question is; To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account, that is whether there is a debit or credit balance, and the amount of the balance. It must extend at least to all the transactions that go through the account; and to the securities, if any, given in respect of the account; and in respect of such matters it must, I think, extend beyond the period when the account is closed, or ceases to be an active account.... I further think that *the obligation extends to information obtained from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of the banking relations of the bank and its customer*- for example, with a view to assisting the bank in conducting the customers business, or in coming to decisions as to its treatment of its customers... In this case however, I should not extend the obligation to information as to the customer obtained after he had ceased to be a customer.... I do not desire to express any final opinion on the practice of bankers to give one another information as to the affairs of their respective customers except to say it appears to me

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that if it is justified it must be upon the basis of implied consent of the customer.[116]

The bankers duty of secrecy has received statutory recognition. Thus the *Bank of Uganda Statute*[117] provides;

s41(1) Every financial institution shall furnish to the Bank in a manner prescribed by statutory instrument all information that may be required by the Bank for the proper discharge of its functions.

(2) The Bank may publish in whole or in part information furnished to it under (1) as the Board may determine.

(3) *The Bank shall not publish or disclose any information regarding the affairs of a financial institution or of a customer of a financial institution unless the consent of the institution or the customer has been obtained.*

This obligation prohibits the banker from disclosure to third parties. It does not stop the banker from using such information for its benefit. Thus in *G.A. Schmitt'sches Weight v Leslie*[118] in dismissing the argument by the counsel for the plaintiffs that the bank was not entitled to use for its own benefit the information it received as an agent of the plaintiffs' bank for handling shipping documents the court held that:-

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116. *Ibid* At pp 485-486 emphasis added by the author

117 No 5 of 1993

118. 1967 (2) ALR Comm 34, High Court of Kenya

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A banker may look at the information he possesses to verify what he is told by a customer as to the customer's financial capacity on his application for overdraft facilities, especially when the customer already has this information in his possession, but the bank cannot disclose this information to third parties.[119]

G. EXCEPTIONS TO THE DUTY OF SECRECY.

There are situations where a duty of strict secrecy would clearly be inappropriate. For example it would be absurd that a banker who is claiming the repayment of a loan or overdraft will be precluded from disclosing the information derived from the account or even from other sources. Some of the exceptions were actually enumerated by Bankes L.J. in *Tournier v National Provincial and Union Bank of England.*[120]

(a) Where disclosures is under the compulsion of the law. The most obvious example given by Bankes L.J. is "the duty to obey an order under the *Bankers Books Evidence Act*"[121] when the banker is required to give evidence in legal proceedings. For example in Uganda S.7 of the *Evidence (Bankers Books) Act*[122]provides:-

> S.7 On the application of any party to a legal proceeding a court may order that such a party be at liberty to

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119. *Ibid* At p.56 per Chanan Singh J.

120. [1924] 1K.B 461

121. *Ibid* At p. 473

122. CAP 44

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inspect and take copies of any entries in a bankers book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party and shall be served on the bank three clear days before the same is to be obeyed, unless the court otherwise orders.

Before the passing of this Act, bankers could be compelled to produce their books in court under a *subpoena duces tecum*, and the object of the Act was to protect bankers against that inconvenience.[123] An application for an order under S.7 of *Evidence (Bankers Book) Act*[124] is similar to an application for a search warrant.[125] In this regard the provisions of article 27 of the *Constitution of Uganda* [126] should be kept in mind. It provides in part

27 (1) No person shall be subjected to
(a) unlawful search of the person, home or other property of that person or
(b) .....

(2) No person shall be subjected to interference with the privacy of that person's home,

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123 *R v Kinghorn* [1908] 2 K.B 949 at pp 950-95 per Lord Alverstone C.J

124. Cap. 44

125. *Williams v Summerfied* [1972] Q.B 512, *Standard Bank of West Africa v Attorney General* 1972 (3) ALR Comm 442 Commenting on the equivalent of s. 7 S.C. (Gambia).

126 *Constitution of the Republic of Uganda* 1995

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correspondence, communication or other property.

Since *Foley v Hill*[127] a customer's bank account has been described as a chose in action or an incorporeal right as contrasted with corporeal or tangible things. An incorporeal right can be a subject of ownership and be a property right.[128] Having regard to article 27 of the Constitution, the courts should set their face against S.7 of *Evidence (Bankers Books) Act*[129] being used as a kind of searching inquiry or fishing expedition beyond the ordinary rules of inquiry.[130] Because it can amount to a so grave interference with the liberty of the subject an order should only be given after the "most mature careful consideration of all the facts of the case"[131]

Other examples include the *Income Tax Act*[132] which stipulates:-

S.132(1) In order to enforce a provision of this Act the Commissioner or any Officer authorised in writing by the Commissioner.

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127 (1848) 9 E.R 1002

128 *Rendall-DAY v Republic* 1967(3) ALR Comm 17 at p.40

129 Cap. 44

130 *Williams v Summerfield op.cit* p.518, *Standard Bank of West Africa v Attorney General* op.cit p. 454

131 *Ibid*

132 No. 11 of 1997

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a) Shall have at all times and without any prior notice full and free access to any premises, place, book, record or computer.

b) may make any extract or copy from any book, record or computer stored information to which access is obtained under paragraph(a)

c) may seize any book or record that; in the opinion of the commissioner or authorized officer afford evidence which may be material in determining the liability of any person to tax, interest, penal tax or penalty under this Act.

This section obliges the banker to disclose any information in its possession including the dealings or affairs of its customers.

Another statute is the *Leadership Code Statute*[133] which provides;

S.28. The inspectorate of Government is authorized by the order under the hand of the Inspector General or Deputy Inspector General to.

(1) authorise any person under its control to inspect any bank account...or any safe or deposit in a bank.

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133 No. 8 of 1992 as amended by *Leadership Code (Amendment Act* No.2) of 1998.

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(2) An order made under subsection(1) of this section shall be sufficient authority for the disclosure or production by any person of any information, account, document or article required by the person so authorised.

The breadth of disclosure embodied in this section is too self evident to need any further comment. The wide powers were thought appropriate in fighting corruption. Similar wide powers are contained in an earlier Act, the *Prevention of Corruption Act*[134] which provides:-

s13 S.12(1) Notwithstanding anything in any other law contained if the Director of Public Prosecutions is satisfied that there are reasonable grounds for suspecting that an offence under the Act has been committed by any person, may by order authorise any police officer of or above the rank of assistant superintendent named in such order or any special investigator so named to investigate any bank account share account or purchase account of such person and such authority shall be sufficient warrant for the production of such accounts and documents as may be required by the officer so authorised.

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134 Act No. 8 of 1970

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16 S.13 The Director of Public Prosecutions may if he considers that any evidence of the commission of any offence under this Act by a person employed by a public body is likely to be found in any documents relating to such a person, his wife or child or a person reasonably believed by the director of Public Prosecutions to be a trustee or agent for such a person, by order authorise any police officer of or above the rank of assistant superintendent named in such order or any special investigator so named to inspect any such documents and a police officer or investigator so authorised may, at all reasonable times, enter the place specified in such order and inspect such documents kept therein and may take copies of any such documents.

18 S.15 Every person required by a police officer or special investigator to give any information on any subject which it is such police officer's or investigator's duty to inquire into under this Act and which it is in his power to give shall be legally bound to give such information.

These provisions compel the banker in very clear terms to disclose the affairs of his customer.

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A final example is inspection of companies under Ss 165-175 of the Companies Act.[135] Section 168 provides that it shall be the duty of all officers and agents of the company and agents of any other body corporate whose affairs are being investigated to produce to the inspector all books and documents. And for purposes of this section, section 168(5) defines an agent in relation to a company or other body corporate to include bankers: But S.176 makes it clear that the company's bankers are not required to disclose any information as to the affairs of any other of their customers other than the company.

To plead compulsion by law, the disclosure must derive its authority from the statute or a court order. Casual inquiries by police officers because they suspect that a crime has been committed are not covered. This point came up in *Standard Bank of West Africa v Attorney General of the Gambia*.[136]

In this case a police officer wished to inspect books of the banker and the accounts of certain of its customers in the hope of coming upon an indication of an offence having been committed but without knowing what he wanted for use as evidence. He laid an information before a magistrate stating that he had reasonable grounds for believing that at the bank's premises there were statements of account, mandates, letters, vouchers, memorandum and documents relating to the affairs of named customers of the bank which would afford evidence as to the commission of an offence or offences. The Magistrate issued a warrant for the statements and other documents mentioned.

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135 Cap. 85

136 1972 (3) ALR Comm 449 S.C of the Gambia. See also *Williams and Ors v Summerfield* [1972] 2 QB 513

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The bank instituted proceedings for a declaration that they should not be subject to a search warrant for the documents of their customers just because there is reasonable ground for believing that they will afford evidence as to the commission of any offence.

> The Supreme court of the Gambia held, *interalia,* that;
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> > A search warrant should issue against a bank only if the bank is suspected of having committed the offence itself or of habouring evidence directly connected with a crime, and should not issue in any case where an inspection order might be made under the *Bankers Books Evidence Act 1879*,[137] and the court must be satisfied that the applicant has very good reason to apply for the warrant, and it is not enough that the applicant hopes that in the course of the search he may come upon evidence of the commission of an offence".[138]

The court further held that an order under the *Bankers' Books of Evidence Act 1879*[139] to inspect and take copies of entries should only be given after the most mature careful consideration because it is a grave interference with the liberty of the subject. The various statutes compelling a banker to disclose their customers affairs should not be used for a kind of searching inquiry or fishing expedition.

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137 17 Status 103

138 *Standard Bank of West Africa v. Attorney General op.cit* pp. 454-455

139 17 Status 103

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An example of disclosure under a court order are garnishee proceedings under the *Civil Procedure Rules*[140]. In such proceedings money held by a banker to the credit of a customer judgment debtor may be attached to satisfy the judgment debt. The bank is called upon to show cause why its customer's money should not be attached. In these proceedings the banker has to disclose its customer's affairs.[141] And just because the amount of the debt cannot be ascertained that alone does not defeat the claim of a garnisher to attachment.[142]

(b) Another exception is where there is a duty to the public to disclose. In the words of Bankes L.J. This is exemplified by:

> where a higher duty than the private duty is involved as where danger to the state or public duty may supersede the duty of the agent to his principal.[143]

An example which is supposed to be covered by this exception is a case where in times of war the customers dealings indicate trading with the enemy. A recent example where the exception was said to apply was *Libyan Arab Foreign Bank v. Bankers Trust Co.*[144] where the defendant bank invoked the exception in relation to disclosure made by it to, and at the request of, the Federal Reserve

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140 S.I. 65-3

141 *Ayuba v Ogunleye & Ors: Bank of America Inc. garnishee* 1970(2) ALR Comm 21 H.C Lagos (Nigeria)

142 *Sunder Das v. Municipal Council of Nairobi* (1948) 15 EACA 33 C.A for East Africa

143 *Tournier v. National Provincial and Union Bank of England op.cit* p.473

144 [1968] 1 Lloyd's Rep. 259

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Bank of New York of payment instructions which the defendant had received from the plaintiff.[145] The court was of the view that the exception was applicable.

(c) Another exception is where the interests of the bank require disclosure. The example given by Bankes L.J is:

> where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft.[146]

The banker can also disclose the affairs of its customers when suing a guarantor where the state of the account guaranteed has to be shown. Also a banker is justified to disclose the customers affairs when it is defending a suit brought by the customer, for example for wrongful dishonour of a customers cheque. For example in *Sunderland v. Barclays Bank Ltd*[147] where the bank dishonoured the plaintiffs cheque because she had insufficient funds and the bank did not wish to give an overdraft. She complained to her husband and to the bank. In the course of a telephone conversation between the wife, the husband and the bank the husband was told that she was making cheques to bookmakers. She sued for breach of duty of secrecy. It was held that the disclosure was in the interests of the bank.

(d) Another exception mentioned by Bankes L.J. is 'where the disclosure is made by the express or implied consent of the customer'. The example he gave was where the customer authorises

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145 17 Status 103

146 *Tournier v. National Provincial and Union Bank of England op.cit* at p.473

147 (1938) 5 LDAB 163

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a reference to his bankers.[148] Answering inquiries from another bank acting on behalf of the customer is within the scope of banking business and the practice may be regarded as implicitly authorised by most customers of the banks. As Cozens-Hardy M.R said in *Parsons v.Barclays & Co. Ltd*[149] that very wholesome and useful habit by which one banker answers in confidence, and answers honestly, to another banker, the answer being given at the request and with the knowledge of the first banker's customer.

However, banks must be careful in giving reference or in advising on investments because there can be liability for financial loss resulting from negligent words even when the parties have no contractual or fiduciary relationship within the principles in *Hedley Byrne & Co. Ltd v. Heller and Partners*[150] and *Box v. Midland Bank Ltd.*[151]

These two cases are authority for the proposition that there can be a special relationship between banker and customer, over and above that of contract.

Apart from these exceptions bankers generally take their duty of secrecy very seriously as illustrated by *Standard Bank of West Africa Ltd. v Attorney-General*[152] where the bank successfully challenged a magistrates order for the bank to reveal the affairs of their customers. In Uganda the Bank of Uganda has wide

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148 *Tournier v. National Provincial and Union Bank of England op.cit.* 473

149 (1910) 2 LDAB 248

150 [1964] A.C. 465

151 [1979] 2 Lloyd's Rep. 391

152 1972 (3) ALR Comm 449

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investigatory powers over all the banks in which process they get to know the affairs of the customers of the banks. The Bank is put under a duty not to disclose such information except under compulsion of the law or an order of the court. Thus the *Bank of Uganda statute*[153] provides:-

> S.46 Board members, officers and employees shall be bound by declaration of secrecy and shall not except as may reasonably be in the performance of their functions disclose to any person any material information acquired in the performance of their functions unless called upon to give evidence in a court of competent jurisdiction or to fulfil other obligations imposed by law.

H. BAILMENT

In *Joachimson v Swiss Bank Corporation*,[154] Atkin L.J. emphasised that there is only one contract made between the bank and its customer. Therefore the statement by Lord Cottenham L.C. in *Foley v Hill*[155] that the relative situations of banker and customer is not an agent or factor, but he is debtor"[156] seems to be widely stated. The true position appears to be that there is only one general contract between the bank and its customer. On top of this contract the banker enters into other specific contracts including

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153. No.5 of 1993

154. [1921] 3 K.B. 110

155. (1848) 9 E.R 1002

156. *Ibid* at 1006

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that a debtor and creditor, bailor and bailee, principal and agent and trustee and beneficiary as the situation demands.

The issue of whether or not a bank could be a bailee arose in the case *Johnson (liquidator of Merchants Bank) v Sobaki*.[157] The defendant was counter-claiming the value of some items which he had left in the bank premises when he was sued to recover the amount due on an overdraft. The defendants counsel argued that he should be compensated once the goods were proved to have been in the bank and were lost. The plaintiff's counsel argued that since the goods were not found in the bank by the plaintiff, the plaintiff could not be made responsible for them: It was held that:-

> A bank is liable as bailee for the value of the goods specifically received by it for safe custody, or otherwise for a purpose of the bank, and then lost, but if there is no bailment and the owner of the goods kept on the banks premises is a mere licensee, then in the absence of a special contractual provision, the bank has no obligation towards him in respect of the goods.[158]

There are three basic elements required for a bailment. The bailee must have rightful or lawful possession of, but not ownership or title to, the property. Thus, a thief who acquires goods unlawfully does not become a bailee. The property bailed must be personal property. The bailor must give the property with the intent that it is to be returned or delivered according to the bailor's instructions.[159]

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157. 1968 (3) ALR Comm 241

158. *Ibid* at pp 247 and 248

159. Schalntz W.T. & anor Ed *Essentials of Business Law*. (London Glencoe Press 1977 pp 377-379).

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