

Law of Banking

by Lord Chorley

assisted by

J. Milnes Holden

SIXTH EDITION

SWEET & MAXWELL

LAW OF BANKING

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PREFACE

SINCE the last edition of this book was put together in 1964-5 a great deal has happened in the world of banking, and particularly in the legal section of it. Indeed I doubt if any parallel period could be found in the past.

In eight years no less than twenty-five Acts have been passed through Parliament which are of sufficient importance to bankers to require notice, even in an introductory work such as this. Some of these such as the Race Relations Act 1968 are general in character and have resulted from the social pressures generated in our modern society. Others such as the Banking and Financial Dealings Act 1970, a statute the potential importance of which has hardly been realised by the banking community, have a more specialised impact. Two of them, though they did not come into effect until 1973 after the work on this edition had been completed, require rather fuller notice here; though brief references to them will be found in the text.

These are the Local Government Act 1972 and the European Communities Act of the same year. The former completely reorganises the structure of local government in Great Britain, establishing what is called the two tier system of authorities which however does not begin to operate until 1974. It does not however alter any of the substantive rules of law discussed in Chapter 9 and after some hesitation I decided not to alter what I had written, and contented myself with appending in footnotes an explanation of the structural changes above referred to.

The latter, which brought us into the European Economic Community, may in the long run profoundly affect banking throughout Western Europe; but this is obviously not the place to start speculating about such matters. The statute which came into effect on January 1, 1973 however contains one section which directly affects our company law. This is section 9 which is obviously directed to pushing our *ultra vires* doctrine more into line with the compromise adopted in the Community in 1968 for the purpose of bringing uniformity into the somewhat divergent systems of some of the member States. The *ultra vires* doctrine had long ago received from our courts a rather specialised and not illiberal, though highly technical, application to the responsibility of a company registered under the Companies Acts for the activities of its directors. This as moulded

by later decisions became the important rule in *Royal British Bank v. Turquand*, well known but understood with difficulty even by judges.

Broadly speaking the new section provides that transactions "decided upon by the directors shall be deemed to be within the capacity of the company," and "the powers of the directors to bind the company shall be free of any limitation under the memorandum or articles." This clearly carries the *Turquand* rule much further than the courts have felt able to do. The wording of the section is however obscurely drafted and far from free of difficulty, as is made clear by an article in 36 *Modern Law Review* 270 by Farrar and Powles, and I did not feel that I should be justified in making radical alterations in the text during the very short time at my disposal after the passing of the statute. The rights of a person wishing to avoid the *ultra vires* rule by pleading section 9 depend on his having acted in "good faith" and I am far from clear that a person having notice of limitations in a memorandum of association, and disregarding them could be regarded as "dealing in good faith." Indeed the learned authors of the above article regard the *Turquand* group of cases as "not entirely superseded."

What I have said about the time at my disposal brings me to an important milestone in the history of this work, the transfer of the publishing from Messrs. Pitman who had published the first five editions. For policy reasons it was decided that this work should be transferred to Messrs. Sweet & Maxwell to whom I am most grateful for their prompt and sympathetic co-operation. During negotiations a number of important cases had been reported, and further statutes had been passed, of which note clearly had to be taken, but it was not possible to ponder and work upon two late 1972 statutes in the way I should have liked to do.

To turn to the new decisions no less than fifty additional cases have been cited in this edition. It is true that some of these are helpful cases from earlier times but the great majority have been reported since the last edition was prepared. That edition coincided with the reporting of several leading cases which have required further comment and several of the still more recent ones are hardly behind them in importance—several were, I felt, of sufficient interest to justify using them as illustrative cases.

I must not leave this part of my Preface without noticing the appearance of a valuable new work on Banker and Customer by my colleague, Dr. J. Milnes Holden, the most important new addition to the literature of banking law for many years. I would thank him for revising his chapter on Securities for Advances in this edition.

In addition to bringing the law in this edition up to date I have made a number of additions and changes to which I must draw

attention. The most important of these is the section on Credit Transfer and Giro. Owing to the complete absence of decided cases very little public discussion of this subject has taken place. Yet it is the outstanding innovation of the century, and I felt that it was time someone attempted an analysis of the legal aspects of the subject. What I have written is perhaps technically of a more advanced quality than the rest of my book, but I offer it to bank lawyers as something to chew on, to criticise, and to improve on.

I have added a new Foreword which is intended to help new students to understand and appreciate how the law of banking fits into the general body of English law, particularly English mercantile law. I have broken up the chapter entitled *Other Services by Bankers* into two. Into the first of these, which is concerned with the legal aspects of what from the economic point of view is the essential service of the banker to the community, that of providing the finance for industry, commerce, and for some aspects of government, lies at the very core of banking—I have transferred the section on *Commercial Credits* which for many years now has ceased to be a mere ancillary service.

The ancillary services proper I have grouped together in what is substantially the old chapter, but in this I have included a much fuller treatment of the financial assistance provided for travellers by the banks, mainly in a new and fairly detailed discussion of the travellers' cheque which in the modern world has become an instrument of considerable importance.

I have completely re-written the first part of the chapter on the Account which in the light of modern developments had become somewhat misleading—some conservative lawyers may think that I have taken up an altogether too heretical position here. In the chapter on *Special Accounts* I have completely re-written the section on local government accounts which I have long felt was inadequate. I have expanded, and I hope improved, the section on the accounts of registered companies—it is here that section 9 of the *European Communities Act 1972* must be taken account of. And I have written a new section on *Solicitors' Accounts*—the *Solicitors' Client Account* with its statutory backing is unique and more than justifies the elevation of the solicitors from the mere footnote to which they have previously been relegated. *Trade Unions* appear shortly too in this chapter—perhaps too shortly.

Under *Company Liquidation* the group of modern cases bringing to bankers the substantial concession in respect of preferred creditors provided by section 319 of the *Companies Act 1948* has led to an important addition.

Another point in the law at which a valuable clarification has

been provided by the House of Lords is the consolidation or combination of accounts on which the decision in the *Halesowen Press Work Case* is perhaps the most important of all those decided during the period under review.

The only other part of the book which I need mention is the Appendix on Stamp Law. The changes in the law on this subject in recent years have been so radical, and in so far as they affect bankers, which is very largely, so helpful, that I was tempted to eliminate this appendix completely. However some aspects of bank work still call for knowledge about stamps and this Appendix is one of the few places where a student can find a non-technical apperçu of stamping so I decided to leave it, though in an appreciably shortened form. I drew attention in my last Preface to the enlightened fiscal policy which was already evident at that time on the part of the government in respect to this out of date type of taxation. It is good to note that it has continued in the meantime at an accelerated pace.

I would like to add that I have taken the opportunity to give the text the most thorough overhaul which it has had since the beginning, though I am conscious that there is still room for improvement.

As previously the work of revision in connection with this edition went on in parallel with that of its companion volume on Leading Cases of which Mr. P. E. Smart is the co-author. Owing to the difficulties mentioned above the two books have got rather out of step—the third edition of the case book appeared early in the year but in it will be found notes on all the most important of the new cases noted in this edition of the Law of Banking. I take this opportunity to thank Mr. Smart for the practical help and legal support he has given to me in recent years. In connection with the present edition he not only read the proofs but gave valuable assistance on a number of matters.

September 1973

CHORLEY

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