

SOME LEGAL PROBLEMS OF BANKING*

DECENNIAL REVISION

As the charters of Canada's ten banks will expire on July 1, 1944, it is anticipated that their extension for a further period of ten years, as is customary, will be preceded by a revision of the Bank Act generally. It may perhaps be an appropriate time to present to the Canadian Bar Association some legal problems which the banks are experiencing. The matters dealt with do not necessarily indicate that the banks may desire remedial legislation as a solution but are merely illustrative of some of the difficulties which arise from time to time.

Before proceeding to a consideration of some of these questions it will perhaps be of interest to look for a moment or two at the origin of the provision which limits the existence of bank charters to ten-year periods. This restriction first appears in Dominion legislation in the Act of 1871 which was the first comprehensive Bank Act of Canada under which the banks actually operated. The Bank Act of 1870 had provided for the continuance by letters patent of the corporate life of banks whose charters were due to expire but the banks preferred a parliamentary charter for which provision was made the following year.

The provision for a ten-year existence goes back further, however, to the charter granted to the Bank of Montreal in 1821 by the Legislature of Lower Canada. This Act, to which Royal Assent was withheld for a year, continued the corporate powers of the bank until 1st June, 1831. The Bank of Montreal had actually operated under articles of association since 1817. The charter of the Bank of Montreal and the charters of other banks which had been incorporated in the same or subsequent years were eventually extended until June 1, 1837. Owing to the difficulties in Lower Canada in that year there was no legislative continuance of bank charters and the banks had to function under temporary charters from the Royal Government or under articles of association under which some had operated prior to 1822. Short term charters were obtained in 1838 and 1839 from the special Council which took over the government of Lower

*A paper delivered before the Commercial Law Section of the Canadian Bar Association at its Annual Meeting in Winnipeg, August 25-27, 1943.

Canada in 1837. After the union of Upper and Lower Canada in 1841 the charters of the Lower Canadian banks were renewed until 1862. Those of Upper Canada at another session were also extended to the same year. In 1854 bank charters were continued until 1870. In 1870 and 1871 the Parliament of Canada extended the charters to 1881, thus carrying on the policy of ten-year renewals.

This unique Canadian custom of giving a ten-year corporate expectation of life with the prospect of renewal after a parliamentary reconsideration of the provisions of their joint charter is confined to banks. Other corporations are allowed to pursue the even tenor of their way. So far as the writer is informed banks are not so treated elsewhere. The requirement has probably proven of value in the past, but the question does arise whether the Canadian banks, on their records, have earned and deserved the continuous life enjoyed by other classes of corporations.

SHARE REGISTRY OFFICES

Shortly after 1900 the shareholders of a bank, having its head office in Halifax, under general federal legislation enacted at that date, which permitted the sale by the shareholders of one bank and the purchase by the shareholders of another bank of all the selling bank's assets in exchange for shares in the purchasing bank, sold its assets to The Canadian Bank of Commerce with head office in Toronto in the Province of Ontario. As a result the former shareholders of the Halifax Banking Company (nearly all resident in Nova Scotia) became shareholders in The Canadian Bank of Commerce.

A similar situation arose when the head office of the former Merchant's Bank of Halifax, with shareholders nearly all resident in Nova Scotia, was, by special legislation in 1900, transferred from Halifax to Montreal and the name of the Bank, by legislative Act, became The Royal Bank of Canada. As a result the former shareholders of the Merchant's Bank of Halifax became shareholders in The Royal Bank of Canada with shares domiciled in the Province of Quebec.

It was not long before the legal representatives in Nova Scotia of such shareholders (deceased) found themselves faced with demands by two provinces for succession duties in respect of the same shares, and sharp complaint was made to the Minister of Finance who had sponsored the legislation referred to. Evidently the possibility of such result had not been foreseen when the legislation was enacted.

The situation came to the attention of the Assistant Deputy Minister of Finance, Mr. Henry T. Ross, K.C., D.C.L., who was considering amendments required to the Bank Act for the revision due in 1911. He studied the situation and found that by the decision of *Attorney-General v. Higgins* (1857), 2 H. & N. 339, Baron Martin had held that when transfer of shares in a company must be effected by change in the register, the place where the register is required by law to be kept, determines the locality of the shares.

It occurred to Mr. Ross, although in that case the only place of registration of the shares was the head office of the company, that the principle might be adapted by amending the Bank Act to enable the directors to open share registries in the provinces and elsewhere where there were shareholders domiciled, so that the shares of the persons resident in these jurisdictions could be registered and effectively transferred there irrespective of where the head office was. Mr. Ross discussed a proposed amendment to section 42 on these lines with the then Deputy Minister of Justice, later Mr. Justice Newcombe of the Supreme Court of Canada, who had argued more Canadian constitutional cases in the highest courts in the preceding twenty years than any other counsel. Mr. Newcombe's verdict was, "Doubtful, but try it."

Accordingly, the amendment formed a part of the Bank Act Bill at the revision of 1913 and became law.

It was not long before the legislation was tested in the courts and eventually the Privy Council in a Quebec case, *Brassard v. Smith*, [1925] A.C. 371, held that the new legislation effectively met the problem. Lord Dunedin, in delivering the judgment of the Board, after referring to *Attorney-General v. Higgins*, said:

This is, in their Lordships' opinion, the true test. Where could the shares effectively be dealt with? The answer in the case of these shares is, in Nova Scotia only, and that answer solves the question.

This principle was affirmed by the Privy Council in *Erie Beach v. Attorney General for Ontario*, [1930] A.C. 161.

While this answered the question in respect of provincial share registries there remained a doubt concerning those established outside of Canada. This too came before the courts in *The King v. Cutting*, [1932] S.C.R. 410, a Quebec case which reached the Supreme Court of Canada. The Privy Council later refused leave to appeal. The Supreme Court followed the precedent establishment in *Brassard v. Smith* and held that shares of persons not domiciled in Quebec which were transferable only

on the bank's New York registry, were not subject to Quebec succession duties. It also held that the relative provision of section 42 of the Bank Act was constitutionally valid.

The result of these amendments has been to encourage a wide distribution of bank share holdings not only in the provinces of Canada, but in other countries as well. The principle established has also been in the interests of shareholders of other corporations and has played an important part in avoiding double taxation. The latest case in which the principle has been invoked is *The King v. Williams*, [1942] 3 D.L.R. 1, a Privy Council decision in a case where an Ontario mining company had established a share registry in Buffalo, New York, as well as in Ontario. Share certificates of a non-resident in Ontario endorsed in blank by the registered holder, situated in Buffalo where they could be effectively dealt with in all respects, were held not subject to Ontario succession duty.

Mr. Ross, at the end of 1916, left the Department of Finance for the Canadian Bankers' Association. The writer was fortunate enough to have been his assistant from 1931 until his retirement in December, 1934, following the last revision of the Bank Act. At the ripe age of 82, he is still hale and hearty and enjoys discussing a fine legal point as much as ever.

BUSINESS AND POWERS OF THE BANK

Section 75 outlines in very general terms what a bank may or may not do. Subsection 1 indicates some activities in which the banks may engage. Of these, clause (a) enables the bank to open branches, agencies and offices. It thus clearly authorizes the establishment of the branch banking system. There was a time, however, back in 1850, when the Legislature of the united provinces of Upper and Lower Canada passed "An Act respecting Banks and Freedom of Banking" which made provision for the establishment of joint stock banks to be conducted at some one place and at such place only. Fortunately, however, unit banks had no strong appeal for Canadians and the legislation was repealed in 1880 by the Parliament of Canada. The remaining clauses of subsection 1 deal with the business of banking generally which, however, is not exhaustively defined. It is perhaps interesting to note in looking at the Act of 1850 already mentioned that section 1 provides that "The business of banking shall, for the purposes of this Act, mean the making and issuing of bank notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities

and such other trade as belongs legitimately to the business of banking." A comparison of the old section and subsection 1 of section 75 of the present Act reveals that the first activity mentioned in the old statute, namely, the making and issuing of bank notes, is not expressly mentioned in section 75 although, of course, the power to issue notes is specifically conferred by sections 60 and 61 of the present Act. Since the last revision, however, the bank note issue has been progressively reduced first at the rate of five per cent of the paid-up capital per annum for five years and latterly at the rate of ten per cent a year. The maximum circulation is now but forty-five per cent, and will be reduced to twenty-five per cent under the existing legislation. It would seem that the note circulation which was formerly regarded as an important phase of banking is now deemed by Parliament to be a subordinate activity. The bulk of the note circulation is of course furnished by the Bank of Canada, whose active note circulation, excluding its notes in chartered bank tills has grown from \$48.9 millions in 1935, and \$122.9 millions in 1939 to \$609.3 millions on May 5th of this year.

In connection with the bank note circulation, it may be of interest to you to learn that under the by-laws of the Association as approved by the Dominion Treasury Board, a tribunal functions to deal with cases of destroyed bank notes. The tribunal consists of the President and Secretary-Treasurer of the Canadian Bankers' Association and the Inspector-General of Banks. In cases where bank notes, either in the course of transit or in the hands of careless individuals, have been destroyed by fire or hazards of the sea, war, etc., the bank concerned cannot deduct the amount of such notes from its liabilities in respect of its own issued bank notes. The by-law, however, enables the bank to present the evidence of such destruction to the tribunal which is empowered to give a certificate for the amount of notes which it is satisfied has been destroyed, whereupon the bank may reduce accordingly its liability on account of its outstanding notes. This enables the bank to reimburse the individuals whose notes have been destroyed. The cases reaching the tribunal range from shipments of notes destroyed by Nazi torpedoes during the present war to instances where people have used cook stoves as safes and have forgotten to withdraw their bank rolls when lighting fires which have reduced their hard-earned savings to charred and almost undecipherable fragments. It would seem that if savings are to be hoarded at home instead of being deposited in a bank these are good reasons for preferring the legendary sock to a stove.

Ration Coupon Banking.—As you are of course aware, the banks have undertaken to conduct ration coupon banking. This involved the opening of a great many accounts to which credits are posted and against which cheques are debited, but oddly enough no money is involved. There is a nice question whether the Bank Act authorizes such activities. There is, of course, the authority in section 75 (1) (d) to engage in and carry on such business generally as appertains to the business of banking. Ration coupon banking had been handled by the British banks for some time and by the United States banks for a short time before Canadian banks undertook it so that it might well be said that ration coupon banking had, by the custom of two great English-speaking countries, become part of the business of banking in war time at least. No one is likely, however, to raise the question of the banks' legal right to conduct this business, least of all the Government at whose request it was undertaken.

The alternative would be the establishment of hundreds of Government ration coupon banks all over the country with new staffs who would have had to be specially trained. The banks, with staffs already used to work of this nature, have taken the new operation in their stride and while some additional staffs have been required the undertaking has been conducted with far less trouble than the Government would have experienced had they chosen to do the work themselves.

Ration coupon banking results in dealing with so-called "cheques" drawn in terms of ration coupons by dealers to the wholesalers from whom they purchase their goods. The dealers deposit with their bank coupons received from customers and draw their cheques against the resultant credits. Another question therefore emerges whether the Bills of Exchange Act applies to these instruments. It would seem that it does not for a bill of exchange involves primarily the payment "of a sum certain in money," as defined by section 17, and section 165 defines a cheque as "a bill of exchange drawn on a bank payable on demand." Section 10 of the Bills of Exchange Act may contain the key to our problem for it provides that "the rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques." It may be that we shall have to go back to the common law, particularly to the law merchant, for surely the merchants of by-gone years who established their own customs in com-

mercial matters, since codified in the Bills of Exchange Acts, must have had some means of dealing with documents which called for payment in terms otherwise than in money in the bygone days of barter. If anyone raises the question, therefore, it may be necessary for someone to do a great deal of research into mediæval mercantile customs, a rather unenviable task. It would involve a journey somewhat similar to that of Alice through the Looking-glass to see what should be done about a ration coupon cheque which looks like a cheque, and is treated like a cheque, but is not a cheque at all.

Limitations upon Banking.—Subsection (2) of section 75 of the Bank Act imposes well-defined and time-honoured limitations upon the activities of Canada's chartered banks.

Land Loans.—Among the most important of these is the prohibition in clause (c) against lending money or making advances upon the security, mortgage or hypothecation of land or ships or upon the security of any goods, wares and merchandise. This prevention of lending against land except for section 79 which permits a bank to take a mortgage on land by way of additional security for debts or liabilities already contracted to the bank in the course of its business, dates back in this country to the charter originally granted to the Bank of Montreal by the Legislature of Lower Canada in 1822. The available evidence indicates that this feature was taken from Alexander Hamilton's charter of the Bank of the United States established in 1791. After the Revolution land speculation engendered distrust in land as security for bank loans, and Hamilton, because of the non-liquid character of such security wrote into the charter for a new national bank this salutary restriction upon its lending powers. The feat of having banks overloaded with real estate has continued in Canada, and section 82 of the Bank Act prohibits a bank from holding any real property, however acquired, (except what it requires for its own use), for longer than seven years from its acquisition unless the time be extended by the Treasury Board for a further period not exceeding five years.

A member of the Committee on Commercial Law at whose instance this paper has been prepared, suggested discussing the advisability of the Bank Act being amended to enable the banks to make long term loans on more permanent security than banks now lend upon, which would presumably be land. Such a change would, you will realize, be contrary to the policy of Canadian Legislatures since 1822. The result of such a policy in the case of one-unit banks has long been evident in United States bank

failures, most notably during the "bank holiday" declared by President Roosevelt when he first assumed office in the midst of an economic chaos. Disastrous bank failures in Australia many years ago were also largely due to loans against land. While the branch bank system is not open to the same danger of carrying too many eggs in one basket, a departure from the century-old policy of not lending on the security of land might well have a serious effect upon Canadian banking. As you know, commercial banking in Canada consists largely in lending at short term. The banker is trained to make his loans upon the combination of a quickly realizable security on salable goods and collectable accounts plus confidence in the character of the borrower and his ability to repay his loans with promptitude. To transform Canadian banking policy to a point where a banker would rely upon the value of the land might well result in his failure properly to evaluate the integrity of the borrower with the result that the banks might become overloaded with much of the poor real estate in the country. It would seem more satisfactory for the banks to remain in the field of commercial loans, leaving loans on the direct security of real estate to loan and insurance companies whose employees are experienced in the making of long term loans. It will be recalled that just prior to the present war the Government was about to establish a Central Mortgage Bank which would have operated as a reserve bank for the loan companies much as the Bank of Canada operates as a central bank for the chartered banks of this country. It is very doubtful whether a proposal to enable the banks to open their doors to real estate loans would be popular either with our legislators or with the bankers. After all, the test of a good banker is not merely to be able to lend money—his ability to get it back is what really counts. We all of us have enough experience to know that it is by no means easy to realize, promptly or otherwise, all or even part of one's money out of land.

Loans on the Security of Goods.—The general prohibition in section 75(2)(c) against lending money on the security of any goods, wares and merchandise is subject to certain specific exceptions. Under section 86 a bank may acquire and hold any warehouse receipt or bill of lading as collateral security and section 88 permits a bank to lend to certain classes of persons upon the security of a wide variety of products, goods, wares and merchandise. Section 90, however, imposes certain restrictions upon the taking of any of these securities and provides that they shall only be acquired to secure the payment of a note negotiated at

the time the bank acquires the security, or upon the written promise or agreement that these securities would be given to the bank.

The provision for taking warehouse receipts and bills of lading originated in 1859 in a statute of the old Province of Canada. In 1861 an amendment provided that the security would be valid even if the person who gave the security owned the goods covered thereby. The list of owners of goods who might thus give security was gradually extended and in 1880 the requirement was omitted that the person issuing the document must be capable of issuing such a receipt as a custodian of the goods or other persons.

It was not until 1890, however, that the use of warehouse receipts was confined to warehousemen and provision was made for a specific new security which is now generally designated as a section 88 security. Of this security, the Royal Commission on Banking and Currency in Canada (1933) stated:

Of interest to the lawyer is the modification of the law of pledge which is to be found in section 88 of the Act of 1923. . . . a provision designed to enable the financing of those who have no available security to offer for advances except assets which must necessarily remain in their own possession.

In the interests of the commercial and agricultural communities at large, this power given to an owner to pledge his own goods as security for the bank loan has been extended to cover crops, live stock or goods in the process of production, whether on a farm, a stock ranch or in a factory. The progress of Canadian industry and agriculture has been to a considerable extent due to the ability of Canadian manufacturers, stock-raisers, farmers and others thus to obtain short term loans from their bankers. The process of obtaining these loans, particularly in the case of active industrial and commercial accounts, is complicated and time-consuming, however. As a result of a series of decisions, the most important of which was possibly *Clarkson v. Dominion Bank* (1919), 58 S.C.R. 448, counsel for the banks developed a procedure under which the prospective borrower signs an agreement, and an application for credit which contains a promise to give security under section 88, or a warehouse receipt or bill of lading under section 86. The bank then indicates its willingness to grant the borrower a line of credit up to a certain amount and the borrower gives notes for his borrowings from time to time. Each note contains at its foot a statement that it is for an advance under the original application for credit and promise to give security and a new promise to give further security. The

security itself, in the form set forth in a schedule to the Bank Act is executed along with the note and must cover all outstanding promissory notes and all of the goods upon which security is being given. In an active business new securities are given several times a day in order to make certain that all newly acquired goods are included.

It is evident from the foregoing that the process in some cases is very complicated and time-consuming and that in the interests of the commercial community particularly, there is room for a simplification of procedure with a view to the saving of time, particularly in these days when it is so precious.

A better idea of the procedure in such cases, particularly those involving a revolving line of credit, can be gained by reading the decision in *Guarantee Silk Dyeing and Finishing Company, Limited v. Bank of Montreal*, [1935] O.R. 493, 4 D.L.R. 483, Ont. C.A. The reasons of the trial judge, Mr. Justice Davis before his elevation to the Supreme Court of Canada, are interesting and instructive. In his view the security is of the nature of a mortgage to the bank by the borrower who retains an equity of redemption. The judgment of the Ontario Appellate Division which varied the trial judgment in some respects, was delivered by Mr. Justice Masten, an expert on commercial law. In opening he said:

It is to be borne in mind that the Parliament of Canada has enacted these sections not so much for the benefit of banks as for the benefit of manufacturers; not principally to provide a convenient and suitable means for the provision and application of capital to industry with the object that thus manufacturing and commercial enterprise in Canada may be encouraged. It is also to be noted that, originally enacted in 1890, they have with amendments from time to time been re-enacted during more than forty years. Their purpose and operation were referred to as follows by Migneault, J., in *Landry Pulpwood Co. v. Banque Canadienne Nationale*, [1927] S.C.R., at page 613:

"The present case affords an apt illustration of the object Parliament undoubtedly had in view when it enacted section 88, this object being to come to the assistance both of the manufacturer of goods, and of the bank which lends the money for the purposes of his business. Thus the owner of a timber license proposes to go into the forest, to cut down the trees and transform them into what is commercially known as pulpwood. Before the pulpwood is produced in its commercial form, considerable expense is necessary to cut the trees, peel off the bark and saw them into the required lengths. The manufacturer of pulpwood therefore requires financial assistance from the outset and unless he can give the bank that assists him a lien on the finished product, although not then in existence, his business cannot be carried on."

Mr. Justice Masten then proceeded:

These considerations render specially applicable that rule of statutory interpretation which requires that such an enactment shall be deemed remedial and must accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. But nevertheless fulfilment of the requirements definitely prescribed by the statute is essential to the validity of the security particularly where as in this case the contest is with a competing lien held by a third party.

It is well known that the conveyancing forms employed and the mode of procedure adopted by banks in taking such security are the result of careful consideration and advice by competent counsel and are applied by bank managers acting under instructions from the bank's head office. For this reason I prefer to express the rule of interpretation to be here applied in the terms I have indicated rather than to say that as commercial documents these securities ought not to be scrutinized with particularity.

Mr. Justice Masten's general description of the security is interesting:

The Bank's securities here in question are in some respects of the same character as the well-known floating charge customarily inserted in bond mortgages and chattel mortgages, and these securities cover not merely the specific goods which, at the moment when the security was given were in the possession of the customer, but also such other goods as were subsequently from time to time acquired by the customer by way of substitution for or addition to those on hand at the time when the security was given, see subsection 4 of section 88 of The Bank Act and *Imperial Paper Mills v. Quebec Bank*, [1913] A.C. 505.

While it is evident that a section 88 security is like a floating charge in some respects the resemblance is confined to its operation, not its creation. There is room for improvement and simplification at its birth. It is to be hoped that our legislators will be inspired to make the process easier and speedier in the interests of all concerned.

BANK RECORDS

Section 92(2) of The Bank Act reads:

The liability of the bank, under any law, custom or agreement to repay moneys heretofore or hereafter deposited with it and interest, if any, shall continue, notwithstanding any statute of limitation, or any enactment or law relating to prescription.

The result of this simple provision, for which there is no corresponding legislation in the United States or Great Britain, to the writer's knowledge, is that the Canadian banks have to keep practically forever, their ledgers containing customers'

accounts, the deposit contract and many vouchers relating to every account. In the case of some banks these records may go back for over 100 years. This requirement results in the concentration of bank records in central places of storage and puts the bank to a great deal of expense. Moreover, in wartime, the pressure is intensified in cases where new space is required to house the growing volume of records.

Even before the war some of the banks conceived the idea of utilizing the principle of microphotography which is used in sending many soldiers' letters abroad on a microfilm, enlarged prints being delivered overseas. It would, of course, be possible at any time if an original document were destroyed after being photographed, to introduce a print from the film in evidence, after proving that the original had been photographed and subsequently destroyed. This method of proof was available under the best evidence rule, but as time goes on difficulties will arise where the person who made the photograph is not available or has passed to his reward. It was therefore necessary to make legislative provision for proof of this nature and to provide that proof of the photography and destruction, etc., could be made by affidavit or a notarial copy thereof.

The problem was accordingly discussed, first with representatives of the Dominion and provincial governments and then with the Commissioners on the Uniformity of Laws, who prepared and included a section on the subject in their draft Uniform Evidence Act then in course of preparation. The draft was also made applicable to governmental records. In 1942 legislation along this line was introduced in all of the provincial legislatures except those of Quebec, Alberta and Saskatchewan. There was also a Dominion Bill, but its provisions appealed to a number of other large organizations such as railways, insurance, loan and telephone companies. Their request to be included in the legislation was granted by Parliament and Dominion legislation, therefore, was somewhat broader than the provincial legislation passed by all of the provincial legislatures in 1942 except those mentioned.

This year Alberta and Saskatchewan have adopted the legislation in principle, the Alberta statute following the Dominion form and that of Saskatchewan the draft Uniform Evidence Act. Although the matter has been under consideration by the Quebec authorities, no legislation has been introduced in the Legislature of that province. Meanwhile the Commissioner on Uniformity of Laws have been giving further thought to the advisability of broadening their 1941 draft to include other types of organizations.

The problem, while appearing to be a simple one on the surface, has given rise to a number of difficulties which call for careful draftsmanship. It is hoped that in 1944 the legislation will be enacted by the Quebec Legislature so that the banks and others interested may take advantage of its provisions and begin to photograph and destroy their ancient records. This could not safely be done until there was adequate protection in the Dominion and provincial Evidence Acts. The question is obviously one of evidence and not of banking and would not have been a proper subject for an amendment to the Bank Act.

The banks and other organizations have great quantities of scrap paper needed for wartime uses, for serious paper shortages have developed from time to time. It would be possible for these old records, instead of being burned, to be destroyed by maceration or pulping so that the material would have contributed and might still contribute to the war effort, if adopted by all provinces in 1944.

TRUST AND JOINT ACCOUNTS

Section 96(2) of the Bank Act reads:

If any deposit made under the authority of this Act is subject to a trust of which the bank has notice, the receipt or cheque of the person in whose name any such deposit stands, or, if it stands in the names of two or more than two persons, the receipt or cheque of all such persons or of such of them as under the document creating the trust may be entitled to receive such deposit shall, notwithstanding any trust to which such deposit is then subject, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit, and the bank shall not be bound to see to the application of any money paid upon such receipt or cheque.

This provision has no doubt occasioned some difficulty to barristers and solicitors acting as or on behalf of trustees. Barristers have doubtless considered that it would be advantageous if the Bank Act could provide for the bank receiving an adequate discharge if it were signed by one or more of a group of trustees authorized to do so by them all.

Such a proposal did, in fact, come before the Banking and Commerce Committee on the occasion of the last revision but it was realized that this would involve legislative interference with the terms of instruments creating trusts contrary to public policy and also of doubtful validity. For that reason, therefore, subsection 2 was enacted in the above terms in order to ensure strict conformity with the terms of any trust of which the bank had knowledge.

DOMINION GOVERNMENT CHEQUES

Section 98 of the Bank Act reads:

The bank shall not make any charge for cashing any cheque drawn on the Receiver General or on his account in the Bank of Canada or in any other bank or for cashing any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund or upon any cheque drawn in favour of the Government of Canada or any department thereof and tendered for deposit in the Consolidated Revenue Fund.

The amount of work done by the banks for the Government free of charge under this section has increased tremendously during the war by reason of the greatly increased number of cheques issued by the Government in payment of its employees, in the armed services and elsewhere. Naturally the dangers from forgery and other frauds have been intensified with the result that the banks have found themselves on more than one occasion in rather difficult positions. At present the practice of the Dominion, if they find some evidence of forgery, is to have the facts stated in affidavit form and to send the original forged cheque and affidavit back to the bank which had paid it, at the same time debiting the bank's account with the amount on the day's clearing.

As a matter of law the bank would not be able to say much in its defence even if given the opportunity to do so. To begin with, the Bills of Exchange Act does not bind the Crown but does bind the banks. The Crown might therefore hold the banks to the strict letter of the law while the banks would be unable to return the compliment. If, therefore, the Crown were to sue the bank for the return of the money involved in the forgery of a cheque, the bank would be unable to avail itself of certain defences which would otherwise be open to it under the Bills of Exchange Act. It would be unable to assert estoppel, because the actions of the servants of the Crown cannot bind it by estoppel and the Crown, not being liable in tort is not concerned in law with the negligence of its servants. It would seem that the doctrine of *London Joint Stock Bank v. Macmillan*, [1918] A.C. 777 would not help the bank because Receiver General cheques are not drawn on a bank and the duty to draw a cheque carefully is a duty which the drawer of a cheque owes to his banker only. Moreover, the bank could not make a counterclaim against the Crown without a fiat, for such a counterclaim would be tantamount to a petition of right. By and large, it would seem that the banks would be in a parlous state.

But the Crown's position is not all it seems, for the "cheque" now commonly used by the Dominion is drawn by the Receiver General on himself. The fact that the drawer and drawee are the same person, would remove these Receiver General "cheques" from the category of bills of exchange for section 17 requires that a bill of exchange be addressed by one person to another. In the case of *London and City Midland Bank v. Gordon*, [1903] A.C. 240, the House of Lords held that a draft drawn by a branch bank on its head office could not be treated by the bank as a bill of exchange. The situation is partly covered by section 26 which enables the holder of an instrument in which the drawee and drawer are one and the same person to treat it as a bill of exchange or promissory note whichever he prefers. This could help the bank as holder in an ordinary case, but the difficulty is that section 26 with the rest of the Act, does not bind the Crown, so that cock won't fight. The result is that as Receiver General cheques are outside the Bills of Exchange Act, the Government would be out of court along with the bank. The matter is evidently one for the exercise of common sense and no doubt a practical solution for the difficulty will be found if cases of fraud and forgery continue to multiply.

UNCLAIMED BALANCES

Section 114 of the Bank Act requires the bank to make an annual return to the Minister of Finance on the balances which have been inactive or upon which no interest has been paid for the previous five years and also of dividends unpaid for over five years. The banks are continually endeavouring to trace the proper owners of these accounts, or their legal representatives, and it is amazing how often they are able to locate people who have moved from one place to another, completely forgetting their bank accounts. These people seem to have the attitude of Little Bo-Peep toward her sheep, "Leave them alone and they'll come home," but although the banks do the best they can to locate the owners there are many who cannot be found or traced and in over 100 years the amounts have become substantial, possibly involving two or three million dollars.

The Dominion's printed lists of unclaimed balances were formerly a sort of happy hunting ground for people who wished to make money easily, for some persons have actually signed contracts agreeing to pay 50% of any moneys found to belong to them by persons who make this sort of thing their business. You can imagine the chagrin of a victim on being advised of a

bank account about which he had forgotten and his annoyance at having to pay 50% of it over to the other party to the contract, when he could have received the whole amount directly from the bank without cost and without an intermediary.

Some persons, after vainly endeavouring to find the true owners of some of these unclaimed balances, came to the conclusion that they might actually be ownerless and therefore bona vacantia in the eyes of the law and that the provincial governments might be interested in obtaining any such ownerless deposits.

The first effort in this direction was made by the Quebec government but the banks were doubtful concerning the adopted procedure and in consequence four test cases were tried in the courts which determined that the proceedings were improper and did not constitute legal authority for the banks to pay the money to the province. *Re Hodgetts, Attorney General of Quebec v. Banque Canadienne Nationale* (1938), 76 Que. S.C. 149. The Quebec Legislature thereupon enacted a statute which provided in general terms that deposits of money and securities in credit institutions, which deposits had been inactive or unclaimed for 30 years, should be deemed to be vacant property belonging to His Majesty in right of the Province of Quebec.

By agreement between the province and the banks another test case was launched covering unclaimed balances in the Bank of Montreal. Mr. Justice Demers, the trial judge, gave judgment in favour of the province. *Attorney General of Quebec v. Bank of Montreal and Attorney General of Canada* (1941), 79 Que. S.C. 339. The Quebec Court of Appeal has sustained his judgment, largely because of the decision of the Supreme Court of Canada in a Manitoba case of a somewhat similar nature.

The Manitoba litigation was of longer duration. In 1924 the Imperial Canadian Trust Company agreed to take over certain deposits of the Great West Permanent Loan Company at Winnipeg and Calgary and by the end of December 1927 the Trust Company had paid off all but about \$18,000 of these deposits. It was ordered to be wound up and the Montreal Trust Company was appointed permanent liquidator. They in turn paid off additional depositors until a balance of \$9,844 was left consisting of many very small deposits.

This money was claimed by the Minister of Finance under sections 139 and 140 of the Winding-up Act and by the Provincial Treasurer of Manitoba as bona vacantia. On the liquidator's application to the court for directions, it was held that the money

should go to the province. The Court of Appeal held that in the absence of any evidence that the depositors were dead or without heirs the funds were not *bona vacantia* and should be paid to the Minister of Finance. In the meantime the Manitoba Legislature had passed the Vacant Property Act in which it was provided that deposits unclaimed for 12 years were vested in and payable to the Crown in the right of the province.

A petition by the Attorney-General claiming the above-mentioned deposits under the new Act was then brought before the courts. A decision that the deposits could not be considered unclaimed did not satisfy the province which appealed. The appeal was dismissed and appeals from both decisions of the Court of Appeal were taken to the Supreme Court of Canada and heard together. The Supreme Court in a recent judgment, [1943] S. C. R. 370, took the view that the evidence did not support a general finding of the abandonment of the deposits.

With respect, however, to the claim under the Vacant Property Act, the court took the view that the 12-year limitation was against the depositors and not the trust companies or the liquidator and that the Attorney-General was entitled to succeed in the second action.

This decision was brought to the notice of the Quebec Court of Appeal before its decision was rendered, and in consequence thereof the Chief Justice, with whom Mr. Justice Walsh concurred, altered his opinion which had been to the effect that the Quebec legislation was invalid in respect to bank deposits. In a few additional paragraphs he outlined the view that in the light of the Supreme Court's decision, the bank as depository did not have a right of ownership of the deposits and that its obligation was rather of the nature of a trust to repay the money to the rightful owner, or to the province if it is legally able to substitute itself for the owner, and that the legislation did not interfere with banking.

The result of this changed decision was that instead of a three to two decision against the province, there is now a four to one decision in its favour. Mr. Justice Marchand did not change his view that the Quebec legislation was invalid.

As the question is of considerable importance, it is reasonable to suppose that the Quebec and Manitoba cases will be carried further.

It may also be anticipated that the other provinces will await the outcome of these cases with considerable interest.

On the occasion of the last revision of the Bank Act one of the members of the Banking and Commerce Committee suggested that provision should be made to vest these unclaimed balances in the Crown in right of the Dominion. The Minister of Finance, however, stated that such a step would be unconstitutional on the ground that the provinces were entitled under section 109 of the B.N.A. Act to such of these unclaimed balances as were really ownerless and therefore bona vacantia coming within the meaning of the term "royalties" in the above section.

It may be mentioned that it is already provided in section 115 of the Bank Act that in the event of a bank becoming insolvent, the liquidator should eventually turn over any unclaimed balances to the Minister of Finance to be held by him subject to all rightful claims on behalf of any person. In the Quebec and Manitoba legislation there is no corresponding provision to protect the depositor or his legal representatives and if he wishes to recover moneys which have been taken over by the province his only remedy is by way of petition of right.

ARTHUR W. ROGERS.

Montreal.