04/72

SUPREME COURT OF VICTORIA — FULL COURT

ANZ SAVINGS BANK LIMITED v MELLAS and VERIGIOS

Winneke CJ, Pape and Crockett JJ

14, 29 March 1972 — [1972] VicRp 79; [1972] VR 690

CIVIL PROCEEDINGS – GARNISHEE ORDER – CONDITION AS TO WHAT WAS TO BE DONE WHENEVER MONEYS PAID INTO OR WITHDRAWN FROM THE BANK – WHETHER BANK OBLIGATED TO REPAY MONEYS PAID IN WHEN CONDITION NOT COMPLIED WITH.

The judgment debtors had credit balances in an account with the ANZ Savings Bank Ltd. One of the conditions appearing in the passbooks was that "This passbook must be produced whenever money is paid into or withdrawn from your account. To withdraw – complete a withdrawal form together with your passbook to the teller. Payment of a withdrawal may be made to the bearer of a completed withdrawal form signed by you and presented with the passbook." A judgment creditor obtained a garnishee order nisi attaching the credit balance. On a reference under O29 rule 39 of the *County Court Rules* it was held that the amount of the credit balances was an attachable debt.

HELD: That the provision above referred to was a condition precedent to any obligation on the part of the Bank to repay moneys deposited to the credit of accounts and that as this condition had not been complied with at the date of the order nisi, there was no debt owing or accruing from the Bank to the judgment debtors.

WINNEKE CJ: The judgment of the Court will be delivered by Pape J.

PAPE J: This is an appeal from an order of his Honour Judge Vickery of the County Court made on 14 May 1971, whereby, on a reference under O29, r39, of the *County Court Rules* in garnishee proceedings it was determined that a sum of $619.70 standing to the credit of Evriniadis Verigios and Epethmia Verigios (the judgment debtors) with the Australia and New Zealand Savings Bank Ltd (the garnishee/appellant) was an attachable debt within the meaning of O29, r34, of the *County Court Rules*.

The facts may be shortly stated. On 6 June 1968 judgment in default of appearance was entered in the County Court at Melbourne for Spiros Mellas (the respondent/judgment creditor) against the above-named judgment debtors for $1055.15 being $991 for money lent and $42.15 for costs. This judgment was not satisfied to the extent of $968.15 and on 19 September 1969, his Honour Judge Somerville made an order nisi whereby it was ordered that "all debts owing or accruing due from the above-named garnishee to the above-named judgment debtors be attached to answer a judgment recovered against the judgment debtors by the above-named judgment creditor in the County Court at Melbourne on 6 June 1968, for the sum of $991.00 and $42.15 costs, on which judgment the sum of $968.15 remains due and unpaid, and that the garnishee be restrained from allowing any withdrawals to be made from the bank accounts standing in the names of Evryviadis Verikios and Effi Verikios and Bank account No. 3411- 3379 at the garnishee's Bridge Road, Richmond, Branch".

It appeared that, at the date on which the order nisi was obtained, the judgment debtor, Evriniadis Verigios, had an account, No. 3411-3379, with the Australia and New Zealand Savings Bank Ltd at its branch at 76 Bridge Road, Richmond, under the name Evryviadis Verikios, which was in credit to the extent of $597.16, and that the judgment debtor, Epethmia Verikios, also had an account, No. 3411-3367, with the same branch under the name of Effi Verikios which was in credit to the extent of $2.06. The order nisi was returnable on 2 October 1969 and was served at the registered office of the garnishee on 24 September 1969. On 16 December 1970 (the matter having apparently been adjourned from time to time) his Honour Judge Gray made an order pursuant to O29, r39, of the *County Court Rules* ordering that "the following question, namely, is the sum of $1,143 standing to the credit of the judgment debtors with the garnishee an attachable debt within the meaning of O29, r34, of the *County Court Rules*" be tried and determined by a judge of the County Court. The sum of $1143 referred to in the question propounded by this order was

inserted by mistake and was by the order now under appeal, amended to read $619.70, being the total amount of the two accounts together with interest to the date of the order nisi.

The trial of this issue took place before his Honour Judge Vickery on 14 May 1971 when his Honour, after hearing argument by counsel on behalf of the judgment creditor and the garnishee (there being no appearance for the judgment debtors), answered the question, "Yes".

On the hearing of the issue, the passbooks in respect of the two accounts were tendered in evidence. In the front of each book appeared these words: "For advice on the operation of your account refer to inside back cover", and on the inside back cover, the following words appeared: "This passbook must be produced whenever money is paid into or withdrawn from your account. To withdraw – complete a withdrawal form and hand the form together with your passbook to the teller. Payment of a withdrawal may be made to the bearer of a completed withdrawal form signed by you and presented with the passbook."

The short point to be determined in this appeal is whether, in the absence of the tender of a withdrawal form signed by each of the depositors accompanied by the passbooks, there was, at the date of the order nisi (which is the relevant date – see *Hetherington v Driscoll* [1891] VicLawRp 79; (1891) 17 VLR 356, and *Universal Guarantee Pty Ltd v Derefink* [1958] VicRp 10; [1958] VR 51; [1958] ALR 213) any debt owing or accruing due by the bank to the judgment debtors in respect of the moneys at credit in the accounts. His Honour Judge Vickery decided this issue in favour of the judgment creditor, considering himself bound (as in law he was) by a decision of this Court in *Chubb v Emery* [1933] VicLawRp 19; [1933] VLR 125; [1933] ALR 130, although he indicated that, had he been free to do so, he would have been disposed to follow later decisions of other courts to a contrary effect.

There is a conflict of authority on this point. Lowe J in *Chubb v Emery supra*, and Wolff CJ in *Dalston Development Pty Ltd v Dean and Commonwealth Savings Bank of Australia* [1966] WAR 36, have decided that, in the circumstances set out, the credit balance in the account is attachable. On the other hand, the Court of Appeal in *Bagley v Winsome and National Provincial Bank* [1952] 2 QB 236; [1952] 1 All ER 637, the Full Court of Queensland in *Music Masters Pty Ltd v Minelle and Bank of New South Wales Savings Bank Ltd* [1968] Qd R 326, and Porter LJ (sitting in the QB Division) in *C and E Lewis Ltd v Gribben* [1955] NI 51, have decided that such moneys are not attachable. Furthermore, in *Haythorpe v Rae* [1972] VicRp 73; [1972] VR 633, in a judgment delivered on 17 September 1970, Crockett J expressed the view that *Chubb v Emery* had been wrongly decided.

In the first place, it is necessary to look at the provisions of the *County Court Rules* under which this order nisi was made in order to ascertain what debts may be attached. O29, r34, of those *Rules* provides, excluding irrelevant words, that "A Judge may upon the *ex parte* application of any person who has obtained a judgment or order for the recovery or payment of money...and upon affidavit by himself or his practitioner stating that judgment has been recovered...and that it is still unsatisfied and to what amount...and that any other person is indebted to such debtor... order that all debts owing or accruing from such third person (hereinafter called the 'garnishee') to such debtor shall be attached to answer the judgment...and by the same or any subsequent order it may be ordered that the garnishee shall appear before a Judge to show cause why he should not pay to the person who has obtained such judgment...the debt due from him to such debtor". What may be attached is, thus, "all debts owing or accruing" from the garnishee to the judgment debtor.

A "debt owing" is one for which the creditor could have immediately and effectively sued: (*Chatterton v Watney* (1881) 16 Ch D 378, per Bacon VC at p383), and in the instant case it would seem that, on 19 September 1969, there was no debt payable *in praesenti* by the bank to either of the judgment debtors. The question, therefore, arises whether there was then any debt accruing to them. A debt accruing has been defined in *Webb v Stenton* (1883) 11 QBD 518; [1881-5] All ER Rep 312, where the Master of the Rolls, Sir Baliol Brett, at (QBD) p524 described it as *debitum in praesenti, solvendum in futuro*, a present debt which is not yet payable, and as not including anything which may be a debt however probable and however soon it may be a debt. Lindley LJ at p527 said:

> "I should say apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

Fry LJ, at p528 said:

> "In my opinion the defendants' counsel is right in contending that the words 'is indebted' (in Order 45 R2 which is in the same form as the present County Court Rule) and the words 'debts owing or accruing' refer to the same subject matter. It appears to be plain that to satisfy either of these two expressions there must be an actual present debt."

To the same effect are the cases of *Jones v Thompson* (1858) 1 EB and E 63; [1858] EngR 551; 120 ER 430, and *Tapp v Jones* (1875) LR 10 QB 591, the effect of which was considered by Scott LJ in *Heppenstall v Jackson* [1939] 1 KB 585, at p592; [1939] 2 All ER 10, in which case his Lordship followed *Webb v Stenton*.

In our opinion, these authorities establish that a debt "accruing due" must be a debt based upon a present obligation but which is payable at a definable approaching future date and not one which is payable only on the performance of a condition precedent. Mr Hooper, who appeared for the appellant garnishee, argued that the requirements appearing in the passbooks with regard to the withdrawal of moneys from these accounts constituted terms of the contract between the bank and the customers, which terms had to be complied with before any debt became payable by the bank to the judgment debtor, and that such requirements were conditions precedent to any obligation to pay arising. Therefore, he said, since the judgment debtors had not complied with the conditions precedent by presenting the passbooks and withdrawal forms before the order nisi was made, there was no present debt or obligation in existence at that time.

On the other hand, Mr Hansen, who appeared for the respondent judgment creditor, argued, first, that the requirements set out in the passbooks were not terms of the contract between the bank and the judgment debtors, but were merely procedural instructions or advice given by the bank to its customers in reference to the withdrawal of moneys. Secondly, he contended that if his first argument should be rejected, a present debt or a present obligation to repay the moneys lodged to the credit of the accounts arose immediately such moneys were so lodged and that such debt or obligation was to be discharged by payment only in the future when demand was made in accordance with the contractual provisions set out in the passbooks. In other words, he contended that the conditions did not alter the fact that a present debt or obligation existed, but only affected the time of payment – that the demand in accordance with the conditions was merely the contractual mode of obtaining a discharge of the existing debt and that this was, therefore, *debitum in praesenti, solvendum in futuro* and thus an accruing debt capable of being attached under O29, r34. He further argued that if the service of the garnishee order nisi was to be regarded as a sufficient demand for payment of a balance standing to the credit of a current account, there was no sufficient reason why such service should not be considered as equivalent to the presentation of a withdrawal form and the passbook in the case of a deposit account.

In our opinion, the argument presented by Mr Hooper should prevail. We think that the provisions set out in the passbooks are part of the terms of the contract between the bank and its customers and do constitute conditions precedent to any obligation by the bank to repay the moneys at credit to the judgment debtors, and that the service of the order nisi cannot be regarded as due performance of those conditions precedent.

It seems plain that the passbooks may be looked at in order to ascertain the terms on which the bank contracted with its depositors: *Re Weston* [1902] 1 Ch 680; [1900-3] All ER Rep 283, per Byrne J at (Ch.) pp685-686; *Birch v Treasury Solicitor* [1951] 1 Ch 298, per Sir Raymond Evershed MR at pp306, 308, 311; [1950] 2 All ER 1198, and *Haythorpe v Rae*, *supra*, per Crockett J at p637. In *Kauter v Hilton* [1953] HCA 95; (1953) 90 CLR 86, the Court consisting of Dixon CJ, Williams and Fullagar JJ said at p101:

> "The passbooks" (of the Commonwealth Savings Bank) "contain a notice that withdrawals may be made by the depositor personally on production of the passbook and the necessary completed withdrawal

> form or to the bearer of a completed withdrawal form signed by the depositor and presented with the passbook. The presentation of the passbook is therefore required before any moneys can be withdrawn from an account...".

And in *Commissioners of State Savings Bank of Victoria v Permewan Wright and Company Ltd* [1914] HCA 83; (1914) 19 CLR 457; 21 ALR 20, Isaacs J at (CLR) p471 said: "A stipulation that the pass-book must be produced by the depositor or by some person with his written authority is a condition precedent to any right of payment", for which proposition he cited *Atkinson v Bradford Third Equitable Benefit Building Society* to which we shall now refer.

In *Atkinson v Bradford Third Equitable Benefit Building Society* (1890) 25 QBD 377, the question was whether the return to the society of a loan passbook issued by it was a condition precedent to the repayment of the loan. Lord Esher MR said at p380:

> "The book contains the contract between them. It contains the terms, in writing, to which the parties had agreed.... The contract is that the depositor will lend his money to the Society on terms that they shall return it to him when certain stipulations have been fulfilled. Those stipulations are that he shall give them notice of his desire to withdraw the money, and that the book shall be produced to the Society either by himself, or by someone with his written authority. If that be the contract, there is no liability to pay on the part of the society, and no cause of action arises against them until all those stipulations have been fulfilled."

Lindley LJ at p382 said: "The conditions as to the production of the pass-book by the depositor himself, or by some person with his written authority, were conditions precedent to the right to receive back the money." For other cases where similar requirements have been held to be conditions precedent to liability, see *Re Tidd* [1893] 3 Ch 154, per North J at p156; *Cowley v Taylor and Ackers* (1908) 124 LTJ 569; *Bagley v Winsome and National Provincial Bank supra*, per Evershed MR at (QB) pp242, 243; per Jenkins LJ at p244 and per Hodson LJ at p245; *Music Masters Pty Ltd v Minelle*, *supra*, at p330, and *C & E Lewis Ltd v Gribben*, *supra*, per Porter LJ, at pp56, 57.

Enough has been said to show that in principle there was no debt owing or accruing from the bank to the judgment debtors on the day on which the order nisi was granted. We do not think that the condition that the passbook must be produced before payment will be made is a mere formality, for as was said in *Birch v Treasury Solicitor*, *supra*, at (Ch.) p311, the passbook is "the essential *indicia* or evidence of title, production or possession of which entitles the possessor to the moneys purported to be given". The court was there considering whether the delivery of such a passbook was a good *donatio mortis causa*. But even if such a condition can properly be described as a mere formality, we think it is none the less a condition with which the depositors have bound themselves by contract to comply. But it is desirable to consider the cases in which the point under discussion arose directly in relation to garnishee proceedings concerning sums standing to the credit of accounts in banks, with particular reference to those accounts other than current accounts known as deposit accounts. We see no reason to doubt that savings bank accounts are to be regarded as equivalent to deposit accounts and we have so regarded them throughout this judgment.

The commencing point is the case of *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110; [1921] All ER Rep 92. At the outset, it must be emphasized that this case is concerned only with current accounts and does not profess to deal with deposit accounts. There a firm known as N. Joachimson were, upon the outbreak of the First World War, carrying on business in Manchester. One of the partners died on 1 August 1914, and thereby the partnership was dissolved. The firm had a current account with the defendant bank in London in which, on 1 August 1914, the sum of £2321 was standing to their credit. One of the surviving partners was an enemy alien, and no transactions took place on the account until an action was brought to recover the balance at credit after the war had ended. Then another of the partners in 1919, for the purpose of winding up the affairs of the partnership, commenced an action against the bank to recover the sum standing to the firm's credit as at 1 August 1914 as money lent or, alternatively, as money had and received. Roche J held that the debt owing by the banker to his customer was in the same position as a debt owed by any other debtor and could be sued for without previous demand, relying upon *Pott v Clegg* (1847) 16 M and W 321; [1847] EngR 212; 153 ER 1212, and *Foley v Hill* [1848] EngR 837; (1848) 2 HL Cas 28; [1843-60] All ER Rep 16. The Court of Appeal reversed this decision, holding

that where money is standing to the credit of a customer on current account with a banker, a demand by the customer was a necessary ingredient in the cause of action.

This decision broke new ground in the law of banking, for until it was delivered, it was generally thought (even by the trial judge) that the relationship of banker and customer was that of debtor and creditor with the super-added obligation of honoring customers' cheques to the extent of the available credit balance, and that although it had been said in the earlier cases (many of which are referred to in the judgment of Bankes LJ in *Joachimson's Case*) that the debt due from the banker to the customer was payable on demand, the requirement of demand was treated as being meaningless and as adding nothing to the liability in the sense that the obligation was enforceable without demand being made just as a promissory note payable on demand is enforceable without previous request for payment: see *Bradford Old Bank v Sutcliffe* [1918] 2 KB 833, per Pickford LJ at p840, and per Scrutton LJ at p848, and *Paget on Banking*, 7th ed., p55.

The result of this concept was that the *Statute of Limitations* began to run as from the date of payment of moneys into the account, and the banker was in strict law bound to seek out his creditor and repay the loan directly after the customer had paid the money into his account.

All judges comprising the Court of Appeal concurred in holding that a term must be implied in every contract between banker and customer that an actual demand by the customer for payment is a condition precedent to the existence of a present enforceable debt: see per Bankes LJ at (KB) p121: per Warrington LJ at (KB) p126, and per Atkin LJ at (KB) pp127, 129 and 130.

So far the decision, although applicable only to current accounts, would seem to support the view already expressed that, in respect of deposit accounts (which are accounts arising out of the relationship of banker and customer – see *Commissioners of State Savings Bank of Victoria v Permewan Wright and Co Ltd*, *supra*), no debt becomes owing or accruing until demand has been made. But the matter is complicated by reason of *dicta* by all judges relating to garnishee proceedings (all of which *dicta* in this case were *obiter* because their Lordships were not dealing with garnishee proceedings).

Under the law, as it was previously understood to be, the debt from banker to customer was said to arise instantly on the loan: see per Parke B in *Norton v Ellam* (1837) 2 M and W 461, at p464; [1835-42] All ER Rep 330, and there was thus no difficulty in a creditor attaching such a debt due by a bank to its customer, for it was at all times a debt which was presently payable. But one result of the decision in *Joachimson's Case* might have been that such garnishee proceedings were no longer available in the absence of a demand, and this possibility was put to their Lordships in argument as a reason for holding that no demand was necessary. As to this, Bankes LJ at (KB) p121 said:

> "It has been suggested that a decision to this effect" (i.e. that a demand was necessary) "would run counter to a line of authorities which have recognized and allowed garnishee proceedings in reference to amounts standing to a customer's credit in his current account...I do not agree with this suggestion...The service of (a garnishee) order nisi is, in my opinion, a sufficient demand by operation of law to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced."

His Lordship goes on to say:

> "As no demand for payment in the present case was made on or before August 1, 1914, it follows, in my opinion, that the plaintiffs had no accrued cause of action on that date and the claim fails on that ground."

Now, a debt can only be the subject of garnishee proceedings if it is "owing or accruing" and here his Lordship is saying that there was no debt either owing or accruing from the bank on 1 August 1914. In these circumstances, it is difficult to see how the service of an order nisi obtained not by the customer, but by a stranger, could (had such service taken place shortly before 1 August 1914) have operated to convert a sum of money which, immediately before such service, was neither owing or accruing to the customer into an attachable debt.

This difficulty is increased when it is realized (as the authorities already cited show) that

the debt must be owing or accruing at the time when the order nisi was obtained, and when it is realized that, according to the judgment of Atkin LJ at (KB) p127 (in a passage which has ever since been regarded as enunciating the nature of the contract between banker and customer) the demand must be made at the branch of the bank where the account is kept, and that the bank could only effectively be served at its registered office and not at a branch: see *Eagles v Eagles* [1960] VicRp 63; [1960] VR 400, at p401. Warrington LJ at (KB) p126 thought that the service of the order nisi would be a sufficient demand. Atkin LJ at (KB) p131, in spite of his decision that the moneys standing to the credit of a current account are payable only after a demand, seems to have thought that such moneys were debts accruing, but was not as positive as his brethren about the effect of service of the order nisi, for he said: "Possibly the order nisi in itself operates as such a demand." But if there was a debt accruing without there being a demand, there would appear to be no need for any demand at all.

One other matter must be mentioned. At (KB) p105, Bankes LJ said: "Even if a demand is necessary to complete the cause of action, a writ is a sufficient demand." In that case the issue of the writ on 5 June 1919 could not be regarded as such a demand, for the plaintiffs, by their pleadings, asserted that their cause of action was one which accrued on August 1 1914. His Lordship's statement is described by *Paget*, 7th ed., at p58, as "somewhat anomalous in as much as a writ pre-supposes an existing cause of action".

Paget, 7th ed., at pp58, 129 and 134 criticizes the *dicta* that we have mentioned and although we accept the decision in *Joachimson's Case* that a demand is necessary before an obligation to repay can arise, we do not desire by this judgment to be taken as adopting those dicta as expressed in *Joachimson's Case*, or in the later cases where they have been accepted. The question of their application to the effect of service of a writ as constituting a demand or to the attachment of a credit balance in a current account does not arise for determination in this appeal, and we should prefer to keep those questions open until they arise directly for decision. If these dicta are not correct, it may well be that, for all practical purposes, current accounts cannot be the subject of garnishee proceedings.

Although the *dicta* in *Joachimson's Case* relating to the effect of an order nisi as equivalent to a demand were *obiter*, the Court of Appeal in *Rekstin v Severo Sibirsko* [1933] 1 KB 47; [1932] All ER Rep 534 (which was a garnishee case), adopted them and held that as such service could operate as a demand, it could equally operate as revocation of a direction by the customer to transfer the balance in his account to another account in the name of a third party.

Some 10 years after the decision in *Joachimson's Case*, the case of *Chubb v Emery* [1933] VicLawRp 19; [1933] VLR 125; [1933] ALR 130, came before Lowe J. That was a case concerning garnishee proceedings in relation to a deposit account, namely, an account with the State Savings Bank of Victoria. A judgment creditor had obtained a garnishee order nisi attaching a balance standing to the credit of a judgment debtor, and on the return of the order nisi the garnishee bank did not appear. It was argued for the judgment debtor that there was no debt due by the bank to the judgment debtor until a demand had been made and a withdrawal form, together with the passbook, had been tendered to the bank.

Lowe J purported to follow the *dicta* in *Joachimson's Case* and held that the condition that a demand should be first made was satisfied by the service of the order nisi and that he was not convinced that the point that the withdrawal form and the passbook must be produced before a debt could arise was a sound objection. It should be noted that the *dicta* in *Joachimson's Case* which his Honour purported to follow were not enunciated in respect of a deposit account, but in respect of a current account, and that generally speaking there is, in relation to current accounts, no requirement similar to that applicable to deposit accounts relating to the presentation of a withdrawal form and a passbook. Further, his Honour considered that he should follow "a well established practice" of making such orders in similar cases, unless convinced that such practice was wrong and was also disposed to think that, by not appearing, the garnishee must be taken to have admitted that it was indebted to the judgment debtor and to have waived the conditions as to production of the passbook and withdrawal form.

In 1952 the question came before the Court of Appeal in *Bagley v Winsome and National Provincial Bank Ltd* [1952] 2 QB 236; [1952] 1 All ER 637. This also was a case where a judgment

creditor had obtained a garnishee order nisi to attach moneys standing to the credit of a deposit account. The contract between the bank and the customer provided (a) that 14 days' notice should be given of a withdrawal and (b) that money could be withdrawn only on personal application by the customer at the bank and on production of the deposit book. The customer had given notice of withdrawal which expired on 11 January 1952, and on the same day, but before any application by the customer or production of the deposit book, the creditor issued a garnishee summons. It was held that, as the judgment debtor had failed to comply with all the terms of the contract, he could not obtain payment from the bank of the money in credit in his deposit account, that the judgment creditor could not be in a better position than the depositor, and that the sum standing to the judgment debtor's credit was not a sum owing or accruing to him from the bank.

Sir Raymond Evershed MR adopted the definition of "Debts owing or accruing" given in *Webb v Stenton*, *supra*, and accepted that *Joachimson's Case* and *Rekstin's Case*, *supra*, must be taken to have established that current accounts could be the subject of garnishee proceedings and that in such cases the service of the garnishee summons was to be regarded as a sufficient demand.

An argument similar to the argument put to us by Mr Hansen was advanced to the effect that, by analogy, the service of the garnishee summons should, where the account sought to be attached was a deposit account, be taken as operating as satisfaction of other conditions applicable to deposit accounts. Their Lordship's rejected that argument, saying that the deposit book was the document of title to the deposit account and the requirement of its production was a condition of a different character to that of giving notice, and was, in any event, one upon the performance of which the bank was entitled to insist.

Reference was made to the case of *Atkinson v Bradford Third Equitable Benefit Building Society* to which we have already referred. At (QB) p244 his Lordship said: "I think Mr Duveen" (counsel for the judgment creditor) "is entitled to say that before the decision in [the *Joachimson Case*] the distinction for this purpose between the deposit account and the current account may not, to say the least, have been clearly apprehended, but I am still, for my part, of opinion, and for reasons I have given, that it would not be right to say that the reconciliation of the [decision in the *Joachimson Case*] with the continuing practice of garnishee proceedings against current accounts involves at this day and age, for the first time, making that form of procedure available also against a deposit account." Both Jenkins and Hodson LJ agreed with the conclusions of the Master of the Rolls.

Jenkins LJ at (QB) p244 said that it was wrong in principle to compel the bank at the instance of the judgment creditor to make payment without compliance with the conditions of the contract between the bank and its customer and that "It is [one thing] to hold that a garnishee order nisi should be treated as equivalent to a simple demand by the judgment debtor, in a case in which a simple demand is all that is necessary in order to make the garnishee immediately liable, and quite another thing to say that such an order is to be taken in substitution for, and as the equivalent of, such a condition or stipulation as the production of a deposit book."

Hodson LJ at p245 remarked (as we have already remarked) that the decision in *Joachimson's Case* was against the contention of counsel for the judgment creditor and was only made relevant (in so far as garnishee proceedings against current accounts were concerned) by the dicta which we have ventured to criticize and which he declined to apply to garnishee proceedings against deposit accounts. We should say here that probably as a result of this decision, s38 of the *Administration of Justice Act* 1956 (4 and 5 Eliz. 2 c. 46) was passed in England making moneys standing to the credit of a deposit account (other than an account with the Post Office Savings Bank and certain other savings banks) attachable notwithstanding that the contract contained conditions similar to those in question in this case.

The next case is *C & E Lewis Ltd v Gribben* [1955] NI 51, a decision of Porter LJ sitting in the QBD of the High Court of Justice of Northern Ireland. There it was sought to attach sums of money deposited with the Northern Bank Ltd on two deposit receipts. The contract between the bank and the depositor provided that 10 days' notice of withdrawal should be given by the depositor to the bank and that the receipt must be produced and discharged when payment was required. His Lordship followed *Bagley's Case* and held that there was no debt owing or accruing

from the bank to the judgment debtor as the two conditions precedent had not been satisfied and that, therefore, garnishee proceedings did not lie against the money on deposit in the bank.

The next case is *Dalston Development Pty Ltd v Dean and Commonwealth Savings Bank of Australia* [1966] WAR 36, a decision of Wolff CJ. This again concerned a deposit account subject to conditions to the same effect as in the instant case. Wolff CJ declined to follow *Bagley v Winsome and National Provincial Bank*, *supra*, and, according to the headnote, declined to follow *Joachimson's Case*. His Honour does not specifically say that he would not follow *Joachimson's Case*, but we think that it is implicit in his reasons that such was his decision, although he does not give reasons for taking that course beyond stating his own opinion. At p37, he said:

> "*Joachimson v Swiss Bank Corporation* had decided that money on deposit in a current account with a bank was not attachable by a person who claimed as partner to have succeeded to the money unless a demand had been made on the bank....In my view, the money standing to the credit of the judgment debtor's account is a debt owing by the bank to the judgment debtor and the fact that the bank has prescribed a procedural formality for the withdrawal of the money does not make it any the less a debt. I am unable to follow the reasoning in *Joachimson's Case* that the garnishee order nisi is sufficient demand or necessary to create a debt as between a bank and its customer. My feeling is that the money in the bank is already a debt."

His Honour misstated the decision in *Joachimson's Case* in this passage, for that case decided nothing in regard to attachment, for no attachment proceedings had taken place. All that was decided was that a demand was necessary before the bank was under an obligation to pay. It may well be that if the *dicta* to which we have referred are read as part of the decision, the effect of the decision is as his Honour stated it to be. In so far as his Honour criticized the statements that the garnishee order nisi was a sufficient demand, we are disposed to agree with him. But we think that his Honour's difficulties with *Joachimson's Case* went much deeper than his inability to follow the notion that the service of a garnishee order nisi was equivalent to a demand, and went to the very basis of the decision itself, for he twice said that the money standing to the credit of a current account is already a debt. This would seem to be a reversion to the pre-*Joachimson* state of the law, and to deny the basic premise upon which that case was decided. This was really the argument which Mr Hansen put to us, and, with respect, we think it is incorrect. We think it is now too late and contrary to principle to go back to the days when the mere fact of the deposit created a debt which the bank was in law bound to pay by seeking out its creditor, and where the *Statute of Limitations* began to ensure for the benefit of the bank as from the deposit of the moneys to the customer's credit.

The last case to be considered is one decided by the Full Court of Queensland in *Music Master Pty Ltd v Minelle* [1968] Qd R 326. There the garnishee was the Bank of New South Wales Savings Bank Ltd, and the terms of the contract under which the account was opened and operated required that a pass-book and a properly signed withdrawal form should be presented before payment would be made from the account. It was held in a joint judgment by Wanstall, Stable and Matthews JJ that although in respect of moneys in a current account where the only prerequisite to payment is a demand, the issue and service of a garnishee order nisi itself operated as a demand, yet in the case of a savings bank account such as that then under consideration, there was no existing obligation to pay either presently or in the future until the customer had satisfied the requirement that the passbook be presented with the withdrawal form and that the performance of those requirements was a condition precedent to the obligation of the bank to make payment and that the service of garnishee proceedings could not take the place of the production of the passbook and withdrawal form.

The Court followed *Bagley's Case*, *supra*, and declined to follow *Chubb v Emery* and *Dalston Development Pty Ltd v Dean*, *supra*. It had been argued by Mr Macrossan QC, for the judgment creditor that the mere fact of the deposit of money to the credit of a deposit account created a present debt, and in the state of the law before *Joachimson's Case* was decided, this was admittedly the position. Therefore, unless *Joachimson's Case* was held to be wrongly decided, the cases prior to 1921 which were cited by him in support of his argument are of little value, because in 1921 that case decided that the mere fact of the deposit of moneys in a current account did not create a debt and that no obligation to repay existed until a demand was made. But Mr Macrossan also relied upon statements made by Lord Morton and Lord Reid in *Arab Bank Ltd v Barclays Bank Ltd* [1954] AC 495; [1954] 2 All ER 226, which was, of course, decided after *Joachimson's*

Case. There the question was whether a contract between a bank and its customer was on the outbreak of war wholly destroyed or whether it was merely suspended. As to this case, the Court at p333 said (and I am now referring to the Full Court of the Supreme Court of Queensland): "For present purposes we think it is sufficient to say that the general statements in those cases as to the relationship existing between banker and customer were not directed to the issue before us", and they illustrated this by pointing to a passage in the speech of Lord Morton adopting the reasoning of Jenkins LJ when the case was before the Court of Appeal the judgment of the Full Court continued:

> "In the particular passage Jenkins LJ refers to a demand for payment or the production of some *indicia* of title as a formality, and says that the requirement of such a formality should not exclude a debt from the benefit of the exception to the general rule that a state of war between the United Kingdom and another country abrogates and puts an end to all executory contracts which required commercial intercourse between a subject of the Queen and an alien enemy. The exception in question was that relating to accrued rights. The point we make is that Jenkins LJ whilst ready to characterise production of a passbook as a formality, clearly by his judgment in *Bagley v Winsome and National Provincial Bank Ltd* regarded it as something which had to be performed before a present obligation to make payment would arise."

Mr Hansen put every argument that could fairly be put on behalf of the judgment creditor. But those arguments had been put in the authorities to which we have referred and were not accepted. We think they should not be accepted by this Court. In our opinion, the judgment creditor in this case could not by reason of the garnishee proceedings put himself in a better position in relation to the bank than the judgment debtors. We think that the terms contained in the passbook were terms of the contract between the judgment debtors and the bank, and that by those terms, it was a condition precedent to any obligation on the part of the bank to repay the moneys deposited to the credit of the accounts, that the passbook together with a completed withdrawal form should be tendered to the bank by the judgment debtors or by someone with their authority, and that as this had not been done at the time when the order nisi was obtained, there was no debt owing or accruing from the bank to the judgment debtors at that date which was attachable by the judgment creditor. Even if with respect to a current account the service of the order nisi is to be regarded as a sufficient demand, we think it is over-straining the effect of the legal process to say that such service can be treated as constructive performance by the customer of another condition precedent of an entirely different nature.

We think that subject to the reservations mentioned, the decisions in *Bagley v Winsome and National Provincial Bank Ltd*, *supra*, *Music Masters v Minelle*, *supra*, and *C & E Lewis Ltd v Gribben*, *supra*, should be followed by this Court, that the decision in *Dalston Development Pty Ltd v Dean*, *supra*, should not be followed and that the decision in *Chubb v Emery*, *supra*, should be overruled.

The appeal should, therefore, be allowed in accordance with the order which will be pronounced by the Chief Justice.

WINNEKE CJ: The order of the Court is, appeal allowed with costs to be taxed and paid by the respondent, Mellas. The order below is set aside and in lieu there will be an order that the question referred for determination be answered "No" and that the garnishee order nisi be discharged with costs to be taxed on scale "C" including reserved costs, such costs to be paid by the judgment creditor. There will be a certificate for counsel and there will be an indemnity certificate under the *Appeal Costs Fund Act* granted to the judgment creditor in respect of this appeal. Orders accordingly. Garnishee order nisi discharged.

Solicitors for the appellant: Blake and Riggall.
Solicitors for the respondent: Leo Dimos and Associates.
