Equity, Legal Coding, and the Foundations of Banking:

*Foley v Hill* (1838-48)

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I. A Seminal Decision, A Hotbed of Theories

In the leading House of Lords decision of *Foley v Hill* in 1848, it was ruled that if a banker had failed to account for a customer’s bank balance, including a failure to acknowledge or pay over the agreed interest, for a period longer than six years, then the extant limitation statute\(^1\) was effective to bar the customer’s claim to an account of the balance, and hence the value of both deposited principal and notionally accrued interest could not be claimed.\(^2\) As part of their reasoning the Lords affirmed Lord Lyndhurst C’s view\(^3\) that a customer depositing money in a bank account has only a conventional debt claim against the banker, and cannot normally demand an account in equity to measure a fluctuating balance, and so cannot use an equitable procedure to maintain the banker’s duties. Some five separate courts heard the cause across a ten-year span of litigation, and of these only the first instance judge Knight Bruce V-C thought that a Chancery court had power to enforce return of the bank money by finding a continuous equitable duty of account binding the

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1 Limitation Act 1624 (21 James I, c 16) s 3.

2 *Foley v Hill* (1848) 2 HLC 28, 9 ER 1002.

3 *Foley v Hill* (1844) 1 Phillips 399, 41 ER 683 (Ch, LC). Curiously, Lord Lyndhurst sat in both this, the intermediate appeal, and then the further Lords appeal, where he gave his speech last despite his precedence as former chancellor, gratefully agreeing that his earlier decree should be affirmed. Cf *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] 1 AC 250 where Lord Neuberger overruled his own judgment in *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453.
banker that was effective to circumvent the limitation period. According to the appellate courts, the claim embodied in a positive bank balance was a simple debt subject to normal limitation rules, even though the debt has no terminus or maturity date. It was true that the banker’s debt to the customer was accompanied or augmented by implied and express contractual terms typically according the customer a right to payment on notice or demand, plus some level of reporting of the balance. In addition it was normal to offer a facility for drawing payment orders on the bank for the benefit of third party payees, such as personal or negotiable cheques giving the payee an autonomous claim to payment from the bank/drawee at the order of the depositor/drawer and payable upon acceptance; and there might further be an overdraft facility annexed to the deposit account. After extensive grappling with the distinction between bailments of money as specie, debts of sums certain, and accountability for control of assets, the judges came to insist on the banker-depositor relation as a simple fluctuating debt relationship, with superadded, limited, and malleable customary and contractual rights. The augmentations do not transform the basic banking relationship into any type of bailment or trusteeship over the money value accorded to the bank via the deposit; nor should the banker be regarded as an accountable agent or fiduciary of the customer (unless he or she takes on a role as adviser or manager). It was crucial to the relationship that the bank should have full title to the money and power to direct its use value, so that the bank could personally lend it out under contract to other customers, or invest in the bank’s own name in external security instruments in order to earn the bank income.

By excluding troublesome and hampering doctrines of property, agency, trust, and fiduciary law from the pure contractual streams of banking law, Foley v Hill was received as a

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welcome clarification and simplification of the law, providing a foundation for modern fractional reserve banking as a means of credit expansion and financial intermediation in the mid-Victorian economy. Indeed, the decision is universally celebrated in modern banking texts as the *locus classicus* of modern banking law, as *Saloman v A Saloman Ltd*\(^7\) sits within the development of company law, or *Donoghue v Stevenson*\(^8\) within tort. But not all commentators have been so sanguine about the consequences of the decision. Economists of a libertarian bent, notably from the Austrian school beginning with Ludwig von Mises, have seen this stream of case law as undermining the historical banking institution of *depositum irregulare*, whereby a 100% level of circulating security for any placed deposit must be warehoused within a fungible mass by a deposit-accepting bank, giving the depositor a complete commercial and legal security, and confining the bank to cashier and payment services rather than lucrative and risky intermediations and maturity transformations, operations deemed more appropriate for other financial institutions.\(^9\)

Critics have also doubted the legal logic of the decision: how can a banker be said to own client money outright, yet be expected to repay a like value on demand, unless the law imposes some set of obligations on the banker to ensure that such ready money is available, thus undermining the simple debt premise?

Two general observations may be registered about the case. First, the judges in *Foley* thought they were deciding a narrow range of legal questions concerning legal defences and were not trying to transform or codify banking practice. Later courts and commentators have read into the decision the larger legal policies they would have liked to exist. Secondly, much legal to-and-fro followed the decision, as uncertainty remained about the nature of the basic bank deposit, reflecting perhaps a deeper fragility and instability within the growing banking sector of Victorian

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6 For an insightful contemporary note, see Anon, ‘Bankers’ Current or Deposit Accounts, and the Statute of Limitations’ (1853) 13 The Bankers’ Magazine; Journal of the Money Market, and Railway Digest 275, 275-81. For a representative modern celebration of the case, see Cranston, *Banking Law* (n 5) 190-92.

7 [1897] AC 22 (HL).

8 [1932] AC 562 (HL).

There remains to this day an ineluctable tension between a banker’s power over deposit values and the risks this imposes over customers’ savings. A host of legal, regulatory, and social devices have had to be invented over time to deal with this uncertainty, from reputational control and personal liability of bank directors and investors, to inter-bank lending pacts, government deposit insurance, ring-fencing of savings and commercial banking, macro-prudential banking regulation requiring capital buffers, and ultimately the threat or promise of government nationalisation. The apparently simple debt answer given in *Foley v Hill* to the question of bank liability only threw up a more complex set of legal and financial puzzles that continue to exercise courts and regulators to this day. Hence it is well worth understanding more deeply the historical genesis and content of the decision, and not rest content with the received and compressed view of the case presented in modern literatures.

The case also presents an opportunity to test Katharina Pistor’s hypothesis of the legal coding of capital, taking her enquiry into the terrain of nineteenth-century equity. Pistor in her 2019 instant classic *The Code of Capital* argued that the law constructs capital with a ‘code’ of shifting ascriptions of rights, powers, duties and liabilities between various parties to legal relationships. In her vision legal history joins to political economy, charting how the law enhances or undermines the claims of original owners, assignees, trustees and beneficiaries, directors, shareholders, secured and unsecured bondholders, employees, fiscal authorities, public and private reinsurers, heirs, tort victims … in fact, every type of party seeking benefit from economic relations or recourse against assets. By uncovering the coding of capital we may discover how elite lawyers, who typically serve powerful corporate and financial interests, can re-engineer assets and transform how risks and profits attach to those assets to favour clients’ interests, often at the

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expense of wider social efficiency, equity and macro-stability.\textsuperscript{12} Pistor prescriptively argues for a stronger public order disciplining the experimentation of cautelary lawyers and restraining their relentless pursuit of monopolist income and market-shaping power on a tilted legal playing field. Her theory can neatly be applied to \textit{Foley v Hill}, as a decision privileging banker profits and reducing their liabilities, whilst cutting away the protections of commercial, industrial, and family savers. Pistor’s analysis can be seen as a descendant of the radical muckraking and realist movements in Gilded Age, Progressive, and Depression America. Indeed in 1914 a famous Boston lawyer soon to join the United States Supreme Court made just such arguments assailing the power of monopolist bankers who diverted wealth from the working population, using complex trust and corporate structures to attain their goals.\textsuperscript{13}

So, we have three framing models available for our leading case: a salutary clarification of existing and successful banking practice making the future possible; an incoherent decision opening the door to unbridled credit creation and financial instability; or a gift to the banking interest by lawyers caught within a financializing ideology and lending the authority of the courts to an intra-capitalist class war.

Let us turn now to the historical legal record to see if any of these theories have traction. A theory of historical law can only be as good as its grasp of the laws being described.

\section{II. The Bank Balance as Debt not Deposit: \textit{Carr v Carr} (1811)}

There was a good deal of litigation over the legal nature of money instruments and payment mechanisms in early modern law; lawyers might struggle to distinguish bullion, fiat, and fiduciary currency from bills, notes and money orders; and liquid sums might be awarded alternatively or concurrently as finite promises of value, as damages awards protecting expectation and reliance, or as covenanted sums or debts encompassing interest awards in addition to the face value or


\textsuperscript{13} LD Brandeis, \textit{Other People’s Money – And How the Bankers Use It} (New York, NY, Frederick A Stokes Co, 1914).
principal owed.\footnote{See eg \textit{Hawley v Cutts} (1677) 2 Freeman 24, 22 ER 1034 (LC). Further on the legal history of money: C Desan, \textit{Making Money: Coin, Currency, and the Coming of Capitalism} (Oxford, Oxford University Press, 2014); R Kreitner, ‘Legal History of Money’ (2012) 8 \textit{Annual Review of Law and Social Science} 415; Fox and Ernst (eds), \textit{Money in the Western Legal Tradition} (n 5).} Lord Mansfield offered the definitive treatment of the legal nature of money and currency in \textit{Miller v Race} in 1757,\footnote{2 Kenyon 189, 96 ER 1151 (KB).} perhaps influenced by the theories of his intellectual companion and compatriot Adam Smith. In this case a stolen banknote had been delivered on to an innocent third party for consideration, who sued when the bank refused to honour the note. This raised the deeper question of the legal nature of a banknote and the relation of title to the paper and money value as embodied in coin or specie. Lord Mansfield explained that banknotes were paper money and that title passed on delivery. To reach this point he had to dig deeper and explain money itself:

Money, properly speaking, is whatever common consent has fixed upon as a sign denoting a certain value; and though, commonly, of gold, or silver, yet, sometimes, of mixed metals: and leather stamped has been used; so may paper; seeing, whatever the material is, common consent may make it money, to all intents, and purposes; and that banknotes are so received, and not considered as documents of a debt, or securities for money only, appears from many determinations. 1. A man devised all his securities for money: it was held, bank notes did not pass. 2. "All my ready money, or cash:" it was held, they did pass. ...

The use of current specie is, that, where it passes from one to another for good consideration, and without collusion, it can never be traced, or demanded, by any former possessor: which has given rise to a quaint expression (which, however, is not warranted by the fact), that money has no ear mark, and therefore cannot be followed. Now this is not true; for money, when it can be distinguished (as some particular pieces may, or in a purse), may be followed, as far as a bank-note may.\footnote{Ibid 2 Kenyon 199, 96 ER 1154.}

In this case the note had not been segregated when placed with the bank but had been presented in the ordinary course for exchange into some other money form. The plaintiff could insist on the value of his paper money, and recover by assumpsit for money had and received a
sum equivalent to the note value, or alternatively a remedy in trover, from the defendant bank who had received the note. This was not a deposit, but an exchange of one form of money for another.

Lord Mansfield’s reserved judgment on the legal nature of money made an enormous impact on the commercial world. Legal analysis of the nature of a money deposit at a bank was not to arrive for fifty years and more, and then by a sideward involving parsing of the language of an obscurely formulated legacy. In the 1811 case of *Carr v Carr*, a testator bequeathed to the plaintiff ‘whatever debts might be due to him (the Testator) from the Plaintiff or others, at the time of his death’. This clause seems to have been intended as a forgiveness of a debt owed by the plaintiff to the testator effected through the drawing of a bill of exchange by the plaintiff in the testator’s favour, which had been lodged with his bank but which had not yet become payable. The testator in addition was owed debts by other parties; and further had a cash balance due to him on his banker’s account. The residue of his personal estate was granted to the defendant. There was no question that the third-party debts should go to the plaintiff. The question before the court, with the distinguished Chancery judge Sir William Grant MR sitting, was ‘Whether this bill of exchange, and the said cash balance, or either of them, passed to the Plaintiff by the above bequest’. If a money claim in the hands of the testator’s bank could be described as ready money at the testator’s demand and disposal, then the defendant could lay claim to that money value as ‘residue’ rather than ‘debt’.

Sir Samuel Romilly for the plaintiff contended that the bill and the balance were both choses in action, that could only be recovered by action, and therefore must be considered as debts. Anthony Hart KC for the defendant, submitted that the bill of exchange ‘was delivered to the bankers by the Testator as money’, and through their control was ‘as if in his own possession’. Moreover,

the cash balance … could not be considered as a debt in the contemplation of the Testator; that, though strictly speaking, a debt, yet it was, in the common opinion of mankind, considered as money deposited with the banker; that, in construction of Wills, words ought

17 *Rolls*, 30 November 1811, reported (1816) 1 Mer 529, 541; 35 ER 767, 771 (note 2 to Sleech’s Case).
18 A distinguished counsel, politician and law reformer, Solicitor-General 1806-07.
19 Briefly Vice-Chancellor (1827), then Irish Lord Chancellor (1827-30).
not to be taken according to their strict legal meaning, but according to the intention of the Testator; and that, in this case, the Testator could not have conceived it to be a debt.

Romilly rejoined that a deposit claim against a bank was clearly nothing but a debt, as ‘it might be proved under a commission of bankrupt; or a commission might be taken out upon it; it would not pass under a bequest of all the Testator’s ready money, and therefore must clearly pass as a debt’.

Grant MR found for the plaintiff on all counts. It was clear that the bill of exchange, like the third-party claims, passed as debt being a chose in action. It did not matter that the plaintiff himself had armed the bank with the power to draw the funds as a debt claim for the testator; its legal characterisation as debt was always maintained. The bank balance, however, gave the judge more pause:

He had entertained some doubt on the other point; but thought that the money which had been paid into the banker’s ought also to pass as a debt. This was not a despositum [sic]. A sealed bag of money might, indeed, be a despositum; but money paid in, generally, to a banker could not be so considered. He observed, that money had no ear-mark; that, when money is paid into a banker’s, he always opens a debtor and creditor account with the payor. The banker employs the money himself, and is liable merely to answer the drafts of his customer to that amount. This would clearly support a commission of bankrupt; it would not pass by the description of ready money; and, therefore, it must be considered as a debt, and must pass by that description.

The plaintiff was declared due the debt due on the bill with interest once payable, and the balance of cash at the banker’s, with interest from the testator’s death, as well as the third-party debts. Interestingly Grant MR simply assumed that the debt owed to a customer by a banker must yield interest at all times when the value had fallen in to the bank’s own joint estate, as it was then presumably available to the bank for its own use.

Finally, Grant MR’s observation that a bank balance is debt not deposit, as a banker ‘is liable merely to answer the drafts of his customer to that amount’, gave no trace of a concept of depositum irregulare, being the loan of a fungible where a 100% floating reserve is kept in place.
to restore a like value to the customer on demand. The judge thus seems to have assumed that the custom and expectation of fractional reserve banking was in play, and that all the parties expected it. Thus, it could not be said that money at bank could be classified as specie or ‘ready money’, even if it could normally be assumed to be freely available on demand. There was behind this a stream of authority classifying a demand triggering an immediate obligation to pay a debt, loan or sum certain as merely the perfection of a debt already in existence and sounding *in personam* from the time the note or covenant constituting the debt had been inscribed.

### III. Balances Held by Bank Partners Are Joint and Several Debts:

The Devaynes Case (1816)

The debt obligations of bankers were soon elaborated by Sir William Grant MR and Lord Eldon C, dealing with problems raised by the insolvency of a partnership bank. The banking firm of

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21 *Rumball v Ball* (1712) 10 Mod 39, 88 ER 616 (QB): ‘a debt [is] plainly precedent to the demand’; *Norton v Ellam* (1837) 2 M & W 461, 150 ER 839 (Ex), where Baron Parke said: ‘It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it’. The common-law rules for pleading of debt and the role of demand are explored in *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 562-70 and *Ogilvie v Adams* [1981] VR 1041, 1049 ff (Fullagar J). Judges were pragmatic as to when conventional interest burdens would lie against a debt payable on demand without maturity, raising difficult points as to whether interest was a primary or remedial obligation: see *Pinock v Willett* (1734) Barnes 228, 94 ER 889 (KB); *Blaney v Hendricks* (1771) 2 Black W 761, 96 ER 445 (CP); *Calton v Bragg* (1812) 10 East 223, 104 ER 828 (KB). The matter of demandable debt is further discussed in Sections V. & VI., below.
Devaynes, Dawes, & Co failed in 1810, giving rise to a complex series of litigation.\(^\text{22}\) Devaynes was a founding partner of the bank but died in 1809, and his son and heir took over his estate including initial rights to partnership profits. However, the son did not join the partnership, and he took out the inherited partnership capital some nine months later, requesting then that his deceased father’s name be removed from the trading name of the continuing banking business where it had been used without overt authority. Customers continued to trade with the renamed and reorganised firm, but the bank failed within a few months, and its surviving partners became insolvent and liable to the creditors of the bank. Certain creditors also sued the son Devaynes for bank debts amassed by the partnership at the time of his father’s death, claiming that they should have satisfaction against the deceased estate for the partner’s share of firm debt run up whilst the father was a member of the firm, taking priority once any personal debts outside the business had been paid under the so-called ‘jingle rule’. In an initial hearing in 1811 Lord Eldon upheld the basic principle that a partner, even having left the firm, remained liable for partnership debts contracted whilst still a partner, unless that debt had been released by the creditors and adopted by the remaining partners.\(^\text{23}\) The case was then remitted for accounting by a master in Chancery and various creditor claims were proved. Devaynes junior, the son, appealed the master’s findings.

In Sleech’s Case in 1816\(^\text{24}\) counsel for Devaynes junior (again Hart KC) argued that since Sleech as a particular creditor had been paid a dividend from the failed bank by the surviving partners and had then settled and composed her claims against those partners, she was shut off from suing the deceased partner’s estate for debts contracted during his lifetime as a partner. The overall argument was that Sleech had in effect settled her claims against the bank as a group or entity, accepting impliedly that the dealings with the live partners had shifted her legal claims to them and them alone. Moreover, her composition had in any case embraced the departed partner’s liability. Counsel for Devaynes junior further tried to argue that the continuation of Devaynes senior’s name in the partnership and the leaving of his capital in the firm should not be taken as

\(^{22}\) *Devaynes v Noble* (1816) 1 Mer 529, 35 ER 767 – some three main cases reported plus various ancillary cases. See A Televantos, *Capitalism Before Corporations: The Morality of Business Associations and the Roots of Commercial Equity and Law* (Oxford, Oxford University Press, 2020) 151-62, focussing on partnership insolvency aspects. I am indebted to Televantos’ analysis.

\(^{23}\) *Ex parte Kendall* (1811) 1 Rose 71; 17 Ves Jun 514, 34 ER 199. The principle was consistently replied in later cases of bank insolvency, and was also used to enforce calls on unpaid capital: see *Wallworth v Holt, in re The Imperial Bank of England* (1841) 4 My & Cr 619, 41 ER 238 (LC).

\(^{24}\) Reported in *Devaynes v Noble* (1816) 1 Mer 529, 539; 35 ER 767, 771.
any representation that the creditor claims against the surviving partners could be attached to the deceased estate. Moreover, by failing to sue the deceased estate at the time of the death and partnership dissolution and reformation, Sleech had forewarned the Devaynes debt, and could not now revive it due to the operation of the laches defence.

Perhaps the most interesting argument adduced by Hart KC was that Devaynes senior did not in law owe a debt as a banker, but was rather a bailee of a deposit, such that a delay in retrieving a deposit from a surviving partner presented a strong case of laches:

The case of bankers is stronger than that of ordinary traders, because the money in their hands is rather a deposit than a debt, and may therefore be instantly demanded and taken up; and this is the reason why nobody ever hears of an action against a banker to pay a balance, unless in the case of disputed items. If a man deposits a collection of pictures in the hands of a partnership, and one of the partners dies, and nine months afterwards a fire happens, by which the pictures are consumed; can he come into a Court of Conscience, and say to the Executors of the deceased, you must make good the loss sustained by the surviving bailees? The trust reposed in a banker arises out of personal confidence …

If the banker leaves the partnership, trust in the maintenance of the deposit must be reposed in the remaining bailees who run the bank. This was a radical alternative hypothesis going beyond the initial arguments that Sleech’s debts had been composed or abandoned.

In response, John Bell, counsel for Sleech (and regarded by Lord Eldon as the best Chancery barrister then in practice) opposed the initial idea that a customer must be taken to have acquiesced in the acquittance of a deceased partner’s estate for debt, if she continues to deal with the surviving partners and does not remove her balance forthwith, settling all claims as the partnership bank is reconstituted. Sir William Grant MR agreed with Bell, and did not accept the defence arguments that Sleech had forewarned Devaynes’ debt when she failed to sue his estate on his death, nor that she had composed the debt implicitly by dealing with the other partners and settling their parts of the extant debt. He applied Lord Eldon’s earlier ruling that individual partnership liabilities survived departures from or dissolution of a partnership, and each individual partner’s liability stood independently of the position of the others. The bank was not to be taken as an entity holding debt only against present membership, even if traders customarily treated it as
such; quotidian mercantile practice did not change basic principles of property and obligation. To accept the defence case that customers must sue for their deposits instantly on the death of a bank partner or face a laches defence for surrendering their claim would only encourage depositors to make a run on the bank and recover their money every time a bank partnership changed its membership and so was legally reconstituted. This would be intolerable, and so it was preferable simply to maintain the usual rule that departing bank partners remained fixed with extant debt liabilities in the normal way of partnerships. Grant MR explicitly rejected the defence claim that the custom of bankers meant that the personal debt relationship should be shifted on a dissolution of the remaining partners of a reformed bank that carried on the same business; counsel could not simply appeal to some vague *lex mercatoria* to shift the normal principles of the law.

Sir William Grant also took time to discern and reject the alternative bailment/deposit hypothesis advanced by Hart KC in Devaynes’ defence:

But it is supposed that there is a considerable difference between the case of bankers and that of any other partnership; and that it is impossible for the creditors of a banking-shop to permit their money to remain in the hands of the surviving partners for such a space of time as eight months—(indeed, the argument went to eight days, or even to a shorter period),—without recognizing those surviving partners to be the depositaries of the balance due, and therefore exclusively responsible to make what is called the deposit forth-coming. There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid in to a banker’s becomes immediately a part of his general assets; and he is merely a debtor for the amount. Therefore, when a man lodges money with a partnership of bankers, he is as much concerned to look to the solvency of each particular partner, as if he was lending the money to any other partnership. The money, in each case, equally ceases to be his the moment he has parted with it, and he has only to trust, for the return of it, to the solvency of the persons into whose hands it passes: but he has, in each case alike, the credit, and the responsibility

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25 ibid 1 Mer 563-71, 35 ER 778-81. For a later case showing how an explicit release by creditors of a retiring partner could work, see *Attwood v Banks* (1839) 2 Beav 192, 48 ER 1153 (MR). Agreements could work in the reverse direction, guaranteeing a retiring partner a share of future debt accruals or profits in the residual partnership: *Lees v Laforest* (1851) 14 Beav 250, 51 ER 283 (MR).
of all the partners in the firm. Then, when one partner dies, what is to be inferred from the mere circumstance of allowing the debt upon the banking account to remain uncalled for in the hands of the surviving partners, beyond what would be inferred from not immediately calling in any debt due by the surviving partners, in any other trade, where money had been advanced or lent to that partnership? The security is permitted to stand just as it did, the party doing nothing to alter it. There is no *novatio debiti* —no new contract—no relinquishment of the old security, whatever it may, either in law or equity, be defined to be.\(^{26}\)

Sir William Grant went on to decide another creditor claim involving problems of ordering the timing of receipts and payments in a running set of joint bank accounts in *Clayton’s Case.*\(^{27}\) Clayton had contracted a debt against the bank whilst Devaynes was alive, and then a further debt after he died. The surviving partners had paid a sum equal to the prior debt. The question arose whether Clayton could count this payment against the later debt, and so revive the earlier debt against Devaynes’ estate. Grant MR stated the ‘first in first out rule’ to deny the creditor a power to determine which debts had been paid out of a consideration from the debtor; the court would simply take the first return of deposited money as retiring the first liability. This celebrated part of the decision is not as strongly relevant to our enquiry into the particular nature of bank deposit and debt; but it does further affirm the obligational or debt nature of bank deposit.

**IV. ‘Money in Hand’, ‘Ready Money’, and the Will Cases**

Sir William Grant MR was esteemed as one of the great lawyers of his time, and his decisions in *Carr v Carr* and *Sleech’s Case* stood within the precedents and had a power of legal logic behind them. But the heterodox concept of the bank balance as an asset in the nature of a demandable deposit, rather than a simple debt, did not vanish as a result of his judgment, and re-emerged in a scattering of will cases. In *Vaisey v Reynolds* (1828)\(^{28}\) a testator made a will giving ‘to my wife all

\(^{26}\) *ibid* 1 Mer 568-69, 35 ER 780.  
\(^{27}\) *ibid* 1 Mer 572, 35 ER 781; and see also a much later airing of the same issue before Lord Brougham C, reported (1831) 2 Russ & M 495, 39 ER 482 (LC).  
\(^{28}\) (1828) 5 Russ 12, 38 ER 931 (MR).
… all and every my book debts, *monies in hand*, stock in trade [etc]’. He next gave to the named
executors ‘all and every my monies out at interest on mortgage, notes of hand, or any other security
whatsoever, together with all my monies vested in the public funds’. The issue was whether a bank
balance fell into the money in hand class, ie immediately available, or money in the form of a
chose in action that had to be realised via a prestation, security, or sale. The banker had no overt
duty to pay interest, and balances were payable on demand; but the banker customarily paid three
percent on balances left for more than nine months. Sir John Leach MR found as follows:

The testator has referred to two descriptions of monies—monies in hand—and monies out
at interest on mortgage, notes of hand, and other securities whatsoever. The balance in the
banker’s hands, though it carried interest, was not out at interest on security; and it was in
the same order and disposition of the testator, as if it had been deposited in his own drawer.
It must be inferred that the testator meant to pass it by one of the two descriptions which
he has used. In no sense was it money on security; and, in a reasonable sense, it was money
in hand, and passed, therefore, to the wife.29

A decade later in *Taylor v Taylor*30 Lord Langdale MR summed up this stream of authority
as follows:

It is true that in strict legal language, what is called money deposited at a banker’s is nothing
more than a debt, and cannot be called ready money, but in the ordinary language of
mankind money at a banker’s is called ready money, and we must construe a will according
to the ordinary language of mankind.

The courts soon noticed that the quality of demandability or readiness of payment for the
bank depositor matched the quality of negotiability of debt to third party payees via issuance of
bills and cheques. In *Marzetti v Williams* (1830)31 the duty of a banker to honour cheques drawn

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29 ibid 2 Russ 14-16, 38 ER 932.
30 (1837) 1 Jur 401. For a full exploration of the early nineteenth-century authorities, see HD
McLeod, *The Theory and Practice of Banking*, 3rd edn (London, Longmans, 1875-76) vol 2, 279-
333, 495-500.
31 (1830) 1 Barn & Ad 415, 109 ER 842 (KB).
for third parties was held in a strong Court of King’s Bench to be an express or implied contract quite independent of the nature of the balance as a debt. The court would imply an actionable contractual duty into the usual banking relationship because this was the strong expectation of the parties. In light of these vested expectations, it would be disruptive and harmful to a customer’s credit and reputation for a cheque unreasonably to be dishonoured where a positive balance was in place or nearly in place, and a banker who had refused a reasonable and expected payment order should pay at least nominal damages to maintain expectations. By so building into a bank balance an expectation of instant payment to the depositor or his or her payee, the courts recognised a legal quality of control or ‘order and disposition’ over bank deposits which they compared to possession.

The Marzetti control and disposition doctrine of King’s Bench went beyond the Chancery cases where the judges were straining to characterise bank balances as ready assets in order to enhance inheritance expectations. Indeed, doubts over the pure debt model may have grown as the credit economy expanded in mid-Victorian England, and parties wished to manipulate their payment expectations in order to generate further credit. The judges remained ambivalent, however; shortly after Marzetti, in the 1833 King’s Bench decision of Sims v Bond, Denman CJ and a full court insisted that an undisclosed provider of a loan paid into a bank account could not claim the account value on the analogy of an undisclosed principal enforcing a contract via an agent. ‘Sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker’. Only the direct provider of the value could claim the account at law, reasserting an obligational, personal concept of bank accounts as personal debts, not as assets of wider exigibility. Perhaps it was expedient to keep the doctrinal choices open, sometimes favouring the debt end of the spectrum, sometimes the asset end.

In Parker v Marchant, the asset/debt dichotomy was tested in another testamentary case,
coming before Vice-Chancellor Knight Bruce in 1842, and appealed the next year before Lord Lyndhurst C. Knight Bruce V-C prefaced his judgment by setting out an interpretative methodology for wills, taking general constructions of expressions in the first place, but allowing special meanings, as used in a locale or community or by particular individuals, to displace general meanings, with wide use of extrinsic evidence to establish those additional interpretative norms.

This liberal approach might have left some doubt whether testamentary causes are safe arenas of law-making for general commerce.

In *Parker* the testator by his will made a series of bequests as follows: (1) ‘in the first place, all of my debts are to be paid’; then (2) £60,000 worth of consols to his wife; (3) the remaining £10,000 of consols to A.; (4) £500 to B.; (5) £100 to C; (6) ‘to D. and E. all the rest and residue of my ready money, securities for money, and monies in the funds, upon trust to invest, &c., and to pay the dividends to my wife for life, and after her decease to divide the capital amongst F., G., H. and I’; (7) all real estate to the same trustees upon certain trusts; (8) a gift of the residuary personal estate to the testator’s wife in terms: ‘And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines and other goods, chattels and effects whatsoever, as her own goods and chattels for ever; and I do hereby constitute and appoint her, my said wife, sole executrix of this my will.’

The court held that in the normal way general debts should be paid out of the personal estate first, and only turn to the realty in case of shortfall. This was uncontroversial, and of no moment since the personal estate was very large. The pertinent question was whether the final bequest of personalty to the wife, which in its latitude was held to be a gift of the entire residuum, encompassed two sizeable bank balances amounting to over £21,000 held to the account of the testator at banks in Bath and London. There was only some £116 in ready cash left amongst the possessions of the testator. If the bank balances were characterised as ‘ready money’ they would be grouped with the ‘securities for money, and monies in the funds’, and those sums would pass

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35 (1842) 1 Y & Col 290, 62 ER 893 (V-C).
36 (1843) 1 Phillips 356, 41 ER 667 (LC).
37 *Parker* (V-C) (n 35) 1 Y & Col 299-304, 62 ER 897-900.
38 Compare in modern law the tensions over the application of proprietary estoppel and constructive trust doctrines in commercial cases (eg *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752) and cases concerning family inheritance (eg *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776; *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911).
39 Cf *Jones v Curry* (1818) 1 Wils Ch 25, 37 ER 11 (MR).
into the specific trust of personalty to be distributed as income for life to the wife with a gift-over of capital to named legatees; the result would be to deny the greater sum of bank capital to the wife as residuary. If the more usual meaning of ‘ready money’ as physically available cash was rather deployed, the bank money as capital would not touch the trust but go directly to the wife. So, everything depended on characterisation of the nature of the bank balances.

Knight Bruce V-C began by observing that the will was ambulatory, and would apply to all wealth fitting the named categories at time of death, not at time of testation – a canon of interpretation established in the prior century but still occasionally challenged. Hence the term ready money applied to such money as was held at death. The judge held that the £116 cash ‘[c]learly is ready money’. He continued:

It is, I think, on the other hand, equally clear that the debts due to the testator at his death from his agents and other persons, however safe, and with whatsoever facility obtainable, were not included under that description, with the exception only of the two [bank] sums … [at] the testator’s bankers at Bath [and] London. The argument has proceeded on the basis that these two sums were ordinary bankers’ balances on banking accounts of the usual description, kept in the usual manner, that neither of them bore interest, and that in the customary mode it was competent to the testator at any moment to have drawn cheques payable to the bearer on demand for the whole. … The main dispute on this part of the case has been whether these two sums are to be considered as “ready money”. According to the decision in Carr v. Carr (1 Mer. 541, n.), they would have passed, or might have passed, under a bequest of debts due to the testator. That, I think, is not conclusive against their capacity of passing under a bequest of ready money.

Knight Bruce V-C then laid out a careful set of reasons to depart from the bank-balance-

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41 Parker (V-C) (n 35) 1 Y & Col 306, 62 ER 901.
as-debt orthodoxy propounded earlier with such authority by Grant MR:

Undoubtedly, an ordinary balance in a banker’s hands is in a sense a debt due from him—certainly, he may be sued for it as for a debt. But it may be equally true that in a sense it is ready money; and, if that description may in general be justly held applicable to it, possible difficulties, not existing here, which may exist in other cases, as of a bequest in the same will of the debts due to the testator to one person, and of his ready money to another, without an explanatory context, or of interest being allowed by the banker, or of a contract that unless upon a certain notice the balance should not be reduced below an agreed amount, or of acceptances by the banker for the customer, not at maturity at the latter’s death, or of drafts upon the banker, drawn by the customer, but not at maturity, not presented, or not paid, ought not to prevent the Court from giving full effect, according to a fair interpretation of the will, to the language which the testator has used. The term “debt,” however technically correct, is not colloquially or familiarly applied to a balance at a banking-house. No man talks of his banker in that character being indebted to him. Men, speaking of such a subject, say they have so much at their bankers, or so much in their bankers’ hands, a mode of expression indicating virtual possession rather than that right to which the law applies the term chose in action. Again, a man having not enough in his purse or in his house to pay a tradesman’s bill for which he is asked, but having a large balance at his bankers, says that he has not so much about him, or that he has not so much in the house; he does not say that he has not so much ready money. Agreeing that this term is applicable to money in the purse, or the house, I cannot agree that it is confined to money so placed. Money paid into a banking-house in the ordinary mode is so paid for the purpose of being not safe merely, but ready as well as safe—available upon the instant for any exigency or object which may arise; according to a definition of the word “bank” in a book of high character—an’”a place where money is laid up to be called for occasionally.” It is true that the deposit is one which the banker is not bound to return in specie; that is, he satisfies the engagement if he has always ready for his customer a sum equal to the amount deposited. That, however, I think too thin and narrow a distinction to render the banker

more in substance than a depositary, though technically, a debtor as well as a depositary. I consider, therefore, these two balances as ready money—a conclusion at which, as it differs, though not necessarily from the decision, yet, from an opinion expressed in Carr v. Carr by one of our greatest Judges, I have arrived, not without feelings of embarrassment and distrust. But it is my unavoidable duty to express and act upon my own opinion in the present case, however slightly I may and must estimate it in comparison with that of a man such as Sir William Grant. I have the relief, certainly, of considering that the view which I take seems to be in accordance with the impression of two eminent Judges—I mean Sir John Leach and the present Master of the Rolls [Lord Langdale]; and that the Plaintiff has the right of bringing my judgment under the review of the Lord Chancellor.

For all the politesse offered to Grant MR, this amounted to a major weakening of the bank debt principle enunciated in Carr. In Knight Bruce V-C’s view, a bank balance, to be paid on demand to the depositor or his assignee without question, was a type of quasi-possession of the money, perhaps bailed as a shifting fungible mass to the bank, with a floating claim to severance from the mass always left in the depositor. The expectations of the parties placing a high level of control in the depositor fed back into the law to create a kind of modified depositum irregulare. In the result, the Vice Chancellor found against the widow, with the large bank balances described as ‘ready money’ to be taken into the trust for legacies. She was therefore to receive the income as a life beneficiary but not the capital as residuary.

On the appeal Lord Lyndhurst C first observed that the testator had used his own private language to denote various classes of ‘ready money’ encompassing both cash and convertible stock to be rendered as initial pecuniary legacies. The testator then goes on to say: ‘All the rest and residue of my ready money I dispose of’ via the trust clause. The words of this grant to trust did not distinguish the large bank balances, nor the small sum of £116 cash left in the testator’s house at death. It seemed unlikely that the elaborate trust settlement raising legacies and income for a range of beneficiaries had been predicated solely on the small cash amount left over. More likely

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43 These supportive authorities are not identified in the judgment; he clearly means Vaisey v Reynolds and Taylor v Taylor, discussed above.
44 Parker (V-C) (n 35) 1 Y & Col 306-08, 62 ER 901.
45 Parker (LC) (n 36).
the clause showed a testamentary intention to put all the remaining bank wealth, described here as ‘ready money’, to that beneficial end. The court should respect the testator’s particular and non-legal use of language, as an objective understanding of his intentions that could be collected from the overall structure of the settlement. Lyndhurst C concluded that such quotidian usage could feed back to change the legal concepts themselves:

The question therefore is, whether the terms he [the testator] has used are sufficient for that purpose. Now, in construing a will of personal property, the terms that are used in the will are to be construed according to the ordinary acceptation of language in the transactions of mankind; and nobody can doubt that, in the ordinary use of language, money at a banker’s would be considered as ready money. Everybody speaks of the sum which he has at his banker’s as money: “my money at my banker’s” is a usual mode of expression. And if it is money at the banker’s, it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires: it is received upon the understanding that it shall be so ready. If a man goes to his banker, the money is counted out to him on the table. If he sends an order for the money, it is counted out to his servant, or the person in whose favour that order is made. I consider, therefore, that it is strictly ready money according to the ordinary acceptation of those terms among mankind.

This decision established the testamentary rule that bequests of bank debt using language of money would be effective. This led to a new bout of litigation outside testamentary causes, testing if the banker’s duty to have customer money payable on demand had now become the core of a revamped depositor’s right.

V. Are Bankers Accountable for Deposits? 
Foley v Hill (1838-48)

46 This subjectivist canon of interpretation later hardened into the so-called ‘arm-chair’ rule stated by James LJ in Boyes v Cook (1880) 14 Ch D 53, 56: ‘You may place yourself, so to speak, in his [the testator’s] arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention’; see also Loring v Woodland Trust [2015] 1 WLR 3238, [2014] EWCA Civ 1314 [21] (Lewison LJ).
47 Parker (LC) (n 36) 1 Phillips 360, 41 ER 669.
48 See eg Manning v Purcell (1854) 2 Sm & Giff 284, 65 ER 402 (V-C); (1855) 7 De G M & G 55, 44 ER 21 (Ch – LJJ).
*Foley v Hill* concerned a bank partnership with roots in the early industrial revolution. The Stourbridge Old Bank, as it came to be known, was founded in 1762, and served as a provincial or country bank providing payment and financial services to the local glass and iron trade in this quintessential Midlands industrial town. It survived as a banking partnership until its takeover by the Birmingham & Midland Banking Company in 1851. This was the first of many acquisitions of smaller provincial and country partnership banks by a new-model joint stock bank that grew to become the Midland Bank, one of the four largest national banks until its takeover by HSBC in 1992. The original Stourbridge Old Bank issued not only notes and cheques but also banknotes which served as good tender in the locale, providing much needed payment systems where there was a dearth of issue of note and coin with general tender in the late eighteenth century.\(^{49}\) Local banking up to the mid-nineteenth century tended to rely on personal relationships and the local reputations of the partner-directors, and shareholders were counted as partners with full and unlimited liability for losses. The staking of personal reputations and fortunes was held to be the essential counterbalance for the great power that bankers wielded over client fortunes. That personalised system was shaken first by the crisis following the fall of Overend, Gurney, & Co in 1866, followed by the still greater City of Glasgow Bank crash of 1878.\(^ {50}\) After this long decade of financial rupture, the banking trade began to amalgamate into large joint stock companies with limited liability, trading with customers at arms’ length and deploying actuarial calculation of risks. At any rate, the defendant bank in the case in hand was known as ‘Messrs. Hill & Co.’, comprising a co-partnership of three bankers named Hill, Bates and Robbins. Hill in fact left the firm in 1834, but the remaining partners continued to trade under his name. So, in fact the instant case had no real connection to the name of Hill; it was in reality a case against the firm of Bates & Robbins, with Robins as the active partner signing the receipts.\(^ {51}\)

Foley the plaintiff belonged to a well-established Stourbridge family who had pioneered metallurgy and iron smelting in the earliest phases of the industrial revolution. Richard Foley had founded the family fortunes, opening ironworks in Staffordshire between 1624 and the Civil War,

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\(^{50}\) Turner, *Banking in Crisis* (n 10) 79-88.

\(^{51}\) See the narration of fact in *Foley v Hill* (1843) 13 Law J Rep (NS) 182 (Ch, V-C).
including multiple furnaces, forges, and mills, fired by charcoal and using the most advanced water power technologies for the milling process. Richard and his son Thomas developed the family business to a national position rivalling the London works, and supplied ordnance to the King’s armies in the 1640s, though they were also sympathetic to the Parliament. The family moved its seat to Stourbridge in 1631 and then to Stoke Edith in Herefordshire in 1670. The family business grew apace, with generations of Foleys joining the management of the family partnership, and owning hundreds of iron works by 1700. Sons of the fourth and fifth generation were educated at Cambridge and Inner Temple, and entered politics, finance and law; a daughter married Robert Harley, Earl of Oxford and later prime minister in a Tory administration. The Foleys now became gentrified and ennobled, and by the early 1700s the speaker of the House of Commons and five MPs were Foley cousins. The iron works that had been the foundation of the Foley fortune passed to other hands from the 1710s, and from the sixth generation onwards the Foleys concentrated on managing their financial and banking interests and three large landed estates. This was a classic case of a rising family moving from trade and industry to finance, politics and landed society.

Edward Thomas Foley, the plaintiff in the instant case, was born in 1791 and educated at Brasenose College Oxford, rising to become member of parliament on the Tory side for Ludgershall (1826-32) and Herefordshire (1832-41). Foley attended the Commons throughout the tumultuous administrations of Wellington, Grey and Peel, and he is recorded in many votes, generally in lockstep with his party; but no parliamentary speeches are recorded. He died without heir in March 1846, leaving his estate freely to his wife, and presumably with his executors maintaining his suit in the House of Lords, which concluded some two years after his death. There is a certain irony in the fact that this well-connected magnate could not protect his liquid wealth from the neglect and depredation of his local bankers, and in a twist worthy of Bleak House, died before the resolution of a decade’s worth of fruitless Chancery litigation.

The initial suit of Foley v Hill was filed in January 1838 in the Court of Chancery, with the bill narrating that the plaintiff had deposited the initial sum of £6117, 10s with the defendant as his local bankers in April 1829. This was large sum of equivalent purchasing power of around

53 (1838) 3 Mylne & Craig 475, 40 ER 1010 (Ch) per Lord Cottenham C.
£0.75 million in today’s pounds. Foley received an account receipt for that sum, and the bankers agreed to pay the conventional 3% interest. It seems that Foley deposited the funds simply to pool their value, and there was little account activity. Foley could prove that he had drawn two cheques for £1700 and £2000 prior to July 1830. He also claimed that fresh profits had been paid semi-annually into his sole account up to August 1834, being his share of income from a local colliery. The colliery account was in fact held at the Hill & Co Bank by Foley as joint holder with his colliery partner Scott, and the bankers denied that the colliery, whether directly or through agents, had ever paid money over to the sole Foley account. Foley further claimed four cheques were drawn for payment to third parties in each year from 1831 to 1834. Foley claimed that interest had accrued and ‘was duly entered or credited to the Plaintiff in the said account’; but all the defendants acknowledged was that interest was calculated at six-month stops up to end of 1831 and the sums recorded in a ledger, but were never actually credited to the account. By 1837 Foley sought to close the account, and narrated that he had asked the defendant bankers ‘to render a statement of their receipts and payments on his account, and of the interest accruing on the balance’; but they [the bankers] refused, under the pretence that no entries had been made to or on account of the Plaintiff’s account within six years then last past, and that no written acknowledgment of the existence of any such account, and no written promise to pay the balance thereof, had been signed by the Defendants, or any member of their firm, since the accountable receipt of April 1829, and that the claim was barred by the Statute of Limitations.\textsuperscript{54}

Foley could not say how much value was left in the bank account beyond estimating it was a large balance; he sought an account first, to find out the level of the account after the purported payments of interest, profits, disbursements and so on, and then have the balance paid over. Alongside the substantive accounting process, Foley also sought procedural discovery of bank documents showing acknowledgment of more recent account activity and so permitting a traversal of the limitation defence.

\textsuperscript{54} ibid 3 Mylne & Craig 476, 40 ER 1010.
The defendants initially mounted a surprising double limitation defence, arguing not only that the remedy of account was time barred, but also that the plaintiff’s seeking of evidence by interrogatories and discovery, in order to dispel the operation of the limitation period by showing proof of account activity, was itself a time-barred action. In other words, no proof of the live nature of the account within six years past could be made out, because the evidence had not been properly assembled within the past six months. The Rolls court\(^\text{55}\) in a preliminary hearing rejected this secondary defence, as did Lord Cottenham C at second instance. Lord Cottenham cited the equity eminences Lord Redesdale and Lord Eldon as authorities for the proposition that the defendant could not presume the success of a legal bar in order to exclude facts and procedures that would test for the existence of that bar:

I have always understood that where a bill contained an allegation which would meet the legal bar, the Defendant could not plead the legal bar without negativing that allegation. That applies to all cases of this kind—to pleas of the Statute of Limitations, pleas of fraud, and so forth.\(^\text{56}\)

The defence counsel for this unmeritorious procedural defence at the first appeal was none other than Solicitor-General Robert Rolfe, later to become Lord Chancellor Cranworth. One can only assume that the large sum of money at stake warranted the hiring of an impressive Chancery silk to try out an *outré* argument. But as we shall see in the appeals that followed, in the end the limitation strategy succeeded, and Hill & Co resisted paying back any balance.

Knight Bruce V-C took the first substantive hearing of the account claim some five years later, in 1843.\(^\text{57}\) He found a continuous duty on the part of the bankers to account for both principal and interest that took the duty outside the ambit of the limitation statute. This was a variation on the liability-generating maxim ‘equity sees as done that which out to be done’, expressed in the language of account:

\(^{55}\) Decision of Sir Lancelot Shadwell MR, noted in (1838) 3 Mylne & Craig 475, 40 ER 1010; a verbatim printed report cannot be located.

\(^{56}\) (1838) 3 Mylne & Craig 475, 481, 40 ER 1010, 1012.

\(^{57}\) Foley v Hill (1843) 13 Law J Rep (NS) 182 (Ch, V-C).
It appears to me, that the mode in which the persons whose duty it was to keep the account – that the mode in which they actually kept it is perfectly immaterial, because they are to be charged according to their duty. And suppose that bankers do receive sums of money from their customers, and do not make any entry of the receipts, are we to be told that they are not responsible, or that they may take the benefit of the Statute of Limitations, because they do not do their duty? If a customer proves that money was received by his bankers’ at any time after the last item in the bankers' account, that is enough to charge the bankers; and when I find there is a statement that it was agreed in the language of the answer, that Hill & Co. should allow interest at the rate of 3l. per cent. per annum, it is the same thing, in my mind, as if there had been the interest at 3l. per cent. from time to time paid by them on the balance to the credit of the customer. The fact that they have not chosen to enter the items, never could be beneficial to them, and they are therefore by virtue of this agreement liable down to this time for that interest, at the rate of 3l. per cent. per annum on the balances, which they agreed should be allowed; and therefore it must be considered as a specific account; and my opinion is, that the bankers are responsible. There must be an account taken.\(^{58}\)

Lord Lyndhurst C heard an initial appeal against the Vice-Chancellor’s account order the next year, in 1844.\(^{59}\) By this stage all that had been added to the evidence by Foley’s earlier discovery efforts were two post-1831 letters between the banking partners acknowledging the existence of Foley’s sole account, but no direct communication or receipt showing transaction on an operating account. Lord Lyndhurst held that this private letter evidence, though adverse to defendants, was not legally an acknowledgment of any debt and was not probative of the live, performed state of the bank account in the years between 1831 and 1837 when the time of limitation had run.

Lord Lyndhurst focussed on whether the application of the six-year limitation applied to debts by the 1623 statute should apply to a money claim where an account in equity was sought to calculate a running balance over the course of a relationship. If the account was an equitable auxiliary action, did this procedural device displace the operation of the statute? An alternative

\(^ {58} \text{Ibid, 183.}\)
\(^ {59} \text{Foley v Hill (1844) 1 Phillips 399, 41 ER 683 (Ch, LC).}\)
enquiry was to postulate that the reason why an accounting remedy was applicable to a bank balance in the first place was because the banker-customer relationship was inherently based on accountability, that is, it was in substance a trusteeship or fiduciary relation. The two strands of justification were mutually entwined: if a complex loan and credit relationship entangles the parties so far that equity must order an account to unscramble their affairs, then a fiduciary element comes in to the legally founded relationship, just as the Chancery court comes to regulate the continuous relations of contractually bound partners.\footnote{60}

Lord Lyndhurst first cited the key passages in \textit{Carr, Sims,} and \textit{Devaynes} to deny the fiduciary element in a banker-customer relation (the substantive fiduciary duty question), and then posed the question of whether equitable accounting applied to the bank balance made any difference:

\begin{quote}
It is quite clear that a banker is not to be considered a trustee for his customer in the legal sense of the term. Money advanced by a customer to a banker is a loan, and constitutes a debt. … Here there was a loan by Foley to the Defendants, to be repaid with interest at 3 per cent.: that was the simple transaction between them, and if this were a case at law, a plea of the statute would be a sufficient answer, unless there were some special circumstances to take the case out of the statute; and the only question, therefore, is whether that defence is to have the same effect in a Court of Equity.\footnote{61}
\end{quote}

Lyndhurst noted that the high authority Lord Redesdale had affirmed that the limitation statute ought to apply directly to equitable causes where possible. He then set out how it might be possible to defeat the operation of limitation in the instant case, based on some equity in the statute interacting with a duty of account:

\begin{quote}
\footnote{60} The affinity assumed here between accountability and fiduciary duty is notably challenged by JE Penner, ‘Distinguishing Fiduciary, Trust, and Accounting Relationships’ (2014) 8 \textit{Journal of Equity} 202; a lot of filigree historical work remains to be done exploring the linkages between such categories, see eg J Watson, \textit{The Duty to Account: Development and Principles} (Annandale, Federation Press, 2016); M Cleaver and A Televantos, ‘Accounting and Breach of Trust in the Nineteenth Century’, in this volume.
\footnote{61} \textit{Foley} (Ch, LC) (n 59) 1 Phillips 404, 41 ER 685.
\end{quote}
It is further said, however, that it was the duty of the Defendants, as bankers, or by reason of the mode in which they usually conducted their business, to have entered the interest half-yearly in their books, on the balance remaining due; that if such entries had been regularly made, the case would have been taken out of the statute; and that, having neglected to do this, they ought not to be allowed to profit from their neglect by setting up the Statute of Limitations as a defence founded on their own omission. But no such question is raised by the bill: no such equity is insisted upon or suggested. The bill is confined entirely to the statement of subsequent transactions for the purpose of taking the case out of the statute.

Foley had not alleged a fraudulent concealment of interest to bring him within the equity court’s remedial power to suspend the statute; and for him to claim that the omission to record and pay over alleged interest on a time-barred principal debt should remove the time bar would potentially undermine the policy of limitation in a wide swathe of debt cases. Foley should have gathered his evidence of breach more vigorously and earlier; he only had weak evidence of recent acknowledgment of the bank account in subsequent transactions, and so it was his own ineptitude that had subjected him to the barring of his debt. The judge concluded: ‘I think, therefore, the Statute of Limitations is a sufficient defence, as the record is at present constituted’.  

He added that the state of the alleged account, with just three proven payment transactions, the initial deposit and two withdrawals, was so simple as to best be decided in a court of common law using money had and received counts: there was no room for a special order of equitable accounting. As Lyndhurst put it: ‘A party has no right to come here upon a simple transaction of this kind, when justice may be administered in a more simple way and at less expense in a Court of law’. Foley’s bill was accordingly dismissed with costs. But too much was at stake to let the matter rest and a third appeal was taken to the House of Lords.

The House of Lords judicial committee took the final appeal of *Foley v Hill* four years later, in 1848, and perhaps the time gap plus a shortage of legal personnel made it seem acceptable for Lord Lyndhurst himself to join the ad hoc panel. This was still some years before

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62 ibid 1 Phillips 407, 41 ER 686.
63 ibid.
64 *Foley* (HL) (n 2).
eminent judges such as Baron Parke were appointed to serve as appellate judges in the Lords so as to produce a stable and professionalised final court distinct from the legislature. As it happened the Court of Exchequer (including Baron Parke) had examined a like issue the year before the Lords hearing of Foley v Hill. The existence of this judgment from a strong common-law court may have influenced the Lords appeal. In Pott, Assignees of Ryle v Clegg the assignees of a bankrupt claimed that the bankrupt’s written admissions that he might claim an old and untouched sum in a bank account did not take the time-barred enforcement of the banker’s duty out of the statute of limitations. The Attorney-General, representing the bankers, cited Lyndhurst C’s judgment in Foley v Hill, arguing that a failure by the banker to acknowledge an account or pay over any sum or add any expected interest for six years sufficed to invoke the limitation statute and time-bar the creditor-customer’s claim to the account. An articulate criticism of this position was then offered by the defence counsel, Chilton:

If the argument on the other side be well founded, it follows that a banker, who neglects to balance the account of his customer for six years, may keep for his own use the money deposited with him by the customer, who may have been abroad the whole time, and may have had no occasion to draw a cheque. Surely that would be contrary to the policy of the law … But the true relation between the parties is this, that the banker holds the money under a special contract to honour the cheques of the customer; who on his part cannot, so long as the banker is solvent, support an action for it without a previous demand of it in writing. This view of the case appears to be supported by the decision in Marzetti v. Williams. In Pothier on Contracts, by Evans, vol. 2, p. 126, it is said—“Where a man deposits money in the hands of another, to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner, until an application and refusal, or other denial of the right; for until then there is nothing adverse; and I conceive that, upon principle, no action should be allowed in these cases, without a previous demand; consequently that no limitation should be computed further back than such demand.”

65 (1847) 16 M & W 321, 153 ER 1212 (Ex).
66 ibid 16 M & W 325-26, 153 ER 1213-14.
The court was not convinced and held that the limitation period ran from the time of the making of the bank debt, and could have been interrupted at any time by a demand for principal or interest; but the accrual of interest over time, and the inchoate duty to pay that sum, only affected the quantum of the existing debt and did not refresh it with fresh obligation. Pollock CB, giving the judgment of the court, fell in with the decision but expressed himself uneasy, and thought it possible that money could be bestowed on a bank under a contract of deposit, hinting that such a claim could stop the limitation clock:

I must, certainly with considerable doubt and diffidence, confess the hesitation of my own opinion, whether there is not a special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. It seems to me that is a question for the jury, who ought to decide what is the liability of the banker, and whether the money deposited with him is money lent or not. I could not concur in the judgment of the rest of the Court without expressing this doubt, in which, however, they do not partake, as they are of opinion that money in the hands of a banker is merely money lent, with the superadded obligation that it is to be paid when called for by the draft of the customer.67

A few months later, Stuart arguing for Foley in the Lords seized on Pollock CB’s remarks and invited the Lords to adopt this line of reasoning. He argued that a banker’s debt obligation had ‘various superadded obligations’ that transformed the banker into an accountable party in equity. He had to repay money deposited, honour depositor’s cheques, and by special contract (commonly applied), pay interest on positive balances. Moreover, a banker had to keep clear and intelligible accounts, calculate interest from time to time, enter that interest in the account, and preserve evidence of all transactions of value (deposits, withdrawals, payments, offsets, charges) affecting the balance of the account.

These duties and transactions constitute a relation more complex than that of mere debtor and creditor, and an account of them is a fit subject for a bill in equity, not only by reason

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of the admitted concurrent jurisdiction of Courts of Equity with Courts of law in matters of account, but also because the account here sought is of moneys received by the respondents, the receipt of which is within their own knowledge, and the entries and record of which they were bound to keep.\footnote{Foley (HL) (n 2) 2 HLC 31, 9 ER 1003-04 \textit{in arguendo}.}

Counsel denied the theory that equity would not order an account in case of a small number of simple transactions when the law could provide a balance of claims and counter-claims; the right to account in equity could be concurrent with common law claims, as was the longstanding practice with stewards, agents, and factors; and the same should apply to the banker-customer relation. Moreover, the facts strongly suggested fraud by the bankers even if the bill had not spelt this out, in the sense that they seem to have refrained from making any entries or formally accounting to the customer for the considerable sums he had banked with them, precisely in order to run down the clock on limitations and make it possible for them to take the money value. They had admitted transactions in the adjacent joint colliery account, and these could be taken as acknowledgment of their overall banker’s duty to Foley in the sole account as well.\footnote{Foley (HL) (n 2) 2 HLC 32-33, 9 ER 1004.} It was not a case of barring a debt, but controlling a relationship. Ample authority, notably from Lord Redesdale and Lord Eldon, was given showing that an equity court would order an account and stave off defences when it saw a need to regulate a continuous relationship.\footnote{Citing \textit{O'Connor v Spaight} (1804) 1 Sch & Lef 305 (Ir Ch) per Lord Redesdale C (ie John Mitford, the acknowledged expert on equitable pleading). But this case was on landlord and tenant accounting for rent and allowances, and it may not have been correct to take the judgment, now nearly a half century old in a pre-fusionary system, as legislating for all cases.}

The Lords would have none of it, and did not even hear counsel for the defence before finding for Hill & Co. Lord Cottenham, the present lord chancellor, commenced. He denied that the tangled state of the account presented any procedural reason for equity to be involved; only in cases too complex for a common-law jury trial was there a call to move a case over to the concurrent equitable jurisdiction to administer the case.\footnote{Foley (HL) (n 2) 2 HLC 31, 9 ER 1003-04 \textit{in arguendo}.} The only other reasons to enforce an
account would be ‘upon the supposed fiduciary character existing between the banker and his
customer’. The analogies suggested all failed: a factor and agent might act as a trustee or ‘quasi a
trustee’ in the sense of being accountable for the proceeds of sales or contracts, but neither actor
owned the goods of the owner-principal. The Chancellor explained:

Money, when paid into a bank, ceases altogether to be the money of the principal; it is then
the money of the banker, who is bound to return an equivalent by paying a similar sum to
that deposited with him when he is asked for it. The money paid into the banker’s, is money
known by the principal to be placed there for the purpose of being under the control of the
banker; it is then the banker’s money; he is known to deal with it as his own; he makes
what profit of it he can, which profit he retains to himself, paying back only the principal,
according to the custom of bankers in some places, or the principal and a small rate of
interest, according to the custom of bankers in other places. The money placed in the
custody of a banker is, to all intents and purposes, the money of the banker, to do with it
as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the
principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not
bound to keep it or deal with it as the property of his principal, but he is of course
answerable for the amount, because he has contracted, having received that money, to
repay to the principal, when demanded, a sum equivalent to that paid into his hands.72

Lord Cottenham cited *Parker v Marchant* for the debt theory, which was strange
considering that this case had established that a passing of ‘money in hand’ or ‘ready money’ in a
will encompassed a bank account payable on demand. The judge dealt with this objection with a
classic flood-gates argument: if any demandable debt could be said to be accountable as resting on
a continuously accountable duty, then equity would have to involve itself with every type of debt
where forbearance could be ended and payment demanded. Lord Cottenham also disposed of the
argument that the failure to pay over the agreed interest renewed the breach of the banker’s
contract: there was no breach unless the banker had resisted an overt demand to account and accrue
the interest, which had not happened. He concluded that the equity court did not even have

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72 *Foley (HL) (n 2) 2 HLC 36-37, 9 ER 1005-06.*
jurisdiction to adjudge the case using account techniques, and so he did not have to decide the limitation point.

The other lords agreed, with Lord Brougham adding some verbose remarks about the function of banking. A banker commonly received money from customers on condition of paying it to the order of the customer on demand, but all the while the banker who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it back, as a mere depositary of the principal. But he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee he could not do without a breach of trust.73

In particular cases a banker might serve as agent or intermediary, or bailee or depositary of specific financial instruments, but these fiduciary acts were distinct from the core function of keeping customer balances and reinvesting the money stock, and here equity had no role.

VI. What Follows?

The Lords’ speeches in Foley v Hill offered a simple, perhaps shallow, answer to an interlocking puzzle that had disturbed the judges since the beginning of the nineteenth century – what were the duties of a banker to a depositing customer, where money to repay the debt was to be ready on demand, yet the value was free to be used and dispelled by the banker? Did the solution lie in fiduciary regulation of the relationship, or were the consequences of such legal characterisation too disruptive to be contemplated? Foley did not, could not, settle the issues forever. Let us take some of the issues in turn.

The core practical finding in Foley was that a banker’s neglect to pay or report principal and interest could be shielded from action by the limitation defence, keeping out troublesome equities of due continuous performance. The rule was restated and perhaps confused in the

73 Foley (HL) (n 2) 2 HLC 43-44, 9 ER 1008.
important 1921 case of *Joachimson v Swiss Bank Corporation*. In that case the plaintiff, a German national, sought to disburse the assets of a partnership that had dissolved on the death of a partner of his firm on 1 August 1914. These assets included a deposit in an account at the defendant bank; and after the outbreak of war the plaintiff as an enemy alien had been barred from seeking to recover any assets relying on a fresh cause of action accruing after the time of hostilities. However, a cause of action accruing before 14 August could have been pursued, on the return of peace. Plaintiff argued from *Foley v Hill* that since limitation ran against claims to recover a bank deposit from the moment the debt was incepted on payment in by the depositor, the law must assume there was a cause of action for debt in place at that same instant of deposit for other legal purposes, such as the timing of a claim before or after the outbreak of war. The Court of Appeal affirmed that authority of *Foley* affirming that a bank deposit was a simple debt with superadded banker’s duties. But the plaintiff’s claims still failed, on the basis that the obligation of a bank to pay out from an open-ended bank deposit was only triggered by a depositor’s demand for payment (which could include a writ of action); before that demand the claim did not solidify as a cause of action, but was only the basis for a cause of action. In the instant case since there had been no demand before 14 August, the bank was able to treat any demand by nationals of an enemy state after that date as barred by the outbreak of hostilities. This appeared to set up the depositor’s cause of action as a version of Schrödinger’s Cat – simultaneously existing from inception of deposit for some purposes (initiating the running of a time limitation) but not for others (dating the claim against outbreak of hostilities). The implication of the 1921 case was that *Foley v Hill* may have been wrongly decided at least on the limitation point because of the peculiar nature of a bank deposit; it was unlike a simple debt where there was an implied term that a borrower would make efforts to locate the lender and repay by the due date without waiting for a demand.

The need for an explicit demand by a depositor was affirmed recently by Lord Sumption in the Hong Kong Final Court of Appeal in the case of *PT Asuransi Tugu v Citibank NA*\(^75\) where it was argued that the fraudulent emptying and closure of a company account with negligent cooperation by the bank did not excite a debt cause of action initiating the running of a limitation period. This was because the bank’s breach of the banking contract by unauthorised closure would

\(^74\) [1921] 3 KB 110.

\(^75\) [2023] HKCFA 3, noted J Lau, ‘Limitation in bank fraud claims: effect of account closure’ (2023) 139 Law Quarterly Review **.
only give rise to a valid demand if the customer noticed and affirmed the breach, perhaps by suing for damages. In the absence of such an acceptance of the wrong and turn to secondary remedy, the bank had a continuous primary duty to reconstitute the bank account that it had wrongfully closed; and the alternative cause of action for the recovery of the debt still owed only arose when a demand for the missing funds was made much later by the successors of the company management. This decision, by preserving a duty of reconstitution immune to limitation, would seem to further distance the law from the conclusions of *Foley* that bank accounts were simple debts incepted from deposit.

The paradoxical conclusions set up by the *Joachimson* doctrine were only laid to rest in English law with the passing of section 6 of the Limitation Act 1980. Here Parliament finally rid the law of the defence of limitation initiated from the date of inception of a loan without term:

(1) … this Act shall not bar the right of action on a contract of loan to which this section applies.

(2) This section applies to any contract of loan which—

(a) does not provide for repayment of the debt on or before a fixed or determinable date; and

(b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter …

A deeper unresolved question left by the cases is whether an open-ended obligation to hold a credit and use its value at will can even count as an existing legal duty, if split off from an ancillary or posterior duty to repay on subsequent demand. If I lend a friend £10 to pay for his pizza on a night out when he forgot to bring his wallet, and I make the transfer with no repayment schedule mentioned, then in a sense I have made a gift with an expectation of a counter gift in some future part of our shared life (if at all). The absence of term suggests no intention, and no possibility, of imposing coercive legal relations. The failure to repay on demand or reminder might

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76 [2023] HKCFA 3, [23]-[28].
be damaging to the friendship, but that is to characterise the duty as relational and continuous, rather than focussed on the imperfect debt.

The *Foley v Hill* dogma about excluding a concurrent equitable accounting function when common law damages or restitution could work a solution also turned out to be less than easy to apply. A host of cases were fought over this point where parties sought an account to police their relationships including finding out the flow of money, goods, and opportunities in and out of their shared affairs. In English fiduciary and tort law the past ten or so years have seen renewed controversy over this very issue. In the United States of America we have a reverse problem, where parties asserting a right to jury trial must overcome a bar based on the need to have a juryless court exploring complex issues through an account mechanism grounded in equity.

There are also implications beyond the law, returning to the political economy mood of our opening pages. The fact that City commentators of the time warmly welcomed the courts’ legal innovations is particularly striking. Henry Dunning McLeod, in his brilliantly argued and widely read *Theory and Practice of Banking*, thoroughly reviewed the course of the banking, credit and currency laws of the mid-nineteenth century across hundreds of tightly written pages, including the legal run-up to *Foley v Hill*. In his discussion of ready or demandable money, he bestowed special praise on the English courts for liberating the law from crude deposit theories of banking. He offered these reflections on how bank debt could be liberated to do good:

Nothing can be more unfortunate or misleading than the expression which is so frequently used that banking is only the “Economy of Capital,” and that the business of a banker is to borrow money from one set of persons and to lend it to another set. Bankers no doubt do collect sums from a vast number of persons, but the peculiar essence of their business is, not to lend that money to other persons, but on the basis of this bullion to create a vast

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77 See eg *Corporation of Carlisle v Wilson* (1807) 13 Ves Jun 276, 33 ER 297 (Ch); *The Taff Vale Railway Co v Nixon* (1847) I HLC 111, 9 ER 695; *Nixon v The Taff Vale Railway Co* (1849) 7 Hare 136, 68 ER 55 (Ch); *Padwick v Hurst* (1854) 18 Beav 575, 52 ER 225 (Ch).
superstructure of Credit; to multiply their promises to pay many times: these Credits being payable on demand and performing all the functions of an equal amount of cash. Thus banking is not an Economy of Capital, but an increase of Capital; the business of banking is not to lend money, but to create Credit: and by means of the Clearing House these Credits are now transferred from one bank to another, just as easily as a Credit is transferred from one account to another in the same bank by means of a cheque. And all these Credits are in the ordinary language and practice of commerce exactly equal to so much cash or Currency. 81

This is a very confident political economy of law; it is also the Austrian school’s nightmare, an invitation to recurring credit bubbles and crashes, and increasingly straitened political interventions to rescue the flailing financial markets. The idea that was rejected in Foley v Hill was a model of the banking relationship whereby bankers should be seen as accountable stewards of deposits backed by adequate capital. By characterizing the banker-customer relationship as pure debt, largely untouched by wider duties, private law effectively abandoned any dynamic role in controlling the solvency of banks by arming customers with tools to monitor capital and hold banking directors or partners to account. 82 In effect the only real legal recourse left to depositors was to claim priority over the partnership or equity investors of the bank if capital proved inadequate and the institution was wound up. 83 Even that discipline was abated in the wave of bank amalgamations and the adoption of limited liability regimes, accelerating in the wake of the crises of 1866-67 and 1878-79. 84 Instead of private law disciplines to enforce capital adequacy, novel

81 ibid, vol 2, 304.
82 I am grateful to David Fox for discussion of these points.
83 Cf Sinclair v Brougham [1914] AC 398 (HL), where depositors were granted an equity to claim their payments in priority to shareholders in a situation where the financial institution eliciting their deposits lacked legal power to do so; an equity was granted because a common-law debt recovery was held to excluded by the lack of deposit-taking capacity, and it would have been wrong to have left the monies in the errant company’s proprietary capital for distribution to shareholders. It would be a stretch to create a fiduciary control of deposits where bankers misbehave in other ways with deposited capital. See further SJ Stoljar, ‘Re-Examining Sinclair v Brougham’ (1959) 22 Modern Law Review 21. The remedial response evolved in Sinclair to bail out the depositors was always controversial and ultimately overruled in Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669.
84 See text accompanying nn 49-51, above.
political measures aimed at maintaining banking stability had to be invented over the next fifty years, including government deposit insurance and guarantees of capital adequacy balanced by monitoring and supervision. But public underwriting to minimise the risk of bank failure fomented fresh moral hazard, as banks evaded supervision in the knowledge that the state would likely provide a backstop if risk-taking went wrong. The country was left with banks that were too large to fail, and too powerful and independent to regulate effectively, even when it became plain that the interests of the controllers were divorced from those of their customers.

We learn from this story that small shifts in private law doctrine can contribute to large effects in the public, political-economic spheres. We need to ask sharper questions about the constant coding and re-coding of capital effected in our courts and legislatures, and the longer-term consequences when legal controls are relaxed at the bidding of financial actors. The legacy of Foley v Hill leaves us with some intriguing counterfactuals. Could more rigorous private law controls have reshaped credit production and better aligned the interests of British industry and commerce with the financial sector in the later nineteenth century? Could heightened duties of care and accountability for bankers sounding in private law have curbed the irrational exuberance and dangerous credit bubbles of more recent times? The judges in Foley dimly perceived that their pure debt theory would free up the banking sector to create credit without restriction. They could not foresee where it would end.

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85 W Bagehot, *Lombard Street: A Description of the Money Market* (London, Henry S King, 1873) is the seminal work grounding the mission of the Bank of England as the lender of last resort with responsibility to neutralise banking crises.