The Law Commission and The Scottish Law Commission

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TRUSTEE SAVINGS BANKS BILL

REPORT ON THE CONSOLIDATION OF THE TRUSTEE SAVINGS BANKS ACTS 1969 TO 1978

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THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION

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To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, and

the Right Honourable the Lord Mackay of Clashfern, Q.C., Her Majesty's Advocate.

The Trustee Savings Banks Bill which is the subject of this Report seeks to consolidate the Trustee Savings Banks Acts 1969 to 1978. In order to produce a satisfactory consolidation it is necessary to make a number of recommendations which are set out in the Appendix to this Report.

The recommendations numbered 2(*a*) and 4 relate only to Northern Ireland and are accordingly made by the Law Commission alone. Otherwise the recommendations are recommendations of both Commissions.

The Treasury, the National Investment and Loans Office, the Registry of Friendly Societies and the Trustee Savings Banks Central Board have been consulted in connection with the recommendations.

MICHAEL KERR, *Chairman of the Law Commission.*

J. O. M. HUNTER, *Chairman of the Scottish Law Commission.*

28 *May* 1981

APPENDIX

RECOMMENDATIONS

1. Our first two recommendations relate to the establishment of trustee savings banks under sections 1 to 3 of the Trustee Savings Banks Act 1969.

Sections 1 and 2 of the 1969 Act, as amended by the Trustee Savings Banks Act 1976, provide that a savings bank (defined in section 1(3)) is not to "have the benefit of" the 1969 Act or the 1976 Act unless its formation was in accordance with section 1(2) and the requirements of section 2 are satisfied with respect to its rules. Those requirements are threefold: (1) the rules must expressly provide for the matters set out in Schedule 1 to the 1969 Act, (2) the rules must have been certified by the Registrar and (3) the rules must have been entered in a book kept by an officer of the bank appointed for the purpose and open for inspection by depositors. Section 3 of the 1969 Act provides that a savings bank established under the Act is to be certified under the Act by the title of "savings bank certified under the Trustee Savings Banks Act 1969". A certified bank is thereafter referred to in the 1969 Act as a trustee savings bank.

Our recommendations deal with two particular difficulties which seem to us to arise on sections 1 to 3 of the 1969 Act. The first arises out of the obscurity involved in the formula mentioned above that a savings bank is not to "have the benefit of" the 1969 Act or the 1976 Act unless certain conditions are fulfilled, particularly as regards the application of that formula in relation to a certified savings bank. The second concerns the reference in section 3 to the certification of a savings bank.

A. The formula that a savings bank is not to "have the benefit of" the 1969 Act or the 1976 Act unless certain conditions are fulfilled can be traced back to an Act of 1828 (9 Geo. 4. c. 92), section 2 of which recited that it was expedient to give protection to savings banks and their funds and to afford encouragement to others to form like institutions. The whole of the Act was drafted in terms of savings banks, and one can readily see that a savings bank which failed to comply with one of the stated conditions in the Act could not then take advantage of any of the provisions of the Act. The same is true of the Trustee Savings Banks Act 1863, which consolidated the 1828 Act with amendments.

The position now is somewhat different, since the 1969 Act (following the Trustee Savings Banks Act 1954) makes a distinction between savings banks and trustee savings banks: savings banks are referred to in sections 1 to 3 of the 1969 Act in the context of the establishment of a trustee savings bank, whereas the provisions of the 1969 and 1976 Acts which regulate the operation of the banks in question are drafted in terms of trustee savings banks (i.e. certified savings banks: see section 3). As a result of this distinction it might be thought that section 2(1) of the 1969 Act, which provides that a savings bank is not to have the benefit of that Act or the 1976 Act unless the three previously mentioned requirements as to its rules are satisfied, does not operate in relation to a certified, or trustee, savings bank. However, quite apart from the origins of this provision in the 1863 and 1828 Acts, it seems clear that section 2(1) must have been intended to have some effect in relation to certified banks, particu-

larly as regards the requirements as to the content of bank rules and as to keeping the book of rules open for inspection by depositors. But we find it impossible to assert with any confidence what effect section 2(1) would have if, for example, a certified bank failed to comply with the latter requirement. First, there are now, given the essentially regulatory nature of the 1969 and 1976 Acts, no obvious "benefits" of which the defaulting bank could be deprived (even the one privilege originally specified in section 1(1) of the 1969 Act of investing money with the National Debt Commissioners has disappeared). Second, there is no machinery for divesting a certified savings bank of its certification. In such a case, therefore, there would apparently be a direct conflict between, on the one hand, the provisions of the 1969 and 1976 Acts applicable to trustee savings banks (which would apparently apply to the defaulting bank) and, on the other hand, section 2(1) (which would suggest that those provisions ought not to apply).

In order to resolve this obscurity, we would propose that the Bill should not reproduce the "shall not have the benefit" formula and instead should distinguish between those provisions of sections 1 and 2 of the 1969 Act which are relevant only to the establishment of a savings bank (and thus to its certification under the Act: see B below) and those which apply in relation to certified banks. On this basis, sections 1 and 2 would be redrafted in terms of conditions for establishment under the Bill. They would contain the requirements at present contained in section 1(2) and section 2(1), except that the requirement that the rules expressly provide for the matters mentioned in Schedule 1 would be expressed to be a requirement imposed on trustee savings banks and would thus have to be attracted for the purposes of section 2, and the requirements at present contained in section 2(1)(*b*) as to the book of rules would apply only in relation to trustee savings banks. The result would be that the same consequences would attend a breach by a trustee savings bank of any of these requirements as at present attend a breach by such a bank of any of the existing obligations on such banks under the Trustee Savings Banks Acts 1969 to 1978: the ultimate sanction in such a case is the power of the Trustee Savings Banks Central Board or a commissioner appointed under section 59 of the 1969 Act to petition for the winding up of the bank under section 399(8) of the Companies Act 1948 or section 349(8) of the Companies Act (Northern Ireland) 1960. However, in the case of the requirement to enter the rules of a bank in a particular book of rules, we think that the Bill should make clear that such rules are not to be binding on depositors etc. unless, in addition to being certified, they have been so entered. This proposition underlies the present law, and it is already expressly enacted in the case of variations of bank rules (see sections 6(1) and 7(1) of the 1969 Act).

We accordingly recommend that, in re-enacting sections 1 and 2 of the Trustee Savings Banks Act 1969, the formula that a savings bank is not to have the benefit of that Act or the Trustee Savings Banks Act 1976 unless certain conditions are fulfilled should not be reproduced in the Bill, and instead the conditions imposed by those sections should be expressed to be either conditions as to the establishment of a savings bank in accordance with the Bill or requirements applicable to trustee savings banks, in the manner outlined above, together with provision for a bank's rules not to be of binding effect

unless the requirement to enter them in a book of rules has been complied with. Effect is given to this recommendation in clauses 1, 2, 5(1) and (2) and 6(1) of the Bill.

B. We now turn to the second of the difficulties mentioned above. This arises in our view because, whereas the reference in section 3 of the 1969 Act to the certification under the Act of a savings bank established thereunder appears to contemplate a separate procedure under the Act for certifying a savings bank which has complied with sections 1 and 2 of the Act, no such procedure is set up by the Act and it seems quite clear that no such procedure has ever been operated independently of it. We are informed that the only relevant certificates ever to have been given in relation to savings banks since section 5 of the Trustee Savings Banks Act 1863 came into operation (from which section 3 of the 1969 Act ultimately derives) have been those given under section 2 of the 1969 Act and corresponding earlier provisions with respect to the rules of savings banks. Despite the clear implication in section 3 of the 1969 Act and the provisions of earlier Acts which it reproduces that a separate certificate is to be given, the certification of the rules of a savings bank has apparently always been treated in practice as constituting the necessary certification of the bank under the Act in question. Thus the provision in section 9 of the Bankers' Books Evidence Act 1879 that the fact that a savings bank is certified under the Acts relating to savings banks may be proved for the purposes of that Act by an office or examined copy of its certificate has, we understand, been in practice satisfied by producing a copy of the certificate given with respect to the rules of the bank in question.

To avoid perpetuating the obscurity at present contained in section 3 of the 1969 Act we would propose that, when reproducing sections 2 and 3 of the 1969 Act as clauses 2 and 3 of the Bill, the Bill should make clear that the certification in pursuance of clause 2 of the rules of a savings bank established in accordance with the Bill (as to which, see A above) constitutes the certification of the bank under the Bill. We are, of course, anxious that this measure of clarification should not cast doubt on what, in the case of an existing trustee savings bank, constituted its certification under the Trustee Savings Banks Act 1969, 1954 or 1863. We think that one way to remove any such doubt would be for the Bill to contain a provision, based on the present practice, that the certification of a savings bank under the Bill or any of those Acts may be proved by producing an office or examined copy of the certificate given under clause 2 or under any corresponding earlier provision, as the case may be.

Accordingly we recommend that, in re-enacting sections 2 and 3 of the 1969 Act, the following provisions should be included:

(*a*) a provision that the certification, in pursuance of the provision of the Bill reproducing section 2, of the rules of a savings bank established under the Bill should constitute the certification of the bank under the Bill; and

(*b*) a provision that the certification of a savings bank under the Bill or any corresponding earlier enactment may be proved by producing an office or examined copy of the certificate given with respect to the rules of the

bank under the provision of the Bill reproducing section 2 or under any corresponding earlier provision, as the case may be.

Effect is given to this recommendation in clause 3(1) and (3) of the Bill.

2. A problem arises on sections 1(2), 10 and 59 of the Trustee Savings Banks Act 1969 as to who, in relation to a trustee savings bank in Northern Ireland, is to exercise functions under those provisions which are expressed to be conferred on "the Registrar". These references to "the Registrar" were inserted by textual amendments purporting to be consequential on substantive amendments contained in section 24(1), (2) and (5) of the Trustee Savings Banks Act 1976 which transferred the functions in question to "the Registrar of Friendly Societies". The problem arises because, although the definition of "the Registrar" in section 95(1) of the 1969 Act (as amended by the 1976 Act) and the definition of "the Registrar of Friendly Societies" in section 35(1) of the 1976 Act generally coincide, they diverge in relation to a trustee savings bank in Northern Ireland. In relation to such a bank, section 95(1) defines "the Registrar" as the Chief Registrar of Friendly Societies or a deputy appointed by him, while section 35(1) provides that "the Registrar of Friendly Societies" means the Central Office of the Registry of Friendly Societies. There is therefore a complete contradiction between the provisions of the 1969 Act as amended on the one hand and the substantive amendments made by section 24(1), (2) and (5) of the 1976 Act on the other.

We would propose that the Bill should reproduce the effect of these substantive amendments for the following reasons. So far as it is possible to ascertain what was intended in relation to Northern Ireland by those concerned in 1976, it appears to be the case that they intended that all the functions under the 1969 Act mentioned in section 24 of the 1976 Act were to be transferred to the Central Office of the Registry of Friendly Societies. Furthermore it appears that the provisions in question of the 1969 Act have been in practice administered on the basis that these functions have been so transferred. Finally, this approach is consistent with the remaining subsection of section 24, namely subsection (4) (as yet not in force: see paragraph 7 of Schedule 7 to the Bill) which relied on non-textual amendment alone.

Although for the purpose of expounding the problem referred to above we have discussed section 1(2) of the 1969 Act in relation to trustee savings banks in Northern Ireland, strictly speaking one is only concerned at that stage with savings banks, that is, uncertified banks. This brings us to the further problem that neither the definition of "the Registrar" in the 1969 Act, as amended, nor the definition of "the Registrar of Friendly Societies" in the 1976 Act is at present wholly appropriate to apply to section 1 or 2 of the 1969 Act, since both definitions are in terms of *trustee* savings banks. We think, however, that they must nevertheless have been intended so to apply.

Accordingly we recommend that:

(*a*) in re-enacting sections 1(2), 10 and 59 of the 1969 Act, it should be made clear that the functions of "the Registrar" under those provisions are, in relation to a trustee savings bank (or savings bank) in Northern

Ireland, exercisable by the Central Office of the Registry of Friendly Societies;

(*b*) in re-enacting the definition of "the Registrar" in section 95(1) of the 1969 Act and the definition of "the Registrar of Friendly Societies" in section 35(1) of the 1976 Act, it should be made clear (so far as not achieved by virtue of paragraph (*a*) above) that each definition applies in relation to savings banks as well as trustee savings banks.

Effect is given to these recommendations in clauses 1(3) and 54(1) of the Bill.

3. Section 13(1) of the Trustee Savings Banks Act 1976 (reproduced in clause 20 of the Bill) provides that a trustee savings bank is to secure that a proportion (to be determined by the Treasury) of the aggregate amount owed by it to its depositors is matched by assets of the bank of one or more of the classes *specified in* Part I of Schedule 3, and that the residue of that aggregate amount is matched by assets of the bank of one or more of the classes *specified in* Part II of that Schedule. Subsection (2) of section 13, however, confers power on the Treasury to determine the amount which may be invested by a trustee savings bank in any class of assets *specified in or designated by virtue of* Schedule 3 as a proportion of the total amount invested by it in all classes of assets *specified in or designated by virtue of* that Schedule. The references in section 13(2) to classes of assets designated by virtue of Schedule 3 were clearly inserted to take account of paragraphs 9 and 22 of Schedule 3 which confer power on the Treasury to designate classes of assets for the purposes of Parts I and II of that Schedule. But the effect of these references is to raise an implication that the references in subsection (1) of section 13 to classes specified in Schedule 3 do not include any classes designated by virtue of paragraph 9 or 22, as the case may be. That this result was never intended is demonstrated by the capital cross-headings of Parts I and II of Schedule 3, and we would propose therefore that any doubt as to the ambit of the references in section 13(1) to classes specified in Schedule 3 should be removed for the purposes of this consolidation by making clear that classes designated by virtue of that Schedule are included in those references.

Accordingly we recommend that, in re-enacting section 13(1) of the Trustee Savings Banks Act 1976, "referred to" should be substituted for "specified" in both places where it occurs in that subsection. Effect is given to this recommendation in clause 20(1) of the Bill.

4. Section 31(2) of the Trustee Savings Banks Act 1969 (reproduced in clause 29(2) of the Bill) contains the sole remaining reference in that Act to a friendly society. Section 95(1) of the 1969 Act provides that in that Act "friendly society" means a friendly society registered in the manner required by the Acts for the time being in force relating to friendly societies, and includes a registered branch of a friendly society. At the passing of the 1969 Act this reference to the Acts for the time being in force relating to friendly societies was in fact a reference to the Friendly Societies Act 1896, a Westminster Act which then extended to the whole of the United Kingdom. However, in 1970, the Friendly Societies Act (Northern Ireland) of that year, an Act of the Parliament of Northern Ireland, repealed and re-enacted provisions of the 1896 Act for Northern Ireland. The subsequent Westminster consolidation,

the Friendly Societies Act 1974, accordingly consolidated the 1896 Act for England and Wales and Scotland, and does not extend to Northern Ireland. Since in the normal way a reference in a Westminster Act to an Act is to be taken as a reference to a Westminster Act and as not including a Northern Irish Act, a question arises as to whether a friendly society, or branch thereof, registered in accordance with the Northern Irish consolidation of 1970 is included in the definition of "friendly society" in section 95(1) of the 1969 Act. We do not think that the consolidation of 1970 can have been intended to produce the result that such a friendly society or branch is not so included; and we note that, given the limited powers of the Northern Irish Parliament, the consolidation could in any event not have amended this definition so as to make clear that such a friendly society or branch is so included.

We therefore recommend that, in re-enacting section 31(2) of the Trustee Savings Banks Act 1969, it should be made clear that the reference to a friendly society includes a friendly society, or branch thereof, registered in accordance with the Friendly Societies Act (Northern Ireland) 1970. Effect is given to this recommendation in clause 29(3) of the Bill.

5. Section 69(1) of the Trustee Savings Banks Act 1969, as amended by the Trustee Savings Banks Act 1976, provides that a trustee of a trustee savings bank is not to incur any personal liability except in the cases mentioned in paragraphs (*a*) to (*d*) of that subsection. It seems clear that, as originally enacted, section 69 was only concerned with the civil liability of trustees towards other persons (and presumably towards depositors of the bank in particular). This is demonstrated by the relationship between section 11 of the Trustee Savings Banks Act 1863 (from which section 69 derives) and section 12 of that Act, by virtue of which a trustee of a bank in Ireland could limit his financial liability in certain respects to a sum not less than £100. It will be noticed, however, that paragraphs (*c*) and (*d*) of section 69(1) (which were substituted by the 1976 Act for the existing paragraph (*c*) dealing with neglect to obtain security from officers) purport to preserve the liability of a trustee in respect of a criminal offence under section 25 or 27 of the 1976 Act.

Paragraphs (*c*) and (*d*) of section 69(1) seem to us to be misconceived on two grounds. First, we do not think there can be any need to refer, by way of exception to the general proposition in section 69(1), to the liability of trustees under sections 25 and 27 of the 1976 Act, given the express creation of criminal liability thereunder. We remark that paragraph (*d*) is in any event slightly defective as it omits any reference to a knowing contravention of regulations under section 27. Second, given that paragraphs (*a*) and (*b*) of section 69(1) deal with civil liability, the inclusion of paragraphs (*c*) and (*d*) might be thought to suggest that some civil liability attaches to the acts proscribed by sections 25 and 27 of the 1976 Act. We feel little doubt that this was not the intention behind the insertion in 1976 of these paragraphs.

Accordingly we recommend that, in re-enacting section 69(1) of the Trustee Savings Banks Act 1969, paragraphs (*c*) and (*d*) of that subsection should be omitted. Effect is given to this recommendation in clause 42 of the Bill.

6. Subsection (1) of section 85 of the Trustee Savings Banks Act 1969 (reproduced in clause 47 of the Bill) provides that any ledger, book of account, register or minute book required by any provision of that Act to be kept by a trustee savings bank may be kept by making entries in a bound book or by recording the matters in question in any other manner. Section 85(2) makes provision for guarding against falsification of such records.

Although the Trustee Savings Banks Act 1976 made a number of amendments to the 1969 Act which extended references to that Act so as to include the 1976 Act, no such amendment was made in the case of section 85, with the result that this section does not apply in relation to the accounts or records required to be kept by trustee savings banks by section 17 of the 1976 Act (reproduced in clause 23 of the Bill). It would seem that this failure to attract section 85 was due to an oversight, since one would have expected that the propositions contained in that section should be equally applicable in the case of such accounts and records, particularly in view of the modern methods available for the keeping of accounts and records otherwise than in the traditional manner. Faced with the alternative of reproducing the present position by expressly excepting from the scope of clause 47 the accounts and records required to be kept by clause 23, we think that the correct approach would be to extend the propositions contained in section 85 to such accounts and records. Moreover, we see no advantage in confining this extension to the records required to be kept by clause 23: if any records are required to be kept in relation to the accounts of a trustee savings bank by the rules of the bank, we think that they too should be covered by clause 47.

Accordingly we recommend that, in re-enacting section 85 of the Trustee Savings Banks Act 1969, its scope should be extended so as to cover the accounts required to be kept by section 17 of the Trustee Savings Banks Act 1976 and any records required to be kept in relation to the accounts of a trustee savings bank by that section or by the rules of the bank. Effect is given to this recommendation in clause 47(3) of the Bill.

7. Section 86 of the Trustee Savings Banks Act 1969 contains provisions as to the execution of documents and other matters required for the purposes of that Act. The question arises as to whether those provisions continue to have any practical utility.

Subsections (1) and (3) of section 86 derive from section 18 of the Savings Banks Act 1929 and section 64 of the Trustee Savings Banks Act 1863. Their effect is to empower the Treasury to make regulations by statutory instrument prescribing the manner in which and the persons by whom any document required by the 1969 Act to be used in connection with a trustee savings bank is to be signed or executed, and subsection (1) provides for such regulations to prevail over any contrary provision contained in that Act.

The powers conferred by section 64 of the 1863 Act and section 18 of the 1929 Act were exercised in the Trustee Savings Banks Regulations 1929 (S.R. & O. 1929/1048); and we think it is clear from regulation 30 of and Schedules 2 and 3 to those regulations which provisions as to documents were then

regarded as within the ambit of sections 64 and 18. When the 1929 regulations were consolidated with amendments by the Trustee Savings Banks Regulations 1972 (S.I. 1972/583), which were expressed to be made under section 86 of the Trustee Savings Banks Act 1969, it was apparently not considered necessary to reproduce regulation 30(1) of and Schedule 2 to the 1929 regulations, notwithstanding that a number of the provisions mentioned in Schedule 2 were still extant as provisions of the 1969 Act. Regulation 30(2) of and Schedule 3 to the 1929 regulations were replaced by regulation 20 of the 1972 regulations. The latter regulation has since been revoked (see S.I. 1980/1061); and the position is now that none of the provisions which were referred to in Schedules 2 and 3 to the 1929 regulations and which ultimately became provisions of the 1969 Act is still in force (and there is no current exercise of the power under section 86(1) of the 1969 Act).

Furthermore, we are informed that there is no prospect that this power will ever be used in future to prescribe the form or manner of execution of documents required under the 1969 Act. The retention of this power would therefore seem to serve no useful purpose.

Subsection (2) of section 86 of the 1969 Act in effect provides that, subject to regulations under subsection (1) of that section, all documents and other matters required for carrying the 1969 Act into execution are to be made subject to the direction or approval of the National Debt Commissioners. Again we are informed that this provision is unnecessary, since the requisite control by the Commissioners over things done in the execution of the 1969 Act can (except as regards the matters mentioned in sections 38 and 55, where specific powers are given to the Commissioners) now be achieved by administrative action. This appears to be a result of the fact that the functions of the Commissioners in relation to trustee savings banks have substantially diminished as a result of changes made by the Trustee Savings Banks Act 1976, changes which would in our view have made it appropriate for that Act to repeal consequentially section 86(2).

We might add that, if section 86 of the 1969 Act were to be reproduced in the Bill, it would be necessary to take account of the fact that subsections (1) and (2) are in terms of the 1969 Act only and do not extend to documents and other matters required by the 1976 Act. Elaborate exceptions would be required to reproduce the present position, which would seem wholly inappropriate given the redundant nature of section 86.

In the light of the above, we recommend that, in consolidating the Trustee Savings Banks Acts 1969 to 1978, section 86 of the Trustee Savings Banks Act 1969 should be repealed and not reproduced.

8. Subsection (4) of section 25 of the Trustee Savings Banks Act 1976 (reproduced in clause 36 of the Bill) provides that any direction given under that section may be varied or revoked at any time by a subsequent direction thereunder. Although a number of other provisions of the 1976 Act provide for directions to be given (see section 1(3)(*a*), (*d*) and (*e*) and sections 5(1), (3) and (4), 7, 17(1)(*b*), 18(1) and 30(1)), none of these other provisions contains any

reference to varying or revoking directions given under it. In these circumstances the existence of section 25(4), which is not couched in the form of a purely declaratory provision, might be thought to suggest that directions given under the other provisions previously mentioned are not capable of being varied or revoked. However, it seems to us that, leaving aside section 25(4), it would be possible to infer a power to vary or revoke in the case of all these other provisions. We do not think that it was intended that section 25(4) should prevent such a power being inferred in these cases, so we think that it would be desirable to include a provision in the Bill making clear that directions given in these cases can be varied or revoked. In order to avoid creating any difficulties as to inferring such a power in the case of directions given under other enactments, we would propose that such a provision should take a declaratory form. We think that such a provision should also apply in relation to clauses 33(1) and 35(1) (which reproduce sections 55 and 59(1) of the Trustee Savings Banks Act 1969).

Accordingly we recommend that, in re-enacting the provisions of the Trustee Savings Banks Acts of 1969 and 1976 mentioned above, it should be made clear by means of a provision on the lines of section 25(4) of the 1976 Act, but taking a declaratory form, that directions given under those provisions may be varied or revoked. Effect is given to this recommendation in clause 54(3) of the Bill.

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