would prove impracticable. It is true that the Committee qualifies its recommendation in this regard by suggesting that the Director of Personnel and Information "should study this problem and the administrative difficulties involved to determine whether additional protection to applicants should be instituted in other areas" (p. 188). Nevertheless, the comparative importance of the security program to new employees who have not yet been cleared, and its consequent significance in determining the attractiveness of federal service for the foreseeable future, makes it particularly unfortunate that the examination of the Committee into this problem was not more penetrating and its recommendations more incisive.

Of course, the remarkable thing is not that this Report has a few fuzzy edges and on some points leaves considerable to be desired, but rather that so representative a group of practicing lawyers was able to agree on such a forthright and comprehensive program of revision. It is devoutly to be hoped that both the bi-partisan Commission on Government Security and ultimately Congress and the Administration will take seriously the fundamental recommendations of the Committee.

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The Law of Bankers' Commercial Credits. By H. C. Gutteridge and Maurice Megrah. London: Europa Publications, 1955. Pp. xiii, 214. 25/–.

Considering the importance of the documentary credit in the structure of British overseas trade,[1] it is surprising to find how little this topic has engaged the attention of English legal writers. The reappearance of Professor Gutteridge's pioneering work of the 1930's[2] is, therefore, a very welcome addition to the meager body of literature which at present exists on this subject.[3] Originally intended as a collaborative effort on the part of Professor Gutteridge and Mr. Maurice Megrah, the Secretary of the British Institute of Bankers, the new edition now stands as the sole work of the latter, due to the unfortunate death of its first author in 1953.

[1] One banker estimates that as of 1952 one-half of the aggregate value of visible world trade was conducted in sterling. Thackstone, The Methods of Financing Foreign Trade: the Part Played by the Banks, Banking and Foreign Trade, Lectures delivered at the Fifth International Banking Summer School, Oxford, 125, 132 (1952). Consult also, Witheridge, The Finance of Foreign Trade: Lectures delivered before the Institute of Bankers 36 (1950).

[2] Gutteridge, The Law of Bankers' Commercial Credits (1st ed., 1932).

[3] There is, however, a considerable body of periodical literature on this subject in the United States, in addition to Finkelstein's major work: Legal Aspects of Commercial Letters of Credit (1930). In England, the most fruitful discussions are to be found in the various issues of the Banker's Magazine, the Journal of the Institute of Bankers, and in Davis, The Law Relating to Commercial Letters of Credit (2d ed., 1953). Probably the best treatise on the subject, however, is the American work of Ward and Harfield, Bank Credits and Acceptances (3d ed., 1948).

Much in the book is new. As the editor points out (p. v), although there has been very little judicial interpretation of the law of documentary credits since 1932, when the work was first published, the practice relating to their use has developed almost beyond recognition. Today, the banks, in addition to being confronted with the perennial and basic problems of documentary conformity, have to face new complications arising from such matters as the negotiability and transferability of credits, indemnities and the application of the Uniform Customs.[4]

Mr. Megrah's training as both lawyer and banker makes him ideally suited for the task of examining these new practices for the first time. Yet in spite of this, one cannot but feel a trifle disappointed in the manner in which he has treated some of their more important aspects. His analysis of the growing use of transferable credits, for example, is particularly dissatisfying. As described in Chapter VI, which is devoted entirely to this question, it is not clear whether the writer views the legal effect of such a transaction as a contractual novation (p. 122–24), an assignment of the proceeds under the credit, involving the delegation of performance of the underlying sales contract by the assignor (p. 124), or merely as an equitable assignment of the benefits which accrue to the seller under the credit (p. 124). Certainly, if regarded as either of these first two categories, the editor's position that such a transfer should only be made with the authorization of the customer-buyer is entirely correct. But why is such consent necessary where only the proceeds under the credit, as distinct from the credit itself,[5] are assigned?[6] And why should it not be considered a valid equitable assignment in law?[7] The argument that the buyer relies upon the personal qualifications of his original seller has little or no relevance here, since the latter is in no way relieved of his obligation to fulfil his contract with the buyer;[8] and

[4] International Chamber of Commerce, Uniform Customs and Practice for Commercial Documentary Credits (1951).

[5] When the credit itself is assigned, the assignee may draw under the credit in his own name. Consult Uniform Commercial Code § 5—116 (Final draft, 1956).

[6] As between assignor and assignee, the consent of the issuing bank or buyer is unnecessary to constitute this a perfect equitable assignment. Gorringe v. Irwell India Rubber Works, 34 Ch.D. 128 (1886). The fact, however, that it is a conditional assignment: conditional, that is, upon the seller's performance of his obligations under the letter of credit, would mean that Section 136 of the Law of Property Act, 15 Geo. 5, c.20 (1925) is inoperative as regards the assignee enforcing the assignment against the issuing bank in his own name. The assignor would have to be joined in such an action.

A more important question, as Ward and Harfield point out, is whether the prime beneficiary has an interest sufficiently concrete to assign. According to their view, however, the beneficiary under a letter of credit possesses an assignable present right, subject to the performance of the condition of the credit. Ward and Harfield, op. cit. supra note 3, at 139–140.

[7] See Griffith v. Tower Publishing Co., [1896] 1 Ch.D. 21. But see British Waggon Co. v. Lea, 5 Q.B.D. 149, 153 (1880), and Davies v. Collins, [1945] 1 All E.R. 247, 250 (C.A.).

[8] This is admitted by Megrah himself. Gutteridge and Megrah, The Law of Bankers' Commercial Credits 126 (2d ed., 1955). For the strongest argument in favor of allowing such assignability, consult McGowan, Assignability of Documentary Credits, 13 Law & Contemp. Prob. 666, 674 (1948); Mentschikoff, Letters of Credit: The Need for Uniform Legislation, 23 U. of Chi. L. Rev. 571, 600 et seq. (1956).

the assignee himself will receive nothing if the prime beneficiary fails to perform all the conditions of the credit.

Megrah admits that the courts would probably regard the transfer of a credit where authorized by the buyer as an equitable assignment of the proceeds, leaving the seller-beneficiary still liable to the buyer for the performance of the contract (p. 126). Nevertheless, he maintains that for an issuing bank to permit the transfer of a credit payable to a specific beneficiary without the buyer's consent would be a breach of its authority sufficient to enable the buyer to reject any tender of documents which were made:

> Any other view might place the buyer at a disadvantage which he certainly would not ordinarily contemplate. It is conceivable . . . that the buyer may be relying on the technical ability of the seller, in which case he might find himself at a disadvantage if the seller had the right without his authority to perform his contract of sale through a third party. An unauthorized transfer to a weak transferee might in a sense weaken the benefit of the sales contract [p. 123–24].

With all due respect, it is a little difficult to follow Mr. Megrah's reasoning in this particular instance. So long as the seller remains personally liable on both the sales and the credit contract, and this would be so whether an equitable assignment of the proceeds were made with or without the buyer-customer's consent, then surely the buyer still retains the advantage of his "technical ability." If, on the other hand, no such liability remains after the transfer, then clearly the transaction cannot be regarded as an equitable assignment of the benefits under the credit.[9]

As is pointed out by other writers,[10] the question as regards the seller-beneficiary's right to transfer is merely a different stage of the same credit problem which arises with the initial contract of sale, and which results in the letter of credit first issuing. Instead of relating to the buyer, however, it focuses attention upon the financing problems of the seller, and his attempt to maximize to the fullest the advantages which accrue to him under the documentary credit so as to fulfil his obligations under the original contract. Unfortunately, the formalization by British bankers of their own practices has apparently resulted not only in their overlooking this basic fact,[11] but has led them to conceive of such a transaction in a manner which, legally speaking, is entirely inappropriate to the commercial needs which it is designed to satisfy. As long as they persist in their refusal to separate an assignment of the credit itself from an assignment of the proceeds under the credit, this misconception is bound to continue. It is,

[9] Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd., [1902] 2 K.B. 660 (C.A.).

[10] Ward and Harfield, op. cit. supra note 3, at 130.

[11] This is apparent from their objections to handling this type of credit. Consult Thackstone, op. cit. supra note 1, at 148–49; Gutteridge and Megrah, op. cit. supra note 8, at 127. Compare also, the English form used by the beneficiary when requesting a transfer of the credit (ibid., App. C, Form 3), with that advocated by McGowan to secure an assignment of the proceeds of the credit. McGowan, op. cit. supra note 8, at 682.

therefore, to be regretted all the more that so able a banking scholar as Mr. Megrah should also have failed to make this distinction.[12]

In most other matters Mr. Megrah's analysis, both legal and commercial, is clear and illuminating. His discussion of the various difficulties of the banker in securing documentary conformity is wholly admirable. Such matters as differences in description of the goods in the credit and in the bill of lading,[13] the meaning of a "clean" bill, the effect of printed and superimposed clauses, and the acceptance of "stale" bills of lading are all examined with considerable skill and insight (p. 76–90). And his criticisms of the present draft of the Uniform Customs as regards these matters reflect less of a traditional British insularity than a banker's well-founded objection to the substitution of one uncertainty for another.[14] Similarly, his analysis of the various practical problems involved in securing the acceptance of irregular documents by an offer of indemnity is both cogent and lucid. As he shows by example,[15] the nature and extent of the

[12] Megrah's definition of a transferable credit as "one in which the issuing banker is authorised to accept the tender of documents from a nominee of the prime beneficiary" is additionally confusing. As worded it could easily apply to the situation in which the beneficiary first draws a draft on the issuing bank, payable to his own order, endorses it over to another bank, and discounts it together with the documents with the latter. Clearly it should not apply to drafts negotiated in this manner, and yet the negotiating bank could easily be regarded as the prime beneficiary's "nominee." Gutteridge and Megrah, op. cit. supra note 8, at 124. Compare Mentschikoff, op. cit. supra note 8, at 602.

[13] Gutteridge and Megrah, op. cit. supra note 8, at 74–75. Ward and Harfield are bitterly critical of what they consider the failure of the court in Rayner v. Hambros, [1943] 1 K.B. 37 (C.A.), to determine just how much importance should be attached to the description of merchandise which is contained in the bill of lading. They argue for the position that where there is no conflict between the description contained in the bill and that given in the credit, the documents should be accepted as good tender. Ward and Harfield, op. cit. supra note 3, at 52–53. Megrah points out, however, that there is nothing in that case to prevent such a position being adopted by the courts. Gutteridge and Megrah, op. cit. supra note 8, at 75.

The recent decision of Midland Bank Ltd. v. Seymour, [1955] 2 Ll.L.Rep. 147 (Q.B.D.), should satisfy all of the Ward and Harfield complaints. Confronted with this very question, Devlin, J., held that it is sufficient that the description should be contained in the set of documents as a whole and that the documents should each one be valid in itself and each be consistent with the other.

[14] For example, under the Uniform Customs, a "clean" bill of lading is defined as "one which bears no superimposed clauses declaring a defective condition of the goods or packaging." Uniform Customs, op. cit. supra note 4, at Art. 18. As Megrah properly points out, such a definition is wide open for what constitutes a "clause which declares a defective condition of the goods or packaging." Gutteridge and Megrah, op. cit. supra note 8, at 79. British bankers, of course, do not adhere to the Uniform Customs.

[15] "A South African bank negotiating documentary drafts under a letter of credit accepted an indemnity with respect to two breaches of the credit contract, namely, part shipment and transshipment. The indemnity itself was 'against any consequence which may arise from any loss sustained by the bank in the event of the draft being dishonoured by reason of irregularities of any nature whatsoever. . . .'

"The goods were destined for Canada; but the Master of the ship decided that it was not worth calling at the Canadian port which was originally planned. Instead he discharged the goods at New York and sent them by rail to their Canadian destination. This resulted in their attracting a higher rate of customs duty than would have been applicable had they not traversed the United States. On being called up to meet the additional cost incurred by the

benefit under such an indemnity are matters which should concern every bank entering into such an arrangement. Unlike the American banking community,[16] however, Mr. Megrah does not seem unduly perturbed by the highly controversial decision of the *Dixon Irmaos*[17] case with respect to a banker's obligation to accept such indemnities as regards missing bills of lading.[18] English banks are also in the habit of accepting indemnities under such circumstances, though, apparently, they reserve themselves a right to refuse such tender (p. 110).

Occasionally, however, Megrah occupies himself with a discussion of matters which really have little or no practical significance. In devoting an unwarranted time to examining the relatively unimportant question of recourse,[19] for example, the writer, in an otherwise illuminating discussion of negotiable credits, completely overlooks such matters as the form of the bill of lading,[20] and the very troublesome problem of the issuing bank as regards notation and the exhaustion of the credit where more than one draft is negotiated under the same instrument.[21]

In this last connection, if one were permitted to make a somewhat unfair criticism of what is, on the whole, a very competent piece of work, it would be that Mr. Megrah has allowed himself to take his responsibilities as editor too seriously. As he himself so pertinently remarks, "[T]he practice of commerce is, as a rule, somewhat in advance of the development of legal doctrine" (p. 14).

Canadian importer under its own indemnity, the South African bank found itself without any claim over against the seller inasmuch as the latter had limited his liability solely to losses arising from dishonour of the draft." Gutteridge and Megrah, op. cit. supra note 8, at 109.

[16] Ward and Harfield, op. cit. supra note 3, at 58 n. 1.

[17] Dixon, Irmaos & Cia, Ltda. v. Chase National Bank of City of New York, 144 F.2d 759 (C.A. 2d, 1944) (term in letter of credit requiring tender of "full set of bills of lading" satisfied by tender of indemnity in lieu thereof).

[18] Megrah does object, however, to the Second Circuit Court of Appeals finding that tender of documents covering a shipment on c.i.f. terms which do not show the freight to have been prepaid was a sufficient tender. Whilst admitting that under a c.i.f. contract prepayment is optional, he suggests that under a credit contract the situation is different, and that, in the absence of express authorization, the banker would not be justified in accepting a bill of lading which was not marked "freight paid." Gutteridge and Megrah, op. cit. supra note 8, at 89–90. With all respect, it is submitted that such a categorical statement is not wholly accurate. In the absence of express instructions on this point, it is suggested that the bank's duty would be no more than to adopt a reasonable course of conduct, which may or may not involve the acceptance of a bill of lading which is not marked "freight paid." As Devlin, J., puts it: "[W]hen an agent acts upon ambiguous instructions he is not in default if he can show that he adopted what was a reasonable meaning." Midland Bank Ltd. v. Seymour, [1955] 2Ll.L.Rep 147, 153 (Q.B.D.). No doubt it is more than likely that an English court would, in the light of prevailing practice, hold that rejection was the only reasonable course for a bank to adopt. But that is beside the point.

[19] Consult Ward and Harfield, op. cit. supra note 3, at 175–76.

[20] For example, bills of lading made out to the order of the issuing bank or the buyer would deprive the negotiating bank of its security. Consult Mentshchikoff, op. cit. supra note 8, at 600.

[21] As, for example, where drafts are drawn against partial shipments. Gutteridge and Megrah, op. cit. supra note 8, App. C, Form 1.

In an area, such as this, where commercial practice has so changed in the last ten or fifteen years, and where there is such a paucity of judicial pronouncement, one cannot but think that it would have served his purposes better to have eschewed purely academic discussion wherever possible. No doubt Mr. Megrah felt constrained by his position as editor to devote some time to such matters, though I for one am convinced that it is about time that the old jurisprudential debate as to the question of consideration between issuing bank and seller was abandoned, and Lord Mansfield's original diagnosis that no consideration is, in fact, present is accepted as being correct.[22] It is inconceivable that any British bank would today ever raise this as a defense[23] and be upheld by an English court.

There seems little doubt that were the original author alive today, he would be more than satisfied with the efforts of his collaborator. The book, despite some faults, stands as the best existing statement of English law on the matter of bankers' commercial credits, and, as such, must be recognized as a significant contribution to the legal literature on this topic.

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[22] Pillans v. Van Mierop, 3 Burr. 1663 (K.B., 1765). It has been accepted by the Uniform Commercial Code § 5—105 (Final draft, 1956). Consult also, Cheshire and Fifoot, Law of Contract 367 (4th ed., 1956). For the obvious objections to the author's agency theory, consult Davis, op. cit. supra note 3, at 64, and Davis, The Relationship between Banker and Seller under a Confirmed Credit, 52 L.Q.R. 225, 228 (1936). Compare also the General Provisions to the Uniform Customs, op. cit. supra note 4.

[23] But, as the Law Revision Committee pointed out, the liquidator of a bank might very well be obliged to raise such a technical defense. Sixth Report of the Law Revision Committee upon the Doctrine of Consideration 28 (1937). But see Denning, L.J., in Smith v. River Douglas Catchment Board, [1949] 2 All E.R. 179, 188 (C.A.).

Some Problems of Proof under the Anglo-American System of Litigation. By Edmund M. Morgan. New York: Columbia University Press, 1956. Pp. ix, 207. $3.50.

"[T]his lectureship will be made so honorable that nobody, however great, or distinguished will willingly choose to decline your invitation" (p. ix). With these words General Horace W. Carpentier launched the James S. Carpentier Lectures at Columbia University in 1903. A glance at the names of those who have since delivered the lectures will show that the aims of the founder have been largely achieved. Professor Morgan's contribution, given in 1955, is equal in standing and competency to the lectures of the past. Indeed, his lectures are outstanding. Here, in 195 pages, is presented what might be termed the philosophy of a man who has spent his life developing powerful arguments for the reform of the law of evidence. The reviewer found the book both stimulating and provocative.