Commercial Bills of Exchange used for Finance Purposes in New Zealand. A Booming Market with Uncertain Legal Foundations*

by

G. B. Robertson

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I. Introduction

Over the past four years there has arisen a new development, for New Zealand, in corporate financing and investment—commercial bills of exchange used for finance purposes. This device, on the one hand, fulfills companies' requirements in respect of funds for working capital, bridging finance and capital expenditure, while on the other hand it provides a flexible and attractive investment avenue. Although commercial bills of exchange had been used as a means of financing international trade for many years, their use as a means of accommodating other financial requirements of the commercial sector only became widespread after the passing of the Interest on Deposit Regulations 1972. These limited the rates of interest that nearly all commercial enterprises could pay on funds borrowed for certain periods. The discounting of commercial bills to obtain accommodation was a means of avoiding the application of these Regulations. As a result of this, and the fact that at that time conventional sources of financial accommodation became strained, a market in commercial bills grew up rapidly. Although these developments are recent in New Zealand, the extending of credit through this medium has an ancient and honourable history. It has been traced back as far as the ancient Greeks who[1] ". . . as the pre-eminent traders of the classical world, invoked the curses of the gods on those who failed to honour their bills." It played a considerable role in establishing Britain as a major

[1] Young, *Merchant Banking Practice and Prospects* (1966).

commercial power, and helps in the survival of the London money-market as arguably still the greatest in the world.

A company, seeking to raise funds, may require short term finance until they become available. Alternatively a short term deficit, which may be of a purely seasonal nature, may be predicted and funds required to cover it. In cases such as these, the company may approach a finance company or a merchant bank. Because of its peculiar flexibility, the extending of credit through the medium of a commercial bills facility is often the most satisfactory way of meeting the company's need. While longer term finance has been extended in this way a company seeking to raise such funds will often prefer a source in the nature of a term loan, because a bill facility is subject to regular variations in interest rates.

In any event, a company must be able to fulfill certain requirements before a facility can be extended. Firstly, the bills must be readily marketable, a factor which turns on the good name of the company raising funds. For example, New Zealand Forest Products Ltd, the largest commercial enterprise in New Zealand, with an impeccable reputation for stability and security, has had the use of a bill facility, extended to it by a consortium of merchant banks. These bills are undoubtedly the most popular on the market, with investors readily purchasing them in preference to others. On the other hand, where bills are extended to small unlisted companies, not widely known to the investor, a higher rate of discount is offered because the bills are more difficult to market. In such cases, steps must be taken to ensure that the second requirement is fulfilled—the company must be able to show that it can meet the bills on maturity. The finance company may require some form of security to back the line up. This may take the form of a debenture, or if there is an appropriate object of security available, a mortgage over land, or even a chattels mortgage. Sometimes, even a shareholders' guarantee will be required. Alternatively, repayment may be provided for out of the proceeds of an overseas loan, or the subscription to debenture stock. Where a prime company is raising funds, security will not generally be required. However a cash flow forecast must be produced as proof of its ability to repay. This, in effect, is a detailed prediction of cash required or surplus cash for a given period, and in its simplest form, reflects the difference between the receipts and payments of an enterprise. There is an element of uncertainty in such a forecast. However, a well managed concern should be able to provide reasonable predictions. It should be noted that the longer the forecast the greater the risk involved, as such uncertain factors as the continuing state of the country's economy become more significant.

When these two factors are found to be in order, and approval is given to provide the facility, a cost to the company which is raising funds will be set. Depending on how the line is organised the rate of interest is normally set at a certain percentage above the discount rate current for bills of that type. Bills will be drawn, and the company raising funds will discount them either directly on to the market at current rates, in which case the margin is paid to the finance company, or back to the finance company at the current rate of discount plus the margin.

The period for which the facility may be extended is flexible. However, bills are conventionally drawn to mature at the end of ninety days, so that if a longer period is required, the facility will customarily be split into ninety day periods. For example, if it is agreed that the facility will be extended for a year, four lots of bills will be drawn each for consecutive periods of approximately ninety days. At the end of each period, further bills are discounted to meet those maturing. However, they must be discounted at the current market rate. This injects an element of risk into the transaction for the company raising funds: if there was a significant upward swing in market rates, it could find its money costing more than originally anticipated. In such an event, depending on the terms of the bill facility contract, the company raising funds may be entitled to opt out and pay off maturities from a source other than that of discounting further bills.

However, rates can be predicted with reasonable accuracy, at least in the short term, upon the broad principles of supply and demand. These relate back to liquidity within the economy and the availability of bills. These factors tend to be inter-related. For example, if, on the one hand, the economy is healthy, there will be more money to invest on the market, while companies will have alternative possibly cheaper sources of funds, so that there may be a shortage of bills. In such a situation rates would remain low. The other extreme was experienced in late 1974 when a lot of companies were raising funds on the market when funds for investment were short. This caused rates to escalate dramatically. The availability of paper may, however, fluctuate for other reasons. For example, there may be a natural lag in the market when a number of dealers find themselves with few pick-ups—alternatively an institution or a sector may buy heavily on the market, causing a temporary scarcity.

These factors may also be considered by potential investors in the market. The investor, like the company raising funds, comes to the market in response to his own cash flow forecast. For the private investor, this normally means that he is seeking a lucrative short term investment to hold his funds until a long term investment comes available. The money may eventually find its way into debenture stock or on to the sharemarket. Often, however, the funds may be invested until payments become due on a house, or similar asset that the investor is acquiring. On the other hand, the institution, which is the traditional investor on the market, will tend to invest in response to a temporary trading surplus, which may disappear, perhaps even to be replaced by a deficit, within a relatively short time. Whether a thirty, sixty or ninety day bill is chosen will often depend as much on the investor's assessment of the future movement of interest rates, as the period for which his surplus will remain. If it is expected that interest rates will rise, it could be more profitable to invest in short term paper which matures when rates are predicted to be higher. The investor can then re-invest in higher yielding bills. If, however, rates are expected to fall, the longest term bill should be sought.

The investor may approach direct, or through a broker, a merchant bank, the money market division of a finance company, or a bill dealer. Having ascertained the period for which investment is required, a selection of paper at various interest rates would be offered. Such factors as the names on the bill and the rates offered will have to be considered and balanced. The investor may, however, regard the manner in which the bill is structured as important.

Section 3(1) of the Bills of Exchange Act 1908 defines a bill of exchange as:

> . . . an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

This means that an unconditional order in writing is addressed by the drawer to the drawee to pay to the payee the face value of the bill when it matures. Under s. 53 of the Act, the drawee does not become liable for payment until he has accepted the bill. By accepting the bill, the drawee[2] "engages that he will pay it according to the tenor of his acceptance." This means that the acceptance may be qualified in some way. Normally the only qualifications to the acceptance of a commercial bill are to specify the date on which it is to be presented, the bank at which it will be paid, and occasionally that it will not be met unless the bill itself is presented. The drawer of the bill is also made liable under Section 55(1)(a):

> (1) The drawer of a bill, by drawing it,—
>   (a) Engages that on due presentation it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken:

[2] Section 54(a).

This amounts to a guarantee of repayment by the drawer as does an indorsement.[3]

Within these bounds a commercial bill discounting transaction may be structured in one of two ways. The finance company may draw a bill on the company raising funds which accepts it and discounts it back to the finance company at the current market rate plus the finance company's margin. Accordingly the ultimate investor receives a bill on which the company raising funds is primarily liable, but the intermediary finance company has added its guarantee by way of indorsement and as drawer. A high proportion of the commercial bill transactions on the New Zealand market are structured in this way. However, a growing number are being structured on an acceptance credit basis, a form which is receiving increasing approval from the investor.

The finance company agrees to accept a bill drawn by the company which is raising funds in consideration of x% of the face value of the bill. The drawer company is then free to discount the bill to whomever it chooses, although the finance company may undertake to find a purchaser. The underlying contract requires an undertaking from the drawer to put the acceptor in funds on or before maturity date, to meet the bills. In this way, the investor receives a bill on which the finance company is primarily liable. This is a useful marketing device in the case of a secondary prime company's raising funds, as it allows the investor to look to the finance company as the primary source of repayment. Provided that body is highly regarded, greater investor confidence is assured.

It seems, then, that provided one good name appears on the bill, whether it be as acceptor, drawer or indorser, the investor is assured of the repayment of his funds. This view has undoubtedly contributed to the rapid growth of the market in New Zealand and its continued popularity despite the fact that the Interest on Deposit Regulations 1972 have now been repealed. There are now over a dozen organisations dealing on the market: they range from large merchant banks with strong overseas backing, to operating companies with undisclosed local backing. By mid-1975 the total bills outstanding exceeded $200 million,[4] and while this has fluctuated from time to time, there seems no doubt that commercial bills used for finance purposes are here to stay.

Indeed, the market is expected to receive a considerable boost now that the Reserve Bank of New Zealand has withdrawn its informal ruling prohibiting Trading Banks from trading in commercial bills or adding their names as accommodation parties. It is not yet clear how

[3] Section 55 (2) (c)

[4] *Bulletin* Reserve Bank of New Zealand June 1976.

the Banks will enter the market. They may do so merely by providing indorsement facilities to existing market dealers, or they may go as far as using the medium to accommodate their own clients. In any event, the whole face of the market will be changed. Prime bills will be bank bills, no matter whom is accommodated. No matter how highly regarded the accommodated party might be, without a bank's name on the bill, the bill will not be regarded as prime. In addition the market is bound to grow in size and in importance.

However, the lawyer viewing the growth of this market can only do so with concern. In particular, it seems that insufficient care has been taken to ensure that transactions comply, in all cases, with the Moneylenders Act 1908. If irregularities are found to exist, unintended though they may be, the consequences could be grave indeed for the investor.

II. The Moneylenders Act 1908

There is a wide divergence of opinion in financial circles as to what application, if any, the Moneylenders Act 1908 has to commercial bill transactions. The approach ranges from meticulous observation of the Act to its complete disregard. The Act imposes duties on a moneylender, which is defined by section 2 as:

> every person (whether an individual, a firm, a society, or a corporate body) whose business is that of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but does not include—
> (d) Any person *bona fide* carrying on the business of banking or insurance or any business in the course of which and for the purposes whereof he lends money at a rate of interest (including any payment or deduction by way of premium, fine, or foregift) not exceeding ten per cent per annum.

In brief, there is imposed on a moneylender the duty to register[5] and to issue a memorandum or note with each loan setting out its details.[6] Penalties are imposed, including imprisonment for false statements, and limitations placed on advertising.[7]

All finance companies and most merchant banks are registered as moneylenders because they engage in straightforward moneylending transactions. However, one merchant bank, which is closely associated with a finance company, and because of this is engaged only in commercial bill operations, rejects the view that these operations may be regarded as moneylending, and accordingly is unregistered. The majority do not adopt such a view but recognise at least that practical difficulties arise in relating the "rollover" aspect of a bill facility to the

[5] Section 4.
[6] Moneylenders Amendment Act 1933, s. 8.
[7] Section 6.

Act. Section 8(2) of the Moneylenders Amendment Act 1933 requires that a statement as to the interest charged on a loan be included in the memorandum or note. This means that, as the rate is likely to be different on every maturity date, a new memorandum must be issued. While this is not an unduly onerus requirement, a secured bill line presents great practical difficulties. Section 8(1) of the amendment Act states:

> no security . . . shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower . . . before the security was given. . . .

This would require new security to be executed with every rollover. A most expensive and a highly inconvenient task. Principally for this reason, some financial institutions strain perhaps with justification, to find that their bill facility transactions are exempt from the Act.

The Common law states that the discounting of a bill of exchange is selling not borrowing. If discounting is not borrowing, then clearly the purchasing of a bill cannot be lending.

Authority for the view that the discounting of a bill of exchange is not borrowing is found in the case of *Dawson* v. *Isle*[8] where Warrington J. quotes Lord Ellenborough as saying:[9]

> every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment for them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the whole property in it pro tanto for his advance.

Warrington J. continued by saying:[10] "when discounted then, according to Lord Ellenborough, it becomes the property of the bankers, but until it was discounted it was not the property of the bankers."

More compelling authority for this proposition is to be found in the case of *Inland Revenue Commissioner* v. *Rowntree and Co. Ltd.*[11] in which a company seeking to raise funds drew bills on an acceptance house, which then arranged for them to be discounted on the money market, and remitted the proceeds to the company. The company claimed that this was borrowed money and accordingly tax-deductible.[12] The tax commissioners took issue. In finding for the tax commissioners Somervell L. J. stated:[13]

> It seems to me that the case brings out very well that there are two ways at least (there may be more) of raising money. One is by borrowing it and the other is by discounting a bill of exchange. They are both quite well known methods. One is borrowing and the other is discounting a bill.

8 [1906] 1 Ch. 633.
9 *Ibid.*, 637.
10 *Ibid.*, 638.
11 [1948] 1 All.E.R. 482; [1948] T.R. 37.
12 Under the Finance (No. 2) Act 1939
13 *Ibid.*, 487.

> The fact that in many cases they produce the same result of providing financial resources for carrying on a business does not mean that the words which are apt to describe one must be construed as covering the other.

The Privy Council considered the same point in *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory*.[14] This was not a taxation case but involved the discounting of post-dated cheques by the respondents, who had received them in the course of their business. The respondents gave, as a form of collateral security, their own post-dated cheques maturing on the same day as those which they had discounted. On the appellant's suing the respondents on their cheques, which had been dishonoured, the respondents contended that the contracts to which the cheques related were[15] "for the repayment of money lent", and that accordingly the claim was unenforcible under s. 15 of the Moneylenders Ordinance 1951, in that the appellant was an unlicenced moneylender, or there was no memorandum of agreement as required by s. 16. Devlin L. J. delivering the opinion of the Privy Council stated:[16]

> The business of buying bills at a discount, that is for their value at date of purchase, is well known and is quite different from moneylending. . . . There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value.

Accordingly it seems that the providing of financial accommodation through bill discounting facilities cannot be regarded as moneylending. However, these cases all involve situations where the primary source of repayment, that is the acceptor, was to be a body other than that which was raising funds. For example in *Rowntree's* case the bills were accepted by an independent acceptance house. Similarly *Dawson* v. *Isle*[17] involved a bill received from a customer in the ordinary course of business and its subsequent discounting on to a third party. In that case, the customer, not the intermediary was primarily liable for repayment. This was also the situation in *Chow Yoong's* case. It is submitted that this is of particular significance, and that the courts, in finding that the discounting of a bill is not borrowing were relying on the fact that a body, other than that which is discounting a bill, is primarily liable for repayment. While there is no objection in law to the acceptor's holding title to his own bill,[17a] commercial bill transactions in which the acceptor purports to discount his own bill cannot be deemed a discounting operation in the strict legal sense.

The concept of a sale cannot be appropriately applied to the

[14] [1962] A.C. 209. P.C.
[15] *Ibid.*, 215.
[16] *Ibid.*, 215-216.
[17] [1906] 1 Ch. 633.
[17a] Bills of Exchange Act 1948 s. 8.

situation where the party accommodated accepts the bill itself. One cannot purport to sell one's own debt, even though repayment may be independently guaranteed. The transaction must be structured in such a way as to involve the discounting of a third party's debt. The purported discounting of ones own debt can amount to no more than the furnishing of a bill to facilitate repayment of that debt.

On the New Zealand moneymarket, most bills are accepted by the company which is raising funds. In such cases the financial intermediary to whom the bill is discounted (accepting that the requirements set out in the common law such as "the number, nature and regularity of such transactions"[18] are fulfilled by it) must be a moneylender. The true nature of the transaction can only be described as follows: the intermediary lends the company raising funds money and draws a bill on it purely as a means of facilitating repayment. The bill is, in effect, a form of promissory note. The intermediary then has something of value which it can legitimately discount, but it is fallacious to suggest that the company raising funds discounted the bill to the intermediary.

Assuming that the intermediary does not purchase the bill itself, the case of an acceptance credit is clearly different. In that case the finance company or merchant bank is purely the acceptor of the bill. The fact that he may undertake to act as an intermediary for the discounter to find a purchaser for the bill does not effect this. The bill is, in fact, discounted direct to the purchaser. The agreement whereby the drawer agrees to put the acceptor in funds on maturity day can only be construed as forming part of the acceptance agreement, and this position is not altered if some form of security is required.

Even if a court were to find that this view is incorrect, and that a company raising funds can accept a bill and discount it, many financial intermediaries severely compromise their position as regards the Act by naming themselves payee on their bills. For example, a merchant bank may draw a bill payable to itself on a company raising funds. Clearly the company raising funds can have no title to that bill if it is made payable to the merchant bank, and accordingly cannot, on any view, purport to discount it. A similar distortion arises with an acceptance credit, where the company raising funds draws a bill payable to the merchant bank on the merchant bank. Bills structured in this manner are extremely common on the New Zealand money market.

Of the intermediaries registered as moneylenders, and recognising that this may be necessary for bill transactions, some do not issue the required memorandum or note. Re *Mountain View Property Holdings*

[18] *A. R. MacKay Ltd* v. *Craig* [1971] N.Z.L.R. 289, 293.

Ltd[19] is often cited as the legal basis for this approach. The liquidator of a company which was being wound up, sought directions from the court on various matters. One question related to a mortgage for which there was no memorandum or note, despite the lender's being a registered moneylender. In finding that this was not necessary because the borrower was a corporation Wild C. J. accepted the reasoning behind a similar decision in *Motel Marine Pty Ltd* v. *I.A.C. (Finance) Pty Ltd.*[20] Firstly it was found that the requirement that the memorandum or note be signed personally by the borrower could not be fulfilled by a corporation. Dixon C. J. stated:[21]

> a study of s. 13 in its context shows that it is part of a set of provisions directed to the protection of borrowers who are natural persons and subject to the possibility of being over-reached in their indigence or necessities by persons possessing the persuasive force of greater money power and engaged in profiting by lending money. It is not directed to the protection of fictitious persons from the possibility of their directors or boards of management misunderstanding an ordinary business transaction or an extraordinary business transaction for that matter.

Wild C. J., in accepting this stated:[22] "The reasoning and decision of the majority of the High Court being directly on point on the question at issue in this case, I prefer to follow that authority."

However, there was in the *Motel Marine* case a strong dissenting judgement delivered by Menzies J. He firstly raised the point that no other part of the Act could be construed as not applying to a corporation. On the meaning of the words "signed personally by the borrower" he considered two ways by which a corporation can sign a document. Firstly by agent, and secondly under seal. On the possibility of an agent's signature being sufficient, Menzies J. considered re *British Games Ltd.*[23] A borrowing agreement was signed: "For and on behalf of British Games Ltd" by a director and the company secretary. When the company went into liquidation and the liquidator claimed that the loan was invalid as the memorandum was not signed by the company personally, it was found that the manner in which it was signed was sufficient for a valid signature in terms of the Act. In rejecting this argument, Wild C. J. stated:[24]

> Simonds J. held that there had been sufficient compliance, apparently assuming that the provision was applicable to the company but, as Dixon C. J. pointed out in the *Motel Marine* case, he did not mention the question whether it was applicable to a company.

19 [1972] N.Z.L.R. 1.
20 [1964] 110 C.L.R. 9.
21 *Ibid.*, 12.
22 [1972] N.Z.L.R. 9.
23 [1938] Ch. 241.
24 [1972] N.Z.L.R. 11.

Wild C. J. made no attempt to answer the points raised by Menzies J. when he considered the second way in which a company could be construed as signing personally:[25]

> When the seal of a company is affixed to a document in accordance with the company's article of association, that document can be said to be signed by the company. . . . Furthermore, such signature by sealing is the company's signature and not the signature of any other person on behalf of the company. In this sense a company has, by sealing, signed the document personally.

Menzies J. also pointed out that the application of the section to companies had never been questioned in previous cases. He cited *Ocean Road Motel Pty Ltd* v. *Pacific Acceptance Corp. Ltd.*[26] In the New Zealand context, *Ross Cole Investment Corporation Ltd* v. *New Fashions Ltd*[27] supports this view. McCarthy J. stated:[28]

> Unfortunately, the plaintiff's solicitors overlooked the requirements of s. 8 of the Moneylenders Amendment Act 1936, and no memorandum, other than a copy of the debenture, was handed over and the debenture did not itself comply with the provisions of s. 8 in that it failed to state the rate of interest in the manner required by the section.

Although Wild C. J. did not consider it, it is respectfully submitted that the majority finding that the legislature cannot have intended the section to apply to corporations because they are less prone to "being over-reached in the indigence or necessities by persons possessing the persuasive force of greater money power . . ."[29] is incorrect. This may be fair comment as regards a large corporation run by a board of professional directors. However, by far the majority of corporations in no way resemble such an organisation. It is common for individuals trading in a small way to take upon themselves the benefits of limited liability by registering as a company. To attempt to draw the line where the High Court of Australia has drawn it would be to deprive the local butcher, grocer or carrier of the protection of the Act. Such people do not possess the financial expertise of the board of a large corporation. To exclude them from protection would be contrary to the whole spirit and intent of the Act.

The decision has since been viewed with some judicial disapproval. In *Ashford* v. *Premier Group*,[30] Hardie-Boyes J. felt sufficiently strongly about the matter to digress from the main thrust of his judgement and comment unfavourably on Wild C. J.'s approach. He stated:

> Having regard to the definition of "person" in our Acts interpretation Act 1924[31] the strong dissenting judgement of Menzies J., quoting English authority, may well require to be heeded in New Zealand when considering the ratio of the decision.

25 *Ibid.*, 21.
26 (1963) 109 C.L.R. 276.
27 [1958] N.Z.L.R. 55.
28 *Ibid.*, 57.
29 [1972] N.Z.L.R. 11.
30 1970 unrep.
31 "Person includes a corporation sole, and also a body of persons whether corporate or unincorporate."

The *Mountain View Property* case was extremely complicated, covering a wide range of largely unrelated issues, and the question relating to the possible application of the Act, was discussed only briefly. It may be, on the facts of the case, that relief should have been available to the lender. However, the way in which relief was granted has such a distorting effect on the law, that it allows one to submit that, at the very least the question is as yet undecided.

The 1973 amendment to the Act adds the following exceptions to the definition of "moneylender":

(e) A trading bank as defined by the Reserve Bank of New Zealand Act 1964; or
(f) A trustee savings bank established under the Trustee Savings Bank Act 1948; or
(g) A private savings bank as defined in the Private Savings Bank Act 1964.

The question arises as to what the effect of these additions is to the pre-existing "business of banking" exception. It may be that "banks" as they are conventionally known, having been included in a separate exception, other organisations such as merchant banks fall under the general banking exception. Such an approach, however, begs the question as clearly only a bank in the conventional sense carries on the business of banking. It would be different if the exception was phrased in terms of "carrying on aspects of the business of banking". In that case, discounting bills of exchange, as a legitimate aspect of the business of banking would bring a merchant bank within the exception.

However, as it stands, the section requires more. Denning M. R. stated what was required in *United Dominions Trust Limited* v. *Kirkwood*:[32]

> There are, therefore, two characteristics usually found in bankers today: (i) they accept money from, and collect cheques for, their customers and place them to their credit; (ii) they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third, namely; (iii) they keep current accounts, or something of that nature, in their books in which the credits and debits are entered.

These, however, were not found to be the sole characteristics. How the organisation was regarded in the business community was found to be of importance, and it was on this basis that U.D.T. was found to be a bank. There were, however, exceptional circumstances, and facts were proven in respect of U.D.T. which could never to proven in respect of a New Zealand finance house or merchant bank. Denning L. J. stated:[33]

[32] [1966] 2 W.L.R. 183.
[33] *Ibid.*, 979.

> It has for many years been accepted in the most responsible quarters as being a banker. There was impressive evidence from four of the big five banks that they regarded U.D.T. as a bank; and that U.D.T. was generally regarded in the City of London as a bank. These bankers accorded to U.D.T. all the privileges of being a banker. They paid crossed cheques presented by U.D.T. They gave it clearance house facilities. They answered references regarding customers, and such like. The Inland Revenue had treated U.D.T. as a banker.

It seems, that if the *Rowntree* line of authority is accepted, with the limitation that it applies to independantly accepted bills only, then it must also be accepted that a moneylending transaction is involved where the company raising funds accepts the bill. Even if the limitation is not accepted, many intermediaries severely compromise their position as regards the Act, by the manner in which their bills are drawn. The possibility of their being exempted from the application of the Act is rejected, so that it must be complied with in every respect, regardless of the nature of the borrower. The effect of non-compliance will be discussed below.

III. Contributory Bills

Because bills are drawn for specific amounts, it is often difficult to precisely match amounts invested to a particular bill. For example, an investor may wish to purchase a bill with a face value of $17,000, but the dealer may only have $20,000 bills in portfolio. Provided that the investor allows the dealer to collect the proceeds on his behalf on due date, the dealer will purport to transfer a part of the bill to him.

In such a case, the transfer of legal title to the bill is prevented by section 32(b) of the Bills of Exchange Act 1908, which states:

> An indorsement in order to operate as a negotiation must comply with the following condition, namely: . . . (b) It must be an indorsement—that is to say, an indorsement that purports to transfer to the indorsee a part only of the amount payable, or to transfer the bill to two or more indorsers severally—does not operate as a negotiation of the bill.

As commercial bills are invariably order bills, they must be indorsed and delivered for legal title to pass.[34] While constructive delivery is possible, a dealer is precluded from transferring part of a bill to an investor by section 32(b).

There seems no doubt that a dealer may collect a whole bill for a client as agent. Legal title passes by indorsement and constructive delivery, but where a dealer purports to collect a single bill on behalf of a number of investors, the question arises as to whether their gaining any interest in it is precluded by section 32(b). If it is, the funds invested can be regarded as no more than a deposit, secured against a bill, for the term of that bill.

[34] Section 31 (3).

Clearly there can be no legal interest in the bill itself. Byles puts forward a proposition based on United States law:[35]

> It is conceived that the effect of such an indorsement, when attempted, is to give the indorsee a lien on the bill, but not to transfer a right of action, except in the indorser's name.

It is not clear what is meant here by "lien". In the strict sense of the word, a lien can only exist where the person claiming it possesses the property which he claims to be subject to the lien.[36] On the other hand the word may be loosely used in the sense of a charge. If the strict interpretation is taken, then the only situation envisaged by this proposition, in which the investor in a contributory bill has any rights in it, is where he also has possession. Such situations are not unknown in practice. For example, where an investor wishes to buy and take possession of a bill worth, for example, $48,000 but the dealer has only $50,000 bills, the dealer may purport to negotiate the whole bill on the understanding that the investor repays $2,000 on maturity. This must leave either party in a vulnerable position depending on which view of the transaction is taken.

The author's second proposition; that the indorsee has no right of action on the bill, except in the indorser's name is untenable. It is inconsistent with section 27(3) of the Act under which the holder of a bill who has a lien over it is deemed to be "a holder for value to the amount of the sum for which he has a lien," and accordingly can, under section 38 of the Act sue in his own name.

It may be that a relationship of trust, in the legal sense, is established between the dealer and the investor in a bill, and that the investor gains an equitable interest in part of the bill. It seems, however, that he would be precluded from suing to enforce his rights because he would not be a holder. This difficulty may be overcome by the proposition that he does not gain an equitable interest in the bill, but simply in the proceeds thereof. In this way, he would not be attempting to sue on the bill itself, but on an undertaking to hold the proceeds in trust. The problem then arises as to whether one can validly discount an equitable interest in the proceeds of a bill. There seems to be no authority on this point.

Even if the sale of such an interest is deemed to be a valid discounting operation, the investor is not in as strong a position as he would be if he had legal title. Because the investor never gets possession of the bill or in fact may never see it, the situation is open to abuse by the dealer fraudulently discounting bills which do not exist at all, or negligently overselling a bill line. The first situation could arise where a dealer, in financial difficulties, seeks extra funds

[35] Megraph and Ryder, *"Byles on Bills of Exchange"* (1972, 24th ed) 83.
[36] *James Bibby Ltd* v. *Woods and Howard* [1949] 2KB 45 3.

to meet outstanding commitments. He may fully expect to be able to repay these funds from future profits, but if this cannot be achieved, the whole effect could snowball until a point was reached at which sufficient bills to fund maturities could not be discounted. The system would collapse with disastrous consequences for the investor. If the process was begun in a period of tight liquidity, the result envisaged would almost be inevitable, and the process would be sped up if investors lost confidence in the enterprise and were unwilling to purchase fresh bills. The second situation involves a dealer with, for example, a $50,000 bill accepting contributions in excess of its face value. What this would amount to is a double assignment of either a part of a bill, or part of the proceeds of a bill, depending upon which interpretation of the nature of the transaction was accepted. In this case, two or more investors would be competing for equitable priority.[37] ". . . in equity, the basic rule is that estates and interests primarily rank in order of creation.", so that the investors to whom the excess was discounted would, in fact, receive no interest.

A further problem arises in respect of a bill line over which the dealer has taken security. In such a case it is impossible to assign such security to a number of investors in the bill, unless the expensive course of assigning it to a trustee is undertaken. If the dealer was to go into receivership or liquidation and the acceptor didn't meet its obligations on maturity date, the investor would be left unsecured. The dealer may realise the security in his own name and claim that it was taken out in respect of his guarantee on the bill, so that it should go into his own general funds. It is against these that the investor may sue in respect of the dealer's guarantee, whether it be as drawer or indorser, but there may be a number of investors in the same position, suing in respect of unsecured bill lines. In such case, there would be insufficient funds available from realised securities to meet all the dealer's obligations. Yet the investor in a secured bill line would not be in a better position than the investor in an unsecured bill line, unless he could lay some direct claim against the security taken out by the dealer in respect of his own bill line. Two cases seem to bear on this point. In re *Nunwa Gold Mines Ltd. Ballantyne* v. *Nunwa Gold Mines Ltd,*[38] invitations to participate in a share issue were sent out containing certain conditions precedent, which if not fulfilled would allow the investors to have their funds returned. The conditions were not fulfilled and the company went into liquidation shortly after. In finding that the holders of a debenture were not entitled to the funds raised in the abortive share issue, Harman J. stated:[39] "It is not, in my judgement,

[37] Snell, *Principles of Equity* (1973, 27th ed) 45.
[38] [1955] 1 W.L.R. 1080.
[39] *Ibid.,* 1085.

anything more than construing the application form." The application form stated:[40] "Should either of these conditions not be fulfilled, application moneys will be returned, and mean while will be retained in a separate account." By analogy, it would seem that where a dealer advertised bills as being secured, or advised a potential investor that the bill line was fully secured, then the security would be held in trust for the investor. The more recent case of re *Kayford Ltd*[41] seems to liberalise the test. Here, a mail order business was receiving funds from purchasers, but was experiencing considerable delays in supplies. The company was soon experiencing severe cash flow problems and, on expert advice, placed the funds that they were receiving from customers into a special bank account, in trust for them. When the company went into liquidation, a determination was sought from the court as to the nature of the funds. Megarry J. stated:[42]

> I feel no doubt that the intention was that there should be a trust. . . . There is no doubt about the so called "three certainties" of a trust. The subject matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the certainty of the words, it is well settled that a trust can be created without using the words "trust" or "confidence" or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

Accordingly, provided that an intention on the part of the dealer to hold the security on trust for the investors can be proven, the investor may have a direct claim on the security.

These problems presuppose fraud, neglect or receivership. However, there is a further disadvantage which will always attach to the investment in part of a bill. One of the greatest advantages of investing in commercial bills is the flexibility allowed to the investor. He may purchase a bill which matures in ninety days time, but if he requires funds before maturity date, he may go back on to the market and re-discount the bill. This he may do at a capital profit or at a loss depending on whether rates have moved up or down since he purchased the bill. However, to do this with ease, the investor must have possession of the bill. Unless the dealer is prepared to repurchase the part of the bill in question, he is effectively precluded from getting liquid.

IV. The Effect if a Transaction is Found to be in Breach of the Moneylenders Act 1908

There is long standing direct authority supporting the view that a loan made by an unregistered moneylender is illegal. In the 1933 case

[40] *Ibid.*, 1081-1082.
[41] [1975] 1 W.L.R. 279.
[42] *Ibid.*, 281-282.

of *Ansford* v. *New Plymouth Finance Co. Ltd*[43] Reed J. was forced to take this approach even after stating:[44]

> The action is entirely without merits, there being no suggestion that the contract was otherwise than a fair and reasonable one; but however unmeritorious his claim, if the plaintiff has legal rights he is entitled to enforce them.

This case was cited in support of the approach taken by Wild J. in *Combined Taxi Co-operative Society Ltd* v. *Slobbe*:[45]

> I feel bound by authority, then, to hold that the plaintiff is a moneylender within the meaning of [s. 2 of the Moneylenders Act 1908]. Since at the relevant time the plaintiff was not registered as a moneylender it is clear that the contract represented by the instrument by way of security is illegal and void.

The Moneylenders Act 1908 is quite explicit as to the effect of non-compliance with the requirement of issuing a memorandum or note in respect of the loan:[46]

> No contract . . . and no security . . . shall be enforceable, unless a note or memorandum in writing of the contract is signed personally by the borrower.

The distinction between "unenforceable" in this case and "illegal" in the aforementioned situation is important in obtaining relief under the court's discretion. This will be discussed below.

Where the head contract is found to be illegal, the Illegal Contracts Act 1970 may provide relief for an innocent party to whom a bill, which is the subject of such a head contract, is rediscounted. A proviso is attached to section 6(1) stating:

> nothing in this section shall invalidate—
> (a) Any disposition of property by a party to an illegal contract for valuable consideration; . . . if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

It seems then, that though a transaction between a dealer and a company borrowing funds may be tainted, if a bill is rediscounted to an innocent client of the dealer, the innocent party is entitled to sue on the bill to enforce payment. It should be noted, however, that if this approach is accepted, it puts an innocent investor in the same position as if he were a holder in due course, obtaining as he would[47] "good and complete title to the bill." Yet he is placed in this position without having to fulfill a requirement which is essential before one can become a holder in due course within the Bills of Exchange Act

[43] [1933] N.Z.L.R. 209.
[44] *Ibid.*, 211.
[45] [1972] N.Z.L.R. 354, 359.
[46] Section 8(1), Moneylenders Amendment Act 1933.
[47] Section 38, Bills of Exchange Act 1908.

1908—namely that the bill be[48] "complete and regular on the face of it." One is inevitably drawn to ask the question whether the legislature can have intended the Illegal Contracts Act 1970 to have such an effect on a principle which has formed part of the traditional law relating to Bills of exchange.

However, it may be that this distortion can be avoided. Even if the bill is complete and regular on the face of it, and the person to whom it is actually discounted has no knowledge of any defect, he may be deemed to have constructive knowledge if it is shown that he knows the bill forms part of a credit transaction. Such knowledge would be undoubted in the case of an investor purchasing a commercial bill. This view was propounded in *Stenning* v. *Radio and Domestic Finance Ltd*[49] in which a promissory note was taken from a purchaser under an illegal hire purchase agreement and subsequently discounted to a finance company. In finding that a holder taking a bill which forms part of a credit transaction and is subject to a defect, has constructive knowledge of such defect Richmond J. stated:[50]

> If . . . the only types of "defect of title" contemplated by the Bills of Exchange Act are those enumerated in s. 29(2), clearly the respondent company must be a "holder in due course". It seems to me however that s. 29(2) is merely an enumeration of certain matters which amount to a defect in title without purporting to be exhaustive.

The Contract and Commercial Law Reform Committee has considered this matter,[51] pointing out that this is the only New Zealand case on the subject and that[52] "some Australian cases take a different view." The committee also stated that while several Canadian and United States tend towards Richmond J.'s approach, they seemed to turn on the fact that there was[53] "a close relationship between the dealer and the finance company."

It seems then, that the matter is, as yet, unclear, but that a distinct risk of the court's finding that an innocent purchaser's title is tainted by a preceding illegality does exist.

However, even if it is found that the dealer does become a holder in due course any security taken out by the dealer, not having been assigned to the ultimate investor, would be unenforcible. This view is re-inforced by Goulding J. in *Barclay* v. *Prospect Mortgages Ltd*[54] where he rejected the view that the security could be set aside upon the condition that the funds be repaid. In doing so, he accepted the approach taken by the Privy Council in *Kasamu* v. *Bubu Egbe*:[55]

48 Section 29.
49 [1961] N.Z.L.R. 7.
50 *Ibid.*, 19.
51 *Working Paper on the Reform of the Moneylenders Act 1908,* para 103-104.
52 *Ibid.*, para 103.
53 *Ibid.*, para 104.
54 [1974] 1 W.L.R. 837.
55 [1956] A.C. 539, 552.

> If a court therefore were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves.

Furthermore, the investing public would not *prima facie* be protected in the situation where they purchased a contributory bill. However, the courts have a wide discretion to uphold unenforcible and illegal contracts, which may be exercised in the case of tainted bill transactions.

V. The Court's Discretion

In the case of an illegal contract, section 7 of the Illegal Contracts Act 1970 provides the court with the power to grant:

> such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.",

to a party to an illegal contract. The relief has been accurately analysed as falling:[56]

> under two major heads. One is the power to validate the contract; presumably once this is done, all the parties ordinary contractual rights and remedies would be available, and there would be no need for the court to make further orders unless they were specifically asked for. The other is the power to order compensation and restitution on the basis that the contract is of no effect. The power to "vary" or "validate in part" is a middle way between the two approaches.

It seems, then, that the legislature has vested wide powers of rectification in the court. However, it is explicit as to what grounds these powers may be exercised on. Chilwell J. effectively summarised these in *R. D. Bull Ltd* v. *Broadlands Rentals Ltd*:[57]

> The matters which the court is directed to take into account in considering applications for relief under the Illegal Contracts Act 1970 are:
> (a) The conduct of the parties.
> (b) The object of the enactment and the gravity of the penalty expressly provided for any breach thereof.
> (c) Such matters as it thinks proper.
> (d) The public interest. The court is precluded from granting relief if it considers that to do so would not be in the public interest.
> (e) The knowledge of the applicant for relief of the facts or the law giving rise to the illegality.

Although only a recent enactment, a clear line of authority is emerging as to the situation in which the discretion will be exercised.

In *Combined Taxis Co-operative Society Limited* v. *Slobbe*[58] the defendant society provided financial assistance to its members to set themselves up in the taxi business, by way of loans on highly advan-

[56] Sutton *Recent Law* April 1972.
[57] [1975] 1 N.Z.L.R. 304, 308.
[58] [1972] N.Z.L.R. 354.

tageous and competitive terms. Its activities were, however, found to constitute moneylending. Because the society was not registered as a moneylender, the plaintiff claimed that the contract under which he had borrowed money, was illegal. The court accepted this, but elected to grant relief under s. 7 of the Illegal Contracts Act 1970. In doing so, Wild C. J. was greatly influenced by the nature of the society's activities:[59]

> I may say that I am most reluctant to declare that the plaintiff society is a moneylender. It is really a mutual benefit society, a co-operative association whose members through their incorporation assist each other according to financial needs on terms which the evidence shows to be more favourable than could be obtained on the ordinary business market. . . .[60] Justice between the parties requires the contract to be carried out according to its terms. The public interest requires no other result. I am satisfied therefore that in pursuance of the power given by s. 7(1) the court should grant appropriate relief.

In this instance, the discretion was exercised on broad principles of justice. The fact that the contract was, in itself, fair as between the parties, was undoubtedly an important factor. The public interest seemed to be of relevance only in that it required that a fair contract, albeit illegal on technical grounds, between two parties of equal bargaining strength, should be enforced. The question is left open at this stage as to whether this element should be used as a ground to refuse relief for deterrent purposes.[61]

> For example, if a particular industry was resorting frequently to illegal contracts to further their business, relying on s. 7 when anything went wrong, could the court declare that, in the public interest, they should not be allowed to avail themselves of the Court's discretion?

The answer to this question, provided by *R. D. Bull Ltd* v. *Broadlands Rentals Ltd*[62] seems to be an emphatic "yes". An agreement had been entered into, which was illegal under the Hire Purchase and Credit Sales Stabilisation Regulations 1957. In refusing to exercise his discretion in favour of Broadlands Rentals Ltd, Chilwell J. stated[63]

> The Regulations were specifically promulgated in order to control the business activities of firms such as the defendant. . . . [They provide] a severe restriction on credit financing known to the defendant and specifically directed at the ability of financiers such as the defendant to grant credit. . . . In my judgement to grant relief to a financier, such as the defendant in this case, who adopts an ingenious device to defeat the operation of the regulations for its own profit would not be in the public interest.

The public interest was also found to be a signficant factor in *Evans* v. *Credit Services Investments.*[64] In finding that the discretion ought to be exercised in favour of the plaintiff, preventing the finance com-

[59] *Ibid.*, 359.
[60] *Ibid.*, 361.
[61] Sutton, *loc. cit.*, 95.
[62] [1975] 1 N.Z.L.R. 304.
[63] *Ibid.*, 309.
[64] 1975 unrep.

pany from repossessing a motor vehicle which had been the subject of a leasing agreement in breach of the Hire Purchase and Credit Sale Stabilisation Regulations 1957, McMullin J. stated:[65]

> There is nothing in s. 7(3) (a), (b), and (c) which would preclude me from granting relief; rather do the matters there mentioned encourage me to grant it. Nor do I think that the public interest stands in the way of the plaintiff's application. . . . Public interest, as declared by the regulations would rather assist the plaintiff.

In *Dreardon* v. *Fletcher Development Co. Ltd*[66] McMullin J. exercised the discretion in favour of the defendant to an action under the Land Settlement Promotion and Land Acquisition Act 1952. In doing so, the court noted that the public interest was an "overriding"[67] consideration, but found that it did not preclude it from granting relief, because the defendant had been guilty of a mere oversight.

Accordingly, it would seem that, while it may be clear as between the parties themselves that the discretion ought to be exercised, the public interest could prevent this.

It must now be assessed whether the parties to a contract rendered illegal by its being in breach of the Moneylenders Act 1908, are likely to be granted relief under the court's discretion. The conduct of the parties would clearly vary from case to case, so that it would be meaningless to explore in this context, the type of behaviour which would preclude the discretion from being exercised. Suffice to note that complementing this consideration is the[68] "knowledge of the applicant for relief of the facts giving rise to the illegality." As there is a genuine difference of opinion as to the true effect of the line of cases distinguishing discounting from borrowing it seems, at this stage at least, to be unlikely that relief would be refused on the ground of knowledge.

Consideration of the object of the enactment and the penalties provided for breach are important as an indication of the gravity with which the legislature would view any breach. Imprisonment and fines are provided under the Act for breach. While the impact of fines, particularly on corporations, has been reduced by inflation, they are by no means inconsequential. No object is specified in the Moneylenders Act 1908, and it is unclear as to whether it is open to the judiciary to speculate as to what it might be, in this context. However, if it is open to do this, it may be expressed in terms of: an Act for the purpose of regulating the activities of moneylenders in order to protect those who borrow money from harsh bargains. If this is accepted, a court may find that it is not in the public interest to

65 *Ibid.*
66 [1974] 2 N.Z.L.R. 11.
67 *Ibid.*, 20.
68 Illegal Contracts Act 1970, s. 7(4).

exercise its discretion in favour of a financial institution, in the business of lending money for a profit, which does not register as a moneylender. The facts of *Slobbe's* case were special in that a co-operative society which the court viewed most favourably was involved. These considerations are no doubt factors in the court's assessment of the public interest. There is no specific reference in the Act to the public interest so that it does not clearly fall within the ambit of the *Broadlands* case. It may be agreed that the Moneylenders Act 1908 is concerned purely with the parties to a transaction, and that if the public interest is of relevance at all, it is only with regard to the view that contracts ought to be enforced. On the other hand is the view that it is in the public interest for a person who carries on the business of lending money no matter how that operation is structured, to be registered and subject to strict controls. On balance, it is submitted that the latter argument is more compelling.

In the case of unenforceable contracts, section 55 of the Statutes Amendment Act 1936 provides that:

> Notwithstanding the provisions of section seven or section eight of the Moneylenders Amendment Act 1933, the Court, if it is satisfied that in the circumstances it would be inequitable that any moneylending transaction or contract for repayment by a borrower of money lent to him to which either of these sections applies should be held illegal or unenforcible, as the case may be, may declare that such transaction is legal or that such contract is enforcible.

This provision contains no reference to the public interest or to such related factors as the object of the enactment or the penalties provided for breach. Any decision under this section turns purely on its being equitable. This leaves greater scope for justice as between the parties, and this is evident from the cases. In *Ross Cole Investment Corporation Ltd* v. *New Fashions Ltd* McCarthy J. stated:[69]

> In my view, having regard to the purpose of the section, "the circumstances" to which the court should have regard are the circumstances in which the transaction was entered into, and the nature, extent, and effect, other than that arising merely by virtue of ss. 7 and 8, of the non-compliance.

In *Birch* v. *Shaw*[70] the court balanced the fact that the moneylender ought to have known better than to lend money without issuing an accompanying memo with the fact that the borrower knew exactly the nature of the transaction which he was entering into. On the facts, justice as between the parties necessitated the discretion's being exercised, and it was.

The further problem arises as to whether a financial institution which is not registered as a moneylender and accordingly has not issued a memorandum on a bill transaction which is subsequently

69 [1958] N.Z.L.R. 55, 58.
70 [1963] N.Z.L.R. 926.

found to be moneylending, is entitled to have this discretion exercised in its favour. The question was dealt with in *Slobbe's* case[71] where it was found that the reference to "moneylender" in section 8 of the Moneylenders Act 1908 cannot be construed as "registered moneylender" so that the discretion may be exercised.

Accordingly, in the case of a contract rendered unenforceable due to there being no memorandum issued, the court is likely to enforce it provided that justice as between the parties demands it. However, this may not be so in the case of a lending transaction undertaken by an unregistered moneylender. The element of public interest, inappropriate though it may be in the context of civil proceedings may preclude.

VI. The Problems in Perspective

It is evident that the use of commercial bills of exchange for finance purposes stands on uncertain legal foundations. The view that the problems caused by the Moneylenders Act 1908 are rendered rather academic because the courts have a sufficiently wide discretion to rectify awkward situations may be true. (This writer thinks not.) However, to allow things to continue as they are, relying on the court to exercise its discretion in the event of anything going wrong, would be gross folly.

It is submitted that the problem may be resolved by adopting one of two possible courses. The first is to accept that the transaction between the financial intermediary and the company raising funds is, in fact, moneylending, and document it as such. Alternatively, bill transactions may be structured in the manner in which it has traditionally been done on the London money-market. That is, for a company raising funds to draw a bill on an acceptance house. The acceptance house accepts the bill for a fee, and the company may discount it direct onto the market. The acceptance house may or may not undertake to find a purchaser for the bill. This avoids having to document the transaction as moneylending, a requirement which seems unreasonable in view of the limited benefits accruing to a company raising funds. A solution may, however, be found in considering the enactment itself.

It is difficult to conceive of any benefit accruing to a large corporation through having the Moneylenders Act 1908 complied with in every respect, as regards its commercial bill discount facility. The only change would probably be an increase in the cost of credit, particularly with a secured bill line, where the security would have to be re-issued on every rollover date. On the other hand, if bills accepted by the

[71] [1972] N.Z.L.R. 354, 362.

company raising funds are to continue to be widely used, it is difficult to conceive of a way by which such transactions could be exempted from the Act. As has already been stated, it is clearly not practicable to exempt corporate borrowers. To exempt bill transactions per se would be to leave the situation open to abuse. There would be nothing to prevent credit being extended to the very people to whom the Act is directed, through the medium of discounting bills.

Perhaps the most disturbing element in commercial bill transactions, is that the the investor is left largely unprotected. The investor will suffer if a transaction is found to be tainted by illegality, so that it is important, for his sake at least, that the problems created by this enactment are resolved. This, however, still leaves him open to abuse by the intermediary overselling a bill line. The further problem of how secure a "secured" bill line is must be resolved and steps taken to prevent misleading advertising. It may be that the size of the bill market in New Zealand now justifies legislation aimed at protecting the investor.

The growth of the commercial bills market in New Zealand has been remarkable. However, it is unfortunate that so little attention has been paid to its legal foundations. It is to be hoped that no problem actually occurs before this problem is rectified, because if it does, quite apart from the fact that many individuals and corporations will be badly hurt, the market will fall, even more quickly than it arose.

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