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England Lond. 1833
[An] on Money, its Origin and Use. Lond. 1833
[A] to the Rt. Hon. the Viscount Althorp, and his proposed interference with the present system of County Banking, by a County Banker. Lond. 1833
[A] on the Evidence taken before the committee of secrecy of the House of Commons on the Bank of England Charter Lond. 1833
[A] for a Plan for amending the system of Taxation. Birmingham, 1833
[A] for immediately reducing the National Debt and Taxation; by an alteration in the value of the Currency, and the adoption of a secure Banking system. Lond. 1833
[A] into the causes of the present distress arising from Taxation, Free Trade, or Currency. Lond. 1833
[A] of Sir James Scarlett, Sir S. B. Lyndal and Mr. Richards, on the Privilege of the Bank of England Lond. 1833
[A] and Plan of the National Bank of

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OPINIONS

OF

SIR JAMES SCARLETT,

SIR EDWARD B. SUGDEN,

AND

MR. RICHARDS,

ON THE

PRIVILEGE

OF THE

BANK OF ENGLAND.

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READ AT

A GENERAL COURT OF PROPRIETORS,

16th AUGUST, 1833.

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1833.



## OPINION OF Sir JAMES SCARLETT,

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YOUR OPINION is requested,

1. Whether under the existing laws, a Joint Stock Deposit Bank can be established in London, or within sixty-five miles thereof?
2. If Joint Stock Banks of Deposit should be formed, and find it impracticable to prosecute their object without the power of suing in the name of a public officer, could Parliament confer such privilege without a violation of the provision contained in the 39th and 40th Geo. 3, c. 28, s. 15.?

### OPINION.

If this question turned exclusively upon the words, "borrow, owe, or take up money upon their notes or bills payable on demand, or at a less time than six months," I should have thought it very doubtful whether any number of persons, or any Joint Stock Company, were

restrained from any other operation of banking than such as appear to fall precisely within those words, and I own that my impression would have been, that Joint Stock and other Companies were not restrained from carrying on any business of banking which might have been consistent with refraining from owing money upon their notes or bills, at a less date than six months. But upon consideration of the other words, with which these words are connected ; and of the provisions in the earlier Acts of Parliament relating to the Bank of England, I am obliged to come to a very different conclusion: and upon the best consideration I have been able to give to the subject, it is my opinion that the words above cited were intended to restrain such Corporations or Societies as did not profess to be banks, from interfering with that part of the business of the Bank of England, which consisted of issuing notes payable on demand, or at short dates ; in other words, that the establishment of rival Banks was understood to be generally prohibited by other provisions; and that these words were introduced as a cumulative protection, and in order to defeat an evasion that had been attempted of one of the exclusive privileges of the Bank.

The Statute of 8th and 9th William III.

c. 20, s. 18, enacts, "That during the continuance [of the Corporation of the Governor and Company of the Bank of England, no other Bank, \* or any other other Corporation, Society, Fellowship, Company, or Constitution, in the nature of a Bank, shall be erected, established, permitted, suffered, countenanced, or allowed, by Act of Parliament, within this Kingdom." This clause is surely inconsistent with a declaration by Act of Parliament, that Corporations or Joint Stock Companies may lawfully transact any part of the business of a Bank.

The statutes which follow this of William III. continue the Corporation and the exclusive privileges of the Bank of England from time to time, and it is remarkable that the very next statute which passed upon the subject, viz. 6 Anne, c. 22, s. 9, recites the occasion of

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\* I apprehend that the term *Bank* was not at the time of this statute applied to what is now an ordinary banker's shop; —these were called goldsmiths' shops, and the word *Bank* implied something in the nature of an establishment formed by general subscription or public authority. This is illustrated by the words in the same clause, "*Company or Constitution*" in the nature of a Bank. A private banking establishment was therefore not called a *Bank*, but if it consisted of a large number of persons, was called a *Company or Constitution* in the nature of a Bank.—J. S.

first introducing those words upon which the doubt now arises, and which I have cited at the commencement of this opinion. I think it cannot be supposed, upon looking at this statute of Queen Anne, that it was the intention of the legislature to diminish any exclusive privilege the Bank of England then possessed—except so far as by implication a permission was given to a number of partners, not exceeding six, to owe and take up money upon their notes. On the contrary, the statute recites in the preamble to the clause the former enactment of 8 and 9 William III. which the legislature appears to have thought a sufficient prohibition of all parts of the business of banking by other Corporations or Societies than the Bank of England, and then adds the words, “Nevertheless, since the passing of the said Act some Corporations, by colour of their charters, and other great number of persons, by pretence of deeds or covenants, united together, have presumed to borrow great sums of money, and therewith, contrary to the said Act, to *deal as a Bank*, &c. &c. now for the prevention thereof, be it enacted, that it shall not be lawful for any body politic or corporate whatsoever, other than the Bank of England, or for other persons whatsoever, united or to be united in covenants or partnership exceed-

ing the number of six persons, to borrow, owe, or take up any sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof.” Now upon consideration of these words, here for the first time introduced with reference to the former Act of King William, and to the recitals in the preamble of the clause in the statute of Anne, where these words are introduced, one of two conclusions appears to my judgment inevitable.—Either the Legislature considered the whole operation and essence of *dealing as a bank* to consist of borrowing and owing money upon notes and bills at short dates, and in that case it meant by these words to prohibit banking altogether by any corporation or partnership exceeding six, or it considered this traffic in borrowing money as only a *part* of the operation of banking, in which case it must have been the opinion of the Legislature that the Act of King William, which it referred to and recited, had been found sufficient to protect the Bank from all other competition in the business of banking, excepting that described by the words of the further prohibition now introduced. The words in question, therefore, were not and could not be intended to limit or diminish the exclusive privileges of the Bank of England, but *more effectually* to protect

them, by prohibiting not only all professed rival *banks of deposit*, but all corporations or societies which, under other names, and with other professed objects, had evaded the statute of William the Third, by undertaking to *deal in that part* of the business of the Bank which consisted of issuing notes or bills for money borrowed.

Now these words, when repeated in subsequent statutes, which in general terms confirm the privileges of the Bank of England, cannot be interpreted in a different sense from that which they bear in the statute from which they were copied, and where they were fully explained by the preamble and the reference to the Act of 8 & 9 William III. I must therefore state it as my opinion, that so far as these words go, when rightly understood, they do by no means justify a conclusion that the Legislature intended to confine the exclusive privilege of the Bank of England to the power of issuing Notes or Bills at short dates, and to leave open to all other Corporations or Societies the power of doing any other of the proper business of a Bank.

But then comes the statute of the 15th Geo. II. c. 13., which after enacting in general terms, that the Bank of England shall have the ex-

clusive privilege of Banking as a Corporation, proceeds in the 15th section, to enact as follows : “ To prevent any doubts that may arise concerning the privilege or power given by former Acts of Parliament to the Governor and Company of the Bank of England, of *exclusive* BANKING ; and also in regard to the erecting any other bank or banks by Parliament, or restraining other persons from banking during the continuance of the said privilege granted to the Governor and Company of the Bank of England as aforesaid, be it enacted, that it is the true intent and meaning of this Act, that no other bank shall be *erected, established,* or ALLOWED by Parliament; and that it shall not be lawful for any body politic or corporate, (here the words of the statute of Anne are copied) during the continuance of such said privilege to the said Governor and Company, who are hereby declared to be and remain a Corporation, with the privilege of exclusive banking, as before recited,” &c. &c.

Now this Act, the terms of which are adopted in those which follow it upon the same subject, appears to me, when taken together with and in reference to the former Acts, to confirm the opinion I have formed upon the effect of those former Acts. It professes a design to remove all doubts as to the *exclusive privilege of*

BANKING given to the Bank of England, and as to the restraining other persons from *banking*, it declares that no other bank shall be erected, established, or *allowed* by Parliament—and it finally declares that the Bank of England is to be and remain a Corporation, with the privilege of *exclusive* banking. It is manifest that the words *bank* and *banking* are here used in the most universal sense that can be applied to them,—embracing as well that part of the business of banking which consists of receiving deposits, as that which consists of issuing notes or bills for money borrowed. How then can it be consistent with the direct enactment, that this exclusive privilege of banking, as well by the one mode as the other, shall belong to the Bank of England, to declare by a subsequent act that it was intended to confine the exclusive privilege only to the borrowing money upon notes and bills, and to leave that of accepting deposits open to all the world? It is plain, therefore, to my apprehension, that the words copied into this and the subsequent Acts from the statute of 6 Anne c. 22, cannot be subjected to a new and different interpretation from that which I have suggested as belonging to them in that statute; but on the contrary, that the accompanying words and clauses in the more modern

Acts tend to corroborate the conclusion that the general exclusive power of banking in all its branches, was prohibited to all other Corporations, or Societies, or Companies, than the Governor and Company of the Bank of England; and that the better to secure and protect that exclusive privilege in the Bank, all other Corporations or Societies, exceeding six in number, whatever might be their professed objects, should be restrained from owing money upon notes or bills at short dates, and therewith or thereby *dealing* in any respect as Banks.

2. It follows, from what I have stated as my opinion, on the first query, that any facility given by Parliament, to any operation of banking, by a Joint Stock Company, would be a direct violation of the words and spirit of the statute of 39th and 40th Geo. III., c. 28, s. 15.

I must add, in concluding, that after what has been stated of the doubts which exist on these points, it becomes me to express more diffidence in the opinion I entertain upon them, than I should otherwise have felt.

J. SCARLETT,  
*Abinger Hall,*

15th August, 1833.

OPINION OF  
 Sir EDWARD B. SUGDEN, & Mr. RICHARDS.

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YOUR OPINION is requested,

1. Whether, under the existing Laws, a Joint Stock Deposit Bank can be established in London, or within sixty-five miles thereof?
2. If Joint Stock Banks of Deposit should be formed, and find it impracticable to prosecute their object without the power of suing in the name of a Public Officer, could Parliament confer such a privilege without a violation of the Provision contained in the 39th and 40th Geo. 3, c. 28, s. 15.?

OPINION.

WE ARE OF OPINION, that under the existing Laws a Partnership or Company exceeding six persons cannot carry on a Joint Stock Deposit Bank in London, or within sixty-five miles thereof. The original provision was, that the Bank of England, and no other Bank or any other Corporation, &c. in the nature of

a Bank, should be allowed by Act of Parliament within the Kingdom. This was the only provision. It was treated as clear that no Bank, properly so called, could be established without the authority of Parliament. As this exclusive privilege was broken in upon by Corporations, and great numbers of persons presuming to borrow great sums, and therewith *contrary to the intent of the Act*, dealing as a Bank, the prohibition was enacted against any other Corporation than the Bank, or any other persons exceeding six in number, borrowing, owing, or taking up any sum of money on their Bills or Notes, payable at any less time than six months from the borrowing thereof. This was a fence thrown around the former provision, but in no manner weakened its original force. The prohibition is not confined to Bankers, but extends to all Corporations and Companies. These two provisions were repeated in later times. No other Bank was to be erected, established, or allowed by Parliament, and the Bank of England was to be and remain a Corporation, "with the privilege of exclusive Banking." This exclusive privilege was so far limited by the 7th of Geo. IV. as to allow any Corporation erected for the purposes of Banking, or any number of persons in partnership, although exceeding

six in number, to carry on the business of Bankers in England, and to make and issue their Bills at any place in England, exceeding sixty-five miles from London, payable on demand, &c.; but they were not to have any establishment as Bankers in London, or at any place not exceeding sixty-five miles from London. This exception still left the former prohibitions untouched as regarded Bankers within sixty-five miles of London, and the Act creating the exception carefully reserved to the Bank all their other rights. The Government now professing only to clear up doubts which exist as to the construction of the Bank Acts, proposes to enact, that any Corporation or Partnership, although consisting of more than six persons, may carry on the business of Banking in London, or within sixty-five miles thereof, with a repetition of the prohibition against their borrowing any money on their Bills, payable at any less time than six months. We are clearly of opinion, that this would be a direct violation of the rights of the Bank of England. If we contrast the present Law with the Law as it is proposed (*in order to clear up doubts*) to be declared, it would stand thus :—

*The present Law.*

The Bank of England to be the only Bank authorized by Parliament to have the exclusive privilege of Banking.

No other Corporation nor any Company exceeding six persons to borrow, &c. any money on Bills payable in less than six months.

Unless their Establishment is more than 65 miles from London, and that their Bills are issued at a greater distance from London than 65 miles.

*The Law now proposed*

The Bank of England not to be the only Bank allowed by Parliament.

But Parliament now to declare, that any Corporation or Partnership, although exceeding six persons, may carry on the trade of Banking any where in England

With a simple prohibition against their borrowing any money upon their Bills payable in less than six months if they carry on their trade in London or within 6 miles of it.

This, in our opinion, is entirely to change the Law under the colour of clearing up doubts upon it. The exclusive privileges of the Bank of England are not confined to its powers as a Bank of Issue, but extend as well to its rights as a Bank of Deposit; and the policy of our Government has hitherto forbidden the establishment of Joint Stock Banks, even of Deposit. If the Law were as it is proposed to be declared, the Provisions in the various Bank Acts could not have assumed their present shape. At the very outset the right of Parliament to allow the establishment of Banks of

Deposit, must have been declared, and more especially the 7th of George the 4th could not have been framed as it stands. It enables the establishment of Banks in England consisting of more than six Partners, and authorizes them to issue Bills at any place exceeding 65 miles from London, provided that they have no House of Business, as Bankers, in London, or at any place not exceeding 65 miles from London.

The first provision therefore, as to establishing Banks, is general and without restraint, and the power to issue Bills at any place exceeding 65 miles from London, is also general, but the prohibition limits the last mentioned power to firms, all of whose establishments are more than 65 miles from London.

Now, if the new view be the correct one, the power to issue Bills payable in less than six months, would have been confined in the first instance to those Bankers who carried on their business wholly at a distance exceeding 65 miles from London, and there would have been no prohibiting proviso. It is quite clear that neither the framers of the various Bank Acts, nor the Legislature in passing those Acts, took the view of the Law which the Government now considers the correct one; and the general opinion of the community has always been

against the right now claimed. This is proved in the strongest manner by the acts of the monied men in England, contrary to their wishes and interests. Great weight surely is due to an universal practice during a century and a quarter, and contemporaneous usage has always been considered to be entitled to great attention.

If the Bank Acts could have borne the construction now put upon them, is it not probable that some of the vast capital thrown away in late years in bubble companies would have been applied to the object of Joint Stock Deposit Banks in London? It may be right to observe that the private trade of Bankers who succeeded to the Goldsmiths, is not prohibited by the Bank Acts. Their establishments, as they are conducted, do not constitute a *Bank* within the provision of the Acts. But they have in practice been confined to six persons. This does not arise from any express prohibition, but may have been occasioned by the prohibition against more than six persons owing any money on any bill payable in less than six months, which practically may interfere with the common course of a private Banker's business; or it may, by an easy analogy, have been considered that the establishment of a company of more than six for any banking purpose

would be a Bank struck at by the Acts of Parliament. It is manifest that even a Bank of Deposit could not be managed without some Parliamentary or Royal sanction. Of course no Royal sanction could be given to any such Bank whilst the present Bank Acts remain unrepealed; but the proposed *declaration* would give a Parliamentary sanction to such establishments, and that would obviously lead to other provisions in their favor. The 7th Geo. IV. is a Parliamentary recognition that a Bank of more than six could not have been established without the aid of the Legislature, for it starts with an enactment authorizing the establishment and carrying on of such Banks “*in like manner as copartnerships of Bankers, consisting of not more than six persons in number may lawfully do*”—and the Government, in the first draft of their Bill, so treated the law. Upon the whole, in our opinion, the proposed clause is not a declaration, as it professes to be, of the existing law, but a repeal of that law and a substitution of a new one, and is in plain opposition to the terms of the contract as originally proposed by the Government to the Bank.

EDW<sup>d</sup>. B. SUGDEN,  
GRIFFITH RICHARDS.

16th August, 1833.

By Order,  
JOHN KNIGHT, Sec.











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