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# Articles 4 and 8 of the Uniform Commercial Code

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# ARTICLES 4 AND 8 OF THE UNIFORM COMMERCIAL CODE

*Norman Penney\**

## BANK-CUSTOMER RELATIONSHIP

Article 4 of the Uniform Commercial Code represents a culmination of extensive efforts to achieve uniformity in the law governing bank deposits and collections. It is divided into two segments, one governing bank collections and the other the relationship between banks and their customers.

I do not plan to discuss that portion of the article which deals with bank collections. I will limit my discussion to part 4 dealing with the bank-customer relationship. This subject matter is more controversial and more interesting; it is of concern to a much broader segment of the legal profession whereas the bank collection area has already received some attention in Louisiana periodicals, including your own.

I would like to make two points before I begin:

- (1) As distinct from many states considering Code adoption, Louisiana already has statutes impinging upon several of the problems dealt with by the bank-customer relationship provisions of article 4.<sup>1</sup>
- (2) Although article 4 provides specifically for adaptation to changes in banking practices,<sup>2</sup> it may well be that many of the rules codified in this statute will be of little relevance in another decade or two.

### *A. Overdrafts (4-401)*

The Code permits a bank to charge properly payable checks to its customer's account, even though the charge produces an overdraft.<sup>3</sup> There are no provisions in the Code governing the propriety of permitting overdrafts and presumably the present Louisiana statute making it a criminal offense for a bank offi-

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1. LA. R. S. 6:36, 42, 51, 52 (1950).

2. UNIFORM COMMERCIAL CODE § 4-103(2)(3).

3. *Id.* § 4-401(1).

cer to knowingly permit total unsecured overdrafts beyond ten per cent of capital stock and declared surplus would be unaffected.<sup>4</sup> The law of Louisiana<sup>5</sup> and most jurisdictions regards the overdraft as analogous to a loan with an implied promise to reimburse the bank.

### *B. Wrongful Dishonor (4-402)*

Louisiana does not have a statute on the subject of wrongful dishonor. The common law rule in Louisiana,<sup>6</sup> permitting a merchant or trader to recover substantial damages for the wrongful dishonor of his check without the necessity of proving actual damages, would be abandoned under the Code. Also abandoned would be the award of nominal damages to non-traders where only a technical breach is found.<sup>7</sup> The Code, however, does add a novel provision permitting recovery of damages for arrest or prosecution resulting from wrongful dishonor.<sup>8</sup>

### *C. Stop Payment (4-403)*

The provisions which have aroused the greatest amount of controversy are those dealing with stop-payment orders. Louisiana's statute limits the effectiveness of stop payment orders to ninety days, with a right to renew from time to time in writing.<sup>9</sup> Although the word "service" in the Louisiana statute may lend support to the argument that only written stop orders need be recognized, the later specific requirements for renewals in writing argue more strongly for the recognition of oral stop orders in the first instance. No Louisiana court has passed on this question. The Code makes oral stop orders effective for fourteen days.<sup>10</sup> The order may be made effective for an additional period of six months by service of a written order within the fourteen-day period. As with the present Louisiana statute, the order may be extended indefinitely by additional writings, but the Code's renewal period is six months rather than ninety days.<sup>11</sup>

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4. LA. R. S. 6:51 (1950).

5. *Caddo Trust & Savings Bank v. Bush*, 182 So. 397 (La. App. 2d Cir. 1938).

6. *Galloway v. Vivian State Bank*, 168 La. 691, 123 So. 126 (1929).

7. *Spearing v. Whitney-Central National Bank*, 129 La. 607, 56 So. 548 (1911).

8. See PATON, DIGEST, Checks § 21. D:2 for collection of cases (Supp. 1963).

9. LA. R. S. 6:42 (1950).

10. UNIFORM COMMERCIAL CODE § 4-403(2).

11. *Ibid.*

*D. Subrogation (4-407)*

Suppose I were to purchase a T.V. set, giving my check in payment. If after I bring it home, it refuses to work, I might be tempted to stop payment on the check. If I do properly stop payment and the bank nevertheless, by inadvertence, pays the check, most jurisdictions, before adoption of the Code, would permit me to both keep the T.V. set and require the bank to restore the funds paid on the stopped check to my account.<sup>12</sup> This resulted from the court's strict view of the bank-customer relationship and an almost universal refusal to apply the doctrine of subrogation to this fact pattern. Louisiana and New Jersey alleviated the harshness of this rule by providing the innocent though negligent bank with a statutory right of subrogation.<sup>13</sup> The Code follows this same pattern and at least in this respect would provide no change in Louisiana law.

There are no Louisiana cases ruling on the propriety of exculpation clauses in stop-payment orders. This has been a heated battleground for bankers in many of the United States. The great majority of jurisdictions, and all the recent cases have ruled such clauses invalid either for violation of public policy or lack of consideration.<sup>14</sup> The Code codifies this widely followed policy determination but leaves some leeway to bankers in permitting them to fix "standards of care that are not manifestly unreasonable."<sup>15</sup> As I have suggested elsewhere, an imaginative use of this opening wedge may permit the banks to cut their stop-payment losses substantially.<sup>16</sup>

*E. Stale Checks (4-404)*

Both the Louisiana Revised Statutes and the Uniform Commercial Code have provisions dealing with stale checks.<sup>17</sup> These statutes seek to alleviate the plight of a bank when it is presented with a several month old check, is unable to reach its cus-

12. *American Defense Society v. Sherman National Bank of New York*, 225 N.Y. 506, 122 N.E. 695 (1919), and Note, 45 YALE L.J. 1134 (1936). See also 2 N.Y. LAW REV. COMM'N REP. 1467 (1955), and Comment, 20 U. CHI. L. REV. 667 (1953).

13. LA. R. S. 6:42 (1950); N.J. STAT. ANN. 17:9 A-225(B)(4) (1953) (N.J. Statute replaced by Uniform Commercial Code § 4-407, eff. Jan. 1, 1963).

14. The cases are collected in 3 PATON, DIGEST 3469 (1944), and Supp. (1954) (*Stopping Payment*, § 7:1).

15. UNIFORM COMMERCIAL CODE § 4-103(1).

16. HOGAN & PENNEY, N.Y. STATE SUPP. TO BANKS AND THE UNIFORM COMMERCIAL CODE 45 (N. Y. State Banker's Ass'n 1964).

17. LA. R. S. 6:52 (1950); UNIFORM COMMERCIAL CODE § 4-404.

tomers, and is faced with the possibility of either a suit for wrongful dishonor or a stale check claim. The Code provides that a bank may refuse to pay a check which is more than six months old, but it is protected in paying a check dated more than six months earlier if it does so in "good faith."<sup>18</sup> The post-six months clause was undoubtedly designed to permit banks to pay checks as to which they could reasonably infer their customers intent to pay, such as checks made payable to tax collectors, insurance companies, and the like. The Louisiana statute protects banks for refusal to pay checks dated a year or more before presentment, unless the bank receives express instructions to pay.<sup>19</sup> There is no provision affecting the bank's liability if it does choose to pay after the passage of a year and I was able to find no Louisiana cases charging banks for the payment of "stale" checks.<sup>20</sup> A six-month period seems more realistic for checks than a year. Certainly no one would have cause to object to a halving of the one-year time period in Louisiana if given the Code's escape clause for good faith payments.

*F. Payment of Checks After Death or Incompetence of Customer (4-405)*

There appear to be neither cases nor statutes in Louisiana on the question of a bank's duty or right to pay checks after the customer's death. The Code codifies what appears to be the majority rule protecting banks in paying checks until they learn of their customer's death<sup>21</sup> and adds a provision, comparable to some state statutes,<sup>22</sup> permitting a bank to pay even after learning of the customer's death if they do so within a ten-day period measured from the day of the customer's death.<sup>23</sup>

*G. Duty to Examine Returned Vouchers (4-406)*

The Code, in subsection 4-406(1), imposes an affirmative duty on the customer to discover and report unauthorized sig-

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18. UNIFORM COMMERCIAL CODE § 4-404.

19. LA. R. S. 6:52 (1950).

20. The only related case concludes that a check is not "overdue" when bought six days after its date of issuance. *Hammond State Bank v. Perrin & Pierrepoint*, 1 La. App. 108 (Orl. Cir. 1924).

21. *Glennan v. Rochester Trust & Safe Deposit Co.*, 209 N.Y. 12, 102 N.E. 537 (1913); 1 PATON, DIGEST 1079-81 (1944).

22. See the statutes collected by Leary, *Some Clarifications in the Law of Commercial Paper under the Proposed Uniform Commercial Code*, 97 U. PA. L. REV. 354, 369-70 (1949).

23. UNIFORM COMMERCIAL CODE § 4-405(2).

natures and alterations. A failure to examine and report such irregularities relieves the bank as to items bearing forged signatures or alterations. Until he notifies the bank, the customer who does not exercise reasonable care and promptness is also precluded from asserting unauthorized signatures or alterations by the same wrongdoer on items paid by the payor bank, if the first item and statement were available to that customer for a reasonable period, not exceeding fourteen calendar days.<sup>24</sup> The Code adds a provision barring any action against a bank for claims arising from alterations or forgeries of the drawer's signature after one year and barring actions based on forged and unauthorized indorsements after three years.<sup>25</sup>

The Code differs from the comparable Louisiana statutes in several respects: (1) The Code provisions relate to "items," a broader term than "checks" as treated in the Louisiana statute<sup>26</sup> concerning forged or raised checks, etc. (2) The Code includes any alterations, not mere "raising."<sup>27</sup> (3) The Code provides a statute of limitation for forged indorsements (three years) where there is no such provision under Louisiana law. (4) Whereas the Code provision imposing the affirmative duty to examine vouchers relates solely to discovery of forgeries and alterations, the Louisiana statute requires examination for and report of "any errors," a somewhat broader responsibility. (5) Although the Louisiana statute has no fourteen-day time period comparable to the provision in section 4-406 (2) (b), it does seem to bar customer claims as to later checks forged or altered by the same wrongdoer. There is decisional law in Louisiana and several other jurisdictions in accord with this latter rule.<sup>28</sup>

The limitation of the Code rule to losses caused by forgery or alteration leaves a troublesome gap as to at least one type of related problem. This may be illustrated by the recent case of *McKenzie & Mouk, Inc. v. Ouachita Nat'l Bank in Monroe*.<sup>29</sup> An insurance agency had maintained its checking account with the defendant bank for ten years. Mrs. Snapp had the responsibility for handling the agency's books of account and bank state-

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24. *Id.* § 4-406 (2) (b).

25. *Id.* § 4-406 (4).

26. Compare UNIFORM COMMERCIAL CODE § 4-406 with LA. R. S. 6:53 (1950).

27. *Ibid.*

28. *Israel v. State National Bank of New Orleans*, 124 La. 885, 50 So. 783 (1909).

29. *McKenzie & Mouk, Inc. v. Ouachita Nat'l Bank in Monroe*, 159 So.2d 304 (La. App. 2d Cir. 1963), *aff'd*, 245 La. 732, 160 So.2d 595 (1964).

ments but she violated her trust by embezzling over twelve thousand dollars from her employer in a great many small transactions. She would make deposits with the bank listing and totaling the checks and then add an entry reading "less cash" for a small amount, usually under \$50, which she received from the cash tellers, telling them that this was cash needed for the business. Although Mrs. Snapp's defalcations could have been discovered by a proper audit at an earlier time, she was only detected when a check on her books was made when she became ill in October of 1960. The bank was notified on December 2, 1960, one day after Mrs. Snapp's death. The court held that the insurance agency was in the best position to check the deposit slips and would therefore have to bear the loss. Although not specifically covered, the result seems consistent with the present Louisiana statute.<sup>30</sup> A more recent Texas case,<sup>31</sup> also involving an embezzling employee's use of the "less cash" *modus operandi*, was similarly decided in favor of the bank on the ground that it was the duty of the depositor to examine his books and statements and report any errors to the bank with "reasonable promptness."

The Code provision requiring examination of statements and items simply does not cover this situation. It may well be that the present Louisiana statute doesn't cover it either, but it certainly presents many more hand-holds for its applicability than the Code. However, if the Code were adopted and this kind of case or another non-covered case arose, a gap-filling argument for the bank could be made by invoking the Code's "supplementary general principles of law" provision, to permit the rule of the *McKenzie* case to be applied. It could certainly be argued that there is a general obligation of a customer to examine and reconcile its statements and perform the other routine and reasonable bookkeeping procedures that would bring such defalcations to light.

The Code does offer some sensible rules regulating the bank-customer relationship and in the case of Louisiana these rules do not represent a drastic upheaval. Although the Code is very well adapted to the latest practices in the banking industry, the industry is revolutionizing its practices so rapidly that the statute may soon become outdated.

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30. See LA. R. S. 6:36 (1950).

31. *First National Bank in Graham v. Fultz*, 380 S.W. 2d 894 (Tex. Civ. App. 1964).

I would like to deal briefly with some of these developments. Let me first summarize the essentials of electronic check handling. At present, provision is made for the encoding of magnetic numerals in three separate "fields" or segments at the bottom of a check. Two fields are normally pre-encoded at the time of printing, one identifying the payor bank by transit number, the other identifying the customer with an arbitrary number assigned to his account. The third field is for the amount, and ideally its encoding will occur at the time the first bank with appropriate equipment receives it in the course of collection. When the system is fully operative, not only may payment be enormously facilitated by the substitution of a computer for rows of girls each with file drawers full of ledgers, but transfers between banks will be greatly facilitated as well. Banks in the chain of collection will automatically prove totals on batches of checks, sort the items by destination, list them, total them, prepare the so-called "cash letter," and record the bank's endorsement.<sup>32</sup> This system produces some new problems such as what to do about encoding errors; but let's go back to part 4 of article 4, and, in particular, to section 4-406 and the rule requiring a customer to examine his statement and returned checks.

At an ABA automation conference in March, a New York banker suggested that banks discontinue the practice of returning checks to their customers.<sup>33</sup> He advocated the inclusion of a fourth item of information in the magnetized symbols, namely, the serial number of the customer's check. Magnetic serial numbers would be put on all checks at the time they are printed. Customers would receive a periodic statement of paid checks listed in the sequence in which he or she issued them rather than having the paid and canceled checks returned to him with the statement. The banker argued that it was time "to help a customer locate an outstanding check, not by making him sort paid checks, but by sending him a statement identifying each paid check with its serial number and placing an asterisk at the place where an outstanding check would have appeared had it been paid." He mentioned that this was already being done for many large corporate customers. Rather than returning the

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32. CLARKE, BAILEY & YOUNG, *BANK DEPOSITS AND COLLECTIONS* 175 (1963).

33. Lawrence E. Davies, A bylined special to the N.Y. Times March 9, 1965 datelined San Francisco referring to a talk given by W. Putnam Livingstone, Vice President of the Banker's Trust Company.



checks the bank would keep them and have them available for the customer upon request. Consider this suggestion in the light of section 4-406. There would obviously be no opportunity for the customer to examine the items to discover alterations or forgeries. The only alteration which the customer could detect would be with respect to the amount. If a check were raised it would be immediately discernible, since the customer would be able to compare individual items with his check stubs, and compare the bank's balance with his own. With this exception, however, most of section 4-406 would be outdated. The bank would continue to be liable for paying checks bearing forged drawer's or indorser's signatures, or items otherwise not in accord with the customer's instructions. Banks would have to be prepared to absorb losses discoverable only by the customer's examination of the checks themselves. It came as somewhat of a shock to me recently to discover that many computerized banks do not manually verify customer's signatures, and apparently there has not yet been developed a sufficiently accurate electronic signature reader to do the job for them. This means that many banks are gambling on the validity of their customer's signatures, apparently prepared to absorb any losses on forged items as the price for the increased efficiency in check handling in the payment process. It also means that if the New York banker's suggestion on returning checks is pursued, many checks will never again be touched by human hands or seen by human eyes once they are fed into the maws of electronic check-handling equipment.

There is a secondary effect on the increased reliance on magnetic markings. It argues for putting a duty of care upon the customer to safeguard his pre-encoded checks. If he is careless with them but seeks to impose liability upon his bank for failing to heed his instructions, the bank ought to, and probably will, be able to defeat the customer's claim.<sup>34</sup>

There are other areas in which electronic check-handling practices have produced and will produce legal problems not covered by article 4. John Clarke of the Federal Reserve Bank of New York has been responsible for several articles and talks on the problems of formulating rules for allocating encoding

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34. See Fried, *Some Legal Implications of the Use of Computers in the Banking Business*, 81 *BANKING L.J.* 753, 762 (1964).

error losses.<sup>35</sup> The most straightforward suggestion is to place the loss upon the bank that encoded the check with the amount varying from the figure inscribed by the customer. Other problems have to do with check certifications and stop payments which have long been thorns in the flesh of the banking industry. Electronic check handling has only served to accentuate bankers' difficulties with respect to these services and increase the vociferousness of the bankers in their arguments for their abandonment.

Check certifications present an increased hazard because of the relative ease with which a double debit to a customer's account may occur through human or mechanical error in failing to appropriately signal the computer not to debit the customer's account a second time when the check is processed for payment. The bank may suffer wrongful dishonor liability when its customer's account is reduced by twice the amount of the certified check and subsequent checks are "bounced."<sup>36</sup>

Stop payments present technical problems similar to certification with a variation in that here, along with the risks of human errors made by bank personnel, there are additional headaches in precisely identifying the check to be stopped. An error of one cent or the transposition of figures in any of the digits in the amount column may result in the bank's failure to pick up the stopped item with its automatic equipment. Although many of these banks would undoubtedly escape liability to their customers for violating stop payment orders, the substantial possibilities for error with resultant damage to customer relations cause bankers many sleepless nights. Where the loss is caused by human error of a bank employee or by malfunction of the automated system, the banks are not able to avoid liability with the use of exculpation clauses. If the bankers' battle to discontinue or curtail stop payment privileges is won, sections 4-103, 4-403, and 4-407 will require re-examination.

Let me mention two more lines of development that may leave the Code far behind. First, remote electronic presentment through the Federal Reserve Banks is now being seriously discussed. Rather than ship so-called transit items all over the country for collection, they would be fed into an electronic reader

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35. See CLARK, BAILEY & YOUNG, *BANK DEPOSITS AND COLLECTIONS* 174, and articles cited 174, n.1 (1963).

36. See Windsor, *The Certified Check, A Special Handling Item in Automation*, 81 *BANKING L.J.* 480 (1964).

at the Federal Reserve Bank serving the bank which takes the item for collection. This reader would be connected to other federal reserve banks all over the country, which in turn would have connections to all computerized payor banks in their respective districts. The "payment" would be made electronically at that time with a debit to the taped customer's account in the payor's computer. The checks might be sent along later, but much of the banking industry's preoccupation with the "float," that is, the amount outstanding on uncollected checks at any one time, would be rendered moot. There is even some discussion about pushing back the reading process to the first bank taker that has a line into the national network connecting the computers. Also under discussion is the possibility of not shipping the checks to the payor bank at all, but rather storing them at a place where they are electronically read and then destroying them after an appropriate time period has elapsed. Down the drain would go the commercial bank's arguments for the use of checks in paying bills because of their value as receipts. Unless signature-reading equipment is developed, we would also have to give up many of our present rules tied to signature verification. It could be argued, however, that signatures are not verified now in most computerized banks, so there would be nothing lost on that score if remote electronic presentment were introduced.

If remote electronic presentment strikes you as far removed from reality, let me tell you about plans for doing away with checks altogether in most transactions where checks are now used. At the convention of the American Bankers Association last October, the Bell Telephone Division of American Telephone and Telegraph Company demonstrated equipment which would permit people to pay their bills electronically, in seconds, by telephone. Users of this service would be supplied with special telephones with receiving slots in the back and pushbuttons rather than a dial. By inserting a plastic dialing card, you are connected to your bank's computer which signals that it is on the line by emitting a special tone signal. You then insert your personal checking account key card, which identifies you to the computer. A third card is inserted to identify the creditor to whom payment is to be made. You then press the appropriate buttons to indicate the amount. If your creditor maintains his account with the same bank, an immediate debit and credit is

accomplished with the preparation of an appropriate advice of credit.

This same device can be used at the supermarket in lieu of cashing a check to pay for your groceries. The cash-out clerk merely takes your cards, puts them into her equipment and accomplishes a direct debit to your account and credit to her employer. As in the case of electronic presentment, the scheme contemplates that ultimately all the bank computers would be linked so that any bill could be paid if the creditor maintains his account in any computerized and linked bank.

Needless to say, all of these changes are not going to come about tomorrow. However, I assure you that some of these "pipe-dreams" will materialize so quickly that you and I will witness, and perhaps participate in, a complete redrafting of the whole body of law controlling bank collections and the bank-customer relationship.

#### ARTICLE 8 — INVESTMENT SECURITIES

Article 8 of the Uniform Commercial Code is often described as the negotiable instruments law of investment securities. It would replace the Uniform Stock Transfer Act which has been in effect in Louisiana since 1911. It would also replace the Uniform Act for Simplification of Fiduciary Security Transfers enacted in Louisiana in 1960, since part 4 of article 8, setting forth the rules with respect to an issuer's or transfer agent's duty to register transfers was drafted to incorporate all the elements of the Simplification Act. The major departure made by the draftsmen of the Code was to alter the terminology involved so as to achieve conformity throughout the Code. Article 8, however, does not deal with "Blue Sky Law" problems or the regulation of the internal affairs of corporations.

This article contains four parts. Part I sets forth definitions and rules of general application. Of special importance is the functional definition of the term "security," determining what types of instruments are controlled. Section 8-102 defines a "security" as an instrument which (1) is issued in bearer or registered form; (2) is of a type commonly dealt in upon securities exchanges or markets, etc.; (3) is one of a class or series, etc.; and (4) evidences an interest in an enterprise or an obligation of the issuer. Article 8 extends full negotiability to all such securities.

Article 8 deals separately with the problem of cutting off defenses of an issuer of a security as against a purchaser for value and without notice, and the problem of competing rights or claims of successive holders or claimants to securities in the case of sales and transfers. The former is dealt with in part 2 and the latter in part 3.

There are two major problems of practical significance to those who are not stock transfer specialists, and it is to these problems that I wish to address myself. The first concerns levying upon or attaching stock certificates, and the second deals with the issuance of replacement securities for those lost, destroyed, or stolen.

Perhaps a helpful way to discuss these problems is to consider a series of hypothetical fact situations. Let us begin with the least difficult problem — the lost, destroyed, or stolen stock certificate.

If a stock certificate of a Louisiana corporation owned by a Louisiana resident is lost or destroyed, the Uniform Stock Transfer Act, as enacted in Louisiana, would apply, as the act contains a specific provision on this subject.<sup>37</sup> In many instances the corporation's by-laws also provide for such contingencies so that if a stockholder is able to satisfy the corporation's agents that he is the true owner, has lost his certificate, and is willing to post an indemnity bond, a replacement certificate will be issued. If the corporation refuses, the Stock Transfer Act provides for bringing an action to compel issuance with the requirement that reasonable notice be given, by publication or otherwise, to interested persons. The statute also provides for the giving of a bond approved by the court, and for the payment of the corporation's reasonable costs and counsel fees.<sup>38</sup>

Now let us assume that the lost stock certificate was issued to our Louisiana resident by a corporation organized under the laws of New York or some other jurisdiction which has adopted the Uniform Commercial Code. Even though the certificate was lost in Louisiana by a Louisiana owner, New York rather than Louisiana law would most likely be applied to determine the responsibility of the corporation to issue a replacement secu-

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37. LA. R.S. 12:540 (1950).

38. *Ibid.*

rity.<sup>39</sup> The Code imposes the duty of issuing a substitute certificate upon the issuer-corporation, when certain statutory requirements are met,<sup>40</sup> and although no judicial remedy is provided for in the Code, it seems quite apparent that a proceeding compelling a corporation to issue such a certificate would be available upon the fulfillment of these requirements.

The Code adds several requirements not found in the previous statute. As a pre-condition to his right of receiving a replacement security, the owner must notify the issuer within a reasonable time after discovery that the security has been lost, destroyed, or stolen. This must be done before the issuer has registered a transfer of the security. Then if the owner makes a request for the issuance of a substitute security, before the issuer is notified that the lost or stolen security has been acquired by a bona fide purchaser, the issuer must comply once the owner files a sufficient indemnity bond and satisfies any other reasonable requirements. The Code's provision is self-executing and mandatory, as contrasted with the Stock Transfer Act provision for recourse to a court in which discretion is vested to determine whether a new certificate shall issue. The Code also provides that should a bona fide purchaser turn up with the lost security after a new security has been issued to the true owner, the corporation must issue a properly registered certificate to the bona fide purchaser unless such action would result in an over-issue. The issuer may then have recourse to the indemnity bond posted by the true owner, this having been the principal reason behind the requirement of the bond. In the alternative, the Code permits the issuer to recover the new or substitute security given to the alleged true owner unless such security has also found its way into the hands of a bona-fide purchaser. If the indemnity bond is utilized, the duplicate security must, of course, be left outstanding.

Aside from the additional hurdles required for the issuance of duplicate certificates, the Code differs from the Uniform Stock Transfer Act in its specific coverage of the stolen security situation. New York was one of the few states to interpret the act to cover stolen as well as lost or destroyed securities.<sup>41</sup> Al-

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39. Comment, *Conflict of Laws in Louisiana: Contract*, 38 TUL. L. REV. 726 (1964).

40. UNIFORM COMMERCIAL CODE § 8-405.

41. *National Sur. Co. v. Indemnity Ins. Co. of North America*, 237 App. Div. 485, 261 N.Y.Supp. 605 (1st Dept. 1933).

though the courts of Louisiana have apparently not dealt squarely with stolen securities, they have interpreted the act to cover securities wrongfully withheld.<sup>42</sup>

If a New York corporation were doing business in Louisiana so as to be subject to service, consideration would undoubtedly be given to bringing an action here to compel the issuance of a duplicate certificate even though Louisiana courts would undoubtedly apply New York law. Although Mr. Francis T. Christy, the stock transfer expert, indicates that an action to compel a foreign corporation to replace a lost stock certificate may be maintained,<sup>43</sup> bringing such an action is not always free from doubt and difficulty. For example, the New York courts declined to entertain jurisdiction in an action involving New Jersey shares because of the provision in the Uniform Stock Transfer Act which requires consistency between the law of the forum and the law of the corporate domicile, for the application of its provisions.<sup>44</sup> Although there is a great deal of similarity between the Uniform Stock Transfer Act and the Uniform Commercial Code, there seems to be ample opportunity to find inconsistency if a Louisiana judge were disinclined to accept jurisdiction. Earlier decisions denied any applicability of the lost securities section to foreign corporations.<sup>45</sup>

Where the issuing corporation is not doing business in Louisiana, the Louisiana stockholder would be forced to seek recourse in the courts of the jurisdiction of corporate domicile with all the additional expense and problems which going out of one's state imply. Where such a jurisdiction had adopted the Uniform Commercial Code, however, there is less likelihood of even having to seek judicial relief because of the Code's more elaborate and clear cut provisions, and the mandatory, self-executing character of the lost securities section.

The problem of levy or attachment is often more complex. Both the Uniform Stock Transfer Act and the Uniform Commercial Code look to the stock certificate itself as a property interest subject to attachment or levy, rather than an intangible claim against the corporation with its situs at the domicile of

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42. *Dyer v. Bridge Heights Realty Co.*, 170 La. 1092, 129 So. 647 (1930).

43. CHRISTY, *TRANSFER OF STOCK* 25:5 (3d ed. 1964); *Guilford v. Western Union Tel. Co.*, 59 Minn. 332, 61 N.W. 324 (1894).

44. *Application of Hughes*, 2 Misc.2d 122, 150 N.Y.S.2d 717 (Sup. Ct. 1956).

45. *In re Bernhard*, 209 App. Div. 808, 205 N.Y.S. 195 (1st Dep't 1924); *Application of Ostrander*, 206 App. Div. 362, 201 N.Y.S. 423 (1st Dep't 1923).

the corporation. This approach bears out the dominant purpose of both statutes — to give full negotiability to stock certificates. Stock certificates are usually held in safe-keeping or otherwise out of reach of levying or attaching creditors. In most instances, creditors have no idea where a debtor's certificates are kept. The Uniform Stock Transfer Act sought to meet this problem by providing an alternative to actual seizure of the certificate. Levy or attachment can be accomplished under present Louisiana law as to Louisiana stock by obtaining personal jurisdiction over the holder of the certificate and enjoining him from further transfer.<sup>46</sup> Notwithstanding the injunction, however, the holder may transfer the certificate to a bona fide purchaser for value. If, for example, a sheriff conducts a sale and delivers an assignment to his purchaser, the corporation is on the proverbial horns of a dilemma. If the bona fide purchaser is not recognized, the negotiable character of the security is denied. If the purchaser from the sheriff is not able to demand a stock certificate in his name, the levy by injunction device is meaningless. Uniform Stock Transfer Act jurisdictions have worked out varying solutions to this dilemma.

Although the courts of Louisiana do not seem to have passed upon this question since the adoption of the Uniform Stock Transfer Act, an earlier case held that a creditor could not attach bank stock standing in the name of the debtor by service of garnishment process on the issuing bank where the stock certificate representing the debtor's interest had been duly and earlier assigned by him.<sup>47</sup> If levy or attachment on shares of stock in a Louisiana corporation were now to be made, the courts would undoubtedly entertain an injunction proceeding as one avenue for the accomplishment of such an objective.

As in the case of lost shares, a different problem would be presented if shares of stock of a New York corporation, owned by a Louisiana debtor, were the subject of an attachment or levy. Suppose for example that a Louisiana resident is seeking to levy on shares of IBM stock held by and in the name of his New Orleans debtor, IBM being both a very popular stock and the stock of a New York corporation. Although under Louisiana law the situs of the property interest is the situs of the certifi-

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46. LA. R.S. 12:536 (1950).

47. *Kern v. Day*, 45 La. Ann. 71, 12 So. 6 (1893). See generally, Johnson, *Attachment and Sequestration: Provisional Remedies under the Louisiana Code of Civil Procedure*, 38 TUL. L. REV. 1 (1963).



cate,<sup>48</sup> the Uniform Stock Transfer Act contains language which some courts have construed as making the attachment provisions applicable only where the situs of the domicile of the corporation issuing the shares has "laws consistent with this subchapter."<sup>49</sup> In Pennsylvania, for example, it has been held that no attachment proceeding is available against Delaware stock certificates physically present in Pennsylvania because of certain inconsistencies between the stock transfer acts of the two states.<sup>50</sup> The particular stumbling block with respect to Delaware stocks has been created by the Delaware provision that:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."<sup>51</sup>

There is no reported Louisiana case determining whether Louisiana's levy and attachment provisions can be applied to shares of stock issued under the laws of another state. Professor Vern Countryman has indicated that the adoption of the Uniform Commercial Code by jurisdictions such as Louisiana would alleviate this problem, because the language of the Code<sup>52</sup> is "not apt to incorporate the law of the state of incorporation as the 'situs' of the security."<sup>53</sup> However, the one decision on this question, by the courts of a Code jurisdiction, contradicts him.<sup>54</sup>

It seems more than likely that even lawyers in Code states will continue to have difficulty attaching Delaware shares until that state repeals its statute which gives controlling effect to its laws as to all matters relating to interests in stock issued by Delaware corporations.<sup>55</sup> Even if some Code states are willing to apply the Code's attachment and levy provisions to Delaware shares, however, it is doubtful whether a later proceeding to

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48. LA. R.S. 12:536 (1950).

49. *Id.* 12:521(A), (B).

50. *Mills v. Jacobs*, 333 Pa. 231, 4 A.2d 152 (1939).

51. DEL. CODE ANN. tit. 8, § 169 (1953).

52. UNIFORM COMMERCIAL CODE § 8-196.

53. COUNTRYMAN, CASES AND MATERIALS ON DEBTOR AND CREDITOR, 39, n.18 (1964).

54. *Vant v. Gish, Jr.*, 111 Pittsb. Leg. J. 265, 1 UCC Reporting Service 339 (Ct. Com. Pleas 1963).

55. DEL. CODE ANN. tit. 8, § 169 (1953).

compel transfer of the shares in Delaware or elsewhere will be successful.<sup>56</sup>

Paradoxically, there are a few cases in which it is to the distinct advantage of attaching creditors to have the laws of Delaware apply. Suppose for example that a judgment debtor has a substantial number of shares of a Delaware corporation, and of course, it is relevant to note that many of the most popular stocks are of Delaware corporations.<sup>57</sup> Suppose further that these Delaware shares are the only substantial assets that you know about, but they are held for the debtor in a broker's margin trading account. If the brokerage house has offices in New York, New Orleans, and other cities, it is more than likely that the "street name" shares in which the debtor has an interest will be physically located in the New York office so as to be near the exchange. Therefore, if you represent a Louisiana creditor you are faced with both a conflict of laws and a "street name" share problem. There are several possibilities. First of all, the brokerage firm may be regarded as the "holder" of the securities.<sup>58</sup> You might therefore attempt to invoke the Uniform Stock Transfer Act provision permitting attachment or levy by an injunction against the holder, but it is not at all clear that a Louisiana injunction against a local office of the brokerage firm will be effective as to shares held by the main office in New York City.<sup>59</sup> Attachment or levy might be concurrently attempted in New York under UCC section 8-317. Although the Code requires seizure of the certificates, a separate subparagraph of the Code's attachment provision provides for legal and equitable relief to assist in satisfying claims and reaching securities that are difficult to attach. Such relief would appear to include garnishment of the debtor's interest in securities held for him by the broker.<sup>60</sup> A case decided in New York prior to the Code's adoption permitted sequestration of the debtor's "equity" in

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56. *Welland Investment Corp. v. First Nat'l Bank of Jersey City*, 81 N.J. Super. 180, 195 A. 2d 210 (1963).

57. See CCH, *Stock Transfer Guide*, CORPORATION DIRECTORY (1965).

58. UNIFORM COMMERCIAL CODE § 1-201(20).

59. Compare *Hodes v. Hodes*, 176 Ore. 102, 155 P.2d 564 (1945) (personal jurisdiction over "Holder" in Oregon effective as to stock certificate kept in Washington under Uniform Stock Transfer Act attachment by injunction provision), and *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), with *Nederlandsche Handel-Maatschappij v. Sentry Corp.*, 163 F. Supp. 800 (E. D. Pa. 1958) (no injunctive relief available under UNIFORM COMMERCIAL CODE § 8-317, where personal services on holder but shares out of state).

60. N.Y. CIV. PRAC. LAWS & RULES §§ 5222. See also Comment, *Garnishment in Louisiana*, 18 LA. L. REV. 446 (1958).

securities subject to a margin account debt to the broker.<sup>61</sup> Finally, and this is where Delaware law works to the creditor's advantage insofar as the stocks held for the debtor are issued by a Delaware corporation, a quasi in rem action may be brought in Delaware, making the attachment by service on the appropriate corporate officer in Delaware without regard to the location of the certificates. If the value of the claim and the Delaware securities are sufficiently great, it may be worthwhile to pursue this avenue concurrently since Delaware does adhere to the common law method of initiating attachment proceedings as to corporate stock.<sup>62</sup> Furthermore, Delaware is one of the few jurisdictions having decisional law permitting attachment of shares held in the name of a broker's nominee.<sup>63</sup>

Most Code provisions will be familiar to anyone who has had experience under the Uniform Stock Transfer Act. As has been said in many other discussions of the Code, however, the draftsman's elimination of several of the old perplexities has not solved all the problems. Although article 8 is undoubtedly a major advance, there are still sufficient doubts to be stilled particularly where conflict of laws questions are superimposed. There is solace, however, in the fact that although the Code does not solve all our problems, neither does it add to them. I hope that no one will take it amiss when I say that one large element of doubt will be removed when Delaware is persuaded to rejoin the Union.

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61. *Hornblower & Weeks v. Sherwood*, 124 N.Y.S. 2d 322 (Sup. Ct. 1953).

62. Note, *Attachment of Corporate Stock: The Conflicting Approaches of Delaware and the Uniform Stock Transfer Act*, 73 HARV. L. REV. 1579 (1960).

63. *Greene v. Johnston*, 34 Del. Ch. 115, 99 A.2d 627 (Sup. Ct. 1953), cited in HENN, CORPORATIONS 581 (1961).