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BANK STATEMENTS, CANCELLED CHECKS, AND ARTICLE FOUR IN THE ELECTRONIC AGE

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My task was to prepare a short article dealing in some depth with specific problems which have arisen under Article Four of the Uniform Commercial Code (Code). Unfortunately for purposes of criticism, but happily for those affected by Article Four, a canvass of recent reported cases as well as bank operations people and bank counsel has revealed very few problems of any significance to either the general practitioner or even the so-called commercial law specialist.[1] This prompts two comments: (1) Article Four seems to be working so smoothly that to develop a "problem" would be to make a mountain out of a molehill (all too frequently done in law review articles); and (2) a greater service could perhaps be performed by considering briefly a more general problem—namely, the effect, if any, of the accelerating operational and technological changes in the banking industry on Article Four. In order to examine the impact of present and contemplated operational innovations and, to some extent, measure the workability of the Code provisions, one aspect of the bank-customer relationship—the periodic issuance of checking account statements accompanied by paid items—has been selected as the focal point of discussion.

I. The Methods of Preparing Bank Statements and Returned Items

It is customary for banks to issue statements of account to their checking account customers at periodic intervals, monthly or quarterly, or on special request.[2] It is also customary to accompany the statement with those cancelled checks which are reflected on the statement. The purpose of this service is to afford the customer a record of the debits and credits posted to his account and to enable

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1. Problems suggested and considered included: (1) a critique of the California variations to §§ 4-213(1) and 4-303 of the Uniform Commercial Code [hereinafter cited as U.C.C.]; (2) what sort of formality should be required (in the way of written or other notice) in lieu of returning the item itself, if it were being held for protest in support of the payor bank's right of return and recoupment under § 4-301(1); and finally, (3) the banks' alleged difficulties in coping with oral stop payment orders under § 4-403.

2. See Aldom, Purdy, Schneider & Whittingham, Automation in Banking 24-25 (1963); Beutel, Bank Officer's Handbook of Commercial Banking Law 21 (1965); 5 Zollman, Banks and Banking 353 (1936).

him to compare the balance reflected on the bank's statement with the balance arrived at in his own records. The customer may also verify that the checks were paid in accordance with his instructions and that the bank has paid only those checks which he had, in fact, drawn. Due to the introduction during the past decade of new banking equipment and procedures, the manner of the preparation and forwarding of these bank statements has changed markedly. Moreover, within the industry, there is anticipation of even more drastic operational changes which will affect these practices.

In the past, and even today in smaller banks, the statement period was determined by the amount of time necessary to complete a single sheet of the particular customer's statement form. This practice permitted cycling of the statement-rendering procedure in a manner which avoided placing an undue burden on the bank's staff and was relatively inexpensive.[3] The difficulty with such a practice, however, was that the customer received his statement at somewhat irregular intervals; if the amount of account usage was small, several months or even years might pass between statements. This shortcoming, coupled with the general increase in the use of checking accounts,[4] has led most banks to use a thirty-day cycle which coincides with either the calendar month (the common practice with business customers) or some arbitrary sequence in which the accounts are arranged. The arbitrary cycle, which may be alphabetic or numerical, normally provides for the processing of about one-fifteenth or one-twentieth of the accounts each banking day, whereas the calendar month cycle compresses the statement preparation process into a few short days.

In the majority of banks even today, the bank statement will probably be a product of what is known as the "dual posting" system.[5] Under this system, two complete sets of books are kept for each checking account—a ledger sheet and a statement sheet. The ledgers and statements are divided into groups and, while one bookkeeper posts to the ledger accounts in one group and the statement accounts in a second group, another bookkeeper posts to the ledger

3. LAPHAM, MODERNIZING THE ACCOUNTING SYSTEM OF THE MEDIUM SIZED BANK 16 (1954).

4. It has been estimated that the number of checking accounts rose from 27 million to 47 million between 1939 and 1952; in this same period, the number of checks written increased from approximately 3.5 billion to just under 8 billion checks per year. The estimated figure for 1970 is 22 billion checks per year. Farnsworth, *A General Survey of Article 3 and an Example of Two Aspects of Codification*, 44 TEXAS L. REV. 645, 652 n.63 (1966).

5. ALDOM, PURDY, SCHNEIDER & WHITTINGHAM, *op. cit. supra* note 2, at 23; LAPHAM, *op. cit. supra* note 3, at 13-15. See also Clarke v. Camden Trust Co., 84 N.J. Super. 304, 201 A.2d 762 (Super. Ct. 1964).

accounts in the second group and the statement accounts in the first group. This system is best suited to the smaller banks where only two bookkeepers are needed, for as the volume of accounts increases, more pairs of bookkeepers are required and the attendant complexities are increased. In "dual posting" systems, the statements, like the ledgers, are posted every day with each entry picking up the previous balance, reflecting the paid or credited item, and extending the new balance. The statement "run" must balance each day with the ledger "run" and serves as a control on the entire posting procedure. When either the end of the sheet or the appropriate day in the thirty-day cycle is reached, the statement is pulled for mailing to the customer. When a customer makes a special request for a statement out of cycle, it is a simple matter to pull the particular statement and mail it.

Before the introduction of computers, some banks shifted to a "single posting" method which, as its name suggests, consists of posting a single entry on a statement form, which is duplicated either by carbon or photography before mailing.[6] Machines were also developed for posting the statement and ledger sheet simultaneously, thereby eliminating the necessity for photography or carbons. However, because this specialized equipment was substantially more expensive than the bookkeeping equipment previously used and since additional safeguards and precautions were required to take the place of the cross-check inherent in the dual posting method, many banks elected to retain the traditional system.[7]

Today, an increasing number of banks either own or lease their own computers or are using off-premises computer plans for their demand deposit business.[8] Although the appearance of the statement

6. LAPHAM, *op. cit. supra* note 3, at 14-15.

7. *Ibid.* One such machine is the "Post-tronic," mentioned in Gibbs v. Gerberich, 1 Ohio App. 2d 93, 98, 203 N.E.2d 851, 854 (1964).

8. Summaries of the findings of the 1966 American Banking Association's National Automation Survey may be found in Banking, Sept. 1966, p. 35; *id.*, Oct. 1966, p. 50; *id.*, Jan. 1967, p. 97. The estimated 13,995 commercial banks were divided into four groups:

I. Those having their own computers or who are in the process of installation (943 or 7%);

II. Those using off-premises computer services (2,055 or 14%);

III. Those planning off-premises service or having computers on order (1,358 or 10%); and

IV. Those having no computer processing and no computer on order (9,639 or 69%).

The data indicate, not surprisingly, that the computerized banks tend to be those with larger deposits: Banks in Group I had 67% of the nation's commercial deposits; Group II, 10%; Group III, 5%; and Group IV only 18%. Among the banks in Group II using off-premises computer services, about two-thirds have their servicing done by correspondents, the others use a "service bureau," a joint venture, or the computer facility of a non-bank. It is estimated that by 1971 there will be over 7,600 commercial banks using computers, or 55% of all commercial banks.

reveals little change, the use of computers has produced several changes in check-handling and statement preparation procedures. For example, in a bank which services approximately 15,000 checking accounts, the accounts are divided into four roughly equal groups, with a clerk assigned to each group. The checks are received by the clerk from the computer section (or off-premises computer facility) for visual examination and filing in the individual account folders,[9] having already been debited to the customer's account by the computer. Since the checks are received numerically sequenced by account number through the computer's "reading" of the magnetic figures embossed on the checks, filing has become more efficient, typically permitting one clerk to handle 2000 to 3000 checks per day. When the checks are filed, the clerk is supposed to verify the signature on the check against the customer's signature card which, to facilitate easy comparison, is normally placed at the top of the folder itself. In some banks, the filing clerk will perform the additional tasks of scanning the face of the check for obvious alterations, comparing the amount of the check as written with the magnetically encoded amount,[10] examining the date of the check to see whether the check is "stale,"[11] and, in cases where the amount of the check is over, say, $500, examining the indorsements to see that at least the payee's signature is present.[12] However, in many banks which service a large volume of accounts, only the customer's signature is verified and, indeed, there is some indication that in large city banks even this step is omitted.[13] To return to our typical computerized bank, on any given day each of the four clerks will

9. This would seem to "complete the process of posting" under § 4-109 although the check has already been debited to the customer's account in the computer's "memory bank." Gibbs v. Gerberich, 1 Ohio App. 2d 93, 97, 203 N.E.2d 851, 854 (1964); Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992, 1003 (1962).

10. See Penney, *supra* note 9, at 1003 n.69; as to risk of loss for encoding errors, see CLARKE, BAILEY & YOUNG, BANK DEPOSITS AND COLLECTIONS 174-84 (1963).

11. See ALDOM, PURDY, SCHNEIDER & WHITTINGHAM, *op. cit. supra* note 2, at 24; Penney, *supra* note 9, at 1003 n.69. The Code "stale check" rule is found in § 4-404, discussed in CLARKE, BAILEY & YOUNG, *op. cit. supra* note 9, at 170.

12. See ALDOM, PURDY, SCHNEIDER & WHITTINGHAM, *op. cit. supra* note 2, at 24; Penney, *supra* note 9, at 1003 n.69. As to the bank's liability for paying a check with a missing indorsement, see 2 PATON'S DIGEST OF LEGAL OPINIONS 2135-36 (1942). On the impact of a bank's "negligence" in failing to notice a race track's indorsement on a check drawn by a church, thus affecting the bank's rights under § 4-406 of the Code, see Jackson v. First Nat'l Bank, 403 S.W.2d 109 (Tenn. App. 1966).

13. This is hearsay, but has been heard by the writer from several commercial bankers and their attorneys. See also Freed, *Some Legal Implications of the Use of Computers in the Banking Business*, 81 BANKING L.J. 753, 761-62 (1964) (predicting eventual abandonment of the practice of signature verification). It is conceivable that equipment could be devised to sort, store, and insert checks in mailing envelopes with the statement. Like the old advertisement, checks would be "never touched by human hands."

also receive approximately 200 statements from the computer center. These statements may be for accounts in her group or, in banks desirous of having more than one person visually examine each check, for the accounts in one of the other groups. The accumulated checks in the account file for a particular statement are removed and counted to see that they correspond with the number of checks set forth at the bottom of the statement. These checks are scanned to see that the customer's signatures on the checks are all in the same handwriting. Moreover, the procedure may include matching individual checks to the debit entries on the computer-prepared statement. The computer-sorted checks, together with the computer-prepared statement, are then mailed to the customer in an envelope addressed by the computer from information on tap in its "memory bank."

Whether the statements are prepared by the traditional double entry or single entry method, or by computer, they follow a similar form. There will be first a balance forward; then, by date and in chronological order, a listing of checks paid, deposits credited, and certain miscellaneous entries. After each entry, or group of entries, the balance remaining in the account is shown in a column at the right-hand margin. On computer-produced statements, the number of checks paid and credits entered are also shown with their respective totals.[14] There is also an almost universal practice of printing some sort of time period legend on the statement, such as: "Please examine at once: If no error is reported within ten days of mailing or delivery the account will be considered correct. All items are credited subject to final payment"; or, more simply, "If no error is reported within ten days the account will be considered correct." On the reverse of the bank statement there will normally appear a reconciliation form for the customer's use in comparing his records of checks drawn and deposits made against the statement rendered by the bank. Allowing for transactions subsequent to the date of the statement, the reconciliation should, of course, result in the same total as the total in the statement.

II. Corollary Duties of Bank: To Pay in Accordance With the Customer's Instruction's and To Render Statements of Account

The elaborate procedures described above are pursued by the banks in their effort to fulfill their common-law duty to provide their customers with account information and to return the cancelled

14. Welch, *The Paper Tape Path to Automation*, Banking, Feb. 1966, pp. 111-12.

checks and other papers covered by the statement.[15] This duty arises from the implied contract between the bank and its customer, but neither the contract nor the common law has precisely defined the scope of the duty: there is obviously some leeway as to when or how often a statement of account must be rendered and the duty itself is subject to modification by banking custom or course of dealing.[16] It is generally held, however, that the statement must at least be accurate[17] and in a form that enables the customer to verify the account.

The bank's duties respecting the issuing of a statement of account are a corollary to its obligation, also arising from the bank-customer relationship, to pay funds out of the customer's account only in accordance with the customer's instructions.[18] In the ordinary case, therefore, the customer may demand recredit by an action in assumpsit if he discovers, upon examining his statement and cancelled checks, that forged or altered checks have been deducted from his account.[19] However, breach of the customer's duties respecting the account statement and cancelled checks may provide the bank with a defense to such an action for recredit.

A. *The Code Defense: Customer's Duty To Examine the Statement and Checks*

One of the most important defenses available to a customer's action for recredit after the bank has paid a forged or altered check is found in section 4-406 of the Code.[20] Codifying the common-law

15. See 5 ZOLLMAN, BANKS AND BANKING 353, 374 (1936).

16. See U.C.C. § 1-205 as to course of dealing and usage of trade generally and §§ 4-103(2) & (3) as to the impact of "federal reserve regulations, clearing house rules, operating letters, general banking usage and the like" upon the duties imposed by Article Four.

17. Barclay Kitchen, Inc. v. California Bank, 208 Cal. App. 2d 347, 353, 25 Cal. Rptr. 383, 388 (1962).

18. See 10 AM. JUR. 2D *Banks* § 494, at 462-63 (1963).

19. *E.g.*, Johnson v. First Nat'l Bank, 367 Pa. 459, 465, 81 A.2d 95, 97 (1951); R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 153, 48 A.2d 420, 426 (1946); Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 108, 138 N.W.2d 157, 159 (1965).

20. Section 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

(1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank

(a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure; and

rule, the Code requires the depositor to exercise "reasonable care and promptness" in examining his statement and items.[21] By showing that the customer failed to comply with this duty and that the bank has suffered a loss as a result, the bank is able to avoid liability on an altered item or an item bearing the unauthorized signature of the customer. The customer is further precluded from asserting any unauthorized signature or alteration by the same wrongdoer on items paid by the bank during a period measured from a "reasonable period" (not exceeding fourteen days) after a statement which includes at least one such improperly paid item is "available" to the customer, to the time when the customer notifies the bank of the improper payment.[22] Furthermore, the customer is barred from asserting after one year *any* claim of alteration or forgery of his signature by the section's "statute of limitations"[23] and, although no obligation is imposed upon the customer to discover forged (or "unauthorized") indorsements,[24] he will be barred from asserting any claim arising from such indorsements after three years.[25]

(b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item(s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

21. *Compare* U.C.C. § 4-406(1), *with* Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 63 N.E. 969 (1902).

22. U.C.C. § 4-406(2); see BRADY, BANK CHECKS 566 (3d ed. 1962); Griffiths, *Bank Deposits and Collections Before and After the Uniform Commercial Code*, 23 OHIO ST. L.J. 236, 244 (1962). As to the relationship of subsection (2) to the doctrine of "estoppel" as applied to a series of forged checks under pre-Code law, see BRITTON, BILLS AND NOTES 362-75 (1961); Spanogle, *The Bank-Depositor Relationship—A Comparison of the Present Tennessee Law and the Uniform Commercial Code*, 16 VAND. L. REV. 79, 88-90 (1962). It has been suggested that, under § 4-406(2)(b), the drawer would be penalized for his failure to use due care even if the exercise of due care would not have prevented the loss, as where the forger also alters the stubs to correspond with the checks. See note 56 *infra*.

23. U.C.C. § 4-406(4).

24. This confirms the common-law rule. See 2 PATON'S DIGEST OF LEGAL OPINIONS 1877 (1942); 10 AM. JUR. 2D *Banks* § 513, at 481 (1963).

25. U.C.C. § 4-406(4); see Murphey, *Uniformity, Forged Indorsements, and Comprehension—Some Observations on the Uniform Commercial Code for Mississippi*, 35 MISS. L.J. 356, 361-77 (1964), for some difficult to comprehend observations and criticisms on this point.

It may be noted that, in addition to codifying the common-law rule as to the customer's duty to examine and report, the Code makes several changes in the previous widely-enacted American Banking Association's *Payment of Forged or Raised Check Statute*:[26] (1) The Code applies to any "item," not merely checks; (2) any alteration is included, not merely "raising"; and (3) the Code applies whenever the bank merely holds the customer's statement and items pursuant to his request or otherwise makes them available to him.[27]

1. *Measurement of Time Periods for Sending and Notifying*

The time periods in section 4-406 run from "the time the statement and items are made available."[28] As the official comment points out,[29] "availability" can mean any one of three things. The bank may "send" the statement and items to the customer, which includes putting them in the mail properly addressed and stamped.[30] Second, the bank may hold the statement and items available for the customer pursuant to his request or instructions. Finally, the bank may "otherwise or in a reasonable manner [make] the statement and items available to the customer."[31] Once the statement of account and cancelled checks are made available to the customer, the customer has a duty to "notify the bank promptly after discovery" of his unauthorized signature or any alteration.[32] "Promptly" is not defined in the Code, but presumably would be determined by the finder of fact from "all the circumstances" as at common law.[33] On the other hand, notification is defined in the Code as "taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it";[34] seemingly a duly mailed unambiguous note would satisfy this requirement.

26. 2 PATON'S DIGEST OF LEGAL OPINIONS 1882-86 (1942); 2 *id. Forged Paper* § 9.1 (Supp. Dec. 1965).

27. See Penney, *A Summary of Articles 3 and 4 and Their Impact in New York*, 48 CORNELL L.Q. 47, 90 (1962).

28. U.C.C. § 4-406(4).

29. U.C.C. § 4-406, comment 2.

30. U.C.C. § 1-201(38). For a case demonstrating a bank's attempt to show that it sent a statement to its customer by proving its customary practice in this regard, see England Nat'l Bank v. United States, 282 Fed. 121 (8th Cir. 1922).

31. U.C.C. § 4-406(1).

32. U.C.C. § 4-406(1).

33. See text accompanying note 59 *infra*.

34. U.C.C. § 201(26). As to the sufficiency or content of the notice, see American Bldg. Maintenance Co. v. Federation Bank & Trust Co., 213 F. Supp. 412, 416-17 (S.D.N.Y. 1963); Indemnity Ins. Co. of No. Am. v. Fulton Nat'l Bank, 108 Ga. App. 356, 357, 133 S.E.2d 43, 44 (1963); Shattuck v. Guardian Trust Co., 204 N.Y. 200, 205, 97 N.E. 517, 519 (1912). See also U.C.C. § 1-201(27) as to "notice" to or "notification" of an organization.

2. *Scope of Customer's Duty: Reconciliation*

Since the way in which the customer discharges his duty to exercise reasonable care in examining his statement and items is not spelled out in the Code, reference must be made to the common law. It has been said that, as a minimum, the reconciliation procedure should include the following steps: (1) a comparison of the cancelled checks with the customer's check stubs; (2) a comparison of the statement balance with the checkbook balance; and (3) a comparison of the returned checks with the debits indicated on the statement.[35] It should be noted once more that subsection (1) of section 4-406 deals solely with the discovery of forgeries and alterations. In some cases, particularly those going beyond forgeries and alterations, courts have indicated that the customer's duty in performing the reconciliation might include, for example, comparing returned checks with daily journal entries (as well as with check stubs) or examining duplicate deposit slips on which wrongful "less cash" deposits would have been revealed.[36]

3. *Effect of the Bank's "Contributory Negligence"*

A bank which is itself guilty of negligence in failing to discover a forgery, alteration, or discrepancy cannot avoid liability on the ground that the customer was subsequently negligent in failing to examine his statement or returned checks.[37] Prior to the Code, the common law required that once the payment of the forged or altered check had been established, the bank had the burden of showing that it exercised due diligence in the transaction before it could raise

35. See, *e.g.*, Stumpp v. Bank of New York, 212 App. Div. 608, 614, 209 N.Y. Supp. 396, 402 (1925); Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 111, 138 N.W.2d 157, 160 (1965), *citing* Clarke v. Camden Trust Co., 84 N.J. Super. 304, 201 A.2d 762, 766 (Super. Ct. 1964). See generally 10 AM. JUR. 2D *Banks* §§ 512, 569 & 604 (1963); BRADY, BANK CHECKS 549 (3d ed. 1962); 5 ZOLLMAN, BANKS AND BANKING § 3403, at 375 (1936). *Compare* Stumpp, *supra*, *with* Takenaka v. Banker's Trust Co., 132 Misc. 322, 229 N.Y. Supp. 459 (New York City Ct. 1928). See also Comment, 62 YALE L.J. 417, 449 (1953).

36. See, *e.g.*, McKenzie & Mouk, Inc. v. Ouachita Nat'l Bank, 159 So. 2d 304, 306 (La. Ct. App. 1964) (examination of "net deposits" would have revealed "less cash" withdrawals); First Nat'l Bank v. Fultz, 380 S.W.2d 894 (Tex. Civ. App. 1964). For cases involving other measures or steps which customers should have taken to avoid being characterized as negligent in the handling of their reconciliation and related duties, see Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 316, 328-29, 139 P.2d 1, 8-9 (1943) (failure to investigate overdraft coupled with duty to examine); First Nat'l Bank v. Mann, 410 P.2d 74 (Okla. 1966) (investigation of continued overdrafts).

37. Leather Mfr's Nat'l Bank v. Morgan, 117 U.S. 96 (1886); Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 63 N.E. 969 (1902); cases cited in 10 AM. JUR. 2D *Banks* § 519, at 490-91 (1963). *But see* cases cited in Herbel v. Peoples State Bank, 170 Kan. 620, 628, 228 P.2d 929, 935-36 (1951); White Castle Sys. v. Huntington Nat'l Bank, 43 N.E.2d 737, 741-45 (Ohio Ct. App. 1941).

the issue of the customer's negligence.[38] If the bank was found to have been negligent in the performance of its duty to pay only in accordance with the customer's order, the customer could recover notwithstanding a showing that he was negligent in the performance of his duty toward the bank.[39] The basis of the bank's liability is its breach of its primary contractual obligation to the customer, not its negligence.[40] Section 4-406(3) changes this common-law rule to the extent that the burden of proof with respect to the *bank's* negligence is placed upon the customer, rather than requiring the bank to demonstrate its freedom from negligence.[41] However, if the customer cannot establish the bank's negligence, the bank must still bear the burden of proof with respect to the *customer's* negligence.

4. *Evidence of the Bank's Negligence*

The two most common types of negligence which a customer is likely to assert against a bank which has paid forged or altered checks are that the bank's "system was wrong," or that the bank's employees were negligent in the performance of their prescribed duties.[42] In attempting to establish the first type of negligence, the particular bank's "system" may be measured against what modern banking practices are or what is the accepted banking practice in the area, as evidenced by expert testimony.[43] In those instances in which only testimony of the procedures followed by the particular bank is offered, the bank's system may be measured against the judi-

38. Johnson v. First Nat'l Bank, 367 Pa. 459, 463, 81 A.2d 95, 98 (1951); R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 153, 48 A.2d 420, 426 (1946); Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 109, 138 N.W.2d 157, 159 (1965).

39. R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, *supra* note 38.

40. See cases cited note 38 *supra.*

41. Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 110 n.6, 138 N.W.2d 157, 160 n.6 (1965). Absent the primary contractual obligation of the bank, this shifting of the burden might be criticized as unduly favorable to banks. It is a difficult burden to overcome since complete control and knowledge of the process at issue is in the hands of defendant bank. Instructive materials in approaching this problem include: MORRIS, TORTS 85 (1953); Roberts, *An Introduction to the Study of Presumptions* (pts. 1 & 2), 4 VILL. L. REV. 1, 475 (1958-59); Comment, *Allocation of Losses From Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 417 (1953). Is this an appropriate case for the invocation of the doctrine of *res ipsa loquitur*? If so, it would seem to contradict the statute's intent.

42. See Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 316, 328, 139 P.2d 1, 9 (1943). This case also suggests a third possibility of claiming that the bank assigned duties to employees who were not competent to operate the system set up by the bank. For further references on evidentiary problems in this general context, see 5B MICHIE, BANKS AND BANKING §§ 368d, 369e & h, 370f (1950).

43. *E.g.*, Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, *supra* note 42 at 330, 139 P.2d at 9 ("essentially the same as that followed in all San Francisco Banks, and is regarded as the accepted modern practice"); Clarke v. Camden Trust Co., 84 N.J. Super. 304, 307-08, 201 A.2d 762, 764 (Super. Ct. 1964) ("in accord with the general usage and practice in similar banks"). See also U.C.C. § 4-103, particularly subsections (2) and (3).

cial conception of reasonableness.[44] Under either approach, examples of relevant evidence are the instructions given to employees "relative to detecting forgeries, or in handwriting,"[45] the number of employees performing a visual examination of the check or checks in question,[46] whether each check is compared to a signature card or simply to the bookkeeper's "mental image" of the signature,[47] and how many checks a single bookkeeper handles each day.[48] Moreover, in at least one pre-Code case, the court concluded that where the burden was on the bank to show its freedom from contributory negligence, it had to show that, with respect to the particular checks in question, its customary practices were carried out with due diligence; a mere showing of its customary procedure in paying and examining checks generally would not give rise to the inference that similar handling was accorded these particular checks.[49] In view of the enormous flood of checks in most banks, such a holding would have created tremendous difficulties for the banks had not the Code shifted to the customer the burden of proving the bank's negligence.

The more likely avenue of attack by the customer would be to focus on the negligence of a bank employee in paying a forged or altered check which a competent teller or clerk ought to have noticed. Proof on this question normally requires putting the subject checks into evidence together with the signature card. If the employee who examined the checks is forced to admit on the witness stand that some of them ought not to have been paid, the lawsuit is virtually won.[50] The bank may attempt to counter this attack by calling a handwriting expert to testify that the checks are such excellent forgeries that even an expert teller or bookkeeper could not have detected them.[51] However, such testimony cannot be

44. *E.g.*, Bank of Delaware v. Union Wholesale Co., 203 A.2d 109 (Del. 1964) (bank did not prove its freedom from contributory negligence); First Nat'l Bank v. Mann, 410 P.2d 74 (Okla. 1966) (bank failed to absolve itself of negligence); R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 48 A.2d 420 (1946) (not clear on what ground the bank lost); Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 138 N.W.2d 157 (1965) (bank found not negligent).

45. Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 328, 139 P.2d 1 (1943).

46. Screenland Magazine v. National City Bank, 181 Misc. 454, 460, 42 N.Y.S.2d 286, 290 (Sup. Ct. 1943) (eleven persons); R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 48 A.2d 420 (1946) (five persons).

47. Clarke v. Camden Trust Co., 84 N.J. Super. 304, 201 A.2d 762 (Super. Ct. 1964); First Nat'l Bank v. Mann, 410 P.2d 74 (Okla. 1966); R. H. Kimball, Inc. v. Rhole Island Hosp. Nat'l Bank, *supra* note 46.

48. Clarke v. Camden Trust Co., *supra* note 47 (1000 checks per day).

49. Bank of Delaware v. Union Wholesale Co., 203 A.2d 109 (Del. 1964), *citing* R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 48 A.2d 420 (1946). Compare Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 138 N.W.2d 157 (1965).

50. See Bank of Delaware v. Union Wholesale Co., *supra* note 49; Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 328, 139 P.2d 1 (1943).

51. See, *e.g.*, Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, *supra* note 50 at 331,

deemed expert, unless the witness is himself a banker or one qualified to testify as to what a knowledgeable, experienced, and careful teller is able to discover under normal banking conditions.[52] Of course, if the witness also testifies that he would be unable to detect the forgery on ordinary visual inspection but would have to resort to microscopic or other scientific analysis, this would seem to be very persuasive and relevant to the issue of the amount of care which can reasonably be expected of bank employees. Nevertheless, the final assessor of the bank's alleged negligence is the trier of fact, and, when the checks and signature card are in evidence for the judge or jury to see, it is probable that a visual examination of the documents themselves is as important as anything else in determining the outcome.[53] However, as Justice Shientag remarked, the danger of resolving this issue in the courtroom, far from the teller's cage, is that bank tellers may be held to the standard of handwriting experts and that it is considerably easier to spot a forgery among a collection of checks bearing what purport to be the same signature than to recognize one isolated forged check in a batch of checks drawn by other customers.[54]

B. *The Code's Contractual Defense: Printed Time Limits for Customer Notification*

Another argument often asserted by banks against customers seeking readjustment of their accounts because the bank had accepted forged or altered checks is that the printed legend on the bank statement, to the effect that any irregularities must be reported within a specified time, bars any claim after the lapse of that time, the account having been deemed correct. The courts have generally refused to give effect to such clauses, most frequently on the basis that they had not been called to the customer's attention, or, if they were, that the customer had not agreed to such provi-

139 P.2d at 10 ("excellent facsimiles"); Wuest Bros. v. Liberty Nat'l Bank & Trust Co., 388 S.W.2d 364, 365 (Ky. 1965) ("could not be reasonably detected by the employees in the normal course of banking business"); Clarke v. Camden Trust Co., 84 N.J. Super. 304, 201 A.2d 762 (Super. Ct. 1964) (ordinary person could not detect forgeries even by comparison with signature card).

52. See Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 328, 139 P.2d 1 (1943); R. H. Kimball, Inc. v. Rhode Island Hosp. Nat'l Bank, 72 R.I. 144, 48 A.2d 420 (1946).

53. See Screenland Magazine v. National City Bank, 181 Misc. 454, 42 N.Y.S.2d 286 (Sup. Ct. 1943) (trial judge comments on quality of forgeries); Huber Glass Co. v. First Nat'l Bank, 29 Wis. 2d 106, 110, 138 N.W.2d 157, 160 (1965) (examination of documents in evidence demonstrates that "each forged signature was a reasonable facsimile of the genuine signature").

54. Screenland Magazine v. National City Bank, *supra* note 53, at 459, 42 N.Y.S.2d at 290.

sions.[55] The customer has also prevailed against such clauses when they have been contained within ageements for the periodic mailing of statements or within receipts for the delivery of statements and cancelled checks.[56]

The Code does not deal squarely with the validity of such provisions other than by limiting the bank's ability to exculpate itself for its own negligence in section 4-103, by imposing an overall obligation of good faith in section 1-203, and by providing for variation by agreement and limitations on exculpation generally in section 1-102.[57] As will be discussed below, the problem may also be affected by section 1-204. Finally, section 1-103, making general principles of law applicable where not displaced by Code provisions, will, of course, serve to make pre-Code law applicable to those aspects of this problem not covered by the Code.

1. *Time Periods on Bank Statements and Section 1-204*

It may be argued that section 1-204's statement that reasonable time is determined by "the nature, purpose and circumstances" of the particular case does not apply to fixing time periods under section 4-406 because the time periods are already fixed in section 4-406(4).[58] However, the arbitrary cut-off periods in subsection (4) should be distinguished from the duty imposed on the customer in subsection (1). Subsection (1) was intended to carry forward and codify the common-law rule requiring customers to examine their statements and checks and report any forgeries, alterations, or discrepancies to the bank within a "reasonable time."[59] Subsection (1)

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55. BRADY, BANK CHECKS 550-51 (3d ed. 1962); 2 PATON'S DIGEST OF LEGAL OPINIONS 1875-77 (1942) and cases cited therein; 5 ZOLLMAN, BANKS AND BANKING § 3404, at 376 (1936, Supp. 1954). For a recent decision upholding such a provision, see Haman v. First Nat'l Bank, 79 S.D. 565, 115 N.W.2d 883 (1962).

56. Frankini v. Bank of Am. Nat'l Trust & Sav. Ass'n, 86 P.2d 686 (Dist. Ct. App.), *aff'd on rehearing*, 31 Cal. App. 2d 666, 88 P.2d 790 (1939); First Nat'l Bank v. American Sur. Co., 71 Ga. App. 112, 31 S.E.2d 402 (1944).

57. See BRADY, BANK CHECKS 564-65 (3d ed. 1962).

58. U.C.C. § 1-204: Time; Reasonable Time; "Seasonably"—

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

See note 20 *supra* for text of U.C.C. § 4-406(4).

59. 10 AM. JUR. 2D *Banks* §§ 511, 515 (1963); 2 PATON'S DIGEST OF LEGAL OPINIONS 1880-82 (1942); see Basch v. Bank of Am. Nat'l Trust & Sav. Ass'n, 22 Cal. 2d 316, 326, 139 P.2d 1, 7 (1943) ("depositor had a legal duty . . . to examine *within a reasonable time*" [emphasis by the court]). A distinction is to be made between the time for examining (or examining *and* reporting in the conjunctive) and the time for reporting

as written requires the customer to exercise "reasonable care and promptness" in examining the statement and further provides that he must "promptly" notify the bank of discovered errors. Although subsection (1) does not use the term "reasonable time," nonetheless section 1-204's statement would seem applicable. To the extent that it is so applicable, it buttresses the authorities denying conclusive effect to provisions included in bank statements.

2. *The Effect of Section 4-103*

An additional argument against giving effect to such clauses might be advanced under section 4-103 on the ground that a provision for an unreasonably short period of time would serve in some instances as a disclaimer of responsibility by the bank for its failure to exercise ordinary care. One point which ought not to be overlooked, however, is that the last clause of subsection 4-103(1)[60] is, in effect, an invitation to the commercial banking industry to devise agreements to run between the banks and their customers; these agreements can, for all practical purposes, determine the bank's responsibility in handling the customer's checking account, including the processes of payment and statement preparation. Such an agreement would have primary relevance to the bank's obligation to exercise due care before asserting the "defense" of section 4-406 against a customer seeking recredit to his account, but such agreements could be tailored to fit the requirements of modern electronic procedures.

C. *Situations Not Covered by the Code*

In spite of the expanded coverage of the Code, there are at least two types of customer claims arising from present statement procedures which are not dealt with by the Code and which therefore

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once the forgery, alteration or error has been discovered. As to the latter, the following statement is instructive:

> [T]here can be no arbitrary standard as to the length of time within which a depositor, after discovering that his bank has charged a forged check to his account, must give the bank notice thereof in order that he may not be precluded from setting up the forgery. . . . The issue as to the timeliness of the notice is one of fact to be so resolved according to the relevant and material attendant circumstances.

Johnson v. First Nat'l Bank, 367 Pa. 459, 464, 81 A.2d 95, 97 (1951).

60. U.C.C. § 4-103. Variation by Agreement; Measure of Damages; Certain Action Constitutes Ordinary Care.

> (1) the effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

require the bank to rely on defenses grounded on the customer's duty to examine that were also available under pre-Code law. The first situation involves the "less cash" deposit made by the depositor's faithless employee: when the deposit is made, the check(s) are totaled on the deposit slip, but are followed by a subtraction entry reading "less cash" for a small amount, say fifty dollars, which the employee explains his employer needs for petty cash, but which he himself pockets. In two cases[61] involving this type of defalcation, the bank has prevailed on the theory that it was the duty of the depositor to examine his books and bank statements and to report any errors to the bank with reasonable promptness; normal bookkeeping procedures would have revealed the wrongful deposits. The Code in general, and section 4-406 in particular, is silent on this issue, as were the previous statutes, but the courts have been able to decide the cases on the strength of common-law principles, and Code section 1-103 would permit the same approach. However, while accepting a deposit with a "less cash" entry may be permissible banking practice,[62] accepting a deposit of a single check accompanied by several separate deposit tickets might appear sufficiently irregular and misleading so as to overcome the bank's defense of customer negligence in failing to examine the statement.[63]

Second, the Code does not deal with the obligation of a customer to report a deposit made but not credited to his account. However, common-law decisions, presumably still effective, have held that the customer has a duty to perform accepted statement reconciliation procedures if he wishes to hold an otherwise innocent bank for failure to credit a deposit. Indeed, in at least one case these procedures were deemed to include use of the customer's books of account in addition to his checkbook.[64]

Many cases in these two areas involve a faithless employee who not only commits the embezzlement but also has the responsibility for reconciling the customer-employer's bank statements. Entrusting this responsibility to an employee without appropriate safeguards greatly simplifies, if not invites, embezzlement. The Code is silent as to the effect of such delegation and, consequently, we must again

61. McKenzie & Mouk, Inc. v. Ouachita Nat'l Bank, 159 So. 2d 304 (La. Ct. App. 1963), *aff'd*, 245 La. 732, 160 So. 2d 595 (1964); First Nat'l Bank v. Fultz, 380 S.W.2d 894 (Tex. Civ. App. 1964).

62. LAPHAM, MODERNIZING THE ACCOUNTING SYSTEM OF THE MEDIUM SIZED BANK 4 (1954).

63. See Barclay Kitchen, Inc. v. California Bank, 208 Cal. App. 2d 347, 356, 25 Cal. Rptr. 383, 391 (1962); text accompanying note 17 *supra*.

64. Portsmouth Clay Prods Co. v. National Bank, 78 Ohio App. 271, 276-77, 69 N.E.2d 653, 655-66 (1946).

assume that common-law rules apply. The majority and better reasoned view is that the customer-employer is charged only with notice of what would have been disclosed had an honest employee reconciled the bank statement (and books).[65] The minority view holds the customer to whatever knowledge the embezzler himself had.[66]

Another type of situation not dealt with in the Code is one involving a discrepancy in favor of the customer. This might result from the bank's failure to debit an item, its crediting to this customer's account of an item which should have been credited to another account, or its making some other error (for instance, underencoding) which produces an overage on the customer's statement. Where such an overpayment has been made, the bank's theory of recovery will most likely be restitution—money paid by mistake.[67] The bank's right to recover on these grounds, however, may be defeated if the customer can prove that he has innocently changed his position to his detriment in reliance on the erroneous statement.[68] Moreover, the law of "account stated," often used by banks in defending claims brought by customers, is equally applicable in this instance as a defense to the bank's claim.[69]

Since these situations are not specifically covered in the Code, the Code's time periods are not applicable. Indeed, the opportunity to seek a readjustment of erroneous accounts appears to extend for a considerable period of time[70]—as long as twenty years in special cir-

65. Clarke v. Camden Trust Co., 84 N.J. Super. 304, 201 A.2d 762 (Super. Ct. 1964); Rainbow Inn, Inc. v. Clayton Nat'l Bank, 86 N.J. Super. 13, 205 A.2d 753 (Super. Ct. 1964); 10 AM. JUR. 2D *Banks* § 514, at 483-84 (1963); 2 PATON'S DIGEST OF LEGAL OPINIONS 1878-80 (1942). This approach often prompts mention of the different outcome one might expect between the case where the faithless employee alters only the name or amount on the check and the case where he goes further and expertly alters the name or amount on the checkbook stub as well. See Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 63 N.E. 969 (1902).

66. Critten v. Chemical Nat'l Bank, *supra* note 65.

67. See, *e.g.*, Manufacturers Trust Co. v. Diamond, 17 Misc. 2d 909, 186 N.Y.S.2d 917 (Sup. Ct. 1959).

68. 2 PATON'S DIGEST OF LEGAL OPINIONS 1666-67 (1942) and cases cited therein.

69. Veneri v. Draper, 22 F.2d 33, 37 (4th Cir.), *cert. denied*, 276 U.S. 633 (1927). See also cases cited in 5 ZOLLMAN, BANKS AND BANKING § 3385 (1936).

The "account stated" rule typically provides that whenever a statement of account is sent by a bank to one of its customers, together with his cancelled checks or vouchers, and the customer does not object to it within a reasonable time, it becomes an account stated between the bank and the customer. See F. A. Potts & Co. v. Lafayette Nat'l Bank, 269 N.Y. 181, 199 N.E. 50 (1935); cases cited in 2 PATON'S DIGEST OF LEGAL OPINIONS 1666-67 (1942). The statement is, however, not entirely conclusive even after it has been retained and acquiesced in; it may still be impeached by either the bank or the customer for fraud, mistake, or error. See Veneri v. Draper, *supra* at 37.

For interesting cases of customers claiming the benefit of entries in their favor improperly made in their passbooks, see British & No. European Bank v. Zalzstein, [1927] 2 K.B. 92, 43 L.Q. REV. 305, 447 (1927); Commercial Bank of Scot. v. Rhind, 3 Macq. 643 (Scot. 1860), MEGRAH, PAGET'S LAW OF BANKING 101 (7th ed. 1966).

70. 5 ZOLLMAN, BANKS AND BANKING § 3385, at 365 (1936).

cumstances.[71] Furthermore, a statute of limitations may be of no benefit to the bank, since in some states it does not begin to run until demand for the uncredited amount is made.[72] Consequently, twenty-two states (as of 1965)[73] have been persuaded to adopt the *Final Adjustment of Statements of Account Statute*, which provides that the account will be presumed correct after a specified period of time and the customer (but not the bank) will thereafter be barred from questioning the correctness of the account for any cause. The time period varies, from state to state, from six months to seven years. However, in those few states where the period is less than three years, there may be a conflict with the Code's time limit for reporting forged indorsements.[74]

III. New Banking Services and Their Effect on the Duties To Send and Examine Statements

There are a variety of new bank services that are now available or contemplated for the near future which will affect the legal rights of the parties arising from the return of statements of account and cancelled checks.[75] For example, many computerized banks are now offering a "reconciliation service." This may consist of simply putting the customer's checks in numerical sequence by pre-printed check serial numbers so as to facilitate comparison with the checkbook. Other banks may, in addition, print the statement in a form that includes serial numbers of paid checks together with some means of calling attention to those checks within the sequence which have not yet been debited (as by printing asterisks where the missing checks would appear). Still other banks provide an actual reconciliation of the account, relying on a duplicate checkbook furnished by the customer. Since the statement and items are returned to the customer under the first two variations, he would still be subject to the same duties respecting examination as under the traditional method of reconciliation. Of course, if the bank should err in its preparation

71. Goodell v. Brandon Nat'l Bank, 63 Vt. 303, 305-06, 21 Atl. 956, 957 (1891).

72. See, *e.g.*, Goodell v. Brandon Nat'l Bank, *supra* note 71. *But see* 5 Zollman, Banks and Banking § 3388, at 372 (1936).

73. 2 Paton's Digest of Legal Opinions, *Deposits* § 8.5 (Supp. 1965).

74. The suggestion of an apparent conflict is made in Owen, *Article 4—Bank Deposits and Collections*, 38 U. Colo. L. Rev. 65, 94 (1965). *But see* Major Oil Dev. Co. v. First Nat'l Bank, 75 N.M. 179, 182-83, 402 P.2d 160, 162 (1965) (suggestion that Final Adjustment of Statement of Account statutes are not generally applicable to cases of forgery or alteration but only to "the mathematical correctness of the statement of account"); Brady, Bank Checks 561 (3d ed. 1962); *id.* § 15:30, at 125 (Supp. 1967).

75. For a discussion of computerized banking services other than those mentioned in the text, see Dean, *The New Look in Banking Services*, Business Automation, Jan. 1965, p. 36.

of the statement in a way which tends to conceal a discrepancy (for example, by omitting an asterisk), this would undoubtedly be seized upon by the customer as the basis for claiming that the bank's defense of negligent examination is unavailable to it. Under the third variation, where the reconciliation is actually performed by the bank, the ability to assert the customer's negligence becomes even more remote, particularly when the cancelled checks are not returned to the customer.

Another variation, under which the bank keeps the cancelled checks and submits only a periodic statement to the customer listing the paid checks in serial sequence with attention drawn to missing items, is already in operation on a significant scale.[76] This plan was tested by Bankers Trust Company in New York City with 120 employee accounts over a three-year period;[77] many payroll accounts have been handled in this way by computerized banks for some time. If the customer does not receive the checks paid by the bank, it does not seem reasonable to hold him accountable for failure to examine for forgeries and alterations. But is he nevertheless to be held liable under section 4-406(1) because his duty begins when the statement and (or?) items are "made available" (held pursuant to instructions) to him?[78] There are at least two problems here: first, whether "statement and items" can be read in the disjunctive so that the rule would apply even though only a statement is returned to the customer; and second, whether the bank can start the rule operating in its favor by accompanying the statement with a legend thereon to the effect: "We will hold the checks for you for your examination for 'X' days."[79] It seems to this writer that a customer (particularly a large one) entering such an arrangement would be well advised to have his attorney work

76. As the customer of Barclay's Bank of Khartoum for eight months in 1965–1966, this writer can testify to the convenience of such a system. See MEGRAH, PAGET'S LAW OF BANKING 119-20 (7th ed. 1966), for a discussion of the practice of returning a customer's paid checks in England. This same book contains an interesting and informative discussion of both the English and American law relating to passbooks, statements and cancelled checks. See *id.* at 99-120.

Apparently, banks in some South and Central American countries put the same onus of care in safeguarding personalized and serialized checks upon the customer which this writer experienced in Khartoum. See Murray, *Forged Bills of Exchange and Checks: A Comparison of the Anglo-American, European and Latin American Law*, 82 BANKING L.J. 565, 581 (1965). The computerization of the payment process and reduction or elimination of signature verification in this country has prompted a similar suggestion. Freed, *Some Legal Implications of the Use of Computers in the Banking Business*, 81 BANKING L.J. 753, 761-62 (1964).

77. Livingston, *Why Return the Checks?*, The Bankers Magazine, Summer 1966, p. 15.

78. U.C.C. §§ 4-406(1) & (4); see note 20 *supra* for text of this section.

79. And neglecting to specify that "after which, if there are any forgeries, alterations, etc., the loss will be borne by you."

out a specific agreement as to what the responsibilities of the parties are and who is to bear the loss with respect to such occurrences as forgery and alteration.[80] In any event, the advent of such practices calls for a re-examination of the scope of the customer's duty under section 4-406.

Another emerging banking service is the practice of "one check payrolls" by which, after debiting the customer's account, either direct credits are made to his employees' personal accounts in the same bank or in some other bank participating in the scheme[81] or, alternatively, "cashier's checks" or "treasurer's checks" are prepared by the bank in reliance on a list or order submitted by the customer.[82] It is apparent that under this scheme there will be no obligation upon the customer to examine cancelled checks nor is there a bank statement, in the traditional sense, to be reconciled. The same observation may be made with respect to consumer or non-business account arrangements for bill paying.[83] Services are available or being discussed that would pay automatically certain basic recurring bills such as mortgage payments, utilities, insurance premiums and the like without being instructed each time by the customer: these payments are also accomplished by either internal entries or the preparation of cashier's checks by the bank. An elaboration of this scheme contemplates the customer's submitting even his non-recurring or more flexible bills to his bank for payment in monthly "batches," thus shifting to the bank virtually all of the customer's check-writing and reconciliation chores. Again, the transfer of function eliminates most of the customer's legal liability as well.

Just about the ultimate among the so-called "checkless society" schemes is the "System for Automatic Value Exchange" or "SAVE" for short.[84] Under this scheme, the customer carries little cash and no checks; he carries only a card which is used by retailers to activate a series of computers which are able to accomplish a transfer from the buyer's "bank acount" to the retailer's "bank account" and, in some instances, a loan to the customer to finance the purchase. The cus-

80. Such an agreement is permitted by U.C.C. § 4-103(1), set out in note 60 *supra*.

81. See Bank of Utah v. Commercial Sec. Bank, 369 F.2d 19 (10th Cir. 1966).

82. Suppose the payroll clerk in the customer's office pads the payroll list with the names of a few fictitious employees. Is the faithless clerk an "agent or employee of the maker or drawer" within the meaning of § 3-405(1)(c)?

83. See Duffy, *Some of the Pitfalls in EDP*, Banking, Aug. 1966, p. 47.

84. See Sprague, *System for Automatic Value Exchange*, Banking, June 1966, p. 117. See also Salveson, *A New Medium of Exchange*, Banking, Dec. 1966, p. 99 (describing the operation of the Universal Bank Credit Card System); Dean & Mathews, *The Electronic Dollar*, Business Automation, Nov. 1966, p. 35; Sprague, *Electronic Business Systems—Nineteen Eighty-Four*, Business Automation, Feb. 1966, pp. 39, 45-46.

tomer will receive periodic statements of his account, but they will be only vaguely similar to those received at present, and, of course, there will be no checks as such returned to him. The present provisions of Article Four, including section 4-406, would again seem to be inadequate to deal with such a scheme, and a new statute or set of provisions for inclusion in the Code may well have to be devised.[85]

The time consumed in the reconciliation process and the space required for check storage, especially with respect to large commercial customers, argue strongly for the adoption of such procedures as those mentioned above as a convenience to the customer. By the same token, the press of the increasing volume of work in modern banks militates toward the abandonment of careful, or in some instances of any, signature verification or other examination procedures. To the extent that checks drawn by customers will still be utilized in the future, the relational obligation of a bank to its customer will continue to permit assumpsit recovery for payment of forged or altered checks, but the possibilities of asserting the negligence of the customer have already been, and will be further, affected by changing banking practices. In an attempt to keep pace with the times, it seems likely that banks will draft provisions, to be incorporated in agreements with both traditional or special checking account customers, delineating standards by which their responsibility for the exercise of ordinary care is to be measured.[86] Such standards must not be "manifestly unreasonable," but it seems likely that reasonableness would have to be determined in the context of modern banking "facts of life," including the ever-escalating volume of work, trained personnel shortages, and the nature of electronic and other equipment. I think most of us will live to see the day, however, when private agreements will no longer suffice and an entirely new statute will have to be drafted.

85. For a discussion of some of the new schemes contemplated and a draft of some provisions to be added to Article Four, see Dunne, *Variation on a Theme by Parkinson or Some Proposals for the Uniform Commercial Code and the Checkless Society*, 75 YALE L.J. 788 (1966).

86. U.C.C. § 4-103(1). The text of this subsection is set forth in note 60 *supra*.