statement.[42] Esoteric inquiries into "truth," "privilege," "comment," and "fact" are eliminated, along with the hazards of whimsical juries. Furthermore, the damage resulting from the initial accusation is minimized, possibly to the point of eradication.[43]

Negotiable Instruments—Forgery—Bank Liable for Fraud of Depositor's Employee—[Rhode Island].—The plaintiff, a jewelry manufacturing and jobbing corporation, brought an action in assumpsit against the defendant bank for debiting forged checks to the plaintiff's account. Over a period of four years ninety-three forged checks in the sum of $61,646.22 were paid out to the plaintiff's bookkeeper who had forged the signatures of the two officers authorized to sign checks and who had concealed his defalcations by clever manipulation of the books.[1] The forgeries were never detected by the firm of certified public accountants hired by the plaintiff to make monthly and yearly examinations of its records. After four years the bookkeeper confessed and written notice of the forgeries was immediately given to the bank. On appeal from a judgment for the plaintiff, *held*, the plaintiff was entitled to recover the sum of those forged checks on which recovery was not barred because of failure to give notice within the time required by the statute of limitations.[2] *R. H. Kimball, Inc. v. Rhode Island Hospital National Bank.*[3]

[42] The principle of immediate rectification of slurs on reputation as a substitute for libel actions has been enacted into law in some states. Unfortunately, the courts have treated such legislation shabbily on the ground that it deprives the individual of the constitutional right to recover general damages for defamation. Waybright, Defamation by Newspaper and Radio—Are the Florida Statutes Constitutional? 14 Fla. L.J. 161 (1940).

[43] Riesman, Democracy and Defamation: Fair Game and Fair Comment II, 42 Col. L. Rev. 1282, 1308–14 (1942), advances politico-sociological formulae as tests for disposing of political libel suits, proposing that courts favor the weaker social and political groups and protect "progressive" elements against "reactionary" elements.

Benjamin Franklin's answer to the problem is candid. "My proposal then is to leave the liberty of the press untouched, to be exercised in its full extent, force, and vigor; but to permit liberty of the cudgel to go with it *pari passu*." Federal Gazette, p. 2 (Sept. 12, 1789).

[1] The bookkeeper employed the following method: He would segregate certain of the incoming checks on accounts receivable and withhold them from the regular deposit in the defendant's branch bank. Later he would deposit them separately in the main bank where he had formerly been employed and was acquainted with several tellers. Simultaneously or shortly threafter he would withdraw a sum identical to that deposited, using one of the plaintiff's printed checks from the back of the checkbook pad and forging the vice-president's signature. When the numbers on legitimate checks approached those on checks he had used in forgeries, the bookkeeper would obtain a new pad of checks, the first few numbers of which duplicated the numbers of the forged checks. The new checks were then used in legitimate fashion and entered in the cash book, maintaining apparent continuity. Other records, including invoices and accounts receivable, were also manipulated to appear in good order, with the result that no discrepancies were noted at any of the monthly or yearly audits which would have led to the discovery of the forgeries.

[2] There is a wide range of time among various jurisdictions within which notice of forgery must be given to a bank. Ore. Comp. Laws Ann. (1940) § 40–1009, thirty days; Wash. Rev. Stat. Ann. (1937) § 3252, sixty days; Ill. Rev. Stat. (1945), c. 16½, § 24, one year; N.Y. Neg. Inst. Law (McKinney, 1943) § 326, one year; R.I. Gen. Laws, (1938) c. 137, one year.

[3] 48 A. 2d 420 (R.I., 1946).

A drawee bank has no right to debit an unauthorized check to the depositor's account and, should it do so, the payment is considered to be out of the bank's own funds.[4] The bank is charged with knowledge of the depositor's signature[5] and in cases where the depositor has not been negligent the bank bears a burden of absolute liability which cannot be avoided by any showing of due care.[6] Even when the depositor has in some way contributed to the loss and might therefore be barred from recovery, the bank can generally discharge its responsibility only by proving its own freedom from negligence.[7]

When for one reason or another the courts have denied recovery to a depositor, their rationale has customarily been framed in terms of one of three general concepts. One such concept, used only in a limited number of jurisdictions, is ratification—the depositor by some failure to exercise due care is held to have "ratified" payment on the forged instrument.[8] More commonly the courts say that a delay in disclosing the forgery which is considered unreasonable may effect an estoppel, even though notice was given within the time required by the statute of limitations.[9] A few jurisdictions have also used estoppel

[4] Phoenix Bank v. Risley, 111 U.S. 125 (1884); Denbigh v. First National Bank of Seattle, 102 Wash. 546, 174 Pac. 475 (1918); Britton, Bills and Notes § 132 (1943). A contract between bank and depositor comes into being upon the filling out of a signature card on which certain conditions appear. These may be limited merely to a willingness on the depositor's part to abide by the bank's rules and regulations. On the other hand, the statement is apt to elaborate on the newly created relationship with regard to collection in the following fashion: In receiving and handling items for deposit or collection this bank acts only as its customer's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited or cashed subject to final payment in cash or solvent credits. . . . . No agreement has been found which includes any statement regarding the effect of unauthorized payment.

[5] Bank of United States v. Bank of Georgia, 10 Wheat. (U.S.) 333 (1825); Maitland, Coppell & Co. v. Laredo National Bank, 296 Fed. 867 (C.C.A. 5th, 1924); Barmby v. Merrimack Co-op. Bank, 285 Mass. 37, 188 N.E. 378 (1933).

[6] Frankini v. America National Trust & Savings Ass'n, 12 Cal. App. 2d 298, 55 P. 2d 232 (1936); Wussow v. Badger State Bank of Milwaukee, 204 Wis. 467, 234 N.W. 720 (1931); Union Tool Co. v. Farmers & Merchants National Bank of Los Angeles, 192 Cal. 40, 218 Pac. 424 (1923).

[7] Gutfreund v. East River National Bank, 251 N.Y. 58, 167 N.E. 171 (1929); Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969 (1902). It is to be noted that rules of evidence may be of great importance in determining who is to bear the loss. For example, in the instant case the court declared that by the law of Rhode Island the bank bears the burden of establishing its freedom from negligence *before* it can raise the issue of its depositor's negligence. R. H. Kimball, Inc. v. Rhode Island Hospital National Bank, 48 A. 2d 420, 428 (R.I., 1946).

[8] The value of the ratification theory in forgery cases is somewhat limited by the split of opinion regarding the propriety of its use. The leading case in its support is Greenfield Bank v. Crafts, 4 Allen (Mass.) 447 (1862). Among cases representing the opposite point of view are Marsh v. State Bank & Trust Co., 153 Tenn. 400, 284 S.W. 380 (1926), and First National Bank v. Allen, 100 Ala. 476, 14 So. 335 (1893). An exhaustive discussion of the arguments raised by each side and of a closely related theory, adoption, is contained in Arant, Forged Checks—The Duty of Depositor to His Bank, 31 Yale L.J. 598, 606 (1922).

[9] United States v. National Bank, 2 Mackey (S.Ct. D.C.) 289 (1883); Traders National Bank v. Roger, 167 Mass. 315, 45 N.E. 923 (1897); 1 Mechem, Agency § 361 (1914); 50

when the forgery was not discovered because of the depositor's negligence.[10] Lastly, the courts sometimes say that a depositor will not recover when he has been negligent to such an extent as to constitute a breach of the implied contract between himself and the bank. This is justified on the grounds that the depositor is in the best position to detect the forgery and that a prompt report of these facts might enable the bank to recover a part or all of the sum from the forger. Thus the depositor is held to have an implied contractual duty to make a reasonable examination of his own records and the canceled checks and statements furnished by the bank.[11] Employment of an expert accountant or of some other agent periodically to examine the books is customarily regarded as discharging the depositor from his personal duty,[12] but he is nonetheless charged with the knowledge which an honest and reasonably prudent agent could obtain through investigation.[13]

Within the typical banking organization the customary methods of handling checks is not likely to disclose forgeries. The paying tellers have recourse at all times to a signature file, but in most large banks the numerical volume of transactions alone makes reference to it a rare occurrence.[14] With checks for small amounts the bookkeeper, in addition to his other functions, is responsible for noting signatures. When the checks are for larger amounts a bank employee is specifically assigned to checking signatures. Above a yet larger amount checks are "double paid," i.e., the signatures are checked by two people. Although

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A.L.R. 1374 (1927). As a result of proof of loss on the bank's part, no matter how small, the depositor under the conditions already outlined may be estopped and the bank thus relieved of its obligation to repay him. This doctrine of complete discharge has been severely criticized. Duty of Depositor to Notify Bank of Checks Forged in His Name, 18 Va. L. Rev. 774, 778 (1927).

[10] First National Bank of Union Bridge v. Wolfe, 140 Md. 479, 117 Atl. 898 (1922); Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S.W. 723 (1916). Note the difficulties encountered in trying to frame liability for negligent omission in terms of estoppel notions which clearly imply positive conduct. See First National Bank v. Allen, 100 Ala. 476, 14 So. 335 (1893); Houseman-Spitzley Corp. v. American State Bank, 205 Mich. 268, 171 N.W. 543 (1919); Britton, Bills and Notes § 132 (1943).

[11] England National Bank v. United States, 282 Fed. 121 (C.C.A. 8th, 1922); Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969 (1902).

[12] Takenaka v. Bankers Trust Co., 132 N.Y. Misc. 322 (1928); Clark v. National Shoe & Leather Bank of City of New York, 164 N.Y. 498, 58 N.E. 659 (1900). Contra: Hammerschlag Mfg. Co. v. Importers & Traders National Bank, 262 Fed. 266 (C.C.A. 2d, 1919).

[13] First National Bank of Philadelphia v. Farrell, 272 Fed. 371 (C.C.A. 3d, 1921); Deer Island Fish & Oyster Co. v. First National Bank of Biloxi, 166 Miss. 162, 146 So. 116 (1933); National Dredging Co. v. President, etc., of Farmers Bank, 6 Pennewill (Del.) 580, 69 Atl. 607 (1908).

[14] In some banks, tellers' windows are arranged in alphabetical sections, thus increasing the probability that the teller will recognize the maker's signature. Investigation in banks employing this practice reveals that reference to signature files then becomes an almost unheard of occurrence, for there is increased trust in the "sixth sense" of the tellers, i.e., that they will recognize forgeries by the difference in handwriting or by a variation in the use of proper names and initials.

some banks habitually verify checks for substantial amounts with their depositors when the payees are unknown to them, most banks have discontinued this practice because it annoyed the depositors. In the instant case where the forger deposited and withdrew the same amount of money within a very brief period, the bank employee charged with making up the periodic statement on which deposits and withdrawals are tabulated daily could theoretically be expected to note this striking identity. It appears, however, that this work is done so rapidly and mechanically as to allow little conscious comparison of the figures noted. The bank assumes the obvious shortcomings of such a procedure as a risk of its business.

The depositor also is faced with the problem of detecting forgeries since, as previously noted, he may be barred from recovery if his efforts in this direction are unreasonably lax. The first logical step is to set up his organization in such a manner as to obviate the dangers of the "confidential agent" so well illustrated in the principal case. Perhaps more important is the employment of expert accountants under terms broad enough to necessitate their investigation of every phase of the accounting operations.[15]

While current preventative practices are clearly inadequate to stop all forgeries, any proposed alterations encounter several important objections. Increased banking safeguards would necessarily result in increased banking costs and, more important, would probably result in slower service if, for example, tellers were directed to check all signatures and if bookkeepers were required to examine daily statements for suspicious debits. Alternatively, imposing on the bank the liability of an insurer has the tempting appeal of offering the depositor complete protection, of especial value to the small uninsured depositor. Noteworthy, however, is the fact that this class of depositors is more likely to prefer the slight risk of losses from forgery and the status quo which provides him with many free banking services to bearing the cost of insurance for another class of depositors, those whose transactions are substantial and whose financial position is more attractive to the forger. It would seem that large commercial enterprises, where these losses customarily occur and which are in the best position to curb them, should be the chief bearers of this cost item.

With these considerations in mind it seems that until legislatures indicate their desire to alter banking practices either by imposing a very high degree of care, and perhaps specifying its characteristics, or by imposing liability without regard to care, the depositor should be made to assume more responsibility. There appears to be little foundation in reason for the judicial imposition of primary liability on the bank. One writer has suggested approaching the relation-

[15] The accountant is not to be overlooked as a risk bearer although there are few cases holding accountants liable for negligent conduct. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 2d 441 (1931); State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E. 2d 416 (1938). See MacMillan, Sources and Extent of Liability of a Public Accountant, 15 Chi-Kent. Rev. 1 (1936); Liability for Negligent Auditing of Accounts, 39 Col. L. Rev. 688 (1939).

ship between bank and depositor as one involving reciprocal duties,[16] which would require the enactment of loss-splitting legislation similar to that passed in a few jurisdictions to govern the imposition of liability in the more typical negligence action.[17]

One hears few proposals for change, however, from any of the parties involved —bank, depositor, or insurance company. In fact a singular contentment with the present state of affairs seems to exist in all quarters. The undoubted explanation lies in the comparatively slight losses resulting from forgeries, recent publicity to the contrary notwithstanding.[18] Figures from two prominent Chicago banks reveal yearly losses ranging from $600 to zero during 1945 and 1946. Furthermore, according to the best available information, national losses are probably greatly overrated; the bankers' annual toll is estimated at approximately $500,000 to $800,000, nearly all of which is covered by forgery insurance.[19] Thus the insurance company is revealed as the risk-shifting vehicle, usually in the role of the bank's insurer. However, forgery claims seem to be sufficiently small in amount to provide no impetus for insurance companies in this competitive field to demand of the banks higher standards of operation. Under these circumstances there is little hope for the reduction of losses through forgery unless and until they become a substantial burden on any one of the classes involved. Thus, despite the clumsiness and conceptualism sometimes indulged in by the judiciary in allocating forgery costs the needs of the business community appear to be adequately served by the present state of the law.

Patents—Revocation of Executory Price-fixing Agreement Held To Relate Back so as To Permit Retroactive Enforcement of Patent—[Federal].—The patentee of a feather-picking apparatus made a manufacturer his exclusive licensee with power to sublicense, the patentee to receive a 5 per cent royalty. The exclusive licensee entered into a sub-licensing agreement, in which the patentee joined, which provided that the exclusive licensee was to specify the

[16] Duty of Depositor to Notify Bank of Checks Forged in His Name, 18 Va. L. Rev. 774, 779 (1927).

[17] Compare the proposals set out in Gregory, Legislative Loss Distribution in Negligence Actions 154 (1936).

[18] The most spectacular recent forgery is that involving the Mergenthaler Linotype Corporation. N.Y. Times, § 1, p. 1, col. 2 (Nov. 3, 1946). See also Stearns, Embezzlement—the Easiest Crime, 48 Reader's Digest, No. 285, at 73 (Jan., 1946).

[19] The statistics were contained in a letter of February 1, 1947, from Mr. James E. Baum of the Insurance and Protective Committee, American Bankers Association. It is to be noted that the total of national losses includes those from forgeries on non-negotiabile instruments as well as on negotiable instruments. Comparison of the figures with the number of banks in operation further substantiates the view that the losses are slight. The average loss per bank equals $52.10 when $800,000 is divided by 14,586—the number of banking offices in the United States on December 31, 1946. 33 Federal Reserve Bulletin, No. 3, at 330 (Mar., 1947). In addition, evidence that banks themselves consider forgery losses insignificant is to be found in the widespread use of excess forgery insurance policies which covers losses only over a certain amount, often $100,000. Below the amount established the banks are, in effect, self-insured.