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Banking-Disclosure of Records-The Duty of a Bank as to Customer Information

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BANKING—DISCLOSURE OF RECORDS—THE DUTY OF A BANK AS TO CUSTOMER INFORMATION—The lawyer who attempts to advise a bank on its duty as to the disclosure of information it has received concerning its customers, including communications from the customer himself, enters a puzzling area of the law. The difficulty is not primarily a conceptual one but rather a surprising scarcity of American authority clearly defining the duty, an inadequate amount of legal literature in the area,[1] and a lack of consistent treatment of customer information by banks. One can only speculate on the cause of the scarcity of authority, but certainly the traditionally conservative treatment given customer information by American bankers and the use of extralegal rules[2] to guide bankers on certain aspects of its duty regarding this information at least partially explain the doctrinal void. Another factor is the tendency of courts to approach this problem obliquely—as a question of whether a banker has a testimonial privilege to refuse to reveal information concerning his customers when ordered to do so by a court[3] or governmental agency[4]—which has resulted in the development of a relatively substantial body of case law detailing instances when a bank may not refuse to disclose information, and a marked absence of any definitive statement on the other, more positive, aspects of the duty itself. A final possible reason for the scarcity of authority is a lack of recognition of the legal implications of the bank-depositor relationship despite increased awareness of the importance of an individual's credit standing in our present economic framework.

1 The only two adequate discussions of the area may be found in 1 PATON'S DIGEST OF LEGAL OPINIONS § 19 (4th ed. 1940) and Limburg, *The Bankers' and Brokers' Privilege*, 25 COLUM. L. REV. 152 (1925).

2 See, *e.g.*, Robert Morris Associates Code of Ethics for the Exchange of Information. A code of credit ethics adopted in 1916 by The Robert Morris Associates dedicated to maintaining the exchange of credit information on a highly confidential and ethical level, the code is voluntarily subscribed to by a large number of banks and savings institutions.

3 See, *e.g.*, Internationale Pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953).

4 See, *e.g.*, ICC v. Harriman, 157 Fed. 432 (C.C.S.D.N.Y. 1908).

The purpose of this comment, therefore, is to describe the scope of the banker's duty as to customer information as best it can be discerned in light of the increasing exchange of credit information and increasing resort to such information by government agencies—particularly the Internal Revenue Service. In the process, it is hoped that attention will be drawn to the uncertainty which exists in this area, perhaps prompting action by the states or the banks themselves to clarify the scope of the duty and to encourage uniform treatment of customer information in a manner consistent with this duty.

The Duty Owed by a Bank to Its Customers

Three possible bases have been suggested for imposing upon a bank the duty of secrecy as to customer information or, stated conversely, for giving the customer a privilege of non-disclosure. An early American case based its finding of such a duty on the theory that the customer held a property interest in the information contained in the bank's records of his accounts, deposits, and withdrawals.[5] Presumably because of the more acceptable basis discussed below, this proprietary analysis has received no additional support. Secondly, it has been suggested that any communication from customer to bank be regarded as privileged,[6] much as is a communication between attorney and client. Although this suggestion will be discussed more thoroughly below, it will suffice here to point out that it has been consistently rejected by American courts.[7] The third theory, accepted by those American writers who have considered the problem, is that first announced in the leading English case of *Tournier v. National Provincial & Union Bank of England*.[8]

The rather complex fact situation of this important case may be summarized as follows. Plaintiff was an overdrawn depositor of defendant bank who had fallen behind in his payments to cover his deficiency. While employed by *K* company he received a check drawn by *X*, another of defendant's customers. Plaintiff endorsed this check to *L*, who deposited it in his own bank. On the return of the check, the defendant bank inquired of the last

5 Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (1929).
6 1 PATON, *op. cit. supra* note 1, at 620.
7 See, *e.g.*, Smith v. Dawson, 234 S.W. 690 (Tex. Civ. App. 1921).
8 [1924] 1 K.B. 461.

named bank as to who had deposited the check. Upon learning that *L* was a bookie, the defendant bank unsolicitedly disclosed this fact to plaintiff's employer. When plaintiff's employment contract ended, *K* company refused to renew it, and plaintiff brought an action at law for damages. On plaintiff's cause of action[9] for breach of defendant's duty not to disclose to any third person either the state of plaintiff's account or any information the defendant had acquired regarding the plaintiff, the jury found for defendant.[10] The court of appeals reversed, holding that as a matter of law the obligation of secrecy was an implied term of the contract between the bank and its depositor.

The English court's finding of an implied contractual duty of secrecy seems to have been based on the confidential relationship then existing between the bank and its customer,[11] an analysis of dubious applicability to American banking because of the general disagreement among our courts on the question of the confidentiality of the banker-customer relationship. Authorities range from the view that the relationship itself is no more than that of debtor-creditor, and therefore not confidential,[12] to the belief that the relationship itself, like that of lawyer and client, is confidential.[13] While some banker-customer relationships fall within the confidential area, the vast majority, in which the average depositor thinks of the bank merely as a safe place in which to keep his money, do not.[14] The more realistic approach, therefore, is to recognize that the duty itself need not depend upon the existence of a confidential relationship and can be more accurately thought of as a product of the confidence customarily ac-

9 Plaintiff also brought an action for slander with which we are not here concerned. Tournier v. National Provincial & Union Bank of England, *supra* note 8, at 462.

10 The jury had been instructed that if the "banker has made that disclosure justifiably, that is to say, if, under the circumstances of the particular case, it was reasonable and proper that he should make the communication, then there is no breach of contract on his part." *Id.* at 471. Bankes, L. J., said in speaking of the instruction, "it is leaving to the jury a question which is primarily a question for the judge, and . . . it leaves the jury entirely without instruction as to what the circumstances are which they are entitled to take into consideration in arriving at a conclusion as to what is reasonable and what is proper." *Id.* at 472.

11 *Id.* at 464.

12 See, *e.g.*, Klatt v. First State Bank, 206 Iowa 252, 220 N.W. 318 (1928). See also 5A MICHIE, BANKS AND BANKING 12, 15 (1950).

13 See, *e.g.*, Brex v. Smith, 104 N.J. Eq. 386, 146 Atl. 34 (1929); *cf.* Hansen, *Internal Revenue Examinations of Customers' Accounts*, 73 BANKING L.J. 163, 164 (1956).

14 Limburg, *supra* note 1, at 157.

corded such information by bankers.[15] In any event, a difference of opinion over the basis of the duty need not detract from the aid given by *Tournier* to an understanding of its scope.

The English court, cognizant of the need to balance the customer's need for privacy in order to protect his credit standing with the need of banks and the economy in general for a certain amount of interchange of credit information and the public need for disclosure of customer information in such areas as tax investigation, qualified its general statement of legal duty with four broad exceptions: "(*a*)Where disclosure is under compulsion by law; (*b*) Where there is a duty to the public to disclose; (*c*) Where the interests of the bank require disclosure; (*d*) Where the disclosure is made by the express or implied consent of the customer."[16]

Although *Tournier* has been criticized for its failure to define more clearly the duty owed, it having been said that the court merely stated "but an implication qualified by other implications,"[17] the case nevertheless gives English banking law a degree of certainty in this area that its American counterpart lacks. As a result, in the absence of applicable American authority, some writers have concluded that *Tournier* states the law as it would be found to exist by an American court.[18] No case has clearly so held, nor has the writer come across any case clearly raising the issue, but this assumption seems fairly reasonable, in view of the customary confidential treatment given by American banks to customer information, the need in our credit-conscious economy for protection of an individual's credit, and other instances of the use of English decisions to guide American courts.[19] Therefore, by drawing from *Tournier* and certain American authority which delineate areas in which a bank clearly cannot withhold customer information,[20] it is possible to sketch in the scope of an American bank's duty as to customer information. The very sources used, however, evidence the uncertainty which attends the law in this area and highlights the need for more authoritative statements of this duty.

15 See Limburg, *supra* note 1, at 157-58 for a discussion of the logic of deriving this duty from custom.

16 Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461, 473.

17 40 L.Q. REV. 278, 279 (1924).

18 See commentaries cited note 1 *supra*.

19 See, *e.g.*, The Turret Crown, 297 Fed. 766, 776-77 (2d Cir. 1924).

20 See cases cited notes 3 and 4 *supra*.

Disclosure in the Absence of Subpoena

When Consent Has Been Given: There is little doubt that a state bank has the power to disclose general information regarding the credit position of a depositor if the customer has consented.[21] The practice is general and is in fact a necessity in today's complex credit economy. As the duty of secrecy is a contractual relation, *ad hoc* consent is merely a form of waiver releasing the bank from any obligation to refrain from disclosing the requested information.[22] However, if the consent is given at the time the relationship is born, the consent would be evidence from which to infer that no obligation ever existed and therefore no release would be necessary. There is some doubt as to the right of a national bank to give such information because of a somewhat questionable holding by a state court that "a national bank has no power to engage in the business of furnishing to depositors . . . [such information]."[23] Clearly inapplicable to the occasional rendering of such information, which could not be deemed to be "engaging in the business of furnishing" information, this case is unlikely to be found applicable even where a continuous practice of rendering such information was found. The furnishing of credit information by banks has become so widespread there is little doubt that it would be deemed an implied power of a national bank. But the case has never been specifically overruled and is still occasionally cited for the proposition that a national bank lacks the power to furnish credit information.

Somewhat related to the consideration of the power of a bank to furnish credit information with the customer's consent is the question of whether the furnishing of such information is within the scope of the bank's duties. It appears that there is no legal obligation on the bank to disclose information.[24] For business

21 *E.g.*, Hindman v. First Nat'l Bank, 98 Fed. 562, 567 (6th Cir. 1899): "It is the usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers." *Cf.* Comment, 31 MARQ. L. REV. 97 (1947).

22 This is an example of what was meant by the fourth exception to the banker's duty stated in *Tournier*. See note 16 *supra*.

23 People's Nat'l Bank v. Southern States Fin. Co., 192 N.C. 69, 77, 133 S.E. 415, 422 (1926). *But see* 1 PATON, *op. cit. supra* note 1, at 627.

24 *Cf.* Lemke v. First Nat'l Bank, 190 Wis. 223, 208 N.W. 946 (1926); Consolidated Milling Co. v. Fogo, 104 Wis. 92, 80 N.W. 103 (1899); Comment, 31 MARQ. L. REV. 97, 100 (1947).

reasons it is unlikely that the bank would refuse to supply the requested information, but generally no one, not even the customer himself,[25] can, without the aid of a subpoena, demand that it be given. However, as the duty of secrecy is based only upon an implied agreement, it appears that the bank and customer could specifically agree to the furnishing of certain information to third parties.

Somewhere between the questions of the bank's power and its duty to disclose information is the question of its liability *vel non* for disclosure of erroneous or misleading customer information, upon which third parties have relied to their detriment.[26] The answer usually depends to a great extent upon the particular fact situation, but generally an employee (especially a cashier) cannot, merely by virtue of his position with the bank, make the bank liable for his having given such information.[27] Even if it is shown that the bank has a customary practice of furnishing such information, liability will not be imposed unless it can be shown also that the bank's misrepresensation was intentional,[28] or unless the bank can be proved to have later discovered its error, and then knowingly received benefits from the giving of the information.[29]

When No Consent Has Been Given: It is important to determine how long the obligation of silence continues and to what information it should apply. Only *Tournier* has spoken on these points and there the judges agreed that the contractual obligation did not have a retroactive scope and therefore did not extend to information received prior to the creation of the banker-customer relationship, but that it did apply after the termination of the relationship to information received during its existence.[30] The court split on whether the duty extended to information received through another customer's account but during the existence of

25 It is clear the relationship between banker and customer, whatever else it might be, is not that of principal and agent. As to the dispute on the actual nature of this relationship, see authorities cited in notes 11 and 12 *supra*.

26 See cases collected in Annot., 48 A.L.R. 528 (1927). See also Comment, 31 MARQ. L. REV. 97 (1947).

27 See, *e.g.*, Taylor v. Commercial Bank, 174 N.Y. 181, 66 N.E. 726 (1903). See also 1 PATON, *op. cit. supra* note 1, at 629.

28 See, *e.g.*, Park & Tilford Import Corp. v. Passaic Nat'l Bank & Trust Co., 129 N.J.L. 436, 30 A.2d 24 (1943); *cf.* Hindman v. First Nat'l Bank, 112 Fed. 931 (6th Cir. 1902). See also 1 PATON, *op. cit. supra* note 1, at 629.

29 See Martin v. Gotham Nat'l-Bank, 211 N.Y.S. 828 (Sup. Ct. 1925). *But see* Shriver v. Fourth Nat'l Bank, 121 Kan. 388, 247 Pac. 443 (1926).

30 Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461, 481.

plaintiff's. Lord Justice Scrutton felt that although the disclosure was a breach of defendant's duty to the drawer of the check, it was not a breach as to plaintiff.[31] The majority adopted as its test whether the information had been received during the currency of plaintiff's account and in defendant's role as banker.[32] Arguably this is an unwarranted extension of the bank's duty, as the information was not received by the bank in its role as plaintiff's banker. However, it was certainly only because of its role as plaintiff's banker that defendant had any interest in the information received through the drawer of the check's account and passed the information to his employer. Therefore the extension seems justified on the facts of this case. And after balancing the importance of personal credit with the many exceptions already stated to the general duty of secrecy, it appears that this broader duty is a legitimate and welcome extension of the scope of the customer's protection.

A bank may be compelled to reveal information concerning its customers even in the absence of a subpoena, but only in certain limited instances. The most obvious of these exceptions to the duty of secrecy is the bank stockholder's right to investigate the bank's books.[33] In reference to the duty found in *Tournier*, one court said:

> "A bank's contract with a customer not to disclose information concerning his transactions with it cannot override the rule of law giving stockholders of the bank a right to inspect its books and records."[34]

The right of a shareholder to inspect a bank's books has been abolished by statute in some jurisdictions,[35] but generally such right exists, safeguarded by a certain amount of discretion in the court to refuse inspection if the good faith or motive of the shareholder are questionable.[36] Although the shareholder has this right, the fact that the inquiry is made by another customer of the bank

[31] *Id.* at 482.

[32] *Id.* at 474, 485; see Winslow, *Banker's Duty of Secrecy*, 32 CASE & COM. 8 (1926); 76 SOL. J. 120 (1932).

[33] See Guthrie v. Harkness, 199 U.S. 148 (1905).

[34] State *ex rel.* G. M. Gustafson Co. v. Crookston Trust Co., 222 Minn. 17, 23-24, 22 N.W.2d 911, 916-17 (1946).

[35] MONT. REV. CODES ANN. § 5-1035 (1947).

[36] *Cf. Bank Shareholder's Right of Inspection*, 25 BANKING L.J. 17, 22 (1908).

is not a relevant factor in determining when a bank may be compelled to reveal information.[37]

In certain instances there may exist a special relationship between the bank and inquirer which would require the bank to reveal information concerning one of its customers. An example is the situation where the inquirer is another bank, for whom the depositor's bank becomes a collection agent. In this instance, the bank has the duty in the absence of a subpoena to furnish the information about the activities or affairs of its customers.[38] This seems to be a legitimate exception to the contractual duty of secrecy because of prevailing business practices and the need to afford special protection in this limited number of special relationships.

If a bank discloses information in violation of its duty of secrecy, it theoretically exposes itself to liability for all damages directly resulting from its breach of duty.[39] However, in the majority of cases recovery would be limited to nominal damages because of the customer's difficult burden of showing actual financial damage.[40] The defenses available to the bank for its breach of duty are the same ones discussed above regarding liability for misrepresentation to third persons, *i.e.*, that the disclosure was beyond the scope of the bank's power or beyond the scope of the employee's duty. As was mentioned earlier, this first defense is probably no longer available because of the generally recognized power of a bank to give this information.[41] The second is largely a matter to be determined from the facts of each individual case.

Apart from the possibility of a contractual liability for breach of the non-disclosure obligation, the bank may also subject itself to a suit for libel or slander by the offended customer.[42] Truth, of course, is a complete defense to such an action,[43] and the bank

37 See, *e.g.*, People's Nat'l Bank v. Southern States Fin. Co., 192 N.C. 69, 133 S.E. 415 (1926).

38 Grant County Deposit Bank v. Greene, 200 F.2d 835 (6th Cir. 1952).

39 *Cf.* Brex v. Smith, 104 N.J. Eq. 386, 392, 146 Atl. 34, 37 (1929).

40 See 1 PATON, *op. cit. supra* note 1, at 619.

41 It is clearly within the power of state banks to give this information and almost as clearly within the power of national banks. See authorities cited in notes 21 and 23 *supra*.

42 *Cf.* Richardson v. Gunby, 88 Kan. 47, 127 Pac. 533 (1912); Lewis & Herrick v. Chapman, 16 N.Y. 369 (1857).

43 See, *e.g.*, Pennington v. Little, 266 Ky. 750, 99 S.W.2d 776 (1936). See generally 33 AM. JUR., *Libel & Slander* §§ 117, 119 (1941).

is further protected by a qualified privilege of confidential communications, available when the information has been given in good faith to one having an interest in the information sought.[44] An example of the application of the latter defense is the case where in response to a telephoned request from another bank the defendant bank stated mistakenly that plaintiff had no account with it. Having spoken in good faith to another bank, defendant bank was protected from liability by its qualified privilege.[45] However, if the inquirer has no legitimate interest in the information sought, the bank will be liable in libel or slander for even a good faith disclosure of erroneous information.

Disclosure in Response to Subpoena

A bank cannot invoke the privilege against self-incrimination to justify refusing to disclose information when properly subpoenaed.[46] Nor is there any authority which indicates bank records are privileged communications free from the reach of subpoena.[47] On the contrary, the writers draw a clear distinction between privilege, meaning freedom from testimonial compulsion—in the lawyer-client type of communication—and the so-called "qualified" privilege, meaning freedom from disclosure in the absence of subpoena—in the banker-customer type of communication.[48]

It would be clearly unwarranted to extend the freedom from testimonial compulsion to banker-customer communications. Such an extension would be a clear violation of the balancing aspect of Wigmore's famous test for the existence of such a privilege:

"The *injury* that would inure to the relation by the disclosure

44 *Cf.* Richardson v. Gunby, 88 Kan. 47, 127 Pac. 533 (1912); Froslee v. Lund's State Bank, 131 Minn. 435, 155 N.W. 619 (1915). See generally 33 AM. JUR., *Libel & Slander* § 170 (1941).

45 Rothholz v. Dunkle, 53 N.J.L. 438, 22 Atl. 193 (1891).

46 See United States v. White, 322 U.S. 694 (1943), and authorities cited therein. As the privilege against self-incrimination is purely a personal privilege, it cannot be used on behalf of a corporation.

47 The overwhelming weight of authority is to the effect that bank records are subject to subpoena by court order. See, *e.g., In re* Davies, 68 Kan. 791, 75 Pac. 1048 (1904); Smith v. Dawson, 234 S.W. 690 (Tex. Civ. App. 1921); Annot., 109 A.L.R. 1450 (1937).

48 See Limburg, *supra* note 1, at 152. On the privilege as to lawyer-client communications, see 8 WIGMORE, EVIDENCE §§ 2290-2329 (McNaughton rev. 1961) and MCCORMICK, EVIDENCE §§ 91-100 (1954).

of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."[49]

While the privilege as to lawyer-client communications rests soundly upon the justifiable argument that encouragement of full disclosure in this area benefits society,[50] and would in fact be discouraged without such a privilege, the social necessity for providing testimonial protection to a bank customer's communications is clearly outweighed by the harm such a barrier would do to the fact-finding process in cases in which such information was relevant, and the probability that absence of privilege will not curtail the relationship. Admittedly it is from the rationale of qualified privilege that many pressure groups have argued, some successfully, for the creation of new statutory privileges.[51] The most closely related of these new privileges is that applied to accountant-client communications now recognized in eleven states and one territory.[52] Arguably there is sufficient need to encourage full disclosure to an accountant because of the need for competent counseling in complex tax matters to justify this extension of privilege.[53] By comparison, the extension of full privilege, as compared to a qualified form of privilege, to banker-customer communications is not warranted by any counter-balancing consideration and would be contrary to well-reasoned opinion against further extension of testimonial privilege.[54]

Nevertheless, the customer is legally entitled to some protec-

49 WIGMORE, *op. cit. supra* note 48, § 2285, at 527. The other parts of the test are as follows: "(1) The communications must originate in *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintainance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*"

50 WIGMORE, *op. cit. supra* note 48, § 2291. But even this privilege has been questioned. See MCCORMICK, *op. cit. supra* note 48, § 91, at 182, "If one were legislating for a new commonwealth, without history or customs, it would be hard to maintain that a privilege for lawyer-client communications would facilitate more than it would obstruct the administration of justice."

51 See Note, 5 VAND. L. REV. 590, 601 (1952) where many of the new privileges, *i.e.*, accountant-client, newspaper reporter-informant, are discussed.

52 For the most recent discussion of the accountant-client privilege, see Kasner, *Confidential Communications Between Accountant and Client*, 6 DRAKE L. REV. 92 (1957). *Cf.* Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), in which a certified public accountant's deposition, taken under authority of subpoena, as to his audit of corporation's books was properly suppressed by an Illinois federal district court to enforce his privilege under Illinois statute prohibiting a court from requiring a public accountant to divulge information or evidence obtained by him in a confidential capacity.

53 This argument is made in Note, 32 TEXAS L. REV. 453, 455 (1954).

54 See MCCORMICK, *op. cit. supra* note 48, § 81, at 166 n.7.

tion even when a subpoena is used, and the bank should give him this protection. It has been held that a banker may refuse to disclose information concerning a customer's affairs to a public official who fails to follow the proper procedure for securing such information,[55] and, in a closely related area, that a stockbroker need not reveal information not material to the issues under investigation.[56] It would appear, in fact, that the banker has a positive duty to refuse to reveal information under such circumstances. But where the proper procedures have been followed the bank is bound to comply with the subpoena, and the customer, who has no greater power in this respect than the bank, cannot prevent compliance.[57] However, a situation may arise wherein the customer can demand protection in the form of an injunction to prevent wrongful disclosure. In one Third Circuit case[58] an injunction was granted to prevent a violation of the fourth amendment protection against "illegal search and seizure" where revenue agents demanding the customer's records from the bank had failed to show cause for obtaining the records. Use of the case as a precedent is weakened by the fact that the court later sustained the subpoena after the Government justified its need to investigate the subpoenaed records, and approved, *obiter*, the rule that a third party does not have standing to invoke the protection of the fourth amendment.[59] However, in the proper situation, perhaps where the statutory prerequisites for securing a customer's accounts have not been met, the doctrine of the earlier Third Circuit decision may once again be found applicable.

Internal Revenue Investigations

A considerable number of cases have been decided on the relationship of a banker and his customer concerning information

55 See Hansen, *Internal Revenue Examinations of Customers' Accounts*, 73 BANKING L.J. 163 (1956).

56 Jonau v. Ferrand, 3 Rob. (La.) 364 (1842).

57 *Cf.* McMann v. SEC, 87 F.2d 377 (2d Cir. 1937), where a broker's customer tried to prevent the broker from complying with subpoena issued by the SEC on the grounds that (1) broker-customer relations were privileged, and (2) compliance would constitute an unreasonable search of the customer. Both grounds were rejected and the court refused to extend testimonial privilege to broker-client communications.

58 Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936).

59 Zimmerman v. Wilson, 25 F. Supp. 75 (E.D. Pa. 1938), *aff'd*, 105 F.2d 583 (3d Cir. 1939). The "standing" rule in this context was first set forth in McMann v. SEC, 87 F.2d 377 (2d Cir. 1937).

held by the former demanded by Internal Revenue Service agents.[60] Clearly the Internal Revenue Service has the power to subpoena customer records from a bank.[61] That the bank will be put to a certain amount of trouble in order to comply is no excuse for refusal, for a bank, like all of society, has a duty to aid in the enforcement of the law.[62] However, there exist certain well-organized limitations on this power of inquiry. Before obtaining a subpoena the revenue agent "must specify with sufficient precision for their identification the documents desired to be inspected. His demands must be within the scope of the statute . . . [and] he must also allege that such documents 'bear upon the matters required to be included in the return' in question."[63] Where these conditions have not been met, the bank owes a duty to its customers to refuse to furnish the requested documents. But in actual practice, apparently, far less may suffice to secure the information sought. From a study of several Los Angeles and New York banks it appears many banks have no set procedure for dealing with Internal Revenue requests for customer records.[64] Some furnish the desired information upon the mere showing of proper credentials while others require the agent to produce a subpoena before releasing any customer information to him.[65] Even more surprising than the unsystematic handling of requests for information is the fact that some banks do not attempt to notify customers that their accounts are under subpoena while others, having no set notice procedure, will notify only "important customers."[66]

In order to be consistent with its duty to maintain the secrecy of its customer's records in the absence of subpoena, a bank should, at the very minimum (1) notify the customer of the investigation; (2) prohibit inspection without a court order; (3) check the procedure followed by the agent and the order itself to assure compliance with the statutory requirements; and (4) adopt and follow a uniform procedure for handling such requests. Such action on the part of the bank might delay tax investigations, but for a

60 *E.g.*, First Nat'l Bank v. United States, 160 F.2d 532 (5th Cir. 1947).

61 INT. REV. CODE OF 1954 § 7602. See Note, 75 BANKING L.J. 9 (1958).

62 Washington Nat'l Bank v. Daily, 166 Ind. 631, 77 N.E. 53 (1906).

63 First Nat'l Bank v. United States, 160 F.2d 532, 534 (5th Cir. 1947).

64 Bailin, *Banks Ordinarily Cooperate with Internal Revenue Service in Tax Examinations of Customers*, 14 J. TAXATION 220 (1961).

65 *Ibid.*

66 *Id.* at 221.

bank to do less than the above is clearly inconsistent with its duty to its customers. If the procedure proves too great an interference with tax investigations, Congress may always amend the *Internal Revenue Code.* But it is not the role of a bank to determine the degree of cooperation to which the Service is entitled at the expense of the customer's privilege of non-disclosure.

State Statutes

A scattering of statutes pertaining to various aspects of the bank-customer duty of secrecy can be found among the states. Exemplary are a Montana statute[67] revoking the shareholder's right to inspect the books and records of a bank, and section 36(10) of the New York Banking Law. The latter reads:

> "All reports of examinations and investigations, correspondence and memoranda concerning or arising out of such examination and investigations, including any duly authenticated copy or copies thereof in the possession of any banking organization, bank holding company or any subsidiary thereof . . . foreign banking corporation, licensed lender, licensed casher of checks, or the savings and loan bank of the state of New York or the banking department, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the superintendent, the ends of justice and the public advantage will be subserved by the publication thereof, in which event he may publish or authorize the publication of a copy of any such report or any part thereof in such manner as he may deem proper."[68]

In a recent case[69] interpreting this language, the court upheld immunity from subpoena by refusing to allow a letter from the New York Department of Banks to a trust company to be introduced into evidence and by sustaining a decision of the Superintendent of Banking that there was no public advantage to be gained by allowing the information to be disclosed. Since the documents described in the statute are "confidential communications" and "not subject to subpoena," it would seem to follow that

67 MONT. REV. CODES ANN. § 5-1035 (1947).
68 N.Y. BANKING LAW § 36(10).
69 Clark v. Flynn, 9 App. Div. 2d 249, 193 N.Y.S.2d 401 (1959).

a bank could refuse to disclose them or their contents in the absence of subpoena as well as under the directives of one.

No state has attempted to deal with the over-all problem by enacting a comprehensive statement of the bank's duty to maintain the confidence of information received concerning its customers.

Foreign Law and the Duty of Secrecy

The most comprehensive and perhaps most familiar foreign banking law is that of Switzerland. The banking secrecy aspect of the Swiss law is but one of the so-called secrecy laws by which the Swiss attempt to effectuate their notion that each individual is entitled to a "sphere of secrecy (Geheimsphare)." One writer has stated:

> "The 'banking secret' has long been recognized as part of such 'sphere of secrecy.' The banking secret is an obligation of the banks or bankers not to disclose any information about their clients which might come to their attention in the course of their business."[70]

A violation of the duty of secrecy was originally considered a tortious offense subjecting the violator to civil liability only. In 1934, however, this duty was made statutory[71] and it was made a crime for anyone to induce the disclosure, or for a bank to disclose the confidential information given it by a customer. Article 47 of the Banking Act states:

> "Whoever intentionally . . .
> "(b) in his capacity as an officer or employee of a bank, or as an auditor or his assistant, or as a member of the banking commission, or as an officer or employee of its bureau, violates his duty to observe silence or professional secrecy; or whoever induces or attempts to induce a person to commit such an offense, shall be fined not more than 20,000 Francs, or shall be imprisoned for not longer than six months, or both . . . ."

Enacted originally to prevent foreign economic espionage in pre-World War II Europe, the Swiss law entitles the bank customer

70 Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284, 288 (1955).

71 Bundesgesetz über die Banken und Sparkassen (Vom 8. Nov. 1934) 51 AMTLICHE SAMMLUNG DER BUNDESGESETZE UND VERORDNUNGEN 117.

to a broad scope of protection, including protection from tax investigations. Moreover, since privileged communications are a matter of cantonal rather than federal law, the banker's privilege to refrain from testifying to customer information is not uniform. Admittedly, the circumstances present in the United States are not the same as those which prompted the Swiss to enact their banking secrecy statute, and it would probably be unwise for the United States to extend an exemption from testimonial compulsion to the banker. Certainly there is no need in the United States for criminal sanctions to punish the breach of the banker's duty.

A number of American cases have involved the secrecy aspect of Swiss and other foreign banking laws. The Second Circuit in two recent decisions has drawn an interesting distinction in the foreign banking field on the effect of service of a subpoena by a United States court. In the first case[72] it was held that an American bank may be required by subpoena to produce records of its Panamanian branch, while in the second[73] it was held that the domestic branch of a Canadian bank should not be served with a subpoena requiring the production of records held by the parent. In the latter case there was some question as to whether sending the records out of Canada would violate Canadian law. The court, concerned about a possible violation of its neighbor's laws, noted that there were other devices, potentially less troublesome, available to secure the requested information and held that the subpoena should not have been issued. The court referred to its earlier decision in the case involving foreign branches of an American bank where it had indicated that enforcement of the subpoena would be qualified if Panamanian law prohibited compliance. This concern over the possible violation of foreign banking law and the effect of this concern on a subpoena issued in the United States is an extension of the Supreme Court opinion in *Société Internationale v. Rogers*.[74] In that case the district court non-suited a plaintiff who was unable to bring certain banking records out of Switzerland and into court without violating Swiss law. The Supreme Court reversed, holding that where plaintiff had done all that was possible to secure the records

72 First Nat'l City Bank v. Internal Revenue Service, 271 F.2d 616 (2d Cir. 1959).
73 Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).
74 357 U.S. 197 (1958).

short of violating Swiss law, he should at least be permitted to proceed to trial although he was to be in no way relieved from his burden of proof, which without the requested records might well prove insurmountable.[75]

Conclusion

The basic problem is, as has been stated before, uncertainty regarding the exact posture of the law in the United States on this question. Speculation and conjecture as to the probable applicability of the *Tournier* doctrine may be an interesting academic exercise but it will not suffice to provide a solution. Nor will an understanding of the cases which have held that no privilege from disclosure existed provide the final answer. What is needed is a positive statement of the bank's duty, either by statute or a self-regulatory banking code, which will properly balance certain relevant interests: (1) the bank customer's need for protection of his credit; (2) the bank's commercial need to reveal customer information in certain situations; (3) the need of the economy for the free flow of credit information; and (4) the public need for disclosure in certain important situations.

The foundation of any code must be the recognition of the general primacy of the customer's need for privacy and protection of his credit. The need for protection of credit is, of course, subordinate to the desirability of disclosure of credit information to one, such as another bank, who has a legitimate interest in the information. Unless there is present such commercial necessity, or the express consent of the customer,[76] or a validly obtained subpoena, the bank should have the duty to refuse to disclose any information obtained during the bank-customer relationship. From these basic premises all other rules should follow.

It is apparent that the public interest is such that bank records should not be placed beyond reach of subpoena by the enactment of a privilege. Nevertheless, the bank should be obliged to adopt a procedure for dealing with such demands which will give each customer maximum protection. The customer should be notified

75 *Id.* at 198.

76 It may also be desirable to infer the customers consent when he has, in relevant dealings with a potential creditor, informed that person of the identity of his bank. In the absence of such an inference, the request for information (and consequently, in all probability, the customer's request for credit) would be denied, to the detriment of no one but the non-consenting customer.

of the impending inspection, and the inspection request should be refused unless consented to by the customer, or authorized by a court or other body with the subpoena power. The bank should further require a showing of full compliance with statutory or judicially enunciated prerequisites for obtaining such information.

If a bank discloses information in breach of its duty, it should be liable according to contract damage rules, compensating the customer for all provable injuries resulting directly from breach, as well as indirect injuries reasonably foreseeable at the time the relationship was begun. The bank should also remain liable for libel or slander when incorrect information has been given, subject still, however, to the qualified-privilege exception for information given in good faith to one having an interest in the information.

Whether a statute be enacted, judicial rules promulgated or a private code adopted, some specific measures are needed to bring greater clarity and uniformity to the treatment of customer information. The problem exists, and the basic doctrines and policies are apparent. It remains only for the legislatures, the courts, or the banks to coordinate them.

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