LEGAL AND INSTITUTIONAL METHODS APPLIED TO THE DEBITING OF DIRECT DISCOUNTS—VI. THE DECISIONS, THE INSTITUTIONS, AND THE DEGREES OF DEVIATION

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THE study of which this series is an account was undertaken, it is true, because it was doubted that legal method, the manipulation of legal abstractions and propositions of "law" found in opinions and briefs, is a device for observing and stating the causal relation between past and future decisions and because it was doubted that, in some fields, there is a direct relation between them which is significant for forecasting. That these doubts are reasonable has been argued;¹ but the study has not attempted the ambitious project of establishing the negatives which the doubts imply. Nor is there need that it should. The office of belief in their reasonableness is to open the mind to the alternative possibilities and, by aggravating curiosity, to prompt the formulation of precise hypotheses for investigation.

The hypothesis which does underlie this study is that the institutions of a locality are among the cultural factors in a litigation-situation significantly connected with the decision and that the semblance of causal relation between future and past decisions is the result of the relation of both to a third variable, the relevant institutions in the locality of the court. It is probable that the notion of a court as to the just, reasonable, fair, and convenient way for customer and bank to behave and also the just, reasonable, fair, and convenient consequence which the court should attempt to attach to the way the parties did behave is related to the more frequent and therefore regular behavior in such situations in the locality. Though behavior which is frequent and regular may not have impinged, frequently or at all, upon the court yet, in part, its attitudes and ideas are molded by a cultural matrix whose patterns are engraved by frequency. Put in another way, if the court is not conditioned by frequent contact with the behavior itself, it is conditioned by verbal behavior which will be found, on last analysis, to be causally related to the patterns or institutions.

The two preceding articles in this series reported the investi-

¹ See the second article of this series, 40 YALE L. J. 555. We cannot conclude this series without thanking Dr. Dorothy Swaine Thomas for her skeptical, pointed and invaluable criticism of these articles before publication.

gations made in South Carolina, New York, and Pennsylvania to find the institutional patterns of behavior or the sequences in the culture of the jurisdictions of the courts which decided *Callahan v. Bank of Anderson*,² *Delano v. Equitable Trust Co.*,³ and *Goldstein v. Jefferson Title and Trust Co.*⁴ In each of the three states a different (though partly overlapping) group of sequences for the liquidation of direct discounts out of the customer's checking account was found.⁵ In each of the three cases the plaintiff's check was presented and dishonored following the debiting to his account on or after the day of maturity of the amount of a note or notes which the bank had discounted for him. The South Carolina court gave judgment for the customer; the New York and Pennsylvania courts, for the bank.⁶ In no one of the three cases did the behavior of the parties conform to the banking institutions. They throw no light, therefore, on an hypothesis that when behavior conforms the government does not intervene. In this they are like most litigated cases involving business transactions. Conforming behavior in this field seldom results in litigation. Although in each of the three cases the behavior of the litigants did not conform to the banking institutions of its jurisdiction, yet in one the judgment was for customer and in the others for bank. The cases, therefore, do not indicate any connection between non-conformity and decision. Observation focused by so gross an analysis as that of behavior into non-conforming and conforming could not be expected to disclose a significant connection between institutions and decisions. Behavior which does not conform to institutions may depart or deviate from them by a hair's breadth or a mile. It may be, however, that the three decisions are significantly connected with the type and degree by which the behavior of the parties deviated from the institution and this is the hypothesis toward the verification of which this study was undertaken. This, the final article of the series, will attempt to state what the study of this group of cases indicates as to the connection between each of the decisions and the type and degree by which the behavior of the parties in each of the cases deviated from the sequences of their respective jurisdictions; the similarity of these interrelations; and the probable significance of a connection between type and degree of deviation and decision. In this attempt the objective method of counting defined aspects of behavior followed in the earlier articles of this series cannot be employed. The rules for

² 69 S.C. 374, 48 S.E. 293 (1904).

³ 110 Misc. 704, 181 N.Y. Supp. 852 (Sup. Ct. 1920).

⁴ 95 Pa. Super. Ct. 167 (1928).

⁵ See the fourth and fifth articles of this series, 40 YALE L. J. at 942, 952, 1071.

⁶ *Supra* notes 2, 3, and 4.

choice of comparable sequences are no more than careful limitations of the sphere for a subjective judgment. The qualities of the differences between deviational transactions and their comparable sequences can not at present be precisely defined, objectively determined or assigned numerical values.

Although the degree of deviation cannot be precisely determined it should, nevertheless, be methodically determined. A method for its determination has been elaborated elsewhere.⁷ It provides, first, a procedure for analysis of behavior (institutional and non-institutional) into transactions. Secondly, it provides for the determination of what transactions are sequential (institutional). Thirdly, it provides a procedure for the choice of the sequence with which each of the transactions is to be compared in finding the type and degree of its deviation. Fourthly, it provides a crude instrument for measuring the degree of deviation by means of a rating based on the judgment of informed persons. That method will be applied to each case.

I

In *Callaham v. Bank of Anderson*,⁸ decided in 1904, the judgment was for the plaintiff upon his demurrer to the second and third defenses stated in the amended answer. The judgment was behavior of the court in a litigation-situation which also comprised behavior of the litigants. The behavior of the litigants went beyond retaining counsel and instructing them to prosecute and defend. Resort to a court of the official government in the absence of some sort of behavior giving rise to a dispute is possible but unlikely. The complaint, the second and third defenses, and the demurrer are sufficient evidence of what the behavior of the litigants in the litigation-situation was. The second and third defenses tentatively admitted the complaint to be an accurate description of part of that behavior. The tentative admission would not advantage the defendant were the partial description of the complaint erroneous in substance. The end of preventing government intervention would be better served by a denial. Similarly, the plaintiff's tentative admission, by demurring, of the partial descriptions of the second and third defenses would not speed him in his quest for government intervention unless those defenses were substantially accurate descriptions of what happened. But the statements in the original answer and in all the defenses of the amended answer, except the second and third, are not sufficient evidence that the behavior described in them actually happened. They were state-

⁷ Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703.

⁸ *Supra* note 2.

ments, lacking the confirmation of his adversary's tentative admission, in the pleadings of a defendant against whom intervention was sought.

Accepting, then, the complaint and the second and third defenses⁹ as the description of the behavior of the litigants in the litigation-situation that behavior may be stated as follows:

(1) Plaintiff, having a checking account at defendant bank, tendered¹⁰ and defendant accepted for loan or discount a time note or notes made by plaintiff and a time note or notes made by third persons payable to and endorsed by plaintiff all of which specified a day of maturity prior to November 22, 1901. The amount of each note is unknown but the sum of the amounts exceeded the book balance of plaintiff at the time the debit entry hereinafter referred to was made.

(2) Shortly before November 22, 1901, plaintiff in the meantime having become insolvent and the notes referred to in paragraph (1) having matured, defendant made a debit entry¹¹ in its

⁹ The pleadings in the Callaham case are on file at the County Court House of Anderson County, Anderson, South Carolina. The complaint and amended answer appear in Appendix A, *infra* p. 1251.

¹⁰ It is believed that the allegations in the second and third defenses that plaintiff "was indebted" to defendant on "notes both as maker and endorser" referred to obligations resulting from either loans to or discounts for plaintiff. Plaintiff was a lien merchant. Lien merchants were financed by the local banks which discounted notes made by the merchants as well as time notes given to them. As to plaintiff's own note it is extremely unlikely that it was discounted with his bank by any one except himself. Plaintiff's obligations to creditors other than his bank ordinarily must have been on open account. It is possible that because of his impending insolvency he may have given or may have been asked to give his creditors time notes. However, the probability that he was indebted and gave his time note to someone in Anderson who discounted it with defendant bank is so slight that it is concluded that he discounted his own note directly. As to the note upon which plaintiff was an endorser it is submitted that it was a receivable which he offered for discount. Of course it is possible that plaintiff may have been an accommodation endorser on a time note discounted directly with the bank by its maker or that he may have been an intermediate endorser of a receivable discounted with the bank by a subsequent endorsee. The latter possibility seems extremely unlikely as plaintiff in all probability would have discounted with his bank a note made payable to him or endorsed to him. That he was an accommodation endorser does not seem as likely as that he was the discounteer. Since he was a merchant it is not unlikely that he received notes from farmers who were his customers.

¹¹ It is believed that it is of no consequence whether there were one or several debit entries. For example, the tender and acceptance for deposit of two or more Federal Reserve notes accompanied by a single deposit slip may be treated as constituting as many separate and distinct deposits as there were notes. It does not seem likely, however, that viewing the behavior as if it were more than one deposit would lead to different conclusions. Certainly it would be less convenient. Similar reasoning justifies the assumption that there was only one debit entry.

record of plaintiff's checking account for the amount of the credit balance. After the entry the individual ledger, which had shown a credit balance of something over \$300 in favor of plaintiff, appeared to be in balance.

(3) Immediately before or after the making of the debit entry plaintiff drew a check for \$300 on defendant bank in favor of and delivered it to the S. F. Royster Guano Company. The check which subsequent to the making of the debit entry was presented to defendant was dishonored.

This is the deposit currency behavior of the litigants which is to be compared with patterns institutional in South Carolina in 1904. The initial requirement of the method is the arrangement of the behavior in a transaction-series.¹²

The statements in paragraph (1) "the plaintiff, having a checking account at the defendant bank" and in paragraph (2) "the individual ledger which had shown a credit balance of something over \$300 in favor of plaintiff" refer to deposit currency transactions including the opening of the account, the making of deposits, and the drawing and honoring of checks.¹³ However, the content of these transactions is unknown.¹⁴ But whatever it may have been, it is believed that they were sequential transactions in institutional relation. It is a reasonable inference that behavior in a litigation-situation concerning which no point is made by either party conformed to the relevant institutional patterns. Consequently the transactions referred to by the statements quoted above are assumed to have been sequential and, therefore, need not be compared according to the method. Comparison of a sequential transaction and its comparable sequence would simply be observation of their identity. How these transactions and their consequences are expressed in the transaction-series will appear presently.

The behavior described in paragraph (1) discloses the first terms of a number (two or more) of transactions within the deposit currency field some (at least one) of which began with the tender and acceptance for loan or discount of a direct time note¹⁵ and some (at least one) of which began with the tender and acceptance for loan or discount of a receivable time note.¹⁶

¹² Moore and Hope, *op. cit. supra* note 7, at 706-7; see the second article of this series, 40 YALE L. J. at 566.

¹³ See complaint, paragraph numbered 3 of each cause of action, Appendix A, *infra* pp. 1251, 1252.

¹⁴ *Ibid.*

¹⁵ The study in South Carolina showed that in 1904 there were a large number of transactions beginning with the tender and acceptance for discount of the direct time note of a customer. See the fourth article of this series, 40 YALE L. J. at 939.

¹⁶ The study disclosed the frequent and regular occurrence of transactions beginning with the tender by the customer and the acceptance by the

There may have been other behavior constituting terms in these transactions such as the delivery and acceptance of collateral, or the crediting of the proceeds on plaintiff's account, or the payment to him of the proceeds in cash, or the sending of notice of prospective maturity.¹⁷ Whether or not there was such behavior and what it was does not appear. The transactions, however, were incomplete. This incompleteness follows from the concept of transaction.¹⁸ According to this concept these transactions beginning with the discount of direct or receivable time notes were not complete until the happening of one of the very small class of events (payment in full in cash, payment in full by check on this bank, renewal in full, etc.) one of which, it is judged, was more likely to happen than any other particular event after the discount and maturity of a time note.¹⁹ No one of this class of events had happened.

No point was raised by either litigant concerning the incomplete discount transactions. It is assumed, therefore, that the behavior in them conformed so far as it went to sequences in South Carolina in 1904. Consequently it need not be compared according to the method.

Whether all of the transactions referred to by the statements quoted from paragraph (1) and paragraph (2) preceded the incomplete direct and receivable discount transactions is unknown. However, all the behavior thus referred to, as well as the behavior comprising the incomplete direct and receivable transactions, preceded the behavior consisting of the making of the debit entry and the drawing and delivery of the \$300 check. Since all the behavior preceding the debit entry is assumed to have been sequential and, therefore, need not be compared according to the method, a symbol referring to its deposit currency consequences, *i.e.*, what transactions might have followed without deviation, is placed at the beginning of the transaction-series. The deposit currency consequences were that thereafter any sequential transaction whatever in the deposit currency field except transactions having the consequence of extinguishment in excess of "something over \$300" might have followed without deviation. They are referred to by "Balance \$300+."

bank for discount of a time note made payable to and endorsed by the customer. *Ibid.* 930, 931.

¹⁷ The study disclosed the frequent and regular occurrence of such behavior in direct discount and receivable transactions. *Ibid.* 937, Table VII.

¹⁸ *Supra* note 12.

¹⁹ It was observed that in South Carolina in 1904 transactions beginning with the discount of either a direct or a receivable time note almost invariably terminated with renewal in full, with renewal in part, or with payment in full in cash, by check on another bank, or check on this bank. See the fourth article of this series, 40 YALE L. J. at 933, 934, Tables I, II, III, and IV.

The making of the debit entry described in paragraph (2) was not part of the transactions beginning with the discount of the time notes. It was not an event which was more likely to happen after the discount and maturity of the direct and receivable time notes and the insolvency of the customer than any other particular event. The likelihood of its happening was not much greater than the likelihood that the officers of the bank would forcibly take money from the person of the plaintiff and apply it in payment of the notes or would without consent appropriate and apply in payment money held by it as bailee. Moreover it was infinitely less likely to follow than one of the small group of events such as payment in full in cash, payment by check on this bank, renewal in full, etc.²⁰ Nor was the debit entry part of any other transaction within the deposit currency field. It was no more likely to follow any one particular event of behavior than another nor was any one particular event more likely than another to follow it. Therefore, the making of the debit entry, if it be judged behavior in the deposit currency field, must itself have been a transaction. Since a point was raised by the litigants with respect to the making of the debit entry, the transaction is assumed to have been deviational and, therefore, must be compared according to the method. Consequently, it is rendered in the transaction-series.

The behavior described in paragraph (3) constituted a transaction. Casual observation confirmed the experiential judgment that in South Carolina in 1904 the drawing, presentment, and honoring of counter checks and the drawing, delivery, presentment, and honoring of checks payable to third persons were transactions which were sequential.²¹ The drawing and delivery of the check for \$300 and its presentment constituted the first two terms. The dishonor of the check was part of the same transaction because it was one of the small group of events one of which was more likely to follow the presentment of the check than any other particular event. The transaction concluded with the dishonor of the check. After dishonor the likelihood of payment presented by the behavior consisting of the drawing and delivery of the check ceased. Since a point was made with respect to this transaction and since it followed deviational behavior it also is assumed to have been deviational and must be compared. Consequently the transaction is rendered in the transaction-series.

The transaction-series may now be stated as follows:

T. Bal.	\$300+	Debit-after for	Check to payee	Presented	Returned
\$300+	direct and receivable	for \$300		unpaid	

²⁰ *Supra* note 19.

²¹ See the second article of this series, 40 YALE L. J. at 569.

According to the method a separate comparison of each of the transactions is required. It is inconvenient (if not impossible) to compare a transaction-series with a sequence-series.

The rules for the selection of comparable sequences have been stated elsewhere.²² An initial deviational transaction and its comparable sequence are compared as devices to produce consequences in the deposit currency field. The consequences which may follow behavior within the deposit currency field are the creation of deposit currency, the extinguishment of deposit currency, the transfer of deposit currency, or the liquidation of accounts by means of the transfer of deposit currency. The transaction consisting of a debit entry for \$300+ is being viewed as a device for the extinguishment of deposit currency. It was claimed by defendant that the consequence of the debit entry was the extinguishment of the deposit currency of plaintiff. Consequently, the sequence with which the transaction is to be compared as an alternative device must be one having the consequence of extinguishment of deposit currency. In South Carolina in 1904 there were many sequences with that consequence and in institutional relation with the sequences symbolized by "Balance \$300+." From among these the sequence chosen for comparison is the one most similar in point of form to the transaction.

It is believed that the comparable sequence is one in which payment of a time note is made by the customer-discounter's check given to the bank after the day of maturity. In South Carolina in 1904 a large number of transactions beginning with the discount of either a direct or a receivable time note terminated with the bank's making a debit entry in the customer's ledger account;²³ but such debit entries invariably followed the receipt from the customer of his check on the bank or his instructions to debit. Inquiry also disclosed that only very seldom were debit entries in such transactions made upon the customer's instructions. Substantially all debit entries in discount transactions were made following the receipt by the bank of the customer's check.²⁴ Consequently, only transactions in which the customer gave his check on the bank were sequential.

Where the whole amount of the note is liquidated the sequences in South Carolina in 1904 are known.²⁵ However, the debit transaction in the *Callaham* case was an alleged partial payment transaction effected by the extinguishment of deposit currency. But the transaction differs from the ordinary run of partial payment transactions in that the unliquidated part of the note was

²² Moore and Hope, *op. cit. supra* note 7, at 712-19.

²³ See the fourth article of this series, 40 YALE L. J. at 939.

²⁴ *Ibid.* 931.

²⁵ *Ibid.* 942.

not renewed. It is judged that the class of transactions in which there was partial payment out of the checking account without renewal was so small that no one of the types to which transactions of this class belonged was a regularly followed pattern. But beyond doubt if any type was sequential it was one in which the customer gives his check.²⁶ The transaction should, therefore, be compared as a device with a sequence in which a direct time note for \$300+ is liquidated in full out of the checking account after the day of maturity. The judgment that this is the sequence with which comparison should be made is predicated upon the fact that the consequence of the sequence and the consequence claimed for the transaction are the same in so far as their effect upon subsequent transactions in the deposit currency field are concerned. The consequence claimed for the transaction and the consequence of the sequence is the extinguishment of deposit currency in the amount of \$300+. The study in South Carolina disclosed the existence of four types of transactions, types 53, 54, 53 (a), and 54 (a), in which liquidation of a direct time note is effected after the day of maturity by the extinguishment of deposit currency. In the report of that study it was stated that it was highly probable that transactions of type 54 were sequential.²⁷ Since the study does not result in a finding as to which one or more of the four types were sequences, a tentative choice of one of the four must be made. The probability that type 54 is a sequence dictates its choice. That sequence is:

S||Discount|Credit|Notice|\$300+ Check-after for directs|Debit-Check||²⁸

It may be suggested that since the debit entry included the amount of a receivable as well as a direct time note it should also be compared with a sequence from the extinguishment subdivision, if there were any,²⁹ which had the consequence of liquidating the discounting customer's indorsement upon a receivable by the extinguishment of his deposit currency. But there is no need of such a comparison. If it were made the degree by which the debit after maturity of the receivable to the discounting customer's account deviated from an hypothetical transaction in which the customer after maturity gave his check for the

²⁶ The study in South Carolina disclosed that payments out of the checking account were invariably made by check. *Ibid.* 931-932.

²⁷ *Ibid.* 942.

²⁸ *Ibid.* 942, 937, Table VII.

²⁹ On the basis of the study made in South Carolina no statement can be made as to whether or not the class of transactions beginning with the discount or loan upon a time note made payable to, endorsed, and discounted by a customer and ending with payment in full out of the checking account of that customer occurred with sufficient frequency so that any of the types to which transactions of this class conformed was a sequence.

amount of the receivable³⁰ would be found to be substantially the same as the degree by which the debit after maturity of the direct deviated from its comparable sequence, type 54.³¹

Expressed for comparison the initial transaction and its comparable sequence are:

{	T. Bal. \$300+		\$300+ Debit-after for direct and receivable //				
{	S. Bal. \$300+		Discount	Credit	Notice	\$300+ Check-after	Debit-Check
						for directs	

The comparison is made in order to observe the degree by which the transaction deviated from the sequence. A rating scale for determining degree of deviation has been proposed.³² A rating scale is used for want at present of any other device for measuring the deviation. It attempts to measure the relative profitableness and familiarity of the transaction and sequence which are being compared as devices. "There is observable within this field a high degree of correlation between those courses of behavior which are most profitable and those which are institutional. Profitableness may thus be considered a constant factor in banking institutional transactions. There is also, because of the manner in which the abstraction, or institution, was derived, a high degree of correlation between those courses of behavior which frequently are followed and those which are institutional, so that a high frequency of occurrences may be considered also a constant factor in banking institutional transactions."³³ The scale by providing for thirteen distinct judgments as a result of which profitableness and familiarity are gauged has the advantage of requiring limited judgments upon the following carefully defined factors.

	Familiarity
	Certainty
	Efficiency
To the bank	Risk of direct loss
	Risk of litigation expense
	Risk of injury to credit
	Risk of loss of good will
	Juridical risk

³⁰ *Supra* note 29. No statement can be made as to which type or types of this class—if the class itself were large enough so that any type could have been a sequence—were sequences. If any were it was a type in which the customer gives his check.

³¹ The judgments recapitulated in the table on p. 1231, *infra*, would hold good.

³² Moore and Hope, *op. cit. supra* note 7, at 717-719. To avoid a false impression of precision in this study digits are not used in recording the ratings.

³³ *Ibid.*

To the customer	{	Risk of direct loss
		Risk of litigation expense
		Risk of injury to credit
		Risk of loss of good will
		Juridical risk

In respect of *familiarity* the debit transaction must be rated on the side of gross dissimilarity to the institution. It was quite unknown as a device whereas a transaction conforming to the sequence was one of the few regular modes of effecting liquidation of time notes out of the checking account in South Carolina in 1904. Even if the type of transactions to which the sequence corresponds occurred with barely sufficient frequency to justify its tentative acceptance as an institutional mode of behaving, yet it would be much more familiar than the unique debit.

Certainty is also scored on the side of gross dissimilarity. *Certainty* is the ratio between the number of successful transactions of a given type and the total number of transactions of that type.³⁴ A successful transaction is one which has the same consequence, is followed by the same behavior, as the comparable sequence. In South Carolina in 1904 the consequence of the sequence preceded by the institutional fragment of the transaction-series was that thereafter no transaction having the consequence of extinguishment of deposit currency, *e.g.*, the drawing and honoring of checks, might institutionally follow though any other sequential transaction might. Certainly there were very few debit transactions in South Carolina. The fact that in the *Callahan* case the transaction was unsuccessful and the independent judgment that, because of their novelty, transactions of this sort, if there were any, were as likely as not followed by transactions having the consequence or the likelihood of extinguishment of deposit currency, *e.g.*, the presentment of checks and their payment notwithstanding the debit, lead to the conclusion that the ratio of successful debit transactions must have been very small.

The transaction may at first blush seem a more *efficient* device, one which required less time and effort, than the sequence because the customer or someone in his employ was saved the labor of drawing and delivering the check or of addressing and mailing it to the bank. However, the debit transaction required the time of an officer necessary for the exercise by him of discretionary judgment; and the execution of his order by a subordinate must have required more time than the making, in the course of routine, of a similar entry upon the receipt of the

³⁴ *Ibid.* 718.

customers' check. Furthermore the customer's check-stubs or other record of his transactions with the bank would not be in accord with its record. The peculiarity of the debit by the bank would, whenever it was necessary for the customer to consult his record, cause the waste of time involved in recalling the unusual transaction and its amount, in reacting to the unfamiliar situation, and in making anew the necessary computation; or the transaction would consume the time necessary to make a memorandum entry in his record. Thus even the cost to the customer would exceed the cost to him of behavior conforming to the sequence. Consequently it is concluded that in respect of *efficiency* the debit was more dissimilar than similar to the institution.

There was, it is judged, a very great *risk of direct loss* to the bank, *i.e.*, the loss of \$300+. The *risk of direct loss* to the bank because in its unprecedented situation it might have felt compelled thereafter to honor its insolvent customer's checks for this amount presented after the debit was certainly much greater than it would have been had the customer given his check. The *risk of litigation expense* was certainly very much greater than it would have been had a check been given. Had a check been given the risk of such an action would have been no greater than the risk of mistake or knavery on the customer's part. Undoubtedly the bank's *risk of loss of good will* of customer and others because, of its own motion and without his consent, it took his money and applied it on the note was incomparably greater than if, by giving his check, he himself had chosen to make the payment. The fact that the plaintiff was an established merchant in his community and was known to be operating a going mercantile concern is an answer to the argument which might be urged that because of his insolvency the *risk of loss of good will* of others was slight. Even with the bank's risks of *direct loss*, *litigation expense*, and *loss of good will* judged very likely to be realized yet its *risk of injury to credit* was no greater than if a check had been given. The amount involved was small. The chance of a "run" slight. The *juridical risk* to the bank, *i.e.*, the risk of the misfinding of facts in a way thought to be prejudicial, was certainly no greater than if a check had been given. In an action for dishonoring a later check the bank's defense would be that it had debited without receiving a check. This would be admitted. As to damages, the chance in so small a community of a misfinding of the extent of the injury to the plaintiff's credit was slight. Thus it is concluded that all of the risks to the bank with the exception of the risk of injury to credit and juridical risk must be scored as grossly dissimilar to the institution.

It is judged unlikely that the bank having applied the \$300+

in part payment would attempt to collect the full amount of the notes. Consequently, the customer's *risk of direct loss*, his *risk of litigation expense*, and his *juridical risk*, which might otherwise have been scored on the side of gross dissimilarity to the institution since he had no voucher showing payment, were no greater than if a check had been given. However slight the chances of the bank's dishonoring a check presented by a third person subsequent to the debit, the customer's *risk of injury to credit* and *risk of loss of good will* were incomparably greater than if he had given his check in payment of the notes. The making of the debit entry would likely lead to dispute between bank and customer with a resultant loss to the customer of the bank's good will and would likely prevent the customer from meeting the insistent demands of some of his creditors. Thus the *risks of injury to credit* and *loss of good will* attendant upon the transaction were much greater than if a check had been given but the *risk of direct loss*, *risk of litigation expense*, and *juridical risk* were not.

The following table recapitulates the judgments upon the several factors.³⁵

		Slightly dissimilar to the institution	Grossly dissimilar to the institution
Familiarity			✓
Efficiency			✓
Certainty			✓
To the bank	Risk of direct loss		✓
	Risk of litigation expense		✓
	Risk of injury to credit	✓	
	Risk of loss of good will		✓
	Juridical risk	✓	
To the customer	Risk of direct loss	✓	
	Risk of litigation expense	✓	
	Risk of injury to credit		✓
	Risk of loss of good will		✓
	Juridical risk	✓	

³⁵ The checks appearing in the columns record the judgments of the slight and gross dissimilarity of the device in respect of the several factors. In arriving at a final judgment as to whether the device is slightly or grossly dissimilar more consideration should be given to the factors of familiarity, certainty, and efficiency, than to any one of the ten factors of *risk*, since *risk* was subjected to a closer analysis than *familiarity*, *certainty*, and *efficiency*.

As a step in the study of the rating scale three experienced executive officers of a commercial bank were requested to rate the initial deviational transaction in the Callaham and Delano cases. At a meeting of the three officers and the authors which continued for about an hour and a half, the factors of the scale, a summary of the material in the articles report-

Thus it appears from the systematic comparison that the debit transaction grossly deviated from its comparable sequence. This conclusion accords with the common sense judgment that the debit as a way of extinguishing deposit currency was very unusual and irregular and very unlike the usual and regular and was, therefore, arbitrary, inconvenient, unfair, unreasonable, and unjust.

The transaction consisting of the drawing and delivery, presentment, and dishonor of the \$300 check must also be compared. For the reason that the initial deviational transaction is compared as a device, *i.e.*, that it is urged that it should or should not be regarded as such a device, the second deviational transaction is compared as a consequence, *i.e.*, it is urged it should or should not be the consequence of the preceding behavior. The end of the comparison is to determine how the transaction viewed as a *consequence* of the behavior which preceded it differs from the sequence viewed as a *consequence* of what precedes it in its sequence-series. In the study it is assumed that the most significant difference between alternative consequences is the difference between them as devices to further consequences. Therefore, though the end is to compare the transaction and its comparable sequence as alternative consequences, they are compared as devices within the deposit currency field.

Two comparisons of this transaction are made. The first comparison is made with a sequence chosen according to the rule for the choice of the comparable sequence for an initial deviational transaction. The sequence chosen according to that rule is the sequence which (1) is in institutional relation with the admittedly institutional fragment of the transaction-series, *i.e.*, Balance \$300+, (2) possesses the consequence, the likelihood of which was presented by the transaction, and (3) is most similar in point of form to the transaction. The second comparison is made with a sequence in institutional relation with the sequence comparable to the initial deviational transaction preceded by the institutional fragment of the transaction-series. The first comparison is made so that the second deviational transaction, preceded by the institutional fragment of the transaction-series, *i.e.*,

ing the studies in South Carolina and in the Second Judicial District in New York, and the comparable sequences for the initial deviational transaction in the Callaham and Delano cases were stated.

Each of the officers, sometimes after the discussion with the other two, expressed an independent judgment on each factor. The authors' ratings were not known to the officers. Each of the officers rated the initial deviational transaction in the Callaham case as grossly dissimilar. The ratings of each officer as to the first deviational transaction in the Delano case were identical with those of the authors in respect of each of the factors except *risk of litigation expense to the customer* and *risk of litigation expense, juridical risk, and risk of good will to the bank*.

Balance \$300+, may be compared as a device with its comparable sequence. The second comparison is made so that the second deviational transaction, preceded by the institutional fragment of the transaction-series and the comparable sequence for the first deviational transaction, may be compared as a device. Two comparisons are made so that the degree of deviation of the second deviational transaction may be stated whether the first deviational transaction be considered to have no consequences within the deposit currency field or whether it be considered to have the same consequences as a transaction identical with its comparable sequence. By these two comparisons of the second deviational transaction coupled with the single comparison of the initial deviational transaction and the preliminary comparison of the unquestioned transactions symbolized by Balance \$300+ it is attempted to approach as near as may be at present a comparison of the whole transaction-series with a sequence-series.

The first comparison is made with a sequence in institutional relation with the institutional fragment of the transaction-series, *i.e.*, Balance \$300+, and chosen from the extinguishment subdivision. The sequence is chosen from this subdivision because the second deviational transaction is being regarded as a device to extinguish deposit currency or to reduce the balance. In South Carolina in 1904 the sequence which satisfied these requirements and was most similar in form to the second deviational transaction is that appearing below in their rendering for comparison.

II	{	T. Bal. \$300+		Check \$300 to payee		Presented		Returned unpaid		36
		S. Bal. \$300+		Check \$300 to payee		Presented		Paid		
								Debit-Check		

When gauged by the rating scale, the degree of deviation of the second deviational transaction compared as an alternate device with its comparable sequence is gross.³⁷ This result is

³⁶ *Supra* note 21.

³⁷

		Slightly dissimilar to the institution	Grossly dissimilar to the institution
	Familiarity		✓
	Certainty		✓
	Efficiency		✓
To the bank	{ Risk of direct loss	✓	
	{ Risk of litigation expense.		✓
	{ Risk of injury to credit ..	✓	
	{ Risk of loss of good will..		✓
	Juridical risk	✓	

See page 1234, *infra*.

unhesitatingly confirmed by common sense which, attempting to compare them directly as consequences, impatiently labels them wholly different. The fact that three of the *risk to the bank* factors are scored as slightly dissimilar probably does not detract from the significance of the method of judging the difference between consequences by employing the rating scale to gauge their difference as devices. Rather it indicates defects in the scale; for example, it may be that the factor of *direct loss* should in this type of case, at least, appear but once in the scale and be scored either to the bank or to the customer and not to both.

A second comparison is made of the second deviational transaction. The second comparison is with a sequence having the consequence of extinguishment and in institutional relation with the comparable sequence for the initial deviational transaction preceded by the institutional fragment of the transaction-series, *i.e.*, Balance \$300+. But in South Carolina there was no such sequence in the extinguishment subdivision of the deposit currency field in institutional relation with the comparable sequence for the initial deviational transaction preceded by Balance \$300+. The consequence of the comparable sequence for the initial deviational transaction preceded by Balance \$300+ was that thereafter no transaction having the consequence of extinguishment might have institutionally followed, though of course any other sequential transaction might. In making the comparison, to emphasize the fact that the comparison is of the second deviational transaction alone, the comparable sequence for the first deviational transaction (which, preceded by Balance \$300+, controls the choice of the comparable sequence for the second deviational transaction and therefore is expressed in the sequence-series) is substituted for the first deviational transaction in the transaction-series. The transaction-series, so modified, and its comparable sequence-series are:

III {	T. Bal. \$300+	Sequence 54	Check \$300 Presented Returned unpaid
	(\$300+)	to payee	
S. Bal. \$300+	Sequence 54	_____	
	(\$300+)		

The absence of a comparable sequence is simply a methodical way of indicating that in South Carolina in 1904 the deposit currency institutions disclosed no sequences for the drawing and honoring of checks after the complete extinguishment of the

To the customer	Risk of direct loss	✓
	Risk of litigation expense.	✓
	Risk of injury to credit ..	✓
	Risk of loss of good will..	✓
	Juridical risk	✓

balance, *i.e.*, no pattern to serve as a model with which to compare the second deviational transaction. The comparison of the second deviational transaction with no sequence for check drawn and honored must be made indirectly. It is accomplished by comparing the transaction with the opposite of no sequence for check drawn and honored, *i.e.*, sequence for check drawn and honored. This comparison has already been made and the deviation judged to be gross.³⁸ If the second transaction deviated grossly from the opposite of that with which it is to be compared, of necessity it deviated but slightly from that with which it is to be compared.

Thus the comparisons disclose that the judgment in the *Callahan* case that the plaintiff might recover for the dishonor of his check followed a transaction-series which included two deviational transactions. The first on a methodical comparison deviated grossly from its comparable sequence. The second on its first comparison also deviated grossly but on its second did not. The relation between the gross deviation of the device (the initial transaction) from its comparable institutional device and the degree of deviation of the consequence (the second transaction) from each of the alternative consequences suggested by the institution indicates that the degree by which the behavior of the parties deviated may be significantly connected with the decision.

On the psychological level, it is interesting to note the significance which might be attributed to the results of the three comparisons. The court, by according no weight or value to the first transaction in determining what the subsequent behavior of the parties should be, may have taken as its standard for decision the sequence from which that transaction grossly deviated. The grossness of the deviation may have been the determining factor leading the court to accord no weight to that transaction. The court's choice of the comparable sequence in the first comparison of the second deviational transaction as its standard rather than the "no sequence" in the second comparison may have been prompted by the gross deviation of the first transaction. It may be that the court, in judging what the consequence of the grossly deviational transaction should be, took as its standard the sequence, the institutional consequence, which would have followed had the first deviational transaction not happened. The court may have examined and rejected as its standard the institutional consequence of the comparable sequence from which the first transaction grossly deviated.

³⁸ *Supra* note 37.

³⁹ *Supra* note 3.

II

In *Delano v. Equitable Trust Co.*,³⁹ decided in 1920, the judgment in the customer's action for dishonor of his check was for the defendant. The judgment was rendered on defendant's motion for judgment on the pleadings which were amended complaint, answer, and reply. The behavior of the litigants in the litigation-situation is, therefore, taken to be the behavior described in the amended complaint, and the reply, and in those allegations of the answer which were admitted by the plaintiff.⁴⁰

(1) Plaintiff tendered and defendant's Colonial Branch office, in the Borough of Manhattan, New York City, accepted for discount a time note for \$1250 maturing April 7, 1919, signed by plaintiff "as executor" and endorsed by him without appending that title to his signature, the proceeds of which were credited to the checking account he maintained in his name "as executor" at the Colonial Branch. At the same time plaintiff deposited, as security, with the Colonial Branch shares of a corporation then in the process of liquidation. Plaintiff was the sole legatee and executor of the estate of his father. Plaintiff was an insolvent judgment debtor and not engaged in business. The note was not paid at maturity and despite repeated and insistent demands for payment, including a threat of suit, was not paid thereafter. Neither on nor after maturity did the books of the Colonial Branch show a balance in favor of plaintiff.

(2) After the demands and threat of suit, plaintiff opened a checking account at defendant's Madison Avenue Branch in the Borough of Manhattan, New York City, by depositing for collection a note for \$1021. The Madison Avenue Branch accepted the note for collection and upon collection, credited plaintiff with the proceeds.

(3) Thereupon plaintiff drew several checks aggregating \$208 on the Madison Avenue Branch which were paid upon presentment.

(4) Four days after the opening of the account at the Madison Avenue Branch and the payment of the checks referred to in paragraph (3), a debit entry for \$813.66, the amount of plaintiff's credit balance, was made in his individual ledger account at the Madison Avenue Branch on account of the note, then more than four months overdue.

(5) After the debit entry and before the receipt of notice of debit, a number of checks drawn by plaintiff on the Madison Avenue Branch, some before and some after the entry, were presented and returned unpaid. Notwithstanding the receipt of notice of debit plaintiff continued to draw checks which also were dishonored.

For the purpose of comparison the behavior set forth in the

preceding paragraph is rendered in the following transaction-series:

Bal.\$0 at Col. Br. and \$813.66 at Mad. Ave. Br.	Prior to opening account at Mad. Ave. Br. discount of \$1,250 note at Col. Br.	Se- cur- ity	Cred- it .	After maturity demands for pay- ment by Col. Br.	Over 4 months after ma- turity and 4 days after opening of account at Mad. Ave. Br. debit entry for \$813.66 at Mad. Ave. Br.	No- tice- deb- it	After the debit en- try and before notice- debit check for some amount drawn on Mad. Ave. Br. and de- livered to payee	Pre- sent- ed	Re- turned Un- paid
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It will be observed that the transactions for the checks drawn and honored by the Colonial Branch which reduced the balance at that bank to zero are not rendered in the series. No question is raised as to them and they are assumed to be sequential.⁴¹ In the transaction-series therefore they are referred to by "Bal. \$0 at Col. Br."

Likewise there are no transactions in the series for the opening of the account at the Madison Avenue Branch and for the payment of checks on that branch which reduced the balance to \$813.66. All of these transactions would have been sequential were it not for the fact that the customer already had an account at another branch of the bank. The opening and operation of a checking account at a branch by a customer who already had a checking account at another branch of the same system was in the Second Judicial District in 1920—and for that matter is today—so infrequent that the transaction of opening the account at the second branch and all subsequent transactions were not sequential.⁴² Nevertheless for three reasons they are not rendered for comparison. Neither party made any point as to their consequences. Secondly, the only circumstance which made them deviational, *i.e.*, the duplicity of accounts, seems to be taken into account when the discount transaction beginning with the discount at one branch and ending with the debit at the other is compared with the sequence in which there is only one account and the transaction begins and ends at the same bank. Thirdly, the transactions in question show no deviation when they are compared. They are deviations by virtue only of their lack of institutional relationship. They are an example of a type of deviation different from that which has been discussed heretofore.

⁴⁰ The amended complaint, the answer, and the reply appear in Appendix B, *infra*, p. 1255.

⁴¹ See p. 1223, *supra*.

⁴² See the fifth article of this series, 40 YALE L. J. at 1073.

It is believed that the debit entry at the Madison Avenue Branch and the notice thereof were terms in the transaction beginning with the discount at the Colonial Branch. The customer was an insolvent judgment debtor more than four months in default; the bank had made repeated demands for payment and had threatened suit; and the bank was doing business in a community in which the practice of making debit entries in the absence of check or instructions, was well known and very likely established.⁴³ Certainly in the Second Judicial District both the making of the debit and the sending of the notice would appear to be events belonging to the very small group of events any one of which was more likely to happen than any other particular event. If it should be concluded that the debit and notice are not part of the discount transaction, then, for the reasons set forth in the discussion of the *Callahan* case,⁴⁴ they constitute a separate transaction; its comparable sequence would be the same as that chosen for the initial deviational transaction in the transaction-series as rendered; and the separate debit transaction would deviate from it in the same degree as the initial deviational transaction does.

The drawing and dishonoring of the checks presented to the Madison Avenue Branch after the debit entry are expressed as a single transaction. They were alike in that the amount of each exceeded the book balance after the debit entry was made.

It was claimed that the initial deviational transaction was a device for part payment out of the checking account after maturity without renewal of the remainder, having the consequence of extinguishment of deposit currency. It is, therefore, to be compared with a sequential device having the same consequence. But there were no sequences for such part payments. It is believed that part payments not accompanied by renewal were of very infrequent occurrence indeed.⁴⁵ The transaction should therefore be compared as a device with a sequence in which a direct time note for \$813.66 is liquidated out of the checking account. The consequence of the sequence and the consequence claimed for the transaction, namely, the extinguishment of deposit currency for \$813.66, are identical insofar as their effect upon subsequent deposit currency behavior is concerned. If it be concluded that the debit and notice of debit constitute a

⁴³Inquiry at 34 banks in the Borough of Manhattan disclosed that all of them debit time notes at maturity and a rough estimate indicated that at these banks slightly more than half of the payments of notes out of the checking account were effected by a debit entry without check or instructions.

⁴⁴See p. 1225, *supra*.

⁴⁵They were so few that no one of the types to which they conformed could have been a sequence. See the fifth article of this series, 40 YALE L. J. at 1067, Table II.

separate transaction the comparable sequence, nevertheless, should be the same.

The study in New York disclosed the existence of but two sequences, types 6 and 26, having the consequence of extinguishment of deposit currency for the amount of a direct time note.⁴⁶ The transaction is to be compared with one of these. Both sequences are like the transaction in that a direct time note was discounted for a customer, and the proceeds credited to his checking account. Unlike the transaction in which the time note was secured and in which liquidation was effected after maturity and then only after repeated demands for payment, the sequences were of unsecured notes liquidated on the day of maturity. Notice of prospective maturity is an aspect of behavior in both sequences but whether or not a notice was sent in the transaction is unknown. Type 6 also differs from the transaction in that, in the sequence, payment was made by check, *i.e.*, it was concluded by a debit entry following the delivery of a check. On the other hand, type 26 resembles the transaction in that payment was effected by a debit, *i.e.*, a debit entry was made by the bank though it had not received either the customer's check or his instructions. Type 26, therefore, is chosen as the standard of comparison.

Stated for comparison the initial deviational transaction and its comparable sequence are:

I	T. Bal. \$0 at Col. Br. and \$813.66 at Mad. Ave. Br.	Prior to opening account at Mad. Ave. Br. discount of \$1,250 note at Col. Br.	Security	Credit	After maturity demands for pay- ment by Col. Br.	Over 4 months after maturity and 4 days after opening of account at Mad. Ave. Br. debit entry for \$813.66 at Mad. Ave. Br.	Notice debit //
	S. Bal. \$813.66	Discount	Credit	Notice	Hold	Debit-on \$813.66	

Since the maintenance of an account at each of two branches of a bank has been found to have been practically unknown in the jurisdiction⁴⁸ it must follow that the debiting at one branch of a past due note discounted at another almost never happened. In respect of *familiarity*, therefore, the transaction must be scored as grossly dissimilar to the regular mode of extinguishing deposit currency, *i.e.*, the comparable sequence.

⁴⁶ See the fifth article of this series, 40 YALE L. J. at 1071.

⁴⁷ *Ibid.* Table III, facing p. 1068.

⁴⁸ *Supra* note 42.

On the other hand, in respect of *certainty* the transaction must be scored on the side of slight dissimilarity to the institution. The ratio of transactions like the one being compared which were successful was probably as high as the ratio of successful transactions corresponding to the sequence. It can not be supposed that a large metropolitan bank operating its branches with reasonable supervision would fail to discover the opening of an account at a second branch, to make a debit to that account, and to dishonor checks thereafter. Indeed in this case the plaintiff's credit balance was applied toward payment of the note four days after the initial deposit at the second branch was made. Certainly in most transactions of this type after a debit equaling the amount of the balance no checks would be drawn and honored.

The factor of *efficiency* must be rated as grossly dissimilar. It is hard to imagine a more time-consuming way in which to liquidate a time note by the extinguishment of deposit currency than that employed in this case.

Each of the *risks of loss to the bank* should be rated slightly dissimilar to the like risks ensuing upon behavior conforming to the sequence. There was no chance that the bank would suffer a *direct loss* of the \$813.66. By no compulsion, even by suit, could the customer obtain that amount from the bank. The *risk of litigation expense*, either in defending an action for the \$813.66 or for the dishonor of a check, was, in view of the customer's default, his circumvention, and his insolvency, but little greater than the risk incurred had the bank debited at maturity. The fact that litigation expense actually did ensue is under the circumstances no evidence that the risk of incurring it was great. *Loss of good will*, except perhaps the customer's, and *injury to credit* were, under the circumstances referred to, no more likely to follow the bank's behavior than in the case of a debit at maturity. As to the customer's good will, an unusual degree of stupidity or naïveté, on his part must be assumed, were it to be judged that there was a risk of losing even his. There is no *juridical risk*, risk of a misfinding of fact prejudicial to the bank.

Each of the *risks of loss to the customer* also should be rated slightly dissimilar to the like risks ensuing upon behavior conforming to the sequence. The *risk of direct loss* of \$813.66 to the customer was precisely the same and *litigation expense* almost as unlikely as if there had been behavior conforming to the sequence. A successful attempt by the bank to secure more than the balance remaining due upon the note after the debit is inconceivable. The action by the customer for damages for dishonor of his check was, under the circumstances, almost as unlikely as an action by the customer for the \$813.66. In view of the customer's default, his circumvention, and his insolvency, the

likelihood of *credit injury* and *loss of good will* to him was no greater than if the debit had been made at maturity. Because of the very slight probability of an action by either party and because of the equally slight probability of a misfinding of fact prejudicial to him the *juridical risk* of the customer must be scored on the side of slight dissimilarity.

The ratings of the various factors of familiarity and profitableness are recapitulated in the following table:

		Slightly dissimilar to the institution	Grossly dissimilar to the institution
	Familiarity		✓
	Efficiency		✓
	Certainty	✓	
To the bank	Risk of direct loss	✓	
	Risk of litigation expense	✓	
	Risk of injury to credit	✓	
	Risk of loss of good will	✓	
	Juridical risk	✓	
To the customer	Risk of direct loss	✓	
	Risk of litigation expense	✓	
	Risk of injury to credit	✓	
	Risk of loss of good will	✓	
	Juridical risk	✓	

Thus the comparison discloses that the factors of slight dissimilarity exceed by a considerable margin those of gross dissimilarity. This conclusion accords with the common sense judgment that the debit at one branch after maturity of a note discounted at another, though an unusual and irregular way of applying the customer's deposit currency to the note, was, under the circumstances, sufficiently like the usual and regular application by debit to be reasonable, fair, and just.

The comparable sequence for the first comparison of the second deviational transaction in which a check was dishonored, chosen according to the rule stated in the analysis of the *Callahan* case⁴⁹ is the drawing, delivery, presentment, payment, and debit of a check payable to a third person. The measurement of the degree of deviation discloses that the deviation was gross.⁵⁰

⁴⁹ See p. 1232, *supra*.

⁵⁰

	Slightly dissimilar to the institution	Grossly dissimilar to the institution
Familiarity		✓
Certainty		✓
Efficiency		✓

See page 1242, *infra*.

Application of the rules for the choice of a comparable sequence for the second comparison of the second deviational transaction discloses that it had no comparable sequence. Comparison by the method explained in connection with the *Callaham* case⁵¹ shows but a slight dissimilarity between the second deviational transaction and the "no sequence" provided by the institution.

Thus in the *Delano* case the judgment for the bank in the customer's action for dishonor was preceded by behavior which included only two deviational transactions requiring systematic comparison. The first appeared to be slightly deviational. On its first comparison the second deviational transaction appeared grossly to deviate but on its second comparison its degree of deviation was slight. The relation between the slight deviation of the device (the initial transaction) from its comparable institutional device and the degree of deviation of the consequence (the second transaction) from each of the alternative consequences suggested by the institution indicates that the degree by which the behavior of the parties deviated may be significantly connected with the decision.

As in the *Callaham* case the same psychological significance can be attributed to the results of the three comparisons. The court, by according full weight or value to the first transaction in determining what the subsequent behavior of the parties should be, may have taken as its standard for decision the sequence from which that transaction but slightly deviated. The slightness of the deviation may have been the determining factor leading the court to accord full weight to that transaction. The court's choice, as its standard, of the "no sequence" in the second comparison of the second deviational transaction rather than the comparable sequence in the first comparison may have been prompted by the slight deviation of the first transaction. It may be that the court, in judging what the consequence of the slightly deviational transaction should be, took as its standard the "no sequence" which would have been provided by the institution had the first deviational transaction been institutional. The court

To the bank	{	Risk of direct loss	✓	
		Risk of litigation expense.		✓
		Risk of injury to credit ..	✓	
		Risk of loss of good will..		✓
		Juridicial risk	✓	
To the customer	{	Risk of direct loss		✓
		Risk of litigation expense.		✓
		Risk of injury to credit ..		✓
		Risk of loss of good will..		✓
		Juridicial risk		✓

⁵¹ See p. 1235, *supra*.

may have examined and rejected as its standard the institutional consequence which would have ensued had the first deviational transaction not happened.

III

In *Goldstein v. Equitable Trust Co.*,⁵² decided in 1928, the judgment in the customer's action for the dishonor of his check, was for defendant upon its motion for judgment non obstante verdicto. The trial court had directed a verdict for plaintiff. The transcript of the testimony offered on behalf of the parties discloses no dispute as to their behavior.⁵³

(1) Plaintiff, an insurance broker, discounted an unsecured time note for \$100 at defendant bank, the proceeds of which were credited to his checking account. At the opening for business on the day of maturity a debit entry for the amount of the note was made in defendant's individual ledger record of plaintiff's checking account. As a consequence of deposits and of the payment of checks his ledger balance immediately before the debit entry was \$161.06.

(2) Later in the morning of the day of maturity a check for \$70.15 drawn by plaintiff to the order of an insurance company with which he did business was presented and returned unpaid.

(3) Thereafter, before the close of business hours on the day of maturity, plaintiff deposited \$50 in cash to the credit of his account.

This summary may be expressed in the following transaction-series:

T. Bal.	Discount	Cred-	Debit-	Check	Pre-	Re-	De-	Credit
\$161.06	of	it	open-	\$70.15	sent-	turned	posit	entry
	\$100		ing	to	ed	unpaid	\$50	\$50
	time		\$100	payee				
	note							

Since no question was raised as to any of the transactions preceding the debit entry it is assumed that they were sequential⁵⁴ and had the deposit currency consequences which are symbolized by Balance \$161.06.

The debit entry made at the opening for business for the amount of the matured note was behavior which should be represented as the concluding term of the transaction beginning with the discount of that note. It was one of the class of events of behavior any one of which was more likely to happen than any other particular event after the discount and maturity of the time note. The few constituents of the class are suggested by

⁵² *Supra* note 4.

⁵³ The transcript of the record appears in Appendix C, *infra*, p. 1262.

⁵⁴ See p. 1223, *supra*.

renewal, payment in cash, payment out of the checking account as a result of either the customer's check, his instructions or a debit made by the bank of its own motion at any time on the day of maturity. In Pennsylvania, it is true no discount transaction of a type which did not include *check-on* was found to be sequential.⁵⁵ But the study in that state showed a sufficient frequency for both *debit-opening* and *debit-close* to number them among the class of events which should be incorporated in discount transactions.⁵⁶ In Pennsylvania in 1928 the likelihood of a debit entry was incomparably greater than in South Carolina where in 1904 a debit entry for the amount of a note in the absence of the customer's check or his instructions was unknown.

The drawing, delivery, presentment, and nonpayment of the check for \$70.15 constituted a single transaction.

The concluding transaction representing the deposit of \$50 is included in the transaction-series because it followed deviational transactions. In that sense only was it deviational.

The initial deviational transaction was claimed to be a device for the payment of a direct time note out of the checking account, having the consequence of extinguishment of deposit currency. It is to be compared, therefore, with a sequential device having the same consequence. The study in Pennsylvania disclosed four types of transactions, types 5, 6, 13, and 14, having this consequence which were or which may have been sequential. In the report of that study it was stated that transactions of types 5 and 6 were sequential but further inquiry would be required if it were necessary to determine whether or not types 13 and 14 were.⁵⁷ Since a comparison of the transaction with a sequence derived either from type 13 or from type 14 would show no different degree of deviation than a comparison with a sequence derived either from type 5 or from type 6, comparison will be made with one of the two established types. The two types differ only in that in type 5 the note is secured and in type 6, unsecured. As the note in the transaction was not secured type 6 is more similar to the transaction and is therefore chosen as the comparable sequence.

The transaction and its comparable sequence may be expressed as follows:

I	{	T. Bal. \$161.06	Discount of	Credit	Debit-opening \$100		
			\$100 time note				
	{	S. Bal. \$161.06	Discount of	Credit	Notice	Check-on ⁵⁸	Debit-
			\$100 time note		\$100	Check	Check ⁵⁹

⁵⁵ See the fourth article of this series, 40 YALE L. J. at 952.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Type 6 is a generalized description of behavior which comprehends,

The *familiarity* of the transaction is rated on the side of slight dissimilarity to the institution. The high frequency in Philadelphia of the types of transactions ending with *debit-opening* (though no one of them was sequential)⁶⁰ shows that the transaction was not an unfamiliar one in Pennsylvania.

Also in respect of *certainty*, the transaction was but slightly dissimilar to the institution. It is judged that the ratio of transactions like the one being compared which were successful, *i.e.*, in which no checks for more than the amount of the credit balance less the amount of the note were presented on the day of maturity or thereafter, was almost as high as the ratio of successful transactions which conformed to the sequence. In Pennsylvania substantially all direct time notes were taken care of on the day of maturity either by payment or renewal.⁶¹ Where payment was made credit balances regularly were sufficient, *i.e.*, more than the amount of the note, not later than the close of business of the day prior to maturity. Where deposit currency is the medium of exchange, as in Pennsylvania,⁶² customers would seldom deposit cash or certified checks on the day of maturity to make the balance sufficient; credit instruments would ordinarily be deposited prior thereto. Consequently, if a renewal had not been made or arranged for it was very unlikely that checks which if honored would necessitate a deposit on the day of maturity to make the balance sufficient would be presented on that day. This judgment is confirmed by inquiry in Pennsylvania which disclosed that after a debit entry had been made

without distinction, payments by check on the day of maturity (*check-on*) whether made at the opening for business, just before the close of business, or at any other time during banking hours. The absence of classification of *check-on* payments by hours, minutes, etc., is based on the judgment that such a classification is of no consequence for the purpose in hand, *i.e.*, the description of institutions to serve as standards of comparison. In other words, it is believed that the study which resulted in type 6, justifies the statement that a transaction of type 6, at whatever hour of the day the check is delivered, is sequential. Therefore, a sequence for any time during banking hours may be derived from type 6.

The judgment which resulted in *check-on* payments not being classified with reference to the particular time they were made, during banking hours, is confirmed by the study in Pennsylvania. It appears that in Pennsylvania the credit balances of customers whose notes were paid in full out of the checking account on the day of maturity were sufficient, *i.e.*, more than the amount of the note, not later than the close of business on the day preceding and at all times on that day until payment was made. Consequently, the hour on which the customer gives his check is of no importance. *Infra* p. 1245; *infra* note 63.

⁵⁹ See the fourth article of this series, 40 YALE L. J. at 947, Table X.

⁶⁰ *Ibid.* 952.

⁶¹ *Ibid.* 948.

⁶² *Ibid.* 948-49.

at the opening for business on the day of maturity checks for more than the amount of the credit balance were not presented.⁶³

In respect of *efficiency* the transaction is more dissimilar than similar to the institution. The making of a debit entry at the opening for business (since the transaction was not a device regularly employed) was the result of a discretionary judgment of an officer and its execution required more time on the part of bank officials and employees than if the customer had given his check. The customer while not required to draw and deliver or mail his check to the bank must depart from his routine and either make an explanatory entry in his records; or, whenever he had occasion to refer to his bank account, recall the transaction and its amount and determine anew the balance.

The *risk of direct loss*, *risk of litigation expense*, and *juridical risk* to the bank were very little, if any, greater than if the customer had given his check. The chance that defendant, a city bank, after embarking on the unusual and drastic course of debiting at the opening for business, would reverse itself upon the demand of a petty customer (*risk of direct loss*), the chance that the customer would make such a demand (*risk of direct loss*), and the chance that an action against the bank would be brought were the demand made and refused (*risk of litigation expense*) were inconsiderable. Were such an action brought the *juridical risk* or a misfinding of fact thought to be prejudicial to the bank would be slight. Since there was little chance of dispute and even less of litigation the risks of *loss of good will* and *injury to credit* must also be scored as slightly dissimilar to the institution.

There was no *risk of direct loss* to the customer. Certainly the bank would not attempt to collect a second time upon the note. Because of the very slight probability of an action by either party the *risk of litigation expense* and the *juridical risk* to the customer were not much greater than if he had given the bank his check. In view of the slight chance that the customer's check for an amount exceeding his credit balance less the amount of the note would be presented on the day of maturity⁶⁴ or thereafter the *risks of loss of good will* and *credit injury* of the transaction were only slightly greater than those of the institution.

The judgments upon the various factors are recapitulated in the following table:

⁶³ *Ibid.* 945.

⁶⁴ *Supra* note 63.

		Slightly dissimilar to the institution	Grossly dissimilar to the institution
	Familiarity	✓	
	Certainty	✓	
	Efficiency		✓
To the bank	{ Risk of direct loss	✓	
	{ Risk of litigation expense	✓	
	{ Risk of injury to credit	✓	
	{ Risk of loss of good will	✓	
	{ Juridical risk	✓	
To the customer	{ Risk of direct loss	✓	
	{ Risk of litigation expense	✓	
	{ Risk of injury to credit	✓	
	{ Risk of loss of good will	✓	
	{ Juridical risk	✓	

Thus the transaction is but slightly dissimilar to the comparable institutional device. This conclusion is in accord with the common sense judgment that the debiting of the note at nine o'clock in the morning of the day of maturity, though an unusual and irregular way of paying on the day of maturity out of the checking account, was in substance and effect so like the usual way of paying on the day of maturity by delivering a memorandum check, that the debiting is not unreasonable, unfair, and unjust.

The first comparison of the second deviational transaction with its comparable sequence—the drawing, delivery, presentment, payment, and debit of a check payable to a third person—chosen according to the rule stated in the analysis of the *Callahan* case⁶⁵ shows that the transaction was grossly dissimilar.⁶⁶ Application

⁶⁵ See p. 1232, *supra*.

⁶⁶

		Slightly dissimilar to the institution	Grossly dissimilar to the institution
	Familiarity		✓
	Certainty		✓
	Efficiency		✓
To the bank	{ Risk of direct loss	✓	
	{ Risk of litigation expense.		✓
	{ Risk of injury to credit ..	✓	
	{ Risk of loss of good will..		✓
	{ Juridical risk	✓	
To the customer	{ Risk of direct loss		✓
	{ Risk of litigation expense.		✓
	{ Risk of injury to credit ..		✓
	{ Risk of loss of good will..		✓
	{ Juridical risk		✓

of the rules for the choice of a comparable sequence for the second comparison of the second deviational transaction discloses that there is no sequence having the consequence of extinguishment in the amount of \$70.15 in institutional relation with the comparable sequence for the initial deviational transaction preceded by the institutional fragment of the transaction-series. That is to say, a balance of \$161.06, followed by the debiting of a check for \$100, is not followed institutionally by a check for \$70.15. The second deviational transaction when compared as explained in the discussion of the *Callaham* case, with the "no sequence" provided by the institution appears to have been but slightly dissimilar.⁶⁷

The third deviational transaction will not be compared. First, its systematic comparison would be with an identical sequence from which of course it would not measurably deviate. Gauging by means of the rating scale would end where it began with the observation that the transaction was deviational only because it lacked institutional relationship in the sense that it followed deviational transactions. In this respect it is like the opening and operation of the account at the second branch in the *Delano* case. It is another instance of a type of deviation the degree of which can not be measured by an application of the rating scale. The fact that unlike the similar transactions in the *Delano* case the deposit followed the debiting of the note and the dishonoring of the check makes no difference. Whenever transactions of this type happen no one questions their consequences in increasing or decreasing the balance. If they be given less than institutional consequences it is solely because they follow deviational transactions. Secondly, in the instant case there seems to be no need to do more than note the type of deviation to which the deposit transaction belongs. It was not claimed to affect the consequences institutional or otherwise of the preceding transactions. A comparison of it as a device was therefore unnecessary. It is not claimed that the preceding transactions were devices to it. Its comparison as a consequence is therefore also unnecessary.

Thus in the *Goldstein* case, an action by the customer for dishonor of his check, three deviational transactions, of which only the first two required systematic comparison, preceded the judgment for the bank. The initial deviational transaction and the second on its second comparison were but slightly dissimilar; but on its first comparison the deviation of the second transaction was gross. The relation between the slight deviation of the device (the initial transaction) from its comparable institutional device and the degree of deviation of the consequence (the second transaction) from each of the alternative consequences

⁶⁷ See p. 1235, *supra*.

suggested by the institution indicates that the degree by which the behavior of the parties deviated may be significantly connected with the decision.

As in the *Callahan* and *Delano* cases the same psychological significance can be attributed to the results of the three comparisons. The court, by according full weight to the initial transaction in determining what the subsequent behavior of the parties should be, may have taken as its standard for decision the sequence from which the transaction but slightly deviated. The slightness of the deviation may have been the determining factor leading the court to accord full weight to that transaction. The court's choice, as its standard, of the "no sequence" in the second comparison of the second deviational transaction rather than the comparable sequence in the first comparison may have been prompted by the slight deviation of the first transaction. It may be that the court, in judging what the consequence of the slightly deviational transaction should be, took as its standard the "no sequence" which would have been provided by the institution had the first deviational transaction been institutional. The court may have examined and rejected as its standard the institutional consequence which would have ensued had the first deviational transaction not happened.

IV

In all three cases the second deviational transaction consisted of the dishonor of a check payable to a third person; in all, the comparable sequences were the same; and in all, the degrees of deviation were the same. In the *Callahan* case the first deviational transaction grossly deviated from its comparable sequence and the judgment was for the customer; in the *Delano* and *Goldstein* cases the deviation of the first transaction was slight and the judgment was for the bank. Since the relation of the second transaction to its comparable sequence is constant and the decision varied with the degree of deviation of the first, there seems to be a connection between degree of deviation and decision which is significant. Doubtless the results of the investigation of the institutions of the several jurisdictions should be judged to represent only the rough outlines of the relevant institutional patterns, and very likely the method for choosing comparable sequences and measuring the degree of deviation would be found to fall far short of attainable precision. Yet the study probably justifies the inference of a causal relation between three of the factors in a litigation-situation, viz., the behavior of the litigants, the institutional patterns of the jurisdiction, and the decision, which may be expressed in terms of the

degree by which the behavior of the litigants deviates from the comparable sequences.

Were it not that this study is but a survey of the threshold leading to adequate investigation of the interrelation of culture and judicial behavior, it would be unnecessary to urge again the plausibility of the existence of a causal relation between the three decisions and the degrees by which behavior of the parties in each deviated from its institutional comparables. A plausible explanation of the judgment for the customer in South Carolina is that the court took as its standard of decision (or was indirectly conditioned by) the institutional comparables for each of the two transactions of the *Callaham* case. The first, viewed as a device, grossly deviated from the standard device and was, therefore, not accorded by the court a legal consequence conforming to the institutional consequence which would have followed had the standard device been used. The second transaction, viewed as a consequence of the first, slightly deviated from the standard consequence of the institutional device from which the first transaction deviated grossly, and was therefore rejected as the legal consequence of the first. Instead the institutional consequence which would have followed had the deviational device not been used was chosen as the legal consequence. Similarly, in giving judgment for the bank in the *Delamo* and *Goldstein* cases, the court took as its standard the institution. In both, the first transaction, viewed as a device, slightly deviated from the standard device, and was, therefore, accorded a legal consequence conforming to the institutional consequence which would have followed had the standard device been used. The second transaction, viewed as a consequence of the first, slightly deviated from the standard consequence of the institutional device from which the first transaction deviated slightly, and was therefore accepted as the legal consequence of the first. The institutional consequence which would have followed had the device not deviated at all was chosen as a legal consequence.

APPENDIX A

CALLAHAM V. BANK OF ANDERSON COMPLAINT

STATE OF SOUTH CAROLINA	}	COURT OF COMMON PLEAS
COUNTY OF ANDERSON		
JOHN R. CALLAHAM, Plaintiff		
against		
THE BANK OF ANDERSON, Defendant		

The Complaint of the Plaintiff respectfully shows to the Court:

FOR A FIRST CAUSE OF ACTION

I.

That at the times hereinafter mentioned the Defendant was and is now, a Corporation under and by the laws of the State of South Carolina, having its principal place of business at Anderson, S. C., and carrying on the business of a bank, in which, among other things, it received deposits from customers and paid out the same on checks, as is usual by the custom of banks and the custom of the law merchant.

II.

That at the times hereinafter mentioned the Plaintiff was a merchant doing business at Honea Path, S. C., and at said times was engaged in carrying on a general merchandise business at the aforesaid place.

III.

That at said times Plaintiff deposited with Defendant certain monies from time to time upon the implied agreement of Defendant to pay out the same upon checks drawn by Plaintiff, and for a long time such course of business had continued between said parties.

IV.

That on the 18th day of November 1901 the Defendant drew a check upon his funds, deposited in said bank, in favor of F. S. Royster Guano Co., Norfolk, Va. in the sum of Three Hundred Dollars, which was duly presented to the Defendant for payment on the 22nd day of November 1901 at its banking house in the city of Anderson, in the County and State aforesaid, and payment was refused on the alleged ground that Plaintiff had no funds in the hands of Defendant to pay the same: And in consequence of such refusal Plaintiff was compelled to take up said check and pay it himself.

V.

That at the time when Plaintiff's check was thus dishonored and payment was refused Plaintiff had on deposit with Defendant funds more than sufficient to pay the same, notwithstanding which fact Defendant wilfully,

wantonly, and with intent to humiliate, embarrass and injure Plaintiff in his business, dishonored and refused payment of Plaintiff's said check, thereby reflecting and casting reproach and odium upon his integrity and standing as a merchant and a man, and injuring him in his credit as a merchant in the sum of Five Thousand Dollars.

FOR A SECOND CAUSE OF ACTION

I.

That at the times hereinafter mentioned the Defendant was, and is now a Corporation under and by the laws of the State of South Carolina, having its principal place of business at Anderson, S. C., and carrying on the business of a bank, in which, among other things, it received deposits from customers and paid out the same on checks, as is usual by the custom of banks and the custom of the law merchant.

II.

That at the times hereinafter mentioned the Plaintiff was a merchant doing business at Honea Path, S. C., and at said times was engaged in carrying on a general merchandise business at the aforesaid place.

III.

That at said times Plaintiff deposited with Defendant certain monies from time to time upon the implied agreement of Defendant to pay out the same upon checks drawn by Plaintiff and for a long time such course of business had continued between said parties.

IV.

That on the 18th day of November 1901 the defendant drew a check upon his funds, deposited in said bank, in favor of F. S. Royster Guano Co., Norfolk, Va., in the sum of Three Hundred Dollars, which was duly presented to the Defendant for payment on the 22nd day of November 1901 at its banking house in the city of Anderson, in the County and State aforesaid, and payment was refused on the alleged ground that Plaintiff had no funds in the hands of Defendant to pay the same: And in consequence of such refusal Plaintiff was compelled to take up said check and pay it himself.

V.

That at the time when Plaintiff's check was thus dishonored by Defendant's refusal to pay the same, Plaintiff had on deposit more than sufficient funds to pay the same. Notwithstanding which fact the Defendant wilfully, wantonly, and with intent to humiliate, embarrass and injure Plaintiff in his business and reputation, refused to pay Plaintiff's check, and the wilful, wanton, reckless and high handed conduct of Defendant in the premises so seriously injured Plaintiff in his business and reputation that he was compelled to go into Bankruptcy and make composition with his creditors, to his damage Five Thousand Dollars.

Wherefore Plaintiff demands judgment against the Defendant for the sum of Five Thousand Dollars.

BONHAM & WATKINS,
GEO. E. PRINCE,
Plaintiff's Attorneys.

AMENDED ANSWER

The Defendant by its amended answer to the complaint herein shows to the Court:

I.

That defendant admits paragraphs I. and II. of the First Cause of Action and paragraphs, I. and II. of Second Cause of Action of Complaint, and for

FIRST DEFENSE TO EACH CAUSE OF ACTION

I.

Defendant denies each and every other allegation of each and every other paragraph of each and every Cause of Action of the Complaint.

SECOND DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the complaint and for some time previous and subsequent thereto, the plaintiff was indebted to the defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That the defendant thereby acquired a Banker's lien on all deposits of plaintiff and a right to hold and set-off any amount due on deposit to plaintiff against the said past due notes and thereupon defendant held and applied the amount due on deposit account of plaintiff as far as the same would go to the settlement of the said past due notes of plaintiff and upon this application being made, the plaintiff had no funds left to his credit to meet the check mentioned in the complaint when the same was presented and defendant refused to pay same.

THIRD DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the Complaint and for some time previous and subsequent thereto, the plaintiff was insolvent, and was indebted to the defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That the defendant thereby acquired a Banker's lien on all deposits of plaintiff and a right to hold and set-off any amount due on deposit to plaintiff against the said past due notes of plaintiff, and upon defendant having reason to believe and knowing plaintiff to be insolvent applied the amount due on the deposit account of plaintiff as far as the same would go to the settlement of the said past due notes of plaintiff and upon this application being made, the plaintiff had no funds left to his credit to meet the check mentioned in the complaint when the same was presented and defendant refused to pay the same.

FOURTH DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the complaint and for some time previous and subsequent thereto, the plaintiff was indebted to the defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That it is the usage and custom of Banks and of the defendant Bank in particular to hold, set-off and apply any sums due depositors on their deposit account to the settlement of any past due notes due the Bank by

the said depositor, which custom the plaintiff ought to have known and did know, and thereupon the defendant held and applied the amount due on the deposit account of plaintiff as far as the same would go to the settlement of the said past due notes of plaintiff and upon this application being made, the plaintiff had no funds left to his credit to meet the check mentioned in the complaint when the same was presented and defendant refused to pay the same.

FIFTH DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the complaint and for some time previous and subsequent thereto the plaintiff was insolvent and was indebted to defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That it is the custom and usage of Banks and of this defendant Bank in particular, in dealing with insolvent depositors who are indebted to the Bank to hold, set-off and apply any sums due said depositors on their deposit account to the settlement of any past due notes due the Bank by the said depositors, which custom the plaintiff ought to have known and did know, and thereupon defendant having reason to believe and knowing plaintiff to be insolvent, held and applied the amount due on the deposit account of plaintiff as far as the same would go to the settlement of the said past due notes of plaintiff and upon this application being made, the plaintiff had no funds left to his credit to meet the check mentioned in the complaint when the same was presented and defendant refused to pay same.

SIXTH DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the complaint and for some time previous and subsequent thereto, the plaintiff was indebted to the defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That this defendant on the 16th day of November 1901 and again on the 18th and 19th days of November 1901 gave notice to plaintiff that by reason of the said past due notes it would not pay checks drawn on it by plaintiff unless his said past due notes were paid or arranged and urged plaintiff to add to his deposit account and to make good his said indebtedness or otherwise arrange same, all of which plaintiff neglected and failed to do, and defendant held and applied plaintiff's deposits to the payment of his said past due notes so far as said deposits would pay said notes as defendant had notified plaintiff it would do, and upon this application being made, plaintiff had no funds left to meet said check and at no time mentioned in the complaint were plaintiff's deposits sufficient to pay all of said notes, nor were they all paid until just before the commencement of this action.

SEVENTH DEFENSE TO EACH CAUSE OF ACTION

1. That at the times mentioned in the complaint and for some time previous and subsequent thereto the plaintiff was insolvent and was indebted to defendant on past due notes both as maker and endorser in a sum largely in excess of the amount which defendant was due to the plaintiff on his deposit account or otherwise.

2. That this defendant on the 16th day of November 1901 and again on the 18th and 19th days of November 1901, having reason to believe and

knowing plaintiff to be insolvent, gave notice to plaintiff that by reason of the said past due notes it would not pay checks drawn on it by plaintiff unless his said past due notes were paid or arranged and urged plaintiff to add to his deposit account and to make good his said indebtedness or otherwise arrange same, all of which plaintiff neglected and failed to do, and defendant held and applied plaintiff's deposits to the payment of his past due notes so far as said deposits would pay said notes as defendant had notified plaintiff it would do, and upon this application being made, plaintiff had no funds left to meet said checks, and at no time mentioned in the complaint were plaintiff's deposits sufficient to pay all of said notes, nor were they all paid until just before the commencement of this action.

EIGHTH DEFENSE TO EACH CAUSE OF ACTION

1. That defendant denies that any act of it, intentional or otherwise has ever injured plaintiff in his business or standing as a merchant, man or otherwise before or after the times mentioned in the Complaint but that plaintiff injured his own integrity and credit as a merchant and a man and whatever damage he may have sustained was caused by his own incompetency and unbusiness like methods in the management of his business, by extending large credits to irresponsible persons which he was unable to collect, by allowing his notes and accounts with mercantile firms and others to run past due so that many of them were placed in the hands of attorneys for collection, by collecting moneys belonging to F. S. Royster Guano Co. and others which he failed to turn over to them but applied to his own use, by borrowing money from this defendant on cotton, as security which he alleged to have had when he had no such cotton, by making a composition with his creditors whereby they accepted twenty cents on the dollar in satisfaction of his indebtedness to them.

Wherefore Defendant asks judgment that said complaint be dismissed with costs.

JOSEPH N. BROWN,
J. M. PAGET, QUATTLEBAUM & COCHRAN,
Defendants Attorneys.

July 22, 1902.

APPENDIX B

DELANO V. EQUITABLE TRUST COMPANY AMENDED COMPLAINT

NEW YORK SUPREME COURT,
NASSAU COUNTY.

MORTIMER DELANO, Plaintiff,
against

THE EQUITABLE TRUST COMPANY OF NEW YORK, Defendant.

The plaintiff for an amended complaint complaining of the defendant, by his attorney, John W. Goff, Jr., respectfully shows to the Court as follows:

FIRST: That the plaintiff at all the times hereinafter mentioned was and now is a resident of the County of Nassau, State of New York.

SECOND: That the defendant at all the time hereinafter referred to was and now is a domestic corporation organized and existing under the laws

of the State of New York and was and now is conducting a general banking business for which purposes it maintains its principal place of business at 37 Wall Street, Borough of Manhattan, City of New York, and in addition thereto a branch office at No. 345 Madison Avenue, in said Borough and City.

THIRD: That on August 26, 1919, the plaintiff visited said branch office of the defendant and delivered to and deposited with an authorized officer, agent, servant or employee of the defendant a certain note in the amount of One thousand twenty-one dollars (\$1,021), drawn by Nathaniel Gray due and payable to the plaintiff on September 1, 1919 at the Broadway Central Bank in the City of New York.

FOURTH: That on said date the defendant through and by its authorized officer, agent, servant and employee accepted said note for collection and thereupon agreed with the plaintiff to collect said note when due and to deposit the proceeds thereof for and to his account and give to the plaintiff a check book and also a pass book bearing and containing an entry or record of a deposit account in his favor in the amount of One thousand twenty-one dollars (\$1,021).

FIFTH: That on or about September 2, 1919 the defendant informed the plaintiff in writing that the note deposited by him on August 26, 1919 for collection had been duly collected and the amount and proceeds thereof, to wit, the sum of One thousand twenty-one dollars (\$1,021) was deposited to his credit and account; that thereupon the plaintiff drew several checks upon the defendant, which checks were duly endorsed by the payees and presented for payment and the defendant paid and honored the said checks.

SIXTH: That between the 3rd day of September, 1919 and the 18th day of September, 1919 the plaintiff drew fourteen checks upon the defendant wherein and whereby the plaintiff directed the defendant to pay to the order of the payees thereof certain and particular sums of money and delivered or transmitted said checks to the payees; that at the time said checks were so drawn and delivered plaintiff had on deposit as aforesaid with defendant sufficient and greater funds to provide and insure the payment of said checks and the said defendant was lawfully indebted to this plaintiff in said amount and more and as plaintiff verily believes that such amount was then duly credited to him and in his favor upon its books.

SEVENTH: Upon information and belief said checks were duly endorsed by the payees in blank and deposited in various banks in the City of New York and elsewhere; that said checks bearing endorsement were duly presented to the defendant for payment and when the same were so presented to the defendant for payment plaintiff had on deposit with said defendant to his credit sufficient funds to provide and insure the payment of said checks but the defendant failed, neglected and refused to pay said checks as directed by the plaintiff and returned them with notice of protest and non-payment to the various banks which had duly presented them for payment and collection.

EIGHTH: That at the times complained of in the complaint and for a long period prior thereto the plaintiff in and about the place of his residence and in the City of New York and elsewhere enjoyed and received from his social and business associates the highest esteem and reputation, particularly as to his financial standing and solvency and from time to time was accustomed to use and receive credit and extensions of credit in connection with various business transactions and affairs.

NINTH: That between the 3rd day of September, 1919 and the 8th day of September, 1919 the defendant failed and neglected to notify the plaintiff that it had stopped payment upon checks drawn against his account and

thereby the plaintiff was permitted to and did continue to draw and issue checks as aforesaid against the defendant.

TENTH: That when said checks were presented to the defendant for payment the defendant wrongfully, wilfully and maliciously dishonored the same and refused payment thereof although well knowing that it was indebted to the plaintiff in an amount far in excess of the amount for which said checks were drawn and that the defendant wrongfully, wilfully and maliciously returned said checks to the various banks in the City of New York and elsewhere with notice of protest thereon or thereto attached on the ground that the plaintiff had not sufficient funds with the defendant to merit the payment thereof without notice to the plaintiff.

ELEVENTH: That as a direct result of the premises herein and the negligence and mismanagement of the defendant and its wrongful, wilful and malicious acts as above set forth and through no fault or wrongdoing on his part plaintiff has suffered serious and grievous loss and damage and thereby his financial credit and business standing has been injured and impaired and his reputation has been damaged and he has suffered great mental anxiety, humiliation and suffering; as a result of the foregoing plaintiff has been unable to meet certain payments due on life insurance and thereby has been compelled to forfeit said life insurance to the amount of Fifty thousand dollars (\$50,000) and as a further result of the foregoing plaintiff has been prevented from entering into a business investment which would have yielded to him large profits and returns, all to his damage in the sum of Two hundred fifty thousand dollars (\$250,000).

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of Two hundred fifty thousand dollars (\$250,000) together with the costs of this action.

JOHN W. GOFF, JR.,
Attorney for Plaintiff,
55 Liberty Street,
New York, N. Y.

(Verification)

ANSWER

Defendant answering the amended complaint:

1. Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph First.

2. Admits the allegations contained in paragraph Second, except that defendant alleges that its branch on Madison Avenue is at No. 355 and not 45 as stated in the complaint, and that defendant also has a branch office known as the "Colonial Branch" at 222 Broadway, Borough of Manhattan, New York City.

3. Admits the allegations contained in paragraph Third, that on or about August 26, 1919 plaintiff deposited at defendant's branch No. 355 Madison Avenue, a note in the amount of \$1021, and denies any knowledge or information sufficient to form a belief as to any of the remaining allegations in said paragraph Third contained.

4. Admits, on information and belief, the allegations contained in paragraph Fourth and alleges that at the time referred to in said paragraph Fourth plaintiff concealed from defendant's agents at its branch at 355 Madison Avenue the fact that he had been indebted to defendant in the sum of \$1250. and interest from April 7, 1919 on an overdue note held by defendant's Colonial Branch, no part of which had been paid at that time.

5. Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in the first sentence of paragraph Fifth;

admits the allegations contained in the last sentence of said paragraph Fifth, but alleges that when said checks were honored by defendant's branch at 355 Madison Avenue it had no knowledge of the fact that plaintiff was indebted to defendant's Colonial Branch, as set forth in paragraph 4 hereof.

6. Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in every other allegation in said paragraph contained.

7. Admits the allegations contained in paragraph Seventh that certain checks drawn by plaintiff were presented for payment to defendant at its branch at 355 Madison Avenue, and that defendant did not pay said checks, and denies each and every other allegation contained in said paragraph Seventh, and alleges that before any of said checks had been presented for payment to defendant that defendant had applied the balance of the plaintiff's said deposit, amounting to \$813.66, against plaintiff's indebtedness to defendant upon the note for \$1250. referred to in paragraph 4 hereof, and notified plaintiff of such application.

8. Denies each and every allegation contained in paragraph Eighth, Ninth, Tenth and Eleventh.

FOR A FURTHER SEPARATE DEFENSE, DEFENDANT
ALLEGES UPON INFORMATION AND BELIEF

9. On or about March 7, 1919 plaintiff discounted at defendant's branch office, known as the "Colonial Branch" 222 Broadway, Borough of Manhattan, New York City, a note for \$1250. a copy whereof is hereto annexed, marked "Exhibit A" and made a part hereof, which note was made by plaintiff as executor of the estate of his deceased father, Thomas F. Delano, and was endorsed by plaintiff individually and the proceeds whereof were credited to plaintiff as said executor. Plaintiff was then and at all times hereinafter mentioned the sole legatee and beneficiary of said Thomas F. Delano. Plaintiff as endorser waived in writing notice of non-payment and dishonor of said note which was due according to its terms on April 7, 1919.

10. Plaintiff concurrently therewith deposited with defendant as security for the payment of said note 300 shares of the stock of C. N. Crittenton Company, a corporation which was then in process of liquidation, and the stock of which had no market value. No payments had been made by the liquidators of said Company for some months and the total amount ultimately realized on said stock in the final liquidation of said Company was insufficient to pay said note in full.

11. Said note was not paid at maturity, nor any part thereof, neither principal or interest, nor was its maturity extended. On the contrary, defendant made continual demands for payment upon plaintiff, informing plaintiff, as plaintiff well knew, that said Crittenton stock was not adequate security.

12. On June 12, 1919, defendant notified plaintiff, who promised many times to make good on said note, that it hoped plaintiff would not make it necessary for defendant to take legal action to protect its interests and in reply plaintiff wrote that he was for the moment helpless; that he had given the last security he had and that the only thing for defendant to do was to see plaintiff's lawyers who knew of plaintiff's straits and who would accept service of process on behalf of plaintiff at any time.

13. On August 26, 1919, plaintiff deposited in defendant's branch office at 355 Madison Avenue in the City of New York a note for \$1021 which defendant collected and credited to plaintiff's account. At the time of said deposit plaintiff conveyed from defendant's said branch at 355 Madi-

son Avenue the fact that he had been indebted for several months to defendant's Colonial Branch on said overdue note of \$1250. above referred to and defendant's branch on Madison Avenue honored several of plaintiff's checks drawn on his account in defendant's Madison Avenue branch before learning of plaintiff's indebtedness to defendant's Colonial Branch as aforesaid.

14. On September 5, 1919 defendant's Colonial Branch was apprised of plaintiff's said deposit in defendant's Madison Avenue branch and immediately instructed said Madison Avenue branch to and said branch did apply the balance remaining of plaintiff's said deposit to the part payment of said note for \$1250 held by said Colonial Branch and on the same day defendant's Madison Avenue branch notified plaintiff by a letter addressed to plaintiff at Columbia University Club, No. 4 West 43rd Street, New York City, the last address of plaintiff known to defendant, that defendant had so applied plaintiff's balance. The amount of plaintiff's balance so applied was \$813.66.

15. On or about September 4, 1919 one G. Stanton-Floyd Jones obtained judgment by default against plaintiff in the sum of \$325.97. Thereafter execution was issued against plaintiff and returned unsatisfied and plaintiff was examined in supplementary proceedings by said Jones who discovered plaintiff's deposit aforesaid of said Crittenton stock with the defendant.

16. On or about November 12, 1919 and before the commencement of this action, plaintiff executed and acknowledged an instrument, a copy of which is attached hereto, marked "Exhibit B" and made a part hereof. At the time said instrument was executed and acknowledged plaintiff owed defendant on account of said note for \$1250 only the sum of approximately \$450, provided defendant's action above related in applying the balance of plaintiff's deposit with defendant's Madison Avenue branch amounting to \$813.66 against the indebtedness on said note was rightful. In said instrument plaintiff recognized that there was a balance due the defendant at that time of \$450, including interest on said note and directed defendant after payment of its said claim to pay any surplus realized out of said Crittenton stock to said Jones, and plaintiff thereby ratified and approved defendant's action above related in applying plaintiff's balance in defendant's Madison Avenue branch against said note \$1250.

FOR A SECOND SEPARATE DEFENSE DEFENDANT UPON INFORMATION AND BELIEF

17. Repeats and re-alleges as if made part hereof all of the allegations contained in paragraphs 9 to 16 inclusive hereof.

18. Alleges that on or about December 19, 1919, and after the commencement of his action, defendant received from the liquidators of said C. C. Crittenton Company the final payment in liquidation of that Company upon plaintiff's stock deposited as security with defendant as aforesaid, amounting to \$646.50. Relying upon plaintiff's assignment above referred to, a copy of which is annexed hereto, marked "Exhibit B", and upon the ratification therein contained by plaintiff of defendant's application of the balance of plaintiff's deposit account in defendant's Madison Avenue branch against plaintiff's indebtedness to defendant on said note for \$1250, as aforesaid, defendant applied \$475.29 out of said sum to the balance then due and remaining unpaid on the principal and interest of said note for \$1250 and paid over \$171.21, the remainder of said sum, to said Jones, in accordance with the directions contained in said assignment, a copy of which is annexed hereto, marked "Exhibit B". Thereupon defendant cancelled said note for \$1250. and delivered same to plaintiff on or about Dec-

ember 19, 1919 and notified plaintiff of the disposition which defendant had made of the proceeds received from the liquidators of said Crittenton Company as aforesaid. Plaintiff retained said note without objection and in no way protested against the action taken by defendant on said assignment.

WHEREFORE defendant demands judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated January 22, 1920.

MURRAY, PRENTICE & HOWLAND,
Attorneys for Defendant,
Office & P. O. Address,
37 Wall Street,
Borough of Manhattan,
New York City.

(Verification)

"EXHIBIT A".

\$1250.

New York, Mch. 7 1919

Thirty days.....after date we promise to pay to the order of
ourselves Twelve hundred fifty.....Dollars
at Equitable Trust Co. Colonial Bch.

Estate Thomas F. Delano, Decd.,

VALUE RECEIVED

No.....Due Apr. 7/19

Mortimer T. Delano
Executor

(Endorsed):

Sept. 5/19

\$813.66 pd. on ac.

Estate Thomas E. Delano
decd.

Mortimer T. Delano
executor

Mortimer T. Delano

"EXHIBIT B".

WHEREAS, I, Mortimer Delano, have heretofore assigned to G. Stanton Floyd-Jones my interest in three hundred (300) shares of stock of the Crittenton Corporation (in dissolution which is held by the Equitable Trust Company as security for a note upon which there is a balance due of Four hundred and fifty (\$450) Dollars including interest, such assignment being subject to the claim of the Equitable Trust Company and is to the extent of the sum of Five hundred twenty-five and 97/100 (\$525.97) Dollars and interest from September 4th, 1919.

AND WHEREAS, said assignment was made by me individually and the said stock is held by the Equitable Trust Company as security for a claim due to it from the estate of Thomas E. Delano, deceased, of which I, Mortimer T. Delano am the executor.

AND WHEREAS, I am the sole legatee and beneficiary under the will of said Thomas E. Delano, deceased, and all debts and claims against said estate have been paid in full and I am entitled to receive any balance that may remain after the claim of the Equitable Trust Company is paid.

NOW, THEREFORE, for the purpose of carrying into effect my intention to assign to the said G. Stanton Floyd-Jones any and all interest or claim to said stock due to me either individually or as executor under the

last will and testament of Thomas E. Delano, deceased, and any moneys that may be realized therefrom (subject to the claim of the Equitable Trust Company) to the amount of Five hundred twenty-five and 97/100 (\$525.97) Dollars with interest from September 4th, 1919, I do hereby assign all interest and claim as aforesaid and I do hereby authorize and direct the Equitable Trust Company, after the payment of its claim under said note, to pay to G. Stanton Floyd-Jones out of any moneys that may be realized in connection with said stock, the sum of Five hundred twenty-five and 97/100 (\$525.97) Dollars with interest from September 4th, 1919.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 12th day of November 1919.

(Signed) Mortimer Delano

individually & as Executor of Thomas E. Delano.

(Witness) Signed Joseph H. Fargis.

STATE OF NEW YORK:

COUNTY OF NEW YORK: ss

On this 12th day of November, 1919, before me personally came and appeared MORTIMER DELANO, to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

(Signed) W. H. D. Tate

Notary Public, Kings County

REPLY

The plaintiff for his reply to the answer of the defendant herein, by his attorney, JOHN W. GOFF, JR., respectfully states to the Court and alleges:

AS TO THE FIRST SEPARATE DEFENSE

1. Admits the allegations in paragraphs numbered 9, 10 and 15.
2. Admits the allegations contained in paragraphs number 11 and 12, that the note referred to was not paid at maturity or any part thereof, neither principal nor interest, and that on June 12, 1919, defendant notified the plaintiff but denies upon information and belief each and every other allegation therein contained not hereinabove expressly admitted.
3. Admits the allegations contained in paragraph 13 that on August 26, 1919, plaintiff deposited in defendant's branch at 355 Madison Avenue a note for \$1021 which defendant collected and credited to plaintiff's account and that defendant honored several of plaintiff's checks drawn on this account, but denies each and every other allegation contained therein not hereinbefore expressly admitted.
4. Upon information and belief denies the allegations contained in paragraph numbered 14 thereof, except that the defendant applied the balance remaining of the plaintiff's deposit in the Madison Avenue Branch to the part payment of the note for \$1250 held by the Colonial Branch without notice to the plaintiff.
5. Admits the allegations contained in the paragraph thereof numbered 16 that on or about November 12, 1918, and before the commencement of this action plaintiff executed and acknowledged an instrument, a copy of which is annexed to the answer, marked Exhibit B, but denies the allegation therein contained that plaintiff thereby ratified and approved defendant's action in transferring or applying plaintiff's balance in defendant's

Madison Avenue Branch towards the part payment of the note of \$1250 held by the Colonial Branch. Further denies on information and belief each and every other allegation contained in said paragraph not hereinbefore expressly admitted or denied.

AS TO THE SECOND SEPARATE DEFENSE

6. For a reply to the allegations contained in paragraphs 9 to 16 inclusive of the first separate defense, plaintiff repeats and realleges each and every allegation contained in paragraphs numbered 1, 2, 3, 4 and 5 of this reply with the same force and effect as if the same were set forth at large.

7. Admits the allegations contained in the paragraph thereof numbered 18 except denies the allegation that plaintiff's assignment marked Exhibit B. contained a ratification of defendant's application of the balance of plaintiff's deposit account in defendant's Madison Avenue Branch against plaintiff's indebtedness to defendant on the note for \$1250.

JOHN W. GOFF, JR.,
Attorney for Plaintiff,
55 Liberty Street,
Borough of Manhattan,
City of New York.

(Verification)

APPENDIX C

GOLDSTEIN V. JEFFERSON TITLE AND TRUST COMPANY
TRANSCRIPT

LAWRENCE J. GOLDSTEIN, 5701 Warrington avenue, sworn.

By MR. DAVIS:

Q. Were you a depositor with the Jefferson Title & Trust Company on November 7, 1924? A. I was. Q. Did you on that day issue a check made payable to the order of the Fidelity & Deposit Company of Maryland in the sum of \$70.15? A. I did. Q. I show you that check and ask you whether this was the check that you had issued? A. It is. Q. What happened to that check? Was that check honored by the bank? A. It was not. Q. And the date on the check is the 7th of November, 1924? A. That's right. Q. Did you get any statement from the Jefferson Title & Trust Company? A. I always got a statement at the end of the month. Q. Did you get one after November 7th? A. On December 1st. Q. I show you a statement and ask you if this is the statement you received from the bank? Is that the statement you received on the 1st of December, 1924? A. It is. Q. In accordance with that statement what was the balance you had in bank at the end of the business day of November 6, 1924? A. About \$167. Q. What was your balance at the end of the business day of November 7, 1924? A. The same. Q. And on November 8? A. \$161. Q. What was your balance on November 9? A. About the same. Q. Will you look at November 7 on that statement and tell me what was charged against your account on that day? A. There is one check of \$40 which left a balance at the end of the day of \$167. Q. Was there any check of \$70.15 charged against your account? A. There was not. Q. Was there any charge made against your account of \$100 in payment of a note that was due on November 10 of \$100? A. There was. Q. Is that shown in that statement? A. Yes, sir; November 10. Q. What deposit did you make on

the 7th of November? A. Not on the 7th. There was one of the 5th and one of the 10th. Q. How much did you deposit on the 10th? A. \$50 in cash. Q. I show you a duplicate deposit slip and ask you whether this was the receipt you got from the bank at the time that you made that deposit? A. It is. Q. Then, according to that statement, how much money did you have on the 10th of November, 1924—at the end of the business day of November 10, 1924? A. This statement shows \$111.06. Q. What were the items that were charged against your account on that date? A. Just one amount of \$100. Q. Was there enough, in accordance with that statement to have paid this check of \$70.15? (Objected to.) (Objection sustained.) Q. Do you know how much money you had in bank on November 10, 1924?

MR. SHARPLESS: I want the time of the day fixed. I object unless he identifies the hour of the day. The hours are very important here.

Q. How much money did you have in the Jefferson Title & Trust Company at 9 o'clock in the morning of November 10, 1924? A. I don't know exactly. According to this it shows—

MR. SHARPLESS: I object. He is not qualified to read our own records. (Objection overruled.)

Q. Answer the question, please. A. According to this, it shows at the end of the day— Q. At the beginning of the day how much did you have? A. The previous balance of November 8th was \$161.06. Q. How much did you have at the end of the day of November 10, 1924? A. \$111.06. Q. Had you made any deposit? If so, at what time on November 10th? A. About 2.45 P.M., \$50 in cash. Q. Now, at the time this check was returned not sufficient funds, were you engaged in the insurance business? A. I was. Q. Were you a licensed broker? A. I was. Q. Did you ever do any business with the Fidelity & Deposit Company of Maryland? A. I did. Q. This check was made out to their order? A. It was. Q. And after this check was returned, what happened?

MR. SHARPLESS: I object to the question unless counsel will be prepared to back up his proof of loss of credit by some official of this surety company. This gentleman on the stand does not know why his credit was stopped.

MR. DAVIS: We have an official of the insurance company.

MR. SHARPLESS: Otherwise I will ask later to have it stricken out.

By MR. DAVIS:

Q. What happened after the check was returned, as far as this insurance company was concerned? A. They called me and told me they had a check returned to them and they wanted cash for it and they would not deposit it and I got cash for it and got the check back and they wrote and explained they didn't like the way I did business and I found out they did not care to do business with me. Q. After this occurred did they renew any business for you? A. Not following this; they refused. Q. Did they give you any reason for refusing your business? A. No, sir; except in the letter they said they did not like the way I did business. Q. What was the amount of business that you were doing with this company in 1924? A. About \$520 worth of premiums a year. Q. Of that, what would be your commission? A. About \$100. Q. Did any of your customers come back to you after the Fidelity & Deposit Company of Maryland refused to handle your business further? I refer to those customers whose policies you placed with this company? A. I lost about 80 per cent., I figured the company would renew them and they didn't renew them and the time elapsed and they placed them elsewhere. Q. After that time did any of these customers give you any of their business? A. Out of nine policies I managed to hold onto two. Q. What was your commission on those nine

policies? A. About \$100 a year. Q. You say none of those policies were renewed? A. With that company, no—they didn't renew any of my business. Q. When you say your commission was \$100, do you mean \$100 each year or any other greater time? A. No, sir; they were annual policies. Q. These policies were renewed each year and after this check was returned they were not renewed? A. The following year none of my business was renewed with the company. Q. And your customers did not return to you?

MR. SHARPLESS: I object and ask this evidence about customers to be stricken out because it has not been shown for what reason these customers did not come back. The only way you can prove that is to bring the customers here and have them tell us why they did not reinsure or give this gentleman a new policy. There might have been many reasons besides the fact they could not get this company's policy, and why they took their business elsewhere. (Objection overruled.)

Q. On the 10th of November, 1924, did you have any conversation with any official of the bank in connection with your note for \$100? A. About noon time someone called me and asked what I was going to do on the note and I said I would be there about three o'clock to take care of it. Q. Did they say anything to you? A. Nothing further. Q. Before three o'clock did you come to the bank? A. I was there. Q. You deposited \$100? A. \$50 in cash. Q. With this deposit of \$50, was there enough money in the bank at any time, I mean throughout that day, to pay a note of \$100 and also pay the check of \$70.15? A. There was. Q. There was a balance beyond those two amounts? A. On November 10th at the end of the day there was a balance of \$111, on November 13th still a balance of \$101. Q. When you came to the bank at a quarter of three on November 10, 1924, did you have any conversation with any official with reference to this check that had been returned? A. No. Q. Did they say anything to you about it? A. They did not. Q. Did they say anything to you about it? A. Nothing was said.

Cross-Examination

By MR. SHARPLESS:

Q. Please have your statement before you. You borrowed money from this bank besides being a depositor, didn't you? A. I did. Q. Did you have a note—

THE COURT: It was agreed there was a note.

Q. Didn't you have a note mature on November 10th? A. It was due on the 10th. Q. What time of the day was it you deposited the \$50? A. About 2.45. Q. Who was the official of the Fidelity & Deposit Company of Maryland who told you he would not grant you any more credit? A. I received a letter signed by Mr. Lawless. Q. As I understand, that letter said that they did not wish to do business with you because they did not like your business methods? A. It amounts to that. Q. They did not say anything in that letter about this check, did they? A. I don't remember. Q. You say on November 10th—on the day of November 10th, who was the official who called you from the Jefferson Title & Trust Company? A. I don't know. Q. Just about three o'clock on that day who was the official of the Jefferson Title & Trust Company you had the conversation with? A. When I paid my note I paid to a man by the name of Schultz. Q. You are speaking about other business. I want you to tell me who you had the conversation with at that particular time? A. Over the telephone I don't know, he didn't say. Q. At a quarter of three in the afternoon? A. I only spoke to one clerk there.

By MR. DAVIS:

Q. Is this the note made payable at the Jefferson Title & Trust Company? A. That's the note.

THOMAS L. LAWLESS, 5845 Hoffman Avenue, sworn.

By MR. DAVIS:

Q. What is your business? A. Insurance and surety bonds. Q. With what company are you connected? A. Herman Hoopes, Inc., general agents of the Fidelity & Deposit Company of Maryland. Q. And in November, 1924, did you do any business with Lawrence J. Goldstein? A. Yes. Q. Do you recall whether this check for \$70.15 made out to your order was received by you? A. Yes. Q. Was that check deposited? A. Yes. Q. It was returned not sufficient funds? A. Yes. Q. After that check was returned on November 12, 1924, did you send a letter to Mr. Goldstein? A. Yes. Q. The original of which I am showing you now? A. Yes. Q. You sent that letter and it is signed by you? A. That's right. Q. Did you do any business with Mr. Goldstein after the 10th of November? A. I don't believe so. Q. Do you know whether or not you did? A. I would say not. Q. What was the reason you did not do any business with Mr. Goldstein? A. His business was unsatisfactory. Q. Can you point to any specific reason why his business was unsatisfactory? A. Well, when this check was received we deposited it to our account, and made our check in payment of those premiums to the company and when the check came back it meant we were out that much until we recovered it. Q. As a result of this check coming back did you refuse to do any more business with Goldstein? A. Yes. Q. Did you renew any more policies of his old customers? A. No. Q. Were your requested to do so by either Mr. Goldstein or his customers? A. I have definite recollection that one particular policy came in the office and requested a renewal. Q. Was that renewal made? A. His girl came in the office and requested a renewal. We told her we would decline to renew any business for him.

Cross-Examination

By MR. SHARPLESS:

Q. Won't you state whether his business had been in any way unsatisfactory before this check was put through? A. The business itself—that is the insurance policies were not unsatisfactory. Q. What was unsatisfactory before this check went through? A. I would simply say that we pay the companies usually about 60 days after the effective dates of the policies and we billed Goldstein, he placed the policies, the premiums were not paid up after the full extent of the 60 days, and then when they were paid up they were paid with a bad check. Q. This happened several times? A. No. Q. In other words, there were other elements entering into your decision except this one check? A. No. Q. In other words, do you mean to tell me the Fidelity & Deposit Company of Maryland refused to do any more business with an agent just because he put in one check—A. We are not the Fidelity & Deposit Company of Maryland, we are the general agents of the company. Q. I mean the general agents? A. Our overriding commission is so small we can't afford to be advancing money for brokers and we don't want to do business with brokers who give us bad checks.

MR. DAVIS: I offer in evidence the check, the note, the statement, the deposit slip and the letter of November 12th.

LAWRENCE J. GOLDSTEIN & Co. No. 1322

Real Estate & Insurance
1212 Real Estate Trust Bldg.

Philadelphia, 11/7 1924

Pay to the Order of Fidelity & Deposit Co. of Maryland \$70 15/100
Seventy Dollars15/100 DollarsLawrence J. Goldstein & Co.
By L. J. Goldstein

JEFFERSON TITLE & TRUST COMPANY

3-184 Philadelphia
Do Not DetachThis Voucher-Check Is Issued In Payment Of Items As Per Statement
Following.The Endorsement Of Payee On The Back Will Constitute a Receipt In Full
If Incorrect To Be Returned

	Amount
Reliable Jewelry	22 —
L Lyons	28 69
M Steinberg	35 50
" "	1 50

	87 69
Com	17 54

Check	70 15
-------	-------

(Endorsements on Back Cancelled.)

(Slips attached as follows): Return to 127

For NS

From Franklin National Bank

Jefferson Title and Trust Company

Philadelphia.

Return to 44

Reason NS

Amount 70 15

\$100 Philadelphia, October 10, 1924

Thirty days after date I promise to pay to the order of Myself One
Hundred.....Dollars at Jefferson Title & Trust Co. Without
defalcation, for value received.

No. 54 Due Nov 10

Lawrence J. Goldstein

(Endorsement)

Lawrence J. Goldstein

Statement of

JEFFERSON TITLE & TRUST COMPANY

Philadelphia

In Account with Lawrence J. Goldstein,
1212 Real Estate Trust Bldg., Philadelphia.The last amount in this column is your balance as shown by our books
Old balance date checks listed in the order of payment, Read across

Date		Deposits			Date new balance		
Balance brought forward					Oct 31 '24	7.46	
7.46					Nov 5 '24	200.00	
207.46	Nov 7 '24	40.00	2.10	3.30			
167.46	Nov 8 '24	1.00			Nov 10 '24	50.00	
161.06	Nov 10 '24	100.00					
111.06	Nov 13 '24	9.90					
61.16	Nov 20 '24	7.00					
101.16	Nov 14 '24	40.00					
54.16	Nov 21 '24	5.91	40.00				
			Nov 5 '24	207.46			
			Nov 7 '24	167.46			
			Nov 8 '24	161.06			
			Nov 10 '24	111.06			
			Nov 13 '24	101.16			
			Nov 14 '24	61.16			
			Nov 20 '24	54.16			
			Nov 21 '24	8.25			
			Balance				

LST—List Please examine, if not correct report at once.
CL—Collection To prove balance use form on other side
IN—Interest CC—Certified check DM—Debit memo CM—Credit memo

Reconcilement of account
Checks outstanding

Number	Amount	
Total outstanding		Deposits
checks		Not credited
Balance as		Bank Balance
per check book		as per statement
Total		Total
Depositor's proof		

Sort the checks numerically or by date issued.
Check off on the stubs of your check book each of the checks paid by the bank and make a list of the numbers and amounts of those still outstanding in the space provided; to the sum of the outstanding checks add the balance as shown by your check book.
This amount should correspond with the bank's balance, as shown on this statement.
List below all deposits which do not appear on this statement, and add to this total the balance as shown by the statement.
The two results should agree, and if so, the statement rendered is correct. This statement is furnished you instead of balancing your pass book. It saves you the trouble of bringing your pass book to the bank and waiting for it to be balanced. These statements will be found very convenient to check up and file. All items are credited subject to final payment.

Deposited in the
JEFFERSON TITLE & TRUST CO.
Girard Ave. at Twenty-Ninth Street, Philadelphia
By L J Goldstein 2.45 P.M. 11/10 1921
Please list each check separately

Bank Notes
 5s and upwards 50
 Bank Notes
 1s and 2s
 Gold
 Silver
 Checks
 In Philadelphia, name the bank
 Out of town, name the place
 Duplicate
 Deposit slip
 Jefferson Title & Trust Co.
 JLF Teller
 Total \$
 See that all checks and drafts are endorsed

FIDELITY AND DEPOSIT COMPANY
 Of Maryland

Fidelity and Surety Bonds and Burglary Insurance
 Real Estate Trust Building, Philadelphia

Edward Hoopes
 L. E. Exline
 Wm. H. Barrett
 Gordon P. Rettew
 Thomas L. Lawless
 G. Harry Davis

Herman Hoopes, Inc.
 General Agent
 Filbert 5470

November 12, 1924.

Lawrence J. Goldstein and Company,
 Real Estate Trust Building,
 Philadelphia, Pa.
 Gentlemen:

Your check # 1322 dated November 7, 1924, drawn on the Jefferson Title and Trust Company in the amount of \$70.15 has been returned marked "not sufficient funds." We are at loss to understand this, especially as you are aware that the insuring companies involved look to us for collections. Will you therefore immediately remit the necessary cash to redeem your check which we hold.

Very truly yours,
 Herman Hoopes, Inc.
 Thomas L. Lawless

TLL:H

The Plaintiff Rests

MR. SHARPLESS: I move for a non suit. (Motion declined.)

DEFENDANT'S TESTIMONY

JACKSON W. SCHULTZ, 45 State Road, Upper Darby, Pa., sworn.

By MR. SHARPLESS:

Q. In November, 1924, you were connected with what company? A. Jefferson Title & Trust Company. Q. What was your position with that company? A. Assistant Secretary and Treasurer. Q. As Assistant Secretary and Treasurer did you have supervision and control of the book-

keeping records of the company? A. I did. Q. Do you remember this incident of the check of Lawrence Goldstein on November 10, 1924? A. I recall it. Q. Will you kindly tell the jury what your recollection is of it? A. I recall this check arrived at our institution about 9:15 or 9:30 in the morning. Previous to the time of the \$100 note falling due, Mr. Goldstein instructed me to simply charge that to his account to clean the matter up, which I did at the opening of the business day. The check arrived and until a quarter of three there was not enough money there to pay that check. In the meantime I returned it not sufficient. At a quarter of three Mr. Goldstein made his deposit of \$50 in cash, and, although it was rather late, I offered to get that check back for him before the close of business that day, as it was not yet to the Federal Reserve Bank and Mr. Goldstein paid no attention whatever to that and simply let the check go back to the Fidelity Company not sufficient funds. Q. Regardless about his express instructions about the note, is it the custom of your bank to take out of the funds the notes that mature at the beginning of the business day? (Objected to.) (Objection sustained.) A. It is.

Cross-Examination

By MR. DAVIS:

Q. I understand you to say this check for \$70.15 arrived between 9:15 and 9:30? A. Approximately. Q. On November 10th? A. About that. Q. Exactly at what time did you pay that note? A. Between 9 o'clock and a quarter of 3, the time he made the deposit—I don't know. Q. You don't know when that note—A. I know that day, in between 9 o'clock and a quarter of three. Q. You mean to tell us you cannot tell when that note was charged up against Mr. Goldstein's account? A. At the beginning of the day I put it through. When it reached the ledger I don't know. It was charged up 9 o'clock in the morning. Q. You are sure of that? A. I am sure of that. Q. Did Mr. Goldstein talk to you about this note and tell you he was coming around at a quarter of three to make a deposit, an additional deposit, and ask you to hold charging his account until he arrived? A. He did not. Q. Now, at a quarter of 9 in the morning, if you took a look at your statement, Mr. Goldstein had enough money to pay his note? A. Yes. Q. And at 9:15 when this check came through, how much was he short? A. I should say about \$9. Q. And you sent the check back not sufficient funds? A. I did. Q. You want us to believe that when Mr. Goldstein came there at a quarter of three you told him that this check to the Fidelity had been sent back not sufficient funds and that, knowing this fact, he paid no attention to that statement? A. That is exactly what I said.

By MR. SHARPLESS:

Q. At that time this gentleman at my right worked for you in the bank? A. That's right. Q. What was his position? A. Head bookkeeper.

By MR. DAVIS:

Q. When he came there at a quarter of three he would have had enough money to pay this check, wouldn't he? A. With that \$50 deposit and balance. Q. He would have had enough money—A. He would have had enough money to take care of the check. Q. This was on what date? A. If I recall correctly, November 10th. Q. Can you explain to us why this check went through the Clearing House on the 8th of November? A. We are not a member—I am not connected now, but the Jefferson Title & Trust Company at that time was not a member of the Federal Reserve. Checks on the Jefferson Title & Trust Company must go from the bank in which they are deposited to the Federal Reserve and then to our company. Some-

times it takes two and three days—it is not uncommon for a check in this city to reach a trust company that is not a member of the Federal Reserve.

JOHN E. MILLER, 2721 West Girard Avenue, sworn.

By MR. SHARPLESS:

Q. In November, 1924 with what institution were you associated? A. Jefferson Title & Trust Company. Q. What was your position? A. I was the head bookkeeper. Q. As head bookkeeper were the bookkeeping records under your supervision? A. They were. Q. Did you make some of the records yourself? A. No, we had girls at the time, they made the actual posting on the ledger. Q. You have some records and books there. What are those? A. These are the original ledger cards. Q. What else?

MR. SHARPLESS: It is admitted that they are the records.

Q. Will you look at your discount record concerning this \$100 note in controversy and tell us the facts about it—just the discount record. A. Discount register, October 10, 1924, the bank discounted a note of Lawrence J. Goldstein payable at the company, discounteer Lawrence J. Goldstein; date of note, October 10th; due date, November 10th; amount, \$100; discount, 54 cents; proceeds, \$99.46 credited to the account. Q. Take your depositor's record and tell me the balance of Lawrence J. Goldstein at the end of the business day on November 9th? A. The end of the business day November 9th the balance was \$161.06. Q. At the beginning of the business day on November 10th what was the balance? A. \$161.06. Q. What was the first deduction on November 10th? A. A note was charged against the account for \$100. Q. When was that paid, that deduction, what time of the day? A. In the morning, right after the opening of business. Q. Then after that was this check in controversy presented? Have you a record of the check? A. Yes, I have a record of the check. Q. What is your record of this check that was returned? A. We had our book record of November 10th, a record of not sufficient checks—checks returned for any reason at all—not sufficient, Lawrence J. Goldstein, \$70.16, returned to bank 44. Q. What time was that check presented to the bank? A. At 9:15 or 9:30 in the morning. Q. What time was it returned to the Clearing House or through your agent to the Clearing House? A. About 12 o'clock. Q. I wish you would look at the depositor's record again and see if there is a deposit later in the day? A. Later in the day was deposited \$50. Q. This is the original deposit slip. What time was that deposit made? A. That is the original deposit slip Lawrence J. Goldstein, November 10, 1924 made at 2:45 P.M. He wrote the time on himself. Q. On this day did you have any conversation with Goldstein? A. No.

Cross-Examination

By MR. DAVIS:

Q. In December of 1924 you were the Treasurer of the Jefferson Title & Trust Company? A. I was not. Q. I show you letter dated December 4th.

MR. SHARPLESS: That is Ralph.

Q. You are the head bookkeeper of this company? A. At that time, yes, sir. Q. Your records do not show the note was charged against this account 9 o'clock in the morning? A. It does not show the time, it is not necessary. Q. It does not show the time? A. Not in the ledger. Q. When you were looking in the book there was no evidence this was charged up 9 o'clock in the morning according to your books? A. That is the usual custom. Q. Please answer my question. There is nothing in your books that shows that? A. No. Q. There is nothing in your book that says

that this check came in 9:15 for \$70.15? A. Came in the morning run. Those checks arrive after that time. Q. Your books do not show that. You gave me the impression you were reading these from your books. I want to know whether that is correct.

By THE COURT:

Q. Answer yes or no. A. No.

By MR. DAVIS:

Q. Your books do not show when the check was returned to the Clearing House, the exact time—your books don't show? A. We go according to the rules of the Federal—the books don't show. Q. Did you have any conversation with Mr. Goldstein over the telephone? A. No, sir. Q. Were you the one who charged up this \$100 against his account? A. No. Q. Were you the one who sent the check back not sufficient funds? A. Yes, sir. Q. Do you recall what time that check was sent back? A. 12 o'clock. Q. Isn't it true that when this check came in for \$70.15 you looked up Mr. Goldstein's account and saw this note was due on that day, and it was at that time you charged up this note against his account? A. The account—the check was sent to the bookkeeper. Q. Do I understand you to answer no to my question that that is not correct? A. Repeat the question. Q. Isn't it true when the check for \$70.15 came in that you looked up Mr. Goldstein's account, you saw there was a note due on that day, and it was at that time you charged up Mr. Goldstein in the sum of \$100, and then sent the check back not sufficient funds, isn't that what happened? A. I didn't look at the account, the check was simply sent to the bookkeeper and returned it to me and I sent it back. Q. You have no one in court who is familiar—the person who actually looked up his account? (Not answered.) Q. Have you or have you not? A. No.

THE DEFENDENT RESTS

BOTH SIDES CLOSE

CHARGE TO THE JURY

BONNIWELL, J.

Members of the Jury: I say to you as a matter of law that this man, according to the records of this Company, did have sufficient money in bank to pay that check, and that the note he gave was not due until the close of business, and at the close of business he had ample to meet both the check and the note.

I am required by the rules governing the comment of the Court to simply comment upon the facts without commenting upon what you and I might think of this kind of business. The fact of the matter is this man had sufficient money in bank when he issued the check, and had sufficient money in bank when the check came there to be paid.

You have here substantial evidence of a responsible concern with which he did business that they refused to do any further business because of the action of the bank, and he is entitled to recover at your hands damages for the breach and damages for any loss created or loss of business he had. The amount of damages the law imposes upon you to say, and you will find a verdict for the plaintiff and assess such damages that you as reasonable men think the plaintiff ought to have to compensate him for the position he was placed in by the act of the bank.

MR. SHARPLESS: I ask for an exception to that part of the charge—

THE COURT: I will grant you a general exception. I will decline the point for binding instructions, and grant you an exception to that.

(Counsel for defendant requests, and the Court orders, that the notes of testimony, the charge of the Court, the rulings of the Court and the exceptions thereto, together with the points for charge, the rulings thereon and exceptions thereto, be transcribed and filed as part of the record in the case.)