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DRAWING AGAINST UNCOLLECTED CHECKS: I

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A RECORD disclosed that a checking account customer of an insolvent commercial bank, whose assets were in the hands of a receiver for distribution, endorsed a third person's check and delivered it with a deposit slip to the bank which entered the amount of the check as a credit, both in his passbook and in the individual ledger in which the bank recorded his deposits, or in one of them, before the closing of the bank. On the deposit slip or in the passbook which was delivered to the bank there was printed a clause or clauses which purported to stipulate part of the consequences to follow the delivery of the check.[1] The assets of the bank were sequestered, and a receiver was appointed before the check was collected. Thereafter the check was collected and the assets in the hands of the receiver were increased by the amount of the check. Upon this record, a group of New York City judges in March and April, 1931,[2] allowed the customer a preferred claim for the amount of the

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1. The stipulation clause upon the deposit slip read: "All items credited shall be subject to actual receipt or final payment by this Bank, which shall not be held responsible for its delay or failure to present, collect or protest any item." The stipulation in the passbook read: "Deposits of all items are accepted for entry only and are subject to final payment at the point on which drawn. All credits other than those for money shall be subject to cancellation if not paid upon presentation. In receiving and forwarding checks, drafts and other items, this bank acts only as your agent and will make its best effort to select responsible agents, but shall not be liable for losses sustained by the failure, default or neglect of such agents, or for losses in the course of transmission, or due to cause or causes beyond this bank's control. . . ."

2. Matter of Vavoudis, 141 Misc. 823, 252 N. Y. Supp. 779 (Sup. Ct. 1931), aff'd without opinion, 233 App. Div. 672, 249 N. Y. Supp. 870, 233 App. Div. 814, 250 N. Y. Supp. 797 (1st Dep't, 1931). See Altmark v. Bank of United States, 233 App. Div. 854, 251 N. Y. Supp. 816 (1931).

check. Upon another record which differed from the one just stated cnly in the form of the stipulation[3] a group of Central Ohio judges in April, 1931, disallowed a preferred claim.[4]

These cases and the probability of the rendering in the near future of other decisions in other regions upon similar records suggested the possibility of making a test of the "institutional" hypothesis[5] like that reported in *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*[6] and in *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks*.[7] A tentative decision was made to test the hypothesis by the *Vavoudis* and the *Smith & Setron Printing Co.* cases.[8]

But at once it was foreseen that the gathering in New York City and in Ohio of the data necessary for such a study would require long absences from home and very laborious work outside of the office. In order to provide themselves with an excuse for postponing for as long a time as possible this inconvenient and arduous task, the writers agreed that before beginning it they would undertake a more convenient and easier piece of work. Why not, on the basis of what they already knew and could readily learn without leaving the office, write something about the *Vavoudis* and the *Smith & Setron Printing Co.* cases?

It was agreed that the article should, of course, be an attempt to find the answer to the conventional question or questions, whether the New York case and the Ohio case would be affirmed or reversed by the Court of Appeals and the Ohio Supreme Court, whether the courts of other jurisdictions would, upon either of these records, allow the customer a preferred claim or a dividend upon the amount of the check.

It was agreed, however, not to attempt to answer the question by assuming Aristotelian logic and the relations stated in propositions of law

3. Here the stipulation read: "Checks on this bank will be credited conditionally. If not found good at close of business, they may be charged back to depositors and the latter notified of the fact. Checks on other city banks may be carried over for presentation through the clearing house on the following day. In receiving items on deposit payable elsewhere than in Cleveland this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. Items lost in transit may be charged back to depositor's account pending receipt of duplicates. Unless otherwise instructed, items may be mailed to drawee banks. Unpaid items may be returned by mail at depositor's risk. In making deposits the depositor hereby assents to the foregoing conditions."

4. Smith & Setron Printing Co. v. State of Ohio, 40 Ohio App. 32, 178 N. E. 211 (1931).

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

6. Moore and Sussman (1931), 40 YALE L. J. 381, 555, 752, 928, 1055, 1219.

7. Moore, Sussman and Brand (1933) 42 YALE L. J. 817, 1198.

8. A second article will report a study made preliminary to an attempt to test the hypothesis.

to obtain between facts and decisions to be self-evidently true and somehow revealed or discovered in speculation. Nor was the attempt to be to find the answer by assuming that propositions of law are hypotheses which have in fact been verified and that Aristotelian logic is a tool and, for the present purpose, a sufficient tool for the manipulation of propositions of law. In short, it was agreed not to attempt to answer the question by the application of either of the "legal methods" of the analytical jurist.[9] Moreover, it was agreed not to attempt to answer the question by making a lawyer's professional forecast of the probable decision by an intuition of experience—an intuitive judgment, a rational, but not logical, calculus—which strives to take into account every factor in the situation impinging on the deciding judges, whether it is a factor associated significantly in the consciousness of the judges with the decision or whether it is a factor below the level of their consciousness, but judged by the lawyer to be significantly associated with the impending judgment of the court.[10] Finally it was agreed not to answer the question by making an objective study of beliefs held or ideas accepted as true by judges, following one of the methods of the social psychologists in their studies of attitudes or of the symbols supposed to be associated with them.[11]

Rather, it was agreed to attempt to answer the question in the manner of the introspective jurist who accounts for and anticipates judicial decisions wholly or partially on the basis of beliefs held or ideas accepted as true by judges, and who ascertains their beliefs or ideas by exploring the consciousness of the judges by uncontrolled observation of his own consciousness.[12] Accordingly, in this article, the writers will attempt to answer the question of dividend or preference first by determining by a

9. Two of the writers have already attempted to answer a similar question by the application of the analytical jurist's "legal method." Moore, Sussman and Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks* (1933) 42 YALE L. J. 817.

10. The application of this method has already been attempted by two of the writers. Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 Yale L. J. 381.

11. See for example Robinson, *Trends of the Voter's Mind* (1933) 4 JOURNAL OF SOCIAL PSYCHOLOGY 265-284.

12. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 31, 54; THE GROWTH OF THE LAW (1924) 22, 32; POUND, THE SPIRIT OF THE COMMON LAW (1921) 33, 118; AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 90; INTERPRETATIONS OF LEGAL HISTORY (1923) 22, 64, 92; JURISPRUDENCE, RESEARCH IN SOCIAL SCIENCES (edited by Wilson Gee, 1929) 181; Llewellyn, *Some Realism about Realism* (1931) 44 HARV. L. REV. 1222, 1244, 1245; Pound, *Do We Need a Philosophy of Law?* (1905) 5 COL. L. REV. 339, 345; id., *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 609; id., *Scope and Purpose of Sociological Jurisprudence* (1911) 24 HARV. L. REV. 593 et seq. (1911) 25 HARV. L. REV. 140; id., *The Theory of Judicial Decision* (1923) 36 HARV. L. REV. 642, 952. See also ARNOLD, SYMBOLS OF GOVERNMENT (1935); ROBINSON, LAW AND THE LAWYERS (1935) (especially chapter VIII et seq.).

process of uncontrolled introspection of the writers' own consciousness, what beliefs will be held by the judges after argument, and secondly by determining by intuition the probable significance of the association, in the consciousness of the judges, of all or some of these beliefs with the decision granting or denying the customer a preferred claim for the amount of the check. The result of this attempt to determine the beliefs which the introspective jurist attributes to judges is reported below under four headings: (1) beliefs as to banking practice; (2) economic beliefs; (3) legal beliefs; (4) ethical or moral beliefs.

1. Beliefs as to how checks deposited with a bank are collected and as to when they are drawn against

In the stream of consciousness of the introspective jurist's judge, his beliefs as to the deposit and collection of a third person's check drawn on another bank appear to be as follows:[13] The deposit of the check is made by a customer with a checking account either by handing it to an employee or by mailing it to the bank. A deposit slip, which may or may not contain stipulations purporting to state some of the consequences of the deposit, is filled in by the customer and accompanies the delivery of the check or is filled in by an employee of the bank. At intervals during the day the deposit slips are sent to the bookkeepers who enter the amounts received as credits in the bank's record of the customers' checking accounts. The checks, which are separated by the tellers or other employees receiving them into local and out-of-town checks, are, if local, sent to the department charged with presenting them or, if out-of-town, sent to the department responsible for the collection of transit items. At the end of the same day or the beginning of the next, debit entries reflecting the amount of the checks deposited are made in the accounts in the general ledgers of the bank which disclose the total of the bank's deposit liabilities.

On the following morning local checks are presented through the clearing house or directly to the banks on which they are drawn and are, as soon as may be, debited to the accounts of their drawers. The clearing balances between the several banks are determined and settlements made by the banks in debit within a few hours of the delivery of the check. Settlements are made either by means of debits and credits on the accounts of the several banks with a Federal Reserve or some other bank; or are made by drafts drawn on out-of-town banks. If the settlement

13. Possibly the judge acquired his beliefs as did the following authors, or as a result of reading their books: KNIFFIN, THE PRACTICAL WORK OF A BANK (1921); COMMERCIAL BANKING (1923); LANGSTON, PRACTICAL BANK OPERATION (1921); SPAHR, THE CLEARING AND COLLECTION OF CHECKS (1926); WESTERFIELD, BANKING PRINCIPLES AND PRACTICE (1928). See description of the process of collection in the next and final article.

is by draft, the bank receiving it proceeds to effect its collection in the same manner as any other check on the same drawee. A local check which is dishonored is returned to the presenting bank by the afternoon of the day it is presented or before banking hours the next morning and its amount is credited upon the current day's clearing balance. As soon as may be after a dishonored check is returned to the depositary, it is debited to the account of the depositor. Thus a day or two days elapse between the deposit of a local check and the time when the bank presenting it receives credit or a draft for its amount and, in the event that the check is dishonored, the same period of a day or two elapses before the time when the check is returned. Obviously, if the settlement is by draft, additional time will elapse before the draft is, in its turn, settled for by its drawee. "Proceeds" of the check, if it be honored, "are received" by the depositary when it is clear to the depositary from the time which has elapsed that it will not be returned dishonored; or perhaps the "proceeds are received" when there has happened some one of the events in the process of deposits, credit entries, debit entries and settlements through which the check and the draft, if one is given in settlement, progress in their journey back to the drawer. The average time required for a check to be returned dishonored and for the happening of some or all of the events in the process called its collection—one or two days—are factors in determining the time stated in the availability schedule[14] for local checks as the time at which the credit represented by the credit entry becomes "available" or "immediate credit." If the depositary is permitted to pay interest to its customers on its demand deposits and does pay interest, it will, at a time which may be before or after the expiration of the time specified in the availability schedule, include the amount of the check in the interest balance.

Checks which are not local are generally sent, together with a cash letter, to one or more out-of-town correspondents with whom the depositary maintains a current account. The vast majority of checks will rarely be received by the correspondent to which they are sent later than twenty-four hours after they are mailed. On the day of their receipt, entries for the amounts of the checks received are, as in the case of the deposits of customers who are not bankers, made on the credit side of the correspondent bank's record of the depositary's account. Again, as in the case of checks deposited in the depositary bank, they are separated into local checks, i.e., checks drawn on banks in the correspondent's city, and out-of-town checks, i.e., those drawn on other places. Local items are handled in the same manner in which the depositary bank handled local checks received by it: they are presented, debited to the drawer's account and settled for, either by debiting and crediting or

14. For description of availability schedules and some explanation of their functions see *infra* pp. 29, 30, 31.

by draft. If the settlement is by draft, the bank receiving it proceeds to effect its collection in the same manner as a check on the same drawee. A local check in the hands of a correspondent which is dishonored by the drawee is returned to the correspondent on the day of its presentment and is debited to the depositary's account with the correspondent on the same or the following day. For example, if the depositary bank is in a New England city and the correspondent in Boston or New York, the making of the debit entry by the correspondent will rarely be later than the first day after the day of the original deposit of the check. On the same day that a local check is returned to the correspondent and debited, the check with a notice of the debit is mailed to the depositary. The check and notice are rarely received by the depositary later than twenty-four hours after their mailing, in other words, the second day after the day of the original deposit. The depositary, on the day of receipt of the returned check, debits the account of the depositor and mails him a notice of the debit. "Proceeds" of the check, if it be honored, "are received" by the depositary when it is clear to the depositary from the time which has elapsed that it will not be returned dishonored; or perhaps "proceeds are received" when there has happened some one of the events in the process of deposits, credit entries, debit entries and settlements through which the check and the draft, if one is given in settlement, progress in their journey back to the drawer. The average time required for a check to be returned dishonored and for the happening of some or all of the events in the process called its collection are factors in determining the time stated in the correspondent's availability schedule[14] as the time at which the credit represented by its credit entry for the local check becomes "immediate credit" or "available" to the depositary. A schedule may make the amount of a local check available on the day of its receipt by the correspondent or one day after its receipt; thus the amount of a local check becomes available on the second or third day after the receipt of the check by the depositary bank. If the correspondent is permitted to pay interest on its demand deposits and does pay interest to the depositary it will, at a time which may be before or after the expiration of the time specified in the availability schedule, include the amount of the check in the interest balance.

Out-of-town checks received from the depositary by the correspondent are credited to the former's account within approximately twenty-four hours after their original deposit. They are then sorted and despatched. In most cases they are sent by the correspondent to those of its correspondents, often Federal Reserve Banks, which are in the vicinity of the various drawees; but they may be mailed directly to the drawees. Upon their receipt by the second correspondents, the amounts of the checks are entered as credits in the account of their customer, the first correspondent. The receipt of the checks by the second correspondent and the

entries for their amounts will generally be made not later than twenty-four hours after the close of the day on which they were received by the first correspondent; that is to say, they are usually received and credited on the second day after the day of original deposit. Of course, if the second correspondent is at some distance from the first, the time required for receipt and credit may be several days longer.

The second correspondent handles the checks received in the same manner as did the depositary or the first correspondent: on the day received or on the following day it presents such of the checks as are drawn on banks in the same city and either mails the out-of-town checks directly to their drawees or forwards them to one or more of its own correspondents with whom it maintains a current account. Perhaps the second more frequently than the first correspondent presents checks received by it either over the counter, through a clearing house or through the mails, and less frequently than the first forwards checks to another correspondent. Checks on drawees in the same city as the second correspondent are presented and settled for by adjustment of balances or by draft generally on the third or fourth day after the day of original deposit. Checks mailed to their drawees are likely to be presented to and debited by them on the fourth or fifth day after the day of original deposit. Some of these are immediately settled for by adjustment of balances; for the others, the drawees remit by draft, which is likely to be received by the second correspondent on the fifth or sixth day after the day of original deposit and is "collected" by the second correspondent in the same manner as any like check deposited with it. Checks which are dishonored are returned by the drawee to the second correspondent, by the second to the first and by the first to the depositary, which on the day it receives them debits them to the depositor's account. The time elapsing between the original deposit and the receipt by the depositary of a returned check varies according to the location of depositary and drawee; for example, a check deposited in a New England city and drawn on a bank in New Mexico, if dishonored, would probably be returned to the depositary twelve days after the day of deposit. If the check is an out-of-town item as regards both the depositary and the first correspondent, its "proceeds," if it be honored, "are received" by the depositary when it is clear to the depositary from the time which has elapsed that the check will not be returned dishonored; or perhaps the "proceeds are received" when there has happened some one of the events in the process of deposits, credit entries, debit entries and settlements through which the check and the draft, if one is given in settlement, progress in their journey back to the drawer. The average time required for such a check to be returned dishonored and for the happening of some or all of the events in the process called its collection are factors in determining the time stated in the first correspondent's availability

schedule as the time at which the credit represented by its credit entry for the out-of-town check becomes "immediate credit" or "available" to the depositary.

The judge concludes his reflection: Following the original deposit of a third person's check, is it possible to fix upon the particular event, upon the particular point in the process of collection, to delimit the period of time, after which the depositary has "received the proceeds" of the check for the customer's account and before which the "proceeds" have not yet been "received"? If that is possible, what is the particular event, the particular point in the process of collection, the period of time after, but not before which the "proceeds" have been "received"? For example, are the "proceeds received" on the day of deposit, upon local clearance by the depositary, on the day the check is credited to the depositary's account by the correspondent, on the day the drawee honors it, on the day specified in the correspondent's availability schedule, on the day the correspondent's claim against another bank has been increased by the amount of the deposited check, on the day specified in the depositary's availability schedule, or on the day the depositary's claim against another bank has been increased by the amount of the deposited check? In deciding whether the customer is entitled to a preference for or a dividend on the amount of the deposited check, why is it of consequence whether the particular event or the period of time which marks the "receipt of the proceeds" has happened or elapsed before the depositary closed insolvent, if demands of customers are regularly made and honored before the happening of that event or the elapsing of that time? Are demands of customers regularly made and honored before the "proceeds are received"? If they are, does the regularity of the practice restrict the customer to a dividend, although the "proceeds" have not yet been "received"?

In the stream of consciousness of the introspective jurist's judge, after what events does it appear that the demands of customers are made and honored and before what events does it appear that they are not made and honored? Surely, the judge reflects, most checks are not drawn against on the day of their deposit. Surely, the common practice is to maintain "collected" balances; surely, the majority of checks are not drawn against until a time much longer than that necessary for the happening of all the events in the process of collection. It is true that a minority of deposited checks are drawn against before the last of these events has happened. But as to how large this minority is, and when such drawing regularly occurs, whether upon the making of the credit entry by the depositary or by the correspondent, upon the honoring by the drawee, or upon some other event, and whether this event is the same in New York City as in Central Ohio, the judge's reflection discloses no belief.

2. *Beliefs as to the causal relation between the economic aspects of depositing, collecting and drawing against checks*

In the stream of consciousness of the introspective jurist's judge, the commercial banks of the country together constitute a banking system. The system as a whole and each of its individual members perform functions indispensable for the welfare of the country. By loans and discounts they create purchasing power in the form of demand deposit liabilities or checking account credit. This process of creation results in making the volume of outstanding checking account credit peculiarly susceptible to expansion and contraction according to business needs. The loans and discounts are made for business men, the amount of whose borrowings is related to their business needs. There are no restrictions, except those imposed by the necessity of paying interest, upon the amount of loans and discounts for which business men may apply. In the granting of applications for loans and discounts, aside from the limitations imposed by the low legal reserve required of commercial banks and other relatively unimportant restrictions, such as the amount which may be lent by one bank to one person, the amount granted is limited only by the credit judgment of the bank. It is, of course, true that bank notes are created upon the making of loans and discounts for business men or upon the making of indirect loans to the government by the purchase of its bonds; and, were the restrictions upon their creation no more stringent than in the case of checking account credit, there would be no difference between them in respect of expansion and contraction in conformity with the needs of business, assuming that the government followed business needs. But, in fact, the restrictions are more stringent: bank notes, other than Federal Reserve notes, may be issued only after the purchase by the bank and the deposit with the government of government bonds of an equivalent value; and the amount of Federal Reserve notes is controlled by a high gold reserve of forty per cent. In the case of gold and silver coin or certificates there is thought to be at most no more than a slight relation between the amount of metallic coin or certificates and the needs of business. The volume of gold and silver coin is thought to depend in large part upon the accident of discovery. Greenbacks, it is true, are issued by the government and their amount is restricted only by the willingness of persons to lend against this form of credit instrument. But it is clear that there is not, as in the case of checking account credit, the certainty of a direct relation between the amount of government notes issued and the needs of business. Is there, however, such certainty of a direct relation between the amount of checking account credit and the needs of business? For instance, at the beginning of a depression, do loans and discounts and checking account credit contract with automatic ease

and certainty in proportion to the decrease in need for purchasing power?

If the needs of business are what control the volume of checking account credit, its volume is less subject to direct control by the government than other forms of purchasing power. The issuance of national bank notes depends upon the existence of government bonds with the note issue privilege; the issuance of gold and silver coins and of gold and silver certificates depends upon the purchase by the government of gold and silver bullion; in the issue of government notes (greenbacks) the initiative at least is always in the government itself. On the other hand, in the case of checking account credit and Federal Reserve notes, the government has no direct control over its amount; but its control, if any, is indirect, as for example, through coercing the central bank to change the rediscount rates or to pursue open market policies which either increase or decrease the central bank's reserves. But the volume of Federal Reserve notes is sooner and more easily affected by such changes in the central bank's policies than is the volume of checking account credit.

The checking account credit thus created by loans and discounts is used in the liquidation of the vast majority of the transactions, both wholesale and retail, which constitute the trade of the country. And it is through the transfer of this form of purchasing power, by means of the issuance, collection and clearing of checks, that another essential function of the commercial banks is performed. The purchasing power thus created and transferred by the banks has a higher velocity than any other form of purchasing power in general use. A given number of dollar units of purchasing power or medium of exchange in the form of checking account credit will, within a given time, effect a greater number of exchanges than will the same number of dollar units of any other form of purchasing power or medium of exchange. Furthermore, this form of purchasing power is more convenient than any other. By requiring the least activity on the part of the users, it is least likely to impinge on the whims or interfere with the activity of the users. It is certainly more convenient than any medium for the payment of irregular and large sums and as convenient as any for the payment of other sums. The tokens by means of which it is transferred are less likely to be stolen than are tokens representative of other forms of purchasing power. On the other hand, this form of purchasing power is less convenient in that it is more easily forged or altered, it does not pass from hand to hand with the same facility as bank notes or coins and it involves a longer period of waiting before the completion of an exchange undertaken.

In his reflection the judge then turns to a consideration of transactions of deposit between commercial banks and their checking account customers. The business of a commercial bank is the borrowing and lending

of money, the medium of exchange, or of purchasing power. The bank borrows the medium of exchange or purchasing power from its customers by receiving present deposits or by arranging with its customers for the making of deposits in the future and lends to its customers either by honoring or by standing ready to honor its customers' demands in excess of the amount of the medium which it has received from them. When a medium of exchange is received by a bank from its customer on account of his checking account, the transaction is one of present deposit and the bank from and after the deposit stands ready to honor the customer's demands in an amount increased by the amount deposited. When a bill of exchange or promissory note of a third person which is not a medium of exchange, but rather a credit instrument calling for the payment of the medium, is received, the transaction is one of the future deposit of the medium called for by the instrument. The deposit is completed when that medium is received by the depositary bank; and the bank from and after, but not before, the deposit is completed, stands ready to honor the customer's demands against the amount deposited.

In the case of either a present or a future deposit, the customer is a depositor and creditor of the bank as soon as the bank stands ready to honor. Upon insolvent liquidation of the bank's assets, he is entitled to rank with other creditors who are depositors. Before a future deposit becomes a present one, both bank and customer are interested in the instrument and its proceeds, the bank because its assets will be increased by the proceeds, the customer because the amount up to which the bank stands ready to honor his demands will be increased by the amount of the proceeds. But if the bank closes before a future deposit becomes a present one, and the bank is therefore unable to receive the proceeds as a deposit and to honor the customer's demands, the instrument, or its proceeds if thereafter received, are returned to the customer.

However, before a future deposit becomes a present one, the bank may, in fact, stand ready to honor the customer's checks in the same way that it would stand ready had there been a present deposit. That is to say, in the case of a future deposit, the bank may extend credit. For example, credit may be extended for a period beginning with the initiation of the deposit transaction by the delivery to the bank of a credit instrument and ending either when the deposit is completed upon the honoring of the instrument and the receipt of its proceeds by the bank or when the instrument is dishonored. During the period of credit extension, the bank stands ready to honor the customer's demands and the customer is a depositor. If the bank closes before the period of credit extension expires and the deposit becomes a present one, the customer ranks with other creditors upon insolvent liquidation and the instrument or its proceeds will not be returned to him. True, the future deposit did not become a present one before the bank closed; but the

bank stood ready to honor the customer's demands before it closed, its standing ready was purchasing power available to the customer, and that purchasing power was precisely what the customer wanted. The situation is quite the same as if, instead of extending credit, the bank had paid the customer in cash the amount of the instrument with the understanding that the money should be returned if the deposit was not completed. Thus, whether the customer who has made a future deposit receives a preference or a dividend, depends upon whether the deposit had been completed and had become a present one, or upon whether the bank had extended credit pending the completion, before the depositary bank closed insolvent. If the deposit had become a present one or if, even though it had not, credit had been extended, the customer does not receive a preference.

The judge is well aware that sometimes in the case of a future deposit the deposited instrument is thought of as remaining the customer's and the bank is thought of as his messenger, representative or agent to effect its presentment unless the bank extends credit and stands ready to honor from the time the deposited instrument is received. If the bank does extend credit, the future deposit is thought of as a sale from the customer to the bank of a credit instrument representing the obligation of the drawer or maker for a purchase price which is the amount of the instrument. The sale may be thought of either as subject to no conditions subsequent or as subject to the conditions subsequent that, if the instrument be dishonored and timely notice thereof be given to the seller, the sale is rescinded and the purchase price, i.e., the amount of the instrument, is to be repaid forthwith by an immediate debiting of the seller's account. If the deposited instrument be received by a bank as messenger, representative or agent, and if the bank closes insolvent before the proceeds of the instrument have been received by the bank as its own, but for the account of the customer, then, either the instrument is returned to the customer or, if it has been collected by the receiver after the closing of the bank, the customer is entitled to a preferred claim in the amount of the proceeds. If, however, the deposit is a sale and the customer is entitled to the price before the bank closes insolvent, then the customer receives a dividend along with other creditors or depositors of the class to which he belongs. Thus, in respect to the consequences of preference or dividend it seems to the judge to make no difference whether a deposit be thought of as a future deposit in which credit either has or has not been extended or whether it be thought of as a transaction which is either a purchase or an agency. Consequently, he finds it more convenient to continue to think of the problem of preference or dividend in terms of present and future deposits and credit extension.

But the judge recognizes that the problem actually presented does not include the question of preference or dividend in a case in which either

cash, a bill of exchange or a promissory note of a third person has been received by the bank. The problem arises from a case in which the bank has received from its customer a check drawn by a third person. He asks himself whether a deposit of a check is a present deposit from the moment the check is received by the bank or whether it is a future deposit. If a future deposit, was credit extended before the bank closed?

Is the deposit of a check a present deposit so that from and after the making of the deposit the bank stands ready to honor the customer's demands in an amount increased by the amount deposited? A present deposit, it will be recalled, is one in which the bank receives a medium of exchange. Certainly checks are commonly used to effect payment in business transactions both retail and wholesale. Demand deposit liabilities are used more frequently than any other form of purchasing power. Indeed, checks are used just as "money" is used. When a payee receives a check, he is receiving the common substitute for the medium of exchange, and when his bank receives the check from him, it also is receiving the common substitute for the medium of exchange. But is this common substitute either a medium of exchange or substantially its equivalent? A check is certainly a token representative of existing purchasing power in the form of checking account credit. But it is not a medium of exchange. A medium of exchange is purchasing power which is generally acceptable to buyers and sellers and is, moreover, immediately available for the final liquidation of accounts between buyers and sellers. A check is not generally acceptable to buyers and sellers. Some classes of sellers or creditors may accept from some classes of drawers checks tendered in definitive or final payment or liquidation; but certainly most sellers do not, under any circumstances, receive checks from drawers except as tokens to be used to effect the transfer in the future of a medium of exchange. Some classes of sellers or creditors may accept from some classes of payees checks tendered in definitive or final payment or liquidation, as they may accept those of drawers; but most sellers or creditors do not under any circumstances receive checks from payees except as tokens to be used to effect the transfer in the future of a medium of exchange. Nor is a check immediately available to buyers and sellers. In a society in which there were but one bank in whose banking rooms and in the presence of whose bookkeeper all payments were made by contemporaneous credit entries to the accounts of the sellers and debit entries to the accounts of the buyers, demand liabilities of the bank would be an immediate means of effecting final payment or liquidation. But in a society like ours in which the use of demand liabilities is made by drawing, delivering and depositing checks, some time, usually a day or more, must elapse before the seller has secured credit on the books of his bank. Therefore the demand liabilities of the buyer's bank represented by his credit balance are not made immediately

available to the seller and consequently are not immediately available to the buyer as a means for closing forthwith that or any other transaction.

If the deposit of a check is not a present but a future deposit, there remains the question of whether credit has been extended pending the completion of the deposit and before the bank closed. Credit may not have been extended at all. If it is extended, though the check has not yet been presented and honored and the purchasing power which is its proceeds not yet received by its depositary, when is it extended? Is credit extended from the moment that the check is received by the bank and the credit entry is made? When, upon the making of an arrangement for a future deposit of its proceeds, a bill of exchange or promissory note of a third person is delivered by a customer to his bank, there is usually no difficulty in determining whether the bank has extended credit from the receipt of the instrument until it is honored or dishonored. If the bank receives a bill of exchange or promissory note which is (a) not about to fall due, (b) through an officer whose function it is to extend credit and after a credit investigation of the customer, (c) exacts compensation, interest or discount, for the extension of credit during the period expiring with the honoring or dishonoring of the instrument and for the risk incidental to the extension, and (d) makes a credit entry for the amount of the instrument less the discount, if any, in the record of the customer's checking account, then credit is extended. If the bank receives a bill of exchange or promissory note which is (a) mature or about to mature, (b) through a teller whose functions do not include the extension of credit and without a credit investigation of the customer conducted more or less *ad hoc,* (c) exacts no compensation in the form of interest or discount, and (d) makes no credit entry for the amount of the instrument in the record of the customer's checking account, then no credit has been extended.

When, however, the bank receives a third person's check which is (a) payable on demand, drawn against funds already in the hands of the drawee and which is expected to be presented and paid forthwith, (b) through a teller, whose function is not the extension of credit and without a credit investigation of the customer, (c) exacts no compensation in the form of interest or discount, and (d) makes a credit entry for the amount of the check in the record of the customer's checking account, is credit extended?

If the future deposit of a check of a third person is in its essentials like a transaction in which a bank receives from its customer a bill of exchange or promissory note not about to mature, it may be that like consequences are to be expected; it may be that in the case of the deposit, as well as in the case of a bill of exchange or promissory note, credit is extended and the bank stands ready to honor from the moment the instrument is received. Or, if it is essentially like a transaction in which

the bank receives a maturing bill or note, it may be that credit is not extended and the bank does not stand ready to honor from the moment the instrument is received. Whether it is significantly like either of these deposits can only be determined by detailed comparison.

In respect of the shortness of the time elapsing before the instrument is honored and the proceeds received by the depositary, the future deposit of a check is similar to the future deposit of a maturing instrument and dissimilar to the future deposit of a not-yet-maturing instrument. This similarity points to a consequence upon the receipt of a check similar to the consequence upon the receipt of a maturing instrument, i.e., no extension of credit. But this formal similarity certainly is not conclusive of "no credit extension." It is not unfamiliar for a bank to stand ready to honor its customer's demands before the receipt of the proceeds of a sight draft delivered to it by the customer. Nor are loans for a few days unfamiliar.

In that a check is received by a teller whose functions do not include the making of loans and discounts, and in that there is no credit investigation *ad hoc*, the future deposit of a check is similar to the future deposit of a maturing instrument and dissimilar to the future deposit of a not-yet-maturing instrument. The similarity points to a consequence upon the receipt of a check similar to the consequence upon the receipt of a maturing instrument, i.e., no extension of credit. But the significance of this formal similarity is also doubtful. It is true that bills and notes are sometimes made payable at a bank and are honored out of the drawer's account as if they were checks; but they are payable by one of the innumerable individuals, firms or corporations engaged in business throughout the country and against funds to be provided from the proceeds of the sale of the goods for the price of which the bill or note was given. In the interval of time between the giving of the bill or note and the maturity date, innumerable business exigencies may have affected the drawer's financial status and his ability to provide funds for payment. But a check is drawn upon a bank and against funds already provided.

In that no compensation is exacted by the bank upon the receipt of a check for an extension of credit or for risk incidental to such an extension of credit, the check is like a maturing instrument and unlike a not-yet-maturing instrument. The similarity points to a consequence upon the future deposit of a check similar to that upon the future deposit of a maturing instrument, i.e., no extension of credit. But this formal similarity of a check to a collection item and dissimilarity to the discount is not significant. All bills of exchange and promissory notes, whether or not about to mature, are credit instruments which may be used at a bank as devices for the creation of bank credit, that is, for an extension of credit, and are not devices for the transfer of existing bank credit. If, then, an instrument which is a device for the creation of bank credit.

though it is about to mature, be received by a bank, the absence of an interest charge, the usual concomitant of an extension of credit, may well be significant of the fact that no credit has been extended. But a check is not a device for the creation of bank credit, that is, for extension of credit. On the contrary, it is a device for the transfer of bank credit which has already been created. Thus a check is always drawn against funds in the bank to which the check is addressed. If those funds were the result of credit extended by that bank, then, from the viewpoint of the country's banking system, compensation should be regarded as having already been paid for the bank credit which the check is transferring. Hence, in determining whether credit is actually extended when a check is received by a bank under an arrangement for future deposit of its proceeds, the absence of an interest charge is of no weight.

However, the judge reflects further. Although a check is a device for the transfer of bank credit, it is nevertheless true that the future deposit of a check, in view of the fact that its proceeds may not be received by the depositary bank for from eighteen hours to five or six days, does offer an opportunity for an extension of credit in the amount of the check during this period of time. If the bank stands ready to honor the customer's checks up to an amount increased by the amount of the check, credit is, in fact, extended, and, if no interest is charged, the bank is, in fact, uncompensated for the extension and the risk. The statement that a check is a device for the transfer of existing bank credit is therefore a half truth. The truth is that a check is a device both for the transfer of existing bank credit and for the creation of bank credit. A bank may stand ready to honor its customer's demands during the period between the receipt of a check and the receipt of its proceeds. Hence, the absence of an interest charge in the case of the future deposit of a check is a weighty factor in determining whether credit is extended. But the statement that a check is a device for credit extension as well as for transfer is misleading. If *A* draws a check on his bank and delivers it to its payee, *B*, the amount up to which *A* draws against his bank is, in fact, reduced by the amount of the check delivered to *B*, though the check has not yet been presented to and debited by *A*'s bank. Hence, a check is a device for the decrease of the total amount of bank credit of the country during the period from its delivery until it is debited, unless the bank in which *B*, the payee, made the future deposit, extends credit against it; even then, it is a device for the decrease of the country's bank credit during the period between its delivery to the payee and its receipt by the payee's bank. From the viewpoint however, of the operation of the country's banking system, the failure of the depositary bank to make an interest charge should be regarded merely as a performance by the depositary bank of part of its function as a cog in the banking mechan-

ism rather than as significant of no credit extension during the period between the receipt of the deposited check and the receipt of its proceeds. It is true that the performance by the depositary bank of its function in the banking mechanism by extending credit to its customer upon the future deposit of a check is gratuitous. But the period of time during which the bank gratuitously extends its credit and thus foregoes the use of the amount elsewhere is very short and the amount of its gratuitous extension of credit is small. Most checks are local and the deposit completed within twenty-four hours; of the out-of-town checks, the great majority are completed within two or three days. Also, compared with the total of checks in which the deposit is completed and against which, therefore, there is no extension of credit, the amount of credit extended against checks in which the deposit is not completed is very slight.

The period of time during which a risk of loss is assumed and the amount upon which the risk is assumed is the same as the period and the amount on which the bank gratuitously foregoes the use elsewhere of the amount of credit extended. The period, it has just appeared, has been thought to be short and the amount small; furthermore the risk itself is slight. The deposited check will be presented, upon its presentment honored, and after its honoring the proceeds will be received by the depositary bank. Drawers of checks do maintain sufficient balances, dishonor of checks through mistake of drawees is unlikely, and the inter- and intra-community clearing systems are practically 100 per cent efficient. If the check should be lost, stolen, forged or altered, the loss to the bank, if any, from the happening of any one of these contingencies has been covered by insurance. If the check should be dishonored, the payee who deposited it has, at the time of its return, a sufficient balance in the depositary bank to cover the returned item, or if he has not, he will forthwith make a deposit to cover the returned item. Only in instances so infrequent as to be negligible will the bank be compelled to seek recourse against the drawer.

In respect of the making of a credit entry, the future deposit of a check and the future deposit of a not-yet-maturing instrument are similar whereas, the future deposit of the check and the future deposit of the maturing instrument are dissimilar. This similarity of check to discount points to the same consequence upon the receipt of a check as upon the receipt of a not-yet-maturing instrument. But this formal similarity seems to have no significance for credit extension. In the case of a future deposit, the time when the bank makes a credit entry in its record of the customer's account for the amount of the bill, note or check is dictated solely by considerations of efficiency and economy in bank operation, whether that time be upon the receipt of the instrument, the receipt of the proceeds or some other time. The number of maturing

bills and notes against which credit is not extended is small enough so that it is more convenient to first record their receipt in a collection register and later to record the receipt of the proceeds on the customer's individual ledger card than to make a credit entry at once and another entry, a debit, in the not unlikely event of dishonor of the instrument; whereas the number of checks received is so great and the chance of dishonor so slight that the making of two memoranda in the case of each check would greatly increase both the necessary personnel and the complexity of bookkeeping methods without compensating advantage. The fact, therefore, that in the case of the future deposit of checks banks make but a single memorandum which is a credit entry made at the time of the receipt of the check, indicates nothing but a decision as to convenient methods of internal bank operation.

And yet, reflects the judge, is it not true that the entries in the individual ledger card indicate the amount up to which the bank stands ready to honor the customer's demands? The balances upon the individual ledger cards are the primary record of the bank's liabilities. They are reflected in the general ledgers of the bank and in its balance sheet. Moreover, the entries in the individual ledger cards are made to disclose to tellers, bookkeepers, officers and other employees of the bank the amount up to which the bank stands ready to honor the customer's demands. May it not be, then, that this formal similarity is significant of credit extension?

Thus to the judge, reflecting upon his beliefs and ideas, it seems that the future deposit of a check is formally similar to the future deposit of a maturing instrument in all respects save in the making of the credit entry. This is not necessarily because the instruments look alike, but because the circumstances surrounding their receipt by the bank are similar. It seems, too, that the future deposit of a check differs in all respects, save in the making of the credit entry, from the future deposit of a not-yet-maturing instrument. However, the motives which lead to the future deposit of a check are so different from the motives underlying the future deposit of a maturing instrument, that the consequences of the formal similarities between these two deposits are not clear.

If credit is not extended immediately upon the making of a future deposit of a check, is it extended thereafter when the depositary bank allows interest to the customer? There is reason to believe that the depositary bank does allow credit to the customer or at least does stand ready to honor his demands for the amount of the check received as a future deposit from the moment the bank allows interest on the future deposit. True, as in the case of the future deposit of a not-yet-maturing bill or note, the bank has not yet received the medium and the deposit is still a future and not a present one. But the allowance of interest indicates that the bank has received what it wanted and can use in the way

of its business, and that, consequently, it is ready to attach to the future deposit of the check at least some of the consequences of a present deposit or of a future deposit of a bill or note in which credit has been extended. The particular consequence which it does attach is the payment of interest which, indeed, is the earmark of that relation between bank and customer which includes the drawing and honoring of checks. This consequence is peculiarly significant because it is also the earmark peculiar to deposits in which the bank has received the medium or has extended credit and does, as a matter of course, stand ready to honor the customer's orders. Furthermore, in the case of the future deposit of a non-maturing bill or note, if interest is paid by the bank on the customer's balance, in computing the balance on which interest is allowed the amount of credit extended against the bill or note is included. The allowance of interest in the case of a future deposit of a check, therefore, suggests that the consequence of credit extension should be attached to the future deposit of a check not only because interest is allowed on present deposits but also because interest is allowed in the case of credit extension. On the other hand, it is true that the allowance of "interest" is often a disguised bonus to the customer for keeping his account at the bank. As such, it indicates nothing as to whether the bank stands ready to honor the customer's demands up to the amount on which interest is allowed either upon the future deposit of a bill or note or of a check or, indeed, upon the deposit of a medium of exchange.

If the depositary bank has an availability schedule and if the time specified in it for the amount of a check becoming available arrives before the check has, in fact, been honored and its proceeds received by the depositary, is credit extended from the time the amount becomes available? An availability schedule is a set of rules for classifying the checks which the bank receives from its customers with reference to the points on which the checks are drawn and for specifying the time when the future deposits of checks of each class shall be treated as present deposits in making cost analyses and in computing the sum up to which the customer's demands will be honored. In the preparation of an availability schedule, the time specified for the availability of each class of checks is based generally upon the average time required for checks to reach the drawee bank by mail plus the time required for the depositary bank to receive the proceeds in the form of bank credit. Sometimes the time specified in the availability schedule is sufficiently extended to include the average time required for a notice of dishonor to reach the depositary. Consequently, a particular check may become available either before or after it has been honored and either before or after the depositary bank has received its proceeds.

What weight should be attached to the arrival of the day of availability in determining whether credit has been extended from that day?

The operation of the banking system includes the preparation by individual banks of availability schedules. Such a schedule sets up a model of behavior with respect to the time for honoring the customer's demands against a particular deposited item. In the operation of the bank the model is, for the most part, conformed to. Consequently, the statement in a schedule that a particular item is available on a particular date indicates that, in fact, the bank stands ready to honor the customer's demands from and after that date.

It is true that in respect of the future deposit of a particular check, the extension of credit from and after its availability date and the concomitant assumption of risk, when the check has not yet been honored, or, if it has, when its proceeds have not yet been received by the depositary, are not compensated for by an interest charge as they would be in the case of the future deposit of a not-yet-maturing bill or note. It is also true that a deposit, when the depositary has received purchasing power, does not involve any extension of credit or risk, whereas the incomplete future deposit does. Yet if it is judged that the loss of interest and the risk of loss would be negligible, were credit extended and risk assumed from the moment of deposit, it obviously would be judged far more negligible if credit is extended in the brief interval between the time for honoring the customer's demands indicated in the availability schedule and the actual reception of the proceeds of any particular check whose progress may have been slower than the average. Furthermore, an extension of credit and the concomitant risk of loss are more than compensated for by the large number of checks, the proceeds of which are received by the depositary prior to the time when they become available to the customers of the depositary according to its schedule.

Is credit extended by the depositary bank to its customer in the case of a future deposit of a check from the time that credit upon the check is extended to the depositary by a bank, the correspondent to which the check has been sent in the course of the process of collection? It may be that there is no extension of credit to the customer upon the receipt of the check nor upon the allowance of interest to the customer nor upon the arrival of a day specified in the availability schedule and yet that there is such an extension when the bank itself receives a credit extension, whether or not that credit extension is contemporaneous with any other event. This extension of credit to the depositary bank by a correspondent against a check whose proceeds have not yet been received and for the amount of which the correspondent is not ready to honor on the ground that the deposit has been completed, may begin, if it occurs at all, from the moment the check is received and credited, from the moment the depositary is allowed interest on the amount of the check or from the moment the amount of the check becomes available according to the availability schedule of the correspondent. From which of these mom-

ents, if any, credit is extended to the depositary by its correspondent depends, it seems, upon the conclusions already reached as to whether the depositary extends credit to its customers upon the receipt of the check, upon the allowance of interest to the customer or upon the arrival of the day of availability. There is no reason to think that the considerations which might determine the extension of credit by the correspondent to its customer, the depositary, will differ from the considerations which might determine whether the depositary extends credit to its customer. Recapitulation of these considerations is unnecessary. The question is whether, if credit is extended to the depositary by another bank, the depositary from that moment, whenever it occurs, extends credit to its customer.

A withholding of credit by the depositary bank after it has itself received credit would seem to be unreasonable. A bank's business is the loaning and borrowing of money. It accepts the future deposit of a check as a means toward securing purchasing power, which will be useful to it in the furtherance of its business. The withholding of credit from its customers when it has itself received credit, would result in an added profit at the expense of the customer. The bank would, upon the basis of the customer's deposit, have gained the use of purchasing power, in effect the "proceeds" of the check, while the customer has received nothing from the bank in return. Moreover, a reason for not extending credit up to this point—the point at which credit has been extended to the depositary—namely, that the extension would result in a loss of interest to the bank through the tying up of its own funds which might profitably be employed elsewhere, is now removed, since an amount of money equal to the amount of the check deposited is now available through the credit extension of the correspondent.

But, on the other hand, the risk to the depositary bank of dishonor of the check is not reduced by the extension of credit to the depositary bank by the correspondent. Subsequent dishonor of the check by the drawee bank will result in the debiting of the depositary's account by the correspondent in an amount equal to the credit extended, whether or not the depositary bank can recoup this loss from the customer. Why should the bank run this risk of loss without compensation? It is true that the withholding of credit extension to the customer after credit has been extended to the depositary may, in particular cases, result in a slight profit to the latter. But this profit, if there be one, is no more than compensation to the bank for bearing its share of the cost of carrying on the clearing and collection operations of the country's banking system.

But, the judge reflects, to what decision, preferred claim or dividend, do these economic ideas lead?

3. Beliefs or ideas in the accepted legal literature as to whether the customer is granted or denied a preferred claim.

In the stream of consciousness of the introspective jurist's judge are there any cases in which there were rulings on "like" claims made upon records "like" those in either the *Vavoudis* or the *Smith & Setron Printing Company* cases? The claims supposed in the question for which an answer is sought is a preference for the amount of the check, and therefore no case will be "like" unless it discloses a ruling upon a claim for a preference. Since there is little room for disagreement as to whether a case discloses a ruling allowing or disallowing a preferred claim, the judge's only difficulty in determining what cases are "like" will be in deciding whether the record upon which the ruling is made is "like" either of the records supposed in the question.[15] He makes this decision of likeness or dissimilarity by comparing, in respect of their likeness in appearance, the "facts" in the record in the case urged to be an earlier "like" case, as they are reflected in the law reports, with the "facts" in the cases supposed in the question. Unfortunately, but not unexpectedly, all of the earlier cases differed from the records supposed to be before the court at the very least in the form of the stipulations printed on the deposit slip or in the passbook.

The law reports, however, do reveal cases in which, upon facts more or less like those in the records supposed to be before the court, there

15. There are many classes of cases which the jurist's judge believes not to be "like" the *Vavoudis* and *Smith & Setron Printing Company* cases; for example: cases in which it is for the proceeds of an instrument other than a check that the customer is seeking a preferred claim against the assets of his insolvent depositary bank: Central Nat. Bank of Lincoln v. First Nat. Bank of Gering, 115 Neb. 444, 216 N. W. 302 (1917) (note); Paulk v. Union Banking Co., 46 Ga. App. 815, 169 S. E. 313 (1913) (sight draft); Messenger v. Carroll Trust & Savings Bank, 193 Iowa 608, 187 N. W. 545 (1922) (sight draft); In re Liquidation of Canal Bank & Trust Co., 181 La. 856, 160 So. 609 (1935) (sight draft); In re Bank of Minnesota, 75 Minn. 184, 77 N. W. 797 (1899) (sight draft); Love v. Elevator Co., 162 Miss. 773, 139 So. 857 (1932) (sight draft); Cottondale Planting Co. v. Dielstadt Bank, 220 Mo. App. 265, 286 S. W. 425 (1926) (sight draft); Matter of International Milling Co., 259 N. Y. 77, 181 N. E. 54 (1932) (sight draft); cases in which it is a bank which is the customer seeking a preferred claim against the assets of its insolvent depositary bank for the proceeds of checks sent it in the course of collection: Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50 (1893); Brusegaard v. Ueland, 72 Minn. 283, 75 N. W. 228 (1898); National Butchers and Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031 (1889); cases in which it is for the proceeds of a check which reduced the liabilities rather than increased the assets of the depositary bank that the customer is seeking a preferred claim against the assets of his insolvent depositary bank: Therrill v. Fogal, 107 Fla. 685, 148 So. 199 (1933); Maged v. Bank of United States, 234 App. Div. 295, 254 N. Y. Supp. 569 (2nd Dep't, 1932); cases in which, upon the depositary bank's insolvency, it is in effect to secure a preference over other customers that the customer seeks to recover the proceeds of a check from a solvent collecting bank: Leonardi v. Chase Nat. Bank, 11 F. Supp. 85 (E. D. N. Y. 1935); Andrews v. First Nat. Bank of Tampa, 115 Fla. 67, 155 So. 143 (1934).

were rulings upon the allowance of a preference to the customer for the amount of the check. It is what is said in the opinions in these cases as to the significance of facts and evidence that determines which of these cases were more and which less like the cases supposed to be before the court. The opinions in these more-like cases state propositions which tell or indicate whether a preference should be allowed the customer upon "facts" which are more-like those in the *Vavoudis* and *Smith & Setron Printing Company* cases. These propositions state ideas accepted as true which are peculiarly relevant. In addition there are found cases in which the "facts" were less-like those in the cases supposed in the question, the opinions in which, however, contained propositions stating or from which it may be deduced that a preference should be allowed or disallowed. These propositions are also relevant; but to them is usually accorded less weight than to ideas stated in the cases which are more-like the cases supposed in the question. Many others are found in which rulings or "facts" were not at all like the cases supposed to be before the court, whose opinions stated ideas indicating in some fashion how these cases should be decided. But these propositions, though relevant, are usually accorded so little weight that the judge takes little or no account of them. Furthermore, the ideas stated in the not-at-all-like cases are entirely consistent with the doctrines stated in both the more-like and the less-like cases.

The legal ideas, then, are taken from twenty cases[16] whose records were, by the standard described, more-like and from eight cases[17] whose

16. Equitable Trust Co. v. Rochling, 275 U. S. 248 (1927); Latzko v. Equitable Trust Co., 275 U. S. 254 (1927); Beal v. City of Somerville, 50 Fed. 647 (C. C. A. 1st, 1892); Quin v. Earle, 95 Fed. 728 (C. C. E. D. Pa. 1899); In re Jarmulowsky, 249 Fed. 319 (C. C. A. 2d, 1918), aff'g, 243 Fed. 632 (S. D. N. Y. 1917); Illinois Central Rr. v. Rawlings, 66 F. (2d) 146 (C. C. A. 5th, 1933); Bassett v. Mechanics Bank, 117 Conn. 407, 168 Atl. 12 (1933); Andrew v. Marshalltown State Bank, 204 Iowa 1190, 216 N. W. 723 (1927); Andrew v. Security Trust & Savings Bank, 214 Iowa 1199, 243 N. W. 542 (1932); In re Liquidation of Hibernia Bank & Trust Co., 162 So. 644 (La. 1935); Matter of Vavoudis, 141 Misc. 823, 252 N. Y. Supp. 779 (Sup. Ct. 1931), aff'd without opinion, 233 App. Div. 672, 249 N. Y. Supp. 870, 233 App. Div. 814, 250 N. Y. Supp. 797 (1st Dep't, 1931); Baker-Cammack Textile Corp. v. Hood, 206 N. C. 782, 175 S. E. 151 (1934); Howe v. Akron Savings Bank Co., 16 Ohio Cir. Ct. (N. S.) 320, 31 C. D. 516 (1905); Smith & Setron Printing Co. v. State, 40 Ohio App. 32, 178 N. E. 211 (1931); First State Bank v. Lisles, 144 Okla. 156, 289 Pac. 1105 (1930); Crouch v. Tarver, 173 S. C. 172, 175 S. E. 273 (1934); Williams v. Cox, 97 Tenn. 555, 37 S. W. 282 (1896), rev'd on rehearing on other grounds, 99 Tenn. 403, 42 S. W. 3 (1897); Fine v. Receiver of Dickenson County Bank, 163 Va. 157, 175 S. E. 863 (1934); Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 218 Pac. 232 (1923); Beehive Marketeria v. Citizens Bank, 126 Wash. 526, 218 Pac. 237 (1923).

17. City of Philadelphia v. Eckels, 98 Fed. 485 (C. C. E. D. Pa. 1896); Goshorn v. Murray, 197 Fed. 407 (W. D. Pa. 1912), rev'd on other grounds, 210 Fed. 880 (C. C. A. 3rd, 1914); Hardesty v. Smith, 159 So. 522 (Fla. 1935); Hogansville Banking Co. v. Wilkinson, 42 Ga. App. 281, 154 S. E. 789 (1930); Macon Grocery Co. v. Citizens' Bank,

records were less-like the records supposed to be before the court. In all of these cases, the report supports the conclusion either that the record justified a finding or that the court assumed that the record justified a finding of the following facts. A checking account customer of a commercial bank endorsed and delivered to the bank a third person's check of which he was the holder, accompanied by a deposit slip or its equivalent. An entry of the amount of the check was made on the credit side of the customer's passbook or of his individual ledger card or of both. The bank subsequently failed and the proceeds of the check, collected by the receiver, increased the bank's assets. The customer claimed and was either granted or denied a preferred claim.

A doctrine stated in all of these cases is that, if a checking account customer of a commercial bank endorses and delivers to the bank a check of a third person of which he is the holder, accompanied by a deposit slip, and if the bank makes an entry of the amount of the check on the credit side of his passbook or of his individual ledger card or of both, the check is "deposited"; but if no credit entry is made and the check, in passing through the bank, is handled in a manner similar to that in which a third person's bills of exchange and promissory notes endorsed and delivered by the customer to the bank just before maturity are handled, the check is "received for collection." The legal consequences following upon the handing in of a check which is "deposited" may be the same as those following upon the handing in of a check which is "received for collection" or the legal consequences of the two transactions may differ.

Another doctrine stated in all of these cases is that when a check is "deposited" a bargain is made between bank and customer, the bank's side of which is, in part, an executory promise to honor the customer's checks or orders in an amount at least equal to the amount of the check. Whether the bank promises to honor the customer's checks or orders from and after the receipt by it of the check "deposited," from and after the receipt by it and the application to its own use of the proceeds of the check, or from and after the happening of some other event, depends upon the terms of the promise as expressed or implied in fact. In determining what the terms of the bank's promise are, there should be taken into account: the promise expressed orally or in writing by the bank; the form of the endorsement, whether general or restrictive; the terms of the stipulation printed upon the deposit slip or in the passbook and purporting to state part of the consequences to follow the delivery of the check; the fact that the customer has or has not generally drawn

42 Ga. App. 74, 155 S. E. 57 (1930); Olinger v. Sanders, 92 Ind. App. 358, 174 N. E. 513 (1931); Baker v. Orme, 6 Ohio Cir. Ct. (N. S.) 289, 17 C. D. 465 (1905), aff'd, 74 Ohio State 337, 78 N. E. 439 (1906); Raynor v. Scandinavian-American Bank, 122 Wash. 150, 210 Pac. 499 (1922).

against "deposited" checks; the regular course of business between the customer and the bank, and the regular course of business.

The doctrine that when a check is "deposited" (and at least when the bank regularly honors checks drawn by the customer against checks "deposited" by him before their collection) there is a presumption that the bank promises to honor the customer's checks and orders from and after the receipt by it of the check "deposited" is stated in twenty-four[18] of the cases. The other four[19] state a different doctrine, that when a check is "deposited" (though the bank regularly honors checks drawn by the customer against checks "deposited" by him before their collection) there is a presumption that the bank promises to honor the customer's checks and orders from and after the receipt by it and the application to its own use of the proceeds of the check.

A doctrine expressed in all of the cases is that that part of the bank's promise which specifies when the customer's check shall be honored is determinative of the customer's position after insolvency. If the time specified is immediately upon the "deposit" of the check, the bank is under a present obligation as soon as the "deposit" is made to honor the customer's checks or orders. The bank has created and put at the disposal of the customer at once, as completely as if it were in his pocket, that form of money or purchasing power called checking account credit or deposit currency, the obtaining of which was the objective of the customer in making his bargain, i.e., in depositing the check for credit. Consequently the customer, upon the deposit of the check, acquires at once the status of a depositor and, however soon thereafter the bank may be closed, its assets sequestered and a receiver appointed, the customer receives upon the distribution of assets no more than the dividend accorded to depositors. The bank having performed its side of the bargain, neither it nor its receiver is obligated to return the "deposited" check, the consideration received by the bank for its performance. But when the bank's promise specifies that the time for the honoring of the customer's check is from and after the receipt by it and application to its

18. Equitable Trust Co. v. Rochling; Latzko v. Equitable Trust Co.; Quin v. Earle; In re Jarmulowsky; Illinois Central Rr. v. Rawlings; Bassett v. Mechanics Bank; Andrew v. Security Trust & Savings Bank; Andrew v. Marshalltown State Bank; In re Liquidation of Hibernia Bank & Trust Co.; Matter of Vavoudis; Baker-Cammack Textile Corp. v. Hood; Smith & Setron Printing Co. v. State; Howe v. Akron Savings Bank Co.; First State Bank v. Lisles; Crouch v. Tarver; Williams v. Cox; Fine v. Receiver of Dickenson County Bank; Washington Shoe Mfg. Co. v. Duke; Beehive Marketeria v. Citizens Bank, all *supra* note 16; Macon Grocery Co. v. Citizens' Bank; Hogansville Banking Co. v. Wilkinson; Olinger v. Sanders; Baker v. Orme; Raynor v. Scandinavian-American Bank, all *supra* note 17.

19. Beal v. City of Somerville, 50 Fed. 647 (C. C. A. 1st, 1892); City of Philadelphia v. Eckels; Goshorn v. Murray; Hardesty v. Smith, all *supra* note 17. There is no intimation in these cases of what evidence rebuts such a presumption.

own use of the proceeds of the check, then the bank is not under a present obligation to honor the customer's checks or orders. It has not created and put at the disposal of the customer that form of money or purchasing power called checking account credit or deposit currency, which was the objective of the customer in making his bargain, i.e., in depositing the check for credit. Nor is a present obligation imposed upon the bank until the receipt and application to the bank's use of the proceeds of the check. Consequently, until that time the customer does not acquire the status of a depositor and, if before that time the bank is closed, its assets sequestered and a receiver appointed, the customer does not receive upon the distribution of assets the dividend accorded to depositors. The bank has not performed its side of the bargain and is no longer capable of performing it, and therefore either it or its receiver is obligated to return the consideration received by the bank for its unperformed promise, i.e., the "deposited" check or its proceeds.

It is clear from the legal doctrines which have just been stated that the answer to the question of preference or dividend depends upon the bargain which the parties are found to have made. But bargains expressed in words are rare. For that reason, in finding the bargain made, it is more common than not to resort to the mechanism of presumption. It will have been noted that the doctrine expressed in twenty-four[18] of the cases is that there is presumption that the bank promises to honor the customer's checks and orders from and after the receipt by it of the check "deposited"; and that the doctrine in four[19] of the cases is that there is a presumption that the bank promises to honor the customer's checks and orders from and after the receipt of the "deposited" check and the application to the bank's use of the proceeds. If the twenty-eight cases agreed upon what the presumption as to the terms of the bank's promise is, and upon what facts rebut the presumption, it might not be so difficult to anticipate the answer to the question. Of the facts which may rebut the presumption, the most conspicuous and the most discussed is the stipulation printed on the deposit slip or in the passbook which purports to state part of the consequences to follow the delivery of the check. It is agreed that the clause or clauses of such a stipulation may rebut the presumption. Unfortunately, there is no agreement as to what form the stipulation must take to rebut the presumption.

In twelve[20] of the twenty-eight more- or less-like cases, the records dis-

20. In re Jarmulowsky, 249 Fed. 319 (C. C. A. 2d, 1918), aff'g, 243 Fed. 632 (S. D. N. Y. 1917); Illinois Central Rr. v. Rawlings, 66 F. (2d) 146 (C. C. A. 5th, 1933); Bassett v. Mechanics Bank, 117 Conn. 407, 168 Atl. 12 (1933); Hogansville Banking Co. v. Wilkinson, 42 Ga. App. 281, 154 S. E. 789 (1930); Macon Grocery Co. v. Citizens' Bank, 42 Ga. App. 74, 155 S. E. 57 (1930); Olinger v. Sanders, 92 Ind. App. 358, 174 N. E. 513 (1931); Andrew v. Security Trust & Savings Bank, 214 Iowa 1199, 243 N. W. 542 (1932); Matter of Vavoudis, 141 Misc. 823, 252 N. Y. Supp. 779 (Sup. Ct. 1931),

closed a stipulation printed upon the deposit slip or the passbook which purported to state part of the consequences to follow the delivery of the check. In seven of these cases[21] the stipulations were identical; in the remaining five,[22] the stipulations were neither identical with those in the first seven cases nor with each other.

In the first of the five cases, there was printed upon the passbook:[23]

"Deposits of currency or coin may be drawn against after deposit, but deposits of checks shall not be drawn against until collected."

In allowing the customer a preference, Hough, J., writing for the Circuit Court of Appeals of the 2d Circuit, said:[24]

"In the absence of any special agreement between these depositors and their bank, the title to the checks would have passed to the bank, and the bank become merely a debtor to the depositor for amount entered in the passbook. . . . On the other hand is the notice in the passbook which undoubtedly constituted part of the original contract between banker and depositor. . . . Therefore both of these proceedings present the same question, which is whether a depositor who is credited with the face of checks, which he has agreed not to draw against until they shall have been collected, has by the act of deposit parted with the title to the checks in question or other such negotiable paper. It is obvious (and is indeed admitted) that unless there was such parting with title the relation of the bank to the depositor in respect of such collectible items is that of agent. Of course, if the agency had been fulfilled by collection of the checks before May 11th, no such question could be presented, for the moment the bank got money on the checks the relation of debtor and creditor arose. . . . But here, when petition was filed and the bank superintendent took possession, the agency (if it existed) was terminated before collection effected, and the depositors can follow their own property or its proceeds wherever they can find it, in the absence of supervening superior rights. . . . And it is our opinion that what the parties here meant was to create as to everything but cash the relation of principal and agent. This inference we draw from these undisputed facts: No depositor had any right (as distinct from an occasional and gratuitous privilege) to draw against anything but cash; this arrangement was advantageous to the bank; and the right to summarily charge back uncollected items, even after full apparent credit on deposit, is thought

aff'd without opinion, 233 App. Div. 672, 249 N. Y. Supp. 870, 233 App. Div. 814, 250 N. Y. Supp. 797 (1st Dep't, 1931); Baker-Cammack Textile Corp. v. Hood, 206 N. C. 782, 175 S. E. 151 (1934); Smith & Setron Printing Co. v. State, 40 Ohio App. 32, 178 N. E. 211 (1931); Fine v. Receiver of Dickenson County Bank, 163 Va. 157, 175 S. E. 863 (1934); Raynor v. Scandinavian-American Bank, 122 Wash. 150, 210 Pac. 499 (1922).

21. Illinois Central Rr. v. Rawlings; Hogansville Banking Co. v. Wilkinson; Macon Grocery Co. v. Citizens' Bank; Olinger v. Sanders; Andrew v. Security Trust and Savings Bank; Baker-Cammack Textile Corp. v. Hood; Fine v. Receiver of Dickenson County Bank, all *supra* note 20.

22. In re Jarmulowsky; Bassett v. Mechanics Bank; Matter of Vavoudis; Smith & Setron Printing Co. v. State; Raynor v. Scandinavian-American Bank, all *supra* note 20.

23. In re Jarmulowsky, 249 Fed. 319, 320 (C. C. A. 2d, 1918).

24. Id. at 321, 322.

inconsistent with any intent on the bank's part to become the owner of such items as those under consideration.

"We conclude, therefore, that the course of business shown herein is in effect the same as though the checks aforesaid had been specifically indorsed 'For collection and deposit to the account of' the depositors."

In the second of these cases there was printed upon the deposit slip:[25]

"All checks credited are subject to payment."

The court, denying the customer a preference, said:[26]

"By great preponderance of authority, where a depositor of checks or drafts is given credit as cash against which he has the right to draw, in the absence of an agreement or understanding to the contrary or proof of circumstances from which such an understanding may be inferred, the presumption is that title to the paper passes to the bank, although this is rebuttable by proof showing a contrary intention of the parties at the time of the deposit. . . . Also, according to the prevailing view, the fact that deposits are credited subject to payment or that the bank has the right to charge dishonored paper back to the depositor instead of proceeding against the maker, does not militate against the passing of title to it. This right is regarded as merely that of an indorsee against an indorser and hence not inconsistent with ownership."

In a third case of this group, a case less-like the records supposed to be before the court, there was printed on the deposit slip the following stipulation:[27]

"Checks on this bank and on other Tacoma clearing house banks will be credited conditionally. If not found good at the close of business, they will be charged back to depositors and the latter notified of the fact. In making this deposit the depositor hereby assents to the foregoing conditions."

In a decision which, on other grounds, granted the customers a preference, Fullerton, J., speaking for the Washington Supreme Court, said:[28]

". . . deposit slips amounted to nothing more than an agreement between the bank and each of the several depositors that, if the check deposited was not found to be good at the close of business on the day of the deposit, it could be charged back to the depositor. Such an agreement we held in *Vickers v. Machinery Warehouse & Sales Co.*, 111 Wash. 576, 191 Pac. 869, did not constitute a deposit for collection, but was a sale of the paper to the bank and passed title to the paper, subject only to the right of rescission if the paper subsequently proved to be without value."

In the fourth case, *Matter of Vavoudis*, there was printed upon the deposit slip:[29]

25. Bassett v. Mechanics Bank, 117 Conn. 407, 409, 168 Atl. 12, 13 (1933).

26. Id. at 413, 414, 168 Atl. at 14, 15.

27. Raynor v. Scandinavian-American Bank, 122 Wash. 150, 152, 210 Pac. 499, 500 (1922).

28. Id. at 158, 210 Pac. at 502.

29. 141 Misc. 823, 824, 252 N. Y. Supp. 779 (Sup. Ct. 1931).

"All items credited shall be subject to actual receipt of final payment by this bank, which shall not be held responsible for its delay or failure to present, collect, or protest any item."

In the only opinion handed down in the litigation, Lydon, J., at Special Term, allowing the customer a preference, said:[30]

"Ordinarily the bank would have become the owner of the check deposited and a debtor to its depositor for the amount of the deposit. But here the deposit slip bore the following provision. . . . Manifestly these provisions were inconsistent with the rights and obligations which would normally have ensued from the deposit of the check. They were inconsistent with the theory of ownership in the bank. They negatived the idea that the bank became a debtor to its depositor upon acceptance of the deposit. They were consistent only with the theory that the bank took the check for collection and that in the execution of its agency it was to be relieved from the customary responsibilities."

In the last of the five cases, the *Smith & Setron Printing Company* case, the following clause was printed in the customer's passbook:[31]

"Checks on this bank will be credited conditionally. If not found good at close of business, they may be charged back to depositors and the latter notified of the fact. Checks on other city banks may be carried over for presentation through the clearing house on the following day.

"In receiving items on deposit payable elsewhere than in Cleveland this bank assumes no responsibility for the failure of any of its direct or indirect collecting agents, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these conditions items previously credited may be charged back to the depositor's account. Items lost in transit may be charged back to depositor's account pending receipt of duplicates. Unless otherwise instructed, items may be mailed to drawee banks. Unpaid items may be returned by mail at depositor's risk. In making deposits the depositor hereby assents to the foregoing conditions."

In denying the customer a preference, Sherick, J., writing for the Ohio Court of Appeals for the 8th Appellate District, said:[32]

"There can be no question that had these checks been deposited for collection, title would not have passed to the bank . . . but the facts in this case do not disclose that such was done; nor can it be inferred, unless the notice appearing in the deposit book, just quoted, so provides. The fact that a bank has a right to charge back a dishonored check as against its customer's account is not alone sufficient to establish the fact that it took the paper for collection purposes only.

"It is well stated in the case of *Raynor v. Scandinavian-American Bank* that in the absence of a special agreement to the contrary the deposit of a check in a bank constitutes not a deposit for collection merely, but is a sale

30. Ibid.

31. 40 Ohio App. 32, 34, 178 N. E. 211, 212 (1931).

32. Id. at 35, 178 N. E. at 212.

of the paper to the bank, and passes title to the bank, subject only to the right of rescission if the paper subsequently proves to be without value. . . . We are advised that it is otherwise held in some jurisdictions, which adhere to the old-considered rule that the relationship is that of bailor and bailee, but we believe that it may now be safely stated that the better rule, recognizing the necessity created by the enormous increase in checking and commercial paper, should be followed."

"Considering now the deposit book 'Notice,' we are unable to understand that its provisions are other than a statement of the general law as herein previously announced. It will be noted that these deposits are to be credited, not received for collection only, and such conditions as are therein stated pertain only to such checks as shall be dishonored. In the matter of the checks in question, there was no dishonor. The checks were paid when presented and the conditional credit clause did not apply."

In seven[21] of the twelve cases it will be recalled that the stipulations upon the deposit slip or the passbook were said to be identical. It is true that there were minor variations: the use of a singular in some stipulations and a plural in others; the use of the word "agent" in some stipulations and of "correspondent" in the others; the use, without a change of meaning, of "and" in some stipulations and "or" in others and the addition of the words "at any time" in some of the stipulations. Subject to the variations just stated, the stipulation common to these cases was as follows:

"In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for the defaults or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents, may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; and it may charge back any item before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited."

An examination of these seven cases indicates that there are two doctrines as to the effect of this stipulation. Three[33] of the seven cases express the doctrine that this stipulation does not rebut the presumption that the bank promises to honor the customer's checks and orders from and after the receipt by it of the check "deposited." Quotations from the opinions in each of these cases follow.

In ruling that, notwithstanding this stipulation, the customer was not

33. Illinois Central Rr. v. Rawlings; Olinger v. Sanders; Andrew v. Security Trust & Savings Bank, all *supra* note 20.

entitled to a preference, the majority of the Supreme Court of Iowa, speaking through Morling, J., said:[34]

"As we have seen, laying aside the 'notice,' the acts of the parties at the time created the relationships of debtor and creditor and of endorser and endorsee. The sentence upon which interveners base their contention is followed by the statement 'the items are *credited subject* to final payment.' There is the further statement that 'the bank *may charge back any item*. . . . Also *any item drawn on this bank* not good at close of business on day deposited.' There are specific provisions designed to relieve the bank from faults which otherwise might disable it from enforcing endorsements.

"It is not disputed that if the deposit had been of cash the bank would have taken title to the cash and interveners would have been its creditors for the amount. Literally, however, the sentence in question would, on interveners' contention, apply to cash, for it reads: 'In receiving items for deposit or collection this bank acts only as depositor's collecting agent.' The language is in the alternative: 'In receiving for deposit . . . this bank acts only as depositor's collecting agent.' It is evident that the words 'deposit or collection' could not have been intended distributively to create the technical relationship of principal and agent. The notice in express terms recognizes that the items are credited and that drafts or credits resulting from them are 'conditional payment.' The notice recognizes that the bank obtains title to the items deposited and that it has given credit to the depositor for them. The meaning and purpose of the notice therefore are found in the provision that the bank 'may charge back any item before final payment whether returned or not.' That is, though the bank has given the depositor credit the credit is not final but may be liquidated by charging back dishonored or worthless items.

"Construing the transaction in its entirety and in its connections in the light of the well known banking practices we think that the words 'this bank acts only as depositor's collecting agent' were not employed in a technical sense and cannot be given the effect of defining the exact and complete legal relationship between intervener and the bank. The bank took title to the checks. Interveners became a depositor. . . .

"In the absence of any contract, this court is committed to the proposition that the title to all deposits passes immediately to the bank. It is a matter of common knowledge that prior to the use of the deposit contracts, such as the one involved in this case, banks frequently found themselves in trouble on account of the negligence of their corresponding banks in making collections. They also found themselves in trouble because certain depositors refused to acknowledge the charge back on items not collectible. This led to the adoption of different contracts of the general type of the one involved in this case.

"They are all contracts made for the purpose of and with the intention of protecting the bank. . . .

"This particular case must be determined by the interpretation to be placed upon the contract. We have no statute on the subject. Our previous decisions have clearly laid down the general principle involved, and the only

34. Andrew v. Security Trust & Savings Bank, 214 Iowa 1199, 1206, 1208, 1209, 243 N. W. 542, 545, 546, 547 (1932).

inquiry here is to what extent does this contract modify the general principle? We have then left only an interpretation of the contract. Inasmuch as it can only be construed to mean a modification of the general rule in this state to the extent of allowing a charge back and protecting the bank from the results of the negligence of collecting corresponding banks, it necessarily follows that the title to these checks passed to the bank, subject only to the right to charge back uncollectible items."

The Appellate Court of Indiana, in denying the customer a preference in a case which was, however, less-like the records supposed, stated:[35]

"The rule applying to bank deposits in this state, in the absence of some special agreement, was well stated by Jordan, C. J., in the case of Union National Bank v. Citizens' Bank, supra, as follows:

" 'The rule which prevails and is generally recognized in regard to bank deposits is that, where a deposit is made in a bank in the ordinary course of business, either of money, or of drafts or checks received and credited as money, the title to the money or to the drafts and checks deposited, in the absence of any special agreement or direction, passes to the bank, and the relation of debtor and creditor arises between the depositor and the bank, without any element of a trust entering into the case.' . . .

". . . unless the statement upon the deposit slip had the effect of limiting the deposit of the state voucher to a deposit for collection only, it must be held that the title thereto passed to the bank.

"Although there is not entire uniformity among the courts, the weight of authority supports the view that while a statement on the deposit slip, or in the passbook, such as here involved, should be considered in determining the intention of the depositor and the bank, it is not conclusive.

"The weight of authority also sustains the conclusion that the title to the voucher in this case passed to the bank; that, paraphrasing the language of the court in the case of Raynor v. Scandinavian-American Bank, supra, 'the condition written on the deposit slip amounted to nothing more than an agreement between the Huntingburg Bank and the appellant, that if the state voucher deposited was found not to be good it would be charged back to the bank,' would not prevent the passing of title.

"The effect of the right to charge back a check to the depositor, on passing of title to the bank, was disposed of by Justice Stone, in the case of Douglas v. Federal Reserve Bank, supra, in this language: 'While there is not entire uniformity of opinion, the weight of authority supports the view that upon the deposit of paper unrestrictedly indorsed, and credit of the amount to the depositor's account, the bank becomes the owner of the paper, notwithstanding a custom or agreement to charge the paper back to the depositor in the event of dishonor.' "

The effect of the stipulation was said by Judge Hutcheson to be the same in a case in the Circuit Court of Appeals for the Fifth Circuit in

35. Olinger v. Sanders, 92 Ind. App. 358, 363, 366, 369, 174 N. E. 513, 514, 515, 516 (1931).

which, however, because of the unexpressed views of his colleagues, the customer was allowed a preference. Judge Hutcheson said:[36]

"It remains only to determine whether the items aggregating $279.81 were, because of the notice on the deposit slip, special deposits.

"The writer does not think they were. He thinks the only purpose of this agreement, its only effect, was to save expressly to the bank the right to reverse the credit entries, in case the items were not collected. These deposits are referred to in the findings as deposits made under a special arrangement. The record, however, shows that they were deposited just as the other deposits were. The only evidence in support of the view that they were special deposits is the notice printed on the back of the deposit slip. He does not think that the character of these deposits as general deposits was at all affected by this notice. The notice contained no reference to the title to the deposits, no reservation against ownership in the bank in case the collection was made. It imposed not a condition precedent to the vesting of title to the deposit in the bank, but a condition subsequent, operating to relieve the bank from responsibility and debt in case the collection failed. It was not effective to convert what was otherwise a general, into a special, deposit. Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 218 P. 232, 37 A. L. R. 617. This is not a case . . . of a collection undertaken by a bank for one not a depositor. It is a case merely of an express reservation by the bank of the right to charge back against a general depositor, when the collection fails, items previously credited to him. Here . . . there was no agreement, express or implied, that the deposit should not be drawn against until collected. . . . On the contrary, the paper was delivered to the bank with an unqualified endorsement giving the depositor the unquestioned right to draw upon it.

"The majority does not agree with these views. They say that the finding of the court is sustained by the record."

The remaining four[37] of the seven cases express the other doctrine, namely that this stipulation does rebut the presumption that the bank promised to honor the customer's checks and orders from and after the receipt by it of the check "deposited."

In a ruling that the customer was entitled to a preference, the Supreme Court of Georgia said, in a case less-like the records supposed:[38]

"The receipt . . . of a check drawn upon a bank in another state, upon the condition that in doing so the bank 'acts only as depositor's collecting agent and . . . all items are credited subject to final payment, . . . and . . . it may charge back any item at any time before final payment,' created such bank merely the agent of such depositor for the purpose of collection; and, that relation having been terminated after the closing of the bank of deposit, but prior to the payment of the check by the drawer to a correspondent of

36. Illinois Central Rr. v. Rawlings, 66 F. (2d) 146, 150, 151 (C. C. A. 5th, 1933).

37. Hogansville Banking Co. v. Wilkinson; Macon Grocery Co. v. Citizens' Bank; Baker-Cammack Textile Corp. v. Hood; Fine v. Receiver of Dickenson County Bank, all *supra* note 20.

38. Hogansville Banking Co. v. Wilkinson, 171 Ga. 165, 154 S. E. 789, 790, 791 (1930).

the bank of deposit, the depositor is entitled to the proceeds thereof in excess of his indebtedness to the bank."

Seven days later the Court of Appeals of the same state granting the customer's claim for a preference in another case less-like the records supposed said:[39]

"Where checks upon other banks are deposited in a bank by a person having a general deposit and against which he is allowed to draw checks, although the checks may be indorsed without restriction by the depositor, and although it may be assumed that, without more, the title to the checks passes to the bank in which they are deposited, and that, as respects thereto, the relation of debtor and creditor arises between the bank and the depositor . . . , yet, . . .

"A provision upon the deposit slips furnished by the bank to depositors, and upon which were made the entries of deposits of the checks, to the effect that 'in receiving items for deposit or collection this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care, all items are credited subject to final payment in cash or solvent credits' and the bank 'may charge back any item at any time before final payment,' constitutes notice to the depositor making the deposit entries upon these slips that the bank, in accepting the checks for deposit, does so only as the depositor's agent to collect the proceeds of the checks and to deposit them to the depositor's credit, and no contract creating the relationship of debtor and creditor arises between the parties, but there is created a contract by which the bank, in accepting the checks, does so as the agent of the depositor to collect the proceeds of the checks and to afterwards deposit them to the depositor's credit in the bank."

The Supreme Court of Appeals of Virginia, speaking through Epes, J., in granting the customer a preference, stated:[40]

"The deposit slip delivered to and accepted by Fine constituted an express agreement that the bank should act as the agent of Fine to collect this check and then deposit its proceeds to Fine's credit. Though it speaks of the check being credited to Fine, it is plain that, if it is credited to him, it is to be done merely for bookkeeping convenience, and that Fine shall acquire no rights by virtue of its being so credited unless and until the check is paid. The bank selected and used this form of deposit slip for its protection. But, when it did so, it assumed the burdens thereof no less than it became entitled to its benefits. . . .

"The cashier of the bank testifies that the bank would have permitted Fine to check against this 'deposit,' but there is nothing to show that this was communicated to Fine. Nor do we find anything in the evidence which we think constituted a waiver either by the bank or by Fine of the contract made between them by the delivery to him and the acceptance by him of this deposit slip."

The same opinion was expressed by the Supreme Court of North

39. Macon Grocery Co. v. Citizens' Bank, 42 Ga. App. 74, 75, 155 S. E. 57, 58 (1930).

40. Fine v. Receiver of Dickenson County Bank, 163 Va. 157, 160, 175 S. E. 863, 864 (1934).

Carolina, speaking through Clarkson, J., in a case less-like the records supposed. Here, in granting the preference, the court said:[41]

"When the checks and drafts were deposited by plaintiff, the following was in the contract, made with the North Carolina Bank & Trust Company, in part: 'In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent, and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. . . . It may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.'

"The first question involved: Did the checks deposited in the bank under the facts as agreed upon become the property of the bank, or, pending collection, were they held by the bank as agent for the plaintiff? We think they were held by the bank as agent for the plaintiff. We think under all the facts and circumstances of this case that the bank by express contract was an agent for collection, the contract in clear language so states."

After considering the beliefs or ideas in the accepted legal literature, the introspective jurist and his judge will, it seems, conclude that the Court of Appeals of New York, the Supreme Court of Ohio, or any other court, would be inclined to take as a model the judicial decisions stated in the relevant legal doctrines and would, therefore, disallow the customer's claim for a preference to the amount of the check, unless the court judged that the form of the stipulation appearing in the records was sufficient to rebut the presumption that the bank had promised to honor the customer's checks and orders upon and after the receipt by it of the customer's check.

4. *Beliefs as to whether in the making of a decision weight ought to be accorded to economic and legal beliefs, and as to the economic and legal beliefs to which weight ought to be accorded.*

In the mind of the jurist's judge, there is another group of beliefs or ideas accepted as true which should be taken into account. They are ethical or moral propositions. They attribute to a course of behavior the quality of goodness or of causing the Good. Sound economic doctrines (i.e., doctrines which are believed or accepted as true) either those holding good for all times and places, those holding good here and now, those of an ideal but not yet existing economic order or those deduced from any of these doctrines, whether the doctrines are laws in the natural science sense, whether intuitive interpretations of economic phenomena or whether they are unrealized ideals, ought to be accorded great weight in the making of a judicial ruling and in the statement of legal doctrines. But perhaps even sound economic doc-

41. Baker-Cammack Textile Corp. v. Hood, 206 N. C. 782, 788, 175 S. E. 151, 154 (1934).

trines, however found or invented and whatever they may be, ought not to be accorded weight unless experiment has shown that they are in causal relation with the Good Life or that they are not inconsistent with the Good Life.

The more relevant of the economic propositions which ought to be accorded weight have already been considered and it was observed that some of them weighed on the side of preference and some on the side of dividend. Thus, for example, there is a proposition that when a bank extends credit against the deposit of a third person's check before it has received the proceeds, it assumes a risk of loss for which it is not compensated though the transaction is one in a profit economy in which compensation for assumption of risk of loss is the rule. The economic belief, which ought to be accorded weight, that compensation for assumption of risk is the rule, will weigh on the side of no credit extension having been made by the bank and therefore of a preference for the customer. But there is another economic proposition that the risk involved in extending credit against a third person's check is so slight and for so short a time that it is negligible and is, as a practical matter, disregarded. This idea, which also ought to be accorded weight, tends to counterbalance the first economic proposition and, combined with other beliefs, on the efficient operation of the banking system for example, weighs on the side of an extension of credit by the bank and therefore a dividend for the customer. But perhaps neither of these doctrines or ideas should be accorded any weight unless they have been proved to be in accord with the Good Life.

In addition to the ethical or moral propositions with an economic reference there are also ethical or moral propositions with respect to law, i.e., judicial decisions and legal doctrines. For example, exact precedents ought to be followed. Propositions of law found either by a study of the facts and rulings in decided cases or in opinions, statutes and commentaries, or propositions deduced from any of these ought to be followed, whether the propositions of law or the deductions be generalizations or "laws" in the natural science sense or whether they be governmental propaganda. But perhaps propositions of law, however found and whatever they may be, ought to be followed only if experiment has demonstrated that the following of the proposition of law. i.e., the making of the ruling required by it, is in causal relation with the Good Life or that it is not inconsistent with the Good Life.

It appears to the judge that there are no exact precedents which ought to be followed in making a ruling for preference or dividend. But, as in the case of economic doctrines which ought to be accorded weight, there are propositions of law, some of which dictate a ruling for a preference and some of which dictate a ruling for a dividend, all of which, however, at least if they have been shown to be in accord

with the Good Life, ought to be followed. Thus, there is a legal doctrine that, upon the deposit of a third person's check, it is that part of the bank's promise which specifies when the customer's checks shall be honored which is determinative of the customer's position after insolvency. If the time at which the bank promised to honor the customer's checks drawn against the deposited check has arrived before the bank closes insolvent, then the customer is entitled to a dividend; but if the time for honoring his checks has not arrived when the bank closes insolvent the customer is entitled to a preference. One proposition of law states that there is a presumption that the bank promises to honor the customer's checks immediately from and after the receipt by it of the deposited check; another proposition of law states a presumption that the bank promises to honor the customer's checks from and after the receipt by it and the application to its own use of the proceeds of the deposited check.

But in addition to ethical or moral propositions of the sort that economic beliefs or ideas accepted as true ought to be accorded weight and that legal precedents and doctrines ought to be followed, there are many other ethical or moral propositions of a more particular sort which will occur to the judge. Since the problem in hand is one arising from a business transaction, most of these propositions will be of economic reference. Some of them are more and some of them less directly associated with the idea of preference or dividend. A few of such ethical or moral beliefs follow:

An insolvent's property in the hands of a receiver ought to be ratably distributed among creditors of the same class; if the property is not the insolvent's it should not be ratably distributed, but ought to be returned to the person to whom it belongs.

Though a third person's check which has been deposited by a customer of an insolvent bank some time before the bank closed insolvent ought, even though it has not yet been collected, to be regarded as the property of the bank, nevertheless a third person's check which has been deposited just before the bank closed ought to be regarded as the property of the customer.

When a customer has deposited a third person's check with the expectation that credit will be immediately extended to him for the amount of the check and credit has been extended to him by the bank, the customer thereby acquires immediately available checking account credit and the status of a depositor and, therefore, upon an insolvent distribution of the bank's assets, he ought to be treated as are other depositors.

The use of checking account credit ought to be encouraged. The use of checking account credit ought not to be restricted simply because its use may give rise to a risk of loss through dishonor of deposited checks. The presence of the risk does no more than create the problem of its just allocation. Allocation of the risk of loss incident to such business transactions, in the absence of a different express allocation, ought to place the risk in the first instance

on the person whose wealth is greater; on the person whose number of transactions is sufficiently great so that the loss may be distributed among them as a cost item; on the person on whom it falls according to usage and custom.

Even though a check is not a medium of exchange, yet whenever a check which has been deposited has completely performed the function of a medium of exchange, it ought to have the consequence of a medium.

The drawing and delivery of a check should not decrease the total of effective demand deposits available as purchasing power for a greater time than is absolutely necessary.

A bank ought not to be required to make unintentional loans without interest or without an antecedent credit investigation.

If an extension of credit belongs to a class of very short term loans which are almost always repaid when due, the bank ought to grant the extension of credit without interest and without a credit judgment.

Reflecting upon the ethical or moral propositions which have been stated, the jurist's judge concludes that it is not clear whether they indicate a decision granting or a decision denying a preferred claim. Unfortunately, he reflects, this conclusion is no more helpful in leading to a decision than the conclusions reached after a consideration of beliefs as to banking practice, economic beliefs and accepted legal propositions.

The writers are inclined to agree with the judge. They have pursued the method of the introspective jurist and find no answer to the question whether, upon records "like" those in the *Matter of Vavoudis* and the *Smith & Setron Printing Company* case, a preferred claim or a dividend would be granted.

[*To be continued*]