NOTES

PRIORITIES IN MISSOURI BANK LIQUIDATIONS*

Victims of the unprecedented flood of bank failures of the last decade and a half are only too well aware of its incidents. Even the cold statistics of the Federal Reserve Board, which tell but a part of the story, are appalling. From 1921 to the date of the declaration of the national bank holiday in 1933,[1] 11,236 of the total of thirty thousand state and national banks failed, almost half of the number during the first three years of the depression. Small wonder that in those three years the aggregate of bank deposits of the country decreased more than twenty-five per-cent.[2]

With each failure was hatched a brood of suits by claimants against the disabled bank. Desperate depositors sought preferences on ingenious theories; liquidating officers sought to protect general creditors and to effect an equitable distribution of the remaining assets. Missouri courts have achieved national recognition for their liberal doctrines favoring claimants for priority of payment.[3] Perhaps because of this advanced position claims for such preferences have been and are an especially fruitful source of litigation in Missouri. This note is an attempt to categorize to some extent the grounds of granting preferences recognized by the Missouri courts.

I. PROCEDURE ON INSOLVENCY

The questions involved in this note presuppose the insolvency of the bank. The state commissioner of finance, whose office is created and whose powers are defined by statute,[4] may in his discretion close a bank and take charge of all its property on discovery by examination that the bank is insolvent or that its continuance would jeopardize the safety of bank indebtedness.[5] Moreover any bank, by posting a notice to that effect, may at any time place its affairs under the commissioner's control.[6] Banks are expressly prohibited from making voluntary general assignments for benefit of creditors. All transfers of assets made

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1. (1933) Executive Order No. 2039, 12 U. S. C. A. sec. 95, note.
2. Braver, *Liquidation of Financial Institutions* (1936) iii.
3. Id. at secs. 712, 858. See also Note (1933) 82 A. L. R. 247.
4. R. S. Mo. (1929) ch. 34.
5. Id. at secs. 712, 858. See also Note (1933) 82 A. L. R. 247.
6. R. S. Mo. (1929) sec. 5316 (3).

after committing any act of insolvency, or in contemplation thereof, with a view to preference of creditors are utterly null and void.[7] In the commissioner's hands the bank's assets are held in trust for the benefit of all creditors alike; and the claims of all depositors become due without demand and placed on the same basis of payment.[8] However the requirement of equal distribution of assets to creditors does not preclude allowance of statutory priorities nor equitable preferences, granted on the theory that the beneficiary is given back his own property, the title to which he never lost to the bank.[9] While Missouri cases declare that the directors of an insolvent bank hold the assets in trust for its creditors,[10] they do not necessarily hold for the benefit of all creditors alike, as will later appear. Mere insolvency of the bank does not prevent a preference which is created by operation of law.[11]

Claimants of the same class must be treated alike.[12] Preferred claims cannot be paid before the time for filing of all such claims has expired, the value of the assets been ascertained, and the time for distribution arrived.[13] All preferred claims must be prorated, whether statutory or otherwise; priority rights exist against general creditors, not against other preferred claimants.[14]

To be entitled to a preferential payment from the assets of an insolvent bank in the hands of the bank commissioner, the claimant must show that the bank held the funds in question as his agent, trustee, or bailee, and not as debtor; that the funds aug-

7. R. S. Mo. (1929) sec. 5318. On the same general principles a bank may not make secret pledges of its assets to secure deposits. Braver, *Liquidation of Financial Institutions* (1936) sec. 75. An exception however is recognized where there is a statutory requirement of security before a deposit can be made, as in deposits of public funds. R. S. Mo. (1929) sec. 11469. French v. School Dist. (1928) 223 Mo. App. 53, 7 S. W. (2d) 415; Consolidated School Dist. v. Citizens' Saving Bank (1929) 223 Mo. App. 940, 21 S. W. (2d) 781.

8. Farmers' Bank of Deepwater v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906, 909; Kling v. Benson Banking Co. (Mo. App. 1937) 100 S. W. (2d) 639.

9. R. S. Mo. (1929) sec. 5339; Polk Tp., ex rel. Seaton v. Harrison (Mo. App. 1933) 64 S. W. (2d) 738. In re Mt. Vernon Bank (1933) 334 Mo. 549, 66 S. W. (2d) 850; Security National Bank Savings & Trust Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33.

10. Roan v. Winn (1887) 93 Mo. 503, 509, 4 S. W. 736.

11. Kahmann v. Moberly (Mo. App. 1935) 77 S. W. (2d) 858; Barnett Grocer Co. v. Brinkerhoff-Farris Trust and Savings Co. (Mo. App. 1935) 78 S. W. (2d) 875.

12. Farmers' Bank of Deepwater v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906.

13. Methodist Benev. Ass'n v. Bank of Sweet Springs (1932) 227 Mo. App. 566, 54 S. W. (2d) 474.

14. In re Mt. Vernon Bank (1933) 333 Mo. 549, 66 S. W. (2d) 850.

mented the assets of the bank; and that as such they came into the finance commissioner's hands.[15] It is difficult, however, to lay down hard and fast rules to guide in the determination of preferences. Each preference must be allowed on the special facts of its case.[16] The bank commissioner has no power to determine priorities but must refer that question to the circuit court.[17] The allowance of preferences is an equitable proceeding, in fact, though not in form, between the claimant and the creditors of the bank for an equitable separation of the claimant's property from the debtor bank's property.[18] Due regard is given throughout to the maxims and principles of equity.[19]

II. KINDS OF DEPOSITS

A. General Deposits

A deposit of money in a bank in the ordinary course of business is presumed to be general, absent a special agreement to contrary effect. In the case of such a deposit, title passes to the bank, which becomes a debtor to the depositor. The bank is entitled to the use of the money and is required to pay not the identical money but the equivalent, on the demand of the depositor.[20] Upon insolvency of the bank such a depositor is not entitled to any preference but must share with the general creditors in the equal and ratable distribution of the assets by the bank commissioner.[21] The assets include funds realized from the

15. Kline v. Cantley (Mo. App. 1931) 34 S. W. (2d) 526; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22; Security Nat. Bank Savings & Trust Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33.

16. City of Portageville v. Harrison (1933) 228 Mo. App. 27, 63 S. W. (2d) 410.

17. R. S. Mo. (1929) secs. 5336, 5339; Methodist Benev. Ass'n v. Bank of Sweet Springs (1932) 227 Mo. App. 560, 54 S. W. (2d) 474; In re Mt. Vernon Bank (1933) 334 Mo. 549, 66 S. W. (2d) 850. See Const. of Mo., art. VI, sec. 22.

18. Bircher v. Walther (1901) 163 Mo. 461, 63 S. W. 691; In re Mt. Vernon Bank (1933) 334 Mo. 549, 66 S. W. (2d) 850.

19. Wauer v. Bank of Pendleton (1933) 228 Mo. App. 1150, 65 S. W. (2d) 167; Spicer v. Round Prairie Bank (1934) 228 Mo. App. 525, 71 S. W. (2d) 121; Smalley v. Queen City Bank (Mo. App. 1936) 94 S. W. (2d) 954.

20. First Nat. Bank v. City Nat. Bank (1903) 102 Mo. App. 357, 76 S. W. 489; State ex rel. American Central Ins. Co. v. Gehner (1928) 320 Mo. 901, 9 S. W. (2d) 621, 59 A. L. R. 1041; Butcher v. Butler (1908) 134 Mo. App. 61, 114 S. W. 564; Craig v. Bank of Granby (1922) 210 Mo. App. 334, 238 S. W. 507; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 412; In re Cooper County State Bank (Mo. App. 1934) 67 S. W. (2d) 109; McClure Garage v. Sturdivant Bank (Mo. App. 1934) 76 S. W. (2d) 438.

21. "No rule of equity appeals more to the judicial conscience than that which requires the assets of an insolvent corporation to be distributed ratably among creditors, and he who claims a departure from this must

liability of officers and directors to the bank for losses caused by negligence or mismanagement, and likewise from their obligations undertaken to preserve the solvency of the bank.[22]

B. Special Deposits

Many Missouri cases quote the following language in distinguishing between general and special deposits:

> A general deposit is where the bank is given custody of the money with the intention express or implied that the bank is not to be required to return the identical money, but only its equivalent. In such cases the legal title to the money at once passes to the bank, and the depositor divested of his title must rely merely on the obligation of the bank to repay him.
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> In the case of a special deposit the bank merely assumes charge and custody of property without authority to use it, and the depositor is entitled to receive back the identical thing deposited. The title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds.[23]

The fact that the bank does commingle a special deposit with its

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establish his right clearly." McClure Garage v. Sturdivant Bank, supra. See also Union National Bank v. Lyons (1909) 220 Mo. 538, 119 S. W. 540; Missouri Mutual Ass'n v. Holland Banking Co. (1927) 220 Mo. App. 1256, 290 S. W. 100; Oliver v. Commercial Bank (Mo. App. 1932) 48 S. W. (2d) 99; Fred A. Boswell Post v. Farmers' State Bank (Mo. 1933) 61 S. W. (2d) 761; Greene County Bldg. & Loan Ass'n v. Cantley (1933) 228 Mo. App. 14, 62 S. W. (2d) 1931; Cockrell v. Moberly (Mo. 1935) 85 S. W. (2d) 185.

22. Craig v. Stacy (1932) 330 Mo. 569, 50 S. W. (2d) 104, construing R. S. Mo. (1929) secs. 5341, 5381-3.

23. Butcher v. Butler (1908) 134 Mo. App. 61, l. c. 69, 114 S. W. 564; Schulz v. Bank of Harrisonville (1923) 246 S. W. 614; Ellington v. Cantley (Mo. App. 1927) 300 S. W. 529; In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 412; In re Central Trust Co. (Mo. App. 1934) 68 S. W. (2d) 919; In re Home Trust Co. (Mo. App. 1934) 69 S. W. (2d) 312; Vandivort v. Sturdivant Bank (Mo. App. 1935) 77 S. W. (2d) 484. The following dicta appeared in In re Home Trust Co., supra, l. c. 316 "However the rule has been greatly relaxed so that where the money deposited is to be used for a specifically designated purpose, it may still be regarded as a special deposit, even though the funds were deposited *(under an agreement allowing them to be commingled with other funds)* in the bank, and they are so mingled that the identical money deposited can no longer be identified." This was disapproved so far as the italicized words are concerned by the Supreme Court of Missouri in Security Nat. Bank Savings & Trust Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33, l. c. 38. The court there said: "Thus, Missouri is in harmony with the greater weight of authority as the same is represented in Restatement, *Trusts*, sec. 12, comment h: 'If money is deposited in bank for a special purpose the bank is a trustee or bailee of the money if, but only if, it is the understanding of the parties that the money deposited is not to be used by the bank for its own purposes.'"

general funds or places it to the credit of the depositor's general checking account without his knowledge or consent cannot defeat the right of the customer to reclaim the amount out of the bank's assets on its insolvency.[24] The fact determinative of the depositor's right to claim a special deposit is the *right* of the bank to commingle and use the deposit under the *bona fide* agreement between the parties as determined by their manifested mutual intent.[25]

The burden of proof is always on a person claiming a preference in the assets of an insolvent bank to show that his deposit is not general, but special.[26] Parol evidence is admissible to show an oral agreement between the bank and the depositor that the deposit should be special, notwithstanding the existence of written indicia of a general deposit.[27] However, a deposit for a special purpose with the bank's consent is not a special deposit without a distinct understanding that the fund is to be kept separate immediately from the time of the deposit.[28] The fact that a de-

24. Schulz v. Bank of Harrisonville, supra; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; In re North Missouri Trust Co., supra; Central Coal & Coke Co. v. State Bank (1931) 226 Mo. App. 594, 44 S. W. (2d) 188; Kent v. Bolckow State Bank (1934) 228 Mo. App. 544, 70 S. W. (2d) 129; Spicer v. Round Prairie Bank (1934) 228 Mo. App. 525, 71 S. W. (2d) 121; Vandivort v. Sturdivant Bank, supra; Cockrell v. Moberly (Mo. App. 1935) 85 S. W. (2d) 185.

25. In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 412; Ozark Fruit Growers' Ass'n v. Bank of Aurora (Mo. App. 1932) 52 S. W. (2d) 430; Spicer v. Round Prairie Bank (1934) 228 Mo. App. 525, 71 S. W. (2d) 121; Vandivort v. Sturdivant Bank (Mo. App. 1935) 77 S. W. (2d) 484; Security Nat. Bank Savings & Trust Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33; Moehlenkamp v. Savings Trust Co. (Mo. App. 1937) 108 S. W. (2d) 605.

26. First Nat. Bank v. City Nat. Bank (1903) 102 Mo. App. 357, 76 S. W. 489; Craig v. Bank of Granby (1922) 210 Mo. App. 334, 238 S. W. 507; Kling v. Benson Banking Co. (Mo. App. 1937) 100 S. W. (2d) 638, and cases cited; In re Citizens' Bank of Senath (Mo. App. 1937) 102 S. W. (2d) 830, and cases cited.

27. Nichols v. Bank of Syracuse (1926) 220 Mo. App. 1019, 278 S. W. 793, where the bank's note was held executed as a result of fraud and was considered but a memorandum open to explanation; Greenfield v. Clarence Savings Bank (Mo. App. 1928) 5 S. W. (2d) 708, where the bank president's note was held of no effect on claimant's right and not prejudicial to creditors; In re Liquidation of Fidelity Bank & Trust Co. (Mo. App. 1934) 77 S. W. (2d) 480, where pass book, deposit slips, and signature cards were held not to contain the full contract of the parties; McPheeters v. Scott County Bank (Mo. App. 1933) 63 S. W. (2d) 456, where secret conversations were allowed to prevail over a matured certificate of deposit.

28. Butcher v. Butler (1908) 134 Mo. App. 61, 114 S. W. 564; Craig v. Bank of Granby (1922) 210 Mo. App. 334, 238 S. W. 507; In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 412; Gibson v. Gower Bank (1932) 227 Mo. App. 264, 52 S. W. (2d) 411; Fred A. Boswell Post v. Farmers' State Bank (Mo. App. 1933) 61 S. W. (2d) 762; Cockrell v. Moberly (Mo. App. 1935) 85 S. W. (2d) 185; Security Nat. Bank Savings & Trust Co. v. Moberly (Mo. App. 1936) 101 S. W. (2d) 33.

posit is not subject to check is of no significance if the bank is allowed by the depositor to use the money for its own purposes.[29] On the other hand the fact that the depositor checked against his account has been held not to defeat his preferential claim, where the bank agreed to act as trustee of a certain amount thereof for investment purposes, and the checks never depleted the account below the amount.[30] A special deposit may become general by the subsequent conduct of the parties, such as the depositor's knowingly permitting such a deposit to be placed in his general checking account, or his issuing a check against the deposit.[31]

The weight of authority unites with Missouri in holding that where a bank receives a deposit in cash or its equivalent with the clear understanding, express or implied, that it is to be applied to a particular debt,[32] invested in certain securities,[33] paid to certain parties on consummation of a condition,[34] applied to meet certain checks,[35] or transmitted to a designated

29. Butcher v. Butler, supra; Missouri Mutual Ass'n v. Holland Banking Co. (1927) 220 Mo. App. 1256, 290 S. W. 100; In re Liquidation of Fidelity Bank & Trust Co. (Mo. App. 1934) 77 S. W. (2d) 480. See also Greene County Bldg. & Loan Ass'n v. Cantley (1933) 228 Mo. App. 14, 62 S. W. (2d) 931; Missouri Utilities Co. v. Scott County Bank (1933) 62 S. W. (2d) 933, where deposits were general though drawn against but once a month. In each of these cases the bank received the deposit as a collection agent for the claimants.

30. Spicer v. Round Prairie Bank, supra. This case held also that the cashier's prediction that a check against the special deposit in violation of the contract of deposit would be honored did not make the deposit general.

31. Greene County Bldg. & Loan Ass'n v. Cantley (1933) 228 Mo. App. 14, 62 S. W. (2d) 931; Spicer v. Round Prairie Bank (1934) 228 Mo. App. 525, 71 S. W. (2d) 121.

32. Noll v. Harrison County Bank (1928) 222 Mo. App. 923, 11 S. W. (2d) 73; Kelley v. Joplin State Bank (Mo. App. 1933) 63 S. W. (2d) 171; Vandivort v. Sturdivant Bank (Mo. App. 1935) 77 S. W. (2d) 484.

33. Harrison v. Smith (1884) 83 Mo. 210; Greenfield v. Clarence Savings Bank (Mo. App. 1928) 5 S. W. (2d) 708; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22; In re Cooper County State Bank (Mo. App. 1934) 67 S. W. (2d) 109; Spicer v. Round Prairie Bank (1934) 228 Mo. App. 525, 71 S. W. (2d) 121; Kent v. Bolckow State Bank (1934) 228 Mo. App. 544, 70 S. W. (2d) 129; Wauer v. Bank of Pendleton (1933) 228 Mo. App. 1150, 65 S. W. (2d) 167; Arnall v. Commercial Bank of Wellsville (Mo. App. 1932) 45 S. W. (2d) 909.

34. Schulz v. Bank of Harrisonville (Mo. App. 1923) 246 S. W. 614; Nichols v. Bank of Syracuse (1925) 220 Mo. App. 1019, 278 S. W. 793; In re Central Trust Co. (Mo. App. 1934) 68 S. W. (2d) 919.

35. Craig v. Bank of Granby (1922) 210 Mo. App. 334, 238 S. W. 507 (recognizing but holding rule inapplicable); Central Coal & Coke Co. v. State Bank (1931) 226 Mo. App. 594, 44 S. W. (2d) 171; Ozark Fruit Growers' Ass'n v. Bank of Aurora (Mo. App. 1932) 52 S. W. (2d) 430; Kelley v. Joplin State Bank (Mo. App. 1933) 63 S. W. (2d) 171; In re Fidelity Bank & Trust Co. (Mo. App. 1934) 77 S. W. (2d) 480; In re Sturdivant Bank (Mo. App. 1936) 89 S. W. (2d) 89. See Fred A. Boswell

recipient,[33] the deposit is special and is regarded as a trust fund in the hands of the bank. If the bank fails to fulfil its duty as to the fund before insolvency, the depositor is entitled to a preferred claim over the claims of general creditors, provided, of course, that the other requisites to a preference are present.[37]

III. DEPOSITS FOR COLLECTION

When a draft or check deposited for collection is forwarded to a correspondent bank for collection, the correspondent bank may pay the forwarding bank by remittance or by employment of reciprocal accounts.[38] If remittance is adopted as the method, the proceeds are actually sent in currency or exchange to the bank of deposit as soon as collected. The collecting bank acts only as agent for the forwarding bank and holds the proceeds in trust until paid or unconditionally credited. In the case of reciprocal accounts, the collecting bank merely gives credit to the forwarding bank, and the latter charges the account of the collecting bank. Periodic settlements of accounts are then made.

Post v. Farmers' State Bank (Mo. App. 1933) 61 S. W. (2d) 761, where evidence was held insufficient to establish a special deposit. The cases dealing with deposits to meet checks require that the bank be able to identify the checks drawn thereon by some means of designation, recognizable on presentment. Missouri is liberal in finding a special deposit in such cases. Cf. the leading case expounding the contrary view, Northern Sugar Corp. v. Thompson (C. C. A. 8, 1926) 13 F. (2d) 829. Braver expresses preference for the Missouri view. Braver, *Liquidation of Financial Institutions* (1936) 682, sec. 602, n. 47.

In these cases the checkholder as well as the depositor may recover the amount of the check from the bank, the N. I. L. provision that a check does not operate as an assignment not applying to special deposits. York v. Farmers' Bank (1904) 105 Mo. App. 127, 79 S. W. 968; Pile v. Bank of Flemington (1915) 187 Mo. App. 61, 173 S. W. 50.

36. Stoller v. Coates (1885) 88 Mo. 514; Fletcher v. Cantley (1932) 236 Mo. App. 1060, 47 S. W. (2d) 217; Kelley v. Joplin State Bank (Mo. App. 1933) 63 S. W. (2d) 171.

37. Supra, notes 32-36. See cases from other jurisdictions cited in Braver, *Liquidation of Financial Institutions* (1936) 593, sec. 532.

A deposit of a check or draft for a special purpose, the drawer and drawee having sufficient funds to meet it, is equivalent to a deposit of cash, and the segregation of funds for that purpose is equivalent to augmentation of the assets if the purpose is not carried out. Stoller v. Coates, supra; Noll v. Harrison County Bank (1928) 222 Mo. App. 923, 11 S. W. (2d) 73; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; Fletcher v. Cantley, supra; Kelley v. Joplin State Bank, supra. So, giving of a past due time certificate of deposit is held sufficient. In re Cooper County State Bank, supra. See also Blackshaw v. French (Mo. App. 1932) 45 S. W. (2d) 916, where the oral direction of a depositor to transmit was held sufficient order for payment of deposit.

38. Bank of Poplar Bluff v. Millspaugh (1925) 275 S. W. 579, approved in (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754. Intent of the parties in forwarding items for collection and remittance is controlling in determining which method is used. Federal Reserve Bank v. Millspaugh (1926) 314 Mo. 1, 282 S. W. 706.

When the reciprocal account method is adopted, the transaction has been held to change the agency relation to one of debtor-creditor.[39] The court points out that there is no augmentation of assets by transferring of liability from a depositor to the correspondent; consequently there is no trust res to which a trust may attach.[40] Missouri courts have restricted the operation of the rule so as not to apply to collections made by remittances by draft of balances due on daily clearings.[41]

Until 1929 Missouri courts held as a matter of law that when a customer of a bank indorses for deposit a check or draft, and the bank gives immediate credit to the depositor's account with unrestricted right to draw checks against the account, the bank takes as owner and not as collection agent of the depositor, in the absence of agreement to the contrary.[42] In 1929 the legislature adopted the Bank Collection Code, which Missouri courts interpret as changing the law as to the relation between the bank and the depositor for collection. The bank of deposit is constituted the depositor's agent, and all subsequent collecting banks his subagents, in the absence of an agreement to the contrary and except as to certain subsequent holders.[43] A revocable credit

39. Midland Nat. Bank v. Brightwell (1899) 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608. See also Bank of Republic v. Republic State Bank (1931) 328 Mo. 848, 47 S. W. (2d) 27, aff'g (1930) 24 S. W. (2d) 676. The liability of an indorsee for collection as trustee for the proceeds in Missouri is discussed in a Note (1929) 14 ST. LOUIS LAW REVIEW 406.

40. Midland Nat. Bank v. Brightwell, supra.

41. Farmers' Bank v. Cantley (Mo. App. 1929) 16 S. W. (2d) 642; Bank of Republic v. Republic State Bank (1931) 328 Mo. 848, 47 S. W. (2d) 27. This latter case holds that American Bank v. People's Bank (Mo. App. 1923) 255 S. W. 943, which denied preference in such a situation had been overruled by the Bank of Poplar Bluff case (1926) 313 Mo. 412, 281 S. W. 733, and abrogated by R. S. Mo. (1929) secs. 5565-75. The St. Louis Court of Appeals in 1934 in McClure Garage v. Sturdivant Bank, 76 S. W. (2d) 438, continued to assert the validity of the American Bank case, but such assertion was unnecessary to the decision. Powell Building and Loan Ass'n v. Larabie Bro. Bankers (Mont. 1935) 46 P. (2d) 697, discusses and disagrees with the Bank of Republic case, holding that the plaintiff bank might demand cash in remittance, and the draft was accepted at its own risk. It was pointed out that a different rule is held to apply to transactions conducted through the mails and transactions over the payor's counter, a distinction the Missouri courts refuse to consider.

42. Ayres v. Farmers' & Merchants' Bank (1883) 79 Mo. 421, 49 Am. Rep. 235; Cairo Nat. Bank v. Blanton Co. (Mo. App. 1926) 287 S. W. 839; Foristel v. Security Nat. Bank etc. Co. (1928) 320 Mo. 639, 47 S. W. (2d) 997; Nat. City Bank v. Macon Creamery Co. (1932) 329 Mo. 639, 46 S. W. (2d) 127, where the liability on the instruments involved accrued in 1927.

43. R. S. Mo. (1929) secs. 5567, 5569, construed and applied in Farmers' Exchge. Bank v. Farm & Home Savings & Loan Ass'n (1933) 332 Mo. 1041, 61 S. W. (2d) 717. See for an analysis of the code, Note (1932) 81 U. of Pa. Law Review 201; Comment (1933) 19 ST. LOUIS LAW REVIEW 147.

is given except as to credit actually withdrawn and until actual payment is made or unconditional credit is given.[44]

Under the Code where a bank receives an item for collection, the agency relation continues to pervade the transaction even after the collection is made and until the actual money is paid or an unconditional credit is given. On failure of an agent collecting bank before actual collection or payment, the item is to be returned if still in the bank's possession to the forwarder or presenter. On failure of any collecting bank after the proceeds of the item are collected but before final payment or remittance in money or unconditional credit, a trust attaches to the proceeds in favor of the owner.[45] This is true although the item collected be one drawn on the collecting bank and it is collected by charging the item against the drawer's account, or if it be an item payable at the collecting bank and it is collected by a check drawn on it.[46] It is true also whether the insolvency preceded payment or remittance or intervened between attempted remittance by draft and unsuccessful presentment of the draft for payment. The trust fund is traceable into the bank commissioner's hands provided the following conditions exist: (1) that the item was forwarded for collection and remittance or presented for payment; (2) that the drawer of the check had a sufficient balance with the collecting bank to authorize the charging of the item to his account; (3) that at the time of so charg-

44. Farmers' Exchge. Bank v. Farm & Home Savings & Loan Ass'n, supra.

45. R. S. Mo. (1929) sec. 5575. Shell Petroleum Corp. v. Sturdivant Bank (Mo. App. 1935) 87 S. W. (2d) 1064; Mississippi Valley Trust Co. v. West St. Louis Trust Co. (Mo. App. 1937) 103 S. W. (2d) 529; Texas Co. v. First Bank & Trust Co. (Mo. App. 1937) 106 S. W. (2d) 28. The Mississippi Valley Trust Co. case points out that the unconditional credit which will create a debtor relation must be given on the bank's books or books of any other bank and requested or accepted by the owner. The rule was the same in Missouri before the adoption of the Code as to items deposited for collection and remittance of the collected proceeds. Bank of Poplar Bluff v. Millspaugh (Mo. App. 1925) 275 S. W. 579, approved in (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754; Farmers' Trust Co. v. Burnes Nat. Bank (Mo. App. 1926) 285 S. W. 110; Commerce Trust Co. v. Farmers' Exchge. Bank (1933) 233 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373.

46. Bank of Poplar Bluff v. Millspaugh, supra; Federal Reserve Bank v. Millspaugh (1926) 314 Mo. 1, 282 S. W. 706; Federal Reserve Bank v. Quigley (Mo. App. 1926) 284 S. W. 164; Gentry County Drainage Dist. v. Farmers' & Mechanics' Bank (1928) 222 Mo. App. 882, 5 S. W. (2d) 1110; Carson Nat. Bank v. American Nat. Bank (1931) 225 Mo. App. 948, 34 S. W. (2d) 1143; Bank of Republic v. Republic State Bank (1931) 328 Mo. 848, 42 S. W. (2d) 27, aff'g (Mo. App. 1930) 24 S. W. (2d) 678; Shell Petroleum Corp. v. Sturdivant Bank, supra; Mississippi Valley Trust Co. v. West St. Louis Trust Co., supra; Quaintance v. Moberly (Springfield Ct. of App., 1937) not yet published.

ing, the collecting bank had sufficient funds available to honor the check; (4) that the bank which failed had at the time of going into receivership sufficient funds on hand to pay the amount collected.[47] In these conditions the item received for collection before insolvency is presumed in equity to have been collected immediately and the proceeds held thereafter in trust for the owner.[48] Of course, where the collecting bank receives actual cash in payment of the item and fails to remit the proceeds before insolvency, the owner is entitled to follow the proceeds as a trust fund.[49]

IV. HOLDERS OF DRAFTS

A. Equitable Assignment of Collected Proceeds

A draft issued on another bank by the collecting bank in payment of the collection is held to be an equitable assignment in favor of the forwarding bank for the amount thereof against the funds in such other bank.[50] The justification for holding that such a draft operates as an equitable assignment *pro tanto* is that the issuing bank is a trustee of the proceeds collected for

47. Midland Nat. Bank v. Brightwell (1899) 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Thomson v. Bank of Syracuse (1926) 278 S. W. 810; Federal Reserve Bank v. Millspaugh, supra; Federal Reserve Bank v. Quigley, supra; Farmers' Trust Co. v. Burnes Nat. Bank, supra; Kline v. Cantley (Mo. App. 1931) 34 S. W. (2d) 526. Federal Reserve Bank v. Quigley, supra, construes requirement (4) not to demand that the failing bank must have had sufficient funds in its own vaults if enough might be found in its solvent correspondent banks as well.

48. Bank of Poplar Bluff v. Millspaugh (Mo. App. 1925) 275 S. W. 579, approved in (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754; Farmers' Trust Co. v. Burnes Nat. Bank (Mo. App. 1926) 285 S. W. 110. But see McClure Garage v. Sturdivant Bank (Mo. App. 1934) 76 S. W. (2d) 438.

49. German Fire Ins. Co. v. Kimble (1896) 66 Mo. App. 370; Thomson v. Bank of Syracuse (1926) 220 Mo. App. 805, 278 S. W. 810; Fidelity Nat. Bank & Trust Co. v. Farmers' Exchge. Bank (Mo. App. 1932) 45 S. W. (2d) 1090, followed in (Mo. App. 1932) 47 S. W. (2d) 1114; Texas Co. v. First Bank & Trust Co. (Mo. App. 1937) 106 S. W. (2d) 28.

50. Federal Reserve Bank v. Millspaugh (1926) 314 Mo. 1, 282 S. W. 706; Gentry County Drainage Dist. v. Farmers' & Mechanics' Bank (1928) 222 Mo. App. 882, 5 S. W. (2d) 1110; State Farmers' Mutual Tornado Ins. Co. v. Cantley (1928) 222 Mo. App. 839, 6 S. W. (2d) 970; Carson National Bank v. American Nat. Bank (1931) 225 Mo. App. 948, 34 S. W. (2d) 143; Bank of Republic v. Republic State Bank (1931) 328 Mo. 848, 42 S. W. (2d) 27. This latter case admits an inconsistency in the Missouri holdings that a purchaser of a draft payable to self is but a general creditor of a bank, but a depositor for collection who directs the proceeds to be remitted by draft to him as a beneficiary entitled to a preference on insolvency. See 1 Morse, *Banks and Banking* (6th ed. 1928) 600, sec. 248.

State Farmers' Mutual Tornado Ins. Co. v. Cantley, supra, holds that Federal Reserve Bank v. Millspaugh, supra, overrules Dickinson v. Coates (1883) 79 Mo. 250, 49 Am. Rep. 228, and Merchants' Nat. Bank v. Coates (1883) 79 Mo. 168. This may be doubted however inasmuch as neither of the latter cases involved collection.

remittance; the draft is then regarded as drawn against the payee's funds. Furthermore the draft can be but a conditional payment to the collection agent, who is only authorized by the depositor to accept cash.[51] Even though the forwarding bank requests remittance by draft or exchange on another bank, the collecting bank remains an agent and trustee; if the paper is dishonored, the draft is charged back, and the holder is entitled to a preference.[52] A collecting bank which violates the depositor's instructions as to the application of the proceeds is consistently held by Missouri courts to be a trustee of the misapplied funds on its subsequent insolvency.[53]

Missouri courts, liberal in finding an equitable assignment before the Bank Collection Code was adopted, have outdone themselves in construing section 11 of that article in favor of preferred claimants who have received drafts in payment of items presented at the drawee or payor bank.[54] Cases before and after the code hold that a payee of a check who accepts a draft in payment thereof so that he may send the money to another bank is entitled to a preference when payment of the draft is refused because of the intervening insolvency of the bank. The court holds that the bank is an agent of the holder of the check for its collection, and the draft is an equitable assignment of sufficient funds to pay it on presentment.[55] A line of recent cases holds that a draft accepted in payment of a check but after an original demand for cash constitutes an equitable assignment in favor of the demandant.[56] The most recent extension of this doctrine was made by the St. Louis Court of Appeals, which allowed a preference to an indorsee of a check who requested

51. Bank of Republic v. Republic State Bank, supra; Carson Nat. Bank v. American Nat. Bank, supra.

52. Federal Reserve Bank v. Millspaugh (1926) 314 Mo. 1, 282 S. W. 706. The decided weight of authority outside of Missouri denies a preference in these circumstances. See cases cited in Braver, *Liquidation of Financial Institutions* (1936) 739, sec. 640.

53. Thomson v. Bank of Syracuse (1926) 220 Mo. App. 805, 278 S. W. 810; Noll v. Harrison County Bank (1928) 222 Mo. App. 923, 11 S. W. (2d) 73; Schreier v. Joplin State Bank (Mo. App. 1933) 63 S. W. (2d) 179.

54. Section 11 of the Code is R. S. Mo. (1929) sec. 5575.

55. Gentry County Drainage Dist. v. Farmers' & Mechanics' Bank (1928) 222 Mo. App. 882, 5 S. W. (2d) 1110; Shell Petroleum Corp. v. Sturdivant Bank (Mo. App. 1935) 87 S. W. (2d) 1064. The Gentry case said that Carmichael v. Tishomingo Banking Co. (Mo. App. 1917) 191 S. W. 1043, which denied a preference in a similar situation was overruled in effect by Bank of Poplar Bluff v. Millspaugh (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754.

56. Thomson v. Bank of Gerster (Mo. App. 1934) 74 S. W. (2d) 74; In re Hodiamont Bank (1936) 230 Mo. App. 190, 91 S. W. (2d) 127; Quaintance v. Moberly (Springfield Ct. of App., 1937) not yet published.

and accepted a cashier's check in payment thereof when insolvency of the payor bank intervened before the cashier's check was paid.[57]

B. Purchase of Drafts

It is, however, everywhere held that a purchaser for value of a draft or a check from a bank in the usual course of business and without any special agreement is a general creditor of the bank with no preferential rights if the bank becomes insolvent before the paper is paid, although the drawer bank had sufficient funds in the drawee bank to pay the holder.[58] Such a draft or check does not effect a *pro tanto* assignment, whether purchased by check drawn on his account by a depositor[59] or by cash paid by one not a depositor.[60] Notwithstanding the rule Missouri courts have held that a depositor who issues a check to his bank for a cashier's check payable to another has a preferred claim when the bank fails after charging the depositor's account but before the cashier's check is cleared;[61] that priority is given a claimant who is given a draft on surrender of her time certificate, where the draft is dishonored because of the intervening insolvency of the drawer bank;[62] and that the holder of a check who

57. Mississippi Valley Trust Co. v. West St. Louis Trust Co. (Mo. App. 1937) 103 S. W. (2d) 529. The request for the cashier's check was held presentment of the item for payment within the meaning of R. S. Mo. (1929) sec. 5575 (2), and of the acceptance of the cashier's check was held not to constitute receipt of unconditional credit within the statute.

58. Dickinson v. Coates (1883) 79 Mo. 250, 49 Am. Rep. 228 (cashier's check); Merchants' Nat. Bank v. Coates (1883) 79 Mo. 168 (same); In re Wells-Hine Trust Co. (Mo. App. 1930) 32 S. W. (2d) 1093 (draft); Cormaney v. Wells-Hine Trust Co. (Mo. App. 1931) 44 S. W. (2d) 172 (draft); Wheelock v. Cantley (1923) 227 Mo. App. 102, 50 S. W. (2d) 731 (certificate of deposit purchased by agent and sent to principal); In re Hodiamont Bank (1936) 230 Mo. App. 190, 91 S. W. (2d) 127 (cashier's check); Smalley v. Queen City Bank (Mo. App. 1936) 94 S. W. (2d) 954. See 2 Morse, *Banks and Banking* (6th ed. 1928) 1109, sec. 493 et seq.; Braver, *Liquidation of Financial Institutions* (1936) 787, sec. 677, for holdings elsewhere.

59. Cormaney v. Wells-Hine Trust Co., supra; Banker of M. W. of A. v. Harrison (Mo. App. 1933) 62 S. W. (2d) 486; Smalley v. Queen City Bank, supra.

60. McClure Garage v. Sturdivant Bank (Mo. App. 1934) 76 S. W. (2d) 438; Huffman v. Sturdivant Bank (Mo. App. 1934) 76 S. W. (2d) 441. In the McClure case, the court says at p. 441: "We are unable to agree with those cases that raise a fictitious agential status of a bank from whom a draft is purchased, in order to facilitate the obtainment of a preference."

61. Fletcher v. Cantley (Mo. App. 1932) 47 S. W. (2d) 217. The court here held the deposit became special by virtue of the transaction, the bank holding only for the purpose of transmission. Banker of M. W. of A. v. Harrison (Mo. App. 1933) 62 S. W. (2d) 486 distinguishes the Fletcher case solely on the ground that the cashier's check was payable to a third person in the latter case.

62. Householder v. Cantley (Mo. App. 1930) 27 S. W. (2d) 1930. It is submitted that this is a flagrant departure from the rule.

requests payment via cashier's check from the drawee bank is entitled to preference on insolvency which precedes payment of the cashier's check.[63]

V. CONSTRUCTIVE TRUSTS

A. Refusal of Payment on Checks

Practically all jurisdictions outside of Missouri hold that mere refusal of a bank to pay checks or deposits on demand does not convert the bank from a debtor into a constructive trustee of the fund withheld, so as to entitle the demandant to a preference for that amount if the bank becomes insolvent.[64] Missouri, however, has by an unbroken line of decisions committed itself to a contrary doctrine.[65] The cases strongly assert the bank's duty to pay checks presented by the holder while the bank is a going concern, if there are sufficient funds of the drawer on hand.[66] Thus while a corporation is empowered to make by-laws for the management of its affairs,[67] a bank cannot lawfully restrict amounts withdrawable by its depositors while it remains open for business, and its assests are unaffected by liens or process of law.[68] Refusal of payment of a check or matured time certificate pursuant to such a restriction accordingly converts the money withheld into a trust fund recoverable as such by the depositor,[69] notwithstanding the Missouri statute prohibiting as-

63. Supra, note 57.

64. Braver, *Liquidation of Financial Institutions* (1936) 830, sec. 711.

65. Claxton v. Cantley (Mo. App. 1927) 297 S. W. 975; Johnson v. Farmers' Bank (1928) 223 Mo. App. 513, 11 S. W. (2d) 1090; Hiatt v. Miller Bank et al. (1931) 224 Mo. App. 1040, 34 S. W. (2d) 532; Koehler v. Joplin State Bank (Mo. App. 1934) 68 S. W. (2d) 728; Kahmann v. Moberly (Mo. App. 1935) 77 S. W. (2d) 858; Farmers' Bank v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906; Bank of Illmo v. Sturdivant Bank (Mo. App. 1936) 89 S. W. (2d) 560; McQuerry v. Bank of Eldorado Springs (Mo. App. 1936) 96 S. W. (2d) 515.

66. O'Grady v. Stotts City Bank (1904) 106 Mo. App. 366, 80 S. W. 777; Allen Gro. Co. v. Bank of Buchanan County (1916) 192 Mo. App. 476, 182 S. W. 777; Waggoner v. Bank of Bernie (1926) 220 Mo. App. 165, 281 S. W. 130. See Hiatt v. Miller Bank (1931) 224 Mo. App. 1040, 34 S. W. (2d) 532, for the interesting holding that retention by the bank of the check for seven days after presentment was equivalent, not to acceptance, but refusal, and entitled the plaintiff to preference on the subsequent insolvency of the bank. See also dicta in In re Farmers' & Merchants' Bank (Mo. App. 1935) 83 S. W. (2d) 198, holding that the drawee bank is a trustee of the amount of a check received by mail in the regular process of collection before final closing if sufficient funds were at hand to pay it. The claimant failed to prove the check reached the bank before it closed.

67. R. S. Mo. (1929) sec. 4555. Barnett Gro. Co. v. Brinkerhoff-Faris etc. Co. (Mo. App. 1935) 78 S. W. (2d) 875.

68. Farmers' Bank v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906.

69. Claxton v. Cantley (Mo. App. 1927) 297 S. W. 975; Kahmann v. Moberly (Mo. App. 1935) 77 S. W. (2d) 858; Barnett Gro. Co. v. Brinker-

signment of bank's assets to one creditor in preference to others.[70]

The demand, which may be oral[71] or written,[72] must be a present demand for a definite amount to bring the claimant within the preferred status on the bank's refusal.[73] When a depositor's check on his account is paid by a draft on another bank in which there were sufficient funds to meet the check, but the draft is refused because of the intervening insolvency of the drawer bank, the depositor is held entitled to a preference. The case is treated as if the insolvent bank has simply refused payment of the check while having sufficient funds.[74]

The fact that the bank is insolvent or may become so by payment of the demand does not affect the plaintiff's right to a preference.[75] The legal effect of the wrongful act of the bank in refusing to pay the check is to swell the assets of the bank at the time of its closing in the same amount;[76] and the bank by operation of law holds, in the capacity of a trustee, the depositor's funds to the amount of the check.[77]

B. Deposits Pending Insolvency

When a bank reaches insolvency, the officers and agents of the bank should close its doors and place it in the hands of the

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hoff-Faris Co. (Mo. App. 1935) 78 S. W. (2d) 875; Farmers' Bank v. Moberly, supra; Laclede Trust Co. v. Rodenberg (Mo. App. 1936) 93 S. W. (2d) 55. In the Claxton case the fact that plaintiff signed an agreement to leave the deposit for a certain time but without specifying the percentage of the deposit withdrawable was held ineffectual as a contract or as an estoppel binding the plaintiff.

70. R. S. Mo. (1929) 5318.

71. Blackshaw v. French (Mo. App. 1932) 45 S. W. (2d) 916; Bank of Illmo v. Bank of Sturdivant (Mo. App. 1936) 89 S. W. (2d) 510.

72. Claxton v. Cantley (Mo. App. 1927) 297 S. W. 975.

73. Langhorst v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 119.

74. Thomson v. Bank of Gerster (Mo. App. 1934) 74 S. W. (2d) 74; Quaintance v. Moberly (Springfield Ct. of App. 1937) not yet published. The Thomson case is distinguished from Cormaney v. Wells-Hine Trust Co. (Mo. App. 1931) 44 S. W. (2d) 172, on the ground that here the plaintiff's original intent was not to purchase a draft. See also In re Hodiamont Bank (1936) 230 Mo. App. 190, 91 S. W. (2d) 127, where a cashier's check was issued in payment of a depositor's check.

75. Kahmann v. Moberly (Mo. App. 1935) 77 S. W. (2d) 858; Barnett Gro. Co. v. Brinkerhoff-Faris Co. (Mo. App. 1935) 78 S. W. (2d) 875. See also Linhart v. Farmers' State Bank (1931) 226 Mo. App. 588, 43 S. W. (2d) 1062, where preference was denied however because the check was presented via mail after the close of the last business day; and Farmers' Bank v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906, where it was held that the obtaining of a moratorium after the depositor's demand could not affect his right to a preference created by the prior refusal.

76. Claxton v. Cantley (Mo. App. 1927) 297 S. W. 975; Johnson v. Farmers' Bank (1928) 223 Mo. App. 513, 11 S. W. (2d) 1090.

77. Farmers' Bank v. Moberly (Mo. App. 1935) 78 S. W. (2d) 906. See also In re Farmers' & Merchants' Bank (Mo. App. 1935) 83 S. W. (2d) 198, where preference was nevertheless denied because no presentment before closing shown.

commissioner.[78] By keeping the doors open to depositors and claimants, the officers impliedly represent that the bank is solvent. A bank which accepts deposits when it is hopelessly insolvent to the knowledge of its officers is held a trustee *ex maleficio* even of general deposits made by one without knowledge of the bank's condition. Fraud on the part of the bank prevents the presumed intent of the parties to enter a debtor-creditor relationship from taking effect, and equity treats the deposit as a trust res which may be followed by the depositor into the hands of the bank commissioner.[79] Analogous are cases where money is lent a bank by reason of fraudulent representations of its officers. The defrauded lender in such cases is allowed a preferential claim.[80]

The plaintiff must actually deposit money or its equivalent, or the bank must hold money for payment, which payment is treated as made and the money redeposited at the date of insolvency.[81] The insolvency of the bank must be contemporaneous with the acceptance of the deposit, not subsequent, to make the bank a constructive trustee.[82] Of course fraud is never presumed, but the burden is on the depositor to show actual knowledge on the part of officials that the bank is hopelessly and irretrievably insolvent.[83] Proof of financial embarrassment or simple insolvency is insufficient; but the officers must have reasonable hopes of securing adequate assistance or of recovering solvency by continuing business to justify the conclusion that they ac-

78. R. S. Mo. (1929) sec. 5318.

79. Fisse v. Dietrich (1877) 3 Mo. App. 584; Turner v. Farmers' Exchge. Bank (1932) 226 Mo. App. 714, 45 S. W. (2d) 1084; Ronchetto v. State Bank (1932) 227 Mo. App. 83, 51 S. W. (2d) 174; Catron v. Harrison (Mo. App. 1933) 63 S. W. (2d) 173; Hennemann v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 113; Langhorst v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 119; Miller v. Farmers' Exchange Bank (Mo. App. 1937) 107 S. W. (2d) 852.

80. West End Bank v. University City Bank & Trust Co. (Mo. App. 1936) 97 S. W. (2d) 881; Fonville v. Citizens' Bank of Senath (Mo. App. 1937) 99 S. W. (2d) 502.

81. Cottondale Planting Co. v. Diehlstadt (1926) 220 Mo. App. 265, 286 S. W. 425; Hennemann v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 113. Thus a renewal of a time certificate at the time the bank was known to be insolvent did not convert the general deposit represented thereby into a trust fund entitled to preference.

82. Hennemann v. Rosebud Bank, supra; Langhorst v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 119. See also State v. Sanford (1927) 317 Mo. 865, 297 S. W. 73.

83. May v. Bank of Hughesville (Mo. App. 1927) 291 S. W. 170; Ronchetto v. State Bank (1932) 227 Mo. App. 83, 51 S. W. (2d) 174; Langhorst v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 119; Miller v. Farmers' Exchange Bank (Mo. App. 1937) 107 S. W. (2d) 852. Lack of ordinary diligence on the part of the depositor to discover the insolvency is no bar to his right to recover according to the latter case.

cepted the deposit without knowledge or sufficient reason to know that they would not and could not pay on the depositor's demand.[84] The liability of the bank as a constructive trustee may be grounded on the knowledge of any agent of the bank acting within the scope of his authority in conducting the transaction with the plaintiff.[85]

C. Fraudulent Sale of Drafts

The law is generally settled that where a bank, knowing or having reason to know of its insolvency, sells a draft for value, the bank is held to have received the money fraudulently and holds it as constructive trustee for the purchaser, who may rescind the purchase and recover the money paid therefor.[86] The question of sufficiency of funds in the drawee bank becomes immaterial when the bank is insolvent, inasmuch as the statute requires the drawee bank on notice from the bank commissioner to refuse to make any payment, advance, or clearance out of the closed bank's funds.[87]

Sale of a draft within one hour before the bank was closed by an order of the directors has been held to have been made presumptively with knowledge of insolvency.[88] However for there to be a fraudulent sale, the knowledge of the officers must include reasonable cause to believe that the draft will not be paid. Without evidence of such knowledge, evidence of sufficient funds to meet the draft in the drawee bank has been held not to entitle a purchaser by check of a draft to a preference.[89] Issuance of a draft in pursuance of a depositor's oral demand is fraudulent if the bank knows that there are insufficient funds to meet the draft, and the depositor's account is entitled to a preference on the insolvency of the bank.[90] On the other hand the transfer or

84. May v. Bank of Hughesville, supra; Ronchetto v. State Bank, supra.

85. Ronchetto v. State Bank, supra; Catron v. Harrison (Mo. App. 1933) 63 S. W. (2d) 173; Langhorst v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 119. The knowledge of the bank directors is not required unless action is brought on the ground of the statutory liability of a director for the wrongful acceptance of deposits by his bank. R. S. Mo. (1929) sec. 5381; White v. Poole (Mo. App. 1925) 272 S. W. 1021.

86. Stoller v. Coates (1885) 88 Mo. 514; St. Louis-San Francisco R. Co. v. Millspaugh (1926) 220 Mo. App. 110, 278 S. W. 786; Blackshaw v. French (Mo. App. 1932) 45 S. W. (2d) 916; Missouri P. S. Co. v. Cantley (Mo. App. 1932) 57 S. W. (2d) 755, In re Hodiamont Bank (1936) 230 Mo. App. 190, 91 S. W. (2d) 127.

87. St. Louis-San Francisco R. Co. v. Millspaugh, supra. See R. S. Mo. (1929) secs. 5316 (3), 5326.

88. Missouri P. S. Co. v. Cantley (Mo. App. 1933) 57 S. W. (2d) 755.

89. Cormaney v. Wells-Hine Trust Co. (Mo. App. 1931) 44 S. W. (2d) 172.

90. Blackshaw v. French (Mo. App. 1932) 45 S. W. (2d) 916.

extension of credit in exchange for a check of an insolvent bank has been held not such a purchase as will entitle the transferor-payee to a preference for the amount of the check on its dishonor because of insufficient funds. The check was regarded as no more than an attempt to discharge the indebtedness incurred by receiving the credit of the payee bank.[91]

VI. PUBLIC FUNDS

A. Priorities of the Sovereign

Thus far this discussion has related only to preferences given private funds. However, a Missouri statute declares that debts due the state shall be first satisfied when a debtor becomes insolvent.[92] The priority so declared is held to be against general creditors only, not against other preferred claimants.[93]

The Missouri Supreme Court thus allows the state tax collector to proceed for the collection of the tax on shares of bank stock out of the bank's assets, even in the hands of the bank commissioner.[94] In bringing such suit, the state is not bound by the statutes of limitations and other procedural requirements which must be followed by other preferred claimants.[95]

The supreme court however declined to enforce the statutory preference as to lawful deposits by the state treasurer for the reason that the right was abrogated or waived by the enactment of the state depository law, and its requirement of security from its depositories.[96] The statutory preference, however, was ex-

91. Bank of Portland v. McCredie Bank (1928) 222 Mo. App. 119, 300 S. W. 1018. It is interesting that this case distinguishes Bank of Poplar Bluff v. Millspaugh (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754, approving (Mo. App. 1925) 275 S. W. 579, and cites as its only authority American Bank v. People's Bank (Mo. App. 1923) 255 S. W. 943. Yet the Supreme Court in Bank of Republic v. Republic State Bank (1931) 328 Mo. 848, 42 S. W. (2d) 27, 31, declared that the American Bank case was overruled by the Poplar Bluff case.

92. R. S. Mo. (1929) sec. 3152.

93. State ex rel. Becker v. Farmers' Exchge. Bank (1932) 331 Mo. 689, 56 S. W. (2d) 129, citing and construing R. S. Mo. (1929) secs. 5300, 5303, 5331. See also In re Mt. Vernon Bank (1933) 334 Mo. 549, 66 S. W. (2d) 850.

94. The Court construes the statute taxing shares of bank stock as making the bank directly responsible for the payment of the taxes.

95. State ex rel. Wyatt v. Cantley (1930) 325 Mo. 67, 26 S. W. (2d) 976; State ex rel. Graves v. Farmers' Trust Co. (Mo. 1930) 31 S. W. (2d) 1069. See however State v. Bank of Southeast Missouri (Mo. 1937) 107 S. W. (2d), where statutory lien for corporation franchise tax against bank was not allowed to attach to assets of another bank to which taxed bank transferred its assets.

96. R. S. Mo. (1929) secs. 11465-11477. In re Holland Banking Co. (1926) 313 Mo. 301, 281 S. W. 702; State ex rel. Becker v. Farmers' Exchge. Bank (1932) 331 Mo. 689, 56 S. W. (2d) 850. To hold that the state, a secured depositor, should be allowed to assert priority as to the unpledged

tended to an unauthorized deposit of motor vehicle license fees by an agent of the secretary of state.[97]

The attitude of Missouri courts toward a deposit of war risk insurance or veteran's compensation money made as a general deposit by the legal representative of a recipient of such compensation has been uncertain. The latest case follows the general weight of authority in holding that such deposit is not a debt due the United States and not entitled to priority of payment as such in the case of the bank's insolvency. The deposit by the guardian of the beneficiary creates no more than a debtor-creditor relationship.[98] Two earlier Missouri cases declare that the proceeds of war risk insurance are funds of the United States and preferred as such until they have reached the hands of the beneficiary, even though in one case the funds were deposited in a bank by the personal representative of the insured.[99]

B. Deposits of Non-Sovereign Political Units

A deposit of any public corporation or political subdivision of the state does not come within the scope of the statutory preference.[100] A lawful and general deposit of public funds, other than state or national moneys, in a qualified depository therefore creates but a debtor-creditor relationship.[1] While a literal compli-

assets of a bank is inequitable and tends to prejudice the banks as depositories for the ordinary depositor.

97. State ex rel. Becker v. Farmers' Exchge. Bank, supra.

98. Parker v. Central Trust Co. (1934) 229 Mo. App. 1244, 71 S. W. (2d) 106. A federal statute provides for priority for the payment of debts of the United States out of the assets of any insolvent debtor. (1797) 1 Stat. 515, 31 U. S. C. A. sec. 191. This case follows and holds as controlling Spiser v. Smith (1933) 288 U. S. 430, 53 S. Ct. 415, 57 L. ed. 875, 84 A. L. R. 1525. This undoubtedly is the Missouri law today. See comment (1932) 81 U. of Pa. L. Rev. 211.

99. Butler v. Cantley (1932) 226 Mo. App. 1047, 47 S. W. (2d) 258; (deposit of war risk insurance money by administrator of deceased soldier's estate); Duzan v. Cantley (1932) 227 Mo. App. 670, 55 S. W. (2d) 711 (time deposit of funds derived from a war risk policy made by the beneficiary of the policy). The Butler case is difficult to reconcile with the rule that money in the guardian's hands is money in the ward's hands. Salee v. Arnold (1862) 32 Mo. 532. Preferred standing of course was denied in the Duzan case inasmuch as the beneficiary had received the money.

100. Boone County v. Cantley (1932) 333 Mo. App. 911, 51 S. W. (2d) 56; In re Citizens' Bank of Senath (Mo. App. 1937) and cases cited. See also State v. Rubey (1883) 77 Mo. 610; State v. Wilson (1883) 77 Mo. 633. A surety paying deposit in an insolvent bank of a school district or of a county treasurer is subrogated to no more than a pro rata share of assets with general depositors. In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 1415.

1. Henry County v. Salmon (1907) 201 Mo. 136, 100 S. W. 20; Boone County v. Cantley (1932) 330 Mo. 911, 51 S. W. (2d) 56; Ralls County v. Commissioner of Finance (1933) 334 Mo. 167, 66 S. W. (2d) 115. In re Citizens' Bank of Senath (Mo. App. 1937) 102 S. W. (2d) 830.

ance with all statutory provisions is not required by some cases for the deposit to be lawful,[2] the noncompliance must not prejudice any public or private rights. Thus the security demanded by the statute must conform literally to the requirements.[3]

A deposit of any public funds in violation of statutory stipulations is wrongful, and the bank is held to be a constructive trustee as to them. Public funds so held on insolvency are entitled to priority of payment over those of general creditors.[4] The bank is chargeable with knowledge of the statutory requirements,[5] and approval of statutory violations on the part of the officials depositing does not work an estoppel of any preferential claim as to funds wrongfully deposited.[6]

Where, contrary to the order of authorities to distribute public money in named depositories, the entire sum was deposited in

2. Henry County v. Salmon, supra; Aurora v. Bank of Aurora (1932) 227 Mo. App. 343, 52 S. W. (2d) 496; Marion County v. First Savings Bank (Mo. 1935) 80 S. W. (2d) 861. See also the broad but doubtful language of In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 415, disapproved in In re Cameron Trust Co. (1932) 330 Mo. 1070, 51 S. W. (2d) 1025.

3. Boone v. Cantley (1932) 330 Mo. 911, 51 S. W. (2d) 56; White v. Greenlee (Mo. 1935) 85 S. W. (2d) 112. So a failure to advertise for bids has also been held not be substantial compliance, though bond is given. In re Cameron Trust Co., supra; Aurora School District v. Bank of Aurora (1932) 227 Mo. App. 339, 52 S. W. (2d) 484. See R. S. Mo. (1929) sec. 12184.

4. Special Road Dist. No. 4 v. Cantley (1928) 223 Mo. App. 89, 8 S. W. (2d) 944; Huntsville Trust Co. v. Noel (1928) 321 Mo. 749, 12 S. W. (2d) 751; State ex rel. Gentry v. Page Bank (1929) 322 Mo. 29, 14 S. W. (2d) 597; Consolidated School District No. 4 v. Citizens' Bank (1929) 223 Mo. App. 940, 21 S. W. (2d) 781; Clearmont School Dist. v. Jackson (Mo. App. 1931) 37 S. W. (2d) 1006; Harrison Tp., Vernon County v. People's State Bank (1932) 329 Mo. 968, 46 S. W. (2d) 165; Consolidated School Dist. No. 5 v. Parma Bank (Mo. App. 1932) 52 S. W. (2d) 425; Deal v. Bank of Smithville (Mo. App. 1932) 52 S. W. (2d) 201; In re Liquidation of Gower Bank (Mo. App. 1932) 55 S. W. (2d) 713; State ex rel. Becker v. Farmers' Exchge. Bank (1932) 331 Mo. 689, 56 S. W. (2d) 129; Mitchell v. Bank of Ava (1933) 333 Mo. 960, 65 S. W. (2d) 99; Ralls County v. Comm'r of Finance (1933) 334 Mo. 167, 66 S. W. (2d) 115; Dobyns v. Bank of Ava (Mo. App. 1937) 99 S. W. (2d) 495. See Braver, *Liquidation of Financial Institutions* (1936) 508, sec. 465 for a host of citations from other jurisdictions.

5. Macon v. Farmers' Trust Co. (Mo. App. 1929) 21 S. W. (2d) 643; Marion County v. First Savings Bank (Mo. 1935) 80 S. W. (2d) 861.

6. Maryville v. Farmers' Trust Co. (1932) 226 Mo. App. 641, 45 S. W. (2d) 103; Marion County v. First Savings Bank (Mo. 1935) 80 S. W. (2d) 861. But see In re North Missouri Trust Co. (Mo. App. 1931) 39 S. W. (2d) 415. Cantley v. Beard (Mo. 1936) 98 S. W. (2d) 730 is interesting for the holding that a county was not entitled to a lien on notes on insolvency of the bank, although the notes were purchased by authority of the county court with county funds deposited in an unlawful depository. The county should have proceeded for a preference instead of seeking to hold the notes which constituted assets of the bank.

one bank, the overdeposit was held illegal and the bank taking with knowledge of the order was deemed a trustee *ex maleficio*.[7] Again, an overdeposit in violation of a statute expressly forbidding it creates a constructive trust fund, though the bank is a lawful depository up to the statutory amount.[8]

A subsequent failure on the part of the official custodian to withdraw the public funds on the failure of the duly selected depository to renew its bond at the expiration of its term does not convert the debt created by the original deposit into a trust fund entitled to preferred treatment on insolvency.[9] However, a deposit by a political subdivision in a bank that had failed to comply with statutory requirements as to filing a bond was held converted by the subsequent filing of an acceptable bond from a trust fund in the bank's hands to a legal general deposit.[10]

Statutes which merely authorize without requiring public officials to select a legal depository for public moneys are held directory not mandatory.[11] Consequently a deposit of public funds by an official custodian in his own name in a bank not selected or qualified under such a statute is nonetheless lawful and not entitled to preference.[12] So also a deposit by a village treasurer of public funds, without having given bond under a statute con-

7. William R. Compton Co. v. Farmers' Trust Co. (1926) 220 Mo. App. 1081, 279 S. W. 746. Where, however, the bank is legally designated as depository of one-half of certain funds, the fact that the other half in another bank becomes less does not constitute the bank holding the greater portion a constructive trustee if the statutory bond is sufficient; this is true though the latter bank has requested no withdrawals be made from its half of the deposit. Polk County v. Farmers' State Bank (Mo. 1935) 82 S. W. (2d) 577.

8. Marion County v. First Savings Bank (Mo. 1935) 80 S. W. (2d) 861.

9. Ralls County v. Commissioner of Finance (1933) 334 Mo. 167, 66 S. W. (2d) 115. J. Frank speaking for Div. 1 here questions the soundness of White v. Greenlee (1932) 330 Mo. 135, 49 S. W. (2d) 132, decided by Div. 2, and holding that substitution by a qualified and selected bank of an insufficient bond for the statutory bond with approval of public authorities constituted the *entire* deposit a preferred claim or insolvency of the bank.

10. Mitchell v. Bank of Ava (1933) 330 Mo. 960, 65 S. W. (2d) 99.

11. City of Aurora v. Bank of Aurora (1932) 227 Mo. App. 343, 52 S. W. (2d) 496.

12. In re Hunters' Bank of New Madrid (1930) 224 Mo. App. 550, 30 S. W. (2d) 782; City of Doniphan v. Cantley (Mo. App. 1913) 52 S. W. (2d) 417; Everton Special Road Dist. v. Bank of Everton (Mo. App. 1932) 55 S. W. (2d) 335; In re Home Trust Co. (Mo. App. 1934) 69 S. W. (2d) 312, aff'd in City of Fulton v. Home Trust Co. (Mo. 1934) 78 S. W. (2d) 445. A statute requiring the funds of a third class city to be deposited in a selected city depository was held in the latter case to be limited to the funds of the city under the control of the city treasurer as custodian of the city's funds, and not to apply to those in the city collector's possession before time he was required by law to deliver them to the city treasurer. A previous practice by the collector (without special agreement) of leaving such funds overtime in a bank not a designated depository was held

strued as directory, was not given preference on insolvency of the bank.[13] The ordinary rule, however, is that a deposit by a treasurer without the required statutory bond is unlawful, and the banks holds such a deposit as constructive trustee.[14] Illegally deposited funds may be legally withdrawn by the official custodian. In such a case the bank is not responsible for subsequent misappropriation by the custodian of the withdrawn funds.[15]

VII. DEPOSITS OF FIDUCIARIES

Funds held in a fiduciary capacity ordinarily may be deposited in a general deposit without committing a breach of duty, and the presumption in favor of a general deposit obtains in the case of a deposit by a fiduciary. The fact that the bank knows of the nature of the fund does not convert the general deposit to a special one entitled to priority on liquidation.[16] Before money in an insolvent bank may be received on the trust fund theory, the claimant must show facts that the bank itself held it other than as a general deposit.[17]

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not to entitle the city to a preference where the bank became insolvent before the expiration of the period allowed for paying over.

Where, however, there is an agreement by the bank to hold such funds beyond the time when the statute requires them to be paid over to the city treasurer, the deposit is unlawful and the city is entitled to a preference on the insolvency of the bank. Maryville v. Farmers' Trust Co. (1932) 226 Mo. App. 641, 45 S. W. (2d) 103.

13. In re Bank of Mt. Moriah's Liquidation (1932) 226 Mo. App. 1230, 49 S. W. (2d) 275.

14. Everton Special Road District v. Bank of Everton (Mo. App. 1932) 55 S. W. (2d) 335; City of Doniphan v. Cantley (Mo. App. 1932) 52 S. W. (2d) 417; School Dist. No. 61 v. Railey & Bro. Banking Co. (1932) 227 Mo. App. 543, 55 S. W. (2d) 699; Portageville v. Fidelity & Casualty Co. (1933) 228 Mo. App. 1, 63 S. W. (2d) 411; Portageville v. Harrison (1933) 228 Mo. App. 27, 63 S. W. (2d) 410.

15. School Dist. v. Railey & Bro. Banking Co., supra. See R. S. Mo. (1929) sec. 3144. In this connection, however, it may be noted that where an unauthorized agent indorsed a company check and thus unlawfully paid by the drawee bank, on misappropriation by the agent the company was entitled to a preference on the bank's insolvency. New York Indemnity Co. v. Farmers' Trust Co. (1932) 227 Mo. App. 55, 51 S. W. (2d) 701.

16. Fred A. Boswell Post v. Farmers' State Bank (Mo. App. 1933) 61 S. W. (2d) 761; Round Prairie Bank v. Downey (Mo. App. 1933) 64 S. W. (2d) 701; Moehlenkamp v. Savings Trust Co. (Mo. App. 1937) 108 S. W. (2d) 605. See also Greene County Bldg. & Loan Ass'n v. Cantley (1933) 228 Mo. App. 14, 62 S. W. (2d) 931; Missouri Utilities Co. v. Scott County Bank (Mo. App. 1933) 62 S. W. (2d) 933; Landwehr v. Moberly (1936) 338 Mo. 1106, 93 S. W. (2d) 935. This is the established general rule. Restatement, *Trusts* (1935) sec. 12, comment h.

17. Paul v. Draper (1900) 158 Mo. 177, 59 S. W. 77, 81 Am. St. Rep. 296; Missouri Mutual Ass'n v. Holland Banking Co. (1927) 220 Mo. App. 1256, 290 S. W. 100; Lloyds' Ins. Co. v. Moberly (Mo. App. 1935) 82 S. W. (2d) 139; West St. Louis Trust Co. v. Brokaw (Mo. App. 1937) 102 S. W. (2d) 792; Security Nat. Bank etc. Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33, and cases cited. In the Lloyds case a surety on a bond securing

A wrongful, unauthorized deposit by a fiduciary in a bank which has knowledge of the facts becomes a trust fund which the owner may reclaim in the hands of the bank commissioner.[18] While a guardian is under statutory duty to invest the money of his ward in specified ways,[19] the statute does not make illegal a deposit in the bank until appropriate investments may be obtained, and no preference may be predicated on such deposit.[20] However, a loan to a bank or a time deposit is an unlawful investment under the statute. The bank, being chargeable with knowledge of the statute and of facts known to its officials dealing with the guardian, is liable as constructive trustee of the ward's money, and the ward may claim a preference on insolvency notwithstanding the guardian's liability on his bond.[21] Ratification of the fiduciary or authorization by the court of an unlawful deposit is no defense for the bank and no estoppel of the ward.[22] Nor can the fact that a bank commingles with its general funds money which it holds in a fiduciary capacity defeat the preferential right of the ward or beneficiary or insolvency of the bank.[23]

VIII. BAILMENTS

A deposit of bonds and securities for safekeeping does not create a debtor-creditor relationship nor a trustee-beneficiary re-

a guardian's deposit and under agreement with the bank not to allow withdrawals without the surety's consent was held but a general creditor of the insolvent bank on its insolvency after the bank had violated the agreement by allowing the guardian to withdraw and misappropriate the fund.

18. In re Linn County Bank (1928) 222 Mo. App. 84, 1 S. W. (2d) 206; Andrews v. Farmers' Trust Co. (Mo. App. 1929) 21 S. W. (2d) 641; Round Prairie Bank v. Downey, supra; French v. Harrison (Mo. App. 1934) 70 S. W. (2d) 141; Happy v. Cole County Bank (Mo. 1936) 93 S. W. (2d) 871. Of course if the claimant can not show the bank's knowledge of the misappropriation of the fund by the fiduciary, he can claim no preference on insolvency of the bank. Plattner v. People's Bank (Mo. App. 1934) 71 S. W. (2d) 75 (misappropriation by a partner of partnership funds).

19. R. S. Mo. (1929) sec. 418.

20. Parker v. Central Trust Co. (Mo. App. 1934) 71 S. W. (2d) 106; Bartholomy v. Harrison (Mo. App. 1934) 74 S. W. (2d) 69.

21. Round Prairie Bank v. Downey (Mo. App. 1933) 64 S. W. (2d) 701; Hart v. Kirksville Savings Bank (Mo. App. 1935) 82 S. W. (2d) 612. See also Methodist Benev. Ass'n v. Bank of Sweet Springs (1932) 227 Mo. App. 566, 54 S. W. (2d) 474. It may be noted here that deposits by school children of their own money were held beneficial and therefore lawful, and the bank did not take as constructive trustee merely because their depositors were minors. Phillips v. Savings Trust Co. (Mo. App. 1935) 85 S. W. (2d) 923.

22. Hart v. Kirksville Savings Bank, supra.

23. Methodist Benevolent Ass'n v. Bank of Sweet Springs (1932) 227 Mo. App. 566, 54 S. W. (2d) 474 (bank was testamentary trustee); McPheeters v. Scott County (Mo. App. 1933) 63 S. W. (2d) 456 (bank was trustee under oral agreement with depositor); Round Prairie Bank v. Downey (Mo. App. 1933) 64 S. W. (2d) 701.

lationship, but rather that of bailor-bailee. On insolvency of the bank the owner of the bonds must in every jurisdiction trace either the bonds or, if they have been misappropriated, the proceeds therefrom into the hands of the bank commissioner to be entitled to a preferred claim on the bonds.[24] However, if there is no contrary showing, the liberal Missouri courts allow an inference that bonds in the hands of the bank before it closed have passed to the hands of the bank commissioner, and permit a preference on the basis of a general augmentation of assets if only sufficient assets reach the commissioner.[25]

When a note deposited in a safety box was wrongfully removed and misappropriated by the bank, a constructive trust was created in law in favor of the owner of the note who was entitled to a preference on the ground of the augmentation of the bank's assets by the transaction.[26]

IX. ESTOPPEL OF CLAIMANTS

A claimant is not estopped to assert a right to a preference by first filing only a common claim, for the interests of other claimants and creditors have not been prejudiced thereby.[27] Nor is allowance of the general claim by the bank commissioner *res judicata,* inasmuch as the commissioner has no judicial power.[28] But when such claimant accepts dividends or other benefits as a common creditor, he is estopped to claim a preference.[29]

The first article of the chapter on the State Department of Finance in the Revised Statutes is deemed a complete scheme of liquidation, and other statutes of limitation are inapplicable.[30]

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24. Summers v. Farmers' Bank (Mo. App. 1926) 282 S. W. 757; Mann v. Farmers' Exchge. Bank (1932) 227 Mo. App. 1, 50 S. W. (2d) 146.

25. Seify v. State Bank (Mo. App. 1931) 44 S. W. (2d) 205; Winston Bank v. Farmers' Exchge. Bank (1932) 227 Mo. App. 77, 51 S. W. (2d) 150.

26. Netherton v. Farmers' Exchange Bank (1933) 228 Mo. App. 296, 63 S. W. (2d) 156. The maker of the note paid it and also a new note which the bank fraudulently induced to be executed, the maker was held entitled to a preference on the principle of subrogation. Accord, Noll v. Harrison County Bank (Mo. App. 1928) 11 S. W. (2d) 77.

27. Macon County v. Farmers' Trust Co. (1930) 325 Mo. 784, 29 S. W. (2d) 1096; In re Liquidation of Gower Bank (Mo. App. 1932) 55 S. W. (2d) 713.

28. Miller v. Farmers' Exchge. Bank (1934) 228 Mo. App. 367, 67 S. W. (2d) 528; same (Mo. App. 1937) 107 S. W. (2d) 852.

29. Stoller v. Coates (1885) 88 Mo. 514; Fidelity Nat. Bank & Trust Co. v. Farmers' Exchge. Bank (Mo. App. 1932) 45 S. W. (2d) 1090; Brackenridge v. Moberly (Mo. App. 1937) 102 S. W. (2d) 679.

30. R. S. Mo. (1929) secs. 5282-5343, construed in Commerce Trust Co. v. Farmers' Exchange Bank (1933) 332 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373. In Ogan v. Farmers' & Merchants' Bank (Mo. App. 1936) 90 S. W. (2d) 438, plaintiff was a minor at accrual of his cause of action.

The bank commissioner is required to notify all creditors on the insolvent bank's books to present proofs of claims within four months of the notice.[31] The word "creditors," as used in the statute, has been construed to embrace common and preferred claimants.[32] If the creditor's claim is rejected, he may institute an action thereon only within the period set by the statute, which may not be later than six months after the time for allowances has elapsed.[33] If the claim is approved, the creditor seeking priority must file his preferential claim with the commissioner for presentation to the circuit court before an order of distribution is made.[34] In such a case, however, the priority seeker is not required to follow the procedural requirements imposed on the claimant whose claim has been rejected by the bank commissioner.[35] While the court will give force to equitable considerations to permit filing of a preferred claim after it has been duly approved as a common claim,[36] an action to obtain reclassification as preferred claim was held barred where first instituted over a year after an order of distribution was made.[37]

Acceptance by a preferred claimant of a note from the bank does not estop him from pursuing his claim where no creditor is prejudiced by such acceptance.[38] Suit by a political subdivision against an insolvent bank on its depository's bond is not

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However the general statute of limitations granting three years after reaching majority was held inapplicable. This case also holds that claims for preferences are not claims for specific personal property because the money is not identifiable or separable from the bank's assets.

31. R. S. Mo. (1929) sec. 5333.

32. Commerce Trust Co. v. Farmers' Exchge. Bank (1933) 332 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373; Power v. Benson Banking Co. (Mo. App. 1936) 99 S. W. (2d) 109.

33. R. S. Mo. (1929) sec. 5337.

34. R. S. Mo. (1929) sec. 5339; Ogan v. Farmers' & Merchants' Bank (Mo. App. 1936) 90 S. W. (2d) 438; Power v. Benson Banking Co. (Mo. App. 1936) 99 S. W. (2d) 1.

35. In re Hodiamont Bank (1936) 230 Mo. App. 190, 91 S. W. (2d) 127; West End Bank v. University City Bank & Trust Co. (Mo. App. 1936) 97 S. W. (2d) 881. See R. S. Mo. (1929) sec. 5339.

36. Macon County v. Farmers' Trust Co. (1930) 325 Mo. 784, 29 S. W. (2d) 1096; Miller v. Farmers' Exchge. Bank (Mo. App. 1937) 107 S. W. (2d) 852. In the latter case a suit for preference based on the bank officers' fraud was held not barred, though brought more than five years after a common claim was allowed but within five years after the fraud was discovered. Laches was held no bar where no dividends had been declared, no distribution ordered, and the assets were yet in the hands of the bank commissioner.

37. Ogan v. Farmers' & Merchants' Bank (Mo. App. 1936) 90 S. W. (2d) 438.

38. Porterfield v. Farmers' Exchange Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22; Greenfield v. Clarence Savings Bank (Mo. App. 1928) 5 S. W. (2d) 708; West End Bank v. University City Bank & Trust Co. (Mo. App. 1936) 97 S. W. (2d) 881.

an election of remedies so as to preclude a subsequent suit for preference in its assets.[39] While a depositor may waive his right to a preference, as by acceptance of a renewal of his certificate instead of insisting on the cash to which he is entitled,[40] proof that such a renewal is taken by the depositor under a mistaken belief as to its effect may nevertheless entitle the plaintiff to a preference.[41]

X. TRACING TRUST FUNDS

All authorities unite in holding that in order to impress a trust on a fund and assert a preferential claim therefor in the hands of the bank liquidator, the claimant must (1) establish that the transaction between him and the bank created a trust in his favor, (2) show that the assets of the bank coming into the hands of the liquidator were augmented by the fund claimed, and (3) be able to trace the trust fund into the hands of the bank commissioner.[42]

As before indicated in this note, Missouri has been exceedingly liberal in permitting preferred claimants to follow trust funds into assets of insolvent banks.[43] Even in Missouri however the existence of the trust is not sufficient. It is by indulgence in presumptions and liberal doctrines that the Missouri courts have aided the beneficiary to show augmentation and to trace his fund into the hands of the bank commissioner.[44]

True, the bank at the time of going into the commissioner's hands must have had sufficient assets upon which the trust could

39. Aurora School Dist. v. Bank of Aurora (1932) 227 Mo. App. 339, 52 S. W. (2d) 484.

40. Hennemann v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 113.

41. Niewald v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 464 (recovery denied because trust res not traceable).

42. May v. Bank of Hughesville (Mo. App. 1927) 291 S. W. 170; In re Linn County Bank (1928) 222 Mo. App. 84, 1 S. W. (2d) 206; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; Johnson v. Farmers' Bank (1928) 223 Mo. App. 513, 11 S. W. (2d) 1090; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22; Duzan v. Cantley (1932) 227 Mo. App. 670, 55 S. W. (2d) 711. See many cases from nearly all jurisdictions in Braver, *Liquidation of Financial Institutions* (1936) 985-990, sec. 854.

The courts are guilty of using the term "trust" very loosely to refer to all kinds of fiduciary relationships analogous to express trusts. While such broad use is sometimes objectionable, note (1931) U. of Missouri Bulletin, 50 Law Series 31, as Jessel, M. R., pointed out in Knatchbull v. Hallett (Eng. 1879) L. R. 13 Ch. Div. 696, it is very proper and convenient in treating of the doctrine of tracing trust funds inasmuch as there is no distinction in equity between liabilities of fiduciaries. See Williston, The Right to Follow Trust Property (1888) 2 Harv. L. Rev. 28.

43. See for general discussion of this subject elaborate Note, (1933) 82 A. L. R. 46.

44. Thomson v. Bank of Syracuse (1926) 220 Mo. App. 805, 278 S. W. 810; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655.

be impressed.[45] But the assets out of which the trust money may be reclaimed are not confined to the amount of cash in the bank vaults alone, which may be less than the amount of the trust fund.[46] The claimant is not required either to identify the particular money claimed,[47] or to show that the specific funds have come to the bank commissioner,[48] or to trace the fund into any specific fund or piece of property in the hands of the commissioner.[49]

The fact that the bank commingles a trust fund with its own general assets does not preclude the claimant from following his fund into the assets in the commissioner's hands.[50] Indeed the

45. William R. Compton Co. v. Farmers' Trust Co. (1925) 220 Mo. App. 1081, 279 S. W. 746; Farmers' Trust Co. v. Burnes National Bank (Mo. App. 1926) 285 S. W. 110; Evans v. People's Bank, supra; Niewald v. Rosebud Bank (Mo. App. 1935) 78 S. W. (2d) 464.

46. First Nat. Bank v. Sanford (1895) 62 Mo. App. 394; Nichols v. Bank of Syracuse (1925) 220 Mo. App. 1019, 278 S. W. 793; Thomson v. Bank of Syracuse (1926) 220 Mo. App. 805, 278 S. W. 810; Federal Reserve Bank v. Quigley (Mo. App. 1926) 284 S. W. 164; Johnson v. Farmers' Bank (1928) 223 Mo. App. 513, 11 S. W. (2d) 1090.

47. Harrison v. Smith (1884) 83 Mo. 210, 53 Am. Rep. 571; Schulz v. Bank of Harrisonville (Mo. App. 1923) 246 S. W. 614; Marshall v. Farmers' & Merchants' Bank (1923) 215 Mo. App. 365, 253 S. W. 15; State ex rel. Gentry v. Page Bank (1929) 322 Mo. 29, 14 S. W. (2d) 597; Turner v. Farmers' Exchge. Bank (Mo. App. 1932) 45 S. W. (2d) 1084; Niewald v. Rosebud Bank (Mo. App. 1935) 55 S. W. (2d) 464. The majority of the states follow this modern doctrine, Note (1933) 82 A. L. R. 46, 125.

48. Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; Special Road Dist. v. Cantley (1928) 223 Mo. App. 89, 8 S. W. (2d) 944; Security Nat. Bank & Savings Trust Co. v. Moberly (Mo. 1936) 101 S. W. (2d) 33.

49. Harrison v. Smith (1884) 83 Mo. 210, 53 Am. Rep. 571; German Fire Insurance Co. v. Kimble (1896) 66 Mo. App. 370; Schulz v. Bank of Harrisonville (Mo. App. 1923) 246 S. W. 614; Federal Reserve Bank v. Millspaugh (1926) 314 Mo. 1, 282 S. W. 706; Evans v. People's Bank, supra; Johnson v. Farmers' Bank (1928) 223 Mo. App. 513, 11 S. W. (2d) 1090; Huntsville Trust Co. v. Noel (1928) 321 Mo. 749, 12 S. W. (2d) 751; Mann v. Bank of Greenfield (1929) 323 Mo. 1000, 20 S. W. (2d) 502; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22; Mann v. Bank of Greenfield (1932) 329 Mo. 862, 46 S. W. (2d) 874; Harrison Tp. v. People's State Bank (1932) 329 Mo. 968, 46 S. W. (2d) 165; Winston Bank v. Farmers' Exchge. Bank (1932) 227 Mo. App. 77, 51 S. W. (2d) 150; Commerce Trust Co. v. Farmers' Exchge. Bank (1933) 332 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373, rvsg. (Mo. App. 1932) 52 S. W. (2d) 406. A decided majority of jurisdictions are contra. See Note (1933) 82 A. L. R. 46, 71.

50. Harrison v. Smith, supra; Schulz v. Bank of Harrisonville, supra; Marshall v. Farmers' & Merchants' Bank (1923) 215 Mo. App. 365, 253 S. W. 15; Bank of Poplar Bluff v. Millspaugh (1926) 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754, aff'g (Mo. App. 1925) 275 S. W. 579; Federal Reserve Bank v. Millspaugh, supra; Evans v. People's Bank, supra; Special Road Dist. v. Cantley (1928) 223 Mo. App. 89, 8 S. W. (2d) 944; Porterfield v. Farmers' Exchge. Bank, supra; Turner v. Farmers' Exchange Bank (1932) 226 Mo. App. 714, 45 S. W. (2d) 1084; Vandivort v. Sturdivant Bank (Mo. App. 1935) 77 S. W. (2d) 484.

beneficiary in such a case has a charge or lien or preferred demand against the whole mass of the bank's assets by virtue of the fact that the bank's assets coming into the commissioner's hands have been augmented and enhanced by the amount of the trust fund.[51] The trust fund may be thus traced into proceeds from bonds, mortgage notes, bills receivable, real property, credits or deposits in correspondent banks.[52] Thus the bank is prevented from taking advantage of its own wrong, and the rights of the general depositors and creditors are not prejudiced because the fund never belonged to the bank.[53]

Withdrawals by the bank from such commingled funds are presumed to be from the bank's portion thereof, so that the trust fund is not dissipated thereby.[54] In order to establish dissipation of the trust fund, the funds must be specifically traced as dissipated, without having augmented the bank's assets, or the funds with which the trust fund has been commingled must be shown to have been wholly dissipated and the remaining assets must have arisen from other sources altogether.[55] False and fraudulent entries by the bank on its books, purporting to show dissipation of the trust fund, do not establish such dissipation.[56] It is a sufficient tracing if the bank is shown to have a balance in the common fund equal to the amount of the trust fund.[57]

Missouri is almost alone in holding that there may be an augmentation of the bank's assets coming to the commissioner's

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51. See cases in footnote 49.

52. Supra, note 46. An augmentation was even found where a trustee bank substituted its bad notes in the place of the beneficiary's good notes, and the beneficiary was entitled to a preference to the extent of the property appropriated and thus commingled. Mann v. Bank of Greenfield (1929) 323 Mo. 1000, 20 S. W. (2d) 502; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22.

53. Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655. However, if after the bank's misappropriation of the trust fund another bank takes over its assets and assumes its liabilities, the beneficiary can not claim a preference against the assets of the second bank since the second bank is not trustee *ex maleficio*, and its assets are not augmented by the trust fund. Mann v. Bank of Greenfield (1932) 329 Mo. 862, 46 S. W. (2d) 874.

54. Nichols v. Bank of Syracuse (1925) 220 Mo. App. 1019, 278 S. W. 793. See also West End Bank v. University City Bank & Trust Co. (Mo. App. 1936) 97 S. W. (2d) 881; Texas Co. v. First Bank & Trust Co. (Mo. App. 1937) 106 S. W. (2d) 28. This is settled by the overwhelming weight of authority. Note (1933) 82 A. L. R. 46, 141.

55. Nichols v. Bank of Syracuse, supra; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22.

56. Nichols v. Bank of Syracuse, supra.

57. Special Road Dist. v. Cantley (1928) 223 Mo. App. 89, 8 S. W. (2d) 944. See also Austin v. Haugh (Mo. App. 1928) 10 S. W. (2d) 944, applying Texas law.

hands, though the trust fund has been used by the bank to discharge its own liabilities and debts.[58] Indeed two Missouri cases do hold that a showing of an application of the special fund to the bank's obligations rebutted the presumption that the remaining balance was the trust fund and constituted such dissipation as to preclude the claimant from following the fund to the extent of the dissipation.[59]

However, in Missouri in the very cases declaring the established principle imposing on the beneficiary the burden of tracing the trust res, a showing that a trust fund has been commingled with the bank's assets, sufficient of which have come to the bank commissioner's hands to cover the trust fund, subjects the whole mass of assets to a preferential claim in favor of the beneficiary.

XI. CONCLUSION

It is not within the scope of this note which covers a broad field of law to present a critical analysis of the many holdings of the Missouri courts. It may be seen from the survey of preference cases here presented that the Missouri view is uniformly favorable to the preferred claimant. It is submitted that with a few noted exceptions the majority of courts differ with Missouri courts not so much in the grounds of granting preference, i. e. the existence of a trust fund in the claimant's favor, as in allowing the plaintiff to reclaim the fund from the assets in the liquidator's hands.[60]

If this assumption is correct, the position of the Missouri courts is impregnable. Trust lawyers and others deplore departures from the fundamental concepts of tracing trust funds with the necessity of a trust res.[61] However such ancestral worship of fictions must yield to exigencies born of increased complexity of the commercial banking business. The Bank Collection Code and other statutes eliminating the need of tracing in collection

58. Schulz v. Bank of Harrisonville (Mo. App. 1923) 246 S. W. 614; Nichols v. Bank of Syracuse (1925) 220 Mo. App. 1019, 278 S. W. 793; Evans v. People's Bank (1928) 222 Mo. App. 990, 6 S. W. (2d) 655; Porterfield v. Farmers' Exchge. Bank (1931) 327 Mo. 640, 37 S. W. (2d) 936, 82 A. L. R. 22. See contra cases from many jurisdictions in Braver, *Liquidation of Financial Institutions* (1936) 1027, sec. 876; and Note (1933) 82 A. L. R. 46, 112.

59. In re Linn County Bank (1928) 222 Mo. App. 84, 1 S. W. (2d) 206; Kline v. Cantley (Mo. App. 1931) 34 S. W. (2d) 526. See also Cormaney v. Wells-Hine Trust Co. (Mo. App. 1931) 44 S. W. (2d) 172; Smalley v. Queen City Bank (Mo. App. 1936) 94 S. W. (2d) 954.

60. See elaborate Note (1933) 82 A. L. R. 46, where cases from nearly all jurisdictions are discussed jointly and severally.

61. Bogert, Failed Banks, Collections Items, and Trust Preferences (1931) 29 Mich. L. Rev. 545, 559.

and remittance cases are an example of legislative recognition of the inadequacy of ancient trust doctrines to protect the depositor.[62] Emphasis on the requirement of tracing the trust fund tends to place a premium on wrongful commingling of trust funds by the bank so completely that the claimant cannot show where his fund has gone. To the argument that the general depositor and creditors rather than the bank are affected by allowing a preference, may it not be said that it is inequitable for general creditors to participate in and profit to the extent of a fund which never belonged to the bank and which therefore was never a part of the assets against which they claim? The practicality of such a view is apparent on a comparison of the benefit that each individual creditor would receive from a pro rata distribution of the trust fund and the importance to the beneficiary of being granted a preference.

Certain it is that both statutory law and judicial decisions everywhere have greatly extended the grounds for granting preferences in insolvent banks' assets since the dates of the Missouri decisions in *Harrison v. Smith*[63] and *Stoller v. Coates*,[64] of which the state supreme court later declared: "In going to this length unquestionably this court took a position in advance of the English chancery and most of the states of this Union, but with the soundness of this position we are satisfied."[65] Missouri judicial declarations which continue to flow out of the cases created by the economic earthquake of 1929 assure the claimant of the court's continued satisfaction. The courts is too clear, the current too strong to permit either a reversion to the limited allowances of common law or a diversion to the strict doctrines of other jurisdictions.

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62. Note (1932) 81 U. of Pa. L. Rev. 201.
63. (1884) 82 Mo. 210.
64. (1885) 88 Mo. 514.
65. Midland Nat. Bank v. Brightwell (1899) 148 Mo. 358, 365, 49 S. W. 994.