

2000

# J.R. Walker v. Tracy Loan & Trust Company, a corporation as receiver for Walker Brothers Dry Good Company, a corporation : Brief of Respondent

Utah Supreme Court

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Henry D. Moyle; Attorney for Plaintiff and Respondent.

Unknown.

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UTAH SUPREME COURT

BRIEF

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

J. R. WALKER,

*Plaintiff and Respondent,*

vs.

TRACY LOAN & TRUST COM-  
PANY, a corporation as receiver  
for WALKER BROTHERS DRY  
GOODS COMPANY, a corporation,

*Defendant and Appellant.*

Case No.

5338

BRIEF OF  
RESPONDENT

Ab's. Trans.

The Lower Court, prior to the institution of this action, required the appellant to set aside a fund of \$11,268.33 out of which certain claims against the appellant could be paid in full, in case they were finally adjudged preferred claims. Respondent's claim of \$2,909.85 went to make up the total of \$11,268.33. By the judgment of the Lower Court in this action, the appellant was ordered to pay to the respondent his claim in full out of said sum. The findings of fact upon which this judgment is founded are in substantial

Abs. Trans.

accord with the allegations of plaintiff's complaint. There is ample evidence in the record, as will be shown hereafter, to support these findings; in fact, the evidence supporting the findings and in turn the allegations of plaintiff's complaint are uncontradicted.

An examination of the Assignments of Error indicates but a single question to be determined upon this appeal, namely, Is the claim of respondent a preferred claim, or does he stand with reference to said claim as a common creditor? At the outset it is respectfully submitted that if plaintiff's complaint states a cause of action for a preference then this appeal should fail and the judgment of the Lower Court should be sustained. The sufficiency of the complaint has never been attacked. There are no affirmative allegations in defendant's answer. The first five paragraphs of the complaint are admitted by the answer. Paragraph six reads as follows:

"6. That prior to the appointment of the defendant as receiver of Walker Brothers Dry Goods Company, as aforesaid, the plaintiff delivered to and depos-

ited with the said Walker Brothers Dry Goods Company the sum of \$2,909.85, to be retained and held by the said Walker Brothers Dry Goods Company for the sole and specific and special purpose, and that only, of securing the payment and of paying for the future goods, wares and merchandise to be purchased by the wife of plaintiff from Walker Brothers Dry Goods store; that the said deposit so made by plaintiff to Walker Brothers Dry Goods Company, as aforesaid, was accepted and held by Walker Brothers Dry Goods store as a special fund or deposit in trust for the specific use and purpose for which it was delivered, received, accepted and held, to-wit: the satisfaction and payment of future advances and sales of goods, wares and merchandise by Walker Brothers Dry Goods store to the wife of plaintiff, as aforesaid, and not otherwise."

In its answer appellant admits the indebtedness of \$2,909.85 but denies the other allegations in said paragraph. Paragraphs eight, ten and elev-



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en of plaintiff's complaint are admitted in defendant's answer, and paragraphs nine, twelve and thirteen denied. We need only to examine into the evidence to ascertain whether or not the allegations of paragraph six are sustained. If so, the allegations of paragraphs nine, twelve and thirteen are necessarily true.

### EVIDENCE

Amy B. Chase was the first witness called. On her direct examination she testified:

18      24

“A. At this time Mr. Walker asked me to transfer the account of Alice Young Frye from her savings account to pay the account of Mrs. J. R. Walker and it left a balance of two thousand dollars, somewhere around that. He said Mrs. Walker would be charging more merchandise and we would use that to pay the account, use this two thousand to pay the account when her account was that amount.

“Q. As I understand it this Frye account was applied first to the payment

of the indebtedness then owing the company by Mrs. Walker.

“A. Yes, sir.

“Q. That was some three odd thousand dollars?

“A. Yes, sir.

“Q. And that left a balance?

“A. Left a balance of somewhere around two thousand dollars.

“Q. It was with reference to that balance Mr. Walker told you to hold it and apply it on future purchases of Mrs. Walker, was it?

“A. Yes, sir.

It will be seen from the testimony of Mr. J. R. Walker, the next witness, that in having the account of Alice Young Frye transferred to himself it was the same as though he had delivered to the appellant an equal amount of cash for the purpose specified. The history, therefore, of the Alice Young Frye account becomes unimportant and absolutely immaterial.

Abs.    Trans.

By its pleadings appellant has admitted the existence of the account standing in the name of  
 25    31 respondent. Mr. Walker says that he put the  
       account there; that he was trustee for her, and  
 34    37 held the fund in trust for her. Finally Mr.  
       Walker's testimony is as follows:

“Q. Now, I will ask you to state whether or not this account of Mrs. Young's or Miss Frye's was transferred to you?

“A. I had for years and years back, she was our old nurse girl, and I had the handling of this fund, had it long before I put it in the store. I put it in there, I was trustee, and in my last year I had Mrs. Chase transfer it to my account. I didn't want to involve her in any receivership proceedings. I was taking care of this fund for her. I told Mrs. Chase to transfer it to my account and apply enough to clean up Mrs. Walker's account and I would leave the balance there for her account. She was in the habit of running an account of two or three thousand

dollars a year. I could have drawn it out if I wanted to.

“Q. Mrs. Chase told you at that time she did do that?

“A. Yes, she did that.

“Q. You left it there upon the reliance of that statement?

“A. Left it there expecting it to be paid on my wife's future purchases.

“Q. That is the way you want to apply it now?

“A. Yes, sir.”

The appellant offered no evidence. By stipulation all of the evidence introduced in the case of C. G. Renshaw against this appellant was considered as evidence in this case. The bill of exceptions settled in said action was also incorporated in and became part of the record in this case on appeal. In the Renshaw case Mrs. Chase was the first witness, and testified concerning deposits made by Mr. Renshaw and Miss Salisbury with Walker Brothers Dry Goods

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Company. (Renshaw Transcript 34.) She explained the nature of the special accounts of Renshaw and Salisbury; how they were entered upon the books of the company, and how special time deposits were maintained in the company's banks more than sufficient to pay all of the deposits made by employees similar to the deposits of Renshaw, Salisbury and Alice Frye. She also testified on cross examination concerning certain changes that had been made when Mr. Dreyfous purchased the business and before the receiver was appointed. It is submitted there is nothing in the testimony of Mrs. Chase in the Renshaw case which in any wise detracts from her testimony in the case at bar or from the testimony of Mr. Walker. The only bearing it could possibly have would be to show the nature of the account of Alice Frye prior to the transfer thereof to the respondent herein. If the respondent is correct in his assumption that what happened prior to the transfer of this account to J. R. Walker is immaterial, then the entire testimony in the Renshaw case is likewise immaterial.

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In the Renshaw bill of exceptions the following appears: (Renshaw Trans. 61.)

“MR. MOYLE: The record may show that we withdraw in open court, and with the consent of counsel on the opposite side, the right of setoff heretofore claimed in our pleadings, without in any wise affecting our claim to the right of preference for the full amount.”

Judgment was entered for the respondent, therefore, for the full amount of his claim and the setoff as prayed for was not allowed.

#### ARGUMENT

WHEN THE PLAINTIFF, RESPONDENT HEREIN, THEREFORE, DEPOSITED WITH WALKER BROTHERS DRY GOODS COMPANY SOME FIVE OR SIX THOUSAND DOLLARS, WITH THE REQUEST THAT IT BE USED FIRST TO PAY HIS WIFE'S ACCOUNT TO DATE AND THEREAFTER THE BALANCE TO BE PAID UPON HIS WIFE'S FUTURE PURCHASES, WAS A TRUST CREATED?

\$2,909.85 is admitted to be the balance left with Walker Brothers Dry Goods Company to pay for respondent's wife's future purchases. Mr.

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Walker states that Mrs. Chase, cashier, book-keeper and control accountant, told him that she would do that, and that she did do it, and that he left the sum of \$2,909.85 with Walker Brothers Dry Goods Company in reliance upon its agreement to use the same to pay his wife's future purchases; that that was the way he wanted to have it applied. The allegations of the complaint conform to the evidence in alleging that the sum of \$2,909.85 was to be retained and held for the sole and specific and special purpose, and that only, of securing the payment and of paying for the future goods, wares and merchandise to be purchased by the wife of plaintiff; that said deposit was accepted and held by the store as a special fund or deposit for the specific use and purpose for which it was delivered, received, accepted and held.

It is admitted that upon the appointment of the receiver there came into his hands sums of money in excess of the amount of plaintiff's claim. In leaving the sum of \$2,909.85 with Walker Brothers Dry Goods Company to pay for future purchases of respondent's wife, the funds of that company were clearly augmented to the amount

of said deposit. This deposit took place in May of 1930, and the receiver was appointed in the following June. It, therefore, necessarily follows that if a trust was created by said deposit the general creditors of Walker Brothers Dry Goods Company are not entitled to participate in the \$2,909.85 deposited by respondent which in turn augmented the assets of Walker Brothers Dry Goods Company, and particularly the cash on hand. The legal presumption is that the money which came into the hands of the receiver contains the trust funds held by the insolvent, that is to say, the insolvent spent its own funds first. Whether or not the presumption is rebuttable, the respondent sustained the burden of proof required of him when he showed that the money actually came into the hands of Walker Brothers Dry Goods Company, and that there was cash on hand the day the receiver took charge in an amount equal to or greater than the balance of the trust funds in question. Inasmuch as the appellant did not offer any evidence to rebut this presumption, it would make no difference in the case at bar whether we consider the presumption as rebuttable or not. The respondent is entitled



to full payment as a preferred creditor, in accordance with the decisions hereinafter set forth.

## A TRUST WAS CREATED

Even the cases cited and relied upon by appellant recognize the principle upon which respondent's claim is predicated. In the case of Northern Sugar Corporation vs. Thompson, 13 Fed. (2d) 829, where a general deposit of funds had been made to meet the beet pay roll, the Court says, at 831:

“Whether a deposit in a bank is general or special depends upon the contract resulting from the mutual understanding and intention of the parties at the time such deposit is made.”

And again:

“Where the depositor, at the time a deposit is made, enters into an understanding and agreement with the bank that the money deposited is for a specific purpose, and for that alone, as funds deposited to pay a particular note, draft or check, such deposit partakes of the nature

of a special deposit, the relation between the depositor and the bank is that of principal and agent, and the title to the deposit remains in the depositor.”

This principle applied to the facts in the case at bar clearly illustrates the right of the respondent and the right of Walker Brothers Dry Goods Company to give and accept the deposit made by Mr. Walker for a special purpose, to-wit: the payment of his wife's purchases. The distinction between the facts of this case and the case at bar is clearly shown by the following quotation from the opinion of the court, quoting a portion of the testimony given upon the trial:

“I expected the ‘beet pay roll’ checks, when presented, would be paid promptly, the same as any check that I might issue against a bank in which I had an account. The balance in the ‘beet pay roll’ account shifted from day to day.”

It certainly was proper for this court to hold, in the light of that evidence, that the deposit of the Sugar Company was general. There is, however, no analogy between the facts of that case and

the transaction of the respondent with Walker Brothers Dry Goods Company.

The next case cited of *Noyes vs. First Nat. Bank*, 167 N. Y. S. 288, involves another general deposit in a bank upon which checks were drawn to pay interest on interest coupons. The court clearly holds that these funds were paid out of the bank on the check of the company, the same as any other general deposit.

The case of *Holland Trust Company v. Sutherland*, 69 N. E. 647, is specifically referred to in this opinion. In that case the Court of Appeals of New York says:

“The effect of that transaction was to make the plaintiff trust company a trustee for the coupon holders whose claims were to be paid out of the fund so deposited. Before the coupons were due, a creditor of the Delaware Water Company levied an attachment on said moneys as the property of a nonresident defendant. The legal effect of that special deposit not only created the plaintiff trust company a trustee for the coupon holders, but it

changed the title to said moneys from the water company to the trust company, in whose possession it constituted a trust fund for the benefit of coupon holders as cestuis que trustent. The trust company adopts this view of the law, and in its complaint expressed its desire to pay these coupon holders the moneys in question, and asks a court of equity for instruction in the premises, based on special reasons.”

In the case of *Fralick v. Coeur D’Alene Bank & Trust Company*, 210 Pac. 586, the Idaho court recognizes the right of a bank to make special deposits. This court clearly holds that the question turns on whether the deposit is a general or special deposit, and that if the latter, it is a preferred claim. The evidence in this case as detailed in the opinion of the court shows a case of a general deposit, but the court says:

“If a bank accepts a deposit from A, under an agreement to pay it to B, the contract is one for the benefit of B. It has been held that such a contract creates

a trust relationship in favor of B., and that in case of insolvency of the bank the trust relationship will be recognized, and B. is entitled to recover the trust fund, if it can be traced into the assets of the bank. *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385. We think this rule is correct, if B. did not consent that the deposit should be considered as one for his credit. The evidence in this case, as we construe it, fails to show a contract which gave the holders of the coupons any right of action against the bank.”

In *Tucker v. Linn et al.* (N. J.), 57 Atl. 1017, relied on by appellant, it is said:

“The charge is that particular money was paid over by the complainant to the defendant’s intestate to be invested in securities, and these securities were to be held by the defendant’s intestate. No equitable title to the money passes in such a case. No equitable title to the securities in any way exists in the holder. If this bill had been proved to be true, then John Linn received money which he had no

right to appropriate to his own use. He did not, by receiving the money, become a debtor to the complainant. He was charged with the duty of expending these moneys for securities or investing them in securities, and when he did so the equitable title to those securities would be in the complainant, and he would be the mere trustee, not having any beneficial ownership.”

The case of Fidelity Savings & Loan Association v. Rodgers et al. (Cal.), 182 Pac. 426, can have no bearing on the present controversy. The Court in this case says:

“The expressions used, however, show that it was regarded and treated by her as an ‘account’ in her favor against the plaintiff, to be paid out by it on her order, and as both parties have discussed the case solely upon the theory that it was a general deposit for exchange or credit, we will assume that such was its character.”

The case of Bledsoe v. Hammons, 36 Ariz. 489, 287 Pac. 297, relied on by appellant on page

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31 of its brief, involves a bank account of a fraternal order. The name in which this bank account stood was changed from the individual name of the treasurer to the name of the organization for which he held it. This change was made just prior to the appointment of a receiver. It involves nothing more than a change in the name under which the deposit was held. The deposit was a general deposit, subject to checking account both before and after this change. It is in no wise enlightening, therefore, so far as the present controversy is concerned.

We turn now to the authorities relied on by respondent.

Michie on Banks and Banking, Vol.  
III, Ch. 6, Sec. 186, p. 259.

“It is a well established rule that moneys received by a bank to be applied to a particular purpose or to be remitted to some creditor of the person paying such sums, are regarded as trust funds, and a claim therefore is ordinarily entitled to preference over the claims of general creditors in the distribution of the

assets of the insolvent bank. Thus money intrusted to a bank for investment is a trust fund. And, where money is deposited with a bank, to be applied in the payment of a note or other obligation on which the depositor is liable, the bank holds it as a trust fund and not as the assets of the bank and it may be followed and reclaimed from the assignee or receiver. The reason of the rule is that the relation between the depositor and the bank as to such deposits is that of principal and agent, or trustee and cestui que trust and not simply that of depositor and depositary."

3 R. C. L. 146.

"The law prescribes no particular formula for the contract involved in making a special deposit. Like all contracts, it grows out of the mutual intention and understanding of the parties. The purpose and terms of the deposit may be explicitly stated, or the intention of the parties may be inferred from their declarations,



considered in connection with their conduct and all of the circumstances.”

Mothersead v. Harrington, Okla. 250  
Pac. 483.

In this action the plaintiff paid into the defendant bank the sum of \$709.65 which was held by said bank to be paid as the balance due on a contract for the sale of an oil and gas lease, upon the seller, a minor, becoming of age. In the meantime the Bank passed into the hands of a receiver. This case not only holds that this sum was held in trust, being a special rather than a general deposit, entitling plaintiff to a preference, but furthermore holds that the commingling of this money with other moneys of the Bank did not in any wise prevent the plaintiff from reclaiming it as a preferred claim. The court quotes with approval from the case of *Secrest v. Ladd*, 112 Kan. 23, 209 Pac. 824, as follows:

“Where a special deposit is placed in a bank to be used only in payment of certain shares of capital stock of the bank when the same should be duly authorized

and issued, which stock was not authorized nor issued, but the bank misappropriated the money so deposited and used the same in its general business, thereby augmenting its assets, and where shortly afterwards the bank became insolvent and its assets passed into the hands of a receiver, the special deposit constitutes a trust fund which the beneficial owner was entitled to follow and reclaim from the augmented assets in the hands of the receiver in preference to the claims of general creditors.”

It likewise quotes from 31 A. L. R. at page 472 the following general rule:

“It may be stated as a general rule that where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which en-

titles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposit.”

This case of *Secrest v. Ladd*, 112 Kan. 23, 209 Pac. 824, cited with approval in the *Mother-sead* case, deserves more than passing comment. The facts are so nearly analogous to those in the case at bar that there is little, if anything, to distinguish the two cases. The Kansas case deals with a deposit made by Secrest sixty days before the insolvency of the bank for the purpose of paying for thirty-one shares of the bank's own stock when the same was authorized and issued to Secrest. The deposit was made and accepted for this special purpose. The increase of stock had not been authorized nor had any stock been issued to Secrest when the bank became insolvent. There were some two hundred thousand dollars remaining upon the closing of the bank and about ninety thousand dollars in claimed preferences. In the case at bar we have a total of \$11,268.33 in preferred claims for which the Court has had that much cash in the hands of the receiver set aside with which to pay such of

the preferred claims as are finally adjudged preferences. It is further shown that general creditors will receive approximately 55% of their claims. The two cases thus far are entirely analogous. \$2,806.73 of the \$3,875.00 deposit in the Kansas case was made up by the transfer of certificates of deposit on other banks. \$1,068.47 was a check or receipt transferring to the bank a savings deposit of \$1,068.47 which Secrest had in that bank. The trial court allowed a preference so far as the \$2,806.73 was concerned, but denied a preference as to the \$1,068.47 which was merely transferred from the savings account to the bank to be held for this special purpose. Each party appealed, the receiver for the bank because of the preference allowed on the \$2,806.73, and Secrest because he had been denied a preference on the \$1,068.47. The Supreme Court reversed the lower court so far as the \$1,068.47 was concerned, and allowed Secrest a preference for the entire amount. Therefore, so far as the \$1,068.47 is concerned, the two cases are still analogous. The Kansas Court in its opinion says:

“Was the special deposit made by the plaintiff in the bank a trust fund, and, if it has the trust character, can it be fol-

lowed and payment required out of the assets of the bank in preference and before distribution to general creditors?"

This is the identical question presented in the case at bar. The Court goes on to say:

“There can be no doubt of the fiduciary relation between the plaintiff and the bank. The fund was placed in the bank to be applied to a specified purpose for the benefit of plaintiff.”

Herein lies the only difference between the Kansas case and the case at bar. In the case at bar the fund was placed in the hands of appellant to be applied to a specific purpose, to-wit: the benefit of a third party. This difference strengthens respondent's contention. It might, under some circumstances, be possible to say that a fund deposited for the benefit of a depositor himself did not constitute a trust, but it is difficult to conceive of the circumstances under which such a deposit made for the benefit of a third person could be held otherwise than in trust. This is the case at bar. The court says further:

“It was intrusted to the bank to be applied in payment of the shares of capital stock when the same was authorized and issued. The increase of stock was never authorized, and no shares were issued or delivered to plaintiff before the failure of the bank. It is agreed that the fund was to be for no other than the specified purpose. The beneficial ownership of the fund remained in the plaintiff, and the misapplication of it by the bank did not change its trust character.”

The second question as to whether or not the funds could be traced is likewise answered by this court in its opinion:

“Can it be identified or traced to the assets of the insolvent bank which came into the possession of the receiver? He holds it by no better title than did the trustee, and he took the assets of the insolvent bank subject to any trust impressed upon them. Instead of holding the fund for the specific purpose and application, the bank converted and mingled it with its general funds using it to honor

checks, make loans, and as a part of its cash and sight exchange. The special deposit was made about two months before the bank was closed for insolvency and possession of its assets was taken by the bank commissioner. If the trust fund can be identified, it may be followed through every mutation and subjected to the trust. The fact that it was mingled with the general deposits and used in the general business of the bank did not take away its trust character nor prevent the owner from reclaiming it if it can be traced into existing assets in the hands of the receiver."

The Court further says:

"The theory was that, as the fund never belonged to the bank, creditors were not injured if it was turned over by the assignee to its owner."

Finally the Court says:

"Here the funds were augmented and bettered to the extent of the amount of the fund misappropriated and used in the

business of the bank. The assets which came into the hands of the receiver greatly exceeded the amount of the trust fund in question and in fact of all the trust funds claimed. The right to follow and retake the proceeds of trust property ceases only when assets into which the fund has come have been expended so that no part of them can be traced to existing assets.

“No reason is seen for disallowing a preference for the amount drawn out of the savings account by plaintiff and turned over to the bank as part of the special deposit. It was as effectually impressed with the trust as if plaintiff had drawn the cash from the bank and placed it with other moneys in the fund to be used for the specified purpose.”

citing *Goodyear Tire & Rubber Company v. Bank*, 109 Kan. 772, 204 Pac. 992.

It is submitted therefore, that the rules laid down in the opinion in *Secrest v. Ladd* are very persuasive, and, respondent believes, controlling



in the case at bar, because of the adoption of these same rules by this court in its prior decisions.

In the case of *Jones v. Commercial Investment Trust Corporation*, Utah, 228 Pac. 896, this court gave in effect, to the purchaser of an automobile a preference of \$1500.00 over general creditors of an automobile sales agency then in the hands of a receiver. Respondent sees little difference between the facts in the *Jones* case and in the case at bar. Jones delivered to Naylor-Woodruff Company an automobile to be sold by them for \$1,500.00, the sale price, when collected, to be applied toward payment for a new automobile. The \$1,500.00 was obtained before the receiver was appointed but no automobile was delivered. Jones did not seek to obtain a return of the \$1,500.00. He sought possession of the automobile he desired to purchase or had agreed to purchase. To give him this automobile the court had to find him to be a preferred creditor. Had Jones sued to recover \$1,500.00 as a preferred creditor rather than to sue for the automobile the case would have been identical with the case at bar. He would have recovered the

\$1,500.00. A careful reading of the opinion of this court in that case leaves no doubt as to Jones' right to recover the \$1,500.00, had he sued therefor rather than for the automobile. No matter in what light the Jones case is examined, we must necessarily come to the conclusion that the deposit of that \$1,500.00 to be applied on the payment of the purchase price when received from the sale of the old automobile was a special deposit held by Naylor-Woodruff Company in trust for one purpose only, the purchase of a new automobile. The facts are no different in the case at bar. Mr. Walker had transferred into his own right the account of Alice Frye. He had Walker Brothers Dry Goods Company immediately apply the major portion thereof to the payment of an existing indebtedness incurred by his wife and he entered into an agreement with Walker Brothers then and there that the balance of said fund should be held by Walker Brothers Dry Goods Company for the sole purpose of paying for the future purchases of Mrs. Walker. It is difficult to see how any deposit of money could be made for a more specific, definite purpose, or on the other hand, how the conclusion can be escaped that a trust was then and

there created entitling Mr. Walker to his right of preference as given him by the decree of the lower court, when Walker Brothers became insolvent and unable to carry out the trust.

Again, in the case of *Gay v. Young Men's Cons. Cooperative Merc. Institution*, 37 Ut. 280, this court recognizes the creation of a trust. The trust consisted of the receipt of the purchase price of a piece of land, said purchase price to be held, first, to secure the debt due from respondent's husband to the parties receiving the purchase price, and, second, the whole balance of the funds to be held in trust for the wife. The court, in recognizing the creation of a trust, says:

“In view of the findings, it must be conclusively assumed that the parcel of land conveyed to the appellant corporation was by it accepted in trust to be sold for the ‘best price that could be obtained’ therefor, but, in no event, for less than \$300; that when sold so much of the proceeds as was necessary to discharge the debts of respondent's husband to said corporation was to be retained by it, and the balance was to be accounted for to

respondent. The corporation, therefore, obtained the property for a special purpose. The purpose was two fold: (1) To secure the debt due from the respondent's husband to it; and (2) to sell the property for that purpose, but for the best price obtainable, and to hold respondent's share of the funds in trust for her, and to account to her for the same. The obligation of the corporation, therefore, was in the nature of a trust, and its relation to respondent and the fund was in the nature of a trustee, and we shall so treat it. The corporation in selling the property was bound to sell it for the 'best price that could be obtained' therefor. If the property was sold for a less price, the corporation would still be liable to respondent for the difference between what the property was actually sold for and what the corporation could have obtained for it."

In the case of *Van Alen vs. The American National Bank*, 52 N. Y. 1, the New York Court of Appeals in its opinion says, at p. 4:

"It appears to me clear that Van Alen & Rice were the agents of the plaintiff to

sell the bonds, and were bound to keep the proceeds of the same for him. He owned the bonds, directed their sale, and also directed that the proceeds should be kept for him in a particular manner, and he was notified by Van Alen & Rice that they had been sold and the avails placed and would be kept as directed. These undisputed facts establish the relation of trustee and cestui que trust between the plaintiff and Van Alen & Rice as to the proceeds of these bonds.”

It is no less certain that the undisputed facts in the case at bar constitute a trust.

Similar situations are found in the case of *State ex rel Sorensen vs. State Bank of Touhy, Neb.* 240 N. W. 925, in which in the course of its opinion the Court says:

“It is a stipulated fact that claimant instructed the officers in charge of the bank to remit the \$4,305.78 to the agent of the Prudential Insurance Company at Fargo. Claimant used the check for the sole purpose of paying his debt by bank

remittance. What the banker entered on the books and on the so-called 'deposit slip' to the contrary was the work of the bank and did not record the consent of claimant to a deposit. If the amount of the check was a mere credit on the checking account of claimant, the bank could not have used the funds for the remittance directed by him without his personal check, which was never drawn. What was called a 'deposit slip' amounted to no more than receipt for the check delivered to the bank for the sole purpose of providing the means for the remittance ordered. The bank received the check as a trustee, converted the proceeds, used them for banking purposes, and is accountable as trustee. The proceeds constituted trust funds which belonged to claimant pending the execution of the trust — an unperformed duty of the trustee. The trust funds never became the property of the bank and are not assets distributable to depositors."

39 A. L. R. 930.

“In that case” (Northwest Lumber Co. v. Scandinavian-American Bank, 225 Pac. 825) “it appeared that a corporation, having certain bonds outstanding, drew a check on its general deposit in a bank which was trustee for the bondholders, in favor of the bank, for the amount to become due on the bonds, and sent it to the bank. Before it could be passed through the bookkeeping routine of the bank and marked ‘Paid,’ the bank was closed by the state authorities. It is held that, immediately on the acceptance of the check by the bank, the amount represented thereby became a specific deposit for the purpose of making the designated payments, and that the depositor had a preferential claim for that amount. The court holds that it is immaterial that the assets of the bank were not augmented by the transaction.”

“So, in Lusk Development & Improv. Co. v. Giinther (1925) Wyoming 232 Pac. 518, the beneficiary was held to be entitled to a preference with regard to

money paid to a bank to obtain a deed held by it in escrow. The court held, further, that in such case the burden was on the claimant to identify the money to which a trust in his favor had attached, but that, in so doing, he was aided by the rule that if a trustee mingles trust funds with his own it is presumed that, in making subsequent payments, he uses his own money, and not the trust fund. Applying this rule, it was said: 'In the case at bar only five days intervened between the time that the payment herein was made and the time that the bank closed. The presumption is, as stated before, that men act honestly, and, carrying that presumption to its logical conclusion, and applying it reasonably, as may well be done in the case at bar, we should, we think, presume that the trustee in this case did not pay out the trust money, but retained it, and that it passed into the hands of the receiver; hence, throwing the burden to produce evidence to show the contrary on the latter'."



In the case of *Littman v. Broderick*, 250 N. Y. S. 546 a deposit was made at the Bank of United States for payment to a creditor in Havana, Cuba. The Bank issued the usual receipt for such money. The creditor in Cuba declined to accept the money and the depositor sued for its return after the Bank of United States closed its doors. The court held the deposit a special deposit for a particular purpose and held that the Bank, having failed to carry out that purpose, was bound to return the money. In the opinion in this case the court cites and quotes from the case of *Cutler v. American Exchange National Bank*, 113 N. Y. 593:

“In that case the plaintiffs deposited with the defendant bank at New York the sum of \$500 for payment to one Hall in Leadville, Colo., and received the bank’s receipt therefor. The bank at Leadville went into the hands of a receiver before the transaction was concluded, and sought to evade liability, disclaiming that the deposit was a special deposit. The court, by Judge Gray, said: ‘The deposit was a special one for a designated beneficiary, and

could not be used or dedicated by the defendant to any other purpose. No system of bookkeeping entries would be allowed to cause the plain agreement of the parties to miscarry, either with respect to a payment to Hall, or to its return to the depositors in the event of the failure of the defendant to cause such payment.' ”

The Court in its opinion also states as follows :

“In *Libby v. Hopkins*, 104 U. S. 303, 309, 26 L. Ed. 769, the court said: ‘When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting.’ ”

If this is true, as it undoubtedly is, then it necessarily follows that the consent of J. R. Walker to become a general creditor of Walker Brothers Dry Goods Company and not to have his wife’s future account paid with the deposit is necessary and is wanting.

Reichert, State Banking Com'r v. Midland County Savings Bank, 236 N. W. 859

“The question is whether the deposit is a preferred claim against the receiver.

“The general rule, as stated in 31 A. L. R. 473, is: ‘It may be stated as a general rule that where a deposit is made in a bank with the distinct understanding that it is to be held by the bank for the purpose of furthering a transaction between the depositor and a third person, or where it is made under such circumstances as give rise to a necessary implication that it is made for such a purpose, the deposit becomes impressed with a trust which entitles the depositor to a preference over the general creditors of the bank where it becomes insolvent while holding the deposits.’ ”

“The parties to a special deposit in a bank ordinarily do not contemplate that the bank shall set aside specific currency to be held in its vault, but that it will collect outside checks in the usual manner through correspondents upon whose books

they have credit. The practice here followed was usual, showed no intention on the part of the bank to change its agreement and convert the deposit into a general one; nor, having received it in specific trust, could it lawfully have so converted it without consent of the depositor.

“The writing of the certificates of deposits was for convenience in bookkeeping. They were not issued as negotiable paper, as they were not delivered to the depositor. The fact that the bank informed Gallagher that the account was so handled did not evidence an intention to modify the contemporaneous specific agreement that the deposit was in trust; nor did it have such legal effect.”

In the case of *Hudspeth v. Union Trust & Savings Bank*, 195 N. W. 378, 31 A. L. R. 466, it was held that money placed in a bank to be delivered to one who has contracted to outfit a cafe as soon as his contract is complied with, is a trust fund. In its opinion the Court says:

“Without restating the facts, it is quite clear that, by the original transaction, a

trust was created. Although the identical funds were not kept separate, the transaction itself was considered as an escrow transaction, and so shown on the escrow register of the Bennett concern, which passed to its successors. The letter of instructions of April 26th passed from the Bennett Company to its successor and on to the receiver. Both banks had notice and knowledge of the character of the transaction. In addition to this, it affirmatively appears that the fund has not been dissipated, but has come into the receiver's hands as a traceable account, or an augmentation of the whole estate. We do not understand appellee to contend, or the cases to hold, that it is necessary to identify the particular funds. The evidence shows without dispute that at all times both the Bennett Loan & Trust Company and its successor had a sufficient amount on hand to pay this claim, and a sufficient amount went into the hands of the receiver to pay it. Under the recent case of *Messenger v. Carroll Trust & Sav. Bank*, 193 Iowa, 608, 187 N. W. 545, this was sufficient tracing of the

funds into the hands of the receiver, and the estate was augmented to the extent of the deposit.”

In the Hudspeth case, quoting from *Jones v. Chesebrough*, 105 Iowa, 303, 75 N. W. 97, it is further said:

“ ‘It appears that the money in question was received by the Cadwells, and that their estate was increased by that amount. As they received it, knowing its trust character, it will be presumed, in the absence of a showing to the contrary, that it was preserved by them in some form, and that it passed into the hands of the assignee. It is not material for the purpose of this case whether the balance was preserved in the form of money or in other property. It is only necessary that it appear, by presumption of law or otherwise, that it has been preserved in the hands of the defendant. The money having been traced to the estate of the Cadwells impressed with the character of a trust fund, the burden was upon the defendant to show that it contributed nothing to the estate which he acquired by

virtue of the assignment, and that he has failed to do.' "

"The relation of a bank toward a depositor who places money with it for a special purpose of paying a note held by a third person is that of a trustee, and the amount so deposited is a special deposit within the rule allowing the recovery of a special deposit as a preferred claim after the insolvency of the bank. *Central Bank & T. Co. v. Ritchie* (Wash.) *supra.*" (120 Wash. 160, 206 Pac. 926 [1922.])

"In *Capitol Natl. Bank v. Coldwater Nat. Bank* (1896) 49 Neb. 786, 59 Am. St. Rep. 572, 69 N. W. 115, writ of error dismissed in (1899) 172 U. S. 434, 43 L. Ed. 505, 19 Sup. Ct. Rep. 873, it was said that a fund which comes into the possession of a bank, with respect to which the bank has but a single duty to perform, and that is, to deliver it to the person entitled thereto, is a trust fund, and is incapable of being commingled with the general assets of the bank, subsequently transferred to its receiver."

“In *People v. City Bank (N. Y.) supra*” (96 N. Y. 32) (1884) “it was said with reference to checks deposited in a bank for the specific purpose of paying certain notes held by a third person: ‘The checks were impressed with a trust, and no change of them into any other shape could divest it so as to give the bank or its receiver any different or more valid claim to them than the bank had before the conversion.’ ”

“Where the owner of a house damaged by fire took the check received from the insurance company to a bank, and stated that she wanted it collected and kept by the bank for the particular purpose of paying the contractor who was repairing her house, but refused to allow it to be credited to her checking account, whereupon she was given a receipt bearing the words ‘Sp. Dept.,’ it was held that, on the insolvency of the bank, her claim should be treated as a trust fund, entitling her to a preference over the general creditors of the bank.”

“In *Lamb v. Ladd* (1922) 112 Kan. 26, 209 Pac. 826, it was held that the owner



might recover as a trust fund a deposit made in a bank in an escrow account to be paid to a third person on the fulfillment by him of a certain contract for drilling an oil well, or returned to the depositor on the failure of the third person to carry out his part of the contract, where it appeared that he had so failed, and the bank had commingled the deposit with its general funds used in the general course of its banking business, and had subsequently become insolvent.”

“Where a purchaser of real estate delivered to a bank a sum of money to be paid over to the seller when he should present to the bank a warranty deed, properly executed, together with an abstract showing good title, and took a receipt from the bank, reciting the purpose for which the money was left with it, on the subsequent failure of the bank it was held that the fund was impressed with a trust, and could be recovered from the receiver in preference to the general creditors of the bank. And the fact that the bank, without the

knowledge or consent of the purchaser, gave credit on its books to him as of a general deposit, and mingled the money with its general funds, was held not to change the character of the transaction.” (Kimmel v. Dickson (1894) 5 S. D. 221, 25 L. R. A. 309, 49 Am. St. Rep. 869, 58 N. W. 561.

“Where the cashier of a bank negotiated a loan for a purchaser of real estate, and, by agreement between the vendor and purchaser, he was to collect the draft given for the loan and hold the same until the transaction was closed, and then turn the proceeds over to the vendor, it was held that the funds were impressed with a trust in favor of the vendor, and so did not pass to the receiver of the bank on its insolvency; and this was true despite the fact that a certificate of deposit was issued to the vendor for the amount, since such certificate, under the circumstances, amounted to no more than a receipt or acknowledgment that the bank held the money for the vendor under the terms stipulated, and did

not make the vendor a general depositor. State ex rel. Ladenburger v. State Bank (1894) 42 Neb. 896, 61 N. W. 252.”

Corporation Commission v. Merchants Bank & Trust, 138 S. E. 530, 57 A. L. R. 382 (North Carolina)

Quoting from Morton v. Woolery, 189 N. W. 232)

“ ‘Where money is deposited for a special purpose, as, for instance, in this case, where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one, but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all, or misapplies it, it can be recovered as a trust deposit.’ ”

The North Carolina court then says:

“Brushing aside the cobwebs, in this action the \$20,000 Page check was deposited upon the distinct agreement and under-

standing that Angelo Bros. were to check out \$12,950 to pay off the lien; in fact, the \$20,000 check was part purchase price of land that there was a lien for \$12,950 on.

“The \$20,000 deposit was impressed with the trust to the extent of \$12,950. The specific purpose was to pay out of it the \$12,950. Under the facts and circumstances of this action, equity will hold the \$12,950 for the benefit of Angelo Bros. The check was held in trust by the bank for this specific purpose. The balance, it would seem, under the facts disclosed, was a general deposit. There is no question as to the bank collecting the check as it was marked ‘paid’ the very day of the deposit. In a court of equity, the general rule is ‘Equality is equity,’ but not so, as in this action, the check of \$20,000 was impressed with a trust of \$12,950. This amount has priority of payment out of ‘the assets in the hands of said receiver.’ As to the balance of the \$20,000 deposit, Angelo Bros. is a creditor like any other unsecured creditor.”

In the case of *Blythe v. Kujawa* (Minn.), 220 N. W. 168, 60 A. L. R. 330, it appears that the plaintiff purchased a farm from the defendants Kujawa. It was agreed that \$4,500, a note, and a mortgage on the property should be left in escrow in the National Farmers' Bank until title to the farm was perfected and approved and a deed given. This agreement was carried out through the agency of F. M. Blythe, a brother of the plaintiff. By direction of an officer of the bank, F. M. Blythe deposited the check in the bank to his own account. The banker then made out a check for the amount on the National Farmers' Bank, payable to John Kujawa, the vendor of the farm, and directed F. M. Blythe to sign it, which he did. The note, the mortgage, and the check to Kujawa were placed in an envelop by the banker, with directions on the envelop to deliver over the \$4,500 to Kujawa when the conditions with regard to the warranty of title had been complied with. The bank credited its assets with the check for \$4,500 deposited to the account of F. M. Blythe. F. M. Blythe never drew

out any of the \$4,500 so deposited. The bank failed and its assets passed into the hands of a receiver before the title to the land was perfected. On the tender of the warranty deed, the receiver refused to receive the deed or recognize the escrow. The court holds that the \$4,500 was a trust fund and special deposit held by the bank, and that the plaintiff was the owner and entitled to the \$4,500 trust fund.

And in *Evans v. People's Bank*, 6 S. W. (2d) 655, where \$4,000 was deposited in the defendant bank, with directions that the bank use this money to purchase certain government bonds, the court held that such funds constituted a special trust fund, and entitled the plaintiff, on the bank's insolvency, to a preferred claim in the assets of the bank, saying: "Plaintiff had a checking account in the bank. She delivered to the cashier two checks on this account for \$2,000 each, payable to bonds, and directed him to invest the proceeds of said checks in government bonds for her. The cashier charged these two checks to her account,

thus withdrawing \$4,000 from said account. While it is true that the \$4,000 may not have actually passed into the physical possession of the cashier, yet the legal effect of charging these checks against plaintiff's account, under the circumstances here shown, was to place \$4,000 of plaintiff's money in the hands of the cashier, with special instructions from plaintiff to invest it in government bonds for her. The cashier violated his instructions by investing the money in time certificates of deposit in said bank, instead of investing it in government bonds, as he was directed to do. The voluntary, wrongful, and unauthorized act of the cashier in placing this money on time deposit and issuing certificates of deposit therefor, without the knowledge or consent of plaintiff, could not have the effect of forcing her to accept a relation with said bank that she never intended to create, or change the relation that was actually created at the time plaintiff delivered the checks to the cashier and directed him to invest their proceeds in government bonds. Relationships are created by the

conduct or agreement of both parties, and not by the voluntary act of one party without the knowledge or consent of the other. *Ellington v. Cantley* (1927) Mo. App. 300 S. W. 529, 530; *William R. Compton Co. v. Farmers Trust Co.* (1925) 220 Mo. App. 1081, 279 S. W. 746, 749. We therefore hold that the unauthorized act of the cashier in investing plaintiff's money in time certificates of deposit did not create the relation of debtor and creditor between plaintiff and the bank. A trust has been defined to be 'a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived.' 39 Cyc. 17. The supreme court of this state, in *Corby v. Corby* (1884) 85 Mo. 371, defines a trust as follows: 'A trust is a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the cestui que trust).' The transaction had between plaintiff and the bank created a relation of trust, and not of debtor and creditor. When the bank accepted the money from plaintiff with speci-



the directions to invest it in government bonds, the title thereto did not pass, but the bank thereafter held the money in trust for plaintiff, subject to the duty of investing it in government bonds as directed by plaintiff.”

Also in *Greenfield v. Clarence Sav. Bank Mo.*, 5 S. W. (2d) 708, it appeared that the plaintiff, George W. Greenfield, who had no account with the Clarence Savings Bank, went there for the sole purpose of purchasing bonds as an investment, and, on the suggestion of its president, he left \$2,000 with the bank, with the distinct understanding that the bank was to purchase bonds of the Farm & Home Savings & Loan Association of Nevada, Missouri, for him with this money. When George W. Greenfield made the deposit in the Clarence Savings Bank, he was given a receipt as follows: “Clarence, Missouri, March 10, 1925. Received of George W. Greenfield, Leonard, Missouri, two thousand and no/100 dollars for the purchase of four five hundred dollar coupon bonds of the

Farm & Savings and Loan Association, Nevada, Missouri, \$2,000. Clarence Savings Bank, by M. H. Lewis, President," The Clarence Savings Bank later became insolvent. The court, in holding that the plaintiff was entitled to a preference, that the deposit made was a special deposit, said: "The trial court, in our view, properly held that it was the intention of plaintiff and the understanding of the bank that the money was accepted by the bank as a special deposit for the specific purpose of purchasing bonds. The fact that, after the insolvency of the bank, M. H. Lewis, its president, gave his personal note for \$2,000 to plaintiff Greenfield, as collateral security for the payment of the deposit, with the understanding that the note was to be returned to Lewis after Greenfield should receive his money from the finance commissioner upon liquidation of the bank, cannot in any manner affect the plaintiff's right to follow and recover the special deposit, where, as here, the right of no creditor of the bank has been prejudiced by the taking of the security."

In *Re Security Sav. Bank (Iowa)*, 217 N. W. 831, it appeared that George J. Dugan was the attorney for the administrator with the will annexed of the estate of one White, and was also a representative of the Western Surety Company. A loan to be made on the property of the White estate was in contemplation, and, in the negotiations therefor, it became necessary for the administrator of the White estate to furnish a bond. The bond was furnished by the Western Surety Company and was executed by Dugan as the representative of that company. In order to secure the payment of the premium on the bond, heirs of the White estate deposited the amount of the premium, \$314.53, with the Security Savings Bank, for which a certificate of deposit or cashier's check was issued, and held by Dugan. Later, before the bank closed its doors, Dugan, through a representative, demanded payment of the \$314.53. The representative was induced by the officers of the bank to leave the amount in the bank on special deposit and to accept the following certificate: "Securi-

ty Savings Bank, Perry, Iowa, Jan. 24, 1925. No 5214. Geo. Dugan, trustee, has deposited in this bank three hundred fourteen and 53/100 dollars, \$314.53, payable to the order of himself as trustee in current funds on the return of this certificate properly indorsed. Special deposit as per notation on back. H. N. Graves, Cashier." On the back of the instrument appeared the following: "This amount of \$314.53 is a special deposit, and paid into this bank for the express purpose of paying the premium of a bond of Western Surety Company to Annis & Rohling in John White estate, and said funds are a special deposit for said purpose, and preferred claim for the above amount. Security Savings Bank, by N. H. Graves, Cashier." Later the bank became insolvent, and its assets passed into the hand of a receiver. The court held that the appellant, Dugan, was entitled to a preference, since the fund constituted a special deposit, and the bank held the money as trustee, and since the funds of the bank were thereby augmented and so had passed into the hands of the

receiver. In so holding, the court said: "It is also well settled that a special deposit, or a deposit for a specific purpose, creates a trust relation as between the depositor and the bank, which will entitle him to a preference. *Officer v. Officer* (1903) 120 Iowa, 389, 98 Am. St. Rep. 365, 94 N. W. 947; *Hudspeth v. Union Trust & Sav. Bank* (1923) 196 Iowa, 706, 195 N. W. 378, 31 A. L. R. 466, and cases cited in note in the latter publication. See also 7 C. J. 631, 751. Here the character of the deposit as special was recognized, the purpose for which the money was to be used was designated, and the right of the depositor to a preference was secured by the express terms of the certificate issued by the bank, the written contract between the parties. The basic fact upon which a preference must be predicated, the existence of a relation of trust between the bank and the claimant, could not be more definitely and certainly established."

The foregoing authorities and the rules enunciated therein establish beyond a doubt the

creation and existence of a trust in the case at bar.

In answer to the further contentions of appellant we cite the following cases. They not only further tend to establish the existence of a trust but likewise lay down the rule that a definite presumption exists in case of a trust followed by insolvency, that the insolvent has used its own funds first, and that what remains and passes to the receiver contains either the trust funds or the proceeds therefrom. In case of money the rule simply requires sufficient moneys to come into the hands of the receiver to meet the requirements of the trust. Respondent endeavors to establish the further rule that the burden of proof resting upon the plaintiff is sustained upon proving the existence of the trust, and that the trust fund augmented the assets of the insolvent coming into the hands of the receiver; that upon the establishment of such a *prima facie* case the burden of proof shifts to the defendant; that this presumption can only be overcome by evidence to the contrary; and furthermore, that this presumption is very greatly strengthened when there is but a short time intervening between the deposit of the

trust funds, that is to say, the creation of a trust, and the appointment of a receiver. In the case at bar but thirty days intervened. When the receiver was appointed at the end of the thirty day period more than enough cash passed into the hands of the receiver to meet the preferred claim of the respondent, and additional assets sufficient to pay general creditors approximately fifty five per cent. Rather than to discuss these questions further in our own language, we have quoted rather liberally from the cases which we cite and rely upon. We feel justified in so doing because of the importance to the respondent of establishing his preference. We have endeavored to confine ourselves to the citation and discussion of leading cases only. This Court has heretofore seriously considered these questions in the case of *Tooele County Board of Education v. Hadlock*. Respondent contends that the opinion in this case should control in the case at bar. Except for the contrary position taken by appellant in its brief many of the cases cited would have been unnecessary. We pass, then, to a review of these cases.

In the case of *Tooele County Board of Education vs. Hadlock*, 11 Pac. (2d) 320, this court says:

“An essential requirement of the law as to which there is no dispute between counsel for the parties is that, in order for funds in a bank or otherwise to be impressed with a trust, they must have increased or augmented the assets of the trustee coming into the hands of the receiver.”

The County Treasurer in this case issued a check on the funds in the bank for \$120,000.00 in favor of the Board of Education. It was argued that this did not augment the funds of the bank; that it was a mere bookkeeping transaction. The Court says:

“No case has been called to our attention, and none has been found by us holding that under circumstances such as these a deposit made in a bank by means of a check drawn on that bank will not be impressed with a trust where it would have been so impressed had the check been drawn on another bank. It is undisputed that there was in the bank more money than was required to pay the check when



it was presented to the bank on December 24, 1930.’’

Again, in the case at bar, the same contention is made that by the transfer of the account of Alice Young Frye to J. R. Walker the assets of Walker Brothers Dry Goods Company were not augmented. The analogy between the situation here and in the Tooole case is identical. It is undisputed that Walker Brothers Dry Goods Company had sufficient funds with which to pay off the entire account assigned to J. R. Walker. Mrs. Chase says,

18           “‘A. At this time Mr. Walker asked me to transfer the account of Alice Young Frye from her savings account to pay the account of Mrs. J. R. Walker and it left a balance of two thousand dollars, somewhere around that. He said Mrs. Walker would be charging more merchandise and we would use that to pay the account, use this two thousand to pay the account when her account was that amount.’’

and Mr. Walker testified:

“ . . . I could have drawn it out if I wanted to.”

The situation, therefore, is identical with the Tooele situation. This court in its opinion further says, page 323:

“The transaction was one equivalent to the board demanding and receiving its money and thereafter placing it on deposit in the bank to its credit. Had this been done, there would have been no difference in the status of the deposit from that of the \$66,448.86 which the court found to have been impressed with a trust. The authorities sustain the view that this is an augmentation of the funds and is sufficient to satisfy the requirements of the law in that respect.”

Likewise, Mr. Walker could have withdrawn the money, for his testimony stands uncontradicted, and he could then have redelivered it to Walker Brothers Dry Goods Company for the special purpose of paying his wife's account. No other conclusion can be reached, therefore, than that the cash on hand of Walker Brothers Dry Goods

Company was augmented by the \$2,909.85. The quotations contained in the Court's opinion from the cases of Goodyear Tire & Rubber Co. v. Hanover State Bank, 109 Kan. 772, 204 Pac. 992, and Northwest Lumber Co. v. Scandinavian American Bank of Seattle, 130 Wash. 33, 225 Pac. 825, are peculiarly in point.

We have heretofore suggested in this brief that appellant is entitled to the benefit of the presumption that what remains at the time of insolvency is a trust fund. The Court says at page 325:

“The same rule as to identifying or tracing the funds applies to public as to private funds. The money must be identified or traced into some other specific fund or property. There is a presumption, however, that what remains at the time of insolvency is a trust fund. The law presumes that trust funds were not appropriated and that a balance of cash in the hands of the depositary is the trust funds.”

While in the Tooele case this presumption was in part at least rebutted by evidence offered for that purpose, in the case at bar the presumption stands. No pleadings attack it. No evidence was offered to rebut it. The defendant admitted paragraphs eight and eleven of plaintiff's complaint, thereby in effect admitting that the receiver received sums of money in excess of the amount of plaintiff's preferred claim upon his appointment as receiver, and that the assets which came into his hands were sufficient to pay approximately fifty-five per cent. of the amount of the claims of general creditors. As a result thereof, respondent is entitled to the full force and effect of the presumption, and if, therefore, the respondent is correct in his contention that this fund is a trust fund, he is entitled to be paid in full as a preferred creditor. This Court goes on to say in the Tooele case:

“The law has been fairly stated in the Wyoming case of Lask Development & Improvement Co. v. Giinther, 32 Wyo. 232 P. 518, 520.”

This Court then quotes from the Wyoming case:

“ ‘Starting out, then, with this established principle, that money in the case at bar must be traced and identified in some specific fund or property in the hands of the receiver—not, however, the identical money paid in—the question remains, whether, indulging in all proper presumptions, that has been done in this case. The burden of proof to do so is on the cestui que trust. 39 Cyc. 532. But, when certain facts are shown, a presumption may aid him and the burden to produce further evidence may shift to the opponent. *First Nat. Bank v. Ford*, 30 Wyo. 110, 216 P. 691. The presumption is that men act honestly; that when a trustee mingles trust money with his own, and then draws out sums from a common fund by check or otherwise, it will be presumed that he drew out his own in preference to the trust money’.”

citing cases including *Waddell v. Waddell*, 36 Utah 435, 104 Pac. 743, and continues:

“This principle has frequently been applied to cases where an insolvent, at

the time of the insolvency, had a certain balance of money on hand which went into the hands of the receiver, and in such case it has frequently been presumed that such balance included the trust money.”

It is said in the case of *Sherwood v. Central Michigan Savings Bank*, 103 Mich. 109, 61 N. W. 352:

“The courts are not overtechnical or zealous in seeking an opportunity to say that the trust fund or property cannot be traced or that it has disappeared altogether from the fund in which it or its proceeds have been comingled where there is evidence from which the contrary may legitimately be inferred.”

In the case of *Yellowstone Company vs. First Trust & Savings Bank*, 46 Mont. 439, 128 Pac. 596, it is held that where trust funds are mingled with funds of the Bank the entire mixed fund is subject to the trust except to the extent that the Bank is able to distinguish and separate its own from the trust fund, and in such cases

the burden is on the Bank or its receiver to show that the commingled fund or that which remains therein is not subject to the trust.

In the case of *Thompson vs. the Bank of Syracuse*, 278 S. W. 810 and in *Evans v. French*, 6 S. W. (2d) 655, although the Missouri Court held that it was encumbent upon the beneficial owner of a trust fund to trace or follow the same into the hands of the receiver, nevertheless it held that the showing that the trust fund was commingled by the Bank with its general assets and that assets came into the hands of the receiver sufficient to cover the trust fund is sufficient without a more particular tracing of the trust fund to subject the entire assets in the hands of the receiver to the satisfaction of the trust.

*Townsend v. Athelstan Bank*

*Dye v. Hook*, 237 N. W. 356.

“Manifestly, the intervener deposited the proceeds of his sale of cattle for the special purpose of meeting the Hess check; or, stating it another way, the intervener made the deposit for the special

purpose of drawing a check in favor of Hess against it."

" 'When cash remains in the failing concern at the time it discontinued banking operations and such money was afterwards delivered to the receiver, \* \* \* the presumption is that said commingled fund contains 'the trust proceeds,' and the latter can be removed from the whole without injury or injustice to the general creditors because there was 'augmentation.' Charity assumes that the trustee did no wrong, but spent and disposed of his own property and retained that which belonged to others'."

From a note in 82 A. L. R. at 141 we take the following:

"As we have seen, the commingling of a trust fund with the funds of the trustee bank does not extinguish the trust nor defeat the right of the beneficial owner to follow his fund into the hands of the bank's receiver, since the identity of the specific money representing the trust fund



is immaterial. See subd. XI. a, b, supra. It is settled by the overwhelming weight of modern authority that where the bank commingles trust funds with funds of the bank, all withdrawals and disbursements by the bank for its own purposes out of the mixed fund are presumed to be of the bank's own portion of such fund, rather than of the trust funds, so long as the balance of the common fund remains in excess of or equal to the amount of the trust funds, since it is presumed that the trustee acted rightfully and left the trust funds intact, rather than that he violated the trust, and any balance remaining in the common fund and passing into the hands of the receiver is presumed to include or to be a part of the trust funds and is subject to the trust."

At page 167 of the same note the author has the following to say:

"The Court in *Carlson v. Kies* (1913) 75 Wash. 171, 47 L. R. A. (N. S.) 317, 134 Pac. 808, having stated the doctrine as a rule of substantive law, expressed

its doubt as to the desirability of treating it as a mere presumption.

“It will be noted that the case of *Knatchbull v. Hallett* (1879) 13 Ch. Div. (Eng.) 696—C. A., does not lay down the rule that this presumption is rebuttable by evidence of facts or circumstances showing that the trust money has in fact been withdrawn from the common fund, where the balance of the fund exceeds the amount of the trust money. On the contrary as will be noted, the language of Jessel, M. R. is that where one can rightfully perform an act, ‘he cannot say’—‘he is not allowed to say’—that the act was in fact done wrongfully, and that, applying this principle to the case of a trustee who has blended trust moneys with his own, ‘he cannot be heard to say’ that the trust money was used and his own funds left intact. And the principle is thus stated in the dissenting opinion of Thesiger, L. J., who, while indicating his approval of the doctrine of a majority of the courts, as a matter of principle, felt constrained

by the authority of earlier cases to give effect to the rule of Clayton's case (1816) 1 Meriv. 572, 35 Eng. Reprint, 781, 3 Eng. Rul. Cas. 329: 'The presumption of a man's innocence of crime may reasonably be set off against the presumption that he intended such an appropriation of payments upon his banking account as could only exist if he intended to commit a crime; and to the argument adduced by Mr. Hallet's representatives in the present case, that the facts proved indicate that he did in fact intend to misappropriate, and had misappropriated, the trust property, the answer might be given, as it might have been given to Mr. Hallett himself if he had been alive to use the argument, '*allegans suam turpitudinem non est audiendus*.' This language would seem to indicate that the principle supporting the modern doctrine is not merely a logical presumption that the trustee will act rightfully rather than wrongfully, which may be rebutted by direct evidence to the contrary, but is a rule of substantive law, analogous to the doctrine of estoppel, by which the trustee

and those claiming under him are absolutely precluded from saying that the trustee used the trust money rather than his own, or from taking advantage of the trustee's own wrongful acts."

From page 204 of the same note we copy the following:

"Where it is shown that the trust fund has been mingled by the bank with its own funds, it has been held that the burden shifts to the bank's receiver or assignee to distinguish between the bank's own property and that of the cestui que trust. *Smith v. Mottley* (1906; C. C. A. 6th) 80 C. C. A. 154, 150 Fed. 266, 17 Am. Bankr. Rep. 863. The whole fund may be held subject to the trust until an equitable separation of the trust money may be made. *First Nat. Bank v. Williams* (1926; D. C.) 15 F. (2d) 585. The fund resulting from the commingling is impressed with a trust to the amount of the trust money mingled therein."

In the case of *Eastman vs. Farmers' State Bank of Olivia* (Minn.), 221 N. W. 236, it is said:

“The burden of proof goes no farther than to require plaintiffs to show that the money actually came into the hands of the bank. That such was the fact is conceded. Had there been on hand the day that Veigel as superintendent took charge of the bank an amount in cash equal to or greater than the balance of the trust funds in question, plaintiffs would have been entitled to full payment as a preferred creditor. This proposition is supported by numerous authorities and is conceded.”

In *Woodhouse v. Crandall*, 64 N. E. 292, a question arose as to whether \$1,500.00 deposited with the Bank to secure the performance of a certain lease constituted a trust fund. The court says:

“This deposit was for a specific purpose, for the benefit and security of a third person (Charles F. Woodhouse), and it created a trust relation in his favor. The banking firm assumed the position of a trustee, and the money deposited constituted a trust fund, which the

bank was bound to keep intact for the purpose of the trust. The obligation of the bank was to preserve the sum of \$1,500 as a trust fund for the person mentioned in the receipt, and to apply it to the purposes therein specified, and the title to such trust fund did not pass to the bank as a part of the general funds of the firm."

The court not only found a trust to exist but further stated at page 294:

"The presumption in such a case is that the money drawn out by the depositor is his own, even if the trust money and his own are in one account, rather than that he had disregarded his trust and violated his duty. The supreme court of the United States, approving of that decision, held in *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.* 104 U. S. 54, 26 L. Ed. 693, that although the relation between a bank and its depositor is that merely of debtor and creditor, and the balance of account is only a

debt, if the money is held by the depositor in a fiduciary capacity its character is not changed by being placed to his credit with his own money in his bank account. Money having been placed in the vaults of the bank, the law presumes that the trustees drew out their own money first, and that what remained belonged to the trust. When the firm failed, there was remaining in the vault where this money was put \$1,152.66 in cash, which the receiver obtained, and the legal presumption is that this belonged to the trust fund."

In the case of *Carlson v. Kies* (Wash.), 134 Pac. 808, a special deposit of some \$3,000.00 was made a few days before the Bank closed its doors, to be held until certain receipts were received. The court in this case says:

"On the other hand, when a bank accepts a special deposit it becomes a trustee of the depositor and holds the money subject to the trust. The receipt itself affords strong, if not conclusive, evidence of a special deposit. It shows that the money was placed in the bank for a special pur-

pose. Fortified by the evidence of the depositor and the admitted circumstances here present, it is obvious that both parties to the transaction intended to make a special and not a general deposit. It follows, therefore, that the bank holds the money, not as a general debtor, but in a fiduciary capacity."

And again:

"The doctrine of the modern authorities and what we consider the sounder view is that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension and passed to the receiver."

And again:

"In *Fogg v. Tyler* it was held that, where a sum of money in excess of the amount of a special deposit was in the hands of the trustee bank when it became insolvent, the trust will be enforced notwithstanding the fact that the identical money cannot be identified. It was said that it suffices if it can be traced into the



hands of the trustee 'either in its original or its altered state.' The Shopert case voices a like rule. There the court also said that receivers take the property of the insolvent subject to all legal and equitable claims, and that, when a fund consists of money, 'identification does not require that the identical bills or coins be discovered, but the ascertainment of the fund into which it has entered and lodged is sufficient'."

This presumption that the trust funds are included in the moneys on hand at the time the receiver takes charge is strengthened when the time intervening between the deposit and the failure is relatively short. In this case Walker made the deposit in May; the receiver was appointed in June. In the annotation in 82 A. L. R. at page 93 we find the following:

"The fact that only a short time elapsed between the receipt of the trust fund by the bank and the final closing of the bank because of insolvency logically reduces the probability that the fund has been paid out or dissipated by the bank.

Indeed, this interval may be so short as to reduce almost to zero the probability that the fund was lost before the closing of the bank. And the courts sometimes give much weight, if not controlling effect, to the shortness of this intervening period.”

This statement is amply borne out by the Supreme Court of Wyoming in the case of Lusk Improvement Company vs. Giinther, 32 Wyo. 294, 232 Pac. 518, cited with approval by this Court in the Tooele bank case. See also Carlson v. Kies (Wash.), 134 Pac. 808 and Secrest v. Ladd (Kan.), 209 Pac. 824, in which latter case 60 days elapsed. The same rule was nevertheless applied.

Fully one-half of appellant's brief is devoted to a discussion of the account of Alice Frye prior to its assignment to the respondent. According to the evidence as detailed in appellant's brief, Mr. Walker held and accumulated a fund in trust for Alice Frye and this fact was known to Mrs. Chase, the control accountant. The funds, therefore, came into the hands of Walker Brothers Dry Goods Company with knowledge on its part of the trust

relationship existing between the respondent and Alice Frye. On page 12 of appellant's brief appellant quotes from the testimony of Mr. Walker in which Mr. Walker says, "I put it in there," (speaking of Mrs. Frye's deposit) "I was trustee." There can be no question, therefore, that whatever moneys Walker Brothers Dry Goods Company took of Alice Frye the same was impressed with the trust existing between the respondent and Alice Frye. Walker Bros. Dry Goods Co., or the appellant standing in its shoes, could not claim to stand in the position of a bona fide purchaser without notice. Whether Alice Frye was a simple contract creditor, as claimed by appellant, or not ceases to be of controlling importance upon the transfer of the deposit to the respondent and the definite change made by the respondent in the nature of said deposit at the time of said transfer. On page 7 of appellant's brief appellant states that in May, 1930, and while respondent was president and director of the Company, he made settlement with Alice Frye and she assigned her claim against the company arising out of the deposit of funds, to the respondent. The credit balance in favor of Alice Frye at this time approximated the sum of \$5,909.85. In emphasizing the

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fact that respondent was president and director of the company at this time, that is, May, 1930, and ordered the control accountant to do as he said, appellant overlooks the fact that on page two of its own brief it has emphasized the fact that Walker at that particular time was only a figurehead. He was not ordering any one at that time. Quoting from appellant's brief:

“From 1903 to November, 1928”  
(speaking of respondent) “he was the active head of the business, but after that date Dreyfous completely ordered its destinies and the plaintiff Walker was only a figurehead.”

Walker entered into a new agreement with the Company at that time. The Company acted through Mrs. Chase, its control accountant, who was in turn under Mr. Dreyfous, the general manager and actual head of the Company. After the transfer of the Frye account to respondent there was no agreement on the part of the Company to pay interest upon the \$2,909.85 or to hold the same as an account payable to an employee or as an employee's savings account. Whatever may

have been the nature of the deposit in favor of Mrs. Frye, after the transfer to Mr. Walker a new and entirely different relationship came into existence. There was a definite novation. In place of an account upon which the company paid interest, the company, in legal effect, paid the total amount of the deposit of Mrs. Frye to the respondent and the respondent in turn applied \$3,000.00 thereof to the payment of his wife's present indebtedness and deposited with the Company under an entirely new, separate and distinct arrangement the balance of \$2,909.85, to be held by the Company for the specific and sole purpose of paying for his wife's future purchases. It is with this transaction that we are concerned upon this appeal. We can rely with implicit confidence upon the decision of this Court in the case of Tooele County Board of Education v. Hadlock, 11 Pac. (2d) in which the Court says:

“The transaction was one equivalent to the board demanding and receiving its money and thereafter placing it on deposit in the bank to its credit.”

On this particular point appellant relies largely on the case of Blakey v. Brinson, 286 U. S.

254, 76 L. Ed. 1089. An important detail distinguishes this case from the case at bar. We have involved in the Blakey case a trust ex maleficio. In the annotation in 82 A. L. R. at page 159 the cases are cited dealing with trusts ex maleficio. In the case of *People v. California Safe Deposit & T. Co.* 175 Cal. 756, 167 Pac. 388, the question is asked, "Can the wrongful act of the party obtaining the money furnish the basis for making him a trustee, and at the same time the ground for presuming that he acts rightfully?" And the Court disposed of this question in the negative. Numerous other cases are cited in which it is held that the presumption in favor of the trust funds upon commingling thereof does not exist in cases of trusts ex maleficio. Furthermore, in the Blakey case there is no third person such as we have in the case at bar. Had the savings account in the Blakey case been closed and had the bank agreed to hold the amount thereof for the sole purpose of paying a definite obligation of a third person thereafter to become due, we would have a situation similar to the case at bar. As the case stands, we do not. We wish at this point to emphasize the fact that the Court in this opinion says:

“It would have been equally competent for respondent to have provided for the purchase of the bonds by the creation of a trust of funds in the hands of the bank to be used for that purpose.”

Inasmuch as the Court found from the evidence that he had not done this the case is clearly and definitely distinguish from the case at bar. The evidence in the case at bar of both Mr. Walker and of Mrs. Chase stands uncontradicted that such a trust was created. Counsel in his brief attempts to distinguish the Tooele County case from the case at bar. In making this comparison appellant assumes there was no change in the status of this account upon the transfer thereof to Mr. Walker and thereafter the agreement upon the part of Walker Brothers Dry Goods Company to hold the balance to pay it for the indebtedness of Mrs. Walker. Inasmuch as this assumption is contrary to the law, as herein cited, the purpose of the attempted comparison must fail. Appellant has likewise overlooked the fact that Walker Brothers Dry Goods Company took Mrs. Frye's money from the respondent knowing it was held by respondent in trust for Mrs. Frye and, therefore, impressed

with the same trust in their hands. We believe, by the authorities which we have heretofore cited, that we have amply substantiated our position that the assets of Walker Brothers Dry Goods Company were augmented in May of 1930 by J. R. Walker leaving with the Company the sum of \$2,909.85 for the payment of his wife's future account. We contend likewise that we have established by the authorities cited the existence of a presumption in favor of respondent. The moneys which came into the hands of the receiver, being greater in amount than respondent's claim, included the trust fund to which respondent is entitled. Had this not been the case, after our establishing our prima facie case, the burden of proof shifted to the appellant to prove the contrary. The facts and the figures and all of the information were peculiarly within the knowledge of the appellant. The appellant nevertheless offered no proof whatsoever to rebut said presumption and, therefore, upon this appeal should not be heard to say that respondent has failed to trace the proceeds of the trust into the hands of the receiver.

The third proposition dwelt on at great length by appellant in its brief, commencing at page 34,



has likewise been fully answered by the authorities herein cited. Appellant would go back and insist upon respondent tracing the funds of respondent's assignor. This, of course, becomes unnecessary under respondent's theory of the case. There were funds on hand with which to pay the full amount of Mrs. Frye's account in May of 1930, when the same was transferred to J. R. Walker. He in effect gave to the company \$2,909.85 at that time, within a month of the appointment of a receiver. The receiver received more than the amount of respondent's preferred claim in cash and enough other assets to pay general creditors approximately fifty-five per cent. We have clearly established facts sufficient to establish a prima facie case, upon which the presumption is predicated. What happened prior to May of 1930 is immaterial.

On page 31 and on page 34 of appellant's brief appear statements in bold, heavy type. Each of these statements might be material and important, as respondent has indicated heretofore, had this action been brought by Mrs. Frye in her own right prior to any assignment or change in the condition of the account. The first statement on

page 31 complains because each of the original deposits of Mrs. Frye have not been traced specifically into the hands of the receiver, and the second statement, on page 34, complains of the fact that these original deposits of Mrs. Frye were intermingled with the funds of the corporation used in the business of the corporation and have not been traced into the hands of the receiver. The entire balance of appellant's brief is largely devoted to a discussion of cases which might have some application or bearing in a suit instituted by Mrs. Frye, but no bearing in the instant case, subsequent to the assignment of the account to Walker and the new agreement made by Walker with the corporation. In this latter half of plaintiff's brief the evidence concerning bank accounts and time deposits, the custom of Walker Brothers Dry Goods Company prior to Mr. Dreyfous' regime, are discussed at great length, as though they had some bearing upon the case at bar. Their importance was terminated upon the assignment to respondent after Mr. Dreyfous had entirely changed the old, established methods and customs of the firm and had accepted said assignment. The Frye account was paid in full and ceased to exist for all purposes. In lieu thereof a

new obligation sprang up, in which the company, under Mr. Dreyfous' management, accepted and agreed to hold in trust for the use and benefit of a third person, to-wit: Mrs. Walker, the sum of \$2,909.85. It is in the light of the conditions as they existed at the time the receiver was appointed that a correct decision of this case can be found, not in the condition of affairs prior to the creation and existence of the rights of respondent sought to be enforced in this action. It would be as useless, therefore, to discuss the cases cited in the latter portion of appellant's brief as it would be to prolong a discussion of the evidence therein set forth at considerable length.

In conclusion, it is submitted that a trust relationship was entered into by the respondent and Walker Brothers in May of 1930, as a result of which the respondent is entitled to receive as a preferred creditor the sum awarded him by the lower court, and is entitled to an affirmance of the judgment of the lower court.

Respectfully submitted,

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