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Banks and Banking—Special and General Deposits—Glass v. Nebraska State Bank (Neb. 1963)

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According to the testimony of defendant bank's teller, prior to the plaintiff's deposit, plaintiff and C, the maker of the deposited check, asked if an escrow account could be opened to cover the check of another party, D. After being informed that such an account was possible, plaintiff and C told the teller that they would make such a deposit. When the checks of D were presented for payment, the teller, pursuant to instructions given to him by the plaintiff, telephoned plaintiff to receive authorization to transfer plaintiff's deposit to the account of D. The teller testified that he received the authorization and transferred the funds. The plaintiff, however, denied all oral agreements with the teller and claimed that he had made a general deposit. The issue presented to the court was whether the deposit of the plaintiff in the defendant bank was special or general. The court noted that a deposit is presumed general unless evidence is introduced to the contrary. Nevertheless, the defendant's evidence which may have established a special deposit was not admitted. The court said that a deposit slip signed by the depositor, the signature card, the signature of the plaintiff on the card specifying only one authorized signature for withdrawal, issuance of a general account card, and crediting on the bank books of the deposit, clearly constituted a written agreement and contract of \textit{general deposit}, not susceptible to any misinterpretation, ambiguity, or indefiniteness. By invoking the parol evidence rule the evidence of any oral agreements between the bank and the depositor was barred.\footnote{It seems from the facts in Glass that the bank could have pleaded one of two cases: (1) that the deposit was specific; (2) that there was a subsequent oral authorization to transfer the funds. Judge Carter in his concurring opinion points out, however, that the issue of subsequent oral authorization was never pleaded—at least not on appeal. 175 Neb. 673, 688-89, 122 N.W.2d 882, 891 (1963).}

If the court had found that the plaintiff's deposit was for a \textit{special purpose}, then the bank would have been the agent\footnote{See cases cited in note 23.} of the principal-depositor for the purpose of transferring the funds of the plaintiff to D. The authorization of the depositor to transfer the funds would have been embodied in the original agreement of

\footnote{1 175 Neb. 673, 122 N.W.2d 882 (1963).}
deposit for a special purpose, and if the bank followed the instructions of the plaintiff and transferred the funds, the bank would not have been liable to the plaintiff for misapplication of funds.  

In Glass, however, the court found that the deposit was a general deposit creating the relation of debtor-creditor between the bank and depositor. By virtue of the agreement creating a general deposit, the bank could pay or transfer the funds on deposit only on the authorization of the depositor. The defendant bank could not prove that they had received any authorization of the depositor to transfer the funds on deposit, and therefore, the court held the bank liable for misapplication of funds.

SPECIAL AND GENERAL DEPOSITS

A. DEFINITIONS

Generally, deposits may be classified according to the interest of the bank in the deposited funds. There are three classifications: general, special and specific.

A general deposit is created by placing money in a bank to be repaid on demand or to be drawn upon by the depositor from time to time in the usual course of banking business. Title to the money passes to the bank creating a relation of debtor and creditor, and such money mingled with the other money on deposit in the bank forms a general fund from which all depositors

4 See cases cited in note 24.

5 See cases cited in note 7.

6 A bank as debtor can only discharge its debt to the creditor-depositor by paying the deposited funds back to the depositor when demanded or by paying a third party who has been authorized to receive the deposited funds by the depositor.

in the bank are paid.\textsuperscript{8} Also included under the classification of general deposits are general deposits for a special purpose.\textsuperscript{9} This type of deposit is merely a general deposit in which the bank agrees to discharge its debt to the depositor in some manner designated by the depositor other than by paying the depositor on demand, or honoring his checks in the regular course of business. The understanding may be that the bank will pay a mortgage of the depositor on the receipt of an instrument acknowledging satisfaction of the mortgage by the mortgagee, or that it will pay a note of the depositor when presented at the bank, or that the bank will pay the water bill of the depositor. The title to the money passes to the bank and the deposited funds are mingled and used by the bank in its general business in the same manner as a general deposit.\textsuperscript{10}

A special deposit is the transfer of money or property to a bank with the mutual intention that the bank shall not own the funds nor have the right to use them in its business.\textsuperscript{11} The bank

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\textsuperscript{8} Union Properties v. Baldwin Bros., 141 Ohio St. 303, 311, 47 N.E.2d 983, 988 (1943): "Title to the money passes from the depositor to the bank, and such money, mingled with the other money, forms a general fund from which depositors of the bank are paid." Rossman v. Blunt, 104 F.2d 877 (6th Cir. 1939); Bank of America Nat'l Trust & Sav. Ass'n v. Board of Supervisors, 93 Cal. App. 2d 75, 208 P.2d 772 (1949); State v. Farmers Bank of Page, 110 Neb. 676, 194 N.W. 865 (1923). See also 5A \textit{MICHIE, BANKS AND BANKING} § 1 (1950).

\textsuperscript{9} \textit{PATON'S DIGEST, Deposits} § 70.3 (1942); 2 \textit{PATON'S DIGEST, Deposits} § 9:1 (1942). 4 \textit{SCOTT, TRUSTS} § 530, at 3355-56 (2d ed. 1956): "The bank may undertake, however, to apply the money deposited in some other way than by honoring the checks of the depositor. The understanding may be that the bank will pay a note of the depositor on the receipt of an instrument acknowledging satisfaction of the mortgage by the mortgagee, or that it will pay to the vendor of land the purchase price on the receipt of a deed to the land, or that it will act as stakeholder between the depositor and a third person and will pay whichever ultimately proves to be entitled to the payment. . . . [I]f the depositor did not retain the beneficial interest in the money, but the bank was entitled to treat the money as its own . . . such a deposit is a general one although made for a special purpose. The relation is not quite the same as that which arises in the case of the usual general deposit, but it differs only in that the understanding is that money is to be paid out for the purpose stated, rather than on the presentation of checks of the depositor."

\textsuperscript{10} 2 \textit{PATON'S DIGEST, Deposits} § 9:1 (1942); 4 \textit{SCOTT, TRUSTS} § 530 (2d ed. 1956).

\textsuperscript{11} Amos v. Baird, 96 Fla. 181, 185, 117 So. 90, 91 (1928): "Deposits by the customers or clients of a commercial bank therewith are of two classes,
becomes a bailee, trustee, or agent without title. Most jurisdictions, however, including Nebraska, impose a strict definition of special deposit and make a further distinction between a special deposit and a specific deposit.

In its strict sense, a special deposit is defined as a delivery of property, securities or money to a bank for the purpose of keeping and returning the identical thing deposited to the depositor. The bank may not use the special deposit as its own, nor mingle the funds with the other funds of the bank. A bailor-

viz: special or specific, and general. When the identical money or other thing deposited is to be restored or is given to the bank for some specified and particular purpose, as to pay a certain note or other indebtedness, or is received by the bank as a collecting agent, such collection to be remitted, such deposits are special or specific, and the property in the deposit remains in the depositor, the bank in such cases becomes the bailee, trustee or agent for the depositor.” See also 2 PATRON’S DIGEST, Deposits § 9:1 (1942).

12 Amos v. Baird, 96 Fla. 181, 117 So. 90 (1928).

13 State v. Platte Valley State Bank, 130 Neb. 222, 264 N.W. 421, 423 (1936): “Deposits of funds in a bank have various characteristics . . . . [A] deposit of funds in a bank to the credit of the depositor ordinarily is termed a general deposit . . . . [T]here is another class known as special deposits . . . . [T]here is another class of deposits where the deposit is made for a specific purpose . . . .” See also Rossman v. Blunt, 104 F.2d 877 (6th Cir. 1939); Officer v. Officer, 120 Iowa 389, 94 N.W. 947 (1903); In re State Bank, 129 Neb. 506, 262 N.W. 15 (1935); Maurello v. Broadway Bank & Trust Co., 114 N.J.L. 167, 176 Atl. 391 (1935). See also 1 MORSE, BANKS AND BANKING §§ 189, 206, 288 (6th ed. 1929).

14 The older cases supported the view that the bank had no right to mingle money or property deposited in a special deposit, and if the bank did mingle the deposited funds with other funds of the bank, the money’s identity was thereby lost and the deposit became a general deposit. Schulz v. Bank of Harrisonville, 249 S.W. 614, 616 (Mo. Ct. App. 1923): “In the case of a special deposit, the bank merely assumes charge and custody of the 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.” See also State v. Bickford, 28 N.D. 36, 147 N.W. 407 (1913).

However, the modern authorities are more liberal and hold that if a special deposit of money is made which becomes commingled with the general funds of the bank, the special character of the deposit is not destroyed by that fact alone. Fogg v. Tyler, 109 Me. 109, 82 Atl. 1008 (1912); Busher v. Fulton, 128 Ohio St. 485, 191 N.E. 752 (1934); In re Warren’s Bank, 209 Wis. 121, 125, 244 N.W. 594, 595 (1932). “However, the idea that the commingling of moneys with the funds of the bank destroyed the character of the special deposit because the deposit couldn’t be identified was exploded . . . . [I]t was held that the general
bailee relationship is created; and, if the bank fails to return the identical thing deposited, or misapplies it in some manner, the principles relating to trust funds should be applied, and so long as the amount of money in the bank exceeded the amount of the deposit it should be presumed that all moneys paid out by the bank were paid out of its own and not out of trust funds.” (Emphasis added). In re Sturdivant Bank, 232 Mo. App. 55, 89 S.W.2d 89 (1936); In re Wellston Trust Co., 136 S.W.2d 430 (Mo. Ct. App. 1940). See also Annot., 82 A.L.R. 1-288 (1933).

There is a difference between the right of the bank to commingle funds and the fact of commingling. Ellington v. Cantley, 300 S.W. 529 (Mo. Ct. App. 1929); Security Nat'l Bank Sav. & Trust Co. v. Moberly, 340 Mo. 95, 102, 101 S.W.2d 33, 36 (1936): “Whether or not the bank in fact commingles the deposit with its general funds and uses it as its own is not determinative of the right or not of the depositor to claim the deposit as a special deposit, but it is the right or not of the bank to so commingle and use the deposit that is determinative. If when the deposit is made there is an agreement, express or implied, that it shall not be commingled with the other assets of the bank and used as its own, but shall be kept intact as a separate deposit for a specific purpose, this constitutes a special deposit, and the fact that the bank without right commingles the deposit with its other assets and uses it as its own, so that it cannot thereafter be traced and identified, does not defeat the right of the depositor to have the amount of the deposit out of the assets of the bank.” See also Rossman v. Blunt, 104 F.2d 877 (6th Cir. 1939); Woodhouse v. Crandall, 197 Ill. 104, 64 N.E. 292 (1902); American Sur. Co. v. Normandy State Bank, 237 Mo. App. 39, 167 S.W.2d 436 (1943); In re Central Trust Co., 69 S.W.2d 919 (Mo. Ct. App. 1934). In re North Missouri Trust Co. of Mexico, 39 S.W. 2d 412 (Mo. Ct. App. 1931). See also 1 PATON’S DIGEST, Bankruptcy and Insolvency § 7D:3 (1940); 4 Scott, Trusts § 530 (1956).

"A special deposit is a deposit for safekeeping, to be returned intact on demand—a naked bailment, the bank acquiring no property in the thing deposited and deriving no benefit from its use. The title remains in the depositor, who is the bailor and not a creditor of the bank.” See Richards v. Fulton, 75 F.2d 863 (6th Cir. 1935); Keyes v. Paducha & L.R. Co., 61 F.2d 611 (6th Cir. 1932); Anderson v. Pacific Bank, 112 Cal. 508, 44 Pac. 1063 (1896); McCrory Stores v. Tunnicliffe, 104 Fla. 683, 140 So. 806 (1932); People v. Home State Bank, 338 Ill. 179, 170 N.E. 205 (1930); Ellington v. Contley, 300 S.W. 529 (Mo. Ct. App. 1927); Schulz v. Bank of Harrisonville, 246 S.W. 614 (Mo. Ct. App. 1929); State ex rel. Good v. Platte Valley State Bank, 130 Neb. 222, 264 N.W. 421 (1936); In re State Bank, 129 Neb. 506, 262 N.W. 15 (1935); Maurello v. Broadway Bank & Trust Co., 114 N.J.L. 167, 176 Atl. 391 (1935); State v. Bickford, 28 N.D. 36, 147 N.W. 407 (1913); Franklin Sav. & Trust Co. v. Clark, 283 Pa. 212, 129 Atl. 56 (1925). See also 1 MORSE, BANKS AND BANKING §§ 182-89 (6th ed. 1928); 5B MICHE, BANKS AND BANKING §§ 330, 332 (1950).
bank is then liable to the depositor under the general rules of bailment.\textsuperscript{16}

A specific deposit\textsuperscript{17} is created when money or property is delivered to a bank for some particular purpose, such as a note for collection,\textsuperscript{18} or money to pay some particular note or draft,\textsuperscript{19} debt to a third party, or certain checks drawn by the depositor.\textsuperscript{20} A specific deposit is of the nature of a special deposit in that title does not pass to the bank.\textsuperscript{21} But a bailor-bailee relationship is not created. The majority of jurisdictions hold that a specific deposit is of a trust nature,\textsuperscript{22} and the relation between the depositor and the bank is one of principal and agent.\textsuperscript{23} The agent-bank has the same rights and liabilities as any other agent. If

\textsuperscript{16}Brown, Personal Property § 86 (2d ed. 1955). "The bailee ... also owes to the bailor the duty of redelivering to him the subject matter of the bailment on demand, when the purposes of the bailment have been fulfilled. ... If the bailee delivers the subject of the bailment to a third person who is not authorized by the bailor to receive it ... the bailee is liable for a conversion of the goods or in damages for breach of contract ...."

\textsuperscript{17}A specific deposit is also referred to as a deposit for a special purpose.

\textsuperscript{18}In re State Bank, 129 Neb. 506, 262 N.W. 15 (1935).

\textsuperscript{19}Ibid.

\textsuperscript{20}State ex rel. Sorenson v. Bank of Otoe, 125 Neb. 530, 251 N.W. 111 (1933).

\textsuperscript{21}Ibid. at 533. See also 1 Morse, Banks and Banking § 185 (6th ed. 1928).

\textsuperscript{22}5B Michie, Banks and Banking § 337 (1950).

\textsuperscript{23}See also State ex rel. Good v. Platte Valley State Bank, 130 Neb. 222, 264 N.W. 421 (1936); State ex rel. Sorenson v. Farmers & Merchants Bank, 125 Neb. 800, 252 N.W. 316 (1934); State ex rel. Sorenson v. Bank of Otoe, 125 Neb. 530, 251 N.W. 111 (1933). Bender v. Nelsville Bank, 10 Wis. 2d 282, 285, 102 N.W.2d 744, 746 (1960): "It seems to be well settled that a deposit made in a bank for a specific purpose, and for that alone, partakes of the nature of a special deposit, and does not establish the relation of debtor and creditor between the depositor and the bank, but establishes a fiduciary relation which is sometimes declared to be that of principal and agent, while some courts hold that a trust relation is created." See also Engleman v. Bank of America Nat'l Trust & Sav. Ass'n, 98 Cal. App.2d 327, 219 P.2d 888 (Dist. Ct. App. 1950); American Sur. Co., v. Bank of Dawson, 43 Ga. App. 593, 159 S.E. 736 (1931); In re Warren's Bank, 209 Wis. 121, 244 N.W. 594 (1932). Narrell v. First Nat'l Bank, 241 S.W.2d 361, 362 (Tex. Civ. App. 1951): "Where the depositor and the bank agree, at the time the deposit is made, that the money is to be used for a specific purpose, and for that alone, the relationship of debtor and creditor between the bank and the depositor is not created, the relationship between them being that of principal and agent, the title to the deposit remaining in the depositor."

(Emphasis added). Hjelle v. Veigel, 169 Minn. 173, 210 N.W. 891 (1926);
the agent exceeds his authority, he is liable to the principal for any loss which the principal may thereby sustain. A minority holds that a specific deposit creates the relation of trust between the bank and depositor, and/or beneficiary. The bank in this case is a trustee of the funds on deposit, and the rights and liabilities of the bank as trustee are the same as any other trustee.

In determining whether a deposit is general, special or specific, courts generally look to the agreement of deposit between the bank and depositor. When a general deposit is made, the bank and depositor have agreed that the bank may use the funds


Bank of British North America v. Cooper, 137 U.S. 473, 479 (1890): "Uniform recognition and enforcement of certain settled and clear rules are important. Among them, few are more significant or more essential than that in the relation of principal and agent strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent, unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether instructions were obeyed or disregarded." See also RESTATEMENT (SECOND), AGENCY §§ 383, 402 (1957).

Rossman v. Blunt, 104 F.2d 877, 879 (6th Cir. 1939). In this case a draft was deposited in a bank for the purpose of paying the purchase price of certain real estate. The bank cashed the draft and used part of the funds for another purpose. The court, in their opinion, stated that there were three classes of deposits: general, special, and special purpose. In the third class the amount constituted a trust fund. See Woodhouse v. Crandall, 197 Ill. 104, 64 N.E. 292 (1902); Wenzel v. People's State Bank, 270 Mich. 424, 259 N.W. 120 (1935); Hershey v. Northern Trust Co., 342 Mo. 90, 112 S.W.2d 545 (1937); Morton v. Woolery, 48 N.D. 1132, 189 N.W. 232 (1922). See also 77 U. PA. L. REV., 280 (1928); Comment, 2 So. Cal. L. Rev. 64, 65 (1928); 27 HARV. L. REV. 190 (1913); 27 HARV. L. REV. 398 (1914).

State ex rel, Sorensen v. American State Bank, 126 Neb. 34, 252 N.W. 460 (1934). See also ANnot., 24 A.L.R. 1111 (1923). RESTATEMENT (SECOND), TRUSTS § 226 (1959): "If by the terms of the trust it is the duty of the trustee to pay or convey the trust property or any part thereof to a beneficiary, he is liable if he pays or conveys to a person who is neither the beneficiary nor one to whom the beneficiary or the court has authorized him to make such payment or conveyance."

of the deposit in its general business. However, where the bank and depositor enter an agreement, either express or implied, that the deposited funds are to be used for a particular purpose, and that the bank may not use the deposited funds in the general business of the bank, nor mingle the funds with the general funds of the bank, then the deposit is specific. On the other hand, if the bank and depositor both understood that the deposit was to be held for a special purpose, and that the bank should not pay checks drawn against it for any other purpose; that if the facts and circumstances surrounding the making of the deposit show the same to be special, the bank receiving the deposit cannot change its character by wrongfully placing it to the credit of the depositor in his general checking account; but that where the deposit is placed in the general checking account of the depositor, with his knowledge, and with the right in him to draw against it for all purposes, it is a general deposit, and title thereto passes to the bank. See cases cited in notes 7 and 8 supra.

See cases cited in note 27 supra.

Wenzel v. Peoples State Bank, 270 Mich. 424, 259 N.W. 120 (1935); Borgess Hosp. v. Union Industrial Trust & Sav. Bank, 265 Mich. 155, 251 N.W. 363 (1933). Busher v. Fulton, 128 Ohio St. 485, 489-90, 191 N.E. 752, 754 (1934): "To constitute a special deposit [or specific deposit] the authorities are generally agreed that the depositor and the bank, at the time the deposit is made, must intend that such deposit shall remain segregated and not be commingled with the general funds of the bank, nor used by the bank in accordance with the ordinary customs and usages of banking practice; and, further, there must be an agreement, express or implied, that such deposit shall not constitute a part of the general funds of the bank, subject to its use and control in the usual and customary course and prosecution of its business. See Rossman v. Blunt, 104 F.2d 877 (6th Cir. 1939); In re State Bank, 139 Neb. 506, 262 N.W. 15 (1935); Union Properties v. Baldwin Bros., 141 Ohio St. 303, 47 N.E.2d 983 (1943); 2 Patons Digest, Deposits §§ 9:1, 7D:3 (1942); 4 Scott, Trusts § 530 (1956).

See cases cited note 14 supra.
hand, if the bank and depositor agree that the bank is merely to hold the deposited funds, return the identical funds deposited, and that the bank may not use the deposited funds in its general business, nor mingle the funds with the general funds of the bank, then the deposit is special.

A possible difficulty may arise in distinguishing between a specific deposit and a general deposit for a special purpose. In both specific deposits and general deposits for a special purpose, the bank and depositor agree that the bank is to use the deposited funds in a particular manner. In the former deposit, however, the bank and depositor also agree that the bank may not use the deposited funds in its general business, nor mingle the funds with the general funds of the bank, whereas, in the latter deposit there is no such agreement and the title to the deposit passes to the bank creating the relation of debtor and creditor.

B. Glass and the Laws of Special and General Deposits

In State ex rel. Sorenson v. Bank of Otoe and State ex rel. Sorenson v. Farmers & Merchants Bank the Supreme Court of Nebraska stated that the relation between a bank and a depositor of a specific deposit was one of agency. The liability, therefore, of a bank which had misapplied such funds was also based on agency.

In Bank of Otoe, Schultz, a depositor, desired to purchase a carload of cattle from Bowles Live Stock Commission Company, and arranged with one Hillman to borrow $1,200 to pay for the cattle. The defendant bank was informed by Hillman and Schultz of the loan arrangement. Hillman gave a check to Schultz for the amount of the loan, and Schultz deposited the same in his account in the bank. Schultz then wrote and delivered a check,

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32 See cases cited note 15 supra.
33 See cases cited note 14 supra.
34 See cases cited notes 9 and 27 supra.
35 See cases cited notes 23 and 30 supra.
36 See cases cited note 14 supra.
37 See cases cited note 9 supra.
38 125 Neb. 530, 251 N.W. 111 (1933).
39 125 Neb. 800, 252 N.W. 316 (1934).
drawn on his account, in payment of the cattle. Before the check was honored, but after presentment, the bank became insolvent and closed. As in Glass, the issue was whether Schultz was a specific or general depositor. It was held that the deposit was specific, and that the bank held the deposit as the agent of Schultz. Upon failure to pay the check, Schultz was entitled to have the claim treated as a trust fund and allowed preference on the assets of the bank.

In Farmers & Merchants Bank, a depositor sued the defendant bank claiming a preference on the same theory as Bank of Otoe. The court, citing Bank of Otoe, stated:

We think that the rule, as it exists here and in most of the states, is that a deposit made for a specific purpose, as for the payment of a particularly designated claim, partakes of the nature of a special deposit and is in a distinct class by itself. When a deposit is so made in a bank, it [the bank] acts as the agent of the depositor, and if it fails to apply the deposit as directed, or should misapply it, the deposit may be recovered as a trust fund.

In Glass, however, where the same issue of general or specific deposit was presented, the court attempted to distinguish Bank of Otoe and Farmers & Merchants Bank by stating:

These cases arose between the depositor and the receiver of an insolvent bank and the question under the particular circumstances was whether the deposit was a trust deposit, which the bank was required to separate out and keep separate from the general funds of the bank. In neither case was the question raised as to whether the bank could transfer funds from one depositor’s account to another without a written signature or authorization by the depositor.

It is contended that this distinction made by the court in Glass was erroneous.

When the depositor in Bank of Otoe and Farmers & Merchants Bank entered into the agreement of specific deposit with the bank, the depositor, at that time, authorized the agent-bank to apply the deposited funds to a particular purpose. Unless the depositor and the bank agreed that some subsequent authorization was needed before the bank could transfer the funds, the bank could transfer or pay the funds of the depositor at the time agreed

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41 125 Neb. 800, 252 N.W. 316 (1934). State ex rel. Sorenson v. Farmers & Merchants Bank will be hereinafter referred to as Farmers & Merchants Bank.

42 Id. at 802-03, 252 N.W. at 317. (Emphasis added).

upon by the bank and depositor in the agreement of deposit for a specific purpose as originally made.\textsuperscript{44}

The court in \textit{Bank of Otoe} and \textit{Farmers & Merchants Bank}, after finding that a deposit for a specific purpose existed, merely imposed the general law of agency to a particular situation where the agent-bank, because of insolvency, failed to apply the funds deposited for a specific purpose to the particular purpose intended by the principal-depositor.\textsuperscript{45}

In \textit{Glass}, if, instead of finding a general deposit, the court had found that a deposit for a specific purpose existed, then the bank would have been the agent of the depositor for the purpose of transferring the funds of the principal-depositor's account to the account of D.\textsuperscript{46} The authorization of the depositor to the bank to transfer the funds would have been embodied in the original agreement of specific deposit between the bank and depositor.\textsuperscript{47} If the agent-bank failed to apply the funds deposited to the particular purpose intended, then the bank would have been liable to the depositor under the general law of agency. However, if the bank did apply the funds to the purpose intended, then the bank would have incurred no liability.\textsuperscript{48}

\section*{C. Special and Specific Deposits—Current Practices}

Historically, most cases involving issues of special and specific deposits arose in cases involving insolvency of a bank, garnish-

\textsuperscript{44} A depositor makes a deposit for a special purpose in a bank on the condition that the bank will at some particular time, or on the happening of a particular event, transfer the deposited funds to a third party. Because the bank must apply the deposit for a special purpose in some particular manner, the authorization of the depositor to the bank to so apply the deposited funds is embodied in the original agreement of deposit for a special purpose.

\textsuperscript{45} See rules of \textit{Bank of Otoe} and \textit{Farmers & Merchants Bank} accompanying notes 39-44 \textit{supra}.

\textsuperscript{46} \textit{State ex rel. Good v. Platte Valley State Bank}, 130 Neb. 222, 225, 264 N.W. 421, 423 (1936): "Then there is another class of deposits where the deposit is made for a specific purpose, as where the fund is delivered to the bank for a particular, specific purpose. Where a fund is deposited in a bank for purpose of paying a specific obligation, it is termed a deposit for a specific purpose. In such case, the bank acts as the agent of the depositor, and if the bank should fail to apply it as directed, or should misapply it, it may be recovered as a trust deposit." See \textit{State ex rel. Sorenson v. Farmers & Merchants Bank}, 125 Neb. 800, 252 N.W. 316 (1934); \textit{State ex rel. Sorenson v. Bank of Otoe}, 125 Neb. 530, 251 N.W. 111 (1933).

\textsuperscript{47} See note 44 \textit{supra}.

\textsuperscript{48} See cases cited note 24 \textit{supra}.
ment of a deposit, and set-off by a bank of a depositor's funds upon failure to repay a loan. The rules and regulations of special and specific deposits, however, are applicable to all cases presenting these issues.

Modern banks, however, are not equipped to handle special and specific deposits according to the specifications set down by the courts.

Banks can accommodate depositors who wish to make special deposits by placing the property or money in safe deposit boxes, or in "safekeeping." This relieves banks from the duty of setting up a separate deposit apart from the general accounts of the bank, and separating the property or money deposited from the general funds of the bank. By placing the deposited funds in a safe deposit box the bank utilizes a means they already have to keep and return the identical money or property deposited.

Specific deposits, however, present a more difficult problem to the banks because banks usually do not have a similar service

40 State ex rel. Sorenson v. Bank of Otoe, 125 Neb. 530, 251 N.W. 111 (1933); State ex rel. Sorenson v. Farmers & Merchants Bank, 125 Neb. 800, 252 N.W. 316 (1934). These two cases are good examples of a court dealing with the issues of special and general deposits where a bank has misapplied the deposited funds because of insolvency. The trust fund imposed on the deposit for a special purpose in cases of insolvency is a constructive trust. State ex rel. Sorenson v. American State Bank, 126 Neb. 34, 252 N.W. 460 (1934); In re Farmers State Bank, 67 S.D. 51, 289 N.W. 75 (1939); RESTATEMENT, RESTITUTION § 190 (1936). See also Annot., 126 A.L.R. 619 (1940); 4 SCOTT, TRUSTS § 462 (1956).


The issue of special or general deposits is important to courts in cases where a creditor of a depositor is attempting to garnish the depositor's deposit. Dolph v. Cross, 153 Iowa 289, 133 N.W. 669 (1911). See also 2 PATRON'S DIGEST, Deposits § 9:1 (1942); 5A MICHIE, BANKS AND BANKING §§ 33, 36 (1950).


51 See cases cited notes 27, 30 and 14 supra.
which may be substituted for specific deposits (such as safe deposit boxes substituted for special deposits).

If a depositor wants to set up a specific deposit, the bank has to set up a separate account for the deposit, and use a completely separate set of books, because a specific deposit cannot be reflected in the balance sheet of the bank but must be treated as a trust fund of which the bank is trustee. The deposit would be expensive for the bank to set up and service; and, the bank could not offset the expense by investing the deposited funds as banks usually do with funds of general deposits. Because of these difficulties, and rarity of specific deposits, it is suggested that banks should handle specific deposits in one of the following ways:

(1) If a bank has a trust department, it could set up the specific deposit as a trust deposit with the bank acting as trustee for the payee-beneficiary.52 In this case the bank would incur no extra expense in setting the deposit up, because the trust department would provide the needed facilities, i.e., separate books, methods of servicing and governing the account. The bank, as trustee, would receive trustee's fees for handling the deposit, and the rights and liabilities of the bank would be the same as any other trustee;

(2) If the bank has no trust department, the bank and depositor could agree to set the deposit up as a general deposit for a special purpose. The bank could demand subsequent written authorization from both the depositor and payee before applying the deposited funds to the intended purpose.53 The relation between the bank and depositor would be one of debtor-creditor;54 the bank would be able to use the deposited funds in the general business of the bank, and the bank would incur no liability for subsequently applying the funds on deposit for the special purpose because of the subsequent written authorization;

(3) If the depositor specifically wants a specific deposit, a bank could avoid the consequence of the Glass case by drawing a written contract of deposit for a specific deposit and then complying with the rules and regulations of such a deposit as set down by the courts. If the bank in Glass had done this they would not have been liable to the plaintiff for misapplication of deposited funds. The bank could have proved that the depositor and the bank had

52 This is assuming, of course, that the depositor agrees to this method of handling the deposit.
53 See cases cited note 74.
54 See cases cited note 7 supra.
set up a deposit for a special purpose and that the bank had applied the funds to the particular purpose intended.

**PAROL EVIDENCE RULE AS APPLICABLE TO SPECIAL AND GENERAL DEPOSITS**

Signature cards and pass books are usually deemed part of the contract between the bank and the depositor, and the depositor cannot usually vary the terms of the printed material embodied therein. When a court, however, is presented with an issue of special or general deposit, the question of whether the printed material embodied on the signature card and pass book constitute a final written contract for a special or general deposit is a question of fact to be determined by each individual court confronted with this problem.

In the past, courts have ignored the printed material on signature cards and pass books and have made their determination on other grounds. Courts have held that the method of bookkeeping adopted by the bank, the crediting of a deposit in the depositor's pass book as special or general, and the issuing to the depositor a form of check so marked are not usually determinative.

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55 Special deposit as referred to in this section also includes specific deposits.

56 2 PATON’S DIGEST, Deposits § 7A:2 (1942). See also Annot., 5 A.L.R. 1203 (1920): “By the weight of authority if a depositor accepts and retains a pass book wherein are printed rules of the bank respecting the repayment of the deposit he is deemed to acquiesce therein, and they become a part of the contract between the bank and the depositor.”

57 In re Fidelity Bank & Trust Co., 77 S.W.2d 480 (Mo. Ct. App. 1934); Goodspeed v. Grand Nat'l Bank, 46 S.W.2d 913 (Mo. Ct. App. 1932). The agreement between a bank and depositor embodied in the printed material on signature cards and pass books is drawn up by the individual bank, and therefore it is a question of fact when determining whether or not this agreement was intended to include special deposits as well as general deposits.

58 Maurello v. Broadway Bank & Trust Co., 114 N.J.L. 167, 176 Atl. 391 (Ct. Err. & App. 1953). In this case a depositor had opened an account in the defendant bank in the usual course of banking business, i.e., signature card, deposit slip, etc., and the question presented to the court was whether the deposit was special or general. The court, in holding the deposit general, ignored the printed material on the signature card and held that the deposit was general because the plaintiff-depositor had not presented a “scintilla” of proof that the account was special.

59 5B MICHE, BANKS AND BANKING § 328 (1950).
tive of whether a deposit is general or special. Deposit slips are generally considered mere receipts or memoranda constituting prima facie evidence that the bank received the sum stated at a particular time and are subject to explanation or contradiction by parol evidence. The court in the instant case, however, held that these items were determinative of the issue.

In re Fidelity Bank & Trust Co., a case which was very similar to the Glass case, the plaintiff entered an oral agreement with the defendant bank to open a payroll account. One of the questions presented was whether oral evidence could be introduced to vary and contradict the terms of the written contract of the parties. To this the court stated:

We think the objection to the oral testimony was very properly overruled. So far as is pointed out, the passbook, deposit slips, and signature cards did not pretend to recite any agreement between the parties respecting the character of the account. The passbook was nothing more than a writing in the nature of a receipt, and as such open to explanation by extrinsic evidence; and the lack of any special characterization of the account on the deposit slips would have warranted the bank in treating the deposits as general only in the absence of information that they were in fact made for a special purpose. The signature cards were designed to serve but a very limited purpose at best; and if the deposits were special, then the bank could in no wise have changed their character by carrying the account on its books as a general one. And so, since the passbook and other writings having to do with the account were never intended to contain the full contract of the parties so as to foreclose proof of any agreement not

60 Franklin Sav. & Trust Co. v. Clark, 283 Pa. 212, 218, 129 Atl. 56, 58 (1925): "Whether a deposit is general or special depends on the facts and circumstances attending its making; but it is certain that the mere use of the word 'special' placed after the depositor's name will not cause the deposit to come within the definition mentioned above, nor will it effect an appropriation of the moneys for any particular purpose, so that it may be said they were set aside for a limited purpose with the bank's knowledge." See also In re State Bank, 129 Neb. 506, 262 N.W. 15 (1935); 5B Michie, Banks and Banking § 331 (1950).

61 State ex rel. Sorenson v. State Bank, 122 Neb. 582, 240 N.W.925 (1932); Rosenthal v. Citizens State Bank, 129 Colo. 35, 266 P.2d 767 (1954); Annot., 42 A.L.R.2d 600, 603 (1955): "[A] deposit slip . . . executed by a bank and delivered to a depositor, is not a written contract in which all oral negotiations and stipulations are merged, but is merely a receipt constituting prima facie evidence that the bank received the sum stated at that time." See also Annot., 97 A.L.R. 875 (1935); 5B Michie, Banks and Banking § 323 (1950); 2 Paton's Digest, Deposits § 7C (1942).

62 77 S.W.2d 480 (Mo. Ct. App. 1934).

63 Id. at 482.
embodied therein, it follows that the parol evidence rule was not offended by the introduction of the evidence in question, and that the objection to it was properly disallowed.

The reason courts have been reluctant to apply the parol evidence rule, as the court did in Glass, is primarily based on the generally accepted presumption that a deposit is presumed general unless evidence can be shown to the contrary.64 The party contending that a deposit is special rather than general, therefore, has the burden of showing that the deposit was received with the express or clearly implied agreement that it should be kept separate from the general funds of the bank and that it should remain intact.65

If the parol evidence rule could be invoked to bar the prior and contemporaneous oral agreements between a bank and depositor, then a bank could relieve itself of the special duties imposed by a special deposit by merely introducing evidence such as signature cards, deposit slips and the method the bank used in treating the deposit, contending that these instruments constituted the final written intention of the parties. The parol evidence rule would be invoked, and unless the depositor could introduce some subsequent evidence, written or oral, showing the nature of the deposit, the court would presume the deposit was general. In other words, the bank could negate the intention and agreement of the parties by merely handling the special deposit as if it were general.

In the Glass case, the bank handled the deposit as if it were general, but, unlike the Fidelity Bank & Trust Co. case, the bank, not the depositor, was contending that the deposit was special.66


65 7 AM. JUR. BANKS § 419 (1937); Annot., 86 A.L.R. 375 (1933).

66 Usually the law of special or general deposits will not change when it is applied to different parties who are contending the deposit special. However, in this case the court interpreted the records of the bank as a written contract of general deposit in order to deny the bank the right to assert by oral agreements that the deposit was special when they had handled the deposit as a general deposit.
It seems that the court invoked the parol evidence rule because the bank, who was contending that the deposit was special, had dealt with the deposit as if it were general. If the bank had been allowed to contend and prove that the deposit was special, then the bank would have been allowed to "reap the rewards" of a general deposit while being relieved of the requirements of a special deposit. To resolve this dilemma the court invoked the parol evidence rule as a type of estoppel, denying to the bank the right to contend one thing when in fact they had done another.

It is submitted that if the court had applied the law of special and general deposits as promulgated in its earlier decisions, and by other jurisdictions, the same result would have been reached. The bank would have had to prove that there had been an agreement between the bank and plaintiff that: (1) the deposit was for a specific purpose, and (2) that the bank was not to mingle the funds nor use the deposited funds in its general business. From the facts stated in the opinion, and the testimony of both the bank teller and plaintiff, it is apparent that these parties never entered such an agreement. Thus, if the court had applied the rules of special and general deposits they would have found the deposit general.

**ORAL AUTHORIZATION OF A DEPOSITOR TO TRANSFER FUNDS**

Judge Spencer, dissenting in the *Glass* case, pointed out that the majority opinion ignored the question of whether the bank was subsequently orally authorized to transfer the funds from the account of the plaintiff to pay the checks of D. The concurring opinion by Judge Carter points out the fact that this matter was not "raised by the pleadings [on appeal] and consequently it is not before the court for its determination." Whether this is a proper treatment of the issue is not the subject of this note. But

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67 A bank may use the funds of a general deposit in its general business, i.e., loans, purchase bonds, etc.  
68 See cases cited notes 14 and 23 supra.  
69 See cases cited note 27 supra.  
70 See cases cited notes 14 and 30 supra.  
72 Id. at 687, 122 N.W.2d at 890 (1963).  
73 Id. at 687, 122 N.W.2d 891 (1963).
if it had been raised by proper pleadings, perhaps the court still reached the proper decision as a matter of public policy.

The majority of courts have held that by virtue of the implied contract arising from the usage of banking business, a bank is entitled to demand some written evidence of an order of the depositor to pay out or transfer his deposit, and the bank is not bound to act upon oral order. However, a bank may waive its right to a written order and pay out a fund on deposit or transfer the deposit to the name of another on the oral order of the depositor. If the bank so elects to waive its right, and the bank accedes to the depositor's parol directions in regard to the manner in which his deposit is to be applied, it will incur no liability in so doing, provided payment is made in accordance with the depositor's direction, and to the person entitled to receive it.

If the bank were allowed judgment in this case on the sole testimony of its teller, it would be possible for a bank to absolve itself of all liability arising from an improper transfer of a depositor's funds where someone, by telephone, authorized the transfer. If this were the rule then deposits in all banks for whatever purpose would be in jeopardy. The correct rule should be that if a bank waives its right to a written order from the depositor, and acts on an oral order, the bank should be required to prove by clear and convincing evidence that such oral authorization was in fact received from the depositor. No such proof was rendered by the bank in Glass.

CONCLUSION

It is submitted that although the court based its decision upon misplaced applications of law, the result in Glass was, nevertheless, correct.

Instead of deciding the issue of whether the deposit was special or general by the accepted methods used in other jurisdictions,


75 Lind v. Porter, 46 Idaho 50, 266 Pac. 419 (1928); Pierson v. Union Bank & Trust Co., 181 Ky. 749, 205 S.W. 906 (1918); Blackshaw v. French, 45 S.W.2d 916 (Mo. Ct. App. 1932).
and by previous Nebraska decisions, the court held that the records of the bank constituted the final written intention of the parties, and therefore invoked the parol evidence rule, thus barring the introduction of the prior oral agreement between the bank and depositor.

If the oral evidence had been introduced, however, the decision would probably have been the same. The testimony of the teller failed to show any agreement between the bank and depositor that the funds on deposit could not be used by the bank, nor mingled with the other funds of the bank. In fact, the bank, had insisted that the deposit was special, and had entered it on their books as a general deposit. Also, if the deposit was special the bank would not have had to receive subsequent oral authorization to transfer the funds. This deposit, then, was merely a general deposit for a special purpose. And for this reason, the rules of Bank of Otoe and Farmers & Merchants Bank did not apply.

It seems that the only conclusion which may be drawn from the decision in Glass is that if a bank, rather than a depositor, is contending that a deposit is special rather than general, there must be: (1) a mutual agreement that the deposit is special; (2) the bank must enter the deposit as special on their records, and; (3) the banks must treat the deposit in accordance with the rules set forth for the establishment of special deposits, which includes refraining from using the deposited funds as their own.

Today situations as presented in Glass involving the issues of special or general deposits are somewhat unusual, primarily because modern banking practices such as deposits in "safekeeping," escrow accounts, trust departments, and the variety of methods in which a general deposit may be employed have reduced the need for special and specific deposits. It is submitted, however, that should a bank be confronted with a situation as presented in Glass, it may avoid the rule of Glass by handling the deposit in one of the following ways: (1), earmark the deposit as a trust deposit with the bank as trustee; (2), set the deposit up as a general deposit for a special purpose and require some subsequent written authorization from both the depositor and payee before applying the funds in the particular manner intended, or; (3), draw a written contract of specific or special deposit and then proceed to handle the deposit in the manner set forth above.

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