

YALE LAW JOURNAL

VOL. XLII

APRIL, 1933

No. 6

LEGAL AND INSTITUTIONAL METHODS APPLIED TO ORDERS TO STOP PAYMENT OF CHECKS—

I. LEGAL METHOD

UNDERHILL MOORE,* GILBERT SUSSMAN† and C. E. BRAND††

*Steiner v. Germantown Trust Company*¹ was an action brought by a customer to recover from his bank the amounts of two of his checks which he had requested the bank not to honor. It appeared that the customer had a checking account at the defendant bank and that he drew two checks on the defendant to the order of the same payee and delivered them to the payee. Shortly thereafter the customer communicated over the telephone to the manager of one of the bank's branch offices his order or request that the bank should not honor the checks. Almost immediately the branch manager communicated the request over the telephone to a teller at the main office who promptly began and, without interruption, continued the relaying of the request to the employees of the bank to whom the checks might be presented. The checks were presented to another teller at the main office who certified them after the order not to honor had been received by the branch manager but before it had been relayed to that teller. It did not appear, however, whether the certification preceded or followed the communication of the order to the first teller at the main office or, if the certification did follow that communication, how long a period elapsed between that communication and the certification. Notwithstanding the hiatus in the evidence the trial court, sitting without a jury, made a general finding for the defendant and entered judgment for the defendant thereon. The judgment was affirmed on an appeal in which the error relied on was the trial court's denial of a motion for judgment *non obstante veredicto*. The affirmance was on the ground that the customer

*Sterling Professor of Law, Yale University.

†Research Assistant, Yale School of Law.

††Third year student, Yale School of Law.

1. 104 Pa. Super. Ct. 38 (1931).

was not entitled to recover the amount of the checks if the teller who certified them did not have actual notice of the order not to honor even though the certification was after the order had been received by the branch officer. If the relaying of the order began promptly and continued without interruption the bank would not be responsible for the failure to reach the teller who certified prior to the certification.

What are the legal requirements which an order or request not to honor a check—an order to stop payment—must satisfy? If the order does not satisfy the legal requirement of communication to the proper person, does the employee who first receives it make a promise or undertaking, for which the bank is responsible, to communicate it to the proper person?

I

What are the legal requirements which an order to stop payment must satisfy? The answer must be derived from the law of contracts. Its derivation requires that the honoring of a check be analyzed and restated in terms of contracts. When a check is honored what contract or contracts are created or extinguished? What are the bargains, the making and performance of which create and extinguish these contracts? What are the promises and acts of which these bargains are compounded? An answer to these questions will disclose the nature of an order to stop payment.

When a checking account is opened and the initial deposit made there is a bargain² and contract³ between bank and customer. The bargain is not express but is one which must be implied in fact.⁴ Signature card, check book, pass book and deposit slip, though they contain the most elaborate stipulations, do not state or purport to state the bargain between bank and customer. The terms of the bargain are that the bank, in exchange for the deposit, will upon actual demand of the customer repay the full amount of the deposit and that the bank will, by honoring his checks, lend to the customer sums of money in amounts less than the amount owed but which

2. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 4. "A bargain is an agreement of two or more persons to exchange promises or to exchange a promise for a performance."

3. *Id.* § 1. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."

4. See *id.* § 5 ". . . a promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise."

do not aggregate more than the deposit.⁵ When a second deposit is tendered and accepted a new bargain is made, separate and distinct from that made upon the first deposit. This new bargain, like the first, is implied-in-fact. If the terms of the new bargain included a promise⁶ on the part of the bank to repay the full amount of the deposit or to lend up to its amount it would be clear that the second deposit was a discrete bargain with its own ensuing obligations. But in fact the promise and obligation of the bank is to repay the sum of both deposits and to lend by honoring checks up to that amount. That this is the promise of the bank is accounted for by the fact that the "opening" of the account included, among other things, a tacit understanding⁷ that the tender and acceptance of a second deposit should, in the absence of an express agreement to the contrary, signify that the customer released the bank from performance of the first bargain and that the bank promised to pay and to lend in the sum of both deposits.⁸ The fact that the promise and obligation upon the second deposit is for the amount of both is not explained by the theory that the opening of the account resulted in a contract obligating the bank to pay and to lend in the sum of all deposits which should thereafter be tendered and accepted. It would be absurd to imply in fact a promise on the part of the bank to pay and to lend indeterminate sums totalling huge amounts in return for a single deposit of a definite and perhaps insignificant sum.⁹ Even if it be argued that the bank, in exchange for the initial deposit and in exchange for deposits to be made subsequently, made an implied-in-fact promise to pay and to lend up to the amount of all the deposits then it is to be noted that, the bank having made

5. See *id.* § 12. "A unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promisee." See note 15, *infra*.

6. *Id.* § 2 (1). "A promise is an undertaking, however expressed, either that something will happen, or that something shall not happen, in the future." See also note 4, *supra*.

7. 2 WILLISTON, CONTRACTS (1920) § 605. "In such informal contracts any code of signals which the parties may devise seems permissible. Not only may A and B agree that holding up a hand means an agreement to buy or to sell a hundred shares of a particular stock, but it seems that in the code which they are using, though it is a code peculiar to themselves, horse shall mean cow, or that buy shall mean sell."

8. See note 17, *infra*.

9. The case of an insurance policy as to which it is said that the payment of the first premium, however small, is consideration for the promise of the company to pay the face of the policy and that the payments of subsequent premiums are merely performances of conditions is quite different because the insurance case is one of express bargain. *New York Life Insurance Co. v. Statham*, 93 U. S. 24 (1876).

a continuing and paid-for offer, susceptible of repeated acceptances by the making of successive deposits, each deposit would create a new bargain.¹⁰ Thus it appears that the making of the second deposit, and indeed of every other subsequent deposit, results in a new bargain between bank and customer which is wholly separate and distinct in respect of terms and obligations from every other bargain previously made.

As in the case of a deposit, when a check is honored a new bargain is made. The new bargain is implied-in-fact. The check contains no promise but at most an order or request that the bank make an advance. Nor is the making of the advance accompanied by words of bargain on the part of either bank or customer. If the amount of the check is less than the amount by which the sum of prior deposits¹¹ exceeds the sum of prior checks then the honoring of the check by the bank is the performance of its pre-existing obligation to lend; and the presentment of the check is the performance of the condition precedent to the bank's obligation. The obligation which the bank is performing is its obligation to make loans, *i.e.*, an obligation to advance money in exchange for a promise and obligation to repay. The proposition that the loan is a new bargain is in no way inconsistent with the proposition that in making the loan the bank is performing a pre-existing obligation;¹² nor is it inconsistent with the notion that the check is the performance of a condition precedent to the performance of the obligation. If one should choose to argue that upon the opening of the account the bank made a continuing and paid-for offer to honor checks, then on this theory the honoring of each check would create a new bargain. That the honoring of the check is a new bargain, a loan, in which the customer promises to repay the amount advanced against the check is

10. *Offord v. Davies*, 12 C. B. (n. s.) 748 (1862); *Buick Motor Co. v. Thompson*, 138 Ga. 282, 75 S. E. 354 (1912); *American Steel & Wire Co. v. Copeland*, 159 N. C. 556, 75 S. E. 1002 (1912).

11. It is unnecessary in this discussion to take up the case in which the bank's obligation to honor checks results not from a deposit but from a discount. The analysis of the transaction of honoring a check is the same whether the obligation which the bank is performing resulted from one or the other. See note 17, *infra*.

12. When a contract obligates one of the parties to perform an act or a series of acts and the obligation of that party is conditioned upon the other party making an offer (a request and a promise) for the act which the first party is already obligated to perform, then notwithstanding the obligation of the first party to perform the act, his performance is a sufficient consideration for the promise in the offer of the second party. *Vickrey v. Maier*, 164 Cal. 384, 129 Pac. 273 (1912); *Koehler & Hinrich's Mercantile Co. v. Illinois Glass Co.*, 143 Minn. 344, 173 N. W. 703 (1919); *Murphy v. Hanna*, 37 N. D. 156, 164 N. W. 32 (1917); ANSON, CONTRACTS (Corbin's ed. 1930) § 145.

especially clear when the check which is honored is an overdraft, that is, for a sum which the bank is not obligated to lend. Here it is agreed that the obligation of the customer to repay the amount lent arises from a new bargain made upon the honoring of the check.¹³ It is equally true though not equally plain that a new bargain is made when the check which is honored is not an overdraft. It is not equally plain first, because the bank in making the loan is also performing its pre-existing obligation to lend and secondly, because the customer is not called upon to perform his obligation to repay unless there is an overdraft. If there is no overdraft the customer is not called upon to repay because, at the time the account was "opened," it was tacitly understood¹⁴ that performance of obligations would not be demanded when there were reciprocal obligations, that is, that reciprocal obligations should be set off one against the other and the balance only demanded and paid.

The new bargain made upon the honoring of a check is compounded of a promise on the part of the customer and of an act or promise on the part of the bank.¹⁵ The promise of the customer is to repay the amount which he has requested the bank to lend. It is true that a promise to this effect is not expressed. Its content is inferred from the circumstances existing at the moment the advance is made. The bank is obligated to lend; the presentment of the check is both the performance of the condition precedent to the bank's obligation and a request for a loan; the making of the advance is the performance or satisfaction of the obligation to lend; consequently there is an implied-in-fact promise to repay on the part of the customer, the borrower. The act or promise of the bank, made in reliance upon the customer's promise and in compliance with his request,¹⁶ is the advance of money or of some form of bank credit. The advance which will comply with the customer's request is an advance of money or of bank credit of the sort which is regularly made by banks when called upon to make loans by honoring checks. It may be an

13. See *Prowinsky v. Second National Bank*, 265 Fed. 1003 (App. D. C. 1920); *Thomas v. International Bank*, 46 Ill. App. 461 (1892); *Franklin Bank v. Byram*, 39 Me. 489 (1855); *Bank of Proctorville v. West*, 184 N. C. 220, 114 S. E. 178 (1922); *Hull v. Guaranty State Bank*, 231 S. W. 810 (Tex. Civ. App. 1921).

14. Note 7, *supra*.

15. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 75 (1). "Consideration for a promise is (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise, bargained for and given in exchange for the promise."

16. *Id.* § 55. "If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given with the intent of accepting the offer."

advance of the sort which the bank is obligated to make or of the sort which, though the bank is not obligated to make it, is usually accepted as compliance with the request. These advances include the payment of legal tender, the payment of any other of the media of exchange, particularly deposit currency, the certification of the check and the issuance of a cashier's check.¹⁷

It will be observed that the words of a check, in a context which includes a dictionary and a grammar only, are not a request for a payment of a debt, or for a gift, or for a loan. They are a request for the payment of money which, however, are ambiguous in that they do not disclose the obligation, if any, performed or the bargain, if any, closed by the payment. Spoken and written words, like other overt behavior, must be interpreted in the light of the context in which they actually happen.¹⁸ The check must therefore be read in the context of the regular course of business between bank and checking account customer, the context in which it is used. So read, the check is a request for a loan to be made by an advance against the check.¹⁹ Perhaps it would be more accurate to say that the check and its context, the whole situation culminating in the presentment of the check, is a request for a loan. Suppose the customer notifies the bank to stop payment. In that event the order to stop payment is part of the context in the light of which the check must be read.²⁰ So read, the check, or more accurately the whole situation culminating in its presentment and including the order, is not a request for a loan. The fact that the order to stop payment is neither an actual striking out of the words written on the check or a physical destruction of it with the result that the check, apart

17. For a more complete statement of the analysis of transactions between bank and checking account customer see LANGDELL, *A BRIEF SURVEY OF EQUITY JURISDICTION* (2d ed. 1908) 114-115; Moore and Shamos, *Interest on Balances of Checking Accounts* (1927) 27 *COL. L. REV.* 633-634; Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 *YALE L. J.* 381; Moore and Sussman, *The Current Account and Set-Offs between an Insolvent Bank and Its Customer* (1932) 41 *YALE L. J.* 1109.

18. *CONTRACTS RESTATEMENT* (Am. L. Inst. 1932) §§ 233, 235.

19. There are doubtless contexts other than the regular course of business between bank and customer in which the check would be a request for a loan. For example, in a community in which the factual consequences between bank and customer of drawing and paying checks are established and familiar, a check drawn by one not a customer would be a request for a loan.

20. It will be noted that the words in the order to stop payment must themselves be read in the light of the context in which they are used. They may mean, notwithstanding the precise words used, that, under some circumstances the check shall nevertheless be paid; or they might mean, as they usually do, that under no circumstances shall the check be paid.

from its context, still appears to contain a request for payment, and the failure to note that the check by itself is not a request for a loan results in confusion of thought. The check itself, apart from its context at the moment of its presentment, is thought of as a request for a loan and the order to stop is thought of as operating by some rule of law peculiar to the case to revoke the request for a loan; whereas, each is but a single item in the situation culminating in the presentment of the check from which it must be inferred whether or not the bank in making the advance, if it does, is complying with the customer's request for a loan. It is not true, therefore, that after an order to stop payment a check is a request for a loan. Hence an advance against it cannot be in compliance with the customer's request and does not justify the implication in fact of a promise to repay. Furthermore it is not true that the making of an advance is a performance of the bank's obligation to lend since the condition precedent to that obligation, the making of a request for a loan, has not happened. Consequently there can be no implication of a promise on the ground that the bank, by making an advance against the check, has performed its obligation to lend. It follows, therefore, that an advance made against a stopped check is not the making of a bargain between bank and customer.²¹

This analysis²² and restatement in terms of the law of contracts discloses that the problems in a situation which culminates in the presentment of a check—whether or not it includes an order to stop payment—are: Is there an implication of a promise on the part of the customer to repay in reliance upon which the advance of the bank is made? Is there an implication of a request on the part of

21. As to the effect of statutes limiting the time during which an order to stop payment shall be effective, see note 63, *infra*.

What has been and will be said with respect to orders to stop payment presupposes that a check is not presented by the customer in person. The effect of a presentment by the customer in person of a check which he has stopped is indicated *infra* p. 836.

22. It will be noted that this analysis is in accord with the orthodox theory that a check is not an assignment *pro tanto* of the customer's balance. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 189; BRANNAN, NEGOTIABLE INSTRUMENTS LAW ANNOTATED (5th ed. 1932) 1065-1081. In jurisdictions in which before the Negotiable Instruments Law the doctrine that obtained was that a check was an assignment, it was held that orders to stop payment were ineffective. *Union National Bank v. Oceana County Bank*, 80 Ill. 212 (1875); *First National Bank of Du Quoin v. Keith*, 183 Ill. 475, 56 N. E. 179 (1900); *Loan and Savings Bank v. Farmers and Merchants Bank*, 74 S. C. 210, 54 S. E. 364 (1906). But see *Tramell v. Farmers' National Bank*, 11 Ky. Law Rep. 900 (1890); *Taylor v. First National Bank*, 119 Minn. 525, 138 N. W. 783 (1912).

the customer so that a dishonor by the bank is a breach of its obligation to lend?

It should be pointed out that the first question is more commonly formulated in terms of extinguishment of the bank's obligation and not, as has been done, in terms of creation of the customer's obligation. Since the obligation resulting from the implied-in-fact promise of the customer to repay is, in pursuance of the tacit understanding made upon the opening of the account, forthwith set off against the obligation of the bank, thereby reducing the bank's obligation whenever there is, as there almost always is, such an obligation to be reduced, the problem is commonly stated as follows. When in a situation which includes an advance against a check—whether or not it includes an order to stop payment—is there a reduction of the bank's obligation? But this form of statement is inaccurate. It is not sufficiently inclusive and will not serve if there is no obligation of the bank against which the customer's may be set off. For this reason the more familiar formulation of the problem is rejected.²³

In what has been said it has been assumed that, if an order to stop payment is present in a situation culminating in the presentment of a check, the order will prevent the implication in fact of a request to lend and of a promise to repay on the part of the customer. But there are events other than an order to stop payment which preclude the finding of a request to lend and a promise to repay. Examples of such events are a withholding of a check from presentment for more than a reasonable time after its issuance²⁴ and a notice of an involuntary alienation of the account upon death²⁵ or bankruptcy.²⁶ In *Steiner v. Germantown Trust Company*, how-

23. If one not a customer drew a check against which an advance was made, notwithstanding an order to stop payment, doubtless the order would be one of the factors which would appear to be important to the court or jury in finding whether or not there was an implied-in-fact request and promise to repay. Very likely if legal rules were formulated to apply to this situation they would be similar to those stated in this article.

24. *Lancaster Bank v. Woodward*, 18 Pa. 357 (1852). See *Wine v. Bank of New South Wales*, 4 A. J. R. 78 (1873); *Merchants' and Planters' Bank v. Clifton Manufacturing Co.*, 56 S. C. 320, 33 S. E. 750 (1899); 2 MORSE, BANKS AND BANKING (6th ed. 1928) § 443.

25. *Sneider v. Bank of Italy*, 184 Cal. 595, 194 Pac. 1021 (1920); *Johnson v. Thomas*, 93 Fla. 67, 111 So. 541 (1927); BRANNAN, *op. cit. supra* note 22, at 825, 1073; Feezer, *Death of Drawer of Check* (1930) 14 MINN. L. REV. 124. See *Glennan v. Rochester Trust & Safe Deposit Company*, 209 N. Y. 12, 102 N. E. 537 (1913) (payment of check without notice of drawer's death).

26. See *Union State Bank of Lancaster v. People's State Bank of Lancaster*, 192 Wis. 28, 211 N. W. 931 (1927); *Citizens' Union Bank v. Johnson*, 286 Fed. 527 (C. C. A. 6th, 1923); 1 MORSE, *op. cit. supra* note 24, § 400 A.

ever, the order to stop payment is the only event relied upon to negative the implication of a promise by the customer. In a discussion of the *Steiner* case it is unnecessary, therefore, to do more than to differentiate an order to stop payment from other events which negative the implication of a promise by the customer and to define the several qualities which an order must possess. The differentiation is accomplished by pointing out that an order to stop payment is that part of the situation culminating in the presentment of a check which prevents the implication of a request or a promise because it contains words or other behavior which symbolize a request not to pay. The several qualities which an order to stop payment must possess are: (1) it must be consciously expressed by the customer or by his agent; (2) it must appear to be consciously expressed by the customer or by his agent and express a countermand of the check; (3) it must be one the communication of which to the bank is a likely possibility; (4) it must be communicated to the bank; (5) it must precede and not follow the honoring of the check; and (6) it must not be revoked. Unless the notice possesses these qualities it will not prevent the court or jury²⁷ from finding that the situation culminating in the presentment of the check justified the bank in inferring a request and a promise on the part of the customer.

REQUIREMENTS FOR AN ORDER TO STOP PAYMENT.

(1) *The order must be consciously expressed by the customer or by his agent.*

The order is expressed by the customer when a court or jury will find that it was spoken or written by him or that it should have been inferred from his conduct.²⁸ The order is consciously expressed by the customer²⁹ when a court or jury will find that he had a conscious will to express it. The order is consciously expressed by

27. "Court or jury" is used here and throughout this article in the sense of "court and/or jury."

28. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 5; *id.* § 21. "The manifestation of mutual assent may be made wholly or partly by written or spoken words or by other acts or conduct."

29. If there is more than one customer, as in the case of a partnership or other multi-party account, whether one may sign checks in the joint name or in his own or whether all must sign, an order to stop payment of the check whether signed by one or all, given by or for any one, even though he was not a signer, is and appears to be the customer's order. See *Ozburn v. Corn Exchange National Bank of Chicago*, 208 Ill. App. 155 (1917); *Schneider v. Irving Bank*, 30 How. Pr. 190 (1865).

the customer although he is not conscious that the words or conduct will have the consequences of an order to stop payment, or if he is, does not desire that they have those consequences.³⁰ Thus, an order is consciously expressed by the customer when it is spoken or written to illustrate to a student the content of an order to stop payment or when the order, if written, is carefully kept under lock and key. The order is not consciously expressed by the customer when he does not have a conscious will to express it, as for example, when an order is spoken or written by a somnambulist.

The expression of the order is an expression for which the customer is responsible when it is the conscious will of the customer's agent. The person who expressed the order is the customer's agent when a court or jury will find that it was expressed by a third person in the customer's behalf and in pursuance of a legal power under the law of agency to give an order to stop payment for the customer.³¹ Thus, an order is one for the conscious expression of which the customer is responsible if it is spoken or written by one who is the customer's attorney in fact under a sufficiently executed power of attorney³² whether it be a power of attorney to give orders to stop payment or a power to draw checks in the customer's name or a power to draw in the attorney's own name, or if it is spoken or written by one who had lost the check which had been entrusted to him, as a fiduciary, by the customer.³³ But an order is not one for the conscious expression of which the customer is responsible

30. It is not "essential that the parties are conscious of the legal relations which their words or acts give rise to. It is essential, however, that the acts manifesting assent shall be done intentionally. That is, there must be a conscious will to do those acts; but it is not material what induces the will. Even insane persons may so act; but a somnambulist could not." *CONTRACTS RESTATEMENT* (Am. L. Inst. 1932) 25-26.

31. The word "agent" refers to a person who, under the law of agency, has a legal power, by giving an order to stop payment, to affect the legal relations of his principal, the customer, and the bank in the same manner in which they would have been affected had the customer in person given the order. *AGENCY RESTATEMENT*, Part 1 (Am. L. Inst. 1926) § 8. An order to stop payment may be given by an agent. *Kellogg v. Citizens Bank of Ava*, 176 Mo. App. 288, 162 S. W. 643 (1914); *American Defense Society v. Sherman National Bank of New York*, 225 N. Y. 506, 122 N. E. 695 (1919); *Cardo Drug Co. v. Chatham & Phenix National Bank*, 215 App. Div. 318, 213 N. Y. Supp. 716 (1st Dep't 1926); *Huffman v. Farmers National Bank*, 10 S. W. (2d) 753 (Tex. Civ. App. 1928); *MECHEM*, *AGENCY* (2d ed. 1914) c. III; *AGENCY RESTATEMENT* (Am. L. Inst. 1926) Part 1, §§ 17-20; *id.* (1930) Part 5, § 493 (2).

32. See *American Defense Society v. Sherman National Bank of New York*, and *Cardo Drug Co. v. Chatham & Phenix National Bank*, both *supra* note 31.

33. See *Public Grain & Stock Exchange v. Kune*, 20 Ill. App. 137 (1886).

if it is spoken or written by one who is not his agent, as for example, an order written by an overzealous, mischievous or spiteful person.

(2) *The order must (a) appear to be consciously expressed by the customer or by his agent and (b) express a countermand (c) of the check.*

An order appears to be consciously expressed by the customer or by his agent³⁴ when a court or jury will find that he appeared to have a conscious will to express it.³⁵ An order may appear to be consciously expressed though it is not communicated to the bank. The order appears to be the customer's, for example, if the signature to a letter or stop payment form is in the customer's own hand and corresponds to the signature on the signature card or is one which the bank does or should recognize,³⁶ or if a telegram contains a code word which the bank has agreed shall identify the customer or which the bank knows identifies him. An order also appears to be the customer's if it is spoken by him in person or over the telephone and he or his voice, as the case may be, is or should be recognized.³⁷ But, for example, if there are no unusual factors, an oral communication over the telephone by a customer who does not identify himself does not appear to be the customer's order; nor does a communication by mail which is not authenticated

34. In making the statement to which this note is appended it is assumed that in giving the order to stop payment the agent acted in such a way that his acts were an exercise of his legal power. No attempt is made to state what acts under the law of agency constitute an exercise of the power. AGENCY RESTATEMENT (Am. L. Inst. 1926) Part 1, § 8.

35. Compare CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 20 and the comment thereon that "*Mutual assent to the formation of informal contracts is operative only to the extent that it is manifested.*" (Italics are the writers').

36. *Grisinger v. Golden State Bank of Long Beach*, 92 Cal. App. 443, 263 Pac. 425 (1928); *Hodnick v. Fidelity Trust*, 183 N. E. 488 (Ind. App. 1932); *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920); *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203 (1929). See *Sarantopoulos v. Mid-City Trust and Savings Bank*, 222 Ill. App. 24 (1921) in which a typewritten letter to which the customer's name was signed in typewriting was held to be a sufficient order.

37. *Westminster Bank v. Hilton*, 43 T. L. R. 124 (1926); *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 Pac. 947 (1926); *Kellogg v. Citizens Bank of Ava*, *supra* note 31; *Mitchell v. Security Bank*, 85 Misc. 360, 147 N. Y. Supp. 470 (Sup. Ct. 1914); *Hunt v. Security State Bank*, 91 Ore. 362, 179 Pac. 248 (1919); *Hewitt v. First National Bank of San Angelo*, 113 Tex. 100, 252 S. W. 161 (1923). See *Waterston v. City of Glasgow Bank*, 11 Scot. L. R. 236 (1874); *Peoples Savings Bank and Trust Co. v. Lacey*, 146 Ala. 688, 40 So. 346 (1906); *Bank of Hamilton v. Williams* 146 Ga. 96, 90 S. E. 718 (1916). But see CAL. CIV. CODE (Deering, 1931) § 3265 g.

by a signature which the bank does or should recognize.³⁸ An order to stop payment appears to be consciously expressed by the customer, no matter how completely the particular verbal communication or other behavior specifically referred to as "the order" fails even to intimate that the communication is from the customer, if the situation which includes the order also includes other behavior of the customer from which a court or jury will find that the order appeared to be the customer's.³⁹ Thus, if after an unsigned letter stopping a check or a telephone message anonymously communicated, the bank learns that the writer or speaker was the customer, the bank is not justified in inferring a request and a promise.

An order expresses a countermand⁴⁰ when a court or jury will find that in the situation it expressed a request not to honor the

38. See *Sarantopoulos v. Mid-City Trust and Savings Bank*, *supra* note 36. As to the efficacy of an unauthenticated telegram see *Curtice v. London City & Midland Bank*, 1 K. B. 293 (1908); *Reade v. Royal Bank of Ireland*, 2 Ir. Rep. 22 (1922); *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29.

"A telegram may, reasonably and in the ordinary course of business, be acted upon by the bank, at least to the extent of postponing the honoring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque." *Curtice v. London City & Midland Bank*, *supra*, at 298-299.

"... we are of the opinion that, as a matter of law, the payment of a check may be countermanded by means of telegraphic notice." *Ozburn v. Corn Exchange National Bank of Chicago*, *supra*, at 158.

39. "... any act of the drawer of a check, which conveys to the bank before certification definite instruction to stop payment of the check, would be sufficient for the purpose." *Sarantopoulos v. Mid-City Trust and Savings Bank*, *supra* note 36, at 29.

Of course, situations of this kind should not be confounded with situations which do not include behavior symbolizing a direction not to pay but do include other behavior, as, for example, the withholding of a check for an unreasonable time after its issuance, which prevents the implication of a request or a promise. Thus the honoring of a stale check may not reduce the bank's obligation or obligate the customer for the overdraft, if any, though the situation culminating in the presentment of the check does not include an order to stop payment.

40. An order to stop payment which expresses a conditional countermand is a possibility which is seldom actualized. The condition upon the happening of which the bank is instructed not to pay may be one the happening of which will inevitably be within the knowledge of the bank when the check is presented or it may be one the happening of which will become known to the bank only by accident or as the result of investigation. Examples of a condition of the first type are an order not to honor if the check is presented by anyone other than the payee or an order not to honor if by the use of reasonable care on the part of the bank the honoring can be avoided (see *infra* p. 841). An example of the second type would be one in which the bank is

check. Thus, for example, an order expresses a countermand if the words "do not pay check," "do not honor check," "refuse to pay check," "stop payment of check" or words of similar import are used.⁴¹ A card or form⁴² provided by the bank, bearing its name

instructed not to honor if X is dead when the check is presented. Since the question always is, is the bank upon the presentment of the check justified in inferring a request and a promise, the legal consequences of making or refusing to make an advance depend upon whether or not the condition has happened. *Quaere* whether the fact that an order containing a conditional countermand of the second type might subject the bank to risk of loss should be taken into account.

41. *Reade v. Royal Bank of Ireland*, *supra* note 38 ("stop my cheque"); *Grisinger v. Golden State Bank of Long Beach*, *supra* note 36 ("stop payment of check"); *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29 ("suspend payment on check"). *Sarantopoulos v. Mid-City Trust and Savings Bank* ("stop payment on checks"); *Tremont Trust Co. v. Burack* ("stop payment of check") and *Gaita v. Windsor Bank* ("stop payment on check"), all *supra* note 36.

42. The following are some examples of forms which are in use.

1.

STOP PAYMENT ORDER

From
First National Bank

You are hereby instructed *not* to pay the following check issued by me-us:

No. Date Amount \$.....
Payable to
of
reason:

Duplicate issued

Date.....
Hour.....

2.

STOP PAYMENT

FIRST NATIONAL BANK

..... 19.....
Stop Payment on Original No.
For \$
Dated
In Favor of
Duplicate { Issued
 { Not Issued

3.

FIRST NATIONAL BANK

..... Branch

STOP PAYMENT

Check of
No. Dated

an order to stop payment which states the correct number, date, payee and amount describes the check countermanded.⁴⁶ If there are no unusual factors in the situation, an order describes the check if it states the correct date, payee and amount but omits the number, or if it omits the date but otherwise correctly describes the check.⁴⁷ But if there are no unusual factors in the situation an order which omits or states incorrectly the payee's name or the amount or which incorrectly describes the date and number does not describe the check.⁴⁸

(3) *The order must be one the communication of which to the bank is a likely possibility.*

The communication to the bank of the order is a likely possibility when a court or jury will find that under the circumstances there was a likely possibility of its communication to the bank. Thus, for example, an order is spoken under such circumstances that its communication to the bank is a likely possibility when it is spoken to an officer or employee of the bank who in the regular course of business receives orders to stop payment, or when it is spoken to a person who would ordinarily convey it to the bank, as for example, a messenger. There is a likely possibility of communication when the order, if written, is mailed or telegraphed or when it is dispatched by messenger.⁴⁹ But, if there are no unusual factors in the situation, the communication to the bank is not a likely possibility when the customer's words are not heard or when a written notice is care-

46. Sarantopoulos v. Mid-City Trust & Savings Bank, *supra* note 36.

47. Friesner v. Atlantic National Bank, 164 N. Y. Supp. 136 (Sup. Ct. 1917) in which the description of the check was correct in all respects save that the number was stated to be 114 instead of 115.

48. Westminster Bank v. Hilton, *supra* note 37 (order, communicated on August 1, stated wrong number and omitted date of check which was post-dated); Mitchell v. Security Bank, *supra* note 37 (amount, date and payee incorrectly stated as \$196.76, December 21, 1910 and Helfand & Abel instead of \$195.75, December 23 and bearer). But see Reade v. Royal Bank of Ireland, *supra* note 38 (telegram reading "Stop my cheque 50635 drawn for M'Entyre" held sufficient); Osburn v. Corn Exchange National Bank, *supra* note 29 (telegram reading "Suspend payment on check issued to Anson Brown" held sufficient though check drawn to Anson H. Brown and customer's name spelled Osburn instead of Ozburn where it appeared that the bank had acted upon a telegram); Levine v. Bank of the United States, 132 Misc. 130, 229 N. Y. Supp. 108 (Mun. Ct. 1928) (description of check correct in all respects save that payee's name given as "Harold Orkand" instead of H. Orkand).

49. Reade v. Royal Bank of Ireland, *supra* note 38; Osburn v. Corn Exchange National Bank of Chicago, *supra* note 29; Sarantopoulos v. Mid-City Trust and Savings Bank, *supra* note 36. But see Curtice v. London City & Midland Bank, *supra* note 38.

fully kept under lock and key. It may be that there is a likely possibility of communication if the order is carelessly spoken in the presence of or, if the order is written, carelessly permitted to get in the custody of an overzealous, mischievous or spiteful person.

(4) *The order to stop payment must be communicated to the bank.*

If the bank is owned by one individual and operated by him single-handed the order is communicated to the bank when a court or jury will find that it was brought to his attention at the banking house and within banking hours. Banking hours in this context are the hours during which the banking house is open for the transaction of business on the day the order is communicated.⁵⁰ The order may be called to the banker's attention at the banking house⁵¹ because that is the place at which he transacts his banking business including the making of memoranda and at which the memoranda must be kept if they are to serve their purpose; and the order may be communicated during banking hours because it is during this period that the banker actually does transact his banking business. The order is also communicated to the bank, when it is brought to the attention of the sole proprietor and operator out of banking hours and outside of the banking house if thereafter, but before the check is presented, he records the order at the banking house in the regular way. Thenceforth the situation is like the one in which the order is communicated at the proper time and place.

The order is not communicated to the bank when it is brought to the attention of the sole proprietor and operator outside of the banking house and out of banking hours if he has not recorded the order before the check is presented, unless he recalls the order at the moment of presentment. He is not justified in inferring a request and a promise by the customer if he recalls the order. But if he does not, he is justified in inferring the request and promise despite his forgetting since the customer departed from the usual mode of communication.⁵²

50. *Baines v. National Provincial Bank*, 32 Com. Cas. 216 (1927); *Butler v. Broadway Savings Bank*, 171 App. Div. 682, 157 N. Y. Supp. 532 (2d Dep't 1916). See *Hewitt v. First National Bank of San Angelo*, *supra* note 37; *Raynor v. Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499 (1922).

51. See *Kellogg v. Citizens Bank of Ava*, *supra* note 31; *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

52. It may be, however, that the banker agreed, when the order was brought to his attention out of banking hours and outside of the banking house, that it should have the consequences of an order communicated to the bank, and that this agreement may make the bank responsible for his undertaking. See *infra* p. 844.

If the bank is not owned and operated by a single individual then the order is communicated to the bank when a court or jury will find that, during banking hours and at the banking house, it was brought to the attention of the proper person, *i.e.*, the person to whom the check was presented for honoring and whose function it was to honor checks.⁵³ The order must be communicated to that person because he is the only person whose inference, that the situation culminating in the presentment of the check is a request and a promise, is taken into account in determining whether or not a bargain has been made. This is true though there are other persons to whom the check might have been presented and whose inferences would have been taken into account had the check been presented to them.

He is the only person whose inference is taken into account for two reasons. If an advance is made against the check by the bank it is made by him. Since a bargain between bank and customer is compounded of an advance by the bank and a request and promise by the customer, if there be any bargain at all between bank and customer it is made when he makes the advance. Similarly if, notwithstanding a request and promise by the customer, there is no bargain it is because he does not make an advance. Secondly, he is the only person among those in whom is vested a legal power to honor or dishonor checks who, in respect of the check, has exercised his power and whose behavior, therefore, could result in legal consequences for which the bank is responsible.

Any of the bank's employees may have a legal power to honor checks. Thus, for example, a loan and discount officer, a stenographer in the trust department, the interest clerk in the savings department or even the janitor might be a person to whom is allocated the function of honoring checks. The allocation of the function is a matter of the actual internal operation of a bank. In most cases the allocation is not expressed but must be implied in fact. The implied-in-fact allocation is to those employees of the bank who regularly honor or dishonor checks. In a new bank in which no one has regularly performed this function the implied-in-fact allocation is to those employees who, in respect of their other attributes, are like the employees in other banks to whom the function of honoring or dishonoring checks is allocated. The persons to whom the function is ordinarily allocated are the employees in the paying tellers' and bookkeepers' departments but do not include officers to whom checks are referred in case of doubt. Even among these employees there often is a specialization of function. Thus,

53. *Steiner v. Germantown Trust Co.*, *supra* note 1. See *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

for example, some of the paying tellers and the certification teller honor checks presented over the counter whereas the other paying tellers and bookkeepers honor checks presented through the clearing house or by mail.

As in the case of the sole owner and operator of a bank and for the same reasons, the notice must be given at the banking house and during banking hours.⁵⁴ But there is an additional reason why this is necessary. The persons with a legal power to honor or dishonor checks also have a legal power to act upon orders to stop payment, but they are empowered to act only upon such orders as are brought to their attention at the banking house and during banking hours. Again as in the case of the sole owner and operator, an order though brought to the attention of the proper employee outside of banking hours and elsewhere than at the banking house, is a sufficient order if, before the check is presented, he records the order at the banking house in the regular way or, if he does not record the order, remembers it at the moment the check is presented. Otherwise the order is not sufficient and the bank is justified in inferring a request and promise.⁵⁵

(5) *The order to stop payment must precede and not follow the honoring of the check.*

The rule refers to an order to stop payment of a check issued before the date it bears, *i.e.*, a post-dated check, as well as to one

54. See notes 50 and 51, *supra*.

55. It may be, however, that the proper person agreed to act upon an order which was communicated to him out of banking hours and outside of the banking house and that, because of the agreement, the bank may be responsible for his undertaking. See p. 851, *infra*.

"Appellee, reasoning from analogy, says that as the cashier could not receive deposits, or pay or accept checks in behalf of the bank at any place other than in the banking house, for the reason that the vaults, safes and books are kept there, so, as the evidence shows that the bank is compelled to keep a stop-check register for the orderly conduct of its business, and that entries therein must be made at the bank where the same is kept, notice to the cashier to stop the payment of a check, given at a place other than at its place of business, is not binding on the bank. We concede that such would be the case, until the cashier, by the use of reasonable diligence, was able to communicate such information to those in charge of the bank's business during his absence, whose duty it would be, upon receiving such information, to make the proper entry in such register.

"In the instant case, no reason is shown why the cashier, if he knew that he would not be at the bank when it was opened Monday morning, should not have communicated the information which he had received to the paying teller." *Hewitt v. First National Bank of San Angelo*, *supra* note 37, at 106-107, 252 S. W. at 163.

issued on or after the date it bears. In the case of a check issued on or after the date it bears, the order precedes and does not follow the honoring of a check when a court or jury will find that the order was brought to the attention of the proper person before an advance was made.⁵⁶ In the case of a post-dated check the order precedes and does not follow the honoring when a court or jury will find that the order was brought to the attention of the proper person before an advance was made⁵⁷ or if it was brought to the attention of the proper person before the date of the check though an advance had been made prior thereto.⁵⁸ An advance may be made against a post-dated check before as well as after the date it bears. But an advance before the date of the check is not in compliance with the customer's request for a loan and therefore is not an honoring of the check.⁵⁹

56. See *Moravek v. First National Bank*, 119 Kan. 84, 237 Pac. 921 (1925); *Johnson v. First State Bank*, 144 Minn. 363, 175 N. W. 612 (1920); *Albers v. Commercial Bank*, 85 Mo. 173 (1884); *Kellogg v. Citizens Bank of Ava*, *supra* note 31; *Sutter v. Security Co.*, 96 N. J. Eq. 644, 126 Atl. 435 (1924); *Freund v. Importers and Traders National Bank*, 76 N. Y. 352 (1879); *Brandt v. Public Bank*, 139 App. Div. 173, 123 N. Y. Supp. 807 (1910); *Poess v. Twelfth Ward Bank*, 43 Misc. 45, 86 N. Y. Supp. 857 (Sup. Ct. 1904); *First National Bank v. School District*, 31 Okla. 139, 120 Pac. 614 (1912); *Hunt v. Security State Bank*, *supra* note 37; *Huffman v. Farmers National Bank*, *supra* note 31.

It is customary for the customer to inquire and for the bank to find out, whether or not the customer has inquired, if the check, the honoring of which he seeks to stop, has been honored. If the check has been honored obviously, there is no point in giving the order to stop payment. If the customer is told at the time of giving the order that the check has not been honored though in fact it has, should the bank's obligation, nevertheless, be reduced? It would seem that it should inasmuch as the events having the consequence of reduction in the bank's obligation have already occurred and the erroneous statement in no way contributed to any loss which the customer has suffered or has been unable to prevent because of the honoring of the check. However, if the customer, relying on the statement of the bank, thereafter issues a duplicate check which is honored or issues a second check for more than his "balance," i.e., the amount up to which the bank is obligated to honor, but for less than the balance plus the amount of the first check, and the second check is dishonored then he should be able to recover for any loss resulting therefrom. The customer has been misled by the erroneous statement of the bank and the ensuing loss is directly attributable thereto. See *Holland v. Manchester & Liverpool Banking Co.*, 25 T. L. R. 386 (1909).

57. *Hiroshima v. Bank of Italy*, *supra* note 37. See *Schoen v. Security Bank of New York*, 81 Misc. 173, 142 N. Y. Supp. 309 (1913).

58. *Peoples Savings Bank & Trust Co. v. Lacey*, *supra* note 37; *Stag Co. v. Union Bank of Chicago*, 201 Ill. App. 510 (1916). See *Mitchell v. Security Bank*, *supra* note 37.

59. An advance against a post-dated check prior to the date specified for its honoring is not made in compliance with the customer's request and in reliance upon his implied-in-fact promise to repay. *Hinchcliffe v. Ballarat*

(6) *The order to stop payment must not be revoked.*

An order is revoked when a court or jury will find first, that the revocation was consciously expressed by the customer or by his agent, secondly, that it appeared to be consciously expressed by the customer or by his agent and expressed a countermand of the order to stop payment, thirdly, that there was a likely possibility of its communication to the bank, fourthly, that it was communicated to the bank and fifthly, that it preceded the honoring of or the refusal to honor the check. A revocation does satisfy the stated requirements when, read as a countermand of the check instead of as a countermand of the order to stop payment, it would satisfy the rules determining the sufficiency of an order to stop payment. Thus, for example, the revocation is sufficient if the customer, who notified the bank to stop payment of a check issued to his own order and lost by him, later finds it and presents it himself at the counter;⁶⁰ or if the payee presents the check after the customer notified the bank to stop payment and informed it that he was doing so solely because the payee who was entitled to the proceeds had lost the check.⁶¹ And if a payee known to the bank to be in possession of the check as the customer's fiduciary loses it and notifies the bank to stop payment, upon his finding the check, if the bank knows he is still entitled to use the check for the customer's benefit, his request that the bank disregard the order but not the check, is a sufficient revocation if the request is brought to the attention of the proper person before presentment by an indorsee. Conversely the revocation is not sufficient if, read as a countermand of the check, it would not satisfy the rules deter-

Banking Co., 1 Vict. (Law) 229 (1870); *Pollock v. Bank of New Zealand*, 20 N. Z. L. R. 174 (1901); *Schoen v. Security Bank of New York*, *supra* note 57. But see *Magill v. Bank of North Queensland*, 6 Q. L. J. R. 262 (1895). Such advance, however, reduces the bank's obligation or obligates the customer from and after the date specified for honoring, if in the meantime there has been no sufficient order to stop payment. *Mitchell v. Security Bank*, *supra* note 37; *Westminster Bank v. Wheaton*, 4 R. I. 30 (1856). The advance is not a loan and the obligation of the customer cannot be derived from the propositions of the law of contracts. If the advance benefits the customer and is not made officiously or is made under mistake an obligation of the customer to reimburse the bank upon the day specified in the check for the amount prepaid against the check may be derived, however, from the law of quasi-contracts. A possible explanation of the reduction in the bank's obligation after the date of the check is that the tacit understanding for the set-off of reciprocal obligations upon the opening of the account may be broad enough to cover any obligations of the customer incurred in the course of banking transactions.

60. See *Cardo Drug Co. v. Chatham & Phenix National Bank*, *supra* note 31.

61. *Cohen v. State Bank of Philadelphia*, 69 Pa. Super. Ct. 40 (1918).

mining the sufficiency of an order.⁶² Thus, for example, a request to pay the stopped check is not sufficient if it is given after the presentment of the check, or if it is not brought to the attention of the proper person at the banking house and during banking hours, or if it does not sufficiently describe the order to stop payment.⁶³

CONSEQUENCES OF COMPLIANCE OR NON-COMPLIANCE WITH THE REQUIREMENTS

An order to stop payment to be effective must comply with all of the rules which have been stated. Thus, if the order was not consciously expressed by the customer or his agent or, if it was consciously expressed, did not appear to be consciously expressed, the order is not sufficient though it expressed a countermand of the check, was likely to be and was communicated to the bank before the advance was made and was not revoked. Similarly, if the order was complete in every respect save that it failed adequately to describe the check countermanded the order is insufficient. If the order is a sufficient order within the rules defined above and the bank nevertheless makes an advance against the check, the bank's obligation is not reduced nor is the customer obligated if the check is an overdraft.⁶⁴ But the

62. But see *American Defense Society v. Sherman National Bank of New York*, *supra* note 31.

63. In some states there are statutes (modelled after the draft recommended by the American Bankers Association) providing that an order to stop payment, though it is not in terms limited in point of time, shall not "remain in effect for more than six months [ninety days] after the service thereof on the bank unless the same be renewed . . ." See for example *IDAHO CODE ANN.* (1932) § 25-1005; *LA. GEN. STAT.* (Dart, 1932) § 632; *MO. STAT. ANN.* (1932) § 5385; *MICH. COMP. LAWS* (1929) § 12075; *ORE. CODE ANN.* (1930) § 22-1412; *W. VA. CODE* (1931) c. 31, art. 8, § 26; *WYO. REV. STAT.* (1931) § 10-154. See also 2 *PATON, DIGEST* (1926) 2308.

As to clauses or stipulations limiting the period of time during which an order to stop payment shall be effective see note 44, *supra*.

64. *Reade v. Royal Bank of Ireland*, *supra* note 38; *Baines v. National Provincial Bank*, *supra* note 50; *Garrioch v. Canadian Bank of Commerce*, 3 *W. W. R.* 185 (1919); *Peoples Savings Bank and Trust Co. v. Lacey*, *supra* note 37; *Hiroshima v. Bank of Italy*, *supra* note 37; *Public Grain & Stock Exchange v. Kune*, *supra* note 33; *Stag Co. v. Union Bank of Chicago*, *supra* note 58; *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29; *Sarantopoulus v. Mid-City Trust and Savings Bank*, *supra* note 36; *Kellogg v. Citizens' Bank of Ava*, *supra* note 31; *Friesner v. Atlantic National Bank of New York*, *supra* note 47; *American Defense Society v. Sherman National Bank of New York*, *supra* note 31; *Schneider v. Irving Bank*, *supra* note 29; *Poess v. Twelfth Ward Bank*, *supra* note 56; *Schoen v. Security Bank of New York*, *supra* note 57; *First National Bank v. School District*, *supra* note 56; *Hunt v.*

advance does reduce the bank's obligation or obligate the customer for an overdraft, if any, if the order is insufficient in respect to any one requirement though it be sufficient in respect of all others.⁶⁵ If, however, the bank does not make an advance, then, whether or not the order is sufficient, there is no change in the amount of the bank's obligation to honor.

If the bank does not make an advance against the check, does the customer have an action for the damage resulting from the failure of the bank to perform its pre-existing obligation to honor his checks? The making by the customer of a request for a loan is a condition precedent to that obligation. Whether or not a loan is requested depends upon the situation culminating in the presentment of the check and upon whether or not that situation includes a sufficient order to stop payment. Thus, if the situation includes a sufficient order to stop payment there is no request for a loan and a dishonor of the check is not a breach of the bank's obligation to lend. But if the order does not comply with all the requirements, the situation culminating in the presentment of the check constitutes a request for a loan and the bank is liable for the damage resulting from the dishonor. Though the customer's attempt to stop payment does not deprive him of an action for dishonor, the facts which led him to attempt to stop payment and his unsuccessful attempt to do so may be shown by the bank in mitigation of damage.

The situation may be such that a court or jury will regard as doubtful either a conclusion that the order complied with the requirements for a sufficient order to stop payment or one that it did not. It may be argued that for this class of cases there should be a special rule permitting the bank either to pay or not to pay and protecting it in whichever course it pursued. This argument, however, overlooks the point that the problems raised by these cases are already covered by the rules as to burden of proof. If the bank claims a reduction in its obligation by virtue of an advance against

Security State Bank, *supra* note 37; Wall v. Franklin Trust Co., 84 Pa. Super. Ct. 392 (1925); Pease & Dwyer v. State National Bank, 114 Tenn. 693, 88 So. 172 (1905); Huffman v. Farmer's National Bank, *supra* note 31.

65. Curtice v. London City & Midland Bank, *supra* note 38; Westminster Bank v. Hilton, *supra* note 37; Baines v. National Provincial Bank, *supra* note 50; Merchants and Planters Bank v. New First National Bank, 116 Ark. 1, 170 S. W. 852 (1914); Frankenberg v. First National Bank, 33 Mich. 46 (1875); Johnson v. First State Bank, *supra* note 56; Albers v. Commercial Bank, Sutter v. Security Co., Freund v. Importers and Traders National Bank, Brandt v. Public Bank, all *supra* note 56; Butler v. Broadway Savings Bank, *supra* note 50; Cardo Drug Co. v. Chatham & Phenix National Bank, *supra* note 31; Mitchell v. Security Bank, *supra* note 37; Steiner v. Germantown Trust Company, *supra* note 1; Raynor v. Scandinavian American Bank, *supra* note 50.

the check the burden is upon the bank to establish that the advance was in compliance with the customer's request and in reliance upon his promise.⁶⁶ This burden includes establishing that the order is not sufficient, that is, that despite the behavior referred to as an order the bank was justified in inferring from the entire situation both the request and promise. If on the other hand the customer seeks damages for the dishonor of the check he must establish that the order was insufficient and, therefore, did not justify the inference that there was not a request and a promise.⁶⁷ Thus, it appears that if the situation is one in which the bank must honor it also is one in which the advance, if one be made, will reduce the bank's obligation, and conversely, if the situation is one in which an advance will not reduce the bank's obligation it also is one in which the bank need not honor.

It may be argued that the rules as to burden of proof do not afford a satisfactory solution of the problem, since in making its decision at the moment the check is presented the bank is faced with the risk that a court or jury may come to a different conclusion as to the sufficiency of the order. Thus, if the bank decides to honor, the court or jury may, nevertheless, decide that the bank has not sustained its burden of proof; and if the bank decides not to pay, the court or jury may, nevertheless, decide that the customer has sustained his. However, the argument goes too far. It simply points out that every transaction involves the risk of subsequent litigation in which the court or jury may resolve doubtful points in a prejudicial way. But the chance of an adverse finding is necessarily involved in judicial decisions upon past transactions.⁶⁸ Moreover the argument has peculiarly little force in the cases under discussion. In most situations the bank may limit the risk to a negligible amount. By refusing to honor the bank can avoid the risk of losing the amount of the check and by assigning, at the time of its refusal to honor, the doubt as to the sufficiency of the order to stop payment as its reason for dishonoring the bank may in most situations limit its liability to nominal damages.⁶⁹

66. See *Chicago Savings Bank v. Block*, 126 Ill. App. 128 (1906); *Patterson v. First National Bank of Humboldt*, 73 Neb. 384, 102 N. W. 765 (1905); *Wiggins v. Stevens*, 33 App. Div. 83, 53 N. Y. Supp. 90 (4th Dep't 1898).

67. See *Mudd v. Farmers' & Merchants' Bank of Hunnewell*, 175 Mo. App. 398, 406, 162 S. W. 314, 318 (1914); *Newburger v. State Bank*, 70 Misc. 46, 127 N. Y. Supp. 956 (Sup. Ct. 1910).

68. Moore and Hope, *An Institutional Approach to the Law of Commercial Banking* (1929) 38 YALE L. J. 703, 719; Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 1219, 1230, 1240, 1246.

69. 1 MORSE, *op. cit. supra* note 24, at 839-840.

Perhaps, for the sake of completeness, it is desirable to point out some of the other legal consequences which follow if an advance against a check is made after a sufficient order to stop payment. First, the customer may not recover from the holder the amount of the advance against the check even though the customer has, and has exercised, his power to rescind the transaction in which the check was given. Since the bank's obligation to the customer is not reduced, even if the holder is unjustly enriched in the amount of the advance, the enrichment is not at the customer's expense.⁷⁰ Secondly, the particular circumstances surrounding the advance against the check may, in some jurisdictions, entitle the bank to recover from the holder the amount advanced on the ground the advance was made under mistake of fact.⁷¹ Thirdly, the bank may, in some jurisdictions, be entitled to recover from the customer the amount advanced against the check if the advance benefited the customer, *e.g.*, paid his debt, and the case satisfies the requirements of the doctrines permitting recovery of benefits conferred without request.⁷² But the bank's obligation to the customer to pay and to lend by honoring checks is not reduced by the amount it may be entitled to recover from him.^{72a} Fourthly, if the situation is such that the bank may recover from either the holder or the customer it may not recover from both.

PRINTED STIPULATIONS RELATING TO ORDERS TO STOP PAYMENT

Sometimes the signature card which is signed by the customer or the pass book which is issued when an account is opened contains stipulations relating to orders to stop payment. If the customer assents to them it may be that a bargain is made, which, if enforceable, might result in legal consequences different from those which have been stated. Such a stipulation may be part of a bargain in which,

70. See *Reade v. Royal Bank of Ireland*, *supra* note 38; *Bank of Moulton v. Rankin*, 24 Ala. App. 110, 131 So. 450 (1930).

71. See *National Loan & Exchange Bank v. Lachovitz*, 131 S. C. 432, 128 S. E. 10 (1925) in which the bank was allowed to recover, and *Bank of Moulton v. Rankin*, *supra* note 70; *Hiroshima v. Bank of Italy*, *supra* note 37; *National Bank of New Jersey v. Berrall*, 70 N. J. Law 757, 58 Atl. 189 (1904); and *Huffman v. Farmers' National Bank*, *supra* note 31, in all of which the bank was not allowed to recover.

72. See *Garrioch v. Canadian Bank of Commerce*, *supra* note 64; *Usher v. Tucker Co.*, 217 Mass. 441, 105 N. E. 360 (1914); *Schneider v. Irving Bank*, *supra* note 29. But see *Hiroshima v. Bank of Italy*, *supra* note 37; *Stag Co. v. Union Bank of Chicago*, *supra* note 58; *American Defense Society v. Sherman National Bank*, *supra* note 31; *Schoen v. Security Bank of New York*, *supra* note 57; *Wall v. Franklin Trust Co.*, *supra* note 64.

72A. But see note 59, *supra*.

in exchange for a sufficient consideration, the customer promises the bank to indemnify it and save it harmless from advances made, inadvertently and in the exercise of due care, against checks as to which a sufficient order of the customer to stop payment has been given. Doubtless, if there is such a bargain, an advance inadvertently made against a "stopped" check by a teller or bookkeeper who knew of the order to stop payment would reduce the bank's obligation or, if the check were an overdraft, would obligate the customer for the amount of the overdraft. If the stipulation were part of a bargain in which the customer promises to repay the amount of unrequested advances made inadvertently and in the exercise of due care against "stopped" checks or, in which the customer agrees that the bank shall not be obligated or liable in the event an advance is so made, then, here too, an inadvertent payment would doubtless reduce the bank's obligation or obligate the customer. These consequences may be explained on the ground that the bargains which cover the inadvertent advances, which in themselves neither reduce the bank's obligation nor obligate the customer, but give the bank a right to indemnity, to repayment, or to release from liability, are specifically enforced by giving the bank the same reduction in its obligation that it would have had, had there been no order to stop payment. The consequence that the inadvertent advance reduces the bank's obligation may also be explained on the ground that the bargain becomes part of the situation culminating in the presentment of the check and so qualifies the order that it does not prevent the inference of a request upon the presentment of the check but does prevent an inference of a request if the bank could, in the exercise of reasonable care, have avoided making the advance. Consequently an inadvertent advance is actually an advance to the customer upon his request and in exchange for his promise.

The stipulation on the signature card or in the pass book, to which the customer assents, may state any one of the promises on the part of the customer which have been supposed in the preceding paragraph but did not result in a contract either because the parties did not attempt to make a bargain or because, if they did, the bargain failed for want of consideration. In such a case, notwithstanding the absence of a contract, the promise of the customer nevertheless becomes part of the context and so qualifies the order that a court or jury will find that the situation, which includes the order, the promise in the stipulation, the check and the inadvertent payment, is a request for a loan and a promise to repay.⁷³ Similarly if the stipulation is no more than a

73. ". . . if the drawer serves a qualified or limited notice like the one in question, the obligation of the bank is thereby limited, and it will not be liable to the drawer if the check is inadvertently paid." *Gaita v. Windsor Bank*,

statement that the bank is not to be liable for advances made inadvertently against stopped checks, the order is so qualified that despite the "stop," a request and a promise would be inferred in the situation culminating in the inadvertent payment. Thus, it appears that the promise or statement though not part of a bargain is effective for the same reason that it would be were it part of a bargain.

Since it is immaterial whether the stipulation is a promise by the customer or a mere statement and, if it be a promise, whether it is or is not part of a bargain, questions of consideration, illegality or any other matter related to the formation and validity of contracts need not be considered.⁷⁴

Sometimes a stipulation relating to orders to stop payment, to which the customer assents, appears in a pass book issued to the customer after the account is opened but before an order is given. In such a case it may be more difficult to find a consideration on the part of the bank sufficient to support a promise. But since the effectiveness of the stipulation does not depend upon its being a promise which is part of a bargain, no material difficulty is presented. The consequence of such a stipulation is the same as the consequence of a stipulation appearing on a signature card or in a pass book issued at the opening of the account.⁷⁵

Sometimes the stop payment forms provided by banks contain stipulations relating to orders to stop payment to which the customer assents.⁷⁶ The consequence of such a stipulation, whether it be a

supra note 36, at 155, 167 N. E., at 204. See *Brandt v. Public Bank*, *supra* note 56; *Schoen v. Security Bank of New York*, *supra* note 57.

74. See *Hiroshima v. Bank of Italy*, *supra* note 37; *Grisinger v. Golden State Bank*, *Tremont Trust Co. v. Burack*, *Gaita v. Windsor Bank*, all *supra* note 36; *Elder v. Franklin National Bank of the City of New York*, 25 Misc. 716, 55 N. Y. Supp. 576 (Sup. Ct. 1899); *Cohen v. State Bank of Philadelphia*, *supra* note 61.

75. But see *Elder v. Franklin National Bank of the City of New York*, *supra* note 74.

76. The following are examples of such stipulations:

1.

"The undersigned hereby agrees to reimburse you for all damages, cost and expenses to which you may be subjected by reason of refusal to honor said check, and to furnish due and sufficient security therefor whenever demanded. If duplicate of above is presented, please pay and charge to our account. We understand that you will use your best efforts to avoid payment of the item mentioned above, but agree not to hold you liable on account of payment contrary to this request should it be occasioned through inadvertence, mistake or accident."

2.

"The undersigned agrees to hold said Bank harmless for said amount, and for all damages, expenses and costs incurred by it on account of refusing payment of said check, and further agrees not to hold said Bank liable on

promise or a statement, is the same as the consequence of a stipulation appearing on a signature card or in a pass book.⁷⁷

It may be that the customer, prior to filling out and signing the stop payment form, had assented to a stipulation on a signature card or pass book. Since the consequences of both stipulations are the same, the fact that there are two stipulations in any particular situation would not be material.⁷⁸

Thus, it appears that whenever a paying teller or bookkeeper, to whose attention an order to stop payment has been brought, inadvertently but in the exercise of due care makes an advance against a check drawn by a customer who has assented to a stop payment stipulation appearing on signature card, passbook or stop payment blank, the advance reduces the bank's obligation or obligates the customer if the check is an overdraft.⁷⁹ But, despite the stipulation to which the customer has assented, an advance which could have been avoided had the teller or bookkeeper making it exercised due care, neither reduces the bank's obligation nor obligates the customer for the amount of an overdraft;⁸⁰ in other words, the result is the same as it would have been had there been no stipulation.

In addition to the clauses relating to inadvertent payments, there is sometimes inserted in the passbook, signature card or stop pay-

account of payment contrary to this request, if same occur through inadvertence or accident. The First National Bank receives above request with the understanding and upon the express condition that it will use its usual methods to prevent oversight and accident, but that it shall not be in any way liable for its act should said check be paid by it in the course of its business."

3.

"..... hereby agreeing to hold you harmless for said amount, and all expenses and costs incurred by you on account of your refusing payment of said check, and agreeing further not to hold you liable on account of payment contrary to this request if same occur through inadvertence or accident only."

77. See *Grocott & Sherry v. African Banking Corporation*, 18 E. D. C. 267 (1904); *Hodnick v. Fidelity Trust, Tremont Trust Co. v. Burack, Gaita v. Windsor Bank*, all *supra* note 36; *Brandt v. Public Bank*, *supra* note 56; *Cohen v. State Bank of Philadelphia*, *supra* note 61. But see *Hiroshima v. Bank of Italy*, *supra* note 37; *Grisinger v. Golden State Bank*, *supra* note 36; and *Levine v. Bank of United States*, *supra* note 48.

78. *Brandt v. Public Bank*, *supra* note 56; *Levine v. Bank of United States*, *supra* note 48.

79. *Grocott & Sherry v. African Banking Corporation*, *supra* note 77; *Hodnick v. Fidelity Trust, Tremont Trust Co. v. Burack, Gaita v. Windsor Bank*, all *supra* note 36; *Cohen v. State Bank of Philadelphia*, *supra* note 61.

80. *Hiroshima v. Bank of Italy*, *supra* note 37; *Grisinger v. Golden State Bank of Long Beach*, *supra* note 36; *Levine v. Bank of United States*, *supra* note 48; *Elder v. Franklin National Bank of City of New York*, *supra* note 74.

ment blank a promise to indemnify the bank, or a promise not to sue or a statement that the bank shall not be held responsible, in the event the check is dishonored.⁸¹ If the order to stop payment has been brought to the attention of the proper person, the situation culminating in the presentment of the check does not justify the implication of a request to lend, and the dishonor is not a breach of the bank's obligation to honor. The consequences of the dishonor if there is no stipulation are, therefore, precisely the same as the consequences which would follow were the stipulation to be given effect according to its terms. The clause is dictated by caution rather than by need.⁸²

II

PROMISES OR UNDERTAKINGS TO COMMUNICATE ORDERS TO STOP PAYMENT

The first question—What are the legal requirements which an order to stop payment must satisfy?—has now been answered. If the order does not satisfy the legal requirement of communication to the proper person, does the employee who first receives it make a promise or undertaking, upon which the bank is responsible, to communicate it to the proper person? This question arises only when the order, sufficient in every other respect, is not given to the proper person but is given to an officer or employee for communication to the proper person. It is possible, of course, that the answer to this question may be found in the terms of an express bargain between bank and customer. The bank may have agreed that an advance against a check made after an order to stop payment had been given to any officer or employee would not reduce the amount of its obligation, or the bank may have promised to insure the communication of the order to the proper person before an advance against the check is made or may have promised to exercise

81. The following are examples of such stipulations:

1.

"I hereby agree to hold you harmless for said amount, and all expenses and costs incurred by you on account of your refusing payment of said draft or check."

2.

"The undersigned hereby agree to reimburse you for all damages, cost and expense to which you may be subject by reason of refusal to honor this check."

See also note 76, *supra*.

82. As to clauses or stipulations limiting the period of time during which an order to stop payment shall be effective, see note 44, *supra*.

reasonable care to communicate it.⁸³ Usually there is no such express bargain. If there is none, three situations must be distinguished. In the first, the officer or employee to whom the order is communicated does not promise or undertake, either by words or conduct, to bring the order to the attention of the proper person; for example, he expressly refuses to receive the order or successfully pretends not to hear it.⁸⁴ In such a case if the officer or employee does communicate the order to the proper person before the check is honored, it is, thereafter, a sufficient order to stop payment.⁸⁵ If he does not, the legal relations between bank and customer are not affected, and the consequences of the subsequent honor or dishonor of the check are those which would have ensued had the customer made no attempt whatever to give an order. In the second, the officer or employee does promise or undertake on his own behalf but not on behalf of the bank to relay the order to the proper person. Here again the legal relations between bank and customer are not affected, though the officer or employee may himself, if the customer relies on the promise or undertaking, become obligated to make reasonable efforts to bring the order within a reasonable time to the attention of the proper person. In the third, the promise or undertaking of the officer or employee is made on behalf of the bank. In this situation is the bank subjected to a liability? *The bank is liable to the customer for damage resulting from its failure to use reasonable efforts to communicate the order to the proper person within a reasonable time if the officer or employee who received the order agreed to communicate it and was one to whom the bank had allocated the function of promising or undertaking to communicate orders to stop payment.*

The subjection of the bank to an obligation to reimburse the customer for the damage resulting from its failure to make reason-

83. *Kellogg v. Citizens' Bank of Ava*, *supra* note 31, and *Hewitt v. First National Bank of San Angelo*, *supra* note 37, are not to be taken to be cases of this sort.

84. See *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

It may be that the order to stop payment form expressly provides that its receipt shall not amount to a promise or undertaking to communicate it. It is believed, however, that courts will hesitate to interpret a clause or stipulation in such a way as to relieve the bank from a promise or undertaking to communicate. *Hiroshima v. Bank of Italy*, *supra* note 37, at 373, 248 Pac. at 951; *Elder v. Franklin National Bank of City of New York*, *supra* note 74, at 719, 55 N. Y. Supp. at 578.

The following clause taken from a form in use apparently attempts to preclude the finding of a promise or undertaking:

"I ask this as an act of courtesy only and hereby release you from any liability in case of payment or non-payment."

85. *Kellogg v. Citizens' Bank of Ava*, *supra* note 31.

able efforts to bring the order within a reasonable time to the attention of the proper person depends upon the applicability of one or more of three legal doctrines. First, if there is a consideration⁸⁶ for the bank's promise there can be no question of its obligation. Second, if there is no consideration and therefore no contract, the bank may be obligated under the doctrine of gratuitous promises upon which the promisee has in fact relied. "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."⁸⁷ Third, the acceptance of the order may make the bank liable under the doctrine of gratuitous undertakings. One who undertakes with another to do an act which he should recognize as necessary to prevent damage to the other who reasonably refrains from himself taking the necessary steps is liable to the other for the damage resulting from his failure to exercise reasonable care to carry out his undertaking;⁸⁸ or, as the doctrine is sometimes stated: "One who by . . . conduct which he should realize will cause another reasonably to rely upon the performance of definite acts of service by him as the other's agent, causes the other to refrain from having such acts done by other available means, is subject to a duty to use care to perform such service or, while other means are available, to give notice that he will not perform."⁸⁹

86. The customer, at the bank's request, may refrain or promise to refrain from bothering any other person with the order or promise to indemnify the bank in the event of the dishonor of the check before the order has been given to the proper person. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 75.

87. *Id.* § 90.

88. See TORTS RESTATEMENT (Am. L. Inst. 1928) Part 3, § 303.

89. AGENCY RESTATEMENT (Am. L. Inst. 1931) Part 6, § 599.

"There is no such thing as a constructive countermand in a commercial transaction of this kind."

"In my opinion, on the admitted facts of this case, the cheque was not countermanded, although it may well be that it was due to the negligence of the bank that they did not receive notice of the customer's desire to stop the cheque. For such negligence the bank might be liable, but the measure of damage would be by no means the same as in an action for money had and received." *Curtice v. London City and Midland Bank*, *supra* note 38, at 298.

"There is an equitable phase to this case which appeals to us most strongly, and we think to hold this notice ineffectual would work grave injustice. When the cashier was called over the telephone, he made no objection to talking this much bank business on Sunday, or when away from the bank. On the contrary, he seems to have accepted the notice without any protest, promising to make a written memorandum and attend to it next morning. It was natural, therefore, for Hewitt to conclude that he could rely upon this promise of the cashier and make no further efforts himself to save his money. Had the

If the bank is obligated by virtue of a promise or undertaking the scope of its obligation will depend upon the terms of the promise or undertaking. If there is an express promise the scope of the obligation is clear. But usually the promise must be implied in fact from the acceptance of the order. The promise which a court or jury will find from the acceptance of the order is a promise to make reasonable efforts to bring the order within a reasonable time to the attention of the proper person. The phrases "reasonable efforts" and "reasonable time" refer to the efforts usually made by bank officers and employees to communicate the order and the time usually taken to complete the communication. The implied-in-fact promise is to make the usual efforts made by bank officers and employees to bring the order to the proper person within the time usually taken to complete the transmission. The reason this is the promise now becomes plain. The acceptance of the order, without more, signifies that the bank will do what is usually done in the premises, and consequently the customer is justified in inferring that the bank will do what is usually done and only that. Similarly the bank must infer that the conduct of the customer in delivering the order means that he expects the usual behavior from the bank and relies upon that behavior and that behavior only taking place. For this reason a promise that the order will be communicated to the proper person before the check is presented can not be inferred; neither can a statement that the order shall be effective forthwith be inferred.

If the obligation of the bank is derived from the doctrine of undertakings and not from the doctrine of gratuitous promises, the scope of the undertaking—since the undertaking is not expressed—will depend upon what a court or jury will find its terms to be. Since the terms of the undertaking depend, just as the terms of the gratuitous promise do, upon the meaning of the acceptance of the order, they will be found to be identical with the terms of the promise. If, however, the obligation of the bank be derived from the doctrine of undertakings, the question of the terms of the undertaking is not important. Even if the undertaking in terms unqualifiedly requires the bank to communicate the order to the proper person before the

cashier objected to the notice for any reason and refused to accept it, the drawer of the check would, at least, have had an opportunity to go to the bank in person by the time it opened on Monday morning and served the notice there. We do not say whether or not, as a matter of law, a cashier could refuse to receive this notice over the telephone at his home on Sunday. That question is not before us. But, we do say that the action of the cashier in the case at bar, in receiving the notice as he did, very naturally lulled Hewitt into a sense of security and kept him from acting further in his own behalf in person." *Hewitt v. First National Bank of San Angelo*, *supra* note 37, at 108, 252 S. W. at 163.

check is presented, yet the bank is liable only in the amount of damages resulting from its failure to use reasonable efforts to communicate the notice to the proper person within a reasonable time.⁹⁰ Were there a gratuitous promise to communicate the order to the proper person at all events the distinction between the right of action arising upon the breach of such a promise and the right of action arising upon the breach of an undertaking having identical terms must be noted. "The former right of action would include the benefit which would have resulted from the full performance of the undertaking and contractual obligations can normally be satisfied only by full performance and not by the exercise of reasonable care to carry out the undertaking. On the other hand, the right of action stated in this Section is only for such harm as results from the other's action or inaction in reliance upon the performance of the undertaking and the obligation imposed upon the actor goes no further than to require him to exercise reasonable care to the end that the undertaking may be carried out."⁹¹ It should be remembered, however, that the promise inferred from the acceptance of the order to stop payment is not to communicate the order but only to use reasonable efforts to communicate it to the proper person within a reasonable time.

Notwithstanding the distinction between the theories of recovery which is suggested by the language quoted, not only is the scope of the bank's obligation the same, but also the amount of the customer's recovery in the event of a breach is the same whether the customer attempts to recover on the theory of a bargain, on the theory of a gratuitous promise, or on the theory of an undertaking. First, if the check, the honoring of which the customer unsuccessfully attempted to stop, is paid he may recover the amount of the check plus interest and no more. If the rules for measuring damages for breach of a promise be applied, the prevention of a reduction in the bank's obligation in the amount of the check is the full benefit which the customer would have received had the promise been performed. If the rules for measuring damages for a tort be applied the harm resulting from a breach of the undertaking is the reduction in the bank's obligation in the amount of the check. Secondly, if because of the honoring of the check a subsequent check of the customer is dishonored for want of sufficient funds, the customer may recover, in addition to the amount of the check honored and interest, not only the damage to his credit but also the consequential damage within the contemplation of the parties resulting from the dishonor of the subsequent check. Viewing the case as an action for breach of the bank's promise, all the damage caused by the dishonor of the

90. Note 88, *supra*.

91. TORTS RESTATEMENT, *supra* note 88, pp. 18-19.

subsequent check, whatever it may be, is recoverable under the rule allowing consequential damages within the contemplation of the parties. Viewing the case as one in tort upon an undertaking, the damage caused by the dishonor is the proximate consequence of the failure of the bank to exercise reasonable care to carry out its undertaking. Thirdly, if the check is not honored the plaintiff may not recover except in the event that the promise of the bank is made for a consideration as part of a bargain. In that case the customer may perhaps recover nominal damages but no more. He can not recover the value of the promised performance because the very fact that the bargain, though not in terms a risk bargain, is a binding contract, effectively shifts from him to the bank the risk of loss resulting from the honoring of the check which could be avoided by the exercise of reasonable care on the part of the bank. If the promise is gratuitous, either it is enforceable only if injustice can be avoided in no other way or it is binding but actionable only if it results in damage. If the measure of damages recoverable in a tort action for non-performance of an undertaking be applied the customer may not recover since no harm has resulted.

From the above discussion of the theories of recovery it appears that, in the absence of an express bargain, if an order to stop payment is not brought to the attention of the proper person, it has no legal consequences unless there is (1) a gratuitous promise or undertaking (2) made on behalf of the bank (3) for which the bank is responsible and (4) upon which the customer relied, and (5) a failure, thereafter, to make reasonable efforts to communicate the order to the proper person within a reasonable time (6) as a result of which he makes an advance against the check before the order is brought to his attention.

There is a promise or undertaking when a court or jury will find that the order was brought to the attention of a person other than the one to whom the check is presented and that from his ensuing verbal or other behavior the customer was justified in inferring that reasonable efforts would be made to communicate the order to the proper person. For example, there is a promise or undertaking if the officer or employee to whom an order is exhibited and delivered at the banking house receives the writing without expressing his refusal to comply with the implied request to forward it or if the officer or employee to whom the order is spoken at the banking house hears it and knowing that he is the person addressed does not express his denial of the request to communicate it to the proper person.⁹² There is not a promise or undertaking to use reasonable

92. *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29.

efforts to communicate the notice to the proper person within a reasonable time when the presence of a written order in the banking house within the control of officers or employees is unknown to them.⁹³ Nor is there such a promise or undertaking when a secretary or stenographer agrees expressly to hand the order to the officer for whom she works. In such a case a promise or undertaking of an entirely different character may result.

The promise or undertaking is made on behalf of the bank when a court or jury will find that the behavior which justified the customer in inferring the assurance that reasonable care would be used to forward the order also justified him in inferring that the assurance was the bank's. For example, the promise or undertaking is made on behalf of the bank if the order is accepted in the banking house by an officer, but it is not if the order is accepted in the banking house by a charwoman. The promise or undertaking may be made on behalf of the bank if the order is accepted on the golf course by the bank executive known to be in charge of the paying and book-keeping departments.⁹⁴

The promise or undertaking on behalf of the bank is one for which the bank is responsible when a court or jury will find that the person making the promise or undertaking had and was exercising his legal power to promise or undertake on behalf of the bank to communicate orders.⁹⁵ Such a person has a legal power when he is one of the persons to whom the function of receiving and agreeing to forward orders to stop payment has been allocated. The allocation may be by express instructions to a particular officer or employee to promise or undertake, at any time and place, to communicate the order and to all others never to do so. For example, express instructions may make the bank responsible for the president's undertaking made at the golf course on Sunday. But ordinarily there is no express allocation, or if there has been, the allocation has in fact been modified by practice and acquiescence. In such cases the allocation must be implied in fact. Hence the allocation will be found to be to those persons who in the regular course of the business of the bank and of other banks in the vicinity usually receive for communication orders to stop payment. For example, the regular course of business may result in the bank's responsibility for the promise or undertaking of any person engaged in the work of the commercial department who receives the order at the banking house during banking hours. Again, the promise of the cashier of a small bank

93. *Curtice v. London City and Midland Bank*, *supra* note 38.

94. *Kellogg v. Citizens' Bank of Ava*, *supra* note 31; *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

95. *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

in a country town may make the bank responsible whenever and wherever the order is spoken to him and the promise given.⁹⁶ It will be recalled that an order to stop payment is not effective even if brought to the attention of the proper person unless it is given to him during banking hours at the banking house or unless he records the order at the banking house in the regular way before the check is presented or, if he does not record it, unless he remembers the order at the moment the check is presented. Of course, if, in a case in which the order, though given to the proper person, is not effective he undertakes to communicate it, the bank may be responsible for the undertaking. Whether the bank is responsible depends upon precisely the same considerations which determine its responsibility when an order is given to an officer or employee of the bank other than the proper person.

The customer relies upon the promise or undertaking when a court or jury will find that, after the promise or undertaking, the customer refrained from himself taking the necessary steps to communicate the order to the proper person. Thus, for example, the customer relies upon the promise or undertaking when, for a significant period of time after the order is given to an officer who agrees to attend to it, he does not make any further effort to stop payment.⁹⁷

There is a failure to make reasonable efforts to communicate the order to the proper person within a reasonable time when a court or jury will find that the behavior of the officers and employees handling the order did not result in its communication to the proper person within a sufficiently short period of time under the circumstances.⁹⁸ No behavior of the officers and employees of the bank will be found to be reasonable efforts unless the behavior results in bringing the order to the attention of the proper person within a sufficiently short period of time under the circumstances. Thus, if an order to stop payment of a check issued after banking hours on the 14th is given at 9:15 A. M. on the 15th to an officer who is told by the customer that the payee is a swindler, and the order is not communicated to the proper person until after banking hours, there would be, in most communities, a failure to communicate the order within a sufficiently

96. See *ibid.*

97. ". . . the action of the cashier in the case at bar, in receiving the notice as he did, very naturally lulled Hewitt into a sense of security and kept him from acting further in his own behalf in person." *Hewitt v. First National Bank of San Angelo*, *supra* note 37, at 108, 252 S. W. at 163. And see *American Defense Society v. Sherman National Bank of New York*, *supra* note 31.

98. *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29; *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

short period of time. But the order may be communicated within a sufficiently short period of time if the proper person were notified at 9:25 A. M. even though it appeared that an advance against the check were made at 9:20 A. M.⁹⁹

There is an advance against the check as a result of the failure to make reasonable efforts to communicate the order to the proper person within a reasonable time when a court or jury will find that, had the bank used reasonable efforts to notify the proper person, the order to stop payment would have reached him before the advance was made.¹⁰⁰ Thus in the preceding example, the advance would be the result of the failure to use reasonable efforts to communicate the order if the advance were made at 1:00 P. M. and by the exercise of reasonable efforts the order would have reached the proper person at 10:00 A. M. or at any time prior to 1:00 P. M. But if the advance were made at 9:30 A. M. and by the exercise of reasonable efforts the order would not have reached the proper person prior to 10:00 A. M. the advance would not be the result of the bank's breach.

Thus, if an advance is made against a check as a result of the bank's failure to perform its promise or undertaking to use reasonable efforts to communicate an order to stop payment to the proper person within a reasonable time, the customer may recover the amount of the check plus interest; and if a second check of the customer is dishonored for want of sufficient funds because of the honoring of the first check, the customer may in addition recover for the injury to his credit and for consequential damages resulting from the dishonor of the second check. The amount of the consequential damages so recoverable might be far in excess of the amount of the check which had been honored. But if the advance is made against the first check despite the exercise by the bank of reasonable efforts promptly to notify the proper person, the customer may recover neither the amount of the first check nor the damage, if any, which results from the dishonor of the second check.¹⁰¹

If no advance has been made against the first check, then with one exception, the customer may not recover upon the bank's promise or undertaking even though the bank has not used reasonable efforts to communicate the order within a reasonable time. The exception is a case in which the bank's promise is made for a consideration as part of a bargain and in that case the customer may recover nominal damages for the bank's breach.

99. See *Ozburn v. Corn Exchange National Bank of Chicago*, *supra* note 29; *Steiner v. Germantown Trust Co.*, *supra* note 1; *Hewitt v. First National Bank of San Angelo*, *supra* note 37.

100. See note 98, *supra*.

101. *Steiner v. Germantown Trust Co.*, *supra* note 1.

It will be remembered, however, that if the check is honored before the order reaches the proper person the amount of the bank's obligation is reduced or the customer becomes obligated if the check is an overdraft.¹⁰² This result follows whether or not the bank is responsible to the customer on its promise or undertaking. If the bank is liable for a breach of the promise or undertaking, that liability is distinct from its obligation to pay the balance and to honor checks. The obligation arises out of the bargain made when the last deposit was made; whereas, the liability results from the breach of the promise or undertaking made when the order to stop payment was accepted. Consequently the amount of the bank's obligation to pay and to honor is not increased by the amount of its liability upon the promise or undertaking. For example, if the bank, because of a breach of its promise or undertaking, were liable in the amount of \$5,000 for both the honoring of a check for \$100, the payment of which the customer attempted to stop, and the injury to credit resulting from the dishonor of a second check for \$75 on the ground of insufficient funds, it would not be contended that thereafter the amount of the bank's obligation to pay the balance or to honor checks was increased by \$5,000.

Thus, though the bank were liable on its promise or undertaking, if the customer sought to recover \$75, which was his balance prior to the honoring of a \$25 check, the payment of which the customer attempted to stop, the amount of his recovery would be the amount of his balance, \$50, although he might also recover the \$25 plus interest upon the bank's promise or undertaking either in a separate action or on a separate count in the action for the balance. The dishonor of a check for \$60 after the honoring of the \$25 check would not be a breach of the bank's obligation to honor checks, and if the customer is to recover for the dishonor it must be upon the bank's promise or undertaking. If the amount of the check which the customer unsuccessfully attempted to stop were \$100 instead of \$25, the bank would have an action against the customer upon his promise to repay. The customer, however, might counterclaim for the amount of the check because of the bank's breach of its promise or undertaking unless the statutes with respect to counterclaims prevented the customer from pleading as a counterclaim a cause of action upon an undertaking. In that event the customer would be compelled to bring a separate action. In stating the amount which the customer may recover from the bank upon a breach of its promise or undertaking to communicate the order, as a result of which an advance was made against the check and the bank's obligation to

102. See p. 837, *supra*.

the customer to pay or to lend by honoring checks was reduced, it has been assumed that the harm or injustice resulting from the breach was the full amount of the check. But it may be that the bank might show in mitigation of damages that the advance benefitted the customer, *e.g.*, paid his debt.¹⁰³ If this were true, the amount of the recovery would be less than the amount of the check plus interest by the amount of the benefit conferred; and it is likely that in some instances there would be no harm or injustice, *i.e.*, the benefit would be equal to the amount of the check plus interest.

PRINTED STIPULATIONS RELATING TO THE COMMUNICATION OF
ORDERS TO STOP PAYMENT

It will be recalled that sometimes there appear on signature cards, pass books and stop payment forms, clauses or stipulations providing that notwithstanding an order to stop payment the bank shall not be liable if the check is inadvertently honored. The theories upon which such stipulations may have legal consequences have already been stated. But it is important at this point to observe what consequences they have in the situation under discussion. The words "inadvertently paid" mean paid without carelessness not only on the part of the person making the advance against the check but also on the part of any person acting for the bank. A stipulation containing these words, therefore, addresses itself to the case in which the check is honored before an order has been communicated to the proper person as well as to the case in which the check is inadvertently honored after the order has been brought to the attention of the person making the advance. But there are two classes of cases in which the check is honored before the order has been communicated to the proper person. In the first, the check is honored after a reasonable time for communication has elapsed and the payment or honoring is, therefore, not inadvertent but careless. For this class, the stipulation which refers to payments made inadvertently and not carelessly makes no provision. In the second, the check is honored before a reasonable time for communication has elapsed and the payment or honoring is, therefore, inadvertent and not careless. This class is covered by the stipulation, but the consequence which it provides for payments inadvertently but not carelessly made are those that would follow from the terms of the promise or undertaking which would be implied in fact were there no stipulation. Thus, the stipulation is nothing more than a cautious

103. See p. 840, *supra*.

though unnecessary attempt to outline the scope of the bank's promise or undertaking.

Sometimes the clause or stipulation contains a promise to indemnify the bank or not to sue it in the event of its dishonoring a check the honoring of which the customer is attempting to stop. Assuming that such a promise is part of a bargain and that it creates an obligation corresponding to its terms, it seems clear that it should not be interpreted in such a way as to make it applicable to the situation in which the check is dishonored before the order is brought to the attention of the person to whom the check is presented. A case in which, by happy accident, a check was dishonored before an order to stop payment was received by the person to whom the check was presented but while the order was on its way to him is so unlikely to happen that it seems absurd to suppose that the parties made a bargain to provide for such an unusual contingency. Furthermore, such an interpretation appears to be even more absurd if it be remembered that its only consequence would be to protect the bank from a claim for nominal damages and then only in the presumably rare case in which the obligation of the bank to communicate the order within a reasonable time is founded upon a bargain. It affords no protection to the bank in those cases in which its obligation is predicated upon a gratuitous promise or upon an undertaking. For a breach of such a promise or undertaking does not, if the check be dishonored, result in injustice or harm and therefore entitles the customer to recover nothing.

III

With the system of propositions relating to orders to stop payment elaborated, it is at last possible to observe some of the relations between them and the case of *Steiner v. Germantown Trust Co.* First, is the case in accord with them? Suppose a syllogism be constructed whose major premise—the system of propositions relating to orders to stop payment which have been stated—asserts that certain behavior of parties is associated with certain behavior of courts and whose minor premise asserts that the facts in the *Steiner* case belong to that class of behavior of parties, does a proposition asserting that the facts in the *Steiner* case are associated with the behavior of the courts in that case in granting judgment for the defendant constitute a logically valid conclusion to this syllogism? If the model of judicial behavior in the major premise is taken to be commanded by the sovereign did the behavior of the trial and appellate courts correspond point for point with the model commanded? There was and can be no question that the order was

consciously expressed by the customer, that it appeared to be consciously expressed by him and expressed a countermand of the checks, that there was a likely possibility of its communication to the bank, that it was communicated to the person to whom the checks were presented and that it was not revoked. It is equally undisputed and indisputable that the checks were honored by the proper teller to whom they were presented before the order was brought to his attention. The decision for the defendant bank is therefore in accord with the proposition that an advance against the customer's check reduces the bank's obligation unless the order to stop payment precedes and does not follow the honoring of the check. However, there was and can be no question that the manager of the branch of the defendant bank to whom the customer telephoned the order did in fact assume to undertake or promise on behalf of the bank and that the undertaking or promise was to use reasonable efforts to bring the order within a reasonable time to the attention of the proper person. The trial court's general finding for the defendant establishes that the manager of the branch was one to whom the function of receiving and agreeing to forward orders to stop payment had been allocated, and that his ensuing behavior and that of the other employees handling the order resulted in its communication to the proper person within a sufficiently short time. The judgment on this finding for the defendant bank and the appellate court's denial of a motion for judgment *non obstante veredicto* are in accord with the proposition that the bank is not responsible upon a promise or undertaking to communicate an order unless the person promising or undertaking on its behalf had and was exercising his legal power to promise or undertake on behalf of the bank to communicate orders received by him. They are also in accord with the proposition that the bank is not liable upon a bargained for promise, a gratuitous promise, or an undertaking for which it is responsible unless it fails to make reasonable efforts to communicate the order to the attention of the proper person within a reasonable time, as a result of which he makes an advance against the check before the order comes to his attention. That is to say, a proposition asserting that the facts in the *Steiner* case are associated with the behavior of the courts in granting judgment for the defendant is a logical conclusion to the syllogism stated above. The behavior of the courts did correspond point for point with the models of behavior conformity to which is said to be commanded by the sovereign in the major premise.

Secondly, in the verbal rationalizations of the trial and appellate courts, as expressed in their written opinions, are the syllogisms, explicit or implicit, syllogisms in which the major premises are, first,

the proposition that an advance against the customer's check reduces the bank's obligation unless the order to stop payment precedes and does not follow the honoring of the check and second, the proposition that a bank is not liable upon its promise or undertaking unless it fails to make reasonable efforts to communicate the order to the proper person within a reasonable time?

Yes: The trial court said:

"This controversy arises out of a check which plaintiff issued and then subsequently directed a branch cashier of the Germantown Trust Company to stop payment. There is no question that notice was given in time, but as a matter of good business and common sense, when people issue checks they have not the right to hold the bank to anything except an explicit and competent notice to stop payment."

"The Court feels that the bank is entitled to such notice as will enable it to notify their different branches. *There is no special responsibility on them to exercise extraordinary methods to dishonor obligations issued by their depositors and the Court therefore finds for the defendant.*"¹⁰⁴ (Italics are the writers'.)

Cunningham, J., for the Superior Court, wrote:

"*Plaintiff had a right to stop payments of his checks and it was the duty of defendant to comply with his notice, provided it was received before the checks were paid or certified . . .*" (Italics are the writers'.)

"The entire argument of counsel for appellant is based upon a . . . statement in the opinion of the trial judge, reading: 'There is no question that notice was given in time.' If the trial judge intended to say that the office of defendant to which the checks were presented had notice prior to their certification, such statement is without the slightest support in the evidence. It is more probable he merely meant to say the Logan Branch had notice before acceptance by the main office, as, in a subsequent portion of his opinion, he said he thought defendant was entitled to such notice, 'as will enable it to notify [its] different branches.'"¹⁰⁵

It will, of course, be noted that, even though the decision in the *Steiner* case is in such a logical relation with the propositions relating to orders to stop payment which have been stated, that the decision may be stated as the conclusion of syllogisms in which those propositions are major premises, it does not follow that the decision could have been predicted if the facts had been known. It is true that in a realm of discourse in which the major premise is granted and the minor premise assumed to be known, the conclusion must necessarily follow, *i.e.*, the conclusion can be predicted. But if the

104. *Steiner v. Germantown Trust Co.*, *supra* note 1; see Brief for Appellant and Record, p. 35a.

105. *Steiner v. Germantown Trust Co.*, *supra* note 1, at 40.

conclusion describes the decision of a court such a prediction would be a forecast of that decision, the worth of which would depend upon the degree of probability of the association, already ascertained in a manner satisfactory in empirical science, between the facts and the decision stated in the major premise. Obviously the propositions in this article which state that certain facts are associated with certain decisions are for this reason alone of little worth in predicting decisions. At best they state the decisions observed to be associated with "the facts" in 54 cases decided between 1865 and 1932 in the courts of 25 jurisdictions scattered from California to Ireland and South Africa. And, even if the propositions relating to orders to stop payment, stated in the cases and in this article, are commands and arouse in judges, lawyers and others who read them the attitude of one who hears his sovereign's voice, nevertheless their value for prediction depends upon the frequency with which such attitudes are followed by the behavior commanded.

The reader, however, should not take these comments to suggest that the methods of empirical science be applied to these and like propositions of law to ascertain the frequency of the associations between facts and decisions asserted or commanded in them. The quality of such propositions makes them unlikely hypotheses for verification. They are highly generalized statements without sufficient specificity. "The facts" which they assert or command are or shall be associated with a decision are described by reference to categories so gross that significantly dissimilar fact situations are not distinguished. It is not profitable for the purpose of investigation to break them down into more precise propositions because it is improbable that there will be found a sufficient number of litigated cases to test the empirical validity of these more precise hypotheses. The common quality of cases which reach the appellate courts and are reported is peculiarity and not similarity. Elsewhere the matter has been put as follows: "The facts' of the recorded cases classified in the traditional 'legal' categories are a small, and very probably non-representative, sample of all behavior, atypical as well as typical. The cases are distinguished by dissimilarity rather than similarity one to another. Thus in order that the 'legal' categories might be multitudinous of individual cases, it was necessary that their differentiating concepts be exclusive of few individual cases. In consequence, the 'legal' categories are inadequate for classification, and the 'legal' abstractions (which were formulated with reference to those categories) are inadequate for manipulation of conduct typical and atypical."¹⁰⁶

106. Moore and Hope, *supra* note 68, at 705.

It will be recalled that the decision in the *Steiner* case was said to be in accord with three propositions. For reasons already given, the proposition that an advance against the customer's check reduces the bank's obligation unless the order to stop payment precedes and does not follow the honoring of the check is a proposition which is of little or no value for prediction. This is obviously true of the other two. The first of these states that the bank is not responsible upon a promise or undertaking to communicate an order unless the person promising or undertaking on its behalf had and was exercising his legal power to promise or undertake on behalf of the bank to communicate orders received by him. But whether or not the person to whom the order was spoken or exhibited had a legal power to promise or undertake on behalf of the bank is determined by a finding of a court or jury as to whether he was one of the persons to whom the bank had allocated the function of receiving and agreeing to forward orders. In the *Steiner* case, for example, under all the circumstances was the manager of the Logan branch authorized to promise or undertake to communicate an order to stop payment of a check which was addressed to the bank generally and not to any particular office? Certainly the proposition does no more than present an issue. The second proposition is that the bank is not liable upon a promise or undertaking for which it is responsible unless it fails to make reasonable efforts to communicate the order to the proper person within a reasonable time as a result of which he makes an advance against the check before the order comes to his attention. But what efforts and what time are reasonable is a question answered by a finding of court or jury that the order was communicated to the proper person within a sufficiently short time. For example, in the *Steiner* case, under all the circumstances, if there were any need to notify the teller at the main office who certified the check, was the time which elapsed between the receipt of the order by the branch manager and its communication to the teller too long? How numerous was the class of persons who should have been notified? Did the class include employees at all offices? In what order should they have been notified? What business, if any, should have been deferred in order to hasten the forwarding of the order? Where were the offices located? What means of communication should have been employed between offices and within each office? The second proposition then, like the first, does not resolve the issue which it presents. Hence the relevant propositions of law do not enable counsel to predict.

If, then, before the litigation in the *Steiner* case, counsel had been called upon to give his opinion, *i.e.*, to forecast the decision, his opinion would have been an intuition of experience, a judgment

upon the innumerable factors in the complex situation about to culminate in the trial or the argument and to impinge upon court or jury.¹⁰⁷ The character of these factors is indicated by describing categories under which the more important of them may be classified. *First*, economic institutions, *i.e.*, the usual forms of the business aspects of overt behavior: for example, the institutions of transferring deposit currency by means of checks, of stopping payment of checks and of handling orders to stop payment after they are received. *Second*, common ideas and theories in respect of economic institutions: for example, ideas and theories as to commercial banking. *Third*, other institutions, or the usual forms of the aspects of overt behavior other than business aspects. *Fourth*, common ethical ideas and theories and social philosophies in respect of economic and other institutions: for example, theories as to the degree of control over his property, *e.g.*, his bank account, which should be accorded the owner; the fair allocation of loss if a stopped check is paid in a situation in which one of the parties might easily have prevented the risk arising; ideas as to the propriety of the end or purpose of the transaction in which a check is given. *Fifth*, "the facts" and the ensuing judgments in reported cases. *Sixth*, the legal literature—judicial opinions, statutes and the commentaries. *Seventh*, common ideas and theories as to legal precedents and legal literature. *Eighth*, the common attitudes towards the economic and other institutions, towards economic, ethical and legal ideas and theories and towards legal precedents and legal literature; and the common attitudes toward minor and major departures from the institutions and from the precepts of the economic and ethical theories and of the legal literature. *Ninth*, the conformity to, or the departure and degree of departure of the behavior of the parties, their attorneys and their witnesses from the models of behavior in the economic and other institutions and from the models in the legal literature; and the similarity between the behavior of the parties and the behavior of the litigants in reported cases.

Counsel's process of forming a judgment upon the factors suggested by the categories enumerated would have been, first, to focus attention on the several aspects of the past and prospective behavior of the parties, their attorneys and their witnesses, secondly, to compare that behavior with the institutions and with the precepts of economic and ethical theories and of legal literature, thirdly, to observe its conformity to or departure from them, fourthly, to measure the

107. Moore and Sussman, *The Lawyer's Law* (1932) 41 YALE L. J. 566; Moore and Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (1931) 40 YALE L. J. 555, 560-564.

degree of its departure by reference to the ideas of economic, ethical and legal theories and to the attitudes towards them and finally, to predict the likely legal consequences of the conformity or departure on the basis of the estimated importance of the degree of departure. All of the factors, it will be noted, are elements in a culture or civilization. Since counsel is himself a product, a mosaic, a reflection of the very culture by which he is judging, and since, in a sense, the culture itself is judging, the cultural factors do not rise to the conscious level, and his judgment appears to be an intuitive conclusion upon the particular situation held before his mind. It is true that the legal precedents and literature receive conscious consideration. But they do no more than pose for him the questions. Was the acceptance of the order by the branch manager a promise or undertaking to communicate it? Did the branch manager have a legal power to promise or undertake on behalf of the bank? Was the notice communicated within a sufficiently short time? And even the pondering of these questions might not bring to consciousness the relevant institutions though the reflections of them in counsel's mind would likely control his answers to the questions.

The prospective or pending litigation was in the courts of Pennsylvania. The personnel of the court or jury was chosen from the residents of that state. Hence, all of the factors suggested by the categories enumerated, except the behavior of the parties, were elements in the culture of that jurisdiction. The values, therefore, assigned in counsel's process of judgment in the *Steiner* litigation would be found in the contemporary culture of Pennsylvania. Certainly, the variable whose Pennsylvania value would likely be of great weight in counsel's calculus would be the institutions or usual forms of overt behavior of banks with branch offices and of their customers in drawing, presenting and stopping checks. Are checks drawn on the bank at large? Are they addressed to the main office though the customer regularly does business at a branch office? At what office is the check regularly presented for payment? Are orders to stop payment commonly given and received at offices at which the check is not regularly presented for payment? If they are, in how short a time are they usually communicated to the tellers and bookkeepers at the office at which the check is regularly presented? The likely importance of Pennsylvania's answers to these questions is illustrated by supposing that the *Steiner* case arose and were being litigated in New York. According to what are believed to be the institutions of that state, the customer of a bank with branches always addresses his checks to the office at which he does business; they are presented there and not elsewhere; and orders to stop payment are given and received there only. New York

counsel would doubtless conclude that the bank is not liable for the breach of a promise or undertaking by a manager of one office to communicate to another office an order to stop payment of a check addressed to the latter and that, unless the order by good fortune or happy accident happened to be brought to the attention of the person to whom the check was presented before its payment, the balance of the customer would be reduced by the amount of the advance.