

states the principle behind these early cases: "Where a proceeding has been had in the nature of a proceeding in rem, whenever the judgment is drawn in question in another action affecting the same property or subject-matter, the facts found by the first tribunal which were necessary to the formation of the sentence pronounced are conclusive of the existence of such facts and can never be the subject of inquiry upon a subsequent investigation in another tribunal more than the sentence itself. *Pinson v. Ivey*, 9 Tenn. 349 (1830), *United States v. Hooe*, 3 Cranch. 73, (1806), *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch. 195, (1808), *Gelstem v. Hoyt*, 3 Wheat, 246, (1818), *Jewett v. Jewett*, 6 Mass. 277, (1810).

The more recent cases disclose that the courts still adhere to this doctrine. In *In re Bloom's Estate*, (Cal.) 293 P 633, (1931), the court held that "a proceeding for the probate of a will is one instituted for the purpose of establishing the status of a written instrument; while the order admitting the same to probate is conclusive in subsequent proceedings as to the ultimate fact of the will, it is not save as to the parties litigant, or for the purpose of the proceeding itself, conclusive as to the facts upon which the question of will or no will depends." *Sorenson v Sorenson*, 68 Neb. 483, 103 N. W 455, (1903), *Clapp v. Vatcher*, 9 Cal. App. 462, 99 P 549, (1908), *Gasquet v. Fenner*, 247 U. S. 16, 38 S. Ct. 416, 62 L. Ed. 956, (1918).

Two comparatively recent New York decisions involved facts very similar to those presented in the principal case. The court in *In re Rowe*, 197 App. Div 449, 189 N. Y S. 395, (1921), stated, "A decrees of the Surrogate Court in proceedings to have an administrator of the estate of an absentee appointed is in no event an adjudication with respect to the time of the death of the absentee and binding on the surrogate of another county in a proceeding in which the exact date is material, since the date was not necessary to be established with exactness, and all the surrogate had to determine was that the absentee was presumed to be dead prior to the issuance of letters and accordingly fixed the date as the date of the decree authorizing the letters to issue." Affirmed without opinion, 232 N. Y 554, 134 N. E. 569. To the same effect is *Bering v. United States Trust Co. of New York*, 201 App. Div. 35, 193 N. Y S. 753, (1922).

While the court in the principal case cites no authority for its statement as to the conclusiveness of a finding as to the date of death, the decision is in accord with the doctrine established elsewhere by a long line of cases.

JAMES R. TRITSCHLER.

AUGMENTATION OF ASSETS BY MEANS OF CASH ITEMS

The Union Trust Co. was named trustee and distributing agent in connection with a bond issue put out by the plaintiff, the University of Dayton. It was provided in the trust instrument that the plaintiff was to make periodical payments into a fund out of which the trustee was to discharge the interest and the principal on the bonds. The first payment was made by a check drawn by plaintiff on its account in the commercial department of the trustee

bank in favor of the trust department. The books of the bank show that this check was deposited by the trust department in its "Uninvested Trusts Funds" account with the commercial department. Subsequently, the Union Trust Co., being insolvent, was taken over by the defendant, the State Superintendent of Banks and the official liquidator. Plaintiff seeks payment in full of its check, claiming a preference. The preference was denied. *Fulton v. The University of Dayton*, 129 Ohio St. 90, Ohio Bar Jan. 14, 1935 (Decided Nov. 27, 1934). The relationship between the trust department and the commercial department was treated as debtor and creditor, as the result of the enactment of Section 710-165 General Code, which authorizes the trust department of a bank to make a deposit in its commercial department. The plaintiff has no "ownership" on which to base his claim, according to the construction placed on this statute in *McDonald v. Fulton*, 125 Ohio St. 507, 182 N. E. 504 (1932).

The earlier law of Ohio, as elsewhere, was that money had no earmarks, and that the title of its owner was gone if it was mingled with other money. Hence if a trustee mingled trust money with his own, or permitted another to mingle it, the cestui que trust, being unable to trace, could not claim a preference. 5 Ohio Jur. 509, and cases there cited. This early law was changed in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696 (1880). It was there held that the title of the owner of money would survive a wrongful commingling of it by one possessed of it as trustee. Hence if the amount of money in the commingled fund was at all times greater than that of the trust fund, the cestui que trust met the requirement of tracing. If withdrawals from the general fund were made by the trustee, this case lays down the rule that he is presumed to be honest, and to be withdrawing his own money and not that of the cestui que trust. But if the sum of money of the general fund was ever reduced to an amount less than the sum of the trust fund, the presumption was rebutted, and the cestui que trust was entitled only to the amount of money remaining. This doctrine seems to be approved by the Ohio courts. *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N.E. 346 (1892), *The Mad River National Bank v. Melhorn*, 8 O. C. C. 191 (1894), *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439 (1906), *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214 (1912).

Section 710-165, General Code, however, was amended in 1932, 115 Ohio Laws 287, by adding the following: "But in case of the insolvency, closing or suspension of such trust company or bank, claims for such moneys hereafter so deposited in any other department of such trust company or bank shall be impressed with a trust for the payment thereof." This amendment was not applicable to the principal case because it had not become law when the cause arose. But its effect in allowing the cestui que trust to claim a preference out of the "property and assets," or the general estate of the bank, coupled with a dictum in *Fulton v. The University of Dayton* respecting augmentation by cash items, presents a potential problem worthy of note. The difficulty will present itself when a case arises in which the cash in the vaults has been exhausted during the last days the bank was open. This is suggested near the end of the opinion where Bevis, J. said, "The result might have been otherwise" had the statute been applicable.

The theory of augmentation as stated by Judge Bevis in this dictum, was

in reply to the argument advanced in behalf of the plaintiff in error, that the University of Dayton could claim a preference only if its check was converted into cash, which cash was deposited in the vaults of the bank at the time of its closing. His words were: "It clearly 'proves too much'—it would lead to a situation where a bank, acting as trustee, would have to perform its duties with segregated quantities of cash, to which ownership in equity could definitely attach. Such a course, while actually possible, is practically never pursued because of its inconvenience. Instead, checks and other instruments are frequently treated 'as if' they were cash." He then quotes with approval from *Schumacher v. Harriett*, 52 Fed. (2d) 817, 82 A. L. R. 1 (1931), the following: "Under modern banking conditions, the rule as stated should be held to apply to cash items received under a trust agreement as well as to cash so received. Such an item for practical purposes differs not at all from currency. In other words, we think that a cash item, which is accepted by a bank as cash and fulfills for it the functions of cash, must be treated as cash in determining whether the cash remaining in the bank is subject to a trust because of the commingling of the trust funds." After quoting from other cases, Bevis, J. concludes: "If the reasoning of these cases is correct, it would seem to follow that a trust may be established without tracing the check deposited into actual cash in the vaults. If the value represented by the check can be followed through the bank's books into *assets belong to the bank when it closed*, the requirements of the modern law are satisfied." (Italics mine.)

Some courts draw a sharp distinction between cash and cash items as to the capabilities of each to augment a fund. This distinction is warranted since an actual difference does exist. The term "cash items" is usually used by courts with reference to checks, but in its broadest sense it includes all commercial paper which a bank accepts in lieu of money. For example if bank A receives a check drawn on bank B, it is generally set off against checks which B holds for payment by A, or if bank A receives a check in which it is drawee, the result is a diminution of A's liability to the depositor and an increase of its liability to the one for whom the proceeds of the check are intended. In neither case has there been an augmentation of the "cash in the vaults" of the bank. In *Larabee Flour Mills v. First National Bank*, 13 Fed. (2d) 330, (C. C. A. 1926), the court showed that it was aware of the problem by the following words: "It is difficult to explain or to understand by what equitable right one who has not contributed to the creation of a fund should be given a special or superior interest therein." In *Hecker-Jones-Jewell Milling Co. v. Cosmopolitan Trust Co.*, 242 Mass. 181, 136 N. E. 333 (1922), the court, in regard to the receipt of a check by the insolvent bank, said: "It was the mere lessening of one of its debts, and productive of nothing even remotely suggesting a 'res' for a trust." Substantially the same position was taken in *Rorebeck v. Benedict Flour & Feed Co.*, 26 Fed. (2d) 440 (C. C. A. 1928). For an exhaustive treatment of the question, see cases collected in 82 A. L. R. 46.

However, the importance which the court in the principal case expressly attached to "modern banking conditions" and the implied judicial notice which it takes of the customs and usages prevailing among bankers are significant. These unequivocal statements and quotations of Judge Bevis would lead

one to conclude that in the eyes of the Ohio Supreme Court cash and cash items are equivalent. The significance of this dictum becomes apparent when it is considered in connection with the amended statute, since the combination seems to pave the way for the revival of the augmentation doctrine in Ohio to the extent that the cestui que trust has a preferred claim, regardless of whether his assets, which were commingled or misused, were in the form of cash or cash items.

Should a case in which it is claimed that augmentation had resulted from the receipt of cash items arise, the recent case of *Huntington National Bank v. Fulton*, 32 O. N. P. (N. S.) 141 (Ohio Law Bulletin and Reporter, May 21, 1934), decided under the amended statute, would be of interest. In this case the augmentation was in the form of a balance in the insolvent bank's favor after a clearing transaction. Bank clearings, mere bookkeeping entries, are even more distinguishable from cash than cash items, and it is more difficult to conceive of their augmenting "cash in vaults", nevertheless the court held that the plaintiff was entitled to a preference. This holding could serve as the basis for an a fortiori argument which might be instrumental in influencing the Ohio courts to transform the dictum of *Fulton v. University of Dayton* into law.

In the last analysis this whole problem resolves itself into a question of policy: should courts favor the general creditors, or should they increase the remedies of those occupying the position of cestui que trustent. Legislative policy, as evidenced by the amended statute, is in accord with the latter alternative. Judicial policy, as evidenced by the obiter dictum of the principal case, points toward an extension of that which the Legislature has initiated. These two afford a basis for augmentation by means of cash items.

HARRY BONAPARTE.

THE RIGHT OF A MURDERER TO ACQUIRE THE PROPERTY OF HIS VICTIM

The case of *Hodapp v. Olaff*, 17 Ohio Abs. 543, decided May 19, 1934, in Montgomery County raises the much controverted question of whether a murderer may acquire and retain the property of his victim. In this case, one, Apostol Milvanos, opened a joint account for himself and another, Tago Milvanos, as authorized under Sec. 9648, General Code. Later he went to Greece where at the instance of Tago, he was murdered. Tago was subsequently convicted under Greek law of being the "moral author of the crime." The question presented to the court was whether the murderer or the heirs of Apostol should take title to the account.

There are four situations in which this question may arise: first, where a legatee or devisee murders his testator; second, where an heir murders his ancestor; third, where a beneficiary in an insurance policy murders the insured, and, fourth, where one joint owner takes the life of the other. It would seem that the solution to the problem in each of these cases would be identical, but an examination of the cases reveals three distinct views.

The first solution is that a murderer may acquire nothing at all from