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Banks and Banking--Special Deposits--Insolvency--Preferences

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RECENT CASE COMMENTS

BANKS AND BANKING — SPECIAL DEPOSITS — INSOLVENCY — PREFERENCES. — The plaintiffs owned a check for $21,241.71 in shares to be determined by arbitration. They endorsed it to the defendant bank "for special deposit in escrow" subject to the award. The sum in controversy was received by the defendant bank's trust department and deposited in the commercial department to the credit of the "escrow agreement account". The award was made after the bank became insolvent and the liquidating agent refused to pay the plaintiffs the amount of the check. The appellate court affirmed the judgment of the lower court giving the plaintiffs a preferred claim. *Parker v. Central Bank & Trust Company of Asheville.*[1]

This case raises the troublesome problem of the classification of deposits with respect to the obtaining of a preference on the insolvency of a bank by means of the trust device. The court treats this deposit as one for a specific purpose and lays down certain criteria by which such deposits are to be determined and classified.[2] The court, however, makes no apparent effort to fit the case to the standard laid down, but allows a recovery without explanation when it is questionable that the measure really fits the facts. No attempt is made to trace the funds and identify them although the court lays it down as one of the elements for the recovery of a deposit for a specific purpose that the fund be definitely identified. It does not even appear that the amount of the assets of the bank were at all times more than the amount of the deposit.[3] To allow a recovery on the basis of this decision leads to but one practical result, — the creation of a preference by the agreement of the parties themselves. As among general creditors the law has always looked with disfavor on a preference and to allow it, as in this case, is doubly undesirable since it arises by force of the acts of the parties themselves. This is accomplished by the parties agreeing at the time of deposit that the funds so deposited will be held for the given purpose. The effect of agree-

[1] 162 S. E. 564 (N. C. 1932).

[2] *Ibid.*, syllabus 1. The court after laying down the elements of the standard says "(5) the mere tracing of the money into the common funds of the bank is not a sufficient identification or segregation of the deposit."

[3] James Roscoe (Bolton), Ltd. v. Winder, (1915) 1 Ch. 62; Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., 99 Fed. 485 (C. C., D. Mo., E. D., 1900); *Ex* Mulligan, 116 Fed. 715 (1902); Powell v. Missouri Co., 99 Ark. 553, 139 S. W. 299 (1911); Chase & Baker v. Olmsted, 93 Wash. 306, 160 Pac. 952 (1916).

ments, however, may be modified by custom. Did not the parties enter into the formal agreement subject to the well-known practice of banks to use such deposits in the same manner as if they were general deposits?[4]

The Texas court has recognized the practical import of the situation presented here.[5] In the cited case that court declared that no difference in fact exists between a deposit for a specific purpose and a general deposit. This appears to be the practical method of handling the problem since the transaction has the effect of a general deposit. In the case of a special deposit the depositor is entitled to receive back the identical thing deposited and the bank is considered a mere bailee to whom the title to the fund does not pass.[6] In such a situation the recovery by means of the trust device is satisfactory if the fund is traceable. However, in the "specific purpose" situation a use of the trust device to create a preference appears to be unsound because there is no wrongful commingling.

The principal case is supported by the numerical weight of authority but it is submitted that the minority view as set out in the Texas case represents the sounder logic and a more common-sense application of the law to business transactions.[7]

—FREDERICK H. BARNETT.

INJUNCTIONS — AIRPORTS — NUISANCE. — Defendants were establishing an airport, not fully developed at the time of trial, on 272 acres of land contiguous to Cleveland, Ohio. Plaintiffs, owners of 135 acres of adjoining land, which they used for agricultural and residential purposes, applied for an injunction against the opening of the airport, on the ground that it would be a

[4] "It is the custom of banks, upon receiving money for a specific purpose, as to pay a note, to mingle the funds with their own, and to pay the note at the proper time, just as they would a check; the funds are not kept separate. There is no practical difference between such a deposit and a general deposit, and it seems clear that the bank should be held to the same liability as for a general deposit." MORSE ON BANKS AND BANKING (6th ed. Voorhees, 1928) § 210.

[5] First State Bank of Seminole v. Shannon, 159 S. W. 398 (Tex. Civ. App. 1913).

[6] Alston v. State, 92 Ala. 124, 9 So. 732, 13 L. R. A. 659 (1891); McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185 (1907); Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168 (1821); Gibson v. Erie, 196 Pa. 7, 46 Atl. 102 (1900).

[7] See generally 1 PATON'S DIGEST (1926) § 1789.