

Michigan Law Review

Volume 37 | Issue 3

1939

BANKS AND BANKING - TRUSTS - SPECIAL DEPOSITS - AGREEMENT BETWEEN DEPOSITOR AND BANK

Robert E. Sipes
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Banking and Finance Law Commons](#), and the [Estates and Trusts Commons](#)

Recommended Citation

Robert E. Sipes, *BANKS AND BANKING - TRUSTS - SPECIAL DEPOSITS - AGREEMENT BETWEEN DEPOSITOR AND BANK*, 37 MICH. L. REV. (1939).

Available at: <https://repository.law.umich.edu/mlr/vol37/iss3/10>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BANKS AND BANKING — TRUSTS — SPECIAL DEPOSITS — AGREEMENT BETWEEN DEPOSITOR AND BANK — During a period of widespread bank failures, plaintiff corporation ceased depositing its funds with the defendant bank. To maintain the public's impression that the plaintiff was a regular customer of the bank, an agreement was entered into by the bank and the plaintiff whereby the bank was appointed "agent" of the plaintiff to collect and remit promptly money due plaintiff. Branch offices of the plaintiff deposited money under this agreement to be transmitted to the plaintiff. When the bank failed with some of this money still in its hands, plaintiff sought to be allowed a preferred claim. *Held*, the deposit was a special one and a preferred claim should be allowed. *Union Electric Light & Power Co. v. Cherokee National Bank of St. Louis*, (C. C. A. 8th, 1938) 94 F. (2d) 517.

Deposits in a bank are usually classified as general deposits, special deposits, and deposits for a specific purpose.¹ The distinction becomes important most commonly where a depositor is seeking preference over other claimants of an insolvent bank. The general deposit is given no preference,² while the other two classes ordinarily are.³ A general deposit results from the ordinary depositor-bank relationship. Ownership of and control over the deposited money passes to the bank and the depositor becomes a creditor of the bank.⁴ A special deposit is one in which the money is deposited on the understanding that the identical money is to be returned to the depositor.⁵ A deposit for a specific purpose, as the term indicates, results when a deposit is made to be used only for a designated purpose.⁶ It is often held that the exact money deposited need not be

safe deposit box liable for valuables which disappeared from the box. It was said that a contract to keep the contents safely arose out of the "nature of the transaction."

HALE, BAILMENTS AND CARRIERS 250 (1896): "The similarity between safe-deposit companies and bailees lies in the fact that the former, by express contract, assume certain duties, which, in the absence of express contract, are imposed upon the latter by law." On this point see also 11 MINN. L. REV. 440 (1927).

¹ 1 MORSE, BANKS AND BANKING, 6th ed., §§ 183, 185, 186 (1928); *Officer v. Officer*, 120 Iowa 389, 94 N. W. 947 (1903); 31 A. L. R. 472 (1924).

² 1 MORSE, BANKS AND BANKING, 6th ed., § 289 (1928); *Andrew v. Union Savings Bank & Trust Co.*, 220 Iowa 712, 263 N. W. 495 (1935); *Kershaw v. Kimble*, (C. C. A. 10th, 1933) 65 F. (2d) 553.

³ *Corporation Commission v. Merchants Bank & Trust Co.*, 193 N. C. 696, 138 S. E. 22 (1927); *Andrew v. Union Savings Bank & Trust Co.*, 220 Iowa 712, 263 N. W. 495 (1935).

⁴ *Maurello v. Broadway Bank & Trust Co.*, 114 N. J. L. 167, 176 A. 391 (1935); *Northwest Lumber Co. v. Scandinavian-American Bank*, 130 Wash. 33, 225 P. 825 (1924).

⁵ *Fogg v. Tyler*, 109 Me. 109, 82 A. 1008, 39 L. R. A. (N. S.) 847 (1912); *Keyes v. Paducah & Illinois R. R.*, (C. C. A. 6th, 1932) 61 F. (2d) 611.

⁶ *Miller v. Andrew*, 206 Iowa 957, 221 N. W. 543 (1928); *Bank of America Nat. Trust & Sav. Assn. v. California Sav. & Commercial Bank*, 218 Cal. 261, 22 P.

used, but that an equivalent fund will suffice.⁷ The latter two classes are often grouped together as special deposits.⁸ Preference given the strict special deposit seems justified in that the deposit which must be returned in specie ordinarily constitutes a bailment in the hands of the bank.⁹ As the bank neither gets title to the fund nor has the benefit of its use, it should not be considered part of the general assets of the bank. If the special deposit is wrongfully mingled with the other funds of the bank, principles of tracing may be used to effectuate the depositor's preference,¹⁰ and the bank may be a trustee *ex maleficio*. But the reasons for giving a deposit for a specific purpose a preference are not so clear. In such a case the relationship between the depositor and the bank is usually described as a trust,¹¹ or an agency,¹² or a bailment.¹³ When the trust description is used the bank is said to hold the fund subject to the trust to carry out the specific purpose.¹⁴ But in many of the cases it is difficult to find all of the elements of an express trust.¹⁵ An express trust is ordinarily created by intent of the parties, and in few of these deposit cases is there any expression of intent to create a trust, nor is it always clear that there is an actual but unexpressed intent to do so.¹⁶ The trustee should have title to the res,¹⁷ and in some of the cases the depositor is purported to retain title to the deposit.¹⁸ Too, there must

(2d) 704 (1933); *Central Coal & Coke Co. v. State Bank*, 226 Mo. App. 594, 44 S. W. (2d) 188 (1931).

⁷ *Bank of America Nat. Trust & Sav. Assn. v. California Sav. & Commercial Bank*, 218 Cal. 261, 22 P. (2d) 704 (1933); *Reichert v. Midland County Sav. Bank*, 254 Mich. 551, 236 N. W. 859 (1931); 1 MORSE, BANKS AND BANKING, 6th ed., § 210 (1928).

⁸ *McGregor v. First Farmers'-Merchants' Bank & Trust Co.*, 180 Wash. 440, 40 P. (2d) 144 (1935); *Bank of America Nat. Trust & Sav. Assn. v. California Sav. & Commercial Bank*, 218 Cal. 261, 22 P. (2d) 704 (1933); 31 A. L. R. 472 (1924).

⁹ *Richards v. Fulton*, (C. C. A. 6th, 1935) 75 F. (2d) 853; *Fogg v. Tyler*, 109 Me. 109, 82 A. 1008 (1912).

¹⁰ *Hudspeth v. Union Trust & Sav. Bank*, 196 Iowa 706, 195 N. W. 378 (1923); *City Nat. Bank of Auburn v. Brink*, 98 Ind. App. 275, 187 N. E. 689 (1933); *Jennings v. United States Fidelity & Guaranty Co.*, 294 U. S. 216, 55 S. Ct. 394 (1934).

¹¹ *McGregor v. First Farmers'-Merchants' Bank & Trust Co.*, 180 Wash. 440, 40 P. (2d) 144 (1935); *Carlson v. Kies*, 75 Wash. 171, 134 P. 808 (1913); *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292 (1902).

¹² *Central Coal & Coke Co. v. State Bank*, 226 Mo. App. 594, 44 S. W. (2d) 188 (1931); *Northern Sugar Corp. v. Thompson*, (C. C. A. 8th, 1926) 13 F. (2d) 829; *Southern Exchange Bank v. Pope*, 152 Ga. 162, 108 S. E. 551 (1921).

¹³ *Maurello v. Broadway Bank & Trust Co.*, 114 N. J. L. 167, 176 A. 391 (1935); *Russell v. Bank of Nampa*, 31 Idaho 59, 169 P. 180 (1917).

¹⁴ *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292 (1902); *Evans v. French*, 222 Mo. App. 990, 6 S. W. (2d) 655 (1928).

¹⁵ 1 BOGERT, TRUSTS AND TRUSTEES, § 21 (1935).

¹⁶ *Blummer v. Scandinavian-American State Bank*, 169 Minn. 89, 210 N. W. 865 (1926); *Carlson v. Kies*, 75 Wash. 171, 134 P. 808 (1913).

¹⁷ 1 TRUSTS RESTATEMENT, § 5 (1935); *Cornick v. Weir*, 212 Iowa 715, 237 N. W. 245 (1931).

¹⁸ See *Corporation Commission v. Merchants' Bank & Trust Co.*, 193 N. C. 696, 138 S. E. 22 (1927).

be a specific trust res, which in these cases is sometimes difficult to find, either because at the time of the attempted creation of the trust the deposit was mingled with other funds of the bank, or because there is no intent to maintain the fund as a distinguishable one.¹⁹ But perhaps what is meant is a constructive trust arising upon the bank's misapplication or non-application of the fund to the specific purpose for which it was delivered to the bank. Such a trust may arise when the bank misuses the depositor's money which it holds in something other than a debtor capacity.²⁰ When the facts of the case are such as to justify description of the relationship of principal-agent, it is easy to explain the preference given the depositor. Ordinarily the agent holds funds or goods of his principal without acquiring title to them and subject to the principal's direction, so they never become part of the assets of the agent. Or if the agent does take title to the funds, he takes it impressed with a trust to carry out the principal's purpose.²¹ At any rate, it is settled that the parties themselves can, by express agreement and consistent action, make definite the relationship desired between the depositor and the bank, and fix the status of the deposit as a preferred one.²² Even where the parties do not make clear their intention, the trend of judicial opinion is to declare the deposit for a specific purpose a special one and the relationship one of those discussed above.²³ Such a result has been criticized²⁴ because of its establishment of preferences, which would not have resulted by a holding that the deposit created a debtor-creditor relationship, although the debtor had specific orders concerning the method of repaying the debt.²⁵ The result of the instant case, however, does not seem open to criticism. It is one of those cases in which the relationship fixed by express agreement between the parties seems clearly to be that of principal and agent. The depositor feared the bank's financial position and made explicit his intention not to become a simple creditor of the bank. While it did not require its deposit to be segregated and be retained in specie, it did provide that an equivalent amount be kept in a special

¹⁹ *Richards v. Fulton*, (C. C. A. 6th, 1935) 75 F. (2d) 853; *Borgess Hospital v. Union Industrial Trust & Sav. Bank*, 265 Mich. 156, 251 N. W. 363 (1933); *Keyes v. Paducah & Illinois R. R.*, (C. C. A. 6th, 1932) 61 F. (2d) 611; *Corporation Commission v. Merchants' Bank & Trust Co.*, 193 N. C. 696, 138 S. E. 22 (1927).

²⁰ *Morton v. Woolery*, 48 N. D. 1132, 189 N. W. 232 (1922); *Dolph v. Cross*, 153 Iowa 289, 133 N. W. 669 (1911).

²¹ 2 *MECHEM, AGENCY*, 2d ed., § 2090 (1914); and see cases cited note 12, *supra*.

²² *Bryan v. Coconut Grove Bank*, 101 Fla. 947, 132 So. 481, 134 So. 229 (1931); *Missouri Mutual Assn. v. Holland Banking Co.*, 220 Mo. App. 1256, 290 S. W. 100 (1927); 3 *MICHIE, BANKS AND BANKING*, perm. ed., § 185 (1931).

²³ *Iselin v. Farrow*, 115 Okla. 218, 242 P. 528 (1925); *First Nat. Bank v. Propp*, 200 Iowa 809, 200 N. W. 428 (1924), noted 23 *MICH. L. REV.* 532 (1925). But see cases noted 31 *MICH. L. REV.* 841 (1933); 32 *MICH. L. REV.* 95 (1933).

²⁴ 1 *BOGERT, TRUSTS AND TRUSTEES*, § 21 (1935); 6 *MINN. L. REV.* 306 (1922).

²⁵ *Pacific State Sav. & Loan Co. v. Commercial State Bank*, 46 Idaho 481, 269 P. 86 (1928); *People v. California Safe Deposit & Trust Co.*, 23 Cal. App. 199, 137 P. 1111, 1115 (1914).

account at all times. Title to the deposit was not to pass to the bank. The other depositors have no cause to complain for the deposit never became part of the assets of the bank so as to be subject to their claims as general depositors.²⁶

Robert E. Sipes

²⁶ For a somewhat analogous case reaching the opposite result, see *Pacific States Sav. & Loan Co. v. Commercial State Bank*, 46 Idaho 481, 269 P. 86 (1928).