TRUSTS - POWER OF TRUSTEE TO INVEST BY SAVINGS DEPOSIT

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TRUSTS — POWER OF TRUSTEE TO INVEST BY SAVINGS DEPOSIT — The guardian of an incompetent veteran placed trust funds in his hands in the savings department of a trust company. The trust company was closed by order of the state bank commissioner on March 4, 1933, and failed to reopen. Held, the guardian is not chargeable with the loss, this being a proper investment of the funds. *Hines v. Ayotte*, (Me. 1937) 189 A. 835.

It is universally recognized that a fiduciary is permitted to deposit trust funds in a bank for temporary safe-keeping.¹ He must deposit the funds as

¹ Barnes v. Clark, 227 Ala. 651, 151 So. 586 (1933); Law's Estate, 144 Pa. 499, 22 A. 831 (1891); In re Woods, 159 Cal. 466, 114 P. 992 (1911); Gibbons v. Norton, 225 Ala. 650, 145 So. 131 (1932); Pethybridge v. First State Bank, 75 Mont. 173, 243 P. 569 (1926); Andrew v. Sac County State Bank, 205 Iowa 1248, 218 N. W. 24 (1928); Wagner v. Coen, 41 W. Va. 351, 23 S. E. 735 (1895). See O'Conner v. Decker, 95 Wis. 202, 70 N. W. 286 (1897); Dewey v. Lindhout, 205 Ill. App. 322 (1917).
trust funds, not as his own,2 and must not surrender exclusive control over them.8 Where the deposit is in proper form, the fiduciary is not liable for loss if he exercised good faith and reasonable diligence and prudence in selecting the bank;4 although where the fiduciary knew, or should have known, of the unsound condition of the bank, he has been held liable.6 But in the principal case the deposit was a permanent investment. It has been held that such a deposit, as an investment, is improper,6 being a loan to the bank on mere personal security,7 and the fiduciary has been held liable regardless of whether or not he knew of the unsound condition of the bank,8 although there is some authority to the contrary.6 The reason for holding such an investment improper is the danger of reliance upon personal security, even that of a bank.10 In the

2 Pethybridge v. First State Bank, 75 Mont. 173, 243 P. 569 (1926); Odd Fellows Benefit Assn. v. Ferson, 3 Ohio C. C. 84, 2 Ohio C. D. 48 (1889); McAllister v. Commonwealth, 30 Pa. St. 536 (1858). In the case of Law's Estate, 144 Pa. 499 at 506, 22 A. 831 (1891), the court said: "But the trustee must be careful to make the deposits in the name of the trust-estate, and not to his personal credit, and not to mix the trust funds with his own; otherwise he will be liable."

3 In re Woods, 159 Cal. 466, 114 P. 992 (1911); Boehmer v. Silvestone, 95 Ore. 154, 186 P. 26 (1920); Law's Estate, 144 Pa. 449, 22 A. 831 (1891); 1 Perry, Trusts and Trustees, 7th ed., § 443 (1929).


10 "The reason for prohibiting investment of trust moneys on personal security is obvious. The borrower may die, or fail in business, or suffer financial reverses. The value of the investment depends partly on the business ability and good fortune of the
principal case, this danger was apparently removed to the satisfaction of the
court by the statutory requirements as to the security behind savings deposits.\textsuperscript{11}
The statute in Maine as to legal investments by guardians of wards' funds
required nothing more than an investment "in any other manner most for the
interest of all concerned,"\textsuperscript{12} which distinguishes the principal case from many
others holding the fiduciary liable.\textsuperscript{13} Also, the defendant had the sanction of
the probate court upon his investment,\textsuperscript{14} as well as the tacit approval of the
United States Veterans' Bureau.\textsuperscript{15} If a savings deposit may be called a legal
investment under the statute, it would seem that the principal case is correct,
since there is nothing to indicate that the defendant did not follow the general
rule as to the care required of fiduciaries.\textsuperscript{16} Further, from a practical point of
view, there were few other attractive investments to be made during the
period of extreme depression prior to the closing of the bank, although in other
cases this factor has invoked little sympathy from the courts.\textsuperscript{17} The question
of liability of the guardian for failure to withdraw the deposit when the bank
first became unsafe was determined by the court by deciding that the guardian
was advised so to act by the Veterans' Bureau and was therefore not liable.\textsuperscript{18}

borrower, and partly on the general financial prosperity of the community. Such an
investment is too uncertain for a trustee. He should place the funds so that there will
be a reasonable assurance of a steady income and ultimate return of the principal. No
matter how prosperous the borrower may be at the time of the loan, the payment
of principal and interest depends upon the multitude of uncertainties incident to human
affairs. The trustee should obtain a lien or interest in some property of reasonable
permanence as security for the safety of his investment."\textsuperscript{3} Bogert, Trusts and
Trustees, § 680, p. 2041 (1935).

\textsuperscript{11} "Every trust company soliciting or receiving savings deposits . . . shall segre­
gate and set apart and at all times keep on hand so segregated and set apart, assets
at least equal to the aggregate amount of such deposits . . . Such assets so segregated and
set apart shall be held in trust for the security and payment of such deposits." Maine

\textsuperscript{12} Maine Rev. Stat. (1930), c. 80, § 22.

\textsuperscript{13} U. S. Veterans' Bureau v. Riddle, 186 Ark. 1071, 57 S. W. (2d) 826 (1933);
of investments collected in McKinney, Trust Investments, 2d ed., 45 et seq.
(1927).

\textsuperscript{14} Hines v. Ayotte, (Me. 1937) 189 A. 835 at 838.

\textsuperscript{15} Maine Rev. Stat. (1930), c. 81, § 9.

\textsuperscript{16} "All that can be required of a trustee to invest is that he shall conduct himself
faithfully and exercise a sound discretion. He is to observe how men of prudence,
discretion, and intelligence manage their own affairs, not in regard to speculation,
but in regard to the permanent disposition of their funds, considering the probable
income as well as the probable safety of the capital to be invested." Harvard College
233, 3 A. 733 (1886).

\textsuperscript{17} Keating v. Hession, 272 Mass. 212, 172 N. E. 111 (1930).

\textsuperscript{18} Hines v. Ayotte, (Me. 1937) 189 A. 835 at 840. See World War Veterans' 
Act of 1924, § 21 (2), as amended by Act of May 29, 1928, 45 Stat. L. 964, § 2,
38 U. S. C., § 450 (2) (1929).
In view of the present safeguards surrounding savings deposits in banks, the principal case would seem to be correctly decided.\textsuperscript{19}

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\textsuperscript{19} Since the only objection to investment by personal loans is the danger of the insolvency of the debtor, it would seem that where, in the case of savings deposits, this danger is alleviated by statutory regulation as to segregation of assets, security behind deposits, and regulation of investments, a loan in the form of a savings deposit would be a comparatively safe investment, and would seem proper unless prohibited by express statutory provision. See Deposit Insurance Act of June 16, 1933, c. 89, § 8 (12B), 48 Stat. L. 168, 12 U. S. C. § 264 (1934).