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Banks and Trust Companies-Insolvency--Preferred Claims

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Banks and Trust Companies—Insolvency—Preferred Claims. Petition for allowance of claim against insolvent trust company as preferred. Under a written trust agreement, executed on April 16, 1931, Katherine D. Vajen transferred $7,527.88 cash in bank and certain securities to the Farmers Trust Company as trustees for herself. On May 21, 1931, Appellee Boyd M. Ralston was appointed receiver of the Farmers Trust Company. Subsequently, the appellant, The Union Trust Company, was appointed trustee under the trust agreement, as successor to the Farmers Trust Company. The receiver turned over to the appellant trustee all the securities belonging to said trust, but did not turn over the uninvested funds belonging to the trust, which, at the time of his appointment as such receiver, amounted to $8,971.34. There had been commingled with the general funds of the insolvent trust company and at the time of the appointment of the receiver the general fund had been reduced to $4,909.14. Appellant filed its verified petition for allowance of a preferred claim in the sum of $8,971.34 against the general assets of the Farmers Trust Company. The trial court allowed the appellant's claim in the sum of $8,971.34 as a preferred claim against the $4,909.14 in the general fund, but the balance not paid out of the general fund was allowed as a general claim only. Appellant appealed from the overruling of motions for a new trial and to modify said judgment. Held: Chapter 167 of the Acts of 1931 governs appellant's claim. Trial court instructed to render judgment allowing appellant's claim against appellee in the sum of $8,971.34 as preferred against all the general assets of the Farmers Trust Company.[1]

Under the law of trusts the trustee has no right to commingle the trust fund with funds of his own.[2] However, in a case where there has been an unauthorized commingling of trust funds with those of the trustee the remedies offered the cestui que trust upon the insolvency of the trustee have varied. At one time money which a trust company had received as guardian and commingled with its common fund was not entitled to preference in Indiana, though the amount received by the trust company as guardian could be traced into the common fund of said trust company. The claim allowed in such case was only a general one.[3] Today, in case of commingling, the majority rule is that the cestui que trust may trace the trust res or its proceeds, whether such be in the hands of the trustee or in the hands of a purchaser or transferee with notice; and in case of insolvency of the trustee the cestui que trust has a preferred claim upon any fund into which he traces the res or its proceeds if he is able to prove that the funds commingled with the general fund "swelled" or augmented the funds in such

[1] Union Trust Company v. Ralston (1934), 191 N. E. 94.

[2] Morgan v. State (1924), 162 Ark. 34, 257 S. W. 364; Iowa Mut. Liability Ins. Co. v. De La Hunt (1923), 197 Iowa 227, 196 N. W. 17; Franklin Sav. & Trust Co. v. Clark (1925), 283 Pa. 212, 129 Atl. 56; Fogg v. Tyler (1912), 109 Me. 109, 32 Atl. 1008.

[3] Wainwright Trust Co. v. Dulin (1918), 67 Ind. 476, 119 N. E. 387.

general fund.[4] This rule has allowed a preference to the cestui when he traced his funds into a general fund which has been augmented thereby; and the preference, or lien against the general fund, has been held good against the entire fund through the commingled fund may have become so depleted that its sum did not total the amount of the preferred claim.[5] In case the commingled sum does not equal the preferred claim any balance remaining is a general claim against the other assets of the trustee. If, however, the cestui can only trace his funds to the assets of the trustee, and into no particular fund his claim against the commingling trustee is only a general one. The cestui must be able to trace the res or its proceeds into a certain and specific fund; and upon his failing to do so no preference is allowed; the claim remains a general one.[6] The burden of tracing into a specific fund is always on the one claiming preference, and if he is able to trace the trust res or its proceeds only to the assets of the trustee, and not to a specific fund, his claim has no preference.[7]

The holding of the principal case is in compliance with legislative enactment, and is not a reversal of Indiana's long compliance with the majority rule. Chapter 167, p. 580, of the Acts of the General Assembly of Indiana for the year 1931, which governs appellant's claim in the principal case reads as follows:

"An Act concerning funds held by a bank or trust company in trust or fiduciary capacity.

Insolvent Banks and Trust Companies Acting as Fiduciaries—Priority of Claims of Beneficiaries.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That hereafter, upon the insolvency, suspension or liquidation of any bank of discount and deposit, or loan and trust and safe deposit company, while acting as executor, administrator, receiver, guardian, assignee, commissioner, agent, attorney-in-fact, or in any other fiduciary capacity, the person or persons beneficially entitled to receive the property and the proceeds held in trust by it as aforesaid, or its successors in trust, shall have preference and priority over its general creditors in all assets of such bank or loan and trust and safe deposit company, for all uninvested funds so held in trust to the extent of any commingling with its general assets or which may not be duly accounted for."[8] By a fair interpretation of this statute,[9]

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[4] Terre Haute Trust Co. v. Scott (1932), 94 Ind. App. 461, 181 N. E. 369; Shopert v. Ind. Nat. Bank (1908), 41 Ind. App. 474, 83 N. E. 515; Pearce v. Dill (1897), 149 Ind. 136, 48 N. E. 788; Windstanley et al. v. Second Nat. Bank of Louisville (1895), 13 Ind. App. 544, 41 N. E. 956; Bevis v. Heflin (1878), 63 Ind. 129; Barnett, etc. v. Kulmer, etc. (1934), 190 N. E. 364; McEwen v. Davis, Rec. (1885), 103 Ind. 526, 5 N. E. 911; Lamb, Rec. v. Morres (1888), 11 Ind. 174, 20 N. E. 746; Porter v. Roseman (1905), 165 Ind. 255, 74 N. E. 1105; People v. California Safe Deposit & Trust Co. (1917), 175 Cal. 756, 167 Pac. 388; Miller v. Anderson (1928), 221 N. W. 543.

[5] Meyers v. Matiusek (1929), 98 Fla. 1126, 125 So. 360.

[6] Allen Steen Acceptance Co. v. Cook, Rec. (1932), 93 Ind. App. 682, 173 N. E. 460; Rottger v. First Merchants' Nat. Bank of Lafayette (1933), 184 N. E. 276; Lebanon Trust & Safe Deposit Bank's Assigned Estate (1895), 166 Pa. 622, 31 Atl. 334.

[7] Frederick Iron & Steel Co. v. Page (1923), 166 Atl. 738; Terre Haute Trust Co. v. Scott (1932), 94 Ind. App. 461, 181 N. E. 369. (Relieves the cestui of his tracing burden in that the trust company's method of keeping record of cash transaction in connection with the trust cannot jeopardize beneficiary's rights.)

[8] Changed by Chapter 40 of the Acts of 1933. This act as set out in Burns' 1933, 18-1210, p. 259, is substantially the same as Chapter 167 of the Acts of 1931, and is as follows: "Upon the liquidation of any bank or trust company while it is acting as attorney-in-fact, agent, custodian, guardian, trustee, receiver, administrator, executor, commissioner, assignee or in any other fiduciary capacity, the person or persons beneficially entitled to receive property or proceeds thereof held by it, or any successor

it is clear that the legislative intent was to grant a uniform remedy to all beneficiaries whose rights under a fiduciary or trust relationship had been breached by a bank or trust company. Formerly, as seen by the majority rule which has been the law in Indiana, the remedy offered a beneficiary against a commingling trustee depended upon the beneficiary's ability to trace the trust res or its proceeds into a certain asset of the trustee. Under the principal decision the beneficiary's remedy against the commingling trustee will no longer waver between a general or preferred claim according to the beneficiary's ability so to trace. The present Indiana rule, as set out in the principal case may then be stated as follows: All beneficiaries entitled to uninvested funds in the hands of a bank or trust company acting as a trustee, which funds have been commingled with the funds of the trustee, have upon the insolvency of said trustee, a preferred claim against all the assets of such trustee.

The granting of a preferred claim over all the assets of a commingling trustee to the beneficiary of a trust has been accomplished in certain instances without the provisions of a statute. One of such instances is where the insolvent trustee held funds for the benefit of the state. In such cases, if the commingled fund does not equal the amount of the state's claim against such trustee, the state obtains a preference over all the trustee's assets.[10] Under Chapter 167 of the Indiana Acts of 1931, any beneficiary under similar circumstances, is now afforded the remedy once open only to the state. Here, the court was clearly correct in granting preference to the appellant's claim, for the statute obviously contemplates a new and more certain remedy for all beneficiaries who have claims against insolvent banks and trust companies.

R. A. B.

Constitutional Law—Eminent Domain—Public Use.—Action for appointment of appraisers of land for railroad connection. Both parties are corporations engaged in the business of operating stone quarries. Defendant contends that the statute which gives stone quarries the power of eminent domain for the purpose of constructing a lateral railroad for not more than ten miles in length to any other railroad or canal is unconstitutional because the property was to be taken for a private and not a public use. Held, the development and operation of mines and quarries is of such public interest and benefit to the state and to the communities in which they are situated that mining and quarrying may properly be regarded as a public use for which the power of eminent domain may be delegated for the purpose of securing a way of necessity. Judgment for plaintiff reversed because the act in question did not enable the plaintiff to acquire defendant's completed lateral railroad, which was included in the proposed appropriation.[1]

No principle of law is better settled than that the legislature can not grant to a private corporation or individual the power to take private property for a private use, but it is equally well settled that the legislature may grant

fiduciary that may be appointed, shall have preference and priority in all assets of such bank or trust company over its general creditors, for all uninvested money held by such bank or trust company in its capacity as a fiduciary, to the extent that such money is commingled with its general assets, or is not duly accounted for."

[9] Wooley Coal Co. v. Trevault (1918), 187 Ind. 171, 118 N. E. 921; State v. Shanks (1912), 178 Ind. 330, 99 N. E. 481; State v. Jennings (1872), 27 Ark. 419.

[10] State v. Bruce (1909), 17 Idaho 1, 102 Pac. 831; Meyer v. Board of Education (1893), 51 Kan. 87, 32 Pac. 658.

[1] Indianapolis Oolitic Stone Co. v. Alexander King Stone Co. (1934), 190 N. E. 57 (Ind.).