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BANKS AND BANKING-NIGHT DEPOSITORY-RELATION CREATED BETWEEN BANK AND DEPOSITOR

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BANKS AND BANKING—NIGHT DEPOSITORY—RELATION CREATED BETWEEN BANK AND DEPOSITOR—By payment of a nominal charge, the plaintiff became entitled to use the night depository service offered to its customers by the defendant bank. On Christmas day, 1942, plaintiff made use of this service by depositing some currency, coins, and a check which were placed in a canvas bag

supplied by the defendant bank for this purpose. Plaintiff never received credit for this deposit. Defendant bank was unable to find the bag which the plaintiff had deposited, and plaintiff sued to recover the value of its contents, obtaining a judgment in the trial court. Defendant bank appealed. *Held*, judgment affirmed. The relationship created between the bank and the user of the night deposit facility was a bailment for mutual benefit, and the bank owed the depositor the duty to use reasonable care in seeing that the deposit was credited to his account. *Bernstein v. Northwestern National Bank in Philadelphia*, (Pa. Super. 1945) 41 A. (2d) 440.

The basic question presented by the use of the night depository service is whether the relationship of debtor and creditor or of bailee and bailor is created. The principal case appears to be the first consideration of this problem by an American court. Ordinarily the relationship created between the parties is determined by reference to the intent.[1] In the case of an ordinary deposit, the relationship intended is that of debtor and creditor, i.e., to make a "general deposit."[2] But not all of the relations which a bank may have with its customers are debtor-creditor.[3] The night deposit service is not a part of the usual business of a bank, but is an additional service rendered to its customers. Since, generally, there is no express agreement covering the night deposit, the nature of the relationship created must be ascertained from a reasonable interpretation of the facts involved. The bank does not intend to be held strictly liable as a debtor for the funds placed in the night depository, since it need not accept all or any part of a deposit until it has had an opportunity to examine that which has been tendered.[4]

[1] ". . . if there be a delivery of money at the bank on the part of the depositor, with the intention of making a deposit, known to the officer of the bank, who receives it, the deposit in the bank is complete." ZANE, THE LAW OF BANKS AND BANKING, § 131 at p. 207 (1900). "It is settled law that 'in the absence of a statutory prohibition to the contrary, a bank deposit may be subject to any agreement which the depositor and the banker may make with respect to it. . . .'" Sol Popofsky Co., Inc., v. Wearmouth, 216 Iowa 114, 248 N.W. 358 (1933); Shopert v. Indiana National Bank, 41 Ind. App. 474, 83 N.E. 515 (1908). See also cases cited 9 C.J.S., Banks and Banking, § 267; and 7 AM. JUR., Banks, § 405.

[2] "It appears, therefor, to be settled law that a deposit is general unless made special by the agreement of the parties, and that, in the absence of facts or circumstances showing that it was the intention of the depositor to make it special, the deposit will be deemed general." Washington Shoe Manufacturing Company v. Duke, 126 Wash. 510 at 516, 218 P. 232 (1923). See cases collected in 9 C.J.S., Banks and Banking, §§ 267 and 273.

[3] Cf. Davison v. Alaska Banking Company, 5 Alaska 683 (1917) (package of money sent to bank held to be a bailment until the package was opened, money counted and placed to customer's credit); Corn Exchange National Bank v. Solicitors' Loan and Trust Company, 188 Pa. St. 330, 41 A. 536 (1898) (package of money given to the bank, held impressed with a trust and recoverable by the depositor); Fogg v. Tyler, 109 Me. 109, 82 A. 1008 (1912), 39 L.R.A. (n.s.) 847 (1912) (package of money marked with initials given to bank for safe-keeping, held a bailment); In re Insolvency of Farmers and Merchants Savings Bank, 202 Iowa 859, 211 N.W. 532 (1926) (bonds left with bank, held a bailment).

[4] "A bank may decline to do business with those whom, for any reason, it does not wish to serve. . . ." TIFFANY, HANDBOOK OF THE LAW OF BANKS AND BANKING, § 4 at p. 15 (1912). Cf. Webb v. O'Geary, 145 Va. 356, 133 S.E. 568 (1926) (depositor cannot become a creditor of the bank until it has given him credit for the

But the depositor does not intend that he will remain responsible for the subject matter, for when the night deposit is made the items pass completely out of his hands into a mechanism that is within the exclusive control of the bank. If the parties had anticipated this situation when they first entered into their contract, they would probably have intended that the bank, while the funds were within its exclusive control, would protect them from loss due to negligence on its part. Since the deposit looks toward the creation of a debtor-creditor relationship, although it in itself does not suffice to create that relationship, benefit to both parties accrues and the relationship set up is a bailment for mutual benefit. Such was the result reached in the principal case. Further, it was reasoned that since the bank is in such a position that it alone can reveal what happened to the property placed in the night depository, a conclusive showing by the depositor that a deposit was actually made, places the burden on the bank to show that it acted with due care in the handling of deposits of this kind. This situation may be likened to the case in tort liability where the doctrine of *res ipsa loquitur* is applied. The result reached in the principal case is consistent with sound business policy in that it leaves to the bank the making of an unequivocal act of acceptance of a deposit before it is held liable as a debtor; and it assures the depositor that the custodian of his funds, who has been paid for the service, will protect them from negligent loss.

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amount deposited); United States v. Holt, (Mo. App. 1939) 131 S.W. (2d) 59 (until accepted, the title to money does not pass from depositor to bank).