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BANKRUPTCY -TRUSTEE'S LIABILITY - EFFECT OF REQUIREMENT OF DEPOSIT IN DESIGNATED DEPOSITARY ON TRUSTEE'S COMMON LAW DUTY OF DUE CARE

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BANKRUPTCY — TRUSTEE'S LIABILITY — EFFECT OF REQUIREMENT OF DEPOSIT IN DESIGNATED DEPOSITARY ON TRUSTEE'S COMMON LAW DUTY OF DUE CARE — In a suit to charge a trustee in bankruptcy for the loss of funds of the bankrupt estate caused by insolvency of the depositary bank, the trustee contended that as he had fulfilled the requirement of section 61 of the Bankruptcy Act [1] by depositing the funds of the estate in a "designated depositary," he could not be charged with liability for any loss occurring thereafter; he argued that section 61 repealed, by implication, the trustee's common-law duty of due care in the handling of estate funds after they were deposited in a "designated depositary." *Held*, the fact that the freedom of choice of the fiduciary is limited by statute does not relieve him of the duty of exercising due care within the field left to his discretion, and he is liable if his negligence caused the loss. *United States ex rel. Willoughby v. Howard*, 302 U. S. 445, 58 S. Ct. 309 (1937).

It is clearly established that the common law imposes on the trustee the duty of due care with respect to the collection and preservation of the assets of a bankrupt.[2] The principal case appears to be the first word of the Court as to the effect on this common-law duty of the statute requiring the trustee to deposit funds in his possession in a designated depositary. Not only is the result reached here wise, in that it avoids opening of a loophole for negligent trustees, but it appears to be supported in analogous situations in the law. It is clear that application of common-law principles is not enjoined by implications arising from statutes, but that express statutory fiat is necessary to accomplish such a result.[3]

[1] 49 Stat. L. 721 (1935), 11 U. S. C. (1934), § 101.

[2] Re Max Reinboth, (C. C. A. 2d, 1907) 157 F. 672, 16 L. R. A. (N. S.) 341; Carson Pirie Scott & Co. v. Turner, (C. C. A. 6th, 1932) 61 F. (2d) 693; In re Moore and Bridgeman, (C. C. A. 5th, 1909) 166 F. 689; In re Schoenfeld, (C. C. A. 3d, 1910) 183 F. 219; In re Newcomb, (D. C. N. Y. 1887) 32 F. 826; Delaware v. Irving Trust Co., (C. C. A. 2d, 1937) 92 F. (2d) 17; In re Montgomery & Son, (D. C. Ohio, 1927) 17 F. (2d) 404; In re Kane, (D. C. N. Y. 1908) 161 F. 633; In re Kuhn Bros., (C. C. A. 7th, 1916) 234 F. 277.

[3] Sears v. Majors, 104 Cal. App. 60, 285 P. 321 (1930); Commonwealth v. Barnett, 196 Ky. 731, 245 S. W. 874 (1922); Sprouse v. Magee, 46 Idaho 622, 269 P. 993 (1928); Hazzard v. Alexander, 36 Del. 512, 178 A. 873 (1935); Bassier v. J. Connelly Construction Co., 227 Mich. 251, 198 N. W. 989 (1924); Central Lithograph Co. v. Eatmor Chocolate Co., 316 Pa. 300, 175 A. 697 (1934); Simpson v. Drake, 150 Tenn. 84, 262 S. W. 41 (1923); Kappers v. Cast Stone Con-

The statutory clause discussed in the principal case is merely supplementary to the common law and does not expressly repeal the relevant common law. An application of this general principle is seen in a case [4] holding that even though a complaint against the director of a bank for negligence did not establish statutory negligence, nevertheless the director could still be held liable under the broader common-law doctrine, as the statute did not expressly repeal the latter. Where statutes have established a requirement that public officers deposit public funds in designated depositaries, it is generally conceded that the common-law duty of due care remains, in conjunction with this new statutory duty.[5] Similarly, when statutes list so-called "legal" securities to limit trustees in their selection of trust investments, the trustees are still held to the common-law duty to exercise due care in the selection of investments from the class of "legals," even though a departure from the selected group results in strict liability in case of a loss.[6] Consequently, support for the doctrine announced in the principal case is clear. The practical results are best illustrated by pointing out that if the trustee's position here were accepted, a trustee could be as careless and negligent as he pleased in disregarding notorious reports or even knowledge of a depositary bank's precarious financial position so long as the bank was within the designated group. Bad faith and collusion with notoriously incompetent banks would receive the sanction of the law. As interpreted, the statute adds valuable protection to bankruptcy estate funds by forcing deposit in inspected and bonded banks, while at the same time preserving the ordinary fiduciary duties in the trustee.

Russel T. Walker

struction Co., 184 Wis. 627, 200 N. W. 376 (1924); The West Jester, (D. C. Wash. 1922) 281 F. 811.

[4] Bowerman v. Hamner, 250 U. S. 504, 39 S. Ct. 549 (1918).

[5] Jordon v. Baker, 252 Ky. 40, 66 S. W. (2d) 84, 93 A. L. R. 813 (1933); Independent School District of Brookings v. Flittie, 54 S. D. 526, 223 N. W. 728 (1929); Board of Commissioners of Grant County v. Soucek, 128 Okla. 151, 261 P. 947 (1927); State to the use of Grinnell v. Carney, 208 Iowa 133, 217 N. W. 472 (1928); Anderson v. Peterson State Bank, 191 Minn. 404, 254 N. W. 459 (1934); Hobbs v. United States, 17 Ct. Cl. 189 (1881).

[6] Delafield v. Barrett, 270 N. Y. 43, 200 N. E. 67 (1936); Clark v. Beers, 61 Conn. 87 (1891); In re Randolph, 134 N. Y. S. 1117 (Surr. Ct. 1911); In re Estate of Allis, 191 Wis. 23, 209 N. W. 945, 210 N. W. 418 (1926); see 49 HARV. L. REV. 821 at 823 (1936).