

January 1952

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Recommended Citation

Paul Castoldi, *Trust or Debt? A Review of Montana Decisions*, 13 Mont. L. Rev. (1952).

Available at: <https://scholarworks.umt.edu/mlr/vol13/iss1/9>

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By way of summation, the general rule is that an overruling decision is to be given retroactive effect; that exceptions to this rule exist where contract or property rights have vested, where a statutory or constitutional provision is being construed, where personal rights in criminal cases are involved. The *Sunburst* decision is the leading case in the growing equitable tendency toward granting prospective effect only. The chief obstacle to general acceptance of the Montana Doctrine still seems to be the declaratory theory that a judge declares not makes law. This the courts still feel themselves bound to follow despite the harsh results often engendered and despite the fact that the *Sunburst* case indicates that there is no constitutional objection nor common law limitation on the power of courts to grant either retroactive or prospective application. Since there are instances when retroactive effect is called for, the determination of which is to be based on the "principle of reliance," it would seem that in the interest of doing effective justice the general rule ought to be prospective overruling, with retroactive overruling the exception.

Existing in four broad categories of (1) constitutional and statutory construction, (2) vested contract and property rights, (3) procedure, and (4) torts, is a guide by which courts can be aided in developing this new judicial technique. Eventually in each category, situations of justifiable reliance will be indicated and ultimately can be listed in an ascending-descending degree of importance. But this determination of the effect to be given an overruling decision, lying so peculiarly within the power and abilities of the courts, is a task and a duty which ought not to be shunted to the legislature.

LAWRENCE G. STIMATZ

TRUST OR DEBT? A REVIEW OF MONTANA DECISIONS

Courts have not consistently answered the question of whether a given transaction creates a trust or a debt. A trust and a debt are fundamentally different, and it is important to distinguish between them where the claimant is seeking a preference.

In some cases courts have disregarded the distinctions be-

common law having been evolved in a process of application of rules to particular cases, has a . . . fitness to the actualities of life that no body of legislative rules made in *a priori* fashion can have."—Carpenter, *supra*, n. 43 at p. 63.

tween a bailment and a trust and used the term "trust" generally.¹ Sometimes a trust is spoken of as a principal-agent relationship.² Whatever the term used, if the plaintiff can show that (1) the transaction created a fiduciary relationship, as distinguished from a creditor and debtor relationship, thus making the defendant a trustee for the benefit of the plaintiff, (2) that by the transaction the defendant's assets were augmented, and (3) that the trust funds can be traced into the possession of the defendant, he will get a preference on his claim.³

The Montana court has had many opportunities to consider this problem. Has the court been consistent in its treatment of the cases? In *State v. Karri*,⁴ the defendant saloon keeper persuaded a liquor dealer to advance him \$1,000 in order to cash miners' pay checks and thereby sell more drinks. Instead of cashing the miners' pay checks, the defendant used the \$1,000 to pay some pressing creditors. When the defendant did not repay on the date agreed, the liquor dealer preferred charges of grand larceny, claiming the defendant was a bailee of the \$1,000 for the purpose of cashing miners' pay checks. The court held the transaction a mere loan for exchange, and the retailer was not guilty of larceny. This case was correctly decided. The retailer had title to the \$1,000 as well as the beneficial interest; his obligation was to repay at a future date; and he assumed no position of trust or confidence with relation to the \$1,000 borrowed nor to the checks cashed for the miners. It was a loan in which the defendant contracted to use the money borrowed for a specific purpose.

The great majority of cases involving a trust or debt question, however, arise in the field of banks and banking. In these cases, the plaintiff is usually attempting to classify his deposit as a special deposit. If he succeeds, he gets a preference over

¹Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co., 118 C.C.A. 142, 199 F. 704 (1912); (The court speaks of subject matter as a bailment and a trust); Fogg v. Tyler, 109 Me. 109, 82 A. 1008 (1912); (The court used the term trustee-trustor as well as bailee-bailor).

²California Packing Corporation v. McClintock, 75 Mont. 72, 241 P. 1077 (1925); Keyes v. Paducah & I.R. Co., 61 F. (2d) 611, 86 A.L.R. 203 (1932).

³Hawaiian Pineapple Co. v. Browne, 69 Mont. 140, 220 P. 1114 (1922); McDonald v. American Bank & Trust Co., 79 Mont. 233, 255 P. 733 (1927); Powell Building & Loan Association v. Larabie Brothers Bankers, Inc., 100 Mont. 183, 46 P. (2d) 697 (1935).

⁴51 Mont. 157; 149 P. 856 (1915).

the general creditors of the bank.⁸ General depositors are considered as general creditors and are not allowed a preference.⁹

A special deposit is one in which the money, chattel, or securities are deposited with the understanding that the identical money or chattel is to be returned to the depositor.⁷ For example, if the bank gratuitously takes bonds from a depositor for safekeeping and they are stolen or lost, the bank, if liable at all, will be liable on principles of bailment.⁸ This is a true special deposit, since the identical thing deposited is to be returned. Also, if the bank is asked to buy a note for the depositor and hold it for him after it has purchased the note, the bank will be considered as holding the note in trust for the depositor.⁹

Another type of deposit which has not been too well recognized is the general deposit for a specific purpose. This type, as the term indicates, results when a deposit is made with the bank undertaking an obligation other than the honoring of checks drawn by the depositor.¹⁰ However, it has been held that in a general deposit for a specific purpose the exact money deposited need not be used, but an equivalent fund will be satisfactory.¹¹ Courts in the past have not distinguished between a special deposit and a general deposit for a specific purpose, but have interpreted them as having the same legal affect. Today there is a noticeable trend to distinguish the general deposit for a specific purpose.¹² The Montana Supreme Court has said, "If a deposit is authorized, it must be either general or special, for there is no other kind of deposit. . . ."¹³ With respect to the status of claimants it is felt that our court should recognize that a general deposit for a specific purpose is similar to a general deposit for checking purposes. In a general deposit for a specific purpose the bank may consent to pay a note for the depositor, take up a mortgage for him, or release the depositor from some other ob-

⁸Hawaiian Pineapple Co. v. Browne, *supra*, note 5; McDonald v. American Bank & Trust Company, *supra*, note 5.

⁹Rohr v. Stanton, 76 Mont. 248, 245 P. 947 (1926); Raban v. Cascade Bank, 33 Mont. 413, 84 P. 72 (1906); Pethybridge v. First State Bank of Livingston, 75 Mont. 173, 243 P. 569 (1926).

¹⁰Boyd v. Harrison State Bank, *supra*, note 7.
State v. Farmers' & Mechanics' State Bank of Helena, 85 Mont. 265, 278 P. 520 (1920); Fogg v. Tyler, *supra*, note 1; SCOTT ON TRUSTS, § 530.

¹¹Boyd v. Harrison State Bank, *Supra*, Note 7.

¹²State v. Farmers' & Mechanics' State Bank of Helena, *supra*, note 7.

¹³SCOTT ON TRUSTS, § 530, (1939).

¹⁴MORSE, BANKS AND BANKING (6th ed. 1928) § 210.

¹⁵Santee Timber Corp. v. William Elliott, 70 F(2) 179, 93 A.L.R. 874 (1934); SCOTT ON TRUSTS, § 530.

¹⁶Montana-Dakota Power Company v. Johnson, 95 Mont. 16, 23 P. (2d) 956 (1933); Pethybridge v. First State Bank of Livingston, 75 Mont. 173; 243 P. 569 (1926).

ligation owing to a third party by paying that third party. If the depositor intends to retain the beneficial interest in the money, he is entitled to the funds deposited in event of the bank's failure. However, if the parties intend that the bank is to consider the money as its own, the transaction takes on the nature of a general deposit. The modern trend where money is deposited with instructions to transmit it to another party is to treat it as a debt.¹⁴

A deposit is ordinarily presumed to be general;¹⁵ therefore to secure a preference a party has the burden of proving that a special deposit was intended. Since recovery of preferred claims from insolvent banks is generally regarded as based upon some theory of trusts,¹⁶ the courts have applied trust principles to determine the intention of depositors.

A deposit of trust funds by a trustee with the bank's knowledge that they are trust funds does not of itself make the deposit a special one so as to entitle the depositor to a priority over the general creditors if the bank becomes insolvent.¹⁷ But if a depositor deposits money "in trust" to the bank, courts have had trouble determining what kind of a relationship was established. In *Conley v. Johnson*¹⁸ one Clark from Butte deposited \$25,000 with the Larabie Brothers, Bankers of Deer Lodge, "in trust" to the end that the bank was to pay 4% interest to two individuals who were to receive the interest in trust and apply the same for the use and benefit of the state prison band. The court allowed a preference, relying almost entirely upon the wording of the agreement: "The sum of \$25,000 was given in trust to the bank in very plain and explicit terms . . ."; and that the relation of debtor and creditor was a "very different relation from that described by the words of the contract." Chief Justice Sands dissented, maintaining that the agreement merely set up a debtor-creditor relationship.

Chief Justice Sands' position seems sound. It is most unlikely that the bank would agree to pay 4% interest unless it was to have the free and unrestricted use of the money deposited; and if it was to have that use, the transaction creates a debt and

¹⁴SCOTT ON TRUSTS, § 530.

¹⁵Powell Building & Loan Association v. Larabie Brothers Bankers, Inc. *supra*, note 3; Montana-Dakota Power Company v. Johnson, *supra*, note 13.

¹⁶ZOLLMAN, BANKS & BANKING § 6591 (1936).

¹⁷Raban v. Cascade Bank, 33 Mont. 413, 84 P. 72 (1906); Lasborn v. First State Bank of Livingston, 75 Mont. 184, 243 P. 573 (1936); Pethybridge v. First State Bank of Livingston, *supra*, note 13.

¹⁸101 Mont. 376, 54 P. (2d) 585 (1936).

not a trust. Furthermore, there was no evidence to show that the bank was intended to invest the money for the depositor and guarantee him a return of 4%.

The *Conley* case seems to stand alone in reaching such a result; no other case has been found which is exactly in point. Two cases from other jurisdictions appear to be similar but they are distinguishable. In one case, the bank was to invest the deposited funds and if it found it "impossible to secure the said four (4%) per cent rate of compound interest" then it was to secure the best rate of interest.¹⁹ In another case the depositor expressly provided that the "said 'Fund' was to remain for a time undisturbed." The court found that the payment of interest was "not for the use of the fund, but rather as a bargaining for a contribution from the banks of an annual rate of percentage of the increase of the trust fund."²⁰

It is quite common for an individual to deposit a check or draft with a bank for collection and credit to his account or to transmit to third parties. What the depositor is actually doing in these cases is authorizing the bank to adopt its practice and customs in the banking field.²¹ The difficulty seems to be in determining the relationship between the bank and the depositor after the commercial paper has been collected. The presumption is that the bank is entitled to use the money it collects as its own. This presumption is capable of being rebutted by special agreement or circumstances clearly indicating a different intention prevailed.²² Therefore, it is usually held that when commercial paper is deposited for collection and remittance or collection and deposit, and is endorsed in blank, or specially or restrictively for collection, the bank is considered an agent up to the time the collection has actually been made, and if there has been no collection the depositor is entitled to a preference in event of insolvency of the bank.²³ However, as soon as the instrument is collected the agency relationship is terminated and a debtor-creditor relationship is immediately established. This view was adopted by the United States Supreme Court in *Jennings v. United States Fidelity & Guaranty Co.*²⁴ in which Mr. Justice Cardozo stated:

"In the absence of tokens of a contrary intention,

¹⁹*City of Canby v. Bank of Canby*, 192 Minn. 571, 257 N.W. 520 (1934).

²⁰*Village of Montecello v. Citizens State Bank*, 180 Minn. 418, 230 N.W. 889 (1930).

²¹*Montana-Dakota Power Company v. Johnson*, *supra*, note 13.

²²*Keyes v. Paducah & I. R. Co.*, 61 F (2d) 611, 86 A.L.R. 203 (1932).

²³*State v. Farmers' State Bank of Bridger*, 54 Mont. 515, 172 P. 130 (1918); *SCOTT ON TRUSTS*, § 534.

²⁴294 U.S. 216, 55 S. Ct. 394, 79 L. Ed. 869 (1935).

the better doctrine is, where the common law prevails, that the agency of the collecting bank is brought to an end by the collection of the paper, the bank from then on being in the position of a debtor, with liberty, like debtors generally, to use the proceeds as its own."²⁵

The trend of recent cases is to follow the Supreme Court decision, although there are jurisdictions holding contra.²⁶

If the paper deposited with the bank is endorsed in blank, some jurisdictions consider this as a sale to the bank, especially if the bank credits the depositor's account and allows him to draw on it. Since the bank is considered the purchaser, the beneficial interest as well as the legal title is in the bank, and in event of insolvency the depositor cannot get a preference.²⁷ This is contrary to the presumption that when matured or un-matured negotiable paper is deposited for collection, the beneficial interest is retained by the depositor until the paper is collected, and the bank is acting as the agent or bailee of the depositor.²⁸

In *State v. Farmer's State Bank of Bridger*²⁹ the depositor gave the bank a certificate of deposit issued by another bank with instructions to collect it when due and credit his account. The bank discounted the certificate immediately and become insolvent before the certificate matured. The court properly held that since the certificate had not matured, the bank could not have collected on it and it could not have credited the depositor's account. The bank violated its obligation to the depositor by discounting it instead of waiting to collect it when it became due. The principal-agency relationship which was established when the certificate was left with the bank for collection was violated and the bank became liable to the depositor.

The same principle applies between banks as it does between a bank and its depositor. In *State v. The Banking Corporation*³⁰ the Stanton Bank sent its checks and drafts to the defendant bank for collection. The agreement, evidenced by correspondence between the two banks, was that the Stanton Bank was not to draw on those checks until a sufficient time had elapsed to allow the defendant bank to collect on the checks through its correspondent banks. This agreement clearly showed that the defend-

²⁵SCOTT ON TRUSTS, § 534.

²⁶*Gonyer v. Williams*, 168 Cal. 452, 143 P. 736 (1914); *Commercial Bank & Trust Company v. Minshull*, 137 Wash. 224, 242 P. 29 (1926). SCOTT ON TRUSTS, § 533.

²⁷*State v. Farmers' State Bank of Bridger*, *supra*, note 23.

²⁸54 Mont. 515, 172 P. 130 (1918).

²⁹74 Mont. 491, 241 P. 626 (1925).

ant bank did not have the beneficial interest, but rather was considered as a trustee of the paper for the Stanton Bank. Likewise, the Stanton Bank was considered a trustee for the owners of the checks who deposited them with the Stanton Bank. A leading text writer in the field of Trusts calls this in substance a trust and a sub-trust.⁸⁰

In Montana it is not difficult to extend that principal-agency relationship to cover the period after the commercial paper has been collected. The court allowed a preference when a paper was deposited with instructions "to collect it, and notify" the depositor. The fact that the depositor had an open account with the bank was of no weight in view of the specific instructions. The court relied on the instruction "to collect it, and notify" to find that the relationship of principal-agent had not been changed to that of debtor-creditor.⁸¹ It is questionable whether such an instruction, in view of banking customs and procedure, is sufficient to constitute a "token of contrary intention" as stated by Mr. Justice Cardozo. The case was correctly decided, however, since the collecting bank becomes a debtor to the forwarding bank which holds that claim in trust for the depositor.

If the paper is deposited for collection without any instructions, the debtor-creditor relationship is established after collection. The case of *In re Liquidation of Columbus State Bank*⁸² is a good illustration. The depositor had been a general depositor with the defendant bank for 30 years and had been in the practice of buying commercial paper from the bank. When the paper became due the bank would collect and credit the depositor's account and make out a deposit slip for the depositor. The bank had just made a collection and issued a deposit slip, but before it credited the account of the depositor it closed its doors. No preferred claim was allowed. This case follows the general trend in holding that the relationship of debtor-creditor was established after the note had been collected. The fact that the depositor did not tell the bank "to notify" him was perhaps instrumental in the court's denying him a preference.

Several cases have been decided where the court held a deposit to be special in nature which, in reality, was a general deposit for a specific purpose. In the case of *In re Gans & Klein*⁸³ it appeared that the bank suggested that the bankrupt conduct a special sale of some of his property to raise money to pay

⁸⁰SCOTT ON TRUSTS, § 535.

⁸¹*Guignon v. National Bank of Helena*, 22 Mont. 140, 55 P. 1051 (1899).

⁸²95 Mont. 332, 26 P. (2d) 643 (1933).

⁸³14 F. (2d) 116 (1936).

pressing creditors with a view towards strengthening his credit with them and thereby continuing his business; the fund realized on the same was deposited in the defendant bank and the bank, instead of allowing the bankrupt to pay his creditors as agreed, attempted to claim the right of set-off against a debt due it from the bankrupt. The court denied the right of set-off, holding that the fund deposited was a special or specific deposit and such deposits are "in the nature of a trust." The result is sound, but not on the principle of a trust; the bank had the funds but it was not required to pay the identical money deposited. The bank was under a contractual agreement to pay an amount equal to the deposit to the creditors of the bankrupt, and by attempting a set-off it had breached its contract.

The case of *Chicago, M., St. P. & P. R. Co. v. Larabie Brothers Bankers*⁸⁴ is questionable. The treasurer of the company customarily sent a draft accompanied by a letter to the bank designating the deposit "a special deposit for use in payment of this company's paymaster's checks." The bank acknowledged receipt by letter stating "we have credited this account as a special deposit. . . ." On insolvency, the court allowed the plaintiff a preferred claim, holding it "clearly a special deposit by virtue of an express agreement between the plaintiff and the bank, as contained in the letters of transmittal by the plaintiff and the letters acknowledging receipt thereof by the bank." The plaintiff did not have any beneficial interest in the deposit; he was only interested in having a sufficient amount on hand to meet the pay checks. This case appears to be a good example of what Professor Scott had in mind in his work on Trusts.⁸⁵

"So also the designation of the account as a 'special account' does not usually indicate a special deposit, but merely indicates that the deposit is not subject to withdrawal by check in the ordinary way; or very often such a designation is employed as a bookkeeping device enabling the depositor to keep separate accounts of his separate activities."

Many similar cases are held to be general deposits, since the presumption is that money deposited with a bank is to be used by the bank as its own, thereby establishing a debtor-creditor relationship.⁸⁶

The following three cases are good examples of the weight the Montana court gives to words expressed by the depositor. All of

⁸⁴103 Mont. 126, 61 P. (2d) 823 (1926).

⁸⁵SCOTT ON TRUSTS, § 530.

⁸⁶Id.

these cases involved collection and transmission. In *Hawaiian Pineapple Co. v. Browne*,⁶⁹ the plaintiff sent a draft from California to a Havre bank drawn on a Havre firm with instructions to "collect and remit the proceeds." The firm paid the draft by check drawn on the bank and the bank forwarded its draft to a Chicago destination as requested. There was no transfer of actual money; bookkeeping entries recorded the transfer. The Havre bank became insolvent before the draft was paid and the plaintiff was successful in getting a preference on his claim. The court found that the principal-agent relation was established and maintained even after the so-called collection because of the instructions to "collect and remit." Considering that the entire transaction involved merely a transfer of credits by the use of bookkeeping entries and a draft, and that the plaintiff accepted the draft mailed by the Havre bank, thereby ratifying the practice and customs of the bank, it appears that the instruction "to collect and remit" is a narrow ground for holding the transaction a special deposit.

Two years later the *California Packing Corporation v. McClintock*⁷⁵ case came before the Supreme Court of Montana under facts identical to those of the *Hawaiian Pineapple Co.* case except that the plaintiff requested a collection and a draft forwarded to the Wells-Fargo bank in San Francisco for the plaintiff's account. The plaintiff's claim, based upon the preceding case, was disallowed. The court held that the instructions to collect and send a draft was a direction not to send the identical money collected, "but was equivalent to an agreement that the bank might use the money collected and pay the plaintiff by its draft on the San Francisco bank." The only difference between the *Hawaiian Pineapple Co.* case and the *California Packing Corporation* case is that in the former the instructions were to "collect and remit" whereas in the latter the instructions were to "collect and send a draft." The court in the *California Packing Corporation* case decided it in accord with the better view and the trend of modern cases when it held:

"An agreement or understanding whereby the collecting bank is to use the identical money collected and substitute its own obligation in its stead destroys all

⁶⁹69 Mont. 141, 220 P. 1114 (1922); See also *Caterpillar Tractor Co. v. Johnson*, 99 Mont. 269, 43 P. (2d) 670 (1935), for a similar result where the instructions were "to collect and remit proceeds in U.S. Current funds."

⁷⁵75 Mont. 72, 241 P. 1077 (1925).

idea of a trust, and creates the relation of debtor and creditor, instead of trustee and beneficiary.”

Sometime later the case of *Montana-Dakota Power Co. v. Johnson*⁹⁵ was decided in which the plaintiff was denied a preferred claim. The plaintiff employed a bank to collect its power and light bills and to transmit the collections to the head office in Williston by draft every third day. The bank kept a record on the power company's "collection statements" and mailed it to the plaintiff along with the draft. At first the bank kept the funds in a cigar box but after a while it found it more convenient to keep a "collection account" and did so without notice to the plaintiff that it was doing so. The court relied heavily on the banking customs to find a general deposit in this case in spite of the fact that neither the bank nor the Power Company intended that the plaintiff was to be an ordinary general depositor. Some good law was applied in this case with regard to the relationship of the bank after the collection was made and also with regard to the "well-known custom of banks":

“ . . . as a general rule, after the collection has been made, the bank becomes a simple contract debtor for the amount and does not hold the proceeds as agent in trust for the depositor. If the party for whom the collection is made is a depositor in the bank, the sum will be placed to his credit, in the absence of special instructions on the subject, but the fact that the party contracting for the collection is not a depositor does not alter this rule, for if the party has no deposit account, the bank simply owes him the amount on demand.”

As to the banking custom, the court said:

“The 'well-known custom of banks' of which the courts must take judicial notice, is to mingle money collected with its general funds and remit by cashier's check or draft on its general funds either in its own or another bank. The party receiving the check or draft must be deemed to have impliedly authorized the employment of the custom and ratified it by the acceptance of such paper; the deposit is general, and the relation that of creditor and debtor, for the paper evidenced that the other side of its bookkeeping transactions had taken place, viz., that the sums had been deposited in its cash as general deposits.”

It appears that in Montana if one wants to be sure of getting a preferred claim or to have a transaction declared to be in the

⁹⁵95 Mont. 16, 23 P. (2d) 956 (1933).

nature of a trust, he should say this is "in trust," or he should instruct the bank "to collect and notify me" or to "collect and remit" or notify the depository that "this is a special deposit." Apparently, the court has accepted such instructions as indicating the intention of the parties, even though the transaction in substance does not bear out the trust.

The Federal Deposit Insurance Corporation was intended to safeguard deposits, and today it should not make any difference whether the deposit is general or special except in those cases where the amount is over the \$10,000 allowed by the insurance. This insurance will reduce the number of cases considerably, but there still may be a few cases which will involve more than the insured amount. If such cases do come up, it is hoped that a consistent policy will be followed by the court.

PAUL CASTOLDI.

WESTERN WATER RIGHTS: MAY THEY BE TAKEN WITHOUT COMPENSATION?

In view of the fact that west of the 97th meridian, where the climate varies from subhumid, to semi-arid, to arid with some 750,000,000 acres of arid lands of which only 21,000,000 are irrigated with streams incapable of supplying more than a fraction of the water that could be beneficially used, and with annual precipitation varying from twenty inches to less than five inches, it is really apparent that water has come to mean everything, and any existing property right in it has become invaluable.¹ Because this is so, the time has now come when it is necessary to determine to what extent rights in western water are recognized and to what extent those recognized rights are protected in the individuals owning them from the encroachment of the Federal government.²

One of the more important questions relating to the protection and recognition of such rights wherein the rights of individuals were asserted against the rights of the Federal Government was presented to the Supreme Court of the United States in June, 1950.³

¹"This condition of the arid region (west of the 97th meridian), and the imperative necessity for irrigation to render it productive, is a matter of such common knowledge that the courts judicially take notice that land within this region will not produce agricultural crops without irrigation." 1 KINNEY, IRRIGATION AND WATER RIGHTS. p. 400. (2d. ed. 1912).

²For a very able discussion of water law in Montana, see Heman, *Water Rights Under the Law of Montana*, 10 MONT. L. REV. 13.

³U.S. v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L. Ed. 1231 (1950).