

GROSSMAN *v.* TAYLOR.

Opinion delivered January 18, 1932.

1. BANKS AND BANKING—CREATION OF TRUST.—An instrument reciting the creation of a trust of moneys deposited in a bank *held* to create an express trust, entitling the beneficiaries to priority on insolvency of the bank, although the money was already in the bank when the trust agreement was accepted.
2. BANKS AND BANKING—INSOLVENCY—PRIORITY OF TRUST FUND.—Beneficiaries of an express trust constituting the bank trustee of a deposit therein, though the trust fund was not a special deposit, were entitled to a preference.

Appeal from Craighead Chancery Court, Western District; *J. M. Futrell*, Chancellor; reversed.

## STATEMENT BY THE COURT.

This appeal involves the correctness of the decision of the chancellor denying preference and priority of payment to the claim of appellants for money on deposit in the failed bank alleged to be a trust fund under an express trust evidenced in writing and signed by the failed bank.

Appellants filed an intervention claiming the sum of \$3,600 on deposit in the American Trust Company of Jonesboro, in the name of the American Trust Company as trustee for Abraham Grossman as a trust fund of which appellants were beneficiaries under an express trust agreement evidenced by writing and signed by the American Trust Company at the time the trust was created. The American Trust Company failed November 1, 1930, and the State Bank Commissioner took charge thereof. The appellants, petitioners, four of the heirs of Abraham Grossman, alleged that on February 11, 1925, \$9,250 was deposited in the American Trust Company

to be held by it as trustee of Abraham Grossman, for which a deposit book was delivered at the time wherein R. E. Townsend, an official of the bank, had written the following memorandum:

“American Trust Co., Trustee for Abraham Grossman.

“This book is a memo. receipt. These funds are not subject to check, but are to be disbursed according to agreement dated 2-10-1925. Int. at 5½% payable the 1st of each month to Abraham Grossman during his lifetime.

This fund was never entirely withdrawn from the bank thereafter, but by agreement of all the parties another trust agreement was executed on November 15, 1927, under the terms of which it was provided it should be a substitute for all other agreements, and that \$3,600 should be held by the American Trust Company as trustee for the benefit of the four appellants, no one of said four heirs having any right to draw out any part of the money, except with the consent of all the other heirs and the trustee. The trust fund was not to be subject to the payment of individual debts or claims of creditors of any of the said heirs, but was required to be kept intact. The trust agreement was filed as an exhibit to the intervention and requires that Abraham Grossman, the father of all the other parties, children of Bessie Grossman, deceased, Abraham Grossman's former wife, and the brothers and sisters of Jake Grossman, deceased, being all the parties interested in the estates of either of the decedents, there being no debts against either of the estates, make this agreement in settlement thereof. Section two recites the contracts of February 9, 1925 and February 10, 1925, under which certain deposits were made by the parties and certain trust fund created, out of which there remains a trust fund in the American Trust Company of Jonesboro, Arkansas, of \$9,250, wherein all the parties hereto are interested. It then recited the purpose to make full and final settlement and disposition of Abraham Grossman's

interest therein that he might have the benefit of same, and that each of the previous agreements of the dates set out are canceled, this agreement being substituted therefor.

Section 5 provided certain amounts should be paid to Abraham Grossman in order to procure a comfortable home for him in the Jewish Old Men's Home in St. Louis, etc. Section 6 provides that the four appellants shall receive certain sums in cash for their individual interest, and they shall retain an undivided interest in the remainder of the trust fund as hereinafter set out.

Section 7 of the agreement also provides: "The remaining sum of \$3,600 of said total amount shall be held by the American Trust Company as trustee for the benefit of each of the four above-named heirs as their interests may appear. No one of said four heirs above named shall have any right to draw out any part of said sum except with the consent of all the other heirs, and the trustee herein named shall see to the enforcement of this provision."

Section 8 provides that the trust fund shall not be subject to the individual debts, etc., of any of the heirs " \* \* \* and all desire that the same be held intact for the express trust herein created."

Sections 9, 10 and 12 read as follows:

"9. It is understood and agreed between the four heirs above-named, who are the sole parties interested in said trust fund, that said fund shall be and remain on deposit with the American Trust Company, and any accumulated interest thereon shall be by said American Trust Company credited to said fund unless it is directed to be paid out by said trustee by written order or direction of all of said four heirs.

"10. The American Trust Company is named as trustee and requested to serve as such by said heirs, and shall have the legal title to said funds together with the accumulated interest thereon, subject to the trust herein set out, and shall use every effort to maintain said fund intact as herein provided.

“12. The American Trust Company may evidence its acceptance of the trust by signing its name below the word ‘Acceptance’.”

This agreement was signed by the four appellants and accepted by the American Trust Company in its signature thereto as follows:

“Accepted: American Trust Co.,

“By R. E. Robertson, Vice Pres.”

Another contract of the same date providing for the disposition of the trust estate upon the death of Abraham Grossman, of which the trustee should be notified by the appellants, was executed.

The Bank Commissioner admitted the statements of the interveners as to the deposit of the money in the failed bank, the execution of the agreements, attached as exhibits to the complaint the insolvency of the bank and his taking charge thereof for liquidation on or about November 1, 1930; that there was on deposit in said American Trust Company, when it was closed for liquidation, “the said sum of \$3,600 to the creditors of interveners herein, but denies that said deposit or any part thereof is a prior or preferred claim entitled to full and complete payment out of the assets of said bank;” admitted the filing of the claim and proof of debt, and that it was alleged to be a preferred claim, etc. It was also stipulated that the records of the bank showed certain balances in other banks to the credit of the American Trust Company and the notes due to such banks, the deposits therein being credited upon the notes as follows:

“Deposit balances in city banks to the credit of American Trust Co., Jonesboro, Ark., October 31, 1930.	
Bankers’ Trust Co., Little Rock, Ark.....	\$17,839.77
Bank of Commerce & Trust Co., Memphis,	
Tenn. ....	12,028.25
Lafayette South Side Bank & Trust Co., St.	
Louis, Mo. ....	12,295.74
Franklin American Trust Co., St. Louis, Mo.	23,314.08
First National Bank, St. Louis, Mo.....	5,643.74
Chase National Bank, New York, N. Y.....	10,005.37
	<u>\$81,126.95”</u>

“American Trust Company owed notes to all of these banks. When American Trust Company closed all of these accounts were applied as credits on its note.

“Cash \$8,873.15.”

The president of the failed bank and the other officials thereof testified that the money, the \$3,600 on deposit under said contract of November 15, 1927, as a trust fund was considered as an express trust, and the fund so handled on the books and reports of the American Trust Company.

The cashier, R. E. Townsend, stated he was familiar with the contract of November 15, 1927, signed by the trust company with his knowledge, and that the contract was carried out on the part of the bank and the other parties until the bank became insolvent and went into the hands of the Bank Commissioner; said that from the time of the original deposit and the drafting of the contract of November 15, 1927, and at all other times, the money was considered by the American Trust Company as a trust fund under the other agreements, the \$3,600 under the agreement of November 15, 1927, and was carried on the books of the bank as “American Trust Company as trustee for Abraham Grossman” as indicated by the pass book. “In our statements it went in as a part of the depository liability of the bank, but it was classified in a detailed statement as trust funds. There is a division there of different deposits, trust funds, individual savings, public funds, postal savings, all listed in a condensed statement merely as deposits. In the detailed statements this with other trust funds were specified as such.” The actual money was used by the bank regularly as were other funds ordinarily deposited therein.

The court held the petitioners were not entitled to a priority or preference, and that the deposit should be treated as a general deposit payable as such and from this finding this appeal comes.

*Charles Frierson, Jr., and Chas. D. Frierson, for appellant.*

*Sam Rorex and Lamb & Adams, for appellee.*

KIRBY, J., (after stating the facts). The law designates all creditors of a failed bank, of which the bank commissioner has taken charge, as either "secured creditors, prior creditors or general creditors;" and in act 107 of 1927, § 1, defines a prior creditor as follows:

"(5) The beneficiary of an express trust, as distinguished from a constructive trust, a resulting trust, or a trust *ex-maleficio*, of which the said bank was the trustee, and which was evidenced by a writing signed by said bank at the time thereof." The instrument creating the express trust of the funds deposited in the bank and naming the American Trust Company as trustee, defining its powers and duties as such, was accepted in writing by said American Trust Company in accordance with the terms thereof, and the bank's record of the transaction shows it as a trust fund, and that the trust was being executed by the trustee in accordance with the terms of the instrument creating it.

It is true the amount of money set aside for this trust was already in the bank at the time of the execution of the agreement creating the trust duly accepted by the bank, but the instrument was as effectual to create an express trust as though the money had been checked out and redeposited. It is likewise true that this trust fund was not a special deposit within the meaning of the provisions of said act classifying creditors entitled to a preference, but neither was it required to be such in order to entitle the beneficiaries to a prior claim, since the express trust constituting the bank trustee was evidenced by a writing signed by the bank at the time prescribing the duties of such trustee.

*Taylor v. Street Improvement District*, 183 Ark. 526, 37 S. W. (2d) 84, furnishes no authority for holding otherwise, that case being easily distinguishable from the instant case. There the money was placed in the bank to its credit as treasurer of the districts, the districts being allowed to check it out without restrictions, and the districts were not entitled to priority in payment of their claims because no express trust in writing was

created at the time, and neither was any special deposit of the funds made within the meaning of the act; the chancellor there having found that they were entitled to such priority because the funds were trust funds of which special deposit was made.

The act provides all prior creditors as defined in the act, not specified in the exception, "shall have such priority to the extent that they, respectively, may specifically identify their property in its original or traceable form into the hands of the Commissioner, and, if unable so to identify such property, to the extent that the assets in the hands of the Commissioner, in the form of the lowest amount of cash on hand, exclusive of deposits in other banks and all other assets, remaining in said bank continuously after their said respective priorities arose, where necessarily increased by such property, such cash on hand being deemed to have been so increased to the extent of any priorities which may be acquired under classification number (7) as hereinabove set forth, and if such cash on hand is not sufficient to pay all such prior creditors in full the same shall be prorated among them." The balance of any such claims that can not be so paid in full to be paid as the claims of general creditors of the bank. Act 107 of 1927, p. 301.

The trust fund was not a special deposit, the actual cash being used by the bank as other funds regularly deposited therein, and could not be specifically identified in the hands of the Commissioner, and is to be paid along with the claims of such other prior creditors out of the fund as designated in the statute, and the balance, if said fund is not sufficient to pay all such claims, to be paid as the claims of the general creditors of such bank.

It necessarily follows that the court erred in holding otherwise, and the decree is reversed and the cause remanded with directions to enter a decree in accordance with this opinion holding said claims entitled to priority of payment along with such other prior claims or creditors under the terms of said act.