TAYLOR *v.* STREET IMPROVEMENT DISTRICT NO. 343.

Opinion delivered March 30, 1931.

1. BANKS AND BANKING—GENERAL DEPOSIT.—Deposit of the funds of an improvement district in a bank, although the funds are known to be a trust fund in hands of the official depositing them, was a general deposit, in absence of a written agreement making them a special deposit, as required by Acts 1927, No. 107, p. 298, § 1.
2. BANKS AND BANKING—INSOLVENCY—GENERAL DEPOSIT.—An improvement district making a general deposit in a bank stands upon the same footing as other general creditors, and is entitled to no preference on the bank's insolvency.

Appeal from Pulaski Chancery Court; *Frank H. Dodge,* Chancellor; reversed.

STATEMENT BY THE COURT.

These suits were brought by appellees, street and other special improvement districts in the city of Little Rock against the Bank Commissioner to have their claims for moneys of the districts, deposited in the failed bank, declared preferential and ordered paid as such.

It appears from the agreed statement of facts that the improvement districts were duly organized, the assessments of benefits made and the moneys collected and deposited in the American Exchange Trust Company, either by the district or the treasurer thereof, to its own credit, or turned over to said bank as treasurer of the particular district. The different amounts due each of the several districts from the bank were alleged and also that the failed bank had at the time it was taken over by the Bank Commissioner $150,000 in money and had no less amount thereafter. It was also alleged that the moneys were deposited in the bank for the purposes of paying the outstanding bonds and interest due thereon by the different districts. That the Bank Commissioner had refused to allow any of the claims as entitled to preference. Each of the districts executed a pledge of all benefits and resources for the payment of the bonds, etc., the pledges all being duly recorded. It was agreed in the pledges and appointments of the trustee that the

chairman and secretary of each district board were authorized to sign vouchers drawn against said funds, and that, if the board did not draw vouchers when the bonds and interest were due, the trustee was authorized to apply the funds on hand for such purposes and charge the amounts to the districts, and this was done in several instances. The stipulation also provides:

"6. That, through agreement entered into at the dates of the several pledges, the trustee was to be the treasurer also and the funds of the district were deposited with the trustee from time to time, in some instances by the district, and in some instances by the city collector, who transferred said funds periodically and as collected by him to the trustee, whereupon the trustee would credit same to the district's account and so advise the district. In no instance were funds used by the district other than for the purpose raised."

A copy of the pledge appears in the statement, but it is signed only by the particular district by the chairman of the particular improvement district and attested by its secretary. On the back of the bond appears the certificate that the particular bond is one of a series mentioned and described on the face of the pledge and signed "American Exchange Trust Company," By.....
This pledge or writing creating the American Exchange Trust Company trustee contains among its other provisions the following: "The said trustee shall be responsible only for wilful misconduct in the execution of its trust. The recitals of facts contained in the said bonds or in this instrument are statements of the said district and shall not be considered as made by the trustee." The trustee was not required to see that the pledge was properly executed and recorded, nor to take notice of any default of the improvement district, unless it was specifically notified in writing thereof, "nor to take action under the pledge until it shall have been indemnified to its satisfaction by the holder or holders of the bonds mentioned," etc.

The chancellor held that the claims of plaintiffs and interveners constituted trust funds and special deposits entitled to preference and payment in full and from the decree the Bank Commissioner prosecutes this appeal.

Sam Rorex and *Nat R. Hughes,* for appellant.

S. L. White, Wallace Townsend, L. P. Biggs, L. C. Auten and *Horace Chamberlin,* for appellee.

KIRBY, J., (after stating the facts). Appellant urges that the chancellor erred in decreeing the deposits of the moneys of the districts in the failed bank special deposits or trust funds within the meaning of § 1 of act 107 of 1927, and entitled to priority of payment over general creditors, as such. The law designates all creditors of a bank, of which the commissioner has taken charge, "classifiable" either as "secured creditors," "prior creditors" or "general creditors," and expressly provides:

"* * * (4) The owner of a special deposit expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which it was not permitted to use in the course of its regular business, (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. * * * All creditors not in this section hereinabove classed as secured or prior creditors of said bank, including the State of Arkansas and any of its subdivisions, shall be general creditors thereof." A special deposit under the law must be expressly made as such in the bank and evidenced by a writing signed by the bank at the time it is made and which the bank is not permitted to use in the course of its regular business. In *Covey* v. *Cannon,* 104 Ark. 550, 149 S. W. 514, the court, after saying the moneys placed on deposit in the bank in the usual way would have been a general deposit and established the relation of debtor and creditor between the bank and the depositors, said: "If it was placed in the bank for safekeeping, and not to be checked

out by the depositor, or under an agreement that the bank should act as bailee or agent and deliver the money to some other persons under certain conditions or apply it to a special purpose, it would have been a special deposit and the bank or agent or bailee with no right, to use it and mingle it with its own funds." See also *Morgan* v. *State,* 162 Ark. 34, 257 S. W. 364; and *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896. The Legislature appears to have restricted the definition of a special deposit in providing for their preferential payment to such only as are made expressly and evidenced by a writing signed by the bank at the time of the making thereof, showing such deposit is not permitted to be used by the bank in the regular course of its business.

There is no contention here that there was any written agreement between the bank expressly making the taxes collected by the improvement districts and deposited therein "special deposits" within the meaning of the law, or showing that they were such and the bank was not permitted to use the money in the course of its regular business. It is true the bank was designated in the pledges as the trustee therein and made a certificate of identification of each bond as one of a certain series as described in the pledge, but it is expressly provided in the pledge or mortgage: "That the said trustee shall be responsible only for wilful misconduct in the execution of its trust," and, "the recitals of facts contained in the said bonds or in this instrument are statements of the said district and shall not be considered as made by the trustee," the pledge or mortgage being signed only by the improvement district. The deposit of the funds of the improvement districts, taxes collected on benefits assessed, although they were trust funds, so far as the particular official collecting and depositing them is concerned, and known by the bank to be such, did not become special deposits in the absence of the written agreement by the bank making them such at the time of their deposit, and the deposit was a general one under the law, the owner or creditor standing upon the same footing

as the other general creditors entitled to no preference or priority of payment. *Warren* v. *Nix,* 97 Ark. 374, 135 S. W. 896; *Rainwater* v. *Davis,* 172 Ark. 538, 289 S. W. 471; *Talley* v. *State,* 121 Ark. 4, 180 S. W. 330; *State, use Prairie County* v. *McKee,* 168 Ark. 441, 270 S. W. 513; *School Districts* v. *Massie,* 170 Ark. 222, 279 S. W. 993; *Paul* v. *Draper,* 158 Mo. 197, 59 S. W. 77; *People* v. *Home State Bank,* 338 Ill. 179, 170 N. E. 205; *Officer* v. *Officer,* 120 Ia. 389, 94 N. W. 947.

The State itself has been held not to be entitled to a preferential claim over other creditors for its deposit made in a bank that afterwards became insolvent, the common-law rule of preference of the sovereign over the subject not being applicable, and she and her political subdivisions are placed in the class of general creditors by the act. *Maryland Casualty Co.* v. *Rainwater,* 173 Ark. 103, 291 S. W. 1003, 51 A. L. R. 1332. As confirmatory of the above as a correct construction of the statute, it may be said that the Legislature at the same session enacted act 182, approved March 22, 1927, requiring all commissioners, treasurers and other officials of improvement districts having in charge the moneys and funds of such districts, before depositing them in any bank, to require of such bank or depository a surety bond conditioned for the apt, full and complete payment of all such funds so deposited, together with the interest thereon and prescribed a penalty for failure to do so. The improvement districts could have protected their funds by making "special deposits" thereof under the first act or requiring bonds made for repayment thereof under said act 182 of 1927, but did not do so.

It follows that the chancellor erred in holding that the funds deposited in the failed bank were "special deposits" or trust funds entitled to priority or preferential payment over the claims of the general creditors, and the decree must accordingly be reversed and the cause remanded with directions to enter a decree in favor of the plaintiffs for the amount of their claims to be paid *pro rata* with the claims of the other general creditors. It is so ordered.