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Trusts--Banks--Purchase of Order to be Cabled Does not Give Rise to Preferred Claim on Insolvency of Bank Before Payment (Matter of Littman, 258 N.Y. 468 (1932))

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possibility of opening two streets which would not have altered the property materially, he could not in good faith conceal the incumbrance of the third street.

F. S. H.

TRUSTS—BANKS—PURCHASE OF ORDER TO BE CABLED DOES NOT GIVE RISE TO PREFERRED CLAIM ON INSOLVENCY OF BANK BEFORE PAYMENT.—Petitioner deposited a sum of money with a bank in New York to be cabled to a third party in Havana. The bank mingled the money with its own, sent a cable order to its Havana correspondent and credited the amount to the latter's agency in New York. At the request of the third party the cable order was cancelled but before the communication reached the bank the latter was taken over by the superintendent of banks for the purpose of liquidation. Petitioner sought to impress a trust for the amount so deposited. *Held,* The relation of debtor and creditor existed. There was no identification of a particular fund, hence the claim could not be preferred. *Matter of Littman,* 258 N. Y. 468, 180 N. E. 174 (1932).

Before a claim can be allowed as preferred against an insolvent bank it must be established that it is a trust fund.[1] In order to establish a trust relationship rather than one of debtor and creditor it is necessary to show that a special and not a general deposit was made. The essence of a special deposit is that the bank has custody of it for some special purpose only and no authority to use it as in a general deposit where the fund may be mingled with its own and disposed of at the will of the bank. While even in the case of a special deposit the identical money is not returned, nevertheless the bank is limited in the number of uses to which it can put the money so deposited.[2] It has been held that where a bank has issued a draft and before payment, failed, there is no preferred claim but the relation of debtor and creditor exists.[3] The money so paid becomes the bank's money and it is a transaction of purchase and sale.[4] The issuance of a certificate of deposit also creates a debtor and credi-

[1] Chetopa State Bank v. Farmers' and Merchants' State Bank, 114 Kan. 463, 218 Pac. 1000 (1923).

[2] Anderson v. Pacific Bank, 112 Cal. 598, 44 Pac. 1063 (1896); People v. California Safe Deposit and Trust Co., 23 Cal. App. 199, 137 Pac. 1111 (1913); Butcher v. Butler, 130 Mo. App. 61, 114 S. W. 564 (1908).

[3] Ligniti v. Mechanics and Metals National Bank, 230 N. Y. 415, 130 N. E. 597, 16 A. L. R. 185 (1921); Clark v. Toronto Bank, 72 Kan. 1, 82 Pac. 582 (1905); Spiroplos v. Scandinavian American Bank, 116 Wash. 491, 199 Pac. 997, 16 A. L. R. 181; see, also, Note, 16 A. L. R. 190.

[4] Ligniti v. Mechanics and Metals National Bank, *supra* note 3.

tor relationship.[5] Likewise the purchase of an order where remittance is to be mailed does not create a trust.[6] The fact that money is sent by cable or radio should not change an established rule of law.[7] Indeed, this very fact precludes the idea of the delivery of any specific fund, which would be necessary to establish a preferred claim by means of a trust.[8] The instant case very logically follows the established law.

E. H. S.

WILLS—BURDEN OF PROOF IN WILL CONTEST.—The executor of Catherine Schillinger offered for probate a writing purporting to be her last will. The contestants in filing their objections alleged the execution of the will was procured by undue influence. The Surrogate refused to charge that the burden of proving undue influence was upon those that assert, but he did charge that if the probabilities were evenly balanced in the minds of the jury, then the verdict must be for the contestants, because, in his opinion, the law places the risk of the situation on the proponents. The decree denying probate was reversed on the law by the Appellate Division.[1] On appeal *held:* Affirmed. *In re Schillinger's Will,* 258 N. Y. 186, 179 N. E. 380 (1932).

A will is entitled to probate "if it appears to the Surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint." [2] "Restraint" includes and covers the term "undue influence." [3] The influence necessary to avoid a will must amount to coercion and duress.[4] It is a species of fraud.[5] Fraud and the like are never presumed, and the burden of proof is upon him who asserts it.[6] Proponent need only prove the proper execution of the

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[5] People v. California Safe Deposit and Trust Co., *supra* note 2.
[6] Beecher v. Cosmopolitan Trust Co., 239 Mass. 48, 131 N. E. 338 (1921).
[7] Ligniti v. Mechanics and Metals National Bank, *supra* note 3.
[8] Strohmeyer and Arpe Co. v. Guaranty Trust Co., 172 App. Div. 16, 157 N. Y. Supp. 955 (1st Dept. 1916); Katcher v. American Express Co., 94 N. J. Law 165, 109 Atl. 741 (1920). In the latter case the court distinguishes the words *forward, remit,* and *remittance* from *deliver.* Credit in this case was sent by cable.

[1] *In re* Schillinger's Will, 231 App. Div. 679, 248 N. Y. Supp. 610 (4th Dept. 1931), *rev'g,* 135 Misc. 42, 237 N. Y. Supp. 515 (Surr. Ct. 1929).
[2] N. Y. SURR. CT. ACT §144, as re-enacted by c. 229 of L. 1929.
[3] Smith v. Keller, 205 N. Y. 39, 44, 98 N. E. 214, 215 (1912).
[4] *Ibid.*
[5] Matter of Smith, 95 N. Y. 516, 522 (1884).
[6] *Ibid.;* Matter of Kindberg, 207 N. Y. 228, 229, 100 N. E. 789, 791 (1912); Matter of Anna, 248 N. Y. 421, 427, 162 N. E. 473, 475 (1928);