Case No. 9,976.

IN RE MUTUAL BUILDING FUND SOC. & DOLLAR SAV. BANK. EX PARTE BEATTY.

[2 Hughes, 374;[1] 15 N. B. R. 44; 5 Am. Law Rec. 571.]

District Court, E. D. Virginia. Dec. 19, 1876.

BANKRUPTCY—BANK DEPOSITS—NEW ACCOUNT—SPECIAL FUND—PREFERENCE—LIEN.

Where a bank, which had suspended payments, advertised that it would on a certain day "resume business by receiving special separate deposits in trust to new account, pledging the bank to use these deposits only in payment of checks against that new account, and as fast as the bank can collect and realize from the loans and securities to pay pro rata instalments of its present indebtedness," etc., etc., and received new deposits, and soon after finally failed, and was adjudicated in involuntary bankruptcy: *Held* (on petition of a new depositor to be paid in full as a preferred creditor), that the new deposits were not special deposits; that no lien was secured when they were paid in over the counter of the bank; that no preference was secured by the advertisement and that the new depositors were general creditors to be paid pro rata.

This savings bank suspended payments over its counter on the 23d of September, 1873, a day memorable among bankers. Its managers, in the belief that the failure would be temporary, invited, a few days after, new deposits by means of and as described in the following advertisement, which they published in the Richmond newspapers:

"Dollar Savings Bank.—This bank will resume business on Monday, October 6th, as per resolution herewith adopted by the board of directors: 'Resolved, that this bank resume business on Monday, October 6th, by receiving special separate deposits in trust to new account, pledging the bank to use the deposits only in payment of checks against that new account, and, as fast as the bank can collect and realize from

the loans and securities, to pay pro rata instalments on its present indebtedness until the whole shall be liquidated, the same drawing the usual interest as heretofore until paid.' (Signed) John E. Bossieux. Thomas S. Armistead, Cashier. Oct. 3–3 times."

Deposits were made under this call, by a few men, one of whom was this petitioner; but the bank very soon found itself unable to go on, and closed its doors. In February, 1874, proceedings were taken against it by creditors, and it was duly adjudicated an involuntary bankrupt in this court There is no evidence that the new deposits were marked and kept separate, as special deposits, and the fact seems to be that they were received over the counter in the same manner as general deposits are received. Indeed, the advertisement itself virtually announced that the new deposits would be treated as a common fund as to the new depositors, and not treated as special separate deposits, except as against the old depositors. A dividend has been declared and paid, without prejudice to the claim of the petitioner, John Beatty, and of the other depositors under the advertisement of October 3d, 1873, to be paid in full, according to the tenor of the advertisement, as preferred creditors.

John B. Young and Holliday & Holliday, for petitioner.

James Neeson, for the trustees in bankruptcy of the assets of the bank.

HUGHES, District Judge. It is claimed on the part of the petitioner that his deposit, under the advertisement of the 3d October, was a special deposit, and that the advertisement was a contract which this court is bound ex aequo et bono to specifically execute, as a court of, equity. I do not concur in either of these propositions.

First. The deposit of the petitioner was not a special deposit; for it is only where the special money or thing

deposited is received by the bank to be kept to itself and returned in corpore on demand, that the deposit can be claimed to be special. True, the advertisement held out that the bank would receive "special separate deposits;" but calling a thing what it is not does not make it what it is not.

Second. It is claimed for the petitioner that he has a higher equity than the former depositors of the bank, created and given by the advertisement of the 3d October. I do not think so. The former depositors made their deposits on precisely the same terms, in all essential respects (save one), as those on which the petitioner made his deposit; those terms being implied in their case, while in his they were expressed.

In the exceptional respect to which I allude, the case of the petitioner is weaker in point of equity than that of the former depositors. The contract under the advertisement was, virtually, that all the existing resources of the bank as well as the new deposits would be first used for paying the checks of the new depositors. The bank proposed to go on with its banking business; and the new deposits were of course intended to be used for the purpose of making new discounts in the regular course of that banking business. As the new deposits were to be loaned out for this purpose, the checks of the new depositors would have to be paid in whole or in part from the moneys taken in on notes already discounted and which would be falling due. The advertisement of October 3d was virtually a promise to use the funds collected on maturing paper in paying the checks of the new depositors; that is to say, the contract required money belonging ex aequo et bono to the old depositors to be paid to the new depositors. I think such a contract, so far as it was to operate in that way, was ultra vires. The bank had no power to make it; and the contract when made was contrary to equity, and, so

far as it had the unjust operation described, ought not to be enforced in equity.

But even if it were a contract free from the 1076 two objections of being illegal and contrary to equity, and were such a contract as a court of equity dealing with solvent parties should specifically execute, still this court, as a court of bankruptcy, would be unable to decree a specific performance. In its nature this court has little to do with the specific execution of contracts. It has to deal with bankrupts who have broken all contracts, and are unable to perform any of them. It is a court whose primary duty is the distribution of assets gathered from the wreck of the estates of bankrupts, who themselves have already exhausted them of every resource available for the execution of contracts. The policy of the law under which the court acts is to avoid preferences, and to divide the assets pro rata, share and share alike, among creditors. The business of the court in this case is to distribute assets under the terms of a law which, except in favor of liens, requires a pro rata distribution.

If the new deposits which have been spoken of had in fact been special deposits, duly earmarked and set aside and held as such, the bank would have been a simple bailee of them and would have been obliged to return them in kind. But it is precisely because they were not special deposits, were not duly earmarked and set aside and held in kind, that a return of them cannot be decreed to the new depositors. No principle has been more thoroughly settled than the one that deposits of money paid into a bank over the counter are not received by the bank as a bailee, the property in them remaining in the depositors; but that they become the property of the bank, which itself thereby becomes the debtor of the depositors.

This bank, therefore, having become the debtor of Mr. Beatty and of the new depositors, and having gone into bankruptcy, and the new deposits having

been paid into it over the counter, no pains having been taken to separate them from other moneys or to preserve their identity, it follows that no lien was preserved at the time of the deposits, that no legal preference could therefore arise under the advertisement of 3d October, 1873, and that the petitioner stands in this court only on the footing of a general creditor. I will sign an order dismissing the petition with costs.

[1] {Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.}

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