

PENAL INSTITUTIONS:

Selection of depository, right to  
preferences in failed banks.

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March 9, 1933

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Honorable Stephen B. Hunter  
Director Department of Penal Institutions  
Jefferson City, Missouri

Dear Mr. Hunter:

We acknowledge receipt of your letter dated March 2, 1933, in which you state in part and inquire as follows:

"The statutes provide that money deposited in a bank by the Penal Board shall be done so by lettings in each odd year, the advertisement being so that the letting will take place on July 1st of the odd-numbered years. There is a further provision that if bids are received for monies offered for deposit and the depositors agree to bond, a bond shall be given securing these deposits.

In the year 1931 the money was offered, as I understand, as provided by the statutes and no bids received. Therefore, the money on deposit in the bank from July 1, 1931 until today is deposited without being secured as provided by the statutes. There is also a penalty in one section providing for the Board not carrying out the sections preceding those providing for the penalty."

And further:

"The Board is in a quandary what shall be done when the banks fail to bid for money or secure the funds deposited with them. These monies cannot be deposited in the State Treasury and withdrawn except by an appropriation, so that is impracticable.

The members of the Board each give a bond, and we do not want to be liable on the bond if anything should happen to any of the funds deposited in the bank, and if we cannot make a deposit in a legal way, we want to be advised what we shall do."

The relation between a bank and its depositor is that of debtor and creditor.

Utley v. Hill, 155 Mo. 232.

Section 3152 Revised Statutes 1929, provides that whenever any person is insolvent and is indebted to the State of Missouri the debt due the state shall be first satisfied out of the insolvent's property. The above statute, standing alone, gives the state priority for money deposited in an insolvent bank.

In RE: Holland Banking Co., 313 Mo. 307, 317,

except as to debts due the United States and to servants for wages and to those due for certain expenses incurred in sickness and burial. Section 15 of Article 10 of the Constitution of Missouri, as well as Article 2 of Chapter 72 Revised Statutes Missouri, 1929, requires all state money to be deposited by the State Treasurer to the credit of the state for the benefit of the funds to which they respectively belong in such bank or banks as may be selected by the Treasurer, with the approval of the Governor and Attorney General, upon such bank giving satisfactory security for the deposit and the money so deposited to be disbursed or paid out by the Treasurer for the purposes of the State, according to law and upon warrants drawn by the State Auditor. The deposit remains to the credit of the state until disbursed according to law. Moneys belonging to the state can only be paid out by the Treasurer when and after the same has been appropriated by the Legislature,

State ex rel Thompson v. Board of Regents,  
305 Mo. 57,

and according to the appropriation Act.

Section 8316 Revised Statutes 1929 creates what is designated as the "Department of Penal Institutions", which department it is provided shall have control and jurisdiction over all penal institutions in the state supported by money appropriated out of the State Treasury, referring specifically to the Missouri Reformatory at Boonville; the Industrial Home for Girls at Chillicothe; the State Industrial Home for Negro Girls at Tipton and the State Penitentiary at Jefferson City. By Section 8317 Revised Statutes 1929, five commissioners to be appointed by the

Governor shall have the control and management of the "Department of Penal Institutions". Moneys received on account of the penitentiary shall be paid into the State Treasury.

Sections 8358, 8377, 8378, 8401, 8451, 8454, 8483, 8505, and 8675, Revised Statutes 1929, provide for requisitions being made by the penal board for funds out of the State Treasury.

Sections 8428, 8453, 8455, 8483 and 8489, Revised Statutes 1929, provide for the State Auditor drawing warrants on the State Treasury on account of the institutions controlled by the "Department of Penal Institutions" apparently without requisitions therefor.

So that after funds for the use of the penal institutions are appropriated and after the same are paid into or for the various funds or uses provided for in the conduct of such institutions, such funds pass out of the classification of the moneys referred to in Section 15 of Article 10 of the Constitution and Article 2 of Chapter 72 Revised Statutes 1929, above mentioned and are funds which come under the provisions of Sections 8676, 8677, 8678, 8679, 8680 and 8681 Revised Statutes 1929 with reference to bids for a depository for funds in the custody and for the use of the "Department of Penal Institutions". And as to such funds the state has its right of priority under Section 3152, supra, upon a bank closing and where no depository has been selected, at least until the selection of a legal depository.

Under Section 8666 it is the duty of the commissioners of the "Department of Penal Institutions" to receive sealed proposals from any banking corporations, associations, trust company or individual banker in any city, town or county in which the institutions controlled by the board may be located - that is if any of such institutions is located in a county other than Cole their bids for funds belonging to or appropriated for that particular institution could be received from such banks, associations or trust companies in the city, town or county where such institution is located. Notice that such bids will be received to be published in some newspaper published where such bids are entitled to be received. Section 8666.

Section 8678 Revised Statutes 1929 provides that if a depository be not selected after giving the above notice, then the commissioners may, at any time after giving the above notice and after

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giving an additional twenty days notice, receive bids and select a depository as is provided in Sections 8676, 8677 and 8678, although Section 8678 uses the word "may" with reference to re-advertising for bids we think it mandatory on the commissioners so to do.

State ex rel v. Lee, 262 S. W. 344, 345.

Since after the appropriation of the fund for the use of the various institutions controlled by the commissioners of the "Department of Penal Institutions" and after the payment by the Treasurer of such funds for the use of such institutions and if a legal depository had not been selected, such funds would not come within the ruling of In RE: Holland Banking Co., supra, holding that the state waived its preference by accepting security for deposits under Section 15 Article X, supra, then we can see no reason why the funds controlled by such commissioners would not further be entitled to the same preference, in event of insolvency of a bank, as are county funds when a county court fails to select a county depository.

Huntsville Trust Co. v. Noel, 12 S. W. (2nd) 751,

Harrison Twp. et al v. Bank, 46 S. W. (2nd) 165,

White v. Greenlee, 49 S. W. (2nd) 132,

Boone County v. Cantley, 51 S. W. (2nd) 56.

White v. Greenlee holding that if a depository bank disqualified itself during the period for which it contracted to be depository, a trust at once arose in favor of the county that entitled it to a preferential claim. Under the above rulings, those who are in control of funds required to be deposited in a selected depository have no right to permit such funds to remain in a bank not lawfully selected as a depository. If they do, the owner of the fund is entitled to a preferential claim. Of course the commissioners cannot carry these funds in their pockets, so that if the commissioners discharge their full duties in advertising for bids, for a depository and failing to get such a bid and leave the money in a bank, nevertheless, the state would have, at least, some protection by reason of its claim for a preference, should the bank fail.

We think the funds controlled by the commissioners should be deposited to the credit of the "Department of Penal Institutions" and to the further credit of the necessary and respective funds dealt with by the commissioners and not to the credit of the commissioners or penal board.

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We suggest that in depositing such funds that the bank records, your pass book and deposit slips should show the following contract,

"this deposit made and accepted as a special deposit and trust fund to be paid out on proper vouchers on said fund".

You can accomplish this wording by use of a stamp with such words on it. This would further tend to create a preference in favor of the state.

You cannot select a depository outside of the city, town or county where any of such institutions are located and unless you actually carry such funds in cash in a safe or vault, there is no other protection to the funds I can suggest. I might add that if the commissioners, in good faith, attempt to and fail to select a depository, that would be a complete defense to the penalties provided by Section 8681, Revised Statutes 1929.

As to whether the commissioners would be liable on their official bonds given under Section 8334 for the faithful performance of their respective duties, we express no opinion at this time.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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Attorney General.

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