

**BANKS & BANKING:** Restricted deposits, permitted to be withdrawn under Commissioner of Finance's regulations, not preferred claim in event bank closes.

H-9

March 26, 1934.

FILED  
64

Hon. O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

Your letter of March 5th received, requesting an opinion on a question submitted by Mr. Chas. W. Dickey, whose letter is as follows:

"In re: Liquidation Queen City Bank

You will remember that on our recent visit to Jefferson City Richard Johnson, Liquidator of the above bank, and I took up with you the matter of the status of deposits made in said bank prior to the moratorium and not withdrawn after the bank was placed on a restricted basis. You asked us to advise you what instructions had been given the bank by your department at the time it was allowed to open. We herewith comply with your request.

In a letter of March 13, 1933, addressed to the Queen City Bank, in Paragraph 1, you instruct as follows:

- '1. Depositors, including demand, savings and time, may for a period of six months, beginning with the date of opening, withdraw not to exceed five percent of their deposits as at the close of business

March 3, 1933, provided that, if conditions justify, additional withdrawals may be permitted upon prior written consent from the Commissioner of Finance. In the case of time deposits, not exceeding five percent may be paid upon maturity but not before maturity if maturity comes within the six months' period mentioned above. No time deposits are to be paid before maturity and the balance of ninety-five percent may be renewed on the basis as heretofore, but, if the holders of time deposits do not wish to renew, they may deposit same as demand deposits, without interest, subject to restrictions for withdrawals as provided above.'

Again in said letter, in Paragraph 8, you advise as follows:

'These restrictions and regulations are made in accordance with the provisions of Senate Bill No. 293, of the General Assembly of the State of Missouri of 1933. Penalties provided in said Bill shall apply if any of the regulations or requirements therein set out are violated.'

The facts, as we understand them, are as follows:

The Queen City Bank was closed, under the General Moratorium, March 3, 1933. At that time there were, of course, a number of deposits, demand, savings and time deposits. On March 13, 1933 you allowed the bank to open under certain restrictions, one of which was that depositors, 'including demand, savings and time, may, for a period of six months, beginning with the date of opening, withdraw not to exceed five percent of their deposits as at the close of business March 3, 1933.'

The bank operated under these restrictions until January 29, 1934, when the directors turned the bank over to you for liquidation. During that time some of the depositors had withdrawn their five percent, as permitted to do so under your restricting. Others had not done so. The question confronting us is whether or not the depositors who did not draw out their five percent have the right to do so now, that is, whether a trust fund was established of five percent of the deposits, which, in any event, should be paid to the respective depositors, or whether, when the bank was finally closed, all the old deposits made prior to the moratorium became assets of the bank to be equally divided among all creditors and depositors.

This question has been discussed to a considerable extent among several lawyers here in Springfield, and their opinion is, as I get it, that there was no trust fund created, and that the depositors who either neglected to withdraw their five percent or who thought best not to withdraw their five percent, lost their right to do so when the bank was finally closed.

This opinion is based on the fact that the bank was operated, and the restricting order was made under S. B. 293 (Laws of Missouri 1933, Page 402), in which bill the Commissioner of Finance is given 'authority to restrict and to regulate the right of any bank \*\*\*\*\* to withdraw assets, pay checks or other orders drawn against deposits, for such time, to such extent and in such manner, as shall to him \*\*\*\*\* appear necessary for the protection of the depositors and other creditors.'

No place in the bill does it appear that a trust fund is established, nor that depositors who fail to withdraw their deposits, in accordance with the regulations and restrictions, shall have any special interest in the deposits.

We call your attention to C. S. H. B. 91 (Laws of Missouri 1933, Page 404), which deals with the closing of banks. This bill authorizes a bank, when unusual withdrawals are made to suspend payment of checks of depositors and any and all withdrawals of assets of said bank for a period of 6 banking days, and authorizes the Finance Commissioner thereafter to take charge of the bank and supervise the receipt of deposits and payment of checks and withdrawals for a period of sixty days thereafter.

Section 2 of said bill provides that the Finance Commissioner shall have the power to limit 'upon a basis of equality' all withdrawals of deposits or assets. Section 3 of said bill says that 'All depositors and creditors of the same class shall be treated alike.' Section 5 of said bill provides that 'deposits may be received \*\*\*\*\* as special deposits or trust funds,' and that no part of the funds deposited during said period of 60 days shall be an asset of such bank.'

The very fact that under S. B. 293, the bill controlling the situation of the Queen City Bank, no mention is made of trust funds, or that the deposits shall be special deposits and not assets of the bank, whereas in C. S. H. B. 91 those terms are expressly used, leads lawyers to give the statutes this interpretation, and leads us to believe that in the present case the deposits made prior to the moratorium, and not withdrawn, do not constitute a trust fund, and no part of them constitute a trust fund, and even the five

percent not withdrawn does not constitute a trust fund.

Your instruction in your letter of March 13, stating that the depositors 'may, for a period of six months \*\*\* withdraw not to exceed five percent of their deposits,' leads to the same conclusion.

A number of the deposits are for very small amounts. The five percent of these various deposits would, in many cases, amount to only a few cents, and would entail a great deal more work on the part of the liquidator.

Mr. Johnson, of course, is anxious to comply with all your instructions and wishes. He has, therefore, asked me to write you this letter.

Will you please give us the benefit of your advice in this matter? It may be that you have already obtained an opinion from the Attorney General or from some other legal source. It may be that you do not care to do so, but have already convinced yourself of the law pertaining to the matter."

The question submitted in Mr. Dickey's letter is, whether or not persons having deposits in restricted banks, closed under the banking moratorium of March 3, 1933, and reopened as a restricted bank whereby depositors were permitted, under regulations governing banks under restrictions issued by the Commissioner of Finance, to withdraw five percent of their deposits, and failed to do so before the bank was placed in the hands of the Commissioner of Finance for liquidation, are entitled to have said five per cent, so authorized to be withdrawn, treated as a trust fund and thereby entitled to a preference.

Under the authority of the Laws of 1933, page 402 (Senate Bill No. 293), the Governor of the State of Missouri, or the Commissioner of Finance, with the approval of the Governor:

"are hereby authorized and empowered whenever in his or their judgment the circumstances warrant the regulation, promotion and preservation of the public health, welfare and property rights of the people of the State of Missouri, in addition to all other powers vested in them by any law, to restrict and to regulate the right of any of the banks or trust companies or other institutions doing a banking business in the State of Missouri, to withdraw assets or to pay checks or other orders drawn upon or against deposits for such time, to such extent and in such manner as shall to him or them appear necessary for the protection of depositors and other creditors;"

The fact that the Commissioner of Finance, under the authority of the Laws of 1933, supra, and the regulations issued thereunder by the Commissioner of Finance, permitted the depositors to withdraw five percent of their respective deposits while the bank was under restrictions, and the depositor failed to exercise that privilege before the bank went into liquidation, does not thereby change the character of that portion of the original deposit, to-wit, the five per cent, and make it a trust fund, thereby becoming a preferred claim. There is no place in the act above or the regulations issued thereunder which designate said five per cent as a trust fund, or that, in the event it is not withdrawn, it thereby becomes a special deposit and entitled to preference. The depositor, failing to exercise his privilege of withdrawal before the bank is placed in the hands of the Commissioner of Finance for purpose of liquidation, thereby waives his right to withdraw the five per cent, or any part thereof, and thereby becomes a common depositor as to that amount, together with the balance of his deposit. However, if the original deposit as made was

entitled to a preference, the fact that the depositor did not withdraw the five per cent, or any part thereof, while the bank was under restrictions, did not change the status of the original deposit and he did not thereby lose his right of preference.

It is, therefore, our opinion that the depositor who has not withdrawn his five per cent, or any part thereof, before the bank passes into the hands of the Commissioner of Finance to be liquidated, is not entitled to a preferred claim as to any part of said five per cent.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

---

ROY McKITTRICK  
Attorney-General.

CRH:EG