CIRCUIT CLERKS: The circuit clerk of a second class county must keep safe and have readily available for payment $25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit, so long as the money is readily available for payment. This can be done on the clerk's own initiative or upon consent of both parties by written agreement. The clerk can also invest in other interest-bearing accounts when done pursuant to court order. The clerk can only pay the funds and the interest earned from investment of the funds as directed by the court. The clerk must also adhere to the requirements of Section 483.312, RSMo 1959.

December 31, 1969

OPINION NO. 548

FILED
548

Honorable G. William Weier
Prosecuting Attorney
Jefferson County Court House
P. O. Box 246
Hillsboro, Missouri 63050

Dear Mr. Weier:

This is in reply to your request for an official opinion of this office concerning the authority of the circuit clerk of a second class county to place in interest-bearing accounts a $25,000 deposit made in a case when the parties have requested that the clerk make such investment.

In your request you have mentioned Section 483.310, RSMo 1959, which authorizes the circuit clerks in counties of the first class to invest funds deposited in court. That section, of course, does not apply here because your question relates to the circuit clerk of a second class county.

26A C.J.S., Deposits in Court, Section 1, says that:

> "A deposit in court arises where property or funds are placed in charge of an officer of the court for safekeeping pending litigation, as, for example, until the question as to who is entitled to the possession is determined, or where money is paid into court as security or for some other purpose."

The duty of the clerk regarding such funds is set out in Section 483.075(1), RSMo 1959, where it says that every clerk shall:

> " * * * keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same."

Subsection 1 of Section 483.025, RSMo 1959, requires every clerk to enter into bond and Subsection 2 says that the bond shall be conditioned that the clerk will:

> " * * * faithfully perform the duties of his office, and pay over all moneys which may come to his hands by virtue of his office, * * * "

The Supreme Court has said concerning money deposited in court from condemnation proceedings that the clerk held the money in trust. Snyder v. Cowan, 120 Mo.389, 25 S.W.382,383; State ex rel Scott v. Trimble, 308 Mo.123, 272 S.W.66,71. The Kansas City Court of Appeals has also said that if the clerk received the money in his official capacity then he is an insurer of the fund. State ex rel. Courtney v. Callaway, 208 Mo.App.447, 237 S.W.173,176. And, in another case concerning money from a condemnation proceeding the same court said that the clerk received the money by virtue of his office, and it was the clerk's duty to pay the money out under decree of the court. State ex rel. and to Use of Clinkscales v. Scott, 216 Mo.App.114, 261 S.W.680,682.

The clerk, then, must pay out the funds when ordered to do so by the court, and the clerk, being a trustee, is entitled to a judgment before paying out the funds. State ex rel. Scott v. Trimble, supra S.W.71. This necessitates keeping the funds safe and having them readily available.

Section 558.220, RSMo 1959, originally enacted in 1853, prohibits public officials from "loaning" money which comes to them in their official capacity and reads as follows:

> "No officer appointed or elected by virtue of the constitution of this state, or any law thereof, and no officer, agent or servant of any incorporated city or town, or of any municipal township or school or road district, shall loan out, with or without interest, any money or valuable security received by him, or which may be in his possession or keeping, or over which he may have supervision, care or control, by virtue of his office, agency or service, or under color or pretense thereof; and any such officer, agent or servant so loaning such money or valuable security, on conviction thereof, shall be punished by imprisonment in the penitentiary not less than two years or by fine of not less than five hundred dollars."

However, under this statute, there is case law permitting "loaning" of money deposited in the registry of the court in two instances.

In State v. Rubey, 77 Mo.610 (1883), it was held that a demand deposit in a bank is not a loan as prohibited by Section 558.220, supra. The court, l.c. 620, said that the legislature meant to " * * * discriminate between a deposit in bank for safety and convenience, and an ordinary loan. * * * "

In State ex rel. Ridge v. Shoemaker, 278 Mo.138,212 S.W.1, an action was brought against the Circuit Court of Jackson County for interest on a fund deposited in the registry of the court. The fund was deposited as a condition precedent to the relief of specific performance and the clerk merely kept the fund on demand deposit and did not receive any interest on the fund. The court in speaking of Section 558.220, supra, said, l.c. S.W.3, that:

> " * * * If the parties to said action had desired said funds loaned, pending said litigation, they should have applied to the court for an order authorizing the loaning of same. They were bound to know, as a matter of law, that the clerk, without such authority, was not authorized to loan said fund."

The court also cited State v. Rubey, supra, l.c. S.W.4, in saying the clerk had the right to put funds in a bank on demand deposit.

The purpose of Section 558.220 and related sections is to compel the officer to look to the security of the funds in selecting a depository and "not to his own emolument." Although Section 558.220, RSMo 1959, was not discussed, the holdings in City of Fulton v. Home Trust Co., 78 S.W.2d 445 (Mo.1934); In re Hunter's Bank of New Madrid, 30 S.W.2d 782 (Spr.App.1930), and City of Aurora v. Bank of Aurora, 52 S.W.2d 496 (Spr.App. 1932), recognize that the deposit of funds in a demand deposit is not precluded by Section 558.220, RSMo 1959.

Unless there is a specific agreement to the contrary, a deposit in a bank is presumed to be a general deposit establishing a relationship of debtor-creditor. Security Nat. Bank Savings & Trust Co. v. Moberly, 101 S.W.2d 33 (Mo.S.Ct.1936); Cassell v. Mercantile Trust Company, 393 S.W.2d 433 (Mo.S.Ct.1965); First National Bank of Clinton v. Julian, 383 F.2d 329 (C.A.8,1967), applying Missouri law.

These authorities indicate further that a debtor-creditor relationship is avoided only when a "special deposit" is made and the depositor and the bank agree that the asset deposited may not be used by the bank, but must be kept intact to be returned to the depositor.

Since the enactment of the predecessor to Section 558.220, extensive regulations have been enacted governing the banking industry. This office has previously held in Opinion No. 177, dated December 20, 1963, issued to Robert B. Mackey, a copy of which is attached, that county courts in making deposits of county funds are not limited to demand deposits, but may place a portion of the funds in interest-bearing time deposits. Although this opinion was based upon Chapter 110 - - Depositories for Public Funds, certain conclusions reached there are relevant. The writer determined on the basis of Section 362.010, RSMo Supp. 1967, of the banking statute that the sole distinction between "demand deposits" and "time deposits" is that the payment of demand deposits can be legally required within thirty days, whereas time deposits cannot be required within such period. The distinction between "demand deposits" and "time deposits" is of importance since under federal regulation and Section 362.385, RSMo Supp. 1967, it is unlawful for banks to pay interest upon demand deposits. See also the enclosed Attorney General Opinion No. 223, dated October 27, 1969, issued to Senator Don Owens, a copy of which is attached, which held in part that the Director of Revenue, as an insurer of a portion of the intangible personal property tax, may deposit such funds for safekeeping and that he may, in doing so, deposit such funds in time deposit accounts which draw interest.

It is therefore our opinion that the circuit clerk of a second class county must keep safe and have readily available for payment $25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit in a bank, so long as the money is readily available for payment. This can be done on the clerk's own initiative, and therefore also upon consent of both parties by written agreement.

It is our further opinion that the clerk can invest, pursuant to proper court order, in other interest-bearing accounts besides time deposits.

Since the clerk can only pay out the funds pursuant to court order, the interest therefore inures to the benefit of the party as directed by the court.

Finally, we call your attention to Section 483.312, RSMo 1959, which applies when there is a deposit in an interest-bearing account.

CONCLUSION

It is the opinion of this office that the circuit clerk of a second class county must keep safe and have readily available for payment $25,000 deposited in court by the parties pending the outcome of litigation. The clerk, in keeping these funds safe, can deposit such funds in a demand deposit or a time deposit, so long as

the money is readily available for payment. This can be done on the clerk's own initiative or upon consent of both parties by written agreement. The clerk can also invest in other interest-bearing accounts when done pursuant to court order. The clerk can only pay the funds and the interest earned from investment of the funds as directed by the court. The clerk must also adhere to the requirements of Section 483.312, RSMo 1959.

The foregoing opinion which I hereby approve was prepared by my assistant Walter W. Nowotny, Jr.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Encls:
OP.177-Mackey-1963
OP.223-Owens-1969