BANKS & BANKING: Circuit Court has no authority to appoint auditor to audit the accounts of liquidation and order same paid out of trust estate.

February 4, 1938

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Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

This is to acknowledge receipt of your letter of January 28th in which you enclosed a letter from Messrs. Carter and Jones, Attorneys at Law, St. Louis, Missouri, relative to the liquidation of the Maplewood Bank and Trust Company, which is pending in Division No.3 of the Circuit Court of St. Louis County and presided over by Honorable Peter T. Barrett.

The letters state that Judge Barrett has made an order requiring the Special Deputy Commissioner in Charge of the above trust to file in the court a copy of the inventory prepared by the Special Deputy at the time he took charge of the estate, and which was filed by him with the recorder of deeds at that time; and also we note that it is the intention of Judge Barrett to appoint an auditor or amicus curiae to investigate and examine into all of the Special Deputy's transactions as liquidator of this bank.

You inquire of this Department as to the legal authority of a special deputy commissioner in charge of a bank in liquidation:

First, to file an inventory of his trust with the circuit court, and

Second, to pay for the services of an auditor appointed by the court to check into the affairs of his trust.

In your letter of request you state that such procedure will not only delay the work of this Special Deputy Commissioner but will greatly increase the expenses of the individual trust involved.

Under the statutes of Missouri, Sections 5316 to 5340, inclusive, R. S. Mo. 1929, the Legislature of Missouri has placed the liquidation of the insolvent banks and trust companies in the hands of the Commissioner of Finance. It has provided a complete and exclusive scheme and method of procedure to liquidate insolvent banks. The statutes set forth specifically and with particularity the methods to be pursued by the Commissioner of Finance in the liquidation of these trusts. Section 5323, R. S. Mo. 1929, provides that the Commissioner of Finance appoint a special deputy commissioner to perform such duties connected with a liquidation as he may deem necessary and advisable; that the Commissioner may employ such expert assistants and counsel and may retain such of the officers or employes of such corporation or banker as he may deem necessary in the liquidation and distribution of the assets of such corporation or banker. And said section further provides:

> "that no salaries or attorney's fees shall be paid unless approved by the circuit court, or judge thereof in vacation, which circuit court, or judge thereof in vacation, may refuse to approve any salaries or attorney's fees that he may deem exorbitant, and set a less fee or salary, which less fee or salary shall be the amount paid."

And Section 5324, R. S. Mo. 1929, provides in part that "all expenses of liquidation, subject to the approval of the circuit court, or judge thereof in vacation, in the county or city in which the principal office of such corporation or banker is located," shall be paid by the Commissioner out of the funds in his hands in said trust, and provides that the Commissioner of Finance shall "fix and pay the compensation of special deputy commissioner, assistants, counsel and other employes appointed to assist him in such liquidation pursuant to the provisions of this article."

Section 5327, R. S. Mo. 1929, provides that after he has completely taken possession of the bank and decided that he will not permit the corporation or banker to resume business pursuant to the provisions of Section 5322, he shall file one copy of an inventory of the assets prepared by him in his office and shall cause one copy to be filed in the office of the recorder of the county or city in which the principal office of such corporation or banker is located.

Replying then to your first question, we find from the statutes no duty or obligation on the Commissioner of Finance or his special deputies to file an inventory of the trust with the circuit court and that the filing of the inventory with the Commissioner of Finance and another in the office of the recorder of deeds, is all that is required under the statute.

The courts of our State have stated many times that the statute has provided a complete and exclusive scheme for the liquidation of insolvent banks and the distribution of their assets. In Commerce Trust Co. v. Farmers' Exchange Bank, 61 S. W. (2d) 928, l. c. 930, it is said:

> "The statute relative to the department of finance and to banking institutions was designed to and does provide a complete and exclusive scheme for the liquidation of insolvent banks and the distribution of their assets. State v. Farmers Exchange Bank of Gallatin, 56 S. W. (2d) 129; Bowersock Mills & Power Co. v. Citizens Trust Co., 298 S. W. 1049, 1051."

And in the case of Kirrane v. Boone, 66 S. W. (2d) 861, l. c. 865, the Supreme Court said:

> "As has several times been held by this court, such statutes (referring to Article 1, Chapter 34, Sec. 5282 et seq. R. S. Mo. 1929, St. Ann. Art. 1, Chap. 34, p. 7226 et seq.) provide a complete and exclusive

> scheme and method of procedure to liquidate insolvent banks. Koch v. Missouri-Lincoln Trust Co. (Mo. Sup.) 181 S. W. 44, 47, where the court said: 'The intent of that act to provide an exclusive system for winding up the affairs of banks cannot be doubted. * * * This is a sufficient epitomization of the act to show that it is, and was intended to be, a complete scheme and system for winding up the affairs of insolvent banks and trust companies in the condition described in the act. The fact that the statutory method is complete, and that the act specifically declares its purpose to be the establishment of a state banking department, "which shall have charge of the execution of the laws relating to banks, private banks, trust companies," etc., necessitates the conclusion that the statutory method is exclusive, and that proceedings for receiverships of such institutions must pursue the statutory method.'"

In the case of State ex rel. Moberly v. Sevier, 88 S. W. (2d) 154, l. c. 156 (1935), it is said:

> "We have on several occasions held that the statutes relative to the department of finance and to banking institutions were designed to and do provide a complete and exclusive scheme for liquidation of insolvent banks and the distribution of their assets. State ex rel. v. Fidelity & Deposit Co. (Mo. Sup.) 53 S. W. (2d) 1036, 1040, 85 A. L. R. 955; Bank of Oak Ridge v. Duncan, 328 Mo. 182, 40 S. W. (2d) 656; Commerce Trust Co. v. Farmers' Exchange Bank of Gallatin, 332 Mo. 979, 61 S. W. (2d) 928, 89 A. L. R. 373; Kirrane v. Boone et al.,

> 334 Mo. 558, 66 S. W. (2d) 861. 'There is no doubt but that, so far as administering the assets of the failed bank is concerned, the collection of its assets, the payment of expenses, and the allowance and the payment of claims out of such assets, the jurisdiction of the commissioner and the local circuit court is exclusive.' State ex rel. v. Fidelity & Deposit Co., supra.
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> ' The method provided for liquidating insolvent banks is by and through the commissioner of finance, as statutory receiver, under the supervision of the circuit court where the bank is located.' Kirrane v. Boone, supra, 334 Mo. 558, 66 S. W. (2d) 861, loc. cit. 865."

The Missouri Banking Laws were taken largely from the New York statutes and Sections 5316, 5319 and 5321, Revised Statutes of Missouri, 1929, are taken almost verbatim from New York statutes, and the New York Court said in In Re Union Bank of Brooklyn, 162 N. Y. S. 488, the following:

> "The former common-law right of banking is now a franchise derived from the Legislature (Attorney General v. Utica Ins. Co., 2 Johns. Ch. 377; People v. Utica Ins. Co., 15 Johns. 378, 8 Am. Dec. 243), and the superintendent is the head of the department for the state regulation of such franchise. He is not a part of the judicial branch of the government. He does not take his office nor derive any of his original powers from it. He is of the administrative branch of the government, appointed by the Governor and confirmed by the Senate. Section 10, Banking Law. He is a state officer. Article 1, Sec. 2, Public Officers Law (Consol. Laws. c. 47); People ex rel. Baird v. Nixon,

158 N. Y. 221, 52 N. E. 1117. And as such officer he is expressly clothed by the Legislature with this power of liquidation. Section 69, Banking Law. His possession is not that of the court. The statute declares that he may forthwith take possession of the business and property of a banking corporation that has violated its charter or any law, is conducting its business in an unauthorized or unsafe manner, is in an unsound or unsafe condition to transact business, has an impairment of its capital, has suspended payment of its obligations, or has neglected or refused to comply with the terms of a duly issued order of the superintendent. Section 57, Id. When he 'shall have duly taken possession of such corporation, * * * he may hold such possession until its affairs are finally liquidated by him.' Section 58 Id. He 'is authorized, upon taking possession of the property and business of such corporation, * * * to liquidate the affairs thereof and to do all acts and to make such expenditures as in his judgment are necessary to conserve its assets and business.' Section 69. 'The moneys collected by the superintendent shall be from time to time deposited in one or more state banks, savings banks or trust companies.' Section 70, Id. As to his further duties and powers, see section 79, Id. Thus it appears as superintendent he takes possession, holds possession until final liquidation by him, and is authorized to liquidate, outside of any judicial proceedings. The fact that he must receive the sanction of the court before certain steps in his procedure are effective (e. g., sections 63, 69, 74, 78, 79) does not imply that the liquidation itself is judicial."

Many other cases might be cited in Missouri stating that the liquidation of banks is a statutory receivership and not a court receivership. It might be added that in Farmers and Merchants Bank v. Coleman et al., 9 S. W. (2d) 549, the Springfield Court of Appeals in an opinion by Judge Bradley held that:

> "The circuit court has no jurisdiction to fix compensation, in first instance of special deputy in charge of insolvent banks, but under Revised Stautes, 1919, 11707 (now Section 5324, R. S. Mo. 1929) compensation in first instance must be fixed by commissioner of finance."

In our search of the statutes we do not find any authority for the circuit court to appoint an auditor, or, as stated in your letter, " a sort of amicus curiae" to investigate and examine into the transactions of the special deputy commissioner in charge of the bank. Neither do we find that the circuit court would have authority to make an allowance out of the trust to pay such auditor or amicus curiae without it was first sanctioned and the compensation fixed by the Commissioner of Finance. The statutes provide that the liquidator in charge of a bank and the Commissioner of Finance give a bond for the faithful performance of their respective duties, and the statutes have definitely placed the obligation and responsibility of the safeguarding and protection of the assets and funds of the failed bank on the Commissioner of Finance and his special deputies and assistants.

From the above and foregoing we are of the opinion that there is no legal authority or obligation on a special deputy commissioner in charge of a bank in liquidation, first, to file an inventory of his trust with the circuit court, and second, nor do we find any legal authority for the circuit court to appoint an auditor

or amicus curiae to check into the affairs of the trust and allow the compensation for such services out of the funds of said trust estate.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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