CONSTRUCTION OF STATUTES:
TRUST COMPANIES:

Section 363.460, RSMo 1949, is mandatory and requires every corporation doing trust business to create and maintain a surplus fund in the manner and for the purposes provided therein. A corporation chartered for the sole purpose of engaging in trust business cannot carry on any phase of banking business. Not being authorized to accept money deposits, it does not have deposit liability within meaning of Section 363.470, RSMo 1949, and section is inapplicable to such corporation.

October 8, 1953

Honorable J. A. Rouveyrol
Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads in part as follows:

> "'The Board of Directors of The Guaranty Trust Company of Missouri are desirous of obtaining an interpretation of Sections 363.460 and 363.470 of the Revised Statutes of Missouri, 1949, and their possible application to this trust company.
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> "'It must be explained that we do no commercial banking, our business being confined to that of trust and estates, and hence, seemingly, Section 363.470 has no application inasmuch as it refers to "a trust company having a deposit liability."'"

It appears that the Guaranty Trust Company of Missouri referred to in the opinion request is a corporation to which a charter was issued in 1947, under the provisions of Section 8024, RSMo 1939, for the purpose of carrying on a general trust business.

Among other things, the articles of incorporation provide that one of the purposes of said corporation shall be to receive upon deposit for safe keeping personal property of every description, excluding money, and to own or control a safety vault, but not to own or control same for rental to the public.

It appears from the charter, and also correspondence attached to the opinion request, that the corporation was organized for and sought to have a charter granted to it for the sole purpose of engaging in a trust business, as it did not wish to engage in a trust business and a banking business.

These facts are further evidenced by the letter of Honorable H. G. Shaffner, then the Commissioner of Finance of Missouri, to the Attorney General in which an opinion was requested upon the proposition as to whether or not the Department of Finance could issue a charter to the Guaranty Trust Company of Missouri, authorizing that corporation to engage in the single business of carrying on a trust business as provided in the articles of incorporation or whether or not the charter must be issued for the purpose of carrying on a trust business and banking business.

On April 14, 1947, the opinion of this department was rendered to the Commissioner of Finance in compliance with his request and in which opinion it was held that the Guaranty Trust Company of Missouri, under the provisions of Section 8024, RSMo 1939, could organize and incorporate for the purpose of carrying out trusts and property rights of others and for the purpose of transacting such business as was provided in its articles of incorporation and that the Commissioner of Finance might lawfully issue a charter to said trust company to carry out the business provided by its articles of incorporation.

It is noticed that the articles of incorporation only provided for the doing of trust business and that since no mention was made of a banking business, the corporation was organized and incorporated for carrying on the former and not the latter type of business.

It further appears that the charter was granted by the Commissioner of Finance on January 6, 1948, and it is assumed that the corporation has been engaged in the trust business, as authorized by its charter from and after said date, and that it has not engaged in the banking business during that period of time.

The present inquiry calls for an interpretation of Section 363.460 and Section 363.470, RSMo 1949, and the possible application of these sections to the Guaranty Trust Company of Missouri.

Section 363.460, RSMo 1949, reads as follows:

> "Every trust company shall create a fund to be known as a surplus fund. Such fund may be created or increased by contributions, by transfers from undivided profits, or from net earnings. Such fund up to forty per cent of the capital of the trust company shall be used only for the payment of losses in excess of undivided profits."

Section 363.470, RSMo 1949, reads as follows:

> "1. When the net earnings of a trust company having a deposit liability have been determined at the close of a dividend period as provided in section 363.450, if its surplus fund does not equal forty per cent of the trust company's capital, one-tenth of such net earnings shall be credited to the surplus fund, or so much thereof, less than one-tenth, as will make such fund equal to forty per cent of such capital; provided, that until the capital and surplus fund of any such trust company now existing the capital of which is not equal to the requirements of section 363.080, equals forty per cent more than the minimum of capital for a trust company in its location, one-tenth of its net earnings at the close of each dividend period shall be credited to the surplus fund.
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> "2. The balance of such net earnings, or the entire amount thereof if such capital equals such requirements and such fund equals forty per cent, may be credited to the trust company's profit and loss account; or, if its expenses and losses for such dividend period exceed its gross earnings, such excess shall be charged to its profit and loss account.
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> "3. The credit balance of such account shall constitute the undivided profit at the close of such dividend period, and shall be available for dividends. The directors of any such trust company may from time to time declare such dividends as they shall judge expedient from such undivided profits."

Section 363.460, supra, refers to a surplus fund of a corporation and the business for which it is created, but does not define said term. Inasmuch as Subsection 12 of Section 363.010, RSMo 1949, defines the term "surplus fund" said subsection must be read along with Section 363.460, supra. Subsection 12, 363.010 reads as follows:

> "(12) 'Surplus fund,' means a fund created pursuant to the provisions of this chapter by a trust company from its net earnings or undivided profits, which to the amount specified in this chapter is not available for the payment of dividends and cannot be used for the payment of expenses or losses so long as any such corporation has undivided profits; * * *."

This section is mandatory and requires every trust company to create a surplus fund, regardless of whether the company does a banking as well as a trust business, or whether it merely engages in a trust business as does above mentioned corporation.

The surplus fund can only be created from net earnings or undivided profits and cannot be used for the payment of any of the expenses of a corporation so long as it has undivided profits. The fund, up to forty per cent of the capital of the corporation shall be used to pay losses which are in excess of the undivided profits. Since the Guaranty Trust Company of Missouri has been authorized to engage in a trust business in this state, the provisions of Section 363.460, supra, are fully applicable to it, and it must comply with that section in the creation and maintenance of a surplus fund as therein provided.

While many different transactions may be included, and may be properly referred to as doing a "banking business" it is generally conceded that the most common reference to the term is when a corporation accepts money deposits from the public and then pays it out by order of the depositors. This was held to be the rule in the case of Rosenblum v. Anglim, 43 Fed. Supp. 889, at l. c. 891, the court said:

> "'Ordinarily the business of banking relates to dealing in money by receiving deposits, making loans, discounting commercial paper, making collections, and issuing bills and notes.' American Sugar Refining Co. v. Anderson, D.C., 20 F. Supp. 55, 56. In State Tax

> Commission v. Yavapai County Savings Bank, 52 Ariz. 374, 81 P. 2d 86, 90, the Court said:
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> "'What then is the test of a banking business? In 3 R.C.L. 375 we find the following test: "1. * * * The usual attributes of the banking business are receiving deposits, making collections and loans, discounting commercial paper and issuing notes for circulation, * * * "having a place of business where credits are opened by the deposit or collection of money or currency."' * * *
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> "'These definitions differ in their terms, but it will be found that there is at least one element appearing in each and every one of them--a bank is an institution which receives and pays out deposits.' (Emphasis supplied)"

The Guaranty Trust Company being authorized to carry on a trust business only, it cannot accept money for deposit and since this would be the doing of a banking business and would be ultra vires in so far as the powers of the trust company are concerned. From the facts it appears that the trust company has not attempted to engage in any phase of banking business, particularly that of accepting money for deposit.

The beginning of Section 363.470, supra, is in these words, "when the net earnings of a trust company having a deposit liability," (emphasis ours), and in view of this statement, it is our thought that the section has reference only to those trust companies which are authorized to carry on a banking business in connection with their trust business, for the reason that only those trust companies authorized to accept money deposits and to pay them out on the orders of the depositors could have a "deposit liability" within the meaning of that section.

Since the Guaranty Trust Company is not engaged in the banking business and does not receive money deposits as noticed above, it has no "deposit liability" within the meaning of Section 363.470, supra, and said section has no application to said trust company. Consequently, it is believed that it could not serve any useful purpose in the present discussion to construe the provisions of this section further.

CONCLUSION

It is therefore the opinion of this department that the provisions of Section 363.460, RSMo 1949 are mandatory and re-

quires every corporation engaged in the business of carrying out trusts in property rights for others to create and maintain a surplus fund, in the manner and for the purposes provided by said section.

It is the further opinion of this department that a corporation chartered for the sole purpose of carrying on a trust business cannot legally engage in any phase of the banking business. Not being authorized to accept money on deposit, it has no deposit liability within the meaning of Section 363.470, RSMo 1949, and said section has no application to such trust corporations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

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