COUNTY DEPOSITORIES: Five questions submitted; County funds preferred claims in National Banks; where no bids submitted for county funds; county authority to buy U. S. Bonds; power of county treasurer to select depository; Construction of Federal Banking Act on insured deposits.

September 6, 1933.

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Hon. Nat. B. Rieger
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Rieger:

This Department is in receipt of your letter of recent date in which you request the opinion of this office on five questions, which letter is hereafter set forth and is as follows:

"A situation has arisen in Adair County, as perhaps in many other counties, in regard to the deposit of county funds and the establishment of county depositaries, which has created a number of legal questions to confound the County Court, and questions on which we would appreciate your opinion.

1. Is the claim of a county for its deposits, made without a compliance with Sec. 12187 R. S. Mo. 1929, a preferred claim as against a National Bank the same as it is against a State Bank, in the event of liquidation?

2. In the event that no bids are received as provided in Sec. 12184 R. S. Mo. 1929, and no bank or banks in this or adjoining counties desire to comply with Sec. 12189 R. S. Mo. 1929, is the County Court privileged to deposit the county funds in any other bank that will comply with Sec. 12187 R. S. Mo. 1929?

3. Is the County Court privileged to treat money not needed for immediate use as a sinking fund and to purchase bonds of the U. S. and the State of Missouri, and sell them as money is needed, as provided in Sec. 12123 R. S. Mo. 1929?

4. In the event that no bond to secure the county funds is obtainable would the County Treasurer be privileged to deposit funds not needed for immediate use in a time deposit, thereby earning a rate of interest not obtainable if the funds were deposited in a checking account?

5. When the Federal Banking Act becomes effective on July 1, 1934, providing for a guarantee of all deposits of $10,000.00 or less, might public funds, such as the Contingent Fund, Pauper Fund, Road and Bridge Fund, etc., be deposited in separate accounts and thereby gain the anticipated security and still satisfy Sec. 12187 R.S. Mo. 1929? "

We take it that these are hypothetical questions and not based on facts existing in your County and without a more complete statement of facts we are unable to give you as full an opinion as we should like to. However, we shall undertake to answer each query as best we can under the circumstances. We will take up each question in the order submitted by you.

Referring back to the first question in your letter, the question as to whether the deposit made in a National Bank, under the circumstances therein mentioned, that the question of preference will be determined by the Federal courts and not by the State courts and different rules will therein apply than in our own courts.

We recognize the rule in this State that if the county funds are deposited in a county depository without compliance with the statute in regard to the selection of the depository that such deposits create a trust fund and the assets of the failing bank or trust company in liquidation are impressed with the trust in the county's favor to the extent of the county's funds wrongfully obtained which augmented the bank's assets as a whole. In other words, the county's claim is preferred.

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

The distribution of the assets by a receiver of an insolvent National Bank is governed by United States Revised Statutes, Section 5236, U. S. Comp. Section 9823, Section 194 Vol. 12 U. S. C. A., which prevail over the states' statutes and we are herewith setting out said section for ready reference:

"DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision

> has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

As was said by Mr. Justice White of the Supreme Court of the United States in the case of Davis v. Elmira Savings Bank, 161 U. S. 275-278:

> "National Banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

In Poweshiek County v. Merchants National Bank of Grenall et al, 220 N. W. 63, l. c. 65, it was said:

> "We have settled the proposition that where the assets of a National bank are involved and it has been sued in the state courts, the Federal law as to the distribution of assets and preferences controls the disposition of the case (in the state court), regardless of what the state law may be with reference to it. We so held in the case of Palo Alto County v. Eldredge, 199 Iowa 1, 201 N. W. 132. This was the exact holding of the United States Supreme Court in the

case of Davis v. Elmira Savings Bank, 161 U. S. 275, 16 S. Ct. 502, 40 L. Ed. 700."

So it will be seen that as to the distribution of the assets of a failed National Bank, the Federal Courts have jurisdiction.

In R. C. L. Section 182, p. 555, it is said:

"The correct rule is announced that where public funds are wrongfully deposited in a bank which has knowledge of the character of the funds, they are impressed with a trust and if such funds can be traced into the hands of the receiver of a bank, or if the assets in his hands have been increased by such deposit, such assets will be subject to such trust and the claim therefor will be entitled to a preference of the assets." (Many cases are cited in this work to support this statement.)

This principle is supported by numerous authorities: That the unauthorized or unlawful deposit of public funds in a bank which subsequently becomes insolvent creates a trust relationship in such funds between the bank and the community to which they belong. The following cases support this theory and several of them are cases where public funds have been deposited in National banks and preferred claims have been allowed by the Federal courts; which cases we cite as follows:

San Diego County v. California National Bank, 52 Fed. 59;
Beard v. Independent Dist., 33 C. C. A. 562, 88 Fed. 375;
Crawford County v. Patterson, 149 Fed. 222;
Crawford County v. Stawn, 15 L. R. A. (n.s.) 1100, 157 Fed. 49;
Centralia v. United States Bank, 221 Fed. 755;
Allen v. United States, 285 Fed. 678;
Page County v. Rose et al, 130 Iowa 296, 8 Ann. Cases 114, 5 L. R. A. (N. S.) 886, 06 N. W. 744;
State v. Midland State Bank, 52 Neb. 1, 66 Am. State Reps. 484.

Although your first question is a hypothetical question we see no reason for a different rule and the Federal courts seem to be just as liberal in allowing preferred claims where a trust has been established as the State courts. However, every case must stand upon the particular facts and circumstances of that case. It is, therefore,

our opinion that,as to your first question, a preferred claim would be allowed by the Federal courts against a National bank the same as it is against a State bank in the event of liquidation under the same state of facts.

Answering your second question, will say that Section 12184 R. S. 1929, provides:

> "It shall be the duty of the county court of each county in this state, at the May Term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county."

And said section further provides how the county court shall proceed and the letting of said county money and how they will advertise that said letting will be had.

Section 12185, R. S. Mo. 1929, provides as follows:

> "Any banking corporation, association or individual banker in said county desiring to bid shall deliver to the clerk of said court, on or before the first day of the term of said court at which the selection of depositaries is to be made, a sealed proposal, stating the rate of interest that said banking corporation, association or individual banker offers to pay on the funds of the county for the term of two years next ensuing the date of said bid, etc. * * * * * * * * *."

Section 12186, R. S. 1929, provides how the county court shall proceed in the opening of the bids and what moneys shall be let to the successful bidder etc.

Section 12187 R. S. 1929, provides:

> "Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety;"

And said section further provides:

> "that the court may accept in lieu of real estate as security bonds of the United States or of the State of Missouri, etc."

All of the foregoing sections provide for the selection of a depositary within the county advertising for bids, and no other.

Section 12189 R. S. 1929, provides as follows:

> "If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositaries as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as the court may deem advisable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit; said interest to be computed upon the daily balances due the county, as provided in section 12186, and any bank or banking concern agreeing to accept deposits under the provisions of this section shall execute a bond in manner and form as prescribed in section 12187, with all the conditions therein mentioned, the penalty of such bond or bonds to be not less than the total amount of the county funds to be deposited with such bank or banking concern."

If we understand the question correctly it is that after all of the statutory requirements have been complied with by the county court in submitting bids by advertisement etc., and no bids submitted by the banks of its own county and no bank in the county court's own county or adjoining county desires to comply with the requirements of Section 12189 R. S. 1929, where no bids have been received by the county court, may the county court then deposit the county funds in any other bank that will comply with Section 12187 R. S. 1929, which, as we would interpret your question, would be to comply with all of the provisions of said section. The procedure under said section 12187 is followed only in connection with the proceedings outlined in Sections 12184, 12185 and 12186, where the county court has advertised for bids, and the bidders have followed a particular course of procedure and the county court opening

the bids in the May term in the odd years therein mentioned and selecting the depositories of the funds in a particular manner.

The county court is a court of statutory origin and its powers must be circumscribed within the confines of the statute and has no powers other than those set out in the statute. The Supreme Court in the case of Saline County v. Wilson, 61 Mo. 237, l. c. 239, had this to say:

> "County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond, their acts are void."

In the case of Bayless v. Gibbs, 251 Mo. 492, l. c. 506, the court said:

> "This court, in numerous cases has repeatedly held, that the county courts of the respective counties of the state are not the general agents of the counties of the state. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the state; as has been well said, the statutes of the state constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

The Supreme Court in the case of Meade v. Jasper County, 305 Mo. 476, l. c. 485, reaffirms the doctrines in the case of Bayless v. Gibbs, supra, and Saline County v. Wilson, supra, and quoted approvingly from both cases. It is the opinion of this office that there is no statutory or other authority for the county court to act under such circumstances as you mentioned in your second question and, therefore, the county depository selected in that manner would not be a lawful despository of said county.

Answering your third question will say that Section 12123 R. S. 1929, provides as follows:

> "In case the county court of any county, having such money as is referred to in the foregoing sections of this article, shall deem it best, such court, instead of loaning such money in the manner hereinbefore provided for, may invest the same either in purchasing, on the best terms

> obtainable, bonds of the United States or of the state of Missouri, said bonds to be held in trust for the fund or funds to which the money applied to their purchase belonged, and shall be so expressed in the public records of the county."

Now the "such money" mentioned in the above section refers to the money mentioned in Section 12117 R. S. 1929, which gives the several counties of this state authority to loan out any money in the hands of the treasurer of such county collected for the purpose of constituting a sinking fund for paying the principal of any indebtedness incurred, for which bonds are outstanding, or collected to pay interest on the bonds of such county issued etc. Section 12118 provides what security the county court shall require. Section 12119 provides for the bond and rate of interest of said loans, and Section 12120 provides for the foreclosure in the event of default in the payment.

The sections above enumerated provide only for the loaning out of the money therein provided for sinking funds and no other. The words "sinking fund" have a well defined meaning.

> "A fund created for extinguishing or paying a funded debt; a fund arising from particular taxes, imposts or duties which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." 58 Corpus Juris p. 738.

So it would be our opinion that your county court would not be "privileged to treat money not needed for immediate use as a sinking fund and to purchase bonds of the U. S. and of the State of Missouri and sell them as money is needed," because these sections have no application to anything other than the sinking fund money.

In reply to your fourth question will say that it is the duty of the county court and it has the power to select a county depository and not the duty of the county treasurer to do so. It is, therefore, the opinion of this Office that the county treasurer of your county has no statutory authority and is not privileged to deposit funds not needed for immediate use in a time deposit.

In the selecting of county depositories by the county court we find no place in the statutes where the county court can deposit the county moneys on time deposit and the county court should follow the statutes in depositing county moneys. The county treasurer has

no power or authority to loan the county funds under such conditions, as that is what a time deposit is - merely a loan to the bank for a stipulated time at a stipulated rate of interest and does not contemplate that the bank would give a depository bond.

Answering the fifth question propounded in your letter will say that we presume that you refer to Section 12B, Seventh Division (L), of the Federal Banking Act of 1933, which pertains to the Federal Deposit Insurance Corporation and insures bank deposits of certain banks that are able to qualify under this act, and we think your question will be answered by reading the following portions of said act relating to insured deposits:

> "* * * * * For the purposes of this sub-section the term 'insured deposit liability' shall mean with respect to the owner of any claim arising out of a deposit liability of such closed bank the following percentages of the net amount due to such owner by such closed bank on account of deposit liabilities: 100 per centum of such net amount not exceeding $10,000.00; and 75 per centum of the amount, if any, by which such net amount exceeds $10,000.00 but does not exceed $50,000.00; and 50 per centum of the amount, if any, by which such net amount exceeds $50,000.00: Provided that in determining the amount due to <u>such owner</u> for the purpose of fixing such percentage, there shall be added together all <u>net amounts</u> due to such owner in the same capacity or the same right, on account of deposits, regardless of whether such deposits be maintained in his name or in the names of others for his benefit. For the purposes of this sub-section, the term 'insured deposit liabilities' shall mean the aggregate amount of all such insured deposit liabilities of such closed bank.
> * * * * * * * * * * * * * "

However, we might add that as this act, so far as insured deposit liabilities are concerned, does not become effective until July 1st, 1934, unless the President shall by Proclamation fix an earlier date, and we anticipate some changes and rulings promulgated by the Comptroller of Currency and the Federal Reserve Board on this Banking Act, and an opinion rendered by this Department at this time without the benefit of those rulings would be of no particular use to your court at this time.

At some future time when this law becomes effective or immediately before it becomes effective when we will have the benefit of the rulings and regulations made by the Comptroller of Currency and others, we shall be glad to give you our views on any questions submitted. Our present idea about the matter, after reading the above section, would be that all of the county funds deposited in one bank would be treated as one deposit and could not be subdivided into four or five funds, which you suggest in your letter, keeping each fund under the $10,000.00 limit, for the purpose of securing 100 per cent claim liability arising out of such deposit in the event that the bank fails, because said section of the Banking Act of 1933, as we interpret it, provides against this very thing and its purpose is to give the smaller depositor 100 per cent protection.

We have answered all of your questions and have given you our views and opinions on the matter submitted, notwithstanding the limited facts set forth in each question.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:_____
ROY McKITTRICK
Attorney-General.

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