Banks--Capital Stock: Banks moving into a city of 50,000 or more population must operate under a minimum capital of at least $280,000.

Should city boundaries of a city of 50,000 inhabitants or more be extended to include banks operating under a $25,000 capital, such banks are not required to increase their capital.

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October 7, 1946

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Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter requesting an opinion from this Department, respecting the capital required of banks changing their locations, or the capital structure required where cities extend their corporate limits to take in territory where a bank is already located.

Your letter is as follows:

> "Parties interested in the Peoples Bank of Suburban Kansas City, located at Dodson, indicate they will apply to this Department for our permission to move the bank to Waldo, situated within the city limits of Kansas City, Present capital structure of the bank in question, providing $25,000 common stock and $25,000 surplus, meets the requirement of the first portion of Sec. 7944, R.S. Mo. 1939. Later the same section recites:
>
> > " 'Provided, however, that any bank now existing, the capital of which is not equal to that limitation required of a bank in its location, may continue to do business under its present capital: Provided, until its capital and surplus fund shall equal forty (40) per centum more than the minimum of capital required for a bank in its location, one-tenth (1/10) of its net earnings for each dividend period as provided in section 7971 shall be credited to the surplus fund, and no such bank shall declare credit or pay any dividends for any dividend period to its stockholders until

it shall have made such credit for that period to its surplus fund.'

"In this instance the cash capital would be $280,000.

"May we be favored with your opinion with reference to this matter, also, the required cash capital for subject bank when Dodson is taken within the city limits of Kansas City on January 1, 1947?"

In the case cited of the Peoples Bank of Suburban Kansas City located at Dodson, a municipal corporation outside of the corporate limits of Kansas City, Missouri, we believe you have correctly estimated and calculated the cash capital necessary for said named bank to maintain should that bank be moved to Waldo, which is within the corporate limits of Kansas City, Missouri, at $280,000. Section 7944, R.S. Mo. 1939 governs the matter of capital structure of a bank in cities like Kansas City, Missouri, having a population of more than 50,000 inhabitants. That Section is as follows:

"The amount of cash capital of such bank shall amount to not less than: (a) $15,000 if the place where its business is to be transacted is an unincorporated or incorporated village or town the population of which does not exceed 1,000 inhabitants; (b) $25,000 if the place where its business is to be transacted is an unincorporated or incorporated village or town the population of which exceeds 1,000 but does not exceed 5,000 inhabitants; (c) $50,000 if the place where its business is to be transacted is an unincorporated or incorporated town the population of which exceeds 5,000 but does not exceed 10,000 inhabitants; (d) $100,000 if the place where its business is to be transacted is a city or town the population of which exceeds 10,000 inhabitants but does not exceed 50,000 inhabitants; (e) $200,000 if the place where its business is to be transacted is a city the population of which exceeds 50,000 inhabitants: Provided, however, that any bank now existing, the capital of which is not equal to that limitation required of a bank in its location, may continue to do business under its present capital: Provided, until its capital and surplus fund shall equal forty (40) per centum more than the minimum of capital required for a bank in its location, one-tenth (1/10) of its net earnings for each dividend period as provided in section 7971 shall be

credited to the surplus fund, and no such bank shall declare credit or pay any dividends for any dividend period to its stockholders until it shall have made such credit for that period to its surplus fund."

Noting the cash capital required of a bank in cities of over 50,000 inhabitants, and taking cognizance of the fact that Kansas City, Missouri, is such a city, we see from reading said Section 7944, that a bank within the corporate limits of said city must have a cash capital of $200,000, and in addition to the capital, under the proviso of section 7944 there must be added 40% more than the minimum capital required in its location as its full capital structure. Therefore, if the Peoples Bank of Dodson is permitted to move to Waldo, within the territorial limits of Kansas City, Missouri, it would require a cash capital of $280,000.

If said named bank undertakes to do so, and is permitted by your department to change its location from Dodson, Missouri, to a suburb within the City of Kansas City, Missouri, it would become practically, within the terms of said Section 7944, if not actually, a new corporation. In other words, it would be invading a new territory different from that where a minimum of $25,000 capital is required of a bank, and would leave behind the conditions governing its capital structure in the old location. It would become subject to the statutory requirements regulating and governing banks in its new domicile, because the location as to population controls the matter of capital either way. It is quite plain, we think that if a bank, having a capital structure as required under said Section 7944 in a small city, town or village, exceeding 1,000 inhabitants but under 5,000 inhabitants, and having a minimum of $25,000 capital, it would be required to comply with said Section 7944, as to the minimum cash capital required of banks within cities of more than 50,000 inhabitants, such as Kansas City, should said bank be permitted to move from the lesser inhabited community to one inhabited by more than 50,000 persons.

We think the proviso of said Section 7944 makes it plain and understandable that any bank in a community with a population such as is indicated by the capital structure of the named bank "now existing", as stated in said proviso, means at the time such bank might undertake to move its place of business to a city of larger population, requiring a greater capital structure, and if such banking institution desires to, and actually does, move to a larger city, which, under said Section 7944, requires a greater capital, it would be required to conform to the capital structure required in the city to which it is moving. The statute seems to make it a matter of both population and location, with respect to a bank moving from a small community to a larger one. We believe that, under the facts stated and applying said Section 7944, thereto, the named bank in making the change from

its present location on its own initiative, basing the matter of its minimum capital structure on the question of population, could not invade the territory of banks in the more populous community and become a competitor with them without increasing its capital structure, as is provided by said Section 7944, to that required of banks already located there.

On the other hand, if the City of Kansas City enlarges its territory by extending its corporate limits so as to take in Dodson, the said named bank, if still transacting a banking business at its present location, and under its present capital structure, based upon the population of Dodson, would not have changed its location, nor would it in any way by affected as to its right to do business, or as to the amount of its capital structure, merely because the City of Kansas City had extended its corporate limits to include its location. It would be a matter of the City of Kansas City moving out to the location of the bank instead of the bank moving into the territorial lines of Kansas City, and we believe under such circumstances, the said bank, under the terms of said Section 7944, would be entitled to and could lawfully continue its banking business with the amount of capital under which it operated prior to the extension of the territorial limits of Kansas City.

Section 7940, R.S. Mo. 1939, sets forth what shall be contained in the articles of incorporation of a bank. Subsection 5 thereof is as follows:

> "The articles of agreement may designate the number of directors necessary to constitute a quorum, and may provide for the number of years the corporation is to continue, which shall not exceed fifty years, or may provide that the existence of the corporation shall continue until the corporation shall be dissolved by consent of the stockholders or by proceedings instituted by the state under any statute now in force or hereafter enacted."

Such Subsection 5, giving the right to a banking corporation to designate the period of its existence, not to exceed 50 years, and that part of Section 7942 directing the Commissioner of Finance to grant a certificate to the corporation to carry on the business of a bank, which said part of said Section 7942 is as follows:

> "In case the commissioner shall find all the provisions of the law have been complied with and shall have satisfied himself by such investigation as to the facts as above provided, he shall grant a certificate setting forth that such corporation has been duly organized and the amount of its capital subscribed and paid up in full. Such certificate shall be recorded in the office of the recorder of deeds of the county or city in which the

> corporation is to be located, and such certificate, so recorded, or certified copies thereof, shall be taken in all the courts of this state as evidence of such incorporation; and the existence of such corporation shall continue for the period limited in its articles of agreement, if there fixed, and if not there fixed, then until the corporation is dissolved by consent of its stockholders or until its corporate existence ends pursuant to the laws of this state."

and the certificate of authority itself granted by the Commissioner of Finance constitute the charter of the bank, during the period of time the incorporation of the bank is to exist.

We believe the statutes themselves would become a part of the franchise of the bank to carry on its business during the time of its incorporation. It is not a mere license. It is an undertaking of the state to protect the bank so long as it obeys the laws of the state. We do not undertake to say that the bank itself has a vested right in its franchise to carry on its business. Such right may be taken away from the bank for violations of its charter for ultra vires acts, or for any violation of the banking laws, or general laws of the state, or by liquidation . But third parties dealing with the bank, some of whom, as purchasers of stock in the bank, at a known figure of capital structure, persons who may and do contract with banks borrowing of its funds, and giving in security therefor pledges of their property, and persons whom the bank may owe, do, we think, have vested rights in the security of the permanent right of the bank under its charter from the state to carry on its business with the same amount of capital existing at the time of the granting of its franchise and during the time contracts between such third persons and the bank might be affected.

It would not be difficult to forsee that persons having contracts with a bank operating under a capitalization of $25,000.00 might be greatly prejudiced and injured in their contracts with the bank, if, indeed, they might not be entirely destroyed, if the bank should be compelled, merely because a nearby city extended its corporate limits to include the territory in which the bank is located, to increase its capital structure to conform to the requirements of our statutes as to the amount of capital required for banks when first incorporated, according to population, in such cities.

The state itself, we believe would have no power, under any conditions, to require a bank to change its capitalization once established, even though the statutes under which it is incorporated, and its capital structure becomes fixed, are modified, or changed.

The Constitution of the United States, Section 10, of Article 1 provides:

> "Powers denied the States. No State shall * * * * pass any * * * * law imparing the obligation of contracts, * "

Section 13 of Article 1, of the new constitution of this state is as follows:

> "Sec. 13. Ex Post Facto Laws--Impairment of Contracts--Irrevocable Privileges. --That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

12 Corpus Juris under the title Constitutional Law, at page 1049, Section 677, in defining changes or modifications of statutes concerning banks or trust companies after such institutions have been incorporated states the following:

> "* * * * and a statute is invalid which requires a previously chartered bank or trust company to change its name or very greatly increase its capital stock. * * * * * * * * * "

One of the most recent and instructive works on banks and banking is "Michie on Banks and Banking." The author of this work in Vol. I, treating the subject of the power of the Legislature to compel or modify banking laws affecting banks already incorporated, or to permit a bank itself to change or amend its articles of corporation, on page 87 of said work has this to say:

> "Impairment of Oblication of Contracts. --The power can not be exercised to impair the obligation of a contract, such as one which the corporation has entered into with a third party."

Footnote 55, is an excerpt from the case of Woodfork v. Union Bank, 43 Tenn. (3 Coldw.) 488, which states the following:

> "Modification cannot impair contract. --The power of the legislature to change, modify, enlarge or restrain, a banking corporation,

> is limited to such measures as are merely ancillary to the main design of the corporation. It can not repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judically ascertained and declared. * * * *"

On the question of the constitutional guarantees above quoted, as preventing the impairment of the obligation of a contract and in harmony with the above quoted text from Michie on banks and banking and the quoted excerpt from the Tennessee case, where it is held that contracts made and existing between a bank and third persons are likewise protected, and as furnishing the proper basis for holding that contracts with third parties are within the protection of the Constitution, we cite our Section 7906, Article 1,Chap. 39, R.S. Mo. 1939, which is as follows:

> "Any bank or trust company organized under the laws of this state may, through action of its board of directors and without requiring any action by stockholders, with the written consent of the Finance Commissioner, issue and sell at not less than par its capital notes, if, at the time of the issuance of such capital notes the capital of such bank or trust company is impaired, and there shall have been issued and sold capital notes of such bank or trust company in accordance with the provisions of Sections 7906 to 7909 inclusive, in an amount equal to or more than the impairment of the capital of such bank or trust company, as found by the commissioner of finance, then the capital of such bank or trust company shall for all purposes be deemed to be restored and unimpaired. Such capital notes may be sold for cash or, with the written consent and approval of the commissioner of finance, for property and they shall be of a nature specified in, and conform to, the requirements of the several provisions of Sections 7906 to 7909 inclusive."

Assuming that a bank may suffer, from any cause, on impairment of its capital, and under said Sections 7906 to 7909, it should be required by the Commissioner of Finance, to issue its capital notes for the repairment of its capital or it should voluntarily issue them, and sell them, obligating itself to take up and discharge said notes as provided in said sections. This

was done after the bank holiday of 1933, and is still being done by banks. Such transactions would be with third parties in no way connected with the bank organization itself. We believe they would have the same constitutional protection against any state statute which would impair the obligations of their contracts with the bank, evidenced by such capital notes, as the bank itself would have growing out of its franchise contract with the state.

We do not find, in our research on this subject, any decision by the Appellate Courts of Missouri. We do find, however, a case decided by the Supreme Court of the State of Oregon, based upon quite similar facts to the proposed conditions which would exist in the present case, should the city of Kansas City, Missouri, extend its corporate limits on January 1, 1947, to take in Dodson, Missouri, where the "Peoples Bank of Suburban Kansas City" is located. The Oregon case is reported in 144 Pac., Page 452. The style of the case is Pacific Title & Trust Company v. Sargent, State Superintendent of Banks, et al.

The facts in that case were that two corporations, namely, Pacific Title and Trust Company and Oregon Realty and Trust Company were incorporated under the laws of the State of Oregon to do many things of the nature of banking, to hold real estate, and one of them, at least, was privileged to prepare and issue abstracts of title to real estate. These companies were incorporated under statutes very similar in terms to our Section 7940 and following sections providing for the incorporation of banks, including like terms and requirements as are contained in Section 7944 respecting the amount of capital to be provided by the corporation according to the population of the cities where such banks operate.

Sometime after the banks had been organized and were operating the State Superintendent of Banks of the State of Oregon sought to compel each of said institutions to drop the word "trust" from its respective corporate name. Injunction suits were filed by the two corporations to restrain the Superintendent of Banks and another from compelling them, under penal statutes of Oregon, to discontinue business. The two cases were consolidated and tried as one. The Circuit Court overruled demurres to the petitions and, the State Superintendent of Banks and others, party defendants, declined to plead further, and the court entered decrees restraining the defendants from interfering with the operations of said corporations, according to the prayers of the complainants. An appeal followed by the defendants to the Supreme Court of Oregon.

In affirming the judgments and decrees of the Circuit Court, the Supreme Court of that state in holding, l.c. 455, that

the State Superintendent of banks had no authority to revoke the charter of said institutions or compel them to discontinue the use of the word "trust" in their corporate names, the Supreme Court in its decision likened the effort of the Superintendent of banks to compel them to cease using the word "trust" to a possible effort to compel them to increase their capital stock. Of such an effort, had it been made, the court said:

> " * * * * The same reasoning applies to the attempt to force them out of business unless they will multiply their capital tenfold. The terms of the contract between them and the state were accepted by the state. To arbitrarily require them to increase their capital stock would be to violate the terms of its contract as much as if A. should agree to sell a piece of property to B. for $5,000, and when B. tendered the money to the former should require him to pay $50,000. The exercise of the police power must be reasonable and have a rational application to the peace, health, and safety of the people, and must not violate any constitutional right. Primarily the exercise of the police power means regulation and not extinction. It would be properly applied in the present instance by such rules as would fairly operate to promote the observance of their charter powers and responsibilities by the plaintiffs without direct destruction or violation of their vested rights, but it would be unreasonable to enforce such regulations as would practically obliterate them or compel them to a breach of their own contracts lawfully made."

In the case of Gladney v. Sydnor, 172 Mo. Court 318, our Supreme Court had before it the question of the impairment of the validity of a contract involving "vested rights", l. c. 329 the court said:

> " * * * * In the case of Bank v. Sharp, 6 How. 301, the doctrine is clearly announced that 'one of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of

encroaching in any respect on its obligation, dispensing with any part of its force.'

"The conclusions reached in this case that George W. Gladney had a vested right prior to the Act of 1895, and that such right can not be impaired by a subsequent statute and that if the Act of 1895 was intended to apply to him, it is retrospective in its operation and is in conflict with the organic law of this State, are supported by principles announced by this court, in analogous cases, and by conclusions reached in other States, in cases identical in principle with the one before us."

If, then, the state may not require a bank directly to change its capital structure, it certainly could not be held that it could be done indirectly by the Commissioner of Finance because of the change of boundaries of Kansas City, Missouri, to take in the territory of the smaller community where the said named bank is operating.

It would change the values of the contracts of the investors in the bank stock, and its operative contracts. It would impair the obligations of its contracts and, indeed, might very readily destroy them altogether. If an order were made upon the bank in question to increase its minimum capital to $200,000.00, when and if the boundaries of Kansas City were extended to include the territory of the bank, and the stockholders would be unable to supply means to pay for the increased capitalization, and other investors could not be found who desired to purchase such stock, the bank would be required, we think to liquidate. This most certainly would impair the obligations of the contracts with all persons making contracts with the bank because in fact such contracts would be destroyed, and the business of the bank itself would be destroyed.

Our Section 7944 is a constructive not a destructive act. The intent of the Legislature in enacting that statute and other sections of the banking code evidently was and is to give sparsely populated communities the opportunity to have immediate banking facilities, and, moreover, to permit persons of moderate means to organize a bank in such a community with a minimum capital of $25,000.00.

We further believe that the Legislature never intended by enacting said Section 7944 to require a bank in a community of 5,000 or less inhabitants to increase its capitalization merely because a city of 50,000 or more inhabitants should move out and take in the territory where such bank is operating.

CONCLUSION

It is, therefore, the opinion of this Department that: If the named bank, or any other bank, operating in a community of less than 5,000 inhabitants and which, under said Section 7944, may operate with a minimum capital of $25,000.00, should be permitted to change its location to a city having 50,000 or more population, which city, under said Section 7944, requires a minimum cash capital of $200,000.00, then the bank moving from the lesser inhabited community to the greater would be required to increase its minimum capital structure to $200,000.00, and in addition thereto 40% thereof as is provided in said Section 7944.

It is the further opinion of this Department that: A bank established and doing business in a community in this state which, as to population, permits banks to operate with a minimum capital structure of $25,000.00 would not be affected under said Section 7944, if a city having a population of more than 50,000 inhabitants should extend its corporate limits to include the location of such bank operating under a capital structure of $25,000.00. The bank with the capitalization of $25,000.00 could still continue to operate with that amount of capital notwithstanding the change in the city limits of a city.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General