Banks and Banking—Deposits—Depositor—Receiver.

Where a bank holds the note of a depositor and such note is due, but not otherwise, such note may be set off by the receiver of the bank against the amount due to the depositor from the bank, whether the amount due to such depositor be upon a certificate of deposit or upon a savings deposit.

Receivers may lawfully make any application of the depositor's money upon his indebtedness to the bank which the bank itself might legally have made.

L. Q. Skelton, Esq.,
Superintendent of Banks,
Helena, Montana.

My dear Mr. Skelton:

You have submitted to this office for my opinion the question whether the receiver of an insolvent bank may apply on the note of a depositor money to the credit of the depositor in the bank either in its savings department or on time deposit.

The general rule seems to be well settled by the great weight of authority that a bank may apply a debtor's deposits in a bank upon his debts to the bank as they become due. This rule is laid down in Corpus Juris, Vol. 7, p. 653, and the statement of the text is supported by authority from most of the states of the Union cited in the accompanying note, the only state apparently in which a contrary rule exists being Louisiana.

The rule is thus stated in Morse on Banks and Banking, 5th Ed., Section 559:

> "A bank, holding a note of a depositor, is under no obligation as against the maker to appropriate a sum sufficient to meet it from his funds on deposit immediately upon its maturity or indeed at any other particular time. * * * They are, however, at liberty at any time after maturity to make such application."

In Section 561 the same author states:

> "A bank has no legal right to retain a deposit to pay notes not yet due."

Citing:

Jordan v. Nat'l Shoe & Leather Bank, 74 N. Y. 467;
Commercial Nat'l Bank v. Proctor, 98 Ill. 558;
State Savings Bank v. Boatman's Savings Bank, 11 Mo. Appeals 292;
State Bank v. McCabe, 135 Mich. 479, 98 N. W. 20.

The general rule being as above stated, its application to your inquiry would seem to be apparent, unless there is some limitation upon the powers of a receiver or something about the nature of a

savings account or a certificate of deposit sufficient to take such deposits out of the rule above stated. I do not find such to be the case. A statutory receiver is simply a person appointed by the court to receive, care for and dispose of the property of an insolvent bank, subject to the control of the court.

Under Section 9306, Revised Codes of 1921, which defines the powers of a receiver, it is apparent that receivers, by virtue of their office, possess neither more nor less authority over property entrusted to their control than was originally had by the owner thereof.

It is, therefore, my opinion that a receiver may lawfully make any application of a depositor's money upon his indebtedness to the bank which the bank itself might legally have made. Neither do I find that there is anything about the nature of a savings account or a time deposit which would render them less applicable to the payment of a depositor's obligations to the bank than an open account.

I assume that the banks to which you refer are commercial banks which conducted savings departments. Our statutes contain no provision giving a depositor in a savings bank any preference in case of insolvency as against the bank, and the rule seems to be that:

> "Where a bank does a general banking business and also maintains a savings department, the savings depositors are sometimes, by statute, given a preference in case of insolvency; but in the absence of such a statute, savings depositors cannot acquire any preference over commercial depositors by virtue of an agreement between the corporation and savings depositors, which is not known of, and consented to, by the commercial depositors."
>
> 7 C. J. 879.

Since, therefore, commercial depositors and savings depositors stand on the same basis as between themselves and the bank, it is my opinion that the bank might lawfully make any disposition of the deposits of the one which it could do of the other. (I am, of course, expressing no opinion on a state of facts where a savings bank may, by its charter or by-laws, have precluded itself from applying a depositor's money in the above matter.)

A "certificate of deposit" is defined in Morse on Banks and Banking, supra, at Section 297, as "The written acknowledgment of the bank that it has received from a certain person a certain sum on deposit."

Substantially the same definition appears in 7 C. J., p. 646, adding the words:

> "which the bank promises to pay to the depositor, to bearer, to the order of the depositor, or to some other person" * * *.

Both of the above authors discuss the general status of certificates of deposit and note the fact that the courts are divided upon the question as to whether they are, in legal contemplation, receipts for money on promissory notes. In either case, my opinion is that the bank can apply them on the indebtedness of the depositor. Certainly, if they are "receipts for money" the general rule above stated would apply. If they are promissory notes (no question of assignment being involved) they and the depositor's note would be viewed as mutual claims which could be set off against each other. See

Steelman v. Atchley, 135 S. W. 902, 32 L. R. A. (N. S.) 1060, in which the court lays down the general rule that:

> "Mutual claims that are due a bank and depositor may be set off against each other. The bank's authority to do this is transmitted to the receiver, while the depositor's defenses are not impaired by the bank's insolvency." (Citing cases.)

It is, therefore, my opinion that if a bank holds the note of a depositor, such note if due, but not otherwise, may be set off by the receiver of the bank against the amount due to the depositor from the bank, either upon a certificate of deposit or a savings account.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.