

debts due it is not waived by officers' deposit of state funds, without legal authority or security, in a bank not designated as a depository. Where, however, the depositing officer demands and receives from the bank good and sufficient security for the payment of the deposit, this is a waiver of preferential priority to the extent of the security.

"But when the deposit is made without legal authority, and without security otherwise required, there is no legal enactment which shows a purpose to limit its (the State's) sovereign right to a preference, so that there is then no evidence of a waiver of such right to any extent."

Montgomery vs. State, supra.

In the absence of the necessary allegations above indicated the petition is without equity, and the Register will enroll the following decree:

D E C R E E:

This cause coming on to be heard is submitted for decree on demurrer to the petition, and upon consideration thereof I am of the opinion that said demurrer is well taken.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that said demurrer to the petition be, and the same hereby is, sustained.

Petitioner is allowed thirty days from the filing of this decree to amend his said petition if he is so advised.

This 19th. day of June, 1934.

J. W. Hare
Judge.

S. M. THARP, SUPERINTENDENT OF
 EDUCATION OF BALDWIN COUNTY, ALABAMA,)
)
 VS.)
)
 CONSOLIDATED STATE BANK IN)
 LIQUIDATION.)

IN THE CIRCUIT COURT OF
 BALDWIN COUNTY, ALABAMA.
 In Equity.

This cause is submitted on demurrer to the petition, which demurrer is merely the general demurrer that there is no equity in the petition.

The petition is filed by S. M. Tharp, as Superintendent of Education of Baldwin County, Alabama, and seeks ~~an~~ establishment as preferred claims of the Baldwin County Board of Education three separate deposits in the Consolidated State Bank of Robertsdale, now in liquidation. It appears from the petition that these three claims were originally filed by the County Board of Education as preferred claims, but allowed as common claims. This petition is filed under Section 6312 of the Code, but not by the Claimant as therein provided. However, this point is not specifically raised by demurrer, and the petition being for the use and benefit of the claimant, this technicality should be waived. The assets of the bank are being administered by the Superintendent of Banks as a trust estate, and it is the duty of the Court to see to it that those entitled to the assets of the bank receive them. The Superintendent of Banks, as Trustee in this case, is not interested in defeating just claims on technicalities, but in the proper and lawful administration of his trust.

The insistence of the respondent that the claims are not preferred claims is based upon a misapplication of the recent case of H. H. Montgomery, etc. vs. City of Athens (MMS) to the facts in the instant case, and a misconception of the nature, powers and functions of the County Board of Education and a School District. It is insisted in brief that a School District, like a municipality (treated in the case just cited), is a voluntary agency, and that the rule applied in City of Athens

case should apply here.

In the recent case of Turk vs. County Board of Education of Monroe County, 131 South. 436, it is ruled that:

"A school district, under our system of government, is merely an agency of the State. xxx They are involuntary corporations, organized not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as were deemed necessary for that purpose. Such Corporations are but the agents of the State, for the sole purpose of administering the state system of public education."

And again: "The County Board of Education has been designated as a quasi corporation, an independent agency of the State for the purposes enumerated in the Statute."

Alabama School Code, Article VI, page 44;

Greeson, etc. vs. County Board of Education, 217 Ala. 565; 117 South. 163.

It is alleged in the petition that the deposits in question were made by the Trustees of the Robertsdale High School, bringing them within the letter of Section 3973 of the Code; and under the rulings of our Supreme Court these deposits would be preferred claims, provided these Trustees failed to ~~require~~ of the bank good and sufficient security to secure the payment of the funds deposited.

Green vs. City of Homewood, 222 Ala. 225; 131 So. 897;

Montgomery vs. Sparks, 225 Ala. 343; 142 So. 769.

Unquestionably these deposits were and are state funds, and unquestionably, too, the state has a prerogative right of preference in payment from the assets of the bank, provided the state has not waived this right. It will not be presumed that the deposits were unauthorized and unlawful, nor that the officers of the bank knew that they were unlawfully made by the school trustees, nor that the bank official improperly comingled these trust funds with the general assets of the bank.

Montgomery vs. State, 153 South. 394.

The State's sovereign right to preferential payment of

Superintendent of Banks of the State of Alabama, is in charge of the liquidation of said bank."

The assignments of error by the appellant-respondent, as Superintendent of Banks, challenge the action of the Circuit Court in overruling the demurrer of appellant to the bill of appellee, and to the phase or aspect of the bill in which it is sought to have a trust declared against the assets of Farmers and Merchants Bank; and in rendition of its decree that petitioner-appellee is entitled to a preferred claim against the assets of said bank and lien upon said assets to the extent of \$1377.60, and declaring the claim of petitioner in part a preferred claim.

The question of prerogative right of a state or county to a preference in a proper case, to be paid from the assets of an insolvent bank, was considered in Montgomery, Superintendent of Banks v. State, 153 So., 394; Montgomery, Superintendent of Banks v. Sparks, Tax Collector, 225 Ala., 343; Green, Superintendent of Banks v. City of Homewood, 322 Ala., 225; and touched upon in Limestone County v. Montgomery, Superintendent of Banks, 226 Ala. 266; Montgomery, Superintendent of Banks v. Wadsworth, Ib 667. The rule of the former cases is discussed and amplified in Montgomery, Superintendent of Banks v. State, 153 So. 394. and the extent to which the doctrine of sovereign right will apply exemplified. There is quite a distinction in law between the status of a county and that of a city. A county is an involuntary association created as an arm of the State, that the latter may more properly function; whereas, a town or city is a voluntary association created and built upon the voluntary assent of the community and its citizens, and enjoys the privileges and rights given in its charter of creation and the laws governing the same. This distinction between County and City entitles is drawn and recognized by text-writers (19 R.C.L., page 1111; 43 C.J. p. 183; Ann Cas. 1928-D, 106 and note; L.R.A. 1917-E 685) and the rule of the general decisions and our Constitution and statutes.- Sec. 37, 38 Constitution; Sec. 220 et seq. and Sec. 1739, et seq. Code.

It is further established in this jurisdiction, that a city or town engaging in the business of furnishing electric lights, water, etc., is not in the exercises of governmental powers or functions, but of proprietary or business powers, and it is governed by the same rules of law applicable to persons or ordinary business corporations engaged in a like business.- Town of Athens v. Miller. 120 Ala. 82, City of Birmingham v. Whitworth, 218 Ala. 603., See also 19 R.C.L. page 691, et seq., Sec. 4, pages 696, 697, Sec. 8 and 9.

We are of opinion, and so hold, that there is not prerogative right in the City of Athens and therefore, no preference in the payment of its claims over the general depositors and creditors of the bank; that there was no unauthorized or unlawful deposit of funds, of the several classes indicated, that created a trust relationship, in the funds remaining in the bank, between the bank and the community, which gave a superior right and lien on the general funds and assets of the insolvent bank;

The most that the city is entitled to, if at all, is to share ratably with other depositors in distribution of the assets of the insolvent bank; thus we dispose of the assignments and cross-assignments of error.

The decree of the circuit court is reversed and the cause is remanded.

Reversed and remanded.

Anderson, C.J. Brown, and Knight J.J. Concur.

S.M.Tharp,

VS.

Consolidated State Bank of
Robertadale,

THE STATE OF ALABAMA
Baldwin County

IN EQUITY
Circuit Court of Baldwin County

This cause is submitted in behalf of Complainant upon the original Bill of Complaint,
Summons, and Brief,

and in behalf of Defendant upon Answer and Brief,

Wm. A. Stone
Register.

LAW OFFICES
ELLIOTT G. RICKARBY
ROBERTSDALE, ALA.

June 2, 1934

Hon. F. W. Hare
Judge Circuit Court
Monroeville, Alabama

Dear Sir:-

THARP SUPT. VS MONTGOMERY SUPT. NO.29: This case which is a petition for a ruling as to whether school funds on deposit in a Bank now in liquidation constitute a preferred claim is now submitted on demurrer to the petition and if this be overruled, for final decree.

We submit that the determination of this question is one of little difficulty as it has already been decided in a number of cases based on the opinion of Chief Justice Anderson in Montgomery, Supt. vs Sparks Tax Collector, 142 So.769, where the Court say:

"It is a principle supported by numerous authorities that the unsecured deposit of public funds in a bank which subsequently becomes insolvent creates a trust relationship between the bank and community to which they belong.... the lien, of the State for payment of the trust fund will attach to all assets of the bank as a preferred claim."

This case has been the basis of opinions of the Attorney General sustaining our contention, one of which was given on a similar situation arising in this county, a copy of which is attached hereto. In view of this I submit that the Robertsdale School is entitled to the relief prayed and submit a form of decree to this effect for your signature.

Needless to say, a copy of this letter has been sent Mr.Beebe, who represents the Bank.

Respectfully submitted,

Elliott G. Rickarby
Solicitor for Petitioner.

EGR/J

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September 16, 1932

Dr. J. N. Baker, M. D.
Department of Public Health,
CAMPBELL T O L.

Banks and Banking-- Unsecured deposit of the State Health Officer
in defunct bank a preferred claim.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 24, 1932, together with
correspondence and a fiduciary depositor's agreement concerning
the Baldwin County Bank at Bay Minette, Alabama. You state that
some months ago, when said bank closed its door, there was on de-
posit in your name as State Health Officer for use in the operation
of Baldwin County Department of Health the sum of \$508.23, which
deposit was unsecured. You state further that an effort is being
made at the present time to reopen the institution, which effort
makes necessary for practically all the depositors to enter into a
certain agreement a copy of which I have on hand.

You request my opinion as to whether or not you should
sign the enclosed agreement giving consideration to the fact that
the deposit above referred to may be a preferred claim.

In answer to your inquiry I am of the opinion that the
deposit in question is a preferred claim against the assets of the
bank and that it would not be to your advantage to sign the agree-
ment in question.

In the instant case there is a deposit of public funds
in a bank and no bond or security was given for the safe return of
the funds as provided by Section 2973, Code of Alabama, 1923. Such
constituted an unauthorized deposit of public funds. The State has
a lien or preferred claim to the funds of the bank - Montgomery,
Superintendent of Banks vs Sparks Tax Collector, 142 So. 769, The
Court in said case, speaking through Chief Justice Anderson stated
as follows:

"It is a principle supported by numerous authorities
that the unsecured deposit of public funds in a bank which subse-
quently becomes insolvent creates a trust relationship between the
bank and community to which they belong... the lien, of the State
for payment of the trust fund will attach to all assets of the bank
as a preferred claim..."

In view of the above, I am of the opinion that the
deposit in the instant case is a preferred claim and further that
it would not be to your advantage to sign the agreement in question.

I am enclosing the attached correspondence and the
agreement in this matter.

Yours truly,

Thomas E. Knight, Jr.,
Attorney General

BEEBE & HALL
LAWYERS
BAY MINETTE, ALA.

W. C. BEEBE
H. M. HALL
J. P. BEEBE

June 9, 1934.

Hon. F.W. Hare,
Monroeville, Alabama.

Dear Sir:

IN RE: THARP VS CONSOLIDATED STATE BANK.

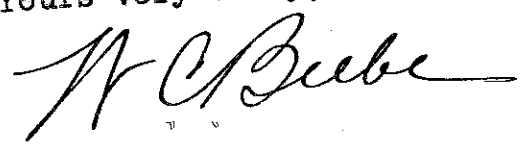
On the 7th the Supreme Court handed down a decision in the case of Montgomery VS the City of Athens.

I am enclosing you a copy of the opinion. This case, in our opinion, precludes the petitioner's preference in all events.

It will be noted from the allegation of the petitioner's bill, the funds were derived from municipal taxes, and although it is not alleged in the bill that they were donated to the Robertsdale School district. The Robertsdale School is a district. Under our constitution and statutes, it is a voluntary agency created similar to a municipality.

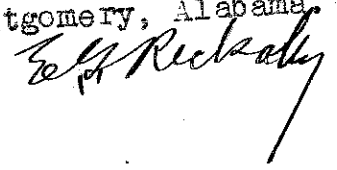
So whether the funds be treated as municipal funds, or whether they be treated as school district funds, in either event, the Athens case denies the right of preference.

Yours very truly,



WCB/y

c/c Supt. of Banks,
Montgomery, Alabama



June 7, 1934

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1933-34.

8 Div. 589
539-A

H.H. MONTGOMERY, AS
SUPERINTENDENT OF BANKS.
etc.,

v.

City of Athens and
Cross Appeal

Appeals from Limestone Circuit Court. In Equity.
THOMAS, J.

The case in equity was upon an agreed statement of facts and the pleadings.

The bill in equity against the Superintendent of Banks, liquidating the affairs of the Farmers and Merchants Bank of Athens, Alabama, sought a preference for municipal funds deposited in that insolvent bank.

The agreed statement of facts shows that the several deposits were made in due course by the treasurer of the city with the bank, and that they were of three classes: (1) "General fund of the City," (2) "Special tax fund of the city," and (3) those funds collected under several ordinances designated as Nos. 20, 23, 33, 34, 35 and 36.

These several items are shown to be as follows:

(1) "the general funds of the city so on deposit were funds received by the City of Athens for electric lights, water, taxes, fines and costs; the said city being at the time engaged in furnishing its citizens electricity for lighting purposes and operating waterworks;" (2) "the special tax fund of the city, on deposit in said bank at the time the same failed and closed its doors, were funds collected by the said city for taxes from the taxpayers within the municipality;" (3) "all of the money above referred to as having been money collected under ordinances # 20, 23, 33, 34, 35 and 36, was money collected by the City Clerk of the City of Athens, Alabama, under improvement ordinances, which improvement ordinances were ordinances drawn under the law of the State of Alabama, and duly adopted in the years 1920 and 1921 with reference to street and sanitary improvements, and that bonds were sold under said ordinances, which are now unpaid and assessments collected by R.A. Smith, City Clerk of Athens, Alabama, who was the city official charged with the duty of collecting said assessments and by him deposited to the credit of said city treasurer and at and by the request of said Howard in said Bank to the several accounts as above designated; that all of said money was on deposit in said bank in the name of said William J. Howard, as Treasurer of the City of Athens, and same was to his credit under the above mentioned funds and ordinances, each being kept separately on the books, but in truth and in fact said money was not kept by said bank, separated and apart from the general funds of the bank, but was co-mingled with

SUMMONS--ORIGINAL.

The State of Alabama, } Circuit Court of Baldwin County, In Equity.
Baldwin County.

To Any Sheriff of the State of Alabama--GREETING:

WE COMMAND YOU, That you summon Consolidated State Bank of
Robertsdale, Ala.

of Baldwin County, to be and appear before the Judge of the Circuit Court
of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Sum-
mons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

S. M. Tharp,

against said Consolidated State Bank,

and further to do and perform what said Judge shall order and direct in that behalf. And this the
said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this
writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, M. A. Stone, Register of said Circuit Court, this 25th day of
April 1934

M. A. Stone Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

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RECORDED

S. M. THARP
Superintendent.

VS

CONSOLIDATED STATE BANK
In Liquidation .

APPEAL FROM RULING
of
SUPERINTENDENT OF BANKS.

Filed - 2/24/38
M. A. Stone
ABH

ELLIOTT G. RICKARBY
LAWYER
FAIRHOPE, ALABAMA