

## Opinion No. 24-3754

February 8, 1924

**BY:** MILTON J. HELMICK, Attorney General

**TO:** Requested by: Hon. L. B. Gregg, State Bank Examiner, Santa Fe, New Mexico.

### **Right of Set-off Against Receiver of Bank is Governed by Conditions Existing at the Moment of Insolvency and not by Conditions Thereafter Created.**

"Moment of Insolvency" Defined.

### **OPINION**

{\*127} This inquiry arises upon the following facts:

The First National Bank of Alamogordo, New Mexico, closed its doors on November 15, 1923 and a Receiver was appointed on January 5, 1924. At the time of closing, the bank rented to the Postoffice the premises then, and now, occupied by it. The Postoffice had a deposit in the bank and desires to off-set the amount it owes for rent from November 15, 1923 to January 5, 1924 against its deposit. In other words, the Postoffice desires to offset the rent which accrued after the closing of the bank and before the appointment of a Receiver. Inquiry is made whether such an offset is legal.

The general rule is that the right to a set-off against the Receiver of a bank is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created. The question as to when the "moment of insolvency" occurs has been before the courts in a number of cases and, usually, the courts have not taken any technical view of the matter, but have held that insolvency exists when a bank closes its doors and suspends business. The courts have usually held that it is not necessary that insolvency be established by a decree of the court on the appointment of a Receiver, but that actual insolvency is what is meant.

Applying the above general principles to the inquiry, it would seem that the Postoffice would not have a right of set-off for rents accruing after the "moment of insolvency" of the bank, which was on November 15, 1923 when the bank closed its doors and suspended business.