IN RE: AWARD:--RIGHT OF MORTGAGEE TO AWARD MADE UNDER CONDEMNATION PROCEEDINGS.

June 1, 1933.

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Hon. Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Attention: Mr. H. S. Johnson
Chief Clerk.

Dear Sir:

This department is in receipt of your letter of May 24 in which you request an opinion from this office as to the proper method of handling the following case:

> "On March 15th, last, your office issued check for $70.00 payable to C. C. Vickers, Novella Vickers and Wellman Arthur, in payment for right of way for land taken for Farm To Market Road South of Mt. View, in Howell County. A deed was duly executed and delivered to the Public at that time for the land taken. The check was made jointly. At that time the Vickers were the legal owners of the land. Arthur held a mortgage on the land deeded only. No agreement whatever I am advised was made between these parties concerning a division of the money. Nor did the deeds delivered, I am told make any provision concerning who was to receive the money. Arthur wants all the money and will not sign the check so that it may be cashed unless it is given to him. My clients, the Vickers claim the entire sum as legal owners of the land at the time the deeds were executed. They are in my opinion entitled the entire sum in the absence of some stipulation to the contrary."

Section 21 of Article II of Constitution of Missouri provides:

> "That private property shall not be taken

> or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

The majority view on the question of where mortgaged property is taken in eminent domain proceedings is that the mortgagee is entitled either to the whole award made for the condemned land or to a share thereof to the extent of its interest or damage. The courts are not unanimous on this proposition, however, many authorities holding that in the absence of a statute providing for compensation to the mortgagee, the mortgagor may recover the full amount of compensation without regard to the mortgagee; the latter having his remedy against the mortgagor.

The Missouri cases seem to follow the doctrine that the mortgagor is entitled to the payment of the award in the case of Thompson v. The Chicago, etc. Ry. Co., 110 Mo. l. c. 163; the court said:

> "The damages awarded to the owner stand instead of the land, and can be subjected to the payment of the incumbrance. Railroad v. Brown, 12 L. R. A. 84, and notes.
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> "'The burden of proof is on the mortgagee to show to what extent he has a claim upon the funds; and that question is then litigated between the parties in interest, and not at the cost of the taker of the land.' 1 Jones on Mortgages (4 Ed.) sec. 681 a.
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> "'The land-owner is entitled to full damages, and the question as to the distribution of the money between the mortgages is a question which does not concern the plaintiff.' Railroad v. Baker, 102 Mo. 553.'"

In the case of Chicago, etc. Ry. Co. v. Baker,

103 Mo. 1. c. 560, the court said:

> "The mortgagees are no doubt entitled to have the damages awarded by the jury applied to the payment of the mortgage debts, and they can still have that done. They might have demanded a separate assessment of damages as to the lands embraced in each deed of trust, but they made no such request, and they are not here making any complaint. The fact that the jury awarded the damages in one sum to defendant Baker is a matter of which the plaintiff has no right to complain. The mortgagees may waive their right to the money, if they see fit so to do, or they can still have their rights adjusted. The land-owner is entitled to full damages, and the question as to the distribution of the money between the mortgagees is a question which does not concern the plaintiff."

These two cases were cited with approval in the case of Cassville School District, v. McArtor, 286 S. W. 729.

While these cases might seem to bear out the contention that the award might safely be made to the mortgagor, the case of Morgan v. Willman, 1. S. W. (2d) 193, held that a mortgagee was, under the section of the Constitution cited supra, an "owner"; so that payment made to the mortgagor upon the authority of the railroad cases cited supra would not bind the mortgagee. The court said:

> "After a careful and thoughtful analysis and study of the authorities bearing upon the question, we are constrained to the view, and so hold, that the interest of plaintiff in the land in controversy, by reason of being the owner and holder of the note secured by the deed of trust upon such land, is "property," and that plaintiff is the "owner" of property, within the meaning and intent of Chap. 21, art. 2, of the Constitution, and the applicable statutes of this state."

- mortgage interest as property.

The court then went on and concluded:

> "Under a statute requiring an award in condemnation proceedings to be paid to the persons entitled thereto respectively, or into court for their use, the mere payment of the amount of the award, without designating the owners, to the clerk of the court, who turns it over to the owner of the equity of redemption, who settles the judgment as to his interest only, does not bind the beneficiary in the mortgage, who was notified merely by publication, and claims under assignment of the mortgage, although the trustee and beneficiary named in the mortgage were made parties to the action."

Therefore, it is the opinion of this office that the proper method of handling the case which you now have before you is as follows:

(1) The money should not be paid to the Vickers as the legal owners of the property unless a release be first obtained from the mortgagee, or unless the parties can come to some agreement as to the award.

(2) In the event that a release can not be obtained or there can be no agreement reached, the money should be paid to the court and the parties required to interplead so that their respective interests may be legally adjudicated.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JWH/AJ