BUILDING AND LOAN : Administrators, Executors, Guardians, and Curators are not included in term "trustees of trust funds" in Laws of 1937 page 508.

August 28, 1937.

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Hon. J. W. McCammon,
Supervisor, Bureau of
Building & Loan Supervision
Jefferson City, Mo.

Dear Mr. McCammon:

This department is in receipt of your request for an opinion which reads as follows:

> "I am enclosing house bill No. 190, on which I desire your opinion as to whether or not said act permits "administrators, guardians and executors" to invest in building and loan shares which are insured by the Federal Insurance Corporation.
>
> You will note that the words "administrator, executor and guardian" are not found in the bill, but the words "invest their trust funds and other funds or moneys in their custody or possession" and the word "trustees" are the only reference to persons acting in a fiduciary capacity.
>
> You will readily understand that this bill is a great aid to savings and loan associations that have their shares insured and I am particularly anxious that such building and loan associations may have all possible avenues of business open to them. In this connection, I might add that while this bill will not be in effect until 90 days after the adjournment of the legislature, plans are already on foot to set the machinery in motion so that executors, administrators and guardians may invest.
>
> There is a diversity of opinion, particularly among probate judges, as to whether such could order or approve an investment in insured shares by administrators, executors, etc.

There was handed to me two memos which may be of value to you in reaching a decision and I am enclosing them herewith and request that same be returned when they have served your purpose.

If by executive interpretation this house bill can be held to be inclusive enough to permit administrators, executors and guardians to invest in federally insured shares, it will be in line with my thoughts on the matter. However, if house bill no. 190 will not permit of such interpretation, then before you promulgate your official opinion, I will appreciate it very much if you will notify me so that I may present other citations of authorities that I may have at my command.

It might be necessary to have house bill No. 190 amended, but in the meantime, if you could give a ruling similar to that given as to Home Owners Loan bonds, then building and loan associations will profit, as I believe the legislature intended that executors and guardians could so invest, and will, if necessary amend said bill at the next session in that particular."

House Bill No. 190 may be found in Laws of 1937, page 508, and provides as follows:

"It shall be lawful for banking institutions, trust companies, insurance companies, loan and investment companies, mortgage loan companies and trustees of trust funds, and they are authorized to invest their trust funds and their funds and moneys in their custody or possession, in the stock and/or savings accounts in any federal or state building and loan association a member of a Federal Home Loan Bank, and insured by the Federal Savings and Loan Insurance Corporation, and said institutions and trustees of trust funds are further authorized to become members of said associations according to the Charter and By-laws of said associations; Provided, that no such investment may be made in excess of the maximum amount for

which such a stock or savings account may be insured.

"The stock and/or certificates of savings accounts in said associations may be eligible as security for all public deposits in depositories or by public officials, deposits of state or any political sub-division thereof where bonds or deposits are required by law to be deposited."

The question presented is whether the phrase "trustees of trust funds" as used in the above statute is broad enough to include administrators, executors, guardians and curators. Section 104 R. S. Mo. 1929 provides as follows:

"Surplus money may be loaned, when.-- If, on the return of the inventory, or at any other time, it shall appear to the satisfaction of the court that there is a surplus of money in the hands of the executor or administrator that will not shortly be required for the expenses of administration, or payment of debts, it shall have discretionary power to order him to lend out the money on such terms and for such time as may be deemed best."

Section 410 R. S. Mo. 1929 provides as follows:

"When it shall appear that it would be for the benefit of the ward that his real estate, or any part thereof, be sold or leased, or his personal property, or any part thereof, be sold, and that the proceeds be put on interest or invested in United States or state bonds, or in any other real estate, or in <u>any other personal property</u>, or in the preservation of the estate of the minor, the probate court may authorize and order such sale, leasing or investment."

Section 418 Laws of Missouri 1935, p. 186, provides in part as follows:

"Guardians and curators shall, unless the money be invested in improving the real estate of wards as hereinafter

> provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or bonds guaranteed by the United States, or of the State of Missouri, or of the federal farm loan bank."

In Stephens v. Stephens, 232 S. W. 979, the Supreme Court held that under Section 418, supra, a guardian or curator without an order of the probate court may loan the money of their wards on prime real estate security or invest it in bonds of the United States or bonds guaranteed by the United States or of the State of Missouri. Therefore we are to ascertain whether House Bill No. 190 allows such funds to be invested in building and loan shares without an order of probate court or must Sections 104 and 410 be followed.

In the memorandum attached to your request, several reasons are advanced as to why administrators, executors, guardians and curators are "trustees of trust funds" so as to bring them within the purview of the statute allowing such fiduciaries to invest in building and loan shares. We will note in passing, several reasons why it may be inferred that the Legislature did not intend to include such persons in the term "trustees of trust funds":

1. An executorship or administratorship is not a trust nor is a guardianship a trust, Restatement of the Law, para. 6 and 7, pp. 22-27. In McCune's Estate v. Daniel, 76 S. W. (2d) 403, the Supreme Court of Missouri recognized the difference between a trustee and a guardian:

> "This will does more than authorize the probate court to appoint Daniel, curator of the estates of the minors and in fact appoints and invests with the power and duties of a trustee with respect to the funds of the estate * * * Had the will in this case done nothing more than designate Daniel as curator of the minor children and the probate court had appointed him such, then the provisions of Section 412 R. S. 1929 would apply. But the present will not only nominate Daniel as curator, but expressly imposed on him the duty as well as power to invest the surplus funds of the estate in foreign lands. That the defendant was to act in the capacity of

> trustee, rather than as a mere statutory curator is evidences by the provisions of the will."

2. The Legislature in similar statutes have included administrators, executors, guardians and curators as well as trustees. Section 2921 R. S. Mo. 1929, wherein the Legislature provided for investments in bonds registered by the State Auditor, reads, in part, as follows:

> "They shall also be eligible for the investment of any funds in the possession of any administrator, executor, guardian, curator, trustee and all other persons sustaining fiduciary relations. Such investments may be made without an order of court first had and obtained, and without incurring liability for loss, except in case of inexcusable negligence."

We may, therefore, infer that the Legislature in enacting the instant statute did not intend to include administrator, executor, guardian and curator, since they could have used these words as they did in the statute quoted above, so there would be no ambiguity.

3. The statute provides that the "trustees of trust funds" are authorized to become members of said associations. It is a well considered principle of law that an investment must not be made in the name of the guardian, but in that of the ward, 28 C. J. p. 1145. It may, therefore, be inferred that since the act provides that the trustee shall become a member, that it was not intended that it should include a guardian or curator who must make the investment in the name of the ward.

However all the above is noted only to show that the intention of the Legislature might be construed as not to include administrators, executors, guardians and curators in the term "trustees of trust funds."

The rule of statutory construction that applies in this case is given in 59 C. J. para. 510.

> "The repeal of statutes by implication is not favored. The courts will not enlarge the meaning of one act in order to hold that it repeals another by implication".

House Bill No. 190 does not expressly repeal sections 104 and 410 R. S. Mo. 1929. The repeal of a statute by implication is not favored in Missouri and the acts should be construed if possible so both will stand and be given effect. State ex. rel Karbe v. Bader, 78 S. W. (2d) 835, 336 Mo. 259.

Therefore in order to construe House Bill No. 190 as allowing executors, administrators, guardians and curators to invest in building and loan associations, we must first imply that the term "trustees of trust funds" includes the four classes above and then we must further imply that the legislature intended to repeal Sections 104 and 410, supra. This is repealing statutes by basing an implication upon an implication or as was aptly stated above, it is "enlarging the meaning of one act in order to hold that it repeals another by implication". We believe the rule is well stated in Roxana Petroleum Company v. Cope, 269 Pac. 1084, 132 Okla. 152:

> "Let it be remembered in beginning the consideration of this question that the Compensation Law of this state makes no mention of minors, and it is only by implication that they can be included within any section of that law, and this seems to be admitted. And having by implication brought them within the Compensation Law, and given them thereunder the rights to adults, upon this implication, as a foundation, we are then asked to hold that the act has changed, abrogated, and superseded the common law and older statutory rights of the parents. And that by building one presumption or implication upon another we should destroy the rights of parents which have existed without question until we were here asked to apply this new and strange doctrine.
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> "No authority is necessary to sustain the proposition that repeals by implication are not to be favored, and that to strike down a value right given by a statute and also existing by common law, merely upon an inference to be drawn from a new statute, presents an unhappy manner of adjudicating those rights and holding that they no longer exist."

CONCLUSION.

It is, therefore, the opinion of this department that

"trustees of trust funds" as provided for in Laws of 1937, page 508, does not include administrators, executors, guardians or curators and that such persons must follow the preceedure as laid down in sections 104 and 410 R. S. Mo. 1929 when investing in shares of building and loan associations; and it is our further opinion that a probate court has power and authority, under such sections, to approve investments in building and loan shares, which are insured by the Federal Insurance Corporation.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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