BANKS AND BANKING: Banks have authority to pledge assets to secure loans for purposes of merger or consolidation.

January 17, 1936. 1-18

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Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of January 16, 1936, in which you request the opinion of this Department on the question submitted by Mr. Francis C. Brown, Counsel, Federal Deposit Insurance Corporation, to you in his letter dated January 14, 1936. We herewith set forth both letters as follows:

"I am enclosing herewith a copy of a letter dated January 14, 1936, received via Air Mail from Mr. Francis C. Brown, Counsel, Federal Deposit Insurance Corporation, Washington, D. C.

"At the present time we have several cases pending where, in order to effect the consolidation, it will be necessary for the selling bank to make application for a loan from the Federal Deposit Insurance Corporation under Paragraph 4 of Subsection (N) of Section 12B of the Federal Reserve Act, as amended.

"I, therefore, shall very much appreciate it if you will give immediate attention to rendering the opinion requested in the attached letter.

Yours very truly,

(Signed) O. H. MOBERLY
Commissioner of Finance."

"With reference to the banks which were recently a subject of discussion between you and Mr. Crowley as possible applicants for loans from this Corporation under Paragraph 4 of Subsection (N) of section 12B of the Federal Reserve Act, as amended, we would like to have you furnish us with an opinion from the Attorney General of your State with respect to the right of the institutions in question to borrow money in the amounts proposed and to pledge the assets of the kind and value contemplated in each instance.

"In the event your Attorney General has already rendered an opinion dealing with the extent to which banks may borrow money and pledge assets, this may suffice but in the event that no such opinion has been rendered it will be necessary that we be furnished with a general opinion on this subject in connection with any definite proposal which may be forthcoming concerning these banks.

Yours very truly,

(Signed) FRANCIS C. BROWN
Counsel. "

Your question pertains to the power and authority of banks in Missouri to pledge their assets and borrow money under the circumstances as outlined in Mr. Brown's letter.

We note from your letter that in order to effect the consolidation of the banks in question that it will be necessary for the selling bank to make application for a loan from the Federal Deposit Insurance Corporation under the provisions of Paragraph 4 of sub-section "(n)" of Section 12B of the Banking Act of 1935, Title 1 - Federal Deposit Insurance; which section is as follows:

> "Until July 1, 1936, whenever in the judgment of the board of directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or, with the approval of the Comptroller of the Currency, any receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans."

The power and authority of a bank to borrow money and pledge its assets as security for the loan has not been questioned in this State. In one of the earlier cases on the subject, decided in 1878, Ringling v. Kohn et al., 6 Mo. App. 333 l. c. 335 and 337, the court said the following:

> "The charter gave to the corporation general banking powers in terms such as are usually employed for that purpose. Sess. Acts 1857, p. 642, sect. 6. Nothing is said about borrowing money. But it is elementary law that a corporation may exercise any unforbidden power which is necessary to carry into effect the powers specially granted. It would be a strange limitation of the authority to purchase

exchanges, or to loan money, which should deny a simple means of obtaining occasional supplies for the purpose. A specific authority to borrow money rarely, if ever, appears in any bank charter. It has always been esteemed a necessary and inherent privilege, inseparable from the exercise of banking functions. Without it no bank, however ample its assets, could at times avoid insolvency. Curtis v. Leavitt, 15 N. Y. 9.

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"In Barnes v. Ontario Bank, 19 N. Y. 156, the court said: 'That the power to borrow existed was determined by this court in the case of Curtis v. Leavitt. That the cashier, in virtue of his general employment, could exercise the power was not denied upon the argument, and the proposition does not admit of a reasonable doubt.'

"Said Story, J., in Fleckner v. United States Bank, 8 Wheat. 357: 'The acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed prima facie evidence that they fell within the scope of his duty.'

"The cases are numerous in which it is held that the cashier of a bank may, by virtue of the general nature of his employment, transfer to outside parties any of the notes, bills, or other securities belonging to the bank, and the transferees need look no further for his authority so to do than to the fact of his being the cashier. Kimball v. Cleveland, 4 Mich. 606; Lafayette Bank v. State Bank, 4 McLean, 208; Bank v. Wheeler, 21 Ind. 90; Robb v. Ross County Bank, 41 Barb. 586; Wild v. Bank, 3 Mason, 505."

What was said in the above case was cited approvingly in the case of Donnell v. Lewis County Savings Bank, 80 Mo. 165, wherein the court said,at page 170, the following:

> "'Where general banking powers powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor. 2. In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors, or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima facie evidence that they fall within the scope of this duty.' These positions are well supported by the numerous authorities cited and relied on by the court of appeals in its well considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that. (Cases cited.)"

In these cases the courts held that the cashier of a bank had a right to borrow money and pledge the assets of the bank to secure same. However, in 1895, by the Laws of Missouri, 1895, page 120, it was provided:

> "* * * The cashier or any other employe shall have no power to endorse, sell, pledge or hypothecate, any notes, bonds, or other obligations received by said corporation for money loaned, until such power and authority shall have been given such cashier or employe by the board of directors. * * * *"

This statute has been amended and it now stands as Section 5380, Revised Statutes of Missouri, 1929, and is the present

statutory law on the subject. The pertinent part of said section provides as follows:

> "* * *The cashier or any other officer or employe shall have no power to endorse, pledge or hypothecate any notes, bonds or other obligations received by said corporation for money loaned until such power and authority shall have been given such cashier or other officer or employe by the board of directors, pursuant to a resolution of the board of directors, a written record of such proceeding shall first have been made; and a certified copy of said resolution, signed by the president and cashier with the corporate seal annexed, shall be conclusive evidence of the grant of such power. * * * * *"

This section, by limiting the powers of the cashier to pledge the assets of the bank to secure borrowed money, recognizes the general powers of the bank to pledge its assets for the reason that the statute states that such authority must be by action of the board of directors. In addition, the borrowing of money and a pledging of the bank's assets to secure same, is a well-established policy and common practice in Missouri, notwithstanding the paucity of cases on the subject in this State.

As was said by the Supreme Court of Missouri in the case of Cantley v. Little River Drainage District, 2 S. W. (2d) 607, l. c. 611:

> "These sections place limitations on officers of the bank as to certain named things, which includes the hypothecating of the bank's notes and securities, but they do not limit the bank itself, when acting through its directors. That the bank itself can borrow money and pledge its notes as security for the payment thereof cannot be questioned. It is done every day in the commercial world. Nor is there any limitation as to the person or corporation from whom it may

> borrow. When we say that banks cannot borrow money we have gutted the modern banking business. When we say that the bank can borrow money, we mean when acting through its board of directors and the authority given by such board of directors to other agents of the bank."

It is, therefore, the opinion of this Department that State banks in Missouri have the general power to borrow money and pledge the assets of the bank to secure same, and it is our further opinion that the banks, under the circumstances mentioned in your letter, would have authority to pledge their assets to secure said loans upon a duly authorized resolution of the board of directors of said banks.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

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