STATE TREASURER: Federal Housing Administration first deed of trust notes do not of themselves become legal collateral for state moneys deposited.

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June 18, 1935.

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Honorable Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Attention of Mr. H. S. Johnson,
Chief Clerk.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "I am enclosing herewith letter from the Merchants Bank, Kansas City, Missouri, and wish you would give me your official opinion as to whether first mortgages, insured by Federal Housing Administration under Title II, are eligible to be deposited with the State as collateral on bank deposits."

Section 15 of Article X of the Constitution of Missouri reads as follows:

> "All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his check - such bank to pay a bonus for the use of such deposits not less than the bonus paid by other

> banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer, for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

Section 2 of Chapter 847, page 1246-7, of the Federal Housing Administration Act, Volume 48, Part 1, United States Statutes at Large, provides, among other things as follows:

> "In no case shall the insurance, granted by the Administration under this section to any such financial institution, exceed twenty per centum of the total amount of the loans, advances of credits and purchases made by said financial institution for such purpose, and thetotal liability incurred by the Administrator for such insurance shall in no case exceed in the aggregate two hundred million dollars. No insurance shall be granted, under this section, to any such financial institution with respect to any obligation representing any such loan, advance of credit or purchase by it, the face amount of which exceeds $2,000.00 nor unless the obligation bears such interest, has such maturity and contains such other terms, conditions and restrictions as the Administrator shall prescribe."

Sections 11388 to 11477 Revised Statutes 1929, set forth the duty of the State Treasurer, and Section 11469 prescribes "for the security of the funds deposited by the treasurer under the provisions of Articles I and II of this chapter the governor, attorney-general and the treasurer shall require of said selected and approved banks or banking institutions giving security for the safekeeping and payment of said deposits a bond equal to at least twenty-five per cent of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto bonds of the United States, the state of Missouri, or in their discretion, * * * *"

Continuing, said section reads:

> "Which bond shall be delivered to the state treasurer, and receipted for by him and retained by him in the vaults of the state treasury of this state, or in the vaults of such banks or safe depository as the governor, attorney-general and treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the governor and attorney-general, for deposits made under articles 1 and 2 of this chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds or any part thereof, may from time to time be withdrawn on the written consent of the governor, attorney general and treasurer; and the governor, attorney-general and state treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such bank or banks other than the bank or banks selected as the state depository, as the governor, attorney-general and state treasurer may have duly agreed upon; provided, that a sufficient amount of said bonds to secure said deposits shall always be kept in the treasury or in such selected depository, and in the event that such bank or banks or banking institutions of deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the state auditor upon the funds for which said bonds are security. Any bank making deposits of bonds with the state treasurer under the

> provisions of articles 1 and 2 of this chapter may cause such bonds to be endorsed or stamped, as they may deem proper, so as to show they are deposited as collateral, and are not transferable, except upon the conditions of articles 1 and 2 of this chapter; Provided, however, the governor, attorney-general and treasurer, in their discretion, may allow said selected banks to deposit as security for the safe-keeping of said funds, in lieu of the above mentioned bonds, the notes held by said banks or banking institutions, secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed 50 per cent. of the actual value of said real estate, which security shall also be accompanied by an abstract of title certified to date by a competent abstractor and the written opinion of some reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested inthe grantors of such deeds, and said bank or banking institutions shall be required to furnish a personal bond equal to at least 75 per cent. of the amount of the accepted bid or bids;**********"

In 1931 a law was passed amending the above section (1931 Session Acts, page 378), which now permits federal land bank bonds as security also.

It will be noted that said statute places the discretion in three elected state officers, the Governor, Attorney General and State Treasurer, to allow selected banks to deposit as collateral security "notes held by said banks or banking institutions secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed fifty per cent of the actual value of said real estate, which security shall also be accompanied by an abstract and an opinion from a lawyer as to the title," and said bank, if it takes advantage of the method provided for putting up notes secured by real estate first mortgages in Missouri, is required to furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids.

In the case of In re: Holland Banking Company, 313 Mo. 307, it was held that Article II of Chapter 72 comprises a scheme complete within itself for protecting the deposits of the State.

In this case the history and development of this law is traced; enacted first in 1889 it required the highest quality of bonds as collateral, and later the field was widened so that now not only bonds of the United States and the State of Missouri, but also those of the smaller cities and other political subdivisions are acceptable. Likewise, in more recent years, the latitude of acceptable security was widened to take in notes of the qualifications set forth in the present statute. Quoting from said case of In re: Holland Banking Company, supra, l. c. 321, the court says:

> "Thus it is seen that, as securities of less absolutely certain value were authorized to be accepted as security, additional safeguards through the means of personal bonds were exacted. Although bonds of cities, school districts, drainage and levee districts and of other states, are everywhere regarded as high grade securities, a bond of twenty-five per cent of the accepted bid or bids was required. The Legislature only authorized the acceptance of notes secured by deeds of trust on real estate and bonds of cities of two thousand population when it supposedly made the State's deposit sufficiently safe by exacting personal bonds in addition equal to at least seventy-five per cent of the accepted bid or bids.
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> The history of the original Act of 1879 (now Section 11469) cannot be studied without reaching the conclusion that it has been the legislative policy of this State so to safeguard the deposits of the state's money by exactions of collateral security and personal bonds of such amount as ample to protect the State against loss occasioned by failure of depositories to pay its deposits, regardless of the common-law priority attaching to claims due the State and regardless of our statute of

> 1881, (now Section 7212) which is simply declaratory of the common law on the subject. In other words, Article II, Chapter 123, and particularly Section 13379, comprise a complete and supposedly all-sufficient separate scheme for protecting the deposits of the State. It was entirely unnecessary for the Legislature to go to the full extent it did in exacting both bonds and secured notes of value equal to the deposits and personal bonds in addition thereto, if it was its intention to rely upon general priority rights afforded by the common law or the statute of 1881."

At page 323 thereof the Court says:

> "Another and seemingly just as cogent reason given was that the act comprised a complete and separate scheme in itself for protecting deposits of the Government."

Quoting from the case of Cook County National Bank vs. United States, 27 L. Ed. (U. S.) 537, said opinion continues:

> " 'In the second place, when the banks are made depositaries of public moneys, and employed as financial agents of the Government, it is the duty of the Secretary of the Treasury to require them to give satisfactory security, by the deposit of United States bonds or otherwise, for the safekeeping and prompt payment of the public money deposited and for the faithful performance of their duties as financial agents. The amount of security which the Secretary may thus require has no limit but his own judgment as to its necessity. Every officer of a bank which is not an authorized depositary, and which has not therefore given the required security, who knowingly receives any public money on deposit, is liable for embezzlement. (R. S. Section 5497). The Government can thus alwayshave security, limited in amount only by the judgment of the Secretary of the Treasury, for public moneys deposited with any national bank.

With these provisions for security against possible loss for moneys deposited, it would seem only equitable that the Government should call for such security, and, if it prove insufficient take the position of other creditors in the distribution of the assets of the bank in case of its failure.'

Section 13379 of our statute does not leave either the value or the character of the security for the State's deposits to the discretion of the Treasurer and the other state officers. It fixed a minimum of security which must be exacted. The bonds and notes taken as such security must be of a value of least equal to the deposit, with the additional requirement of personal bond of twenty-five per cent of the bid accepted, where certain bonds are put up, and personal bond of seventy-five per cent of such accepted bid when notes secured by real estate are put up as security. If such minimum requirements are faithfully observed and solvent personal bonds taken, no loss can accrue to the State on account of such deposit.

The rule that the State will be deemed to have waived its general common-law or statutory priority where it exacts security for its deposits was declared by the Supreme Court of Utah in National Surety Company vs. Pixton, 808 Pac. 878. It was there said:

'Under the banking laws of this State, the State, by its acts and conduct, has clearly indicated that it claims no preferential rights over other depositors. While the law authorizes the State Treasurer to deposit the funds of the State in certain banks, it also compelled him to require the bank to secure the repayment of the funds so deposited. If the State were relying upon

> its preferential right, its funds would be amply secured without requiring any security of that nature. . . . . True, the rights of the sovereign State are not deemed lost or waived unless the waiver is in express terms, yet we cannot see, in so far as the deposit of public funds is concerned, in view of the laws of this State, and especially in view of the State's conduct in the matter before us, how it can be held otherwise than that the State did not intend to assert its preferential rights in those matters, regardless of what its rights in that regard may be, by authorizing the making of a deposit of public funds.' "

Continuing, l. c. 326:

> "It will be seen that the Legislature has devised a plan or scheme quite comprehensive and complete by which the public moneys of the State may be loaned at interest, and has with care and propriety conferred upon three of its highest administrative officers the power and duty to select and qualify state and national banks as such depositaries. The Treasurer is forbidden to deposit with any depositary any excess over the amount of the bond or security furnished."

At page 331, continuing, the Court says:

> "We are satisfied that the decided trend of the better reasoned cases is to the effect that where a State has a general statute giving priority to the debts due the State, or where the common law to the same effect is recognized and where such state also has a depository law directing the deposit of the state's funds in selected depositories which are required to give full and adequate security equal to or in excess of such deposits as may be lawfully made therein, and where no preference over

> and above the protection of such security is specifically provided for in such depository law, the State will be deemed to have waived its priority rights under the general priority statute or the common law as the case may be, and will be required to look to the security taken by it for the repayment of such deposits and can only come in on a parity with general creditors for the distributive share of the unpledged assets of the insolvent depository after it has exhausted the security taken by it and applied same upon its debt.
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> This is especially true where the statutes of such State, regulating the course of procedure for widding up the affairs of an insolvent state bank, make specific provision for priority in certain instances and make no provision for priority as to debts due the State on account of unpaid deposits. Where depository laws of the character described are in existence and the State reserves full powers of visitation of such banks and can make unlimited inquiry into its affairs, the State is in a positionto protect its deposits fully, and loss can only be incurred where there is a failure to take advantage of such powers. To hold that the State, under such circumstances, has the right to assert priority in the unpledged assets of such a bank is inequitable and tends to make state depositories undesirable as depositories for the ordinary depositor."

Nowhere in the statute is a provision found requiring that the collateral note security shall be or shall not be insured by the Federal Housing Administration.

Of course, "firstmmortgages" in themselves regardless of whether they are insured, are not alone proper security in the attempt to comply with said statute, as the note secured by said mortgage is the thing of value and the holder of the note, by

virtue of being such, has the right to enforce the lien of the deed of trust securing the note.

We construe your inquiry to be as follows:

Are notes which are secured by a first mortgage lien on real estate which is located in the State of Missouri, and which are insured under the terms of the Federal Housing Administration Act, such collateral as may be accepted under the provisions of Section 11469 Revised Statutes 1929 as proper statutory security for the deposit, in state depositories, of the State's money?

CONCLUSION.

If the Governor and Attorney General and State Treasurer of Missouri, using their discretion as provided by Section 11469, think it is not inconsistent with sound business to permit banks which have been selected as depositories of State money to deposit as security for the safekeeping of said funds, in lieu of the other collateral described in said section, the notes held by said banks or banking institutions secured by first deeds of trust on Missouri real estate, which notes and deeds of trust shall not exceed fifty per cent of the actual value of said real estate, which security shall be accompanied by an abstract of title certified to date by a competent abstracter and the written opinion of a reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested in the grantors of such deeds, and if said banks or banking institutions furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids, said three state officialsmay so express themselves and thereupon said collateral may be acceptedb by the State Treasurer under the provisions of said Section 11469, regardless of whether said notes are insured by someone, whether the Federal Government or otherwise; that such insurance does not put said notes into a different classification with respect to this statute than they would be in if not insured. The fact

that the notes are so insured does not keep them from being proper security if otherwise they measure up to the statutory requirements, nor does it, of itself, lift them into the classification of proper security as defined by the statute.

Very truly yours,

DRAKE WATSON
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting)Attorney General

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