COMMISSIONER OF FINANCE--
Liability of surety on bond

: The Commissioner of Finance is an insurer of unclaimed funds named in Sec. 7899, R.S. Mo. 1939. The liability of the surety on his bond is the same as that of the Commissioner himself. No statutory bond should exempt a surety on the bond of a public official from loss of funds for any cause. The depository of funds of a public official should not be required to post collateral security, since the surety on his bond is liable for all losses.

September 2, 1947

Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

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Dear Mr. Shaffner:

This is in response to your transmission of a brief filed with your Department by the American Bonding Company of Baltimore, with which you transmit the following letter:

> "The Legal Department of the American Bonding Company of Baltimore has briefed certain thoughts with reference to Sections 7897 and 7882, R.S. Missouri, 1939. These Sections refer to the manner in which the Commissioner of Finance is to handle deposits of insolvent banking institutions and the interpretation of the bond furnished by the Commissioner.
>
> "May I be favored with your opinion in these connections?"

We take it that since you mention independently Sections 7897 and 7882, R.S. Mo. 1939, you desire an opinion from this Department as to the responsibility of the Commissioner of Finance in giving a statutory bond under said Section 7882, and the responsibility of his surety also. The question of liability under the bond of the Commissioner of Finance and his surety being one in relation to the deposit of unclaimed deposits of a bank, upon liquidation thereof, under said Section 7897, if the bank where such funds are deposited should become insolvent.

Said Section 7882 insofar as it may point out the duties of the Commissioner of Finance taking oath of office, and executing a statutory official bond is, in part, as follows:

> "The commissioner of finance, deputy commissioner, other assistants and examiners, and all special agents and other employees shall each, before entering upon the discharge of his duties, take and subscribe the oath of office containing the usual provisions, and, in addition, * * * * and said commissioner of finance, deputy, assistants and examiners shall further execute to the state of Missouri good and sufficient bonds, to be approved by the governor and attorney-general, conditioned that they will faithfully and impartially discharge the duties of their offices, and pay over to the persons entitled by law to receive it, all moneys coming into their hands by virtue of their offices; * * * ".

Section 7897, pointing out the duties and responsibility of the Commissioner of Finance respecting his liability for unclaimed deposits upon the liquidation of banks, is as follows:

> "The commissioner may take and hold as trustee for the owners thereof any sums which remain due to and unclaimed by any creditor, depositor, stockholder or shareholder of any corporation, to which this chapter is applicable, after the completion of the voluntary or involuntary liquidation of the business and affairs of such corporation. Whenever such sums are received by the commissioner and he is not in possession of the business and affairs of such corporation, he shall give his receipt for such moneys and shall forthwith deposit them in one or more solvent state banks, trust companies or savings banks, to the credit of the commissioner in trust for the persons entitled thereto. At the completion of a liquidation by the commissioner or any receiver, he shall in like manner deposit such moneys at the expiration of six months after the order for final distribution. All such deposits by the commissioner shall be entitled to priority of payment in case

> of the insolvency or voluntary or involuntary liquidation of the depository of an equality with any other priority given by this chapter."

The brief of counsel for the Bonding Company supplied you, in the third paragraph on page 1, thereof, correctly states the Missouri rule that a public officer is an insurer of any monies coming into his hands according to law, citing, among other cases, Glaze vs. Shumard, 54 S.W. (2d) 726. In that case, l.c. 728, our Kansas City Court of Appeals said:

> "Since it is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the Legislature has provided otherwise, it follows that even though the county court of Harrison county did select or appoint the Bethany Savings Bank as the county depositary and the officer deposited said funds there, nevertheless, if the county court had no authority, power, or jurisdiction to select a depositary for the funds of the drainage district, the depositing of such funds by the county treasurer and ex officio collector, to his account as county treasurer in the Bethany Savings Bank, was at his peril. * * * ".

There can be no question, we think, that when the Commissioner of Finance takes into his custody and holds as trustee for the owners thereof, any sums which remain due to and unclaimed by any persons entitled thereto upon the final liquidation of a bank he takes such funds, first or last, under said Section 7882 in his official capacity by virtue of his office, for which said Section 7882 requires that he give adequate surety for the discharge of his duties to pay all such monies to the persons entitled by law to receive such funds.

We take it also that there will be no controversy here that the terms of the statute, with respect to statutory bonds, must be read into and become a part of any surety bond given by any public official required by a

statute in this State. The case of Zellars vs. Surety Company, 210 Mo. 86, l.c. 92, holds to that rule in the following language:

> "All statutory bonds are to be construed as though the law requiring and regulating them was written in them. * * * ".

In the brief supplied by counsel for the Bonding Company named, the writer thereof very frankly states in the forepart of the last paragraph on page 2, the following:

> "We, therefore, have at least two decisions of the Missouri courts upholding the validity of a contractual provision in an official bond but we also have a decision that the provisions of the statute will be read into a statutory bond. We can only conclude that there is some doubt that a depository exclusion, inserted in a statutory bond, the conditions of which are prescribed by law, will be upheld. * * * ".

The Naylor case referred to in paragraph 2 on page 2 of said brief, 75 S.W. (2d) 436, decided by our Springfield Court of Appeals, merely holds that where a bond is given, even an official bond, and it is disclosed without denial, that the intention of the parties was to include and effectuate, a clause in a surety bond exempting the surety from liability for any loss of public funds because of the failure of the bank in which such funds are deposited, then such exemption is valid. This case, however, we think, is in direct conflict with the ruling of our Supreme Court in the case of Road District vs. Johnson, et al., 323 Mo. 990. The Supreme Court in construing the liability of a public official, and his surety for the ultimate responsibility of funds coming into the hands of such official, was considering and discussing the case of State ex rel. vs. Wilson, decided by the Springfield Court of Appeals, 151 Mo. App. 723, and the case of University City vs. Schall, 275 Mo. 667, on the measure of liability of a surety on the bond of a public official as compared with the liability of the official himself. Our Supreme Court in the Johnson case, supra, l.c. 997, 998, said:

> "The conclusion to be drawn from these cases cannot be otherwise than that the power of the board or council of a city to select a depository of the city's funds, and relieve the treasurer from liability for money lost, through the insolvency of the depository, does not exist, except, when done by grant of authority from the Legislature. The ruling in the University City case was made in recognition of the rule followed in this State, and generally followed, that the liability of the treasurer of a public corporation for its funds coming into his hands, is absolute. * * * * * * * *
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> "* * * * Under the terms of the bond in suit, the liability of the surety is measured by the liability of the principal. * * * ".

The Johnson case, supra, was a case, the facts related show, where a board of commissioners of a special road district undertook to select the depository for the treasurer of the district. The opinion points out that the board of commissioners had no statutory authority to make a selection of the depository, and that consequently its order in making such selection was void. We do believe that where some statute gives some other authority, or board the right to select a depository for the officer in whose care and custody funds are placed, by law, the right to select a depository, and that if such depository would become insolvent the surety of the officer in charge of the funds, and making such deposit would be perhaps exempted from liability, if the bond contained a provision for such exemption.

There is no provision in our Banking Code giving any authority for anyone to select the place of deposit for such unclaimed funds mentioned in said Section 7897, except the Commissioner of Finance himself. That Section states:

> "* * * he shall give his receipt for such moneys and shall forthwith deposit them in one or more solvent state banks, trust companies or savings banks, to the credit of the commissioner in trust for the persons entitled thereto. * * * ".

If, then, the Johnson case, supra, correctly states the rule of law in this State establishing the same measure of liability for the surety as is placed upon the principal, quoted l.c. 998, and we think it does, and if the public official charged with the safe-keeping and proper payment and distribution of the funds in his hands to those entitled to the same is made an insurer of such funds, as is stated in the Glaze vs. Shumard, case, supra, 54 S.W. (2d) 726, l.c. 728, then we believe, under the Johnson case, supra, that if such funds should become lost by the insolvency of the depository, the surety of the officer becomes an insurer also of such funds.

We find no authority in our statutes giving the Commissioner of Finance, or any other public official having the custody of funds, the right to consent to the insertion in his bond a clause exempting his surety from liability for the loss of funds deposited in a depository which becomes insolvent, although, as is above referred to, the Naylor case, 75 S.W. (2d) 436, supra, seems to so hold. But, as we view the Naylor case, it is in conflict with the Johnson case, supra, and we believe that no public official should take the liberty of consenting for such an exemption to be included in a statutory bond covering his official acts. If a public official has that right, the question naturally arises, why have a bond at all? The loss by a depository of the unclaimed funds mentioned in said Section 7997, supra, by the closing of the depository would in all likelihood be the only risk of loss the principal would take at all. So there would be no virtue or value in an officer providing a surety bond if the surety is exempted from liability for about the only risk it would take.

There is no prohibition in our statutes, in text law, or decision, preventing the Commissioner of Finance from asking the depository, as is suggested in the brief supplied your office by counsel for the American Bonding Company, or demanding that, collateral surety be supplied by the depository securing the funds, and we assume the Commissioner of Finance would have the right to make such demand. That sort of demand, would only become responsive to a clause in the bond exempting the surety for loss of such funds by failure of the depository. So if the Johnson case, supra, is to be followed, and the measure of liability of a surety for such funds is the same as that of the principal, it would but confuse matters to demand such collateral surety from the depository.

It is the view of this Department that no such clause as exempting the surety from loss of such funds by

the failure of the depository should be written into a statutory bond.

It is the further belief of this Department that the Commissioner of Finance should not undertake to demand or secure collateral security for the safety of such unclaimed funds from the depository, but should require the bond to be written and executed by the surety assuming full liability for such funds, even upon the closing of the depository, or upon any other eventuality whatever that would make the principal liable for their loss.

CONCLUSION.

It is, therefore, the opinion of this Department that:

1) The Commissioner of Finance of this State as trustee thereof, is an insurer for the safety and proper payment to the persons entitled to the unclaimed funds upon the liquidation of banks.

2) That the measure of the liability of the security on the bond of the Commissioner of Finance as required by Section 7882, R.S. Mo. 1939, is the same as that of the Commissioner himself.

3) That no clause exempting the surety from liability for the loss of funds named in said Section 7897, R.S. Mo. 1939, if the depository for such funds should close, should be written into the bond of the Commissioner of Finance.

4) That there would seem to be no need or occasion for the Commissioner of Finance to ask or require collateral security from the depository against loss, in event the depository should close.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

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