Washington, D. C.

April 8, 1915.

Secretary McAdoo today made public an opinion received from the Attorney General relating to the right of National Banks to have their deposits guaranteed by surety companies. The Secretary referred the question to the Attorney General in response to a request by the Comptroller of the Currency in view of certain questions which had arisen as to the interpretation of opinions given on this subject by the Attorney General in 1908 and 1909. The opinion is as follows:

"DEPARTMENT OF JUSTICE,

Washington

March 31, 1915.

The Secretary of the Treasury.

Sir:

I have the honor to acknowledge the receipt of your letter of February 12, 1915, enclosing letter of the Comptroller of the Currency, opinion of the acting Solicitor of the Treasury and brief filed with the Comptroller on behalf of a guaranty company and certain national banks, in which the question is raised as to whether a national bank may enter into a contract with a guaranty company under which, in consideration of premiums paid by the bank, the company "insures and guarantees each depositor in the bank the full payment of his deposit therein". You ask my opinion upon this question.

In my opinion, it is within the power of a national bank to enter into such a contract.

The law confers upon national banks such incidental powers as are required to meet all legitimate demands of the banking business, and to enable them to conduct their affairs safely and prudently within the scope of their charters. Section 5136 Revised Statutes; First National Bank v. National

Exchange Bank, 92 U. S. 122, 127. The power to give security for deposits seems to be recognized by section 5153 Revised Statutes as among these incidental powers. The section last mentioned, after providing that all associations created under the Act, shall, when so designated by the Secretary of the Treasury, be depositaries, further provides that "The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them", etc. It is believed that this section is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits, than as a grant by implication of authority to give security for government deposits alone.

The power of banks to give security for deposits or for payment of their debts, has been frequently recognized. It has been held that the property of a bank may be pledged as security for a debt, (United States v. Robertson (1831), 5 Pet. 641, 650); that a bond with sureties may be given to prevent depositors from withdrawing their accounts, (Wylie v. Commercial & Farmers' Bank (1902), 41 S. E. 504, 509, 63 S. C. 406), and that a national bank may give its bond with sureties to

secure a deposit of state funds, (State of Nebraska v. First National Bank of Orleans (1898); 88 Fed. 947, 951).

The power to contract for guaranteeing or securing depositors arises from the nature of the relation existing between the banks and their depositors. The relation created between the bank and a depositor by the receipt of deposits is that of debtor and creditor. National Bank v. Millard (1869); 10 Wall. 152, 155; Davis v. Elmira Savings Bank (1896), 161 U. S. 275, 288. The power to receive deposits, expressly granted to every national bank, (Sec. 5136 R. S.), is, of course, indispensable to the conduct of the business of banking; and the extent of its exercise is in a degree the measure of the success of the bank. The ability of a bank to obtain deposits largely depends upon the confidence of depositors, or the belief that their deposits are secure. Loss of such confidence on the part of depositors is usually attended with loss and inconvenience to them, to the bank and to the public. The law accordingly imposes upon the bank an imperative duty not only to repay deposits, but to keep them secure. For the protection of depositors, its revenues and property are pledged, its stockholders are made subject to a double liability,

and its directors may be held liable for a violation of their duties.

The means by which depositors are to be protected and secured are not expressly limited or restricted by statute. A large discretion is left to the officers and directors. They may use such means for the purpose as are not prohibited by or inconsistent with the provisions of the law, and as they may reasonably find to be suitable and proper and not inconsistent with the prudent conduct of the affairs of the bank within the scope of its charter. "Whatever protects the depositors", it has been said, "protects the bank because it assures confidence in the bank". Noble State Bank v. Haskell (1908) 22 Okla. 48, 89.

A contract of insurance or guaranty, such as described in the question submitted, may afford protection to depositors by securing the performance of an obligation on the part of the bank which otherwise might not be performed. And it is not unreasonable to believe that such a contract, at the same time, may prove valuable to the bank because of the confidence it may assure. No reason is perceived for prohibiting a national bank, in the discretion of its directors, from so securing its depositors, or for denying to the bank such benefits as they believe may accrue in the form of increased confidence result-

ing from such a contract.

Opinions of former Attorneys General, dated respectively, July 28, 1908, (27 Op. 37 ) and April 6, 1909, (27 Op. 272), are referred to in the enclosures as having been construed by the Comptroller of the Currency as holding that national banks are without authority to pay, as part of their legitimate expenses, premiums on policies insuring their depositors against loss.

As I view these opinions, the conclusion in neither of them is inconsistent with the conclusion reached herein. The opinion of July 28, 1908, construing the Oklahoma State Banking Act, determined that a national bank could not lawfully participate in the plan contemplated by the Act for the guarantee of deposits, because it involved essentially a guarantee to the depositors of other banks that they should be paid in full - a contract which was deemed beyond the powers of the bank to make. The opinion of April 6, 1909, held that national banks in the State of Kansas could not avail themselves of the bank depositor's guaranty law of that State. The inquiry, upon the answer to which the decision rests, was, whether an acceptance of the provisions of the Kansas law " would so control the conduct of the affairs of national banks as to expressly conflict with the laws of the United States".

As pointed out in the opinion of the Solicitor of the Treasury, the more recent opinion of May 7, 1909, (27 Op. 324 )

in which the form of a policy of insurance guaranteeing the assets of a national bank against loss was approved, provided certain suggested modifications should be made, is more nearly in point on the question now under consideration, and is in harmony with the views herein expressed.

The language employed in the opinions of July 28, 1908, and April 6, 1909, to the effect that national banks are without power to contract for insuring that depositors shall be paid in full, was used in the course of argument merely, applied to a question which it was not necessary to determine, and may be disregarded so far as inconsistent with this opinion.

Respectfully,

(Signed) T. W. Gregory,

Attorney General."

4/8/15

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FEDERAL RESERVE BOARD

Washington

April 26, 1915.

MEMORANDUM.

Any violation of the provisions of Section 22 of the Federal Reserve Act by officers, directors or employees of a member bank, constitutes a crime, punishable by fine or imprisonment. No ruling or interpretation by the Federal Reserve Board would afford any protection to a person subsequently indicted by a Federal grand jury for any such violation, it not being within the province of the Federal Reserve Board to make an official ruling on the provisions of this section. This opinion, is, therefore, not published as a ruling or regulation of the Board.