C O P Y

X-4949

F E D E R A L R E S E R V E B O A R D

W A S H I N G T O N

July 15, 1927.

Mr. E. W. Stearns,
Deputy Comptroller of the Currency,
Washington, D. C.

Dear Sir:

Receipt is acknowledged of your letter of June 7th in which you request advice from the Board whether a national bank located in Nebraska which has received permission from the Board under the provisions of Section 11(k) of the Federal Reserve Act to exercise trust powers may exercise such powers in Nebraska.

The Board is of the opinion that a national bank located in Nebraska which has received permission from the Board to exercise trust powers may exercise these powers in that State. The reasons for the Board's conclusion may be more fully set out as follows:

Under the provisions of Section 11(k) of the Federal Reserve Act as originally enacted, the Federal Reserve Board was authorized

> "To grant by special permit to national banks applying therefor, <u>when not in contravention of State or local law</u>, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

By an Act which took effect on September 26, 1918, Congress amended Section 11(k) of the Federal Reserve Act in a number of particulars. Under the provisions of this Section as amended the Federal Reserve Board is authorized

> "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to

act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

"Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act."

It has been contended that the provisions of Section 11(k) above quoted are unconstitutional and that Congress had no authority to confer trust powers upon national banks. The Supreme Court of the United States, however, in the cases of First National Bank v. Union Trust Company, 244 U. S. 416, and Burns National Bank v. Duncan, 265 U. S. 17, has held that these provisions are constitutional and that Congress did have the power to confer trust powers upon national banks. In view of these decisions there can be no doubt of the right of national banks to exercise trust powers. It is only necessary to determine whether the exercise of such powers by a national bank in a particular State contravenes the laws of that State.

Under the provisions of Section 11(k) of the Federal Reserve Act, set out above, a national bank which has received permission from the Board to exercise fiduciary powers may exercise these powers if to do so is not in contravention of the laws of the State in which the national bank is located. When Congress originally enacted Section 11(k) of the Federal Reserve Act it did not lay down any rule as to what should be deemed to be in "contravention of State or local law" and in the amendment of September 26, 1918, it only partially defined this phrase. It is obvious, however, that if there is no law of the State which either expressly or by necessary implication forbids the exercise of trust powers by a national bank, then the exercise of these powers by a national bank would not contravene the laws of the State.

This construction of the provisions of Section 11(k) has been upheld by the courts in a case which arose in Michigan prior to the amendment of September 26, 1918, First National Bank v. Union Trust Company, 159, N. W. 335. Under the laws of Michigan, trust companies were not permitted to engage in the business of commercial

banking, and commercial banks organized under the laws of Michigan were not authorized to transact the business of trust companies; but there was no statute in Michigan which either expressly or by necessary implication prohibited national banks from exercising fiduciary powers. A national bank was granted permission by the Board to exercise trust powers and upon its undertaking to exercise one of the powers granted to it a suit was instituted by the Michigan authorities to test its right to so act. In this suit it was contended that the exercise of trust powers by national banks was in contravention of the laws of Michigan, and that Section 11(k) was unconstitutional. The Supreme Court of Michigan held that a national bank should not be considered as acting in contravention of State law in the absence of some law of the State which prohibited national banks from exercising trust powers and that such national bank was not acting in contravention of State law merely because that law placed certain requirements on State institutions exercising trust powers which were not applicable to national banks. In its consideration of this point the Supreme Court of Michigan at page 339 said:

> "No state law is contravened - opposed, come into conflict with - because a corporation exercises the indicated powers, nor by the act of Congress creating national banks. The Legislature has not declared that national banks in this state shall not have the right 'to act as trustee, executor, administrator, or registrar of stocks and bonds.' U. S. Comp. Stat. 1913, Sec. 9794(k). And I do not find in Brother BROOKE'S opinion reference to any state law that will be contravened if respondent continues to act in the indicated capacities. To say that because the Legislature has required certain things of a domestic corporation as a condition to the exercise of the right, and cannot require the same or similar things from national banks, therefore the exercise of the right by national banks will be in contravention of state law, seems to me to be an unsound argument."

When the Supreme Court of the United States considered the case of the First National Bank v. Union Trust Company, 244 U.S. 416, it was not necessary for it to determine whether the exercise of trust powers by the national bank was in contravention of the laws of Michigan but it accepted the decision of the Supreme Court of Michigan on this point.

Since the decision of this case it has been clear that the Board was authorized to grant fiduciary powers to national banks in any State the laws of which did not either expressly or by necessary implication forbid the exercise of trust powers by national banks. The Board has been advised that there was no law of Nebraska which either expressly or by necessary implication prohibited national banks from exercising trust powers in that State. Accordingly, the Board, as you know, has granted to a number of national banks in Nebraska the right to exercise trust powers. The Board understands that at the present time there is no law of Nebraska which either expressly or by necessary implication forbids a national bank to exercise trust powers. The Board is, therefore, of the opinion that a national bank in Nebraska which has received permission from the Board to exercise trust powers may lawfully exercise such powers.

The Board is further of the opinion that even if there were a law of Nebraska which by its terms purported to forbid national banks to exercise fiduciary powers, a national bank located in Nebraska which had received permission from the Board would be legally entitled to exercise the trust powers which Nebraska trust companies are authorized to exercise.

When section 11(k) of the Federal Reserve Act was amended by the Act of September 26, 1918, it was provided that whenever the laws of a State authorize or permit the exercise of any or all of the fiduciary powers enumerated in section 11(k) by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of the State law. Since the enactment of the amendment of September 26, 1918, it has been quite generally recognized by the State courts that national banks may lawfully transact a trust business and that the States can not directly or indirectly prevent them from doing so if the State laws authorize the exercise of trust powers by State corporations which compete with national banks.

In Hamilton v. State, 110 Atl. 54, the Connecticut Supreme Court of Errors held that, regardless of State legislation forbidding the exercise of trust powers by national banks or the absence of State legislation expressly sanctioning the exercise of such powers by them, national banks having the necessary permit from the Federal Reserve Board may act in any fiduciary capacities in which competing State corporations are authorized to act by State law. See also Carpenter v. Aquidneck National Bank, 46 R. I. 152, 125 Atl. 358; In re Turner's Estate, 227 Pa. 110, 120 Atl. 701; Stanchfield's Estate, 171 Wisc. 553, 178 N. W. 310; Re Mollineaux, 179 N. Y. S. 90; and Fidelity National Bank and Trust Company v. Enright, 264 Fed. 236.

The right of national banks to exercise trust powers in a State in which competing State corporations are authorized to exercise such powers regardless of whether or not the State law by its terms prohibits the exercise of such powers by national banks has also been definitely

determined by the Supreme Court of the United States. In the case of State of Missouri, ex rel Burnes National Bank v. Duncan, 265 U. S. 17, the Burnes National Bank of St. Joseph, Missouri, was appointed executor under the will of a citizen of Missouri. The Bank applied to the Probate Court for letters testamentary but was denied appointment on the ground that by the laws of Missouri national banks were not authorized to act as executors. Thereupon the national bank applied to the Supreme Court of the State for a writ of mandamus compelling the Probate Court to appoint the national bank as executor. The Supreme Court of Missouri ruled that the Probate Court could not be compelled to appoint the national bank executor. An appeal was taken to the Supreme Court of the United States which reversed the judgment of the Supreme Court of Missouri and held that the national bank must be appointed executor regardless of the provisions of the Missouri law. In so holding, the Supreme Court of the United States said:

> "By the Act of September 26, 1918, c. 177, sec. 2, 40 Stat. 967, 968, amending sec. 11(k) of the Federal Reserve Act, the Federal Reserve Board was empowered 'To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator . . . or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.' If the section stopped there the decision of the State Court might be final, but it adds the following paragraph, 'Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.' This says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power. The relator has the permit, competing trust companies can act as executors in Missouri, the importance of the power to the sustaining of competition in the banking business is so well known and has been explained so fully heretofore that it does not need to be emphasized, and thus the naked question presented is whether Congress had the power to do what it tried to do.

"The question is pretty nearly answered by the decision and fully answered by the reasoning in First National Bank of Bay City v. Fellows, 244 U. S. 416. That case was decided before the amendment to the Federal Reserve Act that we have quoted and come here on the single issue of the power of Congress when the state law was not contravened. It was held that the power 'was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful.' 244 U. S. 420. The power was asserted and it was added that 'this excluded the power of the State in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function.' 244 U. S. 425. Now that Congress has expressed its paramount will this language is more apposite than ever. The States cannot use their most characteristic powers to reach unconstitutional results. Western Union Telegraph Co. v. Kansas, 216 U. S. 1. Pullman Co. v. Kansas, 216 U. S. 56. Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114. There is nothing over which a State has more exclusive authority than the jurisdiction of its courts, but it cannot escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent. Kenney v. Supreme Lodge of the World, 252 U. S. 411, 415. So here the State cannot lay hold of its general control of administration to deprive national banks of their powers to compete that Congress is authorized to sustain.

"The fact that Missouri has regulations to secure the safety of trust funds in the hands of its trust companies does not affect the case. The power given by the act of Congress purports to be general and independent of that circumstance and the act provides its own safeguards. The authority of Congressis equally independent, as otherwise the State could make it nugatory. Since the decision in First National Bank of Bay City v. Fellows, 244 U. S. 416, it generally has been recognized that the law now is as the relator contends. Turner's Estate, 277 Pa. St. 110, 116. Estate of Stanchfield, 171 Wis. 553. Hamilton v. State, 94 Conn. 648. People v. Russel, 283 Ill. 520, 524. In re Mollineaux, 179 N. Y. S.90, Fidelity National Bank & Trust Co. v. Enright, 264 Fed. 236."

The Board understands that trust companies organized under the provisions of the laws of Nebraska are authorized to exercise certain enumerated fiduciary powers and are forbidden to do a banking business as defined by the laws of Nebraska. It appears, however, that under the provisions of section 8068 of the Compiled Statutes of Nebraska of 1922 these trust companies are authorized to loan money upon real estate and upon collateral security. National banks are authorized to make similar loans and, therefore, Nebraska trust companies are competitors of national banks to this extent. The Board is accordingly of the opinion that in view of the provisions of section 11(k) of the Federal Reserve Act and the decision of the Supreme Court of the United States in the Burnes National Bank case, it is clear that even if there were a Nebraska law which by its terms prohibited national banks from exercising trust powers a national bank located in Nebraska which had received permission from the Board would be legally entitled to exercise the trust powers that Nebraska trust companies are authorized to exercise.

Summing up briefly the conclusions of the Board it may be stated that the Board is of the opinion that since it appears that there is no law in the State of Nebraska which either expressly or by necessary implication forbids national banks to exercise trust powers in that State a national bank which has received permission from the Board to do so may exercise trust powers in Nebraska. The Board is further of the opinion that even if there were a Nebraska law which by its terms prohibited national banks from exercising trust powers in that State a national bank located in Nebraska which has received permission from the Board would be entitled to exercise the trust powers that Nebraska trust companies are authorized to exercise.

Very truly yours,

(s) D. R. Crissinger,
Governor.