3763.

APPROVAL, CONTRACTS FOR ROAD IMPROVEMENT IN FAIRFIELD, CLARK AND COSHOCTON COUNTIES.

COLUMBUS, OHIO, November 14, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

3764.

FIRST MORTGAGE SECURITY—FOR DEPOSITORY ACCOUNTS OF COUNTIES, MUNICIPALITIES AND SCHOOL DISTRICTS UNDER SECTION 2288-1, GENERAL CODE—VARIOUS LEGAL QUESTIONS CONCERNING THE TENDERING OF SUCH SECURITY DISCUSSED.

SYLLABUS:

1. *First mortgages on real estate located in Ohio, without limitation as to the rate of interest which they bear, may lawfully be deposited as security for depository accounts of counties, municipalities and school districts in accordance with the provisions of section* 2288-1, *General Code.*

2. *Bonds secured by first mortgages on real estate located in Ohio, bearing interest at not to exceed six percent as provided by section* 2288-1, *General Code, may be accepted as security for county, municipal or school district depository accounts, by force of the said statute.*

3. *The term "abstract" as used in section* 2288-1, *General Code, requiring the deposit of an abstract with each mortgage tendered as security for depository accounts in accordance with the said statute, should not be construed in its technical sense; the purpose of the statute is met if the abstract in question is sufficiently specific to inform the county, municipal or school authorities, as the case may be, or their counsel, that the mortgage tendered as security is in fact a first mortgage and the first lien on the property mortgaged.*

4. *When mortgages or bonds secured by mortgages are deposited as security for depository accounts, by favor of section* 2288-1, *General Code, the said mortgages should bear an endorsement showing that they have been assigned for the purpose provided for by the statute, which assignment may or may not be noted on the record of the mortgage.*

5. *Upon the assignment of mortgages or bonds as security for depository accounts, as provided for by section* 2288-1, *General Code, the policies of insurance providing for insurance against fire or tornadoes on the buildings located on the mortgaged premises should bear a notation of the facts of the said assignment*

6. *The appraisement of real estate secured by mortgages which are tendered as security for depository accounts by favor of section* 2288-1, *General Code, may lawfully be made by the persons who are the regular appraisers for the bank or trust company tendering said mortgages, providing the said persons are residents of the county where the real estate is located and are conversant with real estate values, and the depositor consents to their acting. Appraisers must be satisfactory to the depositor.*

7. *Any expenses attendant upon the appraisement of property or the furnish-*

ing of an abstract, or the opinion of an attorney, when mortgages or bonds are tendered as security for depository accounts by virtue of section 2288-1, General Code, should be borne by the bank or trust company tendering such security.

8. *When banks or trust companies which have been duly designated as depositories for county, municipal or school funds according to law, have secured those funds by such undertakings as are authorized by sections 2732, 4295, 7605 and 7607, General Code, as the case may be, desire to substitute for the said securities, mortgages or bonds as provided for by section 2288-1, General Code, the public authorities whose deposits are involved may accept said mortgages or bonds as security for their said deposits, but are not required to do so.*

9. *When mortgages or bonds are accepted as security for depository accounts by favor of section 2288-1, General Code, the public authorities may lawfully require the bank or trust company which has furnished such security to submit regular statements showing the exact status of the mortgages in question so that a check may be had at all times on the sufficiency of the security furnished by said mortgage.*

COLUMBUS, OHIO, November 14, 1931.

HON. JESSE K. GEORGE, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "There are a number of banks in this county which are the depositories of public funds belonging to municipalities, school boards, etc., which have been securing such deposits by bonds and other securities, as provided for in sections 2732, 4295, 7605 and 7607 of the General Code.
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> These banks are now endeavoring to secure said deposits by first mortgages and bonds secured by first mortgages as provided for in section 2288-1, of the General Code, which section reads as follows:
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> 'In addition to the undertakings or security provided for in sections 2732, 4295, 7605 and 7607, it shall be lawful to accept first mortgages, or bonds secured by first mortgages bearing interest not to exceed six per cent. per annum, upon unincumbered real estate located in Ohio, the value of which is at least double the amount loaned thereon. If the amount loaned exceeds one-half the value of the land mortgaged, exclusive of the structures thereon, such structures must be insured in an authorized fire insurance company, or companies, in an amount not less than the difference between one-half the value of the land exclusive of structures, and the amount loaned, and the policy or policies shall be assigned to the mortgagee. The value of such real estate, shall be determined by valuation made under oath by two resident freeholders of the county where the real estate is located, who are conversant with real estate values. There shall be deposited with said mortgage, an abstract of title made by some competent person or presons or company, accompanied by the opinion of a competent attorney, which opinion shall certify that the mortgage is a first lien upon the premises mortgaged, or said title shall be guaranteed by a company organized under, and which has complied with the provisions of section 9850 of the General Code.'
>
> The above section provides for interest on said securities not to

exceed six per cent. and some of the securities being offered, bear interest at the rate of seven per cent.

The above section further provides that 'There shall be deposited with said mortgage, an abstract of title made by some competent person or persons or company, accompanied by the opinion of a competent attorney, which opinion shall certify that the mortgage is a first lien upon the premises mortgaged, etc."

Our Query is:

First: Is the part of this section, referring to interest, mandatory or directory, and would it be lawful for the depositors to accept securities bearing a greater interest than six per cent?

Second: Is that part of the above section, pertaining to abstract of title and certificate, mandatory or directory, and would it be lawful for the depositors to accept said securities accompanied only by a certificate of title, omitting the abstract of title?

It has been the custom of the banks in this communiy to furnish only a certificate of title, and this office is having a number of inquiries as to the legality of same."

Bearing in mind the cardinal rule for the construction of statutes, to the effect that the intention of the legislature in enacting the statute is controlling, and that that intention is to be gathered from the language used, it seems clear that the proper construction of section 2288-1, General Code, which is quoted in your letter, in so far as the question of the rate of interest which first mortgages on approved real estate or bonds secured by such first mortgages must bear in order to be acceptable as security for depository accounts is concerned, is that the rate on first mortgages is not limited, whereas the rate on bonds secured by first mortgages is limited to not more than six per cent.

This conclusion is based on the fact that the phrase "bearing interest at not to exceed six per cent." as it appears in the statute, apparently modifies the phrase "bonds secured by first mortgages" only. This is evidenced by the punctuation of the statute. The statute enumerates two classes of securities that may be accepted as security for certain depository accounts, to wit: "first mortgages" and "bonds secured by first mortgages bearing interest not to exceed six per cent." There is no provision of the statute limiting the interest rate which the former class must bear and apparently the Legislature did not intend that such mortgages need necessarily bear any particular rate of interest in order to be acceptable as security for depository accounts. With respect to the latter class, however, the Legislature limited the bonds to such only as bear interest not to exceed six per cent.

With respect to the question relating to the depósit of an abstract with each mortgage tendered as security, it becomes necessary to determine so far as possible, what the Legislature meant by the word "abstract" as used in the statute. Clearly, the word as so used, refers to what is commonly known as an "abstract of title" of the real estate covered by the mortgage. Difficulty arises in determining just what is embodied within the term abstract of title, as in common usage it does not seem to have any definite, positive or well established meaning. The term is used as applying to what we sometimes call a complete abstract, a limited abstract or a mere statement of the title of the property, showing the present ownership and the immediate prior ownership with present

existing liens or encumbrances, depending on the circumstances and the necessities or requirements of the transaction for which the abstract is made.

Bouvier, in his Law Dictionary, defines an abstract of title as "An epitome, or brief statement of the evidences of ownership of real estate and its encumbrances." In the same work it is stated:

> "An abstract should set forth briefly, but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title. See 54 L. J. Ch. 466; *Kane* v. *Rippey,* 22 Or. 296, 23 Pac. 180.
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> In the United States, where offices for registering deeds are universal, and conveyancing much less complicated, abstracts are much simpler than in England, * * *"

The old rule in England was that an abstract should show the title for sixty years, and this was said to be by analogy to the statute of limitations against a writ of right. As succeeding statutes have shortened the time necessary to bar an action for real property, the requirement as to the abstract has been made less strenuous. Williams on Real Property, (6th Ed.) 450. Willard on Real Estate and Conveyancing (2nd Ed.) 527.

By force of Statutes 37 and 38 Victoria, Chapter 78, it has been held that recitals in deeds over twenty years old are prima facie evidence of the facts recited and that therefore where title begins from a deed over twenty years old, reciting seizure in fee, the vendee can not demand further abstract, except so far as he may prove the recital inaccurate. *Bolton* v. *London School District,* 7 Ch. Div. 766.

There seems to be no rule in the United States as to the period required to be covered by an abstract, it being controlled largely by agreement and usage in each jurisdiction. The cases wherein the question of the requirements of an abstract of title is discussed go no further than to say that such abstracts should consist of a memorandum or concise statement of the conveyances and encumbrances which appear on the public records affecting title to real estate. Such abstracts should be sufficiently complete to enable a purchaser or his counsel to pass readily upon the validity of the title in question as shown by the records. The time covered by an abstract or the extent of the abstract, is controlled largely by agreement of the parties, and to some extent, by custom or usage. *Duncan* v. *Kelley* (Okla.) 229 Pac., 425; *Geitliman* v. *Eicher,* 265 Ill., 579, 107 N. E., 180; *Wright* v. *Bott* (Tex.) 163 S. W., 360; *Nicholson* v. *Lieber* (Tex.) 155 S. W., 641; *Wright* v. *Gloss* (Tex.) 174 S. W., 717.

Technically, an abstract of title is a summary or epitome of the conveyances, transfers and other facts relied on as evidence of title, together with all such facts appearing of record as may impair the title. It should contain a full summary of all agreements, conveyances, wills and all records and judicial findings whereby the title is in any way affected and all encumbrances and liens of record, whether they have been released or not. Ruling Case Law, Volume I, page 89; *Atterberry* v. *Blair,* 244 Ill., 363, 91 N. E., 475.

An examination of the decided cases on this point discloses that the courts do not as a general rule, limit the term "abstract" or "Abstract of title" strictly

to its technical meaning. The general tenor of the cases is, as stated above, that an abstract should be sufficiently complete to enable the purchaser or his counsel to pass readily on the validity of the title.

After considerable search I do not find a statutory provision such as the one here involved, to have been construed by the courts. In fact only one case has come to my attention wherein the term "abstract" or "abstract of title" appearing in a statute has been the subject of a judicial finding. In the case of *Jackson* v. *Trimble,* 156 Ala., 480, 47 So., 310, there was under consideration a statute providing that an abstract of title may be demanded in an ejectment suit. The court said:

> "The 'abstract of title' which Code 1896 provides may be demanded in ejectment suits should not be construed as meaning an abstract in the technical sense; but the purpose of the statute is met if, in response to the demand, an abstract is sufficiently specific to inform the party making the demand of the title upon which his adversary will rely."

The purpose of the provision of Section 2288-1, General Code, requiring the deposit of an abstract of title to the property covered by each mortgage tendered by a depository bank or trust company, as security for public deposits, is apparently to enable the depositor to be assured upon examination of the abstract, without a search of the records themselves, that the mortgage is what is required by the statute, that is, a first mortgage on the real estate which it purports to cover.

For this purpose the so-called abstract would necessarily need to show excerpts from the records whereby existing liens against the property had been effected and the effective date of those liens so that their priorities might readily be ascertained. In addition thereto it would be necessary to have appear that the person or persons executing the mortgage had at the time of its execution, an indefeasible title to the said property. To paraphrase the language of the courts, the statement with reference to these matters should be sufficiently complete to enable the depositor or his counsel to pass readily on the question of priority of liens and title in the mortgagee.

It will readily be seen that no hard and fast rule can be laid down as to the limits or extent of an abstract in any case. What might enable one purchaser or his counsel or a depositor or his counsel, as in the instant case, to readily pass on the quality of a title or mortgage might not enable another to do so, and what would enable them to pass readily on these questions under some circumstances might not under others. The obvious purpose of the entire transaction is to satitsfy the depositing agency of the safety of the security.

The statute provides in addition to the provision requiring the deposit of an abstract, that the abstract be accompanied by the opinion of a competent attorney, certifying that the mortgage is a first lien upon the premises mortgaged, or said title shall be guaranteed by what is known as a title guarantee company.

The aforesaid provisions of the statute further confirm the assertion that the object of the provisions of the statute with reference to an abstract of title and the opinion of a competent attorney and a guarantee of title by a title guarantee company, is to assure the depositing agency that the security back of a mortgage deposited by a bank or trust company by favor of the statute is sufficient for the purpose for which it is offered. The statute leaves to the depositing agency the determination of the competency of an attorney whose opinion

accompanies the abstract, and it may be said as well, in my opinion, that the determination of the extent of the abstract to be deposited is likewise within the determination of the governmental agency with whom the abstract is deposited, so long as it is satisfied from all the circumstances that the mortgage is really a "first mortgage" and a first lien on the premises mortgaged.

I am of the opinion, therefore, that the term "abstract" as used in this statute, should not be construed as meaning an abstract in the technical sense; the purpose of the statute is met if the abstract is sufficient to satisfy the county, municipal or school authorities whose deposits are to be secured that the mortgages tendered by the bank or trust company, as security for depository accounts by favor of the statute are first mortgages and a first lien on the premises mortgaged.

Moreover, it must be presumed that the Legislature, in enacting the statute, was conversant with the practical workings of banks and trust companies, and that as a matter of fact, many banks and trust companies do not, when loaning money on real estate, require or have made an abstract of title to the property upon which the mortgage is given to secure the loan, in the sense that the term "abstract" is technically used.

To have required a bank or trust company to deposit what is technically termed an abstract with each mortgage when tendered as security for depository accounts by favor of the statute in question, would have rendered the statute practically useless in many localities and would have entirely nullified the object to be attained by its enactment as the cost of securing abstracts on these properties would in many cases be prohibitive, practically, of the purposes for which the statute permits the use of these mortgages.

Several other questions have been suggested in connection with the deposit of mortgages made by favor of this statute.

The statute contains certain provisions with reference to the value of the real estate covered by the mortgages in question. The question has arisen whether or not these provisions have reference to the valuation of the real estate at the time of the execution of the mortgage or at the time the mortgage is deposited as security. I am of the opinion that they relate to the valuation of the property at the time the mortgage is deposited as security, in accordance with the statute.

The statute provides that the value of the real estate shall be determined by the valuation made under oath by two resident freeholders of the county where the real estate is located.

I have been asked whether or not this valuation may be made by the same persons who are appraisers for the bank tendering the mortgages. If the regular bank appraisers are resident freeholders of the county where the property is located, I am of the opinion that they may lawfully act as appraisers for this purpose if the depositor consents to their doing so. The depositor must be satisfied and is not required to accept the appraisement made by appraisers selected by the bank.

My opinion has also been requested with reference to the status of fire insurance policies covering the buildings on premises which these mortgages cover.

As the mortgages must necessarily be assigned by the bank or trust company to the county, municipal or school authorities whose deposits are being secured by the mortgages in accordance with the statute, this assignment creates in the said assignee a qualified equitable ownership in the premises covered by the mortgage, and this fact should be communicated to the insurance company

issuing the policy and notation of it should be made on the policy itself. I anticipate that there will be no difficulty in this connection, as the insurance companies no doubt have some system of properly taking care of matters of this kind.

Some question has also arisen as to whether or not the assignment of mortgages which are deposited by favor of this statute, must necessarily be noted on the records in the recorder's office. Such an assignment as between the parties is no doubt valid without record. However, as a matter of precaution, and to avoid any possibility of an unauthorized release of the said mortgage on the records thereof, it would not be amiss to have the assignment properly noted on the record of the mortgage. See sections 8546, et seq., General Code.

Another very pertinent question in this connection comes about by reason of the fact that these mortgages are constantly being reduced by partial payments. These payments of course, are made direct to the bank, and there is no way for the authorities with whom the mortgages have been deposited as security, to know what the extent of the payments are, from time to time, and how much the security has been reduced, unless some system of keeping a check on the matter is followed. The county, municipal or school authorities, as the case may be, who are holding the mortgages as security for their deposits may, in my opinion, require the bank to submit regular statements showing the exact status of the mortgage at all times, so that they may be assured of the sufficiency of the security furnished by the mortgage.

The question has been raised as to who should bear the expense that may be incurred in connection with the appraisement of property and the opinion of a competent attorney as to the quality of the lien of the mortgage, or any other attendant expense when mortgages are tendered as security for depository accounts by favor of this statute. It is my opinion that all such expense must be borne by the depository bank or trust company that deposits the mortgages.

I am informed that in some instances banks having depository contracts for the deposit of county, municipal and school funds, and having secured these funds by undertakings or security as provided for in sections 2732, 4295, 7605 and 7607, General Code, as the case may be, are now seeking to withdraw the security formerly furnished and substitute therefor mortgages or mortgage bonds in accordance with section 2288-1, General Code. The question has been raised, whether or not under those circumstances the public authorities whose moneys constitute the deposits are required to accept the substitution.

It will be observed that the statute provides it to be lawful to accept first mortgages on real estate or bonds secured by such first mortgages, but does not provide that such security must be accepted in substitution for security which has already been given.

I am of the opinion that the public authorities are not required to consent to such substitution of security, but may do so if they desire.

In specific answer to the questions discussed above, I am of the opinion:

First, first mortgages on real estate located in Ohio, without limitation as to the rate of interest which they bear, may lawfully be deposited as security for depository accounts of cities, municipalities and school districts in accordance with the provisions of section 2288-1, General Code.

Second, bonds secured by first mortgages on real estate located in Ohio, bearing interest at not to exceed six percent as provided by section 2288-1, General Code, may be accepted as security for county, municipal or school district depository accounts, by force of the said statute.

Third, the term "abstract" as used in section 2288-1, General Code, requiring the deposit of an abstract with each mortgage tendered as security for depository account in accordance with the said statute, should not be construed in its technical sense; the purpose of the statute is met if the abstract in question is sufficiently specific to inform the couny, municipal or school authorities, as the case may be, or their counsel, that the mortgage tendered as security is in fact a first mortgage and the first lien on the property mortgaged.

Fourth, when mortgages or bonds secured by mortgages are deposited as security for depository accounts, by favor of section 2288-1, General Code, the said mortgage should bear an endorsement showing that they have been assigned for the purpose provided for by the statute, which assignment may or may not be noted on the record of the mortgage.

Fifth, upon the assignment of mortgages or bonds as security for depository accounts, as provided for by section 2288-1, General Code, the policies of insurance providing for insurance against fire or tornadoes on the buildings located on the mortgaged premises should bear a notation of the facts of the said assignment.

Sixth, the appraisement of real estate secured by mortgages which are tendered as security for depository accounts by favor of section 2288-1, General Code, may lawfully be made by the persons who are the regular appraisers for the bank or trust company tendering said mortgages, providing the said persons are residents of the county where the real estate is located and are conversant with real estate values, and the depositor consents to their acting. Appraisers must be satisfactory to the depositor.

Seventh, any expenses attendant upon the appraisement of property or the furnishing of an abstract, or the opinion of an attorney, when mortgages or bonds are tendered as security for depository accounts by virtue of section 2288-1, General Code, should be borne by the bank or trust company tendering such security.

Eighth, when banks or trust companies which have been duly designated as depositories for county, municipal or school funds according to law, have secured those funds by such undertakings as are authorized by sections 2732, 4295, 7605 and 7607, General Code, as the case may be, desire to substitute for the said securities, mortgages or bonds as provided for by section 2288-1, General Code, the public authorities whose deposits are involved may accept said mortgages or bonds as security for their said deposits, but are not required to do so.

Ninth, when mortgages or bonds are accepted as security for depository accounts by favor of section 2288-1, General Code, the public authorities may lawfully require the bank or trust company which has furnished such security to submit regular statements showing the exact status of the mortgages in question so that a check may be had at all times on the sufficiency of the security furnished by said mortgage.

Respectfully,

GILBERT BETTMAN,

Attorney General.