

**National Banks—Right to Deposit Government Bonds  
With the State Treasurer as Surety for State Deposits.**

National banks may deposit with the State Treasurer, United States, State, county, school district or municipal bonds as security for State money deposited in such national banks.

J. W. Walker, Esq.,  
State Treasurer,  
Helena, Montana.

My dear Mr. Walker:

You have requested my opinion on the following question:

“Can national banks deposit with the State Treasurer, United States, State, county or school district bonds as surety for State deposits?”

With your request you have submitted a copy of an opinion rendered to your predecessor by a former Attorney General, in which the conclusion was reached that Section 5242, R. S. of the United States, would prohibit such deposits.

Section 5242, above, reads as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this Chapter or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county or municipal court."

That this section was erroneously construed in said opinion above referred to seems clear. Its provisions do not apply to pledges, securities, liens or equities whereby one creditor may obtain a greater amount than another, but are directed against those given or arising after or in contemplation of insolvency.

In the case of *Scott v. Armstrong*, 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059, in construing Section 5242, above, the court says:

"Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes or to prefer one creditor to another is forbidden; but liens, equities, or rights arising by express agreement or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the Act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency."

This language was quoted and approved in the case of *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 19 S. Ct. 360, 43 U. S. (L. ed.) 640.

The same rule was applied in the case of *Ball v. German Bank*, 187 Fed. 750, which was a case where the insolvent bank on the last day it was open for business transferred certain securities to the defendant bank to secure its obligations to the defendant bank. The court held that the act was in violation of Section 5242, above, and void.

In the case of *McDonald v. Chemical National Bank*, 174 U. S. 610, 43 U. S. (L. ed.) 1106, the court went even further and held that Section 5242, above, did not apply to transactions by the insolvent bank in the ordinary course of its business, though at that time the bank was actually insolvent with the knowledge of its officers but had committed no act of insolvency.

The only objection to the State Treasurer's accepting securities owned by a national bank as surety for State deposits appearing in the opinion referred to is that such act would constitute the State a preferred creditor in case of the insolvency of the bank, and this it was held would be prohibited by Section 5242, above. It is clear that the above section was misconstrued. In fact, I am informed that this was discovered and that the opinion, rendered to your predecessor shortly after the date thereof, was withdrawn. At any rate, the opinion is not included in the published volume of Reports of Opinions.

It is my opinion, therefore, that you, as State Treasurer, are not prohibited from accepting from national banks, United States, State, county, school district or municipal bonds as security for State money deposited by you in such national banks.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.