servation Council to suspend, by regulation, the operation of the existing law.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5178.

BOARD OF EDUCATION—NOT NECESSARY TO COLLECT INTEREST ON SCHOOL FUNDS UNDER DEPOSITORY CONTRACT WHEN BANK OPERATED BY CONSERVATOR UNDER FEDERAL BANK CONSERVATION ACT.

SYLLABUS:

1. Under Section 4749-1, General Code, it is not mandatory for a board of education to collect interest on school funds accruing under a depository contract during the period when a national bank is being operated by a Conservator pursuant to the Federal Bank Conservation Act.

2. Under Section 4749-1, General Code, such board of education may collect the principal and waive the interest accruing during the period of such conservatorship.

3. There exists the right to interest on deposits accruing at the contract rate during the period when a national bank is in conservatorship, subject to being divested by an appropriate provision in a valid plan of reorganization.

4. The state and its various political subdivisions act in a proprietary capacity in depositing public funds pursuant to statute, and therefore are bound by all valid plans for the reorganization of closed national banks to the same extent as private depositors.

5. Under Section 207, Federal Bank Conservation Act, when a reorganization plan is approved by the Comptroller of the Currency and the necessary consents are secured, all depositors and other creditors, and all stockholders, become bound by its terms and entitled to its benefits, regardless of whether or not they have consented thereto.

COLUMBUS, OHIO, February 21, 1936.

HON. NELSON CAMPBELL, *Prosecuting Attorney, Mount Gilead, Ohio.*

DEAR SIR: I am in receipt of your letter in which you state that a board of education in your county has duly executed a depository contract for the years 1932 and 1933 with the Mount Gilead National Bank. A conservator was appointed for this bank, following the so-called banking holiday, under Section 203, Bank Conservation Act of

1933. Thereafter a plan of reorganization was adopted pursuant to Section 207 of said act.

Under the plan, unsecured general depositors waived 50% of their claims against the bank, together with all interest accruing after the date of suspension of payment, and agreed to accept instead certificates of participation issued by certain named trustees against assets unacceptable for transfer to a new bank to be organized under the plan. The good assets were to be sold to the new national bank for cash to retire the remaining known liabilities, including the proportion of deposit claims not waived. Payment of the unwaived liabilities was to be through the new bank either in cash or an unrestricted account.

Your letter states that under the plan the board of education will be paid in full. No such provision appears in the "Notice of Plan" and "Consent by Creditor" submitted with your letter, but I assume that the complete plan contains such a provision.

In regard to this reorganization plan, you have asked my opinion on the following questions:

> "1. Is it mandatory for the Board of Education to collect the interest on this account since the bank holiday in 1933? Do the provisions of Section 710-88a apply to Conservators of National Banks? (O. A. G., January 7, 1935, No. 3761.)
>
> 2. Can the Board of Education waive this interest, accept its principal only and remain within the law?
>
> 3. Can the Board of Education collect this interest even though not mandatory? If so, what should be its procedure?
>
> 4. Is a political subdivision, which did not sign the waiver, bound by the terms of such waiver?
>
> 5. Is a political subdivision, which did not sign the waiver, barred from enjoying the benefits of such waiver?"

Your first and second questions involve the same problem—whether a board of education can compromise its claim against a depository bank by waiving accrued interest.

In an opinion reported in Opinions of the Attorney General, 1933, Vol. III, p. 1780, I held that boards of education do not have power to settle and compromise claims due them similar to that granted county commissioners by Section 2416, General Code. I compared this section with Section 4749, General Code, and pointed out that boards of education and county commissioners are both granted the power to sue and be sued but that only the latter are granted the power to settle and compromise suits. This principle was affirmed in an opinion reported in Opinions of the Attorney General, 1934, Vol. 1, p. 222. Subsequently the General

Assembly enacted Section 4749-1, General Code (116 O. L., 451) specifically granting boards of education the power to compound or release claims due them from banks. This section reads as follows:

> "The board of education of any school district may compound or release, in whole or in part, a debt, obligation, judgment or claim due the school district, or due the board of education of the school district from a bank or banks in process of liquidation or operating under a conservatorship, except where any member of the board of education is personally interested as a stockholder; the board of education shall enter upon its records a statement of the facts and the reasons for such compounding or release."

By virtue of this section a board of education is now empowered to waive a claim for accrued interest.

You ask my opinion as to whether the provisions of Section 710-88a, General Code, apply to conservators of national banks.

National banks are banks created and governed under the provisions of the acts of Congress. The general rule as to what law governs such banks is well stated in 7 Corpus Juris, 760, as follows:

> "Congress is the judge of the extent of the powers which should be conferred on national banks and has the sole power to regulate and to control their operations; and the National Banking Act and its amendments are supreme so far as they attempt to regulate these institutions."

From this it appears clear that the provisions of Section 710-88a, General Code, do not apply since this is a state statute and both the Mount Gilead National Bank and the proposed new bank are national banks. The provisions of the federal bank conservation act govern the reorganization in such a case.

Your third question is whether a board of education can collect this interest even though not mandatory and the proper procedure for so doing.

In answering this question, it must be borne in mind that the board is a general creditor. The Supreme Court held in the case of Fidelity & Casualty Company v. The Union Savings Bank Co., 119 O. S., 124, as disclosed by the second, third and fourth branches of the syllabus:

> "2. The legislature has made provision for deposit of state funds in Section 321 et seq., General Code, and a deposit when made under authority of those sections creates the relation of borrower and lender between such depositary and the state.

3. Section 321, et seq., General Code, neither expressly nor impliedly give to the state priority of payment out of the funds of such banking institution in the event of insolvency.

4. A deposit of state funds in a depositary under authority of Section 321 et seq., General Code, is not an exercise of sovereignty but on the other hand in such a transaction the government is acting in its proprietary capacity."

Upon principle the same rule applies to the deposits of a political subdivision, and I so held in an opinion reported in Opinions of the Attorney General for 1933, Vol. 1, p. 589.

In Opinions of the Attorney General for 1934, Vol. 3, p. 1907, and Opinions of the Attorney General for 1935, No. 3761, I held that interest provided in a state depository contract continues to accrue during the period when the depository bank is under the control of a conservator, pursuant to Section 710-88a of the General Code, but that interest payable under such depository contract ceases when the Superintendent of Banks takes possession of a bank for liquidation pursuant to Section 710-89, General Code.

The scope and general purpose of Section 710-88a, General Code, and Sections 203, 205, 206 and 208 of the Bank Conservation Act, are similar. In Section 207 (12 U. S. C. A., Sec. 207), reorganization of banks operating under a conservator is provided for. This section reads as follows:

"In any reorganization of any bank under a plan of a kind which, under existing law, requires the consent, as the case may be (a) of depositors and other creditors or (b) of stockholders or (c) of both depositors and other creditors and stockholders, such reorganization shall become effective only (1) when the Comptroller of the Currency shall be satisfied that the plan or reorganization is fair and equitable as to all depositors, other creditors and stockholders and is in the public interest and shall have approved the plan subject to such conditions, restrictions and limitations as he may prescribe and (2) when, after reasonable notice of such reorganization, as the case may require, (A) depositors and other creditors of such bank representing at least 75 per cent in amount of its total deposits and other liabilities as shown by the books of the bank or (B) stockholders owning at least two-thirds of its outstanding capital stock as shown by the books of the bank or (C) both depositors and other creditors representing at least 75 per cent in amount of the total deposits and other liabilities and stockholders owning at least two-thirds of its outstanding capital stock as shown by

the books of the bank, shall have consented in writing to the plan of reorganization: Provided, however, that claims of depositors or other creditors which will be satisfied in full under the provisions of the plan of reorganization shall not be included among the total deposits and other liabilities of the bank in determining the 75 per cent thereof as above provided. When such reorganization becomes effective, all books, records, and assets of the bank shall be disposed of in accordance with the provisions of the plan and the affairs of the bank shall be conducted by its board of directors in the manner provided by the plan and under the conditions, restrictions and limitations which may have been prescribed by the Comptroller of the Currency. In any reorganization which shall have been approved and shall have become effective as provided herein, all depositors and other creditors and stockholders of such bank, whether or not they shall have consented to such plan of reorganization, shall be fully and in all respects subject to and bound by its provisions, and claims of all depositors and other creditors shall be treated as if they had consented to such plan of reorganization."

The constitutionality of this section was upheld in Milder v. National Chautauqua County Bank, 240 App. Div., 169, 270 N. Y. S., 522, the court refusing to accept the contention that it denies due process of law. It was held that the section constituted a proper exercise of the powers of Congress to legislate on the subject of bankruptcy.

Incidentally, in a ruling on a demurrer entered January 8, 1936, the Court of Common Pleas of Ottawa County upheld a reopening under old Section 710-88a, General Code (115 O. L., 129), which was challenged as denying due process of law because the statute as it existed at the time of the reopening made no provision for judicial review. Ernest Hofer v. Oak Harbor State Bank Co., No. 9672.

Under Section 207, Bank Conservation Act, when the plan is approved by the Comptroller of the Currency and the necessary consents are secured, all depositors and other creditors and all stockholders become bound by its terms and entitled to its benefits, regardless of whether they consented or not.

The "Notice of Plan" provides that, "Fifty (50%) per cent of all *unsecured* liabilities of this Bank, excepting liabilities entitled to priority or preference in payment, will be removed from the books of this Bank, together with any and all interest which may or might have accrued on the same since and including the date of suspension of this bank * * *."

Since interest on the board's deposit continued to accrue during conservatorship, unless cut off by the terms of the reorganization plan, it is necessary to consider the above provision. As has been stated, the board

is not entitled "to priority or preference in payment" since it acted in a proprietary capacity in making the deposit. However, is this an "unsecured liability" within the meaning of the plan? The statute requires the giving of security for such deposits and in your letter you state that the security, or at least part of it, was the individual or corporate sureties. While there may be more reason for a provision in a reorganization plan for paying deposits "secured" by assets, those "secured" by a bond are equally within the ordinary use of the term.

Assuming that the complete plan contains nothing to the contrary, it is my opinion that the deposit in question is not an "unsecured liability" within the terms of the "Notice of Plan", and therefore not subject to the 50% reduction provision above quoted. Under that assumption of fact, the board is legally entitled to interest during the period of conservatorship.

As above noted, the board is entitled to the benefits and is subject to the burdens of the plan, regardless of whether its officers signed the "Consent". If the complete plan, which I do not have before me, discloses that a secured claim of this character is within that class of claims subject to reduction of 50% of the principal and all interest accruing during suspension, the board cannot collect interest accruing during such period.

Summarizing, it is my opinion that:

1. Under Section 4749-1, General Code, it is not mandatory for a board of education to collect interest on school funds accruing under a depository contract during the period when a national bank is being operated by a Conservator pursuant to the Federal Bank Conservation Act.

2. Under Section 4749-1, General Code, such board of education may collect the principal and waive the interest accruing during the period of such conservatorship.

3. There exists the right to interest on deposits accruing at the contract rate during the period when a national bank is in conservatorship, subject to being divested by an appropriate provision in a valid plan of reorganization.

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5. Under Section 207, Federal Bank Conservation Act, when a reorganization plan is approved by the Comptroller of the Currency and the necessary consents are secured, all depositors and other creditors, and all stockholders, become bound by its terms and entitled to its benefits, regardless of whether or not they have consented thereto.

Very truly yours,

JOHN W. BRICKER,

Attorney General.