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TRUST COMPANIES—PAID IN CAPITAL STOCK—DEPOSIT WITH TREASURER OF STATE—SEPARATE SECURITY FOR TRUST—SURPLUS—QUALIFICATION.

SYLLABUS:

1. *The paid in capital stock of one hundred thousand dollars required under Section 710-37, General Code, for a trust company, and the one hundred thousand dollars specifically required under Section 710-150, General Code, to be deposited with the Treasurer of State are regarded as separate and distinct in respect to their being held as security for the faithful performance of the trust undertaken.*

2. *A proposed trust company without funds other than a capital stock of one hundred thousand dollars and a surplus of twenty thousand dollars would not have sufficient funds to fulfill both requirements and thus qualify to receive a certificate of compliance.*

COLUMBUS, OHIO, March 13, 1937.

S. S. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR MR. SQUIRE: This will acknowledge and answer your recent letter which reads as follows:

> "Section 710-37, General Code, provides in part that the capital of a corporation transacting a trust business shall not be less than $100,000, and Section 710-161, General Code, sets forth that the capital stock of a trust company, with the liabilities of the stockholders existing thereunder and the fund deposited with the Treasurer of State as required by the provisions of Section 710-150, General Code, shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust it may administer.
>
> I would appreciate your opinion as to whether or not, subject to compliance with other provisions of the General Code applicable to like corporations and with the approval of the undersigned, a trust company may be legally incorporated and authorized to transact business in a city, the population of which exceeds 25,000, without additional funds other than a capital stock of $100,000 and a surplus of $20,000."

The minimum capital requirements are defined in Section 710-37, General Code, which reads as follows:

"The capital of a commercial or savings bank or a combination of both shall be not less than twenty-five thousand dollars, provided that in cities the population of which exceeds ten thousand such capital shall not be less than fifty thousand dollars.

The capital of a corporation transacting a trust business shall not be less than one hundred thousand dollars and if such business is combined with that of a commercial or savings bank, or a combination of both, such capital shall be in addition to the capital required for such commercial or savings bank, or a combination of both, as provided herein."

As to paid in capital stock of a trust company and a prerequisite deposit to assure faithful performance, Section 710-150 provides:

"No trust company, or corporation, either foreign or domestic, doing a trust business shall accept trusts * * * until its paid in capital is at least one hundred thousand dollars, except that the and until such corporation has deposited with the treasurer of state the sum of one hundred thousand dollars, except that the full amount of such deposits may be in bonds. * * *"

Adding to the purpose of Section 710-150, it is stated in Section 710-161, that both the paid in capital stock of $100,000 and the required deposit of $100,000 to assure faithful performance of all trusts shall be held as security by the treasurer of state. Section 710-161, General Code, reads:

"The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state * * * shall be held as security for the faithful discharge of the duties undertaken by such trust company * * * and no other bond or security, except as hereinafter provided, shall be required * * * except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give security * * * as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such company and revoke such appointment."

After reading Section 710-37, General Code, which says that the capital of a corporation transacting a trust business shall not be less

than one hundred thousand dollars, and Section 710-150, General Code, which says that no trust company shall accept trusts until its paid in capital stock is at least one hundred thousand dollars and until such corporation has deposited with the treasurer of state the sum of one hundred thousand dollars as security, there might be a question as to the clear meaning. It could be asked if the legislature had left the effect that the same hundred thousand dollars paid in as capital stock might be used as the deposit with the state treasurer. Those two sections do not definitely declare that the deposit is to be separate and distinct, or that the capital stock is to be retained for use in the business.

It is prudent, therefore, to move on to a consideration of Section 710-161. That section states that both the capital stock and the hundred thousand dollars deposited with the treasurer shall be held as security for faithful performance of any trusts undertaken. The exact language is: "The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, *and* the fund deposited with the treasurer of state * * * shall be held as security * * *." The context, with the use of the conjunction "and," indicates that the two funds were regarded by the legislature as distinct. The one hundred thousand dollars actually transmitted to the treasurer and the minimum capital stock of one hundred thousand dollars were both to be subject to any recourse arising from fiduciary duties of the company. In the event of disregard of such duties, both the capital stock and the deposit are subject to seizure.

If the hundred thousand dollars of paid in capital stock be sent at once to the state treasurer, of course the company's treasury would be empty. It might be reasonable to think that the paid in capital stock of $100,000 as required, would provide working capital of a going concern bona fide, which the separate deposit in cash or bonds would be intended as a blanket of realizable property for security. If the paid in capital stock were $100,000 and the deposit immediately made were $100,000, what would be accomplished? The enterprise would be a futility.

Section 710-161 says that both the capital stock and the one hundred thousand dollars specifically required for deposit with the treasurer shall be held as security. Thus it appears that the legislature made a distinction, in the purview of Section 710-161, and that the paid in capital stock and the prerequisite deposit are to be held separately.

In view of the foregoing observations, without a deposit apart from the paid in capital stock, your examination, under Sections 710-55 and Secion 710-56, General Code, would not justify a certificate of compliance. Below the latter section there appears a note which reads:

"Before the superintendent of banks issues to a banking

corporation, whose articles of incorporation confer upon it trust powers * * * the certificate mentioned in G. C. 710-56, to the effect that it has complied with all the provisions required by law and is authorized to commence business, he may properly require that the deposit of one hundred thousand dollars mentioned in G. C. 710-150 be made by it. O. A. G., 1920, page 124."

Your letter asks if the company considered may be legally incorporated "without additional funds other than a capital stock of $100,00 and a surplus of $20,000."

In the Banking Act, Section 710-1, General Code, the terms are defined. There it reads in part:

"The term 'surplus' means a fund created pursuant to the provisions of Section 130 of this act by a bank or trust company from its net earnings or undivided profits, which to the amount specified and any additions thereto set apart and designated as such is not available for the payment of dividends and can not be used for the payment of expenses on losses so long as such bank or trust company has undivided profits."

Petraining to surplus and undivided profits, Section 710-130, General Code, states that:

"The board of directors of any bank may declare a dividend of so much of its undivided profits as they deem expedient. Before such dividend is declared, not less than one-tenth of the net earnings of the company for the preceding half year, or for such period as is covered by the dividends, shall be carried to surplus until such surplus amounts to fifty per cent of its capital stock."

The use to which surplus may be put is stated in Section 710-134, which reads:

"The surplus of any bank shall not be used for the payment of dividends nor shall the same be used for the payment of expenses or losses until the credit of undivided profits on the books of the bank has been exhausted. But any portion of such surplus may be converted into capital stock and distributed to stockholders by way of a stock dividend, provided that such surplus shall not thereby be reduced below twenty per cent of

the aggregated capital stock of said bank issued and outstanding after the payment of such dividend."

From the last part of your letter it appears that the organizers of the hypothetical trust company had it in mind to raise $120,000 to forward at once $100,000 to the state treasurer for security, and to hold $20,000 as a surplus. Even if a surplus of $20,000 would be in proportion to aggregate capital stock of an operating bank, it has already been held in this opinion that the legislature intended that the minimum paid in capital stock of one hundred thousand dollars and the one hundred thousand dollars for deposit are separately held as security. If that reasoning holds, the proposed funds would be insufficient.

An opinion on somewhat similar points was given by the Attorney General, August 16, 1933, (No. 1406, Vol. II). The Superintendent of Banks had asked for advice in a letter which in part, read:

"A national banking association is being organized in this state, which will have its principal office in a city the population of which exceeds twenty-five thousand.

It proposes to issue and sell to subscribers common stock in the amount of one hundred thousand ($100,000) dollars and preferred stock in the amount of one hundred thousand ($100,000). It will have a proposed surplus of forty thousand ($40,000) dollars. * * *

Section 710-161 of the General Code of Ohio seems to contemplate that the security for the faithful discharge of duties undertaken by a bank having trust powers shall be threefold, to wit: One, Capital stock; Two, Individual Liability of the stockholders; and Three, Cash or securities required to be deposited with the Treasurer of State under Section 710-150.

Since the shareholders of the bank referred to will apparently not be subjected to individual liability as such, may this institution, with a capital stock as indicated, when and if authorized by the Comptroller of the Currency to commence business, legally exercise trust functions in this state, upon depositing with the treasurer of state cash or securities as enumerated in Section 710-150 of the General Code?"

In the syllabus it reads:

"1. Section 710-161, General Code, does not require national banks to have a double liability on their shareholders to be eligible to transact a trust business in Ohio.

2. A national bank, with a capital stock of one hundred thousand dollars of common stock and one hundred thousand preferred, and a surplus of forty thousand dollars, when and if validly authorized by the Comptroller of Currency to transact trust functions, may, upon depositing with the Treasurer of State the cash or securities as enumerated in Section 710-150, General Code, legally exercise trust functions in this state."

Much of the opinion relates to the organization of national banks. The letter of inquiry had read: "* * * I am confronted by the problem of deciding whether or not, since part of its capital stock will be comprised of preferred stock, it could comply with the provisions of Section 710-37, General Code, as amended by House Bill No. 661." The Attorney General, after analyzing the Federal Banking Act, gave a detailed view of the phrase, "with the liabilities of the stockholders existing thereunder." He said:

"I am of the opinion that an interpretation of Section 710-161, General Code, requiring such 'double liability' is unwarranted * * * This section does not specifically say 'double liability' of the stockholders, but uses the more comprehensive term, 'the liabilities of the stockholders,' which would include the double liability, if any, as well as all other liabilities, such as, for example, liabilities for unpaid subscriptions, etc. It marshalls such liabilities for the costui que trustent, whatever they may be, but does not require 'double liability' of stockholders of a corporation transacting a trust business.

To construe the section as mandatory would cast grave constitutional doubt on Section 710-161, with reference to national banks."

The excerpt just cited is not directly pertinent to the present inquiry, but is given as helpful in any consideration of the liabilities expressed in Section 710-161. In any event, by the constitutional amendment passed at the last election, together with the recently adopted bill, double liability of bank stockholders in Ohio has been discontinued. Continuing, the Attorney General said:

"The rule that the capital stock, with the liabilities of the stockholders existing thereunder, and the one hundred thousand dollars of securities, shall stand in lieu of any special bond to be exacted as a condition of qualification under an appointment in any capacity named in Section 710-161, General Code, ad-

mits of the exception that the appointing authority may 'upon proper application' require additional security of a trust company that has been appointed. * * *

In view of the foregoing, it is my opinion that:

1. Section 710-161, General Code, does not require national banks to have double liability on their stockholders to be eligible to transact a trust business in Ohio.

2. A national bank, with the capital stock as indicated, when and if validly authorized by the Comptroller of the Currency to transact trust business, may legally exercise trust functions in this state, upon depositing with the Treasurer of State the cash or securities as enumerated in Section 710-150."

The second conclusion speaks of "a national bank, with the capital stock as indicated;" that is, one hundred thousand of common and one hundred thousand of preferred. The conclusion itself might be subject to a little searching, to find out the exact meaning, although the clause, "with the capital stock as indicated," in connection with the letter of inquiry was regarded by the author as sufficiently clear. That conclusion seems to say that, when a company which "proposes to issue and sell to subscribers common stock in the amount of one hundred thousand ($100,000) dollars and preferred stock in the amount of one hundred thousand ($100,000) dollars" had done so, it might then, "upon depositing with the Treasurer of State the cash or securities as enumerated in Section 710-150, legally exercise trust functions." It is not completely definite, from the language of the conclusion, that the Attorney General intended to say that the paid in capital stock was to be kept distinct; or, on the other hand, that he said it might be used as the deposit. This writer, however, is inclined to think that he meant the former view to prevail.

It is observed that in his paragraph preceding the conclusion, he said: "The rule that the capital stock * * * and the one hundred thousand dollars of securities shall stand in lieu of any special bond * * * admits of the exception that the appointing authority may * * * require additional security * * *." Thus he appears to say that both the capital stock and the one hundred thousand dollars are to be held separately as security. If that is the purport of the language of the previous Attorney General, the view in this opinion is in agreement.

In an opinion of the Attorney General under date of February 26, 1920, (No. 1025, Vol I, page 210), there was an analysis of the phrase "upon proper application," as used in connection with the provision for additional bond; and incidentally there appeared an expression of view

applicable to Section 710-161, General Code, as it relates to the present inquiry. The Attorney General stated:

> "In the opinion of this department, the first part of this section, which states the general rule to be applied, is not ambiguous. That rule is that the capital stock of the trust company, the so-called 'double' liability of its stockholders and the securities required by law to be deposited with the treasurer of state shall stand in lieu of any special bond to be exacted as a condition of qualification under an appointment in any capacity under this section. So far as it goes, this provision is mandatory, and, though it may have a modifying effect upon numerous other statutes, still it must prevail so far as prior statutes are concerned as being the last expression of the legislative will."

Again, it appears in the foregoing opinion that "the capital stock *and* the securities required by law to be deposited * * * shall stand in lieu of any special bond"; hence the two funds, rather than merging in the deposit, are separately and distinctly to be held as security.

As to the provision for additional security, the opinion stated:

> "Coming now to the specific question submitted, it seems to me that the natural import of the phrase 'upon proper application' is such as to exclude action by the court sua sponte. The court is not to move of its own accord, but only to act when moved by an 'application'. Who, then, may apply, and how should an application be made in order to be 'proper'? The section does not furnish very satisfactory answers to these questions, although it suggests as a natural meaning that the application shall be made as other applications in like cases would be made by any party in interest."

In the second paragraph of your letter you refer to "a city the population of which exceeds 25,000." The specification as to a city of more than 10,000, as expressed in Section 710-37, applies primarily to a commercial or savings bank. It says that "the capital of a commercial or savings bank or a combination of both shall not be less than twenty-five thousand dollars, provided that in cities the population of which exceeds ten thousand such capital shall not be less than fifty thousand dollars." The second part of the section says that the capital of a corporation transacting a trust business shall not be less than one hundred thousand dollars. This part does not specify the size of the city. It does say, however, that if the trust company expands into a commercial or savings bank the capital required for a trust company shall be in

addition to that required for the banking business, which is governed by the first part of the section.

You also ask whether or not a company on taking the steps you outline, "may be legally incorporated and authorized to transact business." It is inferred that you divide your question between the incorporation and the subsequent authorization to transact business. The opinion here is that the company may be legally incorporated without next taking the steps required before it begins to accept trusts. It may go through the process of incorporation and become a legal entity. It may receive its charter from the Secretary of State. Then having been organized it is ready to accept trusts on compliance further with the two requirements of having a paid in capital and making its deposit. Thus it might organize itself and stop short. Its acceptance of trusts would still be in the future. On compliance with the requirements, it would then be authorized to "transact business." As already pointed out, in a quotation from an opinion of the Attorney General (O. A. G., 1920, p. 124): "Before the Superintendent of Banks issues to a corporation, whose articles of incorporation confer upon it trust powers, the certificate mentioned in G. C. 710-56, * * * he may properly require that the deposit * * * be made by it."

Specifically answering your inquiry, it is my opinion that:

1. The minimum paid in capital stock and the hundred thousand dollars of special deposit are to be regarded as distinct, and held separately as security.

2. A corporation without funds other than a capital stock of $100,000 and a surplus of $20,000 could not hold the capital stock distinct and at the same time deposit one hundred thousand with the state treasurer; hence it would not be able to qualify.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

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APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $6,000.00.

COLUMBUS, OHIO, March 15, 1937.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County, Ohio, $6,000.00.