

4124.

SUPERINTENDENT OF BANKS — UNAUTHORIZED TO BORROW MONEY TO PAY DIVIDEND TO DEPOSITORS—WHO MAY PLEDGE ASSETS OF CLOSED BANK TO AID IN ITS REOPENING.

SYLLABUS:

1. *The Superintendent of Banks is without authority to borrow money on the security of assets of a defunct bank in order to pay a dividend to depositors and general creditors of said bank.*

2. *The Superintendent of Banks has no authority to negotiate a loan pledging the assets of a closed bank to aid in the reorganization or reopening of said bank, but this may be done by the duly authorized directors and officers of the banking corporation, subject to the approval of the Superintendent of Banks contingent upon the reopening of said bank and the returning of its assets to the banking corporation.*

COLUMBUS, OHIO, March 4, 1932.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads as follows:

“A recent enactment by Congress known as the Reconstruction Bill to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce and industry and for other purposes, provides among other things that the Reconstruction Finance Corporation may make loans for the following purposes set forth in Section Five of said act, a part of which reads as follows:

“To aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products the corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this Act as it may determine, to any bank, savings bank, trust company, building and loan association, insurance company, mortgage loan company, credit union, Federal land bank, joint-stock land bank, Federal intermediate credit bank, agricultural credit corporation, livestock credit corporation, organized under the laws of any State or of the United States, including loans secured by the assets of any bank that is closed, or in process of liquidation to aid in the reorganization or liquidation of such banks, upon application of the receiver or liquidating agent of such bank and any receiver of any national bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same: *Provided*, That not more than \$200,000,000 shall be used for the relief of banks that are closed or in the process of liquidation.”

Almost daily inquiries have been made of me as to whether or not the Superintendent of Banks, having possession of the business and property of a bank as provided in Section 710-89 of the General Code of Ohio, has power to borrow money and as security pledge a part of the assets of said bank.

The question arises in instances where, first, it is desired to make available early dividends for depositors, and second, such loans, if permissible, may enable the closed bank to reopen and resume business.

I would appreciate your opinion as to whether or not I have power to so borrow money for either of the purposes aforementioned."

Your inquiry requires the construction of section 710-95, General Code, relating to the powers of the Superintendent of Banks in the liquidation of banks. I find no express power therein contained authorizing the borrowing of money for the purposes set forth in your inquiry.

It is provided in section 710-95, General Code, *supra*, *inter alia*, that the Superintendent of Banks may do such acts as are necessary to preserve the assets and business of the defunct bank pending liquidation thereof. It may be here noted that the state official succeeding to the rights of the closed banks is generally held to occupy the position of receiver appointed in equity and to have the same powers and duties, so far as consonant with those powers specifically conferred by statute. 3 *Michie on Banks and Banking* (Permanent Edition, 1931), section 30. Accordingly, the Superintendent of Banks is undoubtedly authorized to borrow money to conserve and protect the assets of the closed bank. 53 C. J., 163, section 205. It is, however, no part of the function of liquidation, express or necessarily implied, that loans be negotiated, secured by a pledge of assets, for the purpose of making a distribution of dividends to the depositors and general creditors of the defunct bank. It might be otherwise if the statutes required the termination of the liquidation within a fixed period. In such case, in order not to sacrifice the value of the assets by forced sale, the incidental and implied power to borrow money to pay dividends might arise. However, I find no such restriction on the powers of the Superintendent of Banks and I have no doubt that in his sound discretion he may extend the period of the liquidation over such reasonable time as will insure the realization of the maximum amount of money on the bank's assets. It follows that the Superintendent of Banks has no power to negotiate a loan of money on the strength of the assets of a defunct bank for the purpose of declaring a dividend to the bank's depositors and creditors.

It is fundamental that the Superintendent of Banks, with powers and duties analogous to that of a receiver in chancery, has no power to reorganize a defunct bank. Touching this proposition as to the power of corporate receivers, it was held in *Bank Company vs. Realty Company*, 29 A. O. 447, as disclosed by the first branch of the headnotes:

"It is the duty of the receivers, in whose hands a business has been placed, to settle and adjust the affairs of the concern, but not to reorganize it for the purpose of carrying it on, and a contract made with the receivers of a real estate company to reorganize the concern is invalid."

I am forced to conclude, however reluctantly, that it is beyond the powers of the Superintendent of Banks, in the exercise of his function analogous to that of receiver, to negotiate a loan to aid in the reopening of a closed bank.

Although I am impelled to the conclusion, before stated, that the Superintendent of Banks has no power, either by negotiating a loan, pledging as security part of the assets of the bank, or by a sale by discounting obligations for the payment of money as part of such assets of a defunct bank, to obtain money for the reopening of a closed bank, the officers, directors or persons interested in its re-

organization may apply for such loan and obtain the same contingent upon the reopening of the closed bank and the pledging of its assets turned over by the Superintendent of Banks upon its reopening, the entire transaction being subject, of course, to the approval of the Superintendent of Banks, as provided by law.

In reaching my conclusions upon your inquiry, I have felt fortified by the fact that Congress, in the enactment of the reconstruction bill, deemed it essential specifically to grant to the receivers of national banks the authority to contract for loans and to pledge assets of the bank as security therefor. This is clear from part of the bill quoted in your communication. It is well known that the powers of a receiver of a national bank and of the Superintendent of Banks in the liquidation of a state bank are closely analogous, and that both have many of the characteristics of a receiver in equity for liquidation purposes. Legislation being deemed essential to authorize a federal bank receiver to contract indebtedness of this character, it would seem necessary, in order to extend similar authority to the Superintendent of Banks of Ohio, either to find already existing specific statutory authority, which as I have pointed out does not exist, or to enact legislation for that purpose along the lines already adopted by Congress.

In specific answer to your questions, I am accordingly of the opinion:

1. The Superintendent of Banks is without authority to borrow money on the security of assets of a defunct bank in order to pay a dividend to depositors and general creditors of said bank.

2. The Superintendent of Banks has no authority to negotiate a loan pledging the assets of a closed bank to aid in the reorganization or reopening of said bank, but this may be done by the duly authorized directors and officers of the banking corporation, subject to the approval of the Superintendent of Banks, contingent upon the reopening of said bank and the returning of its assets to the banking corporation.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4125.

APPROVAL, LEASE FOR RIGHT TO USE FOR DOCKLANDING AND WALKWAY PURPOSES, LAND AT PORTAGE LAKES, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, March 4, 1932.

HON. I. S. GUTHERY, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a communication over the signature of the chief of the bureau of inland lakes and parks of the division of conservation in the department of agriculture, submitting for my examination and approval a certain reservoir land lease in triplicate, executed by the conservation commissioner under the authority of section 471 of the General Code to one Edith Eweith of Akron, Ohio.

By the provisions of the lease here in question, there is leased and demised to the lessee above named, for a term of fifteen years and for an annual rental of seven dollars, the right to occupy and use for docklanding and walkway pur-