

item of real property pursuant to the provisions of Section 5678, General Code, even though the taxpayer, during the time within which such tax might have been paid, had deposited with a bank for transmittal to the county treasurer, a sum of money sufficient to pay such tax without penalty but which the bank had not delivered by reason of an order limiting the payment by banks issued by the state or federal government.

Respectfully,

JOHN W. BRICKER,
Attorney General.

709.

APPROVAL, NOTES OF HAMILTON RURAL SCHOOL DISTRICT, JACKSON COUNTY, OHIO—\$1,728.00.

COLUMBUS, OHIO, April 22, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

710.

BANKS—UNAUTHORIZED TO ISSUE PREFERRED STOCK—DISCUSSION OF STATUTES RELATING TO ORGANIZATION OF CORPORATION—LIABILITY OF STOCKHOLDERS.

SYLLABUS:

Banks organized under the laws of the State of Ohio are not authorized to issue preferred stock.

COLUMBUS, OHIO, April 22, 1933.

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

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

“Under recent legislation enacted by Congress, the Reconstruction Finance Corporation is authorized to purchase preferred stock issued by banks. I would appreciate it if you would advise me as to whether or not banks organized under the laws of the state of Ohio may issue preferred stock under existing statutes and constitutional provisions. If they may issue such stock, is it subject to double liability?”

This question, in so far as my research discloses, has never been subject to judicial interpretation in Ohio.

Section 710-41, General Code of Ohio, provides as follows:

“Any number of persons, not less than five, a majority of whom

are citizens of this state, may associate and become incorporated to establish a commercial bank, a savings bank, a trust company, or to establish a bank having departments for two or more or all of such classes of business, upon the terms and conditions and subject to the limitations hereinafter and by law prescribed.

Such persons shall subscribe and acknowledge before an officer authorized to take acknowledgment of deeds, articles of incorporation, the form of which shall be prescribed by the secretary of state, which must contain:

a. The name by which such corporation is to be known, which shall begin with the word 'The' and end with the word 'bank' or 'company.'

b. The place where its business is to be transacted, designating the particular city, village or township.

c. The purpose for which it is formed, whether that of a commercial bank, savings bank, trust company, or a combination of two or more or all, of such classes of business, or a special plan bank, as provided in G. C. sec. 710-180.

d. The amount of its capital, which shall be divided into shares of not more than one hundred dollars each."

Section 8623-4, General Code, provides as follows:

"Any number of natural persons, not less than three, a majority of whom are citizens of the United States, may become a corporation, by subscribing, acknowledging and filing in the office of the secretary of state articles of incorporation, hereinafter called articles, setting forth:

1. The name of the corporation, which may begin with the word 'the' and shall end with or include 'company,' 'co.' 'corporation,' 'incorporated,' or 'inc.,' except as otherwise provided by law.

2. The place in this state where the principal office of the corporation is to be located.

3. The purpose or purposes for which it is formed.

4. The maximum number and the par value of shares with par value, and the maximum number of shares without par value which the corporation is authorized to have outstanding; and if the shares are to be classified:

(a) the designation of each class, the number and par value, if any, of the shares of each class and, if desired, of the series of any class; and

(b) the express terms and provisions of the shares of each class.

'Express terms and provisions,' as used in this act, shall mean any dividend rates, preferences, conversion rights, voting rights, preemptive rights, rights in stated capital, option rights, participation rights, redemption rights, which may be at the option of the shareholder or of the corporation or at a specified time or in a specified event, amounts payable on redemption of shares (hereinafter sometimes designated 'redemption price'), amounts payable on shares of any class upon dissolution, liquidation, consolidation, merger, or sale of entire assets of the corporation (hereinafter sometimes designated

'Liquidation price'), right of alteration of express terms and provisions and any other relative rights of shareholders, or any restrictions or qualifications of the rights of the holders of shares of any class, which are expressed in the articles.

In lieu of stating the dividend rate, redemption price, or liquidation price of shares of any class, or the series of any class of shares, or the number of shares constituting any series, the articles may authorize the board of directors of the corporation, at one time or from time to time, within the limitations and restrictions stated therein, to fix or alter such dividend rate, redemption price, or liquidation price, or the series or the number of shares constituting any series, or any of them, in respect of shares then unissued or in the treasury of the corporation, by adopting an amendment to the articles, which amendment shall be filed in the office of the secretary of state before the issuance of any such shares, or the disposal of treasury shares on terms so fixed or altered.

5. The amount of capital with which the corporation will begin business, which shall be not less than five hundred dollars.

6. If desired, the amount of consideration for which subscriptions to shares without par value may be received by the incorporators, and the valuation of any considerations to be received for shares either with or without par value proposed to be presently issued.

7. Any lawful provisions which may be desired for the purpose of defining, limiting and regulating the exercise of the authority of the corporation, or of the directors or of the shareholders or of any class of shareholders, or for the purpose of creating and defining rights and privileges of the shareholders among themselves. Any provision authorized to be made in the regulations of a corporation may, if desired, be made in its articles.

* * * * *

It will be observed that section 710-41 provides for the incorporation of banking corporations and section 8623-4 provides for the incorporation of general corporations. It will be further observed that section 8623-4 expressly provides for the classification of shares of stock, and that no such provision is contained in section 710-41.

Section 8623-132, General Code, reads as follows:

"When special provision is made in the General Code for the incorporation, organization, conduct or government of corporations formed for any specified purpose, this act shall not apply, but the special provision shall govern unless it clearly appears that the special provision is cumulative.

No banking, safe deposit, trust or insurance corporation shall be authorized to issue shares without par value."

This section provides that the provisions of the General Corporation Act shall not apply to corporations organized under special statutes unless it shall clearly appear that such special provisions are purely cumulative. It would therefore seem to be apparent that section 8623-4 can have no application to the incorporation of a banking corporation under the provisions of section 710-41. This latter section makes no provision for the classification of shares

of stock. No such provision having been made in the case of banking corporations, it must be concluded that such classification is not permissible.

In Volume 10, Ohio Jurisprudence, Section 605, dealing with the general powers of corporations, we find the following:

"It is said that the power of a corporation depends on its charter, and the laws of the state where it is organized; that all corporations owe their origin and existence to legislative enactment * * * The statement is made repeatedly that corporations are creatures of law who derive all their powers and capacities from the law of their creation and owe their existence to the will of the sovereign; their authority or legal powers are dependent upon the grant by the sovereign power." In Volume 5, Ohio Jurisprudence, at page 286, dealing with the organization of banks, we find the following:

No authority to conduct a banking business can now be granted except to corporations organized for that purpose, which must be incorporated and organized with a capital stock under the provisions of the Banking Code; and which are governed by the general corporation laws of the state, in so far as they are not inconsistent with the provisions of the Bank Act. * * * *

At page 363, we find the following statement under the heading of "Powers in General":

"Banks of course have only such powers as are expressly conferred, or as are incidentally necessary to effectuate their express powers, * * *."

In the case of *State ex rel Chapman vs. Urschel, et al., State ex rel Stuart, Prosecuting Attorney vs. Urschel, et al.*, 104 O. S. 172, at page 181, we find the following statement:

"It is well settled that corporations are artificial beings depending for their existence upon the law of the land. A definition which has been universally accepted is that found in the Dartmouth College case, 4 Wheat. 518, 636. It reads in part as follows:

'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.'

In the state of Ohio corporations are the creatures of statutes and the legislature is authorized by the constitution to enact general laws for their formation. While corporations in Ohio have all powers expressly conferred upon them by statute, and also such other powers as are necessarily incident thereto, all such powers must be exercised in conformity with the manner pointed out by statute in all cases where the statutes contain regulatory provisions, and a failure to so conform with reasonable strictness renders any attempted action invalid."

It is therefore my conclusion that the issuance of preferred stock by

banks organized under the laws of the state of Ohio is not authorized under existing statutes.

Your first question having been answered in the negative, your second question becomes moot. However, I might say that had I reached a conclusion that the issuance of preferred stock by banks was permissible, it would be my opinion that such preferred stock would be subject to the double liability imposed by Article XIII, Sec. 3 of the Constitution of Ohio, and Section 710-75 of the General Code of Ohio.

Article XIII, Section 3, of the Constitution of Ohio, provides in part as follows:

“ * * * except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * * ”

Section 710-75 of the General Code, provides:

“Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The stockholders in any bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such bank to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way recourse which such stockholders might otherwise have against those in whose names such shares are registered at the time of such failure. At any time after taking possession of a bank for the purpose of liquidation, when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.”

It will be observed that in both the Constitution and the statutes of Ohio, provision is made for the double liability of stockholders of corporations authorized to receive money on deposit. A stockholder may be either the owner of preferred stock or common stock, and no qualification is made in either the constitution or the statutes in favor of a preferred stockholder where double liability is concerned. It is therefore apparent that any stockholder of a corporation authorized to receive money on deposit would be doubly liable to the extent of the par value of the stock owned by such stockholder, and the right to enforce such double liability provided for in section 3 of Article XIII of the Constitution, and section 710-75 of the General Code of Ohio, has been established in many cases. See *Long vs. Osborn Bank*, 100 O. S., 51; *Andrews vs. State ex rel Blair*, 124 O. S., 348; *Snider vs. The United Banking*

and Trust Company, 124 O. S., 375, and *State ex rel Lattanner vs. Osborn Bank et al.*, 17 N. P. (n. s.), 236.

While, therefore, as has heretofore been stated, it is my conclusion that the right to issue preferred stock by banks organized under the laws of Ohio does not exist under present statutes, if the issuance of such preferred stock were authorized, such preferred stock so issued would be subject to the double liability imposed by Article XIII, Section 3, of the Constitution of Ohio, and Section 710-75 of the General Code of Ohio.

Respectfully,

JOHN W. BRICKER,
Attorney General.

711.

BOARD OF EDUCATION—MATURITY OF NOTES EVIDENCING MONEY BORROWED PRIOR TO TAX SETTLEMENT, NEED NOT BE ANTICIPATED FROM ADVANCE PAYMENT OF TAXES—COUNTY TREASURER NOT REQUIRED TO MAKE DEDUCTIONS FOR ANTICIPATORY INDEBTEDNESS IN MAKING ADVANCE PAYMENT TO BOARD OF EDUCATION.

SYLLABUS:

1. *When a board of education has borrowed money in anticipation of a tax settlement pursuant to the provisions of Section 2293-4, General Code, and thereafter, but before the maturity date of the notes issued in evidence of such borrowing and before the date of the semi-annual settlement between the county treasurer and the county auditor, the county makes an advance payment of taxes to such board of education which does not reduce the unpaid balance of anticipated receipts from the next semi-annual settlement of taxes below twice the aggregate amount of the anticipatory notes, debt charges and other advances, there is no mandatory duty on such board of education to anticipate the maturity of such notes from such advance payment.*

2. *In determining the amount of an advance payment to a board of education by the county treasurer pursuant to the provisions of Section 2692, General Code, under like circumstances, there is no duty on the county treasurer to make deductions therefrom for such anticipatory indebtedness created by such board of education.*

COLUMBUS, OHIO, April 24, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion on questions of law from the following set of facts:

The P. City School District has borrowed in anticipation of the February, 1933 tax settlement the sum of \$77,000 and issued its promissory notes evidencing such fact. Such board of education's budget for the general fund payable in February, 1933, is \$239,000. Such board of education desires to procure an "advance draw" of \$33,000 and, in addition, borrow from the banks in anticipation of such settlement a further sum of \$9,000. It is contended that if moneys are advanced by the county treasurer to such board in anticipation of such settle-