

4137.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND C. E. MORROW, COLUMBUS, OHIO, FOR LABOR FOR EXTENSION AND IMPROVEMENT OF POWER PLANT AT OHIO PENITENTIARY AT AN EXPENDITURE OF \$1,380.00.

COLUMBUS, OHIO, March 8, 1932.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a supplementary contract between the State of Ohio, acting by yourself, as Director of Public Welfare, and C. E. Morrow, Consulting Engineer of the Ohio State University, Columbus, Ohio, providing for all labor necessary for the supervision of installation of steam generating equipment, turbo generator, condenser, water treatment equipment and general piping in connection with Extension and Improvement of the Power Plant at the Ohio Penitentiary.

This contract is supplementary to that approved by this office in Opinion 3525, rendered August 28, 1931, and calls for an expenditure of Thirteen hundred and eighty dollars (\$1,380.00).

You have submitted encumbrance estimate No. 17, executed pursuant to Section 2288-2, General Code.

It is noted that the Controlling Board has released moneys for this contract.

Finding the contract in legal form, I hereby approve said contract and return to you all the papers submitted.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

4138.

BANK IN LIQUIDATION—SUPERINTENDENT OF BANKS UNAUTHORIZED TO WAIVE PRIORITY OF CLAIM DUE THE BANK IN FAVOR OF NEW LOAN.

SYLLABUS:

*When the Superintendent of Banks has taken possession of the property and business of a bank for the purpose of liquidation, he has no authority to enter into an agreement with a debtor of such bank so closed, agreeing to waive the priority of the sum due to the closed bank in favor of a new loan being advanced to the debtor for the purposes of operating expenses.*

COLUMBUS, OHIO, March 8, 1932.

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

DEAR SIR:—I am in receipt of your recent request for an opinion, which reads as follows:

"A corporation is indebted in a substantial amount to a bank now closed and in my hands for liquidation. The current asset position or ratio of said corporation is such that under present business conditions it cannot borrow enough to liquidate its indebtedness to the bank. While its ratio of current assets to current liabilities is not strong enough to enable it to borrow or to liquidate its indebtedness to said closed bank, it is sufficiently good to entitle it to continue in business.

It has a substantial number of employes and its local transactions are of consequence in the economic structure in the city in which the closed bank is located. To cause a receiver to be appointed for said corporation or by placing it in bankruptcy in order to collect its indebtedness to the closed bank would necessarily destroy its business, terminate the employment of a number of persons and sacrifice asset values, though such action might result in the payment in full of the indebtedness of said corporation to the closed bank.

The corporation being in an unsatisfactory credit and cash position, finds it necessary to borrow money in order to pay its taxes and to purchase materials for its season's operations, and through such payments and purchases the business of said corporation may be kept alive and be productive locally.

Certain parties are willing to loan said corporation the money necessary for the payment of its taxes and the season's purchases of materials, provided and on condition that I, as Superintendent of Banks in charge of the liquidation of said closed bank, agree in some form that the new loan to be made by such parties, shall be repaid in full out of the assets of said corporation before anything other than interest is paid on the indebtedness due the closed bank, and that said indebtedness be deferred or extended to permit said corporation to pay off the new loan. In other words, it is proposed that the indebtedness to the closed bank be subordinated in favor of said new loan and I, therefore, request your opinion as to whether or not, under my general authority to preserve and protect assets of the closed bank, I may enter into such agreements as appear to be reasonable for the renewal or extension of the indebtedness owing to a closed bank or for the subordination of indebtedness to it in favor of new loans as outlined."

The powers of the Superintendent of Banks upon taking possession of the property and business of a bank for the purpose of liquidation are set forth in Section 710-95, General Code, which reads as follows:

"Upon taking possession of the property and business of such bank, the superintendent of banks *is authorized* to collect money due to such bank, and to do such other acts as are necessary to preserve its assets and business, and *shall proceed* to liquidate the affairs thereof, as hereinafter provided. The superintendent of banks *shall collect* all debts due and claims belonging to it, and upon the order of the common pleas court in and for the county in which the office of such bank was located, *may sell or compound* all bad or doubtful debts, and on like order *may sell* the real estate and personal property of such bank, on such terms as the court shall direct. The superintendent of banks, *shall give notice* to such bank of the time and place of making application to said court for such order.

The superintendent of banks upon the terms of sale or compromise directed by the court, *shall execute* and deliver to the purchaser of such real and personal property such deeds or instruments as shall be necessary to evidence the passing of the title; and if said real estate is situated outside the county in which the office of the bank was located, a certified copy of such order authorizing and ratifying said sale *shall be filed* in the office of the recorder of the county within which said property is situated; and *may*, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders." (Italics, the writer's).

It is an elemental rule of law that where an office is created by a statute, setting forth the duties and powers of such office, such office or officer has only such powers and rights as are specifically conferred by statute or such as are necessarily inferred from such statute.

While it is not the arbitrary or definite rule that the language "may" shall always be construed as permissive, or that the word "shall" shall always be construed as mandatory, upon an examination of this section it is evident that certain provisions are merely permissive, such as, the Superintendent of Banks "is authorized to collect money"; "may sell or compound" bad or doubtful debts; "may sell the real estate and personal property"; and "may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders." An examination of the entire act discloses that it does not necessarily contemplate the entire liquidation of the bank by the Superintendent of Banks but contemplates only liquidation to the extent necessary to pay the depositors and creditors. Section 710-102, General Code. Bearing this in mind, it is apparent that the intention of the legislature was not to make these specific provisions mandatory. However, it is to be noted that certain other provisions of the section use the language "shall", thus, "the superintendent of banks shall proceed to liquidate the affairs", "shall collect all debts due", "shall give notice of making an application to the court for an order to sell real estate or personal property" and "shall execute and deliver deeds to the purchasers if he sells the real estate."

While you do not definitely state that the debt of the corporation is past due, from the tenor of your letter, I assume such to be the case. I am therefore of the opinion that the language of the statute "shall collect all debts due, and claims belonging to it" is mandatory. However, since the act does not state the manner in which the Superintendent of Banks shall proceed to collect the debt or that he shall immediately institute action to enforce payment of the obligation, it is only fair to assume that the legislature left to the discretion of the Superintendent of Banks the methods to be used to collect the debts due. In the case of *Peoples State Bank of Lakota vs. Francis et al*, 79 N. W. 853; 8 N. D. 369, decided by the Supreme Court of North Dakota, the second and third branches of the syllabus read as follows:

"2. Where a receiver is placed in charge of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of the assets.

3. Such receiver has authority, upon sufficient consideration, to extend the time of payment of the debt owing such bank, where by so doing he can, in his judgment, strengthen the security for the payment of the debt."

Your request, however, infers that the debtor at the present time is able to pay the debt and if the claim were pressed at this time it would be paid in full. It is my opinion that the Superintendent of Banks in charge of the liquidation of a closed bank does not have authority to execute a waiver or to enter into any other agreement which would create a preference in favor of a creditor or a person or corporation indebted to the closed bank, for this might clearly be prejudicial to the claims of other creditors or to the individual liability of the stockholders in the event that it subsequently became necessary to enforce payment of the obligation which was by the act of the Superintendent of Banks made subsequent to other creditors.

In your request you state that the corporation finds it necessary to borrow money for the purpose of paying its taxes and for the season's purchase of materials, and that third parties are willing to loan money to the debtor of the closed bank providing you, as Superintendent of Banks, enter into an agreement extending the maturity of your loan, and consent that no payments shall be made upon the loan to the closed bank other than interest until such new money so advanced shall have been fully repaid, and you ask whether you may enter into such an agreement. If your question were limited merely to the payment of taxes, I do not believe it would be in excess of your powers; however, since you also include funds for operating expenses it is evident that conditions might be such that the corporate debtor would be liquidated by way of the Receiver, or otherwise, and in such event, by virtue of the agreement which you suggest, such claim would be entitled to be paid ahead of the amount due to the bank which you are liquidating. Thus the bank may only receive a partial payment of its indebtedness and therefore such course might reasonably be presumed to be prejudicial to the rights of the creditors and the stockholders of the bank.

I am therefore of the opinion that, when the Superintendent of Banks has taken possession of the property and business of a bank for the purpose of liquidation, he has no authority to enter into an agreement with a debtor of such bank so closed, agreeing to waive the priority of the sum due to the closed bank in favor of a new loan being advanced to the debtor for the purposes of operating expenses.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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4139.

APPROVAL, BONDS OF INDEPENDENT RURAL SCHOOL DISTRICT  
NO. 2, OF ISLAND CREEK TOWNSHIP, JEFFERSON COUNTY, OHIO  
—\$1,862.00.

COLUMBUS, OHIO, March 8, 1932.

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