Prior to 1927 the above statute provided that no bank should receive a deposit larger than the amount of its paid in capital stock. While the statute was in force in that form a former Attorney General rendered an opinion which may be found in the Opinions of the Attorney General for 1922 at page 278, in which he reviewed the history of the statute and held:

> "The amount of school funds that may be deposited in a bank by a board of education under authority of Section 7604, General Code, can not in any case, or under any circumstances, exceed the amount of the bank's paid in capital stock."

In 1927 the statute was amended to read as it now does (112 O. L., 94). It will be observed that the statute as amended provides that a bank may receive a deposit no larger than the amount of its paid in capital stock *and surplus.* By reason of the amendment it appears clear that the legislature intended to change the limitation on the amount that a bank might receive and the language used in doing so is clear and needs no interpretation or construction.

I am therefore of the opinion in specific answer to your question that where a bank has a capital stock of $100,000.00 and a surplus of $50,000.00 the board of education is authorized by force of Section 7604, General Code, to deposit therein as much as $150,000.00.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4028

BANK—PARTIAL LIQUIDATION—MAY SELL PRIOR PARTICIPATING MORTGAGE WHEN.

SYLLABUS:

When, in order to obtain a partial liquidation of a mortgage owned by a bank, the bank receives the entire proceeds of a new mortgage upon the same priority which secures the bank's loan and applies such funds as a credit on its loan, such bank has the legal capacity to waive the priority of the remainder of its loan in favor of the new mortgage thus placed upon the property the proceeds of which the bank has received and applied on the indebtedness to it.

COLUMBUS, OHIO, February 5, 1932.

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

DEAR SIR:—Your recent request is as follows:

> "A bank has a loan of $10,000.00 secured by a first mortgage on real estate.
>
> An insurance company, in order that the bank may obtain cash, makes a loan in the amount of $8,000.00 on the same parcel of real estate but as a condition precedent requires that the loan made by it be secured by a first mortgage on said real estate.
>
> Is there any legal impediment to the bank waiving priority of its first mortgage lien in favor of the insurance company, in the amount of the loan made by the insurance company, to wit; $8,000.00, in order that said insurance company may have a first mortgage on the premises?"

In answering your inquiry, I do not desire to be interpreted as passing upon

the policy implied by such query, for in a number of instances, such type of waiver would be almost tantamount to the allowing of a $2,000.00 discount for the payment of a loan and in other cases it would amount to the hastening of the liquidation of the loan; such considerations are not questions of law and are therefore not considered by me.

Banks like other corporations have certain capacities or powers for business action. The express powers are those expressly granted by the charter or law creating the corporation. A banking corporation has additional powers which are sometimes referred to as incidental or implied powers, which are inferred, as a matter of law, to enable the bank to exercise the powers expressly granted to such institutions by its charter. The rule is laid down in Ohio Jurisprudence, Section 73, Title "Banks" as follows:

> "Banks, of course, have only such powers as are expressly conferred, or as are incidentally necessary to effectuate their express powers. (G. C. 710-141) * *
>
> What the proper business of a bank is, and what incidental powers may be necessary to that business, are not purely questions of law, nor altogether questions of fact; but mixed questions of law and fact depending upon the circumstances of the transaction and the location of the bank. The power to adopt reasonable and necessary measures for the collection and security of debts is necessarily incident to the power of banking."

In *Allen* vs. *First National Bank of Xenia,* 23 O. S., 97, it was held that although a national bank was prevented by statute from loaning on mortgages, it nevertheless had the power to take an assignment of such type of security in good faith to prevent loss on a debt previously contracted.

In 2, Fletcher's Cyclopaedia of Corporations, Section 792, which is entitled "Classification of Implied Powers", there appears the following:

> "Acts to protect debts owing to the corporation. If a corporation is a creditor, it may do many things to protect its rights which it could not otherwise do. The courts are very liberal in holding all reasonable acts of a corporation in connection with its collection of debts to be within its powers, and there is little conflict in the decisions. Thus, corporations may purchase property, or sometimes run a business temporarily, to collect a debt, where otherwise it would have no power to do so."

Banking corporations in this respect are not materially different from other types of corporations, and even prior to the enactment of the general corporation act there existed the doctrine that a corporation, in the absence of statutory or charter authority, could not purchase its own shares of stock. Courts have consistently held that a corporation could acquire its own stock and resell the same when such stock was taken or received by the corporation in satisfaction of a debt due and in order to save itself from loss. See *State ex rel. Colburn* vs. *Oberlin Building and Loan Association,* 35 O. S., 258; *Coppin* vs. *Greenlees,* 38 O. S., 275; *Morgan* vs. *Lewis,* 46 O. S., 1; *Straus* vs. *Imperial Motor Car Company,* 30 O. C. D., 425.

It therefore appears that unless there is some statutory inhibition against the waiving of priority of the remaining portion of the mortgage when the bank has

received the proceeds it would have such power even though the remaining portion of such mortgage would by reason of such waiver, be a second mortgage. Section 710-111, General Code, sets forth the types of securities in which a bank may invest its funds. This section, in so far as it applies to mortgages, reads as follows:

> "A bank may invest its capital, surplus, undivided profits and deposits in the following securities:
>
> * * * * * * * *
>
> (k) Bonds or notes secured by first mortgage on improved real estate as defined in section 113 hereof of not more than 60% of the value thereof."

Section 710-113, General Code, reads as follows:

> "The term 'improved' real estate as used in this act shall be held to mean land upon which buildings have been erected suitable and intended to be used for residence, business or other purposes and fit for use and occupancy, or under construction for such purposes; and in the case of farm property shall mean tillable land with farm buildings thereon and actually under use for farm purposes, and when so used the same may include pasture and wood lands."

However, your request assumes that the bank has already invested its funds in the type of security described in these sections and you ask my opinion as to whether after having so invested these funds it may upon receipt of the proceeds of a new first mortgage, waive the balance of such mortgage in favor of the new mortgage placed upon the property for the purpose of acquiring funds paid over to the bank. The sections above quoted, therefore have no application to your inquiry. The effect of the transaction suggested in your letter is that the bank will receive the sum of $8,000.00 on its $10,000.00 mortgage loan and will waive the priority of the remainder of the mortgage in favor of a new $8,000.00 loan. The mortgagor's liability on the note would still remain the same except that he would have a credit on the bank's note of $8,000.00. The mortgage which is but an incident to the debt would have its priority changed from a first lien to a second lien, and in the event that it should become necessary to subject the property to the payment of the note, there would be a prior encumbrance paid out ahead of the bank's claim. The effect of such waiver does not extend the maturity of the note or obligation and as a matter of business practice the new loan for the amount which the bank receives and applies upon its mortgage indebtedness does not change the bank's status except that it has received a portion of its funds and a new loan is substituted as a part of the bank's loan.

Under date of October 26, 1931, I rendered a similar opinion to the Director of Commerce, being Opinion No. 3698, which concerned building and loan associations, which type of associations and banks have many similar attributes.

I am therefore of the opinion that when, in order to obtain a partial liquidation of a mortgage owned by a bank, the bank receives the entire proceeds of a new mortgage upon the same priority which secures the bank's loan and applies such funds as a credit on its loan, such bank has the legal capacity to waive the priority of the remainder of its loan in favor of the new mortgage thus placed upon the property the proceeds of which the bank has received and applied on the indebtedness to it.

In reaching the foregoing conclusion I am mindful of the fact that we are now confronted with unusual economic conditions. That fundamental changes

have occurred has already been recognized by the highest authority of the land. The Supreme Court of the United States, in the case of *Railway Company* vs. *Interstate Commerce Commission,* decided January 4, 1932, speaking through Mr. Chief Justice Hughes, said:

> "Of that change we may take judicial notice. It is the outstanding contemporary fact dominating thought and action throughout the country."

Particularly significant has been the effect of the depression upon financial institutions. Judicial notice may be taken of the fact that there are, in our banks, many mortgages which, at the time the loans were made, were well within the percentage limitations prescribed by Section 710-112 of the Code, but which are now in excess of those percentages by reason of receding real estate values. Under such circumstances, in order that a bank may maintain that degree of liquidity which is essential to its safety, it may be necessary to realize upon a portion of the mortgage securities so held. This realization is in no sense an original investment, but the application of sound business principles to the liquidation of investments legally made.

These further considerations may well be added to what has already been said in support of the conclusion heretofore expressed.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4029

COSTS—GOVERNED BY LAW IN EFFECT AT TIME OF FILING WILL—PROVISIONS OF NEW PROBATE CODE INAPPLICABLE.

SYLLABUS:

1. *The filing of a will for probate under the probate code before amendment, constitutes the same a pending civil proceeding within the meaning of section* 26, *General Code, and subsequent fees and accounts should be governed by the law in effect at the time of such filing and not by the provisions of the new probate code effective January* 1, 1932.

2. *The provisions of the probate law in effect at the time of filing a will for probate govern subsequent procedure and new requirements or changes resulting from subsequent enactment, such as the requirement of filing a schedule of debts, need not be complied with.*

COLUMBUS, OHIO, February 5, 1932.

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

GENTLEMEN:—This is to acknowledge receipt of your recent request for my opinion which reads:

> "We are enclosing herewith letter from one of our State Examiners submitting two questions relative to fees of Probate Judges under the new Probate Code."

The questions presented by the attached communication are:

"1. When a will is deposited and probated previous to Jan. 1, 1932,