250.

SUPERINTENDENT OF BANKS—POWERS OF SUPERINTENDENT AS TO A NATIONAL BANK OPERATING A TRUST DEPARTMENT WHICH HAS BEEN PLACED IN THE HANDS OF A RECEIVER APPOINTED BY THE COMPTROLLER OF THE CURRENCY.

SYLLABUS:

1. *Where a national bank operating a trust department is placed in the hands of a receiver appointed by the comptroller of the currency, and is in process of liquidation, the superintendent of banks of Ohio may not compel the transfer of the assets of the trust department of such bank to a special deputy appointed by him for the purpose of having a separate liquidation of such trust department.*

2. *Where a national bank exercising trust powers is in the hands of a federal receiver appointed by the comptroller of the currency, and in process of liquidation, the superintendent of banks of Ohio has authority to examine the books of such trust department and to retain control of the fund of* $100,000 *deposited with the treasurer of state until he is satisfied that proper accounting has been made in all of the trusts being administered by such trust department.*

3. *The superintendent of banks of Ohio is authorized to examine the trust department of a national bank and may, in the event of the discovery of any unlawful acts in the administration of any of the trusts being administered by such trust department, proceed, by proper action in the state courts, to compel the administration of such trust in accordance with state law.*

COLUMBUS, OHIO, March 29, 1927.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent request for an opinion, which reads as follows:

> "On or about the 21st day of February, 1927, The Central National Bank of Marietta, Ohio, was closed by the Federal Banking Authorities at the request of the board of directors of said bank.
>
> The Central National Bank of Marietta, Ohio, was at the time operating a trust department and on or about the 7th day of March, 1927, my predecessor in office appointed Mr. Clyde A. Harness as Special Deputy Superintendent of Banks to assist him in the liquidation of the trust department of said The Central National Bank of Marietta, Ohio.
>
> I have this day been advised by Mr. Harness that the Federal Banking Department has instructed the receiver of The Central National Bank of Marietta, Ohio, to refuse to turn over to the state of Ohio, any assets of the trust department of said bank and that all assets of said trust department must be turned over to said receiver of said The Central National Bank.
>
> It has been my understanding that trust companies and trust departments of either National or State banks were without question under the jurisdiction of this department."

The power of national banks to engage in the business of executing trusts, to operate a trust department is found in Section 11(k) of the Federal Reserve Act. The Federal Reserve Act was passed December 23, 1913 (38 Stat. 262). Section 11 of the act as originally enacted provided:

> "The Federal Reserve Board shall be authorized and empowered:
> * * * (k) To grant by special permit to national banks applying

therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as said board may prescribe."

The above section was amended September 26, 1918 (40 Stat. 968) and, as in effect at the present time, the section reads:

"The Federal Reserve Board shall be authorized and empowered:

* * * (k) Permitting national banks to act as trustees, etc.—To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which state banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the state in which the national bank is located.

Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this chapter.

National banks exercising any or all of the powers enumerated in this subsection (k) shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection. Such books and records shall be open to inspection by the state authorities to the same extent as the books and records of corporations organized under state law which exercise fiduciary powers, but nothing in this chapter shall be construed as authorizing the State authorities to examine the books, records, and assets of the national bank which are not held in trust under authority of this subsection.

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Federal Reserve Board.

In the event of the failure of such bank the owners of the fund held in trust for investment shall have a lien on the bonds or other securities as set apart in addition to their claim against the estate of the bank.

Whenever the laws of a state require corporations acting in a fiduciary capacity, to deposit securities with the state authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the state law.

National banks in such cases shall not be required to execute the bond usually required of individuals if state corporations under similar circumstances are exempt from this requirement.

National banks shall have power to execute such bond when so required by the laws of the State.

In any case in which the laws of a State require that a corporation act-

ing as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice-president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

In passing upon applications for permission to exercise the powers enumerated in this subsection, the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to it proper, and may grant or refuse the application accordingly: Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by state law of state banks, trust companies, and corporations exercising such powers."

Prior to the enactment of section 11 (k) of the Federal Reserve Act, national banks had no trust powers, but were limited to the exercise of such powers granted them by *section* 5136 *Revised Statutes*, which were purely banking powers. In 1913, however, as stated above, Congress extended the powers of national banks to the exercise of trust powers, limited, however, to the exercise of such powers when not in contravention of state or local law.

Section 710-2 of the General Code of Ohio provides:

"The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, *trust companies* and unincorporated banks; * * *. All banks, including the trust department of any bank, organized and existing under laws of the United States, shall be subject to inspection, examination and regulation as provided by law."

The qualifications and powers of trust companies are laid down and defined in Sections 710-37 and 710-150 to 710-171, General Code, both inclusive. Section 710-37 provides that the capital of a corporation transacting a trust business shall not be less than $100,000.00, which in cases where such business is combined with a commercial or savings bank or combination of both, shall be in addition to the capital required for such commercial or savings bank or combination thereof. Section 710-150 provides that no trust company or corporation doing a trust business shall accept trusts until it has deposited with the treasurer of state the sum of $100,000 in cash or certain securities mentioned in said section. Sections 710-151 and 710-152 define the qualifications of trust companies to do business in Ohio. Section 710-153 provides:

"The superintendent of banks shall have the right to examine, * * * the books or affairs of any foreign trust company, or any corporation doing

a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company."

Section 710-155 relates to retirement of foreign trust companies from the state. Sections 710-156 to 710-167, both inclusive, fix the powers and duties of trust companies and define the manner in which such powers and duties may be carried out. Sections 710-168 to 710-171, both inclusive, relate to title guaranty and trust companies.

The constitutionality of section 11 (k) of the Federal Reserve Act was before the supreme court of the United States in the case of *First National Bank of Bay City vs. Grant Fellows, Attorney General, ex rel. Union Trust Company*, 244 *U. S.* 416; 61 *L. Ed.* 1233 (decided in 1917). The supreme court of Michigan had held the section unconstitutional on the ground that the conferring of trust powers on national banks was in excess of the authority of Congress. The supreme court of the United States, however, reversed the court below on the authority of *M'Culloch vs. Maryland*, 4 *Wheat*, 316; 4 *L. Ed.* 579 and *Osborn vs. Bank of United States*, 9 *Wheat*, 738; 6 *L. Ed.* 204. The supreme court of Michigan had held that while there was a natural connection between the business of banking and Federal fiscal operations, there was no connection between such operations and the business of settling estates, or acting as the trustee of bondholders, and this being true, there was in the legislation referred to (Section 11 (k)) a direct invasion of the sovereignty of the state which controls not only the devolution of estates of deceased persons and the conducting of private business, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. The United States Supreme Court, however, reversed the court below, one of the reasons stated being (p. 424):

"1. Because the opinion of the court, instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as *an entity*, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated; that is, by disregarding their relation to the bank as component parts of its operations—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases."

Another ground for reversal is found on page 425 as follows:

"4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that, because a particular function was subject to be regulated by the state law, therefore congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in M'Culloch vs. Maryland and Osborn vs. Bank of United States is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power

to exercise such private business in co-operation with or as part of its public authority. Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by state law, state banking corporations, trust companies, or others which, by reason of their business, are rivals or quasi rivals of national banks, are permitted to carry on such business. This must be, since the state may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks, and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers."

The opinion in the above case was written by Mr. Chief Justice White. Mr. Justice Van Devanter wrote a dissenting opinion in which Mr. Justice Day concurred.

In 1918, the year following the decision of the case of *First National Bank vs. Fellows*, supra, congress amended Section 11 (k) of the Federal Reserve Act, clarifying the language of the section and broadening the trust powers of national banks to include all trust powers granted by the respective states to their own banking institutions. The section as amended is quoted above. It is manifest that congress in amending the section had in mind the decision in the *First National Bank vs. Fellows* case, when it used the following language:

"Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this act."

The *First National Bank vs. Fellows* case, supra, was followed in the case of *State of Missouri at the relation of The Burns National Bank of St. Joseph vs. Duncan, Probate Judge, 265 U. S.* 17; 68 *L. Ed.* 881, the headnotes of which read:

"1. The Act of September 26, 1918, c. 177, Sec. 2, 40 Stat. 967, amending Sec. 11 (k) of the Federal Reserve Act, authorizes a national bank having the permit of the Federal Reserve Board, to act as executor, if trust companies competing with it have that power by the law of the state in which the bank is located, whether the exercise of such power by the national bank is contrary to the state law or not.

2. The power of congress to grant such accessory functions to national banks, to sustain them in the competition of the banking business, cannot

be controlled by state laws. First National Bank vs. Fellows, 244 U. S. 416, p. 24.

3. The authority given by the act is independent of regulations adopted by the state to secure the trust funds in the hands of its trust companies."

The two decisions above discussed seem to lay down the following principles:

First: That a national bank must be considered as an entity, i. e., that its various powers and functions must be considered as one business and can not be separated.

Second: That the powers and functions of national banks flow from congress and not from the states.

Third: That congress *may* permit national banks to compete with state banks by granting to them all powers and functions exercised and enjoyed by state banks.

Fourth: That a state, while it may impose regulations on the manner in which particular functions may be exercised, may not discriminate against national banks by prohibiting national banks from exercising such functions while permitting state banks to do so.

As I have before stated in my second conclusion, the powers and functions of national banks flow from congress and not from the state. It is, I believe, a logical conclusion that the extension of the operation of any state law over the trust departments of national banks must be either expressly or by implication found in section 11 (k) above referred to. In other words, even if we concede that which is not at all clear, namely, that the superintendent of banks by the provisions of the state law is given authority to liquidate the trust department of a national bank, yet that provision will be ineffective unless there is something in the federal statute likewise extending such authority. It is significant, as has before been pointed out, that in certain respects section 11 (k) is very specific in providing that certain provisions of the various state laws shall be applicable to the trust departments of national banks located therein and also that the state bank officials have certain powers. Thus the provision as to deposit and the provision as to the required capitalization both distinctly recognize and apply the requirements of the particular state. Also, the state authorities are given the same right with respect to the inspection of the books of the corporation. On the other hand, the statute is entirely silent on the subject of any authority in the event of liquidation and it appears to me to be of some importance that this section contains a specific reference to the failure of a national bank having trust powers but does not recognize or refer to, in any way, any right of the state authorities in such event.

The fifth paragraph of section 11 (k) is as follows:

"In the event of the failure of such bank the owners of the fund held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."

Here is a specific reference to the liquidation of a bank making provision for a lien in event of deposit in the commercial department of the bank. It is the only instance in which liquidation is referred to in this section, but it indicates that liquidation was in the contemplation of congress in the enactment of this section, and, had it been the intent of that body to authorize the liquidation of the trust department of a national bank by state authority, it would certainly have so specifically provided, since it has been so explicit with relation to other subject matter.

I am therefore impelled to conclude that the superintendent of banks has no authority to take charge of the trust department of a national bank for liquidation.

I do not wish to be understood, however, as holding that the superintendent of banks is without any control or authority whatsoever in view of the appointment of the federal receiver.

It is my understanding that there are still on deposit by The Central National

Bank of Marietta with the Treasurer of State, securities to the amount of $100,000.00, as required by Section 710-150 of the General Code. The purpose of this deposit is to secure the proper administration of all the trusts of the institution. Before this deposit may be released, the superintendent of banks must be satisfied that all of the trusts in the trust department of The Central National Bank of Marietta have been duly administered and properly and legally transferred to a trustee competent and qualified to continue their administration. It need scarcely be pointed out that the federal receiver in the administration and transfer of the trusts is just as much bound by all of the provisions of the state law as either the bank itself or the superintendent of banks, in case he were in charge, would have been.

In the determination of whether or not full compliance has been had with all the legal requirements in the liquidation, the superintendent must necessarily have complete information available. In the case of a national bank in actual operation, specific provision is made by both the Ohio law and the federal law for the examination of the books by the proper state officer. This is set forth in the third paragraph of Section 11 (k) above quoted. I do not believe that the appointment of a receiver for the bank has the effect of terminating this right of examination. In fact, it would appear more essential that this right exist in order that the assurance may be had as to the proper administration of the trusts.

I am of the opinion also that, by implication, there exists the further right of the superintendent of banks to proceed against any national bank which, upon examination, he finds to be conducting its trust department in violation of state law. In other words, while the right to exercise trust powers is derived in the case of national banks, from the federal government, yet by the express terms of the statute those powers are to be exercised only when not in contravention of state law. The specific question as to the right of the state to resort to a state court to determine the extent of the authority of the national bank to exercise particular functions was under consideration in the case of *First National Bank of Bay City vs. Fellows*, cited supra.

In the majority opinion the court says (pp. 427 and 428):

> "In other words, we are of opinion that, as the particular functions in question, by the express terms of the Act of Congress, were given only 'when not in contravention of state or local law,' the state court was, if not expressly at least impliedly, authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground."

On page 426 the court says:

> "Of course, as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came, in virtue of authority conferred upon them by Congress, to exert such particular powers."

If, therefore, in the course of the examination of the trust department of a national bank, the superintendent of banks discovers that the bank is conducting the trust business in any respect contrary to the state law, the remedy lies in a proper action in the state courts by the state on relation of the superintendent of banks against the offending bank.

Answering your question specifically, I am of the opinion that, where a national bank exercising trust powers has been placed in the hands of a receiver properly ap-

pointed by the comptroller of the currency, and is in process of liquidation, the superintendent of banks in Ohio may not compel the transfer of the assets of the trust department of such bank to a special deputy appointed by him for the separate liquidation of such trust department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

251.

PROSECUTING ATTORNEYS—EMPLOYMENT AND COMPENSATION OF SECRET SERVICE OFFICERS—EMPLOYMENT AND COMPENSATION OF ATTORNEYS—ALLOWANCE TO SHERIFF FOR USE OF PRIVATE AUTOMOBILE.

SYLLABUS

1. *Sections* 2914 *and* 2915, *General Code, providing for the appointment of "assistants, clerks and stenographers" of the prosecuting attorney's office and the fixing of their compensation do not authorize the appointment of secret service officers to assist the prosecuting attorney in the discovery and collection of evidence to be used in the trial of criminal cases and matters of a criminal nature.*

2. *By Section* 2915-1, *General Code, the prosecuting attorney is authorized to appoint a secret service officer to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such section further provides that the compensation of such secret service officer shall be fixed by the judge of the court of common pleas of the county in which the appointment is made. A prosecuting attorney may also employ a secret service officer at an annual salary and pay such secret service officer out of the allowance provided by Sections* 3004 *and* 3004-1 *of the General Code, notwithstanding the fact that a secret service officer has been appointed under the provisions of Section* 2915-1, *General Code.*

3. *County commissioners are authorized to make allowances to a sheriff for necessary expenses incurred in the use of his private automobile, based on the mileage covered while such automobile is being used by the sheriff in the performance of his official duties.*

4. *Prosecuting attorneys may employ attorneys for the purpose of appearing in courts lower than the common pleas court either for the conducting of preliminary hearings in state cases or for the prosecution of offenses in contravention of state laws and such attorneys may be paid from allowances made to the prosecutor by virtue of Sections* 3004 *and* 3004-1, *General Code, or the prosecutor may direct his assistants who have been appointed under and by virtue of Sections* 2914 *and* 2915 *of the General Code to conduct such preliminary hearings or prosecutions when in his opinion it is reasonably necessary for the protection of society and in the furtherance of justice.*

COLUMBUS, OHIO, March 29, 1927.

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

GENTLEMEN:—I am in receipt of your communication, in which you request my opinion in answer to three questions as follows:

> "May the prosecuting attorney appoint and pay a secret service officer out of the allowance made to him under the provisions of Section 2914 of the General Code, in view of the fact that special provision is made for the employment of such an officer under the provisions of Section 2915-1 of the General Code?