1927.

BANK—REOPENING THEREOF FOR PURPOSE OF TRANSFERRING ASSETS TO NEWLY INCORPORATED BANK—NEW BANK TAKES TITLE TO SECURITY PLEDGED FOR THE RETURN OF PUBLIC FUNDS ON DEPOSIT WHEN.

SYLLABUS:

Where a bank in the possession of the Superintendent of Banks under Section 710-89, General Code, is authorized by the court to reopen for the sole purpose of transferring a large part of its assets to a newly incorporated bank which assumes 85% of its deposits, the only liability for the other 15% being evidenced by certificates of participation in certain segregated assets to be liquidated by the old bank, and, where the court order is silent as to the right of secured public depositors to resort to collateral pledged as security for the return of the public funds on deposit, the new bank takes title to the pledged collateral, subject to the lien of the depositor, and such depositor having retained possession of the securities may sell a sufficient amount thereof to reimburse it to the extent of the 15% of its deposit account not assumed by the new bank, in the event the depositor has not received such 15% from the proceeds of the segregated assets upon demand.

COLUMBUS, OHIO, November 29, 1933.

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

DEAR SIR:—I have your letter of recent date, which reads as follows:

"After the effective date of the Hunter Bill (present Section 710-89a G. C.), I took possession of the business and property of a certain bank in accordance with the last paragraph of present Section 710-89 G. C. On the same day said bank presented its application to the Court of Common Pleas of the county in which it was located, praying for authority to resume business for the sole purpose of transferring its assets and liabilities to a newly incorporated banking institution. The court approved the reopening for the purpose mentioned and under authority conferred by the first paragraph of said Section 710-89a ordered a proportionate reduction in the amount of fifteen per cent of the deposit and other liabilities of said bank prior to said transfer of its assets and liabilities.

At the time the court so approved the reopening of said bank the incorporated village of W. had certain of its funds deposited therein to secure which the bank had, prior to my taking possession thereof, pledged certain of its assets. The deposit account of the village was reduced to the same extent as other deposits and as so reduced transferred to the new bank, while the assets pledged to secure said deposit account were transferred to said new bank without a like reduction being made.

Credit was given the village on the books of the new bank in an amount equal to eighty-five per cent of its deposit account in the reopened bank and the reopened bank issued to the village participation certificates in an amount equal to fifteen per cent of its deposit account as evidenced by the books of said bank prior to its reopening.

The question is now presented as to whether or not the village may sell assets heretofore pledged sufficient to reimburse it to the extent of the

fifteen per cent of its deposit account which was reduced under order of the court of common pleas.

Counsel representing the bank and the village have been kind enough to present to me an agreed statement of facts which sets forth in detail the subject matter involved, a copy of which is being enclosed herewith and which I wish you would consider in connection with this communication, since I am not setting forth herein all facts which you may deem necessary for the purpose of arriving at a proper conclusion.

Under the circumstances herein set forth and presented to you more completely in the agreed statement of facts, I would appreciate your opinion regarding the right of the village to use the securities for the purpose mentioned."

For clarity and convenience, the old bank will be referred to herein as the O bank and the new bank as the N bank.

From the agreed statement of facts submitted in your inquiry, it appears that the O bank was duly designated as the depository for the funds of the village of W. on September 18, 1931, in the manner provided by Sections 4295 et seq., General Code, and that certain of the bank's assets were properly pledged as security. On December 21, 1931, a contract was awarded to the O bank by the trustees of the sinking fund of the municipality of W. for the deposit of moneys in that fund. The depository was created in accordance with Sections 4515 et seq., General Code.

According to the agreed statement of facts, the O bank restricted withdrawals by order of the President of the United States, issued March 6, 1933, and retained this status throughout the month of March. Sometime in March the N bank was incorporated under the laws of Ohio.

On April 1, 1933, the Superintendent of Banks of Ohio, at the request of the bank, evidenced by a resolution of its board of directors, took possession of the business and property of the O bank under Section 710-89, General Code, as amended by H. B. 657, 90th General Assembly. On the same day the O bank made application to the Court of Common Pleas of the county wherein the bank was situated for authority to resume business under the provisions of Section 710-89a, General Code, as amended by H. B. 358, 90th General Assembly.

With the consent of the Superintendent of Banks on the same day, April 1, 1933, the court approved the reopening of the O bank for the sole purpose of transferring a portion of its assets to the N bank, in payment for which the N bank was to pay 85% of the amounts due to all creditors of the O bank. The court ordered the Superintendent of Banks to return to the O bank the remainder of its assets to be liquidated by it for the benefit of the creditors. The creditors were to receive certificates of participation in these segregated assets issued by the O bank for the 15% not assumed by the N bank. Neither the O bank nor the N bank was to be liable for the 15% except that the O bank was to liquidate the segregated assets and pay the proceeds by way of dividends pro rata to its creditors.

I assume that the sale of 85% of the assets of the O bank to the N bank was properly consummated. The N bank assumed 85% of the deposits of the village and sinking fund trustees. 100% of the assets pledged to secure these deposits were transferred to the N bank. The respective public depositors have continued in possession of these assets and now hold all of them except certain securities for which others were substituted by the N bank, and which substituted securities the pledgees continued to hold.

It seems clear that as to 85% of the amount on deposit in the O bank, the N

bank by purchasing the assets of the O bank became the legal depository. In *National Union Indemnity Company* vs. *Fulton,* 40 O. App., 466, the court said at page 472-473:

> "But we fail to see any illegality or any impropriety in the sale or transfer of assets, such as shown in the instant case. This sale was made in accordance with the provisions of Section 710-86, General Code of Ohio. It will be observed that that section, authorizing such transfer of assets, does not make any exception with reference to public money on deposit. In our judgment, such transfer and sale were made in conformity with the statutes, and convey title to the funds to the purchaser bank, and we see no conflict between that statute and section 2715 et seq., General Code."

The securities pledged to secure the deposit in the O bank remained pledged to secure the deposit in the N bank.

Your question is whether the public depository may sell enough of these securities to reimburse them to the extent of the 15% not assumed by the N bank and evidenced by participation certificates in the retained assets of the O bank.

Section 710-89a, as amended by H. B. 358, 90th General Assembly, provides, with reference to banks that have been taken over by the Superintendent of Banks under section 710-89, as follows:

> "Such bank may with the consent of the superintendent of banks, resume business upon such conditions as may be approved by the court of common pleas in and for the county in which such bank is located. If deemed necessary by the court, such conditions may include, among others, reasonable restrictions upon the withdrawal of deposits and the payment of other liabilities, and may also provide for a proportionate reduction of the deposit and other liabilities of such bank and the substitution, in lieu of the amount by which such deposit and other liabilities are reduced, of trust or participation certificates in assets set aside for the payment thereof; provided that certificates shall in no event impose any liability for the payment thereof upon such bank as reopened except to the extent of the assets so segregated.
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> If consented to by the superintendent of banks and deemed necessary and proper by the court, such conditions may include requirement that not less than two weeks' notice be given by publication or otherwise, as the court may find reasonable and may direct, to the depositors, creditors and stockholders of such bank, and that a fair and equitable proportion of the assets of such bank and of the stockholders' double liability payments in the possession of the superintendent of banks, in proportion to the aggregate amount of their claims to be ascertained by the court, shall, for the benefit of those depositors and creditors who shall file with the clerk of the court written objections to the proposed resumption of business by such bank on such conditions, be disposed of as the court shall direct or be left in the possession of the superintendent of banks to be liquidated. All such objections shall be filed within a time fixed by such court and stated in such notice. All depositors and creditors, including the state or any political subdivision thereof, if a creditor, who shall fail to file such objections within such time fixed by the court, shall be conclusively deemed to have consented to the resumption of business by such bank upon the conditions approved by the court, and shall be bound by the

order of the court approving the same. The order of the court may provide for barring the objecting depositors and creditors from all interest in the assets of the bank and in the stockholders' double liability payments in the possession of the superintendent of banks other than that portion of said assets and of said double liability payments segregated for the benefit of such objecting depositors and creditors as hereinbefore provided.

The conditions hereinbefore set forth shall be without prejudice to, or in limitation of, the power of the court, with the consent of the superintendent of banks, to prescribe other or different conditions."

Under the plan of reopening, the O bank, for the sole purpose of transferring a large part of its assets and liabilities to the N bank, with the consent of the Superintendent of Banks and the approval of the court, there was a proportionate reduction made of deposit liabilities and a substitution therefor of participation certificates, as authorized by this section.

Even assuming that the village consented to the plan, it does not appear from the agreed statement of facts that the order of the court purported to bar public depositors having legally secured deposits from resorting to their collateral. It merely provided that neither the O bank nor the N bank should be liable for the 15% of the deposits. It is my understanding that the court in permitting the O bank to transfer most of its assets to the N bank did not attempt to pass title to the N bank of collateral pledged to secure public deposits free and clear of liens which had previously attached by virtue of the pledge agreement. Prior to the reopening of the O bank and the transfer of its assets to the N bank, under the plan the O bank was liable for the repayment on demand of the full 100% of the deposit and for failure to so repay, the depositor might have pursued its remedy upon the debt. In the alternative, it might have resorted at once to the pledged assets. After the sale by order of the court, neither the O bank nor the N bank was liable for the 15%, the depositors right being to share pro rata with other creditors in certain segregated assets. However, the court order did not purport to alter the remedy of secured creditors to resort to their collateral.

When the O bank failed to pay the public depositors on demand, the depositors had the right at once to resort to their collateral. If the bank had been liquidated the depositor might have sold its collateral before the declaration of a liquidating dividend and received such dividend based upon the balance of the debt remaining after deducting the proceeds of such sale. *State National Bank* vs. *Esterly,* 69 O. S., 24; In re Peoples Commercial & Savings Bank, 30 N. P. (n. s.), 190. In the alternative the depositor might have retained its security and received dividends based upon the full amount of the claim.

In Opinion No. 965, rendered by this office June 17, 1933, it was held, as disclosed by the first branch of the syllabus:

"Where public deposits are secured by the pledge of mortgages, bonds and other securities, the public depositor is entitled to prove its claim against the assets of a depository bank in process of liquidation for the full amount of the deposit at the time the bank failed without deducting the value of the collateral held, and if at the time for paying a liquidating dividend the collateral has not been realized upon, the public depositor is entitled to receive his dividend based upon the entire amount of the deposit; thus if a 20% dividend is declared, the secured public depositor

is entitled to 20% of the total deposit without reference to the pledged security."

Since the court order approving the transfer of assets and liabilities to the N bank did not purport to effect the right of the village of W. to resort to its security, and did not transfer the pledged assets to the N bank, free of the lien of the public depositor, it follows that as to both its general fund deposit and its sinking fund deposit, the village may sell enough of the collateral to reimburse it to the extent of the 15% of its deposit in the O bank not assumed by the N bank, if the subdivision has not received such 15% from the proceeds of the segregated assets upon demand.

It is contended by the bank that this conclusion is erroneous because the officers of the village have by their conduct waived the right to resort to collateral which the subdivision had at the time the bank closed. The basis for this waiver is contended to be the acts of the village officers in permitting the N bank to substitute certain collateral and in continuing to do business with the N bank. Probably no principle of law is more firmly established than that public officers have only those powers and duties prescribed by statute. I am unable to find any provision of the statutes of this state authorizing the officers of a municipality to consent either expressly or impliedly to the compromise of a debt due the subdivision, in the absence of charter provision, nor in my opinion can they by conduct waive the right of the subdivision to resort to the collateral pledged as security for the deposit of public funds.

The bank also contends that the conduct of the village officers estops the village from selling the securities to reimburse itself as to the 15% of the deposit not assumed by the N bank.

There are certain necessary elements for the operation of an estoppel *in pais*: (1) Deliberate acts or disclosures calculated to induce certain conduct on the part of another; (2) conduct on the part of the other on the belief so induced; and (3) damage suffered by the one so misled. One who has so misled another becomes estopped to afterward set up a claim based upon facts inconsistent with those relied upon by the injured party. *Penna Co.* vs. *Platt,* 47 O. S., 366; *Kelley* vs. *Hazard,* 96 O. S., 19; *Lubric Oil Co.* vs. *Drawe,* 26 O. A., 478; *Scholl* vs. *Scholl,* 123 O. S., 1. In my opinion, based upon the agreed statement of facts, the first and second elements necessary for an estoppel *in pais* are absent.

In the light of the foregoing, it is my opinion that where a bank in the possession of the Superintendent of Banks under Section 710-89, General Code, is authorized by the court to reopen for the sole purpose of transferring a large part of its assets to a newly incorporated bank which assumes 85% of its deposits, the only liability for the other 15% being evidenced by certificates of participation in certain segregated assets to be liquidated by the old bank, and, where the court order is silent as to the right of secured public depositors to resort to collateral pledged as security for the return of the public funds on deposit, the new bank takes title to the pledged collateral, subject to the lien of the depositor, and such depositor having retained possession of the securities may sell a sufficient amount thereof to reimburse it to the extent of the 15% of its deposit account not assumed by the new bank, in the event the depositor has not received such 15% from the proceeds of the segregated assets upon demand.

Respectfully,
JOHN W. BRICKER,
Attorney General.