At page 116, said Kellogg Opinion states:

> "The evidence offered in the present case and rejected, showed that the delinquent list had been published four weeks in succession in a newspaper printed in the county of Richland, after the first day of October, 1832; but it did not show that the last of these publications was before the *first day* of December in that year. It was before the *first Monday* in December, but the first Monday was not the first day of the month. It did not then conduce to prove the fact, that publication had been made within the time, and in the manner required by the statute, and it was therefore properly rejected."

It appears in the foregoing statutes and authorities cited, that the publication of the list of delinquent lands for any year, must be made "between the twentieth day of December and the second Thursday in February, next ensuing" as provided in Section 5704 of the General Code, and where said list is not published between said dates, there is no authority for the publication of said list at a later date.

Respectfully,
GILBERT BETTMAN,
Attorney General.

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BANK—VOLUNTARY LIQUIDATION—PROVISION FOR TRUST ESTATES—WHEN CLAIMS PRESENTED AND ASSETS DISTRIBUTED—ENFORCEMENT OF STOCKHOLDERS LIABILITY.

SYLLABUS:

1. *A bank with trust powers, having voted to go into voluntary liquidation, may continue to transact the business of the trust estates until such time as the trust is released, discharged or transferred to a new trustee.*

2. *It is within the discretion of the Superintendent of Banks, in the case of voluntary liquidation, to fix a time when claims shall be presented and no part of the fund realized from the sale of assets of an existing bank or surplus of the bank should be permitted to be distributed until after the time fixed for presenting claims.*

3. *A creditor of a banking corporation may enforce, by proper action, the individual liability of stockholders as provided in Section 710-75 of the General Code of Ohio.*

COLUMBUS, OHIO, March 18, 1929.

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

DEAR SIR:—This is to acknowledge the receipt of your recent communication which reads as follows:

> "A bank incorporated under the laws of this state, having trust powers, with a capital of one million dollars and a surplus of five hundred thousand dollars has received and accepted a proposal from individuals desiring to organize a new bank, by the terms of which proposal the new bank will be capitalized at three million dollars and its shares of stock will carry by endorsement an equal number of shares of a securities company to be organized with a capital of one million five hundred thousand dollars. Of the total

proposed capitalization, to wit: four million five hundred thousand dollars, said individuals have agreed to subscribe three million dollars; this subscription being for two-thirds of the new shares at a price of $112.50 per share; the stockholders of the existing bank having the right to subscribe to the remaining one million five hundred thousand dollars of the capital of the new bank and securities company at the same rate of $112.50 per share.

By the terms of this proposal the new bank agrees to purchase the assets of the existing bank at a cash value to be fixed by an Appraisal Committee to be chosen as set forth in the plan for the organization of the new bank; a copy of which plan I am enclosing you herewith. It is estimated that there will be a depreciation in the value of the assets to the extent of approximately two hundred and fifty thousand dollars. Based on this estimation the purchase price of the assets will be about one million two hundred and fifty thousand dollars, which sum will represent capital and surplus, and it was assumed by both parties to the agreement that the stockholders of the existing bank would have available immediately the amount as represented by the cash payment for subscription to the stock of the new bank.

The plan does not contemplate that the new bank shall assume unknown liabilities of the existing bank. The existing bank will go into voluntary liquidation as provided in Section 710-85 of the General Code of Ohio.

Several questions arise in connection with the general plan proposed, upon which I would appreciate your opinion:

ONE. May a bank with trust powers having voted to go into voluntary liquidation continue to transact the business of its trust estates pending their transfer to another trustee?

TWO. May the Superintendent of Banks in the case of voluntary liquidation of a bank with trust powers fix a definite time when all claims must be presented, and is it within his discretion to permit either the entire fund realized from the sale of the assets of the existing bank to be distributed to its stockholders prior to the final date fixed for the presentation of claims or may he permit the distribution of that part representing the surplus?

THREE. If the answer to inquiry two is in the negative, at what time may he permit such distribution?

FOUR. Will the distribution of the whole or part of the funds realized from the sale and representing capital release the stockholders receiving the distribution from their individual liability as fixed in Section 710-75 of the General Code of Ohio and (or) will an impairment of capital result, requiring an assessment as provided in Section 710-30 of the General Code of Ohio?

FIVE. May a creditor or any person other than the Superintendent of Banks enforce by an action at law the individual liability of stockholders as provided in Section 710-75 of the General Code?"

I shall answer your questions in the order in which they are set forth in your communication.

In answering the first question of your communication, it would be well to have in mind Section 710-85, General Code, of Ohio, which provides:

"A bank may go into liquidation and be closed by the vote of its stockholders owning two-thirds of its stock, in number and amount. When a vote to go into liquidation is so taken, the board of directors shall cause notice of such fact to be certified under seal of the bank, by its president or vice president and secretary, treasurer or cashier, to the Superintendent of Banks,

together with certified copies of all proceedings had by directors and stockholders of such bank, which such stockholders' proceedings shall set forth that stockholders owning at least two-thirds of the capital stock voted in favor of placing the bank in liquidation and shall also set forth the reasons for placing the bank in liquidation. After such certified copies have been filed with the Superintendent of Banks, he shall make an examination of the bank, to determine whether or not the interests of its depositors and creditors will suffer by such liquidation and his consent to or rejection of such liquidation shall be based thereon and no such liquidation shall be made without the consent of the Superintendent of Banks. The expenses of such examination shall be paid by such bank. In case the Superintendent of Banks consents to such liquidation, such bank shall make a report to the Superintendent of Banks, at least once each thirty days from and after the date when the bank ceased to transact business as such, which report shall give a list of assets wholly or partially realized upon, together with the amount of each so remaining uncollected, and also a list of the liabilities retired by application of such amount so realized. The Superintendent of Banks shall have power to examine into the affairs of the bank so liquidated, at any time, to determine whether the rights of creditors and depositors are being protected, and if at any time he finds that such liquidation is being improperly conducted, or that the interests of the depositors and creditors are not being properly protected, he may forthwith take possession of the property and business of such bank and complete the liquidation thereof in the same manner as is provided in other cases. All unclaimed deposits and dividends remaining in the hands of such bank, shall be subject to the provisions of Sections 9864, 9866, 9868 and 9869 of the General Code of Ohio, except that the time of the payment to the treasurer of the county shall be subject to the order of the Superintendent of Banks. When the Superintendent of Banks consents to such liquidation, such bank shall immediately publish notice thereof in a newspaper published in the place in which such bank is located, and if none is there published, then in the place nearest thereto, that it is closing up its affairs and notifying creditors to present their claims against the bank for payment. Such notice shall be published for four consecutive weeks."

It is to be presumed that the bank which has voted to go into voluntary liquidation is not at the present time to surrender its charter. If the presumption is correct, then the liquidating corporation, as a matter of law, would have the corporate power to transact the business of its trust estates until such time as such trusts might be released, discharged or transferred to new trustees.

Considering the section above quoted, it can be seen that the purpose of liquidation is to wind up and close all affairs of the bank and would operate as a cessation of business which would, undoubtedly, preclude the bank from the acceptance of any new trust estates. But the right to continue to transact the business of its trust estates is, in fact, an incident to the liquidation until such time as the trust is released, discharged or transferred to a new trustee.

I am, therefore, of the opinion that a bank with trust powers, having voted to go into voluntary liquidation, may continue to transact the business of its trust estates, pending their release, discharge or transfer to other trustees.

In consideration of your second inquiry, the question presents one which involves the discretionary powers of the Superintendent of Banks.

An examination of the statutes relating to voluntary liquidation of banks, and those pertaining to the transfer of assets and liabilities, reveals that there are no provisions as to the time for presentation of claims against a liquidating bank. The

Superintendent of Banks is given broad powers and is charged with the direction of such liquidation and transfer of assets and liabilities as provided for in Sections 710-85, supra, and 710-86, General Code of Ohio, which provides:

> "A bank may consolidate with or transfer its assets and liabilities to another bank. Before such consolidation or transfer shall become effective, each bank concerned in such consolidation or transfer, shall file, or cause to be filed, with the Superintendent of Banks, certified copies of all proceedings had by its directors and stockholders which such stockholders' proceedings shall set forth that holders of at least two-thirds of the stock voted in the affirmative on the proposition of consolidation or transfer. Such stockholders' proceedings shall also contain a complete copy of the agreement made and entered into between said banks, with reference to such consolidation or transfer. Upon the filing of such stockholders' and directors' proceedings as aforesaid the Superintendent of Banks shall cause to be made an examination of each bank to determine whether the interests of the depositors and creditors and stockholders of each bank are protected and that such consolidation or transfer is made for legitimate purposes, and his consent to or rejection of such consolidation, or transfer shall be based upon such examination. No such consolidation or transfer shall be made without the consent of the Superintendent of Banks. If such consent is refused, an appeal may be taken therefrom in the same manner as is provided in Section 45 of this act (G. C. Section 710-1 to 710-189). The expenses of such examination shall be paid by such banks. Notice of such consolidation or transfer, shall be published for four weeks, before or after the same is to become effective, at the discretion of the Superintendent of Banks, in a newspaper published in a city, village or county, in which each of such banks is located, and a certified copy thereof shall be filed with the Superintendent of Banks."

The liquidation must be made under supervision of the Superintendent of Banks by virtue of his powers relative to such liquidation. It is to be presumed that at his discretion the Superintendent of Banks may fix a definite time when all claims against the liquidating bank may be presented.

The failure, however, of a creditor to present a claim within the period set by the Superintendent of Banks, at his discretion, will not act as a bar to an action by the creditors after the time so set.

The fund realized from the sale of the assets of the existing bank should be held and not distributed until the time has elapsed provided for at the discretion of the Superintendent of Banks when claims should be presented. Claims of creditors should be paid from the fund and distribution made to the stockholders thereafter. Furthermore, that part of the fund which represents the surplus, also should be held subject to the claims of creditors filed within the time specified by the Superintendent of Banks.

It is my opinion that it is within the discretion of the Superintendent of Banks in the case of voluntary liquidation to fix a time when claims shall be presented and that no part of the fund realized from the sale of the assets of the existing bank should be permitted to be distributed until after the time fixed for presenting claims.

The fourth question presents one of statutory construction. Section 710-30 of the General Code of Ohio provides in part:

> "Every bank whose capital stock has not been paid in as required by law, and every bank whose capital shall have become impaired by losses or otherwise, shall within three months after receiving notice from the Superintendent

of Banks, cause the deficiency in such capital to be paid in by assessment upon the stockholders pro rata for the amount of capital stock held by each.

If any stockholder of such bank neglects or refuses to pay such assessment as herein provided, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such stockholder or stockholders to be sold at public auction, upon thirty days' notice given by posting such notice of sale in the office of the bank and by publishing such notice in a newspaper in the place where the bank is located, and if none, then in a newspaper published nearest thereto, to make the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

If any bank shall fail to cause to be paid in such deficiency in its capital stock for three months after receiving such notice from the Superintendent of Banks, the Superintendent of Banks may forthwith take possession of the property and business of such bank until its affairs be finally liquidated as provided by law.

* * * ."

This provision does not impose any personal liability on the stockholders nor does it create any right to enforce it except in the bank itself and the right of the bank is not against the stockholders but against the stock. If the assessment is not paid within the time allowed by statute, the stock will be sold, but if the stockholder does not wish to lose the stock, he can retain it by paying the assessment. This is not the double liability as provided in Section 710-75 of the General Code of Ohio, but, in nature, a reinvestment in the stock in the amount of the assessment. The purpose of this section is to provide for those cases in which there is an impairment of the capital stock of a going bank and it can be seen that the creditors of the bank have no right to participate directly in the proceeds of this assessment.

Section 710-75, General Code of Ohio, 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 would seem that under the provisions of Section 710-75 of the General Code, supra, even though distribution be made of the fund realized from the sale of the assets of the bank and representing the capital, the shareholders could still be held for their liability under the act for all contracts, debts and engagements of such bank.

Section 710-87, General Code, provides:

"In case of either transfer or consolidation, the rights of creditors shall be preserved unimpaired and the respective companies deemed to be in existence, to preserve such rights."

Therefore, it can be seen that such distribution would not be an impairment of the capital of said bank as contemplated by Section 710-30 of the General Code, supra.

In answering your fifth question, it may be stated in regard to the individual liability of stockholders in a banking corporation that the liability in question is in its nature a security provided by law for the creditors, collateral to the usual direct liability of the corporation and is not a primary source to which recourse may be had by the creditors, but secondary only, and only to be resorted to when the assets of the corporation are exhausted.

The statute under which the liability arises contains no provision in regard to the manner in which the liability is to be enforced. It is a provision inuring to the benefit of the creditors of the corporation, but in what way and upon what principle of equity as between creditors and as between stockholders it is to be made available and under what circumstances resort may be had to it, the statutes and decisions are vague and indefinite. The provision in the Constitution of Ohio on the subject is as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; 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. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word 'bank,' 'banker' or 'banking', or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state." (Article XIII, Section 3).

When the Superintendent of Banks has taken possession of a bank for the purpose of liquidation, he is the proper party to enforce the stockholders' liability as imposed by Article XIII, Section 3, of the Constitution of the State of Ohio, supra, but inasmuch as the provisions of the Constitution here referred to inure to the benefit of creditors, no doubt any creditor of the bank may bring an action to enforce the liability, but the right arising out of this liability would seem to be intended for the common and equal benefit of all creditors.

It would follow that whoever might have a claim against a banking corporation which falls within the terms "contracts, debts and engagements" is a creditor of such bank within the meaning of the Constitution and statutes under consideration.

I am, therefore, of the opinion that a creditor of a banking corporation may enforce by proper action the individual liability of stockholders as provided in Section 710-75, of the General Code of Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.