1441.

BANK HOLIDAY—PUBLIC DEPOSITS—PAYMENT OF INTEREST—RECOVERY OF FUNDS WRONGFULLY PAID.

SYLLABUS:

Interest on public deposits ceased on such deposits in national banks upon closing by presidential proclamation in March, 1933, *when such banks did not reopen except on a restricted basis and subsequently a receiver appointed by the Comptroller of the Currency to liquidate them.*

Interest on said public deposits ceased as of the date of the appointment of a conservator, if any in fact were so appointed. See the case of Richman vs. First Methodist Episcopal Church, 76 *Fed. (2nd)* 344.

If no conservator were appointed and the bank never reopened following the bank holiday of March, 1933, *then interest ceased on public deposits in said bank as of the date said bank closed by presidential proclamation. The subsequent appointment of a receiver for said bank has no bearing in point of time as to the fixing of the date of the failure of said institution.*

Interest on public deposit contracts paid out by a receiver of a national bank following its failure and appointment of a conservator and receiver, or one or the other of such, can be recovered back in an appropriate action in either a state or federal court and such recovery is not barred on the theory that it is a payment under mistake of law such as to preclude a court from ordering a remittur of the amount so found to have been illegally paid out.

In those cases wherein said insolvent banks pay in full all claims allowed against them, then said receiver of said banks can pay interest on said depository contracts to the extent that he has funds available for such purpose.

COLUMBUS, OHIO, November 8, 1937.

HON. NORTON ROSENTRETER, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication, which reads as follows:

> "I should like your opinion covering the following situation:
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> Sometime ago the officials of several subdivisions in this county were written to by the Receiver having in charge liquidation of the remaining assets of two National Banks in this county, asking that a refund be made by the subdivisions to the

banks of an over-payment of interest which the Receiver said he paid out erroneously at the time he settled with the several subdivisions having public funds in the two institutions referred to.

The Receiver states that he has been informed by the Comptroller of the Currency at Washington that all interest that was paid by him to such subdivisions accruing after March 5, 1933, was erroneously and illegally paid in that said subdivisions were only entitled to receive interest to March 5, 1933, (this being the beginning of the bank holiday declared by the President) whereas the Receiver paid full interest in all of the accounts up to the date of payment thereof.

Of course all of the subdivisions were possessed of depository agreements wherein it was stipulated that interest was to be charged on daily balances until said money had been repaid by the bank.

In this connection the following cases were cited to me by the Receiver as bearing on the proposition that the rights of all creditors of an insolvent national bank become fixed as of the date of the closing of the bank and not as of the date on which a Receiver was appointed.

Steele vs. *Handall,* 19 Fed. (2) 40; *White* vs. *Knox* 111 U. S. 784; 28L Ed. 603; *MacDonald* vs. *Chemical National Bank,* 174 U. S. 610, 43 L. Ed. 1106; *Merrill* vs. *National Bank,* 173 U. S. 131, 43 L. Ed. 640; *Scott* vs. *Armstrong,* 146 U. S. 499, 36 L. Ed. 1059; *McCandless* vs. *Dyer,* 34 Fed. (2) 989. The case of *Douglass* vs. *Thurstone County* (C. C. A. 9th) decided December 7, 1936, reported in 86 F. (2) 899, 909-910.

A creditor of an insolvent national bank is not entitled to interest on his claim subsequent to the date of closing, unless the assets of the bank are sufficient to pay all creditors such interest. Refer *White* vs. *Knox, supra; Gamble* vs. *Wimberly,* 44 Fed. (2) 329; *In Re Lamp* (1935) 283 N. Y. S. 766; *Kennedy* vs. *Boston Continental National Bank,* 11 Fed. Supp. 611; *Belle National Bank of Pineville* vs. *Green* (1935) 258 Ky. 317; 79 S. W. (2) 967; *Kershaw* vs. *Jenkins* (C. C. A. 10th) 71 F. (2) 647; *Anderson* vs. *Miss. State Life Ins. Co.* (C. C. A. 10th) 69 F. (2) 794; *First National Bank* vs. *Fidelity & Deposit Co.* (C. C. A. 9th) 94 Fed. 705; *Poisson* vs. *Williams,* 15 F. (2) 582; *Smith Reduction Corp.* vs. *Williams,* 15 F (2) 874; *Dunnagan* vs. *Best,* 59 F. (2) 795; *Fink* vs. *Harriman National Bank & Trust Co.,* 287 N. Y. S. 461; *Richardson* vs. *Louisville Banking Co. of Louisville,* (C. C. A. 5th), 94 Fed. 442; *Hallet* vs. *Fish* (C. C. D. Vermont) 123 Fed. 201; *Butler* vs. *Western Ger-*

man Bank (C. C. A. 5th) 159 Fed. 116; *Merrill* vs. *National Bank of Jacksonville, supra.* The Federal courts have held in recent cases that secured creditors are not entitled to interest on their claims after the date of closing. Refer *Fash* vs. *First Nat. Bank of Alva,* decided on April 10, 1936, U. S. Dist. Court, Western District of Oklahoma, *Richman* vs. *First M. E. Church* of *Collingswood* (C. C. A. 3rd), 76 F. (2) 344. This rule denying interest after suspension of a secured creditor has been followed in cases involving the liquidation of insolvent state banks. In Re American Bank & Trust Co. of Ardmore, Okla., 55 Pac. (2) 470 and the cases referred to therein; United States Circuit Court of Appeals for the Tenth Circuit in the case of *Fash* vs. *First National Bank of Alva, Okla.,* 89 F. (2) 110.

In addition to the foregoing I have also been cited by the Receiver to the following authorities with respect to the Receiver's right to recover a preferential payment made under a mistake of law, as he claims was the case here.

Refer *Granzow* vs. *Village of Lyons,* 89 F. (2) 83; *Webb* vs. *American Surety Company,* 88 F. (2) 171; *Rusch* vs. *Baer,* 18 F. Supp. 732; *Thompson* vs. *Twin Falls Highway District,* 17 F. Supp. 705; *Adams* vs. *Cribbie,* 17 F. Supp. 723; *O'Connor* vs. *Rhodes,* 79 F (2) 146, affirmed 297 U. S. 383.

I have read some of the authorities hereinabove cited and I am personally of the opinion that the Receiver is correct that this interest over-payment can be recovered by him from the several subdivisions claimed. I have, however, asked the Receiver to await action until I could submit this matter to your office for an opinion, as I do not know what position or attitude the State Examiner will take unless a formal ruling is made by your office."

In the cases you have under consideration, one is concerned with the law relative to the liquidation of national banks so the law in point applicable to liquidation of state banks is only pertinent insofar as reasoning by analogy is helpful.

Of interest in the latter direction is the opinion of my predecessor in Vol. 3, Opinions of the Attorney General for 1934, p. 1907, Opinion No. 3761, dated January 7, 1935, wherein you will note in the fourth paragraph of the syllabus of the opinion above referred to, it is said:

"Interest payable under such depository contracts (having reference to state depository contracts) ceases when the Super-

intendent of Banks takes possession of a bank for liquidation pursuant to Section 710-89, General Code."

Your attention is also directed to page 1911 of the opinion, wherein the case of *Fulton* vs. *B. R. Baker-Toledo Co.*, 128 O. S. 226, is referred to, wherein the Supreme Court held at page 229, as follows:

> "As given in 2 Bouvier (Rawle's Ed.), 1642, interest on debts is 'The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.'
>
> Now the debtor in this case did not detain the money. The State of Ohio detained it. Moreover, after the superintendent of banks, under the Code, has taken over a bank for the purposes of liquidation, the bank, the debtor, has no use of the money. It is true that the preferred creditor also has no use of the money, *but the same thing is true of every general creditor of the bank, such depositors in savings account or in time deposits, who would be entitled to interest for the use of such money. They also have no use of their money when the bank is insolvent, and they secure no compensation for being deprived of the use of their money.*" (Italics the writer's.)

I also direct your attention to the case of *Squire* vs. *American Express Co.*, 131 O. S. 239, par. 12 of the Syllabus, which reads as follows:

> "Interest on the principal amount is not allowable to preferred creditors as against general creditors (Par. 2 of the syllabus, *Fulton, Supt.* vs. *B. R. Baker-Toledo Co.* 128 O. S. 226, approved and followed.)

Your attention is further directed to the case of *Huntington National Bank* vs. *Fulton*, 49 O. App. 268, at p. 290 of the opinion, wherein the above mentioned case of *Fulton* vs. *B. R. Baker-Toledo Co.* is again referred to and followed.

It would seem, therefore, that interest on public depository contracts ceases when an insolvent bank is taken over for liquidation by the state or national representative authorized to liquidate such bank.

Your only reference as to when the national banks in question were taken over for purposes of liquidation is in the third paragraph of your letter which reads as follows:

"The Receiver states that he has been informed by the Comptroller of the Currency at Washington that all interest that was paid by him to such subdivisions accruing after March 5, 1933, was erroneously and illegally paid in that said subdivisions were only entitled to receive interest to March 5, 1933, (this being the beginning of the bank holiday declared by the President) whereas the Receiver paid full interest on all of the accounts up to the date of payment thereof."

It would appear that these national banks were closed by the national bank holiday order of the President as of March 5, 1933. Although you do not say, it is assumed that a conservator was appointed who operated the banks on a restricted basis for a time and then a receiver appointed who began the formal liquidation of the banks. It is further assumed that these banks were never opened except on the restricted basis above outlined, if at all, after the holiday.

Here we find a difference as to the rule applicable relative to interest as between state and national banks operating under a conservator.

As to the rule applicable in such circumstances under our state law, you are referred to the opinion of my predecessor, supra, wherein in the third branch of the syllabus it is held:

"Interest provided in a state depository contract continues to accrue during the period when the depository bank is under the control of a conservator, pursuant to Section 710-88a, General Code."

The case most in point, in so far as my search of the federal authorities reveals, on the question raised above is the case of *Richman* vs. *First Methodist Episcopal Church,* 76 Fed. (2nd) 344. In such case it is held interest ceases as of the date of the appointment of the conservator. On that matter, the language of the court is as follows:

"The decree of the court awarded interest on the funds from March 6, 1932, to March 13, 1934. The defendant assigns as error the award of interest from March 24, 1933, the date of the appointment of the conservator. The district judge fixed the date when interest terminated as of March 13, 1934, the date when the receiver was appointed. Interest is not allowable, as a general rule, after property of an insolvent is in custodia legis. *Ohio Savings Bank and Trust Co.* vs. *Willys Corp.* (C. C. A.) 8 F. (2d) 463, 44 A. L. R. 1162. This has been specifically ruled as to national banks. *White* vs. *Knox,* 111 U. S. 784, 4 S. Ct.

686, 28 L. Ed. 603. The Act of March 9, 1933, Sec. 203 (12 USCA Sec. 203) defines the rights of parties in interest upon the appointment of a conservator: 'Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this title, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefor.'

In our opinion it was error to allow interest after March 24, 1933, the date of the appointment of the conservator."

Another case of interest in the foregoing regard as to the date that is important in national bank liquidations and the status of the receiver of a national bank is the case of *Steel, County Treasurer* vs. *Randall, et al.,* 19 Fed. (2nd) 40, the headnotes of which case read as follows:

"1. Banks and banking—Creditor of national bank, suing after insolvency and before appointment of receiver, held not entitled to lien under state law creating lien on lands of judgment debtor (U. S. Comp. St. Sections 9823, 9834; Comp. St. Neb. 1922, Section 8986.)

Under Rev. St. U. S. Sections 5236-5242, (U. S. Comp. St. Sections 9823, 9834), forbidding establishment of lien against a national bank, creditor bringing suit after bank went into control of examiner, but before appointment of receiver, *held* not entitled to lien, under Comp. St. Neb. 1922, Section 8986, creating a lien on lands of judgment debtor from date of judgment, since it is not the appointment of a receiver which fixes right of creditors, but the date of insolvency.

2. Insolvency—Insolvency is unaffected by intentions or hopes of persons affected.

Insolvency is a condition unaffected by intentions or hopes of persons affected.

3. Banks and banking—National banks are 'federal instrumentalities.'

National banks are 'federal instrumentalities,' and controlled by federal statutes relating thereto.

4. Banks and banking—Receiver of national bank is an 'agent and officer of United States' (Comp. St. Sections 9821-9823).

Receiver, appointed for national bank, under Rev. St. Sections 5234-5236 (Comp. St. Sections 9821-9823), is not in any sense such an official as receiver appointed by court of equity, but is an administrative officer selected by Comptroller, and is an 'agent or officer of the United States.'"

It will readily appear from the foregoing discussion that, if interest had not been already paid out by the receivers of the national banks in question to the public depositors concerned, such depositors could not collect interest after the date of the appointment of the conservators in said banks following the declaration of the bank holiday irrespective of when the receivers for such banks were appointed.

The date of the failure of said banks would seem to be the date of the appointment of a conservator for same and the date of the failure of said banks fixes the rights of all creditors of said banks. This is brought out in the case of *White* vs. *Knox,* 111 U. S. 784, the headnote of which case reads as follows:

"A creditor of an insolvent national bank, who establishes his debt by suit and judgment after refusal by the comptroller of the Currency to allow it, is entitled to share in dividends upon the debt and interest as established *as of the day of the failure of the bank;* and not upon the basis of the judgment if it includes interest subsequent to that date."

However, the difficulty in the instant cases is that the receivers of the national banks in question have paid out interest to the public depositories concerned under a mistake of law and they now seek to recover it back.

31 Ohio Jurisprudence, page 233, Section 162, reads as follows:

"The question whether money paid under a mistake of law may be recovered is an ancient one, and has provoked much dispute, but the trend of modern authority is strongly in favor of the rule that, as between individuals, money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party, at the time of payment, was ignorant of, or mistook, the law as to his liability. The illegality of the demand paid constitutes, of itself, no ground for

relief. This is an exception to the general rule that money paid under a mistake may be recovered where it is against conscience for the defendant to retain it."

After discussing the basis of the rule and the applications of the rule, the same authority in Section 165 on page 235 says:

"The rule that money paid under mistake of law cannot be recovered back often operates harshly and inequitably, and is regarded with so much disfavor by the courts that it will not be extended beyond the limit heretofore defined for the scope of its operation. The tendency of the courts is to treat mistakes as to legal rights as mistakes of fact, or mistakes of mixed fact and law, whenever it is possible to do so without disturbing well-settled precedents."

The case cited in support of the foregoing is that of *Ward* vs. *Ward,* 12 O. C. D. 59, a reading of which indicates that the text authority is a quotation of paragraph three of the syllabus.

Paragraph four of the syllabus reads as follows:

"Where the executor of an estate and his brother, as individuals, made division of certain funds belonging to the estate under a mistaken view that it was their money, and neither one recognized the action of the executor as being done in his official capacity, or as representatives of the heirs and legatees, who were not parties to the action, it was not such a 'mistake of law' as will prevent a recovery back or prevent the doing of justice between the parties in an equitable action by the executor."

Again we have a case, while not one of payment under a mistake of law, yet one involving equitable relief wherein mistake of law is involved in the case of *Evants* vs. *Strode,* 11 Ohio 480, wherein it is said:

"Where an instrument, by a mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity.

A mistake of law may be corrected in equity."

You cite certain federal authorities which it is claimed hold that money paid out under circumstances similar to the ones before us here can be recovered.

The case of *Webb* vs. *American Surety Company of New York,* 88 Fed. (2nd) 171 is interesting in this connection. The eighth headnote of said case reads as follows:

> "Banks and banking. National bank's receiver *held* entitled to recover from surety preferential dividends paid to surety which having executed bond securing deposits of county funds, paid amount of bond to state treasurer and received assignment of certificate of proof of claim, in absence of bar of limitations."

Also, the case of *Rusch* vs. *Baer,* 18 Fed. Supp. 732, is cited. The fourth headnote of that case reads as follows:

> "Money received. Where, pursuant to ultra vires pledge of assets by national bank to secure deposits made by township treasurer, receiver of bank made preferential payment to treasurer who distributed the money to school districts to which it belonged, the school districts should be sued for the money, as privity of contract is not necessary to support action for money had and received."

It would seem that, in the federal courts, at least, recovery back of money paid out by receivers of national banks under mistakes of law similar to the ones with which we are herein concerned had been had.

In the cases you submit the provisions of the national banking laws govern. This is so obvious that citation of authority is hardly necessary. As exemplary of the general rule on that point, reference is made to the case of *Gamble* vs. *Wimberly,* 44 Fed. (2nd) 329, wherein the fourth headnote reads as follows:

> "Provisions of national banking laws govern distribution of assets of insolvent national banks."

No doubt action against the depositories in question would be started in the federal court and, if so, recovery could be had under the authorities heretofore set out.

If action is begun in the state court, the state court would have to construe the federal acts applicable and refer to the opinions cited for interpretation of same so that a state court would ultimately arrive at the same conclusion as a federal court.

Even if there were a specific state case refusing relief on the facts submitted by you, a federal court, in the exercise of its equity powers,

would not necessarily have to follow the state construction and this principle has been asserted in several cases by the federal courts.

It is to be noted, however, that, in the event any of these national banks concerned pay out all claims allowed against them in full, then these depositories would be allowed interest on their depository contracts. The case of *Douglass* vs. *Thurstone County,* 86 Fed. (2nd) 899, discussing this point as revealed by the seventh headnote says:

> "Where national bank in depositary contract with county agreed to pay 6 per cent. interest on deposit after bank's insolvency, such interest could be allowed only after all claims as allowed against bank were paid in full."

It is my opinion, therefore, that public depositors are not entitled to interest on their deposits in national banks after being closed by presidential proclamation in March, 1933, which banks never reopened except on a restricted basis and subsequently had a receiver appointed by the Comptroller of the Currency to liquidate them.

I am further of the opinion that said interest on said public deposits ceased as of the date of the appointment of a conservator, if any in fact were so appointed, according to the holding of the case of *Richman* vs. *First Methodist Episcopal Church,* 76 Fed. (2nd) 344.

Further, if no conservator was so appointed and the bank or banks in question never reopened after the bank holiday, then interest ceased on public deposits as of the date said bank or banks closed by presidential proclamation and the subsequent appointment of a receiver or receivers for such institutions has no relation in point of time as to the date of the failure of said institutions.

Further, I am of the opinion that interest paid out by any receiver of any such national bank for any period following the appointment of a conservator or following the failure of the bank as set out above can be recovered back by such a receiver in an appropriate action in either a state or federal court as it has been held that such a payment of such illegal interest under a mistake of law is not such a payment as to bar recovery of the amount so illegally paid.

Finally, in those cases wherein said insolvent banks pay in full all claims allowed against them, then the receiver of said banks can pay interest on said depository contracts to the extent that he has funds available for such purpose.

Respectfully,

HERBERT S. DUFFY,

Attorney. General.