

It is proposed to amend Article XII of the Constitution of Ohio by adopting a new section to be known as section 3 and to read as follows:

"No excise tax shall be levied or collected upon the sale, manufacture or consumption of food, clothing or clothing material, or upon building materials for use in the construction of residential buildings, or upon the sale or consumption of coal used for domestic heating purposes."

The summary of this amendment reads as follows:

"A Constitutional Amendment prohibiting the levying or collecting of an excise tax upon the sale, manufacture or consumption of food, clothing or clothing material, or upon building materials for use in the construction of residential buildings, or upon the sale or consumption of coal used for domestic heating purposes."

I am of the opinion that the foregoing is a fair and truthful statement of the proposed constitutional amendment and accordingly submit for uses provided by law, the following certification:

"Pursuant to the duties imposed upon me under the provisions of Section 4785-175, General Code, I hereby certify that the foregoing summary is a fair and truthful statement of the proposed amendment to the Constitution of Ohio by the addition to Article XII of Section 3. JOHN W. BRICKER, Attorney General."

Respectfully,
JOHN W. BRICKER,
Attorney General.

4021.

INCOME TAX—FEDERAL GOVERNMENT MAY NOT TAX COMPENSATION OF SPECIAL DEPUTY SUPERINTENDENTS OF BANKS, ASSISTANTS, CLERKS, AUDITORS AND EXAMINERS.

SYLLABUS:

Compensation paid to special deputy superintendents of banks, assistants, agents, clerks, auditors and examiners appointed under Section 710-94, General Code, is exempt from taxation by the Federal Government under the Constitution of the United States.

COLUMBUS, OHIO, March 6, 1935.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

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

"The Collector of Internal Revenue for the Eighteenth District of Ohio has requested the furnishing of payrolls in connection with the liquidation of certain banks, the business and property of which are in my possession as provided by law.

The purpose of this request, as I take it, is that a penalty may be inflicted upon the employees whom I have named in accordance with the statutes of this state to assist me in the liquidation of these banks, should they not file their income tax returns on or before March 15th, 1935.

It has heretofore been the impression of this department that special deputy superintendents of banks, assistants, agents, clerks, auditors and examiners appointed by the Superintendent of Banks under Section 710-94 of the General Code of Ohio, were exempt from federal income tax insofar as their salaries or wages paid by me in performance of state functions are concerned.

A copy of the request for the information referred to herein is enclosed.

Will you kindly advise me as to whether or not in your opinion I should furnish such information?"

The request from the Collector of Internal Revenue reads in part:

"* * * Will you be good enough to instruct the liquidators of the liquidating State banks under your jurisdiction to furnish this office with the payrolls of all such banks from the date of liquidation to December 31, 1934, inclusive.

In view of the fact that tax returns for 1934 must be filed prior to March 15th, it is very much desired to get this information at once as the employees of liquidating banks who do not file their returns by March 15th may be subject to penalty otherwise. Your cooperation will be appreciated."

If the salaries of persons on the payrolls in question are not subject to the Federal Income Tax there is no basis for the Collector's request that you furnish him copies of the payrolls. Therefore it becomes necessary to determine the taxability of the salaries in order to answer your inquiry.

Formerly all powers and duties relating to the examination, supervision and liquidation of banks were vested in the office of Superintendent of Banks. Under the Administrative Code, enacted in 1921, the Department of Commerce was created (Section 154-3, General Code) and the office of Superintendent of Banks was abolished. Section 154-39, General Code, which was enacted as part of the Administrative Code, reads in part as follows:

"* * * There is hereby created in the department of commerce a division of banks which shall have all powers and perform all duties vested by law in the superintendent of banks. Wherever powers are conferred or duties imposed upon the superintendent of banks, such powers and duties shall be construed as vested in the division of banks. The division of banks shall be administered by a superintendent of banks who shall be appointed by the governor by and with the advice and consent of the Senate, and hold his office for a term of two years, unless sooner removed at the will of the governor * * *."

Section 710-89, General Code, provides, in part:

"The superintendent of banks may forthwith take possession of the business and property of any bank to which this act is applicable * * * (upon certain specified conditions)."

Section 710-90, General Code, prescribes certain things to be done by the Superintendent of Banks, upon taking over a bank, including the posting of a notice on the doors and filing of notice with the Clerk of the Court of Common Pleas.

Section 710-91, General Code, reads:

"Immediately upon the posting of notice on the door or doors of a bank by the superintendent of banks, as provided in Section 710-90 of the General Code, the possession of all assets and property of such bank of every kind and nature wheresoever situated, shall be deemed to be transferred from such bank to, and assumed by the superintendent of banks; and such posting shall of itself, and without the execution or delivery of any instruments of conveyance, assignment, transfer, or endorsement, vest the title to all such assets and property in the superintendent of banks. The time of posting stated in such notice shall be prima facie evidence of the time of posting. Such posting shall also operate as a bar to any attachment, garnishment, execution or other legal proceedings against such bank, or its assets and property, or its liabilities; and interest on deposits shall thereupon cease to accrue at the rate specified in the contracts of deposit, but without prejudice to the rights of depositors to receive interest, with other creditors, from the date of such posting, out of the funds produced by the liquidation of such bank, before distribution is made to shareholders on their shares."

Reading all of these sections together it is apparent that the Division of Banks takes possession of the business and property for liquidation and that the posting of a notice upon the doors of the banks vests possession and title to all assets and property in the Division of Banks, a division of the Department of Commerce, which is one of the nine departments of state government created by the Administrative Code of 1921. In 1921 these departments, together with the elective state officials and certain independent boards and commissions became the administrative branch of the government of the State of Ohio.

Sections 710-89 et seq. General Code, afford a complete, comprehensive, and economical scheme for liquidation. As the chief administrative officer of the Division of Banks, the Superintendent of Banks in charge of a bank for liquidation acts for the bank, its stockholders and creditors. *Wolfe vs. Fulton*, 30 N. P. (N. S.) 238. In the case of *Fulton vs. Wetzel*, 47 O. A. 72, petition in error dismissed 128 O. S. 109, appeal dismissed 35 S. Ct. 207, rehearing denied 55 S. Ct. 236, the court said:

"State banks and Building and Loan and kindred organizations are creatures of the State. They are chartered to do business by the State. They all transact business of a quasi-public character. It is our belief that this state is rightfully committed to a policy of exclusive State supervision, surveillance and, when necessary, liquidation of these institutions through the respective superintendents in the proper and wholesome conservation of the public interest."

Section 710-94, General Code provides:

"The superintendent of banks may appoint one or more special deputy superintendents of banks as agent or agents to assist him in the duty of liquidation and distribution of the assets of one or more banks of whose business and property the superintendent of banks shall have taken possession pursuant to

the provisions of section 710-39 of the General Code. A certificate of such appointment shall be filed in the office of the superintendent of banks and a certified copy in the office of the clerk of the court of common pleas in which the proceedings for the liquidation of such bank are pending. Such special deputy superintendent of banks may execute, acknowledge, and deliver any and all deeds, assignments, releases or other instruments necessary and proper to effectuate any sale or transfer or encumbrance of real estate or personal property; and any deed or other instruments executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed by the superintendent of banks.

The superintendent of banks may also employ such assistants, agents, clerks, auditors and examiners as he may deem necessary in connection with the liquidation and distribution of the assets of any such bank. No such special deputy superintendent of banks, assistant, agent, clerk or auditor shall be subject to the provisions of section 710-11 of the General Code.

The superintendent of banks shall require each such special deputy superintendent of banks, and each assistant, agent, clerk, auditor and examiner employed by him in the liquidation of one or more banks to give bond in such amount and with sureties to be approved by him and conditioned upon the faithful performance of his office or employment. All bonds given shall be deposited with the superintendent of banks and kept in his office. If any surety on any such bond is a qualified surety company, the premium thereon shall be considered and paid as an expense of liquidation and may be allocated to the liquidation of one or more banks in such proportions as the superintendent of banks may in his discretion determine."

Section 710-96, General Code, reads:

"The moneys and funds collected in process of liquidation of any bank by the superintendent of banks, except as otherwise provided for in this section shall be from time to time deposited in one or more banks organized under the laws of this state, subject to his order, and in case of the insolvency, closing or suspension of any such depository, such money and funds shall be preferred and the property and assets of such closed depository impressed with a trust for the payment thereof.

When approved by an order of the court of common pleas in which the proceedings for the liquidation of a bank are pending, or by a judge thereof, and upon such terms and conditions as are contained in said order, the moneys and funds collected in the process of the liquidation of such bank may be deposited by the superintendent of banks subject to his order in one or more banks organized under the laws of the United States."

Section 710-97, General Code, provides in part:

"The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the compensation and expenses of special deputies, assistants, agents, clerks, auditors and examiners so employed and expenses necessary and incident to proper supervision, together with reasonable attorney fees for counsel employed by the attorney general to render legal services in connection therewith. Such com-

pensation and expenses shall be fixed and allocated to each liquidation proceeding, as occasion may require.

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As soon as practicable after the effective date of this section, the superintendent of banks shall file a detailed statement of the estimable expenses in the office of the clerk of the Court of Common Pleas in which the liquidation proceedings are pending, setting forth fixed charges for compensation and expenses of special deputies, assistants, attorneys, agents, clerks and auditors, rents, supplies and other operating expenses, as estimated for the twelve months next succeeding. Within fifteen days after taking possession of the business and property of any bank hereafter a like statement shall be filed. Each succeeding twelve months thereafter a similar estimate shall be so filed. Each such estimate shall be subject to the approval of such court, or a judge thereof.

The expenses of such liquidation shall be paid out of the property of such bank and in the possession of the superintendent of banks and such expenses shall be a charge against such property and shall be paid first in the order of priority. Should any expenditure, not classified in the estimated account of fixed charges, be necessary or should any item to be expended exceed that as set forth in the estimated account of such charges, such unclassified items, or such amount in excess of the estimated amount, shall be submitted for the approval of such court, or a judge thereof, before the superintendent of banks may pay the same. On or before the fifteenth day following the expiration of three months after the filing of such detailed statement as herein provided and on or before the fifteenth day following the expiration of each succeeding three months, the superintendent of banks shall file a report with the clerk of such court which report shall contain an account of actual expenditures made by him during the preceding period.

For the purpose of maintaining an office in the city of Columbus and the payment of expenses incident thereto, necessary in the direction and supervision of banks in the process of liquidation, a fee shall be collected from each such bank. Such fee shall be assessed monthly and shall be based upon the amount of necessary expenses for the maintenance of such office and be prorated among all of such banks on such equitable basis as the superintendent of banks may determine. The fees so collected shall be used for no other purpose than herein specified and shall be deposited in accordance with and subject to the provisions of section 710-96 of the General Code."

Section 710-94, General Code, authorizes the superintendent of banks to appoint special deputy superintendents of banks as agents to assist him in the liquidation of one or more banks and further authorizes the superintendent to "employ such assistants, agents, clerks, auditors and examiners as he may deem necessary in connection with the liquidation and distribution of the assets of any such bank." As above noted persons so employed are agents and employees of the Division of Banks of the Department of Commerce. Under Section 710-97, supra, the expenses of liquidation include the compensation of such agents and employees. Such compensation is not paid by the state treasurer upon warrants drawn by the state auditor against funds derived from taxation and appropriated for that purpose. Rather, as provided in Section 710-97, supra, "the expenses of such liquidation shall be paid out of the property of such bank in the possession of the Superintendent of Banks * * *." As the property of the bank is liquidated the proceeds are deposited in one or more banks by the Superintendent

of Banks, pursuant to Section 710-96, General Code, and from such deposits are withdrawn expenses of liquidation.

Under the Federal Income Tax Law as it previously existed, Section 201 (a), Revenue Act of 1917, "compensation or fees" received by officers or employees of a State or political subdivision thereof were expressly exempt from the Federal Income Tax. Under the present Act such exemption depends upon constitutional grounds.

In the landmark case of *McCulloch vs. Maryland*, 4 Wheat. 316, it was first held that the states were impliedly forbidden by the constitution from taxing instrumentalities of the Federal government. Chief Justice Marshall said at page 436:

"* * * The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws, enacted by Congress to carry into execution the powers vested in the general government. This is, we think the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void."

In *Dobbins vs. Erie Co.*, 16 Pet. 435, it was held that a state could not tax the salary or emoluments of an officer of the United States. The implied limitation was recognized as reciprocal in *Collector vs. Day*, 11 Wall. 113, wherein it was held that the United States could not tax the salary of a judicial officer of a state.

The exemption of state agencies and instrumentalities from national taxation is limited to those of a governmental character. *South Carolina vs. United States*, 199 U. S. 437; *Flint vs. Stone Tracy Co.*, 220 U. S. 107; *Fox Film Corporation vs. Doyal*, 286 U. S. 123; *Ohio vs. Helvering*, 292 U. S. 360; *Helvering vs. Powers*, 55 S. Ct. 171 (Decided December 3, 1934). This limitation has been recognized in formulating the Treasury Regulations which exempt from taxation compensation for services "in connection with the exercise of an essential governmental function." Treas. Reg. No. 69, Art. 88; No. 74, Art. 643; No. 77, Art. 643. When a state departs from its "usual governmental functions" and engages in a purely private enterprise, such as selling intoxicating liquor (*South Carolina vs. United States*, supra; *Ohio vs. Helvering*, supra) or operating a street railway (*Helvering vs. Powers*, supra) it ceases to be immune.

It does not follow from these decisions that the Federal government could tax salaries of officers or employees of the Department of Public Utilities of Massachusetts received in the performance of the function of that department to regulate street railways pursuant to statute for the benefit of the public. Nor could it tax officers or employees of the Ohio Department of Liquor Control engaged in the enforcement of statutes or regulations applicable to private dealers selling liquor under permit. The state may properly regulate such business under its police power for the protection of its citizens.

Banks have long been recognized as quasi-public corporations and the several states have enacted statutes for their incorporation and regulation. The State of Ohio under the Banking Act (Section 710-1 et seq., General Code) is engaged in regulating going institutions and liquidating those found to be unsafe and unsound. Because of the nature of the business and its relation to the economic welfare of the citizens of Ohio these activities are purely governmental functions. See *Metcalf & Eddy vs. Mitchell*, 269 U. S. 514.

Mr. Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, recently gave an opinion that the compensation of a liquidator of a Florida

State bank is taxable. 343 C. C. H. Standard Tax Service, Sec. 6481. One ground of this decision was that such liquidator is not a public officer or employee. The Florida statute (Comp. Gen. Laws, Sec. 4162, as amended by Laws of Florida, 1929, Chapt. 13576, sec. 19) provides that the state comptroller, on becoming satisfied of the insolvency, unsoundness or irregular activities of a bank, may in his discretion "designate and appoint a liquidator to take charge of the assets and affairs of such bank." The comptroller may require him to give bond and may dismiss him at pleasure. Under the statute the liquidator, under the direction of the comptroller, exercises powers similar to those given the superintendent of banks of Ohio by Section 710-95, General Code. After taking possession of the books, records and assets the liquidator collects debts due the bank by suit or otherwise. Upon order of court he may sell or compromise bad or doubtful debts, sell assets and enforce stockholders' liability. Moneys received by the liquidator are required to be paid to the state treasurer to be held as a special deposit for the benefit of the creditors, subject to the order of the comptroller. The statute further provides that expenses of the liquidator shall be paid from the assets of the bank.

The conclusion that such liquidator was not a public officer was based largely upon *Metcalf & Eddy vs. Mitchell*, supra, construing the Revenue Act of 1917 which contained the express exemption as to state officers, and employees above noted. Counsel also quoted Article 643, Regulation 77, which reads in part as follows:

"An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed service and not the accomplishment of specific objects, and whose services are continuous, not occasional or temporary."

The following portions of the opinion in *Metcalf & Eddy vs. Mitchell* were quoted by counsel in his opinion:

"All of the items of income were received by the taxpayers as compensation for their services as consulting engineers under contracts with States or municipalities, or water or sewer districts created by State statute. In each case the service was rendered in connection with a particular project for water supply or sewage disposal, and the compensation was paid in some instances on an annual basis, in others on a monthly or daily basis, and in still others on the basis of a gross sum for the whole service.

* * * * *

We think it clear that neither of the plaintiffs in error occupied any official position in any of the undertakings to which their writ of error in No. 183 relates. They took no oath of office; they were free to accept any other concurrent employment; none of their engagements was for work of a permanent or continuous character; some were of brief duration and some from year to year, others for the duration of the particular work undertaken. Their duties were prescribed by their contracts and it does not appear to what extent, if at all, they were defined or prescribed by statute. We therefore conclude that plaintiffs in error have failed to sustain the burden cast upon them of establishing that they were officers of a State or a subdivision of a State within the exception of section 201(a).

An office is a public station conferred by the appointment of govern-

ment. The term embraces the idea of tenure, duration, emolument and duties fixed by law. Where an office is created, the law usually fixes its incidents, including its term, its duties and its compensation. * * * The term 'officer' is one inseparably connected with an office; but there was no office of sewage or water supply expert or sanitary engineer, to which either of the plaintiffs was appointed. The contracts with them, although entered into by authority of law and prescribing their duties, could not operate to create an office or give to plaintiffs the status of officers. * * * There were lacking in each instance the essential elements of a public station, permanent in character, created by law, whose incidents and duties were prescribed by law. * * *

Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors. The record does not reveal to what extent, if at all, their services were subject to the direction or control of the public boards or officers engaging them. In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea that control or right of control by the employer, which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.

* * * * * * * * *

Just what instrumentalities of either a State or the Federal Government are exempt from taxation by the other can not be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. * * *

When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit in his dealings with the Government may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

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In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of Federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the States, and vice versa. Taxation by either the State or the Federal Government affects in some measure the cost of operation of the other.

But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation can not be so varied or extended as seriously to impair either the taxing power of the government imposing the tax * * * or the appropriate exercise of the functions of the government affected by it * * *."

Counsel took the view that because the liquidator was appointed specially in each bank which he liquidated "his services in each instance were rendered in connection with a particular project and were not 'work of a permanent or continuous character'." Counsel said further:

“The position lacked the elements of tenure and duration. The statute does not create the office of special liquidator, but merely authorizes the employment of any person to render special services as such with respect to special matters. His appointment was temporary, since the statute not only authorizes the comptroller to remove him for cause but empowers the comptroller at any time to transfer to a general liquidator any matter which may be in the hands of a special liquidator.”

There are material distinctions between special deputy superintendents of banks, assistants, agents, clerks, auditors and examiners appointed under Section 710-94, General Code, on the one hand, and consulting engineers of the type involved in *Metcalf & Eddy vs. Mitchell*, supra, on the other.

The Superintendent of Banks must file the certificate of appointment of a special deputy superintendent in the office of the Division of Banks and must file a certified copy in the office of the Clerk of the Court of Common Pleas in which the liquidation proceedings is pending. Section 710-97, General Code, requires the Superintendent of Banks to file with the clerk of court a detailed statement of estimable expenses “setting forth fixed charges for compensation and expenses of special deputies, assistants, * * * agents, clerks and auditors, * * * as estimated for the twelve months next succeeding.” This statement must be filed within fifteen days after the Superintendent takes possession of the bank. Every three months the Superintendent must file with the clerk a statement showing actual expenditures made during the preceding period.

Section 710-94, General Code, confers upon special deputies the power to execute, acknowledge and deliver any and all deeds, assignments, releases or other instruments necessary to effectuate any sale or transfer or encumbrances of real or personal property. All such instruments are declared by the statute to be as valid as if executed by the superintendent.

In addition to those powers granted by statute the superintendent may confer upon special deputies and others involved here other powers and duties relating to the “liquidation and distribution of assets.” Under our statute liquidations are conducted by the Division of Banks of the Department of Commerce. The powers and duties of the Superintendent of Banks as the head of that Division are fixed by statute and the legislature has seen fit to create the positions here in question and to allow the superintendent to delegate such portion of those powers and duties as he sees fit. These are important positions in the Division of Banks, nor is this less true because they may relate to a single institution.

As pointed out in *Metcalf & Eddy vs. Mitchell*, supra, the legislature had created no office of sewage, or water supply or sanitary engineer. Such engineers were appointed under contract by water or sewage districts as consulting engineers to give technical advice regarding sewage systems. No bond was required of them. So far as the record disclosed, they were permitted the free use of their professional judgment and skill to bring about a desired result, viz. the construction of a successful plant. As stated by the court:

“This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.”

The positions herein question are subject to the direct control of the Superintendent of Banks. The Superintendent, as the head of the Division of Banks, and not his

special deputy, is the liquidator. The holders of the positions in question are at all times subject to his orders. In this respect our statute differs materially from that of Florida which was before the Assistant Counsel of the Bureau of Internal Revenue.

It is not necessary to determine whether Special Deputy Superintendents are public officers or public employees. An office is a status created by constitutional provision or statute whereas a public employment arises out of a contract between the government and the employee. 46 C. J. 930. The position of special deputy has some of the incidents of an office. It is created by statute; a bond is required. Emoluments are provided although the amount is not fixed by the statute. Certain powers are granted by statute. It is true that there is no fixed tenure but this has been held to be unnecessary where other qualifications are present. *United States vs. Schierholz*, 137 F. 616; *United States vs. Maurice*, 26 F. Cas. No. 15747, 2 Brook. 96. For a discussion of the distinction between a public office and public employment see *State, ex rel. vs. Board of Commissioners*, 95 O. S. 157.

The above incidents of a public office are also present in the other positions in question except that no specific powers are conferred by statute. However, because of the clerical nature of the work of clerks, auditors, and examiners it could not be said that any part of the sovereign power is to be exercised by them. In my opinion they are public employees, and special deputy superintendents of banks, if not public officers, likewise fall within that category.

I am not persuaded to a contrary conclusion by the sole fact that these positions may relate to a single liquidation. It is permissible under the statute to use special deputies or clerical employees in more than one bank and this has been the practice in various instances. A regularly employed bank examiner examines only one bank at a time, yet it could not be contended that he is an independent contractor engaged in a special project. Various public officers require additional deputies or assistants at particular periods in order to fulfill their duties. The legislature might have provided for conducting all liquidations at the seat of the government. The present staff engaged in liquidations might then have been organized differently. A single auditor, or clerk might then have done a particular specialized piece of work in connection with each and every bank in liquidation. I can see no distinction because the legislature has otherwise organized the liquidation functions of the Division of Banks and has provided for carrying on each liquidation as a separate unit.

The opinion of counsel for the Bureau of Internal Revenue, with reference to the Florida liquidator, contained this language:

"If, however, it should be established that he was an employee of the State, it is certain that a tax upon his income can not be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. No such interference could result with respect to this taxpayer since the compensation was not paid by the State but by the bank which was being liquidated."

This conclusion was based upon the decision in *Miller vs. McCaughn*, 22 F. (2nd) 165, aff'd. 27 F. (2nd) 128, where the District Court said that "the compensation must not merely come to a State officer or employee, but it must come to him from the State, to be exempt."

The taxpayer in this case was appointed by the judges of the Orphans' Court in Philadelphia as standing auditor to ascertain and report the financial worth of such surety companies as should apply to the court to furnish bonds tendered by guardians, administrators and similar fiduciaries. No statute of Pennsylvania authorized such

appointment and the compensation was paid from a fund contributed by applying surety companies. The Circuit Court of Appeals said (27 F. (2nd) at p. 128):

"We agree with the government's contention and the finding of the trial judge. The exemption of state employees from federal income tax rests on the ground that the agencies the state employs in government should not be burdened by federal taxes, which would lessen the state's power to employ, and compel it to pay more for the services of its employes. But no such reason exists in the case of this examiner. No power of the state is crippled or lessened by his paying tax on his income. Neither the state nor the court pay Mr. Miller. Under modern conditions, these companies become sureties for pay, and as part of their business expense, and in order to obtain business, they provide a fund by which the court can be satisfied, through the services of an examiner or auditor, of their solvency, and in no sense can such examiner be regarded, for income tax exemption, as an officer or employee of the state of Pennsylvania. * * *"

It was the conclusion of the Circuit Court of Appeals that the taxpayer was not an officer or employee of the State, for purposes of income tax exemption, because he received compensation from a fund voluntarily created by private corporations for the purpose of getting business.

There are two points of distinction between the Pennsylvania auditor and the persons here involved. The positions here in question are created by statute whereas the position of auditor was not. The officers or employees here involved are paid "out of the property of the bank in the possession of the Superintendent of Banks," Section 710-97, General Code, *supra*. As above noted title to and possession of all such assets is vested in the Division of Banks of the Department of Commerce. This is believed to be an important distinction.

It is true that such assets are held in a fiduciary capacity for the benefit of the bank's creditors. However, when the State of Ohio in the proper exercise of its governmental functions has thus undertaken to liquidate and distribute to hundreds of thousands of its citizens their proportionate shares in the assets of these quasi-public institutions the Federal Government cannot, by taxation or otherwise, impose direct burdens upon such process.

As above noted the salaries are actually paid by the state from money owned by one of its Divisions. Contributions to the fund of any particular bank come from all of its depositors. Where state funds are derived by taxation all of the citizens do not contribute. Furthermore the expenses of certain departments, boards and commissions of state government, are paid from license fees collected from those who benefit from the functions of the particular governmental agency. For example under Section 710-17, General Code, fees and expenses collected by the Superintendent of Banks for examination and inspection of banks together with penalties "shall be paid by him into the state treasury to the credit of a fund for the use of the Department of Banks, and shall be used upon the order of the Superintendent of Banks, but shall not be used or paid out or appropriated for any other purpose." Section 691, General Code, contains a similar provision with respect to fees received from building and loan associations. Under the provisions of Section 606, General Code, the public utilities are assessed for maintaining the public utilities commission. The expenses of the Bureau of Motor Vehicles are paid from the annual license tax levied upon the operation of motor vehicles. Section 6291, General Code. Other statutory provisions of a similar nature exist in this and other states.

No attempt has been made by the Federal Government to tax salaries in such departments. It seems obvious that any such attempt would fail. Yet it would be a short step from taxing the salaries in question to taxing the salaries paid officers and employees of the public utilities commission. On the other hand I am of the opinion that it is a long step from taxing the compensation of the Pennsylvania auditor to levying the tax on the salaries here involved.

It has been held that examination fees paid by building and loan associations under Section 691, General Code, supra, are taxes. *In re Miami Savings & Loan Co.*, No. 76,310, Court of Common Pleas, Montgomery County, decided June 6, 1934. See also *Cincinnati Gas & Light Co. vs. State*, 18 O. S. 237; *Railway Co. vs. State*, 49 O. S. 139. The liquidation as well as the examination of a financial institution is a proper governmental function. *Pennsylvania vs. Williams*, 55 S. Ct. 380. I see no material distinction between an assessment levied by the state upon going institutions to cover the cost of examination and one exacted by the state from the assets of closed institutions to cover the costs of liquidation.

The Board of Tax Appeals has held that *Miller vs. McCaughn*, supra, "is not authority for the proposition that the source of the income of a state officer alone determines its taxability by the Federal Government." *David K. Cochrane vs. Commissioner of Internal Revenue*, 26 B. T. A. 1167. It was pointed out that a contrary conclusion would deprive many states of compensating officers by the so-called fee system. Counsel for the Bureau of Internal Revenue has recommended that acquiescence in this decision be withdrawn but I have not been advised that such step has been taken.

For rulings to the effect that compensation received by state officers, although not paid by the state, is not taxable, see I. T. 1316, 1-1 C. B. 105. See also G. C. M. 60, V-1 C. B. 45, I. T. 2214, VI-2, IV-2 C. B. 46.

I have not been unmindful of the principle that a taxpayer claiming the benefit of an exemption has the burden of proof. *Phoenix Fire & Marine Insurance Co. vs. Tennessee*, 161 U. S. 174; *Metcalf & Eddy vs. Mitchell*, supra. Nevertheless all cases within the constitutional objection are within the exemption in question. See *Elam vs. Commissioners of Internal Revenue*, 45 F. (2nd) 337.

If the compensation in question were taxable it would follow that states having an income tax law could tax compensation of receivers of national banks appointed by the Comptroller of Currency. This is true because the constitutional inhibition is reciprocal. *Collector vs. Day*, supra.

Having concluded that the income in question is non-taxable I am of the view that the Division of Banks is not within the terms of Section 147, Revenue Act of 1934, which reads in part:

"All persons, in whatever capacity acting, including * * * employes making payment to another person, of * * * salaries, wages, * * * compensations, remunerations, (or) emoluments * * * of \$1000 or more in any taxable year, or in the case of such payments made by the United States, the officers or employees having information as to such payments * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payments."

Pursuant to this section the Bureau of Internal Revenue has adopted a regulation requiring "all persons making payment to another person" of an annual fixed or determinable income of \$1000 or more to render a return to the Commissioner on or before

February 15th of the following year, with certain exceptions not here material. T. D. 4523, Feb. 11, 1935.

Both Section 147, *supra*, and the regulation use the term "persons." This term was obviously not intended to include officers or employees of the United States, since a special provision was made with reference to them in Section 147, *supra*. It seems apparent that Congress did not intend the term "persons" to include the officers and agents of the sovereign state with reference to the information concerning compensation paid by such state which can not be taxed under the Constitution.

In the light of the foregoing it is my opinion that compensation paid to special deputy superintendents of banks, assistants, agents, clerks, auditors and examiners appointed under Section 710-94, General Code, is exempt from taxation by the Federal Government under the Constitution of the United States.

This being true I find no basis in law for the demand of the Collector of Internal Revenue that you furnish him with payrolls listing their positions in the various banks in your possession for liquidation.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4022.

FIREMEN'S PENSION—REVENUES DERIVED FROM SEC. 4605 AND 4621, G. C.,
MAY NOT BE USED FOR TAX COMMISSION, BOARD OF ELECTIONS
AND STATE EXAMINATION EXPENSES.

SYLLABUS:

Revenue derived from the levies provided in and by Sections 4605 and 4621, General Code, cannot be used for expenses incurred by the Tax Commission of Ohio under Section 5624-7, General Code, expenses incurred by the Board of Elections under Section 4785-20, General Code, and the state examination expenses under Section 288, General Code.

COLUMBUS, OHIO, March 7, 1935.

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

GENTLEMEN:—I am in receipt of your communication which reads as follows:

"We are inclosing copy of letter received from Andrew J. Hagan, Secretary of the Board of Trustees of the Relief Fund of Cleveland, and we would greatly appreciate you. opinion on the question contained therein."

The enclosed letter from the Secretary of the Board of Trustees of the Relief Fund of Cleveland reads as follows:

"The Board of Trustees of the Police Relief Fund respectfully requests an opinion from the Attorney General on the following matter.

Can the City of Cleveland charge against, and deduct from, the revenue derived from the levies provided for in sections 4605 and 4621 of the General Code for the services rendered by the tax commission, the board of elections and the state examiners office?