

Fourth, if, at the regular November election in 1931, there had been submitted, in a taxing subdivision, a proposed bond issue, and fifty-five per cent of those voting on the proposition voted in favor thereof, the taxing authority of the said subdivision is authorized to proceed with the issue of such bonds and with the levying of a tax outside the fifteen mill limitation sufficient in amount to pay the interest on, and retire said bonds at maturity.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3762.

LIQUIDATION OF BANKS—SUPERINTENDENT OF BANKS MAY BORROW MONEY AND ISSUE NOTES TO PAY TAXES OF TRUST ESTATES—TRUST INCOME USED FOR REIMBURSEMENT.

SYLLABUS:

Discussion of duties of Superintendent of Banks in administering trust department of bank in liquidation.

COLUMBUS, OHIO, November 14, 1931.

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

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

“A question has arisen in several of the closed banks in Toledo with reference to the right of the Superintendent of Banks to borrow money on his personal note in an amount sufficient to pay taxes due and owing on certain trust estates of which the closed bank is a trustee.

In connection with the foregoing, several questions arise upon which I would appreciate your opinion:

1. May the Superintendent of Banks borrow money on a note in his official capacity to pay taxes due and owing on certain trust estates of which the closed bank whose affairs he is administering is a trustee?

2. In order to protect the Superintendent of Banks and the lending bank, may income accruing after such borrowing in trust estates in which taxes were paid, be applied in payment of the pro rata share of that particular estate's participation in the tax moneys borrowed?

3. If the answer to inquiry 2 is in the affirmative, can a cestui que trust or a creditor or a stockholder of such closed bank legally object to trust income being applied as suggested in inquiry 2?”

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

Answering the first question of your communication, I call attention to Section 710-95, General Code of Ohio, which provides:

“Upon taking possession of the property and business of such bank, the superintendent of banks is authorized to collect money due to such

bank, and to do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the common pleas court in and for the county in which the office of such bank was located, may sell or compound all bad or doubtful debts, and on like order may sell the real estate and personal property of such bank, on such terms as the court shall direct. The superintendent of banks shall give notice to such bank of the time and place of making application to said court for such order. The superintendent of banks upon the terms of sale or compromise directed by the court, shall execute and deliver to the purchaser of such real and personal property such deeds or instruments as shall be necessary to evidence the passing of the title; and if said real estate is situated outside the county in which the office of the bank was located, a certified copy of such order authorizing and ratifying said sale shall be filed in the office of the recorder of the county within which said property is situated; and may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders."

Construing liberally that particular portion of the above which reads "to preserve its assets and business", it would seem that the Superintendent of Banks has authority to borrow money if necessary to accomplish this purpose. This assumption is further strengthened by the following language in the opinion rendered by me in Volume I, Opinions of the Attorney General, 1929, Page 300:

"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."

From this opinion, it would seem that the Superintendent of Banks has the right to operate the trust departments of the various closed banks in Toledo, which is further evidenced by an application and entry on file in the Common Pleas Court of Lucas County, Ohio, material parts of which read as follows:

"NOW, THEREFORE, upon consideration thereof the court finds that said I. J. Fulton is the duly qualified and acting Superintendent of Banks of the State of Ohio, and that as such Superintendent of Banks, he did on or about the 15th day of August, 1931, take possession of the business, assets and property of The Ohio Savings Bank & Trust Company, Toledo, Ohio, as provided by law, and that he has in his possession its assets, business and property.

The court further finds that said The Ohio Savings Bank & Trust Company is a corporation duly incorporated and organized under the laws of the State of Ohio, with authority to transact a general banking and trust business, and that it has under its jurisdiction and control as Trustee various trust estates, and that there has come into the hands of said applicant monies, funds and other properties in accordance with the

terms and conditions and by virtue of several instruments creating certain trust estates, and that said applicant has in his possession certain real estate and other property concerning which the instruments transferring the same in trust to said The Ohio Savings Bank & Trust Company specify and impose certain duties upon said Company as Trustee.

The court further finds that said The Ohio Savings Bank & Trust Company has also been acting in the capacity of Registrar, Transfer Agent and Disbursing Agent for various corporations, and that the applicant has in his possession various voluntary trusts, escrows and agencies by the terms of which the makers, donors, etc., reserve the right of revocation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that said I. J. Fulton, as Superintendent of Banks of the State of Ohio, be and he is hereby authorized, ordered and directed as such Superintendent in charge of the liquidation of said The Ohio Savings Bank & Trust Company, to disburse the moneys and funds to the parties entitled thereto which have and will come into his possession as such Superintendent of Banks since the taking possession of said Bank solely by reason and on account of the various trusts held by and in favor of said The Ohio Savings Bank & Trust Company, that he be and he hereby is further authorized, ordered and directed to convey, and/or join in the conveyance of real and personal property by said Company held in trust in accordance with the terms and conditions upon which said real and personal property is held in trust; that he be, and he hereby is further authorized, ordered and directed to control, manage, rent, lease, keep and maintain in proper condition and repair, all such real estate so held in trust by said company, in accordance with the provisions of the instrument or instruments creating said trust or trusts; that he be and he hereby is further authorized, ordered and directed to transfer and deliver all books, papers, records and other instruments of registration, transfer or disbursement agency or upon the order of the corporation or corporations for which such registration, transfer services and disbursing agency may be in existence, or the performance of which duties has been undertaken by said The Ohio Savings Bank & Trust Company, that he be and he hereby is further authorized, ordered and directed to *segregate all trust estates and perform all trust functions and duties under the various trust appointments and designations as evidenced by indentures, wills, agreements, and other documents, until the fiduciary relations created thereunder shall have been legally terminated.*" (Italics the writer's.)

Calling attention to the italicized portion of the entry, the Superintendent of Banks is specifically authorized, ordered and directed by the Court of Common Pleas of Lucas County, to perform all trust functions and duties under the various trust appointments and designations, as evidenced by indentures, wills, agreements, and other documents. Examining the duties of a trustee in the State of Ohio, I call attention to Sections 5684, 5685, 5686 and 5687 of the General Code of Ohio, which sections read as follows:

"Sec. 5684. Each person holding lands as guardian, neglecting or refusing to list or pay the taxes thereon, in manner aforesaid, shall be

liable to his ward or wards for any damage he may have sustained by such neglect or refusal."

"Sec. 5685. Each person being seized or having the care of lands, as executor, and neglecting or refusing to pay the taxes thereon, in manner aforesaid, shall be liable to the devisee or devisees of the person whose executor he is, for any damage occasioned by such neglect."

"Sec. 5686. Each person having the care of lands, as agent or attorney, having funds of the principal in his hands, neglecting or refusing to pay the taxes on such lands, shall be liable to his principal for any damage such principal may have sustained by such neglect or refusal."

"Sec. 5687. Each attorney, agent, guardian, or executor, seized or having the care of lands, who is subjected to any trouble or expense in paying the taxes thereon, or advances his own money for listing or paying the taxes thereon, shall be allowed a reasonable compensation for the time spent, the expenses incurred, and money advanced, which shall be a just charge against the person for whose benefit it was advanced."

From a reading of the above sections, especially of such sections as read in connection with that portion of the journal entry relating to the Superintendent of Bank's right to operate the trust departments of the closed banks, I am of the opinion that the Superintendent of Banks has authority to borrow money on a note in his official capacity to pay taxes due and owing on certain trust properties in the closed banks in Toledo, under Section 710-95 of the General Code of Ohio, under the application and journal entry filed in the Common Pleas Court of Lucas County, Ohio, and under sections 5684, 5685, 5686 and 5687 of the General Code of Ohio.

With reference to your second and third inquiries, it may be said that, generally, it is the duty of a trustee to pay taxes upon the trust *res* and to protect it from tax sale. *Bangor v. Pierce*, 76 Atl. 945; *Dantzler v. McClinnis*, 44 S., 192, and *Whittingbone v. Scofield*, 67 S. W., 846. It would seem to follow that, where a penalty will otherwise be sustained, and the trust income will be sufficient to reimburse an advancement made to avoid the penalty, it is the duty of the trustee to make the advancement and, if necessary, borrow money therefor. Under such circumstances, the trustee would be entitled to reimbursement from the trust estate to the extent that he has bound himself for the benefit of the trust.

Accordingly, by way of specific answer to your second inquiry, I am of the opinion, especially in view of the provisions of section 5687 of the General Code, that trust income accruing after taxes due and owing on a particular trust have been paid with money borrowed by the trustee for such purpose, may validly be applied in satisfaction of the obligation so incurred.

For the same reasons, I am of the opinion that neither a *cestui que trust* nor a creditor or stockholder of the closed bank can legally object to the application of the trust income for the purpose of reimbursement.

Respectfully,

GILBERT BETTMAN,
Attorney General.