It is further to be noted that the long established administrative practice of the Division even prior to the enactment of the present Securities Law when the law was likewise silent as to the withdrawal of exemptions or certifications, has been to permit the withdrawal thereof. The position of the courts on this subject is to the effect that, while not conclusive, long established administrative practice must be given consideration in construing statutes. *Industrial Commission* vs. *Brown*, 92 O. S., 309, 311; *State, ex rel,* vs. *Brown*, 121 O. S. 73, 76; 25 R. C. L. 1043.

Specifically answering your questions, it is my opinion that:

1. The Division of Securities has no authority to revoke a registration of securities either by description or qualification except pursuant to the statutes relating thereto.

2. An applicant who has registered an issue of securities by description or qualification may withdraw same and such withdrawal may be entered upon the records of the Division of Securities.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2665.

BANK—UNDER SECTION 710-92, GENERAL CODE, SUPERINTENDENT OF BANKS AND BANK IN LIQUIDATION JOINED AS PARTIES DEFENDANT WHEN.

SYLLABUS:

1. *Section* 710-92, *General Code, requires that the superintendent of banks and the bank in liquidation be joined as parties defendant in an action to establish a claim for preference or set-off brought under authority of said section.*

2. *In an action under said section brought solely against the superintendent of banks in charge of the liquidation of the bank, unless the superintendent makes timely objection to the defect of parties defendant prior to the rendition of judgment or decree by the trial court, the validity of a judgment or decree against him will not be affected by such defect.*

3. *If a plaintiff elects to prosecute an action brought under favor of Section* 710-92, *General Code, against the superintendent of banks alone, and a judgment or decree is rendered against such plaintiff in the trial court, such judgment or decree will operate as a bar to any subsequent action involving the same issues against either the superintendent of banks or the bank.*

COLUMBUS, OHIO, May 15, 1934.

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

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

"I will appreciate your opinion upon the following questions which have been raised with reference to the provisions of Section 710-92 of the

General Code of Ohio as amended March 31, 1933, which section among other things provides that if a claim for preference or set-off has been rejected by the Superintendent of Banks any person, partnership, corporation or association who shall deem himself or itself aggrieved by the rejection of his or its claim shall bring an action against the Superintendent of Banks *and such bank* within three months after such rejection or be forever barred from asserting the same:

Is an action against Ira J. Fulton, Superintendent of Banks, State of Ohio, in charge of the liquidation of The ..... Bank (or Trust Company), ..., Ohio, Defendant, sufficient compliance with the statute to prevent the claim so rejected from becoming barred, (a) as against the Superintendent of Banks, and (b) as against the bank? Would there be any demurrable defect of parties defendant, i. e., is the bank a necessary party defendant? Is the bank a proper party defendant?"

Under Section 710-91, General Code, the superintendent of banks upon taking possession of a bank for liquidation under Section 710-89, General Code, becomes vested with title to its assets and property. This section further provides that the posting of a notice on the door of the bank shall "operate as a bar to any attachment, garnishment, execution or other legal proceedings against such bank * * *."

Section 710-95, General Code, authorizes the superintendent of banks to collect all money due the bank, and Section 710-97 recognizes his authority to take such legal action as may be necessary to perform the duty thus imposed upon him. Debtors may set off obligations due them from the bank in actions brought against them by the superintendent of banks to enforce obligations due the bank. Section 11321, General Code; *State ex rel,* vs. *Alward,* 44 O. A. 281, 38 O. L. R. 125.

Section 710-98a, General Code, reads:

"No claim for preference shall be allowed by the superintendent of banks or approved by the court unless the same is verified by an affidavit or affidavits fully disclosing all facts upon which said claim is based. All such claims must be filed with the superintendent of banks on or before three months after the last publication of notice required by the second sub-paragraph of section 710-90 of the General Code, and if not so filed the owner or owners thereof shall be forever barred from asserting the same in any manner as entitled to preference."

Section 710-92, General Code, provides:

"If the superintendent of banks doubts the justice or validity of any claim, he may reject the same in whole or in part, or reject any claim of security preference or priority, or offset, and shall serve written notice of such rejection upon the claimant, either personally or by registered mail. A certificate of such rejection and certificate of notice filed in the office of the superintendent shall be prima facie evidence of such rejection and notice.

> Any person, partnership, corporation, or association who shall deem himself or itself aggrieved by the rejection of his or its claim in whole or in part, or the rejection of any claim of security preference or priority, or set-off, by the superintendent, shall bring an action against the superintendent of banks and such bank, within three months after such rejection or refusal of allowance, or be forever barred from asserting the same."

If a claim for set-off or preference is rejected by the superintendent of banks, action must be brought within three months "against the superintendent of banks *and* such bank."

Taking the ordinary meaning of this language the action is to be brought against, "Ira J. Fulton, Superintendent of Banks of Ohio, and The ..... Bank (or Trust Company), Defendants." You inquire whether the banking corporation is either a necessary or a proper party defendant to such action.

In the case of *State, ex rel,* vs. *The Municipal Savings Co.,* 111 O. S. 178, the Supreme Court approved the following distinction between "necessary" and "proper" parties (p. 189):

> "All those whose presence is necessary to a determination of the entire controversy must be, and all those who have an interest in the subject-matter of the litigation which may be conveniently settled therein may be, made parties to the suit. The former are termed the 'necessary' and the latter the 'proper' parties." *Donovan* vs. *Campion,* 85 Fed. 71, 72; 29 C. C. A., 30, 32.

In *Berrien County Bank* vs. *Alexander,* 154 Ga. 775, 115 S. E. 648, in answer to a question certified to the Supreme Court by the Court of Appeals, it was held, as disclosed by the second branch of the syllabus:

> "Where a claim against a bank, which has been taken over by the state superintendent of banks, has been rejected by him, when presented to him for payment, under section 3 of article 7 of the act of August 16, 1919 (Ga. Laws 1919, p. 154), the claimant must bring suit against the bank to establish the justice of such claim, and not against the superintendent of banks."

There was a statute (Ga. L. 1919, p. 154), providing that "the taking possession of any bank by the superintendent of banks, shall be sufficient to place all assets and property of such bank, of whatever nature, in possession of the superintendent of banks, and shall operate as a bar to any attachment or any other legal proceedings against such bank or its assets". Section 15 of article 7 of the same act provided:

> "If the superintendent doubts the justice and validity of any claim or deposit, he may reject the same, and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed in the office of the superintendent. Any action or suit upon such claim so rejected *must be brought by the claim-*

ant against the bank in the proper court of the county in which the bank is located within ninety (90) days after such service, or the same shall be barred." (Italics the writer's.)

In the opinion of a later case, *Williams* vs. *Bennett, Superintendent of Banks,* 158 Ga. 488, 123 S. E. 683, the following language appears in 123 S. E. at p. 687:

"The petition is attacked by special demurrer on the ground of misjoinder of parties; that is, that the Merchants' Bank of Augusta and T. R. Bennett, superintendent of banks, cannot be sued jointly, under the allegations of the petition. The bank became insolvent, and under the banking law of 1919 its affairs, including its assets, were taken over by the superintendent of banks. The petitioner, as stated above, seeks a decree declaring a priority over other creditors of the bank as to the funds in question, and also seeks to enjoin the superintendent of banks from disposing of the assets of the bank to other creditors until the question of priority can be determined. Under the principles ruled in *Conley* vs. *Buck,* 100 Ga. 187, 28 S. E. 97, and the numerous decisions of this court following that one, the petition was not subject to special demurrer on the ground of misjoinder of parties. It can serve no useful purpose to quote at length from the very learned opinion of Mr. Justice Fish in that case. Both defendants, under the facts alleged, were proper parties. If, as contended, the bank was not actually a party when the petition was originally filed, it was so made by amendment. The amendment was properly allowed.

Defendants in error cite the case of *Berrien County Bank* vs. *Alexander,* 154 Ga. 775, 115 S. E. 648, to support the contention that the superintendent of banks cannot be sued in this proceeding. That case is not controlling on the question involved in the present case. In the former case it was held that a creditor, seeking to establish the validity of a claim against the bank, must sue the bank, and not the superintendent of banks, on the theory that the superintendent of banks was presumed to perform the duty placed upon him by statute to pay all who had valid and legal claims against the insolvent bank, as far as the assets of the bank permitted. *The decision followed the provisions of the Banking Act, which in terms declares how such a suit must be brought.* There was no question in that case of enjoining the superintendent of banks from disposing of the assets in payment of creditors before a preliminary decree establishing a priority could be had. The claim itself was disputed, and until its legality could be established the superintendent of banks would not and should not have recognized it.

In this case the indebtedness of the bank to the petitioner in the identical sum demanded is not denied. The difference between the parties arises over the character of the indebtedness. The petitioner claims a priority because of fiduciary or trust relations between the bank and the depositor, and the defendants insist that the deposit was merely general, and that the petitioner was an ordinary creditor entitled to no priority over other creditors. We conclude that the suit was properly maintainable against both the superintendent of banks and the Merchants' Bank jointly." (Italics the writer's.)

In the light of this case it seems clear that both the bank and the superintendent are "proper" parties in an action to establish a preference, even in the absence of specific statutory direction as in the case of Section 710-92, General Code. It is true that injunctive relief was asked against the superintendent in that case but the court intimates that the demurrer would have been overruled even in the absence of this fact. There can be no doubt but that under our statute the superintendent of banks is a necessary party to an action to establish a preference or set-off since his action in rejecting the claim is in issue and since the relief sought is against him.

In the case of *Jackson, Supt.* vs. *Whitesell,* 213 Ala. 369, 104 So. 662, where the superintendent of banks, vested by statute with complete power as statutory receiver and trustee to deal with a bank's assets for the benefit of creditors, elected to litigate a claim rejected by him without joinder of the bank as a party defendant, the court held that his failure to object in the trial to its absence, if improper, did not destroy that court's jurisdiction of the subject matter and the parties present and precluded the raising of such objection on appeal. The court specifically said that it did not decide whether the bank should have been joined.

As above noted, Section 710-92, General Code, in terms requires that the superintendent of banks *and* the bank be joined as defendants. While I am inclined to the view that under the test stated in *State, ex rel.* vs. *The Municipal Savings & Loan Co., supra,* the bank would not be a "necessary" party in the absence of a specific statute, the plain meaning of Section 710-92 cannot be ignored. Words in a statute will be presumed to be used in their general meaning unless the context or surrounding circumstances indicate a different meaning. *Kiefer* vs. *State,* 106 O. S. 285. As defined in *Webster's Twentieth-Century Dictionary* (1934) the word "and" is "a conjunctive, connective or conjoining word" which "signifies that a word, phrase, clause, or sentence is to be added to what precedes." A statute free from ambiguity, clearly expressing the intention of the legislature cannot be otherwise construed. *Ohio Savings & Trust Co.,* vs. *Schneider,* 25 O. A. 259. Where the language of a statute is clear the court cannot, under the guise of construction, ignore its plain terms and insert provisions, even to cover omissions or to correct errors. *State, ex rel.* vs. *Brown,* 121 O. S. 329; *Park Co.* vs. *Development Co.,* 109 O. S. 358; *Maxfield* vs. *Brooks,* 110 O. S. 566. The legislature's intention must be ascertained from the language used in the statute. *D & H Coal Co.,* vs. *Lay,* 37 O. A. 435, affirmed 123 O. S. 468. It should be noted that in the case of *Berrien County Bank* vs. *Alexander, supra,* the court looked no further than the unambiguous language of the statute in determining that an action to establish a common claim must be brought against the bank alone. Furthermore, in the case of *Williams* vs. *Bennett, supra,* when determining that an action to establish a preference was properly maintainable against both the superintendent of banks and the bank, the court distinguished the earlier decision on the ground that the court had followed the terms of the statute declaring how such a suit must be brought.

In the light of well settled principles of statutory construction, it is my opinion that under Section 710-92, General Code, both the superintendent of banks and the bank can be required to be joined as parties defendant in an action to establish a preference or set-off. It follows that an action brought alone against "Ira J. Fulton, Superintendent of Banks, State of Ohio, in charge of the liquidation of The ———————— Bank (or Trust Company), ————————, Ohio, Defendant," does not comply with the statute.

You inquire whether a decree in an action so brought would prevent the rejected claim being barred (a) as against the superintendent of banks, and (b)

as against the bank. In an action so brought a decree against the superintendent would be conclusive upon him unless objection were made to the defect of parties defendant in the trial court. *Jackson, Superintendent,* vs. *Whitsell, supra.*

The following rule is stated in 16 O. Jur. 632:

> "A plaintiff who has invoked the jurisdiction of a court having jurisdiction of the subject-matter cannot object to a judgment unfavorable to himself on the ground that the court had no jurisdiction of the defendant."

In the case of *City of Fostoria* vs. *Fox,* 60 O. S. 340, the court held, as disclosed by the fourth branch of the syllabus:

> "A judgment rendered in an action in favor of a defendant in which the court had jurisdiction of the subject-matter, but not of the person of the defendant, is not erroneous, although the defendant made a timely objection and reserved an exception to the ruling of the court, and might, for this reason, have caused a judgment against him to be reversed."
> See also *Kennedy* vs. *Latchaw,* 100 O. S. 431.

In the light of the foregoing and in specific answer to your questions, it is my opinion that:

1. Section 710-92, General Code, requires that the superintendent of banks and the bank in liquidation be joined as parties defendant in an action to establish a claim for preference or set-off brought under authority of said section.

2. In an action under said section brought solely against the superintendent of banks in charge of the liquidation of the bank, unless the superintendent makes timely objection to the defect of parties defendant prior to the rendition of judgment or decree by the trial court, the validity of a judgment or decree against him will not be affected by such defect.

3. If a plaintiff elects to prosecute an action brought under favor of Section 710-92, General Code, against the superintendent of banks alone, and a judgment or decree is rendered against such plaintiff in the trial court, such judgment or decree will operate as a bar to any subsequent action involving the same issues against either the superintendent of banks or the bank.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2666.

CIVIL SERVICE—UNDER SECTION 486-10, GENERAL CODE, PERSON HAS NOT SERVED IN MILITARY FORCES OF U. S. UNTIL ACCEPTED FOR AND MUSTERED INTO MILITARY SERVICE—DISCHARGE FROM DRAFT BECAUSE OF PHYSICAL DEFICIENCIES.

SYLLABUS:

1. *A person who is inducted by a draft board by virtue of the Selective*