trustee may deem for the best interests of all parties, and for this purpose may sell any or all of the stocks in its possession, and the trustee is hereby given a lien on all the trust property for any such purposes."

Thus it will be seen that while all of the liabilities attendant upon the ownership of bank stock are to fall upon the holder of the trustee certificate, such holder is deprived of a part of the beneficial ownership, such as the right to vote, the right to retain a stock dividend as such, the right to subscribe for additional stock as issued, the right to vote for or against a merger, a sale or a change in the capital structure, as well as the right to vote for the directors who shall manage the business.

Further, the fact that these trustee certificates sell at an advance over the pro rata market prices of the deposited stock is also persuasive that the trustee certificate constitutes a security different from the deposited stock.

For these reasons it is my conclusion that while the trustee certificate constitutes a security predicted upon bank stocks, such security is not identical with but something different from those bank stocks.

I am therefore of the opinion that the shares in question are securities within the definition of that term contained in section 6373-1 of the General Code and that the sale thereof by a dealer, in the course of repeated transactions, is unlawful without compliance with the provisions of the securities act.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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800.

TRUST AGREEMENT—WHERE SHARES OF BANK STOCK ARE DEPOSITED WITH THE TRUST DEPARTMENT OF A NATIONAL BANK AND CERTIFICATES EVIDENCING SHARES IN SUCH TRUST ESTATE ISSUED BY THE TRUSTEE BANK—SUCH ACTION NOT IN CONTRAVENTION OF BANKING AND TRUST COMPANY LAWS.

*SYLLABUS:*

*A trust agreement, whereby shares of bank stock are deposited with the trust department of a national bank and certificates evidencing shares in such trust estate issued by the trustee bank, considered and held not in contravention of laws relative to banks and trust companies.*

COLUMBUS, OHIO, July 28, 1927.

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

DEAR SIR:—This will acknowledge your recent communication as follows:

"The attention of this Department has been called to a certain advertisement appearing in The Ohio State Journal under date of May 31, 1927, a copy of which said advertisement is enclosed.

It is apparent from this advertisement that the stockholders liability on bank stock will be measured in certificates of a face value of $16.75, covering the stock of six different banks.

According to Section 710-41 of the General Code, the amount of capital of a bank must be divided into shares of one hundred ($100.00) dollars each, and

by virtue of Section 710-75 of the General Code the stockholders liability of state banks is defined as follows:

'Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares, etc.'

It seems apparent from the reading of this advertisement and the full force of the two sections of law above referred to, that a conflict in the measure of stockholders liability may result.

It further seems that by force of this advertisement, state bank stocks are being put in a speculative class of investment instead of a conservative class to which they should belong. Should this form of investment be encouraged, I fear it would have a deterrent effect upon the value of State Bank stock.

In administering the laws governing the State Banking Department we have discouraged the trusteeing of bank stock for the reason that it tends to make the enforcement of individual stockholders liability more indefinite than provided for in the statutes.

I am, therefore, respectfully requesting an opinion from your office relative to the legality of trusteeing shares of bank stock in this manner."

The advertisement to which you call my attention consists of an offer of what are denominated as "Bank Stock Trustee Shares of Columbus". Under the plan contemplated, a broker is depositing with a trustee an aggregate of forty-five shares of stock, which includes shares of one state bank and five national banks located in Columbus. The trustee is the trust department of one of the national banks. As against the shares so deposited, the trustee issues the shares in question, which are, in effect, the evidence of the equitable ownership in the stock of the individual banks.

I have also had presented to me a copy of the trust agreement, which is quite a lengthy document, and it is unnecessary to refer largely thereto in the consideration of the question which you present. The owners of the trustee shares participate in the distribution of dividends by the trustee at stipulated periods and the shares are registered, transferable only upon the books of the trustee. It is specifically provided that no holder of shares shall have any legal title to the trust property, his interest being only equitable.

Your question is as to the effect that a plan of this kind will have upon the stock holders liability, which is defined by Section 3 of Article XIII of the Ohio Constitution and by Section 710-75 of the General Code. A similar provision is found in the federal statutes with relation to the liability of stockholders in national banks. I call your attention furthermore to the fact that Section 5152 of the Revised Statutes of the United States provides as follows:

"Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stock holders; but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name."

I find no like provision in the Ohio Code exempting persons in a representative capacity from stockholders liability, nor do I find that the courts of Ohio have passed specifically upon the question of one owning stock in a representative capacity. There are, however, no restrictions as to stock ownership applicable to banks alone and it would seem to follow that stock in a state bank may be held in any one of the methods in which stock in ordinary corporations can be held and consequently the existence

of stockholders liability is of no significance. If this be so, the fact that the shares of bank stock in this instance are held by a trustee does not in any way invalidate such owner ship nor prevent the trustee bank from holding the stock in this manner.

The trust agreement in this instance expressly provides that the trustee shall not be personally liable for any assessment against any of the stocks held in trust and the trustee is authorized either to sell a portion of the other stocks or to levy a pro rata assessment against the trustee shareholders in order to meet the assessment. As applied to the national bank stock held in trust, this provision is in harmony with the federal statute above quoted. That statute has been construed in a number of cases and it has been held to apply in numerous instances where stock has been held in trust.

In the case of *Fowler* vs. *Gowing*, 165 Federal, 891, a father had, with his own money, purchased shares in a bank and had them issued to himself as trustee for his children. The dividends received from these shares were reinvested by the father and became a part of the trust estate. The court construed Section 5152 R. S. as exempting him from any personal liability for assessment upon the failure of the bank.

In the opinion in the case just cited, the court referred with approval to the earlier case of *Lucas* vs. *Coe*, 86 Fed., 972, and I call your attention particularly to the following language:

> "If, then, the defendant was the trustee for his grandson at the time the assessment was made it follows that he cannot be held personally liable. Some one was the legal owner of these shares; some one is liable to assessment. In the absence of all evidence of fraud or concealment, the true situation being fully understood on both sides, it is plain that he would be liable whose property paid for the stock and who was entitled to receive the dividends and proceeds in case the stock was sold. 'One who may profit by the gains of an enterprise should bear its losses, rather than that they should fall on strangers; and the statute imposing a liability on the shareholders of national banks undoubtedly rests on this.' Beal vs. Bank, 15 C. C. A. 128, 67 Fed., 816.
>
> The fact that the defendant is responsible and the cestui que trust presumably irresponsible is a matter of no moment. There is nothing requiring a shareholder in a national bank to be solvent and these shares may be held alike by the millionaire and the pauper. The question for the receiver in making an assessment is, who owns the shares, not who is best able to pay.
>
> But it is argued that the section quoted refers only to a trustee appointed by a will or by the order of a court or judge. The statute does not so say and there can be no question that the relation of trustee and cestui que trust may exist without such formal action."

As pointed out, the decision of the question as to liability cannot hinge upon the fact that collection may be more readily enforced against the trustee than against the cestui que trust. The federal statute having declared the trustee shall not be personally liable, the liability may only be enforced against those holding the real beneficial interest in the stock and it is immaterial whether they be insolvent or collection from them a difficult matter.

As I have before pointed out, we have no similar statute in Ohio. While I have not the benefit of any court decisions in this state bearing directly upon the point in question, I believe the proper rule to be that a trustee holding shares of an Ohio state bank would not be personally liable for an assessment against the stock. I reach this

conclusion because it appears to me that the Federal statute is merely declaratory of what the common law rule is in the absence of statute.

Since the stock is registered in the name of the national bank as trustee, this is notice to other stockholders and creditors that the real ownership of the particular stock resides elsewhere than in the stock holder of record and this would preclude recovery against the trustee above the assets of the trust estate and require proceeding against the real owners, that is, the owners of the bank stock trustee shares. I find no restriction in the statutes upon the assignment of shares or portions thereof. The fact that there will be greater difficulty in enforcing the liability against the many owners of the beneficial interest in the stock in question cannot, in my opinion, be said to preclude the establishment of such beneficial interest in the absence of any specific statutory prohibition. It is almost a truism to say that one may lawfully dispose of a part of that which he owns, unless such disposition be prohibited by law, and I see no reason for not applying this principle to bank stock as well as other property. The trusteeing of bank stock is also not prohibited and in fact has been universally recognized as legitimate by the court, as well as specifically recognized by the Federal statute above quoted.

I have therefore reached the conclusion that in so far as your specific question is concerned, there is no objection to the plan under consideration.

I have, however, broadened my inquiry and examination to include other phases of the arrangement which may possibly be regarded as of doubtful validity. Under the trust agreement the voting power of the stock deposited with the trustee resides in the broker making the deposit. The trustee is directed specifically to execute a power of attorney to the broker. In the event that the broker fails to request the execution of a power of attorney, the trustee bank is authorized to vote the stock. This provision raises some very serious questions. While the amount of stock deposited in the first instance is a negligible quantity, provision is made in the trust agreement for an expansion by other similar deposits of the same kind of stock. If this plan were to prove successful, it is entirely possible for an individual, owning no beneficial interest whatsoever, to have the voting power of substantial blocks of stock in these financial institutions in Columbus. Carrying the possibilities of the situation even farther, this one individual might practically dominate the banking field of Columbus and dictate the policies of what are otherwise competitive institutions. Such a possibility is admittedly remote, but its mere existence shows that the situation presented is fraught with danger. In recognition of the possibilities of the situation, I have examined the provisions of the Valentine act contained in Sections 6390, et seq., of the General Code, but I am convinced that those sections, relating to trusts and agreements in restraint of trade, have no application. At all events, it is doubtful whether any action would lie in the absence of proof of the actual restraint of competition existing by reason of the agreement. Similarly, the Clayton act, which is the Federal anti-trust act succeeding the Sherman act, does not bear upon the situation, since it deals solely with restraint of trade in interstate commerce. I have therefore reached the conclusion that, while the situation is apparently one contrary to public policy, there is nothing in the statutes which warrants any interference of illegality under existing law.

I may also suggest that, because of the provision as to the contingent right of the trustee to hold this stock, there exists the possibility of one financial institution dominating all of the others in the community.

It has been decided by the United States Supreme Court that one national bank cannot lawfully purchase and hold the stock of another as an investment. This was

the holding in the case of First National Bank of Concord vs. Hawkins, 174 U. S., 364. In the present instance, however, the trust department of the national bank acting as trustee does not own the stock in its own right, but holds it for the benefit of the owners of the trustee shares. It does have a contingent voting power and thereby may as effectually dominate the other banks as if it owned the stock in its own right. Some of the language used in the case above referred to may have application to the present situation. On page 369 is found the following language.

> "Another evil that might result if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one."

The court further quotes Section 5201 R. S., which is a prohibition against any banking association making any loan on the security of its own shares and against purchasing and holding any of its own shares, except where necessary to prevent loss. With regard to this statute, the court says:

> "This provision forbidding a national bank to own and hold shares of its own capital stock, would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another."

Tested by this language, I have serious doubt as to the validity of the proposed arrangement from the standpoint of the power of the trustee bank. While it does not own the stock on its own account, it nevertheless, by virtue of the voting power, has effectual control and so the arrangement apparently comes within the condemnation of the Supreme Court. This is especially so in view of the fact that some of the shares placed with the trust department of this bank are its own shares and by the terms of the agreement the bank is specifically given the right of voting its own shares in the event the broker does not choose to vote them himself.

I do not feel, however, that the doubt which exists in my mind is a sufficient warrant for me to conclude that the plan proposed is illegal. While it obviously has possibilities of danger and, in a general sense, may be said to run contrary to public policy if engaged in on a large scale, these considerations are for the legislative authority rather than the judiciary. That is to say, the situation is such as may perhaps recommend legislative action, but in the absence thereof I do not feel that I should rule that the proposed plan is objectionable. Especially is this so in view of the very broad powers given to trust companies by Section 710-159 of the General Code, in the following language:

> "A trust company may act as agent, and take, accept and execute any and all trusts, duties and powers in regard to the holding, management and disposition of any property or estate, real or personal, which may be committed or transferred to, or vested in said trust estate, and the rents and profits thereof or the sale thereof, as may be granted or confided to it by any person, association, corporation, municipal or other authority; and may act as trustee under any will or deed or other instrument creating a trust for the care and management of property under the same circumstances and in the same manner, and subject to the same control by the court having jurisdiction of the same as in the case of a legally qualified person."

Read alone, this section clearly authorizes a trust of this character, and I can find no other section which limits or qualifies this language.

I am therefore of the opinion that the issuance of the proposed bank stock trustee shares is not in contravention of any of the laws governing the issuance of bank stock and that the trust agreement, by virtue of which such shares are issued, apparently is not illegal.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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801.

SECURITIES—AN INTEREST IN OIL AND GAS LEASES AND MINERAL RIGHTS AND ROYALTIES HELD IN NAME OF TRUSTEES FOR AN ASSOCIATION OF INDIVIDUALS IS A SECURITY WITHIN SECTION 6373-1—SOLICITATION OF SUBSCRIPTIONS TO MEMBERSHIP IN SUCH AN ASSOCIATION IS A SALE OF SECURITIES.

*SYLLABUS:*

*Any instrument evidencing an interest in oil and gas leases and mineral rights and royalties, which property is held in the name of certain designated trustees acting for and on behalf of an association of individuals, is a security within the definition of Section 6373-1 of the General Code of Ohio and the solicitation of subscriptions to membership in such an association is a sale of securities.*

COLUMBUS, OHIO, July 28, 1927.

HON. NORMAN E. BECK, *Chief of Division, Division of Securities, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication as follows:

> "I attach hereto agreement to purchase undivided interests in certain oil and gas leases and mineral rights or royalties, which undivided interests are proposed to be disposed of in this state.
>
> Kindly advise whether, in your opinion, these undivided interests would be classed as securities as defined under Section 6373 General Code of Ohio."

The agreement attached to your communication is as follows:

> "Whereas, the undersigned have decided to associate themselves together for the purpose of purchasing certain oil and gas leases on, and one-half of the mineral right or royalty into and under the following described real estate, situated in Caddo county, Oklahoma, and described as follows, to-wit:

| *Description* | *Section* | *Township* | *Range* |
|---|---|---|---|
| SE quarter | 21 | 10 N | 12 W |
| SE quarter | 32 | 9 N | 12 W |
| SW quarter | 5 | 10 N | 10 W |