"Courts should be slow to impart any other than the natural and commonly understood meaning to terms employed in the framing of our statutes.

You shall and *you shall not* should be construed as imposing imperative duties or prohibitions, unless the manifest intention of the legislature suggests a weakened sense of meaning."

The suggested plan of executing two bonds, each bond being for one-half the amount required by the commissioners, would not in my judgment meet the requirement of Section 2633. This section does not authorize the giving of a number of bonds aggregating in amount the sum required by the commissioners, but expressly provides that a "bond" be given with two or more bonding or surety companies as surety.

Specifically answering your question, it is my opinion that the requirement of Section 2633, General Code, that the county treasurer give bond with two or more bonding or surety companies as surety in such sum as the commissioners direct, does not authorize the execution of two bonds aggregating in amount the sum so directed by the commissioners with one surety on each bond.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1406.

NATIONAL BANK—NOT REQUIRED TO HAVE DOUBLE LIABILITY ON SHAREHOLDERS TO TRANSACT TRUST BUSINESS IN OHIO—REQUIREMENTS TO TRANSACT TRUST FUNCTIONS DISCUSSED.

SYLLABUS:

1. *Section* 710-161, *General Code, does not require national banks to have double liability on their shareholders to be eligible to transact a trust business in Ohio.*

2. *A national bank, with a capital stock of one hundred thousand dollars of common stock and one hundred thousand preferred, and a surplus of forty thousand dollars, when and if validly authorized by the Comptroller of the Currency to transact trust functions, may, upon depositing with the Treasurer of State the cash or securities as enumerated in section* 710-150, *General Code, legally exercise trust functions in this state.*

COLUMBUS, OHIO, August 16, 1933.

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

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

"A national banking association is being organized in this state, which will have its principal office in a city the population of which exceeds twenty-five thousand (25,000).

It proposes to issue and sell to subscribers common stock in the amount of one hundred thousand ($100,000.00) dollars and preferred

stock in the amount of one hundred thousand ($100,000.00) dollars. It will have a proposed surplus of forty thousand ($40,000.00) dollars.

I am informed that this institution, when and if it is organized, will apply for authority to exercise trust functions and I am confronted by the problem of deciding whether or not, since part of its capital stock will be comprised of preferred stock, it could comply with the provisions of Section 710-37 of the General Code of Ohio as amended by House Bill 661.

Section 22 of the Bank Act of 1933, approved by the President June 6, 1933, provides that the additional liability imposed on the shareholders in a national banking association by the provisions of 5151 Revised Statutes, as amended and Section 23 of the Federal Reserve Act, as amended, shall not apply with respect to the shares of any such association issued from and after the date of the enactment of said banking act.

Section 710-161 of the General Code of Ohio seems to contemplate that the security for the faithful discharge of duties undertaken by a bank having trust powers shall be three fold, to wit: *One,* Capital Stock; *Two,* Individual liability of the shareholders, and *Three,* Cash or securities required to be deposited with the Treasurer of State under Section 710-150 of the General Code of Ohio.

Since the shareholders of the bank referred to will apparently not be subject to individual liability as such, may this institution, with a capital stock as indicated, when and if authorized by the Comptroller of the Currency to commence business, legally exercise trust functions in this state, upon depositing with the Treasurer of State cash or securities as enumerated in Section 710-150 of the General Code?"

The power of national banks to engage in the business of executing trusts and to operate a trust department is found in Section 11 (k) of the Federal Reserve Act. The Federal Reserve Act was passed December 23, 1913 (38 Stat. 262) and Section 11 (k) of the act as originally enacted provided:

"The Federal Reserve Board shall be authorized and empowered:

* * * * * * * * * * *

(k) To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as said board may prescribe."

In *People* vs. *Brady,* 217 Ill. 100, the court held that the provision of the federal act just quoted was unconstitutional, for the reason that the power thereby conferred upon national banks was not reasonably necessary to the efficiency of such banks as agencies of the government, and concerned matters of private property which are subject to regulation by the states and not to the control of Congress. And also in *First National Bank of Bay City* vs. *Grant Fellows, Attorney General, ex rel. Union Trust Company,* 192 Mich. 640, it was held that the power provided for had no necessary connection with the business of lending money and accepting deposits by national banks, and that the attempted legislation invaded the sovereignty of the states in which the control of the devolution of property and the conduct of private business within the state is placed. That the right of banks to act as trustee was not prohibited by state law was admitted

by the Michigan supreme court, so the sole issue of the case when it reached the Supreme Court of the United States was the constitutionality of this section of the Federal Reserve Act, as the Michigan supreme court held that the conferring of trust powers on national banks was in excess of the authority of Congress.

The constitutionality of section 11 (k) of the Federal Reserve Act was before the Supreme Court of the United States in the case of *First National Bank of Bay City* vs. *Grant Fellows, Attorney General, ex rel. Union Trust Company,* 244 U. S. 416, 61 L. ed. 1233 (decided in 1917). The Supreme Court reversed the Michigan supreme court below on the authority *M'Culloch* vs. *Maryland,* 4 Wheat. 316, 4 L. ed. 579 and *Osborn* vs. *Bank of United States,* 9 Wheat. 738, 6 L. ed. 204. One of the reasons for the reversal is stated as being (p. 424):

> "(1) Because the opinion of the court, instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity, with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank, and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases."

Another ground for reversal is found on pages 425 and 426, as follows:

> "4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that, because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in *M'Culloch* vs. *Maryland* and *Osborn* vs. *Bank of United States* is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in co-operation with or as part of its public authority. *Manifestly this excluded the power of the state in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exercising a power which, under the Constitution, it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if, by state law, state banking corporations, trust companies, or others which, by reason of their business, are rivals or quasi-rivals of national banks, are permitted to carry on such business."* (Italics the writer's.)

The opinion in the above case was written by Mr. Chief Justice White. Mr. Justice Van Devanter wrote a dissenting opinion in which Mr. Justice Day concurred. Such dissent was based on procedural and not substantive grounds, but part of it is worth noting for our purposes. With reference to that part of section 11 (k) of the Federal Reserve Act, "when not in contravention of State or local law", Mr. Justice Van Devanter said at page 430:

> "The first does no more than to withhold the privilege in question from national banks located in states whose laws are opposed to or not in harmony with the possession and exercise of such a privilege on the part of the *banks.*" (Italics the writer's.)

In contrast to this the court in the majority opinion stated at pages 427 and 428:

> "In other words, we are of the opinion that, as the particular functions in question, by the express terms of the Act of Congress, were given 'only when not in contravention of state or local law', the state court was, if not expressly at least impliedly, authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground."

It must be remembered that these statements were both *obiter dicta* inasmuch as the Michigan supreme court admitted that such power of national banks was "not in contravention of state or local law." State banks were expressly permitted to do trust business in Michigan.

In 1918, the year following the decision of the "Fellows" case supra, Congress amended Section 11 (k) of the Federal Reserve Act, clarifying the language of the section and broadening the trust powers of national banks to include all trust powers granted by the respective states in their own banking institutions. It is manifest that Congress in amending the section had in mind the decision of the "Fellows" case, supra, when it added the following language:

> "Whenever the laws of such state authorize or permit the exercise of any or all of the foregoing powers by state banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of state or local law within the meaning of this act."

The "Fellows" case was followed in the case of *State of Missouri, ex rel. The Burns National Bank of St. Joseph* vs. *Duncan, Probate Judge,* 265 U. S. 17, 68 L. ed. 881, decided after the 1918 amendments to section 11 (k) of the Federal Reserve Act. The headnotes of this case read:

> "1. The Act of September 26, 1918, c. 177, Sec. 2, 40 Stat. 967, amending Sec. 11 (k) of the Federal Reserve Act, authorizes a national bank having the permit of the Federal Reserve Board, to act as executor, if trust companies competing with it have that power by the law of the

state in which the bank is located, whether the exercise of such power by the national bank is contrary to the state law or not. (P. 23.)

2. The power of Congress to grant such accessory functions to national banks, to sustain them in the competition of the banking business, cannot be controlled by state laws. *First National Bank* vs. *Fellows,* 244 U. S. 416, p. 24.

3. The authority given by the act is independent of regulations adopted by the state to secure the trust funds in the hands of its trust companies."

The pertinent fact involved here was that at the time, by the Missouri law, state banks, as well as national banks, were excluded from assuming the functions of executors and administrators, which functions it allowed trust companies to exercise, according to the decision of the Supreme Court of Missouri. Nevertheless it was held by the Supreme Court of the United States that national banks with the required permit of the Comptroller could do trust business in Missouri, since trust companies were business rivals of national banks.

Mr. Justice Holmes, writing the majority opinion, stated at pages 23 (see citation, supra), 24 and 25:

"By the Act of September 26, 1918, c. 177, section 2, 40 Stat. 967, 968, amending section 11 (k) of the Federal Reserve Act, the Federal Reserve Board was empowered 'To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator * * * or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.' If the section stopped there the decision of the State Court might be final, but it adds the following paragraph, 'Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this Act.' *This says in a roundabout and polite but unmistakable way that whatever may be the state law, national banks having the permit of the Federal Reserve Board may act as executors if trust companies competing with them have that power.* * * *

The fact that Missouri has regulations to secure the safety of trust funds in the hands of trust companies does not affect the case. The power given by the act of Congress purports to be general and independent of that circumstance and *the act provides its own safeguards* (see infra). The authority of Congress is equally independent, as otherwise the State could make it nugatory. Since the decision in *First National Bank of Bay City* vs. *Fellows,* 244 U. S. 416, it generally has been recognized that the law is now as the relator contends. (The relator contended that the act of Congress granting trust powers to national banks is constitutional, and such power cannot, therefore, be nullified, impeded, burdened or controlled by state law or authority, *except as permitted by Congress.*) Turner's Estate, 277 Pa. St. 110, 116. Estate of Stanchfield, 171 Wis. 553. *Hamilton* vs. *State,* 94 Conn. 648. *People* vs. *Russel,* 283 Ill. 520, 524.

In re Mollineaux, 179 N. Y. S. 90. *Fidelity National Bank & Trust Co.* vs. *Enright,* 264 Fed. 236." (Italics and paranthesis the writer's.)

In Turner's Estate (cited by Mr. Justice Holmes, supra), it was argued that the Federal Reserve Act was in direct violation of the state law in permitting uninvested funds to be mingled with the general assets and in removing such funds from inspection or supervision of state authorities. The court there said at pages 116 and 117:

"The answer to this contention is that, in so far as the state law is inconsistent with the Federal Reserve Act, the former must yield to the latter, even though the result may be to place a benefit or burden not received or assumed by state banks and trust companies.

When the Federal Act was passed (referring to Section 18 (k) of Federal Reserve Act as amended in 1918) Congress had knowledge of the fact that various states had adopted different laws and systems governing persons or corporations acting in a fiduciary capacity. * * * It was with knowledge of this situation and the existing differences between rules governing state and federal banks that *Congress undertook to define by the Act of* 1918, *what would be considered 'in contravention of state law.'* It will be observed that the definition refers to 'powers' only and not the rules governing the exercise of such powers. It is the right itself, not the rules governing the exercise of the right, to which reference is made. *Concede the existence of the right in the state banks and trust companies and we have the same right bestowed upon national banks. Had Congrss intended the latter to be governed by state laws, in the exercise of the right given, surely expression of that intention would be found in the statute. In absence of such utterance, we must assume Congress was satisfied with the rules already prescribed by the Federal Reserve Board."* (Italics the writer's.)

Congress, in addition to the amendment referred to supra, of Title 12, section 248, subsection (k), also added to it the following pertinent provisions on September 26, 1918, which are also in effect at the present time:

"(k) * * * *Whenever the laws of a State require corporations acting in a fiduciary capacity, to deposit securities with State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law.*

* * * National banks in such cases shall not be required to execute the bond usually required of individuals if state corporations under similar circumstances are exempt from this requirement.

* * * National banks shall have the power to execute such bonds when so required by the laws of the state.

* * * In passing upon the applications for permission to exercise the powers enumerated in this subsection (to exercise trust powers), the Federal Reserve Board may take into consideration the amount of capital and surplus of the applying bank, whether or not capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that

seem to it proper, and may grant or refuse the application accordingly; *Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by state law of state banks, trust companies, and corporations exercising such power.*" (Italics and parenthesis the writer's.)

The last amendment to this act was on June 26, 1930, amending subsection 11 (k) by adding a new paragraph with reference to procedural steps for national banking associations in surrendering their rights to exercise the powers granted under subsection 11 (k). This amendment is not material to the inquiry.

The new Federal Banking Act (Glass-Steagall Act, H. R. 5661) provides (Act approved June 16, 1933):

> "Section 22. The additional liability imposed upon shareholders in national banking associations by the provisions of section 5151 of the Revised Statutes, as amended, and section 23 of the Federal Reserve Act, as amended (U. S. C. title 12, secs. 63 and 64), shall not apply with respect to shares in any such association issued after the date of enactment of this act."

This act did not repeal title 12, section 248, section 11 (k) of the United States Code to which reference is given above.

The two Supreme Court decisions discussed above seem to lay down the following principles:

First. That a national bank must be considered as an entity, i. e., that its various powers and functions must be considered as one business and cannot be separated.

Second. That the powers and functions of national banks flow from Congress and not from the states.

Third. That Congress may permit national banks to compete with state banks by granting to them all the powers and functions exercised and enjoyed by state banks.

Fourth. That the extension of the operation of any state law over the trust department of national banks must be either expressly or by implication found in section 11 (k) above referred to.

In other words, if we concede that by a provision of state law, the state has meant to exercise some supervision over the granting of trust powers to national banks, yet such state statutory provision would be ineffective unless there is something in the federal statute likewise extending such authority. Thus the federal provision as to the deposit and the provision as to the required capitalization both distinctly recognize and apply the requirements of the particular state. On the other hand, the federal statute is entirely silent on the right of a state to require double liability provisions before a national bank can exercise trust functions in a particular state.

In Ohio, state banks and trust companies, etc., are authorized to exercise trust powers, and consequently the granting to and exercise of such powers by national banks cannot be deemed to be "in contravention of State or local law" as defined in sub-section 11 (k) of the Federal Reserve Act cited supra.

We must keep these principles in mind in examining Ohio statutes on the subject.

Section 710-37, General Code, as amended by House Bill No. 661, provides inter alia:

"The capital of a commercial or savings bank or a combination of both shall be not less than * * * one hundred thousand dollars in cities the population of which exceeds twenty-five thousand.

The capital of a corporation transacting a trust business shall be not less than one hundred thousand dollars and if such business is combined with that of a commercial or savings bank, or combination of both, such capital shall be in addition to the capital required for such commercial or savings bank, or a combination of both, as provided herein.

No bank hereafter incorporated shall begin to transact business until it has a surplus equal to twenty per cent. of its capital."

The particular national bank in your inquiry meets the capital and surplus requirements of this section, so there can be no valid objection on these grounds.

Section 710-150, General Code, provides, among other things:

"No trust company, or corporation, *either foreign or domestic,* doing a trust business shall accept trusts which may be vested in, transferred or committed to it by a person, firm, association, corporation, court or other authority, of property within this state, until its paid-in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash the sum of one hundred thousand dollars, except that * * *." (Certain enumerated securities accepted in lieu of cash.) (Italics and parentheses the writer's.)

The national bank in question must and is willing to deposit the one hundred thousand dollars in the enumerated securities, and its paid-in capital will evidently equal "at least one hundred thousand dollars," so there is no objection on this ground.

Section 710-161, General Code, provides:

"The capital stock of such trust company, with *the liabilities of the stockholders existing thereunder,* and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, *upon proper application,* require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment." (Italics the writer's.)

The question at issue is whether that part of section 710-161, General Code, "with the liabilities of the stockholders existing thereunder" intends to make it mandatory for national banks to have the so-called "double liability" on shareholders of their stock before such institutions are eligible to transact trust business in Ohio.

I am of the opinion that an interpretation of section 710-161, General Code,

requiring such "double liability" is unwarranted for the following reasons:

1. This section does not specifically say "double liabilities" of the stockholders, but uses the more comprehensive term, "the liabilities of the stockholders," which would include the "double liability," *if any,* as well as all other liabilities of shareholders such as, for example, liabilities for unpaid subscriptions, etc. It marshals such liabilities for the cestuis que trustent, whatever they may be, but does not require "double liability" of stockholders of a corporation transacting a trust business.

2. To construe the section as mandatory would cast grave constitutional doubt on section 710-161, General Code, with reference to national banks. Since such interpretation is not essential, rules of construction dictate a reasonable interpretation casting no constitutional doubt on the validity of the section.

The rule that the capital stock, with the liabilities of the stockholders exisiting thereunder and the one hundred thousand dollars of securities, shall stand in lieu of any special bond to be exacted as a condition of qualification under an appointment in any of the capacities named in section 710-161, General Code, admits of the exception that the appointing authority may "upon proper application" require additional security of a trust company that has been appointed. The phrase "upon proper application" in this section has been interpreted in Opinions of the Attorney General for 1920, Volume 1, page 210, to mean that after appointment, upon application in writing made by any person interested in the trust estate, further security may be required by the court or officer. This exception in section 710-161, General Code, provides a method for obtaining additional security of banks doing a trust business, and it is my opinion that such would also be applicable to national banks because of the provisions of title 12, section 248, subsection 11 (k) supra.

In view of the foregoing, it is my opinion that:

1. Section 710-161, General Code, does not require national banks to have double liability on their shareholders to be eligible to transact a trust business in Ohio.

2. A national bank, with the capital stock as indicated, when and if validly authorized by the Comptroller of the Currency to transact trust business, may legally exercise trust functions in this state, upon depositing wtih the Treasurer of State the cash or securities as enumerated in section 710-150, General Code.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1407.

APPROVAL, NOTES OF TWIN RURAL SCHOOL DISTRICT, ROSS COUNTY, OHIO—$8,239.00.

COLUMBUS, OHIO, August 17, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.