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LIQUIDATION OF BANK—SECTION 810-97, GENERAL CODE, AS AMENDED BY BAKER ACT, RELATIVE TO LIQUIDATION EXPENSES APPLICABLE TO BANKS IN PROCESS OF LIQUIDATION ON EFFECTIVE DATE OF BAKER ACT—PENDING LIQUIDATIONS NOT APPLICABLE.

SYLLABUS:

1. *Section 810-97 of the General Code, as amended by the Baker Act (H. B. 661, 90th General Assembly), relative to liquidation expenses, is applicable to banks in the process of liquidation on the effective date of the Baker Act, it being a remedial section and the legislature having expressly made it applicable to pending liquidations.*

2. *Section 26 of the General Code precludes the application of all other remedial provisions of the Baker Act (H. B. 661, 90th General Assembly) to liquidations begun prior to the effective date of the act, the legislature not having expressly made such provisions applicable to pending liquidation proceedings.*

COLUMBUS, OHIO, June 17, 1933.

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

DEAR SIR:—I have your request for my opinion which reads as follows:

“Question has been raised as to the application of the provisions of House Bill No. 661 known as the Baker Act, to banks in the process of liquidation at the time of its enactment.

Inquiries have been made especially in connection with the provisions of amended Section 710-95 of the General Code and in particular with reference to the paragraph therein contained which reads as follows:

‘The superintendent of banks shall give notice of the hearing of each application made pursuant to this section by publication in a newspaper of general circulation in the county in which the proceedings for the liquidation of such bank are pending. Each such notice shall be published once and shall set forth the time when such application shall be heard, which shall be not less than ten days after the publication thereof, provided, however, that such court, or a judge thereof, may by order dispense with such publication of notice and hear any such application at any time before the expiration of said ten day period. At the hearing on any such application, any shareholder, depositor or creditor of such bank shall have the right to appear and be heard.’

In the Toledo liquidations I am informed that in some instances assets have been exchanged or sold, the consideration for which exchange or sale has been in whole or in part claim against the bank in liquidation, and if this practice is indulged in in the future, I am wondering if the provisions of Section 710-95b should not be adhered to.

If I direct my special deputies to withdraw monies and funds collected in the process of liquidations prior to the enactment of the Baker Bill and redeposit the same, will the provisions of amended Section 710-96 apply to such deposits?

In such banks as were in the process of liquidation on the effective date of the Baker Bill, should I in paying expenses of liquidation proceed under amended Section 710-97?

Are Sections 710-98a and amended Section 710-99 applicable to banks closed prior to the enactment of the Baker Bill?"

It appears that the provisions to which you refer are amendments made by the Baker Act to that portion of the banking law relating to liquidations, and further, that these provisions are remedial in nature.

Section 26 of the General Code provides:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and *when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed*, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act." (Italics the writer's.)

If the process of liquidating a bank, begun under section 710-89, General Code, is a "proceeding", the provisions in question are inapplicable to banks in the process of liquidation on the effective date of the Baker Act unless "expressly" provided by the legislature. *State ex rel. vs. Zangerle*, 101 O. S. 235.

The first question, then, is whether a bank liquidation is a "proceeding." I C. J. 941, reads:

"It has been said that the term 'proceeding' is a technical one, and has acquired a peculiar and appropriate meaning in law; but it has also been said that it is not technical, and has different meanings, according to the context and the subject to which it relates."

In the case of *In re McFarland*, 10 Mont., 445, 455, 26 Pac. 185, it is stated that the term "proceeding" in the code is "used in a much broader and less technical sense than the term 'action'." Other courts have said it to be more comprehensive than the terms "judgment" and "suit." *Yeager vs. Wright*, 112 Ind., 230, 13 N. E. 707; *Uhe vs. Chicago, etc., R. Co.*, 3 S. D. 563, 54 N. W. 601. It has been held that the term "proceedings" is not necessarily restricted to judicial proceedings. Thus, in the case of *Raymond vs. Cleveland*, 42 O. S. 522, it was held that the various steps in council and before boards in regard to assessments for street improvements constituted a "proceeding."

A liquidation begins when the Superintendent of Banks takes possession of the business and property of the bank under section 710-89. The Superintendent appoints a liquidating agent, collects the bank's assets, enforces collection of stockholders' double liability and pays dividends to creditors. From the time the Superintendent takes over a bank, the statute provides for a succession of acts which continue until the liquidation has been completed. In my opinion, the liquidation of a bank is a "proceeding", as that term is used in its broader sense.

Has the legislature "expressly" provided that the provisions in question shall be applicable to banks in liquidation on the effective date of the Baker Act?

The act contains no express provision like section 3 of the Hunter Act (H. B. No. 358, 90th General Assembly), which reads:

“The provisions of section 710-89a of the General Code, as herein amended, shall be applicable to any bank notwithstanding at the effective date of this act such bank is in the hands of the superintendent of banks for liquidation.”

In addition to this section, the emergency clause of the Hunter Act recites that the new act is necessary for the resumption of business of banks “in the process of liquidation.”

If there is an express provision in the Baker Act it must be found in section 3, the emergency clause, which reads:

“This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity is that existing laws providing for the organization of the division of banks in the department of commerce and of the liquidation and re-organization of banks are inadequate to meet the exigencies of the present financial emergency which demand immediate administrative action. Therefore this act shall take effect immediately.”

In the case of *State ex rel. vs. Zangerle, supra*, the question presented was whether or not the amendments to the various sections of the statutes relating to county road bonds, increasing the maximum rate of interest, were applicable to road improvements theretofore ordered by the county commissioners. After holding a road improvement to be a proceeding within the meaning of section 26 the court considered the question whether the language of the act expressly provided for its application to pending improvements. As here that provision, if contained in the act, was in the emergency clause. That clause recited that “certain districts in the state are unable to sell their bonds at the rate of interest provided by the present law and if the operation is delayed until the end of the ninety days’ period provided by the constitution, the funds from such sales will not be available for carrying out the program of road construction during the current year.” Judge Wanamaker said:

“This section 3 clearly was intended merely to exempt the act from the referendum, by declaring it to be an emergency act.”

The emergency clause of the Baker Act manifests no clearer intent to apply the remedial provisions of that act to pending proceedings than did the clause before the court in the Zangerle case. Judge Wanamaker’s opinion casts doubt upon the propriety of finding an express legislative intent to include pending proceedings solely from an emergency clause. Had the 90th General Assembly intended to make this express inclusion, it would surely have used apt language to effect this result, as it did in the Hunter Act.

Section 710-97, as amended by the Baker Act, is in terms applicable to pending proceedings. That section provides:

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

All suits or proceedings brought by the superintendent of banks under authority of law, or to collect any penalty or forfeiture, or in any manner pertaining to the liquidation of banks, shall be brought in the name of the state upon his relation, and shall be conducted under the direction and supervision of the attorney general.

Provided, however, that the attorney general may, whenever it shall become necessary in the course of his duties hereunder, employ special counsel to aid him, and the compensation of such special counsel shall be fixed by the attorney general, subject to the approval of the court, and shall, on certificate of the superintendent of banks, be paid out of the property of such bank in the hands of the superintendent. Such expenses shall be a charge against the property in the hands of the superintendent and shall be paid first in the order of priority.

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 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 pro-rated 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." (Italics the writer's.)

It is clear from the fourth paragraph of the section that statements of estimable expenses must be filed for banks in liquidation on the effective date of the Baker Act as well as for banks taken over thereafter. Since the filing of such statements is part of the procedure found in section 710-97 for allowing expenses, it is clear that the legislature intended the provisions of that section to apply to banks in liquidation on the effective date of the Baker Act.

In specific answer to your inquiry, it is my opinion that:

1. Section 710-97 of the General Code, as amended by the Baker Act (H. B. 661, 90th General Assembly), relative to liquidation expenses, is applicable to banks in the process of liquidation on the effective date of the Baker Act, it being a remedial section and the legislature having expressly made it applicable to pending liquidations.

2. Section 26 of the General Code precludes the application of all other remedial provisions of the Baker Act (H. B. 661, 90th General Assembly) to liquidations begun prior to the effective date of the act, the legislature not having expressly made such provisions applicable to pending liquidation proceedings.

Respectfully,

JOHN W. BRICKER,
Attorney General.

965.

LIQUIDATION OF BANK—PUBLIC DEPOSITOR ENTITLED TO PROVE CLAIM AGAINST ASSETS OF DEPOSITORY FOR FULL AMOUNT OF DEPOSIT AT TIME BANK FAILED WITHOUT DEDUCTING VALUE OF COLLATERAL HELD—DIVIDEND BASED UPON FULL AMOUNT OF DEPOSIT WHEN—RE-DELIVERY OF SECURITIES DISCUSSED.

SYLLABUS:

1. *Where public depositors are secured by the pledge of mortgages, bonds and other securities, the public depositor is entitled to prove its claim against the assets of a depository bank in process of liquidation for the full amount of the deposit at the time the bank failed without deducting the value of the collateral held, and if at the time for paying a liquidating dividend the collateral has not been realized upon the public depositor is entitled to receive his dividend based upon the entire amount of the deposit; thus if a 20% dividend is declared, the secured public depositor is entitled to 20% of the total deposit without reference to the pledged security.*

2. *Such dividend is payable without re-delivery to the liquidator of any*