testator's children have no rights which they can assert against either the corpus of the estate in the hands of the trustees or the income therefrom.

In this situation, I am quite clearly of the opinion that the children of Robert M. Gilleland, deceased, have no equitable interest in the stocks and bonds or other property classed as investments in the hands of the executors of this estate, and that for this reason the moneys that have heretofore been paid by the executors to these children out of the income of the estate are not taxable as income yield in the hands of such of these children as live in this State.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5130.

SUPERINTENDENT OF BANKS—NOT REQUIRED TO COMPLY WITH TERM "EMPLOYMENT" AS DEFINED IN FEDERAL SOCIAL SECURITY ACT, IN CONNECTION WITH LIQUIDATION OF STATE BANKS.

SYLLABUS:

Services performed in connection with the liquidation of state banks by employees of the Superintendent of Banks, are not within the term "employment" as defined by Sections 210(b), 811(b) and 907(c) of the Federal "Social Security Act" (42 U. S. C. A.; Sections 301 to 1305), and therefore the Superintendent of Banks is not required to comply with said act.

COLUMBUS, OHIO, February 1, 1936.

HON. S. H. SQUIRE, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR: You have requested my opinion as to the applicability of the *Federal "Social Security Act" (42 U. S. C. A., Sections 301 to 1305),* to the Superintendent of Banks in possession of the business and property of a bank under Section 710-89, General Code of Ohio.

The Federal "Social Security Act" provides, among other things, for old age pensions and unemployment insurance supported by payroll taxes. Title II of the act relates to federal old age benefits and Title III provides for the administration of unemployment insurance laws.

For the purpose of providing funds for old age benefits, two types of taxes are levied under Title VIII. Under Section 801 there shall be levied an income tax upon employees, and under Section 804 an excise

tax on employers. All employers covered by the act are liable for payment of both taxes.

Title II, Section 210, reads in part:

> "When used in this title—
> * * * * * * * * *
> (b) The term 'employment' means any service, of whatever nature, performed within the United States, by an employee for his employer, except—
> * * * * * * * * *
> (6) Service performed in the employ of a state, a political subdivision thereof, or an instrumentality of one or more states or political subdivisions;
> * * * * * * * * *

Title VIII, Section 811, contains identical language, as does Section 907 of Title IX, which latter title (Sec. 901) levies an excise tax, based on payroll, upon employers of eight or more, to provide funds for unemployment compensation.

If service performed for the Superintendent of Banks in the liquidation of a bank is "performed in the employ of a state * * * or an instrumentality of one or more states" it is excluded from the term "employment," as used in the several sections of the act to which reference has been made.

Section 154-39, General Code, provides in part:

> * * * * * * * * *
> "There is hereby created in the department of commerce a division of banks which shall have all powers and perform all duties vested by law in the superintendent of banks. Wherever powers are conferred or duties imposed upon the superintendent of banks, such powers and duties shall be construed as vested in the division of banks. The division of banks shall be administered by a superintendent of banks, who shall be appointed by the governor by and with the advice and consent of the Senate, and hold his office for a term of two years unless sooner removed at the will of the governor. * * *"

Section 710-89, General Code, provides that the Superintendent of Banks may take possession of the business and property of a bank upon the happening of certain contingencies. Section 710-90, General Code, prescribes certain things to be done by the Superintendent of Banks, upon taking over a bank, including the posting of notice on the doors.

Section 710-91, General Code, reads:

> "Immediately upon the posting of notice on the door or doors of a bank by the superintendent of banks, as provided in Section 710-90 of the General Code, the possession of all assets and property of such bank of every kind and nature, wheresoever situated, shall be deemed to be transferred from such bank to, and assumed by the superintendent of banks; and such posting shall of itself, and without the execution or delivery of any instruments of conveyance, assignment, transfer, or endorsement, vest the title to all such assets and property in the superintendent of banks. The time of posting stated in such notice shall be prima facie evidence of the time of posting. Such posting shall also operate as a bar to any attachment, garnishment, execution or other legal proceedings against such bank, or its assets and property, or its liabilities; and interest on deposits shall thereupon cease to accrue at the rate specified in the contracts of deposit, but without prejudice to the rights of depositors to receive interest, with other creditors, from the date of such posting, out of the funds produced by the liquidation of such bank, before distribution thereof is made to shareholders on their shares."

After reviewing these statutes, I said in Opinion No. 4021, rendered March 6, 1935:

> "Reading all of these sections together it is apparent that the Division of Banks takes possession of the business and property for liquidation and that the posting of a notice upon the doors of the bank vests possession and title to all assets and property in the Division of Banks, a division of the Department of Commerce, which is one of the nine departments of state government created by the Administrative Code of 1921. In 1921 these departments, together with the elective state officials and certain independent boards and commissions, became the administrative branch of the government of the State of Ohio."

The statutes providing for the liquidation of building and loan associations are in all material respects analogous to those applicable to banks. In the case of *Warner* v. *The Mutual Building and Investment Co.*, 128 O. S., 37, 42, the court said, with respect to the Superintendent of Building and Loan Associations, "Such superintendent is not only a creature but an arm of the State."

In the case of *Fulton* v. *Wetzel,* 47 O. A., 72, the court said:

"State banks and building and loan and kindred organizations are creatures of the state. They are chartered to do business by the state. They all transact business of a quasi-public character. It is our belief that this state is rightfully committed to a policy of exclusive state supervision, surveillance and, when necessary, liquidation of these institutions through the respective superintendents in the proper and wholesome conservation of the public interest."

Under the statutes the Superintendent of Banks is given broad powers in liquidation. Section 710-94, General Code, authorizes him to employ special deputy superintendents, assistants, agents, clerks and examiners.

Section 710-95, General Code, reads in part:

"The superintendent of banks, upon taking possession of the business and property of any bank, shall have, exercise and discharge the following powers, authority and duties, without notice or approval of court, but subject to the provisions of this chapter, to-wit:

1. To collect all money due to such bank.
2. To perform all such acts as are desirable or expedient in his discretion to preserve and conserve the assets and property thereof.

* * * * * * * * *

5. To pay off and discharge any taxes, assessments, liens, claims or charges against the assets or property of such bank.

* * * * * * * * *"

Section 710-97, General Code, provides that the expenses of liquidation shall be paid from the assets of the particular bank.

In view of these provisions, it is clear that the Superintendent of Banks may employ persons to assist him in the liquidation and in the preservation and maintenance of the bank's property. This may include office buildings requiring the employment of a staff of janitors, engineers, plumbers, and so on.

It might be contended that the service in question is not rendered "in the employ of a state" because the only persons having a direct financial interest are the depositors and stockholders of the particular bank, and further because the compensation comes from the bank's assets rather than from the state treasury. Compare Opinion No. 4021, supra, and Opinion No. 4200, rendered May 1, 1935, to the effect that the state is the "consumer" of tangible personal property sold to the superintendent

for use in liquidation, and therefore not subject to the sales tax under Section 5546-2, General Code.

In the recent case of *State ex rel.* v. *Bremer,* 130 O. S., 227, it was held that the state does not act in a sovereign capacity when it sues the stockholders of a bank in the possession of the Superintendent of Banks to recover upon their constitutional liability, and therefore that such suit can be barred by statutes of limitation.

Sovereign powers under our constitutional form of government are far more limited than in a monarchy. See *Chisholm* v. *Georgia,* 2 Dall. (2 U. S.), 419. For example, as pointed out by Mr. Justice Wilson in his opinion in that case (p. 456), the term "sovereign" has for its correlative "subject," whereas under the United States Constitution there are "citizens" but no "subjects."

The state performs many acts in a proprietary capacity, for example, the deposit of its funds in banks, under Section 321, et seq., General Code. *Fidelity & Casualty Co.* v. *Union Savings Bank Co.,* 119 O. S., 124. It was there pointed out that "The rights of sovereignty are those which are deemed essential to the existence of government. Without attempting to enumerate all such rights, it may be stated that they include the right of eminent domain, the right to levy taxes and assessments, to impose penalties, to inflict forfeitures, fines, and punishments, and to collect revenues for the support of the government."

The functions of the state's political subdivisions are also divided into sovereign and proprietary. With reference to a municipality, the court said in *Wooster* v. *Arbenz,* 116 O. S., 281, 284-285:

> "First of all, let us ascertain the tests whereby these distinctions are made. In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary."

It is apparent that the state performs many necessary and proper acts for the welfare of its citizens in a proprietary capacity. When an employee of the state performs services of this character, he is no less "in the employ of a state" than when performing services in the furtherance of an essential governmental function. Thus, even if the *Bremer* case is authority for the proposition that the liquidation of a bank is proprietary in nature, employees engaged therein are excluded from the Social Security Act by the express exemption.

Even if the service were not "in the employ of a state," it would at least be in the employ of "an instrumentality of" a state. A railroad held in the name of the United States Spruce Production Corporation, created by the Director of Aircraft Production, subject to the orders of the War Department and authority of the President, was held not subject to state taxation, being an instrumentality of government," as a war necessity. *Callam County* v. *United States,* 263 U. S., 341; *Port Angeles Western R. Co.* v. *Callam County,* 20 Fed. (2nd), 202.

In the case of *Group No. One Oil Corporation* v. *Bass,* 38 F. (2nd), 680, the court held that a lease executed by the State of Texas of state-owned university lands, the state retaining a royalty on oil and gas produced, constituted an "instrumentality" and, hence, that the United States could not tax income derived by the lessee from its operations on such lands.

By an Act of Congress (Act of March 2, 1889; 25 Stat., 888) funds were appropriated for the purchase of live stock and farm implements for the Sioux Indians on the Cheyenne River Reservation. As to the personal property issued it was provided that the Indians could not barter or sell except among themselves. In the case of *Dewey County* v. *United States,* 26 Fed. (2nd), 434, the court held the property issued, the increase thereof and property received in exchange therefor, to constitute an "instrumentality of the United States" and hence not subject to state taxation.

"Instrumentality" is defined by Webster as "anything used as a means or an agency." Ohio is committed to a policy of exclusive state liquidation of financial institutions. *Fulton* v. *Wetzel,* 47 O. A., 72, petition in error dismissed, 128 O. S., 109. *Slocum* v. *Mutual Building and Investment Co.,* 130 O. S., 312.

With respect to liquidation of building and loan associations, the court in *State ex rel.* v. *Capital Endowment Co.,* 129 O. S., 654, 666, said, "The state has exercised its right to preempt this field." This statement is equally applicable to bank liquidations as appears from the statutes and authorities previously cited. It follows that the Superintendent of Banks, with respect to his duties in liquidation, is an "instrumentality" of the state. This becomes clear from a review of the above cases showing the wide applicability of the term "instrumentality."

Specifically answering your inquiry, it is my opinion that services performed in connection with the liquidation of state banks by employees of the Superintendent of Banks, are not within the term "employment" as defined by Sections 210(b), 811(b) and 907(c) of the Federal "Social Security Act" (42 U. S. C. A., Sections 301 to 1305), and therefore the Superintendent of Banks is not required to comply with said act.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5131.

LIQUOR CONTROL DEPARTMENT—CERTAIN BONDS GIVEN BY APPLICANTS FOR LIQUOR PERMITS NOT ENFORCIBLE OBLIGATIONS IN FAVOR OF STATE.

SYLLABUS:

Where bonds were given to the State of Ohio with surety to the satisfaction of the Tax Commission of Ohio, by applicants for class C-1, class C-2 and class D-1 permits from the Department of Liquor Control of the State of Ohio, on and after June 5, 1935, such bonds do not constitute either legal statutory or voluntary common law bonds, and are therefore not enforcible obligations in favor of the State of Ohio.

COLUMBUS, OHIO, February 1, 1936.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN: Acknowledgment is hereby made of your request for my opinion, which reads as follows:

> "Amended Substitute Senate Bill No. 2 of the 91st General Assembly was approved by the Governor June 5, 1935. The requirement of bonds from certain kinds of permit holders under the Department of Liquor Control was omitted from this act. There was some discussion as to the date on which different parts of the act should become effective. The Department of Liquor Control had first adopted July 1 as the date for terminating these requirements. It was later decided that the date should have been June 5.
>
> Many bonds were demanded and received by the Tax Commission to accompany permits issued between June 5 and July 1, which according to the later determination were not necessary. The question arises whether each of these bonds duly executed