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BANKING ACT—LIQUIDATED BANK—SECTION 710-95 G. C.—ALL ASSETS SOLD—WHEN UNDER AGREEMENT OF SALE THE BUYER ASSUMES ALL THE LIABILITIES OF THE BANK, THE LAWFUL OWNERS OF UNCLAIMED DEPOSITS AND UNCALLED FOR DIVIDENDS CAN NOT BE BARRED BY ANY ACTION TAKEN BY SUPERINTENDENT OF BANKS OR THE BUYER—CONTRACT OF SALE TO CONTRARY—ANY UNCLAIMED FUNDS IN HANDS OF BUYER SHOULD BE RETURNED TO SUPERINTENDENT OF BANKS TO BE HELD AND DISTRIBUTED BY HIM—SECTION 710-106 G. C.

SYLLABUS:

When, under the provisions of Section 710-95, General Code, all the assets of a bank being liquidated under the banking act are sold, and under the agreement of sale the buyer assumes all the liabilities of said bank, the lawful owners of unclaimed deposits and uncalled for dividends can not be barred by any action taken by the superintendent of banks, or the buyer, notwithstanding any provisions of the contract of sale to the contrary, and such unclaimed funds in the hands of the buyer should be returned to the superintendent of banks to be held and distributed by him in accordance with the provisions of Section 710-106, General Code.

Columbus, Ohio, October 8, 1948

Hon. Fred J. Milligan, Director, Department of Commerce
Columbus, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

“On or about the 16th day of August, 1931, the Superintendent of Banks took possession of the business and property of The Commerce Guardian Trust and Savings Bank, Toledo, Ohio, for liquidation, as provided by law.

“On or about the 15th day of October, 1936, the Associated Depositors, Inc., a company organized in Toledo for the purpose of acquiring the assets of The Commerce Guardian Trust and Savings Bank, Toledo, Ohio, purchased from the Superintendent of Banks the assets in his possession with the approval of the Court of Common Pleas of Lucas County, Ohio, a copy of the contract being enclosed herewith.

"Associated Depositors, Inc., has now paid the depositors of The Commerce Guardian Trust and Savings Bank one hundred per cent on their claims and has made certain distribution to the shareholders of said bank.

"The question has now arisen as to the status of the claims that have not been certified by the Superintendent of Banks to Associated Depositors, Inc., for payment and whether or not, as provided in Section 710-106 of the General Code, the Superintendent of Banks must deposit these funds with the Treasurer of the county, and further, what must be done with the uncalled for dividends.

"Will you please render your opinion as to whether or not the Superintendent of Banks is in any way obligated further in connection therewith and what is the liability of the corporation to the holders of unclaimed deposits and uncalled for dividends.

"I am also enclosing data furnished me which I think you will need."

I note from your request that the depositors of The Commerce Guardian Trust and Savings Bank, Toledo, Ohio, have been paid in full and that some dividends have also been paid to the stockholders; I am also informed that dividend checks totaling \$20,148.84, the last of which checks were issued in 1944, have not been cashed or claimed and also that there are on the books of The Commerce Guardian Trust and Savings Bank *book* claims aggregating \$37,925.45 which claims have not been filed with the superintendent of banks and consequently have not been certified by him for payment under the agreement referred to in your letter.

On the one hand it may be said that the shareholders of Associated Depositors, Inc., which company under the purchase agreement is trustee for the stockholders of The Commerce Guardian Trust and Savings Bank, are entitled to these remaining funds (mentioned above) after the final liquidation expenses have been paid and that the holders of the unfiled book claims have had ample time in which to make claim and not having done so are now barred, and also that the holders of the uncashed dividend checks having unreasonably neglected to cash them, are likewise barred.

On the other hand, it may be said that under the banking act such claims can not be barred and that such moneys should be returned to the superintendent of banks to be held by him under Section 710-106, General Code, and to continue to be claimable by the lawful owners at any future time.

The contract of October 15, 1936, provided in substance for a sale of all the assets of the bank to Associated Depositors, Inc., and for an assumption of the bank's liabilities by Associated Depositors, Inc. Paragraph 7 of this contract provided that:

"The Superintendent shall certify to the Corporation a list of the creditors and depositors of the Old Bank, with the amounts of all allowed and proven claims and a list of persons holding or appearing to hold claims which have not been proven."

and also provided that:

"The Superintendent shall promptly take action forever to bar the assertion of any and all claims against the Old Bank and its assets, and all claims of security, preference, priority or offset other than those now proved and allowed, and if any possible claim is hereafter discovered, the superintendent shall promptly take action to bar the same.

"All reserves in respect to any such claims shall be terminated as and when such claims are barred."

By this contract the reserves with respect to any such claims are to be terminated only when such claims are barred. Obviously, the funds in question, that is the reserves, should not be paid out unless and until the owners of the unfiled deposit claims and owners of the uncalled for dividends are barred.

The superintendent of banks, being a public officer, has only such powers as are expressly delegated to him by statute and such as are necessarily implied from those so delegated. 32 O. Jur., (Public Officers) Section 74. Let us now examine the statutes to see whether such claims may be barred and the authority of the superintendent of banks with reference thereto.

Section 710-90, General Code, provides in part as follows:

"Upon taking possession of the business and property of any such bank, the superintendent of banks shall forthwith: * * *

"(2) Cause notice to be given by advertisement in one newspaper published and of general circulation in each county in which an office of such bank is located, once a week for four consecutive weeks, *calling on all persons who have claims against such bank to present the same to him, and make legal proof thereof at a place and within a time not later than the last day therein specified.*

“(3) * * * Upon the expiration of the time fixed by the superintendent of banks for the presentation of claims, in the notice advertised as herein provided, he shall mail a *similar* notice to all persons whose names appear as creditors upon the books of such bank who have not at such time presented their claims.”
(Emphasis added.)

The legislature evidently intended the above section, which was last amended in 1933, to apply to book claims only for in 1937, it passed another statute which specifically refers to general claims not appearing upon the books, namely, Section 710-92a, General Code, which reads as follows:

“At any time subsequent to the expiration of the date for filing claims as fixed by the superintendent of banks, pursuant to the provisions of Section 710-90 of the General Code, he may give notice by publication once a week for four consecutive weeks in a newspaper of general circulation in the county in which the principal office of such bank is located, requiring the presentation and proof of all *general claims not filed and not appearing upon the books of the bank*, at a place and time to be fixed in such notice, which time shall be not less than 60 days subsequent to the date of the last publication of such notice.

“*All claims not filed in accordance with the provisions hereof shall be forever barred* from participation in any of the assets of such bank, and such notice shall so state.”
(Emphasis added.)

I understand from the information furnished with your request that the notices provided for in the above mentioned statutes have been given by the superintendent of banks and that the sufficiency of such notices is not in question.

The requirement that a claim be filed within a fixed period of time suggests that if it is not then filed that it is barred, but such result does not necessarily follow. It would seem that the legislature did not intend that book claims (not claims for preference), in which classification the claims here under consideration fall, were to be automatically barred if not filed within the specified time. Several sections of the banking act so indicate.

Section 710-93, General Code, provides in part as follows:

“* * * Upon the expiration of the time fixed for the presentation of claims by the notice provided for in sub-paragraph 2 of Section 710-90 of the General Code, the superintendent of

banks shall make * * * a full and complete list of the claims presented * * *. The superintendent shall in like manner, at intervals of not exceeding six months, make and file supplemental lists *showing all claims presented which have not been exhibited in any list theretofore filed*. Such first list and each supplemental list shall indicate the character and *disposition* of each claim therein listed. * * *” (Emphasis added.)

After providing for newspaper publication of a notice of the filing of each list of claims, calling upon all persons objecting to any claim in such list to file their objections within a specified time, the statute in question then says :

“* * * If no such objection is so filed * * * the claim or claims so listed and not shown thereby to have been rejected shall be considered correct and all persons shall be forever barred from objecting * * * *to the payment thereof*; but nothing in this section shall preclude the superintendent from thereafter rejecting any such claim or claims, in whole or in part, as provided by Section 710-92 of the General Code.” (Emphasis added.)

Another section which recognizes the right of the superintendent of banks to accept and allow book claims filed after the notice period is Section 710-98, General Code, which says :

“* * * Claims presented and allowed *after the expiration of the time fixed in the notice to creditors* shall be entitled to be paid the amount of all prior dividends thereon, if there be funds sufficient therefor, * * *” (Emphasis added.)

So, also, where the legislature intended a claim to be barred, it so provided, for instance, as to barring book claims that have been filed and disallowed, Section 710-92, General Code, provides as follows :

“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, of the rejection of any claim of security preference or priority, or set-off, by the superintend-

ent, 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."

And for barring a claim for a preference, Section 710-98a, General Code, provides as follows:

"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 subparagraph 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."

And in connection therewith, see the case of *Fulton, Supt. of Banks v. State, ex rel. General Motors Corp.*, 130 O. S. 494, wherein the court said at page 500 thereof:

"The duties and powers of the superintendent of banks with respect to consideration of claims for preference are derived exclusively from and are limited by statute. Under Section 710-98a, General Code, the superintendent of banks has no power and owes no duty to consider a claim filed after the expiration of the time limit prescribed therefor."

It would seem to follow that while non-book claims have been barred by the notices, book claims have not been barred.

Your request states that on or about the 15th day of October, 1936, the Associated Depositors, Inc., a company organized in Toledo for the purpose of acquiring the assets of The Commerce Guardian Trust and Savings Bank, Toledo, Ohio, purchased from the superintendent of banks the assets in his possession with the approval of the Court of Common Pleas of Lucas County, Ohio. This contract undoubtedly was consummated under Section 710-95, General Code, which provides in part as follows:

"* * * Without prejudice to or limitation of the foregoing powers, authority and duties, the superintendent of banks may, upon application to the court of common pleas in which the proceedings for the liquidation of such bank are pending, or a judge thereof, and on such terms as such court, or such judge, may by order approve;

“1. Sell or compromise any or all bad or doubtful assets and debts owing to such bank; compromise claims against such bank and sell, lease, exchange or otherwise dispose of any real estate or personal property, or both, of such bank, in whole or in part. * * *”

I am also informed that an order for final distribution was entered by the Court of Common Pleas of Lucas County on November 21, 1936, approving the agreement dated October 15, 1936, and ordering that the assets of The Commerce Guardian Trust and Savings Bank be disposed of as provided for in such agreement.

Your attention is now directed to Section 710-106, General Code, which provides as follows:

“Dividends and unclaimed deposits remaining in the hands of the superintendent of banks for six months after the order for final distribution, unless otherwise deposited for the account and subject to the order of the persons respectively entitled thereto pursuant to an order of the court of common pleas in which the proceedings are pending, or a judge thereof, shall be by him deposited with the treasurer of the county in which the principal office of such bank is located who shall hold such funds as custodian, subject to the order of the superintendent of banks. The superintendent of banks may pay over the moneys so held by the treasurer to the persons respectively entitled thereto, upon being furnished satisfactory evidence of their right to the same. In case of doubt or conflicting claims he may apply to the common pleas court of the county in which the proceedings for the liquidation of such bank are pending, or a judge thereof, for an order authorizing and directing the payment thereof. All unclaimed deposits and uncalled for dividends for which no claim has been made within a period of five years, after the order of final distribution, shall be paid into the treasury of the county in which the principal office of such bank was located upon the warrant of the auditor of said county.” (Emphasis added.)

If the introductory words of this section, namely, “Dividends and unclaimed deposits remaining in the hands of the superintendent of banks for six months after the order for final distribution” be given a strict literal interpretation, this section would have no application to the situation now under consideration as the dividends and unclaimed deposits are not now remaining in the hands of the superintendent of banks. However, if the superintendent of banks had himself completed the liquidation of The Commerce Guardian Trust and Savings Bank and had, pursuant to Sec-

tion 710-106, General Code, turned over to the county treasurer moneys representing the unclaimed deposits and uncalled for dividends, it seems clear that the right of the owners of such deposits and dividends to be paid such moneys would never be barred. My predecessor so held in 1943 *Opinions of the Attorney General, No. 6020 at page 218, wherein he said:*

“The lawful owner of an unclaimed deposit or uncalled for dividend for which no claim was made within five years after final distribution in bank liquidation proceedings had been ordered and which, under the provisions of section 710-106, General Code, had been paid into the treasury of the county in which the principal office of the bank is located, may recover the same upon establishing his right thereto in a claim filed with the county commissioners of such county.”

There is one other statute which should be noted, namely, Section 710-102, General Code, which provides in part as follows:

“Whenever the superintendent of banks shall have paid to each depositor and creditor of such bank, not including stockholders, whose claim or claims as such depositor or creditor shall have been duly proved and allowed, the full amount of such claims, *and shall have made proper provision for unclaimed or unpaid deposits or dividends*, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such bank, by giving notice thereof for four consecutive weeks in one or more newspapers published in the county wherein the office of such bank was located. * * *”

(Emphasis added.)

Since it appears that Section 710-106, General Code, and Section 710-102, General Code, both previously noted, indicate the legislative policy and intention that unclaimed bank deposits and uncalled for bank liquidation dividends should continue to be claimable by the lawful owners at any future time, and that the right to claim same will not be barred by lapse of time, the procedural problem of making this money available for payment in the manner provided for by Section 710-106, General Code, would be very simple. Upon winding up its affairs and before filing a certificate of dissolution, Associated Depositors, Inc. should turn over to the superintendent of banks the moneys in question, whereupon the latter could then follow the procedure specified in Section 710-106, General Code. To do otherwise would be to say that the legislature intended a different rule to apply merely because the superintendent of banks made an outright sale of all the assets, and that while he himself could not bar the book claims,

they could be barred by carrying out the provisions of the contract entered into with Associated Depositors, Inc. relative to barring claims, which provisions, if so considered, would transcend the powers granted him by the Banking Act.

Therefore, you are advised that the unclaimed deposits of The Commerce Guardian Trust and Savings Bank, Toledo, Ohio, that have not been certified by the superintendent of banks to the Associated Depositors, Inc. for payment and the unclaimed liquidation dividends have not been barred by the action taken by the superintendent of banks and can not be so barred and that such moneys should be turned over by Associated Depositors, Inc. to the superintendent of banks to be held by him and distributed in accordance with the provisions of Section 710-106, General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.

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CIVIL SERVICE, CLASSIFIED—OFFICES AND POSITIONS OF EMPLOYES WHO ENTER ARMED SERVICES OF UNITED STATES—PROTECTED UNDER SECTION 486-16a G. C. UNTIL WAR AGAINST AXIS POWERS TERMINATED BY PRESIDENTIAL PROCLAMATION OR BY JOINT RESOLUTION OF CONGRESS.

SYLLABUS:

The offices and positions of employes in the classified civil service who enter the armed services of the United States are protected under Section 486-16a, General Code, until the war against the Axis Powers has been terminated by Presidential Proclamation or by joint resolution of Congress.