

713.

BANKS—INSPECTION OF BOOKS AND RECORDS BY STOCKHOLDERS WHEN BANK IN CUSTODY OF CONSERVATOR AUTHORIZED—CONSERVATOR DIVULGING INFORMATION DISCUSSED.

SYLLABUS:

The stockholders of a bank, which is in the custody of a conservator appointed pursuant to the provisions of section 710-88a, General Code, have the legal right to examine the books and records of such bank, except as to books and records of deposit and trust, at any reasonable time.

COLUMBUS, OHIO, April 25, 1933.

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

DEAR SIR:—Your recent request for opinion reads:

"I have received the following letter:

'The undersigned has been authorized by power of attorney duly executed by P., Trustee, a stockholder of The ——— Trust Company, to request and make inspection of the books and records of the said bank.

Will you be kind enough to appoint a time within the next five days when such inspection can be made?

In connection with the above, may I direct your attention to General Code Section 710-73?'

I do not know exactly what my position is relative to my right to permit an inspection of the books of a bank under conservatorship, and I would appreciate your early opinion as to whether or not I have, or the conservator has, the right to permit such an inspection by virtue of the provisions of Section 710-73 of the General Code."

That portion of Section 710-73, General Code, to which counsel evidently refers, reads:

"The books and records, except books and records of deposit and trust, of every bank, at all reasonable times shall be open to the inspection of every stockholder. * * *

There is a well established rule of law concerning the rights of stockholders of a corporation that a stockholder has the right to examine the books and records of the corporation at all reasonable times. *Miers vs. Turnpike Co.*, 11 Oh. 273; *Volksblatt Co. vs. Hoffmeister*, 62 O. S. 189; *Blymer vs. Iron Works Co.* 5 O. N. P. (N. S.) 71; *Caldwell vs. Hill & Griffiths Co.* 17 O. D. 801; *Peters vs. McLaren*, 218 Fed. 410; *Kenyon vs. Ohio Trust Co.* 14 O. D. 733; *Woodward Co. vs. Hart*, 17 O. App. 103; 75 *Page's Annotation*; 22 A. L. R. 24.

However, in the case of *American Mortgage Co. vs. Rosenbaum*, 114 O. S. 231, the court held that if the stockholder purchased his stock for the express purpose of thereby becoming enabled to examine the books for the purpose

of disseminating the information thus obtained to the prejudice of the rights of the corporation and other stockholders a writ in injunction for such purpose should be denied.

Since you present no facts as to the time and purpose for which P. acquired his stock and none concerning the purpose of the examination, for the purposes of this opinion, I am making the assumption that the case presented by you is not within the exception to the rule established by the case of *American Mortgage Co. vs. Rosenbaum, supra*.

It is thus seen that Section 710-73, General Code, grants to the stockholders of a bank no rights that they did not have under the common law and general corporation acts, but rather limits or restricts the rights of the stockholder. That is, such section takes away from the stockholder of a bank the rights to examine certain of the records of the bank, which, except for the provisions of such section he would have a right to examine; viz., "except books and records of deposit and trust."

To such extent the rights of a stockholder of a bank are less than those of an ordinary corporation. Within such limitations, it is my opinion that the bank, as a going concern, has no more right to refuse to permit the examination of its books and records "at all reasonable times" than an ordinary corporation has.

However, your inquiry implies that the affairs of the bank in question are in the hands of a conservator, appointed pursuant to the provisions of H. B. 661, enacted by the 90th General Assembly. It is therefore necessary to examine the provisions of such act in order to determine the rights and liabilities of such conservator and what restriction, if any, his appointment places upon the rights of the stockholders of the bank over whose assets he is in control.

Section 710-88a, General Code, provides that:

"The conservator * * * shall take possession of the business and property of such bank * * * shall have and exercise in the name and on behalf of such bank all the rights, powers and authority of the officers and directors of such bank and all voting rights of the shareholders thereof and may continue its business in whole or in part with a view to conserving its business and assets pending further disposition thereof as provided by law. * * *"

It is thus seen that the statute confers upon the "conservator" duties similar to a receiver who has been appointed by a court for a corporation among whose directors there is such dissention that they cannot function for the corporation. 2 *Clark on Receivers*, §747; *Morse vs. Metropolitan Steamship Co.* 87 N. J. Eq. 217.

Such receivers are not appointed for the purpose of liquidating the company but for the purpose of managing the trust estate subject to the approval of the court until the dissention is corrected by the stockholders. The corporation continues to exist and function in so far as possible and whenever the disability is removed the receiver is discharged by the court. From a reading of the statutes it would appear that the legislative intent was to give the "conservator" the powers of a receiver of such type, whose acts are subject to the approval of the Superintendent of Banks rather than of the court. No language of the act would indicate that the books of the bank were to be

closed for any purpose other than that of transfer of shares. The statute states that such conservator shall exercise all the powers and authority of directors and officers of the bank and the voting rights of the stockholders.

It is elemental that when the legislature, by statute, creates an agency of the state, such agency has no powers, duties or rights or liabilities other than those specifically granted by the statute or necessarily implied from the language there used. *Elder vs. Smith, Aud.* 103, O. S. 369; *Peter vs. Parkinson, Treas.* 83 O. S. 36.

I am of the opinion that the conservator of a bank, appointed pursuant to the provisions of H. B. 661, holds the business and property of such bank subject to all the rights, liabilities and duties they were subject to in the hands of the officers and directors whom he replaced, and that stockholders of such corporation have the same rights to inspect the books of such corporation they had before his appointment.

The provisions of the statute with reference to the disclosing of secrets by the superintendent of banks (Section 710-35, General Code) could hardly be construed to prevent or to make criminal the disclosure by the conservator of the information contained in the records of the bank, other than those concerning record of deposit and trust to the stockholders of the bank who have a legal right to such information.

Section 710-35, General Code, only purports to prevent the disclosure of "the facts and information obtained in the course of an examination" and is limited in its effect to a disclosure thereof by "the superintendent of banks, a member of the banking advisory board, a deputy, assistant, clerk, examiner or attorney examiner" in his employ. Such section, in so far as material, reads:

"Whoever, being the superintendent of banks, a deputy, assistant, clerk in his employ or an examiner, fails to keep secret the facts and information obtained in the course of an examination, except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the person, partnership, corporation, company, society or association so examined, or wilfully makes a false official report as to the condition of such person, partnership, corporation, company, society or association, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both."

Specifically answering your inquiry it is my opinion that the stockholders of a bank which is in the custody of a conservator appointed pursuant to the provisions of Section 710-88a, General Code, have the same legal right to examine the books and records of such bank, except as to books and records of deposit and trust, at any reasonable time, that they would have had prior to the appointment of a conservator.

Respectfully,

JOHN W. BRICKER,
Attorney General.