borrowed by the issuance of notes, and section 9 which appropriates such sums as shall be necessary for the payment of the notes "herein authorized" could not be construed to allow the borrowing of more money than is authorized by sections 1 and 2. Section 9 does not provide for the payment of moneys "now or hereafter appropriated to the state educational equalization fund" but simply appropriates the necessary amounts "out of any moneys now or hereafter in the state educational equalization fund." In other words, section 1 fixes the amount as that which shall be calculated as having accrued to each state-aid district from the state educational equalization fund to January 1, 1934, section 2 provides for the borrowing of this money by districts "entitled to any part of *such appropriation,*" and section 9 provides the means for the payment of the notes "herein authorized" out of the equalization fund whether the moneys to meet such appropriation are actually paid into the treasury before or after the effective date of the act.

Since it is my opinion that the director of education cannot lawfully certify under the provisions of Senate Bill No. 7 of the second special session of the 90th General Assembly that any school district is entitled to receive any amount from the state educational equalization fund, which has accrued to January 1, 1934, it is my advice that you do not purchase notes issued under said act until it is amended to change the date of accrual to sometime subsequent to the effective date of Senate Bill No. 8 of said second special session which appropriated five million dollars ($5,000,000.00) to said equalization fund.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2338.

APPROVAL, BONDS OF BROOKFIELD TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—$3,000.00.

COLUMBUS, OHIO, March 2, 1934.

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

2339.

DEPOSITORY BANK—BONDS OF HOME OWNERS LOAN CORPORATION ACCEPTABLE FROM BANK DEFAULTING IN DEPOSITORY CONTRACT IN EXCHANGE FOR FIRST MORTGAGES HELD BY MUNICIPALITY WHEN.

SYLLABUS:

1. *By virtue of section 2293-38, General Code, bonds of the Home Owners' Loan Corporation may be accepted from a depository bank in exchange for first mortgages held by a municipality when such bank has defaulted in its depository contract and when the council or other legislative body of the municipality has determined such action to be advisable with a view to conserving the value of such*

mortgages for the benefit of such municipality and for the benefit of the depositors, creditors and stockholders or other owners of such bank. Opinions of the Attorney General for 1933, *No.* 1540, *approved and followed.*

2. *When a restriction is imposed by virtue of sections* 710-107a *and* 710-88a, *General Code, rendering illegal the withdrawal of municipal funds from a depository bank, the municipality may, under section* 2293-38, *General Code, treat such restriction as producing a "default" and forthwith proceed under said section* 2293-38.

COLUMBUS, OHIO, March 3, 1934.

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

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

"(1) Referring to your opinion No. 1540—9/11/33, assuming that the council of the municipality is willing to accept bonds issued by the Home Owners Loan Corporation pursuant to the provisions of the Federal Home Owners Loan Act of 1933, in exchange for mortgages held by it as security for its deposit in a bank, with a view to conserving the value of its security, is such acceptance legal when the one year term of the depositary contract between the municipality and the bank has expired subsequent to the imposition of withdrawal restrictions by the state superintendent of banks? In other words, does such expiration of the depositary contract and the failure of the bank to pay to the municipality its deposit constitute such a default upon the part of the bank under the provisions of Section 1 of House Bill 706, passed as an emergency measure July 1, 1933, as to make legal the acceptance by the municipality of Home Owners Loan Corporation bonds in exchange for mortgages held by it as security for such deposit?

(2) Has such a depositary contract expired notwithstanding the following provision therein?

'This contract shall remain in force until all the funds secured thereby shall have been duly paid over to or upon the order of the City of C....., or the same secured by a new depository contract and bond satisfactory to the Director of Law of the City of C.....'

I understand that under the provisions of the General Code of Ohio there must be competitive bidding for the funds of a municipality each year and that an award may be made only for one year. The provision in the contract extending its term until such time as 'the funds may be duly paid over or secured by a new depository contract and bond satisfactory to the Director of Law of the City of .....' may possibly be effective as to a reasonable period of time elapsing between the termination of the one year term of the contract and the qualification of a new depositary under a new contract. I am in doubt, however, as to whether such a provision may operate to indefinitely extend the term of the original depositary contract so that the depositary bank, being under withdrawal restriction and therefore unable to turn over to a new depositary the city's funds deposited with it, has or has not defaulted under its contract with the city.

If the answer to my first question is that notwithstanding the expiration of the term of the contract there is no default because of the with-

drawal resrictions imposed upon the bank by the state superintendent of banks, the answer to my second question is unimportant. If, however, the expiration of the term of the depositary contract constitutes a default, then with respect to my second question it is important to know whether the provision in the depositary contract quoted above under my second question has the effect of automatically extending the term of the contract indefinitely so that there is no default upon the part of the bank until a new depositary contract with some other bank or with the same bank is entered into.

The particular facts upon which this opinion is requested involve a state bank which has been in the hands of a conservator since May 1, 1933. The Superintendent of Banks on February 28, 1933, restricted withdrawals from the bank to a small percentage of the deposit balances on that date. The bank has on deposit certain funds of a municipality of this state which were deposited under a one year depositary contract, the term of which expired June 30, 1933, subject, however, to whatever extension, if any, might be involved under the provision of the contract quoted under my question (2) above. The municipality holds mortgages upon real estate, together with other collateral, as security for its deposit.

Applications have been made to the bank by various mortgagors requesting the acceptance by the bank of bonds issued by the Home Owners Loan Corporation in exchange for a cancellation of the respective mortgages which are pledged with the municipality. The bank cannot agree to accept these bonds without the consent of the municipality. The bank believes that it can shortly liquidate the deposit of the municipality if it will accept Home Owners Loan Corporation bonds in exchange for mortgages deposited with it as security for its deposit by the later borrowing from Reconstruction Finance Corporation upon the security of such Home Owners Loan Corporation bonds. The municipality being uncertain as to the legality of its acceptance of such bonds in exchange for its security mortgages, fears that the proposed borrowing by such bank from Reconstruction Finance Corporation may not finally be effected and that it will therefore be holding Home Owners Loan Corporation bonds received in exchange for its mortgages contrary to the provisions of Section (1) of House Bill 706, unless in fact at the time of such exchange the bank is in default under the depositary contract between it and the municipality.

The municipality cites the case of *City of East Cleveland* vs. *Fidelity & Deposit Company of Maryland,* Law Case No. 17669 in the District Court of the United States for the Northern District of Ohio, Eastern Division, as authority for the proposition that the bank is not in default under the deposit contract. I find nothing in that opinion holding that the imposition of withdrawal restrictions operates to prevent a default and that being true, certainly the expiration of the term of the contract would constitute a default. Judge West in that opinion held that because of the emergency act of the legislature and the subsequent imposition thereunder by the state superintendent of banks of withdrawal restrictions there could be no present right of action against the bank with respect to public funds deposited with it. It may be, however, that a default can exist under a contract but a right of action with respect thereto be temporarily suspended. If this is true, then it may be that with respect to the case above referred to there does exist such default

upon the part of the bank as to bring its contract within the provisions of Section 1 of House Bill 706, so as to make legal the acceptance by the municipality of Home Owners Loan Corporation bonds in exchange for mortgages held by it as security for its deposit."

Section 2293-38 of the General Code (115 O. L., 611) provides:

"In the case of any default, whether occurring before or after the passage of this act, on the part of a bank in its capacity as depositary of the money of any county, municipal corporation, township or school district, the county commissioners of such county, *the council of such municipal corporation,* the trustees of such township, and the board of education of such school district may and are hereby authorized, in lieu of immediately selling the securities received and held as security for the deposit of such money under authority of sections 2732, *4295,* 7605, 7607 or *2288-1* or any other sections of the General Code, to retain the same, collect the interest and any and all installments of principal thereafter falling due thereon, and to refund, *exchange,* sell or otherwise dispose of such securities, or any of them, at such times and in such manner as such commissioners, council, township trustees, or board of education may determine to be advisable, with a view to conserving the value of such securities for the benefit of such county, municipal corporation, township or school district, and for the benefit of the depositors, creditors and stockholders or other owners of such bank." (Italics the writer's.)

It was held in Opinion No. 1540, rendered by this office on September 11, 1933, as disclosed by the first branch of the syllabus:

"Bonds authorized by the Home Owners' Loan Act of 1933 may be accepted from a depositary bank in exchange for *first mortgages* held by a county, *municipality,* township or school district as security for the deposit of its public funds *only when such bank has defaulted in its depositary contract* and when the county commissioners, council, township trustees or board of education have determined such action to be advisable with a view to conserving the value of such mortgages for the benefit of such subdivision and for the benefit of the depositors, creditors and stockholders or other owners of such bank." (Italics the writer's.)

It thus appears that section 2293-38 authorizes the exchange of bonds of the Home Owners Loan Corporation for first mortgages held by the municipality as security only when the bank has defaulted in its depository contract.

As long as a bank is performing normal banking functions, a demand is necessary to constitute a default in a contract providing for a demand deposit. I am informed that the contract in question covers "inactive funds" and provides that withdrawals may be made only on the first days of January, April, July and October of each year during the continuance of the contract and that 31 days' notice must be given prior to withdrawal. No notice has been given or demand made. If the depository in question were performing normal banking functions, in my opinion such notice and demand would unquestionably be conditions necessary for a default.

Section 4295, General Code, authorizes council to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer. Section 4296, General Code, reads:

"In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby."

It thus appears that council is authorized to determine the sufficiency of the security, the duration of the depository contract and the details for carrying into effect the authority given. Upon examining the statutes, I find no provision limiting the term of contracts for the deposit of municipal funds to one year. There is no provision relating to such deposits similar to sections 2729, 7605 and 3320, General Code, limiting the duration of contracts for the deposit of funds of the respective subdivisions mentioned therein. Upon examination I find no provision in the charter of the city of C..... purporting to limit the duration of depository contracts. The contract in question provides that it shall remain in force from July 1, 1932, to June 30, 1933, or "until all the funds secured thereby shall have been duly paid over to or upon the order of the city of C....., or the same secured by a new depository contract. * * * "

On February 28, 1933, the Superintendent of Banks, pursuant to the authority vested in him by Section 710-107a, General Code, restricted withdrawals from the depository bank in question to a small percentage of the deposit balances on that date. Subsequently a conservator was appointed under Section 710-88a, General Code, and the restrictions continued. The depository contract was in force at the time these restrictions were imposed. By giving notice on March 1, 1933, the municipality could have demanded the return of part or all of its funds on April 1st under the terms of the contract. It could have made a similar demand by giving 31 days notice on the first days of July and October, assuming that the contract had not terminated prior to those dates by virtue of the clause therein above quoted. If, in spite of that clause, the contract terminated on June 30, 1933, or within a reasonable time thereafter, as suggested in your letter, the city became entitled to the return of all of its funds upon demand.

Thus far in referring to the necessity of a demand for the return of the funds on deposit as a condition precedent to default, I have not considered the effect of the withdrawal restrictions legally imposed upon the bank. On considering whether there has been a default under the facts presented, in the absence of a demand (in case the contract has been terminated since the imposition of the restrictions) or notice of withdrawal and demand (in case the contract remains in effect), I deem it material to refer to sections 2293-39 and 2293-41 of the General Code, enacted as part of H. B. No. 706, and therefore in *pari materia* with section 2293-38. Section 2293-39 authorizes the issuing of bonds "In anticipation * * * of the payment of dividends in the liquidation of" a depository bank. Section 2293-41 provides that the principal, interest and proceeds of sale or other disposition of pledged securities and "dividends received from the liquidation of such bank" beyond the requirements of the bond retirement fund for the retirement of bonds issued under section 2293-39, shall be assigned or delivered "to the defaulting bank, or to its liquidating officer."

It would seem, in view of the above language, that when a bank is taken over for liquidation, it thereby becomes in "default" on its depository contract, as the term "default" is used in section 2293-38. I am of the opinion that when a bank is taken over for liquidation under section 710-89, General Code, no demand by the public depositor is necessary to constitute a default. While recognizing the distinctions between a liquidation and a conservatorship, I am of the view that no demand is necessary to complete a default when withdrawals are restricted by virtue of sections 710-107a and 710-88a.

The evident purpose of H. B. 705 was to remedy the situation prevailing at the time of its enactment, viz., an unprecedented number of banks with withdrawals restricted or in liquidation. A large number of these banks were public depositories and the subdivisions holding collateral to secure these deposits were unable to dispose of it quickly to make necessary funds available without a great loss, not only to the public depositors but also to the unsecured depositors and other creditors of the banks. In ascertaining the intent of the legislature, the purpose to be subserved by a statute may properly be considered. *Cochrel* vs. *Robinson,* 113 O. S., 526. In my opinion the legislature intended the "default" to be complete so that the subdivisions might proceed under section 2293-38 at the time of the imposition of withdrawal restrictions by virtue of sections 710-107a and 710-88a, General Code.

Withdrawals having legally been restricted, a demand would be a vain act. Equity does not require the doing of a vain thing. *Eythe* vs. *Commercial Bank & Savings Co.,* 40 O. A., 150, 154. I do not believe that the legislature intended the doing of such an act in order to make available the benefits of section 2293-38 of the General Code.

In your letter you refer to the contention that the case of *City of East Cleveland* vs. *Fidelity & Deposit Co., of Maryland* (Law No. 17669, District Court of the United States, Northern District of Ohio, Eastern Division, decided November 6, 1933), is authority for the conclusion that no default has occurred. That was an action by a municipality against a surety upon a depository bond given under section 4295, General Code. Refusal of the bank, in charge of a conservator, to pay was based solely upon federal and state emergency legislation and orders issued thereunder early in 1933. (Section 5, Tit. 50, and Sec. 95, Tit. 12, U. S. C.; Presidential proclamations March 6 and 9, 1933, May, 1933; Cumulative Pamphlet U. S. C., p. 122, 113; Executive Order 6073, p. 113, and 6085, p. 115, id.; Ohio G. C. 710-107a and 710-88a.) The court held that the defendant was not liable on the bond until the bank became liable to suit under the law. The decision was based upon the principle that a cause of action cannot exist against a surety unless there is a cause of action against his principal. The court attempted to distinguish the case before it, in which the principal was prohibited by law from complying with its contract from those cases in which the surety is liable, although the principal has been discharged, such discharge being based upon personal privilege or disability originating in law, such as bankruptcy and infancy. The case held merely that the remedy against the surety was suspended as long as the law prevented suit against the principal. Judge West said: "The court wishes it made plain that defendant has not been completely discharged and will be subject to suit whenever the bank is." The court did not say that there had been no default. There is in fact an implication in the opinion that a right has accrued in favor of the public depositor and against the principal and the surety, although the remedy has been suspended. I find nothing in the court's opinion which concerned a suretyship contract and not a statute, leading to the conclusion that the

imposition of withdrawal restrictions does not constitute a "default" under section 2293-38, General Code.

In view of my conclusions, it is unnecessary to specifically answer your questions in regard to the expiration of the depository contract.

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

1. By virtue of section 2293-38, General Code, bonds of the Home Owners' Loan Corporation may be accepted from a depository bank in exchange for first mortgages held by a municipality when such bank has defaulted in its depository contract and when the council or other legislative body of the municipality has determined such action to be advisable with a view to conserving the value of such mortgages for the benefit of such municipality and for the benefit of the depositors, creditors and stockholders or other owners of such bank. Opinions of the Attorney General for 1933, No. 1540, approved and followed.

2. When a restriction is imposed by virtue of sections 710-107a and 710-88a, General Code, rendering illegal the withdrawal of municipal funds from a depository bank, the municipality may, under section 2293-38, General Code, treat such restriction as producing a "default" and forthwith proceed under said Section 2293-38.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2340.

COUNTY DITCH—COUNTY NOT LIABLE FOR FURTHER REPAIR WHEN CONSTRUCTION THEREOF IS FAULTY.

SYLLABUS:

Where a single county ditch, constructed under sections 6442, *et seq., General Code, has been accepted as completed by a board of county commissioners and shortly thereafter much of the tile used in construction of such ditch became crushed, and the said ditch fails to work properly, the county is not liable for the further repair of the ditch, but such ditch should be repaired under the procedure set forth in sections* 6691 *et seq., General Code.*

COLUMBUS, OHIO, March 3, 1934.

HON. RAY W. DAVIS, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I am in receipt of your communication which reads as follows:

> "I wish to submit the following inquiry for your opinion:
>
> In 1925 a petition was filed with the County Auditor of Pickaway County, Ohio, for the construction of a county ditch, which is now known as 'The Blaine Ditch', under the Single County Ditch law, being sections 6442 et seq., of the General Code, and such proceedings were had thereon that a survey and report and complete detailed specifications therefor were made by the County Surveyor, and the County Commissioners acting thereon, approved and confirmed the same and found in favor of the petitioners and granted the ditch and ordered the County Surveyor