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*

of the securities pledged whether or not there is a surety bond securing the particular account.

COLUMBUS, OHIO, July 17, 1933.

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

DEAR SIR:—I have your letter of recent date which reads as follows:

> "There are on deposit in The ..... Bank several deposits of public funds which are secured by the pledge of various mortgages, bonds and to some extent are secured by surety bond. In connection with the initial liquidating dividend that will be paid, the question arises upon what basis this dividend will be figured. Assuming that the initial dividend is 20%, am I to pay the secured depositor 20% of the total deposit without reference to the security that is pledged?
>
> I understand that if the securities have been sold, then the 20% will be figured on the balance in the account and not on the original balances as it existed prior to the sale of the securities. However, there are instances in which securities will not have been sold and in which the deposit is under-secured. If the 20% dividend is declared on the total amount of the deposit, this will, in some instances, make the value of the security good for the remaining amount.
>
> I desire your ruling on whether or not in cases where the securities have not been sold, I shall declare the dividend on the full amount of the deposit or make an assumed application of the securities and declare the dividend on the remainder.
>
> Would it be proper, if the dividend is declared on the full amount, to pay that 20% only upon a redelivery to the liquidator of 20% of the securities pledged, especially where there is no surety bond securing that particular account?
>
> I understand that in national bank liquidations there is no application of the security required before the dividends are paid, and that this rule likewise applies to receiverships of ordinary business corporations in the Federal courts. I understand that the rule on receiverships in Ohio is that the security must first be applied, but we are in doubt as to the proper procedure in the liquidation of state banks in this state."

In another letter, over the signature of Mr. C. W. Miller, Special Deputy Superintendent of Banks, the question is presented whether the Treasurer of State may hold securities pledged for the deposit and receive a dividend based upon this amount.

The statutes of this state are silent as to the amount for which secured creditors may prove their claims against a bank in liquidation, and the amount upon which they are entitled to dividends. While there is much confusion in the decisions of various jurisdictions, most of the conflicting cases fall under one of four rules. They are stated in 3 Michie, Banks and Banking, section 158, as follows:

> "English Chancery Rule.—Although there is irreconcilable conflict in the cases, the better rule, and that sustained by the great

weight of authority is that collateral security, by mortgage or otherwise, held by the claimant, does not affect the claimant's right to prove up for the full amount of his claim; nor does the fact that he had realized a part of his claim from the subjection of such collateral, since the date of the receivership; but he is entitled in such case to receive distributions or dividends from the general estate, until such dividends, added to the amount realized from the collateral, are equal to or sufficient to satisfy his debt. This rule, which was adopted in this country in Connecticut in 1817, is frequently referred to as the English chancery rule, though, in that form, it is said never to have been enforced in England at any time.

Bankruptcy rule.—In some jurisdictions it is held that the rule in equity is the same as the rule in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied. The bankruptcy rule, so called because it has been applied in bankruptcy generally and is the rule prescribed by our National Bankruptcy Act, was invoked in this country first in 1820.

The Maryland rule provides that the secured creditor must deduct from his original claim any amounts he may have realized from his security, and the balance so shown to be due at the time any particular dividend is distributed shall constitute the basis for computing such dividend. This rule, which was first applied in Maryland in 1887, requires a readjustment of the basis of distribution at the time each succeeding dividend is declared, and most of the decisions sustaining it were influenced by local statutory regulations.

In Montana the statutory rule for distribution to the secured creditor of a deceased insolvent is held applicable in the case of insolvent banks."

Under the majority rule the claimant may prove for the full amount of his claim, and even though he realizes part thereof from the subjection of collateral prior to the distribution of dividends from the general assets, he may receive dividends based upon the full amount until the dividends added to the sum realized from collateral are sufficient to satisfy the debt. This view has been consistently followed by the Supreme Court of the United States. *Lewis* vs. *U. S.*, 92 U. S. 618; *Merrill* vs. *National Bank of Jacksonville,* 173 U. S. 131; *Aldrich* vs. *Bank,* 176 U. S. 618.

In *State National Bank* vs. *Esterly,* 69 O. S. 24, a receivership case, it was held as disclosed by the syllabus:

"Where the property of an insolvent debtor, by order of court, is placed in the hands of a receiver to be administered upon for the payment of the insolvent's debts, a creditor who holds collaterals taken to secure his claim, and upon which he has realized before a dividend is declared, is entitled to a dividend on only so much of his debt as remains after deducting the proceeds of the collaterals; and this sum may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount."

It is to be observed that this decision rejects the general rule adopted by the Supreme Court of the United States only as it applies to the situation where collateral is actually sold before the dividend is declared. This decision was followed as to a claim of a public depositor against a bank in liquidation, in the case of *In re Peoples Commercial and Savings Bank,* 30 N. P. (N. S.) 190.

It should be noted that if these were the only authorities governing the question it would be impossible to say whether the courts follow the Maryland rule or the Bankruptcy rule. 3 Michie, Banks and Banking, 218, cites the Esterly case in support of the former rule.

The case of *Assets Realization Co.* vs. *American Bonding Company of Baltimore,* 88 O. S. 216, concerns the problem presented. Each of eight surety companies became bound on separate bonds to pay an aliquot part of any loss sustained by the city of Cleveland on account of a depository contract with a bank. The depository bank gave two of the surety companies certain securities to indemnify them on their respective bonds. The bank later made an assignment for the benefit of creditors to the Cleveland Trust Company. The Assets Realization Company purchased the assets of the assignor bank for a certain consideration and agreed to pay the assignee such additional sum as would be necessary to pay a 50% dividend on the face amount of all claims of general creditors theretofore presented and allowed. The city having proved its claim, the surety companies paid to it the amount of the deposits and took separate partial assignments of the claim. In an action by certain of the bonding companies to recover dividends upon their respective shares of the city's claim, the Assets Realization Company contended that the collateral in the hands of the two surety companies should be applied in reduction of the claim which the city had assigned to the surety companies before the computation of dividends thereon. Concerning this contention, the court said at page 259:

> "The other collateral which the plaintiff in error would have applied in reduction of the city's claim was not in the hands of the city, but was held by the two secured companies. The city, as we view it, had the right to present its claim to the assignee for allowance and could have collected from the assignee all dividends thereon before taking any step to enforce its claim on the several bonds, and we do not think that the rule in the Esterly case is applicable to the collateral in question, and the circuit court was correct in making the order for the payment of a dividend on the amount of the claim of the city, as allowed, without applying the collateral in the hands of the two companies in reduction thereof."

It is true that the collateral was pledged with the bonding company which was surety for the public deposit and not directly with the public depositor to secure the deposit. However, the surety paid the city and upon a well-settled principle of law thereby became subrogated to the rights of the city as a claimant. *Seward* vs. *National Surety Co.,* 120 O. S. 47; *Angus* vs. *Aetna Casualty & Surety Co.,* 39 O. A., 411. When the surety company assumed the position formerly occupied by the city it stood in precisely the same position with relation to the debtor as had the city. This being true, the decision stands for the proposition that a public depositor may prove for

the full amount of its claim against a defunct dapository and if it continues to hold its collateral securities, is entitled to receive dividends based upon the full amount.

In my opinion, the Court of Common Pleas of Hamilton County in *Octograph Engraving Co.,* vs. *Ragland,* 30 N. P. (N. S.) 101, disregarded the principle of subrogation in disposing of the case of *Assets Realization Co.* vs. *American Bonding Company, supra.* The court said at pages 112-113:

> "It will be observed that the court referred to the Esterly case and simply held that the rule there enunciated was not applicable to the collateral in the hands of the bonding company. It seems clear that the reason the court so stated was that while the city had a remedial right to subject such collateral to the payment of its claim, it was not security held by the city. It was a part of its remedy against a surety of the assignor, and as it is clear that a claimant is not required to pursue and exhaust a surety or co-debtor before proving his claim, that therefore the fact that this surety held collateral, which under equitable principles the creditor could insist upon his holding for his benefit, did not place the creditor in the position of one itself holding security."

It was held in the Ragland case, as appears from the first branch of the syllabus:

> "Where a debtor has made an assignment for benefit of creditors his secured creditors, before they may share in dividends to general creditors, must realize on their security or have its value determined, and only to the extent of the difference between the value of the security and the amount of the claim are they eligible to participate in dividends."

It should be noted that this case concerned a voluntary assignment and that the court relied upon certain statutory provisions relating to such assignments contained in sections 11092 to 11145 inclusive of the General Code. The court refers to section 11137 requiring an affidavit in proof of claim wherein the claimant must set forth, among other things, "what collateral or personal security, if any, the claimant holds for the claim, or that he has no security." Regarding this provision the court approves the following language from *Searle* vs. *Brumbach, Assignee,* 4 W. L. M. 330, 2 Dec. Rep. 653:

> "We know of no good reason for requiring such an affidavit and showing as to securities, unless it was to enable the assignee to require claimants to account for, or apply such securities before receiving payments out of the trust funds."

Compare *Jelke* vs. *Stallo,* 1 N. P. 29; *In re Spence* 7 N. P. 624.

Since the statutes applicable to bank liquidation contain no provisions setting forth the manner of proving claims comparable to those in voluntary assignments, in my opinion the case of *Octograph Engraving Co.* vs. *Ragland, supra,* has no application to the question presented.

The Esterly case rejected the general rule only as applied to the situation where the collateral is realized upon before declaration of dividends. It does not follow that the courts of this State have rejected that rule *in toto* and adopted the so-called bankruptcy rule which had its origin in a statutory enactment. The Assets Realization Company case leads to the contrary conclusion. In my opinion a creditor of a bank in liquidation who holds collateral may prove for the full amount of his claim and if he continues to hold the collateral and does not realize upon it may receive dividends based upon the full amount.

Under the various depository statutes of this State it is optional whether a surety bond or collateral securities are accepted to secure the public deposit. See Section 4295, General Code, as to deposits of municipalities; section 330-3 as to state deposits. In the case of *Wyoming* vs. *The Citizens Trust & Guaranty Co.*, 9 O. A., 225 (motion to certify overruled by the Supreme Court, April 11, 1918) a village sued on a surety bond given to secure its deposit of public funds. The amount of the bond was $10,000 and at the time the bank went into liquidation the deposit amounted to about $19,000. After the payment of dividends to the village during the liquidation there remained unpaid $9,305.59. The court held that this amount represented the liability of the surety company. In the course of the opinion the court said at page 232:

> "In the case under consideration the loss of the village was less than $10,000. It suffered no loss except that which the bank failed to pay. The fact that it had on deposit more than nineteen thousand dollars when the bank closed its doors does not establish a loss of nineteen thousand dollars. After the bank had closed its doors the village received on its claim more than ten thousand dollars, paid to it by the receiver of the bank, and, manifestly, to the extent that it received payment on its deposit in this bank there was no loss. Its only loss was the amount which the bank failed to pay upon the winding up of its affairs.
>
> We do not think it necessary that any authorities be cited in order to establish this plain proposition. The plaintiff in error (plaintiff below) was entitled to recover from the defendant in error, upon the agreed statement of facts, the amount which The Metropolitan Bank & Trust Company failed to pay on account of the sum of moneys on deposit in said bank. This amount, $9,305.59 with interest, less the amount voluntarily paid by defendant in error, $4,756.50, leaves a balance of $4,642.10 with interest, this being the total amount claimed by plaintiff in error in the action at law."

The purpose of giving a surety bond is the same as that of pledging collateral, namely, to prevent loss to the public depositor by reason of the bank's failure to pay. If a public depositor holding collateral cannot retain its securities until the loss is determined by the payment of dividends based upon the full amount of the deposit it is in a less advantageous position than a public depositor having its deposits secured by a surety bond. I find no basis for such discrimination between the two types of security in the applicable decisions of our courts.

I believe the position of a secured creditor to have been correctly stated

by Mr. Chief Justice Fuller in *Merrill* vs. *National Bank of Jacksonville, supra,* where he said at page 141:

> "In short, the secured cheditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets, or so much of his dividends as are unnecessary to pay him, must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.
>
> The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York court of appeals in *People* vs. *Remington,* 121 N. Y. 328 (8 L. R. A. 458), 'unchanged although insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement.' The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part; and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken. We cannot concur in the view expressed by Chief Justice Parker in *Amory* vs. *Francis,* 16 Mass. 308 (1820), that 'the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken.'
>
> We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources, as to the original amount due; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise."

In the light of the foregoing, and in specific answer to your questions, it is my opinion that:

1. Where public deposits 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 per cent dividend is declared, the secured public depositor is entitled to 20 per cent of the total deposit without reference to the pledged security.

2. Such dividend is payable without re-delivery to the liquidator of any of the securities pledged whether or not there is a surety bond securing the particular account.

Respectfully,
JOHN W. BRICKER,
Attorney General.