705.

DEPOSITORY BANK—STATE BOARD OF DEPOSITS DETERMINES DEPOSITORY BANKS—BANKS ELIGIBLE UNDER SECTION 330-3, GENERAL CODE—WHEN PUBLIC FUNDS RECEIVED BY SURETY BOND OR SECURITIES OF BANK—INTEREST RATE UNAFFECTED BY EXECUTIVE ORDER OR LEGISLATIVE ENACTMENT—PUBLIC DEPOSITOR NOT PREFERRED IN LIQUIDATION—DEPOSITORY CONTRACT DISCUSSED—RELEASE OF PUBLIC FUNDS—SECURITIES MANDATORY—CHANGING DEPOSITORIES DISCUSSED.

SYLLABUS:

1. *Any bank which can comply with section* 330-3, *General Code, and with the terms of a depository contract, may be declared eligible by the state board of deposits to receive state funds.*

2. *If public funds are secured by a surety bond, the depositor should require a waiver from the individual or company giving such bond of any defense resulting from the recent banking situation. This applies to public funds in banks which are now fully open as well as those which are still operating on a restricted basis. If these deposits are secured by securities of the bank, no question arises, for under no circumstances would they be released by virtue of any changes in the depository contract, arising out of the banking situation.*

3. *Public funds in banks are deposited under a depository contract and draw the rate of interest stipulated for therein. This rate of interest will continue until the contract is terminated and no bank will be relieved from paying same because of any regulations imposed on them by executive order or legislative enactment.*

4. *When any bank is closed for liquidation, the public depositor will share pro rata with all other depositors in the assets of the banks and has no preference due to its public nature.*

5. *The only methods by which a public depositor can obtain a release of any part of its funds where its funds are tied up in banks are, either to take the collateral which secures the public moneys and have the bank replace it with cash, or after default sell same on the open market. If there be no collateral, then it would be necessary to declare a breach of the depository contract and proceed against the surety bond.*

6. *All public officers and subdivisions depositing public funds are required to obtain security for same and no deposits can be made without first acquiring some security. If no security is forthcoming from the bank which is chosen as the public depository, then another should be chosen in accordance with the statutes.*

7. *In cases where a bank is operating on a restricted basis, any public officer or subdivision having funds therein desiring to change depositories may do so by proceeding to rescind the depository contract and to acquire a new depository in accordance with the statutes applicable thereto.*

COLUMBUS, OHIO, April 21, 1933.

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

DEAR SIR:—My opinion has been requested on a number of questions relative to public funds deposited in banks. In order to expedite this matter, I am combining all of them in one opinion. The questions are as follows:

1. "The bank, which has been designated as depository for the

above mentioned subdivisions, is now controlled by the government and a conservator is in charge. The depository bank cannot put up securities for monies now to be deposited. Since the code requires that security be put up to secure public funds, can the above mentioned subdivisions deposit money without the securities, or what should be done with their money, the nearest bank being about twenty miles distant from the County Seat?"

2. "Several of the Banks of this County have not reopened on a normal basis, and a good many thousands of dollars of public funds still remain frozen in these banks.

Some of these funds are secured by real estate mortgages pledged as collateral by the banks, while others are simply secured by a personal bond of the Board of Directors.

I have been requested to obtain your opinion as to whether or not there is any method by which any of these accounts can be freed for use by the various political subdivisions."

3. "When by order of the Superintendent of banks, or the comptroller of the Currency, as the case may be, the depository bank of a school district is limited in its operation whereby withdrawals from accounts existing at a certain date are limited to five percent, but is permitted to receive deposits on new accounts to be segregated from the previous accounts and kept one hundred per cent liquid, is the bank required to furnish new and additional security to cover any such new accounts created by deposits made by a board of education after the date in question?"

4. "In the event the school district makes deposits whereby a new and segregated account to be kept one hundred percent liquid is created and the bank does not furnish new and additional security for the accounts, and the bank is later permanently closed and liquidated as provided by law, what are the rights of the depositing board of education in the assets of the bank upon such liquidation?"

5. "Since the local banks went on notice by authority of action of the general assembly, presidential proclamation and congressional action, this office has had numerous inquiries from local boards of education and township trustees who have their moneys in a local bank (their legal depository), which has not been able to reopen without restriction, as to whether or not they can make another bank which is open and doing business unrestricted their depository."

6. "What banks are eligible to receive state funds?"

7. "Can banks legally pay interest on public funds deposited with them over the period when they were closed or operating on a restricted basis, due to legislative enactment or executive order?"

It must be assumed in the consideration of any question with reference to the deposit of public funds in banks under existing conditions, that the acts of the legislature (namely) House Bills Nos. 656 and 657, the proclamation of the President of the United States of March 6, 1933, and the subsequent act of the United States Congress (H. B. R. 1491) are all constitutional. The law is clearly established in Ohio that no public officer or subdivision may deposit public funds in the banks of this or any other state except by virtue of statutory enactment authorizing them so to do. It therefore becomes necessary to make a study of the statutes relative to public depositories. I shall limit my discussion for

the purposes of this opinion to the deposit of state, county, township, board of education and municipal funds.

The sections of the General Code applicable to the deposit of state funds are sections 321-330. These sections provide for a state board of deposits which shall meet on the first Monday in April every two years, consider the applications of banks and designate the banks that are eligible to be made state depositories. The board is apparently vested with great discretion, as there is no limitation imposed upon it by statute. The board therefore can within raesonable limits use its own discretion in determining which of the applying banks shall be eligible as public depositories. There are two types of depositories, one active and the other inactive. The treasurer of state may designate one or more of the banks in Columbus eligible under this act as active depositories. After the banks eligible under this act are determined, they shall submit bids to the treasurer of state which shall be received between one P. M. on the first Monday in March, and closing at one P. M. on the third Monday in March, every two years. The bids so received must be opened in public by the treasurer of state, and the award and deposit of funds is provided for by section 330, General Code, as follows:

> "After bids have been opened the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidders.
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> The treasurer of state shall deposit the state funds in such banks and trust companies after such applications have been approved by the board of deposit. Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders; first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then the next highest bidders."

However, before any deposits are made, the provisions of section 330-3 of the General Code, as amended by Senate Bill No. 287, must be observed, which reads in part as follows:

> "The treasurer of state before making such deposits shall require each and every approved bank or trust company to deposit with him bonds, or other interest bearing obligations of the United States, or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia, farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto, bonds of this state, county, township, school district, road district, or municipal bonds of this state, or notes issued under authority of law by any county, township, school district, road district or municipal corporation of this state, or bonds of any state of the United States, or bonds of any county or city of any state, which, in the opinion of the treasurer of state are good and collectible and as to which there has been no default of principal or interest, at not less than their market value at the time of deposit, in an amount equal to the amount of money to be deposited with such banks or trust companies. The treasurer of state shall have authority to require that additional bonds of the same general character

as those designated as eligible for deposit to secure state funds, shall be deposited from time to time, to make up for any depreciation in the market value of any of the bonds so deposited. Or, the treasurer of state shall require each and every approved bank or trust company to deposit with him, surety company bonds, which when executed, shall be for an amount equal to the amount deposited plus 5%, conditional for the receipt and safe keeping and payment over to the treasurer of state or his written order of all moneys which may come into the custody of such bank, or trust company under and by virtue of the provisions of sections 321 and 330-11, inclusive, of the General Code. Such surety bond may be returned to the bank, or trust company whenever the deposit of state funds made to such bank, or trust company has been repaid in full, with interest to date of payment. And further, said bonds so given shall include a special obligation to settle with and pay to the treasurer of state for the use of the state, interest upon * * * collected balances on said deposit or deposits, at the rate bid for, but not less than * * * 2% per annum for inactive deposits and * * * 1% per annum for active deposits (on a 365 day basis) payable quarterly on the first day of February, May, August and November of each year, or at any time when withdrawals are made or the account is closed."

Under these sections it would appear that the board of deposits could declare banks in any of the existing classes today eligible to be a public depository except those which are by their statements shown to be insolvent. Such bank will also have to be able to observe the conditions of the depository contract. The fact that a bank is operating on a restricted basis, due to governmental interference, does not necessarily exclude it as a public depository. However, before any bank could receive state funds it would first have to comply with section 330-3, General Code, supra.

With reference to county funds, sections 2715-2745 apply. The commissioners of a county shall publish a notice inviting proposals from banks or trust companies, which proposals shall stipulate the rate of interest at not less than two per cent per annum on the average daily balance, on inactive deposits, and not less than one per cent per annum on active deposits, and the proposals are to be opened in public and the use of the money awarded to the bank offering the highest rate of interest. If there be too large a sum for one bank, then the balance may be awarded to the next highest. Also, if several banks offer the same highest rate of interest, the money may be awarded to one or a portion may be awarded to each. Before any deposits can be made, the bank which is to receive the funds must provide proper sureties, securities or both.

General Code 2715 reads as follows:

"The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county, at least one of which shall be located at the county seat, as active depositaries of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the condi-

tions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks, located in the county as such inactive depositaries and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located in the county, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary, No bank or trust company shall receive a larger deposit than one million dollars, except that in case the county commissioners shall find that there will be an excess of money in the treasury of any county which it will be impossible to deposit under the limitation of one million dollars, such bank, banks or trust companies shall be permitted to receive an amount not to exceed five million dollars."

The bank selected remains the depository of the county for a period of three years or until the undertaking of its successor is accepted by the commissioners. Sections 2723 and 2724, General Code, read as follows:

"Sec. 2723. Such undertaking shall be signed by at least six resident free-holders as sureties or by a fidelity or indemnity insurance company, authorized to do business within the state and having not less than two hundred and fifty thousand dollars capital, to the satisfaction of the commissioners, conditioned for the receipt, safe keeping and payment over of all money with interest thereon at the rate specified in the proposal, which may come under its custody under and by virtue of this chapter and under and by virtue of its proposal and the award of the commissioners, and conditioned for the faithful performance by such bank or banks or trust companies of all the duties imposed by law under the depositary or depositaries of the money of the county."

"Sec. 2724. Such undertaking shall be continuous in form and, except as hereinafter provided, shall remain in full force as to any and all deposits secured by it until the same have been withdrawn in total, including all interest thereon, provided, that in case the deposits shall be increased or decreased the depository may furnish and substitute for said undertaking a good and sufficient new undertaking not less than the sum then on deposit or in an amount which together with securities duly and legally hypothecated shall be not less than the sum so on deposit; and any depository which has furnished more than one undertaking for any deposit may, upon such deposit being reduced, obtain the release and surrender of any undertaking as herein provided if there remain in force to secure said deposit an undertaking or undertakings, and securities, or either, not less than the sum then on deposit. The county commissioners by resolution spread on their journal may release any undertaking and surrender the same to the depository upon the withdrawal in total of any deposit, or upon the reduction of any deposit and upon the furnishing and acceptance of any new undertaking or securities substituted therefor, as herein provided."

The undertaking can be canceled by ten days' notice, although such cancellation will not relieve any surety for any liability for deposits made before notice is given until the moneys are returned to the county treasurer or adequate security is given therefor.

Section 2732, General Code, provides what securities may be accepted, in the following words:

> "In place of the undertaking provided for herein, the commissioners may accept as security for money so deposited the following securities:
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> (a) Bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; and the farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto;
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> (b) Bonds of the State of Ohio;
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> (c) Legally issued bonds or notes of any city, village, county, township or other political subdivision of this state and as to which there has been no default of principal, interest or coupons and which in the opinion of the treasurer are good and collectible, provided the issuing body politic has not defaulted at any time since the year 1880 in the payment of the principal and interest of any of its bonds."

Section 2730, General Code reads:

> "At any time they deem it necessary, the commissioners may require additional securities from the bank or banks or trust companies in such sum as they designate. If for the period of five days thereafter such bank or banks or trust companies refuse or neglect to give such additional security, the commissioners may order the removal of the county's deposits therefrom to the county treasury or designate some other bank or banks or trust companies temporary depositary thereof at the same rate of interest.
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> Such removal and other removals ordered by the commissioners under the provisions of this chapter relating to county depositaries, shall be made upon their written order and the check of the county treasurer after thirty days' notice to such depositary."

Sections 7604-7609, General Code, provide for the deposit of school funds. Within thirty days after the first Monday in January every two years the board of education shall provide for the deposit of funds coming into the hands of its treasurer.

Section 7605, General Code, provides as follows:

> "In school districts containing two or more banks such deposit shall be made in the bank or banks, situated therein, that at competitive bidding offer the highest rate of interest which must be at least two per cent for the full time the funds or any part thereof are on deposit. Such bank or banks shall have a good and sufficient bond, or other interest bearing obligations of the United States or those for

the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the State of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, or notes issued under authority of law by any county, township, school district, road district or municipal corporation of this state, or farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto, at the option of the board of education, in a sum not less than the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond. But no contract for the deposit of school funds shall be made for a longer period than two years."

In school districts with less than two banks, the board of education may enter into a contract with one or more banks conveniently located on the same terms as where a depository contract is made with a bank in the same school district.

It is provided in section 4784, General Code, that in case a depository ceases to act, the moneys shall be placed in the custody of the treasurer of the city or county in which the school district is located, until a new depository has been provided for.

Township funds must be deposited in accordance with sections 3320-3326. The four sections applicable here read as follows:

"Sec. 3320. That within thirty days after the first Monday of January, 1916, and every two years thereafter, the trustees of any township shall provide by resolution for the depositing of any or all moneys coming into the treasury of the township, and shall deposit such money in such bank, banks or depository within the county in which the township is located as they may direct, subject to the following provisions."

"Sec. 3322. In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offer at a competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent, for the full time the funds are on deposit. Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. No bank or depository shall receive a larger deposit of such funds than the amount of such bond and in no event to exceed three hundred thousand dollars. The trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

"Sec. 3323. In a township in which but one bank is located, and the location thereof is convenient, the funds of the township shall be deposited in such bank at a rate of interest not less than two per cent on the average daily balance, but when the trustees have reason to

believe that such bank is not a safe depository, or when the location thereof is inconvenient or when such bank refuses to pay at least two per cent interest, or where there are two banks in a township and either one or both refuse to pay at least two per cent interest on such deposits, or in a township in which no bank is located, after the adoption of a resolution providing for the deposit of its funds, the trustees may enter into contract with one or more banks within the county, or in a county adjacent to the county of which the township is a part, that are conveniently located and which offer the highest rate of interest on the average daily balance, and which in no case be less than two per cent for the full time the funds are on deposit."

"Sec. 3324. Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and the trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

As to municipalities, section 4294, General Code, provides:

"Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn. All profits arising from such deposit or deposits shall inure to the benefit of the funds. Such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby."

Section 4295 reads as follows:

"The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; and farm loan bonds issued under the provisions of the act of congress known as the federal farm loan act, approved July 17, 1916, and amendments thereto, bonds of the state of Ohio or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900,

in the payment of the principal and interest of any of its bonds; notes issued under authority of law by any county, township, school district, road district, or municipal corporation of this state; said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent in excess of the maximum amount at any time to be deposited. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

Municipal trustees of the sinking fund shall at least every three years advertise for proposals for the deposit of funds held in reserve and deposit the same in the bank or banks situated within the county which offers the highest rate of interest and good security, as provided in section 4415, General Code.

It has been provided by section 2288-1, General Code, that in addition to the security provided for by sections 2732, 4295, 7605 and 7607, it shall be lawful to accept first mortgages or bonds secured by first mortgage, bearing interest not to exceed six per cent, upon unencumbered real estate located in Ohio.

The above cited sections represent practically all of the legislative enactments applicable to public depositories, and each subdivision or board should examine its respective provisions thoroughly before taking any steps relative to the deposit of its funds.

The present banking situation has given rise to many questions which are unprecedented. The statutes do not cover the problems which face every subdivision and board which handle public funds and there are no authorities or decisions by which they can be guided except the general principles of the law. When a public subdivision or board deposits public funds in a bank, as prescribed by statute, it does so in pursuance of a contract between it and the bank. The bank promises to take the public moneys, keep them safely, and pay them out on demand, and further, to pay a certain interest rate thereon. When a bank fails to observe any of these conditions, there is a default which, if it is a material breach, will enable the other party to the contract to rescind the same. To determine whether there was a material breach, it would be necessary to ascertain the facts in each case.

As to the banks which were closed by virtue of the President's proclamation and subsequent congressional acts and are now open without any limitation, there probably was not such a material breach as would permit a rescission of the contract. Even if it were assumed in such case that a breach were material, the bank could be relieved on the ground of impossibility of performance. Although since the impossibility was only temporary, when the restraint was removed the bank would be required to perform the entire contract. 9 O. Jur. 556.

This doctrine would apply to all the banks except those which were never able to open or which have been opened on a restricted basis. The one group of banks was closed for only a short time and even without the doctrine of impossibility it would probably be held that the default was not of such materiality as to permit either party to rescind the contract. As to the other group, there would seem to be no doubt but that there is a material breach of a depository contract and the public subdivision or board could rescind the same.

The question arises in all these situations as to the status of the surety

bond given to secure public funds deposited in accordance with the above cited sections. The only basis on which a surety could be relieved because of the present banking situation would be on the ground of a material alteration of the depository contract, and even this would only extend to deposits made after such alteration. If there be a breach of a depository contract, there is no doubt that the surety could be held liable on its bond, and what constitutes a breach is stated in 18 Corpus Juris, 588, as follows:

> "There is a breach of the bond where the depositary fails to deliver on demand the funds deposited; and although it has been held that the depositary is never in default until payment is demanded and refused, and that mere insolvency does not constitute a breach, yet it is a general rule that incapacity to make delivery is equivalent to the refusal of a demand."

However, as stated, whether a surety will be relieved depends on whether the depository contract was materially altered and whether its risks are thereby increased. In *London and Lancashire Co.* vs. *Bd. of Comm. of Columbiana County,* 107 O. S. 51, the fifth branch of the syllabus reads:

> "A paid surety will not be released from his obligation of suretyship by changes in the contract guaranteed by him unless such changes operate injuriously to affect materially his rights and liabilities."

In a determination of the materiality of the alteration a study of each individual case would be necessary. I am not in a position to pass on such a question, for the courts have drawn some very fine distinctions in these cases, and in the last analysis the question must be determined on the specific facts in each case. It would be my opinion that all individuals, subdivisions and boards which have on deposit in banks public funds secured by a surety bond should require a new bond, security, or obtain a waiver by the surety of any defense arising because of any breach of the depository contract due to the present banking situation. If such a requirement were made and complied with, all depositors of public funds could feel assured that their interests were fully protected.

It is very doubtful in many of these cases that the surety company would be relieved of its bond where the depositor has waived the breach or where no material breach can be made out. 50 Corpus Juris, 120, states the rule as follows:

> "A waiver by a creditor of a breach of contract by the principal or an acceptance of part performance has been held not to be such a modification as will discharge a surety from liability."

However, in order not to endanger any of its rights, the public depositor should obtain a waiver from the surety which may be given by the surety without receiving any new consideration.

It would be to the interest of any sureties to give a waiver in all of these cases for, if they do not comply with a request for the same, the depositor where there has been a breach of the depository contract could immediately recognize a default of the contract and proceed against the sureties.

No question arises when the public funds are secured by securities of a bank, as they can be sold at any time when there is a failure to pay out any part of the public funds on demand. These securities will not be released because of any alteration or breach of the depository contract. The depositor may require new securities if it deems that there are not sufficient securities to protect its deposits, but there is no requirement that new security must be given to cover new deposits made after the bank begins to operate on a restricted basis.

Concerning interest accruing under the depository contract during the period when the banks of the state were operating under certain limitations, it is my opinion that the bank must be held liable for the same. The bank has contracted to pay a certain rate on all public funds deposited with it. This obligation can not be impaired by any executive order or by the acts of the federal congress or state legislature except in contravention of both the federal and state constitutions. If payment of interest be impossible for a short period due to proclamation or legislative enactment, when the restraint is lifted the bank would still be held for the same rate of interest over the entire period.

It is my opinion that, during the period when the banks were required to keep all new deposits in a separate fund subject to no limitation as to payment or withdrawal and used solely to meet new deposit liabilities, deposits of public funds which were made in pursuance of the depository contract were thus legal deposits, and would draw the interest rate contracted for by the bank.

Where a subdivision or board has its funds in a bank which has not been able to open without restrictions and there is a demand for any part of the public funds which the depository fails to meet, there is a breach of the depository contract which will enable it to rescind the same. If it rescinds the contract, it should take steps in accordance with the statutes to choose another depository for its funds. The depositor may then look to the security and enforce the obligation against the surety bond or sell the securities given by the bank to secure the deposits, or both, as the case may be. These steps would, of course, be necessary in cases where the bank has been closed completely. However, with reference to the banks in other classifications, it might not be deemed advisable.

If a depositor of public funds declares a breach of the depository contract in cases where the bank is operating on a restricted basis, it would not be entitled to receive any of its funds deposited prior to the limitation, except the proportion allowed in each particular case. Thus, declaring a default would not enable a depositor to obtain any additional funds. Furthermore, deposits made after a bank was permitted to open are made in pursuance of the depository contract and would draw interest and would be kept liquid and available on demand. In the case of banks which were open with limitations, it would impose a great hardship on them if a depositor were to declare a default which would be very detrimental to the community in which the bank is located. In addition, it would necessitate the depositor setting aside the contract, proceeding against the surety bond or selling the securities, and would involve the expense of procuring a new depository for its funds. For depositors of public funds who have moneys in such limited banks, the best policy would be to secure a waiver from the surety company of any defenses arising because of the breach or alteration of the contract and continue to deposit in the same depositories. This matter is, however, within their discretion and what action they take depends on their

particular situation. If such depositor determines to change depositories, it should first rescind the contract and proceed in accordance with the statutes to obtain a new depository for while the contract is still in force it, as well as the bank, is required to observe its terms.

Deposit of public funds made under authority of the statutes creates the relation of debtor and creditor. The public stands in no better position than any other depositor of a bank. Such depositor, in case of liquidation of the bank, will share pro rata with all other depositors and has no preferred claim because of its public nature. *Federal Casualty Company of N. Y.* vs. *Union Savings Bank,* 119 O. S. 124. However, as to deposits made by virtue of House Bill 656, in segregated accounts, there should be no question of preference for such funds are by law required to be segregated and used solely to meet new deposit liabilities and no limitation imposed on them as to payment and withdrawal.

In some cases where public funds have been tied up because of the restricted basis on which some of the banks are operating, the public subdivision or board will find it imperative to obtain ready money to meet obligations. In cases where such necessity arises several methods may be adopted. It might be preferable for the public depositor, which is holding certain securities of the bank as security, to have the depository substitute cash as security in place of collateral. The officials could, of course, also declare a breach of the contract and sell the securities on the open market, but this would, in many instances, cause a great loss to both the depositor and the bank. In the event that all the funds are secured by a bond and none by securities, the only method by which funds could be raised would be to declare a breach of the contract and proceed on the bond. Where a public subdivision or board holds only collateral securing their deposits and the value of the collateral is equal to or greater than the deposits, then any bank having such public funds, whether under the control of a conservator or not, may permit their withdrawal. See Opinions of the Attorney General for 1933, No. *653.* If the public funds are secured by both collateral and a surety bond, then in case any change is to be made with reference to the collateral the public depositor should obtain a waiver, consent, or new bond from the surety, or new security from the depository before proceeding further.

It should be noticed in all cases where public funds are deposited in banks, adequate security must first be furnished. This condition is mandatory and if it is not observed the public official who so deposits without first securing sufficient security will be rendered liable for any loss resulting therefrom. If a bank which has been chosen as a public depository fails to provide adequate security, the depositor should award the deposits to the next highest bidder. If there be no other bidders competent to receive the funds, then the subdivision must proceed to secure another depository, and this is true even though it be necessary to go outside the county, township or school district, as the case may be, to find a depository which will comply with the law. Although in case of township funds, the township trustees are limited to banks in the county or in adjacent counties conveniently located, the funds, except in the case of county and school funds, may be kept with the treasurer of the subdivision until a new depository is chosen, but such procedure can not be continued no matter how much inconvenience results from the fact that there are no competent depositories conveniently located.

It is provided in case of school boards, by section 4784, that where a depository ceases to act as custodian of its funds, they may be placed in the custody

of the city or county treasurer in which the school district is located until another depository is provided for such moneys. Also, in case the depository of county funds ceases to act, the county commissioners may place them in some other bank as a temporary depository at the same rate of interest that they were previously drawing.

It is my opinion with reference to the questions propounded that:

1. Any bank which can comply with section 330-3, General Code, and with the terms of a depository contract, may be declared eligible by the state board of deposits to receive state funds.

2. If public funds are secured by a surety bond, the depositor should require a waiver from the individual or company giving such bond of any defense resulting from the recent banking situation. This applies to public funds in banks which are now fully open as well as those which are still operating on a restricted basis. If these deposits are secured by securities of the bank, no question arises, for under no circumstances would they be released by virtue of any changes in the depository contract, arising out of the banking situation.

3. Public funds in banks are deposited under a depository contract and draw the rate of interest stipulated for therein. This rate of interest will continue until the contract is terminated and no bank will be relieved from paying same because of any regulations imposed on them by executive order or legislative enactment.

4. When any bank is closed for liquidation, the public depositor will share pro rata with all other depositors in the assets of the bank and has no preference due to its public nature.

5. The only methods by which a public depositor can obtain a release of any part of its funds where its funds are tied up in banks are, either to take the collateral which secures the public moneys and have the bank replace it with cash, or after default sell same on the open market. If there be no collateral, then it would be necessary to declare a breach of the depository contract and proceed against the surety bond.

6. All public officers and subdivisions depositing public funds are required to obtain security for same and no deposits can be made without first acquiring some security. If no security is forthcoming from the bank which is chosen as the public depository, then another should be chosen in accordance with the statutes.

7. In cases where a bank is operating on a restricted basis, any public officer or subdivision having funds therein desiring to change depositories may do so by proceeding to rescind the depository contract and to acquire a new depository in accordance with the statutes applicable thereto.

Respectfully,
JOHN W. BRICKER,
Attorney General.

706.

TRANSFER OF FUNDS—FUNDS IN BOND RETIREMENT FUND NOT TRANSFERABLE TO GENERAL FUND UNDER SECTION 5625-13, G. C.

SYLLABUS:

Funds in the bond retirement or sinking fund of a subdivision may not be