4. A transaction whereby a person turns in claims against a closed bank in Ohio to be applied to an obligation which such person owes to such bank, is not within the jurisdiction of the Division of Securities.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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653.

PUBLIC FUNDS—WHEN DEPOSITED IN STATE BANK UNDER LIMITED OPERATION MAY BE WITHDRAWN WHEN SECURED BY COLLATERAL SECURITIES IN EXCESS OF DEPOSIT—EFFECT WHEN MEMBER OF FEDERAL RESERVE SYSTEM.

*SYLLABUS:*

*Under regulation 32 of the Secretary of the Treasury, a State Bank which is a member of the Federal Reserve System, operating in a limited way, whether under the control of a conservator or not, may permit withdrawals of public deposits secured wholly by collateral securities in excess of the amount of the deposit.*

COLUMBUS, OHIO, April 21, 1933.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*
DEAR SIR:—I have your letter of recent date which reads as follows:

"The Union Trust Company, Cleveland, Ohio, is a member of the Federal Reserve System and has not as yet been licensed.

Regulation 32 issued by the Secretary of the Treasury of the United States provides:

'Any State bank which is a member of the Federal Reserve System, and is not licensed by the Secretary of the Treasury to perform usual banking functions, may permit withdrawals of deposits which are lawfully secured by collateral; provided that such withdrawals are (a) permissible under applicable law (b) duly authorized by the Board of Directors of such bank upon such terms with respect to the release of the collateral as will fully protect the depositors and creditors from the creation of any preference and (c) approved by appropriate state authorities having jurisdiction of such bank.'

I have received a letter from R. S. Crawford, Secretary of the Union Trust Company, a copy of which I am enclosing, and I would appreciate your opinion as to whether or not I should approve the payment of public funds in the manner suggested in his letter."

The letter enclosed with your request reads in part as follows:

"We have received several requests from political subdivisions for the payment of their impounded balances or a part thereof, in accordance with the so-called Regulation 32 issued by the Secretary of the Treasury under the National Banking Emergency Relief Act, and we expect we shall receive many additional requests of this kind.

In order that we may proceed in accordance with said Regulation 32, we respectfully request your approval of payment in whole or in part of said public funds, the cash required therefor in each case to be derived from borrowings to be made by us from the Reconstruction Finance Corporation on the security of the mortgages, bonds, or other collateral given to the political subdivisions to which such payment is to be made, or from other available cash.

We have been advised by counsel for the Reconstruction Finance Corporation they have received an opinion of counsel acceptable to them to the effect that political subdivisions may waive priority of liens on securities pledged for their deposits in favor of such proposed borrowings from the Reconstruction Finance Corporation.

We are not asking permission to pay public deposits under said Regulation 32 where the security is a surety bond, or where it appears from the attached schedule that there is no equity to be protected."

The Union Trust Company, like many other banks, has been operating on a restricted basis, the payment of its liabilities having been restricted to five per cent. Since receiving your request, a conservator has been placed in charge of this bank. This, and other banks in a similar position, have defaulted, their agreement for accepting deposits of public funds having been to pay the depositors upon demand. See Section 330-2 of the General Code as to state deposits; section 2715-1, as to county deposits; section 4294 as to deposits of municipalities; and section 6602-79 as to deposits of sanitary districts. The depositors of public funds have thus secured the right to resort to securities hypothecated as collateral under the provisions of the applicable statute.

Regulation No. 32 issued by the Secretary of the Treasury provides another remedy for those having deposits lawfully secured by collateral. It authorizes unlicensed members of the Federal Reserve System to permit withdrawals of such deposits when three requirements have been met. The first of these is that such withdrawals are permissable under applicable law. The second is that the bank's directors authorize the withdrawal upon such terms with respect to release of collateral as will protect the creditors from the creation of a preference. The third condition is your approval.

Under the President's executive order of March 18, 1933 (Fed. Res. Bulletin, March, 1933, p. 119), the State Superintendent of Banks was given authority, in accordance with the applicable laws of this state, to appoint a conservator for member banks of the Feedral Reserve System not licensed by the Secretary of the Treasury to resume usual banking functions.

The law of Ohio authorizing the appointment of conservators is contained in House Bill No. 661, effective April 3, 1933, enacting Section 710-88a of the General Code. This section provides in part:

"The conservator so appointed shall take possession of the business and property of such bank and under the supervision of the superintendent and subject to such limitations as the superintendent may from time to time impose, 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."

From this provision, it appears that a State bank belonging to the Federal Reserve System, although under the control of a conservator might be authorized by the Superintendent of Banks to carry on its usual banking business if it were not for the lack of a license from the Secretary of the Treasury. Whether or not a conservator is carrying on the normal functions of the bank, I find no provision in the section in question or in other applicable sections of the statute which would prohibit an unlicensed Federal Reserve Member Bank, operating in a limited way, from permitting withdrawals under Regulation 32 of the deposits secured by collateral.

The authorization of the board of directors is required under the regulation. Under section 710-88a, the conservator, having assumed all the rights and duties of the board of directors, would give the authorization. Such authorization with respect to the release of collateral, must be upon such terms as will protect creditors from any preferences. The letter appended to your request, contains this statement:

> "We have also been advised by counsel for the Reconstruction Finance Corporation, that it is prepared to accept a note and pledge agreement in connection with such borrowings which will provide that any collateral pledged for such borrowings shall not be subject to any other obligations of the borrower, and that no other collateral of the borrower shall be subjected to payment of such obligations required for repayment of public funds."

It is stated in the letter that this provision will avoid the objection that such borrowings involve preferential treatment of subdivisions "assuming that in each case an equity in the pledged collateral is being protected." By this I assume is meant that the value of the securities exceeds the amount of the deposit.

If the bank is solvent, payment of deposits could not be void as creating a preference. The fact that a conservator has been appointed does not necessarily imply that the bank is insolvent; although all member banks of the Federal Reserve System not licensed to perform normal banking functions and for which conservators have been appointed, would appear to be insolvent in the sense that they are unable to pay their debts in the usual course of business. This is likewise true as to a bank on restriction for which no conservator has been appointed.

Section 11104 of the General Code invalidates a transfer by a debtor of property in contemplation of insolvency with intent to hinder, delay or defraud creditors. Insolvency as used in this section means the inability to pay debts in the usual course of business. *Hosiery Co.* vs. *Baker,* 18 O. C. C. 604, *Prose* vs. *Beardsley,* 18 O. App. 211. Under the facts presented, there would clearly be no violation of this statute. There would be no intent to hinder or delay other creditors where the depositor who is paid returns collateral security of a greater value than the deposit. Other creditors of the bank might in fact benefit materially, since the secured depositor would no doubt exercise his right immediately to sell the securities pledged if the bank should fail to pay.

It has been said that on general principles of equity an insolvent bank cannot pay a particular creditor, intending to prefer him over other creditors where both the bank and the creditor having knowledge of the insolvency. 7 C. J. 728; *State ex rel.* vs. *City Auto Stamping Co.,* 11 O. L. Abs., 567, affirmed 13 O. L. Abs., 67, and motion to certify overruled by the Supreme Court, 5 O. Bar 575.

Still assuming that the banks in question are insolvent, this principle does not make the payment of public deposits upon the release of ample security, a preference. There is in fact no prejudice to other creditors and no intent to prefer or defraud them.

I am therefore of the opinion that no unlawful preference will be created by a payment of public deposits by a Federal Reserve Member Bank, not yet authorized to perform normal banking functions. Where collateral securities in excess of the deposit are released by the depositor to the bank.

It appears from your request that the banks are not asking your approval of withdrawals where the deposit is secured by a surety bond or where the value of the collateral securities does not exceed the amount of the deposit. I therefore express no opinion as to your authority to permit withdrawals in such cases.

I note from the transcript of public deposits in the Union Trust Company submitted with your request, that there are several deposits secured both by a surety bond and by a deposit of securities. A deposit of $1,500,000 might be secured by a bond of $1,000,000 and securities valued at $1,000,000. Relying upon the bond, the depositor might withdraw $500,000 of the deposit and relinquish all of the securities. By this act, the surety would be released to the extent of his injury from this action. Had the withdrawal not been made, the surety in this case could have paid the $1,000,000 and become entitled to the rights of subrogation in the security. This illustrates the danger of permitting withdrawals where there is a surety for part of the deposit. I assume that the statement in the letter attached to your request that your permission to allow withdrawals is not being asked where there is a surety, includes cases where only part of the security is a surety bond, the rest being collateral.

Specifically answering your inquiry, I am of the opinion that under Regulation 32 of the Secretary of the Treasury, a State bank which is a member of the Federal Reserve System, operating in a limited way, whether under the control of a conservator or not, may permit withdrawals of public deposits secured wholly by collateral securities in excess of the amount of the deposit.

Respectfully,
JOHN W. BRICKER,
*Attorney General.*

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654.

APPROVAL, NOTES OF JACKSON RURAL SCHOOL DISTRICT, JACKSON COUNTY, OHIO, $2,810.00.

COLUMBUS, OHIO, April 21, 1933.

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

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655.

APPROVAL, NOTES OF NASHVILLE RURAL SCHOOL DISTRICT, HOLMES COUNTY, OHIO—$2,473.00.

COLUMBUS, OHIO, April 21, 1933.

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