And inasmuch as I find upon examination of this deed that the same has been properly executed and acknowledged by said the C. F. Kettering, Incorporated, as a corporation, by the hands of its President and Secretary, and that the form of said deed is such that it is legally sufficient to convey this property to The Ohio State Archaeological and Historical Society by full fee simple title, I am approving this deed, as is evidenced by my signature of approval attached to said deed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3761.

DEPOSITORY—CLAIM WHEN BANK IN LIQUIDATION MAY BE CERTIFIED BY TREASURER OF STATE TO AUDITOR OF STATE—CLAIM MAY BE COMPROMISED—INTEREST ON DEPOSITORY CONTRACT.

SYLLABUS:

1. *A claim against a duly constituted state depository in process of liquidation, and against the sureties on the depository bond, may, under Section* 20, *General Code, be properly certified by the Treasurer of State to the Auditor of State.*

2. *Such claim may be compromised by the Auditor of State and the Attorney General, pursuant to Section* 268, *General Code.*

3. *Interest provided in a state depository contract continues to accrue during the period when the depository bank is under the control of a conservator, pursuant to Section* 710-88a, *General Code.*

4. *Interest payable under such depository contracts ceases when the Superintendent of Banks takes possession of a bank for liquidation pursuant to Section* 710-89, *General Code.*

5. *Where, under a plan approved by a court of competent jurisdiction, for the reopening of a state depository bank, debenture notes of a mortgage loan company are made payable to all depositors, including the State of Ohio, the Treasurer of State, in completing a compromise between the sureties on the depository bond and the state, the same having been approved by the Auditor of State and the Attorney General, may legally endorse such debenture notes to the surety companies "without recourse."*

COLUMBUS, OHIO, January 7, 1935.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

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

> "We have certified to us by the Treasurer of State a claim against the Elyria Savings & Trust Co., Elyria, Ohio, for inactive deposits in the amount of $100,000, plus accrued interest amounting to $3,347.36. This is presumably certified to us under the provisions of Section

20, G. C., to be certified to the Attorney General under the provisions of Section 268, G. C. The question arises as to whether or not this claim should be certified under the provisions of Section 20 of the General Code, in view of the provisions of Section 299, G. C., that money in a duly constituted state depository is within the State Treasury.

This bank has been in the hands of a conservator and later was closed by the State Banking Department and is now reopening. The amount of accrued interest has accrued since the date the bank was placed in the hands of a conservator. Please advise if the bank in the hands of such conservator is liable for the interest at the rate provided in the contract of such depository.

The amount of accrued interest does not include any interest after the date the bank was closed by the State Banking Department. Is the liquidator or person in charge of the affairs of such bank after being closed by the State Banking Department required to pay interest on such deposit at the rate provided in the contract of deposit?

A proposed settlement of this account has been submitted to us in which the Elyria Savings and Trust Co. will pay the Treasurer of State $52,673.70 and deliver to the Treasurer of State two debenture notes of the Andwur Mortgage Loan Co. aggregating $50,673.70, which taken at its face value with the $52,673.70 paid in cash covers the claim in full. However, further condition of the settlement is that the surety companies will pay to the Treasurer of State for the two notes aggregating $50,673.70 the amount of $44,551.78 and take from the Treasurer of State assignment of the two debenture notes. The difference between the amount paid by the surety companies and the face of the notes represents the amount of interest accruing on the deposits in this bank since the date said bank was placed in the hands of conservator. Part of this interest has been paid and it is proposed to deduct from the amount of these notes the total amount of interest. The transaction amounts to the full settlement with the bank by the acceptance of cash and these notes and a discount of the notes to the surety companies, allowing as discount the amount of all interest accruing since the bank was placed in the hands of a conservator.

Please advise if the Treasurer of State has any authority to accept in settlement with this bank such notes and discount them to the surety companies who were on the depository bond of the bank. If he does, is he liable on his bond, for the amount of discount thus allowed, or by reason of such assignment liable for the face value of the notes if said notes are not paid by the maker at maturity?

Your written opinion on these matters is respectfully requested."

Your first question is whether a claim against a closed state depository can be certified to the Auditor of State under Section 20, General Code, for the purpose of certification to the Attorney General under Section 268, General Code, in view of the provisions of Section 299, General Code.

Section 20 of the General Code reads:

"When an officer or agent of the state comes into possession of a claim due and payable to the state, he shall demand payment thereof, and on payment have the amount duly certified into the state treasury.

If he fails to collect such claim within thirty days after it comes into his possession, he shall certify it to the auditor of state, specifying the transaction out of which it arose, the amount due, the date of maturity, and the time when payment was demanded. The auditor of state shall not issue his warrant on the treasurer of state for the salary of any such officer or agent of the state until the provisions of this section are complied with."

You state that under Section 299, General Code, "the money in a duly constituted state depository is within the state treasury." Section 299, General Code, provides:

"The rooms assigned the treasurer of state by authority of the state, with the vaults, safes, and other appliances therein provided for the safe keeping of the public moneys, shall constitute the treasury of the state, and shall be used by the treasurer of state as the sole place for the deposit and safekeeping of the moneys, bonds, notes, obligations, claims, stocks, securities and assets of the state, and of all moneys, bonds, stocks, obligations, claims, securities, and property required by law to be deposited or kept in the treasury of the state. The deposit of public moneys in duly constituted state depositories by the treasurer of state as provided by law shall be deemed a compliance with this section."

The legal effect of this section is not to constitute the deposit of state funds in a regularly designated depository "money" within the state treasury. The depository bank owes the state a "debt." The bank is not a trustee or bailee but a debtor. The bank and not the state has title to the actual money deposited.

In the case of *Fidelity & Casualty Co. vs. The Union Savings Bank Co.*, 119 O. S., 124, the Supreme Court held, as appears from the second, third and fourth branches of the syllabus:

"2. The legislature has made provision for deposit of state funds in Section 321 et seq., General Code, and a deposit when made under authority of those sections creates the relation of borrower and lender between such depositary and the state.

3. Section 321 et seq., General Code, neither expressly nor impliedly give to the state priority of payment out of the funds of such banking institution in the event of insolvency.

4. A deposit of state funds in a depositary under authority of section 321 et seq., General Code, is not an exercise of sovereignty but on the other hand in such a transaction the government is acting in its proprietary capacity."

Since a duly constituted state depository owes the state a "debt," the state has a general "claim" against the bank when it closes. The state, of course, has the right to resort to its security upon the failure of the bank to carry out its contract, but its claim against the bank is general in nature. This relationship between the state and its depository was recognized by the legislature in enacting section 710-89a, General Code, which refers to "all depositors and creditors including the state or any political subdivision thereof. * * *"

In *Fidelity & Casualty Co.* vs. *The Union Savings Bank Co.,* supra, the court said the only right which the state might assert, apart from its security, was "to present the claim for allowance and payment of dividends on a parity with claims of unsecured creditors."

In view of these authorities, I am of the opinion that Section 299, General Code, does not preclude the Treasurer of State, as an "officer * * * of the state," from certifying to the Auditor a claim against a closed depository bank, pursuant to Section 20, General Code. I am of the view that such a claim is one "due and payable to the state" within the meaning of said Section 20.

Your second question is whether interest at the rate provided in the depository contract accrues during the period when a state depository bank is in the hands of a conservator under Section 710-88a, General Code. The latter section reads 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. Nothing herein contained shall be so construed as to vest title to any of the assets of such bank in the conservator so appointed. * * *"

Under this section the conservator operates the bank subject to the restrictions, such as the limitation of withdrawals, that may be prescribed by the Superintendent of Banks. A bank in conservatorship is a going institution as distinguished from a bank in liquidation, where the depositors have only claims against the assets and double liability collections in the possession of the Superintendent of Banks.

I find no provision of law terminating the payment of interest upon depository contracts during conservatorship. In an opinion reported in Opinions of the Attorney General, 1933, Vol. 1, p. 589, I held that a bank operating upon a restricted basis under Section 710-107a, General Code, and a Proclamation of the President of the United States, issued March 6, 1931, was not relieved of paying interest upon public funds at the contract rate during such period of restriction. I see no material distinction between a bank so operating and one under conservatorship. I therefore conclude that a state bank is legally liable for interest at the contract rate for state funds on deposit during the period when such bank is in conservatorship under Section 710-88a, General Code.

When the Superintendent of Banks takes possession of the business and property of a bank under Section 710-89, General Code, he takes title to and possession of its assets to be liquidated for the benefit of the depositors and other creditors.

In the case of *Felter* vs. *Bank of Leipsic Co.,* 31 N. P. (N. S.) 241, holding constitutional Section 710-89, General Code, as it existed prior to the amendment of 1933 (115 O. L., 19), the court said at p. 245:

"Plaintiff may not realize on her contracts 100%, but this court does not believe that plaintiff's contracts have been impaired, in the sense as provided in the Constitution. She still has her contracts. And the bank still has the same assets. The assets are still extant—they are all there. Plaintiff has lost nothing, but the restriction of payment, and that she lost because of depreciated values or bad loans. *If plaintiff's contracts were impaired, they were impaired on January* 14, 1932, *when the bank, a dying financial institution gasping for breath, was taken over by the superintendent of banks for liquidation,* and not when it resumed business on October 12, 1932, after having, at least, some life pumped into it. Plaintiff would have the court believe that the Bank of Leipsic was taken over by the superintendent of banks of Ohio for the purpose of resuming business, whereas, in truth and fact, it was taken over to conserve the assets for the depositors. The resumption of business was an afterthought. The plan approved by the Court of Common Pleas was approved with the hope of restoring her contracts, *already broken and impaired,* that they may have new life, and be saved from complete ruin." (Italics the writer's.)

In the case of *Fulton vs. B. R. Baker-Toledo Co.,* 128 O. S., 226, in which the Supreme Court held that the holder of a preferred claim against a bank in liquidation was not entitled to interest, the court said at p. 229:

"As given in 2 Bouvier (Rawle's 3d Ed.), 1642, interest on debts is 'The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.'

Now the debtor in this case did not detain the money. The state of Ohio detained it. Moreover, after the superintendent of banks, under the Code, has taken over a bank for the purposes of liquidation, the bank, the debtor, has no use of the money. It is true that the preferred creditor also has no use of the money, *but the same thing is true of every general creditor of the bank, such as depositors in savings accounts or in time deposits, who would be entitled to interest for the use of such money. They also have no use of their money when the bank is insolvent, and they secure no compensation for being deprived of the use of their money."* (Italics the writer's.)

The state or a political subdivision thereof is in no different position than the ordinary holder of an interest-bearing account. Both classes of depositors have contracts with the bank which are breached when the institution is taken over for liquidation. By the happening of such condition the bank is unable to perform its agreement to repay the principal and accrued interest upon demand. Thereafter, the holder has merely a claim. In view of the foregoing authorities, I am of the opinion that such claim does not bear interest at the contract rate.

Section 710-91, General Code, as amended (115 O. L., 132), effective March 31, 1933, provides that when the Superintendent of Banks takes possession of a bank and posts the notice of that fact, prescribed by Section 710-90, General Code, "interest on deposit shall thereupon cease to accrue at the rate specified in contracts of deposit. * * *" In view of the authorities above cited, it is

unnecessary to determine whether this section can be applied to contracts made prior to its effective date. In my opinion the above language was inserted in the extensive revision of that portion of the banking act applicable to liquidation out of an abundance of caution, and is not an implied recognition that the law was otherwise prior to its enactment.

Your next question concerns the authority of the Treasurer of State to accept the compromise offered by the surety companies on the depository bond. The Elyria Savings and Trust Company has been authorized to resume business under Section 710-89a, General Code, by order of the Common Pleas Court of Lorain County. *In re Elyria Savings & Trust Co.*, No. 35149, decided September 14, 1934.

Under the terms of the plan for the resumption of business, the bank assumed 50% of the deposit liabilities of the old bank. Under the proposed compromise, referred to in your letter, the resuming bank is to pay $52,673.70 in cash. In addition the state is to receive $44,551.78 in cash from the surety companies, upon assignment to them of Class B debenture notes of the Andwur Mortgage Loan Co. in the face amount of $50,673.70. Under the plan for resumption of business, such debentures are issued to all depositors. For this reason the notes have been issued to the State of Ohio rather than to the surety companies. Thus under the terms of the compromise, the state is to receive in cash the sum of $97,225.48. During the period of conservatorship the Treasurer has received as interest the sum of $2,774.52. Thus the state will receive $100,000.00, the face amount of its deposit and will, under the terms of the compromise, relinquish its claim to interest in the amount of $3,347.36.

The notes referred to are issued against certain slow assets of doubtful value not eligible for retention in the resuming bank. These notes are junior to a debt of $100,000.00 to the Reconstruction Finance Corporation and to Class A debenture notes in the amount of $135,000.00, issued to depositors holding collateral in lieu of that portion of their deposit liability which they waived under the plan.

You state that the claim has been certified to you by the treasurer, which certification I deem proper, as stated above. Under the reasoning used to answer your first question, I conclude that you can properly certify the claim to this office under Section 268, General Code. The legislature has recognized the right of the state and its political subdivisions to consent to a plan for the resumption of business by enacting Section 710-89a, General Code. This section reads in part:

> " * * * All depositors and creditors, including the state or any political subdivision thereof, if a creditor, who shall fail to file such objections within such time fixed by the court, shall be conclusively deemed to have consented to the resumption of business by such bank upon the conditions approved by the court, and shall be bound by the order of the court approving the same. * * *"

The legislature must have known that all such plans involve the waiving of a portion of the deposit liability.

Section 268, supra, provides in part:

> "The attorney general and auditor of state may adjust any claim in such manner as they deem equitable."

It is clear from this language that the Auditor of State and Attorney General have authority to compromise the claim in question. See Opinions of Attorney General for 1915, Vol. 1, p. 885.

You further inquire whether the Treasurer of State could accept the debenture notes and "discount them to the surety companies." The Treasurer of State has submitted to me for examination one of the notes in question. Since under the terms of the compromise the sureties are to pay cash upon delivery of these notes, it is not contemplated that the state shall hold these notes after consummation of the compromise. I see no reason why the state should not accept these notes solely for the purpose of transferring them to the surety companies under the terms of the compromise. However, I note that the instruments are in form negotiable. The printed form of endorsement on the notes is as follows:

"Elyria, Ohio. (Date)................................, 19.......
FOR VALUE RECEIVED, pay to the order of
....
(Signed)..
Payee."

In order that there may be no possibility of a claim at some future time that the state is liable as an endorser, I recommend that the words "without recourse" be inserted after the name of the endorser. In the case of *Cameron* vs. *Ham*, 23 O. A., 359, the court held, as disclosed by the second branch of the syllabus:

"Words 'without recourse' accompanying indorsement indicates that one so signing does not intend to assume position of unconditional indorser or to incur any liability if note is not paid at maturity on demand or if parties to note are insolvent; such indorsement constituting indorser mere assignor of title to paper."

I am of the view that under such an endorsement there would be no liability upon the state of Ohio or the Treasurer of State, as its agent, if the notes should not be paid when due, which will be 7½ years after December 12, 1934.

I should perhaps point out that the Court of Common Pleas, in approving the plan, purported to bind the state according to the terms of the proposed compromise. The following appears in its journal entry:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon release to the Treasurer of State of the state of Ohio of the $2,000.00 present segregated account, and the payment of the sum of $50,673.70, being 50% of the present restricted deposit, with accrued interest therein included up to and including Aug. 25, 1934, the date when said Bank was taken over by the Superintendent of Banks for liquidation, and the delivery to the State of Ohio, or said Treasurer of State, of the Class B Debenture Note of The Andwur Mortgage-Loan Company for the like amount of $50,673.70, all rights, claims and demands of the State of Ohio, the Treasurer of State of the State of Ohio, the United States Fidelity & Guaranty Company and the New

Amsterdam Casualty Company, against said The Elyria Savings and Trust Company arising from or growing out of said deposit of state of Ohio funds and/or the surety bonds given to secure such deposit, shall be, and they are hereby, forever cancelled, discharged, barred and forever held for naught, and each of said named parties is hereby forever enjoined from asserting, or attempting to assert, any further claim against said The Elyria Savings & Trust Company on account of said deposit or the application for, execution and delivery of said surety bonds."

Whether such order is binding upon the state need not be considered in answering the specific questions contained in your letter, since I have concluded upon other reasoning that there is authority for the Auditor and the Attorney General to effect the compromise. Nevertheless, I invite your attention to the following authorities holding constitutional Section 710-89, concerning the reopening of banks, as such section existed prior to the enactment of the present section 710-89a, General Code. *Felter* vs. *Bank of Leipsic Co.*, supra; *Floyd Chilton* vs. *The George D. Harter Bank,* Stark County Common Pleas Court, Unreported; *In re Citizens Savings Bank of Pemberville,* 30 N. P. (N. S.) 291; *In re City Trust & Savings Bank of Youngstown, Ohio,* 17 O. L. Abs., 165.

Specifically answering your inquiry, it is my opinion that:

1. A claim against a duly constituted state depository in process of liquidation, and against the sureties on the depository bond, may, under Section 20, General Code, be properly certified by the Treasurer of State to the Auditor of State.

2. Such claim may be compromised by the Auditor of State and the Attorney General, pursuant to Section 268, General Code.

3. Interest provided in a state depository contract continues to accrue during the period when the depository bank is under control of a conservator, pursuant to Section 710-88a, General Code.

4. Interest payable under such depository contracts ceases when the Superintendent of Banks takes possession of a bank for liquidation pursuant to Section 710-89, General Code.

5. Where, under a plan approved by a court of competent jurisdiction, for the reopening of a state depository bank, debenture notes of a mortgage loan company are made payable to all depositors, including the State of Ohio, the Treasurer of State, in completing a compromise between the sureties on the depository bond and the state, the same having been approved by the Auditor of State and the Attorney General, may legally endorse such debenture notes to the surety companies "without recourse."

Respectfully,
John W. Bricker,
Attorney General.

3762.

APPROVAL, BONDS OF WAYNE RURAL SCHOOL DISTRICT, ADAMS COUNTY, OHIO—$932.50.

Columbus, Ohio, January 7, 1935.

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