577.

PUBLIC DEPOSITOR HOLDING SECURITY OR COLLATERAL —PROOF OF CLAIM AGAINST INSOLVENT BANK FOR FULL AMOUNT OF DEPOSIT—DIVIDENDS ACCRUE TO INSOLVENT BANK, WHEN.

SYLLABUS:

A public depositor holding security or collateral for its deposit and having proved its claim against an insolvent bank for the full amount of its deposit, and later having realized upon part of its security prior to the declaration of a dividend, is entitled to a dividend based upon so much only of its claims remains after deducting the amount realized upon its security.

The opinion of the Attorney General, reported in Opinions of the Attorney General for 1933, *Vol.* II, *page* 908, *is followed in so far as applicable to the above question.*

COLUMBUS, OHIO, May 11, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I have your recent request for an opinion which reads as follows:

> "We are enclosing herewith letter received from the city solicitor of Jackson, Ohio, in which he indicates that he is not quite satisfied with our answer to the question submitted by him.
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> Therefore, may we request that you examine the correspondence and advise us in answer to the following question:
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> Question. If the depository of a city's funds closes, proof of claim being made on the full amount of the city's deposits, and prior to the payment of the first dividend, the city sells a part of the collateral given to secure said deposit, should the dividends be based on the amount stated in the proof of claim, it being the full amount of the deposit, or should the dividends be based on the full amount minus the sum realized from the sale of the collateral?"

I also have before me the letter of the Solicitor of the city of Jackson, Ohio, and a copy of your answer to him. Particular note is taken of the last two paragraphs of the letter from the Solicitor, which reads as follows:

"Several years ago the Attorney General gave to the Solicitor of Jackson, Ohio, an informal opinion to the effect that the dividends should be based on the full amount of the deposit, regardless of anything that might be realized from the sale of collateral.

"However, tending toward the opposite conclusion we have read the case of *State National Bank* vs. *Esterly,* 69 O. S. 24, which would seem to hold the opposite conclusion."

The syllabus of *Bank* vs. *Esterly,* above referred to, reads as follows:

"When 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."

As pointed out by the Court in the case of *In re Peoples Commercial Bank,* 30 N. P. (n. s.) p. 192, speaking of the point of law raised:

"This question has been frequently before the courts of the various states and the Federal courts, and it seems the courts are about equally divided upon the question. A number of eminent courts, including the Supreme Court of the *United States, Merrill* vs. *Bank,* 173 U. S. 131, hold, that the creditor is entitled to prove his claim for the full amount, and to receive dividends thereon, without first deducting the collateral, and receivers of National Banks follow that rule, but the Supreme Court of the State of Ohio had this question before it, and after full consideration of the cases, including the United States Supreme Court, case of *Merrill* vs. *Bank,* held:

'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 collateral 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 collateral; 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.' *State National Bank* vs. *Esterly,* 69 O. S. 24.

The opinion in that case is broad enough to be applicable to all cases where insolvent estates are to be administered, unless the statutes provide otherwise."

Again, the Court in the case of *Engraving Company et al* vs. *Ragland,* 30 N. P. (n. s.) at page 110, makes this comment concerning the decision of the Ohio Supreme Court in *Bank* vs. *Esterly,* 69 O. S. 24:

"In the case of *Bank* vs. *Esterly,* 69 O. S., 24, the court in its opinion analyzed the insolvency laws of Ohio for the purpose of determining by analogy the proper basis of distribution in a receivership case. The exact point decided was that security upon which the creditor had realized at any time before a dividend was declared must be credited upon the entire claim and a dividend paid only on so much of the debt as remained after deducting the proceeds of the collateral. The court, after referring to *Merrill* vs. *Bank* and *Bank* vs. *Armstrong, supra,* and expressing dissent from their reasoning, had this to say at pages 35 and 36:

'In cases of assignment under our insolvent laws, the legal title of the property of the assignor passes to the assignee, in trust for the benefit of, not some, but all creditors of the assignor. The unsecured creditor is as fully represented by that title as is he who holds collateral security for his claims, and if he becomes the equitable owner of such "a proportional part of the whole as the debt due him is of the aggregate of the debts", his equitable title is not weakened nor his equitable joint share decreased by the fact that another creditor has security for all or part of his claim. But to allow a dividend to the secured creditor on the basis of his entire claim unreduced by collected collaterals, would diminish the share of the general or unsecured creditor in the estate of the insolvent debtor. In other words, to pay a dividend on more than is actually due on a secured claim will unjustly reduce the general fund in which the unsecured creditor is entitled to share.'

And at page 37, after quoting the provisions of the statute imposing the terms of the affidavit in proof of claim, said:

'The making and filing of this affidavit is not optional with the creditor, but it is essential to the proper allowance of his claim, and it proceeds upon the evident policy of the

law, that the affidavit will truthfully disclose both the nature of the claim and its condition. * * *'

And at page 38:

'And we think that this information as to the condition of the claims is to be furnished so that a dividend may be made on equitable principles, because whatever amount a secured creditor receives beyond what is actually due him after application of money realized from collaterals, or after allowance of admitted offsets, must be taken from the general fund and therefore from the general creditor.'"

Your particular inquiry indicates that there has been a realization by the city of Jackson upon its security since it proved its claim for the full amount of its deposit and the declaration or payment of the dividend inquired about, and you want to know upon what amount the dividend in question should be declared upon. This is almost analogous to the situation discussed in the case of In re Peoples Commercial Bank, supra, and the language of that court on pages 193 and 194 of said opinion relative thereto reads as follows:

"It is claimed by the treasurer that the claim having been presented before the collateral was sold and the superintendent of banks having allowed the claim for the full amount, and issued a certificate therefor after the securities were sold, binds the superintendent to pay dividends upon that amount, and that the court should not interfere with the action of the superintendent."

* * * * * * * * *

"The superintendent of banks in the distribution of assets of an insolvent bank is governed by the same principles of law as are other trustees, and receivers, charged with like duties. The mere fact that the superintendent issued a certificate of claim for the full amount, certainly could not bind him if he afterward discovers a mistake, nor could it bind an objecting creditor. The very purpose of the statute is to provide a method of bringing the matter before the court for adjudication. Nor, as was held in *Bank* vs. *Esterly,* above, pages 39 and 40, does it make any difference that the collateral was sold after the claim had been allowed."

The foregoing was the rule recognized in the case of *Western Bank and Trust Co.* vs. *Ragland,* 47 O. A. 270, wherein on page 272 of its opinion the Court observes as follows:

"Under the issues made by the pleadings, it would seem that the proper procedure would have been for the trial court to order the allowance of the claims for the amount at the time unsatisfied and unpaid; the question of the amount of dividends to be considered when declared. This procedure is indicated in the case of *State National Bank* vs. *Esterly, Recr.*, 69 Ohio St., 24, 68 N.E., 582, the latter part of the syllabus in that case declaring that 'this sum (the unpaid debt) may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount.'"

The question raised in your letter was passed upon inferentially in Opinions of the Attorney General for 1933, Vol. II, page 908, the syllabus of which reads as follows:

"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 redelivery to the liquidator of any of the securities pledged whether or not there is a surety bond securing the particular account."

However, in the opinion referred to the public depositor had not realized upon its security. A reading of the opinion and authorities cited therein indicates that, upon the facts set out in your letter, the opinion is not at variance but rather in harmony with the Esterly case.

The case of *Oakwood* vs. *Fulton*, 14 O. Abs. 685, would seem to be a complete answer to your question.

In the above case the city of Oakwood had on deposit in the bank in question $77,074.58 at the date the bank went into liquidation. Shortly thereafter the public depositor in question realized the sum of $10,000 upon the collateral held as security. It then presented a proof of claim to the Superintendent of Banks asking that it be paid dividends upon the original sum of $77,074.58. The Superintendent

of Banks allowed said claim in the sum of $67,074.58, which sum was the amount of the deposit less the $10,000 realized by the sale of the assets.

It was contended that, despite the holding of the Supreme Court of Ohio in *Bank* vs. *Esterly, supra,* the case of *Myers* vs. *Bank,* 173, U. S. 131, being the holding of the Supreme Court of the United States on the legal principle involved, should control.

The *Court of Appeals in Oakwood* vs. *Fulton* declared in the syllabus of the above case as follows:

> "1. A legal principle promulgated and announced by the Supreme Court of Ohio is binding on all inferior courts in the State, even though it may be contrary to the rule announced by the United States Supreme Court.
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> 2. A creditor who holds collateral security for a part of the claim against his insolvent debtor, upon which he has realized, before a dividend in insolvency is declared is entitled to a dividend on so much money only of his debt as remains after deducting the proceeds of the collateral.
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> 3. A city having funds on deposit in a bank, secured in part by collateral, upon the liquidation of the bank is, notwithstanding Section 4295 G.C., entitled to dividends on so much of its deposit as remains after deducting the amount realized from the sale of the collateral."

It is submitted that the foregoing is the law of Ohio in answer to the question you ask. The informal opinion of the Attorney General referred to in your letter to the Solicitor of Jackson, if it holds as you quote it, is in error or you are in error in your application of it to the question you present.

It is my opinion, in specific answer to your question, that the city of Jackson, having realized upon its security after proof of claim being made to the liquidating bank and before the payment of a first dividend, is entitled to a dividend on so much only of its debt as remains after deducting the amount realized upon its security resorted to and collected upon. The opinion of the Attorney General, reported in Opinions of the Attorney General for 1933, Vol II, page 908, is followed in so far as applicable to the above question.

Respectfully,

HERBERT S. DUFFY,

Attorney General.