is no provision for exempting the bonds issued by an incorporated church society in the hands of bond holders.

Therefore, it seems clear under this constitutional provision that the bonds in question should be listed for taxation and are taxable as not coming within the constitutional exemption of bonds. The fact that the proceeds from the sale of said bonds are to be used in the construction of a house for public worship would not make said bonds exempt or absolve the holders of the bonds from listing the same for taxation, and this would be true whether the bonds were in the hands of members of the congregation or in the hands of individuals not members of the congregation.

It is therefore my opinion that bonds issued by an incorporated company for the purpose of constructing a house of public worship, are not exempt from taxation in the hands of the bond holders.

Respectfully
EDWARD C. TURNER,
Attorney General.

2450.

SECURITIES—STATE TREASURER LIABLE FOR DEPOSITS—COUNTY OFFICERS LIABLE—INSURANCE AGAINST LOSS DISCUSSED.

SYLLABUS:

1. *Where securities deposited with the state treasurer under Section* 710-150 *of the General Code and Section* 330-3 *of the Code are lost through burglary, holdup, theft or otherwise, the state is not liable, but such liability will extend against the treasurer personally and the sureties on his official bond irrespective of any question of negligence in connection with such loss.*

2. *Where securities deposited with county, township, village, city or school district treasurers to secure the deposit of the funds of such subdivision are lost through burglary, holdup, embezzlement or other wrongful conversion the treasurers of such subdivisions and their sureties are liable irrespective of negligence in connection with such loss. In such cases the subdivisions themselves would only be liable in the event of negligence in the custody of such securities.*

3. *There exists no statutory authority to expend public funds for the insurance of either the public or the treasurers personally against liability for the loss of securities deposited with such officers, but such officers may personally from private funds effect such insurance.*

4. *The treasurer of state has no statutory authority officially to set up an insurance fund to provide burglary, robbery and embezzlement insurance, the cost of which is to be divided pro rata among the institutions depositing securities with such treasurer; but such an arrangement may be effected by voluntary arrangement between such institutions and the treasurer acting as an individual.*

COLUMBUS, OHIO, August 17, 1928.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication, as follows:

> "My attention has been indirectly called to an opinion rendered by you to the Treasurer of State under date of February 13, 1928, the number of which opinion I am advised, being 1705 and in which you state in part as follows:

'The state will not be liable should securities deposited with the State Treasurer, under Section 710–150, General Code, be lost through burglary, holdup, theft or otherwise, but in such case the liability for the loss of such securities will be one against the State Treasurer and the sureties upon his official bond.'

There are at present, eighty-seven State Banks and twenty-nine foreign trust companies, qualified to do trust business in Ohio. This means that each of them has deposited with the Treasurer of State, under Section 710–150 of the General Code of Ohio, One Hundred Thousand Dollars in cash or approved securities, or a grand total of Seventeen Million Seven Hundred Thousand Dollars, against which if I am properly informed, there is a bond given by the Treasurer of State in an amount of Six Hundred Thousand Dollars.

In addition to these securities which are deposited with the Treasurer of State, many banks have deposited with that official certain securities to secure deposits of public funds under the provisions of Section 330–3 of the General Code of Ohio.

Information has reached this department that many of the banks, qualified to do a trust business have become alarmed at this situation and I would therefore appreciate an opinion from you, covering the following questions:

1. Where would the liability attach in case securities deposited with the Treasurer of State to secure a deposit of public money become lost through burglary, holdup, embezzlement or other wrongful conversion. Would the loss be a liability against the State or against the Treasurer of State personally?

2. Where would the liability attach in case securities deposited with county, township, village, city or school district treasurers to secure deposits of the funds of those subdivisions be lost in the manner described above. Would that liability be one against the subdivision itself or against the Treasurer as an individual?

3. Is there authority in the law whereby the Treasurer of State or the Treasurer of any other governmental subdivision may insure either the state or himself personally against such liability?

4. If there is no such authority, would it be possible, in the case of the State at least, for the Treasurer of State to set up an insurance fund for providing such burglary, robbery and embezzlement insurance, the cost to be divided pro rata among those institutions having securities on deposit?"

As stated in my prior opinion to which you refer, no legal liability could in any event attach to the state for the loss of securities deposited with the Treasurer of State for the reason that no provision has been made by the Legislature whereby the state may be sued. I also pointed out that some time ago the Legislature passed a special act appropriating a sufficient sum of money to cover the amount of a lost bond which had disappeared from the state treasury, apparently without any negligence on the part of the treasurer. While I therein stated that this act was passed in express recognition of the fact that under the laws of Ohio and the terms of the official bond of the treasurer he was required and obligated to pay to the bank the value of that bond, this was at best merely a declaration of the views of the Legislature as to the liability and would of course not be conclusive on the courts. The appropriation in this instance might as well have been based upon the moral obligation of the state to make reimbursement to the bank itself without any liability being incurred directly by the treasurer and his sureties because of the loss. Accordingly I believe it necessary, in view of your first inquiry, to re-examine more in detail the question as to the

liability of the treasurer for loss of securities deposited with him as collateral to the deposit of public moneys, when the loss is sustained through burglary, holdup, embezzlement or other wrongful conversion.

In the consideration of this question it is necessary to bear in mind that there is a distinction between the loss of public funds or moneys and the loss of moneys or securities belonging to others which by law are placed in the custody of the treasurer.

While the courts of other jurisdictions are not in accord with respect to the liability of a public treasurer for the loss of public moneys, the rule in Ohio may be said to be definitely settled. A discussion of the subject is contained in 22 R. C. L., pages 468, 469, as follows:

> "Not infrequently public officers are called bailees, and again are said to hold public funds as trustees and clothed with their legal duties and liabilities. Yet by the weight of authority a public officer is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. He is called on to account according to a much more rigorous standard of responsibility. Therefore, while in a general sense they may be said to be bailees, still they are special bailees who are subject to particular obligations for the benefit of the public, and the degree of their responsibility is not to be determined by the ordinary law of bailment."

The added responsibility as to public funds is definitely established in this state by a series of cases decided by the Supreme Court, commencing with the case of *State of Ohio* vs. *Harper et al.*, 6 O. S. 607, the first branch of the headnote of which is as follows:

> "The felonious taking and carrying away the public moneys in the custody of a county treasurer, without any fault or negligence on his part, does not discharge him and his sureties, and can not be set up as a defense in an action on his official bond. The responsibility of the treasurer in such case depends on his *contract*, and not on the law of *bailment*."

In the course of the opinion, on page 610, appears the following:

> "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do those acts. It is, in effect, an insurance against the delinquencies of himself, and against the faults and wrongs of others in regard to the trust placed in his hands. He voluntarily takes upon himself the risks incident to the office, and to the custody and disbursement of the money. Hence it is not a sufficient answer when sued for a balance found to have passed into his hands, to say that it was stolen from him; for even if the larceny of the money be shown to be without his fault, still, by the terms of the law, and of his contract, he is bound to make good any deficiency which may occur in the funds which come under his charge. *Muzzy* vs. *Shattuck et al.*, 1 Denio 233; *United States* vs. *Prescott et al.*, 3 How. 578; *Commonwealth* vs. *Comly*, 3 Penn. State Rep. 372. The distinction between this and a common case of bailment, is that the law of the latter is generally founded upon the *absence* of any positive engagements between the parties to the *hiring*, or as it is called, the *locatio-conductio*, and therefore the question arises, what obligations may, with reference to public policy and general convenience, be implied by law in the absence of such positive engagements. The express contract of the parties

> may, as in the case now under consideration it has done, vary or supersede those derived from the law of bailments. Story on Bail. 7."

While this was said with relation to the particular bond in question, namely, the bond of the county treasurer, yet I believe that the reasoning therein set forth is applicable to all public treasurers in this state and to their bonds.

In the later case of *Board of Education* vs. *McLandsborough*, 36 O. S. 227, there was involved the right of the Legislature to authorize the levy of a tax to meet a loss resulting from the theft of public money in the custody of the treasurer of the school district, the loss having been sustained without negligence on his part. In sustaining the right of the Legislature in this instance the court re-affirms the case of *State* vs. *Harper*, supra, in holding that the treasurer and his sureties are absolutely liable for loss sustained without negligence, and says: "The bond involved in the consideration of this case is not different in legal effect from the bond in Harper's case."

The case last above cited was quite recently referred to by the Supreme Court and the doctrine of the Harper case at least inferentially approved in the case of *Spitzig* vs. *State ex rel.*, 119 O. S. 117, where the court on page 124 say:

> "It was said by this court in the opinion in that case that the loss of the money without fault on the part of the public officer presented no defense to an action for its recovery, citing *State, to use of Wyandot County* vs. *Harper*, 6 Ohio St., 607, 67 Am. Dec., 363."

If this statement, which was unnecessary to the decision of the case there under consideration, may be taken to be the law, it may be stated that public officers whose duties include the custody of public moneys are the insurers thereof and they and their sureties can not escape liability for loss by showing that they were not negligent in the performance of their duties. It does not necessarily follow, however, that the same rule is applicable in the event of the loss of securities not belonging to the state but in the custody of the officer by virtue of law.

I am, of course, in this respect speaking of cases in which the loss was not occasioned by the negligence of the officer in question. In the event that a treasurer himself embezzled the securities or is negligent in the matter of the custody of such securities, obviously he has not faithfully performed the duties of his office and consequently there is a liability not only upon himself but also upon his sureties under any form of surety bond with which I am familiar. If, however, there be no negligence and the loss of the securities occurs in spite of the faithful performance of his duties, an interesting question arises. An extreme example of cases of this character would be where a public treasurer should be murdered in the course of a holdup in which funds and securities in his possession were taken. Manifestly, any one who guards with his life property entrusted to him can scarcely be said to be negligent, and yet this very situation has arisen in other states and has received entirely different answers, one case holding the estate and the sureties liable and the other holding to the contrary.

It is also to be observed from the language quoted from the Harper case, supra, that the decision was at least partially predicated upon the fact that the statute required the treasurer to pay over all money with which he stood charged, and the bond was conditioned that he should so pay over. In fact, Section 2633 of the Code specifically requires that the bond shall be "conditioned for the payment, according to law, of all moneys which come into his hands, for state, county, township or other purposes". Accordingly, it may be questioned whether the word "moneys" is broad enough to include securities not the property of the county but with which he stands charged as custodian. Examining the provisions of law with respect to the state treasurer it is found that Section 297 of the Code requires the bond to be conditioned "for the faithful discharge of the duties of his office." By the terms of later sections the treasurer is

required to account for all moneys, securities, bonds, etc., in the treasury and make settlement with his successor upon leaving his office. Section 318 of the Code states:

> "The liability of the outgoing treasurer, * * * shall not be discharged until such settlement and payment is made, * * *."

Accordingly, there may be some question as to whether the treasurer, because of the specific mention of securities in his custody, is not absolutely liable upon failure to account for such securities. That is to say, the duty to account is absolute and no excuse for failure to account will relieve the treasurer or his sureties.

In view of the attitude of the courts of Ohio as indicated by the above quotations, I am of the opinion that the liability of the treasurer and his sureties would be absolute in the event of the loss of securities in his custody, although I recognize a serious question on this point exists. This is illustrated by the following quotation from 22 R. C. L., page 464:

> "It is the duty of every public officer, or of his personal representative on his death, to account for and pay over or deliver to his successor all public moneys, books, papers and other property in his possession belonging to the office. Where the law authorizes or requires a collecting officer to receive anything but money, as to such receipts he is normally liable only for what he has specifically received. All public moneys must be accounted for, and the officer receiving them cannot make a contract as to their return at the happening of a contingency not recognized by law. Yet it seems established that public officers having in their official custody money belonging to others than the public are not responsible for its loss occurring without negligence on their part."

The rule set forth in the last sentence of this quotation seems to me to be the better rule inasmuch as logically a public treasurer having the custody of property belonging to others can at best be no more than a trustee, accountable for a high degree of care, but subject to no liability where loss of property in his custody occurs without any negligence whatsoever. In view of the attitude of the Ohio courts, however, I am inclined to the belief that they would extend the liability of the treasurer and his sureties to cover losses of property belonging to others which, by law, is placed in his custody.

I have therefore reached the conclusion in answer to your first inquiry that the treasurer of state would be liable in the event of the loss of securities deposited with him, whether such loss resulted from his negligence or that of his employes or otherwise. This loss would also be a liability of his sureties, but no liability would exist on the part of the state which could be enforced.

In your second inquiry you inquire as to the liability in the event of similar loss of securities deposited with the treasurers of the various subdivisions of the state.

Although the question of the loss of securities of others, which are not of course technically public funds, has not received judicial consideration in Ohio, for the reasons hereinabove set forth I am of the opinion that the treasurers of such subdivisions would be liable irrespective of any question of negligence, and such liability would probably be chargeable also against the sureties on the bonds of such officers, although this question is one of considerable doubt and the determination would of necessity rest upon the interpretation of the language in each individual bond coupled with the statutes applicable thereto.

You further inquire, however, whether there would be a liability against the subdivision itself. This question is one which, so far as I have been able to discover, has never received consideration by the courts of this state. The relation between the subdivision and the bank depositing the securities directly bears upon the question and should therefore be carefully analyzed.

In awarding funds to banks, the state and its subdivisions are virtually loaning money to them and in accordance with the statutory requirement there is pledged as security for the loan the securities required by statute. The relation differs in no substantial respect from the ordinary transaction of a bank loaning money to one of its customers and taking as security for the loan certain collateral. Under such circumstances the question arises as to the liability of the bank in the event of loss of the collateral through no fault of its own. I am of course speaking of a case in which there is no express contract which might extend the liability of the bank, for it is my understanding that, in the deposit of the securities as required by law to secure the deposit of public funds, no express contract is entered into by the state or its subdivisions guaranteeing the return of the securities or their equivalent. In the absence of such contract the ordinary rule of pledge apparently applies. This rule is that the duty of the pledgee is to exercise ordinary care and he is liable only for neglect to use such care. It is stated as follows in 31 Cyc., page 827:

> "Since the pledge is a bailment for mutual benefit, it is the duty of the pledgee in the absence of a special contract modifying his common law liability, to exercise ordinary care in the preservation of the property; and he is liable to the pledgor in case of loss, destruction or depreciation of the property by reason of his negligence."

In accordance with this rule it has been held in New York that the pledgee is not liable for the loss of a pledge stolen from his possession if he exercised ordinary diligence in caring for it. *Abbett* vs. *Frederick*, 56 How. Prac. 68.

I have reached the conclusion that the subdivisions of the state would not be liable for the loss of securities where no negligence has been the occasion of the loss. Just what would constitute negligence on the part of the subdivision itself is a question of extreme difficulty. It is a serious question whether the doctrine of *respondeat superior* would be applicable in the event of negligence on the part of the treasurer so as to make the subdivision itself responsible. In the recent case of *Fidelity & Casualty Co.* vs. *Savings Bank Co.*, 119 O. S. 124, the fourth branch of the syllabus is as follows:

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

If the state acts in a proprietary capacity in loaning its funds, it necessarily follows that each of the subdivisions thereof is acting in a proprietary capacity when engaged in a similar enterprise. If this be true, the ordinary rule applicable to the liability of municipal corporations for acts of their servants done in the exercise of a proprietary function would seem to apply, which is that the doctrine of *respondeat superior* may be invoked and the municipality held liable.

The deposit of funds being a proprietary function, it would seem to follow that the receipt of the securities as protection for the deposits would also be in exercise of a proprietary function, and the extension of this rule would make each of the subdivisions of the state liable for the negligence of its officers. I realize, however, that it would be dangerous for me to declare such liabilities to exist in view of the reluctance with which the courts have recognized the liability of certain of the subdivisions, particularly counties. That is to say, the courts have been very reluctant in holding counties liable upon any cause of action not authorized by statute. On the other hand, if in a particular instance a bank would have on deposit ten thousand dollars in funds of a county and the securities which it had deposited with the county treasurer should be lost through negligence, I believe that the bank might properly set off

against its liability for the deposit the damage which it has suffered by reason of the loss of the securities. In other words, the bank would be justified in refusing to pay out from the deposit of the county until satisfaction were made to it for the loss of its securities.

In view of the foregoing, I am of the opinion that where securities deposited with county, township, village, city or school district treasurers to secure deposits of funds of such subdivisions are lost through burglary, holdup, embezzlement or other wrongful conversion, such treasurers and their sureties would be liable therefor irrespective of any question of negligence. Such subdivisions would themselves only be liable in the event that there had been a failure to use ordinary care in the preservation of said securities.

In your third inquiry you ask as to the authority of the Treasurer of State to insure himself or the state against such liability and also as to the authority of other treasurers so to do.

I find no statutory authority for the insurance of public funds. In a series of opinions, No. 1214, dated October 31, 1927, addressed to Hon. Elmer L. Godwin, Prosecuting Attorney, Bellefontaine, Ohio; No. 1221, dated October 31, 1927, addressed to the Bureau of Inspection and Supervision of Public Offices; and No. 1685, dated February 8, 1928, addressed to Hon. Bert B. Buckley, Treasurer of State, the right of a county treasurer to insure such funds against burglary, holdup and the like received consideration and the right was denied. I am enclosing herewith copies of those opinions for your use. My previous conclusions were that the treasurer may not expend public funds for insurance nor have the county commissioners any authority so to do. This reasoning is equally applicable to all other treasurers, including the State Treasurer, since in these instances there is likewise no statutory authority for such insurance.

I call your attention to the fact that in my Opinion No. 1221 there is discussed the decision of the Court of Appeals of Clark County, in the case of *Funderburg et al.* vs. *James B. Webb*, in which a contrary conclusion was reached. In view of that decision I reached the conclusion that, while the right of the county commissioners to pay for such insurance does not exist, yet the decision is the law of the Second Judicial District and administrative officers in that district would be justified in following such rule unless and until reversed by a court of equal or superior authority. I am also giving no consideration to the subject of home rule, which might conceivably extend to municipalities the right to insure moneys and property in the custody of the municipal treasurer and expend public moneys therefor.

This conclusion does not, however, prevent the various treasurers from insuring themselves from any liability, this subject having been discussed in my Opinion No. 1685, of which the following is pertinent:

> "This conclusion would not, of course, prevent the county treasurer from personally insuring the money for which he is responsible against holdup or other contingencies which might result in loss. As you point out, county treasurers are personally responsible for moneys collected by them and their bondsmen would be liable in the event of any loss of public funds, irrespective of whether or not fault or negligence could be imputed to the officials. This subject is discussed in Opinion No. 527, a copy of which is enclosed. From that opinion I quote the following:
>
> 'It is the duty of the county commissioners to protect the county by securing this bond from the treasurer, but the treasurer himself, if he feels the necessity therefor, may take such means as he thinks proper to protect himself against the dangers incident to possible forgery or burglary.' "

It follows, therefore, that any public officer may, if he so desires, take out insurance to protect himself from any personal liability which may be imposed upon him as an incident to his office so long as public funds are not expended therefor.

Your fourth inquiry is as follows:

> "4. If there is no such authority, would it be possible, in the case of the State at least, for the Treasurer of State to set up an insurance fund for providing such burglary, robbery and embezzlement insurance, the cost to be divided pro rata among those institutions having securities on deposit?"

From what I have said it is clear that the Treasurer of State can not officially set up any fund of the character described. That is to say, he may not under his statutory authority set up any insurance fund which would be in any way a responsibility or liability of the state. This will not prevent him, however, from making any arrangement he sees fit with the various banks depositing securities whereby ratable contributions are made to him as their agent for the purpose of effecting the insurance in question. This arrangement would, of course, be entirely outside of his official duties and would necessarily have to be conducted by him as a private individual.

In view of the fact that the arrangement contemplated would be private in character, there would be of course no authority for the treasurer to refuse to accept the deposit of securities from a bank which would refuse to make the necessary contribution for the proposed insurance. In other words, the arrangement would necessarily be purely voluntary on the part of all parties concerned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2451.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND THE H. H. STURTEVANT MERCHANDISE COMPANY, ZANESVILLE, OHIO, FOR CARPETING FOR AUDITORIUM, OHIO UNIVERSITY, ATHENS, OHIO, AT AN EXPENDITURE OF $2,754.00—SURETY BOND EXECUTED BY THE NATIONAL SURETY COMPANY.

COLUMBUS, OHIO, August 17, 1928.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Board of Trustees of Ohio University, and The H. H. Sturtevant Merchandise Company, of Zanesville, Ohio. This contract covers the construction and completion of Carpeting contract for Auditorium, Ohio University, Athens, Ohio, and calls for an expenditure of two thousand seven hundred and fifty-four and 60/100 dollars ($2,754.60).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the controlling board to the expenditure has been obtained as required by Section 12 of House Bill No. 502 of the 87th General Assembly. In addition you have submitted a contract bond upon which the National Surety Company appears as surety, sufficient to cover the amount of the contract.