man and an automobile, and there may be other things incident to an election, of a like character, that would warrant such expense, but the kind of service mentioned in your first question does not seem to be one that could be said to be proper and necessary, no use being specifically stated.

It may be said that the intent of the election statutes is that all things for the proper conduct of an election be foreseen and provided for prior to the voting, so that the board of deputy state supervisors of elections and the clerk, excluding accidents, will have little else to do on election day except to attend to routine matters coming to the office incident to the casting of the votes.

In the aggregate the amount of money now paid in the conduct of the various elections of the state has become what may be accurately described as an enormous sum. The strictest economy in the interest of efficiency in the conduct of elections is enjoined upon all.

Section 5043 G. C. provides for the placing of the ballots, etc., in the voting places and for the manner in which returns, after election, to the deputy state supervisors, are to be made, and for the compensation and the mileage of such services. The plain intention of this section is that the mileage paid the presiding judge for such services should take care of his traveling expenses. Consequently, the answer to your second inquiry must be in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1931.

BANKS AND BANKING—CONTRACT MADE WITH BANK FOR DEPOSIT OF TOWNSHIP FUNDS WITHOUT COMPLYING WITH LAW RELATING TO A DEPOSITORY—CONTRACT VOID—WHO LIABLE—ACCOUNTING OF INCREMENT OF SAID FUNDS MAY BE REQUIRED OF BANK.

1. *A contract made with a bank for the deposit of the funds of a township as a depository without the passing of a resolution declaring such intention and containing provisions for all necessary details, as required under provisions of sections* 3320 *et seq., at a formal meeting of said trustees, at which a full and complete record is not kept, is void ab initio and fails, no depository being thus selected.*

2. *The deposit of the funds of the township in a bank by the township treasurer under such circumstances, even after a bond has been given by the bank, does not release the treasurer and his bondsmen from liability for any loss that thereupon may happen to said funds, nor relieve the township trustees and their bondsmen of liability for neglect in creating a depository as required by law.*

3. *The funds deposited with the bank under such circumstances being trust funds, the increment of which follows the same, an accounting may be required of said bank.*

COLUMBUS, OHIO, March 21, 1921.

HON. CLINTON W. FAWCETT, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Your two letters concerning a township depository read as follows:

> "Section 3320-3326 of the General Code of Ohio provide that the trustees of a township may deposit township funds in certain banks and a method of procedure is provided by said sections for the trustees to follow before the funds are awarded.

On January 7, 1920, the trustees of Liberty township, Putnam county, Ohio, awarded the funds of said township to the Bank of Leipsic, Leipsic, Ohio, but the board of trustees failed to comply with the provisions of said sections of the General Code. No resolution was passed and no competitive bids were considered. The only attempt to follow the law is a bond executed to the board of trustees by said bank. The following is a copy:

'Know all men by these presents that we, the Bank of Leipsic, Leipsic, Ohio, as principal and J. H. Edwards and S. F. Edwards, sureties, are held and firmly bound under the board of trustees of Liberty township, Putnam county, Ohio, by the penal sum of twenty thousand dollars ($20,000), for the payment of which we truly and firmly bind ourselves.

Dated at Leipsic, Ohio, this 7th day of January, 1920.

Conditions of this bond are such that whereas the Bank of Leipsic has been awarded the contract as depository for the funds of the board of trustees of Liberty township, Putnam county, Ohio, and to pay interest on the same at the rate of three per cent per annum from January 1, 1920, and to continue in force for two (2) years.

Now, therefore, as the said Bank of Leipsic shall well and truly account for all such moneys deposited in said bank by the said board of trustees of Liberty township or the treasurer of said board of trustees of Liberty township, and pay over to the said board of trustees upon their order all such moneys so deposited at the times and places designated by the said board of trustees, then this obligation shall be void, otherwise in full force and virtue by law. THE BANK OF LEIPSIC.'

Since the time the bond was executed and the funds awarded to the bank, the interest rates have increased and the new board of trustees now desires to withdraw said funds from the bank and award the same to this bank or some other bank that may bid a higher rate of interest. In other words, the trustees desire to comply with the law and obtain a better rate of interest if possible.

I desire your opinion as to whether the trustees can force the Bank of Leipsic to surrender said funds at this time or before the two-year period mentioned in the bond and provided by law has expired. Also, what is your opinion as to the liability, if any, of the trustees and the bank under this bond?"

In reply to your request for further information:

There are no banks situated in Liberty township, Putnam county, Ohio. The Bank of Leipsic is situated at Leipsic, Van Buren township, in said county, and is near the line between Liberty and Van Buren townships. At the time that the bond in question was executed by the bank, Leipsic had only one bank. Sometime in October, 1920, and after the funds were deposited in the Bank of Leipsic, another bank was started at Leipsic, Ohio, and the town now has two banks. I am of the opinion that the deposit of funds would come under section 3323 of the General Code. I do not understand that the selection of this bank was for the particular convenience of the township treasurer; however, this bank was nearer the township treasurer than any other bank in the county.

I have been reliably informed by the board of trustees that no resolution or minutes were made by the clerk of the township as to the deposit of said funds, neither were there any competitive bids considered. The facts are the trustees went to the bank, the bank executed the bond, and the funds were turned over to the bank. The only attempt to comply with the law was the execution by the bank of this bond,"

The law governing township depositories is found in sections 3320 G. C. et seq.:

"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 hands of the treasurer of the township, and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions."

"Sec. 3321. The trustees of the township shall determine in such resolution the method by which bids shall be received, the authority which shall receive them, and time for which such deposits shall be made, and all the details for carrying into effect the authority herein given, but all proceedings in connection with such competitive bidding and the deposit of such moneys shall be conducted in such manner as to insure full publicity and shall be open at all times to public inspection. But no contract for the deposit of township funds shall be made for a longer period than two years."

In section 3323 G. C. the pertinent part in the instant case provides:

"* * * 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."

It will be observed that in selecting a bank in which to deposit the township funds a resolution is in every instance required to be passed by the trustees of the township. This resolution is to declare the intention of the trustees to provide a depository, and should contain all details as to bids, etc., in the establishment of a depository.

It is trite, perhaps, to say that a public board usually acts the will of its majority, and speaks only through its records. Yet, neglecting the general proposition, in the instant matter, such is clearly the purpose and intent of the law relating to the selecting of a depository for the funds of a township.

The township clerk is required to keep an accurate account of all proceedings of the trustees at all of their meetings, and is to be furnished with a book for that record (see sections 3301 and 3302 G. C.). And by section 3325 G. C. it is required that the record of the resolutions and contract shall set forth fully all details necessary to comply with the law in selecting a bank as depository, open at all times to public inspection. The proceedings in adopting the resolution and making the contract are to be so conducted as to insure full publicity. Therefore, it is evident that a formal contract in writing is to be made and executed by the parties, i. e., the township trustees and the bank.

An opinion in Vol. I, page 705, Annual Report of the Attorney-General, 1912, holds:

"When any of the conditions enumerated in section 3323 of the General Code exist, the township trustees may enter into a contract with one or more banks that are conveniently located within the county or with one or more banks in an adjacent county (to the one) of which the township is a part, and which offers the highest rate of interest (which in no case shall be less than two per cent) upon the funds deposited."

Such a township as Liberty township is, must select a depository for its funds by favor of the provisions of that part of section 3323 G. C. which is quoted herein. From the law just referred to it is evident that bids are to be received after the resolution has been passed, and that a contract is to be made with the selected bidder, who is required to give bond.

Section 3326 G. C. provides that on failure to create a township depository, for any loss so incurred the trustees and their bondsmen shall be liable, and for the time the funds are not so deposited the trustees shall pay two per cent interest on the average daily balances of such funds. This section further provides that the liability of the treasurer for any loss after a depository has been selected, according to law, shall cease except as to funds deposited in excess of the amount of the bond of the depository.

Black on Interpretation of Laws, Sec. 125, page 341, says:

> "Where a statute provides for the doing of some act which is required by justice or public duty, or where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty."

Applying this rule of construction to the act creating township depositories, it is evident that in the selection of a depository the law is mandatory and its requirements must be strictly adhered to.

The township funds are public moneys in the nature of trust funds, in the hands of the township trustees, for the benefit of the township.

In *State* vs. *Maharry*, 97 O. S., 272, wherein it was alleged that a contractor in building a bridge had received $18.30 in excess of the amount due him, the court says:

> "Finally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril; that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation.
>
> Courts have unanimously held that any person who knows, or ought to know, that he is dealing with a trustee of a private trust, deals at his peril and is put upon inquiry to ascertain if the action of the trustee is proper and legal. If this is the doctrine as to private trusts, with greater force of reason it should be the prevailing doctrine as to public trusts."

In the matter of the deposit of the funds of Liberty township, there was no record of a resolution of the trustees. Whatever action they took was taken without a record, at, perhaps, an informal gathering of the trustees where the clerk was not present, or if present made no record of what was intended to be done or was done, and there were no formal bids for the deposit of said funds and no formal contract was made. From the statement of facts it would seem that all these matters were left in parol—mere informal statements on the part of the trustees. How could the requirements of the statute that the adoption of the resolution and the making of the contract be conducted so as to insure full publicity and be open to public inspection, be fulfilled if what was done was mere oral proceeding, without record, left to the memory of those who happened to hear them? In the complete absence of all the requirements specified in the law it cannot be successfully contended that a

contract on the part of the trustees was made in accordance with the statute, so as to bind the township.

In *Wellston* vs. *Morgan,* 65 O. S. 219, in a matter involving contracts under a municipal statute, the court says:

> "A strict adherence to the provisions of the restrictive statutes of the state will be for the general good; and it devolves upon those who deal with public officers, to see for themselves that the statutes have been complied with."

So in this case it devolved on the bank, no matter what the trustees of the township may have said on the subject, to see for itself that the resolutions were of record, and enter into a formal agreement reciting the facts of the record, to be made and signed by both parties thereto, upon which the bond given by the bank could be predicated.

It is true that the bond quoted in your letter recites that the bank has been awarded a contract as depository, is to pay three per cent interest on deposits, and is required to account for and pay back at the time designated by the board of trustees all of the funds so deposited, but such recital as to the award is a statement of what the bank heard was a fact—hearsay statement, a fiction, in view of the law, which amounts to little else than evidence of good faith and an acknowledgment by the bank of the receipt of the township funds on deposit at three per cent interest.

The payment of three per cent interest by the bank that has been made may possibly relieve the township trustees from paying two per cent interest on the funds for failure to select a depository, to quote the phrase of the law, "as herein provided," but it does not relieve the township treasurer or his bondsmen from any loss that may be sustained by the township on account of failure to provide a depository, under the provisions of section 3117 G. C.

In 9 Cyc. 482, it is said:

> "The public policy of a state is found in its statutes, and when they have not directly spoken, then in the decisions of the courts. But when the legislature speaks upon a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it enacts."

So in this matter, the legislature having spoken, the necessity of creating a depository for the township funds is of the public policy of the state. The law, dealing as it does with the public funds held by the trustees in trust for the use of the public, must be strictly followed in the selection of a depository, a fact of which the bank is bound to take notice and concerning which it acts at its peril. The conclusion cannot be avoided that the contract presumed to have been made, as the statement of facts alleges, is void *ab initio* and does not bind the township.

In this matter there can be no doubt of the fair intent of both parties. Evidently they acted in good faith and dealt honestly with each other. It is to be regretted that more circumspection and formality were not observed. Adherence to the strict requirements of the law would have avoided consequences both annoying and unfortunate. In ordinary business matters between individuals the conduct of both parties was sufficiently exact and formal to secure mutual protection. The conduct of public officers is generally restricted by the provisions of statute that insist on great care and the literal observance of explicit directions. Liberty township has no depository under the present circumstances, and it is required that one be selected in pursuance to law.

In re: Liquidation of Osborn Bank, 1 O. A. R. 140, the first syllabus says:

"Township or billage funds deposited in a bank without attempting to comply with the provisions of the depositary act, but solely on authority of the treasurer, are special deposits and entitled to preference out of cash remaining on hand in the bank."

The treasurer of Liberty township has deposited the funds of the township in the Bank of Leipsic, after what was in exect no attempt to comply with the provisions of the depositary act, and in the opinion in the case just referred to above it is said:

"In the consideration of the status of public funds in the hands of a public treasurer we may start with the proposition that such treasurer, under the clearly established law of this state, is a mere custodian of the funds and has no authority by virtue of his office to loan or invest them. *Eshelby* vs. *Cincinnati Board of Education,* 66 Ohio St., 71."

In Eshelby vs. Board of Education, the interest earned by the funds of the board was claimed by the treasurer, Eshelby, as his own. The court held that the increment of the funds held by the custodian of funds belonging to another follows the fund, that is, the interest earned by the funds of the board of education belonged to that fund and was the property of the school board.

Again, in *Newark* vs. *National Bank,* 15 O. C. C. (n. s.) 276, it is held that in an action by a municipal corporation against a bank for the recovery of interest received by the bank on the funds belonging to the municipality, where the bank knew of the ownership and the trust character of the funds, an accounting of the profits so received may be required of the bank. (Affirmed, 90 O. S. 470.)

It is evident from your statement of facts that the funds deposited by the treasurer with the Bank of Leipsic were known by it to be funds of Liberty township, delivered to the bank under circumstances which amounted to a failure in an attempt to create a depository. No reason is seen why an accounting may not be required of this bank for the increment of the township funds, and it is believed this is an answer to your second question in so far as the bank is concerned.

The liability of the township trustees in failing to provide a depository for the township funds is sufficiently set out in section 3326 G. C., which has been referred to herein above and need not be again restated. So, also, the liability of the township treasurer under said section has been referred to, and what has been said is a sufficient answer to the second part of your second inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.

1932.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENTS, COSHOCTON COUNTY, OHIO.

COLUMBUS, OHIO, March 22, 1921.

HON. LEON C. HERRICK, *State Highway Commissioner, Columbus, Ohio.*