in order to ascertain on what amounts interest is chargeable, it must be determined what balances were unnecessarily kept on hand from time to time."

See also R. C. L. Vol. 22, Title "Public Officers", Section 137, and R. C. L Volume 26, Title "Trusts", Section 150.

Under the circumstances related in your inquiry, these memorial trustees were not in need of any moneys for current expenses. They had been accumulating a fund for three or four years, at the rate of $3500.00 per year. They knew exactly by reason of the terms of their contract with the theatre company, when they would get possession of the memorial building and thus, when they would again be needing funds for operating expenses, repairs, etc. Under these circumstances, I am of the opinion that they should be held to the duty of making some provision for the productive investment of the fund in their hands and that therefore, they had no right to deposit this money in a banking institution of any kind without making provision for interest or for some compensation for the use of the fund and that the bank in receiving the deposit, was bound to know the limits of the authority of said trustees in making the deposit.

I am therefore of the opinion, in specific answer to your questions:

1. Funds in the possession of the trustees of a township memorial fund may legally be deposited or invested in a building and loan company.

2. Where the funds making up such a deposit are likely to be needed for contingent expenses or where the sum is so small that a person would not seek an investment for it, the funds may be deposited in a bank without interest, and the bank will not be chargeable for interest or for any profits that may accrue to it from the use of the moneys so deposited, where the understanding at the time of the deposit is that no interest shall be paid or no accounting for profits made, or where there is no understanding whatever with reference to the matter.

Where, however, there has accumulated in the hands of the trustees a fund of considerable size which, by reason of the circumstances, it will not be necessary for the trustees to use for several years, it is beyond the power of the trustees to deposit this fund without interest, and a bank so receiving it will be held to account for any profits made by it by reason of its use of the funds so deposited.

Respectfully,
JOHN W. BRICKER,
Attorney General.

977.

TITLE GUARANTY AND TRUST COMPANY—STATE AUDITOR AUTHORIZED TO REQUIRE REPORTS, IMPOSE PENALTIES FOR FAILURE TO REPORT, MAKE EXAMINATIONS, ASSESS FEES THEREFOR—MAY LOAN MONEY DEPOSITED IN SPECIAL DEPOSITS—MAY ACT AS OWN TRUSTEE—STATE AUDITOR MAY APPRAISE ONLY ASSETS HELD IN TRUST AND IS UNAUTHORIZED TO SUSPEND OR TAKE OVER FOR LIQUIDATION.

SYLLABUS:

1. *Under section 710-171, General Code, the Auditor of State has only the authority with relation to title guarantee and trust companies to require reports,*

to impose the penalties prescribed by section 710-33, *General Code, for failure to make such reports to make examnations, as provided in section* 710-153, *General Code, and assess fees for making such examinations, as provided in section* 710-17, *General Code.*

2. *The power granted to such a company under section* 9850, *General Code, to "make loans for itself or as agent or trustee for others" implies the power to receive special deposits for the purpose of loaning the money deposited for the benefit of the depositor. Having the power to make loans secured by mortgages and collateral, such company may create a mortgage or collateral trust and sell shares therein evidenced by certificates of participation. Such shares may be sold by allowing the purchaser to make small payments upon which interest is allowed, such payments being evidenced by entries in a pass book.*

3. *Title guarantee and trust companies may legally act as their own trustee.*

4. *Under section* 710-153, *General Code, the auditor of State is authorized to appraise only those assets which the company holds in trust. The actual cost of such appraisal shall be charged to and paid by the company examined.*

5. *The Auditor of State has no power to suspend or to take over for liquidation title guarantee and trust companies.*

6. *The Treasurer of State has the duty to determine the value and sufficiency of securities deposited under sections* 9851 *to* 9854, *inclusive, General Code.*

7. *The Auditor of State has no power to examine the books, records and affairs of a corporation controlled through stock ownership by a title guarantee and trust company in order to determine the value of securities pledged by the subsidiary with the parent company for loans.*

8. *Title guarantee and trust companies doing business within this state and incorporated under its laws are qualified to act as depositories of state funds (Sec.* 323 *G. C.) but such companies may not legally act as depositories for municipalities (Sec.* 4295 *G. C.) or boards of education (Sec.* 7604 *G. C.).*

COLUMBUS, OHIO, June 21, 1933.

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

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

> "Section 9850 G. C., prescribes the powers of title guarantee and trust companies, and 9851 G. C., requires a deposit of $50,000 in securities, described in sections 9518 and 9519 G. C., with the State Treasurer to protect guarantees and trusts.
>
> Section 710-168 G. C., provides that said companies may secure banking powers and be examined by the Superintendent of Banks, however, none of the Ohio companies have secured said banking powers.
>
> Section 710-171 G. C., provides that said companies shall make reports to and be subject to the same examination, penalties and fees by the Auditor of State as banks.
>
> Section 710-170 G. C., also provides said companies may have trust powers.
>
> Section 8623-38 G. C., prescribes the manner of computing excess assets for dividend purposes in corporations.
>
> Question 1. Concerning Attorney General's 1927 Opinion No. 495, what power has the Auditor of State in the matter of requiring said companies to discontinue declaring cash dividends when the requirements

set forth in Section 8623-38 G. C., have not been complied with?

Question 2. Is said Auditor invested with authority of law to instruct said companies to set up sufficient reserves to off-set deflation of values on assets at face value in the balance sheets when it appears that additional reserves are necessary?

Question 3. Has the State Auditor the power to demand that an increase be made in 'special reserves for title insurance losses' when it appears to him that reserves carried are less than they should be to fully protect policy holders on possible losses?

Question 4. Has said Auditor the power to require additional and better collateral security pledged to secure cash loans made by the company when, after investigation, the market value of said collateral is found to be insufficient to fully protect said loans?

Question 5. May title guarantee and trust companies legally receive deposits from the public, issue pass books, pay interest on said deposits and invest same in certificates of participation issued by the company against mortgages or other securities owned by said company, and held in trust by them?

Question 6. Are title guarantee and trust companies legally authorized to act as their own trustee (A. G. O. 2558, 9/7/28 cited,) or should a corporate trust be established when the company places some of its own assets in trust?

Question 7. (a) In the examination of said companies, when it appears necessary to determine the value of the real estate securing mortgages held in trust or otherwise, by the said companies, and against which certificates of participation or other like evidences of liability against the companies have been sold to the public in total amount of the face value of said mortgages, is it the duty of the State Auditor, or has he the authority, to hire appraisers and assess the fees for same; (b) and has he the authority and is it his duty, to determine by appraisal the value of all other assets held by the companies, or must said Auditor accept the face value of said mortgages as indicated by the principal, and of said assets in the amount as carried on the books of the companies?

Question 8. Under section 710-171 G. C., or under any other provisions of law, has the State Auditor the power to close title guarantee and trust companies when, after examination, it appears necessary to do so in order to conserve the assets of the companies and protect guarantees and trusts?

Question 9. Is it the duty of the State Treasurer or of the Auditor of State to determine the value and sufficiency of securities, filed by title guarantee and trust companies with the Treasurer of State as required in Sections 9851, 9518 and 9519 G. C.?

Question 10. If it is found that title guarantee and trust companies in Ohio have affiliate companies in which the officers of parent companies, in part at least, are also officers in and control the affiliate companies, the capital stock of said affiliate companies being owned by the parent companies, and mortgages sold and loans made to said affiliates taking notes of the latter company as security for said loans, which notes are carried as assets of the parent companies in their balance sheets, has the State Auditor the power to examine the affiliates of such title guar-

antee and trust companies in order to determine the value of their securities held by the parent company as assets?

Question 11. Are title guarantee and trust companies in Ohio legally qualified to bid for public funds and to act as depositories for inactive funds of taxing districts?"

You have submitted for my consideration a list of questions concerning your powers and duties in relation to title guarantee and trust companies.

In answering your inquiries, it will be necessary to refer to a number of statutory provisions, some of which you have referred to in your letter, since public officers have only those express and implied powers derived from statute. Throop on Public Officers, Section 542.

Sections 9850 to 9855, inclusive, of the General Code, relate to title guarantee and trust companies. Section 9850, which prescribes the powers of those companies, reads:

"A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, bonds, mortgages and other securities, and guarantee such titles, the validity and due execution of such securities, and the performance of contracts incident thereto, make loans for itself or as agent or trustees for others, and guarantee the collection of interest and principal of such loans; take charge of and sell, mortgage, rent or otherwise dispose of real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

Section 9856, General Code, enacted along with these sections, provided:

"Title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies and be subject to like examination and penalties."

In an opinion of this office, reported in Annual Report of the Attorney General, 1913, volume I, page 167, the following language appears:

"As has been noted, section 9856, General Code, provides that title guarantee and trust companies shall make such reports to the auditor of state as are required of safe deposit and trust companies and be subject to like examinations and penalties. In the enactment of the provisions of this section prescribing the duties of title guarantee and trust companies with respect to reports to the auditor of state and prescribing the authority of such officer with respect to the examination of such companies, the legislature, by necessary intendment, had reference to the provisions covering the same subject matter with reference to safe deposit and trust companies, now contained within sections 9834 and 9835, General Code. The effect of this reference was to adopt and incorporate the provisions as to reports and examinations applying to safe deposit and trust companies into the act applying to title guarantee and trust companies the same as if such provisions had been in terms re-enacted in the latter act."

When the banking laws were revised and codified in 1919 (108 O. L. Pt. 1, 80), section 9856 was repealed and section 710-171 was enacted. Section 710-171 is in the following language:

"Title guaranty and trust companies shall make such reports to the auditor of state as are required to be made by trust companies to the superintendent of banks, and shall be subject to like examination, penalties and fees; such examination to be made by and such fees and penalties assessed by and paid to the auditor of state.

Fees so received by the auditor of state and by him paid into the state treasury to the credit of the general revenue fund are hereby appropriated for the express purpose of paying the cost of such examinations."

This section was considered by one of my predecessors in the opinion referred to in your letter, and reported in Opinions of the Attorney General, 1927, volume II, page 818, where it was held, as appears from the syllabus:

"It is the duty of the Auditor of State, by the terms of Section 710-171 of the General Code, to make such examination of the books and affairs of title guaranty and trust companies as will enable him to determine whether such companies are faithfully performing all of the guarantees entered into and trusts accepted by them."

It is stated several times in the body of the opinion that the provisions of section 710-171 confer the same authority upon the Auditor of State in relation to title guarantee and trust companies as the Superintendent of Banks has in relation to trust companies. However, these statements are purely obiter, since the question then under consideration concerned your authority in the matter of reports and examinations. Section 710-171 specifically authorizes title guarantee and trust companies to "make such reports to the Auditor of State as are required to be made by trust companies to the Superintendent of Banks," and also makes them "subject to like examination, penalties and fees * * *".

Your first question concerns your authority in case dividends are illegally declared and paid. Manifestly, any such authority has no relation to "reports", "examination" or "fees". Nor do I believe the term "penalties" comprehends such power. As I read the section, the term "fees" relates to fees for examination provided in section 710-17. I understand "penalties" to refer to the penalties prescribed in section 710-33 for failure to make the required reports. If the Auditor's power were as extensive as that of the Superintendent of Banks over trust companies, the Auditor could take over for liquidation a title guarantee and trust company which had declared and paid an illegal dividend, since section 710-89 authorizes the Superintendent to take over any trust company which "is conducting its business in an unauthorized or unsafe manner." In my opinion, the Auditor derives no such power from section 710-171. That section confers upon the Auditor only the authority to require reports, make examinations and assess fees and penalties. It follows that the Auditor of State is vested with no authority to require the companies in question to discontinue declaring illegal cash dividends. A negative answer to your second, third and fourth questions also necessarily follows from this view.

Your fifth question is whether title guarantee and trust companies legally may receive deposits from the public, issue pass books, pay interest on said deposits and invest same in certificates of participation issued by the company against mortgages or other securities owned by said company and held in trust by it. This question was considered in an opinion of this office reported in

Annual Report of the Attorney General, 1914, volume II, page 1745, the syllabus of which reads:

> "Title guarantee and trust companies may be designated as and act as depositaries of county funds under sections 2715, et seq., General Code, and secure the funds deposited with them in the manner provided by said sections.
>
> These companies have not the power to receive deposits generally, in the same manner as banks, but the power given such companies 'to make loans for themselves or others' implies the power to receive the money with which to make such loans and to that extent to receive deposits; that is such companies can only receive deposits for the purpose of loaning the money deposited for the benefit of the person making the deposit.
>
> Title guarantee and trust companies are not authorized to issue ordinary certificates of deposit which would circulate in the same manner as cashier's checks but they may deliver a proper acknowledgment or certificate for the receipt of money deposited with them.
>
> Title guarantee and trust companies may issue certificates of shares in mortgage notes held by such companies; in the manner specified in the request for this opinion; they may also receive money deposited with them for the purpose of purchasing such certificates, in small payments, such payments being evidenced by entries in pass books; in the manner specified in the request for this opinion.
>
> Only such part of the securities belonging to title guarantee and trust companies as are deposited with the treasurer of state must be in conformity with sections 9518 and 9519, General Code."

The power to receive ordinary deposits and the power to issue negotiable certificates of deposit, such as are commonly used in the banking business, constitute banking powers. Title guarantee and trust companies may secure banking powers only in the manner provided by section 710-168. The companies in question have not secured such banking powers. I am in accord with the prior opinion of this office to the effect that the power to "make loans for itself or as agent or trustee for others" granted by section 9850, implies the power to receive money with which to make such loans, viz., the power to receive special deposits for the purpose of loaning the money deposited for the benefit of the depositor.

Having the power to make loans secured by mortgages as collateral, a title guarantee and trust company has the right to sell participation shares therein. I concur in the language of the former opinion that "the method of selling by allowing the purchaser to make small payments and allowing him interest on the payments as made, is incident to the general powers granted." It follows that such payments may be evidenced by entries in pass books.

Your sixth question was answered in an opinion of this office, reported in Opinions of the Attorney General, 1928, volume III, page 2072, in which I concur both as to reasoning and result. The syllabus of that opinion reads:

> "Title guarantee and trust companies may lawfully, by proper action, designate themselves as trustees for the purpose of holding securities theretofore belonging to them for the benefit of the holders of certificates of participation issued against such securities by such companies."

The following language appears in the body of the opinion at page 2073:

> "I assume that in the transactions referred to the companies are taking definite formal action in setting aside certain designated mortgages in trust for the benefit of the holders of the certificates of participation issued against such mortgages and unequivocally stating that such securities are held in trust for such purposes. In my opinion there is no general rule prohibiting such course, nor do I find any statutory prohibition applicable. In this instance the companies are in reality acting as trustees in the loaning of the funds of the holders of the certificates of participation. While it is true that the funds are not first advanced and then invested, in my opinion this is of no significance. The company furnishes the funds for the investments in the first instance and then establishes a trust for the benefit of those who subsequently supply the capital for investment in the certificates of participation."

I deem it unnecessary to review the discussion and citation of authorities contained in that opinion.

Your seventh question concerns your authority to hire appraisers and assess their fees when it appears necessary to determine the value of mortgaged real estate in which mortgage participation certificates have been sold to the public in total amounts equal to the face value of such mortgages. You also desire to know your authority to determine by appraisal the value of "all other assets held by title guarantee and trust companies."

As previously pointed out, section 710-171 provides that the companies in question shall be subject to like examination and fees as trust companies, such examination to be made and such fees assessed by the Auditor of State. Section 710-153 provides:

> "The superintendent of banks shall have the right to examine, by any deputy, examiner or person especially appointed for that purpose, the books or affairs of any foreign trust company, or any corporation doing a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company."

The power to determine the value of loans secured by real estate mortgages which are held in trust for participation holders includes the power to appraise the real estate. I deem such an appraisal to be included within the "affairs" of the companies, as to which "all matters relating to any trust, estate or property * * * concerning which such trust company is acting in a trust or representative capacity" may be examined.

Likewise, if the company is trustee of a trust, the corpus of which consists of securities other than mortgages, the Auditor may appraise such securities. I find no authority for appraising the assets of a title guarantee and trust company which are not held in trust.

You inquire whether it is proper for you to hire appraisers and assess the fees therefor in cases where they have the right to conduct an appraisement. An appraiser other than a "deputy" or "examiner" would be a person "especially appointed" authorized by section 710-153. That section provides that the expenses

shall be paid by the company examined. Section 710-17 contains a general provision for the payment of "the actual cost of the examination" by the company.

Your eighth question is whether under section 710-171 you have the power to close title guarantee and trust companies in order to conserve their assets. Under my answer to your first question, you do not have the power to take possession of the business and property of such a company under section 710-89, nor am I aware of any other provision of law giving you that power.

Your ninth question is whether it is the duty of the Treasurer of State or the Auditor to determine the value and sufficiency of securities deposited by title guarantee and trust companies under sections 9851 to 9854, inclusive. These sections provide:

> Sec. 9851. "No such company shall do business until its capital stock amounts to at least one hundred thousand dollars fully paid up, and until it has deposited with the treasurer of state fifty thousand dollars in securities permitted by sections ninety-five hundred and eighteen and ninety-five hundred and nineteen. Except such deposit, the capital shall be invested as the board of directors of such company prescribes."
>
> Sec. 9852. "The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all guarantees entered into and trusts accepted by such company, but so long as it continues solvent he shall permit it to collect the interest of, or dividends on, its securities so deposited, and to withdraw them or any part thereof, on depositing with him cash or other securities of the kind heretofore named so as to maintain the value of such deposit at fifty thousand dollars."
>
> Sec. 9853. "Any company so organized shall be limited in its operation to only one county in the state, which shall be designated in its application for a charter, except, that if it desires to issue its policies of title insurance in more than one county it may issue them in such other county or counties upon depositing with the treasurer of state an additional sum of fifty thousand dollars in securities as above provided, for each additional county in which it proposes to operate."
>
> Sec. 9854. "If such a company has made deposits with the treasurer of state as herein required, it may request such treasurer to return to it securities in excess of the amount so required, and he shall surrender such excess to the company, taking proper receipts therefor."

Considering these sections together, it seems clear that the Treasurer has the duty to determine the value and sufficiency of the securities deposited. He is the officer with whom the securities are deposited and he shall permit the company to collect interest or dividends if it is solvent, and to withdraw securities upon the substitution of other securities or cash. The Treasurer's authority to permit the withdrawal of surplus securities necessarily implies his authority to determine the value of the securities. Public officers have not only such powers as are expressly granted by statute but also such powers as necessarily follow by implication therefrom. *State ex rel.* vs. *Medical Board,* 107 O. S. 20.

Your tenth question concerns your authority to examine the affairs of corporations controlled through stock ownership by title guarantee and trust companies in order to determine the value of securities pledged by the subsidiaries to the parent companies for loans, which securities are carried by the latter on

their balance sheets as assets. As pointed out in my answer to your seventh question, the Auditor has no power to examine the assets of a title guarantee and trust company which are not held in trust. If the securities in question constitute part or all of the corpus of a trust, you have authority to determine their value by appraisal. However, in my opinion, this power is not sufficiently broad to authorize you to conduct an examination of the books, records and affairs of the subsidiary company which is not a title guarantee and trust company.

Your eleventh question is whether title guarantee and trust companies doing business within this state and incorporated under the laws thereof, are qualified to act as depositories of public funds. There are several opinions of this office which hold that such companies may act as depositories of state funds under the provisions of section 323 of the General Code, being "trust companies" within the meaning of that section. Annual Report of the Attorney General, 1909-10, page 256; Annual Report of the Attorney General, 1914, volume II, page 1743; Opinions of the Attorney General, 1927, volume 1, page 345. The 1914 opinion, supra, also held that such companies may be designated as and act as depositories of county funds.

I concur in the foregoing opinions of my predecessors, and you are therefore advised that title guarantee and trust companies doing business within this state and incorporated under the laws thereof, are "trust companies" as that term is used in section 323 providing for state depositories, and in section 2715 relating to county depositories.

Section 3320, General Code, which provides for township depositories, reads:

> "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 and all moneys coming into the treasury of the township, and shall deposit such money in such *bank, banks or depository* within the county in which the township is located as they may direct subject to the following provisions." (Italics the writer's.)

After quoting this section, one of my predecessors, in an opinion reported in Annual Report of the Attorney General, 1913, volume 1, page 859, said at page 860:

> "As the subsequent sections refer only to banks, I take it that 'depository' as used in section 3320, refers also to banks and probably to trust companies * * *."

Section 3320 is *in pari materia* with the subsequent sections concerning township depositories. As stated in the former opinion, these sections refer only to "banks." However, the legislature must have intended the word "depository" to have some meaning. It is superfluous if it means only "bank", since it is joined with the terms "bank" and "banks" by the conjunction "or". Since trust companies are specifically designated as depositories in the state and county depository laws, I am inclined to the view that depositories in section 3320 comprehends "trust companies", and, hence, includes title guarantee and trust companies.

Since section 4295 designates only "banks" as depositories for municipalities, I am of the opinion that title guarantee and trust companies may not be selected as depositories under that section. Not having complied with the provisions of section 710-168, the companies in question are not "banks." Sections 7604, et seq.,

providing for depositories of boards of education, likewise refer only to "banks."

It is therefore my opinion that title guarantee and trust companies may not act as depositories of funds of municipalities or boards of education.

Summarizing and specifically answering your questions, I am of the opinion that:

1. Under section 710-171, General Code, the Auditor of State has only the authority with relation to title guarantee and trust companies to require reports. to impose the penalties prescribed by section 710-33, General Code, for failure to make such reports, to make examinations, as provided in section 710-153, General Code, and assess fees for making such examinations, as provided in section 710-17, General Code.

2. The power granted to such a company under section 9850, General Code, to "make loans for itself or as agent or trustee for others" implies the power to receive special deposits for the purpose of loaning the money deposited for the benefit of the depositor. Having the power to make loans secured by mortgages and collateral, such company may create a mortgage or collateral trust and sell shares therein evidenced by certificates of participation. Such shares may be sold by allowing the purchaser to make small payments upon which interest is allowed, such payments being evidenced by entries in a pass book.

3. Title guarantee and trust companies may legally act as their own trustee.

4. Under section 710-153, General Code, the Auditor of State is authorized to appraise only those assets which the company holds in trust. The actual cost of such appraisal shall be charged to and paid by the company examined.

5. The Auditor of State has no power to suspend or to take over for liquidation title guarantee and trust companies.

6. The Treasurer of State has the duty to determine the value and sufficiency of securities deposited under sections 9851 to 9854, inclusive, General Code.

7. The Auditor of State has no power to examine the books, records and affairs of a corporation controlled through stock ownership by a title guarantee and trust company in order to determine the value of securities pledged by the subsidiary with the parent company for loans.

8. Title guarantee and trust companies doing business within this state and incorporated under its laws are qualified to act as depositories of state funds (Sec. 323 G. C.), county funds (Sec. 2715 G. C.) and township funds (Sec. 3320 G. C.) but such companies may not legally act as depositories for municipalities (Sec. 4295 G. C.) or boards of education (Sec. 7604 G. C.).

If the title guarantee and trust companies in this state are by law subject to regulation and supervision to a much less degree than other types of business in which the public is scarcely more vitally interested, the remedy is with the legislature.

Respectfully,
JOHN W. BRICKER,
Attorney General.