that deed was in form absolute on its face, or otherwise, Potter acquired no greater right than that of burial, ornamentation and erection of monuments."

On page 239 we find the following:

"It is clear from a careful reading of this chapter that the deed authorized to be given to a purchaser of a burial lot conveys only the right of burial therein, and constitutes only an easement of burial."

Further, on page 241, the court say:

"From nowhere in the statutes can the claim be deduced that any idea of barter and sale was contemplated in the legislation relating to cemeteries and the proper disposal of the dead."

While it is true that the above case of *Fraser* vs. *Lee* mentions municipal cemeteries, the principles involved are applicable to cemeteries under the supervision of the township trustees, and the requirements for the delivery of a deed to the purchaser are practically the same.

From an analysis of the sections of the General Code above cited and the cases above mentioned it seems clear that a deed executed by township trustees for a cemetery lot is not such an absolute conveyance which requires presentment to and endorsement by a county auditor under section 2768, General Code. It also seems clear that such a deed is not required by law to be filed with and recorded by a county recorder, but that the recordation thereof is controlled by section 3447 of the General Code which provides that the township clerk shall record such deed in a book kept by him for that purpose.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2088.

SANITARY DISTRICT—FUNDS THEREOF DEPOSITED IN BANK CONSTITUTE PREFERRED CLAIM UPON LIQUIDATION OF BANK WHEN.

SYLLABUS:

1. *When a sanitary district organized under the sanitary district act of Ohio (Sections* 6602-34 *to* 6602-106, *General Code) deposits funds coming into its possession in a bank in any other manner than that provided in Section* 6602-79, *General Code, such funds so on deposit, constitute a preferred claim in the event of a liquidation of the bank by reason of insolvency providing the bank had knowledge of the nature of, and ownership of the funds so deposited.*

2. *When the president or other executive officer of a bank is also an executive officer of a depositing corporation such bank should be held to have knowledge of the ownership of the funds on deposit.*

3. *When a sanitary district has illegally deposited its funds in a bank which has knowledge of the illegality of the deposit, and the bank has delivered to the sanitary district securities to insure the return of the funds on deposit such contract by reason of its ultra vires nature, is void, and neither party thereto can obtain any rights thereunder.*

4. *When a taxing subdivision is the owner of a preferred claim against a bank*

in liquidation, such subdivision may not legally waive the priority of its claim and consent to become a general depositor and share with other general depositors in the reorganization of the bank in liquidation.

COLUMBUS, OHIO, December 30, 1933.

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

GENTLEMEN:—I am in receipt of your request for my opinion, enclosing certain correspondence setting forth the nature of the inquiry. I quote therefrom as follows:

> "This district (Mahoning Valley Sanitary District) has on deposit in the Niles Bank Company, Niles, Ohio, the sum of about $160,000.00. This balance represents the unliquidated portion of its deposit in the Niles Trust Company, predecessor bank which closed on September 28, 1931, at which time the district deposit was in the amount of about $434,000.00.
>
> The Niles Bank Company was opened on June 15, 1933, after a hearing conducted by the Court of Common Pleas of Trumbull County under the provisions of the present Ohio Banking Act. The opening plan provided that unsecured depositors or general creditors of the Niles Trust Company were each to receive a deposit account in the new Niles Bank Company in the amount of sixty-five percent of their respective old accounts, the remaining thirty-five percent to be assumed by a holding company. The holding company was to acquire certain assets of the Niles Trust Company in consideration of its assuming the liability for thirty-five percent of the old unsecured deposits.
>
> The Niles Bank Company agreed to pay interest on the deposits assumed by it at the rate of two and one-half percent per annum while the holding company pays no interest. At the time of the closing of the Niles Trust Company the District's status was that of a secured creditor in that it held collateral to secure its deposit. The state banking officials in charge of the Niles Trust Company informed the District that it would be necessary to surrender all unliquidated collateral remaining and thereby assume the position of an unsecured or general creditor to be entitled to a voice in the proceedings before the court which resulted in the reopening plan. The District did not surrender its collateral and therefore did not participate in the court proceedings. At the present time the unliquidated balance of the District's account is in the amount of about $160,000.00 and no interest has been credited since September, 1931, when The Niles Trust Company closed. Since the opening of the Niles Bank Company on June 15, 1933, about $6,000.00 of the account has been liquidated through the maturity of bonds and the receipt of bond and mortgage interest.
>
> A proposal is now before the District under the terms of which it would surrender collateral now held in the aggregate face value of about $250,000.00 and having an estimated market value of perhaps $70,000.00 to $100,000.00. The District would thereby assume the position of an unsecured creditor. The new bank, the Niles Bank Company, would then assume sixty-five percent of the unliquidated deposit, or about $104,000.00, the remaining thirty-five percent, approximately

$56,000.00 to be assumed by the holding company. The deposit in the Niles Bank Company would bear interest at the rate of two and one-half percent per annum from the date of opening, June 15, 1933, and liquidating dividends heretofore declared, twenty percent and ten percent, would be paid to the District in the aggregate amount of about $30,000.00. The District would of course participate in any future dividends. The deposit which would be assumed by the holding company would not yield any available sum, as no dividends in liquidation have been declared by it.

We would like to have a ruling * * as to whether the officials of the district would have the discretion to change the status of the deposit as outlined above in view of the fact that the action contemplated would result in the surrender of the collateral, thereby leaving the account unsecured. * *"

The answer to your inquiry requires an analysis of the nature of the claim of the sanitary district against the Niles Trust Company. The Mahoning Valley Sanitary District, I assume, is a sanitary district organized pursuant to the provisions of Sections 6602-34 to 6602-106, General Code, popularly knowu as the "Sanitary District Act of Ohio." Such type of quasi-corporation is a governmental agency. Such governmental agencies have such powers and such only as have been expressly granted them by the statutes authorizing their creation, and such further powers as are necessarily inferred from such language. It has been established, in Ohio, at least, that such bodies have no authority to make general deposits of money in banking institutions unless they have been expressly granted such power. *Fidelity & Casualty Company* vs. *Union Savings Bank Co.,* 119 O. S., 124.

An examination of the provisions of the "Sanitary District Act of Ohio" has failed to disclose any other authority for the deposit of the funds of such type of district in a bank, except that contained in Section 6602-79, General Code. Such language is:

"** if it should be deemed more expedient to the board of directors, as to moneys derived from the sale of bonds issued from any other source, said board may by resolution, select some suitable bank or banks or other depository, which depository shall give good and sufficient bond, *as temporary or assistant treasurer or treasurers,* to hold and disburse said moneys on the orders of the board as the work progresses, until such fund is exhausted or transferred to the treasurer by order of the said board of directors. For such deposits the district shall receive not less than two nor more than four per cent interest per annum. **" (Italics the writer's).

It should be observed that the statute designates the banks in which moneys are to be deposited pursuant to the authority of this section, as temporary or assistant treasurers. It is fundamental that a treasurer, whether temporary or permanent, or an assistant treasurer, has no title to the funds coming into his possession. Such funds are trust funds. Trust funds are entitled to a preference in payment from the assets of a bank in liquidation, except in certain cases which do not appear germane to your inquiry. *Gulf Land Company* vs. *Union Sav. & Trust Co.,* 29 O. N. P. (N. S.) 375; *Stepfield* vs. *Fulton,* 126 O. S. 351; *Kopp Clay*

Co. vs. *State ex rel. Fulton,* 125 O. S., 512. In view of the reasons hereinafter expressed, even if the funds in question were deposited under the authority contained in this section, it would appear that some question might arise as to whether they were not a prefered claim against the assets of the bank in liquidation. It is not necessary, however, to determine whether a preferred claim might exist in the event that the bank was designated as assistant or temporary treasurer since the letter of the treasurer of the district accompanying your request, specifically states that such designation was not made under the authority of Section 6602-79, General Code.

In the case of *Franklin National Bank* vs. *City of Newark,* 96 O. S. 453, the question was presented as to the nature of the deposit when funds are deposited in a bank by a city treasurer otherwise than pursuant to specific authority of law. In that case the city treasurer deposited certain moneys of the city coming into his posession as treasurer, in a bank which had not been designated pursuant to the authority of statute, as a depository. The court held such funds to be trust funds. On page 457, the court in rendering its opinion, says:

> "* * Any bank receiving funds of a municipality under circumstances disclosed in the record, knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the fund so deposited, and all profits arising from such deposit."

See also *Board of Commissioners* vs. *Strawn,* 157 Fed. 49; *Crawford Co.* vs. *Patterson,* 149 Fed. 229; *State* vs. *Foster,* 5 Wyoming, 199.

Similar reasoning applied to the facts surrounding the deposit of funds with the Niles Bank Company would lead to the conclusion that such funds so on deposit were a preferred claim and not a general claim if the bank had knowledge of the fact that they belonged to the district. In other words, the conclusion would be reached that the bank was the trustee of the funds in question for the benefit of the sanitary district, and that the relation of depositor and depositee did not exist. I am therefore of the opinion that in the absence of any circumstances which would cause the district to lose its preferential rights, the relation between the sanitary district and the Niles Trust Company was one of trustee and beneficiary, rather than debtor and creditor, and that such district was the holder of a preferred claim against the assets of such institution.

You do not state what the relation is between the Niles Trust Company and the Niles Bank Company if the present bank is a continuance of the former corporation; being the same corporate entity the relation of trustee and beneficiary would still exist, since there could be no conveyance of interest, that is, the Niles Bank Company and the Niles Trust Company are one and the same trustee for the benefit of the sanitary district.

I might state that the records of the Secretary of State show that the name of the Niles Trust Company was changed to "The Niles Bank Company" on June 6, 1933. An examination of the records at the Secretary of State's office does not disclose that there is any new corporation known as the Niles Bank Company.

However, even if the Niles Bank Company had been a new and distinct corporation or legal entity from the Niles Trust Company, the same result would ordinarily follow in the absence of the existence of such facts as would create an estoppel on the part of the sanitary district to claim a trust. It is elemental that in the sale of personal property the vendee by such purchase can obtain only

such interest therein as the vendor possessed or had a legal right to convey. Property impressed with a trust will be followed by a court of equity into whosesoever hands it may come except he be an innocent purchaser for value without notice. *Central Trust Co.* vs. *Burke,* 1 O. N. P. 169; *Goodwin* vs. *Cincinnati, etc. Co.,* 18 O. S. 169; *Stoddard* vs. *Smith,* 11 O. S. 581; *Johnson* vs. *Johnson,* 51 O. S. 446; *Ward* vs. *Ward,* 12 O. C. D. 59; *Mills Mfg. Co.* vs. *Whitehurst,* 8 O. F. D. 593.

The persons taking title to trust property other than purchasers for value without notice, are trustees. See cases above cited.

Could the Niles Bank Company be a purchaser for value without notice, of the assets of the Niles Trust Company, under the circumstances presented?

A purchaser for value is one who, for a valuable consideration, acquires title to property without knowledge, actual or constructive, of any defect in the title of the party conveying the same, and without knowledge of any circumstances which should cause him to inquire as to a possible defect in such title. *Hinde* vs. *Vattier,* 1 O. F. D. 315; *Bank* vs. *Wallace,* 45 O. S. 152, 23 R. D. L. 241.

If such bank had been the purchaser from the superintendent of banks, it had knowledge that the superintendent had only such title to the assets of the former bank as it had at the time he entered into possession by reason of its insolvency for the superintendent of banks could not acquire a greater title.

There is some doubt in my mind as to whether a purchaser from the superintendent of banks, as liquidator of an insolvent bank, can be a purchaser for value. While such sales are not, strictly speaking, judicial sales, they have many of the characteristics of such sale. That is, Section 710-91 only gives the superintendent of banks the title and right to possession which the bank had at the time of entry. It only purports to grant the complete title that the bank had at that time, to such assets; that is, no greater and no lesser title. The title so received by the superintendent of banks is subject to such liens, rights and interests of others as existed at the time the superintendent of banks entered into possession. *Hatch* vs. *Johnson Loan & Trust Co.,* 79 Fed. 828; *Scott* vs. *Armstrong,* 146 U. S. 499; *Casey* vs. *La Soiete de Credit Mobilier,* 2 Woods, 77.

The proceedings by the liquidator of a bank in liquidation are very similar to those of a receiver in the liquidation of an ordinary corporation, except that the legislature has vested the jurisdiction to appoint the liquidator in the superintendent of banks rather than in the court. The court of common pleas has certain supervisory powers of the liquidation of an insolvent bank. Section 710-95, General Code, expressly authorizes the approval of the court in the disposition of assets under circumstances therein set forth.

If a sale of assets is considered as a judicial sale, the purchaser could not be a purchaser for value. *First Nat'l. Bank* vs. *Ewing,* 43 U. S. C. C. A. 171; *Osterburg* vs. *Union Trust Co.* 93 U. S. 424; *Osterman* vs. *Baldwin,* 6 Wall (U. S.) 116; *Corwin* vs. *Benham,* 2 O. S. 36; *Dresbach* vs. *Stein,* 41 O. S. 70; *Wier* vs. *Sawmill Co.* 88 O. S. 424.

Inasmuch as the president of the bank and the president of the sanitary district are one and the same person, the question naturally arises as to whether the bank is not to be regarded as having actual knowledge of the nature of the deposit. It has been held that notice to an officer of a corporation is notice to the corporation. *Loomis Campbell & Co.* vs. *Bank,* 1 O. D. 285, affirmed 10 O. S. 327; *Jackson* vs. *Nelsonville Fdry. & Mach. Co.* 27 O. C. C. (N. S.) 81; *Haydens* vs. *Hayes,* O. S. U. 207; *Waynesville Nat'l. Bank* vs. *Irons,* 5 O. F. D. 15; *Ditty* vs. *Bank,* 8 O. F. D. 657; *Orme* vs. *Baker,* 74 O. S. 337. It would appear that when the president of the bank in which the deposit was made, was also managing

officer and director of the sanitary district the bank must be held to have had notice of the nature of the trust deposit.

You do not state whether the president of the sanitary district was an officer of the Niles Trust Company. If he was such officer, such fact alone, would be sufficient to charge the bank with the nature of the deposit. Even though such was not the case, the fact that the trust company delivered to the district collateral securities for the securing of such deposit would indicate that the trust company had actual notice of the nature of the deposit to cause such deposit to be a preferred claim when the bank was taken over for liquidation.

It would appear that the Niles Trust Company held the funds as trustee and not as debtor. Neither such trustee nor the superintendent of banks could reconvey any greater interest to the Niles Bank Company. The Niles Bank Company would therefore hold such funds in trust for the benefit of the sanitary district.

It is to be presumed that the funds in question were either derived from taxation or from the sale of bonds for a particular purpose. In either event such funds must be used for the public purpose for which they were levied or voted. Article V, Section 2, Ohio Constitution; Sections 5625-3, 5625-10 and 5625-13, General Code.

If such be the law, and since no statutory authority exists for the waiver of the priority of the claim against the bank, I am of the opinion that the sanitary district has no authority to enter into an agreement with the bank to receive the return of the deposit after the other preferred claims have been paid.

The question remains as to whether the sanitary district could return the securities deposited with it for the return of the deposit. As I have above pointed out, the depository contract between the bank and the depository district was null and void, being beyond the powers of the subdivision. It is difficult to perceive by what reasoning a subdivision would escape the burdens of the void agreement but at the same time retain its benefits. The purported contract being beyond the powers of the sanitary district, it never was entered into. The result would be that each of the parties to the purported contract would become trustee for the benefit of the other, of that property coming into its possession by reason of the void contract.

It might be contended that Section 710-89a, General Code, would grant authority to the bank to reopen and impose the conditions imposed. Such section provides that such bank may resume business when it has obtained the consent of the superintendent of banks upon such conditions as may be approved by the common pleas court of the county in which it is located. Such section describes the types of conditions that may be improved, *if deemed necessary by the court.*

(a) Reasonable restrictions may be placed on the withdrawal of deposits.

(b) Reasonable restrictions may be placed on the payment of the obligations of the bank.

(c) It might be provided that the deposits and other liabilities of the bank be proportionately reduced if certain assets are set aside for the purpose of the payment of such deposits or liabilities. The creditor receives in such case, a participation in the assets so segregated in lieu of that position of his credit which has been reduced.

(d) The court might approve other conditions.

It should be noted that this section does not give the court any right to place conditions unpon the bank desiring to reopen, but rather gives it the right to approve them. The section further provides for notice to creditors and for the hearing of their objections. If objections are filed the court may set aside

a proportionate amount of the assets for the payment of their claims. There is, however, no language in such section which purports to give the court or the superintendent any right to change the trust title of the bank to the assets in question to an absolute title. The title of the bank to the deposit in question is that of a trustee, the legal title might be said to be in the bank but the entire equitable title is in the subdivision. The relation of debtor and creditor does not exist between the bank and the subdivision. *Franklin Nat. Bank* vs. *City of Newark, supra.*

In specific answer to your inquiry, it is my opinion:

1. When a sanitary district organized under the sanitary district act of Ohio (Sections 6602-34 to 6602-106, General Code) deposits funds coming into its possession in a bank in any other manner than that provided in Section 6602-79, General Code, such funds so on deposit constitute a preferred claim in the event of a liquidation of the bank by reason of insolvency providing the bank had knowledge of the nature of and ownership of the funds so deposited.

2. When the president or other executive officer of a bank is also an executive officer of a depositing corporation such bank should be held to have knowledge of the ownership of the funds on deposit.

3. When a sanitary district has illegally deposited its funds in a bank which has knowledge of the illegality of the deposit and the bank has delivered to the sanitary district securities to insure the return of the funds on deposit such contract by reason of its ultra vires nature, is void, and neither party thereto can obtain any rights thereunder.

4. When a taxing subdivision is the owner of a preferred claim against a bank in liquidation such subdivision may not legally waive the priority of its claim and consent to become a general depositor and share with other general depositors in the reorganization of the bank in liquidation.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2089.

DEPUTY TAX COMMISSIONER—CIVIL SERVICE COMMISSION TO DETERMINE IF POSITION IS IN FACT IN UNCLASSIFIED SERVICE.

SYLLABUS:

1. *The provisions of section* 154-38*a, General Code, in respect to deputy tax commissioners, are not subject to, limited or qualified by paragraph* 9 *of subsection* (*a*) *of section* 486-8, *General Code.*

2. *The Civil Service Commission of the State of Ohio is governed solely by the provisions of section* 154-38a, *General Code, in determining whether a person appointed by the Tax Commission under section* 154-38*a to act for and in place of the Tax Commission in the administration of the duties that devolve upon the Tax Commission by law is in the classified or unclassified service. In determining whether the position of deputy tax commissioner is in fact in the unclassified service, the Civil Service Commission has no recourse to the test or*