been executed by the Conservation Commissioner and by the respective lessees therein named in the manner provided by law.

I likewise find, upon examination of the provisions of the leases here in question and of the conditions and restrictions therein contained, that the same, with one exception hereinafter noted, are in strict conformity to statutory provisions relating to leases of this kind. The excepted provision here referred to is one occurring in one or more of these leases and which attempts to secure to the lessee therein named the right to a new lease for so much of the land covered by the lease as may be occupied by some building or buildings at the time of the expiration of the lease As required by statutory provision, each of these leases is for a stated term of fifteen years and it would not be competent for the present Conservation Commissioner to bind his successor or other officer in authority with respect to the lease, if any, to be executed on the property at the expiration of the lease or leases here in question. The effect of this provision will doubtless be to give something in the way of a moral right to a lessee who has expended money in the construction of buildings or other improvements upon the property covered by the lease and this is, perhaps, as it should be. However, as pointed out in previous opinions of this office, this provision is not one of binding legal obligation. I do not feel disposed to disapprove any lease or leases containing this provision on this ground. The most that can be said of the provision is that the same is legally ineffective. These leases being in all other respects in conformity to law, the same are hereby approved as to legality and form, as is evidenced by my approval endorsed upon these leases and upon the respective duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4652.

LIQUIDATION OF BANK—TOWNSHIP FUNDS DEPOSITED IN EXCESS OF BOND—SURETY LIABLE TO EXTENT OF BOND—DIVIDENDS FIRST CREDITED TO REMAINING TOWNSHIP FUNDS BEFORE SURETY ENTITLED TO SUBROGATION.

SYLLABUS:

When, upon liquidation of a bank which is a depository of township funds, and in which township funds have been deposited in excess of the bond given by such bank, the surety has reimbursed the loss to the extent of the penal sum of the bond, such surety is not entitled to a pro tanto subrogation, and any dividends received upon liquidation should be credited to the repayment of the remaining township funds on deposit, the excess, if any, paid to the bondsman, the township trustees remaining liable for any deficiency.

COLUMBUS, OHIO, September 27, 1932.

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

GENTLEMEN:—I am in receipt of your request for opinion, which reads:

"Section 3324 of the General Code, relating to the security of funds

of a township in a depository, seems to create a liability against the trustees of the township and their bondsmen, if any loss is occasioned by deposits in excess of the security.

Question: In a case where a township depository bank fails and there is more township money on deposit within said bank than the amount of the bond, are the dividends paid by the liquidating agent of the bank credited against the liability of the township trustees, or against the liability of the bond? In other words, if the dividends paid by the liquidating agent of the bank amount to more than the amount of the excess deposit, are the trustees relieved of any liability under the provisions of Section 3324, General Code?"

Section 3320, et seq., apparently place upon township trustees the mandatory duty of providing depositories for township funds. Such section 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 or 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.)

Section 3324, General Code, referred to in your inquiry, which provides for the bond which must be given as security for the safe custody of funds deposited, provides:

"Such bank or banks shall give good and sufficient bond to the approval of the township trustees in a sum at least equal to the amount deposited for the safe custody of such funds, and *the trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds.*" (Italics, the writer's.)

The courts have generally held concerning depository bonds that the statute creating or authorizing and requiring such bonds is to be read as a part of any bond given pursuant to the requirements of such statute. *State* vs. *Federal Union Surety Compan,* 12 O. N. P., N. S., 185; *Village of Wyoming* vs. *Citizens Trust & Guaranty Company,* 9 O. App., 225.

In the case of *Village of Wyoming* vs. *Citizens Trust & Guaranty Company, supra,* a similar question to your inquiry was presented to the Court of Appeals of Hamilton County. In that case the court had under consideration the then existing statute, which required the municipality to procure a bond from the bank in an amount ten percent in excess of the amount deposited in the depository furnishing the bond. The village accepted a bond in the penal sum of $10,000.00 executed by the defendant in error, but subsequently deposited sums aggregating in excess of the penal sum of the bond. At the time the depository was taken over by the receiver for liquidation by reason of insolvency, the village had on deposit with the depository the sum of $19,306.19. Upon liquidation the receiver

paid dividends to the village in the sum of $10,618.40, leaving an unpaid balance of $9,305.59. The defendant in error paid to the village $4,756.50, claiming that it was only liable for this amount. The court held that the surety company was liable for the amount remaining unpaid after receipt of the amount distributed by the receiver, but not in excess of the penal amount of the bond, and permitted recovery of the total deficiency even though the amount on deposit with the depository was in excess of that permitted by statute. Syllabus 1 and 3, read as follows:

> "1. A bond securing deposits made by a city or village in a designated depository is a statutory bond into which the provisions of the statute relating thereto must be read, and the surety will be held to have contracted with reference to such statutory provisions.
> 3. The amount for which the surety is liable, up to the face of its bond, is the amount with interest shown to remain due the municipality after liquidation of the depository."

This case was decided upon the theory that it was the duty of the bank and not of the municipality to see that a bond equal to one hundred and ten percent was given to the municipality. On page 231 of the opinion it is stated:

> "But this statute puts the duty upon the bank which is designated as the depository of the municipal corporation to give good and sufficient bond. It does not impose the duty upon the council of the municipality or upon the treasurer of the municipality to see that the bond is given. No doubt it would be the duty of the officers of the municipality to see that a sufficient bond was given in order to protect the village from any loss which might occur; but it does not lie in the mouth of the surety company to say that because the village failed to secure additional sureties or an additional bond, it, the surety company, is therefore not liable for more than 90 per cent. of the face of its bond. The surety contracted to be liable to the village to the extent of $10,000, and if the loss of the village reached $10,000 it would be liable for the full amount of the bond."

However, in this case the statute differed materially in language from that contained in Section 3324, General Code. The statute then in effect with reference to municipal deposits provided that:

> "Council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest-bearing obligations of the United States," etc.

The language of Section 3324, General Code, is specific, that,

> "The trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such

trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

It will thus be seen that the Legislature has in this section specifically placed the duty upon the trustees of the township of seeing that a sum of money is not deposited with the depository in excess of the bond given by the bank.

I am therefore of the view that the decision in the case of *Village of Wyoming* vs. *Citizens Trust and Guaranty Company, supra,* is not applicable to your inquiry.

It would appear from this statute, read in conjunction with the bond that was given by the bank, that the intention of the legislature was to make the bondsmen liable for the return of the funds to the extent that they were not in excess of the penal sum of the bond, and to make the township trustees and their bondsmen liable for any loss that might be occasioned by a deposit in excess of that sum.

The conditions of the bond have been broken when the bank becomes insolvent and its assets are placed in the custody of the Superintendent of Banks, since the bank is no longer able to return the funds upon demand. In other words it is no longer possible for the bank to perform its part of the contract. This impossibility of performance gives rise to an immediate cause of action against such insurer or bondsman for the penal sum of the bond.

The liability of the township trustees by virtue of the statute (Section 3324, General Code) is not that of an insurer, but is a definite statutory liability "for any loss occasioned by deposits in excess of such bonds." If, upon liquidation, the bank repaid the full amount of the sum deposited, there would be no loss for which the township trustees could be liable, except loss of interest, if any, and loss resulting from the failure to obtain the money when and as needed, if any.

If no money had been deposited in the bank in excess of the amount of the bond, the bonding company might have been entitled to the rights of the township trustees upon payment of the total funds on deposit. However, the Court of Appeals for Madison County, in the case of *Blair, Superintendent of Banks* vs. *Board of Education,* 38 O. A., 303, held, as stated in the syllabus:

> "Where a depositor in a bank has his deposit secured to a limited amount by a bond, but at the time of the insolvency of the bank has a deposit greatly in excess of the amount of the bond, and the assets of the bank are not sufficient to pay its creditors in full, the bonding company, after paying the depositor the amount named in the bond, is not entitled to subrogation pro tanto to the amount paid by it on the bond; nor can it have the amount paid by it deducted from the claim of the depositor and receive a pro rata share of the dividends on the amount so paid, nor is it entitled to have its claim allowed as a general creditor and share in the funds as such."

As a result of this decision I am constrained to hold that when upon liquidation of an insolvent bank, which is a depository of township funds and in which township funds have been deposited in excess of the bond given by such bank, the surety has reimbursed the loss to the extent of the penal sum of the bond, such surety is not thereby entitled to a pro tanto subrogation to the claim against such bank and any dividends received upon liquidation should be first credited to the repayment of the remaining township funds on deposit, the excess if any

paid to the bondsman, the township trustees remaining liable for any deficiency that may occur.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4653.

APPROVAL, LEASE TO RESERVOIR LAND IN INDIAN LAKE, FOR RIGHT TO USE FOR WALKWAY, LAWN AND DOCKLANDING PURPOSES—A. L. FOLEY.

COLUMBUS, OHIO, September 27, 1932.

HON. EARL H. HANEFELD, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge your recent communication over the signature of the Chief of the Bureau of Inland Lakes and Parks, submitting for my examination and approval a certain reservoir land lease executed by the Conservation Commissioner under the authority conferred upon him by Section 471, General Code, as amended by the 88th General Assembly in the enactment of the Conservation Act. By the lease here in question, there is granted to one A. L. Foley of Springfield, Ohio, the right for a term of fifteen years to use and occupy for walkway, lawn and docklanding purposes that portion of the State Reservoir property along the westerly end of Lot No. 43 of the allotment of lands on Orchard Island, in Indian Lake, that lies between the ordinary water line of the reservoir and a contour line run one foot above the waste-weir line of Indian Lake.

On examination of this lease, I find that the same has been executed by the Conservation Commissioner and by the above named lessee in the manner provided by law. And assuming that the State of Ohio has title to the property covered by the lease, I find that the provisions of this lease and the conditions and restrictions therein contained are in conformity to statutory provisions relating to leases of this kind.

The suggestion above made with respect to the question of the state's title to this property arises by reason of certain litigation in the Common Pleas Court of Logan County in which the state was not a party but in which, as I am advised, the question was made as to whether or not the owners of land on Orchard Island did not have proprietary rights in such land down to the water's edge. This question, so far as I am advised, has never been submitted to this office for opinion or determination and no opinion is expressed upon the question at this time. I am approving this lease as to legality and form on the assumption, above noted, that the state has title to the land covered by the lease. If, on further investigation of fact, any substantial question should arise in your mind with respect to the title of the state to this property, the lessee above named should be advised of the fact before the lease is delivered to him and before any money is taken from him by way of rental for this land.

For the reasons above stated, I am approving this lease as to legality and