were offered and all of them were concurred in by representatives from your department. If necessary they can give you the reasons for the suggested changes.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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547.

APPLICATION OF OPINION NUMBER 3445, OPINIONS OF ATTORNEY GENERAL, JUNE 10, 1926, TO CERTAIN FACTS DISCUSSED.

*SYLLABUS:*

*Application of opinion No. 3445, Opinions, Attorney General, June 10, 1926, to certain facts discussed.*

COLUMBUS, OHIO, May 28, 1927.

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

DEAR SIR:—This will acknowledge receipt of your communication as follows:

> "I respectfully request the applicability of the principles of law discussed in the Opinion of the Attorney General No. 3445 to the following specific state of facts, disclosed by a recent audit of the Automobile Division of the Secretary of State's office, as set forth in the account of said division, and this condition obtained in over 200 banks with some variations as to deposits and withdrawals. The accompanying sheets is a transcript of the books relating to the deposits and withdrawals in the Union Trust Company, Cincinnati.
>
> Under these admitted facts would there be any interest due to the State, and from whom?"

The sheets accompanying your communication show a complete statement of the account of one of the deputy registrars of the automobile division of the Secretary of State's office with the Union Trust Company of Cincinnati, as shown by the records of the office of the Secretary of State.

Information which you have furnished me supplementary to your communication shows that the funds making up this account were the moneys received by the deputy registrar in the city of Cincinnati from the sale of motor vehicle licenses which were deposited by him in the Union Trust Company to the credit of Thad H. Brown, Secretary of State, and subject to the order of the Secretary of State.

The initial deposit to the credit of this account was made on December 1, 1923, in the sum of $4,048.00. Additional deposits were made during the said month on the 4th, 5th, 6th, 7th, 8th, 11th, 15th, 18th, 20th, 22nd, 24th, 28th, 29th and 31st, totaling for the month the sum of $157,333.51. Deposits were made at various times during each month until August 3, 1925, when the account was closed by the withdrawal of the balance amounting to $4,812.10. The average aggregate monthly deposits during this period were $70,813.47. The aggregate deposits during the months of December, January and February of each year were much greater than those for any other months of the period. Deposits made during the summer and early fall months were small as compared with those for other months.

The account shows that on December 28, 1923, the total deposits up to that time had amounted to $80,294.10, that no withdrawals were made from said account until January 26, 1924, when there was withdrawn and transferred to the state treasury

the sum of $80,000 which was 20.5% of the total balances at that time. The aggregate deposits on that date had amounted to $398,841.98. Subsequent withdrawals are shown to have been made at various times during the period that the account was carried in amounts bearing proportion to balances at the time of the withdrawals as follows:

| | | | | |
|---|---|---|---|---|
| January | 26, | 1924 | 20.05 | per cent. |
| " | 31, | " | 56.017 | " " |
| February | 15, | " | 41.58 | " " |
| " | 18, | " | 49.01 | " " |
| " | 29, | " | 41.92 | " " |
| March | 17, | " | 58.32 | " " |
| April | 15, | " | 39.99 | " " |
| May | 28, | " | 57.48 | " " |
| June | 26, | " | 48.44 | " " |
| July | 22, | " | 58.09 | " " |
| September | 8, | " | 48.64 | " " |
| October | 2, | " | 74.82 | " " |
| " | 26, | " | 94.08 | " " |
| December | 15, | " | 100.00 | " " |
| January | 12, | 1925 | 57.17 | " " |
| " | 19, | " | 31.29 | " " |
| " | 26, | " | 27.62 | " " |
| February | 2, | " | 57.48 | " " |
| " | 9, | " | 43.99 | " " |
| " | 16, | " | 48.57 | " " |
| " | 21, | " | 54.00 | " " |
| " | 28, | " | 52.04 | " " |
| March | 9, | " | 70.003 | " " |
| " | 23, | " | 52.75 | " " |
| April | 11, | " | 12.10 | " " |
| " | 27, | " | 31.76 | " " |
| May | 4, | " | 49.45 | " " |
| " | 18, | " | 35.27 | " " |
| June | 1, | " | 45.66 | " " |
| " | 15, | " | 57.79 | " " |
| " | 29, | " | 60.14 | " " |
| July | 15, | " | 54.49 | " " |
| " | 28, | " | 61.72 | " " |
| August | 3, | " | 100.00 | " " |

I have no hesitancy in saying that, inasmuch as the deputy regitrar was at all times during which this account was carried, charged by law with the duty of receiving applications for registering motor vehicles and immediately forwarding the same together with the fee therefor to the Secretary of State, (Sec. 6294 G. C. as amended April 5, 1923—110 O. L. 139) the Secretary of State might in the interest of the safe transmission of these fees, adopt a method whereby he could avail himself of the usual facilities afforded by banks for the purpose, and if such arrangement was made whereby the deputy registrar deposited the fees as collected in some designated bank or banks subject to the order of the Secretary of State, such deposit in the designated bank would be forwarding the fees by the deputy registrar to the Secretary of State.

It clearly appears that the officials of the bank knew the nature of the account not only from the fact of its being carried on the books of the bank in the name of Thad H. Brown, Secretary of State, but as well for the reason that the size and frequency

of the deposits must necessarily have put the officials of the bank upon inquiry as to the source of the moneys constituting the deposits.

Opinion No. 3445 to which you refer was an opinion rendered by my predecessor Honorable C. C. Crabbe and directed to you on June 10, 1926. As the principles of law upon which are based the conclusions set out in this said opinion are fully discussed in the opinion, a copy of which you have in your files, I do not deem it necessary at this time to review the authorities upon which the holdings of said opinion are based, but will after setting out the holdings of this aforesaid opinion apply such holdings to the statement of facts before me as you request.

The conclusions of law as determined and set out in the aforesaid opinion No. 3445, supra, are as follows:

"1. It was the duty of the deputy registrar, under section 6294, General Code, as amended by act of April 5, 1923 (110 O. L., 139), to immediately forward to the secretary of state all fees collected by him under the automobile registration act. The duty to immediately forward the funds to the secretary of state is complied with if, under the circumstances of the case, the same are transmitted to the secretary of state within a reasonable time. An arrangement whereby, in the interest of safe transmission of the funds so collected, the secretary of state directed the deputy registrar to transmit the funds to him through the agency of a local bank, was within the powers of the secretary of state under said acts and a delivery of the funds to said local banks, pursuant to such arrangements, by the deputy registrar, constituted substantial compliance with section 6294 and was a transmission of said funds to the secretary of state.

2. It was the duty of the secretary of state, under section 6309, as amended, (108 O. L., 1165) and section 24 General Code, to deposit all registration fees then in his custody in the state treasury on Monday of each week, in order that the same might be placed at interest in the depositories of the state under sections 321, et seq., General Code.

3. If the secretary of state failed to turn into the state treasury the funds so collected by him under said act, in substantial compliance with said act, he is liable to the state for whatever loss may have been suffered by the state due to such failure. The measure of recovery is the amount of loss, if any, suffered by the fund.

The right to so recover is based upon the rule of law that a public office is a public trust, subject to all restrictions and liabilities that obtain against trustees of private trusts, among which is that a trustee for the purposes of investment must use due diligence to keep the funds of the trust invested. The statute prescribes the duties of the public officer and such provisions are mandatory, not merely directory.

4. If it be found that the secretary of state has failed to substantially comply with said act in respect to the deposit of such funds with the state treasurer, such failure would constitute a breach of his official bond conditioned for the faithful discharge of the duties of his office, for which the sureties on the official bond would be equally liable with the principal.

5. If banks have received said fees, otherwise than for the purposes of immediate transmission to the secretary of state, with knowledge that they were such state funds, such banks will be liable to the state for whatever profit may have been realized by them from said funds; or, if no profits have been realized, then to the extent of the loss to the state caused by the funds being withheld from deposit in the state treasury, thereby preventing them from being deposited at interest in the state depository.

The right to so recover, as first stated, is based upon the rule of law that

all increments to trust funds become a part of the principal and that all persons holding trust funds with knowledge of their character, become liable to account to the beneficiary of the trust for the principal and the profits thereon. The right to so recover, as last stated, is based upon the rule of law that all persons holding trust funds for purposes of investment, with knowledge of their character, become liable to account to the trust fund for loss due to neglect of the trustee to keep the funds invested."

It will be noted that the provisions of law requiring the deputy registrar immediately to forward to the secretary of state all fees collected by him under the automobile registration act (Section 6294, General Code, as amended by act of April 5, 1923—110 O. L. 139) have been fully complied with in the instant case as determined by conclusion No. 1 as set out above, his acts in making deposits in the designated depository banks being a substantial compliance with the provisions of section 6294, supra, and amounting to a transmission of the fees to the secretary of state.

In accordance with conclusion No. 3 as above set out, the secretary of state is liable for any loss suffered by the state by reason of moneys coming into his possession as such secretary of state during the period from December 1, 1925, to August 3, 1925, if he fails to deposit the same in the state treasury in compliance with the automobile registration law as amended in 108 O. L., page 1165, which must be determined in this case by taking the amounts received by the secretary of state as shown by the deposits in the depository banks of the deputy registrar and computing what interest the state would have received on such moneys if they had been deposited in the state treasury in compliance with the law.

During the period covered by the transactions herein under discussion it was provided by section 6309-1, General Code, as amended, (108 O. L., Part 2, page 1082) in part as follows:

"The treasurer of state is hereby authorized to deposit any portion of the funds due districts of registration under this chapter not needed for immediate distribution, in the same manner and subject to all the provisions of the law with respect to the deposit of active state funds by such treasurer; and all interest earned by such funds so deposited shall be collected by him and placed in the state treasury to the credit of the 'state maintenance and repair fund.' "

It is apparent that the funds shown by this account were not deposited in the state treasury weekly as provided by law. See sections 24 and 6309, General Code, as amended January 28, 1920 (108 O. L. Part 2, page 1165).

To determine, therefore, the amount of interest which the state has lost by reason of the failure to transmit these funds to the state treasury as provided by law it is necessary to determine the exact dates when such funds should have been transmitted to the state treasury and then to determine what portion of the said funds were not needed for immediate distribution by the state treasurer and what would have been deposited by him as provided by section 6309-1, supra. The interest on these funds from the time the state treasurer would have deposited them with the state depository to the time when the funds would have been withdrawn by the state treasurer, computed on the basis of the amount of interest received by the state on its active state funds will be the interest which the state has lost by reason of the failure on the part of the secretary of state to make deposits with the state treasury as required by law.

If it be determined that the secretary of state is liable for any interest on these funds the sureties on his official bond would be equally liable with him as set out in conclusion No. 4.

It would seem clear that the bank in this case could not be heard to say that it

did not know the character and source of the deposits made by the deputy registrar and would be liable in the first instance for any profits realized from the use of the moneys while on deposit. In view of the holding of the Supreme Court of Ohio in the case of *Bank* v. *The City of Newark*, 96 O. S. 453, this conclusion seems inescapable. Whether or not any profits were realized by the bank is a question of fact which, from the information at hand, I am unable to determine. Whether any profits were realized by the bank or not by reason of carrying this account it would be equally liable with the secretary of state if in fact it is determined that the secretary of state is liable for any interest by reason of his failure to deposit the moneys coming into his hands as secretary of state in the state treasury in compliance with the law.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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548.

## COUNCIL OF CITY OR VILLAGE—AUTHORITY TO FIX SALARY OF JUSTICE OF THE PEACE.

*SYLLABUS:*

*When the corporate limits of a city or village have become identical with those of a township and the council of the city or village has by ordinance fixed the amount of compensation to be paid to a justice of the peace, elected within the township, as the amount of fees taxed and collected by said justice of the peace in the hearing of state cases, the council of said municipality may subsequently change the amount of compensation to be paid to said justices of the peace by the enactment of an ordinance providing for the payment to the justice of the peace of a definitely fixed salary.*

COLUMBUS, OHIO, May 28, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your communication, in which after quoting sections 3512 and 4219, General Code, you request my opinion as follows:

> "The corporate limits of the village of————are identical with those of the township and council by ordinance, passed some years ago provided that the compensation of the justice of the peace should be the fees taxed and collected in state cases tried before him. On March 27, 1927, this ordinance was repealed and the compensation of the justice of the peace was fixed by ordinance at $100.00 per month with the further provision that all fees collected are payable into the village treasury, presumably the fees to be deposited will equal the compensation of the justice.
>
> QUESTION: May the compensation of the justice of the peace in question be definitely fixed in this manner during his term of office since the result might be an increase or decrease over the amount of fees formerly received?"

In your communication you have suggested the applicability of the provisions of sections 3512 and 4219, General Code, which read as follows:

> "Sec. 3512. When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of