quire a license for the operation, maintenance, opening or establishment of stores in this state.' JOHN W. BRICKER, Attorney General."

Respectfully,
JOHN W. BRICKER,
Attorney General.

976.

TOWNSHIP MEMORIAL FUND—TRUSTEES MAY DEPOSIT OR INVEST FUNDS THEREOF IN BUILDING AND LOAN COMPANY—WHEN FUNDS MAY BE DEPOSITED IN BANK WITHOUT INTEREST—BANK LIABLE FOR INTEREST WHEN.

SYLLABUS:

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 with 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.*

3. *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.*

COLUMBUS, OHIO, June 21, 1933.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Some years ago, a Memorial Building was constructed under the provisions of Section 3410-1 et seq. General Code, and a board of trustees appointed by the Common Pleas Court has had charge of the same. The building was destroyed by fire some four or five years ago, and the trustees executed a lease to a theatre company. The terms of the lease were that the theatre company should furnish $200,000 to reconstruct the building, and the trustees would furnish $70,000, received from the insurance on the building; at the end of a specific number of years, the building was to become the sole property of the trustees. In the meantime, the theatre company paid the trustees five percent upon the $70,000.

There has been but one levy of taxes for the support of this building, which was turned over by the township treasurer to the Memorial trustees.

Question 1: May the funds in the possession of the Memorial Trustees be legally deposited in a Building and Loan Company?

Question 2: If the funds are deposited in a bank with no contract to pay interest, is the bank liable for interest under the decision of the Supreme Court in the case of *Franklin National Bank* vs. *Newark,* 96 O. S. 452?"

The first question that occurs to me in connection with your inquiry is whether or not the board of trustees of a township memorial building has a right to the custody of the funds incident to the maintenance of such a building, and as an incident to this custody, if the board has it, any authority to deposit those funds in any type of financial institution.

The first general law authorizing the construction and maintenance of township memorial buildings to commemorate the services of soldiers, sailors, marines and pioneers of the several townships in the state was enacted in 1910. (101 O. L. 387.) This act was codified as Sections 3410-1 to 3410-13, of the General Code. It provided for the construction and maintenance of a memorial building within any township by a board of trustees appointed by the common pleas court, said board to be known as the "Soldiers' and Sailors' Memorial Association of ..... Township, ... County, Ohio." It did not authorize two or more townships to unite in the construction of a joint memorial building as does the present law, but limited the construction and maintenance of such a building and the formation of a township memorial association for that purpose to a single township.

This act authorized the said board of trustees to elect a treasurer from their own number and expressly provided that the custody of the funds incident to the construction and maintenance of the memorial building should be in the said treasurer who was required to give a bond in the sum to be fixed by the common pleas judge. It provided further that these funds were "to be paid out upon the order of the board of trustees certified by its chairman and secretary." The members of the board were also each required to give a bond to the satisfaction of the township trustees.

It was further provided therein that upon the completion of said memorial building no bond need be given by the members of the board of trustees unless the same was required by the common pleas judge, except the treasurer who should give a bond in a sum to be fixed by the said common pleas judge.

In 1919 there was enacted an act of the legislature expressly repealing Sections 3410-1 to 3410-13, of the General Code, and enacting in their stead, several sections which were codified as Sections 3410-1 to 3410-11, inclusive, of the General Code. (108 O. L., Part 1, p. 542.) The title of this act of 1919 is:

"An act to authorize the erection and maintenance of a memorial building, monument, statue or memorial by the trustees of a township or townships to commemorate the services of the soldiers, sailors and marines thereof and to repeal Sections 3410-1 to 3410-13, inclusive, of the General Code."

As indicated by its title, this act authorized the erection and maintenance of a township memorial building by a single township or by several townships joining in the project. It provided for the issuance of bonds for memorial building purposes, by a single township or by each of several townships joining in the erection of said building in proportion to the tax valuation of such townships. Section 4 of said act reads as follows:

"If such improvement is to be made by a single township the proceeds of such bonds, other than any premium and accrued interest which shall be credited to the sinking fund shall be placed in the township treasury to the credit of a fund to be known as 'the memorial fund.' If such bonds are issued by two or more townships to build a joint building, the trustees of each township shall select one of their number and the men so selected shall constitute and be known as the memorial trustees. And such memorial trustees shall have full power to do and perform all acts imposed upon the township trustees with reference to a single township memorial, such powers being fully set out in sections 5, 6, 7, 8, 9, 10, and 11 of this act. And wherever the term trustees or township trustees is used in said section with reference to the powers and duties of such trustees as to the construction and maintenance of such memorial building, monument, statue or memorial, the same shall be construed to mean 'memorial trustees' in case of a joint building. Such fund shall be paid out upon the order of the township trustees. Upon the completion of the memorial building, monument, statue or memorial, any unexpended balance shall be transferred and placed to the credit of the sinking fund."

It will be observed that under the provisions of this act, a board of trustees for the erection and management of a township memorial building separate from the regular "township trustees," is not authorized, unless there are two or more townships joined in the enterprise. When a single township erected and maintained a memorial building under this act, the terms of the act are clear as to the custody of the funds for that purpose. When two or more townships joined in the project the act is silent on this subject. It did not, in terms, as did the former act, provide for the election of a treasurer of a joint board of trustees or for the custody of the funds in that event, or that the members of the board or anyone else should give a bond to secure the funds.

In 1925, Sections 3410-4 and 3410-10 of the General Code, were amended, and Section 3410-9a, General Code, was enacted. (111 O. L. 406.) In the amendment of Section 3410-4, General Code, no change was made except in the clause which appears in the former section, as follows:

"And wherever the term trustees or township trustees is used in said sections with reference to the powers and duties of such trustees as to the construction *and maintenance* of such memorial building, monument, statue or memorial, the same shall be construed to mean 'memorial trustees' in case of a joint building." (Italics the writer's.)

As amended in 1925, the words in italics in the above quotation were omitted. Sections 3410-9a, General Code, as then enacted, and Section 3410-10, General Code, as then amended, read as follows:

Sec. 3410-9a. "Upon the completion, equipping and finishing of the memorial building, the trustees shall certify the same to the court of common pleas of the county in which such memorial building was constructed, and thereupon, and also in the case of any such memorial building existing prior to the enactment hereof, the court of common pleas shall appoint a board of permanent 'memorial trustees' composed of

seven citizens of said township, provided however, if two or more townships unite in constructing a joint building each township shall be represented on each board, one of whom shall be appointed for the term of one year, one for two years, one for three years, one for four years, one for five years, one for six years, and one for seven years, and each and every year thereafter the court of common pleas of the county in which such building is located shall appoint a successor for a term of seven years, to the trustee whose term of office then expires; but not more than four of the members of said board of trustees shall belong to the same political party.

Upon such appointment by the court of common pleas the township trustees shall transfer such completed, equipped and furnished memorial building and such other property and funds acquired under section 3410-6 of the General Code to the said 'permanent (memorial) trustees' and the title of such property shall thereupon vest in the said permanent 'memorial trustees', (and the 'memorial trustees') as provided for in section 3410-4 of the General Code, shall cease to exist as an official board."

Sec. 3410-10. "The permanent memorial trustees shall provide for the maintenance of such memorial building, monument, statue or memorial and shall always keep them in such shape and condition that they will fulfill the purpose for which they are constructed.

They may receive donations and bequests to aid in the maintenance of such memorial building and such moneys, together with moneys received from all other sources, shall be placed in a fund to be known as the township memorial fund, and which shall be paid out on vouchers signed by two members of such board.

The memorial trustees shall report annually a complete statement of all their receipts and disbursements, and shall annually certify to the township trustees of the township or townships the amount of money required for the maintenance thereof and the making of any necessary improvements thereto and the township trustees shall place such amount in their budget or budgets and certify the same to the budget commission of the county. The memorial trustees may permit the occupancy and use of the memorial building or any part thereof, upon such terms as they deem proper."

Neither of the above sections has since been changed nor has there been any further or later legislation with reference to township memorial buildings.

Under the present law a township memorial building, whether erected by a single township or by several townships jointly is to be maintained by a board of "permanent trustees" appointed by the common pleas court. No provision is made for the election of a treasurer by this board or for the giving of a bond by any of the members of the board or by a treasurer, if one should be elected; neither is there any specific provision made as to the custody of the funds.

Section 3410-9a, supra, provides that upon the appointment of the board of permanent trustees the memorial building and all the property and funds incident to the construction of this building and all property previously received by donations, legacies or devises for the purpose shall be transferred to the permanent board. This permanent board is authorized by Section 3410-10, supra, to receive donations, legacies and bequests and is directed to place any such moneys together with moneys received from all other sources, in a fund to be known

as the "township memorial fund" which shall be paid out on vouchers signed by two members of the board. Nowhere in the statutes will be found any specific instructions as to where the actual custody of this "township memorial fund" is reposed.

Provision is made by Sections 3059, et seq. of the General Code, for the erection and maintenance of county memorial buildings. Sections 3068 and 3068-1, General Code, provide for the appointment by the common pleas court of a board of permanent trustees for the maintenance of these county memorial buildings and further provide that the funds incident to the maintenance of these buildings shall be known as the "memorial building maintenance fund." The terms of these sections provide with reference to county memorial buildings for the appointment of trustees and the handling of the funds in language almost precisely like the language used in Sections 3410-9a and 3410-10, General Code, with reference to the appointment of trustees and the handling of the funds for township memorial buildings, except that the title to the funds is not vested in the county memorial trustees. On the other hand, by the express terms of the statute the title to this property is vested in the county.

A former attorney general in construing the terms of Sections 3068 and 3068-1, General Code, held in an opinion which will be found in Opinions of the Attorney General for 1928, at page 606:

> "Such moneys as a board of permanent trustees of a memorial building receives under the provisions of Section 3068-1, General Code, shall be deposited by it in the county treasury to the credit of the 'memorial building maintenance fund'."

The construction placed by the Attorney General on the terms of Sections 3068 and 3068-1, General Code, cannot, in my opinion, be applied to the terms of Sections 3410-9a and 3410-10, General Code, for the reason that the situations are not analogous. To construe these statutes so as to hold that the "township memorial fund," by which money the funds incident to the maintenance of a township memorial building shall be known, as directed by Section 3410-10, supra, should be deposited in the township treasury, the question immediately arises which township, where two or more townships have joined in the erection of the building. To construe these statutes, as did the Attorney General the statutes relating to county memorial buildings, would result in a ridiculous and impossible situation. There is no more reason to say that one of the townships involved in the maintenance of the building should receive the money than another. It is my opinion that no other conclusion with reference to the construction of these statutes is possible than that it was the intention of the legislature that the custody of the funds incident to the maintenance of a township memorial building should be in a board of permanent trustees appointed for the purpose of maintaining the said building. This board is directed, by the terms of Section 3410-9a, General Code, to receive by transfer from the building trustees, upon their appointment, the completed, equipped and furnished memorial building and such other property and funds as may have been acquired by the building trustees for the purposes of the memorial building and it is provided that the *title to all such property, including the funds,* shall "vest in the said permanent memorial trustees."

Had the legislature intended that the custody of these funds should be in any other hands than the persons with whom the title is vested, it would, in

my opinion, have said so. The mere fact that the legislature failed to require these trustees to give a bond, and failed to make any provisions with reference to a depository for the funds is not inconsistent with this conclusion.

By virtue of the foregoing provisions of law, the legislature has clothed these memorial trustees with certain administrative powers and duties. As administrative officers, they are charged with the duty of providing for the maintenance of the memorial building, statue and memorial and of always keeping them in such shape and condition that they will fulfill the purpose for which they are constructed. The trustees are directed to report annually a complete statement of all their receipts and disbursements. Beyond this, their powers with respect to the funds in their possession are unlimited so far as any specific statutory provisions are concerned and I know of no general statute applying to public officers that would in any way limit this board in the investment or deposit of the funds in their possession.

It therefore becomes important to know just what the duties and powers of public officers are, under such circumstances. It has been, and perhaps still is the weight of authority that in the absence of statute to the contrary, or a specific provision for the designation of a depository and the placing of public funds therein, a public officer who, by virtue of his office as a custodian of public money is an insurer thereof. Throop Public Officers, Sections 221 et seq.; Mechem on Public Office, Sections 297 et seq.; R. C. L. pages 468 and 469; 46 C. J. 1039; 22 L. R. A. 449 n.; 7 L. R. A. (N. S.) 1084 n.; 36 L. R. A. (N. S.) 285 n.; 18 A. L. R. 982 n.; 59 A. L. R. 69.

This general rule is not followed in Ohio, although there have been some expressions of courts that would seem to uphold the rule. In the case of *Seward* vs. *Surety Company,* 120 O. S. 47, Judge Kinkade, in rendering his opinion, states positively that the obligation of a public officer to account for funds in his possession is as broad as that of a common carrier of freight received for shipment. To quote from his opinion:

> "That is to say, that when he comes to account for the money received, it must be accounted for and paid over unless payment by the official is prevented by an act of God or the public enemy."

The plain import of this language is to make a public officer the insurer of public funds in his possesion, regardless of his bond or contract for the keeping and accounting for the funds. The syllabus of this case, however, does not fix the responsibility of the officer in question on the basis of an insurer but on the terms of his contract as contained in his bond, following the case of *State* vs. *Harper* 6 O.S. 607. See also *Board of Education* vs. *McLandsborough,* 36 O.S. 231; *Smythe* vs. *United States,* 188 U.S. 171, 47 L. Ed. 431.

In the absence of an express contract such as is contained in an officer's bond, the courts of Ohio apply the trust fund test to the powers, duties and liabilities of a public officer reference to public funds in his possession. In a per curi opinion in the case of *Crane Township ex rel.* vs. *Secoy et al.,* 103 O. S. 258, 18 A. L. R. 979, the court said:

> "It is pretty well settled under the American system of government that a public office is a public trust, and that public property and public money in the hands of or under the control of such officer or officers con-

stitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust fund."

It may be noted at this point that the trust fund test adopted and applied in the above case is not in accord with the rule of absolute liability adhered to by most courts, but the case establishes the rule in Ohio and must be followed. See 18 A. L. R. 983 n.

In many instances, the legislature has directed public officers with respect to the manner with which they shall invest and deposit public funds in their possession. This is done with reference to public moneys in the possession of county treasurers, city treasurers, sinking fund commissioners and boards of education. Similar provisions have not been made with reference to the funds in the hands of memorial trustees for township memorial buildings. Inasmuch as the statutes contain no direction as to the investment or deposit of the funds in the hands of these trustees, I am of the opinion, in accordance with the doctrine of the Secoy case, supra, that the legislature has entrusted to the trustees the discretion to deposit the funds, or invest them, as they may deem to be for the best interests of the township or townships for which they are acting, limited only by those rules of law applicable to trustees of a private trust.

It is a familiar principle of law, evidenced by many authorities, that aside from the limitations placed on the powers of a trustee of a private trust by the terms of the trust, he may act with reference thereto as he sees fit, so long as he exercises such prudence and diligence in the management of the trust funds as men of ordinary diligence, care and prudence manifest in like matters of their own, always with a due regard to the safety of the fund. Beyond this he will not be held accountable. *Miller et al* vs. *Proctor,* 20 O. S. 442; *Willis* vs. *Braucher,* 79 O. S. 290.

Applying this principle to the situation here under discussion, it cannot be said that the trustees in question were guilty of a breach of trust in depositing or investing the funds in their possession in a building and loan association or in depositing them in a bank, as business men generally have for many years regarded such action to be consistent with good business practice. In fact it would most likely be held to be a lack of care or due diligence if the funds were not deposited or invested in some manner, such as a prudent man would invest or deposit them, and loss should occur on account of such failure.

This brings us to the question of whether or not the bank, trust company or building and loan association receiving a deposit of public moneys from a board of memorial building trustees is charged with the payment of interest, or with profits accruing to it by the receipt of said deposit, without a specific agreement to that effect. This necessarily involves the question of whether or not the trustees might lawfully deposit such moneys without interest. It has been held by the courts that where public moneys have been illegally or unauthorizedly deposited with a bank, the funds so deposited are impressed with a trust, and the bank holds said money as trustee and is bound to account for any increment to the fund which comes about by reason of a profit realized by the bank on account of the use of the moneys. A leading case on this question is the case of *Patterson* vs. *Commissioners of Crawford County,* 157 Fed. 49. (Same case in lower court, 149 Fed. 229). In this case the cashier of a national bank who was also a deputy county treasurer had been collecting taxes at the bank and commingling the public funds with the funds of the bank. The proceeds of the collection had been credited to an account kept in the name of the county treasurer. Under the law, neither of

such officers had power to deposit the moneys so collected, in the bank. Upon receivership of the bank, it was held that the county was entitled to recover from the receiver of the trust fund, the collections so made. Burton, C. J., in deciding the case of the United States Circuit Court of Appeals, said:

> "The statute law of Ohio, however, requires the county treasurer, to keep his office and rooms provided at the county seat, and that all public money in his possession shall there be kept. It was therefore, the plain duty of Blythe, when he collected taxes, to pay the same forthwith to his principal and of the latter, to keep the taxes so collected in his office. Blythe had, therefore, no authority to deposit the funds as a general deposit with the Galion Bank and the latter was bound to know that it could not receive and mingle this fund with its general moneys."

In *State* vs. *Bank,* 4 N. P. (N. S.) 425, Judge Allread said:

> "Where a county treasurer without authority under the depository law, deposits the public funds with a bank which receives the funds with the full knowledge of their character and loans the same at interest, such bank will be required to account to the public for the interest so received."

In the case of *Franklin Bank* vs. *Newark,* 96 O. S. 453, it appeared that a city treasurer who was authorized by the statute to deposit funds in a bank with the consent of his surety, deposited certain public funds in his possession without the consent of his surety, and the bank was held accountable for any profits made with funds constituting this deposit. There were other elements present in this case that probably had some weight with the court. The case was decided on facts peculiar to the situation.

In each of the cases mentioned above, there was present the element of an unauthorized deposit. Where that element is not present, it would not necessarily follow, in my opinion, that a deposit of public moneys, simply because they are public moneys, constitutes the bank with which they are deposited, a trustee. *Fidelity and Casualty Company* vs. *Savings Bank Company,* 119 O. S. 124.

The question here is, however, whether the trustees in question were bound to use due diligence in keeping the funds productively invested, and therefore, whether they were permitted to deposit them with the bank without interest. The general rule with reference to this matter is stated in Volume 39, at page 422, of Cyc., as follows:

> "Where the only duty of one receiving money on trust is to be always ready to pay it over whenever the beneficiary is entitled to it, he is not ordinarily chargeable with interest. But it is the duty of trustees holding funds for investment to use due diligence to keep them invested; and if they have retained them uninvested beyond a reasonable time, six months being usually allowed, they are prima facie liable for interest, and the burden is upon them upon an accounting, to explain or justify the delay. It cannot be considered neglect if a sum sufficient to meet contingent expenses be kept on hand, or if a sum so small that a prudent person would not seek an investment for it lies idle. Therefore

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,*