2460.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES—HOWARD C. WHITE.

COLUMBUS, OHIO, August 18, 1928.

HON. J. W. TANNEHILL, *Superintendent, Division of Building & Loan Associations, Columbus, Ohio.*

DEAR SIR:—You have submitted for my consideration an official bond of Howard C. White, given in accordance with the requirements of Section 677, General Code, for the faithful performance of his duties as Examiner in the Department of Commerce, Division of Building and Loan Associations.

To this bond is attached a certificate of the surety company to the effect that the person signing said bond in behalf of said company, is its attorney in fact, and is authorized to sign an official bond of this nature for the amount therein involved, binding upon said company.

There is also attached a certificate from the Department of Commerce, Division of Insurance, to the effect that the surety company signing this bond is authorized to transact its appropriate business of fidelity and surety insurance within this state.

Finding said bond in proper legal form and properly executed, I have noted my approval thereon, and am returning the same herewith to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2461.

STATE DEPOSIT—MUST BE DEPOSITED WITH STATE TREASURER ONCE A WEEK—OFFICERS LIABLE FOR INTEREST—OFFICERS LIABLE TO REMOVAL.

SYLLABUS:

1. *State officers, whether functioning independently or as members of boards, commissions or other departments of the state government, who fail to comply substantially with the provisions of Section* 24, *General Code, which requires such state officers to pay to the treasurer of state, on or before Monday of each week, all moneys, checks and drafts received for the state or for the use of any such state officer, state institution, department, board or commission, are liable to the state for the damages sustained by it by way of loss of the depositary interest on such funds, which would have accrued to the state had the same been deposited as required by the provisions of said Section* 24, *General Code.*

2. *If the failure of a state officer to comply with the provisions of Section* 24 *of the General Code is willful and flagrant, such conduct would be ground for the removal of such delinquent officer under Section* 10-1, *General Code, which provides, among other things, that any person holding an office in this state, who willfully neglects to perform any official duty imposed upon him by law, or who is guilty of gross neglect of duty, misfeasance, malfeasance or nonfeasance, shall be deemed guilty of misconduct in office, and shall be removed from office in the manner provided by said section and sections* 10-2, 10-3 *and* 10-4, *General Code.*

3. *Where any state officer, board or institution coming within the terms of Section* 24, *fails to pay in moneys received for the state or for the use of such officer, board or insti-*

tution, during the preceding week, on or before Monday of each week, such officer, board or institution may be compelled by an action in mandamus to pay to the treasurer the moneys so received.

COLUMBUS, OHIO, August 20, 1928.

HON. VIC DONAHEY, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This is to acknowledge the receipt of your letter of recent date enclosing a communication received by you from the Treasurer of State relating to the failure of some of the officers and departments of the state to deposit in the state treasury weekly moneys collected by them for the state, as required by law. The communication of the Treasurer of State, above referred to, is as follows:

> "In reply to your letter of July 18th, requesting from the Treasurer of State a complete list of the departments which do not deposit in the State Treasury weekly all fines, fees, taxes or other moneys collected by them for the state, there is herewith enclosed a report taken from the records of this department on the number of pay-ins by all state departments, divisions and institutions for the seventy-eight weeks included in the report of eighteen months covered by the Treasurer's report from July 1, 1926, to December 31, 1927.
>
> The Treasurer has no desire to pick out any particular department so submits the entire record to speak for itself. While some departments show a high number of pay-ins, this is brought about by more than one pay-in in a week, with a number of weeks missed with no report.
>
> As to weekly payments, the only offices showing a payment in each and every one of the seventy-eight weeks are the Attorney General and the Ohio Penitentiary. A number of the rest, with a high total of payments, missed just a few weeks. The flagrant violations are those state offices appearing in the list where the number of pay-ins are decidedly small in seventy-eight weeks. The state board of accountancy has never paid anything into the treasury, even during the administration of the Governor as a former Auditor of State. In justice to the Civil Service Commission, that function is now paying regularly into the Treasury each and every week in 1928. If there be weeks when some of these offices or boards receive no money, nevertheless the treasurer believes that a pay-in blank should be regularly filled out for that week, showing no receipts rather than having remittances by citizens, whether large or small, held until the office of its own choice felt that a pay-in should be made."

In your communication to me my opinion is requested as to whether the law requiring such weekly deposit of all fines, fees, taxes and other moneys collected by state officers, departments and boards can be enforced. The statutory provisions touching the question made in your communication and the facts disclosed are those of Sections 24 and 24a of the General Code. Section 24, General Code, so far as the same is applicable to the consideration of the question here presented, reads as follows:

> "On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the Auditor of State a detailed, verified statement of such receipts. * * *"

Section 24a, General Code, provides, among other things, that all sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board or commission, which are inconsistent with the provisions of Section 24 of the General Code, are to the extent of such inconsistency repealed.

Section 24, General Code, was originally enacted as the first section of a comprehensive act to provide a depositary for state funds, 97 O. L. 535. Said section later took its present form by amendment in 1914, 104 O. L. 178.

As noted in your communication, the Legislature, in the enactment of the statutory provisions above noted, did not incorporate in the law any penalty by way of Legislative sanction for the enforcement of the provisions of said law. It does not follow from this circumstance, however, that no legal consequences attach to the failure of state officers, boards or other departments to comply with the provisions of said statute with respect to moneys of the state coming into their possession and custody. In this connection it is quite clear that public moneys in the custody of officers of the state are public trust funds and that such officers are liable personally and on their official bonds for all loss accruing to the state by reason of the failure of such officers to observe the statutory requirements with respect to the disposition of such funds.

In the case of *State ex rel.* vs. *Maharry*, 97 O. S. 272, it is held that:

> "All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact."

In the case of *Crane Township ex rel.* vs. *Secoy*, 103 O. S. 258, it is 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 constitute 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. Surely the public rights ought to be as jealously safeguarded as the rights of any individual made the beneficiary of a trust by the private party creating such trust."

As to this it is to be noted that although the status of a public officer with respect to public funds in his custody partakes of the nature of that of a trustee, the liability of the officer with respect to such funds is absolute, and differs in that respect from that of an ordinary trustee or bailee who may be exempt from liability on account of funds in his custody which are lost without his negligence or connivance. *Eshelby* vs. *Board of Education*, 66 O. S. 71.

In 22 Ruling Case Law, p. 468, it is said:

> "Not infrequently public officers are called bailees, and again are said to hold public funds as trustees and clothed with their legal duties and liabilities. Yet by the weight of authority a public officer is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. He is called on to account according to a much more rigorous standard of responsibility. Therefore, while in a general sense they may be said to be bailees, still they are special bailees who are subject to particular obligations for the benefit of the public, and the degree of their reponsibility is not to be determined by the ordinary law of bailment."

Applicable to the trust nature of public funds in the custody of a state or other public officer, the following principle set out in 26 Ruling Case Law, p. 1305, may be noted:

> "By necessity trustees are clothed with the power and charged with the duty to invest and keep safely and productively invested the funds of the trust, in such property and securities as are recognized as appropriate for trust funds, or are authorized by the trust instrument. An omission to do so will make him chargeable with interest on the funds retained in his hands, and subject him to the animadversion of the court by which he was appointed, for holding the funds instead of investing them."

In an opinion of this department under date of June 10, 1926, Opinions of the Attorney General for 1926, p. 266, where this department had under consideration the question of the liability of the Secretary of State for an alleged failure to deposit automobile registration fees coming into his custody in the manner required by Section 24 and Section 6309, General Code, it was said:

> "It is, therefore, apparent that a trustee of a private trust having funds for the purpose of investment, failing to make the investment within a reasonable time, is held liable for whatever loss the fund may suffer because of his neglect. This rule is the result of adhering to a sound public policy regarding the administration of trusts. There would seem to be no reason why the rule should not have full application to the neglect of a public officer in turning in public funds for purposes of investment if the statute makes provision for such investment."

In said opinion it was held that:

> "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 coming into his possession under said section in the state treasury on Monday of each week. In case of failure to so deposit said funds within such reasonable time as to constitute a substantial compliance with the law, the Secretary of State would be liable for whatever loss may have been suffered by the state on account of said delay."

In this connection it is apparent from the act itself that the legislative intention in the enactment of the provisions of Section 24, General Code, was not only to provide for the safety of moneys of the state coming into the custody of the various officers, boards, commissions and departments of the state, by requiring their prompt deposit in the state treasury, but the intention of the Legislature was likewise to provide for securing interest on such funds by having them deposited by the state treasurer in a depositary or depositaries provided for by law.

By way of answer to the inquiry made in your communication, I am of the opinion that one way of enforcing the provisions of Section 24, General Code, would be to have findings made by the Bureau of Inspection and Supervision of Public Offices against state officers failing to deposit in the state treasury moneys coming into their custody, as required by said law, for the damage sustained by the state by way of loss of depositary interest on such funds which would have accrued to the state had the same been deposited as required by the provisions of Section 24, General Code. Such findings could be made against such state officers whether they are functioning independently or as members of any state board or commission. Again, if the failure of such state

officer to comply with the provisions of Section 24 of the General Code is willful and flagrant, such conduct would be ground for the removal of such delinquent officer under Section 10–1, General Code, which provides, among other things, that any person holding office in this state, who willfully neglects to perform any official duty imposed upon him by law, or who is guilty of gross neglect of duty, misfeasance, malfeasance or nonfeasance, shall be deemed guilty of misconduct in office, and shall be removed from office in the manner provided by said section and Sections 10–2, 10–3 and 10–4, General Code.

In addition to the above, I am clearly of the opinion that compliance with the terms of Section 24, supra, can be compelled by an action in mandamus. Section 12283 of the General Code reads as follows:

> "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

The directions contained in Section 24 of the General Code are clear and specific, the statute specially enjoining that "on or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer", etc., during the preceding week, whether such moneys be from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise.

Where, therefore, any state officer, board or institution coming within the terms of Section 24, fails to pay in moneys received for the state or for use of such officer, board or institution, during the preceding week, on or before Monday of each week, such officer, board or institution may be compelled by an action in mandamus to pay to the treasurer the moneys so received.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2462.

BOND ISSUES—JOINT TOWN HALL—VILLAGE AND TOWNSHIP—MUST BE SUBMITTED TO ALL ELECTORS IN TOWNSHIP.

SYLLABUS:

1. *Where bonds are to be issued for the construction of a joint town hall under authority of Sections* 3399 *et seq., General Code, the village and the township must agree upon their proportionate shares of the cost of the work and the question of issuing the bonds for such respective shares must be submitted separately to the electors of the two subdivisions.*

2. *In voting upon the township's share of such bonds, all the electors of the township may participate, including those residing within the village limits.*