Finding said contract and bond in proper legal form I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2611.

TRUST FUND—WILLED TO BOARD OF EDUCATION AS TRUSTEE FOR SCHOOL—JURISDICTION OF EQUITY COURT DISCUSSED.

SYLLABUS:

1. *Where funds are left by will to a board of education in trust for certain purposes, with right of investment and reinvestment of the principal and the application of the income to such purposes, such board of education functions in the capacity of a trustee and is subject to the equitable jurisdiction of the courts with respect to the administration of such trusts.*

2. *Sections* 7604, *et seq., of the General Code, have no application to the deposit of funds held by a school district in trust and which are not available for ordinary school purposes.*

COLUMBUS, OHIO, September 22, 1928.

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

GENTLEMEN:—This will acknowledge your recent communication in which you ask that I give you my opinion on certain questions submitted by one of your examiners on a statement of facts which you enclose. The statement of facts is too long to be incorporated in full herein, but I shall restate such portions of the facts as seem to me to be pertinent to the questions raised.

Upon the death of one of the prominent citizens of the City of Toledo, Edward Drummond Libbey, there were left to the Board of Education of the Toledo City School District three separate bequests, viz., a teachers' scholarship fund of $100,000, a students' scholarship fund of $200,000 and a Libbey high school library fund of $15,000. The specific items of the will with relation thereto are not furnished except as to the students' scholarship fund, the will with respect to this providing as follows:

> "ITEM XX. From the rest, residue and remainder of my estate I give and bequeath unto the Board of Education of the City School District of the City of Toledo, in Lucas County, Ohio, and unto its successor and successors, the sum of Two Hundred Thousand Dollars ($200,000) as a perpetual endowment, to be known and designated 'The Edward Drummond Libbey Scholarship Fund', the capital thereof to be held, managed, controlled, invested and reinvested by it and them separate and distinct from all other property, and the income therefrom to be divided each year into equal parts as near as may be of not more than Three Hundred Dollars ($300.00) each, to be designated 'Edward Drummond Libbey Scholarship', and to be awarded respectively to worthy and ambitious students residing in said City School District of said City of Toledo, desiring to avail themselves of courses in mechanical or fine arts or to obtain a technical, as distinguished from an academic education, in the schools of said school district, who would otherwise,

because required by their earnings to contribute to the support and maintenance of themselves or those dependent upon them, be compelled to abandon, in whole or in part, their studies; the recipients of such scholarships to be designated by a majority vote of a commission consisting of the president of the said Board of Education and its successors, the superintendent of schools of said city district, and its successors, and the president of the Board of Trustees of said The Toledo Museum of Art and its successors, the amount of each scholarship to be paid by said Board of Education and its successors, upon the order of a majority vote of said commission to or for the use of the recipient thereof in such installments and at such times as said commission from time to time may determine, but only while the recipient shall continue to prosecute his or her studies to the approval of said commission provided that a temporary cessation of studies, because of physical disability, shall not disentitle a recipient to payments thereof.

Such commission may adopt, and, at its discretion, change rules respecting the standards of scholarship and other qualifications of recipients of such scholarships, the amount and times of payment of installments thereof, and such other matters as it shall deem desirable to effectuate the purpose of this bequest for its own government and for the performance of its duties; * * *"

However, the statement is made that the awarding of each bequest is the same and I shall ,therefore, discuss the one fund and assume that what I say with reference thereto is equally applicable to the others.

These funds were made available to the board of education on May 10, 1927, and on that date, pursuant to resolution of the board, the funds were placed in separate savings accounts in the Security Savings Bank and Trust Company, of Toledo, Ohio, no record appearing in the minutes of the board as to any agreement or contract of deposit. Between June 8, 1927, and June 24, 1927, practically all of the funds were invested in bonds and the amounts deposited were correspondingly decreased, so that thereafter the amounts remaining on deposit in these particular savings accounts were small. There were also created separate accounts, which were denominated as income, for each of the funds, into which was paid the income from the investments of the principal. As of June 28, 1928, the aggregate in the principal accounts was somewhat in excess fo $500.00 and the income accounts showed balances approximating $10,000.

Your examiner having audited the accounts from May 10, 1927, to June 28, 1928, discovered that the bank had paid on the daily balances the rate of 2½% from May 10, 1927, to June 24, 1927, after which date 4% was paid in accordance with the usual rule of the bank on savings account. He calls attention to the fact that this bank, during the period from January 19, 1926, to January 18, 1928, was a duly qualified depositary of the Toledo school district, having bid on various amounts aggregating $300,000, at rates of interest varying from 4.037 to 3.037 per cent. The bank was also designated as a depositary from January 19, 1928, to January 18, 1930, at the rate of 3.17 per cent on $100,000. As to this latter period, however, no bond has been filed because of the fact that no money has been deposited under the contract unless the deposits now under consideration can be so treated.

By means of the audit hereinabove referred to, your examiner has reached the conclusion that had the bank paid the depositary rate of interest instead of the rates hereinabove set forth, which were actually paid, the income from the deposits would be $357.32 in excess of what was actually received. The questions accordingly submitted are as follows:

"Inasmuch as The Security Savings Bank & Trust Company of Toledo, Ohio, was a legal depository of the funds of Toledo City Board of Education for the period January 19, 1926, to January 18, 1928, and is not a legal depository for the period January 19, 1928, to January 18, 1930, would not the bank be liable for depository interest at the rates bid and incorporated in their depository contracts on the Libbey Trust Funds which were placed in separate accounts in the Savings Department of said bank on May 10, 1927?

Should not the Security Savings Bank & Trust Company be required to give bond, in accordance with Section 7605, G. C., to cover said Trust Funds?"

Auxiliary to these questions, your examiner also advises that the expenditures from the funds for bonds were made by savings checks signed only by the clerk of the board of education. He points out that Section 4768 of the General Code requires all school warrants to be signed by the president and vice-president and countersigned by the clerk. Thereupon he inquires:

"Has the Board of Education authority to place said trust funds in a savings account, as described above, and purchase bonds by issuing a savings check of the bank therefor, said check signed only by the clerk of the board of education?"

Certain other sections of the Code are referred to by the examiner as having a bearing upon the questions presented. He particularly mentions Section 7604 of the General Code, providing for the deposit of moneys coming into the hands of the treasurer of any school district. This is the first of a series of sections providing for the deposit of school funds and the designation of depositaries. It is unnecessary to cite these sections, but reference will be made hereafter thereto. Mention is also made of Section 5625-9 of the General Code, enumerating the various funds which shall be established by each subdivision, among which is (i) in the following language:

"(i) A trust fund for any amount received by a subdivision in trust for any lawful purpose."

The inquiry, therefore, narrows down to the simple question whether or not, in the administration of the trust established by the will here under discussion, the board of education must treat the funds bequeathed to it as the other funds of the subdivision.

Referring to the provisions of the will hereinabove quoted, it is to be observed that the money is left to the board of education under such terms and conditions as create a trust. Authority to receive trusts is directly given to boards of education under Section 4755 of the General Code, which is as follows:

"By the adoption of a resolution, a board of education may accept any bequest made to it by will or may accept any gift or endowment from any person or corporation upon the conditions and stipulations contained in the will or connected with the gift or endowment. For the purpose of enabling the board to carry out the conditions and limitations upon which a bequest, gift or endowment is made, it may make all rules and regulations required to fully carry them into effect. No such bequest, gift or endowment shall be accepted by the board if the conditions thereof shall remove any portion of the public schools from the control of such board."

You will note particularly that the board is given specific authority to make rules and regulations to carry out the conditions and limitations of any bequest. In this instance it is to be observed that, while the board is trustee for the funds, it is given no authority whatsoever as to the disbursement of the income of the funds, which authority is placed in the commission provided by the will. The income is made payable to those students who are approved by the commission, and hence neither the principal nor the income is to be expended in any way directly for school purposes, such as are within the purview of the board of education as a subdivision of the State of Ohio.

The board is given the right of investment and reinvestment and is directed to hold the principal separate and distinct from all other property of the board. It remains to be seen, therefore, whether or not the provisions of the will are inconsistent with the theory of your examiner that these funds should be deposited in accordance with the depositary laws.

The depositary laws are enacted not only for the protection of the public funds, but also that these funds may earn some income during the period between the time they are received and the time when their expenditure becomes necessary. To that end bids are received and the funds are awarded to those bidding the highest rates of interest. It is quite manifest that the whole theory of public depositaries is based upon a depositary of *moneys* and is inconsistent with the public funds being invested in securities. Accordingly, if the depositary laws were to be held as applicable in this instance, it is difficult to see wherein there would be any authority for the investment of the principal. However this may be, the will specifically directs the investment of the principal and that investment has been done in accordance with the terms of the will. It follows, of course, that so much of the principal as is invested in securities is not in any sense subject to the depositary law.

If I understand the contention of your examiner, however, he raised the question as to the temporary deposit of the principal while it was awaiting investment. If these were public funds strictly, then undoubtedly the depositary law would apply. My opinion, however, is that such is not the case. The board is not in any sense dealing with its own funds. It has, it is true, accepted certain moneys for certain specified purposes. It has agreed to administer for the benefit of deserving students the fund in question and in the administration of the fund the board owes exactly the same duties as any other testamentary trustee. It must seasonably invest the principal so that income will be derived therefrom. This it has done. Temporarily, and pending such investment, the moneys were deposited in a solvent bank and 2½% earned thereon. I take it that such course of conduct on the part of any testamentary trustee would be considered commendable. It has placed the income as it accrued in a savings account on which interest is also earned and that income is made available for the purposes of the trust in accordance with the direction of the commission designated by the will. In so proceeding I also feel that the board of education has in all respects fulfilled its duties as a trustee.

The distinction between the administration of a trust of this character and the treatment which must be given to the public funds lies in the fact that here public funds are not in any sense of the word involved. While the funds are left to the board of education, they are held by it in trust for specific purposes which, while public in one sense, are nevertheless payable not to the subdivision itself, but to certain deserving students in accordance with the provisions of the will. Hence both the principal and income of the funds are not in any way subject to disbursement by the board of education in its capacity as a subdivision of the State of Ohio. It acts solely as a trustee and is responsible to the courts for any maladministration in the performance of its duties as such.

While not directly in point, the case of *Perin* vs. *Carey*, 24 How. 465, has an interesting bearing on the question presented. In the course of the opinion appears the following:

> "It would be doing great injustice to the Legislature even to suppose that it meant, in passing an Act for the government of corporations, under the provisions of the Constitution, that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors.
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> After a close examination of all the legislation of Ohio relating to corporations, and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the Constitution of 1851, in respect to a corporation receiving and taking, either by testament or donation, property for a charity or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and not by any implications by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a state where the Statutes of Mortmain do not exist, the corporation itself having an estate as well by devise as otherwise?"

This case involved the validity of a bequest to the city of Cincinnati in trust for educational purposes and the language heretofore quoted, while particularly pertinent to the power of the municipalities, also has bearing on the right of public corporations in general, which would include the right of boards of education, especially in view of the provisions of Section 4755, supra. You will observe that the court recognizes clearly the right of public corporations to accept trusts and to administer them in accordance with the intention of the donor.

In the present instance the intention of Mr. Libbey was clearly to give to the board of education the sole management and control of the fund in question with respect to its investment and reinvestment and he specifically requires that the funds be kept separate and distinct from all other property. This is clearly inconsistent with their being commingled with other funds for the purpose of depositing them in the public depositary.

In reaching this conclusion I am not unmindful of the provision of Section 5625-9, which requires the establishment of a separate fund for moneys held in trust. This provision should, of course, be followed and the books of the board of education should accurately reveal the condition of the trust in question. This is in no wise inconsistent with the terms of the will, but is merely a mandate requiring proper accounting for the trust. In the absence of any statutory provision, it would follow as a matter of good business practice and proper fulfillment of the duties of trustees that such accounts be kept. In my opinion, however, it by no means follows that these moneys must be treated as public moneys subject to the depositary law. In fact, the opposite conclusion is deducible, since it is clear that the Legislature intended that all trust funds should be kept separate and distinct from other moneys.

In view of the foregoing, and in specific answer to the first inquiry, I am of the opinion that The Security Bank and Trust Company would not be liable for the depositary rate of interest upon the funds in question, the rate upon such funds being the subject of contract between such bank and the board of education acting as trustee under the terms of the will. It also follows that the bank need not give bond for the security of such funds unless such a requirement be incorporated in the contract between the bank and the board of education as such trustee.

What I have heretofore said constitutes a substantial answer to the remaining inquiry. The board is responsible as a trustee and its individual members will be held liable for the proper administration of the trust in question. If the board as such trustee sees fit to have disbursement of the funds in question made, upon check signed by the clerk of the board alone, I cannot say as a matter of law that such course cannot be followed. The fact that payments of this character are not in accordance with the provisions of Section 4768, supra, is not in my opinion material. That section refers solely to the disbursement of school funds for school purposes and hence is not applicable. Any proper method of disbursement of the trust funds which will fulfill the obligations of the board as trustee, will, in my opinion, be sufficient.

Accordingly, I am of the opinion that no finding for recovery would be justified in the specific instance concerning which you inquire, and that a board of education may, under the provisions of Section 4755 of the General Code, supra, adopt such method of procedure in the administration of the trust as may to it seem proper, subject always to the control of the courts with respect to the administration of such trust.

Respectfully;
EDWARD C. TURNER,
Attorney General.

2612.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF FOREST E. ROBERTS IN BENTON TOWNSHIP, PIKE COUNTY, OHIO.

COLUMBUS, OHIO, September 22, 1928.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—You recently turned over to this department a communication received by you from one E. H. Jackson, an abstractor of titles of Waverly, Ohio, in which, after referring to Opinion No. 2379 of this department relating to a corrected abstract of title of certain lands in Benton Township, Pike County, Ohio, standing in the name of one Forest E. Roberts, Mr. Jackson says: