

1. Where public funds are deposited in a bank in violation of the applicable depository statute and the bank has knowledge of the public character of such funds when received, the depository becomes a trustee *ex maleficio*.

2. Where a bank holds funds as trustee *ex maleficio*, the depositor is entitled to a preference upon liquidation if he can identify the trust *res* by tracing it into some specific fund or property which came into the possession of the liquidator at the closing of the bank.

3. Where a depository is lawfully established by a political subdivision of this state, the fact that deposits are made in excess of the security required by law does not render the bank a trustee *ex maleficio* except as to those sums deposited in excess of the required security.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

2664.

SECURITIES—REGISTERED ISSUE OF SECURITIES WITHDRAWABLE BY APPLICANT—DIVISION OF SECURITIES MAY ENTER WITHDRAWAL ON RECORDS BUT UNAUTHORIZED TO REVOKE REGISTRATION EXCEPT PURSUANT TO STATUTE.

SYLLABUS:

1. *The Division of Securities has no authority to revoke a registration of securities either by description or qualification except pursuant to the statutes relating thereto.*

2. *An applicant who has registered an issue of securities by description or qualification may withdraw same and such withdrawal may be entered upon the records of the Division of Securities.*

COLUMBUS, OHIO, May 15, 1934.

HON. THEO. H. TANGEMAN, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—Your request for my opinion reads as follows:

“Your opinion is respectfully requested upon the following propositions:

In view of the provisions of General Code, Section 8624-8, providing that registration by description shall be *deemed completed* when the description, et cetera, is filed with the Division of Securities and the fee paid, as therein provided; and in view of the provisions of General Code Section 8624-15, providing, in substance, that the Division may suspend and, after notice and hearing, revoke such registration on the single ground therein set forth, what is the *legal effect of and what procedure can or may the Division follow* when:

(a) The Division is notified by the issuer or the person who completed such registration by description that ‘such registration is hereby withdrawn’.

(b) The Division is requested by the issuer *or* the person who completed such registration by description to revoke such registration, it not appearing that the statutory reason for revocation, as provided in General Code Section 8624-15, can be ascertained by the Division from the facts surrounding the sale or proposed sale of such securities so registered.

May we also have your opinion as to the effect of and as to what procedure the Division can or may follow when the issuer *or* the person who filed the application requests the revocation of a registration by qualification, when at the time of such request none of the grounds for such revocation, as prescribed by General Code Section 8624-16, can be found to exist by the Division."

An examination of the Ohio Securities Act discloses no express authority for the withdrawal of any registration of securities authorizing the same to be sold in this state, whether registered by description or registered by qualification. The two kinds of registration are accordingly in the same category in so far as the question of the right to withdraw either from registration is concerned.

You also inquire as to the authority of the Division of Securities to revoke a registration pursuant to the request of the person having applied therefor, in the absence of a showing of the statutory grounds for revocation. As to this matter, the statute expressly provides the detailed steps to be taken before a registration may be revoked and having set forth the express grounds therefor an application of the well established rule of statutory construction of *expressio unius est exclusio alterius* leads to the conclusion that a revocation may be had only pursuant to statute.

Further considering then the matter of the right to request withdrawal as distinguished from revocation upon which the statute is silent, it must be borne in mind that the right on the part of an applicant to have an issue of securities registered in order that the same may be offered and sold to the public in Ohio is a privilege of which the applicant need not avail himself unless he sees fit so to do. In the absence of any language prohibiting the applicant from withdrawing a registration after he has availed himself of its benefit, it would appear that he has the implied right so to do and the Division of Securities has implied authority to so indicate on its records. The real intent of the Securities Law is to afford to the public some protection in the matter of the offering and sale of securities to the public. To hold that the Division of Securities must keep in their records as registered an issue the offering of which is perhaps abandoned or withdrawn from the market does not appear to me to be adopting a construction of the law to effectuate its real object and intent. In *Doyle vs. Doyle*, 50 O. S. 330, the first branch of the syllabus is as follows:

"That which is plainly implied in the language of a statute is as much a part of it as that which is expressed."

At page 341, the court said:

"No statute should be so constructed as to lead to an absurd result.  
\* \* \* Courts are not confined to the letter of the law in giving it a construction. A statute must be construed with reference to the subject matter of it, and its real object and true intent."

It is further to be noted that the long established administrative practice of the Division even prior to the enactment of the present Securities Law when the law was likewise silent as to the withdrawal of exemptions or certifications, has been to permit the withdrawal thereof. The position of the courts on this subject is to the effect that, while not conclusive, long established administrative practice must be given consideration in construing statutes. *Industrial Commission vs. Brown*, 92 O. S., 309, 311; *State, ex rel, vs. Brown*, 121 O. S. 73, 76; 25 R. C. L. 1043.

Specifically answering your questions, it is my opinion that:

1. The Division of Securities has no authority to revoke a registration of securities either by description or qualification except pursuant to the statutes relating thereto.

2. An applicant who has registered an issue of securities by description or qualification may withdraw same and such withdrawal may be entered upon the records of the Division of Securities.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

2665.

BANK—UNDER SECTION 710-92, GENERAL CODE, SUPERINTENDENT OF BANKS AND BANK IN LIQUIDATION JOINED AS PARTIES DEFENDANT WHEN.

**SYLLABUS:**

1. *Section 710-92, General Code, requires that the superintendent of banks and the bank in liquidation be joined as parties defendant in an action to establish a claim for preference or set-off brought under authority of said section.*

2. *In an action under said section brought solely against the superintendent of banks in charge of the liquidation of the bank, unless the superintendent makes timely objection to the defect of parties defendant prior to the rendition of judgment or decree by the trial court, the validity of a judgment or decree against him will not be affected by such defect.*

3. *If a plaintiff elects to prosecute an action brought under favor of Section 710-92, General Code, against the superintendent of banks alone, and a judgment or decree is rendered against such plaintiff in the trial court, such judgment or decree will operate as a bar to any subsequent action involving the same issues against either the superintendent of banks or the bank.*

COLUMBUS, OHIO, May 15, 1934.

HON. I. J. FULTON, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date which reads as follows:

“I will appreciate your opinion upon the following questions which have been raised with reference to the provisions of Section 710-92 of the