At the common law, all felonies were required to be prosecuted by indictment, while misdemeanors could be prosecuted either by indictment or information. Warden, J., in the case of *Gates and Goodno* vs. *State,* 3 O. S. 294, at page 297, said that:

> "Informations lie (in England) for misdemeanors only; they would not support a conviction for treason or felony."

See also 31 C. J., page 565. The enactment of section 13437-34 is merely declaratory of the common law practice of instituting prosecutions for misdemeanors by information. The rule of the common law in respect to the commencement of criminal prosecutions prevails in Ohio today by constitutional provision and statutory enactment. Thus, by virtue of the provisions of section 10 of article I of the Constitution of Ohio, prosecutions for felonies can be only by indictment, while prosecutions for misdemeanors can be either by indictment (section 13436-18, General Code) or by information (section 13437-34, General Code).

Specifically answering your letter, I am of the opinion that a felony in Ohio can not be prosecuted by means of an information instead of an indictment.

Respectfully,
JOHN W. BRICKER,
Attorney General.

970.

BUILDING AND LOAN COMPANY—MAY NOT LEGALLY ACT AS TOWNSHIP DEPOSITORY—UPON INSOLVENCY SUCH FUNDS IMPRESSED WITH TRUST AND CONSTITUTE PREFERRED CLAIM—IDENTIFICATION OF FUNDS.

SYLLABUS:

1. *Under sections* 3320 *et seq. of the General Code, a building and loan company may not legally act as a township depository.*

2. *Where township funds are deposited in a building and loan company, the officers of such company having knowledge that the funds are township funds, upon the subsequent insolvency of the building and loan company, such funds are impressed with a trust and entitled to allowance as a preferred claim upon liquidation, provided they can be traced or identified.*

3. *Such identification is complete when the minimum sum on hand in the general deposits of the building and loan company between the date of the trust deposit and the date of closing for liquidation is equal to or in excess of the amount of the trust deposit.*

COLUMBUS, OHIO, June 19, 1933.

HON. F. MERCER PUGH, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—You have requested my opinion as to whether or not a certain deposit by township trustees in a building and loan company, now in process of liquidation, constitutes a preferred claim against the assets of the building and loan company The deposit in question was made by the trustees of Swancreek

township specifically for the purpose of maintaining a township cemetery, of which fact the officers of the building and loan had knowledge at the time the deposit was made.

There are two theories upon which the State and its political subdivisions have been allowed a preference in respect to public funds deposited in banks which have thereafter become insolvent, the "trust theory" and the "prerogative right theory." For discussions of these two theories, see Carl L. Meier, Preferential Rights to Public Funds Deposited in an Insolvent Bank, 4 Cincinnati Law Review, 39; 51 A. L. R. 1336, note.

It is settled in Ohio that the State and its political subdivisions in making deposits under the various depository statutes, do not exercise sovereignty but act in a proprietary capacity. *In re Smart,* 136 Fed. 974; *Casualty Co.* vs. *Union Savings Bank,* 119 O. S. 124; *Ward* vs. *Fulton,* 125 O. S. 382. It appears that in determining whether the deposit in question constitutes a preferred claim, only the "trust theory" need be considered.

Under this theory, where public funds are wrongfully deposited in a financial institution which thereafter becomes insolvent, they are impressed with a trust and entitled to a preference, provided the funds can be traced. The right to a preference involves two conditions: (1) The existence of a trust relation; (2) the ability to trace or identify the trust funds.

Do the facts presented show the existence of a trust relation? Where a county treasurer deposited public funds in a bank with no attempt to comply with the provisions of the depository act, but solely upon the authority of the treasurer himself, it was held that such funds were received by the bank as a special deposit, i.e., in a trust relationship. *In re Osborn Bank,* 1 O. A. 140; 20 C. C. (N. S.) 575. See also *Newark* vs. *National Bank,* 15 O. C. C. (N. S.) 276; affirmed, 90 O. S. 470.

In an opinion by one of my predecessors, reported in Opinions of the Attorney General for 1921, volume I, page 263, it was held that township funds deposited in a manner other than that prescribed by the township depository statute, constitute trust funds. It thus becomes material to inquire whether the deposit in question was lawful or unlawful.

Sections 3320 to 3326, inclusive, General Code, contain the township depository law. Section 3320 reads:

> "That within thirty days after the first Monday of January, 1916, and every two years thereafter, the trustees of any township shall provide by resolution for the depositing of *any and all moneys* coming into the treasury of the township, and shall deposit such money in such *bank, banks or depository* within the county in which the township is located as they may direct subject to the following provisions." (Italics the writer's.)

In an opinion of this office, reported in Opinions of the Attorney General for 1913, volume I, page 859, it was held that building and loan companies may not become depositories of township funds. Although the township depository statute has been amended since the rendition of that opinion, the language on which the opinion was based has not been materially altered. The following language appears in the body of that opinion at pages 859 and 860:

"The sections as to township funds, being sections 3320 to 3326, inclusive, refer only to banks but the word 'depository' is also used. The first section relating to township funds, 3320 is as follows:

'The trustees of any township shall provide by resolution for the depositing of any and all moneys coming into the hands of the treasurer of the township and the treasurer shall deposit such money in such bank, banks or depository within the county in which the township is located as the trustees may direct subject to the following provisions.'

As the subsequent sections refer only to banks I take it that 'depository' as used in section 3320, refers also to banks and probably to trust companies, and cannot be held to include building and loan associations."

I find nothing in the statute relating to township cemeteries (sections 3441 to 3475, inclusive) which authorizes the deposit in question. Section 3459, regarding funds for the improvement of burial lots in township cemeteries, provides, *inter alia*:

"All moneys, securities and other property shall be and remain in the care and custody of the township treasurer and his successors in office, and he and his sureties shall be liable upon the official bond for the safekeeping and proper accounting, as for other money coming into his hands as such treasurer, belonging to the township."

It thus appears that the deposit was unlawful, and it follows therefrom that a trust relationship was created.

The second condition necessary to the right of preferance is the ability to trace or identify the trust funds. There is an exhaustive note on the question of following trust funds in the assets of an insolvent bank in 82 A.L.R. 46. The following language appears at page 265:

"The necessity of some kind of tracing or identfication of the trust funds in the hands of the receiver of the inslovent trustee bank, in order to entitle the beneficial owner to a preference or lien on account of the trust fund, seems to be recognized in all the Ohio decisions. Whether, in a given case, a trust fund has been sufficiently traced and identified, must rest, according to the language of the court in *Jones* vs. *Kilnreth* (1892) 49 Ohio St. 401, 31 N.E. 346, in the judgment of the chancellor who is called upon to enforce the trust against the assets of the bank."

In the article in the Cincinnati Law Review, supra, the author states at pages 50 and 51:

"In applying these principles to a bank holding public funds as constructive trustee, the conversion by the bank of the assets from time to time into the various forms of investment and their employment in the ordinary banking business must be held to involve the cash to which it has title as owner and not that which it holds in trust. From this it follows that the *cestui may at any given time fasten the trust upon the assets available to the extent of the minimum on hand between the origin of the*

trust relation and the time of its enforcement. When the assets in a bank which becomes insolvent have been reduced below the amount of the public funds therein deposited, the extent to which the public funds, mingled with general moneys of the bank, have been dissipated, is determined, not by the balance at the time the bank closes its doors in insolvency, but by the lowest balance after the public funds are deposited." (Italics the writer's.)

In the case of *Pontius* vs. *Sears, Roebuck and Company,* 16 O.A. 240, motion to certify overruled, 20 O.L.R. 136, it was held, as is disclosed by the second and third branches of the syllabus:

"2. The mingling by the bank of such a deposit with the money received from general deposits does not destroy the trust character of the money so received, and the *cestui que trust,* upon the happening of the condition, can recover the amount from the bank.

3. If before the discharge of such trust obligation by the bank a receiver is appointed for the bank on acount of its insolvency, the receiver takes the deposit of such bank charged with such trust, and must allow and pay the claim prior to the claim of general creditors, *provided that there was in the general deposits of the bank from the date of the trust deposit to the date the receiver was appointed a sum of money equal to the trust fund."* (Italics the writer's).

It appears that where the trust funds can be specifically identified, the cestui may clearly recover them. *Lotze* vs. *Hoerner,* 11 Dec. Rep. 131; *Re Commercial Bank,* 1 N.P. 358.

In case no specific identification is posible, the trust fund constitutes a claim prior to the claims of general creditors to the extent of the minimum sum on hand in the general deposits of the bank or building and loan company between the date of the trust deposit and the date when the institution was closed for liquidation. (Sec. 687, Am. H.B. 263, 90th General Assembly).

Your letter implies that the deposit in question may constitute a deposit for a particular purpose, and that a trust relationship may result on such ground. In view of my conclusion, and in the absence of the complete agreement of deposit, I deem it unnecessary to express any opinion upon that question.

You do not state whether or not there are other preferred claims against the building and loan company in question entitled to treatment similar to that due Swancreek township. Such claims may very possibly exist.

In view of the foregoing, it is my opinion that:

1. Under sections 3320 et seq. of the General Code, a building and loan company may not legally act as a township depository.

2. Where township funds are deposited in a building and loan company, the officers of such company having knowledge that the funds are township funds, upon the subsequent insolvency of the building and loan company, such funds are impressed with a trust and entitled to allowance as a preferred claim upon liquidation, provided they can be traced or identified.

3. Such identification is complete when the minimum sum on hand in the general deposits of the building and loan company between the date of the trust

deposit and the date of closing for liquidation is equal to or in excess of the amount of the trust deposit.

Respectfully,
JOHN W. BRICKER,
Attorney General.

971.

CHECK—DEPOSITED BY COUNTY IN DEPOSITORY BANK—INTEREST PAYABLE ACCORDING TO DEPOSITORY CONTRACT—CUSTOM PREVAILS IN ABSENCE OF EXPRESS PROVISION.

SYLLABUS:

1. *Whether or not a check deposited by the county in a depository bank becomes, prior to collection, part of the "average daily balance", upon which interest is payable under section 2716 of the General Code, depends upon the construction of the depository contract.*

2. *In the absence of an express provision in such contract as to the manner of handling checks, the definite, long established custom between the parties is deemed to be part of their contract.*

3. *Where such custom has been to treat checks deposited as for collection only, the "average daily balance" does not include the amount of checks not yet collected and credited.*

4. *Where such custom has been to credit checks when deposited to the public depositor's account as cash, subject to the right reserved in the regulations of the bank to debit such account in the event such checks are not paid in due course, the amount of such checks so credited is included within the term "average daily balance", and this principle applies whether or not there is a clearing house in the city wherein the depository is located.*

COLUMBUS, OHIO, June 19, 1933.

HON. RAY B. WATERS, *Prosecuting Attorney, Akron, Ohio.*

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

> "A problem has arisen in Akron in connection with a temporary depository designated by the County Commissioners for county funds. Inasmuch as the banks in Akron do not have a clearing house, it is necessary for them to individually send checks out of town to the various banks on which the checks are drawn. This means that the account is not credited with the amount of the check for some two or three days.
>
> We are familiar with your opinion stating that the various political subdivisions are entitled to interest on daily balances, and that these daily balances should represent the deposits as made on these particular days. The bank, however, is quite insistent that it could not afford at this time to carry our account if it is necessary to credit our account with the deposits as they are received.
>
> Would you kindly give us your opinion as to whether or not, under the circumstances as they exist today, without the facilities of a clearing