2662.

CORPORATION—SEGREGATION OF ASSETS INTO PARCELS AND ISSUANCE OF PARTICIPATION CERTIFICATES SUBJECT TO OHIO SECURITY ACT—LICENSE REQUIRED.

SYLLABUS:

When a corporation segregates portions of its assets into parcels or pools and issues a series of certificates of participation or declarations of trust as to each of such segregated parcels of assets and sells such certificates to investors, not to exceed ten in number in each such parcel pool such corporation is a dealer within the provisions of the Ohio Securities Act (§§8624-1 *to* 8624-47, *G. C.) As such, it must obtain a dealer's license for the corporation and a salesman's license for each of the agents through which it offers such securities for sale to investors in Ohio.*

COLUMBUS, OHIO, May 14, 1934.

HON. SAM L. SUMMERS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion on the following question:

> "The corporation in question, is engaged in the formation of (Express Trust) whose assets consist of investments in oil royalties.
>
> Each trust is subject to registration with the Division of Securities, under the provisions of Section 8624-6, Subsection 3, providing that sales of such interest in each trust are not made to more than ten individuals.
>
> The question involved is whether a corporate trustee, whose securities are registered under Section 8624-6, Subsection 3, may sell its securities through its officers and employees, keeping in mind that the issuer in question, is a corporation and of necessity, must operate through its officers, directors and employees."

Your question is more specifically whether such corporation, its officers and directors must be licensed as "dealers" and "salesmen" under the Ohio Securities Act (Sections 8624-1 to 8624-47, General Code).

Such terms "dealer" and "salesman" are specifically defined, for the purposes of such Act in Section 8624-2, paragraphs 5 and 6, as follows:

> "(5) 'Dealer' shall, except as hereinafter otherwise provided, mean and include every person, other than a salesman (as hereinafter defined by subsection (6) of this section 2) who engages or professes to engage in this state, either for all or part of his time, directly or indirectly in the business of the sale of securities.
>
> 'Licensed dealer' shall mean a dealer licensed under the provisions of this act.
>
> (6) 'Salesman' shall mean and include every person (other than a dealer) employed, authorized or appointed by a dealer, to sell securities, in any manner within this state.
>
> * * * * * * *

'Licensed salesman' shall mean a salesman licensed under the provisions of this act."

Under certain circumstances, an issuer of securities is not a "dealer" within the meaning of such act. See Section 8624-6, General Code. In such section is contained the following language, to which you refer:

"An issuer engaging in any transaction specified in this section shall not be deemed to be a dealer.

* * * * * * *

(3) The sale of securities representing an interest in a partnership, limited partnership, partnership association, syndicate, pool, trust or trust fund or other company or association, not a corporation, when the security holders do not and will not, after such sale, exceed ten (10). * * *"

From the statements contained in your inquiry, it would appear that the corporation in question contemplates purchasing "oil royalties" and after taking title thereto, creating a number of trusts and selling beneficial interests not to exceed ten in number *in each trust,* which interests are to be sold through the officers and agents of such corporation. It is to be assumed that the ownership of each such beneficial interest is evidenced by some certificate or instrument. If so, whether we view such instruments as representing title to, an interest in, or secured by a lien or charge upon assets or property of the corporation as certificates in or under oil or gas leases or of any interest therein or thereunder, as evidencing an interest in a trust or pretened trust or merely as a form of commercial paper, such certificates would be securities within the meaning of that term as defined in subparagraph 2 of Section 8624-2, General Code.

Section 8624-17, General Code, reads as follows:

"No person shall sell any securities within this state unless licensed by the division of securities, except:

(1) When the securities are the subject matter of the transactions enumerated in section 4 hereof.

(2) When the person is an issuer (selling securities issued by it or issued by its subsidiary) when (a) such securities are specified under subsections 6 or 8 of section 3 hereof; or (b) such issuer is not a dealer by the express provisions of section 6 hereof."

An examination of Section 4 of such act (§8624-4, G. C.) clearly discloses that the securities in question are not of the type enumerated therein. I therefore do not quote such section herein. Subsections 6 and 8 of Section 3 of such act (§8624-3, G. C.) respectively refer to commercial paper issued within three months after sale in the usual course of business of the issuer, and maturing not over fourteen months from their date of issue, and securities issued by a corporation not for profit for charitable or educational purposes. It is evident that the sales in question would not come within the exceptions of such section.

Section 8624-18, General Code, contains the following language:

> "Dealers shall employ as salesmen only those who are licensed under the provisions of this act."

Section 8624-19, General Code, contains a reciprocal provision:

> "Every salesman shall be licensed and shall be employed only by the licensed dealer specified in his license."

By reason of such provisions it is evident that the corporation must become a licensed dealer, pursuant to the provisions of the Ohio Securities Act unless the provisions of Section 8624-6, General Code, above quoted, exempt it from the definition of a "dealer" as defined in Section 8624-2, General Code, supra.

As above pointed out, the corporation in question, contemplates forming a number of trusts; the beneficial interests in each are not to "exceed ten," and to sell such interests to, not to "exceed ten," investors. The question is, do such repeated transactions come within the purview of the exception set forth in Section 8624-6, General Code?

For the purposes of argument, let us for the time being assume that if the corporation were to take title to the royalties and to issue and sell beneficial interests therein, evidenced by certificates to not to exceed ten persons, and were to sell no other securities, it would not be a dealer in securities within the purview of the Ohio Securities Act. The question then arises as to whether such corporation would be a "dealer" if concurrently it were engaged in the sale of certificates in two or more of such trusts. The language of Section 8624-6, General Code, is "sale of securities representing an interest in a * * * trust or trust fund * * * when the security holders do not and will not, after such sale, exceed ten (10)."

Does such language limit the number of security holders to ten for each transaction, or does such language import that the security holders of such type shall not exceed ten, or the dealer must comply with the Ohio Securities Act?

In the fourth branch of the syllabus of *Cochrel* vs. *Robinson,* 113 O. S. 526, the court states the cardinal rule of interpretation of statutes, as follows:

> "In the construction of a statute the primary duty of the court is to give effect to the intention of the Legislature enacting it. Such intention is to be sought in the language employed and the apparent purposes to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

In the third paragraph of the syllabus of *Standard Oil Company* vs. *Surety Company,* 24 O. App., 237, a very old and well established principle of interpretation of statutes is stated:

> "Legislative intent is only gathered from all provisions of law bearing on subject matter, and not from independent and isolated passages except where such passages reach entire subject-matter of controversy."

See also Lincoln College Case, 3 Coke, 596; Celsus Digest of Roman Law, 1, 3, 24.

Upon examination of the act as a whole, it appears that the legislature has in Section 8624-1, subparagraph (5) supra, for the purposes of the Ohio Securities Act, defined the term "dealer" in terms which, were it not for the exception contained in Section 8624-6, General Code, as above quoted, would include the corporation doing business as suggested in your inquiry within such term. Thus, were it not for the exception provisions of Section 8624-6, General Code, supra, such corporation would clearly be required to obtain a license as a dealer before engaging in such business. An exception in a statute is a clause which excepts from the operation of a statute, persons, things, or cases which otherwise have been included in it. Black on Interpretation of Laws, Section 107.

It has been repeatedly held that exceptions to the operation of general laws are to be strictly construed. *State ex rel Keller* vs. *Forney,* 108 O. S. 463; *Jones* vs. *Cresswell,* 60 Fed. 2nd, 827.

It has also been held that the purpose of the legislature in the enactment of a statute may not be ignored in attempting to arrive at its meaning. *Cleveland Trust Company* vs. *Kickox,* 32 O. App. 69; *Rodenbaugh* vs. *United States,* 25 Fed., 2d, 13.

An examination of the Ohio Security Act clearly discloses two purposes: First, the regulation of the sale of securities in Ohio; Second, the prevention of fraud in the sale of securities within the state. See Sixth Report of Committee on Corporation Law and Blue Sky Law, page 13. Such committees further state that the purpose of subsection (3) of Section 8624-6, General Code, is "to enable the small, closely held company to dispose of its shares among interested parties, usually its organizers, without needless hinderance or obstruction." It thus appears that, at least on the part of the framers of the Ohio Securities Act, there was no intent to exempt a person engaged in the business of forming consecutive trusts and selling certificates therein in the course of repeated transactions from the term "dealer."

In other words, it appears to have been the intent of the framers of the act that an issuer of securities was not to be considered as a dealer when he or it sold securities of the type mentioned in subsection 3 of Section 8624-6, General Code, to not more than ten investors. The language of such section, in so far as is applicable to your inquiry, might be stated:

> "The sale of securities representing an interest in a ** trust or trust fund ** when the security holders do not and will not, after such sale, exceed ten (10)."

The article used is "a," not "the". In other words, the legislature has used the indefinite article in describing the ten security holders to whom certificates in a trust may be sold without constituting the issuer a "dealer" within the meaning of such section.

If a strict construction is placed upon such subsection it would appear that if securities were sold to more than ten investors by an issuer whether such securities represented an interest in a partnership, in a limited partnership, in a partnership association, in a syndicate, in a pool, in a trust or trust fund, or in any other type of association or company, or whether the holdings of such purchasers, in the aggregate, represented each and every kind of such securities such issuer would be a dealer within the meaning of the Ohio Securities Act.

As above pointed out, Section 8624-6, General Code, is an exception to the definition of "dealer" as contained in Section 8624-2, General Code. I am, therefore, bound to construe such section strictly and can not extend its meaning beyond the clear import of its language. It is therefore, my opinion that when the security holders of an issuer of trust certificates exceed ten in number whether of one trust or several trusts, such issuer becomes a "dealer" within the purview of the Ohio Securities Act and must comply with its provisions as to license as to himself and his sales agents.

Specifically answering your inquiry, it is my opinion that:

When a corporation segregates portions of its assets into parcels or pools and issues a series of certicates of participation or declarations of trust as to each of such segregated parcels of assets and sells such certificates to investors, not to exceed ten in number in each such parcel pool such corporation is a dealer within the provisions of the Ohio Securities Act (§8624-1 to 8624-47 G. C.) As such, it must obtain a dealer's license for the corporation and a salesmen's license for each of the agents through which it offers such securities for sale to investors in Ohio.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2663.

DEPOSITORY—LIABILITY FOR DEPOSIT OF PUBLIC FUNDS IN EXCESS OF SECURITY—TRUSTEE EX MALEFICIO DISCUSSED—PREFERENCE IF TRUST RES IDENTIFIED—BANK IN LIQUIDATION.

SYLLABUS:

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.*

COLUMBUS, OHIO, May 15, 1934.

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

DEAR SIR:—I have your request for my opinion, which reads as follows: