

conflict between the provisions of these two sections as to warrant the conclusion that there is a repeal by implication of either. It was the obvious intent of the legislature in enacting and later amending Section 654-1, General Code, to except from the provisions of Section 644, General Code, agents of domestic casualty insurance companies. As said in the case of *State ex rel. Crawford v. McGregor*, 44 O. S. 628, at p. 631:

"This is in accordance with the established rule of construction, where the general provisions of a statute are varied by the special provisions of the same or another statute relative to the subject. The courts presume an intention in the legislature to be consistent in the making of laws; and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in a statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provisions of the statute. In this way, without disregarding any of its provisions, effect is given to each and all the provisions of a statute. *Potter's Dwarris*, 272; *Sedgwick Stat. Law*, 423."

I am therefore of the opinion in answer to your first question, that any person duly certified by a domestic casualty insurance company as its agent, to the superintendent of insurance of Ohio as required by Section 654-1, General Code, is authorized to solicit insurance for such company in Ohio without further license or evidence of authority.

Since Section 654-1, General Code, defines the agents of domestic casualty insurance companies as excepted from the provisions of section 644, General Code, I am of the opinion in answer to your second question, that said Section 644, General Code, confers no authority upon the superintendent of insurance in reference to the licensing of agents for domestic casualty companies.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3438.

SECURITIES—SHARES OF COMMON LAW TRUST—SHOULD BE
QUALIFIED IN ACCORDANCE WITH BLUE SKY LAW.

SYLLABUS:

Under the Ohio Securities Act, certificates of beneficial interest or shares of a common law trust should be qualified in accordance with the provisions of such act before being sold in Ohio by a licensed dealer in securities.

COLUMBUS, OHIO, JULY 17, 1931.

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

DEAR SIR:—Your letter of recent date is as follows:

"An application for qualification for sale under the Ohio Securities

Law of the Certificates of Beneficial Interest or Shares of Massachusetts Investors Trust has been filed with the Division of Securities. A photostat copy of the application, with its accompanying exhibits, is enclosed.

From an examination of the application it appears that the applicant is a common law or business trust of the type generally known as a Massachusetts Trust, and that it was organized in Massachusetts on March 21, 1924, under a written Agreement and Declaration of Trust, a printed copy of which is attached to the application, marked Exhibit '1'. The form of the securities issued, and all the provisions for issuing the same, are set forth at length in the trust instrument above referred to and are not here re-stated.

Your opinion is respectfully requested upon the following question:

Assuming that the application is in proper form, does the fact that the applicant is a common law trust of the type shown by this application, as a matter of law prohibit the exemption, registration or qualification of Certificates of Beneficial Interest or shares in said trust under the Ohio Securities Act?"

In so far as the Ohio Securities Act (Sections 8624-1, et seq., General Code) is concerned, instead of prohibiting the qualification of certificates of beneficial interest or shares of a common law trust, such certificates or shares are expressly recognized as securities within the meaning of the act and may not be sold in this state unless qualified as therein provided.

Section 8624-2, General Code, provides that "the term 'security' ** shall include ** certificates evidencing any interest in any trust." This section further defines "person" as including a "trust, trustee of a trust." There appears also in this same section a definition of the term "director" as including "each trustee of a trust."

It would seem that the foregoing should be dispositive of your inquiry. However, comment should be made upon two opinions of this office rendered in 1919, bearing upon the status of common law trusts in this state. In the first of these opinions appearing in Opinions of the Attorney General for 1919, p. 1023, the then Attorney General held as set forth in the syllabus:

"An unincorporated association of persons organized to carry on business in such manner as is calculated to impress the general public with the belief that it is a corporation, and whose intended acts are such as appertain to or are to be done after the manner of corporations, cannot transact business in this state."

Shortly after the rendition of the foregoing opinion, a second opinion supplemental thereto was rendered, holding as set forth in the syllabus:

"No officer or agent of an unincorporated association of persons organized in this or any other state to carry on business in such manner as is calculated to impress the general public with the belief that it is a corporation, and whose acts are such as appertain to or are to be done after the manner of corporations, nor any other person acting for it or in its behalf, should be licensed to deal in its securities in this state."

Opinions of the Attorney General, 1919, Vol. II, p. 1064.

While the syllabi of the foregoing opinions refer to unincorporated associations calculated to impress the general public with the belief that they are corpo-

rations, the opinions themselves have been construed during the past twelve years as holding that all common law trusts are invalid regardless of whether or not such trusts act as corporations or assume the privileges of corporations.

The foregoing opinions were based upon the holding of the Supreme Court in the case of *State ex rel. v. Ackerman, et al.*, 51 O. S. 163, decided in 1894. The fourth branch of the syllabus reads as follows:

"To come within the purview of that provision of section 6760, of the Revised Statutes, which authorizes an action in *Quo Warranto* to be brought 'against an association of persons who act as a corporation within this state without being legally incorporated,' it is not necessary that the association, or persons composing it, avow a purpose to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations."

The Supreme Court has in numerous subsequent decisions cited and followed this Ackerman case, but it has been used as authority for an adherence to other principles therein laid down than those set forth in the fourth branch of the syllabus, *supra*.

In 1925 the Court of Appeals of Lucas County substantially overruled the foregoing opinions of the Attorney General and, I think, rendered a decision at variance with the Ackerman case. I refer to *State, ex rel. v. Meyer*, 19 O. App. 436, the syllabus of which is as follows:

"1. It is a fundamental principle of law that in the absence of a statutory prohibition, an individual may engage in and conduct any legitimate business without legislative assent.

2. In Ohio a natural person or any association of them (not a corporation) may own and operate a cemetery for profit, subject to the regulations which may be enacted by the state in the reasonable exercise of its police powers."

It was contended that the trustees of a common law trust organized to operate or manage a cemetery were violating the law in that "the trustees without being incorporated, are assuming to exercise the franchises, rights, powers and privileges of a corporation organized for cemetery purposes." Upon this point, the court said at pp. 451, 452:

"It is true, of course, that the legislative branch of our government, in the proper and reasonable exercise of its police powers, may and has passed certain regulations in regard to the use of land for cemetery purposes, but it nowhere has prohibited individuals, or an association of them, from devoting privately owned real estate to cemetery purposes, and it is a fundamental principle of law, well recognized and fully established, that in the absence of a statutory prohibition, an individual may engage in and conduct any legitimate business without legislative assent.

The fact that the Legislature has given the power to individuals to organize a corporation for any purpose for which natural persons may lawfully associate themselves (except for professional business), does not deprive natural persons of the rights which they previously possessed, nor militate against the use of the same by them, and in so doing the Legislature has given to corporations thus organized the right to conduct and operate any business which natural persons had a right to do, and

not otherwise. The corporation law of this state therefore gives the right to individuals to organize and operate a cemetery corporation not for profit, which right a natural person always has had and still possesses, and the fact that this right has also been given to corporations by the Legislature, does not thereby take such right away from natural persons.

Further, the Legislature has not yet seen fit to permit cemetery corporations to be organized for profit, but it likewise has not seen fit to prohibit individuals from exercising the natural rights which they have always had so to do, leaving the question whether they desire to engage in such business to be decided by the individuals themselves."

In view of the foregoing, I am inclined to the view that the broad construction which has been placed upon the foregoing opinions is no longer proper.

Having commented upon the opinions heretofore rendered by this office upon the subject of common law trusts, it remains to be stated that I find no sections in the General Code which prohibit the sale in Ohio of certificates of beneficial interest or shares of a common law trust, or which exempt such securities from qualification under the Ohio Securities Act.

It is, therefore, my opinion in specific answer to your inquiry, that under the Ohio Securities Act certificates of beneficial interest or shares of a common law trust should be qualified in accordance with the provisions of such act before being sold in Ohio by a licensed dealer in securities.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3439

APPROVAL, NOTES OF HOPEWELL TOWNSHIP RURAL SCHOOL DISTRICT, PERRY COUNTY, OHIO—\$3,200.00.

COLUMBUS, OHIO, July 17, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3440.

APPROVAL, BONDS OF MONTGOMERY COUNTY, OHIO—\$10,000.00.

COLUMBUS, OHIO, July 17, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.