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:

"A certain village has on deposit approximate'y $37,000.00 in its general account and $150,000 00 in the sinking fund account. Securing both of these deposits are $150,000.00 par amount of bonds of said village. The contention has been made that since the security is less than that required by the statutes, there is a preferred claim for the entire amount of the two deposits. I desire your opinion as to whether or not a preferred claim does exist with reference to the entire deposit or to any part thereof."

Since it appears from your letter that the collateral was pledged to secure both the general and sinking fund accounts, I assume that the deposits in both accounts were covered by a single depository contract. Sections 4505, et seq., General Code, relate to the sinking fund of municipalities. Sections 4515 and 4516 provide the manner in which the sinking fund trustees shall create a depository for all sums held in reserve. Sections 4505 to 4516, inclusive, relate to both cities and villages. Section 4516-1 reads:

"The provisions of sections 4515 and 4516 of the general code shall not apply where sums held in reserve, by trustees of the sinking fund, are deposited in the city treasury, so as to become part of the general city balance to be deposited in banks as otherwise provided by law."

This code section number was assigned by the legislature, 102 O. L., 466. The fact that the legislature placed the section in a group of sections applying to all municipalities, indicates an intention to use the word "city" in a broad sense to include "village." The title of the act by which section 4516-1, General Code, was enacted (102 O. L., 466) reads:

"AN ACT

To supplement section 4516 of the general code relating to competitive bidding by banks for the deposits of moneys in control of the trustees of sinking fund of municipal corporations, by the enactment of supplementary section 4516-1."

This title indicates an intention to make the new section applicable to all municipalities covered by sections 4515 and 4516, viz., all municipalities, whether cities or villages. Section 4516-1 refers to deposits "as otherwise provided by law." Obviously this reference is to sections 4295 and 4296, General Code, which make provision for the deposit of funds of municipalities, including both cities and villages. It is therefore my view that section 4516-1, General Code, authorizes the sinking fund trustees to pay all sums held in reserve by them into the village treasury and that such sums may thereby become part of the general village balance to be deposited under sections 4295 and 4296, General Code. I assume that this was the practice followed in the case presented by you and that the deposits in the general account and in the sinking fund account were thus made under a single contract.

Section 4295, General Code, requires security "in a sum not less than ten per cent in excess of the maximum to be deposited." Thus securities in the sum of $205,700 should have been pledged to secure the deposits mentioned in your letter.

As stated in 51 A. L. R., 1340:

> "The right to a preference on the theory of trust generally involves two conditions: (1) The existence of a trust relation; (2) the ability to trace or identify the trust funds."

It is well established that a deposit of public funds in violation of duties imposed upon the custodian of such funds by statute constitutes the depository, receiving such funds with knowledge of their nature, a trustee. This principle is based upon the theory that the illegal act constitutes a conversion upon which a trust *ex maleficio* is established. 51 A. L. R., 1342. In the case of *In re Osborne Bank,* 1 O. A. 140, "township and village funds were deposited in a bank without attempting to comply with the provisions of the depository act." In this case a preference was accorded. See also *Franklin Bank* vs. *Newark,* 96 O. S., 453; *Sizelman* vs. *Union Trust Co.,* 25 O. A., 165; *Newark* vs. *Peoples National Bank,* 15 O. C. C. (n. s.) 276, affirmed, 90 O. S., 470.

The case of *City of Centralia* vs. *United States Nat. Bank,* 221 Fed., 755, involved a claim for preference against the receiver of a national bank which was the depository for funds of a city under a statute requiring that the bank shall give "a surety bond * * in the maximum amount of deposits designated by said treasurer to be carried in such bank, or, in lieu thereof, shall deposit with the treasurer good and sufficient" securities of the types enumerated. The only security given by the depository was a surety bond in the amount of $10,000. In selling certain municipal bonds, the city treasurer drew a draft upon a Seattle firm and deposited it with the bank with instructions to forward and collect. The collection was effected through the bank's Seattle correspondent, which credited the forwarding bank. Thereupon that bank credited the city's account with that amount. Upon being advised of this fact the city treasurer requested an additional bond which was not given prior to the bank's failure.

In allowing a preference, the court said at page 759:

> "The city treasurer took from the bank no passbook or other evidence of its debt in account of this fund, but it is not necessary to determine whether the city treasurer intended or consented to the depositing of the money in the bank. In the face of the Washington statute, the title to this money *in excess of* $10,000 could not pass to the bank, without an additional bond. The payment of interest by the bank to the city treasurer for two months—even if acquiesced in by the latter—will not change the trust fund into a mere debt. The treasurer could not so accomplish indirectly that which he could not do directly. The proceeds realized from the sale of these bonds were therefore a trust fund, and it remains to consider whether it has been sufficiently identified with the funds now held by the receiver to impress a trust upon the latter." (Italics the writer's.)

The court says that title to money on deposit in excess of the amount of the bond could not pass to the bank. Thus by clear implication it appears that all money deposited up to the amount of the bond was legally deposited and title thereto passed to the bank.

I am of the view that the case of *Yellowstone County* vs. *First Trust & Savings Bank,* 46 Mont., 439, 128 Pac., 596, is dispositive of part of your inquiry. The applicable depository statute required a bank obtaining a general deposit of county funds to give a bond in double the amount of the deposit. A county treasurer deposited county funds in excess of $30,000, and took from the bank a bond for only $25,000, but permitted the bank to retain the whole deposit. In the course of the opinion the court said (128 Pac. 598):

"With the acceptance of this bond for $25,000, then, the treasurer could lawfully keep on deposit with this bank county funds to the amount of $12,500, and the deposit of such funds to that amount would constitute a general deposit authorized by section 3003, above, and to that extent the county would give its consent to become a general creditor of the bank and that its funds to that amount might become the funds of the bank to be commingled with its other funds and assets. At the time this bond was given, it constituted good and sufficient indemnity for the deposit of the county funds, to the extent of $12,500. In other words, when the bond was given to secure county funds already on deposit, in legal effect there was a redeposit of the $12,500 thus secured *(Meeker County* vs. *Butler,* 25 Minn. 363), and neither the validity nor the sufficiency of the bond was impaired in the least by the wrongful act of the treasurer in keeping on deposit with that bank a sum in excess of that amount. In re State Treasurer, 51 Neb. 116, 70 N. W. 532, 36 L. R. A. 746; 13 Cyc. 816.

To the extent, then, of $12,500, the county funds deposited in this bank by the treasurer constituted a general deposit *(Bank* vs. *Bartley,* 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67), and to that extent the county itself consented to become a general creditor of the bank, and, in case of the bank's failure, to share alike with other general creditors in the distribution of its assets, or to look to the bonding company for relief *Commercial Bank* vs. *Armstrong,* 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363.

The fact, however, that the deposit of the county's funds to the extent of $12,500 was secured, does not reflect in the least upon the status of the $20,500 kept on deposit in this bank without security and in violation of the law. The act of the treasurer in keeping this excess on deposit without the security required by section 3003 is denounced by section 8592, Revised Codes, as a felony; and the treasurer and the bank officials are chargeable with knowledge that the use to which these county funds were thus put was altogether illegal and wrongful, and that the county, the rightful owner of such excess, did not consent to such use and did not part with its title to the funds thus employed. *State* vs. *Thum,* 6 Idaho, 323, 55 Pac. 858. The only method by which the county could give its consent that its funds might be placed on general deposit was by speaking through the Legislature as it did in section 3003, above. To the extent that the provisions of that section were complied with, it gave its consent, and beyond that it did not and could not go. The county is but a political subdivision of the state, and, except in so far as the Legislature is restricted by the state Constitution, is subject to legislative regulation and control. *Independent Pub. Co.* vs. *Lewis & Clark County,* 30 Mont. 83, 75 Pac. 860; *Missouri River Power Co.* vs. *Steele,* 32 Mont.

433, 80 Pac. 1093; 11 Cyc. 365. The Legislature having designated the particular instance, and the only one, in which the county's funds may be placed on general deposit, it was not within the power of any one else to consent to a general deposit of such funds under any other circumstances.

The deposit of $20,500 excess, without security, was wrongful and unlawful. The county did not consent thereto, never parted with its title to such funds, and the treasurer and the bank officers knew of these facts, being chargeable with knowledge of the law. The bank was an active participant in the wrong, and the result follows, as of course, that as to such excess the bank held it as a trustee *ex maleficio,* for the use and benefit of the county. *State* vs. *Thum,* above; *Wolffe* vs. *State,* 79 Ala. 207, 58 Am. Rep. 590; Mechem on Public Officers, 922."

In the light of the foregoing, it is my opinion that as to all deposits made under the contract in question, whether in the general account or sinking fund account, for which there was security in the amount of 110%, the bank stands in the relation of debtor, and as to such deposits there can be no preference. As to all deposits in excess of the amount legally secured, whether in the general account or sinking fund account, the bank stands in the relation of trustee *ex maleficio.*

As above pointed out, to establish a preference, in addition to showing a trust relationship, the depositor must be able to identify the trust *res* by tracing it into some specific fund or property.

In *Ohio State Bank & Trust Co.* vs. *Biltwell Tire & Rubber Co.,* 23 O. A. 409, it was held, as disclosed by the syllabus:

"Where the rights and equities of creditors are involved, and it is sought to impress a trust upon property in the possession of a receiver of a trustee, who in violation of its trust has indistinguishably mixed trust funds with its own property, it is necessary to be able to trace such trust funds into some existing specific property in the possession of the receiver, with which the trust funds have been mixed; proof of mere conversion by a trustee of trust funds and the use of same in its manufacturing business, without any proof whatever of how or in what manner such trust funds were used, will not impress a trust for such funds upon the general assets of the trustee in the hands of its receiver."

See also *Fulton vs. Gardiner,* 127 O. S., 77; *Fulton* vs. *B. R. Baker-Toledo Co.,* No. 24209, decided by the Supreme Court April 11, 1934; 82 A. L. R., 46; *Townsend, Tracing Technique in Bank Preference Cases,* 7 U. Cin. Law Rev., 201. The burden of tracing is upon the depositor. *Schuyler* vs. *Bitterroot Development Co.,* 200 U. S, 451, 50 L. Ed. 550. Since no facts are presented showing the ability of the depositor to trace these deposits into any specific fund or funds of the bank which came into the possession of the Superintendent of Banks, I am unable to categorically answer the question whether the amount on deposit, which the bank received as trustee *ex maleficio,* is entitled to be paid as a preferred claim.

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

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 therto.*

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'.