

2846.

SECURITIES—CIGARETTE MANUFACTURERS—GIVING AWAY OF PREMIUMS OR OF WARRANTS REDEEMABLE IN CASH OR SHARES OF CORPORATION—IS ENGAGED IN SALE OF SECURITIES.

SYLLABUS:

A corporation engaged in the manufacture of cigarettes, which includes in each carton of cigarettes delivered to Ohio retailers a warrant redeemable either in cash or in shares of such corporation, is engaged in the business of disposing of securities within this state, although the price of such cigarettes to such retailer is not increased by reason of the inclusion of such warrants in the cartons.

COLUMBUS, OHIO, November 8, 1928.

HON. NORMAN E. BECK, *Chief, Division of Securities, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

“I am enclosing communication from Sullivan and Cromwell, Attorneys-at-Law, New York City, with reference to the proposed plan of the ----- Tobacco Company to distribute stock warrants in the state of Ohio.

I respectfully seek your opinion as to whether the plan as outlined in this letter comes within the jurisdiction of the Division of Securities, State of Ohio.

I am enclosing herewith for your consideration specimen stock warrants, which the company proposes to distribute.”

The letter accompanying your inquiry is as follows:

“One of our clients, The ----- Tobacco Company, a Delaware corporation engaged in the business of marketing various brands of tobacco and cigarettes, including -----, ----- and ----- cigarettes, proposes to make a stock distribution for the benefit of its retailers substantially in accordance with the following plan:

There will be enclosed in each carton of cigarettes a warrant for 12/3000 or other fraction of one share of the common stock without part value of the company depending on the price of the particular brand, which will entitle the bearer to receive without additional cost a certificate for one share of common stock upon surrender of the warrant together with other warrants aggregating one full share of such stock on or after July 1, 1929, and on or before December 31, 1929. Exchanges of warrants for stock will be made at the Trust Department of Guaranty Trust Company of New York. The warrant holder is, of course, entitled to no rights as a stockholder and no dividends are payable in respect of such warrants. However, upon surrender of the requisite number of warrants, the dealer will become a stockholder in the company and will thereafter be entitled to dividends when and as they may be declared. Specimen warrants are enclosed herewith for your full information.

The company ordinarily sells cartons of its cigarettes to jobbers and the jobbers in turn sell them to retailers. In a very few instances the cartons are not broken by the retailers but are resold in the same form to the ultimate consumer. The retailer then will receive the warrants in the cartons and in

practically all cases will retain them. It is not planned to increase the price of cigarettes to the retailer on account of the enclosure of the warrants in the cartons.

From the foregoing, it will be seen that the retailers will obtain a stock interest in the company, with no additional cost to them, in proportion to the amount of merchandise which they purchase, and that the proposed plan presents to them an opportunity to share by way of dividends in the earnings of the company upon receiving certificates of its stock in exchange for the warrants received by them with consignments of cigarettes.

The contemplated benefit to the company is, of course, the increased good will of tobacco retailers and resulting increase in the sales of its brands of cigarettes.

While we do not feel that this plan is covered by the Ohio Securities Law, we wish to call it to your attention so that we may be sure of our interpretation and may know that you have no objection to the distribution. The major purpose of the Blue Sky Laws is, of course, to protect the investing public and to prevent it being defrauded into purchasing worthless securities. As previously pointed out, however, the proposed plan does not increase the price of cigarettes to the jobbers or retailers and the distribution of warrants is in addition to all discounts now allowed.

We would appreciate your advising us of your conclusions from the foregoing and of whether you are of the opinion that the plan outlined is affected by the Blue Sky Law of your state."

One of the specimen warrants which accompanied the letter contains in the body thereof the following:

"This is to certify that, subject to the conditions hereinafter stated, the bearer is entitled to receive a certificate for one share of the common stock of The ----- Tobacco Company, upon surrender of this warrant together with others of like tenor aggregating one full share of such stock on or after July 1, 1929, and on or before December 31, 1929, at the Trust Department of Guaranty Trust Company of New York, No. 140 Broadway, New York, N. Y.

In event this warrant or the issuance or delivery thereof shall be or become subject to any tax or to any prohibition or restriction of law, the bearer hereof shall have no rights hereunder, except that, in such event, he shall be entitled to receive the sum of five cents in cash upon surrender of the warrant on or before December 31, 1929, at the office of the ----- Tobacco Company, No. 511 Fifth Avenue, New York, N. Y.

This warrant shall not entitle the bearer to voting rights or to any other rights of a stockholder and no dividends or interest shall be payable or shall accrue in respect hereof. The undersigned and Guaranty Trust Company of New York may treat any bearer hereof, regardless of the manner in which he shall have acquired possession, as the absolute owner hereof for all purposes without being affected by any notice to the contrary."

The remainder of the warrants are in the same language except that they represent rights to increasing fractions of one share and the cash surrender value of these warrants varies from five cents to twenty-five cents.

From the foregoing, it is plain that the dealer is given the right to secure shares in the corporation upon presentation of the necessary number of warrants, or, in the event of certain contingencies, the warrants have a cash surrender value. The

contention of the attorneys representing the company is that these warrants are given gratuitously and solely for the purpose of stimulating trade, and it is therefore argued that they are not within the provisions of the Ohio Securities Law.

To reach a solution of the question it is necessary to examine certain sections of the law applicable thereto. Section 6373-1 of the General Code is as follows:

"Except as otherwise provided in this act (G. C., Sections 6373-1 to 6373-16, 6373-24), no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

I have no hesitancy in saying that the warrants in question come within the definition of securities contained in this section. Clearly they are issued by a private corporation, evidencing the title to or interest in property. The question remains, however, whether, under the facts here existing, the company is disposing of or offering to dispose of these securities within this state.

Section 6373-2 of the General Code defines the words "dispose of," as used in the securities act, to mean "sell, barter, pledge or assign for a valuable consideration or obtain subscriptions therefor." Since the conversion of the warrants into stock is accomplished by presentation to the trust company in New York, the question narrows down to whether or not the issuance of the warrants is an offer to sell or barter for a valuable consideration. In order to determine this, it is necessary to make critical examination of the proposed plan. It is clear from the statement of the attorneys representing the company that the issuance of these warrants is not purely gratuitous. They state that the contemplated benefit to the company is the increased good will of the retailers, which will in turn result in increased sales of its brands of cigarettes. The company promises on its part either to redeem in cash or to issue stock in return for the warrants presented within the time limitation prescribed. I scarcely believe that it would be argued by the company that, when issued and in the hands of a dealer, these warrants would not be supported by a valuable consideration and enforceable at law. In other words, I am of the opinion that a holder of a warrant who has complied with its terms would have a legal right to enforce the promises therein contained. In order to have this right there must of necessity exist a consideration and hence the warrants cannot in any respect be regarded as mere gratuities.

It is argued by counsel representing the company that the cigarettes are sold at no additional cost by reason of the inclusion of the warrants in each carton, but I do not deem this as dispositive of the question here presented. It is quite possible that were the warrants not issued, the price could be reduced. Especially is this so in view of the fact that the warrants have a cash surrender value, which quite obviously results ultimately, if the option be exercised, in a reduction of price to the dealer.

On the other hand, if the dealer exercises the option of converting the warrants into stock, he is getting for the money paid for the cigarettes something of value in addition to the cigarettes. The shares will, of course, be issued as fully paid. The warrant does not disclose whether the common stock into which the warrants

are converted is of par or no par value. The letter, however, states that these shares are of no par value. The constitution of the state of Delaware, under whose laws this corporation was organized, requires that all shares shall be issued for a valuable consideration in money, property, etc. The shares in this instance would be issued in exchange for the warrants, which, if of no binding force upon the corporation, could not be treated as a proper consideration. The ultimate consideration for the issuance of the shares must accordingly be the consideration for the issuance of the warrants, and this, as I have before stated, must be either a portion of the price paid for the cigarettes or the benefit accruing to the company by way of the good will of the retailers. In either event, the shares would, in my opinion, be supported by and issued for a valuable consideration.

While I have not examined the laws of the state of Delaware, I feel that these shares of stock would necessarily have to be set up on the books of the company as a liability at some stated value. The ordinary rule is that the consideration received from the sale of no par shares is the amount which must be set up on the liability side of the balance sheet of a corporation. In this instance I am not advised what the company proposes to do in this respect, but as I view it, however, the stated value of these shares must either be balanced by deduction from surplus or a corresponding asset item must be added for good will resulting from the issuance of the shares.

The foregoing considerations have led me to the conclusion that there exists a valuable consideration for the warrants when delivered to the dealer in the cartons of cigarettes, and accordingly the acceptance thereof and the payment of the purchase price of the cigarettes constitutes a sale of securities for a valuable consideration. This being so, there is a disposal of securities in this state within the meaning of the act.

As I stated at the beginning of this opinion, I am clearly of the view that these warrants are securities within the definition of Section 6373-1 of the act. I reach this conclusion not only from the language of the section itself, but also as the result of judicial interpretation of its language.

In the case of *Groby vs. The State*, 109 O. S. 543, the court had before it criminal prosecution for violation of the Blue Sky law. In discussing the language of this section as applied to the particular facts before it, the court on page 550 uses the following language:

“This legislation was enacted for the obvious purpose of guarding investors against fraudulent enterprises, to prevent sales of securities based only on schemes purely speculative in character, and to protect the public from swindling peddlers of worthless stocks in mere paper corporations. It should be so administered as to fully meet the purpose of its enactment, and in some respects should be strengthened and made more efficient. Such legislation would be worse than vain and useless, if, while regulating the sale of corporation stocks, it had permitted, without regulation or restriction, the sale of certificates, or ‘membership receipts,’ or instruments by whatever name, of syndicates or associations, upon the representation that at some time in the future the purchasers thereof would be entitled to and would receive certificates of stock in a company to be subsequently organized and incorporated. It is sufficient to say that no such loophole was left in the Blue Sky Law of this state.”

In view of the language of the court, I feel that the warrants here under consideration are clearly to be classified as securities within the definition of Section 6373-1 of the General Code.

You are accordingly advised, by way of specific answer to your inquiry, that a corporation engaged in the manufacture of cigarettes, which includes in each carton of cigarettes delivered to Ohio retailers a warrant redeemable either in cash or in shares of such corporation, is engaged in the business of disposing of securities within this state, although the price of such cigarettes to such retailer is not increased by reason of the inclusion of such warrants in the cartons.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2847.

APPROVAL, ARTICLES OF INCORPORATION OF MOTORISTS MUTUAL
INSURANCE COMPANY, COLUMBUS, OHIO.

COLUMBUS, OHIO, November 8, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning to you herewith the articles of incorporation of Motorists Mutual Insurance Company of Columbus, Ohio, with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2848.

APPROVAL, BONDS OF THE COUNTY OF HAMILTON—\$10,000.00.

COLUMBUS, OHIO, November 8, 1928.

Industrial Commission of Ohio, Columbus, Ohio.