

798.

APPROVAL, BONDS OF CHESAPEAKE-UNION SCHOOL DISTRICT, LAWRENCE COUNTY, \$3,180.00.

COLUMBUS, OHIO, July 27, 1927.

Industrial Commission of Ohio, Columbus, Ohio.

799.

TRUSTEE SHARES—ISSUED BY A NATIONAL BANK AS TRUSTEE AND REPRESENTING A DISTRIBUTIVE INTEREST IN CERTAIN STOCK OF STATE AND NATIONAL BANKS—ARE SECURITIES WITHIN THE MEANING OF SECTION 6373-1, GENERAL CODE.

SYLLABUS:

Trustee shares issued by a national bank as trustee and representing a distributive interest in certain stock of state and national banks, are securities within the meaning of Section 6373-1 of the General Code.

COLUMBUS, OHIO, July 28, 1927.

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

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

“Pursuant to our conversation of even date and in connection with printed data previously submitted, we desire to seek your opinion as to the following:

An individual licensed dealer acquires various amounts of stock certificates issued by local State and National Banks. These certificates are then trusted with the National Bank, who in turn issues a number of certificates against the collateral so held. The licensed dealer then disposes of said certificates to the general public in the course of repeated transactions.

Question: Do you consider the certificates so disposed of a security as securities are defined under the General Statutes of Ohio?”

I also have before me a copy of the trust agreement which discloses additional facts pertinent to the present consideration. It is shown that the dealer has agreed to assign to and deposit with the trustee the enumerated bank stocks. The last clause of the agreement directs the trustee to issue to the dealer, or his nominee, proxies to vote all of the stock deposited at any and all meetings for any and all purposes. In the event of the inability of the dealer to vote the stock or his failure to designate one to whom a proxy shall be granted, the trustee is vested with the voting power of the stock either directly or by proxy. Evidently, therefore, the agreement contemplates the stock being held in the name of the trustee. The duties of the trustee are set forth very comprehensively commencing with the issuance of what are called “bank stock

trustee shares of Columbus", which shares are evidenced by registered certificates transferable upon the books of the trustee. These duties include also the receipt of all dividends and distribution thereof, semi-annually, among the shareholders, certain provisions as to the disposition of stock dividends, stock rights and other property rights and provisions for distribution upon termination of trust, which is limited at all events to twenty years. The trustee is empowered to do the ordinary acts incident to a trust of this character and compensation therefor is provided. It expressly provides that the trustee shall not be liable in the case of any assessment under the double liability provision as to any stock deposited with the trustee, but the trustee is authorized to levy, collect and assess a pro rata assessment from the shareholders or to pay the same out of the trust estate or its income in accordance with the judgment of the trustee. In the event of such an assessment, the trustee is authorized to sell or dispose of any or all of the stocks in its possession.

The agreement further provides that the number of shares of bank stock enumerated as being deposited at the time of the execution of the trust agreement shall constitute what is known as a unit of the bank stock and that a unit of the bank stock trustee shares shall consist of 1000 of such shares. It is agreed that the dealer may hereafter deliver additional units of bank stock and receive therefor units of shares, subject to all the terms and conditions of the trust agreement. In other words, a method is provided for the expansion of the trust so as to include other stock than that deposited at first. An additional clause provides that if at any time the number of units deposited with the trustee shall be less than ten, the dealer may dissolve the trust and thereupon the trustee shall close the same as provided by the agreement. This virtually makes it optional with the dealer whether or not to continue the trust unless and until he shall have deposited with the trustee at least nine more units consisting of the bank stock enumerated as being contained in the first unit.

The dealer, who is a party to the trust agreement, operates under a firm name, but the deposit of securities is made by him individually and not under the firm name.

In order to answer your question it is necessary to examine the definition of the term "securities", as found in Section 6373-1 of the General Code, which section 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 difficulty in concluding that the trustee certificates in question come within the meaning of the words "other similar instruments" and that they evidence title to or interest in property. You will note, however, that there is a qualifying phrase to the effect that these instruments must be issued or executed by a corporation, copartnership or association. In other words, apparently nothing is classified as a security which is not issued or executed by one of these three forms of organization. It should further be noted that Section 6373-2 of the General Code provides for certain specific exemptions from what would otherwise be classed as "securities". The third group of these exempted securities is stated to be as follows:

"The stock or obligation of any national bank or of any bank, trust company or building and loan association, organized under the laws of this state

and subject to examination and supervision by the proper authorities thereof."

As I have before stated, the trust agreement specifically provides that the certificates are to be executed by the trustee bank. Disregarding the exemption just quoted from Section 6373-2 of the General Code, these certificates are quite obviously included within the definition of securities contained in the first section of the act. This is true because they are instruments evidencing title to property executed by a private corporation.

There remains to be considered the question whether the exemption quoted above extends to the certificate under consideration. The Blue Sky Act is a police measure adopted for the protection of the public. As is stated in the case of *Groby vs. State*, 109 O. S. 543, on page 550:

"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."

It is a well recognized rule of statutory construction that exceptions or exemptions from the application of otherwise generally applicable laws are to be strictly construed and not extended beyond their plain terms.

In Lewis' Sutherland Statutory Construction, 2nd Edition, at page 675, the author quotes with approval from an Illinois case, as follows:

"The court said 'it would seem that the same policy which dictates a liberal construction of the statute in furtherance of its general beneficial purpose would necessitate a restricted construction of an exception by which its operation is limited and abridged;' but, independent of that consideration, the court held that provisos should be strictly construed, and accordingly it should be confined to those popularly known as laborers and servants, and did not include book-keepers, managers and other like employees, engaged for skill and knowledge."

As is said in the case of *State ex rel. vs. Forney*, 108 O. S. 463, in the first branch of the syllabus:

"Exceptions to the operation of laws, whether statutory or constitutional, should receive strict, but reasonable, construction."

The claim that the exemption applies in the present instance may be based upon two possible grounds. You will note that "the stock or obligation of any * * * bank" or trust company is not subject to the provisions of the act. While these shares are in a sense executed by the trust department of the trustee bank, they are obviously not in any real sense the stock of the bank. The definition of the term "bank stock" is so well known that it needs no discussion. It means the actual corporate stock of the bank itself and does not extend to any evidence of title to property which the bank may hold merely as trustee. I have no difficulty in concluding that the intent and purpose of this exemption is limited to the actual corporate obligations of the bank and that therefore these certificates issued in its trustee capacity are not thereby exempted.

The more serious question presents itself in the contention that these shares represent an equitable interest in actual bank stock and therefore, being a mere subdivision of bank stock, they come within the exemption clause. The answer to such a contention must rest in a strict interpretation of the exemption clause, confining its effect to the express language used. As I have just stated, the legislature in enacting the exemption provision used the words "stock or obligation" in their common ordinary interpretation. When it extended the exemption to bank or trust company stock, it extended it only to the stock as issued by these corporations themselves. It would be a very liberal interpretation of this exemption to extend it to any subdivision or right or interest in the stocks or their earnings which might be conceived. Certainly such a construction would be going beyond the express terms of the statute and it is no answer to say that, the bank stock itself being exempt, it necessarily follows that all interests therein must be exempt. The propriety of the exemption of the original stock is apparent, since the corporation is under the control and supervision of other branches of government. When, however, that stock is split up into a multitude of interests, as it is in the case under consideration, and it is manifestly difficult, if not impossible, for the ordinary investor to ascertain without an exhaustive investigation and calculation the true worth of his investment, it is perfectly logical and proper that the state step in and apply the regulatory provisions of the securities act.

In reality, the dealer in disposing of these trustee's certificates is not selling either bank stock or the obligation of any bank. While it is true that the interest sold is based upon an equitable interest in bank stock, even this interest is limited. In other words, the dealer has not parted with all of his rights as owner of the stock which he deposited with the trustee for he has reserved to himself the voting rights so long as the trustee holds the stock deposited. Whether the method adopted for reserving the voting rights be legal may be questioned on more than one ground, but for the purpose of this opinion it will be assumed that the voting right has been reserved in accordance with the trust agreement. In other words, it will be assumed that the representation made to the prospective purchaser in this respect is true.

Section 5144 of the Revised Statutes of the United States provides as follows:

"In all elections of directors and in deciding all questions at meetings of stock-holders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy and no shareholder whose liability is past due and unpaid shall be allowed to vote."

Section 8623-50 of the General Code of Ohio provides in part as follows:

"Unless otherwise provided in the Articles, every shareholder of record shall be entitled at each meeting of the shareholders to one vote for each share standing in his name on the books of the corporation. No share shall be voted upon which an installment of the purchase price is overdue and unpaid. * * *

Section 8636 of the General Code of Ohio, which preceded the foregoing section, provided in part as follows:

"* * * At such and all other elections of directors, each stockholder shall have the right to vote in person or by proxy the number of shares owned

by him for as many persons as there are directors to be elected, or to cumulate his votes. * * **

Inasmuch as these certificates or interests are to be sold upon the assumption that they carry with them no voting power, it can not be said that the trustee certificates represent bank stock. In fact, they represent something less than the stock of the respective banks. Indeed, it seems to me that they are separate choses in action, entitling the holder in certain cases to have applied certain beneficial interests in shares of certain stocks. For instance, the holder is not entitled to his pro rata share of the dividends as declared, but only to a pro rata share of the fund derived from dividends after deducting all taxes, charges, costs and expenses in relation to the administration of the trust. The holder of the trustee certificate is not entitled to a stock dividend as such or to stock rights as such. Such stock dividend or stock right accruing to any of the deposited stock is to be sold—not held—and the proceeds distributed.

Again, one or more of the banks whose stock has been deposited may merge, reorganize or modify its capital not only without the consent of the holder of the trustee certificate, but any new or different stock so resulting is to be substituted for the deposited stock affected.

In this respect it is specifically provided in the trust agreement:

“Therefore, for all purposes a unit of stock shall be or include the new stock or securities rather than the stock as originally deposited and shall be so considered for all purposes.”

There is but one way in which the holder of a trustee certificate can become the legal owner of the deposited bank stock, as will be seen from the following provision of the trust agreement:

“No beneficiary or holder of shares shall have any legal title to the trust property which is held by the trustee, his interest being only equitable, and he shall have no right to call for any portion of the trust estate during the continuance of the trust, and any and all such rights being waived by the beneficiaries by the acceptance of the shares; provided, however, that if any beneficiary shall become the owner of one thousand shares provided for herein, he may, at his option, exchange said one thousand shares for a unit of stock deposited with the trustee; provided, however, that the trustee shall not be required to deliver such unit of stock in exchange for said one thousand shares if in the sole and conclusive judgment of the trustee there is a possibility of assessment on any of said stock in the unit for any cause whatsoever, and not until the owner of the shares shall have paid the trustee a fee of ten dollars for each unit transferred.”

Under the foregoing provision, I doubt if the trustee could ever be compelled to surrender the deposited stock prior to the expiration of the trust.

It is also provided in the trust agreement:

“It is further agreed that in case of any assessment under the double liability provision of the stock deposited with the trustee, that said trustee shall not be liable for the same, but shall be and is hereby authorized to levy, assess and collect from the shareholders a pro rata assessment sufficient to cover such liability or to pay the same out of the estate or its income, as the

trustee may deem for the best interests of all parties, and for this purpose may sell any or all of the stocks in its possession, and the trustee is hereby given a lien on all the trust property for any such purposes."

Thus it will be seen that while all of the liabilities attendant upon the ownership of bank stock are to fall upon the holder of the trustee certificate, such holder is deprived of a part of the beneficial ownership, such as the right to vote, the right to retain a stock dividend as such, the right to subscribe for additional stock as issued, the right to vote for or against a merger, a sale or a change in the capital structure, as well as the right to vote for the directors who shall manage the business.

Further, the fact that these trustee certificates sell at an advance over the pro rata market prices of the deposited stock is also persuasive that the trustee certificate constitutes a security different from the deposited stock.

For these reasons it is my conclusion that while the trustee certificate constitutes a security predicated upon bank stocks, such security is not identical with but something different from those bank stocks.

I am therefore of the opinion that the shares in question are securities within the definition of that term contained in section 6373-1 of the General Code and that the sale thereof by a dealer, in the course of repeated transactions, is unlawful without compliance with the provisions of the securities act.

Respectfully,

EDWARD C. TURNER,
Attorney General.

800.

TRUST AGREEMENT—WHERE SHARES OF BANK STOCK ARE DEPOSITED WITH THE TRUST DEPARTMENT OF A NATIONAL BANK AND CERTIFICATES EVIDENCING SHARES IN SUCH TRUST ESTATE ISSUED BY THE TRUSTEE BANK—SUCH ACTION NOT IN CONTRAVENTION OF BANKING AND TRUST COMPANY LAWS.

SYLLABUS:

A trust agreement, whereby shares of bank stock are deposited with the trust department of a national bank and certificates evidencing shares in such trust estate issued by the trustee bank, considered and held not in contravention of laws relative to banks and trust companies.

COLUMBUS, OHIO, July 28, 1927.

HON. E. H. BLAIR, *Superintendent of Banks, Columbus, Ohio.*

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

"The attention of this Department has been called to a certain advertisement appearing in The Ohio State Journal under date of May 31, 1927, a copy of which said advertisement is enclosed.

It is apparent from this advertisement that the stockholders liability on bank stock will be measured in certificates of a face value of \$16.75, covering the stock of six different banks.

According to Section 710-41 of the General Code, the amount of capital of a bank must be divided into shares of one hundred (\$100.00) dollars each, and