Circuit Court was affirmed, without written opinion, in York vs. Warner, Admr., 75 Ohio St., 595, 80 N. E., 1135.

From your statements it appears that the Coal Company owns only certain equities consisting of royalties, which of course can not be reached by a levy of execution, but only by proceedings in aid of execution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

229.

DISAPPROVAL, BOND FOR FAITHFUL PERFORMANCE OF DUTIES—OTHO WALTER MERRELL.

COLUMBUS, OHIO, March 24, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, O.*

DEAR SIR:—You have submitted for my examination the official bond of Otho Walter Merrell to the State of Ohio, in the amount of five thousand dollars ($5,000.00), with The Aetna Casualty and Surety Company as surety, to cover the faithful performance of his duties as Resident Deputy State Highway Commissioner.

This bond was given in accordance with the provisions of Section 1182 of the General Code. While dated and signed by the surety under date of August 31, 1925, it was not approved by you and transmitted to this department for examination until March 17, 1927.

I am herewith returning this bond without my approval endorsed thereon for the following reasons:

1. The bond was not signed and executed by the principal, Mr. Merrell.

2. Two interlineations appear on the face of the bond, the word "Resident" being twice written in before the words "Deputy State Highway Commissioner". No showing is made as to whether these interlineations were made before or after the execution of the bond by the surety company. If they were made before, the bond should contain a statement to that effect signed by the parties bound thereby.

Respectfully,
EDWARD C. TURNER,
Attorney General.

230.

DEALER IN SECURITIES—RIGHT TO DISPOSE OF SECURITIES—SECTIONS 6373-14 AND 6373-16, GENERAL CODE, CONSTRUED.

SYLLABUS:

1. *An Ohio licensed dealer in securities, who acquires from an owner, not the issuer, certain securities, may thereafter dispose thereof upon complying with the requirements of Section* 6373-9 *of the General Code.*

2. *An Ohio licensed dealer in securities, who underwrites a portion of an issue of securities, may not claim exemption from the requirements of Sections* 6373-14 *and* 6373-16, *which provide for the certification of certain classes of securities, by reason of the fact that such dealer has firmly contracted to purchase and pay for said stock ninety per cent of the*

price at which such stock is thereafter sold by him, when in fact payment is made subsequent to the offering of the security.

COLUMBUS, OHIO, March 24, 1927.

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

DEAR SIR:—I acknowledge receipt of your recent communication, in which, after quoting in full the prior opinion of this department rendered on August 26, 1926, you ask for a construction thereof with particular reference to the statement of facts which you set forth. This statement is as follows:

> " 'A', an Ohio licensed dealer, acquires by purchase or has underwritten, at not less than 90% of the price at which such securities are thereafter sold by him, securities from 'B', the owner but not the issuer, and not an Ohio licensed dealer; and now 'A' seeks to qualify such securities for disposal in Ohio.
>
> *Question I.* Is 'A', the licensed dealer in Ohio, who desires to sell these securities which he has purchased or underwritten from 'B' an underwriter within the meaning of the first part of Section 6373-14 of the General Code, and, as such, required to secure a certificate of corporate compliance?
>
> *Question II.* May such a transaction come under the exception of Section 6373-14, where an underwriter who in good faith and not for the purpose of avoiding the provisions of this act, purchases the securities so afterward sold by him and pays therefor in cash or its equivalent, not less than 90% of the price of which such securities are so afterward sold by him?
>
> *Question III.* May 'A' dispose of such securities acquired from 'B' by merely filing information required under the provisions of Section 6373-9 of the General Code?
>
> *Question IV.* May 'A', a licensed dealer in Ohio, claim, as qualification for disposal of securities in Ohio, exception under the provisions of Section 6373-14, where he has firmly contracted to purchase and to pay therefor, in cash or its equvalent, 90% of the price at which the securities are thereafter sold by him, when in fact payment is made subsequent to the offering of such securities?"

In the former opinion of this department (Opinion No. 3590, August 26, 1926) it is clearly set forth that:

> "When the title has once passed from the issuer or underwriter to a purchaser, the subsequent sale of the stock is controlled by the general provisions of the securities act and not by the provisions of Section 6373-14."

Earlier in that opinion it is made manifest that the general provisions here referred to mean Section 6373-9, which provides in substance for the filing of certain information by any licensed dealer prior to disposing of any securities within the state. You will note that Section 6373-9 makes no provision for any action by your department upon the filing. In other words, full compliance has been accomplished by the mere filing and the dealer is thereupon at liberty to proceed at once with the sale of the securities, irrespective of the character of the information contained in the report so filed.

An examination of the remainder of the securities act fails to disclose any provision applicable to the qualification of securities prior to sale other than these provisions of Section 6373-9, which are aptly described in the prior opinion as "general provisions", and the provision of Section 6373-14, which is,as described in that prior

opinion, a requirement for *additional information* and the certification of the stock in certain instances only. It clearly appears, therfore, that the certification by your department of an issue of securities can only be made where the transaction comes within the terms of Sections 6373-14 and 6373-15, the latter not being pertinent to the present situation. This is evident from the language of the first sentence of Section 6373-16, which is the section providing for certification. It is as follows:

> "Said commissioners shall have power to make such examination of the issuer of the securities, or of the property named *in the two next preceding sections*, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable."

Section 6373-14, so far as pertinent, is as follows:

> "For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter, shall, within this state, dispose or attempt to dispose of any such securities until such commissioner shall issue his certificate as provided in Section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in Section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of Section 6373-9 of the General Code, the following:
>
> (a) A certified copy of the articles of incorporation or association of the issuer, its regulations and by-laws;
>
> (b) Certified copies of all minutes of stockholders and directors relative to the issue of such securities;
>
> (c) A sworn statement made by the president and secretary of the issuer, showing in detail the items of cash, property, services, patents, good will and any other consideration for which such securities have been or are to be issued in payment;
>
> (d) Like certified copies of all contracts or agreements between the issuer and any underwriters of such securities, and, if disposed of by the issuer, all contracts and agreements relative to the sale and disposition thereof, and any such contracts or agreements made subsequent thereto shall be filed immediately upon the execution thereof;
>
> (e) All contracts made between such underwriter and any salesman, agent or broker.
>
> This section shall not apply * * * where the sale is made by or on behalf of an underwriter who, in good faith, and not for the purpose of avoiding the provisions of this act (G. C. Sections 6373-1 to 6373-24), purchases the securities so afterward sold by him and pays therefor, in cash or its equivalent, before attempting to sell the same, not less than ninety percentum of the price at which such securities are thereafter sold by him; * * *".

Unless a dealer is either an issuer or an underwriter, or is acting for or in behalf of an issuer or underwriter, the provisions of Section 6373-14 have no application to him and the only action required of the dealer is the filing of the information required by Section 6373-9.

Coming to the specific facts which you set forth, it is evident that your difficulty arises from the determination of whether or not the word "underwriter", as used in Section 6373-14, is broad enough to include "A", the Ohio licensed dealer, who has

purchased or firmly contracted to purchase certain securities from "B", the owner but not the issuer. I am of the opinion that under the facts set forth in your request, "A", the Ohio dealer, is not an underwriter within the meaning of Section 6373-14 and, therefore, that the securities which he proposes to deal in are not subject to that or the next succeeding section. In other words, in order that he may deal legitimately therein, it is only necessary for him to file the information required by Section 6373-9.

In an earlier opinion of this department, found in Opinions of the Attorney General for 1914, at page 759, consideration was given to section 6373-14, and it was there held not applicable to the case of an individual who had acquired certain bonds and stocks of a transportation company as part of the consideration for his employment in constructing its lines. As is stated in that opinion:

> "It is manifest that the only regulation provided for with respect to the sale of securities is that affecting an issuer or underwriter of such securities and any person or company acting for or on behalf of such issuer or underwriter in organizing or promoting a corporation or assisting in the flotation of its securities."

In discussing the word "underwriter", that opinion uses the following language:

> "The terms 'underwriting' and 'underwriter' have a well defined meaning in the affairs of corporate organization and promotion, and it is quite clear that the word 'underwriter' as used in Section 6373-14, was used in such defined and understood sense.
>
> Underwriting means an agreement made before the shares are brought before the public, that in the event of the public (not) taking all the shares, or the number mentioned in the agreement, the underwriter will take the shares which the public do not take."

(Cook on Corporations, Section 14.)

> "Underwriting is a guarantee of the sale of the underwritten securities at a specified minimum price. It is, in fact, a conditional subscription for such securities, the underwriters obligating themselves to purchase at a specified price all of the underwritten securities not sold at an advanced price at public offering or otherwise, on or before a fixed date, or within a certain time of the underwriting. (Conyngton on Corporate Organizations, Section 218.)"

It is unfortunate that the legislature, which in Section 6373-2, has defined most of the terms used in the Securities Act, has failed in this instance to give any enlightenment on the term "underwriter". I am of the opinion, however, that the definitions which are referred to in the quotation above, are proper definitions of this term and that it would be an unwarranted expansion of the word "underwriter" to hold that it included the Ohio licensed dealer under the facts set forth in your request. In that transaction "B" was not the original issuer of the securities, and for that reason alone it seems to me that "A" cannot be regarded as an underwriter.

You will note that the Blue Sky Law contains nothing whatsoever restricting the kind or class of securities which may be purchased by Ohio licensed dealers. In the case which you have set forth, "B", the owner of the securities, who is not an Ohio licensed dealer, may offer the securities to Ohio dealers, since such an offering, being not to the public, is expressly exempted by the provisions of paragraph (f) of Section 6373-2. And likewise the Ohio dealer who purchases such securities can thereafter sell the same without having them certificated. Sections 6373-14 and 6373-16 do not,

as I have before pointed out, apply to such a situation and the only requirement is the filing of the information required by Section 6373-9.

The foregoing answers your first question.

It also constitutes an answer to your second and third questions, since "A", not being an underwriter, does not have to bring himself within the exception of Section 6373-14, and consequently may dispose of the securities by merely filing the information required under the provisions of Section 6373-9. In this connection, however, I call attention to the fact that an underwriter, who is actually within the exception above quoted in Section 6373-14, is entirely exempt from the provisions of that section. He is therefore not required to file any claim for exemption with your department but may, if he deems himself safe in so doing, proceed at once to dispose of the securities upon the filing of the information required in Section 6373-9.

Your fourth question is in substance whether an Ohio licensed dealer may claim to be within the exception of Section 6373-14, where he has made a binding contract to purchase and pay for securities from the issuer, either in cash or its equivalent, at least ninety per cent of the price at which securities are thereafter sold by him, although payment is not actually made until after the offering of the securities.

You will note that the legislature has made it a condition to the exemption of an underwriter that he shall have paid for the security sought to be sold "in cash or its equivalent, before attempting to sell the same, not less than ninety per centum of the price at which such securities are thereafter sold by him." It is obvious that the dealer who has merely contracted to pay for securities has not actually paid therefor. The question then resolves itself into whether or not the contract itself may, under any circumstances, be considered as the equivalent of cash. It seems to me that such an interpretation is unwarranted.

The legislature has been quite specific on the subject and I think the intent is clearly shown to make the exemption conditioned upon a departure from the ordinary underwriting contract in that there must be an absolute transfer of title to either cash or its equivalent. Such an equivalent might be represented by bonds, stocks, other securities, real estate or almost any kind of property with recognized value. I do not feel, however, that the unsecured notes of the underwriter would be within the spirit of the law. If they were endorsed or had marketable collateral security furnished therefor, they might properly be regarded as the equivalent of cash. Such collateral security would not, in my mind, properly include the particular stock being underwritten, since this would be a mere evasion of at least the spirit of the law.

Answering your question directly, therefore, I believe that a dealer may not claim exemption from the provisions of Section 6373-14 of the General Code, as an underwriter, when he has merely contracted to purchase and to pay therefor in cash or its equivalent ninety per cent of the price at which the securities are thereafter sold by him. It seems to me that the responsibility or the solvency of the dealer would not justify the conclusion that his mere promise to pay is the equivalent of cash.

In the consideration of the question which you present, I am not afforded the benefit of any judicial interpretation of the sections of the Securities Act involved. None of the court decisions which I have examined seems to have considered these questions. I have, therefore, been compelled to look to the language of the sections alone. The conclusions above set forth express my views as to the intent of the legislature in the enactment of the sections discussed.

Respectfully,
EDWARD C. TURNER,
Attorney General.