

That body should be held to mean what it has plainly expressed, and hence no room is left for construction.”

Specifically answering your question, it is my opinion that under the provisions of Section 9887, General Code, upon submission of the question of a special tax levy for the purpose of extending aid to a county agricultural society under the circumstances therein set forth, a majority vote is all that is required to carry a question submitted to the electors under such section.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4912.

SECURITY—WHISKEY WAREHOUSE RECEIPT IS A SECURITY.

*SYLLABUS:*

*A warehouse receipt issued for whiskey stored in a bonded warehouse is a security within the meaning of that term as defined in Section 8624-2, General Code, since a warehouse receipt is a certificate or instrument which represents title to or an interest in the property of another.*

COLUMBUS, OHIO, November 20, 1935.

HON. W. PAUL WAGNER, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter which reads as follows:

“Will you please render to this Department your opinion as to whether or not so-called ‘whiskey warehouse receipts’ come within the definition of the term ‘security’ as set forth in Section 8624-2, subsection 2, of the Ohio General Code, and, as such, are amenable to the provisions of the Ohio Securities Act.”

Under the Revenue Laws of the United States distillers are allowed to place whiskey for storage either in a so-called distillery warehouse (R. S. 3271) or in a public warehouse bonded by the United States Government and known as a general bonded warehouse (26 U. S. C. A. Sec. 1265). These warehouses are used for the storage of whiskey upon which the Federal excise tax has not been paid by the distiller. Buildings or storage places used either as

distillery warehouses or general bonded warehouses are privately owned, but by law are placed in charge of agents or employes of the Federal government, who together with the owners of the warehouses, have joint custody and control of the whiskey in storage. See *Taney vs. Penn National Bank*, 187 Fed. 689 at pages 697, 698 and 699.

Whiskey stored in such warehouses can be withdrawn by the owner thereof upon the payment of the tax due the Federal government and in compliance with the other acts of Congress and the regulations of the Treasury Department in respect to the withdrawal of whiskey from distillery or general bonded warehouses. The storage or deposit of whiskey in distillery or general bonded warehouses does not pass title to the spirits to the government, although the spirits are virtually in the control and possession of the government for the payment of excise taxes levied by law upon distilled spirits, which taxes generally are not paid until the whiskey is withdrawn from such warehouses. Although the owner of distilled spirits in a bonded warehouse does not have the outright physical custody of the whiskey stored, nevertheless that fact does not deprive the owner of his title to the liquor and he is free to sell, transfer, or pledge such goods as he may see fit subject to the lien of the government for the taxes due on the spirits. In other words, title to liquor in a bonded warehouse is at least constructively in the owner subject to the lien of the government for taxes. In the case of *Pattison vs. Dale et al.*, 196 Fed. 5, it was held in the first paragraph of the syllabus that:

“Where distilled liquor is stored in a distillery warehouse under control of the collector of the district and in charge of the internal revenue storekeeper as provided by U. S. Comp. St. 1901, pp. 2122-2124, Secs. 3271-3274, et seq. providing for a joint custody of the warehouse by the distiller and the storekeeper, the distiller’s surrender of control does not divest his title nor prevent his dealing with the property subject to the paramount rights of the government.”

Title to whiskey in a bonded warehouse is generally evidenced by warehouse receipts which are issued by the warehouseman. I am informed that warehouse receipts issued for whiskey in bonded warehouses generally give a description of the whiskey, serial number of the barrel or casks, number of proof gallons in the barrel or casks, date of receipt of the whiskey in the warehouse, quantity and type of whiskey, ownership of the spirits, place of storage, rate of storage and other charges, whether insurance is paid, and that a certain and definite number of barrels of whiskey will be delivered to bearer, specified person or his order upon presentation of the receipt. Thus a warehouse receipt for whiskey issued either by a distillery warehouse or a general bonded warehouse is a written acknowledgement by the warehouseman that he holds certain specific spirits in storage for the person to whom the receipt is issued and it is

also written evidence of the ownership by the holder of the receipt of the property covered by the warehouse receipt. In short, a warehouse receipt for distilled spirits is documentary evidence of title to whiskey which is under governmental control and custody for taxation purposes.

According to ordinary usage of trade the transfer or negotiation of such receipts is sufficient to transfer the title to the property in storage and gives constructive possession to the owner thereof subject to the lien of the government thereon. (*Gordon vs. Freeman*, 112 Minn., 482; *Taney vs. Penn National Bank*, supra, p. 700; and *Hunt vs. Bode*, 66 O. S. 255 at 269.) On the transfer of a warehouse receipt for whiskey the title to the spirits covered in the receipt passes and the warehouseman will deliver the whiskey covered by the receipt, providing the holder complies with the laws of Congress and the regulations of the Treasury Department pertaining to the withdrawal of whiskey in bonded warehouses and is allowed to withdraw such spirits. In other words, title and constructive possession passes on the transfer, pledge or negotiation of a warehouse receipt even though the spirits covered in the receipt are subject to the lien of the government for taxes, the lien of the warehouseman for storage and the custody of the spirits is subject to the restraint and control of the Federal government.

The financing of the manufacture and distillation of whiskey before and since prohibition has been and is largely by means of pledging warehouse receipts as collateral for loans or selling the same, either to the public as investments, or to rectifiers, wholesalers and retail liquor dealers for either the purpose of assuring a steady supply over a period of years of particular brands of whiskey for rectification and resale, or for investment purposes. Moreover, warehouse receipts for whiskey are being widely offered today for sale and sold in Ohio as investments to the public and to the whiskey trade as prime investments which have both the elements of safety as far as the principal is concerned and speculation in so far as the future value is concerned. The term "security" is defined in Section 8624-2, General Code, which reads:

\* \* \* \* \*

2. The term 'security' shall mean any certificate or instrument which represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property or credit of any person (as that term is defined by subsection [4] of this section 2) or of any public or governmental body, subdivision or agency, and shall include shares of stock, certificates for shares of stock, voting trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidence of indebtedness, bonds, debentures, land trust, certificates, fee certificates, leasehold certifi-

cates, syndicate certificates, endowment certificates, certificates in or under profit sharing or participation agreements, or in or under oil, gas or mining leases, or certificates, of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, and the currency of any government other than that of the United States and Canada.

The term 'security' shall, for the purposes of this act, be deemed to include real estate not situated in this state and any interest in real estate not situated in this state. \* \* \*

A warehouse receipt for whiskey certainly would come within that part of the definition of the term 'security' which provides that "any certificate or instrument which represents title to or interest in, \* \* \* property \* \* \* of any person" shall be a security under the laws of this state. As stated by Matthias, J., in *Grobby vs. State*, 109 O. S., 543 at 546:

"Lexicographers similarly define the term 'security' as:

'An evidence of debt or of property, as a bond, stock certificate or other instrument etc., a document giving the holder the right to demand and receive property not in his possession.'"

There can be no question but that a warehouse receipt issued for a specific barrel or cask of whiskey in a bonded warehouse represents title to property belonging to another.

In view of that conclusion it is unnecessary to determine whether a warehouse receipt for whiskey is a form of commercial paper, and as such within the definition of "security" as defined in Section 8624-2, General Code.

The Attorneys General of a number of the other states have rendered opinions upon the question here under consideration. Although a majority of these opinions conclude that whiskey warehouse receipts are not securities within the meaning of their respective securities laws, each state's definition of securities varies materially. It is sufficient to say that the language of Section 8624-2, supra, hereinabove commented upon impels me to adhere to the minority view of this question.

Under the provisions of the Liquor Control Act as amended, it is a misdemeanor for anyone to sell whiskey without a permit (Sections 6064-14, 6064-54 and 6064-65), and the prohibition includes transactions wherein title to whiskey is transferred by means of warehouse receipts since the word "sale" as defined in Section 6064-53, General Code, as amended in Substitute Senate Bill No. 2 (116 O. L.) provides:

“In the interpretation of the provisions of the General Code of Ohio, other than this act, the word ‘liquor’ and the phrase ‘intoxicating liquor’ shall be construed to have the meaning assigned to the phrase ‘intoxicating liquor’ by section \* \* \* 6064-1 of the General Code.

As used in the succeeding sections of the liquor control act and in the interpretation of the provisions of the General Code of Ohio relating to intoxicating liquor, other than this act:

‘Sale’ and ‘sell’ include exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer and intoxicating liquor either by constructive or actual delivery by any means or devices whatsoever.”

Thus in order for a person who is engaged in the business of dealing in warehouse receipts to avoid the penalty imposed by the Liquor Control Act upon one who sells and trafficks in liquor without a proper permit, it is necessary for such person to secure a “K” permit from the Department of Liquor Control, which permit is issued pursuant to that part of Section 6064-15, General Code, which reads:

“The following classes of permits may be issued:

\* \* \* \* \* \* \* \* \*

Permit K: A permit to dealers, distiller agents, or liquor industry brokers, to buy, sell, exchange, deliver, or otherwise traffic in bonded warehouse receipts for spirituous liquor, and directly or indirectly to finance the purchase of the same. \* \* \*”

It is clear that the legislature by Section 6064-15, General Code, requiring licenses for dealers in warehouse receipts, did not intend to regulate the sale of warehouse receipts as securities, but intended to require dealers in such warehouse receipts to secure “K” permits in order to avoid being charged with selling whiskey without a license. But the sale of warehouse receipts as securities is apparently subject to additional regulation under the Securities Law. Incidentally, it is not unusual for a particular business or trade to be subject to regulation by two distinct governmental bodies and for a person engaging in such business to be licensed by each governmental body. Thus in *Opinions of the Attorney General for 1927*, Vol. III, page 1662, it was held:

“Any person, firm or corporation, dealing within this state in real estate located elsewhere, must qualify as a dealer under the provisions of Sections 6373-15, et seq., of the General Code, and must also secure a license as a real estate broker and such real

estate salesmen's licenses as may be necessary under the provisions of Sections 6373-25 to 6373-51 of the General Code. In such a case it is necessary that proper bond be given both to the commissioner of securities and the board of real estate examiners, as provided by law."

Concluding, it is my opinion that since a warehouse receipt issued for whiskey in a bonded warehouse is a certificate or instrument which represents title to and an interest in the property of another, the same is a security within the meaning of that term as defined in Section 8624-2, General Code.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

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4913.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$1,000.00.

COLUMBUS, OHIO, November 20, 1935.

*State Employes Retirement Board, Columbus, Ohio.*

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4914.

COUNTY RECORDER—DUTIES AS TO FILING AND RE-FILING CHATTEL MORTGAGE.

**SYLLABUS:**

1. *Where a chattel mortgage is properly re-filed, it is the duty of the County Recorder, in addition to entering the date of re-filing upon the margin of the original filing record, to re-index and re-enter the names of all the parties to the instrument in the same manner as if a new chattel mortgage were filed.*

2. *The County Recorder is required to keep chattel mortgages in his office until six years after the time for re-filing such mortgages has expired.*