721.

SALE OF SECURITY—SECURITIES ACT—WHERE SEVERAL INSTRUMENTS EXECUTED, I. E., PURCHASE ORDER, BILL OF SALE, LEASE OPERATING AGREEMENT—MAY BE INTERPRETED TOGETHER AS THOUGH PARTS OF ONE INSTRUMENT—SECTIONS 8624-1 ET SEQ., G. C.—VENDOR—PARKING METERS OR VENDING MACHINES—LEASE — OPERATING AGREEMENTS — SHARE GROSS PROFITS—WHAT TRANSACTIONS CONSTITUTE SALES OF SECURITIES.

SYLLABUS:

1. In determining whether or not a certain transaction constitutes a sale of a security within the purview of the Securities Act, Sections 8624-1, et seq., General Code, if several instruments are executed in connection therewith, such as a purchase order, a bill of sale and a lease operating agreement, they may be considered and interpreted together as though they were parts of one instrument.

2. Where a vendor is engaged in selling parking meters or vending machines by a plan wherein the purchaser signs a purchase order for the meters or machines and simultaneously, or in connection therewith the vendor executes a bill of sale to the purchaser and takes back a lease operating contract from the purchaser whereby it is agreed that the vendor shall place such machines in suitable locations, keep them in running order and do any and all things necessary to keep such machines in operation, and whereby it is further agreed that the purchaser shall be entitled to a share of the gross profits from the operation or sale of the machines, such a vendor is engaged in the sale of securities within the meaning of the Securities Act.

3. Where a vendor is engaged in selling vending machines and in connection with such sales the purchasers are induced to enter into operating agreements by a common representative of the vendor and an operating concern or by the representations of the vendor, whereby it is agreed that a lease operating contract shall be made with an operator who shall place such machines in suitable locations, keep them in running order and do any and all things necessary to keep such machines in operation, and whereby it is further agreed that the purchasers shall be entitled to a share of the gross profits from the operation of such machines, such transactions constitute the sale of securities within the meaning of the Securities Act on the part of both the vendor and the operator.

COLUMBUS, OHIO, June 8, 1939.

HON. PAUL L. SELBY, *Chief, Division of Securities, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion as to whether or not the sales of parking meters and vending machines, in conjunction with the making of operating contracts with the purchasers as described in your letter, constitute the sale of securities as contemplated under the provisions of the Ohio Securities Act. I quote from your letter, which reads in part as follows:

> "*Plan No. 1.* ABC corporation, organized and existing under the laws of the State of Ohio, is engaged in the business of buying, selling and leasing parking meters which are offered for sale to the public in the manner hereinafter set forth.
>
> The purchaser executes what is termed a Purchase Order, a blank copy of which is attached hereto and marked 'Exhibit A'. A Bill of Sale, a blank copy of which is attached hereto and marked 'Exhibit B', is then executed by ABC Corporation and delivered to the purchaser. In connection therewith ABC Corpora- and the purchaser enter into an Operating Agreement, a blank copy of which is attached hereto and marked 'Exhibit C".
>
> You will note that the purchase Order, Exhibit A, recites that 'this purchase is made by me with the understanding that I will authorize you to include these meters under the terms of an Operating Agreement, which I have read and signed'.
>
> In substance the Operating Agreement, Exhibit C, provides for the placement and servicing of the meters without cost to the purchaser; the payment of 10 per cent of the gross receipts of all parking meters contracted thereunder per month; the payment of the further sum of 10 per cent of the purchase price per month until a sum equal to the original cost of the meters has been paid, at which time the meters become the sole property of ABC Corporation; and the payment of 10 per cent of the proceeds received from the sale of said meters in the event of a sale by ABC Corporation under a power of attorney.
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> *Plan No. 2.* DEF Company, organized and existing under the laws of the State of Ohio, is engaged in the business of selling vending machines to the public. The purchaser executes a Purchase Order, a blank copy of which is attached hereto and marked 'Exhibit D'. A Bill of Sale is executed and delivered by DEF Company to the purchaser, a blank copy of which Bill of Sale is attached hereto and marked 'Exhibit E'. In connection therewith, the sales representative of DEF Company, who is also a representative of XYZ Service, offers to lease the vending machines from the purchaser in behalf of XYZ Service as

lessee, a blank copy of which lease is attached hereto and marked 'Exhibit F'. We understand that the purchaser is not required to enter into the lease, but it is obvious that the lease is held out as an inducement to make the purchase as to all purchasers who do not contemplate personally placing and servicing the vending machines so purchased. It is claimed that DEF Company and XYZ Service exist and function as separate entities without having any mutual relationship excepting as to the employment of a common representative and the exchange of names and addresses of purchasers and lessors.

Plan No. 3. GHI Corporation, organized and existing under the laws of the State of Ohio, is engaged in the business of selling vending machines. The purchaser executes a Purchase Order, a blank copy of which is attached hereto and marked 'Exhibit G'. A temporary Bill of Sale is executed and delivered by GHI Corporation. A final Bill of Sale is executed and delivered within ten days from the date of delivery of the vending machines, a copy of which final Bill of Sale is attached hereto and marked 'Exhibit H'. In connection therewith a lease is entered into by and between the purchaser and UVW Corporation, a blank copy of which lease is hereto attached and marked 'Exhibit I'.

Plan No. 4. JKL Corporation organized and existing under the laws of the State of Ohio, is engaged in selling vending machines and in placing and servicing such machines. The sale is evidenced by a Bill of Sale, a blank copy of which is hereto attached and marked 'Exhibit J'. In connection therewith JKL Corporation enters into a lease with the purchasers, a blank copy of which lease is attached hereto and marked 'Exhibit K'.

Plan No. 5. MNO Corporation is engaged in the business of selling vending machines and in placing and servicing such machines. The purchaser executes a Purchase Order, a blank copy of which is attached hereto and marked 'Exhibit M'. MNO Corporation executes and delivers a Bill of Sale, a blank copy of which is attached hereto and marked 'Exhibit N'. In connection therewith MNO Corporation enters into a lease with the purchaser, a blank copy of which lease is attached hereto and marked 'Exhibit O'.

The foregoing plans of operation constitute the basic plans employed at this time so far as we are able to determine. Each of them is directed in the main to holders of depreciated securities. In this connection you will please note that the Purchase Orders generally make provision for the delivery of securities in payment for the vending machines. There is no indication, however, that sales have or can not be made for cash. In render-

ing an opinion upon the foregoing plans of operation, we would appreciate your consideration in keeping in mind that variations of the plans can be expected but that the basic principles involved will probably be the same.

In view of the provisions of subsection 2 of section 2 of the Ohio Securities Act, 8624-2(2), O. G. C., your opinion is respectfully requested as to whether any or all of the instruments employed in connection with the foregoing plans of operation are securities. If it is your opinion that any or all of said instruments are securities, your opinion is also requested as to whether such securities are sold within the meaning of subsection 3 of said section 2 of the Ohio Securities Act."

The purpose of the Ohio Securities Act as stated in the title to the original act (103 O. L. 743) is "to regulate the sale of bonds, stocks, and other securities, and all real estate not located in Ohio, and to prevent fraud in such sales."

In Sellers v. State, 18 Abs. 328, in the third branch of the syllabus referring to the Act, it was said:

"The Ohio Securities Act was enacted to guard investors against fraudulent enterprises; to prevent sales of securities based only on schemes purely speculative in character; to protect the public from swindling peddlers of worthless stock; and it should be so administered as to fully meet the purpose of its enactment."

Almost the same language is used by the Supreme Court in its opinion in Groby v. State, 109 O. S. 543, at page 550.

Referring to the purpose of security acts generally, it is stated in 37 C. J., 271, section 164:

"The purpose of these laws is to protect investors and prevent, so far as possible, the sale of fraudulent and worthless corporate or quasi corporate stocks and securities, and to regulate the sale of such securities, but not to regulate the ordinary business of corporations."

The meaning of the words "securities" and "sale", as used in connection with this Act, has been defined in section 8624-2, General Code, as follows:

"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, evidences of indebtedness, bonds, debentures, land trust certificates, fee certificates, leasehold certificates, 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, certificates evidencing an interest in any trust or pretended trust, any investment contract, any instrument evidencing a promise or an agreement to pay money, and the currency of any government other than that of the United States and Canada, but the provisions of this act shall not apply to bond investment companies or to the sale of real estate or any interest in real estate intended for burial purposes.

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.

(3) 'Sale' shall have the full meaning of the term 'sale' as applied by or accepted in courts of law or equity, and shall include every disposition, or attempt to dispose of a security or an interest in a security. The term 'sale' shall also include a contract to sell, an exchange, an attempt to sell an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription or an offer to sell directly or indirectly by agent, circular, pamphlet, advertisement or otherwise."

To determine whether or not a given transaction constitutes the sale of a security, it is necessary to go beyond the outward form of the transaction and look at the intent and substance. In Securities & Exchange Comm. v. Wickham, 12 F. Supp., 245, it was said:

> "In determining whether transaction involves issuance of security within regulatory statute, courts will look to substance and not form of transaction."

To the same effect is the following statement in the case of Domestic & Foreign Petroleum Company v. Long, 52 P. (2d) 73 (Cal. 1935):

> "In decisions in this state and in other jurisdictions where it has been contended that a transaction under attack did not come within the Corporation Securities Act because it constituted

only a sale of specific real or personal property or an interest therein, the courts have looked through form to substance and found that in fact the transaction contemplated the conduct of a business enterprise by others than the purchasers, in the profits or proceeds of which the purchasers were to share."

In the case of State v. Gopher Tire & Rubber Company, 177 N. W. 937 (Minn. 1920) it was said:

"To lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without a license would be to aid the unscrupulous in circumventing the law."

In Plan No. 1, as outlined in your inquiry, only one company, the ABC Corporation is involved. In this scheme, the purchaser is induced to sign what is termed a purchase order. The purchaser therein agrees to include in an operating agreement, the parking meters he seeks to purchase. He further states in the purchase order that he has already read and signed the operating agreement.

"Exhibit B" is an ordinary bill of sale evidencing the transfer of title to the purchaser of the ordered parking meters, identifying them by serial number. "Exhibit C" is the operating agreement which reads in part as follows:

"It is mutually understood by and between the Owner and the Company as follows:

1. The Company shall include the Owner's . . . Parking Meters in any Meter Service Agreements it enters into with municipalities for the placement and servicing of Parking Meters.

2. Meter Service Agreements shall provide for cost-free placement and servicing of Parking Meters by the Company, and payments to the municipalities of a sum not exceeding 50% of the gross receipts therefrom.

3. The Company shall deposit in a reputable bank in the City of.....or elsewhere, all sums collected from Parking Meters under Meter Service Agreements with any municipality, and shall pay to the Owner on the 15th day of each calendar month 10% of the gross receipts of all Parking Meters contracted hereunder, said payments to begin on the 15th day of the month following the dates of placement and to continue during the term of this Agreement.

4. The Company shall remit to the Owner on the 15th day of each calendar month, the further sum of 10% of purchase

price, for each and every Parking Meter contracted thereunder. Payments to begin on the 15th day of the month following the date of this agreement and to continue for a period of ten years thereafter. It is expressly agreed and understood that said payments shall amortize the original cost to the Owner of said meters; and when they aggregate a sum equal to said original cost, then the meters shall become the sole property of the Company.

5. The Company shall deposit and set aside in a responsible bank in the city of....., or elsewhere, in a special fund called the 'Anticipation and Purchase Reserve Fund', the amount of $10.00 during each calendar year, for each and every parking meter included and contracted for in Meter Service Agreements with any municipality; said deposit to be made for a period of ten years; said fund to be used only for the purchase of Parking Meters at original purchase price (less the amount paid to Owner as amortization) as, if any when offered for purchase by any Owner thereof, in the order of priority of such offers and not otherwise, provided, however, that no such purchase shall be made until four or more months shall have elapsed from date of purchase by the Owner thereof and the date of inclusion in any meter service agreement.

* * *

8. In the event that an offer to purchase the within meters is made by any municipality, the corporation is herewith authorized to sell said meters, paying the owner 10% of the proceeds received from the sale of said meters. The corporation agrees to replace the meters so sold, with an equal number of new meters, but subject to the terms of this agreement. I herewith give my power of attorney to the corporation to sell and give good title to all such meters sold.

9. This agreement shall continue in full force and effect for 10 years, and shall be renewed by mutual consent for another 10 years on similar terms and conditions."

Considered alone, "Exhibit A" and "Exhibit B" most certainly could not be classified as securities. The status of "Exhibit C" is not so apparent. However, it should be noted that the purchase order specifically refers to the operating agreement and the bill of sale is executed in direct compliance with the purchase order. In 13 C. J. 528, section 487, it is said:

"Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other. So if two or more

agreements are executed at different times as parts of the same transaction they will be taken and construed together."

In 6 R. C. L. 851, section 240, it is said:

"Moreover, the general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance."

A statement to the same effect is found in 12 Am. Jur. 781, section 248:

"Several instruments constituting part of the same transaction must be interpreted together. Thus, if a transaction involves two writings, a proposition and a response, they should be construed together. The general rule is that in the absence of anything to indicate a contrary intention, instruments, executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument."

By considering the execution of the purchase order, bill of sale and operating agreement as component parts of a single transaction, it becomes evident that the corporation has devised a plan for financing its operations by inducing investors to advance the entire cost of the parking meters. To attract investors, they are promised in section 3 of the agreement ("Exhibit C" above), ten percent of the gross receipts of each parking meter during the term of the agreement, which, section 9 thereof provides, is to be for a period of ten years. The remaining portions of the agreement are ambiguous and difficult to understand. In Section 4, the corporation agrees to remit to the investor the further sum of ten per cent of the purchase price each month for a period of ten years thereafter. When a sum equal to the original cost has been paid to the investor "the meter shall become the sole property of the company". This section read in conjunction with the bill of sale gives the bill of sale the characteristics of a chattel mortgage. It is in the nature of a conditional conveyance subject to termination upon repayment of the principal sum originally invested. At the end of the ten months, the purchase price would be repaid and title to the parking meter returned to the corporation. The operating agreement obligates the corporation to continue the monthly payments until it has paid back to the investor twelve times his original investment. All this is in addition to the ten percent of the gross receipts to be paid the investor. In substance, it

is the scheme of the corporation to find investors willing to finance its operations with depreciated securities or cash. In return, the corporation offers the investor temporary title to certain machines, agrees to repay the investor in monthly installments and, in addition, to give him a very substantial bonus, plus a share in the gross receipts. Your inquiry is, does such a scheme constitute the sale of securities as contemplated by the Securities Act?

While your questions do not appear to have been presented to the courts of Ohio, the courts in other jurisdictions have passed on numerous cases where similar questions were involved. Thus, in State v. Robbins, 240 N. W. 456, 185 Minn. 202 (1932) it was held that where by one contract several muskrats were purchased and by another contract known as a "breeding contract", executed simultaneously the buyer agreed to leave the animals on the breeding ground of the seller and assented to the seller receiving one-half of the cash proceeds from the sale of pelts and live animals, the two contracts considered together constituted a sale of an interest in a profit-sharing scheme or venture and were a security.

In Brownie Oil Co. v. Railroad Comm. 240 N. W. 827 (Wis. 1932), an oil company good will contract was held to be a security when issued to purchasers of coupon books, providing that purchasers should buy company's products whenever convenient and recommend them to others, and wherein the company agreed to deposit a specified amount per unit measure of products sold in trust, to be shared about ten years thereafter, by purchasers.

In Gracchi v. Friedlander, 270 P. 235 (Cal. 1928) a contract for the sale of rabbits consisted of an order, promissory note for the balance of the purchase price, a receipt and an agency assignment, authorizing the vendor to retain the rabbits for breeding purposes and sale, the vendor to replace all rabbits sold and divide the profits as described. It was held that since all documents were executed by the same parties, they should be considered together and when so considered constituted a sale of securities as defined by the California Securities Act.

In Kerst v. Nelson, 213 N. W. 904, 54 A. L. R. 495, 496 (Minn. 1927), it was held:

> "The provisions to which we have called attention show that it is the purpose of the seller to induce investors to put money into the development of a large vineyard without giving them the control over the management which they would have if they bought stock in a corporation which owned and operated the vineyard. The right of the investor, at the expiration of five years, to take over and operate so much of the vineyard as is described in his contract of purchase, is more fanciful than real, for it is hardly possible that he could operate his plot of ground successfully except in conjunction with the remainder of the vineyard."

In Stevens v. Liberty Packing Co., 161 Atl. 193, 111 N. J. Eq. 61 (1932) a company had two plans, one for an absentee ownership agreement called a lease, whereby rabbits were sold to the purchaser who in turn leased them to the company for ten years for breeding purposes and sale of the offspring and a division of profits, the second plan a contract to sell the rabbits and buy the offspring. It was held that both plans constituted securities.

The term "security" as defined in the Act, section 8624-2(2), supra, is very broad and complete. To secure the desired completeness, considerable overlapping appears in the wording of the subsection. Some types of securities are unquestionably included in several branches of the definition. Retaining the meaning and substantially the wording of some of the pertinent portions of the definition, but relieving it of some of its complexity, the term "security" means an instrument which represents an interest in the assets, profits or credit of any corporation. It includes evidence of indebtedness; certificates in participation agreements; it is an investment contract; an instrument evidencing a promise or an agreement to pay money.

Several of the terms used in the definition of a security, section 8624-2(2), supra, have been interpreted by the courts in other jurisdictions. In People v. Leach, 290 P. 131 (Cal. 1930), notes for substantial sums secured by mortgages on lots of relatively small value were issued by a corporation. The difference in valuation was to be made good by improvement and development of the land with the proceeds of the sale of such notes. Held, that the notes were "evidence of indebtedness."

In People v. White, 12 P. (2d) 1078 (Cal. 1932), the second branch of the syllabus reads:

> "Term 'investment contract' within statute prohibiting selling securities without license includes certificates issued to purchasers who paid money in expectation of profit from investment."

In Probaska v. Development Co., 256 Ill. App. 331 (1930), a contract for the sale of land whereby the purchaser agreed to pay one-third of the purchase price in cash, the balance payable from crops to be planted and harvested by the vendor, was held to be an "investment contract."

In State v. Gopher Tire & Rubber Company, 177 N. W. 937 (Minn. 1920), it was said that the placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment and certificates entitling the purchasers to an income or a profit from an investment are "investment contracts".

By regarding the plan of the ABC Corporation as one transaction and treating the purchase order, bill of sale and operating agreement as constituent parts of this transaction, which is the true intention of the

corporation, it is my opinion that Plan No. 1, as outlined in your letter, constitutes a sale of securities as defined in section 8624-2 of the Ohio Securities Act.

The entire transaction being a sale of securities within the meaning of the Act, it is not necessary to devote further time to an analysis of the operating agreement, "Exhibit C", to determine whether or not standing alone it constitutes a security.

Plan No. 2, as outlined in your letter, deals with the sale of vending machines to the public. It differs from Plan No. 1, mainly in that a second company referred to as XYZ Service, acquires possession of the machines for the purpose of placing them in service and keeping them in operation. By this plan the purchaser signs a purchase order for the number of vending machines agreed upon, authorizing DEF Company to deliver to him a bill of sale for such machines without any provision for disposition of the machines themselves. In response thereto, DEF Company executes and delivers to the purchaser an ordinary bill of sale. Presumably, at the same time or at least in connection with this transaction, the purchaser signs a lease for such machines to XYZ Service for a period of five years subject to renewal as stipulated. The lease contains the following agreements:

> "I. Lessee agrees to pay Lessor or Lessors, his, her or their heirs, executors or assigns, the sum of Sixty (60c) cents per month as rental for each machine so leased by Lessee, the said sum to be payable on or before the 10th day of each and every month.
>
> II. Lessee agrees and hereby covenants that in the event any of the machines so leased at the end of a one-year period from the date hereof takes in over Thirty-six Dollars ($36.00), said Lessee will pay to the Lessor or Lessors, his, her or their heirs, executors or assigns, Twenty Percent (20%) of all revenue taken in by each machine in excess of Thirty-six Dollars ($36.00).
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> III. Lessee agrees to furnish Lessor or Lessors, his, her or their heirs, executors or assigns, an annual statement at the conclusion of each year that each machine is leased by Lessee, said statement showing the monthly intake of each machine.
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> IV. At all reasonable times Lessor or Lessors, his, her or their heirs, executors or assigns, are hereby given the right to inspect the books of the Lessee in regard to his, her or their account.
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> V. Lessee has examined said Vending Machines hereinabove mentioned, prior to and as a condition precedent to its acceptance and the execution hereof, and is satisfied with the condition of said machines, and its taking possession thereof

shall be conclusive evidence of its receipt thereof in good order and repair.

VI. Lessee agrees that at the request of Lessor or Lessors it will furnish Lessor or Lessors with proper address as to the location of each machine so leased by it.

VII. Lessee agrees to keep said machines in repair and good working order, and insure against loss or damage by fire or theft for the full insurable value of said machines."

Giving these two companies, that is DEF Company and XYZ Service the benefit of the doubt, and assuming that they are separate and distinct organizations, each having its own personnel, the fact still remains they work together in very close harmony. This is evidenced by the fact that they exchange names and addresses of purchasers and lessors and that they employ a common representative. Actually, DEF Company does not sell vending machines. The average purchaser would have no personal use for these machines. He would not know what to do with them if they were actually delivered to him unless XYZ Service, or some other similar organization, took them off his hands. What the purchaser really buys, and what the common representative actually sells, is an investment or speculation. The purchaser lays out money or capital in this business with a view of obtaining an income or profit.

This was the view taken by the court in the case of In re Waldstein, 291 N. Y. S. 697 (1936). This case involved the sale of burial rights in cemetery lots in large blocks for the purpose of resale and profit, with guaranty of a return of six dollars per lot per year for two years. In holding that this plan constituted the sale of securities, the court said:

"It is apparent, therefore, from the methods adopted in selling the burial rights in question, that the purpose is to place these burial rights in hands of purchasers who will hold them as an investment or a speculation. The selling of lots is undoubtedly for the purpose of financing or promoting the enterprise on the one hand and creating a means of investment or distributing the means of financing among the public, on the other."

The XYZ Service's lease is included in the definition of a security contained in section 8624-2 (2), supra, in that it is a certificate in a profit sharing or participation agreement and is an investment contract. It is therefore my opinion that by regarding entire Plan No. 2 as one transaction, which is the true substance of the plan, it constitutes the sale of securities within the meaning and spirit of the Act by both DEF Company and XYZ Service, and furthermore, the execution of the lease by XYZ Service is in itself a sale of securities within the meaning of the Act.

Plan No. 3 is not materially different from Plan No. 2. The purchase order contains only ordinary language and has no legal significance herein other than forming a part of the general scheme. The bill of sale on its face is an ordinary bill of sale, but on the reverse side has printed thereon an assignment form for the purpose of transferring title to the machines should the purchaser desire to sell. In itself this would be immaterial were it not for the fact that the assignment also includes "the rental thereby reserved" and the following paragraph at the bottom of the page:

> "The Grantor has *leased* the machines covered by this bill of sale to the.....Corporation. Notify the.....Corporation,....., ..., Ohio, within 3 days after assignment, otherwise payments will be continued to present registered owner." (Italics the writer's.)

thus indicating a definite knowledge upon the part of the vendor that the purchaser would have no personal use for the machines, but actually would lease them to an operator with a view of receiving a share of the profits or intake of the machines so purchased and leased.

The lease to UVW Corporation in effect is similar to Plan No. 2 lease. The profit or participation agreement contained therein reads as follows:

> "The Lessee agrees to pay Lessor as rental for said devices or machines the sum of TWENTY CENTS ($.20) PER MONTH OR TWENTY PERCENT (20%) OF THE GROSS INTAKE OR COLLECTION, per month, whichever shall be the greater amounts for each device or machine herein enumerated or described, such rentals to be paid on or before the 10th day of each month, commencing on the 10th day of....., 19...., and continuing until the expiration of this Lease, or its termination under the terms hereof."

The statement in your inquiry that this lease is entered into by purchasers in connection with the bill of sale and the wording on the reverse side of the bill of sale make it apparent that GHI Corporation is engaged in the business of selling investments or securities rather than vending machines. As pointed out in the discussion of Plan No. 2 above, the purchasers are not interested in buying vending machines, they would not give a moment's consideration to the plan if it involved a bona fide sale and delivery of the vending machines. They are only interested in the title for the purpose of whatever security it might afford. Their primary interest is the expectancy of enormous profits on their investments. My opinion is that Plan No. 3 may well be considered as one entire transaction involving the sale of certificates of an

interest in profit sharing or participation agreements and the sale of investment contracts. Furthermore, an execution of such lease by the UVW Corporation is in itself sufficient to constitute a sale of a security as contemplated by the Act.

Plan No. 4 affords no new problem. The JKL Corporation sells vending machines and itself enters into the lease-operating agreement with the purchaser. The lease-operating agreement contains the following provisions:

> "II. Lessee agrees to place said machines in suitable locations, subject to lessee's right to change such location for cause; to furnish lessor with the proper address as to the location of each machine within thirty days after same is so placed; to keep said machines in good repair and working order; to insure same aganist loss or damage by fire or theft for the full insurable value thereof.
>
> III. Lessee agrees that it will furnish all necessary merchandise for the profitable operation of said machines, and to collect the receipts therefrom at its own expense.
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> IV. Lessee agrees to furnish Lessor each and every month hereafter with a complete statement of the monies collected from said machines hereby leased and to pay to the Lessor an amount equal to twenty per cent of gross receipts, intake, deposits or collections, retaining the balance thereof for its services in keeping said machines in good working order, located, and properly supplied with necessary merchandise; and for maintenance, insurance and supervision.
>
> V. Lessee agrees to make monthly settlement on the basis mentioned in Paragraph IV hereof, on or before the 10th day of each and every month hereafter, accounting for all sales made the previous month by said machines and will pay the Lessor his share--not less than twenty per cent—of the receipts, intake, deposits or collections thereof."

Based upon the same authority and reasoning contained in the discussions of Plans Nos. 1, 2 and 3 above, it is my opinion that Plan No. 4 constitutes a sale of securities as contemplated under the Act. It is a sale of interests in or under profit sharing or participation agreements; the sale of investment contracts and the sale of instruments evidencing a promise or agreement to pay money.

Coming now to the consideration of your Plan No. 5, I find that like Plan No. 4, there is a reputed selling of vending machines with a lease back from the purchaser. The purchase order itself in this plan is quite indicative of the nature of the transaction reading in part as follows:

"This purchase is made with the understanding that you will deliver a regular Bill of Sale, and that you will Lease said MNO VENDING MACHINES for ..... years. Said Lease is to provide that you locate, insure, service, maintain, and in all ways keep up these machines, and to collect and account for moneys taken in by them during the entire term of the Lease.

I will sign said Lease, which will also provide that the undersigned is to receive monthly, as rental, not less than ....% of the gross moneys collected from said machines.

It is also understood that the Lease and Bill of Sale will show the serial number of each machine, that you will locate each machine within 60 days from date."

The bill of sale while in the ordinary form is, as in the previous plans, in furtherance of the scheme of MNO Corporation. The lease-operating contract reads in part:

"In consideration of said demise, and the agreements hereinafter expressed, it is agreed as follows:

* * * * * * * * *

2. Lessee agrees to place said machines in suitable locations and on request in writing to furnish Lessor with proper address as to the location of each machine so placed by it for him, subject to change without notice for cause and to keep machines in repair and good working order, and guarantee against loss or damage by fire or theft for the full cost value of said machines.

3. Lessee agrees that it will furnish all necessary merchandise for the operation of said machines, and to collect the deposits therefrom at its own expense.

4. Lessee agrees to furnish Lessor each and every month hereafter with a complete account of the monies due from said machines hereby leased and to pay to the Lessor an amount equal to not less than 20% of gross intake, deposit or collection, retaining the balance thereof for its service in keeping said machines in good working order and properly supplied with necessary merchandise, and other expense in locating and servicing the same.

5. Lessee agrees to make monthly settlement on a basis mentioned in Paragraph 4 hereof, every month hereafter, accounting for all sales made the previous month and will pay the Lessor his or her share, an amount equal to not less than 20% of the intake, deposit or collection, in full of all rentals as herein agreed."

As in the previous plans discussed above, it is my opinion that the sales made under this plan constitute sales of securities within the meaning of the Act and that they constitute sales of interests in or under profit sharing or participation agreements; the sale of investment contracts and sales of instruments evidencing promises or agreements to pay money.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

722.

BONDS—CITY OF AKRON, SUMMIT COUNTY, $60,000.00.

COLUMBUS, OHIO, June 8, 1939.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Akron, Summit County, Ohio, $60,000.

The above purchase of bonds appears to be part of an issue of grade elimination bonds of the above city dated December 1, 1938. The transcript relative to this issue was approved by this office in an opinion rendered to the Industrial Commission of Ohio under date of June 1, 1939, being Opinion No. 686.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.