

4849.

APPROVAL, BONDS OF HOLGATE VILLAGE SCHOOL DISTRICT, HENRY COUNTY, OHIO, \$42,900.00 (UNLIMITED).

COLUMBUS, OHIO, October 31, 1935.

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

4850.

SECURITY—ADVERTISEMENTS OFFERING SECURITIES BY NON-RESIDENT AND NON-LICENSED DEALERS.

SYLLABUS:

Advertisements offering securities by non-resident and non-licensed dealers, which securities are not registered under the Ohio Securities Act, are not prohibited by such act when such advertisements are contained in newspapers, magazines or periodicals published outside of the state and offered for sale on news stands within this state or sent to subscribers by mail.

COLUMBUS, OHIO, October 31, 1935.

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

DEAR SIR:—Your letter of recent date is as follows:

“Will you kindly render to this Department your opinion on the following proposition:

Section 8624-2, subsection 3, of the General Code, reads, in part, as follows:

“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.

The term “sell” shall mean any act by which a sale is made.

The use of “advertisements”, “circulars” or “pamphlets” in connection with the sale of securities in this state exclusively to the pur-

chasers specified in section 3 hereof shall not be deemed a sale when the advertiserents, circulars and pamphlets describing and offering such securities bear a readily legible legend in substance as follows:

"This offer is confined in this state exclusively to banks, insurance companies, corporations and licensed dealers."

The offering of securities by any person in conjunction with a licensed dealer by use of advertisement, circular or pamphlet shall not be deemed to be a sale, provided such person does not otherwise attempt to sell such securities in this state.'

Certain newspapers and magazines, published outside the State of Ohio, are offered for sale on various news stands within this state. Such periodicals likewise have subscribers who are residents of Ohio and to whom the publications are sent by mail. In such publications appear advertisements by persons and firms not licensed as dealers under the Ohio Securities Act, which advertisements advertise the offering of securities which are not registered under the Ohio Securities Act.

In view of the above quoted provision of the Ohio Securities Law, do such advertisements constitute a violation of the Ohio Securities Act in either of the two situations above described?"

I assume the dealers offering these securities are non-residents of Ohio.

Section 8624-2, General Code, the pertinent portion of which you quote, might well be construed as being broad enough in its language to prohibit such offering and sale of securities, but it is a well established principle of law that where an act is susceptible to two constructions, one of which would result in an unconstitutional effect being given thereto, the courts will refrain from adopting such construction. *Burt vs. Rattle*, 31 O. S. 116; *State, ex rel. vs. Hunt*, 84 O. S. 143; *Miami County vs. Dayton*, 92 O. S. 215.

The offering and sale of securities by a resident of one state to a resident of another state through the mail by means of advertisement in periodicals published in a state other than that of the purchaser constitutes interstate commerce. It has been repeatedly held by the Supreme Court of the United States that in the exercise of their police power the states are not precluded from indirectly burdening interstate commerce, subject to certain limitations. This point was involved in the case of *Hall vs. Geiger Jones*, 242 U. S. 539, the court recognizing that the Ohio Securities Act there under consideration only regulated the sale of certain securities within this state, which securities might have been acquired by the seller within this state in interstate commerce previous to such offering and sale in Ohio.

A definite statement of the power of a state to indirectly burden interstate commerce and the lack of power to deny the right to engage in such com-

merce is contained in the opinion of the Supreme Court in *Barrett vs. New York*, 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483, wherein it is said :

“Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith vs. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hennington vs. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. vs. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Lake Shore & M. S. R. Co. vs. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege, and prohibit its exercise in the absence of a local license.”

See also numerous cases upon this point collated in *Honnold's Sup. Ct. Law*, Vol. 1, pages 359, *et seq.*

The situation is somewhat analogous to that prevailing in Ohio prior to the recent passage of the Hawes-Cooper Act by Congress. The sale of prison made goods on the open market of Ohio was expressly prohibited by the Ohio statutes, as it has been for many years in a number of the other states. In order to enable the states having such restriction as to the sale of prison made goods to protect themselves from having their market flooded by prison made goods sold within their boundaries in interstate commerce and imported therein from other states, Congress saw fit to enact the Hawes-Cooper Act (45 Stat. at L. 1084; Chap. 79, U. S. C. Title 49, Sec. 65), enabling the states to prohibit the sales within their boundaries in interstate commerce of prison made goods upon the same basis as the sale of such goods was prohibited in intrastate commerce. The question of the constitutionality of this delegation by Congress is now pending before the Supreme Court of the United States in the case of *Whitfield vs. State of Ohio*, October term, 1935, No. 577.

In the instant case, however, I find no provision in the National Securities Act or in any other act of Congress purporting to delegate to the states any control over interstate commerce in securities analogous to that delegated with respect to interstate commerce in prison made goods.

It is my opinion that advertisements offering securities by non-resident and non-licensed dealers, which securities are not registered under the Ohio Securities Act, are not prohibited by such act when such advertisements are

contained in newspapers, magazines or periodicals published outside of the state and offered for sale on news stands within this state or sent to subscribers by mail.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4851.

APPROVAL, ABSTRACT OF TITLE, ETC., TO LAND IN HANOVER TOWNSHIP, ASHLAND COUNTY, OHIO—OTHA L. MONROE AND E. PAUL MONROE.

COLUMBUS, OHIO, October 31, 1935.

HON. CARL E. STEEB, *Secretary, Board of Control, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval an abstract of title, warranty deed, contract encumbrance record No. 21 and other files relating to the purchase by the state of Ohio for the use of the Ohio Agricultural Experiment Station of a tract of land situated in Hanover Township, Ashland County, Ohio, and being the northeast quarter of the northeast quarter of section 18, township 19, range 16, containing forty acres, more or less, in the civil township and county above named.

Upon examination of the abstract of title submitted, which abstract is apparently certified as of July 18, 1935, I find that as of said date Otha L. Monroe and E. Paul Monroe, who are the owners of record of the above described tract of land, have a good merchantable title to this property and that the same is free and clear of all encumbrances except the undetermined taxes for the year 1935, which are, of course, a lien upon this property.

Upon examination of the warranty deed tendered by Otha L. Monroe and E. Paul Monroe, I find that said deed, with one exception, has been properly executed and acknowledged; and I further find that the form of this deed is such that the same is sufficient to convey this property to the state of Ohio by fee simple title, subject to the reservation that the grantors are to receive the royalties from the gas well operated by The Ohio Fuel Gas Company on said premises as long as said company, its successors and assigns continue to pay the same.

The exception above noted with respect to the execution of this deed arises from the fact that by some inadvertence the name of Anne M. Monroe,