

4. A lease of land at Lake St. Marys valued at \$150.00, to E. E. Jackson, of Celina, Ohio, for private landing, lawn and gardening purposes.
5. A lease of land at Buckeye Lake valued at \$100.00, to Ben H. Glass, of Columbus, Ohio, for boathouse, dockland and Walkway purposes.

Finding the above leases to be executed in proper legal form, I have attached my signature thereto in approval.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

4742.

APPROVAL, TWO DEEDS OF CONVEYANCE BY THE HOME BUILDING AND SAVINGS COMPANY OF XENIA AND D. S. WILLIAMSON TO THE OHIO STATE ARCHAEOLOGICAL AND HISTORICAL SOCIETY OF LAND IN GREEN COUNTY.

COLUMBUS, OHIO, November 15, 1932.

MR. HARRY R. McPHERSON, *Business Agent, The Ohio State Archaeological and Historical Society, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination two deeds in which the Ohio State Archaeological and Historical Society is grantee, conveying land situated in Cedarville Township, Green County, Ohio, in connection with Williamson Mound State Park, one grantor being The Home Building & Savings Company of Xenia, Ohio, and the other grantor being one D. S. Williamson, an unmarried man.

Finding these deeds to be executed in proper legal form, my approval is hereby given thereto.

Respectfully,
 GILBERT BETTMAN,
Attorney General.

4743.

SECURITIES—REGISTRATION BY DESCRIPTION MUST CONTAIN SALE PRICE WHICH MAY BE DESIGNATED AS "AT MARKET"—REGISTRATION BY QUALIFICATION MAY SO DESIGNATE WHERE ACTUAL MARKET EXISTS.

SYLLABUS:

1. *In order to constitute a valid description of securities registered by description under the provisions of Section 8624-8, General Code, it is mandatory that the instrument filed with the Division of Securities contain a statement concerning the price at which the securities are to be offered for sale.*

2. *Such requirement does not necessitate the inclusion therein of a fixed and definite price in money, it being a sufficient compliance with the law if the price is designated as "at market" when there is in fact a market for such securities, or the price may be designated in such a manner as to be from time to time readily ascertainable.*

3. *In the event of the registration of securities by qualification, either a definite price in money or its equivalent should be fixed, or, if the circumstances permit, such price may be designated as "at market".*

COLUMBUS, OHIO, November 16, 1932.

HON. THEO. H. TANGEMAN, *Director of Commerce, Columbus, Ohio.*

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

"Section 8 of the Ohio Securities Act (General Code Section 8624-' reads in part as follows:

'The securities specified in Section 5 of this act may be sold and the transactions enumerated in section 6 of this act may be consummated on compliance with the provisions of this section.

A description (verified either by the oath of the person filing the same or of any person having knowledge of the facts) shall be filed with the division of securities on forms prescribed by the division by the issuer of securities, or by a majority of the incorporators of such issuer prior to election of officers, if an incorporated issuer, or by a licensed dealer which shall set forth:

The name of the issuer.

A brief description of the securities.

The amount of such securities thereafter to be offered for sale in this state and, if all of the securities are not to be offered by the person filing the description, then the respective amounts to be offered by others, so far as known, and their names and addresses.

A brief statement of the facts which show that the securities fall within one of the classes specified in section 5 of this act or that they are the subject matter of a transaction enumerated in section 6 of this act.

The price at which the securities are to be offered for sale.

Copies of all prospectuses, circulars, advertisements or other descriptions, if any, when prepared to be used for the public offering, shall also be filed with the description, and when qualification is sought under section 5, subsection (2) (a), there shall be filed with the description an appraisal signed by three disinterested persons having knowledge of such values.

Registration by description shall be deemed completed when the description and prospectuses, circulars, advertisements or other descriptions, if any, together with the fee (in the form of cash, check or United States postoffice money order) prescribed by section 9, are delivered, or mailed by registered mail, postage prepaid, to the division of securities.

* * * * *

Your opinion is respectfully requested upon the questions hereinbelow set forth in reference particularly to the italic portion of Section 8 as above noted:

1. To constitute a valid or complete description, is it mandatory that the instrument filed with the division contain any statement concerning the price at which the securities are to be offered for sale?

2. If so, is it mandatory that such price be set forth or designated in dollars or cents; or
3. May the consideration to be received for such securities be described or set forth otherwise; or
4. May such price be designated or set forth as follows:
 - (a) 'The price prevailing on the X stock exchange.'
 - (b) 'At the prevailing market price.'
 - (c) 'At market.'
 - (d) 'Initial price \$18.00 per share, thereafter at market price.'
 - (e) 'At prices determined by the quotations appearing in the New York Times';

it being taken for granted that 'market price' means a 'free' market price?

5. May such price be designated or set forth in a formula by means of which the price per share can readily be determined, an example of such formula being 'by taking one 2/1000ths of the aggregate values of the securities in the trust portfolio, according to the closing quotations of the X Stock Exchange, plus 10% of such aggregate value?'

The problems confronting the Division of securities may be partially illustrated by the following examples:

FIRST: The X Corporation, having disposed of a portion of its authorized capital under a registration by description or by qualification, now finds that the quoted market price of said securities varies from day to day and differs from the specific price named in the original registration. It now seeks to dispose of both additional authorized but unissued shares and of shares acquired by it from time to time in the open market and wishes to make such sales at the prevailing market price.

SECOND: A licensed dealer wishes to register by description a certain number of so-called 'Fixed Type Investment Trust Shares.' The price of such shares naturally varies from day to day in accord with the fluctuation of the quoted prices of the underlying securities making up the trust portfolio. In this connection, the Division, in the past, has considered the designation of a formula by means of which the price per share could readily be determined as being a compliance with the provision in question contained in Section 8.

Your opinion is further respectfully requested upon the proposition of whether or not your answer with reference to the question of 'price', contained in Section 10, third paragraph, subsection (f) of the Ohio Securities Act, would be the same as it is in the case of Section 8 of the Act.

Your opinion is finally respectfully requested as to whether or not the appended filing, received in this Division under date of September 21, 1932, complies in all respects with the legal requirements of the Ohio Securities Act, with particular reference to the provisions of Sections 8624-5, 8624-7 and 8624-8 of the General Code of Ohio."

The form for the registration of securities under Section 8624-8, General Code, is attached to your communication, which contains a statement as to the price at which the securities will be offered for sale, as follows: "Initial price \$18.00 per share, thereafter at market price." You ask my opinion upon the sufficiency of this form. I presume your inquiry has to do with this last quoted statement contained therein.

Considering first your question number one, Section 8624-8, *supra*, expressly

provides that in the case of registration of securities by description, the description "shall set forth * * * the price at which the securities are to be offered for sale." It is well established in this state that where the legislature uses the word "shall", such word must be given a mandatory construction unless otherwise required by the context. I find nothing in Section 8624-8, General Code, to indicate a legislative intent that the provisions with respect to the matters which shall be contained in the description filed with the Division of Securities should be other than mandatory.

It is accordingly my opinion in specific answer to your first question that in order to constitute a valid description of securities registered by description under the provisions of Section 8624-8, General Code, it is mandatory that the instrument filed with the Division of Securities contain a statement concerning the price at which the securities are to be offered for sale.

Questions 2 to 3, both inclusive, require an interpretation of the meaning of the word "price" as used in Section 8624-B., General Code, and shall therefore be considered as one question. If "price" is to be given a limited and restricted meaning, the section requires that a definite, fixed or ascertainable amount in dollars and cents shall appear upon the instrument filed with the Division of Securities. If, on the other hand, the word is to be given a broad and liberal construction, the price may be designated either as a formula or means by which it may be determined either in money or its equivalent, or as a variable rather than a fixed sum.

An examination of the authorities discloses that the courts have defined the word "price" in numerous ways. In 6 Words and Phrases, First Edition, pp. 5547-5548, the word is defined as follows:

"The word 'price' generally means the sum of money which an article is sold for, but this is so simply because property is generally sold for money, not because the word has necessarily such a restricted meaning. Among writers on political economy, who use terms with philosophical accuracy, the word 'price' is not always or even generally used as denoting the money equivalent of property sold. They generally treat and regard 'price' as the equivalent of 'compensation', in whatever form received, for property sold. The latin word from which price is derived sometimes means 'reward', 'value', 'estimation', 'equivalent'; and Webster shows that 'price' is sometimes used in the same sense. *Hudson Iron Co. vs. Alger*, 54 N. Y. 173, 177; *London & Yorkshire Bank vs. Belton*, 15 Q. B. Div. 457, 460; *Schrandt vs. Loung* 86 N. W. 1085, 1089, 62 Neb. 254."

In *Wing et al vs. Wadhams Oil and Grease Co.*, 74 N. W. (Wis.) 819, 820, the court held that the words 'the price' refer to either an ascertainable price or a standard of value. The language is as follows:

"The words 'the price', as used, naturally refer to some known or ascertainable price, some standard of value. The word 'price' is defined as 'the sum or amount of money, or its equivalent, which a seller asks or obtains for goods in market.' 'The exchangeable value of a commodity.' Cent. Dict. 'The amount at which a commodity is valued or sold in the market. The market price, as the price of wheat.' Standard Dict. To say that the term 'the price' as used in the contract, is not the market price, but some specific price, though secret and unknown to any person

except the contracting parties, is to distort its ordinary meaning. We must hold that, as used in the contract, it means the market price."

To the same effect is *Kinard vs. Jordan*, 101 Pac. (Calif.) 696, 698.

Again in *Emden State Bank vs. Boyle*, 196 N. W. 820, 821, 50 N. D. 573, the court said that while the price is generally understood to mean money, it is recognized that this is not always so. Also in *Ara vs. Rutland* 172 S. E. 993, 994 (Texas), the court construed the word 'price' as used in a pleading as meaning market value, saying:

"It is clear that by the word 'price' the pleader meant value; and market value at that."

In 49 C. J. 1344, 1345, the following language is used, in support of which numerous authorities are cited:

"PRICE. The amount at which a commodity is valued or sold in the market; cost; the cost to the buyer; an equivalent in money asked for anything; an exchangeable value of a commodity; the market price; the market value; the sum actually given for an article; the sum for which anything may be bought, or at which its value is rated; the sum in money or other equivalent set upon an article by the seller, which he demands for it; the sum or amount of money, or its equivalent, which a seller asks or obtains for his goods at market; the sum stipulated as the equivalent of the thing sold, and also every incident taken into consideration for the fixing of the price put to the debit of the vendee, and agreed to by him; the sum which a seller will receive in exchange; the value which the seller places on his goods for sale. It does not necessarily mean value in money; it may mean money or some other equivalent. Among writers on political economy, who use terms with philosophical accuracy, the word 'price' is not always or even generally used as denoting the moneyed equivalent of property sold. They generally treat and regard 'price' as the equivalent of 'compensation' in whatever form received, for property sold. However, in common parlance, 'price' or 'purchase price' is understood to mean money, although this is not always so. Thus it has been said to be, in its usual and ordinary sense, a consideration in current money given for the purchase of the thing sold; the sum of money for which a thing is bought or sold, or offered for sale; the sum of money which an article is sold for. It has been compared with 'consideration' and 'value', and distinguished from 'rent'."

It is obvious from the foregoing citations of but a few of the authorities which are pertinent, that the term is subject to various constructions. It becomes necessary to ascertain the meaning intended by the legislature by the use of the term in the section here under consideration. This requires a consideration of the pursuant object to be attained in the enactment of Section 8624-8, General Code. In *Cochrel vs. Robinson*, 113 O. S. 526, the court held that the language of the legislature should be construed so as to effectuate the paramount object to be attained by the legislature and the purpose to be subserved. The fourth branch of the syllabus is as follows:

"In the consideration of a statute the primary duty of the court is to give effect to the intention of the legislature enacting it. Such intention is to be sought in the language employed and the apparent purpose to be subserved, and such a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained."

The Ohio Securities Act generally places securities in three classes. First, there are certain securities which are exempt from any requirements as to registration or qualification with or by the Division of Securities. Second, there are those securities which may be registered by merely filing a description thereof with the Division as set forth in Section 8624-8, without any further act required by the Division before they may be legally sold and traded in Ohio. Third, there are those securities which must be registered by qualification requiring an affirmative permission of the Division of Securities before the same may be sold in this state. It is unnecessary to discuss the first classification. The third classification includes securities of new and promotional enterprises, that is to say, those which are sold upon a primary market by the issuer or the issuer's agents. The second classification, being those with which we are here particularly concerned, includes the sale of securities which are sold upon what may be termed a secondary market, that is, securities which have for at least a period of two years been outstanding and in the hands of the public and therefore to a varying extent traded in on the market. This class of securities, and particularly the requirement as to including in the description filed with the Division of Securities the matter of the price at which they are to be offered for sale, was discussed by the Report Respecting Questions under the Ohio Securities Act by the Committee on Ohio Corporation Law of the Ohio State Bar Association, November 15, 1929. The pertinent portion of the Committee's report is as follows:

"In complying with Section 8, is it proper for an issuer to file a description and specify the price which it receives from the dealer as 'the price at which the securities are to be offered for sale'?

There are certain circumstances under which, for instance Subsection 1 (c) of Section 5 applies in which it is immaterial to the Division to know the price to the public except when such price is a necessary basis for the computation of the fee to be paid under Section 9. For example, a licensed dealer in Ohio purchases a block of shares from an established company whose earnings are sufficient to enable the stock to be registered by description under Subsection 1 (c) of Section 5. In this case the Division is not interested in the price to the public except in so far as it needs to know that price to compute the fee under Section 9. If the maximum fee be paid by the issuer then the price to the public is immaterial to the Division and the issuer should be able to file the description stating therein the price which it received from the licensed dealer and the licensed dealer would file simply the intention to sell. In the example given, the stock was listed on the Cleveland Stock Exchange and the dealer desired to sell it from time to time at prices prevailing on the Exchange. Under such circumstances the price at which the stock would be sold to the public should be stated in the form as quoted from time to time on the Cleveland Stock Exchange."

It must be borne in mind that the Ohio Securities Act does not empower the Division of Securities to predicate a suspension or revocation of any registration of securities by description upon learning that such securities may have been sold subsequent to registration at a price other than stated at the time of filing the description. The authority to suspend or revoke is contained in Section 8624-15, General Code, the pertinent provisions of which are as follows:

"The division may suspend the registration of any securities or any transaction, and the right to sell any securities registered by description or the subject matter of a transaction registered by description, and if, after notice and hearing, it shall appear that, at the time of filing the description required by section 8, the securities therein described did not fall within one of the classes specified in section 5 of this act, or were not at such time the subject matter of a transaction enumerated in section 6 of this act, the division may revoke such registration and the right to sell such securities.

* * * * *

The fact that a registration of securities by description may not be revoked for subsequent changes in the selling price after registration supports the report of the Ohio State Bar Association, *supra*, to the effect that there are circumstances under which the Division of Securities is not interested in the selling price except in so far as it is needed to compute the fee at the time of filing.

If it were to be held that Section 8624-B requires a statement in the description of a definite, fixed sum in money for which the securities registered must be sold, a rather incongruous situation would arise. When there is an active market in the securities registered at, for instance, the price of \$20.00 per share at the time of registration, and such amount were fixed as the price at which the securities were to be sold, in the event of a rise in the market to say \$30.00 per share, the Securities Division would be in the position of requiring the seller to sell the securities at \$10.00 per share less than the market price. On the other hand, if the market were to fall to \$10.00 per share, the Division of Securities would be in the position of compelling the seller to sell the securities at twice the market price.

In the case of the registration of fixed type investment trust shares, in order to render Section 8624-8 workable when the underlying securities making up the trust portfolio are fluctuating in price, a new registration would be required every day. These are the situations which would result from construing the term "price" in the narrow and restricted sense. I do not think such was the intention of the legislature. A due regard for the general purpose to be served by the requirement that the statement set forth "the price" and the object to be attained by the section, impels the conclusion that the term must be interpreted in the broad sense.

After all, if in fact there is a market for a given thing, the market is the price—and when the price is indicated as "at market", it cannot be said that there is no statement of price.

The construction which I have placed upon Section 8624-8, General Code, is, I understand, identically the same as that which has been adopted by the Division of Securities since the enactment of the section in 1929. Administrative interpretation of a law is not to be disregarded and set aside unless judicial construction

makes it imperative so to do. *Industrial Commission vs. Brown*, 92 O. S. 309, 110 N. E. 744; *State ex rel vs. Brown*, 121 O. S. 73.

It is accordingly my opinion that the requirement of Section 8624-8, General Code, that the description of the securities qualified by registration as therein provided must contain "the price at which the securities are to be offered for sale", does not necessitate the inclusion therein of a fixed and definite price in money, it being a sufficient compliance with the law if the price is designated as "at market" when there is in fact a market for such securities, or the price may be designated in such a manner as to be from time to time readily ascertainable.

You next inquire as to the requirement that the application for registration of securities under Section 8624-10, General Code, by qualification, contain a statement showing the price at which the securities are to be offered for sale. The comments herein above contained with respect to the securities referred to in Section 8624-8 are not usually applicable to this class of securities. Securities qualified under Section 8624-10 require an affirmative act on the part of the Division before the same may be offered for sale. The Division must find, among other things, "that the proposed offer or disposal of securities is not on grossly unfair terms." This requires, particularly in the case of new or promotional enterprises where a portion of the stock is issued for services, patents, good will or other intangibles, a consideration of the definite cash price at which the stock is to be offered. There is a further limitation in selling securities qualified in this manner as to the amount of commission which may be paid in their sale and the amount which must go to the issuer for each share sold. This would indicate the necessity of a fixed selling price.

Of special importance is Section 8624-16 which authorizes the suspension or revocation of the qualification of securities registered by qualification when the issuer "has offered securities on grossly unfair terms." Obviously, if at the time of qualification the securities were to be sold at a fixed price and subsequently, without authority of the Division of Securities, same were to be sold at a greatly enhanced price, such sale might constitute grounds for revocation of the qualification of the securities.

I do not wish to say, however, that where there is a definite market for a security sought to be registered by qualification, it is at all times necessary to fix a definite price in dollars. The authorities heretofore cited clearly show that the word "price" does not necessarily carry such a restricted meaning. The whole purpose and intent of the Securities Act is to prevent the public from being defrauded, and if securities to be registered by qualification actually have a market price which is variable, adequate protection would seem to be afforded by fixing the price at which such securities are to be sold as the market. Of course, in order to justify such method of registration, the Division of Securities must be satisfied that there is a legitimate market and not one of such limitations as to be susceptible to manipulation by the issuer or others.

It is my conclusion that in the event of the registration of securities by qualification, either a definite price in money or its equivalent should be fixed, or, if the circumstances permit, such price may be designated as "at market".

You finally request my opinion upon a specific filing attached to your communication. This is an administrative rather than a legal function. It is the province of the Attorney General to advise as to matters of law and point out legal principles which may be applied by administrative officers in conducting their various departments. For the Attorney General, however, to attempt to apply these principles to specific filings would constitute a usurpation by the

Attorney General of the functions of an administrative department. I accordingly express no opinion upon the filing which you submit.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4744.

APPROVAL, TWO LEASES TO OHIO CANAL LANDS IN COSHOCTON COUNTY, OHIO.

COLUMBUS, OHIO, November 16, 1932.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your recent communication submitting for my approval, among others, two certain leases in triplicate by which there are leased and demised to Starling P. Bahmer and Marguerite E. Bahmer, respectively, of New Philadelphia, Ohio, two certain parcels of Ohio Canal property located in Oxford Township, Coshocton County, Ohio, which parcels of canal lands are more particularly described in the leases above referred to.

The leases here in question have been executed under the authority of Amended Substitute Senate Bill No. 72, enacted as a law by the 89th General Assembly (114 O. L. 541), which act provides for the abandonment for canal purposes of that portion of the Ohio Canal located in Tuscarawas, Coshocton and Muskingum Counties, Ohio. Upon examination of these leases, each of which is for a term of fifteen years and calls for an annual rental of nine dollars, payable in semi-annual installments, I find the same to be properly executed by the Superintendent of Public Works and by the respective lessees above named. Further on consideration of these leases and of the provisions therein contained, I find, assuming that no application for the lease of the parcels of abandoned canal lands here in question has been filed by any corporation or person entitled to prior rights under section eight of said act, that these leases are in conformity with the provisions of this act of the 89th General Assembly and with other statutory provisions relating to leases of this kind. In this connection, however, it is understood that the lessees above named take these leases subject to the right of any village, city, township, county or other taxing district to take this property over for park purposes at any time within two years from the effective date of Amended Substitute Senate Bill No. 69, passed by the 89th General Assembly (114 O. L. 518).

I am accordingly approving these leases as to legality and form as is evidenced by my approval endorsed upon the leases and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,
GILBERT BETTMAN,
Attorney General.