A REVIEW OF THE CASES ON "BLUE SKY" LEGISLATION

BY MONTREVILLE J. BROWN

Prior to 1910 there were no "Blue Sky Laws." Since then nearly all of the states have enacted them. They are in essential respects the same; and are not now open to constitutional objections. In 1917 cases involving the acts of Michigan, South Dakota and Ohio attacked as violative of the fundamental law went to the Supreme Court of the United States; and that court upheld them upon the broad ground that they were expressive of a legitimate exercise of the police power. Since the decisions in these cases litigation has been largely conducted in the state courts and most of the questions raised have called for construction and interpretation; some cases have dealt with matters of criminal pleading and procedure. It is the purpose of this article to take up the more important of these questions and matters and consider them in the light of the holdings of the appellate courts of the various states. In so far as possible consideration of cases will be confined to those of substantially general application.

The purpose of "Blue Sky Laws" has been oft expressed. It is deemed sufficient to state that they are designed to prevent

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fraud in the sale of specified contracts usually designated as stocks, bonds, investment contracts, or other securities. In administering and enforcing the law so as to effectuate the intent, one or the other of the two questions frequently arises. Is the corporation, association, concern or person proposing to sell subject to the law? Is the law regulatory of the sale of the particular contract proposed to be sold? These are the questions; and answers given thereto by those charged with carrying out the legislation have not always met with the approval of applicants, with the result that the courts have from time to time been resorted to. The decisions deal more with these questions than with any others.

PERSONS AND CONCERNS SUBJECT TO THE LAW

The typical law excludes from its purview certain securities and single or isolated transactions; then defines investment company and dealer and prohibits sales by either unless licensed. Exceptions in the various laws differ; but the provisions defining investment company and dealer and requiring license are, for all practical purposes, the same. The exceptions speak for themselves and only incidental consideration will be given thereto. The difficulty arises when commissioners are called upon to determine whether a given seller is an investment company or dealer within the meaning of the law. This question under various states of fact has been before the courts of several of the states; and it is to the decisions of these courts on this question that attention will first be directed.

For a number of years some doubt was entertained as to whether trustees are subject to the law in the sale of certificates of interest in the property and assets held by them under a common law declaration of trust. The question has been passed on by the courts of California, Iowa, Kansas, Michigan and Missouri. These courts hold them subject to the law in making such sale. They are viewed in some of the cases as constituting an investment company, and in others as the agents of an investment company, such investment company operating as an unincorporated association.4 The rule of amenability is recognized as settled law; and commissioners are now without exception, so

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far as the writer is advised, applying it within their respective jurisdictions.

Aside from the standing of so-called common law trusts, no difficulty general to the administration of the law has been encountered in determining whether or not a given applicant is an investment company. If a concern is the issuer of a security and is selling the security, it is an investment company and subject to the law.

When it comes to the question whether one selling a security issued by another is a dealer, the answer is not always free from doubt. A recent case in which this question was passed upon is that of State ex rel. Gutterson v. Pearson, et al. It is of such far-reaching consequences that a somewhat detailed consideration thereof is deemed appropriate.

The case arose in this way: Plaintiff was about to sell fifteen thousand shares of the common and fifteen thousand shares of the preferred stock of the New England Cereal Company, when he was informed by the commission that he could not lawfully sell the stock without its approval, and that if he sold or attempted to sell the same without such approval, it would take steps to put a stop thereto and bring about the criminal prosecution of all offending parties. Under the belief that the securities law had no application to the sale by him of these securities, he brought an action to restrain the commission from in any way interfering with him in the sale thereof. A demurrer to the complaint was sustained in the lower court. An appeal was taken to the supreme court where there was a reversal.

The material facts were few. Plaintiff's business was buying and selling stocks and bonds. He maintained an office in the city of Minneapolis. He was the absolute owner of the stock he proposed to sell in the course of his business. The New England Cereal Company, the issuer of the stock, was a Connecticut corporation; and had never been, and was not at the time, engaged in the business of selling its stock in Minnesota.

Plaintiff's position was based on the wording of sections 3 and 4, chapter 429, Laws of Minnesota 1917, as amended by sections 4 and 5, chapter 105, Laws of Minnesota 1919, and the use in various provisions of the law of the expression "such securities." These sections at the time the case was decided read as follows:

5(Minn. 1922) 189 N.W. 458.
"Sec. 3. Every person, firm, co-partnership, corporation, company or association, whether unincorporated or incorporated, under the laws of this or any other state, territory or government, which shall either himself, themselves or itself, or by or through others engage in the business within the state of Minnesota of selling, offering or negotiating for the sale of any stocks, bonds, investment contracts or other securities, herein called securities (except those exempt under the provisions of this act), issued by him, them or it, except to a bank or a trust company, shall be known, for the purpose of this act, as an investment company.

"Every person, firm, co-partnership, company, corporation or association, whether unincorporated or incorporated under the laws of this or any other state, territory or government, not the issuer, who shall within the state of Minnesota sell or offer for sale any of the stocks, bonds, investment contracts, or other securities herein called securities, issued by an investment company, except the securities specifically exempt under the provisions of this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities within the state of Minnesota, shall be known for the purpose of this act as a dealer. The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust."

Section 4 provides that:

"No such investment company and no such dealer shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities, unless and until he or it shall have been licensed by the commission as herein provided. . . ."

In view of the wording of section 3, plaintiff urged that an investment company was one engaged in the business within the state of selling securities issued by it; that a dealer was one selling within the state securities of an investment company or companies; that, as the New England Cereal Company was not engaged in the business of selling its stock in this state, it was not an investment company; and that in selling the stock of that company owned by him, he was not selling the stock of an investment company; and as a consequence, in so far as the selling of such stock was concerned, was not a dealer and therefore not subject to section 4. He further urged that the expression "such securities" made use of in the act referred to and meant the stocks, bonds, investment contracts and other securities of an
investment company; and that, in view of the fact that the New England Cereal Company was not an investment company, none of these provisions, including all of the regulatory features of the law, had any application to a sale of the stock of that company owned by him.

Plaintiff's contention boiled down amounted to this: The securities law is only regulatory of the sales of securities of issuers themselves engaged in the business within the state of selling such securities.

In answer to this contention it was insisted that the purpose of the act rendered it necessary to place on section 3 a meaning contrary to that contended for by plaintiff. The purpose being to prevent fraud, it was argued that all sales of securities made within the state, subject to exceptions specified in section 2, fell within the regulatory features of the law. Where securities were being sold to the general public, the seller, it was contended, no matter whether as the owner or the agent of another, was subject to the law; it was immaterial whether the issuer was or was not engaged in the sale thereof within the state. This was urged upon the court as the law applicable to the situation:

"With the purpose and intent of the law in mind, we again refer to section 3. It is obvious that a literal interpretation of the language of this section would result in a defeat of the object sought to be attained by the legislature. In such a situation there must be a departure from literal interpretation; we must so construe the section as to bring it in harmony with the purpose and intent of the act. Words may be eliminated or particular terms given an extended or qualified meaning; this, that the act may be potent to eradicate the mischief aimed at, and to avoid a construction which would result in absurdities. A statute is to be construed according to the intention of the legislature and not according to the letter of any section or subdivision thereof; the part must give way to the purpose as disclosed by the whole.

"The rules of statutory construction here applicable are elementary and a discussion thereof is unnecessary. We content ourselves with calling attention to some of the decisions of this court where they have been stated and applied."6

The court declined to adopt the view advanced in behalf of the commission. It held the law did not prohibit a person, the absolute owner of stock issued by a company not itself engaged in the business of selling within the state, from selling such stock without a license. The law, it was ruled, had no application to such a case.

During the course of the court's opinion it was said:

"An 'investment company' as defined in section 3, is one which either itself or through others engages in the business within this state of selling or offering for sale securities issued by itself. A 'dealer' as defined in that section, is one, not an issuer, who within this state sells or offers for sale securities issued by an 'investment company.' Section 4 prohibits any 'such investment company' and any 'such dealer' from selling or offering for sale 'any such securities' until licensed by the commission as therein provided. These prohibitory provisions do not purport to apply to an issuer of securities unless such issuer be an 'investment company' as defined in section three, nor to one, not an issuer, who buys and sells securities unless he be a 'dealer' as defined in that section. It stands admitted that the New England Cereal Company has never, in any manner, sold securities or offered them for sale within the state of Minnesota, and consequently that company is not an 'investment company' within the purview of the statute. As the company which issued the securities offered for sale by plaintiff is not an 'investment company' within the meaning of the statute, selling such securities or offering them for sale did not make plaintiff a 'dealer' within the meaning of the statute, nor bring him within the prohibitory provisions of section four. Defendants do not contend that the statute, taken as it reads, applies to plaintiff, but urge that unless it be construed or extended so as to bring within its provisions those dealers who handle securities issued by companies which do not themselves operate within this state the act can be easily evaded and will fail to accomplish the legislative purpose.

"In order to extend the scope of the statute so as to include within its operation those who sell securities issued by a company which does not itself sell its securities within this state, they urge that the words, 'within the state of Minnesota,' in the paragraph of section 3 which defines investment companies should be either eliminated or transposed from that section to section 4. If the Legislature had done this we might be able to give the statute the broad scope contended for. But this is a highly penal statute, and the courts cannot extend a penal statute to take in those whom the Legislature has left out, nor so as to make acts criminal which the Legislature has not declared to be criminal. Statutes creating crimes must speak for themselves, and cannot be extended by construction to include cases which are clearly outside the statute as enacted by the Legislature."
This decision resulted in curbing the activities of the Minnesota commission to a very appreciable extent; that body had assumed jurisdiction prior to its rendition of all sales of the character of the one under consideration. Its effect was to open the door to the unscrupulous and visionary. The legislature took cognizance of the situation and at its recent session remedied the defect in the law by enacting chapter 4, Laws 1923. This law amends the sections above quoted so as to make them read as follows:

"Sec. 3. Every person, firm, co-partnership, corporation, company or association, whether unincorporated or incorporated, under the laws of this or any other state, territory, or government, which shall either himself, themselves or itself, or by or through others engage in the business within the state of Minnesota of selling, offering or negotiating for the sale of any stocks, bonds, investment contracts or other securities, issued by him, them or it, except to a bank or trust company, shall be known, for the purpose of this act, as an investment company.

"Every person, firm, co-partnership, company, corporation or association, whether unincorporated or incorporated under the laws of this or any other state, territory or government, not the issuer, who shall within the state of Minnesota sell or offer for sale any stocks, bonds, investment contracts or other securities or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale any stocks, bonds, investment contracts or other securities within the state of Minnesota, shall be known for the purpose of this act as a dealer. The term dealer shall not include an owner, not issuer, of any stocks, bonds, investment contracts, or other securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any stocks, bonds, investment contracts, or other securities, embraced within such trust.

"Sec. 4. No such investment company and no such dealer shall sell or offer for sale any stocks, bonds, investment contracts, or other securities, or profess the business of selling or offering for sale any stocks, bonds, investment contracts, or other securities, (all of which are in this act referred to under the general term of and called securities) unless and until he or it shall have been licensed by the commission as herein provided. . . ."

There are other cases in which courts have been called upon to decide whether the seller involved was a dealer; but these have

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7 The following cases were cited in support of the court's position: State v. Finch, (1887) 37 Minn. 433, 34 N.W. 904; State v. Walsh, (1890) 43 Minn. 444, 45 N.W. 721; Berg v. Baldwin, (1894) 31 Minn. 541, 18 N.W. 821; Mahoney v. Maxfield, (1907) 102 Minn. 377, 113 N.W. 904, 14 L. R. A. (N.S.) 251. 12 Ann. Cas. 289.
to do with the interpretation of the following language made a part of the definition of dealer:

"The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature."

The purpose and effect of this provision is stated in the case of Edward v. Ioor, in this way:

"The record discloses that defendant Ioor was the owner of 100 shares of stock of the Illinois Piano Company. He sold 27 of these shares to the plaintiff. He sold no other shares of stock of this company. Section 10 of the Commission Act (Section 11954, Comp. Laws 1915) defines the term 'dealer,' and so far as important here provides:

"The term 'dealer' shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature."

"This provision was thought important by the framers of this act to remove the question of unconstitutional taint, and preserve the constitutional right of the individual to sell his own stock, but by prohibiting 'continued and successive transactions of a similar nature' prevented the abuse of that right and its exercise in a manner contrary to the spirit of the act. Mr. Ioor had the right to sell this stock to plaintiff. He did not by continued and successive transactions of a similar nature become a dealer. He was acting within his constitutional rights, and by this sale to plaintiff did not violate the act. No liability can be predicated on this transaction."

Securities Covered by Law

The other question which has been most frequently before the courts is whether the contract sold or proposed to be sold is a stock, a bond, an investment contract or other security within the meaning of the law. This question is often difficult of answer. A review of the cases in which it has been disposed of is next in order.

The pioneer in this field is the case of State v. Gopher Tire & Rubber Company. Defendant, a Minnesota concern, was indicted charged with selling an investment contract without a license. A demurrer was interposed to the indictment and overruled by the court. Certain questions were certified to the

10(1920) 146 Minn. 52, 177 N.W. 937.
supreme court for answer. Among them was the question whether the contract was an investment contract or other security. The court answered the question in the affirmative.

The company was engaged in the business of manufacturing automobile tires and inner tubes. The indictment set out the contract alleged to have been sold. This recited that defendant had appointed the holder as one of its agents to assist by word of mouth and in other ways in selling the tires and tubes manufactured by the issuer. It provided that in consideration of the certificate holder’s promise to render such assistance and in further consideration of $50.00 paid by him, the issuing company, defendant, would divide pro rata among all the holders of like certificates residing in a specified place 10 per cent of the net price of such tires and tubes as might be sold by defendant’s representatives at such place, such division to be made quarterly for a period of twenty years; that the holder would be entitled to a discount of 10 per cent. on all of the defendant’s goods which he might purchase for his personal use; and that defendant would annually set aside as a bonus to certificate holders all of its excess earnings after paying operating expenses, fixed charges and dividends to stockholders. The contract was designated by the issuer as a certificate; was transferable upon notice; and contained a clause stating that it was not to be construed to be a certificate of stock or security or investment contract.

On the question whether this was an investment contract the court had this to say:

“No case has been called to our attention defining the term ‘investment contract.’ The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood. If defendant issued and sold its certificates to purchasers who paid their money, justly expecting to receive an income or profit from the investment, it would seem that the statute should apply. The statute makes specific mention of stock which, properly speaking, is not a security, and follows the enumeration of investments which fall within its scope with the words, ‘herein called securities,’ indicating that the legislature has not used the term ‘securities’ in a literal but in a broad sense. In that sense, these certificates may properly be regarded as investment contracts or securities. The mere fact that defendant has studiously declared that they are not, does not require a court to hold that they are something else.

“We cannot sustain defendant’s contention that the certificates are contracts for the performance of services by its agents. The
purchaser pays $50 for a certificate in addition to agreeing to become a 'booster agent' for the sale of defendant's goods. As an inducement to invest, he is promised a share in defendant's profits. This promise extends, first to the profits realized on sales made by the local dealer, and, next, to defendant's total profits. It appears to have been the purpose of defendant to obtain capital by the sale of its certificates, without issuing stock, and, at the same time, to build up a market for its goods, without spending money in advertising. The certificates are like stock in that they give their holders the right to share in the profits of the corporation, but their value is purely speculative, for their holders get no interest in the tangible assets of the corporation."

The Minnesota court has had occasion to apply the doctrine of this case on several occasions.11

In the Summerland Case the defendants were charged with selling certain securities issued by the Alexandria Minnesota Oil Syndicate, an unincorporated association. The securities were described in the indictment as "three units of the par value of $100 each, each of which said units entitled the owner thereof to an individual beneficial interest in and to the property and assets of said association and in and to the profits resulting from the operation thereof (such unit being registered in the books of said association in the name of the owner thereof) to participate in the management and control of the business and affairs of said association by casting one vote at any meeting of the unit holders of said association upon any question coming before such meeting." The court was called upon to say whether these were investment contracts or other securities; and on this point said:

"It fairly appears from the whole indictment that the 'oil syndicate' was an investment company issuing the same sort of investment contracts within the meaning of the first paragraph of section 3. The so-called 'units' are fairly within the definition of investment contracts as defined in State v. Gopher Tire & Rubber Company, 146 Minn. 52, 177 N. W. 937."

In the Evans and Reynolds Case the defendants were charged with violating the law in selling a contract entitled by the issuer "3 Per Cent. Contract for Deed." They demurred to the indictment. This was overruled by the lower court. The question whether the instrument set out in the indictment was an invest-

11State v. Summerland, (1921) 150 Minn. 266, 185 N.W. 255; State v. Evans and Reynolds, (Minn. 1922) 191 N.W. 425; State v. Ogden, (Minn. 1923) 191 N.W. 916.
ment contract was certified to the supreme court for answer. The court held that it was such a contract.

The contract before the court was in form a contract for deed. Attached to it and made a part thereof were various options open to the purchaser. One of these gave to the purchaser under certain conditions a right to surrender his contract and receive back the money he had paid with a bonus. Another gave the purchaser, after fifty regular monthly payments had been made, if other options had not been exercised, the absolute right to apply the amount paid with interest to build a home, to buy or improve a farm, or to buy or improve business property, and if the amount accumulated should not be sufficient therefore, the company agreed to advance the balance on real estate security. Other options were given.

The court held this contract to fall within the rule of the Gopher Tire & Rubber Company Case, saying:

"It is plain that the exercise of some of these options converts the contract into one for the laying out or investment of money in a way intended to secure income or profit from its employment. . . . We are of opinion that this contract is an investment contract within the statute."

In the Ogden Case the defendant was convicted of a violation of the law. He appealed to the supreme court and made the point that the contract he was charged with selling was not an investment contract or other security. The court sustained the conviction.

The contract in this case was styled "Statement and Purchase." It recited that defendant had subdivided a leasehold of an eighty acre tract of land in Bighorn County, Wyoming, into 4,800 equal undivided units or fractional interests and was offering 3,000 thereof for sale at $120,000, and that each purchaser purchased separately the number of units set opposite his name. The instrument was signed and acknowledged by the defendant. Following his acknowledgment was a statement with indicated places for signatures of the purchasers, and other data. A purchase of units was made subject under the terms of the instrument to the condition that all money paid was to go to the defendant as treasurer, to be disbursed for obligations incurred, or to be incurred, in connection with the leasehold. This included the obligation on defendant's part to clean out and connect with a pipeline three oil wells on the premises and to drill six additional oil wells and connect with the pipe line.
ant was required to render an account to the purchasers of moneys received and paid out by him. He was to incorporate a company under the Arizona statutes to hold the lease. Provision was made for a board of directors and an executive committee. The company was to have power to operate all of the wells and from the net amounts derived therefrom, the owners of the units were to be paid their respective portions. Defendant agreed to assign his leasehold to this corporation.

The court held this instrument to be an investment contract or other security, saying:

"It differs, of course, from other contracts which we have had before us, but it is an investment contract within State v. Gopher Tire & Rubber Co., 146 Minn. 53, 177 N.W. 937; State v. Summerland, 150 Minn. 266, 185 N.W. 255; and State v. Evans, 191 N.W. 425. The purpose was not to convey undivided interests in the land. The purchasers did not intend to become freeholders or land owners. The intent was that the five-eighths interest in the leasehold was to go to a corporation thereafter to be organized. The defendant agreed to do certain things proper to be done to effect this result. Finally, the unit holders were to participate in profits in proportion to their holdings and were to be interested in the same proportion in the corporation holding the title and operating. The arrangement was legitimate, so far as appears, and convenient enough. The paternalistic purpose of the statute is to prevent offering to the public, not land contracts, but investment contracts, evidencing a right to participate in the proceeds of a venture, without the commission first ascertaining whether there is behind the venture something so tangible that a sound policy of regulation permits the exposing the investing public to them. This is an investment contract within the statute. It is one to which the requirement of a license applies."

Other courts have been called upon to determine the standing of instruments being offered for sale. The decisions in these cases deal with provisions peculiar to the law involved. The Welch and Agey Cases, however, define terms and expressions found in many laws and will, as a consequence, be specially considered.

In the Welch Case defendant was charged with selling speculative securities without a license. The North Dakota law expressly prohibited the sale of such securities without approval.

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Defendant contended that the contract sold by him did not come within the definition of speculative securities as set out in the law. The court disagreed with him and denied his application for a writ of habeas corpus.

The criminal complaint charged petitioner, without first complying with the act, with selling "an agreement or buyers' certificate of the Lignite Consumers' Mining Company of North Dakota." It was alleged that this was a speculative security. The certificate was set out in the complaint. It provided in substance:

"that in consideration of the sum of $100, to be paid in cash or note to the Lignite Consumers' Mining Company, a corporation to be formed under the laws of this state not later than October 1, 1919, the said mining company agrees to utilize 90 per cent. of all the moneys secured to establish a mine at or near Havelock, North Dakota, until the sum of $200,000 shall be so applied; and that all surplus subscribed over said sum may be used either to maintain a mine or other mines within this state, or to carry on educational work or experiments with the lignite coal, or its by-products; that the Lignite Consumers' Mining Company agrees to establish its mine at or near Havelock, North Dakota, not later than October 1, 1919, or as soon thereafter as is possible; and that it will immediately thereafter issue to each member or signer of the agreement, a certificate granting him or it the right to purchase coal at said mine or any other mine or mines said company may establish at a price not to exceed $1.50 per ton, or as much lower as the board of directors may deem advisable to sell coal per ton."

The act made the sale of speculative securities unlawful in the absence of a compliance by the seller of certain requirements, the term "speculative securities" being defined as follows:

"The term 'speculative securities' as used in this act shall be taken to mean and include: (1) All securities into the specified par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; (2) all securities the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions; (3) any securities based in whole or material part on assets consisting of patents, formulae, good will, promotion, or intangible assets; (4) securities made or issued in furtherance of promotion of any enterprise or scheme for the sale of unimproved or undeveloped land on any deferred payments or instalment plan when the principal value of such securities depends on the future performance of any stipulation by the promoters of such enterprise to furnish irrigation or transportation facilities, or other value enhancing utility or improvement."
On the question whether the certificate came within this definition the court said:

"It is contended that the contract or agreement which the defendant sold is not a 'speculative security,' within the terms of the act. In our opinion the contention is wholly untenable. The statute expressly declares that the term 'speculative securities' as used therein shall be taken to mean all stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or instalment plan, or other instruments in this nature by whatsoever name known or called, into the par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; or the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions.

The certificate which the realtor sold for $100 is to be issued in the future. It is to be issued by a corporation to be organized in the future. The mines from which coal is to be sold are to be developed in the future. It seems too clear for argument that the transaction falls squarely within the terms of the statute. The value of the certificate which the realtor sold is manifestly dependent upon the future promotion and development of the mines. It also seems entirely clear that reasonable men would be entirely justified in finding that the element of chance, speculative profit, or possible loss, equal or predominate over the elements of certainty, safety, and investment."

In the Agey Case the defendant was the agent of a Tennessee corporation authorized under the laws of that state to buy and sell real estate. It bought large tracts of land in Georgia which it divided into lots. Through defendant it sold these lots on contract in South Carolina. No license was obtained under the "Blue Sky Law" and defendant was tried and found guilty of a violation thereof. On appeal to the supreme court the question was presented whether the company was an investment company and whether the sale of the contract in question came within the law.

The contract contained these guarantees on the part of the company:

"The company guarantees to scientifically develop, cultivate, prune, and take care of said orchard plot or plots for five years, and, upon completion of the payments as above set forth, to make, execute, and deliver to the purchaser hereof a general warranty deed for the number of plots mentioned above, which shall have at that time 200 living trees thereon. And 'The company guarantees the purchaser hereof 3 cents per pound for all fruit grown on said trees delivered at the preserving plant in good condition.'"
The South Carolina law at the time provided as follows:

“Before any bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company as defined in this chapter), or any individual, corporation or copartnership who shall be agents, offer for sale or sell the stocks, bonds, or obligations of any foreign corporation, whether organized or to be organized or being promoted, shall be authorized to do business in this state, it must be licensed by the insurance commissioner, which the commissioner is authorized to do when he is satisfied that such company or corporation is safe and solvent and has complied with the laws of this state applicable to fidelity companies and governing their admission and supervision by the insurance department. If such company is chartered and organized in this state and has its home office within the state it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars, provided it is solvent to the extent of not less than fifteen thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies.

Gregory's Supplement, sec. 4805a, subsec. 1 (ch. 156, Laws 1913), provides:

“Every corporation, company, copartnership or association, all of which are in this act termed company, organized, proposed to be organized, or which shall hereafter be organized without this State, whether incorporated or unincorporated, which shall in this State sell or negotiate for sale any stocks, bonds, or other evidences of property, or interest in itself or any other company, all of which are in this act termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used, directly or indirectly, for the payment of any commission or other expenses incidental to the organization or promotion of any such company shall be subject to this act.”

Applying these provisions of the act to the company and the contract being sold by it, the court held the company to be an investment company offering to the public an investment in lands and fig orchards in Georgia. It also held that the company was offering the “obligations of said corporation” to cultivate said land and was giving its contract to make title upon compliance with certain terms; and lastly, that it was offering for sale within the terms of Laws 1913, Chapter 156, “evidences of property.”

In the very recent Iowa case of Wagner v. Kelso,12a decided on April 6, 1923, the court was called upon to determine whether certificates of interest in common law trust constitute “stock”

12a(Ia. 1923) 193 N.W. 1.
within the meaning of the Iowa act providing that every person, firm, association, company or corporation that shall, either directly or through representatives or agents, sell, offer or negotiate for sale within the state any stocks, bonds or other securities, shall, before doing or offering to do any such business within the state, be required to secure a permit of the secretary of state. The contention was made that "stock," as used in the law means only corporation stock or shares. The court discussed the point made quite extensively. We take the liberty of quoting from the opinion at some length:

"To say, as do counsel for appellee, that 'stock,' as that word is here used, means only corporation stock or shares, is to add to the statute what is not there expressed and to neutralize to a great extent the evident legislative purpose in enacting it. It may be admitted that more often than otherwise the word 'stock' is used with reference to the shares issued by private corporations, but it is equally true that in common parlance it is often used in a broader and more general sense of shares in voluntary associations and other enterprises in which many contribute shares for the promotion of some common purpose. The point made by appellee is perhaps new in this jurisdiction, but it has been considered and the same or equivalent language construed by other courts, and, so far as we are able to discover, the authorities are uniformly opposed to the restricted construction which counsel would have us approve. See People v. Clum, 213 Mich. 651, 182 N.W. 136, 15 A.L.R. 253; Home Lbr. Co. v. Hopkins, 107 Kan. 601, 10 A.L.R. 879; Malley v. Bowditch, 259 Fed. 809, 170 C.C.A. 609, 7 A.L.R. 608. It is true that these precedents were decided under statutes varying in some degree from our own, but in each the court has considered the question whether a 'certificate of interest' may fairly be included with the general term 'stock.' The Malley Case, supra, involved the question whether a statute imposing a stamp tax upon the issuance of certificates of stock applied to the issuance of certificates of interest in a common law trust. There, as here, counsel contended that certificates of interest were clearly distinguishable from certificates of stock, and therefore were not subject to the requirement. Overruling the point, the court says:

"We are of the opinion that, on the original issue of the certificates of shares of the Pepperell Manufacturing Company, a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities, or benefits from any statute, there was required . . . a stamp tax of five cents each $100 of face value or fraction thereof."

"After stating the general character of the trust, the court adds that:

"There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest
therein and carrying with them certain rights while the company is a going concern and in its winding up.'

"Taking up the contention of counsel that such certificates are not certificates of stock, the court then proceeds to say:

"'The word 'stock' . . . is to be interpreted in connection with the accompanying words of the statute, association, company, or corporation.' It is a term not peculiar to corporations, but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company . . . . It seems to us clear that the words 'certificates of stock' contain no implication of an intent to exclude common law associations or companies.

"A certificate evidencing a transferable share or shares in the share capital of a manufacturing company, whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a 'certificate of stock.'

"In Kennedy v. Hodges, 215 Mass. 112, 102 N.E. 432, the court, in considering the question of local jurisdiction of the ancillary administration of an estate in the assets of which were included certificates of shares in a trust, says:

"'There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation.'

"In Home Lbr. Co. v. Hopkins, supra, the company was organized as a so-called trust, much after the manner of the company in this case, and question arose whether such company had complied with the conditions which a statute imposed upon the right to dispose of securities and stock in that state, and it was there held that, as the agreement or declaration of trust provided, as does the agreement in this case, giving the company powers and privileges not possessed by individuals and partnerships, it must conform to the regulations imposed on corporations. The state of Michigan has a 'blue sky law' in all essential respects quite similar to our own and made applicable with certain exceptions to 'every person, corporation, copartnership, company or association,' and forbidding the sale or negotiation of any stocks, bonds, or other securities until compliance with the conditions named, and making a violation of such statute a punishable misdemeanor.

"In the case of People v. Clum, supra, the defendant, having been convicted of such violation, appealed, and, among other things, urged as does appellee in this case that, as the association which he represented was not incorporated, but was organized under the common law as a trust, the so-called 'stock' was therefore not stock within the meaning of the act, but the court held that—

"'The shares into which the capital of this association was divided and for which certificates were issued as stated were stock within the meaning of the act, the selling and offering for sale of which were forbidden except as provided by the act.'
"In the instant case the so-called agreement of trust is so framed that, if valid, it vests the trustees with all and more than all the powers usually conferred upon corporations. They have absolute control of all the company’s property and assets. The shareholders are expressly excluded from any voice whatever in its management or business and the only enforceable obligation laid upon the trustees is to distribute the remnant, if any there be, of such assets as shall remain when the trust is finally dissolved and all its debts and obligations discharged. Its capital is a share capital, evidenced by certificates which may pass from hand to hand by sale or gift. They expressly provide that the holder has no authority, power, or right whatsoever to do or transact any business for or on behalf of or binding on the company, and the so-called agreement expressly provides that the shareholders shall have no legal right to the property of the trust and no right to call for a partition of the property or dissolution of the trust. That such shareholders in the nebulous and shadowy substance of the so-called trust are ‘stockholders we cannot doubt. The so-called agreement of trust is evidently drawn with meticulous care to avoid the use of the words ‘stock’ and ‘stockholder,’ and thereby, if possible, to avoid the bringing the sale of the shares within the scope of the statute; yet even then the pen of its author at times slipped and betrayed him into the use of the natural and approved word, as, for example, where it makes the parties ‘covenant and agree to and with each other . . . for the use and benefit of the present and all future subscribers and stockholders.’ and again, in enumerating the multitudinous powers of the trustees, it provides authority to hold and reissue the interest of its capitalization ‘its stock and other securities.’ It follows, without need of further discussion at this point as to this objection, that the shares of capital in the so-called trust are stock within the meaning of the law.”

**Criminal Pleading**

Four Minnesota cases have to do with the sufficiency of indictments. They are *State v. Gopher Tire & Rubber Company*, *State v. Summerland*, *State v. Ogden*, and *State v. Summerland*. In the first of these cases the indictment charged several sales and was attacked as duplicitous. The court sustained the indictment, holding that the charge was that of offering and selling securities without a license. In the first *Summerland Case* the indictment charged but one sale. It was demurred to on the ground that it failed to charge a violation of the law. The court sustained the demurrer, holding that where

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13 *(1920)* 146 Minn. 52, 177 N.W. 937.
14 *(1921)* 150 Minn. 266, 185 N.W. 255.
15 *(Minn. 1923)* 191 N.W. 916.
15a *(Minn. May 18, 1923)*.
an indictment alleges but one sale it thereby brings the charge within the exception made by section 2 of the act, namely, that the act shall not apply to single or isolated transactions. In view of these decisions, the only safe course to pursue in drawing indictments under a law such as the Minnesota law is to allege several sales. In this way the exception with respect to single or isolated transactions is negatived and without rendering the pleading double. In the Ogden Case the court held an allegation that defendant sold to a named person followed by the words, "and others," a sufficient negation of the exception.

In the second Summerland Case the court held that an indictment, charging a sale of securities to A, made in the course of like transactions wherein like securities were sold to B and C, states but one offense, namely, a sale to A, upon which the state must rely for a conviction.

MISCELLANEOUS QUESTIONS PASSED ON BY THE COURTS
WHAT CONSTITUTES A SALE WITHIN THE MEANING OF THE LAW?

In Edward v. Ioor, 18 the question whether exchange of stock constitutes a sale within the meaning of the law was before the court. On the point the court said:

"The plan contemplated by these defendants provided for the organization of a corporation under the laws of Arizona to take over and hold the stock in the other companies, giving its own stock in varying proportions in exchange therefor. It was to be largely a holding company. Did the exchange of its stock for that of the other companies constitute a sale within the meaning of the Commission Act? This court has defined a sale as follows: 'A sale is a parting with one's interest in a thing for a valuable consideration.' Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279. 'But every transfer of property for an equivalent is practically and essentially a sale, and the deed of bargain and sale is almost universally used to convey land so transferred. Money's worth is a valuable consideration, as much as money itself.' Huff v. Hall, 56 Mich. 456, 23 N. W. 88. Bouvier defines a sale as: "An agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." 3 Bouvier's Law Dict. 2983.

"This definition has been adopted by the legislature of this state in the Uniform Sales Act (Act 100, Public Acts 1913, Comp. Laws 1915, 11,832 et Seq.)

"We must assume that the legislature had in mind this well-understood meaning of the word "sale" when the Commission

Act was passed. If the act is not so construed, as was suggested upon the argument, one may exchange worthless stock for government bonds and escape with impunity. We are impressed that when the Arizona Piano Company exchanged its stock for that of other companies it was a sale of its stock within the meaning of the Commission Act.”

In *Rex v. Malcolm,* it was held that a “sale” of shares included an agreement to sell.

**WHAT CONSTITUTES FRAUD IN THE SALE OF SECURITIES?**

Whether a sale of a given security will work a fraud on investors is a question for determination by those charged with carrying out the law. The courts are loath to disturb a finding on this point; and do not unless the finding is based upon an erroneous theory of the law, or unqualifiedly against the evidence, or arbitrary, unreasonable, unjust or against the best interest of the public.

In *In re Investors’ Syndicate,* the commission suspended the license of the syndicate to sell a certain instalment savings certificate, on the ground that the sale thereof worked a fraud on investors. The basis for the charge of fraud was that the history of the sale of the certificate, extending over a period of six years, disclosed that over half of the purchasers forfeited after making a few payments and lost all they paid in. The court overruled the commission, saying:

“The instalment certificate promises that, upon the making of specified payments in advance for ten years, the syndicate will pay the purchaser $1,000. This is the amount of the payments made, with interest at 6 per cent. compounded annually. There is a surrender value after two annual payments. The surrender value for each of the first five years is less than the instalments paid. From the sixth year on it exceeds the principal amounts paid. Experience shows that a large number of the certificate purchasers allow their certificates to lapse within a few years. This means a loss to them. It means a gain, measured by book values, to the syndicate. The objection of the commission is based upon the constant lapsing of the certificates. . . . The real objection to the instalment certificates comes from the fact that the purchaser may not carry out his contract, and therefore loses when he takes the surrender value, in short to many of the investors the investment is an improvident one. This is not because of the fault of the syndicate. . . . The commission does not view

19(1920) 147 Minn. 217, 179 N.W. 1001.
the savings contracts as of such a nature that the syndicate will be unable to perform them. If it performs them the purchaser will get what is promised. The investment contract is often an unprofitable one to the purchaser. It is so when he fails to make his payments. We do not inquire as to the limits of the right of the statute to supervise investment contracts of the general nature of the one before us. It is enough to say that the investment certificate does not work a fraud upon purchasers within the meaning of the statute."

What Are the Rights of a Purchaser of a Security Sold Without a License?

In *Goodyear v. Meux*,\(^{20}\) suit was brought to recover a balance alleged to be due on a stock subscription contract. One of the defenses interposed was that the issuer and seller of the stock and its agents had failed to comply with the "Blue Sky Law." It was insisted that the contract was as a consequence illegal and unenforceable. This defense was held good by the court.

The court said:

"The statute referred to, which is carried into Thompson's Shannan's Code, at section 3608a 139 et seq., provides that all local and foreign corporations, with certain designated exceptions, shall be known as investment companies. It provides that before offering to sell any stock, bonds, or other securities of any kind or character, except government, state, or municipal bonds, or any lands or town lots, such corporations shall file statements containing information particularized in the act and shall pay a fee of $25. The act further provides such companies shall file additional statements at the close of business on December 31 and June 30 of each year, and it provides that no agent of such companies shall do any business for them until such agents register their names with the secretary of state and pay certain fees. It is further enacted that any person or agent who undertakes to sell the securities of companies which have not complied with the statute, and that any such companies which undertake to do business in the state without compliance therewith, shall be guilty of a misdemeanor punishable by penalties set out. It is provided that the statute shall be complied with before any attempt to sell stock or do any other business in the state is made.

"We think there can be no doubt but that the bankrupt corporation was one of the kind whose business and the sale of whose securities this statute was designed to regulate. It appears from the record that, when the subscription of defendant for this stock was taken, this company was in default with reference to the statements exacted of it by the statute, and it further appears that the agents who sold the stock were not duly registered.

\(^{20}\)(1920) 143 Tenn. 287, 228 S.W. 57.
"The contract which was entered into with the defendant was accordingly a contract prohibited by law, and the activities of the corporation and its agents in this respect constituted a misdemeanor punishable by law.

"It is well settled that a contract entered into under these circumstances cannot be enforced."

In Edward v. Ioor et al., the Arizona Piano Company sold some of its stock to plaintiff. The consideration passing from plaintiff to the company consisted of stocks in two other corporations. The Arizona Piano Company had not secured a permit from the Michigan Securities Commission to sell its stock in the state. Plaintiff brought suit to recover the value of the stocks assigned to the Arizona Piano Company. In the court below there was judgment for defendants. On appeal a new trial was granted.

On the question as to the right of plaintiff to rescind and recover the value of the stocks parted with the court said:

"This sale to plaintiff of the stock of the Arizona Piano Company was in conflict with the terms of a penal statute, malum prohibitum, and void, although not expressly declared so to be by the statute."

"Some of these cases are so recent and they so fully consider the authorities and the principles involved that we forego further discussion of the subject. When plaintiff's stock in the Arizona Piano Company, received on this void contract, was tendered back, he was entitled to the stocks he had assigned in payment therefor. The transaction had been rescinded, and upon its rescission he was entitled to be restored to what he had parted with. Failure to restore to him what he had parted with entitled him to its value."

