4133.

BOND INVESTMENT ACT—APPLICABLE TO DOMESTIC AND FOREIGN CORPORATIONS ALIKE—EFFECT OF SECURITIES LAW ON SECTION 697, G. C.

SYLLABUS:

1. *Sections 697 to 709, inclusive, General Code, are applicable to domestic as well as foreign corporations transacting business in this state.*

2. *In so far as Section 697, General Code, defines every corporation, partnership or association other than a building and loan association which places or sells securities on the partial payment or installment plan as a bond investment company, such section was repealed by implication at the time of the enactment of the first Securities Law in 1913.*

COLUMBUS, OHIO, March 5, 1932.

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

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

> "I will thank you if you will let me have your opinion on the following questions which relate to the Bond Investment Act, commonly known as Sections 679-709 of the General Code.
>
> First:—Do these sections apply both to domestic and foreign corporations transacting business in the State of Ohio?
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> Second:—When regularly licensed dealers in securities sell securities in this State on the installment plan, is it necessary for such dealers to qualify as Bond Investment Companies by depositing $100,000 with the Treasurer of State?
>
> Third:—If regularly licensed dealers sell securities under a contract providing that the purchaser shall make a down payment of a definite sum and shall pay the balance in monthly installments over a definite period of time, the securities not to be transferred to the name of the purchaser until after final payment has been made, does such selling bring such dealers within the provisions of this Act?
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> Fourth:—If question THREE is answered in the affirmative must the dealer at all times have in his possession securities sufficient to cover all such orders in full, and do such securities have to be segregated so that they may be definitely identified as those covered by the contracts?"

Your first question requires a consideration of the history of the legislation about which you inquire. The so-called Bond Investment Act was enacted April 25, 1898, 93 O. L. 401, as "An Act to regulate certificate, bond and investment companies, partnerships and associations, other than building and loan companies, and to regulate investment guaranty companies, partnerships and associations doing business on the service dividend plan, and to protect holders of their certificates, debentures and securities." Section 2 of this act provided that every corporation, partnership and association other than a building and loan company doing, in this state, the business of placing or selling certificates, bonds, debentures or other investment securities of any kind on the partial payment or installment plan "shall

file with the inspector of building and loan associations, a certified copy of its charter or articles of incorporation, constitution and by-laws, and other rules and regulations showing its manner of conducting business." This section further provided that such corporations "shall also file with the inspector an appointment of a resident attorney in each county within this state in which it does business upon whom service of process may be had, and upon compliance herewith the secretary of state shall issue to the said corporation upon its application all certificates permitted and required to be issued to foreign corporations doing business in Ohio, upon payment of the statutory fees provided by law to be paid therefor." The third section of this act provided in part as follows:

> "Whenever such company, partnership or association has complied with the provisions of this act, and the inspector is satisfied that it is doing business in accordance with law, he shall issue to such company, partnership or association a certificate of authority to do business in Ohio. * * * * *."

I think the inference may be drawn from the foregoing language of the original Bond Investment Act that the legislature intended its provisions to apply only to foreign corporations.

On April 14, 1900, this entire act was amended to substantially its present form, 94 O. L. 147, by "An Act to provide for the better protection of persons dealing with bond and investment companies." Section 1 of this act was codified without substantial change as Sections 697, 698 and 699 of the General Code. These sections provide as follows:

Section 697:

> "Every corporation, partnership or association other than a building and loan association, which places or sells certificates, bonds, debentures or other investment securities of any kind, on the partial payment or installment plan, and every investment guaranty company doing business on the service dividend plan shall be deemed a bond investment company."

Section 698:

> "Before doing business in this state, every bond investment company shall deposit with the treasurer of state one hundred thousand dollars in cash or bonds of the United States or of the state of Ohio, or of any county or municipal corporation in Ohio, for the protection of investors in the securities of such company. Such deposit shall be made out of the paid-up capital stock of such bond investment company."

Section 699:

> "The deposit made by a bond investment company with the treasurer of state shall be held as security for all claims of residents of this state against such company, and shall be liable for all judgments and decrees thereon, and subject to the payment of such decrees in the same manner as the property of other non-residents. If such company ceases to do business in this state, the treasurer of state may release securities, in his discretion, retaining sufficient to satisfy all outstanding liabilities."

The present law in my view presents the same vagueness from which different inferences may be drawn as to whether or not it is intended to apply to Ohio corporations as well as foreign corporations. Section 697 starts out by referring

to "every corporation", but Section 699 provides that the deposit made by these companies with the Treasurer of State shall be "subject to the payment of such decrees in the same manner as the property of other non-residents." Of course, this provision of Section 699 does not necessarily compel the inference that the act applies only to foreign corporations. This being the case, it is necessary to consider the administrative practice which has been followed during the last thirty-three years since the enactment of this act, with respect to its applicability to domestic as well as foreign corporations. Upon this matter of the weight to be given to administrative interpretation of a law, the Supreme Court said in the case of *State, ex rel.* vs. *Brown,* 121 O. S. 73, 75, 76:

> "It has been held in this state that 'administrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do.' *Industrial Commission* vs. *Brown,* 92 Ohio St., 309, 311, 110 N. E., 744, 745 (L. R. A., 1916B, 1277). See also, 36 Cyc., 1140, and 25 Ruling Case Law, 1043, and cases cited."

This office, as early as 1907, apparently construed the act here under consideration as applicable to domestic as well as foreign corporations. In an opinion appearing in the bound volume of Attorney General's Reports, 1903-1908, at p. 189 of the year 1907, there was considered the question of whether or not the Ohio Credit Company, a corporation organized under the laws of this State, was a bond investment company. In the body of this opinion, the following language is used:

> "The question you ask is whether or not such business comes within the provisions of sections 3821r R. S., et seq. The act to which you call attention includes two kinds of business, viz; First, 'the business of placing or selling certificates, bonds, debentures or other investment securities of any kind or description, on the partial payment or installment plan'; second, that 'of an investment guaranty company doing business on the service dividend plan.' If the business in which the Ohio Credit Company is engaged is comprehended within either of such classes it is required to deposit with the state treasurer $100,000 in cash or bonds, as therein described, for the protection of the investors in such certificates, debentures or other investment securities, and is further required to comply with the other provisions of said act."

At the present time, I am advised that the Treasurer of State is holding the deposit required by Section 698, supra, of four bond investment companies, three of which are Ohio corporations. It seems, therefore, that there is little doubt as to the administrative interpretation of the act in question as applicable to Ohio, as well as to foreign, corporations. It is, therefore, my opinion under authority of *State, ex rel.* vs. *Brown, supra,* that Sections 697 to 709, inclusive, General Code, are applicable to domestic as well as foreign corporations transacting business in this State.

Your second, third and fourth questions relate to licensed dealers which sell securities on the installment plan. Section 697, supra, defines two classes of companies as bond investment companies. These are (1) corporations, partnerships or associations, other than building and loan associations, which place or sell securi-

ties on the partial payment or installment plan, and (2) investment guaranty companies doing business on the service dividend plan. In so far as the first class of companies which are defined in Section 697 as bond investment companies is concerned, there arises a question of whether or not this definition was repealed by implication at the time of the enactment of the so-called Blue Sky Law in 1913, 103 O. L. 743. This first Blue Sky Law was entitled "an act to regulate the sale of bonds, stocks, and other securities, and of real estate not located in Ohio, and to prevent fraud in such sales." This act revised the whole subject matter of the bond investment act in so far as the bond investment act afforded a scheme for the protection of the investing public. It provided then, as it does now, a far more comprehensive plan of governmental control over the sale of securities and affords far more adequate protection for the investing public from fraud in such transactions. Among the innumerable new provisions which were enacted at the time of the adoption by the legislature of this first Blue Sky Law not theretofore covered by the bond investment act, were those with respect to the licensing of dealers in securities, the qualification either by certification or exemption of all securities, whether sold for cash or on the installment plan, the examination of accounts and of the business repute of the officers of corporations seeking to have their securities qualified by certification, etc.

In the case of *Goff, et al.* vs. *Gates, et al.,* 87 O. S. 142, the first branch of the syllabus is as follows:

> "An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute by implication if the later act is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it."

Under authority of the above case, if the subsequent act revises the whole subject matter of the foregoing section and is evidently intended as a substitute for it, the above act will be held to be repealed by implication on the ground that such was the intent of the legislature. This principle was recognized in 36 Cyc. 1077, wherein the following language is used:

> "When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act."

A somewhat stricter rule was laid down in *State* vs. *Hollenbacher,* 101 O. S. 478, the first branch of the syllabus reading as follows:

> "A statute which revises the whole subject-matter of a former enactment, and which is evidently intended as a substitute for it, operates to repeal the former although it contains no express words to that effect.

> But repeals by implication are not favored, and where two affirmative statutes exist, one will not be construed to repeal the other by implication, if they can be fairly reconciled. The fact that a later act is different from a former one is not sufficient to effect a repeal. It must further appear that the later act is contrary to, or inconsistent with, the former."

In view of the foregoing authorities, I should be reluctant to say that the provision of Section 697 to the effect that every corporation selling securities on the installment plan is a bond investment company, has been repealed by implication on account of the general reluctance of the courts to hold an act as so repealed, were it not for the fact that it has been the well established administrative practice to so construe the Securities Law as hereinabove indicated. Of all the hundreds of corporations, partnerships and associations which are daily selling securities on the installment plan, there are but four which are now qualified as bond investment companies and have on deposit with the Treasurer of State $100,000 in cash or bonds. It has evidently been the administrative practice to consider Section 697, General Code, in so far as it relates to such companies, as repealed by implication.

The administrative interpretation of the law of Ohio with respect to the sale of securities on the installment plan being controlled by the Securities Law only is not to be disregarded unless judicial construction makes it imperative so to do. *State, ex rel.* vs. *Brown, supra.* I do not find such construction imperative.

This well established administrative interpretation of the law of Ohio relating to the sale of securities is obviously a reasonable interpretation. It required, to say the least, a somewhat strained construction of the English language to say that because a corporation engaged, for instance, in the manufacture of shoes which extends to its employes the opportunity of becoming stockholders by paying weekly installments upon their stock subscriptions out of their salary, shall thereby become a bond investment company. Another corporation with shares of stock of the par value of one dollar a share, for instance, engaged in the same business, selling its shares to its employes for cash, was still a shoe manufacturing company. The legislature evidently recognized the inadequate protection afforded by the bond investment act when it enacted an entirely new scheme of legislation with respect to the sale of securities in Ohio.

Although an adherence to the strict rule as to repeals by implication laid down in *State* vs. *Hollenbacher, supra,* might be very persuasive toward reaching a conclusion contrary to the one I have already indicated, I do not feel that the Attorney General can do otherwise than recognize the long established administrative interpretation of this law.

It is, accordingly, my opinion that in so far as Section 697, General Code, defines every corporation, partnership or association other than a building and loan association which places or sells securities on the partial payment or installment plan as a bond investment company, such section was repealed by implication at the time of the enactment of the first Securities Law in 1913. It is therefore unnecessary for me to answer in detail your second, third and fourth questions.

Respectfully,
GILBERT BETTMAN,
Attorney General.