

7204

1. BANKING ACT — PURPOSE CLAUSE, ARTICLES OF INCORPORATION OF CORPORATION — PURPOSES LIMITED TO LENDING OF MONEY ON MORTGAGED SECURITY AND CORPORATION ATTEMPTS TO ENTER IN BUSINESS OF ACCEPTING DEPOSITS OF MONEY FROM PUBLIC GENERALLY AND ISSUES INVESTMENT CERTIFICATES, DEBENTURES OR NOTES, EVIDENCE OF SUCH DEPOSITS AS A BUSINESS, SUCH ACT OF CORPORATION IS ULTRA VIRES.
2. CORPORATION — ORGANIZED UNDER GENERAL CORPORATION ACT — MAY NOT ENTER BUSINESS OF ACCEPTING MONEYS FROM STOCKHOLDERS AND THE PUBLIC AND ISSUE CERTIFICATES OR OTHER EVIDENCES OF INDEBTEDNESS PAYABLE ON DEMAND OR AT TIME SPECIFIED IN CERTIFICATE WITHOUT COMPLIANCE WITH BANKING ACT — SECTION 710-1 ET SEQ., G. C.

SYLLABUS:

1. When in the purpose clause of the articles of incorporation of a corporation its purposes are limited to the lending of money on mortgaged security and such corporation attempts to enter in the business of accepting deposits of money from the public generally and issues its investment certificates, debentures or notes as evidence of such deposits as a business, such act of the corporation is ultra vires.

2. A corporation organized under the General Corporation Act may not enter the business of accepting moneys from its stockholders and the public and issue its certificates or other evidences of indebtedness payable on demand or at a time specified in such certificate without having complied with the Banking Act, Section 710-1, et seq., General Code.

Columbus, Ohio, November 6, 1944

Hon. H. E. Cook, Superintendent of Banks
Columbus, Ohio

Dear Sir:

You request my opinion as to whether the Farm Bureau Agricultural Credit Corporation, by reason of its method of operation, is engaged in

the banking business illegally since it has not complied with the Ohio Banking Laws and also whether such corporation has been exempted from compliance with the Banking Laws.

The General Assembly has enacted a number of sections of statute which provide specific requirements with respect to the creation of banks and the licensing of banks; also for the regulation, supervision and liquidation of banking corporations or other corporations formed for or engaged in any of the types of business defined as "banking" in such act (see Sections 710-1 to 710-189 and 711 to 714, General Code).

Section 710-2, General Code, contains the definition of the term "bank" for the purposes of such act and reads:

"The term 'bank' shall include any person, firm, association, or corporation soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, and unless the context otherwise requires as used in this act includes commercial banks, savings banks, trust companies, special plan banks, and unincorporated banks; provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal; nor to building and loan associations or title guarantee and trust companies incorporated under the laws of this state. All banks, including the trust department of any bank, organized and existing under laws of the United States, shall be subject to inspection, examination and regulation as provided by law."

Your first inquiry is as to whether the corporation is a bank within the meaning of such section. In your request you state that the company solicits from private investors, including its stockholders, for the investment of funds, and quote the following advertisement used for such purpose:

"Your idle money invested in your own cooperative organization is definitely working for you. The 'Investment Certificates' of the Farm Bureau Credit Corporation provide a short term investment plan with a definite maturity and dividend rate. Money made available through such investments is reloaned to County Cooperative Associations, to Farm Bureau members, or Association patrons."

You further state that its advertised rates are as follows:

"Dividend Rate	
\$50.00 or more	
6 months maturity	1 1/2 %
1 year	2 %
2 years or more	2 1/2 %

You further state that the form of investment certificate issued by he company is as follows:

"No..... Investment CertificateDollars

FARM BUREAU AGRICULTURAL CREDIT CORP.

THIS IS TO CERTIFY THAT the Farm Bureau Agricultural Credit Corporation, a corporation duly organized and existing under the laws of the State of Ohio, (hereinafter called the 'Company') does hereby acknowledge the receipt of..... Dollars (\$.....) which it promises to repay to.....,years from the date of issuance hereof, with interest thereon until the principal sum is paid at the rate of..... (.....) per annum, payable semi-annually. Payment of the principal and interest shall be made at the office of the Company at Columbus, Ohio."

You state further that the company advertises that it has money available for loan "for any and all farm purposes" at a rate of interest of four and one-half per cent. Your request further reads:

"The Ohio Agricultural Credit Corporation was organized under General Code, Sections 10186-1 to 10186-30, inclusive. It has an authorized capital of \$500,000 of common stock, the par value of each share being \$100.00. The purpose clause of these articles is as follows:

Purpose Clause of Farm Bureau
Agricultural Credit Corporation

THIRD. The purposes for which it is formed are:

1. To make loans or advances to farmers in producing and/or conserving and/or marketing staple agricultural products and/or breeding and in purchasing, feeding and/or marketing of live stock, including the purpose of dairy cows and the production and marketing of dairy products.

2. To accept negotiable notes for the money so loaned and/or advanced to farmers, to charge interest on the same and to require the proper security thereof by accepting chattel mortgages and such other forms of security as the directors of this corporation may prescribe.

3. To make, execute, sell and/or discount, rediscount and deliver notes and other evidences of indebtedness to or with the Federal Intermediate Credit Bank of Louisville, or any other person, firm or corporation; to endorse, assign and transfer with or without recourse, all notes and other evidences of indebtedness, together with the chattel mortgages and other evidences of indebtedness securing the same, and to hypothecate them as collateral securities; to renew all notes and other evidences of indebtedness from time to time, and to require additional security therefor in its uncontrolled discretion.

4. To make and execute such contracts as may be necessary or expedient in the making of loans and any other transactions necessary and proper to carry into effect the purposes of this corporation.

5. To loan money on mortgaged security, both real and personal, and to buy and sell the same; to purchase, loan, mortgage and sell real estate; to loan money upon, buy and sell either as principal or agent, bills of lading, warehouse receipts, commercial paper, book accounts, choses in action, contracts for the sale of real estate or personal property, shares of stock, bonds and other securities, conditional contracts for the sale of personal property and mortgages and pledges of personal property.

6. It is the intention that the purposes specified in any clause or subdivision thereof shall be in no wise limited or restricted by reference to or inference from the terms of any other clause or paragraph of these Articles of Incorporation, and that the purposes specified in each of the clauses and subdivisions in this paragraph shall be deemed to be independent purposes. This corporation reserves the right to substantially change and/or add to any purpose for which it is formed in the manner now or hereafter prescribed by general corporation acts."

You state that the corporation in question was organized under Sections 10186-1 to 10186-30, inclusive, General Code, which sections are the provisions of the Cooperative Agricultural Associations Act.

An examination of the Articles of Incorporation of the company in question, which are on file with the Secretary of State (Volume 396, page 103, Records of Incorporations, File No. 145973), discloses that the corporation is one organized "for profit, under the General Corporation Act

of Ohio", with capital structure of five thousand shares, \$100 par. Even were it not for the fact disclosed in the preliminary paragraphs of the Articles of Incorporation, the purpose clause as quoted in your inquiry, indicates that its purpose is other than that for which corporations could be formed under the Cooperative Agricultural Associations Act (see Section 10186-4, General Code).

It would thus seem that your inquiry is actually one of whether a corporation for profit formed under the General Corporation Act may engage in the activities mentioned in your letter without compliance with the Banking Act. Such being true, it is unnecessary to consider your second inquiry for such act contains no exceptions of the type referred to in your inquiry.

In an opinion of one of my predecessors in office (1925 Opinions of the Attorney General, page 356), it was ruled that:

"A corporation soliciting and receiving deposits of money or its equivalent and issuing certificates of indebtedness to the depositor is doing a banking business under section 710-2, General Code."

A question somewhat similar to that considered by my predecessor in such opinion was considered by the Supreme Court in *The Security & Bond Deposit Co. v. The State, ex rel. Seney*, 105 O. S. 113. Such case was concerning an action in mandamus. The corporation there under consideration was incorporated for the purpose of buying and selling securities which undertook, as a business, to borrow securities from the public to be used as collateral for loans from a bank, agreeing to pay for such loan of securities from two to four per cent of the face value thereof as a supplement to the interest coupons attached thereto, and also engaged in the business of borrowing money from the public generally and issued its receipts therefor and agreed to pay for the use of the money five per cent per annum. The court in granting the writ of mandamus held:

"A company incorporated under the laws of this state for the purpose of 'contracting for and buying and selling securities and bonds, also borrowing and loaning on same and making loans on real estate security,' is not authorized to engage in the banking business, and where such company solicits and receives government bonds, on deposit at its established place of business in this state, agreeing to return same or like bonds upon call, or at

a time agreed upon, paying therefor a stipulated rate of interest in addition to that called for by the coupons attached thereto, its announced purpose being to use same as collateral to borrow money which shall constitute its working capital, such transactions are beyond its authority and will be enjoined.”

Matthias, J., in rendering the opinion of the court, reasons as follows on page 121 of the reported opinion:

“The relation of the defendant and its depositor is that of debtor and creditor rather than bailor and bailee, being substantially the relation of a bank and its depositor (*Treasurer, Fayette County, v. People's & Drivers' Bank*, 47 Ohio St., 503), for it appears from the record that the defendant does not undertake to return to the depositor the same bonds, but only bonds ‘of the same kind.’ In that respect the relation is no different than if the deposit were of money instead of that which is used by the defendant to procure money to constitute its working capital.

The language used in the opinion in the case of *Bank of Marysville v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St., 151, at page 157, with reference to the bank's deposits is equally applicable here: ‘The bank does not contract to keep on hand the particular money deposited, or pay depositor's checks out of it, nor is it expected to do so. The moneys of such depositors are commingled with other moneys of the bank * * *. It (the bank) is accountable as a debtor; and the relation between it and the general depositor, is essentially that of debtor and creditor. In legal effect the deposit is a loan to the bank.’”

An examination of the purpose clause of the corporation in question, which is quoted above, would indicate that it may be summarized that the purpose of the corporation in question is to make loans to farmers of various types, secured by mortgages on real estate or collateral, and to lend money on mortgages or other security. At no place in such purpose clause is any power granted or purpose stated which would intimate that the corporation in question was organized for or had the power to engage in the business of borrowing money and issuing its investment certificates, debentures, notes or receipts therefor. It will be observed that in no one of the purpose clauses contained in the Articles of Incorporation of the corporation in question is there any mention of a power to borrow money.

While it is elemental that a general corporation may, as an incidental power, have the authority to borrow money from time to time for the purposes of its business as indicated in the opinions above cited, when any

corporation enters the field of accepting deposits or taking from the public generally moneys which they care to leave with the corporation to be invested by it in its general business and issue their receipts, certificates or other evidences therefor, such business comes within the definition of "banking" as defined in Section 710-2, General Code.

It would, therefore, seem that the corporation in question is not only engaged in an ultra vires business by reason of the fact that its purpose clause is not broad enough to authorize it to engage in such type of business, but that the business so engaged in constitutes a banking business which it may not engage in without compliance with the provisions of the Banking Act.

In specific answer to your inquiry, it is my opinion that:

1. When in the purpose clause of the articles of incorporation of a corporation its purposes are limited to the lending of money on mortgaged security and such corporation attempts to enter in the business of accepting deposits of money from the public generally and issues its investment certificates, debentures or notes as evidence of such deposits as a business, such act of the corporation is ultra vires.

2. A corporation organized under the General Corporation Act may not enter the business of accepting moneys from its stockholders and the public and issue its certificates or other evidences of indebtedness payable on demand or at a time specified in such certificate without having complied with the Banking Act, Section 710-1, et seq., General Code.

Respectfully,

THOMAS J. HERBERT

Attorney General