

completion of two Electric Passenger Elevators in the Starling Loving Hospital, Ohio State University, and calls for an expenditure of \$8,500.00.

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. There has further been submitted a contract upon which The Aetna Casualty and Surety Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
C. C. CRABBE,
Attorney General.

2387.

QUESTION OF WHETHER A FOREIGN CORPORATION IS A CORPORATION NOT FOR PROFIT IS A QUESTION OF FACT—ARTICLES OF INCORPORATION OR LAWS OF FOREIGN STATE NOT CONCLUSIVE.

SYLLABUS:

The question of whether a foreign corporation is a corporation not for profit, as distinguished from corporations for profit, within the purview of the securities law of this state, is a question of fact to be determined by the Chief of the Division of Securities. In the determination of said question, the Chief of the Division of Securities is not bound by the statements of the articles of incorporation or the laws of a foreign state that it is a corporation not for profit.

COLUMBUS, OHIO, April 16, 1925.

HON. CYRUS LOCHER, *Director of Commerce, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date which reads in part as follows:

“The Grain Marketing Company of Chicago has filed certain papers in the Division of Securities, claiming that this company is exempt from the provisions of the Securities Act because the company is incorporated under the Co-operative Marketing Act of Illinois, and that Ohio has a co-operative marketing act of a similar character.”

You submit questions as follows:

- ° 1. Whether the Division of Securities has any duty to perform in the premises or whether the Grain Marketing Company is at liberty to sell its 8% preferred stock in Ohio without reference to the Securities Law of this state.

"2. If it is not necessary for the Grain Marketing Company to secure a certificate of compliance to sell stock in Ohio, is it necessary for agents not officers of the company who sell the said 8% preferred stock in Ohio on a commission, to take out a dealer's or agent's license and give bond as provided for by law?"

You have transmitted with this letter certain documents that have been filed with the Division of Securities, including a copy of the by-laws of the corporation and a copy of the charter.

The claim of exemption made by the Grain Marketing Company is made on the ground that it is a corporation not for profit, and is therefore exempt under the terms of Section 6373-1 of the General Code. This section reads as follows:

"Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

The Grain Marketing Company claims to be a corporation not for profit, by reason of the fact that it is organized under the Co-operative Marketing Act of Illinois, and the further fact that the statutes of Ohio contain a co-operative corporation law practically identical with that of Illinois. The essential question to be determined is whether the fact that this corporation is organized under this law is sufficient of itself to exempt its stock from the operation of the securities law of Ohio, or whether the department may inquire into the affairs of the corporation and its methods of business, to determine whether as a matter of fact the operations of the corporation are such that it is a non-profit organization.

The significant portions of the Ohio law are as follows:

"Sec. 10186-1. * * * Associations organized hereunder shall be deemed 'non-profit', inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers."

"Sec. 10186-2. Five (5) or more persons, a majority of whom are residents of this state, engaged in the production of agricultural products, may form a non-profit co-operative association, with or without capital stock, under provisions of this act."

"Sec. 10186-4. * * * Any such association may limit its activities to the handling or the marketing products of its own members, except for storage. If it handles the products of non-members, such non-members' products handled in any fiscal year must not exceed the total of similar products handled by the association for its own members during the same period. * * *"

"Sec. 10186-13. * * * No stockholder of a co-operative association shall own more than one-twentieth (1/20) of the common stock of the association; and an association, in its by-laws may limit the amount of common stock which one member may own to any amount less than one twentieth (1/20) of the common stock. The association shall limit its dividends on stock of any amount not greater than eight (8) per cent. per annum; and all other net income, less specified reserves which shall be provided for in the

by-laws, shall be distributed back to its members only on the basis of patronage. Any receipts or dividends from subsidiary corporations or from stock or other securities owned by the association, shall be included in the ordinary receipts of the association, and shall be distributed accordingly.

"No member in any association without capital stock shall be entitled to more than one vote. Any association organized with stock under this act may issue preferred stock without the right to vote. Such stock may be sold to any person, member or non-member, and may be redeemable or retireable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate. The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto. * * *"

"Sec. 10186-24. Any corporation or association heretofore or hereafter organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations and functions in this state upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state and all contracts which could be made by any association incorporated hereunder, made by or with such associations shall be legal and valid and enforceable in this state, with all of the remedies set forth in this act."

The Illinois law contains provisions practically identical with those quoted. The articles of incorporation of this organization follow very closely the outlines of the statute.

The question which now confronts us is whether a corporation organized under the Co-operative Marketing Act of Illinois is a corporation within the exempted class of corporations under the provisions of section 6373-1 of the General Code of Ohio, namely, a corporation not for profit.

In the case of *Read vs. Tidewater Coal Exchange*, 116 Atl. Rep. 898, the claim was made that under the law of Delaware the only kind of corporations that could be organized as corporations not for profit, and therefore without stock, were corporations of a charitable, social, religious or eleemosynary character. This corporation was a corporation without capital stock, although organized by persons interested in the coal industry, for the purpose of aiding their business and for their mutual help, and the question presented was whether the corporation was required to pay a franchise tax. In the discussion, some general principles of law are laid down. The pertinent part of the opinion of the Court reads as follows:

"Under the statutes of some states, separate provisions are made for the incorporation of corporations for pecuniary profit as distinguished from corporations not for pecuniary profit. Within the meaning of such a provision, a corporation for pecuniary profit has been defined to be a corporation organized for the pecuniary profit of its stockholders or members."

In continuing, the Court says:

"Whether dividends are expected to be paid may, generally speaking, be taken as the test by which we are to determine whether or not a given corporation is organized for profit."

In the case of *The Celina Telephone Company vs. The Union Center Mutual Telephone Association*, 102 Ohio St. 478, the defendant, The Mutual Telephone Company,

urged that it was a partnership association not for profit, and for that reason that it came within the exempted class of telephone companies and was not required to comply with the Public Utilities Act of this state in obtaining a certificate of public convenience and necessity.

The opinion, by Hough, J., discusses the question of whether or not a mutual telephone association is a public utility "not for profit", thereby being exempted from complying with the Public Utilities Act. The opinion says, in part :

"Does the filing of articles of incorporation in which the declaration is made that it is not for profit, and on which the charter is issued, govern or determine this question? Is the issuance of capital stock controlling, or is it whether a business is to be engaged in, and operated with consideration of the character of that business and the method of conducting it, that is the true test?

"We think the latter. In other words, it is the character of the business and the method of conducting that business that controls. * * *

"In our opinion, this claim is no more than a legal conclusion, and totally at odds with what the company has done and what under its own claims it contemplates doing."

The conclusion reached in the above case was that the defendant should comply with the Public Utilities Act before engaging in the public telephone business.

In the case of *State, ex rel. the Attorney General, vs. The Home Co-operative Union* 63 Ohio St. 547, the Supreme Court of Ohio held that although the articles of incorporation stated that it was a corporation not for profit and that there was no capital stock, yet the corporation was held to be a corporation necessarily for profit.

The Securities Law of Ohio, exempting corporations not for profit, was filed in the office of the Secretary of State on May 10, 1913, and is found in 103 Ohio Laws, 743. Section 6373-1, General Code, as enacted at that time, provided "* * * exempt corporations not for profit, organized under the laws of this state * * *."

The same General Assembly, at its special session in 1914, amended the above section by striking out the words "organized under the laws of this state." It was evidently the intention of the legislature to extend the exemption under Section 6373-1 to corporations not for profit, (as a matter of fact) organized under the laws of other states.

It will be noted that the Grain Marketing Act of Illinois provides :

"The association shall limit its dividend of stock to any amount not greater than eight per cent (8%) per annum; and all other net income, less specified reserves not in excess of two per cent (2%) per year, shall be distributed back to its members only on the basis of percentage."

If the stock of the Grain Marketing Company is exempt from the purview of the Securities Law of Ohio, said exemption must be found in the Co-operative Marketing Act in this state.

Section 24 of the Co-operative Marketing Act of Ohio reads as follows :

"Any corporation or association heretofore or hereafter organized under generally similar laws of another state shall be allowed to carry on any proper activities, operations, and functions in this state upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state * * *."

In other words, the Grain Marketing Act of Ohio requires that any corporation

or association organized under the Grain Marketing Act of another state, under generally similar laws, shall be allowed to carry on any proper activity in this state, only upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state. No preference is shown co-operative marketing associations organized in other states seeking to operate in this state, and they are required to comply with all the laws applicable to foreign corporations. Had the legislature intended to exempt the stock of co-operative marketing associations organized under generally similar laws of another state from the purview of the Securities Act of this state, it would have been easy to have so stated in the act itself. No language to this effect is found contained therein.

Where an exemption from the operation of a particular law is claimed by a person or corporation, the general rule of construction is strictly against the person or corporation claiming the exemption.

In conclusion, it is the opinion of this department, and you are so advised, that the real test of whether a corporation is a corporation not for profit, as distinguished from corporations for profit, is the character of the business in which the corporation is engaged and the method of conducting that business, and not the articles of incorporation alone. It is a question of fact, to be determined by the Chief of the Division of Securities, whether a corporation is or is not a corporation not for profit in each particular case; and the Chief of the Division of Securities is not bound by the statement in the articles of incorporation or the laws of a foreign state that it is a corporation not for profit.

It is deemed that an answer to your second question is unnecessary because of the conclusion hereinbefore arrived at.

Respectfully,

C. C. CRABBE,
Attorney-General.

2388.

APPROVAL, BONDS OF PORTAGE TOWNSHIP, OTTAWA COUNTY.

COLUMBUS, OHIO, April 15, 1925.

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

2389.

APPROVAL, BONDS OF MINERAL CITY VILLAGE SCHOOL DISTRICT,
TUSCARAWAS COUNTY, \$20,100.00.

COLUMBUS, OHIO, April 17, 1925.

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