

2426.

APPROVAL, BONDS OF KEY RIDGE RURAL SCHOOL DISTRICT, BELMONT COUNTY, \$8,000.00.

COLUMBUS, OHIO, April 30, 1925.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2427.

APPROVAL, BONDS OF HOMER TOWNSHIP RURAL SCHOOL DISTRICT, MORGAN COUNTY, \$3,500.00.

COLUMBUS, OHIO, April 30, 1925.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2428.

GRAIN MARKETING COMPANY REQUIRED TO COMPLY WITH SECURITIES LAWS OF OHIO BEFORE DISPOSING OF ITS STOCK IN THIS STATE.

SYLLABUS:

Upon the facts submitted, the Grain Marketing Company of Chicago is not exempted from complying with the securities laws of this state. Said corporation is required to make application for a certificate of compliance before disposing of its stock in Ohio.

COLUMBUS, OHIO, May 1, 1925.

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

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

“I am in receipt of your opinion No. 2387 in the above entitled matter. I note that you say:

“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.'

"The following are the pertinent facts in the matter :

"The Grain Marketing Company is a corporation incorporated under and by virtue of the co-operative act of the state of Illinois and is incorporated 'not for profit,' as provided for in the act. The said act is, as you point out in your opinion, similar to the co-operative act of Ohio. The Grain Marketing Company has purchased large elevators and elevator equipment in Chicago and other places. The charter of the corporation authorizes them to issue preferred stock and common stock. The preferred stock is to pay dividends of 8% and is callable at certain periods. This stock is to be put on the market and will be sold to anyone who desires to buy the same. The common stock is to be sold exclusively to producers and at \$1.00 per share, and no one will be sold more than one share.

"The company deals and proposes to deal in grain, not less than 50% to be bought from members, and to sell the grain anywhere it can be sold to advantage.

"No dividends are to be paid or can be paid, under the charter, on the common stock. At the close of the year's business, if the company has any surplus after paying its expenses and dividends on its preferred stock, representing the difference between what the company had advanced to its members from whom they had bought grain and what they had received in selling and any other income that they might have, the company is to pay out, as provided for in its by-laws, charter and the co-operative act, not as dividends, to its stockholders, as such, or to their members, as such, but to their 'members as producers.'

"There seems to be no dispute that the above are the pertinent facts involved so far as the legal question is concerned.

"As to the value of the corporation's property, or whether the stock is being offered on 'grossly unfair terms,' etc., we are not asking for a legal opinion.

"I respectfully request your opinion :

"First—In view of the conceded facts stated above, whether the Grain Marketing Company is entitled to an exemption in Ohio under the securities law, or whether it is necessary for it to make application for a certificate of compliance in order to legally dispose of its stock in Ohio.

"Second—If it is decided that 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?"

The essential question to be determined is whether a corporation organized and operated as set out in the statement of facts contained in your letter is a corporation not for profit as distinguished from a corporation for profit, within the purview of the securities law of this state.

In the consideration of this question it is important to consider some cases in which the word "profit" is defined.

The supreme court of the United States in the case of *The Providence Rubber Co. vs. Goodyear*, 76 U. S. 788, define the word "profits" as follows :

"Profit is the gain made on any business or investment when both the receipts and payments are taken into consideration."

The Missouri court of appeals give the following definition in the case of *Morrow vs. Missouri Pacific Railway Co.*, 123 S. W. 1034:

"The word 'profits' in a manufacturing or agricultural business means the net earnings or the excess of returns of expenditures, and relates to any excess which remains after deducting from the returns the operating expenses and depreciation in capital, and also, in a proper case, interest on capital employed."

Webster defines the word "profits" as:

"Acquisition beyond expenditures; excess of value received for producing, keeping, or selling over cost; hence, pecuniary gain in any transaction or occupation."

It is noted that your statement of fact contains the following language:

"The preferred stock is to pay dividends of eight per cent and is callable at certain periods. This stock is to be put on the market and will be sold to anyone who desires to buy the same."

From the foregoing, it is evident, that the Grain Marketing Company expects to make profit on the business it conducts, otherwise there would be no profits from which a dividend could be declared.

The supreme court of the United States in the case of *Mobile and O. R. Co. vs. state of Tennessee*, 153 U. S. page 486, lays down the rule that dividends can rightfully be paid only out of profits and profits are measured by the amount of net earnings.

Section 8724 of the General Code of Ohio, provides as follows:

"Directors of a corporation organized under the laws of this state shall not make dividends except from surplus profits arising from its business."

If the stock of the Grain Marketing Company is entitled to an exemption under the securities law of Ohio such exemption must be found in the laws of this state. Section 10186-1 of the General Code, reads as follows:

"As used in this act (a) the term 'agricultural products' shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products; (b) the term 'member' shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock; (c) the term 'association' means any corporation organized under this act; and (d) the term 'person' shall include individuals, firms, partnerships, corporations and associations. 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."

This section specifically says:

"Associations organized hereunder shall be deemed non-profit, inasmuch as they are not organized to make profit for themselves * * *."

It is evident by the wording of this section that the legislature meant only to include corporations organized under the co-operative marketing act of Ohio.

In section 10186-24 of the General Code, which is section 24 of the co-operative marketing act, the legislature provides that "corporations or associations organized under generally similar laws of other states seeking to do business in this state, shall be allowed to carry on any proper activities * * * in this state upon compliance with the general regulations applicable to foreign corporations desiring to do business in this state" * * *.

We fail to find any provision in the co-operative marketing act which attempts to classify associations or corporations organized under generally similar laws of another state as being non-profit corporations.

It is not deemed necessary to review the authorities cited and quoted in opinion No. 2387 rendered by this department April 16, 1925, and this opinion should be read and considered as a supplemental opinion to the one previously rendered on this subject.

In answer to your first question, it is the opinion of this department, based upon the facts as found by you and stated in your communication, that the Grain Marketing Company is not a corporation not for profit within the purview of the securities act of this state. It, therefore, follows that said corporation is not exempted from complying with the securities laws of Ohio and the Grain Marketing Company is required to make application for a certificate of compliance before disposing of its stock in Ohio.

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.

2429.

SINGLE COUNTY DITCHES—METHOD OF LEVYING ASSESSMENTS WITHIN A MUNICIPALITY.

SYLLABUS:

Sections 6454, 6455 and 6484 G. C., provide a method of levying assessments within a municipality for single county ditches.

COLUMBUS, OHIO, May 1, 1925.

HON. CHARLES B. COOK, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I am in receipt of your communication as follows:

"In re interpretation of ditch law.

Replying to yours of April 3rd, relative to the above, asking for further information, would say that we have two or three different ditches under consideration. In one, the petition was signed by parties living in the township. The ditch arose in the township, passing into the incorporated village and there emptied into a creek which ran through the village.