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THE STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

SALT LAKE CITY

June 24, 1942.

Honorable Lawrence Taylor
Director Securities Commission
Department of Business Regulation
B U I L D I N G

Dear Mr. Taylor:

Reference is made to your letter of June 9, 1942, in which you have requested my opinion as to whether or not the issuance and sale of certificates of membership or certificates of interest to members of non-profit agricultural cooperative associations are subject to Title 82 of the Revised Statutes of Utah, 1933, which is better known as the Securities Act of the State of Utah. As you have stated in your letter, your inquiry has been prompted through correspondence with the Regional Attorney of the Federal Farm Securities Administration, whose letters you have enclosed for my examination and consideration.

The question presented has, to my knowledge, never been presented to the courts of this State and therefore our solution of this problem must depend upon a consideration of the intention of the Legislature, as expressed in Title 82, supra, and Chapter 2, Laws of Utah, 1937, which is an act concerning the creation of agricultural cooperative associations within the State of Utah--and, of course, from the remarks that have been previously made upon related subjects by the Supreme Court of this State and by the Superior Courts of other jurisdictions.

In Section 82-1-5 of the Securities Act of this State it is stated:

"The provisions of this chapter shall not apply to:

"(5) Any security issued by a corporation organized exclusively for educational, benevolent, fraternal, charitable or reformatory purposes and not for pecuniary profit, no part of the net earnings of which inures to the benefit of any private stockholder or individual."

It could be held, following a careful consideration of the above language, that, strictly speaking, an agricultural cooperative association is not exclusively educational, benevolent, fraternal, charitable or reformatory. However, these subject cooperatives are not formed primarily for profit but are organized under specific legislative authorization to encourage the farmer to better his standard of living through an organized control of the sale of his products.

In Section 2 (f) of Chapter 2, Laws of Utah, 1937, it is provided:

"Associations shall be classified as and deemed to be non-profit corporations, inasmuch as their primary object is not to pay dividends

on invested capital, but to render service and provide means and facilities by or through which the producers of agricultural products may receive a reasonable and fair return for their products."

Of course, if we would strictly analyze the objectives of the agricultural cooperative associations perhaps we would, in the end, determine that through the cooperative the farmer would realize some profit. However, the profit realized is not the result of the return on invested capital such as the ordinary financial investment but is a return, or savings, brought about through the service of the cooperative in the sale of the agricultural commodities or products. Therefore, it is my opinion that the purchase of the membership certificate which permits the farmer to participate in the cooperative association is not the purchase of a security within the contemplation of the Utah State Securities Commission Act.

It was not the intention of the Legislature in enacting the Securities Act which was drafted to form a "Little Blue Sky Law" to hold that all forms of contracts or investments should be classified as purchases of securities. The act was primarily aimed to protect the public in transactions which are speculative in nature. In the case of *Lewis v. Creasey Corporation*, 248 S. W. 1046 (Ky.) the court remarked:

"We, therefore conclude as the cases referred to hold, that the primary purpose of Blue Sky Laws is to protect investors from investments in securities whereby a profit is promised and expected without any active efforts on the part of the investor, and which scheme contemplates that the company or individual who receives the investment will employ it himself or itself in such a manner as to reap a profit to the holder of the sold security; and that it was not intended to apply to contracts containing mutual obligations, such as are daily entered into in commercial life, and from which a profit can only be reaped by the uses which the investor alone makes of them..."

It is obvious from the authorities in the case that the purchase of securities involves the outlay of money or other consideration with the expectation of profit absenting any other effort upon the part of the investor.

In the agricultural cooperative association each member must contribute not only his original price of the membership certificate but also he must continue to advance the products of his farming operations to the cooperative, and also participate in the active management of the same. The true cooperative cannot hope to survive without such participation on the part of all members, both in production and active management.

It may be interesting at this time to note that in the case of *National Bank of the Republic v. Price*, 234 Pac. 231, the Supreme Court of the State of Utah had to determine whether or not certain stock certificates sold to beet farmers in the State of Utah were subject to the regulations of the Securities Commission of this State. It was argued in the case that since the corporation sold only to certain beet producers who contracted with the corporation to furnish a definite acreage of beets yearly for the uses of the corporation that such a company was a cooperative and not subject to the Securities Act. The decision in this case was rendered in 1923 and

the Court remarked that although the company involved claimed it was a cooperative organization and not a corporation, in the strict or ordinary sense in which the word "corporation" is used, that under the laws of this State a corporation cannot be created except by statute as it is a mere creature of law, and that the statutes of the State make no provision for a cooperative corporation. The Court further stated:

"The fact that a comprehensive plan for securing funds by selling corporate stock was adopted and that contracts for growing beets, an integral part of the plan, were to be secured at the same time, from the same persons buying the stock, did not change the nature of the transaction and transmute into a cooperative agreement for raising beets that which was essentially a stock selling scheme by the corporation for the purpose of securing capital with which to build a sugar factory."

Of course, since the formation of agricultural cooperatives had not been authorized at the time of the decision above referred to, the case cannot be definite authority for the question here involved. However, it is interesting to note that the subject was discussed and that in view of the fact the court said that the company was engaged in a stock selling scheme, the true cooperative cannot be given such a description by our court at this time.

The Legislature of this State, in passing an act for the specific purpose of authorizing the formation of agricultural cooperatives, declared in Section 1 thereof:

"It is the declared policy of this state, as one means of improving the economic position of agriculture, to encourage the organization of producers of agricultural products into effective associations under the control of such producers, and to that end this act should be liberally construed."

Under such a policy it would not be consistent for the administrative officers of this State to hold that such cooperatives are speculative schemes requiring the same supervision that is accorded ordinary corporations under the Securities Act of this State and, therefore, it is my conclusion that certificates of membership in cooperative associations which are incorporated under the authority of Chapter 2, Laws of Utah, 1937, do not require registration before the Utah State Securities Commission.

It is not the purpose of this writing to declare that all cooperatives are exempt from the provisions of the Securities Act, but only those which are the subject of your inquiry; for it has come to my attention that ~~all~~ all cooperatives are agricultural cooperatives and from a summary consideration of the entire field many of the certificates of membership in such organizations may fall within the definition of a security, as set forth in Section 82-1-4 of the Securities Act.

Yours very truly,

S/ Grover A. Giles,

Attorney General

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