

Opinion No. 23-3666

January 31, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: State Corporation Commission, Santa Fe, New Mexico. Chap. 29, Laws of 1921.

A New Mexico Corporation Organized not for Profit has no Authority to Issue Stock.

OPINION

{*11} This inquiry arises on the question of a corporation organized in New Mexico not for profit, but where it is desired to sell securities to finance the institution concerned. The State Corporation Commission asks if it is possible for such a corporation to issue common and preferred stock and to sell the preferred stock while the common stock is held in its entirety by the person whose property is put into the corporation to guarantee the payment of preferred stock and bonds issued by the corporation. It is stated further that upon final payment for all preferred stock and bonds the property will be returned to the original owner.

I do not understand the plan in contemplation, but it is probably unnecessary to inquire further because I think there is no authority whatever, for the issuance of any kind of stock by a corporation organized not for profit in this state. The issuance of stock is authorized by Section 902 of the Code of 1915 by corporations organized under Article I of the Chapter relating to corporations, but corporations not for profit are organized under Article IV and are nowhere in said Article IV, authorized to have any capital or issue any shares of stock of any kind. Whether a corporation, without capital provided for in its charter, may create and issue capital stock is certainly a fundamental and radical matter in corporation law, and it is usually held that a corporation has no implied authority to issue stock in the absence of a specific power conferred by its charter, or the general statute under which it is organized. In the case of *Cooke vs. Marshall* 64 L. R. A. 413, 191 Pa. 315, the Supreme Court of Pennsylvania held that a Cemetery Association, organized under a specific statute which contained no authorization for capital stock had no implied power to issue any. The Court said:

"If the charter conferred no right or power to create capital stock it is difficult to understand how any right to create and issue such stock has any existence."

A corporation not for profit can be organized in this state only under the authority of Article IV of the Chapter on corporations {*12} which consists of Sections 1050 to 1061, Code of 1915. This article does not authorize corporations not for profit to have capital stock, and I think that no such right can be implied. Corporations for profit, organized under Article I of the Chapter on Corporations are, of course, specifically authorized and

required to have capital stock, and provision is made for the issuance of both preferred and common stock.

The statutes of New Mexico, relating to corporations organized not for profit provide for the mortgaging of property by the Trustees for the purpose of raising money, and I think that the plan that is above outlined is not only unnecessary but unlawful.