

RHODES, BLISS and HEFFERMAN, JJ., concur, CRAPSER, J., dissents on the ground that a corporation may not be formed for the practice of optometry either through agents or licensed optometrists or otherwise.

Order affirmed, with fifty dollars costs and disbursements.

In the Matter of ELIZABETH DICKSON et al., Respondents, against EDWARD J. FLYNN, as Secretary of State, Appellant.

OPTOMETRICAL SOCIETY OF THE CITY OF NEW YORK ET AL. INTERVENERS,
APPELLANTS

Corporations—optometry—certificate of incorporation to carry on optical business and employ qualified optometrists to examine eyes of customers may not be properly construed as authorizing practice of optometry by corporation.

A certificate of incorporation to carry on a general optical business, employ qualified optometrists to attend to sales of spectacles, eyeglasses and lenses and examine the eyes of customers in connection with such sales, conforms with the provision of section 1432-a of the Education Law (Cons. Laws, ch. 16) and may not be properly construed as authorizing the practice of optometry by the corporation.

Matter of Dickson v. Flynn, 246 App. Div. 341, affirmed.

Argued January 4, 1937; decided January 12, 1937.

APPEALS from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 28, 1936, which affirmed an order of Special Term granting a motion by petitioners for a peremptory order of mandamus to compel the Secretary of State to file and record a certificate of incorporation of the Four-Boro Optical Corporation. The certificate provided that the purposes for which the corporation was to be formed were, in part, as follows: "to carry on a general optical business; to sell at retail spectacles, eyeglasses and lenses for the correction of vision, provided that duly qualified optometrists be in charge of and in personal attendance at the booths, counters or places where such articles are sold in the respective stores or established places of business of this corporation; to employ duly qualified optometrists for the purpose of being in charge of and in personal attendance at the booths, counters or places where this corporation sells at retail spectacles, eyeglasses and lenses for the correction of vision in the respective stores or established places of business of this corporation and for the purpose of examining the eyes of customers of this corporation where such duly licensed optometrists, while in charge of and in personal attendance at such booths, counters or places, deem the same to be necessary in connection with the sale at retail by this corporation of spectacles, eyeglasses and lenses for the correction of vision * * *." Upon the submission of such certificate of incorporation for filing the Secretary of State objected to the provisions thereof relating to the employment or placing in charge of sales of duly qualified optometrists. The objection, as it appeared in the affidavit of the acting chief of the division of corporations, was that such provisions purported to confer upon a corporation authority to "employ duly qualified optometrists * * * for the purpose of examining the eyes of customers of this corporation where such duly licensed optometrists, while in charge of and in personal attendance at such booths, counters or places, deem the same to be necessary in connection with the sale at retail by this corporation of spectacles, eyeglasses and lenses for the correction of vision." Section 1432-a of the Education Law (Cons. Laws, ch. 16) provides, in part, that it shall be unlawful for any corporation "to sell, at retail, as merchandise, in any store or established place of business in the State, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and [in] personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business."

John J. Bennett, Jr., Attorney-General (*Dorothy U. Smith* and *Henry Epstein* of counsel), for Secretary of State, appellant. The authority under the certificate to sell at retail spectacles, eyeglasses and lenses for the correction of vision not being expressly limited to the sale of such articles as merchandise, the certificate is not in conformity with section 1432-a of the Education Law (Cons. Laws, ch. 16.) (*Roschen v. Ward*; *Kresge Co. v. Ward*, 279 U.S. 337; *Matter of Co-Operative Law Co.*, 198 N.Y. 479; *People v. Woodbury Dermatological Inst.*, 192 N.Y.