4493

1. "FOREIGN CORPORATION ACT" — TO COME WITHIN PURVIEW, NOT NECESSARY THAT FOREIGN CORPORATION TRANSACT ALL OF ITS BUSINESS IN THIS STATE — SUFFICIENT THAT IT TRANSACTS SOME OF ITS BUSINESS IN STATE.

2. FOREIGN CORPORATION ENGAGING IN BUSINESS OF "HOLDING COMPANY" — STATUS WHERE BUSINESS AND CORPORATE AFFAIRS CONDUCTED WITHOUT STATE — OFFICE MAINTAINED IN STATE, SECRETARY AND THREE OR FOUR EMPLOYES KEEP BOOKS AND RECORDS — BANK ACCOUNT USED TO PAY ONLY EXPENSES OF OFFICE — COMPANY DOES NOT TRANSACT BUSINESS WITHIN STATE — SECTION 8625-4 GENERAL CODE.

3. WHEN FOREIGN CORPORATION ENGAGING IN BUSINESS OF "HOLDING COMPANY" PLEDGES ASSETS WITH TRUSTEES AS SECURITY FOR BONDS, THE TRUSTEES TO RECEIVE ALL INCOME, FRUITS AND PROFITS TO PAY OUTSTANDING BONDS AND OFFICE MAINTAINED IN OHIO, SUCH CORPORATION IS TRANSACTING BUSINESS IN OHIO — REQUIRED TO OBTAIN LICENSE.

SYLLABUS:

1. *It is not necessary that a foreign corporation transact all of its business in this state in order to bring it within the provisions of the "Foreign Corporation Act." It is sufficient that it transacts some of its business in this state.*

2. *When a foreign corporation, engaging in the business of a "holding company," conducts all of its business and corporate affairs from without the state, but maintains an office within this state at which the secretary with the aid of three or four employes keeps the books and records of the company and at which city it maintains a bank account for the convenience of the secretary in paying the expenses of such office only, such corporation is not transacting business within this state as such term is used in Section* 8625-4 *of the General Code.*

3. *When a foreign corporation, engaging in the business of a "holding company," pledges substantially all of its assets with trustees as security for the payment of bonds issued by the company, under trust indentures which authorize the trustees to receive all of the income, fruits, and profits arising from such assets and to apply all thereof, other than an amount sufficient to pay the operating expenses and taxes of the company, in payment of the outstanding bonds and the company establishes an office in Ohio for its secretary from which the secretary transacts the corporate affairs of the company, other than those performed by the trustee under authority of the trust indentures, under the direction of its board of directors, such corporation is transacting business in Ohio within the meaning of Section* 8625-4 *of the General Code, and even though the remaining officers of the company reside without this state and the stockholders' and directors' meetings are not held in this state. Such corporation is required by the provisions of the Ohio "Foreign Corporation Act" to obtain a license to so engage in business.*

Columbus, Ohio, December 2, 1941.

Hon. John E. Sweeney, Secretary of State,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion as follows:

"This office has been requested to advise whether or not a foreign corporation operating in Ohio under the following circumstances would be required to secure a license under the Ohio Foreign Corporation Act.

The A Corporation organized under the laws of the State of Maryland, with its principal office in Baltimore, is licensed to transact business in the State of Delaware, and maintains an office in Wilmington where the books, records, and files of the corporation are kept.

The executive officers of the corporation reside outside of the State of Ohio and conduct the affairs of the corporation from without the State of Ohio.

The corporation is a holding company, owning as its principal asset a substantial amount of the stock of The C Company. These shares, together with substantially all of the other assets, are pledged with indenture trustees in New York as collateral security for the corporation's three bond issues. These indentures authorize the trustees to collect the dividends or other

income arising out of the pledged securities and pay the interest accruing with respect to the corporation's outstanding bonds. By agreement between the Corporation and the trustees, assets pledged under the respective indentures may be exchanged for other assets, but under no circumstances does the corporation have the right to withdraw collateral or divert the income therefrom for its own use. Certain funds are released to the corporation for the sole purpose of paying taxes and meeting operating expenses.

The Secretary of the corporation is a resident of Cleveland, and as a matter of convenience to him, the corporation is considering moving its books, records and files from Wilmington to Cleveland, where they would then be maintained. This would necessitate the employment in Ohio of three or four employees for bookkeeping and other clerical work. The corporation would rent office space and maintain a bank account in Ohio for miscellaneous operating expenses. It would also appoint an Ohio co-registrar and a co-transfer agent for its stock, but their activities would be very limited. The executive officers of the corporation would continue to reside outside of Ohio and conduct the affairs of the corporation from without the State.

Your opinion is requested whether under the above statement of facts, the corporation should make application for a license under the Ohio Foreign Corporation Act."

Your inquiry arises by reason of the provisions of Section 8625-4, General Code, which reads:

"No foreign corporation not excepted from the provisions of this act shall transact business in this state unless it shall hold an unexpired and uncanceled license so to do issued by the secretary of state. To procure and maintain a license, a foreign corporation shall file an application, pay a filing fee, file annual reports, pay a license fee in initial and additional installments, and comply with all other requirements of law respecting the maintenance of such license, all as hereinafter provided."

The question of law presented by your inquiry is whether a foreign corporation which performs no acts in Ohio, other than those mentioned in your request, is transacting business in Ohio within the meaning of that term as used in the section above quoted. In an opinion of one of my predecessors in office addressed to one of your predecessors in office, rendered under date of June 15, 1932, and reported in Opinions of the Attorney General for 1932, Volune II, page 771, is contained a general discussion of what constitutes the transaction of business in this state by a foreign corporation within the meaning of the "Foreign Corporation

Act." Such discussion was further supplemented by an opinion of my predecessor found in the same volume at page 835. For the purposes of this opinion I shall assume that you are familiar with the reasoning and contents of such opinions. In the first opinion it was stated that it is generally held that the mere fact that a foreign corporation maintains an office in this state is not evidence that the corporation is transacting business in this state. In other words, it would appear to be the general holding of the courts that the mere maintenance of an office in this state does not constitute the transaction of business within the meaning of the statutes. See Advance Lumber Company v. Moore, 126 Tenn., 313; Hovey v. DeLong Hook and Eye Company, 211 N.Y., 420; Chaney Brothers Company v. Massachusetts, 246 U.S., 147; Alpha Portland Cement Company v. Commonwealth 268 U.S., 203.

Likewise, it is generally held that the mere fact that all or part of the officers and directors of a foreign corporation reside or dwell in another state does not constitute the transaction of business in such state by a foreign corporation. Conley v. Mathieson Alkali Works, 190 U.S., 406; Honeyman v. Colorado Fuel and Iron Company, 133 Fed., 96.

It has been generally held that the mere ownership of a great percentage of the shares of a domestic corporation by a foreign corporation does not constitute its doing business in this state. Peterson v. Chicago R. I. & P. R. Co., 205 U.S., 364; Philadelphia & R. R. Co. v. McKibben, 243 U.S., 264; People's Tobacco Company v. American Tobacco Company, 246 U.S., 79; Cannon Manufacturing Company v. Cudahy Packing Company, 267 U.S., 333; Automotive Material Company v. American Standard Metal Products Company, 327 Ill., 367.

On the other hand, it is generally held that if a foreign corporation maintains an office in some state other than that of its domicile at which its corporate meetings are held and most of its intracorporate affairs are regulated, it is engaged in business in such state. Cheney Brothers Company v. Massachusetts, 246 U.S., 147; Old Dominion Company v. Massachusetts, 237 Mass., 239; Flint v. LeHeup, 199 Mich., 41; Stegan v. American Pigment and Chemical Company, 150 Mo. App., 251; People v. Horn Silver Mining Company, 105 N.Y., 76; Washington-Virginia R. R. Co. v. Real Estate Trust Company, 238 U.S., 185.

As is pointed out in the decisions above cited, it is not necessary that a foreign corporation transact all of its business in a particular state

in order to be engaging in business in that state. Similarly, it is generally held that when a corporation performs the acts for which it is incorporated, it is engaging in business. Cliffs Corporation v. Evatt, 138 O.S., 336.

In Washington-Virginia R. R. Co. v. Real Estate Trust Company, supra, it would appear that substantially all of the corporate business of the company was performed at the office in the foreign state. In Cheney Brothers Company v. Massachusetts, supra, the court considered several different cases, among which were those of the Copper Range Company and the Champion Copper Company, both of which were Michigan corporations maintaining offices at Boston, Massachusetts. The activities of the former at Boston consisted of holding its corporate meetings, receiving monthly dividends from its stockholdings, depositing the moneys in a local bank, paying the expenses of the corporation and three or four times a year paying dividends to its own shareholders. Since such corporation was a holding company it would appear that unless it was engaged in business in Boston, it was not engaged in business at any place. In the latter case the articles of the corporation required the maintenance of the Boston office and the corporate meetings were held at such office which had the control of all of the corporation's finances, both as to receipt and disbursement. In fact, it would appear that the entire executive business of the corporation was there transacted. The only business of the corporation transacted at any other place was the operation of a mine in Michigan which was under the control of the manager there located. He, however, was subject to the control of the board of directors from Boston.

Such cases are but illustrations of the general proposition that if a foreign corporation, by means of continued practice, performs the functions or a part thereof for which it was created within another state, it is "transacting business" or "doing business" within that state. See People, ex rel Stead, v. Chicago I. & L. R. Co., 223 Ill., 581; Kline Brothers and Company v. German Union Fire Insurance Company, 132 N.Y.Supp., 185; Home Lumber Company v. Hopkins, 107 Kan., 153.

In Old Dominion Company v. Commonwealth, 237 Mass., 269, the corporation was incorporated under the laws of Maine, had its principal office in that state wherein it held its stockholders' meetings and kept its records. It operated mining and smelting properties in Arizona. It

also maintained an office in Boston, Massachusetts, from which its treasurer performed his functions. A bank account was maintained in Boston upon which checks were issued as required by the board of directors, not only for dividends but in part for the payment of creditors and as remittances to the manager of the properties in Arizona. The court held such to be transacting business in the state of Massachusetts. Such case was decided on the theory that since the financial offices were maintained in Boston, it was also doing business there.

In Commonwealth v. Wilkes-Barre and Hazleton Railway Company, 251 Pa., 6, the corporation was organized under the laws of New Jersey. One of the direct objects of the corporation was the purchase of stocks and bonds of Pennsylvania corporations. Such corporation kept its transfer books and held its annual meetings in New Jersey. It maintained a bank account in the state of Pennsylvania, held its directors' meetings in such state and conducted all actions of the company, other than those mentioned above, in the state of Pennsylvania and by reason thereof was held to be doing business in the state of Pennsylvania.

The facts contained in your inquiry may be summarized as follows: The A Company, a foreign corporation, has its residence at Baltimore. The business of the company is that of a holding corporation. The chief purpose of the corporation is to own the controlling stock interest in a certain railway company and to exercise the rights incident to such ownership. Substantially, all of the assets of the corporation consist of corporate shares, which assets are pledged under trust indentures which give to the trustees the right to receive all dividends and income arising therefrom and to apply the entire portion thereof in payment of the indebtedness with the exception of such sums as are necessary to pay the operating expenses and taxes of the company. In your inquiry you state that "the executive officers of the corporation reside *outside* of the state of Ohio and conduct the affairs of the corporation from without the state of Ohio." You then state that the secretary of the corporation *is a resident* of Cleveland, Ohio, that it is proposed to remove the books, records and files of the company from Wilmington, Delaware, to Cleveland, where they would be there maintained by the secretary who would have in his employ three or four persons and have a bank account for miscellaneous operating expenses in that city, and that a co-registrar and a co-transfer agent for the company's stock would be there appointed. You then state that "the executive officers would continue to reside out-

side of Ohio and conduct the affairs of the corporation from without the state."

No categorical rule may be laid down which will be applicable to all corporations as to what specific acts or combination of acts constitute the transaction of business. To illustrate: If a foreign *manufacturing corporation* were to own the controlling shares in an affiliated or subsidiary Ohio corporation, the certificates evidencing such ownership being maintained and controlled by its agents in Ohio from an office located in such state by the foreign corporation and such shares were voted by such agents and the dividends accruing thereon were collected by such agents and remitted to the home office, but which corporation performed no other intrastate functions at such office, it is highly probable that courts would hold that such corporation by reason of the performance of such acts was not engaged in or doing business in Ohio. However, if such corporation was formed as a holding company for the purpose of holding title to such shares, voting the same, collecting dividends thereon and distributing the net profits among its shareholders, the performance of such acts would probably be held to be the performance of or doing business in the state of Ohio. See Rhode Island Hospital Trust Company v. Rhodes, 37 R.I., 141; Cliffs Corporation v. Evatt, 138 O.S., 336; Cheney Brothers Company v. Massachusetts, 246 U.S., 147.

Some of the facts contained in your request by reason of the holdings of the court do not seem material to your inquiry. My examination of the reported decisions concerning the question as to what constitutes the doing of business in this state fails to disclose that the residence of the corporate officers has been given much consideration in determining whether the corporation of which they are officers is transacting business within the state. From the facts stated in your inquiry it does not appear that the financial affairs of the corporation are to be conducted from the Ohio office. It does not appear that the financial affairs of the corporation, other than those conducted by the trustee-pledgees, are to be transacted in Ohio by the secretary. On the other hand, it does not definitely appear that all of the affairs of the company, other than those transacted by the trustee-pledgees, are not to be carried on and performed from the Ohio office. By reason of such fact it is impossible for me to categorically answer your inquiry. However, it would seem to me that in view of the authorities above cited, the company in question would be engaged in the transaction of business in Ohio if it performed all of the

executive duties in Ohio which it is authorized to perform or, in other words, all executive functions other than those performed by the trustee-pledgees under authority of the pledge agreement. On the other hand, if the corporation, for reasons of convenience, maintains an office in Cleveland for the convenience of its secretary and there employs assistants to aid such secretary in the performance of his duties as to the maintaining of the records of the company, it would seem that by reason of such conduct merely the corporation would not be engaging in business in Ohio.

Specifically answering your inquiry, it is my opinion that:

1. It is not necessary that a foreign corporation transact all of its business in this state in order to bring it within the provisions of the "Foreign Corporation Act." It is sufficient that it transacts *some* of its business in this state.

2. When a foreign corporation, engaging in the business of a "holding company," conducts all of its business and corporate affairs from without the state, but maintains an office within this state at which the secretary with the aid of three or four employes keeps the books and records of the company and at which city it maintains a bank account for the convenience of the secretary in paying the expenses of such office only, such corporation is not transacting business within this state as such term is used in Section 8625-4 of the General Code.

3. When a foreign corporation, engaging in the business of a "holding company," pledges substantially all of its assets with trustees as security for the payment of bonds issued by the company, under trust indentures which authorize the trustees to receive all of the income, fruits and profits arising from such assets and to apply all thereof, other than an amount sufficient to pay the operating expenses and taxes of the company, in payment of the outstanding bonds and the company establishes an office in Ohio for its secretary from which the secretary transacts the corporate affairs of the company, other than those performed by the trustee under authority of the trust indentures, under the direction of its board of directors, such corporation is transacting business in Ohio within the meaning of Section 8625-4 of the General Code, and even though the remaining officers of the company reside without this state and the stock-

holders' and directors' meetings are not held in this state. Such corporation is required by the provisions of the Ohio "Foreign Corporation Act" to obtain a license to so engage in business.

Respectfully,

THOMAS J. HERBERT,

Attorney General.