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FOREIGN CORPORATION—MAY BE GRANTED LICENSE TO TRANSACT ANY BUSINESS IN OHIO NOT FORBIDDEN TO DOMESTIC CORPORATIONS—FOREIGN CORPORATION AUTHORIZED BY CHARTER OR ARTICLE OF INCORPORATION TO TRANSACT IN OWN STATE BUSINESS FOR WHICH CORPORATIONS MAY NOT BE FORMED IN OHIO—SECTION 8625-4 ET SEQ., G. C.

SYLLABUS:

A foreign corporation may be granted a license under the provisions of Section 8625-4 et seq., General Code, to transact any business in Ohio which is not forbidden to domestic corporations, notwithstanding such foreign corporation is authorized by its charter or articles of incorporation to transact in its own state business for which corporations may not be formed in Ohio.

Columbus, Ohio, June 2, 1945

Hon. Edward J. Hummel, Secretary of State
Columbus, Ohio

Dear Sir:

I acknowledge receipt of your letter requesting my opinion, reading as follows:

> "An application for license under the Ohio Foreign Corporation Act has been presented to this office by Republic Industries Inc., a corporation organized under the laws of the state of Delaware.
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> This corporation is authorized in its articles of incorporation to engage in numerous activities. Among them is the right to engage in and carry on as principal or agent a general architectural, engineering, contracting and constructing business.
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> Section 1083-18 provides: 'No corporation shall hereafter be granted a charter to engage in the practice of professional engineering or surveying nor shall any corporation which is hereafter formed, use or assume a name involving the word "engineer" or "engineering" or any modification or derivative of such form except a non-profit corporation.'
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> Your opinion No. 114 dated February 8, 1945, held that after the effective date of section 1083-18 of the General Code, to wit, August 6, 1943, a foreign corporation organized for profit cannot be granted a license to transact business in Ohio if either the word 'engineer' or 'engineering' forms a part of its corporate name, regardless of when the time of the use of such name was authorized in the state of its incorporation. Your opinion does not, except by implication, hold that a foreign corporation may not be licensed to transact business in Ohio for the purpose of practicing the profession of engineering. The name of the applicant in this case does not contain words which are prohibited under section 1083-18, but is legally authorized to carry on the practice of professional engineering in the state of its incorporation. Notwithstanding the authority granted by the state of its domicile the corporation attempts to secure a license in Ohio for the purpose of transacting such business only as is permitted to be transacted by domestic corporations. Such limitation is contained in the application and would be supplemented by an affidavit of an officer of the corporation to the effect that the corporation would refrain from engaging in the practice of professional engineering in the state of Ohio.

Your opinion is requested upon the following question:

> May a foreign corporation be granted a license under the Ohio Foreign Corporation Act, whose articles provide in part for the practice of a profession when such right is denied domestic corporations; provided further, the foreign corporation agrees to refrain from any activities in Ohio which are not permitted to be engaged in by domestic corporations?
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> If your answer to the above question is in the negative, could the Secretary of State issue a license to this foreign corporation, upon receipt of satisfactory proof that an amendment to its articles of incorporation would be filed and recorded within thirty days in the state of its domicile, eliminating the objectionable provisions from its articles of incorporation?"

Underlying the question of admission of a company organized under the laws of one state to do business in another, it is well to note that under the principle of comity, such foreign corporation is permitted to enter another state and there to transact business *without leave or license, unless prohibited or restricted* by the laws of the state to which admittance is sought. In other words, such right does not arise by virtue of statutes but exists independently of them unless and until restricted. As stated in 20 C. J. S. page 13:

> "Under principles of comity, and *except as otherwise provided by constitutional or statutory provisions,* * * * a corporation created by any state or nation is permitted to enter other states, and there to exercise all legitimate powers conferred on it and to carry on as a corporation any business not prohibited by the local laws or against the local public policy. The rules of comity are subject to local modification by the lawmaking power, but until so modified they have the controlling force of legal obligation, and it is the duty of the courts to observe and enforce them until the sovereign otherwise directs." (Emphasis added.)

U. S. National Carbon Refining Company v. Bankers Mortgage Company, 77 F. 2d, 614.

Magna Oil & Refining Company v. White Star, 280 F. 52.

It is generally recognized that it is within the power and discretion of a state to require foreign corporations, as a condition to the right to do business within the state, to take out a license or permit from the Secretary of State or other designated officer, giving it authority or permission to do

so, and upon compliance therewith the transaction has been held to constitute a contract between the corporation and the state. 20 C. J. S. page 40.

In 20 C. J. S. page 42, the following proposition as to the right of a state to limit a foreign corporation to those duties and powers which a domestic corporation may exercise, is stated:

> "A state may impose on foreign corporations, which seek to come within its limits to conduct their business, the condition that they shall be subjected to the duties and obligations of domestic corporations, and, where a corporation possesses powers under its charter which cannot be exercised by a domestic corporation, permission to do business within the state will allow it to exercise only that part of its powers which might be exercised by domestic corporations. * * *."

The general power of the state to impose terms and conditions upon which foreign corporations may be admitted has been frequently recognized by our own courts. Typical of the judicial expressions on this subject we may note the language of Williams, J. in State, ex rel. v. Life Insurance Company, 47 O. S., 167, 179:

> "There can be no doubt of the power of the legislature to prescribe the terms and conditions upon which foreign corporations may be admitted to do business in this state. It was held in Western Union Telegraph Company v. Mayer, 28 Ohio St., 521, that 'foreign corporations can exercise none of their franchises or powers within this state, except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly under its legislative power may impose.' It was said by Johnson, J. in the opinion in that case, that foreign corporations 'may be excluded from the state altogether, or admitted on such terms as the state may prescribe'."

That this right to restrict is to be measured not only by the express language of statutes but by ascertaining the settled policy of the state is stated in 23 Am. Jur. page 204, where it was said:

> "By means of statutes, constitutional provisions, *or a settled policy of the state,* each sovereignty has undoubted power to deny to foreign corporations, or to such of them as fail to comply with the valid conditions it prescribes, the right to do business within its borders, and has equal power, when consenting to their admission, to grant the right subject to any terms or conditions it may deem proper to impose, * * *." (Emphasis added.)

Coming then, to the statutes relating to the licensing of foreign corporations, we note the provisions of Section 8625-4, General Code which reads as follows:

> "No foreign corporation not excepted from the provisions of this act (G. C. secs. 8625-1 to 8625-33) 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."

Section 8625-5, General Code, reads in part as follows:

> "To procure a license, a foreign corporation for profit shall file with the secretary of state:
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> 1. A complete copy of its articles certified by the secretary of state or other proper official of the state under the laws of which said corporation was incorporated and, if such articles or any part thereof are in a foreign language, so much thereof as is in such foreign language shall be accompanied by an English translation thereof verified by the oath of the translator thereof.
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> 2. An application in such form as the secretary of state shall prescribe, verified by oath of the president, vice-president, secretary or treasurer of such corporation setting forth:
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> (a) The name of the corporation; * * *."

There are certain businesses for the transaction of which corporations may not be formed under Ohio laws. One of these is the practice of a profession. Section 8623-3, General Code. Another is the practice of engineering. Section 1083-18, General Code.

Section 8625-16, General Code, provides in part as follows:

> "No foreign corporation shall transact in this state any business which could not be lawfully transacted by a domestic corporation. Whenever the secretary of state shall find that a foreign corporation licensed to transact business in this state (a) is transacting in this state a business which a domestic corporation could not lawfully transact, * * * then and in any of such events the secretary of state shall give notice thereof by registered mail to such corporation and unless such default be cured within thirty days after the mailing of such notice or within such further pe-

> riod as the secretary of state may grant, the secretary of state shall, upon the expiration of such period, cancel the license of such foreign corporation to transact business in this state and shall give notice thereof by registered mail to the corporation and shall make a notation of such cancellation on his records."

It will be noted by reference to Section 8625-5 supra, that the Secretary of State is authorized to prescribe a form in which the application for a license shall be presented. While the duty is not imposed upon the Secretary of State to pass on the legality under the laws of Ohio of all of the purposes set forth in the charter of the corporation applying, yet in view of the fact that a foreign corporation can not engage in any business which is forbidden to a domestic corporation it would seem obvious that if the Secretary of State upon receipt of the application and examination of the charter filed therewith found the purposes of the corporation to be wholly inconsistent with the laws of the State of Ohio, it would be his right and duty to refuse to issue a charter.

The right of the Secretary of State in this respect was upheld by the Supreme Court in the case of State, ex rel. v. Laylin, 73 O. S. 90, when a license was refused to a foreign corporation because the Secretary maintained that its sole purpose was to practice a profession, which contention the court found to be true. The court therefore refused a writ of mandamus to compel the Secretary of State to issue the license.

It seems to me to follow that if some of the purposes set forth in the charter were legitimate and some not, and that he had knowledge of these facts, he might decline to issue the license except with a limitation to the exercise of such powers as are clearly within the laws of this state. I cannot reach the conclusion that where a variety of purposes are set forth in the charter of the company applying, most of which are quite consistent with our laws and one or more inconsistent therewith, the Secretary of State would be authorized or justified in refusing any license whatsoever to the corporation applying. The contrary is suggested by the quotation which I have already made from 20 C. J. S. where it is stated that where a corporation possesses powers under a charter which can not be exercised by a domestic corporation, "permission to do business within the state will allow it to exercise only that part of its powers which might be exercised by the domestic corporation." Furthermore, when we reexamine Section 8625-16 supra, we note that the power of the Secretary of State

to cancel a license does not arise immediately because the corporation which has been licensed to transact business in this state "is *transacting* in this state a business which a domestic corporation could not lawfully transact," but only when the corporation, after due notice, fails to desist from the unlawful feature of its business. The plain inference is that on ceasing the unlawful acts it may continue to exercise such of its powers as are not forbidden by Ohio laws, wholly independent of the question whether its home charter gives it the right to transact the forbidden business. The plain implication from this provision is that the company accepted its license under an implied agreement to limit its activities to fields allowed by the laws of Ohio and is only subject to the penalty of losing its right when it *persists in transacting* the forbidden business.

Generally speaking, I believe it is and has been the policy of the state to encourage business corporations, wherever organized, to come to Ohio. Many of the state's largest industries are incorporated in other states. Many corporations are formed which intend to extend their operations throughout the nation. It would be absurd to expect them to so limit their express powers and purposes as to cater to all of the various limitations that may be imposed by the other states.

I find in the case of State, ex rel. Bricker, Attorney General v. Buhl Optical Company, 131 O. S. 217, what appears to me to be an indication of the attitude of our courts toward a foreign corporation which has been licensed to do business in Ohio but is violating its permit by carrying on as a part of its operations a forbidden line of business, while at the same time carrying on other lines which are sanctioned by our laws. That was a case wherein it was sought by quo warranto to oust a corporation because it was practicing the profession of optometry, and therefore violating the provisions of Section 8623-3 above referred to, forbidding the organization of a corporation to practice a profession. The court discussed the phases of the company's operations which were legitimate and those which it considered illegal, and concluded its opinion as follows:

> "The relator is not entitled to have the respondent ousted from doing business in the state of Ohio but is entitled to a judgment ousting it from engaging directly or indirectly in the practice of optometry and especially from doing those things which an optical company is forbidden to do as set forth in this opinion."

A similar holding was made in a case decided by the Supreme Court of Washington, to wit, State, ex rel. v. Nichols, 48 Wash. page 605; 94

Pac. 196. Under a law of the state of Washington which prohibited a foreign corporation from carrying on the business of dealing in real estate, the court held that a company which was authorized by the state of its incorporation to deal in real estate and also to manufacture lumber was not forbidden to obtain a license to transact its lumber business in the state of Washington.

It appears to me that the ruling of our Supreme Court in the Buhl Optical case has a direct bearing on your problem. If the court refuses to oust the corporation entirely for violating the law prohibiting it from transacting certain lines of business, it would seem that you would have no authority to bar it entirely from Ohio because it might follow some line which is contrary to the law of the state, though permitted by its charter, particularly if the company expressly disclaims its intention to engage in the forbidden business. Under your power, to which I have called attention, to prescribe the form of the application for license, you might properly require a statement of the types of business which the company asks permission to carry on in Ohio, or require an express renunciation of intention to pursue a line which, while authorized by its charter would be objectionable to Ohio law. However, as I have already pointed out, the company, in accepting a license, would be presumed to have agreed to be bound by the laws of this state, even though such requirement should not be exacted by you as a condition to the issuance of the license.

Respectfully,

HUGH S. JENKINS

Attorney General