

3711.

FOREIGN INSURANCE BROKERS—AUTHORITY OF SUCH REPRESENTATIVES—WHERE DOMESTIC CORPORATION CONTROLLED AND USED TO ASSIST FOREIGN BROKERS— SUPERINTENDENT OF INSURANCE SHOULD NOT LICENSE SUCH AGENTS—WHEN FOREIGN FIRE AND MARINE INSURANCE BROKER SHOULD HAVE LICENSE REVOKED.

1. *A licensed foreign fire and marine insurance broker is without authority to maintain a resident representative in this state, and neither can he send a representative here, for the purpose of negotiating contracts of insurance in his behalf; and this limitation upon his authority cannot be evaded or circumvented by him through the agency of a domestic corporation organized for the ostensible purpose of conducting a legitimate insurance agency business, but which, in fact, was organized and is being managed and used by him and others over whom he exercises a controlling influence, for the ulterior purpose of negotiating contracts of insurance in his behalf.*
2. *A domestic corporation incorporated, controlled and used for such purpose should not be licensed as an insurance agent by the superintendent of insurance.*
3. *A licensed foreign fire and marine insurance broker is without authority to negotiate contracts of insurance in this state for an unlicensed foreign broker.*
4. *The superintendent of insurance would be justified in revoking the license of a foreign fire and marine insurance broker when it is made to appear that the broker is using his license for the purpose of negotiating contracts of insurance in this state for an unlicensed broker, or when it is made to appear that the licensee is practicing a subterfuge for the purpose of evading and circumventing the insurance laws of the state.*
5. *Sections 644, 644-1, 644-2 and 5438 G. C., considered.*

COLUMBUS, OHIO, November 8, 1922.

HON. B. W. GEARHEART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date relative to foreign insurance brokers and the scope of their authority and activities in this state, was duly received. Your inquiry referred only to the fire and marine insurance business, and what is said in this opinion should be understood as applying thereto.

Before coming to a discussion on the specific questions you have submitted, it seems pertinent to call attention to the fact that the Supreme Court of this state has held that the business of insurance in all its phases is a proper subject of legislative regulation and control. In State vs. Ackerman, 51 O. S., 163, the court, speaking of this subject, said:

"Insurance in its early existence, when the nature of the risks assumed were few; and the amount of business small, was done chiefly, if not entirely, by individuals. But in more recent times, it has been extended until it embraces almost every kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people and their property; and has, in consequence, everywhere, become the subject of legislative regulation and control. The several states have enacted laws, designed to place the business within their limits on such

substantial basis as will afford adequate protection to the citizens, and their property. There can be no doubt of the power of the state to do so; nor, that the power extends to the enactment of such laws as its legislative body may deem wise and proper for the purpose, not in conflict with the fundamental law. * * * There has been enacted in this state, an extensive code or system of laws, covering the whole subject of insurance, regulating the incorporation and organization of companies and associations for the transaction of the various kinds of insurance, and prescribing their powers and duties, defining the scope and effect of their policies, and otherwise regulating their business."

An examination of the code or system of laws governing the business of fire and marine insurance in this state discloses that specific provision is made for the licensing by the superintendent of insurance of (a) insurance agents, (b) solicitors for licensed insurance agents, and (c) foreign insurance brokers. See sections 644, 644-1 and 644-2 of the General Code. By reason of their length, these statutes will not be quoted in this opinion, but sufficient reference will be made thereto to disclose their character and application to the particular questions under consideration.

The licensing of insurance agents is provided for by section 644 G. C. The section provides, among other things, that no person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Before granting such license, the statute expressly requires that the superintendent must be satisfied that the prospective agent is a suitable person and intends to hold himself out in good faith as an insurance agent, and the person to be licensed must furnish the superintendent, under oath, a statement giving his name, age, residence, present occupation, occupation for five years next preceding, and such other information as the superintendent may require. The statute also provides for the revocation of the license if it be subsequently determined by the superintendent that the licensee is an unsuitable person to act as agent, etc.

The licensing of solicitors for insurance agents is expressly provided for by section 644-1 G. C. The section provides, among other things, that any insurance agent duly authorized and licensed, as provided in section 644 G. C., may employ such solicitors as he may desire to represent him and his agency. Before issuing the license the superintendent of insurance must be satisfied that the prospective solicitor is a suitable person and intends to hold himself out in good faith as a solicitor of insurance, and such solicitor, before being licensed, is required to file with the superintendent a statement, under oath, giving his name, age, residence, present occupation, occupation for five years next preceding, and such other information as the superintendent may require. The section also provides for the revocation of a solicitor's license if it be subsequently determined by the superintendent that the licensee is unsuitable to act as such solicitor.

The licensing of foreign insurance brokers is regulated and governed by section 644-2 G. C. The section, among other things, provides that the superintendent of insurance may issue to any suitable person resident in any other state, a license to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or effect insurance or reinsurance, with any qualified domestic insurance company or its agent or with the authorized agent in this state of any foreign insurance company duly admitted to do business in this state, and not otherwise, upon certain conditions therein described and set forth. The applicant for a for-

eign broker's license must file with the superintendent an application, under oath, stating, among other things, his name, age, residence and occupation, occupation for five years next preceding, and also that he intends to hold himself out and carry on business in good faith as an insurance broker. The section also requires that the application shall be accompanied by a statement, upon a blank furnished by the superintendent, as to the trustworthiness and competency of the applicant, signed by at least three reputable citizens of this state. The section then goes on to provide that if the superintendent is satisfied that the applicant is trustworthy and competent and intends to hold himself out and carry on business in good faith as an insurance broker, he may issue to him the license applied for. Provision is also made in the section that the superintendent may revoke the license of a foreign insurance broker upon determining that the licensee has not complied with the insurance laws, or is not holding himself out and actually carrying on business as an insurance broker, or is not a suitable person to act as such broker, or has placed insurance or risks in this state in companies or other insurers not authorized to transact business in this state.

Another section bearing upon the question under consideration is section 5438 of the General Code. That section provides, in substance, that no insurance company or agent authorized to transact business in this state, shall write, place, or cause to be written or placed, a policy, renewal of policy or contract of insurance upon property situated or located in this state, except through a legally authorized agent in this state, who shall countersign all policies so issued and enter the payment of such premium upon his record, etc. The section contains two provisos, the first of which provides that any authorized agent of a duly authorized insurance company may procure the insurance of risks in other like companies duly authorized to transact business in the state and may pay a commission thereon to such agent, but that such insurance must be consummated through duly licensed resident agent only of the company taking the risk. The second proviso provides that any authorized agent of a duly authorized insurance company may accept business from such insurance brokers only as are duly authorized and licensed as provided in section 644-2 G. C., and that such agent may pay a commission thereon to such brokers.

Sections 644, 644-1 and 644-2 G. C. hereinabove referred to, and as now in force, are parts of the same act. See 107 Ohio Laws, page 698. That act, in one of its sections, to wit, 644-5, G. C., specifically refers to section 5438, supra, and provides that nothing in the act shall be construed as to modify or repeal its provisions, so that all of the sections referred to should be considered and construed together.

After careful consideration of the questions submitted in your letter and the statutory law of this state regulating and governing insurance agents, solicitors for insurance agents, and foreign insurance brokers, we have reached the conclusion that a foreign insurance broker cannot send his representatives or employes into this state for the purpose of soliciting or negotiating insurance, nor can such foreign insurance broker keep a resident representative or employe in this state for that purpose. The authority of a foreign insurance broker, and the scope of his activities in this state, is specifically pointed out in section 644-2 G. C., and while under that section the foreign insurance broker himself may enter this state for the purpose of negotiating contracts, nevertheless the only persons or companies with whom he may negotiate or through whom he may deal are those specifically enumerated in that statute, to wit, (a) qualified domestic insurance companies, (b) agents of qualified domestic insurance companies, and (c) authorized agents in this state of foreign insurance companies duly admitted to do business in this state.

It will be observed, upon examination, that section 644-2 G. C. not only specifically enumerates the persons or companies with whom foreign brokers may negotiate, but also that it emphasizes the legislative intent that such brokers shall not negotiate with any other persons or companies, by using the prohibitive expression, "*and not otherwise.*"

Support is found for the conclusion just announced in section 644-1 G. C., which provides for the licensing of solicitors for insurance agents. In other words, section 644-1 G. C., as already pointed out, authorizes an insurance agent to employ solicitors to represent him and his agency, and provide for the licensing of such solicitors by the superintendent of insurance, and it seems reasonable to conclude, as we do conclude, that if the legislature had contemplated or intended that a foreign insurance broker might be represented in this state by representatives or employes, it would not only have made provision therefor, but would also have provided for their licensing, as it has done with respect to solicitors for insurance agents. And when we add to this the further observation that section 644-2 G. C. unlike section 644-1 G. C., makes no such provision with respect to foreign insurance brokers, but instead specifically enumerates the persons or agencies and companies with whom or through whom they may negotiate, we feel confirmed in the view already expressed that such brokers cannot send representatives or employes into this state, nor maintain a resident representative or employe here, for the purpose of negotiating contracts in his behalf, but that if they desire to negotiate contracts in his behalf, but that if they desire to negotiate contracts here they must come themselves, personally, and when they do come, their negotiations must be confined exclusively to the agents and companies specifically enumerated in section 644-2 G. C.

A careful examination has been made of the insurance laws and we have been unable to find any provision for the licensing of a representative or employe of a foreign insurance broker, as such, to solicit or negotiate contracts of insurance in this state, and it would seem both logical and reasonable to conclude that since the legislature failed to make such provision, while at the same time making provision for the licensing of insurance agents and their solicitors, it did not intend to permit the representatives or employes of foreign insurance brokers, unlicensed, unrestrained and uncontrolled, to enter the insurance field in this state and negotiate and solicit insurance, and if any such construction or interpretation is to be placed on section 644-2 G. C., the plain result would be a gross discrimination against insurance agents and solicitors for insurance agents, on the one hand, and in favor of the representatives and employes of foreign insurance brokers, on the other hand.

The legislature of West Virginia on April 28, 1921, passed an act providing for the licensing of foreign insurance brokers. See acts of W. Va., 1920 and 1921, pp. 473 et seq. The act appears to be substantially the same as the Ohio law (section 644-2 G. C.) except that it does not go to the extent of authorizing the broker to negotiate directly with domestic insurance companies, as does the Ohio law, but confines his negotiations to the authorized agents of domestic and foreign companies. So far as pertinent to the point now under consideration, it provides as follows:

"The insurance commissioner may, upon receipt of ten dollars, * * * issue to any suitable person, resident in any other state, a license to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or affect insurance or reinsurance with the authorized agent of

any qualified domestic insurance company, or with the authorized agent in this state of any foreign insurance company duly admitted to do business in this state, and not otherwise."

The West Virginia commissioner of insurance recently had occasion to construe this act, with respect to the authority and activities of licensed foreign brokers, and we quote the following from his opinion, viz:

"Such a broker's license does not give you the right to come into the State of West Virginia and solicit business within the State in competition with local resident agents, but only to write such West Virginia business as comes to you as non-resident brokers. If you come into the State, your solicitation or bidding for business must be confined to a local resident agent of the company or companies represented by said broker."

It is an elementary principle that that which the law prohibits being done directly cannot be accomplished indirectly, no matter how ingenious the plan or scheme may be that is resorted to or employed. So, if it should appear to your satisfaction, that a foreign insurance broker licensed by your department has procured his employes, associates, or others over whom he exercises a controlling influence, to join with him in incorporating and organizing a corporation under the laws of this state, for the ostensible purpose of conducting an insurance agency business, and having it licensed as an insurance agent under section 644 G. C., but with the ulterior motive or purpose of being used by him as an agency or medium for the carrying on in this state of his business as a foreign broker, which business he might not otherwise be in a position to negotiate by reason of the fact that the law does not authorize or empower him to have a resident agent or representative here, you would be justified, under such circumstances, in refusing to license such corporation as an insurance agent, and not only that, but by reason of such subterfuge, you would be warranted in finding a foreign insurance broker, who resorts to such schemes to evade the law, to be an unsuitable person to act as broker, and in revoking his license under authority of section 644-2 G. C.; and the mere fact that the capital stock of a corporation, brought into being in such manner and for such ulterior purpose, is divided or arranged by the broker in such way that he owns but fifty per cent thereof, or less, but as a matter of fact is actually controlling the company through his stock ownership and influence over the other stockholders who are of his own selection, would not be sufficient to purge the transaction of its illegality, but, on the contrary, such studied manipulation and placing of the capital stock might very properly be considered as aggravating the situation.

We are not wanting in authority to support what has just been said with respect to companies incorporated or managed for such or kindred purposes. We think such an incorporation and plan comes clearly within the doctrine of *State vs. Standard Oil Company*, 49 O. S., 177. In that case the court says:

"The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for

corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim in *fictione juris subsistit aquitas*, is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. Broom's Legal Maxims, 130. 'It is a certain rule,' says Lord Mansfield, C. J., 'that a fiction of law shall never be contradicted so far as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' Johnson v. Smith, 2 Burr, 962. 'They were invented,' says Brinkerhoff, J., in Wood v. Ferguson, 7 Ohio St. 291, 'for the advancement of justice, and will be applied for no other purpose.' And it is in this sense that they have been constantly understood and supplied in this state. Hood v. Brown, 2 Ohio R., 269; Rossman v. McFarland, 9 Ohio St., 381; Collard's adm'r v. Donaldson, 17 Ohio R., 266."

In determining whether or not the incorporation and organization of a domestic corporation is for the purpose of enabling the foreign insurance broker to bring into being an artificial person which might, on paper, appear to be "a resident of this state," within the meaning of section 644 G. C., to act ostensibly as an insurance agent, when as a matter of fact it is to be used as an agency or tool by the non-resident foreign broker in negotiating contracts of insurance in his interest, you should make inquiry, among other things, to ascertain who conceived the idea of the incorporation and organization, whether or not those who acted as incorporators and those who appear to be stockholders were and are acting bona fide and in their own personal interest, or in the interest of the foreign broker, who financed, advanced and paid the incorporation and organization expenses, who is financing it now and controlling its business policy, who employed the legal talent necessary to prepare the incorporation and other papers, whose money was used by the stockholders in purchasing the shares of stock standing in their names, whether or not there was any understanding or agreement, oral or otherwise, whereby those who appear to be stockholders, and who may have advanced their own funds to acquire stock, are to be reimbursed, either directly or indirectly, by the foreign broker, what control or influence, if any, the foreign broker has been or is exerting over the property, business and affairs of the corporation, and over its officers and stockholders, etc., etc.; and of, upon investigation, you should be of the opinion that the corporation was incorporated and organized and is being used by the foreign insurance broker for the purpose of enabling him to circumvent or evade the statutory limitations or restrictions upon his authority and activity, as described and found in section 644-2 of the General Code, you would be justified, as already indicated, in refusing an agent's license to the corporation, and not only that, but you would be warranted in revoking such license if one has been granted, and also the license of the foreign insurance broker, for the reason, in the first case, that the agent's license is being used for an unauthorized purpose, and in the second case, for the reason that any broker who engages in such a course of conduct is an unsuitable person to act as broker, and hence not entitled to the benefits and protection of our insurance laws.

We are also of the opinion that a resident of another state who has been

granted a foreign broker's license under favor of section 644-2 G. C., should not use his license in the interest of an unlicensed broker. The license is personal to him, and is granted to *him* as *his* authority to negotiate contracts in this state, and not to be used to aid an unlicensed broker in negotiating his contracts. If a non-resident broker desires to negotiate contracts of insurance in this state, and secure the benefits of our insurance laws, he must, himself, meet all the requirements of the Ohio law personal to himself, and which are conditions precedent to the securing of a license, and not attempt to evade these statutory requirements by negotiating through another who has complied with the law and received a license. A licensed foreign broker who uses his license for such purpose would be making an improper use of it. The same considerations which required the licensed broker to secure his license, equally apply to such unlicensed broker, and not only that, but, as already held by us, there is no authority under our insurance laws whereby a foreign broker, whether licensed or unlicensed, can transact business in this state through a representative or employee.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3712.

APPROVAL, CONTRACT OF STATE OF OHIO WITH GRANT-BOULTON COMPANY, COLUMBUS, OHIO, FOR EXTENSION OF WATER SUPPLY LINES TO AGRICULTURAL BUILDINGS ACROSS THE RIVER, OHIO STATE UNIVERSITY, AT A COST OF \$13,875—SURETY BOND EXECUTED BY INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

COLUMBUS, OHIO, November 10, 1922.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (four copies) between the State of Ohio, acting by the Department of Highways and Public Works of the State of Ohio for and on behalf of the Board of Trustees of the Ohio State University, and Grant-Boulton Company, a partnership composed of Earl C. Grant and Carl R. Boulton, of Columbus, Ohio,. This contract is for the extension of the water supply lines to the Agricultural buildings across the river and calls for an expenditure of Thirteen Thousand, Eight Hundred Seventy-five Dollars (\$13,875).

Accompanying said contract is a bond to insure faithful performance, executed by Indemnity Insurance Company of North America.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereof, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.