

4775.

CORPORATION—MAY DO BUSINESS UNDER DIFFERENT NAME
FROM THAT APPEARING IN ARTICLES OF INCORPORATION.

SYLLABUS:

1. *A corporation organized under the laws of this state is not prohibited from doing business under a name other than that appearing in its articles of incorporation.*

2. *Under the provisions of Section 8623-4, General Code, provision may be made in the articles of incorporation of a corporation organized under the General Corporation Act for the use of a name under which such corporation will do business other than its proper name.*

3. *The application of a foreign corporation for a license in Ohio may not be accepted for filing by the Secretary of State if it appears that the name of such corporation is not readily distinguishable from the name of every other corporation, domestic or foreign, authorized to transact business in this state, unless accompanied by the usual consent, notwithstanding the fact that the application may disclose that such corporation is to do business under a name other than its legal name, which is so distinguishable.*

COLUMBUS, OHIO, December 1, 1932.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"I have been asked upon many occasions whether or not a corporation can transact business in Ohio under a trade name or for that matter under any name other than the actual name of the corporation appearing of record in this office. Inquiries have been made both by domestic and foreign corporations.

In view of the new foreign corporation act, G. C. 8625-1, et seq., the question has become of even greater interest due to the fact that section 5 of the new act will not permit the accepting for filing of an application for a license of a foreign corporation if its name is not readily distinguishable from the name of every other corporation, domestic or foreign, already authorized to transact business in this state without the written consent of such other corporation.

In connection with a domestic corporation the question has been raised immediately by a request for advice as to whether or not articles can be accepted for filing which specifically state that the corporation will do business under a name different from the corporate name. For instance, articles may be submitted carrying a corporate name such as the A. B. Company with a provision in the articles authorizing the company to do business as the Blue Front Stores.

In connection with foreign corporations under the new act the question has become immediate through request for advice as to whether or not a license can be issued under the foreign corporation act to a foreign corporation which has a name the same or similar to that of an Ohio corporation if the corporation agrees to use a name other than its own

in the state or if its articles permit it to do business under a name other than its own."

Prior to the enactment of the new Foreign Corporation Act by the 89th General Assembly, there was no provision in the General Code to the effect that before a foreign corporation may be qualified to do business in Ohio it must have a name which is readily distinguishable from every other corporation, domestic or foreign, authorized to transact business in this state. Such a provision is, however, now included, as you state, in Section 8625-5, General Code, being one of the sections of the Foreign Corporation Act. This section provides in so far as pertinent as follows:

"To procure a license, a foreign corporation shall file with the secretary of state:

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2. An application in such form as the secretary of state shall prescribe, verified by the oath of the president, vice-president, secretary or treasurer of such corporation setting forth:

(a) The name of the corporation;

* * * * *

No application for a license shall be accepted for filing if it appears that the name of the foreign corporation is prohibited by law or is not readily distinguishable from the name of every other corporation, domestic or foreign, authorized to transact business in this state unless the written consent of such other corporation, signed by the president or vice-president, be also filed with the secretary of state.

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The General Code of Ohio contains no provisions prohibiting a corporation, either domestic or foreign, from doing business in a name other than that conferred upon it by its articles of incorporation. Section 8623-8, General Code, defines the general corporate capacity and powers of corporations organized under the General Corporation Act of this State. The following portions of this section are pertinent to the subject matter of your inquiry:

"Every corporation of this state, heretofore or hereafter organized, shall have the capacity possessed by natural persons to perform all acts, within or without this state.

Subject to any limitations or restrictions which may be imposed thereon by the articles, every corporation shall have authority to

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Do all acts permitted by this act and all such further acts as are necessary, convenient or expedient to accomplish its stated purposes.

The articles shall constitute an agreement by the directors and officers with the corporation that they will confine the acts of the corporation to those acts which are authorized by the statement of purposes and within such limitations and restrictions as may be imposed by the articles.

No limitation on the exercise of the authority of the corporation shall be asserted in any action between the corporation and any person, except by or on behalf of the corporation against a director or an officer or a person having actual knowledge of such limitation."

It is generally recognized that an individual may do business under a name other than his own. The broad powers conferred upon corporations by Section 8623-8, *supra*, would seem to extend to corporations this same privilege held by natural persons.

There appears to be no reported case in this state directly adjudicating this question. There have been a number of decisions in other states, however, upon the subject and they are not in harmony.

The New York rule is set forth in the case of *Scarsdale Pub. Co.-The Colonial Press vs. Carter*, 116 N. Y. Supp. 731, the fourth and fifth branches of the head-notes being as follows:

"4. A corporation is an artificial creation, having no natural or inherent power, except such as its charter confers.

5. Under Business Corporation Law (Laws 1890, p. 1168, c. 567) §2, subd. 1, providing that the certificate of incorporation shall give the name of the proposed corporation, the name is essential to the existence of a corporation, and its name is a species of property which will be protected, and in its contracts and business dealings it must use the name given to it by the law of its existence."

A similar position has been taken in the Indiana case of *Glass vs. Tipton T. & B. Turnpike Co.*, 32 Ind. 376.

Again in the case of *Svenska Nat. F. i C. vs. Swedish Nat. Assn. et al.*, 205 Ill. App. 428, it was held that "where a corporation has been given a corporate name by its charter, it cannot at the same time acquire, either by usage or prescription, a legal right to a different corporate name." It must be observed, however, that in this case the opinion of the court mentions the fact that Paragraph 220 of Chapter 38, Revised Statutes of Illinois, directly prohibited a corporation from transacting any business under any other or different name than that conferred upon it by its articles of incorporation.

The great weight of authority, however, is contrary to the principles which appear to be established in New York and Indiana. In *Neff vs. Covington Stone and Sand Co.* (Ky.), 55 S. W. 697, it was held that "A corporation may contract by a name other than its corporate name provided it is apparent that it is the contracting party."

In the early case of *Melledge vs. Boston Iron Co.*, 5 Cushing 158, 51 Am. Dec. 59, it was held that "A corporation may have several names for the purpose of transacting its business. Misnomer of corporation in contract does not prevent a recovery thereon against the corporation, if its identity with the corporation intended is pleaded and proved." Again, in the case of *Minot vs. Curtis*, 7 Mass. 441, 444, the court said: "We know not why corporations may not be known by several names, as well as individuals."

Perhaps the most pertinent case is *Ferry vs. Cincinnati Underwriters* (Mich.), 69 N. W. 483. This case involved a matter of garnishment against two Ohio corporations which were both doing business under one name, being a name other than that conferred upon them by their respective articles of incorporation. The name of "Cincinnati Underwriters of Cincinnati, Ohio" was the business name used by "The Eureka Fire and Marine Insurance Company" of Cincinnati, and the "Security Fire Insurance Company" of Cincinnati, Ohio. No exception appears to have been taken to this practice and the court in its opinion recognized the fact that a corporation may have several names, in the following language:

"It is conceded by defendant's counsel that a corporation may have several names, and can be sued in one name or the other, and parol evidence introduced to identify the organization. See *Walrath vs. Campbell*, 28 Mich. 111. The first disclosure in this case shows that the Cincinnati Underwriters is a corporation under the laws of Ohio. The amended disclosure shows that this is a mistake, but that Cincinnati Underwriters is the business name adopted and used by the Eureka Fire & Marine Insurance Company and the Security Fire Insurance Company, and that an indebtedness exists on the part of each of these companies to the principal defendant."

The general rule is, I think, properly summed up in Fletcher Encyclopedia of Corporations, Vol. II, p. 1687, in the following language:

"The rule that a corporation has but one legal name and that that one is the name formally conferred upon it by the state does not mean that the corporation can never act under a different name, nor require that such legal name be used *ipsi simis verbis* in order for the corporation to be bound. While it may be desirable that a corporation act only by its legal name, there being no statutory provision that it must do so a statement that it is only by such name that the corporation can ever be bound would not have the support of the authorities generally. Opposed to any such idea is the rule that a corporation may assume a name, just as a natural person may, for the purpose of carrying on its business, entering into a contract or executing or receiving a conveyance, unless there is some statutory provision to the contrary. If a note or deed is executed by a corporation under an assumed name, it is just as much bound as if it had used its proper name, and the same is true of any other contract. A contract entered into by or with a corporation under an assumed name may be enforced by either of the parties, if the identity of the corporation is established by the proof."

In support of this text are cited numerous cases of Massachusetts, Michigan, Utah, Virginia, West Virginia, New Hampshire and Wisconsin. The conclusion seems inescapable that unless prohibited by statute, corporations may do business under a name other than appearing in their articles of incorporation.

It is my opinion, in view of the foregoing and particularly in view of Section 8623-8, General Code, conferring upon corporations the capacity possessed by natural persons to perform all acts within or without this state, that corporations organized under the laws of this state are not prohibited from doing business under a name other than appearing in their articles of incorporation.

You next inquire as to whether or not domestic corporations may provide in their articles for a name under which they propose to do business other than their official corporate name. Section 8623-4, General Code, lists the provisions which may be included in articles of incorporation. Paragraph 7 of this section provides that such articles may set forth:

"Any lawful provisions which may be desired for the purpose of defining, limiting, and regulating the exercise of the authority of the corporation, or of the directors or of the shareholders or of any class of shareholders, or for the purpose of creating and defining rights and

privileges of the shareholders among themselves. Any provision authorized to be made in the regulations of a corporation may, if desired, be made in its articles."

In view of the foregoing discussion with respect to what I have considered your first question, it is my opinion that under the provisions of Section 8623-4, General Code, provision may be made in the articles of incorporation of a corporation organized under the General Corporation Act for the use of a name under which such corporation will do business other than its proper name.

Coming then to the question with respect to foreign corporations, you inquire as to the issuance of a license under the circumstances which you set forth. Section 8625-5, General Code, provides that to procure a license, a foreign corporation shall file with the Secretary of State an application setting forth "the name of the corporation." This section further provides that "No application for license shall be accepted for filing if it appears that the name of the foreign corporation is prohibited by law or is not readily distinguishable from the name of every other corporation, domestic or foreign, authorized to transact business in this state" unless the application is accompanied by the usual consent. The reference in this section to the name of a foreign corporation is clearly to the legal name of such corporation. It must necessarily follow, therefore, although the articles or application may provide that the corporation will do business under a name other than its legal name, Section 8625-5, General Code, precludes the Secretary of State from accepting for filing such application when the legal name is not distinguishable as therein provided. The language of the section is clear and unambiguous and under such circumstances neither the courts nor administrative officers may write anything into the law which is not there.

It is, accordingly, my opinion that the application of a foreign corporation for a license in Ohio may not be accepted for filing by the Secretary of State if it appears that the name of such corporation is not readily distinguishable from the name of every other corporation, domestic or foreign, authorized to transact business in this state, unless accompanied by the usual consent, notwithstanding the fact that the application may disclose that such corporation is to do business under a name other than its legal name, which is so distinguishable.

Respectfully,

GILBERT BETTMAN,
Attorney General.