

an electric power generating plant in St. Marys, Ohio, such water to be used for the purpose of cooling condensers, for generating steam and for necessary sanitary purposes of the plant owned and operated by the Central Ohio Light and Power Company.

The lease here in question which is one for a term of five years from the first day of January, 1932, and which is for the purpose of giving to said company the right to take water from the feeder from time to time and as occasion may demand for use in its plant, supersedes a prior lease executed under date of June 12, 1929, to the Western Ohio Railway and Power Corporation. It appears that the property and assets of the Western Ohio Railway and Power Corporation were purchased by the Central Ohio Light and Power Company and that said last named company expects to operate this plant from time to time to reinforce electrical energy otherwise generated or acquired by the company.

Whether the lease here under consideration be considered as an independent and original lease to the Central Ohio Light and Power Company or as a modification of the prior lease executed to the Western Ohio Railway and Power Corporation, I am of the opinion that full authority to execute this lease is conferred upon you by the provisions of sections 431 and 14009 of the General Code, the consideration and proper application of which sections of the General Code you will find discussed in an opinion of this office directed to your predecessor, Hon. Albert T. Connor, under date of February 10, 1930, Opinions of the Attorney General, 1930, Vol. 1, page 242.

An examination of this last contract shows that the same has been properly executed by you and by the Central Ohio Light and Power Company, the above named lessee; and inasmuch as the terms and provisions of this lease and the conditions and restrictions therein contained are in conformity with the above mentioned statutory provisions, the same is hereby approved by me as to legality and form as is evidenced by my approval endorsed upon this lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4263.

OPTOMETRY—WHAT CONSTITUTES PRACTICING OPTOMETRY—
WHAT CONSTITUTES A VIOLATION OF THE RULES AND REGULATIONS OF STATE BOARD OF OPTOMETRY—SECTION 1295-22, G. C., CONSTRUED.

SYLLABUS:

1. *When an optometrist, licensed in Ohio, maintains his principal office in one city and owns and operates another office in another city, which is operated in his own name, but in charge of an employee, who is a licensed optometrist, such owning optometrist is practicing optometry in each city.*

2. *When an optometrist, not licensed to practice in Ohio, operates his principal office in another state and maintains an office in Ohio, which is operated by an employee who is a licensed optometrist, such owning optometrist is practicing optometry in Ohio without a license, in violation of section 1295-33, General Code.*

3. *When an optometrist licensed to practice in Ohio advertises two places of business owned by him, one of which is conducted in a second city in charge of an employee, such act is not in violation of section 1295-31, General Code, or the rules of the State Board of Optometry defining "dishonest conduct."*

4. *When an optometrist who is licensed to practice in another state but not in Ohio, and conducts an office in this state in charge of an employee who is a licensed optometrist, such conduct on the part of both the employer and employee is in violation of the rules and regulations of the State Board of Optometry, and on the part of the employer, is in violation of the provisions of section 1295-22, General Code.*

5. *When an optometrist conducts offices in two different counties, he is required by the provisions of section 1295-29, General Code, to have his certificate of license to practice optometry registered with the clerk of the court of common pleas in each such county. Upon failure to so register such certificate, he is subject to conviction of a misdemeanor under the provisions of section 1295-22, which conviction automatically revokes the license of the optometrist under the provisions of section 1295-31, General Code.*

COLUMBUS, OHIO, April 21, 1932.

HON. W. J. BRIGGS, *Secretary, Ohio State Board of Optometry, Shelby, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which reads as follows:

"The Ohio State Board of Optometry has instructed its Secretary to place the following facts before you and request an opinion thereon:

A. X, an Optometrist registered in Ohio, maintains a principal office in one city and owns and operates a second office in another city in which city he advertises said office over his own name and does not set forth that the said office is in charge of an employee.

B. Y is an Optometrist, not an Ohio registrant, who operates his principal office in another state, and owns or maintains a second office in this state with an Ohio registrant in charge thereof, advertising the Ohio office in Y's name or a name other than that of the employee in charge.

C. The employee is registered in the county wherein the second office is advertised and maintained in both 'A' and 'B'.

D. The owner is not registered in the county in which the second office is maintained, admits this fact, yet fails to register.

REQUEST FOR OPINION.

1. Does such an arrangement set forth in paragraph 'A' constitute the practice of Optometry in the county in which the second office is located, in view of the fourth from the last paragraph in your opinion No. 3441 given this Board?

2. Does such an arrangement set forth in paragraph 'B' constitute the practice of Optometry in the county in which the second office is located, in view of the fourth from the last paragraph in your opinion No. 3441 given this Board?

3. Does such advertising and holding out to practice Optometry in

'A' constitute dishonest conduct as set forth in Section 1295-31 on the part of X, and/or of his employed Optometrist?

4. Does failure of the principal in 'A' to register his certificate in the county containing the second office constitute a violation of Section 1295-29, in view of the fact that he holds himself out as engaged in the practice of Optometry in said county?

Our Board has several matters before it of which the above questions are representative, and we would very much appreciate an opinion from your Department."

Section 1295-29, General Code, in so far as material to your inquiry, reads:

"* * * Every applicant who shall pass the examination, and who shall otherwise comply with the provisions of this chapter (G. C. §§ 1295-21 to 1295-35), shall receive from the said board under its seal a certificate of licensure entitling him to practice optometry in this state, which certificate shall be duly registered in a record book to be properly kept by the secretary of the board for that purpose, which shall be open to public inspection and a duly certified copy of said record shall be received as evidence in all courts of this state in the trial of any case. Each person to whom a certificate shall be issued by said board shall keep said certificate displayed in a *conspicuous place in office or place of business* wherein said person shall practice optometry, together with the photograph of said person attached to the lower right-hand corner of said certificate and shall whenever required exhibit the said certificate to any member or agent of said board.

Peddling from door to door, or the establishment of temporary offices is specifically forbidden under penalty of revocation of said certificate by said board. Whenever any person shall practice optometry outside of or away from his office or place of business he shall deliver to each person, fitted with glasses by him, a certificate signed by him wherein he shall set forth the amounts charged, his post office address and the number of his certificate. Each person to whom a certificate has been issued by said board shall, before practicing under the same, register said certificate in the office of the clerk of the court of common pleas in each county wherein he proposes to practice optometry, and shall pay therefor such fee as may be lawfully chargeable for such registry. The clerk of the court of common pleas in each county shall keep a certificate registration book wherein he shall promptly register each certificate for which the fee is paid."

In my opinion rendered to you under date of June 19, 1931, bearing number 3341 (which is probably the opinion to which you refer, since my Opinion No. 3441 deals with the authority of townships and municipalities to issue bonds), I held that an optometrist who was employed as a clerk for a corporation, which fixed and collected the charges for optometry services rendered in an optometry department, was an agent of the corporation, for which reason the corporation, as the principal, was practicing optometry, and that such practice was illegal. I did not, however, hold that the agent was not also practicing optometry.

Like reasoning would lead to the conclusion that X, who maintains an office in another city than that in which he personally conducts his office, would be practicing

optometry in such second city, even though he was not personally present in such city. His agent in the second city acts for and on behalf of his principal, X. It is a familiar and basic rule of the law of agency, "*Qui facit per alium facit per se.*" (He who acts through another acts through himself). That is, the principal is as liable for the acts of an agent as though he performed the acts himself. The law regards the acts of an agent within the scope of his authority as the acts of the principal.

Similarly, in reply to your second question, Y, who has no license to practice in Ohio, might be held to be practicing optometry in Ohio within the inhibition of Section 1295-22, General Code, even though Y is not present in Ohio at any time. Section 1295-22, General Code, reads as follows:

"That on and after January 1, 1920, it shall not be lawful for any person in this state to engage in the practice of optometry or to hold himself out as a practitioner of optometry, or attempt to determine the kind of glasses needed by any person, or to hold himself out as a licensed optometrist when not so licensed, or to hold himself out as able to examine the eyes of any person for the purpose of fitting the same with glasses, excepting those hereinafter exempted, unless he has first fulfilled the requirements of this act and has received a certificate of licensure from the state board of optometry created by this act, nor shall it be lawful for any person in this state to represent that he is the lawful holder of a certificate of licensure such as is provided for in this act, when in fact he is not such lawful holder or to impersonate any licensed practitioner of optometry or to fail to register the certificate as provided in section 1295-29 of this act.

Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, for his first offense shall be fined not more than five hundred dollars at the discretion of the court and upon conviction for a second or later offense shall be fined not less than five hundred dollars, nor more than one thousand dollars or imprisoned not less than six months nor more than one year at the discretion of the court."

The reasoning underlying my Opinion No. 3341, cited above, would impel me to hold that Y, being the principal, was practicing optometry in Ohio where he maintained an office in charge of an employe, where such office was operated for the benefit of Y, who had the right to determine the price to be charged for the services rendered.

In reply to your third inquiry, as to whether when X, an optometrist in one city, advertises that he has a place of business in another city, which other office is in charge of an employe, such act constitutes dishonest conduct within the meaning of section 1295-31, General Code. Said section, in so far as material, reads:

"The board shall refuse to grant a certificate of licensure to any applicant and may cancel, revoke or suspend the operation of any certificate by it granted to any person guilty of fraud in passing the examination or at any time guilty of felony or gross immorality, grossly unprofessional or dishonest conduct, guilty of fraudulently advertising a price of spectacles or eye glasses, by cards, circulars, statements or otherwise, with intent to deceive or mislead the public, or addicted to the use of ardent spirit or stimulants, narcotics or any other substance which im-

pairs the intellect and judgment to such an extent as to incapacitate one for the performance of the duties of an optometrist. The certificate of licensure of any person convicted of a violation of section 1295-22 of the General Code shall be ipso facto revoked."

In the case of *Matthews vs. Murphy*, 23 Ky. Law Rep. 750, the appellate court of Kentucky held that where the statute gave the state board of health the right to revoke a physician's license for "unprofessional conduct of a character likely to deceive or defraud the public" but did not define such phrase, such statute was void for uncertainty on the ground that the physician had a right to know the nature of the offense. This case has been criticised by a number of other courts and text writers. (See note in 1 L. R. A. (N. S.) 813).

In *McPeters vs. Board of Dental Examiners*, 284 Pac. 938 (Cal.) in the fifth paragraph of the syllabus it is stated:

"Power to revoke license of a physician must be under provisions of law which are reasonable and declared with such certainty and definiteness in the act that physicians may know exactly what they are."

It therefore appears that the term "grossly unprofessional or dishonest conduct" must be defined by or through the act or the act would be too indefinite to warrant a revocation of license under such section. However, in the last paragraph of section 1295-24, General Code, the legislature has directed the State Board of Optometry to "make rules and regulations governing the practice of optometry." Such board has adopted rules in compliance with this section, and in them has laid down twelve rules, the violation of any one of which shall constitute "unprofessional conduct." Such rules, as amended May 11, 1931, in so far as material, read:

"1. The practice of optometry shall be conducted only in the name, or names, of the optometrists admitted to practice in the State of Ohio.

* * * * *

6. An optometrist shall not have any professional connection with, accept employment from or lend his name to any person not duly licensed to practice optometry in the State of Ohio, and who holds himself out as offering optometric services or facilities.

* * * * *

Thus, even though the statute does not in and of itself, define the term, it has provided a definition of "unprofessional conduct", and any violation can only be "unprofessional conduct" when in violation of these rules.

Specifically answering your third and fourth inquiries, it is evident that the conduct of X does not violate the inhibition of the express language of any of the "rules of practice."

The employe of X can not be held to violate any of the rules as to unprofessional conduct. The practice is conducted in the manner of an optometrist authorized to practice in the state of Ohio.

Y violates the rule numbered "1" above, in that he does not practice optometry in the name of an optometrist licensed to practice within the State of Ohio, and also violates section 1295-22, General Code, in that he is practicing optometry in Ohio without having obtained a license to practice optometry in Ohio. The employe of Y. might be held to be guilty of violating rule No. 1, that is, of prac-

ticing optometry under a name other than an optometrist licensed to practice in Ohio, and of violating rule No. 6 in accepting employment from one who is not "duly licensed to practice optometry in Ohio."

In reply to your fifth inquiry as to whether A's failure to register his certificate in the second county constitutes a violation of section 1295-29, General Code, the provisions of such section under which your inquiry arises reads, "Each person to whom a certificate has been issued by said board shall, before practicing under the same, register said certificate in the office of the clerk of the court of common pleas in each county in which he proposes to practice optometry," etc. As stated above, A, in operating his office in the second county is practicing in such second county, and in order to comply with the express requirement of such section, he must register his certificate in such county and his neglect would constitute a violation of such section. The penalty for the failure to register the certificate is contained in section 1295-22, General Code, which makes such act a misdemeanor. In section 1295-31, General Code, I find this language: "The certificate of licensure of any person convicted of a violation of section 1295-22, General Code, shall be ipso facto revoked."

It is therefore my opinion that:

1. When an optometrist licensed in Ohio maintains his principal office in one city and owns and operates another office in another city, which is operated in his own name, but in charge of an employe who is a licensed optometrist, such owning optometrist is practicing optometry in each city.

2. When an optometrist not licensed to practice in Ohio, operates his principal office in another state and maintains an office in Ohio which is operated by an employe who is a licensed optometrist, such owning optometrist is practicing optometry in Ohio without a license, in violation of section 1295-33.

3. When an optometrist licensed to practice in Ohio advertises two places of business owned by him, one of which is conducted in a second city, in charge of an employe, such act is not in violation of section 1295-31, General Code, or the rules of the State Board of Optometry defining "dishonest conduct."

4. When an optometrist who is licensed to practice in another state, but not in Ohio, conducts an office in this state in charge of an employe who is a licensed optometrist, such conduct on the part of both the employer and employe is in violation of the rules and regulations of the State Board of Optometry, and on the part of the employer, is in violation of the provisions of section 1295-22, General Code.

5. When an optometrist conducts offices in two different counties, he is required by the provisions of section 1295-29, General Code, to have his certificate of license to practice optometry registered with the clerk of the court of common pleas in each such county. Upon failure to so register such certificate he is subject to conviction of a misdemeanor under the provisions of section 1295-22, General Code, which conviction automatically revokes the license of the optometrist under the provisions of section 1295-31, General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.