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1. WISCONSIN INVESTMENT BOARD, STATE OF—"BODY CORPORATE" — POSSESSES ESSENTIAL ATTRIBUTES OF CORPORATION — OHIO FOREIGN CORPORATION ACT—SECTION 8625-1 ET SEQ., GC.

2. CORPORATION ENGAGED IN INVESTING FOR PROFIT OF WISCONSIN STATE RETIREMENT SYSTEM — PAYMENTS TO BENEFICIARIES — PROFIT ACCRUES TO CORPORATION AS LEGAL ENTITY — CORPORATION NOT FOR PROFIT.

3. FOREIGN CORPORATION — TRANSACTING BUSINESS IN OHIO WHEN IT PURCHASES AND HOLDS FOR INVESTMENT PURPOSES REAL ESTATE LOCATED IN OHIO—TRANSACTION IN FULFILLMENT OF CORPORATE PURPOSES—PART OF ORDINARY BUSINESS—SECTION 8625-1 ET SEQ., GC.

SYLLABUS:

1. The State of Wisconsin Investment Board, being designated by Wisconsin statutes as "a body corporate," is thereby constituted a legal unit and recognized as an entity by the law of its creation, and possesses the essential attributes of a corporation within the meaning of such term as used in the Ohio foreign corporation act. (Section 8625-1, et seq., General Code.)

2. Where such corporation is engaged in the business of investing for a profit certain funds of the Wisconsin state retirement system, which profit accrues to the benefit of such state systems without directly affecting the statutory formulae by which payments to the beneficiaries thereof are determined, such profit must be deemed to accrue to the corporation as a legal entity apart from its members, and the corporation must be regarded as a corporation not for profit.

3. A foreign corporation is transacting business in Ohio within the meaning of the Ohio foreign corporation act, Section 8625-1 et seq., General Code, when it purchases and holds for investment purposes real estate located in Ohio, when the transaction is in fulfillment of its corporate purposes and is a part of its ordinary business. (Opinion No. 578, Opinions of Attorney General for 1949, p. 282, approved and followed; Opinion No. 3566, Opinions of Attorney General for 1948, p. 412, overruled.)

Columbus, Ohio, June 12, 1953

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

This will acknowledge your request for my opinion with respect to an inquiry addressed to you by the Attorney General of Wisconsin, as follows:

"On December 30 I directed a letter to the Honorable C. William O'Neill, Attorney General of Ohio, concerning the right of the State of Wisconsin Investment Board to acquire real estate in Ohio and to lease the same in connection with the investment of public employes retirement funds under the control of said board. I enclose a copy of my letter to Mr. O'Neill.

"In reply to that letter the Attorney General wrote to me on January 13 enclosing copies of opinions No. 578, cited as Opinions of the Attorney General for 1949, page 282, and No. 3566, cited as Opinions of the Attorney General for 1948, page 412. The later opinion No. 578 would indicate that the activity contemplated by the State of Wisconsin Investment Board might be construed as doing business in Ohio.

"As indicated in the letter which I wrote to the Hon. C. William O'Neill, the State of Wisconsin Investment Board is an agency of the state of Wisconsin created by a legislative act. It does not appear to the writer that this board could be held to be a private corporation in any sense of the word. It seems to me to be clearly a public body.

"The State of Wisconsin Investment Board would be acquiring the Ohio real estate strictly for investment purposes. The property would be leased under a long-term lease with the expectation that the rent would be such as to produce a satisfactory income for the benefit of a public employes pension fund of this state whose money would be used to purchase the property. The board would not be purchasing this property for the purpose of establishing an office in the state of Ohio and would not expect to have an office in the state at any location.

"While the main purpose or business of the State of Wisconsin Investment Board is not the acquisition or ownership of land, such ownership is incident to the investment of the pension funds.

"The board in all probability would not be considered to be a 'domestic corporation' by the State of Ohio. If not

would it be considered to be a 'foreign corporation' within the meaning of Ohio statutes? The board does not have any articles of incorporation. It is not a stock corporation and could not declare any dividends.

"In view of the foregoing, will you kindly indicate your answers to the following questions:

"1. Would the State of Wisconsin Investment Board be considered a 'domestic corporation' within the meaning of Ohio statutes?

"2. Would the State of Wisconsin Investment Board be considered a 'foreign corporation' within the meaning of Ohio statutes?

"3. If the answer to questions 1 or question 2 is in the affirmative, could said board qualify and obtain a permit or license to do business in the State of Ohio?

"4. If the answer to question 3 is in the affirmative, what would be the cost to the State of Wisconsin Investment Board of qualifying and obtaining such a permit?

"5. If you are of the opinion that the State of Wisconsin Investment Board could not obtain a license or permit to do business in the State of Ohio, would you feel that it could safely proceed with the proposed transaction without any license or permit, or whether it might be hazardous to do so?

"6. If your answer to question No. 5 is in the affirmative, would you know of any taxes other than real estate taxes to which the State of Wisconsin Investment Board might become subject under the laws of the State of Ohio?

"In addition to answers to the foregoing questions, I would appreciate any further frank comments which you might care to make which would be helpful to us in determining whether the State of Wisconsin Investment Board should attempt to purchase Ohio real estate for investment purposes."

The status of a foreign corporation as "doing business" within Ohio where its sole activity in this state is the ownership of real property, has, as noted in the inquiry, been the subject of conflicting opinions by my predecessors. In Opinion No. 3566, Opinions of the Attorney General for 1948, p. 412, the syllabus is as follows:

"A corporation organized under the laws of another state for the purpose of holding, selling, improving and leasing real estate, is not transacting business within the meaning of section 8625-4, General Code, in the state of Ohio by merely owning real estate located in Ohio or by the institution and prosecution of a suit in the state of Ohio."

In this opinion the writer quoted, p. 415, from Opinions of the Attorney General for 1917, p. 597, as follows:

> "A foreign corporation whose only activity in this state is that of owning real property here, which it leases to others, is not required to comply with the provisions of sections 178 and 183 of the General Code."

In Opinion No. 578, Opinions of the Attorney General for 1949, p. 282, we find the following conclusions stated in paragraphs one and two of the syllabus:

> "1. What constitutes transacting or doing business in Ohio within the purview of the Foreign Corporation Act is a fact question to be determined on the basis of all the facts in the particular case.
>
> "2. A foreign corporation may be said to be doing business in Ohio when it purchases or deals in real estate within the state, when the transaction is in fulfillment of its corporate purposes and is a part of its ordinary business."

In the course of this opinion the writer quoted, p. 284, from Fletcher Cyclopedia Corporations as follows:

> "In purchasing, acquiring or dealing in real property within the state, a foreign corporation would undoubtedly be doing business there, within the meaning of regulatory laws, when the transaction is in fulfillment of its corporate purposes and a part of its ordinary business."

In 20 Corpus Juris Secundum, pp. 46, 47, Section 1829, we find the general rule (followed by illustrations) stated as follows:

> "The general rule is that, when a foreign corporation transacts some substantial part of *its ordinary business* in a state, continuous in character, it is doing, transacting, carrying on, or engaging in business therein, within the meaning of the statutes under consideration.
>
> "In accord with this principle the following transactions have been held to constitute doing, transacting, carrying on, or engaging in business in a state: The making within the state of sales or of contracts for the sale of goods; the making of loans; the making of contracts of insurance; the execution of surety bonds; the acquisition and holding of real estate situated within a state; * * *"
>
> (Emphasis added.)

In 23 American Jurisprudence, 358, Section 372, we find the following statement:

> "* * * Concededly, if dealings with respect to property in the state are undertaken with some regularity and may be regarded as within the purposes for which the corporation was formed, they may constitute doing business in the state, particularly if undertaken for profit. * * *"

In the instant case it is conceded that the board, in investing its funds in real estate in Ohio, is frankly engaged in a profit-making venture; and in doing so is transacting a substantial part of its ordinary business. While it is true that an isolated transaction will not make a foreign corporation amenable to state licensing statutes, I am unable to conceive the continued ownership over a period of years of a valuable parcel of real estate, even though leased to others during such period, to be an instance of an isolated transaction. For this reason I am impelled to concur with the conclusions stated in the 1949 opinion, supra, and to conclude that the 1948 opinion above cited is no longer declarative of the law. This question being resolved, we may next inquire whether the state board of investment is a foreign corporation within the meaning of the Ohio statutes.

It is quite clear from an examination of the Wisconsin statutes by which the investment board is created, Section 25.17 et seq., Wisconsin statutes, that this agency is a state department which has been clothed with certain broad powers which state agencies do not ordinarily possess. It may well be supposed, therefore, to be a state agency possessing corporate powers rather than a corporation the services of which are utilized by the state. In this connection we may observe the decision in Milwaukee v. McGregor, 140 Wis., 35, the fourth paragraph of the syllabus in which reads:

> "A state board empowered to take and hold the title to property for state purposes does not own such property in any proprietary sense,—it is state property, to all intents and purposes, the same as in case of title thereto being formally vested in the state."

It will be noted, too, that the Wisconsin statutes creating the board and defining its powers provide that (1) its operations are to be carried on for the attainment of the purely public purposes of preservation and enhancement of certain retirement system funds, and (2) it is strictly subject to control by the state. If, therefore, the board is a corporation at all, it is a purely public corporation as distinguished from private corpora-

tions. Fletcher, Cyclopedia Corporations, Volume I, p. 90, et seq., Section 67; Dartmouth College v. Woodward, 4 Wheat. (U.S.), 518. We thus come to the question of whether the Ohio Foreign Corporation Act, Section 8625-1 et seq., General Code, is applicable to purely public corporations created by the act of a sister state.

Because in the instant case the corporate entity concerned is so closely identified with the state by which it has been created, we may first examine the status of the state itself in the ownership of real property located in a sister state. In 59 C.J. 166, Section 277, we find the following statements:

> "A state cannot hold land in another state if the latter state objects thereto; but it may do so with the consent of such other state; and where a state has acquired land in another state with the tacit consent of the latter, its title can be divested only by some proceeding by that state in the nature of office found; it cannot be impeached by a private individual in the absence of any action by the state. When a state purchases land in another state from a private person, it holds such land as a subject and not as a sovereign. So, also, where a state grants land within its territory to a sister state, reserving the right and title of government, sovereignty, and jurisdiction, the grantee state assumes merely the position of a private proprietor, and holds its estate subject to all the incidents of ordinary ownership."

In Dodge v. Briggs, 27 Fed. Rep., 160 (1886), we find the following statements, pp. 171, 172:

> "It is said, however, that the state of Indiana cannot own lands in Georgia. The right of a state to hold lands in another state has never been expressly decided. It has been held that the government of the United States cannot accept a legacy to lands in a state, and that such legacy is void. U. S. v. Fox, 94 U. S. 315. It is said, and with great show of reason, that it is abnormal, and contrary to public policy, that a state should be permitted to hold lands in another state; and it is also said that a state can own nothing that is not necessary to its existence, and the proper conduct of its affairs.
>
> "With regard to the last ground of objection, it can be replied that a state has many of the powers of a private corporation, and I do not see why a state may not buy lands as well as bonds. * * *
>
> "* * * It must be understood also that when the state of Indiana bought these lands it came as a subject, and not as a sovereign. * * *"

In County Court of Wayne County v. Bridge Co., Inc., 46 Fed. Sup., 1 (1942), paragraphs 1, 2 and 3 of the headnotes read:

"1. The power of eminent domain is an attribute of sovereignty and within its own jurisdiction each state possesses such sovereign power.

"2. Each state holds all the property within its territorial limits free from the eminent domain of all other states, so that no state can take or authorize the taking of property located in another state.

"3. A state cannot own or acquire property in another state without the latter's consent."

In State of Georgia v. Chattanooga, 264 U. S., 472, the headnotes are in part as follows:

"1. Land acquired and held for railway purposes by one state within the borders of another with the latter's consent remains subject to the eminent domain of the state in which it lies and subject to be condemned by that state, or her authorized municipality, for a public street, in proceedings against the owner state, even though she has not consented to be sued. P. 479

"2. Acceptance by Georgia of permission given her to acquire railroad land in Tennessee, is inconsistent with an assertion of her own sovereign privileges in respect of such land, and amounts to consent that it may be condemned as may like property of others. P. 482"

In the course of the opinion in this case the court said:

"Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning state does not restrict or modify the power of eminent domain of the state wherein the land is situated. See Burbank v. Fay, N. Y. 57, 62; United States v. Railroad Bridge Co., 6 McLean, 517, 533; United States v. Chicago, 7 How. 185, 194. Tennessee by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga did not surrender any of its territory or give up any of its governmental power over the right of way and other lands to be acquired by Georgia for railroad purposes. The sovereignty of Georgia was not extended into Tennessee. *Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad;* and, as to that property, it cannot claim sovereign privilege or immunity. Bank of United States v. Planter's Bank, 9 Wheat. 904, 907; Bank of Kentucky v. Wister, 2 Pet. 318,

323; Louisville C. & C. R. R. Co. v. Letson, 2 How. 497, 550; South Carolina v. United States, 199 U. S., 437, 463."
(Emphasis added.)

The role assumed by a sovereign state when it engages in purely business transactions is aptly described by Mr. Justice Sutherland in State v. Helvering, 292 U. S. 360 (369), in the following language:

"* * * The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. Rippe v. Becker, 56 Minn., 100, 111, 112, 57 N. W. 331, 22 L. R. A. 857. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a state enters the market place seeking customers it divests itself of its *quasi* sovereignity *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. * * *"

From all of the foregoing it becomes clear that a state merely by virtue of its ownership of land located in a sister state enjoys no privileges or immunities whatever by reason of its sovereignty within its own borders. This being so, it must follow that its corporate creatures, even though they be purely agencies designed to discharge purely public functions, can enjoy no greater privileges and immunities than their creator.

We may next consider whether the board is a corporation within the meaning of the Ohio laws or whether, because it is a department of a sister state having corporate powers, it could not be so classified. In Perkins v. Benguet Consolidated Mining Co., 155 Ohio St., 116, the court stated the test by which a corporation is recognized as follows:

"2. An organization, organized under the laws of another state or country, is a foreign corporation if it has the essential attributes of a corporation, within the meaning of that word as used in the Ohio statutes, even though it does not have all the attributes of an Ohio corporation.

"3. In order to be a corporation, an organization must be a legal unit under or be recognized as an entity by the law of the state or country in which it was organized."

In Section 25.17 Wisconsin statutes, it is provided that, "The 'state of Wisconsin Investment Board' shall be a body corporate * * *." Quite clearly the state of Wisconsin has, by this provision, created a "legal unit," and has "recognized as an entity" the agency with which we are here concerned, and even though the board may not possess all of the attributes of an Ohio corporation, I must conclude that it possesses "the essential attributes of a corporation, within the meaning of that word as used in the Ohio statutes."

In Section 8625-2, General Code, we find the following definitions:

> "When used in this act (G. C. Sections 8625-1 to 8625-33), the following words shall have the following meanings:
>
> " 'Domestic corporation' shall mean a corporation incorporated under the laws of this state;
>
> " 'Foreign corporation' shall mean a corporation incorporated under the laws of another state;
>
> " 'State' shall mean any state, territory, insular possession, or other political subdivision of the United States, including the District of Columbia, and any foreign country or nation whose political sovereignty is recognized by the United States, and any province, territory or other political subdivision of such foreign country or nation; * * *"

This definition of "foreign corporation" is quite broad in scope and it makes no distinction in the matter of classification of corporations as private, public, quasi-public, business or eleemosynary. Morever, it will be observed that the exemptions set out in this act make no reference to purely public corporations. Such exemptions are stated in Section 8625-3, General Code, as follows:

> "This act shall not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment, sold by them in interstate commerce, by engineers or employees especially experienced as to such machinery or equipment, as part thereof, nor to banks, trust companies, building and loan associations, title guarantee and trust companies, bond investment companies, insurance companies, nor to public utility companies engaged in this state in interstate commerce."

Here it is appropriate to note the object of legislation imposing conditions on the admission of foreign corporations to carry on their affairs within a state other than that of domicile. In 23 American Jurisprudence, 203, Section 234, we find the following statement:

"* * * Such legislation affords protection to those with whom such corporation does business or to whom it incurs liabilities arising from its wrongful acts. It is intended to relieve, in a measure, the disadvantages of citizens dealing with foreign corporations. It has been said that the chief purpose of requirements imposed as conditions precedent to the right of foreign corporations to do business in the jurisdiction is to subject such corporation to inspection, so that their condition, standing, and solvency may be known; an incidental purpose may be to provide revenue. Many such statutes are designed to obviate the difficulty, under common law rules of bringing a foreign corporation within the jurisdiction of any court other than that of the incorporating state. The state may also wish to limit the number of such corporations or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character, even though the business itself is not unlawful according to the local law. Although the state's plenary power with respect to corporations is sufficient to justify such laws, many of them when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground also their legality cannot be drawn in question."

By referring again to the provisions of Section 8625-3, supra, it will be noted that with the exception of certain corporations engaged in interstate commerce, all the exempted classes of corporations there listed are subject to registration and regulation under special statutes relating to each. The interstate commerce exemption is, of course, made to avoid a constitutional conflict. It will be seen, therefore, that there is no inconsistency between these exemptions and an interpretation of the statute which would include purely public corporations of a sister state.

There is, morever, as to such foreign public corporations, a proper and salutary objective to be attained by the imposition of a licensing or registration requirement on them as a condition of admission. Such registration would establish the jurisdiction of the Ohio courts in controversies which might arise between such corporations and Ohio residents, and would facilitate the service of summons on such corporations in local jurisdictions. That such controversies might well arise from the operations proposed to be undertaken in the instant case can scarcely be doubted. It would appear, therefore, that there is nothing in the inherent nature of the corporate organization nor its proposed business operations in the instant case which is inconsistent with the evident legislative purpose in setting up the registration requirements of foreign corporations generally. This being so, there

being no exemption provision applicable, and in view of the test as to corporate recognition stated in the Benquet case, supra, I am impelled to conclude that the State of Wisconsin Investment Board is a foreign corporation as defined in Section 8625-2, General Code. Accordingly, I perceive no reason why such Board could not lawfully be issued a license under the provisions of Section 8625-1, et seq., General Code.

A further question has been raised as to the cost by way of license fees, etc., of compliance with the foreign corporation act. This requires a determination of whether the board is to be deemed a corporation for profit or one not for profit.

Manifestly the object of the board's investment activities in Ohio will be to realize a pecuniary profit. Under the Wisconsin Laws, however, such profit will accrue to the benefit of the state rather than to any private person. This is true despite the fact that a portion of the funds to be invested by the board will have come into its custody by virtue of contributions made by the several beneficiaries of the pension systems concerned, for it appears that under the Wisconsin statutes the rights of such beneficiaries are fixed by law according to formulae which are affected, only indirectly if at all, by the earnings realized from the board's investments.

It is true that in State ex rel Russell v. Sweeney, 153 Ohio St., 66, the court held that where a profit accrued to members of so-called non-profit corporations, such profits being in the form of a saving of expense or obtaining a service of cost, the corporation concerned could not be regarded as one not for profit. However, in Cattle Club v. Glander, 152 Ohio St., 506, the court held:

> "The fact, that a corporation is organized and operated as one not for profit, does not mean that its enterprises may not be conducted for gain, profit or net income to the corporation as a legal entity apart from its members."

In the instant case I have no difficulty in concluding that all of the board's profit will accrue to "the corporation as a legal entity, apart from its members"; and that this is true despite the purely incidental benefit flowing to the beneficiaries of the state pension systems concerned by reason of the circumstance that profits from the board's investments will materially aid the state in maintaining an actuarily sound pension fund with a proportionate diminution of the need to use public funds raised by taxation for such purpose. It is my opinion, therefore, that the board must be regarded

as a corporation not for profit, and a license issued to it as such, under the provisions of Section 8625-27, General Code.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The State of Wisconsin Investment Board, being designated by Wisconsin statutes as "a body corporate," is thereby constituted a legal unit and recognized as an entity by the law of its creation, and possesses the essential attribute of a corporation within the meaning of such term as used in the Ohio foreign corporation act. Section 8625-1, et seq., General Code.

2. Where such corporation is engaged in the business of investing for a profit certain funds of the Wisconsin state retirement systems, which profit accrues to the benefit of such state systems without directly affecting the statutory formulae by which payments to the beneficiaries thereof are determined, such profit must be deemed to accrue to the corporation as a legal entity apart from its members, and the corporation must be regarded as a corporation not for profit.

3. A foreign corporation is transacting business in Ohio within the meaning of the Ohio foreign corporation act, Section 8625-1 et seq., General Code, when it purchases and holds for investment purposes real estate located in Ohio, when the transaction is in fulfillment of its corporate purposes and is a part of its ordinary business (Opinion No. 578, Opinions of Attorney General for 1949, p. 282, approved and followed; Opinion No. 3566, Opinions of Attorney General for 1948, p. 412, overruled).

Respectfully,

C. WILLIAM O'NEILL
Attorney General