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PHARMACY PRACTICE—STATUTORY PROFESSION—DRUG STORES, OPERATION BY CORPORATION—COMPLIANCE WITH SEC. 12605, G. C.

SYLLABUS:

1. *The practice of pharmacy is a statutory profession within the meaning of Section 8623-3, General Code.*

2. *A corporation may be formed for the purpose of operating drug stores or pharmacies wherein prescriptions are filled and drugs compounded. However, in operating such drug stores or pharmacies, there must be compliance with the provisions of Sections 12705 and 12706, General Code.*

COLUMBUS, OHIO, March 10, 1937.

HON. M. N. FORD, *Secretary, State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion as follows:

“At a recent meeting of our Board, I was directed to request an opinion from your office as to whether or not a corporation may legally engage in the practice of pharmacy. In requesting this opinion, the Board had before them a recent decision of the State Supreme Court, in which it held an incorporated Optical Company could not legally operate as a corporation.

Considering the decision in the Optical case and the wording of Section 12705 of the General Code of Ohio, the Board submits the following resolution:

WHEREAS, the provisions of Section 8623-3 of the General Code of Ohio, provides that a corporation for profit may not carry on the practice of any profession, and

WHEREAS, the Drug Laws of Ohio specifically describe the practice of pharmacy as a profession in Section 1304-1306-1 and 2, 1307 and 1308 General Code of Ohio, and

WHEREAS, the Supreme Court of Ohio construing Section 8623-3, with particular reference to the practice of law and optometry, has prohibited the practice of such professions:

THEREFORE, BE IT RESOLVED that the Board of Phar-

macy respectfully request your department to furnish an opinion interpreting the Statutes regulating the powers of corporations with reference to the practice of pharmacy, and specifically with reference to filling and compounding prescriptions furnished by physicians for the relief of the sick."

In determining the question of whether or not the law relating to corporations practicing law or optometry is applicable to the practice of pharmacy, consideration should first be given to the underlying question of whether or not pharmacy is a profession within the meaning of the General Corporation Act, Sections 8623-1, et seq, General Code.

That part of Section 8623-3, General Code, which is pertinent to this opinion reads as follows:

"A corporation for profit may be formed hereunder for any purpose or purposes, *other than for carrying on the practice of any profession* for which natural persons lawfully may associate * * *." (Italics ours).

This section which was last amended by the 87th General Assembly, 112 O. L., 10, dates back to 1893, when it was enacted by the 70th General Assembly, 90 O.L., 405, R.S. 3235, the pertinent parts of which read:

"Corporations may be formed * * * for any purpose for which individuals may lawfully associate themselves, except * * * carrying on professional business."

At the outset, I would like to point out that this provision in the Ohio statutes as to the practice of a profession by a corporation is not generally contained in the laws of other states and that therefore decisions or practices in other jurisdictions are of little or no value in interpreting the Ohio law. The question as to just what the word "profession" meant in this connection was answered by the court in *State, ex rel vs. Myers*, 128 O. S., 366, when it held that the word encompassed not only the common law professions, but statutory professions as well. That is, if the legislature in dealing with a certain calling has indicated an attitude as to it akin to that commonly taken toward the recognized professions, that calling is a profession within the meaning of Section 8623-3, General Code.

Therefore, in answering your first question we must look to the enactments of the legislature in connection with the practice of pharmacy.

The most important statutes are those setting up the State Board

of Pharmacy, Sections 1296 to 1313. In substance they set up educational, personal and moral prerequisites for an applicant for a pharmacy license, not the least of which is technical training in a recognized pharmacy college. If an applicant is qualified to apply for a license he then must pass an examination in chemistry, botany, materia medica, toxicology and the theory and practice of pharmacy. There are other and more definite indications of the legislature's attitude, particularly:

Section 1297:

“ * * * a registered pharmacist in good standing in his profession * * * .”

Section 1303-4:

“* * * a certificate authorizing him to practice the profession of pharmacy * * * .”

Section 1306-2:

“* * * to practice the profession as a pharmacist * * * .”

Section 1307:

“* * * granted to practice the profession of a pharmacist * * * .”

Section 1308:

“* * * shall be entitled to practice his profession * * * .”

From the foregoing it seems clear that the legislature, in enacting these laws, considered pharmacy a profession.

The Supreme Court of Ohio has recently, *State, ex rel vs. Optical Company*, 131 O. S., 217, inferentially answered the second question as to what is included within the practice of a profession. (Also see *Abstract and Trust Company vs. Dworkin*, 129 O. S., 23.) In that case the court was considering optometry (held to be a statutory profession in *State, ex rel vs. Myers*, supra) and said that the operation of an optical store which advertised in a manner that might lead the public to believe the company did the work of an optometrist or in which the company controlled the manner of work, customers to be served or prices to be charged by the optometrist in its employ, was tantamount to the practice of optometry.

Although there is little doubt under the foregoing authorities but that as a principle of law, the employment of a lawyer or optometrist on a salary whereby an unlicensed person or corporation, may render such professional services constitutes such non-licensed person or corporation practicing those professions, it remains to be determined whether the practice of pharmacy may be so carried on by a non-licensed person, and hence by a corporation. It is perfectly obvious that any practice which may under the law be carried on by a layman without the necessity of being licensed after having met prescribed educational requirements may be carried on by a corporation and hence would not be the practice of a profession within the meaning of the term as used in Section 8623-3, supra. Corporations are otherwise granted the capacity possessed by natural persons under Section 8623-8, General Code.

The answer to the question "may a corporation be formed for the purpose of operating drug stores or pharmacies" is found within the statutes themselves. Section 1310, General Code, now part of the Pharmacy Laws (1296 to 1313, General Code) and also a part of the original Pharmacy Laws, 99 O. L., 506, R.S. 4410, provides:

"Each certificate of registration shall be conspicuously exposed in the pharmacy or drug store of which the pharmacist or assistant pharmacist to whom it is issued is the owner or manager, *or in charge of or in which he is employed.*" (Italics ours).

Section 12705, General Code, which was also first enacted as part of the original Pharmacy Laws, 99 O.L., 506 R.S. 4405, in its present form provides:

*"Whoever, not being a legally registered pharmacist, manages or conducts a retail drug store, unless he has in his employ in full and actual charge of the pharmaceutical department of such store, a pharmacist legally registered under the laws of this state, and, whoever being a legally registered pharmacist shall manage or conduct a retail drug store without being personally in full and actual charge of such store, or unless he has in his employ in full and actual charge of the pharmaceutical department of such store a pharmacist legally registered under the laws of this state, shall be fined not less than fifty dollars nor more than two hundred dollars. * * **

A retail drug store, within the meaning of this section, shall be any room, rooms or place of business wherein drugs, poisons, chemicals or pharmaceutical preparations shall be offered or

displayed for sale at retail, or upon which as a sign the words 'pharmacy,' 'drugs,' 'drug store,' 'pharmacist,' 'pharmaceutical chemist,' 'apothecary' or any of these words, or their equivalent in any language, are or is displayed. (*Italics ours*).

Section 12706, General Code, provides:

"Whoever, not being a legally registered pharmacist, or a legally registered assistant pharmacist employed in a pharmacy or drug store under the management or control of a legally registered pharmacist, compounds, dispenses or sells a drug, chemical, poison or pharmaceutical preparation, shall be fined, * * *"

Reading all of the Pharmacy laws together and considering these last quoted three sections in *pari materia* with the rest of the provisions, it seems clear that the legislature did not intend to restrict the conducting and operating of drug stores and pharmacies to licensed pharmacists. I am not unmindful that the court in *State, ex rel vs. Optical Company, supra*, held that a corporation could not operate an optical store wherein an optometrist was employed by the company and wherein services of said optometrist were offered to the public, but in reading the decision in that case, it should be remembered that there are no provisions relative to optometry similar to Sections 1310, 12705 or 12706, General Code. The practice of optometry is defined in Section 1295-21, General Code, as follows:

"The practice of optometry is defined to be the application of optical principles, through technical methods and devices in the examination of human eyes for the purpose of ascertaining departures from the normal, measuring their functional powers and adapting optical accessories for the aid thereof."

The penal section of the Optometry Act (Sections 1295-21 to 1295-35) is Section 1295-22, General Code, which 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 licensed, or to hold himself out as able to examine

the eyes of any person for the purpose of fitting the same with glasses, * * *”

It will be noticed that nowhere within these sections, 1295-21 and 1295-22, General Code, has the legislature recognized the employment of optometrists by laymen to render services to the public. On the other hand Sections 1310, 12705 and 12706 clearly reveal that the legislature not only did not intend to restrict the operation of drug stores or pharmacies to licensed pharmacists, but actually contemplated the contrary and recognized the right of an individual, other than a pharmacist to operate and conduct such a place of business.

Therefore, it is my opinion that though the practice of pharmacy is a statutory profession, a corporation may be formed for the purpose of operating and conducting drug stores and pharmacies, providing of course, that in the operation of such drug stores and pharmacies they fully comply with the provisions of Section 12705 of the General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General

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APPROVAL—BONDS OF VILLAGE OF ST. CLAIRSVILLE,
BELMONT COUNTY, OHIO \$62,400.00

COLUMBUS, OHIO, March 10, 1937.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of Village of St. Clairsville, Belmont County,
Ohio, \$62,400.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of sanitary sewer and disposal plant bonds in the aggregate amount of \$65,000.00, dated July 1, 1935, bearing interest at the rate of 3% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds