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ARTICLES OF INCORPORATION — CORPORATION OTHER THAN TRUST COMPANY—PURPOSE TO ENGAGE IN BUSINESS OF SERVING, FOR HIRE, AS EXECUTOR, ADMINISTRATOR AND GUARDIAN—SECRETARY OF STATE—DUTY.

SYLLABUS:

The Secretary of State has no duty to accept for filing the articles of incorporation of a corporation other than a trust company, the purpose of which is to engage in the business of serving, for hire, as executor, administrator and guardian.

Columbus, Ohio, February 2, 1956

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

Dear Sir:

I have before me your request for my opinion which reads as follows:

> "This office has received the proposed Articles for a new Ohio corporation to be entitled 'Ohio Administration Company.' The purpose clause of the corporation reads as follows:
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> " 'The purpose or purposes for which this corporation is formed is to engage in business by serving, for hire, as Executor, Administrator and Guardian, subject to the rule and order of the various Courts of Probate throughout the State of Ohio; provided however that this corporation shall not act as trustee, shall not act in any other fiduciary capacity than those specified above, and shall not enjoy the immunity from giving bond enjoyed by trust companies; and provided further that this corporation shall neither receive or accept deposits of money or other things of value nor possess or exercise any other trust, depository, banking, lending or investment powers of a trust company.'
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> "As this is the first instance in which articles of this type have been submitted to the Secretary of State for approval, we request that an opinion be rendered as to the propriety of accepting Articles where the purpose of the proposed corporation is as set forth above."

It will be noted that the articles of the proposed corporation specify that it would engage in the business of serving for hire, as executor, administrator and guardian, but that it would not act as *trustee* nor in any other fiduciary capacity. Neither would the company exercise any depository, banking, lending or investment powers of a trust company. It is therefore obvious that the incorporators propose to steer clear of forming a *trust company*.

The Supreme Court of Ohio held in Schumacher v. McCallip, 69 Ohio St., 500 (1904), that a probate court had no power to appoint the Union Savings and Trust Company, a corporation, as executor. The court's ruling as disclosed in the syllabus was as follows:

> "1. Trust companies are without capacity to receive and exercise appointments as administrators of the estates of de-

> ceased persons because the legislation evincing an intention to clothe them with such capacity (sections 3821c, 3821f, Revised Statutes) is void, being of a general nature and not of uniform operation throughout the state as is required by section 26, article 2, of the constitution."

Section 3821f, Revised Statutes, at that time, granted the probate judge power to appoint a trust company to act as an executor, administrator, guardian, etc., only if the county in which the probate court was located, contained a city of the first class, or a city of the second class having a population of less than 33,000.

In 1908, the Circuit Court of Clark County held in Western Union Telegraph Co. v. Union Savings and Trust Company, 20 Circuit Decisions, 380, that an order of the probate court appointing a corporation executor may be collaterally attacked for want of power. The headnote approved by the court reads as follows:

> "The name 'The Union Savings & Trust Co.' indicates a corporation or partnership, neither of which has any capacity to act as an executor or administrator. Hence, the record of the probate court showing the appointment by that court of a corporation as executor, being beyond its powers, may be collaterally attacked in another court, and an order reviving an action commenced by decedent in the name of such corporation executor is invalid."

The foregoing decision was affirmed by the Ohio Supreme Court vithout opinion in Union Savings Bank v. Western Union Telegraph Co., 78 Ohio St., 398. A rehearing in that matter was granted, and the Supreme Court report of the case is found in 79 Ohio St., 89. The court vacated its former judgment and reversed the judgment of the circuit court. It is important to note, however, that the Supreme Court in reversing the judgment did not alter the law as stated in Schumacher v. McCallip, et al., supra.

In the course of his opinion, Davis J., had the following to say, at page 99:

> "When the plaintiff died, being at that time a resident of Clark County, and left a will nominating the plaintiff in error to be executor of the will, and the will was offered for probate in the probate court of that county, it was within the jurisdiction of the court, and it became its duty, to appoint the person named in the will to be executor, if there were no obstacles thereto in the law as it then existed. Upon the assumption which we have

made, this necessarily involved an inquiry by the court into the legal competency of the Union Savings Bank & Trust Company to be an executor. *This was eighteen months before the decision in Schumacher v. McCallip, et al., 69 Ohio St., 500, and at a time when, as appears from the statement of facts in that case, probate courts, common pleas courts and circuit courts were entertaining a contrary view of the law. The Probate Court of Clark county,* having jurisdiction of the subject-matter and of the estate, *had the right and duty to inquire into the legal competency of the trust company*; the presumption is that it did so *and its judgment in that regard, however erroneous it might thereafter be found to be, was not void."* (Emphasis added.)

The opinion went further to add that the order of the probate court could not be ignored in any *collateral* proceeding and it could not be reviewed or set aside in other way than in a direct proceeding for that purpose. A party with legal standing could have attacked the appointment in the probate court, or by appeal or error.

In 1919 the legislature enacted Section 710-160, General Code, now Section 1107.08, RC., which granted to *trust companies* the power to act as executor, administrator, assignee, guardian, receiver, or trustee. I do not think it necessary to quote the statute. Suffice it to say that Section 1107.08, Revised Code, does not contain the language which occasioned the Supreme Court of Ohio to declare its predecessor statute unconstitutional. The important point is that Section 1107.08 granted the power to act as executor or administrator to trust companies. The case law until that time was to the effect that the appointment of a corporation or trust company to act as an executor could be successfully attacked by a proper party, such an appointment being beyond the powers vested in probate courts.

Section 1107.08, Revised Code, being a statute in derogation of the common law of Ohio existing and in force at the time of its enactment, must be strictly construed. If a change in the common law is to be effectuated, the legislative intent to do so must be clearly and plainly expressed. See Sutherland on Statutory Construction, 3rd Edition, Section 6201. It would seem that the legislature went as far as it intended to go in granting authority to "trust companies" to serve as executor and administrator. The legislative body did not see fit to grant *other* companies or corporations that power.

Chapter 1107, Revised Code, does not specifically define the term "trust company." Section 1107.02, Revised Code, relative to prerequisites to exercise of powers, commences:

> "No domestic or foreign trust company *authorized to accept and execute trusts* * * *." (Emphasis added.)

Section 1107.03, Revised Code, relative to paid-in capital and deposits, commences:

> "No trust company, or corporation, either foreign or domestic, *doing a trust business, shall accept trusts* of property within this state * * * until its paid-capital is at least one hundred thousand dollars * * *." (Emphasis added.)

The foregoing sections indicate that a trust company is essentially a company which is authorized to accept and execute trusts. The primary and ordinary conception of a trust company is a corporation to take and administer trusts, and the fact that a trust company is permitted by its charter to exercise some of the functions of a bank does not constitute it a "banking institution," nor does the possession of certain trust privileges transform a banking corporation into a "trust company." See People v. National Security Company 177 N.Y.S., 838.

On this same point your attention is directed to Opinion 3516, Opinions of the Attorney General for 1938, p. 2466, wherein it was said at page 2470:

> "* * * The mere fact that a corporation exercises some of the powers of a trust company does not make it ipso facto a trust company."

In view of the express wording of the articles of incorporation submitted to you for filing, I do not believe that it can plausibly be urged that the company in question would qualify as a "trust company" under Chapter 1107, Revised Code.

Section 2113.06, Revised Code, establishes categories of *natural* persons to whom administration of an estate of an intestate may be granted. That section establishes a preference system, commencing with the surviving spouse of the deceased. While the legislature has, in another section, expressly authorized *trust companies* to serve as administrator of an estate, that is as far as that body has gone in recognizing such a right in persons other than *natural* persons.

Accordingly, it is my opinion that the secretary of state has no duty to accept for filing the articles of incorporation of a corporation other than a trust company, the purpose of which is to engage in the business of serving, for hire, as executor, administrator and guardian.

Respectfully,
C. WILLIAM O'NEILL
Attorney General