

941

1. EYEGASSES—OPTICAL FIRM LOCATED IN FOREIGN STATE—WHERE ADVERTISING SENT TO PROSPECTIVE PURCHASERS IN OHIO—OFFER TO SEND BY MAIL, MACHINE CONTAINING LENSES TO DETERMINE PRESCRIPTION NEEDED FOR EYEGASSES—OPTICAL FIRM IS PRACTICING OPTOMETRY IN OHIO.
2. IF MACHINE PURCHASED FROM UNLICENSED FIRM LOCATED OUTSIDE OF OHIO, FIRM AUTHORIZED TO SOLICIT OTHER BUSINESS IN STATE, COMPENSATION ONE DOLLAR PER ORDER, THE INDIVIDUAL BECOMES AGENT OF OPTICAL FIRM—UNLICENSED OPTICAL FIRM SUBJECT TO PROSECUTION IN COUNTY WHERE OFFENSE COMMITTED.

SYLLABUS:

1. When an optical firm located outside of the state of Ohio sends advertising to prospective purchasers located within Ohio, offering to send them by mail a machine containing lenses by the use of which they are claimed to be able to determine for themselves the prescription needed for eyeglasses, that optical firm is practicing optometry within the state of Ohio.

2. When the prospective purchaser purchases the machine described in paragraph 1 of the syllabus, from an unlicensed firm located outside of Ohio, and is authorized to solicit other business within Ohio for which he is compensated to the extent of one dollar for each order, such individual becomes the agent of his optical firm and by reason of said agency the unlicensed optical firm is subject to prosecution within Ohio, in the county where the offense was committed.

Columbus, Ohio, September 2, 1949

Hon. Wray Bevans, Prosecuting Attorney
Pike County, Waverly, Ohio

Dear Sir:

Your request for my opinion is as follows:

"I would appreciate it sincerely if you would please send to me your ruling with respect to the following proposition:

'Does a non-resident of the State of Ohio, who sends into the State of Ohio, devices by which individuals may determine the size and lens strength of eye glasses, and fills the orders pursuant to such instructions, guilty of practicing optometry within the State of Ohio?'"

At a conference in my office, you clarified the factual situation by stating that an optical firm located in a large midwestern city outside of the State of Ohio, sends advertising to prospective purchasers living in Ohio, offering to send them by mail a machine containing lenses, by the use of which they are claimed to be able to determine for themselves the prescription needed for eyeglasses. You further stated that the same company offered to pay the sum of one dollar for each similar order arising from the use of the same machine by others receiving the machine from the original prospective purchaser. You also limit your inquiry to the said out-of-state optical firm and also inquire as to the venue of the offense.

In recent years the profession of optometry has been the subject of a number of decisions by Ohio courts. The majority of these decisions involved the questions of whether optometry was a profession; whether a corporation could practice optometry; whether a foreign optical company may employ an optometrist in its optical business; and whether a corporation by leasing its premises for optical purposes engages in the profession of optometry.

In the recent session of the legislature, the 98th General Assembly, Sections 1295-22, 1295-24, 1295-27, 1295-28, 1295-29, 1295-30 and 1295-32 of the General Code, relative to the practice of optometry were amended by Amended Senate Bill No. 50. This act will become effective on and after the first day of January, 1950, so it is not necessary to consider it in this opinion. The provisions of Senate Bill No. 50 would not, however, change my opinion on the facts of the instant case.

In the Opinion of the Attorney General for 1920, Vol. II, page 1127, the syllabus reads as follows:

“The use and employment of a mechanical device operated on optical principles 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, in connection with the sale and fitting of eye glasses, constitutes the practice of optometry as defined in section 1295-21, subject to the exceptions found in section 1295-34 G. C.”

The use and employment of a mechanical device operated upon optical principles in the examination of human eyes for the purpose of ascertaining the departure from the normal, measuring their functional powers and adapting optical accessories for the aid thereof, in connection with the sale and fitting of eyeglasses, constitutes the practice of optometry

as defined in Section 1295-21 General Code, subject to the exceptions found in Section 1295-34 General Code. The body of the opinion reads in part, as follows:

"By reference to the letter of your correspondent, enclosed with your request, you inquire if the use of a mechanical device, which you describe as a 'cabinet * * * with eye cup and a disk of revolving lenses, behind which is a simplified skioptometer,' constitutes the practice of optometry.

"From the facts stated, it appears that the measurement of vision is obtained *by the patient's use and adjustment of the device, which mechanically registers the functional power of the patient's eyes and at the same time indicates what optical accessories should be used to correct any indicated departures from the normal*; that no person, act, diagnosis or express representation of the owner or proprietor of the device enters into such examination or the adaption of the optical accessories, or, as stated by your correspondent, 'from that point on it is a case of merchandising. They choose their glasses and complete the transaction.'

"The question is whether the use of such a device in the manner and for the purposes stated constitutes the practice of optometry within section 1295-21 G. C., which defines such practice 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 object of the law under consideration must be held to be to protect the public from injury at the hands of incompetent or unscrupulous practitioners of optometry. In short, the state has set up a standard of qualification for such persons and has said that no persons, except those so qualifying, may practice optometry in this state.

"The result of the operation of this device is certainly within the terms of section 1295-21, being an 'application of optical principles through technical * * * devices in the examination of human eyes * * * measuring * * * functional powers and adapting optical accessories.' But it may be urged that, admitting this, it is the device that is practicing and not any person; not the owner or proprietor of the device. It is a sufficient answer to this to say that such owner or proprietor is responsible for the agency thus employed by him and that he adopts its acts, so-called, as his own.

"Furthermore, considering the purpose of the law, it may be asked, who passes upon the qualification or scientific correctness

of this device? An examination of and a license to this inanimate thing is not provided for in the law.

“Again, it may be urged that the patient or user is himself measuring his vision, applying corrective accessories and determining optical principles. This seems fallacious; the optical principles have been previously determined, and the condition and accessories are mechanically indicated and communicated to the user, who then purchases his glasses in accordance with this result. It may also be said that the tacit approval or recommendation of the person having such device and selling such glasses is back of the mechanical operations.

“On the whole it would seem, and until the question is judicially determined it is the opinion of this department, that the use of such a device, as above stated, constitutes the practice of optometry.”

In 141 A.L.R. 883, 887, it is stated that *the furnishing and use of an eye-testing machine, in order to ascertain what lenses or glasses are needed, has been held to constitute the practice of optometry. The following cases are cited as authority: People v. Griffith (1917) 280 Ill. 18, 117 N. E. 195; State v. Etzenhouser (1929) 223 Mo. App. 577, 16 S. W. (2d) 656; Price v. State (1919) 168 Wis. 603, 171 N. W. 77.*

I believe from the above cited authorities that the optical firm located outside of Ohio is practicing optometry in Ohio.

Here, the optical firm is applying optical principles through devices in the examination of human eyes and is clearly practicing optometry under Section 1295-21 General Code defining such practice.

The firm is attempting to determine the kind of eye-glasses needed, which is prohibited under Section 1295-22 General Code. The firm involved does not possess an Ohio license and therefore it is guilty of violating the provisions of the General Code of Ohio relating to the practice of optometry.

Nor does this firm come under the provisions of Section 1295-34, subsection 6 of the General Code, which exempts persons selling spectacles and eyeglasses from the provisions of the act.

In the instant case, this firm is attempting to do indirectly that which it may not do directly i.e., practice optometry in this state without a license.

Your question as to the venue of an action against the firm is answered in 12 O. Jur., 121, wherein it is said:

"It is now a generally accepted principle that a person in one county or state, who employs an agent in another county or state to commit a crime, is subject to prosecution in the latter."

Thus, the individuals who are authorized to solicit orders and receive one dollar for each order are the agents of the principal and therefore the principal is subject to prosecution in this state. Section 13426-1 General Code, reads as follows:

"The venue of crimes and offenses against the laws of this state shall be in the counties provided by law; and the courts and magistrates of this state now having jurisdiction and powers over criminal causes, shall have such jurisdiction and powers as are conferred by law, or may hereafter be conferred by law upon them."

See also, Opinion of the Attorney General for 1932, No. 4263, pages 590, 592, where the question of agency is discussed.

Therefore, in specific answer to your question it is my opinion that when an optical firm located outside of the State of Ohio, sends advertising to prospective purchasers located within Ohio, offering to send them by mail a machine containing lenses by the use of which they are claimed to be able to determine for themselves the prescription needed for eyeglasses, that optical firm is practicing optometry within the state of Ohio, and when said prospective purchaser purchases such machine and is authorized to solicit other business for which he is compensated to the extent of one dollar for every order, such individual becomes the agent of said firm, and as a result of such agency the principal may be subject to prosecution in Ohio in the county where the offense was committed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.