CERTIFIED PUBLIC ACCOUNTANT: Styling himself C. P. A. is a personal privilege granted under Chapter 110, R. S. Mo. 1929, and cannot be used to style non-resident partners or non-resident firms or individuals.

October 13, 1938

FILED 29

Hon. David W. Fitzgibbon
Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of October 7th, 1938, requesting an official opinion from this department, which reads as follows:

> "Referring to my letter dated September 30th, 1938 relative to the opinion requested in the matter of Certified Public Accountants, in digesting the letter it appears to me that the question submitted is not very comprehensive, and I am herewith rephrasing the question -
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> "Is it legal for a firm or an individual operating branch offices in Missouri to hold themselves out as certified public accountants, the partners certified public accountants of other states, but not holding Missouri degrees, but the resident partner or manager a Missouri certified public accountant."

Section 13710, Article 1, Chapter 110, R. S. Mo. 1929, reads as follows:

> "Any citizen of the United States, or person who has declared his intention of becoming such, having a place for the regular transaction of business as a professional accountant in the state of Missouri, and who, as in this chapter required, shall have received from the

> secretary of state for the state of Missouri a certificate of his qualifications to practice as a public accountant, as hereinafter provided, shall have the authority to style himself and be known as a certified public accountant, and to use the abbreviated title C. P. A. for and during the term mentioned in his certificate."

It will be noticed that this section specifically states, "any citizen * * * or person who has declared his intention," and further mentions, referring always to "any citizen", "shall have received from the secretary of state for the state of Missouri a certificate of his qualifications to practice as a public accountant." It will also be noted that in referring to the certificate it refers to the word "his." In no way can this section be construed to mean a partnership, copartnership, or partnership operating under a fictitious name as provided in Section 14342, R. S. Mo. 1929. This section also provides that the applicant, to qualify, must have a place for the regular transaction of business as a professional accountant in the state of Missouri. By that it means that the certified public accountant must have a place for the regular transaction of business as a professional accountant, and does not mean that he can be represented in this state by an agent or employee.

There is a great difference between an ordinary accountant and a certified public accountant for the reason the privilege of styling himself as a C. P. A. can only be accorded to accountants who have met the qualifications and taken the examinations as set out in Chapter 110, supra.

Section 13712, R. S. Mo. 1929, reads as follows:

> "The board of accountancy, the majority of which shall in all cases have the powers of the board, shall determine the qualifications of persons applying for certificates under this chapter, shall make rules for the examination of same, which shall embody the following:

> "(a) Examinations shall be held by the board at least once in each year, at such times and places as may be determined by them. The time and place of holding such examinations shall be advertised for not less than three consecutive days, not less than thirty days prior to the date of each examination, in at least two daily newspapers printed and published in this state. The examination shall be in 'theory of accounts,' 'practical accounting,' 'auditing' and 'commercial law as affecting accountancy.'
>
> "(b) Applicants for certificates, before taking the examination, must produce evidence satisfactory to the board that they are over twenty-five years of age, of good moral character, a graduate of a high school with a four years' course, or have an equivalent education, or pass an examination to be set by the board and that they have had at least three years' practical accounting experience. * * * *"

It will be noticed that by this section the board of accountancy is required to hold examinations of applicants, and it also states upon what subjects the examination shall be given. It further provides that the applicant must meet certain qualifications, such as over twenty-five years of age, of good moral character, a graduate of a high school with a four years' course, etc. It also further provides that they shall have at least three years' practical accounting experience. In other words, Chapter 110, supra, by granting the privilege of C. P. A. to accountants, is really raising the plane of ordinary accountants to professional accountants.

Section 13713, R. S. Mo. 1929, reads as follows:

> "The board may, in their discretion, waive the examination of any person of competent age, of good moral character, and who has been engaged in reputable practice as a public accountant for a continuous period of three years, one of

> which shall have been in the state of Missouri immediately preceding the passage of this chapter, or who has been employed as an accountant by reputable firms of accountants for a continuous period of five years immediately preceding the passage of this chapter, one of which shall have been in the state of Missouri, and who shall apply in writing to the board for such certificate within six months after the taking effect of this chapter."

Under this section the board, in its discretion, may waive the examination of certain persons and refers to accountants who have been employed as an accountant by reputable firms of accountants for a continuous period of five years immediately preceding the passage of this chapter. It does not mean that they may waive examination of accountants who have been employed by a duly qualified certified public accountant, and does not by innuendo mean that a certified public accountant who is not a resident of the state of Missouri but who has a place of business in the state of Missouri can be allowed to style himself as a certified public accountant in accordance with Section 13710, supra.

There is a difference between a public accountant and a certified public accountant in that the public accountant cannot style himself as a C. P. A., and is not considered as of a learned profession but as merely a professional man. It was so held in the case of Curry v. Inland Revenue Commission, (1921) 2 K. B. 332. It was also so held in the case of United States ex rel. Liebmann v. Flynn, District Director of Immigration, 16 Fed. (2d) 1006. Also in the case of In re Ellis, 124 Fed. l. c. 643, the court held:

> "Whatever may have been the intention of Congress in 1885 and 1891 as to skilled labor imported from abroad--whether it sought only to keep out 'the lowest social stratum who live in hovels on the coarsest food,' or sought also to give to skilled labor which uses brains as well as hands

somewhat of the protection which it had secured to manufacturing capital--there can be no doubt as to its meaning in 1903, for the inhibition of the fourth section is against the importation of aliens 'to perform labor or service of any kind, skilled or unskilled.' Moreover, the exception has been amended so that it no longer covers 'persons belonging to any recognized profession,' but only 'persons belonging to any recognized learned profession.' The definition of the word 'profession' given in the Century Dictionary and approved in U. S. v. Laws is a broad one, and it seems not unreasonable to assume that Congress qualified it with the adjective 'learned' for the express purpose of restricting the scope of the exception. Certainly in the ordinary use of language an 'accountant,' however expert he may be, would not be included as belonging to one of the learned professions. Apparently counsel for both relators practically concede this, for they make no effort to differentiate between professions. 'All professions are learned, because they require special knowledge,' says the counsel for Charalambis. 'All professions are learned. It is an inherent part of the word "profession,"' says the counsel for Ellis. But Congress did not so understand it, or it would not have inserted the word 'learned,' and the courts must give that word a meaning. However broad such meaning may be, it would seem that an accountant would fall without it."

Section 13714, R. S. Mo. 1929, reads as follows:

"The board may, in their discretion, issue a certificate to the secretary of state, to the effect that any person who is the lawful holder of a certified public accountant's certificate issued under the law of another state which provided for similar registration, and which established a standard of qualifica-

> tion as high as that required under this chapter, and upon the reception of such certificate, the secretary of state shall issue to such person a certificate of registration, which shall entitle the holder to practice as such certified public accountant and to use the abbreviation C. P. A. in this state."

Under this section, in accordance with the comity between states which applies to doctors, lawyers, dentists, and practitioners of optometry, it specifically states that in order for this comity to be acknowledged by the board of accountancy, that state in which the applicant is similarly registered must have the same standard of qualifications as that required under this chapter.

Chapter 110, supra, which applies solely to the state board of accountancy, has not been passed on in this state by either the Supreme Court or the Court of Appeals. The only analogous situation that could be cited as authority under the same reasoning would be constructions based upon other provisions such as dentistry, practice of the law, and practice of optometry.

Chapter 101, R. S. Mo. 1929, page 3511, sets out the method of obtaining a certificate of registration for the practice of optometry. This chapter also sets out certain qualifications and subjects for examination to be given the person. It does not mention partnerships or firms operating under fictitious names.

In this state Chapter 101, supra, in reference to qualifications to practice optometry was construed by the Appellate Court in the case of State ex inf. McKittrick, Attorney General v. Gate City Optical Co., 97 S. W. (2d) 89. This was a case of quo warranto against the Gate City Optical Company and Sears, Roebuck & Co. It was an attempt to oust the Gate City Optical Company and Sears, Roebuck & Company from practicing optometry. On account of exemption (b) as set out in Section 13502, R. S. Mo. 1929, the court held that the corporation was not practicing optometry in violation of Chapter 101. Paragraph (b) reads as follows:

> "The following persons, firms and corporations are exempt from the operation of this chapter:
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> * * * * *
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> "(b) Persons, firms and corporations who sell eyeglasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery."

But the Legislature of this state, in 1931, added another limitation or exemption so as to prevent a corporation from practicing optometry by way of a subterfuge, by paragraph (c) of Section 13502, Laws of Missouri, 1931, page 283, which reads as follows:

> "(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses."

This alone shows that it is the intention of the Legislature in such provisions, in granting certificates of registration not only to certified public accountants, but to dentists, lawyers, or practitioners of optometry, that they follow their profession by personal contact between the practitioner and the public, and not allow a corporation, firm, partnership, or anyone acting under a registered fictitious name to follow that profession.

In the case of State ex rel. Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P. (2d) 995, 102 A.L.R. 334, l. c. 337, the court said:

> "It would seem axiomatic that where the statute requires a practitioner of optometry to be a person (R. S. 65--1502) and that to be entitled to practice persons must have heretofore lawfully registered (as of June 9, 1923) and every person twenty-one years of age, of moral character, possessing specified educational qualifications, being a graduate from a recognized school of optometry of specified requirements, must have passed a requisite examination, that no corporation could be registered and thereby be entitled to practice."

In this case the statute of Kansas provided that a practitioner of optometry should be a person, and under Chapter 110, R. S. Mo. 1929, Section 13710, in reference to granting certificates to certified public accountants, provides, as set out before, that he must be a citizen of the United States, or one who has declared his intention, etc., and does not provide for a registered fictitious name.

In the case of Winslow v. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 P. 308, plaintiff sought to enjoin the board from enforcing an order revoking his license to practice dentistry. It appears the Eastern Dental Company, a Missouri Corporation, had obtained authority to do business in Kansas and maintained an office in Kansas City, Kan. On the door of its reception room, its name appeared in large letters and plaintiff's name appeared below in small letters. Plaintiff was the company's dental operator and was paid a salary and commissions for his work. He made no contracts with patients. One of the stated causes for cancellation of plaintiff's license was that he did not practice under his own name. The board demurred to plaintiff's petition and appealed to this court from an order overruling the demurrer. In disposing of the appeal, the court said:

> "Dentistry is a profession having to do with public health, and so is subject to regulation by the state. The purpose of regulation is to protect the public

> from ignorance, unskillfulness, unscrupulousness, deception, and fraud. To that end the state requires that the relation of the dental practitioner to his patients and patrons must be personal."

In view of the above case, which is analogous to the practice of a certified public accountant, it is the intention of the Legislature of the State of Missouri that his relation with the customers must be personal and should not be controlled in any manner by a corporation, firm, partnership, or anyone acting under a registered fictitious name.

Under Chapter 110, Section 13710, supra, which applies to certified public accountants, a fictitious name such as Haskins and Sells could not take an examination as set out in said chapter.

As to the registration of fictitious names, as set out in Section 14342, supra, it does not apply to a provision which is limited and powers granted by other special acts of the Legislature such as the qualifications and mode of examination of applicants for the certification of being certified public accountants. This was so held in the case of In Re Co-operative Law Company, 198 N. Y. 479, 92 N. E. 15, 32 L.R.A. (N.S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879, where the right of a corporation to practice law was under consideration, and the court said:

> "A corporation for the practice of law is not authorized by a statute permitting the organization of a corporation for any lawful business, since the practice of the law is not a lawful business except for members of the bar, who have complied with all the conditions required by statute, and the rules of the courts: and a corporation cannot perform the conditions."

Also in the case of In Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A.L.R. 1319, it was held:

> "A corporation cannot itself practice law, nor can it lawfully do so by hiring an attorney to conduct a general law practice for others for pay, where the fees earned are to be and are received as income and profit by the corporation."

In the case of State v. Kindy Optical Co., 216 Iowa, 1157, 248 N. W. 332, 335, decided in 1933, it was shown the company was a maker and seller of optical goods. Jensen, a licensed optometrist, was an employee of the company, which operated an optical department in a store in Des Moines. The company entered into a lease with Jensen in which it agreed to pay Jensen, and at the same time it made a contract with Jensen, subject to cancellation on seven days' notice, to employ him, and Jensen agreed to remain in its employ for two years. It was provided Jensen should be manager, subject to the direction and control of the company's officers. All moneys from the business belonged to the company, which agreed to pay Jensen a stipulated salary and commissions. The state brought action to enjoin and the defendant contended it was not practicing optometry; that Jensen was its lessee and was not under its control in the practice of optometry; and that the company did not profess to be an optometrist or to assume the duties incident to said profession. It did not appear that defendant's name was used, the business being advertised in the name of the department store, but the advertisements were prepared and paid for by the company. The company owned the equipment. In its opinion the court said:

> "The subtle attempt on the part of the defendant to evade the provisions of the Iowa statutes in reference to the practice of optometry, by employing a licensed optometrist to conduct its business, and by the execution of the alleged lease with its employee, is too patent to appeal strongly to a court of equity. Younker Bros. probably should have been made a party defendant in this action, as that institution had no more right to hold itself out to the public as being engaged in the practice of optometry than did the defendant.

> "The execution of the so-called lease between the defendant and its employee Jensen, in connection with the contract of employment between the same parties, was also a sham and fraud and a too evident plan, purpose, and intent to evade the provisions of the statutes herein referred to. It is true that the name of the defendant did not appear publicly in connection with the business, but the record shows without controversy that the business was in fact owned and operated by the defendant company. The defendant company controlled the conduct and policies of the business. Jensen was simply its employee on a stipulated salary. The so-called lease between Jensen and the defendant, under the terms of which the defendant, as lessor, was to pay Jensen, as lessee, $281 per month, was only a clever attempt to change the character of Jensen from an employee to a lessee, and does not change the fact that Jensen was an employee of the defendant company.
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> "The defendant company could not conduct a business without a license. It could not obtain a license, and we can conceive of no reason why it should be permitted to continue to conduct a business under the license of an optometrist. We hold therefore that the defendant company was and is engaged in the practice of optometry and that it is so engaged in violation of the statutes of this state."

In the case of Stern v. Flynn, 154 Misc. 609, 278 N.Y.S. 598, 599, plaintiff sought to compel the secretary of state to accept for filing a proposed certificate of incorporation, a part of the proposed purpose being "to do, render and perform optometrical and oculists' work and services" and "to engage in the practice of optometry, provided it employs only licensed optometrists to do the work." The court, after citing authorities holding that a corporation can neither practice law nor

hire lawyers to carry on the business of practicing law for it any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it, said:

> "If it is repugnant to the policy of the state to have the profession of medicine, of dentistry, and of the law practiced by a corporation, it would seem to be quite as repugnant to have the profession in optometry practiced by a corporation. The rule laid down of Matter of Cooperative Law Co., supra, is as applicable to the practice of optometry as to the practice of the law. The practice of optometry may be carried on only by those persons who have complied with the statute and have met the required qualifications as to moral character and educational fitness. It necessarily follows that the right to practice optometry is a personal one and confined to real persons and not to legal entities. A corporation as such cannot meet the requirements of the statute; it cannot have completed a course in a high school or in a university where optometry is taught, nor present the necessary certificate of character. It cannot pass a state board examination or present a degree earned in a university."

In the case of Funk Jewelry Co. v. State (1935), 50 P. (2d) 945, it was held that a corporation which employed a registered optometrist, as a part of its business, to examine the eyes for defects and prescribe glasses to correct them, was engaged in the practice of optometry in violation of a statute which provided that a person desiring to engage in the practice of optometry must be over twenty-one years of age, of good moral character, and possess certain specified educational qualifications, and must pass an examination before the state board of optometry, and obtain a certificate of registration.

In the case of McMurdo v. Getter, 10 N. E. (2d) 139, (Mass.) the court said, l. c. 143:

> "Although the statute does not show an uncompromising determination to apply purely professional standards to optometrists, we think that they are in effect placed on a professional plane. A certificate of registration may be revoked for 'unprofessional conduct' (section 71), although the statute speaks of an 'optometric practice or business.' The general principle is recognized that there should be direct professional relations between an optometrist and the members of the public who engage his services. Section 72 declares that 'No optometric practise or business * * * shall be conducted under any name other than that of the optometrist or optometrists actually conducting such practise or business.' That provision, unless this case falls within some exception to it, makes illegal what was done in this case. It prohibits, as a general rule, the practise of optometry by a layman or a corporation through servants who are registered optometrists."

In view of the holding in this case, there is no question but what a certified public accountant should have direct professional relations between himself and the public who engages his services, and he should not be employed, for the reason that he holds a certificate of public accountancy in the state of Missouri, by a layman, corporation, or firm holding a registered fictitious name, but under Chapter 110, supra, in order to avail himself of the privilege granted him under said chapter to style himself as a C. P. A., it would be unprofessional to allow his name to be used as an employee of a corporation, partnership, firm or anyone doing business under a lawfully registered fictitious name.

In People v. Marlowe, (1923), 203 N. Y. S. 474, it was held that the degree of Certified Public Accountant which had been conferred upon the defendant by the National Association of Certified Public Accountants, a private membership organization in the District of Columbia, would not entitle him to hold himself out to the public as a public expert accountant in the State of New York, the use of such a degree lawfully obtained from any board or other institution outside of the state of New York being prohibited unless the General Business Laws have been fulfilled. And the appending of the name of the Association, "N. A.," after the title of "certified public accountant" did not take the defendant out of the prohibition of the statute. The court said in this New York case:

> "As I view it, the statute affecting Certified Public Accountants in this State was enacted not alone to prevent frauds, but as well to assure the public that persons practicing public accountancy as experts, certified as such, have met our standards of qualifications, and tests fixed by law or in accordance with rules and regulations authorized thereunder. To rule otherwise under these circumstances would mean that other states, boards, associations, and institutions could prescribe a course of study, determining their own tests of proficiency of the applicant, and then issue a degree to him as a Certified Public Accountant which, according to the claim of the defendant, would entitle the recipient thereof to come into this State and practice expert public accountancy. I cannot agree with this view which has been urged upon us for our consideration."

In the case just quoted from, People v. Marlowe, 203 N. Y. S. 474, it was held that unless defendant could plead some other defense, he should be held guilty of violation of the New York law as to Certified Public Accountants.

A note in 43 A. L. R. 1095 says that Frazier v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086, holds that the state may require one to comply with the act before

acting as a certified public accountant or a public accountant, but is unconstitutional when it goes so far as to prohibit one from working at the business of accountancy for more than one person. This case recognizes that "there is in the public mind a marked distinction between a public accountant and a certified public accountant."

In the case of Henry v. State, 97 Tex. Crim. Rep. 67, 260 S. W. 190, wherein it was held that one could act as a public accountant but not as a Certified Public Accountant unless certified by the state of Texas under its laws, the court said among other things:

> "Appellant's criticisms of the charge of the court are directed against that phase of it which declines to sanction his contention that his act in advertising himself as a Certified Public Accountant was illegal inasmuch as he did not state in his advertisement that he was such Certified Public Accountant of the State of Texas. The objection cannot be sustained."

In other words, the court held that it was just as much a violation of the law to practice as a Certified Public Accountant in Texas as if the defendant had expressly stated in his announcements or advertisements that he was certified by the State of Texas. To the same effect is the case of Crowe v. State, 97 Tex. Crim. Rep. 98, 260 S. W. 573. In People v. National Association C. P. A., 204 App. Div. 288, 197 N. Y. S. 775, the defendant was enjoined from operating a school which conferred the C. P. A. degree in the State of New York because it was in violation of the statutes of New York conferring upon its proper authorities the right to certify public accountants. The court said:

> "There is not the slightest doubt that under the statute above quoted a foreign corporation would be restrained from transacting a business in this State contrary to and in violation of the laws of the State."

In Davis v. Sexton, 211 App. Div. 233, 207 N. Y. S. 377, it is pointed out that under the New York laws (as under our own statutes) "persons may practice as public accountants but

without a certificate of the regents they cannot assume the title of 'Certified Public Accountant.' General Business Law, Sec. 80, as amended by Chapter 443, Laws 1913."

The same distinction is observed in State v. De Verges (La.), 95 So. 805, 27 A. L. R. 1526. This latter case also recognizes the right of accountants from other states to become licensed in the state by the provision for their admission upon their foreign certificate if meeting with the approval of the local board, this indicating that a foreign practitioner must be admitted under the laws of the local state. So it is pointed out at length, and interestingly, in Lehman v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94, that while a lawyer or a doctor cannot practice at all without a certificate, yet public accountants may practice accountancy without certificates. The court said:

> "They are not required to obtain a certificate or license to practice their calling but obtaining the license or certificate is purely voluntary on their part."

CONCLUSION

In view of the foregoing, it is the opinion of this department that it is unlawful for a firm or an individual operating branch offices in Missouri to hold themselves out as certified public accountants, the partners being certified public accountants of other states, but not holding Missouri degrees, but the resident partner or manager being a Missouri certified public accountant.

It is further the opinion of this department that a firm or partnership cannot style itself as certified public accountants under a lawfully registered fictitious name.

Respectfully submitted

W. J. BURKE
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APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR