664.

APPROVAL, LEASE TO LAND IN FRANKLIN TOWNSHIP, MONROE COUNTY—TWIN OIL & GAS COMPANY.

COLUMBUS, OHIO, July 25, 1929.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval as to legality and form, a certain lease recently executed by you as Auditor of State to one E. G. Cunningham, doing business as Twin Oil and Gas Company of Woodsfield, Ohio, the purpose of which is to extend for a period of eight months from and after April 22, 1929, the terms and provisions of a certain lease executed by you under date of October 22, 1929, leasing and demising to the above named lessee a certain tract of forty acres of land in the northeast quarter of Section 16, Township 6, Range 7, Franklin Township, Monroe County, Ohio.

An examination of the lease submitted shows that the execution of this lease is within the authority granted to you by Section 3209-1, General Code, relating to the leasing of unsold portions of school and ministerial lands.

It further appears that said lease as to form is in accordance with the provisions of said section and of other sections of the General Code relating to the execution and acknowledgment of leases.

Said lease is accordingly hereby approved and my approval is endorsed upon said lease and the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

665.

CORPORATIONS—MERGER—FEES CHARGEABLE WHEN AGREEMENT FILED WITH SECRETARY OF STATE—MERGER AND CONSOLIDATION DISTINGUISHED.

SYLLABUS:

Where two or more corporations effect a merger, as provided in Section 8623-67 *General Code, as amended by the* 88*th General Assembly, the fees to be charged for filing and recording the agreement effecting such merger, should be the same as provided in Section* 176, *General Code, for filing a certificate of amendment of such corporation. (Merger and consolidation distinguished.)*

COLUMBUS, OHIO, July 25, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

> "Amended Section 8623-67 of the General Code will go into effect on July 23rd. As amended the section among other things provides that a consolidated corporation formed under the section mentioned, may be any one of one or more constituent corporations or a new corporation formed by the consolidation.

G. C. 176 provides for the filing fees of consolidations. Where the consolidated corporation continues the entity of one of the constituent corporations, shall credit be given in computing fees for the number of already authorized shares of such constituent and continuing corporation? In this connection see Section 8623-68, second paragraph, to the effect that where certain constituent corporations are merged into one constituent corporation the agreement of consolidation shall operate as amended articles of such corporation."

Prior to the amendment by the 88th General Assembly, the General Corporation Act, in Section 8623-67, General Code, authorized only the consolidation of two or more corporations. The section, as amended, now provides in part, as follows:

"Any two or more corporations organized under this act or any previous corporation act of this state may consolidate into a single corporation hereinafter called 'consolidated corporation,' which may be any one of such constituent corporations or a new corporation to be formed by such consolidation, as follows:

* * * * "

The Legislature has here provided that two or more corporations may unite, and become one corporate entity,by two distinct methods—first, by merger, and second by consolidation. The fact that it is provided that after the completion of a merger, as authorized, the remaining corporation shall be called a consolidated corporation, does not alter the situation, if such result is accomplished by means of merger, instead of by means of consolidation. The difference between the two terms is clearly set forth in Fletcher's Cyclopedia of Corporations, Volume 7, page 8304, wherein it is said:

"While the word 'merger' is often used as synonymous with 'consolidation,' both in the decisions, textbooks, and also in agreements effecting a combination of corporations, a merger, rightly understood and according to its strict legal meaning, is clearly distinguishable from a consolidation such as is authorized by statutes in most of the states. A merger, using the word in its strict legal sense, exists only where one of the constituent companies remains in being, absorbing or merging into itself all the other constituent companies, while in the case of a consolidation a new corporation is created and generally all the consolidating companies surrender their separate existence. As said in one case, it is in the interest of clearness of definition that 'consolidation' should be limited to signify such union of two or more corporations as necessarily results in the creation of a new corporation; and the term 'consolidation' as used in this chapter will be limited to such combinations of corporations. Moreover, a statute authorizing merely a consolidation does not authorize a merger."

The language of the court in the case of *Lee* vs. *Atlantic Coast Line R. Co.,* 150 Fed. 775, 787, is also pertinent:

"The results of a merger are entirely different from those of a consolidation. Ordinarily, when corporations of two or more states 'consolidate,' in the technical sense of the term, the old corporations are dissolved and a new corporation comes into being in each state. * * * However, when two corporations unite by way of merger, the result is not the same as in case of

consolidation. In the case of merger the one is absorbed by the other, and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist."

Notwithstanding the fact that the Legislature provided that whichever course may be followed, the resultant remaining corporation shall be called a consolidated corporation, it is noted that the distinction between the two terms is recognized in this same section, wherein it is provided that the agreement between the several corporations shall set forth:

"That the constituent corporations are to become a single new corporation or that certain of the constituent corporations are to be merged into a specified constituent corporation; * * * "

Section 8623-68, General Code, to which you refer, contains a further recognition of the distinction between merger and consolidation, which section provides in part, as follows:

"In case certain constituent corporations are to be merged into one of such constituent corporations, the agreement of consolidation shall operate as amended articles of such corporation, and, if the agreement so provides, as a certificate of reduction of its stated capital."

Section 176, General Code, provides for the fees to be collected by the Secretary of State. Paragraph one contains a scale of fees to be charged for the filing and recording of the original articles of incorporation. Paragraph two provides the same scale of fees to be charged for filing a certificate of amendment increasing the number of shares which a corporation shall be authorized to issue, and paragraph three provides the same schedule of fees for filing and recording a copy of an agreement of consolidation. Manifestly, if two or more corporations are uniting under an agreement to consolidate, whereby a new corporation is formed, the schedule of fees provided in paragraph three of Section 176 is applicable. If, however, two or more corporations are uniting by means of merger, and one corporation is retaining its corporate identity, under the provisions of Section 8623-68, supra, as amended by the 88th General Assembly, the fees to be charged for the filing of such agreement as is entered into to effectuate a merger would depend upon the number of shares authorized by the corporation retaining its identity with relation to the number of shares previously authorized by such corporation. In other words, if, after the completion of such merger, the remaining corporation is to have a greater number of shares authorized than theretofore, the agreement would operate as an increase of shares, and the fee for filing such agreement would be based upon paragraph two, of Section 176.

If, however, such merger resulted in the corporation retaining its identity, having an equal or lesser number of shares than theretofore, the fee which should be charged for filing such agreement would be ten dollars, as provided in paragraph 8 of Section 176. To hold otherwise, would be to say, for instance, that every time a small corporation having 10,000 shares, merged with a large corporation having, perhaps, five hundred thousand authorized shares, and such merger made no change in the authorized shares of the merged corporation, nevertheless, the filing of the agreement would necessitate the payment of a fee of $9,000.00. The contrary legislative intent is, I believe, clearly expressed in Section 8623-68, supra, wherein it is said that such agreement shall operate as amended articles.

Specifically answering your question, I am of the opinion that where two or more corporations effect a merger, as provided in Section 8623-67, as amended by the 88th General Assembly, the fees to be charged for filing and recording the agreement effecting such merger, should be the same as provided in Section 176, General Code, for filing a certificate of amendment of such corporation.

Respectfully,
GILBERT BETTMAN,
Attorney General.

666.

CORPORATION—PROFIT AND NOT FOR PROFIT—NECESSITY FOR FILING WRITTEN APPOINTMENTS OF AGENTS AS SEPARATE INSTRUMENTS WITH ORIGINAL ARTICLES.

SYLLABUS:

1. *A written appointment of an agent on whom process, tax notices or demands against a corporation may be served, should, under the provisions of Sections* 8623-4 *and* 8623-129, *General Code, be filed at the time of incorporation under the general corporation act, as a separate instrument, and not as a part of the articles of incorporation.*

2. *The requirement of Section* 8623-129, *General Code, for the filing in the office of the Secretary of State, with the articles of incorporation of "every corporation hereafter incorporated under this act," of a certificate of a written appointment of an agent of such corporation upon whom process, tax notices or demands against such corporation may be served, is applicable to corporations not for profit as well as corporations for profit, providing such corporations not for profit are incorporated under the general corporation act.*

3. *Such written appointments of agents must be filed at the time of the filing of the articles of incorporation of corporations organized under the general corporation act.*

4. *Original appointments of such agents should be filed without charge.*

5. *Forms.*

COLUMBUS, OHIO, July 25, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, as follows:

> "The amended sections to the General Corporation Act go into effect July 23rd. Section 8623-4 has been amended and among other things now calls for the filing with articles of incorporation of a written appointment of an agent upon whom process, tax notices and demands against such corporation may be served. General Code, Section 8623-129 provides that this filing may be made by a majority of the incorporators. Your advice is accordingly requested in connection with the following:
>
> First: Is such appointment of agent a part of the articles? Apparently it is not as a majority of the incorporators may make the designation.
>
> Second: General Code, Section 8623-129, in the first paragraph, provides that the incorporators or a majority of them of *every corporation* here-