

State University, Kent, Ohio, and Mr. Harry A. Fulton, Architect, of Cleveland, Ohio, for the preparation of plans, specifications, bills of material and estimates of cost for a Science Recitation Building, Equipment, Heating Plant and Service Extension. His duty also to include the superintending of the construction of said improvement and the inspection of said materials going into said improvement previous to their incorporation into the same.

Incorporated into the contract is the approval by the Board of Trustees of Kent State University by Joseph B. Hanan, Roy H. Smith and John R. Williams. Also attached is Encumbrance Record No. EE2234 in the amount of \$35,750.00, and the release of the necessary funds by the Controlling Board.

Finding said contract in the proper legal form, I have this day noted my approval thereon and return the same herewith to you together with the above mentioned papers.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2809.

CORPORATION MAY NOT BE INCORPORATED UNDER PROVISIONS OF SECTION 10185, GENERAL CODE, TO DISTRIBUTE MERCHANDISE TO MEMBERS FOR RE-SALE—CORPORATION ORGANIZED TO PURCHASE MERCHANDISE AND DISTRIBUTE SAME TO MEMBERS TO SAVE MONEY IN PURCHASE OF MERCHANDISE IS CORPORATION FOR PROFIT AND SHOULD BE INCORPORATED—SECTION 8623-4, GENERAL CODE.

SYLLABUS:

1. *A corporation may not be incorporated under the provisions of Section 10185, General Code, where the corporation intends to distribute merchandise to its members for resale.*

2. *A corporation organized for the purpose of purchasing merchandise in large quantities and distributing same to such members, the object*

being to secure more favorable terms for such members and to save them money in the purchase of such merchandise, is a corporation for profit and should be incorporated under Section 8623-4, General Code.

COLUMBUS, OHIO, August 9, 1938.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your communication of recent date enclosing a letter addressed to you by an attorney who desires to incorporate a corporation not for profit for the following purpose:

“To engage in the business of cooperative buying for its members of mill feeds, concentrates, grains, vegetables, hay, fertilizer, farm implements and machinery, seeds, shrubbery, nursery stock, fencing, hardware, coal, lumber, lime, cement, tile, brick, and other merchandise. To distribute such products to its members at actual cost plus expense of storage, brokerage, and distribution, so that no profit of any kind is made by said corporation, and so that its members may obtain the full benefit of large-scale purchasing.”

It appears that the proposed corporation

“would have as its members various wholesale and retail dealers in mill feeds, grains, fertilizer, farm machinery, fencing, coal, lumber, cement, etc.

The corporation would purchase such materials for its members in car load lots or other large quantities to obtain the benefit of large-scale buying, and would distribute such materials to its members at actual cost, plus expense of storage, brokerage, distribution, etc. Any surplus which might accrue to the corporation as a result of such operation would be disbursed to the members from time to time on a patronage basis, thus giving each member, in effect, the lowest possible price on its purchases.”

The merchandise to be distributed by the proposed corporation to its members would be so distributed for resale to the public by its members who are engaged in the retail business.

Your specific question is whether or not a corporation organized for the purpose above outlined “should be organized under Sections 10185 and 10186 or under the General Corporation Act; and if it

should be organized under the General Corporation Act, whether the articles should be filed in compliance with Section 8623-4 or Section 8623-98."

Section 10185, General Code, relating to cooperative trade associations, reads as follows:

"An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost and expense of purchasing, holding and distribution, may employ its capital and means in the purchase of such articles or merchandise as it deems best for itself, and in the purchase or lease of such real and personal estate, subject always to the control of the stockholders, as are necessary or convenient for purposes connected with and pertaining to its business."

It is quite evident that under the provisions of the foregoing section cooperative purchasing for distribution to consumers only is contemplated and since the proposed corporation intends to distribute the merchandise to its members for resale by them to the public, the provisions of Section 10185, *supra*, do not apply.

This brings me to a consideration of the question as to whether or not the proposed corporation may be organized as a corporation for profit or a corporation not for profit. Section 8623-3, General Code, provides that "A corporation for profit may be formed hereunder for any purpose or purposes, other than for carrying on the practice of any profession, * * *." Section 8623-97, General Code, relating to corporations not for profit, provides as follows:

"A corporation not for profit may be formed hereunder for any purpose or purposes not involving pecuniary gain or profit for which natural persons may lawfully associate themselves, provided that where the General Code makes special provision for the filing of articles of incorporation of designated classes of corporations not for profit, such corporations shall be formed under such provisions and not hereunder."

It is quite evident from a reading of the above sections that a corporation which involves pecuniary gain or profit must necessarily organize as a corporation for profit under the provisions of Section 8623-4, General Code, unless there are special provisions of the General Code providing for the filing of articles of incorporation of des-

ignated classes of corporation, in which case such corporations are required to be organized under the special provisions.

In the case of *Snyder, et al. vs. Chamber of Commerce*, 53 O. S. 1, the court, considering the corporation laws in existence at that time, laid down the following test to be applied in determining whether or not a corporation is one for profit.

“Corporations for profit within the meaning of the statute are those which are formed for the prosecution of business enterprises with a view to realizing gains to be distributed as dividends among the shareholders in proportion to their contributions to the capital stock.”

In the case of *Celina Telephone Co. vs. Mutual Telephone Co.*, 102 O. S. 487, the question to be determined by the court was whether or not the defendant company was a public utility operated “not for profit.” At page 494, the following is stated:

“How may it be determined whether a corporation or association is one for profit or not for profit? Does the filing of articles of incorporation, in which a declaration is made that it is not for profit, and on which the charter is issued, govern or determine this question? Is the issuance or non-issuance of capital stock controlling, or is it whether a business is to be engaged in, and operated with consideration of the character of that business and the method of conducting it, that is the true test?

We think the latter. * * *

A corporation then, organized for profit, providing no capital stock whatsoever, under certain circumstances, may be in fact conducting a business for profit.”

From the above, it is quite apparent that the fact that the corporation under consideration has no provision for capital stock or states in its articles of incorporation that it is to be organized not for profit, is in itself not controlling in determining whether or not such corporation is one for profit or one not for profit.

In the case of *Read vs. Coal Exchange*, 116 Atl. 898 (Dela.), the court, in discussing some general principles of law, quotes with approval the following citation from Fletcher’s *Cyclopedia of Corporations* as follows:

“Under the statutes of some states separate provisions are made for the incorporation of corporations for pecuniary

profit, as distinguished from corporations not for pecuniary profit. Within the meaning of such a provision, a corporation for pecuniary profit has been defined to be a corporation organized for the pecuniary profit of its stockholders or members. * * ”

Continuing, the court said at page 904:

“Whether dividends are expected to be paid may, generally speaking, be taken as the test by which we are to determine whether, or not, a given corporation is organized for profit. Perhaps a better way to put it would be to say that a corporation is for profit when its purpose is, whether dividends are intended to be declared or not, to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends. Subterfuges by which a corporation allowed its profits to be diverted to those owning it, though not in the form of dividends, would manifestly not remove from the corporation its feature of profit making.”

It might well be argued that if the test laid down by the court in the Snyder case were applied strictly to the facts under consideration, a conclusion might be reached permitting the corporation to be organized not for profit inasmuch as no dividends would be distributed among the members in proportion to their contributions to capital stock. However, applying the test laid down by the Supreme Court in the Mutual Telephone Company case, consideration must be given to the character of the business and the method in which such business will be conducted. There can be no question in my mind that the members of the proposed corporation, although they will receive no dividends in proportion to their investments in capital stock, will receive some pecuniary gain or profit in that they will be permitted to acquire merchandise for an amount less than they would ordinarily be required to pay from outside sources. My predecessors in office on several occasions have recognized the principle that a corporation is one for profit where the members of the corporation will receive pecuniary benefit although the corporation itself will make no profit.

In Annual Report of the Attorney General for 1912, Vol. 1, page 39, the question under consideration was whether or not a corporation formed to provide and maintain a fund with which to make loans to members without interest may be organized as a corporation not

for profit. The then Attorney General, in holding that a corporation with a purpose as above outlined is a corporation for profit, said:

“While I have in a previous opinion advised you that the test of what constitutes a corporation for profit is the distribution of the increment of its funds among the members of the corporation by way of dividend or otherwise, I am disposed, in view of the question which has now arisen, to enlarge upon the former definition and to state that it should be broad enough to include all corporations the sole purpose of which is the direct or indirect pecuniary benefit of the members.”

In Annual Reports of the Attorney General for 1913, Vol. I, page 93, it was said at page 94:

“In other opinions to your department I have more elaborately discussed my reasons for being of the opinion that a corporation, the object of which is to save money for its members by combining their investments and securing more favorable terms therefor, or otherwise, is no less a corporation ‘for profit’ than one the object of which is to make money for its members, so that its profits may be ratably distributed to them.”

The facts submitted by you do not indicate that the proposed corporation intends to engage in any activity which is in restraint of trade or in violation of the Valentine Anti-Trust Law. Sections 6390, et seq., General Code. However, it is well to bear in mind when accepting articles of incorporation for filing that under certain conditions, combinations of capital, skill and acts which affect the public and which are “hurtful and unreasonable” may be in restraint of trade and contrary to the provisions of the Valentine Anti-Trust Law. See *List vs. Burley Tobacco Growers Cooperative Assn.*, 114 O. S. 361.

In view of the foregoing and in specific answer to your question, it is my opinion that:

1. A corporation may not be incorporated under the provisions of Section 10185, General Code, where the corporation intends to distribute merchandise to its members for resale.

2. A corporation organized for the purpose of purchasing merchandise in large quantities and distributing same to such members, the object being to secure more favorable terms for such members

and to save them money in the purchase of such merchandise, is a corporation for profit and should be incorporated under Section 8623-4, General Code.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2810.

APPROVAL—CONTRACT BETWEEN E. C. REITZ COMPANY, BELLEVUE, OHIO, AND STATE OF OHIO BY DEPARTMENT OF PUBLIC WORKS FOR BOARD OF TRUSTEES, BOWLING GREEN STATE UNIVERSITY, CONSTRUCTION AND COMPLETION OF ELECTRICAL CONTRACT FOR WOMEN'S PHYSICAL EDUCATION BUILDING, TOTAL EXPENDITURE, \$4,933.00.

COLUMBUS, OHIO, August 10, 1938.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract by and between E. C. Reitz Company, Bellevue, Ohio, and the State of Ohio, acting by the Department of Public Works, for the Board of Trustees, Bowling Green State University, Bowling Green, Ohio, for the construction and completion of Electrical Contract for Women's Physical Education Building, Bowling Green State University, Bowling Green, Ohio, as set forth in Item 4, Electrical Contract and Item 11, Alternate "E-1" of the Form of Proposal dated March 7, 1938, which contract calls for the total expenditure of four thousand nine hundred and thirty-three dollars (\$4,933.00).

You have also submitted the following papers and documents in this connection: Certificate of availability of funds, addenda No. 2, attached to contract, estimate of cost, division of contract, notice to bidders, proof of publication, workmen's compensation certificate showing the contractor having complied with the laws of Ohio relating to compensation, the form of proposal containing the contract bond signed by the Massachusetts Bonding and Insurance Company, its power of attorney for the signer, its financial statement and its certificate of compliance with the laws of Ohio relating to surety companies, the recommendations of the State Architect, Board of