

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 IN-
 STRUMENTS 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-

after incorporated under this act, shall make a written designation of agent. Does this mean that both profit and not for profit corporations must make the appointment of agent? While the context of the balance of the section would seem to indicate that the section is intended to apply only to for profit corporations, there are many reasons why not for profit corporations with their loose form of corporation and business methods should be required to designate such an agent.

Third: After the effective date of amendments, may articles be accepted without the filing of appointment of agent, with the appointment of agent to be made at a later date?

Fourth: Is the Secretary of State authorized to charge a filing fee for the appointment of agent, where made by separate instrument, although filed at the same time as the filing of the articles? If your answer to the third question is to the effect that such an appointment can be made at a time after the filing of the articles, is the Secretary of State authorized, at that time, to collect a filing fee for such original designation of agent? If so, in what amount? (See General Code Section 8623-129 as to subsequent appointments of agent.)

Fifth: Please advise as to the wording and form to be used in making original and subsequent designation of agent."

Section 8623-4, after providing what articles of incorporation shall contain, in the last paragraph thereof provides as follows:

"A written appointment of an agent upon whom process, tax notices and demands against such corporation may be served as hereinafter provided *shall be filed with the articles.*" (Italics the writer's.)

Section 8623-129, to which you refer, as amended, is in part as follows:

"The incorporators, or a majority of them, of every corporation hereafter incorporated under this act shall file in the office of the Secretary of State, with the articles of such corporation, a written appointment, in such form as the Secretary of State may prescribe, of an agent of such corporation upon whom process, tax notices or demands against such corporation may be served, and such appointment shall continue until such agent shall die, or his appointment shall be revoked by such corporation.

Every corporation heretofore incorporated under the laws of this state shall, prior to the time of filing its first report with the Tax Commission after this section becomes effective, appoint by resolution of its board of directors an agent upon whom process, tax notices and demands against the corporation may be served, and at the time of filing its said report with the Tax Commission shall file with such commission the written appointment of such agent in such form as the Secretary of State may prescribe.

The Tax Commission shall deliver the written appointment so filed with it to the Secretary of State.

Any agent appointed as aforesaid shall be a natural person who shall be a resident in the county in which the principal office of the corporation is located, and in any written appointment or resolution the street and number or a particular description of the address of such agent shall be given. The Secretary of State shall keep a record of the name of each corporation and the name of its agent and the address of each.

Every corporation heretofore or hereafter formed shall state in each

annual report filed by it with the Tax Commission the name and address of the agent appointed by it under this section.

Process in any suit, action or proceeding against any corporation or any tax notice, demand or any other notice required or permitted by statute to be served upon a corporation may be served upon such corporation by delivering a copy thereof to its designated agent or by leaving a copy thereof at his address as the same appears upon the record in the office of the Secretary of State.

If any person so appointed as agent shall change his address within the county, the corporation shall forthwith file with the Secretary of State a certificate setting forth the new address, for the filing of which certificate the Secretary of State shall charge and collect a fee of one dollar.

If any person so appointed as agent shall die, remove from the county or resign, or if the corporation shall revoke any such appointment, the corporation shall forthwith by resolution of its board of directors, appoint another person as agent and file a certificate of such appointment with the Secretary of State, for the filing of which certificate the Secretary of State shall charge and collect a fee of one dollar, but no resignation of an agent shall be effective until his successor has been appointed.

* * * "

It is expressly provided in both sections of the General Corporation Act, quoted above, that the written appointment of an agent on whom process, notices and demands against a corporation may be served *shall be filed with the articles*. It is further provided that the form of this appointment may be prescribed by the Secretary of State. Section 8623-4 contains no provision for incorporating this appointment in the articles themselves. Your attention is directed to the provisions of Section 8623-129, *supra*, relative to filing subsequent certificates appointing such agents in the event of the death, resignation or removal from the county of any such agent previously appointed. Apparently the Legislature did not contemplate that the certificate filed appointing an agent should be part of the articles of incorporation, and I am of the view that the requirement of a separate instrument is made because of the fact of the more or less limited period of time over which such instrument may be effective, as distinguished from the permanent character of the articles themselves. The view that this appointment should be a separate instrument is further strengthened by the provision, which you mention, that only a majority of the incorporators are required for its execution.

Specifically answering your first question, I am of the opinion that 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.

Relative to the necessity of the filing of a certificate appointing an agent, as provided in Section 8623-129, *supra*, in the case of the incorporation of a corporation not for profit, I am inclined to the view that the express provision in this section, that "every corporation hereafter incorporated under this act shall file" such written appointment, is all inclusive. The general corporation act provides for corporations not for profit as well as corporations for profit and the reference to every corporation hereafter incorporated under the general corporation act cannot possibly be construed to exclude either class of corporation. It is true that Section 8623-98, providing for the incorporation of corporations not for profit and for certain information which shall be set forth in the articles, has not been amended by the 88th General Assembly so as to include a reference to such appointment, as was Section 8623-4, which makes

similar provisions for corporations for profit. However, in view of my conclusion in answer to your first question, to the effect that a certificate appointing an agent upon whom service can be had, is not a part of the articles of incorporation, there is no inconsistency in Section 8623-98 not having been amended. It should also be observed that the provisions of Section 8623-129, *supra*, relative to corporations heretofore incorporated under the laws of this state designating agents prior to the time of filing first reports with the Tax Commission, will not reach corporations not for profit heretofore organized. There can be no question, however, but that the Legislature has authority to enact provisions applicable to corporations hereafter organized which may not reach corporations heretofore organized, and I am of the view that the failure of the Legislature to provide that corporations not for profit, heretofore organized, shall designate such agents is not in itself indicative of an intention to exempt the corporations not for profit hereafter organized from the provisions of this section.

In answer to your second question, I am of the opinion that 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.

Considering your third question, I am of the opinion that such written appointment of an agent, as herein contemplated, must be filed at the time of the filing of the articles of incorporation of every corporation organized under the general corporation act. The provisions for the filing of such written appointment are clearly mandatory and there is no authority, express or implied, for the filing of such appointment after the filing of the articles of corporations organized after the effective date of the act. In view of this, it follows that you have no authority to file articles of incorporation after the effective date of this act, of corporations organized under the general corporation act, unless accompanied by such certificate.

Coming now to your fourth question as to the fees to be charged for the filing of such written appointments, as herein under consideration, it will be noted that provision is made in Section 8623-129, *supra*, for the fee of one dollar to be charged by the Secretary of State for filing a subsequent appointment of such agents in the event a person previously appointed should die, remove from the county or resign, or if the corporation should revoke any such appointment. However, this provision relative to the filing of subsequent appointments is specific and apparently exclusive.

No direct provision appears to have been made as to what fee, if any, shall be charged for filing the original appointment of such agents when appointment is made by the incorporators at the time of the incorporation or by the directors of corporations heretofore incorporated prior to the time of filing the report with the Tax Commission.

Section 176, as enacted by the 87th General Assembly, governs fees to be collected by the Secretary of State, and is in part as follows:

" * * *

8. For filing and recording a certificate of amendment which does not increase the number of authorized shares, or any other certificate or copy required or permitted to be filed by the general corporation act, or any other certificate or paper not otherwise specifically provided for by statute, the sum of ten dollars.

9. For filing any miscellaneous certificate or paper not required to be recorded, the sum of five dollars.

* * * "

Considering first whether or not such original appointment of agents is included within the provisions of paragraph 8 of Section 176, *supra*, involves the question of whether or not such appointments are required to be recorded. I am inclined to the view that the words "filing and recording" both modify the phrase "or any other certificate or paper not otherwise specifically provided for by statute."

Section 8623-129, *supra*, provides that the Secretary of State shall keep a record of the names of each corporation and the names of its agents and the addresses of each. No provision is made for recording the appointment of such an agent.

Section 8623-6, General Code, provides as follows :

"The Secretary of State shall record the articles so filed, and all certificates of amendment, other certificates and agreements of consolidation relating to that corporation thereafter filed."

I am of the view that an instrument appointing an agent under the provisions of Section 8623-129, is not required to be recorded under Section 8623-6, *supra*, for the reason that it is specially provided that the names of these agents shall be recorded as above pointed out. Section 8623-6 further refers to "certificates." The Legislature has not seen fit to designate this written appointment of an agent as a certificate except in the latter part of Section 8623-129, wherein reference is made to a subsequent certificate changing the address of an agent.

A reading of the provisions of paragraph 9 of Section 176, *supra*, would appear to include the original appointment of an agent under consideration. It could very well be said that this appointment is required to be filed with the Secretary of State and is at least, a "paper not required to be recorded." Before holding, however, that such original appointment of an agent, either made at the time of incorporation or at the time of filing with the Tax Commission as provided, should be accompanied with a five dollar filing fee, under the provisions of paragraph 9 of Section 176, it is necessary to consider the first paragraph of this section.

As to the necessity of such fee in the case of corporations hereafter organized, it must be kept in mind that the fee described in paragraph 1 of Section 176 for filing and recording articles of incorporation is based upon the number of shares authorized and is not a mere fee for the filing of a paper. Articles of incorporation may, on the one hand, authorize ten shares for which a filing fee shall be twenty-five dollars. Another instrument of the same length may authorize five hundred thousand shares, for which a filing fee of nine thousand dollars would be charged. Clearly, the fee for filing articles of incorporation is a fee based upon the privilege of becoming a corporation and has no relation to the cost of filing and recording a paper.

The Legislature has now provided that there shall be filed *with* the articles of incorporation an appointment of an agent. While not incorporated within the articles themselves as herein discussed, and not in that sense a part of the articles, this appointment is nevertheless, in another sense, a part of the articles themselves in that without such appointment, articles of incorporation are hereafter incomplete. It would therefore appear that the fees provided in paragraph 1 of Section 176, for filing and recording articles of incorporation, include the articles themselves and such other papers as are necessary to constitute such articles upon filing a valid contract between the incorporators and the state, or in other words, a corporation *de jure*.

As to the necessity of such fee in the case of corporations heretofore incorporated these provisions are indicative of a legislative intent that no fee shall be charged for the original appointment of agents. The requirement that such corporations shall file with the Tax Commission written appointment of such agents, and that the Tax Commission shall deliver the written appointment so filed with it to the Secretary of State, contains no reference to a fee being turned over to the Tax Commission, which

in turn would have to be passed on by the Tax Commission to the Secretary of State; neither is there any provision relative to the authority of the Tax Commission to reject such appointments which are not accompanied by a fee, nor is there any provision as to whether or not the duty in the first instance to collect such fee shall be upon the Tax Commission or the Secretary of State.

In view of the foregoing discussion I am of the opinion that in the enactment of Section 8623-129, General Code, as amended by the 88th General Assembly, the Legislature has provided no fee for the filing of an original appointment of an agent on whom process, tax notices and demands against a corporation may be served; that the provision therein to the effect that a filing fee of one dollar shall be charged by the Secretary of State for filing subsequent appointments of such agents is indicative of a legislative intent that the original appointments of such agents shall be filed by the Secretary of State without charge.

Your fifth question inquires as to the proper form to be used in making original and subsequent designations of such agent, as is herein contemplated. In response thereto, you are advised that in my opinion the following forms will meet the requirements of the law:

Original Appointment of Agent,
Ohio Corporation,
Section 8623-129, General Code.

KNOW ALL MEN BY THESE PRESENTS, That _____

_____ Name of Agent
of _____, in _____
_____ Street or Avenue _____ City or Town
_____ County, Ohio, a natural person and resident
of said county, being the county in which the principal office of
_____ is located, is hereby appointed as
_____ Name of Corporation
the person on whom process, tax notices and demands against said
_____ may be served.
_____ Name of Corporation

Name of Corporation

Incorporators
(To be executed by all or a majority of
the incorporators at the time of organi-
zation.)

Original Appointment of Agent,
Ohio Corporation,
Section 8623-129, General Code,

Corporations Organized Prior to July 23, 1929.

KNOW ALL MEN BY THESE PRESENTS, That pursuant to resolution
of the board of directors of _____

_____ Name of Corporation
passed on the _____ day of _____, 192____,
_____ Name of Agent
of _____, in _____
_____ Street or Avenue _____ City or Town
_____ County, Ohio, a natural person and resident
of said county, being the county in which the principal office of
_____ is located, is hereby appointed as
_____ Name of Corporation

the person on whom process, tax notices and demands against said
----- may be served.

Name of Corporation

Name of Corporation
By -----
President

Secretary

Subsequent Appointment of Agent,
Ohio Corporation,
Section 8623-129, General Code.

KNOW ALL MEN BY THESE PRESENTS, That -----

Name of Agent
of ----- in -----

Street or Avenue ----- City or Town -----
----- County, Ohio, a natural person and resident
of said county, being the county in which the principal office of
----- is located, is hereby appointed as

Name of Corporation
the person on whom process, tax notices and demands against said
----- may be served, to succeed -----

Name of Corporation
heretofore appointed as such agent, which appointment is hereby made pur-
suant to resolution of the board of directors passed on the ----- day of
-----, 19-----

Name of Corporation
By -----
President

Secretary

Filing Fee, One Dollar (\$1.00)

Although no provision is made for the acceptance of such appointment by the
agent appointed, in accordance with your practice under similar statutes relating to
foreign corporations, it is suggested that the following form be included in each of
the above suggested forms.

----- Ohio.
----- A. D. 192---

Gentlemen: I hereby accept the appointment as the representative of your
company upon whom process, tax notices, or demands may be served.

State of Ohio,
County of ----- SS:

Personally appeared before me, the undersigned, a Notary Public in and
for said County, this ----- day of ----- A. D. 192---,
the above named ----- who acknowledged the sign-
ing of the foregoing to be his free act and deed for the uses and purposes
therein mentioned.

WITNESS my hand and official seal on the day and year last aforesaid.

Notary Public in and for ----- County, Ohio.

Respectfully,
GILBERT BETTMAN,
Attorney General.