

1736.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
CUYAHOGA AND JEFFERSON COUNTIES.

COLUMBUS, OHIO, February 21, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

1737.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
CARROLL AND GUERNSEY COUNTIES.

COLUMBUS, OHIO, February 21, 1928.

HON. GEORGE F. SCHLESINGER, *Director of Highways, Columbus, Ohio.*

1738.

CORPORATION — NOT FOR PROFIT — CANNOT INCREASE THE NUM-
BER OF ITS AUTHORIZED SHARES IF ORGANIZED PRIOR TO THE
ENACTMENT OF THE NEW GENERAL CORPORATION ACT.

SYLLABUS:

A corporation not for profit, organized prior to the enactment of the new general corporation act, with shares, cannot increase the number of its authorized shares.

COLUMBUS, OHIO, February 21, 1928.

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

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

“The American Oxford Down Record Association, a corporation not for profit, with a present authorized common stock issue of \$10,000 divided into 1,000 shares of \$10.00 each desires to increase the number of its authorized shares. Your opinion is requested as to whether or not, under the General Corporation Act, it will be possible for the corporation named to amend its Articles to provide for the increase and if so as to whether the vote required will be a two-thirds vote of the shareholders, or a majority

vote. Your opinion is also requested as to whether the fee will be \$10.00 or the fee based on the number of increased shares under Amended Senate Bill No. 284, as passed by the last Legislature.

Your attention is particularly directed to Section 102 of the General Corporation Act which, among other things, is to the effect that a corporation not for profit hereafter organized shall not issue certificates for shares. Your attention is further directed to Section 113 to the fact that a corporation not for profit may amend its articles by inserting only such a provision as it would be lawful to insert in original Articles made and at the time of making such amendment. Does Paragraph 113 cover an amendment such as that above referred to or does Section 15 apply for the reason that only in Section 15 is an increase in the number of shares provided for?

Passing attention is also directed to Sections 135 and 136 the last being the saving clause."

The statutes formerly authorized the formation of a corporation not for profit with capital stock. This is made clear from the decisions in the cases of *Becker vs. Germania Hall Company*, 22 O. C. C. (N. S.) 395, and *Snyder vs. Chamber of Commerce*, 53 O. S. 1. The corporation in question was, therefore, apparently legally formed, and under the old law, had authority to increase its capital stock. As you suggest, however, the general corporation act has specifically stated that corporations not for profit shall not issue shares to evidence interest in its property or otherwise. This restriction is found in Section 8623-102 of the General Code. You will observe that Section 8623-98 of the General Code, which contains the matters which should be set forth in the articles of incorporation as a corporation not for profit, does not mention shares. That section is in the following language:

"Any number of persons, not less than three, a majority of whom are citizens of the United States, may become a corporation not for profit by subscribing, acknowledging and filing in the office of the secretary of state articles of incorporation, hereinafter called 'articles,' setting forth:

1. The name of the corporation;
2. The place in this state where the principal office of the corporation is to be located;
3. The purpose or purposes for which it is formed;
4. The names and postoffice addresses of its trustees, not less than three, who are to serve until the first annual meeting or other meeting called to elect trustees;
5. If desired, the names of any persons who, together with the subscribers to the articles, are to be members of the corporation upon organization;
6. If desired, any qualifications for membership in such corporation;
7. Any lawful provision which may be desired for the purpose of defining, limiting or regulating the exercise of the powers of the corporation, and of the trustees and of the members, or of any class of members, and for the purpose of creating or defining rights and privileges of the members among themselves. Any provision authorized to be made in the regulations of such corporation may, if desired, be included in its articles.

No name may be used which shall be likely to mislead the public."

In commenting upon this section the report of committees respecting the revision of the Ohio corporation law, said:

“Under paragraph 7 of this section it is possible to specify in the articles the property rights of members. Heretofore this has been done to some extent by creating a hybrid corporation—a corporation not for profit with capital stock. It seems better in every way to require the articles to state the different classes of memberships and the property, voting, and other rights of each class than to attempt to accomplish that result by issuing shares of stock in a corporation not for profit. See also Section 103.”

You will note that it was at least the idea of the committee that paragraph 7 of this section could be used to state the property rights of the different classes of members, and Section 8623-101 of the code relative to codes of regulations for this class of corporations provides that they may include provisions in respect to “the qualification of members and the specification of their relative rights or interests in the property of the corporation.” The code of regulations must, of course, be consistent with the articles.

For the sake of clarity I also quote the provisions of Section 8623-102 of the General Code in full, as follows:

“The corporation shall keep a membership book containing the name and address of each member, and the date of admission to membership. If desired, membership may be evidenced by membership certificates, which shall be prima facie evidence of the membership of the persons to whom such certificate is issued.

A corporation not for profit hereafter organized shall not issue certificates for shares to evidence interest in its property or otherwise.

Membership may be terminated in the manner provided in the regulations, and, upon the termination of any membership for any cause, such fact shall be recorded in the membership book, together with the date on which the membership ceased.”

You will observe that in lieu of shares a corporation not for profit may issue membership certificates. Evidently it was the theory of the drafters of the corporation act that it was more advisable to eliminate shares from the structure of corporations not for profit and to substitute, in lieu thereof, provision in the articles and the code of regulations governing the property rights of the members, and membership might, if deemed advisable, be evidenced by certificates of membership.

The specific question which confronts me, therefore, is whether or not a corporation not for profit in existence prior to the new general corporation act still has authority to increase its capital stock, although all of the sections of the code pursuant to which that authority has heretofore existed, have been repealed in the enactment of the new act. Section 2 of Article XIII of the Constitution of Ohio contains the following:

“Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. * * * ”

Similar provisions are found in many of the other state constitutions, the necessity therefor having been recognized after the decision of the Supreme Court

of the United States in the famous *Dartmouth College* case, 4 Wheat. 518. The reserve power to alter or repeal is, however, in certain instances to be construed in connection with the provision of the Federal Constitution protective of contractual rights and obligations. In fact, the gist of the *Dartmouth College* case was that the contractual relationship between the state and a corporation to which a charter had been granted could not be violated.

In view of the provision of the Ohio Constitution above quoted, it may safely be said that the state of Ohio may alter or repeal general laws with relation to corporations and their application to existing corporations in any manner not prejudicial to vested interests of the corporation, its creditors or stockholders.

Without reviewing the wealth of decisions which have been rendered both in this state and other jurisdictions having similar constitutional provisions, I deem it sufficient to say that in my opinion there is no vested right either in the corporation or its stockholders to increase the capital stock of the corporation. Consequently, where the corporation has not taken any action prior to the repeal of the statutes authorizing increases of capital stock, I believe that no vested right now exists precluding the withdrawal of that authority by virtue of the repeal, unless the right is preserved by the saving clause of the general corporation act, which will be hereinafter discussed.

I have not before me the question as to whether a corporation not for profit, organized under the old law with capital stock, is now required to cancel the stock already in existence and so amend its articles as to make proper provision for the property rights of its members. Such a question would be interesting, but the reserve power in the state would seem to be broad enough to comprehend such a requirement.

Section 8623-136 of the General Code is as follows:

“This act shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.”

This is the saving clause enacted with the view to protect the rights, liabilities and interests of corporations and their stockholders and creditors existing at the time of the enactment of the general corporation act. In my opinion the corporation not for profit, which has taken no step to increase its capital stock prior to the effective date of the general corporation act, has no “right accruing, accrued or acquired” subsequently so to proceed.

I am accordingly of the opinion that a corporation not for profit, organized prior to the enactment of the new general corporation act, with shares, cannot increase the number of its authorized shares.

In view of what I have said, it is unnecessary for me to discuss certain of your inquiries.

You invite my attention to Section 8623-113 of the General Code, which is as follows:

“A corporation not for profit may amend its articles in any respect; provided, however, that only such provision shall be inserted or omitted by amendment as it would be lawful to insert or omit, as the case may be, in original articles made at the time of making such amendment; and

provided further, the purpose or purposes for which the corporation was formed shall not be substantially changed. Such amendment shall be adopted at a meeting of the members by the affirmative vote of a majority of the members present thereat, if the members present constitute a quorum as specified in the regulations, unless the regulations require the vote of a greater or lesser number of members. Upon the adoption thereof, the president or a vice-president and the secretary or an assistant secretary shall execute and sign a certificate containing a copy of the resolution of amendment, which shall be filed in the office of the secretary of state, whereupon the articles shall be deemed to be amended."

As you point out, the right to amend articles of incorporation of a corporation not for profit is, by the terms of this section, limited to such provisions as it would be lawful to insert or omit, as the case may be, in original articles made at the time of making such amendment. Quite obviously it would not be lawful for a corporation not for profit to make any provision with respect to the issuance of shares at the present time and, since the new general corporation act requires that all provisions with respect to shares shall be included in the articles or in amendments thereto, there is no method by which the corporation in question could now amend its articles so as to increase the number of its shares.

I am not unmindful of the fact that Section 8623-102, heretofore quoted, apparently makes the restriction as to issuance of certificates of shares only applicable to corporations not for profit *hereafter organized*. In my opinion the effect of this is to permit the issuance of certificates within the authority already existing, but that effect cannot be extended to authorize an increase of the authorized number of shares in the face of the other provisions of law which I have quoted.

Section 8623-113, *supra*, apparently provides a method whereby the corporation in question may accomplish substantially the same result as it seeks in increasing the authorized number of its shares. By proper amendment of its articles pursuant to this section, the articles may be so amended as to adjust the property rights of its members and authorize the issuance of membership certificates. If such an amendment is properly worded it might prove an effective substitute for the proposed action. Of course, the filing fee for such an amendment would be ten dollars, as you state in your communication.

Respectfully,
EDWARD C. TURNER.
Attorney General.

1739.

DENTIST—GROSSLY IMMORAL CONDUCT—REVOCATION OF LICENSE.

SYLLABUS:

Where a dentist advises patients to have certain dental work performed, and performs certain dental work, such advice being given and such dental work being performed deliberately and with knowledge that the diagnoses are wrong and that such work is unnecessary and with the intention of getting more money out of his patients, such conduct amounts to grossly immoral conduct likely to deceive or defraud the public, or which disqualifies him to practice with safety to the people