

OPINION
59-35

August 12, 1959 (OPINION)

CORPORATIONS

RE: Annual Report, Failure to File - Corporate Name

This is in reply to your letter of July 22, 1959, in which you state that your office has many domestic corporations which are defunct by failure to file their annual reports as provided for under section 10-0525 of the N.D.R.C. of 1943. You further state that you took the steps provided for in sections 10-0527 and 10-0528 of the N.D.R.C. of 1943. Section 10-0529 of the N.D.R.C. of 1943 provided for the reinstatement of these corporations. These sections were repealed as of July 1, 1959. You wish to know if such corporations may now reinstate.

Section 10-0527 of the N.D.R.C. of 1943 provided as follows:

SECRETARY OF STATE TO NOTIFY COMPANIES IN DEFAULT OF ANNUAL REPORT. The secretary of state shall notify each domestic corporation which defaults in the filing of its annual report or in the payment of the annual filing fee of its default. Such notice shall be given by registered letter addressed to the principal office of the company as shown in the records in the office of the secretary of state. Unless such corporation shall file the required report and pay the required fee plus an additional fee of one dollar within sixty days thereafter, the secretary of state shall enter upon the records of his office the cancellation of the charter of such corporation."

Section 10-0529 of the N.D.R.C. of 1943 provided as follows:

REINSTATEMENT OF DOMESTIC CORPORATION AFTER CHARTER CANCELED. Any domestic corporation which is engaged in active business under its charter and the charter of which has been canceled under section 10-0527 may be reinstated upon the records of the office of the secretary of state upon compliance with the following conditions:

1. Filing an annual corporation report for each year in which the corporation has failed to file its report;
2. Filing an affidavit of an officer of the corporation stating that such corporation at the time of default was and still is engaged in active business in this state;
3. Paying the annual report fee of two dollars and fifty cents for each year in which the corporation has failed to file its report; and
4. Paying a reinstatement fee of five dollars for each and every year in which the corporation has failed to file its report."

These statutes were repealed effective as of July 1, 1959. The similar provisions in the 1957 Supplement are as follows:

10-2113. INVOLUNTARY DISSOLUTION. A corporation may be dissolved involuntarily by a decree of the district court in an action filed by the attorney general when it is established that:

1. The corporation has failed to file its annual report within the time required by this Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-230; * * * * "

10-2114. NOTIFICATION TO ATTORNEY GENERAL. The secretary of state, on or before the first day of July of each year, shall certify to the attorney general the names of the corporations which have failed to file their annual reports in accordance with the provisions of this Act, (chapters 10-19, 10-20, 10-21, 10-22, and 10-23), together with the facts pertinent thereto. He shall also certify, from time to time, the names of all corporations which have given other cause for dissolution as provided in this Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-23), together with the facts pertinent thereto. Whenever the secretary of state shall certify the name of a corporation to the attorney general as having given any cause for dissolution, the secretary of state shall concurrently mail to the corporation at its registered office a notice that such certification has been made. Upon the receipt of such certification, the attorney general may in his discretion file an action in the name of the state against such corporation for its dissolution. Every such certificate from the secretary of state to the attorney general pertaining to the failure of a corporation to file an annual report shall be taken and received in all courts as prima facie evidence of the facts therein state. If, before action is filed, the corporation shall file its annual report, together with all penalties thereon, * * * * such fact shall be forthwith certified by the secretary of state to the attorney general and he shall not file an action against such corporation for such cause. If, after action is filed, the corporation shall file its annual report, together with all penalties thereon, * * * * the action for such cause shall abate."

While there is no specific provision made in the new corporation act for reinstatement of a corporation whose charter was canceled under section 10-0527 of the N.D.R.C. of 1943 the provisions for reinstatement of such a corporation are the same under section 10-0529 of the N.D.R.C. of 1943 and section 10-2114 of the 1957 Supplement. Therefore, it is our opinion that since conditions for reinstatement were the same under both the old corporation act and the new business corporation act that a corporation whose charter was canceled under the provisions of section 10-2507 of the N.D.R.C. of 1943, repealed as of July 1, 1959, may reinstate by complying with the provisions of section 10-2114 of the 1957 Supplement. It should be noted, of course, that the proceedings to cancel a charter under the provisions of section 10-2507 of the N.D.R.C. of 1943 must have been instituted before July 1, 1959, otherwise the charter could only

be canceled under the provisions of section 10-0529 of the 1957 Supplement.

You also ask whether the names of these defunct corporations are available for new corporation use. Section 10-1907 of the 1957 Supplement to the N.D.R.C. of 1943 provides as follows:

CORPORATE NAME. The corporate name:

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3. Shall not be the same as, or deceptively similar to, the name of any domestic corporation existing under the laws of this state or any foreign corporation authorized to transact business in this state, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Act (chapters 10-19, 10-20, 10-21, 10-22, and 10-23)."

Assuming that the corporation charter was canceled under the provisions of section 10-0527 of the N.D.R.C. of 1943 it would appear that such cancellation is not in and of itself a forfeiture of the charter. In the case of *Farmers' State Bank of Richardton v. Brown*, 52 N.D. 806, 204 N.W. 673 (1925) the court considered a statute similar to section 10-0527 of the N.D.R.C. of 1943. The court held that the failure to file the annual report and pay the annual license fee does not ipso facto work a forfeiture of the corporate charter but that a judicial determination is necessary to such a result. It is to be noted that section 10-2114 of the 1957 Supplement does provide for such judicial determination and supersedes section 10-0527 concerning the procedure to be followed in the cancellation of a corporate charter.

It is therefore our opinion that a corporation whose charter has been canceled under the provisions of section 10-0527 of the N.D.R.C. of 1943 is not necessarily out of existence within the meaning of section 10-1907 of the 1957 Supplement to the N.D.R.C. of 1943 and the corporate name would not be available for a new corporation use unless the old corporation has gone out of existence due to the expiration of its corporate life or its charter has been forfeited by judicial determination. If, of course, the corporation has been dissolved under section 10-2114 of the 1957 Supplement of the N.D.R.C. of 1943, the corporate name would then be available for new corporation use.

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