

CIRCULAR NO. 125.

(Revised to May 1, 1903.)

How West Virginia Corporations May Become Extinct—Causes of Forfeiture.

NOTE—This Circular is divided into sections, numbered from 1 to 15, for convenience of reference.

In this Circular is discussed how a corporation incorporated under the laws of the State of West Virginia may voluntarily surrender the rights and franchises conferred upon it by its charter or certificate of incorporation, and thereby end its duties and liabilities to the State; and how it may be wound up otherwise; also is given a statement of causes of forfeiture of charter.

The officers, managers, and stockholders are usually very careless about the proper ending of their corporation. It is an important matter to end the existence properly and legally; for failure to do so may, in some cases, make all concerned liable as partners, or make those whose duty it is to attend to the matter liable for damages.

This office receives many letters stating, for example: 1. "We failed to pay our taxes last year, and went out of business;" or, "thereby forfeited our charter," or "therefore we are no longer a corporation." 2. "We got a charter, but never organized." "This corporation never did any business and is defunct." 4. "We got a charter, organized, but have had no meetings for several years, and are therefore no longer a corporation; please mark us off your record." 5. "We sold our property and went out of business, and are no longer a corporation." 6. "This corporation was organized to develop a mining claim" (or "to work a patent," etc.), "but the scheme failed and we have abandoned the corporation." 7. "This corporation is in the hands of receivers," etc., etc.

It is to be carefully observed that none of these (except probably the failure to organize) ends the existence of a corporation. Failure to pay taxes, never having done any business, failure to hold meetings, the fact that the corporation sold its property—none of these ends corporate existence; and the fact that the mining claim or the patent did not pan out, or that the corporation went into the hands of receivers because of insolvency or for other reason, does not end corporate existence. And even if it did, a mere statement to this office in an ordinary letter is not sufficient notice to this office to justify the making of a record therein.

A corporation must be wound up in a manner prescribed by law;

and notice of that fact must be given this office in a manner prescribed by law. *These two things are both necessary.*

It should be observed that the incorporation of a company is an orderly and formal proceeding, and the corporation thus brought into being must be divested of its rights and powers in a similarly orderly and formal way. A corporation becomes a corporation upon the issuing of the charter thereto, and the date of the beginning of its existence is the date of its charter; it is registered as a corporation in the office of the Secretary of State, and so continues as a corporation upon the records of the State until *its existence is ended in a lawful manner and lawful notice thereof is received by the Secretary of State.*

From what has been said it will be seen that it is important to the corporation and to the individual stockholders thereof, when a corporation *goes out of existence for any cause*, whether regularly or irregularly, that notice thereof be given to the Secretary of State *in a manner that he will be authorized to act on it.*

Coming now to the specific ways in which corporations may be wound up and become extinct, there are two ways whereby a corporation may voluntarily dissolve:

1. Before organizing it may surrender its charter; 2. After it is organized, by resolution of dissolution. These methods in detail are as follows:

Surrender of Charter.

Section 1. Section 6 of chap. 2 of Corporation Laws (sec. 6 ch. 53 Code of W. Va.) reads as follows:

6. When a certificate of incorporation is issued to a joint stock company under the general law, and the incorporators and other stockholders, or a majority of them, desire to abandon such certificate of incorporation and not to organize said corporation, such incorporators and stockholders may, by signing and acknowledging a statement to such effect, and sending the same, together with the certificate of incorporation, to the secretary of state, abandon such corporation. The provisions of sections 56, 57, 58 and 59 of chapter 53 of the Code shall apply to the corporations named in this section so far as they are applicable. The secretary of state shall cancel such certificates of incorporation surrendered to him and file and preserve them and the foregoing named statements in his office, and aptly note in the indexes of corporations kept in his office the fact of the extinction or dissolution of such corporations.

Sections 56, 57, 58 and 59 of the Code, referred to above, are hereinafter quoted, in Secs. 2, 3, 4 and 5 of this Circular and are the same as secs. 56, 57, 58 and 59 of chap. 2 of Corp. Laws.

The certificate to be executed by the stockholders and to be sent to the Secretary of State may be in this form:

The undersigned, being all (or a majority of) the incorporators and other stockholders of Company, a corporation to which a certificate

of incorporation was issued by the secretary of state of the State of West Virginia on the .. day of .., desire to abandon such corporation and not to organize the same, and hereby surrender to said State said certificate of incorporation, and all rights, privileges, and franchises thereby granted.

Given under my hand and official seal this .. day of ..

(sign here)

State of .., county of .., to-wit:

I, .., a Notary Public in and for the county aforesaid, hereby certify that .. whose names are signed to the foregoing writing, dated the .. day of .., this day personally appeared before me in my said county and severally acknowledged their signatures to the same.

Given under my hand and official seal this .. day of ..

(Seal.)

....., Notary Public.

With the above certificate should be sent also the charter of the company.

It is provided that the "provisions of secs. 56, 57, 58 and 59 shall apply so far as applicable." These sections are printed hereinafter as sections 2, 3, 4 and 5 of this Circular. Among other things they provide for notice to be published in a newspaper, the setting aside of property to pay debts, etc. If the corporation owes no debts, there can be no necessity for setting aside property to pay them; and, I should think, no necessity for publishing the notice. If deemed necessary to publish notice, see form under section two of this Circular, which form can easily be modified to suit the case of surrender of charter.

Voluntary Dissolution.

Section 2. The statute concerning the dissolution *after organization*, by vote of the stockholders, being sec. 56 of chap. 2 Corp. Laws (sec. 56 chap. 53 Code, as amended by the Acts of 1903) is as follows:

56. The stockholders may at any time in general meeting resolve to discontinue the business of the corporation, the majority of the capital stock being represented and voting in favor of such discontinuance; and may divide the property and assets that may remain after paying all debts and liabilities of the corporation. Notice of such resolution shall be immediately given by advertisement in some newspaper of general circulation, published near the principal office or place of business of the corporation, once in each week for four successive weeks at least, before any dividend of the capital shall be made; and the said resolution, together with the certificate of the publisher of the newspaper in which the notice was published, shall be certified by the president, under his hand and the common seal of the corporation, to the secretary of state. The secretary shall file the same in his office, and shall issue a certificate under his hand and the great seal of the state, reciting such resolution and certifying that the said notice was duly published. But the secretary of state shall not issue such certificate until it shall be certified to him

by the auditor that such corporation is not delinquent in the payment of the license tax on its charter. The secretary shall certify to the clerk of the house of delegates the name of every such dissolved corporation, stating the date of the dissolution thereof, to be printed and bound in the acts of the legislature. As soon as practicable after such resolution is passed, the stockholders shall cause ample funds and assets to be set apart, either in the hands of trustees or otherwise, to secure the payment of all debts and liabilities of the corporation; and any creditor who supposes his claim not to be sufficiently secured thereby, whether such claim be then due or thereafter to become due, may, on bill in chancery, if sufficient cause therefor be shown, obtain an injunction to prevent the distribution of the capital and decree against any stockholder for the amount of the capital received by him; and, if necessary or proper in the case, the court may appoint a receiver to take charge of and administer the property and assets of the corporation.

Any corporation desiring to dissolve under the provisions of this section or of section six of this chapter, shall, before such dissolution becomes effective, pay into the state treasury the amount it may owe to the state for license tax on its charter, including the penalties prescribed in section 90 of chapter 32 of the code [sec. 7 chap. 19 Corp. Laws]. If the period of such indebtedness includes a fractional part of a year, it shall pay one twelfth the yearly rate for each month or fractional part of a month of such fractional part of a year.

It will be seen that a meeting of the stockholders must be held. Notice of such meeting should be given in the manner prescribed in the by-laws of the corporation. But this notice may be waived, as is provided in sec. 18 of chap. 2 Corp. Laws (see form of Waiver of Notice in the appendix of the Corp. Laws).

The resolution adopted by the stockholders may be in this form:

Resolved, first, That the Company, a corporation created and organized under the laws of the State of West Virginia, does hereby discontinue business as a corporation and surrenders to said State its charter and corporate franchises. *The board of directors will proceed to convert the property, choses in action and all assets of this corporation into cash, and pay off and discharge all its debts, liabilities and obligations; and after fully discharging all such debts, liabilities and obligations, divide the remainder among the stockholders pro rata with their several holdings of stock, but no such payment shall be made to any stockholder until after the publication of the notice hereinafter provided.*

Resolved, second, That the president of this corporation cause notice of the adoption of the foregoing resolution to be published in some newspaper of general circulation, published near the principal office or place of business of this corporation, once a week for four successive weeks; and that he certify these resolutions to the secretary of state of the State of West Virginia, and deliver to him a certificate showing the publication of said notice, as provided by law.

If desired to appoint a committee, or a trustee or trustees, or to

designate certain property to set aside, or if the corporation has no assets, or for any other particular or peculiar purpose, the foregoing form should be changed, between the stars, accordingly.

The certificate of the President to the Secretary of State may be as follows:

I,, president of the Company, a corporation created and organized under the laws of the State of West Virginia, hereby certify to the secretary of state of said State, that, at a meeting of the stockholders of said corporation regularly held, in accordance with law, at the office of said corporation in, on the .. day of, 19, at which meeting the majority of the capital stock was represented and voted in favor of the same, the following resolutions were duly and regularly adopted and passed, to wit:

(Here insert the resolutions.)

And I further certify that public notice of said resolutions was given by advertisement published once in each week for four successive weeks in, a newspaper of general circulation published near the principal office of said corporation, as is shown by the certificate of, the publisher of said newspaper, hereto annexed.

Given under my hand and the seal of said corporation, this .. day of .., 19

(Corporate Seal.), President of Company.

The notice to be inserted in the newspaper, of the proposed dissolution, may be in this form:

Notice is hereby given that, at a meeting of the stockholders of the Company, a corporation created and organized under the laws of the State of West Virginia, held at on the day of, the following resolutions were adopted:

(Here insert the resolutions.)

Given under my hand this .. day of,, President of said Corporation.

Attest:, Secretary.

The publisher's certificate of the publication of the notice may be in this form:

I,, publisher of a newspaper of general circulation published at, in the State of, hereby certify that the notice of the dissolution of Company, a copy of which notice is hereto attached, was published once in each week for four successive weeks in said newspaper, in its issues dated the days of

Given under my hand this .. day of,, Publisher.

A copy of the printed notice, cut out of the newspaper, should be pasted on the margin of the publisher's certificate.

The publisher's certificate should be sent to the Secretary of State with the President's certificate, and both will be filed in the Secretary's office. Thereupon, if the corporation is not delinquent in the payment of the license tax on its charter, the Secretary will issue his certificate certifying the dissolution of the corporation. But before the Secretary of State can do so he must apply to the Auditor of the State and be informed by that office that the corporation is not so delinquent; and this applies as well to surrender of charter under section 1 of this Circular.

The cost of the certificate of the Secretary of State is \$5, which must be paid in advance.

Effect of Dissolution or of Expiration.

Section 3. The effect of a dissolution of a corporation, or of the expiration of its charter, (the charter may be renewed before expiration as provided in sec. 11 chap. 3 Corp. Laws,) is set forth in secs. 59 and 59a of chap. 2 of Corp. Laws (sec. 59 chap. 53, and sec. 17 chap. 52, Code) as follows:

59. When a corporation shall expire or be dissolved, its property and assets shall, under the order and direction of the board of directors then in office, or the receiver or receivers appointed for the purpose by such circuit court as is mentioned in the fifty-seventh section of this chapter, be subject to the payment of the liabilities of the corporation and the expenses of winding up its affairs; and the surplus, if any, then remaining, to distribution among the stockholders according to their respective interests. And suits may be brought, continued or defended, the property, real or personal, of the corporation be conveyed or transferred under the common seal or otherwise, and all lawful acts be done in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto.

59a. When any corporation shall expire, or be dissolved, or its corporate rights and privileges shall have ceased, it may wind up its affairs in the manner prescribed by section fifty-nine of chapter fifty-three of this code.

Proceedings in Equity to Dissolve a Corporation.

Section 4. Sec. 57 of chap. 2 Corp. Laws (sec. 57 chap. 53 Code) provides:

57. If not less than one-third in interest of the stockholders of a corporation desire to wind up its affairs, they may apply by bill in chancery to the circuit court of the county in which the principal office or place of business of such corporation is situated, or if there be no office or place of business in this State, to the circuit court of the county in which the

other stockholders or any one or more of them reside, or are found, or in which the property of such corporation or any part of it may be, setting forth in the bill the grounds of their application; and the court may thereupon proceed according to the principles and usages of equity to hear the matter, and if sufficient cause therefor be shown, to decree a dissolution of the corporation, and make such orders and decrees, and award such injunctions in the cause as justice and equity may require.

Appointment of Receiver.

Section 5. Sec. 58 of chap. 2 Corp. Laws (sec. 58 chap. 53 Code) provides that a receiver may be appointed by a court of equity, as follows:

58. When a corporation expires, or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown therefor, such court as is mentioned in the preceding section, may, on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and whether such receiver be appointed or not, may make such orders and decrees, and award such injunctions in the cause, as justice and equity may require. This section shall apply to corporations heretofore or hereafter chartered by another State, which may have done business and acquired property, or contracted debts, in this State, and any of whose creditors, or stockholders, or their personal representatives, reside herein; and the circuit court of any county wherein such creditor, stockholder, or personal representative may reside, or where such assets or property or part thereof may be, or where the person owing such debts, or having such property in possession, may reside, shall afford such relief as is prescribed in this and the next section.

Chap. 109 of the Code, the chapter concerning mandamus and quo warranto, provides:

6. A writ of quo warranto may be awarded and prosecuted in the name of the State of West Virginia, at the instance of the attorney general, or prosecuting attorney of any county, in any of the following cases, viz.:

First. Against a corporation for a misuse or non-use of its corporate privileges and franchises, or for the exercise of a privilege or franchise not conferred upon it by law, or where a certificate of incorporation has been obtained by it for a fraudulent purpose, or for a purpose not authorized by law.

Second. Against a person for the misuse or non-use of a privilege and franchise conferred upon him by or in pursuance of law.

Third. Against any person or persons acting as a corporation, without authority of law.

Sec. 13 of this same chapter reads as follows:

13. If by judgment of the court rendered as aforesaid, a corporation, or pretended corporation, be dissolved, the court may appoint a receiver of the property of such corporation or pretended corporation, as provided in section twenty-eight of chapter one hundred and thirty-three of this Code, and may make all such other orders in relation thereto as may be necessary for the preservation and safe-keeping of such property.

Causes of Forfeiture.

Under this head the lawyer will recur to what is said of prosecutions by writ of quo warranto in section 5 of this Circular.

Section 6. The most frequent cause of forfeiture of the charter of a corporation is that of failure to pay the yearly license-tax on its charter (see chap. 19 Corp. Laws). Our Supreme Court has held (22 W. Va., 283; 30 W. Va., 566), that the State only in a direct proceeding can take advantage of a violation of a statute where dissolution or forfeiture of charter is a penalty for an act or the omission to act, and that a cause of forfeiture cannot be taken advantage of collaterally or incidentally; the forfeiture must be declared by a court of competent jurisdiction as the result of a direct proceeding on behalf of the State.

Section 7. When the time limited in the charter for the period of the existence of the corporation expires, unless the existence be extended, the corporation dies, but yet it continues as a corporation for the purpose of winding up its affairs (see sec. 3 above); and a corporation is liable for torts after expiration of its charter (see *Miller vs. Coal Co.*, 31 W. Va., 836).

Of course, strictly speaking the expiration of a charter is not a forfeiture.

Section 8. "When a certificate of incorporation has been or shall hereafter be issued for a joint stock company under a general law, such company must be organized and begin its proper corporate business within one year after the date of such certificate; otherwise, the certificate shall be of no effect and such corporation shall be ipso facto dissolved." (Code, 53:6; Corp. Laws, 2:6.)

Section 9. If a joint stock company suspend its proper corporate business at any time for two years continuously, its corporate rights and privileges shall cease. (Code 53:7; Corp. Laws 2:7.)

Section 10. If the number of stockholders be reduced below five and so continue for six months, the corporation shall be dissolved. (Code 53:17; Corp. Laws 2:17.)

Section 11. If any corporation fail to appoint a statutory attorney, it "shall forfeit its charter to the state." (Code 54:24; Corp. Laws 3:24.)

Section 12. For dissolution by sale of property of railroad corporations and of certain bridge corporations, see Code 54:72 and 44:22; Corp. Laws 5:72 and 23:7.

Section 13. For the law and mode of dissolution as to savings banks, see Corp. Laws 8:37, 38.

Section 14. Referring to the decisions of our Supreme Court noted in section 6 it will be observed that a *cause* of forfeiture is not a *forfeiture*; that is, the law is not self-acting. The only ex-

ception to this is the case of section 8, where the corporation fails to organize within a year from the date of its charter. This law was amended since the decisions of the Supreme Court noted in section 6, by the Acts of 1901, and made to read "ipso facto dissolved." Section 15 of chap. 3 Corp. Laws (Code, chap. 54, sec. 15) provides that the first meeting of stockholders to organize a corporation shall be held within six months from the date of the charter; while section 6 of chap. 2 Corp. Laws (Code, chap. 53, sec. 6) says that if the organization is not made within a year "the charter shall be of no effect and such corporation shall be ipso facto dissolved." The proper construction of these two sections of the law, which at first appear to conflict, is probably that if the organization is not made within the six months there arises a *cause* of forfeiture, which forfeiture may be judicially ascertained in the manner noted in section 6; but if a year elapses before organization is effected, the corporation dies—"its charter is of no effect," it is "ipso facto dissolved." In other words, for failure to organize within six months there is a *cause* of forfeiture; for failure to organize within a year there is a self-executed *forfeiture*.

Section 15. It should not be overlooked, however, that *after a corporation is organized*, there are only three ways whereby it may legally become extinct; first, by expiration of its corporate existence; second, by voluntary dissolution; third, by decree of court. In case of expiration no notice need be sent to the Secretary of State. The second case, voluntary dissolution, requires a meeting of stockholders, and this involves a notice to all the stockholders. The third case involves a suit by those stockholders desirous of winding up the corporation where it cannot be accomplished otherwise; this suit involves considerable expense.

In cases where it is not practicable to obtain a voluntary dissolution and the stockholders desiring to wind up the corporation do not feel justified in paying the expense of a suit for that purpose, and the *corporation is practically defunct*, for any of the reasons mentioned in sections 8, 9 and 10, or for reason of its becoming extinct in some irregular way, proper notice should be given to the Secretary of State. This notice must in all cases be *under oath*. It should be signed and sworn to 1. By all the stockholders; or, 2. By a majority in number of the stockholders *holding also a majority of the stock*; or, 3. By the president and secretary of the corporation. Such notice may be in this form:

We, John Jones, Richard Jones, John Roe, Richard Roe, and Chas. Doe, being all the stockholders (or, we, John Jones, Richard Jones, and John Roe, being a majority of the stockholders and holding a majority of the stock; or, we, John Jones, President, and Richard Jones, Secretary,) of the Company, a corporation created under the laws of the State of West Virginia by a charter issued thereto on the . . day of, hereby certify to the secretary of state of said State, that said corporation is no

longer in existence for the reason (here give the facts,—as it failed to organize *and* begin its corporate business in six months or in one year after date of charter; or, has suspended its corporate business and does not intend to resume it; or, that the number of stockholders is below five; or, that its property and franchises were sold under a decree of court, naming the court and its location, and date of sale; and *in any case* name *any other facts* to show extinction).

And said corporation hereby surrenders to said State its charter and corporate franchises and privileges; and we request the secretary of state to note and record the same in his office.

Given under our hands and seals this .. day of

(Sign here.)

I, A. B., a Notary Public in and for the county of .. and State of ..., hereby certify that, whose names are signed to the above writing, this day personally appeared before me in my said county, and severally acknowledged their signatures thereto, and each thereupon made oath before me at the same time, that the statements contained in the said writing are true.

Given under my hand and official seal this .. day of

(Seal.)

....., Notary Public.

This certificate should be accompanied with the original charter if possible; and if not possible to send in the charter, state in the certificate *why it is not possible* to send it in for cancellation.

In such case if the evidence is satisfactory to the Secretary of State and the corporation is not delinquent in the payment of license tax to the State, the Secretary of State will enter the corporation as dissolved, and will, if desired, issue a certificate to that effect.

WM. M. O. DAWSON,
Secretary of State.

Charleston, W. Va.

