

Opinion No. 45-4782

August 30, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Eugene Allison, Chairman State Corporation Commission Santa Fe, New Mexico

{*127} In your letter dated August 28, 1945 you refer to a certain corporation which failed to file its annual report, and, after notice, its right to do business was forfeited by the Corporation Commission on July 13, 1944, and thereafter, on August 20, 1945, its right to do business was reinstated, in compliance with Section 54-236 of the 1941 Compilation.

This corporation requests from your office a certificate that it has been in good standing at all times since its incorporation. You inquire whether you can legally issue a certificate to that effect in view of the period of suspension.

You further inquire, orally, concerning the validity of corporate acts performed during the period of suspension.

I do not believe you can legally issue a certificate to the effect that the corporation has been in good standing at all times since its incorporation, but such certificate should state the facts as they exist.

Your second question is more difficult to answer. The pertinent portion of Sec. 54-236 of the 1941 Compilation is as follows:

"If such report is not made and filed, the state corporation commission shall notify the corporation of such delinquency by letter addressed to it at the place of its principal office, and if such report is not made and filed within ninety (90) days after such notice, the corporation shall forfeit the right to do business in this state; provided, that any such corporation may be permitted to resume business upon payment to the state corporation commission of a reinstatement fee of five dollars (\$ 5.00), and the filing of all delinquent annual reports."

Under this language the Legislature has stated that the corporation shall forfeit the right to do business, and then has provided the method of reinstatement and the resumption of the right to do business. If this section is self-executing, a notation by the Corporation Commission, {*128} after proper notice of forfeiture, would undoubtedly make all corporate acts, performed during the period of suspension, void, just as though the corporation were dissolved during such period. However, I seriously doubt whether the section is self-executing.

The general rule regarding forfeiture is stated in 7 R. C. L., Sec. 731 at page 724, to the effect that a forfeiture can only take effect upon and after the judgment of a competent tribunal. Such forfeiture relates back to the time of the commission of the act for which a judgment of forfeiture is entered, but the corporation continues so as to render its transactions valid until judgment of forfeiture is pronounced.

At page 722, Section 730 of the same volume of R. C. L., the general rule is stated that if a duty is imposed upon a corporation -- and the statute provides that if such duty is not performed, the corporation shall forfeit its charter or franchise -- the court has no discretion in entering judgment against the corporation for the penalty so prescribed.

Under the general rule, the language in our statute to the effect that "the corporation shall forfeit the right to do business in this state" means that the corporation by failure to make such annual reports thereby becomes subject to proceedings looking toward the forfeiture by the court. Although this question has never been directly passed upon by our Supreme Court, yet the court has apparently adopted at least a tendency toward the general rule.

In *State vs. Sunset Ditch Co.*, 48 N.M. 17 at page 26, the court acknowledges the general rule to be that in cases where no public detriment is involved, a statute providing for forfeiture in case of abuse of its corporate powers, or of failure to perform some such statutory duty as making and filing annual reports, will be liberally construed. And further, that provision for forfeiture of corporate rights and privileges relating to filing annual reports must be strictly construed since forfeitures are not favored.

At page 29 of said report, the Court cites with approval an excerpt from 7 Fletcher, Cyc. Corporations 846, Sec. 3687, to the effect that the determination of the question whether there has been a nonuser or misuser so as to give rise to the right to repeal corporate franchises, is a judicial and not a legislative function.

In a recent case decided by the Supreme Court July 2, 1945, being No. 4884, entitled "*Ringle Development Corporation vs. the Town of Tome Land Grant, et al.*" the court was confronted with a petition in the nature of a bill of review. In that case the district court in 1942 entered a judgment for the plaintiff for specific performance of a contract to renew an oil and gas lease to the corporation by the Tome Land Grant. Subsequently, in 1944, the Land Grant discovered that at the time of the execution of the contract the corporation had been suspended for failure to file its annual report, and alleged that the contract was therefore void, and the court was without jurisdiction to order specific performance of the same.

The Supreme Court failed to pass upon the validity of the contract during the period of suspension and decided the case on a question of evidence, to the effect that the fact of suspension of the corporation could have been ascertained by the Land Grant and raised as a defense at the trial. Having failed to do so, the matter could not be raised at a later date in a petition for a bill of review.

By thus deciding the case, it is to be inferred that the Supreme Court did not consider the acts of the corporation during the period of suspension as being void or as divesting the district court of jurisdiction to order specific performance of the contract executed during such period of suspension. Thus, it is assumed that such contracts, at most, would be considered voidable only.

{*129} In view of the foregoing authorities, I am of the opinion that, until there is a judicial forfeiture of the right to do business by a corporation for failure to file annual reports, acts performed by a corporation during a period of suspension would be valid and binding.