4811.

DE FACTO CORPORATION—FAILURE TO STATE CORRECT AMOUNT OF CAPITAL—MAY AMEND ARTICLES OF INCORPORATION TO CORRECT ERROR.

SYLLABUS:

Authority to correct an error in original articles of a corporation by amendment discussed.

COLUMBUS, OHIO, December 13, 1932.

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

DEAR SIR:—Your letter of recent date is as follows:

"There has been submitted for filing an amendment to the articles of THE ELECTRO-MATIC HATTERS DEVICES CORPORATION, tentative copy of which you will find herewith.

Having reference to G. C. 8623-4, sub 5, you will note that articles of incorporation, when filed with the Secretary of State must among other things contain a statement as to the amount of capital with which the corporation will begin business, which shall be not less than five hundred dollars. In case of the subject company articles were submitted by the incorporators which contained a statement that the corporation would begin business with two hundred fifty rather than five hundred dollars. Through inadvertence or oversight the articles were admitted to record containing this statement.

The proposed amendment seeks to correct this mis-statement as to capital which occurred in the original articles. You will note in particular that the amendment recites that the statement was erroneous and that the corporation as a matter of fact began business with one thousand dollars.

My reason for requesting opinion as to whether or not the amendment may be received and filed is the fact that there seems to be a question in the minds of some attorneys as to whether or not a corporation ever came into existence by the original filing inasmuch as it was not a technical compliance with the Code requirements as to filing of articles. There is also the additional reason for requesting opinion in that as far as I know the general corporation act contains no specific provision for correcting errors unless some such procedure is followed as is contemplated by the proposed amendment.

For your information, in the case of the subject company, you will also note that the corporation has apparently completed its organization and has functioned as such even to the extent of filing an amendment in this office changing name."

The proposed amendment to which you refer as attached to your communication, contains the following resolution passed by the shareholders of the corporation in question:

"WHEREAS, on the 10th day of December, 1929, The Jimmy Johnson Devices, Inc. was organized and incorporated under the laws of the State of Ohio, and

WHEREAS, on the 15th day of July, 1930, the Articles of Incorporation were amended, changing the name to The Electro-Matic Hatters Devices Corporation, and

WHEREAS, when the original Articles of Incorporation were granted by the State of Ohio, through an error, the amount of capital with which the Corporation will begin business, was stated as $250.00 when as a matter of fact, the capital with which the Corporation began business was $1000.00, and through a mistake, it was written in the Articles of Incorporation—$250.00.

NOW, THEREFORE, Be it Resolved, that the Articles of Incorporation of The Electro-Matic Hatters Devices Corporation be and the same are hereby amended so that the amount of capital with which the Corporation will begin business is $1000.00 instead of $250.00."

It is my view from the facts submitted that the provisions of the Corporation Act have been met in a sufficiently substantial manner to constitute this a *de facto* corporation. I do not think that the error made in stating the amount of common capital with which the corporation will begin business in the original articles amounts to a failure to substantially comply with the provisions of Section 8623-4, to which you refer, particularly in view of the fact that the amount of capital with which the corporation actually did commence business was in excess of the amount required by statute. It is well established that no question of *de facto* corporations arises unless there has been a failure to substantially comply with a mandatory provision of the statutes which constitutes a condition precedent to the existence of the corporation. In the case of *Garwood* vs. *Oil Co.*, 11 O. A. 96, the syllabus is as follows:

"1. Failure of the subscribers to the articles of incorporation to certify in writing to the secretary of state when ten per cent. of the capital stock is subscribed, as required by Section 8633, General Code, does not render the members of such corporation liable, individually or as partners, to the suit of a creditor who has dealt with such company as a corporation.

2. A *de facto* corporation exists where there has been an attempt to incorporate a corporation which the law authorizes to be formed, the associates are acting in good faith and there has been a user of powers which such a corporation would possess."

Judge Ranney recognized this principle in the early case of *Bartholomew* vs. *Bentley and others,* I. O. S. 37, at p. 41, wherein it is said:

"We concur fully with the judge who presided upon the trial, that mere irregularities in organizing under a charter, will not deprive the officers and stockholders of the corporation of its benefit, nor make them privately responsible. While, on the other hand, it is equally clear, that to entitle them to such protection, the provisions of the act of incorporation must be substantially pursued."

It would seem to follow that the corporation in question came into existence at least as a *de facto* corporation at the time of the filing of the original articles.

Section 8623-14, General Code, containing authority for the amendment of articles of incorporation of Ohio corporations, provides in part as follows:

"A corporation organized under the provisions of this act or of any previous corporation act of this state may by amendment alter its articles in any respect; provided, that only such provisions shall be included or omitted by amendment as it would be lawful to include in or omit from original articles filed at the time of making such amendment or effect changes of shares as hereinafter provided for. * * * * * * * * *"

The provisions of the foregoing section with respect to the amendment of articles of incorporation are exceedingly broad.

Under the circumstances with respect to the particular case which you present, the corporation apparently being a *de facto* corporation, the error having been obviously an inadvertence or oversight on the part of the incorporators and the Secretary of State in accepting the original articles for filing and the fact being that the amount of capital with which the corporation began business did comply with the law, it is my opinion that the proposed amendment may be filed.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4812.

PRISONER—FOUND INSANE BEFORE CONVICTION AND COMMITTED TO LONGVIEW HOSPITAL—UPON REGAINING SANITY HE SHOULD BE RELEASED WHERE COMMITTING COUNTY FAILS TO TAKE PRISONER INTO CUSTODY WITHIN A REASONABLE TIME.

SYLLABUS:

1. *When a person accused of a crime is found insane before trial and is committed to the Longview Hospital at Cincinnati, Ohio, by virtue of Section* 13441-2, *General Code, the superintendent of such institution can release such person when he is restored to reason, but the proper authorities of the committing county must first be notified of such fact and given a reasonable time in which to take such person into custody.*

2. *A person committed to Longview Hospital by virtue of the provisions of Section* 13441-2, *General Code, on being restored to reason, is entitled to his discharge from said hospital by the superintendent of that institution when the proper authorities of the committing county fail or neglect within a reasonable time to take the accused into custody after being notified by the superintendent of that institution that the accused has been restored to reason.*

COLUMBUS, OHIO, Dec. 13, 1932.

HON. JOHN MCSWEENEY, *Director of Public Welfare, Columbus, Ohio.*

This will acknowledge receipt of your letter which reads in part as follows:

"Recently there was admitted to the Longview Hospital one F. L. by commitment under Section 13441-1 and 13441-2 G. C., by the Court of Common Pleas of Hamilton County following his arrest on a charge of forgery.