

959.

CERTIFICATE OF DISSOLUTION—WHAT MUST ACCOMPANY CERTIFICATE OF DISSOLUTION WHEN FILED WITH SECRETARY OF STATE.

SYLLABUS:

Before the Secretary of State can accept the certificate of dissolution filed by the directors of a corporation, such certificate must be accompanied by (1) receipts showing the payment of all franchise and other taxes, fees and penalties due at the time of the filing of the certificate of dissolution; and (2) a certificate from the Tax Commission (which may include a statement of the receipt of excise and franchise taxes already paid) showing that the corporation has given security satisfactory to the Commission for the payment of all taxes of every character accruing against the corporation by reason of its property owned or business done prior to the date of the filing of the certificate of dissolution.

COLUMBUS, OHIO, September 7, 1927.

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

DEAR SIR:—This will acknowledge receipt of your request for my opinion, as follows:

“A certificate of dissolution by unanimous consent of all shareholders of The ----- Company has been presented to the Secretary of State for filing by -----, Attorneys at Law, -----, Ohio.

With this certificate of dissolution is presented a certificate from the Tax Commission of Ohio and also a certificate from the treasurer of ----- County, Ohio, which reads as follows:

‘This certifies that all taxes listed in name of ----- Company are paid to date in ----- County.

This certificate made in conformance with G. C. 5521.’

Will you kindly advise what, if any, effect Section 80 of the General Corporation Act has upon Section 5521 of the General Code of Ohio, and whether or not the Secretary of State should receive and file a certificate of dissolution where the certificate from the county treasurer merely shows the payment of personal property tax to date rather than the payment of all personal property taxes assessed against such corporation for the current and previous years. In other words, is Section 5521 of the General Code modified or repealed by implication by Section 80 of the General Corporation Act?

May the Secretary of State file the certificate of dissolution in question with the county treasurer’s tax certificate above mentioned?”

Your question is: what, if any, effect must be given to Section 5521 of the General Code in connection with the new Corporation Code of Ohio?

You state that the corporation in question has filed a certificate of dissolution by unanimous consent. Such a proceeding is authorized by Section 79 of Amended Senate Bill No. 11, 87th General Assembly (Section 8623-79, General Code). Said section, in so far as applicable to the question before us, provides as follows:

“A corporation may wind up its affairs and dissolve in the following manner:

* * * * *

(c) If the holders of record of all the outstanding shares of a corporation consent in writing to its dissolution or if at a special meeting of which notice has been given to all the shareholders of every class, whether entitled to vote or not, a resolution is adopted by the votes cast in person or by proxy by the holders of record of shares entitling them to exercise two-thirds of the voting power, or such other proportion not less than a majority as the articles may require, declaring that it is desirable to and the corporation does elect to wind up and dissolve, the president or a vice-president and the secretary or an assistant secretary shall file in the office of the Secretary of State a certificate verified by their oath, stating:

1. The name of the corporation.
2. The place where its principal office is located.
3. The names and postoffice addresses of its directors and officers, and, if any postoffice address be in a city, the street and number or other particular description thereof.
4. That it elects to wind up and dissolve.
5. That they have been authorized to execute and file such certificate by a resolution adopted as above provided or that they have been so authorized by the written consent of the holders of record of all the outstanding shares of the corporation."

Section 80 of said Act (Section 8623-80, General Code) provides:

"Upon the filing of any such certificate together with receipts showing the payment of all franchise and other taxes to the date of such filing or the giving of security therefor satisfactory to the tax commission, the corporation shall be dissolved and shall cease to carry on its business, but it shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets and doing all other acts required to adjust, settle and wind up its business and affairs, and it may do all such acts and may sue and be sued in its corporate name."

Section 81 of that Act (Section 8623-81, General Code) provides that the directors of such corporation shall forthwith give notice of such dissolution by publication once a week on the same day of each week for two consecutive weeks in a newspaper published and of general circulation in the county in which the principal office of the corporation is located, and that written notice must be given to all shareholders, creditors and claimants.

Section 82 of the Act (Section 8623-82, General Code) provides that the directors shall act as a board to wind up the affairs of the corporation, and that they shall

"proceed as speedily as may be practicable to a complete winding up of the corporation and, to the extent necessary or expedient to that end, shall exercise all the powers of such dissolved corporation, * * * settle or compromise claims in favor of or against the corporation, apply assets to the discharge of liabilities, distribute assets either in cash or in kind among shareholders according to their respective rights *after paying or adequately providing for the payment of liabilities.*" etc.

Provision is also made for dissolution of corporations by action of the proper courts. Sections 11938 to 11978, both inclusive, of the General Code, which sections related to dissolution of corporations, are specifically repealed by said Amended Senate Bill No. 11.

Section 5521 of the General Code, to which you refer, reads as follows :

“In case of dissolution or revocation of its charter on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the Secretary of State shall not permit a certificate of such action to be filed with him unless the (tax) commission shall certify that all reports required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid, and unless such corporation shall produce a certificate from the treasurer of the county wherein the property of such corporation, both tangible and intangible is or was located, showing that all personal property taxes assessed against such corporation, for the then current and previous years, have been paid.”

The certificate mentioned in said section was provided for in repealed Section 11974 of the General Code, which read as follows :

“In case of dissolution or revocation of its charter, every domestic corporation shall file with the Secretary of State a certificate thereof. If the dissolution is by voluntary action of the corporation, such certificate shall be signed by the president and secretary of the corporation.”

Such certificate is in substance the same as that required by Section 79, supra.

The legislature did not specifically repeal Section 5521, supra. We must then consider whether or not said section can be harmonized with Section 80 of the Corporation Act.

Section 5521, supra, provides that the Secretary of State shall not file the certificate unless

- (1) the tax commission shall certify that all necessary reports are filed;
- (2) that all taxes, fees and penalties due from said corporation are paid;
- (3) the county treasurer shall certify that *personal property taxes assessed* against it are paid *for the current and previous years*.

Section 80 of the Corporation Act, supra, provides in substance, that the certificate shall not be filed unless accompanied with

receipts showing the payment of all franchise and other taxes *to the date of filing* or secure the the payment thereof to the satisfaction of the tax commission.

It will be noted that Section 8 of the Corporation Act does not require a certificate that all reports have been filed, which is a provision found in Section 5521, supra. The latter section is found in that part of the General Code relating to excise taxes on corporations, and the reports mentioned in said section are the reports necessary for the determination of the corporation tax by the proper officials.

The provision of Section 80 which requires that the receipt show that all taxes are paid to date would necessarily also require that the reports be made, because the tax could not be assessed unless the reports had been made according to law.

The second provision of Section 5521, supra, requires that the tax commission certify that all taxes, fees and penalties have been paid. This has evident reference to franchise and excise taxes only and is covered by Section 80, supra, by requiring receipts to show that all franchise and other taxes to date are paid.

The third provision of Section 5521 is that the county treasurer shall certify that personal taxes are paid. That also is provided for in Section 80, as hereinbefore stated.

Section 5521 only requires that the county treasurer's certificate show that the personal taxes are paid. Section 80, supra, provides that the corporation must file receipts showing the payment of all taxes to date.

Section 5521, supra, provides that the personal taxes must be paid for current and previous years. Section 80, supra, provides for receipts showing that taxes were paid to date, or for security satisfactory to the tax commission for those taxes not paid.

With these facts in mind we must then consider whether or not Section 5521, General Code, has been repealed by implication. It is a well recognized rule that such repeals, while recognized, are not favored, and a statute will not be held to be so repealed unless it is repugnant to and irreconcilable with some subsequent legislation upon the same subject and can not be harmonized therewith. It is also well recognized that even when two sections are found to be repugnant or inconsistent and irreconcilable, the one first enacted would become inoperative only to the extent of such repugnancy, irreconcilability and inconsistency.

As I have before pointed out, Section 5521, General Code, requires that the personal taxes for the current and previous years must be paid. In the passage of Section 80 of the corporation act, the legislature doubtless had in mind the fact that it would be manifestly impossible for a corporation, at least on many days during the year, to make payment of personal taxes which, while assessed against corporations as of January 1st, are not due and payable until the December tax collection. It was, therefore, very wisely provided that, in the event that taxes could not be paid, dissolution might be accomplished by giving satisfactory security to the Tax Commission for the payment of all taxes to the date of filing the certificate of cancellation.

In my opinion, where the legislature uses the words "all franchises and other taxes to the date of such filing," it meant all taxes of whatsoever character that might be assessable against a corporation by reason of its existence and operation up to the date of the filing of the certificate of cancellation. This would include not only those taxes which are already due, but also which are to become due in the future by reason of the existence of the corporation and its ownership of property prior to the date of dissolution. The alternative is provided that in the event the taxes are not actually paid so that receipts can be filed, security may be given for future payment. It is unnecessary for me to point out the method of collection of the various taxes that may be assessable against corporations. As I have before stated, in the ordinary administration of these taxes, it is manifest there are many times during the year when a corporation could not possibly pay all the taxes which have accrued against it because of the fact that, while there may be a lien upon the corporate property, the amount thereof is not yet determined.

By the provisions of Section 80 of the General Corporation Act, it is made the duty of the Tax Commission to examine into what may be due from a corporation in respect to all classes of taxes and to take adequate security for the payment thereof. This would include not only the franchise and excise taxes but also the property taxes, both real and personal, which are due the particular subdivisions of the state. After this duty has been accomplished, the Tax Commission should so certify to the Secretary of State and unless and until such certificate is furnished, you are not authorized to file the certificate of dissolution.

It is manifest from what I have said concerning the provisions of Section 80 of the General Corporation Act that it constitutes a departure from the provisions of

Section 5521 of the General Code. The legislature having spoken at a later date in Section 80, it is my opinion that the provisions of this section superseded and repealed by implication the provisions of Section 5521 of the General Code.

In the specific case which you present, you state that the certificate of dissolution is accompanied by a certificate from the tax commission and also a certificate from the county treasurer showing that all taxes listed in the name of the company are paid to date. The treasurer's certificate undoubtedly has reference only to those taxes which normally appear upon his duplicate and does not include those taxes which have accrued but payment of which is not yet due. You have not furnished me a copy of the certificate of the Tax Commission, so I am unable to advise you whether this certificate is in such form as to warrant you to accept the filing of the certificate of dissolution. From what I have said, however, I believe that you have sufficient information to determine whether or not the certificate in the present instance is in the form required by Section 80 of the general corporation act.

It may be said in passing that the Tax Commission, in performing its duty with respect to the security for the payment of all classes of taxes, should be governed in each instance by the particular facts involved. Real property taxes are, of course, a lien upon the property and ordinarily it would not appear to be necessary to take security in addition to that furnished by the property itself. At the same time it is possible to conceive of exceptional cases in which it would be advisable to secure security which could be more easily liquidated than the ordinary lien through the process of sale for delinquent taxes. Franchise and excise taxes also constitute liens on real property, subject to limitations as to time and priority, which need not be here discussed, whereas there is no specific lien as to personal taxes. The Commission must use its best judgment, taking care that ample provision is made for the payment of all kinds of taxes.

Summarizing my conclusions, I am of the opinion that before the Secretary of State can accept the certificate of dissolution filed by the directors of a corporation, such certificate must be accompanied by (1) receipts showing the payment of all franchise and other taxes, fees and penalties due at the time of the filing of the certificate of dissolution; and (2) a certificate from the Tax Commission (which may include a statement of the receipt of excise and franchise taxes already paid) showing that the corporation has given security satisfactory to the commission for the payment of all taxes of every character accruing against the corporation by reason of its property owned or business done prior to the date of the filing of the certificate of dissolution.

Respectfully,

EDWARD C. TURNER,

Attorney General.

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REAL ESTATE—LICENSE FOR AUCTIONEER TO SELL LAND.

SYLLABUS:

Any auctioneer who offers for sale real estate at auction is required by the provisions of Sections 6373-25, et seq., General Code, to secure a license as a real estate