

## Opinion No. 13-1066

June 20, 1913

**BY:** FRANK W. CLANCY, Attorney General

**TO:** State Corporation Commission, Santa Fe, New Mexico.

### **CORPORATIONS.**

Certificate of amendment should set forth what is required by Section 49, Chapter 79, Laws of 1905.

### **OPINION**

{\*236} I have had on my desk for several days your letter of the 16th inst. enclosing another from A. W. Pollard of Deming, in which he contends that the provision of Section 49 of Chapter 79 of the Laws of 1905, with reference to the naming of a statutory agent, does not apply to an amendment to the certificate of incorporation, and expressing the opinion that it would be improper to insert in a certificate of amendment anything foreign to a meeting at which the amendment is adopted.

He also says that this has not heretofore been required of corporations under similar circumstances, but I am under the impression that he is mistaken in this. He also says that Section 49 does not include an amendment to the certificate of incorporation.

It would be difficult to imagine language broader or more inclusive than that to be found in said Section 49, when it speaks of "Every certificate, report or statement now or hereafter required by any law of this territory to be made to any officer or department of this territory, or to be published, filed or recorded by any corporation, domestic or foreign shall, in addition to the other matter required by law, set forth the location (town or city, street and number, if street and number there be) of its principal office in this territory and the name of the agent therein and in charge thereof, and upon whom process against the corporation may be served." This is followed by a provision that no such certificate, statement or report shall be received, filed or recorded unless it complies with the foregoing provision. Now in order effectually to make any amendment to the certificate of incorporation, the law requires that a certificate thereof shall be filed in the office of the recorder of the county in which the principal place of business is located and in the office of the Secretary of the territory, your office having now for this purpose taken the place of the office of the secretary. A literal reading of the sections of the statute, in my opinion, justifies your position that the certificate of an amendment should also set forth that which is required by Section 49 "in addition to the other matter required by law."

Mr. Pollard in his letter interprets Section 30 of said Chapter 79 as requiring the president and secretary to incorporate in their certificate of an amendment the

proceedings had at a meeting and I suppose he means the meeting of the stockholders called by a resolution of the directors, but I do not think this is exactly correct. I believe that the requirement of this section is merely that there shall be a certificate by the president and secretary under the corporate seal, acknowledged, which shall set out the amendment, change or {\*237} alteration in the certificate of incorporation. The statute says that if two-thirds in interest of the stockholders having voting power shall, at the meeting of the stockholders, vote in favor of the amendment "a certificate thereof" shall be made by the president and secretary. It would be difficult to say that this language means anything more than a certificate of the amendment and not a certificate of the proceeding at the stockholders meeting. This view is strengthened by a consideration of the further requirement that there must be with such certificate the written assent of the two-thirds of stockholders, or the affidavit of the president and secretary that the assent of two-thirds was given to the amendment. Now there can be no difficulty or impropriety in inserting in such a certificate, after setting out the amendment, a statement of the things required by Section 49.

I do not find any adjudication in New Jersey on this point and it is one that is not likely ever to get into the appellate courts where it would be passed upon and printed in the state reports, but the fact to which you call attention, that Judge Dill in his publication of the general corporation act of New Jersey, with annotations and forms, includes the statement of what is required by our Section 49 in the form which he has prepared for such a certificate, is strongly persuasive that this must be the settled practice in New Jersey, from which state our statute was copied.

You say in your letter that you were under the impression that my office had heretofore rendered an opinion covering this subject, but that you failed to find anything in your files relative to the naming of an agent in a certificate of amendment. Your impression is, undoubtedly, due to what is contained in my letter to the Secretary of New Mexico, dated January 5, 1912, which appears in my printed report beginning at page 217. That which I then said will be found near the lower part of page 218. That was with reference to the filing of a certificate of extension of corporate existence, the secretary having required that the certificate should set forth the location of a principal office and the name of an agent therein. I then said, as I do now, in effect, that a strict construction of said Section 49 justified the position of the secretary, but I also said that if the company had complied with the provisions of Section 48, as to its annual report, which annual report must contain the information as to the principal office and the name of agent, it would not be unreasonable to hold that that was a sufficient compliance with the purpose of the law to make it unnecessary to exact another such statement before the time for another annual report has arrived.

I return herewith Mr. Pollard's letter.