Opinion No. 15-1592

July 21, 1915

BY: FRANK W. CLANCY, Attorney General

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

Stock holders' liability.

OPINION

*{*167}* I have had your letter of the 16th instant on my desk for some days and have given the matters referred to in it considerable attention, and find that they present considerable difficulty. With your letter you transmit another from Mr. Edward C. Wade upon which is based your request for my opinion.

The subject for consideration is as to the proper construction to be given to Section 23 of Chapter 79 of the Laws of 1905, which act is the general corporation law, that section reappearing in the codification of 1915 as Section 907. It may be well to quote that section here for easy reference in this letter:

"No stockholders liability for unpaid stock shall attach to any stock issued by any corporation under the terms of this article: Provided, That at the time of filing the certificate a separate certificate shall be signed and executed in the same manner that the certificate of incorporation is filed, declaring that there shall be no stockholders' liability on account of any stock issued, and shall be filed in the office of the State Corporation Commission together with the certificate of incorporation, and likewise certified and recorded in the office of the county clerk; and the certificate of incorporation, together with said declaration of non-liability of stockholders. shall be published as hereinafter provided. This section shall not apply to any of the provisions for the issuance of stock and fixing liability and the means of enforcing liability upon the same contained in any other section of this article but shall be construed as a separate and distinct provision and as creating a separate and distinct class of corporations, and stockholders of such corporations shall only be liable for the amount of the capital certified to have actually been paid in property or cash at the time of the commencement of business; and this section may also be made applicable to railroad, telegraph and express companies incorporated under the railroad act."

It is to be noted that this section immediately follows one which fixes the liability of stockholders in case the capital paid be insufficient to satisfy the corporate debts, and by that section every share holder is required to pay up the full amount of the shares held by him, or so much as shall be required to satisfy the debts. Compliance with the section now under consideration would seem to do away with the liability declared in the previous section, or at any rate as stated in the act, it creates a distinct class of corporations. The practical difficulty as to its meaning is in the clause which declares

that the stockholders of such corporations shall be liable only for the amount of capital certified to have actually been *{*168}* paid in property or cash at the time of commencement of business. The certificate of non-liability must, however, be signed and executed at the time of filing the certificate of incorporation, and it is obvious that at that time no capital could have been paid in property or cash, so that it would be impossible then to certify the amount actually paid at the time of commencement of business. Until a certificate of incorporation is filed there is no corporation, and no officers thereof, to which, or to whom any of the capital could be paid. It seems clear, therefore, that somebody must, at a later period and at the time of the commencement of business, make a certificate as to the amount of the capital actually paid in property or cash at the time of the commencement of business. In the absence of any specification of how that certificate should be made we must assume that it should be made by the president and secretary of the corporation under the direction of the directors. In order that the public should be advised of what that certificate sets out, it ought to be made a public record somewhere, and I know of no place where it could appropriately be filed or recorded except in the office of the State Corporation Commission.

A further question is as to what may be the liability of stockholders in such a corporation where the certificate of non-liability has been filed. The statute says that such stockholders shall be liable only for the amount of capital certified to have actually been paid in property or cash at the time of the commencement of business. It does not seem possible that the legislature was declaring a liability for capital which has already been paid in property or cash. That liability must be considered as discharged by the payment, and there must be some further liability in order to give meaning to the language of the statute. It cannot be reasonably contended that the legislature had in contemplation the possibility of a false certificate as to the amount of capital paid in property or cash, and was intending to declare that the capital which had been certified to be paid in must be a liability upon the stockholders if it had not been actually paid. Therefore we are compelled, in order to give meaning to the statute, to hold that a liability rests upon the stockholders to the amount of the capital actually paid at the time of the commencement of business, and this liability would constitute an additional asset of the corporation. For instance, if it should be certified that at the time of the commencement of business there was actually paid in property or cash the sum of one thousand dollars, which amount had been actually paid, then there would be, in case of necessity, a liability resting upon the stockholders of the corporation for another sum of one thousand dollars.

The foregoing, I believe, answers the greater part of what is set out in your letter and in the accompanying letter of Mr. Wade, but he specifically asks whether or not the liability of stockholders can be limited to an amount less than the minimum of two thousand dollars necessary to be subscribed at the time of incorporation. I cannot see that the requirement of the amount which must be subscribed at the time of incorporation and must be set out in the certificate of incorporation, has any relation whatever to the provisions *{*169}* of the section concerning the non-liability of stockholders. Therefore it

seems to follow that the liability of stockholders under that section may be limited to an amount less than two thousand dollars.

Mr. Wade further asks your opinion as to the effect of filing a certificate of stockholder's non-liability under the provisions of Section 907, but without certifying to the amount actually paid in at the commencement of business. In order to effect the desired purpose of creating non-liability of stockholders there must be a certification of the amount of capital actually paid in property or cash at the time of the commencement of business. In the absence of such a certificate it might be held that the certificate of non-liability is of no effect, and the liability of stockholders remains as it would have been if said Section 907 had never been enacted.

I return Mr. Wade's letter herewith.