

Opinion No. 20-2742

November 29, 1920

BY: N. D. MEYER, Assistant Attorney General

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

Corporation Cannot Rescind Action Increasing Capital Stock.

OPINION

Complying with your request that I reduce to writing the oral opinion rendered by me to you on the 18th inst., in regard to the action that the Commission should take upon the application made to the Commission by the G. W. Bond & Brother Commercial Company seeking to rescind its former action increasing its capital stock, I beg to advise:

It was my understanding at the time I talked this matter over with Mr. Williams and Mr. Morrison that the G. W. Bond & Brother Commercial Company had, prior to that time, increased its capital stock from \$ 25,000 to \$ 50,000, and that in doing so they complied with the procedure prescribed by Section 914 of the Code.

If the said Company did as a matter of fact raise its capital stock and took every step in doing so as set out in Section 914, concluding by filing the requisite certificate and written assent by two thirds of the stockholders of each class in the office of the State Corporation Commission, then the said Company became at the moment of completing said steps, and now is, under our law for all intents and purposes, a \$ 50,000 corporation. The power of directors of the Company to rescind by resolution, as they attempted to do in this case, -- as I understand it -- the action increasing the capital stock, is questionable. I seriously doubt whether the Board of Directors possesses any such power at any time. The increasing or decreasing of the capital stock of any company organized under our general incorporation laws is in the hands of two-thirds of the stockholders. Once said stockholders have voted to increase the capital stock of their company, they alone have the power to undo their action.

Once a company or corporation has increased its capital stock in full conformity with our laws, the power to rescind does not exist. If a company or corporation wishes to reduce its capital after having increased it, the procedure set out in Section 914 of the Code, to decrease the capital stock of a corporation must be followed.

It will be noted that Section 914 of the Code, originally enacted in 1905, is identical in language with Section 27 of Chapter 185, Laws of 1896 of the State of New Jersey; in fact, our law must have been copied from the New Jersey law. New Jersey made slight changes in this section in 1908.

I do not find that the courts of New Jersey ever construed Section 27 on the point which has been raised by the G. W. Bond & Brother Commercial Company. However, we do find court reasonings on this section which support the views expressed herein. For instance, in the case of Kean v. Johnson, 9 N. J. Eq. 401, the court made this statement:

"Nothing is more certainly settled than that any fundamental alteration of the charter or material deviation from or extension of a road, in the case of road companies, interferes with the rights of the corporators, and that no majority, however large, can compel any individual stockholder to submit."

And in the case of Zabriskie v. The Hackensack etc., 18 N. J. at page 183, the court states:

"It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators."

As already stated, these cases are not in point, but they do establish this principal; that the charter of a corporation can only be changed by the corporators or stockholders.

It is my opinion that the G. W. Bond & Brother Commercial Company can at this time reduce its capital, which now is \$ 50,000, to its original capitalization, only by following the mode of procedure prescribed by Section 914 of the Code.