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Extinguishment of Corporate Stock

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EXTINGUISHMENT OF CORPORATE STOCK.*—When the writer announced to the President of our Bar Association his title for the paper now to be read, he was advised that not much of a paper could be extended, as there was little law on the subject. Brevity will mark this paper and what I advance may be more in the nature of interrogatories than statements, the latter probably not being punctuated with many citations of authorities. The answer I shall seek to get is to the question: "What is the character of extinguished stock?" How dead is extinguished stock? May the equivalent for stock extinguished up to the capital authorized by charter be again issued and if so, how? Is any consent necessary from the Secretary of State?

The pertinent provision of the Code reads as follows:

"If the corporation acquire shares of its own stock, it may either extinguish or sell the same. If extinguished, it shall operate to that extent as a reduction of the amount of its capital stock. No vote shall be given on any stock while owned by the corporation, nor shall any stock while so held be entitled to any dividend."¹

This provision has been on our statute books for forty-four years and amended but once, which was in 1901, when the words "nor shall any stock while so held be intitled to any dividend," were added. Our Supreme Court has never passed upon this statute.

"If the corporation acquires shares of its own stock it may either extinguish or sell the same." There are many lawyers in this state and at least one prominent accountant well posted in the law, who hold very strongly that by reason of this statute it is not possible for a West Virginia corporation to hold what is called treasury stock. Those who contend that stock may be held in the treasury of a West Virginia corporation seem to rely somewhat upon the word "may" as not being a mandatory word, but as doubtless all of you know and numerous citations can be given, the word "may" used in a statute such as this, is a compelling word and especially when used in a statute to give alternative privileges. Most reliance by those who assert treasury

* Address delivered by Tom B. Foulk, member of the Ohio County Bar, at the Ohio County Bar Luncheon, held at Wheeling, West Virginia, January 22, 1927.

¹ BARNES W. VA. CODE 1923 c. 53, §18.

stock may be held is placed, so I am advised, on the fact that the statute does not say "when" the stock acquired by the corporation shall be disposed of by extinction or resale. Perhaps that is very potent. If the corporation should acquire shares of its own stock and not extinguish or re-sell the same, who could complain and in what manner? There is no penalty provided, so far as I can discover, and if you would say the Attorney General could institute action, what should that action be and what result could he obtain? Perhaps a recalcitrant stockholder might seek to bring action and I leave it for your consideration and discussion as to how this might be done and with what yield of fruitful litigation.

Coke says the word "extinct" comes from the Latin word "*extingueri*" meaning to destroy or put out. In the case of *Commercial Bank v. Lockwood, Administrator*,² the court says:

"When the law speaks of a right or obligation as extinguished, it means that it is put out, taken away, destroyed."

Again, in *Taylor v. Hampton*,³ we find the court says:

"Extinguishment as used with regard to incorporeal hereditaments, means the entire annihilation or destruction and not a mere suspension of the right."

Our statute says "If extinguished it shall operate to that extent as a reduction of the amount of its capital stock." The rule is well settled that where stock is acquired by a corporation either by purchase, surrender, or forfeiture, it is not thereby extinguished unless it is acquired by the corporation with that intention, but may be re-issued.⁴

Quite frequently a corporation acquires shares of its own stock but the directors may not in devotion of part of the surplus to such purchase, declare the intention of handling same after acquired. Assume a case like this—that its own stock is acquired by a corporation over a period of time and the directors have never resolved just what shall be done with the same, but the auditor of that corporation re-

² 2 Harr. (Del.) 8, 14 (1901).

³ 4 McCord (S. C.) 96, 17 Am. Dec. 710 (1827).

⁴ Southern Life Ins. etc. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448 (1853); Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569 (1904). See also Rivanna Nav. Co. v. Dawson, 3 Grat. (Va.) 19, 46 Am. Dec. 188 (1838); Pabst v. Goodrich, 133 Wis. 43, 113 N. W. 398, 14 Ann. Cas. 824 (1907); 25 L. R. A. (N. S.) 51; 17 Ann. Cas. 1269 (1910).

duces the capital stock outstanding by the stock so acquired. Statements of the assets and liabilities are rendered to the stockholders from time to time. Diminution in capital stock outstanding is not noticed and the certificates of stock so acquired are not marked cancelled or extinguished, but are held just as received. A time comes when it is desired to issue stock up to the authorized capital and then there is *some stock* that has never been issued and *perhaps* the equivalent for the stock acquired. The unissued stock must of course be offered to the stockholders in proportion to their respective holdings, but should the acquired stock be considered (if the equivalent in shares may be issued) as having the attributes of unissued stock, or may it be disposed of as treasury stock? There are only two kinds of stock that may be held by the corporation, that which is known as "unissued stock" and "treasury stock," and with treasury stock the stockholders as such have no subscription or participation rights when it is re-issued.⁵

To term unissued stock "treasury stock" is obviously a misnomer. Unissued stock is merely the privilege of creating a liability. It is not in any sense of the word an asset. But stock that has been once legally issued for full honest value, however, is of a very different nature. It is then full paid stock and represents a certain interest in the corporate property. If any of it comes back to the possession of the company, it is still "full paid stock" and is then with some logical correctness considered an asset. Such stock is properly qualified as "treasury stock" and may be sold below par to raise funds for the operation of the company, may be given away as a bonus with preferred stock or bonds, or be otherwise used without involving the recipient in any liability to creditors of the corporation.⁶

It is not believed that the extinguishment of stock, thereby working a reduction in the capital, is intended to affect the corporate franchise on authorized capital stock, but if extinguishment means that the stock has been killed so that the equivalent thereof may never be re-issued, then

⁵ *Hartley v. Pioneer Iron Works*, 181 N. Y. 73 (1905).

⁶ *COOK ON CORPORATIONS*, §§46 and 50; *MORAWETZ ON CORPORATIONS*, §306; 2 *CLARK & MARSHALL ON CORPORATIONS*, §390e; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 37 (1882); *Insurance Press v. Montauk, etc. Co.*, 103 A. D. (N. Y.) 472 (1905). To the same effect, see *Hartley v. Pioneer Iron Works*, *supra*.

should not the corporation certify to the Secretary of State, and receive his certificate decreasing the capital stock, and if it is desired to again issue the equivalent of extinguished stock, should not the necessary steps be taken to increase the capital stock? I am not inclined to think so and believe this has never been done, but have heard the suggestion made.

Again asserting the rule, which in addition to the citations given above may be found stated in *Corpus Juris*, and 7 Ruling Case Law, under "Corporations" Section 534, 17 Ann. Am. and Eng. Cases, 1269, to-wit—

"The rule is well settled that where stock is acquired by a corporation either by purchase, surrender, or forfeiture, it is not thereby extinguished, unless it is acquired by the corporation with that intention, but may be re-issued."

it would seem to follow as a natural sequitur that the converse should betrue, to-wit, if it is acquired by a corporation with the intention of being extinguished, it may not be re-issued. However, to the extent my investigation has taken me, I have not found any court so holding. When a court does hold that stock acquired by a corporation with intention of being extinguished may not be re-issued, then it would seem the authorized capital stock has necessarily been affected or impaired by a permanent reduction. The absolute answer is not with me and my ears are open.