

February 22, 1974

OPINION LETTER NO. 3
Answer by letter-Jones

Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is to acknowledge receipt of your request for an opinion which reads as follows:

"Is a foreign corporation which is seeking to qualify in Missouri or already qualified in Missouri liable for the payment of an initial qualification tax or an increased qualification tax pursuant to Chapters 351.585 (5) or 351.600(3) RSMo based upon its proportion of stated capital and surplus represented by its property located and business transacted in Missouri (but in no event less than value of its property located in Missouri) when the said foreign corporation has absorbed by merger an existing domestic corporation or foreign corporation which has theretofore paid to the State of Missouri its incorporation or domestication tax; if so, is a tax credit due the surviving corporation for those taxes previously paid by the merging domestic or foreign-qualified corporation?"

First of all, it is our view that a foreign corporation which is seeking to do business in Missouri for the first time is required to pay a qualification fee to the state of Missouri in accordance with Section 351.585(5), RSMo 1969, and that there is no constitutional difficulty. Opinion of the Attorney General No. 202, Valier, 1970 (copy enclosed). However, in regard to a foreign corporation

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which has previously qualified to do business in Missouri and is subsequently absorbed by merger with a foreign or domestic corporation so that the surviving corporation is a continuation of the foreign corporation which had previously qualified to do business in Missouri, we recognize that a constitutional question may be raised in regard to the provisions of Section 351.600(3), RSMo 1969. Nevertheless, there is authority for the proposition that statutes are presumed to be constitutional, and a court will not declare an act unconstitutional unless it plainly contravenes the Constitution. Borden Company v. Thomason, 353 S.W.2d 735, 743 (Mo. Banc 1962). In addition, it has been pointed out that when a corporation claims under its charter an exclusive right or privilege, or any right or privilege as against the state, or otherwise as against the general public, the charter is to be construed strictly against the corporation, and in favor of the public, and such a right or privilege will not be held to exist unless it has been granted by the legislature in clear and unmistakable terms. 15 W. Fletcher, Private Corporations, Section 7041, page 6. Lastly, Attorney General Opinion No. 89, Toberman, 1-23-50 was never formally withdrawn and is being reaffirmed in support of our views.

It is, therefore, our opinion that credit is not due the surviving corporation for those taxes or fees previously paid by the merging domestic or foreign qualified corporation.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 202
4-15-70, Valier