Your second question reads as follows:

"2. Should a request be made by the office of Secretary of State that the foreign corporation execute a withdrawal as designated in the Indiana General Corporation Act when the reason for discontinuance of business in Indiana is the dissolution of the corporation in its state of domicile, keeping in mind the distinction between voluntary dissolution and involuntary dissolution?"

The first paragraph of Section 1, Chapter 215, Acts of 1929, same being Burns Indiana Statutes, Section 25-402, 1948 Replacement reads as follows:

"The Secretary of State shall possess and have all necessary powers, and shall perform all the duties, which may be required for the proper and efficient administration of the provisions of this act."

I believe the proper and most efficient method of obtaining compliance with the statute for the withdrawal of foreign corporations, is, as you suggest, to call the appropriate statutory provision to the attention of the corporation. Therefore your second question is answered in the affirmative.

OFFICIAL OPINION NO. 76
December 27, 1950.

Honorable Leland L. Smith,
Secretary of State,
State Capitol Building,
Indianapolis, Indiana.

Dear Sir:

Your letter has been received requesting an official opinion concerning the reduction of Capital Stock by a Corporation and the payment of dividends, said request is stated in two questions, the first reads as follows:

"May the Corporation lawfully use the $255,000 reduction in common stock liability, resulting from re-
duction of the par value of the common stock from $25.00 to $10.00 per share, in part as earned surplus and in part as capital surplus?"

The rule of law on this question is clearly and concisely stated in Corpus Juris Secundum, Section 275, Volume 18.

"After capital stock has been lawfully reduced, the surplus if any as ascertained by an examination into its affairs, may be distributed, in whole or in part, among stockholders subject to claims of persons who were creditors before the reduction."

A precise statement of this doctrine is contained in the Permanent Edition of the Cyclopedia of the Law of Private Corporations, by Fletcher, Section 5150, Chapter 58, reads as follows:

"When the amount of capital stock of a corporation is lawfully reduced under legislative authority, the corporation is not required to keep the excess of its actual capital as reduced, nor has it any right to do so; but the stockholders have the right to have it divided among them, as in the case of a dividend, in proportion to their shares. In making such distribution, however, regard must be had to present value of the property, and the company, instead of distributing money or property equal in value to the excess of the original nominal capital, after deducting its debts, in other words, the surplus, if any, which a corporation may pay to its stockholders on reducing its capital stock must, in every case, be ascertained, and depends upon the difference between the original amount of capital stock and the reduced amount."

It is apparent from the foregoing authorities that a corporation, may, if it has the proper legislative authority, reduce its capital stock liability, by reduction of the value of common stock, in part as earned surplus and in part as capital surplus, providing such reduction will leave the corporation an amount of assets equal to its reduced capital stock in addition to the amount of its debts. Section 30 of the Indiana General Corporation Act, page 749 reads as follows:
"Unlawful Reduction of Outstanding Capital Stock. No reduction, however accomplished, of the issued and outstanding shares of capital stock of a corporation shall be lawful when such reduction renders the corporation insolvent or bankrupt."

It is clear that such a reduction in capital stock can not be legally made until a financial statement is submitted so that an examination may be made of the affairs of the corporation.

Your second question reads as follows:

"May the corporation lawfully pay dividends from such earned surplus account so established and charge liabilities for depreciation, depletion, obsolescence, wear and tear, against the capital surplus account, or do such operations amount to the payment of dividends from capital?"

This question should be so divided into two parts, the question of the paying of dividends from such earned surplus will be considered first.

From the authorities cited in answer to question number one it seems apparent that such dividends may be paid providing the corporation can legally make such a reduction in capital stock and has the legislative authority to declare a dividend and providing there are no restrictions against such dividends being paid, under the 1929 Indiana General Corporation Act, Section 12 Chapter 215, of said Act, approved March 16, 1929 same being Burns Indiana Statutes Section 25-211, 1948 Supplement reads as follows:

"Dividends. The directors of every corporation shall have the power, subject to any restrictions contained in the articles of incorporation, to declare and pay dividends upon the shares of capital stock, out of surplus earnings or net profits or surplus paid in in cash of the corporation."

This provision gives the directors of the corporation the authority to pay dividends, but limits the payment of such dividends from surplus earnings or net profits or surplus paid in in cash of the corporation. The question arises as to
whether it was the intent of the legislature to limit the payment of dividends from funds that were actually surplus earnings or net profit, or surplus paid in cash or whether funds that were legally placed in a fund designated as surplus earnings would be sufficient compliance with the law, however another excerpt from the third paragraph of said Chapter 215, Section 12, Burns Indiana Statutes Section 25-211, 1948 Supplement reads as follows:

"Dividends may be paid in cash, in property or in shares of the capital stock of the corporation, but no dividend payable in cash or property shall be paid out of surplus due to or arising from unrealized appreciation in value, or from revaluation of assets."

This provision definitely prohibits the payment of dividends from such earned surplus account, as contemplated in your question.

On October 15, 1942 (page 230) the Attorney General of the State of Indiana rendered an opinion that stock dividends may be paid from a surplus account, arising from a revaluation of assets, however from the wording of your question it is clear that a stock dividend is not contemplated but a dividend payable in cash which is prohibited by the above quoted statute.

In answer to the second part of question number two, as to whether or not depreciation, depletion, obsolescence, wear and tear, should be charged against a capital account, J. K. Lasser, C. P. A. in his "Hand Book of Accounting Methods," (page 271) states as follows:

"Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year, should be charged to a capital account and not to an expense account."

An excerpt from Fletcher's Encyclopedia of Corporations, Permanent Edition, under the title of Depreciation in Balanced Sheet, Volume 19, Section 9259, reads as follows:
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“It is the general consensus of Accounting Opinion, however, that an annual charge should be made on the books of every corporation to convey the depreciation of fixed assets, and every soundly managed corporation will be found to pursue that practice.”

Although it may not be conformative with good accounting methods to charge depreciation, depletion, obsolescence, wear and tear, against capital *surplus* accounts. However I find nothing illegal in making such charge against said account unless it indirectly resulted in payment of an illegal dividend.