ciations already established in the community, if the department had failed to order such operation discontinued when the fact of operation was first brought to its attention. Thus, for answer to your third question, it is my belief that the operation therein described, of more than seven years' standing to date, would not be in violation of the law if the department had knowledge of such operation and had acquiesced therein by failure to have ordered a discontinuance of the operation, and further if such fixed business location complies with the requirements of Burns' 18-2160, supra, with respect to location and capital requirements.

OFFICIAL OPINION NO. 58

August 28, 1962

Mr. Harry E. McClain, Commissioner
Department of Insurance
509 State Office Building
Indianapolis 4, Indiana

Dear Mr. McClain:

Your request of August 2, 1962, for an Official Opinion presents the following questions:

"1. Once an assessment company incorporated under the 1897 Assessment Company Act becomes dormant because of non-use of its charter rights, may it again be reactivated?

"2. May an assessment company incorporated under the 1897 Assessment Company Act once it becomes dormant through non-use or mis-use of its charter rights sell these charter rights in any manner, either directly or indirectly?"

In answering your question it is necessary that certain facts contained both in your letter requesting this Official Opinion and in other correspondence attached to said letter, be set forth herein for the purpose of clarity.

The assessment company in question was incorporated under Chapter 195 of the Acts of 1897 and continued in business until 1954, at which time a reinsurance treaty was executed and
approved, reinsuring all policies in another company. Since that time the assessment company has remained dormant except for the payment of nominal annual personal property taxes to the county treasurer. Its former board of directors still remain in office, and the company has not been dissolved nor any action taken to terminate its corporate existence.

In passing, it is noted that there are no facts set forth concerning any “mis-use of its charter rights” as stated in the second question. For lack of such facts, this part of the question will not be considered. However, generally speaking, this Opinion would be applicable to such a situation.

Even though insurance corporations are regulated and controlled by laws separate and apart from other corporations, they are still all basically a corporate entity created by statute. Therefore, general law regarding corporations, unless restricted or altered by legislative enactments, would govern.

The general rule pertaining to your question is well stated in Fletcher Cyclopedia Corporations, Vol. 16, § 7986, page 678:

“When it is said that a corporation may forfeit its charter by misuser or nonuser of its franchises, it is not meant that the misuser or nonuser results ipso facto in its dissolution. On the contrary, as a general rule, however long a corporation may fail to exercise the powers conferred upon it, or however much it may abuse them, a forfeiture of its charter can only take effect upon a judgment of a competent tribunal in judicial proceedings * * *”

In an early case, John and Another v. The Farmers and Mechanics Bank of Indiana (1830), 2 Blackf. 367, p. 370, the court states, in part, as follows:

“* * * But, taking this plea in its fullest extent, it shows no more than a mis-user or non-user of the franchises, which of itself has never been considered such a dissolution of a corporation as could be taken advantage of in a collateral way. If it amounts to a forfeiture of the corporate rights, that forfeiture must be judicially determined and declared, at the instance of the government, before it can be pleaded by an individual * * *”
This doctrine of judicial determination of the forfeiture of corporate rights was affirmed in The State v. The Trustees of the Vincennes University (1854), 5 Ind. 77, p. 80, which states, in part, as follows:

"The state now claims that said corporation had ceased to exist, through the failure of the trustees to hold semi-annual meetings, through the absence of members from said meetings, and by the death and removal of the members of the trustee board.

"It is not pretended that the government has ever proceeded against the corporation for mis-user or non-user of franchises, and procured a judicial sentence of forfeiture; and the general rule is well settled, that a plea to an action by a corporation that the charter is forfeited, must show that the forfeiture has been judicially declared in a suit for that purpose at the instance of the government * * *"

Under the provisions of the Acts of 1935, Ch. 162, being the law governing insurance companies from 1954 to the present, there are three methods by which an insurance corporation may be dissolved. One is based upon the filing of a petition for liquidation by the insurance commissioner (Section 31 et seq., being Burns' [1952 Repl.], Section 39-3403 et seq.); another is a voluntary dissolution by the board of directors, which must follow certain defined procedures culminating in the filing and recording of articles of dissolution (Section 131 et seq., being Burns' [1952 Repl.], Section 39-4001 et seq.); a third is by merger with another insurance corporation (Section 114 et seq., being Burns' [1952 Repl.], Section 39-3901 et seq.).

None of these statutory procedures having been followed, it would appear that the instant assessment plan insurance corporation is still in existence although in what has been referred to by the courts as being in a "suspended state," or dormant.

The effect of Acts of 1935, Ch. 162, as found in Burns' (1952 Repl.), Section 39-3201 et seq., being the Indiana Insurance Law, upon the Acts of 1897, Ch. 195, as found in Burns' (1952 Repl.), Section 39-421 et seq., being the law governing assessment plan insurance companies, is discussed in my 1956
O. A. G., page 162, No. 36 and states on page 168, in part, as follows:

"The inescapable conclusion on consideration of the foregoing is that Burns' Section 39-421 et seq. was intended to remain in force as the law governing the actions of existing corporations already doing insurance business on the assessment plan, with Burns' Section 39-5025, supra, of the 1935 Act serving only to forbid the formation of new corporations desiring to do business on the assessment plan."

It is assumed by "reactivate" as used in your question that you refer to those steps which must be taken by the particular corporation to comply with the requirements of the Department of Insurance and the Indiana Insurance Law in order to receive a certificate of authority entitling them to do insurance business. Based upon this assumption and having determined that the assessment plan insurance corporation is still in existence, then such company could be reactivated.

You ask further, whether or not, the same assessment plan corporation could "sell these charter rights in any manner, either directly or indirectly."

The use of the word "sell" is, in my opinion, rather misleading since it is not possible to actually sell a corporation. The shares of stock in the corporation may be sold or the corporation may sell its assets exclusive of its charter. A corporation may also merge or consolidate with another corporation subject to the statutory provisions governing such merger or consolidation.

I must assume that your second question is directed towards the right of the assessment plan insurance corporation, after being reactivated, to merge or consolidate with another insurance corporation.

If the assessment plan insurance corporation should be reactivated and become a bona fide operating insurance corporation, then it may avail itself of all rights and privileges under the Indiana Insurance Law. One of these is the right to merge or consolidate and if such proposed merger or consolidation procedure falls within all limitations and restrictions
provided for in such act then the corporations may merge or consolidate. Only in such fashion may it be said to have "sold" its charter. This answer is, of necessity, general in its nature since there are too many possible problems in connection with a specific merger or consolidation to attempt to define, generally, the rights in a manner which would control each situation.

In summary therefore, it is my opinion that:

1. An assessment plan insurance corporation organized under the Acts of 1897 which has become dormant but has not been dissolved by statutory procedure may be reactivated.

2. Such a corporation when properly reactivated and operating in an approved manner has generally the right to merge or consolidate subject to the restrictions and limitations imposed by the Indiana Insurance Law of 1935.

OFFICIAL OPINION NO. 59
September 27, 1962

Hon. Dorothy Gardner
Auditor of State
238 State House
Indianapolis 4, Indiana

Dear Mrs. Gardner:

This is in reply to your request dated August 29, 1962, for an Official Opinion, which reads in part as follows:

"Is there any legal provision for the retirement funds to write and sign their own retiree checks outside the provisions for a special disbursing officer?"

Your letter indicates that the Director of the Data Processing Division of the State of Indiana has requested you to designate his said division as a service agency for the writing of about 13,000 retiree checks for the State Teachers' Retirement Fund and Public Employees' Retirement Fund.

The office of Auditor of State is a constitutional office created by Indiana Constitution, Art. 6, Sec. 1, which provides as follows:

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