Building and Loan Associations—Secretary of State—Fees—Certificates of Incorporation.

The fees of the secretary of state for filing a certificate of incorporation of a foreign building and loan association are governed by the provisions of section 145 R.C.M. 1921.

R. N. Hawkins, Esq., April 26, 1927.
Secretary of State,
Helena, Montana.

My dear Mr. Hawkins:

You have requested my opinion on the following question:

> "What fee should be charged foreign building and loan associations for filing certificate of incorporation with the secretary of state under the provisions of section 49, chapter 57, house bill No. 4 of the laws of 1927?"

Section 49 provides as follows:

> "Fees of secretary of state, superintendent of banks. Section 145 of the Montana Revised Codes of 1921 and Section 221 of said Codes, as amended by Chapter 236 of the Laws of the Eighteenth Legislative Assembly, and as amended by Chapter 98 of the Laws of the Nineteenth Legislative Assembly relating to the fees of the secretary of state and the state examiner, are hereby made applicable to the fees to be paid by all of the associations mentioned and described in this act."

No mention is made in the above law of chapter 95, laws of 1925, which has repealed section 145 R. C. M. 1921 by implication, and which is the act under which the secretary of state assesses all foreign corporations operating in Montana at the present time.

The language of section 49, supra, is clear and unambiguous and it is a general rule of construction that "in construing the statute the expressed intention of the legislature must prevail." It therefore being clearly the intention of the legislature that the fee to be charged a foreign building and loan association for filing a certificate of incorporation is that provided for in section 145 R. C. M. 1921, we are at once confronted with the more serious question of whether the legislature can incorporate into a statute by reference a statute which has been formerly repealed by implication. That a statute may incorporate another statute by reference unless this is prohibited by the constitution, and there is no such provision in our constitution, has been well settled.

> "When an act of the legislature confers powers which are recited in another act, the act to which reference is made is to be considered as if incorporated into and made part of the act containing the reference." (Tuney v. Wilton, 36 Ill. 385).

I am unable to find where the question of the effect of incorporating a statute which has been repealed has been passed on by the courts. However, there are many cases dealing with the effect on the statute where the statute incorporated by reference has been repealed and it has been uniformly held that "a statute which refers to and adopts the provisions of a prior statute is not repealed by the subsequent repeal of the prior statute, and the provisions of the incorporated statute continue in force so far as it forms a part of the second statute." (36 Cyc. 1094, and authorities therein cited.)

I see no reason why this rule should not apply also where the statute incorporated by the second statute was one which had been repealed at the time of its incorporation, as far as it forms a part of the second statute, particularly where as in the case in question the intention of the legislature is clearly expressed, and the repealed statute is simply referred to for the purpose of ascertaining that intention.

> "Where a statute still in force refers to one since repealed, the latter may be resorted to for the purpose of construing the former."
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> Flanders v. Town of Merrimack, 43 Wis. 567, 4 N. W. 741;
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> Don v. Pfister (Cal.) 155 Pac. 60.

You have called my attention to the case of State ex rel. General Electric Co. v. Alderson, 49 Mont. 29. In that case the court held that while the statute in question was inoperative as far as it authorized the secretary of state to exact prescribed fees for recording and filing certificates of incorporation of foreign corporations engaged in interstate commerce, it was valid as to corporations seeking to engage in a strictly private intrastate business.

In view of the fact that the legislature clearly intended that the fee in question should be governed by section 145, R. C. M. 1921, and that said section was properly included in the statute by reference, it is my opinion that the fees of foreign building and loan associations should be assessed by you under the provisions of said section.

Very truly yours,

L. A. FOOT,
Attorney General.