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## Bank Not Liable for Requiring a Corporate Client to Commit an Ultra Vires Act - TBCA 2.04A By-Passed

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## NOTES

### Bank Not Liable for Requiring a Corporate Client To Commit an Ultra Vires Act — TBCA 2.04A By-Passed

Acting under broad authorization<sup>1</sup> from the board of directors to deal with Republic National Bank of Dallas and specific authorization to negotiate a loan for \$257,500,<sup>2</sup> the president and secretary of Tex-Mex corporation obtained a loan in that amount. The bank required, as a term of the loan, that the corporation pay the balance of the corporate president's present indebtedness<sup>3</sup> to the bank with a portion of the proceeds. Accordingly, the president executed a new note, payable to the corporation, which became a part of the collateral given to the bank to secure the loan.<sup>4</sup> Two months later, the president informed the board of directors that the corporation had paid his indebtedness as a part of the loan agreement.<sup>5</sup> The corporation made nine payments on the note until the directors and stockholders authorized the bank to sell their note to a third party.<sup>6</sup> With the disposition of the proceeds of the sale,<sup>7</sup> the agreement between the bank and the corporation became completely executed.<sup>8</sup> Two months later,

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<sup>1</sup> Record, pp. 58-60, *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415 (Tex. 1965). The resolution, which had been filed with the bank, authorized the president and secretary to borrow money from the bank or to deposit and withdraw company funds from the bank, though the withdrawal item was payable to one of them in cash or for credit to their personal account, and freed the bank from any responsibility of inquiry with respect to any such withdrawals.

<sup>2</sup> Record, p. 48, *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415 (Tex. 1965). The resolution authorized negotiations for \$257,500, with authority to pledge \$680,000 in commercial paper held by the corporation as collateral.

<sup>3</sup> *Id.* at pp. 46-49. On November 24, 1959, the corporation owed the bank \$329,187.50; its wholly owned subsidiary owed the bank \$97,500; and the president owed the bank \$65,270.83 on his personal note of \$75,000.

<sup>4</sup> The corporation agreed to give the following security for the new advance by the bank: (a) the president's note payable to the corporation in the amount of \$65,270.83, secured by a pledge of 37,500 shares of the corporation's stock; (b) two second-lien notes for \$600,000 and \$80,000 respectively, together with a subordination of its remaining lien rights to the holder of the notes.

<sup>5</sup> *Republic Nat'l Bank v. Whitten*, 383 S.W.2d 207, 210 (Tex. Civ. App. 1964), *aff'd*, 397 S.W.2d 415 (Tex. 1965).

<sup>6</sup> *Ibid.*

<sup>7</sup> For a price of \$370,000, the purchaser took delivery of the corporation's notes (\$257,500, on which was owed \$219,981.41 plus accrued interest, and another unrelated note on which the corporation owed \$5,999.92 plus accrued interest) which totaled \$226,655.65, including interest and the collateral securing them. The purchaser paid the rest of the consideration, \$143,344.35, to the corporation. The \$600,000 second-lien note was endorsed to the purchaser by the corporation, and the debt owed the bank was extinguished.

<sup>8</sup> *Republic Nat'l Bank v. Whitten*, 383 S.W.2d 207, 211 (Tex. Civ. App. 1964), *aff'd*, 397 S.W.2d 415 (Tex. 1965).

a petition of bankruptcy was filed against the corporation, on which it was adjudicated bankrupt. Whitten, the trustee in bankruptcy, sued the bank to recover damages suffered by the use of corporate funds to discharge the indebtedness of one of the officers. No fraud was alleged. The court of civil appeals, in reversing the trial court's judgment for the trustee, held that the trustee had failed to state a cause of action for the following reasons: the transaction was ultra vires and thus was within the scope of claims abrogated by the Texas Business Corporation Act;<sup>9</sup> the corporation had received sufficient benefits from the executed contract to estop it as a matter of law to assert ultra vires as the basis of its claim; and the corporation had ratified the transaction.<sup>10</sup> The Texas Supreme Court granted writ of error. *Held, affirmed*: When a corporation receives direct and substantial benefits from a fully executed contract, it is estopped as a matter of law to assert ultra vires as a basis for a claim for payments made under the contract. *Whitten v. Republic Nat'l Bank*, 397 S.W. 2d 415 (Tex. 1965).

### I. ULTRA VIRES IN TEXAS

In the early Texas case of *Bond v. Terrell Cotton & Woolen Mfg. Co.*<sup>11</sup> the Texas Supreme Court defined ultra vires acts as those beyond the powers conferred on a corporation by its charter and the statutes under which it was incorporated.<sup>12</sup> The court distinguished ultra vires acts from illegal acts (*i.e.*, those inherently evil, specifically prohibited by statute, or against public policy),<sup>13</sup> a distinction generally adhered to by the majority of United States jurisdictions.<sup>14</sup> The issue of ultra vires, or lack of capacity, was available to a corporation as a basis for rescission of a contract or as a defense to prevent the enforcement of a contract.<sup>15</sup> The purpose was to protect shareholders of a corporation from loss when corporate management exceeded its authority to make contracts in the corporation's name.<sup>16</sup>

<sup>9</sup> The Texas Business Corporation Act is hereinafter referred to as the TBCA.

<sup>10</sup> *Republic Nat'l Bank v. Whitten*, 383 S.W.2d 207, 214 (Tex. Civ. App. 1964), *aff'd*, 397 S.W.2d 415 (Tex. 1965).

<sup>11</sup> 82 Tex. 309, 18 S.W. 691 (1891).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> See, *e.g.*, *Wagg v. Toler*, 80 Cal. App. 501, 251 P. 973 (Dist. Ct. App. 1926); *Mitchell v. Hart*, 107 Ind. App. 548, 25 N.E.2d 665 (App. Ct. 1940); *Bath Gaslight Co. v. Claffy*, 151 N.Y. 24, 45 N.E. 390 (Dist. Ct. App. 1896); 7 FLETCHER, PRIVATE CORPORATIONS § 3400 (perm. ed. rev. repl. 1964).

<sup>15</sup> Thompson, *The Doctrine of Ultra Vires in Relation to Private Corporations*, 28 AM. L. REV. 376 (1894).

<sup>16</sup> See 7 FLETCHER, *op. cit. supra* note 14, §§ 3406-14, 3432, 3437, 3473; 1 HILDEBRAND, TEXAS CORPORATIONS 339-86 (1942).

However, the plea was soon abused and was used as a tool to place the burdens of corporate mismanagement on third parties dealing with the corporation in good faith.<sup>17</sup> To mitigate the abuse, the bars of estoppel and ratification were allowed. In *Bond*, and later cases, Texas courts have held that a corporation is estopped to plead ultra vires when it has received direct and substantial benefits<sup>18</sup> under the agreement (whether executed,<sup>19</sup> or executory<sup>20</sup>). Moreover, it is generally accepted that a corporation may ratify an ultra vires transaction,<sup>21</sup> although there is substantial conflict as to the manner by which ratification may be effected.<sup>22</sup>

Due to the differences of opinion among courts as to the nature of ultra vires acts, there has been confusion in this area of the law.<sup>23</sup> Legislatures often have sought to clear away the confusion by enacting statutes abrogating ultra vires as a plea against third parties.<sup>24</sup> At the same time, shareholders have been given statutory protection against the directors and officers participating in or approving ultra vires transactions.<sup>25</sup> In 1956 the Texas legislature attempted to abrogate the plea of ultra vires as a basis of a claim or defense involving

<sup>17</sup> *Ibid.*

<sup>18</sup> These direct and substantial benefits are the benefits of the performance of the other party to the contract. *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 18 S.W. 691 (1891) (proceeds of a loan); *Texas W. Ry. v. Gentry*, 69 Tex. 625, 8 S.W. 98 (1888) (conveyance of real property). Money or property benefits are generally sufficient to create an estoppel. See 1 HILDEBRAND, *op. cit. supra* note 16, § 137 (1942).

<sup>19</sup> *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 18 S.W. 691 (1891) (proceeds of a loan); *Malone v. Republic Nat'l Bank & Trust Co.*, 70 S.W.2d 809 (Tex. Civ. App. 1934) *error disp.* (collateral on corporate president's note); *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 107 S.W. 609 (Tex. Civ. App. 1908) (oil under royalty contract); *Parker v. Citizens' Ry.*, 95 S.W. 39 (Tex. Civ. App. 1906) *error ref.* (purchase price of real property); 1 HILDEBRAND, *op. cit. supra* note 16, § 135.

<sup>20</sup> *Kinchele Irrigation Co. v. Hahn Bros.*, 105 Tex. 231, 146 S.W. 1187 (1912) (rent for farm land); *Tenison v. Patton*, 95 Tex. 284, 67 S.W. 92 (1902) (sale price of real estate); *Bond v. Terrell Cotton & Woolen Mfg. Co.*, 82 Tex. 309, 18 S.W. 691 (1891) (proceeds of a loan); *Texas W. Ry. v. Gentry*, 69 Tex. 625, 8 S.W. 98 (1888) (conveyance of real property); *Williford Lumber v. Malakoff Buick Co.*, 113 S.W.2d 248 (Tex. Civ. App. 1938) *error disp.* (liens and notes on real property); *Malone v. Republic Nat'l Bank & Trust Co.*, 70 S.W.2d 809 (Tex. Civ. App. 1934) *error disp.* (collateral on corporate president's loan); *Reed v. Continental State Bank*, 2 S.W.2d 426 (Tex. Comm. App. 1928) (deposits by surety as security on a note); see cases cited in 1 HILDEBRAND, *op. cit. supra* note 16, § 137.

<sup>21</sup> *Kirby v. Fitzgerald*, 89 S.W.2d 408 (Tex. Comm. App. 1936); *Fort Worth Nat'l Bank v. Harwood*, 229 S.W. 487 (Tex. Comm. App. 1921) (the unauthorized use of corporate funds to pay a personal debt); *Hall v. Crawford & Delphenis Co.*, 11 S.W.2d 804 (Tex. Civ. App. 1928) *error disp.*

<sup>22</sup> Compare *Republic Nat'l Bank v. Whitten*, 383 S.W.2d 207 (Tex. Civ. App. 1964) with *Liebowitz, Director Misconduct and Shareholder Ratification in Texas*, 6 BAYLOR L. REV. 1 (1953). See also Note, 43 TEXAS L. REV. 796 (1965).

<sup>23</sup> See authorities *supra* note 16.

<sup>24</sup> See, e.g., CAL. CORP. CODE § 803 (b) (1947); ILL. REV. STAT. ch. 32, § 157.8 (1957); MD. CODE ANN. art. 23, § 124 (1951); PA. STAT. ANN. tit. 15, § 2852-303 (1950); VA. CODE ANN. § 13.1-5 (1950); WIS. STAT. ANN. § 180.06 (1951). See also text *infra* note 27.

<sup>25</sup> See authorities cited note 16 *supra* and note 34 *infra*.

contracts with parties outside the corporation.<sup>26</sup> Article 2.04A of the Texas Business Corporations Act, passed in that year, provides: "Lack of capacity shall never be made the basis of any claim or defense at law or in equity."<sup>27</sup>

## II. LOANS TO OFFICERS

Following *Bond*, the legislature provided the statutory definition of ultra vires in Texas with article 1349 of the Texas Revised Civil Statutes<sup>28</sup> (passed before the TBCA and still in force). However, this statute merely prohibits a corporation from using its assets beyond its corporate purpose or for purposes otherwise permitted by law.<sup>29</sup> Since *Bond*, the Texas courts have held that article 1349 is a general prohibition and does not render illegal an act which is otherwise merely ultra vires.<sup>30</sup> Thus, before the enactment of article 2.02A(6) of the TBCA, loans to officers out of corporate funds, which were held to fall only within the scope of article 1349,<sup>31</sup> were unquestionably legal.<sup>32</sup>

Article 2.02A(6) of the TBCA, in defining corporate powers, provides: "Subject to the provisions of Sections B and C of this Article, each corporation shall have power . . . (6) To lend money to, and otherwise assist its employees, but not to its officers and directors."<sup>33</sup> The TBCA also provides for a derivative action on the part of the stockholders against directors who approve a loan by the corporation to one of its officers.<sup>34</sup> These provisions of the TBCA are very similar to the comparable provisions of the Model Business Cor-

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<sup>26</sup> Bar Committee Comments, art. 2.04, 3A VERNON'S ANN. CIV. STAT. 40; Brimble, *Ultra Vires Under the Texas Business Corporation Act*, 40 TEXAS L. REV. 677 (1961).

<sup>27</sup> TEXAS BUS. CORP. ACT ANN. art. 2.04A (1965). The comparable provision of the Model Act is § 6.

<sup>28</sup> TEX. REV. CIV. STAT. ANN. art. 1349 (1925) prohibits corporations from using their means or assets "directly or indirectly for any purpose whatever other than to accomplish the legitimate business of its creation, or those purposes otherwise permitted by law."

<sup>29</sup> *Lange Soap Co. v. Ward*, 269 S.W. 851 (Tex. Civ. App. 1925).

<sup>30</sup> *Staaek v. Routledge*, 111 Tex. 489, 241 S.W. 944 (1922); *Lange Soap Co. v. Ward*, 269 S.W. 851 (Tex. Civ. App. 1925).

<sup>31</sup> *Malone v. Republic Nat'l Bank & Trust Co.*, 70 S.W.2d 809 (Tex. Civ. App. 1934) *error dismissed*.

<sup>32</sup> *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415, 418 (Tex. 1965); *Paddock v. Siemoneit*, 147 Tex. 571, 218 S.W.2d 428 (1949); *Milam v. Cooper Co.*, 258 S.W.2d 953 (Tex. Civ. App. 1953) *error ref. n.r.e.*

<sup>33</sup> TEX. BUS. CORP. ACT ANN. art. 2.02A(6) (1956).

<sup>34</sup> TEX. BUS. CORP. ACT ANN. art. 2.41A(4) (1956) provides: "In addition to any other liabilities imposed upon the directors of a corporation: . . . (4) The directors of a corporation who vote for or assent to the making of a loan to an officer or director of the corporation . . . shall be jointly and severally liable to the corporation for the amount of such loans until the repayment thereof."

poration Act.<sup>35</sup> However, the model act contains an additional provision (section 42) which expressly prohibits loans by a corporation to its officers or directors.<sup>36</sup> This section was not incorporated into the TBCA. The significance of the omission of the prohibitive section and the proper construction of article 2.02A(6) of the TBCA are shown by *Whitten*.<sup>37</sup>

### III. WHITTEN V. REPUBLIC NAT'L BANK

In *Whitten*, the Texas Supreme Court construed the latter portion of article 2.02A(6) of the TBCA as being "a limitation on a specific power granted, not a positive prohibition."<sup>38</sup> At first glance, the wording of the statute, "but not to officers and directors," seems prohibitive.<sup>39</sup> But, the title of article 2.02 is "General Powers," and, thus, article 2.02A(6) is a grant of powers with a limitation on the extent of the grant. As a result, an act which exceeds the limitations on article 2.02 powers is *ultra vires* but not illegal. Further, the omission of section 42 of the model act<sup>40</sup> from the TBCA indicates an intention not to render loans to officers illegal but rather to conform this portion of the TBCA to the pre-TBCA case law which held loans to officers to be *ultra vires*.<sup>41</sup>

In *Whitten*, the court stated that, although the issues of statutory abrogation of the plea of *ultra vires* by the TBCA and ratification might be "of academic interest . . . resolution of [these] issues was unnecessary and would serve no useful purpose,"<sup>42</sup> because the benefits which the corporation had received under the contract constituted sufficient direct and substantial benefits to estop the corporation as a matter of law to assert *ultra vires* as the basis of its claim for recovery.<sup>43</sup> This holding is in accord with Texas law<sup>44</sup> and with the

<sup>35</sup> Compare article 2.02A(6) TBCA with ABA-ALI MODEL BUS. CORP. ACT § 4(f) (1959). Compare article 2.41(4) TBCA with ABA-ALI MODEL BUS. CORP. ACT § 43(d) (1959).

<sup>36</sup> ABA-ALI MODEL BUS. CORP. ACT § 42 (1959) provides: "No loans shall be made by a corporation to its officers or directors." The comment to § 4(f) states: "Loans to officers are expressly prohibited (§ 42) and directors who vote for or assent to such a loan are personally liable to the corporation for the amount of the loan until the repayment thereof (§ 43(d))."

<sup>37</sup> *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415 (Tex. 1965).

<sup>38</sup> *Id.* at 419.

<sup>39</sup> See note 33 *supra*.

<sup>40</sup> See note 36 *supra*.

<sup>41</sup> See notes 28-32 *supra*.

<sup>42</sup> *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415, 415-16 (Tex. 1965).

<sup>43</sup> The direct and substantial benefits received were: (1) \$73,800 with which the corporation refinanced the claims of other creditors and (2) \$20,474.17 in free funds. 397 S.W.2d at 417.

<sup>44</sup> See notes 19-20 *supra*.

holdings of the majority of United States jurisdictions.<sup>45</sup> Generally, the only benefit necessary to operate an estoppel is the fruit, profit, or advantage of the other party's performance.<sup>46</sup> If no benefits are received by the party pleading *ultra vires*, clearly no estoppel will be raised.<sup>47</sup> However, no concise guidelines as to what are direct and substantial benefits have been set forth by the courts, nor did the court attempt to do so in *Whitten*. Apparently, each case will be examined on an *ad hoc* basis to determine whether the benefits received by either party are sufficient to estop him from pleading *ultra vires*.

#### IV. THE UNANSWERED ISSUES

The court's decision not to deal with the questions of statutory abrogation and ratification leaves unresolved two important issues which were clearly before the court. A third issue, whether the officers and directors breached their fiduciary duty to the corporation and, if so, the consequences to the defendant bank as a result of its participation in the transaction, apparently was not presented to the court. The court specifically noted that no fraud was alleged.<sup>48</sup> Had fraud been alleged, the rights of the parties would have been materially altered.<sup>49</sup>

##### A. Article 2.04 Of The TBCA

Abrogation of the plea of *ultra vires* by article 2.04A<sup>50</sup> fulfills one of the primary purposes of the TBCA; it removes some of the burdens of responsibility previously imposed on third parties dealing with corporations and imposes the greatest portion of these burdens on

<sup>45</sup> *Field v. Bittner*, 267 Ill. App. 346, *aff'd*, 354 Ill. 215, 188 N.E. 342 (1933) (purchase price of notes); *Dome Realty Co. v. Gould*, 285 Mass. 294, 189 N.E. 66 (1934) (compromise saving time and expense of litigation); *Day v. Spiral Springs Buggy Co.*, 57 Mich. 146, 23 N.W. 628 (1885) (delivery of purchased goods); *Hobart-Lee Tie Co. v. Grodsky*, 339 Mo. 706, 46 S.W.2d 859 (1931) (purchased goods); 7 FLETCHER, *op. cit. supra* note 14, §§ 3473, 3478-79.

<sup>46</sup> 7 FLETCHER, *op. cit. supra* note 14, § 3473.

<sup>47</sup> *W. W. Britton Inc. v. S. M. Hill Co.*, 327 Mass. 335, 98 N.E.2d 637 (1951) (labor and materials); *Jemison v. Citizens' Savings Bank*, 122 N.Y. 135, 25 N.E. 264 (Ct. App. 1890) (purchase not delivered; no conveyance of title); *Dunagan v. Bushey*, 152 Tex. 630, 263 S.W.2d 1948 (1953) (unpaid stock subscriptions); *Twisp Mining & Smelting Co. v. Cholan Mining Co.*, 16 Wash. 2d 264, 133 P.2d 300 (1943); *American Express Co. v. Citizens' State Bank*, 181 Wis. 172, 194 N.W. 427 (1923) (guarantee of an acceptance); 7 FLETCHER, *op. cit. supra* note 14, § 3478.

<sup>48</sup> *Whitten v. Republic Nat'l Bank*, 397 S.W.2d 415, 417 (Tex. 1965).

<sup>49</sup> A corporation may recover on an *ultra vires* contract where there is fraud or collusion between the officer or board of directors and the party dealing with the corporation. However, even if fraud was alleged, in a case similar to the principal case, there could be no double recovery. Thus, the corporation could not recover from the officer or board of directors and the third party. *McCombs v. Abrams*, 28 S.W.2d 584 (Tex. Civ. App. 1930), *aff'd*, 48 S.W.2d 612 (Tex. Comm. App. 1932); *Southwestern Cooperage Co. v. Kivlen*, 266 S.W. 826 (Tex. Civ. App. 1924).

<sup>50</sup> See authorities cited note 26 *supra*.

the corporation itself.<sup>51</sup> With the necessity for ultra vires as a plea removed,<sup>52</sup> the court's failure to discuss article 2.04 (the focal point of counsels' briefs and argument) leaves the force and scope of this important provision clouded in mystery.<sup>53</sup>

Article 2.04 seems too explicit to justify judicial interpretation. At the time the TBCA was enacted, there were statutes in force in other jurisdictions which provided for exceptions to abrogation in situations where the third party dealing with the corporation had knowledge that the transaction was ultra vires.<sup>54</sup> However, these exceptions were not incorporated into article 2.04 of the TBCA, with the result that the statutory abrogation as to outside third parties dealing with the corporation is complete.<sup>55</sup> Seemingly, the court is reluctant to endorse complete abrogation. In cases where the third party (here the bank) has instigated the ultra vires transaction, the court seems to require elements of estoppel for that party to be protected from the plea of ultra vires. Perhaps the court will look at each case individually to determine if direct and substantial benefits were received.

### B. Ratification And Breach Of Fiduciary Duty

The actions of the corporation with regard to the contract raised the issue of ratification. There is substantial conflict as to the manner in which an ultra vires transaction may be ratified. The court of civil

<sup>51</sup> See Brimble, *supra* note 26; 7 FLETCHER, *op. cit. supra* note 14, §§ 3406-14; 1 HILDEBRAND, *op. cit. supra* note 16, at 339-86.

<sup>52</sup> See text and authorities *supra* notes 23-26.

<sup>53</sup> A recent Fifth Circuit case notes that the defense of ultra vires has been abrogated in Texas law. Spool Stockyards Co. v. Chicago, Rock Island & Pac. R.R., 353 F.2d 263 (5th Cir. 1965). For a holding similar in reasoning to the principal case, see Rio Refrigeration Co. v. Thermal Supply, 368 S.W.2d 128 (Tex. Civ. App. 1963).

<sup>54</sup> MICH. STAT. ANN. § 21.11 (1963); MINN. STAT. ANN. § 301.12 (1965). A description of the various types of statutes dealing with ultra vires is found in 2 HORNSTEIN, CORPORATION LAW § 563 (1959).

<sup>55</sup> See authorities cited *supra* note 47. Trustee contended that knowledge would cause article 2.04B to apply by negative implication. Article 2.04B abolishes the doctrine of inherent incapacity and provides that ultra vires may be asserted in three specific situations: (1) shareholder suits against the corporations to enjoin the performance of executory ultra vires contracts, (2) proceedings by the corporation or derivatively by the shareholders against incumbent or former officers or directors for exceeding their authority, and (3) proceedings by the attorney general to dissolve the corporation, enjoin performance of an executory contract, or to enforce divestment of real property acquired in ultra vires transactions. It is clear that article 2.04B does not make any provision as to outside parties dealing with the corporation and does not provide that knowledge will prevent the application of article 2.04A. If knowledge that a transaction was ultra vires could prevent the application of article 2.04A, the statute would be meaningless and could seldom be applied. Under the doctrine of constructive notice of statutes, there would be few, if any, situations in which a third party dealing with a corporation would not have knowledge, since, for example, almost every ultra vires act is a violation of article 1349. Hence, the burden of ultra vires would again fall on those dealing with corporations, not on the corporation where it belongs, and the purpose of article 2.04A would be completely frustrated.



appeals' discussion of the issue<sup>56</sup> prompted substantial comment;<sup>57</sup> yet the Texas Supreme Court's decision that the issue of ratification was "academic"<sup>58</sup> leaves the court of civil appeals' opinion as the authoritative resolution of the conflict.

When the question is raised as to whether the officer's conduct was a breach of fiduciary duty, resolution by the court of the issue of ratification becomes more important.<sup>59</sup> In Texas, it is settled law that the directors and officers of a corporation occupy a fiduciary relationship to the shareholders and act in the capacity of trustees for them.<sup>60</sup> Consequently, an officer or director may not secure a private advantage at the expense of the corporation.<sup>61</sup> In *Whitten*, the only benefit that the president received was substitution of creditors; yet the transaction, while technically not a breach of trust,<sup>62</sup> was clearly a breach of fiduciary duty in that it deprived the corporation of the use of the funds required to pay the president's note.<sup>63</sup> Without a decision as to the question of ratification, the court is, in effect, condoning a breach of fiduciary duty and the defendant bank's participation in this breach.

## V. CONCLUSION

*Whitten* is significant for the issues it leaves unresolved. To be sure, existence of benefits<sup>64</sup> seems to justify the application of the estoppel doctrine, and a resolution of the other issues would have no further effect on the outcome of the instant case. However, there are ultra vires transactions in which estoppel could not operate.<sup>65</sup> In electing not to discuss the issues of statutory abrogation and ratification

<sup>56</sup> Republic Nat'l Bank v. Whitten, 383 S.W.2d 207 (Tex. Civ. App. 1964).

<sup>57</sup> Compare Republic Nat'l Bank v. Whitten, 383 S.W.2d 207 (Tex. Civ. App. 1964) with Liebowitz, *Director Misconduct and Shareholder Ratification in Texas*, 6 BAYLOR L. REV. 1 (1953). See also Note, 43 TEXAS L. REV. 796 (1965).

<sup>58</sup> See note 42 *supra*.

<sup>59</sup> A corporation may ratify a breach of fiduciary duty in the same manner as an ultra vires transaction. Hence, a finding of ratification would negate the breach. Hall v. Crawford & Delphenis, 11 S.W.2d 804 (Tex. Civ. App. 1929) *error disp.*; State Nat'l Bank v. Davidson, 295 S.W. 311 (Tex. Civ. App. 1927) *error disp.*; 2 FLETCHER, *op. cit. supra* note 14, § 751.

<sup>60</sup> Trinity-Universal Ins. Co. v. Maxwell, 101 S.W.2d 606 (Tex. Civ. App. 1937) *error disp.*; 3 FLETCHER, *op. cit. supra* note 14, § 838. They are not trustees in the strictest sense, but, as fiduciaries entrusted with the management of the corporation for the benefit of the shareholders, the relation is one of trust. Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428 (1949); Henger v. Sale, 357 S.W.2d 774, *modified*, 365 S.W.2d 335 (Tex. 1963).

<sup>61</sup> See authorities cited note 59 *supra*.

<sup>62</sup> Paddock v. Siemoneit, 147 Tex. 571, 218 S.W.2d 428 (1949).

<sup>63</sup> *Ibid.* An officer is required to use his official powers for the benefit of the corporation in utmost good faith. 3 FLETCHER, *op. cit. supra* note 14, § 850.

<sup>64</sup> See note 43 *supra*.

<sup>65</sup> As for example, an ultra vires transaction which results in a loss to the corporation or those in which the other party has not performed. See authorities cited note 47 *supra*.