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Corporations

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CORPORATIONS

THE 1947 cases covering points of Texas corporation law were less numerous than might be expected. Of these still fewer made any noteworthy changes in the law as it previously existed. Several decisions construing statutes in the corporations field were handed down. A number of statutes bearing on corporation problems were passed by the 50th Legislature.

ULTRA VIRES ACTS

In the case of *Vehle v. Wagner*,¹ a corporation with charter powers prescribed by Article 1302, Section 37,² authorizing it to "contract for, lease, and purchase of right to prospect for, develop and use coal, petroleum, gas and other minerals," received a non-participating royalty interest in land in payment for shares of its non-par value stock. The corporation then sold the interest. The suit in the instant case was one to recover title to the mineral interest and the defense raised was that any sale of the mineral interest was void or voidable as being beyond the power of the corporation as set out in its charter. The Court of Civil Appeals held that the corporation did have the right to sell this interest, even though it was not within its charter powers to do so. The court said this was especially so here since the stockholders of the corporation had given their authority to sell and in the same meeting had incorporated in the same resolution a statement to the effect that any act done under that particular resolution was thereby ratified by them. The point might have been raised here that stockholders' consent would not necessarily vary the effect of their corporation's *ultra vires* contracts except for the fact that these stockholders not only consented to the sale but expressly ratified it. This opinion emphasized, however, that the stockholders

¹ 201 S. W. (2d) 636 (Tex. Civ. App. 1946), *rehearing denied*.

² TEX. REV. CIV. STAT. (Vernon's 1925), Art. 1302, § 37.

could not authorize the corporation to engage in the business of dealing in mineral interests as this would not only be a clear violation of the law, but also an attempt to enlarge the charter powers of the corporation without compliance with the statutory procedure set up to accomplish this end. The court held that title to the mineral interest passed by the sale, and that the defense that the sale was either void or voidable as being *ultra vires*, was not available.

STATUTE OF LIMITATIONS

There is nothing new in the proposition that subscriptions to a corporation's capital stock are capital assets of the corporation, and upon insolvency, constitute a trust fund for the payment of the corporate debts. This is true generally and in Texas. The case of *Bartelt v. Lehmann*³ establishes for the first time when the statute of limitations begins to run against corporation creditors coming under the above doctrine, where the unpaid stock subscriptions are evidenced by notes. The Court of Civil Appeals held that since the rights of creditors against these unpaid subscribers are measured by the original subscription obligation and not by the terms of the note, it followed that limitation of an action by creditors to enforce their liability is governed by the date of the original obligation and not by the due date of the unpaid notes. The notes, it was said, were only evidence of the subscriber's obligations.

UNIFORM STOCK TRANSFER ACT

*Snyder Motor Co. v. Universal Credit Co.*⁴ brought up the construction of Section 13 of the Uniform Stock Transfer Act.⁵ The section provides:

"... no attachment or levy upon shares of stock for which certificate is outstanding shall be valid until such certificate is actually seized by

³ 207 S. W. (2d) 131 (Tex. Civ. App. 1947), *rehearing denied*.

⁴ 199 S. W. (2d) 792 (Tex. Civ. App. 1946), *rehearing denied*.

⁵ TEX. REV. CIV. STAT. (Vernon's, 1925), Art. 1358, § 13.

the officer making the attachment or levy; or is surrendered to the corporation which issued it: or its transfer by the holder is enjoined."

The Court of Civil Appeals held, under Section 13, that a levy of an execution or the service of a writ of garnishment upon the company issuing the stock is insufficient to pass title or to impound the stock under a writ of garnishment, unless the stock certificate is actually seized by the officer serving the writ. This was so here even though the stock issuing company had answered that the judgment debtor had stock in the company. That this is the correct interpretation of the section is clear when it is stated that the main purpose of the Uniform Stock Transfer Act was to make certificates of corporate stock the sole representative of the shares which they represent.

DISSOLUTION

The case of *State v. Dyer*⁶ places a clear construction on Article 1387, Section 7.⁷ Section 7 states:

"... a corporation is dissolved whenever upon proper judicial ascertainment the corporation is found to be insolvent."

In the *Dyer* case a creditor of a guaranty company sued for the appointment of a receiver without any prayer for dissolution. Thirty years later the state intervened in the receivership proceedings for the purpose of collecting franchise taxes for that thirty-year period. The Supreme Court in a judgment for the state construed "upon proper judicial ascertainment" in the statute to mean an ascertainment of insolvency only by a direct proceeding for dissolution brought by the state for that purpose under Article 1380. Under this construction then, since this corporate insolvency followed by the appointment of a receiver had not dissolved the corporation, it was indebted to the state for the back franchises and penalties. This case shows that the only safe practice in a situation such as this is to take in each instance the necessary formal steps for dissolution.

⁶ ... Tex., 200 S. W. (2d) 813 (1947).

⁷ TEX. REV. CIV. STAT. (Vernon's, 1925) Art. 1387, § 7.

PLEADING

The present survey would not be complete without noting the case of *Pollock Paper Box Co. v. East Texas Motor Freight Co.*⁸ There the Supreme Court had Rule 94⁹ under construction. The point raised is of course procedural, but affects suits to which corporations are a party. The rule says, in effect, that certain affirmative defenses must be specially pleaded or affirmatively appear from the plaintiff's allegations. Certain of these defenses are expressly listed in the rule. But this list is not exclusive as is seen by the "catch-all" way the rule ends—"and any other matter constituting an avoidance or affirmative defense." The suit here was one against a motor freight corporation, on account, for printing waybills. The plaintiff's pleadings failed to show, and defendant did not specially plead, the defense of *ultra vires*. Under the rule in question, the court held that such defense was not available. This decision makes it clear that the defense of *ultra vires* is "matter constituting an avoidance or affirmative defense" within the statute and must be specially pleaded or affirmatively appear from the plaintiff's pleadings. It cannot be urged for the first time on appeal.

AGENCY

Subdivision 23 of Article 1995¹⁰ was in issue in the case of *Texas Power and Light Co. v. Adamson.*¹¹ The suit was an appeal from an order overruling the defendant's plea of privilege to be sued in Dallas County set up under Article 1995. The pertinent part of the subdivision reads:

"... suits against a private corporation . . . may be brought in any county . . . in which such corporation . . . has an agency or representative. . . ."

⁸ Tex., 201 S. W. (2d) 228, 1947.

⁹ TEXAS RULES OF CIVIL PROCEDURE, Rule 94.

¹⁰ TEX. REV. CIV. STAT. (Vernon's, 1925), Art. 1995, § 23.

¹¹ 203 S. W. (2d) 275 (Tex. Civ. App. 1947), *rehearing denied*.

The question before the court was whether the evidence sufficiently showed that the defendant corporation had an agency in Cherokee County within the exception to this venue statute. The Court of Civil Appeals in construing the subdivision, said that a "servant" or "employee" is not necessarily an "agent" or "representative." Applying that construction to the facts involved it was held that these persons in the instant case who merely received voluntary payments of bills and sent in these amounts, and did no soliciting of payments or collecting of accounts, made no agreements or performed any other services for the company, were "employees," but not "agents" or "representatives" within the subdivision of the statute. It would seem then that under this subdivision of the venue statute, before courts will confer venue in suits against a private corporation, they will require a clear showing of agency as distinguished from one who merely performs a limited service.

LEGISLATION

The clearest changes in any field of law are those made by the legislature. For the most part the 1947 legislation dealing with corporation law were amendments to Article 1302¹² which in general enumerates the purposes for which corporations may be chartered in Texas. In addition to the long list of existing purposes for which a corporation may be incorporated, they may now be formed for the purpose of dealing in agricultural commodities, poultry, dairy products, livestock; the operation of cold storage plants, warehouses, locker plants; the manufacture of ice and non-intoxicating beverages and other allied purposes.¹³

They may be organized to buy, manufacture and sell feeds, fertilizer, insecticides, fungicides, soaps and cleansers.¹⁴

Subdivision 106 was passed to provide for creation of corpora-

¹² TEX. REV. CIV. STAT. (Vernon's, 1925), Art. 1302.

¹³ Senate Bill 309, 50th Texas Legislature, Reg. Sess., 1947.

¹⁴ Senate Bill 134, 50th Texas Legislature, Reg. Sess., 1947.

tions for the purposes of operating a general commissary business and to deal in goods and equipment incident to that business.¹⁵

Another act amended Article 1302 by providing for the creation of corporations to act as general commercial brokers and as customs brokers in the United States and foreign countries and to act as principal or agent in buying or selling merchandise in all foreign countries and to do general export and import business to and from the United States.¹⁶

Corporations may now be formed for the purpose of engaging in the business of fighting fires and blowouts in oil and/or gas wells.¹⁷

And finally, of interest to the profession, local bar associations may now incorporate.¹⁸

W. H. P.

¹⁵ Senate Bill 101, 50th Texas Legislature, Reg. Sess., 1947.

¹⁶ House Bill 304, 50th Texas Legislature, Reg. Sess., 1947.

¹⁷ House Bill 590, 50th Texas Legislature, Reg. Sess., 1947.

¹⁸ Senate Bill 51, 50th Texas Legislature, Reg. Sess., 1947.