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Corporations

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of the office. On the other hand, the dissent contends, that the drawee bank is liable to the depositor for charging his account with the amount of the checks paid to the unauthorized agent in disregard of its contractual duty to pay them only to the payee or the payee's authorized agent, and consequently, the payee as assignee of this cause of action is entitled to recover thereon.

It is of importance to note that in the situation where a collecting bank cashes checks drawn on other banks, as distinguished from the situation where the drawee bank cashes the checks (as in the *Strickland* case) and the indorsement is unauthorized or forged, a different result is reached. The collecting bank is said to hold the proceeds for the rightful owner and is liable to the payee, even though paying the proceeds to the forger without knowledge or suspicion of the forgery.⁴⁰

Edward Campbell.

CORPORATIONS

EQUITABLE JURISDICTION TO DISSOLVE A CORPORATION

DOES equity have the inherent power to dissolve a corporation without the benefit of an authorizing statute upon suit by stockholders? Many cases throughout the country have taken the position that a court of equity has no such jurisdiction. The reason given is that the existence of a corporation depends upon statute, and its demise must be based on the same authority. Other cases have held that equity has such power where the stockholder has exhausted all other remedies.¹

⁴⁰ *Fidelity & Deposit Co. of Maryland v. Fort Worth State Bank*, 65 S. W. (2d) 276 (Tex. Com. App. 1933); *Greenville Nat. Exchange Bank v. Nussbaum*, 154 S. W. (2d) 672 (Tex. Civ. App. 1941) *writ of error refused*; *Graham Nat. Bank v. Frogge*, 150 S. W. (2d) 429 (Tex. Civ. App. 1941); *Independence Indemnity Co. v. Republic Nat. Bank & Trust Co.*, 114 S. W. (2d) 1223 (Tex. Civ. App. 1938) *writ of error dismissed*; *U. S. Fidelity & Guaranty Co. v. First State Bank of El Paso*, 93 S. W. (2d) 562 (Tex. Civ. App. 1936) *writ of error dismissed*.

¹Note, 43 A. L. R. 238, 288 (1926).

Article 1387² provides five methods for *ipso facto* dissolution in certain specific instances, and two methods are listed for judicial ascertainment. One method authorizes judicial dissolution upon a finding that the corporation is insolvent. Article 1383³ amplifies this by saying that stockholders who own 25 per cent of the stock in an insolvent corporation may institute suit for the dissolution. Under this article imminent danger of insolvency is not enough.⁴ Thus a minority stockholder must stand by, watching the corporation approach insolvency due to mismanagement, fraud and the like, doing nothing until actual insolvency is reached, unless equity has jurisdiction, either inherent or by statute, to dissolve the business.

The second judicial method listed in Article 1387 is "by a judgment of dissolution rendered by a court of competent jurisdiction." The statute does not define "a court of competent jurisdiction." Can this be used as a statutory basis for equitable dissolution of a corporation upon suit by a minority stockholder? The cases do not answer this question.

Early Texas cases took the unequivocal position that a court of equity had no power to dissolve a corporation at the suit of a stockholder alleging fraud, *ultra vires* acts, and mismanagement by the officers and directors.⁵ The court in *People's Investment Co. v. Crawford*⁶ held that equity had no authority to wind up the affairs of a corporation at the suit of a stockholder, except, possibly "where the object of the corporation had become manifestly impossible of attainment." The case did not define the exception. It also stated that there was no statutory authority for such dissolution, and as a consequence the court refused to appoint a receiver ancillary to the suit to wind up the affairs. The refusal

² TEX. REV. CIV. STAT. (Vernon, 1925) art. 1387.

³ TEX. REV. CIV. STAT. (Vernon, 1925) art. 1383.

⁴ *Petroleum Engineering Service v. Peairs*, 73 S. W. (2d) 592 (Tex. Civ. App. 1934).
⁵ HILDEBRAND ON TEXAS CORPORATIONS 353 § 842 (1942).

⁶ *Burnet v. Smith*, 240 S. W. 1007 (1922); *Land Co. v. Bindle*, 5 Tex. Civ. App. 18 (1893).

⁷ 45 S. W. 738 (Tex. Civ. App., 1898).

to appoint a receiver is but declaratory of the general rule in Texas that a request for a receiver will not stand upon its own feet, but must be accompanied by a cause of action before a receiver will be appointed.⁷ Since a request for dissolution was not a cause of action, then the request for a receiver had to be denied, even in the case of fraud and mismanagement.⁸ This case, however, is not authority that equity has no statutory basis for dissolution at the present time, since Article 1387 was passed subsequent to the decision.

Later decisions have relaxed the rule that equity has no inherent powers to dissolve a corporation. In *Yount v. Fagin*⁹ the court limited the no jurisdiction rule to a "going corporation" and held that equity did have jurisdiction to dissolve a corporation that had ceased to do business for several years. In *Bershire Petroleum Corp. v. Moore*¹⁰ the court went even further in granting a receiver with authority to dissolve, if necessary, where the mismanagement of the corporation was such to render it in danger of becoming insolvent and where the action was necessary to preserve the interest of the stockholders.

In the 1948 case of *Hammond v. Hammond*¹¹ the Court of Civil Appeals approved the more liberal view, when confronted with the problem whether to dissolve a going corporation due to bitterness between stockholders in a small, privately owned corporation. At the time of the suit the concern was already under a receivership, but under that management the business had prospered and the time was soon approaching when the receiver would have to be removed, due to the improved financial condition of the company.

The court refused to dissolve the corporation, but the reason

⁷ *Burnet v. Smith*, 240 S. W. 1007 (1922); *Land Co. v. Bindle*, 5 Tex. Civ. App. 18 (1893).

⁸ *People's Investment Co. v. Crawford*, 45 S. W. 738 (Tex. Civ. App. 1898).

⁹ 244 S. W. 1036 (Tex. Civ. App. 1922).

¹⁰ 268 S. W. 484, (Tex. Civ. App. 1924).

¹¹ 216 S. W. (2d) 630 (Tex. Civ. App. 1948) *writ of error refused, n. r. e.*

was not lack of power, but because the party seeking dissolution had not shown a need for it. The plaintiff stood in an excellent position to be in control of the business, since control depended upon who controlled the shares owned by a minor daughter of plaintiff and defendant, the parties at one time being husband and wife. There was no showing who would have this control. Also, there was no allegation of mismanagement, fraud or *ultra vires* acts. But the court said:

“A court of equity may properly take jurisdiction to wind up the affairs of a corporation and sell and distribute its assets at the suit of a minority stockholder on the ground of dissensions among the stockholders, but that it is only an extremely aggravated condition of affairs that will warrant such a drastic action, and that the court will follow such a procedure only when it reasonably appears that the dissensions are of such nature as to imperil the business of the corporation to a serious extent and that there is no reasonable likelihood of protecting the rights of the minority stockholders by some method short of winding up the affairs of the corporation.”¹²

This case based its opinion upon the inherent power of equity to dissolve a corporation. No mention was made of Article 1387. No attempt was made to find statutory authority, although it is believed that the courts could so construe the statute. Surely the clause that a corporation can be dissolved “by a judgment of dissolution rendered by a court of competent jurisdiction” means something. It seems that the courts could define “a court of competent jurisdiction” to include equitable power. Of course, such construction was not needed; the result reached is identical, regardless of the basis. Under the liberal view that equity has an inherent power to dissolve a corporation, the courts do not make it easy for a corporation to be dissolved. As indicated in the *Hammond* case the need must be serious, and there must be no reasonable likelihood of protecting the rights of the minority stockholders by some other method.

¹²*Id.* at 633.

PROMOTER'S CONTRACTS

A Texas corporation comes into existence free of all claims, including any contracts made for them by promoters.¹³ However, contracts of promoters made on behalf of the corporation, within the scope of its general authority, may be adopted by the latter after its organization.¹⁴ The adoption can be by implication, as distinguished from express, by the corporation's acceptance of the benefit of the contract, with knowledge of the facts surrounding the agreement.¹⁵

It was under the latter theory — that a corporation had impliedly accepted the benefit of a contract for the sale of goods made by a promoter — that plaintiff sued in *Wenzel v. Brooks-Asbeck Inc.*¹⁶ In this case three men planned to start a clothing business that was to be incorporated. Each was to put up equal value. Brooks' share was to be contributed in merchandise. The other men were told that the clothing had been paid for by Brooks, and this was verified by the company that had sold the clothes. Brooks had borrowed the money from the plaintiff to pay for the clothing and had not paid the debt. The business operated as a partnership for a short time, and then as a corporation. Plaintiff sued the corporation for the money loaned to Brooks on the theory that corporation had received the benefit.

The Court of Civil Appeals affirmed the decision of the trial court in ruling that the corporation was not liable. There was no evidence of adoption of the contract and there was no evidence that the corporation had knowledge of the facts surrounding the contract of debt. It is true that they had received the benefit, in the sense that they used the merchandise, but the contract was made with Brooks without the knowledge of the corporation, and, in the absence of adoption or implied consent, the corporation was

¹³*Weatherford M. W. and N. W. Ry. v. Granger*, 86 Tex. 350, 24 S. W. 795 (1894).

¹⁴*Ibid.*

¹⁵*Ibid.*

¹⁶211 S. W. (2d) 611 (Tex. Civ. App. 1948) *writ of error refused, n. r. e.*

not liable. This undoubtedly follows the well-established rule in Texas.

In *Moore v. Dallas Post Card Co.*¹⁷ the court was presented with a problem concerning a pre-incorporation contract, but there the question was whether a corporation can sue for fraud on a contract made by promoters, the corporation never having formally adopted it. The promoters had contracted to buy a going business from the defendant. The corporation was not mentioned in the contract, but the trial court found that the defendant knew that the promoters were buying his business with the intention of incorporating. The trial court ruled for the plaintiff and the Court of Civil Appeals upheld the decision saying that the corporation was a proper party to sue, thus expressing the general rule in this state.

A party for whose benefit a contract is made may sue on that contract, and this includes a corporation's suits on pre-incorporation contracts.¹⁸ Formal acceptance is not required,¹⁹ and the act of suing is itself an adoption of the contract.²⁰ It is not necessary that the third party be named in the contract, but it is sufficient that the party be in some measure designated as the one intended:²¹ Thus, in this case, the finding of fact that the defendant knew of the proposed incorporation was sufficient designation to warrant suit by the corporation.

EVIDENCE OF STOCK OWNERSHIP

A certificate of stock issued by a corporation is not the stock or interest owned by a party but is only evidence of that interest.²²

¹⁷215 S. W. (2d) 398 (Tex. Civ. App. 1948) *writ of error refused, n. r. e.*

¹⁸*Coleman Hotel Co. v. Crawford*, 3 S. W. (2d) 1109 (Tex. Civ. App. 1928); 10 TEX. JUR. 607, § 16 (1930).

¹⁹*Waggoner v. Herring-Showers Lumber Co.*, 288 S. W. 260 (Tex. Civ. App., 1926) *Reversed*, 40 S. W. (2d) 1, (1931) *on other grounds*.

²⁰*Ibid.* 10 TEX. JUR. 607, § 16 (1930).

²¹*McCown v. Schrimpf*, 21 Tex. 29 (1858); 10 TEX. JUR. 483, § 280 (1930).

²²*Turner v. Cattleman's Trust Co. of Ft. Worth*, 215 S. W. 831 (Tex. Com. App. 1919) *adopted*; *Yeaman v. Galveston City Co.* 106 Tex. 389, 167 S. W. 710 (1914).

Non-production of the original certificate is not fatal to title,²³ nor is it necessary for a transfer.²⁴ Texas cases do not answer the question as to what is the minimum evidence required for stock ownership.

In *Greenspun v. Greenspun*²⁵ the suit was brought to establish ownership in 500 shares of stock. Plaintiff alleged that defendant was the sole owner of a corporation, that plaintiff had been given 500 shares of stock for services rendered and to be rendered in the operation of the business, he being the bookkeeper and general manager. No certificates were issued. The only evidence of ownership were the minutes of a stockholder's meeting in which it was listed that plaintiff owned 500 shares. About 20 years later defendant dissolved the corporation and with the assets formed a new corporation without plaintiff's knowledge. Plaintiff sued to recover his proportionate interest in the new corporation and to recover his share of dividends declared by the new corporation, contending that under Article 1388²⁶ that defendant is a trustee to creditors and stockholders when a corporation is dissolved.

This case was in the courts for several years, the Court of Civil Appeals in 1946²⁷ agreed with the trial court in holding that there was sufficient evidence of ownership of the stock to warrant recovery for the plaintiff, but reversed and remanded upon other grounds. The Supreme Court affirmed this decision as to stock ownership.²⁸ After the new trial the case came back to the Court of Civil Appeals in 1948, which court affirmed a judgment of the trial court in ruling for the plaintiff, in spite of the earnest con-

²³*Baker v. Wasson*, 53 Tex. 150 (1880).

²⁴*Turner v. Cattleman's Trust Co. of Ft. Worth*, 215 S. W. 831 (Tex. Com. App. 1919) *adopted*.

²⁵211 S. W. (2d) 977 (Tex. Civ. App. 1948) *writ of error refused n. r. e.*

²⁶TEX. REV. CIV. STAT. (Vernon, 1925) Art. 1388, "Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be the trustees of the creditors and stockholders of such corporation . . ."

²⁷194 S. W. (2d) 134 (Tex. Civ. App. 1946).

²⁸..... Tex., 198 S. W. (2d) 82 (1946).