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January 1952

## Corporations

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### Recommended Citation

A. G. Weaver, *Corporations*, 6 SW L.J. 298 (1952)  
<https://scholar.smu.edu/smulr/vol6/iss3/3>

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ages resulting from the breach. The *Correll* case, turning as it does upon the presence of conspiracy, is a correct and just decision.

*Wayne Conner.*

## CORPORATIONS

### DISREGARDING THE CORPORATE ENTITY: CORPORATION AS ALTER EGO OF STOCKHOLDERS

*Louisiana. Meraux v. R. R. Barrow, Inc.*,<sup>1</sup> was concerned with the application of Article 2266 of the Louisiana Civil Code<sup>2</sup> to a situation involving a family holding corporation. In 1937 Mrs. Zoe Barrow Topping conveyed an undivided interest in oil and gas royalties of lands owned by her in Lafourche and Terrebonne Parishes to plaintiff's testator, and in the same instrument conveyed additional undivided royalty interest in the same land to four members of the Barrow family. This instrument was recorded in Lafourche but not in Terrebonne Parish. Subsequently, in 1939, Mrs. Topping conveyed the land involved, subject to the grant of royalty interests as recorded in Lafourche Parish, to defendant corporation, and this conveyance was duly recorded. All of the capital stock of defendant corporation was owned by the four members of the Barrow family, who were co-grantees of plaintiff's testator in the original royalty deed.

Under these facts the Supreme Court of Louisiana was confronted with this question: Was the 1937 royalty deed to plaintiff's testator a nullity under Article 2266 insofar as the Terrebonne royalty interest was concerned because of his failure to record it

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<sup>1</sup> 219 La. 309, 52 So. 2d 863 (1951).

<sup>2</sup> "Contracts and judgments affecting immovable property—Failure to record—Effect—Recording—Effect.—All sales, contracts and judgments affecting immovable property, which shall not be so recorded, shall be utterly null and void, except between the parties thereto. The recording may be made at any time, but shall only affect third persons from the time of the recording...."

prior to the subsequent general conveyance of the land to the corporation? It would appear that a strict construction of the statute would require an affirmative answer; the court pointed out that in *McDuffie v. Walker*<sup>3</sup> it had canonized as a rule of property that all contracts affecting immovables which have not been recorded in the parish where they are situated shall be utterly null and void except between the parties thereto, and that knowledge is not the equivalent of registry. However, the court resolved the question in favor of plaintiff by holding that under the facts defendant corporation was not a third party so as to come under the rule of *McDuffie v. Walker*. In reaching this conclusion, the court found that defendant corporation was a family holding corporation, the *alter ego* of the four co-grantees with the plaintiff's testator in the 1937 royalty conveyance, who were parties to the instrument within the meaning of Article 2266. The court cited with approval its decision in *Keller v. Haas*<sup>4</sup> to the effect that where an individual forms a corporation of which he is sole stockholder, or owns such control of the stock that the act of the corporation is his own, then he may not use the screen of the corporate entity to absolve himself of its responsibilities. Applying this reasoning to the facts, the court held that the 1939 conveyance of land to the corporation was in effect a conveyance to the co-grantees of plaintiff's testator, and, consequently, they were charged with notice of the royalty deed, even though unrecorded, since they were parties thereto.

The Supreme Court of Louisiana has made liberal application of the recognized exceptions to the general rule that a corporation will be looked upon as a legal entity, as noted by scrutiny of a number of precedent decisions cited in the principal case. Recognized exceptions warranting treatment of a corporation as an association of persons arise when the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime.<sup>5</sup>

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<sup>3</sup> 125 La. 152, 51 So. 100 (1909).

<sup>4</sup> 202 La. 486, 12 So. 2d 238 (1943).

<sup>5</sup> *United States v. Milwaukee Refrigerator Transit Company*, 142 Fed. 247 (C. C. E. D. Wis. 1905).

There is a growing tendency, as reflected by the large number of cases in recent years, to pierce the corporate veil on the basis of one or the other of these exceptions.<sup>6</sup> However, the "*alter ego*" theory relied on by the court in the principal case to prevent defendants from using the corporate screen to absolve themselves of responsibility ordinarily has been applied to one-man corporation situations, and the court would seem to have adopted a liberal view in application of that theory to a multi-stockholder situation.

#### COMPENSATION OF OFFICERS AND DIRECTORS: STALE RESOLUTIONS

*New Mexico. Marron v. Wood*<sup>7</sup> presented an unusual situation wherein plaintiff sought to prevent the revival of a resolution authorizing payment to a corporate director/officer of a weekly salary which had been waived over a long period of time. Originally Marron and Wood had acquired all of the stock in the Excelsior Laundry Company, a New Mexico corporation, and thereafter operated it as a closed corporation, the stock being divided equally between the two families. The corporate by-laws called for four directors, two to be elected by each family interest. A resolution was passed by the board of directors in 1934 authorizing payment of an executive salary of \$100 per week to the president, Marron, and the secretary-treasurer, Wood. After the depression set in, they ceased to draw this salary by mutual consent. Subsequently, the laundry was operated as a partnership, through a corporate lease of the physical plant to Marron and Wood as partners. Marron died in 1945, his stock going to his heirs. In April, 1946, the corporation resumed active operation of the laundry. After Marron's death dissension arose between Marron's heirs and the Wood interests on a number of points, the principal disagreement being over Wood's revival in 1948 of the \$100 per week executive salary authorized him by the 1934 resolution. In that year he caused the corporation to pay him \$10,400, allegedly

<sup>6</sup> See cases cited in 1 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS (Perm. ed. 1931) § 41.

<sup>7</sup> 55 N. M. 367, 233 P. 2d 1051 (1951).

pursuant to the 1934 resolution, representing \$5,200 of back pay for 1947 and \$5,200 for 1948, under the theory (1) that the 1934 resolution had never been revoked or amended and (2) that he and Marron had an oral agreement that a salary should be paid to Marron and an equal salary to Wood so long as they lived, and would continue to be paid to the survivor of them.

In reaching its decision on this unique situation, the Supreme Court of New Mexico held that the Marron and Wood interests throughout the course of corporate existence had followed a practice of dividing corporate profits equally and that the 1934 resolution had been adopted in the light of that practice and in execution of their mutual understanding for an equal division of profits. The court held that defendants failed to meet the burden of proving a "survivorship" agreement and that the trial court's judgment that Wood was not entitled to the two years' salary, apparently based on a finding that the 1934 resolution had become dormant through abandonment of use, must be upheld.

Two justices dissented from this decision.<sup>8</sup> Their position was that the corporate resolution of 1934 had never been rescinded or amended, became operative when the corporation took over operation of the plant in 1946, and was in full effect until modified or repealed. The dissent did not express an opinion on the right of representatives of the Marron interests to an equal salary since the issue was not involved in the suit.

Court dockets have not become clogged with litigation on this type of situation. The dearth of authority is evinced by the fact that the majority opinion mustered no cases in point in support of its decision, or at least cited none. It seems clear that a corporate officer may waive his right to a salary<sup>9</sup> if such clearly appears to have been his intention;<sup>10</sup> and a corporate by-law fixing a salary of its officers can be modified by usage and acquiescence, or by an

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<sup>8</sup> The decision was 3-2.

<sup>9</sup> *Nelson v. Caddo Texas Oil Lands Co.*, 176 Wis. 327, 186 N. W. 155 (1922).

<sup>10</sup> *Hansen v. Uniform Seamless Wire Co.*, 235 Fed. 616 (D.R.I. 1916), *aff'd*, 156 C.C.A. 43, 243 Fed. 177 (1st Cir. 1917).

executed parole agreement between the company and the officer.<sup>11</sup> In *Bowler v. American Box Strap Company*<sup>12</sup> it was said that the conduct of the parties is evidence of such agreement. On the other hand, there is some authority which tends to support the view taken by the dissent. In *Caminetti v. Prudence Mutual Life Insurance Association*<sup>13</sup> it was held that a failure to make an express protest against the amount received (less than contracted for) did not effect a waiver of right to compensation in excess of that received. The Fort Worth Court of Civil Appeals in *Superior Brewing Co. v. Curtis*<sup>14</sup> held that a corporate officer's agreement at an informal meeting to accept a lesser salary than authorized unless the corporation made a certain profit was *nudum pactum* where the authority to fix salaries was vested in the board of directors.

Applying the foregoing generalizations to the facts in the subject case, it seems that the waiver or modification doctrine would warrant a denial of any claim by the defendant for back salary, that is, salary not timely demanded from the depression years to 1947. However, the denial of the defendant's claim for current salary (that is to say, his 1948 salary) is more open to question. The majority opinion hinted that it would not have been averse to approving the payment to defendant provided a similar amount could be granted to the Marron interests, but did not pursue the possibilities of this solution because of the effects it would have on the current working capital of the corporation. Probably the determinative factor in the case was the fact that defendant had voluntarily waived his rights under the resolution for a period of approximately thirteen years, and this logically could be construed as an intent to abandon the resolution. By application of the usage and acquiescence theory such a lengthy period of relinquishment of defendant's rights in effect "modified" the resolution out of existence and estopped defendant from reviving it.

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<sup>11</sup> See 14A C.J., *Corporations*, § 1907.

<sup>12</sup> 22 Misc. 335, 49 N. Y. Supp. 153 (1898).

<sup>13</sup> 62 Cal. App. 2d 945, 146 P. 2d 15 (1944).

<sup>14</sup> 116 S. W. 2d 853 (1937).

## POWERS OF DIRECTORS: EMPLOYMENT CONTRACTS

*Oklahoma. Dicks v. Clarence L. Boyd Co., Inc.*,<sup>15</sup> involved the validity of an oral contract of employment entered into by the corporate directors in their individual capacities with a sales agent for an indeterminate period of time. Plaintiff, a sales agent for defendant corporation, had worked in that capacity since 1930 under the terms of a verbal contract to the effect that his employment should continue as long as he was able to continue actively in his work. This purported contract had been entered into with the then president and general manager of defendant corporation with the individual consent of each member of the board of directors and each stockholder. In 1949 the corporation terminated the purported contract in spite of plaintiff's claim that he was able and willing to continue it.

The Supreme Court of Oklahoma ruled against plaintiff on the basis that his employment was permanent and the oral contract violated the Statute of Frauds.<sup>16</sup> The court also analyzed the contract from the standpoint of its validity in view of the informal manner in which it was made with the corporation. It was said that while plaintiff pleaded that the oral contract with defendant's president and general manager was with the knowledge and verbal consent and agreement of all of the members of the board of directors as well as each of the stockholders, "the stockholders have no voice in the employment of sales agents for the corporation. The directors are selected for that purpose and they cannot act in their individual capacities but must collectively as a board," and "it is not alleged that they so acted." The requirement that the directors act as a body, as enunciated by the court, is the overwhelming rule and is for the purpose of having them meet so that they may hear each other's views, deliberate, and then decide.<sup>17</sup>

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<sup>15</sup> \_\_\_\_\_ Okla. \_\_\_\_\_, 238 P. 2d 315 (1951).

<sup>16</sup> OKLA. STAT. ANN. (Perm. ed.) § 136.

<sup>17</sup> See 13 AM. JUR., *Corporations*, § 948.

They can act so as to bind the corporation only when they act as a board and at a legal meeting.<sup>18</sup>

The Court, however, did not consider the facts in the light of the line of authority which gives a general manager authority to employ corporate personnel without necessity for approval by the board of directors. As a broad general rule of law a general manager may hire employees to perform usual and necessary services within the scope of the company's business, including sales agents,<sup>19</sup> where the facts are sufficient to establish apparent or implied authority.<sup>20</sup> In any event the court pointed out that no verbal agreement such as was alleged to have been entered into here with the individual members of the board in 1930 occurred in any year thereafter, and the legislative purpose in requiring annual elections of boards of directors of corporations is for the protection of the stockholders and creditors so that if a wrongful act is committed by one board of directors, the subsequent board can prevent the extension of the wrong. The implication is that a board has no authority to enter into a contract with an employee for his lifetime, such as was attempted in the subject case, and this would appear to be the generally accepted rule.<sup>21</sup> By the same reasoning it would appear that a corporate officer's authority to employ would not extend to lifetime contracts. It has been said that it is a matter of grave doubt whether a board of directors elected for one year can expressly authorize contracts that deprive a succeeding board of its statutory powers of management.<sup>22</sup>

A ruling contrary to the principal case was made by the Supreme Court of Oklahoma in *Oklahoma Portland Cement Co. v. Pollock*,<sup>23</sup> where a similar fact situation existed. There defendant

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<sup>18</sup> *McCall v. Monarch Royalty Corporation*, 179 Okla. 213, 64 P. 2d 871 (1937); 2 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS (Perm. ed. 1931) § 392.

<sup>19</sup> 13 AM. JUR., *Corporations*, § 917.

<sup>20</sup> See *Nocona Cotton Oil Company v. Carter*, 254 S. W. 505 (Tex. Civ. App. 1923), and Note, 159 A.L.R. 796 (1945).

<sup>21</sup> 2 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS (Perm. ed. 1931) § 514.

<sup>22</sup> *General Paint Corp. v. Kramer*, 57 F. 2d 698 (10th Cir. 1932).

<sup>23</sup> 181 Okla. 266, 73 P. 2d 427 (1937).



corporation orally agreed to furnish plaintiff a lifetime position in return for his refraining from filing a workmen's compensation claim for the injury, and the contract was upheld. The Statute of Frauds was not pleaded, and the case probably turned on the point that the employee's promise not to file the claim constituted legal detriment to him, a consideration not found in the subject case.

Texas cases generally hold that directors may bind the corporation in employment contracts,<sup>24</sup> but that is not the invariable rule.<sup>25</sup> The favored rule was given legislative approval in 1951. Article 1327 of *Texas Revised Civil Statutes (Vernon, 1952 Supp.)* provides, *inter alia*, "Contracts of employment may be made and entered into by the corporation with any of its officers, agents, or employees for such period of time as the directors may approve and authorize, when not prohibited by the corporation's charter or by laws as of the date such contracts are executed."

#### CORPORATE STOCKHOLDERS' RIGHT TO SUE THIRD PARTIES IN INDIVIDUAL CAPACITY

*Texas.* In *Humble Oil & Refining Company v. Blankenburg*<sup>26</sup> the question arose as to whether a stockholder could maintain a suit against third parties to obtain title and possession of real property in the name of a corporation which had forfeited its right to do business. The realty involved comprised parks, plazas, and one-half of the streets and alleys abutting thereon in the City of Charlotte, Texas. The common source of the title to the property in litigation was the Charlotte Townsite Company, a Texas corporation organized in 1910 with a capital stock of 1,800 shares of \$10 par value each. In 1912 the corporation conveyed to J. E. Franklin nearly 1,500 lots (apparently virtually all of the assets) and changed its name by charter amendment to Franklin Development Company. The instrument showed that Franklin owned 180 shares.

<sup>24</sup> Denton Milling Co. v. Blewett, 254 S. W. 236 (Tex. Civ. App. 1923).

<sup>25</sup> Beaton v. Continental Southland Savings & Loan Association, 101 S. W. 2d 905 (Tex. Civ. App. 1937), criticized in Recent Cases, 85 U. Pa. L. Rev. 849 (1937).

<sup>26</sup> .....Tex....., 235 S. W. 2d 891 (1951).

In 1913 the right of the corporation to do business was forfeited by failure to pay the franchise tax.<sup>27</sup> Franklin died in 1946 or 1947 intestate, and plaintiff's title derived from conveyances by Franklin's surviving heirs of "all of their individual interests in the lands embraced in Charlotte Townsite" and also "all of their titles and interests in all of the capital stock and assets of the Townsite Company and of the Franklin Development Company 'which appears of record in the name of J. E. Franklin'." In 1948 the City of Charlotte executed an oil and gas lease to Atkins covering the parks, plazas and one-half of the abutting streets and alleys; Atkins conveyed to defendant who commenced drilling operations which gave rise to this suit.

The Supreme Court of Texas held in accordance with the well-settled Texas<sup>28</sup> and general<sup>29</sup> rule that plaintiff was a stranger to the title since the original dedication by Charlotte Townsite Company of the parks, plazas, etc., to the City of Charlotte created an easement in the city, the fee remaining in the corporation. Holding further that the court of civil appeals had erred in concluding that plaintiff had failed to prove any title or interest in the assets of the corporation on the theory a stockholder has no title or interest until the debts are paid,<sup>30</sup> the supreme court stated, "When a corporation is dissolved its property becomes the property of its stockholders in proportion to their respective shares, subject, however, to the rights of the creditors of the corporation whose debts must be satisfied out of the corporation property."<sup>31</sup> This holding follows prior Texas decisions<sup>32</sup> and is in accord with the general

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<sup>27</sup> "Any corporation, either domestic or foreign, which shall fail to pay any franchise tax provided for in this chapter . . . shall for such default forfeit its right to do business in this state. . . ." TEX. REV. CIV. STAT. (Vernon, 1948) art. 7091.

<sup>28</sup> *Odneal v. City of Sherman*, 77 Tex. 182, 14 S. W. 31 (1890); see 14 TEX. JUR., *Dedication*, §§ 29, 39.

<sup>29</sup> 16 AM. JUR., *Dedication*, § 56; 39 *id.*, *Parks, Squares, and Playgrounds*, § 12.

<sup>30</sup> *Blankenburg v. Humble Oil & Refining Company*, 233 S. W. 2d 180 (Tex. Civ. App. 1950).

<sup>31</sup> 235 S. W. 2d at 893, citing *Peurifoy v. Weibusch*, 132 Tex. 36, 41, 117 S. W. 2d 773 (1938).

<sup>32</sup> See cases cited in the principal case. See also 11 TEX. JUR., *Corporations*, § 473, and 3 HILDEBRAND, TEXAS CORPORATIONS (1942) § 858.

rule to the effect that assets of a dissolved corporation are preserved for the benefit of those entitled to share in them either as stockholders or creditors, the property being that of the stockholders impressed with a trust in favor of the creditors.<sup>33</sup>

However, from the facts in the supreme court opinion and those in the civil appeals opinion, it does not appear that the Franklin Development Company was ever dissolved; and Justice Smedley in his opinion indicates as much.<sup>34</sup> While the corporation failed to pay the franchise tax in 1913 and thereby forfeited its right to do business under the provisions of Article 7091, this did not *per se* accomplish a dissolution.<sup>35</sup> It is well settled<sup>36</sup> that the only effect of a corporation's forfeiture of its right to do business is to deny the corporation the right or privilege to sue and defend in the courts of the state, and the right may be revived by payment of taxes and penalties.<sup>37</sup> To accomplish a corporate dissolution for failure to pay the franchise tax it is necessary for the Secretary of State to take the affirmative action provided by statute<sup>38</sup> and bring suit for forfeiture of the charter, which apparently was never done here.

What then is the effect of the mere loss of the corporate right to do business, as opposed to its dissolution, upon the stockholders' right to bring an action such as this against third parties. The court, reasoning that since the corporation was prohibited from suing in its own name and since the legal title to the assets remained in the corporation but the beneficial title thereto was in the stockholders, concluded that the stockholders as beneficial owners of the corporate assets could prosecute or defend such actions in the courts as were necessary to protect their property

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<sup>33</sup> See 19 C. J. S., *Corporations*, § 1773.

<sup>34</sup> 235 S. W. 2d at 894.

<sup>35</sup> *Maloney Mercantile Co. v. Johnson County Savings Bank*, 56 Tex. Civ. App. 397, 121 S. W. 889 (1909).

<sup>36</sup> *Ross Amigos Oil Co. v. State*, 134 Tex. 626, 138 S. W. 2d 798 (1940).

<sup>37</sup> *Federal Crude Oil Company v. Yount-Lee Oil Company*, 122 Texas 21, 52 S. W. 2d 56 (1932). See excellent analysis of this case and the TEX. REV. CIV. STAT. (Vernon, 1948) arts. 7091, 7092 and 7095 in *Recent Cases*, 11 Tex. L. Rev. 250 (1933).

<sup>38</sup> TEX. REV. CIV. STAT. (Vernon, 1948) art. 7095.