1963

General Provisions and Corporate Purposes and Powers--Chapters 1 and 2

William H. Blackwell

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Part of the Law Commons

Recommended Citation
Available at: https://scholarcommons.sc.edu/sclr/vol15/iss2/10

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
GENERAL PROVISIONS AND CORPORATE PURPOSES AND POWERS

CHAPTERS 1 AND 2

WILLIAM H. BLACKWELL*

The new Business Corporation Act of 1962 was approved by the Governor on March 30, 1962, but by its express terms does not become effective until January 4, 1964. Those who formulated the new act felt that due to the vast changes made in the existing law, this time would be necessary for those affected to become familiar with the code. The act is conveniently broken down into chapters, which in turn are divided into sections.

APPLICATION OF LAW

As its name implies, the act applies only to "business corporations," both foreign and domestic. Eleemosynary or non-profit corporations are not affected. It applies to corporations created by special act of the General Assembly "to the extent that power has been reserved to repeal, amend or alter such special act."1

All foreign corporations doing business in the State are subject to the act, whether authorized to do business in the State or not.2

With reference to those classes of corporations which are subject to special statutory provisions, in cases of inconsistency between such special provisions and the provisions of the new act, the former shall prevail.3

As to foreign and interstate commerce and corporations chartered by Congress, it is provided that the Act shall apply to the extent permitted under the constitution and the federal laws.4

The new code does not affect the existence of any corporation chartered prior to enactment, but after the effective

---


1. S. C. Code §12-11.3(a) (1) (Supp. 1962). All references are to sections of the act.
date of the new act, all existing corporations, their shareholders, directors and officers shall be under the act and be subject to all the provisions thereof. Thus, mergers, consolidations, etc. of corporations existing prior to the act but occurring subsequent to its enactment will be subject to the new law.

EXECUTION OF DOCUMENTS

Section 1.4 establishes a standard procedure for the execution of corporate documents required under the act. There is no similar provision in existing statutes. Indeed, there is not, aside from the act, any clearly defined method for the signing of corporate documents. The usual and customary method is for the president to sign, attested by the secretary. In many instances, only the president, or the vice president signs, without the signature of the secretary. It sometimes happens that there are no corporate officers, and provision is made for such a contingency.

In the case of articles of incorporation, the incorporator or incorporators shall sign, but in the case of other documents, provision is made for the execution by officers, directors or shareholders. If there is a president and secretary, then the instrument should be signed by such officers, or by the vice president and the assistant secretary. The by-laws may designate other persons who have authority to execute documents on behalf of the corporation.

In the event there are no officers, as may occur sometimes in a closely held corporation, the majority of the outstanding shares, or in the last alternative, the holders of all of the outstanding shares of the corporation may execute documents on behalf of the corporation.

Another provision requires that any person shall clearly show his name and capacity in which he signed the document. One has only to look at a few corporate instruments with an illegible signature to appreciate the usefulness of this requirement. Other requirements are that the document shall

7. Since the by-laws do not require as a rule of eligibility for corporate office that corporate officers be able to sign their names legibly, this is a useful requirement. It might be well extended to any legal document, and particularly any document required to be recorded. All prac-
show on its face its title and shall set forth the current address of the corporation.8

VERIFICATION OF DOCUMENTS

Unless specifically required, no document need be verified or acknowledged.9 Where it is required, however, the act sets up a standard procedure for such verification and provides that each person signing the document shall sign a certificate:

(1) that he has read and understood the meaning and purport of the statement contained in the document;
(2) that such statements are true or that he is informed and believes that such statements are true;
(3) that he signed the document and had authority to do so, where he signs in a representative capacity.

Apparently the certificate of the officer only is required, there being no necessity for an oath before a notary public or other officer authorized to take oaths. The body of the certificate, in effect, conforms substantially to the wording of the verification of a pleading as presently used in this state.10

DELIVERY OF DOCUMENTS FOR FILING

One of the major changes of the new law relates to the filing and recording of documents. Under existing law, the Secretary of State is required to record "such papers connected with charters of corporations as may be of original issue from his office."11 Further, the charter is required to
ticing lawyers with experience in examining public records know of the many instances when they have struggled to make out illegible scrawls and flourishes passing as signatures.

8. S. C. Code §12-11.4(d) and (e) (Supp. 1962).
10. A suggested form of certificate might be:

"I, ____________, an (officer) of XYZ corporation, to wit, (President) hereby certify that I signed the foregoing (instrument) in my official capacity as (president) of said corporation and was authorized to execute same by (the by-laws of the corporation) (the resolution of the board of directors) (the powers of my office); that I have read and understand the meaning and purport of the contents of said (instrument), and that the same is true, except as to matters stated therein upon information and belief, and as to such matters I believe the same to be true.

be recorded in the office of the clerk of court or register of mesne conveyances in each county in which the corporation has an office or place of business within thirty days from the date of the issuance.\textsuperscript{12}

The new act provides that where any document is required to be filed, the original, together with a conformed copy, shall be delivered to the Secretary of State with payment of all fees and taxes required, and upon such delivery the Secretary of State shall certify that the original has been filed in his office, making appropriate endorsement both upon the original and the conformed copy, following which he certifies the conformed copy and returns it to the sender, and such conformed copy becomes part of the records of the corporation.

As an alternative to the foregoing procedure, the committee drafting the new act suggested that when a charter or other paper was required to be filed in both the Secretary of State's office and the Clerk of Court's office, the instrument should be forwarded to the Secretary of State, with conformed copies and fees, and he would then have the responsibility of filing with the proper clerk of court, in addition to filing and recording in his own office. Although the present law requires the charter to be recorded locally, it is common knowledge that this requirement is not always followed and doubtless a large number of charters are never recorded, other than in the Secretary of State's office. The suggested procedure was to insure that the recording would be made in the clerk of court's office, and eliminate the question of \textit{de facto} vs. \textit{de jure} status sometimes arising for lack of recording.

There was objection to this proposed method of filing and recording, and it was eliminated prior to passage of the act. Under the new law, there is no requirement that the charter be recorded in the clerk of court's office.

It appears that this is a weakness in the new act. It is the writer's opinion that charters, or articles of incorporation, as well as changes and amendments, should be recorded in the clerk of court's office in the county where the corporation has its home office and in any county where it has an office or place of business, as required by present statutes. Thus, information needed could be obtained much more easily and

\textsuperscript{12} S. C. Code §12-60 (1952).
speedily from the local clerk’s office, than by inquiry to the Secretary of State’s office, which would be of much greater convenience to attorneys and the public generally.

It is worth noting that when the Secretary of State endorses the date and time of filing upon the incoming document, such “filing date” shall be conclusive in the absence of actual fraud.

EFFECT OF CORPORATE SEAL

The new act makes it clear that the seal may or may not be affixed to any document. However, it is provided that the use of the seal on a document shall be prima facie evidence that the document was executed by the authority of the corporation, domestic or foreign. Thus, the seal still has some value, but its absence does not impair the validity of the corporate document.

RESERVATION OF POWER BY GENERAL ASSEMBLY

The General Assembly has expressly reserved the power to prescribe such rules and regulations as it may deem advisable for all corporations subject to the act, and the further right to amend, repeal or modify the act.

POWERS OF CORPORATION

Under existing law, the powers of business corporations are spread around in several code sections. The new act brings together all powers in one section, in a well organized and apparently all-inclusive form, and includes some powers not set out in existing statutes. Some of these changes will be noted.

The corporation may make donations for a charitable, scientific, educational or welfare purpose, provided such donation is allowable as a deduction under existing internal revenue laws, and is authorized or approved by the corporation’s board of directors. Thus, corporate officers are afforded

15. S. C. Code §12-63 (1952) grants perpetuity; §12-74 sets out general powers; §12-101 sets out powers of all private corporations; and §12-102 sets out powers of corporation organized under Chapter Two.
protection from solicitation by private charities and fake charities, since they have the excuse that the law does not allow such donations.

The power is also granted to establish and carry out various incentive plans for its officers, directors and key employees. Pension plans, pension trusts, profit-sharing plans and stock options may be adopted, all of which are becoming increasingly common with the two-fold pressure upon corporate management to (1) attract and hold competent personnel, and (2) minimize in any legitimate fashion the impact of federal and state taxes.

The power is given to form, or acquire control of other corporations, and to participate “with others in any corporation, partnership, transaction, arrangement, organization or venture which the corporation has power to conduct by itself.” It may insure for its own benefit the lives of directors, officers or employees.

The new act contains specific provisions for indemnification of directors, officers and employees for expenses of litigation, and, consequently, the power is conferred to reimburse and indemnify such litigation expenses as are permitted by the act.

Lastly, in the temper of the times, the corporation may engage in defense contracts even though beyond its charter powers and purposes, upon request of the government in time of war or national emergency.

DEFENSE OF ULTRA VIRES

The defense of ultra vires has been sparingly used in South Carolina. The courts have allowed it to give equitable relief in a few cases, but have hedged its use considerably. In Associated Seed Growers, Inc. v. South Carolina Packing Corp., the Court said: “It is said that the doctrine of ‘ultra vires’ is entirely a creature of the court. This being so when pleaded, the courts have given such effect thereto as only justice may require.”

The above case, incidentally, holds that the defense of ultra vires, being an affirmative defense, must be pleaded and is of no avail under a general denial.

The new act adopts the wording of the Model Business Corporation act verbatim, and abolishes the defense of ultra vires except in three instances.\(^2\)\(^5\)

The first permits a shareholder suit to enjoin an act or transfer by or to the corporation upon the ground that such act or transfer is ultra vires. If the act or transfer relates to a corporate contract, the court may set aside and enjoin the performance of the contract if all parties are before the court, and if it deems the same to be equitable. According to several decisions, this is consistent with existing South Carolina law.

In Associated Seed Growers, Inc. v. South Carolina Packing Corp., supra, it was held that a corporation could not benefit from an admittedly ultra vires act and then deny liability thereunder. In Beckroge v. South Carolina Pub. Ser. Co.,\(^2\)\(^6\) the court held that a corporation which permitted the execution of a contract and derived benefits therefrom, could not later escape liability upon the ground that the contract was ultra vires and beyond its corporate powers.\(^2\)\(^7\)

The second exception allows the corporation either directly or by a representative or derivative suit, to set up the defense of ultra vires against the incumbent or former officers or directors of the corporation.\(^2\)\(^8\)

Lastly, the Attorney General may bring a proceeding under the act to dissolve the corporation or to enjoin the corporation from transacting unauthorized business.


\(^{26}\) 185 S. C. 210, 193 S. E. 315 (1937).

\(^{27}\) See also, White v. Commercial & Farmers Bank, 66 S. C. 491, 45 S. E. 94 (1903); Kammer v. Supreme Lodge K. P., 91 S. C. 572, 75 S. E. 177 (1911) (fraternal order receiving premiums estopped to deny power to issue certificate); Batesburg Cotton Oil Co. v. Southern Ry., 103 S. C. 494, 88 S. E. 360 (1915).

\(^{28}\) See the case of Alderman v. Alderman, 178 S. C. 9, 181 S. E. 897 (1935), holding that directors are not liable for entering into ultra vires contracts unless guilty of such want of due care as an ordinarily prudent man would exercise with his own affairs.