

1963

## Corporate Name: Registered Office and Agent: Service of Process--Chapter 1.3

David Y. Monteith III

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



Part of the [Law Commons](#)

---

### Recommended Citation

Monteith, David Y. III (1963) "Corporate Name: Registered Office and Agent: Service of Process--Chapter 1.3," *South Carolina Law Review*: Vol. 15 : Iss. 2 , Article 13.

Available at: <https://scholarcommons.sc.edu/sclr/vol15/iss2/13>

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](mailto:dillarda@mailbox.sc.edu).

**CORPORATE NAME; REGISTERED OFFICE AND  
AGENT; SERVICE OF PROCESS**

**CHAPTER 1.3**

**SCOPE**

This note will be concerned with those sections of the South Carolina Business Corporations Act of 1962<sup>1</sup> which deal with the corporate name, registered office and registered agent, and evidentiary considerations pertaining to corporate documents and records.

The treatment of the corporate name section is limited by space considerations. Any treatment of corporate names must, of necessity, take into consideration the common law of trade-mark, trade-name, and unfair competition. Those fields are covered here only to the extent that they affect the selection and use of names between corporations. No attempt has been made to treat trade-marks, trade-names, and unfair competition as to the rights of individuals under the common law, or as to the effect Federal codification of such laws may have on the corporation in its relation with individuals or other corporations.

Many of the points discussed in this note are correlative to those discussed in articles and notes elsewhere in this issue; from time to time reference will be made to those appropriate to points discussed here.

**CORPORATE NAME**

Selection of a name for an embryo corporation is an important decision of the organizers. That a corporation must have a name is a truism<sup>2</sup> recognized since the days of Blackstone.<sup>3</sup> Careful selection of the corporate name, from a legal

---

1. Hereafter, the act will be referred to as "the 1962 Act." Unless otherwise specified reference to such phrases as "the old law" the "existing law," etc., will mean Title Twelve of the S. C. CODE (Supp. 1962).

2. *American Steel Foundries v. Robertson*, 269 U. S. 372, 70 L. Ed. 317 (1926); *Cincinnati Cooperage Co. v. Bate*, 96 Ky. 356, 26 S. W. 538 (1894); *First Nat'l Bank of Ceredo v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792 (1895).

3. "When a corporation is erected; a name must be given to it; and by that name it must sue and be sued, and do all legal acts . . . Such name is the very being of its constitution; . . ." 1 Bl. Comm. 474.

standpoint, can do much to preclude future litigation. A carefully selected name will not infringe upon the rights of others to use a similar name and will be such that if it is infringed upon by others, the courts can furnish protection. There is a basic common law right which allows a corporation to be protected in its corporate name<sup>4</sup> and equity will protect it against use of the same or a similar name.<sup>5</sup> Such a provision is embodied in the 1962 Act<sup>6</sup> and will be discussed in detail later.

The 1962 Act requires that the name of every corporation shall contain one of the following words or an abbreviation thereof: "Corporation," "incorporated," or "limited." This should eliminate the confusing distinctions which have arisen as to the meanings of such words as "company," "& Co.," "Co., Inc.," etc.<sup>7</sup> Existing domestic and foreign corporations, other than banks, insurance companies and railroads, the names of which do not include such words or abbreviations will be required to make an appropriate amendment and notify the Secretary of State. The board of directors of a domestic corporation may make such a change without shareholder approval.<sup>8</sup> Under the new act, those words required to be used as indicative of corporate status are absolutely prohibited to unincorporated business enterprises.<sup>9</sup> There is no statutory or common law in South Carolina which requires that the corporate name be in English; indeed, both the case law<sup>11</sup> and statutes<sup>12</sup> of other jurisdictions allow non-English names.

The new act prohibits the use of words (in the name) which imply that a corporation is engaged in a business different

---

4. *Investor Publishing Co. v. Dobinson*, 72 Fed. 603 (C. C. S. D. Cal. 1896); *Industrial Mut. Deposit Co. v. Central Mut. Deposit Co.*, 112 Ky. 937, 66 S. W. 1032 (1902).

5. *Alaska Sales & Serv., Inc. v. Rutledge*, 128 F. Supp. 1 (D. Alaska 1955); *Dorothy Gray Salons v. Miles Sales Co. of N. Y.*, 162 Misc. 789, 295 N. Y. Supp. 204 (1937).

6. S. C. CODE §12-13.1(a) (3) (Supp. 1962).

7. S. C. CODE §12-13.1(1) (Supp. 1962).

8. *Core Joint Concrete Pipe Corp. v. Piano Bros., Inc.*, 285 N. Y. Supp. 706 (App. Div. 1936).

9. S. C. CODE §12-13.1(d) (1) (Supp. 1962).

10. S. C. CODE §12-13.1(e) (Supp. 1962).

11. *In re Deutsch* — *Amerikanischer Volksfest-Verien*, 200 Pa. 143 49 Atl. 949 (1901).

12. Delaware, Idaho, Louisiana, Minnesota, New York, Oklahoma, Pennsylvania, Washington, and Puerto Rico provide that any language may be used as long as the words are in either English or Roman characters. MODEL BUS. CORP. ACT ANN. §7[2.02 (1960).

from that authorized by its charter.<sup>13</sup> Similar statutory provisions have been enacted in seventeen other jurisdictions.<sup>14</sup>

There has been much confusion regarding the interpretation of statutes relating to the protection of corporate names.<sup>15</sup> There are two common law theories upon which recovery may be had. One is that of trade-mark or trade-name and the other is that of unfair competition.<sup>16</sup> A distinction is sometimes made between trade-marks and trade-names. Basically, a trade-mark pertains to a tangible thing sold, and a trade-name pertains to the individual identification of a business.<sup>17</sup> Generally, the distinction is not important since the same principles will apply to protection under either term.<sup>18</sup> The purpose of the protection afforded is sometimes mentioned: the protection given a trade-mark is for the benefit of the public and that given to a trade-name is for the benefit of the party entitled to use of the name.<sup>19</sup> In any case, protection under the law of trade-mark seems to be substantially similar to protection under the law of trade-name.

The recurring problem in interpreting statutes similar to that in South Carolina has been the determination of the ground for recovery: trade-mark, unfair competition, or strict statutory application have all been proposed. This is mainly important in ascertaining the breadth of protection afforded. An early South Carolina case, *Telephone Mfg. Co. of Sumter v. Sumter Tel. Mfg. Co.*<sup>20</sup> used the narrow ground of trade-mark; the court said:

"The same principles apply in cases of similarity of corporate names and those of the similarity of trade-marks,

13. S. C. CODE §12-13.1(a) (2) (Supp. 1962).

14. MODEL BUS. CORP. ACT ANN. §7(2.02) (1960).

15. See generally, annotations: 65 A. L. R. 2d 263 (1959); 421 A. L. R. 2d 1156 (1955); 42 A. L. R. 2d 516 (1955); 174 A. L. R. 496 (1940); 150 A. L. R. 1067 (1944); 115 A. L. R. 1241 (1938); 66 A. L. R. 934 (1930); 63 A. L. R. 1046 (1929); 56 A. L. R. 447 (1928); 48 A. L. R. 1257 (1927); 27 A. L. R. 954 (1923); 17 A. L. R. 770 (1922).

16. Terminal Barber Shops, Inc. v. Zoberg, 28 F. 2d 807 (2d Cir. 1928); Alhambra Transfer Storage Co. v. Muse, 41 Cal. App. 2d 92, 106 P. 2d 63 (Ct. of App. 1940); 6 FLETCHER, PRIVATE CORPORATIONS §2423 (1950).

17. American Steel Foundries v. Robertson, *supra* note 2; Acme Chem. Co. v. Dobkin, 68 F. Supp. 601 (W. D. Pa. 1946).

18. Holmes, Booth & Hayden v. Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324 (1870); Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kan., 21 Abb. N. Cas. 104, 1 N. Y. Supp. 44 (S. Ct. 1888); Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 59 S. E. 123 (1907); 6 FLETCHER, PRIVATE CORPORATIONS §2423 (1950).

19. Armington v. Palmer, 21 R. I. 109, 42 Atl. 308 (1898).

20. 63 S. C. 313, 41 S. E. 322 (1902).

each being entitled to protection under identically the same rules and principles. The name of a corporation from necessity is its trade-mark."

In that case, injunctive relief was denied since the similar names, being geographic and generic in nature, were not available for exclusive appropriation.<sup>21</sup> It should be noted that the trade-mark rule as to geographic and generic name is not without exceptions. A name clearly geographic or generic in nature (i. e., Southern Railroad, General Electric, Standard Oil) may acquire, after long use, a secondary meaning. Such names will have been so associated with one business as to be generally understood to mean that business.<sup>22</sup>

Because of the narrowness of the trade-mark ground of protection, some other means was desirable. Courts have sought to grant injunctive relief on the basis of unfair competition. Where relief is afforded under the law of unfair competition, there are two interests to be protected: the interest of the using public, which might be deceived by similar names and the interests of the corporation in its exclusive use of a name under which it has acquired good will and custom.<sup>23</sup> A later South Carolina case, *Planters' Fertilizer & Phosphate Co. v. Planters' Fertilizer Co.*,<sup>24</sup> decided after the enactment of a statute prohibiting a name the same as that of any existing corporation, used unfair competition as the basis of its decision to affirm allowance of injunctive relief. The court carefully distinguished the *Telephone Company* case in that it relied on trade-mark as the basis of protection and the *Planters'* case relied on the confusion of goods put upon the market by the respective parties. It should be noted that the plaintiff in the *Planters'* case was known to its customers as "Planters' Fertilizer Co." As to the degree of confusion necessary for relief the court said:

21. See also, *Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp.*, 109 F. 2d 85 (D. C. Cir. 1939), cert. denied 309 U. S. 634, 84 L. Ed. 1028 (1940); *Rochester Sav. Bank v. Rochester Sav. & Loan Ass'n.*, 170 Misc. 933, 11 N. Y. S. 2d 130 (S. Ct. 1939).

22. *Brooks Bros. v. Brooks Clothing of Cal., Inc.*, 60 F. Supp. 442 (S. D. Cal. 1945), aff'd 158 F. 2d 798 (9th Cir. 1946); *American Prods. Co. v. American Prods. Co.*, 42 F. 2d 488 (E. D. Mich. 1930); *Standard Oil Co. of N. Y. v. Standard Oil Co. of Me.*, 38 F. 2d 677 (S. D. Me. 1930).

23. *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Mfg. Co.* supra note 18; *Atlanta Paper Co. v. Jacksonville Paper Co.*, 134 Ga. 205, 190 S. E. 777 (1938); *Farmers' Loan & Trust Co. v. Farmers Loan & Trust Co. of Kan.*, supra note 18; *Federal Sec. Co. v. Federal Sec. Corp.*, 129 Ore. 375, 276 Pac. 1100 (1929).

24. 135 S. C. 282, 133 S. E. 706 (1926).

"What degree of resemblance is sufficient to warrant the interference of a court in cases of this kind is not capable of exact definition. It is, and must be, from the very nature of the case, mainly a question of fact to be determined by the circumstances appearing in each particular case. In general, it may be said that, if the resemblance is such as to mislead purchasers or those doing business with the person or corporation using the name, who are acting with ordinary caution, this is sufficient."<sup>25</sup>

The injunctive relief allowed in this case seems to have been based not upon the statute, but rather on the common law of unfair competition.

The broadest ground for recovery is that of strict statutory interpretation. The new South Carolina act is very specific: names shall not be deceptively similar to appropriated names.<sup>26</sup> A qualification is that nothing in the section shall abrogate or limit the law as to unfair competition or the right to acquire and protect trade-marks and trade-names.<sup>27</sup> It remains questionable, then, whether the statute does anything more than briefly codify the law, as to corporate names, of trade-mark and unfair competition. A number of cases in other jurisdictions have been decided on just such a basis. In *Burnside Veneer Corp. v. New Burnside Veneer Co.*<sup>28</sup> under a statute essentially the same as that in South Carolina,<sup>29</sup> the court denied relief on the common law ground of trade-mark: generic and geographic names could not be appropriated because of the "absurd" results, not within the contemplation of the legislature, which would be reached. The North Carolina court has held, as under the common law, that actual use is necessary before protection will be afforded a prior appropriator.<sup>30</sup> Delaware, though, has held that its statute removes the necessity of showing user;<sup>31</sup> the Washington court, in *Diamond Drill Contracting Co. v. International*

25. *Id.* at 291, 133 S. E. at 708, quoting with approval from *Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 112 N. W. 232 (1907).

26. S. C. CODE §12-13.1(a) (8) (Supp. 1962).

27. S. C. CODE §12-13.1(g) (Supp. 1962).

28. 247 S. W. 2d 524 (Ky. 1952).

29. KY. REV. STAT. §271.045(2) (1953).

30. *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, *supra* note 18; *accord*, *Lawyers' Title Ins. Co. v. Lawyers' Title Ins. Corp.*, *supra* note 21; *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510 (7th Cir. 1912).

31. *Drugs Consol., Inc. v. Drugs Incorporated*, 144 Atl. 656 (Del. Ch. 1929).

*Diamond Drill Contracting Co.*<sup>32</sup> makes deception of the public the essential criterion in refusing to approve injunctive relief in applying a statute similar to that in South Carolina. The names there were in the main identical, but since both corporations catered to a specialized clientele which was not likely to be confused, the court found that the statute offered no protection. The court was able to reach a result, under the statute, which might have been as easily reached under the common law of trade-mark; the rationale of the decision is significant.

In *Cleveland Opera Co. v. Cleveland Civic Opera Ass'n.*<sup>33</sup> the court went one step further and approved relief based on the words of the statute prohibiting names so similar as to cause confusion and unfair competition.<sup>34</sup>

Another case which was decided more on a basis of statute than common law is *Drugs Consol. Inc. v. Drugs Incorporated.*<sup>35</sup> There, the court held descriptive words might be used if there were some distinguishing factor to avoid the confusion contemplated in the statute.<sup>36</sup>

One word, "deceptively," is the key to a reasonable and proper interpretation of the new South Carolina act. If relief is granted or denied on a broad interpretation of what constitutes "deceptive similarity," the fairest results will be reached. The common law of trade-marks and unfair competition can then be relegated to their proper position as factors to be considered, rather than law to be applied. By such a broad interpretation the courts can avoid or utilize, as the facts demand, the rules as to generic and geographic names, secondary meaning, user, injury to the public, and injury to the prior appropriator of a name. All these factors should be considered, but only to the extent of making a determination as to whether there is deception or confusion. After all, these words, "deception and confusion" are the essence of the law of trade-mark, trade-name, and unfair competition. This is the concept of the *Diamond Drill*, *Cleveland Opera Co.*, and *Drugs Cons., Inc.* cases discussed above; such a view seems to allow equitable results on sound judicial principles.

32. 106 Wash. 72, 179 Pac. 120 (1919).

33. 22 Ohio App. 400, 154 N. E. 352 (1926).

34. *Id.* at 402, 154 N. E. at 354.

35. *Supra* note 31.

36. *Id.* 144 Atl. at 658.

The 1962 Act provides that a corporation may use a name, notwithstanding the "deceptively similar" prohibition, if written permission of the prior appropriator is filed with the Secretary of State.<sup>37</sup> The efficacy of this provision is questionable when two other provisions of the act are considered: first, the Secretary of State may refuse to file the articles of incorporation if he finds, *inter alia*, that the provisions of the "deceptively similar" prohibitions have not been complied with;<sup>38</sup> second, nothing in the section shall abrogate or limit the law of unfair competition or unfair trade practice.<sup>39</sup> The leading case in South Carolina<sup>40</sup> bases its decision on the common law of unfair competition rather than the application of a statute similar to the provision of the present act. When it is considered that the rationale of the law of unfair competition is protection of the public as well as the corporation,<sup>41</sup> then there seems to be good reason to believe that the Secretary of State would be justified in refusing to file the articles of incorporation even if the required written permission had been duly filed.

A corporation may not use any name which implies that it transacts any business for which governmental authorization is required unless a statement of such authorization has been granted and certified in writing by the appropriate officer of commission.<sup>42</sup> Such statutes are usually based on the police power and have been held constitutional by the courts.<sup>43</sup> Similar legislation in other jurisdictions has presented problems relative to corporations with previously selected prohibited names.<sup>44</sup> This provision should present little or no trouble in South Carolina as to pre-existing corporations; the 1962 Act also provides that nothing in the corporate name section shall require any existing domestic corporation "to add to, modify or otherwise change its corporate name . . ." <sup>45</sup> Deception of the public seems to be the principal

37. S. C. CODE §12-13.1(a) (3) (Supp. 1962).

38. S. C. CODE §12-13.1(b) (Supp. 1962).

39. S. C. CODE §12-13.1(g) (Supp. 1962).

40. *Planters' Fertilizer & Phosphate Co. v. Planters' Fertilizer Co.*, *supra* note 24.

41. *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Mfg. Co.*, *supra* note 18; *Federal Sec. Co. v. Federal Sec. Corp.*, *supra* note 23.

42. S. C. CODE §12-13.1(a) (4) (b) (Supp. 1962).

43. *Inglis v. Pontius*, 102 Ohio St. 140, 131 N. E. 509 (1921); *Union Trust Co. v. Moore*, 104 Wash. 50, 175 Pac. 565 (1918).

44. *McKee v. American Trust Co.*, 166 Ark. 480, 266 S. W. 293 (1924); *Lornsten v. Union Fisherman's Co-op Packing Co.*, 71 Ore. 540, 1403 Pac. 621 (1914).

45. S. C. CODE §12-13.1(d) (Supp. 1962).



reason for inclusion of this provision. An implication that a corporation is engaged in banking, insurance, or transportation is an obvious violation; illustrative of the less obvious type violation contemplated is *In re New York State Voter League, Inc.*<sup>46</sup> where the court held that such a name might be thought to be an official arm or function of the State.

Fraternal, veterans', service, religious, and similar organizations are protected from any implication by another corporation that it is affiliated with them unless such is true.<sup>47</sup>

Whether the provisions of the act are violated by a particular name is a discretionary decision to be made by the Secretary of State. If he finds the name of a proposed corporation violates the provisions of the statute, he shall refuse to file the incorporation papers. Decisions of the Secretary of State are, of course, reviewable by the courts.<sup>48</sup>

Violations of the corporate name section which are discovered subsequent to incorporation or authorization in no way impair or invalidate the violator's existence or authority to do business. The appropriate remedy for the injured party would be in the courts — either by injunction or other appropriate relief.<sup>49</sup>

There are many improper uses of corporate names which are not specifically treated by the act. Such improper uses are dealt with by providing that nothing in the act shall abrogate the law of unfair competition or unfair trade practice. In like manner, it is provided that there is no derogation of the law of trade-mark or trade-name.<sup>50</sup> The Reporter's Notes to the act state:

“Without this provision (the section prohibiting ‘deceptively similar’ names) might be deemed exclusive of any common law or other statutory remedies.”<sup>51</sup>

### RESERVED NAME

The Reserved Name section of the act allows a yet-to-be formed domestic or foreign corporation or a not-yet-author-

46. 157 N. Y. S. 2d 210 (S. Ct. 1956).

47. S. C. CODE §12-13.1 (a) (4) (b) (Supp. 1962).

48. For a discussion of remedies available by administrative processes and through the courts, see generally, Tighe, *Duties of the Secretary of State*, elsewhere in this issue.

49. S. C. CODE §12.1 (c) (Supp. 1962).

50. S. C. CODE §12-13.1 (g) (Supp. 1962).

51. DRAFT VERSION, S. C. BUS. CORP. ACT OF 1962, REPORTER'S NOTES, p. 19.

ized foreign corporation to appropriate a name in advance of its incorporation or authorization to do business. In like manner, domestic and foreign corporations contemplating a change of name may appropriate a new name by reservation.<sup>52</sup>

The major objective of the section is to combat a type of blackmail in which the name of a proposed domestic corporation or not-yet-authorized foreign corporation is used as the name of a sham corporation, thus requiring those having a legitimate need for the name to buy off the unscrupulous opportunists.<sup>53</sup> While such practices have not been a problem in South Carolina in the past, the expansion of industry in the State and the growing market-potential of the State makes such a provision highly appropriate.

Reservation is accomplished by filing an application with the Secretary of State.<sup>54</sup> It should be noted that any name reserved must comply with the provisions of the corporate name section of the act.<sup>55</sup> A reservation is effective for a period not exceeding one hundred twenty days<sup>56</sup> and may be transferred to any other person or corporation by filing in the office of the Secretary of State a notice of such transfer.<sup>57</sup>

Since the main purpose of the act is to avoid improper or bad faith dealings in corporate names, it is within the discretion of the Secretary of State to revoke any reservation if he finds such reservation or transfer of reservation was not made in good faith.<sup>58</sup>

## REGISTERED NAME

When South Carolina included the registered name<sup>59</sup> section in its new corporation act it joined the ranks of an enlightened minority of jurisdictions.<sup>60</sup> Basically, the section provides a means by which an existing foreign corporation may reserve the availability of its name for a period longer

52. S. C. CODE §12-13.2 (Supp. 1962).

53. DRAFT VERSION, S. C. BUS. CORP. ACT OF 1962, REPORTER'S NOTES, p. 20.

54. S. C. CODE §12-13.2(b) (Supp. 1962).

55. S. C. CODE §12-13.2(a) (Supp. 1962).

56. S. C. CODE §12-13.2(b) (Supp. 1962).

57. S. C. CODE §12-13.2(c) (Supp. 1962).

58. S. C. CODE §12-13.2(d) (Supp. 1962).

59. S. C. CODE §12-13.3 (Supp. 1962).

60. As of March, 1962, nine other jurisdictions had enacted comparable statutory provisions. MODEL BUS. CORP. ACT ANN. §§9,10 (1960).

than that permitted in the "reserved name" section of the act. Corporations contemplating future activities in South Carolina will find this provision particularly convenient. Since this section serves, to some extent, the same purpose as the "reserved name" section, it will avoid the "business blackmail" referred to in the discussion of that section. In addition, it provides a means by which an out-of-state business enterprise can preclude appropriation of its name under the common law of trade-mark and trade-name. The common law of trade-name and trade-mark is regional in doctrine and mere appropriation in one trading area does not preclude a later appropriation of the same name in another trading area.<sup>61</sup>

A corporation organized and existing under the laws of any other state or territory may register its corporate name as long as that name is not the same as or deceptively similar to that of any domestic corporation, authorized foreign corporation, or any name reserved or registered under the act. The same standard should be applied in determining what constitutes deceptively similar as that applied in the "corporate name" section of the act. Once registration is accomplished it is valid until the end of the calendar year and is renewable from year to year for up to ten years.<sup>62</sup>

### REGISTERED OFFICE AND REGISTERED AGENT

The use of the words "registered office" and "registered agent" marks a conceptual change in this phase of corporation law in South Carolina. Prior to the 1962 Act, corporations were required, by legislative interpretation of a mandate of the South Carolina Constitution, to maintain an agent for service of process at its principal place of business.<sup>63</sup>

61. *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 60 L. Ed. 713 (1916).

62. S. C. CODE §12-13.3(d) (Supp. 1962).

63. Corporations, other than mercantile corporations, are required by the state constitution to maintain an agent for service of process and a public office for the transaction of business; the legislature is empowered to provide for binding service of process on agents of corporations. S. C. CONST. art. 9, §4. Under the old statute, the charter of the corporation was required to state the location of the principal place of business of the corporation. S. C. CODE §12-58 (1952). Thus, the concept of the old statute was that the public office required by the state constitution was to be the principal place of business of the corporation. The meaning of the term "mercantile corporation" is not clear, but this should not cause any trouble since there is nothing in the state constitution which is prohibitive of a legislative requirement that "mercantile" corporations maintain an office. DRAFT VERSION, S. C. BUS. CORP. ACT OF 1962, REPORTER'S NOTES, p. 22.

The 1962 Act requires only that there be an office and an agent and that pertinent information concerning them be filed with the Secretary of State. The Secretary of State shall maintain this information on file so as to provide ready reference to the name and location of any corporation's agent. It is specifically provided that the registered agent may be an individual, a domestic corporation, or an authorized foreign corporation. In any case, the business office of the registered agent must be the same as the registered office of the corporation.<sup>64</sup>

These changes from the "principal place of business" concept should be especially useful to the domestic corporation which wishes to carry on the management of its business elsewhere than in South Carolina. Such a corporation may thus employ as its agent an attorney or one of those corporations which make it part of their business to act as statutory agents for other corporations.

#### CHANGE OF REGISTERED OFFICE AND REGISTERED AGENT

The provisions of the 1962 Act concerning the registered office and registered agent are almost identical to those of the Model Business Corporations Act.<sup>65</sup> The concept of the Model Act is that change of the registered office and agent of a corporation is a routine matter within the ambit of the board of directors.<sup>66</sup> In view of this, following authorization of its board of directors, a corporation may change its registered agent or office by simply filing specified declarations with the Secretary of State.<sup>67</sup>

This is a marked departure from the previous statutory provisions; under the old statute, the location of the corporation's principal place of business was one of the charter declarations.<sup>68</sup> For absolute safety, a corporation would have to have amended its charter when the location of its principal place of business changed since charter amendments require shareholder approval.<sup>69</sup> Thus, the utility of the concept of the 1962 Act is obvious.

64. S. C. CODE §12-13.4 (Supp. 1962).

65. MODEL BUS. CORP. ACT ANN. §§11,12 (1960).

66. MODEL BUS. CORP. ACT ANN. §12-14 (1960).

67. S. C. CODE §12-13.5 (Supp. 1962).

68. S. C. CODE §12-58 (152).

69. S. C. CODE §12-19.4 (Supp. 1962).

When an agent becomes incapacitated through death, resignation, or other reason, the corporation must promptly appoint another agent and file a written appointment in the office of the Secretary of State.<sup>70</sup> There will probably be no impairment of the corporation contract rights or obligations by its failure to appoint a new agent when necessary. In an early Kentucky case<sup>71</sup> where the statute made it unlawful for a corporation to carry on business unless there was on file the name of a registered agent, the court held a contract valid even though it was made subsequent to the death of the registered agent. The court said:

“the avowed purpose of the agency being to furnish a person upon whom process may be served, the operation of the statute will not be extended beyond what is reasonably necessary to accomplish its purpose.”

Such a view seems to be a rational approach and could well be followed in South Carolina. The 1962 Act provides that those corporations which fail to file a notice of change of office or agent within a specified period may be dissolved by forfeiture.<sup>72</sup>

### ANNUAL REPORT

The filing of an annual report by corporations is a requirement in every jurisdiction of the United States. There is a variance among the states as to requirements for domestic and foreign corporations and as to whether the filing is under the corporate tax, or anti-trust laws.<sup>73</sup> South Carolina combines its requirements for domestic and foreign corporations in one section of the 1962 Act and specifically makes the filing of the report with the Secretary of State complementary to reports required to be filed with the tax commission.<sup>74</sup> Under the 1962 Act, one copy of a report containing specified information is to be submitted to the Secretary of State and another is to be directed to the South Carolina Tax Commission together with such other information as that commission may require.<sup>75</sup>

70. S. C. CODE §12-13.5 (Supp. 1962).

71. *House v. Bank of Lewisport*, 178 Ky. 281, 198 S. W. 760 (1917).

72. S. C. CODE §12-22.11 (Supp. 1962).

73. MODEL BUS. CORP. ACT ANN. §§118,119 ¶2.02 (1960).

74. The requirement that corporations file a report with the office of the Secretary of State was repealed in 1953 and there was substituted a requirement that corporations file an annual report as required by the South Carolina Tax Commission. 1953 ACTS AND JOINT RESOLUTIONS 301.

75. S. C. CODE §12-24.1 (Supp. 1962).

The consequences of a failure to comply with the filing requirements are serious; pecuniary penalties are provided for those tardy in filing and those who fail to file will face involuntary dissolution or, in the case of foreign corporations, forfeiture of authority to do business within the State.<sup>76</sup>

### EVIDENTIARY CONSIDERATIONS

The 1962 Act accomplishes a needed simplification and clarification of rules of evidence concerning the admission in evidence of corporate documents. Basically, the act allows not only those documents certified by the Secretary of State to be admitted in evidence<sup>77</sup> but also copies of corporate records certified as true and correct by specified corporate officers.<sup>78</sup> Perhaps the real significance of these two sections is that the burden of proof is shifted to the party attempting to controvert the admitted documents. A brief analysis of the prior statutory law may make the force of these provisions evident.

Prior to the 1962 Act, the only statutory rule of evidence dealing with corporations concerned the establishment of the corporate status of a party to an action. A copy of the charter of a corporation was required to be filed with the county clerk and if duly certified was admissible in all courts and places as evidence of the organization and existence of the corporation and of matters specified in the certificate of incorporation.<sup>79</sup>

The 1962 Act goes beyond this elementary concept of admissibility. First, certified copies of all documents required to be filed are admissible in evidence. Second, the Secretary of State may issue a certificate, admissible in evidence, as to the existence or non-existence of the facts stated in them.<sup>80</sup>

Perhaps the broadest addition is the provision for the admission of copies of specified corporate records if certified

---

76. In case of a complete filing default, the Secretary of State is required to proceed as provided by §12-22.11 (Dissolution of Corporation by Forfeiture) or §12-23.11 (Revocation of Foreign Corporation's Authority to do Business in this State) as is appropriate. S. C. CODE §12-24.2 (Supp. 1962).

77. S. C. CODE §12-24.8 (Supp. 1962).

78. S. C. CODE §12-24.9 (Supp. 1962).

79. S. C. CODE §12-60 (1952).

80. S. C. CODE §12-24.8 (Supp. 1962).

under oath by the president and either the secretary or an assistant secretary of the corporation. Again, these documents are admitted as prima facie evidence of the facts stated in them.<sup>81</sup>

DAVID Y. MONTEITH, III

---

81. S. C. CODE §12-24.9 (Supp. 1962).