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Corporations

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CORPORATIONS

I. Service of Papers on Corporate Defendant

Two of the five cases worthy of note in the corporations area, *Lott v. Claussens, Inc.*[1] and *Burris Chemical, Inc. v. Daniel Construction Co.*,[2] dealt with service of process under Section 10-421 of the South Carolina Code.[3]

A. *What Constitutes "Owning Property"?*

Lott v. Claussens, Inc. was an action to recover for personal injuries sustained in a collision in Barnwell County with one of the trucks of defendant bakery corporation. The sole question before the supreme court was whether Claussens owned property in Barnwell County. In its motion for change of venue, Claussens admitted that it did business in the county but denied ownership of property there. The court affirmed the lower court's decision that the ownership of a contractual right to use certain display racks to sell its products in Barnwell County constituted ownership of property in the county for venue purposes.

In the *Burris* case the court held that the presence at its construction site of a mobile trailer office and other equipment owned by defendant corporate builder was sufficient to meet the property ownership requirements of the section.

A sampling of prior South Carolina cases in which a similar question arose reveals the following: The test of ownership of property was not met by owning a truck in which corporate products were sold or delivered to the county where the action was brought from another county;[4] a motion to change venue was overruled in a tort action against a domestic corporation engaged in the manufacture and delivery of bakery products, where the

1. 251 S.C. 478, 163 S.E.2d 615 (1968).
2. 251 S.C. 483, 163 S.E.2d 618 (1968).
3. S.C. Code Ann. § 10-421 (Supp. 1968) provides:
   If the suit be against a corporation, the summons shall, except as otherwise expressly provided, be served by delivering a copy thereof to the president or other head of the corporation, or to the secretary, cashier or treasurer or any director or agent thereof; *provided, further,* that, in the case of domestic or foreign corporations, service as effected under the terms of this section shall be effective and confer jurisdiction over any domestic or foreign corporation in any county where such domestic or foreign corporation shall own property and transact business, regardless of whether or not such foreign or domestic corporation maintains an office or has agents in that county.
4. Brown v. Palmetto Baking Co., 220 S.C. 38, 66 S.E.2d 417 (1951).

corporation had three salesmen residing in the county where the action was brought, each having his own delivery truck with the name of the salesman as "agent" printed on it.[5] The *Lott* opinion distinguished the holding of *Hopkins v. Sun Crest Bottling Co.*,[6] which was that the temporary presence of bottles and crates did not constitute "property" within the statute.

The court was especially impressed by the following from *Gibbes v. National Hospital Service, Inc.*[7]:

> The term "property" is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is the most comprehensive of all terms which can be used. The term is often called "*nomen generalissimum*," and is employed to signify any valuable right or interest protected by law, and the subject matter or things in which rights or interest exist.[8]

The *Gibbes* opinion, along with *Peeples v. Orkin Exterminating Co.*,[9] recognized contract rights as "property" within the meaning of the instant section of the code. By minimizing the property-ownership requirement of Section 10-421, cases like *Lott* clearly ease the plaintiff's chore of pinning down the corporate presence.

B. *What Constitutes "Agency"?*

The *Burris* case was concerned with whether delivery of a copy of the summons to defendant builder's superintendent in charge of fifteen men completing construction of a factory and acting as general superintendent constituted service on an "agent" within the meaning of Section 10-421. The supreme court held that the superintendent was such an agent. The court cautioned that the question was not whether the employee was conducting corporate business so as to make the company a resident of the county for venue purposes, but simply whether he was an agent for service within the meaning of Section 10-421.

Justice Littlejohn pointed out that the purpose of Section 10-421 is to give the corporation *notice* of the proceedings against it.

5. Morris v. Peoples Baking Co., 191 S.C. 501, 5 S.E.2d 286 (1939).
6. 228 S.C. 287, 89 S.E.2d 755 (1955).
7. 202 S.C. 304, 24 S.E.2d 513 (1944).
8. *Id.* at 308, 24 S.E.2d at 515, *quoting* 50 C.J. *Property* §2 (1930).
9. 244 S.C. 173, 135 S.E.2d 845 (1964).

Evidence supported the finding that service of process upon the superintendent could reasonably have been expected to result in prompt notice to the corporation, thus providing an adequate opportunity to defend.

C. *What Constitutes "Transacting Business"?*

The court in *Burris* further commented on the issue of whether defendant, not having completed its project in the county where it was served, was "transacting business" within the meaning of the statute. Holding that it was, Justice Littlejohn distinguished two prior cases[10] saying that both dealt with isolated acts of solicitation of advertising or occasional deliveries within the particular counties and were not analogous to a prolonged construction project as here. He pointed to *Atkinson v. Korn Industries, Inc.*[11] which held a single logging contract to be "transacting business" when such was — as the activity relied on for the element of "transacting business" must always be — part of its *usual* or *ordinary* business and continuous in the sense of being distinguishable from merely casual, occasional, or isolated transactions.

II. NON-PROFIT CORPORATIONS AND THE BUSINESS CORPORATION ACT

In *Columbia Country Club v. Livingston*,[12] the Columbia Country Club had brought suit to recover an amount assessed by the South Carolina Tax Commission for certain alleged admission charges. The intricacies[13] of the tax statute involved led the Tax Commission into the remarkable argument that, though the club was concededly organized and operated as a non-profit corporation, the passage of the Business Corporation Act of 1962[14] automatically converted it into a profit corporation. The "purpose" clauses of the club's charter and by-laws had not been amended since its incorporation in 1945. It had operated accordinging to its by-laws: "without profit." The Tax Commission nevertheless contended that the club "exists [like any other corporation] by operation of law, and by operation of law is defined as a profit corporation and such is conclusive. It was prohibited from offering any evidence that would tend to establish its

10. Seegars v. WIS-TV, 236 S.C. 355, 114 S.E.2d 502 (1960); Thomas & Howard Co. v. Marion Lumber Co., 232 S.C. 304, 101 S.E.2d 848 (1958).
11. 219 S.C. 402, 65 S.E.2d 465 (1951).
12. 167 S.E.2d 300 (S.C. 1969).
13. Discussed in the *Survey of Taxation, infra* at 656.
14. S. C. CODE ANN. §§ 12-11.1 to -24.9 (Supp. 1968).

character otherwise and the evidence and testimony submitted for such purposes was inadmissible."[15] The court dismissed the argument, pointing out that the definition may be enough to create a legal presumption or implication, but such *would* be rebuttable.

The supreme court found authority for its position in an annotation:

> The purpose for which a corporation has been organized is a question of fact, to be determined from all the evidence, including statements in the charter and evidence concerning the circumstances surrounding its organization, the purposes and intentions of of the incorporators, and the activities of the corporation and of any predecessor organization.[16]

The Business Corporation Act provided that the new statutes should not affect the existence of corporations existing on January 1, 1964, the date the act took effect, and any corporation, its shareholders, directors, and officers should have the same rights and be subject to the same limitations, restrictions, liabilities and penalties which apply to corporations organized thereafter.[17]

The court pointed out that since the date of its effectiveness the exclusive statutory authority for the organization of a nonprofit corporation of this character has been the Business Corporation Act, and the act provides that the by-laws may contain any provision not inconsistent with law or the articles of incorporation, for the regulation and management of the business affairs of the corporation.[18]

That particular statement does not mesh with other interpretations of the South Carolina Business Corporation Act. Mr. William H. Blackwell has observed that

> [a]s its name implies, the act applies only to "business corporations," both foreign and domestic. Eleemosynary or non-profit corporations are not affected.[19]

Walter J. Bristow concluded:

> It should be borne in mind that the new law is a *busi-*

15. 167 S.E.2d 300, 303 (S.C. 1969).
16. *Id., quoting* Annot., 69 A.L.R.2d 871, 879 (1960).
17. S.C. CODE ANN. § 12-11.3 (Supp. 1968).
18. S.C. CODE ANN. § 12-16.1 (Supp. 1968).
19. Blackwell, *General Provisions and Corporate Purposes and Powers, Symposium of South Carolina Corporation Law,* 15 S.C.L. REV. 444 (1963).

> *ness* corporation law. This is made plain not only by the title of the act, but even more so by section 1.3, relating to the application of the act, and section 2.1, relating to corporate purposes. Thus the act does not apply to charitable, social or religious corporations, or other eleemosynary corporations. So far as the organization of corporations under the act is concerned, it is specifically provided in section 4.1(a) that a corporation may be organized for "any lawful business." If the proposed organization is not to conduct a business, then it should not be organized under the act.[20]

These comments seem to be more in line with the purposes of the act reflected in the Reporter's Notes to the applicable sections, but do not necessarily affect the accuracy of the court's statement or its decision. The comments and the Reporter's Notes seem directed toward the sections which provide for the creation of eleemosynary corporations which do not issue stock.[21] The Columbia County Club had issued stock, but fell within the category of "non-profit" since its incorporation occurred prior to the passage of the act.[22]

III. PROBLEMS OF CORPORATENESS

Dargan v. Graves,[23] an action for accounting, arose after the failure of a skeleton corporation. In 1954 or earlier Graves and Dargan entered the construction field. Their pact arose because Dargan, a lumber manufacturer, wanted to obtain the services of Graves, an experienced builder. For the first phase of their operation Graves drew a salary and expenses, and was to receive a part of the net profits. In 1959 they began doing business as Coastal Development Corporation and in 1960 they incorporated as Coastal Development Company of Conway, Inc. When the venture failed, each party sought an accounting from the other. The master found that the corporation had earned profits, that Graves was due 50% of them, and that, though a corporate charter had been issued, Dargan had conducted the business as if it were his own personal proprietorship and should be held personally liable for the amount due Graves. Dargan contended that

20. Bristow, *Organization of Corporations, Symposium of South Carolina Corporation Law*, 15 S.C.L. Rev. 346 (1963) (footnotes omitted).
21. S.C. CODE ANN. §§ 12-751, -752, and -753 (Supp. 1968).
22. For a general discussion of the non-profit corporation and its problems, *see* H. OLECK, NON-PROFIT CORPORATIONS AND ASSOCIATIONS (1956).
23. 168 S.E.2d 306 (S.C. 1969).

the entry of a personal judgment against him was error since the profits involved were earned not by him but by the corporation operating under a valid corporate charter. Thus liability for such profits should be confined to the corporation.

The supreme court found it unnecessary to examine the efficacy of the corporate shell, yet it did pause to note that some real business transactions had been conducted by the corporation. Certain real estate and stock had been transferred to it; a bank account was maintained and checks with the corporate name printed thereon were issued against the account, signed, "Coastal Development Company of Conway, Inc. By: O. C. Graves, Jr." Yet no corporate stock had been issued as planned, no meetings ever held, and no officers elected.

Having noted all this, the court found it unnecessary to go further. The facts showed that Graves was estopped from denying the valid existence of the corporation for the purpose of holding Dargan personally liable. The court stated:

> This is in accord with the rule that a member or stockholder of a pretended corporation is estopped to deny the valid existence of the corporation for the purpose of holding the other stockholders or members personally liable on contracts entered into by them in carrying on the corporate business.[24]

One of the purposes of the Business Corporation Act was to do away with many of the knotty problems of *de jure* and *de facto* incorporation.[25] The Coastal Development Company of Conway, Inc. was incorporated prior to enactment of the new act, but the Reporter's Notes convincingly point out that the statute which Section 12-14.5 replaces[26] likewise implied that corporate existence began when the secretary issued the charter:

24. *Id.* at 310.
25. S.C. CODE ANN. § 12-14.5 (Supp. 1968) provides:
(a) The existence of the corporation shall begin as of the filing date of the articles of incorporation, that is to say, as of the date endorsed by the Secretary of State upon the original filed copy of these articles of incorporation, as provided by § 12-11.6.
(b) The fact that the articles of incorporation have been filed with the Secretary of State shall be conclusive evidence that all conditions required by chapters 1.1 to 1.14 of this Title to be performed by the incorporators have been complied with, that the corporate existence has begun, except when the State shall institute proceedings to
(1) Cancel or revoke the articles of incorporation;
(2) Enjoin any person from acting as a corporation within this State without being duly incorporated; or
(3) Compel dissolution of the corporation.
26. S.C. CODE ANN. § 12-59 (1962).

> Upon the filing of the declaration and receipt of the charter fee the Secretary of State shall issue to the incorporators a certified copy of their declaration which shall constitute the charter of the corporation authorizing it to begin business under the name and for the purposes indicated in the written declaration.[27]

The new statute merely pinpoints the exact moment when corporate existence begins and states who may challenge the validity of the incorporation.

The rule enunciated by the court in *Dargan*, however, deals with defective incorporations. The facts of the decision do not reveal in what respect, if any, the corporation was defective.[28] But even if it were defective in some respect, the decision seems to be correct. Certainly the cited rule is the majority rule and the one preferred by the authorities.

In essence where one has participated actively as an officer or director of a defectively organized corporation, he and his representatives are estopped to deny its valid existence for the purpose of holding the stockholders or other members liable to contribution as partners, or for the purpose of holding them personally liable on contracts made by him with the corporation.

A question might arise under S.C. CODE ANN. § 12-14.6 (Supp. 1968) as to whether or not a corporation was authorized to do business by reason of not having paid in the minimum capital required. The rule in such a case seems to be that, although the statute imposes joint and several liability on any person who has participated in a violation of the statute by doing business before that requirement, among others, is met, the statute does not make participants liable for *all* the debts of the corporation, but only those arising from their dereliction of duty.[29] It should be noted that piercing the corporate veil, or disregarding the corporate entity, is still permissible in the event of fraud, great injustice, or illegality, but none of these appear in the present case.

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27. *Id.*
28. *See generally* S. C. CODE ANN. § 12-14.5 (Supp. 1968). The new statute says specifically that the filing of articles is conclusive evidence of incorporation. If one relies on the statute, it is not necessary to look to the "corporation by estoppel" theory which should only come into play if the corporation is defective in some way. *See, e.g.*, Robertson v. Levy, 197 A.2d 443 (1964), noted in 43 N.C.L. REV. 209 (1964).
29. Royer v. Maib, 6 Wash. 2d 286, 107 P.2d 335 (1940).

IV. STOCKHOLDERS' MEETINGS

The year's most intriguing question was raised by the case of *Rogers v. First National Bank*.[30] This was a class action brought by stockholders to determine the validity of a proposed bank merger. The federal district court held that the plaintiffs, all of whom voted against merger and represented less than the one-third of outstanding shares necessary to block merger, had no standing to complain about or take advantage of alleged irregularities in the stockholders' meeting. "[O]nly the shareholders whose votes were counted in favor of the merger can now be heard to complain about . . . the alleged irregularities in the stockholders meeting . . . ."[31]

Among the irregularities asserted were: no record date was fixed for establishing which shareholders were entitled to vote; proxies were voted without being executed by the shareholder himself; and proxies were voted without being dated. The court agreed that such irregularities would violate the South Carolina Business Corporation Act if it were applicable. But the court held that state law does not apply to the merger proceedings in question. Involved are national banking corporations chartered under federal law. Their merger is therefore governed and controlled by federal statutes and regulations.

The district court conceded that if the plaintiffs were correct in their contention that state law applies to the merger proceedings when not in direct conflict with the federal statutes, the shareholders' election was indeed invalid. Unable to find any cases on point — the opinion was written without a single citation — the court decided to extend its temporary restraining order long enough for plaintiffs to appeal the decision.

The United States Court of Appeals for the Fourth Circuit affirmed.[32] Chief Judge Haynsworth found it unnecessary to decide whether state corporation law might supplement federal bank merger legislation when the two are not in conflict. South Carolina law requires that proxies be dated;[33] federal law requires only that proxies be "duly authorized in writing."[34] The ill

30. 297 F. Supp. 641 (D.S.C. 1969).
31. *Id.* at 646.
32. Rogers v. First National Bank, 410 F.2d 579 (1969).
33. S.C. CODE ANN. § 12-16.14(c) (Supp. 1968):
No proxy shall be valid after the expiration of eleven months from the date of its execution. Every proxy shall be dated as of its execution, and no proxy shall be undated or postdated.
34. 12 U.S.C. § 61 (1964).

sought to be cured by the South Carolina law was "the voting of a general proxy over a prolonged period."[35] Since the proxies were addressed specifically to the merger question and could have been no more than two months old, the statute, even if applicable, was not violated. Another contention of plaintiffs was that contrary to the statute[36] no record date more than ten days prior to the meeting was set by the board of directors for determining those eligible to vote. The court held this to be in conflict with the federal provisions:[37] "We find . . . an intention on the part of Congress to permit a bank desiring to merge to select any date, including the date of voting, as the record date."[38] The state law, being not merely supplemental to but in conflict with the federal requirements, may not be applied.

V. NEW LEGISLATION

Several special acts were passed authorizing the Secretary of State to restore charters to certain named corporations. The effect of these acts is to make the new Business Corporation Act applicable to these companies.

S.C. CODE ANN. § 12-18.6 (Supp. 1968) was amended to further provide for the filling of vacancies, however occurring, on the board of directors of business corporations. The amendment omits a part of the old statute requiring that vacancies created by an increase in the authorized number be filled only by the shareholders at a special meeting or at the annual meeting. This section was designed to prevent the current directors from packing the board. The new statute allows such a vacancy to be filled (until the next annual meeting) by the current board or by a special meeting of shareholders. Thus, packing could occur temporarily unless such a special meeting is called; yet the filling of the vacancy, which might be vital to the existence of the corporation, may take place expeditiously without calling a special meeting of all the stockholders.

35. 410 F.2d at 582.
36. S.C. CODE ANN. § 12-16.6(a) (Supp. 1968).
37. 12 U.S.C. § 215(a) (1964).
38. 410 F.2d at 582. The court also rejected the argument that stock held by a father as natural guardian for his children could not be voted by him alone in view of his failure to register guardianship under the Uniform Gifts to Minors Act, S. C. CODE ANN. §§ 62-401 to -411 (1962). According to the court this act "was designed to meet other problems, not to restrict the voting powers of fiduciaries with respect to stock registered in the name of the fiduciary." 410 F.2d at 581.

S.C. CODE ANN. §§ 12-20.1 to -20.2 (Supp. 1968) relating to the authority of domestic corporations to merge or consolidate were amended to provide for the manner of converting shares of each corporation involved. The distinction between the two types of amalgamation — consolidation and merger — which are often confused, is pointed out in the Reporter's Notes accompanying the act. This and subsequent sections of the act are the necessary legislative grants of authority needed before any merger can legitimately take place, and must be closely followed. The statutes as amended make it clear that a plan of merger, promulgated by the board of directors, may provide for the conversion of shares into shares, securities, or obligations, not only of the new corporation but also the parent or subsidiary of the new corporation. This change permits one of the participating corporations to continue its existence after the merger or consolidation while the old statute did not.

S.C. CODE ANN. § 8-103.1 (1962) relating to the number of shares one must own to be eligible for election as director of a bank was amended to clarify the applicability of the statute (it applies to banking corporations organized under South Carolina Law), to delete the requirements of stock ownership for managers and trustees of the bank, and to change the stockholding requirements for a director to the ownership of unencumbered stock in the bank of the aggregate value of five hundred dollars. The new provisions require the ownership of the qualifying shares to be in shares of the parent if the bank is a subsidiary corporation.

S.C. CODE ANN. § 8-125 (1962) relating to merger, consolidation, and transfer of assets of banks and trust companies was amended to include those organized under federal laws such as the National Banking Act. The statute as amended provides that "all applicable laws" relative to such actions first be complied with. The selling and transferring of assets of such a bank or company is newly included in the provisions. The amendment makes it clear that liability will shift to the resultant or transferee organization on the effective date of the transaction. Similarly, it is provided all rights and interests, real and personal, are deemed vested without deed or transfer, while rights of creditors are preserved.

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