South Carolina Law Review

Volume 18 | Issue 1 Article 11

1966

Corporations

Wilburn Brewer Jr.
Cooper, Gary, Nexsen & Pruet (Columbia, SC)

CORPORATIONS

WILBURN BREWER, JR.*

A. Incorporated Associations

Litigation in the corporate area was scant over the past survey period. In general, no new concepts were originated and the writer has felt little need to do more than briefly review the cases.

The power of the secretary of state to deny an application for a corporate charter was raised in *Commonwealth Inv. Co. v. Thornton.*[1] The plaintiff-appellants had applied for a charter to engage in the business of industrial banking. Shortly after the plaintiffs submitted their applications, the legislature repealed the section of the South Carolina Code relating to industrial banks,[2] and enacted a section[3] providing that persons formerly chartered as an industrial bank could "apply for and obtain a license to do business as a small loan company." The secretary of state denied the applications on the ground that the plaintiffs were trying to circumvent the requirements of the act regulating small loan companies. The plaintiff then brought an action for a writ of mandamus to compel the secretary of state to issue the charters. The lower court found that the plaintiffs had filed their applications just before the amendment on the theory that this would automatically entitle them to do business as a small loan company without meeting the requirements of the act regulating small loan companies.[4] The South Carolina Supreme Court, by way of dictum, agreed with the lower court that merely obtaining a charter as an industrial bank would not automatically entitle the plaintiffs to engage in business as a small loan company. However, the court refused to pass on the right of appellants to engage in the small loan business as the issue presented was not what rights are granted by a charter, but whether the secretary of state had discretionary power to deny an application for a charter.

* Associate, Cooper, Gary, Nexsen & Pruet, Columbia, South Carolina.

1. 244 S.C. 146, 135 S.E.2d 762 (1964).
2. S.C. ACTS & J. RES. 1962, p. 1882 repealing S.C. CODE ANN. § 8-232 (1962).
3. S.C. CODE ANN. § 8-739 (Supp. 1965).
4. S.C. CODE ANN. §§ 8-701 to -796 (1962).

Section 12-59 of the 1962 Code[5] provided that upon the filing of certain information, "the Secretary of State *shall issue*" a charter. From the words "shall issue" the court concluded that once the preliminary requirements were met, the secretary of state had no discretion to refuse to issue the charter.

Since section 12-59 has been repealed, the question arises whether a different result would be reached under the new Business Corporation Act.[6] Section 12-14.4[7] of the Business Corporation Act provides that the secretary of state shall determine whether the articles of incorporation contain the information required to be in the articles[8] and "upon making such determination, the Secretary of State *shall* file the articles of incorporation." (emphasis added.) From the word "shall," there can be no doubt but that the same result would have been reached under the new act (assuming of course that the articles contained the information now required).

Peeples v. Orkin Exterminating Co.,[9] was an action for breach of contract accompanied by a fraudulent act. The contract in question was one of a continuing nature, requiring the defendant to make periodic inspections of buildings it had treated for termites, and to render such further treatment or make such repairs as found necessary. The defendant, a domestic corporation, moved for a change of venue on the ground that it had no place of business or property in the county where suit was brought. Considering the word "property" within the meaning of the venue statute,[10] the court pointed out that property is a general term used to designate the right of ownership, and includes every subject upon which such a right can legally attach, and held that the contract in question, being of a continuous nature and in the possession of a resident of the county, constituted property within the county for venue purposes. The court relied on *Gibbes v. National Hosp. Serv., Inc.*[11] which held that an insurance policy in the hands of the insured was property within the meaning of the venue statute. Distinguished were

5. S.C. CODE ANN. § 12-59 (1962) (emphasis added.), repealed by S.C. ACTS & J. RES. 1962, p. 1996.
6. S.C. CODE ANN. §§ 12-11.1 to -24.9 (Supp. 1965).
7. S.C. CODE ANN. § 12-14.4 (Supp. 1965).
8. S.C. CODE ANN. §§ 12-11.1 to -11.6 (Supp. 1965).
9. 244 S.C. 173, 135 S.E.2d 845 (1964).
10. S.C. CODE ANN. § 10-421 (1962).
11. 202 S.C. 304, 24 S.E.2d 513 (1942).

Brown v. Palmetto Baking Co., [12] and *Hopkins v. Sun Crest Bottling Co.*[13] on the ground that the property therein involved was only "temporarily" located within the county.

The court also held that a person performing the function of a telephone answering service was not an agent of the corporation for purposes of the venue statute. As the person in question had no authority except to answer the telephone and take messages, this holding is not subject to criticism.

Szantay v. Beech Aircraft Corp.[14] was an action against an airplane manufacturer resulting from an airplane crash which occurred in Tennessee. The plaintiff was a citizen of Illinois, and the defendant was a Delaware corporation with its principal place of business in Kansas. The defendant moved to dismiss on the ground that it was neither incorporated nor doing business in South Carolina and was not therefore amenable to process in South Carolina. This raised the oft-ligated problem of *International Shoe Co. v. Washington*[15] of whether a corporation is present in a state for the purposes of obtaining jurisdiction. The specific question was whether the defendant's contacts with a distributor of its products in South Carolina were of such a nature as to subject the defendant to suit in this state. It appeared, among other things, that Beech set a sales quota for the distributor, controlled its sales policies, controlled the amount and type of advertising of its products by the distributor, controlled the accounting system of the distributor insofar as sales of its product were concerned, and that Beech personnel conducted training programs in South Carolina for personnel of the distributor. In short, the court found that Beech exercised virtually complete control over the distributor, and held that Beech was doing business in South Carolina through its distributor to such an extent as to be amenable to process in this state. On appeal,[16] the fourth circuit had little more to say than that the facts warranted the conclusion reached by the district court.

12. 220 S.C. 38, 66 S.E.2d 417 (1951). The truck used to make deliveries from another county was not property in the county under the venue statute.

13. 228 S.C. 287, 89 S.E.2d 755 (1955). Crates and bottles which were removed from the county after consumption of the drinks were not property of the beverage company within the meaning of the statute.

14. 237 F. Supp. 393 (E.D.S.C. 1965), *aff'd.*, 349 F.2d 60 (4th Cir. 1965).

15. 326 U.S. 310 (1945).

16. Szantay v. Beech Aircraft Corp., 237 F. Supp. 393 (E.D.S.C. 1965), *aff'd.*, 349 F.2d 60 (4th Cir. 1965). The question, whether S.C. CODE ANN. §

B. Unincorporated Associations

In *Bouchette v. International Ladies Garment Workers Union*[17] the plaintiff brought an action against the union to recover damages resulting from a strike. The action was brought under the provisions of section 10-215 of the South Carolina Code which provides that an unincorporated association may be sued under the name and style by which it operates, without naming the individual members. The defendant argued that since the statute did not give an unincorporated association a corresponding right to sue in its own name, and since the defendant did not have such a right at common law, the statute deprived defendant of equal protection of the laws and was, therefore, unconstitutional.

The court sidestepped the constitutional issue by holding that by necessary implication, the statutes dealing with unincorporated associations confer the right of an unincorporated association to maintain a suit in the name and style under which it operates. Specifically the court pointed out that an unincorporated association is recognized under a common name as a party against which suit may be brought,[18] as capable of having an agent upon whom process may be served,[19] as an entity against which a judgment may be obtained and against whose property an execution may issue to satisfy such judgment[20] and as having status to register trademarks and to bring actions for the protection thereof.[21]

The authorities on the point decided are in conflict[22] and the court could have easily decided this case either way. Practitioners will no doubt find the holding of the case convenient and use-

---

10-214 (1962) prevented the action from being maintained in this state, was presented on appeal.

This section reads:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) By any resident of this State for cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

The question involved a conflict of state and federal policies. For a discussion of this point see 17 S.C.L. REV. 631 (1965).

17. 245 S.C. 586, 141 S.E.2d 834 (1965).

18. S.C. CODE ANN. § 10-429 (1962).

19. *Ibid.*

20. S.C. CODE ANN. § 10-1516 (1962).

21. S.C. CODE ANN. §§ 66-201 to -214 (1962).

22. See 6 AM. JUR. 2d *Associations and Clubs* § 52 (1963); 7 C.J.S. *Associations* § 35 (1937).

ful in many cases. However, the case does raise some questions. For example, who is bound by the decision as far as the members of the association are concerned when a suit is brought under the name of an unincorporated association?[23]

C. Legislation

Several items of interest in the corporate field were enacted during the past survey period. A statute of interest not only in the corporation field, but also to estate planners is Act No. 178. The act reads:

> Certain survivors to be treated as owners of stock and other securities.—A corporation may treat as absolute owner of shares or other securities the survivor or survivors of persons to whom the same have been or may have been issued with the words 'as joint tenants with the right of survivorship' or 'as joint tenants with the right of survivorship and not as tenants in common' following the names, upon the death of one or more of such persons.[24]

It is to be noted that the statute does not create a joint tenancy as such where the appropriate words are used. It only provides that a corporation may treat such a survivor as absolute owner. It could be argued that the statute is designed only for the protection of the corporation, and that it does not serve to create a joint tenancy with right of survivorship. Such a result would leave open the question of whether code section 19-55, providing for the distribution of property held in joint tenancy as if the same were held by tenancy in common, applied.[25] However, it would appear more probable that a joint tenancy with right of survivorship would be created if the statutory words were used. The statutory wording would evince the clearest intent to establish a joint tenancy with right of survivorship, and it has been held that section 19-55 does not prevent the creation of a right

23. For a discussion of this and related problems see 6 AM. JUR. 2d *Associations and Clubs* §§ 52-54 (1963); 7 C.J.S. *Associations* § 35 (1937).

24. S.C. ACTS & J. RES. 1965, p. 243.

25. When any person shall be at the time of his death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant and shall be distributable as if the same were a tenancy in common.
S.C. CODE ANN. § 19-55 (1962).

of survivorship where the same is expressly created by contract or otherwise.[26]

Section 12-23.15[27] of the Business Corporation Act was amended to provide for an additional penalty for foreign corporations doing business in South Carolina without authority. In its original form, the statute provided that a foreign corporation conducting business in this state without authority would be liable for all fees, penalties, and franchise taxes for the years during which it did business in this state without authority. The amendment provides for a fine of ten dollars per day for each day the corporation fails to pay the fees, penalties and franchise taxes which are levied on such corporations for doing business in this state.[28]

The provision of the amendment appears to be a carryover from the old corporation act which imposed a similar penalty for failure to file required papers and failure to pay any of the fees required of foreign corporations.[29] Under the old act, it was held in *State v. Liggett & Meyers Tobacco Co.*[30] that the two year statute of limitations imposed by section 10-145[31] would apply to any action to recover the penalty. An attempt was made in the *Liggett* case to distinguish between the use of the word "penalty" as appeared in the state of limitations and the use of the word "fine" as appeared in the act imposing the fine. The court rejected this distinction and held that the statute of limitations applied. In view of the holding of this case, the two year statute of limitations should also apply to the present statute which calls for a "fine."[32]

Neatly tucked away in the General Appropriations Act of 1965 is a provision amending the tax laws to require corporations

26. See, *e.g.*, Hawkins v. Thackston, 224 S.C. 445, 79 S.E.2d 714 (1954); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953).

27. S.C. CODE ANN. § 12-23.15 (Supp. 1965).

28. S.C. ACTS & J. RES. 1965, p. 232.

29. S.C. ACTS & J. RES. 1962, p. 1996 repealing S.C. CODE ANN. § 12-737 (1962).

30. State v. Liggett & Meyers Tobacco Co., 171 S.C. 511, 172 S.E. 857 (1933), *appeal dismissed*, 291 U.S. 652 (1934).

31. S.C. CODE ANN. § 10-145 (1962).

32. This conclusion is buttressed by the fact that the title of the amendment refers to a penalty. The title reads:

> An Act to amend item (a) of Section 13.15 (sic) of Act No. 347 of 1962, relating to foreign corporations doing business in this state without authority, so as to provide an additional *penalty* for such corporations.

S.C. ACTS & J. RES. 1965, p. 232. (emphasis added.)

to file estimated tax returns.[33] Under the new provisions, a corporation is required to file a tax return estimating its taxes for the coming year. The return is to be filed during the third month of the taxable year. Amendments making adjustments may be filed in the sixth, ninth, or thirteenth month after the beginning of the taxable year. Under the statute, estimated taxes will be prepaid. However, an installment plan is provided and no interest is charged for using the installment plan.

33. S.C. ACTS & J. RES. 1965, p. 330.