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Hugh L. Sowards

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I. NEW LEGISLATION

Four significant amendments to Florida's corporate code were adopted at the 1967 session of the Florida Legislature. First, both filing fees and taxes on corporations for profit were increased.[1] Second, with respect to mergers and consolidations of domestic and foreign corporations, payment for shares in new or constituent corporations may now be made with "other property or assets" of the consolidated or merged corporation.[2] This was a needed addition, for the media of payment was formerly limited to "cash, bonds, notes or stock." Third, section 608.55, which voids certain transfers by a corporation when it is insolvent or its insolvency is imminent, has been amended to make it clear that such transfers are not void if made for a valuable consideration to a person who has "no notice or reasonable cause to believe" that such a transfer would effect a preference.[3] Finally, section 608.59, which prohibits unincorporated persons from operating a business for profit under trade names or styles which suggest incorporation unless accompanied by the words "not incorporated," has been amended to include within the prohibition the word "Incorporated" and its abbreviation "Inc."

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* Professor of Law, University of Miami.

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1. FLA. STAT. § 608.05(2)(a) (1967) was amended to increase filing fees from $5.00 to $10.00. FLA. STAT. § 608.052(2)(b) (1967) was amended to increase the fee for certified copies of corporate documents from $3.00 to $5.00. Similarly, with the exception of corporations organized with no par value stock, filing taxes have been increased. *See* FLA. STAT. § 608.05 (3) (4) (1967), under which the minimum filing tax is now $20.00. Companion amendments effected increases in filing fees for domestic and foreign non-profit corporations. FLA. STAT. § 617.015, 617.11 (1967). Fees for profit corporations for filing a certificate designating a place for service of process have been increased from $1.00 to $2.00. FLA. STAT. § 47.36 (1967). *See also* FLA. STAT. § 47.42 (1967), which has been amended to increase fees for furnishing information contained in certificates filed under FLA. STAT. § § 47.34 and 47.36 (1967) to $3.00.

2. FLA. STAT. § § 608.20(1) and 608.21(1) (1967).

3. The former FLA. STAT. § 608.55 (1965) did except transfers "in the hands of a purchaser for a valuable consideration without notice."

Certain other statutory changes affecting corporations are also worthy of note. Among them is a 1967 amendment to the section governing political contributions.[4] Formerly, that section prohibited political contributions by corporations. The amendment permits corporations to "do any act or thing that an individual may do." Inasmuch as individuals, with certain exceptions, may make maximum political contributions of 1,000 dollars, presumably certain corporations are now also free to contribute that amount.[5]

Part II of the corporate code, enacted in 1963, deals with close corporations.[6] A pertinent section of this legislation provides that corporate existence is not impaired by the acquisition of all the shares of stock by one or two persons. Furthermore, such a one or two man corporation possesses the "managerial boards or bodies or any capacities, powers or authority which it would have possessed with three or more stockholders."[7] But another section provided that the articles of incorporation of such a close corporation could provide for management by "not less than three stockholders." Read together, these two sections were paradoxical. Presumably, the 1967 amendment eliminating the above language was intended to cure this defect.[8]

Section 865.09(2) provides that persons engaging in business under a fictitious name must register that name with the clerk of the circuit court of the county where the principal place of business is located.[9] But the statute formerly excepted corporations from its purview. In 1967 the statute was amended to remove this exception. Does this mean that all corporations must register? Presumably not. It has always been the writer's view that, even before the amendment, a corporation operating a business under a name other than its corporate name was required to register under the fictitious name statute. Three opinions of the Attorney General also take that position.[10] On the other hand, it is the writer's view that even after the amendment a corporation operating a business in its *corporate* name is not required to register. The purpose of the fictitious name law is to put persons on notice. However, filing the articles of incorporation with the Secretary of State constitutes public notice. What, then, was the reason for the amendment? Presumably, it was to clear up

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4. FLA. STAT. § 104.091 (1967).

5. *See* FLA. STAT. § 99.161(2)(a) (1967). The exceptions are contained in FLA. STAT. § 99.161(1) (1967).

6. For a discussion of this legislation, see Dickson, *The Florida Close Corporation Act: An Experiment That Failed*, 21 U. MIAMI L. REV. 842 (1967).

7. FLA. STAT. § 608.0101 (1967).

8. FLA. STAT. § 608.0102 (1967).

9. *See* FLA. STAT. § 865.09 (1967), under which advertisement of intention to register and publication are conditions precedent to operation.

10. *See* 50 FLA. ATT'Y GEN. OP. 379 (1950) and 51 FLA. ATT'Y GEN. OP. 472 (1951); *see also*, 68 FLA. ATT'Y GEN. OP. 2 (1968) which again reiterates and affirms this position.

existing confusion on the matter by codifying the aforementioned opinions of the Attorney General.[11]

Two proposed pieces of legislation which should have been enacted were not adopted by the legislature. A bill introduced in the Florida Senate would have permitted incorporation by less than three persons.[12] In view of the common practice of the incorporating attorney who uses himself and two nominees as incorporators with subsequent assignments to one or two real parties in interest, it seems only a little short of absurd to insist on three incorporators.[13]

The other needed piece of legislation would have permitted the merger or consolidation of Florida corporations with corporations of other countries.[14] As the law now stands, Florida corporations may consolidate or merge with corporations "organized under the laws of any other state, territory, possession or jurisdiction of the United States . . . ."[15] Presumably, then, a Florida corporation does not have the power to merge with a corporation in the Republic of Panama or even with one in the Commonwealth of Puerto Rico. In view of the extensive amount of Latin American business transacted by Florida corporations, legislation permitting such business combinations should be enacted. Of course, it is arguable that if the surviving corporation is a corporation of another country, the Florida courts would lose jurisdiction, a development which might jeopardize the rights of shareholders. But the aforementioned bill provided for this contingency: "[I]n the case of a merger or consolidation with a corporation or corporations of any other country which is neither a territory nor a possession of the United States nor under the jurisdiction of the United States the resulting entity shall be a Florida corporation."[16]

11. In response to an inquiry by the author on this point, the most recent opinion of the Attorney General substantiated the author's belief by answering the following question in the negative:

> Must a corporation doing business in the name under which it was incorporated and licensed to do business register under the provisions of the fictitious name act as amended by chapter 67-209? 68 FLA. ATT'Y GEN. OP. 2 (1968).

12. Fla. S. 1499, 41st Sess. (1967).

13. Paul Carrington, one of the draftsmen of the Texas Business Corporation Act, was asked this question in a panel discussion: "Why didn't Texas permit one man to incorporate like Wisconsin?" Mr. Carrington's answer:

> We debated it and personally I would say that from the standpoint of corporate law I don't see any real objection why we could not permit it. We decided that it was an innovation that had not been tested, that the general historical idea of having at least three people was pretty well embedded in everyone's minds. *Panel on Arkansas Law*, 10 ARK. L. REV. 46, 47 (1956).

14. Fla. S. 1490, 41st Sess. (1967).

15. FLA. STAT. § 608.21(1) (1967).

16. Under FLA. STAT. § 613.07 (1967), a "Foreign corporation is defined as: A corporation organized under the laws of any other state or territory *or of any other country.*" [Italics added]. FLA. STAT. § 613.02 (1967) grants to foreign corporations authorized to do business in Florida the "same rights, powers and privileges" as Florida corporations. Reading these two sections together, it is arguable that a Florida corporation may consolidate or merge with a non-U.S. corporation under existing legislation. But in view of FLA. STAT. § 608.21 (1967) the argument is of doubtful validity. *See also* FLA. STAT. § 608.13(8)(b)

The bills will be reintroduced and, hopefully, enacted at future legislative sessions.

II. RECENT DECISIONS

A. *Corporate Formation*

In two cases the Florida Bar sought and obtained injunctions against individuals who had formed corporations and prepared corporate documents but who were not members of the Florida Bar. In the first of these cases[17] the Supreme Court of Florida decided that the preparation of certificates of incorporation and related documents constituted the practice of law. Respondent, an accountant, had charged a fee for such services and had advertised in newspapers that he was a specialist in the incorporation of businesses. In the second case,[18] respondent, a business consultant, formed two corporations for friends and for his own family. No fee was charged for his services. Nevertheless, the court concluded that neither the absence of compensation nor the close personal relationship validated their actions in forming these corporations.

B. *Separate Corporate Entity Privilege*

In spite of the fact that there is some defect in the process of incorporating, one who has dealt with the associates *as a corporation* may nevertheless be estopped to deny corporate existence. This situation arose in a recent Florida case.[19] In an action by the purchasers for specific performance of a contract for the sale of real property the court held that where the vendor knew at the time the agreement was executed that the purchaser had not filed articles of incorporation[20] but nevertheless contracted with that purchaser under its corporate name, the vendor could not validly object that the purchaser had not been duly incorporated.

Numerous cases have arisen where a creditor, finding the corporate treasury empty, seeks to hold the shareholders individually liable. He asks the court to brush aside the corporate entity, to "pierce the corporate veil." Frequently the contest arises when one individual owns all of the shares. But the Florida courts have repeatedly held that the corporate veil will not be penetrated either at law or in equity unless it is shown that the corporation was organized or employed to mislead

(1967), granting the power to Florida corporations to "Purchase the corporate assets of any other corporation . . . ."

17. Florida Bar v. Town, 174 So.2d 395 (Fla. 1965). *See also* FLA. STAT. § 454.23 (1967).

18. Florida Bar v. Keehley, 190 So.2d 173 (Fla. 1966).

19. 330 Michigan Ave., Inc. v. Cambridge Hotel, Inc., 183 So.2d 725 (Fla. 3d Dist. 1966).

20. "When the articles of incorporation have been filed in the office of the secretary of state and approved by him and all filing fees and taxes have been paid, the subscribers thereof, their successors and assigns shall constitute a corporation." FLA. STAT. § 608.04 (1967).

creditors or to work a fraud upon them. Moreover, the fact that one or two individuals own all of the stock does not in and of itself spell abuse of the corporate entity privilege.[21] In this connection, it should be noted that the courts are far less sympathetic when the plaintiff is a voluntary contract creditor than when he is an involuntary tort claimant. After all, unless the corporate situation is misrepresented to him, the creditor contracts with his eyes open. He could always obtain a personal guarantee by the shareholders. Accordingly, in a case where *D* owned ninety-eight percent of the stock, but where the dealings between that corporation and *P*, the creditor, were "entirely corporate" and where no misrepresentation was shown, it is submitted that Judge Barns correctly refused to pierce the corporate veil and allow *P* to satisfy his judgment from *D*'s personal assets.[22] Two other recent Florida cases have reached the same result on similar reasoning in situations involving liability on corporate leases.[23]

C. *Pre-Incorporation Agreements*

Before the corporation begins its legal existence, the promoter must perform a variety of necessary services. In short, he must turn an idea into a tangible reality. The performance of his services usually spells both expense to the promoter and value to the future corporation. Additionally, such services frequently involve third parties who enter into contracts with the promoter relative to the enterprise to be organized. When the corporation comes into existence, the problem of rights and duties concerning these pre-incorporation arrangements is raised. Frequently the contest takes the form of a suit by the third person against the promoter or the corporation. The legal stumbling block from the standpoint of a suit by the third person against the corporation is that the corporation cannot properly be said to have ratified the promoter's contract. Ratification implies the existence of a principal (a ratifier) at the time of the contract, and, of course, the corporation was not in existence at that time. But courts have overcome this objection under certain circumstances. The corporation is said to have *adopted* the contract by expressly or impliedly accepting its benefits with full knowledge. But knowledge acquired by corporate officers while acting for themselves and not for the corporation will not be imputed to the corporation. Such was the effect of the holding in a recent Florida case.[24]

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21. *See, e.g.*, Advertects, Inc. v. Sawyer Indus., Inc., 84 So.2d 21 (Fla. 1955).

"The acquisition, heretofore or hereafter, of all the shares of stock of a corporation by one person or by two persons is hereby declared to violate no policy or provision of the laws of this state." FLA. STAT. § 608.010(2) (1967).

22. Sirmons v. Arnold Lumber Co., 167 So.2d 588 (Fla. 2d Dist. 1964).

23. Soclof v. State Road Dep't, 169 So.2d 510 (Fla. 1st Dist. 1964); Tiernan v. Sheldon, 191 So.2d 87 (Fla. 4th Dist. 1966). *Cf.*, Am. Mortgage & Safe Deposit Co. v. Rubin, 168 So.2d 777 (Fla. 3d Dist. 1964).

24. C. & H. Contractors, Inc. v. McKee, 177 So.2d 851 (Fla. 2d Dist. 1965).

When the third person seeks to hold the promoter personally liable on the contract, it has been held consistently that, inasmuch as the promoter is not an agent of the corporation to be formed, he is liable unless the party with whom he contracts has agreed to look to the corporation rather than to him for satisfaction. Put another way, a person who acts as an agent for a non-existent principal is himself regarded as a principal. This concept was brought into sharp focus in the Florida case of *Abel v. Dooley*,[25] where lessors who leased realty to a corporation without knowledge that the corporation had not yet been incorporated were permitted to recover rent from the promoter after incorporation.[26]

D. *Authority of Directors and Officers*

When *P* deals with *ABC, Inc.* through one of its officials, the question of whether the contract is binding upon *ABC, Inc.* may arise. In the past, Florida has adhered to two basic tests on this point: (1) Is the contract within the corporation's chartered powers? (2) Is the contract entered into by an agent of the company who is properly authorized, or has the contract been ratified by the company?[27] These tests were applied in a recent Florida case where, although the corporation could not issue construction loans under its charter powers, it properly issued a mortgage commitment to a contractor for proposed construction. The court held that the vice president charged with the responsibility of procuring business for the corporation did have authority to promise the contractor that the corporation would obtain a construction loan for him if he was unable to do so.[28]

E. *Corporate Powers*

Although the corporate code specifies that a corporation can be organized "for any lawful purpose," other statutes may prohibit corporations from engaging in certain lines of endeavor, such as law, dentistry, accounting and architecture.[29] In *Nicholson Supply Co. v. First Federal Savings & Loan Ass'n*,[30] a complaint was filed by a plaintiff corporation through its president, but the complaint was not signed by an attorney

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25. 185 So.2d 491 (Fla. 2d Dist. 1966).

26. One eminent scholar has suggested that:

> [I]t seems more nearly to correspond with the intentions of the parties to suppose that when the corporation assents to the contract, it assents to take the place of the promoter—a change of parties to which the other side of the contract assented in advance. There would then be a novation which could discharge the promoter at the same time the corporation assumed the obligation.

1 S. WILLISTON, CONTRACTS § 306 (1936).

27. *See, e.g.*, Painter Fertilizer Co. v. Boyd, 93 Fla. 354, 114 So. 444 (1927).

28. Florida Capital Corp. v. Bissett Constr., Inc., 167 So.2d 595 (Fla. 2d Dist. 1964).

29. *See* Note, *Right of Corporation to Engage in Business, Trade or Activity Requiring License from Public*, 165 A.L.R. 1098 (1946). *See also* FLA. STAT. § 621 (1967) (Professional Service Corporation Act).

30. 184 So.2d 438 (Fla. 2d Dist. 1966), *noted in* 21 U. MIAMI L. REV. 889 (1967).

as required by the Florida Rules of Civil Procedure in effect at the time of the filing of the case. The court held that the complaint was a nullity, on the ground that although an individual may represent himself in court without the necessity of employing an attorney, a corporation may not do so. The decision is in accord with an established line of authority. The point is that a corporation cannot practice law and thus can appear in court in its own behalf only through the agency of a natural person, *i.e.*, a licensed attorney.

Since the celebrated *Jacksonville* case[31] it has been clear in Florida that corporations have the implied power to do acts necessary or reasonably incidental to the performance of their authorized functions. Thus, it was held in a recent Florida case that a corporation had the implied power to enter into a managerial employment contract.[32] The situation was intensified, however, by the fact that the plaintiff-director had participated in setting his own compensation.[33] But in view of the fact that all interested persons participated in the drafting and execution of the contract and had fully recognized it for a period of two years, the court concluded that the contract was ratified and affirmed by the corporation.

F. *Unlawful Transfers to Officers, Directors and Stockholders*

It is axiomatic that a financially embarrassed corporation may not lawfully transfer any of its property to its officers, directors or shareholders if such transfer would jeopardize the position of primary creditors. A Florida statute so provides.[34] This statute has recently been the subject of two significant interpretations.

In the first of these cases,[35] plaintiff corporation conveyed certain of its real property to a stockholder and former director. These conveyances were made at a time when the corporation was in straitened financial circumstances. In a subsequent attempt to have the conveyances set aside, the corporation relied primarily upon that portion of the aforementioned statute which reads:

> No corporation which shall have *refused* to pay any of its notes or obligations when due, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. [Italics added]

In refuting this argument, the court stated: "There was no showing, however, that plaintiffs had absolutely refused to pay these debts. 'Refused'

31. Jacksonville, M. P. Ry. & Nav. Co. v. Hooper, 160 U.S. 514 (1896).
32. Collins v. Collins Fruit Co., 189 So.2d 262 (Fla. 2d Dist. 1966).
33. *See* Flight Equip. & Eng'r Corp. v. Shelton, 103 So.2d 615 (Fla. 1958).
34. FLA. STAT. § 608.55 (1967).
35. Venice East, Inc. v. Manno, 186 So.2d 71 (Fla. 2d Dist. 1966).

and 'failed' are not necessarily synonymous." The case is in accord with the majority position on this point.[36]

In the second case involving Florida Statute section 608.55,[37] a corporation, while under an obligation to pay a bondholder, borrowed further funds from a bank by means of a note. One of the endorsers of the note was also an officer and director of the corporate borrower. Notwithstanding a demand by the bondholder and refusal by the corporation, it proceeded to pay its obligation on the note. The court held that such payment at least indirectly benefited the officer and director by discharging the note obligation, and that this rendered him individually liable to the bondholder within the meaning of section 608.55.[38] The argument was advanced that recovery against an officer or director under the statute is subject to proof of insolvency of the debtor corporation, or that it was in danger of immediate insolvency, plus a preferential treatment to the officer or director. In refuting this argument, the court again relied heavily on statutory interpretation in New York, the state of origin of the Florida statute. That construction has permitted recovery after the corporate debtor "has *refused* to pay an obligation, by demonstrating that after such refusal the corporation either directly or indirectly benefited an officer or director by discharging an obligation."[39]

G. Shareholders' Actions

Actions by shareholders may take one of three forms: (1) individual action; (2) derivative action; (3) representative or class action. The shareholders' derivative action differs from the individual and the class action in that the purpose of the derivative action is to obtain a judgment in the corporation's favor. In other words, it is an action which the corporation itself would normally bring but for some reason does not, and the shareholder undertakes to do so. On the other hand, individual and class actions assert a cause of action *against* the corporation. A Florida court recently had occasion to consider this difference in definition as a decisive factor in its decision.[40] The stockholder's complaint attacked the directors' handling of corporate affairs. Thus, the court correctly held that it was an attempt "to state a cause of action classically in the right of the corporation."[41] Being a derivative action, it was governed by the Florida

36. *Id.* at 75. FLA. STAT. § 608.55 (1967) was patterned after § 15 of the New York Stock Corporation Law. New York courts have placed a similar construction on this language. *See, e.g.*, Swan v. Stiles, 94 App. Div. 117, 87 N.Y.S. 1089 (1904).

37. Alberts v. Schneiderman, 182 So.2d 50 (Fla. 3d Dist. 1966).

38. The last sentence of FLA. STAT. § 608.55 (1967) provides as follows:

> The directors or officers of a corporation who shall violate . . . any provision of this statute shall be personally liable to the creditors and stockholders of the corporation of which they shall be directors or officers to the full extent of any loss such creditors and stockholders may respectively sustain by such violation.

39. Alberts v. Schneiderman, 182 So.2d 50, 52 (Fla. 3d Dist. 1966).

40. Citizens Nat'l Bank v. Peters, 175 So.2d 54 (Fla. 2d Dist. 1965).

41. *Id.* at 56.

"strike suit" statute, which requires the posting of security if the "plaintiff or plaintiffs hold less than five percent of the outstanding shares . . . unless the stock held by such plaintiff or plaintiffs shall then have a fair value in excess of fifty thousand dollars."[42] Inasmuch as plaintiff did not qualify under either of these criteria, the court correctly required him to post security before proceeding further in the cause.

Will a court of equity appoint a receiver upon the request of a minority shareholder? Generally speaking, such drastic action is taken only as a last resort. In the past, Florida courts have held that unless the corporation is insolvent or unless actual fraud upon the rights of the minority shareholder (or creditor), which may reasonably spell imminent danger of loss of corporate assets and seriously threaten corporate existence, is clearly shown, a receiver should not be appointed.[43] This view was followed in a recent Florida case where no such factors were present except as alleged in unsworn allegations of a minority shareholder's complaint.[44]

42. FLA. STAT. § 608.131(4) (1967).
43. *See* McAllister Hotel, Inc. v. Schatzberg, 40 So.2d 201, 203 (Fla. 1949).
44. Conlee Constr. Co. v. Krause, 192 So.2d 330 (Fla. 3d Dist. 1966).