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Notes

INDIVIDUAL LIABILITY OF OFFICERS AND AGENTS ON CONTRACTS MADE FOR CORPORATIONS

Domestic Corporations

A domestic corporation is required by the act of April 29, 1874, P. L. 76 to record the certificate of incorporation "in the office for the recording of deeds in and for the county where the chief operations are to be carried on". Such a requirement has been held to be a condition precedent to the recognition of its corporate existence.¹

The question arises as to what the effect is of a failure to comply with the act, insofar as the individual liability of officers and agents of such a corporation is concerned.

It was held in *Guckert v. Hacke* 159 Pa. 303 (1893), that, "as exemption from liability is one of the chief characteristics distinguishing corporations from partnerships and unincorporated associations, incorporators who transact business upon the strength of an organization which is materially defective are individually liable as partners, to those with whom they have dealt in ignorance of incorporation".² The reason for the holding is clear: although it is true that they (incorporators) did not intend to become partners, they did engage in a joint enterprise as an associated body. As the law knows but two forms of associations for business or trade—corporation and partnership—and as they are not a corporation they must be a partnership.³

A plaintiff, however, in dealing with defendants as a corporation may "estop" himself from claiming against them in any other capacity, even though they failed to record their charter.⁴ As to what would be sufficient recognition of corporate existence to raise an "estoppel" it was held, that "he must have knowledge of the existence of the charter or something to put him on inquiry".⁵

¹*Guckert v. Hacke*, 159 Pa. 303 (1893); *Braddock Boro. v. Penn. Water Co.*, 189 Pa. 379 (1899).

²*New York etc. Bank v. Crowell*, 177 Pa. 313 (1896).

³*Machen Corp.* Vol. I, p. 253.

⁴*Cochran v. Arnold*, 58 Pa. 399 (1868); *Spahr v. Bank*, 94 Pa. 429 (1880).

⁵*Guckert v. Hacke*, 159 Pa. 303 (1893),

In this connection, it is necessary to distinguish between the liability of agents expressly designated as such and of incorporators acting as agents, not because of express authority, but because of the implied authority vested in them by reason of their position as incorporators. It is clear from the foregoing principles that if A should deal with B, an incorporator, for C, the contemplated corporation, "with knowledge of the charter or something to put him on inquiry", his only recourse would be against C, the other party to the contract. B would be exonerated entirely. If, under the same facts, B should happen to be an agent "expressly designated" as such, not an incorporator nor being otherwise connected with the proposed corporation, the same result would follow, for A's knowledge of the charter would have the effect of limiting his recourse to one against C only. If A should deal with B, an incorporator, for C, without knowledge of their charter or claim to corporate existence, B will be responsible as a partner of the other incorporators, due to the fact that he was an incorporator. But if, under the same facts, B were not an incorporator but merely an agent "expressly designated", A's remedy would be limited against those who compose C, as partners. B will be exempted from liability, since by the case of *Guckert v. Hacke, supra*, the liability as partners is imposed on only those *incorporators* who transact business upon the strength of an organization which is materially defective.

Foreign Corporations

On April 22, 1874, P. L. 108, the Legislature of Pennsylvania passed an act to carry into effect Section 5, Art. 16 of the State Constitution which provides that "no foreign corporation shall do any business in this state without having one or more places of business, and authorized agent or agents in the same upon whom process may be served" in an action against such corporation. By section 2 of the act it is provided that "it shall not be lawful for any foreign corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of State a statement showing the title and object of the corporation, the location of its office, and the name of the authorized agent".⁶

⁶For the constitutionality of the act, see *Lafayette Ins. Co. v. French*, 18 How. 407.

The purpose of the Act is to bring foreign corporations doing business in this state within the reach of legal process, and has the effect of rendering such corporation incapable of bringing any action in the courts of this Commonwealth, which might have arisen out of any business transacted in this state before compliance with the act.⁷ As far as the citizens of Pennsylvania are concerned, however, the courts have held that they may sue the corporation and that the corporation will not be allowed to set up, as a defense, its non-compliance with the act.⁸

The act, furthermore, makes it a misdemeanor for agents of a foreign unregistered corporation to transact business in this commonwealth and prescribes a penalty for such violation. The courts, nevertheless, have held that the penalty imposed by the act is not exclusive but is in addition to the common law liability of agents to the person with whom he dealt.⁹ But the courts have never gone so far as to hold that the liability of officers, although they might at the time have been acting as agents for the corporation, is that of partners.

In *Stephenson v. Dodson*, 36 Pa. Super. Ct. 343, (1908) it was held, that incorporators and members of a foreign, unregistered corporation are not liable as partners for the debts of the corporation unless there be apt, personal, contractual words of their own in the written contract.¹⁰ On the other hand, as to the personal liability of agents, they have said that "one who assumes to act for a foreign corporation must be held chargeable with knowledge of its failure to comply with the act and will be personally liable on the contract which he assumes to enter into on its behalf". This, apparently, is on the theory of breach of implied warranty of authority as having acted for a non-existent principal.¹¹

The decision in the last mentioned case does not in any manner conflict with the former exposition of the law. In the former cases, plaintiff dealt with the agent but relied

⁷*Swan v. Ins. Co.*, 96 Pa. 37 (1880); *Delaware R. Q. etc. Co. v. Pass. Ry.*, 204 Pa. 22-25 (1902).

⁸Cases *supra*.

⁹*Lasher v. Stimson*, 145 Pa. 30 (1892); *Raff v. Isman*, 235 Pa. 347 (1912).

¹⁰Following *Bond v. Stoughton*, 26 Pa. Super. Ct. 486 (1904).

¹¹*Lasher v. Stimson supra*; and it makes no difference that he acted honestly, *Eichbaum v. Irons*, 6 W. & S. (Pa.) 67 (1843); *Kroeger v. Pitcairn*, 101 Pa. 311 (1882).

on the liability of the corporation, the existence of which he at the time was aware. Therefore, it was just that he should be required to enforce that liability against the other real party to the contract, and not against the agent. In the last case, *Lasher v. Stimson* 145 Pa. 30,¹² plaintiff did not know of the existence of the corporation, he merely knew that the agent was acting for a company, and as the company was not in existence but a corporation, and as he did not look forward to corporate liability, there is no reason why he should be denied the right to hold the agent personally liable as having assumed to act for a principal not in existence at the time.

On June 8, 1911 P. L. 710¹³ the Legislature passed another act repealing the act of 1874, referred to. This later act provides that "Every such corporation (meaning, foreign corporation) before doing any business in this Commonwealth, shall appoint, in writing, the Secretary of the Commonwealth * * * to be its true and lawful agent, upon whom all lawful process in any action or proceeding against it, may be served". Section 4 provides: "that the failure of any such corporation to file the power of attorney and statement aforesaid, with the Secretary of the Commonwealth, shall not impair or affect the validity of any contract with such corporation, and actions or proceedings at Law or in Equity may be instituted and maintained on any such contract; but no such action shall be instituted or recovery had by any such corporation, on any such contract, * * *, in any of the courts of this Commonwealth etc., until such corporation complies with the provisions of this act". The act further provides that a payment of \$250.00 before institution of an action, shall give the corporation the right to institute such an action, although the contract was entered into without compliance with the act.

¹²Notice that the courts make a distinction between the generic term "company" and the specific term "corporation".

¹³Amended by the act of April 22, 1915, P. L. 170. Amendment not material to the discussion. As to the unconstitutionality of the act of 1874 as applied to interstate commerce: see *Mearchon & Co. v. Lumber Co.*, 187 Pa. 12 (1898), quoted with approval in *M. Galvanizing Co. v. McInnes Co.*, 272 Pa. 561 (1922). In *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914) it was held that the conditions imposed by a similar act of S. Dakota operated as an unreasonable restraint of interstate commerce, and as such were unconstitutional as far as applicable to it.

This act somewhat modifies the status of an unregistered foreign corporation, validating its contracts, subjecting it to suits in this state and also enabling it to sue here upon the payment of the prescribed penalty of \$250.00.¹⁴

In the latest case of *Bala Corporation v. McGlenn*, 295 Pa. 74, (1929), the Supreme Court of Pennsylvania held, that "one who deals with a foreign corporation, knowing it to be a corporation, can not enforce an individual liability against the officers and agents who act for the corporation", although it has failed to register as required by the act of 1911. Whenever it makes a contract it is the contract of the legal entity and not of the individual members. The mere fact that agents of a foreign corporation might be punished for neglecting to register will not render them liable for the contracts of the corporation.

The decision is consistent with those reached under the act of 1874 and sounds consonant with justice. But, it is submitted, that the basis of this decision as well as that of the others, is not correct on principle.

The courts have held that the reason the plaintiff is not allowed to sue the agents and officers individually, is based on the ground of "estoppel". Strict estoppel involves an actual representation by the party to be "estopped" plus a reliance on the representation by another to his detriment. Therefore, how can it be said, that plaintiff made any representation, when as a matter of fact his conduct was the result of his reliance on the agent's representation? It would seem more equitable to work the "estoppel" against the agent or officer when sued individually rather than against the plaintiff. Why then, should the plaintiff be denied the right to sue the agents and officers individually? The reason should be this: The primary ground of the doctrine of "estoppel by matter in pais" is that it would be a fraud in a party to assert what his previous conduct had denied when on the face of that denial others have acted. It is essential to its being allowed in any case, that it would work an injury to the other party, if the defendant should be permitted to set up his case.¹⁵ Now, the plaintiff on entering into the contract, looked forward to corporate liability, as distinguished from the individual liability of the members and agents. Therefore, the agents and officers

¹⁴*Bala Corp. v. McGlenn*, 295 Pa. 74 (1929). The court in this case did not refer to the amending act of April 22, 1915, P. L. 170.

¹⁵*Hill v. Epley*, 31 Pa. 331 (1858).

should not be "estopped" from showing that fact, since one of the essentials of the doctrine of estoppel, namely, injury to the plaintiff, is not present, because an action against the corporation, the very thing he looked forward to, in case of breach, is still available to him.

The objection that in such an action there is no authorized agent upon whom process may be served, is not tenable. It has been decided, that service upon such agent, if regularly made, is good service against the corporation, even though it failed to appoint one in accordance with the act of 1874, before its repeal.¹⁶ The reason being, that it is to be presumed that the corporation appointed such agent as one upon whom service is authorized to be made.¹⁷ There is no substantial objection to following the same course under the act of 1911, more properly, 1915.

In short, the theory is, that plaintiff being still in a position to enforce his rights against the corporation, the agents and officers should not be estopped from asserting the fact that he intended a contract with the corporation and not with them as individuals. The theory fits the cases of domestic corporations as well as those of foreign corporations without resort to an unwarranted over-extension of the doctrine of "estoppel".

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ADMISSIBILITY OF RECORD OF PREVIOUS CONVICTIONS TO ATTACK CREDIBILITY OF WITNESS—
The case of *Commonwealth v. Quaranta*, 295 Pa. 264, lays down a proposition regarding the admissibility of records of prior convictions in order to attack a witness' character for veracity. The rule is stated by Mr. Justice Kephart to be, "When a party becomes a witness for himself, he stands in no better position than any other witness not a party.¹ Conduct derogatory to the witness' character for veracity may be proved by showing that he has been convicted of an infamous offense. No collateral issue of fact is thus raised, as the record establishes the fact. But every offense or

¹⁶Hagerman v. Slate Co., 97 Pa. 534 (1881).

¹⁷Case supra; Eastman, Private Corporations, Vol. 1 (2d Ed.) p. 554. Service may be made on any agent within the state, Supra; see 23 L. R. A. 490.

¹Beck v. Hood, 185 Pa. 32 (1898); Commonwealth v. Racco, 225 Pa. 113 (1909).