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of the degree of evidence required to establish a loss by windstorm. The defense was based on the claim that the collapse of a roof was due to structural weakness. The court concluded that the plaintiff had succeeded in showing that the windstorm was the proximate or efficient cause of the loss, although structural weakness may have been a contributing factor. Perhaps in most such cases the latter would be true, but as the trial court remarked, a building can be insured even if it is improperly constructed. This addresses itself to the matter of inspection when the taking of the risk is under consideration.

CORPORATIONS

A. N. Yiannopoulos*

In the 1958-1959 term the Louisiana Supreme Court handed down several decisions involving problems of corporation law, such as authority of corporate officers, validity of sale of entire corporate assets, illegal reduction of capital, and taxation of foreign corporations doing business in Louisiana.

Authority of Corporate Officers

Friedman v. Noel Estate, Inc.,¹ involved the frequently debated issue of authority vested in the president to bind his corporation in contractual matters. The general rule is that the president has very little authority by virtue of his office alone.² Corporate affairs are ordinarily managed by the board of directors and the president is merely the presiding officer of the board.³ However, trying to cope with modern business practices, the courts in several states have held that the president has, at least prima facie, authority of a general manager to conduct the ordinary business of the corporation.⁴ In other states, where the strict rule prevails, the courts have held that the president may bind the corporation by reason of acquiescence of the directors in a known exercise or assumption of power.⁵ This result

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1. 236 La. 862, 109 So.2d 447 (1959).

2. See *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Business and Commercial Law*, 7 LOUISIANA LAW REVIEW 165, 257 (1947).

3. See LATTIN, CORPORATIONS 228 (1959).

4. *Id.* at 228 *et seq.*

5. See 2 FLETCHER, CORPORATIONS § 509 (1938).

has been rationalized as estoppel or as exercise of ostensible authority in accordance with well-settled agency principles.⁶

In the instant case, the president of a closely held corporation engaged exclusively in the business of leasing its real estate, concluded an oral lease, the validity of which was disputed by the corporation on the ground that the president had no authority. According to the original articles of incorporation, the president was given all the powers of the corporation without necessity of authorization by the board of directors; by subsequent amendment, however, the president was deprived of the power to act "without the approval of the board" except with regard to "administrative acts only." In spite of this express limitation, the Louisiana Supreme Court did not hesitate to find that the president had authority to conclude the lease in question. Relying on the fact that the sole business of the corporation was the lease of its property, that all business transactions were invariably conducted by the president without previous board action, and that the president of the corporation was the only person dealing with and known to plaintiffs, the court held that the corporation "by its action has indicated that the 'administrative authority' reposing in its president is very broad" and covered the transaction under consideration.

The case seems to rest on ostensible authority rather than estoppel. The court indeed referred to the well-settled rule that "when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted to transact its business."⁷ The real difficulty in the case was the limitation on the authority of the president by the amended articles of incorporation. Under such circumstances it has been held elsewhere that the board could not possibly delegate authority expressly or by acquiescence, nor could it ratify the unauthorized acts of the president.⁸ The result reached by the Louisiana Supreme Court, however, is sound. Unlike the corporation law of some states, persons dealing with officers of a corporation in Louisiana are not charged with constructive notice of the content of the articles of incorporation.⁹ Further, in the instant case the corporation

6. Cf. *Ideal Savings and Homestead Ass'n v. Kerner*, 208 La. 513, 23 So.2d 200 (1945); 2 FLETCHER, CORPORATIONS § 595 (1938).

7. 236 La. 862, 880, 109 So.2d 447, 453 (1959).

8. See 2 FLETCHER, CORPORATIONS § 497 (1938).

9. See LA. R.S. 12:11 (1950).

was closely held; father, wife, son, and daughter were its shareholders and officers. In case of such an "incorporated family partnership," the assumption of powers by the president contrary to the articles of incorporation creates an appearance of authority resting not only on the acquiescence of the directors, but also on that of all the shareholders.

*Esso Standard Oil Co. v. Welsh*¹⁰ involved the authority of a corporate officer to receive payment by checks drawn in his name rather than that of the corporation. Welsh, a consignment distributor under contract with Esso, sent checks to Guibet, credit manager of Esso, addressed to him personally though with the understanding that the proceeds would be credited to his running account with the corporation. Guibet gambled and lost a considerable amount of the money so received. Esso brought action against Welsh for repayment, claiming that although Welsh knew that the funds were misappropriated by Guibet, he had failed to disclose the fact to the management, and that the credit manager (Guibet) had no authority to receive payment in his own name. The Louisiana Supreme Court held that Welsh had properly discharged his obligation to the corporation.

The decision is based on well-established agency principles. As the court observed, "the rank and dignity of the position of plaintiff's credit manager" and the proved fact that "it was not uncommon for customers to make payments by checks payable to the credit manager" were sufficient to create an apparent authority. Under the circumstances, an obligation could be validly discharged by payment to the agent.¹¹ Third persons, in absence of collusion, are not liable to the principal for the agent's fraud.¹² Mere subsequent knowledge of misappropriation of funds paid to the agent on the principal's account may thus be considered immaterial.

Sale of Entire Assets

*Wainwright v. Lingle*¹³ was a sequel to an earlier case involving the same parties. In that case Wainwright had brought suit against the Audubon Development Company, a Louisiana

10. 235 La. 593, 105 So.2d 233 (1958).

11. *Cf. MECHEM, AGENCY* § 949 (1914).

12. *Id.* §§ 2135-37.

13. 236 La. 854, 109 So.2d 444 (1959).

corporation, and one Lingle individually, for the delivery of fifty shares of stock, or their value, in accordance with an alleged subscription contract.¹⁴ The Louisiana Supreme Court ordered specific performance by the corporation, reserving to plaintiff his rights against anyone in case delivery of the stock could not be effected within a reasonable period of time. Plaintiff Wainwright, apparently dissatisfied as the corporation was under dissolution and without assets,¹⁵ brought a new action against the corporation and the individual defendant seeking to set aside on the ground of fraud a transaction whereby all corporate assets were sold to Lingle, a director, at a price below their actual market value; in the alternative, plaintiff prayed for a money judgment in the value of his shares. The Louisiana Supreme Court, following the opinion of the lower court, refused to set aside the sale of assets as actual fraud had not been proved and held that, in absence of fraud, the action was barred by the ninety-day prescriptive period of Louisiana Business Corporation Act, Section 41 E. With regard to the alternative demand for a money judgment, the court fixed the measure of damages in the value of plaintiff's shares on the day preceding the transaction in question.

The case raises interesting questions involving the validity of directors' contracts, sale of entire assets, the appraisal of the value of shares, and the running of the ninety-day prescriptive period of the Louisiana Business Corporation Act, Section 41. Lingle was an organizer, shareholder, and director of the corporation at the time of the allegedly fraudulent transaction. As persons in his position may be tempted to take advantage of their strategic situation, a body of law has been developed designed to safeguard the interests of the corporation, its creditors, and those of minority shareholders. Such law relates mainly to the validity of directors' contracts, compliance by the management with certain requisite formalities in case of sale of all the corporate assets, and to remedies available to dissenting shareholders. In accordance with a strict rule prevailing in some jurisdictions, all contracts concluded between a director and the corporation are voidable without regard to their fairness, good faith of the parties, or other considerations.¹⁶ Most

14. See *Wainwright v. Lingle*, 224 La. 702, 70 So.2d 594 (1954).

15. *Cf. id.* at 707, 70 So.2d at 596; *Wainwright v. Lingle*, 236 La. 854, 855, 109 So.2d 444, 445 (1959).

16. See 3 FLETCHER, CORPORATIONS §§ 916-17, 930 (1938); LATTIN, CORPORATIONS 258 (1959).

courts, however, hold such a transaction valid if entirely fair to the corporation and if the presence of the interested director was not necessary to constitute a quorum nor his vote required to carry the resolution.¹⁷ Few courts went further and held that presence and voting by an interested director will not render the transaction voidable if otherwise entirely fair and entered in good faith.¹⁸ Proof of actual fraud is thus not necessary.¹⁹ In Louisiana, the courts have in the past consistently upheld the validity of directors' contracts provided that there was an independent quorum and voting majority and the contract was entirely fair and concluded in good faith.²⁰ In the instant case, the issue was not squarely raised.

With regard to the sale of the entire assets of a corporation, the Louisiana Business Corporation Act, Section 41, requires the observance of certain formalities. Where these formalities are not observed, the sale of assets may be enjoined or set aside by dissenting shareholders acting within ninety days from the sale. In case of actual fraud, the rights of dissenting shareholders under Section 41 are cumulative with other existing forms of legal and equitable relief.²¹ In the instant case, as fraud was not proved, plaintiff's action to set the sale aside could be based only on the ground that the formalities prescribed by Section 41 had not been complied with. The Louisiana Supreme Court held that such action was barred by the ninety-day prescriptive period of Section 41 E. It is not clear whether Section 41 E establishes a "prescription," subject to suspension and interruption in case the dissenting shareholder is unable to bring action within the ninety-day period or a "peremption" running in any case without regard to personal circumstances. The court, without discussing the nature of the limitation period, took the view that the action should be barred in any case since it "was filed neither within ninety days from the confecting of the sales nor within ninety days after the finality of the judgment of this court decreeing plaintiff to be a shareholder of the corporation."

As the court refused to set aside the sale of assets, it faced the problem of measure of damages. The solution of the court

17. 3 FLETCHER, CORPORATIONS §§ 919, 930, 931 (1938); LATTIN, CORPORATIONS 258 (1959); Comment, 10 LOUISIANA LAW REVIEW 82, 86 (1949).

18. See 3 FLETCHER, CORPORATIONS § 930 (1938).

19. See *id.* § 919. The burden of proof as to fairness rests in all cases on the director. *Id.* at 916.

20. See Comment, 2 LOUISIANA LAW REVIEW 374 (1940).

21. See Bennett, *Remodelling, Merger and Dissolution of Louisiana Corporations: A Critical Survey*, 3 LOUISIANA LAW REVIEW 481, 486 (1941).

was to award plaintiff the fair cash value of his shares as of the day preceding the sale. This measure applies, as the court properly observed, where a shareholder complies with the provisions of Louisiana Business Corporation Act, Section 52. Plaintiff had not complied, nor could he be expected to comply as his status was disputed, and one may ask how this measure of damages could be justified in the instant case. The answer seems to be that in effect plaintiff was treated equally with other non-dissenting shareholders and received a proportionate amount of the proceeds of the sale. The value of the shares on the day preceding the sale was found to be the same as the interest they represented in the assets of the corporation, appraised on the basis of the actual purchase price.

It is questionable whether under the circumstances the value of the shares as of the day preceding the sale of assets, or an equal participation with non-dissenting shareholders in the proceeds of the sale, is a sufficient remedy. During litigation initiated for the clarification of a shareholder's status which may last for several years, the value of the assets involved may increase several times; moreover, plaintiff is deprived of the use of his capital and of possible opportunities for profitable investment. Thus, even where the management observed all requisite formalities concerning the sale of the entire assets of the corporation, some courts in appraising the value of dissenting shareholders' shares took the view that such shareholders should be given the "value of their investment" and interest up to the date of payment.²² In case of sales conducted without observance of statutory formalities, or in case of fraud, the measure of damages is frequently higher and punitive damages are not excluded.²³ Unless such an approach be taken, a money judgment may constitute an inadequate remedy under the circumstances.

The grounds of liability imposed on the individual defendant *in solido* with the corporation are not given in the opinion. The purchaser of the entire corporate assets, whether another corporation or an individual, does not carry any liability toward creditors or dissenting shareholders except in case of fraud and transfer without consideration.²⁴ Thus, it is submitted that in

22. See LATTIN, CORPORATIONS 529 (1959).

23. See *id.* at 524.

24. See 15 FLETCHER, CORPORATIONS §§ 7122-7125 (1938); Bennett, *Remodel-*

accordance with the court's finding that no fraud was perpetrated and that the assets were sold at a fair price, Lingle should be free of any liability to Wainwright.²⁵ If, on the other hand, the liability of Lingle was predicated on the ground of fraud and transfer without sufficient consideration, it seems the sale itself should be set aside.

Reduction of Capital Stock

*Sheffield v. Norris*²⁶ involved the validity of sale of the entire corporate assets and direct distribution of the proceeds among shareholders by reduction of capital stock. Mosquito Hawks, Inc., was a closely held corporation organized to engage in the pest control business; Sheffield, Norris, and their respective wives were its only officers and shareholders. Within a year of its creation, a unanimous decision was taken to discontinue the venture and to sell all corporate assets at a private auction. In a meeting arranged for that purpose, Norris offered to buy the corporate assets for a stated price and Sheffield allegedly accepted. To avoid a possible seizure of the proceeds by the regular counsel of the corporation who had a claim for attorney's fees, the following scheme was devised: Norris would transfer to the corporation a block of shares as half payment of the purchase price; Sheffield would also transfer to the corporation an equal number of shares in order to take possession of the other half of the purchase price directly from Norris. No formal instrument was drawn with regard to the offer and acceptance since a series of documents were contemplated to legalize the transaction: an offer to purchase, a resolution accepting the offer, an act of sale, a charter amendment reducing the capital stock, and two instruments designed to effect the transfer of stock to the company. When these instruments were prepared, Norris refused to sign and Sheffield brought action against Norris claiming half of the purchase price as assignee of the corporation.

The court did not discuss exhaustively the problem whether or not a contract had been concluded between Norris and Sheffield. Assuming that the offer had been duly accepted, it refused to grant the requested relief on the ground that the corporation had no "legal title to transfer the claim to him [Shef-

ling, *Merger and Dissolution of Louisiana Corporation: A Critical Survey*, 3 LOUISIANA LAW REVIEW 481, 498 (1941).

25. Cf. 15 FLETCHER, CORPORATIONS § 7125 (1938).

26. 235 La. 667, 105 So.2d 260 (1958).

field]." "The validity of the assignment to plaintiff," the court declared, "was dependent upon the legality of the corporate amendment reducing the capital stock." But as the "mandatory" provisions of Louisiana Business Corporation Act, Section 45, had not been complied with, the attempted reduction of capital stock was ineffective, and in turn, the assignment invalid.

The disposition of the issue by the Louisiana Supreme Court is sound. Section 45 of the Louisiana Business Corporation Act is designed to safeguard, among others, the interests of corporate creditors by prohibiting the draining off of capital and its distribution among shareholders. Where the shareholders desire to discontinue the venture, the law affords a well-devised procedure for dissolution which safeguards the interests of all concerned;²⁷ informal liquidation by direct distribution of all capital assets among shareholders should not be encouraged. The fact that the corporation was closely held does not eliminate the necessity for formal dissolution and cannot be an argument for a more lenient judicial attitude as is the case with regard to certain informal business transactions of "incorporated partnerships."²⁸

Finally, it should be noted that not only the alleged assignment but also the attempted sale itself was illegal and invalid. Indeed, by making the entire transaction dependent on the validity of the corporate amendment relating to the reduction of capital, the court seemed to indicate that the corporation itself could not under the circumstances hold Norris obligated under his offer to purchase. The soundness of this approach may not be questioned since, on the one hand, the offer had never been formally accepted by board resolution, and on the other hand, it was part of the entire scheme and contemplated transfer of shares rather than cash payment. Sale of entire assets for shares of another corporation, though closely scrutinized as covering a possible merger or consolidation,²⁹ may in fact be a sale for a sufficient consideration.³⁰ Sale of the entire assets for shares of the selling corporation is simply a direct transfer of all capital to the "purchasing" shareholder without regard to the interests

27. See LA. R.S. 12:53-62 (1950). Cf. *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939).

28. Cf. *Daly v. Opelousas Insurance Agency*, 181 La. 89, 158 So. 631 (1934) (upholding the validity of a transfer of all corporate assets authorized of informal director's action).

29. See Bennett, *Remodelling, Merger and Dissolution of Louisiana Corporations: A Critical Survey*, 3 LOUISIANA LAW REVIEW 481, 498 (1941).

30. See LA. R.S. 12:41 (1950); 15 FLETCHER, CORPORATIONS § 7127 (1938).

of third parties. Dissenting shareholders and creditors would be able under the circumstances to set the transfer aside or to hold the purchaser liable.³¹

Taxation

In *Union Producing Co. v. Martin*,³² and three other consolidated cases involving the identical legal issue,³³ the court was confronted with the problem of interpreting R.S. 47:2611.³⁴ On the basis of that section the Secretary of State argued that a foreign corporation must pay, on qualifying to do business in the state, a tax of one-twentieth per centum upon the amount of capital stock initially employed here, the tax to be no less than ten dollars nor more than two thousand five hundred dollars; and that thereafter, it must pay a similar tax on any annual increase over a preceding year's capital. Following "the usual methods of statutory interpretation," the court considered several factors such as the established practice of the tax collecting agencies, the pre-history of the statute, and the probable consequences of all possible interpretations. It appeared that the tax collecting authorities had consistently interpreted the statute in the past as creating the obligation to pay only once and for good up to the maximum; and that the original Act 107 of 1922 stated plainly that "the tax is for the admission of a foreign corporation to do business in this state" and not for the privilege of continuing operation after its admittance.³⁵ Finally, the court pointed out that the interpretation pressed by the Secretary of State would lead to inequitable results as it would offer an opportunity to minimize tax burdens by staggering the introduction of capital into the state. The court thus held that the assessment "was intended to be a single tax levied for the privilege of a foreign cor-

31. Cf. 15 FLETCHER, CORPORATIONS §§ 7163-64 (1938); *Walter v. Gaffal*, 192 La. 447, 188 So. 137 (1939) (transfer for the purpose of avoiding present indebtedness set aside).

32. 236 La. 1057, 110 So.2d 99 (1959).

33. *Esso Standard Oil Co. v. Martin*, 236 La. 1071, 110 So.2d 104 (1959); *United Gas Pipeline Co. v. Martin*, 236 La. 1070, 110 So.2d 103 (1959); *United Gas Corp. v. Martin*, 236 La. 1069, 110 So.2d 103 (1959).

34. See LA. R.S. 47:2611 (1950): "Every foreign corporation, before being authorized to do business in this state shall as a condition thereto, pay into the state treasury a tax of one-twentieth (1/20) of one per centum (1%) upon the amount of the capital stock of the corporation employed by it in this state, and a like tax on any subsequent increase thereof, provided that no such tax on the original capital or increases thereof shall be less than ten dollars, nor more than two thousand five hundred dollars."

35. The court pointed out that where the legislature wanted to create an obligation for annual payment, it did so expressly, as in the case of Act 8 of 1932, LA. R.S. 47:601 (1950) (annual franchise tax in express language).

poration's 'being admitted to do business in the state'; that the amount thereof is determined by the capital employed in the state, but is not to exceed \$2,500; and that the required payments on increases of capital stock were merely to prevent a corporation from entering with the minimum tax of \$10 and thereafter increasing its capital without paying the additional tax up to the maximum."

NEGOTIABLE INSTRUMENTS

*Paul M. Hebert**

Payment of a negotiable instrument in due course by or on behalf of the principal debtor is one of the means expressly enumerated in the negotiable instruments law of discharging the instrument.¹ Under the statute payment is made in "due course" when it is made "at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."² A payment before maturity to one not the "holder" does not discharge the instrument. Payment even after maturity to one not the holder is at the risk of the party making the payment.³ In the application of these principles it is clear that the burden of proof rests upon the party who pleads the defense of payment to show by a preponderance of the evidence that payment of the instrument claimed to be discharged has been made to one authorized to receive payment on behalf of the holder.⁴ It is not incumbent upon the holder who sues on a note to prove non-payment.

*Egert v. Stassi*⁵ was a case merely involving issues of fact in the application of these principles. Plaintiff sued as the transferee-holder of a note for \$5,000.00 executed by defendant payable to a corporation. Defendant pleaded payment on the day before maturity by a check payable to a New Orleans bank. Plaintiff denied that such payment was in satisfaction of the note or that it had any connection with defendant's personal indebted-

1. La. R.S. 7:119(1) (1950).

2. La. R.S. 7:88 (1950).

3. See, for example, *Henry Knight & Son, Inc. v. Shall*, 9 La. App. 98, 119 So. 80 (1928) applying the well-settled rule that a person paying one not in possession of the note and without requiring its delivery up for cancellation acts at his peril unless the person receiving payment has authority from the holder or owner as his agent to receive payment thereof. Numerous cases applying these principles are collected in BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (Beutel's rev. 7th ed. 1948).

4. *Orleans Discount Co. v. Derbes*, 170 La. 660, 129 So. 121 (1930).

5. 237 La. 1070, 112 So.2d 715 (1959).