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# Private Law: Corporations

Milton M. Harrison

Sklar and Rushing agreed to the creation of an overriding royalty measured by total unit production. Sklar then sold to Moffatt an override, and under the terms of the agreement Moffatt agreed to bear any other outstanding overrides. One wonders whether, by an agreement with Moffatt, Sklar can push around the burden of the Rushing override at will. If the intent of the letter agreement between Sklar and Rushing was that Rushing would have an override out of the leases assigned amounting to one thirty-second of seven-eighths of total unit production, that overriding royalty would seem to be a burden on the entirety of the working interest of the assigned leases. Although Moffatt could certainly agree to assume the burden of Rushing's overriding royalty interest, it seems questionable whether by contracting with someone else Sklar can effectively limit Rushing's right to secure his agreed share of production to the interest created by him in favor of Moffatt. Thus, it seems to the writer that although Moffatt definitely is not bound, Sklar might be considered as continuing to be bound to fulfill the terms of the letter agreement as incorporated by reference in the assignment.

## CORPORATIONS

*Milton M. Harrison**

The Louisiana courts only infrequently have disregarded corporateness, pierced the corporate veil, or treated the corporation as the alter ego of even a sole shareholder in order to assess personal liability on the shareholder for corporate obligations. In *Pasternack v. Louisiana & Ariz. Lands, Inc.*,[1] however, the court disregarded the corporateness. The corporation had as its only asset certain immovable property. It was agreed by the corporation, through its sole shareholder as president, that plaintiff would be paid a broker's commission of $25,000 if optionees exercised their option to purchase the property belonging to the corporation. In lieu of exercising its option, the optionees purchased from the sole shareholder all shares in the corporation and dissolved the corporation with the property distributed to themselves. As part payment for the shares in the corporation the former sole shareholder was given a mortgage on the property, thus becoming a preferred creditor. The corporation after

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1. 254 So.2d 142 (La. App. 3d Cir. 1971).

dissolution had no assets with which to pay the commission, and the property was subject to mortgage in excess of its value. The court held that insofar as the ordinary creditors are concerned, the transaction amounted to an unlawful dividend or distribution of the assets of the corporation and the former sole shareholder was held individually liable for the broker's commission under the provision of section 93 of the Business Corporation Law.[2] The court stated further that the corporation was but the alter ego of the sole shareholder who could not hide behind the corporate veil and be immune from his fraudulent practices. The facts of this case justify the disregard of corporateness.

In two cases[3] the courts had occasion to determine whether a corporate officer had sufficiently identified his corporate principle to a creditor that the officer as agent would be relieved from personal liability. Both cases involved suits on open account and each court applied the rule that the agent must carry the burden of proving that he identified his corporate principal and that he made it abundantly clear that he was acting for his principal and not as an individual.[4]

*Hebert v. Stansbury*[5] presents two interesting interpretations of the new corporation law. Section 73 of the law provides that notice of a shareholders' meeting shall be given "at least ten days . . . prior to the day fixed for the meeting."[6] The court held that the day of mailing is included in the computation of the ten days but that the day of the meeting is not.

There was also a contest concerning the right to cumulate fractional shares as a basis for voting. Section 51D provides that "the holder of a fractional share certificate shall . . . have all rights of a shareholder except voting rights." Fifty shares in the corporation, one-half of the outstanding shares, were owned by the plaintiff and her two children, she owning 8⅓ shares and each of her children owned 20⅚ shares. The books of the corporation listed the plaintiff as owner for her 8⅓ shares, and plaintiff as usufructuary for the 41⅔ shares belonging to her children. If she could cumulate all fractional shares, she would

2. LA. R.S. 12:93 (Supp. 1968).
3. Williams v. O'Bryan, 257 So.2d 174 (La. App. 3d Cir. 1972); Prevost v. Gomez, 251 So.2d 470 (La. App. 1st Cir. 1971).
4. *See* LA. CIV. CODE arts. 3012-13.
5. 248 So.2d 873 (La. App. 3d Cir. 1971).
6. LA. R.S. 12:73D (Supp. 1968).

be entitled to 50 votes; if she could treat all shares held as usufructuary as one unit she could vote 49 shares (8 + 41); however, if each owner's shares are considered to be separate she could vote only 48 shares (8 + 20 + 20). The court held that the books of the corporation control. Therefore since the children's shares are listed on the books as 41⅔ in the name of the usufructuary, she could vote the 41 shares.

In *Leaman Corp. v. Morrison,*[7] the court interpreted section 172 of the corporation law.[8] Section 102 requires the filing of an annual report with the Secretary of State, and section 172B provides that an officer of a corporation who refuses to deliver to a shareholder, on written request, a copy of the annual report "shall be under a penalty of fifty dollars" for every day the officer refuses or neglects to deliver the report. In this case the corporation was without funds. Evidence was introduced that the preparation of the report would require an audit costing $5,000. The court refused to impose the penalty provided in the statute, saying that "certainly it is within the contemplation of the law that such report be available or reasonably obtainable, or its nonavailability be attributable to some cause of neglect, refusal or bad faith on the part of the officer on whom the demand was made for the report."[9] Although the decision departs from the mandatory language of the statute, the decision does not do violence to the devices designed for the protection of shareholders.

Two shareholders, owning all the shares of a corporation, agreed that upon the death of one shareholder, the corporation would purchase the deceased's shares.[10] To provide funds for the purchase, the corporation secured life insurance policies on the lives of each of the shareholders, the corporation being the beneficiary. The corporation was in receivership. The court applied section 55A of the corporation law which provides that a "corporation shall not purchase or redeem its shares when it is insolvent, or when such purchase or redemption would render it insolvent . . . ." Therefore, pending a determination of solvency, the proceeds of the insurance policies are merely assets of the corporation and cannot be used to purchase the shares of the

7. 258 So.2d 691 (La. App. 4th Cir. 1972).
8. LA. R.S. 12 (Supp. 1968).
9. 258 So.2d at 694.
10. Collins v. Universal Parts Co., 260 So.2d 702 (La. App. 4th Cir. 1972).

deceased shareholder. It should make no difference under section 55A whether the repurchase is a voluntary one or whether it is pursuant to a contract as in the present case; the corporation may not prejudice corporate creditors by diverting funds to redeem stock.

## TRUSTS

*Gerald Le Van**

The only decision of note dealing with private express trusts was rendered by the Third Circuit in *Harriss v. Concordia Bank & Trust Co.*,[1] where the beneficiary sought to terminate the trust or alternatively to require invasion to the extent of $40,000 to pay outstanding bills. Mrs. Harriss' husband had created a testamentary trust over his entire estate, she being the beneficiary as to one-fourth of both principal and interest. The other beneficiaries were her children. As to her interest, the trust was to continue for life, whereas the trust terminated as to the children's interests when the youngest attained age 25.

Apparently, the principal trust property was a portfolio of securities worth several hundred thousand dollars at the settlor's death. The trust instrument permitted invasion of principal for Mrs. Harriss' benefit in the trustees' "uncontrolled discretion . . . in case of serious illness, surgical operation, or other grave emergency." During the twelve-year period between her husband's death and the institution of this suit, Mrs. Harriss suffered an incredible series of personal, physical, mental, family, and financial disasters. On five different occasions, the trustee had invaded principal on behalf of Mrs. Harriss in an aggregate amount of some $165,000. Apparently, she had joined the trustee on each occasion in obtaining a court order authorizing the invasion. However, in this instance, it appears that the trustee neither joined nor opposed her attempt to terminate the trust or alternatively to invade principal once again. At the time of trial, her monthly trust income was approximately $800.

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1. 265 So.2d 330 (La. App. 3d Cir. 1972). The reader may also be interested in *Bertrand v. Sandoz*, 260 La. 239, 255 So.2d 754 (1971), which upholds the constitutionality of the so-called "public trust" for the financing of public improvements.