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Corporations, Partnerships, and Associations

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that the township is voted dry relieves both parties of further liability. The improbability of the parties foreseeing and expressly providing for this contingency was the basis for granting the relief. The principles of this case are in conformity with previous Ohio decisions.[8]

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CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS

Service on partnerships and on corporations, suits against individual members of associations, substantive questions of partnership contracts, the ultra vires doctrine, and the authority of officers of closely-held corporations were subjects that were considered by the courts in Ohio during 1961.

It seems to this writer that these courts, like courts throughout the country, have in these decisions continued the movement of the common law away from formalism toward realism and determination of controversies on their merits.

SERVICE OF PROCESS

In *Modern Contract Furnishings, Incorporated v. Bishop International Engineering Company*[1] the court was concerned with the validity of a summons which was left at the Cincinnati office of a San Francisco partnership. Since no partner was a resident of or found in Ohio, the service could be good only if a copy of the summons was left at the partnership's usual place of doing business.[2]

The three principle issues which might have been before the court were (1) whether "at its usual place of doing business," required merely an office, or some other requirement of "doing business," (2) whether

1. 172 Ohio St. 200, 174 N.E.2d 615 (1961).

2. *Id.* at 212, 174 N.E.2d at 623.

3. Robert V. Clapp Co. v. Fox, 124 Ohio St. 331, 178 N.E. 586 (1931). See also 36 O. JUR. 2d *Mechanic's Liens* §§ 14, 68 (1959).

4. OHIO REV. CODE § 1311.14.

5. Gebhart v. United States, 172 Ohio St. 200, 215, 174 N.E.2d 615, 625 (1961). See Bown & Sons v. Honabarger, 171 Ohio St. 247, 168 N.E.2d 880 (1960); Howk v. Krotzer, 140 Ohio St. 100, 42 N.E.2d 640 (1942); Bullock v. Horn, 44 Ohio St. 420, 7 N.E. 737 (1886). See also OHIO REV. CODE § 1311.24.

6. 174 N.E.2d 558 (Ohio C.P. 1960).

7. *Ibid.*

8. See, *e.g.*, Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E. 2d 856 (1952).

the statute applied to non-resident partnerships doing business in Ohio, and (3) what constitutes doing business for this purpose by a partnership. Because the parties apparently agreed that the partnership was not doing business in Ohio,[3] the court had simply to say that since the partnership was not "at law" doing business in Ohio, it could not have a "*usual* place of doing business" and the service was not valid.

Due to this agreement by the parties upon which the court based its decision, the most interesting problems raised by this case became moot. In a 1924 appellate decision in Hamilton County,[4] a court on a similar factual situation had held that service on a partnership at its usual place of business under the statute applied only to resident partnerships, and that its application to non-residents would be repugnant to the fourteenth amendment of the United States Constitution. The court in the *Modern Contract Furnishings* case very properly questioned that decision, recognizing that such an interpretation would render immune from service in Ohio the growing number of large national partnerships.[5] By this obiter dictum, which favored service on a non-resident partnership, the validity for service purposes of the orthodox concept that a partnership is not a legal entity, separate from the individual partners, was in effect doubted by this court.

In *Moriarty v. Westgate Center, Incorporated*[6] another service of summons problem required the Ohio Supreme Court to construe section 2703.10 of the Ohio Revised Code, which permits service upon the person "having charge" of "the office or usual place of business" of a corporation when the principal officers who are specifically listed in the statute are not present.[7]

1. 14 Ohio Op. 2d 350 (C.P. 1960).

2. See Ohio Revised Code section 2703.08, which provides: "Service shall be made at any time before the return day, by delivering a copy of the summons with the endorsements thereon, to the defendant personally, or by leaving a copy at his usual place of residence; or, if the defendant is a partnership sued by its company name, by leaving a copy at its usual place of doing business or with any member of such partnership. The return must be made at the time mentioned in the writ, and the time and manner of service shall be stated by the writ."

3. That the plaintiff agreed so readily to this fact seems strange in view of the fact that the partnership had an office and employees in Cincinnati.

4. Smith v. Pinkerton, 2 Ohio L. Abs. 618 (Ct. App. 1924).

5. Even under the decision in Smith v. Pinkerton, 2 Ohio L. Abs. 618 (Ct. App. 1924), if one of the partners was a resident of Ohio, then service on that partner in Ohio would suffice for service on the entire partnership.

6. 172 Ohio St. 402, 176 N.E.2d 410 (1961).

7. Ohio Revised Code section 2703.10 provides: "A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of such officers can be found, by a copy left at the office or the usual place of business of the corporation with the person having charge thereof . . . ."

It is interesting to note, since the *Moriarty* and *Modern Contract Furnishings* cases are

The issue in the *Moriarty* case was whether the statute requires the sheriff to attempt service upon the officers listed in the statute as a condition precedent to service simply on the person in charge of the office.[8] The supreme court took the liberal, non-formal view. It discussed the reason for service, the rationale of service statutes, and concluded that the successive alternative methods of service upon a corporation are not mandatory successive conditions precedent but successively likely methods of promptly bringing to the attention of the corporation the fact that proceedings have been commenced against it. Therefore the court found that a motion to quash the summons should be overruled if it is admitted, or if there can be no reasonable conclusion from the evidence but that the person in charge of the office brought the summons promptly to the attention of the chief officer of the corporation.

Suit Against Unincorporated Associations

In *Lyons v. American Legion Post No. 650 Realty Company*[9] Judge Zimmerman seemed almost to be delivering a law school lecture in his well-considered opinion on the liability of members of an unincorporated association. Among the most important reasons for the invention of the corporation, whether for profit or not, was to provide a device which would limit the liability of individuals. Members of unincorporated associations lack such protection, however, and have always been exposed to liability. Furthermore suits in Ohio by or against the association itself in its own name, were not even possible until the enactment of Ohio Revised Code sections 1745.01 through 1745.04 in 1955.[10]

The plaintiff in the *Lyons* case chose to sue the individual members of an unincorporated association alleging that they were all negligent. Because in Ohio an unincorporated association may now be sued in its own name,[11] the defendants convinced a common pleas court and a court of appeals that no cause of action at all exists against the individual members.

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here considered in juxtaposition, that the statute relative to partnerships, Ohio Revised Code section 2703.08, uses the words "its usual place of *doing* business," and in the statute relative to corporations the words "usual place of business" are used. Query: was a distinction intended by that difference?

8. For a complete discussion of the issues of this case, see *Recent Decision*, p. 605 *infra*.

9. 172 Ohio St. 313, 175 N.E.2d 733 (1961). Note that, although the American Legion Post No. 650 Realty Company was listed in the style of the case as the defendant, the case actually concerned the individual members of American Legion Post No. 650, an unincorporated association, who were joined as party defendants.

10. Section 1745.01 provides that any unincorporated association may contract, sue, or be sued in its commonly known name; section 1745.02 provides that all assets of an unincorporated association are subject to judgments, execution, and other process; section 1745.03 provides for service of summons on an unincorporated association; and section 1745.04 provides that a change in the officers of such an association shall not abate any cause of action against it.

11. Ohio Rev. Code § 1745.01.

The supreme court clearly pointed out that but for the 1955 statute, a voluntary association having no legal existence could not even be sued by its association name, and the persons composing it would have to be joined individually. The court held without question that the new statutes do not abrogate this right to sue the individual members if the plaintiff chooses to proceed that way.[12] The court pointed out that on the trial evidence would have to be produced linking the defendants as active participants in the injury producing affair to establish individual liability and furthermore that the defendants must either have known or in the exercise of ordinary care should have known of the defective condition of the instrumentality claimed to have caused the injury to be liable for it.

With those instructions, and the further admonition that the other elements necessary to support recovery would also have to be proved, the cause was remanded to the trial court.

PARTNERSHIP CROSS-INSURANCE AGREEMENTS

The Court of Appeals of Butler County, in *Oglesby-Barnitz Bank and Trust Company v. Clark,*[13] was faced with a partnership problem which depended upon the interpretation of contract terms in the partnership agreement. In January, 1948, Clark and Helsel, certified public accountants, entered into the business of public accounting and executed a written partnership agreement, Helsel holding a lesser interest than Clark. The partnership continued until 1955 when Helsel died as the result of an accident.

The controversial paragraph of the agreement was:

> That the life of each party shall forthwith be separately insured in the sum of Ten Thousand ($10,000) dollars, and the cost thereof, and all premiums thereon, shall be charged as a part of the expense of the partnership. Each party shall forthwith designate the other party as beneficiary in said policy of insurance, and in event of death of either party, the surviving party shall use the proceeds of said insurance to purchase the deceased party's interest in the firm.

In June of 1948, the partners purchased $10,000 life insurance policies on each of their lives, and at the same time purchased $10,000 accidental death and dismemberment policies, the beneficiary in each case being the "partner of the insured." In 1954 each of the policies was increased to $20,000 by virtue of a change in the group contracts of the

12. The court explained that in an association for profit, partners are liable as partners, while in a veteran's organization not for profit, members are liable only on a principal-agent basis.

13. 112 Ohio App. 31, 175 N.E.2d 98 (1961).

Prudential Insurance Company and the Trustees of the American Institute of Accountants.

At Helsel's death his interest in the partnership was determined to be $2846. As Helsel's death was by accident, both the life insurance and accidental death policies became due, and Clark, the surviving partner, received $40,000 from the insurance company. Helsel's executor tendered conveyance of its "right, title and interest in and to the assets, including good will" of the partnership. However, the executor was only willing to accept the $40,000 for Helsel's share, whereas Clark offered $2846 for the full interest of Helsel in the partnership. The trial court gave judgment to the plaintiff executor for $47,364.38 and costs, and Clark appealed.

The court of appeals stated that its duty as judicial expositor was to interpret the partnership contract by ascertaining the actual meaning of the words, not what the partners meant to have said.[14] Using this premise, the court considered first the difference between life insurance and accidental death policies, and concluded that only the life insurance and not accidental death and dismemberment insurance was meant in the agreement by its reference to "the life . . . shall . . . be . . . insured." Next the court determined that the words "shall use the proceeds of said insurance" meant that all of the proceeds from a $10,000 life policy were to be paid for the deceased partner's interest, and not merely so much of the proceeds as was necessary to buy out the interest after an appraisal of its value. That the $10,000 life policy was raised to $20,000 the court found "to be of no controlling significance," and final judgment was rendered as a matter of law for $10,000.

The court did not discuss the fact that the partnership agreement provided for the keeping of books and that upon termination of the partnership the assets and liabilities were to be ascertained, the debts of the partnership were to be discharged, and the remaining assets were to be distributed in specie in proportion to the capital each partner had invested. Nor did the court do more than comment on the fact that Helsel's share was less than Clark's at the outset but subsequently became equal.

Since the court confined itself almost exclusively to the interpretation of the meaning of the words of the insurance paragraph of the partnership agreement taken alone, the decision must be viewed as an analysis of a contract rather than a discussion of partnership law, although mutual insurance clauses are extremely common in partnership agreements and the valuation or buyout clauses are often the most difficult to draft and to construe.

14. "What the writers meant to have said but did not is foreign to our inquiry." *Id.* at 38, 175 N.E.2d at 103.

ULTRA VIRES ACTS

Certainly the most significant case in the corporation field in Ohio during the year was that decided by the United States Court of Appeals for the Sixth Circuit — *In the Matter of B-F Building Corporation.*[15]

Baird-Foerst Corporation, of which Messrs. Baird and Foerst were the president and vice president, directors, and principal shareholders, purchased merchandise from the General Electric Company. The same gentlemen also formed the B-F Building Corporation, a real estate company which held title to the land occupied by Baird-Foerst. The stock ownership, officers, and directors in the real estate corporation were identical to the operating corporation. Mr. Baird's wife was the third director of both companies. General Electric required the written guaranty of the real estate company to secure Baird-Foerst Corporation's indebtedness to it, and Messrs. Baird and Foerst gave such written guaranty, inadvertently executing it "Baird-Foerst Building Corporation, Inc. by W. J. Baird, President, H. Foerst, Vice President," instead of "B-F Building Corporation," which was the correct name.

The trustee in bankruptcy of B-F Building Corporation objected to the allowance of the General Electric claims based on the guaranty, and the referee and district court sustained his objections. The circuit court stated in its opinion that the reasons advanced by the referee and the district judge[16] for disallowance were (1) that the contract was signed by a nonexistent corporation, (2) that the officers of the bankrupt had no authority to bind the corporation, and (3) that the contract of guaranty was beyond the powers of the corporation and was ultra vires and void. It then said that in its judgment all of these grounds were without substance.

In one paragraph the court of appeals concluded that the clear intention of the guaranty was to bind the bankrupt, that there was no claim that Baird and Foerst were connected with any other building company, and that this is therefore a clear case of misnomer. Actually the district judge likewise had held that ". . . the corporation is nevertheless bound if it is obvious that the name was given in error and that the corporation sought to be bound is the corporation intended in the guarantee."[17]

As to the second reason advanced by the referee for disallowance of the claims, the appellate court here again took what appears to be a most realistic and non-formal view, reasoning that it can hardly be said that the two owners of all of the stock of a corporation, in signing a contract as executive officers, acted without authority. The court said further that

15. 284 F.2d 679 (6th Cir. 1960).

16. See 12 WEST. RES. L. REV. 634 (1961) for a discussion of the district court case. Note that the author of that article took issue with the trial court.

17. *In re* B-F Building Corp., 182 F. Supp. 602, 603 (N.D. Ohio 1960).

officers and directors of a closed corporation frequently act informally, but nevertheless have authority to bind the corporation.

The third issue, whether or not the guaranty contract was ultra vires and therefore void, was the basic one upon which the referee and the district judge were actually reversed, and the holding of this court would seem effectively to have rung the death knell for ultra vires as a defense against third parties in Ohio. Despite the apparently unequivocal language of the statute,[18] the referee had held that the trustee, standing in the shoes of the bankrupt in such capacity, could "question the acts of directors," and the district judge held that the trustee may raise the defense of ultra vires in a bankruptcy proceeding as if it were an action against directors under the statute.[19] Having so held, the district judge then found the guaranty to be ultra vires on the ground that the authority for a corporation to make such a contract must be stated in the articles, or the guaranty must be of assistance in carrying out one of the corporate purposes which is stated in the articles.

The higher court first indicated that in its opinion the corporation actually did have the authority to give a contract of guaranty, again taking a liberal view under the Ohio statute in force at the time.[20] The court said that in executing the contract of guaranty, the building company was merely guaranteeing the indebtedness of its tenant which was the operating company. Having so found, the court then quoted Ohio Revised Code section 1701.13(H) and said very simply: "The present case does not fall within any of the exceptions permitted by the statute."[21] The resultant holding is now unquestionably that even a trustee clothed with the powers given him by a bankruptcy court cannot avoid a corporate obligation by the defense of ultra vires.

PROFESSIONAL ASSOCIATIONS

No survey article directed primarily to Ohio lawyers can omit mention of *State ex rel. Green v. Brown*,[22] decided early in 1962. Briefly,

18. Ohio Revised Code section 1701.11(D) provides: "No lack of, or limitation upon, the authority of a corporation shall be asserted in any action except (1) by the state in an action by it against the corporation, (2) by or on behalf of the corporation against a director, an officer, or any shareholder as such, (3) by a shareholder as such or by or on behalf of the holders of shares of any class against the corporation, a director, an officer or any shareholder as such, or (4) in an action involving an alleged overissue of shares."

19. It appears to this writer that the true application of the trustee's position in the shoes of the bankrupt would have been in an action by the trustee against Baird and Foerst as directors for any loss due to an unauthorized act.

20. That statute was Ohio General Code section 8623-8, which gave every corporation the authority "to acquire, hold, encumber, transfer, guarantee, and dispose of . . . evidence of indebtedness . . . and contracts of other persons, associations and corporations . . . [and] to do all things permitted by this act and to exercise all powers incidental to the purposes stated in its articles." The statute in its present form is Ohio Revised Code section 1701.13(F)(5).

21. See note 18 *supra.*

22. 173 Ohio St. 114, 180 N.E.2d 157 (1962). For a discussion of the professional associa-