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any other device by which individual Americans become the unwilling instruments of foreign policy.⁶⁷

KENNETH L. PENEGAR

Corporations—Constitutional Law—Retroactive Application of Curative Statute Affecting Corporate Existence

The case of *Lester Bros. v. Pope Realty & Ins. Co.*¹ affirmed the doctrine of *Park Terrace, Inc. v. Phoenix Indem. Co.*² that a corporation became dormant when the number of stockholders was reduced to less than the statutory requirement of three. The court in the *Lester* case held that the North Carolina legislature's curative act,³ passed in an attempt to obviate the *Park Terrace* doctrine, was of no aid to the defendant Pope because the statute could not operate retroactively to defeat vested rights. In *Park Terrace* the result of dormancy was that the sole stockholder became the real party in interest in a breach of contract suit brought in the name of the corporation.⁴ In *Lester* one of two stockholders was made a defendant and was held individually liable for an extension of credit which had ostensibly been made to the corporation only.

The plaintiff in *Lester* had sought to hold defendant Pope individually liable for certain sales of package houses made to defendant corporation Pope Realty and Insurance Company. The corporation had been formed with three stockholders. Between January 12 and June 20, 1955, the plaintiff delivered three bills of merchandise to the Company which during this time had only two stockholders. These bills were unpaid, and this indebtedness comprised part of the claim for which suit was brought.⁵ At trial the Superior Court denied plaintiff's motion for judgment against Pope individually.

On appeal the Supreme Court cited *Park Terrace* and stated that when a corporation had less than three stockholders the stockholders

⁶⁷ There is nothing in the proposed statute which would preclude travel to areas where the individual's safety might be in doubt. It should be government's function to forewarn the traveler of the dangers and not to prevent him from assuming the risk.

¹ 250 N.C. 565, 109 S.E.2d 263 (1959).

² 243 N.C. 595, 91 S.E.2d 584 (1956). For an extensive discussion of this case see Note, 34 N.C.L. Rev. 531 (1956).

³ N.C. GEN. STAT. § 55-3.1 (Supp. 1959).

⁴ The decision caused much adverse comment. Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. Rev. 471 (1956); Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C.L. Rev. 432, 441-44 (1956); Comment, 14 WASH. & LEE L. REV. 72 (1957).

⁵ The plaintiff alleged fraud on the part of Pope and sought to hold him liable on all other deliveries made to the corporation, as well as these three. The Supreme Court upheld a finding that there was no reliance on his false statements and therefore no liability on the basis of fraud.

could no longer function as a corporate entity but only as individuals. Thus Pope was individually liable for the three bills of merchandise, and the court ruled that plaintiff's motion for judgment should have been granted.

In 1957, after the *Park Terrace* decision, G.S. § 55-3.1 was enacted by the North Carolina legislature for the purpose of nullifying the ruling that a corporation became dormant when the number of shareholders dropped below three. In the principal case the court quoted subsection (d) of this statute which reads:

If any corporation or purported corporation might have been considered dormant or inactive solely in consequence of the acquisition heretofore of all its shares by one or two persons, such corporation or purported corporation is hereby declared to have had uninterrupted capacity to act as a corporation.⁶

The court then stated:

The defendant Pope contends the foregoing statute⁷ relieves him from individual liability [W]hen plaintiff dealt with Pope the law of this State as declared in the *Park Terrace* case made him individually liable The plaintiff had a vested right in that liability. The liability attached in 1955. The Legislature, in 1957, could not take it away without violating the obligation of the contract. U.S. Constitution, Article I, Section 10; N.C. Constitution, Article I, Section 17.⁸

Thus the plaintiff-creditor acquired a vested right against the stockholder Pope individually, even though there was no showing that at the time the merchandise was delivered the plaintiff was aware that there were less than three stockholders or that the plaintiff had any intention of extending credit to anyone other than the corporation itself.

Although the court stated that this vested right could not be abridged by retroactive legislation, this does not mean that G.S. § 55-3.1 was held to be wholly void. The court may have intended to hold that only subsection (d) was unconstitutional, severing this part from the rest of the statute.⁹ Or the court may have intended to construe the statute as constitutional in all cases except where vested rights would be affected, so that only as applied in the latter case would the act be invalid.¹⁰ The language of the decision is susceptible to either interpretation.¹¹

⁶ N.C. GEN. STAT. § 55-3.1(d) (Supp. 1959).

⁷ It is difficult to tell if the court here referred to all of § 55-3.1 or only subsection (d). The dissent seems to support the view that the majority referred only to subsection (d).

⁸ 250 N.C. at 568, 109 S.E.2d at 266.

⁹ A court may sever part of a statute even when the legislature does not expressly so provide. *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909).

¹⁰ An act may be invalid when applied in certain cases, but this will not cause the downfall of the entire statute. *Missouri Rate Cases*, 230 U.S. 474 (1913).

¹¹ The court also quoted with approval from a case which construed a statute

There are other instances in which the North Carolina court has interpreted retroactive legislation. A North Carolina statute¹² made proof of registration in a party's name prima facie evidence of ownership of a vehicle and prima facie evidence that the vehicle was being operated in the course and scope of the owner's employment. The court held¹³ that this statute would apply to causes of action which arose before its effective date of operation because the statute merely changed a rule of evidence; the court stated that there is no vested right in a rule of evidence; the court stated that there is no vested right in a rule of evidence. Another case¹⁴ held constitutional a 1929 statutory amendment¹⁵ as applied retroactively to a trust created in 1927. The court held that this amendment, allowing revocation of a trust for unborn beneficiaries, disturbed no vested rights. A subsequent trust case¹⁶ held valid a retroactive law¹⁷ which changed the method of removing and substituting trustees; the court said no substantive rights were involved and there was no impairment of the obligation of contract. The court has also upheld¹⁸ the constitutionality of a statute¹⁹ which validated a previous township election and an issue of bonds. Other cases have not dealt so favorably with retroactive legislative acts. In a dictum the court has stated²⁰ that a creditor could not be deprived of rights which had vested under a former statute²¹ imposing double liability on holders of bank stock, and thus an amendment²² terminating double liability would not be allowed to affect such a creditor. Conversely, another dictum declared²³ that a shareholder could not be assessed under a 1925 statute²⁴ for stock purchased in 1919, since to have held the stockholder liable would have destroyed the obligation of a contract, impaired vested rights and denied due process. Where the legislature passed an act²⁵ to validate void deeds of gift by extending the time for registration, the court

as being only operative prospectively. Statutes will be so construed where possible. However, the language of § 55-3.1 would make it virtually impossible for the court to hold that the act was not intended to be retroactive.

¹² N.C. GEN. STAT. § 20-71.1 (1953).

¹³ *Spencer v. McDowell Motor Co.*, 236 N.C. 239, 72 S.E.2d 598 (1952). The statute excepted pending litigation from its effect.

¹⁴ *Stanback v. Citizens' Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

¹⁵ N.C. GEN. STAT. § 39-6 (1950).

¹⁶ *Bateman v. Sterrett*, 201 N.C. 59, 159 S.E. 14 (1931).

¹⁷ N.C. Pub. Laws 1931, ch. 78 (now G.S. §§ 45-10, -12, -17 (1950)).

¹⁸ *Burney v. Commissioners of Bladen County*, 184 N.C. 274, 114 S.E. 298 (1922).

¹⁹ N.C. Priv. Laws Ex. Sess. 1921, ch. 32.

²⁰ *Hood ex rel. United Bank & Trust Co. v. Richardson Realty, Inc.*, 211 N.C. 582, 590, 191 S.E. 410, 415 (1937) (dictum).

²¹ N.C. Pub. Laws 1921, ch. 4, § 21; N.C. Pub. Laws 1925, ch. 121, § 1.

²² N.C. Pub. Laws 1935, ch. 99.

²³ *Bank of Pinehurst v. Derby*, 218 N.C. 653, 657-58, 12 S.E.2d 260, 263 (1940) (dictum). The court avoided the constitutional question by construing the statute as operative only prospectively.

²⁴ N.C. Pub. Laws 1925, ch. 117.

²⁵ N.C. Pub. Laws Ex. Sess. 1924, ch. 20.

said, in refusing relief under the statute, that "the validating statute, if constitutional, cannot be invoked to impair the vested right."²⁶ The court has also stated²⁷ that a statute²⁸ would not be construed as giving authority to retroactive provisions of a corporate charter amendment where such a construction would interfere with vested rights in preferred stock dividends.

The construction of curative legislation affecting corporations has been dealt with by other jurisdictions. An Iowa case²⁹ held constitutional a curative act³⁰ which validated a corporation previously defective due to improper publication. The court here stated that the statute interfered with no contractual liability. The Tennessee court³¹ sustained a statute³² which validated corporate charters previously defective due to faulty acknowledgment. In this case the court held that there were no vested rights in a defective charter. The United States Supreme Court, however, held³³ that the California legislature could not take away the individual liability of a director of a corporation, the liability having vested under a former constitutional provision.³⁴ The repeal of this constitutional provision did not help the defendant because the obligation was contractual, and the right to enforce it had already vested in the plaintiff. An Oregon case³⁵ construed as operating prospectively a constitutional amendment³⁶ which imposed double liability on holders of bank stock; this construction kept the amendment from being unconstitutional.

The North Carolina curative statute, G.S. § 55-3.1, took effect on July 1, 1957. It is clear under the statutory construction in the principal case that this act could sustain all corporations formed on or after the effective date of the statute. Under this decision, however, the statute will be able to sustain corporations in existence before this date only in so far as no vested rights are involved in the corporate transactions. This has left many problems for the one- and two-man corporations regarding transactions during the time before July 1, 1957. Would the grantee in a deed executed by the dormant corporation be liable on a dower claim if the sole shareholder, or either of the two shareholders,

²⁶ Booth v. Hairston, 193 N.C. 278, 283, 136 S.E. 879, 881 (1927).

²⁷ Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939).

²⁸ N.C. Pub. Laws 1901, ch. 2, §§ 29, 30, 37, as amended; N.C. Pub. Laws 1925, ch. 118, §§ 1, 2(a), as amended; N.C. Pub. Laws 1901, ch. 2, § 19, as amended; N.C. Pub. Laws 1925, ch. 118, §§ 2, 2a, as amended.

²⁹ Adler v. Baker-Dodge Theatre Co., 190 Iowa 970, 181 N.W. 254 (1921).

³⁰ Iowa Acts and Joint Resolutions 1915, ch. 127.

³¹ Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S.W. 668 (1894).

³² Tenn. Acts 1890, ch. 17.

³³ Coombes v. Getz, 285 U.S. 434 (1932).

³⁴ CAL. CONST. art. XII, § 3 (1879).

³⁵ Schramm v. Done, 135 Ore. 16, 293 Pac. 931 (1930).

³⁶ ORE. CONST. art. XI, § 3 (1912).

died before this date?³⁷ Would there be personal income tax problems raised for the one or two shareholders?³⁸ In all corporate litigation where the cause of action arose before July 1, 1957, would the one or two stockholders be the real party or parties in interest?³⁹ Did the corporate status come and go before July 1, 1957, depending on whether at any given time there were at least three shareholders or less than that number?⁴⁰ Unfortunately the answers to these and other questions will have to be determined on a case by case basis.

JOHN G. SHAW

Criminal Law—Inciting To Riot

In *State v. Cole*¹ the Ku Klux Klan burned two crosses in the county and publicized a meeting to be held later in the week, the purpose of which was to intimidate the Indian population of the county. Before the day of the meeting the sheriff was apprised of tension growing among the Indians of the county. He went to defendant Cole, who claimed to be the Grand Wizard of the Klan, and told him that it would be dangerous to hold the meeting, but the meeting was not cancelled. As members of the Klan began appearing with firearms at the appointed place for the meeting, Indians of the county appeared with firearms and shooting began. Several hundred shots were fired before law enforcement officers could restore order. There was no further attempt to convene the meeting. The defendants Cole and Martin (and others to the State unknown) were indicted for inciting to riot, in that they willfully and unlawfully, while armed with firearms, assembled with the intent to preach racial dissension and coerce and intimidate the populace, and with the common intent to carry out such purpose in a violent manner to the terror of the people and to assist each other against all who should oppose them. The defendants were convicted, and the Supreme Court upheld defendant Cole's conviction of inciting to riot (defendant Martin's conviction was reversed on other grounds). In so doing the court recognized that inciting to riot and riot are separate and distinct offenses and said:

[I]nciting to riot is a common law offense, the gist of which is its tendency to provoke a breach of the peace, though the parties

³⁷ This question was raised in Note, 36 N.C.L. REV. 48, 50 (1957).

³⁸ This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

³⁹ This question was raised by Latty, *A Conceptualistic Tangle and the One- or Two-Man Corporation*, 34 N.C.L. REV. 471, 479 (1956).

⁴⁰ This question was raised in 250 N.C. at 570, 109 S.E.2d at 267 (dissent). Judge Bobbitt also dissented in the *Park Terrace* case on its original hearing. If his point of view had been adopted, several problems in North Carolina corporation law might have been avoided.

¹ 249 N.C. 733, 107 S.E.2d 732 (1959).