Volume 9
Issue 2 *Survey of Southwestern Law for 1954*

Article 4

1955

Business Associations

Robert K. Pace

SURVEY OF SOUTHWESTERN LAW FOR THE YEAR 1954

BUSINESS ASSOCIATIONS

INTRODUCTION

A REVIEW of Agency, Partnership, and Corporation cases decided by the courts of southwestern jurisdictions failed to produce any real changes in the law. This survey will, however, present some of the most recent developments and clarifications.

WHEN IS A PARTNERSHIP A LEGAL ENTITY?

While the business world has traditionally regarded the partnership as a legal entity distinct from and independent of the persons composing it, the law has refused to recognize its separate existence, considering it to be a mere relationship among the independent partners.[1] Two southwestern jurisdictions, Oklahoma and Louisiana, deviate from this common law view, holding "The partnership, once formed and put into action, becomes in contemplation of law, a moral being, distinct from the persons who compose it" at least to the extent that partners are not owners of partnership property but own only the residuum which may be left from the entire property after obligations of the partnership are discharged.[2] Furthermore, the current authorities construing the Federal Bankruptcy Act agree that in contemplation of that statute, a partnership is a distinct entity;[3] while the Uniform Partnership Act seems to adopt the common law view.[4] It is well established in Texas that for purposes of Rule 28 of Rules of Civil Procedure, providing persons engaged in business as a partnership may sue or be sued in their firm name that the partnership is a legal entity.[5] The scope of Rule 28 is purely procedural, however, and

[1] Glascock v. Price, 92 Tex. 271, 47 S.W. 965 (1898); Martin v. Hemphill, ... Tex. ....., 237 S.W. 550 (1922); Feldman v. Seay, 291 S.W. 350 (Tex. Civ. App. 1927).

[2] Rex White v. Tulsa Iron & Metal Corp., 185 Okla. 606, 95 P. 2d 590 (1939); Heaton v. Schaffer, 34 Okla. 631, 126 Pac. 797 (1912); Holmes v. Alexander, 52 Okla. 122, 152 Pac. 819 (1915); Brinson v. Monroe Automobile Supply Co., 180 La. 1064, 158 So. 558 (1934); Succession of Pilcher, 39 La. Ann. 362, 1 So. 929 (1887).

[3] Timlin v. Bryan, 165 F. 166 (5th Cir. 1908); American Steel & Wire Co. v. Coover, 27 Okla. 131, 111 Pac. 217 (1910).

[4] Uniform Partnership Act, § 6 (1).

[5] Johnson v. Pioneer Mortgage Co., 264 S.W. 2d 761 (Tex. Civ. App. 1954) *error ref.*

does not change the substantive rights of the owners of a business under an assumed name.

This year the Texas courts were presented with an opportunity to change the common law rule when in *Aboussie v. Aboussie*[6] a partnership was sued in its trade name by a minor child of one of the partners for personal injuries sustained through the negligence of another member of the firm. It was held that a minor child, being unable to sue its parents for ordinary negligence, is unable to sue a partnership in which her father is a member. The court ruled a partnership is not a legal entity and that Texas law recognizes no personality in a partnership other than those who compose it.

When Is a Corporation Practicing Law?

While a corporation enjoys many privileges of a natural person it is recognized that it cannot engage in the practice of law.[7] Although there is no judicial dissent from this proposition, there is a problem with regard to what acts amount to a corporate practice of law. The Arkansas Supreme Court in a 1954 case held that when a national bank conducted probate proceedings, through its own employees who were licensed attorneys, upon estates in which the bank was named executor, it was engaging in unauthorized practice of law.[8] The court reasoned that although a corporation could represent itself in court through employees who were licensed attorneys, a corporation was not representing itself when acting as an administrator, executor, or in a similar fiduciary capacity.

The only authority cited by the court was dictum in the Minnesota case of *In Re Otterness*[9] wherein it was stated that although persons could appear in court to represent themselves when parties to a lawsuit, executors, administrators, and guardians were not such parties to an action that they might appear without counsel.

---

[6] 270 S.W. 2d 636 (Tex. Civ. App. 1954) *error ref.*

[7] Hexter Title & Abstract v. Grievance Committee, 142 Tex. 506, 179 S.W. 2d 946 (1944); 157 A.L.R. 283.

[8] Arkansas Bar Association v. Union Bank, ...Ark....., 273 .W. 2d 408 (1954).

[9] 181 Minn. 254, 232 N.W. 318 (1930).

The language of the Arkansas case is very broad and leaves unsettled whether or not, after probate of a will, the corporate executor could appear in court through its attorney employees for the purpose of suing or being sued.

The cases in other jurisdictions uniformly hold that if a bank or trust company may by statute exercise the privilege of executing trusts or estates, they may, through their regular attorney employees, draft instruments and appear in court incident to the administration of the trust or estates in their hands.[10] The Arkansas Court noted these cases but expressly and summarily disagreed with their reasoning and conclusions.

Limitations on Corporations Holding Real Estate

In a significant decision the Oklahoma Supreme Court recently held constitutional the statute prohibiting corporations from holding land for more than seven years and expressly exempting business trusts from such limitations.[11] A probable result of this decision will be to expect a future trend toward business trusts by companies wishing to avoid the real estate limitation. One of the objects of a business trust is to obtain for the associates most of the advantages of a corporation and still retain the freedom from restrictions and regulations generally imposed by law upon the corporation. This is especially true in Oklahoma where the beneficiaries and trustees of business trusts are free from personal liability on debts of the trust when the trustees are vested with title to trust properties and have the exclusive right to manage and conduct the business of the trust free from any control on the part of the beneficiaries.[12] This same inducement would not exist in Texas because the beneficiaries are recognized as partners regardless of whether or not the trustees are independent of control.[13]

---

[10] Merrick v. American Security & Trust Company, 71 App. DC 72, 107 F. 2d 271 (1939); Detroit Bar Association v. Union Guardian Trust Company, 282 Mich. 216, 276 N.W. 365 (1937); Judd v. City Trust and Saving Bank, 133 Ohio St. 81, 12 N.E. 2d 288 (1937).

[11] State v. Hopping Inv. Co., ...Okla....., 269 P. 2d 997 (1954).

[12] Liquid Carbonic Co. v. Sullivan, ...Okla....., 229 Pac. 561 (1924).

[13] Thompson v. Schmitt, 115 Tex. 53, 274 S.W. 534 (1925).

LIABILITY OF A CORPORATION SUCCEEDING TO THE BUSINESS OF A PARTNERSHIP

It is well settled in most jurisdictions that when the property of a partnership is transferred to a corporation without consideration other than capital stock issued to the partners and the corporation is but a continuation of the old business, it will be liable for the existing debts of the unincorporated firm.[14] Closely related to this proposition is the responsibility of the new corporation for the torts of the predecessor. In a case of first impression in Oklahoma, the Supreme Court held that the debts assumed by the new corporation include the predecessor's tort liabilities.[15]

The holding in this case emphasizes the principle that the corporate entity is not just a cloak that can be donned or shed at the convenience of partners or shareholders. The entity will be recognized to protect the corporation in its business but the concept will not be carried so far as to enable the corporation to become a vehicle to evade responsibility.[16]

Robert K. Pace.

[14] S & J Supply Co. v. Warren, 191 Okla. 683, 133 P. 2d 201 (1943); Stowell v. Garden City News Corporation, 143 Kan. 840, 57 P. 2d 12 (1936); 149 A.L.R. 798.
[15] Jones v. Eppler, ____Okla.____, 266 P. 2d 451 (1954).
[16] McCaskill Co. v. United States, 216 U.S. 504 (1910).