Business Associations -- 1961 Tennessee Survey

Kenneth L. Roberts

BUSINESS ASSOCIATIONS—1961 TENNESSEE SURVEY

KENNETH L. ROBERTS*

Tennessee and federal courts decided eight cases during the survey period[1] involving principles of corporate law. The 1961 Tennessee General Assembly enacted numerous statutes relating to business associations in general.

I. CASES

A. Disregard of Corporate Entity

It is uniformly stated that a corporation is a separate legal entity existing apart from its shareholders and officers with distinct rights and liabilities. It is equally accepted, however, that this doctrine is based upon convenience and will not be extended to a point subversive of this underlying policy.[2] Tennessee cases affirm the first proposition.[3] Conversely, they have disregarded the corporate entity

*Associate, Waller, Davis & Lansden, Nashville; Lecturer in Law, Vanderbilt University.

1. The writer examined cases published up to September 1, 1961.
2. See generally BALLENTINE, CORPORATIONS §§ 118-43 (rev. ed. 1946); 1 FLETCHER, CYCLOPEDIA CORPORATIONS §§ 24-48 (rev. ed. 1931); 13 AM. JUR. *Corporations* § 7 (1938); Annots., 34 A.L.R. 597 (1925), 1 A.L.R. 610 (1919); O'Neal, *Business Associations—1958 Tennessee Survey,* 11 VAND. L. REV. 1183-85 (1958).
3. *E.g.,* Hinton v. Carney, 194 Tenn. 262, 250 S.W.2d 364 (1952); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939); Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S.W. 209 (1896).

where: (1) "necessary" in order to reach a "just" result;[4] (2) it is a mere subterfuge for the purpose of evading a contract or otherwise applicable principle of law;[5] (3) it is used to perpetrate a fraud;[6] or (4) it is but a "tool," "agency" or "instrumentality" of its controlling shareholders (generally, a parent corporation).[7] The cases are numerous in this area.

Post Sign Co. v. Jemc's, Inc.,[8] decided by the eastern section of the court of appeals, raises the question again, but in unusual factual circumstances. There, the owners of a drive-in restaurant offered it to one McAshan, its manager, for $65,000 cash or, alternatively, a $110,000 note secured by deed of trust,[9] provided someone could be induced to discount the note for $65,000. One Clayton was so willing, but to meet his individual tax situation the transaction was consummated as follows: (a) the owners gave McAshan an option to purchase for $65,000; (b) simultaneously, McAshan assigned this to Clayton, who exercised the option, and leased the property back to McAshan with an option to purchase for $110,000, payable in monthly installments; (c) approximately a year later, McAshan exercised this option and gave Clayton an installment note and purchase money deed of trust.[10] At the same time McAshan gave Clayton a chattel deed of trust on certain fixtures, equipment and other personal property in the restaurant which he had previously

4. As by giving effect to a testator's intention, Fidelity Trust Co. v. Service Laundry Co., 160 Tenn. 57, 22 S.W.2d 6 (1929); Baldwin v. Davidson, 37 Tenn. App. 606, 267 S.W.2d 756 (M.S. 1954); or finding that a sole shareholder has an insurable interest in corporate property, American Indem. Co. v. Southern Missionary College, 195 Tenn. 513, 260 S.W.2d 269 (1953); or determining a brokerage commission on a partnership lease to be payable by a successor corporation, E. O. Bailey & Co. v. Union Planters Title Guar. Co., 33 Tenn. App. 439, 232 S.W.2d 309 (W.S. 1949). See also Thoni Trucking Co. v. Foster, 243 F.2d 570 (6th Cir. 1957).

5. Scott v. McReynolds, 36 Tenn. App. 289, 255 S.W.2d 401 (M.S. 1952) (contract); E. O. Bailey & Co. v. Union Planters Title Guar. Co., *supra* note 4. See also T. Towles & Co. v. Miles, 131 Tenn. 79, 173 S.W. 439 (1915).

6. Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344 (1948).

7. *E.g.*, Dale v. Thomas H. Temple Co., *supra* note 6; Fidelity Mut. Life Ins. Co. v. Guess, 171 Tenn. 205, 101 S.W.2d 694 (1937); Nashville, C. & St. L. Ry. v. Faris, 166 Tenn. 238, 60 S.W.2d 425 (1933); Dillard & Coffin Co. v. Richmond Cotton Oil Co., 140 Tenn. 290, 204 S.W. 758 (1918); Madison Trust Co. v. Stahlman, 134 Tenn. 402, 183 S.W. 1012 (1916); T. Towles & Co. v. Miles, *supra* note 5; Temmessee Consol. Coal Co. v. Home Ice & Coal Co., 25 Tenn. App. 316, 156 S.W.2d 454 (M.S. 1941); Commercial Club v. Epperson, 15 Tenn. App. 649 (M.S. 1932); Acuff v. J. Albert Robbins Co., 1 Tenn. App. 708 (E.S. 1926). See also Garrett v. Southern Ry., 173 F. Supp. 915 (E.D. Tenn. 1959); Roberts, *Business Associations—1960 Tennessee Survey*, 13 VAND. L. REV. 999, 1004 (1960).

8. 342 S.W.2d 385 (Tenn. App. E.S. 1960).

9. The property was subject to a prior deed of trust for the benefit of a third party.

10. The transaction was actually consummated between McAshan and Western Avenue Realty, Inc., a corporation of which Clayton was sole shareholder, but for convenience of reference only, Western Avenue's corporate entity is disregarded herein.

acquired from the owners. Shortly thereafter McAshan and his wife formed Jemc's, Inc., leased the real property to it and conveyed to it the personalty previously mortgaged to Clayton. The corporation then operated the restaurant and, apparently, all its creditors dealt with the corporation and not McAshan personally. In December 1958, McAshan quitclaimed his equity in the real estate to the corporation in return for its note. In January of 1959 a general creditors' bill was filed against the corporation and a receiver appointed. Clayton filed an intervening petition seeking the turnover of the property for purposes of foreclosure under his deed of trust. The receiver resisted, alleging that the difference between $65,000 and the outstanding balance on the note was usurious since it represented a forebearance of the principal obligation for a period of years and exceeded the legal interest rate. The chancellor agreed with the receiver and held that he was entitled to purge the transaction of the usury. Upon appeal, the court of appeals, speaking through Special Judge Worley, reversed and remanded.

The court, applying settled principles, held that the right to raise usury as a defense is a privilege personal to the debtor, his sureties, guarantors, heirs, devisees and personal representatives.[11] It reasoned that any obligation of Jemc's could be purged of usury by the receiver, *its* personal representative. Clayton, however, was asserting no claim against Jemc's; rather, he was seeking to enforce a lien *in rem* arising out of the mortgage from McAshan. The court felt that the chancellor had erroneously ignored this by disregarding Jemc's separate entity and treating it and McAshan as one and the same; under the principles mentioned above, there was no good reason why this should be done. With the exception of the conveyance to the corporation of the personalty which had been previously mortgaged to Clayton (which was explained as "inadvertent error"), the facts showed that McAshan had "scrupulously maintained" the corporation's activities and liabilities distinct from his own and, as noted above, all creditors of the restaurant had dealt with the corporation and not McAshan personally.

The opinion seems logical, well-reasoned and supported by ample authority. There appears to be no injustice, fraud, illegality, evasion or subterfuge which would warrant the disregarding of the corporation's separate entity in order to reach the result urged by the receiver.[12]

11. See TENN. CODE ANN. § 47-1617 (1956): "If usurious interest has been paid, the same may be recovered by action, at the suit of the party from whom it was taken, or his representative." See also Parker v. Bethel Hotel Co., *supra* note 3; Williams v. Boyd, 2 Tenn. App. 111 (W.S. 1926).

12. *Cf.* McFerrin v. Woods, 62 Tenn. 242 (1873), which holds that partnership rights arising out of a usurious contract cannot be enforced by one

B. Action in Corporate Name After Revocation of Charter

In *Jesse A. Bland Co. v. Knox Concrete Products, Inc.*,[13] the supreme court held that a suit could not be brought in the name of a corporation which had had its charter revoked seven years earlier.

The charter of Jesse A. Bland Co., Inc., a Tennessee corporation wholly owned by Jesse A. Bland, was revoked in 1949 for failure to pay franchise taxes and file necessary reports.[14] Subsequently, Bland leased to the defendant a building, title to which was registered in the corporation's name. In March, 1956, Bland died intestate. In June of that year the building was destroyed by fire, allegedly resulting from the negligence of defendant's employees. An action for damages was then instituted against the defendant in the name of the corporation. It was dismissed in the circuit court on the ground that the corporation had no standing to sue. Upon appeal, this finding was affirmed by the supreme court in an opinion by Chief Justice Prewitt.

The court cited the general rule, followed in Tennessee and elsewhere, that after its dissolution a corporation has no capacity to sue or be sued except as provided by statute.[15] The present statutes (and their predecessors) relating to dissolution and winding-up were discussed in detail. The present code sections[16] provide for voluntary dissolution, either by the incorporators (before business is com-

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partner individually. Note that several states now have statutes prohibiting a corporation from interposing the defense of usury in an action against it, *e.g.*, Delaware, Florida, Illinois, Maryland, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Virginia, Wisconsin and New York. See Annot., 63 A.L.R.2d 924 (1959).

13. 388 S.W.2d 605 (Tenn. 1960).

14. Pursuant to TENN. CODE ANN. § 67-2925 (1956) which provides that a corporation which fails to duly file or pay the state franchise tax shall have its name certified to the secretary of state by the commissioner of revenue and: "Thereupon the charter of such corporation or its domestication in Tennessee shall stand as automatically revoked . . . ." The charter may be reinstated upon the payment of the tax within one year after the date of revocation.

15. See 13 AM. JUR. *Corporations* § 1354 (1938); Annot., 97 A.L.R. 477 (1935); BALLENTINE, CORPORATIONS § 315 (rev. ed. 1946); Pendleton v. Russell, 144 U.S. 640 (1892); Panzer-Hamilton Co. v. Bray, 96 Cal. App. 460, 274 Pac. 769 (Dist. Ct. App. 1929); Dunagan v. Bushey, 152 Tex. 630, 263 S.W.2d 148 (1953). That this represents the general rule in Tennessee see, *e.g.*, State *ex rel.* Fisher v. U.S. Grant University, 115 Tenn. 238, 90 S.W. 294 (1905); Rogersville & Jefferson R.R. v. Kyle, 77 Tenn. 691 (1882); Kyle v. Ewing, 73 Tenn. 580 (1880); Tennessee v. President and Directors of Bank of Tennessee, 64 Tenn. 101 (1875); Hopkins v. Whitesides, 38 Tenn. 31 (1858); White v. Campbell, 24 Tenn. 38 (1844). A minority of states have taken a contrary position and allowed a tort action for the recovery or vindication of property rights to be brought in the name of a corporation involuntarily dissolved, sometimes many years after the dissolution. See, *e.g.*, John J. Gamalski Hardware, Inc. v. Baird, 298 Mich. 662, 299 N.W. 757 (1941); Annot., 136 A.L.R. 1160 (1942). However, these seem strictly limited to tort actions relating to property. See Dawn Constr. Co. v. Davis Home Builders, Inc., 360 Mich. 281, 103 N.W.2d 410 (1960).

16. TENN. CODE ANN. §§ 48-511 to -516 (1956).

menced),[17] the stockholders,[18] or by the officers and directors.[19] Upon dissolution the corporation continues to exist, so long as necessary, for the purpose of winding up its affairs.[20] Where liquidation is by officers and directors, they take charge of the company's assets as trustees and are empowered to bring, in the name of the corporation, all suits necessary and proper to effect the proper settlement of its affairs.[21] The court found that none of these provisions would remove the case from the general rule. Three reasons inhere in the opinion: (1) the above-mentioned statutes relate only to voluntary dissolutions, not involuntary forfeitures of the charter; (2) even if they were otherwise applicable, they allow only suits necessarily and properly relating to the settlement of corporate affairs—which would certainly not encompass the present suit; and (3) in any event, suits of the nature permitted must be brought within a "reasonable" time after dissolution (no time limit being set forth), and seven years was clearly unreasonable.[22] It was concluded that the suit must be brought, if at all, by Bland's survivors, since, as a matter of law, all corporate property passed to Bland upon its termination.

The court seems clearly correct in finding these statutory provisions inapplicable. Although some of the earlier Tennessee statutes on this subject were equally applicable to involuntary forfeitures of charters as to voluntary dissolutions,[23] the present sections apply only to the latter. Too, an action for damages to property occurring seven years after the forfeiture of the corporation's charter does not seem remotely incidental to the winding-up of corporate affairs.[24] It is

17. TENN. CODE ANN. § 48-511 (1956).
18. TENN. CODE ANN. § 48-512 (1956).
19. TENN. CODE ANN. § 48-516 (1956).
20. TENN. CODE ANN. § 48-514 (1956).
21. TENN. CODE ANN. § 48-516 (1956).
22. It is interesting to note that under both the Code of Tennessee §§ 1493 to 1497 (1858), and Shannon's Annotated Code of Tennessee §§ 2071 to 2076 (1917), a corporation dissolved, whether voluntarily or involuntarily, was declared to exist for the period of five years following such dissolution for the purpose of prosecuting or defending suits against it, and such period could be extended in the discretion of the chancellor. Annotated Code of Tennessee § 3757 (1934), omits both the five year and discretionary extension provisions and contains no reference to involuntary dissolution or forfeiture. It is in substance similar to the present section 48-516. It seems clear that all the prior statutes applied only to suits reasonably incident to a winding-up of corporate affairs. See, *e.g.*, Taylor v. Wolf River Corp., 26 Tenn. App. 94, 167 S.W.2d 1004 (M.S. 1942).
23. See note 22 *supra*.
24. The court made short work of two arguments by plaintiff: (1) that under TENN. CODE ANN. § 48-110 (1956) the corporate status could not be collaterally impeached since the corporation had complied with all statutory provisions governing its formation; (2) that under TENN. CODE ANN. § 48-711 (1956) defendant was precluded from setting up a lack of legal organization of the corporation as a defense to the action. Chief Justice Prewitt gave the obvious answer to these statements—that there sections relate to initial

difficult to comprehend why the action was brought in the corporate name.[25]

C. Effect of Merger

Two decisions, one by the United States Sixth Circuit Court of Appeals, raised unusually interesting questions as to the effect of a corporate merger.

1. Privilege Tax.—Tennessee imposes an annual privilege tax upon "each person" operating an intrastate telephone business.[26] The tax is payable in full on August 1 for the year commencing July 1;[27] however, the taxpayer may elect to pay in quarterly installments.[28] If the installment method is elected and the taxpayer subsequently transfers the business, the transferee is liable only for the quarterly installments then unpaid.[29] However, the statutes also provide that "any person who first commences business . . . ." shall pay the tax on a monthly basis until the following July 1.[30]

In *General Telephone Co. v. Boyd*,[31] Southern Continental Telephone Company, a Delaware corporation subject to the above tax, paid in full for the whole fiscal year 1957 before August 1, 1957. In October of the same year, pursuant to approval of the Tennessee Public Service Commission, Southern merged with General Telephone Company of the Southeast, a Virginia corporation which had not previously done business in Tennessee, the latter becoming the surviving corporation.[32] After the merger General continued the business precisely as had Southern previously. It paid no tax for fiscal year 1957, relying on the fact that Southern had already so paid. The state taxing authorities concluded that General was a new "person first commencing business" in Tennessee and therefore subject to the above tax. They conceded that if Southern had paid the tax on the optional quarterly basis then General would have been liable only for the remaining quarterly installments under the provision above referred to;[33] they contended, however, that since Southern

organization, not to a situation where a validly organized corporation subsequently has its charter revoked.

25. Analogous to the instant case are those cases which hold that foreign corporations doing an intrastate business in Tennessee without complying with the filing requirements of TENN. CODE ANN. §§ 48-901 to -907 (1956) may not sue or be sued in Tennessee courts. See Roberts, *Business Associations—1960 Tennessee Survey,* 13 VAND. L. REV. 999, 1008 (1960).

26. TENN. CODE ANN. § 67-4102 (item Q) (1956).

27. TENN. CODE ANN. § 67-4317 (1956).

28. TENN. CODE ANN. § 67-4318 (1956).

29. TENN. CODE ANN. § 67-4319 (1956).

30. TENN. CODE ANN. § 67-4320 (1956).

31. 343 S.W.2d 872 (Tenn. 1960).

32. All the stock of both Southern and General was owned by General Telephone Corporation.

33. TENN. CODE ANN. § 67-4319 (1956), referred to in note 29 *supra.*

had paid in full, this provision was inapplicable. The tax was paid under protest and suit brought to recover it. The chancellor upheld the tax. Upon appeal, the supreme court speaking through Justice Burnett, affirmed the chancellor. In essence, the reasoning of the court was: (1) General is a separate person from Southern and since the tax falls on each person, General must pay it; (2) to construe the provision crediting a transferee with quarterly installments paid by a transferor as being applicable to the situation where the merged company had paid the whole tax in advance would amount to "judicial legislation"; (3) that although upon "consolidation" the new corporation becomes statutorily vested with all of the rights, privileges, powers, franchises and immunities of the "consolidating" corporation,[34] this alone would not preclude the state from collecting the tax since its sovereign rights cannot be limited absent a clear expression of legislative intent.

The tax aspects of this decision are thoroughly discussed elsewhere in this survey.[35] Suffice it to say on this point that the court's determination that the surviving corporation can take advantage of taxes paid by the merged corporation only where they were paid on a quarterly basis seems contrary to legislative intent.[36]

From the standpoint of corporate law, some criticism must also be offered. First, the opinion throughout talks in terms of "consolidation." It is clear that there was not a union of two corporations into one new one with the former ceasing to exist, that is, a "consolidation"; rather, this was a "merger," or combination of two corporations whereby one of the constituents survived, absorbing the other.[37] The merger statute enacted by the 1955 Tennessee General Assembly[38] was not mentioned, although in force at the time of the union of the two corporations. Although this fact alone would make no significant difference on the controlling legal principles[39] the com-

34. TENN. CODE ANN. § 48-502 (1956).

35. See Hartman, *State and Local Taxation—1961 Tennessee Survey*, 14 VAND. L. REV. 1401 (1961).

36. The concluding sentence of TENN. CODE ANN. § 67-4319 (1956) (relating to payment by quarterly installments) provides: "It is hereby declared to be the legislative intent that only one (1) gross receipt tax be paid on account of the operation of a business during any one (1) year." Although this literally applies only to the situation where the transferor pays on the installment basis, it seems inconceivable that the General Assembly intended that where the transferor was public spirited enough to pay the whole amount in full, the transferee should be denied the benefit of a credit for such amount.

37. See generally 13 AM. JUR. *Corporations* § 1176 (1938); BALLENTINE, CORPORATIONS § 292 (rev. ed. 1946); 15 FLETCHER, CYCLOPEDIA CORPORATIONS §§ 7040 to 7199 (rev. ed. 1938).

38. TENN. CODE ANN. §§ 48-517 to -522 (Supp. 1961).

39. The Tennessee statutes relating to consolidation are found in TENN. CODE ANN. §§ 48-501 to -508 (1956). They provide for majority stockholder approval of an agreement of consolidation entered by the majority of di-

bination should be correctly categorized.[40]

Secondly, whether the union be designated as merger or consolidation, it is settled that the new or surviving entity stands in the stead of its constituents as to both rights and liabilities.[41] Concededly, where the liability sought to be imposed is one for taxes, the cases show that the new or surviving corporation has had more difficulty in resisting it (*e.g.*, as where it seeks to rely on a tax exemption previously afforded one of the constituents).[42] But where, as here, a statute specifically affords the survivor all the privileges and immunities enjoyed by the constituents, it seems strained to hold that

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rectors and officers of the respective corporations. Following shareholder approval, the directors and officers then must approve and file the agreement with the secretary of state and the registrar of the county where the consolidated corporation is to have its principal office. Dissenting stockholders are given appraisal rights. When the above formalities are met, section 48-505 provides that the separate existence of the constitutent corporations ceases and the new corporation has all the "rights, privileges, power, franchises and immunities . . . ." and is "subject to all the liabilities and duties of each of such corporations so consolidated . . . ." The new merger statute (see note 38 *supra*), section 48-517 provides: "It shall be lawful for any agreement of two (2) or more corporations to consolidate under the laws of this state to provide that one (1) of them shall survive as the consolidated corporation. A consolidation pursuant to such agreement shall have the effect of a merger of the other corporation or corporations into the said surviving corporation." Section 48-522 provides that the new statute is supplemental to the rights and powers of merger which previously existed under prior law (*i.e.*, the above consolidation provisions). Thus, under the above provisions, a merger is treated as but another form of consolidation wherein the surviving corporation was also one of the pre-existing corporations. Therefore, the effect, in terms of the legal principles applicable to the new or surviving entity, is the same.

40. The case gives no explanation why Southern and General, both foreign corporations, chose to "consolidate" pursuant to Tennessee law. TENN. CODE ANN. § 48-101 (1956) provides: "The provisions [the general corporation statutes] of chapters 1 to 5 inclusive, of this title . . . shall apply to corporations incorporated or consolidated thereunder . . . and to no other corporations . . . ." It would seem that at least one of the corporations being consolidated should be a Tennessee corporation before the Tennessee corporation laws would be applicable.

41. See BALLENTINE, CORPORATIONS §§ 289, 294 (rev. ed. 1946); 15 FLETCHER, CYCLOPEDIA CORPORATIONS § 7117 (rev. ed. 1938); First Nat'l Bank v. Harry E. Chapman Co., 160 Tenn. 72, 22 S.W.2d 245 (1929); Memphis Water Co. v. Magens & Co., 83 Tenn. 37 (1885); Miller v. Lancaster, 45 Tenn. 514 (1868).

42. It is settled that where one of the constituent corporations is entitled to a tax exemption, that exemption does not pass to the new or surviving corporation unless the statute authorizing the merger or consolidation so indicates; and the statute should be construed in favor of the public and against the corporation. 13 AM. JUR. *Corporations* § 1200 (1938); 15 FLETCHER, CYCLOPEDIA CORPORATIONS § 7100 (rev. ed. 1938). There have been several cases on this point before the United States Supreme Court. The earlier cases held that a consolidation statute affording the new corporation the "privileges" of the constituent corporations included their tax exemptions. *E.g.*, Tennessee v. Whitworth, 117 U.S. 139 (1886). However, later cases indicated that stronger language, such as "immunities" or "exemptions" must appear in the statute before the exemption would carry through. *E.g.*, Rochester Ry. v. City of Rochester, 205 U.S. 236 (1907); Wright v. Georgia R.R. & Banking Co., 216 U.S. 420 (1910); Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

one of such privileges or immunities is not the right to be relieved of a second payment of a tax already paid by the predecessor. If Southern had paid *no* tax in this case, certainly the state could, and undoubtedly would, successfully contend that General was liable therefor. The shoe should fit the other foot as well, despite the fact that the wearer is the sovereign.

2. *Statute of Limitations.*—The case of *Alexander v. Buckeye Cellulose Corp.*, recently decided by the Sixth Circuit Court of Appeals,[43] raises this question: Does a merger wherein the surviving corporation assumes the liabilities and obligations of the merged company operate to revive a claim outstanding against the latter but previously barred by the applicable statute of limitations? The court of appeals held that it did not.

Plaintiff had rendered services to Buckeye Cotton Oil Company in Florida without receiving payment therefor, but had failed to sue for recovery within Florida's three-year limitation period. After the running of the statute, the company merged with the instant defendant (which became the surviving corporation), the merger agreement providing that the defendant assumed the liabilities and obligations of the merged company. Plaintiff then sued defendant in the eastern district of Tennessee, advancing the theory that the merger agreement constituted a "new promise" reviving the barred claim. The district court held that the Florida statute of limitations was applicable and[44] that the claim was not revived, and granted summary judgment for the defendant. Upon appeal, this was affirmed in an opinion by District Judge Kent.

Judge Kent concluded that while the few cases on point hold that a merger prior to the running of the statute may operate to start a new limitation period on the theory of a "new promise,"[45] conversely, where the claim is already barred at the time of the merger, authority and reason support the position that the claim is not revived by the merger alone.[46] To hold otherwise would deprive the surviving corporation of defenses formerly available to the merged company and impose upon it liabilities not enforceable against such company.

43. 281 F.2d 187 (6th Cir.), *cert. denied,* 364 U.S. 912 (1960).

44. Correctly applying TENN. CODE ANN. § 28-114 (1956) which provides: "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state."

45. Anderson v. Calaveras Cent. Mining Corp., 13 Cal. App. 2d 338, 57 P.2d 560 (Dist. Ct. App. 1936); Mitchell v. Liberty Clay Prods. Co., 291 Pa. 282, 139 Atl. 853 (1927); 15 FLETCHER, CYCLOPEDIA CORPORATIONS § 7173 (rev. ed. 1938).

46. Board of Comm'rs of Caddo Levee Dist. v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929); 13 AM. JUR. *Corporations* § 1196 (1931); 15 FLETCHER, *supra* note 45, § 7173.

D. Judicial Intervention in Internal Corporate Affairs

In *Roofire Alarm Co. v. Underwriters' Laboratories, Inc.*,[47] Judge Darr of the eastern federal district reaffirmed the generally accepted proposition that courts will not intervene in the internal affairs of corporations absent a showing of illegality, fraud or corruption. Thus, he granted a summary judgment to Underwriters' Laboratories in a suit by a manufacturer whose fire alarm device had been rejected as inadequate, seeking a declaratory judgment that defendant's standards were unreasonable and discriminatory. The judge said:

> It is not a function of the courts to interfere with the internal workings of corporations in exercising their discretion within legal limits, and the establishment of the standards which are here involved is an internal operation that does not violate any known public policy.[48]

This also represents the general Tennessee position.[49]

E. Disregard of Fictitious Corporate Records

In January 1951, the Kennedy-Herring Hardware Company, owned and managed by Kennedy, Herring and two others, purportedly established a schedule of officers' salaries greatly in excess of those then being paid and of what the company would be financially able to pay in the reasonably foreseeable future. The new schedule was motivated by (1) the anticipation of a "salary freeze" thought to be imminent because of the Korean War and (2) potential federal tax deductions thereby made available to the company. The schedule was recorded in the corporate minutes as being authorized by a directors' resolution. Kennedy, the president of the corporation, gave an affidavit to auditors of the Internal Revenue Service that such salaries were legal obligations of the company. However, there was direct testimony from the officers that such resolutions were never formally adopted and that all officers knew that the salaries were not to be paid until the company was able to pay them and until they "wanted them." The increased salaries were never paid. Subsequent internal dissension between Kennedy and Herring resulted in the company's purchasing, at a fair price, all outstanding stock except Kennedy's, leaving him as sole owner. Herring then sued the company in the United States District Court for the Eastern District of Tennessee to recover the difference between the salaries actually received by

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47. 188 F. Supp. 753 (E.D. Tenn. 1959), *aff'd,* 284 F.2d 360 (6th Cir. 1960).
48. *Id.* at 754.
49. Orman v. Bransford Realty Co., 168 Tenn. 70, 73 S.W.2d 713 (1934); Knapp v. Supreme Commandery, United Order of the Golden Cross of the World, 121 Tenn. 212, 118 S.W. 390 (1908); Range v. Tennessee Burley Tobacco Growers Ass'n, 41 Tenn. App. 667, 298 S.W.2d 545 (E.S. 1955); Hawkins Co. v. East Tennessee & Va. R.R., 1 Shan. 290 (1874).

him as vice president and the amount accrued on the company's books according to the above schedule. On these facts, Judge Darr (sitting without a jury) found that the accrued salaries were "fictitious" and not legal obligations of the company and rendered judgment for the company. The Sixth Circuit Court of Appeals affirmed in *Herring v. Kennedy-Herring Hardware Co.*,[50] holding that such findings of fact were not "clearly erroneous" and therefore could not be set aside.[51]

Corporate records and minutes, where properly authenticated, are admissible in evidence to prove corporate acts and proceedings.[52] In fact, it is generally said that they are the "best evidence" of such proceedings and that the statements contained therein are prima facie correct and may not be contradicted by parol evidence.[53] However, parol is admissible to show that such records are false, forged or fictitious, and, when so shown, they are given no evidentiary value unless the officers or directors, having knowledge of their false or fictitious character, impart verity to them by neglecting to correct or disavow them and a third person is prejudiced thereby.[54]

F. Criminal Liability of Corporation for Acts of Agents

The case of *Continental Baking Co. v. United States*[55] involved a prosecution of four bakery companies in the United States District Court for the Western District of Tennessee for illegally conspiring to fix prices of their products in the Memphis area in violation of section 1 of the Sherman Act. Upon the appeal from a judgment of conviction rendered by Judge Boyd, most of the questions concerned principles of evidence. One major issue was the admissibility of certain intra-company letters and reports of company agents to superiors, transmitted by an established private reporting system, concerning activities of competitors in selling goods at lower prices and revealing attempts by such agents to persuade the competitors to adjust their price levels to conform to defendants'. The admissibility of these items turned on whether they could be deemed to be admissions of the corporate defendants. This in turn depended upon whether the

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50. 290 F.2d 270 (6th Cir. 1961).
51. Relying on FED. R. CIV. P. 52(a).
52. 20 AM. JUR. *Evidence* §§ 977-81 (1939); TENN. CODE ANN. § 24-711 (1956).
53. 13 AM. JUR. *Corporations* § 170 (1938); 5 FLETCHER, CYCLOPEDIA CORPORATIONS § 2196 (rev. ed. 1952); North Carolina Mut. Life Ins. Co. v. Banks, 24 Tenn. App. 660, 148 S.W.2d 54 (M.S. 1940); Allen v. Grand Lodge, 20 Tenn. App. 43, 95 S.W.2d 65 (M.S. 1936); Page v. Knights and Ladies of America, 61 S.W. 1068 (Tenn. Ch. App. 1900).
54. Annot., 48 A.L.R.2d 1259 (1956); 5 FLETCHER, CYCLOPEDIA CORPORATIONS § 2196 (rev. ed. 1952).
55. 281 F.2d 137 (6th Cir. 1960).

corporate principal was responsible for the acts of its agents. There was evidence that the agents had no actual authority to determine prices and were specifically instructed not to discuss prices with competitors. There was also evidence that the corporate management knew of the continuing activities of the subordinates of this nature and did not object thereto. In holding that such letters and reports would be admissible if the jury found (on retrial) that the agents had implied authority to so contact competitors, or that their superiors had ratified such acts, the Sixth Circuit Court of Appeals, in a well written opinion by Judge Wieck, stated:

> There is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal's business. Under such circumstances, the courts have held that so long as the criminal act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have "authorized" the criminal act.[56]

Further:

> A corporation which employs an agent in a responsible position cannot say that the man was only "authorized" to act legally and the corporation will not answer for his violations of law which inure to the corporation's benefit.[57]

These propositions now represent established law in Tennessee and other jurisdictions.[58]

G. Corporate Venue Under Federal Anti-Trust Laws

Section 12 of the Clayton Act[59] provides:

> Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it

56. *Id.* at 149.
57. *Id.* at 150.
58. *E.g.*, 13 AM. JUR. *Corporations* §§ 1132-34 (1938); New York Cent. & H.R. Ry. v. United States, 212 U.S. 481 (1909); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1948); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946); C.I.T. Corp. v. United States, 150 F.2d 85 (9th Cir. 1945); Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945); Egan v. United States, 137 F.2d 369 (8th Cir. 1943); Mininsohn v. United States, 101 F.2d 477 (3d Cir. 1939); Zito v. United States, 64 F.2d 772 (7th Cir. 1933); State *ex rel.* Loser v. National Optical Stores Co., 189 Tenn. 433, 225 S.W.2d 263 (1949); Haverty Furniture Co. v. Foust, 174 Tenn. 203, 124 S.W.2d 694 (1939); Love v. Nashville Agricultural & Normal Institute, 146 Tenn. 550, 243 S.W. 304 (1922); Standard Oil Co. v. State, 117 Tenn. 618, 100 S.W. 705 (1907); Turnpike Co. v. State, 96 Tenn. 249, 34 S.W. 4 (1896); State v. Railroad, 91 Tenn. 445, 19 S.W. 229 (1892); State v. Atchison, 71 Tenn. 729 (1879); Louisville & N.R.R. v. State, 40 Tenn. 523 (1859).
59. 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958).

> is an *inhabitant,* but also in a district wherein it may be *found* or *transacts business;* and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Emphasis added.)

As to venue generally of suits in the federal courts against corporations, section 1391(c) of the Judicial Code[60] states:

> A corporation may be sued in any judicial district in which it is *incorporated* or *licensed* to do business or is *doing business,* and *such judicial district shall be regarded as the residence of such corporation for venue purposes.* (Emphasis added.)

It is now clear that the latter statute does not augment or supplement special venue provisions such as section 12 of the Clayton Act; that is, if an anti-trust suit is brought against a corporation, venue must be found under section 12 if at all and may not be expanded by the general provision.[61]

In *R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co.,*[62] plaintiff sought an injunction and damages under the anti-trust laws against Cosmopolitan Funeral Homes, Inc., and others in Judge Darr's court in the eastern federal district. Cosmopolitan was a Tennessee corporation with principal office in Memphis. It had carried on business in the eastern district until it withdrew therefrom, prior to the suit. Apparently,[63] at the time of suit, it was still fulfilling previous contractual obligations. Cosmopolitan moved to quash the summons and dismiss the case against it alleging that it was not an "inhabitant" of the district, was not "found" and did not "transact business" therein, and therefore venue was improper under section 12. The motion was denied.

Judge Darr held that "inhabitant" means a permanent resident and that a corporation is a resident of the state of its incorporation, and, where the state is divided into two or more districts, then in the district where it has its official residence or home office. Thus, Cosmopolitan could not be an inhabitant of the eastern district. He stated that "for the same reason it could not be 'found' in this district . . . ."[64] However, he found that irrespective of whether the

60. 28 U.S.C. § 1391(c) (1958).

61. See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957) (patent infringment); Johnson & Johnson v. Picard, 282 F.2d 386 (6th Cir. 1960) (patent infringement); Crawford Transp. Co. v. Chrysler Corp., 191 F. Supp. 223 (E.D. Ky. 1961) (anti-trust); Koeppler v. James H. Matthews & Co., 180 F. Supp. 691 (E.D. Pa. 1960) (anti-trust); Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958) (anti-trust).

62. 192 F. Supp. 522 (E.D. Tenn. 1960).

63. "Cosmopolitan did a regular business in this district, according to its own affidavit, until 1959 and according to respondent's affidavit has continued some business, apparently fulfilling obligations theretofore contracted." *Id.* at 523.

64. *Id.* at 523.

corporation was or was not carrying on business operations in the district at the time of suit, if it had been "transacting business" there at the time the cause of action arose there was a sufficient basis for venue under section 12. He relied on a statement in *United States v. Scophony Corp. of America:*[65]

> A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due.

Authority supports the court's definition of "inhabitancy."[66] However, the meaning usually ascribed by the courts to the term "found" is the doing of corporate business to such a substantial extent and in such a manner that it may be inferred that the corporation is "present" in the district.[67] Although this too is a somewhat vague test, it does not necessarily follow that because a corporation is not an "inhabitant" of a district it may not be "found" there. A foreign corporation might carry on sufficient business activities within a district to be deemed "present" there. In any event, it must be inferred that Cosmopolitan was not carrying on substantial business operations within the district—at least at the time suit was brought.

The phrase "transact business" causes even more difficulty and has been the subject of much judicial scrutiny. It is generally held to be of broader import than the word "found." That is, if the corporation carries on any substantial business with some degree of continuity it could be "transacting business" even though not "present" in the district.[68] Corporations have been held to be transacting business within a district by maintaining a full-time salesman therein (sans office);[69] by making only occasional visits to maintain good will;[70] by the mere delivery of goods therein for filling of orders obtained outside the district;[71] and, by exercising a general control

65. 333 U.S. 795, 808 (1948).
66. *E.g.*, Suttle v. Reich Bros., 333 U.S. 163 (1948); Sperry Products, Inc. v. Association of American Railroads, 132 F.2d 408 (2d Cir. 1942); Lawlor v. National Screen Serv. Corp., 10 F.R.D. 123 (E.D. Pa. 1950).
67. United States v. Scophony Corp. of America, *supra* note 65; Goldlawr, Inc. v. Shubert, *supra* note 61; Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784 (S.D.N.Y. 1936).
68. United States v. Scophony Corp. of America, *supra* note 65; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Bruner v. Republic Acceptance Corp., 191 F. Supp. 200 (E.D. Ark. 1961); Wentling v. Popular Science Publishing Co., 176 F. Supp. 652 (M.D. Pa. 1959); Goldlawr, Inc. v. Shubert, *supra* note 61; Banana Distrib., Inc. v. United Fruit Co., 158 F. Supp. 153 (S.D.N.Y. 1957).
69. Adolph Meyer, Inc. v. Florists' Tel. Delivery Ass'n, 16 F. Supp. 783 (S.D.N.Y. 1936).
70. Jeffrey-Nichols Motor Co. v. Hupp Motor Car Corp., 46 F.2d 623 (1st Cir. 1931); Abrams v. Bendix Home Appliances, Inc., 96 F. Supp. 3 (S.D.N.Y. 1951).
71. Sunbury Wire Rope Mfg. Co. v. U.S. Steel Corp., 129 F. Supp. 425 (E.D. Pa. 1955).

over the distribution of products by independent contractors therein, even without maintaining an office, place of business or agents.[72]

As to the proposition that venue may be laid on the basis of "transacting business" if the corporation transacted business in the district at the time of the acts complained of though not at the time of suit, there seems to be a divergence of opinion among the districts. The United States District Court for the Eastern District of Virginia reaches the same conclusion as does Judge Darr.[73] On the other hand, the court of the southern district of New York feels that nothing in section 12 "indicates a congressional intent to depart from the usual temporal reference, *i.e.*, the date the complaint is filed with the court."[74] Although it is felt that the latter seems the more logical construction, it must be said that the quotation above from the *Scophony* case gives substantial support to the conclusion reached by Judge Darr.

II. Statutes

A. Unincorporated Associations Treated as Corporations

Chapter 181 of the Public Acts of the 1961 Tennessee General Assembly amended the Uniform Partnership Act[75] by adding a new subdivision to the section defining a partnership.[76] It provides that the provisions of the act do not apply to an association of three or more persons licensed to practice a profession and/or engage in an occupation and/or trade for compensation or profit when such association is created by written articles of association giving it the basic characteristics of a corporate entity and upon the proper filing and recording of such articles. The subdivision then provides that upon meeting the above prerequisites:

> The association so created will be subject to the laws of the State of Tennessee regulating the practice of the profession, or engaging in the occupation or trade involved, and such association shall be deemed and treated at law as a corporation and not a partnership.

The basic characteristics of corporate entities set forth are:

> (a) The death, insanity, bankruptcy, retirement, resignation, expulsion or withdrawal of any member of the association shall not cause its dissolution.

72. Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458 (W.D. La. 1951).
73. See Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E.D. Va. 1954).
74. Gem Corrugated Box Corp. v. Mead Corp., 189 F. Supp. 584, 586 (S.D.N.Y. 1960).
75. Tenn. Code Ann. §§ 61-101 to -142 (1956).
76. Tenn. Code Ann. § 61-105 (Supp. 1961).

(b) The authority to manage the affairs of the association shall be vested in a board of directors, or an executive board or committee, elected by the members of the association.

(c) The members of the association shall not be personally liable for debts of, or claims against the association.

(d) Shares or units of ownership in the association shall be transferable to qualified nonmembers of the association after first being offered at their fair value to other members of the association and not accepted.

Thus, the provision enables an association having these characteristics to obtain the benefits of corporate status without incorporation.

The obvious purpose of this new legislation is to permit persons who may not associate in corporate form for the purpose of carrying on their business or profession because of legal or ethical prohibitions (*e.g.*, doctors and lawyers)[77] to nevertheless obtain federal tax treatment as a corporation under the new "Kintner Regulations"[78] and to enjoy benefits otherwise available to corporations.

Section 7701(a)(3) of the Internal Revenue Code[79] defines corporations to include "associations." In *United States v. Kintner*,[80] a partnership of doctors in Montana formed an association having most of the aspects of a corporation except that the members were to remain responsible to third parties for professional negligence or misconduct. Montana law precluded a corporation from practicing medicine. The Ninth Circuit held, over the Commissioner's objections, that the organization was an association, *i.e.*, corporation, under section 7701(a)(3). In so holding, it stated that the characterization

77. There is no dissent from the proposition that a corporation cannot practice one of the learned professions, chiefly because a uniform prerequisite to such practice is the obtainment of a license so to do after the successful passage of a personal examination relating to knowledge, ability, and moral qualification. A corporation cannot be so examined and licensed. See 13 AM. JUR. *Corporations* § 837 (1938); 41 AM. JUR. *Physicians and Surgeons* § 20 (1942); 5 AM. JUR. *Attorneys at Law* § 25 (1936); Annot., 73 A.L.R. 1328 (1931); Annot., 105 A.L.R. 1364 (1936); Annot., 157 A.L.R. 282 (1945); State *ex rel.* Complainant v. Retail Credit Men's Ass'n, 163 Tenn. 450, 43 S.W.2d 918 (1931) (practice of law); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (E.S. 1952) (practice of law). See also TENN. CODE ANN. § 63-605 (1956) ("No person shall practice medicine . . . until such person shall have obtained . . . a license . . . . "); TENN. CODE ANN. § 29-303 (1956) ("No person shall engage in 'the practice of law' or do 'law business' . . . unless he shall have been duly licensed therefor . . . nor shall any *association* or *corporation* [so engage] . . . ."). (Emphasis added.) Further, insofar as lawyers are concerned, the attorney-client relationship is ethically required to be an individual one. See A.B.A., CANONS OF PROFESSIONAL ETHICS No. 35 (1933). See 13 VAND. L. REV. 574 (1960) (commenting upon the case of Bar Ass'n v. Union Planters Title Guar. Co., 326 S.W.2d 767 (Tenn. App. W.S. 1959).

78. Treas. Reg. § 301.7701-2 (1960). So named because enacted as a result of the case of United States v. Kintner, 216 F.2d 418 (9th Cir. 1954).

79. INT. REV. CODE OF 1954, § 7701(a)(3).

80. Note 78 *supra*.

of the organization under local law was not controlling in federal tax matters. The regulations promulgated in the wake of this case provide in essence that an association will be treated as a corporation if, after weighing all its characteristics, it *more nearly* resembles a corporation than a partnership, trust, or some other form of business organization. The chief characteristics set forth as leading toward the affixation of the corporate label are: continuity of life, centralization of management, limited liability and free transferability of interest. As noted, it is not necessary that *all* these factors be present to the fullest extent. The regulations, contrary to *Kintner,* provide that *local law* shall be determinative as to whether the organization possesses, or may possess, these characteristics. The new Tennessee provision, employing language strikingly similar to the above regulations, has met the challenge by substantially setting forth the prescribed characteristics and saying that an association which possesses them shall be deemed a corporation.

Although this article will not purport to forecast the many problems that might arise under this new provision, one interesting question does present itself: could lawyers unite thereunder as an "association" for the practice of law? It appears doubtful. First, as noted above, the statute specifically states that the association shall be subject to other provisions regulating the profession. Section 29-303 of Tennessee Code Annotated[81] provides that "No person shall engage in 'the practice of law' or do 'law business' . . . unless he shall have been duly licensed therefor . . . *nor shall any association or corporation* . . . ." so engage. Thus the "association" to practice law under the new statute would apparently be subject to the prior prohibition that "no association" can so act. (It should be noted that the licensing provision as to doctors contains no such language.)[82] Secondly, the concept of "limited liability" set forth in subdivision (3) of the new provision may be contrary to the ethical concept of the individual relationship required between lawyer and client.[83] Could this corporate characteristic be deleted from the articles leaving sufficient remaining to result in the corporate designation? Certainly the Kintner Regulations say so.[84] But the Tennessee statute seems to require *all* the characteristics to be present before the organization will be called "association," *ergo* "corporation."[85]

81. TENN. CODE ANN. § 29-303 (1956).
82. See note 77 *supra.*
83. *Ibid.*
84. See example (1) of subdivision (g), *supra* note 78.
85. "The provisions of this chapter shall not apply to an association . . . when created by written articles of association . . . which contain *in substance the following provisions* characteristic of corporate entities . . . ." TENN. CODE ANN. § 61-105(3) (Supp. 1961). (Emphasis added.) Could "in substance" mean "less than all"?

Certain potential tax pitfalls also inhere in the Kintner Regulations. For example: (1) Since income will most generally be derived from the performance of personal service contracts, it could be considered personal holding company income, and, if not distributed, taxed as such.[86] (2) To obtain full benefit of the "association" form (*e.g.,* as by the establishment of a pension plan) the associates must be designated "employees." But can they properly be so designated?[87] (3) Would the formation of the "association" (corporation) be the acquisition of a corporation for the purpose of evasion or avoidance of federal income tax by securing the benefit of a deduction, credit or allowance not otherwise enjoyable? If so, then section 269 of the Internal Revenue Code would preclude the allowance thereof.[88]

B. Amendments to Securities Law

The Securities Law of 1955[89] was amended: (a) to include within the classes exempt from registration the securities of corporations organized pursuant to the co-operative marketing laws of the state;[90] (b) to provide that the financial statements required to be filed as a part of the application for registration as a dealer might be certified by "a public accountant licensed by the State of Tennessee" as well as by an independent certified public accountant.[91]

C. Massachusetts Trust Act

Although apparently heretofore recognized in Tennessee as a matter of common law,[92] the General Assembly in chapter 247 of the Public Laws of 1961 gave express legislative sanction to the form of business association known as the Massachusetts Trust.[93] As defined by the legislature:

> A Massachusetts trust is an unincorporated business association created

86. See INT. REV. CODE OF 1954, §§ 541 to 547.
87. See Treas. Regs. §§ 31.3401(c)-1, 31.3401(d)-1(c) (1957).
88. INT. REV. CODE OF 1954, § 269.
89. TENN. CODE ANN. §§ 48-1601 to -1651 (Supp. 1961).
90. TENN. CODE ANN. § 48-1619(k) (Supp. 1961). The co-operative marketing laws are found in §§ 43-1801 to -1849 (1956).
91. TENN. CODE ANN. § 48-1624(10) (Supp. 1961).
92. Only one Tennessee case was found which used the terms "Massachusetts Trust" or "business trust" and it impliedly recognized the existence of such an association. Bank of Commerce & Trust Co. v. McCabe, 164 Tenn. 591, 51 S.W.2d 850 (1932). The statute taxing income from stocks and bonds also so recognizes the concept by stating that: "The word 'bond' shall be . . . construed to include all obligations issued by any person, firm, joint-stock company, *business trust* or corporation . . . ." TENN. CODE ANN. § 67-2601 (1956). (Emphasis added.) And in § 67-2602 the incomes, dividends and interest taxed are those received from "person, partnership, association, *trust* and corporation . . . ." (Emphasis added.)
93. TENN. CODE ANN. §§ 48-1801 to -1804 (Supp. 1961).

> at common law by an instrument under which property is held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing beneficial interests in the trust estate, the holders of which certificates are entitled to the same limitation of personal liability extended to stockholders of private corporations.[94]

The new law goes on to provide that this is a permitted form of business association in Tennessee; that organization is brought about by a trust instrument which must be filed with the secretary of state and recorded in the county in which it has its principal place of business and owns real property, much like a corporate charter; that it shall pay the taxes and fees imposed on corporations; that it is subject generally to the laws relating to corporations; and that any person dealing with the trust will be bound by the terms of the trust instrument and amendments thereto.

D. Industrial Development Corporation "Projects"

The Industrial Development Corporation Act[95] was expanded by including within the list of sanctioned "projects" an "office building for any board of public utilities or any public authority, agency or instrumentality of the State of Tennessee or the United States of America . . . ."[96] Similarly the purposes of the act were broadened to include the promotion by such corporations of "governmental" as well as manufacturing, industrial and commercial enterprises; and the encouragement of such enterprises to "remain in" as well as "locate in" the state.[97]

E. Amendments Relating to General Welfare Corporations

Numerous changes were made in the laws relating to general welfare corporations: (a) Associations for community improvement and industrial development; the exhibition of stock; and other associations for the promotion of literature, education, science or art, bodily or mental health and related associations were added to the list of organizations which might be granted general welfare charters.[98] (b) Corporations which might amend their charter to come within the general welfare provisions now include those organized "for any lawful objects and purposes" (not necessarily nonprofit). If a private corporation so elects, its shareholders will receive certificates of membership in exchange for their shares and

94. TENN. CODE ANN. § 48-1802 (Supp. 1961).
95. TENN. CODE ANN. §§ 6-2801 to -2820 (Supp. 1961).
96. TENN. CODE ANN. § 6-2801 (Supp. 1961).
97. TENN. CODE ANN. § 6-2802 (Supp. 1961).
98. TENN. CODE ANN. §§ 48-1101(4), (5), (12) (Supp. 1961).

shall not thereafter be entitled to dividends or profits. Charter amendments must now be approved by the shareholders or members unanimously, rather than by a majority of the directors.[99] (c) The prohibition against such corporations engaging in a "trading operation" is clarified so as not to preclude the sale of assets no longer needed so long as the proceeds therefrom are applied toward the objects of the corporation's creation.[100] (d) The prohibition against profits and dividends being paid to members would not include the disbursement of assets upon dissolution, explains a new proviso.[101] (e) Each member is now entitled to a certificate setting forth rights, restrictions, and the extent to which it is redeemable upon dissolution; such certificates are nontransferable unless otherwise stated in the charter.[102] (f) As to dissolution, it is now provided that in addition to dissolution by conveyance of property[103] or by surrender of charter after a unanimous vote of the directors,[104] dissolution may also be effected by expiration of the charter[105] or by surrender thereof after the vote of two-thirds of the members.[106] Surrender upon a vote of the directors is made expressly inapplicable to the charters of social and athletic clubs and nonprofit co-operative associations.[107] Upon dissolution the corporation will continue to exist for the purpose of winding up its affairs and the rights of creditors shall be first satisfied, with the excess of assets after necessary costs being transferred to another nonprofit corporation holding a similar charter or to the state or governmental subdivision thereof for similar use, with this exception —the members of social and athletic clubs and nonprofit co-operative associations are entitled to the assets remaining after liabilities after the payments of claims and costs, to the extent of their contributions.[108]

F. Miscellany

Other enactments in 1961:

1. A proviso was added to the section governing the filing and recording of certificates of incorporation[109] that the secretary of state shall not accept or record the certificate of any cemetery corporation unless it shows thereon the certification of the commissioner of

99. TENN. CODE ANN. § 48-1107 (Supp. 1961).
100. TENN. CODE ANN. § 48-1109 (Supp. 1961).
101. TENN. CODE ANN. § 48-1110 (Supp. 1961).
102. TENN. CODE ANN. § 48-1116 (Supp. 1961).
103. TENN. CODE ANN. § 48-1120 (1956).
104. TENN. CODE ANN. § 48-1118 (Supp. 1961).
105. TENN. CODE ANN. §§ 48-1122, -1123 (Supp. 1961).
106. TENN. CODE ANN. § 48-1124 (Supp. 1961).
107. TENN. CODE ANN. §§ 48-1101(6)(10), -1118 (Supp. 1961).
108. TENN. CODE ANN. §§ 48-1125, -1126 (Supp. 1961).
109. TENN. CODE ANN. § 48-109 (1956).

insurance and banking that the applicants have deposited cash or bond in a specified amount to insure the proper accumulation of the improvement fund otherwise required of such corporations.[110]

2. The provisions relating to merger of parent and subsidiary corporations were modified by lowering the percentage of stock required to be owned by the parent before the provisions could be utilized from 95% to 90%.[111]

3. Denominational schools may now be incorporated by an association of up to 100 persons and may have that number as directors. Formerly the limitation in both instances was fifty.[112]

110. TENN. CODE ANN. § 46-110 (1956).
111. TENN. CODE ANN. § 48-518 (Supp. 1961).
112. TENN. CODE ANN. §§ 48-1403, -1410 (Supp. 1961).