

Denver Law Review

Volume 5 | Issue 8

Article 4

August 2021

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Recommended Citation

Jacob J. Lieberman, Blue Skies, 5 Denv. B.A. Rec. 13 (1928).

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Blue Skies

By JACOB J. LIEBERMAN

(This is the fourth of a series of articles being written especially for the Denver Bar Association Record, by Mr. Lieberman of the Los Angeles Bar, formerly of the Denver Bar, on interesting comparisons and contrasts between Colorado and California law and procedure.)

THIS is not an analysis of a recent popular song, nor a discussion of the relative merits of Jazz and the Classics, nor, on the other hand, is this an astronomical dissertation, but is simply a brief resume of the more interesting phases of the California Corporation Act and Corporation Securities Act.

This subject is particularly timely at this time as considerable agitation is going on within the California State Bar for radical changes in the law relating to corporations in this State. It is also timely because of a recent decision of the Appellate Court in Los Angeles upholding the very broad powers of the Corporation Commissioner of the State of California.

The glaring deficiencies in the corporation laws of California which the Committee on Corporation Law of the State Bar of California (which, it must be remembered is now an incorporated Bar and self-governed) is agitating to have repealed or remedied, are the following:

1. Corporate existence is limited to fifty years and may only be extended for a period of fifty years;

2. There is an unlimited proportionate stockholders' liability as to business corporations (the only other state having this provision being Minnesota);

3. No distinction is permitted as to voting rights in different classes of stock;

4. Different classes of stock issued by the same corporation must either be all of no par value or must be all of a par value.

5. A foreign corporation having preferred stock with a par value, and common stock with no par value, can qualify to do business in this state, while a domestic corporation having such a stock structure cannot be organized under the laws of this state;

6. Fully paid stock of a California corporation is assessable by its board of directors. It is not entirely clear under the law of this state whether a corporation can, if so provided in its articles of incorporation, issue non-assessable stock;

7. Under Article XII, Section 3, of the Constitution, directors of a corporation are jointly and severally liable for embezzlement or misappropriation by officers of the corporation;

8. There are no provisions in the California law for the consolidation, merging or reorganization of ordinary business corporations, or for the protection of minority stockholders in the event of such consolidation, merging or reorganization;

9. The Constitution of the State contains many provisions governing internal management of corporations with the result that as corporate requirements or needs change from time to time the laws applying thereto can be changed to meet these needs only by constitutional amendment.

One of the greatest difficulties which the writer himself experienced in adjusting himself to the California corporation laws arose from the law imposing upon the stockholders of the corporation a proportionate liability for the debts thereof. The writer felt that every time he organized a cor-

poration for a set of clients he was not "selling" them anything; that he was not giving them any service, that is, the clients were not deriving any benefit from the work of their attorney. In other words, under the California Corporation Act, each stockholder of a corporation doing business within the State of California, whether domestic or foreign, is liable for his proportion of the entire indebtedness of the corporation incurred in the State of California. If, for example, a stockholder is the owner of fifty per cent of the stock of the corporation, even though it be fully paid up he is liable for fifty per cent of the entire indebtedness of the corporation, and this is a primary liability on which he can be sued without regard to the liability of the corporation itself, and the creditor is not even obliged to sue the corporation if he chooses not to do so. As indicated above, only two states in the entire country have any such stockholders liability Statutes, and this is a constitutional provision which will require a constitutional amendment to change.

This provision and the provision of the law requiring all classes of stock to be either of a certain par value or of no par value, and not permitting different classifications of different par values, or combining value and no par value, and provisions in the law making all stock, whether preferred or common, voting stock, drives a large number of corporations to incorporate in other States and to do business in the State as foreign corporations inasmuch as the stock structure of a corporation is held by the Courts of California to be a matter of internal organization, and therefore, not within the Statutory regulations.

The "Blue Sky" Act, known as the Corporate Securities Act, on the other hand, is not provoking any agitation (except perhaps among promoters) for repeal or modification except in the

matter of strengthening its provisions and putting teeth in the Act, or adding to the powers and duties of the Corporation Commissioner.

Under the provisions of this "Blue Sky" Act, no company is permitted to sell or offer for sale, or negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the Corporation Commissioner a permit authorizing it so to do. Such application must be in writing, verified in the same manner as a pleading is verified, and filed in the office of the Corporation Commissioner, and must contain the names and addresses of the officers, the location of the office, an itemized account of its financial condition, the amount and character of its assets and liabilities, a detailed statement of the plan upon which it proposes to transact business, a copy of any security it proposes to issue, a copy of any contract it proposes to make concerning the same, a copy of any prospectus or advertisement or other subscription of such securities, and such other information as to the company, its condition and affairs, as the Commissioner may require. Copies of minutes, contracts, articles of incorporation, by-laws, etc., relating to the company and throwing light upon its scheme of incorporation and method of doing business, are likewise required to be furnished to the Corporation Commissioner, and if a foreign corporation, it must file an irrevocable power of attorney appointing the Corporation Commissioner its true and lawful attorney upon whom all process in any action or proceeding against it may be served. The sale of such securities without a permit from the Corporation Commissioner is a penal offense.

The Act provides as to the powers of the Commissioner that "if he finds that the proposed plan of business of the applicant is not unfair, unjust or

inequitable, that it intends to fairly and honestly transact its business and that the securities it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the Commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this State, in such amounts and for such considerations and upon such terms and conditions as the Commissioner may in said permit provide. Otherwise, he shall deny the application and refuse such permit." The Commissioner is also authorized to impose conditions requiring the deposit in escrow of securities, the impoundment of the proceeds from the sale thereof, limiting the expense in connection with the sale thereof, and such other conditions as he may deem reasonable or necessary and advisable to insure the disposition of the proceeds of such securities in the manner and for the purpose provided in the permit. He has also the power from time to time to amend, alter or revoke any permit or temporarily suspend the rights of the applicant under the permit, and finally, he is given power to establish such rules and regulations as may be reasonable or necessary to carry out the purpose and provisions of the Act. He also has supervision over stock brokers and stock salesmen and of the licensing of such persons, and no person has the right to issue, sublet or publish any advertisement, pamphlet, prospectus or circular concerning any security to be issued by such company, broker, partnership, association or corporation until the one proposing to issue such security, shall have first secured from the Commissioner a permit authorizing it to issue or sell such security, and a true copy of the advertisement, circular, etc., shall have first been filed in the office of the Commissioner at

least one day prior to the publication, circulation or issuance thereof unless same shall be previously authorized by the Commissioner. And the Commissioner has the right to require periodic reports as to the status of the business of the corporation and as to the sale of securities.

The Commissioner is empowered to administer oaths and to make an examination or investigation of the books, records, accounts and other papers and of the business of any company, broker or agent. He has power also to examine the books, records and papers of those whom he believes to have violated or are about to violate any of the provisions of the Act, and has the power to issue subpoenas.

The decisions and orders and other official Acts of the Corporation Commissioner are subject to review by the Courts, but as is generally true in proceedings seeking the review of the official acts of discretionary or quasi judicial officers, the Act here specifically provides that upon such review the Court "shall be limited to consideration and determination of the question whether there has been an abuse of discretion on the part of the Commissioner in making such order, decision, or permit." And the Court of Appeals for the Second District in Los Angeles recently held that certain individuals were properly convicted of violating the Corporate Securities Act when they sold stock in their corporation contrary to the provisions and conditions contained in the permit, the letter having authorized the sale of stock for cash and these individuals having issued stock to themselves in consideration of checks drawn on a bank account where they did not have funds and then issued corporation checks to themselves in like amounts so that in fact the company received no money. The lower court held that in placing conditions in permits, the Corporation Commissioner was exercising legisla-

tive power, which the legislature could not delegate to him. The Appellate Court held this ruling to be incorrect, it took the position that the examination of facts and circumstances and determination of reasonable requirements for the issuance of public safety are not legislative matters, but are matters of discretion.

By the provisions of the Act prohibiting the sale of securities except by a licensed broker or agent, or by the company itself, it seems to have prohibited the sale of securities as defined by the Act even by individuals, partnerships or trusts, unless such sale be of such securities as are not issued by the individual partnership or trust but have been purchased and are owned by such trustee or such individual, partnership or trust, and the securities are defined by the Act as including not only corporate shares or capital stock but instruments offered to the public by a "company", or an "individual" advertising or representing any right to participate or share in oil, gas or other hydrocarbon sub-

stances or minerals, or in the proceeds of the sale thereof and all bonds, debentures and evidences of indebtedness issued by any company excepting leases not offered to the public or bills of exchange and promissory notes not offered to the public.

Of course, the Act has been construed as not restricting the right of an individual owning securities not issued by him, to sell them inasmuch as any person has the constitutional right to sell his own property lawfully acquired by him. This has lead to a practice of incorporating in foreign states and issuing the stock in such foreign states and coming into the State of California with so-called lawfully owned and privately held stock for sale by the owner thereof. There is a fear, however, that a court will some day go behind this Act and hold in some particular case that the stock in that case was issued in a foreign state for the sole purpose of evading the Corporate Securities Act of the State of California.

Announcement Concerning the Annual Meeting of The Colorado Bar Association

FOR some months past the officers of The Colorado Bar Association have been engaged busily with preparations for the thirty-first annual meeting. It is scheduled for Friday and Saturday, September 14 and 15, 1928, in the Rose Room of The Antlers Hotel at Colorado Springs.

Realizing the intensity of interest aroused by necessity in the question of a new state Constitution and the calling of an early convention for its consideration and enactment, the program of the sessions this year has been adopted with an eye to demonstration

before the lawyers of the state of the comprehensive problems to be solved.

The proceedings open at 10:30 o'clock in the morning of September 14th, and close with the annual dinner to be given at The Antlers in the evening of September 15th at 7:45 o'clock.

The annual address will be delivered on Friday night, September 14th, at 8:30 o'clock, by the Honorable Henry Archer Williams, of Columbus, Ohio, on *Our Shifting Constitution*, with treatment of our Federal compact in the light of changes wrought in the