

The New Ohio Corporation Act

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Properly, no authoritative inference can be drawn from the opinion of Judge Andrews as to the direction in which the decision will go when there is definitely presented to the Court the question of the right of a union, for proper purpose, to induce a breach of a contract of employment. Judicial wisdom will probably not find it difficult to turn the decision one way or another, depending upon judicial views of the proper functions and utilities of labor organizations. While damages are ordinarily awarded to the plaintiff in cases where the defendant intentionally and knowingly induced the third party to break his contract with the plaintiff,¹⁰ the courts without further explanation, qualifyingly add the mystic phrase, "without reasonable justification or excuse,"¹¹ leaving what may prove a convenient loop-hole.

The application of the I. R. T. for an injunction restraining the union from attempting to unionize its employees on the ground that by so doing it is persuading them to breach contracts of employment, will squarely present to the court the question which we are here discussing. The I. R. T. has a "company union" of which its employees are members and the problem before the court will ultimately become a question of social policy, the advisability of permitting the existence of company unions as against the wisdom of permitting laboring men to organize themselves into unions uninfluenced by the employing organization. In this case, what will be "just cause or excuse" for the labor union's attempted action will probably be but the asking in another form of the question of whether as a matter of general policy the courts will permit a labor organization to attempt to destroy a company union and replace it by a union otherwise organized. The Exchange Bakeries case furnishes ample opportunity for interesting, though speculative, deductions, not only with regard to the precise problem of the I. R. T. suit, but the larger subject of the extension of labor organization activities generally.

E. N. J. A. R.

THE NEW OHIO CORPORATION ACT.

Early in 1926, a special committee was appointed by the Ohio Bar Association to revise and modernize the corporation laws of

¹⁰ *Campbell v. Gates*, 236 N. Y. 459, 141 N. E. 914 (1923); *Goodman Bros., Inc. v. Ashton*, 211 App. Div. 769, 208 N. Y. Supp. 83 (1st Dept., 1925); *Hansen v. Humphrey, et al.*, 218 App. Div. 291, 218 N. Y. Supp. 197 (3rd Dept., 1926); *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401 409 (1st Dept., 1922).

¹¹ *Altman v. Schlesinger*, 204 App. Div. 513, 198 N. Y. Supp. 128 (1st Dept., 1923); *Lamb v. Cheney, supra*, note 7; *Reed Co. v. Whiteman, supra*, note 8; *Exchange Bakeries v. Rifkin, supra*, note 1, 264.

that State. In its work, the committee was actively aided by more than a hundred of the State's prominent lawyers and businessmen, and received the benefits of the suggestions of eminent corporation counsel throughout the country.¹ In addition, Professor Stevens, the present draftsman of the Uniform Business Corporations Law, enabled the committee to avail itself of not only his personal suggestions, but also of the complete files of the Uniform Law Commissioners. Professor Ripley, whose published criticisms of prevalent corporate practices² have attracted much attention, was consulted and saw fit to commend the provisions of the new act respecting the protection of shareholders' pre-emptive and voting rights, the issuance of no par stock and the discarding of the doctrine of *ultra vires*.³ Hence it is little wonder that the proposed new act, representative as it was of much of the nation's best thought in matters corporate, was quickly adopted by the Ohio legislature.⁴

The new act, concise in content and logical in arrangement, is replete with provisions of interest. Of these, perhaps the most interesting is the section concerned with corporate capacity and authority,⁵ and drawn, as the revisers declare, "in an effort to make the law of corporate power more definite and certain."⁶

¹ See Report of Special Committee on Revision of Ohio Corporation Laws, 12-17 (1926).

² See *e.g.*, Ripley, From Main Street to Wall Street, 137 Atlantic Monthly, 94-108 (1926), More Power to the Bankers, 121 Nation 618 (1925). Many of his views are found expressed in his recent book, From Main Street to Wall Street (1927), which, however, was not published until after the work of the Ohio committee had been completed.

³ *Supra*, note 1, 16.

⁴ Ohio General Corporation Act, passed February 16, 1927, approved by governor, March 8, 1927.

⁵ Ohio General Corporation Act § 8:

"Every corporation of this state, heretofore or hereafter organized, shall have the capacity possessed by natural persons to perform all acts, within or without this state.

Subject to any limitations or restrictions which may be imposed thereon by the articles, every corporation shall have authority to

Sue and be sued, contract and be contracted with;

Adopt, use, and at will alter a common seal (but failure to affix a seal shall not affect the validity of any instrument);

Purchase, acquire, hold, convey, lease, mortgage or dispose of property, real or personal, tangible or intangible;

Borrow money and issue, sell or pledge bonds, promissory notes, bills of exchange, debentures, and other obligations and evidence of indebtedness payable at a specified time or times, or payable upon the happening of a specified event or events, whether secured by mortgage, pledge or otherwise, or unsecured;

Few things have been the source of more confusion in the law than the creation and continued recognition by the courts of the doctrine of *ultra vires*.⁷ (With regard to contracts, we find in this country today, as an almost universal rule, that while a contract to which a corporation is a party, remains wholly executory the defense of *ultra vires* is available to either party.⁸ Where one has fully performed, we find that under the so-called Federal rule, the defense is still maintainable.⁹ The injured party, however, is not without recourse, since the courts applying this rule quite uniformly permit a recovery upon an implied contractual obligation provided the party sued has been the recipient of an actual benefit by virtue of the unenforceable contract.¹⁰ It is apparent that this remedy is often inadequate, since the recovery permitted is limited to the benefits received by the defaulting party and, consequently, the other is

Purchase, acquire, guarantee, hold and dispose of the shares, bonds and other evidences of indebtedness, or contracts of any corporation, domestic or foreign;

Do all acts permitted by this act and all such further acts as are necessary, convenient or expedient to accomplish its stated purposes.

The articles of incorporation shall constitute an agreement by the officers and directors with the corporation that they will confine the acts of the corporation to those acts which are authorized by the statement of purposes and within such limitations and restrictions as may be imposed by the articles.

No limitation on the exercise of the authority of the corporation shall be asserted in any action between the corporation and any person except by or on behalf of the corporation against a director or an officer or a person having actual knowledge of such limitation."

⁷ See revisers' note to § 8, to be found in the final draft of the proposed act forwarded by the special committee to Committee on Judicial Administration and Legal Reform of the Ohio Bar Association (Dec., 1926).

⁸ In the Report of Special Committee, *supra* note 1, will be found well presented a brief history of the origin and application of the doctrine of *ultra vires*. Reference is had, *inter alia*, to the discussion of corporate powers (before the introduction of the doctrine) found in the old English text, Kyd on Corporations, vol. 2, 70-72 (1793), to the case which the revisers believe marks the origin of the doctrine, N. Y. Firemen's Ins. Co. v. Ely, 2 Cow. (N. Y.) 678 (1824), and to the first Ohio cases recognizing the doctrine, Commissioners of Gallia County v. Holcomb, 7 Oh. 232 (1835) and Bank v. Swayne, 8 Oh. 257 (1838).

⁹ Case v. Kelly, 133 U. S. 21 (1890); Nassau Bank v. Jones, 95 N. Y. 115 (1884). Kansas is the only state maintaining a contrary view, Harris v. Independence Gas Co., 76 Kan. 750, 92 Pac. 1123 (1907).

¹⁰ Pearce v. Madison, &c., R. Co., 21 How. (U. S.) 441 (1858); California Bank v. Kennedy, 167 U. S. 362 (1897); Ward v. Joslin, 186 U. S. 142 (1902); Natl. Home Bldg. Assn. v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619 (1899).

¹¹ Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24 (1890); Citizens Natl. Bank v. Appleton, 216 U. S. 196 (1910).

precluded from any anticipated gain. In a similar situation, under the rule prevailing in the courts of most states, a recovery directly upon the *ultra vires* contract is permitted.¹¹ Generally, courts will not permit the assertion of the doctrine to interfere with rights acquired under a contract completely executed¹² nor to avoid liability in tort.¹³ It is, however, in the application, not the statement, of these general rules (or more correctly, tendencies) that difficulty is encountered.

To eliminate this element of doubt, the revisers have reverted to the common law doctrine of general capacities. The new act declares the capacity of corporations to be that of natural persons to do all acts. This, however, does not mean that a corporation, as of right, may do all things which a natural person may do. Its authority is necessarily limited to the performance of acts permitted by law, and the same section proceeds to define and illustrate corporate authority. Proceeding further, we find that the articles of incorporation are constituted an agreement between the officers and directors, on the one hand, and the corporation, on the other, that the officers and directors will confine the corporate acts within the limits of conferred authority. In this way, acts beyond the authority will be valid as to third parties except, as provided in the final sentence of the section, those having actual knowledge of the limitations. The corporation, moreover, is expressly prohibited to assert in any action limitations upon its authority and, as a result, must seek redress in proceedings against the offending officers or directors. In effect, we now have the situation which arises when an agent disobeys his principal's instructions. The rights of third parties are protected and the principal, the corporation, asks recompense of the erring agent.¹⁴

In passing, it would be well to call attention to the carefully planned provisions requiring the consent of stockholders, otherwise without voting power, to proposals that would alter the preferences

¹¹ *E.g.*, *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664 (1896); *Watts Mercantile Co. v. Buchanan*, 92 Miss. 540, 46 So. 66 (1908); *Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289 (1897).

¹² *Central Transportation Co. v. Pullman's Palace Car Co.*, *supra*, note 10; *Cook, The Principles of Corporation Law* (1925) 457.

¹³ *National Bank v. Graham*, 100 U. S. 699 (1879); *New York, etc., R. R. v. Schuyler*, 34 N. Y. 30 (1865); *Brokaw v. New Jersey R. Co.*, 32 N. J. L. 328 (1867); *Chicago, etc., R. R. v. Davis*, 86 Ill. 20 (1877); *New Orleans, etc., R. R. v. Bailey*, 40 Miss. 395 (1866).

¹⁴ This brings us to the theory of Brice, *Doctrine of Ultra Vires*, 3d ed., ch. xix (1893); and accords with the views of the late Mr. Morawetz, as found in his *Law of Private Corporations*, 2d ed. 690.

or priorities of their shares,¹⁵ fix the consideration upon the issuance of no par shares,¹⁶ authorize a consolidation with another corporation,¹⁷ or provide for a dissolution.¹⁸ There is also in the new act a requirement that a corporation present to its shareholders at any meeting at which directors are to be elected, a sworn statement of the corporation's financial condition, in form and content complying with statutory prescriptions.¹⁹ It is further provided that upon failure to mail to any stockholder a copy of this statement within three days after request therefor, both the corporation and the delinquent treasurer shall be subjected to quite rigorous penalties.²⁰ Then too, one might, with profit, examine the sections providing for the issue of par shares for lesser considerations,²¹ for the creation of voting trusts,²² for the reduction of stated capital,²³ for granting affirmative relief to dissenting shareholders²⁴ and for the termination, both voluntary and judicial, of corporate existence.²⁵ Something of interest should also be found in the provisions for the inspection of books and records²⁶ and in the section regulating the payment of dividends.²⁷

The new act, in short, seems amply suited to the needs of present day business, and it is to be hoped that it will so fare in the courts as to justify the descriptive and perhaps, prophetic, words of the Ohio Bar Association, "—brief in its composition, but comprehensive in its purpose—as a model and standard for all corporation laws to be enacted for a long time to come."²⁸

A. C. P.

¹⁵ *Supra*, note 5, 15.

¹⁶ *Ibid.* § 17.

¹⁷ *Ibid.* § 67.

¹⁸ *Ibid.* § 79.

¹⁹ *Ibid.* § 64.

²⁰ *Ibid.* §§ 127, 128.

²¹ *Ibid.* § 16.

²² *Ibid.* § 34.

²³ *Ibid.* §§ 39, 40.

²⁴ *Ibid.* § 72.

²⁵ *Ibid.* §§ 79-84, providing for voluntary dissolution; §§ 85-96, authorizing judicial termination.

²⁶ *Ibid.* § 63.

²⁷ *Ibid.* § 38.

²⁸ Report of Committee on Judicial Administration and Legal Reform of the Ohio Bar Association to the President of the Association (Dec., 1926) 7.