

Corporations: Failure to File Annual Reports: Dissolution: Forfeiture of Corporate Rights

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all the negroes would have regarded the prohibition with indifference. Should the legislature have contemplated that denying the right to participate in a primary election would not be denying the equal protection of the law, whereas denying participation in a final election would be, I fear it was sadly disillusioned, for the Supreme Court before determining the constitutionality of the statute, in one sweeping statement, declared that "if defendants' conduct was a wrong to the plaintiff, the same reasons that allow a recovery for denying plaintiff a right to vote at a final election allow it for denying a vote at a primary election that may determine the final result."

The legislature may have felt certain that the enactment would be justly condemned, but passed it nevertheless with a sinister purpose that the negroes might be barred from the primary election of 1924. It would hardly seem credible that a state legislature would harbor such an intent; yet if the legislature of Texas did entertain such an intent, its attitude should meet the hearty contempt of all true Americans, regardless of how urgent it may have felt the need.

All in all, it may be deemed an unfortunate circumstance that the court was called upon to determine the constitutionality of such a statute. It was *prima facie* unconstitutional and yet the court was obligated to give it a determination. Justice Holmes in his opinion did not so much as infer a cause for reproaching the legislature of Texas for the enactment passed by them. To my mind, however, a well timed reproach would have been justified, if not expedient.

C. W. W.

Corporations: Failure to File Annual Reports: Dissolution: Forfeiture of Corporate Rights.—The "legal entity" theory of a corporation has always been a fascinating legal fiction. If one would be consistent and strictly logical the results that would flow from straight-laced deductions are startling. Fortunately, the courts have realized that the fiction of separate entity is but a means to establish an end—not an end in itself.

More specifically, while a corporation may be regarded as a distinct entity for most purposes, the thought will not be permitted to go beyond its legitimate end; the fiction will not be allowed to be made the conduit of fraud. The principal is illustrated in case of *West P. Realty Co. v. Porth*.¹

The facts there were as follows: The plaintiff was incorporated in the year 1905 as a Wisconsin corporation for the purpose of dealing in real estate. Subsequent to the organization it did considerable business, buying and selling real property. During the years 1913, 1914, and 1915 it incurred obligations for which it executed its notes and secured said notes by mortgages on its property. The defendant, Porth, became the owner of the notes and the security by assignment. Upon default in payment in 1921 to 1924 the defendant foreclosed, obtained deficiency judgments and became the buyers of the mortgaged premises.

¹ 212 N.W. 651 (Wis.).

In the year 1916 the plaintiff failed to comply with the provisions of chapter 180 which requires the filing of an annual report by domestic corporations, and in consequence thereof the secretary of state declared a forfeiture of its corporate rights in January, 1917.

In April, 1923, the plaintiff presented affidavits to the secretary of state as provided for in sec. 180.08 (7) and twenty-five dollars was paid, whereupon the officer rescinded the forfeiture.

In May, 1923, the plaintiff deeded by quit claim deed the property described in the complaint in consideration of one dollar and a release of the deficiency judgments.

This action was commenced to set aside the deed on the ground of failure of consideration. Decision for defendants. Affirmed.

Plaintiffs' argument, briefly stated, is that after the declaration of forfeiture on January 1, 1917, the plaintiff merely continued to exist for a period of three years pursuant to chapter 181, for the purpose of winding up its affairs. That on January 1, 1920, after the expiration of the three years, it was legally dead, defunct, and out of existence. Therefore, the attempted re-instatement in 1923 was void, and consequently the deed executed to defendant was a nullity.

The question is novel and involves an interpretation of chapters 180 and 181.

Section 180.08 (1) provides, "Every corporation for profit, organized under the provisions of this chapter shall annually . . . file with secretary of state, a report . . ."

Sub-section (2), last sentence: "In case such report is not filed by said January 1, the corporate rights and privileges granted to such corporation shall be forfeited and the secretary of state shall enter such forfeiture on the records of his department."

It was under this section that the corporate franchise of the plaintiff was declared forfeited by the secretary of state in 1917.

Section 180.08, section (7) provides:

The secretary of state may rescind the forfeiture provided in this section on presentation of an affidavit signed by the president and secretary of a corporation to the effect that such corporation has not suspended its ordinary and lawful business since its organization or since the date of forfeiture. . . .

Under the authority of this section the secretary of the state, upon receipt of the affidavits in question, rescinded the forfeiture.

The plaintiff, however, calls the court's attention to section 181.02 in support of its contention that in this particular instance the order rescinding the forfeiture was void in that the order was made more than six years after the declaration of the forfeiture.

Section 181.02 provides:

All corporations whose term of existence shall expire by their own limitation . . . or shall be *annulled by forfeiture* or otherwise, shall nevertheless continue as bodies corporate for three years thereafter for the purpose of prosecuting and defending actions and of enabling them to settle and close up their business, dispose of and convey their property and divide their capital stock and for no other purpose.

The question involved is one of reconciliation of these sections of the statutes. Reading section 2 of 180.08 we might reasonably conclude that the secretary of state had the right to declare an absolute forfeiture. If that be true, the contention of the plaintiff is well taken, but that section when read in conjunction with sub-division 7 of the same section we see that the legislative intent is to place power in the hands of the secretary cause for disqualifying the corporation from *acting* as a corporation, *not from being*, as a corporation. Chapter 180.08 (7) specifically recognizes and contemplates that the corporation shall continue to do business, after the declaration of forfeiture, by the requirements of allegations "that it had not suspended the ordinary and lawful business." It should also be specifically noted that no limitation as to time is made in allowing the secretary to rescind its forfeiture.

Where there are two interpretations of a statute, one of which will render a statute unconstitutional and the other will support its constitutionality it is an elementary proposition that courts uniformly adopt the latter. Likewise, forfeitures are to be strictly construed. As it is said, "the law abhors forfeitures."

Quoting from the decision at page 653:

The secretary of state is a mere ministerial officer. He possesses no judicial power, and, in fact, if the legislature had attempted to vest him with such the act would be unconstitutional and void. It, therefore, becomes apparent that, when the legislature authorized the secretary of state to declare a forfeiture it merely intended that such declaration should operate as a cause for forfeiture, which could be enforced in a proper action brought by the attorney general or by any private party in the name of the state, under the provisions of section 286.36 of the statutes.

The same question was passed on in the case of *Farmers State Bank v. Brown*.² The opinion declares:

The failure to pay the annual license fee does not *ipso facto* work a forfeiture of the corporate charter; at most, it affords *prima facie* evidence of the non-user of the charter, and might amount to a violation of provisions of law by which it has incurred a forfeiture of its corporate rights, privileges and franchises; but such a result would not follow until there had been a legal determination of the fact of the violation. . . .

The actual effect of this decision is to invalidate the limitation of three years' continued existence after the declaration of forfeiture as provided in Sec. 181.02. The corporation may, it seems, if able to file the required affidavits, return to its state of corporate health, and awake from the legal coma imposed upon it by the secretary of state, *at any time*. Likewise it seems that the limitations on its operation is removed, invalidating the requirement of dissolution and division of its property.

This being true, there arises the very important, but not decided question as to the status of the corporation of its stockholders and officers, during the period of the unrescinded forfeiture. It is admitted

² 52 N.D. 806, 204 N.W. 673:

that the corporation, in the contemplation of the legislature, shall not discontinue its "ordinary and lawful" business. Surely the legislature would not require the allegation of an illegal act as a basis of return to the recognized corporate fold. The corporation, then, under the secretarial ban of forfeiture may continue its business. If it is yet a corporation *in being* (its franchise not having been judicially declared forfeited) what is the status of the directors, and stockholders prior to the rescission of the forfeiture.

It would seem, that in order to give the statute some force and effect there must be some change in the corporate entity. The corporation having been validly organized, we may conclude it to be a true *de jure* corporation at the time of organization. Can it then be said, that the requirements of the statutes as to annual filing of reports is in the nature of a continuing duty, and compliance with that duty is necessary to continued existence as a *de jure* corporation? If we assume the above, we are faced with the difficulty of declaring that a failure to file, is a failure to fully comply with the law, and may render the corporation *de facto*. If we go further, we may arrive at the conclusion that failure to file the annual return is an absence of the essential of "attempted compliance" and thereby render the organization not even *de facto*. These considerations are of prime importance to the rights of creditors and of third parties, remembering the fact that the secretary of state, by statute, publishes the forfeitures third parties and creditors are *given notice*, and their rights are interwoven with the theories above expounded.

CHARLES L. GOLDBERG.

Highways—Mere public user for period of twenty years is insufficient to establish a public highway.¹

The B Company, by deed, gave to the state, in 1907, the land in question. The state established on part of the land, a camp for tuberculosis patients and has since maintained and operated such camp. The B Company owned and used such lands prior to the sale to the state. The B Company had opened a tote road in connection with the operation of its saw mill. In 1890 one, W, built a homestead west of the land in question. He developed a summer resort and he and his guests used the tote road. There were two other approaches to his resort. The tote road continued in its original state until the state improved it and claimed it to be an institutional road leading to its tuberculosis camp. Town Board of Tomahawk in 1919 attempted to lay a highway through a part of the state camp, but at the request of the state camp superintendent, rescinded its motion so to do. In 1925, the Town Board authorized the clearing of the road. Some work was done, but without the knowledge of the state. State seeks a judgment determining that the road in question is not a public highway. From a judgment for plaintiff, defendant appeals. The supreme court affirmed the judgment of the Circuit Court.

It was *held* that the mere naked user of the road for twenty years was insufficient to establish a public highway in the absence of circum-

¹ *State v. Town Board of Tomahawk*, 212 N.W., Wis., Feb. 8, 1927.