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RECENT CHANGES IN THE MISSOURI CORPORATION LAW

BY WARREN M. TURNER

The Fifty-Fourth General Assembly has, in the enactment of House Bill Number 442, made numerous changes in the law of this State governing business and manufacturing corporations. Some of these are minor, merely changing the wording of the law without changing its effect, particularly in bringing some sections into conformity with various Session Acts passed since the original enactment, while others are so sweeping as to bring about a profound change in the policy of Missouri toward corporations and establishing a decidedly liberal policy. The wisdom of such a change of policy, and its effect on corporations generally is not within the scope of this article and will not be considered. That is a problem for social and political study, and the author will confine himself to a comparison of the textual changes and their probable legal result, merely noticing in passing the altered policy.

The Act, which will go into effect July 4, 1927, revises and amends Chapter 90 of the Revised Statutes of 1919, Article I, Sections 9734, 9749, 9752, 9788, 9792 and Article VII, Sections 10144, 10145, 10146, 10151, 10152, 10161, 10165 and adds a new Section, numbered 10165a. Instead of considering these section by section, they will be classified into the five groups into which they naturally fall, namely; in procedure of organization and amendment, in charter powers and requirements, concerning capital stock, in conforming to the "no par value stock" law,¹ and some miscellaneous changes, and they will be discussed in that order.

I. CHANGES AFFECTING THE PROCEDURE OF ORGANIZATION AND AMENDMENT

Under the present law, Section 10145 provides that the Articles of Association or Incorporation (hereinafter called the Articles) shall be signed, acknowledged and sworn to before some officer *in Missouri* having a seal; recorded in the city or county where the corporation is to be located; and a certified copy of the recorded instrument filed with the Secretary of State. Section 9734 provides that a certified copy of the Certificate of Incorporation issued by the Secretary of State should then be recorded in the county or city where the corporation is organ-

¹ Laws of 1921, p. 662, as amended Laws 1923, p. 362.

ized. The new provisions reverse this process with some changes. By the revised Section 10145, the incorporators are not required to come into Missouri to execute the Articles of Incorporation, but may do so before any officer having a seal. Then the incorporators, not the officers as under the present law, must file the Articles in duplicate with the Secretary of State who issues the Certificate of Incorporation, which shall set forth the fact of due incorporation, the amount of capital stock, the period of existence, and the permanent place of location.² According to new Section 9734, the Secretary of State returns one copy of the Articles (keeping one for his permanent records) with a certified copy of the Certificate of Incorporation. Both these latter instruments are then required by Sections 9734 and 10145 to be filed in the Recorder's office *in the place where the principal office of the corporation is to be located*. Finally by the provisions of new Section 10165a, an affidavit must be filed with the Secretary of State, before the new corporation can commence business, showing the recording of the Articles of Association and the Certificate of Incorporation.

The new sections as well as the present provide that the Certificate of Incorporation issued by the Secretary of State is to be evidence of incorporation in all courts of the state, and the existence of the corporation shall date from the filing of the Articles with the Secretary of State. But since this takes place now before the recording, the new Section 9734 adds a condition that "before the corporation shall commence business and before any corporate act shall be legal the certified copy of the certificate and articles shall be filed with the recorder of deeds as herein provided."

By Section 9749 a change in the name of the corporation or in the number of directors shall take effect when the required affidavit of the change is filed in duplicate with the Secretary of State, and all amendments shall be filed in duplicate and then the procedure outlined in Section 9734 shall be followed. This same procedure applies to increase or decrease of authorized capital stock in Section 10161 and in the consolidation of corporations provided for in Section 10165.

So much for the actual changes in the procedure laid down by the new Act. What is their result? Little need be said of the reversal of process in filing the Articles with the Secretary of State and then recording. It has been done as a matter of convenience, since the old way of first recording and then filing with the Secretary led to much loss of time and cluttering of records occasioned by formal errors in the papers which were frequently sent back to the new corporation for

² Also provided in Section 9734 new. This provision as to what the Certificate of Incorporation is to include is transferred from Section 10146.

correction, new recording and a repetition of the same process. Any corrections can now be made before recording. The addition of the affidavit of recording required by Section 10165a is made necessary in order to show the Secretary of State that the law has been complied with.

It will be noted, however, that there has been a liberalization of the law as to where the corporation may be organized. Under the present law³ the Articles of Association must be executed before some officer in Missouri having a seal and the Certificate of Incorporation must be filed in the city or county where the corporation was organized, but the new law drops the words "in Missouri" from the requirement of executing the Articles before an officer with a seal, thus making it possible to do it anywhere, and the Certificate must be recorded in the place where the corporation is to have its principal office.

The noteworthy change in the procedure from the standpoint of its effect on the new corporation is the addition of the clause in Section 9734 providing for the recording of the instruments before the corporation can commence business or perform any legal act. In just what does this result? By specific statutory provision the corporation is already in existence.⁴ What if it proceeds and performs some act, makes some contract before it records its Articles and Certificate? The general rule regarding the requirement of some action by a corporation after it has come into existence but before it can "commence business" is that such requirement is not a condition precedent which prevents it from becoming a "de facto" corporation, but a condition subsequent of the violation of which the state alone can take advantage⁵ and its contracts with third persons are valid.⁶ The Michigan court in *Jhons v. People*⁷ held that such a requirement was merely designed to facilitate proof of incorporation. It is recognized by the Act that acts of organization and financing the proposed corporation taking place before the recording are valid⁸ in line with the ruling in a Kansas case that organization is a condition precedent to the existence of a corporation.⁹ But the Missouri Legislature, apparently in view of these decisions, adds that "before any corporate act shall be legal" the

³ Section 10145.

⁴ Section 9734: "A corporation's existence shall date from the filing of its Articles of Association with the Secretary of State."

⁵ *Jhons v. People*, 25 Mich. 499.

⁶ *Muehlenback v. Babylon, etc.*, R. Co., 55 N. Y. S. 1023; *Murdoch v. Lamb*, 92 Kan. 857.

⁷ Note 5, *supra*.

⁸ Section 10165a: "Provided nothing herein can be construed as to prevent the corporation from organizing and financing and getting ready to do business as contemplated in its articles of association."

⁹ *Nehama Mining Co. v. Settle & Kieth*, 54 Kan. 424.

incorporation papers must be recorded. If the acts of the corporation are not legal, they must be illegal. If illegal, then they are void. This opens up possibilities which are not within the purview of this article and of which the author does not feel capable of suggesting a solution. The question as to the meaning of this phrase can only be left to a decision of the Supreme Court declaring the intent of the Legislature.

II. CHANGES IN CHARTER POWERS AND REQUIREMENTS

Under Sections 9752, 9799 and 10152, three members of the Board of Directors of a corporation organized under this chapter must be citizens and residents of Missouri; while the redraft of these sections requires only one member to be a resident of Missouri. This change, together with the one in Section 10145 permitting the Articles of Association to be executed anywhere enables a Missouri corporation to be organized by a group of business men located anywhere, since it is comparatively easy to assign a share of stock to some Missouri resident and elect him a director. Of course, the three Missouri residents required on the board under the present law, may easily be "dummy" directors, but the new act makes the practice easier. The statutes require that the directors must be stockholders,¹⁰ but the number of shares each must own is not specified, and the general rule is that it is not a valid objection that he has acquired his stock by gift,¹¹ nor that he holds it merely to make him eligible for the office, provided it was not in furtherance of some wrongful purpose,¹² but as a rule he must retain it while he holds the office¹³ and the wording of the Missouri statute would seem to apply this rule.

These new sections do not make the Missouri law as liberal as that of some other States important as corporation-forming States. Delaware has no qualifications of directors as to residence;¹⁴ Florida requires only that one director shall be a citizen of the United States;¹⁵ New York requires that one shall be a citizen of the United States and a resident of New York and the only requirement for shareholding is that prescribed by the by-laws;¹⁶ New Jersey has no residential qualifications but the director must either be himself a shareholder or a shareholder in a corporation owning twenty-five per cent or more of the stock of the corporation in which he is a director.¹⁷ This last provision is inserted to allow holding companies to name directors.

¹⁰ Section 10152.

¹¹ *In re St. Lawrence Steamboat Co.*, 44 N. J. Law 529; *Burden v. Burden*, 159 N. Y. 287.

¹² *People v. Lehne*, 269 Ill. 351; *In re Leslie*, 58 N. J. Law 609.

¹³ *In re Ringler*, 204 N. Y. 30.

¹⁴ Rev. Code, c. 65, sec. 9, as amended Laws 1917, c. 113, sec. 6.

¹⁵ Corp. Law, 1925, sec. 29. ¹⁶ Stock Corp. Law, sec. 55.

¹⁷ Comp. Stat., sec. 44—amended Laws 1926, c. 318, sec. 4.

In furtherance of this liberal tendency in regard to Directors, Section 9752 as altered permits Director's Meetings to be held where authorized by the Articles of Association or the by-laws, while the present law requires them to be held within the State. Under the ruling in *Missouri Lead Mining Co. v. Reinhard*¹⁸ which held that the directors of a corporation are empowered to hold a meeting in a foreign state if they so wish, unless prohibited by an express provision in the charter, by-laws, or general statutes, this permits a corporation to either authorize directors' meetings without the State, or, more unlikely, prohibit them from being held outside of Missouri. Some of the other states with liberal incorporation laws permit the same thing. Thus, Delaware permitting it if the by-laws so provide;¹⁹ Florida providing that they may be held either within or without the state,²⁰ presumably regulated by the by-laws; in New Jersey, it may be permitted by the by-laws;²¹ Illinois permitting any directors' meeting to be held outside Illinois, except certain ones required to be held within the State;²² while New York goes to the other extreme of providing that in order to restrict directors' meetings to the State, the by-laws or Articles of Association must so provide.²³

Thus by these three provisions of the altered law, the way is made clear for the entrance into Missouri as resident corporations, of companies exclusively (for all practical purposes) organized and controlled outside of Missouri. So a group of business men in New York, Chicago, San Francisco or elsewhere, desiring to do business in Missouri as a resident corporation may draw up and execute the Articles of Association there, give some one person resident in Missouri a share of stock (an employee or attorney), elect him a director, hold their meetings in their home city without him if necessary (since it is only required to have a majority of the directors present to have a quorum.²⁴) In consequence the stockholders and directors of a Missouri corporation are placed entirely beyond the reach of Missouri penal law if they violate their duty, except thru the rather impracticable process of extradition in cases where the action of the directors itself constitutes a crime.

But perhaps the most marked reversal of policy is to be found in Sections 10145, 10146 and 10152. Under the present Section 10145, the period of existence of a corporation is to be set forth in the Articles

¹⁸ 114 Mo. 218.

¹⁹ Rev. Code, c. 65, sec. 9—amended Laws 1917, c. 113, sec. 6.

²⁰ Corp. Law 1925, sec. 9.

²¹ Comp. Stat. sec. 44—amended Laws 1926, c. 318, p. 54.

²² Gen. Corp. Act, sec. 19.

²³ Stock Corp. Law, sec. 55.

²⁴ Section 9752.

of Association, not to exceed fifty years. The new sections provide that it may *exist any number of years or be perpetual*. The wording of Section 10146 is made to conform to this by dropping the limiting phrase.²⁵ In addition, by Section 10152, altho the minimum capital is still fixed at \$2000.00 the maximum of \$50,000,000.00 has been removed and the authorized capital may be any sum, however huge, over \$2000.00.

Since by the rule laid down in the *Dartmouth College Case*, the charter of a private corporation is a contract between the State and the corporation,²⁶ and under the Federal Constitution no State may impair the obligations of a contract,²⁷ therefore a corporation chartered in Missouri under the new section 10144 has perpetual life. Policies may come and policies may go but such a corporation "goes on forever," for its charter cannot be repealed or amended either by subsequent constitutional provision²⁸ or legislation.²⁹ It is true that the chief incorporation States permit perpetual existence³⁰ but New Jersey³¹ and New York³² provide that corporation charters may be subsequently repealed by the Legislature, so that if the policy of those States toward perpetual corporations should change, they may destroy them.^{32a}

It is not, as said above, within the scope of this article to discuss the wisdom of such a policy, but the author cannot resist pointing out the possibilities under the plans laid down by these new sections. Thus we have the possibility of a corporation organized in another State,³³ capitalized at a billion or so dollars,³⁴ existing forever,³⁵ with twenty of its twenty-one directors foreigners,³⁶ holding their meetings beyond the reach of its law³⁷ and the State unable to end its existence. It is not intimated that this is the necessary result or the purpose of the new laws, but it is insisted that it is a legal possibility. Whether it was a wise policy to make such a situation possible is a controversial question, which will be left for readers to answer for themselves.

²⁵ "For the period not to exceed fifty years next succeeding. . . ."

²⁶ *Trustees of Dartmouth College v. Woodward*, 3 Wheat. 518, 4 L. Ed. 629; See *State v. Roach*, 267 Mo. 300.

²⁷ Note 26 *supra*; *Gorman v. Pacific R. R.*, 26 Mo. 451; *Sloan v. Pacific R. R.*, 61 Mo. 24; *State v. Greer*, 78 Mo. 188.

²⁸ *New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, 115 U. S. 650.

²⁹ Note 26 *supra*.

³⁰ Delaware, Rev. Code, c. 65, sec. 5; Florida, Corp. Law 1925—amended by Laws 1917, c. 113; Illinois, Gen. Corp. Act, sec. 5; New Jersey, Comp. Stat. secs. 1, 8; New York, Gen. Corp. Law, sec. 11.

³¹ Const. 1875, Art. IV, sec. 7, par. 1. ³² Const., Art. VIII, sec. 1.

^{32a} *Calder v. Michigan*, 218 U. S. 591; *Ramapo Water Co. v. New York*, 236 U. S. 579; *Ives v. So. Buffalo Ry. Co.*, 201 N. Y. 271, 230; *Southern, etc., Co. v. Richmond*, 98 Fed. 671; *Wilmington City Ry. v. Wilmington, etc., Ry.* 46 Atl. 12.

³³ Section 10145.

³⁴ Section 10144.

³⁵ Section 9752.

³⁶ Section 10152.

³⁷ Sections 9788, 10152.

By the changes made in Section 9792 the present provisions limiting the licenses of foreign corporations to fifty years are eliminated and such licenses are to be made perpetual, if desired. This is to accord with the privilege granted to domestic corporations, since the general rule is to allow a foreign corporation licensed to do business within a State the same privileges as are granted to domestic corporations.³⁸

Another marked change in policy has been the addition of two new paragraphs numbered eleven and twelve to Section 10151.³⁹ Paragraph eleven permits corporations doing business under Missouri charters to own stock or bonds in other corporations and to exercise all the incidents of ownership, including the right to vote thereon. This opens the way to the formation of investment or "holding" companies of various kinds. There had been no previous statutory provision for this and an early case held that it was *ultra vires*,⁴⁰ but later cases relaxed this rule, at least to the extent that a corporation might own the stock of a subsidiary ministering directly to its needs⁴¹ or in satisfaction of a debt.⁴² The new provision broadens the law however to include all kinds of stock ownership. Other States favorable to corporations have the same provision⁴³ but Illinois and New Jersey permit it only on the express provision that it does not lessen competition, and consequently tend to monopoly. It can readily be seen that one corporation controlling numberless others may exert great influence thru them, but it has undoubted advantages of convenience in the internal management of great industries.

Paragraph twelve permits a corporation to traffic in its own stock provided it does not impair its capital or defraud creditors by so doing. This has not been heretofore permitted,⁴⁴ except where it was necessary

³⁸ State v. Standard Oil Co., 111 Minn. 85; Penn. Collieries Co. v. McKeever, 183 N. Y. 98.

³⁹ Eleventh. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise hold and possess or otherwise dispose of shares of capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this State, or any other State, Country, Nation or Government, and while owner of said stock may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

Twelfth. To purchase, hold, sell and transfer shares of its own stock; provided that no such corporation shall use its funds or property for the purchase of its own shares of stock when such use would cause an impairment of the capital of the corporation or perpetrate a fraud upon its creditors or other stockholders: And provided further that shares of its own capital stock belonging to the corporation shall not be voted upon by the corporation.

⁴⁰ Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135.

⁴¹ State v. Mo. P. Ry. Co., 237 Mo. 338; State v. Mo. P. Ry. Co., 241 Mo. 1.

⁴² Wilson v. Torchon Co., 167 Mo. App. 305.

⁴³ Delaware, Rev. Code, c. 65, sec. 77; Florida, Corp. Law. 1925, sec. 8; Illinois, Gen. Corp. Act, sec. 7; New Jersey, Laws 1917, c. 195, secs. 2, 34, Supp. 1924, 47-179; New York (except public utility companies), Stock Corp. Law, sec. 18.

⁴⁴ St. Louis Carriage Mfg. Co. v. Hilbert, 24 Mo. App. 338; Stringfellow v.

to protect its debts and the transaction was free from fraud.⁴⁶ Of the States whose laws have been compared, Delaware,⁴⁶ Florida,⁴⁷ and New Jersey⁴⁸ permit it. Illinois and New York have no statutory provisions on this power, but the New York courts have permitted it.⁴⁹

Section 9792 as revised provides for legal service on the Secretary of State on behalf of a foreign corporation if its regularly appointed resident agent cannot be located. This is a new provision intended to secure service on non-resident corporations, who have sometimes sought to avoid it by failing to provide agents who could be served.

Section 10165 provides for twenty-one directors in case two or more corporations are consolidated, instead of the thirteen allowed by the present law, thus placing them on an equality with other corporations.

These are the changes affecting the powers granted to corporations under the new law. It is here that the new policy of liberal treatment is developed. What the social or economic results will be can only be learned by experience.

III. CHANGES CONCERNING CAPITAL STOCK

These alterations relate to the amount of capital stock which must be paid up before a corporation may commence business. Section 9792 dealing with foreign corporations, simply adds the word "authorized" to the words "capital stock," making clear that foreign corporations must pay taxes and fees on the basis of their authorized capital stock rather than on the paid up stock, as has sometimes been contended; it also makes the certificate issued to them by the Secretary of State show the entire amount of their authorized capital stock, rather than the actual or paid up capital.

The new provisions of Sections 10144, 10161, and 10165a, all relate to the amount of capital stock which must be paid up before a corporation can commence business. At present under Section 10144, the Articles of Association *must* show that at least fifty per cent of the authorized capital stock has been subscribed in good faith and actually paid up in money or property of full value and is in the custody of the directors. The obvious purpose is to require a substantial amount of the capital to be paid in as a protection both to those who may do business with the corporation and an assurance to possible investors that

Rosebrough Monument Co., 196 S. W. 1050; Potts-Turnbull Adv. Co. v. Galithell, 257 S. W. 134; Hunter v. Garaflo, 246 Mo. 131.

⁴⁶ St. Louis Rawhide Co. v. Hill, 72 Mo. App. 142.

⁴⁷ Delaware, Rev. Code, c. 65, sec. 19. ⁴⁸ Florida Corp. Law, 1925, sec. 8.

⁴⁹ New Jersey, Comp. Stat. sec. 38—amended Laws 1926, c. 138, sec. 12.

⁵⁰ 17 N. Y. 507; 90 N. Y. 87.

the new corporation is a bona fide business firm in which the incorporators are personally willing to invest. Thus the Articles of Incorporation recorded in the corporation's home show to all the world that a company capitalized at \$100,000.00 has at least \$50,000.00 in money or property with which to start business. The new Section 10144, applying only to corporations issuing par value shares merely provides that a corporation *may* show in its Articles of Association the percentage of the capital stock paid up. Thus the same \$100,000.00 corporation may, if it desires, specify that 1/10 of one per cent of its capital is paid up, and start business with \$100.00, altho suggesting to the *unwary* that it is worth \$100,000.00. However, read in connection with the new Section 10165a, the situation is not quite that, since by that section a corporation is required to file an affidavit with the Secretary of State before it commences business that at least ten per cent of its authorized capital is paid up. Thus the \$100,000 corporation we are considering may start with \$10,000.00 instead of \$50,000.00, but since this affidavit is not required to be recorded, the only way for those doing business with the corporation to discover the amount of paid up capital stock would be to communicate with the Secretary of State, or remember that under this section ten per cent of the stock authorized has been paid in before the corporation was supposed to commence business. This applies only to the corporation issuing par value stock, for the law authorizing the issue of "no par value" stock requires that all the authorized capital be paid in.⁵⁰ The amount of authorized stock may also be increased under Section 10161 without the increase being paid up. Under the present law the statement of the increase decided upon, filed with the Secretary of State must show the percentage of the increase paid up. Under the new act, if it does not show that ten per cent has been paid up, then the corporation must file an affidavit showing that it has been paid before the increase, altho voted, becomes effective.

In short, the changes in these sections reduce the amount of actual capital necessary to start a corporation from fifty per cent of the authorized capital to ten per cent, and would seem to make it more difficult for the average person dealing with the corporation to discover just what capital the corporation is actually operating on.

IV. CHANGES CONFORMING TO THE NO PAR VALUE STOCK LAW

These changes require little comment, as they were merely to bring the wording of the sections affected up to date. When the present

⁵⁰ Laws 1921, p. 662, Laws 1923, p. 362.

sections were written, stock without par value was not permitted in Missouri, but authority to issue such stock was granted in 1921.⁵¹ Such changes occur in Section 9792 relating to foreign corporations and make an alternative statement in the certificate of the Secretary of State permissible to accord with the kind of shares issued, whether par value or no par value. Such a change is also made in Section 10144 which requires that all par value stock issued shall be paid for at its full value, "no par value" stock being taken care of by the law authorizing it.⁵² Such changes have no new legal results since they merely make the wording of an old statute conform to a later one.

V. MISCELLANEOUS CHANGES

These are slight and unimportant changes in several words scattered thru the various sections, probably typographical errors since they do not change the meaning of the sections. In Section 9792 "law" is used instead of "laws," "rights" instead of "right"; and in Section 10152 "plan" is used instead of "plans." Section 10144 also drops the "or company" from the phrase "corporation or company" probably because it is redundant as used here.

CONCLUSION

A study of the more important of these changes shows an effort to attract corporations into Missouri, first, by making the incorporation procedure more convenient, and second, by making the privileges granted to corporations more liberal. It will be noted however that this bill does not attempt to reduce taxes levied on corporations. Whether that has been done in some other bill or not, the author does not know. It is suggested that low corporation taxes as well as ease of incorporation and greater privileges are essential if Missouri is to take a place with Delaware, Florida and New Jersey as an easy incorporation State. The change of policy effected by the new law is a radical one, and the author seriously doubts if it would have been approved by the majority of the people if their attention had been called to what was being done. In some manner, other events at the last session of the General Assembly seemed to overshadow this bill, so far as general knowledge was concerned; events whose results may be found to be not quite so important as are the results of this one.

⁵¹ Note 50, *supra*.

⁵² Note 50, *supra*.