

BUSINESS ORGANIZATIONS

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The material on Business Organization is intended to deal with the more consequential aspects of the new developments in the fields of Agency, Partnership, and Corporation law in Indiana. No specific attempt has been made to break these fields down into all their constituent parts, but only to present the general outlines of each as found in the judicial decisions, the legislation, and the opinions of the Attorney General for the past five years.

AGENCY

THE EMPLOYMENT RELATION

It is realized that there is a technical distinction between the principal and agent relation and the relation of master and servant. However, that distinction does not figure in the materials presented here. Therefore, the term "employment relation" will be used to cover both.

Creation of the Relation; Sub-agent.

In *Standard Oil Co. v. Soderling*,¹ it was held that an attendant employed by the operator of a filling station owned by the defendant oil company became the servant of a trucking company when he undertook to help unload merchandise brought there by the carrier. Thus, when he negligently caused an air compressor to fall on an employee of the trucking company, his negligence could not be imputed to the defendant oil company. The consignee of the merchandise was the lessee and operator of the filling station property, and he had ordered the attendant to help with the unloading, not staying to see how it was done.

The tariff schedule under which the compressor was shipped required the consignee either to furnish a man to help with the unloading or to pay at a rate of one dollar an hour per man if the carrier furnished the additional manpower. The court held that this may have vested in the

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1. 112 Ind. App. 437, 42 N. E. (2d) 373 (1942).

consignee the authority to help unload the compressor, but gave him no authority to appoint another as sub-agent. Since that was true, the court reasons that the attendant, rather than acting for the oil company, was acting exclusively for the carrier. For substantiation, the court pointed to the lease between the operator lessee (consignee) and the lessor oil company, providing that the lessee had no authority to appoint agents to act for the lessor, and that no one performing services on the premises at the request of the lessee should be deemed to be an employee of the lessor.

If this provision be upheld, then the result reached by the court would seem justified, although the oil company probably never objected to looking upon the attendant as its employee when accepting the monetary benefits and other fruits of his labor. Had the case been one of injury to a third person by reason of the third person's reliance on the attendant's being a servant of the oil company, then liability might be founded on an estoppel, but in the instant case the injury probably did not result from any particular reliance on the part of the carrier. The injured man would as readily have accepted the aid of a stranger. Although the reasoning in the case may cause some uneasiness, the end result is probably just if the suit was merely an attempt to relinquish the comparatively slight workmen's compensation award which presumably would be due, in favor of a greater recovery at law against the "master" of the person at fault.²

An interesting question of principal and agent from a taxation standpoint is presented in *Gross Income Tax Division v. Indianapolis Brewing Co.*³ Manufacturers of beer in Indiana, being compelled under a federal statute⁴ to pay a federal tax on beer sold, had adopted the practice of adding the amount of said tax to the sale price of the beer. This, they contended, made them agents of the United States government within the meaning of the Indiana Gross Income Tax Act of 1933,⁵ which contains an exemption clause for "taxes . . . collected as agent for the state of Indiana and/or the United States of America."⁶ The court, citing⁷ the

2. The case is discussed in 149 A.L.R. 644 (1944).

3. 108 Ind. App. 259, 25 N.E. (2d) 653 (1940).

4. 26 U.S.C.A. §3150 (1940).

5. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-2601 et seq.

6. Id. at §64-2606 (b).

7. At 265, 25 N.E. (2d) 653, 655.

Restatement on Agency, defines an agent as “. . . one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it.”⁸ The court might well have excluded the contention of agency in the case by simply quoting from the remainder of the section of the state act in question reading, “No person shall be considered an agent for the state of Indiana and/ or the United States of America . . . unless he has been explicitly designated as a collecting agent in the statute under the terms of which the tax is imposed.”⁹

However, on more devious grounds, the court answered the contention by construing the federal tax to be an excise on the privilege of manufacturing and selling beer, or in other words, a provision “for the collection of such tax from the appellees, instead of constituting appellees . . . as agents for the collection of the tax from others.”¹⁰ Thus, the exemption could not be made to apply in favor of one who was a self-appointed “agent” to collect the federal tax from himself under penalty for failure to do so. This same point was disposed of in the same manner in *Department of Treasury v. Midwest Liquor Dealers*.¹¹

Scope of the Relation; Family Car Doctrine.

*Bryan v. Pommert*¹² has probably been discussed elsewhere, but it may be well to bring out the agency aspect of the case here. The wife of a car owner had a collision with another automobile, and although the owner of the car driven by the woman was not in the car at the time and thus had nothing to do with its negligent operation, the injured plaintiff sued the husband, or owner. The suit was not brought on the family purpose doctrine, but under the theory that an actual principal-agent relation existed between the husband and wife so far as the trip in question was concerned.

8. §1 of the Restatement defines agency as “. . . the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”

9. Ind. Stat. Ann., loc. cit. supra note 6.

10. At 266, 25 N.E. (2d) 653, 655.

11. 113 Ind. App. 569, 48 N.E. (2d) 71 (1943), where the argument was that the dealers were agents of the state for the collection of a stamp tax.

12. 110 Ind. App. 61, 37 N.E. (2d) 720 (1941).

The court, in granting a new trial, indicated that in order to establish liability on the husband, either actual control on his part, or the right to control¹³ the wife's activities would have to be found, and the fact that the wife's trip was for the purpose of buying clothes for a member of the family, and also to bring back some goods with which to stock the husband's store did not necessarily make her the agent of her husband. This was said to be true even though the husband accepted the fruits of the trip. The court was unwilling to consider this a ratification of the wife's acts since it found that the wife was performing the acts in question on her own account at the time.

Since the wife's venture could be said to be for a family purpose without the undue stretch of the imagination so often found in such cases, it seems that an application of the family purpose doctrine of vicarious liability in the instant case would be most timely. However, it will be recalled that the Indiana courts have never looked upon that doctrine favorably.¹⁴ Thus we find the Appellate Court still requiring a showing of actual principal and agent relationship and saying that the absence of active control or the right to such control defeats the agency contended for. Moreover, the court distinguishes between services rendered by a wife as part of her household duties and those rendered in other capacities.¹⁵

Respondeat Superior.

In *Railway Express Agency v. Bonnell*,¹⁶ a general agent for an express company, in the course of the business of his principal, was called upon to visit a customer in regard to lost merchandise. Although a number of company trucks were available for his use, he accepted a ride in a privately owned car driven by the night foreman, who was then off duty and preparing to leave the office. Due to the negligence of the driver, the plaintiff was injured and sued the express company, contending that since the general agent

13. The same test was used in *Van Drake v. Thomas*, 110 Ind. App. 586, 38 N.E. (2d) 878 (1942), where the court said that it was unnecessary that the master's control be in fact exercised so long as the mere right to exercise it existed.

14. Harper, *Law of Torts* (1933) 620.

15. For a discussion of the entire problem, see *id.* at §283.

16. 218 Ind. 607, 33 N.E. (2d) 980 (1941).

was acting within the scope of his authority, the principal should be liable. The court rejected this argument, quoting¹⁷ Mr. Justice Park in 1827 English case:¹⁸

"I cannot bring myself to the length of supposing, that if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority."

The court then added that where the master or principal (the express company here) had no right to command or forbid the act or omission resulting in the injury, no liability should accrue.¹⁹

Since the general agent was without doubt acting within the scope of his employment, liability might have been imputed to the principal if the general agent had in any way controlled or attempted to control the foreman's operation of the vehicle. In such event, the foreman, who by virtue of the time clock, had become a stranger to the principal, might have been converted into a sub-agent, thus forming the chain of liability linking the principal. However, since the foreman was off duty, since the car was not one regularly used in the business, and since the foreman was subjected to no attempted exercise of control, the general agent was no more than a gratuitous guest in the vehicle of a friend. The decision is perhaps strengthened by the fact that the foreman intended to accomplish an errand of his own in addition to transporting the general agent to his destination. Thus he had a motive of his own for the trip, aside from whatever desire he may have had to befriend his superior.

This additional motive is important, although not always controlling, as shown in *Great American Tea Co. v. Van Buren*,²⁰ where the court said²¹ "An act may be within the scope of the employment although done in part to serve the purpose of the servant." This, thought the court, was true even though the *predominant* motive may have been self-

17. At 610, 33 N.E. (2d) 980, 981.

18. *Goodman v. Kennell*, 3 Car. & P. 167 (1827).

19. This passage was cited with approval in *Bryan v. Pommert*, cited *supra* note 12.

20. 218 Ind. 462, 33 N.E. (2d) 580 (1941).

21. *Id.* at 467, 33 N.E. (2d) 580, 581.

service. The servant in that case, a truck driver, had been relieved of his route, but his employer had acquiesced in his keeping the truck and continuing his work, at least in part. When the accident occurred, the servant had finished his deliveries and was in the course of seeing about other employment before bringing the truck home. In spite of this, the court thought his deviation for personal reasons not great enough to take him out of the course of his employment. It seems difficult to reconcile the somewhat elastic reasoning of this case with the doctrinal rigidity of the *Bonnell* case *supra*, although the two are certainly distinguishable on their facts.

Assault and Battery.

The ever-growing conception of apparent authority in the agency field has not yet reached in Indiana the extent of including assaults and batteries perpetrated in the course of carrying out other authorized activities. In *Moskins Stores v. DeHart*,²² an employe of a credit clothing corporation was employed to collect the corporation's accounts. In the course of that duty the agent became over-zealous and committed an assault and battery on one of the debtors. The court found no liability on the part of the corporate principal, saying that the agent's act could not be imputed unless the use of force was contemplated, or was the usual conduct in the particular kind of business involved, or unless the employer had knowledge, either actual or constructive, that the collector was the sort of person likely to resort to force in the collection of accounts.

The case seems well reasoned and allays all fear that the increasing trend of liberality shown in some jurisdictions might come to prevail in Indiana. The opposing theory finds its strength in a group of cases headed by the 1925 *Son v. Hartford Ice Cream Co.* holding by the Connecticut Supreme Court of Errors.²³ The facts were very similar to those in the Indiana case. The agent, in attempting a collection for ice cream delivered, tried forcibly to take a cash register since he could get payment in no other way. In the ensuing struggle, he committed a series of batteries on the proprietor.

22. 217 Ind. 622, 29 N.E. (2d) 948 (1940).

23. 102 Conn. 696, 129 Atl. 778 (1925), *Steffen, Cases on Agency* (1933) 211.

In holding the principal liable, the court pointed to the agent's broad authority to deliver ice cream and collect for it, and added that since the batteries were committed in the course of carrying out that authority, the responsibility should fall upon the principal.²⁴ However, this case and others following it are probably still very much in the minority, so the Indiana holding is in accord with the rule generally applied in other states.²⁵

The Indiana rule as set out in the *Moskins* case was qualified somewhat in the later case of *Goodyear Tire & Rubber Co. v. Paddock*.²⁶ In that case, the office manager of one of the defendant's stores forcibly ejected a customer from the store premises following a dispute over a bill. The court there held the principal liable, distinguishing the situation from that found in the *Moskins* case by saying that an office manager of a store is usually given the authority to properly eject persons from the premises, whereas a collector of accounts, as in the *Moskins* case has no authority given him to use force in his collection of accounts. Thus, the *Goodyear* case falls within the exception announced by the court in the *Moskins* case to the effect that "it is necessary to show that the use of force was contemplated . . . in the conduct of the master's business . . ." ²⁷ It is reasonable to suppose that the use of force would be contemplated on the part of an office manager in proper cases. Moreover, an office manager has more apparent authority generally than a mere collection agent. Thus the distinction seems well founded.

Another assault and battery case, somewhat analogous to the *Moskins* case is *Wells v. Northern Indiana Public Service Co.*²⁸ A meter reader for a public service company, in preparing to read a gas meter, struck at a dog with his flashlight, but instead, hit the plaintiff. Quoting the *Restatement*

24. " . . . the truck driver's attempt to collect out of the plaintiff's cash register precipitated a series of acts constituting one continuous transaction, and the beating occurred in the course of the servant's attempt to perform the business of the master." 129 Atl. 778, 780.

25. The court, in support of its holding of non-liability cites 2 Mechem, Agency (2d ed. 1914) §1978, and 1 Restatement, Agency (1933) §245.

26. 219 Ind. 672, 40 N.E. (2d) 697 (1942).

27. 217 Ind. 622, 627, 29 N.E. (2d) 948, 949.

28. 111 Ind. App. 166, 40 N.E. (2d) 1012 (1942).

on *Agency*,²⁹ the court said³⁰ "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." The court found that the employee was not, in striking at the dog, engaged in his regular course of meter reading, or acting in self defense, but was only giving vent to his personal distaste for dogs; hence he was acting outside the scope of his employment. This case further allays fear of encroachments of such cases as the *Hartford Ice Cream Co.* pronouncement *supra*.

An even simpler assault and battery case is found in *Montgomery Ward & Co. v. Fogle*,³¹ where a store clerk was held to be acting within the scope of his employment in following a woman from the store, forcibly detaining her, and searching violently through her belongings. The clerk had been given express actual authority to follow persons seen in the act of shoplifting, and once outside the store, to forcibly take the stolen goods from them. Thus it was easy for the court to conclude that this was a sufficient basis for inferring that the clerk was expected to act in the manner he did when he suspected someone of shoplifting; therefore, he was acting for his master in committing the assault, battery, and false arrest. The case thus falls well within the rule of the *Moskins* case and the *Goodyear* case, *supra*.

Vice-Principal.

In *McKinnon v. Parrill*,³² the plaintiff, a farm employee, sustained injuries to his hand as a result of the negligence of the husband of the owner of the farm in failing to turn off a power corn picker while the plaintiff was cleaning it. Since the employment did not fall within the Workmen's Compensation Act,³³ the defense of the fellow-servant rule was urged. The farm owner's husband was doubtlessly a fellow-servant in the sense that he was working in the field with the plaintiff, but that did not preclude his having higher status. He was the active manager of the farm, supervised

29. §235.

30. At 168, 40 N.E. (2d); 1012, 1013.

31. 221 Ind. 597, 50 N.E. (2d) 871 (1943).

32. 111 Ind. App. 343, 38 N.E. (2d) 1008 (1942).

33. A claim for compensation was made however, before suit at law was begun. The court held such filing of claim not to be an election of remedies since no Workmen's Compensation remedy existed for election.

all work on it, had full authority to engage and discharge employees, and handled all business matters relative to the farm. Therefore, the court pronounced him a vice-principal and found that in directing the plaintiff's activity, he stood in the same position as the ultimate principal, thus imputing his negligence to that principal.

The use of the vice-principal doctrine here seems logical since the husband was in a very real sense the general manager of the farm. The court pointed out that one person may at different times be both a vice-principal and a fellow-servant, depending upon whether he is directing the work of his employees as a foreman, or whether he is working with them on a common project. Here, the husband was certainly acting in his capacity as an overseer and manager in ordering the plaintiff to clean the corn picker. Although the opinion raises the point incidentally,³⁴ more weight might have been given to the theory that the mechanical corn picker, when in operation, was an inherently dangerous instrumentality, imposing upon the principal a non-delegable duty to see that proper instructions for safety were given to those who were to work with it.

"Entire" Contracts; Bonus.

In *Montgomery Ward v. Guagnet*,³⁵ the plaintiff employee was discharged from his position as store manager for the defendant two months before his annual bonus was to fall due. There is among different jurisdictions a considerable division of authority as to whether a bonus at the end of a certain period calls for service during the entire period as a condition precedent to payment, or whether it is merely a deferred payment plan for compensation accrued. One group of courts consider the bonus as a reward, a bait, so to speak, to induce faithful service for the time specified, while the other group considers it merely as a wage device. Thus the latter group gives the employee that part of the bonus which is proportionate to the length of time worked. The court in the *Montgomery Ward* case shows disfavor toward the latter theory, holding that such a rule should not prevail unless the employee was discharged without cause. However, the problem in the instant case is governed by the contract

34. At 356, 38 N.E. (2d) 1008, 1013.

35. 112 Ind. App. 661, 45 N.E. (2d) 337 (1942).

into which the parties entered, which included a provision that the entire bonus would be forfeited in case of termination of services by either the employer or the employee, and gave the employer the right to discharge without cause. This was held to be controlling.

Tenure; "Permanent Employment."

The term "permanent employment" has also given rise to many conflicting decisions. In other jurisdictions it has been held to mean (1) employment for so long as the same type of work is available;³⁶ (2) employment for life;³⁷ and (3) employment at will.³⁸ The plaintiff in the *Montgomery Ward* case, *supra* contended that he was entitled to "permanent employment" although his written contract with the defendant made no mention of it. There was evidence indicating that one of defendant's representatives told the plaintiff, before the employer-employee relation was established, that the course of training for a store manager's position would take five years, and that the company would not undertake a five-year training period if it did not think the employment following it was to be permanent.

In the cases holding contracts for permanent employment to be more than contracts at will, it is usual to find some consideration given for that employment other than mere services.³⁹ Even if it be assumed that in the instant case the vague language of defendant's representative amounted to a promise, there was certainly no separate consideration given for it. Moreover, since the negotiations were all oral, there could not be any contract, even for the five-year training period because of the statute of frauds.⁴⁰ Thus the written contract later entered into by the parties was the only instrument in question, and since it fixed no tenure, the court held the relationship to be one at will.

36. *Cornig v. Carr*, 167 Mass. 544, 46 N.E. 117 (1897).

37. *Pierce v. Tennessee Coal, Iron, & R. Co.*, 173 U.S. 1 (1899).

38. *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 164 N.E. 342 (1928).

39. In *Carnig v. Carr*, cited *supra* note 36, the employee gave up his business, in which he had been in competition with his new employer. In *Pierce v. Tennessee Coal, Iron, & R. Co.*, cited *supra* note 37, the employee had been injured, and gave his employer a release in consideration for the new contract.

40. An oral "agreement that is not to be performed within one year from the making thereof." *Ind. Stat. Ann.* (Burns, 1933) §33-101.

PARTNERSHIP
FORMATION OF ORGANIZATION

The 1937 Indiana Unemployment Compensation Law,⁴¹ designed to relieve those who have for a time enjoyed a service relationship followed by a period of unemployment, automatically excludes those who are their own employers, such as members of a conventional type partnership. This does not mean however, that the Act can be circumvented by the organization of what appears to be a partnership, and yet has none of its substantial attributes.

In *In re Zeits*,⁴² four lessees of industrial property drew up what purported to be a partnership agreement, naming themselves as senior partners, and all workers in the plant as junior partners. Group meetings were held, at which times the terms of the agreement were explained to the workers, then each was asked to sign as a "junior partner." It was made known to them that a refusal to sign the agreement meant that there would be no more work available to those refusing. As a result, the agreement was signed by 114 workers. Under this agreement all junior partners who worked a minimum of 600 hours during any one year were to receive a ten percent share of the net profits of the business based on "units of interest," such units representing hours of work on the part of the various employees. Any junior partner could be expelled from the organization, or could voluntarily resign therefrom, but in no case could he be entitled to any share in the distribution of assets upon the liquidation of the partnership, except as to the ten percent share already mentioned. No investment of capital was demanded of or made by any junior partner, and all hours of work were rewarded by a fixed hourly rate of compensation; thus, there was no sharing of profits except as to the ten percent shares based on the so-called units of interest. The superintendent was given the authority to assign any and all of the junior partners to their respective positions, supervise their work, and fix their hourly rate wages. Aside from the added dignity of being a "partner" there was no evidence that under the partnership articles, the status and

41. Ind. Stat. Ann. (Burns, Supp. 1943) §52-1501 et seq.

42. 108 Ind. App. 617, 31 N.E. (2d) 209 (1941).

duties of a junior partner were any different from what they were before the agreement was entered into.⁴³

In the definitions section of the Act,⁴⁴ "employment" is defined as ". . . service . . . performed for remuneration, or under any contract of hire, written or oral, express or implied." Several exceptions are enumerated,⁴⁵ but the "junior partners" seemed not to fall within any of them. The court defined a genuine partnership as "a voluntary contract of association for the purpose of sharing the profits as such, which may arise from the use of labor and skill in a common enterprise; and an intention of the parties to form a partnership for that purpose."⁴⁶ Under this, as well as any other accepted definition of partnership,⁴⁷ it is apparent that none of the elements of a partnership existed as to the 114 junior partners. The court said,⁴⁸ "any contract for the performance of service will be scrutinized beyond the mere form for the purpose of determining whether the relationship of the parties involved falls within the provisions of the Act." After such a scrutiny "beyond the mere form," the court concluded that while the organization might be a partnership as among the four originators of the plan, the agreement contained nothing to preclude the "junior partners," who were in reality no more than ordinary employees, from the benefits of the Unemployment Compensation Act.

The court also held that persons who share in the gross receipts are not necessarily partners.⁴⁹ This is in accord with the general rule that while such sharing is a weighty

43. A later amendment was made to the agreement, but it did not enlarge the rights of the junior partners.

44. Ind. Stat. Ann. (Burns, Supp. 1943) §52-1502. See particularly, subsection (d) (1).

45. The act does not apply to one who is free from control or direction in the performance of his duties. Id. at §52-1502 (e) (5) (A). Neither does it apply to one who is either an independent contractor or an agent receiving his remuneration solely on a commission basis, and who is the master of his own time and effort. Id. at §52-1502 (e) (5) (B).

46. At 636, 31 N.E. (2d) 209, 216.

47. The definition used in the Uniform Partnership Act, accepted in twenty-four jurisdictions, is as follows: "A partnership is an association of two or more persons to carry on as co-owners a business for profit." 7 Uniform Laws Ann.; Partnership (1922) §6 (1).

48. At 632, 31 N.E. (2d) 209, 215.

49. At 639, 31 N.E. (2d) 209, 217.

factor for consideration, it is not conclusive.⁵⁰ In the matter of profit sharing, the instant case is somewhat analogous to the leading English case of *Wilkinson v. Frasier*,⁵¹ where fractional shares of the gross product of whaling and fishing ventures were divided among the members of the ship's crew at the end of each voyage. Since this took the form of deferred payment of wages under a fluctuating scale, the court held the relationship to be that of master and servant rather than one of partnership. The instant case is even simpler since wages were paid as they accrued, except for the ten percent additional pay. It seems unlikely that any definition of partnership could be stretched to include the arrangement under which the 114 workers in the *Zeits* case were employed.

Shortly after the Appellate Court's decision, two of the employees of the partnership asked the state Supreme Court for a declaratory judgment to the effect that the organization was in fact a partnership as to all concerned, or if not, that the compensation statute be declared unconstitutional. The court ordered the complaint dismissed because the state had not been named as a party and for want of jurisdiction to enter a declaratory judgment.⁵²

As to coverage of the Act, another problem was raised in *Royal Academy of Beauty Culture v. Review Board*,⁵³ where a corporation engaged in operating a beauty school permitted students to work at the school in return for a credit against their tuition. The court held this credit to fall within the statutory definition of "remuneration," and held the school to be an "employer" so as to entitle the students to compensation.

Estoppel.

A question of the creation of a partnership by . . . estoppel is raised in *Kerestury v. Elkhart Packing Co.*⁵⁴ A mother, who operated a store with her son for a short time after the

50. See Crane, *Law of Partnership* (1938) 51-66, as to different kinds of profit sharing plans and the effects given to them. See particularly §16 on profit sharing as wages to an employee.

51. 4 Esp. 182 (1803).

52. *Thompson v. Travis*, 221 Ind. 117, 64 N.E. (2d) 598 (1943). For a discussion of the case in its context with other problems of declaratory judgments, see Borchard, *Declaratory Judgments in Indiana* (1944) 19 Ind. L. J. 175, 178.

53. 110 Ind. App. 246, 38 N.E. (2d) 872 (1942).

54. 108 Ind. App. 148, 27 N.E. (2d) 383 (1940).

death of the father, surrendered possession of the store to the son, who continued to operate it alone. No instrument in writing showing the change of possession was executed, and no notice of the change was given to persons who had previously dealt with the father, the former proprietor. Although the retiring mother took no active interest in the business and received no income therefrom, she often visited the store and was seen there from time to time by customers and suppliers. Despite this, the Appellate Court found no liability against the mother as a partner for the debts of the business.

Certainly there was no partnership by express agreement, no partnership *inter se*. Therefore, the only problem for the court was to decide the case on the presence or absence of acts sufficient to constitute an estoppel. The court reiterated the Common Law definition of estoppel:⁵⁵ (1) a representation or concealment of facts; (2) with knowledge of the facts; (3) to one who was ignorant of the facts; (4) with the intention that the representation be acted upon; and (5) reasonable reliance by the one acting. Then the court found elements (1), (4), and (5) to be lacking. Such finding was based on the fact that the business had always been, and was still being carried on in the father's name. It was not definitely known by creditors that the mother had ever held a partner's interest in the business, and so there was no reason for anyone to rely on a supposed continuation of that interest. The period during which she operated the store with her son was only two months, not long enough for a presumption of partnership to be formed in anyone's mind. There was no evidence of fraud anywhere in the dealings, so there was no basis for finding a partnership by estoppel.

A similar question was raised in *Weber v. Fohl*.⁵⁶ A father and his son operated mills in different towns in Indiana, both under the name "Weber Milling Company." Upon the son's failure to pay for wheat shipped to him under contract, the plaintiff shipper sued the father as a partner. Again there was no partnership *inter se*, so the basis of the contention was an alleged estoppel. Although there was evidence that a very close business relationship did in fact exist

55. *Id.* at 153, 27 N.E. (2d) 383, 385.

56. 111 Ind. App. 388, 41 N.E. (2d) 648 (1942).

between the father and son,⁵⁷ it was apparent that the plaintiff was not fully aware of it at the time of contracting. The relationship might have been misleading to some, but it was held not to be so in the plaintiff's case. Furthermore, in spite of the close relation between the two, there had never been any attempt by either the father or the son to represent themselves as partners. Therefore, under the definition of estoppel used in the *Kerestury* case, *supra*, cited with approval by the court, there was again no partnership by estoppel.

The weightiest contention of the plaintiff was that the father had once said, "We could use lots of wheat at the mill in Sunman." The court held this insufficient to amount to a representation, and added⁵⁸ that such a statement might "support . . . a reasonable inference that a partnership existed . . ." but that "partnership by inference" in Indiana had never existed. An examination of one of the cases cited by the court as expressly so holding⁵⁹ shows that in Indiana a very sharp distinction has been made between partnership by estoppel and partnership by inference. The distinction goes back to Lord Coke's statement that "every estoppel . . . must be certain to every intent, and not to be taken by argument or inference."⁶⁰ If this be true, then the court is quite right in saying that there can be no estoppel by inference, therefore, no partnership by inference. Query; when does an inference become strong enough to be converted into a representation sufficient to fulfill the prerequisite of estoppel?

CORPORATIONS

FORMATION AND ORGANIZATION

De Jure Existence.

Under the Domestic Corporations Act,⁶¹ a corporation *de jure* comes into being when the certificate of incorporation has been issued by the Secretary of State. Then as a condition precedent to doing business, certain other things are

57. Each checked on the other's bank account, the son had previously worked in the father's mill, and the father owned the mill operated by the son under a lease.

58. At 397, 41 N.E. (2d) 648, 652.

59. *Wilkerson v. Wood*, 81 Ind. App. 248, 143 N.E. 166 (1924).

60. Coke, *Littleton* 352b.

61. Ind. Stat. Ann. (Burns, 1933) §25-218.

required, and in case of failure to comply, the statute imposes personal liability on the officers and directors.⁶² In *Western Machine Works v. Edwards Corp.*,⁶³ it was held that where these requirements were not met before the corporation started doing business, the state could challenge such action, but that a private individual had no such right since the corporation had attained *de jure* status. The conditions to doing business were held to be merely conditions subsequent to organization, so that organization was complete even though those conditions were not complied with.

RIGHTS OF STOCKHOLDERS

Declaration of Dividends.

There seems little doubt in Indiana that the propriety of declaring dividends on corporate stocks rests within the discretion of the directors, and further, that the courts should not interfere with the proper and legitimate exercise of that discretion.⁶⁴ However, courts of equity will interfere to order dividends paid out of surplus when the directors have refused to do so without justification or in bad faith. Therefore, it is not surprising to find the Appellate Court holding in *O'Neill Co. v. O'Neill*,⁶⁵ that it was proper for the lower court to order payment of dividends accrued on cumulative preferred stock in a corporation completely dominated by its president, who made of the board of directors a mere figure-head body. As evidence of bad faith, the court pointed to this domination, the fact that the board did not meet except for organization purposes, and the fact that the president, who owned all the common stock in the corporation, had attempted to purchase the plaintiff's cumulative preferred stock with corporate assets. Therefore, the court affirmed the lower court's order to pay the accrued dividends plus interest, although refusing the claim for future dividends since that

62. *Id.* at §25-219. The requirements are that (1) a copy of the articles, bearing the indorsement of the Secretary of State, must be filed in the recorder's office of the county in which the principal office is located; (2) the amount of paid-in capital provided for in the articles must have been paid in; and (3) an affidavit of a majority of the board of directors must be filed in the recorder's office of the county of the principal office, stating that said paid-in capital has been paid in.

63. — *Ind.* —, 63 N.E. (2d) 535 (1945).

64. *Star Pub. Co. v. Ball*, 192 Ind. 158, 134 N.E. 285 (1922).

65. 108 Ind. App. 116, 25 N.E. (2d) 656 (1940).

again would be a matter within the discretion of the directors, and not to be probed into by the courts until a clear abuse be shown. Since the corporation was entirely within the control of the president, the court found it unnecessary that the other directors be joined as parties defendant in the suit.

Whether the "rule of legitimate discretion" has identical application to both preferred and common stock is somewhat obscure in Indiana, no cases having been found in which the decision rests solely on that ground, apart from differing degrees of discretionary abuses on the part of the directors. To apply the rule equally to both classes of stockholders might allow a corporation to indefinitely postpone payment of dividends in an honest policy of expansion working to the benefit of the common stockholders and to the prejudice of those holding preferred stock. Therefore, it has been suggested⁶⁶ that the rule should be given a dual application in order to more adequately protect the rights of the preferred stockholders who, as such, ought to be entitled to more security. This problem of the rights of holders of different classes of stock, as well as other aspects of the problem has been discussed elsewhere.⁶⁷

Suits to Have Dividends Declared; Form of the Action.

It should be borne in mind that even though there is an apparent right to a declaration of dividends, one must be diligent in selecting the course of procedure toward getting them. In *Rubens v. Marion-Washington Realty Corp.*,⁶⁸ all the circumstances required in the preferred stock certificates to justify payment of dividends were present, and there appeared to be some evidence of abused discretion on the part of the directors. The court admitted the probability that the complaint alleged a *prime facie* duty on the part of the corporation to declare and pay dividends, and also admitted "the probability of a right to a mandatory injunction or writ of mandamus to compel the appellee to declare the dividend."⁶⁹ Yet in spite of all this, the court affirmed the judgment against the plaintiff because she had failed to state a cause of action under the theory upon which she sued. The

66. Note (1940) 15 Ind. L. J. 575.

67. Ibid. See also 133 A.L.R. 653 (1941).

68. — Ind. App. —, 59 N.E. (2d) 907 (1945).

69. Id. at 911.

complaint sounded in express assumpsit as for money due, and in such cases, none is due until declared. Thus, the court held that plaintiff should have sued in equity for a mandatory injunction ordering the declaration of the dividend, rather than suing at law for its payment. Although the distinctions between law and equity in Indiana have been long abolished, the court held that it could not consider the suit in question as one in equity.⁷⁰

Stock Transfers; Ultra Vires Acts.

Another case of a figurehead corporation, but one posing an altogether different series of problems from those in the *O'Neill* case *supra*, is found in *First Merchants National Bank v. Murdock Realty Co.*,⁷¹ and its companion cases. The affairs of the corporation were under the control of A, its president, and B, his sister who together owned a majority of the stock. They executed a corporate mortgage to secure both a corporate obligation and certain individual obligations. Before suit for foreclosure was begun, A, by blank indorsement, had transferred some 400 shares formerly owned by him to C, a third person who, as a minority stockholder, intervened after foreclosure proceedings to protest against the corporation's allegedly *ultra vires* act in executing the mortgage. The court held that C had a right to intervene as a minority stockholder even though no "book transfer" of the certificates was ever made in his favor. As previously held by the Appellate Court,⁷² mere delivery of the certificates indorsed in blank is enough to transfer title under the Act.⁷³ This is true even though the stock certificate provides specifically that it is transferrable only upon the books of the corporation.⁷⁴ On the strength of this, the

70. This question is discussed at greater length under the Equity material in this symposium, *infra*.

71. 111 Ind. App. 226, 39 N.E. (2d) 507 (1942).

72. *Conrad v. Olds*, 110 Ind. App. 208, 37 N.E. (2d) 297 (1941).

73. Ind. Stat. Ann. (Burns 1933) §25-701 et seq. This is the Uniform Stock Transfer Act, adopted in 40 jurisdictions. Its purpose is to give to corporate stock a character equivalent to that of a negotiable instrument. Under the act, a stock certificate and the title to the shares represented by it may be transferred by delivery of the certificate indorsed in blank, and equities in favor of the owner may be terminated by indorsement of the certificate by the person appearing to be the owner and by its delivery to a bona fide purchaser. *Ibid*.

74. *Crowder v. Terhorst*, 107 Ind. App. 288, 21 N.E. (2d) 141 (1939).

Appellate Court held C, the third person, to be entitled to intervene as a representative of the stockholders.⁷⁵ Nor was a request necessary on his part that the officers act for his protection; that obviously would have been a futile gesture since the officers were the ones whose conduct was being questioned. The further holding of the court was that the act of the corporation was *ultra vires*. It is always *ultra vires* for a corporation to enter into contracts of guaranty or suretyship not in the furtherance of its business unless given express authority to do so. Having no express authority, the corporation in the instant case could certainly be said to be acting beyond the furtherance of its business in mortgaging corporate assets to secure individual indebtedness of its officers. Nor could the plaintiff bank (mortgagee) be said to have reasonably relied on the existence of such authority.

Another suit arising out of the same circumstance was *Crowley v. First Merchants National Bank*.⁷⁶ It reveals that the defendant corporation in the *Murdock* case had undertaken to guarantee payment of a mortgage debt incurred by a third corporation, X. The suit being brought against defendant corporation and X corporation, C, the minority stockholder in the *Murdock* case, again intervened to protest against his corporation's guaranty. Again the Appellate Court found an *ultra vires* act. Moreover, the guaranty was found to have been given without consideration since nothing of value moved from X corporation to defendant corporation.⁷⁷

To confuse the issues further, a third suit, *Fardy v. Mayerstein*,⁷⁸ was brought by the successor of plaintiff bank. C, the perpetual intervener, again intervened, and again the

75. It was not then definitely known how C got possession of the certificates, although it was thought that he had bought them at a sale as foreclosed security for a loan he had advanced to A and which A had failed to repay.

76. 112 Ind. App. 80, 41 N.E. (2d) 669 (1942).

77. The evidence disclosed that defendant corporation had originally taken the land in question subject to a balance on a mortgage held by plaintiff bank. Thereafter, X corporation was organized and defendant corporation transferred the land to X by quitclaim deed in return for shares of stock in X corporation taken by A and B, the two principal officers of defendant corporation, and a third person taking one share of qualifying stock. X corporation then executed a renewal note and mortgage to the plaintiff bank which defendant corporation guaranteed. The reasons for the creation of this alter ego, as well as the other intricacies of the intercorporate dealings are stated in the opinion at 86.

78. — Ind. App. —, 41 N.E. (2d) 851 (1942).

Appellate Court held in his favor. The same case reached the Supreme Court in 1943,⁷⁹ and the manner in which C had become a stockholder was disclosed. He had held the certificates, indorsed in blank, as a pledge to secure a loan made by him to A, president of the corporation whose acts were in question. Upon failure of A to repay the amount borrowed, C bought the pledged stock at what he called a public sale, such sale being conducted in his home in Boston, Massachusetts, and witnessed by himself, his brother, and an auctioneer. In the noticeable absence of circumstances evidencing good faith publicity given to the sale, the court, *per* Judge Richman, held that it would have been proper for the trial court to find that no public sale had taken place. In pledge cases, the fiduciary relation of the parties is so close that the pledgee cannot ordinarily buy the pledged property unless the pledge agreement gives him that right, and then he may only purchase at a *public* sale. Thus, if the sale were *private*, as the court indicated it thought it was, C never obtained title and therefore, never had a right to intervene as a stockholder of the defendant corporation. Judge Richman also pointed out that although the Stock Transfer Act⁸⁰ provides for transfer of title by indorsement of the certificates, even though such indorsement be in blank, that provision can only apply as to a bona fide purchaser for value,⁸¹ and certainly there was no bona fide purchaser involved in the pledge and sale in question. Therefore, as between the two parties, A and C, with no innocent third persons involved, A still owned the stock, and C was without grounds to intervene. Thus, the Appellate Court's holding was reversed.⁸²

79. *Fardy v. Mayerstein*, 221 Ind. 339, 47 N.E. (2d) 315 (1943).

80. See note 73 *supra*.

81. This point was also made by the Appellate Court in *Conrad v. Olds*, cited *supra*, note 72.

82. Rehearing denied, 221 Ind. 339, 47 N.E. (2d) 966 (1943). In addition to the inapplicability of this part of the act as between the parties, the act does not affect voting rights under Ind. Stat. Ann. (Burns, 1933) §25-207 (e) (2), providing that no share may be voted at a stockholders' meeting which has been transferred on the corporate books within a certain number of days before the meeting. Cf. *State ex. rel. Breger v. Rusche*, 219 Ind. 559, 39 N.E. (2d) 433 (1942), where it was held that the true owner of corporate stock could vote that stock in spite of an agreement which he entered into calling for an irrevocable proxy in another person, such person not being designated in the corporate books as the owner. As to voting trusts, see *Miller, Voting Trusts In Indiana* (1929) 4 Ind. L. J. 600.

Upon the reversal in the Supreme Court of the *Fardy* case, the plaintiff then petitioned that body for *certiorari* to review the *Crowley case*.⁸³ The Supreme Court, *per* Judge Swaim, conceded that its new version of the *Fardy* case might not be in harmony with the Appellate Court's decision in the *Crowley case*,⁸⁴ but nevertheless refused to consider the latter case in an illuminating discourse on the functions and availability of the writ of *certiorari*.⁸⁵

Mismanagement.

In *Curtis v. North Side Realty Co.*,⁸⁶ the charge of mismanagement was raised, along with the questions of discrimination in the payment of dividends and the reissuance of acquired stock. The defendant corporation, owner by assignment of realty, took such realty subject to an option to buy, held by the lessee, granted in the original lease. The defendant corporation's articles contained a provision to the effect that the corporation should not have the power to convey or to encumber the realty without the consent of 90 percent of the preferred stockholders. In 1925, and again in 1936, without the consent of 90 percent of its preferred stockholders, the corporation entered into an agreement with the lessee whereby the rental rate was decreased. Plaintiffs, preferred stockholders, contended that such reductions amounted to "encumbrances" within the articles, so that they were invalid because not consented to by the necessary 90 percent of the preferred stockholders. Plaintiffs also complained of discrimination in another part of the 1936 contract which decreased the percentage of dividends payable to the preferred stockholders who were parties to that agreement. They also charged mismanagement in the reissuance of acquired shares of preferred stock without the consent of all holders of out-

83. Cited *supra* note 76. The denial of *certiorari* is found in 221 Ind. 682, 50 N.E. (2d) 918 (1943).

84. In reversing the *Fardy* case, Judge Richman indicated disapproval of the *Crowley case*. "If the effect of that case is contrary to our holding herein, it is disapproved." 221 Ind. 339, 349, 47 N.E. (2d) 315, 319.

85. *Certiorari* is not available unless (1) the lower court acts beyond its jurisdiction; or (2) acts in an illegal manner; or (3) no other mode of review is available. In the *Crowley case*, none of the three was present. There was a mode of review open; *viz.*, petition to transfer to the Supreme Court. That petition was denied only because it failed to comply with the Rules of Court.

86. 111 Ind. App. 81, 39 N.E. (2d) 489 (1942).

standing preferred stock, and asked that a receiver be appointed to manage the corporate affairs.

The court held that the rent reductions did not constitute encumbrances on the realty, and also that under the corporation's articles, the unanimous consent of the stockholders, or even a 90 percent consent was not necessary to validate the 1936 agreement. The charge of discrimination in the payment of dividends could not be sustained since only those who voluntarily consented to the 1936 agreement were affected, and they were estopped by their own free consent. The court also found the agreement to be supported by sufficient consideration in that the lessee had deposited \$3,000 with a trustee as security for the performance of its obligations under the lease. This was held to be sufficient return for the rent reductions. Lastly, the court disposed of the reissuing of acquired stock by pointing out that the articles restricted only the reissuance of *redeemed* stock, and contained no prohibition or qualification as to *acquired* stock.⁸⁷ The case still leaves open the question of how much the rights of the stockholders can be impaired by amendment of the articles of incorporation under Indiana's rather liberal statute.⁸⁸

87. Subject to the articles of incorporation, the general practice in redemption shares is to retire them upon redemption, whereas in reacquired stock, the shares are not extinguished by the reacquisition. They may be reissued at any time, or may be held in suspension. For further reading on redemption and acquisition, see Stevens, *Private Corporation* (1936) 245, 383, and Ballantine, *Private Corporations* (1927) 422, 427. Where preferred stock certificates provided that the corporation agreed to redeem it at par value plus arrearages of dividends, a guarantor who guaranteed payment of the dividends and retirement of the stock in accordance with the provisions of the certificates, was bound to redeem the stock even though the plaintiff seeking such redemption had purchased his stock from other preferred stockholders when the corporation was insolvent at a price less than either par or a subsequent liquidating dividend. *Curtis v. Beckett*, 114 Ind. App. 221, 50 N.E. (2d) 920 (1943). On the related problem of increasing the outstanding capital stock by voting stock dividends out of authorized but unissued stock, and also the problem of consideration for such issuance, see *Wabash Valley Coach Co. v. Turner*, 221 Ind. 52, 46 N.E. (2d) 212 (1943). See also *State ex rel. Wabash Valley Coach Co. v. Beasley*, 221 Ind. 274, 47 N.E. (2d) 324, cert. den. 319 U.S. 754 (1943). As to the fee chargeable to a foreign agricultural corporation for an increase in its capital stock, see *Ops. Ind. Atty. Gen.* (1943) p. 591.

88. *Ind. Stat. Ann.* (Burns, 1933) §§25-221 to 25-229.

*TRANSFER OF ASSETS; LIABILITY FOR ASSESS-
MENTS*

The question of liability for corporate debts upon transfer of assets from one corporation to another was raised in *State ex rel. Thompson v. City of Greencastle*.⁸⁹ A privately owned water works company, in petitioning the Public Service Commission for a rate increase some eighteen years ago, caused the commission to incur a considerable amount of expense. Although the commission ordered the city to reimburse it for these expenses, it was never done. Some years later, a plan was evolved for the transfer of the corporate assets and stock to the city. The stock was owned in its totality by the officers and directors of the private corporation, and they sold it, along with the corporate assets, to the city's agents, then resigned as directors. The intermediaries, or agents of the city, immediately appointed new directors to transfer the stock and assets to the city. Thus the original stockholders got full value for the stock and the assets of the corporation without accounting to the state for the claim of the Public Service Commission.

It takes no great amount of perception to see that such a devious method of defeating the just claims of creditors could not be allowed. Thus, the court held that the claims could be satisfied out of the assets in the hands of the stockholders after the sale and transfer,⁹⁰ then moved on to consider the liability of the city, if any. It held that in sales of assets by one corporation to another, no agreement on the part of the vendee to assume the debts of the vendor will be presumed, but if such agreement does in fact exist, then the vendee assumes the vendor's liability. The court found that there was sufficient evidence for the jury to decide that such liability existed on the part of the vendor in the instant case, and left the question of assumption or non-assumption of that liability for the jury.

On the related question of the validity of the assessment against the corporation by the Public Service Commission in its rate investigation, the Attorney General had ruled in 1935 that in his opinion the statute providing for such assessments⁹¹ was a valid one and that legitimate expenses

89. 111 Ind. App. 640, 40 N.E. (2d) 388 (1942).

90. Citing *Pierce v. United States*, 255 U.S. 398 (1921).

91. Ind. Stat. Ann. (Burns, 1933) §54-425.

incurred by the commission in its pre-regulation investigations should be paid by the utility involved.⁹² The court in the instant case confirms that opinion and says that the costs should be borne by the utility even though the enforcement of the rates set up as a result of the investigation was subsequently enjoined.⁹³ The Attorney General ruled in 1939 that the expenses involved in "re-valuing" utility property could also be charged to the utility.⁹⁴ As to what requirements should be met before any expenses are chargeable to the utility, the Attorney General in 1944 ventured that they must be "those expenses incurred in a proceeding pending before the commission, or in a proceeding initiated as the result of the investigation," and the utility must be given the opportunity to inquire as to the amount and the legality of the expenses.⁹⁵

FOREIGN CORPORATIONS

Fees for Admission.

Chapter 79, Acts of 1929⁹⁶ required every foreign finance company doing certain enumerated kinds of business within the state to pay the Auditor of State fifty cents on each hundred dollars gross income derived from Indiana business. Provision was also made for revocation of authority to do business in the state in case of failure to pay the fee. While this section was not among those expressly repealed by the Indiana General Corporation Act of 1929,⁹⁷ it was contended in *State ex rel. Davenport v. International Harvester Co.*⁹⁸ that its repeal should be implied from both the General Corporation Act and the Intangible Tax Act of 1933,⁹⁹ which in part set up the intangibles tax in lieu of other taxes.¹⁰⁰ The court, in denying these contentions, pointed out that repeal by implication should never be fa-

92. Ops. Ind. Atty. Gen. (1935) p. 451.

93. *Greencastle Water Works Co. v. Pub. Serv. Comm.*, 31 F. (2d) 600 (S.D. Ind. 1929).

94. Ops. Ind. Atty. Gen. (1939) p. 23.

95. Ops. Ind. Atty. Gen. (1944) p. 433, 436.

96. Ind. Stat. Ann. (Burns, 1933) §25-315.

97. The prior acts expressly repealed, 89 in number, are enumerated in §25-404.

98. 216 Ind. 463, 25 N.E. (2d) 242 (1940).

99. Ind. Stat. Ann. (Burns, 1943 Replacement) §64-901 et seq.

100. See id. at §64-931.

vored, particularly where the acts in conflict were passed by the same session of the legislature, and more specifically, that neither of the above-named acts laid any foundation for such an implication.

Although the Corporation Act was approved and became effective after Chapter 79, so as to become later legislation, the bill which became Chapter 79 was passed by the General Assembly four days after the bill for the Corporation Act, indicating no legislative intent toward repeal of that Act by the Corporation Act. The Intangible Tax Act, already held to be a general excise measure,¹⁰¹ could not as such, be taken to repeal Chapter 79, requiring the license fee for foreign corporations. Therefore, the court held Chapter 79 to be both unrepealed and constitutional. However, since the corporation in question had entered the state before passage of the act, the court held that it could not apply against the corporation in question since it did not apply to domestic corporations.¹⁰²

Purchase of Stock in Foreign Corporations; Public Utilities.

As to whether an Indiana public utility could purchase stock in a non-resident utility, the Attorney General ruled in 1942¹⁰³ that the allowability of such a purchase would be within the discretion of the Public Service Commission, depending upon the best interests of the state, assuming of course, that the utility's charter permitted such a purchase. An earlier opinion¹⁰⁴ was substantially in accord, and provided further, that if such a purchase were allowed, the books, papers, and accounts of the foreign utility should be kept in Indiana subject to the examination of the commission, and also that a majority of the directors would have to be residents of Indiana.

101. With two dissents, the act was held to be constitutional as an excise tax statute in *Lutz, Atty. Gen. v. Arnold*, 208 Ind. 480, 193 N.E. 840 (1935). See Comment (1935) 10 Ind. L. J. 450. For a discussion of this act in its present context as a tax measure, see Dunham, *Indiana Law and Legislation, 1940-1945; Taxation* (1946) 21 Ind. L. J. 113, 122.

102. Once admitted within the state, the foreign corporation becomes a quasi citizen, and must then be given the same treatment as given to domestic corporations. As to fees chargeable for admission of a foreign corporation to do business in the state, see *Ops. Ind. Atty. Gen.* (1943) p. 100. As to domestic corporations, see *Ops. Ind. Atty. Gen.* (1944) p. 249.

103. *Ops. Ind. Atty. Gen.* (1942) p. 247.

104. *Ops. Ind. Atty. Gen.* (1917-1920) p. 413.

Tax on Foreign Corporations.

Presumably, *State v. Prudential Life Insurance Co.*¹⁰⁵ has been discussed elsewhere. Briefly, the holding was that the Indiana Insurance Premium Tax Act¹⁰⁶ was not unconstitutional as an undue burden on interstate commerce. It arose as a result of the United States Supreme Court's holding in *United States v. South Eastern Underwriters Association*¹⁰⁷ that insurance was commerce, and therefore could be interstate commerce.

AUTHORITY OF OFFICERS

In *Anthony Wayne Oil Co. v. Barall*,¹⁰⁸ the Appellate Court held that the fact that a person was a corporate officer, even a president, did not clothe him with authority to such an extent that he could execute a sub-lease and bind the corporation. This problem has been raised many times in Indiana,¹⁰⁹ and the cases are in accord in holding that in the absence of actual authority, there must be some foundation for finding apparent authority other than in the mere fact that the person purporting to act for the corporation is one of its officers.

CORPORATIONS PRACTICING LAW

Not of much importance as a matter of substantive law, but of interest to the profession is the case of *Groninger v. Fletcher Trust Co.*¹¹⁰ Defendant trust company, authorized by law to act as executor, administrator, guardian, or trustee, had in its employ three full time attorneys to handle matters connected with the establishment and execution of trusts. The attorneys did not in any other way practice their profession. In a class action brought for the benefit of all practicing attorneys, plaintiffs sought to enjoin these activities, which they said constituted an illegal practice of the law. The Indiana State Bar Association filed an *amicus curiae* brief in support of that position.

105. — Ind. —, 64 N.E. (2d) 150 (1945).

106. Ind. Stat. Ann. (Burns, 1940 Replacement) §39-4802.

107. 322 U.S. 533 (1944), reversing *Paul v. Virginia*, 8 Wall. 168 (U.S., 1868).

108. 111 Ind. App. 670, 42 N.E. (2d) 370 (1942).

109. See cases cited in the opinion at 675.

110. 220 Ind. 202, 41 N.E. (2d) 140 (1942).

The court held for the defendant, saying that a corporation has every right to act in its own affairs as a natural person has, except that the natural person can act in *propria persona*, while the corporation must act through some natural person or persons. Since the natural person can execute trusts without illegally practicing law, so can the corporation.¹¹¹

LEGISLATION

General Corporation Act

Domestic Corporations for Profit; Acceptance of 1929 Act.

The amendments made in 1941 to the general act in this regard have been discussed elsewhere at greater length.¹¹² §46 of the original Act¹¹³ provided that any corporation existing at the time of the passage of the 1929 Act might "reorganize" so as to come within the provisions of the new act. The use of the word "reorganized" was unfortunate since in its technical sense that word applies to a judicial sale of corporate property and franchises and the formation of a new corporation by the purchaser.¹¹⁴ Thus all forms of the word throughout the act were replaced in 1941 by the words "accept," "accepted," "acceptance," "articles of acceptance," etc.¹¹⁵ This substitution seemed necessary for clarity since compliance with the 1929 act required none of the acts characteristic of a true reorganization. The 1941 amendment¹¹⁶ gave the same right to "accept" the provisions of the act to corporations which had come into existence prior to March 16, 1929, and whose corporate existence had terminated, by filing articles of acceptance within five years after termination. Upon doing so, the corporation was to be treated as though its existence had been continuous. The amendment was declared not to apply to corporations which had forfeited

111. Other similar cases are cited in the opinion at 208. For further treatment of the same problem, see 151 A.L.R. 782 (1944), 157 A.L.R. 283 (1945).

112. Indiana Legislation (1941) 17 Ind. L. J. 129, 145.

113. Ind. Stat. Ann. (Burns, 1933) §25-245.

114. Ballantine, Law Dictionary (1930) 1118.

115. The sections where the substitutions were made were as follows: id. at §§25-230, 25-245, 25-246, 25-247, 25-248, and 25-249.

116. Ind. Acts 1941, c. 226, §3, Ind. Stat. Ann. (Burns, Supp. 1943), §25-245.

their charters however. In 1943, another amendment was made which increased the time of grace from five years to ten.¹¹⁷

The Attorney General ruled in 1941,¹¹⁸ that any corporation wishing to accept the act must include in its corporate name the words "corporation" or "incorporated," or some abbreviation of one of them. However, in 1944, the Attorney General reversed that opinion and held that the name of the previously incorporated company would be sufficient even though it did not contain such words or their abbreviations.¹¹⁹

Shareholders' Meetings.

In 1943, the time at which the annual meeting of corporate shareholders should be held was increased from four to five months after the close of the fiscal year.¹²⁰

Foreign Corporations; Service of Summons.

A 1941 amendment¹²¹ added another paragraph to the section of the act providing for resident agents of foreign corporations doing business for profit within the state.¹²² The substance of the addition was that the resident agent could terminate his agency at any time he saw fit by filing with the Secretary of State a statement of his unwillingness to serve further. However, such act of disaffirmance does not relieve the corporation from service of process, since it is provided at another place that service may be made on the Secretary of State if the corporation fails to appoint an agent in the first place.¹²³ Presumably that provision would apply equally well where a resident agent has terminated his agency and the corporation has not yet appointed a successor.

A 1945 act¹²⁴ provides that a corporation authorized to do

117. Ind. Acts 1943, c. 94, §1, Ind. Stat. Ann. (Burns, Supp. 1943) §25-245.

118. Ops. Ind. Atty. Gen. (1941) p. 293.

119. Ops. Ind. Atty. Gen. (1944) p. 287. This opinion restates an earlier opinion to the same effect in Ops. Ind. Atty. Gen. (1929) p. 89.

120. Ind. Acts 1943, c. 66, §1, Ind. Stat. Ann. (Burns, Supp. 1943) §25-207 (k). This was the amendment to Ind. Acts 1929; c. 215, §8.

121. Ind. Acts 1941, c. 226, §8.

122. Ind. Stat. Ann. (Burns, 1933) §25-306.

123. Id. at §25-313.

124. Ind. Acts 1945, c. 72.

business in Indiana may be appointed as the resident agent of any corporation, resident or non-resident, for profit or not for profit. The act further provides that service of legal process may be made on such a resident agent by service on the president, a vice-president, the secretary, or an assistant secretary of the corporate resident agent.

Another 1945 act¹²⁵ provides that in all actions against or by a corporation incorporated under Indiana law, where it is proper or necessary to have a non-resident director of the corporation as a party, service of summons on the director may be made by service on the resident agent of the corporation. The act further provides that any non-resident who accepts a directorship in an Indiana corporation is deemed to have appointed the resident agent of the corporation as his own agent for purposes of service.

Forfeiture of Articles.

The requirements of the 1933 act relative to forfeiture of articles of corporations for profit failing to file annual reports¹²⁶ have been superseded by legislation in 1943,¹²⁷ which makes a distinction between corporations organized prior to the effective date of the 1943 statutes and those organized after that time. The same is true of the similar provisions for corporations not for profit.¹²⁷

125. Ind. Acts 1945, c. 361.

126. Ind. Stat. Ann. (Burns, 1933) §§25-407 to 25-409.

127. Ind. Acts 1943, c. 146, §§1-7, c. 147, §§1-8, Ind. Stat. Ann. (Burns, Supp. 1943) §§25-410 to 25-423.

128. Ind. Stat. Ann. (Burns, Sup. 1943) §25-536, superceded by Ind. Acts 1943, cited supra note 127.