



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GROVER SELLERS  
ATTORNEY GENERAL

Honorable Claude Isbell  
Secretary of State  
Austin, Texas

Attention: Mr. J. L. McGarity

Dear Sir:

Opinion No. 0-6561

Re: Whether the Secretary of State should approve and file a charter, or an amendment to a charter increasing the capital stock of a corporation, where all or any part of the original qualifying shares or of the proposed increase is subscribed for and paid by a corporation where the subscribing corporation has a purpose clause which would permit it to engage in the business of the other corporation. And a related question.

Your letter of May 7, 1945, requesting the opinion of this department, presents the above question, and which you also desire answered under the following factual change as stated, to-wit: . . . "where the subscribing corporation has a purpose clause which would not permit it to engage in the business of the other corporation."

A photostatic copy of the proposed amendment doubtless raising the above questions, accompanies your request and you desire to know whether or not same should be approved and filed.

The applicable subdivision of Art. 1302, Revised Civil Statutes of Texas, 1925, provides:

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"The purposes for which private corporations may be formed are:

"34. To transact any manufacturing or mining business, and to purchase and sell goods, wares and merchandise used for such business.

". . .

". . .

"39. To purchase and sell goods, wares and merchandise and agricultural and farm products."

The particular corporations involved in your questions have, in their charter, adopted the foregoing purpose clauses. Subdivision 34 is adopted by the subscribing corporation, and Subdivision 39 by the corporation voting the increase in stock and tendering the amendment.

Under the provisions of Arts. 1313 and 1314, R.C.S., 1925, the duty is imposed upon the Secretary of State to file and record the charter and proper authenticated amendments thereto when the stockholders of any company shall furnish satisfactory evidence to the Secretary of State of a compliance with the provisions of Chap. 2, Title 32 (Arts. 1303-18, inclusive) V. A. C. S.

Art. 1320, Subdivision 7 of said statutes provides that any corporation as such has the power to enter into any obligation or contract essential to the transaction of its authorized business.

Art. 1321 of said statutes provides that corporations may borrow money on the credit of the corporation and may execute bonds and promissory notes therefor, and may pledge the property and income of the corporation.

Art. 1349, V. A. C. S., insofar as material, provides that no corporation, domestic or foreign, doing business in this State, shall employ or use its stock, means, assets or other property, directly or indirectly, for any purpose whatever other than to accomplish the legitimate business of its creation or those purposes otherwise permitted by law, provided that nothing in this article shall be held to inhibit corporations from contributing to any . . . civic enterprises. . .

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It is generally recognized, and by the weight of authority that in the absence of a statute or constitutional provision to the contrary, a corporation may take stock of another corporation in payment of, or as security, for a debt. 18 C. J. S., Par. 243, p 682; 13 Amer. Jur., Par. 791, p 812; 1 Hildebrand's Texas Corporations Par. 80, p 293, and see Annotations in Vol. 36, Amer. St. Rep., p 140.

Neither the proposed amendment with accompanying affidavit nor your letter, disclose any other than a bona fide issue and subscription of stock under the above mentioned and generally recognized rule.

The case of Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co., 127 N. Y. 252, 27 N. E. 831, 24 Amer. St. Rep. 448, furnishes the leading authority and support of the above rule. In that case the president and secretary of the Manufacturing Company, a corporation, subscribed individually for the stock in a newly formed corporation, same being issued to a trustee for said officers. The new corporation thereafter purchased the entire plant, machinery, and etc., of the plaintiff corporation for which it issued said stock as aforesaid, and said Manufacturing Company retired from business. The rule was recognized in this case that a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized to do so. The statute under which plaintiff company was incorporated in the State of New York provided that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation."

The court held that said statute was not intended to limit the powers of the corporation beyond its necessary powers in the exercise of its corporate franchise, to-wit: selling of property, collection of debts, . . . taking title to all kinds of property, including the stock of another company in the payment of a debt, in holding the transaction not ultra vires. The court reasoned in the following language:

"The plaintiff has sold its rolling-mill machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all of the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason

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for condemning its title to the stock so obtained; *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429-435."

The sole ownership of the stock of one corporation by another with the fact of domination and control through such stock ownership in violation of the anti-trust laws of Texas is involved in *State vs. Swift and Co.*, Cause No. 9481, Court of Civil Appeals, Third Supreme Judicial District, to which our attention is called in your letter. The above Court of Civil Appeals in an opinion rendered March 21, 1945, (unreported) recognized the question of whether the ownership of all the stock of Consumer Cotton Oil Company, a corporation, by Swift & Co., an Illinois meat packing corporation, was against public policy, and held that there was no affirmative legislative act which in itself condemned such stock ownership and not being per se illegal, was not against public policy.

Under the foregoing authorities and with reference solely to your question as to whether the proposed charter amendment should be approved and filed, it is our opinion that this question is mainly one of fact, to be determined by the Secretary of State primarily from satisfactory evidence being furnished by the corporation tendering the amendment that the original indebtedness was within the necessary powers of the corporation to create and contract for, and, further that such note evidencing the debt and absorbed in exchange for the stock is of the reasonable value of the amount of stock increase and subscribed for.

Not being informed as to the character of the original indebtedness, we do not consider your general questions, which may or may not relate to the amendment in question. There is insufficient evidence before us from which we may determine a question of ultra vires.

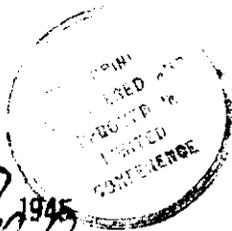
Yours very truly,

ATTORNEY GENERAL OF TEXAS

BY

*J. K. King*  
J. K. KING  
Assistant

Wmk:LT



APPROVED MAY 28 1945  
*Carl H. ...*  
SECRETARY OF STATE