

# Is the Problem of Disregarding the Corporate Entity More a Question of Fact than of Law?

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will be decisive of the validity of the transfer? It will be the secret motive of the transferrer."<sup>25</sup> Thus, until there are further decisions on the point, a transferee may only be safe today, if he makes sure that his transferor's wife joins in the transfer or conveyance—for in this substitute for dower, the courts seem to have found a new favorite.

LOUIS H. RUBINSTEIN.

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IS THE PROBLEM OF DISREGARDING THE CORPORATE ENTITY MORE A QUESTION OF FACT THAN OF LAW?

All authorities agree that, in certain instances, a corporation is to be regarded as an entity, while in other cases, the real parties in interest must be found. The problem of disregarding the corporate entity has become increasingly complex as the mechanism of the corporation has grown to dominant proportions through the use of subsidiary corporations. Under the cover of holding companies, "the legitimate use of subsidiaries has become obscured by a too frequent manipulation of accounting and credit; so that lawyers, bankers, and courts are now faced with complicated structures in which the actual interests can not readily be discerned."<sup>1</sup> The difficult problem for student and lawyer alike is to learn when to apply the theory of the existence of the corporation as a separate entity, and when fearlessly to disregard it.<sup>2</sup> The difficulty of form is negligible; and courts of equity should unravel all forms of evasion of obligation, even though the formation is accomplished by a certificate of incorporation and stock certificates.<sup>3</sup> It is not to be denied that equity should, on proper facts, restrain the unconscionable use of any legal right.<sup>4</sup>

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<sup>25</sup> Dissenting opinion by Untermyer, J., in instant case, *Bodner v. Feit*, at p. 820, cited *supra*, note 18.

<sup>1</sup> (1928) 41 HARV. L. REV. 874 (A. A. Berle, Jr., gives an excellent discussion of "two causes for concern arising out of the development of the device of subsidiary corporations. The first evil is that the financial structure of the subsidiary corporation lends itself to the use of that subsidiary's financial resources in other enterprises controlled by the dominant corporation. Secondly, the subsidiary proves a convenient medium by which a parent may acquire property apparently freed from restrictive covenants or agreements which bind the parent").

<sup>2</sup> (1912) 12 COL. L. REV. 496.

<sup>3</sup> Transfers of property to a subsidiary corporation for the purpose of evading an obligation of the parent were discussed in the case of *Higgins v. California Petroleum & Asphalt Co.*, 147 Cal. 363, 81 Pac. 1070 (1905) (There was no actual fraud, but the court held all three companies jointly liable on the ground that the necessary effect of the conveyance was to hinder collection of royalties by the lessor and that the identity of control of the corporations made them all liable). The case is commented on in *WORMSER, DISREGARD OF THE CORPORATE FICTION* (1927) 59-61, and in (1928) 41 HARV. L. REV. 874.

<sup>4</sup> *People v. North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834 (1890); *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279 (1892);

It is fundamental that control through mere ownership of a majority or of even all the capital stock, and the use of the power incidental thereto, to elect officers and directors will not, in and of itself, predicate liability.<sup>5</sup> It is, of course, recognized that the stockholders are the real participants in every corporate suit.<sup>6</sup> The corporate entity has been disregarded, however, where a corporation resorted to stock ownership in another corporation so as to use the latter company as its agent or instrumentality.<sup>7</sup> In a recent New York case,<sup>8</sup> it was held that a judgment-creditor could not under the instrumentality rule recover the value of assets fraudulently transferred by a debtor to the corporation engaged in foreign trade, as against railroad and terminal corporations which owned stock in the trading corporation. The evidence showed that the plan of organizing the trading corporation, percentages of stock control, and transfer of business

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(1907) 20 HARV. L. REV. 223-224; (1910) 23 HARV. L. REV. 216; (1928) 41 HARV. L. REV. 918; MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 227.

<sup>5</sup> Kingston Dry Dock v. Lake Champlain Transporting Co., 31 F. (2d) 265 (C. C. A. 2d, 1929); Exchange Bank v. Macon Construction Co., 97 Ga. 1, 25 S. E. 326 (1895); Sellers v. Greer, 172 Ill. 549, 50 N. E. 246 (1898); G. Stagg Co. v. Taylor, 113 Ky. 709, 718, 68 S. W. 869 (1902); Old Dominion Copper Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193 (1909); Stone v. Cleveland, C. C. & St. L. R. Co., 202 N. Y. 352, 95 N. E. 816 (1911) ("It is well established that the ownership of a majority of the stock of a corporation, while it gives a certain control of the corporation, does not give that control of corporate transactions which makes the holder of the stock responsible for the latter."); *In re Mt. Sinai Hospital*, 250 N. Y. 103, 164 N. E. 871 (1928); Rapid Transit Construction Co. v. City of New York, 259 N. Y. 472, 182 N. E. 145 (1932); Senior v. New York City R. Co., 111 App. Div. 39, 97 N. Y. Supp. 645 (1st Dept. 1906), *aff'd*, 187 N. Y. 559 (memo. 1907); Cleary v. Higley, 154 Misc. 158, 277 N. Y. Supp. 63 (1934); Commonwealth v. Monongahela Bridge Co., 216 Pa. St. 108, 64 Atl. 909 (1906); Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884). But Maryland holds that a corporation is not a separate entity when its stock is owned wholly by one person. Swift v. Smith, Dixon & Co., 65 Md. 428, 434, 5 Atl. 534 (1896); The Bellona Company's case, 3 Bland 422 (Md. 1831) *semble*; First National Bank of Gadsen v. Winchester, 119 Ala. 168, 24 So. 351 (1898) relied on the Maryland decisions. This disregard of the entity theory is unsound.

<sup>6</sup> State v. Young, 31 Fla. 594, 12 So. 673 (1893).

<sup>7</sup> Miller & Lux v. East Side Canal Co., 221 U. S. 286, 29 Sup. Ct. 111 (1911); Gulf, C. & S. F. Ry. Co. *et al.* v. Cities Service Co. *et al.*, 281 Fed. 214 (D. Del. 1922) (the parent company was liable for torts of its subsidiary); *In re Eiler's Music House*, 270 Fed. 915 (C. C. A. 9th, 1921) (assets of subsidiary held assets of bankrupt parent company); Dillard, *etc.*, Co. v. Richmond Cotton Oil Co., 140 Tenn. 290, 204 S. W. 758 (1918) (the holding company was liable for debts of its subsidiary); Higgins v. California P. A. Co., 147 Cal. 363, 81 Pac. 1070 (1905) (an attempt to evade obligations under a lease); (1929) 42 HARV. L. REV. 1077; (1922) 35 HARV. L. REV. 204.

<sup>8</sup> Lowendahl v. The Baltimore & Ohio R. R. Co., 247 App. Div. 144, 287 N. Y. Supp. 62 (1st Dept. 1936), *aff'd*, 272 N. Y. 360, — N. E. — (1936) (where parent company exercises such control that subsidiary has become mere instrumentality of parent's business and parent is actor, or where business and officers of two corporations have become inextricably confused, and such control has been used by parent to commit fraud or violate other legal duty, or to accomplish dishonesty or other unjust conduct and results in unjust loss and injury, parent will be held liable for subsidiary's obligation).

were the debtor's ideas; that the trading corporation was conducting its own business and was not a mere department of the railroad or a mere dummy or instrumentality; that the railroad or terminal corporations did not exercise control over the real business of the trading corporation; that the terminal corporation guaranteed loans of the trading corporation and the railroad made advances thereto. The case states the essential elements necessary to hold a subsidiary corporation as a mere instrumentality of its parent. "In any case except express agency, estoppel, or direct tort,<sup>9</sup> three elements must be proved. (1) Control, not mere majority, or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had *at the time* no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

*The difficulty arises in discovering the disguises, not in penetrating them when they appear*; this is apparent from a comparison of the majority and dissenting opinion in the *Berkey v. Third Avenue Ry.* case.<sup>10</sup> The dissenting opinion, which shows a better grasp of the

<sup>9</sup> *Pennsylvania R. R. Co. v. Anoka National Bank*, 108 Fed. 482 (C. C. A. 8th, 1901); *Davis v. Alexander*, 269 U. S. 114, 117, 46 Sup. Ct. 34 (1925); *Lehigh Valley R. R. Co. v. Dupont*, 128 Fed. 840 (C. C. A. 2d, 1904); *Lehigh Valley R. R. Co. v. Delachisa*, 145 Fed. 617 (C. C. A. 2d, 1906); *Minifie v. Rowley*, 187 Cal. 481, 202 Pac. 673 (1922); *Stone v. Cleveland, C., C. and St. L. Ry. Co.*, 202 N. Y. 352, 95 N. E. 816 (1911). See POWELL, PARENT AND SUBSIDIARY CORPORATIONS (1931) cc. 1-6, *passim*, and numerous cases cited.

<sup>10</sup> *Berkey v. Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58 (1926) (Plaintiff sued to recover damages for personal injuries received through the negligence of a motorman, an employee of a subsidiary of the defendant; the defendant owned substantially all the common stock of the subsidiary; the executive officers, president, treasurer, general manager, paymaster and counsel of the two companies were the same and the directors nearly so; the defendant made numerous loans to the subsidiary, including loans for construction and sometimes for operating expenses, and owned all the second mortgage bonds of the subsidiary; the cars of both companies were labelled, "Third Avenue System"; the parent leased the cars to the subsidiary for a daily rental; one legal department, one accounting department, and one claim department functioned for the entire system. Yet the Court of Appeals held that even these facts were not sufficient to show such identity that the parent corporation would be liable. The court said, "Liability of the parent has never been adjudged when the subsidiary has maintained so consistently, and in so many ways as here, the separate organization that is the mark of a separate existence, and when the implication of a contract for unity of operation would be the implication of a contract for the commission of a crime." Crane, J., cited the same authorities in his dissenting opinion.) (The U. S. Supreme Court in *Davis v. Alexander*, 269 U. S. 114, 46 Sup. Ct. 34 (1925) said, "Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for injuries due to the negligence of the subsidiary company.") In *Stone v. Cleveland, C., C. & St. L. Ry. Co.*, 202

facts, seems to be the more logical. Here again it is more a question of interpretation of facts than of law, in determining whether the dominance and control is so complete as to hold the parent company liable for the acts of its subsidiary.<sup>11</sup> Of course, where it is established that a corporation is a mere agency or partnership, there is no trouble in holding the parent company liable.<sup>12</sup> The courts have shown much judicial impatience with attempts to delay, hamper or defraud creditors by means of dummy corporations.<sup>13</sup> The entity is disregarded when the separate corporate existence is a mere sham or device to evade an existing obligation,<sup>14</sup> when it is used to defeat public convenience, justify wrong, protect fraud or defend crime;<sup>15</sup> or when the subsidiary is used fraudulently to secure immunity by parent from liabilities which the parent had previously undertaken, or to accomplish fraud or an illegal act.<sup>16</sup> The same rule has been applied in

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N. Y. 352, 95 N. E. 816 (1911), it was held that, "the ownership of a majority of stock of a corporation does not give that control of corporate transactions which makes the holder responsible for the latter." The statement in *Stone v. Cleveland* is not applicable when stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company, so that it may be used as a mere agency or instrumentality of the company or companies.

<sup>11</sup> *J. J. McCaskell Co. v. United States*, 216 U. S. 504, 30 Sup. Ct. 386 (1910); *York Mfg. Co. v. Brewster*, 174 Fed. 566 (C. C. A. 5th, 1909); *In re Waterton Paper*, 169 Fed. 252 (C. C. A. 2d, 1909); *Bauernschmidt v. Bauernschmidt*, 101 Md. 148, 60 Atl. 437 (1905); *Chicago, etc. Ry. Co. v. Miller*, 91 Mich. 166, 51 N. W. 981 (1892); *Barnes v. Smith*, 48 Mont. 309, 137 Pac. 541 (1913); *Home Fire Insurance Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024 (1903). See LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* (1936) § 50 at pp. 205-6.

<sup>12</sup> *N. Y. Trust Co. v. Carpenter*, 250 Fed. 668, 673 (C. C. A. 6th, 1918).

<sup>13</sup> *First National Bank v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834 (1898) (courts ignore the entity concept when used as a shield for attempts to swindle creditors); *Montgomery Web Co. v. Denelt*, 133 Pa. St. 585, 19 Atl. 486 (1890) (the difference is a mere juggle of names).

<sup>14</sup> *Higgins v. California Petroleum and Asphalt Company, et al.*, 147 Cal. 363, 81 Pac. 1070 (1903) (The courts even without regard to actual fraud are wont to disregard the entity theory); *Donovan v. Purtell*, 216 Ill. 629, 641, 75 N. E. 334 (1905) (Mr. Justice Magruder, speaking for the Supreme Court of Illinois said, "\* \* \* when appellant received appellee's money, he was not conducting business under a bona fide corporate organization, but was using a corporate entity for the transaction of his private business.").

<sup>15</sup> *Martin v. D. B. Martin Co.*, 10 Del. Ch. 211, 88 Atl. 612 (1913); *South Florida Citrus Land Co. v. Walden*, 61 Fla. 766, 55 So. 862 (1911); *Kellogg v. Douglas County Bank*, 58 Kan. 43, 48 Pac. 587 (1897).

<sup>16</sup> (1933) 47 HARV. L. REV. 135 discussing *Berry v. Old South Engraving Co.*, 283 Mass. 441, 186 N. E. 601 (1933) (corporation A contracted with the plaintiff union to employ only union men. For the express purpose of continuing in the same business with an open shop, the corporation discharged its men and discontinued business, as it had a right to do under the contract. Its stockholders then organized corporation B, which carried on the business with the same property, stockholders and officers, but employed non-union men. Plaintiff filed a bill against both corporations to enjoin the violation of the contract and to recover damages. From a decree dismissing the bill, plaintiff appealed. *Held*, that despite the motive of the incorporators to escape an

determining rights and liabilities when the same persons have associated themselves together under corporate names and organizations for the purposes of carrying out several branches of a single enterprise.<sup>17</sup>

Many decisions, which only apparently involve the "fiction" must be eliminated from consideration<sup>18</sup>—for example, where the "public inconvenience, wrong, fraud, or crime,"<sup>19</sup> can be prevented through other legal principles.<sup>20</sup> Take, for instance, the *Hall Safe Co. v. Herring* etc. case,<sup>21</sup> where the court, fully maintaining the doctrine of a corporate entity, held that a corporation's promise not to engage in a certain business, assented to by its principal stockholders, bound neither them, nor a new corporation formed by them.<sup>22</sup> Likewise, in *State ex rel. Johnson & Higgins Co. v. Safford*,<sup>23</sup> since the statute<sup>24</sup> looked primarily to the personal qualifications of those seeking to conduct a local insurance agency, it might reasonably have been interpreted as forbidding the issuance of a license to a corporation, regardless of who might hold its stock.<sup>25</sup> The statute provided that no person might be licensed to act as an insurance agent unless he was a resident of Ohio. Mandamus was brought by the state of Ohio on

existing obligation, corporation *B* was not bound by the contract of corporation *A*. Decree affirmed). In allowing use of the corporate fiction to avoid present obligations, the case is apparently opposed to the trend of decisions. See Canfield, *Scope of the Corporate Entity Theory* (1917) 17 COL. L. REV. 128, 141; cf. Rapid Transit Subway Construction Co. v. New York, 259 N. Y. 472, 182 N. E. 145 (1932); Hart Steel Co. v. Railroad Supply Co., 224 U. S. 294, 37 Sup. Ct. 506 (1917) (a corporation, in fraud of creditors, transferred its assets to a new company, the creditors were allowed to reach the assets without regard to the corporate form); The Berry v. Old South Engraving Co. case apparently fails to distinguish between the use of the corporate device to avoid future liabilities and its use to evade present obligations. Home Fire Insurance Co. v. Barber, 67 Neb. 664, 93 N. W. 1024 (1903). See BALLANTINE, PRIVATE CORPORATIONS (1st ed. 1927) § 6.

<sup>17</sup> Kendall v. Klapperthal Co., 202 Pa. 546, 52 Atl. 92. (1902) (sustaining reimbursement of directors by one of such corporations for advances made by them to another of such corporations). And see Bloch Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 929 (1901).

<sup>18</sup> (1907) 20 HARV. L. REV. 223-224.

<sup>19</sup> See United States v. Milwaukee Refrigerator Tr. Co., 142 Fed. 247 (E. D. Wis., 1905).

<sup>20</sup> (1917) 17 CAL. L. REV. 128; (1929) 42 HARV. L. REV. 1077; see Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 COL. L. REV. 128-143.

<sup>21</sup> 146 Fed. 37 (C. C. A. 6th, 1906).

<sup>22</sup> Moore, etc. Co. v. Towers, etc. Co., 87 Ala. 206, 6 So. 41 (1889) (Here the stockholders might readily have been bound by individual contracts, breaches of which equity would enjoin; and the new corporation might then very possibly be enjoined as a confederate in these illegal acts); Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81 (1891).

<sup>23</sup> 159 N. E. 829 (Ohio 1927) discussed in (1928) 41 HARV. L. REV. 918.

<sup>24</sup> OHIO GENERAL CODE § 644.

<sup>25</sup> La Tourette v. McMaster, 248 U. S. 465, 39 Sup. Ct. 160 (1919); State Trust & Savings Bank v. Hermosa Land and Cattle Co., 30 N. M. 566, 240 Pac. 469 (1925); see (1918) 31 HARV. L. REV. 894; (1926) 39 HARV. L. REV. 652.

the relation of an Ohio corporation to compel the defendant, the state superintendent of insurance, to issue to the corporation a license to act in the capacity of a resident insurance agent. The majority of the stock of the corporation was held by a foreign corporation. The defendant demurred. *Held*, that the corporate entity will be ignored in order to prevent the circumvention of the statute. In another case,<sup>26</sup> in which a mandamus proceeding against the transferee was allowed, the entity reasoning seemed unnecessary. The transferee was bound to operate certain street railways which the defendant purchased with notice. As the right to specific performance of the contract will attach to the property to which it relates, so it seems does the right to maintain a mandamus proceeding.<sup>27</sup> Other examples are: The adjudication, that conveyances to corporations by insolvent grantors are fraudulent, rests not upon the basis that there is no real conveyance, but upon the strong evidence that the conveyances are only to the intent and effect of defrauding the grantor's creditors;<sup>28</sup> cases resulting from *ultra-vires* doctrines,<sup>29</sup> and from the doctrine that a fraudulently formed corporation has no legal existence.<sup>30</sup> Moreover, the opinion in the *Northern Securities Co. v. United States* case<sup>31</sup> indicates no belief that the result hinged on disregarding the corporate entity. Justice Brewer pointed out that where a corporation was organized merely as a convenient means of combining separate railroad properties under one control, the court could shake aside the web of entity and regard the combination as just "as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates." And it is also noticeable that in questions of the jurisdiction of the federal courts over suits to which a corporation is a party, substantially the same result has been reached by conclusive presumptions as would logically follow the conception of a corporate entity. For the purpose of preserving the jurisdiction of the federal courts over corporations, depending on the citizenship of parties, it is held that a corporation is an association of persons who may have citizenship, and following this with the adoption of the fiction of law, supported by a conclusive presumption by which the members of a corporation are conclusively presumed to be citizens of the state cre-

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<sup>26</sup> *State v. Brood River Power Co.*, 153 S. E. 537 (S. C. 1929), *aff'd*, 281 U. S. 539 (1930), rehearing granted, 51 Sup. Ct. 38 (1930), discussed in (1930) 44 HARV. L. REV. 260 at 265.

<sup>27</sup> *Mayor of Borough of Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84 (1906).

<sup>28</sup> *Booth v. Bunce*, 33 N. Y. 139 (1865). But *cf.* *First etc., Bank v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834 (1898) ("The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others."); *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 200, 56 N. E. 1033 (1900); COOK ON CORPORATIONS (4th ed. 1898) p. 23.

<sup>29</sup> See Note (1907) 20 HARV. L. REV. 223-224.

<sup>30</sup> *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169 (1892).

<sup>31</sup> *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436 (1904).

ating it.<sup>32</sup> Finally, in *Hart Steel Co. v. R. R. Supply Co.*,<sup>33</sup> it was held that a decision in a patent suit against a wholly owned subsidiary was *res adjudicata* as against the parent on the ground that there was a complete entity of interest.<sup>34</sup>

Another line of cases, in which incorporation is used to evade or circumvent a statute, should give no practical difficulty in regard to the entity theory. In these cases, the entity will be upheld except where used to defeat the purpose of the statute. *Most of the decisions rest on the policy of the court to seek the legislative intent in construing a statute.* The commodities clause<sup>35</sup> cases<sup>36</sup> are perhaps the most interesting on this point.<sup>37</sup> Mr. Justice Harlan, in a dissenting opinion, shows conclusively in one of them,<sup>38</sup> *that the analysis is one of legislative intent.* "Any other view of the act will enable the transporting railroad, by one device or another, to depart altogether from the purpose which Congress had in view, which was to divorce in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners \* \* \*."<sup>39</sup> Along this same line of reasoning, it has

<sup>32</sup> *Louisville etc. Ry. Co. v. Letson*, 43 U. S. 496, 11 L. Ed. 353 (S. C. 1844); *Marshall v. Baltimore and Ohio R. R. Co.*, 57 U. S. 313, 14 L. Ed. 953 (Md. 1853). See (1907) 20 HARV. L. REV. 223-224.

<sup>33</sup> 244 U. S. 294, 37 Sup. Ct. 506 (1917).

<sup>34</sup> *Gulf Co. v. Llewellyn*, 248 U. S. 71, 39 Sup. Ct. 35 (1918) (the separate technical existence of the subsidiaries did not prevent them from being "parts of one enterprise all owned by the petitioner."); *Chicago, etc., Ry. v. Minneapolis Civic Ass'n.*, 247 U. S. 490, 38 Sup. Ct. 553 (1918) (The fact that a subsidiary was a separate legal entity did not prevent the subsidiary rates from being treated as one with those of the parent corporation, where the subsidiary was wholly owned); see *Southern Pacific Co. v. Lowe*, 247 U. S. 330, 38 Sup. Ct. 540 (1918).

<sup>35</sup> Act of June 29, 1906, c. 3591, § 1, 34 STAT. 585, 49 U. S. C. A. 1, par. 8. repeated by Act of June 18, 1910, c. 309, § 7, 36 STAT. 347 ("It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, \* \* \*").

<sup>36</sup> *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 31 Sup. Ct. 287 (1911); *United States v. Elgin, J. & E. Ry. Co.*, 56 Sup. Ct. 841 (1936), *aff'g*, 11 F. Supp. 435; (1912) 12 COL. L. REV. 496; (1928) 41 HARV. L. REV. 874; (1928) 41 HARV. L. REV. 918; (1929) 42 HARV. L. REV. 1077.

<sup>37</sup> *United States v. Delaware and Hudson Co.*, 213 U. S. 366, 415, 29 Sup. Ct. 527 (1909); *United States v. Elgin J. & E. Ry. Co.*, 56 Sup. Ct. 841 (1936) (Holding company's ownership of all stock of subsidiary does not, as a matter of law, make subsidiary an agent, instrumentality, or department of holding company, but existence of such intimate relation is a question of fact to be determined on the evidence, as respects whether subsidiary railroad company which transports products of subsidiary producing companies is violating the commodity clause).

<sup>38</sup> *United States v. Delaware and Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527 (1909).

<sup>39</sup> *Olds and Whipple v. Commissioner of Internal Revenue*, 75 F. (2d) 272 (C. C. A. 2d, 1935); *Munson S. S. Line v. Commissioner of Internal Revenue*.



been held that, "there is no magic in incorporation which can purge a monopolizing scheme of its shiny, greedy viciousness."<sup>40</sup> In these cases it has become necessary to recognize the individual members.<sup>41</sup> It is apparent that a corporation is a purely artificial body created by law.<sup>42</sup> Each corporation is a distinct entity; but courts will look behind form when the corporation, in the perpetration of fraud, or evasion of responsibility, is a mere dummy or alter ego or conduit of individuals, or of another corporation.<sup>43</sup> "Subsidiary corporations not only have legitimate uses, but also are, in most cases, legitimately used. There is no reason to assume they are essentially vicious, or that the building up of a structure based on the interdependent corporate units is not sound."<sup>44</sup> *The obvious pitfall, in judicial determination, is in a construction of the facts.* "There seems to be a general tendency to underestimate the power of a court of equity in granting relief."<sup>45</sup> In equity, the conception of corporate entity is merely a formula for working out rights and equities of the real parties in interest,<sup>46</sup> and the "abstraction of the corporate entity should never be allowed to bar out and prevent the real and obvious truth."<sup>47</sup> It would seem that, in a proper case, especially where the equities are

77 F. (2d) 849 (C. C. A. 2d, 1935) (separate entity of corporation can be disregarded in exceptional circumstance); see *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E. D. Wis., 1905); *Seymour v. Woodstock Co.*, 281 Ill. 84, 117 N. E. 729 (1917); *Stockton v. Central R. R. Co.*, 50 N. J. Eq. 52, 24 Atl. 964 (1892); *Jenkins v. Moyse*, 254 N. Y. 319, 172 N. E. 521 (1930), *rev'g*, 229 App. Div. 743, 241 N. Y. Supp. 901 (2d Dept. 1930); *Brundred v. Rice*, 49 Ohio St. 640, 32 N. E. 169 (1892) (The promoters of a corporation organized a separate entity for the purpose of consummating an illegal railway rebate agreement, thinking no doubt to shield themselves from consequences in that manner. It was held that "the act of incorporating can be of no avail to them as a defense." The court, penetrating the sham, rightly declared that there was nothing "sacred in a certificate of incorporation, and that their ingenious tricky device was of no avail."); *First National Bank v. Trebein Co.*, 59 Ohio St. 316, 52 N. E. 834 (1898); *People's Pleasure Park Co., Inc., et al. v. Rohleder*, 109 Va. 439, 61 S. E. 794 (1908) (The decision in this case, undoubtedly, rested on the "legal" intent of the covenant); (1910) 23 HARV. L. REV. 216; (1918) 31 HARV. L. REV. 894; (1926) 39 HARV. L. REV. 652; (1928) 41 HARV. L. REV. 918.

<sup>40</sup> (1912) 12 COL. L. REV. 496 at 512.

<sup>41</sup> *Ford v. Chicago Milk Shippers Association*, 155 Ill. 166, 29 N. E. 651 (1895); *Southern Electric Securities Co. v. State*, 91 Miss. 195, 44 So. 785 (1907).

<sup>42</sup> *Leonard v. St. Joseph Lead Co.*, 75 F. (2d) 390 (C. C. A. 8th, 1935); *In re American Fibre Chair Seat Corp.*, 265 N. Y. 416, 193 N. E. 253 (1934).

<sup>43</sup> *Forbush Co. v. Bartley*, 78 F. (2d) 805 (C. C. A. 10th, 1935); *C. L. and L. Motor Express Co. v. Achenbach*, 259 Ky. 288, 82 S. W. (2d) 335 (1935); *Fors v. Farrel*, 271 Mich. 358, 260 N. W. 886 (1935).

<sup>44</sup> (1928) 41 HARV. L. REV. 874 at 892.

<sup>45</sup> (1928) 41 HARV. L. REV. 874 at 890, discussing *Finch v. Warrior Cement*.

<sup>46</sup> *Hirsch v. Lincoln Securities Co.*, 118 Fla. 164, 160 So. 12 (1934).

<sup>47</sup> *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 33, 39 N. E. 365 (1895).

with the plaintiff, the courts will disregard the corporate fiction.<sup>48</sup> A proper interpretation of the facts seems to be the major stumbling point.

SYDNEY SAXON.

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<sup>48</sup> For a good statement of the rule in New York see Chief Judge Pound's opinion in *Brooklyn Savings Bank v. Jos. Wechsler Estate*, 259 N. Y. 9, at p. 14, 180 N. E. 752 (1932) ("The law legitimizes the limitation of personal liability by the creation of corporations. Innocent parties acting in reliance thereon should not be lulled into a false security nor should sudden divagations be made from the path of the law in order to save old debts."); *Klein v. Board of Supervisors*, 230 Ky. 182, 18 S. W. (2d) 1009 (1929), *aff'd*, 15 Sup. Ct. 15, 282 U. S. 19 (1930) ("It leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members). Professor Wormser has attempted a generalization from decided cases of the exception which disregards the corporate form. "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate a monopoly, or to protect knavery or crime, the courts will draw aside the rule of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons."