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Evidence: John Doe and Grand Jury Proceedings

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*Harrington*²¹ the owner gave the agent the "exclusive sale" of his farm for four months but the contract did not specifically preclude the owner himself from selling. The Wisconsin Court held that under such circumstances the owner himself could sell without liability where he had no knowledge of the prior negotiations carried on by the agent. In that case the agent had given no consideration and the Court refused to construe the contract as one limiting the owner's right to sell. The agent was free to act or not act under the circumstances and the Court reasoned that it would be inconsistent with the idea of ownership to preclude the owner himself from selling without liability unless clear and unequivocal language to that effect was used. In the subsequent case of *Greene v. Minnesota Billiard Co.*²² the agent was given an exclusive right to sell but the contract contained the stipulation that the agent was to receive his commission "regardless of who negotiates the sale." The owner sold the property and it was shown that the agent had spent time and money in efforts to procure a purchaser, and the Court held that the agent was entitled to his commission.

The Wisconsin Court's interpretation of contracts giving an exclusive right to sell does not place an unreasonable burden on the agent by forcing him to expressly stipulate that a sale by the owner shall not deprive him of his commission. In the absence of either type of exclusive contract the requirement that the agent prove that he was the procuring cause of the sale is the only reasonable method of determining whether the agent is to receive his commission.

PAUL KRUMHOLZ

Evidence—John Doe and Grand Jury Proceedings—Plaintiff, in his capacity as town chairman of the town of Lake, was arrested on the charge of accepting a bribe. After the arrest, a magistrate in another proceeding subpoenaed witnesses and conducted a John Doe hearing into the matter. Plaintiff prayed for a writ of prohibition to restrain the magistrate from further investigational hearings in the John Doe proceeding. *Held*: writ denied. The Court stated that a writ of prohibition is only issued to correct some grave abuse of power or when the magistrate abuses his discretion, and will not issue in the absence of a showing that the magistrate proceeded beyond his powers and jurisdiction. *State ex rel. Kowaleski v. District of Milwaukee County et al.*, 254 Wis. 363, 36 N.W. (2d) 419 (1949).

This action involved a John Doe proceeding, rather than a Grand Jury hearing, so that for clarity it becomes necessary to distinguish between the two. A John Doe proceeding is a hearing conducted by a

²¹ 168 Wis. 217, 169 N.W. 603 (1918).

²² 170 Wis. 597, 176 N.W. 239 (1920).

magistrate in response to a petition or complaint of the district attorney or other person.¹ A Grand Jury proceeding differs basically in that it is a hearing conducted by the jury, with neither the magistrate or the district attorney present unless invited, and is not limited in scope of inquiry to a petition or complaint but can cover an all embracing field of alleged wrong doings.

The John Doe proceeding is used in Wisconsin as an extrajudicial procedure. Testimony is taken by the magistrate who does not issue a warrant until the conclusion of the proceeding. Peculiarly, the magistrate does not have to reduce the examination to writing for no party is charged with a crime until the end of the hearing,² and if a transcript of the John Doe testimony is kept, a defendant's later motion to inspect the record can be denied.³ The "John Doe" statute⁴ was first considered in Wisconsin in *State ex rel. Long v. Keyes*.⁵ There the Court stated:

"... the language employed in framing the section must first be consulted, and its ordinary meaning must govern its construction, unless doubtful or ambiguous. (1) Other witnesses than the complainant may be examined on oath. (2) Such witnesses must be produced by the complainant. He cannot 'produce' then in any other way than to suggest their names to the magistrate. If they come voluntarily with the complainant, he cannot be said to produce them in any other way than to make them known to the justice as witnesses who knew anything about the case. They are produced as parties produce their witnesses in court. They may come voluntarily, or on subpoena and on attachment if necessary. . . ." The magistrate "... must proceed in some way until facts are made known to him by witnesses under oath. He has to judge the facts. He adjudicates upon them. If it shall appear that any offense has been committed, the magistrate shall issue the warrant."

A Grand Jury proceeding is also an extrajudicial procedure and the jury convenes when ordered by a trial court.⁶ The court, before it can institute such an investigation, must have definite information from trustworthy sources that criminal acts forming a system of criminal

¹ WIS. STATS. 361.02 (1947).

² *State ex rel. Schroeder v. Page*, 206 Wis. 611, 240 N.W. 173 (1932).

³ *State v. Herman*, 219 Wis. 267, 262 N.W. 718 (1935).

⁴ WIS. STATS. 361.02(1) (1947) "Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine, on oath, the complainant and any witness produced by him, and shall reduce the complaint to writing and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said magistrate, or before some magistrate of the county, to be dealt with according to law: and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."

⁵ 75 Wis. 288, 293, 44 N.W. 13, 15 (1889).

⁶ *Steensland v. Hoppmann*, 213 Wis. 593, 252 N.W. 146 (1934).

violations of the law have been committed.⁷ In this type of proceeding the jury is the sole judge and is not bound by the court's instructions, and all the magistrate or district attorney does is to attend the hearings when so required by the Grand Jury and examine witnesses in their presence or give their legal advice on the nature of the offenses which the Jury are likely to consider. The minutes of the Jury's proceedings are not open to inspection of all persons.⁸ Defendants are properly informed of the charges against them by indictment.⁹ These records are treated as memoranda and can either be used to aid witnesses in their present recollection or past recollection of the contents.¹⁰

Both these procedures aid the administration of criminal justice by ascertaining whether crimes have been committed. If the court has jurisdiction it can give immunity to the witnesses. It seems the John Doe proceeding may be more efficient in that it moves summarily and is less expensive. A John Doe proceeding is of lesser scope and duration and generally is of a continuous nature, whereas a Grand Jury convenes at the convenience of the jurors and may drag over a long period of time.

JOHN D. STEIN

Corporations — Disregard of Separate Corporate Existence — An independent theatre owner brought suit originally for treble damages and an injunction against respondent and others for violation of the Sherman Anti-Trust Act. Decree was entered against respondent, and subsequently respondent was charged with and found guilty of contempt of court for a violation of that decree. The respondent appealed from the contempt decree. The case was tried on the theory that respondent was operating the Palace Theatre, and that R.K.O. Radio Pictures was the only R.K.O. corporation involved. On trial respondent had admitted this. In the contempt proceeding, for the first time in the course of litigation, respondent attempted to show that another wholly-owned subsidiary of R.K.O. than respondent operated the Palace Theatre. *Held*: the defense of separate corporate entity was raised too late, and cannot be a defense at the enforcement stage of the litigation. *Bigelow et al. v. R.K.O. Radio Pictures, Inc.*, 170 F. (2d) 783 (C.C.A. 7th 1949).

The separate entity fiction is in law true and necessary for many of the business advantages associated with the corporate form of organization, such as capacity for perpetual succession, ability to acquire

⁷ Rauphin County Grand Jury Investigation, 332 Pa. 289, 2 A. (2d) 783 (1938).

⁸ Wis. STATS. 255.23 (1947); *State v. Davie*, 62 Wis. 305, 22 N.W. 11 (1885);

State v. Lawler, 221 Wis. 423, 267 N.W. 65 (1936).

⁹ *Havenor v. The State*, 125 Wis. 444, 104 N.W. 116 (1905).

¹⁰ *Ibid.*

or transfer property and do other acts in the corporate name, achieve free transfer of ownership or membership, and exemption of stockholders from personal liability for debts of the business.

In certain kinds of situations the courts will not recognize separate corporate existence. It is difficult to express generally the principles involved in "piercing the corporate veil" and disregarding the corporate fiction. Some writers feel that generalizations from the cases are anything but satisfactory because the principles are not subject to general definition.¹ When it is remembered that some judicial decisions rest on little more than a vague equitable urge to impose liability upon someone who has not agreed to but ought to pay² it can be seen that the principles controlling the application of the fiction do not lend themselves to precise expression. It is said that no general rule can be laid down except that the corporate entity will be regarded "until sufficient reason to the contrary appears."³

A few instances in which the corporate entity has been disregarded will be noted: where the corporation is undercapitalized and deliberately kept judgment proof to obtain benefits through corporate operations without assuming the obligations;⁴ where the corporate form of organization is adopted in an endeavor to evade a statute or to modify its effect;⁵ where the corporation is the agent, sometimes called the adjunct or instrumentality of another;⁶ where the corporation, though properly organized, so mingled its assets with those of other legal persons as to become indistinguishable as an enterprise;⁷ and where it would promote fraud or defeat justice.⁸ The organization of a corporation for the sole purpose of avoiding personal responsibility is not fraud justifying disregard of the corporate entity.⁹

The principal case illustrates another type of situation where the corporate fiction does not have its usual legal effect. If the corporate structure is a complicated one and separate corporate existence is a defense in an action, it must be asserted in the beginning or it is waived. This is manifestly just and equitable since it would not be proper to permit a corporation to take up the court's time and that of the adverse party through two or three lawsuits and then after losing, in a sur-

¹ BERLE AND WARREN, *BUSINESS ORGANIZATION*, 156 (1948).

² *Farm Security Administration, Department of Agriculture v. Herren*, 165 F. (2d) 554 (C.C.A. 8th 1948).

³ *United States v. Milwaukee Refrigerator Transit Company*, 142 Fed. 247, 255 (C.C.A. 7th 1905).

⁴ *Weisser et al. v. Mursam Shoe Corporation et al.*, 127 F.(2d) 344 (C.C.A. 2d 1942).

⁵ *Keystone Mining Company v. Gray*, 120 F.(2d) 1 (C.C.A. 3rd 1941).

⁶ *Taylor et al. v. Standard Gas & Electric Company et al.*, 306 U.S. 307 (1939).

⁷ *Cities Service Company v. Koenecke*, 137 Kan. 7, 20 P. (2d) 460 (1933).

⁸ *Telis v. Telis et al.*, 132 N.J. Eq. 25, 26 A.(2d) 249 (1942).

⁹ *Gledhill v. Fisher & Company*, 272 Mich. 353, 262 N.W. 371 (1935).

prise move, contend that it was never really involved in the action. Said the court in the principal case:

"The respondent now for the first time drags from the closet the bare bone skeleton of an elaborate corporate structure to show to the court that not the respondent but another wholly-owned subsidiary of the corporation, of which the respondent is also a wholly-owned subsidiary, operates the Palace Theatre, notwithstanding common control of the entire corporate pyramid through stock ownership and interlocking officers and directorates. The contention that under such circumstances the right hand does not know what the left hand is doing is a bit specious. The District Court, which was thoroughly familiar with the respondent's appearance in the other proceedings, very properly looked past this ghost-like corporate figure and, viewing the matter realistically, recognized that after all one and the same group was in control and operation of the Palace Theatre. The respondent was the old familiar face the court had in mind when it drafted its decree in which it intended to cover the respondent as an operator of the Palace Theatre. Just as the court believed when it entered its decree, 'It would be to subordinate reality to legal form' to hold that the respondent did not operate the Palace Theatre."

RICHARD B. ANTARAMIAN

Corporations — Dissolution of Solvent Corporation at Suit of Minority Stockholder — In an action by the personal representative of S. Pemberton Penn against Pemberton & Penn, Inc., it was alleged that the purpose for which the corporation was formed had failed, and the prayer for relief demanded that the corporation be dissolved and its assets distributed under court supervision. Pemberton & Penn had been a closed corporation since 1917. The corporation bought tobacco to be resold to Japan and in Europe. Due to the war both these markets were closed. The corporation sold its priorities to other tobacco buyers during the war, and showed a considerable profit for the duration. In 1945 and 1946, due to the uncertainty of the market, the board of directors did not actively engage in buying and selling. This action was started in 1947. *Held*: the action was dismissed. The question of whether a solvent corporation should be dissolved and its assets distributed is within the sound discretion of the directors, and a court will not intervene in absence of proof of bad faith or fraud on the part of the directors in continuing corporate existence. *Penn. v. Pemberton & Penn, Inc.*, 53 S.E. (2d) 823 (Va., 1949).

Little more than a hundred years ago a court of equity intervened for the first time in corporate management at the suit of a minority stockholder.¹ It was not until half a century later that a court deter-

¹ *Hichens v. Congreve*, 4 Russ. 562 (Ch. 1828); 1 Russ. & Mylne 150 (Ch. 1828).