Marquette Law Review

Volume 3
Issue 3 *Volume 3, Issue 3 (1919)*

Article 7

De Facto Corporations in Wisconsin

Isadore Dinnerstein

DE FACTO CORPORATIONS IN WISCONSIN

The state is the parent of corporations, for corporations are creatures of the state. The former gives to the latter its very existence, namely, its charter. In return the state demands that these corporate bodies which it creates shall conform and adhere to certain regulations, enactments and statutory provisions. From such compliances springs a de jure corporation. (Section 1770-b and 1770-c of Wisconsin Statutes). In the event a corporation omits or fails to proceed as required by the state, or where it abuses its power, the state may annul its charter. The state may well say, in an action of quo warranto, I gave you your existence on certain conditions; these conditions you failed to perform; you denied them. I will, therefore, deny your very existence. Thus whenever a corporation does not take the necessary steps for its creation, it does not become a de jure corporation, but may be de facto.

What are the requirements for a de facto corporation? First, there must be a valid law under which a de jure corporation could have been created. A de facto corporation cannot exist where there is no law authorizing a de jure corporation.

Evenson vs. Ellington, 67 Wis. 634.

Norton vs. Shelby County, 118 U. S. 46.

The proposition which lies at the foundation of the law of corporations in this country, is that here all corporations, public or private, exist, and can only exist by virtue of express legislative enactment, creating or authorizing the creation or existence of the corporate body. Legislative sanction is with us, absolutely eessential to lawful corporate existence. 212 L. R. A. 845. Also an unconstitutional law is not sufficient to support a de facto corporation.

Martin vs. Huber, 127 Wis. 412.

The Town of Winneconne vs. Village of Winneconne, 111 Wis. 12.

Gilkey vs. How, 105 Wis. 41.

Second, there must be a bona fide attempt in good faith to comply with certain substantial requirements of the law authorizing such incorporation. *Schrieber vs. Langdate,* 66 Wis. 616. In *Bergeron vs. Hobbs,* 96 Wis. 641, the members of a corporation failed to file its certificate of organization as required by our

statute in the office of the register of deeds of the county, and the court held that there was no bona fide attempt and that, therefore, there was no de facto corporation. In this case the court adhered to a strict construction of the statute relating to the organization of corporations. But Justice Marshall, who strongly dissented, says that all the statutory requirements to the existence of a corporation need not be complied with, for when that is done, it is not a corporation de facto, but de jure. The weight of authority in Wisconsin is in accord with Justice Marshall's view.

In *Slocum vs. Head,* 105 Wis. 431, where the company failed to file a copy of the articles of incorporation in the office of the register of deeds, but held meetings, elected officers, etc., as a corporation in good faith under the original articles which had been filed, it was sufficient to create a corporation de facto. In *Franke vs. Mann,* 106 Wis. 127, it was held that although no notice of the purpose to organize a corporation was given pursuant to Section 1990 R. S. 1878, there was a corporation de facto, at least, for there was a bona fide attempt to incorporate. In *Gilman vs. Druse,* 111 Wis. 408, where the articles of a mutual insurance company organized under Section 1956-1966 R. S. 1878, were signed in the body of the instrument instead of at the end, and no certified acknowledgment was attached as required by law, but the preamble recited that the signers thereby acknowledged and adopted said articles, it was held, that there was a bona fide attempt to comply with the law, and that there was at least a de facto corporation.

Third, not only must there be a valid law under which a de jure corporation could have been created, and a bona fide attempt to comply with such law, but there must also be a user. In other words, there must be an attempt to organize, and to actually engage in the transactions of its appropriate business. For example, taking subscriptions, issuing stock, electing directors, adopting by-laws, etc. In *Slocum vs. Head,* 105 Wis. 431, where the organizers of an alleged corporation failed to comply with one of the express conditions of incorporation, the fact that the signers of the articles of organization held meetings and elected officers was sufficient to show a user and the court held that it was a de facto corporation. The very meaning of the words "de facto" indicates that nothing more is necessary to the existence of a de facto corporation than the exercise of corporate powers in good faith.

The fact that a corporation is one de facto is no defense in a direct proceeding by information in the nature of quo warranto by the attorney general on behalf of the state. To defeat such a proceeding, the defendants must show a de jure corporate existence; to show a corporate existence is not enough. In short, there must be a substantial compliance with our statutes in order to defeat the state in its direct proceedings against alleged corporate bodies.

It is elementary law, however, that a de facto corporation may legally do and perform every act and thing which the same entity could perform were it a de jure corporation. As to all the world except the paramount authority under which it acts, and even against the state except in a direct proceeding against it, it is as completely and effectively a corporate body. It is well settled in Wisconsin and elsewhere that the corporate existence of a corporation de facto cannot be inquired into collaterally. This doctrine has become almost universal that the state, and the state only in direct proceedings to punish the corporation, can inquire into the legal-existence of corporations, *Farwell vs. Wolf,* 96 Wis. 10.

Thompson in his book on Corporations, paragraph 530, volume 1, says, "A party who enters into a written contract with a body purporting to be a corporation, in which it is described by its corporate name, solemnly admits the existence of the corporation for the purposes of a suit brought to enforce the obligation and in such an action, he will not be permitted to plead nul till corporation, or otherwise to deny the corporate existence of the plaintiff." It was held by the United States Supreme Court that one who deals with a corporation as such can not afterwards avoid the obligations so assumed by him on the ground that the supposed corporation was not one de jure. This is a correct statement of the law of Wisconsin. Again, Justice Brewer says, "If one deals with a supposed corporation, with what all persons suppose is a corporation, he can not afterwards turn around and say, 'Well, I dealt with this supposed corporation, but, by reason of failure to legally incorporate, there is no legal corporation and therefore I will hold that the stockholders are personally liable'." In *Clausen vs. Head,* 110 Wis. 405, the court said that where a person deals with an association of individuals as a corporation, such dealing, by estoppel, as to such transaction fixes the status of the company to be what it was represented and recognized to

be therein. In *Gilman vs. Druse,* 111 Wis. 400, the court held that one who deals with a de facto corporation as a corporation is estopped to question the validity of the organization.

In *Citizens Bank vs. Jones,* 117 Wis. 453, where the charter had expired by limitation, it could not be attacked collaterally, but only in a direct proceeding by the state. Thus one who executes a deed to a body claiming to be a corporation is estopped from denying the corporate charter to defeat the instrument.

Whitney vs. Robinson, 53 Wis. 309.
Skinner vs. Richardson, 79 Wis. 464.
Rickelson vs. Galligan, 89 Wis. 394.
Franke vs. Mann, 106 Wis. 118.
Gilman vs. Druse, 111 Wis. 400.

In *Lockwood vs. Wynkoop,* 144 N. W. 846, where a creditor who had dealt with an association as a corporation before its incorporation was perfected was held estopped to deny the corporate existence where the due organization of the corporation was subsequently perfected and the creditor continued to do business with it as a corporation. One who has purchased the stock of a corporation, dealing with the corporation in the purchase, is estopped to thereafter deny the legality of the corporate organization and sue its members individually. *Slocum vs. Hess,* 105 Wis. 431.

The decisions in this state, however, are not in accord, for the reason that a private individual can not attack a de facto corporation. Sometimes the case is settled on the ground that courts can only enforce contracts actually made by parties, and can not make contracts for them; by others upon the ground of estoppel; by others that only the state can question the existence of a corporate organization; or on principles of justice and public policy that persons who assume to exercise corporate powers and have a de facto right so to do, should not be compelled in all their business transactions, in all courts and places, to be ready to successfully meet attacks upon their right in this regard. Those who deal on the basis of one situation ought not assert another for the purpose of enforcing demands to which they did not believe themselves entitled, 105 Wis. 431; L. R. A. 1916 c—201 n; 106 Wis. 127; 110 Wis. 407; 117 Wis. 453.

The consequences of a contrary view are summed up by a learned judge in the following manner: "One jury might say there was no corporation; another jury find the contrary. One

creditor might sue the corporation as a valid organization; another sue the members, alleging that the charter is null and provides no immunity from personal liability. New stockholders might come in, wholly ignorant of the secret vice in obtaining the corporate thing, and be held liable. The charter would have to be effective on one hand, and ineffective on the other. What confusion would such a monstrous doctrine produce." Therefore, the law wisely says that a private individual can not invoke the challenge to de facto corporations, "Whence comes the charter of your authority?"

In conclusion, in order to have a de facto corporation there must be a valid law under which a de jure corporation could have been created. There must be a bona fide attempt to comply with such law, and lastly, there must be a user. When these requisites exist, private individuals, creditors or members of the alleged corporation can not question its authority. The parent of the corporation alone, the state, may challenge de facto corporations by an action of quo warranto.

ISADORE DINERSTEIN.