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DISREGARDING THE ENTITY OF PRIVATE CORPORATIONS

CHARLES HOROWITZ*

I.

THE PROBLEM STATED

Although the device of incorporation has a number of advantages over other types of business organization such as partnerships,[1] joint stock companies,[2] and common law trusts,[3] the advantage that has

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[1]Thus a partner's death dissolved a partnership, but a stockholder's death had no such effect on a corporation. The sale of a partner's interest in a firm dissolved it, but the sale of stock by a stockholder had no effect on the identity of the company. Partners were agents for one another in the prosecution of the firm business, but stockholders, while owners, were not agents for one another. The liability of individuals and partners for firm debts was unlimited; the liability of stockholders, except in cases of superadded statutory liability (as in the case of bank stock), was limited to the price paid or the stock subscription contract. Finally, a partnership as such, except for limited purposes (*e. g.*, In re Sugar Valley Gin Co., 292 Fed. 508 (D. C. Ga. 1923), partnership may be adjudicated bankrupt as a "person") had no legal personality. Thus real estate could not be held in the firm name, nor suit brought in its name. On the other hand, a distinctive feature of the corporation was that it had legal personality. New Colonial Ice Co. v. Helvering, 292 U. S. 435 (1934); Sneed v. Santiam River Timber Co., 122 Ore. 652, 260 Pac. 237 (1927); Fidelity Trust Co. v. Service Laundry Co., 160 Tenn. 57, 22 S. W. (2d) 6 (1929). It could contract, acquire, own and dispose of property, and within the limits of its charter or articles of incorporation could deal and be dealt with largely as with a human being. Salomon v. Salomon & Co. (1897) A. C. 22, 30; 1 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS (1931) § 22. The theory of corporate personality has been the subject of much discussion and criticism. See Farmers Loan & Trust Co. v. Pierson, 222 N. Y. Supp. 532, 539 (Sup. Ct. 1927); Cincinnati Volksblatt Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 1035 (1900); Deiser, *The Juristic Person* (1908) 57 U. OF PA. L. REV. 131, 216, 300; Machen, *Corporate Personality* (1911) 24 HARV. L. REV. 253, 347; Radin, *The Endless Problem of Corporate Personality* (1932) 32 COL. L. REV. 643, 647.

[2]Resort to joint stock company organization was had in order to eliminate some of the disadvantages of doing business as partners, such as the dissolution of the firm following the death of a partner or the transfer of his interest or the liability resulting from the agency character of partnerships. These disadvantages it largely succeeded in eliminating, succeeding also in enabling the pooling of funds of small investors. But disadvantages remained. Thus in the absence of a statute to the contrary, such a company could neither acquire nor convey property by firm name, nor sue or be sued in the firm name; and in many cases joint stockholders were individually liable on the company's contracts and debts. For additional differences see WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS (1927) 101.

[3]Common law trusts attained popularity in Massachusetts, being there used for the purpose of evading restrictions on the right of corporations to deal in real estate. Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624, 627 (1930). As gradually developed, they became known as "Massachusetts Trusts", becoming elaborate types of business organization largely resembling corporations whose advantages they sought to acquire, and whose disadvantages they sought to eliminate. Nevertheless courts were often inclined to impose unlimited partnership liability on certificate holders, or strict personal liability on trustees, as well as to occasionally make applicable to such trusts tax and other statutes dealing with cor-

held the greatest appeal to prospective stockholders has been the advantage of limited liability.[4] This advantage probably accounts for the widespread popularity of incorporation as a business device. In the last 100 years corporate growth has been such that it dominates the business life of the country.[5]

It has become apparent with the passage of time, however, that the device of incorporation can be used in such a way as to frustrate the legitimate purposes or effects of incorporation. In addition to statutory regulation, therefore, courts have been compelled to remedy this situation "to do justice". It has been principally in connection with this effort that the doctrine of disregarding corporate entity has been developed.

The reasons assigned by courts of law,[6] equity[7] and admiralty,[8] and even administrative bodies,[9] in disregarding corporate entity have been general and varied. Metaphors have been used in abundance.[10] Sometimes it has been stated that the corporate entity is disregarded because the privilege of doing business in the corporate form has been abused,[11] or that the corporate entity will be disregarded because justice

porations. Note (1931) 71 A. L. R. 890; see also State ex rel. Range v. Hinkle, 126 Wash. 581, 219 Pac. 41 (1923).

[4]Hanson v. Bradley, — Mass. —, 10 N. E. (2d) 259 (1937).

[5]BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). The advantages and disadvantages of incorporation today have recently been examined. See Bredell, *Reexamination of the Desirability of the Corporate Form of Business Organization* (1938) 13 IND. L. J. 533.

[6]Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 Pac. 986, 987 (1916); Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641 (1921).

[7]Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 Atl. 612 (1913); Ayer & Lord Tie Co. v Commonwealth, 208 Ky. 606, 271 S. W. 693 (1925); Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024 (1903); Dillard & Coffin Co. v. Richmond Cotton Oil Co., 140 Tenn. 290, 204 S. W. 758 (1918); Landa v. Whitfield, — Tex. Civ. App. —, 131 S. W. (2d) 310 (1939).

[8]See Young v. The Key City, 14 Wall. 653 (U. S. 1872); Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F. (2d) 265 (C. C. A. 2d, 1929).

[9]Palmolive Co. v. Conway, 43 F. (2d) 226 (W. D. Wis. 1930); Brooks-Scanlon Co. v. R. R. Comm., 144 La. 1086, 81 So. 727 (1919); Ohio Mining Co. v. Public Utilities Comm., 106 Ohio St. 138, 140 N. E. 143 (1922).

[10]Courts have referred to the corporate entity disregarded as "adjunct", "agency", "instrumentality", "creature", "mouthpiece", "alter ego", "alias", "device", "dummy", "tool", "corporate double" and "business conduit". The late Justice Cardozo once observed that the relationship between a parent and subsidiary corporation is "still enveloped in mists of metaphor". Berkey v. Third Avenue Railway Co., 244 N. Y. 84, 155 N. E. 58 (1926).

[11]State ex rel. Attorney General v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 287 (1892). Accord in principle: Chicago, Milwaukee & St. P. Ry. Co. v. Minneapolis Civic & Commerce Assn., 247 U. S. 490 (1918); Radio-Craft Co. Inc. v. Westinghouse Elec. & Mfg. Co., 7 F. (2d) 432 (C. C. A. 3d, 1925); State v. Creamery Pkg. Mfg. Co., 110 Minn. 415, 126 N. W. 126 (1910); POWELL, PARENT AND SUBSIDIARY CORPORATIONS (1931) 6; WORMSER, *op. cit. supra* note 2 at 10, 24; Comment (1925) 13 CALIF. L. REV. 235. In Newark Ladder & Bracket Sales Co. v. Furniture Workers Union Local 66, 125 N. J. Eq. 99, 4 Atl. (2d) 49, the court disregarded corporate entity of family corporation because not within the reason or policy of the legal fiction.

requires it,[12] or that the court must look to the substance and not to the shadow;[13] sometimes the court has stated that the entity would be disregarded because it was a mere agency or instrumentality of the defendant sought to be held liable;[14] and sometimes the court has said that the adverse party was identical with the corporate entity disregarded.[15] The various reasons assigned by the courts have been by

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[12]Phoenix Safety Investment Co. v. James, 28 Ariz. 514, 237 Pac. 958 (1925); Markovitz v. Markovitz, — Pa. —, 8 Atl. (2d) 36 (1939); Stony Brook Lbr. Co. v. Blackman, 286 Pa. 305, 133 Atl. 556 (1926). Accord in principle: Gonzales & Co., Brokers, Inc. v. Thomas, 42 Ariz. 308, 25 P. (2d) 552 (1933); Montgomery v. Central Nat. Bank & Trust Co., 267 Mich. 142, 255 N. W. 274 (1934); Knight v. Burns, 22 Ohio App. 482, 154 N. E. 345 (1926); Pittsburgh Reflector Company v. Dwyer & Rhodes Co., 173 Wash. 552, 555, 23 P. (2d) 1114 (1933).

[13]Consumers Const. Co. v. Commissioner of Internal Revenue, 94 F. (2d) 731 (C. C. A. 1st, 1938); Western Securities Company v. Spiro, 62 Utah 623, 221 Pac. 856 (1923). Accord in principle: Cross v. Globe-Boss-World Furniture Co., 63 F. (2d) 421 (C. C. A. 9th, 1933); E. E. Gray Corporation v. Meehan, 54 F. (2d) 223 (C. C. A. 1st, 1931); Gates Rubber Co. v. B. F. Goodrich Rubber Co., 45 F. (2d) 652 (D. Colo. 1930); Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 F. (2d) 265 (C. C. A. 2d, 1929); Mosher v. Lee, 32 Ariz. 560, 261 Pac. 35 (1927); Steinen v. J. P. Stotter Co., 22 Ohio App. 249, 154 N. E. 66 (1926); Knight v. Burns, 22 Ohio App. 482, 154 N. E. 345 (1926); Gallatin Natural Gas Co. v. Public Service Commission, 79 Mont. 269, 256 Pac. 373 (1927).

[14]Oriental Investment Co. v. Barklay, 25 Tex. Civ. App. 543, 64 S. W. 80 (1901). Accord in principle: Interstate Tel. Co. v. B. & O. Tel. Co., 51 Fed. 49 (C. C. D. Md. 1892), *affd.* 54 Fed. 50 (C. C. A. 4th, 1893); In re Muncie Pulp Co., 139 Fed. 546 (C. C. A. 2d, 1905); In re Reiger, Kapner & Altmark, 157 Fed. 609 (S. D. Ohio, 1907); see New York Trust Co. v. Carpenter, 250 Fed. 668 (C. C. A. 6th, 1918); Martin v. D. B. Martin & Co., 10 Del. Ch. 211, 88 Atl. 612 (1913); Mitchell v. Lea Lumber Co., 43 Wash. 195, 86 Pac. 405 (1906); DeLano v. Tennent, 138 Wash. 39, 244 Pac. 273 (1926). In Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1925) 14 CALIF. L. REV. 12, it is stated that most of the cases of "one man" corporations "can be explained by a liberal application of ordinary agency rules".

[15]U. S. v. Lehigh Valley Ry. Co., 220 U. S. 257, 272 (1911). Accord in principle: W. R. Grace & Co. v. Luckenbach S. S. Co., 267 Fed. 676 (C. C. A. 4th, 1920); Bishop v. U. S., 16 F. (2d) 410 (C. C. A. 8th, 1926); Jackson v. Thomas Inv. Co., 46 F. (2d) 252 (C. C. A. 5th, 1931) (alter ego rule); Minifie v Rowley, 187 Cal. 481, 202 Pac. 673 (1921); Davis v. Perry, 120 Cal. App. 670, 8 P. (2d) 514 (1932); see Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 Atl. 612 (1913); Associated Oil Company v. The Seiberling Rubber Co., 172 Wash. 204, 19 P. (2d) 940 (1933) (confusion of identities).

The identity theory is often illustrated though not necessarily expressly relied on in cases applying the rule that the successor, merged or consolidated corporation is liable for the debts of its predecessor. In re W. J. Marshall, 3 F. (2d) 192 (S. D. Ga. 1924); Sheild v. Smith, 53 S. D. 477, 221 N. W. 87 (1928); Cattle Raisers' Loan Co. v. Sutton, 271 S. W. 233 (Tex. Civ. App., 1925); Jones v. Francis, 70 Wash. 676, 126 Pac. 307 (1912); see In re Armbruster Store Co., 66 F. (2d) 110 (C. C. A. 6th, 1933). Likewise predecessor is liable for debts of successor. Davis Provis. Co. v. Fowler Bros., 47 N. Y. Supp. 205, *affd.* 163 N. Y. 580, 57 N. E. 1108 (1900).

The relation between the agency and identity theories in parent and subsidiary corporation cases has been examined but no satisfactory conclusion reached as to the true view. POWELL, *op. cit. supra note* 11 at 89 *et seq.*, 116 *et seq.* Some cases can be rested both on the agency and identity theories. Luckenbach S. S. Co. v. W. R. Grace & Co., 248 Fed. 953 (E. D. Va., 1918) 267 Fed. 676 (C. C. A. 4th, 1920), *cert. denied,* 254 U. S.

no means inconsistent and occasionally a single decision has made full use of all of them. Thus in *United States v. Reading*,[16] an attempt to evade the Commodities Clause of the Hepburn Act was frustrated. In disregarding the corporate entity for the purpose of enforcing the act, the Supreme Court of the United States said:

> "* * * Where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require."[17]

Just when a court will disregard a corporate entity has been a subject of frequent discussion,[18] but so far as examination reveals, tests for disregarding the entity, suggested both in the decisions and by law writers, have either been a mere summary of particular situations,[19] or have not been inclusive of sufficient factual situations calling for

644 (1920); Spokane Merchants Association v. Clere Clothing Co., 84 Wash. 616, 147 Pac. 414 (1915). Other cases are best rested on the agency theory, such as those denying recovery against a parent corporation for the debts of its subsidiary if the transaction involved occurred before the parent corporation had assumed control: Allen v. Phila. Co., 265 Fed. 817 (C. C. A. 3rd, 1920); Hooper-Mankin Co. v. Matthew Addy Co., 4 F. (2d) 187 (C. C. A. 6th, 1925); Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927); or cases denying recovery against a subsidiary for the acts of its parent. Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 31 F. (2d) 265 (C. C. A. 2d, 1929). The identity theory would clearly require contrary holdings. Cases holding that service of process on a domestic subsidiary corporation is not valid service on a foreign parent corporation while not involving substantive liability are also better rested on the agency theory. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333 (1925).

[16]253 U. S. 26, 62 (1920).

[17]See also: Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic Assn., 247 U. S. 490 (1918); Page v. Arkansas Natural Gas Corp., 53 F. (2d) 27 (C. C. A. 8th, 1931) (applying doctrine to common law trusts); State Trust & Sav. Bank v. Hermosa Land & Cattle Co., 30 N. Mex. 566, 240 Pac. 469 (1925); Stony Brook Lumber Co. v. Blackman, 286 Pa. 305, 133 Atl. 556 (1926); Caldwell v. Roach, 44 Wyo. 319, 12 P. (2d) 376 (1932).

[18]In re Clarke's Will, — Minn. —, 284 N. W. 876 (1939), the court rejected the doctrine as unnecessary but substituted reasoning equally unsatisfactory because of vagueness. In re Witkind's Estate, 4 N. Y. Supp. (2d) 933, 167 Misc. Rep. 885 (Surr. Ct. 1938), defines a corporation not in terms of personality which may have to be disregarded but as a name for a useful and usual collection of jural relations to be assigned to their appropriate place, having due regard to the purposes to be achieved.

[19]Callas v. Independent Taxi Owners' Ass'n, 66 F. (2d) 192 (App. D. C., 1933); Jacoby v. Duncan, 138 Misc. Rep. 777, 247 N. Y. Supp. 318 (Sup. Ct., 1931); Continental Supply Co. v. Forrest E. Gilmore Co. of Texas, 55 S. W. (2d) 622 (Tex. Civ. App., 1932). See Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1925) 14 CALIF. L. REV. 12; WORMSER, *loc. cit. supra* note 2.

the application of the doctrine.[20]

If principles can be ferreted out of the decisions which will be reasonably certain of application, preserving the legitimate immunity of incorporation, and yet sufficiently resilient to provide for growth,[21] definite progress will have been made in a field of law still recognized as being in a state of uncertainty. In what follows, therefore, it is proposed to examine applicable principles in an effort to determine the nature of the doctrine of disregarding the corporate entity and to determine just when the doctrine should be applied.[22] In referring to the doctrine of regarding or disregarding the corporate entity hereafter, it will be for convenience and on occasion be referred to as the doctrine of regard or the doctrine of disregard.

II.

Some Factors Involved in Applying the Doctrine

Except for the doctrine of corporate immunity, stockholders would usually be liable as partners for the acts of a corporation as their agent.[23] The doctrine of corporate immunity or limited liability protects stockholders from such liability. But when stockholders, individual, partnership, or corporate, no longer act *merely* as stockholders, but make use of the corporation independently as principals,[24] the corporation becomes an agent and the stockholders are properly held liable as principals.[25] Sometimes this process is spoken of as a case

[20]Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 (1921); Continental Supply Co. v. Forrest E. Gilmore Co. of Texas, 55 S. W. (2d) 622 (Tex. Civ. App., 1932); Anderson, Limitations of Corporate Entity (1931) 53, 54, 64-66, 69, 334; Powell, *op. cit. supra* note 11 at 107; Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 Col. L. Rev. 496.

[21]See Pound, Interpretations of Legal History (1923) c. 7, *The Engineering Interpretation.*

[22]The question of the nature of corporate personality as to whether real or fictional (see Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 Yale L. J. 655) does not necessarily matter because the results reached in the cases really rest on other considerations. (See, however, Amos v. Trust Co. of Florida, 54 F. (2d) 286 (C. C. A. 5th, 1931). This is true even though the fictional character of corporate personality is frequently asserted in the cases. See Farmers Loan & Trust Co. v. Pierson, 222 N. Y. Supp. 532 (Sup. Ct., 1927), and Pagel, Horton & Co. v. Harmon Paper Co., 236 App. Div. 487, 258 N. Y. Supp. 168 (1932); National Bank of Commerce v. Dunn, 194 Wash. 472, 78 P. (2d) 535 (1938). That the common law never received the fiction theory of corporations, see Pollock, *Has the Common Law Received the Fiction Theory of Corporations?* (1911) 27 L. Q. Rev. 219.

[23]See Opportunity Christian Church v. Washington Motor Power Co., 136 Wash. 116, 238 Pac. 641 (1925).

[24]The same thought is suggested by the phrases "undue control", or "undue dominion". See Kentucky Electric Power Co. v. Norton Coal Mining Co., 93 F. (2d) 923 (C. C. A. 6th, 1938); Finley v. Union Joint Stock Land Bank of Detroit, 281 Mich. 214, 274 N. W. 768 (1937).

[25]Adolph Ramish, Inc., v. Laugharn, 86 F. (2d) 686 (C. C. A. 9th, 1936); Pacific Can Co. v. Hewes, 95 F. (2d) 42 (C. C. A. 9th, 1938); Jackson v. Kirschman, — La. App. —, 173 So. 562 (1937); Havey v. Hofmann, 121 N. J. Eq. 523, 191 Atl. 756 (1937).

of disregarding the corporate entity. Strictly speaking, it should not be so regarded, for agency principles are alone sufficient to furnish protection.[26] It is no more necessary to disregard corporate entity in such a case than it would be if the principal were not a stockholder but a third person for whom the corporation acted as agent.[27]

There are a number of cases, however, where the corporate entity is really disregarded,[28] agency principles being insufficient to explain such decisions. Cases of the character here mentioned are cases of legal identity rather than cases of agency, or, as will be explained later, cases in which the doctrine may be invoked as a matter of convenience to enforce a duty owing to the person invoking the doctrine,[29] and certain legal consequences follow therefrom that would not follow if mere agency principles were involved.[30]

When a court disregards the corporate entity, it does so only for the purposes of the particular case,[31] and for special reason.[32] In all other respects the corporation may continue as such. If it expects to be treated as a corporation *de facto* or *de jure* and in other respects enjoy the privileges and immunities that corporate organization affords, it must conduct itself as a corporation and comply, for example, with the law respecting meetings, officers, stock, contracts, tax regulations and the like.[33] What the court really does is not to treat the corporation as nonexistent, but rather to refuse to give effect to certain incidents or immunities of corporate existence. This fact emphasizes the necessity of determining just what there is in a particular factual situation that requires such action of the court.[34]

The facts considered by the courts in determining whether the corporate entity should be regarded or disregarded generally relate to

[26] Floral Park Lawns v. O'Connell, 250 App. Div. 464, 294 N. Y. Supp. 991 (1937).

[27] For a discussion of the principle that a corporation may act as agent, see Killingsworth v. Portland Trust Co., 18 Ore. 351, 355, 23 Pac. 66 (1890).

[28] Raymond-Eldredge Co. v. Security Realty Inv. Co., 91 F. (2d) 168 (C. C. A. 6th, 1937); Everets v. Sunset Farms Inc., 9 Cal. (2d) 691, 72 P. (2d) 543 (1937); In re Turley's Estate, 169 Misc. 190, 289 N. Y. Supp. 704 (Surr. Ct. 1936); Central Trust Co. v. Sickles Holding Co., 55 Ohio App. 394, 9 N. E. (2d) 881 (1937).

[29] See Section V *infra* and note 144 *et seq. infra.*

[30] See note 15, *supra.*

[31] Inconsistent positions cannot, however, be taken in the same case. Either the entity is to be disregarded for purposes of the case or it is not. Bradley v. Butchart, 217 Cal. 791, 20 P. (2d) 693 (1933). It has been held that the corporate entity will be recognized in some relations but not in others. Irving Trust Co. v. Kaminsky, 22 F. Supp. 362 (S. D. N. Y., 1937); Adolph Ramish, Inc. v. Laugharn, 86 F. (2d) 686 (C. C. A. 9th, 1936).

[32] Boatright v. Steinite Radio Corp., 46 F. (2d) 385 (C. C. A. 10th, 1931). When the "entity" is disregarded the court merely states a result. The reasons must exist independently. See Comment (1926) 36 YALE L. J. 254, 259.

[33] 1 FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS (1931) 137.

[34] It has been suggested that each case is *sui generis.* Pagel, Horton & Co. v. Harmon Paper Co., 236 App. Div. 47, 258 N. Y. Supp. 168 (1932).

the purpose of incorporation or the conduct of the corporation or of its stockholders. Sometimes certain facts are held to be insufficient as in the following illustrations: The fact that a corporation has been organized for the purpose of limiting liability for future debts;[35] the fact that the corporation is organized to take advantage of privileges denied individuals and granted corporations;[36] the fact (often referred to) that a person or corporation owns a majority or all of the stock of a corporation, or all except qualifying shares of dummy stockholders, thereby controlling it;[37] and the fact that directors or officers are common to the two corporations.[38] Nor does the fact that a parent corporation lends money to and finances its subsidiary necessarily warrant the application of the doctrine.[39] The fact that the parent organ-

[35]Hoffman Wall Paper Co. v. Hartford, 114 Conn. 531, 159 Atl. 346 (1932); Elenkrieg v. Siebrecht, 238 N. Y. 254, 144 N. E. 519 (1924); In re Richman's Estate, 142 Misc. Rep. 103, 253 N. Y. Supp. 838 (Surr. Ct., 1931); Buckner v. Dillard, 184 Okla. 586, 89 P. (2d) 326 (1939); National Hotel Co. v. Motley, 123 S. W. (2d) 461 (Tex. Civ. App. 1938). See Almirall & Co., Inc. v. McClement, 207 App. Div. 320, 202 N. Y. Supp. 139 (1923).

[36]Imar Mortgage Corp. v. Ticoli Realty Corp., 232 App. Div. 635, 251 N. Y. Supp. 71 (1931); Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 Col. L. Rev. 128, 141.

[37]Pittsburgh & Buffalo Co. v. Duncan, 232 Fed. 584 (C. C. A. 6th, 1916); Smith v. Higgins, 102 F. (2d) 456 (C. C. A. 2d, 1939); Atkinson v. Reid, 185 Ark. 301, 47 S. W. (2d) 571 (1932); Wood Est. Co. v. Chanslor, 209 Cal. 241, 286 Pac. 1001 (1930); Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P. (2d) 839 (1933); Commonwealth v. Muir, 170 Ky. 435, 186 S. W. 194 (1916); Hayhurst v. Boyd, 50 Idaho 752, 300 Pac. 895 (1931); Buckeye Cotton Oil Co. v. Amrhein, 168 La. 139, 121 So. 602 (1929); Waycross Airline Ry. Co. v. Offerman & W. Ry. Co., 109 Ga. 827, 35 S. E. 275 (1900); William Danzer & Co. v. Western Maryland Ry. Co., 164 Md. 448, 165 Atl. 463 (1933); Albert Richards Co. v. The Mayfair, 287 Mass. 280, 191 N. E. 430 (1934); American Union Line, Inc. v. Oriental Nav. Corp., 239 N. Y. 207, 146 N. E. 338 (1924); Monongahela Bridge Co. v. Pittsburgh Traction Co., 196 Pa. 25, 46 Atl. 99 (1900); Vennerbeck & Clase Co. v. Juergens Jewelry Co., 53 R. I. 135, 164 Atl. 509 (1933); Stewart v. Gould, 8 Wash. 367, 36 Pac. 277 (1894); Milwaukee Toy Co. v. Industrial Comm., 203 Wis. 493, 234 N. W. 748 (1931). See Fuller, *The Incorporated Individual: A Study of the One-Man Company* (1938) 51 Harv. L. Rev. 1373. The fact that the government owns a majority or all of the stock of a corporation doesn't make the corporation a government department. Amtorg Trading Corporation v. United States, 71 F. (2d) 524 (C. C. P. A., 1934); Commercial Pac. Cable Co. v. Bank, 263 Fed. 218 (S. D. N. Y., 1920), 269 Fed. 1022 (C. C. A. 2d, 1920). Government corporation agents aren't government agents. United States v. Strang, 254 U. S. 491 (1921). Nor have such corporations government immunity. Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp., 258 U. S. 549 (1922).

[38]Chicago Mill & Lbr. Co. v. Boatmen's Bank, 234 Fed. 41 (C. C. A. 8th, 1916); Martin v. Development Co., 240 Fed. 42 (C. C. A. 9th, 1917); Haskell v. McClintic Marshall Co., 289 Fed. 405 (C. C. A. 9th, 1923); Owl Fumigating Corp. v. Cal. Cyanide Co., 24 F. (2d) 718 (D. Del. 1928); Jones Lumber Co. v. Wisarkana Lbr. Co., 125 Ark. 65, 187 S. W. 1068 (1916); Kniese v. Fairfax Incline Ry. Co., 96 Cal. App. 427, 274 Pac. 382 (1929) (sole stockholder principal officer); Pagel, Horton & Co. v. Harmon Paper Co., 236 App. Div. 47, 258 N. Y. Supp. 168 (1932).

[39]Owl Fumigating Corp. v. Cal. Cyanide Co., 24 F. (2d) 718 (D. Del., 1928); Berkey v. Third Avenue Ry. Co., 244 N. Y. 84, 155 N. E. 58 (1926); Vennerbeck & Clase Co. v. Juergens Jewelry Co., 53 R. I. 135, 164 Atl.

ized the corporation,[40] or that the subsidiary has a name similar to that of the parent,[41] or that one corporation pledges all its property to another corporation,[42] is not considered decisive. Mere intimacy, it has been held, is not enough.[43]

On the other hand, the following illustrative facts have been held sufficient: When separate existence is colorable merely,[44] or when there is a substantial commingling of the property of the corporations resulting in a confusion of identities, the entity may be disregarded.[45] In parent and subsidiary corporation cases, a most important field for invoking the doctrine, there must be more than mere stockholder control of the entity sought to be disregarded. There must be what may be best denoted as *manipulation*.[46] Thus, in addition to the usual elements of common stockholders, directors and officers, the following facts have been relied on: Excessive financing by the parent of the subsidiary corporation;[47] payment of the subsidiary's expenses and losses by the parent;[48] use by the parent of the subsidiary's property

509 (1933); see Kniese v. Fairfax Incline Ry. Co., 96 Cal. App. 427, 274 Pac. 382 (1929); Briggs & Co. v. Harper Clay Products Co., 150 Wash. 235, 272 Pac. 962 (1928).

[40]Continental & Commercial Trust & Savings Bank v. Garden City Co., 123 Kan. 659, 256 Pac. 983 (1927).

[41]Knott v. Fisher Vehicle Co., 190 S. W. 378 (Mo. App., 1916); see Wm. Wrigley, Jr. Co. v. Larson, Jr. Co., 5 F. (2d) 731 (N. D. Ill., 1925).

[42]Overstreet v. Citizens Bank, 12 Okla. 383, 72 Pac. 379 (1903).

[43]See note 129, *infra*. Intimacy is significant. Portsmouth Cotton Oil Ref. Corp. v. Bank, 280 Fed. 879 (M. D. Ala., 1922); McDonald v. Charleston R. R., 93 Tenn. 281, 24 S. W. 252 (1893).

[44]Martin v. Development Co., 240 Fed. 42 (C. C. A. 9th, 1917); United States Smelting R. & M. D. Co. v. Wallapai Co., 27 Ariz. 126, 230 Pac. 1109 (1924); Wall Paper Co., Inc. v. Hartford, 114 Conn. 531, 159 Atl. 346 (1932); Hill v. Jones, 118 Conn. 12, 170 Atl. 154 (1934); Old Ben Coal Co. v. Universal Coal Co., 248 Mich. 486, 227 N. W. 794 (1929). Apt illustrations of the rule will be found in Continental Supply Co. v. Forrest E. Gilmore Co., 55 S. W. (2d) 622 (Tex. Civ. App., 1932); Gullett Gin Co. v. Hicks, 176 Ga. 652, 168 S. E. 597 (1933).

[45]Associated Oil Co. v. Seiberling Rubber Co., 172 Wash. 204, 19 P. (2d) 940 (1933); Keane v. Watson Co., 149 Wash. 424, 271 Pac. 73 (1928); see note 15, *supra*.

[46]In re First Nat. Bank of Arthur, Ill., 23 F. Supp. 255 (E. D. Ill., 1938). It has been suggested that there must be control tantamount to compulsion before the entity is disregarded. Philadelphia Storage Battery Co. v. Radio Corporation, — Del. Ch. —, 194 Atl. 414 (1937). It has also been said that there must be "undue control" before the entity is disregarded. Finley v. Union Joint Stock Land Bank of Detroit, 274 N. W. 768, 281 Mich. 214 (1937). Gledhill v. Fisher & Co., 272 Mich. 353, 262 N. W. 371 (1935) uses the term "undue dominion".

[47]See Albert Richards Co. v. The Mayfair, 287 Mass. 280, 191 N. E. 430 (1934) (inadequate capital); *cf.* Burrows v. Emery, 285 Mich. 86, 280 N. W. 120 (1938).

[48]Stark Elec. R. Co. v. McGinty Contracting Co., 238 Fed. 657, 662 (C. C. A. 6th, 1917); Joseph R. Foard Co. v. Maryland, 219 Fed. 827 (C. C. A. 4th, 1914). Especially if the corporation has inadequate capital. Luckenbach Steamship Co. v. U. R. Grace & Co., 267 Fed. 676 (C. C. A. 4th, 1920), *cert. denied*, 254 U. S. 644 (1920); Albert Richards Co. v. The Mayfair, 287 Mass. 280, 191 N. E. 430 (1934).

as his or its own;[49] description by the parent of the subsidiary as a part of its business;[50] the acts of the subsidiary in the interest of the parent, rather than its own interest;[51] the fact that the subsidiary has no business except with a parent corporation, and no assets except those conveyed to it by the parent corporation;[52] the fact that formal legal requirements such as meetings, elections, and separate bookkeeping devices are not observed by the subsidiary.[53]

In cases of individuals or partnerships using a corporation as a convenience for the transaction of the business of such individuals or partnerships, the corporate entity has been disregarded,[54] with apparently greater freedom than is manifest in cases involving parent and subsidiary corporations, although there would seem to be no distinction in the legal principles to be applied.[55]

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[49]Edward Finch Co. v. Robie, 12 F. (2d) 360 (C. C. A. 8th, 1926); Minahan v. Timm, 210 Wis. 689, 247 N. W. 321 (1933); see Wilkinson v. Walker, 294 Fed. 939 (N. D. Tex., 1923); see dissenting opinion in Sommer v. Yakima Motor Coach Co., 174 Wash. 638, 659, 26 P. (2d) 92 (1933). The burden of proving good faith and adequacy of consideration in such case is on parent corporation. Pennsylvania Canal Co. v. Brown, 229 Fed. 444 (E. D. Pa., 1916), 235 Fed. 669 (C. C. A. 3d, 1916), *cert. denied*, 242 U. S. 646 (1917).

[50]See Platt v. Bradner, 131 Wash. 573, 230 Pac. 633 (1924).

[51]Chicago M. & St. P. Ry. Co. v. Minneapolis Civic Ass'n, 247 U. S. 490 (1918); United States v. Reading Co., 253 U. S. 26 (1920); Westinghouse Elec. & Mfg. Co. v. Allis-Chalmers Co., 176 Fed. 362 (C. C. A. 3d, 1910); In re Eilers Music House, 270 Fed. 915 (C. C. A. 9th, 1921); Costan v. Manila Elec. Co., 24 F. (2d) 383 (C. C. A. 2d, 1928); see Rippel v. Kaplus, 124 N. J. Eq. 303, 1 A. (2d) 883 (1938). See also Berle, *Subsidiary Corporations and Credit Manipulation* (1928) 41 HARV. L. REV. 874.

[52]Portsmouth C. Oil Ref. Corp. v. Bank, 280 Fed. 879 (M. D. Ala., 1922); The Willem Van Driel, Sr., 252 Fed. 35 (C. C. A. 4th, 1918); see United States v. Delaware, L. & W. R. R. Co., 238 U. S. 516 (1915).

[53]In re Barreiro's Estate, — Cal. App. —, 13 P. (2d) 1033 (Cal. App., 1932). The rule assumes the valid existence of the corporation, at least in form. It should be distinguished from the rule holding persons liable individually or as partners who act as a corporation without complying with the law—Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342 (1889); Rowden v. Daniell, 151 Mo. App. 15, 132 S. W. 23 (1910); Empire Mills v. Alston Grocery Co., 15 S. W. 200, 505 (Tex. App., 1891); *cf.* Refsnes v. Myers, 164 Wash. 205, 2 P. (2d) 656 (1931), and Burstein v. Palermo, 104 N. J. Law 414, 140 Atl. 326 (1928), or who act as such after charter expires. Ewald Iron Co. v. Commonwealth, 140 Ky. 692, 131 S. W. 774 (1910). But observance of formalities is not conclusive. The court may still pierce the entity. Southern Pac. Co. v. Lowe, 247 U. S. 330 (1918); Westinghouse Elec. & Mfg. Co. v. Allis-Chalmers Co., 176 Fed. 362 (C. C. A. 3d, 1910). See Bishop v U. S., 16 F. (2d) 410 (C. C. A. 8th, 1926). See generally: POWELL, *op. cit. supra* note 11, c. 2; Berle, *loc. cit. supra* note 51; Elson, *Legal Liability of Holding Companies for Acts of Subsidiary Companies* (1930) 15 ST. LOUIS L. REV. 333; Comment (1936) 21 ST. LOUIS L. REV. 234.

[54]Clark v. Schwaegler, 104 Wash. 12, 175 Pac. 300 (1918) (convenience of community); DeLano v. Tennent, 138 Wash. 39, 244 Pac. 273 (1926); The Sheffield Company v. R. Hoe & Company, 173 Wash. 489, 23 P. (2d) 876 (1933); *cf.* note 89, *infra.*

[55]Thus in Washington, while insisting on the necessity of confusion of assets in dominant and subsidiary corporation cases before the entity will be disregarded, *no such requirement is mentioned in one-man or family corporations.* The requirement seems unduly strict. See note 54, *supra.* See also Burnet v. Commonwealth Imp. Co., 287 U. S. 415 (1932).

III.

The Duty Owed in Each Case Involving the Doctrine

While the facts of each case, in which the doctrine of disregarding the corporate entity is applied, vary,[56] there is one situation common to all: a right owned and its corresponding duty owed to the person demanding recognition of his right and the performance of its corresponding duty.[57] For example, the obligee of a contract has a right to receive performance of its obligations. The obligor, on the other hand, is under a corresponding duty to perform those obligations. When the doctrine of disregard is applied, it is applied because of the necessity of enforcing this right-duty. The nature and origin of these right-duties will be described in detail hereinafter.[58] That such a right-duty exists is presupposed in asserting a cause of action or in relying upon a defense. Its existence is assumed but not often expressed. When expressed it has usually been expressed in a restricted form, namely, by a holding that before a corporate entity is disregarded, some species of fraud, bad faith or other wrong must exist to be obviated,[59] the stockholders of the corporation whose entity is sought to be disregarded being chargeable with the violation of the duty.[60] But such cases often mean nothing more than that violation of duty (denoted as fraud) will result if the entity be not disregarded. Were the rule otherwise, it would be unduly confining, it having been held that actual fraud need

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[56]See note 34, *supra.*

[57]In Williams v. Freeport Sulphur Co., 40 S. W. (2d) 817, 825 (Tex. Civ. App., 1930), the court said:

"The denial by the Texas Company of the right of its stockholders to an inspection of its books and records is a violation of its duty to plaintiffs enjoined both by the common law and statutes of this state . . . And it cannot . . . prevent the courts of this state from compelling the performance of that duty, by setting up the legal fiction of the separate entity of the sulphur company."

The person to whom the duty is owed need not await action by the state before complaining of corporate personality. He may do so to the end that the duty owed be enforced. See Jones v. Missouri-Edison Elect. Co., 144 Fed. 765 (C. C. A. 8th, 1906).

[58]See Section IV, *infra.*

[59]In re John Koke Co., 38 F. (2d) 232 (C. C. A. 9th, 1930); In re Armbruster Store Co., 66 F. (2d) 110 (C. C. A. 6th, 1933); Erkenbrecher v. Grant, 187 Cal. 7, 200 Pac. 641 (1921); Continental Securities & Inv. Co. v. Rawson, 208 Cal. 228, 280 Pac. 954 (1929); Hollywood Cleaning Co. v. Hollywood Service, 217 Cal. 124, 17 P. (2d) 709 (1932); Continental & Commercial Trust & Savings Bank v. Garden City Co., 123 Kan. 659, 256 Pac. 983 (1927); Jenkins v. Moyse, 254 N. Y. 319, 172 N. E. 521 (1930); Moody-Seagraves Ranch v. Brown, 69 S. W. (2d) 840 (Tex. Civ. App., 1934); First National Bank v. Walton, 146 Wash. 367, 262 Pac. 984 (1928); Briggs & Co. v. Harper Clay Products Co., 150 Wash. 235, 272 Pac. 962 (1928); Kelley v. Von Herberg, 184 Wash. 165, 50 P. (2d) 23 (1935).

[60]If other stockholders are innocent, the doctrine cannot be invoked at least to their prejudice. See Weaver v. Atlantian Const. Co., 84 Cal. App. 154, 258 Pac. 111 (1927); Spear v. H. V. Greene Co., 246 Mass. 259, 140 N. E. 795 (1923); Geary v. Cain, 79 Utah 268, 9 P. (2d) 396 (1932).

not exist,[61] it being enough if "inequitable results" would follow if the entity were not disregarded.[62] The term "inequitable results" is vague and general. Properly interpreted, however, in the light of the facts of the particular case, it will in last analysis be found to mean nothing more than violation of duty owed or obstruction to the realization of the right asserted.[63] Indeed, in cases adopting the "substance" or "justice" rule, the corporate entity has been disregarded without express reference to the existence of either fraud or inequitable results. The enforcement of the duty owed requiring it, the courts disregarded the corporate entity by refusing to give effect to the claimed incident of corporate status.[64]

(To be continued)

[61] Hamilton Ridge Lumber & Sales Corp. v. Wilson, 25 F. (2d) 592 (C. C. A. 4th, 1928) (constructive fraud enough); In re Otsego Waxed Paper Co., 14 F. Supp. 15 (W. D. Mich., 1935); People ex rel. Potter v. Michigan Bell Telephone Co., 246 Mich. 198, 224 N. W. 438 (1929); Fors v. Farrell, 271 Mich. 358, 260 N. W. 886 (1935); Associated Oil Co. v. Seiberling Rubber Co., 172 Wash. 204, 19 P. (2d) 940 (1933) (unintended probable fraud enough).

[62] In re Otsego Waxed Paper Co., 14 F. Supp. 15 (W. D. Mich., 1935) (no fraud being involved, the corporate entity was disregarded in bankruptcy); Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 (1921); Wenban v. Hewlett, 193 Cal. 675, 227 Pac. 723 (1924); Bellaire Securities Corporation v. Brown, 124 Fla. 47, 168 So. 625 (1936); see Grimes v. Brammer, 214 Iowa 405, 239 N. W. 550 (1931).

[63] See note 111, *infra*. In Bankers Trust Co. v. Dennis, 256 App. Div. 495, 10 N. Y. Supp. (2d) 710 (1939), the court refused to disregard a corporate entity in absence of a showing that fraud or other breach of duty was involved.

[64] Trustees System Co. of Pa. v. Payne, 65 F. (2d) 103 (C. C. A. 3d, 1933); Montgomery v. Central National Bank & Trust Co., 267 Mich. 142, 255 N. W. 274 (1934); Gallatin Natural Gas Co. v. Public Service Comm., 79 Mont. 269, 256 Pac. 373 (1927); Law v. McLaughlin, 2 F. Supp. 601 (N. D. Cal., 1933); see Phoenix Safe Investment Co. v. James, 28 Ariz. 514, 237 Pac. 958 (1925); State Trust & Sav. Bank v. Hermosa Land & Cattle Co., 30 N. M. 566, 240 Pac. 469 (1925); and In re Culhane's Estate, 269 Mich. 68, 256 N. W. 807 (1934); see notes 93 and 111, *infra*.