LIABILITY OF OFFICERS OF A CORPORATION FOR INFRINGEMENT OF A PATENT,

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When the conditions of government and the exigencies of commerce demanded new and more suitable means for the conduct of affairs, both municipal and financial, and the law sanctioned the formation of bodies corporate, was it intended, in clothing such organizations with all the attributes of individual man, that those forming or controlling them should escape all liability to which they would be subjected if acting in their individual capacity?

Corporate influence dominates the world. There is not a single field of industry in the furtherance of which corporate bodies are not interested. The smallest hamlet has its corporation, while in the manufacturing and industrial centers thousands of companies every year are authorized to engage in business. Small as well as gigantic enterprises are conducted by such organizations.

When we speak of corporations it is impersonally; but, as to each corporate body, it is, after all, only a relatively small number of men who actually control its actions. Its welfare or its destiny is in the hands of officers and directors. Their word is its law; they command its every act, and, if they be unscrupulous, are they to be allowed with personal impunity to override the rights of others? Can they by acting in the name of the corporation escape liability for their tortious acts? Did the law ever so intend?

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Frequently if men can be made to realize that, even though they are acting in the name of a corporation, they cannot escape personal liability for wrongful acts, they are more prone to proceed with due regard to the claims of others. Men will shun as individuals that to which collectively they are indifferent. This is particularly true in respect to patents.

Infringement involves an act *ex delicto*. Of that there can be no question. The statute provides action on the case as the remedy at law for infringement, and it is the settled rule that in such actions the plaintiff, while not compelled to do so, may sue all persons jointly liable. Does an officer escape liability because all the actions of which he has been guilty have been done by him in his representative capacity, in behalf of a corporation?

Boone lays it down as a fundamental rule of corporate law that, although a corporation is liable "for the illegal doings and defaults" of its officers, an injured party is not deprived of his right to proceed personally against the officers who committed the injury.

A public officer is not liable on a contract, although under his own hand and seal, made by him in the line of his duty, by legal authority, and on account of the Government, and enuring to its benefit and not to his own. But he is personally liable to an action of tort by a person whose private rights of property he has wrongfully invaded or injured, even if acting under authority of the United States, and may be sued as for his own infringement of a patent. State officers, acting under an unconstitutional statute of a State, are liable to an action of trespass, and, where the remedy at law is inadequate, may be restrained by injunction. Should any different rule apply to officers or directors of an infring-

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ing corporation? An officer may not himself actually commit the infringement; his connection therewith may be only that of directing the affairs of a corporate body, and even as to this his attitude may be one of mere indifference, or passive acquiescence. The rule is that, although he does not actually and physically commit the tortious act, he may be liable if he directs or commands its commission, or if he sustains to the person committing it the relation of master or principal, even though he is acting in the name and on behalf of the corporation.

When the corporation is a mere pretext—a shield against individual liability—there can be no question that, as was said by the Supreme Court in another connection, "the law will strip a corporation or individual of every disguise, and enforce a responsibility according to the very right, in despite of their artifices." Where it has been shown that an officer, sued as such, is the sole owner of the corporate stock, or has previously been associated with the complainant in the enjoyment of the patented right, or even where the corporation is not joined as a defendant and the officers are sued alone, especially under allegations of attempt on their part to defeat recovery against the corporation of which they are officers, or that the corporation was formed solely for the purpose of manufacturing an infringing device, the courts have not hesitated to hold such individuals liable.

In refusing to hold the officers and directors of a corporation liable, it was once said that "it would be a great hardship if the directors of a railway or manufacturing corporation were bound, at their personal peril, to find out that every machine which the company uses is free of monopoly." It is difficult to comprehend why any greater exemption

should extend to men as directors of a body corporate than they would enjoy as copartners or as members of an unincorporated association. Of course, where there is no direct charge of infringement against the officers, and the prayer against them is for an accounting only on behalf of the company, there is no equitable ground for relief against them individually. The mere fact that they are officers does not *ipso facto* make them liable. An officer having no power over the actions of the corporation cannot be said to have participated in the unlawful act.

In one circuit it is, and has long been, the practice to join the president of a corporation as a defendant—that is, to charge the corporation and the officer, in general terms, with the infringement. This has been sanctioned by the courts on the ground that an injunction is much more apt to secure obedience if directed to an individual officer by name than if it only ran against officers and agents of the corporation by that general designation. The moral advantage of putting the officer addressed upon notice that he must see to it that the process is obeyed, and that he will be held personally responsible for disobedience, has outweighed any strict rule of pleading or interpretation of the law of liability. And when, in such cases, it is shown that the officer was guilty of intentional and willful action, indicating an individual purpose to infringe, a personal decree for damages or costs has issued against him; otherwise he is merely enjoined by name. Conceding the advantage of this practice, and notwithstanding it carries the weight of judicial sanction, it is difficult to see why the officer should be personally made a defendant, unless the bill charges and the proof shows liability on his part for the acts of the corporation.

In patent matters we frequently encounter the professional organizer—the prolific inventor whose morals are blunted by his estimation of the debt the world owes him. No sooner has a corporation or an individual gotten well under way in the manufacture of an invention assigned by him than he seeks fresh capital for the manufacture of a subsidiary or subordinate invention, perchance, as often occurs, when he is under agreement to assign all improvements to the assignee of the original invention. There can be no question of his liability along with the defendant corporation, whether he be an officer, director, or even a mere stockholder. The same is true in cases of mere paper corporations, organized to roam like the pirate of old, with or without color of letters of marque and reprisal, and to annoy and hamper the owner of prior rights, frequently for the unworthy purpose of endeavoring to force him to purchase. Such organizations being kept alive mainly through the monetary aid and personal influence of their officers, there should be no question of the latter's liability, not only to an injunction, but also to an accounting for damages. Often such organizations cannot be successfully reached in time to prevent them from doing serious damage, while an injunction against their officers would instantly forestall that which the corporation itself might otherwise accomplish. This rule has even been extended to the officers of a common carrier to prevent transportation by them of an infringing article.

A liability to an injunction does not conclusively establish accountability for damages or profits, and, conversely, liability for damages does not conclusively establish that an injunction may issue or an account for profits be ordered. One class of cases adopts the acceptance of the benefits, pecuniary or otherwise, springing out of the use or sale of

the patented article, or from the infringing act, as furnishing the test of liability, holding that all who derive such benefit are to be reckoned as guilty of the tortious act which makes it possible. These may be stockholders, as well as officers and directors; but, while the plaintiff may proceed to judgment against all, and while the judgment against one is not a bar to a trial and recovery against the others, yet there can be but one satisfaction. The complainant has the right to pursue the servants and agents and obtain the relief prayed for, although he is pursuing the principal at the same time in another suit for the same wrong. The rule established by these cases is that any person who has made a separate profit to himself out of the manufacture, use, or sale of infringing goods incurs a distinct and separate liability; and while it may be proper to confine the accounting to the corporation when it, in the first instance, derived all the profit, and the officers have profited merely in their capacity of stockholders in the shape of dividends, yet the officers may be made to respond if the corporation does not afford ample satisfaction. But the absence of such gain or advantage on the part of the officers in no way lessens their otherwise present liability. The rule also applies in cases of infringement by unincorporated associations. The infringing use, sale, or manufacture being a tort, each member is liable to be enjoined, and the extent of liability of each for profits and damages is purely a question of fact.

From many cases refusing relief against officers and directors sued individually, it is inferable that they might have been held liable had it been alleged or shown that the corporation itself was insolvent. But will insolvency alone establish personal liability on the part of the officers? In many of the States there are statutory provisions making

officers and directors personally responsible for the liabilities of a corporation under certain circumstances, as when they have been guilty of fraudulent acts. But all such personal liability for corporate wrongs is based on the principle that where, through fraud or carelessness in the management of its affairs, the corporation cannot respond to lawful claims arising from its contracts, the responsible officers or directors will have to answer. The same is true where, through dishonesty on the part of the officers, the corporation is rendered incapable of responding in a sum sufficient to satisfy the judgment. But insolvency alone, taken in the abstract and unattended by any other controlling factor, should not form the basis of individual responsibility, and the frequent refusal to hold officers liable because of failure to allege or establish want of solvency of the corporation is in itself misleading. And why should insolvency alone, when not caused by fraud or dishonesty on the part of the officers, make them personally answerable for the torts of the corporation any more than for its contract liabilities?

It is not difficult to comprehend the reluctance of some courts to hold officers and directors personally liable where the element of malice or willfulness is wanting. In other words, the tendency not to hold officers or directors responsible for infringements unwittingly committed, or where the question of infringement is not free from doubt, is often because of the conduct of such defendants subsequent to notice of the infringement being brought to their attention. Regardless of any primary obligation on the part of a corporation, the officers or directors responsible for the continuance of the infringement after knowledge of the complainant's claim become, if, indeed, they are not already, joint tortfeasors and are answerable as such. Many decisions appar-

ently seek a modification of the rule to the extent of exempting officers and directors from liability where they have not knowingly and with improper motives participated in or directed the commission of the infringing acts. But this is in the face of the rule that, as with other infringers, knowledge that the article manufactured and sold did infringe is immaterial.

The theory upon which the individual liability of officers has been denied is that an artificial person, the corporation, alone is the guilty actor, and none of its members or officials legally participate, as individuals, in acts done by it. This view is so contrary to the fundamentals of the law of torts and so in conflict with sound reason that it is impossible longer to accord it serious consideration.

The affirmance of the liability of officers and directors rests on the ground that all who take part in a tort or trespass are liable, and a man cannot retreat behind a corporation and escape liability for a tort in which he actually participated. In brief, every voluntary perpetrator of a wrongful act of manufacture, use, or sale is a tort-feasor, becomes *ipso facto* an infringer, is legally responsible, and, in addition to being enjoined, may be made to respond in damages. If there is any authority for holding that officers and directors of an infringing corporation, acting as its agents, are exempt from injunction and accountability for their own tort of infringement, it is the only instance known to the law where an agent may plead his agency in avoidance of liability for wrongs committed by him. There is no foundation in law for any such doctrine.