1893

The Liability of a Member of a De Facto Corporation

Lewis Castle Freeman
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Part of the Law Commons

Recommended Citation
Freeman, Lewis Castle, "The Liability of a Member of a De Facto Corporation" (1893). Historical Theses and Dissertations Collection. Paper 212.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The LIABILITY of a MEMBER of a DE FACTO CORPORATION.

-----0-----

THESIS.

By

Lewis Castle Freeman.

-----0-----

School of Law Cornell University.

-----0-----

Ithaca, New York.

June, 1893.
<table>
<thead>
<tr>
<th>CASES EXAMINED.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blanchard V. Kaul,</td>
</tr>
<tr>
<td>Bigelow V. Gregory,</td>
</tr>
<tr>
<td>R. R. Co., V. Clarke,</td>
</tr>
<tr>
<td>R. R. Co., Cary,</td>
</tr>
<tr>
<td>Bank V. Stearns,</td>
</tr>
<tr>
<td>Childs V. Smith,</td>
</tr>
<tr>
<td>Casey V. Galli,</td>
</tr>
<tr>
<td>Cotes V. Ferris,</td>
</tr>
<tr>
<td>Commissioners V. Bolles,</td>
</tr>
<tr>
<td>Congregational Society V. Perry,</td>
</tr>
<tr>
<td>Central Co., V. Valentine,</td>
</tr>
<tr>
<td>Cooper V. Shaver,</td>
</tr>
<tr>
<td>Camp V. Byrne</td>
</tr>
<tr>
<td>Coleman V. Coleman,</td>
</tr>
<tr>
<td>Chaffe V. Ludeling</td>
</tr>
<tr>
<td>Company V. Theobald,</td>
</tr>
<tr>
<td>Church V. Pickett,</td>
</tr>
<tr>
<td>Dooley V. Wolcott,</td>
</tr>
<tr>
<td>Dwight V. Peart,</td>
</tr>
<tr>
<td>Danbury V. R. R. Co., V. Wilson,</td>
</tr>
<tr>
<td>Dutchess Co., V. Davis,</td>
</tr>
<tr>
<td>Doyle V. Mizer,</td>
</tr>
<tr>
<td>Case</td>
</tr>
<tr>
<td>------------------------------------------</td>
</tr>
<tr>
<td>Eaton v. Aspinwall</td>
</tr>
<tr>
<td>Eastern Co. v. Vaughan</td>
</tr>
<tr>
<td>Eppes v. R.R. Co.</td>
</tr>
<tr>
<td>First Baptist Soc. v. Rapalee</td>
</tr>
<tr>
<td>Henriques v. Dutch Co.</td>
</tr>
<tr>
<td>Hughes v. Bank</td>
</tr>
<tr>
<td>Holbrook v. Ins. Co.</td>
</tr>
<tr>
<td>Heaston v. R.R. Co.</td>
</tr>
<tr>
<td>Harriman v. Southan</td>
</tr>
<tr>
<td>Jones v. Type Co.</td>
</tr>
<tr>
<td>Jackson v. Plumbe</td>
</tr>
<tr>
<td>Mc Farlan v. Ins. Co.</td>
</tr>
<tr>
<td>Mc Clinch v. Sturgis</td>
</tr>
<tr>
<td>Martin v. Fewell</td>
</tr>
<tr>
<td>National Bank v. Langdon</td>
</tr>
<tr>
<td>Narragansett Bank v. Silk Co.</td>
</tr>
<tr>
<td>Norris v. Stapps</td>
</tr>
<tr>
<td>Location</td>
</tr>
<tr>
<td>--------------------------------</td>
</tr>
<tr>
<td>Old Town B.F.Co., V. Veazie</td>
</tr>
<tr>
<td>Phaenix Co., V. Badger</td>
</tr>
<tr>
<td>Rennselaer B.F.Co., V. Wetsel</td>
</tr>
<tr>
<td>Richardson V. Pitts</td>
</tr>
<tr>
<td>Sparrow V. Kingman</td>
</tr>
<tr>
<td>Seacord V. Pendleton</td>
</tr>
<tr>
<td>Sixer V. Daniels</td>
</tr>
<tr>
<td>Schenectady B.F.Co., V. Thatcher</td>
</tr>
<tr>
<td>Smith V. Argall</td>
</tr>
<tr>
<td>Topping V. Bickford</td>
</tr>
<tr>
<td>Topping V. Bickford 4 Allen 121</td>
</tr>
<tr>
<td>Tar Co., V. Neal</td>
</tr>
<tr>
<td>U.S. Bank V. Btearns V.</td>
</tr>
<tr>
<td>Valk V. Crandall</td>
</tr>
<tr>
<td>Vredenburgburg V. Behan</td>
</tr>
<tr>
<td>Worcester Institute V. Harding</td>
</tr>
<tr>
<td>White V. Joy</td>
</tr>
<tr>
<td>Williams V. Bank</td>
</tr>
<tr>
<td>Waterville Co., V. Eryan</td>
</tr>
<tr>
<td>Wheaton V. Gates</td>
</tr>
<tr>
<td>Williams V. Cheney 3</td>
</tr>
<tr>
<td>Welland Canal Co., V. Hathaway</td>
</tr>
<tr>
<td>White V. Ross</td>
</tr>
<tr>
<td>Whitney Arms Co., V. Barlow</td>
</tr>
</tbody>
</table>
CASES CITED.

    Church v. Pickett, 19 N.Y., 482.
    Heaston v. R.R. Co., 16 Ind. 275.
    Harriman v. Southan, 16 Ind. 190.
    Childs v. Smith, 35 Barb. 45.
    Horowitz, Page 704.

    R.R. Co. v. Clarke, 26 Ky. 75.
    White v. Ross, 15 Abb. Pr. 66.
    Camp v. Byrne, 41 Mo. 535.


P.9,(1). Coleman v. Coleman, 78 Ind. 346.
    Kaiser v. Bank, 56 Ia. 104.
    Bigelow v. Gregory, 73 Ill. 200.
    Richardson v. Pitts, 71 Mo. 128.
    Holbrook v. Ill's. Co., 25 Minn. 229.
    Wattin v. Fewell, 79 Mo. 401.

P10,(1). Pettis v. Atkins, 60 Ill. 454.


P.13,(1). See Ante,
CASES CITED.

P.14,(1).Morawitz, Par.748.
   Cook, Par.424.
   Spelling, Par.829-38.
   Beach, Par.162.

(2).See cases cited on P.9,(1).

P.15,(1).Pomeroy's Equity J.P. Par.805.
P.19,(1).Welland Canal Co.,
    v.Hathaway, 8.Wend.480.
P.23,(1).Cook, Par.233.
The LIABILITY of a MEMBER of a DE FACTO CORPORATION.

---

Liability on Contracts.

The growth of corporations and of corporation law, is, in the main, the product of recent years. Corporations have become the favorite instruments of persons uniting themselves for trade or profit. Among the reasons for this is the fact that the nature of a corporation is such that it may be made up of so great a number of persons that large enterprises with corresponding chances of profit may be undertaken without the risk of ruin to any one of those interested. This is true only because of the limited liability of corporate members which is given by statutes. It is this fact which leads persons to enter or create a corporation rather than a partnership, burdened with its joint and several liability. The liability of a corporate stockholder is limited to the amount he has invested in the corporation, or at the worst, to but a limited amount in addition. A member of a firm, however, is liable to an amount limited
only by the extent of the liabilities of the firm.

This limited liability is the vital difference between a corporation and a partnership; one, the creature of statute, the other, of common law. This proposition being quite generally understood, by those who have money to invest, has the influence we have suggested.

But has every person who holds stock certificates which prima facie make one a member of a corporation, secured this great immunity? Has a person secured this limited liability when he becomes a member of a supposed corporation? A layman would probably answer that if a man did not become a member of a corporation he would not have that limited liability which is peculiar to a member of a corporation. But the question is not so easily disposed of, for it is answered both affirmatively and negatively by authority. This thesis is the result of an impartial investigation of the authorities and it is believed that the conclusions reached will be verified by a thoughtful examination and weighing of the authorities collated and cited.

The subject of our investigation is the liability of a member of a supposed corporation. Has he a liability of the same limited extent as that of a member of a member of a corporation de jure?

As we have suggested a de facto corporation is not a corporation. A corporation is created only when certain people are given a charter by a sovereign power, or
when, under general laws for incorporation, certain people called incorporators, comply with the provisions of these laws. A compliance with these provisions is a condition precedent to the existence of the corporation.

A solution of our problem involves the consideration of the whole subject of de facto corporations, so we will here state the conditions which are necessary to its existence and the kinds or divisions thereof. The first requisite is that there must be a law permitting the formation of a corporation. (1) The second is that there must be acts done or contracts made by the supposed agents of the supposed corporation.

There are we believe but two classes of de facto corporations; one which results from a bona fide but unsuccessful attempt to incorporate; the other which results from a bare-faced usurpation of corporate privileges. It might be thought that another class of de facto corporations would result where the corporation has expired and the members and officers continue to do business in the name of the corporation. In such a situation, however, it is held that the directors of a corporation, at its expiration, take all its property as trustees for the benefit of the stockholders, the cestuis que trust. (2) It was for this reason that the stockholders escape liability, in the case noted, as partners.

For our purposes, we may say, that a stockholder of a de facto corporation is liable only in two directions.
First:- To the corporation.

Second:- To third persons who contract with the
supposed agents of the supposed cor-
poration.

His liability to the de facto corporation until the
full value of his subscription is paid may be regarded
as settled and unquestioned. The authorities are unani-
mous that a stockholder of a de facto corporation is
liable when sued for calls. (1). This liability is based
on a stoppel, and, if I interpret the authorities correctly,
arises because he has allowed himself to be held out to
the public as a stockholder and must live up to his rep-
resentations so that the capital stock of the corpora-
tion, a trust fund for the benefit of creditors, may not
fade away like a phantom.

The extent of his liability to parties who contract
with the supposed corporation through its supposed officers or agents is not generally agreed upon. To a consid-
eration of this point we will direct our attention. We
will be aided in our investigation if we determine the
nature of a de facto corporation. What is a de facto cor-
poration? It is an association of persons who regard
themselves as, or assert that they are, members of a cor-
poration that does not exist. What are the various as-
associations recognized or created by statutes or Common
Law? How may social or business enterprises be carried
on other than by an individual? In the United States,
persons who unite themselves to carry out any enterprise
business or social, are members either of a corporation, a partnership, a joint stock association, or a club.

De facto corporations are not another sort of an association. The only questions about them are, first, under which of the above named classes do they fall, and this being determined, second, is the liability of a member of a de facto corporation modified or varied because he is a member of a de facto corporation? The second question will perhaps strike the reader as being confused but it is not. Any seeming confusion results from the coupling, as I think unfortunately, of the words “de facto” and “corporation”. We will later give our reasons for considering the term “de facto corporation” a misnomer. The thought of the above question can be expressed more clearly perhaps, though at greater length, as follows: When it is determined which of the four possible associations named, a corporation de facto is, is the liability, which attaches by law to a member of the association discovered, altered because the member thought himself a member of a corporation and because some third party has contracted with the supposed agent of the supposed corporation to which the member in question belonged.

For example suppose it were determined that a de facto corporation was a partnership. This alone however would not conclusively determine the liability of a member, for the partnership liability may be varied, first, by an express contract limiting the liability of a firm or a member in any way desired, or, second, by the presence
of an estoppel.

We have now, therefore, but two questions left for our consideration.

First:- What kind of an association is a de facto corporation?

Second:- Is the liability of a member of the discovered association varied either by express contract to that effect or by an estoppel?

We must keep in mind that an answer to the first question does not decide the second. It can do no more than raise a presumption as shown by our illustration above. First, then, is a de facto corporation a corporation, a partnership, a joint stock association or a club? A de facto corporation is not a corporation. On this point the authorities do not differ. This sounds paradoxical but even in those jurisdictions that have given to the members of a de facto corporation the rights and powers, privileges and immunities of members of a corporation de jure, the decision has been solely upon the ground of estoppel. (1). This, in itself, shows that what is called a corporation de facto is not a corporation, that it is another sort of an association but that the person interested cannot show the truth.

It is unfortunate that the books use the terms corporation de facto and corporation de jure. The term corporation de facto seems to us to be a misnomer, while to affix "de jure" to the word "corporation" seems unnec-
ecessary. Prima facie it would indicate that corporations are divided into these two classes. This is not true. It would be as accurate to divide men into men that are men, and men that are \( \text{men} \). Such a division would doubtless convey a meaning but it would be neither physiologically nor legally correct. Accurately speaking all corporations are corporations de jure. Corporations are artificial creatures of the law. They can come into existence only by a strict compliance with those mandatory provisions of the law which permit their formation. If these then are not complied with, there is no corporation created. Obvious as the above is, it should not be left unstated, for it prepares the way for all that follows.

Since then a de facto corporation is not a corporation, is it a partnership? An overwhelming weight of authority holds that it is. To decide this point it is only necessary to recollect what a partnership is and how it is formed. The best definition of a partnership is that of Pollock viz:—"Partnership is the relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them." It seems to us that a de facto corporation falls within this definition and so is a partnership. Whatever else may be in the minds of the members, they assume a voluntary relation to one another making a contribution to a common fund with an agreement to share the profits of an enterprise conducted on be-
half of all of them. No articles of partnership are necessary for the existence of the relation. Nor is it necessary that they should assume this relation with a full understanding of what such acts involve. As to third parties, at least, one who assumes such an attitude will be held liable as a partner, if he holds such a relation, no matter what his intent or understanding was in assuming it. (1) A case which is cited as authority against our position has dicta to the effect that persons to become partners must unite with such an intent. (2) I think that this is not sound. Whether or not persons are partners depends upon the relation they have actually assumed. The term partnership describes a relation existing between people. If the relation exists the term is applicable.

The question then is as to the relation existing between members of a de facto corporation? All the essentials of a partnership are present, and, with regard to third persons who have dealt with them or their agents, they must be held as such. Whatever they might have thought it is not the policy of the law to permit persons to escape a liability which they have incurred through their own negligence. Among themselves, however, the rights and liabilities of one partner may be governed by express contract or by the fraud of those who induced them to enter into such a relation.

Since then there is so much of authority, and of reason, independent of authority, for holding members of a
de facto corporation liable as partners, are de facto corporations never held to be either a joint stock association or a club? The only authority that I have found giving light on this point is a Pennsylvania case where the members of a Masonic Lodge who had purchased realty were not held to a partnership liability but the rules determining the liability of a club member were applied and only those who ratified the transaction were held responsible.

Independent of authority, the test proposition by which to determine under which class of associations a particular de facto corporation should be placed might be to ask: What sort of a common law association it would ordinarily be, to accomplish the end for which it was established? For example, if the purpose of the organization is social in one case, regard it as a club, but, if in another case its object be business, consider it a partnership. Whatever the future may bring forth, we believe that we have clearly indicated that at present the authorities are practically unanimous in holding directly and indirectly that a de facto corporation is a partnership. This fact, however, as we have said before, does not determine the liability of a member of a de facto corporation. It does, however, raise a strong presumption.

We have now reached the last question which demands our consideration. Has the regular partnership liability
been varied? If that liability has been changed by express contract, the extent of the liability of the party sought to be charged will depend entirely upon the provisions of the contract. This can be disposed of briefly.

But a partnership liability may be changed by estoppel. The presumption then being that a member of a de facto corporation is liable as a partner, it will in every case rest upon him to prove that the party against whom he would raise an estoppel made representations to him or his agent in consequence of which and relying solely upon which he entered into the contract. If he can show this, the reason for an estoppel exists and it is present. Special cases such as this, however, are rare and there is no question as to the result in such a case.

Whether or not an estoppel exists, in each case rests upon questions of fact. Did a person say or do those things which are necessary to raise an estoppel? The question of importance then in every case is, are the facts found sufficient to raise an estoppel? Having reached this conclusion we must consider what is ordinarily the situation in the case of a contract made with a de facto corporation. It is simply this, a person other than a member enters into a contract with a person who holds himself out to be the agent of a corporation. If the transaction is completed, performed by both parties, no question should arise, for there is no doubt but that a
A de facto corporation has power to contract. There is no doubt but that a de facto corporation has all the rights and privileges which an unincorporated association has. As we have shown, a corporation de facto is not a non-entity. It is simply not a corporation. The authorities do not show a single instance where a contract made with a de facto corporation was held null and void, as would be the case if there were but a single party to the transaction. The difficulty arises where the contract, be it express or implied, remains executory upon the part of the supposed corporation, and it becomes insolvent. The members of a de facto corporation are members of a partnership or a club or a joint stock association. This then determines a creditor's rights unless they, by his own acts, have been impaired. Assuming then that they have not been relinquished by any express contract to that effect or by any specific conduct which would of course raise an estoppel against him, we have only to consider whether the ordinary contract made by a de facto necessarily involves such conduct upon the part of the other party as will raise an estoppel against him and bar the rights which otherwise he would have.

How therefore is a contract ordinarily made by a de facto corporation? What is the situation? Without mul-
tiplying illustrating, the facts in every case must be substantially these. The members of a de facto corporation through the officers whom they elect, represent to the public that they are a regularly organized corporation. Nothing is said by either party as to the liability of the members of the association. To illustrate, the proper officers of a de facto corporation order goods. The goods are supplied. The question then is, does such conduct on the part of a person contracting with a de facto corporation, raise an estoppel? On this point authorities squarely differ but even on this precise point opinion is by no means evenly balanced. If Morawitz holds that the making of a contract with a de facto corporation raises an estoppel, Cook and Spelling are of a contrary opinion. But it is from an examination of the cases themselves, with reference to this particular point, that we have come to the conclusion that, wherever this precise point has been considered and the decision has not been based upon other grounds, the overwhelming weight of authority holds that there is no estoppel; that the bare making of a contract with a de facto corporation does not effect a surrender of those legal rights which are unmentioned at the time and unprovided for in the contract. That we may however reach a conclusion of our own, founded upon reason, let us examine the nature of an estoppel. What conduct is suf-
ficient to raise an estoppel? Pomeroy states that there are six essentials to an estoppel.(1)

First:- There must be conduct, acts, language or silence amounting to a representation or concealment of material facts.

Second:- These facts must be known to the party estopped at the time of his said conduct or at least the circumstances must be such that a knowledge of them is necessarily imputed to him.

Third:- The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him.

Fourth:- The party against whom an estoppel is claimed must have made the representations with an intention that they be acted upon.

Fifth:- The party representations or conduct must be relied and acted upon by him claiming the benefit of an estoppel.

Sixth:- The party claiming the estoppel must in fact act upon the representations in such a manner that he would suffer a loss if he were compelled to surrender or forego or alter what has been
done, by reason of the first party being permitted to repudiate his conduct and assert rights inconsistent with it.

With these essentials in mind, let us recall the two classes of de facto corporations and examine the conduct of the parties to a contract made by either class and ascertain if the requisites of an estoppel are present in either case. First, we will take the case of a contract made by a de facto corporation which has resulted after a bona fide attempt to incorporate. Let us remember that there is nothing else present to work an estoppel except the bare making of a contract. Taking the first and second essentials together for the sake of brevity, we see that in the case of an ordinary contract made by a de facto corporation they are not present. Even supposing that by the finest sort of spinning you could make it appear that a failure to deny statements made to you can have the effect in law of making them your own representations made to the person making them to you, the facts are not known to the person, claimed to be estopped, at the time of his said conduct nor are the circumstances such that a knowledge of them is necessarily imputed to him. Silence never amounts to representations unless one conceals facts which it is a duty to disclose. Applying this to the case in point, we see that one to whom statements are made does not conceal facts which he ought to
to disclose; for he has no knowledge of them beyond what he is told. Nor is he put upon inquiry, to ascertain the truth of the statements made to him, in order to prevent the raising of an estoppel; for one can not gain a vantage point in the field of legal action by the aid of untruths. One can not take advantage of his own wrong.

Since the conduct of a person barely contracting with a de facto corporation does not amount to representations, the fourth essential is not present. But notice particularly the fifth requisite which makes it essential that the conduct of the party estopped be such, that the parties claiming an estoppel, solely relied and acted upon it. This again, it seems to us, conclusively shows the non-existence of an estoppel in the case before us. A member of a de facto corporation is not led to the assuming of a privity of contract with a person dealing with the supposed corporation simply because a person at his direct or indirect request enters into a contract with him. The reasons which influence him to act are other and many, as the fact that he believed himself a member of a regularly organized corporation and the reasons for such a belief. Even in a case where the representations of one would be sufficient to raise an estoppel but the other acts from a reliance upon other facts, or a duty rests upon him to ascertain the truth of the representations made to him or he has an opportunity to find out, there can be no estoppel.

We will now take up the second class of de facto
corporations, those that arise from a male fide usurpa-
tion of corporate powers. All that has just been said of
the first class of de facto corporations equally as
well to this variety, with the following in addition.
You will remember that the third essential of an estoppel
was that the truth concerning the facts represented
must be unknown to the party claiming the benefit of an
estoppel at the time when such conduct occurred and at
the time it was acted upon. In the case of a bare usur-
pation, you see the force of the above at once. Clearly
this is another point, if another were needed, that shows
the impossibility of the existence of an estoppel in the
case of an ordinary contract made with a de facto corp-
oration.

While even if it could be sustained with a shadow of
reason that the mere making of a contract with a de facto
is conduct which amounts to representations on the part
of the one contracting with it, yet there are, as we have
indicated, a lack of other and necessary elements which
constitute an estoppel. The point which we wish we wish
to have stand out clearly is that the making of a contract
with a de facto corporation does not involve conduct, upon
the part of a person contracting with a de facto corpor-
ation, sufficient to raise an estoppel changing the lia-
bility of the members of a de facto corporation. Is the
mere making of a contract with a de facto corporation
sufficient to raise any estoppel against the person con-
tracting? It certainly is. By the making of such a contract one recognizes the right of the association to contract as an association but nothing more. (1). That is, he cannot afterwards escape performance of the contract by asserting that since there was no corporation he contracted with a creature of straw and so was in no way bound. As an unincorporated association has power to contract, one contracting with a de facto corporation does not recognize any power which is peculiar to a corporation. The misapprehension which exists concerning a de facto corporation arises, it seems to us, because while not a corporation, authority unanimously and properly gives to them many powers and rights which are exercised by a corporation de jure. This being so the presumption naturally suggested is that since they have these privileges they should, with regard to the persons with whom they contract, have all the rights and immunities, powers and privileges of a corporation de jure. This misapprehension springs from a mistaken idea as to the true status of a de facto corporation. It is an unincorporated association. It is not a non-entity vitalized for the moment by the operation of an estoppel. The reason for its having so many of the rights of a corporation is that an incorporated society has but few powers and privileges which cannot be enjoyed by the unincorporated society. Conceding then to a de facto corporation almost all the powers of a corporation, if they
have also those peculiar to a corporation they must have been gained by express contract or by estoppel; for there are but three ways by which a limited liability can be gained namely:— by statute, by express contract, or by the operation of an estoppel. We trust, for much more might be said, that we have indicated at sufficient length that the making of a contract with a de facto corporation does not involve conduct sufficient to raise an estoppel.

It would be of advantage just here, it would seem to us, in our consideration of estoppel to consider, by way of contrast, such conduct in the making of a contract with an unincorporated association as would be sufficient to raise an estoppel and change the liability of its members. One wishing to make a contract with them says: You need not hesitate to enter into this for in case of trouble your liability is small and limited, you are members of a corporation and as such are of course not liable jointly and severally. Strong as this language is and while prima facie it would raise an estoppel yet it may not. These words are the strongest sort of a representation but the truth concerning these facts may not be unknown to the other party claiming the benefit of an estoppel, and he may not have relied solely upon the statements made to him. He may have had other reasons which led him to believe that his liability was limited, et cetera. So it is that should a party contracting with a corporation de facto, actually make representations, that it is possible and even probable that the second, third and
fifth essentials enumerated by Pomeroy are absent.

This being true in a case where representations are actually made by one contracting with a de facto corporation, consider how much more unlikely it is that an estoppel is present in the case of an ordinary contract of a de facto corporation where the association itself seeks the contract, showing whether that they have reason to believe that their liability is limited or, that knowing the contrary to be true, they are making fraudulent claims believing that they can gain an advantage through their own wrong and so secure that great immunity peculiar to members of a corporation. So much from this point of view. Having as we believe set forth our investigations, at length to justify our conclusions, we shall but briefly consider other points from which additional support may be gained.

Fraud in law vitiates everything. The question then that we would propose is, are the representations made by the members of a de facto corporation, that their association is incorporated, fraudulent? That a statement may be fraudulent, it must be a representation of a material fact made with a knowledge of its falsehood or in reckless disregard of the truth. In the case of a de facto corporation arising from a bare usurpation of corporate powers, the representations are undeniably fraudulent. In the case of a de facto corporation arising from a bona fide but unsuccessful attempt to incorporate the representations are none the less fraudulent. It may happen
in either class of the above associations that a member actually believes that he is a member of a corporation, de jure, but beyond doubt, it seems to us, that such representations fall within that class of statements false because made with a reckless disregard of the truth. Does not a legal duty rest upon the member of any association to know of what sort of an association he is a member? Who should know if he should not? If he does not know it is the result of his own negligence. Statements made with no better a foundation than this cannot be regarded as bona fide. (1). Since then the representations of a member of a de facto corporation are made, in the eyes of the law, with mala fides, can they have changed their position, can they have secured immunity by a mere recital of untruths? Can an estoppel, resting upon equity and good conscience, be raised upon a tissue of falsehoods?

Another proposition which is frequently met with in discussions of de facto corporations is that only the sovereign power which creates corporations can unmake them; that a defect in incorporation can only be objected to by the sovereign power. This statement is not altogether untrue. Given a corporation which has done some act which makes it liable to forfeit its charter, this statement is pertinent but it applies only to a corporation, de jure. When it is necessary for the creation of a corporation that provisions of the law be complied with that are conditions precedent to incorporation and these provisions have not been complied with, as is the
case of a corporation de afacto, this rule is inapplicable. Briefly the situation is this. Only the State may take advantage of a failure to comply with a condition subsequent to incorporation because a contract has been made between the State and the incorporators; But a failure to comply with those provisions of the law which are necessary to incorporation does not alter the legal position of those at fault. Through their fault the State has not been brought into the transaction, it is not a party to it, it has not created an artificial person who shall stand between the supposed incorporators, members of the association and the persons with whom they deal. Neither party is prevented or protected, from fighting his own battles and having the same rights and powers as he would have had, if a corporation had not seemed to exist because, as it were, of an optical delusion.

We shall close with a consideration of but one other point. It is elementary in the law of contracts that there can be no contract unless the minds of the parties gave met. We find it said in discussions of de facto corporations that to permit one who has contracted with a de facto corporation, to hold the members as partners, on learning that the conditions precedent to incorporation have not been complied with, would be to permit the repudiation of a contract and the enforcement of a new one which was never made. Whether or not this is true depends upon the question, is it necessary to the validity of a
contract that the minds of the parties should meet upon the extent of the liability of either? Is it necessary in the making of a contract that this liability be understood or agreed upon? We think not. The extent of one's liability is a question of law, a rule of law. A liability imposed by law may be varied but the presumption is against it. If then in the making of a contract the liability is not varied, the law of course determines it. The fact that one of the parties thought one way and the other, another, is of no legal importance. One may have contracted with a mistaken idea as to what the law was but ignorance of the law excuses no one. For these reasons we object to the above statement and insist that an attempt to enforce a liability imposed by law upon a party to a contract is not the rescission of one contract and the enforcement of a new one never made; it is merely the taking advantage of those remedies provided by law for a party who has fulfilled his part of the contract. We find illustrations that support our view in the case of contracts made by the agent of an undisclosed principal and in contracts made by a firm in which there are dormant partners. A party contracts with one or the other, with no knowledge of a security beyond the personal liability of the agent or of those who represent themselves as composing the firm. If it becomes necessary for him to enforce the contract through law, and he endeavors to collect from the undisclosed principal or the dormant partners
ners, he is not repudiating an old contract and enforcing a new.

Liability may rest upon questions of fact but the facts being determined, the liability is a question of law. The liability of parties to a contract, being a matter of law, is conclusively presumed to be in the minds of the parties and is, as it were, written into the contract.

---0---

Liability for Torts.

In this class of cases, the question of estoppel cannot arise. Therefore no privilege of corporate membership can be even claimed for a member of a de facto corporation.

Few cases of this sort are to be found in the reports. In Louisiana, where a case arose, the members of a de facto corporation were held individually liable as joint tort feasors.(1)
CONCLUSIONS.

I. A de facto corporation is an unincorporated association.

II. A contract between a de facto corporation and third parties does not involve conduct sufficient to raise an estoppel, changing the liability of members.

III. One may sue the members of a de facto corporation as partners.

IV. (Emblem) That the representations of a member of a member of a de facto corporation, to the effect that their association is incorporated, are fraudulent.

V. The holding of members to their common law liability is not the repudiation of an old contract and the enforcement of a new one.