

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1927

Admission by Officers of a Corporation

Edward W. Hinton

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Edward W. Hinton, Comment, "Admission by Officers of a Corporation," 22 Illinois Law Review 301 (1927).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

be made to bear a construction that will support the result reached in this case. The great judge in that case said:

"The distinction is very clear: Where mutual covenants go to the whole consideration on both sides, there they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent."

But the two provisions of the agreement in the case under discussion were not mutual covenants going "to the whole of the consideration on both sides." The buyer did not contract solely for an extension of time within which to remove the timber, nor did the seller contract solely for the buyer's reasonable efforts to remove the timber. The substance of the consideration given by the seller was his transferring, or his covenant to transfer, the timber, and by the buyer his promise to pay the purchase price. The principle of *Boone v. Eyre* might be authority for saying that the covenants to buy and sell are mutually dependent covenants, and therefore the performance of one should be a condition precedent to the duty to perform the other, but unusual powers of imagination are required to see how the principle of that case can be authority for holding that "the covenant to extend, and the covenant to make reasonable efforts to cut and remove the timber within five years are dependent covenants the performance of the latter by the purchaser being in effect a condition precedent to the purchaser's right to require the vendor's performance of the former."

GEORGE W. GOBLE.

EVIDENCE—ADMISSION BY OFFICERS OF A CORPORATION.—
[United States] A recent opinion¹ by the Supreme Court in one of the famous oil cases presents an unusual problem in the use of admissions by an officer of a corporation. The United States filed a bill in equity against the Doheny Oil Companies to cancel certain leases of oil lands which Secretary Fall had made to them. One of the grounds relied on was that Doheny had furnished \$100,000 to Secretary Fall by which he had been improperly influenced in the negotiations. The facts are more fully set out in the report² of the case in the circuit court of appeals.

It appears from that report that Doheny was the president of each company and that he carried on the negotiations which resulted in the execution of the leases. Afterward the Senate appointed a committee to investigate the oil leases executed by Secretary Fall. Doheny voluntarily appeared and testified in this investigation

this part is immaterial and comparatively unimportant, and leaves unperformed the substantial part of his undertaking, he may nevertheless recover from the defendant. Modern cases do not support the doctrine. See 2 *Williston "Contracts"* (1920) sec. 822; *Costigan "Performance of Contracts"* (1927) 96, 97.

1. *Pan-American Petroleum Co. v. United States* (1927) 47 Sup. Ct. 416.

2. *Pan-American Petroleum Co. v. United States* (1926) 9 Fed. (2nd) 761.

that while the negotiations were in progress he furnished \$100,000 to Fall as a personal loan, etc. At the trial in the district court Doheny claimed privilege and was not compelled to testify. The district court admitted proof of Doheny's testimony before the Senate committee to prove the alleged payment to Fall. This evidence was received over the objection of the defendants, "that said statements were not shown to have been made as a part of any transaction of the defendant corporations, or as a part of the res gestae of any corporate transaction, or under circumstances showing any express or implied authority to appear before the Senate committee and speak for said corporations."

The court of appeals sustained the admission of this evidence on the ground that it sufficiently appeared that Doheny was acting within the scope of his authority as an officer and agent of the defendant corporations, and that his statements before the investigating committee were therefore imputable to them.

The Supreme Court affirmed the ruling on the following reasoning:

"The finding that Doheny caused the \$100,000 to be given to Fall is adequately sustained by the evidence. Early in 1924 during the investigation of these contracts and leases by the Senate committee, Doheny voluntarily appeared as witness and there gave testimony for the purpose of explaining the money transaction between him and Fall at the time the initial contract was being negotiated. At the trial of this case over objections of the companies, his statements before the committee were received in evidence. Petitioners insist that they were not admissible. But Doheny acted for both companies when the contracts and leases were negotiated. He controlled the voting power of one that owned all the shares of the other. He was President of the Petroleum Company up to July 24, 1922, and then became chairman of its board. He was President of the Transport Company until December 7, 1923, when he became chairman of its board. He was chairman of both when he testified. There is no evidence that his control over or authority to act for these companies was less in 1924, when he appeared for them before the committee, than it was in 1921 and 1922, when he negotiated and executed the contracts and leases. The companies were much concerned as to the investigation lest it might result in an effort to set aside the transaction. The hearing before the committee was an occasion where it was proper for them to be represented. Doheny had acted for them from the inception of the venture. The facts and circumstances disclosed by the record justified the lower courts in holding that, when he testified before the committee, he was acting for the companies within the scope of his authority. His statements on that occasion are properly to be taken as theirs, and are admissible in evidence against them. *Chicago v. Greer* 9 Wall. 726, 732, 19 L. Ed. 769; *Xenia Bank v. Stewart* 114 U. S. 224, 229, 5 Sup. Ct. Rep. 845, 29 L. Ed. 101; *Fidelity & Deposit Co. v. Courtney* 186 U. S. 342, 349, 351, 22 Sup. Ct. Rep. 833, 46 L. Ed. 1193; *Aetna Indemnity Co. v. Auto-Traction Co.* (C. C. A.) 147 Fed. 95, 98; *Joslyn v. Cadillac Co.* (C. C. A.) 177 Fed. 863, 865; *Chicago, Burlington & Quincy R. R. Co. v. Coleman* 18 Ill. 297, 298, 68 Am. Dec. 544."

If the "facts disclosed by the record" justified the district court in holding that Doheny was speaking for his companies

within the scope of his authority, when he testified before the Senate committee, the admissibility of his statements would seem to follow as a matter of course. The cases³ cited in the opinion are not precisely in point because they all seem to involve situations where the statements of the officer or agent were made in connection with, or as a part of, negotiations or transactions which such officer was actually or presumably authorized to carry on. But the pendency of some negotiation or transaction is not essential. The important consideration is that the agent has authority to speak for his principal and does speak for him within the scope of such authority.

Thus in a leading case⁴ a state board conducted an investigation of a forest fire. A railroad company was represented by attorneys at the investigation, and submitted a report by one of its officers as to the condition of its right-of-way. In subsequent litigation by a third person this statement was held admissible against the defendant railroad. In short, if A is authorized to speak for P, whether in reference to a present or a past transaction, and does speak for him as authorized, such statements are receivable against P to the same extent as if he had made them in person.

On the other hand, it is equally clear that the hearsay rule shuts out the statements unless they were in fact made on behalf of the principal and by his authority. And this rule applies equally to the statements of officers and agents of corporations.⁵

In the principal case the statement was made under oath, but that fact, while unusual, is not decisive. An agent might be authorized to make an affidavit on behalf of his principal. The admissibility of Doheny's sworn statements, then, depends on the fact that he made them on behalf of the defendant companies by their authority. On such a question the government had the burden of establishing the facts essential to admissibility.⁶ The position of Doheny as one of the chief officers of each company doubtless warranted the conclusion or assumption that he had a discretionary authority to appear before the Senate committee as their spokesman if he thought it advisable to do so.

The difficult question is to determine whether he in fact appeared as the representative of the corporations, or as an ordinary witness in his individual capacity. On that precise question it is to be regretted that the facts are not more fully set out in any of the reports of the case. The only fact particularly noticed is that Doheny voluntarily appeared and testified before the committee. This would seem to mean that he appeared without the service of a subpoena, but whether at the suggestion or invitation

3. *Chicago v. Greer* (1869) 9 Wall. 726; *Xenia Bank v. Stewart* (1885) 114 U. S. 224; *Fidelity Co. v. Courtney* (1901) 186 U. S. 342; *Aetna Indemnity Co. v. Auto Traction Co.* (1906) 147 Fed. 95; *Joslym v. Cadillac Co.* (1910) 177 Fed. 863; *C. B. & O. R. R. Co. v. Coleman* (1857) 18 Ill. 297.

4. *Christy v. N. Y. C. R. R. Co.* (1917) 90 N. J. L. 540.

5. *State Bank v. Brocton Fruit Co.* (1913) 208 N. Y. 492.

6. *Louisa Co. Natl. Bank v. Burr* (1924) 199 N. W. 359.

of the committee, or solely on his own motion, is not stated. If he had appeared in obedience to a summons there would clearly be no room for a conclusion that he appeared in any other capacity than that of an ordinary witness.⁷ For example, in the *Louisa County Bank* case, the president of the bank had been summoned and testified as a witness at a bankruptcy hearing, and it was held that his testimony on that occasion could not be used against the bank in subsequent litigation. Yet he would have doubtless been authorized to speak for his bank in these matters if he had chosen to do so.

If Doheny had had no other interest in this investigation except as an officer and stockholder of the companies, his voluntary appearance might very well lead to the conclusion that he was appearing on their behalf and as their spokesman. But Doheny had a distinct personal interest in the matter. The Senate investigation might, and in fact did, lead to a criminal prosecution. It is just as conceivable, in the absence of any further facts, that Doheny appeared for personal and private reasons to explain rumors and suspicions that suggested misconduct on his part.

Under these conditions it is far from clear that Doheny's voluntary appearance warranted a conclusion that he assumed to speak for the corporations.

E. W. HINTON.

INTERSTATE COMMERCE—CLAYTON ACT—CONSTITUTIONAL LAW—JURISDICTION OF FEDERAL TRADE COMMISSION.—[United States] The perennial problem "what is interstate commerce?" so as to justify federal regulation or give rise to a federal question for purposes of jurisdiction, seems never to be conclusively settled by the courts. The United States Supreme Court has said that technical treatment is inadvisable or impossible, but that the conception of interstate commerce is a "practical one, drawn from the course of business."¹ Definition and delimitation in this field do not seem possible; after one has read all the cases on the various relationships involved in the question of interstate commerce, he seems unable to predicate a rule of precise boundaries for the next set of relationships. Prophecy and generalization in this vast field of continually shifting relationships, while of value, cannot be too dogmatic; new cases with new angles will always arise that may defeat the principles laid down, or call for variable application.

In a recent case² the federal Supreme Court had before it for decision the question how far a contract of sale of personalty, which contract was made entirely within the state between the parties therein, but contemplating an interstate shipment, was "interstate

7. *St. Charles Savings Bank v. Denker* (1918) 205 S. W. 208; *Louisa County Natl. Bank v. Burr* (1924) 199 N. W. 359.

1. *Swift & Co. v. United States* (1905) 196 U. S. 375, 398, 25 Sup. Ct. Rep. 276, 49 L. Ed. 518.

2. *Federal Trade Com. v. Pacific States P. T. Assn.* (1927) 47 Sup. Ct. Rep. 255, 71 L. Ed. 321.