INSULATION FROM LIABILITY THROUGH SUBSIDIARY CORPORATIONS*

WILLIAM O. DOUGLAS AND CARROL M. SHANKS

I

While the desire for limited liability has played its part in increasing the use of the corporate device among the smaller industrial units, it alone is not responsible for such extensive use of the corporation among the larger industrial units. A primary factor there has been absentee ownership, attendant on the wide distribution of securities. The corporate device has lent itself peculiarly well to the public marketing of securities and to the evolution of a management structure in which the so-called owners play insignificant roles. The factor of limited liability has not been unimportant. It merely has not been paramount.[1] The same can be said for the evolution that has taken place within the business units using the corporate form. Recent years especially have seen an increasing use of the subsidiary-parent structure. The farthest point along this line of evolution has been reached in the public utility field. But other businesses have adopted it and used it extensively. The reasons for the use of this structure are manifold. The increased facility in financing; the desire to escape the difficulty, if not the impossibility, of qualifying the parent company as a foreign corporation in a particular state; the avoidance of complications involved in the purchase of physical assets: the retention of the good will of an established business unit; the avoidance of taxation; the avoidance of cumbersome management structures; the desire for limited liability, are among the primary motives.[2] The desire for limited liability has been merely one among many factors. And at times it has appeared to recede.

Yet in spite of this apparent recession no one would claim that the availability of limited liability played an insignificant part in the expansion of industry and in the growth of trade and commerce. It has had a potent influence. Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it. It is legiti-

* Parts I and II of this article were written by Mr. Douglas, and Part III by Mr. Shanks.

[1] See VEBLEN, ABSENTEE OWNERSHIP (1923), especially c. V.

[2] See DEWING, THE FINANCIAL POLICY OF CORPORATIONS (1926) 753-783.

mate for a man or group of men to stake only a part of their fortune on an enterprise. Legislatures, courts and business usage have made it so. Each has taken the extreme but logical step of allowing *one* man to do what one thousand men may do. The use of dummy incorporators has received high judicial sanction. There need be but one economic interest, as long as the substantive provisions of the statute are satisfied.[3] To be sure the use of the word "person" in the statutes describing who may be incorporators permits the interpretation that a corporation does not fall within this category. And it has been so held.[4] But the same result may be reached by dummy incorporators who after incorporation transfer their shares to the corporation.[5] And a usage, which is fast becoming inveterate, sanctions it. If there is no incorporation of a new business but merely the acquisition of an established one, in absence of legislative prohibition the shares of such company may be acquired by another corporation so long as the acquisition comes within the scope of the purposes set forth in the charter of the latter. This rule is likewise well established.[6]

The problem here is to ascertain the manner of organization and operation which is necessary in order to secure the insulation from liability which the organizers desired and which the legal system permits. Little will be gained by seeking to ascertain what a corporation is. It is not a thing. It is a method. It defies definition when removed from the background of the purpose attempted to be accomplished and the manner of accomplishing it. When defined as a method the definition varies. The definition for one purpose may be totally different from the definition for another. So the utility in a definition is lacking. In the approach there is no room for theorizing in respect to the.

---

[3] Elenkrieg v. Siebrecht, 238 N. Y. 254, 144 N. E. 519 (1924); Salomon v. Salomon & Co. Ltd., [1897] A. C. 22. See Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531 (1893).

[4] Factors' & Traders' Insurance Co. v. New Harbor Protection Co., 37 La. Ann. 233 (1885); Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002 (1893); Nebraska Shirt Co. v. Horton, 3 Herd. 888, 93 N. W. 225 (Neb. 1903).

[5] Kardo Co. v. Adams, 231 Fed. 950 (C. C. A. 6th, 1916).

[6] State v. Missouri Pac. Ry., 237 Mo. 338, 141 S. W. 643 (1911); Clark v. Memphis Street Ry., 123 Tenn. 236, 130 S. W. 751 (1910). For typical statutes see DEL. REV. CODE (1915) 948, § 1991; MD. ANN. CODE (Bagby, 1924) art. 23, § 9. For cases where the purchase or acquisition was held not to be within the charter powers or fairly incidental thereto, see People v. Pullman Car Co., 175 Ill. 125, 51 N. E. 664 (1898); Central Railroad Co. v. Collins, 40 Ga. 582 (1869).

The statute may create a prohibition. State v. Atlantic City and Shore R. R., 77 N. J. L. 465, 72 Atl. 111 (1909); Franklin Bk. v. Commercial Bk., 36 Ohio St. 350 (1881); ILL. GEN. CORP. ACT (1919) § 8; MASS. GEN. LAWS (1921) c. 156, § 5.

corporate entity.[7] The sole concern need be only with the purpose and the means of attaining it.

On analysis the problem resolves itself into one of allocation of losses. The issue is whether the loss resulting from a contract or tort claim against the subsidiary will be placed on it or on the parent. In the following discussion it is assumed that such a claim exists against the subsidiary. It is also assumed that the incorporation provisions of the statute have been fully complied with both by the parent and by the subsidiary. For analytical reasons the cases will be grouped according to whether the claim is tort or contract.

II. TORT

The statement that the insulation will be broken down when the subsidiary is an "agency," "adjunct," "instrumentality," "alter ego," "tool," "corporate double," or "dummy" of the parent is not helpful. These concepts themselves need defining. At best they merely state results. And the results are significant only in light of the facts. The conclusion that the parent will be held liable only when the use of the subsidiary is a "cloak for fraud" or is "inequitable," "unjust," or "unconscionable" also falls short of describing the standard of conduct which the facts of most of the cases permit. The facts deal with the manner and method of organization and operation.[8] It is with those facts

---

[7] For an extremely good statement of this viewpoint, see the language of Bijur, J., in Farmers' Loan and Trust Co. v. Pierson, 130 Misc. 110, 119, 222 N. Y. Supp. 532, 543 (Sup. Ct. 1927).

See also Dewey, *The Historic Background of Corporate Legal Personality* (1926) 35 YALE L. J. 655; and (1926) 36 YALE L. J. 254.

[8] As said by Cardozo, J., in Berkey v. Third Avenue Ry., 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926): "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an 'alias' or a 'dummy.' All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation."

The following table listing the various types of organization and operation will prove useful:

1. Ownership of all of the stock of the subsidiary.
2. Ownership of a majority of the stock of the subsidiary or the controlling interest therein.
3. Ownership by the same persons of the stock of both corporations.
4. Sufficiency or insufficiency of the capital of the subsidiary as measured by that employed in normal competitive units.
5. Degree to which the subsidiary was financed by the parent.
6. The method of such financing.
7. The extent to which there was a common directorate.
8. The extent to which there were common officers and employees.

that we are concerned. They vary and appear in many combinations. In order to ascertain the proper combinations which will assure the parent the desired insulation and to reveal those combinations that have proved fatal to limited liability, an analysis of the many types of organizations is essential.

Ownership of all or a majority of the stock of the subsidiary or a controlling interest therein or ownership by the same persons of all or a majority of the stock of both companies appears as a constant. In the discussion which follows it can be assumed that it is present. Otherwise the problem would normally not arise. It is well established that such ownership alone does not suffice to destroy the non-conductor of liability.[9] It is tacit in that conclusion that the exercise of the "control" which stock ownership gives to the stockholders, either by statute, judicial decision, or normal corporation procedure, will not create liability beyond the assets of the subsidiary. That "control" includes the election of directors, the making of by-laws, increasing or decreasing the authorized capital stock, and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some[10] or all[11] of the directors or executive officers be fatal. The fact that the constitution and organization of the management of each are the same does not mean that the business identities of the two units are assimilated.

The observance of the following four standards will keep the business units from being treated as assimilated: (1) A separate financial unit should be set up and maintained. That unit should be sufficiently financed so as to carry the normal strains upon it.

---

9. The extent to which separate meetings of stockholders and directors were held.
10. The extent to which both had common departments of business.
11. The degree to which contracts between the two were favorable to one rather than the other.
12. The extent to which separate books and accounts were kept.
13. The extent to which an officer or director of one was permitted to determine the policies of the other.
14. The extent to which an employee, officer, or director of the parent was causally connected with the tort or contract on which suit is brought.
15. The type of business of each.
16. The extent to which the trade or public generally regarded the two units as one business unit.
17. Whom the contract claimant regarded as the promissor.
18. The extent to which there were conveyances by the subsidiary to the parent in fraud of creditors of the former.

Other factors will suggest themselves. Those listed will have to be broken down. But they will suffice as guide posts both for the tort and contract cases.

[9] Berkey v. Third Avenue Ry., *supra* note 8; Bergenthal v. State Garage & Trucking Co., 179 Wis. 42, 190 N. W. 901 (1922).

[10] Stone v. C. C. C. & St. L. Ry., 202 N. Y. 352, 95 N. E. 816 (1911); Pennsylvania R. R. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136 (1894).

[11] Bergenthal v. State Garage & Trucking Co., *supra* note 9; Berkey v. Third Avenue Ry., *supra* note 8 (practical identity).

The risks attendant on the conduct of a business of that type can roughly be averaged and that average met. (2) The day to day business of the two units should be kept separate. Normally each process can be tagged so as to identify it with the activity of one unit or with that of the other. Occasionally such tagging will be difficult in a case where the two businesses are merely units in a line of production. But such separation as the technology of the business permits should be sufficient. And in addition the financial and business records of the two units should be separately kept. (3) The formal barriers between the two management structures should be maintained. The ritual of separate meetings should be religiously observed. The activities of the individuals serving on the two boards can be tagged so that the individuals *qua* directors of the subsidiary can always be distinguished from the same individuals *qua* directors of the parent. Such tagging is not pure fiction. It draws the line that keeps the dual capacities separate and distinct. It conforms to the habit of thought which accepts the fact of dual capacity but which demands a separation of conduct so that each act may be clearly categorized. Separate meetings of the boards are sufficient. The same problem arises in connection with the officers. And the same solution suggests itself. A man may not be indiscriminately one officer or another. The observance of the niceties of business efficiency are normally sufficient. Such demands are not exacting. They merely suffice to keep the record of the business affairs of the two units from becoming hopelessly intermingled. (4) The two units should not be represented as being one unit. Those with whom they come in contact should be kept sufficiently informed of their separate identities.

Conformity with the above standards is all that normally could be required of two units so closely connected. With exceptions to be noted, it will generally suffice to set up the desired non-conductor of liability. The cases sustain the position.

In *Bergenthal v. State Garage & Trucking Co.*,[12] so far as appears the subsidiary was sufficiently financed, its organization was separately maintained, and its business records and affairs distinctly segregated. The plaintiff, a passenger in a taxicab owned by the subsidiary and operated by a driver employed by an officer of the subsidiary, was injured by the negligence of the operator. It appeared that the subsidiary and parent occupied the same offices and had the same telephone; that the parent was engaged in the automobile livery business under the name of "Boynton Automobile Livery Co."; that the name "Boynton's" was printed on the side of the taxicabs of the subsidiary; that the plaintiff secured a cab by directing a friend of his to call the

[12] *Supra* note 9.

common telephone number. A judgment for the plaintiff against the parent was reversed. The court found that no reliance had been placed by the plaintiff on the parent's apparent ownership or control of the particular cab. That factor being removed and, so far as appears, no actual assimilation of business units having been effected, the decision seems sound.

The same can be said for the cases of *Berkey v. Third Avenue Ry.*[13] and *Stone v. C. C. C. & St. L. Ry.*[14] Both involved the operation of railroad "systems," part by the parent and part by the subsidiary. In each the lines were advertised as a "system." But obviously this alone is not sufficient to constitute apparent assimilation, on which the plaintiff would reasonably rely. And those cases reveal no additional facts indicating such reliance. In the *Berkey* case the plaintiff, a passenger on a street car, was injured by the negligence of the motorman. The franchise to operate that line was in the subsidiary. The parent bought the cars and leased them to the subsidiary at a daily rental, which was paid. The cars so leased and the crews operating them did not serve beyond the line of the subsidiary. There were common officers and directors, with some slight variation. The officers were paid by checks of the parent. The common claim and accounting departments were similarly paid. Motormen and conductors of the subsidiary were paid by the parent. There was a common paymaster and one general manager for the entire system who had charge of the superintendents of operation who in turn supervised the motormen and conductors. There was a common repair and construction department. The parent contracted and paid for the electricity to be used in the entire system and paid other bills for general and miscellaneous expenses, apparently allocating to the subsidiary portions of these items. The same was true of expenses for maintenance and repair and judgments for personal injuries, although in some cases the subsidiary paid in the first instance. From time to time the parent made loans to the subsidiary for construction and also for operating expenses. The construction loans were represented by a demand note and second mortgage bonds. Operating loans were generally repaid the following month and not later than the following year. The charges were more than mere book entries, as they were repaid by drafts drawn upon the subsidiary and repaid with its own money. The subsidiary was solvent.

The detail of the *Berkey* case forbids further repetition here. But in summary it seems clear that the subsidiary was adequately financed and solvent; that the rituals of the separate management structures had been observed; that the details of

---

[13] *Supra* note 8.

[14] *Supra* note 10.

the day to day business of transportation were handled by two distinct personnels, except insofar as economy and efficiency in operation had persuaded duplication at strategic points. In other words, assimilation had not been reached. There was a dissent. The majority placed considerable emphasis on the fact that the plaintiff's argument would require the assumption of the existence of a contract between the subsidiary and parent whereby the parent was to use and operate the former's franchise as its own. Such contract would violate the Public Service Commissions Law and constitute a crime. Hence, the majority felt reluctant to infer such an agreement "from conduct or circumstances so indefinite and equivocal." But it does not seem that the holding needs that additional argument for support. It can be maintained on the grounds indicated.

In the *Stone* case the action was for damages for property negligently injured in transit. The goods were received for shipment by the subsidiary. No part of the road of the parent was within the shipping route. The only other connecting links between the parent and the injury were the facts that the parent owned a majority of the stock of the subsidiary; that a minority of the directors of the subsidiary were directors of the parent; that several executive officers of the subsidiary held corresponding or other offices in the parent; that such officers at some points had offices in the same building and in one case in the same suite of rooms as the officers of the parent. Obviously these facts were not sufficient to maintain the action even without the additional facts that the subsidiary made its own contracts, kept its own accounts, collected its own revenues, and paid its own operating expenses, and that the only financial interest of the parent was by way of dividends on its stock.

The same result has also been reached in *Friedman v. Vandalia R. R.*[15] A number of railroads organized a corporation for terminal purposes. A separate management was constituted for the subsidiary. So far as appears that management functioned separately and independently. The only direct interference was a potential one which apparently was never exercised. It was the right of any of the railway companies to cause subordinate officers and employees of the subsidiary to be removed for cause. Such potential interference was so minor and insignificant when translated into direct control over the policies of the subsidiary as not to amount to an assimilation of the two business units.

These cases suggest others for contrast. In *Costan v. Manila*

[15] 254 Fed. 292 (C. C. A. 8th, 1916). Other cases of the same type are Pennsylvania R. R. v. Jones, *supra* note 10; Atchison T. & S. F. Ry. v. Cochran, 43 Kan. 225, 23 Pac. 151 (1890).

Electric Co.[16] the parent was held liable for a tort committed as an incident of the subsidiary's business. The separate management structure of the subsidiary had been disregarded. The directors of the parent had appointed a committee and authorized it to enter into an agreement with a manager to supervise the management and operation of the properties of the parent and subsidiary. A contract between the manager and the parent was accordingly executed, giving such manager extensive powers over the properties of the parent and subsidiary, which would result in making the business of the subsidiary almost completely subjected to the control of such manager. The subsidiary did not take part in the consummation of this plan. The only part which the subsidiary apparently played was to undertake to pay part of the manager's salary. And from what appears it seems that that obligation was saddled upon the subsidiary by the direct action of the parent. The management contract gave to the parent the sole right to supervise the actions of the manager. This contract was carried out and operation under it commenced. During that time the plaintiff's personal injury claim accrued against the subsidiary. The court allowed a recovery against the parent. Swan, J., said,

> ". . . the holding company utterly disregards the Manila Electric Company as a distinct corporate entity, except perhaps for bookkeeping purposes, and deals with the properties and their operation as a street railway exactly as though the legal title were in the holding company." [17]

In other words, the blending of management structures and of the two operation processes was fatal. Assimilation for management purposes was complete. The parent which treats the subsidiary as in no way different from its own property (so far as management and operation are concerned) is allowed to acquire it with the burdensome as well as the beneficial incidents of ownership attached. Cases conforming to this pattern invariably go the same way.

In the case of *The William Van Driel,*[18] the parent (technically the lessee of the parent under a 999 year lease) and the subsidiary held separate director and stockholder meetings regularly. The accounts of the subsidiary were in charge of employees and officers of the parent. They were likewise paid by the parent. The court found that the surplus the subsidiary had in the bank was under the absolute, direct control of the parent. At one time a large fraction of the surplus was voted by the subsidiary at the request of the parent for a certain purpose. Further, the parent

---

[16] 24 F. (2d) 383 (C. C. A. 2d, 1928).

[17] *Ibid.* 384.

[18] The William Van Driel, Sr., 252 Fed. 35 (C. C. A. 4th, 1918).

through its officers issued orders from time to time as to the charges and other features of the management of the subsidiary. The salary of the superintendent of the subsidiary was increased by the order of a vice-president of the parent. The claim was for injuries due to the negligence of an employee of the subsidiary. A decree for the parent was reversed. The court ruled that the parent was liable even though in many respects the subsidiary had a separate business existence. It had a superintendent who directed the mechanical operations. Aside from the mechanical phases of the business it seemed quite clear that the parent was in control directly. Complete dominion over the treasury was present. And on policy questions the parent apparently dictated. Judging from the past, it could and it did. Except for the mechanical operations it had made the business its own. Such adoption should carry burdens with it as well as benefits.

In *Auglaize Box Board Co. v. Hinton*,[19] the subsidiary was insolvent. The parent took over the operation of the factory. Ostensibly it was operated as a separate concern and in the name of the subsidiary. After the parent took over the operation no officer or agent of the subsidiary did any act by way of domination or control over the business of the subsidiary. In other words, the management of the subsidiary became a nonentity. During such period an employee of the subsidiary was injured. The parent was held responsible, though it had taken out liability insurance in the name of the subsidiary and paid the premium out of its own funds. Few cases present such a clear case of complete domination.

In *Joseph R. Foard Co. v. State*,[20] the subsidiary was organized to handle the stevedore business of the parent, a shipbroker and agent. The authorized capital of the subsidiary was $2000, all of which was paid in cash by the parent through dummy incorporators. These incorporators were also the directors and officers. On organization the parent sold the subsidiary equipment for $1,450. The stevedores and superintendent were employees of the subsidiary. Since shortly after its organization, no stockholders' or directors' meetings of the subsidiary were held. The subsidiary never handled its own current funds. These were handled by the parent and deposited in the parent's account. The subsidiary never paid its officers any salary. The parent took the greater part of all the profits as compensation for managing the subsidiary. All bills of the subsidiary were paid by the parent. The books of the parent were with few exceptions the same as they would have been had the subsidiary been a mere department of its business. The parent could not take a trial balance without including the balances of the accounts of the sub-

[19] 100 Ohio St. 505, 126 N. E. 881 (1919).
[20] 219 Fed. 827 (C. C. A. 4th, 1914).

sidiary. Whenever the subsidiary suffered a net loss it was carried into the profit and loss account of the parent. In such case the subsidiary was not treated as a debtor of the parent. The loss was treated as the parent's. In negotiating business there was evidence that the parent dealt directly with the business of the subsidiary without working through the management structure of the subsidiary. In the words of the lower court, the officers "never thought, and in the nature of things never could think, in what capacity they were acting at any particular time, whether as the officer of one company or that of the other." In result there was but one management—that of the parent. That of the subsidiary was non-existent for all practical purposes. Scrambling of two business units rarely has been so complete.

Whether separate, independent management structures have been maintained is often difficult to determine.[21] In *Oriental Investing Co. v. Barclay*,[22] the subsidiary was organized as an operating company to manage a hotel property of the parent company (the same individuals owned the stock of both companies). It appeared that only four directors' meetings of the subsidiary were held in a period of several years, but an executive of the subsidiary was in charge of its business; and at times the parent company furnished supplies to the hotel and received directly the payment which was due the subsidiary under a contract. From these facts alone it would be difficult to say that there had been the necessary assimilation to entail liability. But even though there was not an assimilation the decision can be sustained. In the first place the existence of the subsidiary was quite generally unknown. It was unknown to the plaintiffs, who were employees in the hotel and were injured by a falling elevator. So far as they were concerned their employer was the dominant company, who had hired them before the operating company was organized. Under such facts a different employer should not be substituted. The cases giving rights against ostensible inviters are forceful analogies.[23] In addition the subsidiary seems not to have been sufficiently financed. It never had a dollar of paid-up capital, except $2000 which the dominant company sent to pay for 20% of a stock subscription. The balance of the

[21] A number of cases present so few facts as to be valuable only as interesting examples of legal literature and not as cases where from the facts any analysis is possible. A few of such cases are Finnish Temperance Soc. v. Finnish Socialistic Pub. Co., 238 Mass. 345, 130 N. E. 845 (1921); Pennsylvania Co. v. Rossett, 116 Ill. App. 342 (1904) (a few skeletonized facts pointing to direct interference do appear, however); Davis v. Alexander, 269 U. S. 114, 46 Sup. Ct. 34 (1925).

[22] 64 S. W. 80 (Tex. Civ. App. 1901).

[23] Jewison v. Dieudonne, 127 Minn. 163, 149 N. W. 20 (1914). But *cf.* Meehan v. Hesselgrave, 121 Wash. 568, 210 Pac. 2 (1922).

subscription was never paid. Such financing obviously did not suffice for such a property. The costs and risks of operation were out of all proportion to it. The monthly rental alone was $1500. In addition the property had to be kept in repair and all taxes and insurance paid by the subsidiary. In fact, at the time of the trial the subsidiary was heavily indebted to the dominant company, with apparently no assets with which to pay. The cases of inadequate financing are rare. The factor appeared in the *Joseph R. Foard Co.* case but did not become so crucial, as other facts were quite decisive of the case. But there again the financial structure seemed wholly inadequate to meet the normal strains and stresses of business. $2000 authorized capital with the parent milking the subsidiary of all profits! Those coming into contact with such business units would have little protection. Those organizing such units should furnish substantial financial protection—as measured by the risks to the normal competitive unit—for those who will do business or come into contact with the unit, before the privilege of limited liability is extended to the parent. Independently of the other grounds for the decisions, the *Joseph R. Foard Co.* case and the *Barclay* case might well be decided as they were because of the inadequate financial structures.

But perhaps the most interesting of the entire group of cases is *Erickson v. Minnesota & Ontario Power Co.*[24] The action was for damage to land which was inundated as a result of the negligent operation of a dam. The parent owned the land. The subsidiary acquired the right to erect the dam. The parent contracted with the subsidiary whereby the latter was to erect the dam and perpetually maintain it. The parent advanced the entire cost of the dam in the form of an interest bearing loan secured by a mortgage which covered all property of the subsidiary of every name and nature. By the contract the parent agreed to pay $4,000 annually to meet the expense of the dam. By the contract the parent also reserved the exclusive right to the use of the water passing over the dam and of the land and power houses and reserved the right to place, set, use, and control all the machinery and appliances connected with the operation of the dam. No rent was paid for this use and the subsidiary received no revenue from it. The parent owned and operated mills and used all the power generated. A judgment dismissing the action was reversed and a new trial granted. The decision can be supported on two grounds. In the first place, the type of financing alone should be fatal to the insulation from liability. Regardless of what the initial financial structure of the subsidiary was, when the parent subsequently took a mortgage covering all of the property of the subsidiary; when it was

[24] 134 Minn. 209, 158 N. W. 979 (1916).

impossible under the operating contract for the subsidiary to derive any revenue from its business (the operation of a dam); and when the parent by the one-sided contract which was drawn was milking the subsidiary dry and returning to it nothing except maintenance for the dam, the subsidiary had become financially sterile. The protection necessary for those in the plaintiff's position was lacking. The strains incident to such operation could not be carried by such a frail structure. This does not mean that a parent company may not finance a subsidiary. It is often done and limited liability is retained.[25] But the type of financing under all the facts must be fair to the business unit financed. On that ground alone the decision could be sustained. But there is another. By the terms of the operating contract the right of direct interference in the operation of the dam was reserved to the parent. It had potential control—not indirect control through the cumbersome mechanism of the two management structures—but direct control over the machinery of the dam. Since that right existed; since by virtue of it the parent stood in a strategic position to operate the dam so as to prevent such injuries as occurred, it seems reasonable to attach a duty to the right. Direct interference having been contracted for, a higher standard of conduct should be imposed. This ground alone is support for the case. Certainly these two grounds are more meaningful than the vague statement of the court that the subsidiary is a "mere agency" of the parent. "Agency" states a result and only a result. It does not help the mind in the process of dissection and analysis necessary for a clearer understanding of the cases.

There are cases which present many of the features of the foregoing ones but which analytically are quite different. They raise the question whether or not the parent is, for purpose of jurisdiction, doing business within a state when it has a subsidiary operating in that state.[26] The queston is purely a jurisdictional one. It hinges on the application of the "presence" test.[27] It is divorced from the many and varied issues involved

---

[25] Owl Fumigating Corp. v. California Cyanide Co. Inc., 24 F. (2d) 718 (D. Del. 1928), *aff'd*, 30 F. (2d) 812 (C. C. A. 3d, 1929); Berkey v. Third Avenue Ry., *supra* note 8.

[26] Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 45 Sup. Ct. 250 (1925); P. & N. T. Ry. v. Cox, 106 Tex. 74, 157 S. W. 745 (1913); Atchison T. & S. F. Ry. v. Stevens, 109 Tex. 262, 206 S. W. 921 (1918), overruling Buie v. Chicago, R. I. & P. Ry., 95 Tex. 51, 65 S. W. 27 (1901), and following Peterson v. Chicago, R. I. & P. Ry., 205 U. S. 364, 27 Sup. Ct. 513 (1906); Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728 (1902); Cutler v. Cutler-Hammer Mfg. Co., 266 Fed. 388 (D. Mass. 1920).

[27] Cahill, *Jurisdiction Over Foreign Corporations* (1917) 30 HARV. L. REV. 676; Scott, *Jurisdiction Over Non-Residents Doing Business Within*

in the analysis of the liability cases. As stated by Brandeis, J., with respect to this question of jurisdiction, "There is here no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant. Hence, cases concerning substantive rights . . . have no application." [28] In view of this dissimilarity they are dismissed from this discussion without more ado.

There is a group of cases where liability is imposed upon the parent for torts of the subsidiary, even though the four standards of organization and operation which have been discussed above are in most instances met. *Lehigh Valley Ry. v. Dupont* [29] is one. The negligence was the maintenance of a dangerous station platform on which the deceased, a passenger, was standing when he was hit by a passing train. The ticket, good for transportation to a point on the line of the subsidiary, had been purchased by the deceased from the defendant's ticket agent. On its face it did not purport to be the contract of the subsidiary nor did it refer to the subsidiary in any way. It purported to be an *undertaking* of the defendant. That *undertaking* should be sufficient to entail liability. A relationship of passenger and carrier existed. As a consequence, the incidents of that relationship would follow. The defendant could not relieve itself of those incidents by delegating to another—the subsidiary—the performance of the contract. If through the negligence of the subsidiary the deceased was injured, the parent should be held. The case is totally different from the situation where the parent acts as a mere selling agent for the subsidiary and sells tickets in the name of the subsidiary good over the lines of the latter. This analysis puts the case on a more rational basis than the secondary reason of the court that the parent should be liable because "the dominant corporation ultimately derives all the profits and incurs all the losses arising from the traffic originating on any of the lines." [30] The profit and loss earmarks can be found in every parent company.

There is a closely related type of case in which the parent company is held liable. In *Wichita, F. & N. W. Ry. v. Puckett*,[31] the injured plaintiff had been employed by a common superintendent. He was injured as a result of a defective engine, which engine it was the duty of a common master mechanic to overhaul. Said mechanic was probably negligent. In addition the engines

---

a State (1919) 32 HARV. L. REV. 871; Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1925) 14 CALIF. L. REV. 12; (1925) 20 ILL. L. REV. 281.

[28] Cannon Mfg. Co. v. Cudahy Packing Co., *supra* note 26, at 337, 45 Sup. Ct. at 251.

[29] 128 Fed. 840 (C. C. A. 2d, 1904).

[30] *Ibid.* 846.

[31] 53 Okla. 463, 157 Pac. 112 (1915).

were used interchangeably between the two connecting lines, though the engine in question was not the property of the parent. Not only was the common employee negligent but the activity out of which the negligence arose was not clearly identified as the parent's or subsidiary's, as the engine would or might be used interchangeably in the business of each. Being not clearly identified with the business of one, it should properly be tagged as the activity of either. If the particular process or activity could not be tagged by the parties as belonging to one or the other, it was quite properly the process or activity of each. The courts should not be expected to do what the parties themselves could not do. If the process or activity could have been tagged by the parties but was not, there seems no compelling reason why the courts should do the tagging *ex post facto* for them. Such result seems not unduly burdensome. If it is worth the price to intermingle the processes, the parties will. If it is not, they normally can separate them. The same confusion did not exist in the *Berkey* case. While at certain points the business activities of the two companies were merged, *e. g.*, in the repair shops, the business being done at the time of plaintiff's injury was clearly tagged. It was that of the subsidiary.

The confusion in determining whose business is being done at the time of the injury may arise in another way. In *Lehigh Valley R. R. v. Delachesa*,[32] the cars and engine of the defendant were on the track and dock of the subsidiary. The men in charge of the dock and the train had been employed by the subsidiary. The iron being unloaded at the time of the injury was being delivered from the cars in which it was originally received by defendant on its own line. The bill of lading covering the goods in question did not appear. The plaintiff was an employee of a firm of stevedores unloading a car and was injured by the negligence of the men in charge of the dock and train. The trial court instructed the jury that the parent company was not liable to the plaintiff unless they found that it was engaged in delivering the iron at the dock. The appellate court affirmed a judgment for plaintiff. On that theory the decision can be supported. Certainly if the parent *undertook* to deliver the iron at the dock and did not *allocate* that undertaking to the subsidiary, the parent is liable, even though the employees were hired, paid and subject to discharge by the subsidiary. That which it *undertakes* to do is its *business*. It may very well do its business with another's employees. But the risks attendant on the doing of that business are not avoided. This is quite consistent with agency law.[33] Thus the case can be reconciled with

[32] 145 Fed. 617 (C. C. A. 2d, 1906).

[33] Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 YALE L. J. 584. Note also Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221 (1903),

the *Dupont* case. But it can hardly find support in the statement of the court: "The question was not one of practical importance to the defendant, but merely whether it should be called upon to pay out of one or another of its several purses." [34] Such reasoning would lead to the removal of insulation in any case of a wholly owned subsidiary. Limited liability in such case would become sheer fiction.

There is also a group of cases where the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management. Thus in *Specht v. Mo. Pac. R. R.*,[35] the plaintiff was injured while inspecting cars. The injury appeared to have been caused by the use of a defective coupler. The parent owned the rolling stock in question. Though the possession of the car was, according to the operating contract in force between the two companies, in the subsidiary at the time of the injury, the existence of the defective coupler presumably could be directly traced to the parent. The management which chose the type of coupler was the parent's. That management reserved the ownership of the rolling stock. Ownership normally infers control. And in absence of evidence that the control incident to ownership had been transferred to the subsidiary the presumption would be that the owner controlled the car in question in the sense of having supervision over its mechanical fitness, which would include the condition of the couplers. The fact that the operating contract between parent and subsidiary stated that, when the rolling stock came on to the lines of the subsidiary, possession of every unit would pass to it and each unit would become the unit of the subsidiary, would not demolish the presumption. To do so the incidents of that possession and the history of the defective coupler would have to be known. Supervision over mechanical fitness may not have been allocated to the subsidiary when it took possession; and even if it had been so allocated, perhaps the parent was also causally connected with the condition of the coupler. These facts are not stated in the case. Further support for the case is found in the fact that the action was founded on the Federal Safety Appliance Act.[36] The court, though not making an analysis of that act, concludes that it places responsibility on the "owner." It said, ". . . the de-

where the issue was whether the person who was negligent was the employee of the corporation or of a stockholder of the corporation.

[34] Lehigh Valley R. R. v. Delachesa, *supra* note 32, at 619.

[35] 154 Minn. 314, 191 N. W. 905 (1923).

[36] The original act (27 STAT. 531 (1893), as amended by 29 STAT. 85 (1896)) provided ". . . it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

fendant owned all the rolling stock used by the Delaware corporation, and plaintiff's injury arose out of a defective coupler used in violation of the Safety Appliance Act, on a car which was owned by this defendant."[37] Such interpretation of the act seems reasonable and consistent with the presumption of control set forth above. The decision certainly cannot be reconciled with the great weight of authority if it is explained in the following language of the court: "The 'potential and ultimate control' is exercised by defendant as completely and directly as the machinery of corporate organisms permit."[38] Such rule would remove the insulation from liability between every subsidiary and parent.[39]

The case where the parent is negligent suggests other instances where the parent is directly a participant in the wrong complained of. The parent has been held liable in a tort action for inducing the subsidiary by means of its stock ownership to breach a contract with the plaintiff.[40] Stock ownership was not

[37] Specht v. Mo. Pac. R. R., *supra* note 35, at 320, 191 N. W. at 907.

[38] *Ibid.* 321, 191 N. W. at 907.

[39] In Bethlehem Steel Co. v. Raymond Concrete Pile Co., 141 Md. 67, 118 Atl. 279 (1922), the parent was sued for the negligence of the wholly owned subsidiary. The deceased was injured by the negligent operation of a train of the subsidiary. The trial court had charged that if they found those operating the train were subject to the control of the parent, the latter would be liable. Judgment for the plaintiff was reversed. The court said that such instruction "might have easily led them (the jury) to believe that there could be a recovery if the steel company had control of the railroad company as owner of the stock. . . . That is going beyond what the authorities justify." *Ibid.* 78, 118 Atl. at 282.

[40] Gulf C. & S. F. Ry. v. Cities Service Co., 281 Fed. 214 (D. Del. 1922). A variation of the facts of the preceding case appears in Ufa Eastern Division Distribution, Inc. v. Universum Film Aktiengesellschaft, recently decided by Special Term of the New York Supreme Court (not yet reported). There the parent was sued in tort on allegations that officers of the parent had induced the subsidiary to breach a contract with the plaintiff. The defendant moved to vacate certain attachments on the grounds that the defendant was to be regarded as a party to the contract and was therefore liable in contract and not in tort. The motion was denied. The court said:

"While the American corporation with which plaintiff contracted was a medium by which the defendant by stock ownership controlled the business of such American corporation in making of its contract with plaintiff, it did not exercise a power conferred upon it by the defendant, but a power inherent in it as a corporate entity. It did not in a legal sense derive its right to make the contract from the defendant. It was, therefore, not in a legal sense the defendant's agent in the making of the contract."

From the above discussion it is evident that mere stock ownership is not enough to constitute the parent "agent" of the subsidiary. But if the two businesses were completely assimilated, the *fact* of the agency would be established, and the dominant company which had made the business of the subsidiary its own should not be liable in tort. The contract, though not in its name, would be the contract of the parent in the sense

enough. But the use of the latent power incident to stock ownership to accomplish a specific result made the parent a participator in or the doer of the act. Again, there was interference in the internal management of the subsidiary; an overriding of the discretion of the managers of the subsidiary. The connection between the injury and the interference was so intimate as to make the resulting liability direct and not vicarious. It would seem reasonable to hold the parent liable in tort in any such case so long as it is not a party to the contract nor liable on it as an unnamed or undisclosed principal.

The so-called fraud cases are similar. Another corporation cannot be set up to operate property under a lease to the parent so as to avoid payment by the parent of the royalties under the lease.[41] The parent by direct acts of participation may be liable for the infringement of a patent though the infringement was apparently the act of the subsidiary. Thus, in *Union Sulphur Co. v. Freeport Texas Co.*,[42] the parent was held liable where it knew of the infringing acts and did not repudiate them and where it employed engineers and constructors to furnish and construct the plants in which the acts of infringement were committed by the subsidiary, knowing that those premises would be used in a production process which would violate the plaintiff's patent. As stated by the court, "Under these circumstances the question of technical control by the defendant of the Freeport Sulphur Company . . . becomes unimportant, as the infringing acts were in contemplation of law committed by the defendant." [43]

Similarly, in *Westinghouse Electric Mfg. Co. v. Radio-Craft Co.*,[44] before the subsidiary became affiliated with the parent it

---

that it pertained to its business. In such case the parent could properly be called an unnamed or undisclosed principal. It is not clear in this case whether or not assimilation had been reached. Furthermore, the case may be somewhat weakened by the fact that no issue of ultimate liability was present, but only a question of the availability of a provisional remedy.

[41] Higgins v. California P. & A. Co., 147 Cal. 363, 81 Pac. 1070 (1905). Here substantially all the stock of all the companies was held by one man. *Cf.* Linn & Lane Lbr. Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440 (1914), where voidable patents were not allowed to become valid by a transfer to a corporation formed for that purpose, though suit was not started against the company until the statute of limitations had run against the patentee. Suit had, however, been begun against the latter before the statute had run.

[42] 251 Fed. 634 (D. Del. 1918).

[43] *Ibid.* 662.

[44] 291 Fed. 169 (D. N. J. 1923), *aff'd*, 7 F. (2d) 432 (C. C. A. 3d, 1925). The same result was reached in Westinghouse Electric & Mfg. Co. v. Allis-Chalmers Co., 176 Fed. 362 (C. C. A. 3d, 1910). The facts in the latter case are not set forth in detail. The court says at 368: "It is enough for the present purpose to note that on the face of the pleadings the power to control, operate, and manufacture is in the Allis-Chalmers Company and is being exercised by that company." *Cf.* Hart Steel Co. v. Railroad Supply

owned a non-transferable license to manufacture and sell. The defendant-parent company had actual notice of the limited character of the license at the time the subsidiary was acquired. At that time the subsidiary had abandoned its business. It does not appear whether the formalities of separate legal organizations were respected or not, although the subsidiary was duly incorporated. On the business side the court found there was complete assimilation. The subsidiary moved into the plant of the parent where the two units operated. Employees of the subsidiary worked at benches designated as benches of the subsidiary. Though separate corporate books were kept, business books of the subsidiary were not kept. The marketing plan was for the parent to sell the product under the name of the subsidiary. In all details of production and marketing the management structure of the subsidiary seemed not to exist. The court said, "There is no difference between what the DeForest Company is doing and what it would have done had the license been transferred." [45] Such direct interference was a clear case of infringement by active participation. Again no question of vicarious liability was involved. The liability of a participator was at issue.

This short survey indicates that there is no one formula which can be successfully applied to the tort cases. The formula varies with the facts of each case. But that is unimportant. The significance of this examination is that the concepts which the courts are using can be broken down and translated into the varying factual combinations which are found. That translation will not give the answer to the problem at issue. But it will serve to pose the problem in language which seems more understandable. It will result in reducing the cases to a lower common denominator. It will make more intelligible, and perhaps more intelligent, the answer to the question, was the subsidiary an "agent" of the parent?

III. CONTRACT

The attempt to hold a parent corporation where the claim asserted is of contractual origin presents added difficulties.

Co., 244 U. S. 294, 37 Sup. Ct. 506 (1917).

In Owl Fumigating Corp. v. California Cyanide Co. Inc., *supra* note 25, judgment for the parent was given in an infringement case where it appeared, *inter alia*, that the parent did not organize the subsidiary to infringe the plaintiff's patent; that it was not impossible to carry out the purpose of the parent in organizing the subsidiary without infringing the patent; that separate and independent management structures were maintained and operated.

[45] Westinghouse Electric Mfg. Co. v. Radio-Craft Co., *supra* note 44, at 174.

The very reasonable question must be met and answered why one who contracted with the subsidiary and received the promise which he bargained for but who has been disappointed in the fulfillment by the subsidiary of its commitment should then be allowed to look to the parent.[46] As a matter of contract right it is evident he may not. Additional compelling facts must appear.

As in the case of tort claimants, without the primary requisite of practically complete ownership of the capital stock of the subsidiary by the parent or the common holding of substantially the entire capital stock of both, there is no room for discussion.[47] Such ownership, however, is not enough of itself to justify holding the parent, and something in addition to or in variance from the normal control of the subsidiary through the medium of the ownership of its stock must be present.[48] If any basis of prediction may be reached it must be through an analysis of the facts constituting the variants from such normal control.

Certain cases in which liability of the parent for claims against its subsidiary is discussed may be dismissed with brief comment. The facts are such that either the decision may be placed upon well established grounds other than those involving a disregard of the corporate entities or the holding is greatly weakened so far as it tends to help in building up a theory for prediction. This class of cases includes those in which the claimant has acted to his detriment upon assertions and assurances made by officers of the parent as to ownership and control of the subsidiary and payment of its debts.[49] Cases involving a transfer of assets of the subsidiary in fraud of its creditors are more numerous and need no aider by way of disregard of the corporate status to enable the aggrieved claimant to recover out of the assets transferred,[50] although they at times contain considerable language

---

[46] New York Trust Co. v. Corporate, 250 Fed. 668 (C. C. A. 6th, 1918); Marsch v. Southern New Eng. R. R., 230 Mass. 483, 120 N. E. 120 (1918); *cf.* C. Crane & Co. v. Frey, 126 Fed. 278 (C. C. A. 4th, 1903).

[47] Phosphate Mining Co. v. Unione Austriaca Di Navigazione, 3 F. (2d) 239 (C. C. A. 2d, 1924).

[48] Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927); City of Holland v. Holland City Gas Co., 257 Fed. 679 (C. C. A. 6th, 1919); Allen v. Philadelphia Co., 265 Fed. 817 (C. C. A. 3d, 1920); Martin v. Development Co. of America, 240 Fed. 42 (C. C. A. 9th, 1917); Exchange Bank v. Macon Co., 97 Ga. 1, 25 S. E. 326 (1895); Hooper-Mankin Co. v. Matthew Addy Co., 4 F. (2d) 187 (C. C. A. 6th, 1925); *cf.* Chicago Mill & Lumber Co. v. Boatmen's Bank, 234 Fed. 41 (C. C. A. 8th, 1916).

[49] Platt v. Bradner Co., 131 Wash. 573, 230 Pac. 633 (1924); *cf.* Stark Electric R. R. v. McGinty Contracting Co., 238 Fed. 657 (C. C. A. 6th, 1917).

[50] Baltimore & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 50 (C. C. A. 4th, 1893); Pennsylvania Canal Co. v. Brown, 235 Fed. 669 (C. C. A. 3d, 1916).

about such a disregard. In many instances it is possible to spell out a direct contractual relationship between the parent and the creditor or to settle the matter by construction of the wording of the contract, thus obviating consideration of the question as to looking through the legal entity of either company;[51] again corporations are ofttimes set up to accomplish a fraudulent end or to escape a specific contractual liability of some sort,[52] or to avoid the provisions of a statute.[53] In these, as well as in the case where a criminal prosecution is involved,[54] there is often a direct disregard of the legal corporate status of the companies concerned, but the controlling social policy or the sanction of the statute implicated is so strong that the cases offer little help toward the formulation of a theory upon which to base prediction with respect to the question we are considering. An analysis, however, of cases not containing such disabilities does bring out a few guide posts, somewhat indefinite though they may be.

It appeared in *Portsmouth Cotton Oil Mfg. Corp. v. Fourth National Bank*[55] that the defendant bank, in order to protect itself from loss of advances made, had bought in the assets of a cotton oil refining concern and formed a corporation to conduct the business. The bank supplied the entire capital by giving the subsidiary a credit of $5,000 although the stockholders consisted solely of a vice-president, a stockholder, and the attorney for the bank. At the suggestion of a bank examiner, the bank, better to show the investment on its books, mortgaged the property of the new corporation to secure an issue of $75,000 principal amount of bonds, all of which, apparently, were held by the bank. The manager of the subsidiary consulted with the officers of the bank and reported to them daily. Subsequent to the breach of warranty complained of, the bank, acting directly, made a lease of all the corporate property of the subsidiary and

[51] American Nat. Bank v. National Wall-Paper Co., 77 Fed. 85 (C. C. A. 8th, 1896); Dobbins v. Pratt Chuck Co., 242 N. Y. 106, 151 N. E. 146 (1926); Pullman Car Co. v. Missouri Pacific Co., 115 U. S. 587 (1885); Abney v. Belmont Country Club Properties, Inc., 279 Pac. 829 (Cal. App. 1929).

[52] George v. Rollins, 176 Mich. 144, 142 N. W. 337 (1913); Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334 (1905); Rice v. Sanger Bros., 27 Ariz. 15, 229 Pac. 397 (1924).

[53] United States v. Lehigh Valley R. R., 220 U. S. 257, 31 Sup. Ct. 387 (1911); United States v. Del. Lack. & West. R. R., 238 U. S. 516, 35 Sup. Ct. 873 (1915); Chicago, M. & St. P. Ry. v. Minn. Civic Ass'n, 247 U. S. 490, 38 Sup. Ct. 553 (1918); United States v. Reading Co., 253 U. S. 26, 40 Sup. Ct. 425 (1919); United States v. United Shoe Machinery Co., 234 Fed. 127 (E. D. Mo. 1916); see So. Pac. Terminal Co. v. Int. Comm. Comm., 219 U. S. 498, 523, 31 Sup. Ct. 279, 286 (1911).

[54] Bishop v. United States, 16 F. (2d) 410 (C. C. A. 8th, 1926).

[55] 280 Fed. 879 (N. D. Ala. 1922).

in the lease gave the lessee an option to purchase all the assets. For a breach of warranty as to the quality of certain oil sold by the subsidiary, the bank was held liable. The stock ownership and common officers are clearly not determinative of the case and the subsidiary seems to have had no gross inadequacy of capital, but the facts show, aside from this, a considerable amount of direct intervention by the officers of the parent, as such, in the administration of the affairs of the subsidiary. Turning, on the other hand, to the famous *Luckenbach* case, [56] in which the Luckenbach Company was held liable for the default of the Luckenbach S. S. Company on its contract for the carriage of freight, there is no evidence of direct intervention in the affairs of the Steamship Company generally or in the transaction involved, although the usual factors of common stockholders and common officers are present. It does appear, however, that the Luckenbach Company had leased to its subsidiary for a period of from ten to twelve years the valuable fleet of steamships used for the carriage of freight. The rental, while more than nominal, was clearly below the rental value. To conduct the business of this large fleet the subsidiary had a capital of only ten thousand dollars as compared with a capital of $800,000 for the parent. Looking at these facts the court said, "It would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation which is itself in another form."

In another case [57] the usual indices of common stock ownership and common officers and directors appeared. The subsidiary used the office of the parent and the parent paid the expenses of office, bookkeeper, stenographer, etc. for both. The president and general manager of the parent, although not nominally an officer of the subsidiary, which had been organized to contract for and build a branch line of the parent, did intervene directly in the transaction involving the construction contract sued on by the plaintiff. The president took direct charge to the extent of conducting the negotiations for the contract between the subsidiary and the plaintiff and assured the plaintiff that the subsidiary was used by the parent to secure rights of way and was sort of a buffer between the parent and trouble, that the subsidiary was practically the same thing as the parent, the parent was behind it, and the plaintiff would get his money. Likewise, he handled all questions arising under the contract, writing the plaintiff sometimes on the stationery of the parent and sometimes on that of the subsidiary. The capital of the subsidiary was $5,000

[56] Luckenbach S. S. Co. v. W. R. Grace & Co., 267 Fed. 676 (C. C. A. 4th, 1920).

[57] Stark Elec. R. R. v. McGinty Contracting Co., *supra* note 49.

with $1,000 paid in, while that of the parent was $1,000,000. Impressed apparently by the amount of direct intervention in the transaction by the parent rather than by the disparity of capital, since it pointed out that the subsidiary had been able to meet its obligations, the court held that the plaintiff believed his contract to be in reality with the parent but that the subsidiary, for the convenience of the parent and with the knowledge of all interested, was, respecting this contract, masquerading, acting for and set out substantially as the parent, and that the parent was liable.

As indicated by the foregoing, an analysis of the cases seems to indicate that the courts are more impressed by an obvious inadequacy of capital on the part of the subsidiary than they are by the presence of any of the other indicia of identity between the corporations such as common officers and directors, lack of separate offices, books, etc. In fact, sufficient capital and adequate financial arrangements or the lack of it, insofar as the various factors motivating the court are capable of ascertainment from the cases, in some instances seems to be largely determinative.[58] But, generally speaking, the customary indicia of identity which invariably appear as a basic array of facts, although in varying numbers and intensity, seem to leave the court cold, except as it marshalls them and states that they show the one corporation to be that vague thing an "alter ego," "adjunct," or "instrumentality" of the other. It may be said that something further, generally something in the way of direct intervention by the parent in the transaction involved or in the conduct of the affairs of the subsidiary, or a desire to avoid that undefinable and unsatisfactory thing for purposes of prediction —an inequitable result—must be present before the claimant can look to the parent.

An example of the sort of intervention referred to is that which occurred in the case of *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*[59] There a subsidiary was formed to carry on a cotton ginning business formerly conducted as a department of the parent. An option was given one Sugg to purchase the stock of the subsidiary, but the parent agreed to repurchase the stock or make loans upon it to its par value at any time. The parent caused the subsidiary to adopt a by-law which enabled the parent to discharge the board of directors of the subsidiary at any time and to elect new directors in conformity with its wishes. The officers of the subsidiary made daily reports to the parent of each transaction which it had. On more than one occasion the parent paid the financial obligations of the subsidiary. The parent

[58] First Nat. Bank v. Walton, 146 Wash. 367, 262 Pac. 984 (1928); Luckenbach S. S. Co. v. W. R. Grace & Co., *supra* note 56.

[59] 140 Tenn. 290, 204 S. W. 758 (1918).

was held liable for the overplus of certain drafts drawn by the subsidiary against shipments of cotton and aggregating more than the value of the cotton when sold. Another instance[60] is that of a parent which was held not entitled to share in the assets of its bankrupt subsidiary for advances made and represented by notes. The parent was capitalized at $400,000 and the subsidiary at $250,000, the parent's advances amounting to $147,000. There were common officers and directors. Annual meetings of the subsidiary were held at which directors were elected, but these transacted practically no business. The affairs of the subsidiary were controlled and managed directly by the parent, whose directors met monthly in New York for that purpose, at which times salaries and prices were fixed, finances arranged and all other necessary business of the subsidiary transacted.

In contrast there is the recent case of *First Nat. Bank v. Walton*[61] where, in a suit by certain banks against a solvent subsidiary on notes given against loans made to the subsidiary, the receivers of the insolvent parent intervened, sought to subject the assets of the subsidiary to their administration in the interests of the creditors of both companies as a single insolvent concern, and claimed that the plaintiffs had no greater rights than as creditors of such single insolvent concern. Recovery was nevertheless allowed against the subsidiary as such. The subsidiary had been amply financed, having a capital stock of $250,000 and a line of credit of $100,000 with each of the plaintiff banks secured by ninety day notes, certain of which were ultimately involved in this suit. The corporate relationship between the two corporations was as close as any which could well be devised. The wholly owned subsidiary had been formed to better finance and carry out the marketing of the output. There were practically the same officers and directors, the business was carried on from the office of the parent, and the stock of logs, lumber, etc. of the subsidiary was kept on the premises of the parent. Beyond this, however, there was no direct intervention by the parent or intermingling of the affairs of the two companies. The supply of logs and lumber was not indistinguishable and there were separate books and separate bank accounts. The subsidiary carried on business, shipped, sold, and invoiced in its own name, and borrowed money and pledged security separately. Undoubtedly the adequate capitalization and financial arrangements of the subsidiary had much to do with the decision, but in addition the lack of intermingling and direct intervention

[60] S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania, 264 Pa. 265, 107 Atl. 721 (1919); *cf.* Hunter v. Baker Motor Vehicle Co., 225 Fed. 1006 (N. D. N. Y. 1915), *aff'd*, 238 Fed. 894 (C. C. A. 2d, 1916).

[61] *Supra* note 58.

by the parent appears to have been compelling to the court. The recent case of *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*[62] was concerned with the attempt of a dry dock company to recover against the subsidiary for certain repairs, ordered by the parent, on a boat owned by the subsidiary but leased to the parent. The parent owned 2,095 of the 2,432 outstanding shares of the subsidiary. The subsidiary had purchased certain boats, including the vessel libeled, and finding it difficult to meet the payments, the parent had entered into a contract whereby both became liable for the payments instead of the subsidiary alone. The parent leased the boats from the subsidiary under a bare-boat charter at a rental which the court referred to as being dependent upon the will of the parent because of the control which it exercised over the subsidiary but which was not sufficiently inadequate to call forth further comment. Six of the nine directors of the subsidiary were directors of the parent. Another was vice-president of the parent. The manager of the parent was also manager of the subsidiary. The business of each was separate, however, in that the parent operated on the Erie Canal and the subsidiary in other waters, and nothing shows that the affairs of either company were immediately directed by the officers of the other. The court applied the test of direct intervention and held the subsidiary not liable, saying,

"One corporation may, however, become an actor in a given transaction, or in part of a business, or in a whole business, and, when it has, will be legally responsible. To become so it must take immediate direction of the transaction through its officers, by whom alone it can act at all. . . . At times this is put as though the subsidiary then became an agent of the parent. This may no doubt be true, but only in quite other situations; that is, when both intend that relation to arise, for agency is consensual. This seldom is true, and liability normally must depend upon the parent's direct intervention in the transaction, ignoring the subsidiary's paraphernalia of incorporation, directors and officers. The test is therefore rather in the form than in the substance of the control; in whether it is exercised immediately, or by means of a board of directors and officers, left to their own initiative and responsibility in respect of each transaction as it arises. Some such line must obviously be drawn, if shareholding alone does not fuse the corporations in every case. Much of the metaphor in the books merely impedes discourse, as Judge Cardozo well observes in *Berkey v. Third Avenue Ry.*; here, as elsewhere, it is ordinarily a symptom of confused thinking." [63]

Nevertheless, there are certain cases which defy solution by the foregoing test or by any other except the subjective one of "avoidance of an inequitable result." A reading of the opinions in such cases usually constrains one to the thought, or rather, the

[62] 31 F. (2d) 265 (C. C. A. 2d, 1929).
[63] *Ibid.* 267.

feeling, that they were correctly decided to avoid the "inequitable result." Yet it is not so clear that a set of facts, taken in the raw and before receiving the color necessarily imparted by a judge who has taken a slant on the question and is justifying his decision, would so readily indicate just where the "inequitable result" lies. So in *Ambridge Borough v. Phila. Co.*,[64] the Borough sought to cause the parent to specifically perform the contract of one of its operating subsidiaries to pave between certain car tracks. It appeared that the directors of the subsidiary were all employees of the parent and that they had the same officers; the parent advanced large sums of capital on open book account; the parent owned all outstanding bonds of the subsidiary as well as stock; the directors of the subsidiary met very irregularly and only to authorize important contracts; the parent provided power to the subsidiary through another subsidiary; the officers of the subsidiary, who were also the officers of the parent, took many important steps without action of the Board of Directors; and generally stated, there was unified control and operation. Now, certainly a court with little or no inclination to that end could here find intervention and the exercise of direct control by the parent, but the court paid no attention to this and, looking for and finding no "fraud or bad faith, unfair dealing, or the commission of unlawful acts" on the part of the parent, affirmed the dismissal of the bill as to it. A study of further cases brings to light examples where considerable direct intervention and control appears, but the court looks for "fraud" or "inequity" and decides on the basis of whether it considers it present or absent.[65] It further seems that "avoidance of an inequitable result" is the only test, if it may be called such, which has any pertinence toward the explanation of the comparatively few cases in which a sole individual stockholder and his wholly owned corporation are considered as one, the courts in a proper case finding no difficulty in so treating them.[66]

From the foregoing it will be seen that where contractual rights are concerned the contents of any rules which may be stated to help in the work of prediction are but shifting and faintly outlined at the best, themselves uncertain subjects of predictability. This much, however, may be said:

---

[64] 283 Pa. 5, 129 Atl. 67 (1925).

[65] Pittsburgh & Buffalo Co. v. Duncan, 232 Fed. 584 (C. C. A. 6th, 1916); In re Watertown Paper Co., 169 Fed. 252 (C. C. A. 2d, 1909); *cf.* Hunter v. Baker Motor Vehicle Co., *supra* note 60; In re Muncie Pulp Co., 139 Fed. 546 (C. C. A. 2d, 1905).

[66] Minifie v. Rowley, 187 Cal. 481, 202 Pac. 673 (1921); Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 227 Pac. 723 (1924); Erkenbrecker v. Grant, 187 Cal. 7, 200 Pac. 641 (1921); *cf.* Wabash Ry. v. American Refrigerator Transit Co., 7 F. (2d) 335 (C. C. A. 8th, 1925).

(a) The adequacy or inadequacy of the capital and financial arrangements of the subsidiary weigh heavily in the determination of liability or non-liability of the parent, greatly overshadowing the other so-called indicia of identity between the companies such as common officers, directors, office and lack of separate books.

(b) Direct intervention or intermeddling by the parent in the affairs of the subsidiary and more particularly in the transaction involved, to the disregard of the normal and orderly procedure of corporate control carried out through the election of the desired directors and officers of the subsidiary and the handling by them of the direction of its affairs, seems to have been determinative in some cases to holding the parent liable.

(c) Nevertheless, in many cases direct intervention seems to have had no potency in swaying the courts. After considering the various facts indicating identity of the corporations and direct intervention they have decided according to their subjective idea of "avoiding an inequitable result."

As yet the subject is covered with a "mist of metaphors." Until the courts stop to analyze with more particularity the factors motivating their decisions before lapsing into phrases such as "alter ego" or "adjunct" or "instrumentality" there seems little hope of making prediction more certain than the foregoing.