

LEGAL LIABILITY OF HOLDING COMPANIES FOR ACTS
OF SUBSIDIARY COMPANIES

BY SAM ELSON

Modern corporate jugglery cannot but excite the amazement and wonder of the magician and wizard. The tortuous convolutions and manifold intricacies of present day corporate and holding company structures exhibit the age-old operation of legal ingenuity in taking the utmost advantage of statutory inadequacy and judicial inability to cope with a kaleidoscopic economic evolution. Recent complaints by the Interstate Commerce Commission to the effect that its orders are being evaded by the use of the subsidiary device; the use of the holding organization in the utilities field to minimize the effect of rate regulation and state taxation, and to defeat clear statutory policy; and the facility with which the holding structure lends itself to extensive stock manipulation, all indicate the necessity of a changed attitude in corporate legislation, and in the meantime a more stringent judicial application of present corporation law to unforeseen development.¹

This paper, however, is not concerned with the social or economic impolicy of the phenomenal increase in the use of the holding company device, or with the larger problems of progressive regulation of such corporations in their various activities; rather is it concerned with the narrower problem as to the extent of the operation of the principle of limited liability to the parent-subsidiary relationship, or as stated above—the legal liability of holding companies for acts of subsidiaries. Insofar as the courts perceive an identity of the holding company and the subsidiary, however, the related problems of regulation, taxation, etc., become more susceptible of solution.

Involved in an ascertainment of such liability is the fundamental issue of the disregard of the corporate entity.² The existence of the corporation as an entity distinct and apart from

¹ See St. Louis Post-Dispatch, April 13, 1930. Also *People ex rel. Potter v. Mich. Bell Tel. Co.* (Mich. 1929) 224 N. W. 330.

² Ballantine, *Separate Entity of Parent and Subsidiary Corporations* (1925) 14 CAL. L. REV. 12.

its stockholders is basic in corporation law; it is factual and not a mere fiction of law. And correlative with the principle of separate entity is that of limited liability of stockholders to the extent of the assets of the corporation. The question, then, as to the holding company is—shall the ordinary principles of separate entity and limited liability apply, in view of the peculiar position of the holding company as a stockholder of the subsidiary? Does the normal and necessary interrelationship between the parent and subsidiary—involving stock control of the latter by the former—call for the operation of the classical maxim that

. . . A corporation will be looked upon as a legal entity as a general rule, until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of individuals.³

It should not be inferred from the above statements that the holding company, organized solely for the purpose of holding stock in and controlling other corporations, does not have a valid economic and financial justification. The attractiveness of limited liability with multiple insulation through the holding company, the increased facility of financing and marketing of securities, the non-necessity of qualifying as a foreign corporation under onerous conditions in a particular state, and the economy and efficiency of unified control are among the features of the holding company plan.⁴ That the principle of limited liability is deeply imbedded in our legal economic system and has had a potent effect in our industrial and commercial growth, no one would deny. "It is legitimate for a man or group of men to stake only a part of their fortune on an enterprise. Legislatures, courts and business usages have made it so. Each has taken the extreme but logical step of allowing *one* man to do

³ U. S. v. Milwaukee Ref. Transit Co. (C. C. Wis. 1905) 142 F. 247; note (1926) 10 MINN. L. REV. 598.

⁴ Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations* (1929) 39 YALE L. J. 193, list also the retention of the good will of an established business unit, the avoidance of taxation, and the avoidance of cumbersome management structures.

what one thousand men may do.”⁵ And thus we have the practically universal acceptance of the one-man corporation and dummy incorporators.⁶ The holding company-subsidiary relation is comparable structurally to the one-man corporation form, but as we shall see, the former practice carries with it peculiarities in operation which give it far greater social significance.

A brief examination of the philosophical concept of the corporate entity is highly desirable for a proper perception of the problem. Two theories dominate corporate rationalization,⁷ the first, the German or Association theory, which regards the corporation as virtually a natural person with an “organic character which qualifies it to participate prominently in the life of the state and in the law.” The corporation acquires an independent collective legal personality.⁸ The second view regards the corporation as a fiction, “an artificial being, invisible, intangible and existing only in contemplation of law.”⁹ Neither of these views, nor a third one, that the corporation is a “name for

⁵ *Ibid.* 193, 194.

⁶ *Salomon v. Salomon & Co. Ltd.* (1897) A. C. 22; *Elenkrieg v. Siebrecht* (1924) 238 N. Y. 254, 144 N. E. 519. Some decisions have held that corporations do not fall within the statutory designation of persons capable of incorporating. *Denny Hotel Co. v. Schram* (1893) 6 Wash. 134, 32 Pac. 1002. *Nebraska Shirt Co. v. Horton* (Neb. 1903) 93 N. W. 225. But the corporation may make use of dummy incorporators, and if the corporate charter does not forbid, later acquire the stock. *Kardo Co. v. Adams* (C. C. A. 6, 1916) 231 F. 950. See also *State v. Mo. Pac. Ry.* (1911) 237 Mo. 338, 141 S. W. 643. In Maryland the corporate existence is deemed suspended where the stock is in the hands of a sole stockholder until some of the stock is disposed of to third parties. *Swift v. Smith, Dixon & Co.* (1886) 65 Md. 428, 5 Atl. 534. But the general rule is that sole ownership does not affect the existence of the corporate entity, unless other circumstances call for a disregard. *Louisville Banking Co. v. Eiseman* (1893) 94 Ky. 83, 21 S. W. 531; *Parker v. Bethel Hotel Co.* (1896) 96 Tenn. 252, 34 S. W. 209. See also *Button v. Hoffman* (1889) 61 Wis. 20, 20 N. W. 667; note (1926) 10 MINN. L. REV. 598. *Werner v. Hearst* (1903) 177 N. Y. 63, 69 N. E. 221.

⁷ Wormser, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* (1929) 3.

⁸ Under this view corporations may be guilty of personal and intentional crimes. *U. S. v. N. Y. Herald Co.* (1907) 159 F. 296; *U. S. v. McAndrews & Forbes Co.* (1906) 149 F. 823.

⁹ *Marshall, C. J., in Dartmouth College v. Woodward* (U. S. 1819) 4 Wheat. 518, 636. “. . . for the general purposes and objects of a law this invisible incorporeal creature of the law may be considered as having corporeal qualities.” *Bank of U. S. v. Deveaux* (U. S. 1809) 5 Cranch 61, 89.

a useful and usual collection of jural relations,"¹⁰ is enlightening for our inquiry. A more realistic interpretation regards the corporate entity as the sum of the stockholders. "The factual corporate entity is comprised of individuals in their capacity as stockholders with a common purpose of carrying on a particular enterprise." The corporation is not separate and distinct from its collective stockholders.¹¹ This view is more significant in dealing with the problem of the holding company, since the liability of such a company depends exclusively upon its relation to the subsidiary, involving stock control and corporate domination.

The numberless euphonious statements of the principles governing the disregard of the entity of the holding company, such as that "Generally the holding company is treated as a separate corporation, unless such separate existence is a mere sham, or is used as an instrument for concealing the truth, or where the organization and control is a mere instrumentality of such other company,"¹² are of little value without regard to cases and circumstances.¹³ Nowhere in the law does there exist a greater

¹⁰ *Farmers' Loan & Trust Co. v. Pierson* (1927) 130 Misc. Rep. 110, 116-7, 222 N. Y. S. 532.

¹¹ Note (1927) 27 COL. L. REV. 702. See also Machen, *Corporate Personality* (1910) 24 HARV. L. REV. 253; Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 COL. L. REV. 128; Hohfeld, *FUNDAMENTAL LEGAL CONCEPTS* (1914) 194. The proper view of the corporate entity attains importance in determining the jurisdiction of the federal courts. One theory obtaining in the jurisdictional cases is that the corporation is an association of persons conclusively presumed to be citizens of the state of incorporation. *Marshall v. Baltimore & Ohio R. R. Co.* (U. S. 1853) 16 How. 314. The other regards it "to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person." *Louisville, Cincinnati & Charleston v. Letson* (U. S. 1844) 2 How. 497.

¹² Thompson, *CORPORATIONS* (1927) sec. 4098, citing for non-liability *East St. Louis Connecting R. Co. v. Jarvis* (C. C. A. 7, 1899) 92 F. 735; *Crane v. Fry* (C. C. A. 4, 1903) 126 F. 278; *Pittsburgh R. Co. v. Duncan* (C. C. A. 6, 1916) 232 F. 584; *Martin v. Development Co.* (C. C. A. 9, 1917) 240 F. 42; *Haskell v. McClintic-Marshall Co.* (C. C. A. 9, 1923) 299 F. 405; *Stone v. Cleveland etc., R. Co.* (1911) 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770; *Borough of Cambridge v. Philadelphia Co.* (1925) 283 Pa. St. 5, 129 Atl. 67, 39 A. L. R. 1064.

¹³ Typical statements are these: "All fictions of law are introduced for the purpose of convenience and to subserve the ends of justice. . . . When they are urged to an intent and purpose not within the reason and policy of the fiction, they must be disregarded by the courts." *State v. Standard Oil*

confusion in the judicial approach. Liability of the parent company for acts of a subsidiary is explained variously by the magical terms "agency," "instrumentality," "adjunct," "alter ego," "single enterprise," "complete control," and many others. Judge Cardozo acutely observes: "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."¹⁴ Consequently loose statements of "agency" and "business conduit" help little toward a satisfactory rationale.¹⁵

The primary value of the corporate form of doing business lies in the separation of capacities, in the non-liability of stockholders for the acts of the corporation whose exercise of activity

Co. (1893) 49 Ohio St. 137, 30 N. E. 279. "In ordinary, everyday business transactions such as the acquisition of property, the making of contracts, the institution and the defense of suits, and the like, it is essential that the distinction between the corporation as a legal entity and a fictitious personality, on the one hand, and its stockholders, on the other hand, should be strictly maintained. 'But where the corporate form is used by individuals for the purpose of evading the law, or for the perpetration of fraud, the courts will not permit the legal entity to be interposed so as to defeat justice.'" Wormser, *op. cit.* 29.

"Berkey v. Third Ave. Ry. (1926) 244 N. Y. 84, 94, 155 N. E. 58, 61.

"In numerous cases it is contended that a subsidiary corporation is so far owned and controlled by another as to make the parent corporation responsible for the acts and obligations of the subsidiary. Unfortunately it does not seem possible to lay down any definite test as to when the usual immunity of the stockholder should be disregarded, but the courts assign various grounds which to a great extent are vague and illusory. It may be found in the first place that in substance the relation of principal and agent exists between the two corporations. It is often said, secondly, that one corporation is the mere 'agency,' 'adjunct,' or 'instrumentality' of the other, as if this were something different from principal and agent. In other cases the courts speak of the two corporations as being the same identical concern under different names by reason of the mingling or confusing of their business affairs, as where one is merely the selling agency of the other. In other cases the courts purport to go only on the ground of prevention of fraud, evasion and illegality." Ballantine, *op. cit.* 15.

finds its ultimate stimulus in the stockholders. Although the corporation carries on business in behalf of its stockholders, the latter are not thereby principals of the former, nor is there ordinarily any liability for obligations of the former.¹⁶ But one corporation may be the agent of another corporation, as in the case of individuals. This, however, does not help us determine what facts of ownership, control, financing and management in the parent-subsidiary relationship impress the obligations of the latter as those of the former. The unctuous principle that the corporate entity will be disregarded whenever necessary to attain substantial justice or avoid fraud is not helpful, because the requirements of justice in the particular case are not always apparent, as shown by the severe criticism of the *Moore & Handley Hardware Co. v. Towers Hardware Co.*¹⁷ and the *People's Pleasure Park v. Rohleder*¹⁸ cases. The problem is not one sub-

¹⁶ "Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter and not the contract of the individual members. Taney, C. J., in *Bank of Augusta v. Earle* (U. S. 1839) 13 Pet. 519, 587. Thus, even a sole stockholder does not own individually the corporation property, and cannot recover it in an action of replevin by him. *Button v. Hoffman* (1889) 61 Wis. 20, 20 N. W. 667. And he is not liable for injuries inflicted by the corporation. *Werner v. Hearst* (1903) 177 N. Y. 63, 69 N. E. 221. In *Sloan Shipyards Corp. v. U. S. Shipping Board* (1922) 258 U. S. 549, contracts made by the Fleet Corporation for work on ships were held enforceable against it, although the United States, the sole stockholder, was immune. *Salomon v. Salomon & Co., Ltd.* (1897) A. C. 22. See Canfield, *The Scope and Limits of the Corporate Entity Theory* (1917) 17 Col. L. Rev. 128.

¹⁷ (1889) 87 Ala. 206, 6 So. 41. A, B, & C sold their business to X, received the consideration, and agreed not to run a similar business in the same town. Later they incorporated and engaged in the same business. An injunction for X was refused on the ground that it was the corporation that carried on the business, and not A, B, & C. See note (1926) 36 YALE L. J. 254.

¹⁸ (1908) 109 Va. 439, 61 S. E. 794. A corporation formed by negroes successfully took title to land held under restrictive covenant against conveyance to colored persons. Of course the solution is clear where there is an obvious attempt at fraud as in *Booth v. Bunce* (1866) 33 N. Y. 139, where a creditor of a financially embarrassed firm successfully followed property transferred by the partnership creditors. The entity was also disregarded in *Donovan v. Purtell* (1905) 216 Ill. 629, 75 N. E. 334, where a real estate dealer organized a number of dummy realty companies having offices in the same room and the same officers and directors, with an indiscriminate use of the property of all for the purpose of evading judgments. See also *Quaid v. Ratkowsky* (1918) 183 App. Div. 428, 170 N. Y. S. 812.

ject to formalistic treatment; it is to some extent a philosophical inquiry with the allocation of business risk as its center thread. And, as indicated above, although the subsidiary corporation is a species of one-man corporation, cases in which the sole stockholder is held for the acts of the corporation, or vice versa, are not decisive of the parent-subsidary cases, since the latter group presents a far more complicated and perplexing interrelationship.¹⁹

I.

Before entering into a discussion of specific cases it should be noted that there are various types of holding companies, the only constant being stock control of the subsidiary either by the parent or by the same persons controlling both. The investment trust, organized primarily to hold stock in diversified companies with an eye to the distribution of risk, does not concern us primarily, since it does not normally enter into a managing, operating or unusual controlling relationship with the companies whose stock it holds, and aside from stock control there would be no reason for a variation from the principle of limited liability of the stockholder—in this case the investment trust. A second type involves the parent and subsidiary, both in the same general business, each in a different locality, illustrated by the *Berkey* case, discussed below, with the three identities of control, ownership, and business objective. Another form is one by which the parent uses the subsidiaries in different stages of manufacture of the same product or products, with the parent again possessing all the possible advantages of direct ownership through stock control of the subsidiaries, each of which is interdependent in the complete process. Another structure growing in favor is the pyramidal type, with holding company on holding company in a bewildering maze—though with a definite profitable purpose. These are referred to as “pure” holding companies in contrast with those above, and here again the problem of liability is as complex as the structure, with a generalization of nonliability for obligations of the subsidiaries in the absence of a

¹⁹ See *Wenban Estate v. Hewlett* (1924) 193 Cal. 675, 222 Pac. 723, and *Campbell v. Hanford* (Cal. 1924) 227 Pac. 234.

violation of the rules assuring insulation, to be discussed later. Other forms of holding companies are as various as the forms of business; but practically all fall within the well-defined groups listed.

What, then, are the criteria which govern the liability or non-liability of the particular holding company for acts or obligations of its subsidiaries? Although no mechanical "Open Sesame" can be advanced, certain objective factors characterizing the relationship, such as identity of stockholders, identity of officers, the manner of keeping books and records, the methods of conducting the corporate business "as a separate or a mere department of the other concern," have significance in demonstrating the incidents and use made of stock control of the subsidiary.²⁰ The financial solidity of the subsidiary and its ability to meet the normal capital drains of business are also factors of large effect in determining whether there has been a juggling of capacities so as to make the parent properly responsible.²¹ However, it is clear that liability does not come down merely to a question of good faith and honesty in the use of the corporate

²⁰ Douglas and Shanks, *op. cit.*, list the following pertinent characteristics of operation: (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; (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 interests 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 promisor; (18) The extent to which there were conveyances by the subsidiary to the parent in fraud of creditors of the former. See also notes (1920) 4 MINN. L. REV. 219, (1920) 29 YALE L. J. 659.

²¹ *Berkey v. Third Ave. Ry.*, *supra* note 14; *Luckenbach S. S. Co. v. Grace Co.* (C. C. A. 4, 1920) 267 F. 676.

privilege for legitimate ends, for this begs the issue of legitimacy.

That the ownership of all or a majority of the stock of the subsidiary or a controlling interest therein, or ownership by the same person or persons of all or a majority of the stock of both companies does not result in itself in a merger of the two corporations,²² or liability of one for the acts of the other,²³ is a principle clearly established. To a lesser extent it is agreed that the normal exercise of the ordinary incidents of stock ownership—such as the election of directors, the making of by-laws, and the increase or decrease of the authorized capital stock—carries no more liability for the parent than for any other stockholder, even with the additional fact of duplication of directors or executive officers; for identity in management in itself does not mean assimilation of the two activities.²⁴ The question then is raised, which can only be answered by an analysis of the cases, what participation in the affairs of the subsidiary—without attempting to define the terms “assimilation” or “domination”—can be deemed so extraordinary or abnormal that the corporate insulation will be of no avail? The issue is not entirely—as one writer has suggested—as to the form that the control has taken, but is also one as to its substance and extent.

For purposes of convenience, and because the element of reliance by the claimant appears in the contract and not in the tort cases, the two types of cases are discussed separately. Perhaps the most widely discussed case in which the parent was sought to be held for the tort of the subsidiary and one presenting as evenly divided a group of facts as could be desired, is the famous

²² In *Gramophone and Typewriter Ltd. v. Stanley* (1906) L. R. 2 K. B. 856, *aff'd* (1908) L. R. 2 K. B. 89, an English corporation owned all the stock of a German company, and it was contended that the profits of the latter could be taxed as of the English company, but both courts regarded the separate entity. In *People ex rel. Studebaker Corp. v. Gilchrist* (1926) 244 N. Y. 114, 155 N. E. 68, an attempt to tax a foreign parent on its profits through the local subsidiary which operated at a loss failed, the court saying: “Before the corporation *persona* may be ignored, the evidence must show that the parent though in form speaking and acting through another, is operating the business directly for itself.”

²³ *Berkey v. Third Ave. Ry.*, *supra* note 14; *Bergenthal v. State Garage and Trucking Co.* (1922) 179 Wis. 42, 190 N. W. 901.

²⁴ *Stone v. C. C. C. & St. L. Ry.* (1911) 202 N. Y. 352, 95 N. E. 816.

New York case, *Berkey v. Third Avenue Ry.*²⁵ One Berkey, who had been injured through the negligence of a motorman of the Forty-Second Street Railway, the subsidiary, brought suit against the parent, the Third Avenue Railway. The defendant, who itself owned and operated a street railway, owned 99% of the stock of the Forty-Second Street company, and was a dominant stockholder in several other street railways. The lines of the defendant and the subsidiary connected, and together were known as the "Third Avenue System," although the franchise to operate the particular line was in the subsidiary. The boards of directors of the defendant and its subsidiary were virtually the same, and the president, treasurer, general manager and paymaster were identical. The general manager for the entire system had charge of the superintendents of operation, who in turn directed the motormen and conductors. The departments for repairs, the printing plant, the employment bureau, the legal and accounting departments, and other activities were single departments operated for the entire system but under the direct control of the defendant, who paid all expenses and salaries in the first instance and later prorated them and charged them to the subsidiary's accounts. The cars were owned by the defendant and leased to the subsidiary at a substantial daily rental. The employees and cars never ran beyond their respective lines. The subsidiary, though solvent, was heavily indebted, its chief creditor being the defendant who held its second mortgage bonds, the first mortgage bonds being held by the general public. The president of the Third Avenue Railway Company, in making its report to the stockholders of that company, included the consolidated income of both companies in one statement.

The Court of Appeals, through Judge Cardozo, held that the parent was not liable for the tort of the subsidiary and that the latter was not the *alter ego* of the former, in spite of the use of the one company's assets by the other, the unity in operation, and the general interchangeable names.²⁶ The court evidently was

²⁵ *Supra* note 14.

²⁶ The First Appellate Division had reversed (217 App. Div. 504) a judgment of dismissal on the theory that a question of fact existed as to whether the corporations were not in fact one and the same. The Court of

impressed by the facts that "the subsidiary was adequately financed and solvent, that the rituals of the separate management structures had been observed; that the details of 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."²⁷ There was a strong dissenting opinion²⁸ proceeding upon the theory that where one corporation actually controls another and operates both as a single system, the dominant company must bear the unified burdens, including liability for torts of the subsidiary; that while separate bookkeeping entries were made, "these things cannot hide the reality or cover up the fact that the Third Avenue Railway Company, in operation, in control, in dominance, in execution, and in the furnishing of service to the city of New York, was the Forty-Second Street Railway." It might be pointed out that the majority opinion was influenced by the consideration that a decision to the effect that the parent was using and operating the subsidiary's franchise as its own would carry with it criminal liability. The conclusion of the majority has never recommended itself to the writer; the only separation of the entities was an internal domestic distinction while, as the minority opinion points out, there was one single enterprise, interchangeability of assets, with the parent using the subsidiary with the same flexibility and effect associated with direct ownership. The three identities were present—control, ownership, and business objective. Following the majority reasoning there appear to be no limits to the assimilation which may be had for the purposes of economy and efficiency. As one writer has said, "Of the decision it might be stated: 'The victim is offered up to the gods of jurisprudence on the altar of regularity.'"²⁹ That the *Berkey* result has not been generally approved is shown by the number of cases decided otherwise on substantially similar facts.³⁰

Appeals, in the reversal, held that as a matter of law they were not one and the same.

²⁷ Douglas and Shanks, *op. cit.* 198, 199.

²⁸ By Crane, J., concurred in by Pound, J.

²⁹ Wormser, *op. cit.* 23.

³⁰ *Davis v. Alexander* (1925) 269 U. S. 114; *Lehigh Valley R. R. v.*

In *Auglaize Box Board Co. v. Hinton*³¹ the parent took over the operation of the factory of the insolvent subsidiary, ostensibly operating it as a separate concern in the name of the latter. The officers of the subsidiary had no voice and performed no duties subsequent to the change. The parent took out liability insurance in the name of the subsidiary, paying the premium out of its own funds. An employee injured after the change in operation was permitted to recover from the parent. Although the case appears to present a much clearer one for liability than the *Berkey* case because of the complete change in domination and control from officers of the subsidiary to those of the parent, and because the former was *actually* and *directly* operated by the latter as a part of its general business, we must note that in the *Berkey* case the same domination was effected through the officers who were identical for both companies, and that the differentiation in assets was little more than one of bookkeeping as far as the ultimate owners—the stockholders—were concerned.

A clear case of assimilation was presented in *Joseph R. Foard Co. v. State of Maryland*.³² The subsidiary, which had an authorized capital of \$2000, paid by the parent through dummy incorporators, was organized to carry on the stevedore business of a shipbroker parent, both having identical officers and directors. The superintendent and stevedores were employed by the subsidiary, but practically no stockholders' or directors' meetings of the subsidiary were held. The parent handled the funds of both through its own account, and paid the expenses of both, keeping books as though the subsidiary was nothing more than a department of its business. Losses of the subsidiary were carried into the profit and loss account of the parent, which did not consider itself a creditor. In many instances the parent used facilities of the subsidiary directly, ignoring the management of the subsidiary. The parent was held liable for damages caused by the negligence of an employee of the stevedoring companies, the

Delachesa (C. C. A. 2, 1906) 145 F. 617; *J. R. Foard Co. v. State of Maryland* (C. C. A. 4, 1914) 219 F. 827; *Pennsylvania R. R. v. Sellers* (1889) 127 Pa. St. 466; *Auglaize Box Board Co. v. Hinton* (1919) 100 Ohio St. 505, 126 N. E. 881.

³¹ *Supra* note 30.

³² *Supra* note 30.

court saying, "Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the business of the Foard Company as ship-brokers and agents." The same result was reached on similar facts in *Davis v. Alexander*³³ where the parent railroad company actually controlled another railroad and operated both as a single system. Where there is direct control and complete unification into a single merged activity there is little doubt as to liability.³⁴

In *Stone v. C. C. C. & St. L. Ry.*³⁵ the parent escaped liability where the facts fell considerably short of assimilation and interdependent operation. Here the parent owned a majority of the stock of the subsidiary and advertised the two as a system; a minority of the directors of the subsidiary were directors of the parent; several of the executive officers were duplicated; the offices of both were in the same building. But the inferences from these facts were rebutted by evidence showing that the subsidiary made its own contracts, kept its own accounts, collected its own revenues, paid its own expenses, and that the parent's major interest was in the dividend return on its stock. And assimilation was not reached in *Friedman v. Vandalia R. R.*³⁶

³³ *Supra* note 30.

³⁴ *Pennsylvania R. R. v. Sellers*, *supra* note 30. The rolling stock of the two companies was used indiscriminately on either line, the trainmen on either line wore uniform clothing, marked with the insignia of the parent; tickets over the subsidiary were sold by the parent, which termed the subsidiary one division of its road; the principal officers of both were the same; the general freight department of the parent issued orders to the subsidiary's agents; and advertisements referred to the subsidiary as a road leased, operated, and controlled by defendant. In *Finnish Temperance Society v. Finnish Socialistic Publishing Company* (1921) 238 Mass. 345, 130 N. E. 845, the parent publishing company, which organized the subsidiary for the sole purpose of publishing a newspaper and to manage and use it as a creature or mouthpiece for the circulation of its propaganda, was held for a libel published by the subsidiary.

³⁵ *Supra* note 24.

³⁶ (C. C. A. 8, 1916) 254 F. 292. A number of railroads entering St. Louis organized the subsidiary, the St. Louis Terminal Railroad Association, each holding an equal number of shares and appointing one of the directors. Each railroad had the joint use of the property, and any em-

where the parent, by contract with the subsidiary, had certain potential rights of direct interference with the subsidiary, but had never exercised them. The mere fact of stock ownership does not merge the entities in the absence of evidential facts such as those found in the above cases.³⁷ Thus where the subsidiary is adequately financed, maintains a separate organization with separate transactions and records the parent will not be held liable for the tort of the subsidiary though they occupied the same offices, used the same telephone, and were both engaged in the same type of business.³⁸

That the parent cannot arbitrarily disregard the separate management structure of the subsidiary by giving one manager extensive control over the properties of the two companies, the subsidiary acquiescing because of the parent's control, is shown by *Costan v. Manila Electric Co.*,³⁹ the court attaching the burdens to the benefits of ownership:

. . . we think it is apparent that by it [the management contract] the holding company undertook to assume complete control of the operation of its subsidiaries. It employed a manager to operate their properties, authorized him to hire operating employees on its behalf, to fix their salaries, and to discharge them, and to purchase labor, materials, and supplies, in its name and on its behalf, necessary for operation for construction work. The manager's actions are made subject only to such general supervision as may be exercised by the director of the holding company, not of the subsidiaries whose properties are to be operated. In short the holding company utterly disregards the Manila Electric Company as a distinct corporate entity, except perhaps for bookkeeping purposes, and deals with its properties and their operation as a street railway exactly as though the legal title were in the holding company.

ployee of the subsidiary was removable on request in writing of any of the roads. The court held that the relationship of the parent to the subsidiary was merely that of a stockholder who contracted for services.

³⁷ *Bethlehem Steel Co. v. Raymond Concrete Pile Co.* (1922) 141 Ind. 67, 118 Atl. 279; *Atchison, Topeka & S. F. R. R. v. Cochran* (1890) 43 Kan. 225, 23 Pac. 151.

³⁸ *Bergenthal v. State Garage & Trucking Co.* (1922) 179 Wis. 42, 190 N. W. 901.

³⁹ (C. C. A. 2, 1916) 24 F. (2d) 383. That bookkeeping is not a decisive factor apart from the actual manner of conducting business is shown in *Dobbins v. Pratt Chuck* (1926) 242 N. Y. 106, 151 N. E. 146.

The element of control was found too great to prevent liability of the parent in *The William Van Driel, Sr.*⁴⁰ although separate management structures were maintained, where there was duplication to some extent of the officers of the parent railway company and the subsidiary grain elevator, and where the railroad issued orders as to management of the subsidiary, controlled its funds and their disposal, despite the fact that separate stockholders' and directors' meetings were held.

In cases where there is difficulty in determining the existence of separate management structures, the doubt has been resolved in favor of liability of the dominant company. This was the case in *Oriental Investing Co. v. Barclay*,⁴¹ plus the additional factor of inadequate financing of the subsidiary—the parent supplying only \$2000 in the form of a stock subscription—to operate a substantial hotel business. The parent may not successfully evade tort liability where it uses the subsidiary as a construction and operating unit, if by the contract with the subsidiary it milks the latter of all profits and at the same time makes itself a secured creditor of the subsidiary by a mortgage on its property, and reserves a right of direct interference. Thus the court in *Erickson v. Minnesota & Ontario Power Co.*⁴² in effect holds that the parent company may not do business through a subsidiary and at the same time safeguard itself against concomitant obligations, thereby throwing all the risk on persons coming in contact with the subsidiary. One cannot eat the business pie and still have it. The same principle applies where the activities of the two companies are inextricably intermingled and so confused that it is impossible to identify the activity as that of the parent or of the subsidiary. The courts cannot be expected to accomplish the separation which the companies have failed to effect.⁴³ In a final group of cases, represented by *Le-*

⁴⁰ (C. C. A. 4, 1918) 252 F. 35.

⁴¹ (Tex. Civ. App. 1901) 64 S. W. 80.

⁴² (1916) 134 Minn. 209, 158 N. W. 979.

⁴³ *Wichita, F. & N. W. Ry. v. Puckett* (1915) 530 Okla. 463, 157 Pac. 112 (Both railroad companies had a common superintendent and master mechanic, and used rolling-stock interchangeably); *Lehigh Valley R. R. v. Delachesa* (C. C. A. 2, 1906) 145 F. 617, the court saying: "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."

high Valley Ry. v. Dupont,⁴⁴ the holding company has been held liable purely on the basis of stock control even though the businesses were separately operated and managed with the subsidiary having a distinct and adequate financial backbone. In the *Dupont* case it was said that the parent should be held 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." However, the ultimate interest in profits or losses characterizes every parent-subsidary relationship, so that this can hardly be said to be a true basis of liability, absent other factors. Although the approach in the case seems to be a proper one, the ultimate reason assigned for liability does not bear inquiry.

Some cases have been asserted to support the theory that ownership of stock alone, carrying with it "ultimate" and "potential" control, is sufficient to entail liability. But in most of these the plaintiff can also trace his injury back to some neglect of duty by the parent. Such a case is *Specht v. Mo. Pac. R. R.*,⁴⁵ where the plaintiff was injured because of a defective coupler in a car owned by the parent but which was in the possession of the subsidiary under an operating contract which provided that when rolling stock came onto the lines of the subsidiary such cars should become units in the subsidiary. Responsibility for the defect belongs to the parent, the owner, and the provision of the operating contract could not affect the plaintiff's rights.

In *Radio-Craft Co. v. Westinghouse Elec. & Mfg. Co.*,⁴⁶ which

The decision, however, is supportable on the separate ground that the defendant itself was engaged in the transaction leading to the tort, although the employees involved were those of the subsidiary.

⁴⁴ (C. C. A. 2, 1904) 128 F. 840. Aside from the parent-subsidary feature, this case may be justified on the ground that the ticket, though calling for transportation on the subsidiary's line, had been purchased from defendant, and did not refer to the subsidiary, but was an undertaking of the parent which it could not delegate to another and thereby avoid all liability.

⁴⁵ (1923) 154 Minn. 314, 191 N. W. 905. See *Gulf C. & S. F. Ry. v. Cities Service Co.* (D. Del. 1922) 281 F. 214, where the parent, by means of its stock ownership, induced the subsidiary to breach a contract with plaintiff. Also *Ufa Eastern Division Distribution v. Universum Film Aktiengesellschaft* (Memo. order of affirmance Nov. 22, 1929, in Appellate Division, 237 N. Y. S. 912).

⁴⁶ (1925) 7 F. (2d) 432. The same result was reached in *Radio-Craft Co. v. Westinghouse Electric & Mfg. Co.* (D. N. J. 1923) 291 F. 169, *aff'd* (C.

is representative of the patent infringement suits, the evidence indicated that the Radio-Craft Company was a mere instrumentality of the De Forest Company, which acquired the stock of the former company for the purpose of using that corporation as a cover for its own transactions. The De Forest Company made its own employees officers of the subsidiary in order to be "fully covered on this patent situation" as its vice president wrote. The court in finding for liability repeats the principle which is repeated in most of the cases, that,

Where stock control has been resorted to not for the purpose of participating in the affairs of the corporation in the normal and usual manner, but for the purpose of controlling the company, so that it may be used as a mere agency or instrumentality of the owning company, courts will look through the screen of separate corporate control and place the responsibility where it actually belongs.

However, in *Owl Fumigating Corporation v. California Cyanide Co.*,⁴¹ in spite of ownership of all the subsidiary's stock, identity of officers, and a close financial relationship, the conclusion was for nonliability because it appeared that the parent did not organize the subsidiary to infringe the plaintiff's patent and that the parent's purpose in organizing the subsidiary could be executed without an infringement. Such an approach would seem to beg the real question, which concerns the parent's vicarious liability through the intermediacy of the subsidiary.

II.

Liability of the holding company for contract obligations of its subsidiary cannot rest on a contractual basis, since it is the subsidiary which is the contracting party, and normally the stockholder—whether a natural person or a corporation—is not bound thereby. In order that the plaintiff may hold one whose liability he did not bargain for, much the same circumstances must exist as in the tort cases before the separate entity

C. A. 3, 1925) 7 F. (2d) 432, where there was complete assimilation in management and operation in the production and marketing processes, and in Westinghouse Electric & Mfg. Co. v. Allis Chalmers Co. (C. C. A. 3, 1910) 176 F. 362. See Union Sulphur Co. v. Freeport Texas Co. (D. Del. 1918) 251 F. 634.

⁴¹ (D. Del. 1928) 24 F. (2d) 718, *aff'd* (C. C. A. 3, 1929) 30 F. (2d) 812.

of the subsidiary will be disregarded. Here again ownership or common holding of the stock of the subsidiary is a *sine qua non*, but, as in the tort cases, the normal control which is the incident of stock ownership is not in itself productive of liability.⁴⁸

It is necessary to eliminate from consideration a large number of cases where the parent has been held for obligations of the subsidiary on a theory other than that of vicarious liability. Thus the parent may be estopped to deny liability where it has led the claimant to rely on its ownership as an assurance of repayment,⁴⁹ or where the parent causes a transfer of assets of the subsidiary in fraud of creditors.⁵⁰ In some cases the decisions find alternative bases in contractual liability,⁵¹ but in the majority of cases liability is predicted because of some fraudulent or illegal purpose which is sought to be accomplished through the subsidiary device.⁵² Numerous assaults have been made by this means on complete enforcement of the anti-trust regulations, the commodity clause, and orders of the Interstate Com-

⁴⁸ *Martin v. Development Co. of America* (C. C. A. 9, 1917) 240 F. 42; *City of Holland v. Holland City Gas Co.* (C. C. A. 6, 1919) 257 F. 679; *Allen v. Philadelphia* (C. C. A. 3, 1920) 265 F. 817; *Hooper Maniken Co. v. Matthew Addy Co.* (C. C. A. 6, 1925) 4 F. (2d) 187; *Majestic Co. v. Orpheum Circuit* (C. C. A. 8, 1927) 21 F. (2d) 720. In *N. Y. Air Brake Co. v. International Steam Pump Co.* (1909) 64 Misc. Rep. 347, the capital stock of two manufacturing companies was owned by a third company, all having common officers and offices, and acting through a common agent. Plaintiff, who contracted with the two subsidiaries, sued all three companies, but his suit for breach of contract against the third corporation was dismissed on the ground that redress must be sought "by pursuing the particular corporation with which it contracted."

⁴⁹ *Platt v. Bradner Co.* (1924) 131 Wash. 573, 230 Pac. 633.

⁵⁰ *Pennsylvania Canal Co. v. Brown* (C. C. A. 3, 1916) 235 F. 669 (parent held for losses occasioned to bondholders for causing diversions of subsidiary's sinking fund); *B. & O. Tel. Co. v. Interstate Tel. Co.* (C. C. A. 4, 1893) 54 F. 50 (sale price of subsidiary's property held trust fund where the railroad company parent organized, and controlled the telegraph company, duplicated the latter's officers, supplied all its capital, and caused the sale of the subsidiary's assets when plaintiff obtained a judgment).

⁵¹ *Dobbins v. Pratt Chuck Co.* (1926) 242 N. Y. 106, 151 N. E. 146; *American Nat. Bank v. National Wall-Paper Co.* (C. C. A. 8, 1896) 177 F. 85. See also *Pullman Car Co. v. Mo. Pac. R. R.* (1885) 115 U. S. 587.

⁵² *Rice v. Sanger Bros.* (1924) 27 Ariz. 15, 229 Pac. 397; *George v. Rolins* (1913) 176 Mich. 144, 142 N. W. 337 (defendant organized new corporation in order to evade agreements not to use plaintiff's name). *Higgins v. California P. & A. Co.* (1905) 147 Cal. 363, 81 Pac. 1070.

merce Commission, illustrated by *U. S. v. Lehigh Valley R. R.*,⁵³ *U. S. v. Del. Lack. & West. R. R.*⁵⁴ and other cases, but where discovered they have in most cases failed.⁵⁵

Greater significance has been attached by the courts dealing with contract obligations to the factor of adequate financial stability of the subsidiary. In *Luckenbach S. S. Co. v. W. R. Grace & Co.*⁵⁶ the parent was held for a breach by the subsidiary where the former leased to the subsidiary (which had a \$10,000 capitalization as contrasted with the parent's capital of \$800,000) its fleet of steamships at an inconsiderable rental, with the subsidiary functioning to assume contract obligations which otherwise would fall upon the parent. The same officers and directors controlled the destinies of both companies. Without hesitation the court declared: "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 simply itself in another form."

In *Portsmouth Cotton Oil Mfg. Corp. v. Fourth Nat'l Bank*⁵⁷ a bank organized a corporation, whose stockholders were officers in the bank which supplied the entire capital, to operate an oil refining business which it had purchased. All the activities of the business were carried on under supervision of the bank so that in a suit for a breach of warranty by the subsidiary it was not difficult to hold the parent in view of the direct administration by it, through its officers, of the affairs of the subsidiary, and of the financial dependence of the subsidiary. In *McClintic-Marshall Co. v. Scandinavian-American Bldg. Co.*⁵⁸ under substantially similar facts a bank was held not liable where it organized a building company to construct a building for the bank and

⁵³ (1911) 220 U. S. 257 (commodities clause).

⁵⁴ (1915) 238 U. S. 516 (commodities clause).

⁵⁵ *Chicago, M. & St. P. Ry. v. Minn. Civic Ass'n* (1918) 247 U. S. 490; *U. S. v. Reading Co.* (1919) 253 U. S. 26 (Anti-Trust Act); *U. S. v. United Shoe Machinery Co.* (1916) 234 F. 127 (Anti-Trust Act); *U. S. v. Milwaukee Refrigerator Transit Co.* (1905) 142 F. 247; *Northern Securities Co. v. U. S.* (1904) 193 U. S. 197; *People v. North River Refining Co.* (1890) 121 N. Y. 582, 24 N. E. 834.

⁵⁶ (C. C. A. 4, 1920) 267 F. 676.

⁵⁷ (N. D. Ala. 1922) 280 F. 879.

⁵⁸ (C. C. A. 9, 1923) 289 F. 405.

where the two corporations had virtually identical officers and shareholders.⁵⁹ Liability did not follow in *City of Holland v. Holland City Gas Co.*⁶⁰ where the holding company acquired stock control of a gas company, elected its own directors and officers to similar positions in the gas company, and included it in the parent's prospectus, the court making the significant admission:

It must be conceded, however, that through acquisition of shares of stock in the gas company, and through interrelations of its directorate and officers of the two companies, the Delaware Company secured opportunity alike to benefit or to injure the interests of the gas company and its patrons.

The degree and form of intervention in the affairs of the subsidiary has been the decisive test in such cases as *Stark Elec. R. R. v. McGinty Contracting Co.*⁶¹ and *Dillard & Coffin Co. v. Richmond Cotton Oil Co.*⁶² In the former case an officer of the parent participated in the particular transaction, representing the parent as backing the subsidiary. Another important factor was the great disparity of capital—the parent having a \$1,000,000 capitalization, while the subsidiary construction company had a paid-up capital of only \$1,000. In the latter case officers of the parent supervised the daily business of the subsidiary, and in some cases paid the debts. Community in the processes of production and in business objective were determinative of liability in *Advance-Rumely Thresher Co. v. Geyer*:⁶³

. . . The M. Rumely Company [parent] manufactured certain articles of machinery or certain machinery. It is

⁵⁹ In *Hooper-Maniken Co. v. Matthew Addy Co.*, *supra* note 48, evidence of corporate control through stock ownership, the manner of stock sales, the similarity of names and stationery, the use of corporate insignia, the representations of sales agents, credit reports, and the fact that joint offices were maintained and financial aid was given, was held insufficient to require submission to the jury of the question of instrumentality. In *N. Y. Trust Co. v. Carpenter* (C. C. A. 6, 1918) 250 F. 666, and in *Marsch v. Southern New Eng. R. R.* (1918) 230 Mass. 483, 120 N. E. 120, lack of concealment of the parent-subsidary relationship, and a fully cognizant reliance by the plaintiffs on the subsidiary influenced the decisions.

⁶⁰ *Supra* note 48.

⁶¹ (C. C. A. 6, 1917) 238 F. 657.

⁶² (1918) 140 Tenn. 290, 204 S. W. 758.

⁶³ (1918) 40 N. D. 18, 168 N. W. 731.

evident that the mere manufacture of the machinery did not terminate the object for which such corporation was organized. The machinery which it manufactured had to be marketed, and if the Rumely products company [subsidiary], a corporation, was organized for the specific purpose of marketing such machinery of the Rumely Company as it manufactured, the marketing process was equally as important. . . .

and

. . . the conclusion is irresistible that they were really in effect, one company, though operated under separate names and possibly with entirely distinct shareholders.

A contrary view, and one highly welcomed by holding companies, is advanced in *Kingston Dry Dock Co. v. Lake Champlain Tran. & R. Co.*⁶⁴ where Judge Hand asserts:

Liability must normally 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 line must obviously be drawn, if shareholding alone does not fuse the corporations in every case.

This theory, pressed to a logical extreme, governed in an earlier case, *Borough of Ambridge v. Philadelphia Co.*,⁶⁵ and resulted in palpable injustice. The directors and officers of parent and subsidiary were identical; the parent financed the latter by advances on open account, the parent owning all the bonds of the subsidiary in addition to the stock; the directors of the subsidiary met infrequently, while the officers of the latter, being also officers in the former, assured the parent unified control and operation. In spite of these and other evidences of relationship, the court was impressed by the superficial distinction maintained and the fact that

The physical property and the franchise of the Pittsburgh Beaver line [subsidiary] are in its name and owned by that

⁶⁴ (C. C. A. 2, 1929) 31 F. (2d) 265.

⁶⁵ (1925) 283 Pa. St. 5, 129 Atl. 67.

company. The Philadelphia Company [parent] *eo nomine*, could not dispose of a dollar's worth thereof; nor could it, *eo nomine*, operate cars over the Pittsburgh & Beaver line, or make any use whatever of the latter's rights and franchises.

On this basis vicarious liability of the parent is impossible, and liability, if at all, could be founded only on direct intervention in the transaction sued upon.

Essentially the same considerations are raised in cases involving the bankruptcy of the parent or subsidiary, or both, and where the one or its creditors seek to share in the distribution of the assets of the other, or where both companies are sought to be adjudicated although only one is insolvent. It is safe to generalize that where the circumstances would point to liability of the parent for acts of its subsidiary that assets of the subsidiary will be held to be assets of the bankrupt parent corporation.⁶⁶ In *In re Rieger, Kapner & Altmark*⁶⁷ the subsidiary corporation was adjudicated with the parent partnership, where the partnership, engaged in the commission business, acquired for partnership purposes 99% of the stock of a manufacturing corporation, each partner holding an equal amount of the stock, and as directors and officers managing the business of the corporation, the partnership taking and selling all of the output. The same result was reached in *In re Muncie Pulp Co.*,⁶⁸ where the same shareholders held the stock of both companies, there being identical directors, but no separate books being kept. On similar facts a contrary result was reached in *In re Watertown Paper Co.*⁶⁹ Here, after the organization of a paper company, its stockholders organized a pulp company. Both companies mingled

⁶⁶ *In re Eilers Music House* (1921) 270 F. 915, 274 F. 330; *In re Rieger, Kapner & Altmark* (1907) 157 F. 609; *Re Muncie Pulp Co.* (1905) 139 F. 546.

⁶⁷ *Supra* note 66.

⁶⁸ *Supra* note 66.

⁶⁹ (1909) 169 F. 252. In *First Nat. Bank v. Walton* (1928) 146 Wash. 367, 262 Pac. 984, the solvent subsidiary was not adjudicated with the parent, although there was a close operating relationship, the subsidiary having been formed to better finance and carry out the marketing of the output, and the officers were identical, the general business being carried on from the office of parent, and the subsidiary's lumber being kept on the parent's premises.

their affairs, the paper company purchasing the output of the pulp company; and the stockholders regarded the two companies merely as departments of the same business. However, each operated in its own name, and separate books were maintained. These more or less fortuitious circumstances preserved the separate entities in the eyes of the court, and the pulp company was allowed to share in the paper company's assets.

The converse situation has been raised in a number of cases where the parent seeks to share in the assets of the insolvent subsidiary in competition with the creditors of the latter. Here the courts have been instinctively reluctant, and properly so, to allow the parent, which has the choice originally in determining the business structure, to choose the subsidiary method as one by which it can enjoy limited liability at the same time exercising effective control, whether direct or indirect, and yet to share in the subsidiary's assets in competition with the latter's creditors.⁷⁰ This was the result in *S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania*⁷¹ where both companies had common officers and some common directors, but the board of directors of the subsidiary being a figurehead and transacting no business, the affairs and finances of both companies being arranged for by the directors of the parent.

III.

Two related aspects of the problem, not thus far treated, should be referred to briefly for purposes of completeness. The first, which is merely mentioned here, since it does not fall within the scope of the discussion, is that of criminal liability of the holding company for acts which would subject the subsidiary to penal consequences. There is little or no direct authority on this phase, but it may be suggested that partly because of the strict construction of criminal statutes and also because of the difficulty of determining evidentially, even in the case of one corporation, where responsibility justly is to be attached, that the insulation offered by the holding company relation will pro-

⁷⁰ *Hunter v. Baker Motor Vehicle Co.* (1915) 225 F. 1006; *Clere Clothing Co. v. Union Trust, etc., Bank* (1915) 224 F. 363; *S. G. V. Co. v. S. G. V. Co.* (1919) 264 Pa. St. 265, 107 Atl. 721.

⁷¹ *Supra* note 70.

tect the holding company and its officers from criminal liability in all but the clearest cases of direct intervention, control, and perhaps, commission of the particular criminal acts. In determining the question of criminal liability under specific statutory provisions, it is evident that little weight can be attached to such factors, important as they are in civil liability, as adequate financial basis and separate books, records, etc. Vicarious criminal liability, in the sense used as to civil liability, is not a principle favored by the criminal law.

The second phase, and one of growing practical importance, is that involving the question of jurisdiction of foreign parent or holding corporations by means of service of process on the local subsidiary. The issue is not directly one of liability, but when it is decided that a foreign corporation has been properly served because it is doing business in a state through a subsidiary, on whom the process has been served, we are given further criteria on the merger of entities. The courts, however, distinguish sharply between the jurisdiction and liability cases, since the former cases are concerned with the application of the technical, perhaps artificial, concept of "doing business" in the state, and consequently one type of case is not authority for the other.⁷² As generally stated, the jurisdictional rule is that a foreign corporation can be personally served with process only when it is doing business within a state.⁷³ Here, as in the case of liability, ownership of stock in the subsidiary does not bring the person or corporation owning the stock within the state in the sense of "doing business" there.⁷⁴ But too close an operative relationship will meet the jurisdictional test, as in *Cutter v. Cutler-Hammer Mfg. Co.*,⁷⁵ where the parent was held to be present through

⁷² See, on the problem generally, Cahill, *Jurisdiction Over Foreign Corporations* (1917) 30 HARV. L. REV. 676; Scott, *Jurisdiction Over Non-Residents Doing Business Within a State* (1929) 32 HARV. L. REV. 871.

⁷³ *Riverside, etc., Mills v. Menefee* (1915) 237 U. S. 189.

⁷⁴ *Peterson v. C. R. I. & P. R. R. Co.* (1906) 205 U. S. 364; *Mechanical Appliance Co. v. Castleman* (1909) 225 U. S. 437; *Bank of America v. Whitney Bank* (1922) 261 U. S. 171. In the Peterson case there was complete identity of organization, yet the decision was against jurisdiction.

⁷⁵ (D. Mass. 1920) 266 F. 388. In *Conley v. Mathieson Alkali Works* (1902) 190 U. S. 406, there was no jurisdiction where the subsidiary was the selling agent of the parent, both using the same management structure.

the subsidiary, its selling agent, the parent exercising control through the subsidiary's manager who received his salary directly from the parent, which collected the money on sales by the subsidiary. This in spite of a separate bookkeeping system—a factor which has unduly influenced many decisions.

The jurisdictional line has been drawn in two recent cases, *Cannon Mfg. Co. v. Cudahy Packing Co.*,⁷⁶ and *Industrial Research Corporation v. General Motors Corporation*.⁷⁷ In the first case, where a foreign corporation marketed its products through a subsidiary which it completely dominated through stock ownership, but which maintained a superficially distinct corporate entity, and which did not act as the agent of the parent but instead bought goods from the parent and sold them to dealers to be shipped directly from the parent, it was held that the parent company, in a suit against it, could not be served through the subsidiary. The entities were recognized in spite of the fact that the parent exercised the same control over the subsidiary that it did over selling branches or departments of its business not separately incorporated which were established to market the same products in other states. The result was to the contrary in the second case, a suit for patent infringement, in which the General Motors Corporation was sought to be held for acts of its subsidiaries. A motion to quash service on the Ohio subsidiary was denied, though the General Motors Corporation was a Delaware corporation which did no business in Ohio in its own name. The evidential facts which supported the decision, and perhaps distinguish it from the *Cudahy* case, aside from stock ownership, were that the advertising and annual reports of the parent treated the subsidiary companies as mere divisions and operating adjuncts of the holding company, which controlled and directed their policies and business. In any event it is clear that the parent-subsidiary relationship exemplified in such cases

In *Miller & Lux v. East Side Canal Co.* (1908) 211 U. S. 293, the decision was in favor of jurisdiction where it was shown that the subsidiary had no independent existence, apart from the purpose of obtaining federal jurisdiction on the basis of diversity of citizenship. See also *La Varre v. International Paper Co.* (1929) 37 F. (2d) 141.

⁷⁶ (1925) 267 U. S. 333.

⁷⁷ (1928) 29 F. (2d) 623; (1929) 14 St. Louis L. Rev. 436.

is an assurance of sufficient notice to satisfy that element of the due process clause.

CONCLUSION

The writer does not have the temerity to hope that the more or less detailed discussion of the cases above will lead to an enlightened viewpoint on the problem of the liability of the holding company for acts of its subsidiaries, in view of the present hopeless confusion of approach and logic. Such a discussion can have its only value in indicating what the courts are doing and how they are doing it. The use of the holding company device, still in its infancy, is already the source of much judicial perplexity. Whether such states as New Jersey and Maryland, among those sponsoring the holding company method, are incubating a species of legal-economic Frankenstein monster remains to be seen.⁷⁸ In the interim, until a crystallization of legislative reaction either in inhibition or stimulation, it is believed that an effective form of regulation can be exercised by the courts through a judicious predisposition against, rather than in favor of, the recognition of the separate entities at all costs. The parent-subsidary form of business activity carries with it distinct advantages which, under an omnipresent system of compensation, requires a balancing of regulatory disadvantages. A readier piercing of the corporate insulation is one remedy.

The following principles state as definitely as is possible in the premises the circumstances in which the holding company should be held for obligations of the subsidiary: (1) The real parties in interest to reap the benefits of the business of both corporations must be, at least in large part, identical; (2) The holding company must be in a position to exercise, and have exercised, its power of control; (3) Such power of control must have been

⁷⁸ "The design of such corporations in the light of their history is evident, and from this it is apparent that their real purpose is to form and foster monopolies and combinations. It is surprising at least that any legislature in recent years as against present anti-trust and anti-monopoly sentiments, should authorize the formation and the existence of corporations for such purposes, and to make it easily within their power practically to neutralize and nullify all anti-trust laws. Such institutions are only fathered by states that have gone 'corporation mad.'" 5 Thompson, CORPORATIONS (1927) sec. 4098.

exercised so as to secure the transaction of such business by the subsidiary corporation as would inure to the benefit of the controlling corporation and its stockholders by virtue of their ownership of stock in the controlling corporation and would not inure to the benefit of the stockholders of the subsidiary corporation as such.⁷⁹ Under such principles the criteria of a formal separate management structure, separate financial operations, etc., though of evidential significance, assume minor importance. The underlying philosophy is the justifiable assumption that unified business activity cannot be divorced from unified business risk.

The views stated above do not appear to cover sufficiently the question of liability in the case of the "pure" holding company which is engaged in no activity other than the holding of stock. It is clear to the writer, however, that liability will not exist as to these, except where the above indicia are found to exist;⁸⁰ and these characteristics, it can be seen, are more often to be found in the case of the parent and subsidiary companies which together form elements in the productive processes. Another version of the relationship which presents difficulties for judicial treatment, and one which is growing in favor with utilities, is the formation of a foreign holding company by persons interested in local utilities, the management structure of the holding company being a mere dummy of the "subsidiary." The advantages of this device for purposes of rate manipulation are evident, as can be testified by the citizenry of a large mid-western municipality.

In conclusion we agree with the writer who has pierced through to the real significance of the problem:⁸¹

Subsidiary corporations not only have legitimate uses, but also are in most cases legitimately used. There is no reason to assume that they are essentially vicious, or that the building up of a structure based on interdependent corporate units is not sound. Such a system, however, involves certain obvious perils. The primary danger arises out of the fact that the management of a subsidiary has ceased to rep-

⁷⁹ Note (1920) 4 MINN. L. REV. 219.

⁸⁰ *Majestic Co. v. Orpheum Circuit* (C. C. A. 8, 1927) 21 F. (2d) 720.

⁸¹ Berle: *STUDIES IN THE LAW OF CORPORATE FINANCE* (1928) 174.

resent the interests of the enterprise in which the subsidiary is itself engaged. Rather, it is the protagonist of a parent involved in far wider schemes, and the particular enterprise of the subsidiary is only one part of a much greater plan. The temptation, consequently, is to use the corporate structure of the subsidiary to evade obligations of the parent and to manipulate the credit of the subsidiary to support transactions which may not benefit the other holders in the subsidiary [and the public].⁸² This creates a situation of fact, of which, it is submitted, the law must take cognizance.

⁸² Brackets my own.