These problems are not raised by the principal case, but before proposed legislation is enacted, they should merit close scrutiny. The gratifying feature of the principal case is that it is another blow to the theory of *Collector* v. *Day*. In the future, the Court will probably not approach the problem by considering whether a state agency is being taxed but whether such a tax would hamper the state in performing its duties.

Corporations—Parent and Subsidiary—Set-off of Subsidiary's Claims against Parent's Indebtedness—[Indiana].—The defendant manufacturing corporation maintained a subsidiary under a separate name, the latter's sole asset being a deposit in the plaintiff bank. In financial reports of the defendant to the plaintiff the subsidiary was referred to as a "selling division." Checks and remittances, although in the subsidiary's name, were honored only upon the signatures of those who were also officers of the parent corporation, and were frequently used to transfer the subsidiary's account to that of the defendant. In an action by the receiver of the bank on a note-indebtedness, owed to the bank by the defendant, the defendant successfully set-off the subsidiary's deposit. On appeal, *held*, reversed. No mutuality in the cross-claims since the manufacturing and sales corporations were distinct entities. *Feucht v. Real Silk Hosiery Mills*.[1]

It is frequently stated that where the corporate fiction is resorted to as a means of evading defined public policy or a statute,[2] or of achieving a forbidden monopoly,[3] or of perpetrating fraud,[4] or of immunizing the parent corporation from tort[5] or contract[6] liabilities apparently incurred by its subsidiary, the court at the instance of the injured party will pierce the corporate shell to fix responsibility on the actual principal.[7] The novel question raised by the instant case is whether in the absence of

[1] 12 N.E.(2d) 1019 (Ind. App. 1938).

[2] People v. North River Sugar Refining Co., 121 N.Y. 582, 24 N.E. 834 (1890); State *ex rel.* Marsh v. Safford, 117 Ohio St. 576, 159 N.E. 829 (1927); United States v. Delaware, L. & W. Ry. Co., 238 U.S. 516 (1914); United States v. Lehigh Valley Ry. Co., 220 U.S. 257 (1911).

[3] Federal Gravel Co. v. Detroit & M. Ry. Co., 249 Mich. 49, 226 N.W. 677 (1929); United States v. Lake Shore & M.S. Ry. Co., 203 Fed. 295 (D.C. Ohio 1912); Aluminum Co. of America v. Fed. Trade Comm'n, 284 Fed. 401 (C.C.A. 3d 1922).

[4] Mosher v. Lee, 32 Ariz. 560, 261 Pac. 35 (1927); Security Bank & Trust Co. v. Warren Light & Water Co., 170 Ark. 50, 278 S.W. 643 (1925); Donovan v. Purtell, 216 Ill. 629, 75 N.E. 334 (1905).

[5] Costan v. Manila Electric Co., 24 F. (2d) 383 (C.C.A. 2d 1928); The William Van Driel, 252 Fed. 35 (C.C.A. 4th 1918); Auglaize Box Board Co. v. Hinton, 100 Ohio St. 505, 126 N.E. 881 (1919). *Cf.* Berkey v. Third Avenue Ry., 244 N.Y. 84, 155 N.E. 58 (1926); Owl Fumigating Corp. v. California Cyanide Co., Inc., 24 F. (2d) 718 (D.C. Del. 1928).

[6] Luckenbach S.S. Co. v. W. R. Grace & Co., 267 Fed. 676 (C.C.A. 4th 1920); Start Electric Ry. v. McGinty Contracting Co., 238 Fed. 657 (C.C.A. 6th 1917). *Cf.* First Nat'l Bank v. Walton, 146 Wash. 367, 262 Pac. 984 (1928); Kingston Dry Dock Co. v. Lake Champlain Transportation Co., 31 F. (2d) 265 (C.C.A. 2d 1929).

[7] For general discussion as to when courts will disregard corporate personality see Wormser, Piercing the Veil of Corporate Entity, 12 Col. L. Rev. 496 (1912); Stevens, Corporations § 19 (1936).

such circumstances the parent corporation itself can for its own benefit request the court to recognize the essential oneness of parent and subsidiary.[8]

No satisfactory criteria have been evolved for determining when corporate identity exists,[9] the cases revealing an extraordinary preoccupation with the details of the particular organization.[10] The statement that the corporate insulation will be broken down when the subsidiary is an "agency," "adjunct," "instrumentality," "alter ego," "tool," "corporate double," or "dummy" of the parent is but to state a conclusion for a reason. The facts which give rise to such conclusion, however, reveal that where the parent corporation exerts a *direct* intervention in the management, operation, and finances of the subsidiary, assimilation of the units will be found.[11]

The court's refusal to find assimilation at the suit of the parent corporation in the instant case might be justified on the ground that the corporation by voluntarily incorporating its subsidiary should not now set the machinery of the law to undo what it itself has done. Unless great injustice would otherwise result, no reason is apparent for not insisting upon consistency in the corporation's conduct.

Where the interest of the state creating the subsidiary is involved, as in the tax cases,[12] the courts have generally refused to disregard the separateness of parent and subsidiary, albeit no technical estoppel could be asserted by the state. In order to avoid undue complication of the law, third persons likewise should be permitted to insist upon the independent status of the subsidiary even though such third persons, like the bank in the instant case, cannot show that they have relied to their detriment upon the ostensible separateness of the subsidiary.

Despite the total financial integration and identity of personnel in the instant case, were the bank the one seeking to appropriate the subsidiary's account on the parent's note, it seems only problematical whether the court would have disregarded the fiction of corporate entity where the set-off would operate as a preference over the other creditors of the subsidiary. In refusing the set-off in the converse situation the court's solicitude for the creditors of the bank is in line with the modern trend of confining

[8] See Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 25 P. (2d) 839 (1933), where holding company recovered on false representations made by defendant to subsidiary. While the assimilation of holding company and subsidiary were one of the points urged by the plaintiff in his right to recover, the court chose to base its decision on other grounds. See also General Discount Corp. v. First Nat'l Bank, Detroit, 5 F. Supp. 709 (Mich. 1933).

[9] See Douglas and Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L.J. 193 (1929); Stevens, Corporations 83 (1936): "Whether a distinction between the personalities will be made when there is a dominant and a subsidiary corporation cannot be determined for all purposes in one action. The distinction may be ignored as to one pair of corporations for one purpose, and scrupulously regarded as to the same corporations for another purpose."

[10] For a table of the various types of organization and operations which link parent and subsidiary see Douglas and Shanks, *op. cit. supra* note 9, at 195 note 8.

[11] Failure to provide the subsidiary with sufficient assets, failure to keep separate accounts or to observe the ritual of separate management may be other factors influencing the finding. See Stevens, Corporations §18 (1936).

[12] In Hans Rees' Sons, Inc. v. North Carolina *ex. rel.* Maxwell, 283 U.S. 123 (1931); Commonwealth v. Pennsylvania Ry. Co., 297 Pa. 308, 147 Atl. 242 (1929).

set-off in bankruptcy strictly to its traditional limits.[13] Although the preference created by set-off seems firmly entrenched in precedent,[14] and is recognized by the express language of the Bankruptcy Act,[15] the set-off demanded in the instant case is not statutory set-off, but equitable. Whatever equity the parent corporation may have had in its subsidiary's deposit[16] is nullified by the desirability of narrowing the scope of a rule which is an anomaly in the first instance.

Corporations—Right of a Stockholder Not within the Statutory Class To Inspect the Corporate Books—[Illinois].—The plaintiff, a stockholder of record for less than six months and owning less than five per cent of the outstanding shares, petitioned for a writ of mandamus to compel the defendants individually and as officers of the corporation to permit him to examine its books. The first paragraph of the applicable section of the statutes[1] grants a right of inspection for proper purposes to stockholders "of record for at least six months . . . or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation . . . ." The second paragraph provides for a penalty upon an officer of the corporation for refusal to allow such a stockholder to examine the books upon showing of proper purpose, while the third paragraph of the statute provides that "nothing herein contained shall impair the power of any court . . . upon proof by a shareholder of proper purpose, to compel by mandamus . . . the production for examination of the books . . . of a corporation." *Held*, for the defendants. Since the plaintiff is not within the statutory class, he is not entitled to a writ of mandamus to compel the production of the corporate books. *Neiman* v. *Templeton, Kenly & Co., Ltd.*[2]

Statutes in many jurisdictions have extended the common law right of a stockholder to examine the corporate books by removal of the requirement that the stockholder show proper purpose,[3] or by the imposition of a penalty on officers and directors

[13] *Cf.* Elliot v. Flynn Bros., 192 S.E. 400 (S.C. 1937); Hodgin v. People's Nat'l Bank, 124 N.C. 540, 32 S.E. 887 (1899). See also note, 4 Univ. Chi. L.Rev. 330 (1937).

[14] Yardley v. Clothier, 51 Fed. 506 (C.C.A. 3d 1892); Upham v. Bramwell, 105 Ore. 597, 209 Pac. 100 (1922); see Gilbert's Collier, Bankruptcy §§ 1426–1430 (4th ed. 1937); Glenn, Creditor's Rights and Remedies §428 (1915).

[15] 30 Stat. 565 (1898), 11 U.S.C.A. §108 (1937).

[16] See *dictum* in Kimberly Coal Co. v. Douglas, 45 F. (2d) 25, 27 (C.C.A. 6th 1930) to the effect that property and debts of the subsidiary are in equity considered those of the parent corporation.

[1] Section 45 of the Business Corporation Act, Ill. Rev. Stat. 1937, c. 32, §157.45.

[2] 294 Ill. App. 45, 13 N.E. (2d) 290 (1938).

[3] For instance see Smith's Ill. Rev. Stat. 1919, c. 32, §38; Cahill's Cons. Laws N.Y. 1935, c. 60, §10; S.C. Civ. Code 1932, §7750; Tex. Rev. Civ. Stat. 1925, Art. 1328; Utah Rev. Stat. 1933, title 18. c. 2, §31. See also Estuar, The Nature and Extent of the Right of a Stockholder to Inspect the Books of a Corporation, 17 Phillipine L. J. 105 (1937); 5 Fletcher, Cyc. Corp. §2220 (perm. ed. 1931).

As to what constitutes a proper purpose see Burns v. Drenner, 220 Ala. 404, 125 So. 667 (1930); Davis v. Cambria Title and Savings and Trust Co., 304 Pa. 32, 155 Atl. 108 (1931); Miller v. Spanogle, 275 Ill. App. 335 (1934); Carey v. Dalgarn Const. Co., 168 La. 621, 122 So. 884 (1929); 80 A.L.R. 1503; 20 Calif. L. Rev. 449 (1932).