class of debtors; it merely empowers him to determine whether or not his debtor's driving license should be suspended. This power may be used by the creditor as a remedy analagous to those given by statutes providing for supplementary proceedings to enforce judgments.[17] The difficulty of enforcing judgments in metropolitan areas may necessitate such additional remedies.

Further justification for the 1939 amendment may be found in the fact that prior to 1939 the clerk of the court was burdened with unnecessary work in transmitting to the commissioner of motor vehicles copies of all judgments unpaid after fifteen days. It is only in cases in which the creditor is unable to collect his judgment without resort to such procedure that the clerk's action is necessary under the amended act. Furthermore, it may be that the clerk (under the original act) acted only under pressure from the creditor, so that no substantial change resulted from the amendment.

Corporations—Recovery in Derivative Suit by Minority Stockholders of Subsidiary for Breach of Fiduciary Duty by Parent—Adequacy of Relief—[New York].—In 1927 Standard Oil Company of Indiana acquired a controlling interest in Pan American Petroleum & Transport Company, thereafter operating Pan American as a subsidiary. The Blausteins own twenty per cent of the stock and are directors and officers of Pan American. In 1931 and 1932 Indiana caused Pan American to dispose of its domestic crude reserves and pipe lines and its foreign producing properties. The problems raised by the fact that Pan American was no longer an integrated company led to negotiations between Pan American and the Blausteins and Indiana, culminating in an agreement (in 1933) which provided that Pan American was again to become an integrated company. By this agreement Pan American was to construct a large amount of new refining capacity, and Indiana was to assist its subsidiary in securing sufficient producing properties.[1]

In 1937 the Blausteins instituted a derivative suit against the other directors of Pan American and Indiana (as its majority and dominant stockholder), charging fraud, conspiracy, waste, negligence, and breach of trust. Also joined as defendants were the Standard Oil Company (New Jersey) and its president, on the theory that they knowingly participated in and profited from the alleged breaches of fiduciary duty, and that they conspired with the other defendants to secure benefits from transactions involving Pan American. Although not suing on the agreement, the plaintiffs treated the contract as setting a standard of fiduciary conduct, which they allege was broken by Indiana in four ways: (1) Pan American was prevented from acquiring producing resources at the same time that Indiana, through a subsidiary, was leasing such properties and selling to Pan American at a substantial profit most of the crude oil so obtained; (2) Indiana defeated a proposal for building a pipe line from the oil fields to the new refinery, arranging instead for transportation of the oil over two existing pipe lines, one owned by an Indiana subsidiary and the other by a New Jersey subsidiary; (3) although the 1933 agreement inferentially provided for a Pan American purchasing

[17] N.Y. Civ. Prac. Ann. (Cahill, 1937 and Supp. 1940) § 773 et seq.

[1] By 1929 Indiana had acquired over ninety per cent of the Pan American stock. The 1933 agreement provided for a reorganization which gave Indiana seventy per cent and the Blausteins twenty-eight per cent of the Pan American stock. In 1938 the ratios were again altered to seventy-eight per cent for Indiana and twenty per cent for the Blausteins.

department, it was decided that an Indiana subsidiary should do the purchasing for Pan American, thereby benefitting the subsidiary; and (4) the refinery which was built had only half the capacity contemplated by the agreement, the remainder of Pan American's requirements being processed by a New Jersey subsidiary.

In the suit for accounting, damages, and injunctive relief, *held*, that Indiana's position as a majority stockholder which had assumed control of the corporation's business created a fiduciary relationship between Indiana and Pan American. Indiana prevented Pan American from undertaking activities essential to its business while Indiana took advantage of these opportunities and profited from them. An accounting of profits and properties so acquired was ordered.[2] Pan American may recover damages consequent upon the defendants' preventing it from building a pipe line. The suit against the New Jersey defendants was dismissed because neither conspiracy nor knowing participation in the breach of trust was shown. *Blaustein v. Pan American Petroleum & Transport Co.*[3]

The principal case tests some familiar doctrines of fiduciary duty, in a situation in which the plaintiffs were not typical small-holding minority stockholders but represented a twenty per cent interest and were directors and officers in a favorable position for keeping close check on corporate affairs.[4] Of significance, moreover, is the fact that the agreement between the parties placed in writing the affirmative obligations assumed by a parent toward its subsidiary. In holding that the parent was subject to some of the obligations of a fiduciary, the court adopted the view of most courts[5] that

[2] The court found that the defendants' decision not to proceed with the program of refinery construction as provided by the agreement was justified because of unsettled economic conditions and technical difficulties.

[3] 174 Misc. 601, 21 N.Y.S. (2d) 651 (S. Ct. 1940).

[4] The amount of money involved in the principal case and the size and industrial importance of the corporate parties render it especially significant. Estimates of the amount of recovery range from fifty to seventy million dollars. The Pan American Petroleum & Transport Company has assets of over $90,000,000, and in 1939 its net income was slightly in excess of $5,000,000. It operates through nine subsidiaries, and its retail outlets are concentrated in the Eastern Seaboard states. The Standard Oil Company of Indiana represents total assets of over $700,000,000, controls over twenty-five subsidiaries and affiliates, and in 1939 reported a net income of $34,000,000. Indiana is the leading distributor of petroleum products in the Middle-West. The Standard Oil Company (New Jersey) is one of the two largest corporations in America, with total resources estimated at over $2,000,000,000; within its system are 240 odd subsidiaries and affilliates. In 1939 its net income totalled nearly $90,000,000. New Jersey's principal marketing areas are in Texas, the lower Mississippi Valley states, and the Eastern Seaboard. It was in this latter area that prior to 1932 Pan American competed most vigorously with New Jersey. See Standard Oil Co. (N.J.), 21 Fortune, No. 4, at 49 (April, 1940); Standard Oil of New Jersey Heavily Dependent upon Foreign Operations, 20 Barrons, No. 47, at 18 (Nov. 18, 1940); Standard Corporation Records, July, 1940, pp. 3982–88 (Standard Oil Company of Indiana), September, 1940, pp. 3389–3402 (Standard Oil Company–N.J.), August, 1940, pp. 3611–14 (Pan American Petroleum & Transport Company). For the light the principal case casts on the relations of units of the old Standard Oil Company after its dissolution in 1911, see A Bill of Rights for Investor Minorities, 1 Your Investments, No. 7, at 3 (Aug., 1940).

[5] Southern Pacific Co. v. Bogert, 250 U.S. 483, 487, 488 (1919); Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N.Y. 410, 430, 431, 44 N.E. 1043, 1048, 1049 (1896); Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 771 (C.C.A. 8th 1906); Kavanaugh v. Kavanaugh

this relationship depends upon "control, domination, and active management" and not upon "damage or evil intention." It has been suggested elsewhere, however, that to occupy a "fiduciary" position the majority not only must assume control of the corporation but must manage it in their own interest.[6] But such a qualification would seldom yield different results, because the question of fiduciary duty usually arises only after the majority have acted prejudicially.

When dealings between corporate "fiduciary" and beneficiary are challenged, the burden is on the fiduciary to prove good faith and to show that the transactions are fair.[7] A fiduciary may not appropriate for itself a business opportunity belonging to the beneficiary.[8] In the principal case the defendants sought to justify their acts of appropriation by a showing that the contracts made for Pan American regarding the pipe line and the purchasing of crude oil were fair and reasonable, and that Pan American was unable financially to undertake these activities. Similar arguments were advanced and rejected in *Irving Trust Co. v. Deutsch.*[9] The dismissal of Indiana's con-

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Knitting Co., 226 N.Y. 185, 195, 123 N.E. 148, 151, 152 (1919). The holding company aspect of the principal case raises no problems, for as regards fiduciary relationship, the courts treat a holding company precisely as any majority stockholder. That the pattern of relationships is the same may be seen by examining cases in which the majority stockholder so operates the corporation as to benefit a second corporation which he also dominates. Everett v. Phillips, 22 N.Y.S. (2d) 852 (S. Ct. 1940); Red Top Cab Co. v. Hanchett, 48 F. (2d) 236 (D.C. Cal. 1931); Des Moines Terminal Co. v. Des Moines Union R. Co., 52 F. (2d) 616 (C.C.A. 8th 1931).

[6] Holub v. Jacobwitz, 123 N.J. Eq. 308, 312, 197 Atl. 423, 425 (1937); cf. Cleary v. Higley, 154 Misc. 158, 168, 169, 277 N.Y. Supp. 63, 76 (S. Ct. 1934). By another statement of the rule, however, one in control of a majority of the stock and of the board occupies a fiduciary position. Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529, 537 (C.C.A. 6th 1915); cf. Wheeler v. Abilene Nat'l. Bank Bldg. Co., 159 Fed. 391, 393, 394 (C.C.A. 8th 1908); In re New York Railways Corp., 82 F. (2d) 739 (C.C.A. 2d 1936).

[7] Pepper v. Litton, 308 U.S. 295, 306 (1939); Ross v. Quinnesac Iron Mining Co., 227 Fed. 337 (C.C.A. 6th 1915); Sage v. Culver, 147 N.Y. 241, 247, 41 N.E. 513, 514 (1895). The same rule applies to transactions between boards of directors having common members. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599 (1921); Wentz v. Scott, 10 F. (2d) 426 (C.C.A. 6th 1926).

[8] Irving Trust Co. v. Deutsch, 73 F. (2d) 121 (C.C.A. 2d 1934), cert. den. 294 U.S. 708 (1935); Guth v. Loft, 5 A. (2d) 503 (S. Ct. Del. 1939); Liability of Directors for Taking Corporate Opportunities, Using Corporate Facilities, or Engaging in a Competing Business, 39 Col. L. Rev. 219 (1939).

[9] 73 F. (2d) 121 (C.C.A. 2d 1934), cert. den. 294 U.S. 708 (1935). In that case the Acoustic Products Company required rights to manufacture under certain basic radio patents. One of the defendants, Reynolds, was in a position to meet this need, having a contract to purchase stock in the company which owned the patents. Negotiating through one Bell, an Acoustic employee, he offered participation in the purchase of the shares to Acoustic; the offer was accepted. Certain of the Acoustic directors, learning from the president that the corporation was definitely unable to raise sufficient funds to participate, formed a syndicate to take over the contract with Reynolds, indicating that they would extend to the corporation all the benefits it would have obtained from consummation of the original Reynolds' offer. Reynolds was informed that Acoustic was unable to perform and consequently agreed to sell to the syndicate. The court held the directors and Bell liable, the latter on the ground that he knowingly partici-

tention in the principal case, that the organizational arrangement of the subsidiary rendered it unable to exploit business opportunities disposes of another suggested defense for a delinquent fiduciary. It should be noted, however, that in the principal case not only did Indiana formally agree to help Pan American undertake certain activities, but its representatives on the Pan American board later rejected suggestions that Pan American commence such undertakings.[10]

The finding for the New Jersey defendants rested upon two grounds: (1) There was a sufficient degree of separation between corporate entities, i.e., between New Jersey and its seventy-two per cent subsidiary, Humble Oil & Refining Company. The latter's completely owned subsidiary operated the pipe line used by Pan American. And, (2) the evidence indicating awareness of Indiana's breach of trust was insufficient. Admittedly, proof of knowledge of breach of a trust is difficult to establish, and the cases fail to make clear exactly what must be proved. The fact that the Humble Company was not joined as a defendant[11] made it unnecessary for the court in the principal case to attempt a clarification. Some statements of the rule of the liability of an outsider in dealing with a fiduciary impose liability only if the third party "knowingly joins with a fiduciary" in a breach of trust, or has "affirmative knowledge";[12] another requires merely that the third party be put on notice.[13] The strongest case against New Jersey concerned the pipe line transactions, for from these both Indiana and New Jersey profited. Nevertheless, the court indicated that the New Jersey defendants were in a position analogous to that of the outsider, Reynolds, in the *Deutsch* case.[14] In that case Reynolds sold to a syndicate formed by the directors an interest which the company had desired to obtain. Previously he had been informed that the company was unable to make the purchase because of its financial position. The comparison, it is submitted, is not a good one in two important respects. Reynolds did not stand to gain from the breach of fiduciary duty, whereas New Jersey in the principal case did, since construction of the contemplated pipe line would have made Pan American independent of New Jersey facilities. Secondly, since the dealings between Indiana and New Jersey were of long standing,[15] it is less likely that New Jersey was so ignorant of

pated in a breach of fiduciary duty. In absolving Reynolds, the court indicated that he was justified in proceeding on the understanding that Acoustic could not perform, that he was not obliged to investigate the intracorporate affairs of Acoustic, and that he received no benefit from the breach of trust.

[10] Cf. Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

[11] Humble Oil Co. is a Texas corporation. It does not appear why it was not joined, but presumably service could not be had.

[12] Jackson v. Smith, 254 U.S. 586, 589 (1921); Irving Trust Co. v. Deutsch, 73 F. (2d) 121, 125 (C.C.A. 2d 1934), cert. den. 294 U.S. 708 (1935).

[13] Stark v. Nat'l City Bank, 278 N.Y. 388, 401, 16 N.E. (2d) 376, 381 (1938).

[14] Note 9 supra.

[15] Prior to 1923 when the Blausteins were engaged in the retail gasoline business only, they purchased almost all their requirements from New Jersey. By joining with Pan American at that time they became independent of New Jersey, and until Indiana disposed of Pan American's crude oil sources in 1931 and 1932, Pan American competed vigorously with New Jersey, first as an independent integrated company and after 1927 as a part of the Indiana system. Although such inferences may not have evidentiary value, it would appear almost certain that

the intracorporate affairs of the other party as Reynolds understandably may have been.

Inasmuch as the profits were made not by Indiana but by its subsidiaries, and the injuries were suffered not by Pan American but by its subsidiaries, the consequence was a suit by minority stockholders of a corporation (Pan American) for redress for damage done to, and profits wrongfully made from, its subsidiaries by other subsidiaries of its parent (Indiana). The defendants urged that recovery could be sought, not by Pan American from Indiana, but in appropriate actions by Pan American subsidiaries against Indiana subsidiaries. Rejecting this contention, the court indicated that Pan American shared the injuries suffered by its wholly-owned subsidiaries. Since no creditors of the subsidiaries were shown to be prejudiced, there was no sound objection to permitting recovery by Pan American. The court also placed reliance on doctrines usually phrased in terms of ignoring the separateness of corporate entities when an "unjust" result threatens[16] or where subsidiaries are mere "instruments" or "departments" of the parent.[17] While these principles are ordinarily employed to impose liability on the parent for the torts and obligations of a subsidiary,[18] the court in the principal case, by allowing shareholders of the parent (Pan American) to recover in a derivative suit for injuries done its subsidiaries, reaffirmed what seems to be a sound position, yet one which has not found universal acceptance.[19] It is not clear, however, why this general equitable principle to prevent fraud or injustice should not apply as uniformly in this instance as when the question is the parent's liability for torts and obligations of the subsidiary. As another ground the court in the principal case might have employed the theory of *General Rubber Co. v. Benedict*[20] to allow shareholders of the parent a cause of action in a derivative suit, on the ground that Indiana and the

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New Jersey knew something of the internal structure of the Pan American and Indiana corporations, for changes in those structures directly affected New Jersey's business not only as to the acuteness of competition but also as to New Jersey's ability to sell crude and fuel oil to its competitor.

[16] Berkey v. Third Avenue R. Co., 244 N.Y. 84, 94, 95, 155 N.E. 58, 61 (1926); Rapid Transit Subway Constr. Co. v. City of New York, 259 N.Y. 472, 182 N.E. 145 (1932); Des Moines Terminal Co. v. Des Moines Union R. Co., 52 F. (2d) 616 (C.C.A. 8th 1931).

[17] Lowendahl v. Baltimore & O. R. Co., 247 App. Div. 144, 287 N.Y. Supp. 62 (1936), aff'd 272 N.Y. 360, 6 N.E. (2d) 56 (1936); Chicago, M. & St. P. R. v. Minnesota Civic Ass'n, 247 U.S. 490 (1918); Industrial Research Corp. v. General Motors Corp., 29 F. (2d) 623 (D.C. Ohio 1928); Detroit Motor Appliance Co. v. General Motors Corp., 5 F. Supp. 27 (Ill. 1933); Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C.C.A. 8th 1927). Compare the criteria for establishing "actual managerial domination" with those employed by courts applying the so-called "instrumentality" rule. See Corporations—Right of Minority Stockholders to Interfere in Corporate Management, 32 Mich. L. Rev. 839 (1934); Douglas and Shanks, Insulation from Liability through Subsidiary Corporations, 39 Yale L. J. 193 (1929).

[18] Cf. Rapid Transit Subway Constr. Co. v. City of New York, 259 N.Y. 472, 182 N.E. 145 (1932), where the subsidiary was charged with responsibility for the acts of the parent corporation.

[19] Cf. Holmes v. Camp, 180 App. Div. 409, 167 N.Y. Supp. 840 (1917); Sabre v. United Traction & Electric Co., 225 Fed. 601 (D.C. R.I. 1915); Schneider v. Greater M. & S. Circuit, 144 Misc. 534, 259 N.Y. Supp. 319 (S. Ct. 1932).

[20] 215 N.Y. 18, 109 N.E. 96 (1915).

majority directors of Pan American, by not preventing injury being done to Pan American's subsidiaries, violated a duty owed to Pan American as holder of stock in its subsidiaries.[21]

The court in the principal case adopted a realistic attitude not only in regard to the problem of separate corporate entities in the Pan American hierarchy but also in connection with another frequent obstacle in minority stockholders' suits, namely the proper forum. Although none of the corporate parties were New York corporations, the court recognized that service could be had in New York on most of the necessary defendants; certainly it was doubtful whether as many could be served in any other state. The court denied the plea of forum non conveniens interposed by the defendants, characterizing that doctrine as an instrument of expediency and justice to be used sparingly in stockholders' suits charging fiduciaries with breach of trust.[22] Despite the court's realism, the problem of effective remedy still remains. In addition to an accounting and damages, the court granted injunctive relief, restraining the defendants from interfering with free competition between Pan American and its subsidiaries and any Indiana subsidiaries, from preventing Pan American from developing a purchasing department, and from diverting any Pan American opportunities to Indiana or its subsidiaries. The plaintiffs had asked for relief which would ensure that Pan American be managed as an autonomous enterprise, suggesting four possible methods: enjoin Indiana from voting its stock in Pan American;[23] place the voting power in the hands of a representative of the court;[24] direct that Indiana distribute its holdings in Pan American pro rata among the stockholders of Indiana;[25] afford the parties an opportunity to agree upon a plan for the disinterested management of Pan American.[26] The court refused these suggestions for relief on the ground that they would deprive Indiana of property rights in its Pan American stock.

Considering the size and importance of the corporations concerned, the issues as to adequacy of remedy raised by the principal case may hardly be dismissed so easily, for the unsatisfactory nature of the Indiana-Pan American-Blaustein relationship cannot be remedied except by drastic means.[27] If the court's decree is followed, Pan American

[21] This possibility was recently suggested in Piccard v. Sperry Corp., 30 F. Supp. 171 (N.Y. 1939).

[22] Cf. Levy v. Pacific Eastern Corp., 153 Misc. 488, 275 N.Y. Supp. 291 (S. Ct. 1934); American Creosote Works v. Powell, 298 Fed. 417 (C.C.A. 5th 1924), cert. den., 265 U.S. 595 (1924); Williamson v. Missouri-Kansas Pipe Line Co., 56 F. (2d) 503 (C.C.A. 7th 1932); Rogers v. Guaranty Trust Co., 288 U.S. 123, 149 (1933). See Internal Regulation of Foreign Corporations, 29 Col. L. Rev. 968 (1929).

[23] 5 Fletcher, Cyc. Corp. 243 (perm. ed. 1931). In Turner v. Calumet & Hecla Mining Co., 187 Mich. 238, 153 N.W. 718 (1915), a parent corporation was enjoined from voting at stockholders' meetings for persons who were its own directors and from managing the subsidiary for the sole benefit of the parent. Cf. Dunbar v. American Tel. & Tel. Co., 224 Ill. 9, 79 N.E. 423 (1906).

[24] Cf. the decree in United States v. Reading Co., 273 Fed. 848, 854, 861 (D.C. Pa. 1921). If this arrangement were an express trust, a court of equity could remove the trustee. 3 Bogert, Trusts and Trustees § 519 (1935).

[25] Cf. United States v. Standard Oil Co. of New Jersey, 173 Fed. 177, 199 (C.C. Mo. 1909).

[26] Cf. the decree in United States v. American Tobacco Co., 221 U.S. 106, 187 (1911).

[27] The most obvious solution would be for Indiana to take over the Pan American stock held by the Blausteins in return for an equivalent amount of Indiana stock, or alternatively for cash.

will again become an integrated oil company and through its subsidiaries will be so situated that it can be in constant competition with Indiana subsidiaries. Indiana, however, may continue to elect a majority of the board of Pan American. Under such circumstances real competition between the parent and its seventy-eight per cent-owned subsidiary is as unlikely as that the Indiana directors on the Pan American board could completely divorce themselves from considerations of Indiana's welfare in situations in which the interests of the two corporations conflict. In virtually admitting that the Indiana-controlled directors on Pan American cannot be disinterested,[28] the court furnishes a sufficient answer to any argument that the relief granted is adequate.[29]

Corporations—Sale of Controlling Minority Interest under Questionable Circumstances—[Federal].—The plaintiff, an incorporated investment trust, had been in the control of a group of minority shareholders who had solicited proxies and secured the election of their candidates as directors. This controlling group sold their stock in a block to a syndicate. When the control had been transferred, the directors in office successively resigned within a period of a few minutes, and after each resignation the remaining directors elected to office a member of, or an individual "suggested" by, the syndicate. Immediately afterwards, the syndicate, all the members of which became directors, systematically looted the corporation's assets by substituting worthless securities for valuable ones. Subsequently a new board of directors was elected. In an action by the corporation against members of the original controlling group and the directors who had relinquished control to the syndicate, *held*, that "the owners of control are under a duty not to transfer it to outsiders if the circumstances surrounding the proposed transfer are such as to awaken suspicion[1] and put a prudent man on

[28] 174 Misc. 601, 662, 664, 21 N.Y.S. (2d) 651, 709, 711 (S. Ct. 1940).

[29] An appeal in the principal case has been filed in the appellate division. The plaintiffs have filed a cross-appeal from that portion of the judgment refusing to grant permanent relief as asked for in the complaint. It is not without significance that Pan American is proceeding with construction of a pipe line from the East Texas field to its refineries on the Gulf. Standard Corporation Records, Guide and Index Section, November 28, 1940, p. 10, and Chicago Daily News, col. 4, p. 45 (Dec. 13, 1940).

[1] The suspicious circumstances were: the agreement to have a large part of the corporation's assets converted into cash and available as such at the time of the sale; the several warnings to the defendant director by counsel of the corporation of the danger of dealing with little-known parties; the fact that the same corporation had been looted by another group five years before which should have been a vivid reminder of the dangers to which these investment trusts were subject; the presence of a director whose questionable ethical standard was well-known; and the inflated price paid.

The payment of an inflated price is not of itself a suspicious circumstance, for a controlling group may receive a higher than market price by virtue of its strategic position, and the buyer may desire control for an honest business reason (cf. Stanton v. Schenck, 140 Misc. 621, 251 N.Y. Supp. 221 (S. Ct. 1931) where control of Loew's Theaters, Inc. was passed to Fox Theaters, Inc.). But an investment trust, whose assets are but the ready equivalent of cash, cannot give the opportunities of a commercial or industrial venture unless it holds stocks of a nature peculiarly desirable to the purchaser. In the absence of knowledge of this fact, the payment of a price equivalent to several times the market value of the stock is a circumstance which should put a reasonable man on his guard.