courts already have used such tests in paternity cases.[20] As a fact-finding device, they may be said to be superior to circumstantial evidence and the subjective opinion of a jury which is called upon to detect the absence or presence of any physical resemblance between an adult and a child. Paternity is difficult to disprove; it may be lightly charged. The mechanisms for sifting such charges hitherto available have been not only cumbersome, but inadequate in that they were inaccurate. Blood-grouping tests are relatively painless and safe.[21] Insofar as their forensic utility has been demonstrated, they make possible the introduction of scientific accuracy and certainty in resolving disputed paternity cases.

Procedure—Corporations—Statute of Limitations in Stockholder's Derivative Suit —[New York].—A minority stockholder of Radio Corporation of America brought suit against its directors, the General Electric Company and its directors, and the Westinghouse Electric and Manufacturing Company and its directors, alleging that the latter corporations had been majority stockholders of RCA, and, through their control of its directorate, had managed RCA for their benefit contrary to the best interests of RCA. The wrongs alleged included the purchase of goods by RCA from the defendant corporations at excessive prices, the payment of a large sum by RCA to the defendant corporations for exclusive manufacturing rights at a time when the defendants knew the government was preparing to void these licenses under the Sherman Act, and the improper declaration of dividends by RCA. It was also alleged that these acts had been fraudulently concealed from the minority stockholders of RCA, and that suits by those stockholders who had discovered the wrongs had been collusively compromised and settled.[1] All the alleged wrongs admittedly had occurred more than six years before this action was brought, and the defendants pleaded the statute of limitations as a bar. The plaintiff contended in the alternative (1) that the complaint was essentially a claim for relief on the ground of fraud, and that the statute of limitations accordingly

[20] See, for example, Arais v. Kalensnikoff, 67 P. (2d) 1059, 1061 (Cal. App. 1937), aff'd 10 Cal. (2d) 428, 74 P. (2d) 1043 (1937). But see Bednarik v. Bednarik, 16 A. (2d) 80, 84 (N.J. Ch. 1940). In a suit for divorce on the ground of adultery the court refused a husband's petition for an order to compel his wife to submit to a blood-grouping test to determine the paternity of a child. The opinion rested upon the "constitutional" right to personal security and upon a statute (N.J. Comp. Stat. (1937) sub. tit. 11, c. 97, § 2:97–9) expressly exempting a husband and wife in a divorce action from being compelled to give "evidence" for the other, except to prove the fact of marriage. A recent New Jersey statute (N.J. Comp. Stat. (Supp. 1939), sub. tit. 11, c. 101, § 2:101–2) expressly empowers courts to order blood-grouping tests in disputed paternity cases, but the court denied that the more recent statute impliedly repealed the older one. This decision is open to question.

[21] Cf. Hayt v. Brewster, Gordon & Co., 199 App. Div. 68, 191 N.Y. Supp. 176 (1921). As to the privilege against self-incrimination, ". . . . it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion." 8 Wigmore, Evidence § 2263 (1940). Wigmore thus draws a distinction between real evidence, which is not within the scope of the privilege, and into which category blood-grouping tests fall, and testimonial evidence. See Britt, Blood-Grouping Tests and the Law: The Problem of the "Cultural Lag," 21 Minn. L. Rev. 671 (1937).

[1] Bill of Complaint, paragraph 95, p. 40. The defendants denied that the settlements were not made in the best interests of RCA. Reply Memorandum of Individual Defendants, pp. 22–25.

did not begin to run until the discovery of the wrongs; or (2) that since an accounting was necessary, the legal remedies were not adequate, and the action was therefore an equitable one to which the ten-year limitation period appropriate to equitable actions should apply. Upon motion to dismiss the complaint, *held*, (1) that since the gravamen of the complaint was the breach of the fiduciary duty, the action was not one for fraud within the meaning of the statute of limitations; and (2) that the six-year period then governing actions at law to recover damages for injury to property, rather than the ten-year equity period, was applicable where the wrongdoing fiduciaries were not alleged to have made personal profits. Complaint dismissed. *Druckerman v. Harbord.*[2]

The relevant provisions of the New York statute of limitations are the following:

§ 48. . . . . The following actions must be commenced within six years after the cause of action has accrued: . . . .

3. An action to recover damages for an injury to property,[3] or a personal injury. . . . .

5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

§ 53. . . . . An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues.

At first impression it would appear that the present case should be disposed of under the limitation for fraud actions, since, as the court states, "breach of duty by directors has been characterized, and properly so, as conduct in fraud of the corporation and its stockholders."[4] Furthermore, the rationale for having the period of limitations in fraud actions run from the time of discovery—viz., the difficulty of uncovering the harm—applies in the instant case, where it would be to the interest of the directors and controlling stockholders to conceal the facts if they committed the alleged wrongs. But it is well settled in New York that a complaint will not, for purposes of the statute of limitations, be viewed as based upon fraud where the facts alleged state a complete cause of action apart from the allegations of fraud.[5] And since the facts alleged in the present action to constitute the fraud also stated a complete case of action for breach of fiduciary duty,[6] the action was not viewed as one "to procure a judgment on the ground of fraud" within the meaning of the section in question.

It is not clear, under the New York precedents,[7] whether this action is governed by Section 48.3, the six-year period (since changed to three years) applicable to legal actions to recover for injuries to property, or by Section 53, the ten-year period applica-

[2] Opinion of Sheintag, J., Supreme Court: New York County, Special Term Part, October 28, 1940.

[3] By amendment in 1936 (N.Y.L. 1936, c. 558) the period of limitation for actions to recover damages for an injury to property was reduced to three years. This is the relevant portion of the section, Mencher v. Richards, 283 N.Y. 176, 27 N.E. (2d) 982 (1940), but the change did not affect causes of action then in existence.

[4] Opinion of Sheintag, J., Supreme Court: New York County, Special Term Part, October 28, 1940.

[5] Hearn 45th St. Corp. v. Jano, 283 N.Y. 139, 27 N.E. (2d) 803 (1940).

[6] See Blaustein v. Pan American Petroleum & Transport Co., 174 Misc. 601, 21 N.Y.S. (2d) 651 (S. Ct. 1940), noted in 8 Univ. Chi. L. Rev. 329 (1941), also involving management of a subsidiary corporation for the benefit of the holding companies, where extensive relief was given although there was no concealment or "fraud."

[7] See discussion in 123 A.L.R. 346, 354 (1939).

ble to actions in equity.[8] The rule is that the six-year period will be applied in equity where the legal remedy would have been fully adequate[9] had the suit been brought at law;[10] but the test of adequacy as developed under the New York decisions is unclear and difficult to apply. In *Potter v. Walker*,[11] regarded as controlling by the court in the instant case, it was held that the ten-year period of limitation governed actions to recover profits which a corporate director had wrongfully received and for which he was liable to account, but that the six-year period applied to actions founded upon the negligence of the director.[12] From subsequent cases it cannot be clearly determined whether the need for an accounting or the existence of wrongful profits[13] or a combination of both makes the legal remedy inadequate for purposes of the statute of limitations. Even with the availability of pre-trial examination and discovery,[14] and regardless of whether or not a profit was made, an accounting is a more adequate remedy where the facts giving rise to the litigation are complicated.[15]

Nevertheless, a test based on the adequacy of the legal remedy seems to have little relation to the rationale of the statute of limitations. It may be urged that the New York cases based on the adequacy test make sense in that the longer period is necessary to protect the injured party where the facts are complicated[16] and the harm accordingly more difficult to discover. Similarly, since fiduciaries are more apt to attempt to conceal their intentional wrongs than their unintentional negligence, deliberate wrong-

[8] Previous to the adoption of the Code of Civil Procedure in 1848, equitable actions were governed by the doctrine of laches, but upon adoption of the code, the ten-year residual period was held to replace this doctrine and to govern all equitable actions. Gilmore v. Ham, 142 N.Y. 1, 36 N.E. 826 (1894).

[9] Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co., 270 N.Y. 86, 200 N.E. 589 (1936); Keys v. Leopold, 241 N.Y. 189, 149 N.E. 828 (1925).

[10] Although a stockholder's derivative suit is cognizable exclusively in equity (see The Statute of Limitations as Applied to Stockholder's Derivative Suit, 47 Yale L. J. 1004 (1938), noting Potter v. Walker, 276 N.Y. 15, 11 N.E. (2d) 335 (1937)), the New York courts follow the majority view (Stevens, Corporations § 152 (1936)) in viewing the stockholder as standing in the place of the corporation. Thus where the legal remedies would have been adequate had the corporation itself brought suit, the period which would have governed that action at law will govern the suit by the stockholder. Chance v. Guaranty Trust Co., 282 N.Y. 656, 26 N.E. (2d) 802 (1940).

[11] 276 N.Y. 15, 11 N.E. (2d) 335 (1937).

[12] Mencher v. Richards, 283 N.Y. 176, 182, 27 N.E. (2d) 982, 983 (1940).

[13] In Cwerdinski v. Bent, 256 App. Div. 612, 11 N.Y.S. (2d) 208 (1939), aff'd without opinion 281 N.Y. 782, 24 N.E. (2d) 475 (1939), the six-year period was applied where an accounting was not necessary. See also Davis v. Cohn, 256 App. Div. 905, 9 N.Y.S. (2d) 881 (1939); Dunlop v. Dunlop, 172 Misc. 66, 14 N.Y.S. (2d) 452 (S. Ct. 1939), rev'd 259 App. Div. 233, 18 N.Y.S. (2d) 852 (1940).

[14] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, 1940) Rules of Civil Practice, Rule 140.

[15] It is arguable, however, that different periods of limitation ought not to be applied to the same types of wrongs depending upon whether the fact situation in the particular case is simple or complex. The Statute of Limitations in Stockholder's Derivative Suits Against Directors, 39 Col. L. Rev. 842, 850 (1939).

[16] In the instant case, while the defendant directors were not alleged to have made personal profits, the defendant corporations were alleged to have profited at the expense of RCA, and an accounting to determine the amount of those profits was asked.

doing is apt to be the more difficult of the two to discover, and so should also be governed by the longer period of limitations.[17] But the use of the ten, rather than the present three-year period in these cases may subject the fiduciaries to unnecessarily stale suits in some instances, and at the same time does not afford complete protection to the shareholder. It is submitted that the problem presented by "conduct in fraud of the corporation and its stockholders" is more squarely met by the adoption of a rule similar to that applicable in the case of actual fraud; a short period of limitation, which, however, would not begin to run until the discovery of the wrongs.[18]

Were such a rule adopted, the court would be faced with the problem of determining when such discovery should be deemed to have been made. As to an individual stockholder, actual notice would clearly be sufficient to begin the running of the statute. Without more, the notice of one stockholder should not be imputed to all; but if suit were filed, and a wide publicity resulted, the stockholders as a class might be deemed barred. At some point, constructive notice to the stockholders as a class should be imputed, but an inflexible statutory provision as to when this notice should be imputed does not appear desirable. A provision that actual notice to a certain percentage of the stockholders should result in barring the rights of the class seems unduly arbitrary; a provision requiring the ascertainment of when, in the particular case, a reasonably vigilant stockholder would have discovered the wrongs in question, while perhaps more difficult to apply, seems more just.

Public Utilities—Commission Jurisdiction of Cooperatives—[Utah].—The plaintiff, a cooperative electric utility, applied to the Utah Public Service Commission for exemption from the commission's jurisdiction, or for a certificate of public convenience and necessity authorizing it to erect electric generating plants and distribution lines. The commission denied the application for exemption and granted the certificate. On appeal from the commission's order, *held*, that the commission had no jurisdiction over

[17] In Chance v. Guaranty Trust Co., 282 N.Y. 656, 659, 26 N.E. (2d) 802 (1940) the court, in holding the six-year period applicable, noted that the charges against the defendant director were essentially the mere negligent approval of an acquiescence in the wrongful acts. The defendant was not charged with wrongful profits or concealment of the wrongs.

[18] Knowledge on the part of the wrongdoing directors should not be imputed to the corporation for this purpose, since the corporation is powerless to act as long as the wrongdoers are in control; and there is strong authority that the period of limitation does not begin to run while the wrongdoers remain in control of the corporation. See dissenting opinion of Lazansky, C. J., in Chance v. Guaranty Trust Co., 256 App. Div. 840, 9 N.Y.S. (2d) 478 (1939). This is apparently the Illinois rule. Becker v. Billings, 304 Ill. 190, 136 N.E. 581 (1922).

It is well settled that the statute of limitations does not run against the beneficiary of an express trust until the trustee explicitly repudiates the trust, In re Deitz' Estate, 134 Misc. 393, 235 N.Y. Supp. 756 (Surr. Ct. 1929), and although directors are not usually held to be express trustees (The Statute of Limitations in Stockholder's Derivative Suits Against Directors, 39 Col. L. Rev. 842, 845, 856 (1939)), it would seem that, as fiduciaries in a controlling position, they ought not to be allowed to plead their own wrongful failure to bring suit against themselves on behalf of the corporation, or their success in preventing effective action by the stockholders through concealment of the wrongs, to immunize themselves from liability. Van Schaick v. Aron, 170 Misc. 520, 533, 10 N.Y.S. (2d) 550, 560 (S. Ct. 1938); Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Ventress v. Wallace, 111 Miss. 357, 71 So. 636 (1916).