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constructive trustee of the entire estate for the benefit of the victim's heirs, subject to a life estate in one-half the net income of the property in the murderer.

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SELECTING THE PARAMOUNT DUTY OF A DIRECTOR-MANAGER COMMON TO TWO CORPORATIONS

Defendant, with the acquiescence of the directors of plaintiff corporation, acted as director-manager of plaintiff corporation while holding the same position in a corporation owned wholly by him. The corporations were engaged in business of a similar nature. Defendant gave his corporaction a valauble patent right and plaintiff corporation brought a bill in equity seeking damages for breach of fiduciary duty. *Held,* that the failure to offer the business opportunity to plaintiff corporation was a breach of fiduciary duty. *Production Machine Company v. Howe,* 99 N.E. (2d) 32 (Mass. 1951).

Thompson[1] says the rule is thoroughly embedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders and are treated by courts of equity as trustees. If there is presented to a corporate officer or director a business opportunity in the line of the corporation's business, of practical advantage to the corporation, and one the corporation is financially able to undertake, the law will not allow the officer to alienate that opportunity from the corporation.[2] The fiduciary obligation of directors may be ground for recovery of profits realized by a director in transactions with third persons, the benefit or opportunity of which director was equitably bound to give his corporation.[3]

In the instant case, the court was not troubled with a determination of the paramount duty of defendant. Rather, the court found a duty to plaintiff only, pointing out that defendant wholly owned the other corporation. The corporate entity will be disregarded, and accordingly there will be no fiduciary obligation, when the corporation is the mere alter ego or business conduit of one person.[4] Fiduciary relation cannot be urged where the corporation is a mere shadow organized and maintained by a person as a cloak under which to conduct his own business.[5] Sole owners of a corporation are not under a fiduciary obligation to that corporation; though directors in name, they are principals in fact.[6]

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1. Thompson, Corporations, sec. 1320 (3d ed. 1927).
2. Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A. (2d) 225 Del. 1938); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. (1928); Turner v. American Metal Co., 268 App. Div. 239, 50 N.Y.S. (2d) 800, 1st Dep't 1944, appeal dismissed, 295 N.Y. 822.
3. Ballantine, Corporations, sec. 66 (Rev. ed. 1946).
4. Fletcher, Cyclopedia Corporations, secs. 41-46 (Rev. & Perm. ed., 1931).
5. Hanson Sheep Co. v. Farmers' and Traders' State Bank, 53 Mont. 324, 163 Pac. 1151 (1917).
6. McCracken v. Robinson, 57 Fed. 375 (2d Cir. 1893).

But the case suggests a more difficult problem. If there were other shareholders in both corporations, then the question would be one of determining the paramount duty of a director with fiduciary obligations to two corporations. This problem has most often arisen in cases involving contracts between corporations with interlocking directorates. By the prevailing view, contracts are not voidable merely by reason of conflicting duties or interests as to corporations represented even when a majority or all of the directors are common to both corporations. The courts will scrutinize the fairness and reasonableness of the contract to prevent overreaching.[7] The dominant person in two corporations is under a duty to see that transactions between the two corporations are fair to both.[8] Common directors and managers occupy a fiduciary relation toward both corporations and contracts between them will be carefully scrutinized.[9] The development of this body of law has tended to modify the rule requiring an undivided loyalty on the part of corporate directors.[10]

The similarity between the duty of interlocking directors to see to the fairness of contracts between their corporations and the duty of a common director to give both corporations the benefit of a business opportunity warrants an attempt to apply the fairness test of the former to the latter. Perhaps a director faced with the selection of a paramount duty, could, under ideal conditions, make a fair distribution of the opportunity to both corporations. Too, a division of the benefits of an opportunity by a contractual arrangement between the corporations may offer the basis for a square application of the fairness test. Refusal by the courts to allow a divided loyalty in such case would appear arbitrary in light of their tolerance of interlocking directorates. The evident objection to application of the fairness test is the distinction between a contract and a business opportunity. Ordinarily a contract works benefit to both corporations, while sharing an opportunity would result in a loss to each measured by the profit received by the other. Sane reflection indicates the inapplicability of the fairness test in at least some situations.

Rather than indulge in the thought that a determination of the paramount duty would lead to a legal impasse, it is suggested that courts look to the particular facts of the case. Should those facts preclude a fair division of the business opportunity, the selection becomes merely an application of the formula, first in time, first in right. Supporting this alternative is the rule that an assumption of a duty inconsistent with a prior relation is in itself a breach.[11] As illustrations of this, a director cannot procure for

7. Ballatine, Corporations, sec. 72 (Rev. ed. 1946).
8. Farmers' State Bank of Riverton v. Haun, 30 Wyo. 322, 222 Pac. 45 (1924).
9. Wentz v. Scott, 10 F.(2d) 246 (6th Cir. 1926); Geddes v. Anaconda Mining Co., 254 U.S. 590, 41 S.Ct. 209, 65 L.Ed. 425 (1921).
10. Litwin v. Allen, 25 N.Y.S.(2d) 667 (Sup. Ct. 1940).
11. Gilman, Clinton and Springfield Railway Co. v. Joseph J. Kelly, 77 Ill. 426 (1875); Litwin v. Allen, 25 N.Y.S.(2d) 667 (Sup.Ct. 1940); Covington and L. R. Co. v. Bowler, 72 Ky. (9 Bush) 468 (1873).

his newly created corporation the lease of the old corporation to whom he owes a fiduciary obligation,[12] and an attorney after receipt of retainer and client's confidence cannot accept a like relation with an adverse party.[13]

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12. McCourt v. Singers-Bigger, 145 Fed. 103 (8th Cir. 1906).
13. Walker v. Wright, 90 Mont. 111, 300 Pac. 260 (1931).