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All the aforesaid, of course, does not mean that foreign exchange control is advocated, but it probably does indicate that such restrictions will not be ignored *a limine*. Exchange control is one of many tentative and supposed remedial devices for clear and present evils. It is the hope of all who long for a free world that all artificial obstacles hampering free communication among the nations of the world will be abolished and, of course, foreign exchange restrictions are a species of such artificial hindrances. Still, for the time being, they do exist all over the world—even in many countries which apply standards of thinking, morality, and freedom similar to those applied here.

A cautious approach to the problem is recommended. Since the effect given in our courts to foreign exchange restrictions is closely bound up with international relations, no position should be taken without careful consideration of possible repercussions in that sphere. On the other hand, the protection of American interests, and the basic principles of our public policy should not be sacrificed to this latter consideration.

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DUTY OF A DIRECTOR NOT TO COMPETE

Manifestly, free enterprise is vital to the position of the United States as a world power. For this reason, encouragement of competition is deemed to be in the best interests of the community, and monopolies and combinations in restraint of trade are prohibited as contrary to public policy. Notwithstanding the obvious advantages of free competition, certain business and personal relationships are carefully scrutinized by the courts because in some circumstances, by nature of the trust reposed in one individual by another, unfair advantage may be taken by the one in whom the trust is reposed unless he act in utmost good faith.

The corporation, as an institution, was created to serve business needs, and has proved extremely valuable to businessmen. In fact, in the manufacturing, communication and service industries, over 90% of the business volume is carried on by corporations.

The question naturally arises: What is a corporation? Various definitions have been advanced, but perhaps the one that best expresses the vacillating concepts indicative of the relations between the artificial person [the corporation] and the natural persons who neces-

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sarily are part and parcel of this legal fiction, is stated in the famous case of *Farmers' Loan and Trust Co. v. Pierson,* wherein the court said: ". . . a corporation is more nearly a method than a thing, and . . . the law . . . may treat it as a name for a useful collection of jural relations, each one of which must in every instance be ascertained, analyzed, and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purpose to be achieved. . . ." [1]

Corporations, being artificial persons, must act through natural persons. The management of a corporation is vested in its board of directors. This relationship between director and corporation gives rise to many duties. The director, however, will sometimes find these duties to be in conflict with other personal interests. This note will concern itself with the duties incumbent upon the director where he is thus placed in the position of serving two interests.

In analyzing the position of a director of a business corporation, it is clear that he, strictly speaking, is neither a trustee nor an agent. He occupies a *sui generis* status.[2] Like a trustee or agent, he does, nevertheless, stand in a fiduciary relation to the corporation and its stockholders.[3] By virtue of that fact, "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale. . . ." [4] Nevertheless, it is necessary to have some conception of where the line will be drawn between a permissible self-interest and a breach of fiduciary responsibility. In attempting to find that point, the burden may be simplified by dividing the problem into its various aspects, *viz.,* (1) the director's appropriation to himself of opportunities properly belonging to his corporation; (2) the director's use of his influence to prevent his corporation from competing with an enterprise in which he has an interest; (3) the director's unauthorized use of corporate facilities to advance his personal interests; and (4) the director's engaging, or having an interest in another enterprise which may engage, in direct competition with his corporation.

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[1] Farmers' Loan & Trust Co. v. Pierson, 130 Misc. 110, 119, 222 N. Y. Supp. 532, 543 (Sup. Ct. 1927).

[2] Fuller, *Restrictions Imposed by the Directorship Status on the Personal Business Activities of Directors,* 26 WASH. U. L. Q. 189 (1941).

[3] Gamlen Chemical Co. v. Gamlen, 79 F. Supp. 622, 631 (W. D. Pa. 1948); Young v. Columbia Oil Co., 110 W. Va. 364, 158 S. E. 678 (1931).

[4] Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A. 2d 503, 510 (Sup. Ct. 1939).

Appropriating Corporate Opportunities

The rule is firmly established that a director may not appropriate to himself corporate opportunities.[5] "The fundamental question in each case is whether the officer or director of a corporation has permitted his self-interest to conflict with the interests of the corporation. Where a business opportunity is in the line of the corporation's activities, . . . the opportunity, as one in which it has a legitimate interest or expectancy, belongs to the corporation and not to its officers or directors . . . but, where the opportunity is one in which the corporation has no interest or expectancy, the opportunity is not a corporate, but a personal, one. . . ." [6] What constitutes a corporate opportunity is a question of fact, to be determined by the facts and circumstances existent at the time the alleged opportunity arose, and not by events occurring subsequently.[7]

It has been held that no corporate opportunity existed when the corporation declined an offer because of legal barriers; [8] or when it was the settled policy of the corporation not to engage in a particular line of business; [9] or when it declined the opportunity because of business reasons; [10] or when the opportunity was not truly available to the corporation either because a party had refused to deal with it, or because the corporation sought without success to obtain it.[11]

If, on the other hand, a corporate opportunity was found to exist and it was appropriated by a director, he will be required to account to the corporation for the profits realized from the wrongful appropriation. The case of *Averill v. Barber* [12] well illustrates this rule. In a stockholders' derivative action, defendant directors were charged with acquiring and using for their personal benefit patents that rightfully belonged to the corporation. Affirming the lower court opinion, the court stated, "It was proper to decree that the defendants Barber, McLain, and Langdon should account for and pay over all profits realized by them out of their purchase of the De Smedt patents, which they assumed to acquire for themselves individually when they

[5] Diedrick v. Helm, 217 Minn. 483, 14 N. W. 2d 913 (1944); Lutherland, Inc. v. Dahlen, 357 Pa. 143, 53 A. 2d 143 (1947).

[6] Diedrick v. Helm, 217 Minn. 483, 14 N. W. 2d 913, 919 (1944).

[7] The court should ". . . look at the facts as they exist at the time of their occurrence, not aided or enlightened by those which subsequently took place. . . ." Purdy v. Lynch, 145 N. Y. 462, 475, 40 N. E. 232, 236 (1895). For an interesting analysis of judicial application of this rule, *compare* McCandless v. Furland, 296 U. S. 140 (1935), *with* Old Dominion Mining and Smelting Co. v. Lewisohn, 210 U. S. 206 (1908).

[8] Thilco Timber Co. v. Sawyer, 236 Mich. 401, 210 N. W. 204 (1926).

[9] Lancaster Loose Leaf Tobacco Co. v. Robinson, 199 Ky. 313, 250 S. W. 997 (1923).

[10] Lincoln Stores, Inc. v. Grant, 309 Mass. 417, 34 N. E. 2d 704 (1941).

[11] Bisbee v. Midland Linseed Products Co., 19 F. 2d 24 (8th Cir. 1927).

[12] 6 N. Y. Supp. 255 (Sup. Ct. 1889).

ought to have acquired them for the American Asphalt Paving Company. . . ." [13]

Resignation of a director after learning of the opportunity will not absolve him from liability for a subsequent pre-emption thereof.[14] Likewise, a director of a solvent corporation cannot take over a corporation's contract on the plea of its financial inability to perform,[15] nor can a director secure to himself leases [16] or properties [17] for the purpose of subsequent resale to the corporation for a personal profit.[18]

Director's Prevention of Corporate Competition

Just as a director may not appropriate to himself corporate opportunities, he is also prohibited from actively using his position and power over the corporation to prevent it from seeking business in competition with him.[19] A strong application of this rule is found in the case of *Singer v. Carlisle*.[20] There the defendants were directors of a corporation engaged in the business of security underwriting. At the same time, defendants were also interested in several banking firms engaged in the same business. Plaintiff-stockholders, in a derivative action, sought to charge the defendants with liability for preventing the corporation from competing with the banking concerns. An allegation that the directors actively used their influence over the corporation to prevent competition with the banks was sufficient to sustain the complaint.

Use of Corporate Facilities

Since the corporation is an independent legal entity, distinct and apart from its stockholders,[21] its property and the use thereof is reserved to the corporation alone, and a director may not make use of corporate facilities to promote his personal interests if such interests

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[13] *Id.* at 260.

[14] Albert A. Volk Co. v. Fleschner Bros., Inc., 60 N. Y. S. 2d 244 (Sup. Ct. 1945).

[15] Irving Trust Co. v. Deutsch, 73 F. 2d 121 (2d Cir. 1934).

[16] H. C. Girard Co. v. Lamoureux, 227 Mass. 277, 116 N. E. 572 (1917). *But cf.* Critterdon & Cowler Co. v. Cowler, 66 App. Div. 95, 72 N. Y. Supp. 701 (3d Dep't 1901).

[17] Blake v. Buffalo Creek R. R., 56 N. Y. 485 (1874).

[18] See N. Y. GEN. CORP. LAW § 60. "*Action against officers of corporation for misconduct.* An action may be brought against one or more of the directors . . . of a corporation to procure judgment for the following relief or any part thereof: . . . 2. To compel them to pay to the corporation or its creditors, any money and the value of any property, which they have acquired to themselves, or transferred to others, . . . by or through any neglect of or failure to perform or other violation of their duties."

[19] Singer v. Carlisle, 26 N. Y. S. 2d 172 (Sup. Ct. 1940). *Cf.* Starling Industries v. Ball Bearing Pen Corp., 298 N. Y. 483, 84 N. E. 2d 790 (1949).

[20] 26 N. Y. S. 2d 172 (Sup. Ct. 1940).

[21] Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884).

are separate from those of the corporation.[22] Unauthorized use of facilities has led to the imposition of a constructive trust upon all the profits realized from such wrongful appropriation. In *Red Top Cab Co. v. Hanchett*,[23] plaintiff corporation sued defendant, former director of plaintiff, for breach of fiduciary duty. While Hanchett was a director, he organized a competing cab company, and, in the early stages of development, used the facilities of the Red Top Cab Company. He also induced key personnel to leave plaintiff's employ and work for the competing company. Plaintiff sought and was granted equitable relief in the form of a constructive trust. The court stated: "The evidence in the present case leaves no room for doubt that defendant, in organizing his competing business, knowingly crippled and injured the plaintiff company, depriving it of selected personnel and using its facilities in the launching of his own project." [24]

It must be recognized that the use of corporate facilities usually results from the conflict between the director's personal interest and that of his corporation. Therefore, in cases dealing with the use of corporate facilities, this conflict of interest will ordinarily be involved. For purposes of clarity then, the decisions must be analyzed to determine whether liability was predicated upon the appropriation of corporate opportunities, use of corporate facilities, or a combination of both.[25]

Engaging in Direct Competition

There is no rule of law which prohibits a director from engaging in an independent enterprise, notwithstanding the possibility of such enterprise affording the corporation competition.[26] This is clearly illustrated in *New York Automobile Co. v. Franklin*.[27] There *W* was employed by the plaintiff corporation to design a car and was elected a director. Although he completed designs for two cars, the plaintiff never entered into production of these designs, seemingly because of an inability to obtain capital. Subsequently, *W* entered into a similar arrangement with the Franklin Corporation and designed two different automobiles. It was proven that *W* did not incorporate any of the previous designs into those made for the defendant. The plaintiff attempted to impress a trust upon the profits realized. Judge Andrews, speaking for the court, said, "But I know of no rule which prohibits a director of a corporation engaging in a business similar to

[22] As to the possibilities of criminal prosecution, see People v. Ashworth, 220 App. Div. 498, 222 N. Y. Supp. 24 (4th Dep't 1927); N. Y. Penal Law §§ 1290, 1290-a.

[23] 48 F. 2d 236 (N. D. Cal. 1931).

[24] *Id.* at 238.

[25] See Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A. 2d 503 (Sup. Ct. 1939); Red Top Cab Co. v. Hanchett, 48 F. 2d 236 (N. D. Cal. 1931).

[26] Carper v. Frost Oil Co., 72 Colo. 345, 211 Pac. 370 (1922).

[27] 49 Misc. 8, 97 N. Y. Supp. 781 (Sup. Ct. 1905).

that carried on by the corporation either in his own behalf or for another corporation of which he is likewise a director.

"True, he owes to his stockholders the most scrupulous good faith. . . . He may not deal in his own behalf in respect to any matter involving his rights and duties as a director. He may not seek his own profit at the expense of the company or its stockholders. But, so long as he violates no legal or moral duty which he owes to the corporation or its stockholders, he is entirely free to engage in an independent competitive business." [28]

Broderick v. Blanton [29] affords an illustration of what may appear to be a contrary view. There defendants were directors and employees of a liquor corporation engaged in distilling and bottling liquor. They purchased bulk whiskey for purposes of personal speculation. Generally, these liquor stocks were first offered to the corporation, but were rejected by defendants acting for the corporation. The plaintiffs, in a shareholders' derivative action, alleged that the defendants breached their employment contracts requiring them to devote their full time to the corporation and not to engage in any other or competing business, and also breached the fiduciary responsibilities of corporate directors. Defendants proved that the corporation never bought manufactured whiskey except on rare occasions to meet inventory requirements. It was shown that the purchases were not necessary for the corporation, and its financial condition forbade speculation. The court ruled that "[t]he acts of defendants were thus in no sense competitive with the business of the corporation. In fine, the business of the corporation was not interfered with or affected in any way by the acts of defendants and no true corporate opportunity was thereby lost." [30] After discussing the fact that the instant transactions were trivial when compared with the million-dollar business of the corporation and that the defendants made no use of corporate facilities, the court added, ". . . liability may ensue . . . where there has been wrongful pre-emption of true corporate opportunity, or advantage taken of corporate needs or property, or unfairness, interference, or *competition with the corporation.* None of these circumstances are here present. . . ." [31] (Italics supplied.)

It is submitted that the suggestion that liability might be predicated on the mere existence of direct competition may be explained by the fact that the defendants in this case were more than directors. They were the paid purchasing agents of the corporation, and the duties required of agents are not the same as the duties required of directors. Otherwise, this dictum would run counter to the current of authority.[32] Admittedly, the rule allowing a director to compete is

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[28] *Id.* at 14, 97 N. Y. Supp. at 785.
[29] 59 N. Y. S. 2d 136 (Sup. Ct. 1945).
[30] *Id.* at 138.
[31] *Id.* at 139.
[32] See note 26 *supra.*

usually qualified by adding that he ". . . could not in good faith engage in a rival business to its [his corporation's] detriment." [33]

The only reasonable interpretation of this qualification is that it prohibits the director from appropriating corporate opportunities, preventing his corporation from competing with an enterprise in which he has an interest, or using corporate facilities to advance his personal interests. Were it otherwise, modern-day directors often serving for a token compensation, and sitting on the boards of many corporations, often engaged in competing enterprises, would be reluctant to subject themselves to such a crushing burden of liability which ensues when the director breaches his fiduciary duty.

Recognition of this prevalent practice in corporate management has resulted in the evolution of a new rule regarding the validity of transactions entered into between corporations having common directors. Previously, intercorporate executory contracts effected through common directors (even one) could be avoided by the corporation without cause.[34] Today, "[d]irectorship in two competing corporations does not, in and of itself, constitute a wrong. It is only when a business opportunity arises which places the director in a position of serving two masters, and when, dominated by one, he neglects his duty to the other, that a wrong has been done." [35] Therefore, fraud or imposition because of this dual position, must be proven before the contract can be repudiated.[36]

Conclusion

Whether or not the above-stated rules best serve the needs of the business world is a matter of conjecture. Management and ownership are devolving upon completely separate groups.[37] In the complex system of corporate enterprise, the stockholder is often left to the mercy of scheming directors. Of necessity, equity must protect his interests by securing from the director-fiduciary an "undivided loyalty" free from the ". . . 'disintegrating erosion' of particular exceptions. . . ." [38] Balancing these equitable considerations are the requirements of efficient business administration. Allowing directors to engage in competing enterprises is supported by the argument that the best directors are often selected from those already engaged in the same or similar businesses. The validity of this reasoning may be justly questioned by the plight of the unsuspecting stockholder.

[33] Coleman v. Hanger, 210 Ky. 309, 275 S. W. 784, 789 (1925).
[34] *See* Burden v. Burden, 159 N. Y. 287, 307, 54 N. E. 17, 23 (1899); *cf.* Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, 76 N. E. 1075 (1906).
[35] Singer v. Carlisle, 26 N. Y. S. 2d 172, 182 (Sup. Ct. 1940).
[36] Everett v. Phillips, 288 N. Y. 227, 43 N. E. 2d 18 (1942); *accord,* Globe Woolen Co. v. Utica Gas & Electric Co., 224 N. Y. 483, 121 N. E. 378 (1918).
[37] See note 41 *infra.*
[38] Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928).

It is submitted that directors should be required to make full disclosure of their conflicting interests and that such information be available to the stockholders and creditors of the corporation, with a statutory penalty for noncompliance.

Another remedy is suggested in the case of *Simonson v. Helburn*,[39] where a corporation conducting theatrical plays permitted administrative directors to engage in personal ventures, provided the question of competition with the corporation was first passed on by an umpire. The court held this a valid and commendable device to protect both director and corporation before any harm is done. Conflicting interests should be brought into the open; for it is difficult to perceive the value of secrecy in promoting business efficiency.

Corporation law does not exist in the abstract; the word corporation ". . . has a variable, not a constant, meaning. The rights and obligations that are comprised within the compass of the word [corporation] change not only with time, but with locality."[40] The corporate form of enterprise is designed to serve the community at large and not a small group of entrepreneurs. The expansion of our economy has produced an entirely new corporate structure,[41] and the law must adjust to the complexities of that economy and the new corporate structure incident thereto to protect the interests of all those involved. Only in this way will it perpetuate the efficiency which is the cornerstone of our material strength.

Dual Education v. Constitutional Guarantee

Introduction

When Chief Justice Taney wrote his celebrated opinion in the famous *Dred Scott* decision,[1] he argued that the foundation of the American State had not included the Negro as a participating element or as a beneficiary of its privileges.[2] Union victory in the Civil War and the subsequent adoption of constitutional amendments purporting to give the Negro equal status with the whites have destroyed the legal efficacy of that ruling,[3] but in our southern states,

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39 198 Misc. 430, 97 N. Y. S. 2d 406 (Sup. Ct. 1950).

40 Farmers' Loan & Trust Co. v. Pierson, 130 Misc. 110, 119, 222 N. Y. Supp. 532, 544 (Sup. Ct. 1927).

41 For a detailed analysis of the economic aspects of this problem, see Berle & Means, The Modern Corporation and Private Property (1933).

1 Scott v. Sandford, 19 How. 393 (U. S. 1856).

2 *Id.* at 407; Bond, Education of the Negro in the American Social Order 3 (1934).

3 This is not to imply that the Dred Scott decision no longer has value as a legal precedent. See Mott, Due Process of Law 329 (1926).