

# Administrative Law--Conclusiveness of Decision Under Finality Clause of Government Contract (United States v. Wunderlich, 72 Sup. Ct. 154 (1951))

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## RECENT DECISIONS

ADMINISTRATIVE LAW — CONCLUSIVENESS OF DECISION UNDER FINALITY CLAUSE OF GOVERNMENT CONTRACT.—Plaintiff contracted to construct a dam for the United States Government. The contract contained a “finality clause”<sup>1</sup> which provided that all disputes of *fact* arising out of the contract should be decided by the government contracting officer, subject to an appeal to the head of the administrative department<sup>2</sup> whose decision was to be conclusive upon both parties.<sup>3</sup> The contracting officer required the plaintiff to perform certain services which, the plaintiff alleged, were not within the purview of the contract. The plaintiff performed the services but appealed the order of the contracting officer denying his claim, to the department head.<sup>4</sup> Following an adverse finding by that official, the plaintiff sued in the Court of Claims<sup>5</sup> for extra compensation. The Court of Claims entertained jurisdiction, deciding that the dispute was one of *law* rather than one of *fact* and that therefore the “finality clause” did not preclude judicial review of the contracting officer’s action. The Court of Claims set aside the order of the contracting officer as arbitrary and capricious.<sup>6</sup> The Government appealed, the parties stipulating that the dispute was one of *fact*. *Held*, reversed. In the absence of a showing of fraud, the decision of the contracting officer is not subject to review by the Court of Claims. *United States v. Wunderlich*, 72 Sup. Ct. 154 (1951).

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<sup>1</sup> “Article 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon both parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.” Standard United States Contract Form 23: *United States v. Wunderlich*, 72 Sup. Ct. 154, 155 n. 1 (1951).

<sup>2</sup> Unless the contractor exhausts his administrative remedies according to the agreed procedure by appeal to the appropriate head of the department, the courts will under no circumstances allow review of an adverse decision. *Silas Mason Co. v. United States*, 62 F. Supp. 432 (Ct. Cl. 1945); *W. Horace Williams Co. v. United States*, 85 Ct. Cl. 431 (1937); *Fitzgibbon v. United States*, 52 Ct. Cl. 164 (1917).

<sup>3</sup> Although the “finality clause” is inserted primarily for the protection of the government, the courts have frequently sustained it in favor of the contractor. *Stacey-Schmidt Mfg. Co. v. United States*, 64 Ct. Cl. 499 (1928); *Yale & Town Mfg. Co. v. United States*, 58 Ct. Cl. 633 (1923).

<sup>4</sup> In the instant case the head of the department was the Secretary of the Interior.

<sup>5</sup> 28 U. S. C. § 1491(4) (1946). The Court of Claims Act gives the Court of Claims jurisdiction to render judgments on all claims against the United States arising out of contract, express or implied.

<sup>6</sup> *Wunderlich v. United States*, 117 Ct. Cl. 92 (1950).

Until recently, the Supreme Court had held that the decision of the contracting officer under a "finality clause" was conclusive, and not subject to review in the absence of fraud, gross error implying bad faith, or a failure to exercise an honest judgment.<sup>7</sup> Following this settled rule the Court reversed a decision of the Court of Claims on the sole ground that the latter permitted review on the basis of *gross error*, rather than upon *gross error as would imply bad faith*.<sup>8</sup> Although it has been stated that the contracting officer has a duty to act reasonably<sup>9</sup> and impartially,<sup>10</sup> the Supreme Court has otherwise strictly adhered to the rule requiring an affirmative showing of fraud, actual or implied. Mere incompetence and negligence<sup>11</sup> or mistake<sup>12</sup> on the part of the contracting officer is insufficient to afford a basis for review.

The Court of Claims, however, has adhered to no such rigid rule. This Court, by virtue of a liberal interpretation of the criterion laid down by the Supreme Court, has allowed review where a contracting officer's decision is arbitrary and capricious,<sup>13</sup> unreasonable,<sup>14</sup> or lacking in substantial evidence.<sup>15</sup> Review is granted where the facts were not fairly<sup>16</sup> or impartially<sup>17</sup> considered or where the decision was rendered without adequate information.<sup>18</sup>

In addition, the Court of Claims has reserved to itself the right to review where the dispute is one of law rather than of fact.<sup>19</sup> This Court has repeatedly held that the interpretation of a contract is a question of law,<sup>20</sup> and refuses to be ousted of jurisdiction where such

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<sup>7</sup> *United States v. Gleason*, 175 U. S. 588 (1900); *Sweeney v. United States*, 109 U. S. 618 (1883); *Kihlberg v. United States*, 97 U. S. 398 (1878).

<sup>8</sup> *Martinsburg & Potomac R. R. v. March*, 114 U. S. 549 (1885).

<sup>9</sup> *Saalfeld v. United States*, 246 U. S. 610 (1918); see *Ripley v. United States*, 223 U. S. 695, 701-702 (1911).

<sup>10</sup> *United States v. Penner Installation Corp.*, 340 U. S. 898 (1950), *rehearing denied*, 340 U. S. 923 (1951). It is significant to note that the Supreme Court affirmed the decision of the Court of Claims in a *per curiam* opinion by an evenly divided court, the Chief Justice abstaining.

<sup>11</sup> *Chicago S. F. & C. R. R. v. Price*, 138 U. S. 185 (1891).

<sup>12</sup> *Cf. Martinsburg & Potomac R. R. v. March*, 114 U. S. 549 (1884).

<sup>13</sup> *Newhall-Herkner Construction Co. v. United States*, 89 F. Supp. 321 (Ct. Cl. 1950); *Great Lakes Dredge & Dock Co. v. United States*, 90 F. Supp. 963 (Ct. Cl. 1950); *Scully v. United States*, 197 Fed. 327 (D. Nev. 1912).

<sup>14</sup> *Stafford v. United States*, 74 F. Supp. 155 (Ct. Cl. 1947); see *Rego Building Corp. v. United States*, 99 Ct. Cl. 445, 490 (1943).

<sup>15</sup> *Loftis v. United States*, 76 F. Supp. 816 (Ct. Cl. 1948); *Ruff v. United States*, 96 Ct. Cl. 148 (1942).

<sup>16</sup> *Zweig v. United States*, 92 Ct. Cl. 472 (1941); *Penker Construction Co. v. United States*, 96 Ct. Cl. 1 (1942).

<sup>17</sup> *Cf. Great Lakes Dredge & Dock Co. v. United States*, 90 F. Supp. 963 (Ct. Cl. 1950).

<sup>18</sup> *Shippey & Outzen v. United States*, 49 Ct. Cl. 151 (1913).

<sup>19</sup> *Pfotzer v. United States*, 77 F. Supp. 390 (Ct. Cl. 1948); *McShain v. United States*, 82 Ct. Cl. 334 (1936); *Schmoll v. United States*, 91 Ct. Cl. 1 (1940); *Davis v. United States*, 82 Ct. Cl. 334 (1936); *Albina Marine Iron Works v. United States*, 79 Ct. Cl. 714 (1934); *Lyons v. United States*, 30 Ct. Cl. 352 (1899).

<sup>20</sup> *Callahan Construction Co. v. United States*, 91 Ct. Cl. 538 (1940).

a question is involved.<sup>21</sup> The Supreme Court, on the other hand, has declined to make this distinction between law and fact,<sup>22</sup> and has repeatedly held that where contract interpretation was in dispute the decision of the contracting officer was final in the absence of fraud,<sup>23</sup> notwithstanding a long line of lower court decisions holding that the parties could not contract to submit questions of pure law to the final decision of an arbiter.<sup>24</sup> The inference is therefore compelling that it is the policy of the Supreme Court, at least in cases involving government contracts, to treat interpretation as a factual question.<sup>25</sup>

The existing confusion in the decisions of the Court of Claims involving government contract interpretation illustrates the need for a clear pronouncement on the legal effect of a contracting officer's order made pursuant to a "finality clause." The instant case supplies a concise though somewhat harsh rule. The decision makes fraud the *only* basis for review. In the words of the Supreme Court, "By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest."<sup>26</sup> Findings that the administrative decision was arbitrary, capricious, or grossly erroneous are not equatable to findings of fraud and will not fit within this rigid rule.

It must be remembered, however, that this rule applies only to a special class of administrative action—a class wherein the parties to a contract have agreed that the administrative decision shall be final. The general rule applicable to administrative decisions is otherwise and, in the main, review will be granted where the action of the administrative agency was arbitrary and capricious or lacking in substantial evidence,<sup>27</sup> even though such action was specifically declared conclusive by statute.<sup>28</sup> Notwithstanding its apparent injustice,<sup>29</sup> the rule enunciated in the principal case will introduce consistency and will eliminate the confusion which has heretofore existed.

<sup>21</sup> *Stafford v. United States*, 74 F. Supp. 155 (Ct. Cl. 1947).

<sup>22</sup> *United States v. Beuttas*, 324 U. S. 768 (1945).

<sup>23</sup> *United States v. Moorman*, 338 U. S. 457 (1950).

<sup>24</sup> *Rae v. Luzerne County*, 58 F. 2d 829 (M. D. Pa. 1932); *Tatsuuma Kisen Kabushiki Kaisha v. Prescott*, 4 F. 2d 670 (9th Cir. 1925); *Mitchell v. Dougherty*, 90 Fed. 639 (3d Cir. 1898).

<sup>25</sup> *Wunderlich v. United States*, 117 Ct. Cl. 92, 212 (1950).

<sup>26</sup> *United States v. Wunderlich*, 72 Sup. Ct. 154, 155 (1951).

<sup>27</sup> *Ng Fung Ho v. White*, 259 U. S. 276 (1922).

<sup>28</sup> *Reynolds v. United States*, 292 U. S. 443 (1934); see *United States v. Williams*, 278 U. S. 255, 257 (1929); *Silberschein v. United States*, 266 U. S. 221, 225 (1924).

<sup>29</sup> At least two bills are pending in the House of Representatives, one of them introduced by the Chairman of the Judiciary Committee "to correct the unfortunate holding of the Supreme Court of the United States in the Wunderlich case. . . . This is the case which virtually defies the decision of the contracting officer under a government contract in the absence of downright cheating or dishonesty. The bills would allow judicial review to the same extent as the McCARRAN-SUMNERS ACT where administrative decisions are not supported by substantial evidence." NEW YORK STATE BAR ASSOCIATION, LAWYER SERVICE LETTER, No. 162, Feb. 20, 1952.

BANKRUPTCY — ELECTION OF TRUSTEE — APPLICATION OF § 44(A) BANKRUPTCY ACT.—At the first meeting of creditors, held before a referee in bankruptcy, seven creditors, whose proofs of claim totaled \$7,000, nominated one Levy as their candidate for trustee. An eighth claimant, the New York Meat Packing Co., with a proof of claim in the sum of \$93,000, nominated one Mills, as its candidate. The right of the Meat Packing Co. to vote its claim was challenged on the ground that it was owned and controlled by the same persons who owned and controlled the bankrupt corporation. These objections were overruled by the referee and, as a consequence, neither candidate received the necessary majority in both number and amount of claims voted.<sup>1</sup> On failure of choice by the creditors, the referee appointed Mills, the Meat Packing Company's nominee, as trustee. Schwartz, one of the objecting creditors, petitioned for a review of the referee's order. *Held* (one Judge dissenting), order affirmed. The provision of the Bankruptcy Act, which disqualifies the bankrupt's ". . . stockholders or members, its officers, and the members of its board of directors . . ." from voting to appoint a trustee in bankruptcy,<sup>2</sup> does not prohibit the present creditor corporation's participation in the election. *Schwartz v. Mills*, 192 F. 2d 727 (2d Cir. 1951).<sup>3</sup>

Impartiality has always been a prime requisite for a trustee in bankruptcy, entangling alliances between the trustee and the bankrupt entailing suspicious regard.<sup>4</sup> The appointment of a bankrupt's relative,<sup>5</sup> close business associate,<sup>6</sup> or attorney<sup>7</sup> usually fails the test, and merits the stamp of invalidity.<sup>8</sup>

Passage of the Bankruptcy Act of 1898,<sup>9</sup> allowing creditors the

<sup>1</sup> BANKRUPTCY ACT § 56(a), 52 STAT. 865 (1938), 11 U. S. C. § 92(a) (1946). "Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors . . ."

<sup>2</sup> BANKRUPTCY ACT § 44(a), 30 STAT. 557 (1898), as amended, 11 U. S. C. § 72(a) (1946).

<sup>3</sup> A second point of contention in the reported case: validity of the proof of claim, is not here considered.

<sup>4</sup> See Note, *Disqualification of Trustee in Bankruptcy for Prejudicial Associations*, 43 YALE L. J. 1187 (1934).

<sup>5</sup> *In re Powell*, 19 Fed. Cas. 1210, No. 11,354 (D. N. J. 1868).

<sup>6</sup> *Wilson v. Continental Building & Loan Ass'n*, 232 Fed. 824 (9th Cir. 1916).

<sup>7</sup> *In re Wink*, 206 Fed. 348 (D. Md. 1913).

<sup>8</sup> *But cf. In re Gloria Vanderbilt-Sonia Gowns*, 26 F. Supp. 766 (S. D. N. Y. 1938); *In re Syracuse Paper & Pulp Co.*, 164 Fed. 275 (N. D. N. Y. 1908).

<sup>9</sup> BANKRUPTCY ACT § 44(a), 30 STAT. 557 (1898), as amended, 11 U. S. C. § 72(a) (1946). "The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication . . . appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee . . . the court shall make the appointment." See also Sections 55 and 56 of the BANKRUPTCY ACT, 11 U. S. C.

right to elect the trustee, gave the Courts of Bankruptcy (judge or referee) the right to preside at the first meeting of creditors and to supervise trustee elections to properly insure against prejudiced appointees.<sup>10</sup> Generally, in the absence of conflict between his interests and those of the general creditors, the creditors' nominee qualifies for appointment.<sup>11</sup> One method of assuring freedom from such conflict has demonstrated itself in the practice of nullifying bankrupt-controlled elections. Thus, active intervention in the election by the bankrupt or his attorney, if adverse to the interests of the estate, will void the appointment.<sup>12</sup> Similarly, votes cast at the solicitation of the bankrupt or his attorney have been refused effect.<sup>13</sup> Nevertheless, prior to the 1938 amendments to the Act, relatives<sup>14</sup> of an individual bankrupt, and stockholders, directors and officers of a corporate bankrupt,<sup>15</sup> were permitted to cast their ballot where there was no evidence of prejudice to the general creditors. Congress, however, having determined that such persons bear ". . . too close a connection with the bankrupt to make it proper that their vote should be counted in the selection of the trustee . . .,"<sup>16</sup> foreclosed their future participation by amending Section 44 of the Bankruptcy Act.<sup>17</sup>

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§§ 91, 92 (1946), for meetings of creditors and voters thereat. See also BANKRUPTCY ACT § 1(9), 30 STAT. 544 (1898), as amended, 11 U. S. C. § 1(9) (1946), which defines "Court" as ". . . the judge or the referee of the court of bankruptcy in which the proceedings are pending. . . ."

<sup>10</sup> See 1 COLLIER ON BANKRUPTCY 8-22 and 2 COLLIER ON BANKRUPTCY 1633 (14th ed. 1940) for legislative history of the Bankruptcy Act and of Section 44(a). The Bankruptcy Act of 1898 gave creditors the unrestricted right to appoint the trustee. 30 STAT. 544 (1898). But the Supreme Court made the appointment subject to approval of the courts. GENERAL ORDER IN BANKRUPTCY No. 13. This is now ordered by Section 2(a)(17) of the Bankruptcy Act. 11 U. S. C. § 11(a)(17) (1946).

<sup>11</sup> *Mayflower Hat Co.*, 65 F. 2d 330, 331 (2d Cir. 1933); *In re Allied Owners' Corp.*, 4 F. Supp. 684, 688 (E. D. N. Y. 1933).

<sup>12</sup> *In re Bloomberg*, 48 F. 2d 635 (D. Minn. 1931); see *In re Rothleder*, 232 Fed. 398 (S. D. N. Y. 1916). *But cf.* *Sloan's Furriers v. Bradley*, 146 F. 2d 757 (6th Cir. 1945); *In re Ketterer Mfg. Co.*, 155 Fed. 398 (M. D. Pa. 1907).

<sup>13</sup> *In re McGill*, 106 Fed. 57 (6th Cir. 1901); *In re Stowe*, 235 Fed. 463 (N. D. Cal. 1916); *In re Sitting*, 182 Fed. 917 (N. D. N. Y. 1910). *But cf.* *In re Portage Wholesale Co.*, 183 F. 2d 959 (7th Cir. 1950); *In re Parsons Mfg. Co.*, 247 Fed. 126 (D. Mass. 1917); *In re Rothleder*, 232 Fed. 398 (S. D. N. Y. 1916).

<sup>14</sup> *In re Rothleder*, 232 Fed. 398 (S. D. N. Y. 1916). *But cf.* *In re Ballantine*, 232 Fed. 271 (N. D. N. Y. 1916); *In re Bogert*, 3 Fed. Cas. 802, No. 1,598 (S. D. N. Y. 1869).

<sup>15</sup> *In re L. W. Day & Co.*, 178 Fed. 545 (2d Cir. 1910); *In re Gloria Vanderbilt-Sonia Gowns*, 26 F. Supp. 766 (S. D. N. Y. 1938); *In re Stradley & Co.*, 187 Fed. 285 (N. D. Ala. 1911); *In re Syracuse Paper & Pulp Co.*, 164 Fed. 275 (N. D. N. Y. 1908).

<sup>16</sup> Analysis of H. R. 12889, 74th Cong., 2d Sess. 157 (1936), cited in 2 COLLIER ON BANKRUPTCY 1638 (14th ed. 1940).

<sup>17</sup> 30 STAT. 557 (1898), as amended, 11 U. S. C. § 72(a) (1946). "The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the

Since its enactment, the statute has been strictly construed. The statutory disqualification is declared to be personal. Thus an assignee of a bankrupt corporation's controlling stockholder was not deemed to fall within its proscription.<sup>18</sup> Nor was a creditor who had formerly owned stock in the bankrupt corporation but who had validly assigned his holdings.<sup>19</sup> The bankrupt's attorney has been held not to be within the section's prohibition.<sup>20</sup> Significantly, a relative of a corporate-bankrupt's officer was not denied his vote.<sup>21</sup>

Nevertheless, the legislative prohibitions are not exclusive, and one disqualified from participation prior to the amendment is not now enfranchised by failure of specific exclusion. However, it is clear that the contention advanced by the petitioner in the principal case finds no authoritative support in the decisions prior to the passage of Section 44(a).<sup>22</sup> Therefore, if a creditor corporation, whose ownership and control mirror the bankrupt's, is to be denied its vote, the authority for the denial must be gleaned from the present statute itself.

Judge Frank, dissenting in the principal case, would accomplish this result by disregarding the corporate entity<sup>23</sup> thereby invoking the mandate of Section 44(a). The same Judge, in his opinion in the case of *In re Loewer's Gambrinus Brewery Co.*,<sup>24</sup> had already stated that the claim of any such creditor corporation is to be subordinated to the claims of the independent creditors. Thus, his opinion in the *Schwartz* case is to some extent a retreat from the former position, which would not only disqualify the vote of a controlled creditor, but would prefer other creditors' claims to his. It is submitted that the corporate entity has not been so lightly regarded in the past.<sup>25</sup>

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*bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall . . . appoint a trustee or three trustees of such estate.*" (Italics indicate material added by 1938 amendments, effective Sept. 22, 1938.)

<sup>18</sup> See *In re Latham Lithographic Corp.*, 107 F. 2d 749 (2d Cir. 1939).

<sup>19</sup> *In re Page Displays*, 35 F. Supp. 140 (S. D. N. Y. 1940).

<sup>20</sup> See *West Hills Park v. Doneca*, 131 F. 2d 374, 376 (9th Cir. 1942). Judge Frank, dissenting in the principal case, distinguishes the *West Park* decision on the ground that the attorney was no longer alive. *Schwartz v. Mills*, 192 F. 2d 727, 735 (2d Cir. 1951).

<sup>21</sup> *In re Universal Seal Cap Co.*, 40 F. Supp. 420 (E. D. N. Y. 1941).

<sup>22</sup> See note 15 *supra*. It should be noted that the *Gloria Vanderbilt* case was decided on November 14, 1938, nearly two months after Section 44(a) took effect, yet no mention of the amendment is made in the decision.

<sup>23</sup> *Schwartz v. Mills*, 192 F. 2d 727, 731 (2d Cir. 1951).

<sup>24</sup> 167 F. 2d 318 (2d Cir. 1948); 27 TEX. L. REV. 383 (1949).

<sup>25</sup> *In re Commonwealth Light & Power Co.*, 86 F. 2d 474 (7th Cir. 1936); *In re Charles Nelson Co.*, 27 F. Supp. 673 (N. D. Cal. 1939); *The Gloucester*, 285 Fed. 579 (D. Mass. 1923); accord, *In re Hale Desk Co.*, 89 F. 2d 1 (2d Cir. 1937). See *In re Fox West Coast Theatres*, 88 F. 2d 212, 227-230 (9th Cir. 1937). See Wang, *The Corporate Entity Concept (or Fiction Theory) and the Modern Business Organization*, 28 MINN. L. REV. 341 (1944) for an excellent treatment of the entire subject and reported cases.

True, courts have pierced the "corporate veil" when fraud or injustice would otherwise result.<sup>26</sup> Principals incorporated to evade the force of legislative enactment will not be permitted to benefit by the protection of corporate insulation.<sup>27</sup> Application of the "instrumentality rule" has equivalent effect: where a corporation is merely used as an instrument or agent of another in a single enterprise, corporate form will not prevent recognition of the true principals.<sup>28</sup>

The creditor in the instant case is not measured by any of these specifications. Neither fraud nor injury to the general creditors is alleged, and there is no evidence of an attempt to evade the statute. The instrumentality theory is not applicable for the creditor and bankrupt were involved in completely separate enterprises despite their common ownership.<sup>29</sup>

There is little indication that courts will relax the rigidity of the corporate entity theory under exceptions differing from those already mentioned.<sup>30</sup> The dictum of Judge Frank in the *Loewer's* case<sup>31</sup> is an extreme view; it is not likely to be followed in the fore-

<sup>26</sup> *Pepper v. Litton*, 308 U. S. 295 (1939); *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307 (1938); see *U. S. v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255 (E. D. Wis. 1905), "A corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

<sup>27</sup> *Nettles v. Rhett*, 94 F. 2d 42 (4th Cir. 1938); see *Jenkins v. Moyse*, 254 N. Y. 319, 323, 324, 172 N. E. 521, 522 (1930). *But cf.* *Schenley Distillers Corp. v. United States*, 326 U. S. 432 (1946).

<sup>28</sup> *Hollander v. Henry*, 186 F. 2d 582 (2d Cir.), *cert. denied*, 341 U. S. 949 (1951); *In re Rieger, Kapner & Altmark*, 157 Fed. 609 (S. D. Ohio 1907). *But cf.* *Moline Properties v. Commissioner of Internal Revenue*, 319 U. S. 436 (1942); *Consumers Const. Co. v. Commissioner of Internal Revenue*, 94 F. 2d 731 (1st Cir.), *cert. denied*, 304 U. S. 577 (1938). *Compare In re Otsego Waxed Paper Co.*, 14 F. Supp. 15 (W. D. Mich. 1935), *with Madden v. Mac Sim Bar Paper Co.*, 103 F. 2d 974 (6th Cir.), *cert. denied*, 308 U. S. 556 (1939).

<sup>29</sup> Transcript of Record, In the Matter of Grade A Foods Corp. (S. D. N. Y. 1951).

<sup>30</sup> See note 25 *supra*. Courts have refused to disregard the corporate entity in any event unless fraud or injustice would otherwise be abetted. To this effect, see *United States v. White Sulphur Springs*, 57 F. Supp. 48 (S. D. W. Va. 1944); *In re Oceanic Insul-Lite Corp. v. Sullivan Dry Dock & Repair Corp.*, 191 Misc. 354, 77 N. Y. S. 2d 498 (Sup. Ct. 1947); see *Kentucky Electric Power Co. v. Norton Coal Mining Co.*, 93 F. 2d 923, 926 (6th Cir. 1938) (entity stands unless unfair advantage taken of subsidiary by parent corporation).

<sup>31</sup> See *In re Loewer's Gambrinus Brewery Co.*, 167 F. 2d 318, 319 (2d Cir. 1948). Hand, J., concurred, applying the "instrumentality rule" (see note 28 *supra*). The other judge merely concurred in the result, without expressing an opinion on the law. The lower court opinion, *In re Loewer's Gambrinus Brewery Co.*, 74 F. Supp. 909 (S. D. N. Y. 1947), noted that both creditor and bankrupt corporations were merely agencies for the conduct of a single enterprise for the benefit and under the control of their common owners. On the other hand, the Record on Appeal in the *Schwartz* case discloses that both



seeable future, barring legislative activity. Therefore, it would seem that the instant case pronounces a *technically* correct statement of the applicable law. Although the dissent is in closer harmony with the spirit of the Bankruptcy Act, its acceptance as the governing rule would necessitate a change in the existing statute<sup>32</sup> or in the substantive law of corporations.



CONTRACTS — JOINT VENTURES — ENFORCING LEGAL PART OF AGREEMENT.—Plaintiff, formerly sole proprietor of a New York liquor business, entered upon a joint venture with defendants to sell alcohol for industrial use and for beverage purposes in New York and in international trade. Renewals of plaintiff's liquor license were thereafter granted upon admittedly false statements that he was sole owner of the business. In an action brought for an accounting, defendants' motion to dismiss the complaint was granted because of the resulting illegality<sup>1</sup> to that part of the business which encompassed the selling of alcohol in New York. *Held*, reversed. Dismissal of

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corporations involved were engaged in separate businesses and the claims attempted to be voted did not arise out of a course of dealings between them as in the *Loewer's* case.

<sup>32</sup> Compare Section 44(a), *supra* note 17, with the standards of impartiality set out elsewhere in the Act for a trustee in corporate reorganization. BANKRUPTCY ACT § 158(4), 52 STAT. 888 (1938), 11 U. S. C. § 558(4) (1946), declares that a person shall not be deemed disinterested for the purposes of selection as a trustee in corporate reorganization if ". . . it appears that he has, by reason of any other *direct or indirect relationship to, connection with, or interest in the debtor* or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders." (Emphasis supplied.) See also *Consolidated Realty Co. v. Dyers, Finishers & Bleachers Federation*, 137 N. J. Eq. 413, 45 A. 2d 132 (Ch. 1946). The court ruled that a corporation, owned and controlled by the same persons as another corporation then involved in a labor dispute, was deemed to be an interested party in said labor dispute despite the separate entities of both corporations. The statute applicable (R. S. 2: 29-77.8 N. J. S. A.) read, "A person or association shall be held to be a person participating or interested in a labor dispute . . . if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein. . . ."

<sup>1</sup> N. Y. ALCO. BEV. CO. LAW § 110. ". . . [I]n any application for a license under this chapter, the following information shall be given under oath:

1. The name . . . of each applicant and, if there be more than one and they be partners, the partnership name . . . of the several persons so applying.

2. The name . . . of each person interested, or to become interested, in the business covered by license for which application is made, together with the nature of such interests. . . . N. Y. ALCO. BEV. CO. LAW § 130. "Any person who shall make any false statement in the application for a license or permit under this chapter shall be guilty of a misdemeanor. . . ."