St. John's Law Review

Volume 17
Number 2 *Volume 17, April 1943, Number 2*

Article 10

Corporations--Officers--Appeal and Error--Constitutional Law (Securities and Exchange Commission v. Chenery Corporation et al., 63 Sup. Ct. 454 (1943))

St. John's Law Review

enforceable with respect to things done and rights accrued up to the time that fulfillment of the object of the contract became impossible.[14]

A. J.

CORPORATIONS—OFFICERS—APPEAL AND ERROR—CONSTITUTIONAL LAW.—The Securities Exchange Commission brings certiorari to review a decision of the United States Court of Appeals for the District of Columbia,[1] reversing an order made by the Commission approving a plan of reorganization for the Federal Water Service Corporation. The directors and officers of the Federal Water Service Corporation (hereafter called Federal), a holding company registered under the Public Utility Holding Company Act of 1935,[2] purchased preferred stock of the company during a period in which the management of the company, which they controlled, proposed to the Commission successive plans of reorganization pursuant to the Act.[3] The respondents controlled Federal through their control of its parent, Utility Operators Company, which owned all of the outstanding shares of Federal's Class B common stock, representing the controlling voting power in the company. Prior to this plan, three other plans for reorganization were submitted by Federal which provided for participation by Class B stockholders in the equity of the proposed reorganized company. This feature of the plans was unacceptable to the Commission, and all were ultimately withdrawn. The present plan proposing a merger contemplated the elimination of Class B stock and the conversion of the preferred stocks and Class A stock into a new common stock with a par value, the effect of which was to reduce materially the capital of the corporation. The Commission declined to approve the plan on the ground that the plan permitted the preferred stock purchased by respondents to participate in the reorganization on a parity with all other preferred stock. Thereafter, the plan was amended to provide that the preferred stock, so purchased, unlike other preferred stock, would not be converted into stock of the reorganized company, but might be surrendered to the reorganized

[14] Economy v. S. B. & L. Bldg. Corp., 138 Misc. 296, 245 N. Y. Supp. 352 (1930); Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N. Y. Supp. 179 (1915), cited *supra* note 5.

[1] 128 F. (2d) 303, 75 U. S. 374 (App. D. C. 1942), wherein order of Commission was reversed and remanded on the ground that the Commission acted on a vital question of policy which Congress would have to act first by changing the standard it has expressed in the Act. Thus, the Commission exceeded its statutory authority. There was at the time no regulation of the Commission, no provision of the Statute, and no rule of common law or equity prohibiting the purchase of stock by an officer or director of a corporation during the pendency of reorganization proceedings.

[2] C. 687, 49 STAT. 803, 15 U. S. C. A. § 79 *et seq.*

[3] PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, §§ 7 and 11.

company at cost plus 4 per cent interest. All of the purchases were currently reported to the Commission as required by the Act.[4] Over the objections of the directors and officers involved, the Commission approved the plan as amended. The Commission conceded that the respondents did not acquire their stock through any favoring circumstances. The question is whether the Court of Appeals erred in reversing the Commission's order based upon the Commission's finding that it would be detrimental to the interests of investors and unfair and inequitable within the meaning of the Act to allow the preferred stock so purchased to participate in the reorganization on a parity with all other preferred stock. *Held,* there is no "established legal principle" which makes an officer or director accountable to his corporation for any profit which he may realize by investing in his company's securities pending reorganization, and also, if the Commission should believe that this is a practice which should be forbidden, it can forbid it by rule which would presumably be prospective and not retroactive in its application or by order. Judgment reversed. *Securities and Exchange Commission v. Chenery Corporation et al.,* 317 U. S. —, 63 Sup. Ct. 454, 87 L. ed. 411 (1943).

Although the holding in the Supreme Court technically reverses the lower court opinion, for all practical purposes it affirms it.[5] The majority opinion is far from clear as to just what finding the Commission would have to make to sustain its order without passing a general rule. The finding may be one of a particular wrongdoing or injury in a particular case, or merely a finding that the Commission, in its experience, is of the opinion that the application of a rigid rule is necessary to prevent possible abuses.[6] Under Delaware law the purchase of shares of stock in a corporation by a director is entirely legal and proper,[7] and such purchases of preferred stock together with dividends in arrears thereon, might be converted into new securities through a merger.[8] A dominant or controlling stockholder is a fiduciary.[9] Corporate directors are fiduciaries.[10] The rule sustained by the weight of authority is that the officer or director does not occupy a fiduciary relation to the stockholder with respect to his shares of stock in the corporation and that in buying and selling stock an officer or director may trade like an outsider provided he acts in good faith and does not intentionally conceal facts.[11] While they are not trus-

---

[4] *Id.* § 17.

[5] 128 F. (2d) 303, 75 U. S. 374 (App. D. C. 1942).

[6] *See* Note, *Chenery Corporation v. S.E.C.* (1942) 56 HARV. L. REV. 126, on the power of the S.E.C. to limit directors' purchases of stock.

[7] Cahall v. Lofland, 12 Del. Ch. 299, 114 Atl. 224 (1921); Dupont v. Dupont, 256 Fed. 129 (C. C. A. 3d, 1919), *certiorari denied,* 250 U. S. 642, 39 Sup. Ct. 492, 63 L. ed. 1185 (1919).

[8] Havender v. Federal United Corp., 11 A. (2d) 331 (1940).

[9] Southern Pacific Co. v. Bogert, 250 U. S. 483 (C. C. A. 2d, 1919).

[10] Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (1875).

[11] Dupont v. Dupont, 242 Fed. 98 (D. C. Del. 1917), also cited *supra* note 7; Strong v. Repide, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. ed. 853 (1909).

tees in the technical sense of the term, they occupy a fiduciary relation to stockholders respecting corporate transactions,[12] and a relation of trust to the corporation by being bound to exercise the strictest good faith in respect to its property and business.[13] The Act[14] denies to directors and officers the right to profit from short term dealings in the securities of their corporation by requiring the filing of statements of their security holdings in the company and further provides that profits made from dealings in such securities within any period of less than six months shall inure to the company. "The cases[15] upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order," and I believe it will be difficult for them to enforce a penalty by way of limitation to cost upon the findings of a past transaction which has been harmful to the public interest or the interest of investors. Both subordination and the limitation to cost cases are cases[16] based on the fiduciary relationship, and in each of the cases the claimant was a stockholder. The leading subordination case is known as the *Deep Rock* case.[17] There the parent claimant in a reorganization proceeding was to receive stock in the new company. The court held that the parent's mismanagement, resulting in the subsidiary's insolvency, required the subordination of the parent's claim to that of preferred stockholders. This present decision eliminates any possibility of the court connecting the Deep Rock doctrine with a limitation to cost theory. The limitation to cost is a somewhat less drastic penalty than subordination for a similar type of situation.

M. M. D.

CRIMINAL LAW—DOUBLE JEOPARDY.—Defendant-appellant was convicted of violating a federal statute (12 U. S. C. A. § 588b) by entering a national bank in Vermont with intent to utter a forged

---

[12] Heim v. Jones, 14 F. (2d) 29 (C. C. A. 8th, 1926).

[13] Elliot v. Baker, 194 Mass. 518, 80 N. E. 450 (1907).

[14] PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, § 17 (a and b).

[15] Magruder v. Drury, 235 U. S. 106, 35 Sup. Ct. 77, 59 L. ed. 151 (1914); Michoud v. Girod, 4 How. 503, 11 L. ed. 1076 (U. S. 1845). The Commission applied an analogy to the latter case which dealt with specific obligations of express trustees and in which case the following rule of equity is noted—"that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another, whether he has an interest in it or not —*per interpositam personam*—carries fraud on the face of it." The Commission held here that even though the management does not hold the stock of the corporation in trust for the stockholders, nevertheless the duty of fair dealing which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud.

[16] Pepper v. Litton, 100 F. (2d) 830 (C. C. A. 4th), *certiorari granted*, 307 U. S. 620 (1939).

[17] *See* Note, *The "Deep Rock" Doctrine: A Realistic Approach to Parent—Subsidiary Law* (1942) 42 COL. L. REV. 1124.