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Corporations—"Continuing Wrong" Theory Adopted in Action for Inadequate Freight Rates

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tion clearly against public policy but not violating a criminal statute, could occur. Such discrimination would be against public policy but not unlawful. It was reasoned that if discretion were allowed in such cases, there could be little objection.

The majority opinion, however, limits the courts to considerations of lawfulness only in deciding whether to approve charter applications under Section 10 of the Membership Corporations Law. This limitation will prohibit the use of personal standards and lead to consistency, a reform long overdue.

P. D. C.

"CONTINUING WRONG" THEORY ADOPTED IN ACTION FOR INADEQUATE FREIGHT RATES

In *Ripley v. International Railways of Central America*, the minority stockholders of International Railways (hereafter referred to as Irca) brought suit on behalf of the corporation against the United Fruit Company (hereafter described as United).[17] United was in practical control of Irca by virtue of a voting trust created in 1928;[18] consequently it (United) was in a fiduciary relationship to the minority stockholders of Irca. Damages are based on allegedly inadequate freight rates for hauling United's bananas from the interior of Guatemala to the coast.

In 1936, Irca, United and Compania Agricola de Guatemala (hereafter described as Agricola), a subsidiary of United, entered into business arrangements which were controlled by ten contracts each relating to different aspects of the parties' business dealings. One of these contracts, entitled "Main Agreement," was approved by the stockholders of Irca. This agreement contained terms by which Agricola helped Irca finance new equipment and obtain certain other operating benefits. Agricola received notes and Irca stock in exchange. Agricola also agreed to use the main lines of Irca to transport its bananas and supplies, *"under such arrangements as the parties hereto may agree upon from time to time."*

The "Trackage" and "Operation of Trains" agreements were executed at the same time, but they were not submitted to the stockholders of Irca. These agreements "fixed" the total cost to Agricola for shipping a carload of bananas at $60.00; whereas, a similar haul would cost an independent producer $130.00 after 1939.

The referee awarded damages to the plaintiffs for the difference between the rates paid and the fair and reasonable value of the transportation. Recovery was limited to the six year period preceding the commencement of the action.[19] The referee's determinations were affirmed by the Appellate Division.[20] The Court of Appeals, two judges dissenting, affirmed the judgment.

17. 8 N.Y.2d 430, 209 N.Y.S.2d 289 (1960).
18. Ripley v. International Railways of Central America, 276 App. Div. 1006, 95 N.Y.S.2d 871 (1st Dep't 1950).
19. N.Y. Civ. Prac. Act § 48.
20. 8 A.D.2d 310, 188 N.Y.S.2d 62 (1st Dep't 1959).

The primary contention of the defendant United was that the ten agreements were really one integrated contract,[21] and that in order for Irca to repudiate the rate agreement it must restore to the defendant all benefits received under the other agreements.[22] United also maintained that Irca could not attack the contract(s) because the cause of action was barred by the statute of limitations.[23] United further claimed that the shareholders had ratified the freight rates, and finally that the plaintiffs had no standing[24] to bring the action because they were not stockholders of record at the time the contracts were executed.[25]

The Court rejected the contention that the rates had been ratified by the shareholders on the ground that the rate agreements had never been submitted to a stockholders' meeting for approval. The Court considered the fact that the plaintiffs were not shareholders in 1936 unimportant because it viewed the wrong as a continuing one. This apparently establishes a new cause of action with every shipment under the inadequate rate schedule.

The adoption of the continuing wrong theory effectively eliminates the bar of the statute of limitations, at least as to the six years immediately preceding the action, because it implies that the cause of action arose not when the injurious contract was executed, but every time the defendant took advantage of its terms. In addition, the majority opinion states that the rate contract is severable from the other 1936 agreements because in 1933 the same rates had been set by contract for a 25 year period, so that a reaffirmance by Irca of the 1933 agreement could not possibly have been a consideration advanced by Irca for the benefits it received under the other 1936 contracts.[26]

It appears, as pointed out by Judge Dye in his dissenting opinion, that the majority in adopting the theory of continuing wrong have partially nullified the protection afforded by the statute of limitations against litigations of old claims. This same theory restores to subsequent purchasers of stock the right to bring suit on a cause of action that arose previous to their ownership, as long as the harmful effect is continuing. This result appears to be contrary to

21. Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551 (1953). Holding that separate memorandums may be pieced together if they all relate to the same transaction in order to satisfy requirement of the Statute of Frauds that the party to be charged must have subscribed to a written memorandum. This case stands for the proposition that the existence of a signed contract can be established rather than separate contracts each of which can be construed as one integrated contract.

22. Barr v. New York, L.E. & W.R. Co., 125 N.Y. 263, 26 N.E. 145 (1891).

23. N.Y. Civ. Prac. Act § 48.

24. N.Y. Gen. Corp. Law § 61.

25. Cf. Henis v. Compania Agricola de Guatemala, 116 F. Supp. 223 (D. Del. 1953). I decide the present cause of action for the recovery of damages and other equitable relief has long been barred by the applicable Delaware statute of limitations.

The case was affirmed on the basis of Rule 23(B), Fed. R. Civ. P., 210 F.2d 950 (2d Cir. 1954).

26. A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract. Carpenter v. Taylor, 164 N.Y. 171, 58 N.E. 53 (1900).

the express provisions of Section 61 of the General Corporation Law,[27] which was enacted to prevent the practice of buying into a corporation to commence suit on a pre-existing cause of action.[28]

D. G. M.

CORPORATION BOUND BY COLLECTIVE BARGAINING AGREEMENT OF ITS PREDECESSOR PARTNERSHIP

The case of *Reif v. Williams Sportswear, Inc.*[29] raised the issue of whether a corporation, in spite of the fiction of its separate legal existence, is bound by a collective bargaining agreement made by its predecessor (partnership) in the same business, when there has been no change in the persons controlling and owning the two businesses. The respondent corporation moved for a stay of the arbitration proceedings on the ground that its separate corporate existence insulated it from its predecessor's collective bargaining agreement under which the arbitration proceedings were being sought by the petitioner union. The motion was heard on the affidavits of both litigants.

The common law rule regarding a corporation's liability for a contract of its promoters is that the corporation cannot be bound by such a contract, since at the time the contract was entered into, the corporation was legally nonexistent and, therefore, could not be made a party to the contract by its promoters. Exceptions to this rule have been grounded upon several theories, including: ratification, adoption, estoppel and novation. Perhaps the most prevalent theory in New York State is that of implied adoption, which requires that the corporation, with knowledge of the contract, receive some benefit under it, and that the party rendering that benefit do so without knowledge of the new corporate identity acquired by the business.[30] Other jurisdictions have invoked the so-called "alter ego" doctrine[31] to find corporate liability in the special situation where a corporation and its predecessor have been controlled and owned by the same persons.[32]

In the present case the Court of Appeals did not decide the question of whether the respondent corporation had, by taking the benefit of union labor while knowing of the collective bargaining agreement, implicitly adopted the agreement. Part of the difficulty precluding the Court's consideration of this question was the insufficiency of the affidavits as to a finding concerning the

27. N.Y. Gen. Corp. Law § 61:
In any action brought by a shareholder in the right of a foreign or domestic corporation it must be made to appear that the plaintiff was a stockholder at the time of the transaction of which he complains or that his stock thereafter devolved him by operation of law.

28. Northridge Cooperative Section No. 1 v. 32nd Avenue Construction Corp., 2 N.Y.2d 514, 161 N.Y.S.2d 404 (1957).

29. 9 N.Y.2d 387, 214 N.Y.S.2d 395 (1961).

30. Morgan v. Bon Bon Co., 222 N.Y. 22, 118 N.E. 205 (1917). For a review of earlier cases see 1 White, New York Corporations 22 (12th ed. 1947).

31. For a thorough discussion of the "alter ego" doctrine, see. Schifferman, "Alter Ego," 32 Calif. S.B.J. 143 (1957).

32. See e.g., Zander v. Larsen, 41 Wash.2d 503, 250 P.2d 531 (1952); Fena v. Peppers Fruit Co., 185 Minn. 137, 239 N.W. 898 (1931).