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Richard M. Ramsey
Member, Indiana Bar

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DIRECTOR'S POWER TO COMPETE WITH HIS CORPORATION

RICHARD M. RAMSEY*

The scope of this paper, in so far as possible, will be confined to the strict conception of competition as it is involved in the law governing transactions in which a director or manager1 of a corporation endeavors to obtain for himself business opportunities which might or would prove advantageous to the corporation. Stated directly, the problem may arise from any business transaction with a third person in which the corporation is interested. Only in so far as it contributes to clarity and completeness of treatment will the rules of law governing interlocking directorates or business contracts and transactions with the principal corporation be considered.

The main purpose is to look into the restrictions placed upon a corporate director’s or manager’s freedom to engage in personal business activities, and the reasons behind those restrictions. In this respect, it is well to bear in mind that the problem as well as the solution the courts have found is another of the outgrowths of conflicting motivity so common to modern complex society. In such a situation as this, it should be the purpose of the law to arrive as nearly as possible at a complete balance of economic advancement and justice to all parties in interest. On one side is the position of trust and confidence which a director of a corporation holds and the reliance that the stockholders must of necessity place in him. On the other side, however, there is freedom of enterprise concept and the proposition that by placing too great a restriction upon the freedom of corporation directors, competent men would be discouraged from accepting directorships.

There are few decisions directly limiting the competitive activity of corporate directors. These few cases, however, have resulted in an abundance of talk on the part of the judges and the suggestion of rules which, if carried to their logical conclusion would produce indefensible results. The

* Member, Indiana Bar; now, U.S.N.R.

1. The courts do not in this field clearly distinguish directors from other officers.
actual decisions, however, are for the most part quite satisfactory.

The large corporation has seldom appeared in litigation of the question, and the cases have generally involved the small or so-called "closed" corporation. From this and other circumstances, one writer goes so far as to conclude that effective supervision over the directors of large corporations is impracticable.²

The director of a corporation in the course of his ordinary duties is strictly speaking neither an agent nor a trustee. The same factors, however, which lead to judicial condemnation of certain conduct of agents and trustees is sometimes applicable to corporate directors.³ The courts generally refer to this abstractly as a "fiduciary relation." In addition the rule that the failure of the directors to conduct the affairs of the corporation with diligence and care renders them liable to the corporation for negligent management.⁴

There is no question as to the director's right to engage in a business which is not at the time competitive with that of the corporation,⁵ nor that, after his relation as director to the corporation has been terminated, he may enter into a competitive business provided he does not violate any contractual duty⁶ or engage in any unfair competition practices in the nature of using or disclosing trade secrets.⁷ In addition, an individual, as a condition of becoming an officer of a corporation may reserve the right to engage in a similar business at the same time.⁸ Likewise, any restrictions which exist have no application to directors who own all of the stock,⁹ except perhaps as creditors of the corporation might complain.¹⁰ Beyond this point, the real confusion begins to appear.

3. Ballantine, Private Corporations (1927) Sec. 104; Stevens, Corporations (1936) 545.
6. N.Y. Automobile Co. v. Franklin, 49 Misc. 8, 97 N.Y.S. 781 (1905).
Although the problem is essentially the same throughout, the case holdings may be considered for purposes of clarity under three main heads: (1) Transactions with third persons involving the acquisition or sale of property in which the corporation might be interested; (2) Engaging in the same type of business as that in which the corporation is engaged; (3) A correlation and a consideration of miscellaneous cases.

ACQUISITION OR SALE OF PROPERTY RIGHTS IN WHICH THE CORPORATION MIGHT BE INTERESTED

The mere fact that a corporation might use certain property for its benefit, or has a purely abstract interest therein, is not of itself sufficient to preclude a director from purchasing it for his own benefit. The limitations on his power of purchase in his own behalf must be looked for in other circumstances than the mere fiduciary position which he holds as a director. Thus, the Alabama court in stating this proposition said,

"Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit, enterprises or investments, which, though capable of profits to the corporation, have in no way become subject to their trust or duty."

What circumstances, then, will impose such a "trust" on the property or "duty" on the director?

The cases hold that a corporation's interest in the property under a present lease was sufficient, since it had an expectancy of renewal. This expectancy idea was extended by the recent case of News-Journal Corporation v. Gore to include a lot over which the company was necessarily a trespasser in the course of ingress and egress to

12. La Garde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199, 262 (1900).
14. 147 Fla. 217, 2 S. (2d) 741 (1941).
their back entrance. The corporate director's fiduciary duty prevents him from acquiring a property interest which he knows the corporation must necessarily acquire or is dependent upon for the successful prosecution of its corporate purpose. Furthermore he cannot acquire property with an intent to transfer it to the corporation at a personal profit, or use it to defeat the plans of the corporation. This last situation might logically, though not necessarily, be extended to the acquisition of property with intent to profit from competitive bidding between his corporation and a competitor.

Beyond this the courts have refused to go. They have often stated the rules in broad terms, for example, in Zecken-dorf v. Steinfeld the court said,

"Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest, actual or in expectancy, in the property, or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in carrying on or developing the legitimate business for which it was created."

In this case, one Steinfeld, while not a director, so dominated the board that the court considered the case as if he had been a member of it. From certain reports of the company's superintendent and other sources open to him by reason of his connection with the company, Steinfeld learned that neighboring properties were valuable for mining purposes. He bought the properties for his own use. Since he did not mislead the company by representations that he

19. 12 Ariz. 245, 100 Pac. 784, 790 (1909).
was buying for it, the court held that his purchase was not in violation to his duty to the company. Likewise, in *Carper v. Frost Oil Company*, the court held the circumstances insufficient to warrant a finding that the director had violated his fiduciary duty. Here, the corporation was organized for the purpose of purchasing, developing, and operating oil lands in the state of Louisiana. One Malone, a director, was sent to Louisiana as general manager. While there, he purchased some oil leases for himself and the president of the corporation in their own names and for their personal benefit. In a suit to establish a constructive trust, and for an accounting, the court held for the defendant, saying,

"When acting in good faith, a director or officer is not precluded from engaging in distinct enterprises of the same general class of business as the corporation is engaged in."

In the case of *LaGarde v. Anniston Lime and Stone Company*, the court also showed its reluctance to burden directors with fiduciary duties. The situation was that LaGarde knew that his corporation owned a one-third interest in a certain quarry, leased a second one-third interest, and had been negotiating for the purchase of the reversion, and the other one-third interest. The acquisition of the entire quarry would have been of great benefit to the corporation. LaGarde bought the two-thirds interest for his own account, intending to quarry and sell lime in competition with the company. The court here held that the acquisition of the one-third which the company held under a lease was a breach of his duty to the corporation since it had an expectancy of renewal. As to the other one-third interest, the court held that LaGarde was within his legal rights in buying, for although the property would have been valuable to the company, acquisition of it was not necessary to the company’s business, and LaGarde had not been instructed by the company to buy the property for it. It is noteworthy that it was considered immaterial that LaGarde gained his knowledge as to the value of the property through his connection with the company.

The courts have often referred to this so-called “ex-

20. 72 Colo. 345, 347, 211 Pac. 370, 371 (1922).
21. 126 Ala. 496, 28 So. 199 (1900).
22. Id. at 499, 28 So. at 201.
pectancy" of renewal, as a property right or in the nature of a property right belonging to the corporation,\textsuperscript{23} and therefore deserving protection against interference by a director in his individual capacity. Some of the cases involving patents or copyrights,\textsuperscript{24} contain language suggesting the existence of a special or vested interest. This, however, is rationalization. No protection in similar situations would be given against third persons who are not directors. All of the cases suggesting this proposition can be decided more easily under conventional theories.

Where the corporation is unable or unwilling to acquire the property dealt with by the director, the courts generally protect the director. Thus courts have absolved a director when the party dealt with had refused to deal with the corporation,\textsuperscript{25} or the corporation lacked financial ability to seize the opportunity,\textsuperscript{26} or it would have been ultra vires for the corporation to act,\textsuperscript{27} or the corporation was not at the time in the market for the property.\textsuperscript{28}

A sale of property by a director in competition with a beneficial sale by his corporation, has come before the courts on only one occasion.\textsuperscript{29} In that case, the director owned a one-acre tract of land adjoining a sixty-five-acre tract owned by his corporation. A purchaser offered $75,000 for both

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\item \textsuperscript{23} See Pikes Peak Co. v. Pfuntner, 158 Mich. 412, 123 N.W. 19, 20 (1909); Crittenden & Cowler Co. v. Cowler, 66 App. Div. 95, 72 N.Y.S. 701, 702 (3d Dep't. 1901); Robinson v. Jewett, 118 N.Y. 40, 53 (1899).
\item \textsuperscript{25} Jacksonville Cigar Co. v. Dozier, 53 Fla. 1059, 43 So. 523 (1907); Pioneer Oil & Gas Co. v. Anderson, 168 Miss. 334, 151 So. 161 (1933); Keokuk Northern Line Packet Co. v. Davidson, 95 Mo. 467, 8 S.W. 595 (1888); cf. Crittenden & Cowler Co. v. Cowler, 66 App. Div. 95, 72 N.Y.S. 701 (3d Dep't. 1901) (The court refused to adopt such a rule because of the danger of collusion between the third party and the defendant.).
\item \textsuperscript{26} Jasper v. Appalachian Gas Co., 152 Ky. 69, 153 S.W. 50 (1913); Hannerty v. Standard Theatre Co., 109 Mo. 297, 19 S.W. 82 (1891); Murray v. Vanderbuilt, 39 Barb. Ch. 140 (N.Y. 1863).
\item \textsuperscript{27} Thilco Timber Co. v. Sawyer, 236 Mich. 401, 210 N.W. 204 (1926).
\item \textsuperscript{28} Carper v. Frost Oil Co., 72 Colo. 345, 211 Pac. 370 (1922); Lawrence v. Sutton-Zwolle Oil Co., 193 La., 118, 190 So. 351 (1939); Tierney v. United Pocahontas Coal Co., 85 W. Va. 545, 102 S.E. 249 (1920); See Loewer v. Lomake Rice Milling Co., 111 Ark. 62, 77, 161 S.W. 1042, 1048 (1913); cf. DuPont v. DuPont, 256 Fed. 129, 150 (C.C.A. 3d, 1919) (director's participation in the decision-making of the corporation).
\item \textsuperscript{29} Dravosburg Land Co. v. Scott, 340 Pa. 280, 16 A (2d) 415 (1940).
\end{itemize}
tracts. The defendant refused to sell his tract for less than $40,000. Rather than lose the $35,000, the corporation by unanimous consent of the stockholders and directors agreed to take that amount. The deal was closed. This suit was brought to have equity compel the defendant to pay over that amount by which he was unjustly enriched, but the court found for the defendant, saying,

"No law, outside of eminent domain, compels a person to part with his property for what other persons, or a court may regard as sufficient compensation.

"No duty to his company restricted his right to refuse to sell his land, or, if he sold it at all, to do so only at a price satisfactory to himself."

This, it would seem, is the desirable and only possible result, as is substantiated by the absence of cases.

ENGAGING IN THE SAME TYPE OF BUSINESS AS THAT IN WHICH THE CORPORATION IS ENGAGED

Obviously a director should be permitted to engage in business activities other than those of the corporation. Equally obvious is the necessity for some limitations upon this power. Under certain circumstances, he is free to enter an independent competitive business. It is, in fact, the rule rather than the exception. Thus, in Red Top Cab Company v. Hanchett the court observed that,

"The directors or officers of a corporation are not, by reason of the fiduciary relationship they bear toward the corporation, precluded from entering into an independent business in competition with the corporation. This general statement, however, is subject to the proviso that directors or officers entering into such competing enterprise must act in good faith and may not cripple or injure the corporation which they serve."

The last sentence of this quotation, while typical, is broader than the decisions. Most courts have held a transgressing director liable under a violation of his fiduciary duties only when his act constitutes a clear abuse of his


31. 48 F. (2d) 236, 238 (D.C.N.D. Cal. 1931).
position as a director. When such an abuse is shown, the corporation is entitled not only to damages and recovery of any profits resulting therefrom, but equity will impound for the benefit of the corporation any property acquired.\footnote{32}

It has been held that if a fiduciary is engaged in a business in competition with his corporation, he cannot actively use his position and power over his corporation so as to prevent the corporation from seeking business in competition with himself.\footnote{33} That this rule may be extended to mere dissuasion by one in whom reliance is placed is at least suggested by the court in Blaustein v. Pan American Petroleum and Transportation Company.\footnote{34} If the director uses the corporation's personnel, facilities, or finance in obtaining and developing his business, the corporation is entitled to the benefits.\footnote{35} Nor will a director, in furtherance of his own personal interests, be permitted to engage in practices of unfair competition such as the use or disclosure of trade secrets.\footnote{36} It has also been hinted in this respect, that he will not be permitted to entice away any corporate employees.\footnote{37} The act of obtaining for himself something in which the corporation has an expectancy, by reason of a present interest, also renders a director liable under a breach of his fiduciary duties,\footnote{38} as the courts apparently apply the

\footnotesize{\begin{enumerate}
\item[33.] In re New York Rys. Corp., 82 F. (2d) 739 (C.C.A. 2d, 1936); Singer v. Carlisle, 26 N.Y.S. (2d) 172, affirmed 26 N.Y.S. (2d) 320 (1940).
\item[34.] 174 Misc. 601, 21 N.Y.S. (2d) 651, 731 (1940).
\item[37.] Red Top Cab Co. v. Hanchett, 48 F. (2d) 236, 238 (D.C.N.D. Cal. 1931).
\end{enumerate}
doctrine of Meinhard v. Salmon. Similarly, a director can be prevented from obtaining or using a thing which gains its value to him by reason of its value to the corporation, that is, where the director acts with an intent to sell or otherwise dispose of property, or, through it, a service to the corporation at a profit to himself. Similarly it is a breach of duty for him to use his position as a director or manager to steer part of the corporation's business or business with the corporation, through his own enterprise to the detriment of the company.

The state of the law in situations where the director is dealing in the corporation's behalf is uncertain. Of course, when the director's action constitutes fraud or a violation of an agency with which he is specifically charged, the corporation may recover, and it seems, in light of the fiduciary relationship that the same should be extended where the director actively misleads or conceals from the corporation the true facts of the situation, but the burden of proof would undoubtedly be on the corporation. Certainly appropriation to himself of a corporate opportunity in the nature of an offer which was made to the corporation or to him in his corporate capacity constitutes a breach of duty.

43. Compare Golden Rod Mining Co. v. Buckvich, 108 Mont. 569, 92 P. (2d) 316; Blaustein v. Pan American Petroleum & Transportation Co., 174 Misc. 601, 21 N.Y.S. (2d) 651 (1940), with Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784 (1909). The difficulty arises from the fact that all the cases involving such a situation have involved other factors as well. True this can be said of nearly every case in this field, however, unlike most of the others, these particular cases have involved other elements which alone were sufficient to ground the decisions.
44. See cases cited supra note 30.
45. Bay City Lumber Co. v. Anderson, 8 Wash. (2d) 185, 111 P. (2d) 771 (1941).
46. Guth v. Loft, Inc., 5 A. (2d) 503, (Del. 1939); Brite v. Penny, 157 N.C. 110, 72 S.E. 967 (1911); Solimi v. Hollander, 128 N.J.Eq. 228, 16 A. (2d) 203 (1941). But note, the mere fact that an opportunity would be advantageous to the corporation does not render it a "corporate opportunity," LaGarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900); Colorado & Utah Coal Co. v. Harris, 97 Colo. 309 P. (2d) 429 (1935).
While constituting a departure from the immediate issue, it is important to note that a director will not be permitted to seek a personal profit or advantage from the performance of a duty owed to the corporation as a director or manager.47

In the absence of special circumstances, courts have refused to compel the director to act for the corporation or not at all on the ground that this would place an unwarranted restriction upon personal business activity. The rule has been applied even in fields in which the corporation is directly interested.48

In the case of *Lancaster Loose Leaf Tobacco Company v. Robinson,*49 the plaintiff company was organized for the purpose of operating a tobacco warehouse, and selling, and having sold by auctioneers on its floors, tobacco brought for that purpose by producers and other owners. The corporation had never speculated in tobacco except for an occasional purchase made on its own floors. Action was brought by the corporation to recover $24,000, the profits realized upon the purchase and resale of a large quantity of burley, upon the theory that as an officer of the corporation, secret profits made in a business transaction of a nature similar to those of the corporation should inure to the corporation's benefit. But the court held in favor of the defendant.

Another early case, *Barr v. Pittsburgh Plate Glass Company,*50 held that it was proper for a director to purchase property and engage in a competitive business, and there-


49. 199 Ky. 313, 250 S.W. 997 (1923).

after, when the corporation wished to buy the defendant's plant, to sell it at a profit in the same way that he might sell any other property owned by him.

Among the more recent cases, those of Witmer v. Arkansas Dailies, Inc., and Solimi v. Hollander are outstanding. In the former case, suit was brought seeking an injunction to restrain the defendant, a minority stockholder in the plaintiff organization from obtaining advertising to be used in local papers. The defendant had resigned after ten years as manager, secretary, and treasurer of the plaintiff corporation and entered business independently. He contacted former patrons of the plaintiff corporation and entered into contracts with them to handle their business after expiration of present contracts. Throughout, and at the time of the trial, the defendant remained a nominal director of the corporation. The court denied the injunction.

In the latter case, the defendant directors of the American Corporation, while still owning all of the stock therein, exercised an option under a previously entered trust agreement with their father for the purchase of the stock of a Canadian corporation engaged in an identical business. Suit was brought by the American corporation on the grounds that, (1) this was a corporate opportunity which should have gone to the American company, (2) the defendants were prohibited from acquiring the Canadian business because of their fiduciary responsibility to the American company because in the acquisition and development of the opportunity, the assets and facilities of the American company were employed. But again, the court decided in favor of the defendants.

Likewise, the fact that a company has negotiated for property does not preclude the defendant from buying for his own benefit, even though his knowledge of the property or its value or its availability was acquired through his relationship to the company.

52. 126 N.J. Eq. 228, 16 A. (2d) (1941).
53. LaGarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900); Holmes v. Doe Run Lead Co., 223 S.W. 772 (Mo. App. 1920); Colorado & Utah Coal Co. v. Harris, 92 Colo. 309, 49 P. (2d) 429 (1935).
A CORRELATION AND CONSIDERATION OF MISCELLANEOUS CASES

The futility of attempting to separate the problem into even two broad headings as those here used is easily discernible. The cases themselves often involve both problems. Even an isolated instance of property acquisition, while alone constituting an act of competition, may point toward the broader conception of competitive business.

In the light of the cases, it becomes difficult, if not impossible, to determine the limits of the so-called "fiduciary duties" or to state accurately the point at which courts will limit a director's or manager's right to act in his own behalf. However, to pass it off as some have done is not helpful.

Although there is much confusion in the field, the greatest difficulty originates from the dicta of the cases. The decisions themselves are less confusing. By disregarding misleading dicta and considering the holdings alone, it appears that there is no distinct field, nor set rules, which in themselves constitute the limits of a corporate director's power to operate in his own behalf. His power, and the limits of that power are controlled by the rules of law in a number of fields in accordance as they become involved by the factual set-up of the particular case, and not the so-called fiduciary relationship in and of itself. Thus far, the cases in this field in which a director has been held to have violated a duty owing to the corporation, have involved one or more of the following: agency; unfair competition; active fraud; waste, negligence, or nonfeasance in office constituting corporate mismanagement, and the doctrine of Meinhard v. Salmon. Of course, the law of trusts becomes involved, but only insofar as the courts may construct a trust in favor of the corporation, provided a case can be made out in one of the above fields.

The application of the law of agency must be considered in light of the fact that corporate personality is a recognized

54. Note (1941) 54 Harv. L. Rev. 1911. Placing the test upon a functional basis the author proceeded to admit, "It may be objected that this leaves unanswered the major question as to what are the functions of a corporate director or officer. In a period where the role of the corporation and the corporate manager in our national economy is undergoing decided changes and being critically examined, this is perhaps more a virtue than a vice."

55. 249 N.Y. 458, 164 N.E. 545 (1928).
fiction and the corporation can act only through its agents. Thus, the rules most often involved concern the acceptance of a power to act in a particular matter in behalf of another. The agent is precluded from acting in his own behalf in that matter.\(^5\)

A director or manager is in closer relationship with his corporation than is an employee; thus, the law of unfair competition more clearly restricts his freedom of enterprise. Consequently, the erring director may not entice away employees of the corporation,\(^6\) use corporate facilities and capital in development of competing enterprise,\(^7\) actively prevent the corporation from competing,\(^8\) or seize for himself a corporate opportunity.\(^9\)

In *Meinhard v. Salmon*,\(^10\) two joint venturers were bound to each other by contract with respect to a lease out of which a new business opportunity arose. The defendant, who was in control with exclusive power of direction and management, appropriated the new opportunity for himself. The court held that the relationship so nearly approached that of an express trust that it gave the plaintiff an expectancy in the new opportunity sufficient to impose a duty of disclosure on the defendant. The doctrine of the case, however, in all of its implications, is much broader.

"While there is a lofty moral implicit in this rule, it actually accomplishes a practical, beneficient purpose. It recognizes the frailty of human nature; it realizes that where a man's immediate fortunes are concerned, he may sometimes be subject to a blindness often intuitive and compulsive. The rule is de-


\(^{57}\) Red Top Cab Co. v. Hanchett, 48 F. (2d) 236 (D.C.N.D. Cal. 1931).


\(^{60}\) LaGarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 So. 199 (1900); Guth v. Loft, Inc., 5 A. (2d) 503 (Del. 1939); Solimi v. Hollander, 128 N.J. Eq. 228, 16 A. (2d) 203 (1941).

\(^{61}\) See, supra n. 55.
signed on the one hand to prevent clouded conception of fidelity and a moral indifference that blurs the vision, and on the other hand, to stimulate the most luminous critical sense and the finest exercise of judgment uncontaminated by dress of prejudice, of divided allegiance or of self interest."62

Obviously such an approach requires correlation into the cases. But first, it is important to note, that court or jury might be influenced by the fiduciary position of a director and therefore, find that an agency existed, that acts of unfair competition were committed, that there was active fraud, or, that the case falls within the rule of Meinhard v. Salmon, where under ordinary circumstances they would have found to the contrary.

The proposition contended for is perhaps best substantiated by the recent decisions of the New York courts,63 Thus, in Dunlop’s Sons v. Dunlop, the court said,64

"What we have in this case is a claim for the return to the corporation of a loss suffered by the corporation. The amount of the loss is the same as the so-called “profit” received by the defaulting officers and directors. The wrong done to the company is no different from the wrong done to a corporation when an excess salary is paid to an officer or when gifts are made to strangers, or when bonuses are wrongfully paid."

Likewise, in Singer v. Carlisle,65 the court held that, “The gist of the alleged wrongdoing was an improper diversion of business from the plaintiff corporation. This amounts to waste. Even if it be inferred that the director received some benefit, the character of the cause of action would still remain one of waste or negligence.”

None of the cases attempt to define the so-called “good faith” or determine what constitutes this “fiduciary relationship.” Such statements in effect seem to assume the issue.66 That the duties found in the cases are not duties resting solely on the directorship relation is certainly substantiated by the decisions.

65. 26 N.Y.S. (2d) 172, 178, affirmed 26 N.Y.S. (2d) 320 (1940).
Among the leading cases allowing recovery, one and often more of the above circumstances usually are present. In *Irving Trust Company v. Deutch*, the offer of 200,000 shares of DeForest stock, while addressed to the directors individually, was made with the knowledge of a requirement of Board approval of stock purchases. Based on this and other facts in evidence, the court found that the original offer was an offer to the corporation through the defendants as agents. It was further conceded that access to the patents controlled by the DeForest Company was essential to the accomplishment of the corporate purpose.

Several of the cases have involved active prevention of competition of the corporation company by its directors. Similarly, it should be noted that the actual decision in *New York Trust Company v. American Realty Company* was based upon the fact that the pleadings might be construed as stating that the directors had bought land with intent to resell to the corporation. In *Haben v. Morris*, before deciding for the plaintiff, the court determined that the circumstances imposed upon the defendants a "mandate" to buy for the company. In *Coleman v. Hanger*, two closed corporations were involved. The plaintiff was a stockholder in the first. The defendants were directors and managers. The defendants organized a second corporation under a similar name to engage in the same business and did not offer to the plaintiff any stock in this corporation. The two corporations continued under the same management and directorship, but all the cost-plus contracts were thereafter assigned to the new corporation, and the doubtful contracts were given to the old corporation. The action was not brought by or on behalf of the old corporation, and the decision rested largely on the freezing out of the plaintiff from the new corporation. Likewise, while the court in deciding *Hall v. Dekker* indulged in the customary broad

69. 244 N.Y. 209, 155 N.E. 102 (1926).
71. 210 Ky. 309, 275 S.W. 784 (1925).
language, the case was decided upon the ground of unfair competition.

All of these cases seem to fall within one of six classifications: agency, unfair competition, active fraud, waste, negligence or non-feasance in office sufficient to constitute corporate mismanagement, or the doctrine of Meinhard v. Salmon. 73 Added weight if given to this rationale is afforded by the cases in which the courts have refused to charge directors with a violation of duty. 74 That such an approach is valuable and not merely begging the issue seems obvious; on the other hand, it is equally clear that the courts will continue to talk in generalities and consider previous generalities of other courts, and so a conclusion in terms most often used by the courts seems to be demanded.

The courts are reluctant to go beyond the application of ordinary fiduciary rules. Doubtless this position is warranted, for if it were otherwise, competent men would be dissuaded from assuming the burdens of corporate directorship.

Thus, if the director acquires a property interest in anything in which the corporation already has an interest sufficient to give it an “expectancy,” or the defendant’s acquisition will prevent or hinder the corporation in effecting the purpose of its creation, the director will be held to have violated his duties as director. 75 Likewise, if by overreach-

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73. The case of Meinhard v. Salmon is not used as a cure-all, but as effectively establishing as a concrete rule of law something at which the courts had hinted for years.

74. These cases are sufficiently treated in the earlier parts of this discussion.

75. It might be objected that the cases dealing with the purchase by a director of the debts or outstanding obligations of the corporation are not dealt with, or at least not sufficiently so. Such cases were intentionally omitted due to the fact that in so far as they are not distinguishable on the basis of the relationship between the parties and their respective duties, the same principles as here developed are applicable. The inclusion of such case in the text of this treatment would add nothing constructive, but would only contribute to confusion. However, for purposes of completeness a brief statement of the law in this regard seems advisable.

The weight of authority seems to be that in the absence of special circumstances sufficient to impose upon the director a duty toward the corporation to have the claim discharged at the time the purchase is made, such a purchase is permissible. Camden Safe Deposit & Trust Co. v. Citizens Ice & Cold Storage Co., 69 N.J.Eq. 718, 61 Atl. 529, affirmed 71 N.J.Eq. 221, 65 Atl. 980 (1905); Seymore v. Spring Forest Cemetery Assn., 144 N.Y. 333, 39 N.E. 365 (1895); Glenwood Mfg'r. Co. v. Syme, 109 Wisc. 355, 85 N.W. 432 (1901); McIntyre v. Ajax Mining Co., 28 Utah 162,
ing the corporation, he acquires an interest which the corporation had contemplated or desired, or which was first offered to the corporation, or to him in his corporate capacity, the court will find a violation of fiduciary duties. A similar result should be reached if an officer or director takes advantage to the detriment of his corporation, of his knowledge gained by reason of his position and relation with the corporation.\footnote{76} And it should not be forgotten that if the personal interests of a director become so antagonistic to those of the corporation as to threaten the corporation’s well-being, it is the director’s duty to resign, and he may be compelled to do so.\footnote{77}

\footnote{77} Pac. 613 (1904). Contra: Hill v. Frazier, 22 Pa. 320 (1853). In some jurisdictions it appears that among such special circumstances sufficient to impose a duty upon the director to act for the corporation is the fact that the opportunity was to purchase the claim below par. This is true at least to the extent that the director should not be allowed to enforce them against the company for more than their cost to him. The Telegraph v. Lee, 125 Iowa 17, 98 N.W. 364 (1904); Wabunga Land Co. v. Schwanbeck, 245 Mich. 505, 22 N.W. 707 (managing director); see Martin v. Chambers, 214 Fed. 769, 771 (C.C.A. 5th, 1914); In re Allen-Foster-Willet Co., 227 Mass. 551, 116 N.E. 875, 866. Similarly, a distinction seems to be drawn by some courts in the cases involving “pure” directors from those involving officers or directors-officers. Davis v. Rock Creek L.F.&M. Co., 55 Cal. 059, 364 (1880) (president); The Chouteau Ins. Co. v. Floyd, 74 Mo. 286, 291 (defendant’s powers almost equal to those of a trustee). Under Sec. 16 of the Securities and Exchange Act of 1934, a director subject thereto is prohibited from profiting from the sale of corporate securities which he has held for less than six months.


76. It is noteworthy that the cases wherein liability has been found have involved rights or things of special or unique value to the complainant, for example, necessary or much needed real estate, a proprietary formula valuable to the corporation’s business, competing enterprises or one required for the growth and expansion of the corporation, and the like. Similarly noteworthy is the fact that the courts have not often used such terms as “competing business” after once determining that a corporate opportunity existed or failed to exist; and when such terms have been mentioned the court proceeded to apply the usual rules of competitive business.

\footnote{77} Golden Rod Mining Co. v. Buckvich, 108 Mont. 569, 92 F. (2d) 316, 320 (1939).