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Corporate Finance -- Securities Exchange Act of 1934 -- Gain to Corporate Officer Who Took Income Tax Deduction on Securities Donated to Charities Held Not a Profitable Sale

in opposition to the federal act;[19] and in three cases the acts of Congress occupied only a limited field.[20] The "conflict test," adopted by the Court in the instant case, had been invoked [21] in previous cases only when determining whether Congress had *intended* to occupy a particular field, when such was not apparent from a reading of the federal and state regulations. It could hardly be contended that such a problem was presented to the Court in the instant case, since the theory upon which the Court proceeded was that the federal and state regulations were identical.[22]

The effect of the Court's decision appears to be that the states may now enact coincidental legislation, supplementing federal legislation enacted under the commerce clause, though heretofore the jurisdiction of the federal government, in the field of commerce, *when exercised,* was deemed to be exclusive. In subsequent cases arising under the commerce clause, involving state and federal regulations, the Court may rely upon the instant case as authority to increase the regulatory power of the states in the field of interstate commerce. Should Congress desire to thwart this result, its intention to supersede all existing state laws on the same subject will have to be expressly declared.

CORPORATE FINANCE—SECURITIES EXCHANGE ACT OF 1934—GAIN TO CORPORATE OFFICER WHO TOOK INCOME TAX DEDUCTION ON SECURITIES DONATED TO CHARITIES HELD NOT A PROFITABLE SALE

Defendant, a director, received stock warrants under a contract of employment with his corporation. Within six months he contributed the unexercised warrants to bona-fide charitable organizations. Plaintiff, a corporate stockholder, brought an action under Section 16(b) of the Securities Exchange Act of 1934 [1] for an accounting to the corporation of profits realized by reason of defendant's income tax deductions taken pursuant to such contributions. *Held,* on rehearing, that a donation by a

19. Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942) (holding a federal statute providing that the importations of process butter shall be subject to the laws of the state, indicates a Congressional purpose not to hinder the free exercise of state power except as it may be inconsistent with federal legislation).

20. Maurer v. Hamilton, 309 U. S. 598 (1940) (holding valid a state law regulating the weights of trucks since the Interstate Commerce Commission had only investigated the need for such regulation); Kelly v. Washington, 302 U. S. 1 (1937) (holding valid a state law requiring the inspection of hulls and machinery of ships since there was no federal regulation covering the particular subject); Mintz v. Baldwin, 289 U. S. 346 (1933) (holding valid state regulation of cattle shipments from districts not regulated by the Federal Quarantine Act).

21. Townsend v. Yeomans, 301 U. S. 441 (1937); Atcheson, Topeka & Santa Fe Ry. v. Railroad Commission, 283 U. S. 380 (1931); Missouri, Kansas and Texas Ry. v. Harris, 234 U. S. 412 (1914); Savage v. Jones, 225 U. S. 501 (1912).

22. People of State of California v. Zook, 69 Sup. Ct. 841, 845 (1949).

1. 48 STAT. 896 (1934), 15 U. S. C. § 78p(b) (1946).

corporate officer of unexercised stock warrants does not come within the definition of "sale" in Section 3(a) (14) [2] of the Act, and no action lies for recovery of profits under Section 16(b) unless the donee is the alter-ego of the donor. *Truncale v. Blumberg*, 83 F. Supp. 628 (S. D. N. Y. 1949).

Prior to enactment of federal legislation, speculation by insiders was widely condemned.[3] Section 16(b) of the 1934 Act has as its purpose protection against short-swing speculation and profit-taking in corporate securities by insiders on information gained pursuant to their close relationship with the issuer.[4] Under this section, the insider's profit may be recovered by the corporation irrespective of his intent.

In delimiting the definition of the term "sale," the holding in the instant case does not seem consistent with the objective of the statute, i.e., to prevent *profits* by insiders. It has been clearly demonstrated that, in certain instances, it may well be more advantageous for the corporate insider to forego his short term price appreciation gain in favor of an even larger profit in the form of allowable tax deductions pursuant to gifts.[5] Dismissal of such a possibility as "fanciful" [6] and the assertion that ". . . the tax laws would seem to have absolutely nothing to do with the question . . . ," [7] fail to take into consideration the very real problem of continued insider profit-taking through tax deduction rather than price appreciation. The definition of the term "sale" in Section 3(a) (14) of the statute itself includes the words, "or otherwise dispose of." Other courts have given a construction more in accord with the objectives of the governing statute.[8]

It is submitted that the term "sale" should be liberally construed to include *any* short term transaction in securities by the insider which results in financial gain to him. The holding in the principal case leaves a loophole in the Act that may well serve only to defeat the very objective that it set out to accomplish.

CORPORATE FINANCE—TRADING IN SECURITIES BY PRODUCTION MANAGER NOT WITHIN SECTION 16 (b) OF SECURITIES EXCHANGE ACT OF 1934

Plaintiff, a stockholder of Twentieth Century Fox-Film Corporation, brought suit for recovery of profits realized by defendant, production manager,

2. 48 STAT. 884 (1934), 15 U. S. C. § 78c(a) (1946).
3. See Tracy and MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1032 (1934); Comment, 32 MICH. L. REV. 678 (1934).
4. See Smolowe v. Delendo Corp., 136 F.2d 231 (C. C. A.2d 1943); Park & Tilford v. Schulte, 160 F.2d 984 (C. C. A.2d 1947).
5. See *Hearings before Committee on Ways and Means on "Revenue Revision of 1942,"* 77th Cong., 2d Sess. 91 (1942); WORMSER, THE THEORY AND PRACTICE OF ESTATE PLANNING 75 (1946).
6. Truncale v. Blumberg (original case), 80 F. Supp. 387, 389 (S. D. N. Y. 1948).
7. *Id.* at 390.
8. See Moore v. Gorman, 75 F. Supp. 453 (S. D. N. Y. 1948); Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875 (C. C. A.2d 1943).