doing is apt to be the more difficult of the two to discover, and so should also be governed by the longer period of limitations.[17] But the use of the ten, rather than the present three-year period in these cases may subject the fiduciaries to unnecessarily stale suits in some instances, and at the same time does not afford complete protection to the shareholder. It is submitted that the problem presented by "conduct in fraud of the corporation and its stockholders" is more squarely met by the adoption of a rule similar to that applicable in the case of actual fraud; a short period of limitation, which, however, would not begin to run until the discovery of the wrongs.[18]

Were such a rule adopted, the court would be faced with the problem of determining when such discovery should be deemed to have been made. As to an individual stockholder, actual notice would clearly be sufficient to begin the running of the statute. Without more, the notice of one stockholder should not be imputed to all; but if suit were filed, and a wide publicity resulted, the stockholders as a class might be deemed barred. At some point, constructive notice to the stockholders as a class should be imputed, but an inflexible statutory provision as to when this notice should be imputed does not appear desirable. A provision that actual notice to a certain percentage of the stockholders should result in barring the rights of the class seems unduly arbitrary; a provision requiring the ascertainment of when, in the particular case, a reasonably vigilant stockholder would have discovered the wrongs in question, while perhaps more difficult to apply, seems more just.

Public Utilities—Commission Jurisdiction of Cooperatives—[Utah].—The plaintiff, a cooperative electric utility, applied to the Utah Public Service Commission for exemption from the commission's jurisdiction, or for a certificate of public convenience and necessity authorizing it to erect electric generating plants and distribution lines. The commission denied the application for exemption and granted the certificate. On appeal from the commission's order, *held*, that the commission had no jurisdiction over

[17] In Chance v. Guaranty Trust Co., 282 N.Y. 656, 659, 26 N.E. (2d) 802 (1940) the court, in holding the six-year period applicable, noted that the charges against the defendant director were essentially the mere negligent approval of an acquiescence in the wrongful acts. The defendant was not charged with wrongful profits or concealment of the wrongs.

[18] Knowledge on the part of the wrongdoing directors should not be imputed to the corporation for this purpose, since the corporation is powerless to act as long as the wrongdoers are in control; and there is strong authority that the period of limitation does not begin to run while the wrongdoers remain in control of the corporation. See dissenting opinion of Lazansky, C. J., in Chance v. Guaranty Trust Co., 256 App. Div. 840, 9 N.Y.S. (2d) 478 (1939). This is apparently the Illinois rule. Becker v. Billings, 304 Ill. 190, 136 N.E. 581 (1922).

It is well settled that the statute of limitations does not run against the beneficiary of an express trust until the trustee explicitly repudiates the trust, In re Deitz' Estate, 134 Misc. 393, 235 N.Y. Supp. 756 (Surr. Ct. 1929), and although directors are not usually held to be express trustees (The Statute of Limitations in Stockholder's Derivative Suits Against Directors, 39 Col. L. Rev. 842, 845, 856 (1939)), it would seem that, as fiduciaries in a controlling position, they ought not to be allowed to plead their own wrongful failure to bring suit against themselves on behalf of the corporation, or their success in preventing effective action by the stockholders through concealment of the wrongs, to immunize themselves from liability. Van Schaick v. Aron, 170 Misc. 520, 533, 10 N.Y.S. (2d) 550, 560 (S. Ct. 1938); Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Ventress v. Wallace, 111 Miss. 357, 71 So. 636 (1916).

the cooperative because it was not a "public utility." Order reversed. *Garkane Power Co., Inc. v. Public Service Com'n.*[1]

The statute here in question extended commission jurisdiction to electrical corporations performing service "for the public generally" and "for compensation."[2] The Utah court followed decisions under similar statutes in other states[3] and held that the defendant cooperative was not engaged in serving the general public within the meaning of the statute, since it intended to serve only its members.[4] The court was not influenced by evidence indicating that the general public had been solicited to join, that anyone able to pay for service was admitted to membership and sold electricity, that the cooperative had taken over an existing public utility's plant and lines, and that the organization had a general purpose of serving all people in the area of operation.[5] Nor was the court moved by decisions holding that the question whether a company engaged in public service must be determined by what it does, not by what it professes to do in its charter and by-laws.[6] Additional support for the decision in the principal case

[1] 98 Utah 466, 100 P. (2d) 571 (1940).

[2] Utah Rev. Stat. Ann. (1933) § 76–2–1(28). Similar statutes exist in other states. S.C. Code (1932) § 8252; Mich. Comp. Laws (1929) § 11087. Other statutes merely require the company to be serving the public. Ore. Code Ann. (1930) § 61–201; R.I. Gen. Laws (1938) c. 122, § 2; N.J. Rev. Stat. (1937) tit. 48, c. 2, § 13; Colo. Stat. Ann. (Michie, 1935) c. 137, § 2.

In some states, statutes grant the state public service commission jurisdiction over corporations "making and selling" electricity. Mass. Ann. Laws (1933) c. 164, § 1; Kan. Gen. Stat. Ann. (Corrick, 1935) § 66–104. Such a broad definition would seem to include cooperative electric utilities although it might be argued that a cooperative does not "sell" electricity but that members produce electricity for their own use and therefore are not subject to commission jurisdiction any more than a manufacturer who has a private electric plant furnishing power for his factory. This argument would not seem to apply, however, where the legislature, in addition to thus broadly defining commission jurisdiction, has granted exemptions to certain kinds of cooperative organizations, the implication being that all other cooperatives are subject to regulation. Kan. Gen. Stat. Ann. (Corrick, 1935) § 66–104.

[3] Inland Empire Rural Electrification, Inc. v. Dept. of Public Service of Washington, 199 Wash. 527, 92 P. (2d) 258 (1939); State Public Utilities Com'n ex rel. Macon County Tel. Co. v. Bethany Mutual Tel. Ass'n, 270 Ill. 183, 110 N.E. 334 (1915); Schumacker v. Railroad Com'n of Wisconsin, 185 Wis. 303, 201 N.W. 241 (1924); People v. Orange County Farmers' and Merchants' Ass'n, 56 Cal. App. 205, 204 Pac. 873 (1922); State v. Southern Elkhorn Tel. Co., 106 Neb. 342, 183 N.W. 562 (1921). Several states expressly exempt cooperatives from commission regulation. Idaho Code Ann. (1932) § 59–104; Tenn. Code Ann. (Michie, 1938) § 5448; Ohio Code Ann. (Throckmorton, 1940) § 614–2a (exempts non-profit utilities); Ill. Rev. Stat. (1939) c. 111⅔, § 10 (exempts mutual telephone companies).

[4] The cooperative charter limited sale of electricity to members. Brief for Defendant, at 6, Garkane Power Co. v. Public Service Com'n of Utah, 98 Utah 466, 100 P. (2d) 571 (1940). The by-laws restricted membership to persons who had been accepted by a majority of the directors or members of the cooperative. Ibid., at 7.

[5] Ibid., at 3 and 77.

[6] Davis v. People ex rel. Public Utilities Com'n, 79 Colo. 642, 247 Pac. 801 (1926); Ford Hydro-Electric Co. v. Aurora, 206 Wis. 489, 240 N.W. 418 (1932); Parlett Cooperative, Inc. v. Tidewater Lines, Inc., 164 Md. 405, 165 Atl. 313 (1933); Inland Empire Rural Electrification, Inc. v. Dept. of Public Service of Washington, 199 Wash. 527, 92 P. (2d) 258 (1939); see Celina & Mercer County Tel. Co. v. Union-Center Mutual Tel. Ass'n, 102 Ohio St. 487, 495, 133 N.E. 540, 554 (1921).

was derived from the statutory definition of a public utility as a corporation performing service "for payment" or "compensation."[7] Although the words "payment" or "compensation" can be interpreted in several ways, the instant case followed decisions holding these terms to be synonymous with "profit," thus excluding a non-profit cooperative from commission jurisdiction.[8]

Further support for the decision was found in what was deemed to be the underlying policy of utility regulation—to protect consumers from exploitation by independent separate interests. Since a cooperative is not an independent entity engaged in business for profit to itself at the expense of a consuming public, it has been said that cooperative members do not need protection by a state commission in the matter of rates and service.[9] This argument, however, disregards the fact that even in cooperative electric utilities sufficient problems center around rate-making to justify commission regulation.

Although conflict of interest is present in a cooperative to an even smaller extent than in municipal utilities (where taxpayer demand for profits conflicts with consumer demand for low rates), continuous supervision over cooperative rate differentials by a specialized commission seems desirable. Such regulation, moreover, is desirable in spite of the possibility that any unfair discrimination among cooperative members can be prevented if courts follow precedents in the municipal utility cases where suits to enjoin discrimination are allowed.[10] Experience with municipal utilities exempt from commission jurisdiction indicates the need for guarding against the danger of inadequate and haphazard bookkeeping practices,[11] although the danger of "vest-pocket bookkeeping" practices in municipal utilities is greater since they oftentimes desire to conceal the profits contributed by the electric plants to general revenues. Further arguments for commission regulation can be based on the need for preventing denial of

[7] Utah Rev. Stat. Ann. (1933) § 76–2–1(28). For similar provisions see S.C. Code (1932) § 8252; Mich. Comp. Laws (1929) § 11087; Ill. Rev. Stat. (1939) c. 111⅔, § 10 (for hire); Cal. Gen. Laws (Deering, 1937) Act 6386, § 2.

[8] State v. Southern Elkhorn Tel. Co., 106 Neb. 342, 183 N.W. 562 (1921); Limestone Rural Tel. Co. v. Best, 56 Okla. 85, 155 Pac. 901 (1916).

[9] The existence of conflict between the producer and consumer seems to be the final test for determining whether a company is a public utility within the meaning of the statute, since if a cooperative undertakes to serve non-members who have no voice in management of the cooperative or interest in its profits, the courts hold it to be a public utility and subject to commission regulation. Gilman v. Somerset Farmers' Co-op. Tel. Co., 129 Me. 243, 151 Atl. 440 (1930); State ex rel. Helm v. Trego County Co-op. Tel. Co., 112 Kan. 701, 212 Pac. 902 (1923). A similar position has been taken when a municipal utility sells electricity outside the city limits. Lamar v. Wiley, 80 Colo. 18, 248 Pac. 1009 (1926).

[10] These are cases where municipal utility rates are not subject to commission regulation: Holton Creamery Co. v. Brown, 137 Kan. 418, 20 P. (2d) 503 (1933); State ex rel. Lammons v. Commander, 211 Ala. 230, 100 So. 223 (1924); Kiefer v. Idaho Falls, 49 Idaho 458, 289 Pac. 81 (1930); American Aniline Products v. Lock Haven, 288 Pa. 420, 135 Atl. 726 (1927).

[11] In the case of municipal utilities exempt from commission jurisdiction, bookkeeping practices have been so haphazard and inadequate that agitation has arisen for allowing the public service commission to compel use of an adequate uniform accounting system and to supervise the accounts. Municipal Utilities: Jurisdiction of State Commissions, 33 Col. L. Rev. 338, 352 (1933). See the Minnesota statute attempting to encourage adequate accounting methods in cooperatives. Minn. Stat. (Mason, 1927) § 6114.

membership in a cooperative for arbitrary reasons, e.g., racial discrimination, for insuring creation of proper replacement reserves and surplus accounts,[12] for requiring cooperatives to extend service to areas that can most efficiently be served by it, and for insuring maintenance of minimum service requirements.[13] Nor does the argument of the court in the principal case give proper consideration to another purpose of utility regulation—prevention of unrestricted competition between companies, resulting in wasteful duplication of services and establishment of two companies in areas able to support only one utility.[14]

Although these considerations might justify a holding contrary to the decision in the instant case, several policy considerations support it. First, the cooperative movement might be hindered if brought within control of state public service commissions favorable to existing utility interests.[15] Second, commission jurisdiction over cooperatives would create situations where the commission would have to determine which of the two types of utilities should be given preference.[16] The question of granting such a preference would seem to be within the province of the legislature, and perhaps the court in the instant case wisely refused the state commission that power.

State legislation regulating cooperatives has varied both in method of administration and scope of regulation. Some states grant regulatory power to the existing public service commission,[17] others provide for regulation, but do not impose on any commission or board the duty of enforcement;[18] a few states establish separate authorities to

[12] Iowa Code (1939) § 8512.30 (requires cooperatives to maintain surplus at 30% of capital paid in for stock or memberships, plus unpaid patronage dividends, plus certificates of indebtedness payable upon liquidation, or $1000, whichever is greater).

[13] Commissions can force public utilities to serve an entire area if it operates in so much of it that no other company could afford to enter the remaining part. Georgia Public Service Com'n v. Georgia Power Co. 182 Ga. 706, 186 S.E. 839 (1936). Nor can a public utility limit service to large profitable areas and refuse to serve small communities. State ex rel. Ozark Power & Water Co. v. Public Service Com'n, 287 Mo. 522, 229 S.W. 782 (1921).

[14] Wasteful competition between a private utility and a cooperative may arise in two situations: (1) where both companies rush lines into new unexploited areas; (2) where one company encroaches on territory being served by another. For excellent examples of the former, see Re Harrison Rural Electrification Ass'n, Inc. 24 P.U.R. (N.S.) 7, 22 (W.Va. 1938); Bailey v. Carolina Power & Light Co., 212 N.C. 768, 195 S.E. 64 (1938). Commission power to prevent wasteful competition and duplication of services by public utilities is well established. Kansas Gas & Electric Co. v. Public Service Com'n, 124 Kan. 690, 261 Pac. 592 (1927); Gilmer v. Public Utilities Com'n of Utah, 67 Utah 222, 247 Pac. 284 (1926).

[15] A similar problem existed in connection with municipal utilities where a requirement that the municipality secure a certificate of public convenience and necessity often closed the door to public ownership. Municipal Utilities: Jurisdiction of State Commissions, 33 Col. L. Rev. 338, 353 (1933).

[16] See note 14 supra.

[17] Virginia provides that cooperatives are subject to the jurisdiction of the state public service commission to the same extent as a public utility. Va. Code Ann. (Michie and Sublett, 1936) §§ 4057(18), 4057(24). Other statutes have provisions which have a similar effect. Ind. Laws (1935) c. 175, §§ 5, 18; Me. Laws (1931) c. 230.

[18] Some states have special statutes regulating cooperative electric utilities. Ga. Laws (1937) No. 503; N.M. Stat. Ann. (Courtright, Supp. 1938) §§ 32-1324—32-1346; Mont. Code (Supp. 1939) §§ 6396.1—6396.31; N.D. Laws (1937) c. 115; Pa. Stat. Ann. (Purdon, 1938) tit. 14, §§ 251-88; Tenn. Code Ann. (Michie, 1938) § 3291(47)—3291(73); Ala. Gen'l Laws (1935)

regulate cooperatives.[19] This latter method is objectionable, since it fails to provide for coordination of activities of the cooperative board with those of the public service commission.

While many statutes have detailed provisions covering the corporate form and power of cooperatives, only a few statutes adequately guard against a competitive race between a cooperative and an existing utility to serve an area.[20] A possible solution is to require a cooperative to file for public record a statement of its intention to construct lines in an area; when thirty days have passed the cooperative may proceed with its plans if no existing utility has begun construction.[21] A few statutes establish membership qualifications for cooperatives.[22] Some acts seem to give the commission power to set the rates to be charged by a cooperative.[23] In other instances, however, the acts merely provide that rates "shall be sufficient" to pay operating and maintenance ex-

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No. 45. Other states have general statutes regulating the formation of all cooperatives. They provide regulations for sale of stock, charges for services, distribution of surplus after reserves have been set up, method of calling meetings and electing directors, and restrictions on voting. Annual reports to the state are required. N.Y. Cons. Laws (McKinney, Supp. 1940) c. 77, §§ 15–26 (audit required); Mo. Stat. Ann. (1929) §§12748–66 (audit required); Minn. Stat. (Mason, 1927) §§ 7834–47; Mich. Comp. Laws (Mason, Supp. 1935) §§ 10135–98—10135–131 (no report required); Wis. Stat. (1939) §§ 185.01—185.23.

[19] Vt. Acts (1935) No. 157; N.C. Code Ann. (Michie, 1939) §§ 1694(1)—1694(28).

[20] Competition by a cooperative is prevented if it must obtain a certificate of public convenience and necessity before erecting its lines in new territory. Va. Code Ann. (Michie and Sublett, 1936) § 4057(18); Ind. Laws (1935) c. 175, § 5. Competition by an existing public utility with a cooperative that has begun construction of lines in an area is not prevented where public utilities have to obtain a certificate of public interest in order to extend their lines into territory already served by a "public utility." Since a cooperative is not usually classified as a public utility, the commission would be powerless to prevent a public utility extending lines into the area in which the cooperative has begun construction. Utah Rev. Stat. Ann. (1933) § 76–4–24; Colo. Stat. Ann. (1935) c. 137, § 36; Ill. Rev. Stat. (1939) c. 111⅔, § 56. Similar problems may arise where a cooperative seeks to extend its lines into an area served by a private utility.

[21] New Mexico and Alabama have such a provision. It seems to be limited, however, to extensions of service by an existing cooperative and not to the formation of new cooperatives. Ala. Gen'l Laws (1935) No. 45, § 17; N.M. Stat. Ann. (Courtright, Supp. 1938) § 32–1339 (cooperative must wait sixty days).

Such a provision, it should be noted, gives a preference to existing public utilities; however, it could be drafted so as to give cooperatives priority.

[22] Membership is restricted to persons living in rural areas who do not receive central station service. Ga. Laws (1937) No. 503, § 10; Pa. Stat. Ann. (Purdon, 1938) tit. 14, § 263; N.D. Laws (1937) c. 115, § 12. This does not prevent the cooperative from establishing further conditions for membership. N.D. Laws (1937) c. 115, § 6. It has been indicated, however, that as a quasi-public corporation the cooperatives must admit anyone who satisfies their membership requirements. Alabama Power Co. v. Cullman County Electric Membership Corp., 234 Ala. 396, 174 So. 866 (1937).

[23] Va. Code Ann. (Michie and Sublett, 1936) § 4057(18); Ind. Laws (1935) c. 175, § 18. See statutes cited in note 17 supra.

penses and to create reserves.[24] Revenues not required "for business purposes" must be returned from time to time to members on a pro rata basis according to the amount of business done with each.[25] An interesting problem, not yet considered by the courts, is whether "business purposes" includes expansion. If expansion is considered to be a business purpose, some regulation of this matter might be desirable to prevent a majority from forcing a minority to contribute to an expansion not desired by all.

Public Utilities—Holding Company Act of 1935—Power of District Court to Approve Corporate Simplification Plan in Non-adversary Proceeding—[Federal].—A holding company registered under the Public Utility Holding Company Act[1] submitted to the Securities and Exchange Commission a voluntary plan for corporate simplification. The plan provided that it was not to become effective until approved by a federal court.[2] After notice to persons affected and a hearing at which no objections were raised, the commission entered an order approving the plan.[3] Thereafter, at the request of the company, the commission applied to a federal district court "to enforce and carry out . . . . the plan," alleging among other things that officers and directors of the company feared that if they carried out the plan without having obtained court approval, creditors and security holders of the company might bring suit to subject them to liability.[4] *Held*, inter alia, that Section 11(e) of the act empowers the district court to take jurisdiction of the subject matter. *In re Community Power and Light Co.*[5]

[24] Ala. Code Ann. (Michie, Supp. 1936) § 687(36); Ga. Laws (1937), No. 503, § 14; N.D. Laws (1937) c. 115, § 25; N.M. Stat. Ann. (Courtright, Supp. 1938) § 32–1340; Pa. Stat. Ann. (Purdon, 1938) tit. 14, § 276; Tenn. Code Ann. (Michie, 1938) § 3291(64); Mont. Code (Supp. 1939) § 6396.20. Many municipal utilities are subject to similar legislation. Ill. Rev. Stat. (1939) c. 111⅔, § 107; Conn. Rev. Stat. (1930) § 532; Iowa Code (1939) § 6151.1; Minn. Stat. (Mason, 1927) § 1312.

[25] Ala. Code Ann. (Michie, Supp. 1936) § 687(36); Ga. Laws (1937) No. 503, § 14, N.D. Laws (1937) c. 115, § 25; N.M. Stat. Ann. (Courtright, Supp. 1938) § 32–1340; Pa. Stat. Ann. (Purdon, 1938) tit. 14, § 276; Tenn. Code Ann. (Michie, 1938) § 3291(64); Mont. Code (Supp. 1939) § 6396.20.

[1] 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (Supp. 1939).

[2] In the Matter of Community Power and Light Co., Hold. Co. Act Rel. No. 1803, p. 3; No. 1804, p. 7 (1939).

[3] In the Matter of Community Power and Light Co., Hold. Co. Act Rel. No. 1803, p. 20 (1939). For discussion of the plan used in the instant case see Feldman, Voluntary Reorganization under the Holding Company Act, A3 Corp. Reorg. 227 (1940); Recapitalization under Section 11(e) of the Public Utility Holding Company Act, 49 Yale L.J. 1297 (1940).

[4] SEC's Application to the Court, count 14. The alleged fear of the officers and directors of the company that they might incur liability if they attempted to carry out the plan before court approval appears to be inconsistent with that provision in the plan according to which it was not to become effective until such approval had been obtained. Indeed, this allegation may have been inserted in the petition in order to bring the application within that provision of § 11(e) which provides that applications are to be made in accordance with § 18(f). One of the provisions of § 18(f) is that an action may be brought when any person is about to violate the act or any order thereunder.

[5] 33 F. Supp. 901 (N.Y. 1940). The court also held that §§ 11(b) and 11(e) of the Public Utility Holding Company Act are constitutional; and that the plan submitted to the court was fair and equitable and effectuated the provisions of § 11(b).