However, the same argument adduced above with respect to preferences may be made against the position that superseniority under the circumstances of the *Cutler-Hammer* case is unlawful discrimination. The prohibition of Section 8(3) re-enacted in Section 8(a)(3) was not aimed at, and has never been interpreted as aimed at, union-security devices. It is nevertheless conceivable that courts may find that non-union employees are in fact discriminated against where there is superseniority, since this device sets a premium on joining the union to secure special advantages. Only union officials may enjoy them, and one cannot be a union official without joining the union. But this argument seems far-fetched, and is not compelling in light of the practical need for superseniority in successful administration of a collective-bargaining agreement. Indeed it seems clear that, as a matter of policy, superseniority should not be prohibited as an unfair labor practice. While the privileges of superseniority cannot guarantee responsible union leadership—a matter with which the membership must be concerned—such advantages make the duties of leadership more attractive to capable men who might otherwise forego the holding of union offices. Moreover, superseniority by encouraging continuity of experienced union leadership contributes substantially to the smooth operation of grievance machinery, the lack of which has in the past been a fertile source of industrial unrest; and it assures the constant contacts necessary for the successful negotiation of future contracts. Therefore continued recognition of superseniority for union officers as lawful might well operate to further the objectives of the LMRA by promoting stability in the collective-bargaining relationship.

THE CHENERY CASE AGAIN

Law in the courts, as the realists insist and most students admit, is not the unchanging, self-consistent body of rules which some might wish it to be. Nevertheless, one of the reigning conventions in the drafting of majority opinions requires that it be given that appearance whenever possible. But occasionally a court finds itself in a position where this convention cannot be served if the court's true opinion is to be voiced, as, for example, when more or less controlling decisions and the court's inclination in the instant case cannot be harmonized.

No court, regardless of its own opinion, will hear the merits of a dispute which it considers already finally adjudicated between the parties.[1] Courts will,

Co., 68 F. Supp. 1014 (N.Y., 1946), rev'd 161 F. 2d 552 (C.C.A. 2d, 1947); Droste v. Nash-Kelvinator Corp., 64 F. Supp. 716 (Mich., 1946). In all these cases the propriety of superseniority for union officials was assumed and often served as an argument for similar provision for veterans. One case held directly that a veteran is bound by the superseniority provisions of a contract negotiated in his absence. Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448, 451 (C.C.A. 3d, 1947). This case is distinguishable from the instant case in that a closed-shop contract was involved.

[1] For a close case turning on this seemingly elementary principle, see Deposit Bank v. Frankfort, 191 U.S. 499 (1903).

however, overrule their own prior decisions in disputes between different parties on the same facts if they feel that such a departure is justified in the light of changed conditions or that the earlier decisions were erroneous;[2] but the rule of the decided cases is generally first given consideration. Somewhere between the principles of res judicata and stare decisis lies the problem with which we are concerned. It arises when an appellate court grants successive reviews of the same case, and feels on a later review that one of its initial decisions on an issue of law was incorrect. To deal with this problem the courts have developed the doctrine of the "law of the case," which requires that the first ruling be adhered to.[3] But although it is the same dispute between the same parties, the case as a whole has not been finally adjudicated, and some courts have held that there are situations where a bald overruling of the earlier holding, now considered erroneous, is justified.[4] When this is done, of course, the smooth-flowing "application of the relevant principles to the material facts" is conspicuously interrupted.

The Supreme Court recently found itself in a situation which threatened to raise this problem. In a review of an SEC order, the majority of the Court were in favor of sustaining it even though it was substantially the same as one remanded by the Court four years before in an earlier review of the same case. In the time between the Commission's first order and its order on remand there had been no changes in the fact situation imperatively calling for the re-entry of an order not sustained on its first review.[5] Nor had there been procedural deficiencies in the Commission's first hearing which could have been cured.[6] Thus the view of the majority would have squarely raised the law of the case problem, had it not been for a foothold offered by the ambiguity of the remanding opinion. This foothold was seized by the new majority, and by this means it was able to sustain the Commission's order without overruling the Court's earlier decision.

In September 1941 the Securities and Exchange Commission approved[7] a plan for the voluntary reorganization of the Federal Water Service Corpora-

[2] Smith v. Allwright, 321 U.S. 649 (1944), overruling Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Darby, 312 U.S. 100 (1941), overruling Hammer v. Dagenhart, 247 U.S. 251 (1918); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), overruling Swift v. Tyson, 16 Pet. (U.S.) 1 (1842).

[3] 3 Am. Jur., Appeal and Error, §§ 985–86 (1936); see Insurance Group Committee v. Denver & R. G. W. R. Co., 329 U.S. 607, 612 (1947); Messinger v. Anderson, 225 U.S. 436, 444 (1912); Great Western Telegraph Co. v. Burnham, 162 U.S. 339, 343 (1896); Washington Bridge Co. v. Stewart, 3 How. (U.S.) 413 (1845).

[4] McGovern v. Eckhart, 200 Wis. 64, 227 N.W. 300 (1929); Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (C.C.A. 2d, 1919).

[5] See FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

[6] See United States v. Morgan, 307 U.S. 183 (1939); Ford Motor Co. v. NLRB, 305 U.S. 364 (1939).

[7] Matter of Federal Water Service Corp., 10 S.E.C. 200 (1941).

tion,[8] a public utility holding company registered under the Act of 1935.[9] One provision of the plan, included at the insistence of the Commission, was that certain shares of Federal preferred, purchased by the company's officers and directors during the period when they were presenting successive reorganization plans for the consideration of the Commission staff, should be surrendered to the reorganized corporation at cost plus 4 per cent interest. There was no evidence of actual abuse of their position as reorganization managers by these persons, and the Commission conceded that throughout the greater part of this purchase program the management had made an "honest effort" to follow a policy of buying only after any new reorganization developments had been made public. The chief objective of the purchase program was to retain control of the corporation after reorganization. This the management freely admitted. Also, in the plan as submitted by the management, the book value of the new common shares was to be considerably greater than that of the old preferred shares which were to be exchanged for them; this disparity, however, was much reduced in the plan as finally approved by the Commission,[10] and there was never any difference between the increase in value of the management-held shares and the increase in those held by the public.

In support of its order making its approval of the reorganization plan depend upon the limitation of participation by the management-held stock in question to cost plus accumulated dividends,[11] the Commission relied chiefly on broad judicial declarations of the requirement that a fiduciary shun any position in even potential conflict with his duty of fidelity, and forego any profits accruing to him as a result of having taken such a position.[12] But it also cited the pre-

[8] Hereinafter referred to as "Federal."

[9] Public Utility Holding Company Act, 49 Stat. 803 (1935), 15 U.S.C.A. § 79 (1941). The plan was considered by the Commission as subject, first, to § 7 of the Act, which provides for Commission supervision of readjustment of capital structure for the company's own ends and makes approval of proposals for such readjustments contingent on a finding by the Commission that they will not be "detrimental to the public interest or the interest of investors or consumers" and will not "result in an unfair or inequitable distribution of voting power" among stockholders of the company, 49 Stat. 814 (1935), 15 U.S.C.A. § 79g (1941), and, second, to § 11, the so-called "death-sentence" section, which empowers the Commission to require, along specified lines, reorganization and simplification of certain described holding companies and holding company systems, but also provides for the submission of plans by the affected companies themselves, designed to comply with these requirements. These plans the Commission is to judge by the standard that they be "fair and equitable to the persons affected" thereby. 49 Stat. 820 (1935), 15 U.S.C.A. § 79k (1941).

[10] There is a detailed statement and analysis of the legal and financial background of the case in the Commission's opinion in Matter of Federal Water Service Corp., 8 S.E.C. 893 (1941).

[11] "Cost plus accumulated dividends" was later changed to "cost plus 4% interest." 10 S.E.C. 200 (1941).

[12] Matter of Federal Water Service Corp., 8 S.E.C. 893, 916–17 (1941). The citations for these broad principles were Michoud v. Girod, 4 How. (U.S.) 502, 507 (1846); Magruder v. Drury, 235 U.S. 106, 119, 120 (1914); and Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928). None of these cases, however, involved corporate officers and directors. To sup-

Chandler Act[13] judicial extensions of this principle, under Section 77B of the Bankruptcy Act,[14] to "persons whose fiduciary position arises from the fact that they act for others in the formulation of a reorganization plan."[15] On the basis of these authorities, the Commission found that "the provisions [in the plan submitted by the management] for participation by the preferred stock held by the management [resulted] in the terms of issuance of the new securities being detrimental to the interests of investors and the plan being unfair and inequitable."[16] Thus the final finding on this question was couched in the language of Sections 7(d)(6) and 11(e) of the Holding Company Act[17] which charge the Commission with the application of these standards. The Act was not, however, specifically cited at this point, and the judicial authorities mentioned were the only basis for the ruling clearly stated by the Commission.

On petition for review by the management, and by the company as an intervenor, the Court of Appeals for the District of Columbia, Justice Justin Miller dissenting, reversed the order in a somewhat hostile opinion which denied the applicability of the judicial authorities cited by the Commission and held that the duties of holding company officers and directors with respect to the purchase and sale of stock in their own company were covered, and covered completely, by Section 17 of the Act,[18] which had been fully complied with by the petitioners.[19]

On certiorari, the Supreme Court held, four to three, that the Commission's order could not be sustained on the authority of the equity precedents it had cited, but nevertheless remanded the case for "such further proceedings, not

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port the proposition that such persons "are fiduciaries," whose "powers are powers in trust," the Commission cited Pepper v. Litton, 308 U.S. 295 (1939), a case of blatantly fraudulent manipulation of a one-man corporation.

[13] Section 249 of Chapter X of the Bankruptcy Act, 52 Stat. 901 (1938), 11 U.S.C.A. § 649 (1946), codifies this principle with respect to persons acting "in a representative or fiduciary capacity" in proceedings for corporate reorganization in bankruptcy, to the extent of denying compensation for such services to such persons where they have traded in the stock of, or claims against, the debtor without court permission.

[14] 48 Stat. 912 (1934), as amended, 11 U.S.C.A. § 207 (supp. 1937), now amended and transferred by the Chandler Act.

[15] Matter of Federal Water Service Corp., 8 S.E.C. 893, 917 (1941).

[16] Ibid., at 921.

[17] 49 Stat. 815 and 820 (1935), 15 U.S.C.A. §§ 79g(d)(6) and 79k(e) (1941). In addition, § 7(f) [49 Stat. 815 (1935), 15 U.S.C.A. § 79g(f) (1941)] empowers the Commission to attach such terms and conditions to any order permitting a declaration to become effective as the Commission finds necessary to assure compliance with all conditions specified in § 7.

[18] 49 Stat. 830 (1935), 15 U.S.C.A. § 79q (1941), requiring officers and directors to make public all their trading in stock of their own companies, and providing for recapture by the company of all profits made by such persons on described short-term trading.

[19] Chenery Corp. v. SEC, 128 F. 2d 303 (App. D.C., 1942); see Stock Purchases by Directors During Voluntary Reorganization, 10 Univ. Chi. L. Rev. 70 (1942); Chenery Corp. v. SEC: Power of the SEC to Limit Directors' Purchases of Stock, 56 Harv. L. Rev. 126 (1942).

inconsistent with [the Court's] opinion, as [might] be appropriate,"[20] thus implying that some basis for the order might be found. The majority in this decision consisted of Chief Justice Stone, Justice Frankfurter, who wrote the opinion, and Justices Roberts and Jackson. In the minority were Justices Black, Reed, and Murphy, who thought that the order should be sustained as it stood.

On remand, the Commission reaffirmed its original order on substantially the same findings of fact. No bad faith on the part of Federal's management was revealed. The judicial authorities, however, were abandoned, and the new order denying parity participation was grounded on the discretion vested in the Commission by the Holding Company Act.[21]

On petition for review to the Court of Appeals for the District of Columbia, that court again reversed the Commission, holding that the opinion of the Supreme Court precluded the retroactive application of these limitations in the absence of bad faith on the part of the management.[22]

But on certiorari the Supreme Court held, five to two, that the Commission's order must now be sustained, since it had been given the proper statutory basis, the absence of which had been considered fatal in the prior review.[23] Thus the result of this final decision is that sought by the dissenters to the Supreme Court's earlier decision.

The former dissenters, Justices Black, Reed, and Murphy, along with two new members of the court, Justices Rutledge and Burton,[24] now constitute the majority, while Justice Frankfurter, the author of the majority opinion in the first decision, and Justice Jackson, the only member remaining of those who concurred, are now in dissent. Moreover, this reversal of roles was accomplished without any overt departure by either majority or dissent from the majority opinion in the 1943 decision—a tribute to that opinion's pliability.

Mr. Justice Frankfurter's 1943 opinion is not easy to interpret. He agreed with the Commission that "officers and directors who manage a holding company in process of reorganization under the Public Utility Holding Company Act of 1935 occupy positions of trust." But to say this "only begins analysis."[25] As the record showed no finding by the Commission of actual abuse of the position of reorganization managers by Federal's officers and directors, he concluded that "some technical rule of law must have moved the Commission to single out the respondents and deny their preferred stock the right to partici-

[20] SEC v. Chenery Corp., 318 U.S. 80 (1943); see Dodd, The Chenery Corporation Case: A New Landmark in the Law of Administrative Procedure, 56 Harv. L. Rev. 1002 (1943).

[21] Matter of Federal Water Service Corp., Holding Company Act Release No. 5584 (1945).

[22] Chenery Corp. v. SEC, 154 F. 2d 6 (App. D.C., 1946), noted 14 Univ. Chi. L. Rev. 75 (1946).

[23] SEC v. Chenery Corp., 332 U.S. 194 (1947), rehearing den. 332 U.S. 783 (1947). The majority opinion was published in June and the dissent was held over the summer and handed down in October at the beginning of the new term.

[24] Justice Burton concurred only in the result.

[25] SEC v. Chenery Corp., 318 U.S. 80, 85, 86 (1943).

pate equally in the reorganization."[26] The rules of law in the cases cited by the Commission were held not to support such a denial. "But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time of the adoption of the [Holding Company Act]." Here, however, the Commission had "explicitly disavowed any purpose of going beyond those [standards] which the courts had theretofore recognized." Therefore, "its action must be judged by the standards which [it] itself invoked."[27] He refused to follow the Court of Appeals in its holding that "§ 17(a) and (b), which requires officer and directors of any holding company registered under the act to file statements of their security holdings in the company and provides that profits made from dealing in such securities within any period of less than six months shall inure to the benefit of the company" was a "limitation upon the power of the Commission to deal with other situations in which officers and directors have failed to measure up to the standards imposed upon them by the Act." Rather "the Commission could take appropriate action for the correction of reorganization abuses found to be 'detrimental to the public interest of investors or consumers.' "[28]

The most difficult and important question about the majority opinion is what Justice Frankfurter intended to indicate would be sustainable as "appropriate action" by the Commission. There is one passage which, read alone, seems to state clearly a conclusion that in the absence of bad faith only the enforcement of a general rule, adopted by the Commission before the fact under its rule-making power, could be sustained.[29] But at the close of the opinion, he returned to a disapproval merely of the grounds on which the Commission had purported to act. Since those grounds would not sustain the order, and no others appeared, the Court was unable to perform its duties of review, and the case must be remanded, seemingly so that the Commission might give reasons for the order which would make it reviewable as an exercise of statutory discretion instead of as an application of established law.[30]

The opinion has been the subject of some doubt and considerable speculation since its publication. Mr. Justice Black, in his dissent, said that the Court "apparently [held] that the Commission [had] full power to do exactly what it did."[31] Professor Dodd has said that "it is far from clear that the majority opinion implies a denial of that power."[32] Law-review comment has been split.[33]

[26] Ibid., at 86–87.

[27] Ibid., at 89.

[28] Ibid., at 91–92.

[29] Ibid., at 92–93.

[30] Ibid., at 94–95.

[31] Ibid., at 99.

[32] Dodd, op. cit. supra note 20, at 1005.

[33] Case notes on the first Supreme Court decision and the second Court of Appeals decision have been far from unanimous in their interpretation of Mr. Justice Frankfurter's opinion. Thus, "It is doubtful that the majority opinion of the Supreme Court precluded the Commission from prescribing a new standard of fiduciary duty for reorganization managers in a

Interpreted as a remand for more adequate findings and a clarifying of the Commission's theory of its authority and objectives, the 1943 decision certainly could not be called unreasonable.[34] A court charged by Congress with the review of administrative orders might conceivably feel at a loss when faced with a casual application by an agency of a sanction hitherto unknown, with no thorough exposition of its relation to the special field in which the agency is expert and therefore vested with discretion. To affirm the order on its own authority when the Commission had stated no sustainable basis for it, the Court said, would be to invade the preserve of the Commission and to make a policy determination which, though to some extent reviewable, belonged in the first instance to the Commission.[35] While there are some paradoxes in this situation, they are inescapable if judicial review of administrative decisions is to be the rule. Certainly there is no dearth of instances where the Supreme Court has refused to permit enforcement of administrative orders because the necessary statutory or factual basis was not clearly stated.[36]

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particular case." 59 Harv. L. Rev. 459, 460 (1946). A note in 41 Mich. L. Rev. 987 (1943) sees no ambiguity in the decision and interprets it as merely remanding the case because a proper basis for the order was not shown. 43 Col. L. Rev. 253 (1943) also notes no ambiguity, but gives the decision a different emphasis from that of the Michigan note. "The Commissioner's order," it says, "could not be sustained. Had the Commission promulgated a general rule, of which this order was a particular application, it would probably have been upheld as a correction of an abuse 'detrimental to the public interest or the interest of investors.'" To the author of 14 Univ. Chi. L. Rev. 75, 77, 78, 79 (1946) it "hardly seems tenable" that "the Supreme Court split four to three in the *Chenery* case merely because the majority wanted the SEC to indicate which of its powers was being exercised and to clarify the grounds upon which it was acting. . . ." Instead this author suggests that the Court of Appeals, in its reversal of the Commission's second order, "perhaps properly [construed] Mr. Justice Frankfurter's opinion," although "there is support for both the SEC and the Court of Appeals in their conflicting interpretations of the overgenerous language of the Supreme Court opinion." 17 St. John's L. Rev. 129, 130 (1943) says the Supreme Court in its first decision "for all practical purposes . . . affirms" the Court of Appeals. "The majority opinion," this note continues, "is far from clear as to just what finding the Commission would have to make without passing a general rule."

[34] The substantive questions raised by this litigation are beyond the scope of this note. The persuasive arguments for sustaining the Commission's order at the outset, without remand, as a desirable extension of the conception of corporate powers as powers in trust, are set forth in Stock Purchases by Directors During Voluntary Reorganization, 10 Univ. Chi. L. Rev. 70 (1942), noting the first Court of Appeals decision. The author of that note emphasizes the concurrence of the purchases in question with the reorganization proceedings as distinguishing this case from those where the right of officers and directors to trade in their company's securities is clearly recognized. The note calls attention to the federal courts' development and retroactive application of similar limitations to persons acting in representative capacity in reorganization proceedings in bankruptcy.

[35] SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). This reasoning, however, is subjected to severe criticism by Justice Black in his dissent. Ibid., at 99 (1943).

[36] United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 488–89 (1942); United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499 (1935); United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 463 (1935); Florida v. United States, 282 U.S. 194, 215 (1931). These were all suits to set aside or enjoin enforcement of administrative orders. Apparently there was no occasion for a remand; the Court simply decided that because the

If, however, the opinion is construed as denying the Commission the power to proceed in a case-by-case development of the standards of the Act, and thus precluding the proscription of the transactions here in question in the absence of bad faith or a general prospective rule, the remand for further proceedings becomes hard to explain. It had become too late to adopt a prospective rule applicable to the purchases involved here.

The remand could be reconciled with the second interpretation only by understanding it as looking toward a possible adducing by the Commission of evidence of actual bad faith. Thus, even construing the opinion as a denial of the Commission's power to apply the non-participation sanction retroactively when no bad faith was shown, one could see some purpose in sending the case back. But there is much language in the opinion to suggest that Justice Frankfurter was taking the management's good faith as established.

Whatever the intended meaning of the opinion, the Commission not unnaturally chose the first construction, and supported its new order with a thorough exposition of its conception of its powers and duties under the Act, the dominant position of the holding company management in the voluntary reorganization proceedings provided for by the Act, and the possibilities of abuse arising from the conflicting interests of the management in the instant case. These considerations, it said, made it impossible to find affirmatively that the plan was fair and equitable as required by Section 11(e).[37] The Commission's opinion was meticulously drafted to conform to an interpretation of Justice Frankfurter's opinion as a remand for clarification of the Commission's theory of its authority and objectives. If that interpretation was correct, the Commission's new order certainly seemed to merit affirmance. But the Court of Appeals reversed the Commission's order as not in conformity with the Supreme Court's mandate.

The grant of certiorari by the Supreme Court gave promise of a final answer to the debate over the meaning of the earlier decision, and to the broader

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bases on which the orders were entered did not appear in reviewable form, they were unenforceable. There is no reason to suppose, however, that the agency concerned was not free to take the matters in question up again.

In Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), prominently cited and quoted in the Chenery case, the Supreme Court conceded the bare legal power of the Board to order reinstatement of employees discharged for union activity, even though they had obtained substantially equivalent employment elsewhere. But the case was remanded for a showing by the Board of how the enforcement of such an order would effectuate the policies of the National Labor Relations Act in the particular case in question. The Court asked that "the statute speak through the Board when the statute does not speak for itself." Ibid., at 196. This procedure, the Court believed, would "effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board." Ibid. On remand, the Board complied with these directions and re-entered the same order, Matter of Phelps Dodge Corp., 35 N.L.R.B. 418 (1941), which, for all that appears in any of the reports, was then enforced by the Circuit Court of Appeals. The basis the Board provided for its order on remand was notably broad and general.

[37] Matter of Federal Water Service Corp., Holding Company Act Release No. 5584 (1945).

question of whether the Commission was to have some freedom to develop the meaning of the statutory standards case by case so long as it stated the grounds of its action clearly. The latter question was answered with a definite affirmative by the Supreme Court's reversal of the Court of Appeals. The question as to the meaning of the 1943 opinion, which would seem to be almost as fair game for the dissent as the majority, was answered very clearly and unequivocally by Justice Murphy for the majority and just as clearly and unequivocally, and with more vigor, by Justice Jackson for the dissent. In Justice Murphy's hands the 1943 opinion appeared to have been a fatherly admonition to the Commission to explain itself more fully; this it had now done and could therefore be sustained. In Justice Jackson's dissent, however, although he avoided extended discussion of the 1943 opinion, it became lightning from the heavens descending upon the "lawless" Commission.

As has been noted, none of the present majority had concurred in the earlier opinion, and the three who were on the Court at the time it was handed down had joined in a stiff dissent. Justice Murphy, speaking for the new majority, of course gave the 1943 opinion the interpretation followed by the Commission. Either one of the other two interpretations would have required a reversal either of the Commission or of the 1943 decision itself. The majority favored sustaining the Commission, and they apparently chose what seemed a convenient and economical way of doing it. By interpreting the earlier opinion as simply calling for the fuller statement of the grounds for the Commission's action which had now been supplied, the course of the litigation was given a generally reassuring air of continuity and order. While the respondents probably failed to find reassurance in the decision, such an appearance of order is at least one of the subsidiary goals of jurisprudence.

The effect of this artistic curtain speech was spoiled, however, by a violent protest from the wings. Justice Jackson, in his dissent, with which the author of the 1943 opinion agreed, accused the majority of making "judicial review of administrative orders a hopeless formality for the litigant" and of "[reducing] the judicial process in such cases to a mere feint."[38] He portrayed himself as reduced to comic perplexity[39] by the sophistical reasoning of the majority. Nevertheless, he proceeded to take severe exception to its pagan obeisance to the principle of "judicial deference to administrative discretion," and characterized its action as "the first encouragement this Court has given to conscious lawlessness as a permissible rule of administrative action."[40]

The general line of the dissenting opinion seems to indicate that its subscribers now think a more definite action than a remand was in order on the

[38] 332 U.S. 194, 210 (1947)

[39] "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.' " Ibid., at 214.

[40] Ibid., at 217.

first review.[41] Or possibly, as has already been suggested, they interpreted the remand as looking toward a re-entry of the same order only if a finding of actual bad faith on the part of the management was made by the Commission.

It is difficult to say how feasible it would have been for the Commission to supply this helpful ingredient as a basis for the later order. It insisted in its second opinion[42] and in its briefs that the Court had misconstrued its first opinion by taking good faith to be conceded, when actually it had only been assumed for purposes of argument, good or bad faith being irrelevant under the principle it was applying. Nevertheless, it produced no evidence and made no finding of bad faith in its second consideration of the case. This, as we have seen, left the majority, whose objective was to sustain the Commission, with the necessity of either making Justice Frankfurter's opinion serve their turn or abandoning it completely. The opinion lent itself to the first alternative rather better than the dissenters might have wished.

The present majority might have put itself in a stronger position by abandoning the previous decision and holding that the Commission should have been sustained on the first review. This would have taken some wind out of the dissenters' sails, but would also have raised the law of the case problem and spotlighted the changes in personnel as the controlling factor. Moreover, it would have been difficult to find any administrative law doctrine well-enough crystallized to provide a firm basis for calling the 1943 decision erroneous.

The case probably represents a step forward in the development of the conception of corporate powers as powers in trust,[43] at least with respect to this particular situation,[44] and also shows a tendency in this Court to narrow its review of an administrative agency's case-by-case development of the broad

[41] See 14 Univ. Chi. L. Rev. 75 (1946), noting Chenery Corp. v. SEC, 154 F. 2d 6 (App. D.C., 1946), and advancing the proposition that the uncertainty of the first Supreme Court opinion hid a fundamental split on the question of administrative discretion among the justices of that Court.

[42] Matter of Federal Water Service Corp., Holding Company Act Release No. 5584, at 29 n. 28 (1945).

[43] See Berle and Means, The Modern Corporation and Private Property, Book II, Ch. VII (1933).

[44] Subsequent cases decided by the SEC involving analogous problems indicate a disposition to limit the Chenery doctrine rather strictly to the facts of its own case. In these cases the Commission states that it is considering a general rule to cover these situations. Matter of Cities Service Co., Holding Company Act Release No. 7720 (1947); Matter of American States Utilities Corp., Holding Company Act Release No. 7721 (1947). Concurring opinions by Commissioners McEntire and Hanrahan state their belief in the desirability of a general rule, and that until the adoption of such a rule the Commission "should not impose the sanction of limitation to cost except in a case where the conflict between the management's personal interests as traders and their duties as reorganization managers is actually so acute that it would not be unreasonable to have expected the management to recognize such conflict at the same time of the trading as raising at least an ethical problem." Matter of Cities Service Co., Holding Company Act Release No. 7720, at 21 (1947). Management-held stock was allowed full participation in the reorganizations involved in both these cases.

statutory standards it is charged with applying.[45] It is equally interesting, however, as a problem in the coordination of judicial conviction with judicial convention.

SPECIFIC ENFORCEMENT OF SHAREHOLDER VOTING AGREEMENTS

An agreement was entered into in 1941 by two of the three shareholders in Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a family corporation, whereby they were to vote their stock jointly for a period of ten years. In the event that they could not decide to their mutual satisfaction how their shares were to be voted before any corporate election, the matter was to be submitted to an arbitrator whose powers were to be "exercised to the end of assuring .... good management [of the corporation] and such participation therein by the members of the Ringling family as the experience, capacity and ability of each [warranted]." The decision of the arbitrator in such a situation was to be binding on the contracting parties. The agreement also provided that each of the parties was to have first option to purchase the other's stock in the event of a decision to sell. Prior to the annual stockholders' meeting in 1946, the two shareholders could not agree as to how their votes should be cast in the election of directors. The arbitrator whose services were utilized at the request of the plaintiff, directed that the parties to the agreement vote for her choice.[1] The defendant refused to comply with the award and voted contrary to it. The present suit was brought to determine the validity of the election and the right of the elected directors to hold office.[2] The Delaware Supreme Court held that the agreement

[45] For an earlier enunciation of the principle, see FTC v. Keppel & Bro., 291 U.S. 304, 314 (1934). There the Court said, "While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, ... in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study, of the business and economic conditions of the industry affected,' and it was organized in such a manner ... as would 'give to [its members] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong. 2d Sess., pp. 9, 11." See also Pound, The Administrative Application of Legal Standards, 44 Reports of the American Bar Ass'n 445 (1919).

[1] The arbitrator first directed that the stock of both parties be voted for a 60-day adjournment. The plaintiff voted her shares in pursuance of this order, but the defendant voted against adjournment. Although the chairman ruled that the motion for adjournment had carried by virtue of the voting agreement, the meeting proceeded to the election of directors. The plaintiff stated that she would continue in the meeting "without prejudice to her position with respect .... to the fact that adjournment had not been taken."

[2] The plaintiff and the defendant had sufficient votes (under a cumulative voting scheme) to each elect two of the seven directors. By pooling their remaining votes they could elect an additional candidate regardless of how the third shareholder voted. If the agreement were not enforced, the third shareholder who held a slightly larger number of shares than either plaintiff or defendant would control the choice of three directors.