

### Conclusion

What light does the *Columbia Steel* case shed on the future course of anti-trust litigation? Does the victory of the United States Steel Corporation, as the dissent averred, give *carte blanche* to corporate concentration?

No categorical answer seems possible. The peculiar facts of the case, with their strong tinge of estoppel, remove the mere statement of result from the realm of predictive usefulness. Instead, the case's significance rests on a *seriatim* consideration of its impact on the various components of antitrust doctrine.

Its main value to the antitrust defendant lies in the authoritative rejection of the theory that vertical integration is illegal *per se*. Of subsidiary aid in cases where the facts permit its use may be the reminder, that specific intent is an element which the plaintiff must prove.

As an aid to the successful prosecution of antitrust cases, *Columbia Steel* has much more to say: it strengthens market control as a test for determining illegality. It is true that the test cuts the other way in this case, because of its inutility in appraising the prospective significance of mergers. But for cases of full-blown monopoly, the Court's remarks on market control take their place as a significant addition to the doctrine of *Alcoa*, *Tobacco*, and *Paramount*. And with the economic test, the Court reaffirms the practice of setting a narrow limit to the relevant market.

But the new facet that may make the case a milestone in the development of antitrust doctrine is the as yet enigmatic reference to Section 7 of the Clayton Act. Even without legislative revision the section may now become an effective sanction. Together with the Court's refusal to apply old merger precedents, the canalizing of Section 7's policy into Sherman Act cases points the way to a lower, more easily provable standard of illegality for mergers.

## LIMITING THE DEEP ROCK DOCTRINE\*

THE inconsistent role of a parent corporation as the creditor of its own subsidiary has long confounded the courts.<sup>1</sup> Until 1939, the courts sometimes permitted the parent to participate as a creditor in the reorganization of its subsidiary, despite parental mismanagement, when the obstacle of their separate corporate entities appeared insurmountable.<sup>2</sup> But in *Taylor*

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\* *Comstock v. Group of Institutional Investors*, 335 U.S. 211 (1948).

1. See LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS*, 142-55 (1936); Rembar, *Claims Against Affiliated Companies in Reorganization*, 39 *COL. L. REV.* 907 (1939); Comment, 45 *YALE L. J.* 1471 (1936).

2. *Taylor v. Standard Gas & Electric Co.*, 96 F.2d 693 (10th Cir. 1938), *rev'd*, 305 U.S. 307 (1939), *amended*, 306 U.S. 618 (1939). Under the "instrumentality" rule the court had to find the subsidiary a mere "instrumentality" or department of the parent corporation in order to dispose of the parent's claim. Despite parental mismanagement the

*v. Standard Gas & Electric Co.*,<sup>3</sup> the Supreme Court enunciated the *Deep Rock* doctrine, which put aside the conceptualistic puzzle of the corporate entity and centered on the vital factor—whether the parent had breached its fiduciary duty to others interested in the subsidiary.<sup>4</sup> Thus, when the parent had managed the subsidiary for its own benefit and to the detriment of the subsidiary, and when the parent's claim was connected with that mismanagement, a bankruptcy court could disallow the claim, or at least subordinate it to the claims of the subsidiary's other creditors and public investors.<sup>5</sup>

*Comstock v. Group of Institutional Investors*,<sup>6</sup> while strongly restating that doctrine,<sup>7</sup> may in fact represent its first significant limitation. In a joint

circuit court had felt unable to label the subsidiary an "instrumentality" of the parent and the parent's claim was allowed. However even under this rule the dissenting judge below was able to call the subsidiary an "instrumentality" and thereby dispose of the parent's claim.

On the lack of predictability afforded by this approach see Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L. J. 193 (1929). LATTY, *op. cit. supra* note 1, at 143, 157 *et seq.*, suggested that no realistic line of cleavage could be drawn on the basis of the degree of control over the subsidiary and that in actuality judicial response was determined by unexpressed policy considerations.

3. 306 U.S. 307 (1939), *amended*, 306 U.S. 618 (1939). The *Deep Rock Oil Corp.*, the subsidiary there involved, has furnished a name for the doctrine introduced by this case.

4. The character and scope of the parent's fiduciary obligation is defined, as in other situations, by the extent of its power to affect the interests of third persons. *McCandless v. Furlaud*, 296 U.S. 140 (1935). Thus while an express trustee cannot purchase an interest in the subject matter of his trust, (*Michoud v. Girod*, 4 How. 502, 557 (U.S. 1846)), a parent or controlling stockholder, who is also a fiduciary, (*Southern Pacific Co. v. Bogert*, 250 U.S. 483, 492 (1919)), is prohibited from purchasing stock from a minority stockholder only if such purchase involves overreaching, as in the utilization of inside information. For an attempt to reconcile these divergent standards, see *Overfield v. Pennroad Corp.*, 42 F. Supp. 586, 607 (E.D. Pa. 1941), *modified*, 146 F.2d 889 (3rd Cir. 1944).

The class protected comprises the "entire community of interests in the corporation—creditors as well as stockholders." *Pepper v. Litton*, 308 U.S. 295, 307 (1939). On the difficulties involved in applying the *Deep Rock* doctrine for the protection of the subsidiary's public common stockholders, see, Israels, *Implications and Limitations of the "Deep Rock" Doctrine*, 42 COL. L. REV. 376, 386 (1942).

5. See *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307 (1939), *amended*, 306 U.S. 618 (1939). "Though disallowance of such claims will be ordered where they are fictitious or a sham, these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment." *Pepper v. Litton*, 308 U.S. 295, 310 (1939). Thus *Deep Rock* sets up a system of equitable priorities in bankruptcy to supplement the system of absolute priorities. See, Healy, Commissioner, concurring in *Middle West Corp.*, 11 S.E.C. 533, 566-7 (1942). See Comment, 49 YALE L.J. 881 (1940); Note, 50 YALE L.J. 892 (1941).

On the *Deep Rock* doctrine, see, Israels, *Implications and Limitations of the "Deep Rock" Doctrine*, 42 COL. L. REV. 376 (1942); Sprecher, *The Conflict of Equities Under the "Deep Rock" Doctrine*, 43 COL. L. REV. 336 (1943); Krottinger, *The "Deep Rock" Doctrine: A Realistic Approach to Parent-Subsidiary Law*, 42 COL. L. REV. 1124 (1942); Note, 47 COL. L. REV. 800 (1947).

6. 335 U.S. 211 (1948).

7. *Id.* at 228.

reorganization of the Missouri Pacific Railroad (MOP) and its subsidiary the New Orleans, Texas & New Mexico Railway (NOTM),<sup>8</sup> under section 77 of the Bankruptcy Act,<sup>9</sup> the Supreme Court refused, despite charges of mismanagement, to disallow or to subordinate any part of MOP's creditor claim against NOTM.

Part of that claim derived from direct loans to NOTM during the years 1928 to 1931.<sup>10</sup> Concurrently with the receipt of these loans, NOTM declared and paid dividends in approximately the same amount, the major portion of which returned to its parent MOP.<sup>11</sup> These dividends exceeded NOTM's current earnings,<sup>12</sup> although presumably they did not exceed its surplus on a consolidated basis. But because the surplus derived almost entirely from one of its own subsidiaries, the St. Louis, Brownsville & New Mexico Railway, the dividends to MOP could be legally declared and paid only after the Brownsville had declared large dividends to NOTM.<sup>13</sup> In 1931, this process reached its pre-bankruptcy climax when, with falling revenues and scant working capital, the Brownsville declared dividends totaling eight times its capital stock;<sup>14</sup> it could not, however, make a cash

8. At times relevant here MOP owned from 58 to 93% of NOTM capital stock. The affairs of NOTM were managed through MOP officers who were given corresponding positions in NOTM.

9. 47 STAT. 1474 (1933), as amended, 49 STAT. 911 (1935) and 53 STAT. 1405 (1939), 11 U.S.C. § 205 (1946).

10. MOP's total claim was over \$10.5 millions but this Note considers only the sum (\$2.8 millions) loaned by MOP concurrently with the payment of dividends by NOTM. See note 11 *infra*.

A description of two other parts of MOP's claim may be found in the dissent, *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 248-51 (1948). The first of these parts arose from MOP's attempt to improve its creditor standing at the expense of NOTM by an intercorporate adjustment which, in effect, forced NOTM to assume the debt which an NOTM subsidiary, weaker financially than NOTM, owed to MOP. The second part concerned advances by MOP to NOTM to acquire five Texas railroad lines. *Comstock* argued that these lines, which were operated at a loss, had been purchased for the benefit of MOP rather than NOTM.

A majority of the Supreme Court refused to subordinate any of MOP's claim, but the dissenters urged the subordination of the portions connected with the dividends and with the assumption by NOTM of its subsidiary's debt, while refusing to subordinate the portion connected with the purchase of the Texas railroads.

11. See table of concurrent loans and dividends, 335 U.S. 240 (1948). MOP's contention was that the loans were actually for previous capital expenditures. This would provide the legal basis for the borrowing. Actually the legality of the loans is not in doubt. For a strong contention that the immediate purpose of the loans was to obtain funds with which to pay dividends, see, SEN. REP. No. 25, 76th Cong., 3rd Sess., pt. 9, App. pp. 19, 20 (1940).

12. See tables of income for NOTM reproduced in the dissent, *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 243-4 (1948); see, also, SEN. REP. No. 25, *op. cit. supra* note 11, at 2.

13. For the mechanics of this operation, see, SEN. REP. No. 25, *op. cit. supra* note 11, at 3, 4, 9, 10, 11.

14. The Brownsville had an unusual capital structure in that its debt was 30 times

payment on these dividends without leaving unpaid its operating debts to NOTM. Nevertheless, in violation of ICC accounting rules,<sup>15</sup> the dividends were treated as income by NOTM. In this manner NOTM legally<sup>16</sup> converted a surplus into notes payable to MOP.

Comstock, as a holder of MOP bonds secured by NOTM common stock, objected to MOP's creditor claim in an effort to preserve his equity in the NOTM stock.<sup>17</sup> His contention was that in milking NOTM, MOP had breached its fiduciary duty,<sup>18</sup> to the detriment of its subsidiary.<sup>19</sup>

The Supreme Court, four justices dissenting, upheld the trial court's finding that these were not only legal but also good faith transactions,<sup>20</sup> and

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its stock issue. But the dividends are also startling from the standpoint of the railway's earnings, since they were over ten times its earnings for the year 1931. *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 245 (1948) (dissenting opinion).

15. "Dividends declared shall not be credited prior to actual collection unless their payment is reasonably assured by past experience, guaranty, anticipated provision, or otherwise." 49 CODE FED. REGS. § 10.513 (1938). In 1936 the ICC informed NOTM that it had violated this rule in 1931. *Comstock v. Group of Investors*, 335 U.S. 211, 245-6 (1948) (dissenting opinion).

16. The NOTM dividends were legal under state law although in excess of current earnings, since by virtue of the dividends declared by Brownsville they were not in excess of NOTM's corporate earned surplus. The fact that they may have been paid by borrowing from MOP would not make them illegal.

17. Since MOP was insolvent, Comstock was opposed by the Group of Institutional Investors, holders of MOP bonds not secured by NOTM stock.

On the applicability of the *Deep Rock* doctrine when the parent is insolvent, see *In re Commonwealth Light & Power Co.*, 141 F.2d 734 (7th Cir. 1944), *appeal dismissed*, 322 U.S. 766 (1944). The court held that bondholders of the parent as pledgees of the subsidiary's stock could obtain the subordination of the insolvent parent's tainted claim; while the parent's other creditors would have to take subject to the equities. The court distinguished *Prudence Corp. v. Geist*, 316 U.S. 89 (1942), where the claim of the defaulting guarantor of the mortgage, in this case an insolvent parent corporation, was allowed to share in the proceeds of the mortgage on grounds that it had not inequitably acquired its claim.

*Cf.* Note, 47 COL. L. REV. 800, 810-5 (1947) (recommending a commingling of the assets of the parent and the subsidiary, where both are insolvent, in order to achieve equality of distribution among the same classes of creditors of the two corporations). On commingling, see *Stone v. Eacho*, 127 F. 2d 284 (4th Cir. 1942), *cert. denied*, 317 U.S. 635 (1942). And see *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941) (creditors of subsidiary allowed to recover from the assets of the parent).

18. Comstock objected on the theory that the parent owes a fiduciary duty to the pledgees of the subsidiary's stock not to impeach the value of the pledge. *In re Commonwealth Light & Power Co.*, 141 F. 2d 734, 739 (7th Cir. 1944), *appeal dismissed*, 322 U.S. 766 (1944).

19. Comstock objected to other transactions besides the dividend payments. See note 10 *supra*.

20. The district court had four grounds for overruling Comstock's objection: (1) all the transactions were legitimate and in good faith; (2) NOTM benefitted under MOP's expansion program and the advances were related to that program because the loans refunded previous capital expenditures; (3) the objection was barred by laches; (4) subordination would injure other innocent bondholders who were not secured by NOTM stock. *In re Missouri Pac. R.R.*, 64 F. Supp. 64, 77-8 (E.D. Mo. 1945). The court of

assumed that the district court's finding of benefit to NOTM under MOP's expansion program applied to the dividend transactions.<sup>21</sup> The majority therefore refused to subordinate MOP's claim under the *Deep Rock* doctrine. Apparently the decisive finding of good faith depended on the statements of the parent's officers and directors based on the consolidated balance sheet, without specific inquiry into the origin of the NOTM surplus. The dissenting justices argued that mere legality and good faith do not remove inequity from intercorporate transactions and that the finding of over-all operative benefits from MOP's expansion program did not apply to these particular transactions. The loans, though doubtless funding prior legitimate capital expenditures, were made, they thought, in order to permit the payment of dividends at a time when dividends were unjustifiable as a matter of ordinary prudence. The minority's view therefore was that the impropriety of the dividends infected the status of the loans which financed them. They therefore urged that the claim of MOP connected with the payment of the questioned dividends be subordinated.<sup>22</sup>

The Court, by refusing to examine the extent of the financial detriment to the pledgees from particular transactions, has unduly limited its power to investigate the mismanagement of subsidiaries. Earlier *Deep Rock* cases provide a standard of fiduciary duty which, at least verbally, demands more from the parent than good faith and over-all operational benefits to the subsidiary. In *Taylor v. Standard Gas & Electric Co.*,<sup>23</sup> where the subsidiary was undercapitalized and, in addition to other acts of mismanagement, was compelled to borrow from the parent to pay unwarranted but legal divi-

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appeals affirmed on the first and second grounds. *Comstock v. Group of Institutional Investors*, 163 F.2d 350 (8th Cir. 1947).

In affirming, the Supreme Court stressed the point that exceptional error was required to overturn the concurrent finding of two courts below. The Court rejected the defense of laches because the subject matter of the objection went beyond the objector's individual interests and affected the fairness and equity of the reorganization plan. *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 226-7 (1948). The majority did not consider the fourth ground of the district court's holding. The dissent considered that the insolvency of the parent did not bar the application of the *Deep Rock* doctrine and that the indirect loss to the innocent bondholders from subordination was outweighed by the direct loss to the pledgees. *Id.* at 238-9. See note 17 *supra*.

21. Mr. Justice Jackson, writing the majority opinion, clearly overstated his case. "The criticized transactions . . . are established as beneficial rather than injurious to the interests which now challenge them." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 230 (1948). At most the district court had said that MOP control and the advances to NOTM were beneficial to the NOTM and the holders and pledgees of its securities. This certainly does not mean that the payment of dividends to MOP was beneficial to the pledgees of NOTM common stock.

22. There have been numerous cases subordinating the parent's claim when it was connected with the payment of unwarranted dividends. *See, e.g.*, *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307 (1939), *amended*, 306 U.S. 618 (1939); *In re Commonwealth Light & Power Co.*, 141 F.2d 734 (7th Cir. 1944), *appeal dismissed*, 322 U.S. 765 (1944); *Indiana Service Corp.*, SEC Holding Company Act Release No. 7054, December 14, 1946.

23. 306 U.S. 307 (1939), *amended*, 306 U.S. 618 (1939).

dends,<sup>24</sup> the Court indicated that the parent must provide the subsidiary with the equivalent of an "independent management." Holding-company transactions had to be made with an "eye single" to the interests of the subsidiary.<sup>25</sup> In *Pepper v. Lilton*,<sup>26</sup> it was stated that the dominant stockholder had the burden of proving not only the good faith of his dealings with the corporation but also their "inherent fairness" to all interested in the corporation.<sup>27</sup>

Contrasted with this standard, the test of good faith and over-all operational benefits appears ineffectual. Good faith appears inadequate because the intent of the parent's officers and directors is not only difficult of proof,<sup>28</sup> but it cannot in any case disclose whether the assets of the subsidiary have been inequitably withdrawn to the detriment of the *cestuis*.<sup>29</sup> The test of over-all operational benefits from previous capital expenditures is not directly relevant to a determination of the financial detriment to the pledgees from the dividend payments. The dividends certainly do not make possible the previous expenditures.<sup>30</sup>

24. See Berle, *The Theory of Enterprise Entity*, 47 COL. L. REV. 343, 350 (1947). Berle considers the loans by the parent in the *Taylor* case as an "equity investment." Use of the label may help verbally in the treatment of the loan as a stock equity with resulting subordination. Similarly, the courts have sometimes called loans capital investments, where they were advanced to an inadequately capitalized corporation. *Arnold v. Phillips*, 117 F.2d 497 (5th Cir. 1941) (loans for building a brewery were subordinated but those for current expenses were not).

25. *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 323 (1939), *amended*, 306 U.S. 618 (1939).

26. 308 U.S. 295 (1939).

27. *Id.* at 306. See, also, *In re V. Loewer's Gambrinus Brewery Co.*, 167 F.2d 318 (2d Cir. 1948).

The SEC has often faced *Deep Rock* situations, in passing on reorganizations under section 11 of the Public Utilities Holding Company Act, 49 STAT. 820 (1935), 15 U.S.C. § 79k (1947). The Commission employs a similar standard. See, e.g., *Indiana Service Corp.*, SEC Holding Company Act Release No. 7054, Dec. 14, 1946, at 34-5 (subordinating where dividend payments are "obviously inconsistent with the best interests" of the subsidiary); *Southern Natural Gas Co.*, 9 S.E.C. 486, 497 (1941) ("profit shall not result to holding companies from transactions between a holding company and its subsidiary, without justification therefor . . .").

28. See Edgerton, *Negligence, Inadvertence and Indifference; the Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 865 (1926). Compare the SEC's specific rejection of "good faith" as a fiduciary standard, upheld in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (note especially Mr. Justice Jackson's vigorous dissent at 209) with the instant case. See, also, *In re Los Angeles Lumber Products Co.*, 46 F. Supp. 77, 88-9 (S.D. Cal. 1941) (good faith or innocent motives of the fiduciary constitute no defense to liabilities founded upon breach of fiduciary obligations).

29. "Like negligence, inequity may be present where there is the utmost subjective good faith." *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 238 (1948) (dissenting opinion).

30. The existence of an expansion program for the subsidiary and the failure to provide for the sound financing of the program has been used as a reason for subordinating advances by the parent when connected with the payment of dividends. *In re Com-*

Previous *Deep Rock* cases, however, containing more evidence of mismanagement than the *Comstock* case, presented the Court with a more clean-cut basis for subordination.<sup>31</sup> While the *Taylor* case involved the inadequate capitalization of the subsidiary in addition to undeserved dividends, as well as other acts of mismanagement, and the *Pepper* case arose from the clearly fraudulent use of a one-man corporation, neither fraud nor inadequate capitalization could here be shown. On the contrary, instead of over-all mismanagement, one finds here operational benefits to NOTM. The presence of this factor and the absence of inadequate capitalization<sup>32</sup>—an element traditionally important in other aspects of parent-subsidiary law<sup>33</sup>—make the instant case a marginal *Deep Rock* case. Mismanagement, if present, must derive from milking operations which are separable from other aspects of MOP management.

But the factual difference between the *Taylor* case and the instant case does not justify the Court's acquiescence in a weaker standard.<sup>34</sup> Either undercapitalizing or milking the subsidiary seems to warrant subordination, for both have the same result: the production of a creditor-proof corpora-

monwealth Light & Power Co., 141 F.2d 734, 738-9 (7th Cir. 1944), *appeal dismissed*, 322 U.S. 766 (1944); Indiana Service Corp., SEC Holding Company Act Release No. 7054, December 14, 1946 at 32-4.

31. The Court has said that the basis of subordination in the *Taylor* case was "the history of spoliation, mismanagement, and faithless stewardship of the affairs of the subsidiary." *Pepper v. Litton*, 308 U.S. 295, 308 (1939). It should be noted that in the *Taylor* case the entire claim of the parent was subordinated because the complexity of the case was such that the Court felt that it was impossible to restore the subsidiary to the position it would have had but for the parent's mismanagement. *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 323 (1939), *amended*, 306 U.S. 618 (1939). *But cf. In re Midland United Co.*, 58 F. Supp. 667 (D.Del. 1944), *appeal dismissed*, 141 F.2d 692 (3rd Cir. 1944) (faced with an extremely complex fact situation the court approved a compromise, subordinating a portion of the parent's claim). See Note, 47 COL. L. REV. 800, 808-9 (1947) and cases cited therein.

32. See Israels, *Implications and Limitations of the "Deep Rock" Doctrine*, 42 COL. L. REV. 376, 379 (1942). Israels in a tentative analysis presents inadequate capitalization as a prerequisite for the application of the *Deep Rock* doctrine. See, also, Note, 47 COL. L. REV. 800, 806 (1947) ("... in none of the cases (subordinating the parent's claim) was it denied that capital was inadequate."). On inadequate capitalization, see Rembar, *Claims Against Affiliated Companies in Reorganization*, 39 COL. L. REV. 907, 915-6 (1939).

33. Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 218 (1929).

34. The distinction between the "good faith" and the "independent management" standards may well prove to be largely a verbal one. See DODD, *STOCK WATERING; THE JUDICIAL VALUATION OF PROPERTY FOR STOCK ISSUE PURPOSES* 92-3 (1930). Dodd contends that the distinction between the "good faith" and the "true value" rules for the valuation of assets has become merely a verbal distinction because in both cases the question resolves itself into whether the valuation was *reasonable*.

But there seems an equally good chance that the "good faith" test will become the cloak for a "legal" test. See Mr. Justice Jackson's emphasis on the legality of the dividends, *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 228-9 (1948).

tion.<sup>35</sup> Despite the absence of over-all mismanagement, the Court could have asked whether an independent management could reasonably have consented to the transactions.<sup>36</sup> An independent management with bankruptcy impending would hardly have undertaken the desperate financial measures adopted by NOTM in order to continue the payment of dividends. Such a view would have led to subordination of part of MOP's creditor claim against NOTM.<sup>37</sup>

On the other hand, the Court would seem equally unjustified if, applying the *Deep Rock* doctrine to separable acts of mismanagement, it were to subordinate MOP's entire claim.<sup>38</sup> The amount of the claim subordinated might depend either directly upon the amount of dividends which would not have been paid by an independent management, or upon the amount of the loans found to be directly connected with those dividends. Although the latter measure is clearly indicated by both majority<sup>39</sup> and dissenters<sup>40</sup> in the *Comstock* case, a requirement that the claim subordinated be related to the individual acts of mismanagement, under these circumstances, seems an arbitrary one. The pledgees of NOTM stock suffered unjustifiable detriment to the extent of the dividends found to be unwarranted, and not at all to the extent of MOP's loans to NOTM, however closely these loans may have coincided in time and amount with the dividends. Similarly, MOP benefited to the extent of the dividends, not the loans. If tainted loans were to be the measure, moreover, an artificial issue of fact would be interjected.

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35. There are numerous methods by which a parent may drain the assets of a subsidiary. See, e.g., *In re United Gas Corp.*, 58 F. Supp. 501 (D. Del. 1944) (payment of dividends made possible by grossly inadequate reserve policy); *In re Midland United Co.*, 58 F. Supp. 667 (D. Del. 1944), *appeal dismissed*, 141 F.2d 692 (3rd Cir. 1944) (securities, owned by subsidiary used by parent as collateral for its borrowing from third party); *Overfield v. Pennroad Corp.*, 42 F. Supp. 586 (E.D. Pa. 1941), *modified*, 146 F.2d 889 (3rd Cir. 1944) (subsidiary forced to make injurious investments for the benefit of the parent); *Middle West Corp.*, SEC Holding Company Act Release No. 6606, May 10, 1946 (huge profit to parent corporation from sale of subsidiary's securities); *Pennsylvania Electric Co.*, SEC Holding Company Act Release No. 4643, Oct. 27, 1943 (parent advanced unneeded and unused credits to subsidiary at a high rate of interest).

36. For a skillful application of this test, see *Ewen v. Peoria & E. Ry.*, 78 F. Supp. 312 (S.D. N.Y. 1948).

37. See Mr. Justice Murphy, dissenting at 335 U.S. 211, 247; SEN. REP. NO. 25, 76th Cong., 3rd Sess., pt. 9 (1940) (vigorously condemning MOP for the dividend manipulations).

Added support for this position is afforded by the SEC. With a dividend situation comparable to that in the *Comstock* case, the Commission has not hesitated to apply *Deep Rock* where the dividends are not "in the best interests" of the subsidiary. *Indiana Service Corp.*, SEC Holding Company Act Release No. 7054, December 14, 1946.

If the Court had decided to subordinate a portion of the parent's claim in the *Comstock* case, it might well have remanded the case for a determination of the date at which NOTM dividends became unwarranted.

38. Cf. note 31 *supra*.

39. *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 228 (1948).

40. *Id.* at 237.