tions and particularly in New Jersey by statute. It is, therefore, a simple matter for the trustee to acquire the right to purchase if his intentions are primarily trustworthy. It is only the scheming fiduciary, fearing a true value estimated by the court as to the state property, who is entangled in the mesh of prohibitions.[31]

CORPORATIONS—THE DUTY OF DISCLOSURES BY DIRECTORS* IN THE PURCHASE OF STOCK FROM THEIR STOCKHOLDERS.—The relation of a director of a corporation to his stockholder has been described as that of trustee and *cestui que trust*.[1] They are the trustees of its business and property for the collective body of stockholders in respect to such business.[2] The mere statement that they are trustees is manifestly inaccurate; the directors lack any interest, legal or equitable, in the assets of the corporation, which are owned by the corporation itself.[3] It is true, however, that there exists a fiduciary duty; the director occupies a position of trust of such a character that his dealings where his interest is opposed to the interest of the corporation will be subjected to the closest scrutiny.[4]

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31. R.S. 3:20-5 . . . when it appears to the Chancellor, by petition of a fiduciary that it will be to the advantage of the estate of which such person is fiduciary, that such fiduciary should purchase real estate, or any part thereof, belonging to the estate, the Chancellor may inquire in a summary manner into the merits of the application, by reference to a master or otherwise, and ascertain the actual money value of the real estate, or part thereof, so to be purchased. If the Chancellor is satisfied that the transaction will be to the advantage of the estate he may order that such fiduciary may purchase the real estate for such prices and in the same manner as though the fiduciary were any person purchasing the same . . .

* "Directors" herein means both directors and officers of the corporation.

1. Stephany v. Marsden, 75 N.J.Eq. 90, 71 A. 598, (Ch. 1910); Cuthbert v. McNeil, 103 N.J.Eq. 199, 142 A. 819, (Ch. 1928); Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918).
2. Dixmoor Golf Club v. Evans, 325 Ill. 612, 156 N.E. 785 (1927).
3. BOGERT ON TRUSTS, §16; POMEROY'S EQUITY JURISPRUDENCE, (3d. ed.) §1090.
4. Marr v. Marr, 73 N.J.Eq. 643, 70 A. 375, (E.&A. 1907). See also Stewart v. Lehigh Valley R.R. Co., 38 N.J. Law 505. (E.&A. 1875).

Assuming a fiduciary duty with respect to corporate affairs, the problem is, whether the director should divest[5] himself of his fiduciary belt when he steps out of his directorial robes; and as an individual, purchases shares of his corporation from another stockholder. A growing social conscience and a more benign attitude towards the individual stockholder[6] makes profitable a re-examination of the rules governing this type of transaction.

The New Jersey law on this subject is meagre; the two reported cases[7] cover not more than four pages in the official reports, but in both cases the rule that the directors do not have any fiduciary duty towards the stockholders with respect to their individual holdings was categorically followed. In *Crowell v. Jackson,* as a question of novel impression, the rule was adopted by approving the conclusion reached in an early Indiana case;[8] and in *Connolly v. Shannon,* the vice-chancellor felt the decision was controlled by the earlier case, although he cited the leading case for the opposite rule[9] and concluded by saying, "Since our court of last resort has adopted the majority rule, my own view as to which of the rules is more consonant with equity and justice is immaterial."[10] This last sentence of the opinion furnishes an indication that perhaps the vice-chancellor felt the minority rule the more efficacious.

The rule, as expressed in the New Jersey cases, is the numerical weight of authority in the United States[11] and appears to be the rule in England.[12] The mere fact that the directors purchased shares from the stockholders does not, as between them, create a fiduciary relationship,[13]

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5. *i e.,* by sanction of law.

6. Sired in the main by the Securities Act of 1933. (48 Stat. 74, 15 USCA §77 *et seq*).

7. Crowell v. Jackson, 53 N.J. Law 656, 23 A. 426 (E &A. 1891); Connolly v Shannon, 105 N.J.Eq. 155, 147 A. 234. (Ch. 1929) *affm'd,* 107 N.J.Eq. 180, 151 Atl 905 (E. & A. 1930).

8. Tippecanoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245. (1873).

9. Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903).

10. 105 N.J.Eq. 155, 158.

11. FLETCHER CORPORATIONS, §2564; THOMPSON CORPORATIONS, (2d. ed.) §§1258, 1259. But see POMEROY'S EQUITY JURISPRUDENCE, (3d. ed.) §1090.

12. Percival v. Wright (1902) 2 Ch. 421, 18 Times L.R. 697.

13. Cahall v. Lofland, 12 Del., Ch 299, 114 A. 224 (1921); Hooker v. Midland Steel Co., 215 Ill. 444, 74 N.E. 445, 106 Am. St. Rep. 170 (1905); Tippe-

even though the directors formed a syndicate to purchase them.[14]

The decisions of the minority states which impose the fiduciary duty and hence hold the director liable for the excess when he purchases stock of the stockholder at a sum less than its true value;[15] or later sells the stock at a profit, can be explained as an attempt by the courts to mitigate the harshness of the majority rule if applied to the facts of the particular case.[16]

There are some courts which, while paying lip service to the majority rule, hold that the fiduciary duty to make disclosure to the seller may arise by reason of the special circumstances surrounding the transaction;[17] or that the directors' duty is not fiduciary as to preclude him, as a matter of law, from purchasing stock from a stockholder, but if he is called upon to give information affecting, or tending to affect, the value of the stock, the director cannot withhold information and must make complete disclosure.[18] The question of what special circumstances will cast upon the director the duty to make disclosure is too vague to war-

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canoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245 (1873); Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690 (1847); Blabon v. Hay, 269 Mass. 401, 169 N.E. 268 (1930); Schuur v. Berry, 285 Mich. 654, 281 N.W. 393 (1939); Rogers v. Drewry, 196 Minn. 16, 264 N.W. 225 (1936); Carpenter v. Danforth, 52 Barb. (N.Y.) 581 (1868); Kruumbhaar v. Griffiths, 151 Pa. St. 223, 25 A. 64 (1892); Deadericks v. Wilson, 67 Tenn. 108 (1874); Shaw v. Cole Mfg. Co., 132 Tenn. 210, 177 S.W. 479, LRA 1916 B 706 (1915).

14. DuPont v. DuPont, 256 F. 129 (C.C.A. Del. 1919); Cert. den. 250 U.S. 642, 39 S. Ct. 492, 63 L. Ed. 1185 (1919).

15. This is sometimes market value, sometimes book value. The courts are not in accord.

16. Jacquith v. Mason, 99 Neb. 509, 156 N.W. 1041, LRA 1917F 817 (1916). Husband recently deceased, widow sold stock for $75 a share, worth $110. Stewart v. Harris, 69 Kan. 498, 77 P. 277, 66 LRA 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873 (1904). Plaintiff, a man of eighty, retired and never engaged in the business, sold stock to defendant at $166 a share at the time it was worth $350. Hotchkiss v. Fisher, 136 Kan. 530, 16 P2d. 531 (1932). Stock sold for $1.25 a share. Worth $3.80 and a dividend of $1.00 a share declared one week after sale. Oliver v. Oliver, 118 Ga. 362, 45 S.E. 232 (1903). Stock sold for $110 a share, worth $185. *Cf.* Bohannon v. Taylor, 52 Ohio App. 564, 4 N.E. 2d. 164 (1936). Where suit was brought for benefit of the corporation.

17. Strong v. Repide, 214 U.S. 419, 29 S.Ct. 521, 53 L.Ed. 853 (1908); Steinfield v. Nielsen, 15 Ariz. 424, 139 Pac. 879 (1914).

18. Poole v. Camden, 79 W.Va. 310, 92 S.E. 454, LRA 1917E 988 (1916).

rant its application as a rule of positive law. Parties should be reasonably sure that their conduct is legal, if not approbative. And again, if the stockholder calls upon the director to give such information which tends to affect the value of the stock, the director may not be in a position to say what factors do enhance its value. Must he make complete and full disclosure at the risk of breaching his duty to the corporation, or must he withhold any confidential information at the risk of an accounting by the stockholder? Or should the information to be given to the stockholder be limited to that information which the director would be under a duty to give to stockholders generally irrespective of the negotiation?[19] The director is between Scylla and Charybdis.

These cases seek the fiduciary relationship, the absence or presence of which determines the ultimate liability of the director. One court,[20] however, did completely ignore the legal concept of the fiduciary relation. "The debate as to whether technically a fiduciary relation exists may and doubtless will go on, but a knowledge of the law is not required to enable one to appreciate the moral wrong perpetrated by a corporate officer in profiting by the ignorance of a stockholder by means of knowledge acquired by virtue of his position"[21] and the "stockholder places trust and confidence in the officers and directors and with them the stockholders do not deal at arm's length and on an equal footing."[22] And in holding the officer liable decided that "the earlier decisions turned on the question as to whether the director or officer is, in fact, a trustee with respect to the shares of stock, and the shareholder *cestui que trust*, and that scant attention was given to the natural relation of influence on the one hand and reliance on the other existing between them."[23] The standard laid down is too high; the law should not take cognizance of moral laws, but should limit itself to enforcing the legal rules of conduct. The holding of the court was probably sound, but its reasoning is likely to be taken to mean more than intended.

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19. COOLEY ON TORTS, (4th ed) §375

20. Dawson v. National Life Insurance Co., 176 Iowa 362, 157 N.W. 929, LRA 1916E 878, Ann. Cas. 1918B 230 (1916). The secretary of the corporation purchased shares from the bookkeeper at $200 a share when they were worth about $1,000.

21. 176 Iowa 362, 375.

22. *Id.* at 376.

23. *Id.* at 389.

The proper conduct of directors should not be determined by ascertaining if there is a fiduciary duty. The type of corporation, how its stock is sold, and the extent of its holdings should be inquired into. A corporation with four stockholders is not the same as one with four hundred or four thousand, although the present statute law considers them the same.[24] There is much to be said for both the majority and the minority rule. The majority rule allows the director to buy freely from whomever he chooses. The purchase may be for investment only and not for a sudden speculative profit. This director should be allowed to do. If too high a duty of care is placed upon directors and their actions are too restricted, the premium placed on directorates would not be commensurate with the reward.[25] The minority rule on the other hand protects the individual stockholder in his dealings with the corporate director.

The solution is not to be had by further judicial expression alone. The courts have laid bare the problem; it is up to the legislatures to enact corrective legislation. It should not be directed to directors of all classes of corporations. As to corporations whose stocks "have a regularly quoted price or market price parties generally sell and buy them, with reference to their real value"[26] *i.e.* whose stocks are listed on one of the national stock exchanges, any dealing between director and stockholder should be at arm's length. The mere fact that the books of the corporation are open to all stockholders and each may inform himself of the condition of the company should not, on the other hand, preclude the necessity of making disclosure.[27]

It is suggested that there should be no fiduciary relation between director and stockholder in their individual shareholding capacities in large corporations; but that the duty of disclosure of all relevant facts when specially requested be made when the transaction is between director and stockholder in a close corporation, and any immediate profit

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24. Weiner, *Legislative Recognition of the Close Corporation,* (1929), 27 MICH. L. REV. 273; Douglas, *Directors who do not Direct,* (1934), 47 HARV. L. REV. 1305, 6. *Cf.* McManus v. Durant, 168 App. Div. 643, 154 N.Y.S. 580 (1915).

25. *Cf.* Uniform Business Corporation Act, §33, 9 ULA 87, and Commissioners' Note thereto.

26. Carpenter v. Danforth, 52 Barb. (N.Y.) 581, 586 (1868).

27. *Cf.* Walsh v. Goulden, 130 Mich. 531, 90 N.W. 406 (1902).

realized in such a deal should be presumptively fraudulent. A recognition of the inherent differences in the management of large and close corporations will do much in the acceptance of the two rules. This is not intended to mean that all transactions in large corporations will be accepted, *per se,* as lawful. If the director suppresses such facts that, if known to the stockholder, would give him cause to make a further investigation, then the burden of proof will be on the director to establish the fairness of the bargain. These rules are not intended to deprive the director of his compensation, in the form of profits, for his business acumen and sagacity, they are merely intended to inject the element of fair play into the transaction and not to weigh the balance too heavily in favor of either the director or the stockholder.

Although it has been said that the relationship of director to stockholder resembles in some respect that of an agent to his principal, of managing to dormant partner, and of trustee to beneficiary, and that no advantage should be derived by the director by reason of his position;[28] it has also been said that the parties generally do business with reference to the regularly quoted price of stock and rely little on the representations of the directors.[29] These two canons are interdependent and in any given set of facts the decision should rest on a consideration of both and not on only one, or the other.

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28. Cahall v. Lafland, 12 Del. Ch. 299, 114 A. 224 (1921).
29. Carpenter v. Danforth, 52 Barb. (N.Y.) 581 (1868).