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Edwin P. Horner

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STATUTORY PROVISIONS FOR VALUATION AND PURCHASE OF SHARES OF DISSENTING SHAREHOLDERS

THERE is ample authority that at common law the unanimous consent of the shareholders was required to sell the corporate assets and to liquidate and dissolve the corporation,[1] although Warren has suggested that the rule might have been otherwise.[2] Most states, however, now have statutory provisions permitting a certain percentage of the shareholders to vote a sale of the entire assets and a subsequent voluntary dissolution.

The importance of such statutes permitting less than unanimity for voting dissolution is readily seen because of the difficulty encountered in securing the representation of all the outstanding shares at shareholders' meetings; the strictness of the common-law rules on the majority shareholders was hampering corporate growth. Other similar actions now permitted rather widely are consolidation and merger, reorganization, and other fundamental changes in the corporate organization.

On principle, it is easy to justify such statutes. One individual, or a small minority of shareholders, should not be able to block majority action. Although minority shareholders have certain interests, the majority shareholders also have interests which should be protected from an oppressive or contrary minority.

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[1] Abbott v. American Hard Rubber Co., 33 Barb. Ch. 578 (N. Y. 1861); Myerhoff v. Bankers' Securities, 105 N. J. Eq. 76, 147 Atl. 105 (Ch. 1929); Kean v. Johnson, 9 N. J. Eq. 401 (1853); 6 FLETCHER, CYCLOPEDIA OF CORPORATIONS (perm. ed. 1931) § 2942; 1 HILDEBRAND, TEXAS CORPORATIONS (1942) § 64. As to unanimous consent not being necessary when the corporation is insolvent or in failing condition, see Geddes v. Anaconda Mining Co., 254 U. S. 590 (1921).

[2] Warren, *Voluntary Transfers of Corporate Undertakings* (1916) 30 HARV. L. REV. 335. Prof. Warren states, at 337, that the case from which the statement of the common law gets its source is Ward v. Society of Attornies, 1 Collyer 370 (1844), where the majority of the shareholders were proposing to *give* away the assets and render the stock valueless. See also Note (1932) 19 VA. L. REV. 166.

And in connection with these new "majority rights" statutes, many legislatures gave to the shareholders dissenting from certain majority action the right to ask for an appraisal and compulsory purchase of their shares by the corporations.[3] As one judge has suggested, with regard to such statutes granting the majority the right to sell the corporate assets,

> "In compensation for the lost right, a provision was written into the modern statute, giving the dissenting stockholder the option to completely retire from the enterprise and receive the value of his stock in money."[4]

It is the purpose of this note to inquire, in cases when this sort of a compromise between the interests of the majority and the minority is carried out according to the statutory procedure, whether the appraisal statutes have been effective to do justice and protect the rights of both parties.

Twenty-five states now have some statutory provision for the valuation and purchase of the dissenter's shares by the selling corporation. One of the first enactments of this nature was passed in England in 1862.[5] Many of the statutes in the United States have been modeled after the early English statute. Levy, characterizing the statutes as being "for the most part crudely drawn," has observed that they "have left in their wake a host of problems. Even the elemental question of who are included in the class entitled to payment is not clearly answered."[6]

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[3] In those states that have statutes providing for the sale of assets, without statutory provisions for appraisal of the dissenting shareholders' stock, it has been suggested that the dissenter is not given the appraisal right either because small minorities are objecting for the purpose of harassing the corporation or else because there is deemed to be wisdom in the action of large majorities. This may be especially true in those states requiring action by 80 per cent of the outstanding stock.

[4] Chicago Corporation v. Munds, 20 Del. Ch. 142, 172 Atl. 452, 455 (1934). These statutes are constitutional. Miller v. Canton Motor Coach, Inc., 58 Ohio App. 94, 16 N. E. (2d) 486 (1937); also Note (1932) 79 A. L. R. 626.

[5] 25 & 26 Vict., c. 89, § 162 (1862).

[6] Levy, *Rights of Dissenting Shareholders to Appraisal and Payment* (1930) 15 CORN. L. Q. 420. For a discussion of other problems raised by the appraisal statutes in addition to the problem of valuation see Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes* (1931) 45 HARV. L. REV. 233.

The statutes are not uniform in their wording as to the type of value which the dissenter shall be paid. The statutes use variously the terms "value,"[7] "fair value,"[8] "fair cash value,"[9] "real value,"[10] "full and fair value,"[11] "market value,"[12] and "market value, but not less than book value according to the last balance sheet,"[13]; and one statute provides "fair value" with "practice and procedure . . . [to] be, so far as practicable, the same as that under the eminent domain laws of this state."[14] One court has treated all such terms as synonymous in this connection.[15]

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[7] CONN. (Gen Stat. 1930) § 3384, as amended by Laws 1945, art. 365, Supp. 717h; IDA. CODE (1932) § 29-149; IND. ANN. STAT. (Burns, 1933) § 25-239; ME. REV. STAT. (1944) c. 49, § 81, 84; MASS. GEN. LAWS (1932) c. 156, § 46, p. 1968; MONT. REV. CIV. CODE (1935) arts. 6005, 6006; N. Y. (McKinney's Law Ann., 1940) Stock Corp. § 20; S. C. CODE OF LAWS (1942) § 7705; VT. PUB. LAWS (1933) arts. 6009, 6010; WASH REV. STAT. (Remington, 1932) § 3803-41, as amended by Laws 1939, c. 143, § 7.

[8] MD. PUB. LAWS ANN. (Flack, 1939) art. 23, § 38; MO. GEN. BUS. CORP. ACT (1943) § 72; N. H. REV. STAT. (1942) c. 274, § 75; ORE. LAWS ANN. (1940) § 77-263; TENN. CODE (1932) § 3748.

[9] LA. GEN. STAT. (Dart, 1939) tit. 14, art. 1132. Dissenters have right to demand fair cash value only when the action complained of was authorized by less than 80 per cent. A vote of two-thirds of the shareholders can authorize sale of the assets. Mich. Act 327 (P. A. 1931) § 57; OHIO GEN. CODE (1940) § 8623-65; VA. CODE (1942) art. 3820a.

[10] IOWA CODE (1946) art. 491.23 requires unanimous consent for a voluntary dissolution, or a lesser number if provided in the charter. Article 491.25 gives the dissenter to the renewal of the charter the right to be paid the real value of his stock. There is no provision for appraisal for sale of assets.

[11] R. I. GEN. LAWS (1938) c. 116, art. II, §§ 55, 56.

[12] KY. REV. STAT. (1946) art. 271-415 (4); N. J. REV. STAT. (1937) tit. 14, c. 3-5.

[13] N. M. REV. STAT. (1941) §§ 54-229, 231. See 2 BONBRIGHT, VALUATION OF PROPERTY (1937) 827, to the effect that these provisions are too absurd for comment. In Borg v. International Silver Company, 11 F. (2d) 147, 152 (C. C. A. 2d, 1925), Judge Hand said, "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious..."

[14] ILL. REV. STAT. (Smith-Hurd, 1941) c. 37, § 157-73. See Ahlenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N. E. 824, 95 A. L. R. 913 (1934), where the Supreme Court mentioned eminent domain only in connection with the procedure involved, but based value upon the elements generally used by the other courts.

Approximately fifteen states have statutory provisions providing for the sale of the corporate assets with no provisions for appraisal of the dissenters' shares. A large part of these states have provisions, however, for the appraisal of dissenters' shares to corporate merger or consolidation. Among these states are Alabama, Arkansas, California, Delaware, Florida, Georgia, Kansas, Minnesota, Nebraska, and others. It is easier to justify the appraisal of stock of those dissenting to consolidations and mergers than those dissenting to voluntary sale of assets.

[15] Chicago Corporation v. Munds, note 4 *supra*, at 455.

The economists, writing on "value," uniformly give varying definitions of the term and formulas for determining it, depending upon the purpose for which the "value" is to be used. Thus,

> "There is market value of securities which is a matter of fact, the price at which securities change hands in the market place, and this value is recorded as matters of fact. Another value is investment value. The analyst is constantly comparing the market value with the investment value to ascertain whether or not the market value is too high or too low. The market value exists only at the time of the sale. The investment value continues over a longer period of time."[16]

Other uses of the term for which the economists give varying definitions and formulae for determination are fair liquidation value, fair replacement value, and fair reproduction value. Valuation is also necessary for taxation, insurance, and many other purposes too numerous to mention. Consequently, it is necessary at the outset to keep clearly in mind the type of value and use of the term which one is considering. Even then, the mere use of the term in a single limited sense is not free from difficulty. The problem involved has been thus clearly indicated:

> "Value is subjective; it is based on individual human experience. Hence when an individual tries to find an objective standard or criterion for his own personal values, he is confronted with an endless confusion. Values change from hour to hour; value is different according to the standards of experience and the standards of judgment. Consequently, when attempts are made to set up legal postulates to control economic value—such postulates as original costs or the cost of reproduction—nothing but uncertainty and contradiction results. In the end the test of value is pragmatic—where the judgment of most men meet? . . . such terms as 'value,' and the more specific terms 'market value,' 'normal market value,' and 'basic market value,' are verbal symbols portraying attempts to reach an objective standard of value in a world where value exists only as the subjective judgments of separate individuals."[17]

None of the statutes attempt to define "value" or to give a formula to be followed. The statute usually prescribes the pro-

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[16] Clifford, *Evaluation of Corporate Securities* (1938). For the various factors determining investment values, see *id.* at 14.

[17] See 1 Dewing, Financial Policy of Corporations (4th ed. 1931) 285.

cedure to be followed only in such matters as the appointment of appraisers, appeals, and making payment.

The courts, in interpreting these statutes, have applied different tests and elements of value in arriving at the resulting figure to be paid. As has been observed by one writer,

> "Most the decisions reveal a sharp contest between the dissenters who have insisted that their shares be appraised at 'intrinsic value' and the corporation, which has contended that the appraisal be limited, at most, to 'market value'."[18]

In reading the various state statutes giving the dissenter the right to demand an appraisal and purchase of his shares at "fair value," the courts must ask, "What is the legislature trying to do for the dissenter? What type of 'value' does the legislature have in mind?" The legislature obviously does not mean that the dissenter receive only the amount of money that he has paid for his shares.

The problem which the appraisal statutes create is one where no precise rules for determining the value, whatever the description used, can be laid down.[19] "The very nature of the case precludes proof of value and damage with the precision of mathematical computation."[20] To appreciate fully the operation of these statutes, then, it is necessary to consider specific cases dealing with the problem; consideration should be given to cases involving both sale of assets and mergers because of the similarity involved and the tendency of courts to apply the same tests to both situations.[21]

In considering a New Jersey statutory provision for "full market value" to the shareholder dissenting from a merger or consolidation, the New Jersey court said:

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[18] See BONBRIGHT, *op. cit. supra* note 13, at 828.

[19] Matter of Fulton, 257 N. Y. 487, 493, 178 N. E. 766, 769, 79 A. L. R. 608 (1931).

[20] Jones v. Missouri Edison Electric Co., 233 Fed. 49, 52 (C. C. A. 8th, 1916). This case was in the courts almost a decade, seeking valuation of the dissenters' shares.

[21] Miller v. Canton Motor Coach, Inc., note 4 *supra*.

"It was proper to appraise according to market value and not according to the speculative value of various properties and other interests of the corporation."[22]

Bonbright has criticized this test, saying:

"The 'market value test' is utterly inapplicable. . . . the fatal objection to the 'market test' is that it reflects the influence of the very sale or merger against which the dissenter is seeking a remedy. The market does not wait until the corporation action has taken place before it discounts the event."[23]

The New Jersey statute now provides that the "full market price without regard to appreciation or depreciation in consequence of merger shall be paid the dissenters."[24] Other states also have similar provisions, but how effective such provisions are is somewhat doubtful.

Most of the courts in interpreting the "value" statutes have rejected use of "market value" as a sole standard, although it is considered in connection with other factors. In *Cole* v. *Wells*,[25] the court said:

"The 'value of the stock' means not merely the market price if the stock is traded in by the public but the intrinsic value to determine which, all the assets and liabilities must be ascertained. . . . the arbitrators must resort to the books . . . although books may fail to exhibit true financial condition. Fair value is to be ascertained as if liquidation had been voted and all the corporation property after payment of the debts had been marshalled for the benefit of all the stockholders."

The court said nothing about "good will" or "going business," which will be discussed hereafter. The valuation theory followed in *Cole* v. *Wells* has been called the "hypothetical dissolution theory."

In the recent case of *Matter of Fulton*, the court said:

"To require them (the dissenters) to accept less than a fair market

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[22] Prall v. United States Leather Co., 6 N. J. M. 967, 143 Atl. 382 (1928), *aff'd without op.* 106 N. J. 602, 146 Atl. 916.

[23] See BONBRIGHT, *op. cit. supra* note 13, at 828.

[24] N. J. REV. STAT. (1937) tit. 14, c. 3-5.

[25] 224 Mass. 504, 513, 113 N. E. 189, 191 (1916).

value for their stock would be a distinct injury. It is true that there may be cases where the stock has a fictitious market price. To require the corporation to pay the market price of the stock owned by the dissenting stockholders would work a hardship on the corporation and the remaining stockholders.

Under such circumstances the market quotations should be considered but not accepted as decisive of a fair market price. The market quotations at the time of the dissent may, in certain instances, reflect an expectation of increased value as a result of the proposed sale. A dissenting shareholder is not entitled to share in an enhanced value of stock due to the sale which he opposed. Market quotations are, therefore, to be considered only in so far as they reflect a reasonable basis for estimating market quotations which would probably have continued if a sale had not been made. . . ."[26]

This case has been generally cited, with approval, as the proper approach to determining the value of the dissenter's shares. This case involved the disapproval in a merger and it appears that the above is possibly dictum as the question involved was whether or not the preferred shareholders who dissented should be allowed to share in the accumulated surplus. The theory of the *Fulton* case, as opposed to the "hypothetical dissolution" theory, has been designated the "continuous investment" theory or the "hypothetical market value of a continuous investment."[27]

Some courts say that since the stock cannot properly be valued at prevailing market price, its fair value must be estimated by reference to the value or fair market value of the underlying corporate assets. Such a statement may mean that the shares must be valued as a continuing interest in a going business;[28] on the other hand it could mean as if the corporation were being dissolved, the assets sold to the majority interest at a fair valuation, and the resulting cash proceeds distributed to the security holders

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[26] See note 19 *supra*. Bonbright prefers the theory of the *Fulton* case.

[27] See BONBRIGHT, *op. cit. supra* note 13, at 834.

[28] Jones v. Missouri-Edison Electric Co., note 20 *supra*; American Seating Co. v. Bullard, 290 Fed. 896 (C. C. A. 6th, 1923); Chicago Corporation v. Munds, note 4 *supra*; Robinson, *Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares* (1932) 32 COL. L. REV. 60, 75.

in accordance with their contract rights in the event of a voluntary liquidation.[29]

The Delaware court has been somewhat more articulate in analyzing the element of value. In *Allied Chemical and Dye Corporation* v. *Steel and Tube Co.*,[30] the court outlined the elements of value as follows: earning capacity, the investment value, which is largely determined by the rate of dividends, the regularity with which they have been paid, the possibility that they will be increased, the selling price of stock of like character, the amount of preferred stock in comparison with the common stock, the size of the accumulated surplus applicable to dividends, the record of the corporation, and its prospects for the future.[31]

Some courts have added "good will" as an element to be considered in arriving at a valuation. In *Seaich v Mason-Seaman Transportation Co.*,[32] the New York court allowed the "good will" to be capitalized in arriving at the value of the stock. The court held that the value could be determined by multiplying the average annual net profits and deducting therefrom the interest on the capital invested.[33]

Several recent cases show the difficulty which the courts often

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[29] This view was adopted in Prall v. United States Leather Co., note 22 *supra*.

[30] 14 Del. Ch. 1, 64, 117, 368, 120 Atl. 486, 122 Atl. 142, 127 Atl. 414 (1925).

[31] BONBRIGHT, *op. cit. supra* note 13, criticizes this case at p. 815 as "one of the most unfortunate opinions in the recent history of minority-stockholder law. Its artificial distinction between the question of a fair sale price and the question of the wisdom of the sale itself, has no support in economic theory. The price at which property can be sold is always an essential factor in determining the wisdom of the sale, and the two problems are merely restatements of a single question of sound business policy." Query, whether it is the court's function to be governed by economic theory as to the wisdom of the sale, or whether the court is to be governed by the statutory provisions that give the right to the majority of the shareholders to sell their entire assets, if they so choose, with the court seeing that equity is done between the conflicting interests?

[32] 170 App. Div. 686, 156 N. Y. Supp. 579, *aff'd without op.* 219 N. Y. 634, 114 N. E. 1083 (1916).

[33] "The determination of the number of years is not a question of law but one of fact dependent upon the evidence in each action with respect to the nature and character of the particular business." Van Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. Supp. 659, 126 App. Div. 257, 110 N. Y. Supp. 629, 638, *aff'd without op.*, 196 N. Y. 510, 89 N. E. 1114 (1909).

have in applying standards and tests of value.[34] In each case considerable time was necessary for the appraisal and prolonged and expensive litigation was engaged in. Moreover, the disagreement among the judges in a single case indicates the latitude of opinion possible in applying the statutory formula. In *Roessler v. Security Savings and Loan Co.*,[35] the court said:

> "The fair cash value . . . means the intrinsic value of the shares determined from the assets and liabilities of such corporation, upon consideration of every factor bearing upon value."

This case (involving a merger) was commenced in September 1943. The corporation had offered $25.00 per share and the dissenters asked $160.00 per share. The trial court instructed the appraisers upon many of the factors involved, in addition to the "willing buyer-willing seller" test. The upper court stated that the trial court erred in the instruction by making the "willing buyer-willing seller" test the basic factor; that it had over-emphasized this factor in preference to others. The appraisers had found the value to be $43.50 per share. On February 28, 1947, the case was reversed and remanded for a new trial. Almost four years have passed and the court is still trying to find the "fair cash value" of 174½ shares of Security Savings and Loan Co. stock. Three judges dissented, saying that the evidence showed that for the years 1937-1943 this stock had ranged from $15.00 to $22.50 per share and that the $43.50 per share value found by the appraisers was a "fair cash value."

The case of *Lebold* v. *Inland Steel Co.*,[36] offers similar evidence that the problem becomes exceedingly involved when the court commences to apply judicial standards to arrive at the fair value of the dissenters' shares. The Steamship Corporation was a West Virginia corporation and 80 per cent of its stock was

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[34] For a recent case that summarizes a number of the "value" cases, see Ahlenuis v. Bunn and Humphries, Inc., note 14 *supra*.

[35] ___ Ohio ___, 72 N. E. (2d) 259 (1947).

[36] 82 F. (2d) 351, 125 F. (2d) 369, 136 F. (2d) 876 (C. C. A. 7th, 1943), *cert. denied*, 320 U. S. 787 (1943).

owned by the Steel Company. The facts indicated that all the Steamship Corporation business came from the Steel Company, at competitive rates. "Desirous of stopping the golden flow of dividends" (over $100 annually on $100 par value shares), the Steel Company made an offer of $700 per share for the $100 par value stock. This offer was refused. The Steel Company then voted to dissolve the Steamship Corporation, selling the assets to the Steel Company. This action was authorized under West Virginia law. The dissenters to this action then brought suit in the federal court for damages because of the alleged fraud arising from the dissolution of the Steamship Corporation. After trial in the lower federal court, the case was appealed. The circuit court of appeals returned the case to the trial court to determine the value of the dissenters' shares, based upon various elements, one of which was the value of the business as a going concern. In the new trial, the dissenters presented thirty-two charts, ratios, analytical surveys, arriving at values varying from $2,885 to $5,689 per share. The Steel Company, capitalizing 11 years average earnings at 10 per cent, computed the value of each share to be $1,289. On the basis that the Steel Company would have entered into competition with the Steamship Corporation, the Steel Company presented figures of $779.24 per share. What was termed "expert opinion" varied from $224.90 to $3,200 per share. The trial court, in accordance with the circuit court's direction as to fixing the value, found the value to be $2,350 per share. Upon appeal from this decision, the circuit court concluded:

> "After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1,350.00 each or in allowance of damages in excess of the difference between the value and the amount the dissenters have received."[37]

The "careful analysis" to which the court refers is not related in the opinion so it is impossible to determine just what standards

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[37] 136 F. (2d) 876, 878 (C. C. A. 7th, 1943).

or guides the court finally used in arriving at its figure. Further, there was never disclosed in any of the opinions the figure that the dissenters had received as a result of the sale and dissolution. The assets of the Steamship Corporation consisted of three ships. The case was in the court for some eight years.[38]

CONCLUSION

The problem of arriving at procedures adequate to protect the minority's interest against an unscrupulous majority is as yet unsolved, in spite of the statutory provisions for appraisal and forced purchase.

It is submitted that when one buys shares of a corporation, he knows, or should know, that the corporation is managed by the majority, that he exercises power in the management in ratio to the number of shares he owns or the proxies he can control. The court, in exercising its equitable powers, protects the minority when it is apparent that the majority is taking unfair advantage of the minority, either through fraud, mismanagement or other devices familiar to a corrupt majority. For protection from these practices, the minority needs no statute as equity will assume jurisdiction.[39]

Most of the writers upon this subject seem to have assumed that the usual majority is taking advantage of the minority. The writer feels that the commentators who champion the cause of the dissenters are perhaps overlooking other interests, those of the majority. Those interests should also be protected against dissipation by stockholders suits.[40]

When, in their vote, the majority decides that the corporate assets should be sold, there being no evidence of fraud or a

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[38] See also in re General Realty and Utilities Corporation, ... Del. Ch. ....., 52 A. (2d) 6 (1947). This case was in court for almost three years.

[39] See 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) §§ 1094, 1095.

[40] The dissenters can be just as guilty of "bad faith" as the majority. For a case where a shareholder dissented to the merger of the corporation, then bought additional shares and attempted to receive the appraised price for them also, see Graves v. Pittsburgh Consolidation Coal Co., 355 Pa. 224, 49 A. (2d) 344 (1946).

clear case of underselling, the minority should receive pro rata the share that the majority shareholders receive. "All questions involving the exercise of business judgment to be decided by the stockholders are to be decided by a majority vote. . . . When to stop is as much a question of business judgment as how to proceed. Financial embarrassment is not the only legitimate business reason for such transfer."[41]

In *Manning* v. *Brandon Corporation*,[42] the court said:

> "The statute (appraisal) should be construed liberally in favor of the stockholder, so as to carry out the manifest theory of the act, and to save harmless the stockholder from all costs and expenses in obtaining the value of his stock at the time of the consolidation, and interest thereon from 30 days thereafter."

But isn't the court unduly extending its protection to one side when they take this attitude? If the majority is exercising good faith in the sale, why should the minority be given an opportunity to fasten expensive litigation, delays, costs of appraisers and appraisals, and adverse publicity upon the majority?

A further difficulty with the statutes providing forced sale and appraisal is that they operate to the financial advantage of the minority at the expense of the majority. Is the method of taking into consideration the estimated future earnings which won't be earned, capitalizing "good will" which will cease to exist for the corporation upon the sale of the assets, fair and equitable to the other party to the suit? If the corporate assets are sold intact to be continued under new management, the vendor corporation obviously was paid for this good will in the consideration received.[43] In this event, the assets to be shared are enlarged, so that

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[41] See WARREN, *op. cit. supra* note 2, at 357. "In the absence of usurpation, fraud, or gross negligence, courts of equity will not interfere at suit of dissatisfied stockholders to overrule and control discretion of directors on questions of corporate management, policy, or business." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. (2d) 393 (1944).

[42] 163 S. C. 178, 186, 161 S. E. 405, 408 (1931). This makes a convincing argument why the majority should attempt to settle out of court.

[43] The writer admits that this statement can be subject to close examination where the vendee corporation is controlled or is interested in the vendor corporation. See Garrett v. Reid-Cashion Land and Cattle Co., 34 Ariz. 245, 270 Pac. 1044 (1928).

the dissenters can be paid for that part of the "good will" which their shares helped to create. If the corporation is not to be continued by the vendee as a going business, then why should the dissenters have a profit on some non-existent "goodwill" and "going business" theory? A legal reason advanced for capitalizing this "going business" and adding it to the value of the dissenters' share is that there is an implied contract between the minority and the majority that the corporation will continue until the end of the term stated in the charter. But should the court find such an "implied contract?" The statute giving the majority the right to sell the assets, as well as being a statute, is a term of the contract by which shareholders buy and hold their shares. Why isn't this said to be the contract instead of the highly fictional "implied contract?"

Finally, it may be inquired how effective are the appraisal statutes when years are required to appraise the value of the dissenters' shares.

A promising approach to the problem is that adopted in the South Dakota statute[44] which provides that a two-thirds vote of the shares can authorize a sale of the corporate assets. This dissolution is under the supervision of the court. It also provides[45] that all who object to such dissolution shall appear in court and protest with the provision that "This action shall be deemed an equitable action, without jury, to hear and determine the rights and interests of all parties to the action in the assets of such corporation." This statute appears to be one where all the interests of all the shareholders can be adequately protected without the necessity of an appraisal statute and its resultant expensive and time consuming litigation.

Edwin P. Horner.

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[44] S. D. Code (1939) art. 11.0902.
[45] *Id.*, art. 11.0911.