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Corporations -- Disposition of Corporate Assets

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purview of the statute.[44] Such a rule would assure SEC intervention and independent trustee's investigation for the protection of the investing public just as these safeguards are provided today for the protection of stockholders and secured creditors whose rights are materially and adversely affected in an adjustment proceeding.

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Corporations—Disposition of Corporate Assets

Where does the control by shareholders over the disposition of corporate assets begin and the control by management end? Most statutes give the shareholder the right of control when the sale constitutes "substantially all" the corporate assets. But the confusion engendered over the definition of "substantially all" gives no precise answer to the question. The final determination of consent rights is one of policy—of balancing the shareholder's interest in protecting his investment against the director's interest in having efficient centralized management.[1]

[44] The determination of whether a particular agreement is an investment contract is often difficult to make. The term "investment contract" has been defined judicially in these terms:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

SEC v. W. J. Howey Co., 328 U.S. 293, 298-99 (1946). A district court has said that "the elements that make up an 'investment contract' within the statutory definition, as distinguished from some other form of security, are not amenable to characterization in absolute terms. Consideration must be given to all surrounding and collateral arrangements." SEC v. Los Angeles Trust Deed & Mortgage Exchange, 186 F. Supp. 830, 888 (S.D. Calif. 1960), *modified and aff'd*, 285 F.2d 162 (9th Cir. 1961). For illustrative cases, see Farrell v. United States, 321 F.2d 409 (9th Cir. 1963); Roe v. United States, 287 F.2d 435 (5th Cir.), *cert. denied*, 368 U.S. 824 (1961); Woodward v. Wright, 266 F.2d 108 (10th Cir. 1959); Penfield Co. v. SEC, 143 F.2d 746 (9th Cir. 1944).

[1] The primary purpose of this note is to discuss the concepts behind one of the fundamental corporate changes: the sale, lease, or exchange of all or substantially all the corporate assets. The focal point will be on the right of shareholders to approve such dispositions. For related works on this subject, see Note, 38 CALIF. L. REV. 913 (1950); Note, 9 SYRACUSE L. REV. 269 (1958); Note, 67 YALE L.J. 1288 (1958). This note will not discuss the procedure for obtaining shareholder consent, the value of consideration received, or fraudulent transfers of assets. For such discussion, see Note, 58 COLUM. L. REV. 251 (1958). The other fundamental changes of consolidation and merger are not discussed. For a comparison of these

At common law, the sale of all the assets of a prosperous, going concern required unanimous shareholder consent.[2] This doctrine was based on a theory of an implied contract between the shareholders to pursue the business for which the corporation was chartered. Since a disposition of the assets would destroy the corporate purpose, the sale could not be consumated without complete mutual cancellation by the shareholders of their contract.[3] The doctrine also found support in a public policy against corporate suicides.[4] When the corporation was insolvent, the unanimous approval rule was relaxed to permit the directors[5] or a majority of shareholders[6] the right to approve a sale of all the assets. Because of the restriction on the alienation of assets and because a dissenting shareholder could demand an exorbitant price for his concurring vote,[7] the common law rules are supplanted in all states except Arizona[8] by statutes that reduce the shareholder vote requirement[9] when all[10]

subjects with sale of assets, see BALLENTINE, CORPORATIONS § 280 (rev. ed. 1946) [hereinafter cited as BALLANTINE].

[2] See, *e.g.*, Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921); Tillis v. Brown, 154 Ala. 403, 45 So. 589 (1908); People v. Ballard, 134 N.Y. 269, 32 N.E. 54 (1892). See generally Note, 94 U. PA. L. REV. 412 (1946).

[3] Small v. Minneapolis Electro-Matrix Co., 45 Minn. 264, 47 N.W. 797 (1891). See generally BALLANTINE § 281; 6A FLETCHER, PRIVATE CORPORATIONS § 2950 (perm. ed. rev. repl. 1950) [hereinafter cited as FLETCHER].

[4] See People v. Ballard, 134 N.Y. 269, 32 N.E. 54 (1892). For a criticism of the rule requiring unanimous shareholder approval, see Warren, *Voluntary Transfers of Corporate Undertakings*, 30 HARV. L. REV. 335 (1916).

[5] Beardstown Pearl Button Co. v. Oswald, 130 Ill. App. 290 (1906).

[6] See, *e.g.*, Butler v. New Keystone Copper Co., 10 Del. Ch. 371, 93 Atl. 380 (1915); Oskaloosa Sav. Bank v. Mahaska County State Bank, 205 Iowa 1351, 219 N.W. 530 (1928) (the rights of shareholders to have the business continue becomes subordinate to creditors' rights when the corporation is insolvent).

[7] In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910).

[8] See ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶¶ 2.01, 2.02 (1960, Supp. 1964).

[9] See, *e.g.*, DEL. CODE ANN. tit. 8, § 271 (Supp. 1964) (majority of shares entitled to vote); MICH. STAT. ANN. § 21.57 (1963) (majority of shares outstanding); W.VA. CODE § 3076 (1962) (sixty per cent of the voting power); N.Y. BUS. CORP. LAW § 909 (two-thirds of shares entitled to vote); N.C. GEN. STAT. § 55-112 (1965) (two-thirds of shares outstanding); MO. REV. STAT. ANN. § 351.400 (1952) (three-fourths of shares entitled to vote); S.D. CODE § 11.0709 (1939) (three-fourths of shares outstanding); TEX. BUS. CORP. ACT art. 5.10 (Supp. 1964) (four-fifths of shares outstanding). (The statutes are cited in the order of increasing size of vote requirement.)

[10] See, *e.g.*, DEL. CODE ANN. tit. 8, § 271 (Supp. 1964) (refers to all assets sold). In Fisk v. Toys & Novelties Publishing Co., 259 Ill. App. 368 (1930), the court construed a statute referring to all the assets to include

or substantially all[11] the corporate assets are sold. In addition, thirty-five jurisdictions offer the dissenting shareholder the protection of having his stock judicially appraised and purchased by the corporation when all or substantially all the assets are sold.[12]

Because the disposition does not affect the shareholder's interest or investment, consent statutes do not apply to sales made by nonprofit corporations,[13] and most jurisdictions do not require consent if the corporation is insolvent.[14] The right of shareholders to approve leases,[15] mortgages,[16] and pledges[17] of substantially all assets

the sale of nearly all the assets terminating the business of the corporation.

[11] See, *e.g.*, N.Y. Bus. Corp. Law § 909(a); N.C. Gen. Stat. § 55-112(b) (1965).

[12] See ABA-ALI Model Bus. Corp. Act Ann. § 73, ¶¶ 2.01, 2.02 (1960, Supp. 1964). In the absence of statute, some courts will grant appraisal rights to dissenting shareholders. See Tanner v. Lindell Ry., 180 Mo. 1, 25-26, 79 S.W. 155, 161 (1904). *But see* Heilbrunn v. Sun Chem. Corp., 38 Del. Ch. 321, 150 A.2d 755 (1959). In the absence of fraud or illegality, some statutes make appraisal the exclusive remedy available to dissenting shareholders. See, *e.g.*, N.Y. Bus. Corp. Law § 806. Where fraud or illegality occurs, the shareholder may seek other remedies in equity. See Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 Atl. 183 (1931); Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 106 N.E.2d 848 (1952) (rescinding fraudulent sale). If the statute is silent as to the exclusiveness of appraisal as a remedy, courts will generally reach this result. See, *e.g.*, Wick v. Youngstown Sheet & Tube Co., 46 Ohio App. 253, 188 N.E. 514 (1932). See generally Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes,* 45 Harv. L. Rev. 233 (1931); Skoler, *Some Observations on the Scope of Appraisal Statutes,* 13 Bus. Law. 240 (1958); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right,* 77 Harv. L. Rev. 1189 (1964); Note, 58 Colum. L. Rev. 251 (1958); Note, 72 Harv. L. Rev. 1132 (1959). For a criticism of the use of appraisal when assets are sold, see Manning, *The Shareholder's Appraisal Remedy,* 72 Yale L.J. 223, 254-57 (1962).

[13] See, *e.g.*, Chamber of Commerce v. Barton, 195 Ark. 274, 112 S.W.2d 519 (1937); Knapp v. Supreme Commandery, U.O.G.C., 121 Tenn. 212, 118 S.W. 390 (1908).

[14] See, *e.g.*, Mills v. Tiffany's, Inc., 123 Conn. 631, 198 Atl. 185 (1938) (sale by insolvent corporation outside statute, unless business continued by another corporation); Petition of Avard, 5 Misc. 2d 817, 144 N.Y.S.2d 204 (Sup. Ct. 1955) (sale by insolvent corporation outside the statute). See also N.C. Gen. Stat. § 55-112(b) (1) (1965), which provides that the directors may sell without shareholder approval if the corporation is "in a failing condition." *But see* Michigan Wolverine Student Co-Operative, Inc. v. Wm. Goodyear & Co., 314 Mich. 590, 22 N.W.2d 884 (1946) (dictum that insolvency is not an exception under Michigan statute); In the Matter of MacDonald, 205 App. Div. 579, 199 N.Y. Supp. 873 (1923) (dictum that the sale of assets by insolvent corporation requires shareholder approval).

[15] A lease of assets, not made in the regular course of business of the corporation, requires shareholder consent. See, *e.g.*, Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 200 Cal. App. 2d 322, 19 Cal. Reptr. 208 (1962) (lease of gold mine requiring shareholder approval). See also N.C. Gen. Stat. § 55-112(b)(3) (1965). If the lease of assets is made in the regular course of business, shareholder consent is not required.

varies among jurisdictions. Either by statute in twenty jurisdictions[18] or by judicial construction in nearly all states,[19] a sale of all or substantially all assets made in the usual and regular course of the corporate business does not require shareholder approval.[20]

Of the exceptions that limit the application of consent statutes, regular course of business is the most important and troublesome. Before the question of whether the sale is substantial can be raised, it must be determined that the sale is outside the regular course of the corporate business.[21] The purpose of the regular-course-of-

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See, *e.g.*, Sante Fe Hills Golf & Country Club v. Safehi Realty Co., 349 S.W.2d 27 (Mo. 1961); Janoff v. Sheepshead Towers, Inc., 22 App. Div. 2d 950, 256 N.Y.S.2d 45 (1964) (dictum); Keating v. Coleman, 214 App. Div. 668, 213 N.Y. Supp. 213 (1925). See generally 13 FLETCHER § 5791 (1961).

[16] The trend in current statutes is to allow the board of directors to mortgage all property without shareholder approval, unless the charter provides otherwise. See, *e.g.*, N.Y. BUS. CORP. LAW § 911; N.C. GEN. STAT. § 55-112(a) (1965). Thirteen jurisdictions still require shareholder consent for mortgages. See ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶ 2.02 (1960, Supp. 1964). See also McDonald v. First Nat'l Bank, 70 F.2d 69 (1st Cir. 1934) (mortgage of all assets requires shareholder approval); Commerce Trust Co. v. Chandler, 284 Fed. 737 (1st Cir. 1922). Of these thirteen, eight subject mortgages to the regular course of business exception. See, *e.g.*, CONN. GEN. STAT. § 33-372 (1962).

[17] Pledges are usually subject to the same statutory provisions as mortgages. See note 16 *supra*.

[18] ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 71-72, ¶¶ 2.01, 2.02 (1960, Supp. 1964). See, *e.g.*, N.Y. BUS. CORP. LAW § 909(a). Like New York, most statutes refer to the usual and regular course of business. Compare this approach to N.C. GEN. STAT. 55-112(b) (1965), which rejects the general "usual and regular" course of business exception. The statute sets out three specific situations where the sale of assets does not require shareholder approval. They are (1) sales made by a corporation in a "failing condition," (2) sales made by a corporation incorporated for the purpose of liquidation, (3) sales made in furtherance of the business of the corporation. See generally ROBINSON, NORTH CAROLINA CORPORATE LAW AND PRACTICE § 196 (1964).

[19] See, *e.g.*, Thayer v. Valley Bank, 35 Ariz. 238, 276 Pac. 526 (1929); Jeppi v. Brockman Holding Co., 34 Cal. 2d 11, 206 P.2d 847 (1949); Bradford v. Sunset Land & Water Co., 30 Cal. App. 87, 157 Pac. 20 (1916); Pollack v. Adwood Corp., 321 Mich. 93, 32 N.W.2d 62 (1948); Tuttle v. Junior Bldg. Corp., 227 N.C. 146, 41 S.E.2d 365 (1947); Painter v. Brainard-Cedar Realty Co., 29 Ohio App. 123, 163 N.E. 57 (1928); Van Buren v. Highway Ranch, Inc., 46 Wash. 2d 582, 283 P.2d 132 (1955); Gottschalk v. Avalon Realty Corp., 249 Wis. 78, 23 N.W.2d 606 (1946).

[20] To determine if the sale is in the regular course of business, "the test applied by courts is not the amount involved, but the nature of the transaction, whether the sale is in the regular course of the business of the corporation and in furtherance of the express objects of its existence, or something outside of the normal and regular course of business." In the Matter of Miglietta, 287 N.Y. 246, 254, 39 N.E.2d 224, 228 (1942).

[21] This is not always the case. Several New York decisions seem to rely solely on the regular course of business test set forth in In the Matter

business exception is to facilitate easy transfers by companies whose stock in trade consists of tangible assets.[22] For example, a company organized for and engaged in the sale of real estate[23] or in the liquidation of assets[24] need not obtain shareholder approval for the sale of its assets. The exception enables a corporation to sell its assets without shareholder approval if the sale is in furtherance of the corporate business.[25] However, if the corporation disposes of part of its franchise so as to divest the corporation of one of the powers conferred by its charter, it is not a sale in the regular course of business.[26]

In applying this exception to a sale, a court must first identify the selling corporation's regular course of business. Two approaches have been developed for making such a determination: one based solely upon the language of the corporate charter,[27] and the other upon the history and actual operations of the enterprise.[28] Given

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of Miglietta, *supra* note 20, to determine shareholders' rights. These cases seem to grant consent rights if the sale is outside the regular course of business without regard for the effects of the sale on the ability of the corporation to carry on its operations. See In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953), *aff'd mem.*, 306 N.Y. 967, 120 N.E.2d 228 (1954).

[22] See Thayer v. Valley Bank, 35 Ariz. 238, 276 Pac. 526 (1929).

[23] See, *e.g.*, Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957), 67 YALE L.J. 1288 (1958); In the Matter of Rosenshein, 16 App. Div. 2d 537, 229 N.Y.S.2d 14 (1962); Tuttle v. Junior Bldg. Corp., 227 N.C. 146, 41 S.E.2d 365 (1947). *But see* Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932) (consent required if real estate corporation sells its sole asset); Borea v. Locust Court Apartments, Inc., 234 App. Div. 450, 255 N.Y. Supp. 215 (1932).

[24] See, *e.g.*, Jeppi v. Brochman Holding Co., 34 Cal. 2d 11, 206 P.2d 847 (1949); Roehner v. Gracie Manor, Inc., 6 N.Y.2d 280, 160 N.E.2d 519, 189 N.Y.S.2d 644 (1959); In the Matter of Miglietta, 289 N.Y. 246, 39 N.E.2d 224 (1942). See also N.C. GEN. STAT. § 55-112(b)(2) (1965).

[25] See Murphy v. Washington American League Base Ball Club, Inc., 293 F.2d 522 (D.C. Cir. 1961); Petition of Hake, 285 App. Div. 316, 136 N.Y.S.2d 817 (1955); Petition of Avard, 5 Misc. 2d 817, 144 N.Y.S.2d 204 (Sup. Ct. 1955).

[26] In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910).

[27] See *In re* United Gas Corp., 58 F. Supp. 501 (D. Del. 1944); Sewell v. East Cape May Beach Co., 50 N.J. Eq. 717, 25 Atl. 929 (Ch. 1893); Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957); In the Matter of Rosenshein, 16 App. Div. 2d 537, 229 N.Y.S.2d 14 (1962); Wattley v. National Drug Stores Corp., 122 Misc. 533, 204 N.Y. Supp. 254 (Sup. Ct.) (dictum), *aff'd*, 208 App. Div. 836, 204 N.Y. Supp. 956 (1929).

[28] See Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106 (S.D.N.Y. 1951); In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953), *aff'd mem.*, 306 N.Y. 967, 120 N.E.2d 228 (1954); Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928). The new N.Y. BUS. CORP. LAW § 909(a) now follows this approach, overruling the decision of Eisen v. Post, *supra* note 27. For a case interpreting this pro-

the predominance of multipurpose charters[29] and broad powers granted corporations under statute,[30] the charter approach is an inaccurate means of ascertaining the business of the corporation.[31] On the other hand, the actual-operations approach affords the shareholder realistic protection because his investment is based not on what the charter says the corporation may do, but on what the corporation actually does. And, assuming the shareholder's investment is based on actual operations, a sale held to be in the regular course of business within the charter provisions could substantially change his investment without granting him adequate protection.

When the corporation contemplates a continued existence, the sale of all or substantially all the assets in the regular course of business should necessarily be under the control of the board of directors, as a part of their duty to carry on the corporate business. But the exception should not be used to evade shareholder consent and appraisal rights if the financially sound corporation anticipates eventual liquidation. Unfortunately, some courts have often ignored the ultimate purpose of the sale, and have only looked to the present effect of the sale upon the shareholder's interests.[32]

Once the sale is considered outside the regular course of business, it is necessary to decide if the particular sale involves substantially all the assets. The problem arises in determining the meaning of "substantially all."[33] An examination of the common law rules and subsequent statutory history indicates that the purpose of most consent statutes is to protect the shareholder from

vision of the statute, see Boyer v. Legal Estates, Inc., 2 CHH CORP. LAW GUIDE ¶ 10935 (152 N.Y.L.J. 15, 1964).

[29] See, *e.g.*, DEL. CODE ANN. tit. 8, §§ 101-02, 121-22 (1953, Supp. 1964).

[30] See, *e.g.*, statutory sections cited in note 29 *supra*.

[31] As said by Lord Wrenbury in Cotman v. Brougham, [1918] A.C. 514, 523, the function of the charter is "not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms." See BALLANTINE § 82.

[32] See Eisen v. Post, 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957) (sale of the corporation's only asset virtually ending corporate existence held to be in regular course of business). *But see* Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932) (sale by real estate corporation of its only asset requires shareholder consent). See generally ISRAELS, CORPORATE PRACTICE 286 (1963).

[33] It should be noted that most of the litigation concerning this question involves appraisal rights granted to the dissenting shareholder. Most consent and appraisal statutes have identical requirements that the sale must meet before shareholder's rights are granted. *Compare* N.Y. BUS. CORP. LAW § 909(a) *with* N.Y. BUS. CORP. LAW § 910(a)(1)(B).

fundamental change, or more specifically, to protect the shareholder from the destruction of the means to accomplish the purposes or objects for which the corporation was incorporated and actually performs.[34] Obviously, a sale of all the assets would destroy the corporate business. The same result could be reached if less than all the assets are sold. The words "substantially all" seem designed to cover such situations. For example, in *Stiles v. Aluminum Products Co.*,[35] the manufacturer of aluminum and stainless steel cooking utensils sold its plant, machinery, and goodwill for 1,406,570 dollars. The corporation retained a realty company, accounts receivables, securities, and an old car, all valued at 760,622.69 dollars. The court held that the sale was of substantially all the assets under the applicable Illinois statute.[36] Though the sale amounted to only 64.7 per cent of the total assets and could not literally be considered substantially all, the sale did destroy what was ostensibly the corporation's business; therefore, the sale had the effect of a sale of all the assets.[37]

In contrast, New York seems to have broadened the ambit of the shareholder's rights. Under the former Stock Corporation Law,[38] the shareholder was afforded protection where the assets sold were an "integral part thereof essential to the conduct of the business of the corporation."[39] For example, a sale of part of the assets and franchise, no matter how small, was considered to be the sale of an integral part of the corporate business even if the sale did not destroy the ability of the corporation to continue operations.[40] Also,

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[34] See 2 FLETCHER § 546 (1954).

[35] 338 Ill. App. 48, 86 N.E.2d 887 (1949).

[36] ILL. REV. STAT. ch. 32, § 157.73 (1954) (appraisal statute).

[37] For cases reaching the same conclusion, see Fisk v. Toys & Novelties Publishing Co., 259 Ill. App. 368 (1930); Prince George's Country Club v. Edward R. Carr, Inc., 235 Md. 591, 202 A.2d 354 (1964). *Cf.* Philadelphia Nat'l Bank v. B. S. F. Co., 199 A.2d 557 (Del. Ch.), *rev'd on other grounds,* 204 A.2d 746 (Del. 1964). *But see* Krell v. Krell Piano Co., 23 Ohio N.P. (N.S.) 193, *aff'd,* 14 Ohio App. 74 (1921). For cases concluding the sale was less than substantially all, see Klopot v. Northrup, 131 Conn. 14, 37 A.2d 700 (1944); Frankel v. Tremont Norman Motors Corp., 21 Misc. 2d 20, 193 N.Y.S.2d 722 (Sup. Ct. 1959), *aff'd,* 10 App. Div. 2d 680, 197 N.Y.S.2d 576 (1960), *aff'd,* 8 N.Y.2d 901, 168 N.E.2d 823, 204 N.Y.S.2d 146 (1960); Fontaine v. Brown Country Motors Co., 251 Wis. 433, 29 N.W.2d 744 (1937).

[38] N.Y. STOCK CORP. LAW § 20.

[39] *Ibid.* See Petitions of McKay, 19 App. Div. 2d 815, 243 N.Y.S.2d 591 (1963) (sale of assets accounting for seven percent of gross revenues held to be within § 20); In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953) (sale of one-fourth assets held to be within § 20).

[40] See In the Matter of Timmis, 200 N.Y. 177, 93 N.E. 522 (1910);

if the disposition affected the shareholder's investment, protection was granted regardless of the size of the sale.[41] The new Business Corporation Law has replaced the integral concept and relies solely on the words "all or substantially all."[42] This change would appear to drastically limit the protection formerly bestowed the shareholder, though some commentators think not.[43]

The use of broad consent statutes, similar to the Stock Corporation Law, affords the shareholder more protection because such statutes do not limit protection to an implied quantity such as substantially all. But there are certain inherent practical disadvantages to the use of a broad consent statute. The board of directors are often unable to predict when or when not to call for a shareholder vote.[44] Because of the diffusion of shareholders throughout the country and the necessity for fast transfers, a shareholder vote cannot always be called to remedy the uncertainty. Until a judicial determination is made, neither the directors nor the purchaser know if the sale is a valid transaction. To avoid this predicament, it is suggested that a single standard, as implied in *Stiles,* be adopted. Because it would be easy to determine if a sale prevents the corporation from carrying out its business,[45] the directors would be able to predict the need for a shareholder vote; shareholder litigation, caused by uncertainty as to how far courts will go, would be reduced;[46] and the purchaser would be protected from having the

Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928). It is questionable whether a sale including franchise affects the corporation's operations any more than a sale without the franchise. See Manning, *supra* note 12.

[41] See In the Matter of Kunin, 281 App. Div. 635, 121 N.Y.S.2d 220 (1953) (distribution to shareholders of stock of buying corporation); Borea v. Locust Court Apartments, 234 App. Div. 450, 255 N.Y. Supp. 215 (1932); In the Matter of Drosnes, 187 App. Div. 425, 175 N.Y. Supp. 628 (1919).

[42] N.Y. BUS. CORP. LAW § 909(a).

[43] Comment, 11 BUF. L. REV. 615, 649 (1962).

[44] Manning, *supra* note 12, at 255 n.55.

[45] If the corporation is multipurpose and the sale involves one segment of the multipurpose, some confusion may arise as to the rights of shareholders under N.C. GEN. STAT. § 55-112(b)(3) (1965), which refers only to "*the* business in which the corporation was organized to engage . . . ." (Emphasis added.) See ROBINSON, NORTH CAROLINA CORPORATION LAW AND PRACTICE § 199 (1964). Under most statutes, the problem of the multipurpose corporation would be covered because they refer to the "*usual*" business of the corporation. See, *e.g.*, N.Y. BUS. CORP. LAW § 909(a).

[46] It is interesting to note that most litigation in the area of consent rights has arisen under the N.Y. STOCK CORP. LAW § 20 (1954), which is a very broad statute.

sale declared invalid. The adoption of such an arbitrary limitation on consent rights may seem to sacrifice the shareholder's interests for the goals of uniformity and predictability, but it is suggested that the shareholder sacrifices his interests when he delegates to the directors the duty to carry out the corporate purposes.[47] Any decision to sell assets that does not destroy the ability of the directors to carry on the corporate business should necessarily be within the business discretion of the directors, absent fraud,[48] and such a decision should not be subject to approval because the shareholder dislikes it or suffers by it.

If a sale of all or substantially all the assets is made without the required consent, the shareholder may bring an action to rescind[49] or enjoin[50] the sale, or his sole remedy may be appraisal, depending on the law of his jurisdiction.[51] Because the consent statutes are for the benefit of the shareholder,[52] only he has the right to attack the sale made without consent.[53] If the sale is attacked, it is considered voidable rather than void;[54] therefore, subsequent approval can rectify the situation. Furthermore, the shareholder's attack may be barred by the defense of estoppel[55] and laches.[56]

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[47] See 5 FLETCHER § 2097 (1952).

[48] See, *e.g.*, Robinson v. Pittsburgh Oil Ref. Corp., 14 Del. Ch. 193, 126 Atl. 46 (1924). See generally Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

[49] See Kaszubowski v. Buffalo Tel. Corp., 131 Misc. 563, 227 N.Y. Supp. 435 (Sup. Ct. 1928).

[50] See Starrett Corp. v. Fifth Ave. & Twenty-Ninth St. Corp., 1 F. Supp. 868 (S.D.N.Y. 1932).

[51] See note 12 *supra*.

[52] See, *e.g.*, Foss v. Riordan, 84 N.Y.S.2d 224 (Sup. Ct. 1947), *aff'd*, 273 App. Div. 982, 79 N.Y.S.2d 515 (1948).

[53] See, *e.g.*, *ibid.* Those who may not assert the invalidity of a sale because of the failure of consent are: (1) Creditors of the corporation. See, *e.g.*, Long Constr. Co. v. Empire Drive-In Theatres, Inc., 208 Cal. App. 2d 726, 25 Cal. Rptr. 509 (1962); *but see In re* James, Inc., 30 F.2d 555 (2d Cir. 1929) (trust receipts covering automobiles). (2) Receivers in insolvency for the corporation. See, *e.g.*, Manhattan Hardware Co. v. Phalen, 128 Pa. 110, 18 Atl. 428 (1889); *but see* Glover v. Ehrlich, 62 Misc. 245, 114 N.Y. Supp. 992 (Sup. Ct. 1909). (3) Trustee in bankruptcy or assignee of creditors of the corporation. See, *e.g.*, United States v. Jones, 229 F.2d 84 (10th Cir. 1955); *but see* Shapiro v. People's Co-Op. Soc., 125 Misc. 839, 211 N.Y. Supp. 468 (App. Div. 1929). (4) The corporation. See, *e.g.*, Schreiber v. Butte Copper & Zinc Co., 98 F. Supp. 106 (S.D.N.Y. 1951); *but see In re* Paul De Laney Co., 26 F.2d 961 (2d Cir. 1928) (recognized the possibility).

[54] See, *e.g.*, Long Constr. Co. v. Empire Drive-In Theatres, Inc., 208 Cal. App. 2d 726, 25 Cal. Rptr. 509 (1962); Schneider v. Greater M. & S. Circuit, Inc., 144 Misc. 534, 259 N.Y. Supp. 319 (Sup. Ct. 1932).

[55] Armstrong Manors v. Burris, 193 Cal. App. 2d 447, 14 Cal. Rptr.

Fortunately, litigation involving failure to obtain the necessary consent is rare. As a matter of policy, many corporations ask for shareholder approval when an important disposition is made, regardless of whether consent is required. Obviously, this policy is desirable, and the fact that consent is granted does not affect a subsequent claim for appraisal rights. Unfortunately, shareholder approval is not always possible. In such situations, the directors should have the power to make necessary dispositions, unless the sale, not in the furtherance of the actual business of the corporation, destroys the corporation's ability to continue its present operations. Such an approach reaches the desired practical balance between protecting the shareholder's investment and having an efficient centralized management.

RICHARD G. ELLIOTT, JR.

Credit Transactions—Mortgages and Deeds of Trust—Application of Statute of Limitations to Promise of Assuming Grantee

Debtors gave notes secured by deeds of trust on certain realty. Seven years thereafter, during which period no payments of either principal or interest had been made on the obligations, the equity of redemption in the land was conveyed to grantee who thereupon executed an instrument acknowledging that the land was encumbered by the deeds of trust, that no payments had been made to date, and further that he agreed "to pay the full sum of both notes . . . together with all accrued interest thereon."[1] This instrument was attached to the notes and deeds of trust found among the valuable papers of the creditor after his death. Five years after the conveyance to the grantee, there still having been no payments on the obligations, the defendant trustee attempted to exercise the power of sale contained in the first of the deeds of trust, and this action was instituted by debtors and their grantee to restrain such foreclosure. The North Carolina Supreme Court, in *Lowe v. Jackson*,[2] affirmed the trial court's judgment granting the injunction. The grantee's

338 (1961); Garvin v. Pythian Mut. Industrial Ass'n, 263 S.W.2d 114 (Ky. 1953) (lapse of fourteen years).

[56] Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 200 Cal. App. 2d 322, 19 Cal. Rptr. 208 (1962); Elster v. American Airlines, Inc., 36 Del. Ch. 213, 128 A.2d 801 (1957).

[1] Lowe v. Jackson, 263 N.C. 634, 635, 140 S.E.2d 1, 2 (1965).

[2] 263 N.C. 634, 140 S.E.2d 1 (1965).