court puts all sleight-of-hand performers to shame in deducing in the *Griffith* case that "By the same token, when it loaned its financial credit, it made itself indebted to the seller."[48] The public is not allowed to learn the magic by which a municipality purchasing on time payments is first transformed into a creditor only to then be reclassed a debtor. Yet on the strength of this deduction, the court concluded "that if the bonds in this case are issued as contemplated, the state not only lends its credit by the contribution of its property *in esse* but becomes indirectly indebted on account of these bonds."[49] Here would seem to lie the weakest link in the chain of reasoning by which Ohio's high court invalidated the first effort made under the Building Authority Act. But that court's opinion and decision in the *Griffith* litigation gives evidence that on this very matter will come the greatest judicial resistance to further efforts to find a solution through the general technique contemplated in that legislation. J.M.H.

# CORPORATIONS

## Corporations — Sales of Assets — Presumption of Fair Value Favoring Demands of Dissenters

The early American corporation was a small enterprise with a simple financial structure and few stockholders, most of whom were actively engaged in the management of the business. In most jurisdictions, a majority of the stockholders of a solvent corporation were denied the power to transfer all of its property,[1] effect a consolidation or merger,[2] or bring about fundamental changes in the financial structure,[3] as against the dissent of a single stockholder.

These common law rules were inadequate to meet the changing needs of the modern corporate system. It became apparent that majority shareholders were too greatly restricted if sweeping changes in corporate structure were to be carried out with efficiency and dispatch; greater

[48] *Supra*, note 28, at 617, 22 N.E. (2d) at 206.
[49] *Ibid.*

[1] Butler v. New Keystone Copper Co., 10 Del. Ch. 371 (1915); Abbott v. American Hard Rubber Co., 33 Barb. Ch. 578 (N.Y. 1861); Kean v. Johnson, 9 N.J. Eq. 401 (1853), (often cited as a leading case denying to the majority the right to sell. The decision was perhaps influenced by the fact that the corporation involved was a railroad, and a quasi-public corporation); 3 Cook, Corporations (8th ed. 1923) sec. 670; 13 Fletcher, Cyc. Corp. (Perm. Ed.) sec. 5797. *Contra:* Treadwell v. Salisbury Mfg. Co., 73 Mass. 393, 66 Am. Dec. 490 (1856); see Warren, *Transfers of Corporate Undertakings* (1917) 30 Harv. L. Rev. 335..

[2] Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044, rehearing denied, 34 Ariz. 482, 272 Pac. 918 (1928); Colgate v. U. S. Leather Co., 75 N.J. Eq. 229, 72 Atl. 126, 19 Ann. Cases 1262 (1909).

[3] Kent v. The Quicksilver Mining Co., 78 N.Y. 159 (1879).

flexibility in corporate management was demanded. Furthermore, it was recognized that the minority should not be able to compel the continuation of the business of the corporation against the wishes of the majority.

In Ohio, the legislature has met this need and the majority has been given the power to sell[4] all of the corporation's assets and to make other fundamental changes.[5] In the event of such a sale, the dissenting stockholders have been given the right to receive the fair cash value of their shares, provided that they comply with the provisions set forth in Ohio G.C. sec. 8623-72, commonly called the appraisal statute.

In the case of *Voeller et al.* v. *The Neilston Warehouse Co. et al.*[6] the unnumbered seventh paragraph,[7] of the Ohio appraisal statute was declared unconstitutional. At a stockholders meeting called for the purpose, and done in conformity to Ohio G.C. sec. 8623-65, the requisite majority of the stockholders of the defendant corporation voted to approve a sale by the directors of a piece of real estate owned by the corporation and comprising substantially the only remaining asset of the corporation. The plaintiffs are minority stockholders who voted against the sale. Acting in compliance with Ohio G.C. sec. 8632-72 they demanded of the corporation the payment of the fair cash value of their shares, some shareholders placing such value at $100 per share, the par value of which was $100.

The defendant corporation failed to act in compliance with paragraph five Ohio G.C. sec. 8623-72. Instead, within ten days, the corporation, by its president, sent a letter to each of the claimants advising them that their damands for payment were unequivocally refused. About a month and a half later, the directors took official action toward dissolving the corporation, designated a local bank as liquidating agent, and turned over to it the cash and other assets.

No suit having been begun by either the corporation or the minority stockholders to have the fair cash value of the shares of such minority determined within a six-month period, as provided by the sixth paragraph of Ohio G.C. sec. 8623-72, the plaintiffs sued the corporation and the bank, asking for judgment in an amount equal to the sum

[4] Ohio G.C. sec. 8623-65.

[5] Ohio G.C. secs. 8623-14, 15, 15a, 67.

[6] 136 Ohio St. 427, 26 N.E. (2d) 442 decided March 27, 1940.

[7] "If such petition (referring to the petition, which may be made within six months after the vote was taken, to the court of common pleas to determine the fair cash value of the shares of the dissenters) is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

originally demanded[8] as the fair cash value. The corporation challenged the constitutionality of Ohio G.C. sec. 8623-72, paragraph seven, as it was sought to be invoked, on the ground that it deprived the majority stockholders of their property without due process of law.[9] The trial court declared paragraph seven, Ohio G.C. sec. 8623-72, to be unconstitutional. This judgment was reversed by the Court of Appeals, one judge dissenting, and the Ohio Supreme Court, two judges dissenting,[10] reversed the Court of Appeals and affirmed the judgment of the trial court.

The Supreme Court, in its majority opinion, takes the position that the consenting shareholders had no notice of the demands of the dissenters and even if they had had notice, they had no opportunity to be heard, and consequently there was a denial of due process of law.

As to the definition of due process of law there is no dispute in this case. "Due process of law involves only the essential rights of notice and hearing, or opportunity to be heard before a competent tribunal."[11] Furthermore, both the trial court and the Supreme Court take the position that by the operation of the statute there results no denial of due process to the corporation but that there is a denial of due process only as to the majority shareholders, as individuals.

It is true that the statute nowhere requires notice of the demands of dissenters to be given to the consenting shareholders. But is notice to them necessary? The privilege of incorporation is a privilege granted by the state acting through the legislature,[12] and the laws of the state, constitutional or statutory, enter into and become a part of the articles of incorporation.[13] Of these laws the stockholder is charged with notice when he becomes a stockholder, and under the reserved power of the state[14] he is bound by the pertinent statutes passed after he becomes a stockholder. Since corporations are allowed to function only with the consent of the state and in accordance with the requirements imposed by the state, may it not be said that all stockholders have consented in advance, in matters of appraisal, to the procedure set up in the statute for this purpose—that the stockholders have really appointed the corporation to act for them as in other ordinary business matters? If the

[8] Ohio G.C. sec. 8623-72, paragraph 7.

[9] Upon a distribution of the assets of the corporation after dissolution, the majority shareholders will receive a less amount per share, if the plaintiffs are paid the $100 per share which they have demanded, than if the plaintiffs are required to share pro rata with the majority in the assets distributed.

[10] One of the dissenting judges concurred in the syllabus but dissented from the judgment.

[11] Luff. v. State, 117 Ohio St. 102, 113, 157 N.E. 388 (1927).

[12] Ashley v. Ryan, 49 Ohio St. 504, 527, 31 N.E. 721 (1892).

[13] Wegener v. Wegener, 101 Ohio St. 22, 126 N.E. 892 (1920).

[14] Ohio Constitution, Art. III,sec. 2.

assets of a corporation are impaired as a result of unwise management in the day to day business affairs of the corporation, would anyone be heard to assert that such loss was without due process of law to the majority shareholders?

There are practical difficulties arising out of the Supreme Court's interpretation. What if the corporation had informed the dissenters, in the instant case, that it would pay the amount demanded? Would the court have held that such agreement would not be binding upon the corporation and the majority stockholders, and that the latter could prevent the payment of that amount because they, as individual shareholders, had been given no actual notice of the demand and agreement. Surely, notice to the consenting stockholders would be no more necessary in the case where the corporation refuses to pay the amount demanded than where it agrees to pay it.

Or suppose that the corporation, refusing to pay the amount demanded, had, itself, made an offer of "an amount," as it had a right to do. The statute[15] would create a conclusive presumption in favor of the amount offered by the corporation, if neither the corporation nor the dissenters petitioned the court within six months to have the fair cash value determined. Under such facts would the court say that due process required the dissenters to notify the consenting shareholders of the amount offered by the corporation? Consistency would seem to require notice in one case as much as in the other.

It was the contention of defendants that while the board of directors represent the shareholders in corporate matters they are not representatives of the shareholders as respects the latters' individual rights—that in this case the defendant is a corporation in dissolution with nothing remaining to be done but distribute the assets to the shareholders, hence they, and only they, as individuals, are interested in the method of distribution. On the contrary, at the stockholders meeting called for the purpose of voting on the proposed sale, it does not appear that any action was taken on the matter of distribution of the assets, and it was not until about a month and a half after the date of this meeting that the directors authorized dissolution of the corporation.

The dissent of minority stockholders gives rise under the statute[16] to a controversy only between the corporation and the dissenting stockholders, and hence, the controversy in this case is not between two classes of stockholders nor between two groups of stockholders of the same class. The provision of sections 8623-65 and 8623-72 prescribe and control the rights and remedies of both the corporation and those

[15] OHIO G.C. 8623-72, paragraph seven, set out in note 7, *supra*.
[16] OHIO G.C. 8623-72.

who oppose action of the kind under consideration, and file written demands for payment of the fair cash value of their shares. Thus the question involved is one between the corporation and those who became claimants by filing written demands.

The Supreme Court points out that the controlling statute does not expressly provide for action on the part of the majority and the court declares that no real detriment occurred to the majority until the expiration of the six-month period when the conclusive presumption became absolute and thus concludes that the majority had no cause of action until after the six-month period, when it would be too late. A shareholder may be given opportunity to be heard without showing a presently existing injury if he can show threatened irreparable injury.[17] Any individual majority shareholder, upon demand of and refusal by the corporation to bring such suit, had a right at any time during the six-month period to bring a representative suit to determine the fair cash value of the shares.[18]

While parties are entitled to have their day in court they are not to be compelled to come into court and it is only necessary that they have a "fair opportunity" to avail themselves of judicial process. Moreover, this same majority had another "fair opportunity." It had the right under the controlling statute[19] to revoke the authority given to the board of directors to sell the property in question.

Furthermore, the dissenters take the position that even if the court should find that paragraph seven does have an unconstitutional operation as respects the majority stockholders, it should find also that the majority are estopped to question the constitutionality of that part of the statute because of the principle of law that a party who invokes the provision of a statute for his own purpose, and obtains relief under that statute to the disadvantage of another party, will not thereafter be heard to complain of the validity of the statute which he has invoked.[20] The Ohio Supreme Court has already adopted this principle in *New York*

[17] Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401 (1856). This is a leading case which arose in Ohio. The directors of an Ohio bank, the charter of which stipulated the amount of tax it should pay in lieu of all taxes, refused to question the validity of a statute increasing the rate of taxation. The directors of the bank believed that the new tax was unconstitutional but objected to resisting the tax by litigation. The tax collector had collected the tax for one year and was preparing to collect it for another year when Dodge, a stockholder, sought an injunction permanently restraining the collection of the tax. The Supreme Court sustained the stockholder's bill, which alleged that the tax was so onerous on the bank that it would finally compel a suspension of its business.

[18] Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401 (1856); Zinn v. Baxter, 65 Ohio Sa. 341, 62 N.E. 327 (1901); 13 FLETCHER, CYC. CORP. (PERM. ED.) sec. 5939 *et seq*; 10 OHIO JURISPRUDENCE sec. 244 *et seq*.

[19] OHIO G.C. 8623-72, paragraph 19.

[20] Pierce Oil Co. v. Phoenix Refining Co., 259 U.S. 125, 66 L. Ed. 855 (1922); Hirsh v. Block, 267 Fed. 614 (1920).

*Central R. R. Company* v. *City of Bucyrus*.[21] Applying the rule of that decision to the instant case should we say that the corporation and the majority stockholders, having invoked the provisions of Ohio G.C. sec. 8623-65, will not be permitted to claim the unconstitutionality of any part of Ohio G.C. sec. 8623-72, because the latter section is made a part of the former one? The court answers this by saying that the one section is not made a part of the other, that they are separate and distinct and cover different subjects, Ohio G.C. sec. 8623-65 authorizing the corporation to sell its assets upon a favorable vote of the stockholders, and Ohio G.C. sec 8623-72 dealing with the rights of dissenting stockholders after the vote.

This view of the court seems to ignore the intent of the legislature as evidenced by the language of the statute, and the obvious purpose of protecting minority stockholders. The last paragraph of Ohio. G.C. sec. 8623-65 states, "Dissenting shareholders, whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided." A sale of substantially all of the assets of an Ohio corporation may be had only by compliance with this section, and when they authorized the sale the majority impliedly agreed to provide for dissenters. To what relief are the dissenters entitled? Why, to that "hereinafter provided," and the only relief hereinafter provided is that provided in Ohio G.C. sec. 8623-72, which is entitled, "Dissenting Shareholders." J.M.B.

## Corporations — Vested Rights in Accrued Cumulative Dividends — Power of Cancellation Under New Amendment to Statutes

By the articles of incorporation of the defendant corporation, organized in 1923, certain shares of preferred stock were issued with 7% cumlative dividends. In 1935, the articles were amended to provide for an exchange of the first issue carrying 7%, for the new issue of 5%, with a 2½% dividend on the new stock payable immediately, and also for the issue of one share of new common, admittedly worth about $6.00, in cancellation of all accrued and unpaid dividends on the old preferred, which amounted to $24.50. The plaintiff, a holder of the original preferred, refused to exchange his old stock for the new issue and sued to enjoin the payment of dividends on the common stock until the unpaid cumulated but undeclared dividends, which had ac-

[21] 126 Ohio St. 558, 186 N.E. 450 (1933). In this case the court, having declared the statute involved to be unconstitutional, nevertheless declared that a party claiming constitutional invalidity while having received and still holding the fruits of an agreement made under the statute is estopped from questioning its unconstitutionality.