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The Sale-of-Control Premium: The Definition

David Cowan Bayne, S.J.*

I. INTRODUCTION

If everything about the philosophy of corporate control could be said at once, the analysis of the sale-of-control premium would have appeared long since.¹ The pressing immediacy of the problem is intensified with each succeeding year. Recent litigation in county, state and federal courts has proved no exception to the trend, to say nothing of numerous newspaper reports. Norton Simon in the vanguard of his corporate minions raised the premium question in Wheeling Steel's² attempted takeover of Crucible. The Circuit Court of Cook County questioned the premium passing from Simon, Hunt Foods, and Wheeling to the outgoing Crucible controleur in the late 1967 case of *Rubin v. Norton Simon*.³

On the state level, in *Fenestra Incorporated v. Gulf American Land Corporation*, the Supreme Court of Michigan in the spring of 1966 left little doubt that the premium question was far from answered:

Gulf [Gulf American Corporation] says, first of all, that there was nothing unlawful in the means by which it obtained Fenestra's shares. Gulf concedes the obvious, that is, that it paid a price per share greater than the market value of Fenestra but

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1. This study of the control premium is substantially dependent on the custodial concept of corporate control first presented in Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22 (1963) and developed in a series of five later articles and a book review: Bayne, *The Sale-of-Control Quandary*, 51 CORNELL L.Q. 49 (1965); Bayne, *The Sale of Corporate Control*, 33 FORDHAM L. REV. 583 (1965); Bayne, *Corporate Control as a Strict Trustee*, 53 GEO. L.J. 543 (1965); Bayne, *The Definition of Corporate Control*, 9 ST. LOUIS U.L.J. 445 (1965); Bayne, *A Legitimate Transfer of Control: The Weyenberg Shoe—Florsheim Case Study*, 18 STAN. L. REV. 438 (1966); Bayne, Book Review, *The Silent Partners*, 35 FORDHAM L. REV. 398 (1966).

The present article is itself the first of a new series analyzing the sale-of-control premium from the strictly *legal* (in contradistinction to the *factual*) aspect. This series will continue with (1) Bayne, *The Sale-of-Control Premium: The Intrinsic Illegitimacy*, 47 TEX. L. REV. — (1969), (2) *The Culpability of the Parties*, (3) *The Sale-of-Control Premium: The Disposition*, (4) *Damages in the Sale of Control* (5) *The Role of the Premium-Bribe: The Presumption of Unsuitability*.

2. It is no longer a Simon minion, however. *The Wall Street Journal*, Nov. 2, 1967, at 4, col. 4.

3. *Rubin v. Norton Simon*, Circuit Court of Cook County, Illinois, County Department Chancery Division, No. 66CH1649 (Nov. 1, 1967).

says that there is no law which prevents a purchaser from paying a premium in connection with the purchase of shares.⁴

A New York federal court, in *Laurenzano v. Einbender*,⁵ faced a simple variant of the complex problem in the redemption of the outgoing controleur's stock at an appreciable premium. This was in late 1966. From late 1967 to September, 1968 the press reported intriguing proposals and arrangements that smacked of the same. Mr. A. King McCord, Chairman of Westinghouse Air Brake, became publicly indignant at Mr. Thomas Mellon Evans, Chairman of Crane Company, for "inappropriate" financial inducements, including stock options" toward Crane's assumption of control of Wabco. "I was shocked" at this offer," he says.⁶ In the Shearson, Hammill-E.M. Warburg control takeover of Silvray-Litecraft, top Silvray executives "Messrs. Gilbert and Gordon received \$137,000 each to resign their posts."⁷ In a suspiciously similar gambit, the incumbent controleur of Schenley, Lewis S. Rosenstiel has been accused of accepting a substantial premium and acceding to the sale of control of Schenley to Glen Alden "in his own self interest, and to the detriment of other shareholders, by negotiating a sale of his own holdings in Schenley to Glen Alden at a price 'substantially above' that offered the other shareholders."⁸ Equally questionable is the seven dollar premium—39 per cent over market—Cyrus Eaton exacted from American Export Industries as he handed over two board positions and ostensible control of Detroit Steel.⁹

These examples are by no means prototypes, but simply the latest in a long series. Over the years the amount of the premium may have varied, but the issues have been the same. In 1856 the amount involved in *Sugden v. Crossland*¹⁰ was a trivial £75, but it was nonetheless a premium for the sale of control. In the 1899 New York case of *McClure v. Law*, William R. Law succeeded in purchasing "the absolute control and management of the Life Union Association in consideration of the

4. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 141 N.W.2d 36, 45 (1966). This was the same Gulf American so strongly chastised by the Florida Land Sales Board. *The Wall Street Journal*, Oct. 16, 1967 at 2, col. 5.

5. *Laurenzano v. Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

6. *The Wall Street Journal*, May 16, 1968, at 1, col. 6. See also *The Wall Street Journal*, Aug. 28, 1968, at 1; Feb. 21, 1968, at 11, cols. 2 and 3; Dec. 19, 1967, at 6, col. 1.

7. *The Wall Street Journal*, Nov. 2, 1967, at 4, col. 4.

8. *The Wall Street Journal*, Mar. 26, 1968, at 6, cols. 2 and 3.

9. *The Wall Street Journal*, Mar. 27, 1968, at 4, col. 2.

10. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

sum of \$15,000."¹¹ In the 1914 Pennsylvania case of *Porter v. Healy*,¹² the directors "sold . . . control as their individual estate" and received an \$86,830 "bonus" for it.¹³ In the two *Reynolds Metals*¹⁴ cases, 20 years apart, the premiums were \$1.3 million and \$40 million respectively. And so it has gone through the years, with *Perlman v. Feldmann* in 1955 (\$2.1 million),¹⁵ *Green Giant* in 1961 (\$2 million),¹⁶ *Essex Universal* in 1962 (\$2 million),¹⁷ the New York *Lionel* litigation of mid-1964 (\$135,000)¹⁸ and *Ferraioli v. Cantor* in 1967 (\$2.2 million).¹⁹

The importance of the premium is incalculable. From a strictly extrinsic standpoint, the premium has occasioned most modern control litigation. Here, after all, is where the money lies. The tangible and estimable harm to the corporation has surfaced in the form of the premium and afforded the requisite opportunity to bring the malefactors to justice. Intrinsically, the premium analysis is the end of the philosophical line. It poses, and answers, a myriad of questions, thereby illustrating and substantiating the basic control principles, particularly the custodial concept of corporate control. The premium, its inner nature, its legitimacy or illegitimacy, disposition and role, constitute the superstructure of the control edifice. The court's award of £75 in *Sugden*,²⁰ or \$135,000 in *Gabriel-Lionel*²¹ 108 years later, is the practical implementation of a philosophical theory. To indulge in metaphor, the premium piece is the last in the control puzzle. In this sense, perhaps, the premium is of great intrinsic importance. If the last piece of the puzzle does not fit, something is essentially wrong.

11. *McClure v. Law*, 161 N.Y. 78, 79, 55 N.E. 388, 389 (1899).

12. *Porter v. Healy*, 244 Pa. 427, 91 A. 428 (1914).

13. *Id.* at 433, 91 A. at 430.

14. *Manacher v. Reynolds*, 39 Del. Ch. 401, 165 A.2d 741 (1960); *Gerdes v. Reynolds*, 28 N.Y.S.2d 622 (Sup. Ct. 1941).

15. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955).

16. *Honigman v. Green Giant Co.*, 309 F.2d 667 (8th Cir. 1962).

17. *Essex Universal v. Yates*, 305 F.2d 572 (2d Cir. 1962).

18. *Matter of Lionel Corp.*, 151 N.Y.L.J. No. 24, at 14, col. 3 (Feb. 4, 1964), *aff'd sub nom.*, *Caplan v. Lionel Corp.*, 20 App. Div. 2d 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964). [hereinafter cited as *Matter of Lionel Corp.*] *Gabriel Indus., Inc. v. Defiance Indus., Inc.*, (Sup. Ct. N.Y. County) in 151 N.Y.L.J. No. 119, at 13, col. 8 (June 17, 1964) (Serafite, J.), *aff'd mem.*, 23 App. Div. 2d 630, 260 N.Y.S.2d 180 (1st Dep't 1965), *modified*, 22 N.Y.2d 405, 293 N.Y.S.2d 65 (1968).

19. 281 F. Supp. 354 (S.D.N.Y. 1968).

20. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

21. *Gabriel Indus., Inc. v. Defiance Indus., Inc.*, (Sup. Ct. N.Y. County), in 151 N.Y.L.J. No. 119, at 13, col. 8 (June 17, 1964), (Serafite, J.), *aff'd mem.*, 23 App. Div. 2d 630, 260 N.Y.S.2d 180 (1st Dep't 1965).

II. THE SCOPE OF THE DEFINITION

A. PREMIUMS AND PREMIUMS

Among the many sources of confusion has been the existence of a plethora of "premiums." The Michigan Supreme Court agreed "that there is no law which prevents a purchaser from paying a premium in connection with the purchase of shares."²² Was this the same premium that the New York court had in mind in *Gabriel-Lionel* when it held that "Defiance, who controlled the management of Lionel, when it illegally sold such control, must account to Lionel in this action for the illegal profit?"²³ Was it the same "premium price . . . paid for the . . . transfer of . . . control that was the all important emolument of the transaction" according to the same New York court in *Caplan-Lionel*?²⁴ In *Matter of Carter*, what was meant by: "[T]here was no premium paid for control?"²⁵ What was the nature of the premium condoned by the court in *Manacher v. Reynolds* when it stated, "No other factor being present, they may demand a reasonable premium for the use of their key?"²⁶ In *Essex Universal*, Chief Judge Lumbard said for the court, "There is no question of the right of a controlling shareholder under New York law normally to derive a premium from the sale of a controlling block of stock."²⁷ In his concurring opinion Judge Friendly was not so sure of the legality of the premium. He stated:

This seems to me a wrong to the corporation and the other stockholders [the transfer of control with less than 50 per cent stock ownership] which the law ought not countenance, whether the selling stockholder has received a premium or not.²⁸

Did the concurring judges have the same premiums in mind as the majority? The *Porter v. Healy* court called the premium a "bonus" . . . paid . . . for this control."²⁹

The point seems clear. A precise legal definition is long

22. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 587, 141 N.W.2d 36, 45 (1966).

23. *Gabriel Indus., Inc. v. Defiance Indus., Inc.*, (Sup. Ct. N.Y. County) in 151 N.Y.L.J. No. 119, at 13, col. 8 (June 17, 1964) (Serafite, J.), *aff'd mem.*, 23 App. Div. 2d 630, 260 N.Y.S.2d 180 (1st Dep't 1965).

24. *Matter of Lionel Corp.* at 14, col. 5.

25. *Matter of Carter* (Sup. Ct. N.Y. County), in 151 N.Y.L.J. No. 103, at 17, col. 1 (May 26, 1964), *aff'd*, 21 App. Div. 2d 543, 251 N.Y.S. 2d 378 (1st Dep't 1964).

26. 39 Del. Ch. 401, 423, 165 A.2d 741, 754 (1960).

27. 305 F.2d 572, 576 (2d Cir. 1962).

28. *Id.* at 581.

29. *Porter v. Healy*, 244 Pa. 427, 91 A. 428 (1914).

overdue. Yet it is equally clear that all these could not have been the same "premium." Some selection must be made, but on what grounds and for what reasons? Grant, *ex arguendo*, that there are many validly definable "premiums." Are all worthy of the same intensive analysis? Reflection will reveal that one premium stands out, and it alone necessitates an intensive analysis.

The definition must represent a *legal* analysis of a discernible premium, accepted by a consensus, and discussion must not degenerate into a *factual* quibble over its presence or absence. Grant the factual presence of a premium; what exactly are its constituent elements? Leave the factual vagaries, as collaterally important as they are, for another time.³⁰ This inhibition may be especially annoying to those who have so long desired to unfold the complications of the more involved instances of spurious premiums (to begin at the end instead of the beginning, as it were). Here, however, patience is essential. The very cause for so much chaos has been the refusal to learn first the abc's of the true premium before attempting to explore all the confusing limitations.

B. THE WORKING DEFINITION

Remarkably, these somewhat demanding strictures can be met. Courts and commentators over the years from *Sugden*³¹ to *Laurenzano*³² have ascribed, more often than first meets the mind, one meaning to the term "premium." This meaning relates to the controleur's fiduciary duty and is consequently most fundamental and important.

At the turn of the century, the New York Court of Appeals, quoting the Appellate Division, penetrated to the core, and presented a starting definition of the technical "premium" in the sale of control:

The question is, therefore, presented, whether . . . [William H. Law] is bound to account for the money received from Levy for the transfer to him and his associates of the management and control of the Life Union *The learned Appellate Division has treated this transaction as a bribe paid to the directors of the Life Union by Levy*³³

30. A second series concerning the premium will endeavor to apply the legal analyses to the factual complexities in: *The Sale-of-Control Premium: The Fact Question*.

31. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

32. *Laurenzano v. Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

33. *McClure v. Law*, 161 N.Y. 78, 80, 55 N.E. 388, 389 (1899) (emphasis added).

The Appellate Division was correct. The premium in the sale of control is nothing other than a bald bribe, some special consideration calculated to influence the incumbent in his appointment of a new man to the office of corporate control. Broadly, the premium is an inducement paid to the controleur to breach his fiduciary duty in the specific area of the selection of his successor.

C. A TERM OF ART

Consistent with this tentative definition, therefore (but certainly contingent on later elaboration), and pursuant to an undeniable need for a technical control lexicon, the term "premium-bribe" is submitted as referable to the concept of a bribe paid for the sale of control.³⁴ Let this usage be sacrosanct. Designate all other non-bribe emolument or consideration by other terms—bonus, investment value, deferred compensation, gift, convenience cost, whatever—but confine "premium-bribe" to nothing other than a bribe.

D. *Reductio ad Absurdum*

The ancient logical device of the *reductio ad absurdum* was not so very absurd. The fallible human mind can discern a delicate nuance and subtle ethical principle when the true-to-life fact situation embodying them is reduced to the utter simplicity of a primitive drama. To the contrary, if the fragile intellect is forced first to extricate the essentials from a bewildering maze of interlocking boards, syndicate controleurs, fluctuating market values, working-control stock blocks, and the like, little energy remains to evaluate the legal issues behind the complexities.

The turn-of-the-century case of *McClure v. Law*³⁵ is just such an apposite *reductio*. No one can dispute the *McClure* facts. Contrary to the sale-of-control premium so often before the courts or commentators in the past, the premium there stands large and clear, and apt for definition. Just what it was that was objectionable in *Perlman v. Feldmann*,³⁶ *Green Giant*,³⁷

34. There is something gross about the term "bribe," but the English language offers no appropriate euphemistic substitute. Try as one might, no circumlocution can hide the fact that consideration paid for the appointment is a bribe. At first, the term "premium" was thought to be adequate, but it proved to be both too bland and insufficiently pejorative. Besides it is dilute with many another meaning. "Premium-bribe" seemed a suitable compromise.

35. 161 N.Y. 78, 55 N.E. 388 (1899).

36. 219 F.2d 173 (2d Cir. 1955).

37. *Honigman v. Green Giant Co.*, 309 F.2d 667 (8th Cir. 1962).

or *Essex Universal*³⁸ might be difficult at first to discern, but in *McClure* no one should have any doubts.

The Life Union Association was a New York mutual life insurance company. As with all such cooperative or assessment-plan companies, each member was at once an insurer and an insured. No stockholders exist, only members. No set premiums are levied. Assessments are later laid to indemnify a member's loss. In the late 1800's during the presidency of William H. Law "the members of the company had every reason to believe . . . that its affairs were in a flourishing condition."³⁹ This flourishing state of Life Union was impressive, and "it seems that one Mr. Louis P. Levy desired for his own purposes to procure the control of it and for that purpose he made a contract"⁴⁰ with Mr. William H. Law and the other board members "to the effect substantially that he would pay them the sum of \$15,000, in consideration [T]he result was that these trustees transferred to Levy the full control of the corporation whose interests they were bound to protect"⁴¹

The transfer was achieved by the then-novel seriatim resignation of the board.⁴² According to the plan, the Law men

would resign their offices as directors from time to time, as [Levy] might request, and would substitute in their places other persons, to be nominated by him, so that he and his creatures might have the entire control of the corporation.

As might be expected, shortly after this transaction was completed the affairs of the Life Union ceased to flourish, and within a few months it went into the hands of a receiver⁴³

As receiver, David McClure undertook to put together again as much of the Life Union Association as was possible. His first

38. *Essex Universal v. Yates*, 305 F.2d 572 (2d Cir. 1962).

39. *McClure v. Law*, 20 App. Div. 459, 461, 47 N.Y.S. 84, 85 (1897).

40. *Id.*

41. *Id.*

42. Interestingly, Congress recently passed legislation requiring full disclosure of corporate equity ownership in corporate takeover bids:

Any person who . . . after acquiring . . . any equity security of a class which is registered pursuant to section 12 of this title or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 10 per centum of such class shall . . . file with the Commission, a statement containing . . . the following information . . . (C) if the purpose of the purchases or prospective purchases is to acquire control of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its stock to or merge it with any other persons, or to make any other major change in its business or corporate structure

Act of July 29, 1968, Pub. L. No. 90-439, § 13(d)(1)(C), 82 Stat. 454.

43. *McClure v. Law*, 20 App. Div. 459, 461, 47 N.Y.S. 84, 85 (1897).

step was an action to recover from William H. Law, the former president and director of the Life Union, \$3,000 he had gained "out of his trust relationship with the company," and his share of the money flowing from Levy under the agreement by which Law "undertook to deliver . . . the absolute control and management of the Life Union Association"44

Receiver McClure met with success in the New York Supreme Court, but suffered an inexplicable reversal in the Appellate Division on the antiquated theory that the corporation could not recover under an ultra vires contract. The Court of Appeals, however, was not to be deceived by a logical conclusion from an illogical premise and not only ordered the \$3,000 over to Life Union, but adduced in support sound reasoning:

The question is . . . whether the defendant is bound to account for the money received from Levy for the transfer to him and his associates of the management and control of the Life Union, together with its property and effects. The learned Appellate Division has treated this transaction as a bribe paid to the directors of the Life Union by Levy, and reached the conclusion that the money did not belong to the corporation. We think, however, that the law does not permit the defendant to avail himself of his own crime as a defense to this action.⁴⁵

The Court of Appeals then proceeded to found its decision on *Sugden v. Crossland*⁴⁶ (which was on all fours) and to apply its trust reasoning without qualification:

As President and Director of the Life Union he was bound to account to that association for all moneys that came into his hands by virtue of his official acts, and he cannot be permitted to shield himself from such liability under the claim that his acts were illegal and unauthorized. As an officer he had the right to resign, but the money was not paid to him for his resignation. It was paid over upon condition that he procure Levy and his friends to be elected directors and given the control and management, together with the property and effects of the corporation. The election of directors and the transfer of the management and property of the corporation were official acts, and whatever money he received from such official acts were moneys derived by virtue of his office for which we think he should account.⁴⁷

The case could not have been simpler. Unencumbered by shareholders and a concomitant sale of control-bearing shares, *McClure* reduces the transaction to the absurdity of a sale of control of Life Union for a \$15,000 premium. Without the onerous, and sometimes impossible, chore of segregating the true in-

44. *McClure v. Law*, 161 N.Y. 78, 79, 55 N.E. 388 (1899).

45. *Id.* at 80, 81, 55 N.E. at 389.

46. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

47. *McClure v. Law*, 161 N.Y. 78, 81, 55 N.E. 388, 389 (1899).

vestment value of accompanying shares, the *McClure* premium stands stark, in the words of the Appellate Division, "as a bribe."⁴⁸

Just as the *Weyenberg-Florsheim* case study⁴⁹ illumined a legitimate transfer of control, *McClure* will supply the background for the ensuing definition of the illegitimate premium.

From these remarks, it can be seen that this article has a two-fold purpose: (1) to define the one central concept, the premium as a bribe, without the double disability of complex legal refinement and cloudy fact situations and thus (2) to supply a reliable and basic definition of the premium-bribe toward further study of its nature, role and disposition.

E. THE PREMIUM IN PERSPECTIVE

A major source of misconception has been the failure to lay bare the mechanics of the sale of control and the place of the premium-bribe. Never have they been seen for what they really are. To get the sale and the premium-bribe in proper focus, begin with two basic premises: (1) Every transfer of control, of whatever kind, is very simply the appointment of a new person to the office of controleur. For some reason the incumbent is leaving. He finds a willing successor. Control has been transferred. (2) Every transfer of control is not a sale of control, but every sale is a transfer. The "sale" is a limited species of the genus "transfer"—the sale is a transfer for a price. The sale, in effect, adds only one new element—the premium paid for the appointment. Never does a non-sale transfer directly involve money passing from appointee to controleur.

In view of these premises, "sale of control" should be re-

48. *Id.* This issue will receive further consideration in "The Investment Value in Control Stock," an article now in preparation by this author.

49. The *Weyenberg-Florsheim* case is a fascinating instance of a completely untainted transfer. Old Mr. Weyenberg, patriarch and founder of his shoe company, was ready to retire at age 82, but no Weyenberg heir was up to the job. A long search found a suitable successor in Thomas W. Florsheim of the famous Florsheim name. Far from exacting a premium-bribe, Weyenberg sold some of his shares to Florsheim at approximately market value and guaranteed control by a wide dispersal in a large-block secondary offering. Bayne, *A Legitimate Transfer of Control: The Weyenberg Shoe Florsheim Case Study*, 18 *STAN. L. REV.* 438 (1966), reprinted in *CORPORATE COUNSEL'S ANNUAL* 147-68 (H. Friedman, H. Schlagman, & M. Bender ed. 1966). The broad control hypothesis of ownership-control separation postulates the absolute duty in the incumbent to appoint his successor, given the need and the ability. The owner alone, of course, has the right to appoint the initial controleur. Unless the appropriator reassumes dominion and the role of the owner, successive appointments and selections are in the incumbent.

served exclusively for the illegitimate transfer involving a premium bribe and "transfer of control" for all non-bribe appointments. As additions to the control argot, "transfer" and "sale" should eliminate some loose terminology and loose concepts underneath.

Once one conceives control as "a valuable commodity," or as Judge Lumbard's "personalty"⁵⁰ or Berle's "corporate asset"⁵¹ rather than a relation of rights and duties, questions arise as to the ownership of the commodity, its value, and its salability. The result is a long line of inexact reasoning. So too, if the concept is the "sale of the office," rather than a bribe to induce appointment to the office. To the contrary, the office is never sold, always remains, is essential to the corporation, never leaves or changes, and is always occupied. What is sold is the occupancy, and the price paid for the occupancy is the premium-bribe.

F. THE KINDS OF TRANSFER

Fortunately for the corporate world the overwhelming majority of control changeovers are effected legitimately, and hence never elicit litigation. The recent release of General Motors by the DuPonts, and Mr. Weyenberg's appointment of Mr. Florsheim as controleur of Weyenberg Shoe are just such legitimate transfers. Far more fascinating, but equally legitimate, was the selection of little known Albenarle Paper Corporation as controleur of the vast GM-SONJ Ethyl Corporation.⁵² However, the necessary absence of a premium-bribe in a legitimate transfer circumscribes the problem areas and correspondingly limits its value as a vehicle for the study of corporate control. For present purposes the abuse of the power is more rewarding than its use.

Among illicit transfers the sale is pre-eminent; fraud, duress and blackmail are rare. It is also most prolific of problems which require the construction of a code for their solution. Although the culpable appointment of an inept son or an unsuitable associate is an illegitimate transfer, which is not a sale and does pose conflict-of-interest control questions, the resulting problems are not comparable to those created by the outright sale.

50. *Essex Universal Corp. v. Yates*, 305 F.2d 572, 575 (2d Cir. 1962).

51. Berle, "Control" in *Corporate Law*, 58 COLUM. L. REV. 1212 (1958).

52. Ethyl Corp. *Annual Report* 1965.

G. CONCOMITANT STOCK

The greatest deterrent to the definition of the premium, the construction of a control code, and the development of a philosophical consensus has been the intrusion of the fact problems raised by the legitimate sale of a block of stock, controlling or otherwise, concomitant to the sale of control. Undoubtedly, most confusion and consequent dispute would disappear if these two distinct and essentially unrelated acts—the sale of stock and the selection of a successor for a price—were studied and evaluated in completely separate treatises. This is exactly the prerequisite to the present analysis. Whether a premium was imbedded in the \$2 million over market moving from Essex Universal to Yates,⁵³ in the \$2.1 million received by C. Russell Feldmann from the Wilport Syndicate,⁵⁴ or in the \$7 million that passed in *Fenestra*⁵⁵ are all complicated *questions of fact*. Let judge or jury so determine the matter. In *Sugden*,⁵⁶ no such fact question clouded the legal issue. The £75 stood stark and alone with no stock involved. Similarly, in *McClure*,⁵⁷ no estimation of investment value distracted the court from the sole operative fact; Levy paid Law and friends \$15,000 for the control of Life Union. Since no stockholders, there was no stock; since no stock, there was no investment-value problem.

Clearly, therefore, the presence or absence of concomitant stock is legally irrelevant to the presence or absence of a premium-bribe. If a premium-bribe is in fact embedded in the price paid for the stock, the transfer is a sale of control, as apparently in *Lionel*,⁵⁸ *Feldmann*,⁵⁹ and *Essex Universal*.⁶⁰ If there is no premium-bribe, the transfer, with accompanying block of stock, is perfectly legitimate—apparently the case in *Fenestra*,⁶¹ *Weyenberg*,⁶² *GM-DuPont* and *Albemarle-Ethyl*.⁶³ Whether the block is controlling, as in *Albemarle-Ethyl*, or noncontrolling, as in

53. *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

54. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955).

55. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 141 N.W.2d 36 (1966).

56. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

57. *McClure v. Law*, 161 N.Y. 78, 55 N.E. 388 (1899).

58. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

59. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955).

60. *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

61. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 141 N.W.2d 36 (1966).

62. Bayne, *supra* note 49.

63. Ethyl Corp. *Annual Report* 1965.

Weyenberg or *GM-DuPont*, is also irrelevant as long as no premium-bribe prevails.

In summary, four possibilities exist: (1) a transfer of control with neither stock nor premium-bribe—conceivably, thus, in a transfer of AT & T; (2) a transfer of control with concomitant stock, but no premium-bribe—thus, *Weyenberg*; (3) a sale of control with both stock and premium-bribe—thus, allegedly, *Muscat-Sonnabend in Lionel*;⁶⁴ and (4) a sale of control, no stock but premium-bribe—as *Sugden*⁶⁵ and *McClure*.⁶⁶

H. THE PHILOSOPHICAL BACKGROUND

To place the premium-bribe in proper philosophical perspective, one must begin with the central philosophical event in the premium-bribe question—the selection of a successor-controleur. No transfer can be made, no sale of control consummated, no appointment to the office effected, and no premium-bribe paid or accepted, before a specific individual person has been chosen for the privilege and the burden of the office of controleur. Every applicant for the appointment, as much a Florsheim as a Levy, inescapably must present himself for approval. Whether the controleur seeks to sell or the aspirant buy, briber must meet bribed before a premium-bribe can pass. In this selection all the fiduciary obligations of an outgoing controleur coalesce.

I. THE FIDUCIARY DUTY IN THE SELECTION

However important his day-to-day and year-to-year decisions, none approaches the gravity of the controleur's last official act. True, every in-tenure selection of personnel affects the corporate well-being intimately, but the choice of a successor crystallizes completely the controleur's contribution to the corporate future. If he fails in the selection of a successor, the controleur fails in the end. Consequently, this last act should be subjected scrupulously to the fiduciary norms of the office.

The controleur has, by definition, total dominion of the entity. He is the ultimate authority in the policy-making hierarchy, and into his custody all the corporate assets have been entrusted. In acquiescing to this appropriation, the controleur has accepted an unqualified stewardship, with its attendant obligations. Here

64. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

65. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

66. *McClure v. Law*, 161 N.Y. 78, 55 N.E. 388 (1899).

is the ultimate manifestation of the custodial concept of corporate control.

At this point, a third subduty of the total set of obligations emerges: to secure the best possible personnel.⁶⁷ Clearly implicit in this third subduty is the five-fold norm of appointee suitability: (1) moral integrity, (2) intellectual competence, (3) managerial and organizational proficiency, (4) social acceptability, and (5) satisfactory age and health.⁶⁸ Thus, whatever else transpires in any transfer of control, and no less so in a sale, the central concern is the suitability of the successor. Since controleur as incumbent possesses the stewardship, and since successor as appointee has acquiesced in the stewardship, both are bound to the broad duty and the fivefold norm as well.

J. THE TECHNICAL DEFINITION

One must bear in mind at the outset that the function of the definition is only to discover the exact nature of the premium-bribe. The definition will not include an analysis of the role of the premium-bribe in the overall philosophy of corporate control, but will serve as a prelude to a later study of that question. The objective now, therefore, is a close scrutiny, element by element, to determine exactly what a premium-bribe is.

Next, do not become impatient with exactitude. Many of the control problems disturbing the courts today are caused by differing points of reference. It would be difficult to be overly exact. How absurd it is, in a later analysis of intrinsic illegitimacy, to be uncertain about the subject of the illegitimacy.

III. THE FIVE ELEMENTS OF THE PREMIUM-BRIBE

Broken down into its five principal parts, the sale-of-control premium-bribe can thus be technically defined as (1) some form of consideration, monetary or otherwise, (2) flowing to the incumbent controleur, (3) from or on behalf of the prospective controleur, (4) to induce the appointment to the office of control, (5) paid knowingly, *scienter*.

Although the premium-bribe is indisputably a bribe, it is a peculiar type of bribe with its own special features. A bribe after

67. The other two subduties are excellence in corporate structure and managerial policy. Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22, 45 (1963).

68. Bayne, *The Sale of Corporate Control*, 33 FORDHAM L. REV. 583, 593 (1965).

all can be used to achieve many objectives other than merely the appointment to an office, especially the office of control. The premium-bribe has all the features of the common bribe, and one more. By definition, unlike the ordinary bribe, the premium-bribe consideration must be passed by the would-be controleur himself. In short, the individual character of the premium-bribe can only be discerned in the context in which it is inextricably involved, the context of corporate control.

A. THE EXISTENCE OF CONSIDERATION

The first of many problems facing the fact-finder in the analysis of the premium-bribe is the ascertainment of the presence of some consideration. Consideration must be present or the discussion is over; if it is present, the definition can go forward.

The chore for the fact-finder is simple when the consideration is cash and the parties make no attempt to hide it. Such was the case in *Sugden*,⁶⁹ where the £75 was clearly a bribe, and in *McClure v. Law*,⁷⁰ where Mr. Levy blatantly contracted with Mr. Law and the board to pay them the sum of \$15,000, in consideration for the full control of the corporation.⁷¹

But the consideration is not always so easily identified. In the famous *Caplan-Lionel* case,⁷² the court found no difficulty in isolating the \$135,000 consideration paid by Sonnabend to the Muscat group, because this represented the exact excess over the market value of the small three per cent block. And, even more to the point, it was also \$135,000 more than the Muscat men had paid Roy Cohn for the very same stock only seven months earlier. But all possible conjectures would be unavailing to condemn Roy Cohn himself for a similar consideration from Muscat—unless founded on some highly successful detection and a piecing together of many disparate parts. On the face of things no such consideration was present.

Patently, the consideration need not be cash. The form may vary from job patronage to contract allocation to the use of a yacht or a summer home. Even more subtle for the fact-finder would be a set of intangibles which forestall not only evaluation but even identification. For years, the incumbent controleur

69. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

70. 161 N.Y. 78, 55 N.E. 388 (1899).

71. *Id.* at 79, 55 N.E. at 388.

72. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

may have coveted the presidency of the Detroit Athletic Club, or admission into the Bronxville Square Mile or the Down Town Association of the City of New York. The kinds of consideration are limited only by the ingenuity of human desire. Consider, for example, a cumulative pattern of Christmas gifts, a long-term low-interest loan, or perennial purchases below market.

The point is simple. Judge and jury must conclude that consideration is present in one form or another or the first element of the definition of the premium-bribe is absent.

B. MOVEMENT OF CONSIDERATION TO THE INCUMBENT CONTROLEUR

On occasion, the premium-bribe consideration is not only visibly present but its path to a point of rest in the controleur is also unmistakable. More often, however, the path is more like a maze. Yet nothing could be more essential to the definition. A premium-bribe can scarcely be ascribed to the incumbent unless the consideration can be traced with certainty into his hands.

The New York case of *Laurenzano v. Einbender*⁷³ illustrated the difficulty of tracking the consideration to its terminus. There, the two-man controleur of Retail Centers of the Americas, Incorporated, "bought 690,100 shares of Retail stock from Dobin and Horne, giving National voting control of Retail. . . ."⁷⁴ The deal after all seemed simply "a sale by Dobin and Horne of a bare majority of Retail's voting stock to National at *less than market value*. . . ."⁷⁵ The only conclusion is that Dobin and Horne wanted out, and National struck a good bargain.

Certainly nowhere did any consideration flow visibly to the incumbent controleurs—other than the money for the stock, a just price at worst. However, as minority-shareholder, Laurenzano saw the picture—a second transaction, designed presumably as a camouflage, hiding the extra consideration that smacked of a premium-bribe—and tied it directly to the incumbent controleurs. This second phase of the deal was effected by the newly appointed controleur, National Industries, Incorporated, after Dobin and Horne had left Retail. At the insistence of National, its new controleur, Retail Centers of Americas, Incorporated, graciously determined to redeem the remaining shares still owned by ex-controleurs Dobin and Horne. Mr. Laurenzano summarized the move as:

73. *Laurenzano v. Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

74. *Id.* at 358.

75. *Id.* (emphasis added).

. . . a redemption of the remaining twenty-odd percent of the Dobin and Horne stock at an excessive cost to Retail through National's exercise of its control over Retail (amounting . . . to National's paying a premium for the Dobin-Horne control stock out of Retail's assets). . . .⁷⁶

Subject to proof by Laurenzano, here was a routine attempt to disguise the consideration of a premium-bribe.

Laurenzano carries a double message. First, in spite of circuitry and camouflage, extra effort can unearth premium-bribe consideration, even though buried in an apparently unrelated transaction. Second, the consideration need not move during incumbency, but may well occur after resignation when seemingly no connection remains. Post-resignation payment in no way alters the fact; consideration passed to the former controleur as controleur.

But the subterfuge in *Laurenzano* was hardly challenging. An imaginative controleur has an intriguing array of possibilities: an enlightened program (with an added cynical tax value) of charitable donations to the appointee's longtime but deeply impoverished friend who fortuitously happens also to be the controleur's brother-in-law; favorable, but not alarmingly so, contracts awarded to the wholly owned subsidiary of the incumbent's wholly owned corporation; or a sinecure, summer after summer, to the son of the controleur. All of these are at least slightly more deceiving than *Laurenzano*.

In the end, as with the consideration itself, the task for the fact-finder resolves itself into one question: Did the consideration actually pass to or for the incumbent controleur? Of course, if the ruse is sufficiently successful the proof will fail. But the objective remains, nonetheless, to strip away the camouflage. With success here, the second essential of the definition is confirmed and one new element is added; the terminus of the consideration is the controleur.

C. MOVEMENT OF CONSIDERATION FROM THE PROSPECTIVE CONTROLEUR

As with the identification of the consideration and its proven reference to the incumbent, the verification of the third element is at worst not a greatly demanding assignment for the fact-finder. At best, it is as simple as laying the blame on Levy for the \$15,000 admittedly paid to Law, or holding Crossland liable in

76. *Id.* at 359.

*Sugden*⁷⁷ as the source of the £75 paid to Horsfield to bribe him out of office. But whether simple or difficult, an essential to the premium-bribe is the indisputable nexus with the appointee.

Whether there is a patent payment directly from the appointee himself, or indirectly from some third party, or a complicated series of moves from the controlled corporation, one overriding principle prevails—the consideration must be the primary responsibility of the appointee. Regardless of appearances, all three sources must be reducibly the same. He must be proven the debtor and be legally liable for the amount.

1. *Directly From the Appointee*

Not all payments are as bald as *Sugden*,⁷⁸ *McClure*,⁷⁹ or *Caplan-Lionel*.⁸⁰ As with receipt, so it is with payment; an appointee-owned corporation might impose a series of rates and charges sufficiently below market, for example, to aggregate in a ten-year period a stipulated \$100,000.

The use of his private plane, his Palm Springs cottage, or his country club privileges could coalesce almost imperceptibly into a formidable outlay by an eager suitor. Whether the benefits pass before or after a successful sale of control is again irrelevant. Nor does a prorated payment for tax purposes diminish accountability.

2. *Indirectly from Third Parties*

Perhaps the most difficult of detection of all devices is the use of a third-party friend, relative or debtor. With such cooperation, the would-be controleur can channel substantial sums to the incumbent. Gifts funneled through appointee relatives or friends could probably be satisfactorily concealed. True, if the debtor understandably wishes an acknowledgment of satisfaction, this fact could be revealing. However, the only clamorous evidence generally would be muffled in the personal accounts of the parties. With no external evidence of a suspicious payment, how untoward to insist on a fishing expedition for an unexplained debt-cancellation or a receipt from an unlikely payor.

In the case of a premium-bribe-prone suitor, increased atten-

77. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

78. *Id.*

79. *McClure v. Law*, 161 N.Y. 78, 55 N.E. 388 (1899).

80. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

tion by the courts to the sale-of-control premium-bribe predictably will result in greater resort to such third-party duplicity, and thus diminish the chances of ferreting out the hidden consideration of a premium-bribe.

3. *Indirectly from the Controlled Corporation*

Although definitely begging a later question, nearly every successful premium-bribe is sooner or later recouped from the corporation. Often, however, the new appointee avoids the circuitry of a personal payment and later corporate recoupment by an immediate raid on the corporate till.

Perhaps the most common method of corporate payment is the unearned-salary or consultation-fee device. In *Caplan-Lionel*,⁸¹ appointee Sonnabend was prepared to approve a \$75,000 outlay over a five-year period to the former controleur, the Muscat group. In another recent case continuing payments to the outgoing controleur were openly stipulated in the contract:

Woike would cause the corporation to employ Wilcox as consultant for five years at a total salary of \$118,541, upon the understanding that Wilcox was not to be required to spend more than twenty-five percent of his regular business hours in performing his duties, and that in no event were such duties to unreasonably interfere with his other activities. . . .⁸²

Possibly as a presage for the future, this consultation-fee formula has been used recently in the sale of a nonprofit corporation, The _____ General Hospital:

We now understand that Mrs. _____ proposed to donate the capital stock of the Hospital Corporation to a local church and the corporation in turn is to retain Dr. _____ and Mrs. _____ under longterm employment and consultation agreements providing for, we understand, compensation at approximately the same levels they are presently receiving.

We further understand, incidentally, that Mrs. _____ has no formal education or practical training in hospital management [and that Dr. _____ is mentally incompetent].⁸³

As with the other facets of the premium-bribe consideration, the only limit to the variety of the corporate disbursement is human resourcefulness. Retention of the former controleur as honorary chairman could mean important emolument—executive perquisites, continuing prestige and social position, appreciable

81. *Id.*

82. *Oser v. Wilcox*, 338 F.2d 886, 888 n.2 (9th Cir. 1964).

83. Letter to the author. This example was related by an attorney whose client was prepared to "buy" the hospital for over one million dollars.

financial savings and benefits—completely apart from a bald, unearned salary. The premium-bribe can also come indirectly from the corporate treasury by the deft use of the manufacturer's-agent ploy.

In *Laurenzano* the successful suitor, National Industries, Incorporated, caused the controlled corporation, Retail Centers of the Americas, Incorporated, to redeem

. . . the remaining twenty-odd per cent of the Dobin and Horne stock at an excessive cost to Retail through National's exercise of its control over Retail (amounting . . . to National's paying a premium for the Dobin-Horne control stock out of Retail's assets), and a sale of G*E*S to Retail at an excessive price (recouping most of National's cash outlay for the control stock).⁸⁴

One wonders if Glen Alden-Schenley-Rosenstiel in late March of 1968 envisaged the same corporate-till approach of National Industries-Retail Centers-Dobin and Horne. The stockholder's suit against Schenley Industries, its directors, and Glen Alden Corporation, charges that Glen Alden intends to use Schenley funds to retire the six-month notes given Mr. Rosenstiel as part of the payment for his 945,126 shares of Schenley stock, to pay the public holders the cash portion of Glen Alden's offer for their shares, and to repay Glen Alden's borrowings to finance the cash portion of Mr. Rosenstiel's payment.⁸⁵

Whatever the device, the result is the same. The appointee passes a premium-bribe, either directly to the controleur or through third parties or from the corporation itself. In the end, the establishment of this third element requires proof of ultimate responsibility in the appointee for the amount involved.

D. PURPOSE TO INDUCE THE APPOINTMENT TO THE OFFICE OF CONTROL

A conceptual nicety, but a relevant one, is in order. Obviously the premium-bribe in itself does not entail action; it is not an act. Yet the money or consideration involved can never become the premium-bribe without first becoming the sole and principal object of an act. This act is the act of bribery and, strictly speaking, bribery and not the premium-bribe is the more proper subject of this aspect of analysis and definition.

The innermost essence of bribery, and correspondingly of the premium-bribe, lies in its purpose. Here is the crux of the defini-

84. *Laurenzano v. Einbender*, 264 F. Supp. 356, 359 (E.D.N.Y. 1966).

85. *The Wall Street Journal*, Mar. 26, 1968, at 6, col. 2.

tion. The finality of a given action colors it completely and imparts its moral content. To pull a trigger is arguably indifferent. To pull a trigger at a skeet-shoot is recreation. To pull the same trigger at an innocent man is murder. But to fend off an aggressor is praiseworthy. The intrinsic gravity of the turpitude, as well as its presence or absence, lies in the purpose.

Thus, too, the purpose in the premium-bribe imparts the moral turpitude. If the goal is not the appointment to the office, the premium-bribe is absent. The mere passing of money from appointee to controleur is as indifferent as the pull of a trigger. However, the consideration could be the payment of a just debt, an overdue salary, a commendable gift—or the inducement to the appointment. To induce the incumbent to appoint must be, by definition, the sole purpose of the consideration.

1. *To Buy or To Loot*

At this point, a distinction too rarely made, yet disarmingly simple and altogether essential, must clear the way for much of the later analysis of the premium-bribe. Distinguish two totally different objectives: (1) to induce the appointment, and (2) to loot, or benefit, the corporation. "To induce" is integral to the premium-bribe. "To loot" is outside its essence.

It would seem that the purpose of the premium-bribe is to induce the appointment. And the purpose of the appointment may be to loot the corporation—or not to loot, or to benefit; it does not matter. The premium-bribe itself in no way involves the use and disposition of the appointment once secured.

This distinction is important for several reasons other than its ontological truth. Thus, if one depended on looting or some similar malefaction such as self-serving contracts, unjustified nepotism, or exorbitant salaries for the discernment of a premium-bribe, the rare instances would be overlooked where the briber had such less reprehensible thoughts in mind as social status, personal power, or even the praiseworthy objectives of a Robin Hood. Moreover, without this distinction a Robin Hood might intriguingly argue from a praiseworthy end to a praiseworthy means. Faced vividly with the sole goal of inducement, however, one could hardly be beguiled by the jesuitical "end justifies the means" argument. In defining the premium-bribe, therefore, one must consider only the inducement to the appointment and relegate any other contemplated crimes to discussion *apropos*.

The greatest importance of this distinction, however, lies in its application to the later study of the intrinsic illegitimacy of the premium-bribe. If the premium-bribe necessarily includes post-appointment intentions, good or bad, the premium-bribe correspondingly will be good or bad. But if the inducement is the sole purpose, the illegitimacy, or the legitimacy, will be determined correspondingly by that purpose. Further, this segment of the definition is not meant to explain why the premium-bribe is a perversion—why even a Robin Hood may not buy an appointment. The definition only adverts to the junction of the five elements. The perversity, or lack of it, is the consequence of this junction.

Note, however, that the evil designs of the briber are, in fact, helpful in discerning, but strictly extraneously, the presence of a premium-bribe. An illicit end suspicions an illicit means. One who has future evil in mind will not generally cavil at a little evil en route. Equally possible, however, is the legitimate acquisition of control with the ultimate objective of looting.

2. *The Presumption of Premium Presence*

Closer scrutiny of the simple purpose “to induce” yields many further insights—seemingly collateral commentary but in fact essential to the full definition of the situation.

The progress thus far has seen the fact-finder present three essentials to the definition: (1) some consideration (2) flowing to the controleur (3) from the appointee. To this has been added, but without more, the major and controlling element, the purpose to induce to the appointment. This single purpose, already sharply delimited, is faced with another major circumscription. Just as the premium-bribe neither requires nor permits an excess of purpose, so too with anything less. Any purpose short of inducement is irrelevant. Any consideration for another reason, legitimate or otherwise, does not constitute a premium-bribe.

With little difficulty, excess of purpose by looter or Robin Hood can be discerned and eliminated from analysis. But not so in detecting possible alien *non-premium-bribe* purposes.

(a) Clearly Identified Consideration

At this point the justification for the selection of the various case examples becomes clearer. As with most moral analyses, the extremes are patent. In the transfers of control of Weyenberg Shoe, of General Motors, and of Ethyl, no consideration at

all was visible. With *Sugden*,⁸⁶ *McClure*,⁸⁷ and *Laurenzano*,⁸⁸ it was obtrusively present. No quibbling over facts was possible.

A chief cause for confusion surrounding the premium-bribe has been the unhesitating and fearless plunge into the midst of the most complicated fact situations, especially the tortuous "true investment value" of a "control block" of stock. For example, who can give an off-the-cuff label to the \$2 million premium in *Essex Universal*?⁸⁹ Is two dollars per share over market—eight dollars against six dollars—a premium-bribe? Or is it true investment value? Does the 23.7 per cent block of *Essex* differ from the three per cent in *Lionel*?⁹⁰—or from the stock-less control in *McClure*?⁹¹ These gray-area questions explain the relegation of such as *Essex* to later studies. How the fact-finder determines the presence of a premium bribe, and the problems he faces in doing it, should not interrupt the study of its essence. The knotty investment-value question posed by *Essex* is not being dismissed; it will be faced later, with the help of the present study.

Suffice for the present that the fact-finder has categorically presented in *Sugden*, *McClure*, and *The _____ General Hospital*, clear-cut cases unencumbered by the queries of *Essex*. If the *Essex* fact-finder must throw up his hands in defeat, the matter is concluded. The application of clear principles to fuzzy facts is vain.

The £75 in *Sugden*, the \$15,000 in *McClure*, the salaries in *The _____ General Hospital* case have all been clearly identified. The problem then remains: What was the purpose of this consideration? Can (1) such consideration passing (2) to controleur (3) from the appointee have any other purpose than "to induce the appointment?"

(b) Avowed Purpose to Induce

Remarkably the day is not over when the parties unabashedly announce their purpose.

A. King McCord, the Westinghouse Air [Brake] chairman, was particularly critical of Thomas M. Evans, chairman of Crane, whom he accused of attempting to "force a combination,

86. *Sugden v. Crossland*, 65 Eng. Rep. 620 (V.C.C. 1856).

87. *McClure v. Law*, 161 N.Y. 78, 55 N.E. 388 (1899).

88. *Laurenzano v. Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

89. *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

90. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

91. *McClure v. Law*, 161 N.Y. 78, 55 N.E. 388 (1899).

one way or another," of the two concerns. . . .

Mr. McCord said he was visited three times by Mr. Evans to discuss merger During two of the meetings, Mr. McCord said, Mr. Evans proposed that Mr. McCord become chairman of the executive committee of the surviving corporation

"In the last meeting," Mr. McCord, said, "he (Mr. Evans) added the suggestion that I would receive an option to purchase Crane stock and benefits after retirement, possibly by a consulting arrangement."

"On each occasion," Mr. McCord continued, "I told Mr. Evans that such proposals were inappropriate and shouldn't be discussed in connection with the suggestion for combining the companies, which should be considered strictly on its own merits."⁹²

In the recent takeover of Silvray-Litecraft Corporation, a New Jersey producer of architectural lighting, by Shearson, Hammill, and E. M. Warburg, one wonders if the forthright press release could possibly mean what it says:

In addition, Messrs. Gilbert and Gordon received \$137,000 to resign their posts. Mr. Roisman will continue as president and member of the board⁹³

The press release is highly redolent of the statement in *Porter v. Healy*: "[T]he price fixed for the stock itself was \$165 per share . . . and the additional compensation that we were to receive for parting with our control was an entirely private business matter"⁹⁴

But such open avowal may not always be forthcoming. What is to be done when the facts point only to consideration from appointee to controleur? How should one approach the purpose, unaided by an open admission?

(c) The Presumption

The fact may be that the parties are readily able to prove a purpose totally unrelated to a premium-bribe. The consideration flowing at the time of the transfer may in truth be a genuine quid for a legitimate quo, a long-due debt, deferred salary, or even a gracious gift. But these alien purposes must be flushed out, and the burden lies on the payor and payee to do the flushing.

Toward this objective a presumption seems tenable: *When some consideration, clearly identified, has passed to the incum-*

92. The Wall Street Journal, Dec. 19, 1967, at 6, col. 1. See also The Wall Street Journal, Aug. 28, 1968, at 1, col. 2; May 16, 1968, at 1, col. 6; Feb. 21, 1968, at 11, cols. 2 and 3.

93. The Wall Street Journal, Nov. 2, 1967, at 4, col. 4.

94. *Porter v. Healy*, 244 Pa. 427, 434, 91 A. 428, 431 (1914).

bent controleur from the prospective appointee under circumstances reasonably related to the control transfer, a rebuttable presumption arises that the purpose of such consideration is to induce the appointment. The *Presumption of Premium-Bribe Presence* imposes the burden of explanation on the parties to the transfer. Clearly this approach is negative. Its purpose is to negate and hence eliminate all irrelevant non-premium-bribe purposes.

Note, however, that the presumption itself is founded on a very basic assumption that on first blush would seem to require proof. The primary purpose of the presumption is truly negative—to remove from discussion all purpose alien to a premium-bribe. *But* does the absence of a non-premium-bribe purpose prove the presence of a premium-bribe purpose? At first blush the answer is no—on reflection, yes. In the elaboration of the presumption, assume for later proof that every unexplained or admittedly relevant consideration is always “to induce the appointment.” Thus the present approach is only to show that consideration attendant on the control transfer demands an explanation.

Note that the terminology involves an inaccuracy. The title should rather read: *The Presumption of the Presence of the Purpose to Induce*. But the purpose “to induce” is so predominantly the essential part of the premium-bribe that such a transposition seems acceptable, even preferable. In future usage simply recall that the whole is used for the part, albeit somewhat loosely.

3. *The Rebuttal of the Presumption*

The explanation of any suspicious emolument should not be difficult, unless, of course, the suspicions are well-founded.

Indebtedness. Of all possible alien consideration a bona fide debt should be the most easily verified. If a direct deal occurs, the debtor-appointee will show the sum on his books. In any event the creditor-controleur will certainly carry the amount on his. If the debt is long standing the bookkeeping evidence should be cumulative. If recent, the causes, occasions and circumstances, as well as any parties involved, should be fresh and readily substantiated. In either event, the quid for the suspect quo should be patent.

Salary. The presumption of premium-bribe presence might not have been so strong in the case of the salaries of Mrs. _____ and Dr. _____ specified in the “gift” to the local church had not

Mrs. _____ originally attempted to extract \$1.3 million for the sale of "her" nonprofit hospital. Such salaries would be no more suspect than a similar salary for Patriarch Weyenberg were he consultant to Weyenberg Shoe.⁹⁵ But the point in either case is the need, not the ease, of explanation. In fact the New York Court in *Caplan-Lionel*⁹⁶ saw the need and apparently felt that Sonnabend and Muscat were unsuccessful in their explanation of the \$75,000 to the Muscats over five years. In *Oser v. Wilcox*⁹⁷ one would be justified in demanding a similar explanation from Wilcox and Woike, since the \$118,541 paid to Wilcox "as consultant for five years" was virtually indistinguishable from the Muscat \$75,000.

Gifts. Christmas and Hanukkah, birthdays and anniversaries should constitute no particular fact-finding problem. Only when the beneficence transcends the customs of a locality, social stratum, financial competence, or the established pattern between donor and donee, does the presumption of premium-bribe presence come into operation. The books are full of apt analogies, especially in the tax field, involving purchasing agents, suppliers, the five percenters and the historic vicuna coat. The norm is the reasonable gift set off against an amount efficacious enough to constitute a satisfactory premium-bribe.

Deferred Compensation. One of the more appealing methods of camouflaging a premium-bribe is the subterfuge of accrued compensation. In a related context, old Mr. Cosgrove, after retirement from the presidency of Green Giant, felt that the two million dollars for the transfer of control could well be the capitalization of his former salary.⁹⁸ This device of the deferred compensation perhaps deserves greater study. In sum, however, the principal questions would seem to be: Why was the compensation not paid when earned? Was the original employment contract silent on the matter? Why wait until the transfer of control? Should a third party pay a corporate salary?

All these examples say the same thing. Any yacht clubs, perquisites, any unusual emolument, gifts or payment, demand an explanation. This is not unreasonable or intrusive. All the controleur need do is simply show that the debt, the salary, and the gift are completely unrelated to an inducement to the appoint-

95. See note 49, *supra*.

96. *Caplan v. Lionel Corp.*, 20 App. Div. 301, 246 N.Y.S.2d 913, *aff'd mem.*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

97. 338 F.2d 886 (9th Cir. 1964).

98. *Honigman v. Green Giant Co.*, 309 F.2d 667 (8th Cir. 1962).

ment. When an accused can account for the consideration, the premium-bribe evanesces.

4. *The Rationale of the Presumption*

Three cogent reasons converge to justify such a demand on the principal parties to the control transfer. First, at that charged instant when control passes from controleur to appointee, the complete custody of the corporation hangs precariously in the grasp of each, the one relinquishing, the other assuming. At this moment, therefore, both are logically strict trustees. As such, both are bound to forego any emolument of any kind connected with the trust corpus. The very hypothesis of a trust relationship is the benefit-to-beneficiary rule.

Equally logically, then, an immediate explanation is incumbent on both, since (1) both are trustees; (2) trustees garner all for the beneficiaries; (3) whatever is passing to trustee rather than beneficiaries is suspect; (4) whatever is suspect requires explanation; and (5) whatever is unexplained can only be assumed to induce the transfer. The least obligation engendered by this benefit-to-beneficiary rule would be an accounting of the suspect consideration.

Second, of all the acts of his corporate career the most important is probably the controleur's appointment of a successor, an act fraught with deep trust implications, determinative of the long-term future well-being of the corporation. How completely unthinkable and unlikely for men of prudence to pass unrelated consideration at this time. Even grade-school discretion would caution a contrary course. Thus does the presumption of premium-bribe presence arise. Since only a rare trustee would not heed such grade-school warnings to wait, any consideration is damning, and without explanation assumedly induces the appointment.

Finally, the premium-bribe presumption could be justified for a far lesser reason—a readiness to explain. As strict trustees at the most, as men jealous of their reputation at least, and certainly impelled by the delicacy of the moment, both controleur and appointee would demand the opportunity to explain.

5. *The Presumption Illustrated*

In the spring of 1968 Detroit Steel had been plodding along at about \$18 per share on the New York Stock Exchange in relatively active trading and the firm "had been the subject of take-

over rumors for months."⁹⁹ In fact the controleur of Detroit Steel, Cleveland financier Cyrus S. Eaton, and William R. Daley, long associated with Mr. Eaton in widespread business ventures,¹⁰⁰ wanted out. Negotiations with the Isbrandtsen interests, specifically American Export Industries, Incorporated, led to just the deal: American Export paid \$25 per share for 525,000 shares, or about 13 per cent of the outstanding shares of Detroit Steel Corporation.¹⁰¹ With the stock sale

Jakob Isbrandtsen, president of American Export, and Albert E. Rising, Jr., vice president of American Export, replace Mr. Eaton and Mr. Daley as directors on the boards of both Detroit Steel and Cleveland-Cliffs Iron Co., a Cleveland-based lake shipping and iron ore concern, which is about 24% owned by Detroit Steel.¹⁰²

Apply the presumption of premium-bribe presence to these facts. A sizable consideration—\$3.6 million—\$5 to \$7, 25 to 39 per cent,¹⁰³ over market, is flowing from the would-be board members to the incumbent controleur under circumstances reasonably related to the actual appointments and the ostensible transfer of control. In such a situation would not the fiduciary duty of both parties call for an explanation of the \$5 to \$7 over market? Did not the owners of the other 87 per cent of the outstanding shares still plodding along at \$18 deserve some word?

6. *The "Inexplicable" Few*

Granted the success of the negative aspect of the premium-bribe-presence presumption, does this really end the matter? Does the elimination of all foreign and unrelated consideration mean ipso facto that what remains unexplained was passed solely to induce the incumbent to the appointment?

Consider this situation. The controleur has willingly admitted relevant consideration; or reducibly the same, has failed to rebut the premium-bribe presumption. But impelled by several sincere reasons, he stoutly denies any premium-bribe purpose.

99. The Wall Street Journal, Mar. 27, 1968, at 4, col. 2.

100. *Id.* As president of an Eaton interest, Otis & Co., Mr. William R. Daley found himself in the midst of a street-shaking securities litigation. *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952). For a detailed study of this case, see Bayne, *Kaiser-Frazer v. Otis: A Legal and Moral Analysis*, 2 DEPAUL L. REV. 131 (1953).

101. The Wall Street Journal, Mar. 27, 1968, at 4, col. 2.

102. *Id.*

103. This parallels exactly the 39 per cent in *Ferraioli v. Cantor*, 281 F. Supp. 354 (S.D.N.Y. 1968), where the total premium was \$2.2 million. The shares were sold at \$3.50 over the \$9 per share market.

This rather rare controleur concedes that the consideration cannot be explained by the usual human commerce, or by understandable quids for traditional quos. It is neither debt, salary nor gift. It is transfer related, but nonetheless not designed to induce. There is consideration, yes; unexplained, yes; but premium-bribe, no. Faced with such a staunch stand, how certain can one be?

The second thoughts to such questions are generally the same—impossibly contrary to fact. It is so unreal as to invite derision. How could an incumbent accept out-of-the-blue consideration and seriously disavow a premium-bribe or call it something else?

(a) The Justified Gratuity

However absurd and unreal, the haunting doubt persists: Is every unexplained consideration really a premium-bribe? Is it invariably passed to induce? Or more subtly, may not the appointment be merely the occasion or the condition rather than the cause?

Ninety-nine out of 100 cases clearly support the blanket statement: Every unexplained "gratuity" related to the transfer is causally related. But, however contrary to fact it may be, an exhaustive inspection cannot overlook the one in 100. If one may conclude to a premium bribe in such an ultimate instance no problem can remain with the other 99.

Several reasons support a minute dissection of such a "justified gratuity." Beyond a simple search for the truth lies a practical incentive. Any sincere proponent of the justified-gratuity thesis would undoubtedly concede the illegitimacy if, but only if, the premium-bribe itself were first identified. The question for him is not illegitimacy but existence. He sees merely a gratuity, surely not a premium-bribe.

What type of mind can engender such self-delusion? Antipolar to the hardened operator who admits the premium-bribe but blandly denies its turpitude, is the well-intentioned entrepreneur, perhaps a bit callow but certainly sincere. The complexities of the modern control transaction, the blasé approach to any gratuity, the apparent divorce of the gratuity from the control transfer, have all conspired to lead a limited few into such a self-delusion.

The Robin Hood explanation also has some fascination. Once grant such a one-in-a-million entrepreneur with the unimpugn-

able purpose of building up the company, and the equally incredible fact follows: Such a Robin Hood could fail to see the premium-bribe in his gratuity. This is scarcely remarkable since the end justifies the means in far less subtle situations.

The most credible rationale, however, has been concocted by competent corporate counsel. Why should a modified Robin Hood, untrained in the law but eminently self-made and successful, question his Wall Street attorney when he quotes from *Essex*,¹⁰⁴ *Perlman*¹⁰⁵ and *Fenestra*?¹⁰⁶ After all, Chief Judge Lumbard for the Second Circuit seemed clear: "There is no question of the right of a controlling shareholder under New York law normally to derive a premium from the sale of a controlling block of stock."¹⁰⁷ Judge Swan in the same circuit some seven years earlier had been equally clear: "Concededly a controlling block of stock has greater sale-value than a small lot."¹⁰⁸ The Michigan Supreme Court saw no problem in a similar deal:

Gulf [Gulf American Corporation] concedes the obvious, that is, that it paid a price per share greater than the market value of *Fenestra* but says that there is no law which prevents a purchaser from paying a premium in connection with the purchase of shares.¹⁰⁹

No wonder an unsophisticated entrepreneur concluded that his is a "justified gratuity." The prestigious Second Circuit nowhere defines the "premium," certainly does not call it a premium-bribe, and at times openly condones it. True, these very courts in other contexts have spoken directly to the contrary. But that has not destroyed the conviction that this gratuity does not induce the appointment. Certainly these eminent courts would never permit an outright bribe. Therefore, this gratuity, or premium, or bonus, or whatever, could not conceivably be a premium-bribe. Even though a subliminal sense says caution, such an entrepreneur does not pause long enough to strip the situation bare.

As captious as it may seem, the answer to the justified gratuity argument lies in a look at the more subtle delusions possible to incumbent and appointee. Consider, therefore, a formula least like a premium-bribe.

104. *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

105. *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955).

106. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 141 N.W.2d 36 (1966).

107. *Essex Universal Corp. v. Yates*, 305 F.2d 572, 576 (2d Cir. 1962).

108. *Perlman v. Feldmann*, 219 F.2d 173, 180 (2d Cir. 1955) (dissenting opinion).

109. *Fenestra, Inc. v. Gulf Am. Land Corp.*, 377 Mich. 565, 587, 141 N.W.2d 36, 45 (1966).

(b) The Mere Gratuity

Assume that at no time have the parties discussed any gratuity, any expected acknowledgment of the gratitude and indebtedness owed the controleur by the appointee for the opportunity to guide the corporation. Least of all has any mention ever been made of a premium-bribe. Not even remotely has any deal been made.

The incumbent controleur has spent long hours in evaluating all prospective successors. In the appointee he has found all the qualities demanded by the fivefold norm of suitability—intellectual, moral, managerial, social, physical—as established by his third subduty of the overall fiduciary duty of corporate control—the choice of the best possible personnel. He then proceeds to make his formal selection, installs the appointee, retires from the scene, and rests content that his fiduciary duty has been done.

With the matter thus completely consummated the appointee then steps forward, impelled perhaps by the modern and pervasive sense of fair play, and bestows an appropriate gratuity on the former contrôleur. Or the appointee-Robin Hood, so happy at the opportunity to help the corporation, effuses gratitude and wants to thank the controleur by way of a gift. Assume, of course, that the stipend is substantial.

Faced with such a fact situation the immediate reaction is to say that here the “consideration” was not paid *in order to induce* the appointment since the appointment had already been irrevocably made. The appointee could scarce be buying what he already had. At this point the exact legal philosopher would tend to retreat, to conclude that possibly here is a mere gratuity, a non-bribe premium, or perhaps a new, legitimate species. Seemingly, this benefaction is at most “in connection with” or “related to,” but certainly not “to induce.”

(c) A Retroactive Quid Pro Quo

To the contrary, fuller reflection finds no real difference between an avowed purpose to induce and the allegedly legitimate formula of a post-appointment gratuity. Three factors must be carefully considered: *First*, the would-be controleur actually proffered, consciously and deliberately, a substantial sum of money or its equivalent. At the same time, and related to the same deal, the incumbent actually accepted, consciously and deliberately, such substantial sum. *Second*, the appointee owed the incumbent absolutely nothing. The incumbent had nothing com-

ing from the appointee. *Third*, and possibly most important, the sum involved was not de minimis. If it were, the parties would have already explained it as an acceptable gift. A guideline can be reasonably erected. The consideration on one hand must meet the requirements of an acknowledged premium-bribe situation. How much, in the estimate of experts, would "buy the office" involving such prestige, influence, desirability? On the other hand, what would a man of relative affluence, social status and habits present to his counterpart as an understandable gift?

With a firm grip on this tripartite reality, one line of reasoning is inescapable. This "mere gratuity" is a belated quid pro quo, a retroactive settlement of an implicit or sensed contract of purchase. Such a gift would either be de minimis or clearly discernible by its size as a premium-bribe. Never would an appointee pay such a substantial sum unless he sensed somehow that he must do so. But the only reason for such feelings would be the conviction that somehow he owed such an amount. Yet if appointee owed controleur, the debt must be for *something*. And the *something* must be the appointment—which, of course, is the definition of the premium-bribe.

The motives for such a post-appointment payment are manifold and irrelevant. Implicit could be the fallacious reasoning encouraged by present-day premium-bribe attitudes that somehow the appointee "owed" the controleur for the appointment; that although unenforceable in practicality or in law, the controleur somehow "had it coming" and the appointee correspondingly "had to pay" if he wanted the office. In the end the only explicable attitude that would elicit such post-appointment gratuities would be the subliminal assumption on both sides that such payment was part of the total understanding, was really integral to the deal, and was part of the accepted procedure.

Such reflections pose a dilemma. Either the "mere gratuity" is reducibly a premium-bribe or the parties are simpletons. Gratitude could take on such proportions only in such a rare instance.

7. *The Presumption Confirmed*

These reflections complete the analysis of the presumption of premium-bribe presence. The parties to a transfer of control are faced with two governing principles: (1) Any consideration passing at the time of transfer must be explained. (2) Any unexplained consideration is presumed to have been passed to induce appointment.

E. SCIENTER

The inability to say everything at once is a particularly disturbing handicap in the case of scienter. Necessarily, scienter has been implicit in every single element of the definition, and is integral to each of the four other essentials. The Latin of scienter has misled many into the limited meaning of "knowledge" or more exactly "knowingly," but the legal and philosophical scienter has two components, equally important. Not only must appointee and incumbent have sufficient intellectual appreciation of the full meaning of the transaction—the "knowingly" of the Latin—but both must also have a voluntary determination to go forward with the appointment. Thus sufficient reflection by the intellect and full consent of the will are sine qua non to any moral act. And the moral act of bribery is patently incomplete without each of the four other elements: (1) consideration passing (2) to the controleur (3) from the appointee (4) to induce the appointment. If scienter is absent in any one, the act may be illegitimate and hence reprehensible, but it is not premium-bribery.

This interaction of the intellect and the will transforms a lifeless, disconnected series of movements into a rational, human, moral act. By the injection of knowledge and volition the mere materiality of the consideration becomes the formality of a premium-bribe.

Through scienter the actors assume the act as their own. Only by knowledge of intellect and consent of will does a *homo rationalis* accept liability. Without both, any act is unrational, not his own, and without responsibility. Turpitude in the air becomes through scienter the personal baseness of the premium-bribing appointee and the premium-bribed controleur.

1. *The Erroneous Conscience*

Here again the subjective state of the parties is pertinent. Distinguish: (1) the parties, lacking scienter, fail to pass a premium-bribe (and hence are guiltless), and (2) the parties act knowingly and willingly, but erroneously judge the act blameless (and hence are guiltless). The subjective moral evaluation of passing a premium-bribe has nothing to do with its presence or absence. The allied question of the erroneous conscience concerns the culpability of the parties and arises by hypothesis only when total scienter is present.

2. *Scienter and the Purpose to Induce*

Confusion could arise between the purpose to induce and the will to induce. What is the difference between the fourth element of the premium-bribe, the purpose to induce, and the volition of the fifth, the will to pass the premium-bribe? Since the distinction is valid and important, the conceptual stages in the application of the intellect and the will—scienter—to the other four, but especially the fourth, is warranted.

Begin with the recollection that without scienter the other four elements, notably the purpose to induce, remain only potential and are not yet reduced to actuality. With this in mind, the interaction of intellect and will may be conceptualized into three steps, with the identical process in both appointee and incumbent. (1) The first four elements are laid out in complete array (a sum of \$135,000 would not seem exorbitant to the suitor, nor insufficient by the incumbent to induce him to accede to the appointment). (2) As thus laid before the intellect these four factors are studied thoroughly. Confident, with a full knowledge and understanding of the entire control transfer, the intellect passes judgment, giving its approval, and hands this conclusion on to the will. (3) The will in turn, impelled by the reasoning of the intellect, freely assents to the transaction. This consent of the will to the advice of the intellect is scienter. Only now have appointee and controleur knowingly and willingly embraced a potential series of actions and vitalized them into the actual, rational and culpable act of passing a premium-bribe to induce the appointment. Here then the theoretical purpose to induce becomes the practical will to effectuate the purpose to induce.

All this explains the relegation of scienter to fifth place. Each other element had first to be defined before it could be known and assented to.

3. *Two to Tango*

The question naturally arises: Must both appointee and controleur have scienter? Very simply, technical verification of the definition requires every single element. And mutual scienter is an element. This rigidity intimately affects appointee suitability, the culpability of the parties, the disposition and the role of the premium-bribe. Thus a naive appointee lacking scienter could be guiltless and hence suitable, saving the naivete, even though he passed an apparent premium-bribe. The culpable controleur, of course, would be forced to disgorge the "premium-

bribe" and be liable in damages.

Just as the criminal code has stratified homicide according to knowledge and consent, so also with the premium-bribe. In cases short of total scienter the principles and philosophy of the premium-bribe are applicable *mutatis mutandis*, since some other unnamed but very real malefaction is indubitably present.

IV. EPILOGUE

A definition often appears to be a simple thing. But as it unfolds one wonders as many of the complex questions left for later begin to answer themselves. So it is with the definition of the premium-bribe. The principal benefit, of course, should be univocity of meaning. No more should there be premiums and premiums. Or at least the premium-bribe is now known for what it really is.