Michigan Law Review

Volume 46 | Issue 4

1948

CORPORATIONS-APPRAISAL STATUTES-DEMAND BY DISSENTING SHAREHOLDER FOR CASH VALUE OF HIS SHARES

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CORPORATIONS—APPRAISAL STATUTES—DEMAND BY DISSENTING SHAREHOLDER FOR CASH VALUE OF HIS SHARES—Plaintiff shareholder, who dissented from a plan to sell all of defendant corporation's assets, sued under the Ohio statute [1] to obtain appraisal of his shares. At plaintiff's request, an objection to the sale and a demand for the cash value of his shares was served upon defendant by his attorney. Although the demand was made within the required period after the shareholders' meeting at which the plan was accepted, the trial court refused to allow appraisal on the ground that plaintiff did not make the demand personally and had not notified the corporation that his attorney was authorized to act in his behalf in making the demand. On appeal, *held*, affirmed. Where demand for payment is made by an attorney, there must be an appointment in writing, signed by the shareholder, and exhibited to the corporation within the statutory period allowed for demand. *Klein v. United Theaters Co.*, (Ohio 1947) 74 N.E. (2d) 319.

Generally, courts have been strict in requiring the shareholder to comply with conditions precedent to appraisal,[2] in spite of the assertion found both in

[1] " . . . Within twenty days after the day on which the vote was taken, [the shareholder] shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares." Ohio Gen. Code Ann. (Page, 1938) §8623-72.

[2] Johnson v. C. Brigham Co., 126 Me. 108, 136 A. 456 (1927); Stephenson v. Commonwealth & Southern Corp., 19 Del. Ch. 447, 168 A. 211 (1933); Friedman v. Booth Fisheries Corp., (Del. Ch. 1944) 39 A. (2d) 761.

texts and decisions that the statute should be liberally construed in favor of the shareholder.[3] The court in the principal case concludes that the language of the statute leaves the dissenting shareholder with the alternatives of making his demand in person or by proxy. In the latter case he must conform to the requirements prescribed by the statute pertaining to the use of proxies, which include notifying the corporation thereof.[4] It is suggested, however, that the proxy statute was never intended to have any application outside the scope of shareholders' meetings. It would also appear that the possibility of one's misrepresenting his authority to make objection and demand for a dissenting shareholder should not require the same precautions as those used to prevent the casting of an unauthorized vote. With these factors in mind, and considering that the appraisal statute includes no reference to the shareholder's acting by proxy, it is at least arguable that the legislature intended that a shareholder could follow the normal law of agency in appointing a representative to make demand. If this is accepted, there appears to be little doubt that the authority of plaintiff's attorney to make demand on his behalf was adequately established.[5] Even if this approach is rejected, the alternative construction of the statute would compel the shareholder to make demand personally, without even the right to use a proxy. Exclusion of a shareholder from his right to appraisal on such a technical and perhaps artificial ground becomes more unsatisfactory when the problems to which it may give rise are considered. The Ohio decisions indicate that appraisal is not the dissenting shareholder's exclusive remedy, but that he may elect either to oppose the majority's action by a suit in equity, or to liquidate his investment in the corporation by appraisal.[6] This cannot be taken

[3] 15 FLETCHER, CYC. CORP., perm. ed., § 7165 (1938); In re Camden Trust Co., 121 N.J.L. 222, 1 A. (2d) 475 (1938); Schenck v. Salt Dome Oil Co., (Del. Ch. 1943) 34 A. (2d) 249. Since the statute abolishes the right possessed by a single shareholder at common law to prevent such actions as sale of all the corporation's assets and consolidation, it should be liberally construed in favor of the shareholder.

[4] Ohio Gen. Code Ann. (Page, 1938) § 8623-53, which provides that any shareholder of record who is entitled to attend a shareholders' meeting, may be represented at such a meeting by a proxy " . . . to vote thereat . . . or to exercise any other of his rights." Particularly when read in connection with the proxy statutes of other states and with the Ohio statute which it supplanted, it appears that "any other of his rights" refers only to rights which might be exercised at a shareholders' meeting.

[5] 1 AGENCY RESTATEMENT, § 26 (1933). 1 MECHEM, AGENCY, § 743 (1914); Gore v. Canada Life Assurance Co., 119 Mich. 136, 77 N.W. 650 (1898); 2 MECHEM, AGENCY, § 2052 (1914).

[6] Johnson v. Lamprecht, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938); Wick v. Youngstown Sheet & Tube, 46 Ohio App. 253, 188 N.E. 514 (1932); Goodisson v. North American Sec. Co., 40 Ohio App. 85, 178 N.E. 29 (1931). The appraisal remedy has been made exclusive by statute in some states, and by decision in others. Mich. Pub. Acts (1931) No. 327, §§ 44, 54; Cal. Civ. Code (Deering, 1937) § 369 (17); Beechwood Sec. Corp. v. Associated Oil Co., (C.C.A. 9th, 1939) 104 F. (2d) 537; Adams v. U.S. Dist. Corp., 184 Va. 134, 34 S.E. (2d) 244 (1945); Ill. Ann. Stat. (Smith-Hurd, 1935) c. 32, § 157.73; Morris v. Columbia Apts. Corp., 323 Ill. App. 292, 55 N.E. (2d) 401 (1944). Writers on the subject seem to be unanimously in favor of regarding appraisal as an alternative and not an exclusive

to indicate, however, that after determining to sever his connection with the corporation, the dissenter would be able to affirm that connection by seeking to enjoin or avoid the sale. Furthermore, having registered his dissent, the plaintiff lost his right as a shareholder to participate in corporate activities.[7] With the denial of his petition, it would seem that his rights should be restored retroactively. The problems which this might create, however, particularly in connection with the voting right, add force to the argument against placing any but the most necessary obstacles in the path of appraisal of the dissenting shares. Whatever criticism can be made of the opinion, it is decidedly in harmony with the few decisions on this precise question in other states.[8] The Ohio court seemed to rely heavily on these decisions.

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remedy. Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 CORN. L. Q. 420 (1930); Lattin, "Remedies of Dissenting Shareholders Under Appraisal Statutes," 45 HARV. L. REV. 233 (1931).

[7] "A shareholder who so objects . . . shall not be entitled to vote such shares or to exercise any rights respecting such shares or to receive any dividends. . . ." Ohio Gen. Code (Page, 1938) § 8623-72. On the question of such interim rights generally, see Robinson, "Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares," 32 COL. L. REV. 60 (1932).

[8] In re Universal Pictures, (Del. Ch. 1944) 37 A. (2d) 615; Friedman v. Booth Fisheries Corp., (Del. Ch. 1944) 39 A. (2d) 761; Era Co. v. Pittsburgh Consol. Coal Co., 355 Pa. 219, 49 A. (2d) 342 (1946). A contrary view seems to be taken, however, in Application of Baker, 257 App. Div. 1024, 13 N.Y.S. (2d) 408 (1939), where, under facts similar to those of the principal case, the court allowed the corporation to inquire into the agent's authority to make demand, but found it adequate, even though the shareholder had not notified the corporation of it.