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## CORPORATIONS - POWER OF MAJORITY STOCKHOLDERS TO REORGANIZE BY TRANSFER OF ASSETS TO NEW CORPORATION IN EXCHANGE FOR STOCK

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CORPORATIONS — POWER OF MAJORITY STOCKHOLDERS TO REORGANIZE BY TRANSFER OF ASSETS TO NEW CORPORATION IN EXCHANGE FOR STOCK — A private corporation is solvent and prosperous but is nearing the time when its charter will expire. The directors call a stockholders' meeting at which the majority of the stockholders vote: first, to form a new corporation and, second, to transfer all the assets of the old corporation to the new corporation in consideration for the entire capital stock of the new corporation and the assumption by the new corporation of all liabilities of the old corporation. The plan further provides that the old corporation is then to be dissolved, and the stock of the new corporation is to be distributed pro rata to the stockholders of the old. The plan is carried out as contemplated. Plaintiff, a minority stockholder who has refused to consent to a renewal of the charter dissents to the plan, refuses to receive his share of the stock in the new corporation and brings a bill in equity to set

aside the transfer and to have the old corporation liquidated by a receiver.

This problem was presented recently to the Supreme Court of Minnesota in a case in which the state statute allowing sale of the assets of a corporation by a two-thirds vote of the stock had been passed subsequent to the formation of the selling corporation.<sup>1</sup> The court avoided the constitutional question which application of the statute would have presented by holding that under the circumstances of the case a reorganization by sale of the assets in exchange for stock was warranted by the rule of the common law, absent any statute.<sup>2</sup> Hence the court upheld the transfer, saying that if the plaintiff would not receive his share of the stock in the new corporation, it could be disposed of on the market in the dissolution proceedings and the proceeds delivered to him.

The case raises two distinct problems. First, it concerns the power of majority stockholders to reorganize a corporation by transferring its assets to a new corporation in exchange for the stock of the latter corporation. If it is found that they have such power, the second problem arises of how to deal with the equities of minority stockholders who have dissented to the plan.

#### I.

With regard to the first problem, majority stockholders had power at common law to sell the assets of the corporation for cash whenever

<sup>1</sup> *Hill v. Page & Hill Co.*, (Minn. 1936) 268 N. W. 705.

<sup>2</sup> *Dodd*, "Dissenting Shareholders and Amendments to Corporate Charters," 75 *UNIV. PA. L. REV.* 585 (1927). The effect of the decision of the United States Supreme Court in *Trustees of Dartmouth College v. Woodward*, 4 *Wheat.* (17 U. S.) 518, 4 *L. Ed.* 629 (1819), was that no state could alter, amend, or repeal the charter of any corporation without reserving the power to do so, either in its constitution or statutes. In 1933 the Minnesota legislature passed a new corporation act applicable only to new corporations, with provision that the act apply also to existing corporations provided they did not file a certificate of election not to be bound by the act before May 1, 1935. See *PARKER, CORPORATION MANUAL*, 37th ed., 829 (1936); *Minn. Stat. (Mason Supp. 1936)*, § 7492-61a. In this new act the legislature reserved the power to alter, amend or repeal. Prior to that time there was no reservation of power either in the statutes or the constitution of Minnesota. The selling corporation in the principal case was formed in 1903, and the Minnesota statute permitting holders of two-thirds of the stock of any corporation to sell its assets was not passed until 1925. See *Minn. Stat. (Mason, 1927)*, § 7447-1. Therefore, since the Minnesota legislature in 1925 had no reserved power to alter or amend the charters of existing corporations, it is obvious that under the doctrine of the *Dartmouth College* case the statute giving the majority power to sell could not be applied to the principal case. Such application has been found arguable even in the presence of a reserved power to alter, amend or repeal. In such a state of the law it would seem that the court in the principal case had no course to follow other than a consideration of the case under the common law. See *Curran*, "Minority Stockholders and the Amendment of Corporate Charters," 32 *MICH. L. REV.* 743 (1934).

the exigencies of the business so required.<sup>3</sup> The phrase "exigencies of the business" generally referred to a situation in which the corporation was insolvent, or in which it was failing and had no reasonable prospects of future success. The power to sell generally did not exist where the corporation was a solvent going concern.<sup>4</sup> It is doubtful if majority stockholders had power at common law to sell the assets for stock in another corporation under any circumstances, although several cases indicate that such action could be taken where the stock received had an established market value and was therefore the equivalent of cash.<sup>5</sup> This brief statement of the common law should be sufficient

<sup>3</sup> 6 FLETCHER, *CYCLOPEDIA CORPORATIONS*, perm. ed., § 2946 (1931); 13 *ibid.*, § 5798; 15 *ibid.*, § 7216; Warren, "Voluntary Transfers of Corporate Undertakings," 30 *HARV. L. REV.* 335 (1917); 12 *N. Y. UNIV. L. Q. REV.* 144 (1934).

<sup>4</sup> 6 FLETCHER, *CYCLOPEDIA CORPORATIONS*, perm. ed., § 2947 (1931); *This v. Spokane Falls Gas Light Co.*, 34 *Wash. 23*, 74 *P.* 1004 (1904); 7 *VA. L. REV.* 640 (1921); *Abbot v. American Hard Rubber Co.*, 33 *Barb. (N. Y.)* 578 (1861); 35 *L. R. A. (N. S.)* 396 (1912); *American Seating Co. v. Bullard*, (C. C. A. 6th, 1923) 290 *F.* 896; Hills, "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 *CAL. L. REV.* 349 at 352 (1931). But see *Bowditch v. Jackson Co.*, 76 *N. H.* 351, 82 *A.* 1014 (1912).

<sup>5</sup> *In re Drosnes*, 187 *App. Div.* 425, 175 *N. Y. S.* 628 (1919), noted in 20 *COL. L. REV.* 344 (1920); 35 *L. R. A. (N. S.)* 396 (1912); *McRoberts v. Independent Coal & Coke Co.*, (C. C. A. 8th, 1926) 15 *F. (2d)* 157. In view of the fact that the court in the principal case places its decision upon the law as it exists in the absence of a statute giving majority stockholders power to sell, an examination of the basis of its opinion should not be out of order. In *Geddes v. Anaconda Copper Mining Co.*, 254 *U. S.* 590 at 598, 41 *S. Ct.* 209 (1921), noted in 30 *YALE L. J.* 633 (1921), and cited in the principal case, the court says,

"the general rule is that while, under the circumstances of this case, a sale of all of the property of a corporation could be authorized by the owners of less than all of the stock for an adequate consideration, it must be for money only, for the reason that the minority stockholders may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company.

"But it has been suggested that this rule, also, should be subject to the exception that when stock which has an established market value is taken in exchange for corporation property, it should be treated as the equivalent of money and that a sale otherwise valid should be sustained. . . . We approve the soundness of such an exception. . . ."

As the stock received in the principal case was in a small, new corporation, it is doubtful if it possessed the established market value required by the exception stated in the *Geddes* case. The court in the principal case says, 268 *N. W.* 705 at 706-707: "The rule that such sales should ordinarily be made for cash is not without exception. . . . And we think the circumstances here existing justified an exception. . . ." The court cited the *Geddes* case, *supra*; *Treadwell v. Salisbury Manufacturing Co.*, 7 *Gray (73 Mass.)* 393 (1856), which permitted a sale for stock in a new corporation apparently in the absence of any statute and thus is in support of the principal decision; and *Metcalf v. American School Furniture Co.*, (C. C. N. Y. 1903) 122 *F.* 115, which also seems to support the principal case. At page 125 the latter court gives the

to indicate that reorganization through exchange of assets for stock in a new corporation was made practically impossible in the case of a solvent and going concern. Business necessity, however, conflicted violently with the common-law rule that a corporation could not sell its assets without the consent of all the stock, and today that rule has been displaced by statute in most states.<sup>6</sup> The statutes are usually phrased in broad terms and give a prescribed per cent of the stockholders apparently unlimited power to dispose of the assets of the corporation.<sup>7</sup> An example is the Minnesota statute involved in the principal case.<sup>8</sup> On their face these statutes give majority stockholders power to dispose of the assets of the corporation regardless of their purpose or motive in doing so. If construed to mean precisely what they say, they would place minority stockholders largely at the mercy of the majority. The courts, however, have placed quite definite limits upon these statutory powers of majority stockholders.<sup>9</sup> Where a re-

following reason, "It is asserted that the implied power to wind up the affairs of a corporation and dispose of its property authorizes a sale for stock in another corporation. . . ." At least one court, in addition to the court in the principal case, has permitted such a sale and has based its decision chiefly on the Treadwell case. *Maben v. Gulf Coal & Coke Co.*, 173 Ala. 259, 55 So. 607 (1911).

<sup>6</sup> PARKER, CORPORATION MANUAL, 37th ed. (1936); Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 CORN. L. Q. 420 (1930); Weiner, "Payment of Dissenting Shareholders," 27 COL. L. REV. 547 (1927); Robinson, "Dissenting Shareholders: Their Right to Dividends and the Valuation of their Shares," 32 COL. L. REV. 60 (1932).

<sup>7</sup> Lattin, "Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders," 30 MICH. L. REV. 645 (1932); *Wall v. Anaconda Copper Mining Co.*, (D. C. Mont. 1914) 216 F. 242 at 243-244, where the court says, "These statutes vest power, unknown at common law, in holders of two-thirds of the issued stock of any Montana mining corporation, for any reason at any time to any one at any price for any consideration to sell all corporate property inclusive of choses in action and to dissolve the corporation. . . ."

<sup>8</sup> "Every corporation heretofore or hereafter organized under the laws of this state may at any meeting of its board of directors, sell, lease or exchange all of its property, rights, privileges and franchises upon such terms and conditions as its board of directors deem expedient, and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of two thirds of the shares of stock of the company issued and outstanding having voting power, given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of two-thirds of the shares of stock of the company issued and outstanding having voting power. . . ." Minn. Stat. (Mason 1927), § 7447-1. In 1933 the Minnesota legislature passed a new "Business Corporation Act," applicable only to new corporations and to those existing corporations thereafter adopting it, which altered the provision quoted above to include expressly sales for securities as well as for cash. See PARKER, CORPORATION MANUAL, 37th ed., 851 (1936); Minn. Stat. (Mason Supp. 1936), § 7492-35.

<sup>9</sup> Lattin, "Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders," 30 MICH. L. REV. 645 at 649 (1932), where the writer

organization through sale of assets to a new corporation is attempted, a cash consideration received from the new corporation must be adequate, and the majority stockholders will probably have the burden of proof as to adequacy.<sup>10</sup> The reorganization must be founded upon a legitimate business reason.<sup>11</sup> Where the sole purpose is to freeze minority stockholders out of the business, the transfer will be enjoined or set aside.<sup>12</sup> The same result will follow where the purpose is to obtain the advantage of more liberal corporation laws through incorporation in another jurisdiction,<sup>13</sup> or where it is to obtain an increase in authorized capital stock without complying with statutory requirements,<sup>14</sup> or where such a plan violates some policy of the jurisdiction.<sup>15</sup> In one recent case the court set aside a sale otherwise within statutory power because the contract of sale was not sufficiently definite.<sup>16</sup> Dissolution proceedings must follow the transfer of the assets for stock. The selling corporation cannot retain the stock and act as a holding company, at least where its charter does not authorize such action.<sup>17</sup> One wonders what justification there is for such judicial limitation of a statutory power given in terms without limit. It is to be remembered that these

states, "That the motive of the controlling stockholders in bringing about permitted dissolution, merger or consolidation, has had an important bearing on the outcome of the cases involved is obvious from the large number of cases that have arrived in courts of last resort and been decided upon this ground. . . ."

<sup>10</sup> *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590 at 599, 41 S. Ct. 209 (1921), where it is stated, "where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration." 6 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 2946 (1931); *Wall v. Anaconda Copper Mining Co.*, (D. C. Mont. 1914) 216 F. 242.

<sup>11</sup> Warren, "Voluntary Transfers of Corporate Undertakings," 30 HARV. L. REV. 335 at 358 (1917).

<sup>12</sup> *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 P. 1004 (1904); *McLeod v. Lincoln Medical College of Cotner University*, 69 Neb. 550, 98 N. W. 672 (1904).

<sup>13</sup> 6 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 2943 (1931); *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54 (1892); *McCutcheon v. Merz Capsule Co.*, (C. C. A. 6th, 1896) 71 F. 787; *Dalsheimer v. Graphic Arts Co.*, 86 N. J. Eq. 49, 97 A. 497 (1916).

<sup>14</sup> *Schwab v. E. G. Potter Co.*, 194 N. Y. 409, 87 N. E. 670 (1909).

<sup>15</sup> *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54 (1892).

<sup>16</sup> *Schwartz v. Inspiration Gold Mining Co.*, (D. C. Mont. 1936) 15 F. Supp. 1030. Although the majority had power under the statute to sell, the court felt that the minority were entitled to a contract sufficiently definite to give them reasonable assurance of a fair deal.

<sup>17</sup> 6 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 2950 (1931); *Riker & Son Co. v. United Drug Co.*, 79 N. J. Eq. 580, 82 A. 930 (1912); *McCutcheon v. Merz Capsule Co.*, (C. C. A. 6th, 1896) 71 F. 787; *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn. 336, 31 A. 833 (1895).

statutes were passed to prevent minority stockholders from gaining a strangle hold upon the majority and from being placed in a position to demand a hold-up value for their stock.<sup>18</sup> Necessity for the statutory power appears especially in cases where the majority have a legitimate business reason for reorganization. But the power given by the statutes to majority stockholders is also subject to abuse, especially in reorganization sales<sup>19</sup> where the majority in the selling corporation are also the majority in the new corporation. The courts have been prone to scrutinize such transactions carefully and to impose the limitations referred to. Although the legislature has conferred upon the majority the power to sell, justification for such judicial limitations is found in the theory that the legislature has not in conferring such power relieved majority stockholders of their fiduciary duties. Their duties of good faith and fair dealing to the minority stockholder remain.<sup>20</sup> And arbitrary action by the majority may well inject a constitutional limitation into the case.<sup>21</sup>

There is a limitation of a different kind which the construction placed by some courts upon the statutes has imposed upon the majority power to effect a reorganization sale. Some statutes expressly authorize a

<sup>18</sup> The increasing need for flexibility of corporate control in modern economic society has led to increasing emphasis upon the interest of majority stockholders. See dissenting opinion of Fellows, J., in *Paine v. Saulsbury*, 200 Mich. 58 at 67, 166 N. W. 1036 (1918).

<sup>19</sup> The term "reorganization sale" is used to denote a sale of the corporate assets to a new corporation, voted by majority stockholders for the purpose of reorganizing the business.

<sup>20</sup> *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N. Y. 185 at 195, 123 N. E. 148 (1919), where the court said, "When a number of stockholders constitute themselves, or are by the law constituted, the managers of corporate affairs or interests they stand in much the same attitude towards the other or minority stockholders that the directors sustain, generally, towards all the stockholders, and the law requires of them the utmost good faith. . . ." Also see Lattin, "Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders," 30 MICH. L. REV. 645 at 655 (1932), where the writer makes the following statement: "Whether limitations be put upon this majority by asserting that the statute was not meant to be used in this manner, or that the ethics of the situation demand such a holding, or that there still exists a fiduciary relationship which prevents such action, the result is pretty much the same. The reasoning in terms of a fiduciary relationship, however, seems to furnish the best approach to a satisfying solution. . . ."

<sup>21</sup> Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 CORN. L. Q. 420 at 425 (1930), where the writer says, "And even where the charter originally provided for the right in the majority to amend or change at will, equitable considerations of fairness and the constitutional protection of contract rights still hover in the background as guardians of the interests of minority shareholders." See also, *Peters v. United States Mortgage Co.*, 13 Del. Ch. 11, 114 A. 598 (1921); *Morris v. American Public Utilities Co.*, 14 Del. Ch. 136, 122 A. 696 (1923).

sale for cash or for stock in another corporation.<sup>22</sup> More often the statute simply gives the power to sell. In construing the latter type of statute some courts have said that a transfer of assets in exchange for stock in another corporation is not a sale, and that the statute does not authorize such a transfer.<sup>23</sup> Where such construction prevails, the validity of a transfer for stock depends upon the common law. And the answer of the common law was generally a decree enjoining the transfer or setting it aside.

In conclusion, majority stockholders under modern statutes probably have power to effect a reorganization sale if they follow the statutory procedure prescribed, and if their purpose for reorganization does not run afoul of some judicial limitation upon the statutory power to sell, and provided the statute in question either provides expressly for or is construed to include a sale of assets for stock as well as cash. If the Minnesota statute could constitutionally have been applied in the principal case, there is little doubt that the sale involved would thereby have been placed within the power of the majority because the sale was apparently in conformity with the statutory procedure and, as the court pointed out, was justified from a business and ethical point of view. But the constitutional question present in the principal case forced a decision under the common law. And the general rule at common law did not permit majority stockholders to reorganize by exchanging the assets of their corporation for stock in a new corporation.<sup>24</sup>

## 2.

Once a court has settled the question of the validity of a sale of assets to a new corporation in exchange for stock, it must then determine the effect which the answer to that question has upon the equities of dissenting minority stockholders. Today statutes generally give majority stockholders power to sell the assets of the corporation.<sup>25</sup> As such statutes are a part of the corporate contract, at least as to corporations formed after their passage, the common-law objection of minority stockholders that sale alters the corporate contract without

<sup>22</sup> The statute now in effect in Minnesota, passed in 1933, is of this type. See PARKER, CORPORATION MANUAL, 37th ed., 851 (1936); Minn. Stat. (Mason Supp. 1936), § 7492-35.

<sup>23</sup> Lattin, "Remedies of Dissenting Stockholders Under Appraisal Statutes," 45 HARV. L. REV. 233 at 240 (1931). That an exchange for stock is a sale within the statute: *Forsyth v. Alabama City, G. & A. Ry.*, 207 Ala. 488, 93 So. 401 (1922). That an exchange for stock is not a sale within the statute: *American Seating Co. v. Bullard*, (C. C. A. 6th, 1923) 290 F. 896; *Koehler v. St. Mary's Brewing Co.*, 228 Pa. 648, 66 A. 1016 (1910).

<sup>24</sup> See note 5, *supra*.

<sup>25</sup> See note 7, *supra*.



their consent is no longer valid.<sup>26</sup> If the transfer of assets is within the power of majority stockholders as outlined in the preceding section of this comment, in the absence of a statute giving them more it is difficult to see how minority stockholders can claim more than their proportionate share of the assets held by their corporation after the sale, whether those assets then consist of stock or cash.<sup>27</sup> However, some courts have felt, without apparent legal justification, that the minority must be paid some kind of fair value for their shares, apparently as some kind of an equitable price for majority exercise of the power to sell given in the corporate contract.<sup>28</sup>

However, if the sale is beyond the power of the majority for some one of the reasons outlined in the preceding section, the sale is then no more than a conversion of the assets and the minority will be able to enjoin it or set it aside by acting promptly.<sup>29</sup> If through laches the minority lose their right to have the sale set aside because of change of position on the part of other parties in the transaction, they still have their action for damages for conversion which will give them the fair value of their stock in the selling corporation as of the time of the sale.<sup>30</sup>

It is clear that when the sale is within the power of the majority there is no legal justification for awarding dissenting stockholders any more than their proportionate share of the consideration given by the new corporation for the assets of the old. If the consideration consists of stock in a new corporation, the plight of the dissenting stock-

<sup>26</sup> *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 120 A. 486 (1923); *Farmer's Loan & Trust Co. v. Toledo & S. H. Ry.*, (C. C. A. 6th, 1893) 54 F. 759.

<sup>27</sup> *Mayfield v. Alton Ry., Gas & Electric Co.*, 198 Ill. 528, 65 N. E. 100 (1902); *Traer v. Lucas Prospecting Co.*, 124 Iowa 107, 99 N. W. 290 (1904); *Levy*, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 *CORN. L. Q.* 420 at 426 (1930), where the writer makes this statement: "Where the amendment or change is unauthorized by the charter or the statutes, no provision for paying dissenters should validate it. And where the charter or statute permits the majority to override the objections of dissenting members, the power should not entail, in the absence of statutory provision therefor, the necessity of buying up the shares of those who disapproved. And the majority of courts seem to have so held."

<sup>28</sup> *Black v. The Delaware and Raritan Canal Co.*, 22 N. J. Eq. 130 (1871); *Lauman v. Lebanon Valley R. R.*, 30 Pa. 42 (1858).

<sup>29</sup> *Riker & Son Co. v. United Drug Co.*, 79 N. J. Eq. 580, 82 A. 930 (1912).

<sup>30</sup> *American Seating Co. v. Bullard*, (C. C. A. 6th, 1923) 290 F. 896; *Finch v. Warrior Cement Corp.*, 16 Del. Ch. 44 at 55, 141 A. 54 (1928), where the court says, "On this aspect of the case, therefore, the conclusion is that the complainants as stockholders have delayed too long to be granted the relief of rescission and restoration. . . . But a refusal to grant the relief of cancellation does not mean that the complainants as stockholders are to be deprived of any relief whatever. . . . That they are entitled to a decree for damages in an amount representing the value of their stock based upon its proportionate share of the total net assets of the company is a form of relief to which they are entitled. . . ."

holder will depend largely upon the market conditions surrounding this stock. If there is no market and the minority are forced to take the proceeds of a sacrifice sale of the stock in the dissolution proceedings, the result may well seem unfair to them. To remedy this situation many states have passed statutes giving the dissenting stockholder a statutory remedy for the value of his stock in the selling corporation, determined usually as of the day before the sale.<sup>31</sup> The value is ordinarily determined by appraisers appointed in accordance with the statute, usually by the court or the parties. This appraisal remedy has been given generally to dissenting stockholders in statutory consolidation and merger proceedings;<sup>32</sup> and in view of the increasing use by majority stockholders of the statutory power to sell assets as a means of reorganization, it seems only reasonable that the legislature extend the statutory appraisal remedy to stockholders who dissent to a sale of assets to a new corporation. Some states have done so.<sup>33</sup> Some states, however, extend the remedy in statutory consolidation and merger proceedings, but fail to provide for it in connection with the statutory power of majority stockholders to sell all the assets.<sup>34</sup> As the Minnesota statute falls within the latter classification, it would seem that the court in the principal case reached the same result that would have been reached had the statute been applicable.

Certainly the appraisal statutes constitute a long step toward adequate protection of dissenting stockholders. It is undoubtedly desirable that the power given by modern statutes to majority stockholders to work a fundamental change in the venture by selling the assets to

<sup>31</sup> Lattin, "Remedies of Dissenting Stockholders Under Appraisal Statutes," 45 HARV. L. REV. 233 at 237 (1931); Weiner, "Payment of Dissenting Stockholders," 27 COL. L. REV. 547 (1927); *Geiger v. American Seeding Mach. Co.*, 124 Ohio St. 222, 177 N. E. 594 (1931).

<sup>32</sup> Various statutes have made other corporate acts lawful, and have provided to dissenters the appraisal remedy in connection therewith. Among these corporate acts are: change in corporate purposes, issuance of stock to employees, change in share preferences. See Weiner, "Payment of Dissenting Stockholders," 27 COL. L. REV. 547 at 548 (1927).

<sup>33</sup> UNIFORM BUSINESS CORPORATION ACT, § 42, 9 UNIFORM LAWS ANNOTATED 94 (1932). For a list of states having statutes providing for payment to dissenters, see Weiner, "Payment of Dissenting Stockholders," 27 COL. L. REV. 547 (1927).

<sup>34</sup> Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 CORN. L. Q. 420 at 421-422 (1930); PARKER, CORPORATION MANUAL, 37th ed. (1936); Hills, "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 CAL. L. REV. 349 at 361, note 16 (1931), where the author states, "Some states, such as Delaware, do not make provision for compensation of dissenting shareholders on a sale of assets, but do permit the appraisal of dissenting shares upon a consolidation or merger. This difference seems indefensible after it is recognized that a sale of assets is commonly used as a means of voluntary reorganization."

a new corporation be balanced by statutory power given to dissenting stockholders to withdraw from the venture if they so desire.

In conclusion the writer reverts to the point of beginning. The foregoing discussion, it is hoped, illustrates the necessity of distinguishing the two distinct problems involved in reorganization sales such as the one discussed in the principal case. If the sale is beyond the power of majority stockholders, the common law decreed either that the sale be set aside, or that the dissenting stockholder receive damages for the conversion. Although dictum in some cases seems to say that the statutory appraisal remedy is likewise available where the sale constitutes an abuse of power,<sup>35</sup> it is submitted that the appraisal remedy was never intended to be applicable to this problem.<sup>36</sup> There is no need for its application here. The common-law remedy for conversion provided the same measure of recovery to the dissenting stockholder as the statutory appraisal remedy.<sup>37</sup> It is when the court finds the reorganization sale valid either under statute or common law that the second problem involved in the principal case arises, and the statutory appraisal remedy looms large as the only means available to affirmatively protect the equities of the dissenting stockholder.<sup>38</sup> In the absence of the statutory appraisal remedy, a holding that the sale is lawful forces the dissenting stockholder to take his chances in the market. Hence it was to provide a remedy where the sale is lawful that the appraisal statutes were passed, and the remedy should be confined within the scope of such purpose.<sup>39</sup> It is evident, then, that the

<sup>35</sup> Recourse to the statutory appraisal remedy when the plaintiff stockholder knows facts making the sale invalid will bar a later suit to set the sale aside. *Wall v. Anaconda Copper Mining Co.*, (D. C. Mont. 1914) 216 F. 242. Such a result would be avoided if the court should set the sale aside in the first instance and hold the requested appraisal remedy inapplicable because of the invalidity of the sale.

<sup>36</sup> Lattin, "Remedies of Dissenting Stockholders Under Appraisal Statutes," 45 *HARV. L. REV.* 233 at 247 (1931). The author says: "It is certainly free from doubt that legislative intent, if there was any conscious intent, was directed toward *legal* action by the majority rather than illegal. The appraisal provision could not have been intended to cover *all* action by the majority regardless of the manner in which the action was taken. . . ."

<sup>37</sup> *Finch v. Warrior Cement Corp.*, 16 Del. Ch. 44, 141 A. 54 (1928); *Kremer v. Public Drug Co.*, 41 S. D. 365, 170 N. W. 571 (1919).

<sup>38</sup> Attention should be called to the various statutory conditions precedent to the granting of the appraisal remedy. The remedy can be lost by failing to fulfill certain statutory requirements such as proper dissent and election to demand the fair value of shares within a prescribed period.

<sup>39</sup> *General Inv. Co. v. Lake Shore & M. S. Ry.*, (C. C. A. 6th, 1918) 250 F. 160 at 174, where the court makes this statement: "This statute, whose prime purpose was evidently to provide just compensation to a stockholder dissenting from a consolidation lawfully made, does not, in our opinion, provide an adequate remedy for a stockholder who seeks in advance to restrain the corporation from entering into an illegal consolidation. . . ."

type of remedy applicable turns upon the validity of the sale in question. As the validity of a sale cannot be determined in advance, modern appraisal statutes should, it seems, be construed to permit suit in the alternative: either to set aside the sale, or to apply the statutory appraisal remedy.<sup>40</sup> The theoretical distinction drawn between the problems involved in a reorganization sale has been made practical by the application of different remedies respectively to the solution of each. And application of the correct remedy can be only accidental if the distinction between the problems referred to is not realized.

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<sup>40</sup> Lattin, "Remedies of Dissenting Stockholders Under Appraisal Statutes," 45 HARV. L. REV. 233 at 249 (1931); *Lazenby v. International Cotton Mills Corp.*, 174 App. Div. 906, 160 N. Y. S. 1 (1916).