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Corporations—Appraisal Statutes—Who May Seek Appraisal under the Statute.— Bache & Co. v. General Instruments Corp.

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The court noted that Professor Corbin was in apparent disagreement both with Williston and the Restatement,[16] but reasoned that his statement was evidently intended to apply only to situations of supervening impossibility occurring after the entire time for performance of the executory contract had expired.[17]

Naturally, had plaintiff's suit for loss of profits for the entire term of the contract been successfully concluded one day before the fire, there could be no contention that damages should thereafter be limited. However, these were not the facts before the court, and to allow full damages on the basis of the breach alone is to deny that the primary aim in measuring damages in the field of contract law is to arrive at compensation.[18] The damages for breach of contract should place the plaintiff in the position he would have been in had there been no breach.[19] And had there been no breach, there nevertheless would have remained the fire. In such a situation, the normally operative rule as to impossibility discharging the promisor from further performance should and would prevail.[20]

An analogous situation often exists when plaintiff, after having filed suit for breach of contract, is thereafter allowed to recover for damages occurring to the time of trial.[21] It seems reasonable, therefore, that if damages under particular circumstances can be increased, then it should follow that damages under particular circumstances can be decreased. Thus the court in *In re Griffin Mfg. Co.*,[22] in allowing plaintiff to prove damages occurring subsequent to the commencement of the action, likewise aided the defendant bankrupt by taking judicial notice of the panic of 1929 in mitigation of such damages.

In reaching a decision founded on analogy and logic, and thereby adjusting the loss between the parties, it would appear that the *Stanisci* court has made the law of impossibility a little more possible to live with.

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Corporations—Appraisal Statutes—Who May Seek Appraisal under the Statute.—*Bache & Co. v. General Instruments Corp.*[1]—Bache & Co., a stock brokerage firm, was the registered owner of 33,400 shares of the com-

[16] Supra note 1, at 18, 180 A.2d at 397, citing 6 Corbin, Contracts § 1341 (1951). "Impossibility of performance caused by death of a person or by destruction of the subject matter is not operative as a discharge if the breach for which suit is brought occurred before there was any such impossibility."

[17] See Holt Mfg. Co. v. Thornton, 136 Cal. 232, 68 Pac. 708 (1902), where, under a contract to harvest wheat to commence on July 5, appellant did not begin work until July 15 after a large amount of the grain had shelled out. Accord, Ollinger & Bruce Dry Dock Co. v. James Gibbony & Co., 202 Ala. 516, 81 So. 18 (1919).

[18] Fratelli Pantanella, S. A. v. International Commercial Corp., supra note 13; McCormick, Damages 560 (1935) and cases cited therein.

[19] Hawkins v. McGee, 84 N.H. 114, 146 Atl. 641 (1929).

[20] Taylor v. Caldwell, 3 B.&S. 826, 122 Eng. Rep. 309 (K.B. 1863).

[21] Losei Realty Corp. v. City of New York, 254 N.Y. 41, 171 N.E. 899 (1930).

[22] 43 F.2d 624 (N.D. Ga. 1930).

[1] 74 N.J. Super. 92, 180 A.2d 535 (1962).

mon stock of the General Instruments Corporation, which was held in its "street name." The beneficial owners were customers of Bache. General Instruments announced that a special stockholders meeting was to be held for the purpose of approving a merger with the Pyramid Electric Co. Prior to the meeting Bache notified General Instrument that it would vote 2,690 shares against the proposed merger in accordance with the wishes of the beneficial owner. At the meeting Bache voted these shares against the merger, which was approved by the stockholders. Pursuant to the applicable New Jersey statute,[2] Bache then filed a petition demanding appraisal and payment for its dissenting shares. The Chancery Division ordered that an appraisal be made. General Instrument appealed. HELD: Under the New Jersey statute a brokerage firm may properly seek an appraisal for stock which it holds in its "street name."

In the absence of express statutory provisions[3] the courts are in conflict as to how inclusive the word "stockholder" or "shareholder" should be when it appears in an appraisal statute. The Delaware court takes the view that only a registered owner of stock should be entitled to an appraisal.[4] New York disagrees, and gives unregistered beneficial owners the right to demand an appraisal.[5]

There are three possible interpretations of the inclusiveness of the word "stockholder":

(1) only registered owners are included.
(2) both registered and beneficial owners may be included.[6]
(3) only beneficial owners may be included.

The instant case is unusual, in that General Instrument was forced to

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[2] N.J. Stat. Ann. § 14-12-7 (Supp. 1961).
Upon the merger or consolidation of any two or more corporations . . . into a single corporation . . . if any stockholder . . . not voting in favor of such agreement of merger or consolidation, shall dissent therefrom and shall refuse or neglect to convert his stock into the stock of such consolidated corporation may . . . apply . . . for the appointment of three disinterested appraisers to appraise the full market value of his stock without regard to any depreciation or appreciation thereof in consequence of the merger or consolidation. . . .

[3] For an example of such an express provision see In re Kreher, 379 Pa. 313, 108 A.2d 708 (1954); Era Co. v. Pittsburgh Consol. Coal Co., 355 Pa. 219, 49 A.2d 342 (1946).

[4] Salk Dome Oil Co. v. Schenk, 28 Del. Ch. 433, 41 A.2d 708 (Sup. Ct. Del. 1945); Coyne v. Schenly Indus. Inc., 155 A.2d 238 (Sup. Ct. Del. 1959).

[5] Application of Deutchmann, 281 App. Div. 14, 116 N.Y. Supp. 578 (1952); In re Rowe, 107 Misc. 549, 176 N.Y.S.-753 (Sup. Ct. N.Y. 1919); Application of Bacon, 278 N.Y. 1, 38 N.E.2d 105 (1941). The applicable New York Statute, N.Y. Stock Corp. § 21-1, provides: ". . . if any stockholder has objected to such action and demanded payment for his stock . . . the corporation . . . shall mail . . . to him a written offer to pay for such stock. . . ." § 21-3 further provides that "If the corporation shall fail to make an offer . . . or if the objecting stockholder shall fail to accept an offer from the corporation . . . either such stockholder or the corporation may petition . . . to determine the value of such stock."

[6] As to the possible results when the beneficial and registered owners attempt to take conflicting action, see Booma v. Bigelow Sanford Carpet Co., 330 Mass. 79, 111 N.E.2d 742 (1953).

argue that interpretation (3) was correct,[7] and that since Bache was the registered owner, it was not entitled to an appraisal. In rejecting this argument the court placed considerable reliance on *Salt Dome Oil Co. v. Schenk*.[8] There, an unregistered beneficial owner sought an appraisal under the Delaware statute.[9] In denying relief the court emphasized the practical difficulties which would result if a corporation were not able to rely on its records as sole evidence of ownership. After drawing an analogy to voting rights and the payment of dividends, as to which corporate records are conclusive, the court held that only a registered owner could seek an appraisal. The court was careful to point out that its decision would in no way affect any rights existing between the beneficial owner and the registered owner.

It is clear that the *Salt Dome* opinion necessarily adopts interpretation (1). Had interpretation (2) or (3) been accepted the beneficial owner would have prevailed. In the instant case, however, General Instrument could have been successful only if the court held that beneficial owners alone were entitled to the benefit of the appraisal statute (interpretation (3)). Therefore, it appears that the court has only rejected interpretation (3), and has not passed on interpretation (2). However, the opinion shows strong approval of the holding in the *Salt Dome* case,[10] and it is likely that the New Jersey court would reach a similar result on similar facts.

It is submitted that interpretation (3) is not justified, and would lead to wholly unsatisfactory results. Such an approach would make the appraisal process much too cumbersome and risky. A corporation would never know which persons had the right to demand appraisal of their stock. The author has been unable to find any authority, statutory or otherwise, which adopts this view.[11]

The real conflict seems to be between interpretations (1) and (2). Interpretation (1) has the advantage of being clear, definite and uncompli-

[7] Factually, most of the cases involve an attempt by the beneficial owner to seek appraisal and payment; interpretation (2) or (3) will accomplish this result. See cases cited in notes 4 & 5, supra.

[8] Supra note 4.

[9] Del. Code Ann. Tit. 8 § 262(a) (1953) provides: "when used in this section, the word stockholder means and includes a holder of stock in a stock corporation . . . The words stock and share mean and include what is ordinarily meant by those words. . . ."

§ 262(b) provides: "If any such stockholder shall . . . demand in writing . . . payment for his stock, such resulting or surviving corporation shall . . . pay to him the value of his stock. . . ."

§ 262(2) provides: "If . . . the corporation and any such objecting stockholder fail to agree as to the value of such stock any such stockholder . . . may . . . demand a determination of the value of the stock . . . by an appraiser to be appointed by the court."

[10] "In this case, as in the Delaware case, we find nothing in our General Corporation Act to support the idea that an unregistered beneficial owner of stock is intended to have the status of stockholder in intracorporate affairs." 180 A.2d at 539.

[11] But see Application of Friedman, 184 Misc. 639, 54 N.Y.S.2d 45, 50 (Sup. Ct. 1945), where the court stated: "The term 'stockholder,' as used in the statute, plainly means that the actual owner of the stock alone is entitled to rights thereunder, even though his shares stand in the name of another on the corporate books." The statement must be regarded as dicta since the beneficial owner was seeking appraisal and thus interpretation (2) could support the decision as well as interpretation (3).

cated. A mere glance at the corporate records is all that is needed to ascertain whether the person seeking appraisal and payment is properly entitled to relief. On the other hand, the registered owner is placed in a position where he has the power to sever the beneficial owner's interest in the corporation. Yet it should be borne in mind that this situation results from the beneficial owner's own act since he assented to the registration of his shares in the name of another. Furthermore, he will not be left without a remedy against the registered owner.

To a lesser degree, interpretation (2) is subject to the disadvantages of interpretations (1) and (3). Under interpretation (2), the simplicity of interpretation (1) does not exist, since the corporate records will not be the sole criterion in determining the parties entitled to an appraisal. Also, the registered owner will still have the power to affect the beneficial owner's interest. Furthermore, there is the possibility of conflict between the actions of the beneficial and registered owners. It is submitted, therefore, that interpretation (1) is the preferable view.

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Corporations—Judicial Review of Corporate Elections—Section 25 of the New York General Corporation Law.—*Gearing v. Kelly*.[1]—The appellant, a director of Radium Chemical Company, Inc., stayed away from a directors' meeting for the sole purpose of preventing a quorum. In her absence the board of directors elected a new director to fill an existing vacancy on the board. The Supreme Court, Special Term,[2] granted appellants' petition to the extent of setting aside the election. The Court of Appeals[3] upheld the Supreme Court, Appellate Division,[4] in dismissing the petition. HELD: Both appellant and the stockholder whom she represented were estopped to assert that the lack of a quorum invalidated the board's election of the new director.

Section 27 of the New York General Corporation Law states:[5]

> *Unless otherwise provided a majority of the board at a meeting* duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at such a meeting shall be the act of the board. (Emphasis added.)

Section 27[6] also gives every corporation the privilege of enacting a by-law fixing its own quorum requirement at any fraction not less than one-third, nor more than a majority of its directors.[7] And although the probability of a deadlock is enhanced,[8] section 9 of the same act[9] permits the certificate

1 11 N.Y.2d 201, 182 N.E.2d 391, 227 N.Y.S.2d 897 (1962).
2 29 Misc. 2d 674, 215 N.Y.S.2d 609 (Sup. Ct. 1961).
3 Supra note 1.
4 15 App. Div. 2d 219, 222 N.Y.S.2d 474 (1961).
5 N.Y. Gen. Corp. Law § 27.
6 Ibid.
7 Benintendi v. Kenton Hotel, 294 N.Y. 122, 60 N.E.2d 829 (1945).
8 See Henn, Corporations and Other Business Enterprises § 274 (1961).
9 N.Y. Gen. Corp. Law § 9. The statute provides in detail the manner of effecting,