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CORPORATIONS — ACCOUNTABILITY OF MAJORITY SHAREHOLDERS FOR SECRET PROFITS — *A* corporation wished to obtain a lease owned by *B* corporation. Unable to purchase the lease, *A* corporation contracted with *C* and *D*, holders of a majority of the stock of *B* corporation, and officers and directors therein, whereby *C* and *D* were to exchange their stock in *B* corporation for an equivalent of $15.95 a share. *C* and *D* further agreed to recommend to the minority an offer of an equivalent of $14.12 a share. On the recommendation of *C* and *D*, but without knowledge that they were receiving less for their stock, the other shareholders accepted the offer. A former minority stockholder brought suit in his own behalf and in behalf of all others similarly situated to recover as for loss of profits against *C* and *D*, among others. *Held*, the transaction was nothing more in essence than a sale of the entire corporate assets; and the individual stockholders are entitled to share rateably in the proceeds in proportion to their stock holdings. *Dunnett v. Arn*, (C. C. A. 10th, 1934) 71 F. (2d) 912.

That the officers and directors of a corporation stand in a fiduciary relation to the *corporation* is without dispute.[1] If the breach of trust consists of wrongful dealing with corporate property, the individual stockholder, bringing an action is enforcing a *corporate* right of action,[2] and the relief obtained belongs to the corporation.[3] While cases assert the principle that the directors are trustees for the other stockholders as individuals, these statements appear either as dictum,[4] or with reference to a suit to rescind a fraudulent conveyance.[5] In such cases, the distinction between derivative and representative actions is of no importance, as the

[1] 3 FLETCHER, CYCLOPEDIA CORPORATIONS, Perm. ed., § 838; 1 MORAWETZ, PRIVATE CORPORATIONS, 2d ed., § 516 (1886); Gray v. Cornelius, (D. C. Okla. 1930) 40 F. (2d) 67; Bonner v. Chapin Nat. Bank, 251 Mass. 401, 146 N. E. 666 (1925); SPELLMAN, CORPORATE DIRECTORS 14 (1931).

[2] 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., §§ 1090, 1091, 1093 (1918); Smith v. Hurd, 12 Metc. (53 Mass.) 371, 46 Am. Dec. 690 (1847); Dana v. Morgan, (C. C. A. 2d, 1916) 232 F. 85; Abbot v. Merriam, 8 Cush. (62 Mass.) 588 (1851); Niles v. New York Central & H. R. R. R., 176 N. Y. 119, 68 N. E. 142 (1903); Dupont v. Standard Arms Co., 9 Del. Ch. 324, 82 A. 692 (1912).

[3] SPELLMAN, CORPORATE DIRECTORS 635 ff. (1931); 3 POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 1095 (1918); Whitten v. Dabney, 171 Cal. 621, 154 P. 312 (1915) (likening the stockholder suing in a derivative capacity to a guardian ad litem); Von Arnim v. American Tube Works, 188 Mass. 515, 74 N. E. 680 (1905); Wangrow v. Wangrow, 211 App. Div. 552, 207 N. Y. S. 132 (1924); Rafferty v. Donneley, 197 Pa. St. 423, 47 A. 202 (1900). And see cases supra, note 2.

[4] Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 A. 54 (1928) (cited in 3 FLETCHER, CYCLOPEDIA CORPORATIONS, Perm. ed., § 157, to the proposition that the director "is a trustee for the individual stockholder . . . at least in a limited sense." But the recovery was ordered paid to the corporation-defendant in the action). And see SPELLMAN, CORPORATE DIRECTORS 633 (1931), and cases there cited, note 11.

[5] A sale: Wheeler v. Abilene Nat. Bank Bldg. Co., (C. C. A. 8th, 1908) 159 F. 391, 16 L. R. A. (N. S.) 892, 14 Ann. Cas. 917. A consolidation: Jones v. Missouri-Edison Elec. Co., (C. C. A. 8th, 1906) 144 F. 765 (containing a review of a number of decisions in support of its position). A foreclosure: Jackson v. Ludeling, 21 Wall. (88 U. S.) 616 (1874).

benefit inures to the corporation in any event. Other situations in which there is no good reason for applying this distinction arise after the dissolution of the corporation,[6] or after transfer of all the stock to third parties.[7] For in such situations the stockholder, who is ultimately the injured party, no longer has such an interest as would allow him to participate in a recovery on behalf of the corporation alone. On this ground, the instant case, allowing individual recovery to the stockholders, is not inconsistent with the principles outlined above.[8] There is authority for holding a director to fiduciary standards in dealing with corporate stock.[9] At one time the majority rule denied the existence of such fiduciary relation.[10] But the trend of recent decisions [11] has been away from that position.[12] Had the court here not expressly declined to decide the case on that basis, it could at least have found that the special facts of the case gave rise to a fiduciary relation.[13]

H. A. M.

[6] Ervin v. Oregon Ry. & Nav. Co., (C. C. N. Y. 1884) 20 F. 577; Denman v. Richardson, (D. C. Wash. 1921) 284 F. 592.

[7] Hechelman v. Geyer, 252 Pa. 123, 97 A. 193 (1916); Upton v. Southern Produce Co., 147 Va. 937, 133 S. E. 576 (1926).

[8] Supra, notes 1, 2, 3.

[9] Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232 (1903); Stewart v. Harris, 69 Kan. 498, 77 P. 277 (1904); Sautter v. Fulmer, 258 N. Y. 107, 179 N. E. 310 (1932); McManus v. Durant, 168 App. Div. 643, 154 N. Y. S. 580 (1915).

[10] Carpenter v. Danforth, 52 Barb. (N. Y.) 581 (1868); Board of Comrs. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245 (1873); Hooker v. Midland Steel Co., 215 Ill. 444, 74 N. E. 445 (1905). For a complete review of cases up to 1910, see Wilgus, "Purchase of Shares of Corporation by a Director from a Shareholder," 8 MICH. L. REV. 267 (1910).

[11] See Smith, "Purchase of Shares of a Corporation by a Director from a Shareholder," 19 MICH. L. REV. 698 (1921); Walker, "The Duty of Disclosure by a Director Purchasing Stock from His Stockholders," 32 YALE L. J. 637 (1923); 45 HARV. L. REV. 1388 (1932).

[12] Affirming the existence of the fiduciary duty: Jacquith v. Mason, 99 Neb. 509, 156 N. W. 1041 (1916); Dawson v. Nat. Life Ins. Co. of America, 176 Iowa 362, 157 N. W. 929 (1916); Sherman v. Fulmer, 258 N. Y. 107, 179 N. E. 310 (1932). Adopting the compromise view that fiduciary duties may arise on special facts of a given case: Strong v. Repide, 213 U. S. 419, 29 S. Ct. 521 (1909); Seitz v. Frey, 152 Minn. 170, 188 N. W. 266 (1922); Goodwin v. Agassiz, 283 Mass. 358, 186 N. E. 659 (1933); George v. Ford, 36 App. D. C. 315 (1911); Voellmeck v. Harding, 166 Wash. 93, 6 P. (2d) 373 (1931); Wood v. MacLean Drug Co., 266 Ill. App. 5 (1932). Striving to find a direct and special agency between the stockholder and director for the sale of the stock: Gadsden v. Bennetto, 23 Man. L. Rep. 33, 9 Dom. L. Rep. 719 (1913). But see Bacon v. Soule, 19 Cal. App. 428, 126 P. 384 (1912); Connolly v. Shannon, 105 N. J. Eq. 155, 147 A. 234 (1929).

[13] Strong v. Repide, 213 U. S. 419, 29 S. Ct. 521 (1909). For a discussion of the special facts doctrine, see Smith, "Purchase of Shares of a Corporation by a Director from a Shareholder," 19 MICH. L. REV. 698 (1921).