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CORPORATIONS-APPRAISAL STATUTES-EXCLUSIVENESS OF STATUTORY REMEDY

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CORPORATIONS—APPRAISAL STATUTES—EXCLUSIVENESS OF STATUTORY REMEDY—Defendant corporation's charter provided for retirement of preferred stock at par plus accumulated dividends, before payment could be made to common stockholders, in the event of dissolution or "recapture" of its assets by the enfranchising city. Under authority of a majority vote of its stockholders, the corporation conveyed all its assets to defendant City of Quincy, the enfranchising city. Defendants offered to pay preferred stockholders only \$150 per share, although par plus accumulated dividends amounted to \$205 and some common stockholders had already received \$5 per share. Plaintiffs, preferred stockholders, sued to secure full payment, but the trial court held that their only remedy was assertion of the statutory right to appraisal and payment.¹ On appeal, *held*, reversed. The statutory remedy is not exclusive when the distribution agreement is in fraud of stockholders' rights. *Opelka v. Quincy Memorial Bridge Co.*, (Ill. App. 1948) 82 N.E. (2d) 184.

Absent an express statutory mandate to the contrary,² courts have usually

¹ Ill. Ann. Stat. (Smith-Hurd, 1934) c. 32, §157.73.

² The appraisal remedy has been made exclusive by statute in four jurisdictions, although only Michigan extends the remedy to cover a sale of total assets. Cal. Corp. Code (Deering, 1948) §4123; Mich. Comp. Laws (1948) §§450.44, 450.54; Pa. Stat. Ann. (Purdon, 1948) tit. 15, §2852-908; Rev. Laws of Hawaii (1945) §8387. Several jurisdictions provide in terms that the dissenter is concluded by the vote of assenting stockholders if he fails to commence

reached the result of the principal case.³ When statutes were enacted permitting fundamental alterations in the purposes and powers of a corporation by less than a unanimous vote of stockholders, the minority stockholder was necessarily deprived of his common law right to prevent such alterations.⁴ Appraisal provisions find their origin in a theory of compensation for this deprivation. These two types of statutes together form a legislative attempt to balance the necessity of adjusting corporate mechanisms to business exigencies against the injustice to the minority stockholder of compelling him to suffer changes in his investment against his wishes.⁵ Thus, the usual approach of the courts has been that appraisal statutes are designed to give the dissenting stockholder relief against a legal but personally unfavorable act of the majority. The cases reiterate that common law remedies are still available to prevent action by the corporation in excess of the statutory authority,⁶ and that the appraisal remedy will not be held exclusive where there is showing of fraud⁷ or oppressive and inequitable treatment of the minority.⁸ One argument against this view is that the corporation may thereby be forced to cope with a multiplicity of suits in different forums prosecuted on different theories, with the resultant possibility of varying recoveries for identical interests.⁹ Other arguments are based on the continuing possibility of extortion through strike suits and the difficulty of rescinding a completed transaction of the type and magnitude usually involved.¹⁰ However, the consensus of judicial opinion seems to be that the general statutory purpose

proceedings under the statutes; e.g., Ill. Ann. Stat. (Smith-Hurd, 1934) c. 32, §157.73; Ohio Code (Throckmorton, 1948) §8623-72, but these have been construed to leave open the possibility of attack for fraud and illegality, or possibly to make such action a condition precedent to commencement of any type of suit. *Harbine v. Dayton Malleable Iron Co.*, 61 O. App. 1, 22 N.E. (2d) 281 (1939); *Johnson v. Lamprecht*, 133 O. St. 567, 15 N.E. (2d) 127 (1938); *Morris v. Columbia Apartments Corp.*, 323 Ill. App. 292, 55 N.E. (2d) 401 (1944). Only Washington expressly provides for preservation of the equitable remedy for fraud. Wash. (Rem.) Rev. Stat. (Supp. 1940) §3803-36.

³ 13 *FLETCHER, Cyc. Corp.*, perm. ed., §5893 (1943).

⁴ *Mayfield v. Alton Ry., Gas & Elec. Co.*, 198 Ill. 528, 65 N.E. 100 (1902).

⁵ *Chicago Corp. v. Munds*, 20 Del. Ch. 142, 172 A. 452 (1934); *In re Timmis*, 200 N.Y. 177, 93 N.E. 522 (1910).

⁶ *Wheatley v. Root Co.*, 147 O. St. 127, 69 N.E. (2d) 187 (1946); *Starret Corp. v. 5th Ave. & 29th St. Corp.*, (D.C. N.Y. 1932) 1 F. Supp. 868; *Genl. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, (C.C.A. 6th, 1918) 250 F. 160 at 174.

⁷ *Cole v. Natl. Cash Credit Assn.*, 18 Del. Ch. 47, 156 A. 183 (1931); *Wall v. Anaconda Copper Mining Co.*, (D.C. Mont. 1914) 216 F. 242; *Porges v. Vadsco Sales Corp.*, (Del. Ch. 1943) 32 A. (2d) 148 (actual or constructive fraud).

⁸ *Outwater v. Public Service Corp.*, 103 N.J. Eq. 461, 143 A. 729 (1928), *affd.* 104 N.J. Eq. 490, 146 A. 916 (1929); *MacArthur v. Port of Havana Docks Co.*, (D.C. Me. 1917) 247 F. 984. But see *Hottenstein v. York Ice Machinery Co.*, (D.C. Del. 1942) 45 F. Supp. 436, holding that relief may be afforded only if the plan is so unfair as to shock the conscience and amount to actual fraud.

⁹ See *Adams v. United States Distributing Corp.*, 184 Va. 134 at 146, 34 S.E. (2d) 244 (1945), where the court regarded it as "inconceivable . . . that the legislature ever intended that dissenting stockholders . . . should receive different values for their shares."

¹⁰ *Ballantine & Sterling*, "Upsetting Mergers and Consolidations: Alternative Remedies of Dissenting Shareholders in California," 27 CALIF. L. REV. 644 (1939). But to the effect that danger of strike suits has been overemphasized, see *Lattin*, "A Reappraisal of Appraisal Statutes," 38 MICH. L. REV. 1165 (1940).

is not to divest dissenters of protection against illegal action; the statutes contemplate proceedings carried through in good faith, not tainted with fraud.¹¹ Statutes limiting the dissenter to the single alternative of selling out would, if literally enforced,¹² increase the chances of success of a majority attempt to "squeeze out" minorities by changes making their stock virtually worthless.¹³ The importance of such an alteration in the protection of legal rights makes it doubtful that the legislature intended this result to be implied from the creation of a new remedy.

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¹¹ *Homer v. Crown Cork & Seal Co.*, 155 Md. 66, 141 A. 425 (1928); *Johnson v. Lamprecht*, 133 O. St. 567, 15 N.E. (2d) 127 (1938).

¹² It might be doubted that any court would permit perversion of the statute into a shield for obviously fraudulent actions. See *Hubbard v. Jones & Laughlin Steel Corp.*, (D.C. Pa. 1941) 42 F. Supp. 432, where the court, in denying injunctive relief, emphasized the fairness and legality of the proposed merger, although the statutory remedy was exclusive.

¹³ *Colgate v. United States Leather Co.*, 73 N.J. Eq. 72, 67 A. 657 at 668 (1907); S.E.C., Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part VII, pp. 609-610 (1938).