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Corporations--Sale of Corporate Assets--Dissenting Shareholder Not Limited to Right of Appraisal (Eisenberg v. Central Zone Property Corp., 306 N.Y. 58 (1953))

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tions increase the temptations to corporate fraud.[19] Though the derivative suit has been abused, the abuses are insignificant as compared with the results which might follow if corporate directors attain the unbridled immunity this decision seems to portend.

CORPORATIONS — SALE OF CORPORATE ASSETS — DISSENTING SHAREHOLDER NOT LIMITED TO RIGHT OF APPRAISAL.—A representative action by a dissenting minority stockholder was brought to enjoin a plan of reorganization[1] under Section 20 of the New York Stock Corporation Law, whereby his shares of stock would be converted into voting trust certificates of a newly formed corporation. Defendants contended that the plaintiff's sole remedy was the right of appraisal under Section 21 of the New York Stock Corporation Law. On cross motions for judgment on the pleadings, the Court granted the plaintiff's motion and *held* that the proposed plan was violative of Section 20, and that the plaintiff was not limited to his right of appraisal, but may invoke equity's aid where the proposed plan is oppressive, *ultra vires* and illegal. *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 115 N.E.2d 652 (1953).

At common law, before a sale of corporate assets could be effectuated, unanimous consent of all the stockholders was required.[2] The reason advanced for this rule was to protect the minority stockholder from unjust and oppressive treatment by the majority. The rapid growth of corporations, with their increasingly large number of stockholders, however, made it virtually impossible for a corporation to obtain the required unanimous consent; thus, further growth was stifled. It was not surprising that abuses arose. Minority stockholders, by means of "strike suits," compelled the corporation to buy their stock at exorbitant prices.[3]

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[19] Ballantine, *supra* note 18, at 416.

[1] The proposed plan: defendant corporation was to sell all its assets (real estate) to a newly formed Delaware corporation which was to pay for it with its own stock. A voting trust agreement would be effectuated, and, upon dissolution of the defendant corporation, each stockholder was to receive a voting trust certificate representing his shares. In addition to normal voting rights, the trustees would have the right to sell all the stock of the Delaware corporation, with the added provision that they might deduct from the selling price sufficient funds to form a third corporation which was to lease the property from the buyer.

[2] *See* Eisenberg v. Central Zone Property Corp., 306 N.Y. 58, 66, 115 N.E.2d 652, 655 (1953); Matter of Fulton, 257 N.Y. 487, 493, 178 N.E. 766, 768 (1931); see PRASHKER, CASES AND MATERIALS ON CORPORATIONS 870 (2d ed. 1949).

[3] See Matter of Timmis, 200 N.Y. 177, 181, 93 N.E. 522, 523 (1910).

In 1893, the legislature, recognizing these evils, enacted a statute [4] which authorized a corporation to sell its assets to a domestic corporation upon the affirmance of the holders of two-thirds of the shares, and at the same time reserved the right of the dissenting minority to have their stock appraised and purchased by such corporation. The statute has been successively amended to meet changing conditions, and is at present embodied in Sections 20 and 21 of the New York Stock Corporation Law.[5] Closely akin to the growth of these statutes have been those providing for merger [6] and consolidation.[7]

Similar statutes have also been enacted in other jurisdictions.[8] Some states, however, in what appears to be the minority view, expressly limit a dissenting shareholder to his right of appraisal and sale.[9] Other jurisdictions, in cases of fraud or oppression, permit the invocation of equity's aid in addition to extending the statutory right of appraisal.[10]

Heretofore, the New York Court of Appeals had not passed directly on this issue. In an early Appellate Division decision, where a minority stockholder sought to hold the directors liable for the negligent or fraudulent sale of the corporate assets, plaintiff was not limited to his right of appraisal.[11] Recently, however, the Court of Appeals, in dealing with corporate consolidation [12] and merger,[13] stated that the minority holder *was* limited to such right of appraisal. As there can be found no sound explanation why the foregoing rule should not apply with equal force to the sale of corporate assets, it would appear that New York had adopted the minority rule, notwithstanding the contrary Appellate Division decision. Thus it was not unusual to discover a lower court ruling that, in a sale of corporate assets situation, the dissenting shareholder's sole remedy was ap-

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[4] Laws of N.Y. 1893, c. 638.

[5] Section 20 no longer contains the restriction limiting the sale of assets, with the exception of franchises, to a domestic corporation engaged in a business similar to that of the seller.

[6] N.Y. STOCK CORP. LAW § 85.

[7] *Id.* § 86.

[8] For a complete listing of the appraisal statutes of all the states, see Note, 38 VA. L. REV. 915 (1952).

[9] Michigan's statute expressly provides, in the sale of corporate assets, that the dissenting shareholder's exclusive remedy is appraisal. MICH. COMP. LAWS § 450.44(2) (1948). California and Pennsylvania have similar statutes, but refer only to merger and consolidation cases. CAL. CORP. CODE § 4123 (Deering, 1953); PA. STAT. ANN. tit. 15, § 2852-908 (Purdon, Supp. 1953).

[10] See, *e.g.*, MacArthur v. Port of Havana Docks Co., 247 Fed. 984 (S.D. Me. 1917); Opelka v. Quincy Mem. Bridge Co., 335 Ill. App. 402, 82 N.E.2d 184 (1948); *cf.* Klopot v. Northrup, 131 Conn. 14, 37 A.2d 700, 705 (1944).

[11] Bown v. Ramsdell, 227 App. Div. 224, 237 N.Y. Supp. 573 (4th Dep't 1929).

[12] *See* Anderson v. International Minerals & Chem. Corp., 295 N.Y. 343, 350, 67 N.E.2d 573, 577 (1946).

[13] *See* Beloff v. Consolidated Edison Co., 300 N.Y. 11, 19, 87 N.E.2d 561, 564 (1949).

praisal.[14] The trial court, in the instant case, recognizing these precedents, intimated that the plaintiff was limited to the statutory remedy.[15]

The principal case, in ruling that equity may intervene in a proper instance,[16] indicates that New York has now adopted the majority rule. In this, the court has made a wise decision. Since, however, merger and consolidation plans may be just as oppressive to dissenting minority shareholders, this equitable relief should not be limited to sale of corporate assets situations.

In the majority of cases, of course, the dissenting stockholder will have a just remedy in appraisal, and the courts should so limit him. Further, as it is the policy of this state to guard against "strike suits," [17] equity should intervene only in the clearest of situations. It may be said, therefore, that this middle of the road policy, when properly applied, seems to be to the best interests of both the majority and minority stockholders.

CRIMINAL PROCEDURE — AVAILABILITY OF CORAM NOBIS IN FEDERAL PRACTICE.—In 1939, respondent pleaded guilty in a federal district court to mail theft and was sentenced to a four-year term which he duly served. In 1950, he was convicted of a state charge and sentenced as a second offender because of the prior federal conviction.[1] Respondent, while in state prison, filed application for writ of error coram nobis in the district court to vacate its judgment, claiming he was deprived of his constitutional right to counsel under the Sixth Amendment.[2] The application was denied but the Court of Appeals for the Second Circuit reversed.[3] The Supreme Court,

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[14] Blumenthal v. Roosevelt Hotel, Inc., 202 Misc. 988, 115 N.Y.S.2d 52 (Sup. Ct. 1952).

[15] *See* Eisenberg v. Central Zone Property Corp., 203 Misc. 59, 64, 116 N.Y.S.2d 154, 158 (Sup. Ct. 1952). The court then stated that the proposed plan was more than a sale of assets and enjoined the creation of the voting trust. *Ibid.*

[16] "Stockholders may not be forced out of corporations by any such method at the hands of directors or officers or 'principal stockholders' . . . . The Legislature never sanctioned such treatment of a minority stockholder and, on application, equity will forbid it." Eisenberg v. Central Zone Property Corp., 306 N.Y. 58, 66-67, 115 N.E.2d 652, 655-656 (1953).

[17] This position is evidenced by the enactment of Section 61-b of the New York General Corporation Law. See Lapchak v. Baker, 298 N.Y. 89, 80 N.E.2d 751 (1948).

[1] N.Y. PENAL LAW § 1941.

[2] There may, however, be a waiver of this constitutional right. See Chandler v. United States, 195 F.2d 383 (5th Cir. 1952); De Jordan v. United States, 187 F.2d 262 (8th Cir.), *cert. denied*, 341 U.S. 942 (1951).

[3] United States v. Morgan, 202 F.2d 67 (2d Cir. 1953).