LEGISLATION

VALUATION OF DISSENTING SHAREHOLDERS' INTEREST IN A MERGED OR CONSOLIDATED CORPORATION—Flexibility of the common law has been the guarantee of its existence. Courts have not been impervious to change. Broad, general principles enunciated in prior decisions have been limited to the particular circumstances of those cases, and *obiter dicta* have been denounced as mere surplusage when new factual situations demanded application of new principles if justice was to be accomplished. In general, the law, conservative in its conception, has gradually reacted to changed economic conditions and kept pace with the ebb and flow of human activity. The stupendous and precipitant rise of the corporate form, however, has introduced new problems, so varied and novel that courts have found considerable difficulty in applying common law concepts, probably because of their tendency to grope for standards of general application, rather than a recognition of the necessity of determining only the peculiar right litigated as between the particular parties. A tradition of individualistic law cannot be molded readily to determine problems affecting interests of shareholders as a group, and this is quite apposite to the problems arising when there is an attempt to effect a merger or consolidation against the wish of minority shareholders.

When the prevailing form of business enterprise was a partnership, composed of three or four members, the rule was developed that the business could not be sold nor combined with another without the consent of all the partners.[1] As the corporate form began to supersede the partnership, the shareholders were few in number, and the courts, recognizing that the corporation was merely the partnership with a few rights superadded by the legislature, adopted the rule that consent of all shareholders was a condition precedent to the validity[2] of a sale of all the corporate assets,[3] a merger[4] or a consolidation.[5] The shareholder had an interest in continuing as a member of the group which interest the courts would not allow to be taken from him without his consent; such a taking being considered as tantamount to a conversion of his shares.[6] Without such a rule, a member of the shareholding group might have been deprived of his membership at the whim and caprice of the majority of the shareholders.[7] As the corporation became the favored type of business organization, ownership became widely diffused and the shareholding group was subject to constant flux. The unanimity rule was obviously inadequate to deal with the situation where one shareholder out of thousands, the owner of one share out of millions, might prevent a sale or combination advantageous to the corporation. Whereas the

[1] See LINDLEY, PARTNERSHIP (9th ed. 1924) 405. The Uniform Partnership Act provides in section 9 (3): "Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to: . . . (b) Dispose of the goodwill of the business, (c) Do any other act which would make it impossible to carry on the ordinary business of a partnership, . . ."

[2] *I. e.*, the transaction will not be enjoined at the instance of a minority shareholder.

[3] Meyerhoff v. Banker's Securities, Inc., 105 N. J. Eq. 76, 147 Atl. 105 (1929); Abbot v. American Hard Rubber Co., 33 Barb. Ch. 578 (N. Y. 1861); Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044 (1928). See also Warren, *Voluntary Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335.

[4] Geddes v. Anaconda Mining Co., 254 U. S. 590, 41 Sup. Ct. 209 (1920).

[5] Or the formation of a holding company. American Seating Co. v. Bullard, 290 Fed. 896 (C. C. A. 6th, 1923); Murrin v. Archbald Consol. Coal Co., 232 N. Y. 541, 134 N. E. 563 (1921).

[6] Garrett v. Reid-Cashion Land & Cattle Co., *supra* note 3, at 274, 270 Pac. at 1054.

[7] For a discussion of devices for diluting stock participations, see Berle, *Corporate Devices for Diluting Stock Participations* (1931) 31 COL. L. REV. 1239.

majority might have forced a sale of the minority interest had the unanimity rule not been invoked, the minority might now, with the aid of the rule, compel the majority to buy them out at an exorbitant price or register their dissent and prevent the consummation of the proposed plan.[8] This situation led to the adoption by a few courts of the so-called modern rule that the minority will not be permitted to prevent a sale or combination plan which is fairly made.[9] In most of the states the situation called for statutory reformation, and at the present time thirty-nine states, the District of Columbia and the Philippine Islands provide for the sale, transfer or combination of a corporation by approval of less than all of the shareholders.[10]

When at the time of incorporation the statute or articles of association expressly authorize merger and consolidation, such provisions become part of the contract between the shareholders and the corporation, and a combination may be effected by compliance with the provisions of the statute or articles of association.[11] Where the authorizing statute is passed subsequent to the incorporation of the enterprise, the shareholders are bound, if the statutory requirements are satisfied, when the legislature has reserved the power to alter, amend or repeal the articles of association.[12] Though this privilege is reserved, where the consolidation would work a material modification of the purposes and character of the corporate business, the statute does not affect existing corporations.[13] If the legislature has not reserved the privilege, subsequent statutes or amendments to the articles validating corporate combination give no added power to existing corporations.[14] Of the forty-one statutes mentioned, thirty-two authorize merger or consolidation by affirmative sanction of less than all the shareholders; the other nine statutes refer to the sale, leasing or exchange of all the corporate assets. A merger or consolidation would seem necessarily to involve an exchange of all the assets. Whether the courts will so decide is conjectural, it having been held that such a statute does not apply to a consolidation.[15]

Seven of the statutes authorizing consolidation [16] and one of the statutes authorizing the transfer of all the property [17] provide no remedy for non-assenting shareholders. Since the statutes have destroyed the right of the minority to prevent consolidation or other fundamental change in the corporate structure, courts might construe the right to receive the value of their shares as ancillary to the new right of the majority, a recompense for the deprivation of the minority's common law right, or the combination plan might be considered unfair in absence of a provision providing for the payment in cash to dissentients of the value of their shares. Some courts have allowed actions by dissentients for the

[8] See *In re* Timmis, 200 N. Y. 177, 181, 93 N. E. 522, 523 (1910).

[9] Nave-McCord Mercantile Co. v. Ranney, 29 F. (2d) 383 (C. C. A. 8th, 1928); Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 142 N. W. 434 (1913); Halpern v. Grabosky, 296 Pa. 108, 145 Atl. 834 (1929); Cohen v. Big Stone Gap Iron Co., 111 Va. 468, 69 S. E. 359 (1910). *Cf.* Treadwell v. Salisbury Mfg. Co., 73 Mass. 393, 404 (1856): "At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, is not limited as to objects, circumstances or quantity."

[10] For the various statutes, see *infra* notes 26 to 32 inclusive.

[11] 8 THOMPSON, CORPORATIONS (3d ed. 1927) § 6032.

[12] Hale v. Chesire R. R., 161 Mass. 443, 37 N. E. 307 (1894). For a full discussion of the effect of subsequently enacted legislation, see Dodd, *Dissenting Shareholders and Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 584.

[13] Kenosha, Rockford & Rhode Island R. R. v. Marsh, 17 Wis. 13 (1863).

[14] Thomas v. Railroad Co., 101 U. S. 71 (1879); Lauman v. Lebanon Valley R. R., 30 Pa. 42 (1858); *cf.* Tuttle v. Michigan Air Line R. R., 35 Mich. 247 (1877).

[15] Norton v. Union Traction Co., 183 Ind. 666, 110 N. E. 113 (1915). A different attitude is apparent in Cole v. National Cash Credit Ass'n, 156 Atl. 183 (Del. Ch. 1931), where it is said, at 188: "While a consolidation is quite distinct from a sale, yet, from the viewpoint of the constituent companies, a sale of assets is in substance involved."

[16] Those of Colorado, Iowa, Kansas, Montana, North Dakota, Utah and West Virginia.

[17] That of Wisconsin.

value of their shares although the statute was silent,[18] but the weight of authority is to the effect that payment is not an inherent right of shareholdership and therefore exists only where the legislatures have specifically provided therefor.[19] Though the latter rule appears theoretically sound, it is to be regretted that the statutes did not, in all cases, give the right to dissenting shareholders to compel payment of the value of their shares if they did not desire to join the acquiring corporation. When the statute authorizes payment, the question arises whether this remedy is exclusive. An affirmative answer compels the conclusion that the provision would then be unconstitutional as confiscatory[20] except where the right of eminent domain exists. The California Code,[21] however, provides that litigation is limited to suits to determine whether the requisite affirmative vote of authorization has been given. In absence of such statute, it is held that payment is not made an exclusive remedy.[22] Where the merger or consolidation agreement is unfair and a fraud upon the minority, the proposed arrangement may be set aside.[23] If consummated, the acquiring corporation holds the property of the constituent company upon constructive trust. A dissenting shareholder is not required to exercise his option of surrendering his shares for their cash value until he has been given a fair opportunity of joining in the proposed change subject to conditions, proper both at law and in equity.[24] In Pennsylvania, the dissenting shareholder is not limited to an action at law in pursuance of the remedy given by the appraisal statute, but may sue in equity to enforce payment of the value of his shares.[25] Adequacy of the remedy at law, however, would appear to be a complete defense to the action in equity.

The provisions for determination of the value of the shares of dissentients display a considerable lack of uniformity. The usual difficulties attendant upon statutes inartistically drawn abound. The statutes may be roughly divided into two groups, those specifying that "value" is to be paid, and those providing for "market value". Of the "value" group, twelve statutes provide that "value" of the shares is to be paid [26]; nine provide for payment of the "fair cash value" [27];

[18] Garrett v. Reid-Cashion Land & Cattle Co., *supra* note 3; Southern Mut. Aid Ass'n v. Blount, 112 Va. 214, 70 S. E. 487 (1911). In absence of statute, dissentients have been allowed payment for their shares. Paterson v. Shattuck Arizona Copper Co., 186 Minn. 611, 244 N. W. 281 (1932), 81 U. OF PA. L. REV. 219; Lauman v. Lebanon Valley R. Co., *supra* note 14; International & G. N. R. R. v. Bremond, 53 Tex. 96 (1880); *cf.* State v. Bailey, 16 Ind. 46 (1861).

[19] 15 FLETCHER, CYCLOPEDIA OF CORPORATIONS (Perm. ed. 1932) § 7164. Nugent v. The Supervisors, 19 Wall. 241 (U. S. 1873); Mayfield v. Alton Ry., Gas & Elec. Co., 198 Ill. 528, 65 N. E. 100 (1902); Traer v. Lucas Prospecting Co., 124 Iowa 107, 99 N. W. 290 (1904).

[20] See Levy, *Rights of Dissenting Shareholders to Appraisal and Payment* (1930) 15 CORN. L. Q. 420, 427.

[21] CAL. CIV. CODE (Deering, 1931) § 369; *cf.* § 44 (2) and § 54 of Mich. Pub. Acts 1931, No. 327.

[22] Weiner, *Payment of Dissenting Stockholders* (1927) 27 COL. L. REV. 547, 557; Goodisson v. North American Securities Co., 40 Ohio App. 85, 178 N. E. 29 (1931).

[23] Jones v. Missouri-Edison Elec. Co., 144 Fed. 765 (C. C. A. 8th, 1906); Colgate v. United States Leather Co., 73 N. J. Eq. 72, 67 Atl. 657 (1907); Tanner v. Lindell Ry., 180 Mo. 1, 79 S. W. 155 (1903).

[24] Colgate v. United States Leather Co., *supra* note 23; Outwater v. Public Service Corp'n of N. J., 103 N. J. Eq. 461, 143 Atl. 729 (1928).

[25] Barnett v. Philadelphia Market Co., 218 Pa. 649, 67 Atl. 912 (1907). *Contra:* Spencer v. Seaboard Air Line Ry. Co., 137 N. C. 107, 49 S. E. 96 (1904).

[26] CONN. GEN. STAT. (1930) § 3466; DEL. REV. CODE (1915) c. 65, § 61, as amended by Del. Laws 1927, c. 85, § 20; IDAHO CODE ANN. (1932) § 29-155; IND. ANN. STAT. (Burns, Supp. 1929) § 4856.2; ME. REV. STAT. (1930) c. 56, § 66; MASS. GEN. LAWS (1921) c. 156, § 46; MO. REV. STAT. (1929) § 4568; N. Y. STOCK CORPORATION LAW (1923) §§ 21, 87, as amended by N. Y. Laws 1924, c. 441, § 6; N. C. CODE ANN. (Michie, 1931) § 1224 (c); S. C. CIV. CODE (1932) § 7759; VT. GEN. LAWS (1917) § 4938, as amended by Vt. Laws 1919, No. 125, § 2; PHILIPPINE ISLANDS CORPORATION ACT OF 1906, § 28½, as amended by Act of 1928, § 13.

[27] Ark. Laws 1931, c. 255, § 63; CAL. CIV. CODE (Deering, 1931) § 369; FLA. COMP. LAWS (1927) § 6564; LA. GEN. STAT. (Dart, 1932) § 1132; Mich. Laws 1931, No. 327, § 54; MINN.

five stipulate for the "fair value" [28]; and Rhode Island requires payment of the "full and fair value".[29] In this group, there is no substantial disparity of terminology. The full value and the fair value would be required in all cases as well as payment in cash. The second group may be divided into statutes providing for "market value" [30] and those providing for the "full market value".[31] Here again no substantial distinction exists. But whether the same criteria will be applied in both groups is problematical. The statutes of Alabama [32] and Tennessee [33] use the terms "value" and "market value" interchangeably, a manifestation of inaccurate draftsmanship. In these two states, at least, the two terms must be construed to be synonymous. The New Jersey court,[34] in approving the report of appraisers evaluating shares of dissentients under statute calling for their "full market value", determined that market value of the shares was the proper basis, and that value based upon a *pro rata* share of the corporation's assets properly valued is unsound. But, in *Outwater v. Public Service Corporation*,[35] the same court, when it was contended that sales were too infrequent and casual to give a market value to the shares, suggested that the argument that proof of intrinsic value should have been resorted to might have been persuasive had that line of proof been introduced. In Pennsylvania, where the statute also provides for payment of the "full market value", a dissentient may pursue his remedy in equity to enforce payment of the value of his shares, in which case recovery is not limited to market value if the value as measured by assets is greater.[36] Courts certainly should make a distinction between value and market value. Market value should be considered in determining value but ought not to be conclusive. Ten of the statutes provide that the value of the shares shall be ascertained without reference to any appreciation or depreciation in consequence of the consolidation. In New York, where there is no statutory provision on this subject, it has been decided that the enhanced value of his shares by reason of the proposition which the dissentient has disapproved is not to be allowed.[37] However, where the consolidation plan was not fair to minority shareholders, any appreciation in value arising from the transfer will be assigned to the dissentients since the majority may not gain a profit resulting from a violation of their duty.[38] The Illinois statute, while stipulating that the shares

STAT. (Mason, 1927) § 7457-14; NEV. COMP. LAWS (Hillyer, 1929) § 1640; OHIO GEN. CODE (Page, 1931) § 8623-72, as amended by Ohio Laws 1931, pp. 66, 68; VA. CODE ANN. (Michie, 1930) § 3822.

[28] ILL. REV. STAT. (Cahill, 1931) c. 32, § 73; MD. ANN. CODE (Bagby, 1924) art. 23, § 35; N. H. PUB. LAWS (1926) c. 225, § 54; ORE. CODE ANN. (1930) § 25-234; D. C. CODE (1928) § 639 (d), as amended by D. C. Laws 1931, No. 619.

[29] R. I. GEN. LAWS (1923) c. 248, § 56, as amended by R. I. Laws 1932, c. 1941, § 5.

[30] KY. STAT. (Carroll, 1930) § 558.

[31] N. J. COMP. STAT. (1910) p. 1661, and (Supp. 1924) p. 683; N. M. STAT. ANN. (Courtright, 1929) § 32-217, 218, 1201, 1203; PA. STAT. ANN. (Purdon, 1930) tit. 15, § 425.

[32] The dissenting shareholder is to be paid the *actual value* of his shares, and may apply for the appointment of appraisers to appraise the *full market value;* if the court is satisfied that the appraisement is not the *true market value,* it may enter an order for the *true value* thereof. ALA. CODE (Michie, 1928) § 7043.

[33] Dissentients are entitled to the *fair market value* of their shares; if a *fair value* cannot be agreed upon, the court may determine the *value,* and upon payment of the *fair cash value,* the shares shall be transferred to the new corporation. TENN. CODE (1932) § 3752.

[34] *In re* Capital Stock of Morris Canal & Banking Co., 104 N. J. L. 526, 141 Atl. 784 (1928); Prall v. U. S. Leather Co., 6 N. J. Misc. 967, 143 Atl. 382 (1928).

[35] *Supra* note 24.

[36] Petry v. Harwood Electric Co., 280 Pa. 142, 124 Atl. 302 (1924); Ferrando v. U. S. Nat. Bldg. & Loan Ass'n, 307 Pa. 25, 160 Atl. 716 (1932); Nice Ball Bearing Co. v. Mortgage Building & Loan Ass'n, Pa. Sup. Ct., Jan. 16, 1933, (1933) 81 U. OF PA. L. REV. 872, 873.

[37] Matter of Fulton, *In re* Clark's Will, 131 Misc. 151, 226 N. Y. Supp. 141 (1928), *aff'd,* 227 App. Div. 785, 237 N. Y. Supp. 745 (1929), modified, 257 N. Y. 487, 178 N. E. 766 (1931).

[38] Jones v. Missouri-Edison Elec. Co., *supra* note 23.

of non-assenting shareholders are to be valued without regard to appreciation or depreciation resulting from the plan, provides that the acquiring corporation shall be obligated to purchase the shares "together with all rights and interests thereby represented, including all cash or securities or other benefits accruing to such share or shares, from or by reason of the sale, lease, merger or consolidation".[39]

A few sporadic provisions remain to be considered. In Oregon, dissentients are given the remedy only when the consideration for the sale or transfer is not wholly lawful money of the United States. The Pennsylvania statute requires the appraisers to estimate the damages to the non-assenting shareholder by the consolidation and to appraise the shares at their full market value, the corporation then being given an election to pay either. In Ohio, "unless the articles otherwise provide", dissentients are to be paid. Even in absence of such a provision there is no valid reason why the articles cannot prevent dissentients from availing themselves of the statutory right. Where the articles provide for consolidation without the necessity of buying out the minority, shareholders must be deemed, when they purchased their shares, to have consented to such provision as a portion of the contract between them and the corporation. The Louisiana Act states that consolidation may be effected by approval of two-thirds of the shares of each class "unless otherwise provided in the articles". The articles, then, might provide that a three-fourths vote or a unanimous vote is essential. This would also seem to be permissible in absence of specific stipulation in the statute, though some courts would show reluctance to uphold the requirement of unanimity in all situations. The Louisiana statute also contains the unique provision that dissenting shareholders may demand the value of their shares only where the proposal has been adopted by less than eighty *per cent.* of the shareholders.

Determination of the various factors influencing value[40] which are to be considered with regard to a given state of facts has been left to the discretion of the courts. The statutes give little assistance in elucidating the elements comprising "fair cash value" or "full market value". Courts have felt that, since the corporation was to survive, though in a different form, the dissentients are entitled, not only to their aliquot share of the assets as upon a dissolution, but to any additional value of the corporation as a going concern.[41] Where the statute prescribes that the market value of the shares is to be paid, if the security is listed on the Stock Exchange, ascertainment of the market value will be comparatively simple. Any effect on quotations resultant from the merger or consolidation agreement will have to be eliminated, but this can be done by comparison with quotations of the shares before the proposal was made. When the market is in a state of normality, no resort to extraneous factors or conditions need be made. But when the condition of the market is unsteady, or when there is unjustified inflation or deflation, present market quotations can be influential only insofar as they reflect a reasonable basis for estimating what would be the market value of the shares in absence of abnormalities. Consideration must then be given to the factors upon which market value is founded—the past record and present reputation of the management, stability of earning power, rate of return on the investment, and prospective earning power. In Kentucky and New Mexico, it is provided that dissenting shareholders shall be paid the market value of the shares, but this shall not be less than book value of the shares according to the

[39] ILL. REV. STAT. (Cahill, 1931) c. 32, § 73.

[40] See Robinson, *Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares* (1932) 32 COL. L. REV. 60; Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes* (1931) 45 HARV. L. REV. 233; HARTMAN, FAIR VALUE (1920), discussing primarily this term as used by utility commissions.

[41] American Seating Co. v. Bullard, *supra* note 5; *cf.* Cole v. Wells, 224 Mass. 504, 113 N. E. 189 (1916).

last balance sheet of the corporation. Whether book value is any measure of actual value is controversial. In *Borg v. International Silver Co.*,[42] consideration of book value as influential in determining actual value was declared to be fallacious. Book value has also been held too intangible to be sufficient, by itself, to show that a purchase of corporate assets based upon market value of the shares is unreasonable or fraudulent.[43] Earnings are some indication of the value of the investment of the shareholders and book value represents accumulated earnings added to the amount paid in on the shares. Book value, then, is the estimate of the total investment of shareholders in the corporation, and in absence of goodwill among the assets would be some evidence of what shareholders would be likely to receive were the corporation dissolved.

In Oregon,[44] the dissentient is to be paid in cash the fair value of his interest, based upon his proportionate share of the "reasonable and fair value of the net assets" of the corporation. The other "value" statutes do not specify a valuation basis. In *Cole v. Wells*,[45] "value" was interpreted as including not only the market price of the shares but their intrinsic value, to be ascertained by a valuation of the excess of all the assets over the liabilities. In appraising realty owned by the corporation, ten *per cent.* is to be allowed for plottage. Five *per cent.* extra is allowed where the contiguous properties are available for the "best possible use," but this allowance will not be granted where the best possible use of the properties will require removal of a structure now upon the land.[46] Evidence of the par value of the shares of the acquiring corporation given in exchange for the shares of the absorbed corporation may be considered in appraising the minority shares,[47] but the fact that the value set by the appraisers is greater than the *pro rata* share of the proceeds of the transfer is no objection to their report.[48] In *Seaich v. Mason-Seaman Trans. Co.*,[49] the New York court modified a valuation based upon the proportionate share of the corporation's net assets, and allowed, as an asset, goodwill, ascertained by multiplying average net profits, less interest on capital invested in the business, by a number of years, to be ascertained in each case by reference to the nature and character of the particular enterprise.[50]

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[42] 11 F. (2d) 147 (C. C. A. 2d, 1925).

[43] Homer v. Crown Cork & Seal Co., 155 Md. 66, 141 Atl. 425 (1928).

[44] ORE. CODE ANN. (1930) § 25-234.

[45] *Supra* note 41.

[46] Erlanger v. New York Theatre Co., 206 App. Div. 148, 200 N. Y. Supp. 696 (1923), modified, 237 N. Y. 159, 142 N. E. 571 (1923).

[47] Wunsch v. Consolidated Laundry Co., 116 Wash. 44, 198 Pac. 383 (1921).

[48] *In re* Bickerton, 196 App. Div. 231, 187 N. Y. Supp. 267, *aff'd*, 232 N. Y. 1, 133 N. E. 41 (1921).

[49] 170 App. Div. 686, 156 N. Y. Supp. 579 (1915); *aff'd*, 219 N. Y. 634, 114 N. E. 1083 (1916).

[50] The appraisers had determined the preferred shares to be worth $88.43 per share, $15,298.39 for the 173 shares of respondent. The assets, as of the date when respondent objected, were determined to be $1,201,728.14, including valuation of the goodwill at $366,707.52. The Company earned $219,005.91 during its 21½ months of corporate existence or a yearly average of $122,235.84. This was multiplied by three to arrive at the value of goodwill. The court modified the goodwill figure by deducting interest on the capital invested in the business. The assets as found by the appraisers less their goodwill figure amounted to $835,020.62, six *per cent.* of which amount is $50,101.24. This is deducted from the average net profits of $122,235.84 leaving a balance of $72,134.60. Multiplying this figure by three, goodwill is found to be $216,403.80 and the assets $1,051,424.42. Subtracting from this amount the conceded liabilities of $457,809.89 and an overvaluation of taxicabs of $84,099.60, net assets become $509,514.93. This made the value of petitioner's shares $60.57 each, or $10,478.61 as finally found by the court. It is submitted that this result is incorrect. The assets as found by the appraisers less the amount allowed by them as goodwill are $835,020.62. This figure reduced by the conceded liabilities of $457,809.89 and taxicab overvaluation of $84,099.60 is equal to $293,111.13. This amount is the net asset value exclusive of goodwill, in other words, the capital invested. Six *per cent.* of this is $17,586.67, the interest on capital invested. Average earnings, $122,235.84, less interest on invested capital, is $104,649.17

It has sometimes been stated that a sale of all the corporate assets or a merger or consolidation effects a practical dissolution [51] of the corporation, but as far as determination of value is concerned, this statement has been repudiated by *Matter of Fulton,*[52] in which the rule for distribution of surplus between preferred and common shareholders upon a dissolution was held inapplicable where there had been a transfer of the corporation as a going concern. The court decided that the preferred shareholders had no interest in the surplus since their shares were preferred only as to dividends and these had been paid regularly. The accumulated earnings in the surplus account therefore might have been paid to the holders of the common shares and any equity in the surplus account belonged to them. Unless the preferred shareholders would be denied participation in the surplus if a dissolution of the corporation were effected, it is difficult to justify the result. The dissenting shareholder has an interest in the corporation and the maintenance of its status as a going concern. He should be entitled at least to what he would receive if the corporation were dissolved rather than merely absorbed. However, transfer of the corporate property without his consent gives him, in addition, the added right to share in any surplus value represented by that vague generality, going concern value. The case is also interesting because of the weight it attaches to earning power as a factor in the determination of value. By way of *dictum,* the court states that investment value of shares is to be considered in determining their value. This in turn is dependent upon the rate of return, the security affording regularity of dividend payment, the record of the corporation and its prospects for the future. In *Jones v. Missouri-Edison Elec. Co.,*[53] the master capitalized the net income of the fourth year after the consolidation at seven *per cent.* and discounted this amount back to the date of the consolidation. The report was held erroneous on the ground that net income for the first three years should have been considered, and that capitalized income was not by itself the test of value but should have been considered along with other evidence of value such as the sales value of the shares.

The sparseness of case material and the failure of the statutes to elucidate a procedure for ascertaining the dissenting shareholder's interest leave much to speculation. New circumstances will demand additional considerations. Meanwhile the conflict among the various standards of value remains. Selection of a single method to the exclusion of all others may be expeditious but at the same time is very likely to lead to inaccuracy. For this reason the statutes prescribing market value as the test are unsatisfactory. The market is usually in either a bullish or bearish condition. Over a period of time the variations tend to be ironed out, but in valuation the problem is to ascertain the value as of a particular time. Where there is a ready market, value based upon market prices will not give the dissentient anything he does not already have, since he may dispose of his shares in the market, and any recession of the market price due to the increase in supply brought about by his desire to sell will be more than offset by the saving of the expenses of prosecuting his statutory right of appraisal. Where there is no ready market, there will probably be no substantial facts upon which

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which multiplied by three is equal to $313,947.51, the goodwill of the company. Goodwill plus the value of net assets exclusive of goodwill amount to $607,058.64, the total net asset value. Petitioner's *pro rata* share of this is $72.16 per share or $12,483.68, more than $2000 in excess of the amount finally found by the court. Proper application of the language used by the court in its opinion requires this result.

[51] People v. Ballard, 134 N. Y. 269, 32 N. E. 54 (1892); *In re* Timmis, *supra* note 8; Murrin v. Archbald Consol. Coal Co., *supra* note 5; see Cole v. Wells, *supra* note 41, at 513, 113 N. E. at 191.

[52] *Supra* note 37.

[53] 233 Fed. 49 (C. C. A. 8th, 1916). This case traveled back and forth between the District Court and the Circuit Court of Appeals for eleven years before finally adjudicated.

to base the estimate of market value. A maximum and minimum from which to start calculations appear to be desirable. Two of the statutes [54] set the minimum at book value as of the last balance sheet. It would be better to place dissolution value as the minimum, book value to be considered as evidence thereof. Some statutes provide that the demand by the shareholder for payment is to be accompanied by a statement of the amount considered by the shareholder to be the fair value of his shares. If the corporation is not satisfied that this is the fair value of the shares it is to notify the dissentient of what it considers to be such fair value. Provisions of this sort in the statutes, with the additional requirement that the estimate be accompanied by a statement of the facts upon which such value is based, might be conducive to settlement of the dispute by compromise; if not, the two estimates would be a starting point from which the appraisers could work, using market value, asset or intrinsic value, present and prospective earning power, and the sale or exchange value used in the agreement of transfer insofar as they tend to show at what point between the two extremes actual value is situated. There is no single, self-sufficient test of value. The various factors must all be considered and weighed with respect to the peculiar circumstances of each particular case.

An interesting problem arises in determining at what time the dissentient ceases to be a shareholder and becomes a creditor of the corporation. The Illinois statute provides for the payment of interest at the rate of five *per cent.* from the date of the consummation of the sale, lease, merger or consolidation.[55] From this provision it would seem to be a justifiable implication that rights of shareholdership cease on the day from which interest begins to run. Four of the statutes stipulate that upon demand by the dissentient for the value of his shares he ceases to be a shareholder.[56] In Ohio, it is provided that, if prior to the consummation or abandonment of the proposal, dividends are paid to the shareholders of the same class as those dissenting, the amount which dissentients would have received but for their dissent shall be paid to them as a credit upon the amount to be paid for their shares.[57] Ohio also provides that the court in confirming the award of the appraisers shall provide for the payment of interest at the rate of six *per cent.* from whatever date it shall set. In *Paterson v. Shattuck Arizona Copper Co.*,[58] since the corporation was formed prior to the enactment of the appraisal statute, it did not apply, but the dissentients being less than one *per cent.* of the total shareholding body, the court refused to enjoin the merger but gave the petitioners the option to take shares in the acquiring company on the basis of a fair exchange, or the value of their shares at the highest market or intrinsic value between the time of the consolidation and the trial, with interest from the date fixed for determining the value. Under this view, the dissentient remains a shareholder until the date which he chooses as the time from which value is to be calculated. The Minnesota statute, however, provides that value as of the day before the authorization vote is to be the standard. When the case arises under the statute, there will be no choice of the date for determining the value, but the case is still authority for stipulating that interest is to run from the date mentioned in the statute as the base rather than from the date of payment. This would intimate that all rights except the right of payment cease when the consolidation is authorized. In *Matter of Erlanger*,[59] it was determined that interest

[54] KY. STAT. (Carroll, 1930) § 883b-3; N. M. STAT. ANN. (Courtright, 1929) § 32-1203.
[55] ILL. REV. STAT. (Cahill, 1931), c. 32, § 73.
[56] FLA. COMP. LAWS (1927) § 6564; NEV. COMP. LAWS (Hillyer, 1929) § 1640; N. C. CODE ANN. (Michie, 1931) § 1224 (c); PHILIPPINE ISLANDS CORPORATION ACT OF 1906, § 28½, as amended by Act of 1928, § 13.
[57] OHIO GEN. CODE (Page, 1931) § 8623-72.
[58] *Supra* note 18.
[59] *Supra* note 46.

was to run only from the time of confirmation of the award; but in the unreported case of *Ames v. Godchaux Sugars, Inc.*,[60] the corporation had not fared well since the consolidation and the court was reluctant to consider dissenting shareholders as affected by such losses. It therefore decided that the dissentients had no right to dividends between the time of dissent and confirmation of the award. This result is untenable since it refuses to recognize that the shareholder has the important right to share in profits and refuses to recognize him as a creditor entitled to interest. The shareholder's demand for the value of his shares is also a notification by the shareholder to the corporation that he no longer wishes to be considered a member of the shareholding body. Upon such demand, his rights of shareholdership should cease unless he later withdraws his disapproval of the corporate action and desires reinstatement as a member of the new group. The time between authorization of the corporate action and the date by which the shareholder must have registered his demand is so short that likelihood of alteration in his status as a shareholder is negligible. Since most of the statutes provide that value is to be ascertained as of the day before the corporate action is approved, it is submitted that, to provide for all cases, the date of authorization should be considered the time from which dissentients cease to have the rights, privileges and liabilities of shareholdership, and the time from which interest on the value of their shares is calculated.

The problem of determining the value of the interest of the dissenting shareholder is manifestly perplexing and intricate. Value, itself, intangible and fluctuating, must be determined largely in the discretion of the appraisers and courts of review. In thirty-one states, the right to payment has been provided by statute. That these statutes are largely unsatisfactory and inadequate has been demonstrated.[61] The desirability of a uniform act[62] expounding the mechanics of valuation, enumerating the factors to be contemplated, and elucidating the status of the dissentient pending payment, cannot be overestimated. The paucity of judicial interpretations of problems involved in this type of valuation lends weight to the efficacy of such a statute. Uniformity of construction is more readily attainable when the problem of interpretation is not hampered by limitations in prior adjudications. During the past decade, merger and consolidation have been on trial. Further development was delayed by the sudden deflation. Reconstruction of the corporate structure will become more imminent as the recession of activity fades into the recovery phase. Corporate combination will be essential to eradicate the disastrous consequences of destructive competition.[63] The trial and test of combination have shown advantages too numerous to prevent its growth from continuing and accelerating. The legislature and judiciary must meet its advance with a vigilance designed to protect the interests of those whose importance may be forgotten in its ascendancy.

E. C. F.

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[60] Affirmed without opinion in 228 App. Div. 801, 239 N. Y. Supp. 917 (1930). For a full discussion of the case, see Robinson, *supra* note 40, at 62.

[61] An exposition of other statutory deficiencies is contained in Levy, *supra* note 20, and Lattin, *supra* note 40. See Comment (1933) 42 YALE L. J. 952 for an interesting discussion of capital reclassification under the appraisal statutes.

[62] See Ballantine, *Questions of Policy in Drafting a Modern Corporation Law* (1931) 19 CALIF. L. REV. 465, particularly at 482; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1927) 779 *et seq.* The UNIFORM BUSINESS CORPORATION ACT, §§ 42, 48, as approved by the National Conference in 1928, has very brief provision for non-assenting minority shareholders. 9 U. L. A. 37, 94, 98; HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1928) 334, 404, 409. No reference is made to the status of the shareholder between dissent and payment; nor is any method for determining value prescribed.

[63] The Supreme Court has recently enunciated a more liberal attitude in dealing with combinations effected to eliminate detrimental corporate rivalry. Appalachian Coals, Inc. v. United States, 53 Sup. Ct. 471 (1933), (1933) U. OF PA. L. REV. 1006.