

allow the supplier to "cover" debts which, for all practical purposes, are uncollectible, and then sit back secure in the knowledge that he can sue on the surety bond to recover for the materials furnished on the secured account.

The cases here under discussion, though issuing from different circuits, evidence a definite unity in refinement of approach. The federal equity rule concerning the application of payment can be seen as having experienced an evolutionary development culminating in an alignment with the formulation found in Section 388 of the Restatement of Contracts. It is unfortunate that the reported case, as the most recent pronouncement on the subject, failed to crystallize a more intelligible and firm guideline by which the business world can function. It seems correct to state, however, that the federal courts, in adjudicating future cases involving issues similar to those in the reported case will be using the federal equity rule as formulated in Section 388 of the Restatement of Contracts.

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Securities Regulation—Section 10(b)—Requirement of Sale—Long Form and Short Form Mergers Are Sales.—*Dasho v. Susquehanna Corp.*,¹ *Vine v. Beneficial Fin. Co.*²—In *Dasho*, Korholz, a director and major stockholder of American Gypsum Company, arranged with the directors of The Susquehanna Corporation to purchase their Susquehanna stock at a price in excess of market value. Korholz purchased the Susquehanna stock, then sold it to Gypsum. Fulfilling their obligations to Korholz under the purchase agreement, the Susquehanna directors passed control of Susquehanna to Korholz through seriatim resignation of the incumbents and election of Korholz as chairman and his nominees as directors. Using his position as chairman of both corporations, Korholz obtained approval for a Susquehanna-Gypsum merger from the respective boards of directors. Before the proposed merger was submitted to the stockholders for their approval, Dasho and other Susquehanna stockholders brought a stockholder derivative suit against the new officers and directors of Susquehanna in the federal district court seeking injunctive relief and damages. Plaintiffs alleged that the defendants had conspired to defraud the corporation in violation of Section 17(a) of the Securities Act of 1933,³ Section 10(b) of the Securities Exchange Act of 1934,⁴ and Rule 10b-5⁵ since their activities would cause Susquehanna to

¹ 380 F.2d 262 (7th Cir.), cert. denied, 88 S. Ct. 480 (1967).

² 374 F.2d 627 (2d Cir.), cert. denied, 88 S. Ct. 463 (1967).

³ 15 U.S.C. § 77q (1964) provides in pertinent part: "(a) It shall be unlawful for any person in the offer or sale of any securities . . . (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

⁴ 15 U.S.C. § 78j (1964) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any

acquire by indirection 435,000 shares of its own stock at a price \$1,740,000 in excess of fair market value. Defendant directors denied no allegations of fact, but urged dismissal on the ground that the transaction complained of would be a merger and not a "sale" of securities as required in order to bring the transaction within the coverage of the securities acts. The district court, holding that a merger is not a "sale," granted the defendants' motion to dismiss, and the plaintiff appealed to the United States Court of Appeals for the Seventh Circuit. HELD: Reversed. In the context of the antifraud provisions of the securities acts, the word "sale" may reasonably include a merger.

In the second case, *Vine v. Beneficial Fin. Co.*,⁶ Beneficial Finance Company allegedly conspired with the directors of Crown Finance Company to acquire Crown for less than its worth as a going business. Crown had two classes of issued stock: Class A, of which there were 624,870 shares outstanding, and Class B, of which there were 46,500 shares outstanding. The Class B stockholders were authorized to designate two-thirds of the board of directors, and the Class A stockholders one-third. The officers and directors of Crown were its principal Class B stockholders and although they were minority stockholders, they controlled the board of directors at the time that Beneficial approached the Crown board.

Beneficial purchased the directors' Class B stock for approximately \$887,500 above its value, then made public offers to buy Class A stock—offers which allegedly contained "materially misleading financial information" and omitted "material information which would have apprised Class A shareholders of their rights in the acquisition of their company"⁸ When Beneficial had acquired 95 percent of all Crown stock, it effected a short form merger which dissolved Crown and left Beneficial with a new acquisition that, as planned, had cost it much less than if it had purchased Crown's assets and liquidated the Class A and B stock at a price which would have had to encompass the value of the going business. It was alleged that if Beneficial had properly offered in merger to give Crown stockholders cash for their stock, the Class A voting superiority would have blocked the transaction or assured a just apportionment of the total price.

Vine, one of the holders of the five percent of Class A stock who found

security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

⁵ 17 C.F.R. § 240.10b-5 (1967) provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

⁶ 374 F.2d 627 (2d Cir. 1967).

⁷ Brief for Appellant, Appendix at 18-19, *Vine v. Beneficial Fin. Corp.*, 374 F.2d 627 (2d Cir. 1967) (Brief for SEC as Amicus Curiae at 3).

⁸ Id.

his company merged without need of his consent, was faced with the alternative of either accepting Beneficial's offer to buy the remaining stock or of pursuing his statutory right to have the court determine the value of his stock before he sold it.⁹ Instead of pursuing either alternative, Vine brought suit on behalf of all Class A stockholders alleging that they had been defrauded by these transactions in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Defendant Beneficial admitted the facts as alleged but sought dismissal on the ground that plaintiff had failed to state a cause of action because plaintiff was not a "seller" within the meaning of section 10(b). The district court granted defendant's motion to dismiss, and the plaintiff appealed to the United States Court of Appeals for the Second Circuit. HELD: Reversed. Since the merged-corporation stockholder, as a result of the short form merger, must eventually exchange his shares for money, the section 10(b) "sale" requirement is satisfied and the actual exchange is unnecessary.

In each of these cases the court was required to decide whether a corporate merger is or involves a "sale of securities" as that phrase is used in the antifraud provisions of the securities acts. In each of these cases the court answered in the affirmative. Since the fact situations in the two cases differed, the courts based their holding upon different grounds. Both courts reinforced the theoretical bases of their decisions with a liberal use of public policy. They failed, however, to analyze completely the technical aspects of merger and sale and to demonstrate how in certain contexts the former can include the latter so as to bring the merger within the antifraud provisions.¹⁰

⁹ N.Y. Bus. Corp. Law § 910 (McKinney 1963) provides in pertinent part: "(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section" N.Y. Bus. Corp. Law § 623(h) (McKinney 1963) provides in pertinent part: "(4) . . . if the court finds that any dissenting shareholder is so entitled [to receive payment for his shares], it shall proceed to fix the value of the shares The court may, if it so elects, appoint an appraiser to receive evidence and recommend a decision on the question of fair value."

¹⁰ These two courts are not the first which have failed to explain their holdings in terms of the merger procedure. In *Voegel v. American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965), a case considered by the *Vine* court to be "on all fours," the plaintiff was granted relief without comment on the merger-sale problem. That court was content to base its decision on a finding that because years earlier the plaintiff had bought the stock now subject to the merger, plaintiff was a purchaser and as such entitled to relief. The *Voegel* court stated that:

It may be fairly inferred, however, that when plaintiff purchased her shares she did rely upon the honesty and fair dealing of New Company and those who controlled it. . . . Plaintiff at bar was the subject of deception for when she acquired her stock she did so upon the justifiable assumption that any merger would deal with her fairly, only later to find, according to the Complaint, that the terms of the merger were designed to defraud her.

241 F. Supp. at 375. In *Simon v. New Haven Board & Carton Co.*, 250 F. Supp. 297 (D. Conn. 1966), the court decided that deception of either the directors or the stockholders in connection with a merger will warrant a remedy under § 10(b). The *Simon* court, having found deceit in connection with a merger, did not expressly state that this was the equivalent of having found deceit in connection with a "sale," but by granting relief where a "sale" was required, it raised the implication that a merger involves a "sale"

Merger is the term applied to the transaction whereby one corporation absorbs another.¹¹ The surviving corporation retains its name and corporate identity while gaining the properties and franchises of the merged corporation which is dissolved.¹² State corporation statutes prescribe procedures for mergers,¹³ generally classified as either long or short form mergers depending on the time and effort required for consummation.

There are several steps in the consummation of a long form merger. First, the directors of both companies agree on a plan of merger, the most important element of which is the ratio of exchange of merged-corporation stock for surviving-corporation stock. Then the proposed merger plan must be approved by at least a majority of the stockholders of the corporations involved in the merger. If authorized by the requisite number of stockholders, the directors file certain papers with a state official to finalize the transaction.¹⁴ Finally, the surviving corporation issues its stock in return for stock of the merged corporation which is turned in by the stockholders of that corporation pursuant to the ratio of exchange in the merger plan.¹⁵ Upon consummation of the merger, the assets and franchises of the merged corporation are deemed to be transferred to and vested in the surviving corporation without further

for securities acts purposes. The *Simon* court indicated more directly than the *Voegel* court that merger is a "sale" for securities acts purposes, but was just as vague about the theoretical basis of its decision.

¹¹ *Ahles Realty Corp. v. Commissioner*, 71 F.2d 150, 151 (2d Cir.), cert. denied, 293 U.S. 611 (1934).

¹² *Akwel Corp. v. Eiger*, 141 F. Supp. 19, 21 (S.D.N.Y. 1956); *Greater Adelphia Bldg. & Loan Ass'n v. Trilling*, 121 Pa. Super. 469, 474-75, 183 A. 651, 653 (1936). Consolidation, the other statutory method of corporate union, differs from merger in that it effects a dissolution of the companies consolidating and a fusion of their assets and franchises into a new corporation. *White v. Melillo*, 165 Misc. 318, 320, 300 N.Y.S. 1275, 1277-78 (N.Y. City Ct. 1937).

¹³ A merger must be carried out in conformity with the state law. As one court has said, "Corporations as such only have such powers as are granted to them by the sovereign power and their right to consolidate, if any, is derived solely from the sovereignty which has the power to grant their organization as corporations." *McRoberts v. Minier*, 270 Ill. App. 1, 10 (1933).

¹⁴ Cal. Corp. Code § 4100-15 (West 1955). The *Dasho* merger was effected under the Illinois long form statute. Ill. Ann. Stat. ch. 32, §§ 157.61-.67 (Smith-Hurd 1954). See, e.g., Mich. Stat. Ann. § 21.52 (1963).

¹⁵ Cf. *In re Interborough Consol. Corp.*, 267 F. 914, 917-18 (S.D.N.Y. 1920). The plan of merger prepared by the directors of both corporations and submitted for stockholder approval determines how many shares in the surviving corporation will be issued in exchange for merged-corporation stock. A fair ratio of exchange will "somehow spread the prospective increments in value among the various participants." 2 J. Bonbright, *Valuation of Property* 817 (1937). Three main ratio theories emerge.

The first is that the common stockholders of the constituent companies are entitled to a ratio of exchange for the stock of the new company roughly in proportion to the *relative* values of their shares (or of the net assets represented by their shares) in their particular companies considered as independent enterprises. The second is that the ratio of exchange should be based on the relative contribution of each company to the value of the combined enterprise. And the third is that there is no such thing as an "equitable" ratio of exchange, but that the whole question must depend on the relative bargaining power of the various classes and their constituted representatives.

Id.

act or deed.¹⁶ The merger statutes provide that the surviving corporation will assume the debts and obligations of the merged corporation.¹⁷ The stockholder of the surviving corporation retains the same shares he had before the merger.

A short form merger may be entered into if one of the corporations owns a specified large percentage of the second corporation's stock. The short form merger may be effected by action of the board of directors of the surviving corporation without a vote of the holders of the small percentage of merged-corporation stock not owned by the surviving corporation.¹⁸ A copy of the board-approved merger plan must be distributed to all the shareholders of each corporation to be merged. The plan must list the names of each such corporation and present the manner and basis of converting shares of each such corporation into cash or securities of the surviving corporation. The short form merger takes effect upon the satisfaction of certain procedural requirements. In some states merger is completed upon the filing of the certificate of merger by the department of state;¹⁹ others require the recording of the certificate with the Secretary of State by the surviving corporation.²⁰

Under a short form statute, the effect on both corporations and the stockholders of the surviving corporations is the same as under a long form statute. The merged-corporation stockholder may receive different treatment, however. While long-form-merger statutes require the issuance of stock in the surviving corporation to the stockholders of the merged corporation in exchange for their old shares, short form mergers give the surviving corporation the option of either offering its shares in exchange for the merged corporation's shares or forcing the stockholder of the merged corporation out of the new corporation by redeeming his shares for cash.²¹

The preceding analysis of the elements of the long form merger in *Dasho* and the short form merger in *Vine* is essential to a consideration of whether such transactions involve sales of securities as required by the federal securities legislation. Section 17(a) of the Securities Act of 1933 provides: "It shall be unlawful for any person *in the offer or sale of any securities* by use of any means . . . (1) to employ any device, scheme, or artifice to defraud . . ."²² (Emphasis added.) Section 10(b) of the Securities Exchange Act makes it unlawful for any person "[t]o use or employ, in connection

¹⁶ E.g., Cal. Corp. Code § 4116 (West 1955); Ill. Ann. Stat. ch. 32, § 157.69(d) (1954); N.Y. Bus. Corp. Law § 906(b)(2) (McKinney 1963).

¹⁷ E.g., Cal. Corp. Code § 4116 (West 1955); Ill. Ann. Stat. ch. 32, § 157.69(e) (1954); Mich. Stat. Ann. § 21.53 (1963).

¹⁸ N.Y. Bus. Corp. Law § 905(a) (McKinney 1963) provides: "Any domestic corporation owning at least ninety-five percent of the outstanding shares of each class of another domestic corporation or corporations may merge such other corporation into itself without the authorization of the shareholders of any such corporation." Delaware has the only other short form statute. Del. Code Ann. tit. 8, § 253(a) (Supp. 1966). The court in *Vine* did not decide which of these statutes controlled the Crown-Beneficial merger, since Beneficial met the requirements of both. 374 F.2d at 633.

¹⁹ N.Y. Bus. Corp. Law § 906(a) (McKinney 1963).

²⁰ Del. Code Ann. tit. 8, §§ 253(a), (b) (Supp. 1966).

²¹ E.g., N.Y. Bus. Corp. Law § 905(a)(3) (McKinney 1963).

²² 15 U.S.C. § 77q(a) (1964).

with the purchase or sale of any security . . . any manipulative or deceptive device . . ."²³ (Emphasis added.) Defendants' claim that a merger is not covered by the sections demands as analysis of "sale" as it is used in the securities acts. Section 3(a) of the Securities Exchange Act of 1934, the definitions section, provides that: "When used in this chapter, unless the context otherwise requires— . . . (13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire. (14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."²⁴

Statutes are presumed to be consistent with the common law unless the statutory language clearly indicates a contrary legislative intent.²⁵ There appears to be no explicit indication in the Securities Exchange Act that the words in the statute or its definitions section were intended to contradict the common law. Thus an analysis of the common law "sale" is in order. The common law "sale" generally requires competent parties, a subject, a transfer, a price and an intention to carry out the transaction.²⁶ A competent party is a person legally capable of taking part in a sale,²⁷ and any valuable possession may be the subject matter of a sale.²⁸ The transfer is the passing of the subject matter or title thereto from one person to another;²⁹ and the price, formerly thought to be payable exclusively in money, now may be paid in any form of valuable consideration.³⁰ The final element, intention to contract, is the willful choice to enter into the transaction. The short form merger in *Vine* apparently fails to satisfy these requirements on two points: first, one of the parties, the alleged seller, did not exercise an intention to sell, on the contrary, he was forced to sell; second, at the time of the suit, *Vine* had not parted with possession of or title to his stock, nor had he received payment for it. The issue is whether these elements or any part of them are essential to a securities acts "sale."

The defendant in *Vine* argued strenuously that "[t]here admittedly was no . . . sale contract with, or voluntary act by, [Vine] in the present case."³¹ It is submitted that the defendant-Beneficial was looking to the

²³ Id. § 78j.

²⁴ 15 U.S.C. §§ 78c (a) (13), (14) (1964). This Securities Exchange Act definition of "sale" does not appear to materially alter that used in the Securities Act of 1933 which provides:

When used in this subchapter, unless the context otherwise requires—

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. . . .

Id. § 77b (3).

²⁵ *Sullivan v. School Dist.*, 179 Wis. 502, 507, 191 N.W. 1020, 1022 (1923).

²⁶ J. Benjamin, *Treatise on the Law of Sale of Personal Property* 1-11 (4th ed. 1884); 2 J. Kent, *Commentaries on American Law* 468 (12th ed. 1873); 2 Blackstone, *Commentaries* *446.

²⁷ See *Vorbnoff v. Mesta Mach. Co.*, 286 Pa. 199, 205, 133 A. 256, 258 (1926).

²⁸ *St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 472, 33 N.E. 113, 115 (1893).

²⁹ *Commercial Discount Co. v. Cowen*, 18 Cal. 2d 610, 615, 116 P.2d 599, 602 (1941).

³⁰ *Young v. Gerosa*, 11 App. Div. 2d 67, 71, 202 N.Y.S.2d 470, 476 (1960).

³¹ Petitioner's Brief for Certiorari at 6, *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir.); see also Brief for Appellee at 10, Id.

wrong party in order to satisfy the volition requirement, for instead of looking for volition on the part of the seller, it should have been looking for volition on the part of the purchaser. The requirement of volition in the purchase rather than the sale was stated by the Securities Exchange Commission in a 1938 report as follows: "The Commission's view has been that it is essential to a 'sale' under section 2(3) that the *prospective purchaser* have the right to individually and voluntarily elect whether or not to purchase."³² (Emphasis added.) A suggested inference that there is no requirement of volition on the part of the seller is supported by the Uniform Commercial Code, which defines sale as "the passing of title from the seller to the buyer for a price."³³ Referring to the foreclosure proceeding as a sale, the U.C.C. obviously does not consider seller's volition essential to a sale.³⁴ Since, in the U.C.C., sale is recognized to include involuntary transfers, the involuntary nature of the seller's actions in a short form merger is arguably irrelevant to the existence of a section 10(b) "sale."³⁵

Even if it is assumed that the common law generally requires an exercise of volition on the part of the seller, situations have arisen in which exceptions have been made.³⁶ The involuntary sale which occurs through the exercise of the eminent domain power is the most conspicuous example and arises in a situation that bears a striking resemblance to the short form merger.

Eminent domain is the power of the state to force a landowner to surrender his property to the state for full consideration.³⁷ Several jurisdictions adopt the theory that condemnation proceedings pursuant to the eminent domain power result in compulsory sales of an owner's interest in his property.³⁸ Upon the decision of the statutorily prescribed authority to take land for public use, the condemnee loses the use of his land because title is immediately vested in the state and his prior rights are extinguished, if a definite and adequate source of payment is provided.³⁹ Similarly, when Beneficial consummated the short form merger, Crown's assets vested in Beneficial and Vine lost the beneficial ownership of his shares in Crown because the shares no longer represented an ownership interest in an existing corporation.⁴⁰ Since the eminent domain taking can be treated as a sale regardless of the

³² SEC, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees pt. VII, at 249 n.172 (1938).

³³ Uniform Commercial Code § 2-106(1).

³⁴ Id. §§ 9-501(5), -504.

³⁵ Brief for SEC as Amicus Curiae at 8, *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir. 1967).

³⁶ 1 S. Williston, *Sales* § 4 (Rev. Ed. 1948).

³⁷ *United States v. Jones*, 109 U.S. 513, 518-19 (1883).

³⁸ E.g., *Stockton Harbor Indus. Co. v. Commissioner*, 216 F.2d 638, 651 (9th Cir. 1954); *Pedrotti v. Marin County*, 152 F.2d 829, 831 (9th Cir. 1946); *Pierce County v. King*, 47 Wash. 2d 328, 333, 287 P.2d 316, 319 (1955). Another prominent theory is that the condemnation proceeding is a proceeding in rem. Under this theory the power of eminent domain acts on the land rather than on the title to the land. The state, in such a case, does not claim its title through the divested owner as would be the case in a sale. On the contrary, the decree recognizes an independent title in the state. *United States v. 127.03 Acres of Land*, 148 F. Supp. 904 (D. Puerto Rico 1957).

³⁹ *Adirondack Ry. v. New York*, 176 U.S. 335 (1900).

⁴⁰ See note 16 *supra* and accompanying text.

fact that it is completely involuntary on the part of the landowner-"seller,"⁴¹ the involuntary nature of the taking in a short form merger should not preclude such merger from being considered a bona fide variety of sale.⁴² Thus even if the common law is assumed to control the meaning of "sale" as it is used in the securities acts, there is precedent for deeming Vine a "seller," regardless of his lack of volition.

If *arguendo* the involuntary sale is deemed not a part of the common law, the definition in the securities acts contains indications that Congress "clearly" intended to include involuntary sale within the statutory coverage. Certainly the broad language of the definitions sections of the securities acts encourages courts to construe as "sales" those transactions which may not comply in all particulars with the common law.⁴³ The use of the introductory phrase "unless the context otherwise requires" appears to invite the courts to look beyond the strict language of the statute. It encourages the courts to "read the text in the light of the context."⁴⁴ There are other words in the definitions section which appear to require a broad construction of "sale." The use of "include" rather than "means" to introduce the definition is an example. The verb "include" allows the courts, when the situation presents itself, to look beyond the enumerated definitions of "sale" to a consideration of unlisted types of transactions.⁴⁵ Finally, the words "or otherwise dispose of" present an alternative for "sale" which can hardly be said to discourage interpretation. One obvious interpretation of the phrase is that, as opposed to the preceding phrase, "contract to sell," it might include a transaction that does not require volition.

If Vine can be a "seller" without an exercise of volition, the next question becomes whether he has "sold" without parting with title or possession of the shares in return for valuable consideration. The court in *Vine* dealt primarily with this issue. It stated that Vine must exchange the shares for money to become a party to a "sale," but, since he eventually will do so, it would be a "needless formality" to require such a physical transfer as a condition to suit. Thus only if the physical transfer will inevitably occur can the plaintiff make out a cause of action. It is submitted that the "sale" takes place far earlier in the series of events than the transfer of the stock for money and that the

⁴¹ Cases cited note 38 supra.

⁴² Some securities act cases have imposed a requirement of reliance by a seller-plaintiff who claims to have been defrauded. *List v. Fashion Park, Inc.*, 340 F.2d 457, 462-64 (2d Cir.), cert. denied, 382 U.S. 811 (1965); *Rogen v. Ilikon Corp.*, 361 F.2d 260, 266-68 (1st Cir. 1966). That is, the method of deception must be of such a nature that a reasonable man would have acted upon it to his detriment. Since the short form merger requires no active participation by the merged-corporation stockholders, there was no reliance by Vine upon any allegedly fraudulent activities of the defendant. The court must discard the reliance requirement when it finds an involuntary sale if the plaintiff in such a suit is to recover. The *Vine* court recognized this problem and stated that "[w]hatever need there may be to show reliance in other situations, . . . we regard it as unnecessary in the limited instance when no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoer." 374 F.2d at 635 (citations omitted).

⁴³ 15 U.S.C. §§ 77b(3), 78c(a)(13), (14) (1964).

⁴⁴ *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943).

⁴⁵ *United States v. Robertson*, 181 F. Supp. 158, 162 (S.D.N.Y. 1959).

court's emphasis on the inevitability of this transfer was apparently misplaced. By short form merger and the resultant dissolution of the merged corporation, the surviving-corporation directors effectively removed the beneficial ownership of the minority stock and replaced it with a claim for cash. A corporation's stock is valuable because it earns dividends, has a speculative value and represents a portion of the net corporate assets. Upon dissolution of the corporation these benefits of ownership terminate because the corporation ceases to exist. When the beneficial ownership is removed, the merged-corporation stockholder receives an equitable claim for compensation in accordance with the merger plan announced by the surviving corporation before the beneficial ownership was terminated.⁴⁶ This "exchange" of beneficial ownership of the stock for a claim for cash is, on analysis, the "sale," and the exchange of the merged-corporation stock for money is truly a needless formality, a mere liquidation of a claim for cash. Thus the court was correct in deeming the exchange of stock for cash a needless formality, but incorrect in citing the inevitability of the exchange as the reason for so holding.

All the elements required to constitute a "sale" in the case of *Vine's* short form merger are present in *Dasho's* long form merger. A long form merger causes the same dissolution of the merged corporation and subsequent loss to the merged-corporation stockholders of the beneficial ownership of their stock. This loss raises the same right to compensation in merged-corporation stockholders as was created by the short form merger. Similarly, therefore, this exchange of beneficial ownership of stock for a claim for surviving-corporation securities is a "sale." The only distinction between the long form and the short form cases is that in the former, the merged-corporation stockholders receive stock while in the latter, they may receive cash. Since the stock received by the merged-corporation stockholders is valuable consideration, this is a distinction without a difference.

In every long form merger there is, in effect, an exchange of the stock in the surviving corporation for the stock in the merged corporation. Each party to a stock-for-stock exchange is a "seller" of securities.⁴⁷ Securities are given up in return for valuable consideration which is in the form of other securities. In *Vine*, and in the foregoing discussion of *Dasho*, the merged-corporation stockholder has been considered the "seller." In a long form merger, however, the mechanics of the transaction could also lend themselves to the interpretation that the surviving corporation is a "seller." Since the method of exchange in a long form merger is issuance of stock, the question is whether an issuance of stock pursuant to a merger is a "sale."

The most recent case dealing with this issue is *Ruckle v. Roto American Corp.*,⁴⁸ which held that the issuance of stock by a corporation is a "sale." In *Ruckle*, certain corporate directors sought to preserve their control of the corporation. They concealed the true financial condition of the corporation and fraudulently induced the remaining directors to authorize an issuance of stock which was acquired by the president for cash. A derivative suit was

⁴⁶ See *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 302-03, 93 A.2d 107, 112 (1952).

⁴⁷ See *United States v. Wernes*, 157 F.2d 797, 799 (7th Cir. 1946).

⁴⁸ 339 F.2d 24 (2d Cir. 1964).

filed on behalf of Roto American Corporation alleging fraud in connection with a sale of securities. The court held that "the issuance by a corporation of its own shares is a 'sale' to which the anti-fraud policy expressed in the federal securities laws extends."⁴⁹

Ruckle relied⁵⁰ on *Hooper v. Mountain States Sec. Corp.*⁵¹ which also held that the issuance of stock is a "sale." *Hooper* involved a derivative suit on behalf of Consolidated American Industries in which fraud in connection with a sale of securities was alleged. The several defendants allegedly conspired to induce Consolidated to issue 700,000 shares of its stock to Mid-Atlantic Development Co. in return for that company's assets. Having issued its stock to Mid-Atlantic, Consolidated did not receive the valuable assets it had sought to acquire. The court of appeals held that the transaction was a "sale" within the meaning of the securities acts. The court found that the transferee of the stock, Mid-Atlantic, had properties of value that it was willing to transfer in consideration for the stock. It realized also that Consolidated desired to issue its valuable stock to acquire this property. Having found these "earmarks of a sale,"⁵² the court felt that "[n]either statutory terminology nor practical business legal considerations support the contention that, as a matter of law, Consolidated in issuing its stock was not a seller and the transaction was not a sale."⁵³ *Ruckle* and *Hooper* indicate that a "sale" occurs when stock is issued by a corporation for value.

Dasho appears to be controlled by *Ruckle* and *Hooper*, for as in those cases, the stock was issued for valuable consideration—the assets of the merged corporation. The acquisition of these assets is undoubtedly a benefit to the surviving corporation. By the same transaction, the merged-corporation stockholders directly and individually lose the beneficial ownership of their shares, an obvious detriment. But the stockholders of the merged corporation do not own the corporate assets, and the question is how can they logically be termed "sellers" of assets that they do not own. This question is more form than substance, however, because the stockholders own the corporation which, in turn, owns the assets. Therefore, when the stockholders as a group authorize and direct the corporation to dissolve and to transfer its assets on merger, they are in effect, if not technically, "selling" the assets of the merged corporation to the surviving corporation.⁵⁴ The receipt of these assets by the surviving corporation creates an obligation to compensate the merged-corporation stockholders. This compensation to the merged-corporation stockholder

⁴⁹ Id. at 27.

⁵⁰ Id.

⁵¹ 282 F.2d 195 (5th Cir. 1960), cert. denied, 365 U.S. 814 (1961).

⁵² Id. at 202.

⁵³ Id. at 203.

⁵⁴ *Cole v. National Cash Credit Ass'n*, 18 Del. Ch. 47, 156 A. 183 (1931). The court in the *Cole* case stated:

While a consolidation is quite different from a sale, yet from the viewpoint of the constituent companies, a sale of assets is in substance involved. Here it is the sale feature of the merger and that alone with which we are concerned. . . . [T]he stockholders of the defendant are in substance selling its assets to another in exchange for securities issued by the latter

Id. at 57, 156 A. at 188.

takes the form of an issuance of stock by the surviving corporation. The issuance of stock in conjunction with a merger fulfills the requirements of *Ruckle* and *Hooper*, and results in a securities act "sale." Thus the long form merger involves a "sale" of securities so as to afford an injured party a remedy under the antifraud provisions of the securities acts.

The foregoing analysis has revealed that a technical "sale" exists in both the long form and the short form merger. In neither of the noted cases did the court feel such an analysis was necessary to the decision, choosing instead to rely upon the congressional intent manifested in the legislative history of the securities acts. Although these courts probably reached a result which was consistent with the equities of the cases, such a method of dealing with this important securities law issue is an unsatisfactory method of developing a stable body of law. Until the courts face the problem of whether merger involves a "sale" in a manner which is consistent with corporate law and the financial realities of merger transactions, the freedom of judges to interpret legislative history will remain unimpaired and the rights and responsibilities of the financial community and the investing public under the securities laws will be uncertain.

PETER W. BROWN

Securities Regulation—Securities Exchange Act of 1934—Voting Trust Regulated Under Section 14(a).—*Greater Iowa Corp. v. McLendon*.¹

—A group of shareholders of Greater Iowa Corporation organized a voting trust² with the objective of controlling the corporation or gaining a voice in its management. The voting-trust organizers, dissatisfied with the corporation's management apparently because of poor earnings and a decline in stock value, solicited memberships for the "Iowa Trust" from 45 of the 12,000 Greater Iowa Corporation shareholders. Solicitation was carried out mainly on a person-to-person basis in Iowa, but memberships were also sought by mail and telephone from shareholders in other states.

Plaintiffs, Greater Iowa Corporation, its directors and three shareholders purporting to represent the class of all shareholders in the corporation, brought an action to enjoin all further activity of the trust.³ According to plaintiffs, the Iowa Trust had failed to register its securities⁴ with the Securities and Exchange Commission,⁵ had made deceptive statements in its

¹ 378 F.2d 783 (8th Cir. 1967).

² In general, the voting trust is a device for concentrating the voting power of several shareholders into one party so that the latter may control or have partial control of the corporation. To participate in a voting trust, the shareholder transfers his shares in the corporation to trustees. The trustees then become holders of legal title to the shares, with power to vote them at shareholders' meetings.

³ Brief for Appellant at 5, 378 F.2d 783 (8th Cir. 1967).

⁴ Under the Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1) (1964), a voting-trust certificate is defined as a "security," so that it is regulated under the securities acts. A voting trust issues such certificates to its participating shareholders to indicate the number of shares delivered to it by the shareholder.

⁵ As required by the Securities Act of 1933 § 5(a), 15 U.S.C. § 77e(a) (1964), and the Investment Company Act of 1940 § 7(a)(1), 15 U.S.C. § 80a-7(a)(1) (1964).