

DISSENTING MINORITY STOCKHOLDER'S RIGHT OF APPRAISAL

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I. INTRODUCTION

The law recognizes the existence of corporations as separate legal entities composed of stockholders who have invested their funds in common. The corporate charter is the contract which binds the stockholders together.¹ In general, decisions made within the framework of the corporate charter are made by the holders of a majority of the stock.² Other decisions, more fundamental to the continued existence of the corporation, often require the approval of the holders of more than a mere majority of the stock.³ Early cases held that fundamental changes, such as liquidation, sale or exchange of all the assets, or merger of the corporation with another, required the approval of all the stockholders.⁴

This requirement of stockholder unanimity gave minority stockholders a veto power over fundamental stockholder decisions, and created the possibility that a stubborn minority could thwart the majority from taking action obviously desirable for the protection and continued existence of the corporation. In corporations composed of large numbers of stockholders having widely divergent interests, and not intimately acquainted with the corporate affairs, securing the support of all the stockholders could be an impossible task. For this reason, virtually all American jurisdictions have provided that at least some fundamental decisions may be made by less than all the stockholders.⁵ In most jurisdictions, dissenting stockholders have been given the right at least in certain cases, to withdraw their investment by demanding and receiving payment for their stock. Where the corporation and the stockholder fail to agree on the value of the stock, the value is determined by appraisal.

Although most appraisal statutes follow the same general pattern, the differences are so significant that an examination of the specific statute involved would be necessary before the rights and obligations of a stockholder could be determined with certainty. The problems

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¹ See Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 *Law & Contemp. Prob.* 307 (1958).

² See 13 Fletcher, *Cyclopedia of the Law of Private Corporations*, Permanent Edition, 1961, § 5715 et seq. (hereinafter referred to as Fletcher).

³ *Id.* at § 5797.

⁴ *Ibid.*; cf. *Calman v. Guaranty Security Corp.*, 271 Mass. 533, 543; 171 N.E. 830, 834 (1930); *Treadwell v. Salisbury Mfg. Co.*, 73 Mass. (7 Gray) 393, 404 (1856).

⁵ See Note, 72 *Harv. L. Rev.* 1132 (1959); Lattin, *supra* note 1.

encountered in one state may be nonexistent in another and so, in an effort to encompass the majority of problems incident to appraisal, only the statutes in those states which have enacted the Uniform Commercial Code shall be considered.⁶ Ranging from the relatively short Massachusetts statute⁷ to the comprehensive treatment in New York,⁸ they provide an excellent cross-section of this statutory body and when compared with the Model Business Corporation Act, provide good basis for examination and solution of the problems connected with appraisal.

Apart from legislation, much has been written on the subject⁹ and from a gleaning of this wealth of legal discussion, what an adequate statute should contain seems certain. Clearly, the circumstances under which dissenting stockholders are entitled to appraisal, the standards to be applied by the appraisers in fixing the value of the stock, and the procedures to be followed in the conduct of the appraisal, should be plainly stated.

II. PROBLEMS CONNECTED WITH APPRAISAL STATUTES

The most common problems connected with appraisal statutes can be separated into two general categories. First, the substantive

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- ⁶ Alaska: Ala. Bus. Corp. Act §§ 62, 73.
 Arkansas: Ark. Stat. Ann. § 64-703 (1957).
 Connecticut: Conn. Gen. Stat. Ann. §§ 33-374 (1958).
 Georgia: Ga. Code Ann. §§ 22-1845 to -1850 (Supp. 1961).
 Illinois: Ill. Rev. Stat. ch. 32, §§ 157.70, 157.73 (1959).
 Kentucky: Ky. Rev. Stat. Ann. §§ 271.415(4), 271.490 (1955).
 Massachusetts: Mass. Gen. Laws Ann. ch. 156, §§ 46, 46E (1959).
 Michigan: Mich. Comp. Laws §§ 450.44 (1948), 450.54 (Supp. 1956).
 New Hampshire: N.H. Rev. Stat. Ann. §§ 294:42(vi), 294:76 to :80 (1955).
 New Jersey: N.J. Stat. Ann. §§ 14:3-5, 14:12-6 to -7 (Supp. 1961).
 New Mexico: N.M. Stat. Ann. §§ 51-2-31, 51-11-5 to -6, 51-11-9 (1953).
 New York: N.Y. Stock Corp. Law § 21.
 Ohio: Ohio Rev. Code Ann. §§ 1701.74, 1701.76(C), 1701.81(B), 1701.83(B), 1701.85 (1955).
 Oklahoma: Okla. Stat. Ann. tit. 18, §§ 1.157 to .161, 1.172 (1951).
 Oregon: Ore. Rev. Stat. §§ 57.490, 57.516 (1961).
 Pennsylvania: Pa. Stat. Ann. tit. 15, §§ 2852-311, 2852-515, 2852-810, 2852-908 (1958).
 Rhode Island: R.I. Gen. Laws Ann. §§ 7-5-8 to -16 (1958).
 Wyoming: Wyo. Stat. Ann. §§ 17-36.71 to .72 (1957).
⁷ Mass. Gen. Laws Ann., *supra* note 6.
⁸ N.Y. Stock Corp. Law, *supra* note 6.
⁹ See, Levy Rights of Dissenting Shareholders to Appraisal and Payment, 15 Cornell L.Q. 420 (1930); Lattin, Remedies of Dissenting Stockholders Under Appraisal Statutes, 45 Harv. L. Rev. 233 (1931); Lattin, Equitable Limitations on Statutory or Charter Powers Given to Majority Shareholders, 30 Mich. L. Rev. 645 (1932); Lattin, Reappraisal of Appraisal Statutes, 38 Mich. L. Rev. 1165 (1940); Note, 60 Yale L.J. 337 (1951); Note 28 N.Y.U.L. Rev. 1021 (1953); Note, 66 Harv. L. Rev. 1528 (1953); Kaplan, Problems in the Acquisition of Shares of Dissenting Minorities, 34 B.U.L. Rev. 291 (1954); Lattin, *supra* note 1; Note, 58 Colum. L. Rev. 251 (1958); Note, 72 Harv. L. Rev. 1132 (1959); Bozenhard, The Massachusetts Appraisal Act and Minority Stockholders, 45 Mass. L.Q. 27 (1960).

right of the stockholder to be paid the value of his stock, and second, the procedural steps by which the appraisal is conducted and payment made.

A. SUBSTANTIVE RIGHTS OF THE STOCKHOLDER

Fundamental changes to which appraisal statutes apply; the availability of alternate remedies; and the standards used in determining the "value" of the stock constitute the three major areas into which dissenting stockholders' substantive rights can be divided.

1. *Fundamental Changes to which Appraisal Statutes Apply.* The Massachusetts and New York statutes and the Model Act provide that a dissenting stockholder has the right to demand and to receive payment of the value of his stock where the requisite number of other stockholders vote a fundamental change. However, in many jurisdictions a dissenting stockholder has this right with respect to one form of fundamental corporate change but not with respect to another. For example, some jurisdictions provide for appraisal and payment if the corporation merges, but not if the corporation sells or exchanges substantially all of its assets. The Code states uniformly provide for appraisal rights for dissenting minority stockholders in the case of mergers or consolidations. But in the case of a sale or transfer of substantially all the assets of the corporation, Arkansas and Georgia are excepted, since no appraisal rights appear in their statutes. Connecticut, although aligning itself with the majority of Code states, is unique in that the statute provides for appraisal only where the sale is for securities.¹⁰ This legislative inadvertence in failing to provide for appraisal and payment, except where the form of corporate consolidation is that of a statutory merger, is far from trivial since it provides an obvious loophole to avoid payment to the minority altogether. Therefore, a well-drafted statute should reflect the fact that the rights of the dissenting minority should not depend upon the mere form of the consolidation.

In addition to providing for appraisal in the cases of mergers, consolidations and sale of assets, some jurisdictions provide for appraisal in the case of other forms of corporate action. For example, Massachusetts, New Hampshire and Oklahoma provide a right of appraisal upon a change of corporate purpose. Connecticut, New York and Oklahoma authorize appraisal rights to any stockholder whose priority or preferential stock rights have been adversely affected whereas Ohio only offers this to preferred stockholders.¹¹

The result of these varying provisions among the states and the variety of circumstances which initiate appraisal rights is, at best, a

¹⁰ Conn. Gen. Stat. Ann., supra note 6, at § 373(d).

¹¹ For a brief list of the various provisions with respect to this point see 2 ABA-ALI Model Bus. Corp. Act Ann., § 73, ¶ 2 (1960).

very tenuous reconciliation of interests between the two shareholder groups. To permit a majority of the stockholders of a corporation to make fundamental changes for the good of the common investment and by the same effort, protect the minority stockholders from complete domination by the majority calls for a degree of legislative acumen found wanting in many jurisdictions. The consequence is piece-meal legislation which enables the majority to attain its objective with or without appraisal depending solely on the form of action employed.¹²

2. *Availability of Alternate Remedies.* Whether appraisal and payment is a dissenting stockholder's only remedy in the event of a fundamental change in the corporation generally depends upon whether or not he can prove fraud or deceit. A leading case on the subject is *Cole v. Wells*,¹³ in which the owner of twenty-three percent of the stock of American Optical Company brought a bill in equity against the owners of the other seventy-seven percent of the stock and the corporation. The defendant stockholders were also the officers of the company and had full control of its management and operation. The bill alleged that the defendant stockholders had improperly diverted to their own use certain assets of the corporation under the guise of salaries and that they had wrongfully caused the corporation to sell all of its assets to themselves as trustees for less than adequate consideration. The plaintiff argued that he had voted against the sale at a stockholders' meeting duly called for the purpose of considering the sale, and that he thereafter demanded payment for his stock. He alleged that during the course of negotiating the value of his stock with the officers of the corporation, he had occasion to cause an audit of the books and records, and at that time discovered the alleged wrongdoing of the defendants. His amended prayers for relief sought an accounting to the corporation by the defendant stockholders for the assets wrongfully converted by them to their own use, together with an accounting to the corporation for the full value of all the assets of the corporation transferred to the defendants as trustees. From the overruling of their demurrers, the defendants appealed. The Supreme Judicial Court held that the plaintiff was entitled to maintain his bill. The defendants had interposed a plea in bar that the corporation had offered to submit the question of the value of the plaintiff's stock to arbitration under Statute 1903, Chapter 437, Section 44,¹⁴ including the plaintiff's claims with respect to the misappropriation of corporate

¹² For example, most jurisdictions permit dissenting minority stockholders of surviving consolidating corporations to demand appraisal. However, it is quite uncommon for minority stockholders of a corporation which has acquired substantially all the assets of another to have such rights.

¹³ 224 Mass. 504, 113 N.E. 189 (1916).

¹⁴ The predecessor of the present Massachusetts appraisal statute, *supra* note 6.

funds, but that the plaintiff had refused to proceed with the arbitration. As to this the court said:

It is plain that the defendants through their control of the corporation cannot compel the plaintiff, who was ignorant of their misdoings, to accept payment for his stock upon a valuation of the assets which excludes the amounts misappropriated. A demand under such circumstances cannot be held to have the force and effect of the demand contemplated by the statute, and there was no irrevocable election, as the defendants contend, to receive payment upon a valuation to be fixed by the agreement of parties, or by arbitration, whereby all demands for an accounting or proceedings to set aside the transfer as violative of his just rights as a dissenting or minority stockholder were waived.¹⁵

This case appears to state the majority rule although a different result is possible in Connecticut, Michigan and Pennsylvania. In these states, the statute expressly provides that appraisal shall be a stockholder's exclusive remedy which is the same position adopted in New York and Ohio by judicial decision.¹⁶ However, it is submitted that if a corporation by vote of a majority of its stockholders has the right to make certain fundamental changes, it seems only logical that dissenting minority stockholders should not have the power, absent fraud or illegality, to enjoin or set aside the proposed change. On the other hand, where fraud or illegality exists, the minority stockholder should have his usual equitable remedies and not be forced to choose between acceding to the change or seeking appraisal and payment. The most sensible rule is the one most often applied. That is, appraisal and payment is a dissenting stockholder's only remedy unless he can show fraud or illegality in which case he can seek equitable relief.

3. *Definitions of "Value."* The Massachusetts statute states that the appraisers are to ascertain the "value" of the stock as of the date of the fundamental change. Statutes of other states employ phrases such as "fair value," "market value" and "fair cash value."¹⁷

¹⁵ Supra note 13 at 513-14, 113 N.E. at 191.

¹⁶ New York; *Anderson v. International Mineral & Chemical Corp.*, 295 N.Y. 343, 67 N.E.2d 573 (1946). Ohio; *Geiger v. American Seeding Mach. Co.*, 124 Ohio St. 222, 177 N.E. 594 (1931).

¹⁷ Of the states which have enacted the Uniform Commercial Code, seven states call for payment of "fair value" (Alaska, Illinois, New Hampshire, Oklahoma, Oregon, Pennsylvania and Wyoming); four states call for payment of "fair cash value" (Arkansas, Georgia, Michigan and Ohio); two for payment of "value" (Massachusetts and New York); two for "full market value" (New Jersey and New Mexico); one for "fair market value" (Kentucky) and one for "full and fair value" (Rhode Island). Ohio has defined "fair cash value" and Oklahoma has defined "fair value" as used in their appraisal statutes to mean fair market value. Arkansas has used the term

As a practical matter, the biggest single distinction between these definitions probably turns on whether it is open to the stockholder to prove that the value of his stock is, for one reason or another, of greater value than market. If there is a market for the stock of the company, the stockholder, if entitled to market value or fair cash value, is probably restricted to the market price of the stock. If entitled to fair value, he can probably prove that the market price of the stock did not represent its fair value.

Restricting the stockholder to market value would seem to have the advantage of easy determination providing there was a sufficiently active market for the stock. However, most appraisal statutes expressly provide that the value of the stock, however defined, should not include any change in value or market price caused by the proposed corporate change. Thus, even determining the market value of the stock can become complicated if there were fluctuations in the price of the stock at or near the valuation date.

As defined by the Massachusetts court in the *Cole* case:

'the value of the stock' means not merely market price if the stock is traded in by the public, but the intrinsic value, to determine which all the assets and liabilities must be ascertained.¹⁸

In the case of *Martignette v. Sagamore Mfg. Co.*¹⁹ the court later modified and to some extent amplified its definition stating:

The statement of the rule for appraising stock on merger in terms of 'intrinsic value' affirms that in all merger cases market price is not the only measure, so that, as a matter of course, other evidence will be relevant

The rule does not mean that prices, in an established market in normal times, of a widely held stock bought for investment by well-informed persons will not be entitled to 'considerable weight' The rule does mean that even if such a market is shown other evidence is relevant and that it is for the appraisers in the particular case to determine the weight of the relevant factors.²⁰

However, in situations where there has been no substantial market for the corporation's stock, there is probably little difference in the proof of value under any of the common definitions. Proof of the price a willing buyer would pay and a willing seller would accept,

"value" interchangeably with "fair cash value" in its appraisal statute, and Connecticut has used the terms "value" and "fair value" interchangeably.

¹⁸ *Cole v. Wells*, supra note 13, at 513, 113 N.E. at 191.

¹⁹ 340 Mass. 136, 163 N.E.2d 9 (1959).

²⁰ *Id.* at 141-42, 163 N.E.2d at 12-13.

COMMENTS

would undoubtedly be substantially the same as proof of value or fair value of the stock.

B. PROCEDURE FOR APPRAISAL AND PAYMENT

The procedure for appraisal and payment can be divided into six steps: (1) preliminary procedural requirements to qualify for appraisal and payment, (2) preliminary negotiations between the parties, (3) consolidation of claims, (4) conduct of the appraisal, (5) allocation of costs and (6) payment of interest on the award. A well-drafted statute should spell out each of these steps. The New York statute and the Model Act do so and in Massachusetts the steps are covered either by statute or judicial decision. Unfortunately, most appraisal statutes are generally less inclusive.

1. *Preliminary Procedural Requirements to Qualify for Appraisal and Payment.* The general pattern of appraisal statutes require the dissenting stockholder to make written objection to the proposed corporate change, to refrain from voting for the proposed action, and thereafter to demand payment for his stock. There is usually a short time limit within which the dissenting stockholder must object and demand payment, and failure to act within the time limit operates as a waiver of the stockholder's right to appraisal and payment.

Massachusetts requires the dissenting stockholder to affirmatively vote in opposition to the proposed change.²¹ Otherwise he is not entitled to payment. This places the burden on the stockholder to see to it that his stock is, in fact, voted at the meeting. If the stockholder resides a considerable distance from the Commonwealth, he may have to appoint an attorney to vote the stock for him. If his stock is held by and in the name of a nominee, he will have to make certain that the nominee receives and carries out his instructions with regard to the voting of the stock. If the stockholder's stock is not voted in opposition to the proposed consolidation or sale despite his instructions, the stockholder may have a cause of action against his attorney or nominee, but he has clearly lost the right to an appraisal and payment.

Section 74 of the Model Business Corporation Act provides that stockholders, in order to qualify for appraisal, must first register their written objection at or prior to the stockholders' meeting, and then make written demand for payment within ten days thereafter. Both the requirements of the Massachusetts statute and those of the Model Act are unnecessarily cumbersome. The imposition of the two-step requirement on dissenting stockholders is a trap for the unwary without providing any particularly advantageous information

²¹ Arkansas, Georgia, Michigan and New Hampshire are among the states with a like requirement that the stockholder vote in opposition to the proposed change.

to the corporation. Perhaps the most expeditious and sensible requirement is the one provided by the New York statute. There, the stockholder, within twenty days after notice of the stockholders' meeting, or prior to the vote, whichever is later, must file with the corporation written objection to the proposed plan and demand payment for his stock. This eliminates the two-step requirement of the Massachusetts statute and the Model Act while providing the corporation with the necessary information as to the number of dissenting shares.

The Massachusetts statute does not state clearly whether a stockholder must vote all of his stock against the proposal, or whether he can vote part of his stock in favor of the proposal and part of the stock against, and retain a right of appraisal as to the latter. This can be a serious problem for one in whose name the stock of various other beneficial owners may be registered. In New Jersey under a similar appraisal statute, the court discussed this very question. In *Bache & Co. v. General Instrument Corp.*,²² the plaintiff-brokerage house voted stock standing in its name for and against a merger and the court concluded that plaintiff waived no appraisal rights, thus protecting the plaintiff's customers, the beneficial owners of the stock. However, in view of the courts dictum:

We must not blind ourselves to the realities of present-day security practices, or the complex mechanisms of the stock market. A brokerage house like plaintiff almost always holds blocks of stock in its 'street name' for various beneficial owners. If defendant is correct in its position, it would logically follow that unless all of plaintiff's customers voted the same way, those voting against the merger—if they owned only a minority of the shares held by plaintiff—would have any appraisal rights normally theirs completely wiped out.²³

it would appear that the case is restricted to its facts. Therefore, whether or not a trustee or individual shareholder could argue on the basis of the *Bache* case remains an open question. In any event, a well-drafted statute should provide that a stockholder who is a nominee should retain a right of appraisal as to the portion of stock standing in his name, which is a proviso in the Model Act.

2. *Preliminary Negotiations between the Parties.* Every appraisal statute at least provides for the possibility that the dissenting shareholder and the corporation might agree on the value of the stock, although the statutes vary in the extent to which preliminary

²² 74 N.J. Super. 92, 180 A.2d 535 (1962). The question before the court was whether the term "stockholder" in the appraisal statute referred to "registered owner" or "beneficial owner." For a discussion of this aspect of the case, see case notes, *infra*.

²³ *Id.* at 101, 180 A.2d 540.

negotiations must be conducted. The Massachusetts statute provides no express procedure for negotiation, but seems to assume that some form of negotiation will take place. Both the New York statute and the Model Act require the corporation to make a written offer to purchase the stock of dissenting shareholders at a price deemed by the corporation to be the value of the stock, and to furnish the stockholder with a recent balance sheet and profit and loss statement. This at least gets the negotiations underway, and provides the stockholder with some basis upon which to value his stock. If agreement is not reached as to the value of the stock within a relatively short time, either party can petition for judicial intervention. In this instance, the court has wide discretion to either value the stock or appoint an appraiser.

With the exception of Massachusetts and New Hampshire, all of the Code states have sanctioned some form of judicial proceeding to value the stock when the parties are unable to agree.²⁴ Generally, the court is given authority to appoint one or more appraisers vested with powers similar to those exercised by masters in equity. In Massachusetts, each party appoints an appraiser and they appoint a third.²⁵ The statute has no express provision for judicial supervision, and whether or not the court could appoint a third appraiser in the event of disagreement is a question that has never presented itself. It would seem that judicial intervention is at least a possibility in Massachusetts.

3. *Consolidation of Claims.* One of the distinct advantages in providing for judicial supervision of the appraisal is the consolidation of the claims of different stockholders into a single proceeding. In seven Code states²⁶ this is expressly provided for by the appraisal statutes. In others, consolidation is possible whether or not the statute so provides.

The conflict occurs in states like Georgia, Massachusetts and New Hampshire where the choice of appraisers is left to the parties, because conceivably, each stockholder could desire a different appraiser. The result would be a series of different appraisals which would consume time, duplicate effort, increase the over-all cost, and

²⁴ Alaska, Arkansas, Michigan, New Mexico, Ohio, Pennsylvania and Wyoming provide for the appointment of three appraisers by the court. Kentucky, New York and Rhode Island provide for the appointment of one appraiser. Illinois, New Jersey, Oklahoma and Oregon provide that the stock shall be valued by the court. In Connecticut a court can appoint one or more appraisers. The Georgia statute provides that each party is to appoint an appraiser and the appraisers in the event of disagreement shall appoint an umpire. If the appraisers cannot agree on an umpire, the court may appoint. Massachusetts and New Hampshire have no provision for court appointment of appraisers.

²⁵ Mass. Gen. Laws Ann. ch. 156, § 46 (1959).

²⁶ Connecticut, Kentucky, New York, Ohio, Oklahoma, Rhode Island and Wyoming expressly provide for consolidation.

undoubtedly result in different stock values. However, the statutes of these states are not without merit. The valuation of the stock of a corporation might easily require knowledge of accounting, economics, market conditions and the industry itself. Permitting the parties to choose their appraisers gives them an opportunity to choose someone in whom they have confidence and who possesses the requisite knowledge.

It is submitted, to resolve this conflict, the legislature could require the corporation to hold a meeting of all dissenting shareholders within a specified time after a petition for an appraisal has been filed. The dissenting stockholders, by majority vote, could then appoint an appraiser to represent them who along with the court and company appointed appraisers, would determine the value of the stock. Although this is a more cumbersome method of appointing appraisers than leaving the choice up to the court, it has the advantage of giving all the dissenting stockholders an opportunity to participate in the choice. A small stockholder residing far from the state of incorporation who is not represented by counsel would have had at least some voice in the proceedings.

4. *Conduct of the Appraisal.* The degree of court supervision of the conduct of the appraisal varies greatly from state to state. In some cases the appraisal itself is conducted by the court. In others, it is conducted by appraisers appointed by the court.²⁷ In such cases the conduct of the appraisal can be controlled by the court, presumably in accordance with the normal rules of procedure. Evidence relevant to the determination of the value of the stock as defined by the applicable statute would then be admissible in evidence. Massachusetts and New Hampshire have no statutory provision whereas the Model Business Corporation Act gives the court the authority to establish procedure for the conduct of the appraisal.²⁸ This has the advantage of giving the parties the opportunity to be heard on preliminary matters in advance of the appraisal (*e.g.*, whether or not a stenographic record shall be kept).

5. *Costs.* Although considered to be one of the most important considerations in the appraisal procedure,²⁹ and certainly one of the most practical, the Massachusetts statute makes no provision for allocation of cost. However, there is some authority to the effect that a court has jurisdiction to allocate costs under general equity prin-

²⁷ *Supra* note 21.

²⁸ New York spells out broad powers in the appraiser to hear evidence with respect to valuation of the stock. N.Y. Stock Corp. Law § 21.4.

²⁹ Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 Cornell L.Q. 420, 439 (1930); Note, 60 Yale L.J. 237 (1951).

ciples,³⁰ and statutes in some jurisdictions³¹ expressly grant such discretion but it is doubtful whether the Massachusetts court would so hold. Clearly, an adequate appraisal statute should include a provision for allocating costs, especially if a consolidated proceeding is to be held. The Model Business Corporation Act provides that costs shall be borne by the corporation unless the court finds that the stockholders acted vexatiously or in bad faith in demanding the appraisal.³² The difficulty with this approach is that an allocation based on a finding of the stockholders' motives would be difficult at best, and is apt to turn on the extent to which the appraisers' findings agree with the stockholders' contentions. If the stockholders are given the right to an appraisal, there is little reason for inquiring into their motives in asserting their rights.

It could be argued that the costs should be borne by the corporation, or, in effect, by the majority stockholders, since the appraisal was made necessary because they chose to vary the terms of the contract between themselves and the dissenting stockholders. However, this gives dissenting stockholders an opportunity to engage in an appraisal proceeding at no cost to themselves. Furthermore, the right of the majority stockholders to make fundamental changes was a part of the contract between the stockholders. It is suggested that costs be subject, in the first instance, to court scrutiny for fairness. Thereafter, they should be allocated equally among all the dissenting stockholders in the proportion that their holdings bear to the total stock issued and outstanding on the date of the vote, the remainder to be paid by the corporation. This would have the advantage of relieving the court from an inquiry into the motives of the parties. At the same time, each party would tend to avoid unwarranted expense because of the detrimental effect on his own proportionate financial interest.

In addition to the problem of cost allocation, there is also the problem of determining what fees and expenses are to be included in costs. It is suggested that costs should include not only the fees of the appraisers, but also those of expert witnesses. If costs were limited solely to fees and expenses of appraisers, dissenting stockholders might well find that their witness fees exceeded the value of their interest in the corporation. However, fees of appraisers and expert witnesses should be subject to court approval for fairness.

6. *Interest.* The question of payment of interest depends to

³⁰ See Note, 60 Yale L.J. 237 (1951); *Ashton v. Pittsburgh Consol. Coal Co.*, 69 Pa. D. & C. 277 (C. P. Allegheny Co. 1949).

³¹ E.g., Kentucky and Ohio.

³² Such provisions are found as well in Connecticut, New York, Pennsylvania and Wyoming.

some extent on the stockholder's status between the time he demands payment for his stock and when he is actually paid. If after demand his corporate rights are limited to appraisal and payment, it would seem that he is entitled to payment of interest. In Massachusetts a dissenting stockholder is not entitled to interest until thirty days after the appraisers' finding,³³ but since the Massachusetts Supreme Judicial Court has held that a dissenting stockholder retains his interest in the corporation until he has surrendered his stock and has been paid,³⁴ the thirty day suspension of interest appears justified.

With respect to the other Code states, inconsistency is more the rule than the exception. No particular correlation can be found between those states which allow interest on the award³⁵ and those which cut off the stockholder's interest in the corporation immediately upon demand for payment.³⁶ Of the seven states which have this "cut off" rule, only Connecticut, New York and Ohio expressly provide for payment of interest.

As a practical matter, the dissenting stockholder's status as a stockholder during this period may be largely illusory. He is entitled to dividends paid by his corporation, but if he is a stockholder in a corporation which has sold its assets to another corporation in exchange for its stock, he is a stockholder in a corporate shell, and obviously no dividends will be paid. In the meantime, the corporation has his money.

Once the stockholder has made demand for payment for his stock, at least in the absence of fraud, he has probably irrevocably committed himself to that remedy and cannot thereafter change his mind, at least without the consent of the corporation.³⁷ It is suggested therefore, that the stockholder be paid interest from the date on which he demands payment, and after he has demanded payment his right to further participation in the corporation be terminated. This would reflect the fact that once he has made demand for payment, his status is more that of a creditor than that of a stockholder. This approach could be taken without necessarily precluding the

³³ *Martignette v. Sagamore Mfg. Co.*, *supra* note 19.

³⁴ *Ibid.* Alaska, Illinois and Oregon, like Massachusetts, provide that a stockholder's interest in the corporation ceases upon payment to him of the value of his stock.

³⁵ Alaska, Connecticut, Illinois, New York, Ohio, Oregon and Wyoming expressly provide for the payment of interest.

³⁶ Arkansas, Connecticut, Georgia, Michigan, New York and Ohio provide that a stockholder's interest in the corporation, except for a right to appraisal and payment, ceases upon demand for payment. A stockholder's interest in Kentucky ceases when he commences an action in court for valuation of his stock.

³⁷ Connecticut, Michigan, Ohio, Pennsylvania and New York provide that a stockholder may withdraw his demand for payment only with the consent of the board of directors or of the corporation. Rhode Island is the only Uniform Commercial Code state expressly providing that the stockholder may withdraw his demand at any time prior to the appraisers' report.

COMMENTS

stockholder from asserting a cause of action arising prior to the time he made demand for payment.

III. CONCLUSION

As can be seen from this brief survey, the right of dissenting minority stockholders to receive payment for their stock and the procedures to be followed in demanding and conducting an appraisal of their stock vary widely from state to state. No doubt few stockholders who invest in a corporation have any idea of their rights and obligations in this regard, yet should the majority decide on some fundamental change in the corporation, appraisal rights and procedures become of great importance not only to the dissenting minority, but to the majority stockholders and the corporation as well. It is just as important to the corporation that the dissenting minority be paid as quickly and expeditiously as possible as it is to the minority stockholders themselves. Any procedure which is inadequate works a hardship on all parties concerned.³⁸

To be adequate, an appraisal statute should be both clear and complete. That is, the statute should be clear enough that a minority stockholder can understand what procedure he is to follow in demanding appraisal, and complete enough to discount the problems which can be expected to arise during the appraisal procedure. Completeness also calls for specificity in enumerating just what fundamental changes in the corporation shall give rise to appraisal rights and what stockholders are to have this right. It should provide the minority stockholder with a simple method of making demand and for preliminary settlement negotiations.

If appraisal becomes necessary, there should be provision for consolidating all claims into a single hearing, as well as for payment of interest and costs. Unless an appraisal statute covers each of these points, it cannot be considered adequate. It is not necessary that appraisal rights and procedures be uniform throughout the states, but it is important that each state have a simple, comprehensive procedure. It has been this legislative failure to clearly define the methods for appraisal and payment which has resulted in the delays, uncertainties and legal expense incident to the appraisal process.

In view of this, and because the problem is, in the main, procedural, any remedy would seem to lie with the legislature. Statutory enactment would expedite clarification and by the same process, eliminate the substantive inconsistencies which have resulted from judicial decisions and piece-meal legislation.

³⁸ See Kaplan, *Problems in the Acquisition of Shares of Dissenting Minorities*, 34 B.U.L. Rev. 291 (1954).