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OPPUGNANCY AND OPPRESSION IN CLOSE CORPORATIONS: REMEDIES IN AMERICA AND IN BRITAIN

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This article discusses first the heavy impact of dissension in a close corporation and the injustices and hardships which minority shareholders in that type of business organization often suffer.¹ It then examines remedies available in this country to unhappy or aggrieved shareholders. Finally, it looks at some of the remedies open to oppressed shareholders in British companies, especially at a provision in the Companies Act of 1948 designed to enlarge the protection afforded minorities and at the interesting decisions which have been handed down under that provision.

PROBLEMS OF STRIFE AND OPPRESSION

(A) *Inability of Unhappy Shareholder To Get Out.* In a close corporation, the relationship among the participants, like that among partners, presupposes close co-operation and a high degree of good faith and mutual respect. Ordinarily all or most of the shareholders are active in the business and they are in constant contact with each other. Once dissatisfaction or distrust has developed, friction is likely to continue to grow. Strife in turn often breeds oppression; and indeed in the mind of an unhappy shareholder there is often no clear-cut line between dissension and unpleasantness on the one hand and oppression and injustices on the other.

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¹ Part of this article is based on discussions of dissension, deadlock and squeeze-outs in O'Neal, *Close Corporations: Law and Practice* §§ 8.07-8.10, 9.01-9.29 (1958). The author acknowledges his indebtedness to William M. Sinrich, associate in the Atlanta firm of Haas, Holland and Zinkow, for research and helpful ideas.

An unhappy shareholder in a close corporation often cannot get out of the enterprise without serious loss. All or a large part of his assets may be tied up in the business, and the salary he receives from the company may furnish his principal livelihood. He ordinarily does not have a partner's power to dissolve the business unit; and, unlike the shareholder in a public-issue corporation, he cannot dispose of his stock easily. Anything less than a controlling interest in a close corporation does not have a ready market; and, if there is dissension, a minority interest is even less inviting to prospective purchasers. Further, if there are restrictions on the transferability of the corporation's shares, as is often the case, irritated and obstinate associates can prevent a sale.

(B) *Losses to Enterprise and to Participants.* Whenever a dissatisfied shareholder in a close corporation cannot dispose of his shares without heavy financial sacrifice, serious harm to the enterprise and heavy losses to the shareholders often follow. The shareholder's services may be necessary for the efficient operation of the business or he may be frozen into the directorate or an officership by a shareholders' agreement or other control arrangement; but, in exasperation, he may consistently refuse to cooperate with his associates and in fact do whatever he can to obstruct the operation of the corporation's affairs. Unhappiness and strife among participants not uncommonly result in litigation and much unfavorable publicity; and sometimes even in physical violence.

(C) *Deadlocks.* The distribution of voting shares in a close corporation is often such that an eventual impasse is probable. In some instances, the shares are evenly divided between two shareholders or groups of shareholders. Wherever directorates have an even number of members—not an uncommon occurrence—even divisions among the directors are likely to occur. Further, persons who are to hold minority interests in closely held enterprises, in an effort to protect themselves against the power normally vested in a majority of the shareholders and their directors to determine corporate policy and to make decisions by simple majority vote, often bargain for and obtain a veto over corporate policies and decisions. Veto powers of course greatly enhance the risk of eventual corporate paralysis. In the colorful language of a Virginia court,² veto arrangements empower a recalcitrant shareholder or director to "embalm his corporation and hold it helpless . . . in a state of suspended animation."

(D) *Squeeze Outs.* On the other hand, whenever control is not evenly divided in a close corporation and minority shareholders do not have a veto over corporate decisions, majority shareholders and

² Kaplan v. Block, 183 Va. 327, 31 S.E.2d 893, 896-97 (1944).

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the directors and officers whom they control often try to squeeze out the minority shareholders or some of them. A "squeeze out" is a manipulative use of corporate control to eliminate minority shareholders from an enterprise, reduce their voting power or claims on corporate earnings and assets, or otherwise deprive them of corporate income or advantages.

A squeeze out may take any one of a number of forms. Majority shareholders may cause the corporation to sell its assets at an inadequate price to the majority shareholders or to companies in which the majority are interested;³ they may organize a new company in which the minority will have no interest, transfer the corporation's assets or business to it, and perhaps then dissolve the old corporation;⁴ they may bring about the merger or consolidation of the corporation under a plan unfair to the minority;⁵ they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority shareholders or unreasonable payments by the corporation under contracts between the corporation and majority shareholders not arrived at in arm's length dealings.

In recent years, a squeeze out has perhaps most often taken one of the two following forms: (1) the shareholder-director-executives refuse to declare dividends but they provide high compensation for themselves and otherwise enjoy to the fullest the "patronage" which corporate control entails, leaving minority shareholders who do not hold corporate office with the choice of getting little or no return on their investments for an indefinite period of time or of selling out to the majority shareholders at whatever price they will offer;⁶ or (2) the shareholder-director-executives cause the corporation to issue a large number of new shares, which they themselves take at grossly inadequate price, thus increasing their proportionate control and claims on earnings and assets and diluting the interests of the minority⁷ (if minority shareholders have pre-emptive rights, the issue will be made at a time when the minority shareholders are not in a position to finance the acquisition of their part of the issue).⁸

³ See, e.g., *Ervin v. Oregon Railway & Navigation Co.*, 27 Fed. 625 (S.D.N.Y. 1886).

⁴ See, e.g., *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 120 Atl. 486 (Ch. 1923); *Theis v. Spokane Falls Gaslight Co.*, 34 Wash. 23, 74 Pac. 1004 (1904).

⁵ See, e.g., *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765 (8th Cir. 1906).

⁶ See *Von Au v. Magenheimer*, 126 App. Div. 257, 110 N.Y. Supp. 629 (2d Dep't 1908), *aff'd*, 196 N.Y. 510, 89 N.E. 1114 (1909).

⁷ See *Hammer v. Werner*, 239 App. Div. 38, 265 N.Y. Supp. 172 (2d Dep't 1933).

⁸ For a detailed discussion of squeeze-out techniques, see Comment, 1959 Duke L.J. 436. See also note, 35 N.C.L. Rev. 271 (1957).

(E) *Losses to the Economy*. There is no way of knowing the extent of the economic loss resulting from the failure of our laws to assure fair treatment to minority interests in close corporations and to provide effective ways of settling disputes in such companies. Certainly, the frequency of squeeze outs and deadlocks has become well known to prospective investors; undoubtedly, many persons, because of the dangers of oppression or deadlock in a close corporation, choose to purchase shares in public-issue corporations or even permit their accumulated funds to remain idle rather than risk the purchase of a minority interest in a closely held enterprise. Thus potential sources of much-needed risk capital for small business enterprises are squandered.

REMEDIES IN THE UNITED STATES

(A) *Principles Which Obstruct Relief*. Barriers to relief for aggrieved or unhappy shareholders include (1) the principle of majority control, (2) the business judgment rule, and (3) the reluctance of some courts to permit departures from the traditional pattern of corporation management.

In the absence of some special control arrangement, a corporation is subject to the principle of majority rule: holders of a majority of voting shares govern. "The very foundation principle of a corporation," commented a Georgia judge many years ago, "is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their chartered rights."⁹

Majority shareholders elect the directors, even under cumulative voting over half of them. The directors in turn select officers and employees, fix their compensation, determine business policies, and manage the business. Whatever voice a minority shareholder has is purely at the grace or acquiescence of the majority.

Majority rule is modified in most states by statutory provisions requiring for fundamental corporate acts, such as charter amendments, mergers or consolidations, or sale of substantially all corporate assets, the favorable vote of holders of two-thirds or three-fourths of the shares with voting power or the vote of the holders of a specified percentage of all shares irrespective of whether the shares are given voting rights by the charter. Statutes of this kind give sizeable minorities protection against some of the cruder and more direct squeeze-out techniques, but of course do nothing to relieve a shareholder's dissatisfaction with the way the majority is conducting corporate affairs.

The business judgment rule gives a large discretion to the directors to determine business policy and to conduct corporate affairs. As

⁹ *Hand v. Dexter*, 41 Ga. 454, 462 (1871).

the late Professor Ballantine has pointed out,¹⁰ courts "hesitate to substitute their judgment on complicated questions of business policy for that of the elected managers of the business and have limited the scope of judicial review which they are willing to undertake." This means that in general they will not review directors' decisions in selecting corporate officers and employees, fixing salaries, authorizing contracts, and determining business policies and the course of corporate affairs.

Persons acquiring a minority interest in a closely held enterprise often seek by arrangements made in advance to protect themselves against the tremendous powers the principle of majority control and the business judgment rule vest in majority shareholders and the directors they select. Lawyers representing minority interests sometimes show great resourcefulness and ingenuity in setting up arrangements to protect their clients: pre-incorporation agreements, special charter and by-law clauses, shareholders' contracts of various kinds, voting trusts, irrevocable proxies, and long-term employment contracts. That intriguing story of imaginative corporate practitioners, complex legal instruments, and ingenious solutions to planning and drafting problems has been told elsewhere;¹¹ it will not be repeated here. For present purposes, it suffices to say, some courts even now will upset on one ground or another a special charter or by-law provision or a contractual arrangement which departs from the principle of majority rule or sets up a control pattern different from the orthodox scheme of corporation management.

Judges and legislators, no less than other men, are creatures of their culture: its ideas are their ideas, its methods their methods, its limitations their limitations. Small wonder that a legal generation which grew up in an atmosphere of corporate theory pervaded with the "concession theory" of corporate existence, under which the corporation is viewed as an artificial, fictitious being, and a corporate charter as a grant from the sovereign giving "life" to a new legal entity,—small wonder that such a generation is slow to approve unorthodox arrangements among shareholders which imply that a corporation is simply a group of businessmen voluntarily associating together, with freedom within broad bounds to determine by contract their relations among themselves.

(B) *Remedies in General.* An unhappy shareholder can of course

¹⁰ Ballantine, Corporations § 231 (Rev. ed. 1946).

¹¹ E.g., O'Neal, Close Corporations: Law and Practice chs. III-VII, IX (1958); Hoban, Voting Control Methods, 1958 U. Ill. L. Forum 110; Logan, Methods to Control the Closely Held Kansas Corporation, 7 Kan. L. Rev. 405 (1959); Powers, Cross Fire on the Close Corporation: Norms Versus Needs, 11 U. Fla. L. Rev. 433 (1958); Scott, The Close Corporation in Contemporary Business, 13 Bus. Law. 741, 748-752 (1958).

harass those in control of a corporation by exercising his right to inspect corporate books and records. If he has the pocketbook and stomach for tough, long-drawn-out litigation and can overcome the rather numerous obstacles to a shareholder's derivative suit (the rule requiring demands on directors and shareholders before suit, the contemporaneous ownership rule, minimum share requirements, and security-for-expense statutes), he can bring an action on behalf of the corporation for wrongs supposedly committed against it. Some of the magic words on which such a suit might be based are "fraud," "waste of assets," "spoliation," and "pre-emption of corporate opportunity."¹² By instituting litigation of this kind, a minority shareholder might be able to obtain for the corporation redress for past wrongs committed, or he might be able to exact concessions in respect to future conduct of the business in return for his discontinuing the litigation.

If majority shareholders try to squeeze minority holders through the issuance of additional shares of the corporation's stock, minority shareholders may find their pre-emptive rights, if those rights have not been taken away by statute or charter provision, some slight comfort but hardly real protection against persistent and sophisticated squeeze-plays. If the squeeze technique utilized is merger or consolidation, an informed minority shareholder can assert his statutory right to have his interest appraised and to receive cash for it; in some jurisdictions he also has appraisal rights if the majority causes the corporation to sell all or substantially all its assets.

If a shareholder is induced to sell his shares to majority interests or to the corporation through misrepresentations or "half truths," he may be able to rescind the sale or to affirm the sale and recover damages for deceit.¹³ If the purchaser merely withholds information, making no statement which is false or which can be construed as a half-truth, the selling shareholder may be able to obtain relief in some jurisdictions on the theory that the purchaser has breached a fiduciary duty to the seller, a duty which requires the disclosure of all officially-obtained information which affects the value of the stock,¹⁴ in the presence of "special facts" or "special circumstances"

¹² For a discussion of the doctrine of corporate opportunity, see Carrington and McElroy, *The Doctrine of Corporate Opportunity*, 14 *Bus. Law.* 957 (1959); Scott, *The Close Corporation in Contemporary Business*, 13 *Bus. Law.* 741, 754-56 (1958).

¹³ For a discussion of the various theories on which a selling shareholder may proceed when he has been induced to sell his shares by misrepresentation, see *Barnes v. Eastern & Western Lumber Co.*, 205 Ore. 553, 287 P.2d 929, 948 (1955). For a purchaser's liability for "half truths," see *Restatement, Torts* § 529, Comment a; *Prosser, Torts* 534 (2d ed. 1955).

¹⁴ *Blazer v. Block*, 196 F.2d 139, 146 (10th Cir. 1952); *Oliver v. Oliver*, 118 Ga. 362, 45 S.E. 232 (1903); *Humphrey v. Baron*, 223 Iowa 735, 273 N.W. 856 (1937); *Hotchkiss v. Fisher*, 136 Kan. 530, 16 P.2d 531 (1932).

a duty to disclose arises in still other jurisdictions;¹⁵ and in the absence of remedy under state law and perhaps in preference to it even where available, a shareholder may find remedies under the Federal Securities Act of 1933, the Federal Securities Exchange Act of 1934, and rules of the Securities and Exchange Commission implementing those statutes.¹⁶

(C) *Expanding Conception of Fiduciary Duties of Directors and Controlling Shareholders.* In the past, some courts have permitted majority shareholders and the directors to exercise almost without restriction the powers they have under the statutes and the corporation's charter and by-laws;¹⁷ they have even treated the fiduciary duties of the directors as running only in favor of the corporation, not to the minority shareholders.¹⁸ This view that the controlling shareholders and the directors do not owe fiduciary duties to minority shareholders is outmoded, at least as applied to squeeze outs and other attempts to deprive minority shareholders of their proportionate rights without a just equivalent. Where several owners carry on an enterprise together (as they usually do in a close corporation), their relationship should be considered a fiduciary one¹⁹ similar to the relationship among partners. The fact that the enterprise is incorporated should not substantially change the picture. True it is, that when businessmen organize a corporation they enter into their relationship against a background of corporation statutes and common law doctrine which vest in the directors the power to manage the corporation's affairs and in the directors and specified percentages of the shareholders power to effect fundamental corporate acts, such as the sale of all the corporation's assets or reorganization of the corporation through merger or consolidation. That does not mean, however, that the directors or the majority shareholders should be permitted to exercise their powers arbitrarily or without regard to the legitimate expecta-

¹⁵ *Strong v. Repide*, 213 U.S. 419 (1909); *Agatucci v. Corradi*, 327 Ill. App. 223, 63 N.E.2d 630 (1945); *Nichol v. Sensenbrenner*, 220 Wis. 165, 263 N.W. 650 (1935).

¹⁶ See Latty, *The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation under the S.E.C. Statutes*, 18 *Law & Contemp. Prob.* 505 (1953). For an outline (prepared for British readers) of the protection afforded minority shareholders by American law, see Latty, *Minority Shareholder Protection in American Corporation Law*, 1957 *J. Bus. L.* 110, 224, 337.

¹⁷ See *Barrett v. Denver Tramway Corp.*, 53 F. Supp. 198 (D. Del.), *aff'd*, 146 F.2d 701 (3d Cir. 1944); *McNulty v. W. & J. Sloane*, 184 Misc. 835, 54 N.Y.S.2d 253, 262 (Sup. Ct. 1945); *Ballantine, Corporations* § 278 (1946); cf. *Bodell v. General Gas & Electric Corp.*, 15 Del. Ch. 420, 140 Atl. 264 (Sup. Ct. 1927), sustaining discretion of the directors in selling no par stock at less than market value.

¹⁸ *Carpenter v. Danforth*, 52 Barb. 581 (N.Y. Sup. Ct. 1868); *Stevens, Corporations* § 150 (2d ed. 1949).

¹⁹ See Dodd, *For Whom Are Corporate Managers Trustees?*, 45 *Harv. L. Rev.* 1145-46 (1932).

tions of the minority shareholders.²⁰

Many of the older decisions²¹ and practically all of the recent ones²² indicate that controlling shareholders, in some circumstances at least, owe fiduciary duties to minority shareholders and that the courts will require them (whether they act in their capacity as shareholders or through directors or officers whom they control) to observe accepted standards of business ethics in transactions affecting rights of minority shareholders. In view of the informal way in which the affairs of most close corporations are conducted, there is usually no necessity for distinguishing between the fiduciary duties of the controlling participants in their various capacities as shareholders, directors, and officers. As was said by the Court of Appeals of New York,²³ whenever a number of stockholders "constitute themselves, or are by the law constituted, the managers of corporate affairs or interests, they stand in much the same attitude towards the other or minority stockholders that the directors sustain generally towards all the stockholders, and the law requires of them the utmost good faith," and a court of equity "will protect a minority stockholder against the acts or threatened acts of the board of directors or of the managing stockholders of the corporation, which violate the fiduciary relation and are directly injurious to the stockholders."²⁴ And, as a federal court has said,²⁵ majority shareholders "owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest

²⁰ In *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-88 (1919), Mr. Justice Brandeis, speaking for the court, in referring to the principle that majority shareholders rule, commented as follows: "The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much as the corporation itself or its officers and directors."

²¹ *Hyams v. Calumet & Hecla Min. Co.*, 221 Fed. 529 (6th Cir. 1915); *Ervin v. Oregon Railway & Navigation Co.*, 27 Fed. 625 (S.D.N.Y. 1886); *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 120 Atl. 486, 491 (Ch. 1923); *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 123 N.E. 148, 151-52 (1919).

²² See, e.g., *Funk v. Spalding*, 74 Ariz. 219, 246 P.2d 184 (1952) (shareholder who took over management of close corporation on departure of other shareholder for military service owes the absent shareholder a fiduciary duty to account for profits, and absent shareholder can maintain in his own right action based on fiduciary relation); *Elsbach v. Mulligan*, 58 Cal. App. 2d 354, 136 P.2d 651 (1943); *Bennet v. Breuil Petroleum Corp.*, 99 A.2d 236 (Del. Ch. 1953); *Mendelsohn v. Leather Mfg. Co.*, 326 Mass. 226, 93 N.E.2d 537 (1950); *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951); *Gaines v. Long Mfg. Co.*, 234 N.C. 331, 67 S.E.2d 355 (1951); *Meadows v. Bradshaw-Diehl*, 139 W. Va. 569, 81 S.E.2d 63 (1954); *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 23 N.Y.2d 620 (1946).

²³ *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 123 N.E. 148, 151-52 (1919).

²⁴ Compare language in *Allied Chemical & Dye Corp. v. Steele & Tube Co.*, 14 Del. Ch. 1, 120 Atl. 486, 491 (1923).

²⁵ *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765, 771 (8th Cir. 1906). See also *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350, 353 (1951).

possible amount, to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just proportion of the income and of the proceeds of the property. Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery."

(D) *Power of Minority Shareholders To Compel the Declaration of Dividends.* If a minority shareholder in a close corporation is not an officer or principal employee, he is of course vitally interested in seeing that the corporation makes profits and (aside from tax considerations in some instances) that the corporation distributes the profits in the form of dividends as rapidly as is consistent with the safety of the business and its future profit-making position. On the other hand, the directors of the corporation (usually the principal shareholders or the holders of a controlling interest) may not want to "show" a profit; or, even if the corporation's books show a large fund legally available for dividends, they may not be willing to declare dividends.

The directors may prefer to plow the earnings back into the business in order to increase its size and thus enhance their own prestige and power. Further, as they normally expect the lion's share of their return from the corporation to be in the form of compensation from the offices they hold rather than in the form of dividends from their shareholdings, they naturally are more interested in keeping their compensation (including bonuses and other "incentive" compensation) high and in protecting it against future business vicissitudes than they are in paying high dividends. Thus the tendency is for them to retain profits in the business for use in its expansion (a larger enterprise justifying larger salaries for the officers) or for use as reserves to see the corporation and its officers through lean years. In addition, persons controlling a close corporation sometimes withhold dividends to avoid heavy personal income taxes to which they themselves would be subjected on corporate distributions. And, as has been mentioned, majority shareholders in a close corporation sometimes deliberately try to squeeze out a minority by withholding dividends, hoping ultimately to buy out the minority interest at a price considerably less than its actual value.

A minority shareholder's chances of obtaining relief against the accumulation of earnings beyond the reasonable requirements of the business²⁶ are ordinarily not particularly bright.²⁷ He may have con-

²⁶ The unreasonable accumulation of earnings may lead to tax grief.

²⁷ See generally on minority shareholders' power to compel dividends in close corporations, Scholder, *Dividends and the Minority Stockholder in a Closely Held*

siderable trouble establishing the facts—the amount of the corporation's earnings, what capital is needed for operation and expansion, why the directors are withholding the profits and refusing to declare dividends, and so on; and, even if he succeeds in establishing the facts, he will still have difficulty in demonstrating that the facts evidence a breach of duty by the directors. The courts in general permit management—whether in a close or publicly held corporation—to exercise a high degree of discretion in two important respects.²⁸ First, management may exercise discretion in the choice and application of the accounting methods used to determine the existence and size of the surplus or other fund available for dividends.²⁹ Second, the directors are given broad discretion in deciding whether funds which the corporation's books show are legally available for dividends shall be distributed to the shareholders as dividends or shall be retained in the business.

The doctrine is well settled³⁰ that whether or not dividends are to be declared and, if so, the amount of the dividends and when and how they shall be paid, are matters to be decided by the directors. Nevertheless, there are limits to the directors' privilege to retain earnings in the business;³¹ and the courts, particularly in cases involving close corporations,³² will exercise their equity powers against arbitrary refusal of directors to declare and pay reasonable dividends. If the directors act fraudulently or in bad faith in withholding dividends,

Corporation, 14 N.Y.U. Intra. L. Rev. 140 (1959); Note, 10 Rutgers L. Rev. 723 (1956). See also Note, 64 Harv. L. Rev. 299 (1950). Success in a suit to compel the directors to pay dividends may be only a temporary victory for a minority shareholder, because the directors may refuse to pay future dividends without additional litigation. But see, *Patton v. Nickolas*, 154 Tex. 385, 279 S.W.2d 848 (1955) (decree to declare dividend at earliest practical date and thereafter to declare reasonable dividends annually from future profits and accumulated surplus).

²⁸ See *Frey*, *The Distribution of Corporate Dividends*, 89 U. Pa. L. Rev. 735, 736 (1941).

²⁹ *Ibid.*

³⁰ *Lesnick v. Public Industrials Corp.*, 144 F.2d 968 (2d Cir. 1944); *Anderson v. Bean*, 272 Mass. 432, 172 N.E. 647, 72 A.L.R. 959 (1930); *Barrows v. J. N. Fauver Co.*, 280 Mich. 553, 274 N.W. 325 (1937); *Lockley v. Robie*, 301 N.Y. 371, 93 N.E.2d 895 (1950) (close corporation); *City Bank Farmers' Trust Co. v. Hewitt Realty Co.*, 257 N.Y. 62, 177 N.E. 309, 76 A.L.R. 881 (1931) (a family corporation; president had animosity toward one of the stockholders but a business reason for refusing to pay dividends was shown); *Kehl*, *Corporate Dividends* 158 (1941).

³¹ See *Jones v. Van Heusen Charles Co.*, 230 App. Div. 694, 246 N.Y. Supp. 204 (3d Dep't 1930).

³² For an early decision requiring the directors of a close corporation to declare dividends, see *Crichton v. Webb Press Co.*, 113 La. 167, 36 So. 926 (1904). For a more recent decision requiring directors of a close corporation to declare dividends as required by a statute providing that directors shall declare dividends of accumulated profits in excess of amount reserved as working capital, see *Nebel v. Nebel*, 241 N.C. 491, 85 S.E.2d 876 (1955).

it is clear that the courts will grant equitable relief.³³ Where fraud or bad faith is absent but the directors have unreasonably or arbitrarily refused to declare dividends, the decisions are in conflict on whether the courts will interfere and compel the payment of dividends.³⁴ It is believed, however, that most courts will require reasonably sound business judgment from the directors and some consideration for minority shareholders.³⁵ As was said by the Supreme Court of Indiana,³⁶ "the courts will not allow the directors to use their power oppressively by refusing to declare dividends where the net profits and the condition and character of the business clearly warrant it." The ultimate test, according to the Supreme Court of Minnesota,³⁷ "resolves itself into an examination of the good faith and reasonableness of the policy of retaining that which otherwise is available for dividends."

A proceeding to force the directors to declare a dividend is equitable in nature.³⁸ There is a split of authority on whether such a proceeding should be brought in the name of the corporation as a

³³ In re Brantman, 244 Fed. 101, 103 (2d Cir. 1917); W. Q. O'Neill Co. v. O'Neill, 108 Ind. App. 116, 25 N.E.2d 656 (1940); Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809 (1939); Hiscock v. Lacey, 9 Misc. Rep. 578, 30 N.Y. Supp. 860 (Sup. Ct. 1894). "Undoubtedly the malicious suppression of dividends is a wrong akin to breach of trust, for which the courts will afford a remedy." Patton v. Nickolas, 154 Tex. 385, 279 S.W.2d 848, 854 (1955). See also Lesnik v. Public Industrials Corp., 144 F.2d 968 (2d Cir. 1944) (question for jury whether directors' failure to declare dividends was pursuant to a conspiracy to acquire a shareholder's stock).

³⁴ Indicating that under such circumstances a court will not compel dividends: Blanchard v. Prudential Ins. Co., 80 N.J. Eq. 209, 83 Atl. 220 (Ct. Err. & App. 1912) (in the absence of fraud there is no ground for equitable interference); Gottfried v. Gottfried, 73 N.Y.S.2d 692, 695 (Sup. Ct. 1947) ("There must also be bad faith on the part of the directors.") See also Wabash Ry. v. American Refrigerator Transit Co., 7 F.2d 335 (8th Cir. 1925) (equity can interfere only if there is bad faith or clear abuse of discretion); Ballantine, Corporations § 232 (1946).

Indicating that under such circumstances a court will compel dividends: Gaines v. Longs Mfg. Co., 234 N.C. 331, 67 S.E.2d 355 (1951); Stevens v. United States Steel Corp., 68 N.J. Eq. 373, 378, 59 Atl. 905, 907 (Ch. 1905) (dictum); Tefft v. Schaefer, 136 Wash. 302, 239 Pac. 837, 840 (1925) (dictum).

³⁵ See Whittemore v. Continental Mills, 98 F. Supp. 387 (D. Me. 1951) (complaint alleging that board was improperly influenced by holder of majority stock who gained taxwise by withholding of dividends stated a cause for relief in equity).

³⁶ Star Pub. Co. v. Ball, 192 Ind. 158, 171, 134 N.E. 285, 290 (1922). "As a general rule the officials of a corporation are the sole judges as to the propriety of declaring dividends and the courts will not interfere with the proper exercise of that discretion. Yet when the right to a dividend is clear and there are funds from which it can properly be made, a court of equity will interfere to compel a company to declare it. Directors are not allowed to use their power illegally, wantonly, or oppressively." W. Q. O'Neill Co. v. O'Neill, 108 Ind. App. 116, 25 N.E.2d 656, 659 (1940) (preferred shareholders allowed to maintain suit to compel dividends). See also Belfast & Moosehead Lake R. Co. v. City of Belfast, 77 Me. 445, 454, 1 Atl. 362, 366 (1885).

³⁷ Keough v. St. Paul Milk Co., 205 Minn. 96, 285 N.W. 809, 821 (1939).

³⁸ Lawton v. Bedell, 71 Atl. 490 (N.J. Ch. 1908).

derivative action³⁹ or whether it should be brought as a class or representative suit on behalf of all shareholders or of all shareholders in a class.⁴⁰ An attempt to get the corporation to act, unless such an attempt would have been useless, is a condition precedent to the right to bring the suit.⁴¹

(E) *Power of Minority Shareholders To Prevent Dilution of Their Interests through the Issuance of New Stock.* Some courts have been surprisingly reluctant to interfere to prevent the issuance of stock that dilutes the interests of minority shareholders,⁴² indicating that if pre-emptive rights have been honored they will not intercede to prevent the issuance of stock or to cancel an issue unless issuance of the stock is in opposition to the interests of the corporation itself. To make their decisions more palatable to minority shareholders who claim they are not financially able to exercise their pre-emptive rights, these courts have sometimes suggested that impecunious minority shareholders could sell their pre-emptive rights⁴³ or borrow to exercise them, using the stock as security.⁴⁴

These suggestions overlook the possible unfairness of permitting majority shareholders to compel the minority shareholders to increase their investment in the enterprise (when the welfare of the business itself does not so require). After all, if minority shareholders are not getting what they consider to be a fair return on their original investment and majority shareholders are trying to squeeze them out, the minority shareholders naturally are hesitant "to throw good money after bad" by making additional investments in the company; and indeed there seems to be no compelling policy reason to require

³⁹ *Lydia E. Pinkham Medicine Co. v. Gove*, 303 Mass. 1, 20 N.E.2d 482 (1939) (a shareholder may bring a derivative suit on behalf of the corporation to have a dividend declared). See also *Fletcher Cyc. Corp.* (Perm. ed.) § 5326; 27 St. John's L. Rev. 360 (1953).

⁴⁰ *Stevens v. United States Steel Corp.*, 68 N.J.Eq. 373, 59 Atl. 905 (1905); *Raynolds v. Diamond Mills Paper Co.*, 69 N.J.Eq. 299, 60 Atl. 941 (Ch. 1905); *Ballantine, Corporations* § 234 (Rev. ed. 1946).

⁴¹ *Ballantine, Corporations* § 234 (Rev. ed. 1946). "So far as we can discover all the decisions recognizing the right to compel the declaration of dividends agree that a shareholder cannot sue without first attempting to move the corporation, unless such attempt would be useless, and that the corporation is at least a proper party to a suit brought by a shareholder." *Lydia E. Pinkham Medicine Co. v. Gove*, 303 Mass. 1, 12, 20 N.E.2d 482, 490 (1939).

"The corporation is an indispensable party to an action to compel the issuance of dividends on corporate stock, since it is the corporation's money which is to be paid out on the order of the court." *Whittemore v. Continental Mills*, 98 F. Supp. 387, 391 (D. Me. 1951).

⁴² *Bellows v. Porter*, 201 F.2d 429 (8th Cir. 1953); *Hyman v. Velsicol Corp.*, 342 Ill. App. 489, 97 N.E.2d 122 (1951); *Schramme v. Cowin*, 205 App. Div. 20, 199 N.Y. Supp. 98 (1st Dep't 1923).

⁴³ See *Schramme v. Cowin*, 205 App. Div. 20, 199 N.Y. Supp. 98, 100 (1st Dep't 1923).

⁴⁴ See *Bellows v. Porter*, 201 F.2d 429, 433-34 (8th Cir. 1953).

minority shareholders to take the very real risks of large additional investments in order to protect their existing holdings. Further, the suggestions are unrealistic in the setting of a close corporation in that outside purchasers for a minority interest in a close corporation can seldom be found⁴⁵ [and lenders are not likely to advance funds on the security of such an interest especially if a contest between majority and minority shareholders is impending].⁴⁶ Perhaps underlying suggestions such as these are unexpressed conclusions by the courts that in the particular cases before them the minority shareholders actually had the funds to purchase the shares offered but claimed impecuniosity to buttress their opposition to a business decision of the majority.

An Illinois decision⁴⁷ illustrates how majority shareholders can cause new shares to be issued to dilute the interests of the minority holders who are not financially able to exercise their pre-emptive rights. In that case, the corporation had outstanding 200 shares of stock with a par value of \$100 per share. Plaintiff held 40 shares, or one-fifth of the total number outstanding. After a quarrel among the shareholders, the other two shareholders caused a plan of recapitalization to be adopted under which (1) the par value of the corporation's stock was reduced from \$100 to \$10, (2) the number of shares outstanding was increased from 200 to 2,000 and (3) the issuance of 68,000 additional shares at the \$10 par value was authorized.

In due course, subscription warrants to the new shares were issued to existing shareholders in recognition of their pre-emptive rights. The other two shareholders promptly exercised their pre-emptive rights, but plaintiff did not, allegedly because he did not have the money to do so. Instead, plaintiff brought suit to restrain the directors from carrying out the plan of reorganization and to nullify acts already performed under it, charging that the plan was not

⁴⁵ In *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 23 N.W.2d 620, 631 (1946), the court realistically took cognizance of the difficulty of disposing of rights to subscribe to shares in a close corporation, commenting that "in a closely held corporation which operates locally the same factor that makes it difficult to appraise the value of the stock may make it equally difficult in the event that new stock is issued for substantially less than its true value to get any substantial protection from the exercise of the pre-emptive right. This, for the reason that there will be no greater sale for subscription rights than there is for the stock itself, and that those stockholders who had sufficient control of the corporation to achieve reorganization are apt not to be in the market for further shares. The circumstances may therefore point to an oppressive attempt on the part of the controlling majority to compel minority stockholders to keep putting more money into the corporation in order to prevent dilution of their equity." "We consider, therefore, that plaintiff is right in his assertion that in a closely held corporation the fact that the issue is to be sold at materially less than its value may evidence an oppressive scheme directed against minority stockholders and render wholly invalid as an abuse of discretion irrespective of provisions for pre-emptive rights the corporate action authorizing the issue."

⁴⁶ See *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236, 240-41 (Del. Ch. 1953).

⁴⁷ *Hyman v. Velsicol Corp.*, 342 Ill. App. 489, 97 N.E.2d 122 (1951).

adopted for the benefit of the corporation but as a scheme to decrease plaintiff's interest in the corporation.

The court held that the majority shareholders and directors had not abused their discretion; that the reorganization plan was not fraudulently oppressive; that by issuing to the plaintiff the additional stock arising from the stock split and issuing him subscription warrants for the new stock authorized, defendants had given plaintiff an opportunity to protect his pro rata interests and were not to blame for his failure to obtain the money necessary to avail himself of his preemptive rights; and that, as long as the plan was legal and fair, the defendants' state of mind with respect to the plaintiff and the effect of the plan on plaintiff's interests were immaterial. In response to plaintiff's contention that the par value of the new stock (the price at which it was issued) was insignificant compared to the actual value of the stock, the court stated that the directors were not required to "recommend" the stock at a price equivalent to its true value.⁴⁸

On the other hand, a number of recent decisions,⁴⁹ proceeding on the theory that directors and controlling shareholders are subject to fiduciary duties to minority shareholders, have indicated that minority shareholders will be protected against squeeze outs engineered by the majority through the issuance of additional shares. In a North Carolina case,⁵⁰ the corporation had ten outstanding shares of stock with a par value of \$100 each. Plaintiff, the holder of two shares, brought suit to enjoin the proposed issuance of additional stock, alleging that the corporation had prospered from its inception, that it was not in need of additional operating capital but in fact had idle money, that the corporation could at any time pay from its cash all of its indebtedness, that the purpose of the plan to issue the stock was to reduce the value of plaintiff's stock, and that the plan would reduce the value of plaintiff's stock from \$60,000 to \$800. The court held that the complaint stated a cause of action for equitable relief. Although the majority has a right to control the corporation, when it does so it becomes subject to a fiduciary obligation to the minority;⁵¹ and courts of equity at the instance of minority shareholders who are unable to obtain redress within the corporation and who do not have a remedy at law will entertain jurisdiction to prevent any act on the part of the majority which is in breach of those fiduciary duties.

The Court of Chancery of Delaware had indicted a perhaps even greater readiness to protect minority shareholders against issues of

⁴⁸ 97 N.E.2d at 125.

⁴⁹ *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236 (Del. Ch. 1953); *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951); cf. *Steven v. Hale-Haas Corp.*, 249 Wis. 205, 23 N.W.2d 620 (1946). See also Note, 35 N.C.L. Rev. 271 (1957).

⁵⁰ *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951).

⁵¹ See *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-88. (1919).

new shares which dilute their holdings. In a strongly worded opinion,⁵² that court has stated that it will grant relief to minority shareholders (1) whenever new shares are offered for grossly inadequate consideration even though the pre-emptive rights of the minority shareholders are honored, or (2) whenever the primary purpose of an issue is to squeeze out a minority interest, and this irrespective of the fairness of the price at which the shares are offered. In that case, one defense was that the minority shareholder who had brought the suit had not been injured by the issuance of the stock because he had been offered his pro rata share of it. In response to that contention, the Chancellor commented⁵³ that the plaintiff shareholder had "the right not to purchase as well as the right to purchase. But his right not to purchase is seriously impaired if the stock is worth substantially more than its issuing price. . . . A corporation is not permitted to sell its stock for a legally inadequate price, at least where there is objection. Plaintiff has a right to insist upon compliance with the law whether or not he cares to exercise his option. He cannot block a sale for a fair price merely because he disagrees with the wisdom of the plan but he can insist that the sale price be fixed in accordance with legal requirements."

(F) *Relief Available to Minority Shareholders against Excessive Compensation of Shareholder-Employees.* Persons holding voting control in a corporation not uncommonly elect themselves directors and officers, compensate themselves handsomely as employees of the corporation, but exclude minority shareholders from corporate positions carrying compensation. "Instead of treating all of the stock alike, and distributing the profits fairly and proportionately by way of dividends, the majority first elect themselves directors, then as directors elect themselves officers, and then distribute among themselves a substantial part of the profits in the way of excessive salaries, additional compensation and other devices."⁵⁴ In a situation of this kind, what remedies does a minority shareholder have? He cannot compel the majority shareholders to elect him a director or the directors to make him an officer, at least not in the absence of a valid shareholders' agreement so providing. He probably cannot bring about the dissolution of the corporation except perhaps in cases of extreme abuse.⁵⁵ But can he force the majority shareholders to reduce their compensation and return to the corporation part of the excessive payments that have been made to them? Perhaps so; but the litigation (it would

⁵² *Bennett v. Breuil Petroleum Corp.*, 99 A.2d 236 (Del. Ch. 1953).

⁵³ 99 A.2d at 240-41.

⁵⁴ This sentence is quoted from *Carr v. Kimball*, 153 App. Div. 825, 139 N.Y. Supp. 253, 259 (1st Dep't 1912), *aff'd mem.*, 215 N.Y. 634, 109 N.E. 1068 (1915).

⁵⁵ See *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955).

probably take the form of a shareholders' derivative action)⁵⁶ might be expensive and burdensome and the outcome of that litigation would be uncertain.

The courts have not laid down definite rules to determine the propriety of the amount of compensation paid corporate officers and executives; perhaps they cannot. In any event, the rules are stated in vague, elastic terms; and consequently the results reached in the decisions are not entirely consistent. It has been said that shareholders will not be permitted to take advantage of their ownership of a controlling interest in a corporation to vote themselves excessive salaries or to cause excessive salaries to be voted to them by directors under their control.⁵⁷ A New York court comments⁵⁸ that the proposition is well settled "that the directors are trustees of the corporation and for all the stockholders, and may not deal with themselves for their own benefit, to the detriment of the corporation and the minority, who, by a representative action, may cause the sums improperly taken to be returned to the treasury." It has been said too that directors must act honestly and reasonably in setting the compensation of officers and executives,⁵⁹ that in fixing compensation they will not be

⁵⁶ See, e.g., *Ashley v. Keith Oil Corp.*, 73 F. Supp. 37 (D. Mass. 1947) (stockholder's derivative suit); *Uccello v. Gold'n Foods, Inc.*, 325 Mass. 319, 90 N.E.2d 530 (1950) (minority stockholder's bill seeking damages for mismanagement and restoration of sums paid as salaries); *Carr v. Kimball*, 153 App. Div. 825, 139 N.Y. Supp. 253 (1st Dep't 1912), *aff'd mem.*, 215 N.Y. 634, 109 N.E. 1068 (1915) (representative action by minority stockholders to compel an accounting by directors). "And there is ample authority to sustain the right of a minority stockholder to maintain a representative action to recover salaries voted by the directors to themselves." *Jones v. Van Heusen Charles Co.*, 230 App. Div. 694, 246 N.Y. Supp. 204, 209 (3d Dep't 1930). Cf. *Maguire v. Osborne*, 384 Pa. 430, 121 A.2d 147 (1956) (suit by minority stockholder against the corporation, the majority stockholder, and two directors who were also employees to compel the directors to return to the corporation moneys received by them as additional compensation).

Unless a minority shareholder acts with promptness to contest what he considers to be excessive compensation paid to corporate officers or executives, he may find that he is estopped or barred by laches. *Uccello v. Gold'n Foods, Inc.*, 325 Mass. 319, 90 N.E.2d 530 (1950) (minority stockholder barred by acquiescence as he knew of payments); *Riddle v. Mary A. Riddle Co.*, 142 N.J.Eq. 147, 59 A.2d 599 (Ch. 1948) (delay in bringing suit as well as actual affirmative approval of compensation payment may bar stockholder); *Maguire v. Osborne*, 384 Pa. 430, 121 A.2d 147 (1956) (shareholder estopped to raise an issue of quantum of compensation payable in 1950 and thereafter under a 1948 agreement as no objection made to compensation paid under the agreement before 1950, though company's profits and officers' compensation based on profits were small for the earlier years). But see *Worley v. Dunkle*, 2 N.J. Super. 161, 62 A.2d 699 (Ch. 1948) (minority shareholder's suit not barred by shareholder's failure promptly to protest).

⁵⁷ *Fletcher Cyc. Corp.* (Perm. ed.) § 2132.

⁵⁸ *Car v. Kimball*, 153 App. Div. 825, 139 N.Y. Supp. 253, 259 (1st Dep't 1912), *aff'd mem.*, 215 N.Y. 634, 109 N.E. 1068 (1915).

⁵⁹ *Fletcher Cyc. Corp.* (Perm. ed.) § 2132. See also *Barrett v. Smith*, 185 Minn. 596, 242 N.W. 392, 394 (1932) (salaries of corporate officers may be so high as to evidence fraud and oppression on minority).

permitted to "waste" the corporation's assets,⁶⁰ that compensation must bear some reasonable relation not only to the value of the services rendered⁶¹ but also to the ability of the corporation to pay,⁶² and that courts of equity will review the fairness and reasonableness of compensation.⁶³

Whether or not executive compensation is reasonable is a question of fact.⁶⁴ Among the factors which courts say they consider in passing on the reasonableness of compensation are the following: the executive's ability, the quantity and quality of the services he renders, the time he devotes to the company, the difficulties involved and responsibilities assumed in his work, the success he has achieved, the profits resulting to the corporation from his efforts to build up its business, the amounts under his jurisdiction, the corporation's financial condition, and increases in the volume or quality of the corporation's business.⁶⁵

In spite of their professed determination to grant relief to minority shareholders against excessive salaries of corporate officers or executives, the courts actually seldom interfere with decisions by corporate directors fixing officers' or executives' compensation.⁶⁶ This reluctance is grounded on a general disinclination to substitute their judgment for that of the directors on matters of internal management, matters which the shareholders have entrusted to the directors,⁶⁷ and

⁶⁰ *Baker v. Cohn*, 42 N.Y.S.2d 159 (Sup. Ct. 1942), modified and aff'd, 266 App. Div. 715, 40 N.Y.S.2d 623 (1st Dep't 1943), aff'd as modified, 292 N.Y. 570, 54 N.E.2d 689 (1944).

⁶¹ See *Nemser v. Aviation Corp.*, 47 F. Supp. 515 (D. Del. 1942); *Schall v. Althaus*, 208 App. Div. 103, 105, 203 N.Y. Supp. 36, 38 (1st Dep't 1924). See also *Swan*, Cir. J., dissenting, in *Rogers v. Hill*, 60 F.2d 109, 113-14 (2d Cir. 1932).

⁶² *Backus v. Finkelstein*, 23 F.2d 531, 537 (D. Minn. 1924); *Baker v. Cohn*, 42 N.Y.S.2d 159 (Sup. Ct. 1942), modified and aff'd, 266 App. Div. 715, 40 N.Y.S.2d 623 (1st Dep't 1943), aff'd as modified, 292 N.Y. 570, 54 N.E.2d 689 (1944).

⁶³ *Stratis v. Anderson*, 254 Mass. 536, 150 N.E. 832, 44 A.L.R. 567 (1926); *Worley v. Dunkle*, 2 N.J. Super. 161, 62 A.2d 699 (Ch. 1948) (fixing of salary by the sole vote of a majority shareholder is subject to review by the court of equity); *Ballantine, Corporations* § 76 (Rev. ed. 1946).

⁶⁴ *Black v. Parker Mfg. Co.*, 329 Mass. 105, 106 N.E.2d 544 (1952).

⁶⁵ *Id.* at 115, 106 N.E.2d at 551; *Gallin v. National City Bank of N. Y.*, 152 Misc. 679, 273 N.Y. Supp. 87, 113 (Sup. Ct. 1934). That additional compensation would have gone to pay income tax if it had not been voted to corporate officer does not justify voting it. *Hurt v. Cotton States Fertilizer Co.*, 159 F.2d 52 (5th Cir. 1947). Cf. *Black v. Parker Mfg. Co.*, supra note 64 (effect of taxes on income of corporate officer and on income of the corporation properly to be considered in determining reasonableness of officer's salary).

⁶⁶ *Bachelor v. Olmstead*, 261 Fed. 533, 536 (W.D.N.Y. 1919); *Cron v. Tanner*, 171 Kan. 57, 229 P.2d 1008 (1951); *Riddle v. Mary A. Riddle Co.*, 142 N.J. Eq. 147, 59 A.2d 599 (Ch. 1948); *Garbarino v. Utica Uniform Co.*, 269 App. Div. 622, 58 N.Y.S.2d 136 (4th Dep't 1945), aff'd 295 N.Y. 794, 66 N.E.2d 579 (1946); *Fletcher Cyc. Corp.* (Perm. ed.) § 2133.

⁶⁷ "The court would not be authorized to substitute its judgment for theirs [the

on the conclusion reached by some courts that issues of the excessiveness of compensation are difficult if not impossible to resolve satisfactorily.⁶⁸ Unless the majority shareholders and the directors are clearly managing the affairs of the corporation dishonestly or the compensation payments are so unreasonable that they can be characterized as "waste" or "spoliation," the courts have been at a loss to find a proper reason for substituting their judgment for that of the directors.

Perhaps the courts' concern about usurping functions of the board is misplaced in compensation cases arising out of close corporations, because close corporations seldom if ever have independent and disinterested directors making the decisions on compensation; the directors are almost always both shareholders and officers or are closely controlled by majority shareholders. Nevertheless, the decisions indicate that courts will seldom interfere in either publicly held⁶⁹ or close corporations⁷⁰ with directors' decisions on the amounts of officers' or executives' compensation.

(G) *Power of Minority Shareholders To Bring About an Equity Receivership or a Statutory Dissolution.* The general rule has been laid down in many decisions that aside from statute, courts of equity do not have power to wind up a solvent corporation or to appoint a receiver for the liquidation of its affairs.⁷¹ Thus, a receiver will not be

directors'] as to what are proper salaries, provided they acted in good faith within their powers, and the salaries fixed by them were not clearly excessive." *Matthews v. Headley Chocolate Co.*, 130 Md. 523, 100 Atl. 645, 650 (1917).

The Delaware courts have laid down the following rule: "In the absence of fraud, either express or implied, the action of the governing body of a corporation, in matters of internal management . . . will not be disturbed by a Court of Equity." *Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Mfg. Co.*, 26 Del. Ch. 16, 29, 21 A.2d 178, 184 (Ch. 1941); *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, 17 Del. Ch. 325, 333-34, 154 Atl. 457, 461 (Ch. 1931); *Davis v. Louisville Gas & Electric Co.*, 16 Del. Ch. 157, 169, 142 Atl. 654, 660 (Ch. 1928).

⁶⁸ See *Wyles v. Campbell*, 77 F. Supp. 343, 350 (D. Del. 1948).

⁶⁹ See *Washington and Rothschild, Compensating the Corporate Executive*, 413 (Rev. ed. 1951); *Note*, 49 Colum. L. Rev. 232, 238 (1949).

⁷⁰ For an analysis of the decisions relating to executive compensation in closely held companies, see *Washington and Rothschild*, *supra* note 69, at 363-381. Where relief has been granted, the compensation has usually been glaringly excessive. See, e.g., *Baker v. Cohn*, 42 N.Y.S.2d 159 (Sup. Ct. 1942), modified and aff'd, 266 App. Div. 715, 40 N.Y.S.2d 623 (1st Dep't 1943), aff'd as modified, 292 N.Y. 570, 54 N.E.2d 689 (1944), where the salaries of the officers totaled 44 per cent of the corporation's gross income and the ratio of salaries to net income ranged from 80 per cent to 102 per cent.

⁷¹ *People ex rel. Daniels v. District Court of Denver*, 33 Colo. 293, 80 Pac. 908 (1905); *Lush's Brand Distributors, Inc. v. Fort Dearborn Lithograph Co.*, 330 Ill. App. 216, 70 N.E.2d 737 (1946); *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 70 N.W. 216 (1897); *Bowman v. Gum, Inc.*, 321 Pa. 516, 184 Atl. 258 (1936); *Hammond v. Hammond*, 216 S.W.2d 630 (Tex. Civ. App. 1948); *Ballantine, Corporations* § 304 (Rev. ed. 1946); 13 Am. Jur., *Corporations* § 1295 (1938). "The general equity jurisdiction of the courts does not extend to distributing the assets of a corporation merely because

appointed to wind up a corporation merely because a shareholder is dissatisfied with some of the decisions made by management or is generally unhappy with the way the business of the corporation is being conducted.⁷² Nor will such relief be granted to a shareholder merely because the other shareholder in the corporation has breached an agreement between the two.⁷³ Further, the courts have often refused to appoint a receiver or to decree a winding up on the basis of quarreling or dissatisfaction among the shareholders,⁷⁴ at least if the corporation was actively engaged in business and capable of carrying out its corporate functions.⁷⁵ And courts have even denied such relief where directors of a corporation were holding over after the expiration of their terms because the shareholders were deadlocked and were unable to elect new directors.⁷⁶

Most of the modern courts, however, recognize a number of exceptions to the general rule,⁷⁷ exceptions which are particularly

need for its continued existence is not apparent." *Bleck v. East Boston Co.*, 302 Mass. 127, 130, 18 N.E.2d 536, 537 (1939); *Rizzuto v. Onset Cafe, Inc.*, 330 Mass. 595, 116 N.E.2d 249, 250 (1953).

⁷² *Lyon v. Bollinger*, 221 Ark. 423, 253 S.W.2d 773, 778 (1952) (dictum); *Indianapolis Dairymen's Co-op v. Bottema*, 226 Ind. 237, 79 N.E.2d 399 (1948); *Enterprise Printing & Publishing Co. v. Craig*, 195 Ind. 302, 144 N.E. 542, rehearing denied, 195 Ind. 302, 145 N.E. 309 (1924); *Troutman v. Council Bluffs Street Fair & Carnival Co.*, 142 Iowa 140, 120 N.W. 730 (1909); *Reid Drug Co. v. Salyer*, 268 Ky. 522, 105 S.W.2d 625 (1937). "Where the corporation is a going concern it is undoubtedly true that a minority stockholder cannot maintain a bill to have it dissolved or to have its assets distributed. In such case, if the shareholders disapprove of the company's management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw." *Corning Custom Gin Co. v. Oliver*, 171 Ark. 175, 283 S.W. 977, 978 (1926).

⁷³ *McKay v. Beard*, 20 S.C. 156 (1883).

⁷⁴ *Freedman v. Fox*, 67 So.2d 692 (Fla. 1953); *Sternberg v. Wolff*, 56 N.J.Eq. 555, 42 Atl. 1078 (Ch. 1898) (dissensions not sufficient to justify appointment of a receiver, at least in absence of a showing of injury to business or mismanagement); *Bowman v. Gum, Inc.*, 321 Pa. 516, 184 Atl. 258 (1936). "Mere dissensions among corporate stockholders, whether over internal matters or otherwise, will seldom justify the appointment of a receiver." *Drob v. National Memorial Park, Inc.*, 28 Del. Ch. 254, 41 A.2d 589, 597 (Ch. 1945). See also Comment, 41 Mich. L. Rev. 714, 720 (1943), expressing the view that dissension is not an independent ground for dissolution but rather a factor that contributes to a factual situation requiring relief on other grounds.

⁷⁵ *Freedman v. Fox*, 67 So.2d 692 (Fla. 1953) (conflict was serious but corporation was still functioning); *Hanes v. Watkins*, 63 So.2d 625 (Fla. 1953); *McGuire v. Kaysen-McGuire*, 184 Minn. 553, 239 N.W. 616 (1931).

⁷⁶ *Alabama Coal & Coke Co. v. Shackelford*, 137 Ala. 224, 34 So. 833 (1903); *Lush's Brand Distributors, Inc. v. Fort Dearborn Lithograph Co.*, 330 Ill. App. 216, 70 N.E.2d 737 (1946); *McGuire v. Kaysen-McGuire Co.*, 184 Minn. 553, 239 N.W. 616 (1931) (the corporation was a holding company, however, and there was no claim of mismanagement). Some cases indicate that a different result might be reached if "there is a present danger to the interests of the stockholders, consisting of a serious suspension of or interference with the conduct of the business, and a threatened depreciation of the value of the assets consequent thereon, which may be met and remedied by a receiver." *Reid Drug Co. v. Salyer*, 268 Ky. 522, 105 S.W.2d 625, 629 (1937); *Fletcher Cyc. Corp. (Perm. Ed.)* § 7713.

⁷⁷ See *Stevens, Corporations* § 199 (2d ed. 1949); 56 Mich. L. Rev. 1019 (1958).

applicable to situations brought about by dissension or deadlock among the shareholders of a close corporation. Among the situations in which courts will now often afford relief by appointing a receiver and winding up a corporation are the following: (1) the directors or officers have been guilty of fraud, have abused and oppressed shareholders, or have grossly mismanaged the corporation;⁷⁸ (2) a deadlock exists among the shareholders which has resulted in stoppage of corporate activities or culminated in a usurpation of control by part of the shareholders to the exclusion of the others;⁷⁹ (3) because of dissension or otherwise, it has become impossible for the corporation to attain the objectives for which it was formed⁸⁰ or for the business to be carried on profitably.⁸¹ Dissension among shareholders, directors or officers rendering it impossible for a corporation to operate at all or to operate in a way that is advantageous to the shareholders often has been recognized as a proper ground for winding up, at least if imminent danger of loss of assets is threatened and no other relief is available.⁸²

Especially in cases involving close corporations, courts have manifested a willingness to wind up and even to dissolve a corporation wracked by bitter dissension among its shareholders; sometimes

⁷⁸ *Ashton v. Penfield*, 233 Mo. 391, 135 S.W. 938 (1911) (majority shareholders knowingly kept fraudulent general manager in charge of the corporation's affairs); *Lennan v. Blakeley*, 273 App. Div. 767, 75 N.Y.S.2d 331 (1st Dep't 1947); *Patton v. Nicholas*, 154 Tex. 385, 279 S.W.2d 848 (1955) (in more extreme cases of abuse of minority shareholders, court may decree liquidation and appoint a receiver for that purpose or it may appoint a receiver for the less drastic purpose of rehabilitation). See *Hornstein, A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Stockholder*, 40 Colum. L. Rev. 220 (1940).

⁷⁹ *Saltz v. Saltz Bros., Inc.*, 84 F.2d (D.C. Cir. 1936); *Campbell v. Pennsylvania Industries, Inc.*, 99 F. Supp. 199 (D. Del. 1951) (equity may liquidate solvent corporation in the event of deadlock between factions seeking to control it); *Burleson v. Hayutin*, 130 Colo. 58, 273 P.2d 124 (1954); *Sternberg v. Wolff*, 56 N.J.Eq. 389, 39 Atl. 397 (Ct. Err. & App. 1898); *Guaranty Laundry Co. v. Pulliam*, 200 Okla. 185, 191 P.2d 975 (1948); *Boothe v. Summit Coal Mining Co.*, 55 Wash. 167, 104 Pac. 207 (1909). See *Drob v. National Memorial Park, Inc.*, 28 Del. Ch. 254, 41 A.2d 589, 598 (Ch. 1945), suggesting that the proper remedy in the event of deadlock is not the winding up of the corporation but the appointing of a temporary receiver to preserve the corporate assets until it can function properly.

⁸⁰ *State v. Breedlove*, 38 Tenn. App. 80, 270 S.W.2d 582 (1953) (suit in the name of the state on relation of five preferred shareholders).

⁸¹ *Flemming v. Heffner & Flemming*, 263 Mich. 561, 248 N.W. 900 (1933); *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N.W. 218, 17 L.R.A. 412 (1892). "The power of this court to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled . . ." *Edison v. Edison United Phonograph Co.*, 52 N.J. Eq. 625, 29 Atl. 195, 197 (Ch. 1894).

⁸² *Burleson v. Hayutin*, 130 Colo. 58, 273 P.2d 124 (1954); *Hammond v. Hammond*, 216 S.W.2d 630, 632 (Tex. Civ. App. 1948); *Annot.*, 13 A.L.R.2d 1260, 1263-64 (1950), and authorities there cited.

they have indicated that dissolution or winding up will be granted in a close corporation whenever similar relief would be granted in a partnership.⁸³ As was said by a Michigan court,⁸⁴ there "are many authorities which uphold the power of a court of chancery to dissolve a corporation because of dissensions of so serious a character as under the circumstances will inevitably defeat the purpose for which it was created. Especially is such the holding in cases where there are only a few stockholders so that the corporation for practical purposes as between those interested is much like a partnership."

Modern courts recognize so many exceptions to the general rule that courts do not have power in the absence of statute to dissolve or wind up a corporation and the exceptions are applied so frequently that the exceptions seem to have eaten up the rule. No longer is the question whether the courts have jurisdiction or power to appoint a receiver to wind up a corporation or even to dissolve it in the sense of terminating its legal existence.⁸⁵ The real question is whether a court will exercise its power in the particular case before it. Perhaps the attitude of most modern courts would be accurately stated by a rule worded somewhat as follows: courts are hesitant to decree the winding up or dissolution of a corporation, but they will do so whenever they conclude that such action is reasonably necessary to protect adequately the interests of the shareholders or some of them.

Nevertheless, in some situations, e.g., where the shareholders are deadlocked but the corporation is still operating successfully, it is difficult to prophesy what a court will do. The type of line-drawing which is sometimes engaged in is illustrated by two Colorado cases. In one,⁸⁶ where a deadlock had caused the corporation to "bog down"

⁸³ "But we find no real disagreement in the adjudications in cases where like relief upon similar grounds is sought in actions against mismanaged copartnerships. . . . If the rule be sound as applied to copartnerships, the manner and form of the organization of corporation would seem not a sufficient reason for denying similar relief at the suit of stockholders thereof." *Green v. National Advertising & Amusement Co.*, 137 Minn. 65, 162 N.W. 1056, 1058, L.R.A. 1917E 784 (1917). See also *In re Yenidje Tobacco Co.*, [1916] 2 Ch. 426 (Ct. App.). But for cases refusing to treat "incorporated partnerships" as partnerships for dissolution purposes, see *Hanes v. Watkins*, 63 So.2d 625 (Fla. 1953); *Hennessy v. During*, 124 N.Y.S.2d 266 (Sup. Ct. 1953). "There is no occasion, either, for holding that, after all, the corporation is only a partnership. . . . The corporation was chartered by the State, contracted and incurred debts as a corporation and in all respects operated in that capacity. Apparently it is only when dissension arises that the respondents became dissatisfied with their position as stockholders." *Freedman v. Fox*, 67 So. 2d 692, 693 (Fla. 1953).

⁸⁴ *Flemming v. Heffner & Flemming*, 263 Mich. 561, 568, 248 N.W. 900, 902 (1933).

⁸⁵ For a discussion of the trend toward recognition of a general equity power to dissolve a corporation, see *Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778, 787-88 (1952). Some courts recognize the general equity power even though there is a statutory provision for dissolution, holding that the statutory remedy is not exclusive. *Id.* at 788.

⁸⁶ *Burleson v. Hayutin*, 130 Colo. 58, 273 P.2d 124 (1954).

and one faction of shareholders had excluded the other from the profits of the business, the Supreme Court of Colorado decreed that a receiver should be appointed. In the other,⁸⁷ decided less than a year later, where there was a deadlock but no fraud or mismanagement was alleged, that court refused to permit the dissolution of the corporation.

Practically all jurisdictions now have statutes setting forth procedures for dissolving a corporation and stating the grounds on which a corporation will be dissolved. In general, the effect of the statutes has been to increase the number of situations in which the courts will decree a winding up or dissolution.⁸⁸ Dissolution statutes vary considerably from jurisdiction to jurisdiction,⁸⁹ but on the whole fall into two broad classes: statutes fixing procedures for the voluntary dissolution of a corporation and statutes stating the circumstances in which courts may entertain proceedings for the involuntary winding up or dissolution of a corporation.

The voluntary dissolution statutes ordinarily authorize a corporation to dissolve whenever dissolution is approved by specified percentage of its shareholders. Often voluntary dissolution proceedings may be conducted either out of court or subject to the supervision of a court.⁹⁰

Voluntary dissolution of course offers a way for a dissatisfied shareholder to escape from an unhappy business connection if he can muster the shareholder vote (and in some jurisdictions the director vote) required by the statute. Many of the statutes, however, set a

⁸⁷ *Hepner v. Miller*, 130 Colo. 243, 274 P.2d 818 (1954). See also Note, 32 *Dicta* 314 (1955).

⁸⁸ There is a conflict on whether the enactment of statutes on dissolution deprives a court of its general equity powers to wind up a corporation. For authorities suggesting that the courts retain their equity powers to dissolve, see *Dorf v. Hill Bus Co.*, 140 N.J. Eq. 444, 54 A.2d 761, 763 (1947); *Israels, The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778, 788 (1952). The Court of Appeals of New York, however, has stated that "the method of effecting corporate dissolution, when prescribed by statute, as in this state, is exclusive, and must be substantially followed." *In re Importers' & Grocers' Exchange*, 132 N.Y. 212, 217, 30 N.E. 401, 403 (1892). See also *Cachules v. Finkelstein*, 279 App. Div. 173, 109 N.Y.S.2d 272, 274-75 (1st Dep't 1951).

In New York there is no statutory procedure for winding up or dissolving a corporation at the suit of a minority shareholder. The New York courts, however, have required the directors of a corporation to dissolve it if they are continuing the corporation's existence for the sole purpose of benefiting those in control of the corporation at the expense of the other shareholders. *Lennan v. Blakeley*, 273 App. Div. 767, 75 N.Y.S.2d 331 (1st Dep't 1947); *Kroger v. Jaburg*, 231 App. Div. 641, 248 N.Y. Supp. 387 (1st Dep't 1931); cf. *Fontheim v. Walker*, 282 App. Div. 373, 122 N.Y.S.2d 642 (1st Dep't 1953), *aff'd mem.*, 306 N.Y. 926, 119 N.E.2d 605 (1954). N.Y. Stock Corp. Law § 9 contains a statement that nothing in that section is to be construed to limit the power of a court of equity to decree a dissolution in a proper case.

⁸⁹ See generally *Ballantine, Corporations* §§ 301-06 (Rev. ed. 1946).

⁹⁰ See, e.g., *Wash. Rev. Code* § 23.44.010 (1951).

two-thirds or three-fourths vote of the shareholders, and thus they give no relief at all to a minority shareholder; and even a majority shareholder may be stymied because he does not control enough votes to get the statutory majority.

Statutes providing for the involuntary dissolution of a corporation in a suit by a minority shareholder⁹¹ are more likely than the voluntary dissolution statutes to be useful in resolving problems arising out of dissension and deadlock. The involuntary dissolution statutes typically authorize the courts in a suit by a shareholder or by the holder of a specified percentage of a corporation's shares to wind up or dissolve a corporation if its directors or majority shareholders are guilty of fraudulent conduct or if the winding up of the corporation is necessary to protect the rights of the shareholders.⁹²

In some states, the statutes providing for involuntary dissolution state some of the grounds for dissolution in very broad and general terms. The Connecticut statute,⁹³ for instance, provides that whenever "any good and sufficient reason" exists for the dissolution of a corporation, any shareholder or shareholders owning not less than one-tenth of its stock may apply for its dissolution and for the appointment of a receiver to wind up its affairs. In spite of the breadth of the language in which such statutory grounds for dissolution are stated, courts have sometimes refused to recognize that corporations wracked by dissension or paralyzed by deadlock qualify for winding up or dissolution on those statutory grounds.⁹⁴

In a few states,⁹⁵ the statutes, although permitting a minority shareholder to seek relief through the winding up or dissolution of the corporation, empower majority shareholders to avoid the dissolution by purchasing the shares of the dissatisfied shareholder at their fair value as determined by a prescribed procedure. This buy-out feature is desirable because it permits majority shareholders to preserve the enterprise as a going business and at the same time guarantees a dissatisfied shareholder a fair price for his holdings.

Many jurisdictions, including practically all the more important

⁹¹ A number of states also have statutes providing for the involuntary dissolution of a corporation in a proceeding brought by the Attorney General for the corporation's failure to file reports or pay taxes or for its abuse of its powers. See, e.g., Ill. Ann. Stat. c. 32, § 157.82 (Smith-Hurd 1954). A statute of this type of course offers little or no promise of relief to an aggrieved or dissatisfied shareholder in a close corporation. See Note, 32 N.C.L. Rev. 335 n. 11 (1954), for the attitude of the Attorney General of North Carolina on the use of such a statute.

⁹² See, e.g., Pa. Stat. Ann. tit. 15, § 2852-1107 (1938).

⁹³ Conn. Gen. Stat. § 5226 (1949).

⁹⁴ See, e.g., *Bator v. United Sausage Co.*, 138 Conn. 18, 81 A.2d 442 (1951).

⁹⁵ Conn. Gen. Stat. § 5228 (1949); Calif. Corp. Code Ann. §§ 4658-59 (*Deering* 1953); W. Va. Code Ann. § 3093 (1955). See also *Hall v. McLuckey*, 135 W. Va. 864, 65 S.E.2d 494 (1951).

commercial and industrial states, now have statutes specifically authorizing corporate dissolution in situations of deadlock in director or shareholder voting.⁹⁶ There is considerable variation from jurisdiction to jurisdiction in the language of these statutes and some differences in the kinds of deadlock situations covered.

The New York statute⁹⁷ authorizes dissolution in the following situations: (1) a corporation has an even number of directors who are equally divided respecting the management of its affairs; (2) the votes of a corporation's stockholders are so divided that they cannot elect a board of directors;⁹⁸ or (3) a corporation's certificate of incorporation requires a vote for director action or a stockholder vote for election of directors greater than otherwise would be required by law,⁹⁹ and the directors are divided respecting the management of the corporation's affairs in such a way that the requisite number of votes for action cannot be obtained or the votes of the stockholders are so divided that the requisite number of votes for election of directors cannot be obtained.¹⁰⁰ An important restriction on a court's right to dissolve under the New York statute is that it must appear that the dissolution will be beneficial to the stockholders and not injurious to the public.¹⁰¹ This requirement has been applied by the

⁹⁶ See, e.g., Cal. Corp. Code Ann. §§ 4650-51 (Deering 1953); Ill. Ann. Stat. c. 32, §§ 157.86-91 (Smith-Hurd 1954); Ind. Ann. Stat. § 25-242 (1948); Mass. Ann. Laws c. 155, § 50 (1948); N.J. Stat. Ann. § 14:13-15 (Supp. 1956); N.Y. Gen. Corp. Law §§103-117; Ohio Rev. Code Ann. § 1701.91 (Baldwin Supp. 1956); Pa. Stat. Ann. tit. 15, §§ 2852-1107-10 (1938).

⁹⁷ N.Y. Gen. Corp. Law § 103. See generally on deadlock-dissolution problems in New York, Burstein, *The Dissolution of Closed Corporations*, 123 N.Y.L.J. 1464, 1484, 1504 (April 26-28, 1950); Note, 27 N.Y.U.L. Rev. 300 (1952); 50 Colum. L. Rev. 100 (1950).

⁹⁸ Under this provision, the fact that the stockholders are evenly divided on how the business should be conducted is not sufficient; there must be a showing of an unsuccessful attempt to elect directors. *Application of Landau*, 183 Misc. 876, 51 N.Y.S.2d 651 (Sup. Ct. 1944).

⁹⁹ Unanimity and high vote requirements of this sort are authorized in New York by N.Y. Stock Corp. Law § 9.

¹⁰⁰ For the use of this ground as a basis for dissolution, see *Application for Dissolution of Fulton-Washington Corp.*, 3 Misc.2d 277, 151 N.Y.S.2d 417 (Sup. Ct.), *aff'd mem.*, 2 App. Div. 2d 981, 157 N.Y.S.2d 894 (2d Dep't 1956).

The New York statute clearly provides that the stockholders by a provision in the certificate of incorporation can stipulate against dissolution on the grounds numbered (1) and (2) in the text. N.Y. Gen. Corp. Law § 103. However, *Application of Cohen*, 183 Misc. 1034, 52 N.Y.S.2d 671 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 663, 53 N.Y.S.2d 467 (1st Dep't 1945), held that a stockholders' agreement to submit disputes to arbitration does not deprive dissatisfied stockholders of the right to petition for dissolution without resort to arbitration.

Query whether a provision in the certificate of incorporation stipulating against dissolution on ground (3) would be given effect. See N.Y. Gen. Corp. Law § 103.

¹⁰¹ N.Y. Gen. Corp. Law § 117; *In re Seamerlin Operating Co.*, 307 N.Y. 407, 121 N.E.2d 392 (1954); *In re Radom & Neidorff, Inc.*, 307 N.Y. 1, 119 N.E.2d 563 (1954); *Application of Cantelmo*, 275 App. Div. 231, 88 N.Y.S.2d 604 (1st Dep't 1949) (dissolution will not be granted as beneficial to the stockholders where petitioner is seeking to

Court of Appeals to deny dissolution of a deadlocked corporation if it is profitable.¹⁰²

The deadlock statutes clearly cover a deadlock in which a board with an even number of members divides equally and the shareholders cannot resolve the deadlock by election of a new board because the shares are evenly divided between two shareholders or two factions. Some of the statutes, however, apparently do not authorize the dissolution of a corporation which is deadlocked, not because of an equal division among directors and shareholders, but because the charter or by-laws of the corporation require unanimity or a high vote for director or shareholder action and no faction can get the necessary vote;¹⁰³ or if they do authorize dissolution in such a situation they do not permit a shareholder with relatively small holdings to bring the petition.¹⁰⁴ Thus, the Massachusetts statute¹⁰⁵ does not permit a petition for involuntary dissolution to be filed on the basis of deadlock except by the holder or holders of not less than forty per cent of the corporation's stock, and then only if the votes of the corporation's board of directors and of its stockholders "are *equally* divided on a question affecting the general management of the affairs of the corporation, or if the votes of its stockholders are *equally* divided in the election of directors, and there appears to be no way of reaching an agreement and breaking such deadlock."¹⁰⁶

BRITISH REMEDIES

(A) *Remedies in General.* The rights of a shareholder in an English company to bring a derivative action are considerably nar-

oust other stockholder from the business); In re Norton & Schneider, Inc., 137 N.Y.S.2d 269 (Sup. Ct. 1954) (court recognized that its refusal to dissolve meant that the corporation would have to function for an indefinite time with a holdover board because the shares were evenly divided and could not elect a new board, but it denied dissolution because there had been no showing that dissolution would benefit the shareholders).

¹⁰² In re Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954) (profitable operation of a deadlocked corporation warrants dismissal of dissolution petition without a hearing), noted 68 Harv. L. Rev. 714 (1955), 29 N.Y.U.L. Rev. 1485 (1954). In Application for Dissolution of Fulton-Washington Corp., 3 Misc.2d 277, 151 N.Y.S.2d 417 (Sup. Ct.), aff'd mem., 2 App. Div. 2d 981, 157 N.Y.S.2d 894 (2d Dep't 1956), the court entertained a petition for involuntary dissolution even though the corporation was continuing to operate at a profit, saying that the rule against the dissolution of profitable corporations was not applicable, as the corporation involved had been organized to buy and resell specific real estate and the participants had from the first intended to liquidate the corporation after the resale of the realty.

¹⁰³ See, e.g., Fla. Stat. Ann. § 608.28 (1956); La. Rev. Stat. § 12:55(4) (1950); Wash. Rev. Code § 23:44:030(4) (1951). See also Powers, Cross Fire on the Close Corporation: Norms Versus Needs, 9 U. Fla. L. Rev. 433, 462 (1958).

¹⁰⁴ See, e.g., Cal. Corp. Code Ann. § 4650 (Deering 1953) (petitioners must be holders of not less than one-third of shares for not less than six months).

¹⁰⁵ Mass. Ann. Laws c. 155, § 50 (1948).

¹⁰⁶ Emphasis added.

rower than those of a shareholder in an American corporation. The famous English decision of *Foss v. Harbottle*,¹⁰⁷ it is true, was a forerunner of the derivative action as it is known in this country in that the court in that decision recognized that a shareholder in some circumstances can assert the corporation's right to recover for wrongs to the corporation. However, that decision and subsequent ones¹⁰⁸ limited the shareholder's suit to one in which fraudulent or ultra vires acts have been committed against the corporation and the persons against whom relief is sought control the company and are preventing an action from being brought in the company's name. One effect of this limitation is to shield directors from shareholder suits based on their negligence.

However circumscribed the rights of a shareholder in an English company (as compared with the rights of his counterpart in an American corporation) to bring a derivative action, he is perhaps more than compensated by the greater statutory and administrative protection he enjoys. For example, the Board of Trade, a governmental agency charged with the general supervision of English companies, is empowered to appoint an inspector to look into the affairs of a company if there are circumstances suggesting that "persons concerned with its formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members" or that "its members have not been given all the information with respect to its affairs which they might reasonably expect."¹⁰⁹ After a report from its inspector, the Board of Trade may publish a report of the inspector's findings (a copy of the report then becomes admissible in any legal proceedings), may cause criminal proceedings to be brought, or may petition a court for a winding-up order or for an order under Section 210 of the Companies Act (this statutory section will be discussed in detail presently).

The Companies Act also empowers the court on a shareholder's petition to wind up a company, among other circumstances, if the court "is of the opinion that it is just and equitable that the company should be wound up."¹¹⁰ That provision has been on the statute books in substantially its present form for over a hundred years. It has occasionally been used successfully to solve problems of dissension or deadlock in private companies. Thus, where the managing director was guilty of grave irregularities in making a secret profit, the court

¹⁰⁷ 2 Hare 461, 67 Eng. Rep. 189 (Ch. 1843).

¹⁰⁸ E.g., *Pavlides v. Jensen*, [1956] Ch. 565, noted 19 Modern L. Rev. 538 (1956), 74 S.A.L.J. 86 (1957).

¹⁰⁹ English Companies Act, 1948, § 165. See also *id.* § 164.

¹¹⁰ English Companies Act, 1948, § 222.

decreed a winding-up.¹¹¹ And, the courts have ordered a winding-up in a number of cases¹¹² in which such a complete deadlock of management had occurred that the company's activities would have been brought to a standstill if the court had not intervened.

Nevertheless, English judges, just as their American brothers, have been reluctant to decree a winding-up whenever that action was opposed by majority shareholders; and the books contain singularly few cases in which an oppressed minority in an English company secured a winding-up order. As a general proposition, the English courts heretofore have imposed a winding-up only if some plain injustice was being done petitioner which could not be remedied otherwise than by a winding-up order.¹¹³

The Companies Act of 1948 contains a cautiously worded provision designed to somewhat broaden the courts' use of winding-up on "just and equitable" grounds and to make clear the power of a court to order a winding-up notwithstanding the existence of an alternative remedy. That provision reads as follows:

Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion—

- (a) that the petitioners are entitled to relief either by winding up the company or by some other means; and
- (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up;

shall make a winding up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.¹¹⁴

(B) *Section 210 Remedy.* Perhaps the most interesting innova-

¹¹¹ *Re Newbridge Sanitary Steam Laundry, Ltd.*, [1917] 1 Ir. R. 67.

¹¹² E.g., *Re American Pioneer Leather Co.*, [1918] 1 Ch. 556; *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426.

¹¹³ See Peppiatt, *Statutory Protection of Minority Shareholders in English Limited Companies*, 14 *Bus. Law.* 621, 629 (1959).

¹¹⁴ English Companies Act, 1948, § 225(2). For other statutory sections furnishing some protection to minority shareholders in rather narrow situations, see English Companies Act, 1948, § 72 (right of holders of 15 per cent or more of a class of shares to apply to court to have action modifying rights of shares canceled), §§ 206-208 (court approval required for "arrangements"), § 209(2) (right of minority shareholders in a company ninety per cent of whose shares are acquired by another company to compel the acquiring company to buy their shares).

tion of the Companies Act of 1948 was Section 210, the objective of which is to enlarge the protection afforded to minorities by providing an alternative remedy to winding up in cases of oppression. The Committee on Company Law Amendment which recommended the enactment of Section 210 pointed out that in many instances the winding-up of a company does not benefit the minority shareholders, because the break-up value of the assets may be small or the only available purchaser may be that very majority whose oppression drove the minority to seek redress.¹¹⁵ Therefore, the Committee suggested that "the Court should have, in addition, the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable. This discretion must be unfettered, for it is impossible to lay down a general guide to the solution of what are essentially individual cases."¹¹⁶

The Committee's suggestion was followed: Section 210¹¹⁷ provides in part as follows:

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) . . . may make an application to the court by petition for an order under this section.¹¹⁸

(2) If on any such petition the court is of opinion—

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up;

the court may, with a view to bringing to an end the matters complained of, make such order as it sees fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

During the first nine years that Section 210 was on the books, no

¹¹⁵ Report of the Committee on Company Law Amendment (H.M.S.O., 1945, Cmd. 6659), para. 60, as quoted in Peppiatt, *Statutory Protection of Minority Shareholders in English Limited Companies*, 14 *Bus. Law* 621, 631 (1959).

¹¹⁶ *Ibid.*

¹¹⁷ English Companies Act, 1948, § 210.

¹¹⁸ The omitted material gives the Board of Trade also the right under certain circumstances to make such an application.

shareholder succeeded in obtaining the court's assistance under it; although the possible availability of relief or perhaps threats to resort to the section may in many instances have tempered majority action.

In the Scottish case of *Elder v. Elder & Watson*,¹¹⁹ decided in 1952, the court refused relief under Section 210 to petitioning shareholders on facts illustrating what is (in the United States at least) the most frequently used of the squeeze-out techniques, namely, the exclusion of minority shareholders from office and employment in the company. The company involved in that case had been brought into existence by the incorporation of a two-man partnership. At the time of the action under Section 210 the company had twelve shareholders, all descendants of the original partners. The company had a three-man board of directors; the two petitioners were members of the board. The trouble started when one of the petitioners got into a violent quarrel with his brother, the third man on the board of directors. The brother thereafter persuaded holders of a majority of the shares to join with him in removing the petitioners as directors and in forcing their retirement or dismissal as secretary and factory manager respectively. Some time later petitioners tried to sell their shares to the company and its new directors, but their proposals were rejected.

Petitioners then resorted to Section 210, seeking an order for the purchase of petitioners' shares by the company at a stated price or at a price to be fixed by the court. The court dismissed the petition. Section 210 applies to oppression of members of a company in their character as shareholders; removal of shareholders from the directorate and from corporate offices and employment does not affect their interests as shareholders; and mere refusal of the directors to buy a member's shares is not oppression. There was no averment that the business had been or was being mismanaged. Thus the affairs of the company had not been conducted in a manner oppressive to part of the members. Furthermore, another condition to relief under Section 210 had not been met: under that section the court can act only if a winding-up order would be "just and equitable,"¹²⁰ and in this case the facts did not justify winding-up. Lord President Cooper commented: "Where the 'just and equitable' jurisdiction has been applied

¹¹⁹ 1952 Sess. Cas. 49.

¹²⁰ The Draft Companies Bill for the State of Israel, § 151 (1957) provides as follows: "Any member of the company who considers himself oppressed by the conduct of the affairs of the company, may apply to the court, and the court may make such order as it thinks fit, whether for regulating the conduct of the company's affairs or for the acquisition of the applicant's shares by others or by the company, or otherwise, except an order for the winding-up of the company." Apparently this section gives the court power to grant other relief irrespective of whether a winding-up would be "just and equitable."

in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy."¹²¹ Later he went on to say, "I do not think that a 'just and equitable' winding-up has ever yet been ordered merely because of changes effected in the board of directors or the dismissal of officers, and very strong grounds would be needed to justify such a step."¹²²

The opinions in the *Elder* case indicated that Section 210 is indeed rather narrow in application and is not available for use in some of the most common dissension and deadlock situations. Thus Lord President Cooper commented that "the new remedy is not lightly to be accorded."¹²³ Lord Keith, referring to the types of cases to which Section 210 applies, stated: "Mere loss of confidence or pure deadlock does not, I think, come within Section 210."¹²⁴ At another point in his opinion he remarked that Section 210 did not suggest to him "that it includes mere domestic disputes between directors or members or lack of confidence between one section of members and another section in matters of policy or administration."¹²⁵

Two cases decided in 1958, however, showed that Section 210 can be used to advantage in some dissension and oppression situations. The first case under Section 210 to reach the House of Lords, and also the first case in which the petitioning shareholder obtained relief under Section 210, was *Scottish Co-op. Wholesale Soc'y v. Meyer*.¹²⁶ In that case, a co-operative wholesale company (hereafter referred to as the "society") and two textile experts, Meyer and Lucas, organized a company to process and sell rayon materials. The society supplied most of the capital for the company, and Meyer and Lucas furnished the formulae, experience and trade connections. Something over half the stock issued was allotted to the society and the remainder to Meyer and Lucas. Of the company's five directors, three were nominees of the society; Meyer and Lucas were the other two.

The new company became in effect a marketing subsidiary of the society. Meyer and Lucas, through their European connections, bought supplies of yarn, which were paid for by the society. The yarn was then processed and woven into cloth at one of the society's

¹²¹ 1952 Sess. Cas. at 55.

¹²² *Id.* at 57.

¹²³ *Id.* at 55.

¹²⁴ *Id.* at 59.

¹²⁵ *Id.* at 60.

¹²⁶ [1958] 3 All E.R. 66 (H.L.), noted 72 Harv. L. Rev. 761 (1959).

mills, which had not previously been used for the manufacture of rayon cloth. The cloth was then sold to the new company and by it dyed, finished and resold.

The new company's affairs prospered until, after a quarrel between the society's managers and Meyer and Lucas, the society formed a department to process and sell rayon cloth and adopted a policy of withholding cloth from the company except at uneconomical prices. Thereafter, the society's board of directors refused an offer of Meyer and Lucas to sell their shares at a negotiated price, recording in their minutes (this was not communicated to Meyer and Lucas) that the company had served its purpose and should be liquidated. The society's nominees on the company's board passively supported the society's decision to bring about the company's liquidation; they did nothing to prevent the company's business from declining.

Meyer and Lucas petitioned for relief under Section 210, and the court ordered the society to purchase their shares at a figure fixed by the court. The society appealed, and the House of Lords dismissed the appeal, holding that the society's conduct was oppressive and that, although complaining shareholders could only bring themselves within Section 210 by proving that the affairs of the company in which they held shares were being conducted in a manner oppressive to shareholders, the facts that the company was the society's subsidiary and the society's nominees on the company's board were participating in the society's oppression and passively neglecting the company's interests, rendered the conduct of the society and its nominees oppressive conduct of the company's affairs within the meaning of Section 210. In that connection, Lord Keith commented: "Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know."¹²⁷ The House of Lords also indicated that whenever a subsidiary company is formed with an independent minority of shareholders, the parent company is subject to an obligation to deal fairly with the subsidiary. Finally, the House of Lords found no fault with the court's fixing of the transfer price of the shares: the price was properly fixed at the value they would have had if it had not been for the oppressive conduct.

The other 1958 case applying Section 210 was *Re H. R. Harmer, Ltd.*,¹²⁸ decided by the Court of Appeal. "Truly lamentable litigation," remarked Jenkins, L.J.,¹²⁹ of the suit by two shareholders asking for relief under Section 210 from the high-handed and oppressive conduct of their eighty-eight-year-old father. The father had founded a

¹²⁷ Id. at 85.

¹²⁸ [1958] 3 All E.R. 689 (C.A.).

¹²⁹ Id. at 693.

stamp business and had operated it successfully for many years. Eventually he incorporated it, giving to his two sons most of the non-voting shares, which carried the major beneficial interest in the company, i.e., liquidation rights and rights to divisible profits, but retaining for himself and his wife most of the voting shares, which carried no right to participate in profits. The father and the two sons were all life directors of the company; in addition, the company's articles designated the father governing director but did not define the powers of the governing director or reduce the powers of the other directors.

The father perhaps believing that his voting control entitled him to run the business just as he had before incorporation, assumed powers he did not have, disregarded resolutions of the board of directors, and in general interfered autocratically in the company's day-to-day affairs. Among other things, he opened a branch in Australia without authority, procured the appointment of directors whom he expected to vote as he directed, dismissed employees summarily, and told a prospective employee that one of the sons was "wrong in the head" and would not be with the company much longer. The petitioners asked for the following relief under Section 210: (1) a change in the company's regulations to confer voting rights on the nonvoting shares; or (2) an order requiring the father to sell his shares or at least his voting shares to petitioners; and (3) removal of the father from his office as director and alteration of the company's articles of association accordingly, on the company's undertaking to pay to the father and his wife such pension as the court might think proper; or (4) whatever order would be just. It was not disputed that the facts would justify a winding-up order under the "just and equitable" rule.

The court held that the petitioners had proved their case and entered an order under Section 210, but (with the agreement of the petitioners) not in the terms of the prayer in the petition. On appeal, the Court of Appeal held that relief under Section 210 had been properly granted. The affairs of the company had been conducted in a manner oppressive to the petitioners as members, not merely as directors. Even if the father's acts might lawfully have been done pursuant to formal authority from a general meeting, the petitioners were entitled to insist that proper procedure be followed. The fact that the sons had originally acquired the shares as a gift from the father (if that were a fact) was irrelevant. Further, even if the sons at the time they acquired their shares contemplated that the father would retain control, it could not be assumed that they knew the father would exercise that control irregularly and without giving any effect to their own life directorships. Finally, if the father had gotten no pecuniary benefit from what he did, his conduct would still have

been oppressive: "If there is oppression, it remains oppression even though the oppression is due simply to the controlling shareholder's overweening desire for power and control and not with a view to his own pecuniary advantage."¹⁸⁰

RANDOM COMMENTS

American courts traditionally have been reluctant to interfere in the internal affairs of corporations when dissension develops among shareholders or even when minority shareholders claim that they have suffered injustices. This refusal to review action by majority shareholders or directors is generally based on the principle of majority rule or on the business judgment rule.

Apparently without close examination, courts accord the principle of majority rule the same sanctity in corporate enterprises, including small businesses, that it enjoys in the political world. The principle of majority rule is in traditional legal thought a firmly established attribute of the corporate form. Yet many participants in closely held corporations are "little people," unsophisticated in business and financial matters. Not uncommonly a participant in a closely held enterprise invests all his assets in the business with an expectation, often reasonable under the circumstances even in the absence of express contract, that he will be a key employee in the company and will have a voice in business decisions. Thus, when courts apply the principle of majority rule in close corporations, they often disappoint the reasonable expectations of the participants.

The indiscriminate application of the business judgment rule to sustain action of directors in close corporations is also subject to some criticism. That rule is perhaps grounded on the following ideas: (1) the shareholders have selected the directors to manage the business, and the courts are not justified in substituting their judgment for that of managers selected by the owners of the business; (2) directors' decisions are based on complex business considerations and courts are simply not qualified to make those decisions or to pass on their propriety in the absence of a clear abuse of discretion; and (3) a heavy burden should be placed on complaining shareholders to discourage "strike suits" and frivolous litigation. These reasons for the business judgment rule, however, do not apply in all their vigor in a close corporation; and courts might well consider intervention to protect minority shareholders in a close corporation against oppressive action by the directors, even though fraud, bad faith or, for that matter, clear unreasonableness on the part of the directors cannot be shown. Participants in a close corporation do not usually think of

¹⁸⁰ Jenkins, L.J., [1958] 3 All E.R. at 704.

themselves as delegating management of their corporation to an independent board of directors. Owners and managers, insofar as the participants look into the future, are to be the same. Minority shareholders expect to share in management. A board of directors to them is a legal formality. The minority shareholders have not actually agreed to have the business managed unilaterally by directors chosen by the majority. It hardly seems necessary in all cases to say, as the courts so often have said in effect, that when a person becomes a shareholder in a corporation, he assumes a status with all of its legally built-in liabilities, irrespective of his and his associates' intentions and expectations. Further, in a close corporation the business considerations on which directors' decisions are based are likely to be somewhat less intricate than in public-issue corporations, and the directors making the decisions are likely to be in general somewhat less astute; there is less reason for judges to show an unquestioning deference to decisions the directors have made. Finally, the great practical danger to a too-ready judicial interference in public-issue corporations, the danger of "strike suits," is not present, at least not in the same degree.

In spite of the principles of majority rule and the business judgment rule, the courts in this country are moving steadily, though slowly and often clumsily and gropingly, to provide a remedy for oppressed minority shareholders. They are doing that principally by imposing a fiduciary duty on controlling shareholders and corporate directors for the benefit of minority interests, and by gradually expanding the scope of that fiduciary duty.

Perhaps in imposing this duty the courts are simply applying the ethical standards of the business community. It is interesting to note that the British also fall back on fundamental notions of fairness and justice in deciding when to come to the aid of minority shareholders. Thus Lord President Cooper, in *Elder v. Elder & Watson*,¹³¹ in considering what classes of cases Section 210 of the English Companies Act was intended to cover, commented that "the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

As the ethical standards of the American business community have progressed far since the "robber baron" days when it was just good business to squeeze out a competitor or an associate, and as they give every indication of further advances, American courts are quite likely to broaden the classes of cases in which they will inter-

¹³¹ 1952 Sess. Cas. 49, 55.

fere to aid oppressed shareholders. In an age when small businessmen hear "brotherly love" speeches in their civic clubs at least once a year, most of the squeeze-plays heretofore used to eliminate business associates can hardly be considered "cricket." Perhaps in the not too distant future American courts will uniformly insist that majority shareholders refrain from any conduct which can reasonably lead to the inference that they are ignoring the interests of other shareholders or are using their majority powers other than in the interests of the company as a whole. And eventually the courts may even impose some duties on minority shareholders, *e.g.*, that they refrain from spiteful conduct that harms the business and that they avoid acting in ways that make it impossible for the majority to cooperate with them.

Whatever action courts now or in the future may take on behalf of "oppressed" shareholders, there will probably always be some unhappy shareholders who cannot get relief. Courts are not likely, for instance, to give satisfaction to a minority shareholder who simply is being outvoted on matters of policy on which he has strong convictions, or who has over a period of time lost confidence in the business ability of the controlling shareholders and the directors and officers they select. Thus, irrespective of progress being made in protecting shareholders against oppression, a person entering a closely held enterprise as a minority shareholder, if he is well informed, may still want special charter or by-law provisions or some kind of contractual arrangement which will give him a voice in management (perhaps a veto over corporate decisions), assure him employment with the company at a salary commensurate with that of majority shareholders, and provide for the settlement of disputes that may arise among the participants. The doubt which exists in many jurisdictions on the validity of such charter and by-law provisions and contractual arrangements should be removed by clear statutory authorization. There is simply no justification, for instance, in refusing to give full effect to a contract among businessmen for the arbitration of disputes (including disputes on management and policy questions) which may in the future arise out of the operation of their business.

American legislators and judges should watch carefully English experience in the application of Section 210 of the Companies Act, not only to observe the types of cases to which the section is applied but also to see what kinds of remedies the English courts give and the success they have with them. Section 210 expressly says that the court may "make such order as it sees fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company. . . ." This section cer-

tainly seems to confer on the English courts much broader remedial powers than our courts have ever exercised. The suggestion has been made that in some circumstances the court in applying the section might give voting rights to holders of nonvoting shares;¹⁸² and as a matter of fact, a court might undertake to rearrange the whole share structure of the corporation.

¹⁸² Peppiatt, *Statutory Protection of Minority Shareholders in English Limited Companies*, 14 *Bus. Law.* 621, 637 (1959).