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## Corporations--Are Nonvoting Shares Entitled to Appraisal Rights

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# Comments

## CORPORATIONS—ARE NONVOTING SHARES ENTITLED TO APPRAISAL RIGHTS?<sup>1</sup>

There is a difference of opinion as to the power of directors and a majority of the members or shareholders of a prosperous and going corporation at common law to sell all, or substantially all, of the corporate assets.<sup>2</sup> According to a strict view of the matter, shareholders in contract with each other are considered to have impliedly agreed to invest their money to advance the corporate objectives specified in the articles, and barring business disaster, there may be no transfer of corporate assets and discontinuance of the business except with the unanimous assent of the shareholders.<sup>3</sup> There is no question, however, as to the right of the whole body of shareholders to participate in the determination of whether such a singular course is wise and expedient.<sup>4</sup>

The issue is now settled by statute in practically all states.<sup>5</sup> In some the statutory provisions have been adopted to relax the strict common law rule of unanimity and substitute therefor the principle of majority rule. All the shareholders are entitled to have a hand in the determination of a course of action vitally touching their investment in the enterprise, but all are bound by the decision of a specified majority.<sup>6</sup> In other states, of which Missouri is one, only shareholders to whom management functions have been given are allowed to vote on the authorization to sell formulated by directors chosen by them.<sup>7</sup> In like

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1. For one answer, see 6 MISSOURI PRACTICE HANDBOOK, MISSOURI BUSINESS ENTERPRISES § 17.12 (Mo. Bar C.L.E. 1962): "The right to object, and to secure appraisal of and payment for their shares is not limited to holders of voting stock."

2. BALLANTINE, CORPORATIONS § 281 (rev. ed. 1946); 6A FLETCHER, CYCLOPEDIA OF CORPORATIONS § 2947 (rev. ed. 1950); Warren, *Voluntary Transfer of Corporate Undertakings*, 30 HARV. L. REV. 335 (1917).

3. See *supra* note 2. In *Tanner v. Lindell Ry.*, 180 Mo. 1, 79 S.W. 155 (1904), the court refused to set aside an executed transfer because of equitable considerations. See also *Luehrmann v. Lincoln Trust & Title Co.*, 192 S.W. 1026 (Mo. 1917).

4. Warren, *supra* note 2, at 341-46.

5. For a review of statutory provisions, see 2 MODEL BUSINESS CORP. ACT ANN. 369-84 (sale of assets), 318-27 (merger and consolidation) (1960).

6. *E.g.*, N. C. GEN. STAT. § 55-112(c)(3) (sale of assets), 55-101(a) (amendments), 55-108(b) (merger and consolidation) (Supp. 1957). Each outstanding share is allowed to vote on the proposed change, whether or not it is entitled to vote by the provisions of the articles of incorporation.

7. § 351.400(3), RSMo 1959: "Such authorization [to sell] shall require the affirmative vote of the holders of at least three-fourths of the outstanding shares entitled to vote at such meeting"; and § 351.245.1, RSMo 1959: "Each out-

manner, in Missouri approval of an agreement of merger or consolidation is sought only from a select class of shareholders which may, indeed, represent but a small minority of corporate investors.<sup>8</sup>

The prescribed statutory procedure to obtain shareholder approval of a re-organizational plan involving sale of assets, merger or consolidation commences with the giving of notice of the shareholders' meeting at which approval will be sought. Only holders of voting shares are entitled to notice of the meeting.<sup>9</sup> Nonvoting preferred or common shareholders are without a right to notice, and for good reason: since they may neither vote for or against the proposed plan changing the character of their investment, prior notice of the meeting would be a vain thing. It is arguable that statutory denial of the right to be notified of the meeting and its purpose is itself counter-evidence of an intention to grant any right the assertion of which depends upon suitable prior notice.<sup>10</sup>

To the holder of voting shares, prior notice of the meeting has a two-fold significance. It affords him an opportunity to be indifferently absent or prudently on hand to express by his vote approval or disapproval of the proposed alteration of the fundamental agreement. Also, it gives him from ten to thirty days to decide whether to withhold his approval; if he does, to choose whether to go along with the majority notwithstanding his disapproval; if he does not, to elect whether to take the initial step to assert appraisal rights by filing on or before the day of the meeting his written objection to the proposed plan.<sup>11</sup> It is apparent that even a voting shareholder is obliged to move with dispatch, once he has received the notice of meeting to which he is entitled. The point is often made that under the appraisal procedure, rights are likely to be lost through failure to learn of them in time to comply with the prescribed formalities.<sup>12</sup>

Consider now the awkward position to which the statute consigns the non-voting shareholder temerous enough to claim appraisal rights. He is not entitled

standing share entitled to vote under the provisions of the articles of incorporation shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders."

8. § 351.425, RSMo 1959. Approval of a plan of merger or consolidation requires the affirmative vote of the holders of two-thirds of the outstanding shares *entitled to vote at the meeting*.

9. § 351.400(2), RSMo 1959 (sale of assets): "[N]otice . . . shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided by this chapter for the giving of notice of meetings of shareholders"; and § 351.420, RSMo 1959 (merger and consolidation): "Notice of such meeting shall be given as provided in § 351.230." § 351.230.1, RSMo 1959, requires the giving of notice not less than ten or more than thirty days before the date of a shareholders' meeting "to each shareholder of record entitled to vote at such meeting."

10. See Note, *Merger and Consolidation in Iowa*, 34 IOWA L. REV. 67, 77-78 (1948).

11. *I.e.*, the right to receive an agreed or appraised sum for his stock from the corporation. See § 351.405, RSMo 1959 (sale of assets); § 351.455, RSMo 1959 (merger and consolidation).

12. BAKER & CARY, *CASES AND MATERIALS ON CORPORATIONS* 1480 (Supp. 3d ed. 1959); BALLANTINE, *op. cit. supra* note 2, at 701; LATTIN, *CORPORATIONS* 524-25 (1959).

to nor given notice of the meeting.<sup>13</sup> A procedure is prescribed that must be strictly observed, else his rights (if he has any) will be lost.<sup>14</sup> To qualify for the appraisal remedy, he must file written objection to the agreement or authorization (of which he may be unaware) on or before the day set for the shareholders' meeting (of which he has no notice).<sup>15</sup> All things considered, this aspect of the statutory procedure does not easily allow him to assert appraisal rights; to the contrary, it bespeaks a calculated legislative unconcern for his lot.

A dissenting shareholder by whom appraisal rights may be asserted is one "who shall not have voted in favor" of the proposed change.<sup>16</sup> Can a shareholder who is without voting rights meet this requirement?

Early analyses of appraisal statutes found this to be one of the unanswered questions. The language, it was said, came from the English Companies Act of 1862,<sup>17</sup> which gave appraisal rights to shareholders who, among other things, "did not vote in favor" of the proposition.<sup>18</sup> It presented no problem in England in 1862 because nonvoting shares probably were unknown.<sup>19</sup> The interpretation of "not voting in favor" generally considered the more plausible included all shareholders except those voting in favor of the proposal, regardless of voting power.<sup>20</sup>

Various arguments designed to induce doubt as to the evident sense of the statute have been suggested. Any other interpretation, it is said, would "emasculate the remedy by excluding the large class of non-voting stock."<sup>21</sup> Also, the nonvoting shareholder's case for payment "would be the strongest because he has no voice in the consideration of the proposed plans and is powerless to prevent their consummation."<sup>22</sup> Again, the language is ambiguous, and the courts would be more likely to "resolve the ambiguity in favor of the shareholder who had no vote but wished to be paid."<sup>23</sup> Finally, giving to appraisal statutes a liberal construction favoring dissenting shareholders, "it seems that on principle the right to object and demand payment should not be confined to those entitled to vote on the issue . . . , but should be enjoyed by every stockholder not actually voting in favor."<sup>24</sup>

There is, however, a more logical inference to be drawn from the language—one that avoids the charge of ambiguity and precludes a liberal or lax construc-

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13. See note 9 *supra*.

14. HORNSTEIN, CORPORATION LAW AND PRACTICE § 632 (1959); LATTIN, *op. cit. supra* note 12.

15. § 351.405, RSMo 1959 (sale of assets); § 351.455, RSMo 1959 (merger and consolidation).

16. *Ibid.*

17. 25 & 26 Vict., c. 89, § 162 (1862).

18. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. Q. 420, 427 (1930).

19. *Id.* at 427 n.32.

20. *Id.* at 428. See also Weiner, *Payment of Dissenting Shareholders*, 27 COL. L. REV. 547, 552 (1927); Note, *Corporations—Statutory Right of Dissenting Stockholders to Obtain Appraisal and Purchase of Shares*, 16 VA. L. REV. 484, 491 (1930).

21. Levy, *supra* note 18, at 428.

22. *Ibid.*

23. Weiner, *supra* note 20, at 552 n.23.

24. 16 VA. L. REV. 484, 491 (1930).

tion. "Who shall not have voted in favor" defines the class as including only those shareholders who, having the right to vote, have either voted against it or have refrained from voting for the plan. "But the right to vote must be there. Else it might be argued why mention 'voting' if it were intended to include members who have no voting rights."<sup>25</sup>

This view of the matter was taken in what probably is the only reported decision of the question. In *Application of Harwitz*,<sup>26</sup> petitioners, owners and holders of nonvoting preferred shares, sought an order appointing persons to appraise the value of their shares. The case arose under a statute providing that a corporation may sell certain assets with the consent of the holders of two-thirds of the shares "entitled to vote thereon," and further providing that any shareholder "not voting in favor" of such proposed sale may apply to have such shares appraised and paid for upon compliance with the procedural requirements therein prescribed. Petitioners made and the court rejected all the friendly arguments heretofore mentioned:

This position seems to me untenable for if it was the legislative intent that section 20 should be applicable to nonvoting stock and that nonvoting stock should have the right to apply for appointment of appraisers as well as voting stock, then there was no need to include in section 20 the phrase "*entitled to vote thereon*." This seems to me to indicate a clear legislative intent to confine and limit the rights to appraisal under section 20 to voting stock only and as indicating the exclusion of nonvoting stock.<sup>27</sup>

Further evidence of a legislative purpose to exclude nonvoting shares from appraisal rights in the case of a sale of assets, merger or consolidation is found by a comparative reading of the procedure provided in the case of charter amendment. There, under specified circumstances, preferred shareholders adversely affected by the proposed amendment are entitled to notice and to vote as a class, "whether by the terms of the articles of incorporation such class be entitled to vote or not."<sup>28</sup> Thus, for that special occasion their shares are voting shares, and the appraisal remedy is available, upon compliance with other conditions, to a limitedly enfranchised shareholder "who shall not have voted in favor of the proposal."<sup>29</sup>

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25. Levy, *supra* note 18.

26. 192 Misc. 91, 80 N.Y.S.2d 570 (Sup. Ct. 1948).

27. *Id.* at 93, 80 N.Y.S.2d at 573.

28. § 351.090.1(3)(b), RSMo 1959.

29. § 351.090.1(4), RSMo 1959. See also § 351.205, RSMo 1959, where the appraisal remedy is given to holders of preferred shares "who shall not have voted in favor" of the resolution to redeem preferred shares. Here, too, the right to notice of the meeting and to vote on the resolution is not restricted to shareholders entitled to vote by the terms of the articles of incorporation. For this specific purpose, all shares are voting shares.