

Summer 1963

Recent Cases

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Recent Cases, 28 MO. L. REV. (1963)

Available at: <http://scholarship.law.missouri.edu/mlr/vol28/iss3/7>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Recent Cases

AGENCY—THE DANGER CONFRONTING A DUAL AGENT

*Martin v. Hieken*¹

Defendant Hieken, a real estate broker, was employed by the McCords to sell their resort property. Plaintiff Martin, a prospective buyer, proposed to Hieken an exchange of properties and hired Hieken to act as his agent with the understanding that he would also act as agent for the McCords. Hieken then drafted an exchange contract, under terms dictated by plaintiff, which included provisions that each party was to take subject to existing deeds of trust and that taxes and interest would be adjusted to date of closing. Martin signed the contract; the McCords rejected it but made a counter-offer by interlineation on the original draft, so that Martin, by accepting, would agree to assume the two deeds of trust on the McCord property and taxes and interest would not be adjusted to the date of closing. Hieken presented Martin with the altered contract and explained some of the changes, but failed to mention the alteration with respect to the adjustment of taxes and interest on the deeds of trust. Although Martin originally rejected this offer, and although several more offers and counter-offers were made before an agreement was reached, the original draft, slightly adjusted, was used as the final agreement.

When Martin discovered that he was to assume the deeds of trust and that the interest was not to be adjusted to date of closing, he repudiated the contract and asked Hieken to return his earnest money. Hieken refused and insisted that Martin was bound by the contract. After some negotiation the McCords agreed to assume part of the interest, and Martin sued Hieken for the balance. *Held*: Judgment for plaintiff Martin affirmed. Defendant Hieken was acting in the capacity of a dual agent and had a duty to inform Martin, his principal, of all of the terms of the contract.

This case illustrates one of the dangers inherent in any transaction where two principals with conflicting interests employ a dual agent to transact their business. The use of a dual agent, frequently an attorney, is extremely common in real estate transactions, but even though it is common there are many dangers that should be kept in mind by a person so acting, in order that he will do nothing to make the transaction voidable, void, or have any liability attach to himself, as in the principal case.

The danger stems from the general rule that an agent may not act for two

1. 340 S.W.2d 161 (St. L. Mo. App. 1960).

principals with conflicting interests.² This rule is based upon the belief that an agent who voluntarily places himself in the position of owing loyalty to two principals with conflicting interests creates a situation ripe for possible fraud or dishonesty. The law, therefore, demands an extremely high standard of care from such an agent, and holds that he must come within certain well-defined exceptions to the general rule prohibiting dual agency.

One principal exception to this rule of prohibition is where both principals have complete knowledge of the dual agency and consent to its use.³ Even though both principals consent, however, the agent is still under a duty to reveal all facts within his knowledge material to the decision of either principal.⁴

The second principal exception is where the agent acts as a mere scrivener or middleman.⁵ In this role, the agent's function is to bring the parties together so that they may deal at arms' length. Thus the element of discretion is removed from the agent. This does not, however, relieve the agent of the duty of informing both principals of all the material facts within his knowledge.

Consequently, if the agent does not come within one of the exceptions to the general rule, the contract between the principals will be held voidable⁶ by the principal not knowing of the material fact or the dual agency. In Missouri, there is an additional danger that the contract will not only be held voidable but will be held "absolutely void." At least one Missouri case so holds.⁷

The danger to the agent, if he does not come within one of the exceptions, is that he will be unable to collect his commission from either principal if he fails to disclose either the dual agency⁸ or a material fact,⁹ and may be held

2. See, e.g., *McElroy v. Maxwell*, 101 Mo. 294 (1890); *McClure v. Ullman*, 102 Mo. App. 697 (St. L. Ct. App. 1903). See generally STORY, AGENCY §§ 31, 210 (4th ed. 1851); Annots., 80 A.L.R. 1075 (1932), 48 A.L.R. 917 (1927), 12 L.R.A. 395 (1891).

3. See *DeSteiger v. Hollington*, 17 Mo. App. 382 (K.C. Ct. App. 1885). See generally RESTATEMENT (SECOND), AGENCY § 391 (1958).

4. *Feldman v. Goldman*, 164 S.W.2d 634 (St. L. Mo. App. 1942); RESTATEMENT (SECOND), AGENCY § 392 (1958); Annot., 48 A.L.R. 917 (1927).

5. See, e.g., *Benway v. Colle*, 99 N.H. 51, 104 A.2d 734 (1954). See generally STORY, *supra* note 2, § 31; Annots., 80 A.L.R. 1075 (1932), 48 A.L.R. 917, 924 (1927).

6. E.g., *McElroy v. Maxwell*, *supra* note 2. See generally Annot., 48 A.L.R. 917 (1927).

7. *Neuman v. Friedman*, 156 Mo. App. 142, 148, 136 S.W. 251, 253 (St. L. Ct. App. 1911). *But see* *Kearney v. Vaughan*, 50 Mo. 284, 287 (1872), where the court, in dealing with the terms "voidable" and "void", stated: "It is, perhaps, unfortunate that we are not supplied with a term of more precision than the word 'void', a word more often used to point out what may be avoided by those interested in doing so than to indicate an absolute nullity—a proceeding or act to be disregarded on all occasions." On the question of holding the contract void see generally Annot., 48 A.L.R. 917 (1927).

8. See *Chapman v. Currie*, 51 Mo. App. 40 (St. L. Ct. App. 1892); Annot., 45 L.R.A. 33, 44 (1899).

9. The following facts have been held to be material: (1) helping the third party to buy land that the agent knew the principal wanted to lease, *Loeb v. Kroger Grocery & Baking Co.*, 205 S.W.2d 913 (St. L. Mo. App. 1947); (2) failure of agent to inform seller that he was a partner of the buyers, *Jarvis v. O'Brien*, 147

personally liable for any loss sustained, as in the principal case. The good faith or honest belief of the agent is universally held not to be a defense,¹⁰ and the general rule that "No man can serve two masters"¹¹ still applies.

As a practical matter, therefore, it is extremely important for one acting as a dual agent to ascertain that both principals are apprised of all material facts.

ROBERT S. DRAKE, JR.

Cal. App. 758, 305 P.2d 961 (1957); (3) failure to give name of purchaser to seller where seller would not have sold to buyer had seller known buyer's identity, King v. Pruitt, 365 Mo. 823, 288 S.W.2d 923 (1956); (4) informing buyer the title was unmarketable after receiving the opinion on the title and before informing the seller, Thomas J. Johnson & Co. v. Mueller, 356 Mo. 1109, 205 S.W.2d 521 (1947); (5) failure to disclose that prospective purchaser is a relative, Annot., 26 A.L.R.2d 1307 (1952).

10. See, e.g., DeSteiger v. Hollington, *supra* note 2. See generally Annots., 106 A.L.R. 125, 165 (1937), 48 A.L.R. 917, 925 (1917), 45 L.R.A. 33, 44 (1899).

11. *Matthew* 5:24.

CONTRACTS—CONSTRUCTION—APPLICATION OF
EJUSDEM GENERIS TO EXCULPATORY CLAUSES

*Austin Co. v. United States*¹

Plaintiff contracted with the United States to develop and manufacture a digital data recording and transcribing system unlike any other previously manufactured. After expending funds exceeding the contract price, it became apparent that performance of the contract was impossible due to the inability of plaintiff to make the system as required and the United States terminated the contract. Plaintiff brought suit in the United States Court of Claims to recover the contract price, basing its cause of action on certain exculpatory clauses which provided, *inter alia*, that plaintiff was entitled to recover if non-performance was "due to causes beyond the control . . . of the contractor." This clause was supplemented by another clause, that "such causes include, but are not restricted to, acts of God or the public enemy, acts of the government, fires, flood, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any such causes."

The court determined non-performance was due to impossibility inherent in the subject matter existing at the time the contract was made and should not be excused under the exculpatory clauses. To achieve this result the court applied the familiar rule of contract construction, *ejusdem generis*, which operates in the present case to restrict excuses for non-performance to the kind of contingencies enumerated in the exculpatory clauses.

Under the facts and circumstances the decision in the present case is supported by strong precedent with regard to both the substantive law pertaining to impossibility of performance and the applicability of *ejusdem generis* to the general category of exculpatory clauses under consideration.² However, the contract in the present case contains words which distinguish it from the usual type of *ejusdem generis* situation.

The contract contained three exculpatory clauses worded to excuse non-performance due to causes "beyond the control" of the plaintiff. One clause appears to go further and includes the words "such causes include, but are not restricted to, acts of God, . . ." Apparently the court felt these words were insignificant as no mention of them was made in the opinion. Since *ejusdem generis* is a rule of

1. *Austin Co. v. United States*, 314 F.2d 518 (Ct. Cl. 1963).

2. The court based its opinion on the leading case of *Carnegie Steel Co. v. United States*, 240 U.S. 156 (1916), which involved a contractor who undertook to manufacture a type of armor plate never before produced and which required a new production process. An exculpatory clause was included to protect the contractor against "unavoidable causes, such as fires, storms, labor strikes, . . ." The court held that the contractor's inability to perform due to ignorance of scientific process necessary to produce the armor plate did not fall within the meaning of the clause. In *accord*: *Traylor v. Crucible Steel Co. of America*, 192 App. Div. 445, 183 N.Y.S. 181 (App. Div. 1920); *aff'd*, 232 N.Y. 583, 134 N.E. 581 (1922). For a collection of cases applying *ejusdem generis* to exculpatory clauses, see Annot., 51 A.L.R. 990 (1927).

construction and should not be applied to defeat the intention of the contracting parties or the real purpose of the contract as may be gathered from the whole instrument,³ perhaps the court should have given some attention to the words "but not restricted to," in an attempt to determine the intention of the contracting parties. Otherwise, it would seem that such words are utterly meaningless as *ejusdem generis* operates to limit "causes beyond the control" to the kind and class of contingencies specifically enumerated.⁴

No cases were found construing the exact words "but not restricted to" in the sense used in the present case; however, in the case of *Bennett v. Kimsey*,⁵ while the court reached the same result as in the present case, it did recognize that such words should be given some consideration. The court stated:

The contract gives a specific description of "ornamental iron works business," and the words "but not be limited to" would not be construed as covering any other type of business except that described by the specific language.⁶

Since the words "limited" and "restricted" are recognized synonyms, both words would probably be construed the same in any given situation.

The present case stands for the proposition that exculpatory clauses, like any other contract clauses, must reflect specifically and unequivocally the intent of the contracting parties. The courts are not reluctant to apply *ejusdem generis* to limit general statements to the same kind and class as those specifically enumerated. Perhaps *ejusdem generis* does some violence to what one or more parties actually intended, for if the parties had thought some extraneous contingencies were not included by operation of the rule, they undoubtedly would have made proper provisions. However, it must be remembered that it is not the duty of the courts to rewrite or make the contract, but instead to construe what the parties themselves have written.

WILLIAM F. SUTTER

3. *Hickman v. Cabot*, 183 Fed. 747, 749 (4th Cir. 1910), *citing* *United States v. Mescall*, 215 U.S. 26 (1909).

4. *Scullin Steel Co. v. Mississippi Valley Iron Co.*, 308 Mo. 453, 273 S.W. 95 (En Banc 1925).

5. *Bennett v. Kimsey*, 218 Ga. 470, 128 S.E.2d 506 (1962).

6. *Id.* at 473, 128 S.E.2d 509.

CORPORATIONS—RECAPITALIZATION PLAN—FAIRNESS TO
MINORITY SHAREHOLDER*Honigman v. Green Giant Company*¹

Plaintiff, a holder of Class B non-voting common stock, brought a class action² against the company, its controlling stockholders, officers and directors, to upset a recapitalization plan. Under the recapitalization plan the Class A shareholders, owners of exclusive voting control, gave up their control in exchange for a premium in the form of new voting stock. In the alternative, plaintiff asked that the consideration received by Class A shareholders for the sharing of voting rights in the corporation with Class B shareholders, beyond fair consideration, be returned to the corporation.

The plan provided for the exchange of the 44 outstanding Class A shares, in which exclusive voting rights were lodged, and the Class B stock, numbering 429,000, for a new class of voting common stock. Class B shareholders were to exchange their stock on a one-to-one basis for the new stock. The Class A shareholders were to receive 10 shares of "convertible common stock" for each share of Class A stock they held. One share of the convertible stock was to be exchangeable each year for 100 shares of the new common stock, the result being that at the end of 10 years each Class A share would have been exchanged for 1000 shares of the new common stock.

Although the alleged purpose of the plan was to create a single class of common stock with sole voting rights which would offer a more marketable stock, promote expansion, and aid in the raising of capital,³ the participation of the Class

1. 309 F.2d 667 (8th Cir. 1962). The court relied heavily on the district court's opinion, 208 F. Supp. 754 (D. Minn. 1962).

2. The court of appeals treated it as such. However, in the district court, the plaintiff brought the action both as a class action on behalf of the Class B shareholders, and derivatively in behalf of the corporation. See Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956), where the author points out that, since a class action involves a breach of duty to the shareholders, and a derivative suit, a breach to the corporation, the plaintiff, where procedure allows, should always assert both so that he may recover if he proves a breach to either the shareholders or the corporation. See note 12 *infra*.

3. The purposes of the plan were set out in a letter, signed by the President and Chairman of the Board, sent to all stockholders. The letter is set out in full at 208 F. Supp. 754, 763-65. It announced the holding of a special stockholders meeting for the purpose of considering the recapitalization plan. The letter went ahead to state: "There are sound business reasons why it is now essential to have the voting rights in the company vested in all of the common stock. The proposed Plan of Recapitalization will do this. A more marketable stock would be created. Marketability and the resulting spreading of ownership would particularly aid the company in attracting and retaining executive personnel. A widely held voting stock would also promote expansion opportunities which might become available through acquisitions involving Green Giant Company stock. Finally, and above all, improved marketability would clearly be helpful in raising additional equity capital as needed. . . . Your management recommends unqualified approval. . . . We sincerely urge that you sign and return the enclosed proxy form."

A shareholders in the assets of the company under the plan would be increased from .01 per cent to 9.3 per cent over the 10 year period.⁴

All the Class A shareholders and 92.3 per cent of the Class B shareholders approved the plan at a duly called stockholders meeting.⁵ The articles were then amended and the plan put into effect.

Plaintiff's primary contentions were first, that the plan was illegal, unfair, and inequitable in exacting the huge premium for the granting of voting rights to the Class B shareholders and second, that there was no consideration for the bonus stock, as required by Minnesota statute.⁶

The court held that the defendants were entitled to exact a premium for their giving up of the exclusive control of the corporation; that the premium so extracted was fair under the circumstances; and, that the consideration flowing to the corporation fairly satisfied the Minnesota statutes.

It is generally held that inherent in the ownership of stock is the idea that a shareholder may deal with his corporate interest as he wishes, selling it to whom he pleases, for such price as he can obtain with the purchase amount belonging to the seller.⁷ It is furthermore held that he may exercise his right to vote stock as he chooses,⁸ limited by permissible restrictions prescribed in the charter and by-laws.⁹ This voting right is exercisable notwithstanding the fact that he may have a personal interest in the outcome.¹⁰

4. Thus, before the plan, 44 Class A shares represented .01% of the approximately 429,000 outstanding shares. At the end of ten years, the Class A shareholders would have exchanged their 44 shares of Class A for 44,000 shares of the new voting stock. At that time, Class A stock would represent 9.3% of the 473,000 (429,000 plus 44,000) outstanding shares.

5. MINN. STAT. § 301.37 (3) (3) (1957) requires as a minimum the affirmative vote of at least a majority of any class of stockholders that might be adversely affected by recapitalization amendment.

6. MINN. STAT. § 301.15 (1) (1957): "Consideration. No shares shall be allotted except in consideration of cash, or other property, tangible or intangible, received or to be received by the corporation, or services rendered or to be rendered to the corporation, or of an amount transferred from surplus to stated capital upon a share dividend." See note 26 *infra*.

7. Keely v. Black, 91 N. J. Eq. 520, 111 Atl. 22 (1920); Levy v. American Beverage Corp., 265 App. Div. 208, 38 N. Y.2d 517 (1st Dep't 1942); Stanton v. Schenck, 140 Misc. 621, 251 N. Y. Supp. 221 (Sup. Ct. 1931).

8. South & N.A.R. Co. v. Gray, 160 Ala. 497, 49 So. 347 (1909); Dulin v. Pacific Wood & Coal Co., 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207 (1894); Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947); Pennsylvania R.R. v. Pennsylvania Co. for Ins., 205 Pa. 219, 54 Atl. 783 (1903); 5 FLETCHER, CORPORATIONS § 2025 (perm. ed. rev. repl. 1952).

9. State v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905); Orme v. Salt River Valley Water Ass'n, 25 Ariz. 324, 217 Pac. 935 (1923); 5 FLETCHER, CORPORATIONS § 2029 (perm. ed. rev. repl. 1952).

10. "A stockholder, merely because he is such, sustains no fiduciary relation to the other stockholders or to the corporation and may vote his stock in whatever way is most advantageous to him." General Inv. Co. v. American Hide & Leather Co., 97 N. J. Eq. 214, 127 Atl. 529 (1925); Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling, *supra* note 8; Wilson v. Rennselaer & Saratoga R. R. Co., 184 Misc. 218, 52 N. Y. S.2d 847 (S. Ct. 1945), *aff'd* 268 App.

As a limitation on these general principles is the recognition that the majority, for some purposes, occupy a fiduciary position with relation to the corporation and minority shareholders.¹¹ So where approval of an extraordinary corporate matter, such as the amendment of the articles, requires a shareholder vote, the controlling shareholders take on the cloak of a fiduciary.¹² There is some authority to the effect that where a sale of corporate control is involved, it is considered an extraordinary corporate matter and fiduciary duties are imposed on the seller.¹³ When majority shareholders are treated as fiduciaries, the courts scrutinize their actions from the standpoint of "fairness."¹⁴

Since, under the recapitalization plan, the Class A shareholders were, in effect, selling control to the Class B shareholders by extracting a premium for sharing their voting rights, plaintiff contended that *Perlman v. Feldman*¹⁵ was controlling. In that case, plaintiffs, minority stockholders, brought a derivative action to compel an accounting for the restitution of alleged gains which accrued to the defendants as a result of a sale of their controlling interest in the corporation. Defendant Feldman, acting as chairman of the board, president, and dominant stockholder, sold his interest in the corporation for twice its market value. The court found that the defendants knew that the buyer, a syndicate, planned to allocate a portion of the corporation's production to syndicate members. Plaintiffs contended that the consideration paid for the stock included compensation for the sale of a corporate asset, *i.e.*, the power position or control of the corporation. The trial court dismissed the complaint. On appeal, the judgment was reversed and remanded with instructions to grant recovery to individual plaintiffs to the extent

Div. 1076, 53 N. Y. S.2d 306 (1945); *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N.E. 201 (Ct. of App. 1890); 13 AM. JUR., *Corporations* § 489 (1938).

11. *Pepper v. Litton*, 308 U. S. 295, 306 (1939); *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 488 (1919); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Gerdes v. Reynolds*, 28 N. Y. S.2d 622, 650 (Sup. Ct. 1941).

12. *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N. Y. 185, 123 N.E. 148 (Ct. of App. 1919); *Farmers Loan & Trust Co. v. New York & Northern Ry. Co.*, 150 N. Y. 410, 44 N.E. 1043 (Ct. of App. 1896). Once we say that a majority or controlling shareholder is a fiduciary, the cases are vague as to whether his duty is to the corporation or to the minority shareholders. HENN, *CORPORATIONS* § 241 (1961).

13. "In selling control, controlling shareholders owe to the corporation duties of due care and fiduciary duties. *Perlman v. Feldman*, 219 F.2d 173 (2d Cir. 1955), cert. den. 349 U. S. 952, reversing 129 F. Supp. 162 (D. Conn. 1952)." HENN, *CORPORATIONS* 384-85 (1961). The principle receives similar recognition in 13 FLETCHER, *CORPORATIONS* § 5805 (perm. ed. rev. repl. 1961): "[T]he owners of control of a corporation occupy a fiduciary relationship to the corporation and its stockholders in respect of the transfer of control." But the duties arise only with respect to the sale of control, and not to the sale of the shares. See *Insuranshares Corp. of Delaware v. Northern Fiscal Corp.*, 3 F. Supp. 22 (E.D. Pa. 1940). *But cf. Levy v. American Beverage Corp.*, *supra* note 7, requiring knowledge of purchaser's intent to loot or of his previous looting.

14. *Hottenstein (Moore) v. York Ice Machinery Corp.*, 136 F.2d 944 (3d Cir. 1943), petition for leave to file bill of review denied 146 F.2d 835 (3d Cir. 1944), cert. den. 325 U. S. 886 (1945); *Lebold v. Inland Steel Co.*, 125 F.2d 369 (7th Cir. 1941), cert. den. 316 U. S. 675 (1942).

15. *Supra* note 13.

of their respective interests,¹⁶ this to be done after a determination was made as to how much of the purchase price paid to the defendant was actually a "premium."

There has been much discussion as to the scope of the holding in that case.¹⁷ Plaintiff's contention in the principal case was that it stood for the broad proposition that control is an asset of the corporation.¹⁸ If so, she reasoned, then the dilution of the Class B shareholder's equity could not be justified by the Class A shareholder's surrender of this exclusive control.¹⁹

The controversy over whether or not control is an asset of the corporation was precipitated by Professor Berle in his book, *The Modern Corporation and Private Property* (1932). He there developed the argument that the dispersion of stock ownership, inherent in the corporate system, has brought about a "separation of function" in that the ownership of corporate wealth and the control over it tend to lie in different hands. This separation of function, says Berle, forces us to recognize "control" as something apart from ownership and from management. He then concludes that the power that goes with control, since not properly attributable to either ownership or management, is an asset of the corporation, payment for which must go to the corporate treasury. Since direction of the corporation is exercised through the board of directors, control is thus said to be in the hands

16. If corporate recovery had been given, all the purchasers would have received a portion of the purchase price to which they were entitled. However, the recovery given in *Perlman* is not what one would ordinarily expect in a derivative suit; but, there is ample authority for individual recovery in a derivative suit. See *JENNINGS, op. cit. supra* note 2, 28 footnote 98.

17. Some courts and writers think the case was decided on the "corporate opportunity" theory in that the asset alleged to have been sold was the ability to allocate steel during the Korean War when it was in short supply. *SEC v. Insurance Securities*, 254 F.2d 642 (9th Cir. 1958); *Central Standard Life Insurance Co. v. Davis*, 141 N.E.2d 45 (Ill. 1945); 25 *FORDHAM L. REV.* 137 (1956); 68 *HARV. L. REV.* 1274 (1956). Others would put it in the category of the "looting" cases, where a majority shareholder is held for the damage done to the corporation by those to whom he sold, where the sale was negligently or fraudulently made. See *Hill, The Sale of Controlling Shares*, 70 *HARV. L. REV.* 986 (1957), where the author says it is inconclusive as to whether the decision is based on breach of trust or foreseeable harm.

18. Circuit Judge Swan, dissenting in that case, thought the majority so held. *Perlman v. Feldman*, 219 F.2d 178-179. Professor Berle, commenting with reference to his "corporate asset" theory, said, "The *Perlman* decision goes far in that direction." Berle, "Control" in *Corporate Law*, 58 *COLUM. L. REV.* 1212, 1221 (1958). See also 40 *CORNELL L. Q.* 786 (1955); also, *Jennings, Trading in Corporate Control*, 44 *CALIF. L. REV.* 1 (1956), where the author is obviously in doubt as to what the *Perlman* case held, but expresses a preference for the corporate asset theory. Cf. *Copland v. Wisconsin Department of Taxation*, 114 N.W.2d 858 (Wisc. 1962).

19. This raises a problem: "The dilemma, arising from the rules that duties attach to the control—on the theory that control is a corporate asset in which all shareholders have an equitable interest and are entitled to share—but not to the sale of the shares, is that a controlling block of shares cannot be severed from its appurtenant control and the price realized from the sale of such block cannot readily be allocated between the payment for such shares *per se* and any premium for appurtenant control." *HENN, CORPORATIONS* 384 (1961). But *Perlman* seems to offer a solution to this problem of allocation by placing the burden on the seller.

of the majority shareholders, *i.e.*, those who have the actual power to select the board.²⁰

The court, however, did not feel that the *Perlman* case supported the "corporate asset" theory and it thus summarily concluded: "When fairly read, it does not go to the extent of supporting the rule urged."²¹ It did not elucidate on what *was* the rule of the *Perlman* case "when fairly read."²² In respect to Professor Berle's theory the court said: "No Minnesota cases have been cited or found which indicate that the Minnesota court would follow such view."²³

20. The general thesis of Professor Berle has found impressive judicial support from at least one source. Justice Brandeis, in his important opinion in *Louis K. Liggett Co. v. Lee*, 288 U. S. 517, 564-65 (1933), (dissenting in part) cites Berle's book throughout, and observes: "Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the states and long unsuspected. They show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise. . . . The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. *Ownership has been separated from control*; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And, as ownership of the shares is becoming continually more dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public are . . . fundamental and far reaching."

21. In another case, the court, citing *Perlman*, said: "The offer by plaintiff [a director and substantial shareholder] to the 'inside group' in an effort to gain 'numerical control' at a price above the market . . . was an opportunity which if accepted would have placed them in a position of jeopardy of being held responsible to account for the excess to the other shareholders." *Zweifach v. Scranton Lace Co.*, 156 F. Supp. 384, 397 (M.D. Pa. 1957). These two cases lead Professor Lattin to conclude: "The trend of the law seems to be toward holding control as a corporate asset in which all shareholders have an equitable interest and in which they are entitled to share." LATTIN, *CORPORATIONS* 268 (1959).

22. The recent case of *Essex Universal Corporation v. Yates*, 305 F.2d 572 (2d Cir. 1962), decided by the same court that decided *Perlman*, would seem to lend support to those who say the *Perlman* holding stands on appropriation of a corporate opportunity. In that case, the court held that a contract for the sale of 28.3% of voting stock of a corporation was not, under New York law, *per se* invalid as against public policy because it included a clause giving the purchaser an option to require a majority of the existing directors to replace themselves by a process of seriatim resignation with a majority designated by the purchaser. Each of the three judges wrote opinions and one specifically said that the *Perlman* case was decided on the corporate opportunity theory. 305 F.2d at 576. Thus, a writer noting this case was led to conclude that: "[T]he 2d circuit has dispelled any doubt as to the proper reading of its *Perlman* decision." 37 N. Y. L. REV. 933, 938 (1962). However, the other two judges, one of whom was Judge Clark who wrote the *Perlman* opinion, specifically stated that *Perlman* was not controlling in *Essex*. Thus, it seems less than clear that we know any more now than before as to the "rule" of *Perlman*.

23. *Supra* note 1 at 670.

In assessing the fairness of the plan, the court adopted the opinion of the trial court. Following *Perlman*, the court ostensibly placed the burden of proof on the directors, who proposed the plan, to establish its fairness to the non-assenting Class B shareholders.²⁴

Statutes today invariably allow fundamental changes in the charter, if authorized by a majority or some larger percentage of the shareholders,²⁵ in order to meet the changing needs of the corporation. A dissenting shareholder is entitled to a review of such change, the court applying the equitable standard of "fairness."²⁶ To the extent that an "unfair" plan is imposed upon him, his contract with the corporation has been impaired.

The courts have refused to apply a strict standard of fairness when evaluating recapitalization plans,²⁷ due perhaps to the difficulty of reviewing abuse of powers in technical questions of business policy,²⁸ and to the possibility of obstructive tactics by minority shareholders.²⁹

Thus, in the principal case, the court required very little to satisfy the "fair-

24. 208 F. Supp. 754, 758 (D. Minn. 1961).

25. The Minnesota provision is MINN. STAT. § 301.37 (1957); and see § 351.090, RSMo (1959).

26. The existence of this equitable limitation is everywhere given recognition by the courts. See, for example, *Wessel v. Guantanamo Sugar Co.*, 134 N. J. Eq. 271, 35 A.2d 215 (1944); *Bodell v. Gen. Gas & Electric Corp.*, 15 Del. Ch. 119, 132 Atl. 442 (Ch. 1926), *aff'd*, 15 Del. Ch. 420, 140 Atl. 264 (Sup. Ct. 1927). However, the Minnesota legislature, in an unusual provision, has seen fit to give statutory recognition to this principle. MINN. STAT. § 301.16 (1) (1957): "Shares with or without par value shall not be allotted for a cash consideration which is unfair to the then shareholders nor for a consideration other than cash upon a valuation thereof which is unfair to such shareholders." It seems arguable that this statute contemplates a more stringent enforcement of the "fairness" standard than courts have generally deemed possible or proper, as noted *infra*.

27. "No standard of fairness comparable to that developed for insolvent reorganization has been established, and the courts assume far too readily that the usual type of optional plan involved no unfair concessions to common shareholders." *Dodd, Fair and Equitable Recapitalization*, 55 HARV. L. REV. 780, 817 (1942). In the older cases, the burden was generally placed on the dissenting shareholder to show unfairness. *Porges v. Vadsco Sales Corp.*, 27 Del. Ch. 127, 32 A.2d 148 (Ch. 1943).

28. *Bodell v. General Gas & Electric Corp.*, *supra* note 26, lists some of the factors to be considered in determining what price is fair: "Prices should be fixed in the light of all legitimate considerations such as appraisal and sale value of assets, book values, market values of outstanding shares, present and probable earning powers, market conditions, size of the issue, reputation of the corporation, and such exceptional considerations as honest and fair minded men might take into account." (Emphasis supplied.)

29. BALLANTINE, CORPORATIONS 525-26 (Rev. ed. 1946). This attitude by the courts has been much criticized. See, for example, *Walter, Fairness in State Court Recapitalization—A Disappearing Doctrine*, 29 B.U.L. REV. 453 (1949). "Recapitalization plans are neither so unimportant nor so difficult that the equities can be superficially considered or blandly ignored." *Id.*, at 485. The author suggests that some standard criteria, such as used by the SEC in appraising reorganization plans for "fairness," should be developed in this area. See also 71 HARV. L. REV. 1133 (1958); and LATTIN & JENNINGS, CASES & MATERIALS ON CORPORATIONS, 1345-48 (3d ed. 1959), urging that administrative supervision is the most effective and efficient method of assuring fairness.

ness" standard. It merely pointed out that the Class B shareholders are getting something they didn't have before, *i.e.*, voting rights, and then discussed the benefits which could be expected to accrue to the corporation under the plan. It concluded by stating:

After due consideration, the Court is satisfied that a fair analysis of all the circumstances justifies a finding that defendants have sustained the burden of proof in establishing that the premium shares issued to the Class A stockholders is commensurate with the benefit received by the corporation and that the plan is fair and reasonable to the Class B stockholders. The Court concludes that the consideration flowing to the corporation fairly satisfies any demands of the Minnesota statutes relied upon,³⁰ as well as the basic principles of fair dealing required by equity.³¹

The court seems to beg the question when it says that a plan is fair without a thorough evaluation of what contractual rights the Class B shareholders gave up to the Class A shareholders, and what they got in return from the Class A shareholders.³² It is the amount of the premium that must be compared with the value of the voting rights in determining fairness. Any other benefits which accrued to the Class B shareholders did not flow from the Class A shareholders, and hence do not make the plan fair as between the two.³³

Admittedly, any attempted analysis comparing the value of the voting rights with the value of the premium will be difficult. But since the court has placed on the defendants the burden of showing fairness, any difficulties which may inhere in such an analysis should be borne by the defendants, and not by the court. It seems, then, that although allegedly bearing the burden of showing fairness, the defendants, under the court's less than stringent requirements, were saddled with a very light burden indeed.

DONALD R. WILSON

30. But is this the *kind* of consideration that MINN. STAT. § 301.15 (1957) requires? See *supra* note 6.

31. *Supra* note 1 at 671.

32. "When a stockholder objects to a recapitalization plan on the ground that its consummation would be seriously detrimental to him, there is no valid reason why the courts should not at least attempt a thorough analysis of the plan to ascertain whether or not it conforms to basic standards of fairness. These standards must be objective—in other words, they must inquire into the *treatment* the class of shareholders will receive." Walter, *supra* note 29 at 483.

33. Contrast this approach with that of the Delaware Chancery Court in *Manacher v. Reynolds*, 165 A.2d 741 (1960). "I return to one central question: *What was the A fairly entitled to exact from the B for the rights relinquished and the consequent benefits to the B?* . . . I must say frankly that were I to view the case apart from the stockholder action [in voting for the recapitalization plan] I would conclude that the premium is excessive. I say this because the discount factor [the discontinuance of which was said to be the primary benefit to B under the plan] is not a "value" which may be attributed to the A. I do however recognize that the A may fairly exact a premium as a condition to the relinquishment of absolute voting control." *Manacher v. Reynolds*, *supra* at 754. The court went on to approve the plan it thought unfair merely because the stockholders had approved it. But if the plan is not "fair," a majority of shareholders voting for it does not make it "fair." See a criticism of the case on this point, terming it, "an abdication of its supervisory role in the settlement," 109 U. PA. L. REV. 887 (1961).