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Consolidation of Corporations by Sale of Assets and Distribution of Shares

[This article, by Mr. George S. Hills, is contributed in explanation and support of a novel provision of the bill revising the general corporation law which was incorporated therein by the committee of the State Bar at Mr. Hills' suggestion. This bill has been passed by the legislature and has received the Governor's signature.]

DURING the past decade practically every voluntary corporate reorganization has been accomplished by a sale of assets of one or more corporations to another, the sale being for shares or securities of the purchasing corporation which are distributed to the shareholders of the selling corporation as a part of the same transaction.[1] Mergers and consolidations under statutory authority have also taken place, but objections of one kind or another to that method of reorganization have prevented its general use. Shareholders are accustomed to changes in their holdings and are not interested in or acquainted with the ways and means of reorganization; to them it is merely an opportunity to exchange their old shares for new ones. Newspaper accounts and the announcements of brokers and investment houses rarely disclose the methods of reorganization procedure, and the courts themselves often fail to describe a particular transaction properly. Consolidations, mergers and sales are popularly known as "reorganizations," "mergers" or "combinations," and rarely is a sale called a sale. Such matters are left

[1] See Conway v. Citrus Belt Land Co. (1928) 94 Cal. App. 533, 542, 271 Pac. 525, 528, noted in (1929) 17 CALIF. L. REV. 557. See Gott v. Live Poultry Transit Co. (Del. Ch. 1931) 153 Atl. 801, 806.

This paper deals only with voluntary reorganizations in the sense of a continuation of the business through a change of corporate form by consolidation, merger or sale of assets under statutory authority. It does not cover reorganizations by decree or by other judicial procedure with or without a decree. See BALLANTINE, PRIVATE CORPORATIONS (1927) 760, 762. The words "consolidation" and "merger" are used in the body of the article in their strict technical sense, and the phrase "sale of assets" is intended to cover a voluntary sale by a corporation of all or substantially all of its assets to another corporation for a consideration including shares or securities of the purchasing corporation. The rights of creditors of a predecessor corporation against it and against the successor corporation are not considered here. This paper deals only with the rights of shareholders, as creditors must be satisfied in fact or in law no matter what procedure is used to effect a reorganization.

to the lawyers and to the management, who naturally select the simplest and safest method of combination irrespective of form. They must choose between a consolidation, a merger or a sale of assets.

Broadly speaking, the power to consolidate or merge was granted to enable two or more corporations to unite their businesses and continue as a unit with the same group of shareholders. Corporations were also granted the power to sell their assets as an entirety so that they could, if they desired, dispose of their assets, discontinue business and liquidate their affairs. These two powers, to consolidate or merge, and to sell, were originally intended to serve different purposes. The function of a merger or consolidation has always been to unite the shareholders as well as the assets of the merging corporations, but the primary function of a sale was to transfer the assets and business and to liquidate and distribute the proceeds to the shareholders of the selling corporation. In late years, however, it has become the fashion to use a statutory sale of assets rather than a consolidation or merger as a vehicle of reorganization. This practice developed from necessity, as consolidation and merger statutes generally do not favor transactions which cross state lines. The power to sell has thus acquired a double usefulness; it may be used as a method of liquidation or as a method of perpetuating a going concern under a different corporate set-up. If used in lieu of a consolidation or merger, may it not be given all the benefits incident to such procedure? In the pending bill revising the California general corporation laws the statute law is brought in line with corporate practice in this respect.[2]

[2] See VI STATE BAR JOURNAL (Feb. 1931) Part II, §§343, 343:1, 401:3; Assembly Bill 1000 containing the revised general corporation act has a section which reads as follows:

"Section 343a. Plan of distribution of shares or securities upon sale of assets. The directors and shareholders, in authorizing and approving a sale or other disposition of all or substantially all of the property and assets pursuant to Section 343 of this code, may also authorize and approve a plan for the distribution of all or a part of the consideration to be received, including shares or other securities of any corporation or corporations, domestic or foreign.

"Shareholders who approve such sale or other disposition and such plan of distribution, and shareholders who do not dissent therefrom and do not exercise their rights as dissenting shareholders as hereinafter provided, shall be deemed to have waived and surrendered such distributive rights as they may have upon a liquidation or dissolution or winding-up of the corporation and to have agreed to accept in lieu thereof, and to have accepted, the shares or securities or other considerations to which they are entitled under such plan of distribution.

"Dissenting shareholders, whether or not entitled to vote, shall be entitled to compensation under the conditions hereinafter provided.

"Any distribution under such plan shall be subject to the provisions of this title, including but not limited to those as to reduction of stated capital, distribution of surplus after reduction of stated capital and to the manner of dissolving and winding-up of corporations."

This tendency finds expression in the certificate of incorporation of the Colgate-

In selecting a method of reorganization the relative merits and disadvantages of a consolidation, merger or sale of assets must be weighed and considered. The objections to a merger or consolidation may arise from the inadequacy of the statute law itself or from the desire to avoid some of the requirements of the law. The main objection to a sale of assets arises in connection with distributing the consideration received among the shareholders of the selling corporation. Consolidations and mergers, being fundamentally alike, may, for purposes of comparison, be considered together as one method of voluntary reorganization, and a sale of assets may be considered separately as the other. In either case there is a transfer of assets to another corporation and usually an assumptiou of liabilities. In either case there may be an exchange of shares and a dissolution of the transferring corporations. Their similarities and differences may be broadly summarized as follows:

1. In a consolidation the assets of the constituent or predecessor corporations are transferred to the successor corporation by operation of law, but in the case of a sale by one corporation to another the assets of the selling corporation are transferred by instruments of conveyance. The result is the same insofar as the final position of the assets is concerned.

2. The requirements as to vote or consent of the shareholders differ in each case. Upon a merger the shareholders of the successor or surviving corporation as well as of the merged corporations are entitled to vote and to exercise the rights of dissenting shareholders. In a consolidation the shareholders of all the constituent corporations must authorize the agreement of consolidation. In the case of a sale of assets the purchasing corporation acts only through its board of directors and

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Palmolive Peet Company which contains the following provisions (Stock Exchange Application No. A-9241): "In the event that it shall, at any time, be deemed advisable to reorganize by transferring the assets and business of this corporation as a going concern to a corporation organized under the laws of Delaware or of any other state, and the successor corporation shall take over all the property, assets, good will, and business of this corporation, without any decrease in assets and without any increase or change in the character of liabilities, except in the ordinary course of business (except that the common stock may be increased) and the holders of the common stock of this corporation shall have taken or shall have become obligated to take the common stock of such successor corporation in exchange for their shares and the preferred stock of such successor corporation shall be entitled to all the preferences, rights, benefits, and protection to which the preferred stock of this corporation is entitled, then the holders of preferred stock of this corporation then outstanding shall be obligated to take in exchange for their shares an equal number of shares of preferred stock of equal par value of the successor corporation."

Convertible stocks and convertible bonds also frequently provide for exchange in case of a consolidation, merger or sale of assets.

the necessity for shareholders' authorization is limited to the selling corporation.

3. In a consolidation the method or basis of exchanging shares of the predecessor corporations for shares of the successor corporation is set forth in the consolidation agreement and is binding on all except qualified dissenting shareholders. The agreement under which assets of one corporation are sold to another for its shares or securities usually outlines a plan of distribution whereby such shares or securities are to be distributed to the shareholders of the selling corporation upon an exchange basis, but there is no way of requiring the shareholders to surrender their shares and accept shares of the purchasing corporation. The plan of distribution is itself no part of the sale, and a distribution pursuant to the plan is a separate step following actual consummation of the sale itself.

4. A purchase by one corporation of the assets of another for shares or other securities does not disturb the shares of the purchasing corporation or require an exchange or substitution of certificates, but, on the other hand, consolidations require an exchange of the shares of all the corporations involved.

5. Upon a consolidation a new corporation is created and the constituent corporations lose their corporate existence. Although a corporation is not dissolved by reason of a sale of its entire assets, it is customary forthwith to liquidate its affairs and cause its dissolution. Unless dissolved the corporation is a hollow shell or an inactive holding corporation.

6. State statutes permitting corporations to consolidate do not as a rule permit the consolidation of a domestic corporation with a foreign corporation. A corporation may, however, sell its assets to any other corporation, domestic or foreign.[3]

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[3] BALLANTINE, PRIVATE CORPORATIONS (1927) 592, 594, 595.

For an historical survey of the power of a corporation to sell its assets as an entirety see Warren, *Voluntary Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335.

It is a general rule that a prosperous corporation does not have the power to sell its entire assets in the absence of statutory authority. Geddes v. Anaconda Mining Co. (1921) 254 U. S. 590, 41 Sup. Ct. 209; American Seating Co. v. Bullard (C. C. A. 6th, 1923) 290 Fed. 896; Barry v. Interstate Refineries, Inc. (D. C. W. D. Mo. 1926) 13 F. (2d) 249; McRoberts v. Independence Coal & Coke Co (C. C. A. 8th, 1926) 15 F. (2d) 157; Garrett v. Reid-Cashion Land & Cattle Co. (1928) 34 Ariz. 245, 270 Pac. 1044; Butler v. New Keystone Copper Co. (1915) 10 Del. Ch. 371, 93 Atl. 380; Allied Chemical & Dye Corp. v. Steel & Tube Co. of America (1923) 14 Del. Ch. 1, 120 Atl. 486; People v. Ballard (1892) 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; Murrin v. Archbald Consolidated Coal Co. (1921) 196 App. Div. 107, 187 N. Y. Supp. 606, *aff'd*, 232 N. Y. 541, 134 N. E. 563. But see Sweet v. Lang (C. C. A. 8th, 1926) 14 F. (2d) 762.

A sale under statutory authority must comply strictly with the statute. Barry

It may be seen from the above outline that the method of consolidation or merger is often inconvenient or undesirable for business reasons and frequently impossible as a matter of law, and that a sale of assets is usually preferable to any other procedure in spite of its apparent difficulties. Accordingly it seems desirable that adequate statutory provisions should be made whereby a sale of assets may have all of the benefits of a consolidation if the shareholders so wish. This cannot be done without solving the problem of distribution. The problem may be outlined as follows:

1. The power of a corporation to sell its assets as an entirety does not include the power to distribute the shares, securities or other consideration received among its shareholders.[4]

2. The minority shareholders of the selling corporation cannot be required to exchange their shares for shares or securities of another corporation nor to permit the exchange of the property of their corporation for shares or securities of another corporation which is to take its place and carry on its business, thus practically dissolving the first corporation.[5]

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v. Interstate Refineries, *supra;* Garrett v. Reid-Cashion Land & Cattle Co., *supra;* Matter of MacDonald (1923) 205 App. Div. 579, 199 N. Y. Supp. 873; Kremer v. Public Drug Co. (1919) 41 S. D. 365, 170 N. W. 571; Dodd, *Amendment of Corporate Articles Under the New Ohio General Corporation Act* (1930) 4 CIN. L. REV. 129, 147.

[4] Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54; Gerber v. American Seeding Machine Co. (1931) 28 Ohio N. S. 19; BALLANTINE, PRIVATE CORPORATIONS (1927) 594, 595.

It has been held in Massachusetts, however, that a corporation not insolvent can legally sell its assets for securities of another corporation "to be distributed among its stockholders who are willing to receive them, or to be converted into money and paid to the stockholders who do not desire the stock or bonds." Abbot v. Waltham Watch Co. (1927) 260 Mass. 81, 156 N. E. 897; Calnan v. Guaranty Security Corp. (Mass. 1930) 171 N. E. 830.

[5] Farmers' Loan & Trust Co. v. Toledo & South Haven R. Co. (C. C. A. 6th, 1893) 54 Fed. 759; Jackson Co. v. Gardiner Investment Co. (C. C. A. 1st, 1912) 200 Fed. 113; Forrestor v. Boston & Montana Consolidated Copper & Silver Mining Co. (1898) 21 Mont. 544, 21 Mont. 565, 55 Pac. 229, 55 Pac. 353; Riker & Son Co. v. United Drug Co. (1912) 79 N. J. Eq. 580, 82 Atl. 930, Ann. Cas. 1913A 1190; People v. Ballard (1892) 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; Schwab v. Potter Co. (1909) 194 N. Y. 409, 87 N. E. 670; Lauman v. Lebanon Valley R. Co. (1858) 30 Pa. 42, 72 Am. Dec. 685; Koehler v. St. Mary's Brewing Co. (1910) 228 Pa. 648, 77 Atl. 1016; Moy v. Colonial Finance Corp. (1925) 283 Pa. 323, 129 Atl. 115, 40 A. L. R. 271; Kremer v. Public Drug Co. (1919) 41 S. D. 365, 170 N. W. 571; BALLANTINE, PRIVATE CORPORATIONS (1927) 594, 595.

In American Seating Co. v. Bullard (C. C. A. 6th, 1923) 290 Fed. 896, the court said, "In no case so far as we can find, have the non-consenting minority been compelled to accept stock in the new corporation in the absence of some statute in force when they became stockholders, expressly conferring that authority." For a statement of the California law see Note (1929) 17 CALIF. L. REV. 557. In Hollister v. Stewart (1889) 111 N. Y. 644, 19 N. E. 782, it was held that majority

3. The shareholders of the selling corporation cannot be deprived of their contractual rights upon a liquidation, dissolution or winding-up of the corporation.[6]

4. The shareholders may vote for or against a sale of assets and thereafter object to the kind or value of the shares, securities or other consideration payable to them under the plan of distribution or upon liquidation.[7]

5. A sale of assets and a distribution to shareholders of the consideration received are separate and independent steps in the corporate procedure. Each has different problems arising from unrelated proceedings.[8]

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bondholders could not change the rights of the minority and require them to take other securities in lieu of their bonds.

But the purchasing corporation may be required to issue its shares to a shareholder of the selling corporation. Holmes & Griggs Manufacturing Co. v. Holmes & Wessell Metal Co. (1891) 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; Anthony v. American Glucose Co. (1895) 146 N. Y. 407, 41 N. E. 23. And the selling corporation may be required to reduce its capital and distribute the shares. Riley v. Callahan Mining Co. (1916) 28 Idaho 525, 155 Pac. 665.

The courts of Massachusetts have taken an independent view. In Treadwell v. Salisbury Manufacturing Co. (1856) 7 Gray 393, 66 Am. Dec. 490, a failing corporation sold its assets for shares which were distributed among the shareholders, the court holding that dissenting shareholders could not complain. See also Calnan v. Guaranty Security Corp. (Mass. 1930) 171 N. E. 830. The possibility of a liquidating dividend in kind was suggested in Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54. And see Conway v. Citrus Belt Land Co. (1928) 94 Cal. App. 533, 542, 271 Pac. 525, 528.

The rights of shareholders who have exchanged their shares are discussed in *In Re* Dennett (D. C. Ariz. 1915) 221 Fed. 350, *cert. den.* 238 U. S. 628, 35 Sup. Ct. 791; Garrett v. Reid-Cashion Land & Cattle Co. (1928) 34 Ariz. 245, 270 Pac. 1044; Finch v. Warrior Cement Corp., *supra;* People v. Ballard, *supra;* Kremer v. Public Drug Co., *supra.*

[6] Preferred shareholders who are entitled to a preference in assets upon liquidation, dissolution and winding-up cannot be deprived of their rights upon a distribution of the consideration received from a sale of assets. Shares and other securities delivered to the selling corporation constitute its assets and are distributable to the preferred shareholders having sufficient preference rights to exhaust them, to the exclusion of the common shareholders. Robinson v. Pittsburgh Oil Refining Corp. (1924) 14 Del. Ch. 193, 126 Atl. 46.

In Eagleson v. Pacific Timber Co. (D. C. Del. 1920) 270 Fed. 1008, a sale of assets was enjoined as it "denied to the holders of the preferred stock, entitled to priority in payment over the common stock on dissolution or liquidation of the company, rights which it conferred upon the holders of the common stock." It was held in Petry v. Harwood Electric Co. (1924) 280 Pa. 142, 124 Atl. 302 that non-assenting preferred shareholders were entitled, upon a merger, to recover the full par value of their shares, and not merely the market value, as the merger was in effect a dissolution. See also Putnam v. Slayback (C. C. A. 4th, 1928) 23 F. (2d) 406; Gerber v. American Seeding Machine Co. (1931) 28 Ohio N. S. 19; Hatch v. Newark Telephone Co. (1930) 34 Ohio App. 361, 170 N. E. 371, 174 N. E. 12.

[7] Gerber v. American Seeding Machine Co., *supra* note 6.

[8] Note (1921) 30 YALE L. J. 633.

The idea of a sale, as opposed to a dissolution or liquidation, must be preserved

6. Statutes which permit shareholders to dissent from a proposed sale of assets and demand an appraisal of their shares have no application to a distribution of the consideration received. Such statutes lead up to the sale itself, which is the half-way mark in the full procedure, and then drop off, leaving the selling corporation and its shareholders with the task of distribution.[9]

The statute law as to the sale of the entire assets should be amended to recognize that a sale of assets may be used not only as a method of liquidation but also as a vehicle of reorganization, and to authorize a sale for securities and the distribution thereof with compensation to dissenters.

The problem is comparatively simple if the selling corporation has but one class of shares, or if it has more than one class of shares, with no preferences between the classes upon liquidation, dissolution or winding-up.[10] At a meeting duly called the shareholders will vote to sell the assets for shares and to dissolve the corporation. After the

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throughout the transaction. Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54. A sale of assets for shares is not a merger. Moy v. Colonial Finance Corp. (1925) 283 Pa. 323, 129 Atl. 115, 40 A. L. R. 271. A consolidation or merger is not a liquidation or dissolution entitling preferred shareholders to a preference in assets. Garrett v. Reid-Cashion Land & Cattle Co. (1928) 34 Ariz. 245, 270 Pac. 1044; Hale v. Cheshire Railroad (1894) 161 Mass. 443, 37 N. E. 307; Windhurst v. Central Leather Co. (1931) 101 N. J. Eq. 543, 138 Atl. 772, 105 N. J. Eq. 621, 149 Atl. 36, 153 Atl. 402; Note (1930) 30 Col. L. Rev. 732. But see Petry v. Harwood Electric Co. (1924) 280 Pa. 142, 124 Atl. 302. But a sale of assets for shares issued directly to the shareholders may resemble a merger. American Shipbuilding Co. v. Commonwealth S. S. Co. (C. C. A. 6th, 1914) 215 Fed. 304. Definitions of "liquidation" may be found in People of Colorado *ex rel.* Fraser v. Great Western Sugar Co. (C. C. A. 8th, 1928) 29 F. (2d) 810; Gilna v. Barker (1927) 78 Mont. 357, 254 Pac. 174. A distribution of assets to the shareholders upon a liquidation must conform to the requirements of a statutory dissolution. See Calkins v. Wire Hardware Co. (1929) 267 Mass. 52, 165 N. E. 889; Note (1929) 17 Calif. L. Rev. 557 and cases therein collected. The title to assets of a dissolved corporation is discussed in Stearns Coal & Lumber Co. v. Van Winkle (C. C. A. 6th, 1915) 221 Fed. 590, *cert. den.* 241 U. S. 670, 36 Sup. Ct. 654; Young v. Fitch (1918) 182 Ky. 29, 206 S. W. 29.

[9] A shareholder who has qualified as a dissenting shareholder under the statute may not, of course, object to the distribution made to others. But a failure to dissent from the sale does not preclude a shareholder from objecting to a distribution on liquidation. Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54; Gerber v. American Seeding Machine Co. (1931) 28 Ohio N. S. 19.

[10] Common and preferred shareholders share alike in the assets of a liquidating corporation if the preference is only as to dividends. Continental Insurance Co. v. United States (1922) 259 U. S. 156, 42 Sup. Ct. 540; Equitable Life Assurance Society v. Union Pacific R. Co. (1914) 212 N. Y. 360, 106 N. E. 92, L. R. A. 1915D 1052. In Simpson v. Palace Theatre Ltd. (1893) 69 L. T. R. 70, 2 Rep. 451, the preferred shares were not preferred as to assets. The company sold its assets for common and preferred shares and it was held that a common shareholder could not be limited on distribution to the new common shares, but was also entitled to his proportion of the new preferred shares.

transfer of assets and receipt of the consideration in shares the selling corporation will formally dissolve, and its board of directors will declare a liquidating dividend of all its assets payable in kind to shareholders of record as of the date of dissolution.[11] Assuming that the corporation can legally sell its assets for shares of another corporation,[12] the only remaining question is whether the corporation can declare and pay a liquidating dividend in kind rather than in cash.[13] There being

[11] The above procedure has been followed a number of times without question. In Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54, a corporation sold all of its assets for shares which were issued directly to consenting shareholders, the balance being retained for distribution to non-consenting shareholders who might thereafter exchange their shares. The court said, at page 59: "There is no way to compel the complainants to exchange their Gulf stock for Warrior stock. If the Gulf had received the Warrior stock as the consideration for its assets and could then upon dissolution have distributed it in kind, of course the complainants in the absence of any countervailing circumstances could have been forced to submit to becoming Warrior stockholders or lose all their rights."

[12] This power, which has been specifically granted by a number of state statutes, must not be confused with the power to distribute the shares or securities received among the shareholders. In Geddes v. Anaconda Mining Co. (1921) 254 U. S. 509, 41 Sup. Ct. 209, a sale of assets by a failing corporation for marketable shares of another corporation was upheld. The power to purchase or hold shares of another corporation empowers a corporation to sell its assets for shares. Germer v. Triple-State Natural Gas & Oil Co. (1906) 60 W. Va. 143, 54 S. E. 509. But it was held in Farmers' Loan & Trust Co. v. Toledo & South Haven R. Co. (C. C. A. 6th, 1893) 54 Fed. 759 that a sale is binding on dissenting shareholders if made for cash, but not binding if made for shares. Likewise in Murrin v. Archbald Consolidated Coal Co. (1921) 196 App. Div. 107, 187 N. Y. Supp. 606, *aff'd*, 232 N. Y. 541, 134 N. E. 563, the court said, "In such cases where the rights of the nonconsenting shareholders are not protected, the right of sale given upon the consent of a percentage of the owners of the stock means the right of sale for cash" but that if statutory provision exists for the payment of dissenting shareholders it would seem immaterial whether the sale be for cash or for shares. But see Holmes & Griggs Manufacturing Co. v. Holmes & Wessel Metal Co. (1891) 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448.

[13] Unless prohibited by statute or by the articles, dividends may be paid in stock of other corporations. Smith v. Cotting (1918) 231 Mass. 42, 120 N. E. 177; Williams v. Western Union Telegraph Co. (1883) 93 N. Y. 162; Equitable Life Assurance Society v. Union Pacific R. Co. (1914) 162 App. Div. 81, 147 N. Y. Supp. 382, *aff'd*, 212 N. Y. 360, 106 N. E. 92, L. R. A. 1915D 1052; Liebman v. Auto Strop Co. (1926) 241 N. Y. 427, 150 N. E. 505. *Contra*: James v. Beaver Consolidated Mines Ltd. [1927] 3 D. L. R. 163. See also Peabody v. Eisner (1918) 247 U. S. 347, 38 Sup. Ct. 546; United States v. Phellis (1921) 257 U. S. 156, 42 Sup. Ct. 63; Continental Insurance Co. v. United States (1921) 259 U. S. 156, 42 Sup. Ct. 540; Venner v. Southern Pacific Co. (C. C. A. 2d, 1922) 279 Fed. 832. The stock need not be sold for cash, but may be distributed in kind. Leland v. Hayden (1869) 102 Mass. 542; Continental Securities Co. v. Northern Securities Co. (1904) 66 N. J. Eq. 274, 57 Atl. 876. There is apparently a distinction between dividends from surplus and liquidating dividends, as it has been generally held that shareholders have the right upon a dissolution and liquidation to require that the assets distributable be converted into money. Mason v. Pewabic Mining Co. (1890) 133 U. S. 50, 10 Sup. Ct. 224; Stewart v. Pierce (1902) 116 Iowa 733, 89 N. W. 234; Young v. Fitch (1918) 182 Ky. 29, 206 S. W. 29. But see Geddes v. Anaconda Mining Co. (1921)

no preference as to assets upon a final distribution, the shareholders' rights to object are reduced to a minimum. But if such preferences do exist additional difficulties must be met. Shareholders can object to a proposed plan of distribution, or to a sale of assets under an agreement which contains a plan of distribution or exchange, on the grounds that the plan does not comply with the requirements of the articles, that it gives them shares or other securities instead of cash, and that it does not give them marketable securities of a sound value equivalent to the cash distribution to which they would otherwise be entitled.

Corporation lawyers have long recognized the inadequacy of the present statutes to cope with the problem of distribution, and have devised a number of schemes to bridge the gap. Most of these are of doubtful validity but of sufficient strength to ward off the attacks of all but the most obstreperous shareholders. These schemes may be divided into three general classes:

A. The first and most difficult class is made up of reorganizations accomplished without a prior deposit of shares, and in which all of the shares of the purchasing corporation payable for the assets of the selling corporation are issued directly to the selling corporation upon the transfer. Assume, for example, that a corporation having common and preferred shares sells its assets as an entirety and receives in exchange therefor an equal number of common and preferred shares of the purchasing corporation which are to be distributed by the selling corporation to its common and preferred shareholders, respectively, share for share. In anticipation of the usual problems of distribution the shareholders of the selling corporation will, at the time they authorize the sale of assets or possibly at a later date, take one or more steps amending the articles of the selling corporation. The first step is to reduce its stated capital to a nominal amount, thereby permitting it to acquire its own shares and to make distribution out of its original capital. The next step is to declare a liquidating dividend of all of its assets, being shares of the purchasing corporation, or to offer to purchase its own shares and pay therefor in shares of the purchasing corporation. To support this latter step and give the proposed distribu-

254 U. S. 590, 41 Sup. Ct. 209; Cullinan v. Walker (1923) 262 U. S. 134, 43 Sup. Ct. 495; Robinson v. Pittsburgh Oil Refining Corp. (1924) 14 Del. Ch. 193, 126 Atl. 46; Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54. A corporation in liquidation cannot use its funds to purchase securities for distribution against the objection of a dissenting shareholder. Ferry v. Latrobe Steel Co. (C. C. E. D. Pa. 1907) 155 Fed. 161. No shareholder has a right to any particular asset upon liquidation. Clow v. Redman (1899) 6 Idaho 568, 57 Pac. 437; Hoag v. Edwards (1910) 69 Misc. 237, 124 N. Y. Supp. 1035. In general see Bank of Morgan v. Reid (1921) 27 Ga. App. 123, 107 S. E. 555; Anderson v. Burgess (1924) 110 Ore. 265, 223 Pac. 244.

tion a semblance of legality and strength the corporation may then take one or more of the following steps:

1. Amend the articles of the selling corporation to empower it to sell its assets to the purchasing corporation for shares and to distribute such shares in accordance with and upon the basis of a plan of distribution set forth in the agreement of sale.

2. Amend the articles to reduce the redemption price of the preferred shares of the selling corporation to an amount less than the market value of the shares of the purchasing corporation issuable in exchange therefor. Similar action may be taken with respect to the dissolution or liquidation price of the preferred shares.

3. Amend the provision of the preferred shares of the selling corporation to the effect that they may be redeemed by the payment of a price in cash, and provide that they may be redeemed by the issuance of a fixed number and class of shares of the purchasing corporation.

4. Amend the articles of the selling corporation to provide that upon a dissolution, liquidation or winding-up of the corporation the shareholders, common and preferred, shall be entitled to receive shares of the purchasing corporation upon the basis set forth in the plan of distribution in lieu of the cash to which they would be entitled otherwise.

5. The selling corporation may from time to time reduce the number of its outstanding shares of common and preferred stock proportionately so that at all times the ratio of the values of the remaining outstanding shares will be the same. In determining the value of the outstanding shares the preferred shares are taken at their dissolution value, and the common shares are taken at their book value.

6. The purchasing corporation, at the same time it accepts the assets of the selling corporation in consideration of issuing shares directly to it, will sometimes make an additional offer to the shareholders of the selling corporation to exchange its shares for their shares. This involves a double issue by the purchasing corporation; one full issue to acquire the assets and another full issue to acquire the shares of the selling corporation. After all or substantially all of the shares of the selling corporation have been delivered to the purchasing corporation in exchange the purchasing corporation will own all or substantially all of the outstanding shares of the selling corporation. The selling corporation will still own the shares of the purchasing corporation originally issued to it for its assets. The two corporations may then exchange their shares upon the same basis of exchange. Upon the completion of such exchanges the double issue is retired by the purchasing corporation.

B. Frequently the shareholders of the selling corporation are called upon to deposit their shares under a plan or agreement of reorganization by the terms of which a committee may declare the plan operative when sufficient deposits have been made. If this is done a large percentage of the shares of the selling corporation have been placed under control and the problem of distribution is limited to the undeposited shares. Standard devices have also been improvised to meet this situation.

1. The purchasing corporation may purchase the assets of the selling corporation for an amount in cash equal to the book value of the unexchanged common shares and the redemption value of the unexchanged preferred shares. It then issues its own shares directly to the depositing shareholders in accordance with the plan of distribution upon the surrender of their certificates of deposit. This procedure is too expensive if a large number of shares are outstanding, or if the redemption value of the preferred shares is materially higher than the market value of the shares of the purchasing corporation issuable therefor.

2. A second method is similar to the first except that sufficient shares of the purchasing corporation are issued to the selling corporation in lieu of cash to make all exchanges with non-depositing shareholders. Shares of the purchasing corporation are also issued directly to depositing shareholders. The selling corporation then has a problem of distribution which may be approached as outlined in *A* above.

3. A third method is again similar to the first except that the selling corporation transfers its assets to the purchasing corporation for a nominal amount in cash, plus an agreement on the part of the purchasing corporation to issue its shares directly to shareholders of the selling corporation who may thereafter request exchange, or to pay to the selling corporation an amount in cash sufficient to redeem or pay off shares upon which redemption or payment may be demanded. Shares of the purchasing corporation are also issued directly to depositing shareholders.

C. The third sort of reorganization by a sale of assets is the simplest. In this class all of the shareholders of the selling corporation authorize the sale and voluntarily agree to exchange their shares. The selling corporation has no problem of distribution and is free to direct the purchasing corporation to issue its shares directly to the shareholders of the selling corporation. Even in the state of New Jersey which has not given its corporations the statutory power to sell their assets as an entirety this method has been accepted as practically safe, although there are certain legal objections.[14]

An amendment to the statute law governing the sale of assets as an entirety is suggested as a substitute for these circuitous and doubtful

[14] The New Jersey law has been amended permitting the sale of the entire assets by two-thirds vote of the stockholders, N. J. Laws (1931) c. 288.

devices to accomplish a consolidation. First, the shareholders shall be given the optional right to adopt a plan of distribution at the time they authorize a sale of assets. The consideration received upon the sale may then be distributed among the shareholders upon the terms and conditions and in the manner set forth in the plan. Second, the shareholders shall have the right to dissent from any such plan of sale and distribution, with the requirement that if they vote in favor of the plan or do not dissent therefrom within the time limit they shall be deemed to have waived their contractual rights under the articles to cash upon a distribution of assets and to have agreed to accept the shares, securities or other consideration distributable to them under the plan. This procedure would permit a corporation and its shareholders to approve a sale of assets and distribution of shares as a means of reorganization without destroying or changing their present right to use a sale for any other purpose such as liquidation.

A sale of assets accompanied by a binding plan of distribution would permit a reorganization across state lines without conflict of state authority, thereby giving a sale the benefits of a consolidation without its jurisdictional limitations. It is to be noted that the procedure above recommended does not deprive shareholders of any right which they may have to object to a sale of assets or to a plan of distribution on the grounds of illegality, lack of corporate capacity, irregularity of procedure, fraud or misrepresentation or inadequacy of consideration amounting to fraud. The right to enjoin a sale of assets, consolidation or other corporate transaction on such grounds has always existed and need not be taken away.[15]

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[15] In Allied Chemical & Dye Corp. v. Steel & Tube Co. (1923) 14 Del. Ch. 1, 120 Atl. 486, it was held that the court may, in spite of the statute (a) enjoin a sale if any fundamental principles of equity have been violated, (b) if the terms of the sale are not fair, and (c) if the consideration to be received is not adequate. The price to be paid, the manner of payment, the terms of credit, if any, and such like questions, must all meet the test of the corporation's best interests. Eagleson v. Pacific Timber Co. (D. C. Del. 1920) 270 Fed. 1008; American Seating Co. v. Bullard (C. C. A. 6th, 1923) 290 Fed. 896; Barry v. Interstate Refineries, Inc. (D. C. W. D. Mo. 1926) 13 F. (2d) 249; McRoberts v. Independence Coal & Coke Co. (C. C. A. 8th, 1926) 15 F. (2d) 157; Garrett v. Reid-Cashion Land & Cattle Co. (1928) 34 Ariz. 245, 270 Pac. 1044; Brown County Bank v. Freie Presse Printing Co. (1928) 174 Minn. 143, 218 N. W. 557; Colgate v. United States Leather Co. (1907) 73 N. J. Eq. 72, 67 Atl. 657; People v. Ballard (1892) 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; Langan v. Francklyn (1892) 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404; Matter of MacDonald (1923) 205 App. Div. 579, 199 N. Y. Supp. 873. For jurisdictional matters see Wallace v. Motor Products Corp. (C. C. A. 6th, 1928) 25 F. (2d) 655. The majority shareholders occupy a fiduciary capacity with respect to the minority upon a sale of assets. Southern Pacific Co. v. Bogert (1919) 250 U. S. 483, 39 Sup. Ct. 533; Stebbins v. Michigan Wheelbarrow & Truck Co. (C. C. A. 6th, 1914) 212 Fed. 19; Bisbee v. Midland Linseed Products Co. (C. C. A.

The right of dissenters to recover the value of their shares should be limited to the right given them by the compensation statute.[16] It has been held in some cases that the existence of a statute providing for an appraisal of dissenting shares does not preclude dissenters from getting compensation in equity,[17] but it has been held on the other hand that such statutes, in the absence of illegality or fraud, give the shareholders a full, complete and adequate remedy.[18] The aggregate cash amount payable to all dissenters is an important factor in all reorganizations and should be established without delay. Furthermore, a right of

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8th, 1927) 19 F. (2d) 24, *cert. den.* 275 U. S. 564, 48 Sup. Ct. 121; Nave-McCord Mercantile Co. v. Ranney (C. C. A. 8th, 1928) 29 F. (2d) 383; Allied Chemical & Dye Corp. v. Steel & Tube Co., *supra.*

A sale is not void merely because the two corporations have common directors. Hellier v. Bausch Machine Tool Co. (C. C. A. 1st, 1927) 21 F. (2d) 705; Buck Co. v. Tuxedo Land Co. (1930) 63 Cal. App. Dec. 902, 293 Pac. 122. The directors are presumed to act *bona fide.* Robinson v. Pittsburgh Oil Refining Corp. (1924) 14 Del. Ch. 193, 126 Atl. 46. Inadequacy of price does not of itself amount to fraud. Allaun v. Consolidated Oil Co. (Del. Ch. 1929) 147 Atl. 257; Koehler v. St. Mary's Brewing Co. (1910) 228 Pa. 648, 77 Atl. 1016. In Wall v. Anaconda Copper Mining Co. (D. C. Mont. 1914) 216 Fed. 242, *aff'd sub nomine,* Wall v. Parrot Silver & Copper Co. (1917) 244 U. S. 407, 37 Sup. Ct. 609, the district court said that "motive, vendee, price, consideration are all immaterial, provided the transaction be free from fraud."

The effect of laches in objecting to a sale of assets is discussed in Nave-McCord Mercantile Co. v. Ranney (C. C. A. 8th, 1928) 29 F. (2d) 383; Young v. Southern Pacific Co. (C. C. A. 2d, 1929) 34 F. (2d) 135, *cert. den.* 280 U. S. 597, 50 Sup. Ct. 68; Finch v. Warrior Cement Corp. (Del. Ch. 1928) 141 Atl. 54; Streuber's Appeal (1910) 229 Pa. 184, 78 Atl. 106; Narragansett Electric Lighting Co. v. Sabre (1930) 50 R. I. 288, 146 Atl. 777, 150 Atl. 756, 70 A. L. R. 46; see also Southern Pacific Co. v. Bogert (1919) 250 U. S. 483, 39 Sup. Ct. 533; Kaifer v. Ohio Leather Co. (1930) 122 Ohio St. 476, 172 N. E. 280; Note (1931) 70 A. L. R. 53.

[16] Some states, such as Delaware, do not make provision for compensation of dissenting shareholders on a sale of assets, but do permit the appraisal of dissenting shares upon a consolidation or merger. This difference seems indefensible after it is recognized that a sale of assets is commonly used as a means of voluntary reorganization.

[17] General Investment Co. v. Lake Shore & Michigan Southern Ry. Co. (C. C. A. 6th, 1918) 250 Fed. 160; Cole v. Wells (1916) 244 Mass. 504, 113 N. E. 189; Colgate v. United States Leather Co. (1907) 73 N. J. Eq. 72, 67 Atl. 657; Langan v. Francklyn (1892) 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404; Barnett v. Philadelphia Market Co. (1907) 218 Pa. 649, 67 Atl. 912; Jones v. Rhea (1921) 130 Va. 345, 107 S. E. 814.

[18] *In re* Interborough Consolidated Corp. (D. C. S. D. N. Y. 1921) 277 Fed. 455; Willson v. Waltham Watch Co. (D. C. D. Mass. 1923) 293 Fed. 811; Homer v. Crown Cork & Seal Co. (1928) 155 Md. 66, 141 Atl. 425; Dodd, *Amendment of Corporate Articles Under the New Ohio General Corporation Act* (1930) 4 Cin. L. Rev. 129, 149.

A demand for appraisal is an election to waive any claim of illegality. Wall v. Parrott Silver & Copper Co. (1917) 244 U. S. 407, 37 Sup. Ct. 609. A shareholder may waive illegality and demand an appraisal. *In re* Drosnes (1919) 187 App. Div. 425, 175 N. Y. Supp. 628. A demand for appraisal, without knowledge of fraud, may be abandoned. Cole v. Wells (1916) 244 Mass. 504, 113 N. E. 189.

appraisal should preclude shareholders from objecting to a sale of assets on the grounds of unfairness or inadequacy of value not amounting to fraud, and from objecting on a distribution to the kind of consideration received. It is not unreasonable to limit shareholders to a choice between shares, securities or other consideration distributable and the appraised cash value of their shares.[19]

The constitutionality of a statute making a plan of distribution binding upon non-dissenting shareholders seems to be fairly well assured, especially if dissenting shareholders are given the right to compensation for their shares at an appraised value. The best available analogy is that of a consolidation pursuant to which shareholders who do not dissent are deprived of their rights as shareholders of the constituent corporation and are given the sole right to exchange their shares and become shareholders of the consolidated corporation. If a consolidation is constitutional it should follow that a sale of assets accompanied by a binding plan of distribution is also constitutional. The following propositions seem to summarize the principles of law applicable to this question:

1. Corporations organized after the enactment of a corporation statute, and perhaps even shareholders who become such thereafter in prior corporations, are in all respects bound by the terms and provisions thereof. All statutes affecting corporations are as a matter of law a part of the corporation's contract with the state and a part of the shareholder's contract with the corporation and *inter sese*.[20]

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[19] It has been contended by many that dissenting shareholders should not have a right of appraisal but that they should be precluded from objecting to a fair reorganization. The English Companies Act 1929 §§153-155, 234 [See PALMER, COMPANY LAW (13th ed.) 459-465]; the Business Corporation Act of Louisiana, LA. ANN. STAT. 1928 §63, act 250, and the General Corporation Law of Delaware, DEL. REV. CODE c. 65 §5. as amended in 1929, permit the adoption of a plan or reorganization and distribution under court authority which is binding on dissenting shareholders and creditors. These acts provide that a compromise arrangement or plan of reorganization, adopted by a majority or other percentage of the shareholders or creditors, shall, if sanctioned by the court, be binding on all shareholders or creditors, respectively, and on the corporation. Irrespective of statute it has been held that a court of equity may, even without a judicial sale, impose upon creditors and shareholders a reorganization plan found by the court to be equitable, and enjoin them from attacking it. Phipps v. Chicago Rock Island & Pacific Ry. Co. (C. C. A. 8th, 1922) 284 Fed. 945; Chicago Rock Island & Pacific Ry. Co. v. Lincoln Horse & Mule Commission Co. (C. C. A. 8th, 1922) 284 Fed. 955. But see Harding v. American Sumatra Tobacco Co. (D. C. N. D. Ga. 1926) 14 F. (2d) 168. These cases have been supported by Rosenberg, *Reorganization—The Next Step* (1922) 22 COL. L. REV. 14, and criticized by Swaine, *Reorganization of Corporations: Certain Developments of the Last Decade* (1927) 27 COL. L. REV. 901.

[20] Shareholders of a corporation organized subsequent to the enactment of a statute permitting the corporation to sell its assets hold their shares under the condition that at any time all of the assets of the corporation may be sold in the manner provided in the statute. Farmers' Loan & Trust Co. v. Toledo South Haven R. Co.

2. A statute in existence at the time of incorporation which authorizes corporations to consolidate or to sell all their assets upon a majority vote of the shareholders, and which does not make provision for compensating dissenting shareholders, is binding upon all shareholders. Under such a statute dissenters have no legal right to object to a consolidation or sale, or to compel a purchase of their shares.[21]

3. A constitutional or legislative reservation of the power to alter, amend or repeal acts affecting corporations is a part of the corpora-

(C. C. A. 6th, 1893) 54 Fed. 759; Allied Chemical & Dye Corp. v. Steel & Tube Co. (1923) 14 Del. Ch. 1, 120 Atl. 486; Churchill v. Frontier Mortgage Corp. (1927) 219 App. Div. 643, 220 N. Y. Supp. 685. The same rule is applicable to consolidations. *In re* Interborough v. Consolidated Corp. (D. C. S. D. N. Y. 1921) 277 Fed. 455; Market Street Ry. Co. v. Hellman (1895) 109 Cal. 571, 42 Pac. 225; Mayfield v. Alton Ry. Gas & Electric Co. (1902) 198 Ill. 528, 65 N. E. 100; Colby v. Equitable Trust Co. (1908) 124 App. Div. 262, 108 N. Y. Supp. 978, *aff'd*, 192 N. Y. 535, 84 N. E. 1111; Winfree v. Riverside Cotton Mills (1912) 113 Va. 717, 75 S. E. 309.

A shareholder may not complain of a consolidation, if he acquired his shares after the legislature has conferred upon the corporation the right of consolidation under the reserved power to amend, even though no provision for consolidation existed under the law at the time the corporation was organized. Kirby v. Saginaw Hotels Co. (Mich. 1931) 235 N. W. 153; 14a C. J. 1060; Note (1901) 52 L. R. A. 369, 384; 7 R. C. L. 167.

The statute has the effect of a private contract between the shareholders. The shareholders may, of course, agree among themselves on the disposition and transfer of the assets of a dissolved corporation. Pewabic Mining Co. v. Mason (1892) 145 U. S. 349, 12 Sup. Ct. 887; Proctor v. Keith & Proctor Amusement Co. (1912) 109 Me. 147, 83 Atl. 449; People *ex rel.* Recess Exporting & Importing Corp. v. Hugo (1920) 191 App. Div. 628, 182 N. Y. Supp. 9; Drewry, Hughes Co. v. Throckmorton (1917) 120 Va. 859, 92 S. E. 818. But the majority may not change the minority right to an equal distribution. Craycraft v. National Building & Loan Ass'n. (1904) 117 Ky. 229, 77 S. W. 923.

[21] Nugent v. The Supervisors (1874) 86 U. S. (19 Wall.) 241 (consolidation); Farmers' Loan & Trust Co. v. Toledo & South Haven R. Co. (C. C. A. 6th, 1893) 54 Fed. 759 (sale of assets); Jones v. Missouri-Edison Electric Co. (C.C.E.D.Mo. 1905) 135 Fed. 153 (consolidation of utilities; the corporation was organized before the consolidation act was passed, but the plaintiff purchased his shares after its enactment); Mayfield v. Alton Ry. Gas & Electric Co. (1902) 198 Ill. 528, 65 N. E. 100 (consolidation); Germer v. Triple-State Natural Gas & Oil Co. (1906) 60 W. Va. 143, 54 S. E. 509 (sale of assets). This principle has been applied to a consolidation authorized under the reserved power. Hale v. Cheshire Railroad (1894) 161 Mass. 443, 37 N. E. 307.

In Canada Southern Ry. Co. v. Gebhard (1883) 109 U. S. 527, 3 Sup. Ct. 363, a plan of reorganization, which changed the contract rights of bondholders and required them to accept other securities in place of their bonds, was authorized by Act of the Parliament of the Dominion of Canada. In holding that bondholders of the United States were subject to the act the Court said, "It is not in conflict with the constitution of the United States, which, although prohibiting states from passing laws impairing the obligation of contracts, allows congress 'to establish * * * uniform laws on the subject of Bankruptcy throughout the United States.'" See also Gates v. Boston & New York Air Line R. Co. (1885) 53 Conn. 333, 5 Atl. 695; Narragansett Electric Lighting Co. v. Sabre (1930) 50 R. I. 288, 146 Atl. 777, 150 Atl. 756, 70 A. L. R. 46.

tion's contract with the state and a part of the shareholder's contract with the corporation.[22] Under such reservation the legislature may make any amendments it desires to the corporation law in any way affecting the rights of the corporation and the rights of the shareholders, provided such amendments do not impair the obligation of a contract, deprive the shareholders of their property without due process of law or violate other constitutional guarantees.

4. A statute passed under the reserved power permitting the consolidation of corporations upon the vote of a majority of shareholders and against the objection of a minority, with provision for paying dissenting shareholders the appraised value of their shares in cash, is constitutional and does not impair the obligation of a contract or deprive the shareholders of their property without due process of law.[23]

5. A statute passed under the reserved power authorizing corporations to sell their assets as an entirety upon the vote of a majority of shareholders and against the dissenting vote of a minority, with provision for paying dissenting shareholders the appraised value of their shares in cash, is constitutional and does not impair the obligation of

[22] See cases cited in notes 21 and 23. For a contrary view see the interesting dissenting opinion in Germer v. Triple-State Natural Gas & Electric Co. (1906) 60 W. Va. 143, 154, 54 S. E. 509, 514. There are a number of decisions, however, to the effect that the reserved power does not authorize radical and fundamental changes in the articles and in the relationship of shareholders to the corporation. Hollender v. Rochester Food Products Corp. (1926) 242 N. Y. 490, 152 N. E. 271. No attempt is made here to distinguish between amendments made by the legislature under the reserved power, and amendments made by the majority shareholders under statutes in existence at the time of incorporation. See Dodd, *Amendment of Corporate Articles Under the New Ohio Corporation Act* (1930) 4 CIN. L. REV. 129, 150; Dodd, *Dissenting Stockholders and Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 585, 723.

[23] Jones v. Missouri-Edison Electric Co. (C. C. E. D. Mo. 1905) 135 Fed. 153 (consolidation of utilities, without provision for dissenting shareholders); Market Street Ry. Co. v. Hellman (1895) 109 Cal. 571, 42 Pac. 225 (consolidation of street railways); Bishop v. Brainerd (1859) 28 Conn. 289 (consolidation of railroads); Hale v. Cheshire Railroad (1894) 161 Mass. 443, 37 N. E. 307 (consolidation of railroads, without provision for appraisal); Colby v. Equitable Trust Co. (1908) 124 App. Div. 262, 108 N. Y. Supp. 978, *aff'd*, 192 N. Y. 535, 84 N. E. 1111 (consolidation of trust companies); Winfree v. Riverside Cotton Mills (1912) 113 Va. 717, 73 S. E. 309 (consolidation of manufacturing companies). Unless the legislature has reserved its right, a statute enacted after incorporation is not binding on dissenting shareholders. Clearwater v. Meredith (1863) 68 U. S. (1 Wall.) 25. In Bingham v. Savings Investment & Trust Co. (1928) 101 N. J. Eq. 413, 138 Atl. 659, 140 Atl. 321, the court said, "With the compensation provision present, there can be no longer any question as to the power of the state under the reserve power to repeal, alter, or amend the charter of any corporation in any respect, if the change be in the public interest."

a contract or deprive the shareholders of their property without due process of law.[24]

6. A statute which gives dissenting shareholders the right to receive in cash the appraised value of their shares upon a consolidation or sale of assets is constitutional.[25]

7. A statute which provides that shareholders who do not dissent from a plan of distribution within a fixed reasonable time are bound thereby and obligated to take the shares or other security distributable to them under such plan is constitutional and does not impair the obligation of a contract or deprive the shareholders of their property without due process of law.[26]

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[24] In Allen v. Ajax Mining Co. (1904) 30 Mont. 490, 77 Pac. 47, the court declared constitutional an act passed under the reserved power authorizing corporations to sell their assets as an entirety upon a two-thirds vote of shareholders, with provision for appraisal of dissenting shares. The Montana statute was followed, and described as "of a seemingly equitable character" in Wall v. Parrot Silver & Copper Co. (1917) 244 U. S. 407, 37 Sup. Ct. 609. A similar case, in which there was no provision for dissenting shareholders, is Germer v. Triple-State Natural Gas & Oil Co. (1906) 60 W. Va. 143, 54 S. E. 509. In Gerber v. American Seeding Machine Co. (1931) 28 Ohio N. S. 19, the Ohio law permitting corporations to sell their assets was declared constitutional, but the court held that it would be an impairment of contract to require dissenting shareholders to accept new stock in lieu of their preferential rights.

[25] Logan v. New Amsterdam Gas Company (1915) 172 App. Div. 898, 156 N. Y. Supp. 1131, *aff'd*, 224 N. Y. 664, 121 N. E. 876.

A Rhode Island statute permitting one utility to acquire the assets of another and providing for the condemnation of the shares of the dissenting shareholders of the selling utility has been held constitutional. Narragansett Electric Lighting Co. v. Sabre (1930) 50 R. I. 288, 146 Atl. 777, 150 Atl. 756, 70 A. L. R. 46. See also Spencer v. Seaboard Air Line R. Co. (1904) 137 N. C. 107, 49 S. E. 96.

[26] In Gilfillan v. Union Canal Co. (1883) 109 U. S. 401, 3 Sup. Ct. 304, a Pennsylvania statute forcing bondholders to accept new securities or nothing upon their failure expressly to dissent from a proposed plan of reorganization within a given time was upheld as constitutional. The Court said, "No majority, however large, can compel a minority, small though it be, to enter into such the [an] agreement against their will; and, under the constitution of the United States, it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent, would be valid. But it seems to us a proper exercise of legislative power to require a minority to act whenever such an arrangement is proposed, and to provide that all shall be bound who do not in some direct way, within a reasonable time after notice, signify their refusal to concur. To sustain such legislation it is only necessary to invoke the principle enforced in statutes of limitations, which makes neglect to sue within a specified time conclusive evidence of the abandonment of the cause of action." See also Union Canal Co. v. Gilfillan (1880) 93 Pa. 95; Van Alstyne v. Houston & Texas Central Ry. Co. (1882) 56 Tex. 373.

In Cowell v. City Water Supply Co. (1906) 130 Iowa 671, 105 N. W. 1016, 108 N. W. 116, a bondholder's protective agreement provided that upon the failure of a majority of the depositors to dissent after receiving notice of the proposed plan of reorganization, all of the depositors, dissenters as well as assenters, were bound thereby. The plaintiff depositors were held to the agreement and the plan of reorganization, as a majority did not dissent.

8. A statute passed under the reserved power authorizing corporations to sell their assets upon the vote of a majority of shareholders and against the vote of a minority, with provision for paying dissenting shareholders the appraised value of their shares in cash, and permitting a distribution of the consideration received by a like vote which shall be binding upon all non-dissenting shareholders would, on the basis of the above, appear to be constitutional.

In conclusion it may be said that no shareholder should be required to give up his shares and enter upon a new venture as a shareholder of another corporation, whether the transformation be by a consolidation, merger or sale of assets. The form of reorganization is immaterial; it is the result alone that counts. At the same time no minority shareholder should have the right to block a reorganization which is approved by a majority or by two-thirds of the shareholders. As a safeguard a shareholder is entitled to dissent from a reorganization which will require him to accept new shares or securities and to get in cash the fair value of his shares. Dissenting shareholders should be given a reasonable opportnnity to take a position for or against a proposed reorganization, and if they do not affirmatively object they should be bound by the will of the majority. Upon a consolidation or merger shareholders have but one opportunity to express their objection. That opportunity comes to them at the meeting of shareholders called to approve the consolidation or merger. Upon a sale of assets, however, shareholders have two opportunities; one at the time the sale is approved and the other at the time the proceeds are distribnted. When it is recognized that a sale of assets is a convenient and useful method of reorganization, statutes should provide that the entire transaction may be authorized and dealt with in a way similar to a consolidation or merger.

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A shareholder's or creditor's deposit agreement is a binding contract, and the depositors cannot withdraw. Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co. Inc. (C. C. A. 2d, 1924) 296 Fed. 875, 43 A. L. R. 1035, *cert. den.* 265 U. S. 587, 44 Sup. Ct. 633. The agreement provided that "depositors who fail to withdraw in the manner aforesaid within said period of 30 days, shall be conclusively and finally deemed for all purposes to have irrevocably waived the right of withdrawal."