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Corporations: Dissolution of Solvent Corporation at Suit of Minority Stockholder

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prise move, contend that it was never really involved in the action. Said the court in the principal case:

> "The respondent now for the first time drags from the closet the bare bone skeleton of an elaborate corporate structure to show to the court that not the respondent but another wholly-owned subsidiary of the corporation, of which the respondent is also a wholly-owned subsidiary, operates the Palace Theatre, notwithstanding common control of the entire corporate pyramid through stock ownership and interlocking officers and directorates. The contention that under such circumstances the right hand does not know what the left hand is doing is a bit specious. The District Court, which was thoroughly familiar with the respondent's appearance in the other proceedings, very properly looked past this ghost-like corporate figure and, viewing the matter realistically, recognized that after all one and the same group was in control and operation of the Palace Theatre.
> The respondent was the old familiar face the court had in mind when it drafted its decree in which it intended to cover the respondent as an operator of the Palace Theatre. Just as the court believed when it entered its decree, 'It would be to subordinate reality to legal form' to hold that the respondent did not operate the Palace Theatre."

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Corporations — Dissolution of Solvent Corporation at Suit of Minority Stockholder — In an action by the personal representative of S. Pemberton Penn against Pemberton & Penn, Inc., it was alleged that the purpose for which the corporation was formed had failed, and the prayer for relief demanded that the corporation be dissolved and its assets distributed under court supervision. Pemberton & Penn had been a closed corporation since 1917. The corporation bought tobacco to be resold to Japan and in Europe. Due to the war both these markets were closed. The corporation sold its priorities to other tobacco buyers during the war, and showed a considerable profit for the duration. In 1945 and 1946, due to the uncertainty of the market, the board of directors did not actively engage in buying and selling. This action was started in 1947. *Held*: the action was dismissed. The question of whether a solvent corporation should be dissolved and its assets distributed is within the sound discretion of the directors, and a court will not intervene in absence of proof of bad faith or fraud on the part of the directors in continuing corporate existence. *Penn. v. Pemberton & Penn. Inc., 53 S.E. (2d) 823 (Va., 1949).*

Little more than a hundred years ago a court of equity intervened for the first time in corporate management at the suit of a minority stockholder.[1] It was not until half a century later that a court deter-

[1] Hichens v. Congreve, 4 Russ. 562 (Ch. 1828); 1 Russ. & Mylne 150 (Ch. 1828).

mined it had the power to wind up a corporation at the suit of such a stockholder.[2] The first power is now acknowledged everywhere; the second is still the subject of a sharp division of authority.[3]

Until fifty years ago the uniformly accepted principle was that in the absence of statute a court has no power to decree the winding up of a corporation at the suit of a minority stockholder. Many writers still declare this to be the law and describe a few contrary cases as exceptions.[4] Their conclusion is both illogical and misleading.

There has been development in the law and the doctrine that equity has power and will exercise it in appropriate cases is supported by an overwhelming weight of carefully reasoned authority.[5]

It appears to be generally accepted that a court of equity has inherent jurisdiction, at the instance of stockholders in a proper case, to appoint a receiver for a solvent corporation on the ground of fraud, gross mismanagement, or dissension among stockholders, directors or officers, if there is no other adequate remedy.[6]

Minority stockholder dissatisfaction with corporate management is not of itself sufficient to warrant appointment of a receiver. Courts state they will not undertake to control corporate policy or business methods although wiser policies might be adopted and more efficient business methods pursued. A majority of the directors must be permitted to control corporate business through lawful methods and pursuant to the corporate contract.[7]

A minority of stockholders cannot dictate corporate policy and no interference with management in their behalf, through appointment of a receiver, can be justified unless such interference is absolutely necessary to the attainment of justice.[8]

In *Goodwin v. Von Cotzhausen,* the leading authority in Wisconsin that a corporation can be dissolved at the suit of a minority stockholder, it was said:

> "The trend of modern decisions is in recognition of this growing distinction between the present and the original corporation, and there is now a respectable array of judicial authority to the

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[2] Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N.W. 218 (1892).

[3] Hornstein, *"A Remedy for Corporate Abuse,"* 40 COL. L. REV. 220 citing Hichens v. Congreve, 4 Russ. 562 (Ch. 1828); 1 Russ. & Mylne 150 (Ch., 1828); Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N.W. 218 (1892); Hawes v. Oakand, 104 U.S. 450, 453 460 (1882).

[4] *Ibid.,* 3 COOK, CORPORATIONS § 2293 (8th ed. 1923); 16 FLETCHER, CYCLOPEDIA CORPORATIONS § 8080, 8098 (1933); 4 POMEROY, EQUITY JURISPRUDENCE 1540 (4th ed. 1919); 8 THOMPSON, CORPORATIONS 6465 (3rd ed. 1927).

[5] *Supra,* note 1.

[6] 43 A.L.R. 246. In general, the cases here cited involve solvent going corporations, or at least their support of the rule indicated is not dependent on a contrary condition. 61 A.L.R. 1212; 91 A.L.R. 665.

[7] Wheeler v. Pulman Iron & Steel Co., 143 Ill. 197, 32 N.E. 420 (1892).

[8] Peatman v. Centerville Light Heat & P. Co., 100 Iowa 245, 69 N.W. 541 (1896); Gesell v. Tomahawk Land Co., 184 Wis. 537, 200 N.W. 550 (1924).

> proposition that where a corporation has been plundered by its officers, or they have so mismanged its affairs as to bring it to the verge of bankruptcy, threatening the minority stockholders with loss of their investment, and it seems certain that the purposes for which the corporation was organized are no longer attainable, and there is no other adequate remedy, a court of equity in the exercise of its inherent power will appoint a receiver for the corporation, wind up its affairs, distribute its assets, and decree a dissolution thereof at the suit of a minority stockholder."[9]

In this Wisconsin case the corporation was engaged in lithographing. From 1903 to 1912 it showed an increasing profit and was a very lucrative business. In 1913 the defendant who was majority stockholder took over as president and general manager. Immediately there was a tremendous decrease in profits, and in 1914, 1915 and 1916 losses were incurred. This was due to the president's antagonism to agents, incompetence, gross mismanagement, and fraudulent appropriation of the property to his personal use. The referee found he had appropriated approximately $60,000 for himself. The Court held that the accomplishment of the object for which the corporation was organized was no longer possible; that defendant's further active connection with the corporation would result in its inevitable ruin; and that there was no other adequate remedy available to the minority group. The Court took the view that under such circumstances, it had jurisdiction to appoint a receiver of the property of the corporation, decree a winding up of its affairs, and dissolution.

Although the Court emphasized that this power is one which must be exercised with great caution, it appears that Wisconsin clearly follows the majority position on this question, and will allow dissolution.

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[9] Goodman v. Von Cotzhausen, 171 Wis. 351, 359, 177 N.W. 618, 621 (1920). The Court further stated at page 358:
"It is contended that a court of equity has no power or jurisdiction, at the suit of a minority stockholder in the absence of statutory authority, to appoint a receiver for a corporation and wind up its affairs. That such was the well-nigh universal rule until a comparatively recent date, cannot be doubted. This rule had its origin at a time when corporations were created by special charters the grants of which conferred valuable and exclusive franchise upon their grantees, and it was considered that, as the franchises were granted by the state, they could be vacated or forfeited only in a proceeding by the state. That their lives depend upon the action of the state or the stockholders as a whole. The reason for this rule has entirely ceased in respect to the ordinary business corporation formed under general laws, the privileges conferred upon which are open to all who comply with the statutory conditions which conditions are simple and formal in character, and may be readily complied with by and who desire to associate themselves for the prosecution of any business venture. The ordinary business corporations are not organized for the purpose of performing any public function, and the state has no particular interest in them. It is only those who invest their money in them as stockholders or bondholders, and creditors thereof, who have a substantial interest in their proper management and business suc-