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Corporations

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unsuccessfully sought there was a specific performance of the earnest money agreement rather than damages, and a contract may be too indefinite to allow the former but still sufficiently definite to permit awarding the latter remedy.

It was the position of a dissent that the earnest money agreement should be construed as a contract to make a second contract, the terms of which had not been agreed upon, and so was unenforceable.

A number of questions occur to the reader of the opinions in the *Hedges* and *Hubbell* cases. When, if ever, is an earnest money agreement specifically enforceable? When will it be so indefinite that it will not support an action for damages? What is the effect of the intent of the parties to execute a subsequent, more detailed contract for the sale of the land?

Guaranty Contract—Consideration. The case of *Universal C.I.T. Credit Corporation v. DeLisle*, 147 Wash. Dec. 283, 287 P.2d 302 (1955), was an action upon a written guaranty. Dealer was in the business of selling motor cars and executed a contract with C.I.T. whereby C.I.T. agreed to finance Dealer's car and purchases and Dealer promised to assign to C.I.T. its commercial paper. Subsequent to the execution of this financing contract, DeLisle, who was owner of 37% of the stock of Dealer, executed a guaranty to C.I.T. which basically was as follows: "Each of us request you to extend credit to, make advances . . . and to induce you to do so and in consideration thereof . . . each of us . . . unconditionally guarantees to you . . . all Dealer's present and future obligations to you . . ." C.I.T. continued to finance the car purchases and subsequently lost money as a result of Dealer's becoming financially involved. An action brought by C.I.T. on the guaranty was dismissed by the trial court. The judgment was affirmed on appeal, the court holding that the guarantee was not supported by an independent consideration and consequently was unenforceable. The court failed to recognize that the guaranty could be construed as an offer for a unilateral contract and that the subsequent extension of credit by C.I.T. was the acceptance of this offer. Such an analysis would of course have resulted in a contrary holding by the appellate court. For further comment on this and similar cases the reader is referred to a comment entitled *Consideration in Suretyship Contracts in Washington*, 31 WASH. L. REV. 76, where the problem is dealt with at length.

CORPORATIONS

Appraisal Statutes—Remedies of Dissenting Shareholders. In *Van Buren v. Highway Ranch Inc.*,¹ the only activity of the defendant corporation was the leasing of a large wheat ranch in eastern Washington. Since incorporation in 1930, this lease had been held by plaintiff, a minority shareholder. In 1953, the corporation decided not to renew, leasing instead to the son of the majority shareholder. This was done in accordance with RCW 23.36.140, which provides that a sale, lease, or exchange of all the assets of a corporation may be authorized by a vote of two-thirds of the shareholders' voting power, or such percentage as may be provided for in the articles of incorporation. Dissenting from this move, and alleging unfairness and a breach of

¹ 46 Wn.2d 582, 283 P.2d 132 (1955).

fiduciary relationship, plaintiff thereupon brought his action pursuant to RCW 26.16.140 and RCW 26.16.160. The former provides that a shareholder who did not vote in favor of corporate action authorized by RCW 23.36.140 and who, within twenty days, files with the corporation his written objection thereto, shall be paid the value of his shares. The latter provides that, in case of dispute over the value of such shares, the matter may be submitted to judicial determination.

Reversing the lower court's decision, the supreme court ruled that the appraisal statutes did not apply when the lease, sale, or merger of all corporate assets could be said to be within the corporation's "normal and regular course of business." Here, of course, the sole business of defendant corporation was the leasing of its wheat ranch. This exception is generally recognized and applied by the courts,² even in the absence of express statutory provision. As for plaintiff's allegation of breach of fiduciary duty, the court held that normal and regular course of business "refers not to the equity or fairness of a particular transaction, but to whether it was a *class* of which . . . the corporation is expressly authorized to consummate."³

More significantly, plaintiff also contended that statutory relief should be granted him in this case, otherwise the decision in *Matteson v. Ziebarth*⁴ would preclude him from any other remedy. There, the minority shareholder sought to enjoin a merger as unfair. He did not seek appraisal, and had not filed his objection to the corporate action within the statutory time limit. The court held that in the absence of actual fraud, his only possible remedy lay in the appraisal statutes and that he could not enjoin the merger on the ground of unfairness.

In rejecting this argument, the court distinguished the two cases on the facts. It was pointed out that in the *Matteson* case, plaintiff, by failing to comply with statutory requirements, had himself rejected what otherwise might have been a valid case for appraisal, and had instead chosen an injunctive remedy. Here, since the transaction was within the regular course of business, statutory relief had been unavailable from the start. Concluding by way of dictum, the court then stated that "*Matteson* is not authority for the proposition that the statutes under consideration would prevent respondents from seeking relief in equity. Nothing said in this opinion is intended to imply that

² *Jeppi v. Brockman Holding Co.*, 34 Cal.2d 11, 206 P.2d 847 (1949).

³ 46 Wn.2d at 586, 283 P.2d at 135.

⁴ 40 Wn.2d 286, 242 P.2d 1025 (1952).

respondents are, or are not, entitled to equitable relief.”⁵ The rationale of this is simply that in a case where statutory appraisal is at no time an available remedy, obviously it cannot exclude any other.

As might be expected, most cases involving appraisal statutes have arisen upon proposed mergers or sales of all corporate assets, rather than leases, but in Washington the principles involved are identical.⁶ Prior to the enactment of such statutes, the common law rule was that the dissenting vote of a single shareholder was enough to defeat any attempted sale or merger of a prosperous corporation.⁷ With the growth of modern industrial combines, however, it became increasingly apparent that this placed an inordinate degree of power in the hands of a few. A clear minority could thus effectively block action potentially beneficial to the vast majority. As a result, statutes were passed in most states providing for such moves upon the vote of a reasonable majority of shareholders.⁸ Complementary legislation has usually made it possible for dissenters, if they so desired, to obtain an appraisal and payment for the value of their shares.⁹

Not content to depend solely upon the efficacy of appraisal statutes, however, most courts continued to entertain equitable actions in the event of fraud or unfairness.¹⁰ To avoid this, some states passed statutes *expressly* making appraisal and payment the *exclusive* remedy of minority shareholders.¹¹ In Washington, RCW 26.16.150 provides that any shareholder who did not vote in favor of such corporate action and who did not within the time allowed him file with the corporation his written objection thereto, demanding payment for his shares, “shall be bound by such corporate action with like force and effect as though such shareholder had voted in favor of such corporate action.” On its face, this statute does not expressly say that appraisal is the sole remedy. In *Matteson v. Ziebarth*,¹² however, the court construed its language as follows: “We are of the view that, under our own act, the statutory remedy is likewise exclusive as to unfairness

⁵ 46 Wn.2d at 586-587, 283 P.2d at 135.

⁶ RCW 23.36.140 and RCW 23.16.140 refers to “sales, leases, or exchanges,” and also “mergers and consolidations.”

⁷ 13 FLETCHER, CYCLOPEDIA OF CORPORATIONS § 5797 (1943).

⁸ *Id.* at § 5798.

⁹ *Id.* at § 5891.

¹⁰ *Thies v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004 (1904).

¹¹ Cal. Civil Code § 369 (17) and Mich. Gen. Corp. Law §§ 44, 45 are examples. For a lively and able “battle of the experts” on the policy arguments concerning remedial exclusiveness of appraisal statutes, see Ballantine and Sterling, *Upsetting Mergers and Consolidations*, 27 CALIF. L.REV. 644 (1939) [arguing for statutory exclusiveness]; and Lattin, *A Reappraisal of Appraisal Statutes*, 38 MICH. L.REV. 1165 (1940) [arguing against].

¹² Note 4, *supra*.

or breach of fiduciary duty short of [1] actual fraud,"¹³ or [2] breach of fiduciary duty or unfairness unknown to the aggrieved shareholder at the time of the shareholders' meeting at which the corporate action was approved.

Since the latter exception can be avoided easily by simply telling the minority shareholder about the impending move, the question of what precisely was meant by *actual fraud* thus assumed critical importance for the Washington corporate attorney. The matter is not settled since in the course of the *Matteson* opinion, the words "fraud" and "actual fraud" were used interchangeably without any definition of them being given.

Actual fraud, or fraud in fact, is usually defined as that type which includes, among others, the classic elements of intent to deceive and deception.¹⁴ Under this meaning, it is clear that the court's first exception could also be circumvented easily by informing the minority of the planned transaction, since no deception could then be said to exist.

Constructive fraud, or fraud in law, is broadly defined as a breach of legal, equitable, or fiduciary duty, which, irrespective of guilt or intent, the law declares fraudulent because of its tendency (1) to deceive others or (2) to violate public or private confidence, or to injure public interests.¹⁵

The last paragraph of RCW 23.36.140, which provides for the original transfer of all corporate assets upon a two-thirds shareholders vote, must now be noted. This paragraph, which was not referred to directly in the *Matteson* decision, provides that "This section shall not be construed to authorize conveyance or exchange of assets which would otherwise be *in fraud* of corporate creditors or minority shareholders or shareholders without voting rights." If the court restricts the meaning of "fraud" as used in this paragraph to cases involving deception, again it is obvious that the paragraph's import can be avoided easily in the same manner as stated above. If this be the case, the Washington appraisal statutes, as a practical matter, must be regarded as providing the exclusive relief for the dissenting minority, without exception. In addition no legal, equitable, or fiduciary relationship could then be said to exist between the majority and minority

¹³ 40 Wn.2d at 297, 298, 242 P.2d at 1028.

¹⁴ *Barker v. Scandinavian-American Bank*, 97 Wash. 272, 166 Pac. 618 (1917).

¹⁵ *Bell v. Bell*, 44 Ariz. 520, 39 P.2d 629 (1935). An example of (1), above, can be found in *Thompson v. Huston*, 17 Wn.2d 457, 135 P.2d 834 (1943). There the court held that untrue and misleading statements amounted to "constructive fraud," though made in entire good faith.

shareholders in the area of statutory reorganizations involving all the corporate assets, providing the former first notify the latter about the planned transaction.

Should the court be willing to interpret the term "fraud" as including "constructive fraud," another result might well accrue. An attempt by an unscrupulous majority to force a highly unfavorable transaction upon the minority might be regarded as "constructive fraud" and subject to nullification.¹⁶

Under a possible aspect of this theory, fair dealing would simply be a condition precedent to a valid exercise of the two-third majority's rights under RCW 23.36.140 and once complied with, statutory appraisal would *then* be the exclusive remedy of the minority shareholder as per RCW 23.16.150.

The court is not foreclosed from making either of the two above interpretations by the *Matteson* decision. First of all, as was stated, no definition of fraud was given. Secondly, the court held that there was no fraud in the *Matteson* case, not because of the lack of any technical elements of that term, such as deception, but because of a finding that the transaction in question was in fact advantageous to the minority shareholder.¹⁷ What the court said in effect was: there is no fraud here because there is no unfairness.

As a result, the question of exactly what the court meant by "fraud" must be considered as unresolved. As a necessary corollary to this, the extent of exclusiveness of Washington's appraisal statutes must be regarded as unclear at the present time.

Some indication of a possible future result may be gleaned from the *Matteson* decision itself, however. In distinguishing it from *Theis v. Spokane Falls Gas Light Co.*,¹⁸ the court employed the following language at page 301:

In that case, it was held that an attempted dissolution of a prosperous corporation and the transfer of its assets to a new corporation, not for any *bona fide* business reason, but for the sole purpose of getting rid of a disagreeable stockholder who refused to sell his stock, was fraudulent and would be set aside.

¹⁶ *Whicher v. Delaware Mines Corporation*, 52 Idaho 304, 15 P.2d 610 (1932). This case involved a non-statutory reorganization. The minority shareholder involved had prior knowledge of the proposed transaction, and had protested against it. Though there was clearly no deception, the court ruled that the attempt of the majority to force a financially disadvantageous scheme on the minority against their will was "constructively fraudulent." This case was quoted at great length and with approval in *Moore v. Los Lugos Gold Mines*, 172 Wash. 570, 21 P.2d 253 (1933).

¹⁷ *Supra* note 4, at page 300.

¹⁸ *Supra* note 10.

It must be noted that the *Matteson* court did not overrule *Theis*, but, in distinguishing it, or "limiting its scope," implied that its rule would still apply to a similar fact situation.

The essential fact difference between the two cases is that in *Matteson* the minority shareholder was denied relief since the corporation involved was held to be in precarious financial condition and the proposed transaction was ruled to be actually fair and advantageous to him, whereas in *Theis* relief was given because the involved corporation was a going concern and the proposed transfer, which would have eliminated, or "frozen-out" the plaintiff, was thereby deemed "fraudulent."

The latter assumes special significance in light of the fact that in the *Theis* case, the minority shareholder was fully aware of the proposed scheme at the time of the shareholder's meeting. Though the classic element of deception necessary for "fraud in fact" was absent, the conduct involved was still considered fraudulent.

If the *Theis* rationale is followed in the future, it is likely that a "freeze-out" of a minority shareholder of a prosperous or expanding corporation by the device of merger or consolidation and attendant stock manipulation would not be tolerated in Washington. Such a course, at any rate, is clearly not negated by the *Matteson* decision.

Returning to the *Van Buren* case, the dictum referred to there has no effect on the *Matteson* case as such, because of the explicitly distinguished fact situations. It does, however, stake out an area wherein, if the corporate transaction can be said to be within its "normal and regular course of business," the appraisal statutes have no application. Since the minority shareholder then can get no possible remedy at law, the court implies that, if treated unfairly, he may obtain equitable relief.

ARTHUR T. LANE

Corporations—Taxability of Distribution of Real Property Upon Dissolution. *Deer Park Pine Industry Inc. v. Stevens County*, 46 Wn.2d 852, 286 P.2d 98 (1955). Upon the dissolution of a certain North Columbia Company, a Washington corporation, a distribution *in kind* of the company's real property assets was made to the former shareholders. The approximate value of this property, most of which was located in Stevens County, was in excess of five hundred thousand dollars. At the same time, the former shareholders also assumed their proportionate shares of the liabilities of the dissolved corporation. These amounted to approximately one hundred thousand dollars. The question in this case was whether the distribution of real property to the former shareholders was subject to the one per cent county tax on real estate sales, as authorized by RCW 28.45. The court held that it normally was not, there being no conveyance for

a valuable consideration. But where, as here, the former shareholders also assume the liabilities of the dissolved corporation, it was ruled that the real estate sales tax is applicable to the extent of the liabilities assumed by the shareholders. Thus, the former shareholders here paid the one per cent sales tax to the extent of the approximately one hundred thousand dollars worth of liabilities assumed by them.

COMMUNITY PROPERTY

Tort Liability and Conflicts of Laws. In *Maag v. Voykovich*¹ a husband committed an assault in Alaska. At the time of the tort, the husband was a Washington domiciliary. The suit was brought in Washington, and the court assumed that the liability would have been a community obligation had the tort been committed in Washington. The court held, however, that since the tort was committed in Alaska, the obligation was only against the individual husband, and not against the marital community. While the reasoning of this decision is supported by many Washington cases,² the author submits that it is incorrect, since it is based upon a semantic misinterpretation which dates back to 1896.

The court's reasoning proceeds as follows: since the tort was committed in Alaska, we will adhere to the usual conflict of laws rule and apply the law of Alaska.³ In Alaska there is no marital community so therefore we must employ the common law rule which would hold only the husband's property liable for the tort. Because only the property of the husband could be levied on to satisfy a judgment in Alaska, we hold that only the husband's separate property in Washington can be so utilized, and therefore it is not a marital community obligation.

The author believes that the semantic confusion comes in the use of the word "separate." "Separate property" as used in Washington doesn't mean the same as "husband's property" as used in Alaska. This distinction is correctly pointed out by Judge Hill in his "concurring"⁴ opinion which relies strongly on the criticism of Marsh in his treatise on marital property.⁵

¹ 46 W.2d 302, 280 P.2d 680 (1955).

² The only tort case is *Mountain v. Price*, 20 Wn.2d 129, 146 P.2d 327 (1944), but in the contract area see *Achilles v. Hoopes*, 40 Wn.2d 664, 245 P.2d 1005 (1952); *Meng v. Security State Bank*, 16 Wn.2d 215, 133 P.2d 293 (1943); *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115 (1896), and other cases cited in the majority opinion of the *Maag* case.

³ RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

⁴ Judge Hill concurs in the result on the basis of *stare decisis* only. His opinion is a dissent against the reasoning employed by the court and the result reached in these cases.

⁵ MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 146 (1952).