

# ST. LOUIS LAW REVIEW

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Vol. II

Published by the Undergraduates of the  
Washington University Law School

No. 4

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## DISPOSAL OF ASSETS INDISPENSABLE TO THE BUSINESS OF A CORPORATION

Two fundamental principles underlie the rules of law which regulate the alienation of property by private and quasi-public incorporated companies. The first is that a private company is organized by the members as a device to carry on the business designated in the charter, and therefore a disposal of assets, either total or partial, which will frustrate that purpose, is unlawful unless consented to by all the members; whereas a disposal adapted to realize the purpose is within the powers of the company acting through its board of directors. The second principle is, that private corporations affected with a public use, like railway companies for example, must not make such a disposition of their property as will disable them to serve the public, without first obtaining the consent of the sovereignty which granted their franchises, and granted them in consideration of the public being served by the companies in the occupations these are authorized to pursue. In the enforcement of these principles, the common law withholds from the directors and officers of a corporation the power to dissolve it, their duty being to see that its business is carried on, and properly carried on, until the shareholders, to whom is left the power of dissolution and winding up, decide to the contrary.<sup>(a)</sup> And what they are without power to do by direct action, they are equally without power to do indirectly by a transfer of all or part of the corporate property, when the transfer will render the continuation of the business of the company impossible. (*2 Thomp. Corp. 3rd Edn., Sec. 1187*).

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<sup>(a)</sup> *Smith v. Smith*, 3 Desaus, (S. C.) 557; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393; 1 *Morawetz Corps*, Secs. 512 et seq.; 2 *Thompson Corps*, 3d Ed., Sec. 1187; 5 *Thompson Corps*, 2d Edn., Sec. 6478.

But the directors may dispose of assets when to do so is necessary to pay the company's debts, it being a duty of the directors to see that the debts are paid.<sup>(b)</sup> And in the absence of a statutory restriction, which is, however, often imposed, the authority to mortgage a company's property is in the board of directors, as one of the incidents of directorial authority in the management of the business.<sup>(c)</sup>

The courts and commentators agree that the right to dispose of all the assets of a *solvent, profit-earning* corporation remains with the shareholders, but disagree about whether this right belongs to the holders of a majority interest in the capital stock or to the entire interest. Otherwise stated, they disagree as to whether the unanimous consent of the members is requisite to the validity of such an act. The transfer of an asset indispensable to the transaction of the company's affairs, and the transfer of which necessarily would terminate corporate activity, stands upon the same principles as regards its validity.

One writer says that "ever since the case of *Abbot v. American Hard Rubber Company*, the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property when the corporation is a solvent, going concern."<sup>(d)</sup> In another work we find this statement, "The law is well settled that the majority of a solvent, prosperous corporation cannot, as against the dissent of the minority, direct the sale of the entire corporate property where there is no exigency demanding such a course, since the contract between the stockholders is that their joint fund shall be employed for the purposes specified in their charter."<sup>(e)</sup> In a supplement to that work, it is said: "In the absence of any statutory or charter restriction, a majority of the stockholders may direct a sale of all the corporate property."<sup>(f)</sup>

A third treatise is more guarded in declaring that except when restricted by law or public policy, corporations have an absolute right of disposal, unlimited as to objects, circumstances or quantity, and that this right belongs clearly to private companies formed for manufacturing and trading; a broad statement, which is qualified by the further one, that "a majority of the shareholders of a prosperous

<sup>(b)</sup> *Hutchinson v. Greene*, 91 Mo. 367; *Dana v. Bank of United States*, 5 Watts & S, 223; 1 *Beach Private Corps*, Sec. 358.

<sup>(c)</sup> *Blood v. La Serena & Co.*, 113 Calif. 221; *Thompson v. Natchez Co.*, 68 Miss. 423; 3 *Cook Corps*, 7th Edn., Sec. 808; 3 *Thompson Corps*, Sec. 2560, *et seq.*

<sup>(d)</sup> 3 *Cook Corps*, 7th Edn., Sec. 670.

<sup>(e)</sup> 4 *Thompson Corps*, 2d Edn., Sec. 4489.

<sup>(f)</sup> *White's Supplement*, Sec. 2420.

corporation cannot sell out the property and invest in other enterprises against the wishes of the minority. Nor may the directors, even with the consent of a majority of the shareholders do so.”<sup>(g)</sup> That proposition, if taken according to its full terms, is unquestionable; for it is a cardinal rule of corporation law that the investment of a shareholder in the capital stock of a company formed to conduct a particular business, cannot be diverted without his consent so as to cause it to be risked in a different enterprise from the one the company was chartered to undertake. And this is so, whether the diversion will result from his company itself engaging in the new business or from the transfer of its capital to another company.<sup>(h)</sup>

Another author concedes to a corporation unlimited power to dispose of its property as an incident of corporate activity, unless it is expressly restrained by law, and says the right of corporate disposal is as full as that of an individual; but says further that this power will not be implied, if to do so will conflict with any express provision of the charter or “with the rights of other persons, or of the public. Thus a corporation having *public duties* to perform cannot alienate any property which is required to enable the company to perform those duties in a proper manner.”<sup>(i)</sup>

A recent writer states quite accurately the condition of the law of the question we are investigating, when he confesses that “the American cases on the subject are neither numerous nor conclusive.”<sup>(j)</sup> The cases containing dicta on the question are numerous; but there are few, if any, where decision of the point was required by the facts involved, even when decisions upon it were actually given. The proposition that a prosperous corporation cannot dispose of its entire property, without the consent of all its stockholders, has been declared often by both courts and commentators in unqualified terms and as though it were a fixed dogma of the law.<sup>(k)</sup> On the contrary, courts have held that an alienation of the entire property of a corporation is valid, if authorized by a majority of the capital stock; provided the action was taken in good faith and for the benefit of everybody in interest;

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(g) 1 Beach Corps, Sec. 357.

(h) Black v. Canal Co., 24 N. J. Eq. 455, 467; Lauman v. R. R. Co., 30 Pa. St. (6 Casey) 46; Ashton v. Burbank, 2 Dill 435, 2 Fed. Cas. 26; Hartford & Co. Rd. v. Crowell, 5 Hill 383; Colgate v. U. S. Leather Co., 75 N. J. Eq. 229.

(i) 1 Morawetz Corps, Sec. 335.

(j) 1 Machen Corps, Sec. 65.

(k) 3 Cook Corps, 7th Edn., Sec. 670; Harding v. American Glucose Co., 182 Ill. 551; Abbot v. American Hard Rubber Co., 33 Barb 578; Schuyler Electric Mfg. Co. v. Byrne, 65 Conn. 336; People v. Ballard, 134 N. Y. 269; Blais v. Brazeau, 25 R. I. 417; Tillis v. Brown, 154 Ala. 403; Small v. Minneapolis, 45 Minn. 264; Forrester v. Boston & Co., 21 Mont. 544.

that in such a transaction the minority must submit to the decision of the majority, as they must in other questions of corporate policy.<sup>(1)</sup>

The subject of present inquiry lies close to the question of the right of shareholders possessing a majority interest, to dissolve a company and distribute the assets while it is prosperous; for dissolution involves, of course, a total alienation of property. And on the other hand, parting with all the property often results in practical, though not technical, dissolution by disabling the company to carry on business; or, in effect, to justify its existence by doing the work it was chartered to do. The two inquiries are ultimately the same in many instances, the real problem presented being the right of the majority interest to abandon the corporate business while it is profitable. Accordingly, we observe that commentators hesitate to state any rule upon the power of the majority to dissolve, and that they voice a doubt as to what the rule is.<sup>(m)</sup> That the larger interest could dissolve if the charter of the company did not fix the period of its existence, appears to have been taken for granted until recently; and there is much authority for this proposition. In an able treatise, but not of late date, the author stated as his conclusion from the cases that it is an implied condition in the charter of every corporation formed for the pecuniary profit of its shareholders, such as an ordinary trading or manufacturing company, that its business may be wound up whenever the majority deem expedient; and that then "the majority may, without the consent of the minority, sell the whole of the company's property, close up the business, distribute the assets and surrender the charter to the State." The qualification is added that the majority have no right to sell property needed to carry on the company's chartered business, except in good faith to wind up its affairs; have no implied authority to sell with the intention to renew the business subsequently.<sup>(n)</sup>

So certainly was this power supposed to belong to the dominant membership, that in a leading case, decided in 1871, the court declared no decision held that "a majority of corporators, where a time is not

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(1) *Treadwell v. Salisbury Manfg. Co.*, 7 Gray 393; *Lauman v. Lebanon Valley Ry. Co.*, 30 Pa. St. (9 Casey) 420; *Miners Ditch Co. v. Zellerbach*, 37 Calif. 543; *Leathers v. Janney*, 41 La. Ann. 1120; *Trisconi v. Winship*, 43 La. Ann. 45; *Chilowee Woolen Mills Co. v. State*, 115 Tenn. 266; *Maben v. Gulf Coke & Coal Co.*, 173 Ala. 259; *Chicago Hansom Cab. Co. v. Yerkes*, 141 Ill. 320; *Bowditch v. Des Moines Life Ins. Co.*, 46 L. R. A., N. S. 291; *Price v. Holcomb*, 89 Ia. 123; *Merchants' & Planters' Line v. Wagner*, 71 Ala. 581; *Wilson v. Bridge Co.*, 9 R. I. 590; 10 Cyc., pp. 1265-1303.

(m) 5 *Thompson Corps*, 2d Edn., Sec. 6500; 2 *Cook Corps*, 7th Edn., Sec. 629.

(n) 1 *Morawetz Corps*, Sec. 413.

specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company."<sup>(o)</sup> We cite in the footnote other cases to the same effect, in the first four of which the companies involved were prosperous, for aught that is stated.<sup>(p)</sup>

The solution of the question is to be reached by determining the extent of the implied engagement between the members as to the length of time the company shall continue in existence and activity, when this time is not expressly stipulated. Was it understood the corporation should be kept alive and going as long as it was earning dividends? The disappointment one feels in studying the opinions is the omission to investigate on principle and from the known usage of business, whether it is more reasonable to imply an agreement to continue the corporation while it pays, or an agreement that it may be terminated when the majority, acting in good faith, desire. Really the question of an implied contract, in the strict sense, is not involved; but rather what should be inferred from the general usage of business, aided by the facts of the particular case, to have been the understanding of the incorporators. If there is to be a rule on the subject which will correspond to practical needs, it must be ascertained by that method instead of by basing it on an arbitrary implication one way or the other.

The argument for dissolution at the judgment of the larger interest is, that incorporating for a specified purpose, but not for a specified time, does not imply an agreement to continue the business forever unless misfortune impends, but rather that it may be terminated when deemed advisable by those most interested.<sup>(q)</sup> No case cited by any author is directly in point against the power of the majority to dissolve, the one usually cited having turned upon peculiar statutes regulating Building and Loan Companies,<sup>(r)</sup> and the weight of authority may be said to favor the proposition that the majority shareholders of a private corporation, not chartered to endure for a fixed term, may wind up whenever they think proper, subject to the proviso that

<sup>(o)</sup> *Black v. Delaware & Canal Co.*, 22 N. J. Eq. loc. cit. 404.

<sup>(p)</sup> *Pringle v. Eltingham Construction Co.*, 49 La. Ann. 301; *Chilowee Woolen Mills v. State*, 115 Tenn. 266; *Merchants etc. Line v. Wagner*, 71 Ala. 581; *Lau-man v. Ry. Co.*, 30 Pa. St. 42; *Union Agricultural Society v. Gamble*, 52 Ia. 524; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393; *Hancock v. Holbrook*, 112 U. S. 229; *Wilson v. Cent. Bridge Co.*, 9 R. I. 590; *Parker v. Bethel Hotel Co.*, 96 Tenn. 252; see too 2 *Waterman Corps*, Sec. 420, p. 846, and IX *Encyc. Law*, 2d Edn. 562.

<sup>(q)</sup> *Black v. Canal Co.*, 22 N. J. Eq. loc. cit. 406; note to *Chilowee Woolen Mills v. State*, 2 L. R. A. (N. S.) 493, 494.

<sup>(r)</sup> *Barton v. Enterprise etc. Assn.*, 85 Md. 14.

the facts do not show the action was taken in oppression or fraud of the minority. Such a power necessarily carries with it the further power to dispose of all assets, and leaves the majority's right of total disposal open to question only in instances when it was not exercised with a view to dissolution; as stated in the excerpt from the work of Mr. Morawetz (section 413). As the members are never likely to desire to end the company's business from mere caprice, and as the right to do so is conceded to them in every jurisdiction when necessary to avert disaster, and denied to them when the purpose is illegal or fraudulent, the conflict of authority arises on the proposition of whether they may dissolve if the company is solvent and earning a profit when no fraudulent purpose inspires the act.

It is worth while to analyze some of the most cited cases that deal with this unsettled question, with the view to learning what was actually decided in them, and also the necessity of the decision in order to dispose of the controversy.

A leading case is *Abbot v. American Hard Rubber Co., supra*, wherein a bill in equity was filed by a stockholder in the defendant company to set aside a sale of all its property except some real estate, and to lease the real estate to the purchasing company. It appeared a majority of the stockholders had not consented to the sale; but the court said the transaction would have been equally invalid if they had, for the reason that unanimous consent was required, the effect of the transfer being to terminate the business for which the company was chartered. Other facts existed for which the sale might have been held invalid: the price was to be paid in notes maturing monthly for twelve months, and not in cash, and the directors of the old company, who made the sale, were the purchasers and were officers of the new company; hence interested both as sellers and purchasers; and on this ground, too, the transaction was condemned as ultra vires. Nevertheless the court expressly ruled that the sale was invalid against the dissenting stockholders for the reason that "an act, which, to all intents terminates the corporation by taking from it the power to fulfill the purposes of its organization, is not consistent with the purposes of its constitution."

The decision in *Byrne v. Schuyler Electric Manufacturing Company, supra*, a frequently cited case against the power of a corporation, without the approval of all its stockholders, to dispose of its entire property, will be found on attentive study to hold merely that the defendant corporation could not dispose of all its property for the stock of another company, with the intention of holding such stock

permanently as a dividend bearing investment; that such a transaction was ultra vires, as the laws of Connecticut did not authorize it; wherefore a dissenting stockholder might have it rescinded, since it would put the company in which he held stock out of business and embark its capital, including his investment in the adventure of a different company. The selling company was insolvent, and the court had no thought of disputing the rule that an insolvent corporation may sell its property to pay its debts and wind up its affairs. The particular act denounced as ultra vires was investing the capital of the selling company permanently in the stock of another corporation.

Perhaps as strong expressions are used in *Keene v. Johnson*,<sup>(6)</sup> in denial of the right of the majority of the stockholders to dispose of the entire assets of a company, as can be found in any opinion. But the opinion states, finally, that the effect of the particular transaction before the court was to create a new corporation to take over the property of the one in which the plaintiff held stock, saying that "in form it was a sale of the road: in fact it was an extension of it—an addition to the originally proposed scheme." The court then pointed out that this would amount to a deviation of the corporate business from the chartered purposes of the company; the contested scheme being the transfer of the assets of a railway company in which the plaintiff was a stockholder, to another company, and to compel the dissentients to accept stock in the new company in lieu of their holdings in the old one. The case went off on a demurrer and those were the facts stated in the bill.

Another striking instance of the manner in which dicta are thickly strewn through the opinions on this subject, is *Buford v. Keokuk Packet Company*,<sup>(7)</sup> wherein the court first held the plaintiff had no standing to complain of the alleged unlawful disposal of assets, because he was not a stockholder in the selling company but in the purchasing one. Yet, after so deciding, the court went largely into the question of the validity of the sale as dependent on the power of a company to dispose of its property without the consent of every shareholder, deducing lack of power to do so from a supposed contract among all the shareholders that the company should continue in business as long as it prospered.

The dicta in the preceding case were taken for law in *Bulkley v. Big Muddy Iron Co.*<sup>(8)</sup> This decision is emphatic against the power

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(6) *Kean v. Johnson*, 9 N. J. Eq. 401.

(7) *Buford v. Keokuk Packet Co.*, 3 Mo. App. 159.

(8) 7 Mo. App. 589 (memo. report only).

of sale by the majority interest so long as the company is not actually insolvent, for the defendant was embarrassed when its assets were sold and had exhausted its borrowing resources. Nevertheless, as it was found to have been doing a prosperous business and to have more than four hundred thousand dollars of property as against an indebtedness in excess of three hundred thousand, the court held there was not such danger of financial wreck as justified the majority in selling; apparently holding a sale could not be made against the dissenting plaintiff unless it was the only means to avert a collapse. It was adjudged that the plaintiff recover the real value of his stock from the defendants. Seven of the directors of the selling company were also directors of the purchasing one; a fact commented on by the court adversely, but it cannot be said the decision was put on that ground.

Nor was the point of majority power involved necessarily in *Field v. Roanoke Investment Co.*,<sup>(v)</sup> where the gist of the plaintiff's allegation was fraud, and he was denied relief on the score of his having acquiesced, and indeed participated, in the acts of which he complained.

*Tanner v. Lindell Ry.*, *Johnson v. United Rys. Co.* and *Cummings v. Parker*<sup>(w)</sup> dealt rather with the relief dissenting shareholders may obtain when the property of a solvent company is sold, than with the right of the majority to sell. And they dealt with the question of relief only in a negative way; towit by ruling against the dissentients' demand to set the sale aside when the majority acted in good faith. But much is said in the opinion in the first of those cases, which implies that the majority may sell, and the Tanner case was followed without a thorough discussion of the subject in the other two. In view of the state of the relevant decisions, it can be said that the exact point has not been adjudicated in Missouri in any cause where its decision was indispensable, though it has been passed upon in rulings adverse to the validity of disposals by authority of the majority interest. We quote from the Tanner opinion remarks which serve to show the rule is in doubt: "It is said that if the corporation is doing business at a loss the majority may close it out. But suppose it is not running at an actual loss, but at a profit so small that, in the judgment of the majority, the capital invested is not yielding what it should, and from a business standpoint it should be diverted into a

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<sup>(v)</sup> 123 Mo. 603.

<sup>(w)</sup> *Tanner v. Lindell Ry. Co.*, 180 Mo. 1; *Johnson v. United Ry. Co.*, 227 Mo. 423; *Cummings v. Parker*, 250 Mo. 427.



channel that promises better results, is there no discretion lodged in the majority to act in such an emergency?" The opinion then calls attention to the fact that large profits resulted to the shareholders of the Lindell Co. from the sale, and asks if the plaintiffs should be permitted to have it set aside, when no real loss had resulted to them "upon the bare, naked legal proposition, that it is a violation of the implied contract between the stockholders *inter sese* to sell the property of the corporation so as to disable it from doing business, without the consent of all. To concede to the plaintiffs the right to annul the sale under those conditions would be to place the holders of one share of stock in a position to dictate to the majority the terms on which a sale might be made, giving him an advantage which reason and justice cannot approve. This is not the law."

The court did not consider the bearing on the validity of the sale in controversy, of the statute providing how voluntary dissolution may be accomplished, and requiring, for this purpose, in the case of solvent companies the vote of two-thirds in value of the shares (1 R. S. 1909, sec. 2996 *et seq.*). It was said to be unnecessary to pass on the statute in order to determine the case. But it is obvious that the statutory provisions for dissolving a solvent company might be held to preclude dissolution in any other way, and hence to preclude a sale of assets that would result in practical dissolution. And *a fortiori* is this so by reason of the fact that all Missouri private corporations are organized to continue for a definite period, either named in the Articles of Association, or, if not, prescribed by statute.

The cases on the subject are too numerous for the facts of all to be dissected to ascertain whether they required a decision of the question we are considering. But every opinion found in an extensive search, which either stated, or decided, that no disposition of corporate property which will operate to terminate a prosperous business, is valid against a dissenting minority of shareholders, involved facts on which the court might have held the transaction voidable upon other and settled legal principles.

Most of the cases may be classified in the following groups:

First. Where the majority of stockholders in authorizing a sale, or other disposal of assets, acted for their own personal advantage, instead of for the interests of the company and entire body of stockholders.<sup>(\*)</sup> As the members of the corporation are engaged in a

(\*) *Erwin v. Oregon etc. Co.*, 23 Blatch. 517, (purchase by majority at unfair price); *Tillis v. Brown*, 154 Ala. 403, (nominal consideration); *Treadwell v. United Verde Copper Co.*, 47 App. Div. (N. Y.) 613; *Theis v. Gas Light Co.*, 34 Wash. 23 (not bona fide); *McLeod v. Medical College*, 69 Nebr. 555 (Dictum that majority have power to sell and wind up, but sale in question held fraudulent).

common enterprise, the controlling members are bound to act in good faith, and for the benefit of the minority as well as themselves, in directing the policy of the company. In other words, their dominant position, though it does not make them technically trustees, imposes on them a fiduciary duty towards the minority; a rule that has been applied in deciding the very question we are dealing with. In *Wheeler v. Abilene Building Company*,<sup>(7)</sup> the court said upon the point: "This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty: the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him; the duty to exercise good faith, care and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself, for less than he could obtain for it from another; or any other act in his interest to the detriment of the holders of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery." See also numerous cases cited in the opinion in support of that statement.

Second. Where the transfer of the assets to another company is upon terms which require members of the transferring company to accept an interest, usually shares of stock, in the transferee, in lieu of their present shares, and thus submit to have the safety of their investment depend on the management of another company.

(a) Under this general head may be classed those cases where the effect of the transfer would be to bind the dissenting stockholders to exchange their stock for shares in another company engaged, or chartered to engage, in a different business from the one the selling company was organized to pursue; thereby, in effect, forcing the dissentients to risk their capital in a new venture.<sup>(8)</sup> Corporate leases have been held void sometimes on this ground. (*Cass v. Steel Co.*, 9 Fed. 640 and cases cited in opinion.)

It is of the essence of the agreement among stockholders in a company, that they assume no further risk by investing in the stock,

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(7) *Wheeler v. Abilene Bldg. Co.*, 159 Fed. 391.

(8) *Kean v. Johnson*, 9 N. J. Eq. 401; *Black v. Canal Co.*, 24 N. J. Eq. 455; *Elyton Land Co. v. Dowdell*, 113 Ala. 177.

than will be entailed by pursuing the particular enterprise for which the company was formed.

(b) Perhaps the arrangement is that the transferee shall take over the property of the transferring company, to continue the same business but under officers chosen by the shareholders of the transferee, so that the management and policy of the business will no longer depend on the judgment and integrity of officers of the company of which the dissenting minority were members. A good type of this class of cases is *Byrne v. Schuyler Electric Co.*, *supra*. Such a transaction is in violation of the rights of the minority, because it commits the safety of their investment to the management of directors and other corporate officials whom they have no voice in selecting.

(c) Flagrant examples of this type are where the assets are transferred to a corporation of another State than that of the domicile of the transferring company, the purpose being to have the business continued by the alien transferee. Such examples present the instance of a company's abjuring allegiance to the State of its nativity, and rightly may be held *ultra vires* in the strict sense of the term—*towit*, as beyond the power of a corporation, even though authorized by all the shareholders. Accordingly, we find that in one case, the court permitted the State itself, acting through its Attorney General, and without a relator, to maintain a suit to set aside the sale.<sup>(1)</sup> In another case, such a transfer was pronounced to have been *ultra vires* from lack of legislative authority when it was made, but it was held the authority was supplied, as far as the State was concerned, by a later statute.<sup>(1a)</sup> Similar instances where the plaintiff sued as a dissenting stockholder are *Taylor v. Earle*, *Forrester v. Mining Co.*, *Small v. Elector-Matrix Co.*, *Abbot v. Hard Rubber Co.*<sup>(1b)</sup> The *ultra vires* quality of a company ceasing to operate in its home State and actually ceasing to exist, through the transfer of its property and business to a corporation of another State, is dwelt upon in *Black v. Canal Co.*<sup>(2)</sup> from the point of view we have suggested; namely, that a shareholder is thereby compelled to subject his investment to the regulations of another sovereignty.

Third. The transferring company may be a quasi-public corporation which the transfer will disable to serve the public in the manner its charter requires. It is universally held that without legislative authority from the State which chartered it, a quasi-public corporation cannot

<sup>1</sup> *People v. Ballard*, 134 N. Y. 269.

<sup>1a</sup> *Boston etc. Ry. Co. v. N. Y. etc. Ry. Co.*, 13 R. I. 260.

<sup>2</sup> *Black v. Canal Co.*, 24 N. J. Eq., loc. cit. 466.

dispose of any property needed for the discharge of its functions.<sup>(3)</sup> The reason of the rule is obvious. In the exercise of its sovereignty, the State has granted franchises to the particular company, presumably in consideration of the benefit that company has undertaken to render the public in the way of transportation, light, water, and other conveniences; and therefore the State is concerned that the company shall not take any action which will disable it to carry on its business. If the State consents to a disposal of its property by a company of this kind, the question of the validity of the act, as against dissenting shareholders, will depend then upon the principles applicable to similar dispositions by purely private corporations.<sup>(4)</sup>

Fourth. Sometimes the disposal of assets is for a purpose opposed to public policy; for example, to create a monopoly, and is invalid for that reason.<sup>(5)</sup>

Fifth. In one or more opinions often cited against the right of the majority to act, the facts were that the directors had acted on their own motion, without authority from the majority;<sup>(6)</sup> and in another decision invoked in the books for the same doctrine, an express agreement among the stockholders was violated by the transfer, which was held void on that ground.<sup>(7)</sup>

Most of the cases cited under the enumerated propositions will be found to contain more than one fact sufficient to invalidate the transaction assailed, upon the general principles of Equity; and an attentive study of the decisions touching the subject impresses one with the soundness of the following statement of the law, in a standard text: "How far, under what circumstances, and upon what application a Court of Equity would restrain a corporation from an improper alienation of its property, must depend upon those general principles which guide it in the exercise of its powers; but there is little doubt that, in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes."<sup>(8)</sup>

Turning now to judgments supporting the right of total disposal by the majority shareholders, we find that facts may exist which, by all the decisions, render the transaction legal. If the company was

<sup>3</sup> *Black v. Canal Co.*, 22 N. J. Eq. 130-399, and citations; *Thomas v. Ry. Co.*, 101 U. S. 83; *Central Transpn. Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Middlesex Ry. Co. v. Boston etc. Co.*, 155 Mass. 347.

<sup>4</sup> *Lauman v. Ry. Co.*, 30 Pa. St. (6 Casey) 42; *Black v. Canal Co.*, 22 N. J. Eq., 1. c. 403.

<sup>5</sup> *Harding v. Am. etc. Co.*, 182 Ill. 551; *Central Ry. Co. v. Collins*, 40 Ga. 582.

<sup>6</sup> *Rollins v. Clay*, 33 Me. 132.

<sup>7</sup> *McCurdy v. Myers*, 49 Pa. St. 535.

<sup>8</sup> *Angel & Ames Corps*, 10th Edn., Sec. 190.

financially embarrassed and sold its assets to avoid insolvency, the act was within the power of the majority, and perhaps of the Board of Directors.<sup>(9)</sup>

If the company is solvent, but the continuance of its business will be unprofitable or impracticable, it may sell its property and cease activity.<sup>(10)</sup>

Or, if conditions are such that the objects of the corporation cannot be realized; for example, by reason of discord among shareholders.<sup>(11)</sup> Where the company's powers under its charter are of a character to authorize a sale of all its property in the ordinary course of its business, for example the only boat of a steamboat company.<sup>(12)</sup> So a company, chartered to conduct a hotel, may sell the hotel it is operating and purchase another.<sup>(13)</sup> Most of the foregoing cases present exceptional facts, showing either that it was necessary to dispose of the property to avert loss, or insolvency, or that the transaction was contemplated by the charter of the company as within the powers granted.

But some courts have gone further, in recent decisions, and have upheld the power of the controlling members acting in good faith and for what they conceive to be the welfare of all concerned, to dispose of all the company's assets for any reason they deem renders the action expedient. Putting aside decisions supposed to maintain the right of disposal by the majority, but wherein such a ruling was not required to decide the cause, like *Treadwell v. Salisbury Mfg. Co.*, *supra*, we will notice the following cases where the question was involved: *Miners Ditch Co. v. Zellerbach*; *Bowditch v. Jackson Co.*; *Maben v. Gulf Coke and Coal Co.*; *Beiderkopf v. Des Moines Ins. Co.*; *Leathers v. Janney*; *Trisconi v. Winship*.<sup>(14)</sup> Other opinions in

<sup>9</sup> *Manfg. Sav. Bk. v. Iron Co.*, 97 Mo. 38; *Sargent v. Webster*, 13 Metcalf, 497; *Ardesco Oil Co. v. North Am. Oil Co.*, 66 Pa. St. 375; *Hayden v. Directory Co.*, 42 Fed. 875; *Raymond v. Security etc. Ins. Co.*, 111 App. Div. (N. Y.) 191, 195; *Hancock v. Holbrook*, 9 Fed. 353.

<sup>10</sup> *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. (N. Y.) 380; *Raymond v. Security etc. Ins. Co.*, 111 App. Div. (N. Y.) 191; *Price v. Holcomb*, 89 Ia. 123; *Treadwell v. Salisbury Mfg. Co.*, *supra*; *Thompson's Corp.*, Sec. 4489.

<sup>11</sup> *Hitch v. Hawley*, 132 N. Y. 212, 221; *Arents v. Durham Tobacco Co.*, 101 Fed. 338 (threatened with disaster from political influence of one member); *Hayden v. Directory Co.*, 42 Fed. 875 (company financially embarrassed. Question held to be one of good faith on part of majority towards minority).

<sup>12</sup> *Leathers v. Janney*, 41 La. Ann. 1120; *Lange v. Reservation Co.*, 48 Wash. 167; *Starke v. Petroleum Co.*, 98 Tex. 542; *Peters v. Beerly etc. Co.*, 78 S. E. Rep. — Va. —.

<sup>13</sup> *Freeman v. Seaview Hotel Co.*, 57 N. J. Eq. 68.

<sup>14</sup> *Miners Ditch Co. v. Zellerbach*, 37 Calif. 543; *Bowditch v. Jackson Co.*, 76 N. H. 351; *Maben v. Gulf Coke & Coal Co.*, 173 Ala. 259; *Beiderkopf v. Des Moines Ins. Co.*, 46 L. R. A. 290; *Trisconi v. Winship*, 43 La. Ann. 45.

which the rule was declared, but perhaps not of necessity involved in the decision, are *Lauman v. Ry. Co.*, *supra*; *Chicago Hansom Cab Co. v. Yerkes*, 131 Ill. 320; *Arents v. Tobacco Co.*, *supra*; *Black v. Canal Co.*, 22 and 24 N. J. Eq., *supra*.

In *Bowditch v. Jackson Co.*, dissenting stockholders filed a bill to enjoin a sale of the assets of the Jackson Company to the Nashua Manufacturing Company. Fraud on the part of the majority was charged, but none was found to exist, and the terms of the transaction were held to be fair and equitable. The selling company was prosperous, but most of the stockholders thought more profit would be realized by selling on the terms offered than by continuing the business; and the question was squarely presented whether the majority, in selling to make greater gains than probably would be made by continuing to operate the company, acted within their powers. The power of the majority in this respect was upheld as involving the same principle and theory by which they were allowed to sell to avoid loss, the court saying the question was one of future prospects; that its decision required the exercise of business judgment, sagacity and power to forecast coming events; and that the issue was not one for determination by the courts, but rather was to be settled by the judgment of men conducting the business.

The Iowa case—*Beiderkopf v. Insurance Company*—may be classed fairly with the Bowditch case. It, too, was a suit by minority stockholders to enjoin the sale of the property of the Des Moines Life Insurance Company and its business to the National Life Company of Illinois. Though the sale was to a company of another State, no attention was paid to that fact in the opinion, nor does it appear to have been urged as an objection to the transaction. A majority of the shareholders of the Des Moines Company had resolved to transfer its business to the National Life Company for the reason that the President and Vice-President of the Des Moines Company were in failing health and could no longer look after the company's affairs, which, in the opinion of the majority, had depended for success on the management of those officers. The company had prospered and was prosperous at the time of the disposal of its assets. The court drew the conclusion from its prior decisions, particularly *Platner v. Kirkby*,<sup>15</sup> that insolvency, and financial distress, were not the only occasions for the exercise of the majority right to sell, but that they might do so for any just cause; and further that it was the right of the majority to decide whether the business should continue or be

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<sup>15</sup> *Platner v. Kirkby*, 138 Ia. 265.

wound up. The New Hampshire case, *supra*, was fully endorsed, as were also text-writers who state the law in accordance with it.<sup>(16)</sup>

Perhaps the decision in *Maben v. Gulf Coke and Coal Company* might have been put on the ground that the Company was chartered to buy and sell mineral lands, and hence the contested sale was within the scope of its business under its charter. The bill was one to annul the sale of all the lands and minerals of the defendant made pursuant to the vote of all its stockholders except three, of whom plaintiff was one. The opinion took broad ground in favor of the rule that the dissentients must submit to the judgment of the majority, endorsing the doctrine of *Miners Ditch Company v. Zellerbach*, and other decisions of like tenor, and distinguishing *Kean v. Johnson, supra*, by the fact that it involved the sale of the property and franchise rights of a public service corporation; also distinguishing other cases dealing with the consolidation of corporations without the unanimous consent of stockholders.

The pioneer case in which the right of disposal by the majority of the stockholders was declared, was *Miners Ditch Company v. Zellerbach, supra*, the facts of which are too intricate to be stated. Suffice to say it was a suit by the plaintiff company to set aside the sale of all its property to another corporation, which mortgaged it, and by foreclosure of the mortgage the property passed into the hands of the defendant. The theory of the suit was that the sale was *ultra vires*, a question elaborately considered in the opinion, and the conclusion announced, that such an act was within the discretion of the majority of the members.

If we leave out of view questions of fraud on the part of the majority, of transfers for a purpose opposed to public policy, or those by companies owing a service to the public which the transfer will disable them to perform, the principle upon which the right of the majority to act is questioned is, that the transaction in controversy was a breach of an implied contract among the stockholders. Such breach may be argued to consist either in the fact that the sale by the majority forced a dissenting stockholder to transfer his investment to another company than the one in which he took stock, or to accept payment for his shares at a value fixed by the majority shareholders, whereby a quasi eminent domain was exercised as to his stock, or by terminating the business of the company while it is profitable. The rule in regard to instances where the investment of a stockholder is changed through the alienation of a company's assets by the majority

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<sup>16</sup> 4 Thompson Corps, Sec. 443; Morawetz Corps, Sec. 413.

stockholders, has been dealt with above. It is universally conceded that this cannot be done without a stockholder's consent, by compelling him to exchange his stock for shares in another company. Whether a dissentient may be compelled to sell his stock at an ascertained value if he will not exchange it, is a problem outside the scope of this article, and would require the consideration of many cases to elucidate it.

Does an alienation of all the assets of a company while it is prosperous, against the will of a portion of the stockholders, necessarily violate a contract, either express or implied, among the shareholders that the company shall go on in business as long as it makes money? The most that can be affirmed upon the authority of adjudged cases, is, as we have seen, that the weight of decision is opposed to implying such a contract, when the company is chartered for an indefinite period, and inclines, instead, to imply an understanding among the stockholders that the majority may wind up the corporation whenever they deem such act advisable. When a company is formed to exist for a period mentioned in its charter, as is commonly true nowadays when most corporations are organized under public statutes which fix a term of corporate duration, another material fact is involved. The rule must turn on the interpretation of the charter; namely did it intend to prescribe a period for which the company must continue in existence and activity, or only to provide against the granted franchises being enjoyed beyond the period? There is but meager authority on the question. If, in a particular case, the court thinks the intention of the clause is that a company's business shall be carried on for a definite time, as may be argued plausibly upon most statutes of the kind, a majority could not discontinue the business sooner if it was prosperous.<sup>(17)</sup> If, however, the conclusion to be drawn from the statute is that the provision was inserted solely for the benefit of the state, the right to dissolve will depend on the same principles as in the case of companies formed for an indefinite period. When the statutes, besides fixing a period of corporate life, prescribe a method of dissolution, the conclusion is reasonable that the requisite majority of the shares, acting in the way prescribed, may dissolve within the charter period, and that this cannot be done otherwise if the company is solvent. We have seen that in Missouri the amount required is fixed at two-thirds the total capital stock.<sup>(18)</sup>

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<sup>17</sup> 1 Morawetz, Sec. 418; *Black v. Canal Co.*, 22 N. J. Eq., 1. c. 404; *Schmidt v. Huntington*, 1 Calif. 55, joint stock association.

<sup>18</sup> 1 R. S., 1909, Sec. 2996.



But although its charter is for a definite period, if the company becomes insolvent, or its business impracticable, the company may be wound up by the majority.<sup>(19)</sup>

It should be stated in conclusion that a study of the trend of the law shows that the rule requiring unanimous consent of the shareholders to any disposal of corporate assets which will operate to terminate the corporation as an active and going concern, is incompatible with the needs of modern business and is giving way before judicial decision and statutory enactment. As a recent author remarks: "The rule is very narrowly applied."<sup>(20)</sup> or as the Supreme Court of Missouri has said in its last opinion on the subject, the doctrine "is guardedly put as subject to modification."<sup>(21)</sup>

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<sup>19</sup> I Morawetz, Secs. 412, 418.

<sup>20</sup> I Machen Corps, Sec. 78.

<sup>21</sup> Cummings v. Parker, 250 Mo. 427-441.