

1954

Jane B. Carter v. George S. Spencer et al : Brief of Plaintiff and Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

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JANE B. CARTER, also known as
Mrs. J. W. Carter,
Plaintiff and Respondent,

vs.

GEORGE S. SPENCER, GEORGE J.
CANNON, LAURENCE E. ELLI-
SON, JAMES E. ELLISON, MOR-
RIS H. ELLISON, J. WM. KNIGHT,
ELLISON RANCHING COMPA-
NY, a Utah corporation and ELLI-
SON RANCHING COMPANY, a
Nevada corporation,
Defendants and Appellants.

Case No. 8249

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Sup
the Court, Utah

Brief of Plaintiff and Respondent

PUGSLEY, HAYES & RAMPTON

*Attorneys for Plaintiff
and Respondent*

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In the Supreme Court of the State of Utah

JANE B. CARTER, also known as
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Case No. 8249

Brief of Plaintiff and Respondent

STATEMENT OF FACTS

The issue in this case is not complex, it is simply this:
Can a dissenting stockholder be forced by a majority of the
stockholders to surrender his stock in a corporation and accept
in lieu thereof stock in another corporation?

Counsel for the appellants in their Brief set forth the facts as they contended them to be, not as the evidence established them, and as the Court found them to be. It is uncontroverted that the Ellison Ranching Company, a Utah corporation, had been operating for many years and in May of 1952 was a solvent, in fact a very successful corporation. On May 19th a notice of a meeting was sent out to the stockholders which meeting, it was announced, was for the purpose of disincorporating in Utah and transferring the assets of the corporation to a Nevada corporation to be thereafter formed. The notice states that a copy of the proposed Articles of the Nevada corporation was attached thereto. However, it is admitted by all parties that these proposed Articles were not attached, and in fact were never seen by the plaintiff herein or by her proxy until the meeting of May 29th was nearing its conclusion (T-62). The meeting in question was held and the evidence among the parties differs considerably as to what actually transpired at this meeting. The Court having heard all of this evidence found in accordance with the claims of the plaintiff and entered its Findings of Fact accordingly. The court found in effect that the minutes as written up by Mr. Morris Ellison subsequent to the meeting did not accurately reflect what actually took place. What actually took place, and in accordance with the Court's findings was in substance as follows:

A Motion was first presented approving the operation of the Ellison Ranching Company, a Utah corporation, and commending the officers thereof. This Motion was unanimously passed with Mr. Carter, the proxy for the plaintiff, voting for

such Motion. A second Motion was then presented calling for the dissolution of the Utah corporation. This Motion was also passed unanimously. A third Resolution was then presented which called for the incorporating of a Nevada corporation, also to be known as the Ellison Ranching Company according to the proposed Articles of Incorporation which were then, for the first time, read to the stockholders. When this matter was put to a vote, Mr. Carter registered objection to the proposal and stated that he could not vote therefor. He is recorded as not voting.

The Court could not have found otherwise in light of the evidence in the record. Mr. Ellison was faced with the fact that he had written a letter to the plaintiff (See Exhibit No. 2) in which he acknowledged to the plaintiff that her proxy, had objected to the Nevada corporation and to accepting stock in the Nevada corporation in lieu of her stock in the Utah corporation and had in fact threatened to employ an attorney to prevent such action. Mr. Ellison attempted to explain this away on the ground that these objections were made immediately after the meeting adjourned in the presence of only himself and his brother and not in the meeting itself. This contention is refuted by the fact that Mr. Smoot, one of the directors, admitted on cross-examination to having heard these objections and the evidence shows that Mr. Smoot was not present at any conference after the meeting and so could have heard them only at the meeting. Furthermore, Mr. Ellison himself, on cross-examination, admitted that at the time the resolution which he designated No. 1 Resolution approving the incorporation of the Nevada corporation was adopted, the

stockholders had not even heard the proposed Articles of Incorporation read (T-62). Under his theory they were in effect buying a "pig in a poke." This, of course, is inconceivable. The only sensible finding is as the Court did find, namely, to the effect that the Resolution providing for the incorporation of the Nevada corporation and the transfer thereto of the assets of the Utah corporation was Resolution No. 3 to which Mr. Carter voiced his objections. The evidence in regard to these matters will be discussed more in detail in connection with the points to which applicable.

POINT ONE

THE PLAINTIFF DID NOT CONSENT TO THE SO-CALLED "REORGANIZATION" AND CANNOT BE FORCED TO ACCEPT STOCK IN THE NEW CORPORATION IN LIEU OF HER STOCK IN THE OLD CORPORATION.

The defendants have changed their position during the course of this case. When the Complaint was first filed, they filed a Motion to Dismiss on the ground that by a 2/3 vote the majority stockholders could force the so-called reorganization and compel a dissenting minority stockholder to accept stock in the new corporation in lieu of her stock in the dissolved corporation. This matter was thoroughly argued before Judge Baker and the Motion to Dismiss was denied. The defendants have apparently abandoned this position at the present time, however, because it is the crux of this case, it requires some comment here.

There are three general statutory methods by which the character of corporations can be changed. However, in each case the statute must be followed closely and in the absence of statute, the power does not exist except by unanimous consent. These methods are consolidation, merger and reorganization. Although these three processes have some elements in common, they are by no means the same procedure. Under a consolidation one corporation is absorbed into and becomes part of another corporation. Under a merger, two corporations enter together to form a single new corporation. Under a reorganization one corporation goes out of existence and a new corporation takes over its property. Any of these procedures can be followed by unanimous consent of all stockholders. However, unless there is statutory authority therefor, none of them may be followed without unanimous consent. Utah has a statute on consolidation and merger but none on reorganization. In Idaho the same situation prevails. In the case of *Whicher v. Delaware Mines Corporation*, decided by the Idaho Supreme Court in 1932, 15 Pac. (2d) 610, a corporation attempted to affect a reorganization by virtue of the consolidation and merger statute just as was done in this case. In holding that this could not be done, the Idaho Supreme Court stated:

“No specific statutory authority for the reorganization of a corporation is contained in the laws of Idaho, either in the Business Corporation Act of 1929 or elsewhere. The Business Corporation Act does make provision for the merger and consolidation of corporations (Sess. Laws 1929, c. 262, Sec. 38-43), which carry some of the attributes of a reorganization. We are concerned here, however, with an attempted volun-

tary reorganization of the Delaware Company similar to that proposed in *Seymour v. Boise Railroad Company, Ltd.*, *supra*, which can be accomplished, absent statutory authority, only upon the consent and agreement of all the stockholders.

"But where there has been no judicial sale of the property, a reorganization can be accomplished by the stockholders only upon the consent and agreement of all, unless there is some statutory provision or an agreement by which the stockholders either not consenting or not consulted shall be protected." 8 *Thompson on Corporations* (3rd Ed.) p. 41, Sec. 5988.

"There can be no question as to the right of stockholders to reorganize their corporation, but this right is subject to this well-defined rule that a part of the stockholders, even a majority cannot reorganize and deprive nonconsenting stockholders of their property or change their contract rights, without their consent. A stockholder has a vested interest in the corporate property and earnings, represented by his shares of stock, of which he cannot be deprived, in the absence of a delinquency which justifies and authorizes forfeiture. 14 C. J. 480, Sec. 707. The attributes which attach to a share of stock are well defined in *Ken v. Quicksilver Mining Co.*, 78 N.Y. 159: "The holding and owning of a share gave a right which could not be divested without the assent of the holder and owner; or unless the power so to do had been reserved in some way. (*Mech. Bank v. N.Y. & N.H. R.R. Co.*, 13 N.Y. 599-627.) Shares of stock are in the nature of *choses in action*, and give the holder a fixed right in the division of the profits or earnings of a company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any right in property, and can no more be taken away or lessened, against the will of the owner than can any other right, unless

power is reserved in the first instance, when it enters into the constitution of the right; or is properly derived afterwards from a superior law giver. The certificate of stock is the muniment of the shareholder's title, and evidence of his right. It expresses the contract between the corporation and his co-stockholders and himself; and that contract cannot, he being unwilling, be taken away from him or changed as to him without his prior dereliction, or under the conditions above stated."

In the Montana case *Forrester et al v. Boston & M. Consolidated Copper and Silver Mining Co., et al*, 55 Pac. 229, it was proposed that all assets of a Montana corporation be transferred to a New York corporation. Stockholders of the Montana corporation were to receive in exchange shares of stock in the New York corporation, except that dissenting stockholders were to receive \$170.00 per share for their shares. The holders of 131,036 shares voted in favor of the reorganization. Holders of 200 shares dissented and brought an injunction suit to restrain the transfer. The Court held that the transfer was ultra vires without the unanimous consent of all the stockholders and granted the injunction.

In the Arizona case of *Farish et al v. Cieneguita Copper Co.*, 100 Pac. 781, the majority of the stockholders in the Arizona corporation formed a Nevada corporation and transferred all the assets to that corporation. Suit was brought to set aside the transfer. The Court refused to set aside the transfer because it did not have the jurisdiction of the Nevada corporation, but held that the transfer was ultra vires and that the reorganization could not be accomplished without the unanimous consent of all stockholders.

Another good case in point is the New York case of *People v. Ballard*, 32 N.E. 54, where the Court stated:

“While a corporation may sell its property to pay its debts or to carry on its business, it cannot sell its property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement when a majority of non-resident trustees for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act which the law will not tolerate. Whether the process by which it was sought to convert the New York corporation into a California corporation is called “reorganization” or “amalgamation” it was the exercise of a power not delegated and was void. It was a corporate burial in New York for resurrection in California. While the stockholders who consented may be estopped by their acts, those who do not consent can take advantage of this violation of their rights and the state of New York can demand that those who did the wrong shall make restitution.

“The fact that the trustees acted in good faith did not empower them to do an illegal act, and the fact that there may be some difficulty in the final adjustment of rights because some of the stockholders consented while others did not, constitutes no defense to the action.”

See also in support of this position *Moore v. Los Lugos Gold Mine et al*, 21 Pac. (2d) 253; also 15 *Fletcher on Corporations* 325.

The defendants, as stated above, have now apparently abandoned the position that 2/3 of the stockholders could force

Mrs. Carter into the new corporation and have taken the position that Mrs. Carter, through her proxy, consented to accept stock in the Nevada corporation. As has been pointed out above, the evidence is quite to the contrary. Mr. Carter, the plaintiff's son, kept the only minutes of the corporate meeting. He referred to three Resolutions that were acted upon as Resolutions 1, 3 and 3, but his notes did not set out the nature of these three Resolutions. Mr. Morris Ellison, who wrote up the minutes himself some time later with the aid of Mr. Carter's notes, showed Resolution No. 1 as being a Resolution authorizing the dissolution of the Utah corporation and the organization of the Nevada corporation. Resolution No. 2 he showed as a Resolution authorizing the use of the name Ellison Ranching Company by the Nevada corporation. Resolution No. 3 he showed as a Resolution approving the Articles of Incorporation for the new Nevada corporation.

Mr. Carter, on the other hand, testified that Resolution No. 1 was a Resolution commending the officers of the old corporation for their conduct of the business. Resolution No. 2 was a Resolution dissolving the Utah corporation and Resolution No. 3 was a Resolution to form the Nevada corporation and accepting the Articles of Incorporation therefor. As has been pointed out above, after hearing all of the evidence, the Court held with the testimony of Mr. Carter. This is an important matter in the case because Mr. Carter voted for Resolutions No. 1 and 2, but refrained from voting for Resolution No. 3 and at the same time indicated his vigorous objection thereto.

The evidence strongly supports the facts as found by the

Court. Mr. Ellison himself admitted (Tr. 62) that at the time Resolution No. 1, whatever it might have been, was adopted the stockholders had never heard the proposed Articles of the new corporation. He admits that they were not read to the stockholders until Resolution No. 3 was under consideration. It does not appear probable that the stockholders would vote to form the Nevada corporation until they knew what the Articles of that corporation were to provide. Furthermore, let us take for a moment the position that Resolution No. 1 did authorize the dissolution of the Utah corporation and the formation of the Nevada corporation. Could that then bind all of the stockholders who had voted for it to accept whatever Articles of Incorporation might be set up for the Nevada corporation? Certainly no dissenting stockholders would be bound to accept the stock in this new corporation until the character of the Articles were made known and approved by all stockholders. Even the defendants admit that Mrs. Carter's proxy did not vote to approve the Articles of Incorporation of the Nevada corporation.

There is a dispute in the evidence as to whether Mr. Carter, as his Mother's proxy, merely refrained from voting or vigorously urged his objections. The Court found that he did urge his objections in the stockholders meeting. Mr. Ellison, when confronted with plaintiff's Exhibit No. 2, a letter which he wrote to the plaintiff on November 27, 1952, maintained that these objections of Mr. Carter were voiced not at the meeting, but immediately thereafter. This letter in question stated:

"Early last summer your son represented you at our shareholders' meeting and he seemed very much ex-

exercised over the fact that we had made the decision to disincorporate in Utah and to organize under the laws of Nevada and felt that we had no right to take such action without your consent. He informed us that he would consult an attorney in the matter. * * * * * The new company has taken over all the assets of the old one and your old certificate is therefore of no value to you. If and when you send in the old certificate, we will send the new one to you and will also send you the dividend check.”

One of the directors of the company, however, Mr. Smoot, admitted that he had heard Mr. Carter’s objection (Tr. 35). Mr. Smoot was present only at the regular meeting and not at any conference held thereafter, and therefore, could not have heard the objections only during the meeting. The findings are clear, therefore, and supported by irrefutable evidence that Mrs. Carter’s proxy objected vigorously at the stockholders’ meeting to accepting stock in the Nevada corporation in lieu of her stock in the Utah corporation.

The evidence is also clear that the officers and directors of the Utah corporation believing that they required only a 2/3 vote (see Morris Ellison Transcript, page 32), proceeded to transfer the assets without making any provision whatever to compensate Mrs. Carter for her share of such assets.

POINT TWO

THE DIRECTORS ARE PERSONALLY LIABLE FOR BREACH OF TRUST.

Defendants’ counsel take the position in their Brief that the directors are not personally liable because it was the

President and Secretary that actually signed the papers effecting transfer of the assets of the Utah corporation to the Nevada corporation. This contention if it were valid would, of course, not be available to Mr. Morris Ellison, one of the defendants against whom judgment was rendered as he was President as well as Director. However, an examination of this position will reveal that the position is not sound as to any of the defendants. All of the cases cited under this section by the defendants are to the effect that there is no personal liability on the part of the directors if they act pursuant to a valid resolution of the stockholders. However, it is equally clear, as cases we will cite will show, that an invalid or ultra vires action by the stockholders is no protection to the Board of Directors and the Board of Directors are personally liable to any dissenting stockholders injured by their action pursuant to such ultra vires resolution.

In regard to the claim that the Board of Directors did nothing in this case for which they could be liable, we wish to call attention of the Court to the fact that the directors are charged with the operation of the corporate business. The directors against whom judgment was entered in this case were all directors of the Utah corporation which transferred the assets to the Nevada corporation. They all became directors of the Nevada corporation which accepted the assets from the Utah corporation. To say that they had nothing to do with the transaction is ridiculous. Whether they were all present at all times, of course, is immaterial. As directors they are made responsible individually for the action taken by the Board of Directors as a whole.

In this regard, Sections 16-2-28, 16-2-29 and 16-2-30, U.C.A. 1953 provides as follows:

"16-2-28. *Directors charged with knowledge of corporate affairs.*—Every director of a corporation is deemed to possess such a knowledge of the affairs of his corporation as to enable him to determine whether any act, proceeding or omission of the board is a violation of law.

"16-2-29. *Directors presumed to have concurred in corporate acts, unless expressly dissenting.* Every director of a corporation who is present at a meeting of the board at which any act, proceeding or omission of such directors in violation of law occurs is deemed to have concurred therein, unless he at the time causes, or in writing requires, his dissent therefrom to be entered in the minutes of the directors.

"16-2-30. *Absent directors presumed to have concurred in corporate acts.*—Every director of a corporation although not present at a meeting of the directors at which any act, proceeding or omission of such directors in violation of law occurs is deemed to have concurred therein, if the facts constituting such violation appear on the records or minutes of the proceedings of the board of directors and he remains a director of the same corporation for six months thereafter and does not within that time cause, or in writing require, his dissent from such act, proceeding or omission to be entered in the minutes of the directors."

Directors of a corporation are in a fiduciary capacity, and are responsible to the stockholders for any breach of that fiduciary relationship. The following general language in this regard is found at 13 Am. Jur. 939.

"The posts of director and executive officers of corporations carry with them certain duties attendant upon

the management of the affairs of the corporation and the custody and use of its assets. The directors and officers of a corporation in charge of its management are, in the performance of their official duties, under obligations of trust and confidence to the corporation or its stockholders and must act in good faith and for the interests of the corporation or its stockholders, with due care and diligence, and within the scope of their authority. Any intentional deviation or departure from these duties to the substantial injury of any of the stockholders constitutes wilful mismanagement as a matter of law, for which a court of equity has jurisdiction to call them to account; and where the directors or officers of a corporation are guilty of a breach or neglect of any duties owing by them to the corporation, and the proximate result of such breach or neglect of duty is a loss to the corporation, they are liable to it."

In regard to personal liability of the directors of the corporation for selling assets of the corporation without proper authority, the following language is found at 3 Fletcher on Corporations, page 168, paragraph 1107:

"A sale without authority makes the officer who made the sale personally liable. Thus the directors are personally liable to the corporation for a diversion where they wrongfully transferred all its assets to a consolidated corporation."

The same matter was presented to the Connecticut Supreme Court in the case of *Mills v. Tiffany, Inc.*, 198 Atl. 185. There the Supreme Court stated:

"Directors or stockholders who brought about an illegal transfer are guilty of a tort and may be held personally accountable for the loss suffered by the minority stockholder. *Nave-McChord Mercantile Com-*

pany v. Ranney, *supra*, 8 CIR, 29 Fed. (2d) 383-389; Irvin v. Oregon Railway & Navigation Co., CC 20 Fed. 577-582; Heath v. Erie Railway Co. 8 Blatchf. 347-394, Fed. Case 6306; Godley v. Crandall and Godley Co., 153 App. Div. 697, 139 N.Y. Supp. 236-249, affirmed *me as to this point*. 212 N.Y. 121, 105 N.E. 818, L.R.A. 1915-D 632. The nature of the wrong being one *ex delicto*, any person who actively and knowingly participated in bring it about may be held equally liable with the guilty directors or stockholders.”

For further holdings to the same effect, see the following cases: Oil Shore v. Kahn, 94 Fed. (2d) 751; Spiegel v. Beacon Participation, a Mass. case, 8 N.E. (2d) 895; Hornstein v. Paramount Pictures, 37 N.Y. Supp (2d) 404.

The corporate directors in this case have breached their trust by having conveyed all of the corporate property away without proper authority and are personally liable to the plaintiff as a dissenting stockholder. Even under the defendants’ theory that the directors did nothing toward the corporate transfer, still the holding would be good as to Morris Ellison, who was both President and Director.

POINT THREE

THE PLAINTIFF IS ENTITLED TO JUDGMENT FOR THE VALUE OF HER PROPORTIONATE SHARE OF THE ASSETS OF THE CORPORATION LESS THE LIABILITIES OF THE CORPORATION.

The defendants take the position that the plaintiff is entitled to recover the market value of her stock as such if sold

on the open market, and not her representative share of the assets. This position is not well taken for three reasons:

1. The defendants stipulated to the type of appraisal adopted by the Court.

2. We do not have here a conversion of the stock itself as the plaintiff still has her stock. What they converted was the assets out from under the stock.

3. This would be the proper method of evaluation even if the stock itself had been converted.

During the course of the trial, the Court called counsel into its chambers and discussed the method of making an appraisal. The court pointed out that it would be best to have the job done by experts. An agreement was reached in chambers which was later quoted in the record and which agreement appears at page 10 of the defendants' Brief to the effect that three appraisers would be appointed who would value the assets of the Utah corporation; that the Court should then deduct the liabilities and determine the proportionate share that belonged to the plaintiff depending on her holdings of stock. This method of appraisal was agreed upon by counsel and by the parties in open court. More will be said of this particular matter in the succeeding section.

In this case we do not have a conversion of the stock itself. There was a valid resolution adopted for the dissolution of the Utah corporation. All stockholders voted for that and indeed if the plaintiff had dissented from such a vote, it would have done no good because 2/3rds of the stockholders, under the Utah law, may direct a dissolution. However,

when a dissolution is made the directors become trustees for the stockholders, either to distribute the assets in kind or to sell the assets and to distribute the proceeds therefrom among the stockholders according to their share holdings. The directors, therefore, had power to take the property from the corporation, but they had no power in the absence of the plaintiff to place her share of the property into a new corporation. It was, therefore, the plaintiff's share of the assets of the corporation rather than the stock itself which was converted.

Even if it were held to be the stock of the corporation which was converted, still the measure of damages adopted is the proper one. In case of a closely held corporation where there is no active market for the stock, the only method of determining valuation is to determine the cash value of the assets back of the stock. In those states which have statutory provisions authorizing reorganization on less than a unanimous vote of the stockholders, such statutory provisions almost without exception provide that the corporation must purchase the stock of the dissenting shareholders. Fletcher on Corporations, Vol. 15, page 245, discusses the matter of the measure of value of stock purchased under such reorganization statutes. The authors of this work state:

“The courts must determine the value of the shares of dissenting stockholders and in arriving at such valuation all the assets and liabilities of the corporation must be ascertained and considered such as the company's good will. In other words the appraisal of the stock should embrace the elements entering into its value.”

POINT FOUR

THE APPRAISERS MADE A LEGAL AND SOUND APPRAISAL.

Counsel has never been able to understand the objection which the defendants have to the appraisal as returned, except that they think it is too high. There were three qualified appraisers appointed, Mr. Leonard Elton, a well-known and respected member of the Utah Bar; Mr. Karl Hardy, whom counsel has never met, but whom he understands is a qualified real estate man, and Mr. Don Kinney, a livestock man who is an employee of a company of which Mr. Morris Ellison is a director. At least two of these men actually made a trip to the ranches and conferred with the Ellisons' employees before arriving at a figure.

Much of the property was in the form of stocks, bonds and cash on which it was easy to determine the value. The livestock was appraised on the ranch. The appraisers arrived at this valuation by taking the market value less the cost of gathering the livestock and getting it to the market. In regard to the real property, where the defendants seem to have the most objection, the appraisers determined that the cash value on real property of this type depended upon its carrying capacity. This carrying capacity, of course, takes into consideration the number of acres, the amount of water available, the amount of grass available and all other features that go into enabling the ranch to raise cattle. The appraisers, after conferences with the Ellison people, determined what the carrying capacity of the ranch was. They then determined the price

that ranches would bring on the open market depending upon carrying capacity and thus arrived at the valuation. This appears to be clearly within the direction given by the Court to the appraisers, and certainly appears to be a good sound method for an expert appraiser to arrive at a valuation of property of this type.

Counsel for the defendants makes much of the fact that plaintiff filed her Motion for Judgment before the appraisal was actually filed in the Court. The reason for this was explained by counsel for the plaintiff in the record. Mr. Leonard Elton, one of the appraisers, called counsel for the plaintiff and informed him that the appraisal was completed. He further informed him that in view of the fact that the appraisers had been contacted during the course of the appraisal by Mr. Skeen, attorney for the defendants, Mr. Elton felt that counsel for the plaintiff should look over the appraisal before it was filed. Counsel proceeded to do so and made no objection thereto except to call to the attention of the appraisers that the number of shares of Utah Power and Light stock had been understated due to a typographical error. Counsel for the plaintiff was then informed by Mr. Elton that the appraisal was being returned with the correction. Counsel then proceeded to file a Motion unaware that Mr. Elton had been delayed in the technicality of getting the signatures upon the appraisal which had been agreed to by all three appraisers.

POINT FIVE

THE DEFENDANTS SHOULD NOT BE ALLOWED TO APPEAL THIS JUDGMENT AS IT IS IN EFFECT A CONSENT JUDGMENT.

As pointed out above, during the course of the trial, a conference was held in the Judge's chambers. The matter was discussed pro and con, and it was agreed by all parties that the appraisers should determine the fair value of the assets of the corporation; that the Judge should then deduct therefrom the liabilities of the corporation and that the defendants should then pay to the plaintiff the value of her proportionate share of the assets less liabilities. This stipulation was read into the record by the Court and all parties agreed thereto. The defendants evidently felt that because one of the appraisers was an employee of a company of which Mr. Morris Ellison was a director that they would be able to direct the course of the appraisal. As quickly as they found that they had underestimated the independence of Mr. Kinney, they started to backtrack on the stipulation. However, the stipulation still stands and is subject to no other interpretation than that defendants consented that a judgment be returned according to the formula agreed upon. Plaintiff, therefore, submits that the defendants have no standing before this Court. Any error in the Court's proceeding, if error there was before the stipulation, would be wiped out thereby. The defendants were not pressured by anybody to enter into the stipulation. They did it willingly. Now that they have not gained the advantage that they hoped to gain thereby, they are attempting to change their position.

POINT SIX

THE COURT PROPERLY HELD THAT NO AMOUNT SHOULD BE DEDUCTED FROM THE VALUE OF THE ASSETS FOR ANY CORPORATE INCOME TAX PAYABLE UNDER A SUPPOSED SALE.

After the appraisal was returned, counsel for the plaintiff made a motion for judgment against the defendants. The amount stated in this motion was arrived at as follows: Counsel first took the total value of the assets as found by the appraiser and then deducted therefrom the company's liabilities as shown by the Answers to Interrogatories filed by the Company president during the course of the case. The value per share of stock outstanding was then determined by dividing the result of this figure by the total shares outstanding. The amount due to the plaintiff was then determined by multiplying the number of shares which she held by the value per share of the stock. The defendants objected to the figure thus arrived at, contending that the company had certain liabilities that had not been listed. The Court heard the evidence on this point and made an adjustment in the figure to allow for these other liabilities. The Court, however, refused to allow a deduction of some \$400,000.00 which the defendants claim would have been due to the Federal Government in income tax, if in fact, the property had been sold. They based their computation on the theory that the corporation itself would sell the property in the ordinary course of business. This matter was thoroughly briefed for the Trial Court and the defendants cited the same cases that they had cited in their brief to this Court. Each of these cases which hold the sale

taxable to the corporation do so on a particular fact situation. The case which goes the farthest of any of them is the Court Holding Company case. There the Supreme Court held that the sale was made by the corporation, however, the facts were that the sale was negotiated by the corporation and in fact the original down payment was paid to the corporation.

The language in the Court Holding Company case was rather broad and it caused some uncertainty in the law with the result that the Supreme Court in the later case of *United States v. Cumberland Public Service Company*, 338 U.S. 451; 94 L. Ed. 251, granted certiorari. The language used by the Court in the later case explains its holding in the Court Holding Company case and also definitely establishes the law; therefore, we take the liberty of quoting at some length from this decision:

“ . . . One judge dissented, believing that our opinion in *Commissioner v. Court Holding Co.*, 324 U.S. 331, 89 L. Ed 981, 65 S. Ct. 707, required a finding that the sale had been made by the corporation. Certiorari was granted, 338 U.S. 846, to clear up doubts arising out of the Court Holding Co. case.

“Our Court Holding Co. decision rested on findings of fact by the Tax Court that a sale had been made and gains realized by the tax payer corporation. There the corporation had negotiated for sale of its assets and had reached an oral agreement of sale. When the tax consequences of the corporate sale were belatedly recognized, the corporation purported to ‘call off’ the sale at the last minute and distributed the physical properties in kind to the stockholders. They promptly conveyed these properties to the same persons who had negotiated with the corporation. The terms of purchase were substantially those of the previous oral agreement.

One thousand dollars already paid to the corporation was applied as part payment of the purchase price. The Tax Court found that the corporation never really abandoned its sale negotiations, that it never did dissolve, and that the sale purpose of the so-called liquidation was to disguise a corporate sale through use of mere formalisms in order to avoid tax liability. The Circuit Court of Appeals took a different view of the evidence. In this Court the Government contended that whether a liquidation distribution was genuine or merely a sham was traditionally a question of fact. We agreed with this contention, and reinstated the Tax Court's findings and judgment. Discussing the evidence which supported the findings of fact, we went on to say that 'the incidence of taxation depends upon the substance of a transaction' regardless of 'mere formalisms', and that taxes on a corporate sale cannot be avoided by using the shareholders as a 'conduit through which to pass title.'

"This language does not mean that a corporation can be taxed even when the sale has been made by its stockholders following a genuine liquidation and dissolution. While the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held, Congress has chosen to recognize such a distinction for tax purposes. The corporate tax is thus aimed primarily at the profits of a going concern. This is true despite the fact that gains realized from corporate sales are taxes, perhaps to prevent tax evasions, even where the cash proceeds are at once distributed in liquidation. But Congress has imposed no tax on liquidating distributions in kind or on dissolution, whatever may be the motive for such liquidation. Consequently, a corporation may liquidate, or dissolve without subjecting itself to the corporate gains tax,

even though a primary motive is to avoid the burden of corporate taxation.

“Here, on the basis of adequate subsidiary findings, the Court of Claims has found that the sale in question was made by the stockholders rather than the corporation. The Government’s argument that the shareholders acted as a mere ‘conduit’ for a sale by respondent corporation muts fall before this finding. The subsidiary finding that a major motive of the shareholders was to reduce taxes does not bar this conclusion. Whatever the motive and however relevant it may be in determining whether the transaction was real or a sham, sales of physical properties by shareholders, following a genuine liquidation distribution cannot be attributed to the corporation for tax purposes.”

Mr. Lynn E. Baxter, a tax expert called by the defendants, admitted on cross-examination (T-104) that there would be no tax payable on dissolution if the sale were made by the directors as trustees for the stockholders.

It appears clear, therefore, that no tax would have been assessable to the corporation on a sale and distribution by the stockholders and so the Court properly refused to deduct this amount from the valuation of the assets. The Court then entered judgment for the plaintiff for the amount the Court found as adjusted, together with interest from the date of conversion.

It is a well-established rule of law that in conversion cases, interest is allowable at the legal rate from the date of conversion to the date of judgment. The defendants contested this matter in the court below but do not contest it here. We, therefore, are citing no cases in support of this proposition.

CONCLUSION

The problem before the Court is simply this. Can the majority of stockholders compel a minority and dissenting stockholder to surrender her stock in the corporation in exchange for shares of stock in another corporation? It appears that it would clearly be unjust and unequitable to take away this property right of the shareholder in a corporation. The appeal should, therefore, be dismissed.

Respectfully submitted,

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