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# Corporations

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## CORPORATIONS

### DEMAND BY DISSENTING SHAREHOLDER

Section 1701.85 of the Revised Code establishes relief for dissenting shareholders upon the sale or merger of a corporation and entitles a stockholder to the "fair cash value" of his shares if he complies with the requirements of the statute. One of the statutory requisites is that the shareholder serve a written demand upon the corporation, within a prescribed period, setting forth certain information, including the amount claimed as a fair value. Another requirement is that the shareholder deliver his share certificate upon the request of the corporation.

These requirements were the subject of controversy in the case of *Clarke v. Rockwood and Company*.<sup>1</sup> In that case, an attorney had submitted a letter of demand to the merging corporation on behalf of a number of stockholders, including several corporations. The company, after acknowledging receipt of the letter, asked the agent to have the shareholders deliver their certificates to the corporation for endorsement. After the certificates had been submitted by the shareholders, and after the statutory period for making the demand had expired, the company changed its position and rejected the agent's earlier demand. The company claimed that a demand by an attorney who offered no proof of agency authority did not comply with the requirements of the statute. In support of its position the company relied on *Klein v. United Theaters Company*,<sup>2</sup> a case in which it had been held that a written demand made by a purported agent of a shareholder was not a sufficient compliance with the applicable statute.

In holding the agent's demand valid in the present case, the court of appeals pointed out that the statute in effect at the time of the *Klein* decision did not grant the corporation the right to require that a shareholder deliver his certificate for endorsement. The court further pointed out that in this case the company had seemingly acknowledged the agent's authority by requesting that he have the shareholders deliver their certificates to the corporation, and did not reject the demand until after the statutory period within which the demand should be made had expired. Moreover, the court noted that the corporation had no good reason to question the authority of the agent because the shareholders had reaffirmed that authority by obeying his request for the submission of their shares to the corporation.

1. 110 Ohio App. 38, 168 N.E.2d 592, *appeal dismissed*, 170 Ohio St. 7, 161 N.E.2d 492 (1959).

2. 148 Ohio St. 306, 74 N.E.2d 319 (1947).

## CONFLICT OF INTERESTS

One of the many interesting issues raised in the complex *Manchester v. Cleveland Trust Company* case,<sup>3</sup> decided recently by the Cuyahoga County Court of Appeals, involved the ever present problem of conflict of interest. Briefly, the significant reported facts were that one George Bryant was the chief executive officer and Chairman of the Board of Directors of the Austin Company and was, along with his wife, a large stockholder of that company. Bryant was also a shareholder and director of the Cleveland Trust Company. A trust established by Samuel Austin and his wife, containing about eight per cent of the Austin Company's stock, was being administered by the Cleveland Trust Company as trustee. Bryant, desiring to acquire all the outstanding Austin Company stock for the employees of that company, made an offer to purchase for the company the shares held in trust by the Cleveland Trust Company. Bryant, however, was not present at the directors' meeting when the offer was made, his absence being attributable to a Cleveland Trust Company policy which forbids the attendance of a director at meetings which are to cover matters in which that director has a personal interest.

An action was filed by certain of the beneficiaries of the trust to remove the Trust Company as trustee because of the conflict of interest arising out of Bryant's dual position, the claim being made that Bryant was, in effect, a trustee. The court refused to take this action, but did find that a conflict of interest existed with the Trust Company by virtue of the fact that the Austin Company was a depositor (and a potential borrower) in the Trust Company, and hence was a source of profit to the trustee. Because of this situation the court was led to say that the trustee's "private interests present a constant threat of conflict with the management of the trust estate."<sup>4</sup> For this reason, the court ordered that the Trust Company, as trustee, was to secure judicial sanction prior to the consummation of any sale of Austin Company stock.

## SHAREHOLDERS' RIGHT TO INSPECT CORPORATE BOOKS

It is a well recognized principle that a shareholder has a right, formerly by common law and now under statute,<sup>5</sup> to inspect the books and records of the corporation. Section 1701.37(C) of the Code provides that a shareholder of a corporation may examine corporate records upon submitting a written demand "stating the specific purpose thereof." In

3. 168 N.E.2d 745 (Ohio Ct. App. 1960). See also discussion in *Trusts* section, p. 582 *infra*.

4. *Id.* at 753.

5. OHIO REV. CODE § 1701.37.

*Grossman v. Cleveland Cartage Company*<sup>6</sup> it was argued by the corporation that the plaintiff did not state a specific purpose in a letter which read: "The purpose of this inspection is to secure information as to the details of the company's business, the status of its affairs and to investigate whether there are any improprieties in the management and operation of the company."<sup>7</sup> The court held that this was a sufficient statement of a "specific purpose" within the meaning of the statute. The court noted that the aforementioned statement would be adequate to compel an inspection under the common law and concluded that statutory modifications must be liberally construed in order to protect the shareholder's interest.

#### DIVESTMENT OF CORPORATE CHARTER

In *State ex rel. McElroy v. A.M. Kinney, Incorporated*,<sup>8</sup> the supreme court was asked to determine whether a corporation, which was organized prior to 1943 for the purpose of engaging in the practice of engineering, is presently barred from such practice by virtue of the terms of section 1701.03 of the Code, which forbids the formation of a corporation for the purpose of carrying on the practice of any profession. The issue was raised by an action in quo warranto brought by the Attorney General. The petition was demurred to by the corporation. A 1933 statute<sup>9</sup> provided that a "firm, or a co-partnership, or an association" might engage in the practice of engineering. This statute was for many years interpreted by the state officials handling corporate charters as not precluding the incorporation of engineering companies.<sup>10</sup> In 1943 the section was amended to include a provision that "no corporation shall hereafter be granted a charter to engage in the practice of professional engineering or surveying. . . ."<sup>11</sup> The court sustained the demurrer holding that the legislature, by using the word "hereafter" in the 1943 amendment, had intended to protect and preserve rights of pre-existing engineering corporations. In discussing the 1933 statute the court stated that in order for the state to divest a corporation of its charter it must be done "directly and clearly or by necessary implication,"<sup>12</sup> and then ruled that

6. 83 Ohio L. Abs. 101 (C.P. 1959).

7. *Id.* at 102.

8. 171 Ohio St. 193, 168 N.E.2d 400 (1960). See also discussion in *Constitutional Law* section, p. 474 *supra*.

9. Ohio Gen. Code § 1083-18.

10. *State ex rel. McElroy v. A. M. Kinney, Inc.*, 171 Ohio St. 193, 195, 168 N.E.2d 400, 401-02 (1960).

11. The amended section is now OHIO REV. CODE § 4733.16.

12. *State ex rel. McElroy v. A. M. Kinney, Inc.*, 171 Ohio St. 193, 195, 168 N.E.2d 400, 401 (1960).