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relevance of each, the court was able to consider all appropriate facets of sameness. The Currie analysis focuses attention on the principles underlying the double jeopardy prohibition and the competing policies in a given factual situation. This emphasis provides a generally applicable analytical framework, assures that fundamental policy objectives will be considered, and may enhance the predictability of results.

Corporations: Dominant Shareholder in Close Corporation Allowed To Vote Without Regard to Interests of the Corporation

Complainant, a director and stockholder in a close family corporation, challenged a vote of the majority stockholders refusing shares offered to the corporation pursuant to a first option provision. Complainant’s stepmother, a second director, controlled the corporation by virtue of a life interest in approximately 80 percent of the outstanding stock. Upon her death the shares barred by such former prosecution under the following circumstances:

(1) . . . the subsequent prosecution is for:

. . .

(c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil . . . .

Under § 1.07, arguably the offense of reckless driving is included within the charge of atrocious assault because it could be established by proof of the facts “required to establish” the atrocious assault. Here, just as in the same evidence test, however, difficulty lies in determining which facts are required to establish the including offense. See note 7 supra. Depending on the view chosen as to required proof, opposite results could be reached.

Assuming both offenses were committed by the same conduct, § 1.09 would bar the atrocious assault prosecution unless each offense “requires proof of a fact not required by the other.” Here again opposite results can be reached depending on how the evidentiary problems noted above and in note 7 supra are resolved.

1. The option provided that any shareholder desiring to sell stock must first offer it to the corporation which may then purchase within one month from the time of the offer. Boss v. Boss, 200 A.2d 231, 233 (R.I. 1964). Such provisions are universally held to be for the benefit of the corporation and therefore valid. See 48 Minn. L. Rev. 808 (1964). First options are designed to allow the original shareholders to control the entry of new shareholders and to protect their proportionate interest in the corporation. For extensive discussion of first option provisions, see 2 O’Neal, CLOSE CORPORATIONS §§ 7.02–29 (1956).
were to be divided equally between the complainant and his half
brother, the remaining director. The refusal permitted the half
brother to complete his purchase of a small number of shares,
which at his mother's death would give him majority control. 2
The court below, solely on the basis of the pleadings, set aside
the vote of the majority, finding it contrary to the interests of
the corporation. On appeal, the Rhode Island Supreme Court
did not review the lower court's determination, but by reversing,
held in effect that the dominant stockholder could vote in her
own interest irrespective of the interests of the corporation. Boss
v. Boss, 200 A.2d 231 (R.I. 1964). This Comment is concerned
with the basis upon which the case was decided and its necessary
implications; the actual transaction is not evaluated.

When action taken by the majority shareholders is challenged
as contrary to the interests of the corporation or the minority
shareholders, the court's decision may very well be based upon
the adoption of one of two seemingly contradictory views. The
popular view, supported by the older cases 3 and the general re-
luctance of the judiciary to interfere in corporate management, 4
is that stockholders may vote in their own interest without regard

2. The corporation had only 71 shares outstanding. Complainant held
three shares and had a remainder interest in 30. His half brother held two
shares and also had a remainder interest in 30. The remaining six shares,
including the four in controversy, were held by an outsider. Had there been
no refusal, complainant would have had one more share than his half brother,
and thus would have been in a more commanding position. 200 A.2d at 232-33.
The lower court found that it was the intention of the corporation's founder
in devising the stock to the respective parties that ultimate control should
vest in the complainant, his son. Brief for Complainant, pp. 40, 41, Boss v.

3. E.g., Du Pont v. Du Pont, 831 Fed. 937 (D. Del. 1918), aff'd except as
to costs, 256 Fed. 199 (3d Cir.), cert. denied, 250 U.S. 642 (1919); Haldeman
v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917); Albert E. Touche, Inc. v.
Touche, 264 Mass. 499, 163 N.E. 184 (1928); Bjornsgard v. Goodhue County
Bank, 49 Minn. 488, 52 N.W. 48 (1892); Robotham v. Prudential Ins. Co.,
64 N.J. Eq. 673, 53 Atl. 942 (Ch. 1908); White v. Kincaid, 149 N.C. 415, 63

4. This reluctance is predicated on the democratic belief in deferring to
the majority — in the case of the corporation, a rule of the majority in interest.
See Du Pont v. Du Pont, 256 Fed. 129, 134 (3d Cir. 1919); Kentucky Package
Store, Inc. v. Checany, 281 Mass. 125, 128, 117 N.E.2d 139, 141 (1954); BERLE
& MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 121 (1932);
Sneed, Stockholders Votes Motivated by Adverse Interest: The Attack and the
Defense, 58 Mich. L. Rev. 961, 966 (1960); Sneed, The Factors Affecting the
Validity of Stockholder Votes in Adverse Interest, 13 Okla. L. Rev. 373, 375
to the interests of the corporation. In *Gamble v. Queens County Water Co.*, a stockholder-director voted his stock to confirm a sale which he had previously made to the corporation. The New York Court of Appeals held that the stockholder was in no sense a trustee and had a right to vote in his own interest, even though that interest was entirely separate from the interests of the other stockholders.

Representative of the opposite position is *Lebold v. Inland Steel Co.*, in which the majority shareholders voted to dissolve

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5. The "self-interest principle" is no more than a presumption that what is good for the majority must also be good for the corporation. Memphis & C.C.R.R. v. Wood, 88 Ala. 630, 644, 7 So. 108, 113 (1890). Since individuals generally enter business to make a profit, those having the largest investment will be the most diligent in seeing that their investment is maximized. Conversely, they will not vote to injure the business entity for this would only jeopardize their own investment. Sneed, *The Stockholder May Vote as He Pleases: Theory and Fact, 22 U. Prr. L. Rev. 23, 25 (1960)*. The profit incentive which provided a basis for the "self-interest principle" has also led to the development of other propositions which buttress the shareholder's freedom to vote. Thus it has been held that the stockholder owes no fiduciary duty to his fellow shareholders. E.g., Price v. Holcomb, 89 Iowa 125, 56 N.W. 407 (1893); Meriman v. National Zinc Corp., 82 N.J. Eq. 493, 89 Atl. 764 (Ch. 1914). Allied with this proposition is the contention that an adverse interest will not disqualify a shareholder from voting. Kentucky Package Store, Inc. v. Checani, 321 Mass. 125, 117 N.E.2d 139 (1954); United States Steel Corp. v. Hodge, 64 N.J. Eq. 807, 54 Atl. 1 (Ct. Err. & App. 1909); Thurmond v. Paragon Colliery Co., 82 W. Va. 49, 95 S.E. 815 (1918). The latter assertion is based on the conception that the right to vote is a property right inhering in the ownership of shares and, as such, is beyond the control of the other shareholders. Kentucky Package Store, Inc. v. Checani, *supra*. Some courts indulge in a presumption that majority action was fair. Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 38 A.2d 148 (Ch. 1943); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 Atl. 183 (Ch. 1931). The presumption is probably a result of the assumed identity of interest between the majority and the corporation, but it is also a rule of judicial convenience designed to relieve the court of the difficult problem of examining many varied and complex corporate transactions. Sneed, *supra* at 42.


7. Id. at 97, 25 N.E. at 202.

8. 125 F.2d 369 (7th Cir.), cert. denied, 316 U.S. 675 (1942); accord, Pepper v. Litton, 308 U.S. 295 (1939); Geddes v. Anaconda Copper Mining Co., 354 U.S. 590 (1951); Southern Pac. Co. v. Bogert, 280 U.S. 483 (1919); Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); Lebold v. Inland S.S., 82 F.2d 251 (7th Cir. 1936); Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529, 537 (6th Cir. 1915); Franklin v. Havalaena Mining Co., 16 Ariz. 200, 141 Pac. 727 (1914); Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 99 A.2d 230 (Ch. 1953); Robb v. Eastgate Hotel, Inc., 347 Ill. App. 261, 106 N.E.2d 848 (1952).
a successful subsidiary solely to deprive the minority of the opportunity to share in the subsidiary's profits. The Seventh Circuit, emphasizing the fact that the majority controlled 80 percent of the subsidiary's stock and actually managed all its affairs, stated that because of their dominant position they owed the same fiduciary obligation to the corporation and the minority as would directors exercising similar managerial functions. In a distinguishable context the United States Supreme Court has stated that dominant or controlling shareholders hold their power to control in trust for the benefit of the corporation and the remaining shareholders.

Taken out of context, Gamble requires the conclusion that a shareholder may vote as he pleases no matter how oppressive the result. On closer analysis the "self-interest principle" may have been employed in that case merely to buttress a previous finding that the action taken by the majority was "not unfair" or that the interested stockholder's vote did not determine the result. The defendant's vote in Gamble was not needed to constitute a majority, and although he received a premium for the sale, the

9. 125 F.2d at 872.
10. Pepper v. Litton, 308 U.S. 285 (1989). The case involved a fraudulent scheme engineered by the dominant shareholder of a bankrupt corporation to use the bankruptcy proceeding as a device to deprive a creditor of his claim while at the same time enabling the shareholder to reap a tremendous profit.
11. Fairness, as applied in these cases, does not refer to an abstract concept of justice, but to an analysis of what is not unfair in light of the prevailing business mores. Given the proposition that the majority should be free to manage with minimal interference, fairness is essentially a determination that some inference of business purpose can be drawn. See Sneed, The Stockholder May Vote as He Pleases: Theory and Fact, 22 U. Pitt. L. Rev. 23, 33 (1960). It presupposes a negative analysis which is only meaningful in light of the situations in which courts have found the majority's action unfair. Moreover such an analysis of the result precludes an examination of the motive prompting the action, since the only relevant object of inquiry is whether the act was within the business discretion of the stockholders. Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 577, 580 (C.C.S.D.N.Y. 1884); Kirwan v. Parkway Distillery Inc., 258 Ky. 605, 611, 148 S.W.2d 720, 723 (1942); White v. Kincaid, 149 N.C. 415, 420, 68 S.E. 109, 111 (1906). Recent cases generally speak solely in terms of fairness. In Honigman v. Green Giant Co., 309 F.2d 667 (8th Cir. 1962), the court sustained a recapitalization plan whereby the voting shareholders gave the nonvoting shareholders a right to vote in return for a $2,000,000 increase in the former's share in the equity. The court based its decision solely on the finding that the plan was fair. 309 F.2d at 671–72.
12. See, e.g., Du Pont v. Du Pont, 256 Fed. 129 (9th Cir.), cert. denied, 250 U.S. 642 (1919). If the challenged vote was not needed to constitute a majority, then the self-interest of the shareholder becomes immaterial.
court found that under the circumstances the transaction was justifiable. Moreover, if the majority’s vote were sufficiently detrimental to suggest that their interest lay wholly outside the interests of the corporation, the court indicated it would not hesitate to interfere. Therefore, *Gamble* does not speak to the question of a dominant shareholder’s duty to the corporation and minority shareholders. Nevertheless, cases adopting the principle established in *Gamble* do emphasize the fact that courts are reluctant to impose their conception of management policies on a corporation if it is not unreasonable to presume that the stockholders’ desire to maximize their investment will lead them to pursue the most profitable course for the corporation. Such judicial tradition deserves continued respect, but it has no application when a dominant shareholder’s vote bears no relation to the interests of the corporate whole. When such a finding is made, interference by the court in corporate affairs is desirable.

The apparent inconsistency between the cases imposing fiduciary duties and those which refuse to do so may be explained, in part, by an analysis of the respective factual contexts. The validity of the self-interest principle depends upon drawing a distinction between managerial functions and ownership. The mere ownership of stock does not impose a fiduciary obligation. It is only where majority shareholders actually undertake to manage the corporation’s affairs or are in a position of dominance that a duty of trust will be imposed. Thus in *Gamble*, although

14. *Id.* at 104–05, 25 N.E. at 204.
15. *Id.* at 99, 25 N.E. at 202.
16. See note 5 *supra*.
18. This distinction is characterized in 3 FLETCHER, PRIVATE CORPORATIONS § 993 (perm. ed. rev. repl. 1947): “A stockholder-director is not deprived of his right to vote on any matter properly coming before a stockholders’ meeting, on account of any private interest he may have which is detrimental to the corporation.” See also BEKELE & MEANS, op. cit. *supra* note 4, at 119–25.

In general the management of the corporation is left to the directors. The director’s duty of loyalty will not allow him to prefer his own interest to that of his *cestus* and will subject him to the highest standard of good faith. *E.g.*, *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Irving Trust Co. v. Deutch*, 73 F.2d 131 (2d Cir. 1934); *Austrian v. Williams*, 105 F. Supp. 61 (S.D.N.Y.), rev’d on other grounds, 108 F.2d 697 (2d Cir.), cert. denied, 344 U.S. 999 (1952); see 3 FLETCHER, op. cit. *supra* note 18, § 838 and cases cited therein.
the defendant was a director as well as a shareholder, it was unnecessary to impose restrictions upon him as a shareholder because he had no management power in that capacity — no controlling interest. On the other hand, in *Lebold* the majority shareholders also constituted a majority of the directors; in either capacity they were able to manage the corporation.

Sometimes a dominant management-ownership group will have an interest in conflict with the corporation as a whole. If such a management group can act in its alter ego as owners and thereby avoid its managerial responsibilities, the position of the minority becomes precarious. Without judicial limitations property which the minority entrusted to the majority is subject not to the latter's managerial ability, but to its unlimited personal discretion. Where domination is shown, all managers, whether acting as owners, directors, or officers, should be subject to the obligations necessary to protect the property of those for whom they manage.

20. It is fundamental that one who takes stock, does so with full knowledge that he takes it subject to the power of the majority. *J. H. Lane & Co. v. Maple Cotton Mills*, 226 Fed. 692 (4th Cir. 1915). Nevertheless, the recognition of the majority's power to manage is precisely the reason he is burdened with fiduciary obligations since the minority has no alternative but to act through the majority. *Wheeler v. Abilene Nat'l Bank Bldg. Co.*, 169 Fed. 391, 394 (8th Cir. 1908); *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 194-95, 123 N.E. 148, 151 (1919).

21. In *Southern Pac. Co. v. Bogert*, 250 U.S. 483 (1919), Mr. Justice Brandeis aptly stated the obligation owing to the minority: "The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors." 250 U.S. at 487-88.

Akin to cases imposing restrictions on shareholders who vote contrary to the corporate interest are cases which impose limitations upon shareholders selling "control." One court has allowed the corporation to recover from the seller a premium received, apparently on the ground that the shareholder usurped a corporate opportunity. *Perlman v. Feldmann*, 219 F.2d 173, *cert. denied*, 349 U.S. 952 (1955). Courts seem more willing to impose responsibilities on stockholders who sell under circumstances which indicate the seller should have known or foreseen that the buyer would subsequently loot the corporation. *Insuranshares Corp. v. Northern Fiscal Corp.*, 35 F. Supp. 32 (E.D. Pa. 1940); *Gerdes v. Reynolds*, 28 N.Y.S.2d 623 (Sup. Ct. 1941). In *Levy v. American Beverage Corp.*, 265 App. Div. 208, 38 N.Y.S.2d 517 (1942), the court determined that the seller had no knowledge or reason to know that the buyer intended to loot the corporation. The corporation involved in *Levy* was a manufacturing concern whereas the cases imposing liability involved corporations with a substantial percentage of liquid assets. In the latter situation the possibility of looting is probably more foreseeable. For extensive treatment of the problem of control see *Bayne, A Philosophy of Corporate*
Unfortunately, the severity of the limitation imposed upon a dominant group's freedom to act in its own interest has seemed to depend upon the type of transaction challenged. Where the operating assets of the corporation may be adversely affected or the proprietary interest of the minority impaired, a fairly rigid standard has been required. On the other hand, if the challenged transaction has only peripheral effect, the standard has been relaxed in order to preserve the manager's business discretion. In either situation dominance, not the nature of the transaction, should be the crucial factor.

In the instant case the court did not determine whether the majority's vote was contrary to the corporate interest, fair, or in good faith. By allowing the dominant shareholder to vote in her own interest without an examination of the surrounding circumstances and result, the court placed all shareholder action beyond the scope of judicial review. The result leaves the minority shareholders totally unprotected. The majority vote in Boss may have been fair, but the court refused to adopt a fairness standard, relying instead on the formal distinction between directors and stockholders. The stepmother's pervasive control of the corporation is precisely the dominance which the Lebold case found to impose a fiduciary duty. The determination by the court that a dominant shareholder may, as a matter of law, vote his stock in his own self-interest, irrespective of the corporate interest, is indefensible and should not be followed.

22. See cases cited note 8 supra.


24. The question of the exercise of the option was first brought before a directors' meeting. Since the half brother could not vote because of his interest in the shares, the stepmother voted against the exercise of the option thereby creating a stalemate and forcing the question to the stockholders' meeting where she could then vote her majority against the option. She apparently contended that a fiduciary duty was not applicable to her outside of the directors' meeting. See 200 A.2d at 234.