STATUTORY EXPROPRIATION OF THE MINORITY SHAREHOLDER

The recent decision of the Court of Appeal in *In re Bugle Press Ltd.*[1] raises questions concerning the principles which should direct judicial review where the majority shareholders in a company purport to exercise the statutory power given by s.209(1) of the United Kingdom Companies Act 1948 to expropriate the shares of the minority. The comparable sub-section in the New South Wales Companies Act, 1936, s.135(1), is, for present purposes, in similar terms.

Section 209(1), in so far as relevant, provides —

> Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as 'the transferor company') to another company, whether a company within the meaning of this Act or not (in this section referred to as 'the transferee company'), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company . . . .

In the present case the Court was asked to deny the use of the section to expropriate the shares of one of three shareholders in a tranferor company when the transferee company was wholly owned and controlled by the other two shareholders. One would have thought it obvious to any student of basic company law doctrines that the attempted expropriation was doomed to failure. But apparently the majority shareholders were advised that it was sufficient to comply with the bald procedural requirements of the section and that by doing so they were entitled to expropriate the shares of the minority.

I. *Facts and Judgments*

The facts in *In re Bugle Press Ltd.* are briefly as follows: Bugle Press Ltd. was incorporated in 1950 and carried on a successful bookselling and publishing business. The authorised and issued capital of the company was 10,000 shares of £1 each fully paid, all of one class, of which 4,500 each were held by George Shaw and Henry Jackson who were also the two directors of the company. The

[1] (1960) 2 W.L.R. 658 (Buckley, J.); (1960) 3 W.L.R. 956 (C.A.).

remaining 1,000 were held by Henry Treby. In 1958 the two majority shareholders promoted a company, Jackson and Shaw (Holdings) Ltd., of which company they were the only members and directors. This company carried on no business of its own and was incorporated solely for the purpose of purchasing the total shareholding of the transferor company. In July 1959 the transferee company offered to purchase the 10% shareholding of the minority shareholder at a value calculated by an independent firm of accountants; the 90% shareholding of the majority shareholders was, of course, assured. The offer made was refused and Jackson and Shaw (Holdings) Ltd. gave the minority shareholder notice under s.209 of the Act that it intended to exercise its statutory rights of compulsory acquisition under that section.

The minority shareholder applied for a declaration under the section that the transferee company was neither entitled nor bound to acquire his shares in the transferor company on the terms of the "scheme and contract" of July 1959, notwithstanding that it had been approved by the majority of the shareholders. Buckley, J.,[2] at first instance declared accordingly. His decision was based on two major findings: that the transferee company had not satisfied the court that the price offered was a fair price and that the case was of an unusual nature — "unusual in this sense that the 90 per cent. majority shareholders were, themselves, in substance the transferee company". This second finding was adopted and expanded by the Court of Appeal and formed the main basis for the rejection of the appeal. The principal judgment of the court was given by Lord Evershed, M.R., with whom Harman, L.J., and Donovan, L.J., agreed.

In the Court of Appeal counsel for the appellant argued firstly, that the case was within the four corners of the section upon the ordinary construction of its language; secondly, that the onus must be upon the dissident shareholder to show that an order should be made otherwise than as the section envisages; thirdly, that the dissident shareholder had not discharged the onus on him to show the offer was unfair, and finally that the principle set out by Maugham, J. in *In re Hoare and Co.*,[3] and expressly approved by the Court of Appeal in *In re Press Caps Ltd.*[4] applied in favour of the majority shareholders.

The first contention was defeated by the discretion clause in the section. Even if a notice situation falls within the four corners of the section the power to acquire is still defeasible if "the court thinks fit to order otherwise". The Court accepted the second contention that the minority shareholder had to establish that the discretion should be exercised in the way he sought but held that he had discharged this onus by showing that the transferee company and the 90% of the transferor company's shareholders were the same. It was found unnecessary to decide the third contention as the court based its decision on the broad ground of the special circumstances of the case. The Court had little difficulty in distinguishing the facts in the present case from those in *In re Hoare and Co. Ltd.* and *In re Press Caps Ltd.* In the former case the transferee company had acquired 99.86 per cent. of the shareholding in the transferor company. Maugham, J., refusing to make an order otherwise, stated his interpretation of the section thus:

> Accordingly without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders the scheme is unfair.[5]

This principle was expressly approved by the Court of Appeal in *In re Press*

[2] *In re Bugle Press Ltd.* (1960) 2 W.L.R. 658.
[3] (1933) 150 L.T. 374; (1933) All E.R. Rep. 105.
[4] (1949) 1 All E.R. 1013; (1949) Ch. 434.
[5] (1933) All E.R. Rep. at 107.

Caps Ltd. and applied in that case to a similar fact situation. It should be noted that Evershed, L.J. (as he then was), was a member of the Court of Appeal in that case. In these two cases the shareholders who had accepted the offers of the respective transferee companies "were persons wholly independent of the offeror or transferee company".[6] This was the major basis for the decision of the Master of the Rolls, who found that the circumstances in the present case were "special" within the ambit of the principle expressed by Maugham, J. Lord Evershed said —

> Even, therefore, though the present case does fall strictly within the terms of s.209, the fact that the offerer, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special — a case therefore, of a kind contemplated by Maugham, J., to which his general rule would not be applicable.[7]

His Lordship held that the minority shareholder, by showing that the majority shareholders and the transferor company were the same for all practical purposes, had *prima facie* shown that the court ought otherwise to order.

His Lordship had no hesitation in using the discretion clause to "pierce the corporate veil" and go behind the corporate personality of Jackson & Shaw (Holdings) Ltd. to the separate personalities of Mr. Jackson and Mr. Shaw, the majority shareholders in the transferor company. The principle in *Salomon's Case*[8] that a company is a separate legal entity has, as Professor Gower points out, generally precluded the courts from treating a company as the "alias, agent, trustee or nominee" of its members. "They will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct".[9] This is merely an extension of the well-known equitable doctrine based on the maxim: "equity will not allow a statute to be used as a cloak for a fraud". It is submitted that the action of the Court of Appeal in the present case is justified by this equitable doctrine, as the obvious admitted purpose of promoting the transferee company was to expropriate the shares of the minority shareholder; in other words to use the strict terms of a statutory enactment to obtain their improper ends.

Two important aspects of the statutory power of expropriation thus arise: It is clear that mere literal compliance with the terms of the section will not necessarily be sufficient to ensure a successful acquisition, and some light is thrown upon the conditions under which the court will exercise the discretion given. A judge, when asked to review exercise of the statutory power when there is a literal compliance with the terms of the section, will therefore have two questions to ask. Firstly, do the facts show a situation which conforms to the policy of the legislature? If the answer is yes, the judge should make an order in favour of the applicant majority. If the answer is no, a second question should then be asked, namely: is the fact situation an appropriate one for the exercise of the discretion given by the section? To be able to answer these questions the judge must ascertain the policy of the legislature and the principles upon which he is to base the exercise of his discretion. It will be submitted[10] that the policy of the legislature is that the section should apply to the larger public company take-over situations where a large majority of shareholders in a transferor company have agreed to sell their shares to a transferee company and a dissident minority refuses to conform to the majority decision, rather than

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[6] (1960) 3 W.L.R. at 960.
[7] *Id.* at 962.
[8] (1897) A.C. 22.
[9] L. C. B. Gower, *Modern Company Law* (2 ed. 1957) 208.
[10] *Infra* p. 96.

to the smaller private or proprietary company set-up where comparatively few shareholders are involved. Lord Evershed does not clearly set out the principle or principles upon which he exercised his discretion in favour of the minority shareholder. After stating that the section in the present case had not been used for the purpose of any proper scheme or contract of sale,[11] His Lordship went on to determine that the section had been used for the quite different purpose of enabling majority shareholders to evict the minority: "and that, as it seems to me, is something for the purposes of which *prima facie*, the court ought not to allow the section to be invoked — unless at any rate it were shown that there was some good reason in the interests of the company for so doing".[12] It is submitted that in these latter words can be found the true principle which should govern the exercise by the court of the discretion provided in the section. That is, the discretion should be exercised in accordance with the principles dealing with expropriation at general law. Paramount among these is that any expropriation must be *bona fide* and for the benefit of the company as a whole. This submission is strengthened by the fact that His Lordship did not consider the question of the fairness of the price offered for the shares to be in any way vital to his decision. He relied first and foremost on what constituted a proper exercise of the discretion given by the section. From his remarks it can reasonably be inferred that the majority shareholder, to succeed, would have had to show circumstances justifying a general law expropriation. Accordingly, properly to understand the statutory expropriation, it is necessary to consider expropriation at general law.

Harman, L.J., expressed his distaste of the attempted expropriation in strong terms.[13] With respect, it is submitted that His Honour showed some lack of appreciation of (a) the "fundamental rule of company law"; and (b) the purpose and policy of s.209(1); for it is clear that the section was inserted for the very purpose of allowing a majority, in certain cases, to expropriate a minority. In an endeavour to obtain a clear picture of the inter-relationship of general law and statutory expropriation it is proposed in what follows to consider the origin, substantive content, purpose, applicability and effect of both methods.

II. *Expropriation at General Law*

The general law principle is by no means clearly defined. Professor Gower states that the majority cannot exercise their voting power so as to deprive other members of their shares in the company, but adds, "the prohibition is not absolute and will not apply if such expropriation is for fair compensation and required in the interest of the company as a whole."[14] This principle, which Professor Gower classifies as "somewhat doubtful" (presumably in the sense of not well settled, is found in the three decisions in *Brown* v. *British Abrasive Wheel Co.*,[15] *Sidebottom* v. *Kershaw Leese & Co.*, [16] and *Dafen Tinplate Co. Ltd.* v. *Llanelly Steel Co. (1907) Ltd.*[17] The first and third are decisions by single judges; the second is a decision of the Court of Appeal. All these cases concern attempts by majority shareholders to expropriate the shareholding of a

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[11] *Semble* both Lord Evershed, M.R. and Harman, L.J. would have been prepared to hold that in the present case there was no "scheme or contract" within the meaning intended by the section had this point been raised in the Court below. It thus appears that a mere offer *simpliciter* to purchase shares will not amount to a "scheme or contract" for the purposes of the section.

[12] (1960) 3 W.L.R. 962.

[13] *Id.* at 963.

[14] L. C. B. Gower, *op. cit.* 513.

[15] (1919) 1 Ch. 290.

[16] (1920) 1 Ch. 154.

[17] (1920) 2 Ch. 124.

minority by means of powers to be derived from alterations or amendments to the articles of association of the various companies.

In *Brown's Case* a public company was in urgent need of further capital. The 98 per cent. majority were ready to provide it if they could buy out the 2 per cent. minority. Having failed to persuade the minority to sell they proposed to pass a special resolution adding to the articles a clause whereby *any* shareholder was bound to transfer his shares upon a request in writing of the holders of nine-tenths of the issued capital. Astbury, J., referring to the alteration said: "If fair and just and in the interest of the company and shareholders generally I have no right to interfere. If, on the other hand, it is oppressive it is both my right and duty to prevent it being imposed on the minority".[18] The alteration was not directly concerned with the increase of capital — it simply gave a blanket power of expropriation to the majority. His Honour held that the alteration was solely for the benefit of the majority and granted an injunction to restrain the passing of the resolution.

In *Sidebottom's Case* a private trading company, in which the majority of shares were held by the directors, passed a special resolution to alter the articles of association so that the directors could require any shareholder who competed in the company's business to transfer his shares at their full value to nominees of the company. The plaintiff minority in this application carried on a competing business. The Court of Appeal held that the resolution was *bona fide* and for the benefit of the company as a whole and was therefore valid. It should be noted that the power given by the resolution here could only be used against a particular person or class of person, *i.e.*, a shareholder-competitor. The Court, correctly it is submitted, considered *Brown's Case* to have been decided on the facts and stated (*albeit* more precisely) a similar principle of law. Lord Sterndale, M.R., pointed out that Astbury, J. had merely come to an opposite decision on the facts in *Brown's Case* to the one he had reached in the instant case. Warrington, L.J. made a similar assessment.

In the *Dafen Tinplate Company Case* the amendment to the articles was in a most arbitrary form. By virtue of the amending resolution, any member (except one specifically named), could be compelled by the Board to transfer his shares to such person or persons as the Board thought fit at a fair value to be determined by the Board. The apparent major reason for the amendment was that the plaintiff minority shareholder had been purchasing steel for processing from a competing company instead of from the Llanelly Steel Company as had been the original arrangement. Peterson, J. stated the *Sidebottom* principle but went on to say:[19]

> But in this case the resolution which was passed went much further than the protection of the company from action by shareholders which could be properly considered detrimental to its interests. The resolution as passed enables the majority of the shareholders to compel any member (other than the Briton Ferry Company) to transfer his shares, although there may be no complaint of any kind against his conduct and it cannot be suggested that he has done, or contemplates doing, anything to the detriment of the company.

As His Honour pointed out there was no *present* intention of exercising the very wide powers conferred by the amendment but cases could arise where it could be used as an instrument of oppression. On the principle in *Sidebottom's Case* he concluded that the power given to the majority to expropriate any shareholder they may think fit at their will and pleasure was not for the benefit of the company as a whole. The test used by Peterson, J. to determine whether

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[18] (1919) 1 Ch. 294.
[19] (1920) 2 Ch. at 137-138.

the power of alteration was exercised "for the benefit of the company as a whole" appears at first blush to be an objective one. His Honour rejected the suggestion that the test should be whether the shareholders *bona fide* believed that the alteration was for the benefit of the company and considered the question was whether in fact the alteration was for the benefit of the company as a whole. This would appear to mean that the question was one to be decided by the court as a question of law. In *Shuttleworth* v. *Cox Bros. & Co. (Maidenhead) Ltd.*[20] the Court of Appeal disapproved of the *dictum* of Peterson, J. on this aspect and stated that it was for the shareholders and not the Court to say whether the alteration was for the benefit of the company unless the conduct of the shareholders was such that no reasonable man could consider it for the benefit of the company. It is suggested that the reasonable man test set out in *Shuttleworth's Case* at least lays down a well known legal criterion for deciding the issue and if this test had been applied in the *Dafen Tinplate Company Case* the result undoubtedly would have been the same.

In *Greenhalgh* v. *Arderne Cinemas Ltd.*[21] Lord Evershed, M.R. set forth the test of the benefit of an individual hypothetical member to be used to decide whether the acts of the shareholders are properly motivated.[22] This principle was applied in slightly modified form in the recent New South Wales case of *Australian Fixed Trusts Pty. Ltd.* v. *Clyde Industries Ltd.*[23] The modification involved an *addendum* that the hypothetical member must have no personal interests conflicting with those of the company. It is submitted that this test is of limited value, as the answer to the question posed, i.e. what is for the benefit of the individual hypothetical member will almost invariably be that which the majority wishes. Followed to its logical conclusion the test used could result in the "fundamental principle of company law" being meaningless and no principle at all. However as the authorities stand there appear to be three distinguishable tests to determine whether an attempted expropriation is "*bona fide* for the benefit of the company as a whole". First, did the expropriating shareholders have a proper motive for acting as they did? This is a question of law to be decided by the use of Lord Evershed's test of benefit to the individual hypothetical member. Secondly, were the shareholders *bona fide* moved by such motive? This is a question of fact. Finally, were the steps taken by the expropriating shareholders proper to further their purpose? What are proper steps must be left to their judgment unless their actions are so extravagant that no reasonable man could say that what they did was for the benefit of the company.

It is submitted that on an analysis of the above decisions a third element can be added to our basic principle. This is the element of particularity. In *Brown's Case* and in the *Dafen Tinplate Company Case* the respective resolutions altering the articles gave the company powers of a general nature, not confined to the particular purpose for which the resolution was formulated. In *Sidebottom's Case* however the resolution was a particular one directed at that person or class of person who competed with the company. Thus, it is submitted, at general law in any attempt by the majority to expropriate the minority an amendment to the articles must be confined to the particular aspect it is desired to remedy.

Another aspect of the subject which calls for examination is the significance of an existing power of expropriation in the articles. In the *Bugle Press Case* Harman, L.J. stated: "In my judgment this is a barefaced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, *unless the articles so provide*, to expropriate a minority".[24] Similarly Astbury,

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[20] (1927) 2 K.B. 9.
[21] (1951) Ch. 286.
[22] *Id.* at 291.
[23] (1959) S.R. (N.S.W.) 33.
[24] (1960) 3 W.L.R. at 963.

J. in *Brown's Case* indicated in *obiter* that a power of compulsory acquisition is not void *per se* and if such a power had been inserted in the original articles of association it would have bound all the members of the company because they chose to join the company knowing that the power might be used against them. This statement, along with many others in the case law would appear to assume that there is a *volens* principle in this area of company law. The supposed principle may be stated thus: If the original articles of association contain a particular expropriation provision no shareholder may subsequently attack its validity. It is based on the proposition that the articles of association of a company constitute a contract between the members of the company who are accordingly bound by their contract.[25] Thus it is said any person who is or becomes a member of a company cannot complain if subsequently any power set out in the articles when he purchased his shares is used against him. By becoming a member of the company he is deemed to know the contents of the articles and takes any risk involved.[26]

It is submitted, however, that powers set out in articles must be read as subject to and embodying the general principles of equity and company law established by the courts. The well known statement of Lord Lindley, M.R., in *Allen* v. *Gold Reefs of West Africa*[27] dealing with alteration of articles of association is equally applicable to the situation where there is an exercise of power already contained in the articles. His Lordship said:

> The power thus conferred on companies — that is, by section 50 of the Companies Act, 1862 (25 and 26 Vict. c.89) — to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum to association. Wide, however, as the language of s.50 is, the power conferred on it must, like all other powers, be exercised and subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.[28]

Phillips v. *Manufacturers' Securities Limited*[29] might appear to be a decision contrary to the above submission. The articles of association of the defendant company empowered the company in general meeting by a three-fourths majority, to determine that the shares of any member be offered to other members for sale at not less than 1s. per share, such price being a gross undervalue. Peterson, J., at first instance, held that it was within the powers of the majority of the shareholders to fix the price at 1s., although the value was in fact greater; and that, this being the bargain between the persons becoming shareholders of the company, there was no ground of complaint against the company in respect of the resolution passed for the sale of the plaintiff's shares. The Court of Appeal affirmed the decision of Peterson, J., but it should be carefully noted,

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[25] "I have said that these articles are nothing more or less than a personal contract between Mr. Borland and the other shareholders of the company under s.16 of the Companies Act, 1862." *per* Farwell, J., in *Borland's Trustee* v. *Steel Brothers & Co. Ltd.* (1901) 1 Ch. 279 at 290.

[26] This supposed principle is the basis of many ventures in the field of tax and estate planning. It finds some support in the judgment of the High Court in *W.P. Keighery Pty. Ltd.* v. *Commissioner of Taxation* (1957) 100 C.L.R. 66. In that case the articles of association of the company gave Mr. and Mrs. Keighery the power to effect the redemption of the shares of the preference shareholders (except during a certain specified period of time), on seven days' notice. The Court paid scant attention to the rights of the preference shareholders and apparently proceeded on the basis that these shareholders by taking the shares had submitted to any exercise of the provision in the articles allowing their redemption.

[27] (1900) 1 Ch. 656.

[28] *Id.* at 671.

[29] (1917) 86 L.J. Ch. 305.

not on the supposed *volens* principle. Rather did it hold that in the circumstances the fact that the resolution provided for a sale at a gross undervalue was no evidence that the company had acted oppressively or fraudulently or that it had acted otherwise than in *bona fide* exercise of the power conferred by the article. The facts in this case were somewhat special as the company was formed with the main object of furthering the interests "in any way which the law allows" of an associated trade union. Basically it was decided that the company was furthering the interests of the union by compelling the purchase of the plaintiff's shares at a low price. Warrington, L.J. applied Lord Lindley's principle and held that the power in the articles had not been exceeded; the exercise of the power was *bona fide* and for the benefit of the company as a whole.[30]

The decision of the High Court in *Ngurli* v. *McCann*,[31] it is suggested, entails a more than tacit rejection of the alleged *volens* principle. Here the articles of association gave C complete control during his lifetime and gave his personal representatives, so long as the "life governor's share" remained registered in C's name, complete control of the company after his death. After his death, acting in accordance with the articles, his personal representatives and H the beneficiary of the "life governor's share" brought about an allotment of a large number of shares to the personal representatives with the intention that subsequently these shares would be transferred to H. The Court, in making perhaps its most detailed survey on the law of abuse of powers conferred by the articles of association of companies, said:

> But the powers conferred on shareholders in general meeting and on directors by the Articles of Association of Companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose.[32]

It accepted the twofold interpretation of the term "*bona fide* for the benefit of the company as a whole" stated by Evershed, M.R. in *Greenhalgh* v. *Ardene Cinemas Ltd.*[33] the second part of which introduces the test of the benefit of an individual hypothetical member. The Court then went on to hold that the powers entrusted to the directors by the articles to be exercised on behalf of the company are fiduciary powers and that the fiduciary power vested in H as director, had been exercised without consideration for the other shareholders' rights and in breach of his fiduciary powers.

It is inherent in the judgment of the High Court that powers set out in articles of association of companies are not to be interpreted as unqualified by any principle of the general law. Rather they are conditional upon compliance with the general doctrines of equity developed by the courts within the framework of company law.

III. *Statutory Expropriation*

The prototype of the present s.209 of the 1948 United Kingdom Act first appeared in the 1929 United Kingdom Act. It was inserted as the result of a

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[30] It is surprising to discover that there was an application for an injunction between the same parties, heard in 1915 before Eve, J., two years prior to the above decision and reported under the same name *(Phillips* v. *The Manufacturers' Securities (Limited)* (1915) 31 T.L.R. 451 and this case was not mentioned nor referred to, in the report of the 1917 case. The facts of the 1915 case were the same as above stated. Counsel for the defendant company argued that the articles were a contract and gave the company the legal right to expropriate the plaintiff's shares at the price resolved. Eve, J., however, rejected this argument. It would be, he said, "little less than shocking if the court could not intervene in a case like this". He regarded the defendant company's action as dishonest in the extreme and granted an injunction to restrain the defendant company from acting in pursuance of the resolution.

[31] (1954) 90 C.L.R. 425.

[32] *Id.* at 438.

[33] (1951) Ch. 286 at 291.

recommendation by the Company Law Amendment Committee under the chairmanship of Mr. Wilfred Greene, K.C. (later Lord Greene).[34] The Committee recognised the fact that in some amalgamations between companies it was necessary that the concern which in substance was being taken over should be amalgamated by a transfer of shares and not by a sale of assets. The reason might be the desire to preserve the goodwill of the company's name or to preserve part of its property (e.g. a patent) which could not be assigned. In most cases the acquiring company desires to obtain the whole of the share capital of the company being taken over and in some cases will not entertain the amalgamation except on that basis. It was represented to the Committee that holders of small numbers of shares in the company being taken over, either from a desire to obtain better terms than their fellows or from apathy or other reasons, frequently failed to come into an arrangement which commended itself to the vast majority of the shareholders with the result that the transaction failed to materialise. To remedy this situation "which is in effect an oppression of the majority by a minority"[35] the Committee recommended that where a scheme of amalgamation involving the transfer of shares has been sanctioned by the holders of at least 90 per cent. of the shares involved, the purchasing concern should be entitled as of right within a limited time to acquire the shares of non-assenting holders on the same terms as those accepted by the assenting shareholders, with the right to appeal to the Court on any question of value or oppression. In consequence of this recommendation a new section, s.155, appeared in the United Kingdom Act of 1929.[36] This section was adopted by the New South Wales Legislature in the Companies Act, 1936, and is still in its original form in our statute book.

In 1945 the Cohen Committee presented its report[37] which formed the basis of the consolidated Act of 1948. The Committee recommended two substantive amendments to the existing s.155. The first dealt with the case where the transferee company was already the holder of 10 per cent. or more of the shareholding in the transferor company (a situation to which s.155 did not extend), and considered that the section should apply to such a case provided that the offer was made to all the shareholders concerned other than the transferee company and was accepted by not less than 75 per cent. in number of such shareholders holding between them not less than nine-tenths in value of the shares sought to be acquired. The second recommendation was designed to give a minority shareholder the right to require the transferee company to purchase his shares at an agreed price or a price to be settled by the Court. Thus if a transferee company acquired nine-tenths or more in value of the shares in the transferor company it must within one month notify this fact to the minority holders who might, if they so desired, compel the transferee company to purchase their shareholding. These two recommendations were incorporated into a new section, s.209, in the 1948 Act. No parallel amendment was made to our s.135 but clause 185 of the Companies Bill 1960 (N.S.W.) adopts all the provisions in s.209 and adds further procedural provisions of its own.

It is to be carefully noted that these sections deal solely with the situation which has become known as a "take-over". Before the provision can operate there must be a transferor company and a transferee company within the meaning of the Act. The transferee company must have made an offer by way of a "scheme or contract" to the shareholders in the transferor company and this offer (excluding any shares held by the transferee company) must have been

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[34] Cmd. 2657/26.
[35] Cmd. 2657/26, 44.
[36] 19 & 20 Geo. V, c. 23.
[37] Cmd. 6659/45.

accepted by the shareholders holding nine-tenths or more in value of the transferor company's shareholding. It is obvious from a reading of both the Greene Report and the Cohen Report that these Committees were concerned only with the situation involving a take-over of one company by another company. It can be further inferred both from the Greene Report and the terminology of the section, that the statutory provision is intended to apply more to the larger public type of company than to the smaller private or proprietary type. The policy of the legislature appears to be that in the situation where a take-over offer is accepted by the large majority of shareholders, their interests should not be defeated by a small minority of "stay-puts" who without valid justification refuse to accede to the offer.[38] This policy should be considered by proposed offerors before embarking upon the expensive business of attempted expropriation on tenuous grounds. In the *Bugle Press Case* the situation itself (apart from the other considerations involved) was not appropriate for the application of the section. The company's shares were distributed among three shareholders only and the minority holder held one-tenth of the total issued capital. This type of company set-up was never intended to become the basis of a s.209 application.

IV. *Application of the General Law and Statutory Powers of Acquisition*

The general law and statutory powers are distinct and separate in themselves, have separate origins and purposes and are available in different fact situations. The statutory power as we have seen is only available where one company has made a take-over offer and acquired at least nine-tenths in value of the shares of the company being taken over (excluding shares already held by the offeror company). The general law power of expropriation on the other hand, is mainly concerned with the fact situation where an existing majority group of shareholders wishes, for various reasons, to acquire all the company's shares and proceeds to insert a power in its articles of association to allow such acquisition. The statutory power has a major advantage over the general law power in as much as when the provisions of the section have been complied with and there are no special circumstances existing — such as, for example, those existing in the *Bugle Press Case* — to invoke the court's discretion, there is no way of avoiding the compulsory acquisition. In the case of the general law power however the majority must ensure that the taking of the power given by the alteration to the articles is "*bona fide* and for the benefit of the company as a whole" and, it is submitted, is aimed at a particular existing situation.

Professor Gower interprets the decisions in *Brown's Case* and the *Dafen Tinplate Company Case* to mean that there is something approaching an absolute prohibition on expropriating other members' shares. He goes on to say that both these cases have been somewhat "blown upon" by decisions of the Court of Appeal, and then observes:

> Unless the decisions in *Brown's Case* and the *Dafen Tinplate Case* are right, the statutory power seems to be unnecessary and the statutory safeguards unavailing, for the majority, even if less than nine-tenths, could attain

[38] There appears to be no reported local case law dealing with our s.135: However, in the recent upsurge of company take-overs it has more than once been invoked by a take-over bidder to compel transfer of the shares of a minority, e.g. on 4th August, 1960, G. J. Coles & Company Ltd., made a take-over offer to the shareholders of Matthews, Thompson & Co. Ltd., which was subsequently accepted by more than nine-tenths in value of the shareholders. G. J. Coles & Company Ltd., after the time prescribed by s.135, gave notice to the minority shareholders that it was compulsorily acquiring their shareholdings.

> their object by an alteration of the articles provided only that they could not be proved to have acted otherwise than *bona fide* for the benefit of the company as a whole.[39]

With respect, it is submitted that the learned author's interpretation of these cases is incorrect and does not appreciate the major basis of both decisions; that is, the nature of the respective resolutions which allowed indiscriminate scope for the majority at any time, for any reason, to expropriate other members' shares. The writer reiterates that there is no fundamental difference in principle between *Brown's Case*, the *Dafen Tinplate Company Case*, or *Sidebottom's Case*. It is further submitted that the statement that the statutory power is unnecessary because the majority could alter the articles of association anyway, indicates a lack of understanding of the vital difference between the statutory and the general law powers of expropriation. The statutory power deals with a company-to-company take-over situation and aims at allowing a complete transfer of all shares in the transferor company to the transferee company. To obtain a majority to pass a special resolution to alter the articles in the situation envisaged by Professor Gower the transferee company must first become the holder of at least 75 per cent. of the shares in the transferor company. But the transferee company may not want to purchase any shares at all unless it can obtain the total shareholding. This was the situation specifically recognised by the Greene Committee in 1926 and the resulting s.155 of the 1929 Act was aimed at enabling a transferee company once it had obtained nine-tenths in value of the shareholding to obtain the whole. Almost invariably a take-over offer is conditional upon the acceptance by the holders of at least nine-tenths in value of the shares of the offeree company. Although the two powers are separate and distinct there exists a vital inter-relationship between the two methods. The general law power, as developed by the courts, may be invoked by majority shareholders of all companies whether large or small. As a gloss on the general law power there has developed the statutory power which is only available to majority shareholders of the larger public type company in a "take-over" situation. Thus in the latter case the majority may have a choice between proceeding under the general law or invoking the statute. However, as witnessed by the *Bugle Press Case*, there may be no such choice in the smaller private or proprietary company set-up.

V. *Conclusions*

1. At general law expropriation of the minority by the majority shareholders by amendment of the articles of a company must be *bona fide* for the benefit of the company as a whole and must be confined to the particular situation in which it is for the benefit of the company to compulsorily acquire the shares in question.

2. The statutory method of expropriation contained in s.209 of the United Kingdom Act and s.135 of the New South Wales Act is not properly applicable to take-over situations within small private or proprietary companies but is confined to larger take-over "deals" by or between public companies.

3. The discretion given to the Court by the section, if exercised, should be exercised in accordance with the principles dealing with expropriation at general law.

4. The statutory and general law methods are separate modes of acquisition available in certain distinct fact situations. Each has a definite place and purpose but they co-exist and may overlap to give a choice to the majority shareholders

[39] L. C. B. Gower, *op. cit.* 514-515.

in the case of the larger companies.

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