ceedings invariably demand exorbitant fees,[40] but also because they have put a penalty on bona fide demands: the petitioner who demands only what his services are worth will generally find his fees reduced to the same extent as are those of less conscientious petitioners. The factors which the courts now purport to consider in allowing fees are satisfactory; it is their application which is doubtful. If the administrative task is too onerous for the judges themselves, it should be given to some other officer of the court, whose intimacy with the reorganization proceedings will make it possible for him, with some accuracy, to determine the sums to be allowed.[41]

RIGHT OF THE RECEIVER OF AN INSOLVENT CORPORATION TO RECOVER PROMOTERS' PROFITS

Corporate promoters have often been able to minimize the risk of liability for secret profits by carefully arranging the promotion transactions in the light of distinctions drawn by the courts.[1] If shares are first issued to outsiders and thereafter the directors transfer property to the corporation at a profit, the corporation can recover the profit in the absence of assent by an independent board of directors after full disclosure or by all shareholders.[2] And even if at the time of the transfer the promoters own all of the shares then issued, when the corporation later issues further shares to outsiders, these later purchasers are, by the majority view, treated as existing shareholders whose consent is necessary to bar the corporation.[3] The United States Supreme Court, however, took the op-

asked $54,000.00, allowed $20,000.00; *In re* Paramount-Publix Corp., 12 F. Supp. 823 (D.C. N.Y. 1935), asked $3,239,828.15, allowed $1,045,211.48; *In re* Stevens Bros. Corp. (D.C. Ill.) Chicago Daily News, Feb. 11, 1936, $273,890.00 asked, $141,159.00 granted; *In re* Celotex Company of Chicago (D.C. Del.), $721,000.00 asked, less than $221,000.00 granted, Chicago Daily News, Feb. 20, 1936, p. 27.

[40] See for example the charges of Senator Ashurst, 80 Cong. Rec. Feb. 24, 1936 at 2698; also, the proposal of Senator William G. McAdoo to try federal judges accused of wrongdoing in granting excessive fees. Chicago Daily Tribune, Feb. 25, 1936, p. 25. In the course of hearings on requests for fees aggregating $1,600,000 in connection with the reorganization of the Middle West Utilities, Judge Wilkerson is reported to have said, "Legal fees have grown to be 'grossly exorbitant' as a result of business conditions over the last 25 to 50 years." Chicago Daily Tribune, March 14, 1936, p. 35.

[41] Undoubtedly, the present practice of determining fees does involve reliance on the work of officers of the court, such as Masters in Chancery. Their work, however, has not promoted a satisfactory system of determining fees because they, following the example set by the judges, have not given serious consideration to the aforementioned criteria.

[1] See 47 Harv. L. Rev. 1031 (1934).

[2] Erlanger v. New Sombrero Phosphate Co., L. R. 5 Ch. D. 73 (1877), aff'd in L. R. 3 App. Cas. 1218 (1878); Arnold v. Searing, 73 N.J. Eq. 262, 67 Atl. 831 (1907); Hughes v. Cadena de Cobre Mining Co., 13 Ariz. 52, 108 Pac. 231 (1910); Davis v. Las Ovas Co., 227 U.S. 80 (1913).

[3] Bailey v. Pittsburgh, etc., Gas, Coal & Coke Co., 69 Pa. St. 334 (1871); Old Dominion Copper Mining & Smelting Co. v. Bigelow, 188 Mass. 315, 74 N.E. 653 (1905); California-Calaveras Mining Co. v. Walls, 170 Cal. 285, 149 Pac. 595 (1915).

posite view in *Old Dominion Mining & Smelting Co. v. Lewisohn*,[4] and held the corporation barred by the consent of the directors and existing shareholders, even though a future issue of shares was contemplated. But in almost every jurisdiction the promoters can avoid liability to the corporation by having all shares issued to them in the first instance and by selling to the public only shares thus issued. In such a case the corporation is held barred because the directors and holders of all the shares have consented.[5]

These traditional categories were subjected to a severe test in a case recently decided by the United States Supreme Court, in which the promoters' profits were realized by the sale of corporate bonds and notes, as well as stock.[6] The promoters organized a corporation, planning to sell it certain oil lands which they had an option to purchase for \$2,500,000. They advertised securities of the company in a prospectus, declaring that the purpose of the issue was to acquire "properties, and to provide cash for .... corporate purposes."[7] The prospectus stated that the land had been appraised at \$7,000,000. Having assured themselves of a market for the securities, the promoters brought about the transfer of the land to the corporation and took in return \$5,000,000 in bonds secured by a mortgage on the land, \$1,000,000 in notes, and all the issued stock—535,000 shares of no par value. The indebtedness of the corporation thus was more than twice what the promoters had paid for its land. Although the court made no finding of actual value, it apparently accepted the testimony of one witness that the land was worth \$2,700,000. On this assumption, the corporation was insolvent from the start. The promoters disposed of the bonds and notes at once, and of the stock shortly afterward. Within two years the insolvent corporation went into receivership, and the receiver sued the promoters for their profit. The

[4] 210 U.S. 206 (1908). Though the denial of recovery to the corporation in this situation seems harsh, there are substantial practical objections to sustaining such a suit. Assenting shares will participate in the recovery and thus some of the parties to the wrong may be benefited. But by limiting recovery to the proportion the innocent shares bear to the total and distributing the proceeds directly to the injured parties (see Brown v. De Young, 167 Ill. 549, 47 N.E. 863 (1897)) this difficulty is avoided. Besides, the same objection exists when recovery is permitted because there were innocent, non-assenting shareholders at the time of the transaction. Yet the Supreme Court, in common with other jurisdictions, permitted the corporation to recover at the instance of such shareholders. See cases cited in note 2 *supra*. For a full discussion of this and related problems, see 47 Harv. L. Rev. 1031 (1934).

[5] Foster v. Seymour, 23 Fed. 65 (C.C. N.Y. 1885); Turner v. Markham, 155 Cal. 562, 102 Pac. 272 (1909); Hayes v. The Georgian, 280 Mass. 10, 181 N.E. 765 (1932).

It is contended that the stock of the corporation, having no assets behind it before the sale to the promoters, is worth nothing; therefore, the exchange of any amount of par value stock for property of small value, is not injurious to the corporation. See Stratton's Independence v. Dines, 126 Fed. 968 (C.C. Colo. 1904), aff'd in 135 Fed. 449 (C.C.A. 8th 1905). The trouble with this argument is that it proves too much. If the exchange is fair, existing shareholders would not be injured and the failure to disclose to them would be insignificant. Yet recovery is permitted in such cases. See cases cited in notes 2 and 3 *supra*.

[6] McCandless v. Furlaud, 56 Sup. Ct. 41 (1935).

[7] 56 Sup. Ct. 41, 43.

district court allowed recovery of profits realized from the sale of the bonds and notes, but not of the stock. The circuit court reversed and denied recovery on the ground that all the shares had consented to the profit,[8] relying upon *Old Dominion Copper Mining & Smelting Co. v. Lewisohn.*[9] The Supreme Court reversed the circuit court and modified the decree of the district court, holding that the receiver was entitled to profit arising from the stock, as well as from the bonds and notes. Four judges dissented, principally on the authority of the *Lewisohn* case.[10]

The majority opinion limits the scope of the *Lewisohn* case to transactions which do not result in injury to creditors. While it was there held that the entry of innocent shareholders into the corporation would not permit corporate recovery, the present case holds that the entry of innocent bondholders and note-holders may have that effect, even though they purchased their securities from the promoters.[11] The exception in favor of creditors draws support from the analogous decisions permitting the receiver of an insolvent corporation to sue holders of watered stock[12] under the statutes prohibiting issuance of stock for less than par,[13] though the corporation itself is barred.[14] The alternative to corporate recovery is the cumbersome and uncertain remedy of individual actions by purchasers of the stock or bonds. While the possibility of a class suit may afford an answer to the objection based upon the multiplicity of actions, the individual cause of action is by no means clear, since courts have not yet recognized an affirmative duty on the part of the promoter to disclose his profit to persons to whom he sells securities. In the absence of such recognition, the re-

[8] 75 F. (2d) 977 (1934).

[9] Note 4 *supra.*

[10] This view seems to have been taken in Tompkins v. Sperry, Jones & Co., 96 Md. 560, 54 Atl. 254 (1903). The receiver there sued the promoters for secret profits realized by the resale of stock and bonds. It was held that the corporation was barred by the consent of all its shares when owned by the promoters, and that the subsequent resale of the shares and bonds to innocent purchasers did not remove the bar. But there was no showing that the promoters had rendered the corporation insolvent by the transaction. This may furnish a ground for distinguishing the principal case.

[11] This ground thus is made to distinguish not only the Lewisohn case, but also the cases cited in note 5 *supra.*

[12] Halcombe v. Trenton White City Co., 80 N.J. Eq. 122, 82 Atl. 618 (1912), aff'd in 82 N.J. Eq. 364, 91 Atl. 1069 (1913); Meier v. Eaton, 46 S.D. 286, 192 N.W. 721 (1923); Woodward v. Sonnesyn, 162 Minn. 397, 203 N.W. 221 (1925); 11 Fletcher, Corporations §§ 5232, 5244 (perm. ed. 1932). *Contra:* James v. Bosworth, 223 Ky. 1, 2 S.W. (2d) 1075 (1928). The power of the receiver to sue involves consideration of local statutes governing receivers. In addition, some of the decisions use, as an alternative ground, statutes making stockholders liable for the unpaid amount of the par value of their stock in spite of an agreement with the corporation.

[13] There was such a statute in the jurisdiction where the corporation in the principal case was organized. See p. 488.

[14] Vasey v. New Export Coal Co., 89 W.Va. 491, 109 S.E. 619 (1921); Wells v. Green Bay & Miss. Canal Co., 90 Wis. 442, 64 N.W. 69 (1895); 11 Fletcher, Corporations § 5226 (perm. ed. 1932).

quirements of a common law deceit action would have to be fulfilled. The present recovery is therefore a preferable result,[15] at least where all of the present security holders are equally deserving of protection.

Two other theories are suggested on which to explain the recovery in the principal case. Fraudulent conveyance rules prohibit depletion of the estate of an insolvent debtor. If, in the principal case, the bonds and notes had been issued by the corporation, and the proceeds used to buy the promoters' land at an inflated price, the creditors could have held the promoters for the payment in excess of value, as a fraud on their rights. The promoters, however, arranged the transaction so that the bond and note holders were not existing creditors, and the cash they paid was not an asset of the corporation. The Supreme Court showed a disposition to invert the order of events, precisely what it refused to do for the benefit of stockholders in the *Lewisohn* case.[16] Even without such inversion, the bond and note holders could possibly have made out a case of fraudulent conveyance. Creating debts for an inadequate consideration may be a fraud on creditors.[17] Subsequent creditors can complain if the transaction was carried out with actual intent to defraud them.[18] In the principal case the court was willing to infer that the appraisal was intentionally inflated and this might be held to constitute intent to defraud. If the promoters had continued to hold the bonds and notes and if further debts had been contracted by the corporation, the promoters' claims would probably be postponed at least to some extent. And if the securities had been sold to bona fide purchasers, the subsequent creditors might be able to reach at least part of the proceeds in the hands of the promoters.[19] This cause of action might be available to the receiver, for he could be treated as a representative of creditors, with power to assert causes of action

[15] If the promoters had taken all their profits through the resale or subsequent issue of no par stock, it seems that they could completely have avoided liability to the corporation, either for secret profits or for stock-watering. It is said that the absence of par value makes it almost impossible to determine the existence and amount of overvaluation of the property conveyed to the corporation. Consequently, the corporation finds it difficult to prove that the amount of stock taken gave the promoters a profit. It has been held that no par stock has no certain value, so that an exchange of any number of shares for property of small value is fair. Piggly Wiggly Delaware v. Bartlett, 97 N.J. Eq. 469, 479, 129 Atl. 413, 417 (1925); Allenhurst Park Estates v. Smith, 101 N.J. Eq. 581, 609, 138 Atl. 709, 721 (1927). See Berle, Compensation of Bankers and Promoters through Stock Profits, 42 Harv. L. Rev. 748, 750 (1929). It is submitted that such denial of liability for secret profits is wrong. The difference between the value of the property and the amount realized by the promoter upon resale of the stock, or the amount paid by incoming shareholders, could justly be used as a measure of the profit.

[16] 56 Sup. Ct. 41, 45.

[17] Stat. 13 Eliz., c. 5, § II (2) (1570).

[18] Ward v. Marie, 73 N.J. Eq. 510, 68 Atl. 1084 (1907); Uniform Fraudulent Conveyance Act, § 7.

[19] If the fraudulent grantee has disposed of the property, creditors can recover the proceeds from him. School District v. Gorder, 55 N.D. 823, 215 N.W. 281 (1927) (modified and aff'd in 57 N.D. 668, 223 N.W. 694 (1929)); Cooke v. Fenner & Beane, 214 Ala. 558, 108 So. 370 (1926).

which inured to them.[20] A receiver is frequently empowered to avoid fraudulent conveyances.[21] The difficulty in applying this theory in the principal case lies in the fact that the only "subsequent creditors" involved were transferees of the very securities the issuance of which might constitute the fraud. In this situation existing fraudulent conveyance law furnishes no precedent. In any event, recovery for the stock, however, would have to rest upon fraudulent intent coloring the entire transaction.[22]

Reliance was also placed by the court upon a local statute which provided that "no corporation shall issue either bonds or stock except for money, labor done, or money and property actually received, and all fictitious increase of stock or indebtedness . . . . shall be void."[23] Creditors and representatives of creditors have been permitted under this statute to cancel bonds given for fraudulently overvalued property.[24] If the original owners have transferred the obligations to innocent persons who can enforce them, the transferors would be liable for the proceeds, as a fraudulent grantee who has sold the property fraudulently conveyed.[25] An action for the proceeds of bonds, however, raises a serious question under such a statute. Any sale of bonds to an underwriter at a discount might be subject to attack, and the courts might have some difficulty defining the class of transactions forbidden by the statute.

SOME ASPECTS OF DELIVERY: SPECIALTIES AND THE UNIFORM WRITTEN OBLIGATIONS ACT[1]

Originally, manual transfer or surrender of possession of the instrument was an indispensable element of delivery.[2] Today; we are prone to treat the problem of delivery wholly as a question of intention and to disregard the necessity for

[20] Brockhurst v. Cox, 71 N.J. Eq. 703, 64 Atl. 182 (1906), aff'd in 72 N.J. Eq. 950, 73 Atl. 117 (1907); Bell v. New York Safety Steam Power Co., 183 Fed. 274 (C.C. N.Y. 1910); Olson & Co. v. Voorhees, 292 Fed. 113 (C.C.A. 3d 1923).

[21] Whitman v. Dorsey, 110 Md. 421, 72 Atl. 1042 (1909). In Keedy v. Sterling Electric Appliance Co., 13 Del. Ch. 66, 115 Atl. 359 (1921), the receiver of a corporation was allowed to set aside a transfer made by the insolvent without compliance with the Bulk Sales Act, on the alternative ground that the conveyance was fraudulent against creditors at common law.

[22] See 56 Sup. Ct. 41, 49.

[23] 15 Purdon's Pa. Stat. 1930 § 131.

[24] *In re* Wyoming Valley Ice Co., 153 Fed. 787 (D.C. Pa. 1907), aff'd *sub nom.* Wiegand v. Albert Lewis Lumber & Mfg. Co., 158 Fed. 608 (C.C.A. 3d 1908) (creditors); Bingaman v. Commonwealth Trust Co., 15 F. (2d) 119 (D.C. Pa. 1926) (trustee in bankruptcy); *cf.* Tepel v. Coleman, 229 Fed. 300 (D.C. Pa. 1914) (trustee in bankruptcy), aff'd on other grounds in 230 Fed. 63 (C.C.A. 3d 1916).

[25] See cases cited in note 19 *supra.*

[1] The discussion will be confined chiefly to delivery of instruments under seal, and bills and notes. The problem of delivery is not often associated with simple contracts, because in that

[Footnote 1 continued on page 489]

[2] The term delivery designates the final act by which one who has previously signed an instrument, or has both signed and sealed it, gives the instrument its legal operation. See 2

[Footnote 2 continued on page 489]