validity or the invalidity of the marriage. Similarly, if a New Jersey court had to pass on the question as to where a change of title to a chattel occurred while the chattel was not in New Jersey, it would have to declare itself incapable of passing upon the question even if that question were presented in a litigation between two New Jersey parties. Such results would be ludicrous and would, of course, not be accepted by a New Jersey court. However, on principle, the problems are not different from that of the instant case.

APPRAISAL RIGHT OF PREFERRED SHAREHOLDERS IN MERGER WITH PAPER SUBSIDIARY

In March 1941, certain preferred shareholders of a Delaware corporation brought suit in a federal district court to enjoin the merger of the corporation with a paper subsidiary which had been set up as part of a plan to eliminate cumulative preferred arrearages.[1] The proposed merger plan, according to the preferred shareholders, was grossly unfair because it gave benefits to the common stock which, they asserted, had no equity in the corporation. The court found that the common had an equity in the corporation and denied the injunction.[2] After the merger was completed other dissenting preferred shareholders exercised their statutory appraisal right and demanded cash payment for their shares. The appraisers fixed a value of $90 per preferred share which was far below the figure of $197.50 necessary to cover par plus arrearages, and the corporation thereupon filed a petition in the Delaware Court of Chancery to compel the dissenters to deliver their stock certificates on payment of the appraisal figure. The dissenters cross-petitioned to have the $90 appraisal valuation set aside on the grounds that it was inconsistent with the findings of the court in the injunction suit, and they asked that a new appraisal be made. The Delaware court held that no significant inconsistency existed, and ordered the dissenters to deliver their stock certificates at the value set by the appraisers. *Root v. York Corp.*[3]

In 1936 the Delaware court had taken the position that preferred dividend arrearages were "vested rights" in the nature of a debt, and that they could not be scaled down by charter amendments.[4] The same court in 1940, however, decided that such arrearages could be scaled down in mergers, even where the merger was between a corporation and a dummy subsidiary.[5] In denying that

[1] Under the merger plan the preferred shareholders, who held 25 per cent of the voting control, were offered 83.2 per cent of a new single issue of common stock, while the common shareholders, previously in the majority, were to take 16.8 per cent of the new issue.

[2] Hottenstein v. York Ice Machinery Corp., 45 F. Supp. 436 (Del., 1942), aff'd 136 F. 2d 944 (C.C.A. 3rd, 1943), noted in 43 Col. L. Rev. 230 (1943).

[3] 50 A. 2d 52 (Del. Ch., 1946).

[4] Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936).

[5] Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A. 2d 331 (1940).

there was any change in its position the court ignored the strong language used in the previous decision and relied on a literal and unrestricted interpretation of the words of the merger statute.[6] The court did point out, however, that under the merger statute the minority stockholder was protected by his right to demand an appraisal and cash payment for his shares.[7] Realistically, that right would seem to provide the only real distinction between the merger and charter amendment situations. The instant case shows, however, that the appraisal right, as interpreted by the Delaware courts, provides no protection whatever for the preferred shareholder.[8]

The preferred stockholder faced with the cancellation of his dividend claims is not in a position to bargain for his own protection. The common stock, which holds a decisive voting control, can devise a merger plan which is only limited in its advantages to the common stockholders by the threat of an injunction if the plan is excessively unfair. The limitation is not a strong one, however, since the Delaware courts have taken a hands-off attitude toward merger plans, preferring to assume that they involve only intra-corporate matters and that judicial intervention is required only to prevent unfairness so extreme as to amount to fraud.[9] The courts may require that there be an equity for the common stock in order to justify any representation for it in the new corporation, but they are loath to question the fairness of the actual percentage alloted to the common. Under these loose standards the preferred shareholder cannot prevent the use of merger plans which allot some 15 or 20 per cent of a new issue to the common stock, the value of which had theretofore been purely speculative.[10]

Presumably the appraisal right was included in the merger statute to take care of just this situation; if the preferred stockholder was not awarded a fair percentage of new stock in the merged corporation he could, through use of his appraisal right, as it was interpreted in the *Havender* case, be insured the

[6] Del. Rev. Code (1935) § 2091.

[7] Federal United Corp. v. Havender, 24 Del. Ch. 318, 334, 11 A. 2d 331, 339 (1940); see Shanik v. White Sewing Machine Corp., 19 A. 2d 831, 835 (Del. Ch., 1941).

[8] In the typical case the right to appraisal and payment is not a practical alternative for the small minority stockholder anyway, since the procedure is an expensive one and full of technical requirements. SEC Report on Reorganization Committees, Part VII 590–610 (1938). The procedure is not often put to use. Ballantine, Corporations 702 (1946).

[9] Porges v. Vadsco Sales Corp., 32 A. 2d 148 (Del. Ch., 1943); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 Atl. 183 (1931); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 157 Atl. 396 (1928); see Accrued Dividends in Delaware Corporations—From Vested Right to Mirage, 57 Harv. L. Rev. 894 (1944).

[10] The merger plan used in the principal case was typical. The corporation had been in existence for fifteen years and during that time had paid no dividends on the common stock and less than one year's dividend on the preferred. Moody's Manual of Investments, Industrials (1942) 70. The balance sheet net worth was insufficient to cover the liquidation claims of the preferred, and in order to show an equity for the common stock the corporation had to show that its fixed assets had been arbitrarily written down and were actually worth several million dollars more than the balance sheet figure. In an actual liquidation the possibility of any distribution to the common stock would have been small. But under the merger plan devised, the common stock's nuisance value, derived from its voting control, was rewarded by allocation of 16.8 per cent of the new issue of stock.

equivalent of a fair percentage in cash. The Delaware courts, however, have subsequently refused to interpret the appraisal right in the light of the protective function it was meant to fulfil, and instead have treated it as if it presented only a routine problem of valuation. If the dissenting shareholder is to be given an equivalent in cash of his interest in the corporation it would seem that the fairest standard would be his liquidation interest in the net worth of the corporation as a going concern. The courts, however, put the problem in the hands of the appraisers with only the most general instructions to make use of all available factors.[11] The appraisers juggle the various value elements, such as market value, book value, and capitalized earnings, but they must especially allow for the fact that the preferred shareholder is in no position to force the payment of dividends to himself and that his interests are always vulnerable to depression in a dummy merger. By thus emphasizing the weakness of the minority stockholder's position, the standards of appraisal used preclude any hope of protection for him.

As a practical matter the Delaware courts perhaps must refuse to allow real protection for minority stockholders in appraisals because, if the appraisal right were strengthened, many of the preferred shareholders might dissent, and recapitalizations by merger might become impossible. The revelation of the complete lack of protection afforded by appraisals would seem to make clear, however, that the *Havender* case[12] did involve a complete turnabout from the position taken in the *Keller* case,[13] and that the latter case's rule on charter amendments should be frankly abandoned; it shows in addition that if the cumulative provisions in Delaware preferred stock are to have any meaning at all the courts must scrutinize merger plans to insure that they result in fair distributions of ownership in merged corporations.[14]

PROTECTION OF PERSONAL RIGHTS IN EQUITY

The California Civil Code makes it unlawful for proprietors of places of public amusement to deny admission to those who have purchased and tendered tickets of admission, and provides for the recovery of actual damages plus one hundred dollars for each violation.[1] The plaintiff, who had been ejected from the defendant's race-course, although he had paid admission and had conducted himself properly, sought an injunction to prevent his being ejected in the future.

[11] Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 Atl. 452 (1934). A similar position is taken in other states. Matter of Fulton, 257 N.Y. 487, 178 N.E. 766 (1931); Republic Finance and Investment Co. v. Fenstermaker, 211 Ind. 251, 6 N.E. 2d 541 (1937); Ahlenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934).

[12] Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A. 2d 331 (1940).

[13] Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936).

[14] The situation is analogous to that involved in the judicial treatment of reorganization plans a generation ago as discussed in Katz, The Protection of Minority Bondholders in Foreclosures and Receiverships, 3 Univ. Chi. L. Rev. 517 (1936).

[1] Cal. Civ. Code (Deering, 1941) §§ 53, 54.