

10-1-1958

Corporations—Stockholders' Consent for Sale of Realty

Buffalo Law Review

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Buffalo Law Review, *Corporations—Stockholders' Consent for Sale of Realty*, 8 Buff. L. Rev. 95 (1958).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol8/iss1/43>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Stockholders' Consent for Sale of Realty

Section 20 of the Stock Corporation Law requires the consent of two-thirds of the stockholders in a sale of substantially all the assets of the corporation *not* made in the regular course of business. Past decisions hold that the regular course of business is the business that the corporation was actually carrying on prior to the sale and not what the corporate charter authorized.⁷ In *Eisen v. Post*,⁸ when the directors sold all of the corporate assets without the consent of its stockholders, the corporation's actual business was an ultra vires activity. Although the sale was authorized by the corporate charter the stockholders brought an action to set the sale aside on the ground that section 20 was applicable. Relying on past decisions the stockholders claimed that the sale was not made in the regular course of business because the regular course of business was what the corporation actually had been carrying on. The Court held that an ultra vires activity cannot be the regular course of business under section 20 and therefore the charter must control. In so holding the Court did not overrule the past decisions which make actual business controlling but made the distinction that the actual activity carried on in past cases was authorized.

The Court based its decision upon the theory that third persons who rely on the charter of the corporation with which they deal should be protected, however it refused to disavow the general rule and made the charter controlling only where the actual business is ultra vires. Therefore outsiders still may not rely upon the corporate charter. They must still find out which of the authorized businesses are actually being carried on in order to protect themselves against voidability. Since they cannot know the actual business to be ultra vires without first finding what the actual business is, the holding of this case is of no protection to them unless they have failed to exercise the usual care required to protect themselves by investigating and the actual business turns out to be ultra vires. The kind of protection thus afforded by the present case is a windfall and is not required by reason or authority.

A more realistic basis for the holding is that since the stockholders can have no legitimate interest in the continuation of an ultra vires business, there is no reason to give them relief under section 20.

Authority of President to Commence Arbitration

The Court was again this term presented with the question of the power

7. *In re Kunin*, 306 N.Y. 967, 120 N.E.2d 228 (1954); *Hodes v. 1299 Realty Corp.*, 278 App. Div. 803, 104 N.Y.S.2d 206 (1st Dep't 1951).

8. 3 N.Y.2d 518, 169 N.Y.S.2d 15 (1957).