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Corporations—Director Action—Remedy of Aggrieved Party

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plaintiff failed to comply with the provisions of his contract incident to certificate of final acceptance before bringing suit for any unpaid balance; hence, dismissal of his cause of action for the unpaid balance was affirmed by the Court of Appeals.

CORPORATIONS

Director Action—Remedy Of Aggrieved Party

Section 25 of the General Corporation Law¹ provides for judicial review of a corporate directors election. In the past, there has been some confusion in the application of this section as to the scope of the discretionary power which it gives to the trial judge. Obviously, if the election was carried on in an illegal manner it will be set aside.² However, the difficulty arises in the group of cases where, although there is no specific legal defect in the election, an air of unfairness envelops the transaction to such an extent that the court feels that "justice" requires a new election.³

In re William Faehndrich, Inc.,⁴ sheds little light on this cloudy area. There, the aged founder of the corporation failed to attend a stockholders meeting although he had been notified that its purpose was the election of directors. The trial court set aside the election⁵ on the grounds that under the circumstances the notice had failed to "carry home" to the complainant that the purpose of the meeting was to remove him as a director and subsequently as an officer of the corporation. The Appellate Division affirmed without opinion,⁶ and the Court of Appeals reversed holding that the notice had been sufficient under section 45 of the General Corporation Law⁷ and stating that there was no duty to disclose the course of conduct to be followed by the new directors after their election.

The case also involved a dispute as to the ownership of certain shares of

1. N.Y. GEN. CORP. LAW §25 provides:

Upon the application of any member aggrieved by an election, . . . the Supreme Court at a special term thereof shall forthwith hear the proofs and allegations of the parties, and confirm the election or order a new election, as justice may require.

2. See, *eg.*, *In re Green Bus Lines, Inc.*, 166 Misc. 800, 2 N.Y.S.2d 556 (Sup. Ct. 1937).

3. See, *Application of Kaminsky*, 251 App. Div. 132, 295 N.Y. Supp. 989 (4th Dep't 1937); *aff'd without opinion* 277 N.Y. 525, 13 N.E.2d 456 (1938).

4. 2 N.Y.2d 468, 161 N.Y.S.2d 99 (1957).

5. 3 Misc.2d 156, 151 N.Y.S.2d 261 (Sup. Ct. 1956).

6. 1 A.D.2d 992, 152 N.Y.S.2d 413 (1st Dep't 1956).

7. N.Y. STOCK CORP. LAW §45 provides:

Notice of meetings of stockholders. . . . Such notice shall state the purpose or purposes for which the meeting is called . . .

stock; and a question of the validity of a corporate by-law requiring a quorum of two-thirds of the stockholders at a meeting for the election of directors (admittedly this number was not present). The Court reaffirmed its position that section 25 provides only a summary remedy and thus that the corporate stock-books must generally be conclusive as to stock ownership, the real question being reserved for adjudication in a plenary action.⁸ As to the by-law question, the Court again affirmed a former holding⁹ that such quorum requirements are invalid in that they contravene public policy of the state as reflected in its statutes.¹⁰

Undoubtedly, the failure of the Court to lay down more specific criteria for the interpretation of section 25 can be attributed to the peculiar circumstances of the case. Section 25 allows the Court only two alternatives, to confirm the election or to order a new one,¹¹ and since the victorious directors controlled a majority of the stock, a new election would have been useless. However, the necessity still exists to clearly elucidate the bounds of the trial court's discretion in abrogating a questionable election.

Power Of Corporate Officers To Institute Litigation

A recurring problem in the field of corporate law is the authority of corporate officers to institute legal proceedings in behalf of the corporation. It is undoubted that the board of directors is originally vested with such power,¹² but a question often arises when charter and by-laws are silent and no proscription has emanated from the board of directors as to the power of corporate officers to commence litigation. Because of the duties incumbent upon a corporate president with respect to the management of the corporation,¹³ it has been held that he has prima facie authority to prosecute suits in the name of the corporation.¹⁴ But the difficulty appears when lesser corporate officers undertake such responsibility.

In *Rothman & Schneider, Inc. v. Beckerman*,¹⁵ the Court of Appeals unani-

8. In re Burder & Son, Inc., 302 N.Y. 52, 96 N.E.2d 829 (1950) (dictum).

9. Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945).

10. STOCK CORP. LAW §55 provides:

The directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation by a plurality of the votes at such election, provided that, . . . the by-laws, may fix the number of shares, not exceeding a majority, necessary to constitute a quorum.

11. See, *eg.*, In re Baldwinville Fed. Sav. & Loan Ass'n, 268 App. Div. 414, 51 N.Y.S.2d 816 (4th Dep't 1944).

12. Koral v. Savory, 276 N.Y. 215 (1936); United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 375 S. Ct. 509 (1917).

13. Oakes v. Cattaraugus Water Co., 143 N.Y. 430, 38 N.E. 461 (1894); N.Y. STOCK CORP. LAW §60.

14. In re Bernheimer, —Misc.—, 43 N.Y.S.2d 300 (Sup. Ct. 1943); Twyefort v. Unexcelled Mfg. Co., 263 N.Y. 6, 188 N.E. 138 (1933).

15. 2 N.Y.2d 493, 161 N.Y.S.2d 118 (1957).