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## Corporations—Power of Corporate Officers to Institute Litigation

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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.<sup>8</sup> As to the by-law question, the Court again affirmed a former holding<sup>9</sup> that such quorum requirements are invalid in that they contravene public policy of the state as reflected in its statutes.<sup>10</sup>

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,<sup>11</sup> 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,<sup>12</sup> 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,<sup>13</sup> it has been held that he has prima facie authority to prosecute suits in the name of the corporation.<sup>14</sup> But the difficulty appears when lesser corporate officers undertake such responsibility.

In *Rothman & Schneider, Inc. v. Beckerman*,<sup>15</sup> 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).

mously held that a secretary-treasurer of a closely held corporation could sue strangers to the corporation for conversion of corporate property. The issue arose on a motion to vacate and set aside the service of summons.<sup>16</sup> Admitting that ordinarily a secretary-treasurer has no implied power to encroach upon the president's authority, the Court considered that the evidence in the instant case indicated that the secretary-treasurer had been actually managing the business of the corporation, and the president had withdrawn from active participation. It followed therefore, reasoned the Court, that the secretary-treasurer had sufficient authority to prevent the defendant strangers to the corporation from challenging his power to protect the interests of the corporation.

In view of the factual setting of the case, the situation that the movant was a stranger to the corporation, and because it has been previously held that lesser corporate officers may, by virtue of exercising the management functions, bind the corporation,<sup>17</sup> it would not seem that the case represents an unreasonable inroad upon the power of either the board of directors or the president to commence litigation on behalf of the corporation.

#### Alienation Of Corporate Stock—Reasonableness Of Restraint

It has been generally held in this state that a reasonable restraint on the alienation of corporate stock, giving the corporation a right of first option to purchase, is valid.<sup>18</sup> The problem, of course, is to determine what is a "reasonable" restriction.

In *Allen v. Biltmore Tissue Corp.*,<sup>19</sup> the corporation reserved a 90 day option to repurchase its stock, at the price originally paid for it, upon the death of any shareholder. Plaintiff, executor of a deceased shareholder's estate, refused to surrender the stock in question and demanded that the corporation be compelled to deliver stock certificates to him. The Appellate Division<sup>20</sup> reversed the trial court and held the restrictive option invalid on the ground that it operated as a prohibition on transfer of the stock. The Court of Appeals reversed, holding such restriction is reasonable and valid.

It was pointed out that such options are usually treated as being contractual in nature, and thus upheld if reasonable.<sup>21</sup> The Court stated that reasonableness

16. —Misc.—, 142 N.Y.S.2d 668 (Sup. Ct. 1955).

19. See *Barkin Const. Co. v. Goodman*, 221 N.Y. 156, 116 N.E. 770 (1917); *Hastings v. Brooklyn Life Ins. Co.*, 138 N.Y. 473, 34 N.E. 289 (1893).

18. See, *eg.*, *Penthouse Properties v. 1158 Fifth Ave.*, 256 App. Div. 685, 11 N.Y.S.2d 417 (1st Dep't 1938); *Cowles v. Cowles Realty Co.*, 201 App. Div. 460, 194 N.Y. Supp. 546 (1st Dep't 1922).

19. 2 N.Y.2d 534, 161 N.Y.S.2d 418 (1957).

20. 1 A.D.2d 599, 153 N.Y.S.2d 779 (2nd Dep't 1956).

21. *Hassel v. Pohle*, 214 App. Div. 654, 212 N.Y. Supp. 561 (2nd Dep't 1925).