

12-1-1953

## Business Associations—Corporations

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### Recommended Citation

Donald J. Holzman, *Business Associations—Corporations*, 3 Buff. L. Rev. 62 (1953).  
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol3/iss1/13>

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election officials. The citizen wrongfully deprived of the right to vote can sue for damages.<sup>51</sup>

Where a valid petition for nomination was arbitrarily declared invalid and the plaintiff's name was not put on the ballot, the Court of Appeals held a damage action would lie against the individual members of the election board.<sup>52</sup> In reaching this decision the court followed *Frank v. Eaton*,<sup>53</sup> which also was authority for the proposition that plaintiff did not have to exhaust his statutory remedies by court review of the board's action.<sup>54</sup>

Thus not only can a citizen, wrongfully deprived of his right to vote, sue, but also a candidate who has been deprived of his rights.<sup>55</sup> The bases for these decisions rest upon grounds of public policy, the importance of the personal rights involved, and the difficulty of vindicating them in any other way.<sup>56</sup>

## II. BUSINESS ASSOCIATIONS

### *Corporations*

a. *Reimbursement of Corporate Officials*: Sections 63-68 of the General Corporation Law make up Art. 6-A which is concerned with reimbursement of litigation expenses of corporate officials. Section 63 does not concern us here; sections 65-68 are procedural; section 64 reads as follows: "Any person made a party to any action, suit or proceeding by reason of the fact that he . . . is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding . . . assessed against the corporation . . . except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

In *Schwarz v. General Aniline & Film Corp.*<sup>1</sup> a majority of the Court of Appeals interpreted the court-mandated reimbursement provisions of Art. 6-A as not applying to expenses incurred in a criminal prosecution.

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51. *Goetcheus v. Matthewson*, 61 N. Y. 420 (1875).

52. *Schwartz v. Heffernan*, 304 N. Y. 474, 109 N. E. 2d 68 (1952).

53. 225 App. Div. 149, 231 N. Y. S. 477 (3d Dep't 1928).

54. ELECTION LAW § 330.

55. *Jaffarian v. Murphy*, 280 Mass. 402, 183 N. E. 110 (1932).

56. See Note, 153 A. L. R. 148; 29 C. J. S. Elections § 64 (1941).

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1. 305 N. Y. 395, 113 N. E. 2d 533 (1953).

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Schwarz, a former vice-president and director of General Aniline & Film Corp., was one of several defendants indicted individually with the corporation in 1941 for alleged violations of the Sherman Anti-Trust Act.<sup>2</sup> After having pleaded not guilty to the indictment, Schwarz, in 1950, was allowed to plead *nolo contendere*. He paid a \$500 fine and requested General Aniline to reimburse him but, the corporation declined to do so without court order. The United States District Court declared itself without power to provide such an order and referred petitioner to his rights in the state courts.

The Special Term, quoting *People v. Daiboch*<sup>3</sup> by saying that "while a plea of *nolo contendere* is not an admission of guilt, it nonetheless is a conviction and has the same consequences, in the criminal cause in which it is entered, as a plea of guilty,"<sup>4</sup> concluded that the imposition of a fine amounted to an adjudication that Schwarz was liable for misconduct in the performance of his duties within the meaning of section 64 and refused to award reimbursement.

Although the Appellate Division affirmed this decision,<sup>5</sup> a dissenting Justice, declaring himself reluctant to agree that a plea of *nolo contendere* necessarily showed any "misconduct" toward the corporation, suggested that the conduct of petitioner might even have been in promotion of the corporation's interests and that defendant's plea might well have been a mere settlement in the anti-trust suit, not involving any adjudication or any misconduct at all.

In the Court of Appeals, Judge Desmond, speaking for the majority, injected for the first time the proposition that Art. 6-A was not intended to apply to expenses incurred by an officer or director in his defense against a criminal indictment. The legislative intent, he said, revolved around stockholders' suits in which certain corporate officers and directors had to pay their own lawyers. This intent was found in part by referring to *New York Dock Co. v. McCollum*<sup>6</sup> where it was pronounced that the corporation in whose behalf a stockholder's suit is brought was not obligated, at common law, to pay legal fees incurred by its directors in defending themselves as individual defendants in such an action. That case, which was concerned with a civil action, was a forerunner to the change in the General Corporation Law which tended

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2. 15 U. S. C. A. § 1.

3. 265 N. Y. 125, 191 N. E. 859 (1934).

4. *Schwarz v. General Aniline & Film Corp.*, *supra* note 2 at 399, 113 N. E. 2d at 534.

5. 279 App. Div. 996, 112 N. Y. S. 2d 146 (1st Dep't 1952).

6. 173 Misc. 106, 16 N. Y. S. 2d 344 (Sup. Ct. 1939).

to alleviate this burden on corporate officials. Therefore, the belief that 6-A was directed to civil actions.

A further aid to statutory construction was found when the majority viewed Art. 6-A as a supplement to Art. 6 which describes civil actions involving corporations and its officers. It is thought that both articles are *in pari materia* and both refer to civil litigation. In addition, "strange public policy" was the classification given to any program which would allow one charged with a crime to require the corporation by whom he was employed to pay his legal expenses.

This approach by the majority, concurred in by Judge Carswell in a separate opinion, rendered it unnecessary to examine the question of whether a plea of *nolo contendere* is an adjudication of misconduct. Judge Desmond did add, however, that "it is instructive . . . to look a little closer at the exception found at the end of § 64, which denies reimbursement to a corporation official who has been adjudged to be 'liable for negligence or misconduct in the performance of his duties.' We think 'negligence or misconduct', as there used, refers right back to §§ 60 and 61, setting up civil actions by or on behalf of corporations against their officers or directors who have injured the corporations by wrongdoing or inattention to duty."

This case raised two main issues concerning § 64, (1) its applicability to criminal actions; (2) if so applicable, the relation of *nolo contendere* and "misconduct." While the latter is quite unsettled, the 4-3 decision produced a definite conclusion as to the former. However, this decision has attached to it as a permanent fixture a strong dissenting opinion by Judge Fuld.

The dissent, in which Lewis and Conway concur, mentions searching in vain for any limitation restricting the scope of § 64 to civil cases and uses an historical approach as one method of sustaining the "plain-meaning" rule of interpretation. Before 1945 the statute was expressly limited to "any action, suit or proceeding . . . brought by the corporation, or brought in its behalf." A sharp contrast is illustrated by Fuld as he shows the rejection of the former narrow language by a new section calling for reimbursement in "any action, suit or proceeding."

In addition, the report of the Law Revision Commission<sup>8</sup> which preceded the adoption of the broad language mentioned that such language might include a "criminal" anti-trust suit and suggested having a special proceeding for collecting such fees in

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7. *Schwarz v. General Aniline & Film Corp.*, *supra* note 2 at 403-404, 113 N. E. 2d at 537.

8. Report of New York Law Revision Commission, p. 161, n. 36 (1945).

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case a court, lacking equity power, would not be in a position to pass upon the right to indemnification.<sup>9</sup>

Neither did Fuld find his interpretation to be repugnant to public policy. He suggested that the cost of such a suit against a corporate official because of his acts in the best interests of the corporation might be considered as a normal risk of corporate operation to be assumed by the corporation, whether the official be acquitted or not. *Simon v. Socony Vacuum Oil Co.*<sup>10</sup> is quoted as providing court sanction for reimbursing a corporate official for expenses incurred in defending a criminal anti-trust proceeding.

The dissent sees also a flaw in the courts' reasoning when it finds an essential difference between the criminal and the civil in the area of anti-trust regulation.

Fuld continued by discussing the *nolo contendere* aspect. He reasoned that a judgment entered upon such a plea is in the nature of a compromise settlement and is in no way an adjudication of any fact, particularly not a fact of misconduct as to a corporation.

As the law now stands, § 64 will not be made to apply to criminal prosecutions.<sup>11</sup> However, should the court reverse itself at a later date or should the legislature indicate its intent is other than as expressed in the instant case, then the effect of pleading *nolo contendere* will be in issue. The language of this case would seemingly indicate that so far as the New York Court of Appeals is concerned, a judgment following a plea of *nolo contendere* is not necessarily an adjudication of misconduct to the corporation within § 64 of Art. 6-A of the General Corporation Law.

b. *Liquidation*: New York courts generally take the position that directors of a corporation owe to their corporation, its stockholders, and its creditors a duty of promoting the interest of the corporation by using good faith in business judgment.<sup>12</sup> A slight variance is implied, however, when a corporation is on the verge of insolvency.<sup>13</sup>

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9. The majority considered this a mere comment referring to a contention that the section might be applicable in a criminal cause—but which view lacked any indication of adoption by the Legislature or even the Law Revision Commission.

10. 267 App. Div. 890, 47 N. Y. S. 2d 589 (1st Dep't 1944), *affirming* 179 Misc. 202, 38 N. Y. S. 2d 270 (1942).

11. See note 1 *supra*.

12. *Rous v. Cartisle*, 261 App. Div. 432, 26 N. Y. S. 2d 197 (1st Dep't 1941), *aff'd*, 290 N. Y. 869, 50 N. E. 2d 250 (1943). *Everett v. Phillips*, 288 N. Y. 227, 43 N. E. 2d 18 (1942). GEN. CORP. LAW § 60.

13. *New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 305 N. Y. 1, 110 N. E. 2d 397 (1953).

In *New York Credit Men's Adjustment Bureau, Inc. v. Weiss et al.*<sup>14</sup> defendants were sole directors and stockholders of such a corporation. The corporation's inventory had a balance sheet value of \$73,000 and a cost value of at least \$60,000; claims of creditors aggregated approximately \$52,000. Defendants arranged an auction sale in liquidation which netted slightly under \$20,000. Creditors had not been notified of the sale, and newspaper advertisements did not contain the name of the corporation. Shortly thereafter the corporation was adjudged an involuntary bankrupt. This action against the directors was brought by the trustee in bankruptcy for the wasting of assets under § 60 of the General Corporation Law.

The Court of Appeals was of the opinion that while the directors were under no obligation to give notice to each creditor of their intention to convert the assets into cash, they were obligated to obtain for the corporation the full value of the assets under the circumstances at that time, the trustee having established a *prima facie* case.

The directors were termed "trustees by statute for the creditors by virtue of § 60 of the General Corporation Law which obligated them to protect the trust *res* . . . and account for waste . . . if there was any waste by reason of their conduct."<sup>15</sup>

The language of the decision seems to indicate a preference for liquidation proceedings under court supervision and to show a desire on the part of the court to give full protection to corporate creditors when a corporation approaches insolvency.

c. *Appeal to Stock Valuation*: It is a general rule in New York that ordinarily a party who accepts the benefit of a judgment thereby waives his right to appeal.<sup>16</sup> However, a right to appeal will survive the acceptance of benefits in some cases, most common of which involve condemnation proceedings where the claimant seeks to question the *amount* of the award he has received,<sup>17</sup> or cases where the situation is such that separate claims are dealt with in the same judgment.<sup>18</sup>

In *re Silverman*<sup>19</sup> adds to these exceptions a stock valuation proceeding pursuant to § 21 of the Stock Corporation Law. In this case dissenting stockholders objected to appraisers' valuation of their shares. Special Term confirmed the appraisers' report and denied petitioners' request that the order provide that

14. *Ibid.*

15. *Id.* at 7, 110 N. E. 2d at 398.

16. *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37 (1887).

17. *Matter of New York & H. R. Co.*, 98 N. Y. 12 (1885).

18. *Goepel v. Kurtz Action Co.*, 216 N. Y. 343, 110 N. E. 769 (1915).

19. 305 N. Y. 13, 110 N. E. 2d 402 (1953).

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they could surrender their stock and accept payment without prejudicing their right to appeal the valuation.

During their appeal to the Appellate Division, stockholders did surrender their stock and receive payment. The Appellate Division subsequently granted corporation's motion to dismiss the appeal on the ground that the stockholders' interest was now terminated.

The Court of Appeals reversed on the basis of the language of § 21 (6) of the Stock Corporation Law which states: "Any stockholder demanding payment for his stock shall have no right . . . with respect to such stock, except the right to receive payment for the *value* thereof." [italics added.] The majority of the court held the word "value" to mean the "proper value" and refused to allow the language of § 21 (7) ("upon receipt of such payment, the objecting stockholder shall cease to have any interest in the corporation or its assets by reason of his ownership of the stock so paid for . . .") to narrow its meaning. Such interpretation involves no inconsistency, the court maintained, because subdivision 7 refers to rights such as to notice, to attend meetings, and to vote and, therefore, it does not conflict with the right to receive "payment for the value thereof."

### *Bulk Sale—"ordinary course of trade"*

To come within the scope of the Bulk Sales Act,<sup>20</sup> a bulk sale must be "otherwise than in the ordinary course of trade and in the regular prosecution of said business." "Whether or not a particular transfer in bulk is or is not within the ordinary course of trade depends on the facts of each case."<sup>21</sup>

*Sternberg v. Rubenstein*<sup>22</sup> presented an interesting fact situation in which plaintiff trustee in bankruptcy sought to hold Rubenstein, a dealer in leftover footwear, accountable for the value of a batch of "off season" shoes sold to him by the bankrupt.<sup>23</sup> It appears that in the business of shoe retailing the sale of "off season" merchandise, that rendered obsolete by the passage of time, is an established operating pattern.<sup>24</sup>

Special Term rendered judgment in favor of the view that such sale was in the ordinary course of bankrupt's business. The

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20. PERS. PROP. LAW § 44.

21. WHITNEY, OUTLINE OF THE LAW OF SALES 87 (4th ed. 1947).

22. 305 N. Y. 235, 112 N. E. 2d 210 (1953).

23. The sale of 1,294 pairs of shoes represented approximately one-sixth of bankrupt's stock on hand in money value.

24. *Sternberg v. Rubenstein*, *supra* note 22 at 240, 241, 112 N. E. 2d at 212, 213.