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Corporation Law--Payment by the Corporation of the Expenses of Both Factions Incurred in a Proxy Battle

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CORPORATION LAW — PAYMENT BY THE CORPORATION OF THE EXPENSES OF BOTH FACTIONS INCURRED IN A PROXY BATTLE

Recently the Court of Appeals of New York upheld the payment of money to both the deposed board of directors and the new board as reimbursement for expenses incurred in a proxy struggle.[1] Sherman Fairchild, the chief stockholder in the Fairchild Engine and Airplane Corporation, attempted to gain control of the corporation. There ensued a vigorous proxy fight with the insurgents ultimately emerging as victors. Before leaving office, the incumbent board reimbursed itself for the expenses incurred in defending its position and policies. One of the first acts of the new board after gaining control was the passage of a resolution providing for reimbursement of its expenses. This resolution was ratified by a large majority of the corporation's shareholders. William Rosenfeld, a shareholder, brought a derivative action against the corporation and several members of the old and new boards of directors. The relief sought was the restitution of the money paid as reimbursements. The trial court entered judgement upon the decision of the Official Referee dismissing the complaint.[2] The Appellate Division unanimously affirmed the judgement.[3] The Court of Appeals, with one concurring opinion, affirmed the judgement in a 4-3 decision.

The decision appears to be based on two grounds. First, the plaintiff failed to allege that any of the items for which reimbursement was made to the old board were "unwarranted," or that the reimbursement was "excessive." Second, the stockholders have a right (although not a duty) to reimburse the members of the new board for their expenses.

This rule is qualified by a good faith test. Both sides in the contest must have been engaged in an honest dispute over corporate policy. If it appears that the contest was carried on merely for the purpose of gaining or retaining personal power then reimbursement would not be proper.

The dissent contends that neither board was entitled to reimbursement in this case and asserts that, as a matter of procedure, the burden of proof was on the old board to show that its expenses were reasonable and legitimate. The dissent also feels that payment to the insurgent group was ultra vires as a matter of law. The case of *Lawyer's Advertising Co. v. Consolidated Ry., Lighting & Refrigerating Co.*[4] is relied upon as author-

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[1] Rosenfeld v. Fairchild Engine and Airplane Corp., 309 N.Y. 168, 128 N.E.2d 291 (1955).

[2] Rosenfeld v. Fairchild Engine and Airplane Corp., 116 N.Y.S.2d 840 (1952).

[3] Rosenfeld v. Fairchild Engine and Airplane Corp., 284 App. Div. 201, 132 N.Y.S.2d 273 (1954).

[4] 187 N.Y. 395, 80 N.E. 199 (1907).

ity for these contentions. The opinion of the Official Referee in the present case, however, rather clearly distinguishes the *Lawyer's Advertising Co.* case from the present case.[5] The dissent further claims that reimbursement of the insurgents is against public policy since it would encourage more people to take the risk of proxy contests and thus make stockholders' meetings more expensive.

The dissent criticizes the decision in the present case on two grounds. First, the precedents chiefly relied upon for the decision were decided under Delaware law because Delaware corporations were involved. Since the corporation law of Delaware is less stringent these cases are said by the dissent not to be binding on New York courts. Second, the dissent criticizes the good faith test and its application in the present case. This test is said to be difficult to administer since, in the typical situation, both policy considerations and desire for personal advantage are present in proxy contests. The dissent further argues that the insurgents could not have been in good faith since they had announced in their campaign literature that the proxy battle was being waged at their own personal expense.

The concurring opinion agrees with the result in this case, but only on the ground that the plaintiff had failed to allege liability as to specific expenditures. This opinion fails to distinguish between the old and new boards as to the propriety of reimbursement. The opinion does state that such reimbursement is improper but points out that the question was not raised in the pleadings. The *Lawyer's Advertising Co.* case is cited as authority for the proposition that reimbursements similar to those in the present case are ultra vires, but this is offered only as dictum.

Thus, it appears that this case is dubious authority for the rule which its decision enunciates. The concurring opinion seems to be in agreement with the dissent on the major issue in the case, i.e., the impropriety of reimbursement for proxy contest expenses. When it is noted that the dissenting and concurring justices constitute a majority in the Court of Appeals, it becomes obvious that the state of the law on the question of reimbursement is still very much in doubt, in New York at least. It does

[5] The part of the opinion in the earlier case which supports the dissent appears to be merely dicta. The Official Referee in the instant case points out that the suit in the *Lawyer's Advertising Co.* case was brought against the defendant corporation on a contract. The contract was made by the secretary of the corporation who had authorized the plaintiff to publish four notices of a stockholders' meeting. The board of directors of the defendant corporation, however, had authorized the publication of only one such notice. The corporation was held not liable on the contract. In the words of the Official Referee, "The whole case turned, not on the propriety of two separate groups of stockholders in the same corporation contending for control because of honest differences with regard to policy, but, on the question of the power of the secretary to incur expense on behalf of the defendant which was not authorized by the board." 116 N.Y.S.2d at 846.

appear to be settled that the incumbent board of directors, whether successful in the proxy contest or not, is entitled to reimbursement for the expenses of the contest.[6] Whether payment should be made to successful insurgent groups has not, however, been settled. Although such payment has been urged by some writers,[7] it has been upheld in only one decision.[8] Certainly the *Fairchild* case, if it is to be at all authoritative, stands only for the proposition that payment to insurgent groups, to be proper, must be ratified by a majority of the stockholders.

A recent Ohio case, in which it was held that the stockholders have the power to ratify a fraud of the directors, suggests that Ohio might also recognize that the stockholders have the power to ratify reimbursements. This appears to be the better rule. The policy behind the decision in the *Fairchild* case makes provision for a greater shareholder interest and participation in corporate affairs. There should be more incentive for shareholders to wrest control from an unsatisfactory or mediocre board of directors. The tests of good faith and reasonableness of expenditures seem to provide the rule with all the flexibility it might need. It is somewhat unfortunate, therefore, that this decision may have little significance as precedent.

BARRY BYRON

CRIMINAL LAW — THE MURDER-FELONY RULE

The defendant, Thomas, and his accomplice, the now deceased, entered a grocery store and ordered the proprietor to open the cash drawer. After removing the money the two fled, each in a different direction. Securing his pistol, the proprietor chased the accomplice and in an exchange of shots killed him. Thomas was apprehended and tried under Pennsylvania's murder-felony statute for the first degree murder of his accomplice.[1]

Defendant's demurrer was sustained in the trial court and the commonwealth appealed to the Supreme Court of Pennsylvania which reversed the lower court. Interpreting Pennsylvania's statutory murder-felony rule,[2] the court concluded.

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[6] Hand v. Missouri-Kansas Pipeline Co., 54 F. Supp. 649 (D.C. Del. 1944); Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946); Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78, 171 Atl. 226 (1934); Peel v. London & North Western Ry. Co., 1 Ch. 5 (1907).

[7] EMERSON and LATCHAM, SHAREHOLDER DEMOCRACY 78 (1954).

[8] Steinberg v. Adams, 90 F. Supp. 604 (D.C.S.D.N.Y. 1950).

[9] Claman v. Robertson, 164 Ohio St. 61, 128 N.E.2d 429 (1955).

> As has been said many times, such a rule is equally consistent with reason and sound public policy, and is essential to the protection of human life. The felon's robbery set in motion a chain of events which were or should have been within his contemplation when the motion was initiated. He therefore should be held responsible for *any death* which by direct and almost inevitable sequence results from the initial criminal act.[3]

Homicide resulting from the perpetration or attempted perpetration of a felony is murder by the perpetrator. This was the common law statement of the murder-felony doctrine and it was applied even though the perpetrator did not actually commit the homicide.[4] Malice was implied from the fact that the homicide was committed while the felony was being perpetrated. No intent on the part of the felon to kill was required and the felony was not required to be of such a nature as to endanger life or threaten great bodily harm.[5] "If the act be unlawful," said Coke, "it is murder."[6]

The origin of the common law rule is obscure. Perhaps the most accurate explanation of its evolution was given by an early New York court:

> Every felony, by the common law, involved a forfeiture of the lands or goods of the offender, upon a conviction of the offense; and nearly all offenses of that grade were punishable with death, with or without the benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony was, by implication of law, transferred from such offense to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence.[7]

As more of these cases came before the courts a gradual change occurred in the character of the rule. Courts, instead of predicating guilt on the mere coincidence of the felony and the homicide,[8] began to invoke the principles of causation. Upon this basis the relationship of cause and effect had to exist between the felony and the murder before guilt could be imposed on the felon.[9]

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[1] Commonwealth v. Thomas — Pa. —, 117 A.2d 204 (1955).

[2] 18 PA. STAT. § 4701 (Purdon 1939). All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, *or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree.*" (Italics added).

[3] Commonwealth v. Thomas, — Pa. —, 117 A.2d 204 (1955).

[4] PERKINS, CRIMINAL LAW 777 (1952).

[5] CLARK & MARSHALL, CRIMES § 248 (5th ed. 1952); PERKINS, CRIMINAL LAW 775-78 (1952).

[6] 3 Co. Inst. 56.

[7] People v. Enoch, 13 Wend. 159 (N.Y. 1834), 27 Am. Dec. 197.

[8] State v. Fouquette, 221 P.2d 404 (Nev. 1950); State v. Adams, 339 Mo. 926, 98 S.W.2d 632 (1937).

[9] CLARK & MARSHALL, CRIMES § 236 (3rd ed. 1927).

The holding in the principal case adopts this causal limitation on the murder-felony rule:

> The killing of the co-felon was the natural foreseeable result of the initial act. The robbery was the proximate cause of the death. We can see no sound reason for distinction merely because the one killed was a co-felon.[10]

Pennsylvania has found a causal relation between the felony and the homicide in instances in which, in the commission of a felony, the defendant kills his victim,[11] kills a bystander,[12] and also where the defendant's accomplice kills the victim of the felony,[13] kills a bystander,[14] or is himself killed by the victim.[15]

The majority of states require that the felony be one that is dangerous to life[16] and that the homicide be proximately caused by the felony.[17] Such a killing is murder irrespective of whether the person killed was a victim of the felony,[18] a bystander,[19] or an accomplice.[20] Furthermore, the killing need not be the act of the person participating in the felony.[21]

Ohio's murder-felony statute,[22] contrary to the old common law rule, clearly requires an intent to kill.[23] It is not necessary, however, that there be malice aforethought. That is implied from the enormity and turpitude of the criminal act in which the offender is engaged at the time.[24]

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[10] Commonwealth v. Thomas, — Pa. —, 117 A.2d 204 (1955).

[11] Commonwealth v. Eagan, 190 Pa. 10, 42 Atl. 374 (1899).

[12] Commonwealth v. Lessner, 274 Pa. 108, 118 Atl. 24 (1922).

[13] Commonwealth v. Biddle, 200 Pa. 640, 50 Atl. 262 (1901).

[14] Commonwealth v. Major, 198 Pa. 290, 47 Atl. 741 (1901).

[15] Commonwealth v. Thomas, — Pa. —, 117 A.2d 204 (1955).

[16] People v .Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); Regina v. Serne, 16 Cox C. C. 311 (1887).

[17] Marcus v. United States, 86 F.2d 854 (1936); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Whitfield v. Commonwealth, 278 Ky. 111, 128 S.W.2d 208 (1939); State v. Leopold, 110 Conn. 55, 147 Atl. 118 (1929); State v. Block, 87 Conn. 573, 89 Atl. 167 (1913); State v. Badgett, 87 S.C. 543, 70 S.E. 301 (1911); People v. Olsen, 80 Cal. 122, 22 Pac. 125 (1889).

[18] Commonwealth v. Green, 302 Mass. 547, 20 N.E.2d 417 (1939); Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721 (1937); Commonwealth v. Eagan, 190 Pa. 10, 42 Atl. 374 (1899).

[19] Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926).

[20] People v. Cabaltero, 31 Cal. App.2d 52, 87 P.2d 364 (1939).

[21] Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949); People v. Gilbert, 22 Cal. 2d 522, 140 P.2d 9 (1943); People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935); Commonwealth v. Doris, 287 Pa. 547, 135 Atl. 313 (1926).

[22] OHIO REV. CODE § 2901.01. "No person shall purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

[23] Robbins v. State, 8 Ohio St. 131 (1857).

[24] State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 11 (1951); Turk v. State, 129

Theoretically the application of the principles of intent and those of causation in the same situation can produce the same result. However, the prosecution must prove beyond a reasonable doubt that the defendant had the requisite intent to kill.[25] The state is aided in this task by the presumption that one intends results which are the natural and probable consequences of his voluntary acts;[26] but this presumption may be rebutted by raising a reasonable doubt.[27] Doubts, sufficient to rebut the presumption, have been raised by showing that the blow was only intended to wound,[28] that the building was burned only to collect the insurance,[29] that poison was administered only to cause an abortion,[30] or that the weapon used was one not likely to cause death.[31]

Ohio has thus removed much of the offensive harshness of the murder-felony rule by injecting a requirement that involves a more humane and just approach.

WILLIAM J. SCHAFER

MANDAMUS — A CITIZEN'S RIGHT TO ENFORCE A PUBLIC DUTY

The relator, in his capacity as a citizen of the state, sought the writ of mandamus to enforce the Ohio Sunday Closing Law.[1] He had purchased a loaf of bread in a Cleveland Heights ice cream parlor on Sunday. Subsequently, he sought the issuance of a warrant for the arrest of the merchant. The respondent magistrate refused it. Relator in his petition contended that the respondent was under a mandatory duty to issue the warrant upon relator's complaint, and that the performance of such a duty could be enforced under the Ohio mandamus statute,[2] which requires the writ to issue "on the information of the party beneficially interested." The court decided that, in the absence of injury to the relator in a manner different from that to the public in general, he had not such a beneficial interest as to permit him to compel the issuance of a warrant.[3]

The weight of authority permits a private citizen to procure mandamus for the enforcement of a public duty. He need not show any legal or special

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Ohio St. 245, 194 N.E. 453 (1935); Koon v. State, 30 Ohio App. 379, 165 N.E. 98 (1928); Stephens v. State, 42 Ohio St. 150 (1884).

[25] Long v. State, 109 Ohio St. 77, 141 N.E. 691 (1923).

[26] State v. Huffman, 131 Ohio St. 27, 1 N.E.2d 313 (1936); Jones v. State, 51 Ohio St. 331, 38 N.E. 79 (1894); Ridenour v. State, 38 Ohio St. 272 (1882).

[27] Turk v. State, 129 Ohio St. 245, 194 N.E. 453 (1935).

[28] Bailus v. State, 8 Ohio C. Dec. 526, 16 Ohio C.C. Dec. 226 (1898).

[29] Turk v. State, 129 Ohio St. 245, 194 N.E. 453 (1935).

[30] Robbins v. State, 8 Ohio St. 131 (1857).

[31] State v. Farmer, 156 Ohio St. 214, 102 N.E.2d 111 (1951).

interest in the result. It is sufficient that he is interested as a citizen in having the laws executed and the duty enforced.[4] This is true even for those jurisdictions, such as Ohio, which have the "beneficial interest" requisite in their mandamus statutes.[5] But in these cases the public duty sought to be enforced is not the issuance of a criminal warrant, but usually one concerning election or tax ordinances, and, under such circumstances, citizens who are voters or taxpayers are considered to have sufficient beneficial interest to permit them to maintain mandamus.

In the early cases on this subject, Ohio courts tended to construe most narrowly the statutory requirement of beneficial interest.[6] Gradually, however, these courts fell into line with the development of the law in other jurisdictions, and today it seems certain that a citizen of Ohio need not show a specific personal interest in order to enforce public duties relating to elections,[7] or appointments to public office.[8]

But the instant case brings us to an inquiry concerning Ohio's position on the right of a private citizen, uninjured personally except as a member of the public at large, to compel a magistrate to perform his duty with regard to *criminal* proceedings. The precise point has never been raised in this jurisdiction. The case primarily relied on by relator involved an ordinary theft. The citizen sought mandamus to compel the issuance of an arrest warrant. He was considered to be beneficially interested because he himself had been injured by the violation of law, since he was the person from whom the accused had stolen the money.[9] According to the few reported cases in other jurisdictions, mandamus unquestionably would lie to

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[1] See OHIO REV. CODE § 3773.24 (Ohio Gen. Code §§ 13044, 13045, 13046).

[2] See OHIO REV. CODE § 2731.02 (Ohio Gen Code § 12287).

[3] State *ex rel.* Skilton v. Miller, 164 Ohio St. 163, 128 N.E.2d 47 (1955).

[4] 18 R.C.L. § 273; Heard v. Pittard, 210 Ga. 549, 81 S.E.2d 799 (1954); State *ex rel.* Johnson v. Sevier, 339 Mo. 483, 98 S.W.2d 677 (1936); Florida Industrial Commission v. State *ex rel.* Orange State Oil Co., 155 Fla. 772, 21 So.2d 599 (1945); State *ex rel.* Shallcross v. Slaughter, 2 Terry 94, 16 A.2d 116 (1940); *Cf.* Retail Liquor Dealers v. Schreiber, 382 Ill. 454, 459, 47 N.E.2d 462, 464 (1943). *Contra:* Bradley v. Cleaver, 150 Kan. 699, 95 P.2d 295 (1939); Mitchell v. Dixon, 140 Tex. 520, 168 S.W.2d 654 (1943).

[5] State *ex rel.* Halloran v. McGrath, 104 Mont. 490, 67 P.2d 838 (1937); Board of Social Welfare v. Los Angeles County, 27 Cal.2d 98, 162 P.2d 627 (1945); Hutcheson v. Gonzales, 41 N.M. 474, 71 P.2d 140 (1937). *Contra:* State *ex rel.* Hoard v. Ashley, 171 Okla. 169, 42 P.2d 225 (1935).

[6] State *ex rel.* Clark v. Murphy, 3 Ohio C.C. 332 (1888); State *ex rel.* Park v. Felton, 10 Ohio N.P. (N.S.) 344 (1910).

[7] State v. Brown, 38 Ohio St. 344 (1882); State *ex rel.* v. Tanzey, 49 Ohio St. 656, 32 N.E. 750 (1892); State *ex rel.* Newell v. Brown, 162 Ohio St. 147, 122 N.E.2d 105 (1954).

[8] State *ex rel.* Trauger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902).

[9] State *ex rel.* Goodman v. Redding, 87 Ohio St. 388, 101 N.E. 275 (1913).

compel a magistrate to issue a criminal warrant where the relator had been injured personally by the violation of law,[10] but not where the relator's injury was simply as a member of the general public.[11] Ohio, therefore, has followed the weight of authority in ruling, in the instant case, that where the relator as a private citizen seeks mandamus to compel a magistrate to perform his duty with respect to criminal proceedings, he must show that he has a private or special interest independent of that which he holds in common with the general public.

The rationale of the cases as a whole would seem to be that if the general public, as distinguished from the State in its sovereign capacity, is affected, as the public is in the enforcement of election or tax duties, any member of the state may sue out the writ. But where the duty in question affects the peace and dignity of the state in its sovereign capacity as distinguished from the people at large, as in criminal proceedings, the action must be instituted by the proper public officials, or by one having a personal "beneficial interest."

Despite the apparent definiteness of these propositions, the courts are quite confused in wrestling with the problem of public duties. The instant case illustrates this confusion. The performance of many, but by no means all public duties, will be enforced by the issuance of a writ of mandamus. The distinction between those which will be so enforced and those which will not is often unclear. This is so because considerations of public policy are frequently involved. Where the duty sought to be enforced is the issuance of a criminal warrant, the gravity of the violation and the status of the complainant may be important. In the instant case, a mere misdemeanor was alleged, and the relator himself had instigated the violation of which he complained. It may be argued that any citizen of the state has a direct and personal interest in the enforcement of the laws of the state, but it should be borne in mind that both the public and the administration require protection from a wasteful multiplicity of suits instigated by unskilled or officious volunteers. As the court in the instant case wisely held, law enforcement may best be left to public officials, and crusading zealots should not be encouraged to compel the arrest of persons for offenses in which the relator has no legitimate concern.[12]

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[10] *Cf.* State *ex rel.* Romano v. Yakey, 43 Wash. 15, 19, 85 Pac. 990, 992 (1906) (Perjury).

[11] Mitchell v. Boardman, 79 Me. 469, 10 Atl. 452 (1887) (search warrant); Fritts v. Charles, 145 Cal. 512, 78 Pac. 1057 (1904) (gambling); Nickelson v. State *ex rel.* Blitch, 62 Fla. 243, 57 So. 194 (1911) (Sunday baseball). *Contra:* Marshall v. Herndon, 161 Ky. 232, 170 S.W. 623 (1914) (Sunday movies).

[12] State *ex rel.* Skilton v. Miller, 164 Ohio St. 163, 128 N.E.2d 47 (1955).