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CORPORATIONS-VALIDITY OF BY-LAW REQUIRING ASSENT OF ALL OR PROPORTION OF SHAREHOLDERS GREATER THAN MAJORITY FOR ACTION

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CORPORATIONS—VALIDITY OF BY-LAW REQUIRING ASSENT OF ALL OR PROPORTION OF SHAREHOLDERS GREATER THAN MAJORITY FOR ACTION—The defendants, employees of the plaintiff corporation, were discharged by the president, who was empowered under the by-laws to appoint, remove, employ and discharge, and fix the compensation of, all employees of the corporation, subject to the approval of the board of directors. A majority of the directors and the holders of a majority

of the shares were in agreement that the defendants should be discharged. The defendants refused to leave the premises, took possession of certain of the corporate books and records, and otherwise interfered with the conduct of the business, claiming that their discharge was ineffective because it was in violation of a by-law requiring assent of holders of ninety per cent of the outstanding shares for corporate action of any character. On motion for an order to restrain them from entering the plaintiff's place of business and from interfering in any way with its business, *held,* motion granted. A by-law requiring unanimous action of shareholders to pass any resolution or take action of any kind is obnoxious to the statutory rule of stock corporation management. A provision requiring action by the holders of ninety per cent of the shares is substantially the same as one requiring unanimous consent. *Eisenstadt Bros., Inc. v. Eisenstadt,* (N.Y. 1949) 89 N.Y.S. (2d) 12.

The power to adopt by-laws is necessary to the very existence of a corporation in order that the shareholders may be able to carry out the purposes for which it has been formed.[1] As a basic proposition shareholders have the right to adopt any by-law which is reasonable and not contrary to the charter of the corporation, public policy, or the law of the land as found in federal and state constitutions, federal and state statutes, and the common law.[2] The principal case is rested upon an earlier case which held that a by-law requiring unanimous action of stockholders to pass any resolution or take any action of any kind is invalid as obnoxious to the statutory scheme of stock corporation management.[3] The trial court in that case[4] held merely that, since the applicable statutory provisions required the consent of specified percentages of the outstanding shares for certain types of corporate action,[5] a by-law requiring unanimous consent for all actions would require more than the statute as to such actions and would, therefore, be void in its entirety.[6] The by-law might well have been sustained against that objection by construing it as applicable only to actions not specified by statute to require a fixed percentage of shares. Since by-laws represent the expressed desires of the shareholders, it would seem that a construction which will sustain their validity should be adopted, if reasonable, in preference to one which would render them void.[7] The court of appeals in the prior case, however, went beyond the decisions of the trial court, holding that a by-law requiring unanimous assent of all shareholders for any action is contrary to the statutory scheme, not merely because it would include

[1] ANGELL & AMES, CORPORATIONS, 10th ed., §§325, 326 (1875).

[2] 1 COOK, CORPORATIONS §4a (1923); 1 MORAWETZ, PRIVATE CORPORATIONS, 2d ed., §§491, 492, 494, 496 (1886); 8 FLETCHER, CYC. CORP., perm. ed., §§4185, 4191 (1931).

[3] Benintendi v. Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E. (2d) 829 (1945).

[4] Benintendi v. Kenton Hotel, Inc., 45 N.Y.S. (2d) 705 (1943).

[5] N.Y. Gen. Corp. Laws (1943) §§102, 103. Holders of a majority of shares may force directors to dissolve the corporation. If there is a deadlock, half may compel this action; N.Y. Stock Corp. Law (1940) §§36, 37. Two-thirds vote of shares is required to change the capitalization.

[6] 8 FLETCHER, CYC. CORP., perm. ed., §4191 (1931); ANGELL & AMES, CORPORATIONS, 10th ed., §358 (1875); State ex rel. Corey v. Curtis, 9 Nev. 325 (1874).

[7] ANGELL & AMES, CORPORATIONS, 10th ed., §357 (1875). See The Poulters' Co. v. Phillips, 6 Bing. (N.C.) 314, 133 Eng. Rep. 124 (1840), where a by-law enabling the company to call into livery all such freemen as they thought fit was reasonably construed as implying only freemen eligible by law.

actions for which a specified percentage is required, but also because it gives to the minority interest an absolute, permanent, all-inclusive power of veto which would render ineffective the policy of the state "that every stock corporation chartered by it must have a representative government, with voting conducted conformably to the statutes, and the power of decision lodged in certain fractions, always more than half, of the stock."[8] The court is not clear as to the basis for this principle, aside from the instances in which a definite absolute percentage is fixed, but seems to find it implicit in the statutory scheme as a whole. It concedes, however, that at least as to certain types of action, with respect to which no definite percentage of votes is required by statute, a by-law would be valid which required unanimous consent.[9] One may well speculate, therefore, as to where the line would be drawn. It would seem that such a by-law would be just as destructive of the concept of a representative government as would a by-law requiring unanimous consent for any action. It is questionable whether or not a corporation can function adequately with a by-law requiring unanimous consent of shareholders for any action; but the fact that a by-law is inconvenient or embarrassing in its administration does not necessarily invalidate it, even though it may seem unwise or inexpedient.[10] By parity of reasoning it would seem that a by-law requiring unanimity of assent as to any matter except where a required percentage is fixed by statute should not be held invalid merely because of an implied statutory policy.

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[8] Benintendi v. Kenton Hotel, Inc., supra, note 3.

[9] Ripin v. Atlantic Mercantile Co., 205 N.Y. 442, 98 N.E. 855 (1912); Tompkins v. Hale, 284 N.Y. 675, 30 N.E. (2d) 721 (1940).

[10] 8 FLETCHER, CYC. CORP., perm. ed., §4191 (1931); Burden v. Burden, 8 App. Div. 160, 40 N.Y.S. 499 (1896); Weatherly v. Medical & Surgical Society, 76 Ala. 567 (1884).