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INSPECTION OF CORPORATE BOOKS AND RECORDS IN NEW YORK BY STOCKHOLDERS AND DIRECTORS

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Inspection of corporation books and records is one of the fundamental rights of stockholders and directors.[1] Demands for such inspections are continually being made upon corporate officials. Much concern and litigation has resulted from these demands and the refusal to permit the inspection. The decisions upon the subject are innumerable but, unfortunately, the language in a number of cases is conflicting and confusing. Strangely enough there has been little literature upon the subject which has attempted to reconcile the decisions. Accordingly, an analysis of the statutes and cases in New York now appears timely—particularly in view of the great number of corporations transacting business in this State. Although this review is restricted to the New York law, a cursory examination reveals that the decisions in other jurisdictions insofar as they are based upon common law, are substantially the same. In approaching the subject, the line of demarcation between an examination of the stock book and an examination of the business books and records of a corporation must be continually observed.

PROCEDURE

To appraise the right to inspect corporate books and records, it is necessary at the outset to make a distinction between the right and the remedy. The existence of the right, either in a stockholder or in a director, and whether it originates from statute or common law, does not necessarily mean that the court is obligated to enforce that right by a proceeding in the nature of mandamus. While a mandamus will not issue unless an absolute right exists, the court in its discretion may

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1 FLETCHER, CYCLOPEDIA CORPORATIONS § 2213 (1952); BALLANTINE, CORPORATIONS 376 (rev. ed. 1946).

upon equitable grounds refuse to issue the writ and remit the party to his legal remedy. This distinction explains why the recovery of the penalty for failure by the corporation to comply with the statute with respect to the stock book is more easily obtained by the stockholder than the issuance of a mandamus for the inspection of the books; it also explains the diversity of decisions by the courts upon almost identical facts.

In New York, the application for an order directing the corporation to allow an inspection of its books and records must be made under Article 78 of the Civil Practice Act.[2] This application is not an action but a special proceeding[3] that is similar to the former proceeding for a writ of mandamus.[4] It is an independent proceeding supported by a petition, and it cannot be made on motion in a pending action.[5] Service upon the corporation is effected and jurisdiction obtained by the service of an order to show cause.[6]

An application seeking an inspection may be granted or denied in the first instance where the applicant's right depends upon questions of law.[7] The corporation may either answer the petition or may move to dismiss it as a matter of law. If the corporation answers and any material issues of fact are presented by the answer, the court must issue an alternative order directing a trial of these issues in accordance with Section 1295 of the Civil Practice Act.[8] In some cases it is stated that in determining whether or not a material issue of fact is so presented, all facts disclosed in the corporation's answer must be deemed to be true,[9] while only the undisputed averments of the petition will be deemed to be true.[10] It is difficult to understand how the disputed facts of either

2 Levine v. Lending, 176 Misc. 462, 26 N.Y.S.2d 775 (Sup. Ct. N.Y. County 1941).

3 *Ibid.*

4 *In re* Movizzo, 125 N.Y.L.J. 1073, col. 4 (Sup. Ct. March 26, 1951).

5 Spector v. Rosman Metal Body Co., 268 App. Div. 929, 51 N.Y.S.2d 468 (2d Dep't 1944); Eagle Publications, Inc. v. Reeves, 122 N.Y.L.J. 1628, col. 7 (Sup. Ct. Dec. 13, 1949).

6 Levine v. Lending, note 2 *supra.*

7 Schulman v. Dejonge & Co., 270 App. Div. 147, 59 N.Y.S.2d 119 (1st Dep't 1945); People *ex rel.* Giles v. Klauder-Weldon Dyeing Mach. Co., 180 App. Div. 149, 167 N.Y. Supp. 429 (3d Dep't 1917); *In re* Movizzo, note 4 *supra. In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

8 Matter of Wong Wah Yew v. Mun Hey Publishing Co., 275 N.Y. 615, 11 N.E.2d 967 (1936); Kohlberg v. Am. Council of Institute of Pac. Relations, 270 App. Div. 520, 60 N.Y.S.2d 586 (1st Dep't 1946); Schulman v. Dejonge & Co., note 7 *supra.*

9 Matter of Durr v. Paragon Trading Corp., 270 N.Y. 464, 1 N.E.2d 967 (1936); Schulman v. Dejonge & Co., note 7 *supra; In re* Murita Trading Corp., 98 N.Y.L.J. 1406, col. 5 (Sup. Ct. Oct. 29, 1937); *In re* Wygant, note 7 *supra.*

10 *In re* Rehe, 136 Misc. 136, 239 N.Y. Supp. 41 (Sup. Ct. N.Y. County 1930). In Green v. Baltic Shipping Co., 76 N.Y.S.2d 608 (Sup. Ct. N.Y. County 1947), *rev'd on other*

the petition or the answer can be deemed to be true when a reference is granted for the sole purpose of determining if they are true. Perhaps all that is meant by this language is that where a conflict or question of fact is presented, a reference must issue.

If the respondent corporation moves to dismiss the petition as a matter of law, all factual allegations of the petition and every favorable inference which might reasonably be drawn from them must be deemed admitted.[11] If in such a case, the application should be granted, the motion to dismiss must be denied, and the corporation allowed an opportunity to answer the petition.[12]

Thus the procedure similar to mandamus which must be sought in this type of action is important, because it introduces the element of the court's discretion into the application to inspect the business books of the corporation[13] or to inspect the stock books, at least since the 1933 amendment to Section 10 of the Stock Corporation Law.[14] This discretion is flexible and permissive of an equitable rather than an absolute enforcement of the right.

Inspection by Stockholders

A stockholder has always had the right at common law to inspect all books of the corporation, including the stock book, at a proper time and

grounds, 275 App. Div. 700, 87 N.Y.S.2d 354 (1st Dep't 1949), the court said: "In order to defeat the issuance of such order, the corporation has to make direct and positive denial of the essential fact relied upon to support the application." 76 N.Y.S.2d at 609.

[11] Friedman Roseth Corp. 271 App. Div. 870, 66 N.Y.S.2d 525 (1st Dep't 1946).

[12] *Ibid.* See also Bresnick v. Saypol, 270 App. Div. 837, 61 N.Y.S.2d 376 (1st Dep't 1946).

[13] Matter of Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Schulman v. Dejonge & Co., 270 App. Div. 147, 59 N.Y.S.2d 119 (1st Dep't 1945); Matter of Hitchcock, 157 App. Div. 328, 142 N.Y. Supp. 247 (2d Dep't 1913); People *ex rel.* Callanan v. Keeseville R.R., 106 App. Div. 349, 94 N.Y. Supp. 555 (3d Dep't 1905); Latimer v. Herzog Teleseme Co., 75 App. Div. 522, 78 N.Y. Supp. 314 (1st Dep't 1902); Matter of Coats, 73 App. Div. 178, 76 N.Y. Supp. 730 (1st Dep't 1902); People *ex rel.* McElwee v. Produce Exchange Trust Co., 53 App. Div. 93, 65 N.Y. Supp. 926 (1st Dep't 1900); Matter of Pierson, 44 App. Div. 215, 60 N.Y. Supp. 671 (1st Dep't 1899).

[14] Tate v. Sonotone Corp., 272 App. Div. 103, 69 N.Y.S.2d 535 (1st Dep't 1947); Baker v. McFadden Publications, Inc., 270 App. Div. 440, 59 N.Y.S.2d 841 (1st Dep't 1946), *rev'd on other grounds,* 300 N.Y. 325, 90 N.E.2d 876 (1950); People *ex rel.* Britton v. Am. Press Ass'n, 148 App. Div. 651, 133 N.Y. Supp. 216 (1st Dep't 1912); Bresnick v. Segal Lock & Hardware Co., 120 N.Y.L.J. 1695, col. 1 (Sup. Ct. Dec. 30, 1948), *aff'd,* 275 App. Div. 805, 89 N.Y.S.2d 701 (1st Dep't 1949); Donald & Co. v. Butterick Co., 117 N.Y.L.J. 891, col. 5 (Sup. Ct. March 6, 1947); Bresnick v. Saypol, 57 N.Y.S.2d 904 (Sup. Ct. N.Y. County 1945), *modified,* 270 App. Div. 837, 61 N.Y.S.2d 376 (1st Dep't 1946). See, *e.g.,* Matter of Bensky, 127 N.Y.L.J. 415, col. 1 (Sup. Ct. Jan. 30, 1952), where application made only three days before the annual meeting of a well-run corporation was denied.

place and for a proper purpose.[15] There is no doubt that this common law right still exists, unimpaired by any legislation, with respect to the examination of the business books and records of the corporation.[16] In New York, however, Sections 10 and 113 of the Stock Corporation Law expressly grant the stockholder a statutory right to inspect the stock book or stock ledger of the corporation. The pertinent portion of Section 10, which refers to a domestic corporation, provides for the inspection of the stock book in the following language:

> The stock book of every such corporation shall be open daily, during at least three business hours, for inspection by any judgment creditor of the corporation; or by any person who shall have been a stockholder of record in such corporation for at least six months immediately preceding his demand; or by any person holding or thereunto in writing authorized by the holders of at least five per centum of all of its outstanding shares; provided (a) that such inspection shall not be for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation, and (b) that such stockholder or other person has not within five years sold or offered for sale any list of stockholders of such corporation or any other corporation, or aided or abetted any person in procuring any stock list for any such purpose; and provided further that such inspection may be denied to such stockholder or other person upon refusal to furnish to such corporation or its transfer agent a written statement that such inspection is not desired for purpose (a) and that such stockholder or other person has not been connected with any stock list as provided in (b). Persons so entitled to inspect stock books may make extracts therefrom.[17]

Section 113 of the Stock Corporation Law contains similar provisions for

> Every foreign stock corporation having an office for the transaction of business in this state, except a moneyed or railroad corporation. . . .

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15 Guthrie v. Harkness, 199 U.S. 148 (1905); Henry v. Babcock & Wilcox Co., 196 N.Y. 302, 89 N.E. 942 (1909); Tuttle v. Iron Nat. Bank, 170 N.Y. 9, 62 N.E. 761 (1902); Matter of Hitchcock, 157 App. Div. 328, 142 N.Y. Supp. 247 (2d Dep't 1913); People *ex rel.* Hunter v. Nat. Park Bank, 122 App. Div. 635, 107 N.Y. Supp. 369 (1st Dep't 1907); People *ex rel.* Callanan v. Keeseville R.R., 106 App. Div. 349, 94 N.Y. Supp. 555 (3d Dep't 1905); People *ex rel.* Lorge v. Consolidated Nat. Bank, 105 App. Div. 409, 94 N.Y. Supp. 173 (1st Dep't 1905); *In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

16 Henry v. Babcock & Wilcox Co., note 15 *supra;* Matter of Steinway, note 15 *supra;* People *ex rel.* Britton v. Am. Press Ass'n, 148 App. Div. 651, 133 N.Y. Supp. 216 (1st Dep't 1912); Matter of Colwell, 76 App. Div. 615, 78 N.Y. Supp. 607 (1st Dep't 1902); *In re* Wygant, note 15 *supra.*

17 Section 10 also specifically states that if any corporation has a transfer agent in the state, the stock book may be kept in the office of the transfer agent provided that "there shall be posted in a conspicuous place in the office of the corporation a statement setting forth that fact, with the name and address of the transfer agent where the stock hook is kept." Inquiry has disclosed that very few corporations observe this requirement.

These sections extend the right of inspection to a judgment creditor, and also provide for a penalty in case the corporation fails to comply with the statute. It is interesting to note that the statute specifically provides that: "Nothing herein shall impair the power of the courts to compel the production for examination of the books of a corporation."[18] But it is of equal interest to note that there is nothing in the statute which requires the court to issue a mandamus for its enforcement.

The right given the stockholder under Sections 10 and 113 of the Stock Corporation Law to inspect the stock book differs from the right granted by common law, by requiring the stockholder to have held shares of the corporation for at least six months preceding the demand or, in the alternative, to represent or hold five percent of the outstanding shares of the corporation, and by providing a penalty for refusal to permit an inspection in a proper case.

The statutes also provide (a) that the requested inspection of the stock book shall not be for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation, and (b) that the stockholder shall not within five years have sold or offered for sale any list of stockholders of the corporation or any other corporation, or aided or abetted any person in procuring any stock list for that purpose.[19] Moreover, it should be observed that since an application for an inspection is addressed to the court's discretion, it is possible for the court, in a proper case, to deny the application of a stockholder, who is entitled to an inspection under the terms of the statutes.[20]

There is language in a number of cases indicating that the statutory right to inspect the stock book under Sections 10 and 113 of the Stock Corporation Law is not exclusive, and that, irrespective of the statute, the common law right to examine the stock book in a proper case continues to exist.[21] Some support for this position may be found in

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[18] N.Y. STOCK CORP. LAW §§ 10, 113.

[19] A petition which does not contain such allegations will be denied. Talbot v. Segal Lock & Hardware Co., 112 N.Y.L.J. 866, col. 3 (Sup. Ct. Oct. 13, 1944). But see L. Weinstock v. Holly Holding Corp., 100 N.Y.L.J. 1290, col. 3 (Sup. Ct. Oct. 25, 1938):

> It may be doubtful whether section 10 of the Stock Corporation Law requires petitioner to negative improper motives or other conditions mentioned in the amendments to that section. But the statement that petitioner has been a stockholder for six months requires to be stated.

[20] See cases cited note 14 *supra*.

[21] People *ex rel.* Venner v. N.Y. Life Ins. Co., 111 App. Div. 183, 97 N.Y. Supp. 465 (1st Dep't 1906); ROSEBROOK, NEW YORK CORPORATION MANUAL 290 (1947).

> We do not think that the statute now in force is exclusive, or that it has abridged the common-law right of stockholders with reference to the examination of corporate books. . . . The statute merely strengthened the common-law rule with reference

the statutory language that nothing therein shall impair the power of the court to compel the production of the books. If this be true, however, then a stockholder of less than six months or who holds or represents less than five percent of the outstanding shares of the corporation would have the right under common law to obtain an inspection,[22] subject, of course, to the requirement of good faith and the lack of an ulterior purpose. In spite of the language appearing in these cases, there is no decision, since the enactment of the last amendments to the statute, holding that such a stockholder is entitled to an inspection of the stock book. Moreover, it would appear that if the statute is to be effective, it must be deemed to have modified the common law right of the stockholder to examine the stock book. This construction would not conflict with the phraseology of the statute respecting the impairment of the court's power to compel production of the corporate books for examination. That language can harmoniously be construed to refer only to the books of account of the corporation, since the stock book is specifically mentioned whenever it is referred to in the statute.

It is important to emphasize again that the distinction should always be recognized between the right to inspect the general business books and records of the corporation and the right to inspect its stock book. The former right is based solely upon common law. The latter is based upon statute, and may also be based upon common law, depending upon the future construction of the statute by the courts.[23] This distinction must also be kept in mind because of the difference in the nature of the information which is made available to the stockholder. Thus, in a number of cases, an inspection of the general business books has been denied while an inspection of the stock books has been permitted.[24]

Who may exercise the right. The right to inspection depends upon

to one part thereof, and left the remainder unaffected. It dealt with but a single book, and as to that it amplified the qualified right previously existing, by making it absolute and extending it to judgment creditors. The stock book has no relation to the business carried on by a corporation; and the change was doubtless made to enable stockholders to promptly learn who are entitled to vote for directors, and judgment creditors to learn who are liable as stockholders for a failure to comply with the provisions of the act. The statute is silent as to the other books, and provides no system of inspection as a substitute for the right of examination at common law.

Matter of Steinway, 159 N.Y. 250, 264-65, 53 N.E. 1103, 1107 (1899).

22 See Hornstein, *Rights of Stockholders in New York Courts*, 56 YALE L.J. 942 (1947). But see L. Weinstock v. Holly Holding Corp., 100 N.Y.L.J. 1290, col. 3 (Sup. Ct. Oct. 25, 1938).

23 See ROSEBROOK, *op. cit. supra* note 21.

24 People *ex rel.* Callanan v. Keeseville R.R., 106 App. Div. 349, 94 N.Y. Supp. 555 (3d Dep't 1905); People *ex rel.* Clason v. Nassau Ferry Co., 86 Hun 128, 33 N.Y. Supp. 244 (1st Dep't 1895).

legal ownership of stock rather than upon equitable ownership.[25] Generally speaking, the application for inspection must be made by a stockholder of record.[26] For example, an executor or administrator of a deceased stockholder,[27] and a pledgor of stock registered in the pledgor's name may institute a proceeding.[28] On the other hand, a pledgee of stock registered in the pledgor's name[29] or a temporary administrator holding stock pending the outcome of a will contest that will determine the title to the stock,[30] or a mere agent[31] may not succeed in an application for inspection. Furthermore, since the right of inspection flows

[25] Brentmore Estates v. Hotel Barbizon, 263 App. Div. 389, 33 N.Y.S.2d 331 (1st Dep't 1942). But see Bernard v. Hudson & Manhattan R.R., 125 N.Y.L.J. 2376, col. 5 (Sup. Ct. June 28, 1951), holding that an equitable owner of stock has an equitable right to examine the books.

[26] *In re* Reiss, 30 Misc. 234, 62 N.Y. Supp. 145 (Sup. Ct. Kings County 1900). See Ballantine, *op. cit. supra* note 1; Rosebrook, *op. cit. supra* note 20. N.Y. STOCK CORP. LAW § 10 provides:

> The stockbook . . . of every stock corporation shall be presumptive evidence of the facts therein so stated in favor of the plaintiff, in any action or proceeding against such corporation. . . .

In Matter of Fleckenstein, 104 N.Y.L.J. 45, col. 6 (Sup. Ct. July 6, 1940), a stockholder of record was granted inspection although certificates had never been issued. See Beals v. Buffalo Expunded Metal Const. Co., 49 App. Div. 589, 63 N.Y. Supp. 635 (4th Dep't 1900).

The fact that Section 10 also provides: "No transfer of stock shall be valid as against the corporation . . . for any purpose . . . until it shall have been entered in such [stock] book . . ." should preclude an application by a stockholder not of record.

[27] Matter of Hastings, 128 App. Div. 516, 112 N.Y. Supp. 800 (1st Dep't 1908), *aff'd*, 194 N.Y. 546, 87 N.E. 520 (1909); Application of Schnepf, 84 N.Y.S.2d 416 (Sup. Ct. N.Y. County 1948); Matter of Partridge, 99 N.Y.L.J. 1836, col. 3 (Sup. Ct. April 15, 1938). In Tramontana v. World Dyeing & Finishing Co., 104 N.Y.L.J. 1654, col. 5 (Sup. Ct. Nov. 22, 1940), however, the administratrix of a deceased stockholder was denied an inspection where stock certificates were lost and the administratrix was unable to pay for undertaking required to transfer shares to her name.

[28] United States Trust Co. v. U.S. Fire Ins. Co., 18 N.Y. 199, 224 (1855); Adderly v. Storm, 6 Hill 624 (N.Y. 1844); Booth v. Consol. Fruit Jar Co., 62 Misc. 252, 114 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1909).

[29] Hartwell & Lester, Inc. v. Shaw Coal Co., 97 N.Y.L.J. 3241, col. 5 (Sup. Ct. June 26, 1937); Matter of First Nat. Bank of Brooklyn, 28 Misc. 662, 59 N.Y. Supp. 1042 (Sup. Ct. N.Y. County 1899), *aff'd*, 44 App. Div. 635, 60 N.Y. Supp. 1138 (1st Dep't 1899).

[30] Matter of Hastings, 128 App. Div. 516, 112 N.Y. Supp. 800 (1st Dep't 1928).

[31] The proceeding for inspection cannot be instituted in the name of a holder of a power of attorney, but must be brought in the stockholder's name. Application of Gill, 192 Misc. 283, 80 N.Y.S.2d 400 (Sup. Ct. N.Y. County 1948). The petition, however, may be made and verified by the stockholder's attorney where he is so authorized and has knowledge of the facts. Seff v. Williamsburgh Maternity, Inc., 81 N.Y.S.2d 584 (Sup. Ct. Kings County 1948). Either the power of attorney or some other proof of the authorization to bring the proceeding must be shown. Latimer v. Herzog Teleseme Co., 75 App. Div. 522, 78 N.Y. Supp. 314 (1st Dep't 1902).

from legal ownership, the right of a voting trust certificate holder depends upon the extent to which he retains his legal rights under the voting trust agreement.[32] It would appear anomalous for a voting trust certificate holder to possess any legal rights.

Even in the cases in which ownership of the stock is disputed a stockholder of record will be granted an inspection,[33] and a stockholder not of record will be denied the right absolutely,[34] or will be required to prove his ownership at a separate trial.[35]

The size of the petitioner's stockholding is usually said to be an immaterial factor in the determination of the application,[36] although it appears that in a few cases some weight has been given to the size of the holding.[37]

A preferred stockholder is entitled to the same treatment as a common stockholder.[38]

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32 Baczkowsha v. 2166 Operating Corp., 304 N.Y. 811, 109 N.E.2d 470 (1952); Brentmore Estates v. Hotel Barbizon, 263 App. Div. 389, 33 N.Y.S.2d 331 (1st Dep't 1942); Matter of Green, 129 N.Y.L.J. 1103, col. 7 (Sup. Ct. April 3, 1953); *see* FLETCHER, CYCLOPEDIA CORPORATIONS § 2230 (1952).

33 Matter of Fleckenstein, 104 N.Y.L.J. 45, col. 6 (Sup. Ct. July 6, 1940). See Application of Milton, 297 N.Y. 900, 79 N.E.2d 738 (1948), where application was granted subject to limitations consented to by the petitioner in his reply affidavit, notwithstanding respondent had commenced an action for specific performance of petitioner's contract to resell his stock to respondent, so that petitioner had only a contingent interest in the stock, and that petitioner, who was formerly employed by respondent, was now engaged in a competing business.

34 *In re* Olsen, 117 N.Y.L.J. 2440, col. 5 (Sup. Ct. June 20, 1947); Tramontana v. World Dyeing & Finishing Co., 104 N.Y.L.J. 1654, col. 5 (Sup. Ct. Nov. 22, 1940); *In re* Reiss, 30 Misc. 234, 62 N.Y. Supp. 145 (Sup. Ct. Kings County 1900). To raise an issue of stock ownership, the corporation's denial must be positive and not evasive. Martin v. Johnston Co., 62 Hun 557, 17 N.Y. Supp. 133 (1st Dep't 1891), *aff'd*, 133 N.Y. 692, 31 N.E. 627 (1892).

35 Munyer v. A. E. Munyer Electrotype Co., 265 App. Div. 819, 37 N.Y.S.2d 332 (2d Dep't 1942); Matter of Holland, 218 App. Div. 780, 218 N.Y. Supp. 556 (2d Dep't 1926); *In re* Murita Trading Corp., 98 N.Y.L.J. 1406, col. 5 (Sup. Ct. Oct. 29, 1937). Del Orto v. Elizabeth Grause, Inc., 98 N.Y.L.J. 679, col. 5 (Sup. Ct. Sept. 15, 1937).

Where a separate proceeding is already pending against the corporation to determine title to the stock, the application should be denied until decision upon the separate proceeding. Matter of Blish, 106 N.Y.L.J. 273, col. 1 (Sup. Ct. Aug. 5, 1941).

36 Matter of Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Matter of Hitchcock, 157 App. Div. 328, 142 N.Y. Supp. 247 (2d Dep't 1913); Matter of O'Neill, 47 Misc. 495, 95 N.Y. Supp. 964 (Sup. Ct. N.Y. County 1905).

37 *See In re* Bakeris, 122 N.Y.L.J. 259, col. 2 (Sup. Ct. Aug. 15, 1949), *aff'd*, 276 App. Div. 905, 94 N.Y.S.2d 909 (1st Dep't 1950); Adler v. Oppenheim Collins & Co., 81 N.Y.S.2d 293; Matter of Snaider, 117 N.Y.L.J. 1191, col. 5 (Sup. Ct. March 27, 1947); *In re* Hoeflich, 107 N.Y.L.J. 25, col. 7 (Sup. Ct. Jan. 3, 1942); FLETCHER, CYCLOPEDIA CORPORATIONS § 223 (1952). In Matter of Partridge, 99 N.Y.L.J. 1836, col. 3 (Sup. Ct. April 15, 1938), the court dismissed arguments as to petitioner's ulterior motives where she owned 50 percent of stock.

38 *See* Matter of Ross, 99 N.Y.L.J. 1061, col. 4 (Sup. Ct. March 3, 1938).

Demand. Normally, an order for an inspection will issue only after the stockholder has established that the information he desires has been refused[39] by the corporation after a demand.[40] In one case,[41] a stockholder served his demand on the corporation by registered mail. The corporation's defense to a later proceeding for an inspection that the demand could be served only by personal service was quickly dismissed.

In another recent case,[42] petitioner alleged that he had made an oral demand on the corporation. This allegation was denied. Petitioner also made a written demand, but commenced his proceeding before waiting to see whether that demand would be refused. The court held the written demand ineffective and ordered a trial on the issue of the making of the oral demand.

When a demand to be allowed access to the stock book is made upon a corporation, it has the right under the statutes to require from the stockholder a statement that the inspection is not for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation, and that he had not been connected with the sale of a stock list in the last five years.[43]

Good Faith of Petitioner. An application for an examination of either

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39 In Matter of Lerner, 98 N.Y.L.J. 2384, col. 7 (Sup. Ct. Dec. 28, 1937), a petition was denied where it appeared that the corporation had refused to permit the inspection unless it should be performed by a well-known and established firm of accountants.

40 Matter of Wong Wah Yew v. Mun Hey Publishing Co., 275 N.Y. 615, 11 N.E.2d 967 (1936); Osher v. Fleet Utilities Co., 124 N.Y.L.J. 112, col. 3 (Sup. Ct. July 31, 1950). Necessity for demand held to be excused by explicit refusal of an inspection contained in answer. Brentmore Estates, Inc. v. Hotel Barbizon, 108 N.Y.L.J. 1098, col. 6 (Sup. Ct. Oct. 20, 1942). *In re* Hitchcock, 149 App. Div. 824, 134 N.Y. Supp. 174 (2d Dep't 1912); Latimer v. Herzog Teleseme Co., 75 App. Div. 522, 78 N.Y. Supp. 314 (1st Dep't 1902); Matter of Taylor, 117 App. Div. 348, 101 N.Y. Supp. 1039 (3d Dep't 1907).

Despite language of Section 1286 of Civil Practice Act, proceedings need not be brought within four months of demand. *In re* Mann, 118 N.Y.L.J. 1570, col. 2 (Sup. Ct. Dec. 2, 1943). *Contra:* Matter of Green, 129 N.Y.L.J. 1103, col. 7 (Sup. Ct. April 13, 1953).

The right to an inspection cannot be barred by laches. Mullen v. Thomas W. Kiley & Co., Inc., 128 N.Y.L.J. 852, col. 5 (Sup. Ct. October 17, 1952); *Contra:* Matter of Green, *supra.*

41 Green v. Baltic Shipping Co., 76 N.Y.S.2d 608 (Sup. Ct. N.Y. County 1947), *rev'd on other grounds,* 275 App. Div. 700, 87 N.Y.S.2d 354 (1st Dep't 1949).

42 Martin v. Columbia Picture Corp., 129 N.Y.L.J. 464, col. 6 (Sup. Ct. Feb. 10, 1953).

43 The stockholder need not furnish the statement except upon demand by the corporation. *See* Application of Spanierman, 58 N.Y.S.2d 10, *adhered to on rearg.* 58 N.Y.S.2d 322 (Sup. Ct. N.Y. County 1945), *aff'd,* 269 App. Div. 1023, 59 N.Y.S.2d 400 (1st Dep't 1945), *aff'd,* 270 App. Div. 885, 61 N.Y.S.2d 923 (1st Dep't 1946).

the stock book or the general business books of the corporation must be made in good faith, that is, for a proper purpose. The real test in both cases is always: Is inspection necessary solely to protect the petitioner's economic interest in the corporation as a stockholder?[44] If the application is not for the purpose of protecting the petitioner's economic interest in the corporation, it is motivated by an "ulterior purpose" which will result in a denial of the petition.[45]

An ulterior purpose that might defeat an examination of the stock book might not, however, constitute an ulterior purpose to defeat an examination of the business books of the corporation, and vice versa. For instance, a stockholder who seeks to examine the stock book for the purpose of selling a stock list, but who otherwise alleges a proper purpose for the examination of the business books of the corporation would be permitted an examination of the business books and denied an examination of the stock book. By the same token, a competitor of the corporation who holds a few shares of stock, and who presumably would be more interested in the business secrets of the corporation than in protecting his economic interest, would probably be denied an examination of the business books and permitted an examination of the stock book.

It has been repeatedly held that an examination will not be permitted to satisfy idle curiosity or to aid a blackmailer;[46] these are examples of ulterior purposes.

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[44] *In re* Taylor, 117 App. Div. 348, 101 N.Y. Supp. 1039 (3d Dep't 1951); Osher v. Fleet Utilities Co., 124 N.Y.L.J. 112, col. 3 (Sup. Ct. July 31, 1950); Hecht v. Select Theatres Corporation, 91 N.Y.S.2d 464 (Sup. Ct. N.Y. County 1949); FLETCHER, CYCLOPEDIA CORPORATIONS § 2 (1952).

[45] Peo. *ex rel.* Althause v. Giroux Consol. Mines Co., 122 App. Div. 617, 107 N.Y. Supp. 188 (1st Dep't 1907). In Baker v. MacFadden Publications, 270 App. Div. 440, 59 N.Y.S.2d 841 (1st Dep't 1946), *rev'd on other grounds,* 300 N.Y. 325, 90 N.E.2d 876 (1950), it was said that the examination would be denied "where the purpose is not consonant with law, the business of the corporation or good faith." 270 App. Div. at 443, 59 N.Y.S.2d at 844-5.

Normally, when the application is made by a stockholder to acquire information for the use of a third party the application will be denied. *See* People *ex rel.* Hunder v. Nat. Park Bank, 122 App. Div. 635, 107 N.Y. Supp. 369 (1st Dep't 1907), where to aid undisclosed persons in some undisclosed scheme against the corporation was held to be an ulterior purpose. Also *see* Matter of Coats, 73 App. Div. 178, 76 N.Y. Supp. 730 (1st Dep't 1902). *See* also Osher v. Fleet Utilities Co., 124 N.Y.L.J. 112, col. 3 (Sup. Ct. July 31, 1950); Schwarz v. Rayon Pub. Corp., 98 N.Y.L.J. 934, col. 3 (Sup. Ct. Oct. 1, 1937).

[46] Matter of Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Matter of Hitchcock, 157 App. Div. 328, 142 N.Y. Supp. 247 (2d Dep't 1913); *In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

Similarly, in *Tate v. Sonotone Corp.*,[47] in which the stockholder's petition was denied, the court stated:

> That petitioner is not motivated by a desire to aid a competing business has no tendency to establish that he is trying to better his economic position as stockholder where what actuates him is clearly "disinterested malevolence" . . . against the individuals in charge of the corporation.[48]

It was pointed out in the *Tate* case, furthermore, that the burden is not on the stockholder affirmatively to show his good faith,[49] and the rule in New York is that the burden of proving the stockholder's improper purpose rests upon the corporation;[50] nevertheless, the stockholder should state what his purpose is so that the court may determine if it is proper.[51]

Competitors. The most frequent and outstanding example of ulterior purpose appears when the stockholder bringing the application is a competitor.

Status as a competitor should be of no importance if inspection of only the stock book is sought, because the names and addresses of the stockholders ordinarily will not be of much assistance to a competitor.[52]

A different question is presented, however, when the competitor-stockholder seeks to examine the general business books of the corporation.[53] In *Schulman v. Louis Dejonge & Co.*,[54] for example, the court directed a trial of petitioner's good faith because,

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[47] 272 App. Div. 103, 69 N.Y.S.2d 535 (1st Dep't 1947).

[48] *Id.* at 105, 69 N.Y.S.2d at 536.

[49] *Ibid.*

[50] *In re* Ditisheim, 96 N.Y.S.2d 622 (Sup. Ct. N.Y. County 1950); Osher v. Fleet Utilities Co., 124 N.Y.L.J. 112, col. 3 (Sup. Ct. July 31, 1950); Application of Joslyn, 191 Misc. 512, 78 N.Y.S.2d 183 (Sup. Ct. N.Y. County 1948), *aff'd*, 273 App. Div. 945, 78 N.Y.S.2d 923 (1st Dep't 1948); Bresnick v. Segal Lock & Hardware Co., Inc., 120 N.Y.L.J. 1695, col. 1 (Sup. Ct. Dec. 30, 1948), *aff'd*, 275 App. Div. 805, 89 N.Y.S.2d 701 (1st Dep't 1949); Lennan v. 551 Fifth Ave., Inc., 120 N.Y.L.J. 1635, col. 4 (Sup. Ct. Dec. 23, 1948); FLETCHER, CYCLOPEDIA CORPORATIONS § 2253 (1952).

[51] Bresnick v. Saypol, 57 N.Y.S.2d 904 (Sup. Ct. N.Y. County 1945), *modified*, 270 App. Div. 837, 61 N.Y.S.2d 376 (1st Dep't 1946). In this case it was said:

> That discretion may not be invoked favorably by the petitioner upon a parroting of the verbiage of the statute, unsupported by the presentation of any facts whatsoever from which the necessity or motivation for this application may be gleaned.

57 N.Y.S.2d at 910.

[52] But compare Javits v. Investors League, 92 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1949).

[53] People v. Klauder-Weldon Dyeing Mach. Co., 180 App. Div. 149, 167 N.Y. Supp. 429 (3d Dep't 1917); People v. Consolidated Fire Alarm Co., 142 App. Div. 753, 127 N.Y. Supp. 348 (1st Dep't 1911); Matter of Kennedy, 75 App. Div. 188, 77 N.Y. Supp. 714 (3d Dep't 1902); Osher v. Fleet Utilities Co., 124 N.Y.L.J. 112, col. 3 (Sup. Ct. July 31, 1950); *In re* Dunhuber, 80 N.Y.L.J. 2136, col. 1 (Sup. Ct. Feb. 4,

> . . . it is equally well settled that an examination will not be permitted where the ulterior purpose of the inspection is to supply knowledge of the inner workings and details of a corporation's business to a competitor, or to embarrass the corporation.[55]

In a number of cases, the courts have permitted an examination of the corporation's general business books to the extent that it will not aid the competitor *qua* competitor.[56] Thus, in *Hughey v. DuBois Press*,[57] for example, it was held that merely because the petitioner

> . . . is employed by a competitor will not defeat his right to an examination when he seeks to safeguard himself against substantial losses, . . . for the court can always throw up barriers against an examination that ranges too far into trade or business secrets.[58]

Accordingly, a substantial stockholder was allowed to examine the books and records to determine why there had been a progressive deterioration in the business of the corporation. In another typical case, a stockholder-competitor was permitted an examination of the books "with the exception that the books containing any business secrets of the corporation or the names and addresses of customers may be withheld."[59] In one case,[60] the matter was referred to an official referee to determine whether under the circumstances it was necessary to limit the examination, with the direction that if he found that it was, he was to suggest the most appropriate way to safeguard the corporation's interests. In another case,[61] the court provided that the corporation was entitled to have the inspection supervised by a referee.

An interesting situation was presented in In re *Chanel*,[62] the per-

1929); In *In re* Finkelstein, 123 N.Y.L.J. 2105, col. 1 (Sup. Ct. June 23, 1950), where the court referred the case to a referee to determine whether an examination was necessary where the petitioner was a competitor.

[54] 270 App. Div. 147, 59 N.Y.S.2d 119 (1st Dep't 1945).

[55] *Id.* at 149, 59 N.Y.S.2d at 122.

[56] Application of Pohl, 272 App. Div. 792, 71 N.Y.S.2d 707 (1st Dep't 1947); Martocci v. Martocci, 266 App. Div. 854, 42 N.Y.S.2d 334 (2d Dep't 1943); Gluck v. Gluck Bros., Inc., 126 N.Y.L.J. 1070, col. 3 (Sup. Ct. Oct. 31, 1951); *In re* Roth, 124 N.Y.L.J. 546, col. 2 (Sup. Ct. Sept. 21, 1950); Matter of Evans, 116 N.Y.L.J. 716, col. 1 (Sup. Ct. Oct. 2, 1946); *In re* Elish, 114 N.Y.L.J. 628, col. 2 (Sup. Ct. Sept. 25, 1945); *In re* Hoeflich, 107 N.Y.L.J. 25, col. 7 (Sup. Ct. Jan. 3, 1942); Hansen v. Marblette Corporation, 24 N.Y.S.2d 200 (Sup. Ct. Queens County 1940), *aff'd*, 260 App. Div. 866, 23 N.Y.S.2d 842 (2d Dep't 1940); Ludwig v. Ludwig & Co., 126 App. Div. 696, 111 N.Y. Supp. 94 (1st Dep't 1908).

[57] 37 N.Y.S.2d 343 (Sup. Ct. Monroe County 1942).

[58] *Id.* at 345.

[59] Hansen v. Marblette Corporation, 24 N.Y.S.2d 200 (Sup. Ct. Queens County 1940), *aff'd*, 260 App. Div. 866, 23 N.Y.S.2d 842 (2d Dep't 1940).

[60] Application of Pohl, 272 App. Div. 792, 71 N.Y.S.2d 707 (1st Dep't 1947).

[61] Gluck v. Gluck Bros., Inc., 126 N.Y.L.J. 1070, col. 3 (Sup. Ct. Oct. 31, 1951).

[62] 74 N.Y.S.2d 203 (Sup. Ct. N.Y. County 1947).

fumers, where the stockholder claimed mismanagement, and the respondent corporation tried to defeat the application by claiming that petitioner was a competitor. The court determined:

> If petitioner's evidence at the trial establishes this allegation [of mismanagement] the court may conclude that [petitioner] is not precluded from obtaining an inspection necessary to stop such injury to respondent because she also may be in competition with it, or may be able to frame an order in such manner as to prevent the alleged wrongs to respondent without giving petitioner information which she might use for competitive purposes.[63]

It thus appears that the fact that the applicant is a competitor should not necessarily nor completely defeat an examination. On the other hand, if the primary or sole purpose of the competitor is to procure business or trade secrets, a balance of the equities involved requires that the application be denied.

Purpose. As we have previously seen, an inspection will not be granted unless it is sought for a valid purpose—that is, one that relates to the petitioner's interest as a stockholder.[64] It is necessary, moreover, to illustrate that a valid purpose for an inspection of the stock book may not be a valid purpose for an examination of the general business books of the corporation. Accordingly, these two purposes should be treated separately.

Stock Book Purposes. As early as 1851, in the case of *Cotheal v. Brouwer*,[65] it was held that every stockholder has the right to the information that can be derived from an examination of the books that contain the names of the stockholders, so that he can ascertain those who are qualified to vote, and to enable him to confer with them concerning the election of directors.

It is, therefore, a proper purpose to inspect the stock book in an attempt to contest the activities of the management, to seek representation on the board of directors, or even to oust the existing management,[66] and it is immaterial whether the inspection is in aid of an ouster

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[63] *Id.* at 208.

[64] See cases cited notes 44 and 45 *supra.*

[65] 5 N.Y. 562 (1851). Also *see* Matter of Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899).

[66] Bresnick v. Segal Lock & Hardware Co., 120 N.Y.L.J. 1695, col. 1 (Sup. Ct. Dec. 30, 1948). The possible desire of a stockholder to acquire control of the corporation is not such bad faith as would deprive him of his right of inspection. Martin v. Columbia Pictures Corp., 129 N.Y.L.J. 1047, col. 8 (Sup. Ct. March 30, 1953), appeal pending.

The fact that petitioner may use the procedure provided for under the rules of the Securities and Exchange Commission to solicit proxies does not deprive him of the right to secure an inspection under Sections 10 and 113 of the Stock Corporation Law. *In re* Ditisheim, 96 N.Y.S.2d 622 (Sup. Ct. N.Y. County 1950). Even if consent

of an arguably good management or a demonstrably bad one.[67] Nevertheless, an inspection of all the books of a corporation in order to oust the present management may be denied.[68] In this respect, the statement of the late Judge Shientag in *Davids v. Sillcox*[69] should be noted:

> A distinction must be made between an attempt to subvert an organization and an attempt to impugn or to replace its present leadership. The former, of course, could not furnish the basis for the issuance of the writ; the corporation obviously should not be compelled to aid in its own harm or destruction. But it is in the interests of the corporation, and not those of the group which holds power within the corporation, which the court must protect. The amendment of a corporation's procedures and the replacement of its present officers are legitimate objectives for members of the corporation.[70]

It would thus appear that where petitioner's ultimate object is liquidation of the corporation, the application should be denied.[71]

A recent development in New York has been the granting of petitions to stockholders to inspect stock books so that they may obtain information to solicit other stockholders of the corporation to join them in derivative actions in order to overcome the need of furnishing the security for costs required by Section 61-b of the General Corporation Law.[72] This result has largely deterred corporations from making motions for security for costs and has emasculated Section 61-b.

An application which seeks a stock list for the purpose of selling the same should be denied.[73]

Business Book Purposes. Textbooks have stated that a stockholder is justified in demanding an inspection of the corporation's general business books to determine the value of his shares of stock for sale or in-

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of the Securities and Exchange Commission is required to solicit proxies, it is not condition precedent to a proceeding to compel inspection. Application of Joselyn, 191 Misc. 512, 78 N.Y.S.2d 183 (Sup. Ct. N.Y. County 1948), *aff'd*, 273 App. Div. 945, 78 N.Y.S.2d 923 (1st Dep't 1948).

[67] *In re* Ditisheim, 96 N.Y.S.2d 622 (Sup. Ct. N.Y. County 1950).

[68] *In re* Rehe, 136 Misc. 136, 239 N.Y. Supp. 41 (Sup. Ct. Kings County 1930).

[69] 188 Misc. 45, 66 N.Y.S.2d 508 (Sup. Ct. N.Y. County 1946), *rev'd on other grounds*, 272 App. Div. 54, 69 N.Y.S.2d 63 (1st Dep't 1947), *rev'd*, 297 N.Y. 355, 79 N.E.2d 440 (1948).

[70] 188 Misc. at 51, 66 N.Y.S.2d at 514.

[71] *In re* Ditisheim, 96 N.Y.S.2d 622 (Sup. Ct. N.Y. County 1950). *See* Matter of Newman v. Smith, 263 App. Div. 85, 31 N.Y.S.2d 576 (1st Dep't 1941).

[72] Baker v. MacFadden Publications, 300 N.Y. 325, 90 N.E.2d 876 (1950); Neuwirth v. The Pantasote Co., 125 N.Y.L.J. 1128, col. 5 (Sup. Ct. March 29, 1951). *See* Application of Joselyn, 191 Misc. 512, 78 N.Y.S.2d 183 (Sup. Ct. N.Y. County 1948), *aff'd*, 273 App. Div. 945, 78 N.Y.S.2d 923 (1st Dep't 1948).

[73] N.Y. STOCK CORP. LAWS §§ 10, 113.

vestment.[74] There does not, however, appear to be a case reported in New York that supports this proposition, although representatives of the estate of a stockholder have been permitted to inspect and to make copies of the balance sheets and earning statements to obtain information required for an appraisal of the stock for estate tax purposes.[75]

The reason most frequently given by stockholders to support an application for an examination is alleged mismanagement of the corporate affairs by the present management. A number of cases have held that stockholders have the right to inspect the corporate books to determine whether the officers and directors are properly managing its affairs, even though upon an actual examination of the records it should appear that in fact there was no mismanagement.[76] In these cases, a denial of mismanagement will not defeat the application.[77] It must be remembered in this connection that mismanagement is not the only ground for

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[74] BALLANTINE, CORPORATIONS 378 (rev. ed. 1946). FLETCHER, CYCLOPEDIA CORPORATIONS § 2214 (1952).

[75] Matter of Lay, 44 N.Y.S.2d 430 (Sup. Ct. N.Y. County 1943).

[76] Durr v. Paragon Trading Corporation, 270 N.Y. 464, 471, 1 N.E.2d 967 (1936); Matter of Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Matter of Hitchcock, 157 App. Div. 328, 142 N.Y. Supp. 247 (2d Dep't 1913); *In re* Movizzo, 125 N.Y.L.J. 1073, col. 4 (Sup. Ct. March 26, 1951). *In re* Schiller, 126 N.Y.L.J. 1034, col. 1 (Sup. Ct. Oct. 29, 1951); Lewis v. Nat. Lewis Retail Corporation, 194 Misc. 427, 86 N.Y.S.2d 823 (Sup. Ct. N.Y. County 1949); Matter of Evans, 116 N.Y.L.J. 716, col. 1 (Sup. Ct. Oct. 2, 1946); *In re* Hassuk, 57 N.Y.S.2d 798 (Sup. Ct. N.Y. County 1945); Norton v. Electro Hygiene System, Inc., 109 N.Y.L.J. 102, col. 4 (Sup. Ct. Jan. 8, 1943); Hughey v. DuBois Press, 37 N.Y.S.2d 343 (Sup. Ct. Monroe County 1942); Hansen v. Marblette Co., 24 N.Y.S.2d 200 (Sup. Ct. Queens County 1940), *aff'd,* 260 App. Div. 866, 23 N.Y.S.2d 842 (2d Dep't 1940).

[77] Durr v. Paragon Trading Corporation, 270 N.Y. 464, 471, 1 N.E.2d 967 (1936); Lerner v. Louis Dejonge & Co., 127 N.Y.L.J. 957, col. 2 (Sup. Ct. March 10, 1952); *In re* Siegel, 115 N.Y.L.J. 2249, col. 5 (Sup. Ct. June 6, 1946); *In re* Hassuk, note 76, *supra; In re* Mann, 110 N.Y.L.J. 1570, col. 2 (Sup. Ct. Dec. 2, 1943); *In re* Paley, 105 N.Y.L.J. 1800, col. 7 (Sup. Ct. April 23, 1941). "If there has been no corporate mismanagement, no harm can result from such examination. If mismanagement exists it should be brought to light." *In re* Kobler, 126 N.Y.L.J. 180, col. 4 (Sup. Ct. Aug. 1, 1951). Kouremenos v. Queens Ice Cream Co., Inc., 117 N.Y.L.J. 2516, col. 7 (Sup. Ct. June 26, 1947), held affidavit by 24 out of 27 stockholders that they were satisfied with present management and that corporate books and records were always made available to them, insufficient to defeat application. Petitioner's purchase of considerable amounts of stock is not inconsistent with his claim of mismanagement. Martin v. Columbia Pictures Corp., 129 N.Y.L.J. 1047, col. 8 (Sup. Ct. March 30, 1953), appeal pending.

In Matter of Bakeris, 122 N.Y.L.J. 159, col. 2 (Sup. Ct. Aug. 15, 1949), *aff'd,* 276 App. Div. 905, 94 N.Y.S.2d 909 (1st Dep't 1950), an examination was denied where there were merely general allegations of poor business management, public agencies had already made a thorough examination of the corporation's records and activities and there was no proof that the corporation was not conducting its affairs along sound business principles.

an application. But the stockholder must show, however, that his economic interests are being threatened.

It has been held that the non-payment of dividends despite the accumulation of a surplus, is not, without more, a valid reason for an examination,[78] but it appears that failure to pay dividends is a factor tending to influence a court to exercise its discretion in favor of granting an inspection.[79] Similarly, a decrease in earnings does not necessarily show mismanagement, and is not, alone, a valid reason for allowing the inspection.[80]

Furthermore, the mere fact that petitioner lacks knowledge of the corporation's affairs will not justify an examination of its books and records,[81] and the broad statement in some texts[82] that stockholders may obtain an inspection for the purpose of ascertaining the financial condition of their company does not appear to be justified. The stockholder must have a valid reason vis-à-vis the protection of his stock interest in the corporation.

Where an examination is sought to aid a personal claim of the stockholder it will be denied.[83] In *Matter of Taylor*,[84] for example, an application for an examination was denied because the stockholder sought information to support an action for deceit against the directors personally to recover damages resulting from their publication of a false report that had induced him to become a stockholder.

Petitioner's Knowledge No Bar. Frequently a corporation will attempt

78 Matter of Latimer v. Herzog Teleseme Co., 75 App. Div. 522, 78 N.Y. Supp. 314 (1st Dep't 1902); Hecht v. Select Theatres Corp., 91 N.Y.S.2d 464 (Sup. Ct. N.Y. County 1949).

79 Matter of Ross, 99 N.Y.L.J. 1061, col. 4 (Sup. Ct. March 3, 1948); People *ex rel.* Colby v. Imbrie & Co., 126 Misc. 457, 214 N.Y. Supp. 53 (Sup. Ct. N.Y. County 1946); *In re* Elish, 114 N.Y.L.J. 628, col. 2 (Sup. Ct. Sept. 25, 1945); Schwartz v. I. Rokeach & Sons, Inc., 113 N.Y.L.J. 405, col. 4 (Sup. Ct. Jan. 31, 1945); *In re* Hoeflich, 107 N.Y.L.J. 25, col. 7 (Sup. Ct. Jan. 3, 1942).

80 Adler v. Oppenheim Collins & Co., 81 N.Y.S.2d 293 (Sup. Ct. N.Y. County 1948); *In re* Mann, 110 N.Y.L.J. 1570, col. 2 (Sup. Ct. Dec. 2, 1943).

81 Matter of Latimer v. Herzog Teleseme Co., 75 App. Div. 522, 78 N.Y. Supp. 314 (1st Dep't 1902); Hecht v. Select Theatres Corp., 91 N.Y.S.2d 464 (Sup. Ct. N.Y. County 1949). A stockholder is not entitled to inspect the corporation's business records merely to confirm his suspicion that the corporate business was being operated at a loss. Dubroff v. Grand Provisions, Inc., 114 N.Y.L.J. 214, col. 5 (Sup. Ct. Aug. 2, 1945).

82 BALLANTINE, CORPORATIONS 378 (rev. ed. 1946).

83 Matter of Taylor, 117 App. Div. 348, 101 N.Y. Supp. 1039 (3d Dep't 1907); Kosser v. Levine, 99 N.Y.L.J. 2008, col. 7 (Sup. Ct. April 26, 1938). Mere fact that petitioner has a personal claim against corporation will not defeat application where there are valid reasons for granting it. Matter of Ross, 99 N.Y.L.J. 1061, col. 4 (Sup. Ct. March 3, 1938).

84 See note 83 *supra*.

to defeat an application by alleging that it has supplied petitioner with records that are adequate to inform him of all he wants to know, or that it is willing to do so.[85] These gestures, however, will not defeat the application, because the stockholder's right of inspection is not to be limited by what the officers of the corporation are willing to show.[86] Of course, if the stockholder already has the information which he seeks in the corporation's records, that may be a factor tending to demonstrate a lack of good faith.[87]

A stockholder, under Section 77 of the Stock Corporation Law, is entitled on demand to be furnished by the corporation's treasurer with a financial statement, but it has been said that,

> . . . nothing in that section detracts from the power of the court to make the books of a corporation accessible to a stockholder for the purpose of protecting his legitimate interests.[88]

Nevertheless, in one case, a stockholder entitled to such a statement from the treasurer was denied an inspection because it appeared that he could obtain all the information he needed from the statement.[89]

The fact that a stockholder is maintaining a derivative action against a corporation in which he might be able to obtain an inspection of the corporate books and records does not deprive him of the right to an inspection by an order under Article 78.[90]

By-Laws and Charter Provisions. A number of corporations have at-

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85 *In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

86 *In re* Kobler, 126 N.Y.L.J. 180, col. 4 (Sup. Ct. Aug. 1, 1951); Lewis v. Nat Lewis Retail Corporation, 194 Misc. 427, 86 N.Y.S.2d 823 (Sup. Ct. N.Y. County 1949); *In re* Chanel, 74 N.Y.S.2d 211 (Sup. Ct. N.Y. County 1947); Lennan v. 551 Fifth Ave., Inc., 120 N.Y.L.J. 1635, col. 4 (Sup. Ct. Dec. 23, 1940).

87 *See* People *ex rel.* Giles v. Klauder-Weldon Dyeing Mach. Co., 180 App. Div. 149, 167 N.Y. Supp. 429 (3d Dep't 1917); Ryan v. Standard Cap & Seal Corp., 123 N.Y.L.J. 1072, col. 1 (Sup. Ct. March 27, 1950). Where petitioner already has had a full and complete examination, the petition will be denied. But in Matter of Partridge, 99 N.Y.L.J. 1836, col. 3 (Sup. Ct. April 15, 1938), petitioner was allowed a second examination with assistance of accountant and attorney because her first examination without such assistance was not helpful to her and in Salter v. Columbia Concerts, Inc., 116 N.Y.L.J. 65, col. 4 (Sup. Ct. July 11, 1946), it was held that a stockholder's examination would not be limited to what had not been covered in a previous examination, as that would create endless litigation about scope of previous examination.

88 Hughey v. DuBois Press, 36 N.Y.S.2d 220 (Sup. Ct. Monroe County 1942).

89 People *ex rel.* Clason v. Nassau Ferry Co., 86 Hun 128, 33 N.Y. Supp. 244 (1st Dep't 1895).

90 Rogers v. Am. Tobacco Co., 143 Misc. 306, 257 N.Y. Supp. 321 (Sup. Ct. N.Y. County 1931), *aff'd*, 233 App. Div. 708, 249 N.Y. Supp. 993 (1st Dep't 1931). The fact that an inspection is sought to aid a stockholder's derivative action does not show bad faith. Matter of Sperling, 125 N.Y.L.J. 41, col. 3 (Sup. Ct. Jan. 4, 1951).

tempted to regulate inspections by charter and by-law provisions.[91] In fact, some charters and by-laws flatly prohibit inspection by stockholders. These provisions seem to be invalid.[92] It is the rule in other states that only reasonable restrictions concerning the time, place and conditions of the inspection are proper.[93] There is no reason for a different rule in New York. The Court of Appeals has thus held invalid the by-law of a membership corporation which provided in part:

> In order that the list of members may be protected against misuse, no officer, member or employee of the Guild shall furnish any list of names and addresses of members of the Guild, or allow access to such list, to any individual, group, firm or organization, without specific authorization by the Guild Council.[94]

Books that may be examined. Normally, all the business books of the corporation may be examined without exception.[95]

There are, however, certain circumstances under which this rule might be qualified. It has been held, for instance, that a stockholder will not be permitted to examine the minutes of the corporation if an examination would disclose confidential information.[96] The objection to disclosing minutes can be quite substantial when the corporation is in the process of negotiating contracts or important purchases. Perhaps a line might be drawn between minutes which disclose past transactions and those which reveal proposed future transactions.

As to by-laws, it appears that they are a part of the contract between the stockholder and the corporation and that there should be no valid objection to their examination or inspection. The application, however, is still addressed to the court's discretion and will be denied if an improper purpose is shown.[97]

Conditions of Inspection. The statutes specifically provide that extracts may be made by the stockholder from the stock book.[98] These

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91 *See* Hornstein, *Rights of Stockholders in New York Courts,* 56 YALE L.J. 942 (1947).

92 Davids v. Sillcox, 297 N.Y. 355, 79 N.E.2d 440 (1948); Brentmore Estates v. Hotel Barbizon, Inc., 108 N.Y.L.J. 1098, col. 6 (Sup. Ct. Oct. 20, 1942).

93 FLETCHER, CYCLOPEDIA CORPORATIONS § 2244 (1952); BALLANTINE, CORPORATIONS § 165a (rev. ed. 1946); Koenigsberg, *Provisions in Charters and By-Laws Governing Inspection of Books by Stockholders,* 30 GEO. L.J. 227 (1942).

94 Davids v. Sillcox, 297 N.Y. 355, 359, 79 N.E.2d 440, 441 (1948).

95 FLETCHER, CYCLOPEDIA CORPORATIONS § 2239 (1952).

96 Davids v. Sillcox, note 95 *supra;* FLETCHER, *op. cit. supra,* note 96, § 2240.

97 Matter of Coats, 75 App. Div. 567, 78 N.Y. Supp. 429 (1st Dep't 1902).

98 N.Y. STOCK CORP. LAW §§ 10, 113.

provisions are a codification of the common-law rule.[99] The right to make extracts from the corporation's general business books as well has never been seriously challenged.[100]

The right of the stockholder to be assisted by his attorney and accountant in the examination is clear.[101] The stockholder himself need not even be present at the examination as long as his authorized representative is there.[102] The fees of attorneys and accountants and other costs of inspection are normally borne by the petitioner.[103] In one case,[104] a petitioner sought an order requiring the corporation to furnish copies of its income statements and balance sheets, because he did not wish to incur the expense of an examination and was ineligible for reports from the treasurer under Section 77 of the Stock Corporation Law. There is, of course, no authority for granting such an order, and it would have the effect of shifting the cost of the examination from the stockholder to the corporation. The application was properly denied.

That the examination may be inconvenient to the corporation is not to be considered in deciding whether an order for inspection should be allowed.[105] Nevertheless, an application which seeks to harass the

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[99] Henry v. Babcock & Wilcox Co., 196 N.Y. 302, 89 N.E. 942 (1909); Cotheal v. Brouwer, 5 N.Y. 562 (1851); Hollamon v. El Arco Mines Co., 137 App. Div. 862, 122 N.Y. Supp. 852 (2d Dep't 1910); People *ex rel.* Althause v. Giroux Consol. Mines Co., 122 App. Div. 617, 107 N.Y. Supp. 188 (1st Dep't 1907); People *ex rel.* Lorge v. Consol. Nat. Bank, 105 App. Div. 409, 94 N.Y. Supp. 173 (1st Dep't 1905); Fay v. Coughlin-Santard Switch Co., 47 Misc. 687, 94 N.Y. Supp. 628 (App. Term 1905).

[100] Matter of Martin, 62 Hun 557, 17 N.Y. Supp. 133 (1st Dep't 1891), *aff'd*, 133 N.Y. 692, 31 N.E. 627 (1892).

[101] Matter of Oltarsh, 271 App. Div. 772, 65 N.Y.S.2d 278 (1st Dep't 1946); People *ex rel.* Clason v. Nassau Ferry Co., 86 Hun 128, 33 N.Y. Supp. 244 (1st Dep't 1895); *In re* Hassuk, 57 N.Y.S.2d 798 (Sup. Ct. N.Y. County 1945); *In re* Fleckenstein, 104 N.Y.L.J. 45, col. 6 (Sup. Ct. July 6, 1940); Matter of Partridge, 99 N.Y.L.J. 1836, col. 3 (Sup. Ct. April 15, 1938); Matter of Lerner, 98 N.Y.L.J. 2384, col. 7 (Sup. Ct. Dec. 28, 1937); *In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

[102] Glade v. Restbar, Inc., 115 N.Y.L.J. 1392, col. 4 (Sup. Ct. April 9, 1946).

[103] Schiller v. Flatbush Message Bureau, 108 N.Y.S.2d 828 (Sup. Ct. Kings County 1951); Brentmore Estates, Inc. v. Hotel Barbizon, 108 N.Y.L.J. 1098, col. 6 (Sup. Ct. Oct. 20, 1942). However, in Matter of Goldberg, 248 App. Div. 729, 288 N.Y. Supp. 596 (2d Dep't 1936), the court directed that the fee of the accountant assisting in the examination was to be paid by the petitioner subject to reimbursement by the corporation in the event the examination was found justified by the results thereof.

[104] Feinberg v. Enselberg, 63 N.Y.S.2d 891 (Sup. Ct. Queens County 1946).

[105] Matter of Oltarsh, 271 App. Div. 772, 65 N.Y.S.2d 278 (1st Dep't 1946); *In re* Reiss, 30 Misc. 234, 62 N.Y. Supp. 145 (Sup. Ct. Kings County 1900).

corporation will be denied.[106] It has been said that the examination ". . . must not be exercised in a manner to interfere with or interrupt the orderly progress of the business of the corporation or with the corporate affairs either in the office or in the factory."[107]

In one case an examination was granted despite the charge that the petitioner was highly temperamental and disputatious.[108]

The order for inspection should provide proper safeguards to prevent the abuse of the privilege. Accordingly, an order granted without any restrictions regarding the place or duration of the inspection, and without adequate provision against interference with the business of the corporation during the progress of the examination has been reversed on appeal.[109] The period of time to be covered by the examination should be restricted, and a petitioner should not be permitted to inspect all the books kept since the date of incorporation without a proper reason.[110]

As the stockholder should not interfere unduly with the business of the corporation, neither should the corporation interfere with the conduct of the examination. The stockholder conducting an examination ". . . must not be subjected to arbitrary, unfair or unwarranted restrictions, or humiliation, or to provocative conduct, but should be afforded a fair and reasonable opportunity for such inspection and examination."[111] In *Glade v. Restbar, Inc.*,[112] for example, the court held that an examination was not to be hampered by the corporation's giving petitioner only one book, paper and record at a time, nor by pro-

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[106] Hughey v. DuBois Press, 37 N.Y.S.2d 343 (Sup. Ct. Monroe County 1945); Melup v. Rubber Corporation of America, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. N.Y. County 1943); *In re* Wygant, 101 Misc. 509, 167 N.Y. Supp. 369 (Sup. Ct. Albany County 1917).

[107] Melup v. Rubber Corporation of America, 181 Misc. 826, 828, 43 N.Y.S.2d 444, 446 (Sup. Ct. N.Y. County 1943). See also Matter of Oltarsh, 271 App. Div. 772, 65 N.Y.S.2d 278 (1st Dep't 1946). *In re* Elish, 114 N.Y.L.J. 628, col. 2 (Sup. Ct. Sept. 25, 1945); Schwartz v. I. Rokeach & Sons, Inc., 113 N.Y.L.J. 405, col. 4 (Sup. Ct. Jan. 31, 1945).

[108] *In re* Chanel, 74 N.Y.S.2d 211 (Sup. Ct. N.Y. County 1947).

[109] Matter of Coats, 73 App. Div. 178, 76 N.Y.S. 730 (1st Dep't 1902).

[110] Weinberger v. Washine-National Sands, Inc., 267 App. Div. 913, 47 N.Y.S.2d 176 (2d Dep't 1946); Martocci v. Martocci, 266 App. Div. 854, 42 N.Y.S.2d 334 (2d Dep't 1943); Matter of Levy, 101 N.Y.L.J. 2323, col. 1 (Sup. Ct. May 19, 1939). The period need not be limited by any statute of limitations that might control any facts discovered. Matter of Snaider, 117 N.Y.L.J. 1191, col. 5 (Sup. Ct. March 27, 1947); Lennan v. 551 Fifth Avenue, Inc., 120 N.Y.L.J. 1635, col. 4 (Sup. Ct. Dec. 23, 1948).

[111] Melup v. Rubber Corp. of America, 101 Misc. 826, 828, 43 N.Y.S.2d 444, 446 (Sup. Ct. N.Y. County 1943).

[112] 115 N.Y.L.J. 1392, col. 4 (Sup. Ct. April 9, 1946).

viding him with such restrictive accommodations that it became difficult to conduct a proper examination.

Corporations subject to inspection. Stock corporations, membership corporations,[113] foreign corporations,[114] and banking corporations, including national banks,[115] are subject to the examination. The former officers and directors of a dissolved corporation will not, however, be required to permit an inspection of the corporate books when they no longer have an official capacity.[116]

It should be observed that Section 113 of the Stock Corporation Law, which provides for the examination of stock books of foreign corporations, refers only to foreign corporations "having an office for the transaction of business in this state." This phrase, however, has been interpreted to have the same meaning as "doing business in this state" for purposes of service of process.[117]

In the past there was some question whether an inspection of the books and records of a foreign corporation could be granted aside from the limited statutory right.[118] Now the question seems to have been resolved, and an examination of all the books of a foreign corporation will be granted if the foreign corporation is doing business in New York and the books are within the State.[119] An application for such an in-

[113] Davids v. Sillcox, 188 Misc. 45, 66 N.Y.S.2d 508 (Sup. Ct. N.Y. County 1946), *rev'd on other grounds,* 272 App. Div. 54, 69 N.Y.S.2d 63 (1st Dep't 1947), *rev'd,* 297 N.Y. 355, 79 N.E.2d 440 (1948).

[114] See cases cited in note 119 *infra.*

[115] Lauer v. Bayside Nat. Bank, 244 App. Div. 601, 280 N.Y. Supp. 139 (2d Dep't 1935); Lorge v. Consol. Nat. Bank, 105 App. Div. 409, 94 N.Y. Supp. 173 (1st Dep't 1905); Schwam v. United Nat. Bank, 113 N.Y.L.J. 206, col. 4 (Sup. Ct. Jan. 16, 1945).

[116] Matter of Lehrich v. Sixth Avenue Bus Corp., 251 App. Div. 391, 296 N.Y. Supp. 358 (1st Dep't 1937).

[117] Hovey v. DeLong Hook and Eye Co., 211 N.Y. 420, 105 N.E. 667 (1914); *In re* Moran, 115 N.Y.L.J. 161, col. 4 (Sup. Ct. April 25, 1946).

[118] Matter of Rappeleye, 43 App. Div. 84, 59 N.Y. Supp. 338 (1st Dep't 1899).

[119] Kohlberg v. Am. Counsel of the Institute of Pac. Relations, 270 App. Div. 520, 60 N.Y.S.2d 586 (1st Dep't 1946); Matter of Lehrich v. Sixth Avenue Bus Corp., 251 App. Div. 391 296 N.Y. Supp. 358 (1st Dep't 1937); *In re* Mann, 110 N.Y.L.J. 1570, col. 2 (Sup. Ct. Dec. 2, 1943); Rogers v. Am. Tobacco Co., 143 Misc. 306, 257 N.Y. Supp. 321 (Sup. Ct. N.Y. County 1931), *aff'd,* 233 App. Div. 707, 249 N.Y. Supp. 993 (1st Dep't 1931). Petition will be denied where the corporation does no business in the state, and has an office here only for the transfer of its stock. Bolles v. Corp. Trust, 256 N.Y. Supp. 952 (1st Dep't 1932); FLETCHER, *op. cit. supra* note 1, § 2228. Inspection will be denied where the books are not in the state. Mitchell v. Northern Security Oil & Transp. Co., 44 Misc. 514, 90 N.Y. Supp. 60 (Sup. Ct. N.Y. County 1904), *aff'd,* 99 App. Div. 624, 91 N.Y. Supp. 1104 (1st Dep't 1904).

In Fogarty v. Am. Car & Foundry Motors Co., 103 N.Y.L.J. 738, col. 7 (Sup. Ct. Feb. 16, 1940), the court seemed to assume that application would be denied where petitioner was a non resident, and respondent corporation, a foreign corporation.

spection does not relate to the internal affairs of a foreign corporation that ought to be regulated only by the court of the state in which it was organized.[120]

An examination of the books of a subsidiary or controlled corporation by a stockholder of the parent or holding corporation will be permitted only if the corporation whose books are sought to be examined is a mere tool or instrumentality of the corporation in which petitioner is a stockholder.[121]

PENALTIES

Sections 10 and 113 of the Stock Corporation Law provide that if an officer or agent of a corporation refuses to allow the stock book to be inspected and extracts made therefrom by any stockholder entitled to such an inspection, the corporation and the officer or agent shall each pay a penalty of fifty dollars plus all resulting damages to the stockholder.[122] It must be noted that this statute does not apply to the business books of the corporation. The penalty is incurred only for a willful refusal or neglect to exhibit the stock book upon a proper demand for an inspection.[123]

A party suing for the penalty can recover for only one violation or one default prior to the commencement of the action.[124] After the commencement of the action, however, a second action may be commenced for a penalty based upon a new demand and refusal made subsequent to the commencement of the first action.[125] Furthermore, the stock-

120 Kohlberg v. Am. Council of the Institute of Pac. Relations, note 119 *supra.*

121 In Matter of Brown, 99 N.Y.L.J. 1462, col. 4 (Sup. Ct. March 25, 1938), examination of books of an affiliated corporation was denied. Matter of Fogarty, 103 N.Y.L.J. 1403, col. 6 (Sup. Ct. March 28, 1940); BALLANTINE, *op. cit. supra* note 1, § 163; Note, *Remedies of Stockholders of Parent Corporation for Injuries to Subsidiary,* 50 HARV. L. REV. 963, 967-68 (1937); FLETCHER, *op. cit. supra* note 1, § 2228.

122 N.Y. STOCK CORP. LAW §§ 10, 113. In Gladshire Frocks, Inc. v. Robin Redbreast Hosiery Co., Inc., 112 N.Y.L.J. 751, col. 2 (Sup. Ct. Oct. 4, 1944), a stockholder was denied recovery of a per diem penalty.

123 Lozier v. Saratoga Gas & Power Co., 59 App. Div. 390, 69 N.Y. Supp. 247 (3d Dep't 1901); see also Moore v. Institute of Educational Travels, Inc., 89 Misc. 369, 151 N.Y. Supp. 929 (Sup. Ct. N.Y. County 1915). In Kelsey v. Pfaulder Process Fermentation Co., 41 Hun 20 (5th Dep't 1886), where a stockholder made a demand upon the president of the corporation on Saturday for an inspection and was informed that the books were in the safe and the employee who knew the combination was away, but that the books would be available early Monday morning, it was held that the delay was not unreasonable and therefore did not subject the officer to a penalty.

124 Cox v. Paul, 175 N.Y. 328, 62 N.E. 586 (1903); Walcott v. Little, 46 Misc. 96, 91 N.Y. Supp. 411 (Sup. Ct. N.Y. County 1904); Gladshire Frocks v. Robin Redbreast Hosiery Co., Inc., 112 N.Y.L.J. 751, col. 2 (Sup. Ct. Oct. 4, 1904).

125 Gould v. Olympic Mining Co., 49 Misc. 612, 96 N.Y. Supp. 455 (Sup. Ct. N.Y. County 1906).

holder, although entitled to recover all damages resulting from the refusal to grant him an inspection, cannot recover as a penalty the costs and counsel fees of a proceeding under Article 78 of the Civil Practice Act by which he compelled the corporation and its officers to allow an inspection.[126]

Formerly there were a number of actions to recover penalties. Then, however, under the language of the statute the stockholder's motive, however sinister, constituted no answer to an action by him to recover the penalty for the refusal of the corporation to permit an inspection.[127] A distinction was drawn between the action for the penalty and the proceeding to compel the inspection. In the latter case, the courts held that they retained their discretion to grant or refuse the application, whereas in the former case they held that the right to the penalty was absolute under the statute, and that accordingly their discretion could not be exercised.[128]

Since the amendment of the statute in 1933, however, the stockholder, in order to obtain the penalty, must at least show that his purpose is not to communicate with stockholders in the interest of a business or object other than the business of the corporation and that he has not been involved in a sale of a stock list within the last five years. But a distinction must still be drawn between the action for the penalty, where no judicial discretion is involved, and an application for an inspection. The stockholder in *Tate v. Sonotone Corp.*,[129] for instance, may have been entitled to a penalty although his application for an inspection was denied. It is believed that this distinction should be removed by legislative enactment.

When a demand is made for an examination of the stock book, the corporation and its officers have a right to demand a statement from the stockholder that his purposes are proper. This statement is prescribed in the statutes. The corporation is also entitled to require that the stockholder who makes a demand properly identify himself.[130] The stockholder, on the other hand, must make his demand upon the officer or agent

126 Clason v. Nassau Ferry Co., 20 Misc. 315, 45 N.Y. Supp. 575 (Sup. Ct. N.Y. County 1907), *aff'd*, 27 App. Div. 621, 50 N.Y. Supp. 160 (1st Dep't 1898).

127 Henry v. Babcock & Wilcox Co., 196 N.Y. 302, 89 N.E. 942 (1909); People *ex rel.* Britton v. Am. Press Ass'n, 148 App. Div. 651, 133 N.Y. Supp. 216 (1st Dep't 1912); Lawshe v. Royal Baking Powder Co., 64 Misc. 220, 104 N.Y. Supp. 361 (Sup. Ct. N.Y. County 1907).

128 People *ex rel.* Britton v. Am. Press Ass'n, note 127 *supra*. See Klingenschmidt v. Marttocci, 108 Misc. 626, 178 N.Y. Supp. 673 (N.Y. City Ct. 1919).

129 272 App. Div. 103, 69 N.Y.S.2d 535 (1st Dep't 1947).

130 Theile v. Merlis, 85 Misc. 351, 147 N.Y. Supp. 405 (Sup. Ct. N.Y. County 1914).

who has the stock book in his possession in as much as an action will not lie against one who could not grant the inspection.[131] Accordingly, if the corporation fails to keep any books, a stockholder cannot maintain an action for a penalty. In this case, however, the State may bring an action to recover a penalty of fifty dollars for every day that the corporation has neglected to keep books.[132]

Actions for penalties are not favored, and complaints in such actions are construed with the same measure of strictness as indictments.[133] The complaint must allege that the demand was made at the principal office of the corporation,[134] must state fully the circumstances of the demand, and show that the corporation is a stock corporation. The corporation is not a necessary party to the action.[135]

For the reasons already mentioned, actions for penalties have fallen into disregard. Stockholders are more interested in the examination than in a penalty of fifty dollars.

Finally, it should be noted that corporate officials who refuse to permit an inspection in a proper case are guilty of a misdemeanor under Section 665 of the Penal Law, which provides:

> A director, officer, agent or employee of any corporation or joint-stock association who:
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> * * *
>
> 4. Having the custody or control of its books, wilfully refuses or neglects . . . to exhibit or allow the [stock book] to be inspected, and extracts to be taken therefrom by any person entitled by law to inspect the same, or take extracts therefrom. . . .
>
> Is guilty of a misdemeanor.

RIGHT OF A DIRECTOR TO INSPECT CORPORATE BOOKS AND RECORDS

The right. The New York courts have held on many occasions that a director has an absolute as distinguished from a qualified right to examine the corporate books and records.[136] The rules governing the stockholder's right to an examination do not apply to the right of a

131 Lozier v. Saratoga Gas & Power Co., 59 App. Div. 390, 69 N.Y. Supp. 247 (3rd Dep't 1901); Gould v. Olympic Mining Co., 49 Misc. 612, 96 N.Y. Supp. 455 (Sup. Ct. N.Y. County 1906).

132 Lozier v. Saratoga Gas & Power Co., note 131 *supra;* Moore v. Institute of Educational Travels, Inc., 89 Misc. 369, 151 N.Y. Supp. 929 (Sup. Ct. N.Y. County 1915); Billingham v. Gleason Mfg. Co., 43 Misc. 681, 88 N.Y. Supp. 398 (Sup. Ct. N.Y. County 1904).

133 Levy v. Cohen, 19 N.Y. Supp. 912 (C.P.N.Y. County 1892).

134 *Ibid.*

135 Gunst v. Goldstein, 30 Misc. 44, 61 N.Y. Supp. 707 (Sup. Ct. N.Y. County 1899).

136 Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948); Lavin v. Lavin Co., 264 App. Div. 205, 34 N.Y.S.2d 947 (2d Dep't 1942); Matter of Bellman v. Standard Match Co., 208 App. Div. 4, 202 N.Y. Supp. 840 (2d Dep't

director.[137] The reason for allowing this unqualified right is simply that a director, if he is to discharge his duties properly, must keep himself fully informed of his corporation's affairs.[138] The Court in *People* ex rel. *Leach v. Central Fish Co.*[139] stated:

> The duty of a director is to direct, and if he neglect this duty he is certainly guilty of a moral wrong, if not a legal one. To perform this duty intelligently it is essential that he should keep himself informed as to the business and affairs of the corporation and as to the acts of its executive officers, and in order to keep himself so informed he has the unqualified right to inspect its books, records and documents.[140]

It has been said that under no circumstances can this absolute right be restricted by agreement of the parties.[141] All that the director need show to entitle him to the inspection is that he is a director, that he has demanded permission to examine the books, and that his demand has been refused.[142]

Hostility. It is no answer to a director's application for inspection to allege his hostility to the corporation, or his ulterior motives since the objects and motives of a director's examination are immaterial.[143]

1924); People *ex rel.* Grant v. Atlantic Terracotta Co., 133 App. Div. 890, 118 N.Y. Supp. 1133 (1st Dep't 1909), *aff'd,* 196 N.Y. 523, 89 N.E. 1108 (1909); People *ex rel.* Leach v. Cent. Fish Co., 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907); People *ex rel.* McInnes v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N.Y. Supp. 1084 (1st Dep't 1905); Zwecher v. Delca Fish Preservators Inc., 123 N.Y.L.J. 2296, col. 5 (Sup. Ct. June 30, 1950); *In re* Peatman, 122 N.Y.L.J. 779, col. 6 (Sup. Ct. Oct. 10, 1949); Dunheiser v. Beck Duplicator Co., 99 N.Y.L.J. 2451, col. 6 (Sup. Ct. May 20, 1938).

137 Crawford v. Henzel Artificial Limb Corp., 129 N.Y.L.J. 380, col. 7 (Sup. Ct. Feb. 3, 1953); People *ex rel.* Zirin v. Gustazin Products Inc., 109 N.Y.L.J. 141, col. 3 (Sup. Ct. Jan. 12, 1943); Curtis v. Strich & Zeidler Inc., 106 N.Y.L.J. 449, col. 2 (Sup. Ct. Aug. 28, 1941).

138 *In re* Bornstein, 111 N.Y.L.J. 1060, col. 4 (Sup. Ct. March 17, 1944); People *ex rel.* Zirin v. Gustazin Products Inc., note 137 *supra.*

139 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907).

140 *Id.* at 79, 101 N.Y. Supp. at 1109.

141 See dicta in Granat v. Altime Fabrics Co., 99 N.Y.L.J. 2472, col. 7 (Sup. Ct. May 21, 1938), holding that it cannot be made subject to arbitration by agreement of the parties.

142 People *ex rel.* Leach v. Cent. Fish Co., note *supra* 139; *In re* Hassuk, 57 N.Y.S.2d 798 (Sup. Ct. N.Y. County 1945). The question whether petitioner is a director should be determined in a reference. H. Weinstock v. Holly Holding Corp., 100 N.Y.L.J. 1290, col. 3 (Sup. Ct. Oct. 25, 1938).

143 People *ex rel.* Grant v. Atlantic Terracotta Co., 133 App. Div. 890, 118 N.Y. Supp. 1133 (1st Dep't 1909); Leach v. Cent. Fish Co., 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907); People *ex rel.* McInnes v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N.Y. Supp. 1084 (1st Dep't 1905); Matter of Overland, 127 N.Y.L.J. 152, col. 1 (Sup. Ct. Jan. 11, 1952), *rev'd on other grounds,* 279 App. Div. 876, 110 N.Y.S.2d 578 (2d Dep't 1952), *aff'd,* 304 N.Y. 573, 107 N.E.2d 74 (1952); Zirin v. Gustazin Products Inc., 109 N.Y.L.J. 141, col. 3 (Sup. Ct. Jan. 12, 1943); Dunheiser v. Beck Duplicator Co., 99 N.Y.L.J. 2451, col. 6 (Sup. Ct. May 20, 1938).

Examinations have been granted, for example, despite allegations that the examination was sought to aid a competitor,[144] or to further a claim or an action by the petitioner against the corporation,[145] or to hamper an action by the corporation against the petitioner.[146] Furthermore, it has been held that the right of inspection does not depend upon the director's being able to satisfy the other officers and directors that his motives are proper.[147] Accordingly, in *People* ex rel. *Muir v. Throop*,[148] the court issued a mandamus order commanding a cashier of a bank to allow a director to inspect the discount book even though the board of directors of the bank had passed a resolution excluding the director from an inspection of the books because they believed him to be hostile to the bank's interests.

Another interesting situation was presented in *Javits v. Investors League*,[149] in which a membership corporation attempted to prevent a director's inspection and examination of its books on the ground that he had organized a similar membership corporation and sought the membership list in order to entice away members to the new organization. The court held that the director had an absolute right to inspect the corporation's business books, but, since he could intelligently perform his duties as a director without seeing the membership list, he had no right to inspect it; however, in order to permit the petitioner to communicate his views on the management of the corporation to its members, the corporation was required, at its own expense, to mail to the membership any communication submitted by the director.

Removal of the hostile director is the corporation's only method of preventing the examination. As the court stated in *People* ex rel. *Leach v. Cent. Fish Co.*,[150]

> If the hostility assumes such a shape and goes to such an extent as to justify his removal from the office, the law has provided a method by which that end can be accomplished, but so long as he remains a director, he cannot be denied the rights appertaining to the office.[151]

It seems apparent, however, that removal is not a complete remedy

144 Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948); Matter of Overland, note 143 *supra*.

145 Wilkins v. Ascher Silk Corp., 207 App. Div. 168, 201 N.Y. Supp. 739 (1st Dep't 1923); Matter of Ain, 118 N.Y.L.J. 352, col. 6 (Sup. Ct. Sept. 2, 1947).

146 Davis v. Keilsohn Offset Co., note 144 *supra*.

147 *Ibid.* See also Javits v. Investors League, 92 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1949).

148 12 Wend. 183 (N.Y. 1834).

149 See note 147 *supra*.

150 117 App. Div. 77, 101 N.Y.Supp. 1108 (1st Dep't 1907).

151 *Id.* at 80, 101 N.Y. Supp. at 1110.

and that it is generally too slow to satisfy all the parties. This perhaps suggests that the rule with respect to the immateriality of the director's motives is too harsh. Under certain unusual factual circumstances, the right has been restricted,[152] and one supreme court case[153] has held that the right is,

> . . . subject, of necessity, to certain exceptions, as to whether the examination and inspection sought are for unlawful purposes, for objects hostile to the interests of the corporation, to annoy or harass the corporation, or for purposes detrimental to it; . . .[154]

It is believed that this pronouncement is not an accurate statement of the New York law at the present time. The citations given to support it do not appear to be relevant to the situation presented when a director of a going concern seeks an examination. Perhaps, however, the rule of this case should be the law. Some support for this new theory can be gathered from the concurring opinion in *Davis v. Keilsohn Offset Co.*,[155] in which it was said:

> . . . a person ought not to receive the aid of a court order for an inspection of the books and records of a corporation as a director, if it be established that he has disqualified himself from continuing to act in that fiduciary capacity toward the corporation.[156]

Nevertheless, the law today is that hostility of the director is immaterial.

An unusual situation was presented recently in *Posen v. United Aircraft Products*.[157] The corporation there, because it was involved in national defense work, came under the provisions of the federal Espionage Law that only persons with security clearance from the federal government could examine its books and records. One of its directors, who had declined to apply for the governmental security clearance, nevertheless requested the examination to which he was entitled as a director. The court, it would seem quite properly, refused the examination without prejudice to a renewal of the application if the director could obtain the necessary security clearance.

Interest. It should be obvious that a director need not be a stock-

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152 Matter of Bellman v. Standard Match Co., 208 App. Div. 4, 202 N.Y. Supp. 840 (2d Dep't 1924) (corporation in dissolution); Posen v. United Aircraft Products, 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. N.Y. County 1952) (national security risk); Javits v. Investors League, 92 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1949) (membership list).

153 Melup v. Rubber Corp. of America, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. N.Y. County 1943).

154 *Id.* at 828, 43 N.Y.S.2d at 445.

155 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948).

156 *Id.* at 697, 79 N.Y.S.2d at 542.

157 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. N.Y. County 1952).

holder, either of record or beneficially, in order to obtain an inspection. It has been held, therefore, that a director whose stock was held by a voting trustee,[158] or even a dummy director without any interest in the corporation, is entitled to the inspection.[159] Similarly, it is immaterial that the director was placed on the board to represent a certain interest in the company.[160] These decisions are based on the proposition that these directors were nonetheless responsible for the affairs of the corporation.

Inconvenience. The fact that the examination may cause inconvenience to the corporation is not a reason for refusing it.[161] The examination, however, should be held at a reasonable time and at the office of the corporation.[162]

Knowledge. That the director has knowledge of the information in the corporate books should not be a basis for defeating the application. Thus the fact that the director has been given information of the corporate activities by the corporate accountant appointed by him is not a ground for denying the examination.[163] The director is entitled to a personal inspection.[164]

Assistance. Because the corporate books are usually complicated, the director is entitled to the assistance of an accountant or an attorney in the examination.[165] The director, nevertheless, cannot delegate the examination to professional accountants, because the responsibility is his and not the accountants'.[166] The accountant, however, must not be

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158 *In re* Bornstein, 111 N.Y.L.J. 1060, col. 4 (Sup. Ct. Mar. 17, 1944).

159 Crawford v. Henzel Artificial Limb Corp., 129 N.Y.L.J. 380, col. 7 (Sup. Ct. Feb. 3, 1953); People *ex rel.* Stauffer v. Bonwit Bros., 69 Misc. 70, 125 N.Y. Supp. 958 (Sup. Ct. N.Y. County 1910).

160 People *ex rel.* Leach v. Cent. Fish Co., 117 App. Div. 77, 101 N.Y. Supp. 1108 (1st Dep't 1907).

161 *In re* Tollman, 126 N.Y.L.J. 104, col. 1 (Sup. Ct. July 18, 1951); Halperin v. Airking Products Co., 59 N.Y.S.2d 672 (Sup. Ct. Kings County 1945); but see Melup v. Rubber Corp. of America, 181 Misc. 826, 43 N.Y.S.2d 444 (Sup. Ct. N.Y. County 1943).

162 *In re* Hassuk, 57 N.Y.S.2d 798 (Sup. Ct. N.Y. County 1945); *In re* Wygod, 107 N.Y.L.J. 458, col. 1 (Sup. Ct. Jan. 30, 1942).

163 Davis v. Keilsohn Offset Co., 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948).

164 People *ex rel.* McInnes v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N.Y. Supp. 1084 (1st Dep't 1905).

165 Davis v. Keilsohn Offset Co., note 163 *supra;* People *ex rel.* Bartels v. Borgstede, 169 App. Div. 421, 155 N.Y. Supp. 322 (2d Dep't 1915); People *ex rel.* Clason v. Nassau Ferry Co., 86 Hun 128, 33 N.Y. Supp. 244 (1st Dep't 1895); *In re* Tollman, 126 N.Y.L.J. 104, col. 1 (Sup. Ct. July 18, 1951); *In re* Peatman, 122 N.Y.L.J. 779, col. 6 (Sup. Ct. Oct. 10, 1949); *In re* Hassuk, 57 N.Y.S.2d 798 (Sup. Ct. N.Y. County 1945).

166 People *ex rel.* Bartels v. Borgstede, note 165 *supra.*

adverse and hostile to the corporation and when the corporation and the director cannot agree on an accountant, the court will appoint one.[167] Naturally, the director is not permitted to be assisted in his examination by representatives of a business rival.[168] Also, the director may not conduct the examination for such a period of time and have so many assistants that the inspection interferes unduly with the affairs of the corporation.[169]

Extracts. It is clear that the director may make extracts from the books and records he is examining,[170] or may have them photostated.[171]

Removal. A number of cases in recent years have dealt with the question that arises when a director who has requested an examination has been removed from office.

Frequently, the director will contest his removal and in such cases, the examination will not be granted until the petitioner can prove his right to the office in a separate proceeding.[172] Thus, the court in *Application of Hafter*[173] said:

> Petitioner, claiming to be a director of respondent corporations . . . seeks an order permitting inspection of their books, records, etc. It appears he is no longer a director and that his successor was elected. In a separate proceeding . . . he seeks to annul the election. Until he succeeds, he remains no longer a director and hence may not maintain this proceeding; his right to inspection exists only while he possesses the status of a director.[174]

The legality or illegality of the director's removal from office cannot be tried in the proceeding for the examination.[175]

Confusion regarding the effect of the director's removal from office has been clarified by the recent decision of the Court of Appeals in *Overland v. LeRoy Foods.*[176] The Court in that case tersely held:

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167 *In re* Strassburger, 101 N.Y.L.J. 975, col. 4 (Sup. Ct. March 2, 1939).

168 People *ex rel.* Poleti v. Poleti, Colva and Rabecchi, 193 App. Div. 738, 184 N.Y. Supp. 368 (1st Dep't 1920).

169 People *ex rel.* McInnes v. Columbia Paper Bag Co., 103 App. Div. 208, 92 N.Y. Supp. 1084 (1st Dep't 1905).

170 *In re* Wygod, 107 N.Y.L.J. 458, col. 1 (Sup. Ct. Jan. 30, 1942); *In re* Wagner, 99 N.Y.L.J. 3078, col. 5 (Sup. Ct. June 25, 1938).

171 Singer v. State Laundry Co., 65 N.Y.S.2d 806 (Sup. Ct. Kings County 1946), *aff'd,* 271 App. Div. 837, 66 N.Y.S.2d 644 (2d Dep't 1946).

172 Application of Minskoff, 192 Misc. 559, 80 N.Y.S.2d 863 (Sup. Ct. N.Y. County 1948); People *ex rel.* Berkeley v. N.Y. Cas. Co., 34 Misc. 326, 69 N.Y. Supp. 775 (Sup. Ct. N.Y. County 1901).

173 67 N.Y.S.2d 745 (Sup. Ct. N.Y. County 1946), *aff'd,* 270 App. Div. 995, 62 N.Y.S.2d 861 (1st Dep't 1946), *aff'd,* 296 N.Y. 808, 71 N.E.2d 774 (1947).

174 67 N.Y.S.2d at 746.

175 Rush v. Ace Linen Service Inc., 128 N.Y.L.J. 495, col. 3 (Sup. Ct. Sept. 16, 1952).

176 304 N.Y. 573, 107 N.E.2d 74 (1952).

> A director has an absolute right to inspect the corporate books . . . but such right terminates when, as here, an applicant for such an order is removed as director while his application is pending before the Special Term. . . .[177]

Prior to that decision a number of cases had held that the petitioner's status was determined as of the date of the institution of the proceedings for an inspection, and if petitioner was a director on that date, although subsequently removed, he was entitled to an examination.[178] Other cases held that although removed from office, a former director was still entitled to an examination of the books recording the transactions which occurred while he was in office.[179] It is now definitely settled that a removed director has no right of inspection in any case.

There remains the problem of the effect of a pending action or special proceeding to remove the director from office, upon his application to inspect the corporation's records. In *Diamond v. Jarold Shops, Inc.*,[180] an inspection was permitted by a director even though proceedings were pending to remove her from office; however, the basis for the removal proceeding was a contract to resign upon certain conditions, and not breach of any fiduciary duty. In the latter case, it is suggested that a different result might have been reached. This belief is supported by the dicta appearing in the concurring opinion in *Davis v. Keilsohn Offset Co.*[181] that,

> Where an action or proceeding is pending for the removal of such an individual as a director, . . . there may be instances where the discretion of the court should be exercised so as to stay the application to inspect the books and records until after the hearing and determination of the proceedings to remove him as a director.[182]

Corporations Subject to Inspection. The same rules concerning an examination of books and records by a director of a foreign corporation prevail as in the case of a domestic corporation as long as the foreign corporation is doing business in this state.[183] The decision in *Kaletay v. National Register Pub. Co.*[184] must be noted in this regard.

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177 *Id.* at 574, 107 N.E.2d at 74.

178 Halperin v. Airking Products Co., 59 N.Y.S.2d 672 (Sup. Ct. Kings County 1945); Application of Lavin, 37 N.Y.S.2d 161 (Sup. Ct. Queens County 1942).

179 Matter of Shapiro, 118 N.Y.L.J. 165, col. 4 (Sup. Ct. July 29, 1947); Halperin v. Airking Products Co., note 178 *supra;* Application of Lavin, note 178 *supra;* Matter of Brown, 99 N.Y.L.J. 1462, col. 4 (Sup. Ct. March 25, 1938).

180 275 App. Div. 923, 90 N.Y.S.2d 683 (1st Dep't 1949), *reversing* 91 N.Y.S.2d 585 (Sup. Ct. N.Y. County 1949).

181 273 App. Div. 695, 79 N.Y.S.2d 540 (1st Dep't 1948).

182 *Id.* at 697, 79 N.Y.S.2d at 542.

183 Lavin v. Lavin Co., 264 App. Div. 205, 34 N.Y.S.2d 947 (2d Dep't 1942).

184 171 Misc. 497, 13 N.Y.S.2d 48 (Sup. Ct. N.Y. County 1939).

It was held there that a director's application for an inspection to "satisfy myself that the business of the corporation was properly managed" would be denied on the ground that it related to the internal affairs of a foreign corporation, although the court remarked that if the application had been made by a stockholder, it would assume jurisdiction. It is unknown whether the corporation was doing business in New York State.

The same rules apply to both stock and membership corporations,[185] as well as to corporations in bankruptcy.[186] Apparently a different situation exists with respect to a dissolved corporation. In *Matter of Belmont v. Standard Match Co.*,[187] a director sought an examination concerning the sale of certain corporate assets for which he claimed a commission as broker. The court refused the examination because the duties of a director of a dissolved corporation only involve winding up the affairs of the corporation and thus the examination not being in furtherance of this duty, would be improper. The reasoning of this decision has been criticized[188] on the ground that its real basis was the director's hostility to the corporation.

CONCLUSION

Inspection of the books and records of corporations has been the subject of extensive litigation in New York. The distinction between the right and the remedy and between a proceeding for mandamus and an action for a penalty has caused confusion. Apparently experience in New York has prompted the enactment of Sections 10 and 113 of the Stock Corporation Law in their present form with respect to the examination of the stock book. However, the extent to which these Sections have modified the common law upon the subject is not clear. Whether the enactment of a statute wholly or partially regulating the examination of the business books of a corporation would create more certainty or confusion is a debatable subject. The Model Business Corporation Act[189] specifically provides that a shareholder shall have the right for any "reasonable purpose" to examine the business books of a corporation. This language immediately raises the question as to what is a reasonable

185 Javits v. Investors League, 92 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1949).

186 See *In re* Bush Terminal Co., 78 F.2d 662 (2d Cir. 1935).

187 208 App. Div. 4, 202 N.Y. Supp. 840 (2d Dep't 1924).

188 See Note, 24 COL. L. REV. 799, 800 (1924), where it was said: "Therefore, it seems that the result of the instant decision is desirable though it is hardly justifiable on its reasoning in view of the previous rulings."

189 § 35, 9 U.L.A. 120 (1951).

purpose. Due to the difference in the nature of the books there can be little doubt that there is more justification and room for the exercise of judicial discretion with respect to the examination of the business books of a corporation than exists with respect to the examination of the stock books.

Directors, of course, are in a different category than stockholders. Their unqualified right is easily understood. On the other hand, it would appear that the court should have the right to exercise its discretion when the hostility of the director is unquestioned and the best interest of the corporation is jeopardized by his examination of the books. Removal should not be the only remedy.[190]

190 State v. Scott, 247 P.2d 543 (Wash. 1952). But see, Note, 51 MICH. L. REV. 747 (1953).