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CORPORATIONS-QUALIFICATIONS OF OFFICERS-EFFECT ON EXISTING BY-LAWS OF CHANGE IN STATUTE

CORPORATIONS—QUALIFICATIONS OF OFFICERS—EFFECT ON EXISTING BY-LAWS OF CHANGE IN STATUTE—Corporate by-laws adopted under and following Act No. 84, Michigan Public Acts of 1921, required that directors be chosen from stockholders, the positions to become vacant should the directors dispose of their stock. In 1931 the statute was changed, now reading that "directors . . . need not be shareholders unless the articles so provide." [1] The by-laws were not altered. Qualified directors subsequently disposed of their stock and petitioned the chancery court under the statute for dissolution of the corporation and appointment of a receiver.[2] Appealing from an order granting that petition, creditors and stockholders of the corporation contended that the directors were not qualified and could not give the court jurisdiction. *Held*, the change in statute did not affect the by-law requirements; hence, petitioners were not directors *de jure*. But the court had jurisdiction to entertain the proceedings because they were *de facto* directors. *In re Petition of Andrews*, 265 Mich. 661, 252 N. W. 482 (1934).

By-laws which contravene legislative or public policy are of course ineffective;[3] and it is elementary that mandatory provisions in a statute abrogate inconsistent corporate rules.[4] Variance between by-laws and statute does not void the former, however, when the statutory terms are purely permissive.[5] When the legislative pronouncement is neither mandatory in terms nor in the policy it reveals, such pronouncement does not revoke previously-enacted by-laws

[1] Mich. Gen. Corp. Act, sec. 13, Pub. Acts (1931), Act No. 327.

[2] Mich. Comp. Laws (1929), sec. 15331 *et seq.*

[3] 1 COOK, CORPORATIONS, 8th ed., sec. 4a (1923); BALLANTINE, PRIVATE CORPORATIONS, sec. 178 (1927), and cases cited.

[4] In re Boulevard Theatre and Realty Co., 195 App. Div. 518, 186 N. Y. S. 430 (1921), aff'd 231 N. Y. 615, 132 N. E. 910 (1921).

[5] St. John of Vizzini v. Cavallo, 134 Misc. 152, 234 N. Y. S. 683 (1929). There a statute permitting voluntary dissolution of a corporation by two-thirds vote was held not to repeal a by-law for the continued existence of the corporation so long as ten members desired. The statute was declared permissive. See BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS, 2d ed., sec. 150 (1911), as to mandatory and permissive statutory terms. If the statute viewed in connection with the surrounding circumstances and construed as a whole indicates a legislative intent that it be discretionary and not imperative, courts will effectuate such intention. N. Y. Consol. Laws (McKinney Ann. 1916), tit. 1, sec. 12 *et seq.*

containing other provisions. The principal case, in which a statute requiring directors of a corporation to own stock therin [6] was changed without alteration of the corresponding by-law, provides one of the few illustrations of this sensible doctrine. The particular by-law did not depend for its validity upon the continuing support of the statute: in the absence of provisions to the contrary, by-laws may make reasonable requirements for officers.[7] It seems clear that the change from the original statute did not indicate a basic policy totally opposed to the requirement of stock-ownership.[8] The permissive statutory terms, the provision that the articles may require ownership as a qualification, make other interpretation difficult. In certain types of corporate organization Michigan statutes still require directors to be stockholders;[9] but since the technical requirement is easily satisfied, beneficial ownership generally being held unnecessary,[10] it is probable that the legislature saw no need to continue this when portions of the corporation law were codified. Instead, the stockholders might decide whether an interest in the corporate stock should be a desirable qualification for directors; and retention of the by-law three years after removal of the statutory mandate indicates an affirmative decision in the principal case.[11] By disposing of their stock, then, the petitioners ceased *ipso facto* to be *de jure* directors.[12] But the court was supported by authority in finding that they were *de facto* directors. Directors originally ineligible or subsequently disqualified become *de facto* directors if allowed to perform official acts under color of

[6] At common law directors of a corporation need not be stockholders. Johnson v. York Coal and Coke Co., 182 Ky. 303, 206 S. W. 611 (1918); Parsons v. Rinard Grain Co., 186 Iowa 1017, 173 N. W. 276 (1919); Tapper v. Boston Chamber of Commerce, 235 Mass. 209, 126 N. E. 464 (1920). Directors are only agents and in the absence of statute or by-laws the corporation can choose anyone. McDowall v. Sheehan, 129 N. Y. 200, 29 N. E. 299 (1891). But ownership of shares is frequently required. 2 FLETCHER, CYCLOPEDIA OF CORPORATIONS, perm. ed., sec. 299 (1931).

[7] BALLANTINE, PRIVATE CORPORATIONS, sec. 178 (1927). The former Michigan statute, Mich. Comp. Laws (1929), sec. 9985, besides requiring that directors be chosen from stockholders, provided that they " . . . shall have such further qualifications as may be prescribed by law or by the articles or the by-laws of such corporations."

[8] If the repeal of a statute that had authorized a by-law indicates a policy at variance with such by-law, the latter has no effect. First Nat. Bank of South Bend v. Lanier, 11 Wall (78 U. S.) 369, 20 L. ed. 172 (1871).

[9] In telephone companies, Mich. Comp. Laws (1929), sec. 11691; in summer resort associations, Mich. Comp. Laws (1929), sec. 10312; in co-operative corporations, Mich. Pub. Acts (1931), Act No. 327, sec. 110; and in non-profit corporations, Mich. Pub. Acts (1931), Act No. 327, sec. 124.

[10] Holding of the legal title may suffice. In re Leslie, 58 N. J. Law 609, 33 Atl. 954 (1896). And whether ownership extends to one share or a majority of the shares is immaterial. See Tefft v. Schaefer, 148 Wash. 602, 269 Pac. 1048 (1928).

[11] While repeal of by-laws by implication is possible, it is no more favored than such repeal of a statute. 8 FLETCHER, CYCLOPEDIA OF CORPORATIONS, perm. ed., sec. 4183 (1931).

[12] 3 COOK, CORPORATIONS, 8th ed., sec. 623 (1923).

position and title.[13] As such, they are not subject to collateral attack,[14] and their petition under statutes allowing dissolution by this manner suffices to confer jurisdiction on the court.[15]

W. J. W.

[13] Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380 (1890); Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15 (1911); Tufts v. Waltham Auto Bus Co., 273 Mass. 390, 173 N. E. 537 (1930); State ex rel Heikkenen v. Kylmanen, 180 Minn. 486, 231 N. W. 197 (1930). In Porter's Adm'r v. Dulin Oil Co., 242 Ky. 34, 45 S. W. (2d) 495 (1932), the *de facto* officers had been ineligible when elected. See Carpenter v. Clark, 217 Mich 63, 185 N. W. 868 (1921), where the court points out that the *de facto* doctrine does not protect an officer where his own rights are involved.

[14] Mortgage Land Inv. Co. v. McMains, 172 Minn. 110, 215 N. W. 192 (1927); Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 Pac. 15 (1911).

[15] In re Manoca Temple Ass'n, 128 App. Div. 796, 113 N. Y. S. 172 (1908); McMahon v. Stepney Spare Wheel Agency, 140 App. Div. 554, 125 N. Y. S. 823 (1910).