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CORPORATIONS-ELECTIONS-JUDICIAL ACTIONS OF INSPECTORS OF ELECTIONS

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COMMENTS

CORPORATIONS—ELECTIONS—JUDICIAL ACTIONS OF INSPECTORS OF ELECTIONS—Inspectors of corporate elections are commonly laymen selected to exercise good business judgment. Their appointment

is often provided for by statute, corporate charter or by-law,¹ and there are no special qualifications necessary for the position. Into their hands is thrust responsibility for an honest and fair election.

Because inspectors perform primarily ministerial duties,² it has frequently been asserted that they cannot act judicially. This view was expressed by the majority of the court speaking through Tilghman, J., in the early case of *Commonwealth v. Woelper*:³

"The inspectors do no more than receive and count the votes. But it is said that the inspectors are *judges*, and may decide the election as they please, by the admission or rejection of votes. Their office is ministerial rather than judicial. The charter declares who may vote and the inspectors are bound by it."⁴

Gibson, J., dissented from this view:

"I consider the judge of an election as a judicial and not as a ministerial officer. It is his business to decide on the qualifications of every one that presents himself as a voter; and though the law defines those qualifications, he is still to determine whether the party has brought himself within its provisions."⁵

If the modern cases are to be judged in light of what the courts say, it is probable that Judge Tilghman's views are the weight of authority. While a few courts frankly admit that inspectors do act judicially at times,⁶ most of the courts continue to define the actions of the inspectors in ministerial terms.⁷ However, there are two areas within which the inspectors may exercise such unusual powers that

¹ The power "to make rules, bye-laws, and ordinances, and do everything needful" includes the power to provide for the appointment of inspectors of election. *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.) 29 (1817). In the absence of a provision contrary, the power to select inspectors vests in the stockholders. *State v. Merchant*, 37 Ohio St. 251 (1881); *State v. Chute*, 34 Minn. 135, 24 N.W. 353 (1885). See 5 FLETCHER, *CYC. CORP.*, perm. ed., §2018 (1931).

² The primary ministerial duties are tabulating the ballots and certifying the result. *Hart v. Harvey*, 32 Barb. (N.Y.) 55 (1860). If an election is otherwise valid, its validity is not affected by the fraudulent or illegal conduct of the inspectors in counting the ballots and declaring the result. *Umatilla Water User's Assn. v. Irvin*, 56 Ore. 414, 108 P. 1016 (1910); *State v. Smith*, 15 Ore. 98, 14 P. 814, 15 P. 137 (1887).

³ 3 Serg. & R. (Pa.) 29 (1817).

⁴ *Id.* at 32.

⁵ *Id.* at 43.

⁶ "An inspector is a judicial officer to the extent his decision is valid until set aside by a competent tribunal." *Umatilla Water User's Assn. v. Irvin*, 56 Ore. 414 at 423, 108 P. 1016 (1910). "They determine judicially that the votes are receivable or not, and as ministerial officers, they receive or reject." *In re Mohawk & Hudson R. Co.*, 19 Wend. (N.Y.) 135 at 145 (1838).

⁷ E.g., see *Young v. Jebbett*, 213 App. Div. 774, 211 N.Y.S. 61 (1925); *People v. Pease*, 27 N.Y. 45 (1863); *Bache v. Central Leather Co.*, 78 N.J. Eq. 484, 81 A. 571 (1911). See also 14a C.J., *Corporations*, §1806(c) (1921).

they may be called judicial, namely, those relating to the ascertainment of (1) the validity of proxies and (2) title to stock. The scope of this comment is confined to these two areas with attention directed to the scope of the inspectors' powers and the effect of their findings on the courts.

1. *Actions Relating to Proxies*

Proxies regular on their face are presumed to be duly executed and authorized.⁸ It has frequently been held that inspectors may refuse proxies only for irregularities apparent upon their face.⁹ This view is commonly justified on the grounds that inspectors, being laymen, are not equipped to act judicially, that permitting them so to act would usurp the courts' powers and delay the elections, and that they, often being members of one of the factions, might not act impartially.¹⁰ Therefore, frauds, forgeries and improper solicitations are normally beyond the scope of the inspectors' powers.¹¹

While each of the above arguments has some relevancy and cogency, there is no question but that inspectors act judicially at times. Assume, for example, that inspector X is presented with duplicate proxies, one group bearing the date of the meeting and the other group, earlier dates.¹² A proper objection is made¹³ and X is given competent

⁸ ". . . when the validity of an election is attacked, it will be presumed, in the absence of evidence to the contrary, that proxies presented and voted were regularly executed and given by persons entitled to vote." *Gentry-Futch Co. v. Gentry*, 90 Fla. 595 at 610, 106 S. 473 (1925). *Standard Power and Light Corp. v. Investment Associates, Inc.*, (Del. Ch. 1947) 51 A. (2d) 572; *In re St. Lawrence Steamboat Co.*, 44 N.J.L. 529 (1882). See also *Axe*, "Corporate Proxies," 41 *MICH. L. REV.* 38 at 60 (1942).

⁹ *In re Cecil*, 36 *How. Pr. (N.Y.)* 477 (1869): "When a proxy apparently executed by the stockholder, regular in form was presented to them [inspectors], they had no right to refuse to receive the vote, or assume themselves the power of a judicial tribunal to try its genuineness. If it was apparently the act of the stockholder, and regular upon its face, that ended the matter so far as the inspectors were concerned. If for any reason, not apparent upon its face, it was invalid, redress must be sought from the courts after the election, if its being used worked any detriment."

¹⁰ The fact that an inspector is a candidate for office does not disqualify him, nor does the fact that he is an officer, employee or shareholder of the corporation render him unfit to serve. *Commonwealth v. Woelper*, 3 *Serg. & R. (Pa.)* 29 (1817); *Haslam v. Carlson*, 46 *R.I.* 53, 124 *A.* 734 (1924). For the sake of impartiality it has been suggested that the inspectors should be chosen from outside the corporation. *Dickson v. McMurray*, 28 *Grant Ch. (U.C.)* 533 (1881).

¹¹ *In re Lake Placid Co.*, 274 *App. Div.* 205, 81 *N.Y.S. (2d)* 36 (1948); *Commonwealth v. Cox*, 1 *Legal Chron. (Pa.)* 89 (1873); *Young v. Jebbett*, 213 *App. Div.* 774, 211 *N.Y.S.* 61 (1925).

¹² Where one executes two or more proxies, the last one revokes all previous ones. *Pope v. Whitridge*, 110 *Md.* 468, 73 *A.* 281 (1909); *Bache v. Central Leather Co.*, 78 *N.J. Eq.* 484, 81 *A.* 571 (1911).

¹³ It has been held that if no objection is made within a reasonable time after the ballot has been cast, the inspector must receive it. *Coolbaugh v. Herman*, 221 *Pa.* 496, 70 *A.* 830

proof that the proxies bearing the earlier dates were in fact executed later. In such a situation X could claim that he was powerless to act and, of necessity, accept the group bearing the later dates on their face; or he could summarily investigate the matter and determine that those bearing the date of the meeting were executed before the other group. On these facts in *Burke v. Wiswall*,¹⁴ the New York court found the latter course the more desirable and affirmed the inspectors' actions on proof that they acted honestly and with reasonable grounds. This view is sound and founded on reason, for when proof sufficient to overcome the presumption of validity surrounding proxies is offered, the inspector should be permitted to investigate even though the defect is not apparent on the face of the proxies.¹⁵ The only alternative is the expense and inconvenience of a new election.¹⁶

In their desire to affirm corporate elections, the courts are often influenced by the findings of the inspectors. Thus, where stock was registered in the wife's name and the inspector accepted the wife's proxy over the objection that her husband should have joined her, it was held that the inspector acted properly.¹⁷ Where stock was registered in the names of the husband and wife and the inspector refused a proxy signed by only one of them, it was held that the inspector had acted properly and both must sign.¹⁸ But in a later case in the same court, where the inspectors accepted a proxy signed by the husband for himself and his wife, it was held that the inspectors had acted properly and one of the spouses may sign for both.¹⁹ While the cases are not necessarily inconsistent they do illustrate the desire of

(1908). It has also been held that in reviewing the election the courts will consider only such evidence as was presented to the inspectors. In *re Mohawk & Hudson R. Co.*, 19 Wend. (N.Y.) 135 (1838); *Atterbury v. Consolidated Coppermines Corp.*, 26 Del. Ch. 1, 20 A. (2d) 743 (1941).

¹⁴ 193 Misc. 14, 85 N.Y.S. (2d) 187 (1948).

¹⁵ When the inspectors cannot conduct an investigation summarily, which would considerably delay the election, it has been held that the matter must be left to the courts. *Pope v. Whitridge*, 110 Md. 468, 73 A. 281 (1909).

¹⁶ The majority of courts cannot declare a candidate receiving a minority of votes elected. In *re Argus Printing Co.*, 1 N.D. 434, 48 N.W. 347 (1891); *State v. McDaniel*, 22 Ohio St. 354 (1872); see N.Y. Gen. Corp. Law (McKinney, 1943) §25. Where there is a clear case a few courts will declare the minority candidate elected. In *re Cape May & Del. Bay Nav. Co.*, 51 N.J.L. 78, 16 A. 191 (1888); In *re Election of Directors*, 11 Del. Ch. 369, 102 A. 787 (1917).

¹⁷ *Gentry-Futch Co. v. Gentry*, 90 Fla. 595, 106 S. 473 (1925).

¹⁸ In *re Giant Portland Cement Co.*, 26 Del. Ch. 32, 21 A. (2d) 697 (1941). The court refused to apply an analogy to co-executors and co-administrators, where one can represent all. *Schmidt v. Mitchell*, 101 Ky. 570, 41 S.W. 929 (1897).

¹⁹ *Standard Power and Light Corp. v. Investment Associates, Inc.*, (Del. Ch. 1947) 51 A. (2d) 572.

the courts to uphold the actions of the inspectors; these actions are often given the finality of a judicial pronouncement.²⁰

2. *Actions Relating to Title*

Similar to the rule confining inspectors to the face of the proxy is that rule confining inspectors to the stock registration books in ascertaining stock voting rights. At common law the legal owner of corporate stock was entitled to vote at corporate elections even though his title was not registered in the corporate books.²¹ However, as the inspectors would often have to conduct an extended inquiry into title, statutes were enacted to afford the inspectors a simple method of determining title, the stock books being either prima facie or conclusive evidence of the right to vote.²² Thus, the statutes attempt to balance the common law right to vote as an incident of stock ownership with the interest of the corporation in having a simple and summary method of determining the right to vote.

In the normal situation the inspectors merely consult the stock books, and the registered owner is the one entitled to vote.²³ However, a difficult situation arises when one without title attempts to vote. In the case of *In re Giant Portland Cement Co.*,²⁴ the inspectors accepted proxies given by former owners who had sold their shares since giving the proxies.²⁵ The transferees did not object and did not offer the stock for registration. It was held that while the right to vote

²⁰ "A corporate election appears to have no halo of sanctity about it. . . . In fact, their very frequency itself seems to call for some liberality in the conduct of corporate elections, and when judged and not found wanting in the light of those essential and controlling elements of fairness, honesty and good faith, no sound reason presents itself for disturbing their results." *Burke v. Wiswall*, 193 Misc. 14, 85 N.Y.S. (2d) 187 at 191 (1948).

²¹ *People v. Devin*, 17 Ill. 84 (1855); *Dennistoun v. Davis*, 179 Minn. 373, 229 N.W. 353 (1930).

²² "The purpose for which this section [Cal. Civ. Code, §320a] was enacted, however, was to relieve election officials from the embarrassing and awkward position of having to determine at every election who had the right to vote the shares of stock claimed by more than one stockholder. . . . It was never intended to decide finally and conclusively the right to vote stock of a corporation irrespective of the method by which recitations of stock ownership on the books of the corporation were procured." *Lawrence v. Parlier Estate Co.*, 99 Cal. Dec. 197 at 202, 100 P. (2d) 765 (1940).

²³ Certain well-known exceptions exist which enable parties to vote irrespective of stock registration. Often a pledgor may vote though stock is registered in the pledgee's name. *State v. Smith*, 15 Ore. 98, 14 P. 814, 15 P. 137 (1887); *In re Argus Printing Co.*, 1 N.D. 434, 48 N.W. 347 (1891). A personal representative may vote stock registered in the name of his decedent. *Schmidt v. Mitchell*, 101 Ky. 570, 41 S.W. 929 (1897); *Schoharie Valley R.R. Case*, 12 Abb. Pr. N.S. (N.Y.) 394 (1872).

²⁴ 26 Del. Ch. 32, 21 A. (2d) 697 (1941), noted in 40 MICH. L. REV. 588 (1942).

²⁵ It has been held that the sale of stock ipso facto revokes any proxies given in respect to such stock. *Dennistoun v. Davis*, 179 Minn. 373, 229 N.W. 353 (1930); see 18 C.J.S., Corporations §550(g) (1939).

is vested in the legal owner, the election will not be disturbed without a showing that either the transferees objected or that peculiar, inequitable circumstances exist between the parties to the transfer. A rather anomalous situation is presented where one without title is permitted to vote, for under statutes the corporation can recognize only the registered stockholder.²⁶

In the title situations the inspectors may assert unusual power, for the courts may uphold their actions although they act beyond the normal scope of their authority. Where the inspectors accept the transferor's vote and the transferee does not object, the vote will ordinarily be sustained on the ground that the transferee, the real owner, has tacitly assented.²⁷ If the inspectors refuse the vote of a transferor who is the registered owner, they have clearly acted beyond their authority; yet it is unlikely that the courts would reverse the result merely to enable one without legal title to vote. This is especially true if some sort of inequitable conduct is imputable to the transferor.²⁸ If the inspectors receive the vote of a transferor guilty of inequitable conduct, the court may uphold the election on the ground that the transferee should have forced his transferor to give him a proxy in order to obtain the right to vote at the election in question.²⁹ The same result would possibly follow where the inspectors receive the vote of the transferor over the transferee's objection. Within these areas the findings of the inspectors are peculiarly important. If the inspectors perform their duties properly,³⁰ the scales will weigh heavily in favor of affirming their actions, for, while the law is zealous to protect the right

²⁶ ". . . a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered." *People v. Robinson*, 64 Cal. 373 at 375, 1 P. 156 (1883).

²⁷ It is assumed in these situations that the result of the election hinges upon the votes in question. If the result of the election will not be changed in any event, the courts decline to take cognizance of the grievance. *Haslam v. Carlson*, 46 R.I. 53, 124 A. 734 (1924).

²⁸ "As between the transferor who has parted with all beneficial interest in the stock and his transferee, the broad equities are all in favor of the latter in the matter of its voting." *In re Canal Construction Co.*, 21 Del. Ch. 155, 182 A. 545 (1936), noted in 34 *MICH. L. REV.* 1039 (1936). The courts are not concluded by the stock books as are the inspectors. *Strong v. Smith*, 15 Hun. (N.Y.) 222, *affd.*, 80 N.Y. 637 (1880); *Pender v. Lushington*, 6 Ch. D. 70 (1877), 46 L.J. (Ch. D.) 317.

²⁹ *Thompson v. Blaisdell*, 93 N.J.L. 31, 107 A. 405 (1919); *Hoppin v. Buffum*, 9 R.I. 513 (1870). See also, *Wick v. Youngstown Sheet & Tube Co.*, 46 Ohio App. 253, 188 N.E. 514 (1932).

³⁰ A civil proceeding may be brought against the inspectors for fraudulently and maliciously rejecting a vote. *Weckerly v. Lutheran Congregation*, 3 Rawle (Pa.) 172 (1831); see also, *Triesler v. Wilson*, 89 Md. 169 (1889); *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.) 29 (1817). It has been suggested that as public officers inspectors may be subject to criminal liability. See Finkelstein, "The Conduct of Corporate Elections," 17 *ST. JOHN'S L. REV.* 75 (1943).

to vote as an incident of legal ownership of stock, the law also favors a finality of elections.³¹

3. *Conclusion*

So long as their duties are not precisely defined,³² the inspectors must continue to act in that nebulous area, said by the New York court to be controlled only "by accepted usage and common practice."³³ While the modern cases continue to use the language of their predecessors, they appear to be more realistic in their approach. They realize that corporate elections are not sacred proceedings but are business affairs; that inspectors must act judicially at times if they are to act at all; and that some sort of finality is desirable with a minimum of litigation involved. The empowering of inspectors to make decisions that will be upheld in the courts will lead to the achievement of these ends.

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³¹ In the absence of proof to the contrary, an election is presumed regular and valid. *Brackett v. Persons Unknown*, 53 Me. 228 (1861). The courts will not review an election on mere suspicion alone. *Burke v. Wiswall*, 193 Misc. 14, 85 N.Y.S. (2d) 187 (1948).

³² The typical statute is completely silent on the duties of the inspectors or speaks only in vague terms. Eg., see *Mich. Stat. Ann.*, Vol. 15, Corp., §21.41 (1937); *N.Y. Stock Corp. Law* (McKinney, 1940) §46. But see, *Ohio Gen. Code* (Page, 1938) §8623-54.

³³ *Young v. Jebbett*, 213 App. Div. 774 at 779, 211 N.Y.S. 61 (1925).