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R. C. Vaughn Jr.

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average man to face it alone. . . ."³⁹ The court has held the failure to assign counsel to be a denial of due process where the defendant was incapable of defending himself on trial by reason of his age, race, or mentality;⁴⁰ where the trial court or its officers acted unfairly;⁴¹ and where the defendant was unable to conduct adequate defense because of a complex charge or fact situation.⁴²

The rule of the United States Supreme Court affecting the states is thus similar to the North Carolina rule, but the "special circumstances" which require the assignment of counsel in non-capital cases have been more thoroughly explored, and it is likely that the United States rule is more liberal than the North Carolina rule. It appears that a person accused of a non-capital crime in North Carolina today has no assurance of an assignment of counsel.

The writer suggests that the United States Supreme Court has maintained a strong and liberal policy on civil rights, including the right to counsel in criminal cases, expressing a desire to leave the application of this privilege in the hands of the several states. Thus, the function of the states is to delineate a policy which will insure defendants in non-capital cases a substantial constitutional right.

ROY W. DAVIS, JR.

Corporations—Dissolution—Deadlock

The problem of corporate stockholder and/or director deadlock is a familiar one to the practicing corporation lawyer.¹ This deadlock situation is, of course, only one of many problems which arise under the general subject of dissolution of a corporation, for any cause, at the instance of minority stockholders. The broader topic above referred to has already been treated in this *Law Review*² and therefore, the

³⁹ *Bute v. Illinois*, 333 U. S. 640, 682 (1948).

⁴⁰ *Palmer v. Ashe*, 342 U. S. 134 (1951) ("young irresponsible boy" of low mentality); *Wade v. Mayo*, 334 U. S. 672 (1948) (eighteen year old "youth unfamiliar with court procedure"); *De Meerleer v. Michigan*, 329 U. S. 663 (1947) (seventeen year old boy); *Rice v. Olson*, 324 U. S. 786 (1945) (Indian).

⁴¹ *Uveges v. Pennsylvania*, 335 U. S. 437 (1948) (defendant threatened by state's attorney); *Townsend v. Burke*, 334 U. S. 736 (1948) (court questioned defendant about former criminal charges, of which he had been exonerated); *Smith v. O'Grady*, 312 U. S. 329 (1941) (false promises by officers of the court).

⁴² *Palmer v. Ashe*, 342 U. S. 134 (1951) (defendant, convicted of robbery, meant to plead guilty to breaking and entering); *Gibbs v. Burke*, 337 U. S. 773 (1949) (court said counsel could have prevented admission of incriminating testimony); *Rice v. Olson*, 324 U. S. 786 (1945) (venue problem of trial court's jurisdiction over an Indian on reservation).

¹ For an excellent discussion of the problem in general, see *Israels, Deadlock and Dissolution*, 19 *CHI. L. REV.* 778 (1952).

² Note, 28 *N. C. L. REV.* 313 (1950).

"Deadlock, which appears by the decided cases to have occurred only in corporations having a few stockholders, implies dissension due to equal division, and therefore does not involve problems of protection for the minority." *Horstein, A Remedy for Corporate Abuse*, 40 *COL. L. REV.* 220, 231 (1940).

present note will be confined to a discussion only of deadlock situations, which usually occur in closely held or "family" corporations in which each group has 50% of the outstanding voting stock. These "glorified partnerships" will be seen to be extremely vexing headaches when it is realized that most courts, absent any specific statutory authority, will not act to dissolve the corporation merely on the grounds of deadlock or dissension.³

Although courts of equity, even in the absence of a statute, will sometimes assume jurisdiction,⁴ the general rule still prevails that unless specific statutory authority is given, the courts have no right to interfere in the dispute.⁵

An increasing number of decisions, however, seem to exhibit a willingness to assume jurisdiction where there would be irreparable injury to the corporation,⁶ where the interests of the stockholders may

³ Alabama Coal and Coke Co. v. Shackelford, 137 Ala. 224, 34 So. 833 (1903) (director's terms expired; equity refused to act); Drob v. National Memorial Park, Inc., 28 Del. Ch. 254, 41 A. 2d 589 (1945) (no dissolution because there was a Board of Directors); Lush's Brand Lithograph Co. v. Fort Dearborn Lithograph Co., 330 Ill. App. 216, 70 N. E. 2d 737 (1946); Wallace v. Pierce-Wallace Publishing Co., 101 Iowa 313, 70 N. W. 216 (1897) ("a situation into which the parties voluntarily placed themselves," and equity court would not dissolve); Reid Drug Co. v. Salyer, 268 Ky. 522, 105 S. W. 2d 625 (1937); McGuire v. Kayser-McGuire Co., 184 Minn. 553, 239 N. W. 616 (1931), commented on in Note, 16 MINN. L. REV. 707 (1932); Dorf v. Hill Bus Co., 140 N. J. Eq. 444, 54 A. 2d 761 (1947) (deadlock; statute applied to even number of directors and court would not dissolve because there were 3 directors); Bowman v. Gum, Inc., 321 Pa. 516, 184 Atl. 258 (1936); McKay v. Beard, 20 S. C. 156 (1882) (refusal of one of the two incorporators-stockholders to be bound by the by-laws did not work a dissolution); Hammond v. Hammond, 216 S. W. 2d 630 (Tex. Civ. App., 1949).

"Dissension, then, would seem not to be an independent ground for dissolution but rather a contributing element to the factual situation necessary for relief on one of the other grounds." Note, 41 MICH. L. REV. 714, 720 (1943).

See also: Anno. 13 A. L. R. 2d 1261 (1950).

⁴ Saltz v. Saltz Bros., 84 F. 2d 246, cert. denied, 299 U. S. 567 (1936); Vale v. Atlantic Coast and Inland Corp., — Del. Ch. —, 99 A. 2d 396 (1953) (no specific deadlock statute but court held the complaint sufficient to withstand a motion to dismiss).

But see Hall v. Woods, 325 Ill. 114, 156 N.E. 258 (1927). In this case the court held that part of the stock, owned by a foreign corporation, cannot be voted and therefore there is no deadlock. On a petition to rehear, the court suggested how such stock could be voted but then said that it would not anticipate a deadlock (which would occur whenever the excluded stock was allowed a vote).

⁵ Cases cited note 3 *supra*; BALANTINE, CORPORATIONS § 304 (Rev. ed., 1946); 16 FLETCHER, Cyc. CORPORATIONS § 8080 and § 8098 (Rev. ed. 1942); STEVENS, CORPORATIONS § 199 (2nd ed., 1949); Note, 47 MICH. L. REV. 684 (1949).

⁶ Handlan v. Handlan, 360 Mo. 1150, 232 S.W. 2d 944 (1950); Guaranty Laundry Co. v. Pulliam, 200 Okla. 185, 191 P. 2d 974 (1948); Application of Radom, 282 App. Div. 854, 124 N. Y. S. 2d 424 (1st Dep't 1953) (evidence did not establish deadlock or frustration of corporate activities by lack of a board of directors; dissolution denied).

But under statutes which state that corporations may be dissolved "for good cause shown," courts have refused to dissolve on the mere fact of deadlock alone. Gidwitz v. Cohn, 238 Ill. App. 227 (1925); Platner v. Kirby, 138 Iowa 259, 115 N.W. 1032 (1908).

suffer,⁷ or where the court says that these corporations are mere partnerships.⁸ Notwithstanding these more liberal interpretations of applicable laws or of equitable jurisdiction without a particular law, there is still a need for definite statutory authority in this field.

The present state of the North Carolina law on this point is in doubt. The relevant statutes set out various methods of involuntary dissolution at the instance of private persons,⁹ stockholders,¹⁰ or the Attorney-General,¹¹ but in the opinion of writers on the subject, these statutes are not specific enough to encompass the problem at hand¹² Therefore an examination of pertinent corporation laws in other states is necessary in order to be able to formulate a suggested addition to Chapter 55 of the General Statutes.

Some states merely give their equity courts the power to dissolve corporations "whenever any good and sufficient reason exists,"¹³ or when liquidation is "reasonably necessary for the protection of the rights of the stockholders or creditors."¹⁴ In this writer's opinion, such statutes are far from adequate for the reason that these courts tend to give an undue amount of weight to various factors such as

⁷Petition of Collins-Doan Co. 3 N. J. 382, 70 A. 2d 159 (1949); Application of Cantelmo, 275 App. Div. 231, 88 N. Y. S. 2d 604 (1st Dep't 1949); *Re* Waldorf Amusement Co., 13 Ohio App. 438 (1928).

⁸Flemming v. Hefner-Flemming, 263 Mich. 561, 248 N.W. 900 (1933); Green v. National Advertising and Amusement Co., 137 Minn. 65, 162 N.W. 1056 (1917). Note, 22 VA. L. REV. 469, 470 (1936).

Israels, *Deadlock and Dissolution*, 19 U. CHI. L. REV. 778, 792 (1952), advances the theory of considering the participants in a stalemated close corporation as joint venturers as between themselves.

Contra: Freedman v. Fox, —Fla.—, 67 So. 2d 692 (1953); Cohen v. Wacht, —Misc.—, 124 N. Y. S. 2d 207 (Sup. Ct. 1953).

⁹N. C. GEN. STAT. § 55-124 (1950).

¹⁰N. C. GEN. STAT. § 55-125 (1950).

¹¹N. C. GEN. STAT. § 55-126 (1950) which provides in part:

" . . . It is the duty of the Attorney General, whenever he has reason to believe that any of these acts or omissions can be established by proof, to bring an action in every case of public interest, and also in every other case in which satisfactory security is given to indemnify the state. . . ." (italics added)

In response to a North Carolina attorney's contention that the Attorney General was required under this clause to bring action in a situation where two persons each owned 50% of the stock and could not elect a third director, the Attorney General replied; ". . . I do not think that it would be proper for me to authorize one of the parties in the controversy to institute an action in the name of the Attorney General." Letter from Attorney-General, Aug. 12, 1953.

A subsequent letter states that "I am not satisfied that the failure of the directors . . . to agree upon . . . a third director . . . would in itself justify an action to dissolve. . . ." The Attorney General then suggests that it might be possible to proceed under N. C. GEN. STAT. § 55-114 (1950), but this gives the court the right to *continue* the corporation whereas in the majority of cases, a dissolution is desired. Letter from Attorney-General, Aug. 20, 1953.

¹²Israels, *Deadlock and Dissolution*, 19 CHI. L. REV. 778 (1952). The writer in Note, 28 N. C. LAW REV. 313, 315 (1950), discusses in some detail the relevant North Carolina cases on involuntary dissolution and concludes that ". . . all the presently appropriate circumstances for dissolution are not covered by statute in North Carolina." *Supra* at 318.

¹³CONN. GEN. STAT. § 5226 (1949).

¹⁴N. H. REV. LAWS c. 274, § 96 (1942).

solvency¹⁵ or impossibility of carrying out corporate purpose,¹⁶ and do not squarely face the issue of paralysis in the management because of a deadlock.

Other legislatures have adopted the provision set out in the Model Business Corporation Act.¹⁷ Even this paragon was elaborated upon by some states which adopted the Model Act clause verbatim and then supplemented it with additional sections pertaining not only to director deadlocks but also to situations where no new directors can be elected because of a stockholder deadlock which has extended over a period of time, usually two successive annual meetings.¹⁸ Consequently, the Model Act was amended in 1952 so as to include this additional provision.¹⁹

Another group of states have statutes²⁰ derived from the New York General Corporation Law, the pertinent section of which is as follows:

. . . If a corporation has an even number of directors who are equally divided respecting the management of its affairs, or if the votes of its stockholders are so divided that they cannot elect a Board of Directors, the holders of one-half of the stock . . . may present a verified petition for dissolution. . . .²¹

¹⁵ The Mississippi Statute specifically provides for liquidation if the corporation ". . . ceases to be a going concern." MISS. CODE ANN. § 5355 (1942).

¹⁶ *Olechny v. Thadeus Kosciuszko Society*, 128 Conn. 534, 24 A. 2d 249 (1942) (dissolution denied, but the court admitted that the test to be applied was impossibility of corporate purpose).

¹⁷ MODEL BUSINESS CORPORATION ACT § 90 (1950): "The courts shall have full power to liquidate . . . a corporation . . . when it is established . . . that the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof." MINN. STAT. ANN. § 301.49 (West 1947); MO. ANN. STAT. § 351.485 (Vernon 1949); PA. STAT. ANN. tit. 15 § 2852-1107 (1938).

¹⁸ ILL. ANN. STAT. c. 32, § 57.86 (Supp. 1952); *Wimp Packing Co. v. Wimp*, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); *Wiedoelt v. Frank Holton & Co.*, 294 Ill. App. 118, 13 N. E. 2d 854 (1938) (statute to be strictly construed); WIS. STAT. § 180.771 (1951), as amended by Wis. Laws 1953, c. 399, §§ 49, 50.

Of the laws examined, the California statute seems to the writer to meet the situation most adequately. CAL. CORP. CODE ANN. § 4651 (1948).

¹⁹ "The courts shall have full power to liquidate . . . a corporation . . . when it is established . . . that the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election of their successors. . . ." MODEL BUSINESS CORPORATION ACT § 90 (1952 Revision).

²⁰ FLA. LAWS 1953, § 608.28, p. 631; KY. REV. STAT. § 271.570 (1948), as amended by Ky. Laws 1952, c. 116; LA. REV. STAT. ANN. § 12.55 (1950); N. J. REV. STAT. § 14:13-15 (Supp. 1953); OHIO GEN. CODE ANN. § 1701.94 (1938); WASH. REV. CODE § 23:44:030 (1952).

²¹ N. Y. GENERAL CORPORATION LAW § 103 (Supp. 1953). It is to be noted that this statute does not say "irreparable damage" like the Model Act, but as construed by the New York Courts, this statute is to be read in connection with N. Y. General Corporation Law § 117 which states that the dissolution must be beneficial to the stockholders. It has been held that this test is not met when the corporation is financially sound. *Re Cantelmo*, 275 App. Div. 231, 88 N. Y. S. 2d 604 (1st Dep't 1949).

But even with the above type of statute, the decisions show that the courts are still overly conscious of the old rule, and therefore tend to construe strictly the applicable statute.²² For example, the New York Court has denied dissolution in cases where the evidence did not establish that corporate activities were frustrated by lack of a board of directors,²³ where dissolution would not be in the best interest of the stockholders,²⁴ and where it was claimed that there was in fact an existing deadlock and one of the three directors was merely a "dummy" who refused to act.²⁵ Therefore it would seem that any proposed statute should be definite enough to meet the deadlock situation in general, while retaining sufficient elasticity to enable the court adequately to cope with specific problems which might arise.

The North Carolina General Statutes Commission has drafted a deadlock statute as part of a revised corporation law for submission to the 1955 General Assembly. The latest draft of this proposed law would give the superior court the power to liquidate a corporation when it is established that:

- (1) The directors are deadlocked in the management of the corporate affairs and the stockholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders; or
- (2) The shareholders are deadlocked in voting power and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose term had expired; . . .

This proposal is an adoption of the present Illinois statute,²⁶ with the exception of the last clause in subsection (1), which has been changed from the Illinois requirement of actual or threatened "irreparable injury to the corporation." This change is a commendable one because presumably the inclusion of the phrase "to the advantage of all of the shareholders" would give the court, in its discretion, power

²² *Wimp Packing Co. v. Wimp*, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); *In re Belton*, 47 La. 1614, 18 So. 642 (1896) (failure to elect officers does not work a dissolution); *Dorf v. Hill Bus. Co.*, 140 N. J. Eq. 444, 54 A. 2d 761 (1947).

But see In re Evening Journal Ass'n, 15 N. J. Super. 58, 83 A. 2d 38 (1951) (the test used here was not solvency but whether or not there was a corporate paralysis).

²³ *Application of Radom*, 282 App. Div. 854, 124 N. Y. S. 2d 424 (1st Dep't 1953).

²⁴ *Application of Numode Realty Co., Inc.*, 278 App. Div. 979, 105 N. Y. S. 2d 588 (2nd Dep't 1951).

²⁵ *Petition of Binder*, 172 Misc. 634, 15 N. Y. S. 2d 4 (Sup. Ct. 1939), reversed without opinion, 258 App. Div. 1041, 17 N. Y. S. 2d 1020 (1st Dep't 1940) (remanded with instructions for referee to find out whether the third director was in fact a "dummy").

²⁶ ILL. ANN. STAT. c. 32, § 57.86 (Supp. 1952).

to liquidate even a solvent concern if the internal dissension reached a point where such action would be the only feasible solution. It was presumably the intention of the Drafting Committee that by making the above change, the North Carolina courts will be able to take a more liberal attitude than has the Supreme Court of Illinois²⁷ under their similar statute.

Subsection (1) of the proposed statute seems very adequately to provide a solution in any director deadlock situation. This section also seems applicable to stockholder deadlocks by the clause "and the stockholders are unable to break the deadlock."²⁸ The need for specific reference to stockholder deadlock is vividly brought out in the case of *Cook v. Cook*²⁹ where, although there was a 50-50 stock division, the applicable statute dealt with director deadlocks and therefore relief was denied.

If however the situation should arise where there is an uneven split among directors, but the stockholders become deadlocked so that it is impossible to elect a new board, then subsection (2) could be put into use.

The California³⁰ and West Virginia³¹ statutes have an additional section which in essence allows the defendant stockholders, if they wish to prevent dissolution, to purchase the plaintiff's stock at a fair market value set by the court. In the opinion of this writer, the above provision, which would preserve the going concern and possibly prevent hardship to some defendants, is an excellent addition and serious thought should be given as to the possibility and advisability of incorporating it into the new proposal.

The need for this statute is amply shown by case law on the subject and the fact that four states, Florida, Kentucky, New Jersey, and Wisconsin, following the example set by the recent change in the Model Act, adopted similar laws or amended old laws at the last meeting of their legislatures. In order to clarify the vague and inadequate state of the North Carolina law on involuntary dissolution, it is hoped that

²⁷ *Lush's Brand Lithograph Co. v. Fort Dearborn Lithograph Co.*, 330 Ill. App. 216, 70 N. E. 2d 737 (1946) (statute to be strictly construed).

²⁸ This writer is convinced that the proposed statute would be a sufficient remedy for any conceivable deadlock situation, but should there be any doubt as to its applicability to stockholder deadlocks, the California Code has a pertinent section which provides for dissolution if "there is internal dissension and two or more factors of shareholders in the corporation are so deadlocked that its business cannot be conducted with advantage to its shareholders." CAL. CORP. CODE § 4651(d) (1948).

²⁹ 270 Mass. 534, 170 N. E. 455 (1930). After this case the Massachusetts statute was amended to include the clause "or if the votes of its stockholders are equally divided in the election of directors." See also: *Wimp Packing Co. v. Wimp*, 313 Ill. App. 262, 39 N. E. 2d 720 (1942); *In re Hedberg-Fredheim Co.*, 233 Minn. 534, 47 N. W. 2d 424 (1951).

³⁰ CAL. CORP. CODE ANN. § 4658 (1948).

³¹ W. VA. CODE ANN. § 3093 (1949).

the next legislature will give careful consideration to the proposed corporation laws, with special emphasis on a remedy for the deadlock situation.

R. C. VAUGHN, JR.

Labor Law—Fair Labor Standards Act—Coverage of Maintenance Employees of Office Buildings

Maintenance employees in office buildings present a real problem under the Fair Labor Standards Act. Their employer is frequently a corporation whose sole business is that of renting space in local buildings, although the employer may be a manufacturing company or a bank using a part of the building for its own offices and renting the balance. Where all or part of the building is rented, the tenants may be engaged in purely local business, or in interstate commerce either on or off the premises, or in the production of goods for commerce either in the building or at another location. The maintenance employees themselves seldom have any direct contact with the carrying on of interstate commerce or with the physical production of goods for commerce. They clean the building, operate the elevators, make repairs, guard and heat the premises, and perform a variety of other activities admittedly essential to the successful operation of the modern office building. The question which arises in each case, however, is whether such activities are so closely related to commerce or production of goods for commerce as to bring the maintenance employees under the coverage of the Fair Labor Standards Act.

Coverage under the act is dependent on the activities of the employee rather than on the business of the employer. Thus the employees may be under the act even though the employer is a local real estate firm and therefore clearly not engaged in commerce or in the production of goods for commerce.¹ On the other hand, the employees may not be covered even though their employer is engaged in commerce.²

Any employee is covered who is engaged in commerce or in the production of goods for commerce,³ the latter including any closely related process or occupation directly essential to the production of goods for commerce.⁴ In this connection it is necessary to distinguish

¹ *Kirschbaum v. Walling*, 316 U. S. 517 (1942).

² *Carrigan v. Provident Trust Co.*, 153 F. 2d 74 (3rd Cir. 1946); *Building Service Employees International Union v. Trenton Trust Co.*, 142 F. 2d 257 (3rd Cir. 1944).

³ 52 STAT. 1062, 1063 (1938), 29 U. S. C. §§ 206, 207 (1946), as amended, 63 STAT. 912 (1949), 29 U. S. C. §§ 206, 207 (Supp. 1953). See LIVENGOOD, *THE FEDERAL WAGE AND HOUR LAW* (American Law Institute 1952); Tyson, *The Fair Labor Standard Amendments of 1949*, 28 N. C. L. REV. 161 (1950).

⁴ 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).