

Washington Law Review

Volume 28 | Number 2

5-1-1953

Corporations—Right of Director to Inspect Corporate Books

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Recommended Citation

Robert F. Brachtenbach, Recent Cases, *Corporations—Right of Director to Inspect Corporate Books*, 28 Wash. L. Rev. & St. B.J. 159 (1953).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol28/iss2/9>

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It does not seem that the rationale of this decision conflicts with the holding in the principal case. It would require a very definite extension of orthodox contract principles in order to find a contract under such circumstances. Perhaps it could be said that picking up the telephone and answering it would be sufficient consideration to support the sponsor's offer to pay a given amount to the person who so answers, but a bar to the formation of a contract would be the fundamental principle of contract law that an act done without knowledge of an offer cannot be an acceptance thereof. RESTATEMENT, CONTRACTS § 53 (1932).

In the *Robertson* case the court was not faced with the issue and therefore, unfortunately, did not provide any clearly defined guide as to the answer when the payment of the award is not the discharge of a contractual obligation. It is submitted that, although the Supreme Court in its summary disposition of the factual situation presented by the principal case has provided a guide to some of the more troublesome situations upon which the Bureau and the lower courts have been in general disagreement, an equal number of problems remain open for further judicial determination, with the *Robertson* opinion giving little or no aid to the Supreme Court should it be called upon to settle future controversies in this narrow but confusing area of the law.

NEWMAN L. DOTSON

Corporations—Right of Director to Inspect Corporate Books. *P*, as a director and stockholder of a corporation, sought a writ of mandamus to compel the corporation's officers to make available for inspection by *P* certain corporate books and records. The court found that *P*'s purposes in seeking inspection of the records were hostile to the corporation and if consummated would be inimical to the best interests of the corporation. The trial court dismissed *P*'s petition. *Held*: Affirmed. *State ex rel. Paschall v. Scott*, 141 Wash. Dec. 62, 247 P.2d 543 (1952).

This case is the first Washington ruling upon the question of whether the right of a director of a corporation to inspect and examine the corporate books and records is absolute, or whether it is qualified and may be denied upon proof of a purpose which is hostile and adverse to the best interests of the corporation. Washington adopts the view that the director's right of inspection is qualified rather than absolute, a minority position.

Two statutes have a bearing on this question: first, "The business of every corporation shall be managed by a board of at least three directors. . . ." RCW 23.36.010 [REM. SUPP. 1943 § 3803-31]; second, "Officers and directors stand in a fiduciary relation to the corporation, and must discharge the duties of their respective positions *in good faith*. . ." RCW 23.36.080 [RRS § 3803-33] (*italics added*). It is axiomatic that if the directors are to manage the affairs of a corporation they must have access to the corporate records to carry out that function. However, the statute commands that the director must discharge the duties of his position in good faith. Thus, the court reasoned that the director's right of inspection is an incident of the duties imposed by statute, discharge of which must be in good faith. When the director's good faith disappears he can no longer assert that he is carrying out his duties, hence the right of inspection can no longer be claimed.

The majority rule, clearly rejected by the Washington court, confers upon the director an absolute right of inspection. The right will not be denied, even upon the showing of motives adverse to the interests of the corporation. The following cases are in accord with the majority view: *Lavin v. J. C. Lavin Co., Inc.*, 264 App. Div. 205, 34 N.Y.S.

2d 947 (1942); *Javits v. Investors' League, Inc.*, 92 N.Y.S. 2d 267 (1949); *Machen v. Machen and Mayer Electrical Mfg. Co.*, 237 Pa. 212, 85 Atl. 100 (1912); and *Drake v. Newton Amusement Corp.*, 123 N.J.L. 560, 9 A. 2d 639 (1939). The absolute right has also been expressed in statutory form, e.g., CAL. CORP. CODE, § 3004 (1947).

The problem of the right of inspection of corporate records by a director motivated by interests adverse to the corporation involves two principal considerations. First, a director must have access to the corporate records if he is to function intelligently as a manager of the business. Second, the undesirability to the corporation of a director having an absolute and unlimited access to the corporate papers when his purposes are hostile and adverse to the corporation. When the director's right is held to be absolute the burden is cast upon the corporation to institute removal proceedings to protect its interests from exposure to the hostile director. The alternative adopted by Washington places the burden upon the director, instead of the corporation, to institute mandamus to enforce his qualified right.

The Washington rule is preferable. The director must take the initiative under the minority rule—a requirement which may make him less anxious to enforce his asserted right when he is aware that his manifested motives and purposes are to be scrutinized by the court. Should the corporation be forced to institute removal proceedings (the solution suggested by several of the cases under the majority rule), it is indeed possible that the director in question may secure the information he seeks while removal proceedings are being instituted. It is possible that this objection might be overcome by the corporation obtaining a temporary injunction restraining the director's inspection pending outcome of the removal proceedings. RCW 7.40.020 [RRS § 719] gives the broad grounds for issuance of injunctions. It is beyond the scope of this article to determine whether the corporation would secure such an injunction, but it is pointed out that the statute would place upon the corporation the additional task of securing an injunction bond conditioned to pay all damages and costs which may accrue by reason of the injunction. RCW 7.40.080 [RRS § 725]. Further difficulty could arise where the jurisdiction has a limitation on removal to protect the right of cumulative voting. RCW 23.36.040 [REM. SUPP. 1943 § 3803-31] provides: “. . . Unless the entire board is removed, no individual director shall be removed in case the votes of a sufficient number of shares are cast against the resolution for his removal, which, if cumulatively voted at an election of the full board, would be sufficient to elect one or more directors.” Thus if the director is also a shareholder with sufficient shares, or has enough support from other shareholders, he could defeat the removal.

However, while practical considerations seem to favor the minority ruling, great caution must be exercised in its application. Denial of a director's right of inspection of corporate records strikes at one of the fundamental means by which he functions. Only in a clear case of hostile and improper motives should the director be denied the right. Unwise use of the minority rule in doubtful cases is as undesirable as the grant of the absolute right under the majority rule.

An incidental problem arises under the minority holding. Upon whom does the burden of proof fall in the mandamus proceedings: i.e., will the director be required to prove proper motive or will the corporation have to prove improper motive? The latter result would be but a logical extension of the presumption which exists when a stockholder seeks inspection of the records, to wit: that the inspection is in the interests of the corporation, placing the burden on the officers to show otherwise. *State ex rel. Weinberg v. Pacific Brewing and Malting Co.*, 21 Wash. 451, 58 Pac. 584 (1899).

P also claimed the right of inspection because she was a stockholder in the corporation. RCW 23.36.120 [RRS § 3803-35] governs inspection by a stockholder, providing for inspection for “. . . any reasonable purpose. . .” (italics added). The court denied

P's claim of right, based on her position as a stockholder, by reasoning that when improper and hostile motives are shown the conclusion necessarily follows that the purposes are not reasonable within the meaning of the statute. The holding accords with prior Washington cases: *State ex rel. Weinberg v. Pacific Brewing and Malting Co.*, supra; *State ex rel. Lee v. Goldsmith Dredging Co.*, 150 Wash. 366, 273 Pac. 196 (1928), and with the majority holdings in other jurisdictions. BALLANTINE, CORPORATIONS § 160.

ROBERT F. BRACHTENBACH.

Divorce—Domicile of Choice—Military Personnel. *P* was stationed at Fairchild Air Force Base near Spokane. When his wife joined him in April, 1950, he took quarters outside the base. He told his friends that he intended to make Spokane his permanent home. In July, 1950, he was sent overseas. His wife returned to Philadelphia, their domicile of origin. In November, 1950, *P* returned to Spokane, and, except for two trips to Philadelphia to visit his wife who refused to join him, remained in Spokane. He found work there after his discharge in November, 1951. In July, 1951, *P* commenced this action for a divorce. *D* claims that *P* has not been a "resident of the state for one year" under RCW 26.08.030 [REM. SUPP. 1949, § 997-3]. The trial court found that it had jurisdiction. *Held*: Affirmed. *Sasse v. Sasse*, 141 Wash. Dec. 338, 249 P. 2d 380 (1952).

"Residence" is an elastic term. Its interpretation is governed by the purpose of the statute in which it is employed. *McGrath v. Stevenson*, 194 Wash. 160, 77 P. 2d 608 (1938); *De Meli v. De Meli*, 120 N.Y. 485, 24 N.E. 996 (1890). To establish "residence" under divorce statutes, courts uniformly require newcomers to their jurisdictions to prove not only physical presence within the jurisdiction, but also a concurrent intent to abandon the prior domicile and remain indefinitely. In other words, residence is read as domicile. The Supreme Court of the United States has indicated that if divorce jurisdiction is not based on domicile, it will be subject to collateral attack outside the jurisdiction. *Williams v. North Carolina*, 325 U.S. 226, 157 A.L.R. 1366 (1945).

While the elements of domicile are clear, ". . . physical presence at a dwelling place and the intention to make it a home . . ." 141 Wash. Dec. 338, 340, 249 P. 2d 380, 382, the results of their application to military personnel assigned to a claimed domicile of choice vary substantially. See Note, 21 A.L.R. 2d 1163 (1952). It is settled law that a person may change his domicile while in the military service. *Kankelborg v. Kankelborg*, 199 Wash. 259, 90 P. 2d 1018 (1939); *Ames v. Duryea*, 6 Lans. 155 (N.Y., 1871). The question is one of intent. If the serviceman lives on the military post, courts seldom find the domiciliary intent. *E.g.*, *Zimmerman v. Zimmerman*, 175 Ore. 585 155 P. 2d 293 (1945). Some courts state that a soldier, when stationed on a military post, cannot acquire domicile since he has no free choice. *E.g.*, *Wallace v. Wallace*, 371 Pa. 404, 89 A. 2d 769 (1952); *Wilson v. Wilson*, 10 Alaska 616 (1945). *Accord*, RESTATEMENT, CONFLICTS, § 21, comment c. (1934). These cases seem to have crystallized a presumption into an inflexible rule of law. Courts have found domiciliary intent in spite of residence only on the post. *Walsh v. Walsh*, 215 La. 1099, 42 So. 2d 860, cert. den. 339 U.S. 914 (1949); *Walcup v. Honish*, 210 La. 843, 28 So. 2d 452 (1946). Residence on or off the post has been ignored entirely in finding jurisdiction. *Gipson v. Gipson*, 151 Fla. 587, 10 So. 2d 82 (1942).

When the soldier establishes a residence away from the post, the courts are more inclined to find domiciliary intent. But, decisions are by no means uniform. In *Allen v. Allen*, 52 N.M. 174, 194 P. 2d 270 (1948), a finding of domicile by the trial court was reversed, though a home had been established for *P* and his family outside the post and there were uncontradicted statements that *P* intended to make the jurisdiction his