

1964

# Jay W. Jacobson et al v. E. H. Backman et al : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

JAY W. JACOBSON, BRYCE REYNOLDS,  
HOWARD BRADSHAW, MOE McCUL-  
LOUGH, AUGUSTUS REEVES and LOUIS  
REEVES, all Directors of WASATCH  
MINES COMPANY, a Utah Corporation,  
and JAY W. JACOBSON, as Shareholder of  
Record in WASATCH MINES COMPANY,  
a Utah Corporation,

Plaintiffs-Respondents,

vs.

E. H. BACKMAN, WILLIAM HOPKINSON,  
C. W. LOVE, JOHN THOMPSON, L. L.  
COOK and EVA JACOBSON, Former Direc-  
tors of WASATCH MINES COMPANY, a  
Utah Corporation, and C. W. LOVE, Former  
Secretary-Treasurer of said WASATCH  
MINES COMPANY,

Defendants-Appellants.

CASE  
NO. 10149

## APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court  
for Salt Lake County  
Hon. Joseph G. Jeppson, Judge

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Defendants-Appellants.

**CASE  
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## APPELLANT'S BRIEF

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### NATURE OF THE CASE

This is an action involving an election contest of corporate directors of Wasatch Mines Company, a Utah corporation.

## **DISPOSITION IN LOWER COURT**

The matter was tried to the Court on an Order to Show Cause, and from a judgment for the plaintiffs, defendants appeal.

## **RELIEF SOUGHT ON APPEAL**

Defendants seek reversal of the judgment and judgment in favor of the defendants as a matter of law.

## **STATEMENT OF FACTS**

This matter involves a question of law and appellants believe that all of the facts essential to a complete disposition of the case by the Supreme Court are contained in the Court's order signed and entered under date of May 4, 1964, and are as follows:

On March 30, 1964, a special meeting of the stockholders of Wasatch Mines Company was regularly and duly held in Salt Lake City, Utah, for the called purpose of removing from office as directors, plaintiffs Jay W. Jacobson, Bryce Reynolds, Howard Bradshaw, Moe McCullough, August Reeves, and Gus Reeves and for the further purpose of electing a new board of directors.

At the time of the special meeting, there were issued and outstanding a total of 754,000 shares of the capital stock of the Company. Each share was entitled to one (1) vote.

There were a total of 682,316 shares represented at the meeting. Defendants and others voted 407,964 shares in favor of the removal and plaintiffs voted 274,352 against removal. At said meeting 407,964 shares were also voted for each of the following new directors: William Hopkin-

son, C. W. Love, L. L. Cook, John Thompson, C. C. Loose, Earl Blumenthal, and Eva Jacobson.

The plaintiffs took the position that the removal motion had failed to carry and they thereupon closed the meeting and refused to surrender the books and records of the Company.

Defendants brought an Order to Show Cause in an action which had been previously filed and which had been kept open pending the holding of the special meeting. After hearing on the Order to Show Cause, the Court entered the judgment from which this appeal is taken.

## **STATEMENT OF POINTS**

### **POINT I**

THE COURT ERRED IN HOLDING THAT THE PROVISION CONTAINED IN THE ARTICLES OF INCORPORATION OF THE COMPANY GOVERNS THE REMOVAL OF CORPORATE DIRECTORS ON THE FACTS OF THIS CASE.

## **ARGUMENT**

### **POINT I**

THE COURT ERRED IN HOLDING THAT THE PROVISION CONTAINED IN THE ARTICLES OF INCORPORATION OF THE COMPANY GOVERNS THE REMOVAL OF CORPORATE DIRECTORS ON THE FACTS OF THIS CASE.

The Articles of Incorporation of Wasatch Mines Company, with respect to removal of officers or directors, provide:

"Any of said officers or directors may be removed by a two-thirds vote of the stock represented at any meeting of the stockholders called for that purpose."

Applicable provisions of the Utah Business Corporation Act, effective January 1, 1962, relating to removal of directors, provide:

"16-10-37 REMOVAL OF DIRECTORS. At a meeting called expressly for that purpose, directors may be removed in the manner provided in this section. One or more directors or the entire board of directors may be removed, with or without cause, by a vote of the holders of a majority of the shares then entitled to vote at an election of directors.\* \* \* \*"

The above section must be read in conjunction with the following:

"16-10-136 GREATER VOTING REQUIREMENTS. Whenever, with respect to any action to be taken by the shareholders of a corporation, the articles of incorporation require the vote or concurrence of the holders of a greater proportion of the shares, or any class or series thereof, than required by this act with respect to such action, the provisions of the articles of incorporation shall control."

The question, then, is whether the statutory requirement, 16-10-37 of the Business Corporation Act, relating to removal of directors, which requires a vote of the holders of a majority of the shares then entitled to vote at an election of directors, or the provision in the articles of incorporation which provides that officers or directors may be removed by "two-thirds vote of the stock represented at any meeting of the stockholders called for that purpose,"

requires the concurrence of the greatest proportion of the shareholders and thus controls the election in question. Had the articles required the concurrence of two-thirds of the stock entitled to vote, then that would have required a greater proportion, and that provision would then govern.

The Articles of Incorporation contain no reference whatever to the quorum necessary to hold a meeting. Therefore, it is necessary to fall back on the general law which requires a majority of those entitled to vote, be represented in person or by proxy unless otherwise specified in the articles of incorporation or by-laws. (16-10-37). In Wasatch Mines Company there are 754,000 shares of stock outstanding, all of which would be entitled to one vote each at an election. A quorum would constitute any number in excess of 377,000 votes represented at the meeting. Under the formula provided in the Articles of Incorporation, two-thirds of that number would be all that would be necessary to remove a board of directors at a special meeting called for that purpose. It would thus be possible for voters totalling as few as 254,000 to meet the requirements of the Articles of Incorporation. Under the statute, more than 50% of the stock entitled to vote would be required for removal proceedings under any and all circumstances. Accordingly, under that requirement, 377,000 or more votes would be required in every event to remove the directors. While it would be possible, as it was in the instant case, to have a larger number of shares represented and thereby increase the number of votes required for the removal as provided in the Articles, such is not required by the Articles. Therefore, the statute which makes the



requirement for the greater proportion of the shares, in any event, should and does govern.

In an article entitled, "The Board of Directors Under the Utah Business Corporation Act," Utah Law Review, Volume 7, Number 4, Fall of 1961, at page 507, dealing with "removal", the following is found:

"Under the prior statute the power of removal could be delimited by the articles or the by-laws. In the absence of a specific provision in the articles or by-laws, the removal power was held by the holders of a majority of the outstanding stock. No reference was made whether just cause was necessary for removal.

"By virtue of Section 16-6-37 of the new code, shareholder control over the board has been significantly increased with respect to power to remove directors. The removal power is no longer subject to the articles or by-laws but is guaranteed to a majority of the shares by the statute.\*\*\*\*\*"

In **Roland Park Shopping Center vs. Hendler**, 206 Md. 10, 109 A 2d 752, the court held that a statute which permitted articles to require the vote of a "greater proportion" of shareholders than a majority, authorized a provision requiring a unanimous vote. This case is helpful because it shows that the statute would govern unless the article provision did, in fact, require a "greater" proportion of the votes than a mere majority.

**Ripan vs. Atlantic Mercantile Company**, 205 NY 442, 98 NE 855, involved a charter provision requiring unanimous vote of stockholders for an increase in the number of directors. The New York statutory law at that time provided that the number of directors might be increased

by a majority vote of the shareholders. Relying upon a section of law similar to Section 136 of the Utah Business Corporation Act, the court held that the charter provision was valid because it required the greater proportion of the voting power.

Corporations are creatures of statute and their charters and by-laws must conform to the will of the creating power. Even if 100% of the stockholders agree, a corporation may not write into a certificate of incorporation nor adopt in by-laws provisions contrary to applicable statutes. **Benintendi vs. Kenton Hotel**, 60 NE (2) 829.

In Model Business Corporation Act Annotated, volume 2, page 763, (published for the American Bar Association by Wise Publishing Company, 1960), the authors state:

“\*\*\*Statutes like section 136 of the Model Act make it clear that the articles of incorporation may require the vote or assent of a larger percentage of the shares than might otherwise be prescribed by statute. Section 136 does not contemplate that the articles may provide for a lower percentage, as do the statutes of a few jurisdictions.”

The statute is clear that the holders of a majority of the shares can remove directors unless the articles require a “greater proportion.” The articles require only two-thirds of the shares represented at the meeting. Under the Act it would take more than 377,000 votes in any case. Under the articles it would be possible to remove directors with as few as 254,000 votes. Therefore, the articles actually require a greater proportion of the shares, and the statute overrides the articles.

Here the defendants voted 407,964 shares, approxi-

mately 55% of the entire stock of the company, in favor of the ouster and for the election of the directors.

### CONCLUSION

The Supreme Court should declare that the plaintiffs were lawfully removed from office at the special meeting of March 30, 1964, and that the defendants were lawfully elected as directors, and were entitled to the books and records and to manage and control the affairs of the Company after that date.

Respectfully submitted,

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