

1964

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

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

JAY W. JACOBSON, BRYCE REYNOLDS, HOWARD BRADSHAW, MOE McCULLOUGH, 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 Directors of WASATCH MINES COMPANY, a Utah Corporation, and C. W. LOVE, Former Secretary-Treasurer of said WASATCH MINES COMPANY,

*Defendants-Appellants.*

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AUG 4 - 1964

Clerk, Supreme Court, U

Case No.  
10149

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

## RESPONDENT'S BRIEF

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Case No.  
10149

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## RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

The plaintiffs agree with the Statement of Facts set forth in Appellants' Brief except that plaintiffs desire to point out that the special meeting of the stockholders to remove the directors was called at the request of the appellants, who claim they represented over ten per cent of the outstanding stock in the company after it was adjudged by the trial court that the plaintiffs had been duly elected as directors of the company at the annual meeting held in June, 1963, and that the appellants had wrongfully refused to surrender the books and records of the company to the plaintiffs.

## ARGUMENT

### POINT I

THE TRIAL COURT PROPERLY HELD THAT THE ARTICLES OF INCORPORATION GOVERNS THE REMOVAL OF THE DIRECTORS OF THE COMPANY AT A SPECIAL MEETING CALLED FOR THAT PURPOSE.

The defendants have erroneously construed the statute relating to the removal of directors. It is contended by them that the Articles of Incorporation, which calls for a two-thirds vote of the stock represented at any meeting called for the purpose of removing directors, does not apply, in that Section 16-10-37 provides that the directors can be removed by a majority

of the outstanding shares of stock. This is an incorrect interpretation of the statute. It was the intention of the Legislature, and it has so been expressed in the Business Corporation Act, *that directors can be removed with the same number of shares as they can be elected, except where the Articles of Incorporation require a greater proportion of shares.* The Wasatch Mines Company had, at the time of the meeting, 754,000 shares outstanding. Under the statutes of the Business Corporation Act, a minimum of 189,000 and a maximum of 377,000 plus shares can remove the directors; but under the Articles of Incorporation, a minimum of 251,000 and a maximum of 478,000 shares can remove the directors. In either instance, the Articles of Incorporation require a greater proportion of the shares, not a lesser amount as defendants contend.

To properly support the above statement, it is necessary to restate the Articles of Incorporation and the statutes concerning the matter of removal of the directors of Wasatch Mines Company, italicising the parts of the Articles and the statutes which affect this matter.

Article XI, relating to removal of officers and directors, set forth in the Articles of Incorporation, reads as follows:

“Any of the 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.*”

Section 16-10-37, Utah Code Annotated, 1953, relating to removal of officers, reads as follows:

“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.*”

Section 16-10-136, Utah Code Annotated, 1953, reads as follows:

“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 of any class or series thereof, than required by this act with respect to such action, the provisions of the articles of incorporation shall control.*”

In Section 16-10-30, Utah Code Annotated, 1953, regarding quorum of shareholders, it is stated:

“Unless otherwise provided in the articles of incorporation or by-laws, a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If a quorum is present, *the affirmative vote of the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number or voting by classes is required by this act or the articles of incorporation or by-laws.*”

Section 16-10-31, Utah Code Annotated, 1953, regarding the voting of shares, reads as follows:

“A shareholder may vote either in person or by proxy executed in writing by the shareholder or his duly authorized attorney in fact.”

The above statutes should be read in conjunction with each other. Section 16-10-37 provides that the directors can 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 statute must, therefore, be read in conjunction with Section 16-10-30 Supra, which covers the manner in which directors are elected and provides that unless otherwise provided by the Articles of Incorporation, “*a majority of the shares entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders.* If a quorum is present, *the affirmative vote of the majority of the shares represented at the meeting* and entitled to vote on the subject matter shall be the act of shareholders unless the vote of a greater number . . . is required by this act or by the Articles of Incorporation or by-laws.” It is under Section 16-10-30 Supra that the board of Directors is elected. All that is required to hold a meeting and elect a Board of Directors under this statute is as follows:

1. There must be a quorum present, which consists of a majority of the stock, and in the instance of Wastach Mines, an excess of 377,000 shares.



2. The vote of the majority of the shares represented at the meeting must be affirmatively voted, and in the instance of Wasatch Mines, a vote of 188,000 shares are ample to elect a Board of Directors.

Section 16-10-37 provides that the directors can be removed by the holders of a majority of the shares entitled to vote at an election of directors, which means that they can be removed with the same number of shares as they are elected and, therefore, it is necessary to read this Section in conjunction with Section 16-10-30, which sets forth the quorum necessary to hold a meeting, which is as follows:

1. A quorum is a majority of the shares entitled to vote.

2. The affirmative vote of a majority of the shares represented at the meeting determines the failure or passage of a resolution to remove the directors.

To sum it up, the Board of Directors under the Business Corporation Act are elected and can be removed by a majority of the votes represented at the meeting called for that purpose. In each instance, directors can be elected or removed with 26% of the outstanding shares, and as already stated, it is possible to elect or remove directors of Wasatch Mines Company with a mere 188,000 shares.

In order to prevail, defendants urge to the court the theory that Section 16-10-37 provides that a majority of the outstanding stock must vote for removal of

directors. In other words, they claim that 377,000 plus shares out of the 754,000 outstanding shares must vote for removal. This contention is not in accordance with the statutory requirements. The statute requires a quorum of 377,000 plus shares must be present and 188,000 of these shares are ample to remove the directors. Had it been the intention of the Legislature to provide that in order to remove directors it would be necessary to vote more than the majority of the outstanding shares, it would have said so as it has done in the case of mergers of corporations, wherein it is stated that a majority of the outstanding stock of a corporation must vote in favor of the merger to be binding upon the stockholders. (Section 16-10-68, Utah Code Annotated, 1953).

We are in agreement with the defendants' statements and citations to the effect that it is legal and proper for a corporation to provide in its charter a requirement that a greater proportion of the shares may be voted. In this case, the Articles of Wasatch Mines specifically provide that the directors may be removed "by a two-thirds vote of the stock represented at any meeting of the stockholders called for that purpose." When the special meeting was called for the purpose of removing the directors, it was necessary to have the following:

1. A quorum. Since the Articles of Incorporation are silent on quorum, the statute will control, to wit, Section 16-10-30, which requires that there must be present in person or by proxy a majority of the out-

standing stock, to wit, 377,000 plus shares, in order to legally hold a meeting.

2. Two-thirds of the shares present must vote for the resolution for the removal of directors, otherwise the resolution will fail.

It is clear that the Articles of Incorporation require a greater proportion of the shares to bring about the removal of the directors. Assuming that 377,000 plus shares were present at the meeting, such number of shares being a quorum, 251,000 shares would have to be voted in order to remove the directors under the requirements of the Articles of Incorporation as against 188,000 shares under the statute.

In *Hinckley vs. Swaner*, 13 Utah 2d 93, 368 Pac. 2d, 709, the following language is stated in the footnote:

“Fletcher, Cyclopedia of the Law of Corporation (1952 Revised Volume), supra, note 1: “It is of the essence of all elections that the will of the majority shall govern.’ \* \* \* Such majority of those present is sufficient to elect directors or other officers, or to decide any question unless there is some express provision to the contrary. \* \* \*”; *Standard Power and Light Corp. v. Investment Associates*, 29 Del. Ch. 593, 51 A.2d 572 (1947); “Outstanding among the democratic processes concerning corporate elections is the general rule that a majority of the votes cast at a stockholders’ meeting, provided a quorum is present, is sufficient to elect Directors.”

Where the statute provides that a corporation may be dissolved “with the assent of three-fourths of the

stock represented at such meeting," the assent of three-fourths of the entire stock is not necessary. *Dreifus v. Colonial Bank & Trust Co.*, 48 So. 649.

A charter provision that it "may be amended by a vote of two-thirds at any regular or special meeting of the company" merely requires a favorable vote by two-thirds of the stock represented and voting at the meeting and not two-thirds of the outstanding stock. *Green v. Felton*, 42 2d App. 675, 84 N.E., 166.

Section 16-10-136 provides that with respect to any action to be taken by the stockholders of a corporation, if the Articles require the vote of a greater proportion of the shares than is required by the statutes, the provisions of the Articles of Incorporation shall control. It will be noted that this Section is found in the Miscellaneous Provisions of the Act and were intended to cover an observation made by the Dean of the Utah Law School, Daniel J. Dykstra, in a speech before the Bar Institute on the Business Corporation Act before the Act became effective, and speaking on the matter of the removal of directors, stated:

"Utah Code 16-10-37 provides that a director may be removed with or without cause by a vote of the majority of the shares entitled to vote at an election of directors, except in the case of directors elected under cumulative voting procedures or the holders of a special class of shares. This rule, unfortunately, makes directors in closely held corporations unduly vulnerable. An amendment is suggested to the effect that a

phrase be included that this is the method unless otherwise provided by the Articles or by-laws."

Section 16-10-136, Supra, is in line with the suggestion made by Dean Dykstra.

## CONCLUSION

In conclusion, plaintiffs claim that the meeting of March 30, 1964, called for the purpose of removing the present directors, was held in accordance with the law, that a quorum was present, but the defendants failed to vote two-thirds of the stock represented at the meeting in favor of the resolution for the removal of the directors and, therefore, the order of the court should be affirmed.

Respectfully submitted,

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