St. John's Law Review

Volume 23, November 1948, Number 1 Article 26

Amendment to the General Construction Law Relative to Quorum and Majority

Isador Liddie

"personal service *without* the state in lieu of publication," so that by merely driving outside of the city limits, he can accomplish what another could not by going to California, namely, evasion of personal service in lieu of publication. It is apparent that the new section was designed to relieve a plaintiff from the expenses of publication where there is only a small sum involved, the Municipal Court having jurisdiction only of actions where the amount involved is under $1,000,[35] by providing a cheaper means of service upon elusive defendants whose property is within the jurisdiction of the court. The publication statute was intended to apply to a large degree to defendants, departing or removing property from the *city*, with intent to evade service or defraud creditors. It is therefore quite probable that the new section, since it allows such personal service in all cases where publication is ordered, was intended to apply to persons without the city, whether within the state or not, there being no reason for any such restriction on its use. It is apparent, however, that the section as it now stands cannot apply to persons who remain within the state. Where words of a statute are as clear and unambiguous as they are here, no interpretation other than a strictly literal one can be given, especially in view of the many decisions which hold that provisions for methods of service other than personally within the jurisdiction are in derogation of the common law, and must be strictly construed.[36]

It is submitted that the effect of the section as it now stands is improperly and unnecessarily limited and that it should be amended by replacing the words *"without the state"* with the words *"without the city or without the state."*

MORTON S. ROBSON.

AMENDMENT TO THE GENERAL CONSTRUCTION LAW RELATIVE TO QUORUM AND MAJORITY.—Effective March 21, 1948, Section 41 of the General Construction Law defining the terms "quorum" and "majority" was amended on the recommendation of the Law Revision Commission [1] to read as follows:

> QUORUM AND MAJORITY. Whenever three or more public officers are given any power or authority, or three or more per-

---

[35] MUNIC. CT. CODE § 6.

[36] Korn v. Lipman, 201 N. Y. 404, 406, 90 N. E. 861, 862 (1911), wherein it is said: "The general rule in regard to the service of process . . . is that process must be served personally within the jurisdiction . . . . Substituted service when provided by statute is in derogation of such general rule, and, consequently, the directions thereof must be strictly construed . . . ." Erikson v. Macy, 231 N. Y. 86, 131 N. E. 744 (1921); Rome Trust Co. v. Cummings, 123 Misc. 884, 206 N. Y. Supp. 728 (Sup. Ct. 1924).

[1] N. Y. LAW REVISION COMMISSION REPORT, LEGIS. DOC. No. 65(H) (1948).

> sons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of *the whole number* of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, *shall constitute a quorum and not less than a majority of the whole number* may perform and exercise such power, authority or duty. *For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.*[2] (Amended matter in italics.)

The purpose of the amendment was to clarify an ambiguity as to the number of votes required for the exercise of the powers conferred upon public bodies of three or more members. It was the rule at common law that, when the power to act was conferred by statute upon several persons, all were required to act before the power could be exercised.[3] The rule requiring action by all was too rigid, however, to meet the exigencies of modern times. The plain purpose of Section 41, as originally enacted,[4] therefore, was to abrogate the common law rule, the section permitting three or more public officers given any power or authority, whether acting as a group, an unincorporated board, or as a corporate body, to act through a majority of a quorum. The salutary effect of the old Section 41 was indisputable. The fact remains, however, that this section was in derogation of the common law rule, and the tendency of courts has always been to construe such statutes strictly.[5] The legislative intent should therefore be manifested in unmistakable language, leaving little room for judicial interpretation. Careful perusal of the old statute reveals rather glaring deficiencies in language creating problems of construction, some of which are worthy of mention. Through an evaluation of the old statute, the needed legislative reform can be more readily perceived. Section 41 formerly read:

> QUORUM AND MAJORITY. Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, *a majority*

---

[2] Laws of N. Y. 1948, c. 320.

[3] People *ex rel.* v. Nostrand, 46 N. Y. 375 (1871). The court there held that where a vacancy existed among commissioners, the power of the remaining commissioners was suspended until an appointment should be made. *See* Morris v. Cashmore, 253 App. Div. 657, 3 N. Y. S. 2d 624 (1st Dep't 1938).

[4] Laws of N. Y. 1892, c. 677.

[5] Burnside v. Whitney, 21 N. Y. 148 (1860); People v. Schaller, 224 App. Div. 3, 229 N. Y. Supp. 492 (1st Dep't 1928).

of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and *if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting,* a majority of the *whole number* of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, *if not less than a majority of the whole number of such persons or officers* may perform and exercise any such power, authority or duty. (Ambiguous matter in italics.)

Let us consider these phrases separately. What is meant by the statutory phrase, "a majority of *all* such persons or officers"? If a town board consists of five members, but one office is vacant and one member is disqualified, can two of the remaining elect a person to fill the vacancy? In *Matter of Crosby v. Van Valkenburgh* [6] it was necessary to resort to Section 41 of the General Construction Law in an effort to clarify Section 64(5) of the Town Law. The court there answered this question in the negative. In that case the court correctly argued that Section 41 of the General Construction Law applies only in the absence of some governing statute to the contrary, as the General Construction Law itself so provides.[7] This phrase now reads, "a majority of *the whole number* of such persons or officers." In order to make the meaning of this phrase absolutely clear, the new statute adds another sentence, "For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting." This latter phrase removes also the third ambiguity referred to above. With respect to the words, "a majority of the *whole number* of such persons or officers shall be a quorum," the same question presented itself, namely, did the statute mean the total number of qualified and acting incumbents or did it refer only to the number of persons required to constitute the full membership of the particular board or body? By definition a quorum is such a number of the officers or members of any body as is competent by law or constitution to transact business.[8] It has been held that there are two rules as to a quorum in legislative

---

[6] 178 Misc. 746, 36 N. Y. S. 2d 301 (Sup. Ct. 1942).

[7] N. Y. GEN. CONST. LAW § 110 provides: "Application of chapter. This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter."

[8] BLACK, LAW DICTIONARY (3d ed. 1933).

bodies: [9] one where the quorum is fixed by the power creating the body, in which it is clearly unnecessary to resort to the General Construction Law, and the other where the quorum is not fixed by such power, in which case the general rule is that a quorum is a majority of all the members. To illustrate the ambiguity of the phrase under discussion: If the authorized membership of a board is nine, but actually there are only seven qualified members, would four, a majority of the qualified members, or five, a majority of the authorized members, constitute a quorum? Under the new statute there can be no doubt that the answer is five.

The clause which reads "if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting," also posits a number of problems. A literal reading of the provision might be construed to mean that a majority of the whole number shall constitute a quorum only in the event that one or more of such persons shall have died, become insane, or refused or neglected to attend. Assume a board to consist of seven members, three of which have become disqualified. All seven members attend a meeting. Manifestly none of the members are dead or mentally incapable, nor have they neglected or refused to attend. The argument might well have been raised that, in this situation, the statute failed to define a quorum because none of the conditions of the "if" clause existed. On the other hand, a different function might have been ascribed to the "if" clause. It is possible that the legislative intent was not to count among the "whole number" those who were dead, mentally incapable or refused or neglected to attend. Although it is unlikely that this actually was the intent of the legislature, as such interpretation would permit one to act alone if all the other members neglected to attend, the statute was nevertheless open to that construction in its original form. This phrase has now been entirely eliminated from the section, being replaced by more precise wording, as follows: ". . . a majority of the whole number of such persons or officers, at a meeting duly held . . . shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty."

Finally, the statute provided that a majority of the quorum "if not less than a majority of the whole number" may act. Assume a board of seven members. Four members would constitute a quorum. Would a vote of three or four be requisite for binding action? [10]

---

[9] Cleveland Cotton Mills v. Commissioners of Cleveland County, 108 N. C. 678, 13 S. E. 271 (1891).

[10] In Erie Railroad Co. v. City of Buffalo, 180 N. Y. 192, 197, 73 N. E. 26, 28 (1904), the court said, "According to the rules which govern corporate bodies, and deliberative or elective assemblies composed of a definite number of persons, a majority of the whole number is necessary to constitute a legal meeting, and the number necessary to constitute a quorum remains the same even though there may be vacancies in the membership."

The issue was squarely presented to the court in *Matter of Talbot v. Board of Education of City of New York.*[11] In that case the court held that, where seven members comprised the Board of Education, and of the seven only four were present at a meeting, one of the four not voting, the striking out of certain specific items from the budget on the votes of the remaining three present was invalid as contravening Section 41 of the General Construction Law. *Greene v. Goodwin Sand & Gravel Co.*[12] is also a case in point. There the defendant, a gravel company, applied to the Highway Commissioners for discontinuance of 2,000 feet of a highway. By a majority vote the commissioners declared the highway abandoned. Application was then made to the Town Board, whose consent was necessary to authorize the action. This board consisted of six members, two of whom declined to participate while a third was away. Only three were qualified to vote, one less than a majority. The court held that, inasmuch as the required number of persons necessary to make a quorum had not participated at the meeting, the consent was ineffectual for binding action. This phrase has also been removed from the new statute as the new definition is complete without it.

While it is true that courts have almost uniformly handed down decisions which were apparently consistent with the legislative intent, as indicated by the cases cited, so that the present amendment is generally a codification of the previous interpretation of the statute, the fact remained that the statute itself should be easily susceptible of but one interpretation both by lawyers and by those public officials who are wanting in legal training and who are often called upon to construe this section. It is submitted that the new Section 41 attains this objective. The words "quorum" and "majority" are simply defined and easily understood. It would seem that the amended section has effectively dissipated the clouds of uncertainty and ambiguity which formerly enveloped the statute and has removed the last vestiges of doubt as to legislative intent occasioned by the loose and cumbersome phraseology of the old statute, thus reducing the necessity for much future litigation.

ISADOR LIDDIE.

AMENDMENT TO DOMESTIC RELATIONS LAW RELATIVE TO DISSOLUTION OF MARRIAGE FOR INCURABLE INSANITY.—At common law a marriage with a lunatic was void, not merely voidable.[1] The rationale of this rule was that an insane person was not capable of

---

[11] 171 Misc. 974, 14 N. Y. S. 2d 340 (Sup. Ct. 1939).
[12] 72 Misc. 192, 129 N. Y. Supp. 709 (Sup. Ct. 1910).
[1] 1 BL. COMM. 438; Wightman v. Wightman, 4 Johns. Ch. 343 (N. Y. 1820); Winslow v. Troy, 97 Me. 130, 53 Atl. 1008 (1902); Floyd County v. Wolfe, 138 Iowa 749, 117 N. W. 32 (1908).