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Corporations--Right of a Stockholder to Purchase Treasury Stock (Hammer v. Werner, Smith, etc., 239 App. Div. 38 (2d Dept. 1933))

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The necessity of proof beyond a reasonable doubt lies only in purely criminal actions.[2] Filiation proceedings are merely quasi-criminal[3] and, hence, the rule does not apply. Generally, in civil actions a preponderance of proof is adequate.[4] In certain types of civil proceedings, such as cases involving fraud, undue influence, or to establish lost deeds or wills, it has been a long-established rule, in other jurisdictions, that "clear and convincing proof" is required.[5] However, the courts in New York have not gone so far; a fair preponderance of the evidence is all that is necessary even in such cases.[6] The phrase "entirely satisfactory," in the instant case, should be construed to mean a genuine belief as to the truth of the allegation. The necessity for more than the mere preponderance of evidence arises from the nature of the case. The charge is easily made but difficult to refute, and the verdict against the defendant carries serious consequences in its wake.

Bastardy proceedings are neither civil nor criminal suits but partake of both. The amount of proof necessary lies similarly between the requirements of these actions. The Court has indicated where this middle ground lies.[7]

J. D. G.

CORPORATIONS—RIGHT OF A STOCKHOLDER TO PURCHASE TREASURY STOCK.—Plaintiff had owned 636 shares in a corporation of which defendants were officers and directors. Subsequently, said company purchased from various stockholders 2,130 shares of its outstanding stock, such as plaintiff was holding, which were "turned into the treasury." Of this block, 445 shares were offered and sold to stockholders in ratable proportions, the balance, the defendants secretly turned over to themselves at an inadequate price to control the voting rights in the election of directors. Afterwards, the entire stock of the company was purchased by another corporation. Plaintiff contends that he has been deprived by the defendants of a portion of the purchase price under circumstances constituting a breach of the fiduciary relationship owing to him as stockholder. The lower court dismissed his complaint. On appeal, *held reversed,* that defen-

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[2] Kurz v. Doerr, 180 N. Y. 88, 72 N. E. 926 (1904); 5 WIGMORE, EVIDENCE (2d ed. 1923) 472.

[3] People, *ex rel.* Mendelovich v. Abrahams, 96 App. Div. 27, 88 N. Y. Supp. 924 (1st Dept. 1904).

[4] Stearns v. Fields, 90 N. Y. 640 (1882); Seybolt v. N. Y., L. E. & W. Ry. Co., 95 N. Y. 562 (1884); 5 WIGMORE, EVIDENCE (2d ed. 1923) 470.

[5] 5 WIGMORE, EVIDENCE (2d ed. 1923) 473, 474.

[6] Roberge v. Bonner, 185 N. Y. 265, 77 N. E. 1023 (1906).

[7] Instant case.

dants have breached their fiduciary obligations to stockholders, for which violation plaintiff has a personal action, even though at the time of bringing this action he had disposed of his stock. *Hammer* v. *Werner, Smith, etc.*, 239 App. Div. 38, 265 N. Y. Supp. 172 (2d Dept. 1933).

The general rule is that a stockholder has a pre-emptive right to purchase the stock of his corporation only where there is an increase of capitalization and a new issue floated.[1] But, ordinarily, no right exists where stock is issued for services to purchase property for the benefit of the corporation or to effect a consolidation.[2] Neither has a stockholder a pre-emptive right to unissued authorized stock [3] or to treasury shares.[4] In these cases, shares may be issued by the directors for full value and in good faith without first offering them ratably to existing shareholders.[5] But circumstances may exist, as in the instant case, where a denial of this right is prejudicial to stockholders and amounts to a breach of the fiduciary obligations of a director of a corporation to its stockholders.[6] However, a stockholder cannot maintain a personal action against directors for the wrong done to the corporation merely because the indirect result is the diminution in the value of his shares.[7] The injury done is then, primarily, to the stockholders collectively and must be redressed through the corporation.[8] However, where wrongdoers are in control, or the corporation in bad faith refuses to sue, a stockholder may bring an action in its

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[1] Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090 (1906); Dunlay v. Avenue M Garage and R. Co., 253 N. Y. 274, 170 N. E. 917 (1930); Way v. American Grease Co., 60 N. J. Eq. 263, 47 Atl. 44 (1900).

A number of corporations have provided for a waiver of this right in their certificate of incorporation or by-laws. An example of this denial of pre-emptive rights is the provision in the certificate of incorporation of the General Motors Corp. that, "No holder of stock of the corporation of whatever class shall have a preferential right of subscription * * *."

[2] Stokes v. Continental Trust Co., *supra* note 1; Bond v. Atlanta Terra Cotta Co., 137 App. Div. 671, 122 N. Y. Supp. 425 (1st Dept. 1910); Archer v. Hesse, 164 App. Div. 493, 150 N. Y. Supp. 296 (1st Dept. 1914); Bonnett v. First Nat'l Bank, 24 Tex. Civ. App. 613, 60 S. W. 325 (1900).

[3] Borg v. Int'l Silver Co., 11 F. (2d) 143 (C. C. A. 2d, 1926); Dunlay v. Avenue M Garage and R. Co., *supra* note 1; Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130 (1902); Morawetz, *Pre-emptive Right of Shareholders* (1928) 42 HARV. L. REV. 197.

[4] Borg v. Int'l Silver Co., *supra* note 3; Morawetz, *supra* note 3; Frey, *Pre-emptive Rights* (1929) 38 YALE L. J. 563.

[5] *Supra* notes 3 and 4.

[6] Snelling v. Richard, 166 Fed. 635 (C. C. A. 2d, 1909); Stokes v. Continental Trust Co., *supra* note 1; Whitaker v. Kilby, 55 Misc. 337, 106 N. Y. Supp. 511 (1907), *aff'd*, 122 App. Div. 895, 106 N. Y. Supp. 1149 (4th Dept. 1907); Way v. American Grease Co., 60 N. J. Eq. 263, 47 Atl. 44 (1900).

[7] Niles v. N. Y. C. & H. R. R. R. Co., 176 N. Y. 119, 68 N. E. 142 (1903); General Rubber Co. v. Benedict, 215 N. Y. 18, 109 N. E. 96 (1915); Converse v. United Shoe Mach. Co., 209 Mass. 539, 95 N. E. 929 (1911).

[8] Niles v. N. Y. C. & H. R. R. R. Co., *supra* note 7; General Rubber Co. v. Benedict, *supra* note 7; MORAWETZ, PRIVATE CORP. (2d ed.) §§276, 277.

behalf.[9] Such rights of derivative character are inherent in the stock and pass on its conveyance.[10] It is only, as in the instant case, where the wrong moves directly that an independent action lies.[11] Plaintiff's action arose when defendants, by acts amounting to a breach of fiduciary duties, decreased his proportionate voting power and corporate control. And the action continues even though he is no longer a stockholder and despite the right of a present stockholder to redress the wrong in a derivative action.[12]

A. A. M.

CORPORATIONS—WHEN DOING BUSINESS IN FOREIGN STATE—SERVICE OF SUMMONS.—Defendant corporation was sued in New York for unpaid interest on its bonds and summary judgment was granted. Its president, in order to withhold final judgment in said action, arranged a conference with the plaintiff in that action, a resident of Wisconsin. While in conference, said president was served with summons and complaint addressed to the corporation to answer action instituted by bondholders for unpaid interest on bonds. Although the company had its principal place of business in New York, it was shown that it sold goods in Milwaukee through a subsidiary corporation. Plaintiff sought a writ in the Supreme Court of Wisconsin to restrain the suit on the ground of lack of jurisdiction. The petition being denied, plaintiff appealed. *Held,* the corporation was not suable in that state, since it was not "doing business" there as required for service of summons. *Consolidated Textile Corp.* v. *Gregory,* — U. S. —, 53 Sup. Ct. 529 (1933).

In order to hold the corporation suable in a foreign state it is necessary to show that the corporation is "doing business" in that state at the time of service of process.[1] Although the degree of business sufficient to subject it to service of process be less than that

[9] Hawes v. Oakland, 104 U. S. 450 (1881); Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520 (1899); Witherbee v. Bowles, 201 N. Y. 427, 95 N. E. 27 (1911); Continental Security Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138 (1912).

[10] Hanna v. Lyon, 179 N. Y. 107, 71 N. E. 778 (1904); Thompson v. Stanley, 73 Hun 248, 25 N. Y. Supp. 890 (1893); Fitchett v. Murphy, 46 App. Div. 181, 61 N. Y. Supp. 182 (2d Dept. 1899).

[11] Stokes v. Continental Trust Co., *supra* note 1; Von Au v. Magenheimer, 126 App. Div. 257, 110 N. Y. Supp. 629 (2d Dept. 1908), *aff'd,* 196 N. Y. 510, 89 N. E. 114 (1908); General Rubber Co. v. Benedict, *supra* note 7.

[12] Rothmiller v. Stein, 143 N. Y. 581, 38 N. E. 718 (1894); Von Au v. Magenheimer, *supra* note 11.

[1] International Harvester Co. v. Kentucky, 234 U. S. 579, 34 Sup. Ct. 944 (1914); Scheinman v. Bonwit Teller & Co., 132 Misc. 311, 229 N. Y. Supp. 783 (1928).