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Notes and Comments

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NOTES AND COMMENTS

Divorce *in absentia* Upon Deposition

The conduct of litigation in wartime is not without attendant difficulties. To protect the rights of defendants whose enforced absence on military service would hamper an adequate defence, Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1940.[1] That statute, however, was not primarily intended to supply aid to the service-man plaintiff who is likewise necessarily absent. In the average case no special aid is needed since that plaintiff may leave his affairs in the hands of an attorney-in-fact and may supply all necessary personal testimony through the form of depositions.[2] Personal attendance of the plaintiff at the trial, customary under ordinary conditions, is not a requisite and may well be dispensed with. In one special situation, however, the enforced absence of the plaintiff presents a serious hinderance to the preservation or enforcement of his rights and that is in the case of suit for absolute divorce in which the default of the defendant has been taken.

Local court rules, adopted prior to the present conflict, forbid the granting of divorce unless the plaintiff is physically present in the courtroom at the hearing of such case.[3] The slight inconvenience caused by such rules in normal times becomes an almost insurmountable burden when the plaintiff, compelled by his residence to use such court,[4] is obliged thereby to be present in court at a time when his military duties force him to be elsewhere, perhaps overseas. By reason of such unfortunate impasse, unless presence can be dispensed with and testimony be supplied by deposition as in other civil cases, the marital status of the parties, with its attendant duties, must go unchanged until more favorable circumstances permit.

Attacks have been made upon such rules, at least in the nisi prius courts, in an effort to relieve the tension. The burden of all such assaults has been that a violation of the constitutional guarantee calling for the granting of justice promptly and without delay has occurred.[5] Despite such criticism, the nisi prius judges in Cook County appear to have adhered to the position disclosed by their rules and have refused to accept either the plaintiff's deposition or the testimony of other witnesses in the plaintiff's absence.[6] The charge that such action amounts to an affront

1 50 U.S.C.A. § 501, et seq.

2 Ill. Rev. Stat. 1943, Ch. 51, § 26, makes special provision for the taking of depositions of service men.

3 See Rule 60, § 4, of the Circuit Court of Cook County, effective January 1, 1934; Rule 60, § 4, of the Superior Court of Cook County, effective November 15, 1937. The text of the rules is set out at note 12, post.

4 Ill. Rev. Stat. 1943, Ch. 40, § 6.

5 Ill. Const. 1870, Art. II, § 19.

6 See newspaper accounts of the action taken in the nisi prius courts in the cases of Kinsley v. Kinsley (Superior Court of Cook County), Chicago Daily Tribune of January 21, 1944, and of Scherenberg v. Scherenberg (Circuit Court of Cook County), Chicago Daily Tribune of January 27, 1944.

upon the state constitution is a serious one, but an understanding of the fundamental situation underlying such rules should reveal the soundness of the judicial position and should operate to negative any impression that the nisi prius judges are lacking in sympathy with the plight of service men unable to comply therewith.

There can be no question of the general power of the courts to adopt rules governing proceedings before them since affirmative grant to that effect appears in the Illinois statutes.[7] Even independently of statute, courts possess an inherent power to adopt rules[8] provided the same are uniform in operation and not contrary to the constitution and the statutes of the state.[9] Such rules as may be adopted will be upheld if they are reasonable,[10] and will possess the binding force of law both on the courts and upon the litigants conducting proceedings therein.[11]

The specific rule in question, identical in both the local courts having jurisdiction of divorce cases, reads as follows: "No decree of divorce in any case will be granted upon the unsupported testimony of the plaintiff or without the appearance of the plaintiff in open court."[12] Certainly, no criticism can be directed to the first clause thereof as the same merely restates the mandate of the Illinois statute concerning divorces. That statute, since 1874, has provided that: "If the complaint is taken as confessed the court shall proceed to hear the cause by examination of witnesses in open court, and in no case of default shall the court grant a divorce, unless the judge is satisfied that. . .the cause of divorce has been fully proven by reliable witnesses. . . ."[13] The reiteration of the word "witnesses" therein even gives emphasis to the rule in question, while the requirement that the divorce hearing shall take place in open court was once declared to have been enacted to put an end to the practice of referring such causes to a master in chancery.[14] That practice had given rise to much scandal and gave Chicago a reputation for being a Mecca attractive to disgruntled and dissatisfied married people where divorce could be speedily and secretly accomplished.

The second clause of the rules under consideration merely serves to carry out the policy of that statute, for courts hearing divorce cases do not exercise an unlimited discretion to grant divorces whenever they may deem it expedient or desirable. Their power to act is derived from the stat-

7 Ill. Rev. Stat. 1943, Ch. 37, § 72.25 and § 72.28.

8 Koch v. Dickinson, 152 Ill. App. 413 (1910); People v. Conzo, 307 Ill. App. 169, 30 N.E. (2d) 106 (1940).

9 People v. Davis, 357 Ill. 396, 192 N.E. 210 (1934).

10 Chicago Title & Trust Co. v. Core, 126 Ill. App. 272 (1906), affirmed in 223 Ill. 58, 79 N.E. 108 (1906).

11 Feldott v. Featherstone, 290 Ill. 485, 125 N.E. 361 (1919); People ex rel. Chicago Bar Association v. Feinberg, 348 Ill. 549, 181 N.E. 437 (1932); Kelley v. United Benefit Life Ins. Co., 275 Ill. App. 112 (1934).

12 Rule 60, § 4. The text is identical for both the Circuit and the Superior Court of Cook County.

13 Ill. Rev. Stat. 1943, Ch. 40, § 9.

14 Hall v. Hall, 201 Ill. App. 589 (1916).

ute and they must conform strictly to its provisions.[15] At the same time, they bear a responsibility to the public when passing upon such cases for the public, as well as the immediate parties, is concerned in every marriage and its dissolution.[16] Such responsibility was emphatically declared by the Illinois Supreme Court, in the case of *Decker* v. *Decker*,[17] where the court said that the separation of married persons by decree "concerns. . . the people, the public morals, the prevailing system of social order, and, in a greater or lesser degree, the welfare of every citizen. These interests are not represented by either of the parties to a divorce proceeding, but the law has not left them unprotected. It is within the power of the chancellor of whom a decree of divorce is asked to stand as a representative of the public, and, in a proper case, to refuse to grant the decree though the grounds of such refusal be without the issues made by the pleadings of the parties."[18] For this reason, the statute regarding divorce has been held to vest a considerable degree of discretion in the Chancellor, both with regard to the degree of proof and other matters.[19]

Upon this basis, the balance of these rules would seem to be designed to provide the Chancellor with the means of exercising such discretion by giving him an opportunity to make any and every necessary investigation in order to protect the interests of the public. The Chancellor is enabled, by requiring the presence of the plaintiff along with other witnesses in open court, to ascertain the bona fides of the case. Through intelligent questioning of the plaintiff he is enabled to verify matters concerning residence and domicile as well as facts concerning the ground of divorce relied upon. It is not disputed that the plaintiff may establish a *prima facie* case by other witnesses than himself, but such interrogation will provide the basis for the exercise of discretion and enable the judge to be "satisfied . . .that the cause of divorce has been fully proven by reliable witnesses."[20] The policy evident in the statue would seem, therefore, to be aided and reinforced by the rules in question.

Whether or not depositions will serve as an available means of proof in divorce cases has been an even more vexing question. The requirement of the statute is that the cause shall be heard "by examination of witnesses in open court."[21] By reason of such language, it was held in *Suesemilch* v. *Suesemilch*[22] that the testimony of one witness in open court and the introduction of the deposition of another witness was insufficient compliance with the statute. A decree based on such testimony was reversed. No doubt was cast upon that holding until, in the case of *Hazard* v. *Haz-*

15 Thomas v. Thomas, 51 Ill. 162 (1869); Trenchard v. Trenchard, 245 Ill. 313, 92 N.E. 243 (1910); Floberg v. Floberg, 358 Ill. 626, 193 N.E. 456 (1934).

16 See article by Hon. John C. Lewe entitled "When the Tide Turns," in 25 Chicago Bar Record 367 (1944).

17 193 Ill. 285, 61 N.E. 1108 (1901).

18 193 Ill. 285 at 287, 61 N.E. 1108.

19 Lorenz v. Lorenz, 93 Ill. 376 (1879).

20 Ill. Rev. Stat. 1943, Ch. 40, § 9.

21 Ibid.

22 43 Ill. App. 573 (1892).

ard,[23] the court sustained a decree of divorce against attack by bill of review. Among the grounds relied upon for review was the fact that, while one witness had testified in open court, the testimony of the other witness was given in the form of a deposition. When holding that the bill of review was properly dismissed, the court placed principal emphasis upon the laches of the plaintiff. It did say, however, that: "A witness heard by deposition is as much heard in open court as is one who appears in person before the court . . . equal effect is to be accorded to the testimony of witnesses produced by deposition as to those produced in open court and testifying *viva voce*. . . ."[24]

Such statement would be unquestionable in any ordinary proceeding. In fact, the disposition of cases under the old equity practice called for no other testimony than that evidenced in the form of the sworn pleadings or that provided by depositions taken out of court. The fallacy of the statement, however, lies in the fact that a divorce case is not an ordinary proceeding in equity. The entire basis for jurisdiction in such cases is statutory, the procedure therein is expressly regulated by statute,[25] and is subject to whatever special requirements the legislature may see fit to impose. One such requirement is the one above mentioned calling for the examination of witnesses in open court.[26] Inasmuch as the Chancellor, in the absence of a demand for jury trial,[27] must decide all questions of credibility and the weight to be given to the testimony, he should be in a position to observe the witnesses as they testify so as to judge the fairness or falsity of their evidence. If he is to be denied such opportunity and be confined to written depositions, he will be unable to perform his true function. For such reasons, depositions as a substitute for oral testimony should not be regarded as acceptable.

The language of another section of the court rules under consideration would seem to sanction the practice of using depositions, but it is subject to an important qualification that should not be overlooked, to-wit: depositions cannot be taken except where the use thereof is "permitted by law."[28] Matrimonial causes not infrequently involve other related matters such as the division of property rights, custody of children, determination of alimony, and the like. In such cases and as to those points, the Chancellor is dealing with an ordinary proceeding. No objection can, therefore, exist to the use of depositions on such issues for any form of legal proof would be available. The statutory requirement, reiterated in the rule of court, of *viva voce* testimony on the issue of whether or not a divorce should be granted, ought to be regarded as the only form of testimony permissible.

23 205 Ill. App. 562 (1917).
24 205 Ill. App. 562 at 569.
25 Ill. Rev. Stat. 1943, Ch. 40, § 7.
26 Ibid., § 9.
27 Ibid., § 8.
28 Rule 60, § 3, identical in both courts, reads in part: " . . . All testimony in any such case shall be taken by examination of witnesses in open court, except where the use of depositions otherwise taken is permitted by law."

Divorce upon deposition, granted in the absence of the plaintiff, smacks too much of the mail-order divorce so frequently condemned by juristic writers. It is hoped that the unfortunate circumstances of war will not influence the courts to change rules possessing such substantial social value.

W. F. ZACHARIAS

SHOULD "PROPER PURPOSE" AFFECT SHAREHOLDER'S RIGHT OF INSPECTION?

When business first began to keep books and records it engendered a problem which still tends to harass the courts, to-wit: by whom and under what circumstances may such records be examined. Appendant to that problem is the subordinate one as to the procedural means which may be utilized to enforce the right of inspection, assuming that one exists.[1] In the case of the individual proprietorship little dispute can exist since the proprietor, as owner of the records, can exert full dominion over the same.[2] Much the same doctrine exists in the case of the partnership,[3] although the partner's use of information obtained by an inspection thereof may be subject to limitation.[4]

In the case of the joint stock company,[5] and of the chartered corporation, however, the problem is not so simple particularly since the shareholder, pursuant to the entity theory of separate personality, is not the owner of the company records. The nature of the relationship existing between the shareholder and the corporation, though, entitles the former, as a matter of right, to have access to the books and the things contained therein. Such right is founded upon the necessity of self-protection for the investor whose capital has been risked in the enterprise and who has legitimate concern in its profitable and honest employment.

The principal difficulty in that regard has arisen not so much in connection with the right of inspection as in the manner of its enforcement. Attempts to arrive at adjustment between the shareholder and the corporation, or more precisely its management, without placing hindering limitations in the path of the one nor subjecting the other to burdensome

1 No consideration is herein given to the right of third persons, including governmental agencies, to use inquiry or subpoena for the purpose of obtaining information necessary for taxation, for criminal prosecution, for evidentiary purposes, and the like.

2 For the right to use judicial process to obtain the same, see Di Angeles v. Scauzillo, 287 Mass. 291, 191 N.E. 426 (1934). Upon death of the proprietor, the legal representative succeeds to the same right: Moore v. Brandenburg, 248 Ill. 232, 93 N.E. 733 (1911).

3 In Sanderson v. Cooke, 256 N.Y. 73 at 78, 175 N.E. 518 at 520 (1931), the court said: "The general rule regarding business partnership books is that the books should be kept, open to the inspection of any partner at all reasonable times, even after dissolution, subject, however, to special agreement." See also Albee v. Wachter, 74 Ill. 173 (1874).

4 Trego v. Hunt [1896] A.C. 7; Chamberlain v. Hemingway, 97 Conn. 156, 115 A. 632 (1921).

5 In re Hatt, 108 N.Y.S. 468 (1907).

probings, have met with varied success. Such attempts have ranged from the use of the common law writ of mandamus to compel inspection, through statutory recognition of an absolute right thereto, to the imposition of penalties for an improper denial thereof. Yet through none of these, nor any combination of them, have the rights of the respective parties been readily accommodated. The principal stumbling block lies over the question whether the shareholder should be obliged to show a proper purpose for his contemplated examination or whether the corporation should be obliged to justify its refusal to permit examination on the ground that the same is sought from improper or unlawful motives.

The recent holding of the Illinois Supreme Court, in *Morris* v. *Broadview, Inc.*,[6] indicates that the former of these views is the one to be followed in this state. A peremptory writ of mandamus granted the petitioner therein had required the corporate directors and the trustees under a voting trust agreement to permit petitioner, owner of a certificate of beneficial interest for more than six months prior to demand, to examine and make copies of certain corporate records and of the list of holders of beneficial interests in the outstanding capital stock.[7] An appeal from such order was predicated on the ground that while the petitioner had alleged that his purpose was proper and lawful, still he had offered no proof on that point hence had not made out a case justifying the issuance of the writ. Such contention was countered by petitioner's argument that (1) such proof was required only of one who had not held stock for at least six months preceding the demand or who held less than five per cent. of all outstanding stock,[8] or (2) that the burden was on the respondent to plead and prove that the purpose was improper or unlawful, as facts of that character would constitute an affirmative defence.[9] The issues thus squarely raised were answered when the court, reversing the judgment granting the writ, decided that the pertinent provision of the Business Corporation Act[10] applied to all shareholders, regardless of the size or duration of the holding, and that the burden of proof was on the petitioning shareholder.

At common law, the right of examination had to be asserted in good faith, for a proper purpose, and at a reasonable time, hence would not be enforced for speculative purposes or if its exercise appeared hostile to

6 385 Ill. 228, 52 N. E. (2d) 769 (1944), reversing 317 Ill. App. 436, 46 N. E. (2d) 174 (1943).

7 No point appears to have been made that plaintiff, not being a record holder of stock in the corporation itself, had no right to examine the records. According to the holding in Babcock v. Chicago Rys. Co., 325 Ill. 16, 155 N.E. 773 (1927), such right does not accrue to the holder of beneficial interest certificates under a voting trust. Right of inspection of the records of the voting trustees was preserved by the trust agreement in the instant case, which assimilated such right to that enjoyed by corporate shareholders: 385 Ill. 228 at 229, 52 N.E. (2d) 769 at 770.

8 Ill. Rev. Stat. 1943, Ch. 32, § 157.45.

9 Ill. Rev. Stat. 1943, Ch. 110, § 167, requires that certain defenses be pleaded in affirmative fashion. Though the instant problem is not specifically named therein, it might be covered by the reference to defenses which are likely to surprise.

10 Ill. Rev. Stat. 1943, Ch. 32, § 157.45.

the corporation. It was not presumed, though, that the motive was improper unless challenge was directed to that point, whereupon the burden was on the shareholder.[11] The extra-ordinary remedy of mandamus was available to vindicate the right, but, unlike habeas corpus, the writ did not issue as a matter of absolute right,[12] hence would not be granted to gratify idle curiosity. The petitioner was obliged to have some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired.[13]

As corporations expanded in number, size, and in power, this right of inspection of the corporate books by the individual shareholder became even more important. Most states, therefore, made specific provision by statute for a more convenient enforcement of the right. Of this type was the act adopted by the Illinois legislature in 1872. It provided that the books of account of all the business of a corporation were open to inspection by the stockholder at all reasonable times.[14] The purpose of such statute was not merely to restate the common law but was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right and with a view to protect small and minority shareholders against the power of the majority.[15]

Since the writ of mandamus had been regarded as a discretionary one, there was some confusion in Illinois, as to where the burden of proof did rest after the passage of the statute. For a while the courts wavered on that point for in one case it was intimated that the court had power to deny mandamus,[16] while in *Rodger Ballast Car Company* v. *Perrin*[17] it was declared that the right could not be inquired into. Other cases, however, finally settled the point. Thus, in *Maremont* v. *Old Colony Life Insurance Company*,[18] it was held that the right of a shareholder could not be denied by the corporation on the ground that he had an unlawful or improper purpose for inspecting the books. Similarly, in *Baird* v. *King*,[19] the court declared that the motive and purpose of a shareholder seeking by writ of mandamus to compel a corporation and its officers to allow him to inspect the corporate books, could not be inquired into for purpose of defeating the writ. Again, in *Wilson* v. *Mackinaw State Bank*,[20] the right was declared to be absolute and not to depend upon any circumstance or condition except ownership of stock.

11 State ex rel. Costello v. Middlesex Banking Co., 87 Conn. 483, 88 A. 861 (1913); Davidson v. Alameda Consol. Mines Co., 66 Ore. 412, 134 P. 782 (1913).

12 People v. C. & E. I. R.R. Co., 262 Ill. 492, 104 N.E. 831 (1914).

13 The King v. Merchant Tailors' Co., 2 B. & Ad. 115, 109 Eng. Rep. 1086 (1831); A. & F. R. R. Co. v. Rowley, 9 Fla. 508 (1861); State v. Sportsman's Park Ass'n., 29 Mo. App. 326 (1888).

14 Laws 1871-2, p. 296, § 13.

15 Such was also the view of the court in Foster v. White, 86 Ala. 467, 6 So. 88 (1889), where a similar provision was involved.

16 Furst v. Rawleigh Medical Co., 282 Ill. 366, 118 N.E. 763 (1918).

17 88 Ill. App. 323 (1899).

18 189 Ill. App. 231 (1914).

19 213 Ill. App. 228 (1919).

20 217 Ill. App. 494 (1920).

Perhaps the clearest exposition of the rationale for the statute was expressed in *Stone* v. *Kellogg*,[21] wherein the court adopted the language of an Alabama decision,[22] which had stated ". . . the statute was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right, and the purpose is to protect small and minority stockholders against the power of the majority, and against the mismanagement and faithlessness of agents and officers. . . The only express limitation is, that the right shall be exercised at reasonable and proper times. The implied limitation is, that it shall not be exercised from idle curiosity or for improper or unlawful purposes. In all other respects the statutory right is absolute."[23]

The case of *Venner* v. *Chicago City Railway Company*[24] further clarified the problem by stating: "Where the right is conferred by statute in absolute terms, the purpose or motive of the shareholder in making the demand for an inspection is not material, and he cannot be required to state his reasons therefor."[25]

Then, in 1919, the legislature repealed the act of 1872 and replaced it with a new statute which restricted the right of the shareholder to an examination of the books of stock ownership by adding the limitation that the same be "for all proper purposes."[26] A penalty provision, however, recognized the shareholder's right to examine the books of account by granting recovery of damages if the same was improperly denied. Despite the addition of the words "for proper purposes," the statute was steadfastly interpreted by the courts as leaving the burden of proof to show improper purpose upon the corporation. Thus, in *Palmer* v. *Diel*,[27] upon a petition for mandamus, the court held the motive of the petitioner could not be inquired into. Again, in *Kassin* v. *Grigsby-Grunow Company*,[28] the court said: "Under this statute a shareholder of a corporation has the absolute right to examine its records and books of account. . . And the fact that such shareholder is interested in a competing company and may by such examination obtain information that will be of benefit to the rival company, will not defeat his statutory right to examine the books and records of the corporation."[29] In a suit brought to recover damages under the penalty provision of the statute, the court stated: "The only limitation made by law upon that right is that the examination will be conducted at reasonable times. . . ."[30] The addition of the apparent limitation by the phrase "for all proper purposes" in the

21 165 Ill. 192 at 205, 46 N.E. 222 at 226, 56 Am. St. Rep. 240 (1897).
22 Foster v. White, 86 Ala. 467, 6 So. 88 (1889).
23 86 Ala. 467 at 469, 6 So. 88 at 89.
24 246 Ill. 170, 92 N.E. 643, 138 Am. St. Rep. 229 (1910).
25 246 Ill. 170 at 173, 92 N.E. 643 at 645.
26 Laws 1919, p. 325, § 37.
27 233 Ill. App. 508 (1924).
28 268 Ill. App. 574 (1933).
29 268 Ill. App. 574 at 577.
30 Cooper v. Nutt, 254 Ill. App. 445 at 455 (1929).

mandamus section of the statute did not, then, influence the courts to shift the burden back to the shareholder.[31]

The Business Corporation Act of 1933, repealing the earlier provisions, opened all corporate books to examination by a shareholder owning five per cent. of the outstanding stock or who had been a shareholder for six months prior to demand.[32] The right thereby granted purported to be absolute except that the examination was to be limited to a reasonable time and again for a proper purpose. As before, a penalty provision was inserted to secure recognition of that right. The same statute declared that nothing therein contained should impair the power of a proper court to issue mandamus to compel production of these books for examination, but here also was affixed the limitation calling for "proof by a shareholder of proper purpose."[33] Because the benefits of that section appeared to be limited to certain stockholders only, an amendment was added in 1941 which removed any implied condition of size or duration of stock-holding on the right to apply for mandamus.[34]

When the Supreme Court was called upon, in *Morris* v. *Broadview, Inc.*,[35] to interpret the provision so amended, it placed special stress upon the fact that the phrase "for a proper purpose" appeared in each section of the statute and it regarded the repetition thereof as indicative of the fact that such words evidenced a legislative intent to place the burden on the shareholder. It was not, however, interpreting a novel introduction into the statute but one that had been there since 1919 and which had already been construed many times as keeping the burden of proof on the corporation. Legislative acquiescence in such earlier interpretation might well be inferred, or more emphatic language would most likely have been used.

Departing from abstract argument as to what the intention of the legislature might have been, intermediate appellate courts subsequent to the passage of the Business Corporation Act have left the burden of proof on the defendant corporation. For example, in *Miller* v. *Spanogle*,[36] the court indicated that its view was like that expressed by a standard text on the subject[37] by saying: "If, in a particular jurisdiction, the motive or purpose of the shareholder is a proper subject of judicial inquiry, it is only so when asserted as a defense. . . it was not necessary for this petition to allege facts showing the motive or purpose of the petitioner in seeking to inspect the records and books of this company. . . ."[38] That view seems, to the writer at least, the more desirable one considering the fact that

31 In a suit based on the penalty provision, the burden is on the corporate officials to show improper purpose according to Vigran v. Hamilton, 321 Ill. App. 541, 53 N.E. (2d) 250 (1944).

32 Ill. Rev. Stat. 1943, Ch. 32, § 157.45.

33 Ibid.

34 Laws 1941, Vol. 1, p. 425, § 45.

35 385 Ill. 228, 52 N.E. (2d) 769 (1944).

36 275 Ill. App. 335 (1934).

37 14 C.J. 856, § 1302.

38 275 Ill. App. 335 at 341. In Wise v. Byllesby & Co., 285 Ill. App. 40 at 45 (1936),

the corporate management serves, in a sense, as the agent of the shareholder and should be obliged to make prompt and full revelation of its conduct at the behest of the latter.

If it should be argued that the more recent statute should be differently interpreted because it opened all corporate books to examination as contrasted merely with books of stock ownership under former laws, an Ohio case supplies the best answer.[39] The statute there involved had at one time read: "The books and records of such corporation at all reasonable times shall be open to the inspection of every stockholder."[40] It was later amended to read: "The books of account, lists of shareholders, voting trust agreements, if any, and minutes of meetings of every corporation shall be open to inspection. . . ."[41] By that amendment every conceivable corporate book was thrown open, yet the court held that the enlargement of the scope of inspection was not meant to be a restriction of the right to inspect. When the words "for a proper purpose" were added to the statute, the court still refused to shift the burden to the shareholder.[42] Explanation for such result may best be found in the words of a New Jersey court which once observed that "to say they [the shareholders] have the right, but that it can be enforced only when they have ascertained in some way without the books that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books. . . ."[43] To require the shareholder to prove some proper purpose for his desired examination places him under the duty of proving a negative, i. e. absence of idle curiosity on his part. Yet, until examination has been had, he can possess nothing more than suspicion of mismanagement hence could well be said to be an officious busybody.

The difficulty in complying with the Illinois statute, as now interpreted, bids fair to defeat the very grounds upon which a right of inspection is said to exist. Assuming the decision in the Morris case to be a proper construction of the legislative language, good ground would seem to exist for calling for its repeal or amendment.

J. E. REEVES

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the defense attorney had cross-examined the petitioner on this point and the court said: "Although perhaps he was not required so to do, petitioner assumed the burden of proof and established a prima facie case. . . . "

39 William Coale Development Co. v. Kennedy, 121 Ohio St. 582, 170 N.E. 434 (1930).

40 Ohio Gen. Code § 8673.

41 Ohio Gen. Code §§ 8623-63.

42 The court stated: "When the stockholder is asking the right to inspect . . . such request is attended by a presumption of good faith and honesty of purpose until the contrary is made to appear. . . . " 121 Ohio St. 582 at 587, 170 N.E. 434 at 435.

43 Huylar v. Cragin Cattle Co., 40 N.J. Eq. 392 at 398, 2 A. 274 at 278 (1885).