Washington and Lee Law Review

Volume 29 | Issue 1 Article 16

Spring 3-1-1972

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exclusive market control. This would tend to accelerate the decrease in American exports compared to imports.[54]

In contrast, the test of final operable assembly appears to be oriented more toward the public good since it allows competition for world markets; with competition comes technological advancement. Under this test, a manufacturer competing with the patent holder may export his product without penalty by leaving it in an incomplete, inoperable condition. It leaves intact the patent holder's domestic rights but does not extend his monopoly into world trade. The monopoly granted to the patent holder within the United States is by itself a sufficient reward.

JOHN C. BALDWIN

"NOTICE TO THE CORPORATION" AND THE UNDATED RESIGNATION

The resignation of a director of a private corporation can lead to numerous legal problems. For example, the corporation may seek to deny the validity of service of process made on a resigned director,[1] the resigned director may defend against liability for acts of the corporation on the grounds of his resignation,[2] or there may be a question as to the existence of a quorum on the board during a particular vote.[3] The validity of a resignation may depend on such factors as the motive behind the resignation,[4] the director's post-resignation conduct,[5] or the form of notice given to the corporation.[6] A recent federal case, *Dillon v. Berg*,[7] introduced a new factor which may increase the difficulty in determining the validity of a director's resignation.

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[54]In 1960, the excess of exports over imports was $5.9 billion. By 1969, this excess had declined to $1.9 billion. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: *1970* 777 (91st ed. 1970). For the period from January through August, 1971, *imports exceeded exports* by 1.4 billion dollars. U.S. NEWS & WORLD REPORT, Oct. 11, 1971, at 89.

[1]*See, e.g.*, Venner v. Denver Union Water Co., 40 Colo. 212, 90 P. 623 (1907).

[2]*See, e.g.*, Zimmerman v. Western & Southern Fire Ins. Co., 121 Ark. 408, 181 S.W. 283 (1915).

[3]*See, e.g.*, Seal of Gold Mining Co. v. Slater, 161 Cal. 621, 120 P. 15 (1911).

[4]*See, e.g.*, Zeltner v. Henry Zeltner Brewing Co., 174 N.Y. 247, 66 N.E. 810 (1903). *See also In re* Caplan, 20 App. Div. 2d 301, 246 N.Y.S.2d 913 (Sup. Ct.), *aff'd*, 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

[5]*See, e.g.*, *In re* Fidelity Assurance Ass'n, 42 F. Supp. 973 (S.D. W. Va. 1941).

[6]*See* Briggs v. Spaulding, 141 U.S. 132 (1891). *See also* B.F. Goodrich Rubber Co. v. Helena Motor Car Co., 53 Mont. 526, 165 P. 454 (1917).

[7]326 F. Supp. 1214 (D. Del. 1971).

F. Steven Berg was the Chairman of the Board of Scotten, Dillon Company, a Delaware corporation. Berg informed Ralph R. Power, a director, that he would oppose Powers's re-election to the Board unless Power gave him an undated letter of resignation. The seven-man board was divided into two factions over a proposed merger with another company which Berg had founded. Power held the deciding vote, and when he supplied Berg with the undated letter,[8] he effectively gave Berg the ability to thwart opposition to the merger and other policies. Berg did not disclose the letter's existence until Power changed his mind and wrote him a second letter,[9] copies of which were sent to the other board members, withdrawing the resignation. The record indicated that Berg then sent the resignation letter, which he dated ten days before the withdrawal letter, along with his acknowledgement, which he dated four days before the withdrawal, to the other directors. Power continued to attend meetings but was not seated as a director.

The Berg faction elected a replacement for Power which gave Berg virtually unfettered control of the corporation. Thus it became essential to the opponents of the merger and other policies of Berg to contest the validity of the resignation which led to this replacement or else face repeated defeats in the board meetings.

The Delaware statute requires written notice for a director's resignation.[10] The court held in *Dillon* that this means "actual written notice to each and every member of the Board of Directors or actual written notice to an agent of the corporation. . . ."[11] In most other jurisdictions[12] the statute is based on or is similar to section 36 of the Model Business

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[8]The text of the first letter was:

> Gentlemen:
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> I herewith tender my resignation as a Director of Scotten, Dillon Company effective immediately.

Id. at 1222 n.7.

[9]The text of the second letter was:

> Prior to the meeting of the Board of Directors on Monday, March 9, you demanded and received my undated resignation from the Board. Upon careful consideration I am herewith withdrawing that resignation and will continue to serve as a director.

Id. at 1222.

[10]The statute reads in part:

> Each director shall hold office until his successor is elected and qualified or until his earlier resignation or removal. Any director may resign at any time upon written notice to the corporation.

DEL. CODE ANN. tit. 8, § 141(b) (Supp. 1970).

[11]326 F. Supp. at 1224.

[12]Two other states have statutory provisions requiring written notice. KAN. STAT. ANN. § 17-3101 (1963); N.J. STAT. ANN. § 14A:6-3 (1969). Statutes in other jurisdictions are based on or similar to the Model Act. The relevant sections are: ALA. CODE tit. 10, § 220

Corporation Act and does not require written notice, but merely provides that the director shall serve for "the term for which he is elected and until his successor shall have been elected and qualified."[13] Such a provision[14] has been held to embody the common law requirement that some form of notice must be given to the corporation, though it need not be in writing.[15] Thus, whether statute or common law controls, notice is required.

The *Dillon* court held that the undated letter of resignation which Power gave to Berg did not give notice of his resignation to the corporation at the time it was submitted and therefore did not meet the statutory requirement.[16] According to the court, the transaction between Power and

(1958); ALASKA STAT. § 10.10.120 (1962); ARK. STAT. ANN. § 64-302 (Repl. Vol. 1966); CAL. CORP. CODE § 805 (West 1955); COLO. REV. STAT. ANN. § 31-5-2 (1963); IDAHO CODE ANN. § 30-139 (1967); ILL. ANN. STAT. ch. 32, § 157.34 (Smith-Hurd Supp. 1971); IND. ANN. STAT. § 25-208(d) (Repl. Vol. 1970); IOWA CODE ANN. § 496A.35 (Supp. 1971); MD. ANN. CODE art. 23, § 54 (Repl. Vol. 1966); MASS. GEN. LAWS ANN. ch. 158, § 19 (1970); MICH. STAT. ANN. § 21.13 (Rev. Vol. 1963); MISS. CODE ANN. § 5309-72 (Supp. 1969); MO. ANN. STAT. § 351.315 (1966); MONT. REV. CODES ANN. § 15-2234 (Repl. Vol. 1967); NEB. REV. STAT. § 21-2036 (Reissue 1970); NEV. REV. STAT. § 78.330 (1967); N.M. STAT. ANN. § 51-24-35 (Supp. 1971); N.Y. BUS. CORP. LAW § 703(b) (McKinney 1963); N.C. GEN. STAT. § 55-25(d) (Supp. 1969); N.D. CENT. CODE § 10-19-37 (1960); ORE. REV. STAT. § 57.185 (1967); PA. STAT. ANN. tit. 15, § 1401 (Supp. 1971); R.I. GEN. LAWS ANN. § 7-1.1-34 (Supp. 1970); S.D. CODE ANN. § 47-5-2 (1967); TENN. CODE ANN. § 48-804(2) (Supp. 1970); TEX. BUS. CORP. ACT art. 2.32 (1956); UTAH CODE ANN. § 16-10-34 (Repl. Vol. 1962); VT. STAT. ANN. tit. 11, § 1882 (Supp. 1971); VA. CODE ANN. § 13.1-36 (Supp. 1971); WASH. REV. CODE ANN. § 23.01.320 (Supp. 1970); W. VA. CODE ANN. § 31-1-16(b) (Supp. 1971); WIS. STAT. ANN. § 180.32(2) (1957); WYO. STAT. ANN. § 17-36.34 (Repl. Vol. 1965).

[13]MODEL BUS. CORP. ACT ANN. § 36 (2d ed. 1971).

[14]12 U.S.C. § 71 (1970) formerly §§ 9-10 of the National Banking Act (1864).

[15]Briggs v. Spaulding, 141 U.S. 132 (1891). In addition, notification is enough to effect a resignation and no action is required on the part of the corporation. *Id.* at 154. *See also* Schuckman v. Rubenstein, 164 F.2d 952 (6th Cir. 1947); Wingate v. Bercut, 146 F.2d 725 (9th Cir. 1944); Fearing v. Glen, 73 F. 116 (2d Cir. 1896); Robinson v. Blood, 151 Cal. 504, 91 P. 258 (1907); San Jose Sav. Bank v. Sierra Land Co., 63 Cal. 179 (1883); Mayo v. Interment Property Inc., 51 Cal. App. 2d 654, 128 P.2d 417 (1942); Security Investors' Realty Co. v. Superior Court, 101 Cal. App. 450, 281 P. 709 (1929); Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & Trust Co., 169 Ky. 840, 185 S.W. 156 (1916); Marine Forwarding & Shipping Co. v. Barone, 154 So. 2d 528 (La. App. 1963); Manhattan Co. v. Kaldenberg, 165 N.Y. 1, 58 N.E. 790 (1900); Chandler v. Hoag, 2 Hun 613 (Sup. Ct. 1874), *aff'd*, 63 N.Y. 624 (1874); Harry Levi & Co. v. Feldman, 61 N.Y.S.2d 639 (Sup. Ct. 1946); Wilson v. Brentwood Hotel Co., 16 Misc. 48, 37 N.Y.S. 655 (Sup. Ct. 1896). *But see* Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299 (Del. Ch. 1954); Lippman v. Kehoe Stenograph Co., 11 Del. Ch. 190, 98 A. 943 (Del. Ch. 1916); Colorado Debenture Corp. v. Lombard Inv. Co., 66 Kan. 251, 71 P. 584 (1903); Timolat v. S.J. Held Co., 17 Misc. 556, 40 N.Y.S. 692 (Sup. Ct. 1896).

[16]326 F. Supp. at 1224.

Berg "amounted to a covert agreement between the two in which Berg consented to support Power's reelection to the Board . . . in exchange for Berg obtaining the right to remove Power at any time, without cause."[17] Presumably this right would be exercised in the event Power did not support Berg's policies. Thus, Berg was acting in his own interests in obtaining the undated letter of resignation and not in the interest of the corporation. "Therefore [this transaction did] not constitute 'notice to the corporation' as required by [the Delaware statute]"[18]

Normally, notice to one director would be notice to the corporation, for the director, as agent, is presumed to communicate this notice to his principal, the corporation.[19] This is especially true where the agent is the president or chairman of the board.[20] However, as the court noted, this presumption fails when the director has an interest in the subject that is "*substantially adverse* to the corporation,"[21] and therefore his knowledge is not attributable to the corporation.[22] The interest must be so adverse as to "practically . . . destroy the agency or to render it reasonably probable that an ordinary person . . . [due to the] incompatibility in interests, will withhold such knowledge from [the corporation]."[23] The court does not explain Berg's adverse interest, but rather seems to equate a "substantially adverse interest" with a private interest. It is difficult to see how the existence of a private interest could always be said to "destroy the agency" as *Dillon* seems to indicate.

Perhaps sensing this weakness, the court considered the agreement between Power and Berg, finding that it "was void and unenforceable under Delaware law."[24] Simply stated, Power's undated letter was not a resignation at all but was rather the creation of an authority in Berg to tender Power's resignation in consideration for Berg's support in the election. The court somewhat blurs the distinction between a resignation and an authorization to tender a resignation. Apparently the court felt that when the letter was tendered it did not constitute a resignation because it was not "notice to the corporation." But neither party intended that the letter would constitute a resignation when it was submitted to Berg. The letter was only intended to be evidence of a later resignation which Berg was authorized to tender at his discretion. As the court correctly held,[25] such authorization in this instance is tantamount to vesting

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[17]*Id.*

[18]*Id.*

[19]3 W. FLETCHER, PRIVATE CORPORATIONS § 790 (perm. ed. rev. vol. 1965).

[20]*Id.* § 811.

[21]326 F. Supp. at 1224 (emphasis added). *See also* 3 W. FLETCHER, PRIVATE CORPORATIONS § 819 (perm. ed. rev. vol. 1965).

[22]American Nat'l Bank v. Miller, 229 U.S. 517 (1913); 3 W. FLETCHER, PRIVATE CORPORATIONS §§ 789-90 (perm. ed. rev. vol. 1965).

[23]Goldstein v. Union Nat'l Bank, 109 Tex. 555, 213 S.W. 584, 591 (1919).

[24]326 F. Supp. at 1224.

[25]*Id.*

removal power in one who is not authorized to hold such power.[26] The letter authorizing Berg to tender Power's resignation effectively allowed Berg to remove him unilaterally without cause, a power which is not available to the board of directors by most statutes[27] nor by decisions in Delaware.[28] The Model Act is typical of the statutes, specifically including a clause to protect the minority's directors elected through cumulative voting.[29] Several states allow the corporation to specify a procedure for removal in the articles of incorporation or in the bylaws.[30] Two states, Massachusetts and Oklahoma, allow the directors to remove a member of the board, but this power is severely limited to specific instances or for cause.[31]

If such restrictions did not exist, the board could frustrate the will of the shareholders, especially the minority, by removing a duly elected director. The value of cumulative voting would be completely destroyed

[26]Feldman v. Pennroad Corp., 60 F. Supp. 716 (D. Del. 1945), *aff'd* 155 F.2d 773 (3d Cir. 1946), *cert. denied*, 329 U.S. 808 (1947); Burch v. National Guarantee Credit Corp., 13 Del. Ch. 180, 116 A. 738 (Del. Ch. 1922); MODEL BUS. CORP. ACT ANN. § 39, Comment (2d ed. 1971); 2 W. FLETCHER, PRIVATE CORPORATIONS § 357 (rev. vol. 1969).

[27]The following states have statutory provisions similar to the Model Act: COLO. REV. STAT. ANN. § 31-5-5 (1963); GA. CODE ANN. § 22-706 (Rev. Vol. 1969); IOWA CODE ANN. § 496A.35 (Supp. 1970); MISS. CODE ANN. § 5309-75 (Supp. 1968); MO. ANN. STAT. § 351.315(2) (1966); NEB. REV. STAT. § 21-2039 (Reissue 1970); N.J. STAT. ANN. § 14A:6-6 (1969); N.M. STAT. ANN. § 51-24-38 (Supp. 1971); N.Y. BUS. CORP. LAW § 706 (McKinney 1963); N.C. GEN. STAT. § 55-27 (Supp. 1969); N.D. CENT. CODE § 10-19-40 (1960); OHIO REV. CODE ANN. §§ 1701-58(B)-(C) (Baldwin 1971); ORE. REV. STAT. § 57.193 (1967); PA. STAT. ANN. tit. 15, § 1405 (Supp. 1971); S.C. CODE ANN. §§ 12-18.7 (1962); UTAH CODE ANN. § 16-10-37 (Supp. 1971); VA. CODE ANN. § 13.1-42 (Repl. Vol. 1964); WASH. REV. CODE § 23A.08.380 (Supp. 1967).

These states also reserve control to the shareholders: ARK. STAT. ANN. § 64-304 (Repl. Vol. 1966); CAL. CORP. CODE ANN. § 810 (West 1955); IDAHO CODE ANN. § 30-139(4) (1967); MD. ANN. CODE art. 23, § 52(d) (Repl. Vol. 1966); MICH. STAT. ANN. § 21.13(3) (Rev. Vol. 1963); MINN. STAT. ANN. § 301.29 (1969); NEV. REV. STAT. § 78.335 (1967); TENN. CODE ANN. § 48-807 (Supp. 1971).

[28]Everett v. Transnation Dev. Corp., ___ Del. Ch. ___, 267 A.2d 627 (Del. Ch. 1970); Essential Enterprises Corp. v. Automatic Steel Prod. Inc., 39 Del. Ch. 93, 159 A.2d 288 (Del. Ch. 1960); Campbell v. Lowe's Inc., 36 Del. Ch. 563, 134 A.2d 852 (Del. Ch. 1957).

[29]MODEL BUS. CORP. ACT ANN. § 39 (2d ed. 1971) provides in part "Any director 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."

[30]In Indiana, the articles of incorporation control: IND. ANN. STAT. § 25-208a (Supp. 1971). The bylaws control in these states: CONN. GEN. STAT. ANN. § 33-317(b)(3) (1960); HAWAII REV. LAWS § 416-80 (1968); MONT. REV. CODES ANN. § 15-2236 (Supp. 1971); W. VA. CODE ANN. § 13-1-20 (1966); WIS. STAT. ANN. § 180.32(3) (1965).

[31]MASS. GEN. LAWS ANN. ch. 156B, § 51 (1970) allows the directors to remove "for cause." OKLA. STAT. ANN. tit. 18, §§ 1.39-.40 (1953) recognizes certain circumstances such as conviction of a felony or insanity of a director as giving the other directors removal power.

since a director so elected to protect the minority could easily be removed by the rest of the board. As the court said in *Laughlin v. Geer,*[32] when it ruled against an attempt by directors to remove one of their number,

> the board of directors may not nullify the . . . right of a shareholder to choose whomsoever he may think proper to represent him on the board of directors.* ** [To allow the board to remove one of its members would create] a power most dangerous to the minority stockholders . . . .[33]

Clearly then, policy, as reflected by the statutes and decisions, is against the board of directors removing a fellow director in any but the most dire circumstances. If policy is opposed to the board as a whole removing a director, it must be assumed that policy is even more strongly opposed to an individual director possessing removal power, and therefore the agreement giving Berg that power was void.

In addition to Berg's improper attempt to procure removal power, there is a second basis, not considered by the court, for holding that the agreement between Berg and Power was void. Just as an attempt to procure unauthorized removal power is void as opposed to public policy, an agreement to buy or sell a resignation is also against policy and void as *contra bonos mores.*[34] The resignation of a director may not be purchased in order to replace him with one who might not have the shareholders' best interests at heart.[35] Power acted improperly in agreeing to surrender control of his office for his own gain.[36]

Such gain need not be pecuniary to void the transaction, though when it is, the director may be liable to the corporation for his profit.[37] In *Dillon,* Power's gain was the right to hold office until Berg chose to remove him, and by implication, this right would be terminated if Power did not support the merger. This is no more acceptable than an outright money payment, for the result in each instance is that the director no longer represents the shareholders' interest but rather that of another director. In *Essex Universal Corp. v. Yates,*[38] the court said that "persons

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[32]121 Ill. App. 534 (1905). *See also* Burch v. National Guarantee Credit Corp., 13 Del. Ch. 180, 116 A. 738 (Del. Ch. 1922); Stott v. Stott Realty Co., 246 Mich. 267, 224 N.W. 623 (1929); Raub v. Gerken, 127 App. Div. 42, 111 N.Y.S. 319 (1908).

[33]Laughlin v. Geer, 127 Ill. App. 534, 538 (1905).

[34]Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962); Forbes v. McDonald, 54 Cal. 98 (1880); Guernsey v. Cook, 120 Mass. 501 (1876); Reed v. Catlett, 228 Mo. App. 109, 68 S.W.2d 734 (1934); Ballentine v. Ferretti, 28 N.Y.S.2d 668, 678-80 (Sup. Ct. 1941); T.F. Pagel Lumber Co. v. Webster, 231 Wis. 222, 285 N.W. 739 (1939); Koelbel v. Tecktonius, 228 Wis. 317, 280 N.W. 305 (1938).

[35]Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888, 895 (3d Cir. 1953). *See also* 2 W. FLETCHER, PRIVATE CORPORATIONS § 348 (perm. ed. rev. vol. 1969).

[36]*See* Cox v. Berry, 19 Utah 2d 352, 431 P.2d 575 (1967).

[37]McClure v. Law, 161 N.Y. 78, 55 N.E. 388 (1899).

[38]305 F.2d 572 (2d Cir. 1962).

enjoying management control hold it on behalf of the corporation's stockholders, and therefore may not regard it as their own personal property to dispose of as they wish."[39] The agreement, in which Power had compromised his independent representation of the shareholders in favor of Berg by selling his resignation to the latter in order to retain his office, was therefore void on this basis as well.

Thus, there are ample grounds to find that the agreement was void; however, there is some question as to the necessity and the wisdom of that holding. The court, despite its "conclusion" that Berg acted to publicize the resignation letter *after* he was aware of Power's revocation,[40] found some "conflict in the evidence as to whether Berg informed the other directors of Power's resignation before or after Power revoked it."[41] Clearly, if Power had revoked the authority[42] before Berg had used it, Power would retain his seat. If the evidence supported the "conclusion" that Power revoked first, the court should have allowed the decision to rest on that basis, for the ultimate holding may be too broad. The opinion, if taken literally, would void *any* grant of authority to tender resignation including those instances where there is no objection which may logically be raised.

For instance, it was held in *Crespinel v. Color Corp. of America*[43] that it is not an illegal and void grant of authority for a director to agree in advance to tender his resignation upon request of the majority of the board if such resignation serves a corporate purpose.[44] Further, it was established in *Essex*[45] that when the controlling interest in a corporation[46] is sold, the sale contract will not be illegal and void simply because it contains a clause requiring that the existing directors resign in favor of nominees of the purchaser.[47] Such contracts were termed "normal and

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[39]*Id.* at 575.

[40]326 F. Supp. at 1222.

[41]*Id.* at 1224.

[42]Authority is revocable unless it is coupled with an interest in the property on which the power is to operate or given as security to insure the performance of a duty or to protect a title. The authority in question here does not fit into these categories so Power clearly could revoke it. *See* Taylor v. Burns, 203 U.S. 120 (1906); Hunt v. Rousmanier's Adm'rs, 21 U.S. (8 Wheat.) 379 (1823); RESTATEMENT (SECOND) OF AGENCY §§ 138-39 (1959).

[43]160 Cal. App. 2d 386, 325 P.2d 565 (Dist. Ct. App. 1958).

[44]*Id. See also* Joseph v. Raff, 82 App. Div. 47, 81 N.Y.S. 546 (1903).

[45]Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962).

[46]A seat on the board may not be sold apart from control, but control does not necessarily mean a majority of the outstanding shares. See note 34-37 *supra.* In *Essex,* 28.3% of the stock was sold and the court held that this constituted control.

[47]Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962). *See also In re* Caplan, 20 App. Div. 2d 301, 246 N.Y.S.2d 913 (Sup. Ct.), *aff'd* 14 N.Y.2d 679, 198 N.E.2d 908, 249 N.Y.S.2d 877 (1964).

. . . desirable" by Judge Clark in his concurring opinion in *Essex*.[48] Since such contracts do involve a grant of authority to resign, they might be void under *Dillon*. However, Chief Judge Lumbard said in *Essex* by way of dictum that such a contract would be illegal only if it were shown that there were "circumstances which would have prevented [the purchaser] from electing a majority of the . . . board of directors in due course."[49]

Thus, these exceptions must be recognized in order to prevent the disruption of a great many transactions, past and future. They may be distinguished from *Dillon* on the ground that they are for the ultimate benefit of the shareholders, while the agreement between Power and Berg in this case was primarily for the benefit of one director, possibly at the shareholders' expense. The determining factor should be whether the agreement primarily serves a corporate purpose (i.e. the interest of the shareholders), or a private purpose of one or more directors.

An alternative method of limitation would be to confine the rule of *Dillon* to the holding that it is illegal "[t]o allow the removal of one director, without cause, by another director through the vehicle of obtaining a secret, undated resignation as a *quid pro quo* for allowing an uncontested reelection to the Board . . . ."[50] In those cases which did not involve such an agreement, the rule would have no force.

Thus, while it is beyond doubt that the rule enunciated in *Dillon v. Berg* is valid for that particular case, care must be taken to limit its application. If the rule is employed in cases that lack *Dillon's* peculiar circumstances, the validity of the acts of countless boards may be called into question. If the rule is construed broadly, it will be at the peril of "normal and desirable" business practices and at the risk of inciting litigation.

GREGORY JAMES DIGEL

[48]305 F.2d at 580 (Clark, J., concurring).

[49]*Id.* at 579.

[50]326 F. Supp. at 1225.