1974

Election Inspectors Have Judicially Reviewable Discretionary Authority to Determine the Validity of Proxies (casenote)

George Lee Flint Jr

The outlook is dim for future assaults on executive activity, but then it never has been especially bright. Despite a few judicial findings of abuse[70] and intermittent calls for facilitating challenges to discretion,[71] the executive discretion fortress still stands. To attain standing under the Mandamus and Venue Act, a plaintiff must now demonstate that the relief he seeks will effectively remedy his injury, provided that he can overcome the judicial prejudice in favor of upholding discretionary decisions and that events subsequent to or caused by those decisions have not mooted his claim. The task will obviously be difficult. The *Nader* court could have laid traditional accolades at the feet of prosecutorial discretion. It could have rebuffed the doctrine. Instead it added a new and stifling dimension to what has become in too many situations a "magical incantation."[72]

CORPORATIONS — PROXIES — ELECTION INSPECTORS HAVE JUDICIALLY REVIEWABLE DISCRETIONARY AUTHORITY TO DETERMINE THE VALIDITY OF PROXIES. *Salgo v. Matthews*, 497 S.W.2d 620 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

Jockeying for control of General Electrodynamics Corporation, the Matthews faction was thwarted during a proxy contest by a management-appointed election supervisor who invalidated its proxies and votes. Matthews responded quickly with a suit in district court, filed before the closing of the proxy solicitation and voting, which sought mandatory injunctive relief to compel the inspector to validate the proxies and votes and declare the Matthews slate elected as directors. The rejected proxies derived from a decisive block of shares listed on the transfer books under the name of Pioneer Casualty Company, then in receivership. Under court order the receiver had surrendered Pio-

70. *E.g.*, Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1973).

71. *Cf., e.g.*, DeVito v. Shultz, 300 F. Supp. 381 (D.D.C. 1969). *See also* Potomac Passengers Ass'n v. Chesapeake & O. Ry. Co., 475 F.2d 325 (D.C. Cir. 1973), *rev'd sub nom.* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), where Judge Wright himself indicated that public policy favors a liberalized standing test to ensure federal regulatory integrity.

72. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970).

[Note by H. Keith Myers.]

neer's proxy to the bankrupt owner, instructing him to deliver the proxy to Matthews. The bankruptcy trustee held beneficial title to the shares, and a bank was in actual possession of the certificates. The district court granted permanent injunctive relief, directing the inspector to accept the rejected proxies, to count the accompanying votes along with a newly acquired block of sympathetic votes,[1] and to approve the election of the Matthews faction's candidates to the board of directors. *Reversed.* Injunctive relief was improper since an election inspector's discretion to determine the validity of proxies is not subject to judicial control. Furthermore, plaintiffs had failed to show any inadequacy in the statutory quo warranto remedy that justified the extraordinary mandamus procedure.

Supervision by election inspectors is optional unless required by statute, charter, or bylaw,[2] in which case the shareholders, directors, or presiding officer usually chooses inspectors.[3] Even absent a formal requirement, any shareholder may submit a motion requesting supervision. Generally, election inspectors perform the procedural exercises of calculating the number of outstanding shares, insuring the necessary quorum, and tabulating the votes. However, inspectors often have discretionary functions as well, such as judging the validity and effect of proxies and hearing and resolving vote challenges. In Texas, statutes govern many of these matters.[4]

The potential for abuse of power and collusion by election inspec-

1. The proxies in the new block all represented shareholders who wished to change their votes. The court of civil appeals rejected the Salgo faction's efforts to exclude the votes, adopting the generally accepted rule that a shareholder may change his vote at any time before the inspectors finally announce the results. Salgo v. Matthews, 497 S.W.2d 620, 631 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). The rule stemmed from a practice by election inspectors of authorizing voters in the majority to cumulate their votes in order to counter secret cumulation by the minority. *See* Zierath Combination Drill Co. v. Croake, 21 Cal. App. 222, 131 P. 335 (Dist. Ct. App. 1913); Zachary v. Milin, 294 Mich. 622, 293 N.W. 770 (1940); State *ex rel.* Lawrence v. McGann, 64 Mo. App. 225, 233-34 (1895); State *ex rel.* David v. Daily, 23 Wash. 2d 25, 158 P.2d 330 (1945). Courts have used the rule to overrule election inspectors who refused to allow corrections. *In re* P.B. Mathiason Mfg. Co., 122 Mo. App. 437, 99 S.W. 502 (1907); Young v. Jebbett, 213 App. Div. 774, 211 N.Y.S. 61 (1925). Only once has a court used the rule to overrule election inspectors who did not allow a change of vote. Wells v. Beekman Terrace, Inc., 23 Misc. 2d 22, 197 N.Y.S.2d 79 (Sup. Ct. 1960). *Salgo* was the first instance of a vote change executed by a proxy.

2. *See generally* W. GRANGE, D. SCHWARTZ, W. GRAY & T. WOODBURY, MANUAL FOR CORPORATION OFFICERS 660-61 (1967); 1 B. MILLER, MANUAL AND GUIDE FOR THE CORPORATE SECRETARY 98-100 (1969).

3. Unlike the corporation in *Salgo*, which entrusted the election to one inspector, most companies use three. W. GRANGE, D. SCHWARTZ, W. GRAY & T. WOODBURY, *supra* note 2, at 661.

4. *See* TEX. BUS. CORP. ACT ANN. art. 2.27-.29 (1956).

tors led nineteenth century American courts to create the distinction between ministerial functions, reserved to inspectors, and judicial functions, reserved to the courts.[5] The earliest court to formulate the narrow ministerial view held that inspectors were bound by charter declarations specifying voting qualifications; they had only a modicum of judicially reviewable discretion in applying the charter standards.[6] Although subsequent courts permitted the exercise of more discretion, they were mindful of the rule's complexity[7] and rightfully grew concerned about the limit to which an inspector's judgment might extend before it encroached upon the jurisdiction of the courts. The problem was more than hypothetical; election inspectors clearly had some discretion.[8] For example, they were required to make every reasonable effort to ascertain the authenticity of a proxy or vote before rejecting it.[9] Ultimately the courts decided to draw the line at the evidence-weighing function, retaining this for themselves on the ground that inspectors generally lack the necessary means for factual determinations.[10] To insure the swift resolution of disputes facing inspectors, the courts of several states evolved specific election rules. If the proxy is regular on its face, the election inspector must accept it;[11] if irregular, he must reject it.[12]

5. *E.g., In re* St. Lawrence Steamboat Co., 44 N.J.L. 529, 540 (Sup. Ct. 1882); *In re* Cecil, 36 How. Pr. 477 (N.Y. Sup. Ct. 1869); Commonwealth v. Woelper, 3 S. & R. 29, 33, 8 Am. Dec. 628, 631 (Pa. 1819). *See generally* E. ARANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 407 (1968); 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2018, at 108 (perm. ed. 1967).

Several courts have recently revitalized this distinction. Williams v. Sterling Oil, Inc., 273 A.2d 264 (Del. Sup. Ct. 1971); State *ex rel.* Howley v. Coogan, 98 So.2d 757 (Fla. App. 1957), *cert. denied*, 101 So. 2d 817 (Fla. 1958).

6. Commonwealth v. Woelper, 3 S. & R. 29, 32, 8 Am. Dec. 628, 631 (Pa. 1819).

7. A plethora of rules evolved to aid in the resolution of this ministerial-judicial dilemma. Election inspectors could neither reject nor examine an unchallenged proxy or vote. Kauffman v. Meyberg, 59 Cal. App. 2d 730, 140 P.2d 210 (Dist. Ct. App. 1943); Hartt v. Harvey, 32 Barb. 55 (N.Y. Sup. Ct. 1860); *In re* Chenango County Mut. Ins. Co., 19 Wend. 635 (N.Y. Sup. Ct. 1839). Election inspectors could not use extrinsic evidence, such as affidavits, in determining the validity of proxies. Williams v. Sterliug Oil, Inc., 273 A.2d 264 (Del. Sup. Ct. 1971); *accord*, Thompson v. Blaisdell, 93 N.J.L. 31, 107 A. 405 (Sup. Ct. 1919).

The courts removed from the inspector's dominion several types of decisions that require judicial factfinding powers. Gow v. Consolidated Coppermines Corp., 19 Del. Ch. 172, 165 A. 136 (Ch. 1933) (which issues may be considered); *In re* St. Lawrence Steamboat Co., 44 N.J.L. 529, 540 (Sup. Ct. 1882) (competency of a voter); *In re* Lake Placid Co., 274 App. Div. 205, 81 N.Y.S.2d 36 (1948), *appeal denied*, 298 N.Y. 932, 82 N.E.2d 44 (1949) (genuineness of proxy).

8. Young v. Jebbett, 213 App. Div. 774, 211 N.Y.S. 61 (1925); Burke v. Wiswall, 193 Misc. 14, 85 N.Y.S.2d 187 (Sup. Ct. 1948).

9. *In re* St. Lawrence Steamboat Co., 44 N.J.L. 529, 535 (Sup. Ct. 1882).

10. *See id.* at 540.

11. Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 10, 20 A.2d 743, 747 (Ch. 1941); State *ex rel.* Howley v. Coogan, 98 So. 2d 757, 759 (Fla. App. 1957),

Either determination is subject to judicial correction.[13] Some courts limited election inspectors' discretion to delve into voter qualification problems, with a rule that the listing on the company books is conclusive on the inspectors.[14] Others found that the books constitute only prima facie evidence,[15] from which a certain discretionary latitude may be inferred.[16] These rules facilitate nonjudicial resolution of voter qualification problems;[17] without them, the salutary effect of the narrow ministerial view might be altogether lost.

cert. denied, 101 So. 2d 817 (Fla. 1958).

12. *See* Atterbury v. Consolidated Coppermines Corp., 26 Del. Ch. 1, 10, 20 A.2d 743, 747 (Ch. 1941) (dictum).

13. *In re* Cecil, 36 How. Pr. 477 (N.Y. Sup. Ct. 1869). Despite the general judge-made rule that makes proxy rejection a ministerial matter, inspectors have often exercised considerable discretion in determining whether the proxy is regular on its face. *See, e.g.*, Hey v. Dolphin, 92 Hun. 230, 36 N.Y.S. 627 (Sup. Ct. 1895) (requiring consent of all joint owners of a stock share in order to validate the proxy held proper). However, it is easier to find examples of inspector overreaching. *See* Standard Power & Light Corp. v. Investment Associates, Inc., 29 Del. Ch. 593, 51 A.2d 572 (1947) (no power to pass on forgeries); Young v. Jebbett, 213 App. Div. 774, 211 N.Y.S. 61 (1925) (improper to reject proxies because of uncancelled revenue stamps); *In re* Cecil, 36 How. Pr. 477 (N.Y. Sup. Ct. 1869) (no power to require affidavits to validate proxies).

14. *In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (Ch. 1941) (for the corporation's purposes, the record owner must be regarded as the one with the right to vote); *In re* Grove Cemetery Co., 61 N.J.L. 422, 39 A. 1024 (Sup. Ct. 1898) (exclusive evidence); *In re* William Faehndrich, Inc., 2 N.Y.2d 468, 141 N.E.2d 597, 161 N.Y.S.2d 99 (1957) (conclusive on the inspectors, with the issue reserved to the courts). *Contra*, Thisted v. Tower Management Corp., 147 Mont. 1, 409 P.2d 813 (1966). In *Thisted* the special situation in which management could use another method to determine share ownership—namely the requirement of approval of all current shareholders before another person could purchase shares in an apartment complex—authorized the inspectors to diverge from the customary rule and inquire beyond the books. One court suggested that the rule relieves inspectors of the embarrassment and awkwardness occasioned by the same voter qualification disputes arising at every election. Lawrence v. I.N. Parlier Estate Co., 15 Cal. 2d 220, 100 P.2d 765 (1940). A better justification is that the rule is certain and straightforward and facilitates the conduct of corporate affairs. *In re* Bruder's Estate, 302 N.Y. 52, 96 N.E.2d 84, 98 N.Y.S.2d 459 (1950).

15. *In re* Argus Co., 138 N.Y. 557, 34 N.E. 388 (1893) (inspectors shall consider the books as evidence of the right to vote); *In re* Chenango County Mut. Ins. Co., 19 Wend. 635 (N.Y. Sup. Ct. 1839) (inspectors have the duty to inquire into voters' qualifications, but this is usually an informal inquiry assuring that there is a prima facie right to vote); Hoppin v. Buffam, 9 R.I. 513, 516, 11 Am. R. 291, 293 (1870) (the books are prima facie evidence, and the shareholders cannot require that the corporation pass on a disputed right).

16. *See* Thisted v. Tower Management Corp., 147 Mont. 1, 409 P.2d 813 (1966).

17. To aid in the determination under the transfer book rules, courts have fashioned supplementary guidelines. Inspectors must accept the proxy of a transferor listed on the books, and they must reject that of the transferee. Thompson v. Blaisdell, 93 N.J.L. 31, 107 A. 405 (Sup. Ct. 1919); *In re* Mohawk & H.R.R., 19 Wend. 135 (N.Y. Sup. Ct. 1838). Inspectors must accept the proxy of an executor for stock in the name of the decedent, provided the executor has letters testamentary issued by the surrogate court. *In re* Cape May & D.B.N. Co., 51 N.J.L. 78, 16 A. 191 (Sup. Ct.

A number of states subsequently passed statutes granting election inspectors judicial power to determine the validity of proxies and settle all right-to-vote disputes.[18] Overruling much of the old case law, these statutes impose upon the adversaries the duty of attending the meeting and submitting proof of claims to the inspector.[19] The judicial power granted by the statutes is somewhat undercut, however, by these states' relentless adherence to the prima facie evidence rule.[20] Since none of these jurisdictions have codified the companion proxy rule, inspectors may presumably reject a proxy that appears to be regular on its face, but is in fact proved invalid by the contending factions.[21]

When the law imposes duties upon private corporations, injured parties may petition the courts to compel the discharge of that duty by a writ of mandamus,[22] a legal writ issued according to equitable principles.[23] Equity denies the right to mandamus when the official's act is discretionary[24] or when the relator has another adequate remedy.[25]

1888); Elevator Supplies Co. v. Wylde, 106 N.J. Eq. 163, 150 A. 347 (Ch. 1930) (under a statute); *see In re* Schirmer's Will, 231 App. Div. 625, 248 N.Y.S. 497 (1931). By statute, inspectors are required to reject a trustee's proxies if they are undisclosed in the books. Coolbaugh v. Herman, 221 Pa. 496, 70 A. 830 (1908). Under the prima facie rule a bankrupt has the right to vote stock listed in his name on the corporation's books, even though the Bankruptcy Act vests property in a trustee. Kresel v. Goldberg, 111 Conn. 475, 150 A. 693 (1930). Under court order a receiver has the power to vote stock owned by a corporation in receivership. Strang v. Edson, 198 F. 813 (8th Cir. 1912), *cert. denied*, 229 U.S. 612 (1913).

18. CAL. CORP. CODE ANN. § 2233 (West 1955); ILL. ANN. STAT. ch. 32, § 157.26a (Supp. 1974); N.J. STAT. ANN. § 14A:5-26 (1969); N.Y. BUS. CORP. LAW § 611 (McKinney 1963); OHIO REV. CODE ANN. § 1701.50 (Page 1964); PA. STAT. ANN. tit. 15, § 1512 (1967). The New York statute is typical: "The inspectors of election shall determine . . . the authenticity, validity, and effect of proxies . . . [and] hear and determine all challenges and questions arising in connection with the vote . . . ." N.Y. BUS. CORP. LAW § 611 (McKinney 1963).

19. *See* E. ARANOW & H. EINHORN, *supra* note 5, at 408.

20. CAL. CORP. CODE § 2215 (West 1955) (only those whose names are on the stock records may vote); ILL. ANN. STAT. ch. 32, § 157.32 (1954); N.J. STAT. ANN. § 14A:5-8(1)(d) (1969); N.Y. BUS. CORP. LAW § 607 (McKinney 1963); PA. STAT. ANN. tit. 15, § 1510 (1967). The New York statute is representative: "The . . . transfer book . . . shall be prima facie evidence as to who are . . . entitled to vote . . . ." There are exceptions to the prima facie rule. *See, e.g.*, Thisted v. Tower Management Corp., 147 Mont. 1, 409 P.2d 813 (1966). However, Aranow and Einhorn believe that the use of the term "prima facie" implies that the stock records are conclusive on the inspector. E. ARANOW & H. EINHORN, *supra* note 5, at 386.

21. *See* E. ARANOW & H. EINHORN, *supra* note 5, at 409.

22. *See, e.g.*, Uvalde Rock Asphalt Co. v. Loughridge, 425 S.W.2d 818 (Tex. 1968).

23. *E.g.*, Smith v. Grievance Comm., 475 S.W.2d 396 (Tex. Civ. App.—Corpus Christi 1972, no writ).

24. *E.g.*, Cobra Oil & Gas Corp. v. Sadler, 447 S.W.2d 887 (Tex. 1969). "Discretionary act" generally presupposes a judgmental determination by an official, whereas

Where the issue involves the post-election right to hold corporate office, quo warranto,[26] an action brought by the state on behalf of the relator, constitutes a proper remedy.[27] Texas courts have held that quo warranto is the exclusive remedy available to shareholders for protecting themselves against usurpation of corporate office.[28] Other jurisdictions have reasoned that by virtue of the essential adequacy of quo warranto as a remedy, equitable relief should be denied.[29] Some federal courts, however, have found that quo warranto is an inadequate remedy when the right to it is not absolute[30] or when the aggrieved party has been compelled to rely on state officials' discretionary whims.[31] The Texas statute is subject to neither objection.[32]

In *Salgo* a Texas court explained for the first time the nature and scope of an election inspector's authority. Texas had no statutory definition of this authority, nor were there any pertinent bylaw provisions. Since Texas courts may not mandamus an officer to control the exercise of his judgment, the Matthews faction contended that the inspector had no discretion. In evaluating that argument, the court divided the previous case law along classic lines, recognizing both the narrow ministerial view and the broader judicial view. The court characterized the narrow ministerial view as completely denying the inspectors any discretion[33] and dismissed it with the remark that it merely operated to release the reviewing court from strict reliance on the inspector's de-

"ministerial act" usually implies the absence of this type of judgment. In compelling the reasonable exercise of official discretion, mandamus is proper. *E.g.*, Cornette v. Aldridge, 408 S.W.2d 935 (Tex. Civ. App.—Amarillo 1966, mand. overr.). It is also properly applied in correcting a clear abuse of discretion. *E.g.*, Hereford v. Farrar, 469 S.W.2d 16 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).

25. *E.g.*, Gonzales v. Stevens, 427 S.W.2d 694 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.).

26. TEX. REV. CIV. STAT. ANN. arts. 6253-57 (1970).

27. *See* Whitmarsh v. Buckley, 324 S.W.2d 298 (Tex. Civ. App.—Houston 1959, no writ).

28. *See, e.g.*, Toyah Independent School Dist. v. Pecos-Barstow Consol. Independent School Dist., 497 S.W.2d 455 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.), *cert. denied*, 415 U.S. 991 (1974).

29. *See, e.g.*, State v. Byington, 168 So. 2d 164, 175 (Fla. Dist. Ct. App. 1964).

30. Columbian Cat Fanciers, Inc. v. Koehne, 96 F.2d 529 (D.C. Cir. 1938).

31. Toledo Traction, Light & Power Co. v. Smith, 205 F. 643 (N.D. Ohio 1913).

32. *See* Salgo v. Matthews, 497 S.W.2d 620, 632 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.).

33. Otherwise, declaring that the broader viewpoint grants a measure of discretion would be ineffectual; the obscurity of the distinction would prompt an application of the narrow rule. *Id.* at 627-28. Two New York courts have stated that inspectors are authorized to determine any dispute. Data-Guide, Inc. v. Marcus, 16 Misc. 2d 541, 181 N.Y.S.2d 945 (Sup. Ct. 1958); Prigerson v. White Cap Sea Foods, Inc., 100 N.Y.S.2d 881 (Sup. Ct. 1950).

cisions.[34] Feeling that a corporation must be apprised of the validity of board elections as quickly as practicable to prevent temporary paralysis, the court assumed that the stockholders' interests are best served when the inspectors resolve proxy and voting disputes.

The court's treatment of the broader judicial view intimated that judicial review of any discretionary error removes the most serious initial objection to the judicial viewpoint—the possible finality of the inspector's factfinding decisions.[35] The court noticed that under the broader judicial view, other courts did not disturb an inspector's findings unless they were clearly erroneous.[36] It then emphasized that despite its authorization of discretionary latitude, it would reserve full power to review both facts and law. Thus, the inspector's findings are only initial determinations. Under the court's resolution, election inspectors should have discretionary authority to decide the validity of proxies and the right to vote, and they should be protected against mandamus actions. However, the court did not altogether foreclose the possibility of mandamus. The election inspector's function encompasses both ministerial and discretionary duties. The court of civil appeals noted this dual role[37] and left open the possibility that an inspector might be subject to a mandamus for the exercise of a ministerial function.

Since good business practice dictates the necessity for prompt resolution of election disputes, the court reasoned that the election inspector should not look beyond the transfer books for a determination of voter qualification. Extensive foraging for the owner of beneficial title would be costly, time-consuming, and unnecessary, since the beneficial owner has other remedies.[38] The inspector's only duty should be

34. 497 S.W.2d at 627. The same could be said, however, of Texas justices of the peace. They serve a judicial function, but their decisions are not bindiug on the reviewing county court. *See* TEX. CONST. art. V, § 16.

35. *See* 497 S.W.2d at 628. The fear is unfounded. The inspectors' findings of fact are usually sustained on the grounds that a new election would be costly, and that even if the inspectors had counted the rejected proxies the result would be the same. *See* Burke v. Wiswall, 193, Misc. 14, 85 N.Y.S.2d 187 (Sup. Ct. 1948).

36. Umatilla Water Users' Ass'n v. Irvin, 56 Ore. 414, 108 P. 1016 (1910).

37. *See* 497 S.W.2d at 627 n.3.

38. The beneficial owner's remedies had never been spelled out by the Texas courts, which left the *Salgo* court again in the position of filling gaps in the law. It resolved the problem by sanctioning the use of the general remedies granted to the beneficial owner in other jurisdictions. For example, the beneficial owner may obtain a proxy. *In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (Ch. 1941); Thompson v. Blaisdell, 93 N.J.L. 31, 107 A. 405 (Sup. Ct. 1919); *In re* Atlantic City Ambassador Hotel Corp., 62 N.Y.S.2d 62 (Sup. Ct. 1946) (under a state statute). He may obtain an injunction to prevent the record owner from voting. *In re* Canal Constr. Co., 21 Del. Ch. 155, 182 A. 545 (Ch. 1936); Haskell v. Read, 68 Neb. 107, 93 N.W. 997 (1903);

to ascertain who represents the record holder. If a receiver is involved, a statute gives the holder or controller of the stock the right to vote.[39] The Salgo faction argued that either the bank, as the holder of the certificates, or the bankruptcy trustee, as the beneficial owner, had control of the shares. The court disagreed on the basis that these individuals held or controlled the shares no more than a transferee. Since transferees do not enjoy the right to vote the shares,[40] the court held by analogy that the bank and the trustee were similarly not entitled to vote.

The court also had a procedural reason for denying the mandamus: the adequacy of a legal remedy. Although the previous case law suggested the extreme position that quo warranto would be the sole remedy available when an office has been usurped, the *Salgo* court was content to hold only that, in the *Salgo* situation, quo warranto was an adequate remedy.[41] It reached this conclusion by comparing it with a mandamus.[42] The court asserted that quo warranto, a proceeding at least as expeditious as a mandamus proceeding, was a final decree that would conclusively banish the opposition.[43] It recognized that in some cases plaintiffs might be unable to prove the validity of their proxies or to obtain full relief in a quo warranto proceeding, or that the corporation might become seriously disabled in the event of a delay in accession by the new board.[44] Had the Matthews faction alleged and proved such circumstances, mandamus would have been proper; however, they had made no effort to prove the inadequacy of their legal remedies.

Salgo authorizes Texas election inspectors to assume judicial powers similar to those conferred by statute in other jurisdictions.[45] The court of civil appeals, in an effort to insulate inspectors from mandamus, granted inspectors substantial discretionary authority. The min-

American Nat'l Bank v. Oriental Mills, 17 R.I. 551, 23 A. 795 (1891). Additionally, he may obtain a mandamus to compel recordation of the transfer. Amidon v. Florence Farmers' Elevator Co., 28 S.D. 24, 132 N.W. 166 (1911).

39. TEX. BUS. CORP. ACT ANN. art. 2.29(G) (1956): "[S]hares held by or under the control of a receiver may be voted by such a receiver without the transfer thereof into his name if authority so to do be contained in an appropriate order of the court by which such receiver was appointed."

40. Since no Texas court had ever faced the problem, the court of civil appeals adopted the transferee rule used in other jurisdictions: a transferee may not vote the shares since he is not the record owner. Thompson v. Blaisdell, 93 N.J.L. 31, 107 A. 405 (Sup. Ct. 1919); *In re* Mohawk & H.R.R., 19 Wend. 135 (N.Y. Sup. Ct. 1838).

41. 497 S.W.2d at 625

42. *Id.* at 626.

43. *Id.*

44. *Id.* at 624.

45. *See* note 18 *supra* & accompanying text.

isterial viewpoint clearly flouts the authority of inspectors to try the genuineness of a proxy;[46] hence under that view validity is determined by the courts.[47] Logically, the court's rejection of this view must evidence its intent to permit inspectors to resolve such problems independently. *Salgo* thus assimilated into Texas common law selected statutory manifestations of the broader view expressed by other jurisdictions. The court's treatment of the *Salgo* inspector provided further notice of its intention to enlarge all inspectors' judicial powers. The *Salgo* inspector was a lawyer. The disputed facts were complex, and the law was sharply contested by both factions. Yet the court did not announce any rule for determining the validity of proxies. Instead it sanctioned and approved judgmental decisions by inspectors,[48] subject to postelection judicial review. Although the court then said in dictum that the inspector had made the wrong decision, it adhered to the belief that the decision should prevail without judicial intermeddling until the conclusion of the election process.[49]

The court's reason for granting this judicial power was at odds with its basic premise. If achieving a swift preliminary resolution of corporate elections were really the paramount concern, the court would have adopted the talismanic rules of the narrow ministerial view, thereby simplifying and routinizing the election inspector's task. Granting judicial powers to election inspectors only slows down the initial stages of the election process since assimilating and weighing the possibly voluminous evidence bearing on the issues that inspectors must decide is time-consuming. On the other hand, granting judicial powers does improve the accuracy of the election, a point that the court failed to emphasize. Under the narrow ministerial view inspectors must accept fraudulent proxies if regular on their face,[50] a procedure that virtually guarantees subsequent litigation. Trusting election inspectors with judicial powers minimizes the likelihood of successful subsequent litigation because of the increased accuracy of the election results.[51]

The broad discretionary powers granted to inspectors to determine the validity of proxies was seriously undercut in the court's decision to

46. *In re* Cecil, 36 How. Pr. 477 (N.Y. Sup. Ct. 1869).

47. *See In re* Lake Placid Co., 274 App. Div. 205, 81 N.Y.S.2d 36 (1948), *appeal denied*, 298 N.Y. 932, 82 N.E.2d 44 (1949).

48. 497 S.W.2d at 628.

49. *Id.*

50. *See* text accompanying note 11 *supra.*

51. The *Salgo* court probably overlooked this rationale, either because it was interested in insuring the postelection availability of quo warranto or because it intended that the interpretation aid election accuracy. *See* 497 S.W.2d at 628.

restrict voter qualification judgments to a mere examination of the transfer books. This transfer book rule was designed to encourage speedy resolution of disputes. However, nothing inherent in the rule guarantees that effect since after this decision the inspector still must determine "who was entitled to act for the record owner."[52] The evidence offered to show this will be no more leviathan than the evidence necessary to determine the validity of proxies. Furthermore, the proxy acceptance and voting process already takes several days; a few more would not be overly cumbersome. Limiting the inspectors, but not the reviewing court, to the transfer books undermines the effectiveness of the entire policy. The only way a challenger may enforce what he believes is his right to vote is by obtaining a judicial decision, available only in a court. The result is an inevitable increase in litigation. In contrast, when election inspectors have authority to make speedy, initially binding judgments, an air of legitimacy surrounds the election result, and future litigation is discouraged. The loser is better able to determine the merits of his cause of action, if any, and the potential effect of corporate paralysis is substantially avoided. While allowing broad judicial powers to determine the validity of proxies, the court offered no justification for denying inspectors the same authority in voter qualification disputes. Instead, it implied that it would bow to the wisdom of sister states. Texas statutes say only that the books are prima facie evidence,[53] which is presumably rebuttable. However, the court construed the term "prima facie" to mean that the book was conclusive on the inspectors but not on a reviewing court.[54] This rule persists only in jurisdictions espousing the narrow ministerial viewpoint,[55] which the court earlier rejected. Had the court more carefully analyzed the election process, it surely would have made the two rules

52. *Id.* at 629. Other jurisdictions have adopted a number of rules to help in this determination. *See* note 17 *supra.* The Texas legislature has also adopted several: the executor rule, TEX. BUS. CORP. ACT ANN art. 2.29(F) (1956) (executor may vote shares still part of estate); the receiver rule, *id.* art. 2.29(G) (receiver may vote shares under conditions specified); and the pledgee rule, *id.* art. 2.29(H) (pledgee may vote shares once they are transferred to his name). *Salgo* adopted as Texas common law the transferor-transferee rule, which states that the transferee does not have the right to vote the shares. *See, e.g.*, Thompson v. Blaisdell, 93 N.J.L. 31, 107 A. 405 (Sup. Ct. 1919). The inspectors need only determine whether the voter falls within the provisions of the rule: *i.e.*, is the voter the record holder's representative? The transferor-transferee rule was used in the instant case to divest the Salgo faction of its votes. This discretion is identical to the judicial power denied by the early nineteenth century courts.

53. TEX. BUS. CORP. ACT ANN. art. 2.27(A) (1956).

54. 497 S.W.2d at 629; *see* note 20 *supra.*

55. Two commentators label this rule as a corollary of the ministerial rule. E. ARANOW & H. EINHORN, *supra* note 5, at 411.

consistent: it would have either restricted the inspector's authority to validate proxies or expanded it to determine voter qualifications. Instead, in eclectic fashion, the court opted for a procedure that spawns barratry (narrow ministerial view) and prolongs the election period (broad judicial view)—both of which significantly undermine the corporation.

In this case a corporate bylaw provided that stock could be transferred only on the books; this might have reinforced the court's decision to forbid the *Salgo* inspector from inquiring further. Whether the decision can be extended to cases in which no such bylaw exists is uncertain. If it is extended, an inspector may be susceptible to a mandamus if he ignores the transfer book rule and conducts additional investigations. Arguably the *Salgo* inspector's reliance on information not in the books fell within the proscribed area;[56] yet the court was unwilling to label his action a clear abuse of discretion that required correction by mandamus. Anxious to avoid mandamus on policy grounds, the court probably felt that uncertainty about the identity of the listed owner's representative rendered the decision of the election inspector something short of a clear abuse of discretion. Normally, though, if the election inspector seeks to assume the court's function and go beyond the transfer books, he will commit a clear abuse of discretion, thereby enabling the challengers to obtain a mandamus, which in turn inflicts all the concomitant burdens on the corporation. The better position would have been to allow the election inspectors to render a judicial decision. Whether this power derives from statute, bylaw, or common law should be immaterial.

Granting the election inspectors discretion to determine the validity of proxies and then asserting the rule that discretionary functions are not proper subjects of mandamus did not fully refute the Matthews faction's arguments. They had relied on two commentators, Aranow and Einhorn, for the proposition that an aggrieved stockholder should always have the opportunity to obtain a remedy before the conclusion of the election.[57] Aranow and Einhorn based this proposition on two cases that allowed a mandamus to issue prior to the termination of the election.[58] These cases, however, do not sup-

56. The inspector went beyond the transfer books and determined that the beneficial owner, the bankruptcy trustee, was the only party entitled to vote.

57. E. ARANOW & H. EINHORN, *supra* note 5, at 492-95.

58. State *ex rel.* Howley v. Coogan, 98 So. 2d 757 (Fla. App. 1957), *cert. denied*, 101 So. 2d 817 (Fla. 1958); Young v. Jebbett, 213 App. Div. 774, 211 N.Y.S. 61 (1925).

port the point for which they were cited. Rather, they bear on the principle that one may secure a mandamus to compel an election inspector to execute a ministerial duty. The position taken by the *Salgo* court indicated an intent to prevent the expense of lengthy proxy contests and the concurrent diversion of executive efforts from corporate affairs. A quick, conclusive resolution of the contest best serves the interests of the corporation.[59] Whether mandamus or quo warranto would better serve this policy is not immediately obvious, since both involve time, expense, and effort.

The court's principal ground for preferring quo warranto over mandamus started from the premise that the two actions consume approximately equal appellate time. Given this equivalence, it might have felt some responsibility not to vitiate the statutory remedy. The Texas Rules of Civil Procedure have shortened the record-filing period for quo warranto, and the procedure is given preference by the apellate court.[60] Similar rules hold for mandamus actions.[61] No investigation was made into the time factor in district court aside from a remark that resort to the full range of equitable procedures does not constitute a summary proceeding.[62] In resolving this question, a distinction must be drawn between the situation in which management wins and that in which the insurgents win. If quo warranto is the remedy, the suit must be brought after the election process is completed. If management wins the election, the corporation's business will proceed as before during the pendency of the quo warranto action;[63] this would have been the case in *Salgo*. However, if the opposi-

In *Coogan* the election inspectors refused to allow use of a proxy to vote on an amendment proposed at the meeting, yet allowed its use on the subsequent main proposition. The court claimed that an election inspector served a ministerial function and was therefore subject to a mandamus. The mandamus issued because an inspector is not authorized to limit the use of an unchallenged proxy that is regular on its face. The court suggested that the mandamus might not have issued if the proxy's validity had been in issue.

In *Young* the election inspectors had misplaced some proxies and discovered their error only after the polls had closed. They rejected the proxies. The court again asserted that inspectors served purely ministerial functions and were subject to mandamus. But it required only that they receive the proxies; it reformed the lower court's mandamus to exclude that court's determination of the proxies' validity.

59. E. ARANOW & H. EINHORN, *supra* note 5, at 493.

60. TEX. R. CIV. P. 384, 781.

61. TEX. R. CIV. P. 385.

62. 497 S.W.2d at 626.

63. The old directors would remain in office until replaced. Vogtman v. Merchant's Mortgage & Credit Co., 20 Del. Ch. 364, 178 A. 99 (Ch. 1935) (when the attempted election of new directors is invalid, the old directors continue in office until the election of their successors).

tion wins, the use of quo warranto might result in two changeovers of management, assuming the suit was successful, seriously disrupting the corporation's business. The Aranow and Einhorn solution, which allows a mandamus action before the election is completed, might be the better alternative. While the suit is pending, the old guard would remain in control. Thus, the corporation would suffer no more than one management changeover, with minimal damage to the corporate routine.[64] Coupling the quo warranto action with a preliminary injunction might secure the advantages of both approaches. The main appeal of the Aranow and Einhorn suggestion is the speed with which it would correct an inspector's errors.[65] Since quo warranto is a summary procedure in Texas, the practical significance of mandamus that was recognized by Aranow and Einhorn is minimal.

Another policy consideration is the need to discourage litigation. The court is unpersuasive in suggesting that a mandamus decree will necessarily encourage litigation. According to the *Salgo* court, quo warranto is superior to madamus because the former reinstates validated officers while the latter merely settles election results. The court neglected to mention, however, that absent new grounds for reversal,[66] a mandamus decree will operate as collateral estoppel or res judicata[67] upon both a subsequent quo warranto proceeding and further equity suits. A mandamus action will generate further litigation only if the parties are initially negligent and fail to completely dispose of the issue. Thus, it appears that the two procedures have substantially the same effect. If instituted prior to the end of an election, however, the mandamus proceeding does have one practical drawback: some shareholders may be forced to leave the meeting before resolution of the mandamus proceeding.[68] Thus, some need does exist for promptly resolving disputes, and election inspectors appear to be best-suited for the task, provided that they are not hamstrung by a mandamus.

64. The court recognized this possibility. *See* 497 S.W.2d at 624. In quo warranto proceedings won by the opposition, courts have issued preliminary injunctions to protect the status quo, *i.e.*, to keep management in power. Hand v. State *ex rel.* Yelkin, 335 S.W.2d 410 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

65. *See* E. ARANOW & H. EINHORN, *supra* note 5, at 510.

66. *See* 497 S.W.2d at 626.

67. *See* City of Gilmer v. Moyer, 181 S.W.2d 1020 (Tex. Civ. App.—Texarkana 1944, no writ).

68. *Cf.* Burke v. Wiswall, 193 Misc. 14, 85 N.Y.S.2d 187 (Sup. Ct. 1948). Since they were excluded from the meeting, some shareholders, for this reason, may have used proxies to change their votes in favor of the Matthews faction.

None of the reasons advanced in *Salgo* justify favoring quo warranto over mandamus. Both require the same amount of time, and both possess the same degree of finality. The most that can be said is that the court's very choice of one remedy over the other may serve a beneficial purpose in establishing certainty concerning available remedies. Quo warranto does not have the practical drawback of mandamus. Furthermore, as an added litigation deterrent, the state must agree to institute the aggrieved faction's suit. Mandamus will be superior to quo warranto only when a management changeover is involved. In that situation even the *Salgo* court would allow mandamus, assuming the proper pleading and proof of irreparable harm. On the whole, therefore, quo warranto appears to be the better remedy.

Having decided that quo warranto causes the least disruption to the corporation and is the preferable remedy for litigants, the court ignored its own reasoning and wasted additional time by dissolving the injunction and dismissing the action.[69] In the contested election cases in which quo warranto is the exclusive remedy, failure to bring that action results in dismissal,[70] although a new quo warranto proceeding is always available if the statute of limitations has not run. Federal courts have concluded that a claim predicated on the wrong extraordinary writ is not fatal to the action.[71] State courts, however, are reluctant to exercise this flexibility in the absence of a statute.[72] The court of civil appeals, therefore, may have missed the opportunity for a major contribution to state law in its insistence on formal regularity.

The *Salgo* court amplified considerably the election inspector's discretionary authority beyond the limit imposed by American cases. However, in following the New York statute's rule confining the in-

69. 497 S.W.2d at 631.

70. *See, e.g.*, Austin v. Welch, 480 S.W.2d 273 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ) (mandamus dismissed by district court); Shaw v. Miller, 394 S.W.2d 701 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (injunction dismissed by district court); Hamman v. Hayes, 391 S.W.2d 73 (Tex. Civ. App.—Beaumont 1965, writ ref'd) (declaratory judgment dismissed by district court).

71. *Ex parte* Simons, 247 U.S. 231 (1918) (the form of the extraordinary writ does not matter); *see* Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (appellate court remanded a habeas corpus action to be treated as a mandamus proceeding); Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), *rev'd*, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969) (the district court treated a motion for law books as a writ of habeas corpus). *See also* FED. R. CIV. P. 54.

72. *See* Fins, *Should an Error in Seeking the Wrong Writ be Fatal?*, 4 J. MARSHALL J. OF PRAC. & PROC. 188 (1971). *But see* Ferguson v. Ferguson, 98 S.W.2d 847 (Tex. Civ. App.—Eastland 1936, no writ) (designating relief requested as writ of prohibition instead of injunction was immaterial).

[Note by George Lee Flint, Jr.]

spector to the transfer books, it created an anomalous split in the inspector's authority: he does have discretion to determine validity of votes, but he has little or none to determine who may vote. Nevertheless, *Salgo* has also helped to resolve a number of minor dilemmas facing the election inspector—the problem of changed votes and the status of beneficial owners and transferees. Although the court refused to grant a mandamus, it did not foreclose the possibility that mandamus will lie where the functions are purely ministerial or where quo warranto is inadequate.

MECHANICS AND MATERIALMEN—A BOND MUST SUBSTANTIALLY COMPLY WITH THE HARDEMAN ACT'S REQUIREMENTS FOR THAT STATUTE TO GOVERN THE BOND'S CONSTRUCTION. *Sherwin-Williams Co. v. American Indemnity Co.*, 504 S.W.2d 400 (Tex. 1974).

Rowton Construction Company, naming Ken Row Apartments and Dallas Federal Savings & Loan Association as obligees, executed a $400,000 payment bond in conjunction with a contract to build a $957,435 apartment project for Ken Row. Although the bond contained a two-year contractual limitations period, the terms of the bond stated that it was intended to comply with the Hardeman Act,[1] which statutorily specifies a fourteen-month period of limitations and prescribes that the penal sum of the bond be at least as great as the contract price.[2] In a suit to foreclose its materialmen's lien, Sherwin-Williams Company, who had supplied materials to both Rowton and a subcontractor, joined American Indemnity Company, the bond surety, by filing an amended petition after the fourteen-month limitation period had expired but before the end of the two-year contractual limit. The trial court and the Dallas Court of Civil Appeals granted American Indemnity's motion for summary judgment, holding that the Hardeman Act controlled, so that Sherwin-Williams was barred by the fourteen-month statute of limitations.[3] *Reversed.* A bond that by its express terms evidences its intent to comply with the Hardeman Act is not

1. TEX. REV. CIV. STAT. ANN. arts. 5452 *et seq.* (Supp. 1974).
2. *Id.* art. 5472d.
3. Sherwin-Williams Co. v. American Indem. Co., 491 S.W.2d 485 (Tex. Civ. App.—Dallas 1973).