cated. A mere glance at the corporate records is all that is needed to ascertain whether the person seeking appraisal and payment is properly entitled to relief. On the other hand, the registered owner is placed in a position where he has the power to sever the beneficial owner's interest in the corporation. Yet it should be borne in mind that this situation results from the beneficial owner's own act since he assented to the registration of his shares in the name of another. Furthermore, he will not be left without a remedy against the registered owner.

To a lesser degree, interpretation (2) is subject to the disadvantages of interpretations (1) and (3). Under interpretation (2), the simplicity of interpretation (1) does not exist, since the corporate records will not be the sole criterion in determining the parties entitled to an appraisal. Also, the registered owner will still have the power to affect the beneficial owner's interest. Furthermore, there is the possibility of conflict between the actions of the beneficial and registered owners. It is submitted, therefore, that interpretation (1) is the preferable view.

MICHAEL B. SPITZ

Corporations—Judicial Review of Corporate Elections—Section 25 of the New York General Corporation Law.—*Gearing v. Kelly*.[1]—The appellant, a director of Radium Chemical Company, Inc., stayed away from a directors' meeting for the sole purpose of preventing a quorum. In her absence the board of directors elected a new director to fill an existing vacancy on the board. The Supreme Court, Special Term,[2] granted appellants' petition to the extent of setting aside the election. The Court of Appeals[3] upheld the Supreme Court, Appellate Division,[4] in dismissing the petition. HELD: Both appellant and the stockholder whom she represented were estopped to assert that the lack of a quorum invalidated the board's election of the new director.

Section 27 of the New York General Corporation Law states:[5]

> *Unless otherwise provided a majority of the board at a meeting* duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at such a meeting shall be the act of the board. (Emphasis added.)

Section 27[6] also gives every corporation the privilege of enacting a by-law fixing its own quorum requirement at any fraction not less than one-third, nor more than a majority of its directors.[7] And although the probability of a deadlock is enhanced,[8] section 9 of the same act[9] permits the certificate

[1] 11 N.Y.2d 201, 182 N.E.2d 391, 227 N.Y.S.2d 897 (1962).
[2] 29 Misc. 2d 674, 215 N.Y.S.2d 609 (Sup. Ct. 1961).
[3] Supra note 1.
[4] 15 App. Div. 2d 219, 222 N.Y.S.2d 474 (1961).
[5] N.Y. Gen. Corp. Law § 27.
[6] Ibid.
[7] Benintendi v. Kenton Hotel, 294 N.Y. 122, 60 N.E.2d 829 (1945).
[8] See Henn, Corporations and Other Business Enterprises § 274 (1961).
[9] N.Y. Gen. Corp. Law § 9. The statute provides in detail the manner of effecting,

of incorporation to include a provision requiring unanimity or greater than a majority vote to constitute a quorum.

The question of the legality of the election arose from the alleged absence of a quorum.[10] In an early decision,[11] a New York court had held that the power of a board of directors is not suspended by vacancies in the board unless the number be reduced below a quorum. The general rule is that the number necessary and sufficient to constitute a quorum is a majority of the *entire* board, notwithstanding that there may be vacancies in the board at the time.[12] Neither the decision nor the rule, however, was applied by the Appellate Division in the instant case.

Radium's certificate of incorporation provided for a minimum of four directors. In 1961 one of these directors resigned, and the meeting in question was called to fill the resulting vacancy on the board. Since only two directors actually attended the meeting and voted to fill the vacancy, a majority of the *entire* board was not present. It would appear, as a result, that under ordinary circumstances the action of the board would be a "void act,"[13] regardless of the appellant's motive for staying away from the meeting.[14] However, the Appellate Division interpreted the by-laws of the corporation as permitting vacancies on the board to be filled by a majority of the directors actually in office.[15] Since only three directors were actually in office two would therefore constitute a majority of the board, and any action by them would be fully authoritative. The court reached this result by comparing the section of the by-laws which provided that "a majority of the directors shall constitute a quorum" with other sections which required the approval of "a majority of the whole board." From this distinction between "the board" and "the whole board" the court inferred that a majority of "the board" meant a majority of the directors actually in office.[16] Further grounds for the decision were derived from the fact that twenty-one states and the Model Business Corporation Act allow directors to fill vacancies where less than a quorum remains.[17] If, as was decided by the Appellate Division, two directors were a sufficient number

subscribing and acknowledging an amendatory certificate adopting, changing or striking out such a provision.

10 See Cirrincione v. Polizzi, 14 App. Div. 2d 281, 220 N.Y.S.2d 741 (1961); In re New York & Westchester Town Site Co., 145 App. Div. 613, 130 N.Y.S. 414 (1911).

11 Castle v. Lewis, 78 N.Y. 131 (1879); White, New York Corporations § 188, (12th ed. 1947).

12 Erie Ry. v. City of Buffalo, 180 N.Y. 192, 197, 73 N.E. 26, 28 (1904).

13 Supra note 10.

14 See Tomlinson v. Loew's Inc., 134 A.2d 518 (Del. Ch. 1957); rearg. denied, 135 A.2d 136 (Del. Ch. 1957), in which a Delaware court in a situation similar to the present ruled that:

> The fact that four directors of the corporation stayed away from a meeting of the board of directors to prevent a quorum, would not estop directors who stayed away from the meeting from raising the contention that the election of directors at a meeting to fill vacancies was invalid because there was no quorum. Furthermore, the absence of directors from the meeting would not be considered temporary resignations by them. Since the individual defendants were purportedly elected at a directors' meeting at which no quorum was present, it follows that their election was contrary to the governing by-laws and invalid.

15 Supra note 4, at 220, 222 N.Y.S.2d at 476.

16 Id.

17 Supra note 4, at 221, 222 N.Y.S.2d at 477.

for the purpose of filling vacancies on the board, it would appear that the vacancy was validly filled. Therefore, the absence of the appellant should make no difference.

The Appellate Division also held that the appellant-director should be estopped to complain, since a director should not be allowed to gain personal advantage through breach of his duty to attend meetings.[18] Furthermore, the appellant-stockholder was estopped to complain since the stock was so closely held as to make the director (her daughter) "her" director, and to show that the two were motivated by identical interests.[19]

The Court of Appeals affirmed the decision of the Appellate Division in a per curiam opinion which discussed only the issue of estoppel. However, Judge Froessel dissented strongly, maintaining that two directors were not sufficient to constitute a quorum and that consequently the election was wholly void and should be set aside.[20] He also took issue with the majority's insistence that the appellants should be estopped from complaining on the grounds that such relief was precluded by the language of the pertinent sections of the General Corporation Law.[21]

In holding that the shareholder is estopped from attacking the election, the Court of Appeals appears to be reaching a conclusion directly in conflict with *In re William Faehndrich, Inc.*[22] In that case the Court of Appeals held that an improper purpose on the part of a stockholder provided no grounds for relief under Section 25 of the General Corporation Law[23] where the literal statutory prerequisites for holding an election had been properly complied with. This was because the purpose of the section was "to provide a summary review of a contested election, free from the procedural complications of a plenary proceeding."[24] In the instant case the court rests its decision to

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[18] Id.

[19] Supra note 1, at 203, 227 N.Y.S.2d at 898.

[20] Supra note 1, at 205, 227 N.Y.S.2d at 899.

[21] N.Y. Gen. Corp. Law § 25.

> Upon the application of any member aggrieved by an election, and upon notice to the persons as the court may direct, the supreme court at a special term thereof shall forthwith hear the proofs and allegations of the parties and confirm the election or order a new election as justice may require.

See discussion, infra.

[22] In re William Faehndrich, Inc., 2 N.Y.2d 468, 161 N.Y.S.2d 99 (1957). The president of a corporation caused a notice to be sent to his father, the secretary and treasurer of the corporation, advising him of a special meeting of the stockholders to be held on a stated date "for the purpose of electing directors of the corporation for the ensuing year, or for such action or further business as may arise at said meeting." The father failed to attend the meeting. The son voted his shares in favor of himself and his wife and they were elected directors. They thereupon held a directors' meeting, elected the son president and treasurer, and his wife vice-president and secretary, thereby replacing the father as secretary-treasurer. They also terminated the father's employment. The court at Special Term set aside the election. It was the court's conclusion that the notice of the meeting was invalid because it did not "carry home" to the petitioner that it was respondent's "purpose" to remove him as a director, officer and employee of the corporation. The Appellate Division unanimously affirmed without opinion. The Court of Appeals ruled that "sympathy-provoking though the facts may appear, they afford no ground for relief under section 25 of the General Corporation Law; the petition should have been dismissed."

[23] Supra note 21.

[24] Supra note 22, at 474, 161 N.Y.S.2d at 104.

estop the shareholder wholly on an examination of the improper motives of the director, which motives are attributed to the shareholder because of the close relation existing between them. The court is, in effect, applying the "clean hands" doctrine. But, in relying on the purpose of the shareholder, this decision seems to ignore the summary nature of proceedings under section 25. Such proceedings, by their very nature, should not be concerned with the motives of the parties, but with whether or not the corporate bylaws have been complied with.[25]

Section 25 provides that the court "shall . . . confirm the election or order a new election as justice may require."[26] It might be argued that the statutory phrase, "as justice may require," authorized the court to grant a different type or a greater measure of relief where the circumstances of a particular case warrant such a remedy. It has been held, however, that these words merely modify those specifying the two alternatives open to the court, namely to confirm or to order a new election.[27] Where it is intended that a court may vary its relief according to the circumstances of the election under review, the state statute usually confers such power.[28] Thus it appears, in light of these factors, that the Court of Appeals, by holding appellants estopped from attacking the election result, has departed from the provisions set forth in section 25—"to either confirm the election or order a new election." If the Court of Appeals had addressed itself directly to the question of whether or not Radium's quorum requirements had been fulfilled, the court could have confirmed or set aside the election solely on that basis, exclusive of the estoppel consideration. Consequently, it further appears that the Court of Appeals has not only utilized a form of relief which is not permissible under section 25, but has done so in a case where such relief is wholly unnecessary.

It is interesting to note that in the new Business Corporation Law of New York, which will become effective April 1, 1963, section 25 of the present act has been replaced by section 619[29] which will give the court the power "(1) to confirm an election, or (2) order a new election, or (3) to take such other action as justice may require." The addition of the latter clause to the existing law will enable the court to grant whatever type of relief is warranted by the circumstances of the contested election,

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[25] Supra note 22, at 475, 161 N.Y.S.2d at 105. "It may well be that it would be more desirable and expedient if the court were empowered in the summary proceeding to pass on all issues. But that is, of course, a matter for the legislature rather than the courts. Section 25 of our General Corporation Law, as written and construed, permits the courts no alternative but to confirm the election or order a new one in summary fashion."

[26] Supra note 21.

[27] In re William Faehndrich, Inc., 2 N.Y.2d 468, 161 N.Y.S.2d 99 (1957); In the Matter of Baldwinsville Fed. Sav. & Loan Ass'n, 268 App. Div. 414, 51 N.Y.S.2d 816 (1944).

[28] See, e.g., N.J. Stat. Ann. § 14:10-16 (Supp. 1954) . . . [The court may] establish the election so complained of, or order a new election, or make such order, and give such relief in the premises as justice may require; Cal. Corp. Code Ann. § 2238 (West 1955) .... The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper; Del. Code Ann. tit. 8, § 225 (1953).

[29] N.Y. Bus. Corp. Law § 619.

with the result that decisions, such as the present one, will henceforth be above reproach.

PETER N. WELLS

Fair Trade—McGuire Act—Absolute Prohibition of Resale Price Maintenance Agreements between Competitors.—*Texas Co. v. DiGaetano.*[1]— A bill in equity was brought by the Texas Company against a gasoline retailer to enjoin the latter from selling Texaco gasoline for less than the minimum prices established by a resale price maintenance agreement which was entered into between the company and another of its retailers.[2] The defendant, though not a party to this agreement, was obligated to comply with the resale prices agreed upon, once he learned of the agreement, by virtue of the "non-signer" provisions of the New Jersey Fair Trade statute.[3] The defendant appealed from an order denying his motion to vacate a final judgment enjoining his "price-cutting" and the Appellate Division of the Superior Court of New Jersey reversed and remanded the decree of the lower court. HELD: The plaintiff oil company could not compete with the defendant retailer for business of a type exempted from the plaintiff's price-resale schedule and at the same time enforce fair trade prices against the retailer in a non-exempted field.

It is by virtue of the Miller-Tydings amendment of the Sherman Act[4] that state-authorized fair trading of goods moving in interstate commerce is lawful, and the application of such price-maintenance agreements to "non-signers" is permitted by the McGuire amendment of the Federal Trade Commission Act.[5] Both of these permissive amendments provide that agreements between "corporations in competition with each other" are expressly prohibited. The defendant in the instant case contended that since he and the plaintiff were "in competition with each other" for commercial and industrial accounts, it would be unlawful to allow the plaintiff to hold him to fair trade restrictions on price with respect to sales to privately owned automobiles.

Plaintiff oil company, perhaps with an eye to the competition provisions of these amendments, had promulgated a New Jersey fair trade price schedule exempting from fair trade prices "sales made by retailer to . . . commercial or industrial concerns or institutional establishments." The schedule stated that the "primary purpose" of the exemption was to enable the Texaco retailers to meet the competition of retailers of other brands selling at lower prices to buses, trucks, tractors and other commercial vehicles.

1 71 N.J. 413, 177 A.2d 273 (1961).

2 The suit was instituted pursuant to the New Jersey Fair Trade Statute. N.J. Rev. Stat. § 56:4-5 (1940).

3 N.J. Rev. Stat. § 56:4-6 (1940). This statute has been sustained as not violative of due process. See Lionel Corp. v. Grayson-Robinson Stores, 15 N.J. 191, 104 A.2d 304 (1954).

4 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

5 The Miller-Tydings Act did not have a non-signer provision. The Supreme Court in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), had held that the resale price agreements could not be enforced against non-contracting parties.