

admiralty jurisdiction with the already united law and equity jurisdictions.¹²⁰ The merger would wipe out unrealistic technical distinctions now attendant on the divided jurisdictions. Civil and "admiralty" claims arising out of the same operative facts must now be brought in separate actions.¹²¹ Two appeals are necessary.¹²² Mistakes in determining the side of the court on which to bring the claim are possible.¹²³ Filing on the wrong side means transfer¹²⁴ or dismissal.¹²⁵ In either case the litigant suffers delay.

Experience with remodeling of law and equity has demonstrated that amalgamation of dual procedural systems to give one federal procedure is not difficult. Unification of admiralty with law-equity involves only the problem of preserving to admiralty and civil litigants their substantive rights.¹²⁶ The Supreme Court should appoint a committee similar to that which successfully combined law and equity to effect a further merger with admiralty. With the assistance and cooperation of the admiralty bar, revision should be accomplished without undue delay.

120. "[U]nder its present rule making power [the Supreme Court could weld] the admiralty and the united law and equity jurisdictions together under the civil procedure of the Federal Rules with such additions for special matters as may be appropriate." 5 MOORE, FEDERAL PRACTICE 69-70 (1951).

121. *E.g.*, *The Eclipse*, 135 U.S. 608 (1889). See 5 MOORE, FEDERAL PRACTICE 285 (1951).

122. *Ibid.*

123. Although the admiralty court may enforce a "subsidiary" legal or equitable claim, see *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (where the court had jurisdiction over libellant's "subsidiary" claim that property attached by him had been fraudulently transferred by one respondent to the other respondent), the admiralty court may not enforce an "independent" legal or equitable claim. See *e.g.*, *The Eclipse*, 135 U.S. 608 (1889) and cases there cited. The distinction between a "subsidiary" and an "independent" claim is often unclear. The Supreme Court decision in *Swift & Co. Packers v. Compania Colombiana Del Caribe*, *supra*, overruled the two lower courts which had held that admiralty had no jurisdiction over the claim of fraudulent transfer.

124. *E.g.*, *The John R. Williams*, 144 F.2d 451 (2d Cir.), *cert. denied sub nom. Great Lakes Dredge and Dock Co. v. United States*, 323 U.S. 782 (1944) (transfer from admiralty docket to civil docket); *Jordine v. Walling*, 185 F.2d 662, 671 (3d Cir. 1950). See *Petrol Corp. v. Petroleum Heat and Power Co.*, 162 F.2d 327, 333 (2d Cir. 1947) where it is said that transfer from the civil docket to the admiralty docket would be available in a proper case.

125. *The Eclipse*, 135 U.S. 599 (1890).

126. 5 MOORE, FEDERAL PRACTICE 70 (1951).

NOTES

PROXY SOLICITATION COSTS AND CORPORATE CONTROL*

PROXY voting, intended to facilitate stockholder participation in corporate decisions,¹ has stymied stockholder control in publicly-held corporations.² Stockholders who disapprove of managerial policy or action face far greater difficulty in securing supporting proxies than does management.³ The incumbents not only can ride on the need for corporate stability and on stockholders' inertia,⁴ but also have easier access to the stockholder list.⁵ Moreover, man-

*Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950).

1. Common law did not recognize a right to vote by proxy, in the absence of special authorization in the corporate charter. 5 FLETCHER, CYCLOPEDIA CORPORATIONS, §2050 (perm. ed. 1931); Ake, *Corporate Proxies*, 41 MICH. L. REV. 38-40 (1942). But impracticability of personal attendance at stockholders' meetings, resulting from ownership increasingly dispersed among investors with stakes in many enterprises, forced general acceptance of proxy voting. See *id.* at 42-6; Bernstein & Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. OF CHL. L. REV. 226-7 (1940). It is now expressly sanctioned in all states except Iowa and Texas, which, in practice, permit it. Dean, *Non-Compliance with Proxy Regulations*, 24 CORNELL L.Q. 483, 488 (1939).

2. See BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 86-9, 138-9 (1932); DIMOCK & HYDE, *BUREAUCRACY AND TRUSTEESHIP IN LARGE CORPORATIONS* 19-21 (TNEC Monograph 11, 1940); Blair, *Appraising the Beard of Directors*, 28 HARV. BUS. REV. No. 1, pp. 101, 102 (1950). Cf. BURNHAM, *THE MANAGERIAL REVOLUTION* (1941). The proxy solicitation process has in effect supplanted the stockholders' meeting. Bernstein & Fischer, *supra* note 1, at 227; Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 655 (1951). And since solicitation is ordinarily conducted only by management, stockholders are presented a choice between voting for management or not voting at all. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE COMMITTEES, PART VII, MANAGEMENT PLANS WITHOUT AID OF COMMITTEES 130 (1938) (hereinafter cited as SEC REPORT VII); Dean, *supra* note 1, at 493; Note, 53 HARV. L. REV. 1165, 1168 (1940).

The resulting separation of ownership from control of corporate affairs has encouraged incompetence, negligence and corruption in management. *Hearings before Subcommittee of the Committee on Banking and Currency on S. 3580, 76th Cong., 3d Sess. 53, 203* (1940); SEN. REP. No. 1775, 76th Cong., 3d Sess. 11 (1940); Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future*, 41 COL. L. REV. 405, 443 (1941). For a classification of the types of intracorporate abuse, see *id.* at 406-7.

3. See LOSS, *SECURITIES REGULATION* 522 (1951); Comment, 33 ILL. L. REV. 914, 917 (1939); Note, 53 HARV. L. REV. 1165, 1168 (1940). State statutes commonly require little or no advance notice to stockholders of management proposals presented at corporate meetings. See, e.g., N. Y. STOCK CORP. LAW §45, DEL. CORP. LAW §30. See also Dean, *supra* note 1, at 490. Consequently, stockholders may not learn of objectionable plans in time to contest them effectively.

4. STEVENS, *CORPORATIONS* §123 (2d ed. 1949); DIMOCK AND HYDE, *op. cit. supra* note 2, at 19-21; Note, 36 CORNELL L. Q. 558, 559 (1951).

5. Stockholders have a right to examine the stockholder list for proper purposes. P-H CORP. SERV. ¶3404 (1947). The right cannot be taken away by charter or by-law.

agement can draw on the corporate treasury for all reasonable solicitation expenses, at least in proxy contests involving policy issues.⁶ In no reported case has management had to pay its own way in a proxy fight.⁷ Dissenting stockholders, on the other hand, have traditionally defrayed all solicitation expenses out of their own pockets.⁸ Thus the proxy machinery has operated as a cost-free "self-perpetuation and self-approval device"⁹ for management.

The Securities and Exchange Commission's proxy rules have laid the groundwork for effective stockholder participation.¹⁰ In proxy solicitations

State *ex rel.* Cochran v. Penn-Beaver Oil Co., 4 Del. 81, 143 Atl. 257 (Ct. in Banc 1926); *cf.* CAL. CIVIL CODE § 355 (Deering 1941). And solicitation of other stockholders' proxies for use in an election is a proper purpose. Klein v. Scranton Life Insurance Co., 139 Pa. Super. 369, 11 A.2d 770 (1940); Insuranshares Corp. of Del. v. Kirchner, 40 Del. 105, 5 A.2d 519 (Sup. Ct. 1939). But management has physical possession of the stockholder list, and litigation may be necessary to enforce the right to examination. Note, 53 HARV. L. REV. 1165, 1168 n.22 (1940); see, *c.g.*, Application of Joslyn, 191 Misc. 512, 78 N.Y.S.2d 183 (Sup. Ct. 1948).

6. The leading American case is Hall v. Translux Daylight Picture Screen Corp., 20 Del. Ch. 78, 171 Atl. 226 (Ch. 1934), following Peel v. London & N.W. Ry. Co. [1907] 1 Ch. Div. 5 (1906). *Accord*: McGoldrick v. Segal, 124 N.Y.L.J. 461, col. 2 (Sup. Ct. Sept. 14, 1950); Hand v. Missouri-Kansas Pipe Line Co., 54 F. Supp. 649 (D.Del. 1944); see Empire Southern Gas Co. v. Gray, 46 A.2d 741, 744 (Del. Ch. 1946) (management has "duty to solicit" in policy controversies). Limited proxy solicitation at corporate expense, incident to mailing notices of meeting, seems permissible whether or not an issue of policy is involved. Bounds v. Stephenson, 187 S.W. 1031 (Tex. Civ. App. 1916) (expenditures for management proxy, blank proxy and stamped envelope enclosed with notice held proper without reference to issues involved); *cf.* Lawyers' Advertising Co. v. Consolidated Ry. L. & R. Co., 187 N.Y. 395, 399, 80 N.E. 199, 201 (1907) (no policy issue; dictum that custom of distributing proxy forms at slight expense with directions for return is "not without merit"). Where nothing more is at stake than the membership of the board of directors, however, the costs of extensive solicitation may not be charged to the corporation. Lawyers' Advertising Co. v. Consolidated Ry. L. & R. Co., *supra* (follow-up newspaper advertisements held improper); Pittsburgh Steel Co. v. Walker, 92 PITTS. LEG. J. 464 (C.P. Alleghany County 1944) (professional proxy solicitors). *Contra*: *In re Zickl*, 73 N.Y.S.2d 181 (Sup. Ct. 1947) (employment of professional proxy solicitors sustained without reference to issues involved).

7. *But cf.* Pittsburgh Steel Co. v. Walker, 92 PITTS. LEG. J. 464 (C.P. Alleghany County 1944) (court refuses to dismiss where professional proxy solicitors were paid from corporate funds in personnel contest). *Compare* Lawyers' Advertising Co. v. Consolidated Ry. L. & R. Co., 187 N.Y. 395, 80 N.E. 199 (1907) (advertising agency denied recovery against corporation for cost of newspaper solicitation which "was not and could not have been lawfully" authorized in personnel contest). Under the circumstances, recovery from directors personally may have followed.

8. See BERLE & MEANS, *op. cit. supra* note 2, at 82-3; LOSS, SECURITIES REGULATION 522 (1951); Caplin, *supra* note 2, at 682.

9. Bernstein & Fischer, *supra* note 1, at 227.

10. Regulation X-14 (Rules X-14A-1 through X-14A-9 and Schedule 14A), 17 CODE FED. REGS. §§ 240.14a-1—240.14a-9 (1949), promulgated under § 14a of the Securities Exchange Act of 1934, 48 STAT. 881, 895 (1934), 15 U.S.C. § 78n(a) (1946). This section makes it "unlawful for any person by the use of the mails or by any means

over which it has authority,¹¹ the SEC requires full disclosure of the substance of each proposal on which the proxy is to be voted¹² and other pertinent information.¹³ The proxy form must also permit the stockholder to vote for or against each proposal.¹⁴ Moreover, management must mail dissenters'

or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." For excellent analyses of the proxy rules, see Loss, *SECURITIES REGULATION* 521-60 (1951); Emerson & Latham, *SEC Proxy Regulation: Steps Toward More Effective Stockholder Participation*, 59 *YALE L.J.* 635 (1950); Friedman, *SEC Regulation of Corporate Proxies*, 63 *HARV. L. REV.* 796 (1950). The rules' main thrust has been toward assuring stockholders the full information necessary for intelligent participation in corporate affairs. Loss, *supra* at 525; Comment, 33 *ILL. L. REV.* 914, 915 (1939).

11. § 14a of the Securities Exchange Act gives the Commission rule-making power only over proxy solicitation in connection with securities listed on national exchanges. Other legislation extends the SEC's authority to the unlisted securities of public-utility holding companies and their subsidiaries, and registered investment companies. Public Utility Holding Co. Act, § 12(e), 49 *STAT.* 803, 824 (1935), 15 *U.S.C.* § 791(e) (1946); Investment Company Act, § 20(a), 54 *STAT.* 789, 822 (1940), 15 *U.S.C.* § 80a-20(a) (1946). But the voting securities of numerous large publicly-held corporations, e.g., Aluminum Co. of America, remain outside the range of SEC regulation. See *SEC SUPP. REP. TO CONGRESS, A PROPOSAL TO SAFEGUARD INVESTORS IN UNREGISTERED SECURITIES*, 81st Cong., 2d Sess. 10-11 (Sen. Banking and Currency Comm. Print 1950).

12. The proxy form itself must "identify clearly and impartially each matter or group of related matters intended to be acted upon, whether proposed by the management or by security holders". Rule X-14A-4(a)(2). And the proxy statement required to accompany or precede the proxy form must describe such matters in substantial detail. See Schedule 14A, Items 8-21.

13. The proxy form must "indicate in bold face type whether or not the proxy is solicited on behalf of the management." Rule X-14A-4(a)(1). And the proxy statement must include information on (1) the revocability of proxies; (2) appraisal rights; (3) whom the solicitation is to benefit, and at whose expense; (4) the solicitors' "substantial interest," if any, in the outcome; (5) the voting securities and their principal holders; (6) the backgrounds of director-candidates; and (7), under some circumstances, the compensation of top management. Schedule 14A, Items 1-7.

14. Rule X-14A-4(b). This does not apply to management's candidates for election as directors.

The proxy holder may not be effectively bound to vote adverse proxies. See Dean, *supra* note 1, at 493-4; 64 *HARV. L. REV.* 668, 669 (1951). Proxies are technically treated by courts as creating a form of agency relationship, revocable at will unless "coupled with an interest". *Duffy v. Loft, Inc.*, 17 *Del. Ch.* 140, 151 *Atl.* 223 (Ch. 1930); *cf. Rudolph v. Murphy*, 121 *Neb.* 612, 237 *N.W.* 659 (1931). For various theories on which damage liability for failure to vote proxies might be based, see Comment, 33 *ILL. L. REV.* 914, 928-9 (1939). And solicitation may amount to a representation that proxies will be voted as marked, on the basis of which timely action to compel voting them will lie. *Cf. Lizars v. Dahlberg*, Docket 1944, Folio 264, Superior Ct. of Baltimore City, May 22, 1944. The SEC now seeks to enforce voting of proxies by requiring the proxy materials to state that they will be voted as marked. Rule X-14A-4(e). Failure so to vote them

proxy materials for them, if it does not surrender the stockholder list,¹⁵ and must include certain stockholder proposals in its own proxy materials.¹⁶ While these rules encourage formation and expression of stockholder opinion,¹⁷ they do little to endanger management's tenure.¹⁸ A real possibility of replacing the board of directors¹⁹ is necessary to assure an able management

would presumably make this statement materially false or misleading and might lead to damages, injunction, or criminal penalties for violation of the fraud rule, X-14A-9. But damages resulting from non-voting are difficult to prove; injunctions must be sought before the meeting; and violation of the SEC rule must be "willful" to incur criminal sanctions.

15. Rule X-14A-7. Mailing is at the stockholder's expense.

16. Rule X-14A-8. The proposal must be "a proper subject for action by the security holders." As to what constitutes such a subject, see *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), Note, 57 YALE L.J. 874 (1948); *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951). If management opposes the proposal, the stockholder must be permitted to include a statement of not more than 100 words in its support. However, the shareholder must have an affirmative proposal; he cannot simply state his opposition to management plans. And stockholders may not thus propose an opposition slate of candidates for election to office. For a blow-by-blow account of an economical proxy fight in which the insurgents took full advantage of this and other proxy rules, see Emerson & Latcham, *Further Insight into More Effective Stockholder Participation: The Sparks-Wilmington Proxy Contest*, 60 YALE L.J. 429 (1951).

17. The disclosure and ballot requirements afford substantial basis for informed stockholder action upon specific management or stockholder proposals for the future. As to management's record of past performance, however, disclosure is less complete: management is simply required to submit an annual report of operations, if it solicits proxies in connection with an election meeting. Rule X-14A-3(b).

18. The Commission, and perhaps the stockholder as well, has broad powers to prevent and undo violation of the proxy rules. Loss, *SECURITIES REGULATION* 543-52 (1951); Friedman, *supra* note 10, at 808-14. The rules may often be avoided, however, by the simple expedient of soliciting proxies only from "cooperating" stockholders, or not soliciting proxies at all. Management may control a quorum without need to solicit where statutes permit minimal quorum requirements. See, e.g., OHIO GEN. CODE § 8623-48 (Page 1949). Or, lacking control of a quorum, it may fail to solicit and continue in office by default of a quorum at the meeting. *Crown Plumbing Supply Co. v. Mishkin*, 119 N.Y.L.J. 1909, Col. 7 (Sup. Ct. May 21, 1948). See Gilbert, *Management and the Public Stockholder*, 28 HARV. BUS. REV., No. 4, pp. 73, 79 (1950). A number of corporations appear to have thus evaded the disclosure requirements of the proxy rules. Dean, *supra* note 1, at 487; Bernstein & Fisher, *supra* note 1, at 242.

19. In corporations which elect only a fraction of the board at any one meeting, insurgents cannot win control in a single campaign.

One commentator has suggested that stockholders' power to control their corporation can be largely restored by extension of Rule X-14A-8, *supra* note 16, to permit nomination of and voting for an opposition slate in management's proxy materials. Caplin, *supra* note 2, at 679-86. Such an extension of the Rule was at one time considered by the Commission. See *Hearings before Committee on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821 and H.R. 2019*, 78th Cong., 1st Sess. 34-5 (1943). For the objections of business, see *id.*, at 197. This would permit challenging the incumbents at slight expense to the corporation. But establishment of "an effective right of recall" by this means seems unlikely. Aside from the limited range of SEC proxy authority,

attentive to stockholder interests.²⁰ Yet the obstacles to a proxy contest—particularly the cost of solicitation—make such a possibility slim.²¹

The recent decision in *Steinberg v. Adams*²² takes a long step toward eliminating the cost burden on dissenters. At the 1947 annual meeting of the Thompson-Starrett Co., dissident stockholders unseated management which had spent \$20,000 of the corporation's funds soliciting proxies in its own behalf. The new board, with subsequent stockholder approval, reimbursed itself from the corporate treasury for its solicitation expenditures of \$27,000.²³ In a stockholder's derivative suit plaintiff claimed both sums for

supra note 11, possible refusal to vote adverse proxies, *supra* note 14, and possible evasion of the proxy requirements, *supra* note 18, corporate management could hardly be ousted without vigorous proxy solicitation by the opposition. See *Dauids v. Sillico*, 188 Misc. 45, 66 N.Y.S.2d 508 (Sup. Ct. 1946); *Friedman*, *supra* note 10, at 807.

20. *Caplin*, *supra* note 2, at 657. The disclosure requirements of the proxy rules probably tend to curb management misconduct. *Id.* at 667; *Hornstein*, *supra* note 2, at 451. But if management nevertheless ignores the stockholders' expressed views, is neglectful or incompetent, or actively abuses its position, stockholders have no other effective remedy than the threat of replacing the board of directors. Though Rule X-14A-8 facilitates expression of shareholders' views, it adds nothing to their limited power under state law directly to control corporate action. See *Loss*, *SECURITIES REGULATION* 538-9 (1951). The stockholder's derivative suit, another check on management, is increasingly pocked with procedural pitfalls. *Cf.* *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541 (1949); *Hornstein*, *The Deathknell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944); *The Future of Corporate Control*, 63 HARV. L. REV. 476 (1950). See note 47 *infra*.

21. Proxy contests have apparently been rare. *Gilbert*, *supra* note 18, at 78. For an excellent detailed account of one, see *Emerson & Latham*, *supra* note 16.

Under § 12(e) of the Public Utility Holding Company Act, 49 STAT. 803, 824 (1935), 15 U.S.C. § 791(e) (1946), the SEC has acted to reduce insurgents' relative cost disadvantages in solicitations for elections in registered holding companies and their subsidiaries. Rule U-65 prohibits management expenditure of more than \$1,000 of corporate funds annually aside from "ordinary" proxy solicitation expenditures, unless the Commission orders otherwise. 17 CODE FED. REGS. § 250.65 (1949). See *Standard Gas and Electric Co.*, SEC Holding Co. Act Release No. 7020, Dec. 2, 1946. *Cf.*, *Pittsburgh Steel Co. v. Walker*, 92 PITTS LEG. J. 464 (C.P. Alleghany County 1944). Nevertheless, the absolute cost burden of an active proxy fight probably remains a substantial deterrent to such contests. See note 23 *infra*.

22. 90 F. Supp. 604 (S.D.N.Y. 1950); 36 CORNELL L.Q. 558 (1951).

23. To comply with Item 3(d)(2) of Schedule 14A of the SEC proxy regulation, the parties had indicated in their proxy statements that their respective expenditures would be about \$7,500 and \$6,000. Plaintiff's Memorandum in Support of Motion for Summary Judgment, Jan. 6, 1950, p. 14, *Steinberg v. Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950). Understatement is not uncommon: in the Sparks-Withington contest, management predicted \$7,500, but spent \$51,000. *Emerson & Latham*, *supra* note 16, at 445.

Proxy solicitation costs vary widely, apparently depending upon the size of the company and the distribution of its voting stock. In the *Fairchild Engine and Airplane Co.* contest in 1949, each party spent over \$125,000. *Caplin*, *supra* note 2, at 668 n.30. In contrast, the successful insurgents in the Sparks-Withington contest apparently spent only \$6,000. *Emerson & Latham*, *supra* note 16, at 433. Expenditures may be substantial though no contest is involved. Proxy solicitation costs for the 1947 special meeting

the benefit of the corporation. Both parties moved for summary judgment. They apparently agreed that the old board's expenditures were proper if an issue of policy was involved in the contest. Plaintiffs contended, however, that reimbursement of the insurgents was improper in any case. Going beyond established precedent, the Court held that the successful insurgents' right to corporate funds for proxy solicitation is as great as the incumbents'—at least where their reimbursement is approved by both the board of directors and a majority of the shareholders.²⁴ It saw no reason to prevent repayment to "those whose expenditures succeeded in ridding a corporation of a policy frowned upon by a majority of the stockholders."²⁵ But since, on the evidence in the record, the Court could not decide beyond the "slightest doubt" whether the contest had involved a "policy" issue, both motions for summary judgment had to be denied.²⁶

Benefit to the corporation was the decisive principle of the *Steinberg* holding.²⁷ Surely the corporation benefits directly by informed decisions resulting from clarification and settlement of latent issues in a contest for control of the corporation. Moreover, this process stimulates stockholder interest in the corporation and encourages active participation in corporate affairs.²⁸ Above all, the increased threat of accountability for its conduct of the enterprise makes for more responsible management.²⁹

In view of the corporate benefit principle, application of the *Steinberg* rule in future cases should require neither subsequent stockholder approval

of Consolidated Edison Co. Inc. of N.Y. were forecast at \$50,000. Note, 21 TEMP. L.Q. 406, 411 (1948).

24. 90 F. Supp. 604, 608 (S.D.N.Y. 1950).

25. *Id.* at 607-8.

26. *Id.* at 608. Unwilling to furnish the security for costs required by the court under N.Y. GEN. CORP. LAW § 61-b, see note 47 *infra*, plaintiffs thereafter abandoned their action. Communication to the YALE LAW JOURNAL from Carlos J. Israels, dated Oct. 29, 1951, on file in Yale Law Library.

27. The court found analogy in the reimbursement of the successful stockholder who brings a derivative suit for the benefit of the corporation. 90 F. Supp. 604, 608 (S.D.N.Y. 1950). See STEVENS, CORPORATIONS § 174 (2d ed. 1949). For an evaluation of the decision in terms of this analogy, see Note, 36 CORNELL L.Q. 558 (1951).

28. It has been suggested that stockholders are not equipped to comprehend corporate affairs, Note, 53 HARV. L. REV. 1165, 1172 (1940), and that, being primarily speculators, they are not interested. But stockholder indifference may well be an effect as well as a cause of management domination. Cf. Caplin, *supra* note 2, at 680-1. And shareholders may be fully as competent as non-expert directors. Moreover, some issues of corporate policy, e.g., management compensation and incentive schemes and pension plans, can be intelligently passed upon without special expertise. The direct value of stockholders' views aside, the corporation benefits indirectly by any increase in their participation: one substantial reason for public regulation of the enterprise disappears as politically dangerous concentration of control in management is eliminated.

29. See note 20 *supra*. For a narrower view of what constitutes benefit to a corporation, see Note, 36 CORNELL L.Q. 558, 563-4 (1951).

of reimbursement³⁰ nor success in ousting management. The corporation gains equally whether or not the shareholders ratify repayment.³¹ Since courts have never required management to seek stockholder ratification, no reason appears why such a burden should be placed on the opposition.³² And although permitting repayment only to insurgents who win control of the corporation eliminates any necessity for affirmative judicial action, others should not be inflexibly barred from reimbursement.³³ Indeed, some or all of the insurgents' campaign proposals may be adopted by the corporation, though incumbent management wins the election.³⁴ And the good of the corporation may also be served by consideration of the losing slate's views, even though they are ultimately rejected. Shareholders' dissatisfaction may be eliminated and their interest stimulated whatever the outcome. Moreover, restriction of reimbursement to successful dissenters would seriously limit the prophylactic usefulness of the *Steinberg* rule. Given management's other proxy solicitation advantages, a possibility of cost recovery conditioned upon success in ousting management affords little new incentive to challenge incumbents.

The reasoning of the cases upholding management expenditures supports judicial extension of the *Steinberg* rule to permit reimbursement of deserving but unsuccessful proxy contestants. Management is said to have a duty, or at least a right, when challenged, to state and support its views on questions of corporate policy, and may therefore solicit proxies at corporate expense.³⁵

30. See *id.* at 560, n.8.

31. Moreover, shifts in stock ownership by the time of ratification might capriciously alter the result.

32. In approving management's solicitation outlays in *Peel v. London & N. W. Ry. Co.* [1907] 1 Ch. Div. 5 (1906), the court noted, *id.* at 7, but did not turn its decision on, subsequent stockholder ratification. Nor did the *Steinberg* court deem it indispensable. 90 F. Supp. 604, 608 (S.D.N.Y. 1950).

33. Change of management itself need not inevitably benefit the corporation. Note, 36 CORNELL L.Q. 558, 563-4 (1951). However, the benefits incident to the process of challenging management accrue whether or not the challengers prevail.

34. *Cf.* *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), Note, 57 YALE L.J. 874 (1948). A stockholder of Transamerica submitted four proposals for shareholder action to management for inclusion in its proxy materials pursuant to Rule X-14A-8. Management declined to include any of the proposals, but adopted one of them. When required to include the other three proposals in its proxy literature, management adopted two of them without putting them to a vote.

35. *Peel v. London & N.W. Ry. Co.* [1907] 1 Ch. Div. (1906) (duty to inform and advise gives rise to incidental right to solicit supporting proxies at corporate expense); *Empire Southern Gas Co. v. Gray*, 46 A.2d 741 (Del. Ch. 1946) (right or duty to solicit proxies); *Hall v. Translux Daylight Picture Screen Corp.*, 20 Del. Ch. 78, 171 Atl. 226 (Ch. 1934) (proper to inform, advise and solicit supporting proxies); *McGoldrick v. Segal*, 124 N.Y.L.J. 461, col. 2 (Sup. Ct. Sept. 14, 1950) (same). When no question of corporate policy is raised, the desirability of securing a quorum justifies limited expenditures by management. *Bounds v. Stephenson*, 187 S.W. 1031 (Tex. Civ. App. 1916) (trifling expenditures permissible); *cf.* *Lawyers' Advertising Co. v. Consolidated Ry. L. & R. Co.*, 187 N.Y. 395, 399, 80 N.E. 199, 201 (1907).

The theory here, too, is benefit to the corporation.³⁶ Courts sustain such expenditures on the ground that proxy solicitation promotes intelligent exercise of shareholders' judgment and expression of their views.³⁷ But clearly, informed shareholder action cannot result from a one-sided presentation, or no presentation at all.³⁸ The "benefit" justification of management recourse to corporate funds in a proxy campaign requires its extension to the unsuccessful opposition in proper cases.

An elastic rule of reasonableness should determine what is a proper case for dissenter recovery. Plainly, the rule should not give crackpots and opportunists carte blanche to spend corporate funds in pursuit of pet projects or personal plums.³⁹ Courts could use the standard generally applied to test the propriety of management solicitation expenditures: were reasonable expenditures made in a contest involving some issue of policy?⁴⁰ But courts recognize that no clear line separates policy issues from those merely of personnel.⁴¹ Any candidate for corporate office can readily develop a policy platform on which to run. The policy test should therefore be abandoned as inadequate.⁴² Rather, repayment of dissenters' expenses should be restricted

36. *Peel v. London & N. W. Ry. Co.* [1907] 1 Ch. Div. 5 (1906); *Hall v. Translux Daylight Pictures Screen Corp.*, 20 Del. Ch. 78, 171 Atl. 226 (Ch. 1934); cf. *Rascovor v. American Linseed Co.*, 135 Fed. 341 (2d Cir. 1905). One writer has suggested that management's "duty" to inform and advise the shareholders gives it a unique right of access to the corporate treasury to pay proxy solicitation costs. Note, 36 CORNELL L.Q. 558, 564 (1951). However, courts do not always justify solicitation expenditures in terms of management's "duty." See note 35 *supra*. But in any case, management's duty is predicated on the assumption that it is acting for the benefit of the corporation. And stockholders' identical activities might be of equal benefit.

37. *Hall v. Translux Daylight Picture Screen Corp.*, 20 Del. Ch. 78, 171 Atl. 226 (Ch. 1934); *McGoldrick v. Segal*, 124 N.Y.L.J. 461, col. 2 (Sup. Ct. Sept. 14, 1950); *Peel v. London & N. W. Ry. Co.* [1907] 1 Ch. Div. 5 (1906).

38. In connection with recapitalization plans, for example, the SEC noted in 1938 that "with but infrequent exceptions the management fails to present the arguments which could be raised against the plan." SEC REPORT VII at 116.

39. The danger of abuse is easily exaggerated. It was thought that SEC proxy rule X-14A-8, obliging management to include stockholder proposals with supporting 100-word statements in its proxy materials, "would open the door wide to libelous, malicious, scurrilous, or abusive matter supplied by notoriety-seeking persons. . . ." *Hearings before Committee on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821 and H.R. 2019*, 78th Cong., 1st Sess. 159 (1943). Yet in the years 1945 through 1949, less than 2% of the proxy statements filed by management with the SEC contained any stockholder proposals. 16 SEC ANN. REP. 42 (1951).

40. See note 6 *supra*.

41. *Hall v. Translux Daylight Picture Screen Corp.*, 20 Del. Ch. 78, 85, 171 Atl. 226, 229 (Ch. 1934) ("It is impossible in many cases of intracorporate contests over directors, to sever questions of policy from those of persons . . ."); *Steinberg v. Adams*, 90 F. Supp. 604, 608 (S.D.N.Y. 1950) ("generally policy and personnel do not exist in separate compartments"); *McGoldrick v. Segal*, 124 N.Y.L.J. 461, col. 2 (Sup. Ct. Sept. 14, 1950).

42. The policy test does not seem to add anything to the reasonableness test other than a delusive suggestion of clarity. See Comment, 49 MICH. L. REV. 605 (1951) *passim*.

to proxy fights where issues are reasonably related to corporate welfare.⁴³ And reasonableness should depend on not only the issues involved, but the insurgents' good faith, the strength of shareholder support enlisted, and the type and amount of expenditure.⁴⁴ With the sanction of such case-by-case determination, stockholders will be discouraged from extravagant and capricious campaigning. An outright reasonableness test, therefore, is a more valid measure than the "policy-reasonable cost" standard and can effectively control solicitation expenditures.

Two methods are available for judicial enforcement of losing dissenters' reimbursement claims. In a direct suit by the losers against the corporation payment might be ordered.⁴⁵ Or courts could indirectly enforce payment by enlarging management's derivative suit liability. Thus they could hold management's outlay unreasonable and compel restitution to the corporate treasury unless the losers' reasonable claims were honored by management,

43. Cf. *Hall v. Translux Daylight Picture Screen Corp.*, 20 Del. Ch. 78, 171 Atl. 226 (Ch. 1934) (merger and stock dividend); *Hand v. Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649 (D.Del. 1944) (plan for liquidation); *Empire Southern Gas Co. v. Gray*, 46 A.2d 741 (Del. Ch. 1946) (merger or maintaining costly suite of offices); *Peel v. London & N.W. Ry. Co.*, [1907] 1 Ch. Div. 5 (1906) (conference on inter-railway cooperation, use of larger railway cars, and more elaborate statistical system). See also *Emerson & Latham*, *supra* note 16 (management's record of neglect and poor performance). Two types of issue which may be involved in an election contest can be distinguished: the directors may be challenged because they stand for particular policies whose desirability for the future is questioned, or because they stand for a record of performance whose promise for the future is doubted. Issues of the latter type, though difficult to cast into the mold of a "policy" formula, would seem at least equal to the former in potential importance to corporate welfare.

44. No court has yet held any expenditures improper in a "policy" contest. When courts are convinced that nothing more is involved than the spoils of corporate office, however, their scrutiny becomes closer. In such cases, the tendency has been to limit expenditures of corporate funds by declaring improper the means of solicitation principally employed. *Pittsburgh Steel Co. v. Walker*, 92 PIRTS. LEG. J. 464 (C.P. Alleghany County 1944) (employment of professional proxy solicitors); *Lawyers' Advertising Co. v. Consolidated Ry. L. & R. Co.*, 187 N.Y. 395, 80 N.E. 199 (1907) (newspaper advertisements); *but cf.*, *In re Zickl*, 73 N.Y.S.2d 181 (Sup. Ct. 1947) (employment of professional proxy solicitors held "entirely proper" without discussion of nature of issues). Use of professional proxy solicitors is apparently standard practice today. See Regulation X-14, Schedule 14A, Item 3.

45. Cost reimbursement of successful plaintiffs in derivative suits may afford useful precedent. Cf. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Cannon v. Parker*, 151 F.2d 706 (5th Cir. 1945). See Note, 36 CORNELL L.Q. 558 (1951). In such cases, no separate suit for cost recovery need be brought, however. The award is usually made as a part of the adjudication in which the claim to it arises. But see N.Y. GEN. CORP. LAW § 65 (permitting separate suit). Moreover, it is usually made "out of" the particular fund or property which is the subject of the original suit. Alternatively, losing dissenters might seek to recover at law in quasi-contract. See *DAWSON, UNJUST ENRICHMENT* 113 (1951): "[T]here is nothing in our present conceptions that prevents an appropriate unjust enrichment remedy from being used in any field."