NOTES

NONVOTING COMMON STOCK: STATE CONSTITUTIONAL PROHIBITIONS

To MEET the needs of the business community in the 1920's, a virtually new device, nonvoting common stock, was introduced into the realm of corporate finance. The principal utility of this innovation has been that, while providing for corporate expansion and financial flexibility, it also allows retention of voting control within a select class of stockholders.[1] A few courts, however, have refused to recognize the validity of this device, despite enabling legislation, because of state constitutional provisions which have been construed so as to prohibit the issuance of nonvoting stock.[2]

Illustrative of this approach is *State ex rel. Dewey Portland Cement Company v. O'Brien*.[3] There, in order to permit an increase in its authorized capital, a cement company sought a charter amendment dividing a proposed new stock issue into two classes: class A common and class B common, with voting rights vested only in the latter. The Secretary of State of West Virginia declined to certify the desired modification, and the Supreme Court of Appeals subsequently refused to issue a writ of mandamus to compel the Secretary to act, concluding that in so far as the Constitution of West Virginia guaranteed to every stockholder

[1] Three reasons have been suggested for the increased utilization of classified common stock: (1) investor-speculator's demand for a share in the bounteous profits being reaped by industry during this period; (2) desire of management to acquire additional capital while at the same time retaining full control of the corporation; (3) desire of bankers and promoters to have something new to offer to the public. 1 DEWING, FINANCIAL POLICY OF CORPORATIONS 165 (4th ed. 1941); Dewing, *The Development of Class A and Class B Stocks*, 5 HARV. BUS. REV. 332 (1927). See General Investment Co. v. Bethlehem Steel Corp., 87 N.J. Eq. 234, 100 Atl. 347 (1917). *Cf.* Warren v. Pim, 66 N.J. Eq. 353, 59 Atl. 773 (1904).

[2] In the absence of conflicting constitutional and statutory provisions, nonvoting stock was early recognized. See *In re* Barrow Haematite Steel Co., 39 Ch. D. 582 (1888). Perhaps the first American case actually to deal with the legality of nonvoting stock was Miller v. Ratterman, 47 Ohio St. 141, 157, 24 N.E. 496, 500 (1889). The court there said: "The promise to the preferred stockholders was to award them the first net earnings, the holders of the common stock to share in such of the net earnings as they might, by good management, be able to make over and above the 8 percent."

[3] 96 S.E.2d 171 (W. Va. 1957).

the right to vote in the election of directors, including the right to vote cumulatively, the issuance of stock stripped of voting rights could not be tolerated.

The language of the West Virginia Constitution,[4] considered alone, would perhaps support the court's decision. Furthermore, in Illinois[5] and Delaware,[6] under identical or similar provisions, the courts have likewise held that every stockholder is guaranteed an unqualifiable right to vote all stock registered in his name. The Missouri Supreme Court, on the other hand, has interpreted an analogous constitutional provision simply to protect those stockholders who by corporate charter are entitled to vote in the election of directors against manipulations which might deprive a minority of a voice in the corporation's affairs.[7] Indeed,

[4] W. VA. CONST. art. XI, § 4 (1872) provides as follows: "The Legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the numbers of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit: and such directors or managers shall not be elected in any other manner." See Note, 40 W. VA. L. REV. 97 (1934). Adopted in 1872, the West Virginia Supreme Court of Appeals has considered this section but twice prior to the instant case. Germer v. Triple-State Natural Gas and Oil Co., 60 W. Va. 143, 54 S.E. 509 (1906); Cross v. W. Virginia Cent. and Pa. R. Co., 35 W. Va. 174, 12 S.E. 1071 (1891). In both cases it was held that a corporation could not deprive a stockholder of the right to vote cumulatively in the election of directors.

[5] ILL. CONST. art. XI, § 3 (1870). In State *ex rel.* Watseka Telephone Co. v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922) the court denied mandamus to enforce issuance of a corporate charter by the Secretary of State because the proposed preferred stock denied the stockholder the right to vote. It was held that the words declare the meaning of the constitution, and neither the courts nor the legislatures have the right to add to or take away from that meaning. It is perhaps significant that Illinois had no statute authorizing nonvoting stock, and legislative construction of a constitution carries considerable weight in interpreting its provisions. See Comment, *Corporations—Stockholders—Voting Powers—Preferred Stock—Constitutional Law.* 17 ILL. L. REV. 138 (1923). *Cf.* Durkee v. People *ex rel.* Askren, 155 Ill. 354, 40 N.E. 626 (1855); Wright v. Central Calif. Water Co., 67 Cal. 532, 8 Pac. 70 (1885).

[6] DEL. CONST. art. 9, § 6 (1897). Delaware had a statute analogous to that of West Virginia which permitted the issuance of nonvoting stock. DEL. LAWS c. 273, § 20 (1889). In Brooks v. State, 3 Boyce 1, 79 Atl. 790 (Del. 1911), the court, in construing the constitutional provision held that the statute authorizing nonvoting stock was unconstitutional and all issues of stock thereunder invalid. In 1903, however, prior to this decision, Delaware had repealed the constitutional provision in question. See DEL. LAWS c. 254, § 2 (1903).

[7] MO. CONST. art. 12, § 6 (1875). In State *ex rel.* Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905), the court stated: "We hold that the evident purpose of section 6, art. 12, of our Constitution was the guaranty to stockholders having the right

this was apparently the interpretation that the West Virginia legislature placed on its own governing constitutional provision when it enacted its statute[8] sanctioning nonvoting stock.[9]

At common law, it was well settled that absent a charter provision

to vote of cumulating their votes, and has no reference to the contractual right of the stockholders inter sese of providing that preferred stockholders shall or shall not have the right to vote such stock, and to hold that it has taken away this well-recognized common-law right would be to distort its obvious purpose." Although the *Swanger* case dealt with nonvoting preferred stock, presumably, the above quoted language would also apply to nonvoting common stock should the question of its validity ever arise.

[8] W. VA. CODE ANN. §§ 3034, 3078 (1949). As early as 1864 West Virginia enacted a statute providing that stockholders of any corporation may provide for the issue of preferred stock, upon such terms and conditions, and with such stipulations and regulations respecting preferences as they may see fit to precribe. W. VA. ACTS c. 43, § 1 (1864). This was the same statute that was in force when art. XI, § 4 of the Constitution was adopted in 1872. In 1873, one year after the enactment of the Constitution, the legislature provided that in all elections of directors, every stockholder shall have the right to vote for the number of shares of stock owned by him for as many persons as there are directors to be elected, or to cumulate said shares. W. VA. ACTS c. 181, § 44 (1872-73). This same provision was re-enacted without substantial change in 1881. W. VA. ACTS c. 17, § 56 (1881). In 1882, the general corporation law was enacted which included the provisions of W. VA. ACTS c. 43, § 1 (1864) and c. 17, § 56 (1881). W. VA. ACTS c. 96, § 16 and § 44 (1882). The present W. Va. Code Ann. § 3034 (1949) follows substantially the language of W. VA. ACTS c. 96, § 16 (1882), and W. Va. Code Ann. § 3078 (1949) follows substantially the language of W. VA. ACTS c. 96, § 44 (1882).

[9] 2 REPORT OF THE CODE REVISORS OF WEST VIRGINIA 10 (1931): "The weight of modern judicial opinion seems to hold such a provision unconstitutional, but these decisions, while well reasoned in many respects, seem to ignore the flexibility of a state constitution to meet changing public conditions, and for this reason do not seem to give as much weight as we think should be given to the real purpose of the provision, which was to secure the right of cumulative voting. . . . Attention is also called to the fact that the constitutional provision referred to relates only to voting for directors, and does not relate to the right to vote on other corporate acts." *But see* Note, 40 W. VA. L. REV. 97 (1933) wherein Melvin G. Sperry, Chairman of the Code Commission of 1921 states: "We studied with considerable misgiving the well-reasoned cases of the People v. Emmerson, [302 Ill. 300, 134 N.E. 707 (1922)] decided by the Supreme Court of Illinois in 1922; Brooks v. The State, [3 Boyce 1, 79 Atl. 790 (Del. 1911)] decided by the Supreme Court of Delaware in 1911; and Randle v. Winona Coal Company, [206 Ala. 315, 89 So. 790 (1921)] decided by the Supreme Court of Alabama in 1921. [These courts] answered in the negative every proposition which was or apparently could be asserted in favor of the constitutionality of legislative action of the respective states similar to the West Virginia act of 1901, in the face of the constitutional inhibition in the state of Illinois identical, and in the state of Delaware almost identical, with the provision of West Virginia. The courts of those states were not influenced by an [*sic*] business consideration, or obligation to prevent confusion in business affairs, or by any question of public policy. Indeed, they held that in the matter of public policy the rule clearly favored the right to give to every shareholder of a corporation one vote for each share of stock held."

to the contrary, each stockholder was entitled to only one vote, without regard to the number of shares he held.[10] The obvious inequity of this method of voting was early recognized, however, and each stockholder was soon legislatively assured a specific number of votes based upon a decreasing proportional ratio to the number of shares he held in the corporation.[11] But in most jurisdictions, these safeguards were subsequently eroded by statutory provisions which entitled each stockholder to one vote for each share, thus enabling a majority bloc to exclude entirely the minority from representation.[12] A resulting fear of abuse led to the introduction of cumulative voting.[13] Viewed in this

[10] Commonwealth v. Conover, 10 Phila. 55 (1873); Taylor v. Griswold, 2 Green 222 (N.J. 1834); *In re* Horbury Bridge Coal, Iron and Wagon Co., 11 Ch. D. 109 (1879). In Luthy v. Ream, 270 Ill. 170, 181, 110 N.E. 373, 377 (1915) it was held that: ". . . the power to vote is inherently attached to and inseparable from the real ownership of each share. . . ." See FLETCHER, CYCLOPEDIA OF CORPORATIONS, §§ 2025, 2045 (perm. ed. 1952); Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 156 (1888). *Cf.* Tracy v. Brentwood Village Corp. 30 Del. Ch. 296, 59 A.2d 708 (1948); McLain v. Lanova Corp., 28 Del. Ch. 176, 39 A.2d 209 (1944); *In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).

[11] The Virginia statutes which first set forth the ratio of votes to the number of shares held by the stockholder, varied the ratio and made it dependent upon the catagorization of the corporation. For example, in manufacturing and mining corporations, the ratio was one vote for every share up to fifteen shares; one additional vote for every five shares from fifteen shares up to one hundred shares; and one additional vote for every twenty shares over one hundred shares. VA. ACTS c. 84, § 5 (1837). In 1849, title 18 of the Code of Virginia was enacted to cover all chartered corporations and, for the first time, standardize to a degree, the ratio of votes to the number of shares held by the stockholder. CODE OF VA. tit. 18, c. 57, § 10 (1849).

[12] MO. LAWS, CORP., § 3 (1849) provided that: "All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in the said company. . . ." Gregg v. Granby Mining and Smelting Co., 164 Mo. 616, 625, 65 S.W. 312, 313 (1901): "It was evidently the purpose of our legislature to settle this question [of a stockholder's voting rights] by a positive enactment. . . . Thus, the share is made the unit of election, and not the person who owns it, regardless of the number of his shares."

DEL. LAWS, c. 273, § 20 (1899) provided that: "A stockholder shall be entitled to one vote for each share of stock he may hold [in the corporation]."

ILL. LAWS, CORP., § 3 (1859) provided that: "At such meeting stockholders may vote, either in person or by proxy, one vote for each share of stock held and thus represented."

[13] See FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 2048 (perm. ed. 1952); BALLANTINE, CORPORATIONS 404, § 177 (rev. ed. 1946). For the mechanical aspects of cumulative voting see WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS 40-46 (1951). For arguments for and against the cumulative method of voting see Young, *The Case for Cumulative Voting*, WIS. L. REV. 49 (1950); Axley, *The Case Against Cumulative Voting*, WIS. L. REV. 278 (1950).

perspective, the West Virginia constitutional provision was apparently designed solely to insure representation to minority voters.

Yet, it is arguably anomalous thus to assure representation to minorities, but to deny it to nonvoting stockholders who, in fact, may represent a majority of the corporate investors. In this connection, even those jurisdictions that recognize the validity of nonvoting stock, in the face of similar constitutional impediments, have limited their sanction to nonvoting preferred stock, reasoning that preferred stockholders are otherwise protected by law or agreement and, therefore, do not need representation as a protective measure.[14]

Admittedly, nonvoting stock does not conduce the promotion of intracorporate democracy, but in reality, it would seem that this shortcoming is largely academic. The growth of corporations and the widespread dispersion of stock ownership have combined to reduce true stockholder democracy to an unattainable ideal.[15] Illustrative of this thesis is the proxy, which, although originally designed to extend representation to the absent stockholder, has become one of the principal instruments not by which corporate democracy is sustained, but by which the right to representation is usually delegated to representatives of the control group.[16]

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[14] State *ex rel.* Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905); American Railway-Frog Co. v. Haven, 101 Mass. 398 (1869); State *ex rel.* Danforh v. Hunton, 28 Vt. 594 (1856). GUTHMAN & DOUGALL, CORPORATE FINANCIAL POLICY 91 (2d ed. 1948); 1 DEWING, FINANCIAL POLICY OF CORPORATIONS 163 (4th ed. 1941).

[15] BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 138 (1932). For a discussion of the status of stockholder democracy today, see EMERSON AND LATCHAM, SHAREHOLDER DEMOCRACY, A BROADER OUTLOOK FOR CORPORATIONS (1954).

[16] Grantz v. Claughton, 187 F.2d 46 (2d Cir. 1951), *cert. denied*, 341 U.S. 920 (1951); Pacific Gas & Electric Co. v. SEC, 127 F.2d 378 (9th Cir. 1942), 139 F.2d 298 (9th Cir. 1943), *aff'd*, 324 U.S. 826 (1944) (17.71% of stock as controlling interest); American Gas & Electric Co. v. SEC, 134 F.2d 633 (App. D.C. 1943), *cert. denied*, 319 U.S. 763 (1943) (17.5% as controlling interest); Detroit Edison Co. v. SEC, 119 F.2d 730 (6th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941) (19.2% as controlling interest); Rochester Tel. Co. v. United States, 307 U.S. 125 (1939), 39 COLUM. L. REV. 295; Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937) (33.33% as controlling interest); Koppers United Co. v. SEC, 138 F.2d 577 (App. D.C. 1943) (14.59% as controlling interest); Morgan Stanley & Co. v. SEC, 126 F.2d 325 (2d Cir. 1942); BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 82 (1932) (14.9% given as controlling interest in Standard Oil Company). See LOSS, SECURITIES REGULATION 7-13, 458 (1951); Timberg, *Corporate Fictions-Logical, Social and International Implications*, 46 COLUM. L. REV. 533, 561 (1946). Cf. Comments, *Interpretation of "Holding Company" and "Affiliate" Under the Public Utility Holding Company Act*, 51 YALE L.J. 1018 (1942); *Holding Company Act—"Controlling Influence,"* 40 MICH. L. REV. 274 (1941).

Is the right to vote in ordinary managerial matters, then, a right all stockholders must possess in order to insure adequate individual investor protection?[17] Nonvoting stock vests management in a select class of shares, but it does not exclude the nonvoting shareholder from exercising all of the perogatives of corporate ownership. For example, inuring to every stockholder are, by virtue of numerous statutes and decisions, the right to vote upon the propriety of a dissolution or of a sale of all the assets and a voice in matters affecting the ratio of voting to nonvoting stock, as well as in matters concerning the surrender of the corporate charter.[18] Further, although judicial policy has tended to

[17] There is substantial authority for answering this question in the affirmative. Since 1926, the New York Stock Exchange has refused to list nonvoting common stock, and since 1940, certain preferred stock, the voting rights of which have been substantially curtailed. LOSS, SECURITIES REGULATION 488 (1951). Similarly, the SEC may not authorize the sale of a security of a registered utility unless such security is a common stock having at least equal voting rights with any outstanding security of the declarant. Public Utility Holding Company Act, 1935, 49 STAT. 815, 15 U.S.C. § 79g(c)(1) (1952). The Federal Bankruptcy Act requires that plans of reorganization must include provisions prohibiting the reorganized company from issuing nonvoting stock. Bankruptcy Act, 1898, 52 STAT. 895 (1938), 11 U.S.C. § 616(12)(a) (1952).

[18] For example, N.Y. STOCK CORP. LAW, § 105. All stock, voting and non-voting shall be considered voting for purposes of dissolution unless there is an express provision to the contrary in the charter. But, when a sale of all the assets is proposed, only those stockholders entitled to vote may vote. N.Y. STOCK CORP. LAW, § 20. *Accord*, N.J. STAT. ANN., § 14.13-1 (1939). MO. REV. STAT. ANN., § 351.090 (1949), provides, in case a charter amendment would adversely affect issued and outstanding nonvoting stock, then the vote of such nonvoting stock must be taken before the amendment can be made.

Some states, however, make no distinction between voting and nonvoting stock, the effect of which is to exclude nonvoting stock from voting on such matters. W. VA. CODE ANN., §§ 3076, 3093 (1949); ILL. STAT. ANN., §§ 32.074, 32.076 (Jones, 1934); DEL. CODE ANN., tit. 8, §§ 271, 275 (1953).

The leading decision is generally considered to be Abbott v. American Hard Rubber Co., 33 Barb. 578 (N.Y. 1861). The common law rule is that a corporation has no power to sell all its property and discontinue business against the dissent of a single stockholder. Luehrmann v. Lincoln Trust & Title Co., 192 S.W. 1026, 1032 (Mo. 1917). Jones v. Bank of Leadville, 10 Colo. 464, 476, 17 Pac. 272, 278 (1887).

See FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 2945 (perm. ed. 1950); Sprecher, *The Right of Minority Stockholders to Prevent the Dissolution of a Profitable Enterprise*, 33 KY. L.J. 150 (1945); Lattin, *Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders*, 30 MICH. L. REV. 645 (1932); Berle, *Nonvoting Stock and "Bankers' Control,"* 39 HARV. L. REV. 673 (1926); Comments, *Sale of All or Substantially All of Corporate Assets—Effect of Modern Statutes*, 45 MICH. L. REV. 341 (1947); *Limitations of the Statutory Power of Majority Stockholders to Dissolve a Corporation*, 25 HARV. L. REV. 677 (1912);

view with liberality the activities of management—except where directors' actions are ultra vires or fraudulent or oppressive to the minority—it is well settled that those entrusted with the management of corporate affairs must exercise the highest degree of trust and good faith.[19] This would seem especially true where one or more classes of owners are not represented by the board of directors. Thus, when every stockholder enjoys the right to vote, courts will generally decline to substitute their judgment for that of the majority, since, presumably, the interests of the majority will best serve the interests of the corporation.[20] On the other hand, when one or more classes of stockholders are not represented by the directors, the presumption of good faith would seem to be attenuated, and, at the instigation of a nonvoting stockholder, courts tend carefully to evaluate alleged misconduct by the directors.[21] Accordingly, it would seem that even though nonvoting

Notes, 95 U. PA. L. REV. 203 (1946); 94 U. PA. L. REV. 412 (1946); 40 HARV. L. REV. 944 (1927); 6 VA. L. REV. 640 (1921); 2 MINN. L. REV. 526 (1918). *Cf.* Annot., *Power of Directors to Sell Property of Corporation Without Consen. of Stockholders*, 60 A.L.R. 1210 (1928). Also, *cf.* Note, 30 CAL. L. REV. 338 (1942) setting forth grounds for rescinding sale.

[19] Fielding v. Allen, 99 F. Supp. 137 (S.D.N.Y. 1951); Otis & Co. v. Pennsylvania R. Co., 61 F. Supp. 905 (E.D. Pa. 1945), *aff'd*, 155 F.2d 522 (3rd Cir. 1946), 31 VA. L. REV. 695 (1945); Abrams v. Allen, 297 N.Y. 52, 74 N.E.2d 305, *reh. denied*, 297 N.Y. 604, 75 N.E.2d 274 (1947), 15 U. CHI. L. REV. 423 (1948), 48 COLUM. L. REV. 290 (1948), 33 CORNELL L.Q. 421 (1948), 61 HARV. L. REV. 541 (1948), 31 MARQ. L. REV. 294 (1948), 46 MICH. L. REV. 683 (1948), 23 N.Y.U.L.Q. REV. 209 (1948), 48 STAN. INTRA. L. REV. 147 (1948), 21 SO. CALIF. L. REV. 403 (1948), 96 U. PA. L. REV. 418 (1948), 57 YALE L.J. 489 (1948); Bayer v. Beron, 49 N.Y.S.2d 2 (1944); Turner v. American Metal Co., 268 App. Div. 239, 259, 50 N.Y.S.2d 800, 819 (1944); Chelrob, Inc. v. Barrett, 293 N.Y. 442, 57 N.E.2d 285, *reh. denied*, 293 N.Y. 859, 59 N.E.2d 446 (1944); Shaw v. Davis, 28 Atl. 619, 621 (Md. 1894): ". . . whenever any action of either directors or stockholders is relied on . . . for the purpose of invoking the interposition of a court of equity, if the act complained of be neither ultra vires, fraudulent, nor illegal, the court will refuse intervention because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interest may dictate, and their action will be binding on all, whether approved by the minority or not." See BALLENTINE, CORPORATIONS 160, 161 (rev. ed. 1946); Uhlman, *The Duty of Corporate Directors to Exercise Business Judgment*, 20 B.U.L. REV. 488 (1940); Latty, *Partial Survey of Minority Shareholder Protection in American Corporation Law*, 1 J. BUS. L. 110 (1957).

[20] See note 19 *supra*.

[21] *Duty of directors:* Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919). See Swope, *Some Aspects of Corporate Management*, 23 HARV. BUS. REV. 314 (1945); Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934); Rhodes, *Personal Liability of Directors for Corporate Mismanagement*,

stockholders are denied direct managerial participation, they are, nevertheless, protected by statute or decision in proprietary matters.[22]

It would appear, therefore, that the decision of the West Virginia court in the instant case effectively places a premium upon evasive techniques[23] to vest control in a minority group.[24] The court remarked that

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of Corporations, 3 CALIF. L. REV. 21 (1914); Comment, *Liability of Corporate Directors*, 65 U. PA. L. REV. 128 (1916); Lynch, *Diligence of Directors in Management*, 17 YALE L.J. 33 (1907). Notes: 5 U. CHI. L. REV. 668 (1938); 16 B.U.L. REV. 736 (1936); 20 IOWA L. REV. 808 (1935); 82 U. PA. L. REV. 364 (1934); 16 MINN. L. REV. 588 (1932).

Duty of directors and majority stockholders to nonvoting stockholders: Bates Street Shirt Co. v. Waite, 130 Me. 352, 156 Atl. 293 (1931). Kidd v. New Hampshire Traction Co., 74 N.H. 170, 66 Atl. 127 (1907). See BALLANTINE, CORPORATIONS 156 (rev. ed. 1946); Berle, *Non-voting Stock and "Bankers' Control,"* 39 HARV. L. REV. 673 (1926).

Duty of majority stockholders to minority stockholders: Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921); Zahn v. Transamerica Corp., 162 F.2d 36 (3rd Cir. 1947), 36 CALIF. L. REV. 325 (1948), 33 CORNELL L.Q. 414 (1948), 61 HARV. L. REV. 359 (1948), 41 ILL. L. REV. 122 (1946) (see 63 F. Supp. 243 (D.C. Del. 1945)), 46 MICH. L. REV. 1061 (1948), 96 U. PA. L. REV. 276 (1947); Lebold v. Inland S.S. Co., 82 F.2d 351 (7th Cir. 1936); Nave-McCord Mercantile Co. v. Ranney, 29 F.2d 383 (8th Cir. 1928); Outwater v. Public Service Corp. of New Jersey, 103 N.J. Eq. 461, 143 Atl. 729 (1928), *aff'd*, 104 N.J. Eq. 490, 146 Atl. 916 (1929); Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 120 Atl. 486 (1923); Kavanaugh v. Kavanaugh Knitting Co., *supra*; Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 74 Pac. 1004 (1904). See Lattin, *Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders*, 30 MICH. L. REV. 645 (1932); Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). Note, 33 YALE L.J. 436 (1924).

Duty of directors to the corporation: See Uhlman, *Legal Status of Corporate Directors*, 19 B.U.L. REV. 12 (1939); Dodd, *Is Enforcement of Fiduciary Duties of Corporate Managers Practicable?* 2 U. CHI. L. REV. 194 (1935). Notes, 35 COLUM. L. REV. 219 (1935); 44 YALE L.J. 527 (1935); 83 U. PA. L. REV. 56 (1934); 8 WIS. L. REV. 342 (1933); 45 HARV. L. REV. 1388 (1932); 29 COLUM. L. REV. 338 (1929).

[22] See note 18 *supra*.

[23] For example: Where the issuance of nonvoting stock is not permitted, corporations may accomplish its end result by dividing the class of stock that is to be given control into small denominations thereby increasing its voting strength. Thus, in a corporation with $100,000 capital stock, $75,000 class A shares could be given a par value of $100 each and thereby 750 votes; the remaining $25,000 class B stock could then be divided into shares of $25 par valne and thereby possess 1000 votes. Another device for achieving the same objective is "vote laden" stock, i.e., control by voting strength disproportionate to investment. Thus, the class A stock could be given one vote per share, while the class B stock has 2 votes per share. The plan most commonly used to frustrate the effectiveness of minority representation is to classify the board of directors and stagger the election of each class. A board comprised of six members whose term of office is three years may be classified into three groups whereby two directors are elected each year. This latter device, however, would not achieve the

nothing in the West Virginia Constitution prohibits stockholders of a private corporation from waiving their right to vote or from entering into an express agreement with other stockholders affecting the manner in which they exercise this right.[25] The weight of authority supports this conclusion, even though the obvious purpose of voting control agreements is to secure or retain control of the corporation in a select group of stockholders,[26] and even though the consideration may

minority control which is perhaps the most significant feature of both nonvoting stock and the first two control devices. Nevertheless, it will achieve perpetuation of management, which is one of the suggested reasons for the rise in prominence of nonvoting stock. See note 1 *supra*.

[24] "Minority stockholder" is used in contradistinction to controlling stockholder, though in fact, the minority may well represent a majority of the stockholders. Schmid v. Ballard, 175 Minn. 138, 220 N.W. 423 (1928); Cases cited note 18 *supra*. *Cf.* Alster v. British Type Investors, 83 F. Supp. 949 (S.D.N.Y. 1949); Note, 8 U. CHI. L. REV. 335 (1941).

[25] 96 S.E.2d 171, 180 (W. Va. 1957).

[26] E.K. Buck Retail Stores v. Harket, 157 Neb. 867, 62 N.W.2d 288 (1954), 33 NEB. L. REV. 636; Ringling Bros. B. & B. Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947), 36 CALIF. L. REV. 281 (1948), 60 HARV. L. REV. 651 (1947), 46 MICH. L. REV. 70 (1947), 15 U. PA. L. REV. 738 (1948), 96 U. PA. L. REV. 121 (1947); Gumbiner v. Alden Inn, 389 Ill. 273, 59 N.E.2d 648 (1945). It is particularly interesting that Illinois has long recognized the validity of such agreements, while expressly prohibiting nonvoting stock. Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641, 5 BROOKLYN L. REV. 336, 36 COLUM. L. REV. 836, 21 MINN. L. REV. 103; 13 N.Y.U.L.Q. REV. 585, 11 ST. JOHNS L. REV. 117; Fitzgerald v. Christy, 242 Ill. App. 343 (1926); Horn v. J.O. Nessen Lumber Co., 236 Ill. App. 187 (1925); Thompson v. J.D. Thompson Carnation Co., 279 Ill. 54, 116 N.E. 648 (1917); Luthy v. Ream, 270 Ill. 170, 110 N.E. 373 (1915); Venner v. Chicago City R. Co., 258 Ill. 523, 101 N.E. 949 (1913); Kantzler v. Bensinger, 214 Ill. 589, 73 N.E. 874 (1905); Higgins v. Lansingh, 154 Ill. 301, 40 N.E. 362 (1895); Faulds v. Yates, 57 Ill. 416 (1870). See FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 2064 (perm. ed. 1952); BALLANTINE, CORPORATIONS 442, § 189 (rev. ed. 1946); Delaney, *The Corporate Director: Can His Hands Be Tied in Advance*, 50 COLUM. L. REV. 52 (1950); Comment, *Stockholders Control by Agreement*, 17 FORDHAM L. REV. 95 (1948); Annot., 71 A.L.R. 1289 (1930). *Cf.* Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945) (dictum). Also, *cf.* Durkee v. People *ex rel.* Askren 155 Ill. 354, 40 N.E. 626 (1895). An agreement which violates express provisions of the constitution and statutes relative to the right to vote is void. Some courts, however, apparently take the view that such agreements are per se invalid as against pnblic policy. Clark v. First Nat. Bk. of Ottumwa, 219 Iowa 637, 259 N.W. 211 (1935); Stott v. Stott, 258 Mich. 547, 242 N.W. 747 (1932), 18 IOWA L. REV. 89; Bridges v. Staton, 150 N.C. 216, 63 S.E. 892 (1909).

Assuming a valid agreement, courts may award damages for breach of the agreement, E. K. Buck Retail Stores v. Harket, 157 Neb. 867, 62 N.W.2d 288 (1954), or grant an injunction to prevent conduct not in conformity with, and decree specific performance of the agreement. Katcher v. Ohsman, 26 N.J. Super 28, 97 A.2d 180 (1953) (agreement enforceable by specific performance); Kronenberg v. Sullivan

consist of the purchase of stock on the faith of a promise of others similarly to purchase under the terms of the agreement.[27] Perhaps the only limitation is that the agreement must not work a hardship on the corporation or in any way oppress creditors or other stockholders not parties to it.[28]

Stockholders, however, generally may not irrevocably sever by contract the voting rights from stock ownership.[29] Thus, even though a

County Steam Laundry Co., 91 N.Y.S.2d 144, *aff'd, without op.*, 277 App. Div. 916, 98 N.Y.S.2d 658, *motion to resettle denied*, 278 App. Div. 726, 103 N.Y.S.2d 660 (1949) (violation enjoined); Ringling Bros. B. & B. Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (1947) (votes of stockholder who breached agreement treated as of no effect); Martocci v. Martocci, 42 N.Y.S.2d 222, *aff'd without op.*, 266 App. Div. 840, 43 N.Y.S. 2d 516, *app. denied*, 266 App. Div. 917, 43 N.Y.S.2d 517 (1943) (agreement enforceable by specific performance); Harris v. Magrell, 131 Misc. 380, 226 N.Y.S. 621 (1928) (violation of agreement enjoined); Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936) (agreement enforceable by specific performance); Fitzgerald v. Christy, 242 Ill. App. 343 (1926) (violation of agreement enjoined).

Contra, Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917). Although holding the particular agreement was invalid as against public policy, the court stated that even if it was assumed that the contract was valid, a court of equity would not grant specific performance. The court said to do so would be in effect to have the court elect the directors, a matter which has historically been within the province of the stockholders. Gage v. Fisher, 5 N.D. 297, 65 N.W. 809 (1895). See Annot., 71 A.L.R. 1289 (1930).

[27] Asher v. Ruppa, 173 F.2d 10 (7th Cir. 1949); Gray v. Bloomington & Normal Ry., 120 Ill. App. 159 (1905); Smith v. San Francisco & N.P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897). *Contra*, Johnson v. Spartanburg County Fair Ass'n, 210 S.C. 56, 41 S.E.2d 599 (1947).

[28] Ford v. Magee, 160 F.2d 457 (2d Cir. 1947), *cert. denied*, 332 U.S. 759 (1947); Feich v. Kaufman, 174 Ill. App. 306 (1912); McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234, *reh. denied*, 264 N.Y. 460, 191 N.E. 514 (1934). An agreement among a minority in number for the purpose of obtaining control of the corporation by election is not illegal since stockholders have the right to combine their interests and voting power to secure control of the corporation. It is only when such agreements contravene express charter or statutory provisions or contemplate any fraud, oppression, or wrong against other stockholders or an illegal object, that they are invalid and not binding upon the parties thereto. Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918).

[29] Luthy v. Ream, 270 Ill. 170, 110 N.E. 373 (1915); Gage v. Fisher, 5 N.D. 297, 65 N.W. 809 (1895). See FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 2065 (perm. ed. 1952); Comment, *Separation of the Voting Power from Legal and Beneficial Ownership of Corporate Stock*, 47 MICH. L. REV. 547 (1949); Note, 61 HARV. L. REV. 1062 (1948). *Contra*, White v. Snell, 35 Utah 434, 100 Pac. 927 (1909); Smith v. San Francisco & N.P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897) (neither is it illegal nor against public policy to separate the voting power of the stock from its ownership). *Cf.* Winsor v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908 (1911) (statute specifically provided for the separation).

stockholder may enter into a valid contract delegating authority to vote his stock, he, nevertheless, retains the power to abrogate the agreement when the delegatee threatens to exercise the vote in a manner inimical to the stockholder's best interests.[30] Furthermore, it is arguable that a stockholder who is able contractually to delegate his voting rights in an arm's-length voting control agreement enjoys a somewhat more favorable bargaining position than one whose right to vote is denied by his purchase of stock with predetermined rights and privileges.

Voting-control agreements, nevertheless, do not provide the flexibility in corporate finance or the complete close stockholder control that non-voting stock accomplishes. Furthermore, the practical difficulties inherent in any attempt to secure such flexibility and control by means of voting-control agreements, tend to render their use ineffectual in large and widely-held corporations. Consequently, the Supreme Court of Appeals of West Virginia has foreclosed the most effective means of obtaining corporate financial flexibility and close stockholder control that was thought formerly to exist.

If, then, complete stockholder democracy is a practical impossibility and if the West Virginia Constitution is sufficiently ambiguous to warrant the construction that the vigorous dissent in the instant case espoused and which the Missouri court, in interpreting its analogous constitutional provision adopted, the result here is unfortunate.[31] Unless a court is bound by clear and unequivocal language, it should proceed with caution in nullifying a statute upon which extensive business practice and expectations have been built.[32]

[30] Shepang Voting Trust Cases, 60 Conn. 553, 24 Atl. 32 (1890); Warren v. Pim, 66 N.J. Eq. 353, 59 Atl. 773 (1904); Morel v. Hoge, 130 Ga. 625, 61 S.E. 487 (1908); Bridges v. First Nat. Bank, 152 N.C. 293, 67 S.E. 770 (1910).

[31] See note 3 *supra*. The dissenting judge argued first, that the constitutional provision appeared under the subhead "Rights of Stockholders," and a stockholder has no rights except those acquired by contract. Secondly, that great deference should be given past administrative and legislative interpretation of the provision. Finally, assuming that the provision was intended to guarantee the right to vote to every stockholder, there was no valid reason why the stockholders could not waive the right.

[32] The West Virginia Legislature has proposed an amendment to article XI, section 4 of the constitution which will provide in part as follows: "The Legislature shall provide by law that every corporation, . . . shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers. . . ." Seuate Bill No. 251.