

Corporations--By-Law Providing for Staggered Directorate Held Valid Though Nullifying Right to Cumulative Voting (Humphrys v. Winous Co., 165 Ohio St. 45 (1956))

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CORPORATIONS—BY-LAW PROVIDING FOR STAGGERED DIRECTORATE HELD VALID THOUGH NULLIFYING RIGHT TO CUMULATIVE VOTING.—Illinois statutes require cumulative voting for directors but permit the classification of directors. Plaintiffs, holders of approximately forty per cent of the corporate stock, sought to determine their rights with respect to a proposed by-law of the corporation. Under the plan to classify the board, one director would be elected each year resulting in a loss of minority representation on the board. The Court, in upholding the right of the corporation to classify its directors held that cumulative voting gives stockholders the right to cumulate their votes, but does not necessarily guarantee representation on the board of directors. *Humphrys v. Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780 (1956).

Subject to the laws of the particular state and the individual corporate charter, the primary means by which the stockholders of a corporation may exert influence over their corporate enterprises is through their right to select the individuals who are to constitute the board of directors. At common law each shareholder was permitted to cast one vote regardless of the size of his holdings.¹ When laws were enacted granting a single vote for each share of stock owned, it became apparent that a bare majority could completely control the affairs of a corporation and afford the minority no opportunity for criticism.² For example, under the straight voting plan, a majority group with as little as fifty-one per cent of the stock can elect the full slate of directors. The forty-nine per cent faction is then left with no authority whatsoever in corporate affairs. On the other hand, if cumulative voting is used, each voting stockholder is granted as many votes as there are directors to be elected multiplied by the number of shares that he holds. He may cast all of these votes for a single director or distribute them among two or more candidates as he sees fit.³

In 1870 the first cumulative voting proposal was formally introduced into American law through a provision in the constitution of the state of Illinois.⁴ Today, all but nine states have enacted similar provisions.⁵ However, the "staggered directorate" or the classifica-

¹ See *Procter Coal Co. v. Finley*, 98 Ky. 405, 33 S.W. 188, 190 (1895); *Matter of American Fibre Chair Seat Corp.*, 241 App. Div. 532, 535, 272 N.Y. Supp. 206, 209 (2d Dep't) (dictum), *aff'd*, 265 N.Y. 416, 193 N.E. 253 (1934); *Matter of Rochester Dist. Tel. Co.*, 40 Hun 172, 174 (Gen. T. 5th Dep't 1886) (dictum).

² See BALLANTINE, *CORPORATIONS* § 177 (rev. ed. 1946); PRASHKER, *CORPORATIONS* 481 (2d ed. 1949); Stephan, *Cumulative Voting and Classified Boards: Some Reflections on Wolfson v. Avery*, 31 NOTRE DAME LAW. 351, 353 (1956).

³ See BALLANTINE, *op. cit. supra* note 2; WILLIAMS, *CUMULATIVE VOTING FOR DIRECTORS* 6 (1951).

⁴ ILL. CONST. art. XI, § 3. See Note, 30 ST. JOHN'S L. REV. 83, 84 (1955).

⁵ See WILLIAMS, *op. cit. supra* note 3, at 11. Texas adopted permissive cumulative voting in 1955. TEX. BUS. CORP. ACT art. 2.29 (1955). Cumulative

tion of directors has also gained wide acceptance and, consequently, this trend toward minority representation on the board has been substantially checked.⁶ Under the classification system, only a portion of the board is vacated at each election resulting in a reduced number of openings on the board at each election period. A larger percentage of votes then becomes necessary for the election of each director.⁷ Obviously, classification conflicts in theory with the right of cumulative voting. For example, if at a corporate election, one director is to be elected, is the right to cumulate votes of any value? Such a situation is presented by the instant case.

Despite the apparent contradiction, New York is one of at least sixteen states which not only provide for permissive cumulative voting⁸ but which also authorizes a staggered directorate.⁹ Under the present cumulative voting statute, Section 49 of the New York Stock Corporation Law, the right is dependent upon an inclusion in the corporate charter of a provision authorizing shareholders to vote cumulatively.¹⁰ Section 55 of the New York Stock Corporation Law corresponds to a classification statute.¹¹

voting is also provided for in the Model Business Corporation Act, ALL MODEL BUSINESS CORPORATION ACT § 31 (rev. ed. 1953), and in a similar act proposed by the commissioners on Uniform State Laws. MODEL BUSINESS CORPORATION ACT § 28 (III), in 9 U.L.A.

⁶ See *Wright v. Central California Water Co.*, 67 Cal. 532, 8 Pac. 70 (1885); *Wolfson v. Avery*, 6 Ill.2d 78, 126 N.E.2d 701 (1955). In these cases the right to classify was denied as restricting the right to cumulate votes.

⁷ See *WILLIAMS, op. cit. supra* note 3, at 48-49.

⁸ COLO. REV. STAT. ANN. § 31-2-4 (1953); DEL. CODE ANN. tit. 8, § 214 (1953); IND. ANN. STAT. § 25-207 (Burns 1955); LA. REV. STAT. § 12:32 (1950); MD. ANN. CODE art. 23, § 39(3) (1951); MINN. STAT. ANN. § 301.26(3) (1947); N.J. STAT. ANN. § 14:10-15 (1939); N.M. STAT. ANN. § 51-6-6 (1953); N.Y. STOCK CORP. LAW § 49; N.C. GEN. STAT. § 55-110 (1950); OKLA. STAT. ANN. tit. 18, § 1.68 (1951); ORE. REV. STAT. § 57.170(4) (1953); R.I. GEN. LAWS c. 116, § 23 (1938); TENN. CODE ANN. § 48-313 (1955); TEX. BUS. CORP. ACT art. 2.29 (1955); VA. CODE ANN. § 13-203 (1950).

⁹ COLO. REV. STAT. ANN. § 31-1-6 (1953); DEL. CODE ANN. tit. 8, § 141 (1953); IND. ANN. STAT. § 25-208 (Burns 1955); LA. REV. STAT. § 12:34 (1950); MD. ANN. CODE art. 23, § 48 (1951); MINN. STAT. ANN. § 300.22 (1947); N.J. STAT. ANN. § 14:7-3 (1939); N.M. STAT. ANN. § 51-2-14 (1953); N.Y. STOCK CORP. LAW § 55; N.C. GEN. STAT. § 55-48 (Supp. 1955); OKLA. STAT. ANN. tit. 18, § 1.35 (1951); ORE. REV. STAT. § 57.190 (1953); R.I. GEN. LAWS c. 116, § 19 (1938); TENN. CODE ANN. § 48-403 (1955); TEX. BUS. CORP. ACT art. 2.33 (1955); VA. CODE ANN. § 13-202 (1950).

¹⁰ "The certificate of incorporation of any stock corporation or other certificate filed pursuant to law may provide that at all elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of votes which (except for such provisions as to cumulative voting) he would be entitled to cast for the election of directors with respect to his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit. . . ." N.Y. STOCK CORP. LAW § 49.

¹¹ "At least one-fourth in number of the directors of every stock corporation shall be elected annually." *Id.* § 55. In speaking of Section 55 of the Stock

Because the New York courts have never directly ruled on the validity of classified boards restricting the right of minority groups to cumulate their votes,¹² it will be profitable to examine the treatment that this problem has received in another state with statutes similar to our own.¹³ In the instant case, a by-law permitting one director to be elected each year was upheld as valid by the trial court. The court, however, ruled against the majority on a technicality.¹⁴ Plaintiffs, fearing a repetition of the same action brought the case before the Court of Appeals on a question of law. "The only question presented by this appeal is whether or not the stockholders by amending the code of regulations may adopt an amendment classifying the directors as to their terms of office . . . so that the right to vote cumulatively . . . is completely nullified."¹⁵ The Court of Appeals held that although in some instances cumulative voting and classification of directors can be harmonized, where classification results in the election of but one director each year thus nullifying the effect of cumulative voting, it is repugnant to the legislative intent and hence invalid.¹⁶

The cause then came before the Supreme Court of Ohio upon a motion to certify the record. The highest court readily admitted that the amendment would completely nullify the effect of cumulative voting but held that the law ". . . guarantees to minority shareholders

Corporation Law a New York court said: "That section, however, is intended to provide a method for staggering the election of directors and the word 'annual' there used does not preclude elections for a shorter term." *Wyatt v. Armstrong*, 186 Misc. 216, 222, 59 N.Y.S.2d 502, 507 (Sup. Ct. 1945). *But see In re Empire Title & Guarantee Co.*, 73 N.Y.S.2d 84 (Sup. Ct. 1947), where the court said that Section 55 ". . . was not intended to stagger the election of directors, but to prevent the directors from holding office for more than four years without obtaining stockholders' renewed approval." *Id.* at 86.

¹² See Note, 30 ST. JOHN'S L. REV. 83, 92-93 (1955).

¹³ OHIO REV. CODE ANN. § 1701.58 (Baldwin 1953) embodies the mandatory cumulative voting provision of Ohio. It further provides that "such right to vote cumulatively shall not be restricted or qualified by the articles or the code of regulations." OHIO REV. CODE ANN. § 1701.64 (Baldwin 1953), provides in part, as follows: "The articles or the code of regulations may provide for the term of offices of all of the directors, or, if classified upon the basis of the expiration of the terms of office of the directors of each class thereof, provided that no term shall be fixed for a period of more than three years from the date of their election and until the election of their successors."

¹⁴ The code of regulations of the corporation provided that the code could be amended at a special meeting called for that purpose. The Court of Common Pleas, although holding the classification of directors valid, found that the notice of the annual meeting sent to the shareholders was not sufficient to give notice of the intention to amend the code of regulations. *Humphrys v. Winous Co.*, 165 Ohio St. 45, 133 N.E.2d 780 (1956).

¹⁵ *Humphrys v. Winous Co.*, 72 Ohio L. Abs. 65, 125 N.E.2d 204, 207 (Ct. of App. 1955).

¹⁶ "When the minimum number of three directors is provided for, and their terms of office are for three years, one to be elected each year, the right to cumulate voting is, in such case, completely nullified." *Id.* at 210. ". . . [T]he resolution, attempting to classify the directors of The Winous Company under a by-law or code regulation, is invalid. . . ." *Id.* at 211.

only the right of cumulative voting and does not necessarily guarantee the effectiveness of the exercise of that right to elect minority representation on the board of directors."¹⁷

In effect, the Court has declared that the statute has granted a mere right which others, also under the guise of statutory power can fashion into a hollow claim. Cumulative voting was first introduced into American law to correct the evils widespread in private corporations after the Civil War.¹⁸ It was designed to grant representation to minority interests on the board of directors.¹⁹ The instant decision appears to be an anomaly in the current trend of American law—a trend which seeks to protect and grant representation to minority groups.



CRIMINAL LAW — OBSTRUCTING JUSTICE — DESTRUCTION OF DOCUMENTS BY PROSPECTIVE WITNESS HELD PUNISHABLE UNDER 18 U.S.C. § 1503.—In an action prosecuted under the federal "Obstruction of Justice" statute,¹ the defendant was accused of destroying certain papers which he had reason to believe would be subpoenaed in a pending grand jury investigation. The defendant moved for a dismissal on the grounds that the indictment had failed

¹⁷ *Humphrys v. Winous Co.*, *supra* note 14, 133 N.E.2d at 789.

¹⁸ See WILLIAMS, *CUMULATIVE VOTING FOR DIRECTORS* 20-22 (1951); Stephan, *Cumulative Voting and Classified Boards: Some Reflections on Wolfson v. Avery*, 31 NOTRE DAME LAW. 351 (1956).

¹⁹ See *Matter of Rogers Imports, Inc.*, 202 Misc. 761, 116 N.Y.S.2d 106 (Sup. Ct. 1952); *Maddock v. Vorclone Corp.*, 17 Del. Ch. 39, 147 A.2d 255 (1929); *Commonwealth ex rel. O'Shea v. Flannery*, 203 Pa. 28, 52 Atl. 129 (1902); PRASHKER, *CORPORATIONS* 488 (2d ed. 1949).

¹ "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1503 (1952). This statute was derived from Sections 5399 and 5404 of the Revised Statutes of 1875.