

Corporations--Cumulative Voting--Provision Therefor in By-Laws (Matter of American Fibre Chair Seat Corp., 241 App. Div. 532 (2d Sept. 1934))

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inquire into the degree of necessity for laws and enactments in the matter would be to overstep the line of distinction between the legislative and judicial departments of our government.¹⁰ In view of this attitude of unwillingness to overstep this line of demarcation, the court did not look into the degree of necessity for the legislation involved.¹¹

In the *Legal Tender Cases*,¹² the court says that Congress has the power to impair contracts by its legislation. "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power."¹³ The prohibition on the payment of obligations in gold even when the evidence of debt requires that it be paid in gold or its equivalent and a direction to cancel all such obligations by payment of a dollar for each dollar of indebtedness is within the power of Congress and is therefore a measure within the powers conferred by the Constitution of the United States.¹⁴

J. A. R., JR.

CORPORATIONS—CUMULATIVE VOTING—PROVISION THEREFOR IN BY-LAWS.—Petitioner, a minority stockholder, seeks confirmation of election of a director through cumulative voting of his stock pursuant to a by-law adopted by the corporation with consent of all the stockholders authorizing that method of voting. Respondents, majority stockholders, claim that since there is no provision in the certificate of incorporation providing for cumulative voting, the election is invalid. *Held*, such provision in by-laws creates a vested right in the stockholder, and is binding on the other stockholders. *Matter*

of exigency arises, and not a judicial question to be afterwards passed upon by the courts." *Legal Tender Cases*, *supra* note 3, at 450.

¹⁰ *Fong Yue Ting v. United States*, *supra* note 5.

¹¹ *Legal Tender Cases*, *supra* note 3.

¹² *Ibid*.

¹³ *Id.* at 457.

¹⁴ Instant case; *Rae v. Homestead Loan & Guarantee Co.*, 176 U. S. 121, 20 Sup. Ct. 341 (1899); *United States v. Boak Fish Co.*, 146 Fed. 104 (Cir. Ct. 3rd D. Minn. 1906); *Ceballos v. United States*, 146 Fed. 380 (C. C. A. 2d, 1906); *Troy v. Bland*, 58 Ala. 197 (1877); *Belloc v. Davis*, 38 Cal. 242 (1869); *Jones v. Harker*, 37 Ga. 502 (1867); *Black v. Lusk*, 69 Ill. 70 (1873); *Brown v. Welch*, 26 Ind. 116 (1866); *Hintrager v. Bates*, 23 Iowa 331 (1867); *George v. Concord*, 45 N. H. 434 (1864); *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400, writ of error dismissed, 68 U. S. 512 (1863); *Schollenberger v. Brinton*, 52 Pa. St. 9 (1866); *Johnson v. Ivey*, 44 Tenn. 608 (1867). *In re Société Intercommunale Belge d'Electricité—Feist v. The Company*, 49 Times Law Reports 344. *Contra*: *Hepburn v. Griswold*, *supra* note 3; *Meyer v. Kaufmann*, 37 Ga. 600 (1868); *Hepburn v. Griswold*, 63 Ky. 20 (1865); *Meyer v. Roosevelt*, 25 How. Pr. 97 (N. Y. 1862).

of *American Fibre Chair Seat Corp.*, 241 App. Div. 532, 272 N. Y. Supp. 206 (2d Dept. 1934).

At the common law each stockholder, regardless of the number of shares held, was entitled to one vote only.¹ In New York, under the present statute,² each stockholder is entitled to one vote for each share of stock held.³ Cumulative voting is one way of exercising that right.⁴

The New York statute⁵ states that a provision for cumulative voting "may" appear in the certificate of incorporation or other certificate filed according to law.⁶ "May" in a statute will usually be construed as merely permissive.⁷ Does this mean, however, that although there *may* be such a provision, it *must* appear in the certificate of incorporation or other duly filed certificate? Legislative intent is the key to interpretation.⁸ Under the court's holding in the instant case, the words "certificate of incorporation" are insignificant. Vain use of language by the legislature will not be presumed.⁹ But looking beyond the wording to the result sought by the legislature,¹⁰ it has been said that cumulative voting is intended to give minority stockholders some representation on the board of directors.¹¹ In some states¹² this intent has been carried out by a right granted by law, constitutional or statutory, which cannot be taken away by resolution or by-law.¹³ In this state, the statute¹⁴ is merely permissive,¹⁵ suggesting one method of protecting the stockholder.¹⁶ Equally

¹ 3 COOK, CORPORATIONS (8th ed.) §609.

² N. Y. STOCK CORP. LAW (1923) §47.

³ *Ibid.*

⁴ Instant case.

⁵ N. Y. STOCK CORP. LAW (1923) §49.

⁶ *Ibid.*

⁷ *Medbury v. Swan*, 46 N. Y. 200, 201 (1871); *People ex rel. Comstock v. Mayor*, 59 Hun 258, 12 N. Y. Supp. 890 (N. Y. 1891), *aff'd*, 128 N. Y. 632, 29 N. E. 146 (1891).

⁸ *Caddy v. Interboro Rapid Transit Co.*, 195 N. Y. 415, 88 N. E. 747 (1909); *Wiley v. Solvay Process Co.*, 215 N. Y. 584, 588, 109 N. E. 606, 608 (1915); *New York Railways Co. v. City of New York*, 218 N. Y. 483, 113 N. E. 501 (1916); *State Industrial Commissioner v. Newman*, 222 N. Y. 363, 118 N. E. 794 (1918).

⁹ *Travelers Ins. Co. v. Louis Padula Co., Inc.*, 224 N. Y. 397, 121 N. E. 348 (1918); *Johanns v. Ficke*, 224 N. Y. 513, 519, 121 N. E. 358, 360 (1918).

¹⁰ *103 Park Ave. Corp. v. Exchange Buffet Corp.*, 242 N. Y. 366, 152 N. E. 117 (1926); see also *Emerson v. Buck*, 230 N. Y. 380, 130 N. E. 584 (1921).

¹¹ *Matter of Jamaica Consumers Ice Co.*, 190 App. Div. 739, 741, 180 N. Y. Supp. 384, 386 (1st Dept. 1920), *aff'd*, 229 N. Y. 516, 129 N. E. 897 (1920).

¹² *Tomlin v. Farmers & Merchants Bank*, 52 Mo. App. 430 (1893); *Pierce v. Commonwealth*, 104 Pa. 150 (1883); *Cross v. West Va. Cent. & P. Ry. Co.*, 35 W. Va. 174, 12 S. E. 1071 (1891).

¹³ *Tomlin v. Farmers & Merchants Bank*, *supra* note 12, at 436.

¹⁴ *Supra* note 5.

¹⁵ Instant case.

¹⁶ *Ibid.*

binding as the charter¹⁷ are the by-laws of the corporation¹⁸ which vest a right that cannot be taken away without the owner's consent.¹⁹ Cumulative voting provided for therein carries out to a large extent the intent of the legislature and an election by votes cast cumulatively under such a provision should be affirmed.

J. T. B., JR.

CRIMES—MURDER IN FIRST DEGREE—COMMON LAW RULE THAT DEATH MUST OCCUR WITHIN A YEAR AND A DAY ABROGATED BY STATUTE.—The defendant was convicted of murder in the first degree. The deceased was shot on July 22, 1928, and died on July 13, 1932. The defendant claims that the indictment should have been quashed as to murder in the first degree. *Held*, common law rule that the death must occur within a year and a day has been abrogated by statute. *People v. Brengard*, 265 N. Y. 100, 191 N. E. 842 (1934).

At common law to have a conviction for murder in the first degree, the deceased must die within a year and a day of the day on which the assault was committed.¹ If the victim does not so die then the common law conclusively presumes that the death was due to some other cause.² This rule remains unchanged in many jurisdictions.³ Under the first constitution adopted in New York, the

¹⁷ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 179 (1879); *Hassel v. Pohle*, 214 App. Div. 654, 658, 212 N. Y. Supp. 561, 566 (2d Dept. 1925); *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N. Y. 1826).

¹⁸ *Kavanaugh v. Commonwealth Trust Co.*, 223 N. Y. 103, 107, 119 N. E. 237, 238 (1918); *Matter of Corp. of Yaddo*, 216 App. Div. 1, 3, 214 N. Y. Supp. 523, 525 (3d Dept. 1926).

¹⁹ *Kent v. Quicksilver Mining Co.*, *Hassel v. Pohle*, both *supra* note 17; *Matter of Corp. of Yaddo*, *supra* note 18.

¹ 1 WHARTON, CRIMINAL LAW (10th ed. 1896) 336; 2 COOLEY, BLACKSTONE (4th ed. 1899) 1363; "The time both of the stroke and the death should be stated (in the indictment) that the death may appear to have taken place within a year and a day after the mortal injury"; 1 BARBOUR, CRIMINAL LAW (3d ed. 1883) 71; *Darry v. People*, 10 N. Y. 120 (1854); *People v. Enoch*, 13 Wend. 159 (N. Y. 1834); *Thomas v. State*, 67 Ga. 460 (1881); *Clark v. Commonwealth*, 90 Va. 360, 18 S. E. 440 (1893); 29 C. J. 1083.

² 1 WHARTON, CRIMINAL LAW (10th ed. 1896) 336; 1 BARBOUR, CRIMINAL LAW (3d ed. 1883) 71; *Burns & Cary v. People*, 1 Park. Cr. 182 (N. Y. 1848); *People v. Aro*, 6 Cal. 207 (1856); *People v. Kelley*, 6 Cal. 210 (1856); *State v. Mayfield*, 66 Mo. 125 (1877); *State v. Orrell*, 12 N. C. 139 (1828).

³ *Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761 (1891); *Howard v. State*, 7 Div. 787, 137 So. 532 (Ala. 1931); *Roberts v. State*, 17 Ariz. 159, 149 Pac. 380 (1915); *Kee v. State*, 28 Ark. 155 (1872); *People v. Aro*, *supra* note 2; *People v. Kelley*, *supra* note 2; *State v. Bantley*, 44 Conn. 537 (1877); *Jane v. Commonwealth*, 3 Metc. 18 (Ky. 1860); *State v. Kennedy*, 8 Rob. 590 (La. 1845); *State v. Conley*, 39 Me. 78 (1854); *Commonwealth v. Macloom*, 101 Mass. 1 (1869); *Harrel v. State*, 39 Miss. 702 (1861); *State v.*