Corporate Voting: Majority Control

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CORPORATE VOTING: MAJORITY CONTROL

The traditional corporate set-up is based upon the democracy of the dollar—one share, one vote; majority control.¹ With respect to the large publicly owned corporations it is no longer true that control is necessarily exercised by the stockholders who have invested the largest capital in the enterprise.² This result has been achieved in part by the use of various legal devices, such as non-voting stock, but more important, in practice, is the generality with which control is exercised by the owners of a minority of even the voting stock.³ Because of such factors as widespread ownership,⁴ inertia and disinterest in management,⁵ and inaccess-

¹ State v. Gray, 20 Ohio App. 26, 153 N. E. 187 (1925). The use of no par stock in part destroys this concept because, unless otherwise expressly provided, each share of stock is entitled to one vote regardless of its par value, State v. Kinkead, 113 Ohio St. 487, 149 N. E. 697 (1925). The original common law view that each stockholder is entitled to only one vote regardless of the number of shares owned by him (Taylor v. Griswold, 14 N. J. L. 222 (1834); Matter of Rochester Dist. Tele. Co., 40 Hun 172 (N. Y. 1886); Commonwealth v. Conover, 10 Phila. 55 (Pa. 1873) was abandoned in the earliest days of business corporations, but such voting may still be permissible (Op. Atty. Gen. N. Y. 1910) 406; North Dakota Civil Code, §4534; Washington, Rem. Code, §3812). The move away from the man to his investment was also marked by the allowance of proxy voting which is now universal but which was not permitted at common law, Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014 (1912); Commonwealth v. Bringhurst, 103 Pa. 134 (1883). The derivation of the notion of “majority rule” from politics is obvious; its validity as a social ideal is beyond the scope of this article.

² Only 22 of the 200 largest corporations in the United States are controlled by majority owners, BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) 94.

³ 134 of said 200 corporations are controlled by the management and by minority stockholders, BERLE AND MEANS, loc. cit. supra note 2. The writer has in course of preparation an article on Perpetuating Control.

⁴ At the end of 1931, over 4,000,000 persons owned the common stock of the 65 leading corporations listed on the New York Stock Exchange. Some average individual holdings were: U. S. Steel, 49.9 shares; Amer. Tel. & Tel. Co., 29 shares; General Motors Corp., 14.7 shares. See N. Y. Times, Feb. 7, 1932, Part 2, at 9. The first indication of a check in the trend towards widespread stock ownership occurred during the third quarter of 1932 when U. S. Steel, General Motors, and other large corporations showed the smallest increase in number of common stockholders experienced since 1928 (N. Y. Times, Oct. 9, 1932, Part 4, at 1, Dec. 14, 1932, at 16), but even at that time it was estimated that 88% of the owners of common stock in 48 representative American Corporations owned less than 100 shares each (ibid.). For a discussion of the means of union available to small security holders, see Rohrlich, Protective Committees (1932) 80 U. OF PA. L. REV. 670.

⁵ The average stockholder in the large corporations is primarily interested in financial return; when apprehensive of the management he sells his stock. These and other considerations seem to call for a sharper distinction in corpo-
sible places of meeting, the "privilege of voting" has become largely "theoretical." However, the power to control unquestionably resides with the owners of the majority of the voting stock. At times of stress, this power, normally quiescent, asserts itself in full vigor and it is important to understand its nature and the limitations to which it is subject.

**STATUTORY AND CHARTER LIMITATIONS.**

None of the cynicism towards the importance of corporate voting elsewhere rampant has entered the courts. In the opinions of the judges the right to vote is "a property right," "a vested interest," "a vital right," "an inherent right," "an essential attribute" of the stock itself, a right of "substantial value," indeed, the stockholder's "supreme right and main protection."

Notwithstanding the broad sweep of the language quoted, it is not surprising in view of the statutory nature of the modern corporation itself that statutory restric-

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6 Stockholders' meetings are generally held in the state of incorporation but that state is not usually chosen because it is the place of residence of most stockholders. See "WHY CORPORATIONS LEAVE HOME" (The Corporation Trust Company, 1929).

7 DEWING, THE FINANCIAL POLICY OF CORPORATIONS (1926) 628; see also Andrews, Our "Voting" Stock (1932) 8 VA. Q. REV. 400.

8 The word "majority" is used in this article to indicate the vote legally necessary to adopt a course of conduct; that may be 51%, 66 2/3% or 75%.

9 "Control" is ordinarily exercised by the election of friendly directors; on special questions, such as mergers, dissolution, etc., by direct vote.

10 Not to extend this article unduly, reference to the ordinary routine matters with respect to meetings and voting usually contained in corporation statutes is omitted.


11a Prior to the American Revolution, corporations were generally created by royal charter rather than by Act of Parliament. See Warren, Safeguarding the Creditors of Corporations (1923) 36 HARV. L. REV. 509, 515.
tions upon voting rights have been sustained.\textsuperscript{12} It has been held that the majority do not have such a vested right in their voting power as to invalidate a statutory amendment providing for cumulative voting designed to give the minority representation upon the board of directors.\textsuperscript{13} Conversely, the minority do not have such a vested right in the benefits of cumulative voting sufficient to prevent a reduction in the number of directors which would make it necessary for more shareholders to combine in order to obtain representation on the board.\textsuperscript{14}

The corporation itself may not change voting rights as fixed by statute.\textsuperscript{15} Where the statute provides that the directors shall be elected by the stockholders, a vote may not be given to bondholders.\textsuperscript{16} Nor may a statutory provision that such election be by a plurality vote be changed by a charter provision requiring a unanimous vote.\textsuperscript{17} And where the statute provides for annual elections of directors, the charter may not create a permanent, self-perpetuating board.\textsuperscript{18}

Under a constitutional provision providing that “every shareholder shall have the right to vote,” non-voting preferred stock may not be issued.\textsuperscript{19}

\textsuperscript{12} E. g., limiting voting power to residents, State v. Hunt, 28 Vt. 594 (1856); limiting number of votes to be cast by any one stockholder, Mack v. DeBardeleben Coal & Iron Co., 90 Ala. 396, 8 So. 150 (1890).


\textsuperscript{15} Breweer v. Hartley, 37 Cal. 15 (1869).


\textsuperscript{18} State v. Anderson, 31 Ind. App. 34, 67 N. E. 207 (1903).

\textsuperscript{19} Brooks v. State, 29 Del. 1, 79 Atl. 790 (1911); People v. Emmerson, 302 Ill. 300, 134 N. E. 707 (1922). \textit{Contra:} State v. Swanger, 190 Mo. 561, 89 S. W. 872 (1905). The Delaware constitutional provision relied on in the
In *Lord v. Equitable Life Assurance Society*, the certificate of incorporation gave each stockholder one vote for each share owned and provided that the directors might grant one vote to each policyholder insured for not less than $5,000. Some years later, the legislature enacted a law providing that the directors with the consent of a majority of the stockholders might confer upon policyholders the right to vote for all or any lesser number of directors. Thereupon the directors with the necessary concurrence of stockholders sought to confer the right to vote for 28 out of 52 directors upon the policyholders and to limit the stockholders to the right to vote for 24 directors. The court held the legislative act valid in view of the “mutualization” features contained in the original certificate of incorporation but held the action taken thereunder as invalid because it construed the statute as permitting the granting of a vote to policyholders but not as authorizing the denial of any vote to the stockholders.

In the absence of controlling statutes the extent to which voting rights may be curtailed by charter or by-law is largely one of “public policy.” Generally, the charter may provide for non-voting classes of stock and may limit the num-

Brooks case was repealed in 1903. Non-voting stock may be issued where the governing statute authorizes the creation of two or more classes of stock “with such designations voting powers or restrictions” as may be stated in the certificate of incorporation, Randle v. Winona Coal Co., 206 Ala. 254, 89 So. 790 (1921); infra note 22. Many statutes thus authorize the issuance of non-voting stock (e.g., Del. Gen. Corp. Act, §17; N. Y. Stock Corp. Law (1929) §§; Purdon's Pa. St. Tit. 15, §§161, 164) and the proposed Uniform Business Corporation Act (approved Amer. Bar Assn. 1928, 53 A. B. A. Rep. 92) does so with a novel addition (§2811): “If, by the articles of incorporation, voting power is granted to the holders of shares of a certain class or classes and denied to the holders of shares of other classes, then the person or persons exercising such power shall stand in a fiduciary relation to the entire body of shareholders and shall be responsible to the corporation, for the benefit of all shareholders, for any violation of the obligations of such relationship.”

*Supra* note 11.

The Company was thereafter completely mutualized. The Charter was first amended to permit policyholders and stockholders to vote for all directors and then the stock was purchased and cancelled, leaving the sole voting power with the policyholders, see Royal Trust Co. v. Equitable Life Assurance Society, 247 Fed. 437 (C. C. A. 2d, 1917).

The curtailment when sustained is generally on the basis of contract, consent, or waiver.

People v. Koenig, 133 App. Div. 756, 118 N. Y. Supp. 136 (1st Dept. 1909); General Investment Co. v. Bethlehem Steel Corp., 87 N. J. Eq. 234, 100 Atl. 347 (1917); Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496 (1890); cases cited 21 A. L. R. 643 (1922); see also *supra* note 19.
her of votes of any one shareholder.\textsuperscript{23} But the corporation may not issue all of its stock without voting powers, vesting such power in another body,\textsuperscript{24} or stipulate in advance the manner in which stockholders shall vote upon matters submitted to them.\textsuperscript{25} And when once voting power has attached to stock its relative voting strength may not be reduced without its consent.\textsuperscript{26}

\textbf{SELF-IMPOSED LIMITATIONS—BY CONTRACT.}\textsuperscript{27}

The foregoing indicates that a stockholder’s vote may not be taken from him without his consent,\textsuperscript{28} but the law has gone further and has imposed limitations even on his own right to deal with it. He, of course, cannot be compelled to exercise his voting right,\textsuperscript{29} but, on the other hand, he will not be permitted

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\item Lebus v. Stansifer, 154 Ky. 444, 157 S. W. 727 (1913). This was done in the case of The Bank for International Settlements; see Reynolds, N. Y. L. J., Dec. 17, 1932.

\item McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954 (1897), holding void a by-law requiring stockholders to vote in favor of proposals to increase capital made by directors. \textit{Cf.} Elger v. Boyle, 69 Misc. 273, 126 N. Y. Supp. 846 (1910), sustaining a provision in a will directing executors to vote stock in a corporation as directed by its directors. But see Randall & Sons, Inc. v. Luecke, 123 Misc. 5, 205 N. Y. Supp. 121 (1924). See also \textit{"Validity and Effect of Provision in Will to Control Voting Power of Corporate Stock"} (1920) 9 Alas. 242, 17 A. L. R. 228.

\item Page v. Amer. & Br. Mfg. Co., \textit{supra} note 11, holding illegal reduction in power of common stock resulting from attempted change of capital from 80,000 shares common and 20,000 shares preferred to 20,000 shares of each where both classes were entitled to vote.

\item Charter and by-law provisions are generally treated as in the nature of “contract” limitations, but we shall in this section treat only “true” contracts. Because of the extensive literature on the subject, we refrain from discussing “voting trusts.” See (1932) 5 So. CALIF. L. Rev. 214; and material cited Rohrich, \textit{Protective Committees} (1932) 80 U. of Pa. L. Rev. 673, especially in connection with this article: Lilienthal, \textit{Corporate Voting and Public Policy} (1887) 10 Harv. L. Rev. 423; Bergerman, \textit{Voting Trusts and Non-Voting Stock} (1928) 37 Yale L. J. 445.


\item See Vandenburgh v. Broadway Ry. Co., 29 Hun 348 (N. Y. 1883); Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929 (1897).
to sell his vote to another.\textsuperscript{30} Thus, it is said a stockholder may not, for a consideration private and personal to himself and to which the corporation is a stranger, agree to cast his vote in a certain prescribed way.\textsuperscript{31} Agreements whereby one agrees to vote in a particular manner in consideration of his employment by the corporation accordingly have been held invalid.\textsuperscript{32} On the other hand "it is not illegal or against public policy for two or more stockholders owning the majority of the shares of stock to unite upon a course of corporate policy or action, or upon the officers whom they will elect."\textsuperscript{33} Accordingly, agreements to vote for certain persons as directors are valid.\textsuperscript{34} And an agreement substantially giving one stockholder a veto power has been held valid, at least where all the stockholders were parties to it.\textsuperscript{35}

\textsuperscript{30} This common law rule is sometimes embodied in statute, e. g., N. Y. Stock Corporation Law (1930) §47, New York Penal Law (1909) §668. The New York statutory provision that proxies are revocable (N. Y. GEN. CORP. LAW [1929] §19) has, in view of the foregoing, been construed to prevent the creation of a proxy "coupled with an interest," Matter of Germicide Co., 65 Hun 606, 20 N. Y. Supp. 495 (1892). See also, Matter of Glen Salt Co., 17 App. Div. 234, 45 N. Y. Supp. 568 (3d Dept. 1897), \textit{aff'd}, 153 N. Y. 688, 48 N. E. 1105 (1897). The proposed Uniform Business Corporations Act, \textit{supra} note 19, expressly limits the provision that proxies are revocable to such as are "not coupled with an interest" (art. 27IV).


\textsuperscript{32} Hellier v. Achorn, 255 Mass. 273, 151 N. E. 305 (1926), refusing to recognize a distinction in fact that employment was to continue only so long as plaintiff "did his best"; Cone v. Russell & Mason, 48 N. J. Eq. 208, 21 Atl. 847 (1891); Kreisel v. Distilling Co., 61 N. J. Eq. 5, 47 Atl. 471 (1900). The two last-cited cases recognize that a stockholders' pooling agreement would be valid if intended to carry out some corporate policy for the benefit of all stockholders. See also Rigg v. Railway Co., 191 Pa. 298, 43 Atl. 212 (1899).

\textsuperscript{33} Manson v. Curtis, 223 N. Y. 313, 119 N. E. 559 (1918).


\textsuperscript{35} Fitzgerald v. Christy, 242 Ill. App. 343 (1926).
An agreement whereby the parties agreed to vote as determined by a majority of them has been sustained. It is, however, a reluctance specifically to enforce contracts involving corporate control even when valid.

It seems futile to attempt any detailed analysis of the cases in the hope of reconciling them on the basis of "distinguishing" facts, and in preference we shall comment on the underlying attitudes.

The courts which sustain agreements such as here under discussion are impressed with the importance of the right freely to contract. They have not as yet sought support in frank recognition of the fact that most stockholders purchase stock for financial return and that it is entirely in harmony with their attitude to leave control to others. Courts which have refused to sanction such agreements have done so because of a refusal to recognize "sterilized" boards of directors or because of a refusal to permit the so-called separation of voting power from beneficial ownership. It is submitted that in most cases such separation, when voluntary, is entirely proper, and it is difficult to understand how they can be deemed contrary to "public policy" in states which permit the issuance of non-voting stock or the use of

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36 Smith v. San Francisco & N. Pac. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897); cf. Morel v. Hoge, supra note 34; Sullivan v. Parkes, 69 App. Div. 221, 74 N. Y. Supp. 787 (1st Dept. 1902). "Agreements such as in the Smith case must be sharply distinguished from "irrevocable proxies." It is well settled that a proxy to vote stock, not "coupled with an interest," may be revoked even though it purports to be irrevocable, 3 COOK, CORPORATIONS (8th ed. 1923) 2136; 5 FLETCHER, CYC. CORPS. (Perm. ed.) 187; 2 THOMSON, CORPORATIONS (3d ed. 1927) §977; 14 C. J. 911; Schmidt v. Mitchell, supra note 29; Luthy v. Ream, 270 Ill. 170, 110 N. E. 373 (1915); Randall & Sons, Inc. v. Lucke, supra note 25; Woodruff v. Dubuque & S. C. R. Co., 30 Fed. 91 (S. D. N. Y. 1887).

37 Gage v. Fisher, 5 N. D. 297, 65 N. W. 809 (1895); Foll's Appeal, 91 Pa. St. 434 (1879). In McQuade v. Stoneham, supra note 34, a complaint asking for specific performance of an agreement by stockholders to "use their best endeavors" to continue certain named persons (3 out of 7) as directors and the plaintiff as treasurer was sustained, but, after trial, the Court refused specific performance and granted damages (also asked for in the complaint)—142 Misc. 842, 256 N. Y. Supp. 431 (1932). But in Harris v. Magill, supra note 34, a motion to restrain plaintiff's removal as director and officer in violation of agreement was granted.


39 See supra note 5.

40 This subject will be discussed hereafter.
CORPORATE VOTING: MAJORITY CONTROL

voting trusts. The doctrine against the sale of votes is, it is submitted, also without substantial merit. The horror with which courts view such transactions is undoubtedly directly attributable to their drawing analogies from public law with its views as to the duties of citizens and public officials. If there was any validity to the analogy when corporations were created by private charters establishing certain definite relations between the corporators and the sovereign, it vanished when it came to pass that a certificate of incorporation could be obtained by any one upon the filing of a document in a public office. The reasons given by the courts do not withstand, it seems, close analysis. It is surely illogical to conclude, as some opinions do, that a stockholder may not agree with another how he will vote because he may "vote as he pleases." Nor can consistency between opinions recognizing the validity of a sale of stock for the purpose of selling control and those invalidating a sale of a vote be readily established. The only effect seems to be to make the purchase of control more expensive in those cases where the control is not already separated from ownership by the use of various legal devices which are rec-

41 Of course, in those states where voting trusts are authorized by statute, there are certain safeguards such as the requirement that the agreement be open to all stockholders. It may be desirable that all agreements between stockholders as to voting should be filed with the corporation, open to inspection by all stockholders, in order to be valid.

42 See supra notes 30-32.

43 E. g., Cone v. Russell & Mason, supra note 32. In the early days, little attention was given to the distinction between public and private corporations (see Williston, History of the Law of Business Corporations Before 1800 (1888) 2 HARV. L. REV. 105, 149, 156), and many inconsistencies in modern corporation law can be traced to this early confusion. See Gold Bluff Mining & Lumber Corp. v. Whitlock, 75 Conn. 669 (1903); Bergerman, supra note 27; Note (1931) 44 HARV. L. REV. 442.


The writer is at a loss for a sound reason why a stockholder should not be permitted to own a share of common stock, as an investment, free to dispose of its vote, if corporations are at liberty to sell non-voting securities. If investors are able to buy non-voting securities, ordinarily in ignorance of the governing voting provisions, it ought to follow that they may voluntarily buy stock with voting rights and then, in the exercise of their own discretion, sell the voting power, for limited periods, to others for a consideration. This would merely be a frank judicial

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45 Forty-two of the 200 largest corporations in the United States are so controlled, Berle and Means, op. cit. supra note 2.

46 There may be sound social reasons against the use of non-voting securities (see Nickel-Plate Unification, 105 I. C. C. 425, 444 (1926); Stevens, Stockholders' Voting Rights and the Centralization of Voting Control (1926) 40 QUAR. JOUR. OF ECONOMICS 353, 382, et seq.; Riple, Main Street and Wall Street (1927) c. IV), but that question raises basic social and economic questions as to the extent to which separation of ownership from control ought to be permitted. See Bergerman, supra note 27; Berle and Means, op. cit. supra note 2. The law at present not only recognizes the validity of separation of ownership from control resulting from the use of non-voting stock and voting trusts, but in many other ways, see Benkard v. Leonard, 231 App. Div. 625, 248 N. Y. Supp. 497 (1st Dept. 1931), holding that the personal representative of a deceased settlor, who had reserved the voting rights of trusteed stock, succeeded thereto in preference to the trustee in whom legal title was vested; Buffalo Electro-Plating Co. v. Day, 151 App. Div. 237, 135 N. Y. Supp. 1054 (4th Dept. 1912), holding that a director does not forfeit his office by selling all his stock. A director need not be a stockholder (e. g., N. Y. Stock Corp. Law (1930) §55; see Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593 (1912) as to nominal stockholders serving as directors) and a holder of non-voting stock may be a director (Matter of Haecker, 212 App. Div. 167, 207 N. Y. Supp. 561 (2d Dept. 1925). See also, In re Newcomb, 18 N. Y. Supp. 16 (1891). The Bank for International Settlements affords an interesting example of a corporation wherein the voting power is separate from the ownership of its stock; see Reynolds, N. Y. L. J., Dec. 17, 1932.

46a It may possibly be argued that stockholders, like infants, should be protected against their own acts, but if that is to become the guiding principle in corporation law, in order to render it effective, the state must go very much further than it has. Professor Wormser has said (Frankenstein, Incorporated—1931, p. 157): "If stockholders refuse or neglect to protect themselves * * * the State must take up the cudgels in their behalf." The opposite point of view was recently expressed by Mr. William C. Breed (an address, Feb. 9, 1933), as follows: "The theory of State-constituted guardianship of investors should be abandoned, * * * It is an exercise of the sovereign authority in a manner which tends to prevent the development of that caution, sagacity and character which an investing public must possess if it is to avoid unnecessary loss." Although not unmindful of the fact that "the truth may lie between the two extremes" (Andrews, The Decisions of the Court of Appeals in Recent Years and How They Have Affected Substantive Law (1927) 12 CORN. L. Q. 433, 435, 452), the present writer nevertheless deems it appropriate to call attention to the lack of consistency and of policy in the present state of the law on this subject.
recognition of the fact that "control" has a financial value. It would enable corporations to get the benefit of the higher prices for which voting stock can be issued in comparison with non-voting stock and would enable small investors to realize upon the value of "control" which they do not exercise or even desire. Conversely, it would probably check the resort to schemes designed to deprive stockholders of their votes against their will.

The original justification for holding that a stockholder should not be permitted to barter his vote for a private consideration was the notion that every stockholder was entitled to the honest and unbiased judgment of every other stockholder. This view is at variance with the well settled principle that a stockholder is not disqualified from voting merely because he is personally interested and that he may vote so as to best serve his personal interests. It is so completely unrealistic that the courts are abandoning it.

Much of the confusion in the cases is due to a failure to distinguish between agreements made by stockholders qua stockholders and those made by directors qua directors. It is clear that elected directors should not be permitted to assume in consideration of a secret profit private obligations.

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It would also accelerate the development of a professional managerial class. The more completely management is subjected to the obligations of fiduciaries the less danger there is in non-voting stock. It is in the temper of the times to impose such obligations upon those who handle "other peoples' money." See President Roosevelt's Message to Congress, March 29, 1933; Uniform Business Corporations Act, supra note 19. There has, however, developed no greater tolerance for non-voting stock. The Emergency Banking Law of March 9, 1933, seems to contemplate that the preferred stock to be issued by national banks shall have voting powers (§302a) and the form of by-law drafted by the Comptroller of the Currency thereto under so provides.

The old theory which seemed to dominate the earlier writers, to the effect that every stockholder in a corporation is entitled to have the benefit of every other stockholder in the selection of a board of directors, has necessarily been rendered obsolete because of our modern business being conducted by large corporations located in all parts of the country." Mackin v. Nicollet Hotel, Inc., 25 F. (2d) 783, 786 (C. C. A. 8th, 1928), cert. den., 278 U. S. 618, 49 Sup. Ct. 22 (1928). The use of uninstructed proxies necessarily involves an abandonment of the notion. See Gow v. Consolidated Coppermines Corp., 165 Atl. 136 (Del. Ch. 1933) for an indication of the powers vested by a general proxy in the attorney.

"E. g., West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838 (1890); Snow v. Church, 13 App. Div. 108, 42 N. Y. Supp. 1072 (2d Dept. 1897); Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376 (1917); Creed v. Copps, 103 Vt. 164, 152 Atl. 369 (1930)."
to certain stockholders which may be inconsistent with the trust duties which they owe to all the stockholders but it does not follow that stockholders are necessarily subject to the same limitations. In their case, their agreements as to voting should be “valid and binding if they do not contravene any express charter or statutory provision or contemplate any fraud, oppression or wrong against other stockholders or other illegal object.”

It is believed that business ethics can be better served by compelling faithful adherence to obligations voluntarily assumed by competent persons than by permitting their breach because of technical arbitrary rules dissociated from the justice of the particular case.

**RESULTANT LIMITATIONS.**

The most liberal views of “freedom of contract” cannot relieve the majority stockholder from limitations upon his voting rights. There are inherent limitations resulting, whether he will or not, from his relationship to other groups interested in the corporation. Despite his power ultimately to change the management, the very existence of the board of directors serves sharply to delimit his voting powers. Stockholders may not control (that is, directly and avowedly, as by agreement) the directors in the exercise of the discretion vested in them as to the ordinary business of the corporation or with respect to powers directly conferred upon them by statute. This result follows from the fact that the statutes confer certain

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52 Singers-Biggers v. Young, 166 Fed. 82 (C. C. A. 8th, 1908).
53 Manson v. Curtis, supra note 33.
54 Such legally imperfect obligations as those owing to the general public and to employees are beyond the scope of this paper, see Dodd, *For Whom are Corporate Managers Trustees* (1932) 45 Harv. L. Rev. 1145; Berle, *For Whom Corporate Managers are Trustees* (1932) 45 Harv. L. Rev. 1365; O’Leary, *Corporate Enterprise in Modern Economic Life* (1933) c. V. It has been suggested that the effect on labor should be a factor in determining between immediate liquidation and continued operation by receivership, Douglas and Weir, *Equity Receiverships* (1930) 4 Conn. B. J. 1.8-9. This by analogy to the continued operation of utilities for the public’s benefit. See Central Bank & Trust Co. v. Cleveland, 252 Fed. 530, 533 (C. C. A. 4th, 1918).
55 Manson v. Curtis, supra note 33; Fells v. Katz, supra note 34; Rush v. Aunspaugh, 179 Ala. 542, 60 So. 802 (1912); Jackson v. Hooper, 76 N. J. Eq. 592, 75 Atl. 568 (1910); cf. Wabash Ry. Co. v. Amer. Ref. T. Co., 7 F. (2d) 335 (1925), cert. den., 270 U. S. 643 (1926), where an agreement by all the stockholders with the corporation as to the distribution of its profits was held valid.
powers directly upon the directors and they may not therefore be regarded merely as delegated to them by the stockholders, and from the view that directors are fiduciaries for all the stockholders and may not therefore assume inconsistent obligations to some of them.

In the absence of express authorization in the statutes or the charter, directors may not be removed during their term of office by the stockholders except for cause. Nor in the absence of such authorization may the board remove a director. On the other hand, directors may not extend their own term by changing the date of election. Controlling stockholders do, however, possess a method of procuring a favorable board even between regular elections. They may increase the number of directors and forthwith proceed to elect the new additional directors. Where sufficient cause exists, the right of removal is inherent.

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60 Manson v. Curtis, supra note 33; Bechtold v. Stillwagon, 119 Misc. 177, 195 N. Y. Supp. 66 (1922), holding invalid by-law vesting election of officers in stockholders; State v. Daubenspeck, 189 Ind. 243, 123 N. E. 402 (1920), denying right of stockholders to interfere with directors' by-law-making power.


70 Walsh v. State, supra note 58.


72 Matter of Koch, 257 N. Y. 318, 178 N. E. 545 (1931); Templeman v. Grant, 75 Colo. 519, 227 Pac. 555 (1924); Brush v. Natl. Gtee. Credit Corp., 13 Del. Ch. 180, 116 Atl. 738 (1922). As to what constitutes sufficient cause, see Matter of Koch, supra; Spellman, Corporate Directors (1931) §108. (Many of the cases cited by Spellman do not involve removal by the corporation.) Where the power to remove exists, judicial review thereof will be limited to ascertaining whether it has been exercised "fairly and in good faith" and whether the removed director was given notice and an opportunity to be heard in his own defense, State v. Brost, 98 W. Va. 596, 127 S. E. 507 (1925). The procedural requirements of due process may be waived, Matter of Koch, supra.

Judicial procedure for the removal of directors for misconduct is sometimes provided by statute (e.g., N. Y. Gen. Corp. Law (1929) §60); but in the absence thereof courts have no inherent jurisdiction to remove corporate officers, Johnstone v. Jones, 23 N. J. Eq. 216 (1872).
Until comparatively recently it could have been said with a fair degree of assurance that stockholders were not trustees for each other. From this premise it follows that they may vote upon matters in which they are personally interested and that their motives may not be inquired into by a court. A stockholder may not be deprived of his vote upon a charge that he proposes to vote in a manner which the others deem detrimental to the corporation.

However, majority stockholders have never been accorded free rein by the courts to do as they will with the corporation. They may not, over the objection of the minority, embark it upon ultra vires ventures, commit fraud, or treat the minority unfairly or inequitably.

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67 Ervin v. Lorillard, 110 N. Y. 519, 18 N. E. 363 (1888); Murrin v. Archbold Cons. Coal Co., 232 N. Y. 541, 134 N. E. 563 (1921); Manderson v. Commercial Bank, 28 Pa. St. 379 (1857); Langolf v. Seiberlich, 2 Pars. Eq. Cas. 64 (Pa. 1851). For additional cases, see 3 COOK, CORPORATIONS (6th ed. 1923) §669; 13 FLETCHER, CYC. CORPS. (Perm. ed.) §§8382-8; 4 THOMPSON, CORPORATIONS (3d ed. 1927) §§8096-8. As the result of increasingly liberal corporation statutes and the use of the broadest possible terminology in certificates of incorporation, this limitation has lost its early importance, see Note (1932) 45 HARV. L. REV. 1374, 1393.


CORPORATE VOTING: MAJORITY CONTROL

The application of these limitations is sharply restricted in practice by the doctrine that courts will not interfere with the discretion of the majority on matters of business policy, but there persists the notion that the majority do in fact owe fiduciary obligations to the minority. The obligations of trustees have been imposed upon stockholders when acting under statutory power to make a corporate decision, and in favor of the holders of non-voting securities, and against majority stockholders who do in fact direct the affairs of the corporation as distinguished from those who merely have the power to elect controlling directors.

The distinction has been well put in Robotham v. Prudential Insurance Co.: "Authorities have been cited to support the proposition that an individual or a corporation holding a


Meeker v. Winthrop Iron Co., 17 Fed. 48 (C. C. W. D. Mich. 1883); Farmers Loan & Trust Co. v. N. Y. & N. R. Co., 150 N. Y. 410, 430, 44 N. E. 1043 (1896); Jones v. Missouri-Edison Elec. Co., supra note 69; Kidd v. Traction Co., supra note 72. See also Wood, The Status of Management Stockholders (1928) 38 Yale L. J. 57. A minority may occupy the position of trustee if in fact it controls (for instance, with the aid of proxies), Hyams v. Calumet & Hecla Min. Co., 221 Fed. 529 (C. C. A. 6th, 1915). If the fact of control be there, the technique or manner of its exercise is of no importance, Southern Pacific Co. v. Bogert, supra note 69. In Wheeler v. Abilene Natl. Bk. Bldg. Co., supra note 71, at 393-4, the Court said: "The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct places him in his shoes, and constitutes him the actual, if not the technical trustee for the holders of the minority of the stock."

But in that case, the majority of the stock was owned by one person who was also a director and president of the corporation. See also Harrison v. Thomas, 112 Fed. 22 (C. C. A. 5th, 1901); Hiscock v. Lacy, 9 Misc. 578, 30 N. Y. Supp. 860 (1894); Tefft v. Schaeffer, 148 Wash. 602, 269 Pac. 1048 (1928).

64 N. J. Eq. 673, 689-690, 53 Atl. 842, 848 (1903).
majority of the capital stock of another corporation sustains, by reason of such holding a fiduciary relation to the minority stockholders. But these authorities only hold, in effect, that the fiduciary relation arises when the majority stockholder assumes control of the corporation and dictates the action of the directors. The majority stockholder is not made a trustee for the minority stockholders in any sense by the mere fact that he holds a majority of the stock, or by the further fact that he uses the voting power of his stock to elect a board of directors for the corporation. The majority stockholder does not necessarily control the directors whom he appoints, and, in fact, he has no right to control them, and if they are controlled by him, they may be violating their duty, for which he also may be liable. * * * No liability of the majority stockholder to the minority stockholder for the misdeeds of his common trustees—the directors—can arise from the mere fact that the majority stockholder had the power to appoint, or, in fact, did appoint, these trustees. Such liability, however, may arise if the majority stockholder has made the derelict trustees his agents and dictated their conduct and thus caused a breach of fiduciary duty.”

JUDICIAL CONTROL.75

The proper procedure 76 to test the validity of corporate elections and title to corporate office is by quo warranto, 77 and mandamus is ordinarily the proper method to compel the holding of elections in accordance with the governing

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75 The matter is in some states covered in part by statute, see 5 Fletcher, Cyc. Corps. (Perm. ed.) §2073. On the general subject of judicial redress on behalf of minority stockholders against the majority and “stockholders’ suits,” see Rohrlich, supra note 69.

76 Except as modified by statute; e. g., N. Y. Gen. Corp. Law (1929) §25.

77 Hart v. Harvey, 32 Barb. 55 (N. Y. 1860); Brooks v. State ex rel. Richards, 29 Del. 1, 79 Atl. 790 (1911); Deal v. Miller, 245 Pa. 1, 90 Atl. 1070 (1914). In Massachusetts, quo warranto may not be used in private corporations, Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1090 (1898). For collection of cases, see “Quo Warranto, or Information in Nature of Quo Warranto, To Test Title to Office in Private Corporation,” Note (1914) 51 L. R. A. (N. s.) 1126.
CORPORATE VOTING: MAJORITY CONTROL

law. Mandamus will also issue to inspectors of election directing them to receive votes entitled to be cast.

However, when a suit is properly pending in equity the court will determine all questions of title to office or validity of elections which may incidentally arise therein or the determination of which is necessary to enable it to do complete justice. Ordinarily, equity prefers to give redress against specific wrongs and not interfere with corporate voting per se, but it has acted directly in a large number of cases by injunction. Thus: Corporations have been restrained from voting majority stock held ultra vires in rival competing corporations; voting on stock title to which, or the voting power of which, is in dispute has been restrained pendente lite but not necessarily in every case where the plaintiff

77 People ex rel. Miller v. Cummings, 72 N. Y. 433 (1878); Walsh v. State, 199 Ala. 123, 74 So. 45 (1917); Bassett v. Atwater, 65 Conn. 355, 32 Atl. 937 (1894); Cella v. Davidson, 304 Pa. 389, 156 Atl. 99 (1931); cf. Lutz v. Webster, 249 Pa. 226, 94 Atl. 834 (1915).
79 Mandamus may also lie to compel persons wrongfully claiming office to deliver up books, American Railway-Frog Co. v. Haven, 101 Mass. 398 (1869).
83 Harvey v. Harvey, 290 Fed. 653 (C. C. A. 7th, 1923); Harper v. Smith, 93 App. Div. 608 (1st Dept. 1904); Stewart v. Pierce, 116 Iowa 733, 89 N. W. 234 (1902). The voting of issued but unauthorized stock may also be enjoined, Haskell v. Read, 68 Neb. 107, 93 N. W. 997 (1903), rehearing denied, 68 Neb. 107, 96 N. W. 1007 (1907). The stockholder is a necessary party to an injunction suit against his stock being voted, General Inv. Co. v. Lake Shore & M. S. Ry. Co., 250 Fed. 160 (C. C. A. 6th, 1918); Talbot J. Taylor Co. v. Southern Pacific Co., 122 Fed. 147 (C. C. W. D. Ky. 1903); Jones v. Nassau S. H. Co., 53 Misc. 63, 103 N. Y. Supp. 1089 (1907); Bourse v. Trust Francais, 14 Del. Ch. 332, 127 Atl. 56 (1924). Where the stock in question represents control, an injunction may be obtained not only by its claimants but also by minority stockholders, the minority, however, being restrained from holding elections while such injunction against the majority stock is in force, Villamil v. Hirsch, 138 Fed. 690, 143 Fed. 654 (C. C. S. D. N. Y. 1905-6).
claims the stock from defendant; registered owners not entitled to vote have been restrained from doing so. And the injunctive powers of equity are broad enough to meet special situations that may arise. Occasionally equity will even use its powers in order to direct the manner in which votes shall be cast and to control the subjects submitted to stockholders for action. In Byington v. Piazza, persons holding stock under an agreement whereby they were required to vote in favor of the re-election of the "present Board of Directors" were restrained from voting to increase the board from five to seven. The submission of a by-law which would be illegal to a stockholders' meeting was enjoined where the notice of the meeting did not sufficiently advise the stockholders of the effect of their voting in favor thereof.

One of the extraordinary powers of equity with respect to corporate elections is the power to appoint special mas-

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86 Graselli Chemical Co. v. Aetna Explosives Co., 232 Fed. 456 (C. C. A. 2d, 1918), stockholders restrained from voting while corporation in hands of equity receiver. Millspaugh v. Cassidy, 191 App. Div. 221, 181 N. Y. Supp. 276 (2d Dept. 1920) is a very special case. There the certificate of incorporation filed in 1908 failed to exclude the preferred stock from voting power but the by-laws did in accordance with the understanding of the incorporators. The preferred stockholders did not claim the right to vote for twenty years and then when they did the Court made a decree reforming the certificate of incorporation.


88 Cf. Lersner v. Adair Mach. Co., 137 N. Y. Supp. 565 (1912), where the Court refused to restrain the majority stockholder from voting to decrease the board and then ousting the plaintiff merely because of the probability that such new board might release the majority stockholder from certain claims. "It is an unheard-of thing that stockholders of a corporation can be enjoined from voting on the ground that the persons they may vote for to manage it possibly abuse their trust." Lucas v. Milliken, supra note 84, at 833.

ters to conduct them. The power will be exercised when sufficient reason is shown for anticipating that a fair and honest election cannot be held because of the danger of fraud, violence or other unlawful conduct.

No decree may justify the voting of stock in a manner contrary to statute or public policy.

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90 This power may, of course, be limited by statute or rule, see Yetter v. Delaware Vy. R. R. Co., 206 Pa. 485, 56 Atl. 57 (1903); cf. Deal v. Erie Coal & Coke Co., 248 Pa. 48, 93 Atl. 829 (1915).


92 People v. Burke, 72 Colo. 486, 212 Pac. 837 (1923).