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Validity of Non-Voting Provisions in Corporate Stock

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good. Of course, the State by whose law the marriage is invalid can refuse to allow these parties certain privileges of the marital relationship while the parties are within that State.[22]

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VALIDITY OF NON-VOTING PROVISIONS IN CORPORATE STOCK

According to the records of the Secretary of State, the device of non-voting stock is used occasionally in Montana. This practice apparently is authorized by Section 5905, R.C.M., 1935, which requires that the articles of incorporation set forth "the amount of its capital stock, and the number of shares into which it is divided, and if there is to be more than one (1) class of stock created by the articles of incorporation, a designation of each class and the number of shares into which it is divided, and a designation of the voting powers or rights, if any, of any or all classes of stock, with any limitations or restrictions thereof, * * *."

However, this Section must be read in the light of the State constitution, Article XV, Sec. 4, which reads: "The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every shareholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or trustees 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 trustees shall not be elected in any other manner."[1]

Article XV, Sec. 4, appears to have more than one purpose. First, it establishes the share of stock as the unit of voting

[22]Cross v. Cross, decided by the Montana Supreme Court March 15, 1940, agrees in substance with the conclusions of this note, quoting from 38 C. J. 1349 to the effect that "Jurisdiction of the marriage *res* depends upon the residence or the domicile of the plaintiff, and it is immaterial where the marriage was solemnized." However, it having been recognized earlier that annulment declares the marriage void *ab initio*, this statement, although correctly stating jurisdiction for divorce, begs the question as to annulment because the very question at issue is whether a marriage *res* ever existed. But the statement is consistent with the modern view that the domicil ultimately controls the validity of the original marriage. Moreover, it is entirely possible that R. C. M., 1935, Sec. 5729, which sets forth the causes for annulling marriages operates to dissolve the marriage from the time of the decree only, and not from the time of marriage. If this is the case, then the law governing annulment is much the same as the law governing divorce.

[1]See also Art. XV, Sec. 10, which might affect Sec. 5905.

power. Second, it grants the right of cumulative voting. But does it have the third purpose of granting to every shareholder the right to vote his stock as an inseparable incident thereof?[3] If it does grant such a right, then it would seem that Sec. 5905 is unconstitutional insofar as it authorizes the issuance of stock with no voting power.

It is possible that the framers of the constitution meant to provide only that every shareholder entitled to vote shall have the right to vote in the manner specified. A similar provision in the Missouri constitution was so interpreted by the Missouri Supreme Court in *State ex rel. Frank v. Swanger.*[4] In that case the Court, holding that preferred stock of a corporation may be made non-voting under a statute giving the power to issue such stock, said, "Properly understood we think Section 6 of Art. XII means only that every shareholder entitled to vote at any corporate election is entitled to vote his shares on the cumulative plan, but does not mean that the stockholders themselves in the organization of the company may not voluntarily agree that certain preferred stock shall be issued, and that the holders shall not have the right to vote."

On the other hand, there is considerable authority to the effect that such a constitutional provision grants a definite right to each and every shareholder to vote his stock, at least in the election of directors. Illinois has exactly the same constitutional provision on the subject as has Montana,[6] and, in *People ex rel. Watseka Telephone Co. v. Emerson,*[5] the Supreme Court of Illinois held that a corporation cannot deprive stockholders of the constitutional right to vote for directors and that the Secretary of State was right in refusing to grant a charter to a corporation which in its articles of incorporation provided for non-voting stock. In *Luthy v. Ream*[6] the Court said that the stockholders cannot be deprived, nor can they deprive themselves, of their constitutional power to vote for directors. *Hall v. Woods*[7] declared that any provision of a statute or by-law having the effect of depriving a stockholder of the right to vote for directors is unconstitutional.

The State of Delaware had, until it was repealed in 1903, a similar constitutional provision[8] which read in part, "* * * in all elections for directors or managers of stock corporations, each shareholder shall be entitled to one vote for each share

[3]Of course, even though the court were to decide that Art. XV, Sec. 4, granted a power to every shareholder to vote in the election of directors, it might well hold that the right might be contracted away. But see Luthy v. Ream, *infra.*

[4]190 Mo. 561, 89 S. W. 872, 2 L. R. A. (N. S.) 121 (1905).

[6]Art. XI, Sec. 3, Const. of 1870.

[5]302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636 (1922).

[6]270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B, 368 (1915).

[7]325 Ill. 114, 156 N. E. 258 (1927).

[8]Art. IX, Sec. 6, Const. of 1897.

of stock he may hold * * *." In *Brooks v. State ex rel. Richards*[9] the Court held that, in the light of that Section, statutory and charter authority to deprive holders of preferred stock of the right to vote in the election of officers and directors is invalid.

California had until recently a similar provision in its constitution[10] and also a statute expressly giving voting rights to all stockholders.[11] In *Centrifugal Nat. Concentrate Co. v. Eccleston*[12] the Court held that the power of the Corporation Commissioner to impose regulations to prevent fraud in stock sales did not vest him with power to deny the owner the right to vote all his stock. The Court, referring to Art. XII, Sec. 12, of the constitution, stated that "The constitution has given the owner of the stock the right to vote it because it is he, who is, in the last analysis, liable for the debts of the corporation in proportion to the stock owned by him." The California Court cited with approval *People v. Emerson, supra.* Evidently those interested in making non-voting stock lawful in California found it necessary to repeal Art. XII, Sec. 12, as has now been done.[13]

Fletcher, in his CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS,[14] says: "According to the weight of authority such a provision [referring to a provision for non-voting stock] is not in conflict with a constitutional or statutory provision to the effect that each shareholder shall be entitled to one vote for each share held by him, although there is authority to the contrary." In favor of his proposition he cites *State v. Swanger, supra,* and *People v. Koenig.*[15] He cites *Brooks v. State, supra,* as being *contra,* but ignores the Illinois and the California cases. As *People v. Koenig, supra,* refers only to a statutory provision, it is doubtful if his statement as to the weight of authority is correct.

The Supreme Court of Montana has had very little to say on the interpretation of Art. XII, Sec. 4. In *Allen v. Montana Refining Co.*[16] the Court, in response to a contention by counsel that a preferred stockholder should be able to vote his stock notwithstanding contrary provision in the articles of incorporation, the by-laws, and the stock certificate, pointed out that the corporation involved was a foreign corporation and said that this constitutional provision applies only to domestic corporations. The Court in this case referred to only the first part of the Montana constitutional provision giving every share-

[9]3 Del. 1, 79 Atl. 790, 51 L. R. A. (N. S.) 1126 (1911).
[10]Art. XII, Sec. 12, Const. of 1879.
[11]Sec. 307, Calif. Civil Code, Superseded 1931.
[12]122 Cal. App. 698, 10 P. (2d) 1033 (1932).
[13]Nov. 4, 1930.
[14]Vol. VI, Sec. 3638, at page 6037.
[15]133 App. Div. 756, 118 N. Y. Supp. 136 (1909).
[16]71 Mont. 105, 227 Pac. 582 (1924).

holder the right to vote. This is persuasive that the Court might hold that the first part of the provision grants the right to vote to every shareholder and that the second part gives him the right to vote cumulatively.[17]

Although the issue has never been raised in the Montana Court, it seems quite possible, in the light of the decided cases, especially those of Illinois, and of the history of this section in Calfornia, that the Court might decide that the part of Sec. 5905 set out above is unconstitutional and that Montana corporations cannot issue non-voting stock. This position is strengthened, first, by the fact that the Montana Court has continued to assert the "plain meaning" rule of statutory construction, *viz.*, that where the language of the enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be given their ordinary meaning,[18] and, second, by the possible distinction which can be drawn between the Montana and Illinois provisions that *every* shareholder shall have the right to vote and the Missouri provision that *each* shareholder shall have the right to vote. Some authorities have suggested that, whereas "every" refers to the members of a class as such, "each" emphasizes the individual.[19]

It is rather hard to tell just what the framers of the Montana constitution had in mind when they incorporated Art. XV, Sec. 4, into the constitution. Some light may be thrown on the problem by the statement made in reference to the comparable California section in *Del Monte Light and Power Co. v. Jordan,*[20] "the Constitution of 1879 was adopted at a time in the history of the state, in fact of all the states, * * * when the actual or possible evils of favoritism among the stockholders of corporations, both in respect to voting influence and liabilities, had become apparent * * *. It was to guard against these and certain other consequences of actual or potential danger, existing or foreshadowed, * * * that the provisions in Art. XII of our constitution were adopted." If it can be assumed that, ten years later, the framers of the Montana constitution had the same idea in mind, this would perhaps support a construction against the power to issue non-voting stock.

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[17]Art. XV, Sec. 4, however, may not as a whole have been brought to the Court's attention.
[18]R. C. M., 1935, Sec. 10519, 10520. State v. Bruce, 106 Mont. 322, 77 P. (2d) 403 (1938); State *ex rel.* Du Fresne v. Leslie, 100 Mont. 302, 50 P (2d) 403 (1938).
[19]People v. Taylor, 257 Ill. 192, 197, 100 N. E. 534 (1912); Griffin v. Interrurban St. R. Co., 180 N. Y. 538, 72 N. E. 1142 (1905).
[20]196 Cal. 488, 238 Pac. 710, 713 (1925).