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Corporations - Statutes Providing for Both Cumulative Voting and Classified Boards

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CORPORATIONS—STATUTES PROVIDING FOR BOTH CUMULATIVE VOTING AND CLASSIFIED BOARDS—The shareholders of the Winous Company amended the articles of incorporation to provide for staggered elections whereby one of the three directors would be elected each year to serve a three-year term. The Ohio Code provides for classified boards,¹ and contains a guarantee of the right to vote cumulatively which is not to be restricted by the articles of incorporation.² The county court of appeals reversed the court of common pleas and held the amendment invalid because it nullified the

¹ "The articles of the code of regulations may provide for the term of office 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. . . ." Ohio Rev. Code (Baldwin, 1953) §1701.640.

² ". . . Each shareholder shall have the right to cumulate such voting power as he possesses. . . . [S]uch right to vote cumulatively shall not be restricted or qualified by the articles or the code of regulations." Ohio Rev. Code (Baldwin, 1953) §1701.580.

right to vote cumulatively. They interpreted the cumulative voting provision as specific and therefore a limitation on the more general section authorizing staggered elections.³ *Held*, reversed. Where there are contradictory provisions in two statutes and both are susceptible of a reasonable construction which will nullify neither, it is the duty of the court to give such construction. The section guaranteeing the right of cumulative voting does not guarantee the effectiveness of that right to insure minority representation on the board. *Humphreys v. Winous Co.*, 165 Ohio St. 45, 133 N.E. (2d) 780 (1956).

Several states provide for mandatory cumulative voting by statute, while others provide for it by constitutional provision, and still others have permissive statutes whereby cumulative voting may be provided for in the articles or by-laws of a corporation if the stockholders so desire. Likewise, a majority of the states have by legislative enactment sanctioned classified boards.⁴ Prior to 1955 there were only two cases which discussed the effect of the classification of boards of directors on cumulative voting, and neither of these cases passed directly on the matter.⁵ *Wolfson v. Avery*⁶ was the first case to deal directly with conflicting provisions, and gave precedence to a constitutional provision over a statute.⁷ The principal case is the first to construe conflicting and contemporaneous statutes. The court's decision makes it clear that classified boards are not necessarily precluded by cumulative voting provisions.⁸ A particular difficulty was presented by the principal case in that the effect of cumulative voting was entirely negated where only one director was to be elected. The Ohio Legislature, however, remedied this situation after this case was decided by providing that only

³ 57 Ohio Op. 44, 125 N.E. (2d) 204 (1955).

⁴ For complete citations to the legislation in this area see 24 UNIV. CIN. L. REV. 560 (1955). For construction of these statutes and constitutional provisions see annotation in 43 A.L.R. (2d) 1322 (1955).

⁵ *Pittsburgh Steel Co. v. Walker*, 92 Pitts. L.J. 464 (Court of Common Pleas, Allegheny County, 1944); *Cohen v. Byers Co.*, (Court of Common Pleas, Allegheny County, 1950), *affd. per curiam*, 363 Pa. 618, 70 A. (2d) 837 (1950).

⁶ 6 Ill. (2d) 78, 126 N.E. (2d) 701 (1955). See 22 UNIV. CHI. L. REV. 751 (1955); 24 UNIV. CIN. L. REV. 560 (1955); 60 DICK. L. REV. 185 (1956); 69 HARV. L. REV. 380 (1955); 1955 UNIV. ILL. L. FORUM 316 (1955); 43 ILL. B.J. 807 (1955); 7 MERCER L. REV. 227 (1955); 9 MIAMI L.Q. 365 (1955); 50 N.W. UNIV. L. REV. 112 (1955); 103 UNIV. PA. L. REV. 822 (1955); Sell and Fuge, "Impact of Classified Corporate Directorates on the Constitutional Right of Cumulative Voting," 17 UNIV. PITT. L. REV. 151 (1956); 30 ST. JOHNS L. REV. 83 (1955); 41 VA. L. REV. 809 (1955); 1 WAYNE L. REV. 217 (1955).

⁷ It had been held previously that the privilege of cumulative voting could be abolished only by authority equal to that which conferred the privilege. Thus, a statutory privilege could not be vitiated by a corporate resolution. *Tomlin v. Farmers & Merchants Bank*, 52 Mo. App. 430 (1893). Cf. *Maddock v. Vorclone Corp.*, 17 Del. Ch. 39, 147 A. 255 (1929) (under permissive statute the right to vote can be taken away by properly amending the charter); *Wright v. Central Cal. Colony Water Co.*, 67 Cal. 532, 8 P. 70 (1885) (mandatory cumulative privilege cannot be nullified by a majority resolution providing for separate ballots for each director).

⁸ See MODEL BUSINESS CORPORATIONS ACT §§31, 35 (1950), prepared by the Committee on Business Corporations of the American Bar Association, providing for both the mandatory right of cumulative voting and classification of directors.

a certain minimum number of directors can comprise a class.⁹ It should be noted that classification does not necessarily reduce minority representation.¹⁰ In addition, although the purpose of cumulative voting provisions is to *aid* minority stockholders in obtaining representation,¹¹ they do not purport to *insure* minority representation in any event.¹² The size of the board may be legally reduced,¹³ and if this is permissible, classification into groups no smaller than the minimum number of directors allowed should certainly be unobjectionable in any case. Also, many states permit removal without cause,¹⁴ so it is clear that the minority's right to representation is not absolute even apart from the effect of classification.

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⁹ Ohio Rev. Code (Baldwin, 1955) §1701.57 amended §1701.64 to require that each class must consist of not less than three directors.

¹⁰ In some instances it actually increases it, e.g., 26% of the stockholders could elect only 2 of 9 directors if all are elected at once, but 3 of 9 if divided into classes of 3. For various formulae to determine the amount of stock needed to elect a director cumulatively, see Cole, "Legal and Mathematical Aspects of Cumulative Voting," 2 S.C. L. REV. 225 (1950); WILLIAMS, CUMULATIVE VOTING FOR DIRECTORS (Harvard Business School) (1951). See also 69 HARV. L. REV. 380 (1955); Bowes and DeBow, "Cumulative Voting at Election of Directors of Corporations," 21 MINN. REV. 351 at 362 (1937).

¹¹ See *In re Jamaica Consumers' Ice Co.*, 190 App. Div. 739, 180 N.Y.S. 384, *affd.* 229 N.Y. 516, 129 N.E. 897 (1920); *Commonwealth ex rel. O'Shea v. Flannery*, 203 Pa. 28, 52 A. 129 (1902).

¹² See *Maddock v. Vorclone Corp.*, note 7 *supra*. For policy arguments for and against cumulative voting see Young, "Case for Cumulative Voting," 1950 WIS. L. REV. 49; Axley, "Case Against Cumulative Voting," 1950 WIS. L. REV. 278; 56 DICK. L. REV. 330 (1952).

¹³ See *Bond v. Atlantic Terra Cotta Co.*, 137 App. Div. 671, 122 N.Y.S. 425 (1910), *affd. per curiam* 210 N.Y. 587, 104 N.E. 1127 (1914). But see Curran, "Minority Stockholders and the Amendment of Corporate Charters," 32 MICH. L. REV. 743 (1934). A California statute provides that the number of directors cannot be reduced below five without the consent of more than 80% of the voting power. Cal. Corp. Code Ann. (Deering, 1953) §501. A Michigan statute prevents reduction of the number of directors where the dissenting minority would not be able to elect cumulatively the same number of directors on the reduced board. Mich. Comp. Laws (1948) §§450.13, 450.651.

¹⁴ But see *Matter of Rogers Imports*, 202 Misc. 761, 116 N.Y.S. (2d) 106 (1952), noted in 51 MICH. L. REV. 744 (1953), where a charter amendment to provide for cumulative voting was held to invalidate a by-law providing for removal without cause. Statutes sometimes prevent removal of a director if there are enough votes against his removal cumulatively to elect one director, e.g., Mich. Comp. Laws (1948) §450.13. A few statutes require a two-thirds vote of the capital stock for removal, e.g., S.D. Code (1939) §11.0704.