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CORPORATIONS-OFFICERS AND DIRECTORS-VALIDITY OF VOTING AGREEMENTS TO CONTINUE SHAREHOLDERS AS DIRECTORS

John F. Dodge
University of Michigan Law School

CORPORATIONS—OFFICERS AND DIRECTORS—VALIDITY OF VOTING AGREEMENTS TO CONTINUE SHAREHOLDERS AS DIRECTORS—Plaintiff, the president of a corporation and owner of 31½ of the 100 shares of corporate stock outstanding, brought an action against *A*, the vice-president who owned 48½ shares, and *B*, the owner of the remaining 20 shares, for specific performance of an oral agreement between the plaintiff and *A* that the plaintiff and a third person, *X*, should be continued as directors. The vice-president, *A*, had allied himself with *B*, and in disregard of the agreement had served notice requesting a stockholders' meeting for the purpose of removing the plaintiff and *X* as directors. Neither waste nor mismanagement by the plaintiff was proved by the defendants. *Held*, for the plaintiff. The oral agreement between the plaintiff and *A* to continue the plaintiff and *X* as directors of the corporation is valid and may be specifically enforced.[1] *Storer v. Ripley*, 125 N.Y.S. (2d) 831 (1953).[2]

There has been little harmony among the courts on the question of the validity and enforceability of agreements entered into by shareholders to continue certain directors in office. The prevailing view of earlier cases was that all voting agreements are void on the grounds that each shareholder has the right to the unfettered judgment of every other shareholder in making the corporate decisions, and that consequently it is against public policy to permit the concomitant duty to exercise that judgment to be bargained away.[3] With a few notable exceptions,[4] however, most jurisdictions in the last four decades have repudiated this earlier view and today it can be said that voting agree-

[1] There is a real problem as to the applicability of the statute of frauds in the principal case since the voting agreement was oral. See Dulin v. Pacific Wood and Coal Co., 103 Cal. 357, 35 P. 1045 (1894).

[2] Affd. on other grounds 282 App. Div. 950, 125 N.Y.S. (2d) 339 (1953).

[3] Lothrop v. Goudeau, 142 La. 342, 76 S. 794 (1917); Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917); Harris v. Scott, 67 N.H. 437, 32 A. 770 (1893). See discussion in 71 A.L.R. 1287 (1931).

[4] Roberts v. Whitson, (Tex. Civ. App. 1945) 188 S.W. (2d) 875; Cummins v. McCoy, 22 Tenn. App. 681, 125 S.W. (2d) 509 (1938).

ments, the purposes of which are not illegal, are not void per se.[5] But where such a contract is entered into for the purposes of exploiting the business of the corporation to the prejudice of minority stockholders,[6] attempting to supersede the discretion of the directors,[7] or for some other purpose forbidden by law,[8] the agreement is invalid. But it is not objectionable that the shareholders' motive in making the agreement is personal profit, or the perpetuation of themselves in office as directors, or even mere whim or caprice.[9] The old view that each stockholder was entitled to the individual judgment of each other stockholder is impossible of application in the highly complex corporation of today with its many widely scattered stockholders. Furthermore, the many practical purposes to which voting agreements may be put make their validity highly desirable.[10] As a practical matter, gaining a majority vote without voting agreements is almost an impossibility in a large publicly owned corporation, while in a close corporation independent voting in reality is a fiction.[11] Consequently, insofar as the principal case merely upholds the validity of the voting agreement in question, the decision furnishes little possibility of attack on the grounds of either current authority or wise public policy. To the extent that it specifically enforces the voting agreement, however, the principal case is without the support of most authority.[12] Although the agreement is not void, specific

[5] Trefethen v. Amazeen, 93 N.H. 110, 36 A. (2d) 266 (1944); White v. Snell, 35 Utah 434, 100 P. 927 (1909). That hostility toward such agreements seems to be lessening, see 5 FLETCHER, CYC. CORP., perm ed., 256 (1952).

[6] Weber v. Della Mt. Min. Co., 14 Idaho 404, 94 P. 441 (1908); People v. Burke, 72 Colo. 486, 212 P. 837 (1923); Venner v. Chicago City Ry. Co., 258 Ill. 523, 101 N.E. 949 (1913). Also see 11 ST. JOHNS L. REV. 117-118 (1936) for what the writer calls a "damage test." Voting agreements are valid insofar as no one is to be damaged thereby.

[7] Creed v. Copps, 103 Vt. 164, 152 A. 369 (1930); Borland v. John F. Sass Printing Co., 95 Colo. 53, 32 P. (2d) 827 (1934); Snow v. Church, 13 App. Div. 108, 42 N.Y.S. 1072 (1897). In many cases cited for the earlier view that voting agreements are void, the courts may well have been influenced by what they felt was an attempt to control the directors. However, in those states which permit or direct the election of officers by shareholders, voting agreements to elect officers would presumably be valid.

[8] Perhaps the alleged public policy against voting agreements may be traced to the 1890's when stock pooling agreements were among the legal forms devised to evade the antitrust laws. Cf. West v. Camden, 135 U.S. 507, 10 S.Ct. 838 (1890). That a consideration personal to the shareholder so agreeing will invalidate the agreement see 5 FLETCHER, CYC. CORP., perm. ed., 287, n. 51 (1952).

[9] Davis v. Arguls Gas and Oil Sales Co., 167 Misc. 377, 3 N.Y.S. (2d) 241 (1938); Brightman v. Bates, 175 Mass. 105, 55 N.E. 809 (1900).

[10] For a discussion of the numerous beneficial purposes of voting agreements, see 3 UNIV. CHI. L. REV. 640 (1936).

[11] Some writers have advocated the division of corporation law into two parts, one dealing with the large publicly owned corporation, and the other with close corporations. Insofar as this proposal affects voting agreements, see the arguments in favor in Weiner, "Legislative Recognition of Close Corporation," 27 MICH. L. REV. 273 (1928), and against in 44 YALE L. J. 873 (1935).

[12] Most of the cases involve attacks on the validity of the agreements rather than suits for their enforcement. But existing authority indicates that specific enforcement will usually be denied. Kennedy v. Monarch Mfg. Co., 123 Iowa 344, 98 N. W. 796 (1904); 3 COOK, CORPORATIONS, 8th ed., 2191 (1923); 5 FLETCHER, CYC. CORP., perm. ed., 290 (1952); 71 A.L.R. 1287 (1931).

performance of such a contract has been denied by courts of equity on the grounds that it is unwise to require the continuance of joint control of two persons whose views are utterly irreconcilable,[13] that it is against public policy not to allow an obligor to withdraw from such an arrangement,[14] and that decrees of specific performance would be impossible of enforcement or would lead to the control of many corporations by the courts themselves. However valid these equitable doctrines may be in rationalizing the refusal to decree specific performance, some courts, perhaps even enough to indicate a trend, have disagreed with the practical results of such a disallowance.[15] Since in most cases of suit on the contract the law action is inadequate because damages are too speculative,[16] the result of the refusal to decree specific performance is to create a right without a remedy. Assuming the validity of voting agreements, the decree of specific performance is the only feasible means of enforcing them, and the advantages of enforcement would seem heavily to outweigh the difficulties of enforcing the decree.[17]

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[13] Gage v. Fisher, 5 N.D. 297, 65 N.W. 809 (1895); Gleason v. Earles, 78 Wash. 491, 139 P. 213 (1914); Haldeman v. Haldeman, note 1 supra.

[14] Moses v. Scott, 84 Ala. 608, 4 S. 742 (1888).

[15] Illinois courts generally extend such relief. Thompson v. J. D. Thompson Carnation Co., 279 Ill. 54, 116 N.E. 648 (1917). McQuade v. Stoneham, 142 Misc. 842, 256 N.Y.S. 431 (1932), allowed specific performance, but the case was later reversed on the invalidity of the agreement. Also see Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936) (dictum); Application of Kirshner, 81 N.Y.S. (2d) 435 (1948). In White v. Snell, note 5 supra, at 438, the court said: "As between the parties . . . we can conceive of no good reason, either in law or equity, why such an agreement is not binding and enforceable." Specific performance was allowed in Ringling Bros.-Barnum and Bailey Combined Shows, Inc. v. Ringling, 29 Del. Ch. 610, 53 A. (2d) 441 (1947). In Smith v. San Francisco & N.P.R. Co., 115 Cal. 584, 47 P. 582 (1897), and Davis v. Arguls Gas and Oil Sales Co., note 9 supra, the decrees of the two courts had the same practical result as a decree of specific performance.

[16] 3 COOK, CORPORATIONS, 8th ed., 2191 (1923).

[17] 47 MICH. L. REV. 580 (1949).