February 1962

Corporations—Stock Granting Only Limited Power to Vote For Directors Valid Under Constitutional Amendment

John Everett Busch
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Business Organizations Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol64/iss2/7

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
framed, the bench, bar and public may anticipate a determination as to whether a constitutional right here exists.

William Erwin Barr

Corporations—Stock Granting Only Limited Power to Vote For Directors Valid Under Constitutional Amendment

Ps, minority stockholders, seek to enjoin defendant corporation from reducing the membership of the board of directors and to require Ds to permit all stockholders to vote for all directors to be elected. Defendant corporation has reduced the number of directors to be elected from eight to three; one director to be elected by preferred stockholders, the remainder to be elected by holders of common stock. Ps claim the charter of defendant corporation allowing stockholders limited power to vote for directors is invalid and in conflict with W. Va. Const. art. XI, § 4, as amended in 1958. Held, the charter is valid and stock issued with the right to vote for less than the number of directors to be elected is constitutional. Diamond v. Parkersburg-Aetna Corp., 122 S.E.2d 436 (W. Va. 1961).

The controlling question in the case was whether the 1958 Amendment to article XI, section 4 of the constitution effected a change so as to allow preferred stockholders to elect one director and allow common stockholders the exclusive right to elect other directors, as provided by the corporate charter. The amended constitution, with the amended portion italicized, now reads:

"The Legislature shall provide by law that every corporation, other than a banking institution, shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers, and with preferences and special rights and qualifications, and that in all elections for directors or managers of incorporated companies, every stockholder holding stock having the right to vote for directors, shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers 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 managers shall not be elected in any other manner."

The amendment to the constitution was attacked on the ground that its parts were in "irreconcilable conflict." The first part of the amendment relates to the power of a corporation to issue stock with full, limited, or no voting power. The second part of the amendment relates to the cumulative manner in which persons "holding stock having the right to vote" shall exercise that right, and provides that persons holding stock with the right to vote shall vote for "as many persons as there are directors or managers to be elected . . . and such directors or managers shall not be elected in any other manner." The circuit court ruled that the part of the provision allowing stock with limited voting power was in irreconcilable conflict with the provision granting holders of voting stock the right to vote for "as many persons as there are directors or managers to be elected." The circuit court then reasoned that the amendment to article XI, section 4, did not alter or change the meaning of the original constitutional provision which denied corporations the right to issue stock without the power to vote for directors. The charter provisions of the defendant corporation were accordingly held invalid and unconstitutional, in that they gave the corporation the right to issue stock with limited power to vote for directors.

The decision of the circuit court was reversed by the West Virginia Supreme Court in the principal case. The court, in a four to one decision, upheld the right of corporations to issue stock with limited voting power, and held that a stockholder holding stock which gives him a limited right to vote for directors can only vote for the number of directors or managers as per the limitation, and a stockholder who has the right to vote for only one director cannot cumulate his shares for the reason that his vote for only one director cannot be cumulated. The amendment was held to apply to corporate charters in existence at the time of the ratification of the amendment, and to all corporations subsequently created and organized. The right of the defendant corporation to reduce the number of directors to be elected was also upheld, as authorized by the by-laws of the corporation and W. VA. CODE ch. 31, art. 1, § 16 (Michie 1955). The majority opinion reasoned that there was no irreconcilable conflict in the amendment to article XI, section 4, but found the provisions unclear and ambiguous and thus subject to interpretation. Great weight was given to the fact that the amend-
ment was the last word of the people and the "object of construction, as applied to a written constitution, is to give effect to the intent of the people adopting it." May v. Toppens, 65 W. Va. 656, 64 S.E. 848 (1909). "A constitutional clause . . . should not be construed so as to defeat the obvious intent of the people if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent" 11 Am. Jur. Constitutional Law § 61 (1937).

The dissent in the principal case concluded that the language in article XI, section 4, as amended, is clear and unambiguous, and not subject to interpretation. It was agreed that a corporation could issue stock without the power to vote for directors, but if stock was issued with the right to vote for directors, then the holders of that stock should have the right to vote for as many directors or managers as are to be elected, and "such directors shall be elected in no other manner."

Prior to the decision in State ex rel. Dewey Portland Cement Co. v. O'Brien, 142 W. Va. 451, 96 S.E.2d 171 (1956), the issuance of stock with limited or no voting power was granted in W. Va. Code ch. 31, art. 1, § 22 (Michie 1955), which expressly empowered corporations to issue stock with full, limited, or no voting power; and W. Va. Code ch. 31, art. 1, § 66 (Michie 1955), which allowed cumulative voting rights to holders of stock "entitled to a vote." The Dewey case held these statutes unconstitutional and in contravention of article XI, section 4 of the West Virginia Constitution, and prohibited the Dewey Portland Cement Company from issuing stock which did not grant stockholders the power to vote in elections of directors. This case led to the adoption of the amendment to article XI, section 4 and was followed by the legislative re-enactment of the statutes declared invalid by the Dewey case. For a discussion of the Dewey case see Comment, 59 W. Va. L. Rev. 374 (1957).

There have been cases deciding the question of non-voting stock as a violation of a constitutional provision similar to article XI, section 4, before amendment. The first such case arose in State ex rel. Frank v. Swanger, 190 Mo. 561, 89 S.W. 872 (1905). The Missouri Supreme Court held that the purpose of the Missouri Constitution was only to guarantee to those shareholders having the right to vote the right of cumulative voting, and non-voting agree-
ments were agreements between classes of stockholders and not affected by the constitutional provision. Mo. Const. art. 12, § 6 (1875). A constitutional provision identical to article XI, section 4, before amendment, was construed in People v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922). The Illinois court refused to follow the Swanger case, supra, and held there could be no deprivation of the voting right of any stockholder, based on Ill. Const. art. XI, § 3. This, in essence, was the decision of the West Virginia Supreme Court in the Dewey case, supra. In Brooks v. State, 27 Del. (3 Boyce) 1, 79 Atl. 790 (1911), a statute depriving stockholders of their right to vote was also held unconstitutional. The constitutional provision was subsequently repealed. These cases are discussed in Comments, 39 W. Va. L.Q. 345 (1933), and 40 W. Va. L.Q. 97 (1933). In Nebraska a similar constitutional provision was enacted in 1941, and that state has since refused to issue certificates of corporation which deny stockholders the right to elect directors. 25 Neb. L. Rev. 190 (1946). In both the Brooks and Emmerson cases the contention was unsuccessfully made that the applicable provisions concerned only stockholders who bought stock with the right to vote, and guaranteed the right to elect directors only to those persons. The West Virginia amendment expressly states that "holders of stock having the right to vote" for directors shall be guaranteed that right. There are apparently no cases where a provision like the amended article XI, section 4, of the West Virginia Constitution has been construed to either permit or deny the issuance of stock which limits the power to vote for directors.

The court in the principal case stated that the holding therein was not contrary to State ex rel. Syphers v. McCune, 143 W. Va. 315, 101 S.E.2d 834 (1958). In this case the by-laws of a transit company provided that two of the five directors of the company should be elected in one year, two to be elected two years thereafter and one four years thereafter. This case was decided under article XI, section 4, before the ratification of the 1958 Amendment, and concerned the right of stockholders to cumulate their votes. The right of cumulative voting allows a voter to concentrate the whole of his votes on one person or to distribute them among the number of directors to be elected as he may see fit. If five directors are to be elected, the elector may vote all five of his votes for each share of stock he owns for one nominee. In this manner the minority holders, by all concentrating their votes on selected persons, are more certain of representation. However, the fewer the
number of directors to be elected, the less the representation accorded to a minority. The minority was entirely deprived of representation in the *Syphers* case, and this was held to be in violation of article XI, section 4, before amendment. This decision is criticized in 19 U. Prrt. L. Rev. 806 (1958). The holding in the principal case was expressly stated not to be contrary to the *Syphers* holding. Now that it is constitutional to limit the power of stockholders to vote for directors it is foreseeable that the validity of staggered directorates will be litigated again.

The majority opinion in the principal case does operate to serve the best interests of corporations doing business in West Virginia. Furthermore the decision sets at rest a confusion which has existed some sixty years, and clearly gives a corporation the right to issue stock giving holders “full, limited, or no voting powers” in the election of directors or managers.

*John Everett Busch*

Federal Tax Lien—Effect of State Statute of Limitations

The United States brought an action to recover so much of a debt owed to a delinquent taxpayer that would offset the tax deficiency. The debtor contended that the state statute of limitations had run against a preponderance of the obligation, W. VA. Code ch. 55, art. 2, § 6 (Michie 1955); therefore, the United States was partially barred from recovery. *Held*, the statute of limitations was tolled prior to the commencement of this action, and the United States is entitled to all money not paid by the debtor before notice of levy. *United States v. Polan Indus., Inc.*, 196 F. Supp. 333 (S.D. W. Va. 1961).

This decision held that the federal government was immune to a state statute of limitations when enforcing a tax lien perfected under federal law. The brunt of the debtor’s argument was based on the derivative nature of the government’s claim. It asserted that the government stepped into the shoes of the taxpayer and could attain no greater rights than the taxpayer itself could claim. Thus, the government could only stop the statute by starting suit. The court admitted that the United States took the claim with all its attendant infirmities. *United States v. Summerlin*, 310 U.S. 414