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THE STATUS OF NONVOTING STOCK IN WEST VIRGINIA

In a recent decision,¹ the Supreme Court of West Virginia decided that certain statutory provisions of the *Code*² were unconstitutional insofar as they permitted a limitation on the right of a stockholder in any corporation to vote for the directors of such a corporation. The constitutionality of the applicable statutes was discussed in two articles printed in this law review twenty-four years ago,³ but in light of the decision in *State ex rel. Dewey Portland Cement Co. v. O'Brien*⁴ (for the purposes of this note, this case will be designated the *Dewey Cement Co.* case.), there is valid reason to examine the subject of nonvoting stock once more.

Since 1901, the West Virginia Legislature has expressly recognized that private corporations, other than banking corporations, had the power to issue various classes of stock, with or without voting powers.⁵ Chapter 35, section 5, of the Acts of 1901 reads: "The agreement of incorporation and the certificate of incorporation issued by the secretary of state, or the stock holders in general meeting, by a resolution or by-law, may provide for or authorize the issuing of preferred stock on such terms and conditions, and with or without the right to vote in stockholders' meeting . . ." This statute was in effect until the adoption of the 1931 *Code* when the present statute⁶ was enacted. It reads in part: "Every corporation, other than a banking institution, shall have the power to issue one or more classes of stock or one or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value, with such voting powers, full or limited, or without voting powers and in such series and with such designations, preferences and relative, participating, optional or other special rights and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the charter. . . ."⁷ Prior to the decision in the *Dewey Cement Co.* case, there had never been any legislative or executive objection raised to the issuance of cor-

¹ *State ex rel. Dewey Portland Cement Co. v. O'Brien*, 96 S.E.2d 171 (W. Va. 1956).

² W. VA. CODE c. 31, art. 1, §§ 22, 66 (Michie 1955).

³ Sperry, *The Power of a West Virginia Corporation to Deprive Classes of Its Stock of the Right to Vote for the Election of Directors or Managers*, 40 W. VA. L.Q. 97 (1933); Note, 39 *id.* 345 (1933).

⁴ 96 S.E.2d 171 (W. Va. 1956).

⁵ W. Va. Acts 1901, c. 35, § 5.

⁶ W. VA. CODE c. 31, art. 1, § 22 (Michie 1955).

⁷ *Ibid.*

porate stock with limited or no voting powers, and from 1948 to 1956, approximately one hundred and twenty corporate charters containing such limitations had been approved by the secretary of state.⁸

Then, in 1956, the Dewey Portland Cement Company sought to increase its capital stock and issue two classes of common stock, Class "A" and Class "B" with all voting rights to be vested in the holders of the Class "B" common stock. The secretary of state refused to accept and file the resolution containing the change, and the cement company sought a writ of mandamus against the secretary of state to compel him to perform the requested acts. The Supreme Court of West Virginia, in the *Dewey Cement Co.* case, denied the writ of mandamus and held that the statutes limiting the right of a stockholder to vote were unconstitutional. The applicable constitutional provision is as follows: "The Legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder 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 and managers shall not be elected in any other manner."⁹

The above constitutional provision, adopted in West Virginia in 1872, is identical with a provision of the Illinois constitution of 1870.¹⁰ In 1922, the Illinois constitution was interpreted as forbidding any limitations on the right of a stockholder to vote,¹¹ and this decision was reaffirmed by a dictum in 1955.¹² At one time, Delaware had a constitutional provision similar to that of West Virginia, and even the "homing ground of corporations" declared that nonvoting stock was unconstitutional.¹³ The decision had little effect in Delaware since the "odious" provision of the constitution was repealed prior to the final decision of the case. All of the

⁸ 96 S.E.2d at 181.

⁹ W. VA. CONST. art. XI, § 4.

¹⁰ ILL. CONST. art. XI, § 3. This section has not been amended.

¹¹ *People ex rel. Watseka Telephone Co. v. Emmerson*, 302 Ill. 300, 134 N.E. 707, 21 A.L.R. 636 (1922).

¹² *Wolfson v. Avery*, 6 Ill. 2d 78, 86, 126 N.E.2d 701, 706 (1955).

¹³ *Brooks v. State ex rel. Richards*, 3 Boyce 1, 79 Atl. 790, 51 L.R.A. (N.S.) 1126 (Del. 1911).

decisions holding that nonvoting stock is unconstitutional say that it violates a cumulative voting section of the constitution of the state deciding the case. These decisions are based primarily on the premise that if the text of a constitutional provision is plain and ambiguous, courts in giving construction thereto are not at liberty to search for its meaning beyond the instrument itself.¹⁴ "Ambiguity—but all is ambiguity, saith the law."¹⁵ Webster defines ambiguous as "capable of being understood in either of two or more possible senses."¹⁶ If Article XI, section 4 of the West Virginia Constitution is capable of being understood in either of two or more possible senses, then it seemingly is ambiguous. At page 178 of the court's opinion in the *Dewey Cement* case, there is this statement: "This Court finds that Article XI, Section 4, of the Constitution of this State, is clear and unambiguous, and there is no occasion to resort to the rules of construction in ascertaining its meaning." The dissenting opinion in the same case contains the following at page 182: "Although I agree that the language of Section 4 is clear and unambiguous, I am of the view that the conclusion reached by the majority is not in accord with the plain language used." Needless to say, the lone dissenting judge finds nothing in the constitutional provision that would prohibit a corporation from issuing nonvoting stock. Obviously, the language of Article XI, section 4 is capable of being understood in two senses, but neither the majority of the court nor the dissenter will make such an admission. Thus, it seems clear that basing an important decision on the outmoded "ambiguity rule" may maintain the West Virginia Constitution as a "solemn instrument,"¹⁷ but it will have to be amended every time a new political, social, economic or legal problem arises. An amendment to the constitution was the suggested solution of the nonvoting stock problem offered in the *Dewey Cement Co.* case.¹⁸

The question of whether the issuance of nonvoting stock was a violation of a constitutional provision similar to that of West Virginia first arose in Missouri.¹⁹ The applicable constitutional section stated that each stockholder shall be entitled to cast as many votes

¹⁴ *Chesapeake & Ohio Ry. v. Miller*, 19 W. Va. 408, syl. 3 (1882).

¹⁵ *Hardman, A Problem in Interpretation*, 42 W. VA. L.Q. 110, 131 (1936).

¹⁶ WEBSTER'S NEW INTERNATIONAL DICTIONARY 81 (2d ed. 1922).

¹⁷ *Chesapeake & Ohio Ry. v. Miller*, 19 W. Va. 408, 437 (1882).

¹⁸ 96 S.E.2d 180.

¹⁹ *State ex rel. Frank v. Swanger*, 190 Mo. 561, 89 S.W. 872, 2 L.R.A. (n.s.) 121 (1905).

as he has shares in the company. The Missouri court held: "A construction has nowhere been given to section 6, art. 12, within our knowledge or research, as to constitute it a prohibition or restriction on the right of stockholders to make their contracts which violate no rule of the common law, and which affect no rights, except their own. . . . Every stockholder entitled to vote at any corporate election is entitled to vote his share 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 thereof shall not have the right to vote."²⁰ *Wright v. Central California C. W. Co.*²¹ was improperly cited to support the above proposition, but since the Missouri case was the first decision in the United States on this question, there was no prior case in point.

Although there has been criticism of the separation of control from ownership in a corporation, which often results in the use of nonvoting stock,²² the Missouri view seems to be preferable. In light of the long-established legislative and executive policy in West Virginia favoring nonvoting stock, and the ensuing disruption of the financial structure of hundreds of West Virginia corporations when nonvoting stock was outlawed, the dissent in the *Dewey Cement Co.* case, which followed *State ex rel. Frank v. Swanger*,²³ represents the more desirable rule.

If there is any doubt as to the constitutionality of a statute, that doubt should be resolved in favor of its validity.²⁴ Since West Virginia had a statute in effect for fifty-five years construing the constitution as permitting the issuance of nonvoting stock, and for fifty-three of those years, the secretary of state approved charters containing provisions for limiting the voting power of stockholders,²⁵ there should have been sufficient doubt raised to be resolved in favor of the two statutes²⁶ declared unconstitutional in the *Dewey Cement Co.* case. The constitutional provi-

²⁰ *Id.* at 575, 89 S.W. at 876.

²¹ 67 Cal. 532, 8 Pac. 70 (1885).

²² BERLE, *STUDIES IN THE LAW OF CORPORATION FINANCE* 41 *et seq.* (1928).

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

²⁴ *State ex rel. Cosner v. See*, 129 W. Va. 722, 744, 42 S.E.2d 31, 43 (1947).

²⁵ 96 S.E.2d at 175.

²⁶ W. VA. CODE c. 31, art. 1, §§ 22, 66 (Michie 1955).

sion reads "every stockholder *shall* have the right to vote,"²⁷ but there is no reason that a person cannot make a contract giving up that voting power in exchange for some other benefit, such as preferential treatment as to dividends. Even if the constitution contemplates that every stockholder "must" have the right to vote, "there remains no valid reason why the stockholders of a private corporation can not waive such constitutional right, by an express agreement to that effect, either in the articles of incorporation, or by purchase of stock contract. I need cite no authorities to the effect that, with certain exceptions not here pertinent, constitutional rights may be waived, if done with intelligent understanding. Even those charged with serious criminal offenses are usually permitted to do so."²⁸

Until the West Virginia Supreme Court reverses itself (a most unlikely occurrence) or the constitution is amended, however, the holder of "nonvoting" stock has the right to vote for corporate directors and managers. Article XI, section 4 of the West Virginia constitution does not mention the rights of stockholders as to voting on other corporate issues, and presumably the statute²⁹ remains in effect insofar as it permits only stockholders "entitled to vote" to vote on other matters. The *Dewey Cement Co.* case, however, does say that any limitation on the right of a stockholder to vote is in violation of the constitution.³⁰ There is no basis for such a blanket ruling, and it should be considered as merely dictum.

Many corporations may try to circumvent the new ruling and issue common stock at a low par value and nonvoting stock at a high par value. It is impossible to predict whether such a plan would be valid in West Virginia, but this very plan was rejected in California.³¹ In *Film Producers v. Jordan*, the California court said "the fundamental right (of a stockholder) to vote is based upon ownership of the capital stock as distinguished from shares and not merely upon shares, which are but representatives of value. And as little can it be questioned but that the voting power should be given to the stockholders in proportion to their interest in the capital stock of the corporation."³² Another stock plan would be to issue preferred stock at a high par value and common stock with

²⁷ W. VA. CONST. art. XI, § 4.

²⁸ 96 S.E.2d at 184 (dissenting opinion).

²⁹ W. VA. CODE c. 31, art. 1, § 66 (Michie 1955).

³⁰ 96 S.E.2d at 180.

³¹ *Film Producers v. Jordan*, 171 Cal. 664, 154 Pac. 605 (1916).

³² *Id.* at 667, 154 Pac. at 606.

no par value. This plan might be attacked on the same ground as was mentioned above, but there should not be any valid objection to no-par stock. Under the present West Virginia law, perhaps, the best way to achieve the result previously accomplished by nonvoting stock would be to issue debentures without definite maturities, with cumulative interest, and deferred to ordinary creditors. Nothing new would be created, as modern preferred stocks are becoming more and more like unsecured debts, but if these papers were called shares, they could vote, but because they are called debentures, they could not vote.³³

In 1958, the voters of West Virginia will vote on a proposed amendment to article XI, section 4 of the state constitution. If this amendment is approved by the people, section 4 will read: "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. . . ."³⁴ This proposed amendment has no retroactive provision so that it appears that corporations in existence prior to the adoption thereof, with charters containing provisions limiting the powers of stockholders to vote, will not be aided by the proposed amendment unless additional legislation is passed.

P. B. H.

VIEW BY A JUDGE SITTING IN LIEU OF A JURY

As stated by Dean Thomas P. Hardman in his article on the evidentiary effect of views,¹ the question whether a judge may have a view and whether what the judge observes upon a view is usable as substantive evidence, has never been judicially decided in West Virginia. However, recently in the case of *Westover Volunteer Fire Department v. Barker*,² hereinafter referred to as the principal case, the Supreme Court of Appeals of West Virginia was, to a very limited extent, presented with those questions. Because there are today a great number of cases in which the judge sits as the trier of fact and there are statements of the court in the aforementioned

³³ Note, 17 ILL. L. REV. 138, 143 (1922).

³⁴ Senate Bill No. 251.

¹ Hardman, *The Evidentiary Effect of a View: Stare Decisis or Stare Dictis?*, 53 W. VA. L. REV. 103 n.3 (1951).

² 95 S.E.2d 807 (W. Va. 1956).