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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

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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

Mr. Burdett of the student board of editors of the West Virginia Law Quarterly, in a note published in the June 1933 issue of that journal, cites as authority for the constitutionality of section 22, article 1, chapter 30 of the Revised Code the report of the commission lately charged with revising and codifying the laws of the state of West Virginia.

As chairman of that commission, I think I speak for all of the members who participated in the work, in disclaiming all responsibility for any such interpretation of section 4, of article XI of the Constitution of West Virginia, which 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 or managers shall not be elected in any other manner."

This section became a part of the constitution in 1872. With the exception of the name of the legislative body, which in Illinois is designated the "general assembly" and in West Virginia the "legislature", the provision is copied literally from the constitution of the state of Illinois, even to the extent of inserting the punctuation marks. It first appeared in the constitution of Illinois adopted in 1870.

The legislature of West Virginia, session 1872-3, authorized corporations chartered in the state to issue preferred stock, authorizing in unrestricted terms the creation of such preference and the imposing of such restrictions on such shares as might seem advisable. The legislative act mentioned did not expressly confer upon corporations the power to deprive the owner of any class of shares of the right to vote, but, nevertheless, the practice

arose soon after the adoption of the constitution of 1872, of chartering West Virginia corporations with authority to issue preferred shares, by the terms of which they were deprived of the right to vote at any meeting of the stockholders. The legislature in the session of 1901, chapter 35, section 5, expressly authorized the chartering of corporations with authority to issue preferred shares without voting rights. This act merely gave legislative sanction to a practice that had prevailed from 1872 to 1901.

In the work of the code commission the members of that body were confronted with the constitutional provision referred to and the act of 1901 which was apparently in plain disregard of the constitutional inhibition, and conditions of business affairs in West Virginia arising out of the fact that during the period of more than fifty years the administrative officers of the state had issued charters in which corporations were authorized to issue preferred non-voting shares. It was then and is now apparent that some confusion, the avoidance of which is probably desirable, would arise from changing the statute to comply with the constitutional mandate above quoted.

In order to avoid the disturbance to business which would result from upsetting the practice of more than fifty years, the members of the code commission carried into their report the provisions of the act of 1901, but attempted to limit strictly the departure from the constitutional provision to that which had the sanction of legislative action and of fifty years practice. A thorough investigation of the decisions of courts interpreting similar constitutional provisions convinced the members of the commission that the weight of judicial opinion would hold as unconstitutional the West Virginia act of 1901.

We studied with considerable misgiving the well-reasoned cases of the *People v. Emmerson*,[1] decided by the supreme court of Illinois in 1922; *Brooks v. The State*,[2] decided by the supreme court of Delaware in 1911; and *Randle v. Winona Coal Company*,[3] decided by the supreme court of Alabama in 1921.

Mr. Justice Woolley, later Chief Justice of Delaware, and still later an able judge of the United States Circuit Court of Appeals for the Third Circuit, and Justice Carter of the Supreme Court of Illinois, answered in the negative every proposition which

[1] 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636.
[2] 3 Boyce 1, 79 Atl. 790.
[3] 206 Ala. 254, 89 So. 790.

was or apparently could be asserted in favor of the constitutionality of legislative action of the respective states similar to the West Virginia act of 1901, in the face of the constitutional inhibition in the state of Illinois identical, and in the state of Delaware, almost identical, with the provision in West Virginia. The courts of those states were not influenced by an business consideration, or obligation to prevent confusion in business affairs, or by any question of public policy. Indeed, they held that in the matter of public policy the rule clearly favored the right to give to every shareholder of a corporation one vote for each share of stock held.

The supreme court of Missouri, in the case of *Frank v. Swanger*,[4] decided in 1905, upheld the right of the legislature to authorize the issuing of non-voting preferred stock by a Missouri corporation under a constitutional provision somewhat similar to but not identical with the constitutional provision of West Virginia.

The members of the commission anticipated that the West Virginia court might follow that of Missouri, and in that event they desired to buttress such decision with an express legislative interpretation of section 4, of article XI of the constitution of the state. With that object in view we appended to the section in question, in our report, the following note:

> "The provisions of sec. 16, c. 53, Code 1923, authorizing the issuing of classes of preferred stock without, or with limited, voting rights are retained in this section. The weight of modern judicial opinion seems to hold such a provision unconstitutional, but these decisions, while well reasoned in many respects, seem to ignore the flexibility of a state constitution to meet changing public conditions, and for this reason do not seem to give as much weight as we think should be given to the real purpose of the provision, which was to secure the right of cumulative voting. It is thought if its true weight is given the purpose in mind, and the flexibility of state constitutions to meet changing public conditions is not forgotten, that the provision respecting preferred stock is constitutional, especially where there has been a long existing legislative policy in harmony with this statute, which has induced many corporations to adopt its provisions. Attention is also called to the fact that the constitutional provision referred to relates only to voting for directors, and does not relate to the right to vote on other corporate acts."

[4] 190 Mo. 561, 89 S. W. 872, 4 Ann. Cas. 563.

In the note quoted we expressly recognize the weight of judicial authority to be against the constitutionality of the West Virginia act of 1901 which was carried into the revision. At the same time we give a plausible reason so far as able why the supreme court of this state might give judicial sanction to the interpretation of the constitutional provision given by a legislative act and fifty years of application by the administrative officers of the state.

However, the report of the code commission carrying into the revision the provisions of the act of the legislature of 1901 was not adopted by the legislative committee or the legislature, but instead the provisions of a recent Delaware statute were bodily inserted in the West Virginia code. If the legislature had set out with the sole object of disregarding all constitutional obligations assumed by its members and defying the provisions of the section of the constitution quoted, language more apt for the purpose than that adopted could not have been found.

> "Every corporation, other than a banking institution, shall have 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, or in any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of the charter or of any amendment thereto. The power to increase or decrease or otherwise adjust the capital stock as in this chapter elsewhere provided shall apply to all or any of such classes of stock. Any preferred or special stock may be made subject to redemption at such time or times and at such price or prices and may be issued in such series, participating, optional or other special rights, and qualifications, limitations or restrictions thereof as shall be stated and expressed in the charter, or in any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided."

This provision copied from the Delaware statutes is authority for every corporate abuse which justly casts obloquy upon the

legislature and courts of Delaware. Of course, no such provision could have been written into the Delaware statutes under the constitution of that state effective at the time of the decision to which we have referred. All constitutional restrictions on the power of the legislature to create corporations had been removed by amendment prior to the passage of the Delaware statute. It is hardly necessary for us to say that we believe the West Virginia statute quoted to be in violation of the state constitution and constitutional authority. Keeping in mind that article 4 of section XI of the Constitution of West Virginia under elemental rules of law is as much a part of every charter issued by the state of West Virginia as if set out and written verbatim on the face of the charter, we cannot think it possible that a court in West Virginia would uphold this statute. Indeed, a decision of the West Virginia court upholding the statute could afford but little assurance to those subsequently relying upon its constitutionality. Any such must at all times have before them the probability that a court at a later date better advised would hold that any such interpretation was not and never had been the law of the state of West Virginia as written in its constitution.

Justice Woolley perhaps gave the only excuse that any court will be able to give for the adoption of the West Virginia statute. In discussing the constitutionality of an act of the legislature of Delaware much less flagrant in its disregard of the supreme law of that state, he said:

> "The general corporation law that was enacted subsequently to the adoption of the constitution of 1897, under the terms of which the preferred stock of George Brooks & Son Company was deprived of voting power, must have been enacted in ignorance of the constitutional provision then existing."[5]

—MELVIN G. SPERRY.

[5] Brooks v. The State, *supra* n. 2, at 79 Atl. 801.