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Corporations

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CORPORATIONS

Voting Trusts—Chapter 46 legalizes voting trust agreements¹ when the purpose of the agreement is lawful.² Ob-

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2. §1(c)(4).
 3. §1 (c) (10).
 4. § 1(c)(11).
 5. § 1(c)(8).
 6. C. 238, § 1(a), amending Ind. Acts 1935, c. 231, § 1, Ind. Stat. Ann. (Burns, Repl. 1943) § 58-901(a).
 7. Ind. Acts 1935, c. 231, §§ 11-14, Ind. Stat. Ann. (Burns, Repl. 1943) § 58-911 to § 58-914; Ind. Acts 1935, c. 231, § 1, Ind. Stat. Ann. (Burns, Repl. 1943) § 58-909.
 8. C. 238, § 2. By taking advantage of this exception to the licensing statute, retail sellers may accept reassignment of commercial paper from finance companies and thereby control relations with their customers.
 9. *Ibid.*
 10. Ind. Acts 1941, c. 43, Ind. Stat. Ann. (Burns, Supp. 1945) § 19-1916a and Ind. Acts 1945, c. 160, § 1, Ind. Stat. Ann. (Burns, Supp. 1945) § 19-1916 were expressly repealed, but the holidays listed therein are re-declared in the new act. Ind. Acts 1947, c. 236.
 1. "The current prevailing view toward voting trusts has come to be that they are valid even in the absence of statute". Ballantine, "Corporations" (rev.ed.1946) §184.
 2. "The statutes are not intended to preclude the courts from invalidating voting trusts which have no legitimate business pur-

viously an intention to eliminate competition by the creation of a voting trust is an illegal purpose.³ Although a particular purpose may be legal when the agreement is created, an amendment to the voting trust statute may make this purpose illegal so that the agreement becomes invalid.⁴

A copy of the agreement, upon a written demand by the corporation or by a shareholder of record, must be filed with the secretary of the corporation and shall be subject to inspection by any shareholder.⁵ This agreement shall not be irrevocable for more than ten years unless the voting rights are coupled with an interest in the shares.⁶ The definition of coupled with an interest is identical to the one used by the Ohio voting trust statute.⁷ Ohio's definition has been characterized as "dangerously broad."⁸ In an Ohio case⁹ a voting trust was created in which no provision was made for the termination of the trust within ten years. Nevertheless, the court held the voting trust was valid but only for a ten year period, since compliance with the statute must have been intended by the settlor. On the other hand, non-compliance with statutory requirements has been held to render the agreement ineffective so that a transfer of the stock on the books

pose. . . (they do not authorize voting trusts for purposes for which voting agreements could not be created by the majority common law rules." Ballantine, "Corporations" (rev.ed.1946) §184; Bankers Fire and Marine Ins. Co. v. Sloss, 155 So.371, 372 (Ala. 1934); Horne, "Voting Trust Agreements in Indiana" (1944) 19 Ind. L.J.225,229. "The burden of proving a wrongful purpose will no doubt be placed on the attacker in ordinary judicial proceedings, particularly where created under a voting trust statute." Ballantine, id. at §184, note 15.

3. *People v. Northern River Sugar Refining Co.*, 121 N.Y.582, 24 N.E. 834 (1890).
4. *In Re Morse*, 247 N.Y. 290, 160 N.E. 374 (1928). For a discussion of other illegal purposes, see Ballantine, "Corporations" (rev.ed. 1946)§184a.
5. Ind. Acts 1947, c. 46, § 5.
6. Ind. Acts 1947, c. 46, § 2. Such rights are coupled with an interest in the shares if "reserved or given (a) in connection with an option, authority or contract to buy or sell such shares or a part thereof, or (b) in connection with the pledge of such shares or a part thereof to secure the performance or non-performance of any act, or (c) in connection with the performance or non-performance of any act, or agreement therefor, by the corporation issuing such shares, or (d) in connection with any other act or thing constituting an interest sufficient in law to support a power coupled therewith".
7. Ohio Gen. Code Ann. (Page, 1938) §8623-34.
8. Ballantine, "Corporations" (rev.ed.1946) §184, note 1.
9. *Loyd v. McDiarmid*, 60 Ohio App. 7, 19 N.E. (2d) 292 (1937).

of the corporation gives the transferee the right to vote.¹⁰ If the agreement so provides, the trust may be extended from time to time for periods of not more than ten years.¹¹ But such a provision has been interpreted as not permitting a clause in the voting trust agreement authorizing the trustees to create a new voting trust every ten years.¹² Even though irrevocable for ten years, if the beneficial ownership of any shares is acquired by the corporation, then, as to those shares, the voting trust is automatically terminated.¹³ In the twenty-one states having voting trust statutes, the usual limitation is ten years,¹⁴ but the periods vary from five to twenty-one years.¹⁵

Upon the creation of a voting trust¹⁶ the shareholder transfers his share certificates to the trustee. This transfer is subject to federal taxation.¹⁷ After the transfer, the trustee issues voting trust certificates. Unless the agreement otherwise provides,¹⁸ these certificates are subject to the Indiana Uniform Stock Transfer Act.¹⁹ After the transfer of the share certificates to the trustee, he may surrender them to the corporation with a request that new certificates be issued

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10. *Davidson v. American Paper Mfg. Co.*, 188 La. 69, 175 So. 753 (1937).
 11. Ind. Acts 1947, c. 46, § 2.
 12. *Kittinger v. Churchill Evangelistic Assoc.*, 151 Misc. 350, 271 N.Y.S. 510 (1934).
 13. Ind. Acts 1947, c. 46, § 8.
 14. Ark. Dig. Stat. (Pope, 1937) § 2175; Colo. Stat. Ann. (Michie, 1935) c. 41, § 45; Del. Rev. Code (1935) § 2050; Fla. Stat. (1941) §612.19; Idaho Code (1932) § 29-134; Kan. Gen. Stat. (Corrick, Supp. 1945) §17-3307 (unless coupled with an interest); La. Gen. Stat. Dart, 1939) § 1113; Md. Ann. Code Gen. Laws (Flack, 1939) art. 23, § 131; Mich. Comp. Laws (Mason, Supp. 1940) § 10135-34; N.H. Rev. Laws (1942) c. 275, § 15-20; N.J. Rev. Stat. (1934) § 14:10-10; N.Y. Stock Corp. Act § 50; Ohio Gen. Code Ann. (Page, 1938) § 8623-34 (unless coupled with an interest); Pr. Stat. Ann. Purdon, 1938) tit. 15, § 2851-511; Tenn. Code (Michie, Repl. 1942) § 3733; Wash. Rev. Stat. Ann. (Remington, Supp. 1939) § 3803-29; W.Va. Code (Michie, 1943) § 3085.
 15. Cal. Civ. Code (Deering, 1941) § 321a (21 years, but the voting trust may be terminated at any time by a majority in interest); Minn. Stat. (Henderson, 1941) § 301.27 (15 years unless connected with a debt); Neb. Rev. Stat. (1932) § 21-139 (5 years); Nev. Comp. Laws (Hillyer, 1929) § 1621 (15 years).
 16. The usual consideration for a voting trust agreement will be the mutual promises of the parties. Note (1932) 5 So. Calif. L. Rev. 214.
 17. *Cliffs Corp. v. U.S.*, 103 F.(2d) 77 (C.C.A. 6th, 1939).
 18. Ind. Acts 1947, c. 46, § 3.
 19. Ind. Acts 1923, c. 24, Ind. Stat. Ann. (Burns, 1938) §25-701 et seq.

in his name. These new certificates, as well as appropriate entries in the corporate books, must give notice of the voting trust.²⁰ Even though the trustee thus becomes the record holder of the shares, the beneficial owner has the same rights to examine the books of the corporation as if he were the record holder.²¹

The trust agreement may define the authority and liability of the trustee.²² There has been much litigation concerning the powers thus given to trustees. In one case,²³ an exculpatory clause in a voting trust agreement was held no bar to statutory removal of trustees for misconduct. Since the Indiana statute requires that the exonerating provisions of an agreement must not be "repugnant to law," an attempted exculpatory clause for misconduct would probably be invalid. Even though apparently within the scope of the general power granted by the agreement, the trustee cannot act adversely to the interests of those he represents whether this benefits himself or other persons.²⁴ When the agreement requires all the trustees to act, although less than the full number have no power to act,²⁵ a voting trustee may give a proxy to a co-trustee but only after all the trustees have conferred and decided how to vote on the particular matter.²⁶ Similarly, a trustee cannot exercise his power through an agent.²⁷ The power to vote for dissolution will not be conferred on a trustee by general language in the voting trust agreement.²⁸ But specific language in the agreement can authorize the trustee to vote for the sale and disposition of corporate prop-

20. Ind. Acts 1947, c. 46, § 6.

21. Ind. Acts 1947, c. 46, § 9. Quære, does the trustee, who is the record holder, have the same rights? Probably so, in which case one share of stock confers the right of inspection upon two persons.

22. Ind. Acts 1947, c. 46, § 4.

23. *Petition of Allen*, 178 Misc. 541, 35 N.Y.S. (2d) 120 (1942).

24. *Brown v. McLanahan*, 148 F. (2d) 703 (C.C.A. 4th, 1945).

25. *Loughery v. Bright*, 267 Mass. 584, 166 N.E. 744 (1929).

26. *Chandler v. Bellanca Aircraft Corp.*, 19 Del. Ch. 57, 162 Atl. 63 (1932). The decision was based upon statutory authorization, but presumably the same result could be reached in Indiana by a provision in the agreement.

27. *Re Green Bus Lines*, 166 Misc. 800, 2 N.Y.S. (2d) 556 (1937).

28. *Re Bacon*, 287 N.Y. 1, 38 N.E. (2d) 105 (1941); *Mannheimer v. Keehn*, 41 N.Y.S. (2d) 542, 547 (1943).

erty,²⁹ merger,³⁰ refinancing³¹ or reorganization³² of the corporation.

The rights conferred by this statute are in addition to other statutory rights as well as rights at common law.³³ Prior to this statute, there were no cases in Indiana recognizing a voting trust as valid.³⁴

From one Indiana case an inference could be drawn that voting trusts without statutory authority were not illegal *per se*.³⁵ In another case,³⁶ several stockholders made an assignment which authorized a trust company to vote their shares for certain directors. This agreement was not attacked as a voting trust and the court held that it was not void because its purpose was to perpetuate certain directors in office. Since the stockholders reserved the right to vote upon all other matters, this agreement was more like a proxy than a voting trust; however, the case represented a forward step towards judicial recognition of the validity of voting trusts in Indiana even in the absence of a statute.

Merger and Consolidation of Non-profit Corporations.—Chapter 88 authorizes³⁷ the merger and consolidation of non-profit corporations organized under the Indiana non-profit corporations act.³⁸

Section 2 establishes the procedure for merger and section 3 establishes the procedure for consolidation. Section 3 (b) incorporates specifically section 2(a) and clearly intended to include section 2(b). This error is obvious³⁹ since

29. *Bray v. Jones*, 190 Wisc. 578, 209 N.W. 675 (1926).

30. *Scott v. Arden Farms Co.*, 28 A. (2d) 81 (Del. Ch. 1942).

31. *Larimer v. Salida Granite Corporation*, 112 Colo. 598, 153 P. (2d) 998 (1944).

32. *Bullivant v. First National Bank*, 246 Mass. 324, 141 N.E. 41 (1923).

33. Ind. Acts 1947, c. 36, § 10.

34. See Horne, "Voting Trust Agreements in Indiana" (1944) 19 Ind. L.J. 225.

35. *Graub v. Blish*, 88 Ind. App. 309, 152 N.E. 609 (1926).

36. *Rice v. Fletcher Savings and Trust Co.*, 215 Ind. 698, 22 N.E. (2d) 909 (1939).

37. Ind. Acts 1947, c. 88, § 1.

38. Ind. Acts 1935, c. 157, Ind. Stat. Ann. (Burns, 1945 Supp.) §25-507 et seq.

39. §3(b) provides: ". . .The agreement of consolidation shall then be submitted to a vote of the members. . .in the same manner and shall be adopted upon receiving the same affirmative votes and the adoption shall be followed by the same notice. . .prescribed in paragraph (a) of section 40. . ." §40(a) which is section 2(a) of the new act provides why the manner and notice of voting

it is fundamental that a statute must be construed as a whole and its different sections read together and harmonized wherever possible.⁴⁰

Foreign Non-profit Corporations.—Chapter 26⁴¹ provides that a foreign non-profit corporation transacting business in this state without authority shall not maintain a suit in the courts of this state upon any demand arising out of a contract or tort.⁴² A maximum penalty of ten thousand dollars is established for transacting business without authority and in appropriate proceedings brought by the attorney general the corporation may be enjoined from transacting business in Indiana.

Three situations may arise. First, a corporation may sue without being authorized to transact business in this state. In such a case an answer in abatement is sufficient.⁴³ Second, the circumstances may be such that the corporation can no longer comply with the statute.⁴⁴ In this case, the corporation can never maintain the suit. Third, after the answer in abatement, the corporation may comply with the statute and begin the suit anew. Although the contract sued upon was executed before compliance with the statute, the contract is not void and the suit can be maintained.⁴⁵ This is reasonable. The primary purpose of legislation of this type is to secure compliance with admission statutes.

Domestic Corporations for Profit.—Chapter 57 embodies several minor changes in the general corporation act. Section one prohibits for a period of ten years the use of a corporate name similar to the name of a corporation whose existence

while it is 2(b) that prescribes the number of affirmative votes that must be received.

40. *Hargis v. State*, 220 Ind. 429, 433, 44 N.E. (2d) 307, 309 (1942).
41. Amends Ind. Acts 1935, c. 157, § 28, Ind. Stat. Ann. (Burns, 1945 Supp.) § 25-534. Cf. Ind. Acts 1929, c. 215, § 69, Ind. Stat. Ann. (Burns, 1933) § 25-314.
42. Ind. Acts 1947, c. 26, § 2.
43. *Warren v. Exodus*, 114 Ind. App. 651, 54 N.E. (2d) 775 (1944).
44. *Barnett v. Central Republic Bank and Trust Co.*, 100 Ind. App. 495, 196 N.E. 369 (1935). In this case, the plaintiff corporation had consolidated with another corporation before the suit was brought. This consolidation precluded the plaintiff corporation from thereafter complying with the admission statute.
45. *Selph v. Illinois Pipe Line Co.*, 206 Ind. 490, 190 N.E. 191 (1934). See Note (1945) 10 Ind. L.J. 419 where this problem is considered. Contra: *Sandage v. Studebaker*, 142 Ind. 148, 41 N.E. 380 (1895).

has ceased due to merger, consolidation, or sale of assets.⁴⁶ This prohibition does not apply to a corporation which acquires ownership of another corporation. An acquiring corporation may give another corporation written permission to use the name of any corporation it has acquired.⁴⁷

A 1935 amendment to the corporation statute which authorized the filing of a voluntary petition in bankruptcy has been repealed.⁴⁸

A corporation that voluntarily⁴⁹ or involuntarily⁵⁰ dissolves is now specifically permitted to collect, liquidate and distribute to the shareholders any assets not distributed prior to dissolution. In order to exercise these privileges the dissolved corporation is given the right to sue. The same rights are extended to a corporation whose term of existence as fixed by its articles of incorporation has expired.⁵¹ There is no limitation on the time in which the corporation must bring these suits. The two year limitation on actions against a corporation which voluntarily dissolves remains unchanged.⁵² Likewise, suits may be commenced against a corporation for a term any time within two years from the date its corporate existence expires.⁵³ However, a decree of involuntary dissolution acts as a bar against new suits against the corporation and no creditor's claim shall be permitted to be filed in the receivership proceeding.⁵⁴

Section 6 restricts the former ten year period in which a corporation for a term may validate acts performed subsequent to the expiration of its term to two years.⁵⁵

46. Ind. Acts 1947, c. 57, § 1.

47. *Ibid.*

48. Sec. 2 repeals Acts 1929, c. 215, § 58, as amended Ind. Stat. Ann. (Burns, 1945 Supp.) § 25-237.

49. Ind. Acts 1947, c. 57, § (c).

50. Id. § 4 (f).

51. Id. § 5.

52. Ind. Acts 1929, c. 215, § 42, Ind. Stat. Ann. (Burns, 1933) § 25-241.

53. Id. § 44 Ind. Stat. Ann. (Burns, 1933) § 25-243.

54. Ind. Acts 1947, c. 57 § 4 (f).

55. Amending Ind. Acts 1929, c. 215, § 46, as amended Ind. Stat. Ann. (Burns, 1945 Supp.) § 25-245.