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VOTING TRUST AGREEMENTS IN INDIANA

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Along with the rapid development of the corporation as a form of business enterprise, many problems pertaining to the control and operation of the corporation have arisen. The stockholders of a corporation, often numbering in the thousands, are usually small investors unfamiliar with the intricate problems of management and for that reason have little interest in exercising their rights as stockholders and owners to vote. So long as the corporation continues to pay dividends, the problems of management and policy are beyond the pale of their interests. The reluctance of stockholders in general to exercise their voting privilege is a familiar aspect of modern corporate management. For this and numerous other reasons, it become necessary to centralize the control of the corporation and as a means to effectuate this end, the voting trust agreement was developed.

In a voting trust, the shares are conveyed to a trustee and are transferred on the books of the corporation. The trustee then issues to the former stockholder trust certificates which recite that each holder of such a certificate is entitled to the delivery of his stock at the end of a specified period or until a certain object has been reached and that he may transfer the trustee's certificate as he would a share of stock. Dividends are paid to the holders of the trustee's certificates, less expenses. No proxy is given. The legal owner of the shares, the trustee, has the voting power.[1]

Upon a resume of the cases involving voting trusts it will usually be found that where a court has decided to uphold the voting trust agreement, it has cited as its authority the decisions of those states supporting its view, and has omitted to cite the opposite contentions. Likewise, courts who have felt ill-disposed towards voting trust agreements have cited as their authorities supporting cases and have excluded opposite holdings. The real ground of the decisions,

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1. See Ballantine, Private Corporations (1927 Ed.) 582; 5 Fletcher Cyc. Corp. (Perm. Ed.) Sec. 2075; 44 Words & Phrases (Perm. Ed.) pp. 466-467; 18 C.J.S., Corps. Sec. 552; Bankers' F. & M. Ins. Co. v. Sloss, 229 Ala. 26, 155 So. 371 (1934); In re Morse, 247 N.Y. 290, 160 N.E. 374; Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102 (1935).

however, is not the arguments paraded in the opinion, but the more subtle and inarticulate views which have influenuced jurists in all ages, i.e., the historical setting, the judicial temper, the economic background and many other elements that enter into the makeup of judicial decisions.

Voting trust agreements have been used for numerous ends. A corporation may because of poor management find itself in difficult financial condition although the business is fundamentally sound. Creditors may be willing to lend additional capital to the corporation if the stockholders assure them control to protect their investment.[2] Similarly, corporations in sound financial condition but in need of more capital may find it necessary to encourage new investments by giving the control to an impartial group.[3] In one case, a voting trust agreement was used to wind up the affairs of the corporation.[4] In Clowes v. Miller,[5] a voting trust was established to facilitate a sale of stock. In 1919 a New Jersey Court upheld a voting trust formed to prevent the stock of a corporation manufacturing submarines for the use of England during the war from falling into the hands of German agents.[6]

There is some language in the decision of a New York Court in the case of Tompers v. Bank of America[7] which

2. Ecker v. Kentucky Refining Company, 144 Ky. 264, 138 S.W. 264 (1911). In this case the corporation found itself in difficult financial circumstances and undertook to reorganize. The voting trust agreement was upheld against the objections of a minority stockholder. See also Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. Agency Co., 79 F. (2d) 804 (C.C.A. 8th, 1935).
3. Simmons v. Atlanta T. & T. Co., 139 Ga. 488, 77 S.E. 377 (1913).
4. Bowditch v. Jackson, 76 N.H. 351, 82 Atl. 1014 (1912).
5. 60 N.J.Eq. 179, 47 Atl. 345 (1900).
6. Frost v. Carse, 91 N.J.Eq. 124, 108 Atl. 642 (1919).
7. 217 App. Div. 691 (New York), 217 N.Y.S. 67. In this case the court said: "As the object of these actions and the effect of the injunction may be to open the way to a competing institution to engulf the defendant bank and its management, or to permit several speculators to embarrass the bank in the accomplishment of their designs, the orders should have at least awaited trial." In the case of Hall v. The Trust Co., 106 Me. 465 (1910) an agreement was executed among the majority stockholders, which pooled the stock in the hands of the trustee for the purpose of preventing adverse interests from getting control of the corporation. The power of sale was conferred upon the trustee, which was to be exercised by him in accordance with the directions of a committee. The Maine court said that the agreement was not a voting trust, but a power to sell coupled with an incidental provision for voting and thereby relieving themselves from considering the legality of such a voting trust.

indicates that a court might uphold a voting trust which is designed to prevent a rival group from getting control of the corporation. Voting trust agreements have been upheld when their general purpose was to secure efficient management of the corporation,[8] or to retain for a fixed period of time the management and control in the person who originally promoted the same.[9] In general, it may be said that trust agreements are valid.[10]

In the early stages of the development of voting trust agreements there was a strong sentiment against them which found expression in the opinions of the judges. It was held in a very early case that the trustee, acting for more than one stockholder, who attempted to cast a majority of the votes at an election, could be restrained.[11] In the case of Bostwick v. Chapman,[12] decided in 1890 and generally re-

8. Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103 (1910).

9. Gray v. Bloomington & Normal Railway, 120 Ill. App. 159 (1905).

10. Mackin v. Nicollet Hotel, Inc., 25 F. (2d) 783, cert. denied, 278 U.S. 618, 73 L. Ed. 541, 49 Sup. Ct. 22 (1928); In re O'Gara Coal Co., 260 Fed. 742 (1919); Borland v. Prindle Co. 144 Fed. 713 (1906); Ziezler v. Railway Co., 69 Fed. 176 (1895); Moses v. Scott, 84 Ala. 608, 4 So. 742 (1888); Mobile & O. R. Co. v. Nicholas, 98 Ala. 92, 12 So. 723 (1893); Smith v. San Francisco & N.P. Ry., 115 Cal. 584, 47 Pac. 582, 35 L.R.A. 309 (1897); Aldridge v. Franco Wyoming Oil Co., ——— Del. Ch. ———, 7 A. (2d) 753 (1939); Weber v. Della Mountain Min. Co., 35 Idaho 404, 94 Pac. 441 (1908); Kann v. Rossett, 307 Ill App. 204, 30 N.E. (2d) 204 (1940); Thompson v. J. D. Thompson Carnation Co., 279 Ill. 54, 116 N.E. 648; Venner v. Chicago City Ry., 258 Ill. 523, 101 N.E. 949 (1913); Gray v. Bloomington & Normal Ry. supra note 9; Ecker v. Kentucky Refining Co., supra note 2; Hall v. Merrill Trust Co., supra note 7; Green v. Nash, 84 Me. 148, 26 Atl. 1114 (1892); Abbot v. Waltham Watch Co., 260 Mass. 81, 156 N.E. 897 (1927); Brightman v. Bates, 175 Mass. 105, 55 N.E. 809 (1900); General Inv. Co. v. Bethlehem Steel Corp., 91 N.J.Eq. 234, 100 Atl. 347 (1917); Chapman v. Bates, 61 N.J.Eq. 5, 47 Atl. 638 (1900); Kressl v. Distilling Co. of America, 61 N.J.Eq. 5, 47 Atl. 471 (1900); Tompers v. Banks of America, supra note 7; Mason v. Curtis, 223 N.Y.S. 313, 119 N.E. 559 (1918); Williams v. Montgomery, 148 N.Y. 519, 43 N.E. 57 (1896); Redman v. Minnis, 43 Ohio App. 371, 183 N.E. 299 (1932); Boyer v. Nesbitt, supra note 8; White v. Snell, 34 Utah 434, 100 Pac. 927 (1909); Carnegie Trust Co. v. Security Life Insurance Co., 111 Va. 1, 68 S.E. 412, 31 L.R.A. (N.S.) 1186 (1910); Thompson-Starrett Co. v. E. B. Ellis Granite Co., 86 Vt. 282, 84 Atl. 1017 (1912); Winson v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908, 33 L.R.A. (N.S.) 63; Clark v. Foster, 98 Wash. 241, 167 Pac. 908 (1917).

11. Mac v. DeBardeleben Coal & Iron Co., 90 Ala. 396, 8 So. 150 (1889).

12. 60 Conn. 553, 24 Atl. 32 (1890). The court in Mackin v. Nicollet Hotel, supra note 10, as follows: "There has been a gradual modification of the views of both courts and text-writers upon this subject in modern times. The old theory which to dominate the earlier writers, to the effect that every stockholder in a corpora-

ferred to as the Shepaug Voting Trust Cases, a voting trust agreement was held invalid because it involved a separation of control from beneficial interests in the corporation. An Illinois court held that all stock must be given the right to vote under statute and the constitution of the state.[13] The basis upon which many of the courts opposed to voting trust agreements have based their decisions is expressed by the court in Luthy v. Ream.[14] The court said: "The principle to be deducted from these cases is that the holders of the majority of shares in a corporation may control its management, and every person who becomes an owner of stock has the right to believe that the corporation will, and to insist that it shall, be managed by the majority; that the power to vote is inherently attached to and inseparable from the real ownership of each share, and can only be delegated by proxy, with power of revocation; that each stockholder must be free to cast his vote, whether by himself or by proxy, for the best interest of the corporation; that each stockholder has the right to demand that every other stockholder if he desires to do so, shall have the right to exercise at each annual meeting his own judgment as to the best interests of all the stockholders, untrammeled by dictation and unfettered by the obligation of any contract."

In Harvey v. Linville Improvement Company[15] the court held a voting trust agreement invalid by saying that the power to vote is inherently annexed and inseperable from the real ownership of each share, and can only be delegated by proxy with power of revocation. In Hafer v. N.Y.L.E. & W.R.R. Co.,[16] the court held a voting trust agreement to be invalid at the suit of a minority stockholder and stated: "The law presumes that the pecuniary interests of a stockholder will be a motive to impel him to vote in such a manner as will promote the interests of the company. Such a motive

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tion is entitled to have the benefit of judgment of every other stockholder in the election of a board of directors, has necessarily been rendered obsolete because of our modern business being conducted by large corporations with thousands of stockholders located in all parts of the country."

13. People v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922).

14. 270 Ill. 170, 110 N.E. 373 (1915). See also Kreissl v. The Distilling Co of America, supra note 10; White v. Thomas Inflatable Tire Co., 52 N.J.Eq. 178, 28 Atl. 75 (1893).

15. 118 N.C 693, 24 S.E. 489 (1896).

16. 14 W.L.B. 68 (Ohio) (1885).

is entirely lacking if one who is not a stockholder—and if such a person be empowered to vote for directors, he may be subject to interests and motives other than such as would conduce to the welfare of the company."

Whether or not a statute exists authorizing voting trust agreements, such agreements have been held invalid if the object of the voting trust is the accomplishment of some unlawful end, or where its object is not in the interests of all the stockholders, but to give some unfair advantage to a party or parties to the agreement.[17]

In a great many cases involving the validity of voting trust agreements the general question has been broadened beyond the question whether a voting trust may under any circumstances be valid to embrace the particular question whether a given one was valid and legally sufficient. The condemnatory language found in the earlier cases, beginning with the Shepaug Voting Trust Cases from which can be spelled a wholesale condemnation of voting trust agreements without regard to their purpose,[18] seems to have run its course and the tide of condemnation moves toward a discriminating approval.[19] Early pronouncements against the validity of voting trust agreements were based upon the theory that such trusts are against public policy. Public policy varies from time to time[20] and generalized statements of it have been pronounced dangerous because uncertain and vague, especially as applied to voting pools and combinations.[21]

To examine in detail the arguments against the validity

17. Bankers' Fire & Marine Ins. Co. v. Sloss, supra note 1.

18. The most extreme hostility is to be found in North Carolina cases which come just short of being out and out declarations of a wholesale policy against voting trust agreements. See Harvey v. Linville Impv. Co., supra note 15; Bridges v. First National Bank of Tarboro, 152 N.C. 293, 67 S.E. 770, 31 L.R.A., (N.S.) 1199 (1910); Sheppard v. Rockingham Power Co., 150 N.C. 776, 64 S.E. 894 (1909).

19. Carnegie Trust Co. v. Security Life Insurance Co. of America, supra note 10. In this well known case the court said: "In the early stages of the development of this idea, [voting trusts] there was a strong sentiment against them which found expression in the opinions of judges and in the not always temperate language of commentators upon the law; but experience has demonstrated their usefulness, and the hostility evinced towards them has by degrees diminished." See also note 12.

20. McGinniss v. Boston & Montana Consol. Copper & Silver Min. Co., 29 Mont. 428, 75 Pac. 89; McKendree v. Southern States Life Ins. Co., 112 S.C. 335, 99 S.E. 806.

21. Smith v. San Francisco & N.P. Ry., supra note 10.

of the voting trust agreement is unnecessary inasmuch as nearly every case, where a voting trust was held to be against public policy, the court was opposed, not to the voting trust agreement per se,[22] but to the objects of the contracting parties. Even those decisions in which the particular agreements under consideration at the time have been held to be invalid have usually recognized that there may be such a thing as a valid voting trust.[23] Usually, the agreements were permeated with fraud and often the objects of the subscribers to the trust agreement were not such as could be countenanced in a court of equity.

Although in many instances courts embarked on elaborate dissertations on the invalidity of voting trusts, it would have been sufficient to show that the fraud in the agreements rendered them unenforceable. In the course of time judicial thought and utterances have clarified, and the majority of courts now agree that valid voting trust agreements are possible. Many states have enacted legislation recognizing the validity of voting trusts beginning with New York in 1901,[24] and followed by Maryland in 1908.[25] Since that time the states of Florida,[26] Nevada,[27] Delaware,[28] New Jersey,[29] Arkansas,[30] Ohio,[31] Louisiana,[32] California,[33] Michigan,[34] Min-

22. In Bostwick v. Chapman, supra note 12, the court had this to say: "It is insisted that there is nothing illegal per se, in the pooling of stock to carry out a scheme of extension authorized by law and favored by the corporation. This may be true under proper limitations. . . . "
23. In Cone v. Russell, 44 N.J.Eq. 208, 21 Atl. 847, Chancellor Pitney stated: "This conclusion does not reach so far as to necessarily forbid all pooling or combining of stock, where the object is to carry out a particular policy with the view to promote the best interests of all the stockholders."
24. McKinney's Consolidated Laws of New York, v. 58, Stock Corp. Law, Sec. 50.
25. Flack's Annotated Code of Maryland, Corps., Sec. 131.
26. Compiled Gen. Laws of Florida, Fourth Div., Title III, c. IV. Art. 5, Sec. 6545.
27. Nevada Compiled Laws (1929), Corps., Sec. 1621.
28. Revised Code of Delaware (1935) c. 65, Sec. 2050.
29. New Jersey Statutes Ann., Corps., Title 14, c. 10, Sec. 14: 10-10.
30. Pope's Digest of Statutes of Arkansas, c. 37, Sec. 2175.
31. Page's Ohio General Code, Corps. Act (1927), Sec. 8623-34.
32. Dart's Louisiana Gen. Statutes, Title 14, c. 1, Sec. 1113.
33. Civ. Code of California, Sec. 321(a).
34. Michigan Statutes Ann., c. 195, Gen. Corp. Act, Sec. 21.34.

nesota,[35] Kansas,[36] Nebraska[37] and New Hampshire[38] have passed statutes authorizing voting trusts.[39]

In absence of an express statute, the validity of a voting trust depends on the purpose and nature of the agreement involved. Although there have been a few opinions rendered which indicate that there can be no valid voting trust without the aid of a statute, it may be said that generally a voting trust may be valid in absence of an express statute authorizing its creation.[40] In some cases statutes relating to proxies or the right to vote at stockholders meetings have been regarded as indicative of legislative policy approving or disapproving of voting trust agreements.[41] Of course, a voting trust agreement must comply with the prerequisites of trust and contract law to be valid where not authorized by statute.[42]

Taking the cases as a whole, it may be concluded that there is no general indiscriminating public policy against voting trust agreements if they are formed for a lawful pur-

35. Mason's Minnesota Statutes (1940 Supp.), c. 58, Sec. 7492-26.

36. General Statutes of Kansas Ann., (1941 Supp.), c. 17, Art. 33, Sec. 3307.

37. Compiled Statutes of Nebraska (1941 Supp.), c. 24, Art. 1, Sec. 24-135.

38. Laws of New Hampshire (1931), c. 104, p. 116, amending Sec. 1, c. 226.

39. The statute of California is quoted for the purpose of showing the manner in which voting trusts are validated. Sec. 321(a) provides as follows: "Shares of stock in any corporation may be transferred to a trustee or trustees in order to confer upon them the right to vote and otherwise represent such shares.

"A duplicate of the voting trust agreement may be filed in the office of the corporation, and if so filed shall be open to inspection by any shareholder, or holder of a voting trust certificate, or his agent upon the same terms as the stock books of the corporation are open to inspection.

"If the voting trust agreement be so filed, the corporation shall take notice of its terms and the limitations on the authority of the trustees thereunder.

"Anytrust, the sole or principal purpose of which is the voting or representing of shares, may be terminated at any time by the holders of a majority in interest of the beneficial interests therein unless otherwise specified therein. No such voting trust shall be made irrevocable for a period of more than twenty-one years."

40. Mackin v. Nicollet Hotel, supra note 10; Venner v. Chicago City R.R., note 10 supra; Day v. Helca Mining Co., 126 Wash. 50, 217 Pac. 1 (1923).

41. See Smith v. San Francisco & N. R.R., supra note 10; Boyer v. Nesbitt, supra note 8; Clark v. Foster, 98 Wash. 241, 167 Pac. 908 (1907).

42. For a complete annotation of the validity of voting trusts according to states see 105 A.L.R. 123.

pose and are capable of being executed in a lawful manner. Courts cannot forbid voting trusts, and have not attempted to do so, but have merely declared that the particular trust offended some legislative prohibition. A fair and close analysis of the cases will show that their expressions of an adverse policy may be reduced to particular grounds of invalidity in the voting trust agreement which was under judgment, or to wrongs done under it. The objects, purposes, and effects of the trust determines its validity, and if that is lawful it is valid, provided, it can be accomplished in a lawful manner. The motives and intentions of the parties to the trust will not establish the validity of a voting trust, but the controlling question is what the agreement permits.

No case has been decided by an Indiana Court involving the validity of a voting trust agreement. In Groub v. Blish[43] the minority stockholders entered into an agreement to assign their stock to three persons as depositaries (the majority stockholders) for twenty years and also gave the depositaries an irrevocable proxy to vote the stock for the time stipulated. The depositaries agreed to issue participating certificates, to collect dividends, and to accumulate a sinking fund therefrom to retire one class of certificate at the end of the twenty years. The court, in holding the agreement valid, said that the effect of the contract was a sale and not a voting trust. Although the court declared the contract did not create a voting trust, an inference might be drawn from the opinion that voting trusts are not illegal per se.[44]

In the case of Rice v. Fletcher Savings and Trust Company,[45] the plaintiffs attempted to assert ownership of the testator's stock in a life insurance company which by agreement had been assigned for voting purposes to the defendant. In connection with the agreement, the court held that an agreement whereby stockholders place their stock in trust for voting purposes only was not void as undertaking to per-

43. 88 Ind. App. 309, 152 N.E. 609 (1926).

44. The court stated as follows: "The execution of the agreements by which the depositaries were given irrevocable authority to vote appellant's stock did not give them any power over the corporation that they did not already possess, and did not create a voting trust that was invalid under the facts and circumstances of this case."

45. 215 Ind. 698, 22 N.E. (2d) 809 (1939).

petuate certain persons in office as directors of the corporation.[46]

Many elements, other than law and precedent, may enter into the make-up of a judicial decision, and it is not only difficult but impossible to anticipate or predetermine a court's reaction to an untried issue. If, however, a case arose involving the validity of a voting trust agreement and was presented to an Indiana Court, in my opinion, it would be declared valid assuming that the legal requisites of contract and trust law were satisfied, that no fraud was present, and that the purpose to be accomplished was lawful.

Since no case has been decided squarely on the issue by the courts of Indiana, public policy could be a "peg" upon which the court, in deciding adversely to the validity of the agreement, could base its decision. Without a doubt, the opposing parties would strongly argue this question. The court would be faced with the question of deciding or determining what the policy was or is to be. Whatever position the court took, its decision could be substantiated and supported by ample authority. However, it is believed that the trend of the later decisions and the increased number of statutes passed authorizing the use of the voting trust agreement lends to a strong presumption that the court would declare that there was no public policy against them.

The fact that no statute exists in Indiana authorizing voting trust agreements does not weaken the argument that they are valid as evidenced by the numerous decisions of state and federal courts where no statute was present. However, a statute may strengthen the argument for the validity of such an agreement in that it may validate what would otherwise by an invalid trust or contract, and further, a statute is a concrete expression of public policy.

At this point, I think it would be safe to assume that a voting trust agreement is not invalid per se.

The voting trust agreement must satisfy the legal requisites of contract and trust law, i.e., writing, consideration, dry trusts, fraud, etc. For the purpose of this discussion, I

46. The validity of the agreement by which the testator and others assigned to the Trust Company, as trustee, their stock to vote for certain persons therein named as directors of the life insurance company, and reserved to themselves the right to vote the stock on all other questions was not attacked as being invalid as a voting trust agreement.

again make an assumption, viz., that the agreement before the court would be sufficient in every way to satisfy these legal requisites.

As has been said by many commentators on the law, the validity of a voting trust agreement, in absence of express statute, depends on the purpose and nature of the agreement involved. The courts carefully scrutinize the purpose for which the agreement was executed, and whether it be to encourage financial assistance, secure efficient management, minority control, or other reasons the purpose must be lawful. If the agreement in effect is fraudulent, or gives some unfair advantage to a small group, or is contrary to the best interests of the minority stockholders or the corporation, the court would be justified in holding the particular agreement invalid without establishing a precedent unfavorable to all voting trust agreements. In fact, many courts in holding a particular agreement illegal, have emphatically stated that the voting trust agreements are not illegal per se.

It would appear that the voting trust agreement has not been extensively used in this state, if at all, because there is neither statute nor legal precedent evidencing a favorable attitude towards them. Since there are many advantages to be gained from the proper use of such agreements, favorable legislation would be helpful in clearing the "atmosphere of doubt" that now exists as to the validity of the voting trust agreement.