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CORPORATIONS - AMENDMENTS BY MAJORITY OF THE STOCKHOLDERS - PROVISION IN CERTIFICATE OF INCORPORATION REQUIRING MORE THAN MAJORITY

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CORPORATIONS — AMENDMENTS BY MAJORITY OF THE STOCKHOLDERS — PROVISION IN CERTIFICATE OF INCORPORATION REQUIRING MORE THAN MAJORITY — A Delaware general corporation statute provided for changing the preferences, rights, or powers of any class of stock if a majority in interest of each class voted in the affirmative thereon.[1] Another part of the statute allowed the certificate of incorporation to require a larger proportion.[2] The certificate of incorporation of *D* corporation required a vote of seventy-five per cent of the outstanding preferred stock to change the "designations," preferences, and voting powers" of the preferred stock. This required vote was reduced to sixty per cent by an amendment which received a favorable vote of fifty-five per cent of such preferred stock. Thereafter it was proposed to change some of the preferences of the preferred stock by a sixty per cent vote as provided by the amended certificate of incorporation. *Held*, the first amendment was invalid. *Sellers v. Joseph Bancroft & Sons Co.*, (Del. Ch. 1938) 2 A. 108.

In recent years there has been some confusion as to what sort of amendments can be put through by a majority consent of the stockholders.[3] Although in Delaware it looked for a while as if the majority could do almost anything, the last *Keller v. Wilson & Co.*[4] case put some restrictions on their power.[5] But even without that case, the action of the majority in the principal case would be improper because their contract clearly provided for a higher vote.

[1] Del. Rev. Code (1935), § 2058.

[2] Del. Rev. Code (1935), § 2037.

[3] Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 A. 654 (1928); McKenzie v. Guaranteed Bond & Mtg. Co., 168 Ga. 145, 147 S. E. 102 (1929); Cathcart v. Cathcart Van & Storage, 175 Ga. 196, 165 S. E. 58 (1932). See 7 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 3718 (1931), where a fairly detailed summary is given as to what restrictions there are on the majority.

[4] (Del. Ch. 1935) 180 A. 584, reversed (Del. 1936) 190 A. 115.

[5] 34 MICH. L. REV. 859 (1936); 35 MICH. L. REV. 620 (1937); 36 MICH. L. REV. 662 (1938).

The statute in this case required a majority vote of the class in interest in order to make an amendment unless a higher vote was required by the certificate of incorporation. The certificate of incorporation did require a higher vote. As the contract is to be determined by the provisions of the charter and the provisions of the statute,[6] it therefore naturally follows that the higher vote was necessary. This higher vote was not in conflict with the statute as contended by counsel for the defendant, but was in reality a requirement of the statute. The first amendment came within this provision of the certificate of incorporation so must necessarily be passed by the vote required by the certificate of incorporation.[7]

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[6] Lloyd v. Pennsylvania Elec. Vehicle Co., 75 N. J. Eq. 263, 72 A. 16 (1909); Yoakum v. Province Biltmore Hotel Co., (D. C. R. I. 1929) 34 F. (2d) 533.

[7] Although the stockholders can still vote, the proportionate voting power of each certificate has been changed. See Page v. American & British Mfg. Co., 129 App. Div. 346, 113 N. Y. S. 734 (1908).