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Voting Trusts Currently Observed

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When Mr. Justice Douglas was serving on the Securities and Exchange Commission, he stated that the voting trust "as currently observed is little more than a vehicle for corporate kidnapping" and a device whereby promoters may eat the cake and have it too. Such caustic condemnation of corporate voting trusts is not novel. Several writers in the past have urged their elimination and many courts have used vivid language when invalidating particular trusts. However, this corporate device has weathered all former storms and it is believed that there are as many voting trusts in existence today as ever before. Thus one might be inclined to accept Mr. Justice Douglas' comment as the

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†I am indebted to Professor Ralph J. Baker of the Harvard Law School and to James P. Johnson, member of the Illinois Bar, for valuable aid on this article. Mr. Johnson writes that he has recently had the temerity to draw a voting trust agreement in Illinois, where all voting trusts are suspect. See infra, p. 352.

A voting trust may be defined as a transfer of the legal title and voting power of shares of stock of a corporation to a trustee or trustees for a limited period for the purpose of concentrating control of such corporation in the hands of fewer persons than the whole number of its shareholders. Judge Baldwin reminds one of Dr. Johnson at his best, in defining the voting trust as "an attempt by some of the corporators to bargain away their right to share in the control of the corporate business without consulting the wishes or welfare of the rest." Baldwin, Voting Trusts, (1891) 1 Yale L. J. 1, 11.

Democracy in Industry and Finance, address of William O. Douglas before The Bond Club of New York, New York City, March 24, 1937, p. 12—one of the so-called "Wall Street nightmares." The writer wondered whether the SEC hoped to extend the "Lindbergh Law" (18 U.S.C.A. Sec. 408 a-c (Supp. 1939)) so as to protect corporations. Voting trusts, however, have been approved by the SEC in at least two cases. In the Matter of Great Lakes Utilities Company, (1937) 2 SEC 129, Holding Company Act Release No. 595; In the matter of The United Telephone and Electric Company et al., (1938) 3 SEC—, Holding Company Act Release No. 1187. Despite these instances of approval of voting trusts in connection with reorganizations, it is apparent that voting trusts are not yet looked upon with enthusiasm by the members of the SEC. See Note 123, infra.

For a notable example, see Untermyer, A Legislative Program to Restore Business Freedom and Confidence (1914) 24.


conclusion of one who was continually engaged by virtue of his office in exposing corporate abuses. But such criticism from the man who has been in a short space of time professor of corporate finance at Yale, member and chairman of the SEC, and Associate Justice of the Supreme Court, well deserves an answer. It is the main purpose of this article to show why the voting trust device, though criticized and abused, should receive the approval of all our legislatures and courts.

HISTORY AND ANALYSIS

During the past decade of depression, the corporate voting trust device has been widely used and sometimes abused. It has been taken to court on numerous occasions. It has been paraded before legislative investigating bodies. It has been the subject of statutes in twelve states. \(^7\)

The story of the voting trust over the past fifty years is quite similar to this thumbnail sketch of the last ten, but it is necessary to outline the history of voting trust law in order to reveal early errors and to provide a background for recent and future developments. The first voting trust which occasioned litigation was formed by shareholders of the Pacific Mail Steamship Company in 1864, and was held to be valid three years later with little discussion of the problems which subsequently have troubled the


Sometimes a voting trust is authorized by special act of the legislature. Ariz. Laws 1934 (3d Spl. Sess.) ch. 6, sec. 5; Maricopa County Municipal Water Conservation District No. 1 v. La Prade, (1935) 45 Ariz. 61, 40 P. (2d) 94 (upholding the Arizona statute).
Voting trusts sprang to prominence during the period of vast industrial expansion and consolidation toward the latter part of the nineteenth century. In the numerous attempts to monopolize various fields of industry, the voting trust was frequently used, and trusts acquired an opprobrious connotation which was probably in no small degree responsible for the disapproval of voting trusts shown by courts and others. The name "voting trust" was no small handicap in early "trust busting" days. Add to that the fact that most of the early voting trusts over which litigation arose involved monopolistic, fraudulent or other illegal purposes, and it is small wonder that the courts declared many voting trusts to be illegal in the adolescent period of voting trust law. As usual, what was legitimate and without fraud rarely was dragged into court, and therefore the law books do not show us the large number of voting trusts which were operated successfully. What cases there were, however, were taken as authority for the general invalidity of voting trusts, and their influence is still felt.

The famous Shepaug Voting Trust Cases decided together in 1890 in Connecticut are a perfect example of the paralyzing effect which misconceived and misapplied opinions, handed down in the formative period of a new field of law, have upon later cases. Almost all commentators and judges have cited these cases as holding that voting trusts are illegal per se on the ground that it is against public policy to separate the voting power from the beneficial ownership of stock. The Shepaug opinions set forth no such blanket condemnation of voting trusts, although few voting trusts could run the gauntlet of dicta laid down therein. A syndicate wanted to gain control of the Shepaug, Litchfield & Northern Railroad Company so as to extend the line and obtain the contracts for construction work. A majority of the stock was purchased and placed in a voting trust, a trust company having legal title to the stock but voting it as directed by certain

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9 It is probably true that the name "voting trust" has been no such handicap in more recent years. Recurring waves of criticism of voting trusts have coincided with the anti-trust legislation of the first Wilson administration and the anti-trust, anti-bigness drive of the present administration, but in these periods the voting trust has been attacked not because of the implications of its name but because it is (admittedly) one method of concentrating control of a corporation.

10 Starbuck v. Mercantile Trust and Bostwick v. Chapman, (1890) 60 Conn. 553, 24 Atl. 34.
members of the syndicate. The Connecticut court used very broad language in granting complete relief to certain transferees of the voting trust certificates who had brought suit to revoke the trust and obtain stock for their certificates. The language of the court has been quoted but misapplied time and again. It should be noted that the purpose of the Shepaug voting trust was fraudulent, that the voting was to be controlled by those who were neither the beneficial nor the legal owners of the stock and that the court admitted that there was nothing illegal per se about "pooling" agreements. The Shepaug cases should have been limited to their own facts, and it is significant that the opinion in an important later Connecticut case involving a voting trust problem did not even cite them. No blanket prohibition upon a divorce of the voting power from beneficial ownership was laid down, and it has been unfortunate for the progress of the law of voting trusts that almost all commentators and courts which have cited the Shepaug cases have so often failed to recognize that fact.

Toward the close of the century voting trusts frequently were put to what has been until recently their commonest use. Many of the reorganization problems which resulted from the period of rapid expansion and overcapitalization of the railroads, and, to a lesser extent, of other industries, were solved by the use of voting trusts. The much reorganized Erie Railroad was subject to a number of them; the Northern Pacific was reorganized by a spectacularly successful voting trust, voluntarily terminated by the trustees, all partners in J. P. Morgan & Co., when they felt it was no longer necessary.

Voting trusts also have been used in many other ways, of which a few should be mentioned: In connection with the promotion of new corporations or the development of patents, to establish continuity of control or management, to protect those furnishing new money, and to insure or facilitate the accomplishment of some particular corporate or public object. Recently William Randolph Hearst turned over to Judge Shearn as voting trustee under a ten year voting trust the common stock in his top holding company as a part of the program of rearranging his

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11 At p. 581.
13 See (1900) 71 Com. & Fin. Chron. 989.
14 "This is now the occasion for the most frequent use of the voting trust," Dewing, Financial Policy of Corporations (3d ed. 1934) 389.
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pyramid of possessions, in anticipation of life's three (no longer two!) certainties—death, taxes, and death taxes. 15

With the turn of the century there came a change of attitude toward voting trusts. Courts began to admit that voting trusts might be legal under certain circumstances. In 1901 New York passed the first general statute 16 permitting the creation of voting trusts with very slight restrictions. Writers took up the cudgels in favor of the legality of voting trusts. And in 1910, the Virginia court gave unqualified approval to voting trusts in Carnegie Trust Company v. Security Life Insurance Co., 17 an excellent analysis of the voting trust device which has been cited many times with approval.

Unfortunately, just as the judicial portals were opening to let in the voting trust device they were blown shut again in some quarters by another burst of adverse sentiment. In the same year, 1910, the North Carolina court declared voting trusts to be illegal per se, following earlier precedents in that state. 18 The following year we find the unqualified dictum of Vice-Chancellor Howell of New Jersey: "I am of the opinion that it is unlawful and a gross violation of the public policy of this state to permit . . . separation of the voting power of corporate stock from its ownership." 19 The so-called "voting trust cases" in New Jersey and the leading case of Warren v. Pim 21 had established that voting trusts were merely prima facie illegal in that jurisdiction. Then in 1913 came an investigation of banking and finance by a sub-committee of the House of Representatives Committee on Banking and Currency under the Chairmanship of

15Davis, Mr. Hearst Steps Down, in the Saturday Evening Post, August 27, 1938, pp. 5, 65. The voting trust was also undoubtedly part of the program to "save the empire." See Dusk at Santa Monica, Time, March 13, 1939, p. 49.
17(1910) 111 Va. 1, 68 S. E. 412.
21(1904) 66 N. J. Eq. 353, 59 Atl. 773 (here a "fifty-year" voting trust was declared void by a court divided seven to six; Swayze, J., delivered a masterful dissent).
Arsene P. Pujo. Mr. Samuel Untermyer as counsel for the Pujo Committee led a crusade against the voting trust and voting trustees which was not without effect.\(^{22}\) Indeed, in 1915 the Illinois court echoed the opinion of the North Carolina court\(^{23}\) and threw the Illinois bar into a confusion over the subject from which it has not yet recovered.\(^{24}\) Finally, the Public Service Commission of the state of Missouri took an unqualified position against the validity of voting trusts in 1916, in connection with the proposed plan of reorganization of the Santa Fe Railroad.\(^{25}\)

In 1918 Mr. I. Maurice Wormser wrote an able article which stated the case for voting trusts.\(^{26}\) Mr. Wormser’s article, however, failed to go far enough. It supported the general validity of voting trusts but only “provided the propriety and reasonableness of its object affirmatively appear. . . .”\(^{27}\) This puts the burden of establishing good faith upon the shareholders entering the combination, contrary to a basic principle of both our civil and criminal law. If it is once admitted that voting trusts are legal, the burden of establishing that a particular combination is for an unfair purpose must rest with those who so assert.\(^{28}\)

Despite this shortcoming, the Wormser article probably helped to stem the tide of renewed opposition to voting trusts. Since 1918 no court has declared voting trusts to be illegal per se and North Carolina is now the only state in which all voting trusts are prohibited. In this respect North Carolina seems as unprogressive as is her sister Carolina with respect to divorce.\(^{29}\) It is
true that some of the opinions still include long paragraphs on the history of voting trusts, and qualify legality by time-worn judicial shibboleths, invented years ago when condemnation of voting trusts first began to soften. However, representative cases during the past decade in both the United States and Canada uniformly have admitted or assumed the legality and validity of voting trusts in the absence of a fraudulent or illegal purpose.\footnote{30} Furthermore during the same period the number of jurisdictions having general statutes allowing the creation of voting trusts has increased from eight to twenty, and former fears that the statutes in Arkansas, Delaware, Florida, Maryland, Nevada, New Jersey, New York and Ohio would be restrictively construed by hostile courts\footnote{31} have not materialized.

Whether or not the legislative and judicial trend in favor of the validity of voting trusts will continue is within the realm of conjecture. The writer believes it should and will continue. We have already seen that voting trusts have weathered adverse business cycles, dicta, and epithets before. It is safe to say that they will do so again. There are three reasons why this may be asserted with confidence. In the first place, voting trusts have proved to be a most useful aid to corporate finance and management. Second, the legal arguments used against the device are specious, if not patently unsupportable. Third, the device has not been abused in enough instances to require state legislation outlawing it.

We have already seen the various ways in which voting trusts have proved useful, so let us briefly examine the arguments against their validity.\footnote{32} They are as varied as the colors of Joseph’s coat.


\footnote{32}For excellent answers to some of the arguments, see Harriman, Voting Trusts and Holding Companies, (1904) 13 Yale L. J. 120; and Swayze, J., in Warren v. Pim, (1904) 66 N. J. Eq. 353, 402, 59 Atl. 773, 794.
It has been argued that voting trusts are a method of violating statutory limitations on the period for which proxies may be created. This contention overlooks the fact that a voting trust is not an agency, not a mere power of attorney, but rather "an outright conveyance of the stock, conditioned upon certain covenants made by the voting trustees and duties imposed upon them."\footnote{See Wormser, The Legality of Corporate Voting Trusts and Pooling Agreements, (1918) 18 Col. L. Rev. 123, 135.}

A few have objected that voting trusts are an invalid restraint on alienation, and violate the rule against perpetuities. Since the beneficial ownership of stock placed in a voting trust is almost invariably freely transferable, the argument that there is a restraint on alienation is untenable.\footnote{"It is true that the voting power of A’s stock cannot be alienated without B’s consent; but there is no more restraint on alienation than B’s easement in A’s land is a restraint on the alienation of the land."—Harriman, Voting Trusts and Holding Companies, (1904) 13 Yale L. J. 109, 113.} The rule against perpetuities is inapplicable to a voting trust, because there is no question of the vesting of contingent interests.\footnote{Someone has said that the rule is no more applicable to a voting trust, a present vested interest, than to the old United States Beef Trust. However, early voting trusts may have seemed proper subjects for the rule. In one case the trust might terminate twenty years after the last survivor of the then living descendants of Her Majesty (Queen Victoria) died. See Warren v. Pim, (1904) 66 N. J. Eq. 353, 59 Atl. 773.}

It has often been urged that a voting trust is illegal, or at least revocable, unless it is an active trust, or unless the agreement is supported by consideration, or unless the trust is coupled with an interest in the stock. In some cases these terms have been used side by side and apparently synonymously.\footnote{See People v. Burke, (1923) 72 Colo. 456, 212 Pac. 837; Thompson Starrett Co. v. E. B. Ellis Granite Co., (1912) 86 Vt. 282, 84 Atl. 1017.} In others, courts have used one term when the decision seemed clearly based on what most courts have discussed under different terminology.\footnote{For a notable example, see Clark v. Foster, (1917) 98 Wash. 241, 167 Pac. 908.} Unfortunately few courts or writers have carefully analyzed their different import, and their connection with the law of trusts, contracts and agency from which they are respectively drawn. Found ad nauseam in the cases, they seem to be a magic triad by which courts strike down particular voting trusts. They are the glossy formulae with which courts reach results. Judged by ordinary standards of law, most voting trusts would seem to be active and supported by consideration. In the absence of other duties...
which would unquestionably make a voting trust active the duty of voting trustees to vote\textsuperscript{38} (or to decide not to vote!) and the duty to pay over dividends, or either one alone, should be sufficient to make the trust active. Sufficient consideration is found in the mutual promises of the shareholders not to revoke\textsuperscript{39} and in the interest in his own stock which each shareholder gives to his fellow shareholders. It is often difficult to tell what courts mean when they state that a voting trust is illegal or at least revocable unless coupled with an interest. This usually means that a voting trust may be formed only for the protection of creditors; it may also mean that the voting trustees must be shareholders themselves, or that they must have an option to purchase any stock placed in the trust.\textsuperscript{40} In any case, an "interest" is required as a matter of law only if a voting trust is an agency, a premise which we have already seen is unsound.\textsuperscript{41} But even if we proceed on the false premise that a voting trust is an agency, we find in most voting trust arrangements that the trustees have an interest which couples with the power to vote and makes it irrevocable.\textsuperscript{42}

Some contend that voting trusts lead to minority control of a corporation. If minority control means control by a few persons,\textsuperscript{43} it is in a sense true that a corporation, while a voting trust is in effect, is controlled by a few persons, but in such a case the objection to control of the corporation by voting trustees who are selected by a majority of the voting shares of stock, is scarcely stronger than an objection to control of a corporation by

\textsuperscript{38}As suggested by Chief Justice Holmes, "It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases." Brightman v. Bates, (1900) 175 Mass. 105, 55 N. E. 809; see also Carnegie Trust Co. v. Security Life Ins. Co., (1910) 111 Va. 1, 68 S. E. 412.


\textsuperscript{40}Boyer v. Nesbitt, (1910) 227 Pa. St. 398, 76 Atl. 103.

\textsuperscript{41}See supra, p. 354.

\textsuperscript{42}The trustees sometimes represent a creditor, or are shareholders, or have a right of first refusal of the stock. It has been suggested that the trustees' interest to see the trust properly executed and the reciprocal rights of the participating shareholders preserved is a sufficient interest to support the power. See Warren v. Pim, (1904) 66 N. J. Eq. 353, 410, 59 Atl. 773, 794. See also Restatement of Agency, sec. 138, comment c and illustration 5.

\textsuperscript{43}See Note, (1928) 16 Calif. L. Rev. 537, 540. The writer of the note states that, "... the voting trust offers the control of a selected minority, which is fixed, responsible and open, instead of secret and fluctuating."
its board of directors. If minority control means control by less than half of the voting shares of stock of a corporation, the contention seems unwarranted. In most voting trusts, the voting trustees, who possess powers of discretion as to voting and other matters, have been selected and approved by a majority of the voting shares of stock. In some instances, it is true that the policy followed by voting trustees is to be formulated by a majority of the deposited shares of stock, all of which together may constitute only a minority of the total amount of the stock. In such a situation there seems to be nothing inherently wrong in extending the rule of the majority to the second degree, especially since the original majority agrees to govern the trust by majority rule.

Nevertheless, minority control in and of itself is no such bugbear as many writers would have us think. As a practical matter, it is hard to escape in large corporations with many stockholders. In small corporations minority control by a voting trust which holds the balance of power may in many cases prove to be the most democratic form of operation. By forming a voting trust a large group of stockholders with interests which, though separately small, total almost half the stock outstanding may be able to protect themselves against the complete domination of the corporation by one or two large minority stockholders. It is hard to understand how public policy is violated by permitting small stockholders to join forces for a period of more than one year in order to make their union effective. Moreover, suppose forty per cent of the stock of a corporation is concentrated in a voting trust and together with a small percentage of the remaining, but ununited stock, actually controls the corporation for the duration of the trust. It is difficult to see why such control by a combination of three or three hundred stockholders in a voting trust should be deemed more objectionable than the same control by a single stockholder owning or purchasing a similar forty per cent of stock.

It has been urged that a voting trust denies those shareholders not parties to an agreement of a voice in the management. This argument overlooks the principle of cumulative voting.

44This is the meaning given to "minority control" by most writers. See Note, (1916) 29 Harv. L. Rev. 433, 434; Miller, Voting Trusts, (1929) 4 Ind. L. J. 600, 603.

45Miller, Voting Trusts, (1929) 4 Ind. L. J. 600, 603: "Since a majority of the stockholders were in favor of vesting control in a trustee, the action by the trustee is the action by the majority."
wherever it exists. Where cumulative voting is not in force, the objection involves the "fallacy of division." Each share of stock may have a potential voice in management, but ordinarily this potentiality is not realized until the one share becomes part of a controlling majority. Moreover, this objection does not exist in the multitude of cases where either statutes or agreements, or both, provide that all shareholders of the same class or classes for which a voting trust agreement is drawn may participate in the agreement if they so desire. In such cases a non-depositing minority shareholder is in practically the same position as if there were no voting trust.

Although many courts have found the foregoing arguments against voting trusts to be unsupportable, all too often they have taken refuge in public policy, a fertile field of judicial indecision. The reason most often given for condemning voting trusts is that it is against public policy to separate the voting power from the ownership of stock. This is the heritage of the Shepaug Voting Trust cases and their "ancestors." In many jurisdictions where voting trusts have run their checkered career through the courts an abhorrence of the separation of the voting power from the ownership of stock has persisted. It originated in the supposed duty which one shareholder owed to his fellow shareholders and to the corporation. The notion that each shareholder owes a duty to his fellow shareholders to exercise his own personal discretion, judgment, and voting power for the best interests of a corporation is a judicial relic from the days when proxies were generally invalid, and the corporation meeting ran like a New England Town Meeting. Since then a century of kaleidoscopic change has followed. The voting of shareholders nowadays is a formality exercised by proxy almost entirely, and personal judgment is not often used. Moreover, it is generally said that everyone may "use his position as a stockholder solely for his own benefit." This is subject of course to the limitation that

\[\text{\footnotesize 40\textsuperscript{h}}\text{Voting trust statutes in Arkansas, Colorado, Florida, Idaho, Louisiana, Maryland, Nevada, New Hampshire, New York, Philippine Islands, Tennessee and Washington so provide. Under the Colorado statute an agreement "must" contain such a provision. The New Hampshire statute puts a limit of six months on the time within which shares may be transferred to the trustees after the voting trust agreement is filed. See note 74, infra.}^{47}
\text{\footnotesize 47See Taylor v. Griswold, (1834) 14 N. J. L. 222 and dictum of Chief Justice Shaw in Fuller v. Dame, (1836) 18 Pick. (Mass.) 472, 484.}\n\text{\footnotesize 48It is too early to know what effect the new SEC proxy rules will have. SEC Regulation X-14. Of course hundreds of corporations are not subject to such rules.}\n\text{\footnotesize 49Lord Robertson in Bradley v. Carritt, [1903] A. C. 253, 269.}\]
the majority may not exercise its authority fraudulently for its advantage and at the expense of the minority. Furthermore, a shareholder owes no duty to a corporation other than to refrain from defrauding it by using his power of control to its injury.\(^6\)

It seems apparent, therefore, that the shareholder has fulfilled his whole duty to his fellow shareholders and the corporation when he has done with his shares what he thinks is best. To deny him the right to place his shares in a voting trust would only be hampering the free exercise of his personal judgment for which the opponents of voting trusts have so loudly clamored.

Some writers try to show that there has not been a complete separation of voting power from stock ownership rather than to answer the archaic arguments which brought the rule into being. How easy it is to fall into this error is shown by the fact that Mr. Wormser in the article already referred to,\(^5\) tried to persuade his readers that the separation argument "is based upon an unsound premise, because in the case of most voting trusts, the voting power follows the legal ownership of the stock."\(^5,2\) It is true that in every voting trust properly so called, the voting power follows the legal ownership of the stock. Mr. Wormser merely stated the obvious without answering the supposed objection. What some courts and writers have objected to is the separation of the voting power from the beneficial ownership. The real answer to the objection seems to be that there is no mystical unity between the voting power and the ownership of stock. They are no more "one" for all purposes nowadays than are husband and wife. Separation between the two takes place in a number of situations: (1) The universal permission of proxy voting constitutes an approval of such separation. If a shareholder may vote blindly by proxy there seems to be no real reason why he should not be allowed to vote with others by trustee.\(^5,3\)

Trustees and pledgees are very generally empowered by statute also Gamble v. Queens County Water Co., (1890) 123 N. Y. 91, 97, 25 N. E. 201, 202; United States Steel Corp. v. Hodge, (1903) 64 N. J. Eq. 807, 54 Atl. 1. This proposition does not permit a shareholder to "sell" his votes in exchange for an executive position in the company. Cone v. Russell, (1891) 48 N. J. Eq. 208, 21 Atl. 847.

\(^5\)See Harriman, Voting Trusts and Holding Companies, (1904) 13 Yale L. J. 109, 115 and authorities cited in footnote 38 thereof.

\(^5,3\)Wormser, Legality of Corporate Voting Trusts and Pooling Agreements, (1918) 18 Col. L. Rev. 123.

\(^5,2\)Wormser, Legality of Corporate Voting Trusts and Pooling Agreements, (1918) 18 Col. L. Rev. 123, 134. See also the ingenious argument in 5 Fletcher, Corporations (Perm. ed. 1931) sec. 2065, footn. 35.

\(^5\)See (1910) 24 Harv. L. Rev. 51, 52.
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(3) It often happens that stock is transferred absolutely in the period when the stock transfer books are closed before a meeting. Statutes provide that only those may vote who are registered on the books of the corporation before a certain day. In such a case the transferor has no interest whatsoever in the stock and yet he may vote it. (4) It is obvious that where non-voting stock has been issued there is a separation of beneficial ownership and voting power ab initio. True enough, the opponents of voting trusts usually condemn non-voting stock more violently even than voting trusts. However, it is significant that Illinois is a lonely and notable exception to the general rule of statute and case law which permits the issuance of non-voting stock.

In view of these analogies, and the fallacies involved in the arguments leveled against voting trusts, it appears that the voting trust is beyond reproach both as a corporate and a trust device. The all important question remains: Is the likelihood of misconduct and fraud so great in connection with the voting trusts that they should be banned despite their legal invulnerability otherwise? Judge Baldwin would have answered this in the affirmative fifty years ago, Mr. Untermyer twenty-five years ago, and perhaps Mr. Justice Douglas now. They can all point to cases of grave abuse. However, such cases are greatly outnumbered by the legions of voting trusts which have been operated with success and without abuse. Unfortunately any amount of research and study will not reveal the percentage of cases where there has been abuse. That the percentage is very small seems apparent from the fact that no opponent of the voting trust device has shown more than a few glaring and isolated cases of abuse. Thus the opponents of voting trusts must rest their case for the most part on the possibility of abuse.

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64 People v. Robinson, (1883) 64 Cal. 373; Thompson v. Blaisdell, (1919) 93 N. J. L. 31, 107 Atl. 405. In such a case, the buyer may obtain a proxy as part of the transaction in order to protect himself; if the seller votes, however, there seems to be no requirement that he vote in the interests of the buyer.

65 Illinois, constitution, art. XI, sec. 3; and see People v. Emmerson, (1922) 302 Ill. 300, 134 N. E. 707 (depriving preferred stock of vote held unconstitutional).

66 Baldwin, Voting Trusts, (1891) 1 Yale L. J. 1.

67 Untermyer, A Legislative Program to Restore Business Freedom and Confidence (1914) 24.


69 It is remarkable that no evidence was introduced pro and con before the Pujo Committee in 1913 (see note 22) to show generally whether
On that basis and with as good reason they might urge the elimination of corporations and trusts as well.

Suspicion is no substitute for proof under our system of law, and over against it text writers, lawyers and business men everywhere testify to the utility of voting trusts and to their repeatedly successful operation. Further eloquent testimony is found in the collective judgment of a score of legislatures which have approved voting trusts.

**STATUTES**

Writing thirty-five years ago in support of the validity of voting trusts, a reviewer concluded with these prophetic words: "It seems probable that if the courts fail to sustain such arrangements, the desired result will be reached by statute." At that time the first general voting trust statute had just been adopted in New York but it does not appear that the reviewer knew it. The prophecy was slow of fulfillment, for only five other states passed voting trust statutes within the ensuing quarter of a century. However, fourteen states enacted such statutes within the period from 1926 through 1934. The Uniform Business Corporation Act which was approved by the Commissioners on Uniform Laws in 1928 was no doubt influential in this legislative progress because of the excellent section in it providing for the creation of voting trusts. However, since Washington passed its statute in 1934, no other state has joined the ranks. It is to be hoped that the legislative grist-mill will not be long idle. Statutes are not a complete cure for judicial confusion or even a sure inoculation against future litigation. Nevertheless, they are of great importance in settling public policy in favor of voting trusts had been beneficial or detrimental. Cushing, Voting Trusts (1st ed. 1915) p. 23. In a recent SEC report on real estate reorganizations, it is said, "Results to date of reorganizations or liquidations accomplished under these voting trusts and liquidation trusts are too meagre for adequate appraisal. But the risk of grave abuse of the tremendous power vested in these trustees is great..." SEC Report on Protective and Reorganization Committees, (1936) Part III, p. 206.

60(1902) 15 Harv. L. Rev. 756.
64Uniform Laws Ann. 82 et seq.
trusts and in prescribing limitations and requirements for their creation, operation and termination.

But when policy is thus determined, an important question arises which sooner or later must be answered: Must all voting trusts comply with the requirements of the statute in order to be valid? In one of the leading voting trust cases, Matter of Morse,65 a voting trust agreement for the shares of stock of the Bank of America had been drawn up under the New York voting trust statute which provides that all shareholders may become parties to the agreement. Before a majority of shares had been deposited, the New York statute was amended so that it did "not apply to a banking corporation."66 Thereafter other shareholders deposited shares, with the result that the voting trustees held a majority of the stock. The trustees' right to vote this stock at a subsequent election of directors was challenged and a unanimous court granted the motion for a new election. In reply to the argument that the trust agreement was valid at common law, the New York Court of Appeals said, through Pound, J.:

"No voting trust not within the terms of the statute is legal and any such trust so long as its purpose is legitimate coming within its terms is legal. The test of the validity is the rule of the statute. When the field was entered by the legislature it was fully occupied and no place was left for other voting trusts."

This seems to answer the question emphatically in the affirmative. While the court refused to permit voting trusts for shares of corporations expressly excepted from the statute,67 it is perhaps still open to question in states where the voting trust statutes apply merely to business corporations,68 whether there may be valid common law voting trusts for other classes of corporations.

This holding of the New York court of appeals would probably be followed in most jurisdictions today, and yet the indication that where there is a statute no voting trust may be justified on common law principles is expressly abrogated by the statutes in Colorado69 and Ohio.70 The Colorado provision is a wise

66 New York Laws 1925, ch. 120.
70Ohio, Code Ann. (Throckmorton 1936) sec. 8623-34.
one aimed to protect valid voting trusts created under common law principles before enactment of the Colorado statute, for it has several times been argued that the passage of a voting trust statute shows a new public policy in favor of the validity of voting trusts as opposed to invalidity before passage of the act. This weak a posteriori argument as applied to the Delaware statute has been rejected by the federal circuit court of appeals for the eighth circuit, but was accepted by the Delaware court itself in a very recent opinion. Other states adopting voting trust statutes should copy the Colorado statute in this regard so as to forestall any such decision as has been handed down in Delaware.

The Ohio statute stipulates that rights under the statute shall not limit rights at common law, and that it may be provided in a voting trust that it is to be governed by the common law. These clauses indicate a receptive attitude toward voting trusts in Ohio, but when taken together with other amendments in 1929 which changed the character of the Ohio statute from mandatory to permissive, they emasculate the statute and tend to create confusion among bench and bar in that state.

It is impossible within the compass of this article to analyze in detail and to compare carefully the statutes already enacted in twenty states on the subject of voting trusts, but the specific statutes deserve some mention. An examination of their various provisions reveals an interesting but sometimes discouraging diversity. All too often it seems that the drafters of a particular statute have reached into the grab-bag of existing provisions and inserted in their codes the clauses that were drawn out. It is to be regretted that only Idaho, Louisiana, and Washington have adopted section 29 of the Uniform Business Corporation Act in its entirety. The uniform section on voting trusts was

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21 MacLennan v. Nicollet Hotel, (C.C.A. 8th Cir. 1928) 25 F. (2d) 783.
It is interesting to note that this case was decided just a few days after the principles of the Mackin Case had been affirmed in Western Pacific R. Corporation v. Baldwin, (C.C.A. 8th Cir. 1937) 89 F. (2d) 269.
23. "The rights conferred by this section shall be in addition to rights at common law, and no limitations established by this section shall limit rights at common law.
"If it is desired that any such agreement shall be considered and held to have been made under and pursuant to the common law and not under or pursuant to this section, the agreement may so state, whereupon it shall be so considered and construed by all courts." Ohio, Code Ann. (Throckmorton 1936) sec. 8623-34 (1929). See also Berry, Voting Trusts under the Ohio General Corporation Act, (1932) 6 U. Cin. L. Rev. 64.
drafted with great care, as even a brief summary of its provisions will show.

Paragraph one provides that two or more shareholders of a domestic corporation may form a voting trust for a period not exceeding ten years. Paragraph two provides that a duplicate copy of the agreement shall be filed in the registered office of the corporation and shall be open to inspection by shareholders and depositors. Paragraph three provides that other shareholders may participate in the voting trust. Paragraph four provides for the surrender of stock certificates and the issuance of new certificates to the trustees, upon which notice of the trust agreement shall appear. Paragraph five provides for the execution and delivery of voting trust certificates and for their free transferability. Paragraph six provides that the trustees shall have all voting and other rights in the stock subject to the terms of the agreement. Paragraph seven provides that unless otherwise provided the trustees may vote in person or by proxy, that a majority thereof shall determine the vote, that vacancies shall be filled by remaining trustees and that a trustee shall incur no responsibility except for his own neglect or malfeasance. These provisions in the Uniform Act make a reasonable and workable statute which many states would do well to follow. Paragraph seven is the only one which is prefaced by the words "unless otherwise provided," and the lack of such a phrase in the other paragraphs indicates that the draftsmen intended that the other provisions should be mandatory.

There are very few places where the uniform voting trust statute needs correction. Paragraph three might well be amended so as to provide that other shareholders "of the same class or classes provided for in the agreement" may transfer their stock to the trustee. In the absence of such a provision it is uncertain whether all shareholders of a corporation may become parties to the agreement or merely those of a particular class to whom the agreement specifically applies. If the former, and if the agreement provides for substitution of trustees and direction by

\footnote{Such a provision should be inserted in every statute and every voting trust agreement, but, unfortunately it is all too often omitted from voting trust agreements and the voting trust statutes in California, Delaware, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania and West Virginia have no such provision. Cf. Stevens, Handbook on Corporations (1936) 477. See Note 46, supra.}

\footnote{Nevada has such a provision. Nevada, Comp. Laws (Hillyer 1934) sec. 1621.}
the cestuis que trustent, conceivably a group of unforeseen parties may dominate the trust with unexpected results.\textsuperscript{76} Paragraph five in so far as it provides that "... trustees shall execute and deliver voting trust certificates ..." should be changed from a mandatory to a permissive provision. As a matter of fact certificates of beneficial interest are almost always given to depositing shareholders. However, under the modern statutes the shareholder has adequate protection without such a certificate, and there may be cases where for reasons of economy in time and money, it would be better not to go through the formality of issuing voting trust certificates. Another change that might well be made in the uniform statute involves the provision that vacancies among the trustees shall be filled by the remaining trustees. A clause should be added providing that in the event of the lack of trustees caused by the death or resignation of a sole trustee or of a whole trustee slate, new trustees should be selected by a court or by a majority of the depositing shareholders subject to the agreement. Of course, such a clause is often supplied in the agreement or in other statutes of the state relating to fiduciaries. It would also be wise to provide that the trustees are entitled to vote shares which are not withdrawn at the termination of the trust.\textsuperscript{77} Such a provision will prevent disenfranchisement of shares during the period from termination to withdrawal. Sometimes this provision is inserted in a voting trust agreement, but unless the governing statute contains it also, the agreement is subject to attack on the ground that the voting trust extends beyond the period permitted by statute.

The uniform act leaves blank the space where the number of years duration of trusts should be inserted. The maximum term permitted is ten years in Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Tennessee and Washington. Arkansas, Maryland, and New York all had statutes limiting the duration of voting trusts to five years before making the change to a ten year term, but now the Philippine Islands is the only jurisdiction with a five year period.\textsuperscript{78} Any limit

\textsuperscript{76}See: 1 Dodd and Baker, Cases on Business Organization 344, footn. 4, p. 346.


\textsuperscript{78}Philippine Islands Corporation Law sec. 36. The Philippine Islands also has the express proviso that no agreement shall be entered into for the purpose inter alia of lessening competition or creating a monopoly of any
may prove unsatisfactory in an individual case, but general practice and economic considerations seem to have established ten years as a fair term during which the voting power of stock may be separated from the beneficial ownership thereof by means of the voting trust device. Such a period is ordinarily adequate for the fulfillment of the purpose of a particular voting trust, whether it has been formed to protect new money, old money, corporate infancy, or some other legitimate object. Minnesota and Nevada provide for a maximum term of fifteen years, and California goes so far as to provide that no "voting trust shall be irrevocable for a period of more than twenty-one years." Such periods seem too long in an age when business is undergoing violent changes. An opportunity should probably be given shareholders once every ten years to decide whether or not to continue a voting trust arrangement. Furthermore, the California statute, like the Ohio statute, raises a problem of construction because of the unfortunate expression just quoted as to irrevocability. It is not clear whether a voting trust for a longer period than the statute prescribes would be invalid at the end of the statutory term or merely revocable. At such time the trust would seem to become merely revocable, but the presence of the dual possibility demonstrates the error in draftsmanship. There have been intimations in various opinions that voting trusts will be illegal regardless of statutes if they are of indefinite duration.

There is very little in the statutes regarding extension of voting trust agreements or renewal thereof. Ohio has a provision allowing extension for additional periods of ten years each, but it makes no provision for the withdrawal by dissenters at the time of a given extension, an omission which seems to be a mistake. The insertion of such a provision in a very recent amendment to the Delaware act and in the New York statute recently enacted to regulate voting trusts in connection with real estate reorganizations, is a favorable indication of the develop-

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27 It should be noted, however, that California, like Minnesota, provides that unless otherwise specified in the agreement, the voting trust may be terminated at any time by the majority in interest.

80 Fletcher, Corporations (Perm. ed. 1931) sec. 2087.


82 Delaware, Laws 1935 ch. 148, sec. 2.

83 New York, Laws 1936 ch. 900.
ment and cross-fertilization which is going on in the field of voting trust legislation.

Although the statutes make little provision for renewal or extension agreements, such clauses are often inserted in voting trust agreements. A late case in New York, *Kittinger v. Churchill Evangelical Ass'n*, involved a voting trust created for a ten year term but with a clause authorizing the trustees to renew the agreement at the expiration of the term. The court gave a declaratory judgment in the tenth year of the operation of the trust in which it held that the provision was invalid, being a violation of the New York statute limiting voting trusts to ten years' duration. However, the clause was found to be severable, and the trust was held to be in effect until the end of the ten year period. In a case such as this the court has three alternatives before it: (a) It may declare the whole trust invalid regardless of a severability clause, on the ground that the invalidity permeates the whole trust. It is submitted that this would be an extreme view to take. The New York court of appeals said in the *Morse Case* that, “The voting trust agreement must exist in its entirety or it ceases to be valid.” The court, however, was not adverting to a question of severability, and consequently it seems unlikely that it would reverse the *Kittinger Case* result on the basis of a statement in fact directed to quite a different purpose. The provision for renewal does not necessarily mean that the statute will be infringed, but merely that it may be. (b) The better view is that of the *Kittinger Case* itself, namely, that the renewal clause is severable and the trust therefore valid for the original period. This should be true whether or not there is a severability clause in the voting trust agreement. (c) It has been suggested that the voting trust be governed by the common law after the statutory period has run.

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85 However, in a recent Delaware case the court took a view hostile to voting trusts in construing a statute (Delaware, Rev. Code (1935) sec. 2050) similar to the New York statute in the *Kittinger Case*. *Perry v. Missouri-Kansas Pipe Line Co.* (Del. Ch. 1937) 191 Atl. 823. A voting trust agreement was held completely invalid on the ground it was created for a period of eleven years, when in fact there was strong evidence that the date of termination was erroneously included as April 1, 1941, instead of April 1, 1940, and the original agreement provided for an extension period of ten years if desired. As so often happens, the court was no doubt influenced by evidence of self-interest on the part of the voting trustees. See the companion case, *Lippard v. Parish* (Del. Ch. 1937) 191 Atl. 829, and comment on these cases in (1938) 38 Col. L. Rev. 508-511.

We have already seen, in the *Morse Case*, that this view is rejected in New York, as, in the interests of certainty, it surely ought to be.

Due to the possibility that a voting trust may be completely invalid because of a renewal clause it would seem wise to leave such a clause out altogether in drafting agreements unless an applicable statute permits its insertion. If the shareholders want to continue the voting trust when the time comes for renewal, they may decide to do so. A majority should not be allowed to force dissenters to renew; a fortiori no trustee should be allowed to force all shareholders to renew beyond the statutory period. It is a clear violation of statutory intent to vest in the trustees the right to decide upon renewal after the time limit of the statute has been reached.

In concluding a brief discussion of voting trust legislation, something should be said regarding the recent amendment to the Real Property Law of New York\textsuperscript{87} which sets up new standards for the financing and refinancing of real estate operations. This legislation was the result of the findings and recommendations of a joint committee of the New York Legislature organized early in July of 1935 “for the purpose of aiding and assisting distressed investors in real estate.” The committee, under the chairmanship of Hon. Saul S. Streit, made its report early in 1936.\textsuperscript{88} It closely parallels the survey of committees for holders of real estate bonds submitted to Congress by the Securities and Exchange Commission shortly afterward.\textsuperscript{89} In both investigations the testimony related in large measure to S. W. Straus & Co. and the protective and reorganization committees controlled by that company. The findings and recommendations in both reports are strikingly similar. The Streit Committee reported that “it has only been able to scratch the surface,”\textsuperscript{90} but legislation has resulted which seems free from the earmarks of haste and bids fair to afford protection to New York real estate investors in the future. The sections regarding voting trusts provide inter alia that: (a) only certain persons are eligible to become voting trustees under a plan of reorganization of real estate unless others are approved by the court and the consent

\textsuperscript{87} New York, Real Property Law sec. 130-c.
\textsuperscript{88} Report of the Joint Legislative Committee to Investigate Bondholders’ Committees, etc., New York State Legislative Document (1936) No. 66.
\textsuperscript{89} See SEC Report on Protective and Reorganization Committees (1936) Part III.
\textsuperscript{90} Report, p. 7.
of holders of at least 51 per cent of the mortgage investments is obtained, or unless a plan of reorganization has been duly approved by the court; (b) the compensation of voting trustees shall be subject to court approval; and (c) unless approved by the court no voting trust agreement shall be valid for longer than five years and no voting trustees shall continue to act at the expiration of the term unless a new or extension agreement has been entered into and approved by 51 per cent of the stock. Although no reason or recommendation for fixing the term at five years was given in the Streit report, the reduction from the customary ten-year period seems advisable in view of the great fluctuation in real estate values and the adequate provision made in the new statute for extension agreements.

On the whole the history of voting trust legislation in New York state is a model which other states would do well to copy, argue as one will, pro and con, as to particular clauses that have been enacted into law. First came a general statute in 1901 settling the public policy of the state in favor of corporate voting trusts which complied with certain "requirements." Second, the period of permissible duration was extended from five to ten years. Third, the statute was made inapplicable to banking corporations, though by an amendment which, it must be admitted, sacrificed precision on the altar of brevity. And finally, specific limitations have been placed upon voting trusts in real estate reorganizations. Thus we find a state (and fortunately there already are others like New York) where voting trusts have been the subject of frequent litigation, but for thirty-five odd years bench and bar have not wrestled with the question of the validity per se of voting trusts. Amendments have been made to suit business convenience and to meet economic necessity, and statutes have been added to protect the rights of the investing public in ad hoc situations.

Capital red letters ought to be used for the statement that the legality (or illegality) of voting trusts is a legislative and not a judicial question. It is more a question for the legislature to

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91 This last clause seems to have been drafted in view of the decision of the Kittinger Case, (1934) 151 Misc. Rep. 350, 271 N. Y. S. 511.
92 The SEC report indicated that S. W. Straus & Co. used the full twenty-one year period allowed for its voting trusts in California and the ten-year period for its issues in New York, until, due to newspaper criticism, they came to provide for referenda as to termination at two-year intervals. Report, supra, note 89, pp. 203-4.
94 New York, Laws 1925 ch. 120.
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use judgment in protecting shareholders by surrounding their agreements with proper limitation rather than for courts to set them aside as against public policy." Thus the present legislative approval of voting trust agreements in twenty states is a substantial contribution to the law of corporations. It is greatly to be desired that the states without statutes will soon fall into line, ending the uncertainty as to the validity of voting trusts and prescribing regulations and standards for their orderly operation.

PROBLEMS IN CONFLICT OF LAWS

With such variety among the statutes and diversity among the decisions regarding voting trusts, it becomes important to know what law will govern the creation and administration of any specific trust. Shareholders of a Delaware corporation will not want to form a voting trust in Illinois if it can be declared invalid by the law of Illinois. Similarly Pennsylvania shareholders of an Idaho corporation will be anxious to know (or at least their counsel will!) whether to follow the provisions of the Pennsylvania or Idaho statute if a voting trust is to be created and administered in Philadelphia.

The first and perhaps the leading case on the question of the law governing the legality of voting trusts is In re O'Gara Coal Company, which involved a New York bankruptcy corporation doing business and having its principal office in Illinois. It was claimed that certain corporate action was not effective since the directors were elected by voting trustees under a voting trust which was invalid under the Illinois law. The federal circuit court of appeals for the seventh circuit flatly rejected the claim with these words,

"We find nothing, however, in the statutes of Illinois or the decisions of its courts that would deny to stockholders of a New York corporation the right to make valid voting trust agreements, and no statute or decision to show that Illinois excludes foreign corporations from doing business in the state on account of the corporation's compliance with the regulations of the chartering state, and we reject as untenable the claim that these votes were illegally cast."

This seems to be a holding that the law of the state of incorporation governs the validity of a voting trust of corporate shares no matter where the trust is formed. The holding is particularly strong since the business of the New York coal company

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\[9^2\] (C.C.A. 7th Cir. 1919) 260 Fed. 742.
\[9^3\] At p. 745.
was done in Illinois, the trust was executed and administered there, and the settlors-beneficiaries resided in Illinois.

There are a few other cases where this choice-of-law problem has been present where unfortunately it has gone unanswered. However, despite the lack of a positive holding, these cases all seem to lend support to what we may hope and expect to be the fixed rule in the near future, namely, that the law of the state of incorporation is the sole criterion of the validity of voting trusts. There are several reasons for such a rule. It will produce certainty, a result greatly to be desired in the law of conflict of laws. It prevents persons outside the state of incorporation from obtaining control of a corporation by a device which would be invalid within the state. On the other hand, it avoids invalidation of a voting trust which is valid in the state of incorporation, but which would be invalid where the shareholders reside and form the trust. As the O'Gara Case clearly points out, no paramount public policy of the forum condemns a voting trust which is valid in the state of incorporation. Furthermore, it is logical and natural that voting rights in shares of stock should be subject to the exclusive jurisdiction of the state of incorporation by whose ultimate authority they were granted.

Any number of additional arguments in favor of testing the validity of voting trusts by the law of the state of incorporation does not save us from a dilemma when a corporation is incorporated in two or more states. Consolidated railroad systems have often been incorporated contemporaneously in more than one state, and the stock issued by such a corporation is equally attributable to all the corporations simultaneously formed. If, for instance, the Northern Central Railroad System had been incorporated in both Virginia and North Carolina as well as

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88See also Bouree v. Trust Francais des Actions de la Franco-Wyoming Oil Co., (1924) 14 Del. Ch. 337, 127 Atl. 56, where a Delaware court sustained an arrangement similar to a voting trust, a device alien to French law, which had been set up in France in order to facilitate trade in and control of shares of a Delaware corporation.


Maryland and Pennsylvania\textsuperscript{102} and its stock placed in a voting trust, the legality of such a voting trust could not be determined by any of the existing rules. The choice of the law would have to depend upon a judicious balancing of various factors, with particular emphasis being given to the place of administration. In such a case a court would want to take into consideration the state where the principal office is, where the trust is or is intended to be executed and administered, the state or states where the trustees are domiciled and where the beneficiaries reside, where the voting is to be done, etc. Of course the law as to legality in the various states where incorporation had been taken out would be a most important factor, and as in other fields of the conflict of laws, the problem is likely to be resolved in favor of the law sustaining the voting trust.\textsuperscript{103}

Some writers argue that many factors should be taken into consideration in all choice of law questions, but there seems to be no reason or necessity for such elasticity in choosing the law to govern the validity of voting trusts, except as noted above in connection with corporations incorporated in several states. The attempt to bring more flexibility into the law regarding the problem of the law to govern inter vivos trusts has resulted only in confusion. Such confusion is perhaps justified in the case of inter vivos trusts because it represents the struggle to get away from the impractical continental maxim "mobilia sequuntur personam" imported by Mr. Justice Story about a century ago. However, no such flexibility of rule is necessary when it comes to the law applicable to voting trusts. The voting power of corporate stock emanates from rights granted by the state of incorporation and its law alone should govern. That state has granted the corporate "birth certificate" from which come the voting rights, and it alone (as between jurisdictions) is concerned with the manner in which the voting power is to be exercised. Our whole framework of state incorporation is based on such a conception, even though the parental interest which a state like Delaware has in the thousands of corporations "born" there may sometimes be exaggerated. Furthermore, the manner of exercising the voting power of stock is an internal affair of every corporation, and settlement of such affairs is almost always

\textsuperscript{102}See Northern Central Ry. Co. v. Fidelity Trust Co., (1927) 152 Md. 94, 136 Atl. 66.

\textsuperscript{103}See Creighton, Interstate and International Living Trusts, (1930) 50 Trust Companies 741, 742.
left to the state of incorporation. Even if another forum assumes jurisdiction of the controversy, the law of the state of incorporation is invariably applied.

Thus for reasons of simplicity, certainty and convenience and because the question of the voting rights of stock is an internal affair of every corporation, the validity of voting trusts should be governed by the law of the state of incorporation. What little authority there is on the subject gives emphasis to this view, as we have seen.

The writer believes that the same rule should apply in determining the law to govern the administration of a voting trust. No decisions squarely in point have been found but the case of Simms v. Garrett seems to be the key to the right answer. That case involved a voting trust of the stock of a Wyoming corporation. All the books, records and funds of the corporation were located in West Virginia, and a majority of the stock was owned by West Virginia citizens. In rejecting the contention that voting rights of the voting trustees were to be governed by the terms of the West Virginia statute, the court stated that if the statute were to be given such an effect, "we would be imposing the policy of West Virginia as to the operation of voting trusts upon a Wyoming corporation." The court inferred that the law of the state of incorporation was to govern the administration as well as the validity of voting trusts. Although there are alternatives, this appears to be the best rule, since administration of a voting trust, like the larger question of the exercise of voting power, is an internal affair of a corporation, and as such it should be subject to the law of the state of incorporation. It seems as reasonable and convenient that the appointment or removal of voting trustees, the filing of their accounts, and other administrative matters should be governed by the law of the state of incor-

103W. Va. 19, 22, 170 S. E. 423, 424 (italics ours).
104(1) The law of the state where the trust is to be administered, "the seat of the trust." Restatement, Conflicts, sec. 315; Goodrich, Conflict of Laws (1920) 360; or (2) the law of the state where the trust is to be administered except in so far as it is inconsistent with the express administrative provisions of a voting trust statute in the state of incorporation; or (3) the law of the state which has the most substantial connection with the trust. See note by Professor Cook, (1919) 19 Col. L. Rev. 486, 488.
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poration as that directorships and various corporate reports and acts should be governed by the same law. Any wrongdoing on the part of any persons connected with a voting trust can still be dealt with in the jurisdiction where it occurs.

It remains to be seen how far these rules may be changed by statute or by the parties to a particular agreement. If we follow the formal logic of Professor Beale, we allow intention to play no part in the law of conflict of laws governing contracts (and surely a voting trust is a contract), for otherwise we make a legislative body of any two persons who choose to act together and contract. However, there is an increasing body of authority in sympathy with the belief that "There are no insuperable barriers to allowing the parties to select any law having a substantial connection with the agreement, or, indeed, the law which will sustain it." The Ohio statute on voting trusts for instance provides that "shares issued by a foreign corporation may be made the subject of an agreement under this section." A similar provision was recently incorporated in the New York Personal Property Law relating to inter vivos trusts, permitting parties to choose their law, but again the writer can see no substantial reason for bringing about such flexibility in the conflict of laws rules for voting trusts. Shareholders' rights of all kinds are circumscribed by the constitution and statutes of the state of incorporation and by charters and by-laws stemming from that authority, and it is therefore not establishing new law to hold that the state of incorporation has the sole right to determine the legality and fix the administrative requirements of all voting trusts of the stock of its corporate children. It is building on a firm foundation.

DRAFTING THE AGREEMENT

The questions of the legality of voting trusts and the law applicable to them have never been the only battlegrounds for cases on this subject. Jurisdictional questions involving the right

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110(1933) 33 Col. L. Rev. 1251; Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, (D. Mass, 1928) 25 F. (2d) 493, 495 supports the "intention" theory by what has been termed an "ill-considered" dictum; and see Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, (1921) 30 Yale L. J. 655 et seq.
111Ohio, Code Ann. (Throckmorton 1936) sec. 8623-34.
112New York, Personal Property Law sec. 12a., as amended in 1933; and see Hutchison v. Ross, (1933) 262 N. Y. 381, 187 N. E. 65.
to attack the validity of voting trusts, tax controversies over the duties, powers, and liabilities of voting trustees, tax litigation concerning the ownership or transfer of voting trust certificates—these, and myriad other inevitable problems have found their way into the law reports in unending succession. It is not the purpose of this article to reconcile conflicts in the decisions nor to attempt to arrange them in an harmonious pattern. It is more important to find ways and means to forestall future litigation over voting trusts. As has already been pointed out, statutes are a great help toward this end, but regardless of statutes considerable insurance against litigation is gained by careful draftsmanship of voting trust agreements. To the end that voting trusts may be immune to attack, the writer recommends that the following precautions be taken in drafting and operating the usual voting trust agreement, regardless of statutes or decisions which may seem to make them unnecessary:

1. The agreement should state fully the purpose or purposes for which the voting trust is formed.


The expense of a voting trust may not be borne by the corporation unless all the shareholders participate in the trust: Sagalyn v. Meekins, Packard & Wheat, Inc., (1935) 290 Mass. 434, 195 N. E. 769.


These suggestions are also made lest this article suffer completely from a serious defect of many, in that they are written for judges, professors and students, with not enough thought of the practicing lawyers.
The agreement should be created for a fixed period not to exceed ten years. It is safer to leave out renewal provisions altogether, but if a renewal clause is inserted it should provide for withdrawal of dissenters at the end of the original period.

The agreement should recite a valuable consideration other than the mutual promises of the depositing shareholders.

The duties of the voting trustees should be set forth at length.

A duplicate copy of the agreement, together with a list of the parties thereto, should be filed in the registered office of the corporation, and it should be open to inspection by both shareholders and depositors or their attorneys.

Every other shareholder of the same class or classes covered by the agreement should be permitted to transfer his shares to the voting trustees upon the terms and conditions of the agreement.

Notice of the voting trust arrangement should be clearly marked on the certificates and the transfer books.

The trustees should have all voting rights of the stock except that such stock should not be voted by the trustees in favor of the sale, mortgage or pledge of all or substantially all of the assets of the corporation or for any change in the capital structure or the powers of the corporation or in connection with a merger, consolidation, reorganization, or dissolution, except with the written consent of the holders of voting trust certificates representing at least a majority of the stock subject at the time to the voting trust agreement.

Voting trustees should be selected from among the shareholders.

It is safer to provide that no voting trustee may be a director or officer of the corporation, or of any of its subsidiaries, although the writer admits that there are many situations where the directors and officers are the persons best qualified to act as voting trustees, and where they should be permitted to act as such.

See supra, p. 367.


Of course such limitations should not be imposed in the frequent instances where a voting trust is organized for the purpose of selling the assets of a corporation or effecting a merger, reorganization or dissolution. Unless otherwise permitted by the agreement, a trustee's vote has been held to be limited to carrying on the ordinary business of the corporation, and cannot be exercised to dissolve the corporation. Re Firstbrook Boxes, Ltd., [1936] Ont. Rep. 15, [1936] 1 Dom. L. Rep. 92.
(11) It should be provided that any profit realized by any voting trustee from any purchase and sale, or any sale and purchase, of any security of the corporation or any subsidiary thereof within any six months period is, subject to certain exceptions, recoverable by the corporation.\textsuperscript{120}

(12) Careful attention should be given to the insertion of provisions regarding the manner of voting by the trustees, the right to vote by proxy, the filling of vacancies among the trustees and the standard of care imposed upon the trustees.

There are other precautions which it may be wise to take in particular cases, but those listed above afford a large measure of protection for the shareholders who participate in the voting trust agreement, and should prove to be persuasive evidence of validity before any court where the agreement might be subjected to attack.

CONCLUSION

A survey of voting trusts through three-quarters of a century from 1864 to date leads to certain almost inevitable conclusions.

The legal arguments against voting trusts are without substance. The voting power and beneficial ownership of stock are not as inseparable as the Siamese Twins, as some would have them. The public policy argument behind the claim that they are inseparable was a smoke screen in the early days for a prevalent feeling that every combination was a conspiracy and in more recent years it has sometimes been a camouflage for paternalism in stock buying. It is impossible to bar public policy from the decisions of our courts, and yet it is not the judicial function under our Anglo-Saxon system of jurisprudence to determine public policy when broad sociological and economic considerations are involved. This is a legislative prerogative. If voting trusts are to be considered invalid, it is for the legislature to say so.

The fact that twenty legislatures have given voting trusts affirmative approval and none has declared them invalid is a persuasive record that public policy favors voting trusts. Such policy is strongly buttressed by the thousands of cases where voting trusts have proved of great benefit to all concerned. In some instances it is true that voting trusts have led to abuse, yes,\textsuperscript{120}This conforms to recent federal legislation, aimed at profiteering from inside information. See Securities Exchange Act of 1934, sec. 16(b). Such a provision was inserted in the United Telephone voting trust and helped to gain the approval of the SEC thereto. See In the matter of The United Telephone and Electric Company, (SEC 1938) Holding Company Act Release No. 1187, p. 8.
even "corporate kidnapping." Such abuse has been widely denounced, as it should be. This article is in no sense an apology for instances where unscrupulous bankers or executives have used the voting trust as a direct, or indirect vehicle for personal aggrandizement. However, cases of abuse are only a small fraction of the total.\footnote{See Cushing, Voting Trusts (rev. ed. 1927) 21; Professor Dewing has minimized the abuse of voting trusts and met the criticism that he had failed to emphasize the "dangers of abuse" of voting trusts in one of his books by stating that "Everything in this world of ours is subject to the dangers of abuse, from man's procreative powers to gooseberry tarts at Thanksgiving." Dewing, Financial Policy of Corporations (3d ed. 1934) 396-7. One text-writer has gone so far as to say that in his experience, "... he has never known of a voting trust that was not wisely administered or whose existence was inimical to the best interests of the corporation and of its stockholders." 19 Fletcher, Corporations, (Perm. ed. 1933) sec. 8986. Abuse is also minimized in Ballantine, Manual of Corporation Law and Practice (1930) 587-8 and Berle and Means, The Modern Corporation and Private Property (1932) 78.\footnote{See New York, Real Prop. Law sec. 130-c., supra, note 87; earlier the New York legislature banned voting trusts in banking corporations, supra, note 66. Congress may someday place restrictions on voting trusts like that set up by the Pennroad Corporation on the ground they constitute evasions of the Transportation Act. (The Pennroad Corporation Voting Trust Agreement expired in May 1939, after a stormy life of ten years). See Form 16-K, required by the SEC to be filed annually by voting trustees of registered issues, setting forth facts as to the trust and the interest of the trustees in the corporation. Such forms may be required in the future by state securities commissions as a protection for investors.\footnote{In the matter of the United Telephone and Electric Company, (SEC 1938) Holding Company Act Release No. 1187. It is interesting to note that the SEC "seems impressed by the need for creditor control under certain circumstances and appears to be ready to sanction the voting trust device as a permissible means of exercising that control." Meck and Cary, Regulation of Corporate Finance and Management under the Public Utility Holding Company Act of 1935. (1938) 52 Harv. L. Rev. 216, 229.}}

It is important not to plow up the whole field in order to eliminate a few weeds. The weeds of abuse in the field of voting trusts can be killed by the salt of corrective legislation.\footnote{It is true that there were some new provisions in that voting trust giving added protection to the shareholders, but such approval by the body whose chairman had been to approve the reorganization would not have been given if the abuses were not corrected.}

Because trusts of all kinds are coming up for investigation in these years of depression, and because of the attacks of Mr. Justice Douglas and others upon voting trusts, there is some fear that the legislative trend in favor of voting trusts will be retarded and that the courts will again take a hostile attitude toward them. The writer was much encouraged by the action of the Securities and Exchange Commission in approving a plan of reorganization of the United Telephone and Electric Company which included a voting trust.\footnote{It is true that there were some new provisions in that voting trust giving added protection to the shareholders, but such approval by the body whose chairman had been to approve the reorganization would not have been given if the abuses were not corrected.}
branded the device as "corporate kidnapping" a short time before is a very significant step in the right direction. Moreover, one of the predominant reasons for approving the trust was the economic necessity of the situation—continuity of control was imperative in order to obtain a satisfactory executive to head the company.\textsuperscript{124}

An attitude antagonistic to voting trusts fails to consider legitimate economic necessity and commercial expediency and overlooks the actualities of countless situations. These elements, present in nine out of ten voting trust situations, are sufficient justification for the general acceptance of voting trusts. No longer should each voting trust be forced to justify itself.\textsuperscript{125} The legality of all voting trusts, except those expressly forbidden by statute, should be assumed. It is as superfluous to state that voting trusts are valid if for proper purposes as it is to say the same about an ordinary contract. Illegality ought only to be decreed if there has been a fraudulent, improper or monopolistic design in the execution of a voting trust. Of course, relief should be swiftly granted if there has been misconduct on the part of the voting trustees or the shareholders participating in the trust.

The usual voting trust insures stability of policy and continuity of management, provides protection for shareholders, corporation and creditors alike, and fixes responsibility in a small, select group of fiduciaries during a difficult or dangerous period in a corporation’s history. Since the eventual outcome is normally beneficial to all concerned, we may urge with Lord Bowen that "law should follow business." Business and bar have used voting trusts widely and well for over fifty years and it is high time that all courts and legislatures approve them in principle. Adequate sanctions exist or may be invented for the relatively few cases where "corporate kidnapping" exists in practice.


\textsuperscript{125}For the most severe rules requiring a justification for each voting trust, see Marion Smith, Limitations on the Validity of Voting Trusts, (1922) 22 Col. L. R. 627.