Cumulative Voting at Elections of Directors of Corporations

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CUMULATIVE VOTING AT ELECTIONS OF DIRECTORS OF CORPORATIONS

By Harlowe E. Bowest† andLedlie A. De Bow*
and the Territory of Alaska\textsuperscript{7} and congressional legislation applicable to national banking associations.\textsuperscript{8} Within the "permissive" classification fall enactments of fifteen states\textsuperscript{9} and Puerto Rico.\textsuperscript{10} The North Carolina cumulative voting statute appears to straddle the classifications just enumerated.\textsuperscript{11} Apparently none of the remaining states has a statute expressly relating to cumulative voting, although in two instances there is some indication that, as a matter of practice, corporations may make provision for the exercise of the privilege.\textsuperscript{12}

\begin{itemize}
\item[7] Comp. Laws of 1933, Title 2, ch. XI, art. II, secs. 911 and 934.
\item[11] Under section 1173 of Michie's 1931 Code cumulative voting is permitted only when there is a grant of that privilege in the corporation's charter except, as and unless the stock records of the corporation show that 25 per cent or more of the stock entitled to vote is owned or controlled by one person in which event the right of any stockholder to cumulate his votes apparently becomes absolute upon compliance with certain formalities, irrespective of any charter provision.
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In requiring or making it possible that stockholders be accorded the privilege of voting cumulatively, the design of legislators undoubtedly has been to afford minority interests the opportunity to secure representation on the board of directors\(^\text{18}\) and thus, as one court has observed, enable the minority interests to "obtain direct contact with the business of the corporation, and its management, and observe the conduct of the corporate officers whom the directors may employ."\(^\text{14}\) As another court has aptly pointed out, however, "the scheme does not pretend to assure to a minority a representation in any event."\(^\text{15}\) The enjoyment of the right is a thing incident to each share of stock, but the effectiveness of its exercise depends, as later illustrated, upon several factors such as the number of shares voted cumulatively in the same way, the method of distributing the votes and the number of directors to be elected.

The typical cumulative voting provision permits each shareholder "to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit. . . ."\(^\text{16}\) The choice or option afforded by this type of statute to the holder of a single share was rather aptly illustrated by the Pennsylvania court which, after calculating that at an election of six directors a single share would be entitled to an aggregate of six votes, went on to point out that the holder of that share "may cast those six votes for a single one of the candidates, or he may distribute them to two or more of such candidates as he may think proper. He may cast two ballots for each of three of the proposed directors, three for two, or two for one and one each for four others, or finally, he may cast one vote for each of the six candidates."\(^\text{17}\)


\(^{14}\)State ex rel. Price v. Du Brul, (1919) 100 Ohio St. 272, 126 N. E. 87.

\(^{15}\)Maddock v. Vordelone Corporation, (1929) 17 Del. Ch. 39, 147 Atl. 255.


\(^{17}\)Pierce v. Commonwealth, (1883) 104 Pa. St. 150; see also Schmidt
Instances are not lacking in which the courts have been called upon to decide the validity under the Constitution of the United States of attempted applications of state constitutional or statutory provisions for cumulative voting to the affairs of corporations chartered prior to adoption of such provisions. The problem seems to revolve somewhat about the doctrine of the historic case of Trustees of Dartmouth College v. Woodward, which established that a charter from a state to a corporation constituted a contract within the meaning of that clause of the Constitution of the United States which prohibits passage by a state of any law impairing the obligation of contract, and to depend for its solution, in part at least, upon the existence or non-existence of a so-called "reserved powers" clause which certain passages from Mr. Justice Story's concurring opinion in that case inspired many states to incorporate in their constitutions or statutes in order to avoid the limiting effect of the decision upon their powers. The fact that a corporate charter was granted subject to reservation on the part of a state of power to alter, amend or repeal the same has been held to render cumulative voting legislation passed subsequent to the grant validly applicable to the affairs of the corporation under the constitution of the United States. On the other hand, if the power to alter, amend or repeal corporate charters or powers be not reserved by the state at the time a charter is granted to a corporation, it would seem that the constitution of the United States renders invalid any attempt to apply cumulative voting legislation enacted subsequent to such grant to the affairs of the corporation.


18(1819) 4 Wheat. (U.S.) 518, 4 L. Ed. 629.

19Art. I, sec. 10, cl. 1.

20"In my judgment, it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant...."


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where power to alter, amend or repeal corporate charters apparently was not reserved until passage in 1933 of the Business Corporations Act, which also made provision for cumulative voting, the problem of constitutional validity may become important.

It appears to be the rule that express statutory authorization therefor is a necessary prerequisite to the existence of the cumulative voting privilege. In states where statutes pertaining to the privilege are of the "permissive" type absolute adherence to the statutorily defined method of creating the privilege seems to be essential. For instance, a by-law designed to authorize cumulative voting was held to be ineffective because an applicable statute contemplated that the privilege be created, if at all, by appropriate provision in the corporation's charter and it appears that a general agreement between stockholders likewise might be ineffective in the ordinary situation. Where, however, stockholders by unanimous vote have taken the action required of them by the enabling statute in order to make provision in the charter for cumulative voting, but the provision has not become effective because of the failure of corporate officers to file a certificate or take other action contemplated by the statute in order to effectuate the action of stockholders, an agreement or contract between stockholders may be implied from the unanimous vote which will permit exercise of the cumulative voting privilege.

One gathers that the cumulative voting privilege, when once accorded, cannot be taken away except by authority equal in grade to that by which the privilege was conferred. Consistently with

24Laws 1933, ch. 300, sec. 60.
25Possibly the absence of reserved power to alter, amend or repeal corporate charters moved the draftsmen of the Minnesota Business Corporation Act (Laws 1933, ch. 300) to make it applicable in terms to corporations chartered prior to its passage by "consent" of such corporations (see sec. 61). The extent to which courts might uphold this "consent" theory involves a number of interesting questions exploration of which will not be attempted in this article.
26State ex rel. Baumgardner v. Stockley, (1887) 45 Ohio St. 304, 13 N. E. 279; In re Brophy, (1935) 13 N. J. Misc. 462, 179 Atl. 128; see Matter of American Fibre Chair Seat Corp., (1934) 265 N. Y. 416, 193 N. E. 253. In the light of these authorities some question may be raised concerning the practice apparently followed in Maine and Utah of making provision for cumulative voting without express statutory authority (see supra, footnote 12 and text).
this view it has been held that stockholders cannot be deprived of the right to cumulate their votes granted them by constitutional or statutory provision through enactment of a by-law\textsuperscript{31} or by resolution passed by a majority vote of shares\textsuperscript{32} or by action on the part of the majority adjourning the meeting\textsuperscript{33} or as a result of arbitrary action on the part of the chairman of the meeting.\textsuperscript{34} Equally consistent with the aforesaid rule is the Delaware decision that under the law of that state, which permits corporate charters to contain cumulative voting provisions, such a provision may be repealed through amendment of the charter in accordance with statutorily defined procedure, notwithstanding the objection of minority interests.\textsuperscript{85}

Failure to utilize the right to cumulate votes for directors over a long period of time does not amount to a waiver, or result in loss, of the privilege.\textsuperscript{86} Nor is the right forfeited by failure on the part of the stockholder to give notice of his intention to cumulate in advance of the balloting,\textsuperscript{87} in the absence of statutes providing to the contrary.\textsuperscript{88}

The motive controlling the stockholder’s decision to cumulate his votes is apparently not a subject of inquiry, one court stating

\textsuperscript{31}People ex rel. Snapp v. Younger, (1925) 238 Ill. App. 502; see Tomlin v. The Farmers & Merchants Bank, (1893) 52 Mo. App. 430.

\textsuperscript{32}Wright v. Central California Water Co., (1885) 67 Cal. 532, 8 Pac. 70; Alliance Co-Operative Insurance Co. v. Gasche, (1914) 93 Kan. 147, 142 Pac. 882; Tomlin v. The Farmers & Merchants Bank, (1893) 52 Mo. App. 430; Commonwealth ex rel. Oler v. Gutman, (1927) 10 Pa. Dist. & Co. 606. In the Tomlin Case the court observed that the cumulative voting right “is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder,” and accordingly “cannot be taken from him by a resolution or by-law adopted by a majority of shareholders.”

\textsuperscript{33}West Side Hospital v. Steele, (1906) 124 Ill. App. 535.

\textsuperscript{34}State ex rel. Price v. Du Brul, (1919) 100 Ohio St. 272, 126 N. E. 87; Chicago Macaroni Manufacturing Co. v. Boggiano, (1903) 202 Ill. 312, 67 N. E. 17.

\textsuperscript{35}Maddock v. Vorclone Corporation, (1929) 17 Del. Ch. 39, 147 Atl. 255.

\textsuperscript{36}Matter of Jamaica Consumers Ice Company, (1920) 190 App. Div. 739, 180 N. Y. S. 384, affirmed without opinion (1920) 229 N. Y. 516, 129 N. E. 897; Commonwealth ex rel. MacCallum v. Acker, (1932) 308 Pa. St. 29, 162 Atl. 159. In the case last cited the court stated: “That the members of this fund did not attempt to exercise this right in the past does not preclude their exercise at this or any time they desire to do so. The right exists and no basis for an estoppel is shown.”

\textsuperscript{37}Pierce v. Commonwealth, (1883) 104 Pa. St. 150, the court stating that “we do not see who has the right . . . to compel the voter to say in advance whether he will or will not use that privilege.” Commonwealth ex rel, Hanahan v. Smith, (1910) 19 Pa. Dist. 638.

\textsuperscript{38}Advance warning or notice of intention to cumulate votes is required by the laws of at least three states: Minnesota, Laws 1933, ch. 300, sec. 25; North Carolina, Michie’s 1931 Code, sec. 1173; Ohio, Gen. Code 1931, sec. 8623-50.
that "it would be a dangerous and far-reaching precedent to permit an inquiry into the motive which is alleged to control or influence the shareholder in making his choice of a directory." It has also been held immaterial that the privilege of cumulating votes was exercised as a result of influence brought to bear by others. Where a ballot appears to evidence an intention to vote non-cumulatively, the stockholder will not be allowed to prove that he intended to vote cumulatively.

Whether or not exercise of the privilege of cumulating votes is properly within the limits of the authority of a shareholder's proxy is a question which does not appear to have been raised very often. The provisions of the Illinois Constitution and statutes pertaining to cumulative voting seem to have been interpreted to authorize in terms the exercise of the privilege by proxy and provisions effective in certain other states seem open to the same interpretation. Even though applicable cumulative voting statutes do not in terms authorize exercise of the privilege by proxy, it is difficult to find any substantial basis for an objection to the practice. It is true, of course, that the grant of authority by the stockholder to his proxy ought to be broad enough to convey the privilege, but language now commonly employed by draftsmen authorizing the proxy to vote for the election of directors "with all the powers the undersigned would possess if personally present at said meeting" seems adequate in this connection.

In the very nature of things the cumulative voting system requires that more than one vacancy exist on the board of directors.

41 Commonwealth ex rel. James v. Blatchford, (1876) 21 Pa. Dist. 453. The doctrine of this case should be distinguished from the rule which permits shareholders to correct their ballots while the polls are still open (see infra, footnote 65 and text).
44 See Forsyth v. Brown, (Pa. 1893) 33 W. N. 72, wherein the court without discussing the point seems to have validated votes cast on a cumulative basis by proxies who were authorized by stockholders, respectively, to vote on their behalf "at any election of directors ... as fully as I might or could were I personally present."
and that but one ballot be held for the purpose of filling all vacancies. Otherwise, as the California court has pointed out,

"If but one director at a time be balloted for, a majority of the stockholders could, by combining, cumulate their votes each time upon a single candidate and elect him; and by thus shaping and controlling the manner of the election, it would be in the power of the majority of the stockholders to virtually cancel the votes of the minority and deprive them of their rights to representation on the board of directors."\(^4\)

In view of this situation it is obvious that a director's election depends not upon obtaining a number of votes equal to a majority of the number of shares voted but upon obtaining a plurality of all votes cast,\(^4\) since it is mathematically possible for more candidates than there are vacancies to receive, respectively, votes aggregating a number which is the same as or greater than the number representing a majority of the shares voted.\(^7\)

It is possible that strict application of the just discussed plurality rule to determine the results of elections of directors at which votes were cast cumulatively may be in derogation of statutes of the type applicable to the affairs of national banking associations\(^4\)

\(^4\)Wright v. Central California Water Co., (1885) 67 Cal. 532, 7 Pac. 70.
\(^5\)In Bridgers v. Staton, (1909) 150 N. C. 216, 63 S. E. 892, while passing upon the propriety of a demand for cumulative voting upon the question of adjourning a stockholders' meeting, the court pointed out:

"... It was impossible for him to vote cumulative upon a single proposition. It is only when several persons are voted for at the same time that the voter can 'cumulate' his votes."

The logical necessity for one ballot upon more than one question in order that cumulative voting be possible was met in an interesting fashion by the draftsmen of the Michigan statute authorizing cumulative voting upon the question of removal of directors (Public Acts, 1931, Act. No. 327, sec. 13) cited supra (footnote 4). Apparently the statute contemplates cumulation through multiplication of a number equal to shares held by a number equal to directors (including the impeached) elected for the same term as the impeached. If votes sufficient to elect a director at an election of a full board are recorded against the removal, the impeached incumbent may not be removed. Once shares have been cumulatively voted in this fashion they cannot be voted on the question of removing any other director elected for said term.

\(^6\)Schwartz v. State ex rel. Schwartz, (1900) 61 Ohio St. 497, 56 N. E. 201.

In South Dakota, where cumulative voting is provided for by a constitutional provision of the "mandatory" type (constitution, art. XVII, sec. 5), a statute provides that "a vote of stockholders representing a majority of the subscribed capital stock ... is necessary to a choice" (Rev. Code of 1919, sec. 8787).

\(^7\)For instance, in an election of five directors by shareholders of a corporation having 100 shares outstanding and entitled to vote where the voting is on the cumulative plan, it is theoretically possible that out of the total of 500 votes which may be cast nine candidates will each receive 51 votes or, in other words, a number equal to the number constituting a majority of 100 shares.

which require that a certain number or proportion of the directors elected possess residential qualifications.

Apparently the only case involving such a situation is a Kansas decision\(^4\) which is not particularly illuminating for present purposes. The case came before the court on a writ of quo warranto secured to test the right of three Kansas residents to hold office as directors of a Kansas corporation. The opinion indicates that at a meeting of the stockholders held prior to the commencement of legal proceedings a ballot was taken for the election of a board of eleven directors after the chairman of the meeting had called to the attention of assembled stockholders two separate provisions of Kansas law, one of which accorded the privilege of cumulative voting, and the other of which required that at least three directors be citizens or residents of the state. Two opposing factions voted cumulatively, one faction concentrating the distribution of its votes among six non-resident candidates, and the other among five non-resident candidates, although each faction cast a few scattered votes for residents. When the vote was tabulated it was found that three Kansas residents had received 16, 6 and 8 votes, respectively, and that eleven non-resident candidates had polled votes varying in number from 78,493 to 103,850. The chairman of the meeting declared the three resident candidates and the eight non-resident candidates receiving the highest number of votes to have been duly elected. The quo warranto proceeding was thereafter instituted by the three non-resident candidates who had each received more votes than the residents who were declared elected.

The actual decision of the court appears to have been that it would not exercise discretionary power to remove the residents from office in accordance with the only request for relief made by plaintiffs. There is reason to believe that the court, in so ruling on the only request for relief before it, did not wish to inspire any inference that it approved the methods followed in electing directors and declaring the results of the poll, for it was carefully pointed out that had the court been requested to set aside the election "it is the opinion of the writer that the conduct of the election by both parties was such as to defeat its validity." Unfortunately, however, the court omitted indication of any method for avoiding in all cases potential conflicts between the plurality rule incident to cumulative voting and statutes defining residential requirements applicable to a part but not all of the membership of a

\(^4\)Horton v. Wilder, (1892) 48 Kan. 222, 29 Pac. 566.
board of directors. It repeated an obviously accurate observation that "the advantage of cumulative voting will be greatly restricted by the election of two classes of directors, resident and non-resident"; stated that cumulative voting statutes and those defining residential requirements for directors "must be construed together, and effect given to both"; pointed out that there would be no difficulty in this connection "except where non-resident directors are to be chosen"; and voiced the opinion that "where both resident and non-resident directors are to be voted for, that method of cumulative voting must be employed by which at least three residents and citizens shall be elected."

Notwithstanding the inconclusive language of the opinion just summarized, one regards it as some indication that statutes defining residential requirements for directors are controlling, and properly should require a modified application of the plurality rule incident to cumulative voting in all cases of conflict. It seems likely that the number of such conflicts will be small, because they arise only in those instances where votes are cast preponderantly for non-residents, and can be avoided by majority interests which judiciously apportion votes between residents and non-residents.

The principles applied by the chairman of the meeting to determine the result of the election litigated in the Kansas case appear to be reasonable, notwithstanding the failure of the court to approve them, for they simply contemplate that residentially qualified candidates will first be declared elected to fill so many of the vacancies as the law requires to be filled by persons so qualified, in order of plurality over other similarly qualified candidates, and that then other candidates will be declared elected to the extent of the remaining vacancies in order of plurality, irrespective of residence. In the event that there are fewer residentially qualified candidates receiving votes than there are vacancies which the law requires to be filled by persons so qualified, it seems proper, as well as consistent with the "second ballot" rule discussed in the succeeding paragraph, that any residentially qualified candidates receiving votes be declared elected, and another ballot or other ballots be taken to fill all remaining vacancies. On the second and succeeding ballots the plurality rule should be applied exclusively between residentially qualified candidates only to the extent that vacancies remain to be filled by persons so qualified. The existence and potential applicability of these principles might furnish every incentive to voting factions to distribute their votes judiciously
among resident as well as non-resident candidates in the first instance, in order to eliminate any necessity for a second ballot on which their ability to elect candidates might be impaired as a result of a reduction in the number of vacancies to be filled on that ballot.

As might be expected, cumulation of votes and distribution thereof among a number of candidates greater than the total which the aggregate of cumulated votes can elect over any and all opposition has sometimes resulted in a tie vote between candidates numbering more than the total of the vacancies available. In such situations the proper procedure is to take another ballot or other ballots to fill only those vacancies affected by the tie. The privilege of voting cumulatively is not exhausted by the first ballot, but may be exercised on succeeding ballots.

Should a meeting of stockholders be concluded before all directorate vacancies have been filled as a result of an election which was part of the business of the meeting, a variety of results may follow. In the comparatively rare instance where no vacancies are filled because opposing factions control the same number of votes, with the consequence that no candidate receives a plurality, the old board holds over. Where balloting results in the election of part but not a quorum of the board of directors before conclusion of the meeting, the old board holds over also. Where, however, vacancies are filled to a number equaling a quorum, the old board is displaced, even though unfilled vacancies exist at the time the meeting concludes.

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61 State ex rel. Price v. Du Brul, (1919) 100 Ohio St, 272, 126 N. E. 87, where the court said it had "no hesitancy in holding that the language and purpose of the statute is to permit the privilege of cumulative voting to all of the shareholders, not only on the first, but on successive ballots, where directors are to be elected." See also Forsyth v. Brown, (Pa. 1893) 33 W. N. 72.
62 Western Cottage Piano & Organ Co. v. Burrows, (1908) 144 Ill. App. 350. There seems to be no reason why this rule should not be applicable to all elections of directors, whether or not the voting is on the cumulative plan.
63 See State ex rel. Price v. Du Brul, (1919) 100 Ohio St, 272, 126 N. E. 87, where it was said that if "the second ballot taken at the annual election . . . is invalid, it is manifest that the two persons receiving the majority on the first ballot cannot be inducted into office, and that the old board would remain until their successors are legally chosen." Here again the rule is one properly applicable to all elections whether or not the voting is on the cumulative plan. See Matter of Union Insurance Company, (1840) 22 Wend. (N.Y.) 591, where it was said that if "less than twelve, the major part of twenty-three," had received a plurality of votes, it may be that the whole election would have been void." Cf. Gilchrist v. Collopy, (1904) 119 Ky. 110, 26 Ky. L. Rep. 1003, 82 S. W. 1018.
64 Wright v. Commonwealth, (1885) 109 Pa. St. 560, 1 Atl. 794; For-
One need look no further than the reported cases for illustrations of situations in which a misunderstanding or disregard of the legal rules applicable to, and mathematical principles underlying, cumulative voting may lead to results not contemplated by the framers of legislation granting or providing for the privilege.

It is perfectly possible, for instance, that an unwary majority stock interest may lose control of the board to a cumulatively voting minority stock interest. At least three judicial decisions are evidence of one method by which a minority achieved this result. In Pierce v. Commonwealth,\(^5\) it appeared that at an election of a board of six directors an aggregate of 6,433 shares out of a total of 7,000 were voted by two opposing factions as indicated below:

<table>
<thead>
<tr>
<th>Stockholders</th>
<th>Total Shares</th>
<th>Total Votes</th>
<th>Distribution of Votes by Candidates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Majority Group</td>
<td>3,396</td>
<td>3,396</td>
<td>3,396</td>
</tr>
<tr>
<td>Minority Group</td>
<td>3,037</td>
<td>18,222</td>
<td>3,396</td>
</tr>
<tr>
<td>Totals........</td>
<td>6,433</td>
<td>38,598</td>
<td>3,396</td>
</tr>
</tbody>
</table>

Candidates G, H, I and J were declared elected and, in view of the fact that they constituted a quorum, the old board was probably displaced.\(^6\) An Illinois decision\(^7\) indicates that a majority interest lost control of a board of three directors in similar fashion, though it controlled 511 out of the 999 shares represented at the meeting. The following is a tabulation of the vote as the facts indicate it probably was cast:

<table>
<thead>
<tr>
<th>Stockholders</th>
<th>Total Shares</th>
<th>Total Votes</th>
<th>Distribution of Votes by Candidates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Majority Group</td>
<td>511</td>
<td>1533</td>
<td>511</td>
</tr>
<tr>
<td>Minority Group</td>
<td>488</td>
<td>1464</td>
<td></td>
</tr>
<tr>
<td>Totals........</td>
<td>999</td>
<td>2997</td>
<td>511</td>
</tr>
</tbody>
</table>

Candidate C, minority stock owner, and his nominee, candidate


\(^7\)See supra, footnote 54 and text.

\(^8\)Chicago Macaroni Manufacturing Company v. Boggiano, (1903) 202 Ill. 312, 67 N. E. 17.
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D, were declared elected. The Ohio decision of Schwartz v. State ex rel. Schwartz involved a situation and result analogous to the two just reviewed. It is apparent that in each of these situations the majority erred in that it voted its stock non-cumulatively, against cumulatively voting minority interests. In each instance the majority, by cumulating and properly distributing its votes, could have secured control of the board of directors. The requirement of certain statutes that stockholders give advance notice or warning of their intention to vote cumulatively probably was inspired by a desire to avoid the inequitable result illustrated by these cases.

Another method by which a majority interest might conceivably lose control is by permitting minority interests to "creep" on successive ballots. A fact situation involved in an Ohio case furnishes an indication of this possibility, but is not precisely illustrative because the opposing factions happened to be of equal strength, and because one faction withdrew from the meeting after the first ballot. For purposes of illustration, however, let it be assumed that all of the 100 shares of a corporation outstanding and entitled to vote are represented at a meeting called for the purpose of electing five directors and that opposing factions hold 60 and 40 shares, respectively. On the first ballot, if the majority divides its 300 votes evenly among more than three candidates (enough to constitute a majority of the board) the minority by dividing its 200 votes evenly between two other candidates can elect them. On the second ballot, required as a result of the tie of four or more majority interest candidates for three vacancies, the minority interest can elect one additional candidate over any and all opposition by casting for him the 120 votes to which it is entitled on a cumulative basis.

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58(1900) 61 Ohio St. 497, 56 N. E. 201.
59See supra, footnote 38 and text.
60One of the notes of the Drafting Committee, incorporated in a reprint of the Minnesota Business Corporation Act published under the auspices of the Minnesota State Bar Association, contains the following statement with reference to the requirement of said Act that notice be given of an intention to vote cumulatively:

"... But cumulative voting, unless it is known to the shareholders that it will actually be followed, may lead to minority control if the minority is organized and votes cumulatively, and the majority is not so organized and does not know that the minority proposes to cumulate its votes... By the provisions here recommended all shareholders present at the meeting will know that cumulative voting is to be followed by at least some of the shareholders, and can protect themselves accordingly."
61State ex rel. Price v. Du Brul, (1919) 100 Ohio St. 272, 126 N. E. 87.
62See supra, footnote 50 and text.
63See supra, footnote 51 and text.
It is likewise possible that an unwary minority interest may lose a part of the representation on the board of directors which its votes could elect if cumulated and distributed properly. A California case involved a fact situation which illustrates this possibility. At an election of five directors, shareholders owning 100 shares in the aggregate distributed votes among themselves as indicated below:

<table>
<thead>
<tr>
<th>Stockholders</th>
<th>Total Shares</th>
<th>Total Votes</th>
<th>Distribution of Votes by Candidates</th>
</tr>
</thead>
</table>
| B.D.C.       | 44           | 220         | B.D. 73  
|              |              |             | C. 73  
|              |              |             | L. 73  
| G.G.G.       | 25           | 125         | G.G.G. 41  
|              |              |             | G. 41  
|              |              |             | G. 41  
| J.E.A.       | 4            | 20          | J.E. 4  
|              |              |             | A. 4  
| L.C.         | 1            | 5           | L. 1  
|              |              |             | C. 1  
| J.W.         | 1            | 5           | J. 1  
|              |              |             | W. 1  
| Totals       | 100          | 500         | 80  

It will be noted that B.D.C., the largest single stockholder, with a 44 per cent minority interest, failed of election solely because he distributed the votes, which he had cumulated, among candidates numbering one more than such votes would elect over any and all opposition.

Naturally enough, a majority interest faction which finds that it has been or is likely to be out-maneuvered by minority interests through failure to cumulate and distribute votes properly is likely to seek some method of correcting the situation. One of the simplest expedients which might occur to a stockholder under such circumstances is that of correcting his ballot. So long as the polls remain open, there appears to be no legal objection to this action. The rule appears to be otherwise, however, where the polls have been closed. Conceivably, also, the majority interest faction might attempt to hold the election over again. Two cases have been found which involve situations where the latter tactical approach was employed while the meeting was still in session, and which apparently hold that such strategy is legally permissible.

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65 Zierath Combination Drill Co. v. Croake, (1913) 21 Cal. App. 222, 131 Pac. 335, where the court said that "before the final vote was cast, and before any canvass or result of election was announced, it was proper to permit the correction of the ballots that they might express the true intention of the stockholders." State ex rel. Lawrence v. McGann, (1895) 64 Mo. App. 225.
If it be established doctrine that a majority can vacate an election and hold it over again, the rule is probably subject to the qualification that the second ballot be for the same number of directors. Otherwise, by repealing the results of the earlier ballot only to the extent that minority candidates were successful, a majority could prevent minority representation.\textsuperscript{8}

Reconciliation of a rule which permits stockholders by a vote of a majority to set aside the results of a vote for directors and hold the election over again with other legal principles applicable to the election and incumbency of directors involves a number of interesting speculations: first, is the rule one which can be invoked for the sole purpose of correcting situations in which the majority by failure to cumulate and distribute votes properly has failed to secure the directorate representation to which it is entitled and, if so, are there limits on the time within which the majority can exercise the privilege accorded by the rule; second, is the rule based upon the proposition that the closing of the polls and announcement of the result of the ballot are not determinative of a director's election and, if so, when can it be said, conclusively, that a director has been elected; and third, is it possible that the rule permits stockholders who have just elected directors to reverse their action immediately by removing such directors from office without cause?

Unfortunately the cases which seem to establish the rule answer none of the questions just posed. One might be inclined to justify such a rule as an exceptional doctrine designed solely to permit a majority to procure the representation to which it is lawfully entitled, if it were not for the fact that the rule would be a standing invitation to majority interest factions to devote one ballot to an attempt to elect more directors than their votes entitle them to without risking loss of proportionate representation in case the attempt fails. Though there exists some authority indicating that stockholders may reverse action previously taken by them\textsuperscript{9} there are decisions indicating with some clarity that in the

\textsuperscript{8}See Commonwealth ex rel. Oler v. Gutman, (1927) 10 Pa. Dist. & Co. 606, where the court said that majority stockholders "cannot be permitted to defeat the right of the minority to representation on the board by arbitrarily declaring three vacancies to have existed when there were no vacancies, and by again cumulating their votes elect an entire board of their choosing and defeat the right of minority stockholders to be represented on the board."

\textsuperscript{9}Terry v. Eagle Lock Company, (1879) 47 Conn. 141, holding that at
case of elections of directors at which the voting is on the cumulative plan the close of the polls and tabulation of the result of the ballot is the determinant of a director's election.\(^7\) Of course, if the result of cases holding that a majority of stockholders can effectively act to hold an election of directors over again is to be explained on the ground that the courts in those cases simply upheld the right of stockholders to remove just elected directors from office, the value of these cases as precedents ought to be considered in the light of principles pertaining generally to the removal of directors, a subject next discussed.

In at least four states statutes which permit stockholders to remove directors are expressly qualified so as to prevent use of removal proceedings by a majority interest faction for the purpose of eliminating minority representation on the board of directors.\(^7\)

a subsequent meeting stockholders may repeal authorization for a stock increase; Cumberland Coal & Iron Co. v. Sherman, (1863) 20 Md. 117, where the court indicated that stockholders still in session had power to repeal confirmation of a contract to which the corporation was a party; see note, 13 A. L. R. 131.

\(^7\)State ex rel. Price v. Du Brul, (1919) 100 Ohio St. 272, 126 N. E. 87; Forsyth v. Brown, (Pa. 1893) 33 W. N. 72; Wright v. Commonwealth, (1885) 109 Pa. St. 560, 1 Atl. 794. The cases just cited are the genesis of the "second ballot" rule (see supra, footnotes 50 and 51 and text). From a logical standpoint it seems necessary to premise said rule on the proposition that the close of the polls and tabulation of the results of the ballot determine whether or not a candidate has been elected.

Conceivably, if conclusion of the stockholders' meeting without reversal of action taken thereat is the determinant of a director's election, the election of a new board might be postponed indefinitely by adjourning the meeting pro tempore from time to time, since subsequent sessions after such an adjournment are merely continuations of the original meeting (see Shaw v. Tati Concessions, Ltd., [1913] 1 Ch. 292, 82 L. J. Ch. 159; McLaren v. Thomson, [1917] 2 Ch. 261, 117 L. T. 417). In West Side Hospital v. Steel, (1906) 124 Ill. App. 535, it was held that a majority stock interest could not adjourn the annual meeting of stockholders pro tempore before the scheduled election of directors took place in order that retiring directors could elect officers for the coming year in the interim before the date of the adjourned session. The basis of the decision was that adjournment operated to deprive stockholders of the opportunity to exercise effectively the cumulative voting privilege.

\(^7\)Minnesota, Laws 1933, ch. 300, sec. 28; California, Civil Code, sec. 310; Michigan, Public Acts 1931, Act No. 327, sec. 13; Pennsylvania, Laws 1933, Act No. 106, sec. 405. The Minnesota statute provides that "unless the entire board be removed, no individual director shall be removed in case the votes of a sufficient number of shares are cast against his removal, which if then cumulatively voted at an election of a full board would be sufficient to elect him." The California and Pennsylvania statutes are similarly phrased. The Michigan statute is discussed in footnote 45. A provision such as that just quoted from the Minnesota statutes, when coupled with a cumulative voting enactment of the "mandatory" type, might have unfortunate consequences in certain conceivable situations. A minority stockholder might be able, for instance, to continue himself in office as a director in spite of the fact that his derelictions of duty eminently justified attempts to remove him.
Oddly enough, in several states where there exist cumulative voting provisions of the "mandatory" type there also exist statutes which expressly and without qualification seem to permit a specified majority of the stockholders (usually two-thirds) and, in some instances, the directors, to remove directors from office. In some of these states where the cumulative voting privilege is conferred by constitution, statutes pertaining to removal of directors might properly be held subordinate to the purpose underlying the provision of the constitution and, therefore, inapplicable to minority interest directors who are innocent of official misconduct. Unless legislation be supplemented by "judge made law" based on the theory just outlined or another theory productive of the same ultimate result, it is conceivable that a majority stock interest, through removal proceedings authorized by statute in these states, could effectively eliminate minority representation on the board of directors obtained through exercise of the cumulative voting privilege granted by constitution or statute.

Another type of enactment which contemplates removal of directors for cause through judicial proceedings might be practically adequate to safeguard minority interest representation on a board of directors, if it were not for the possibility that this type of enactment may not be held to define the exclusive method by which directors may be removed from office prior to the expiration of the term for which they were elected. In states where there are no statutes regulating in express terms the removal of directors from office without cause prior to the expiration of the terms for which they were elected, it is entirely possible that common law principles may prevent elimination of minority representation on boards of directors through removal proceedings instituted by a majority stock interest, since there are precedents indicating that


73Idaho, Montana, North Dakota and South Dakota—see supra, footnote 6.

74See supra, footnotes 30 to 35 and text.

75The following are examples: Alaska, Comp. Laws of 1933, Title 2, ch. XI, art. II, sec. 918; Missouri, Rev. Codes of 1935, sec. 4959; New York, Cahill's Consolidated Laws, ch. 24 (General Corporation Law), secs. 60-61.

76In People ex rel. Manice v. Powell, (1911) 201 N. Y. 194, 94 N. E. 634, the court said with respect to the provision of New York law cited in the previous footnote:

"... The statute providing for an action in the name of the attorney-general to suspend or remove a director is not exclusive of such reasonable and lawful charter provision relating thereto as may be included in the articles of incorporation. . . ."
in the absence of statutory authority a director cannot be removed from office without cause prior to the expiration of his term by his fellow directors or by vote of the stockholders.

A few comments summarizing certain personal ideas about cumulative voting legislation are probably not out of order. It is difficult to quarrel with the purpose underlying such enactments, for minority representation on boards of directors seems desirable. It needs to be remembered, however, that the purpose probably cannot be effectuated in many instances because of practical obstacles. Particularly does this seem true in the case of large corporations, for any one conversant with difficulties attending solicitation of proxies appreciates that a formidable task confronts a militant minority leader desirous of obtaining proxies covering enough shares to elect a minority representative or representatives to the directorate of a large corporation, the stock of which is widely held. For instance, a survey of the ownership of stock of the Pennsylvania Railroad Company, American Telephone & Telegraph Company and United States Steel Corporation, as of 1929, developed that in each case the largest individual holding amounted to less than one per cent of the outstanding stock; that the aggregate holdings of the twenty largest shareholders were respectively 2.7 per cent, 4 per cent and 5.1 per cent; and that in all there were 196,119 stockholders of the railroad, approximately a half million owning stock in the telephone company and 182,585 holders of steel stock. In the same year (1929) it appears that the Pennsylvania Railroad Company had seventeen directors, American Telephone & Telegraph Company had either nineteen or


Professor See Berle and Means, The Modern Corporation, 47-48.

Professor Moody's Manual of Investments, Railroad Securities, (1929) p. 588 and (1930) p. 704. The 1936 edition of this manual lists the Pennsylvania Railroad Company as having seventeen directors (p. 1402) and indicates that as of July 31, 1936, there were 222,999 holders of the stock (p. 1425).
twenty directors and United States Steel Corporation had either fourteen or fifteen directors. It can be realized, accordingly, that on the basis of this information it would have been mathematically impossible for the twenty largest stockholders of any of these companies to elect a single director through the process of cumulating their votes and casting all of them for the same candidate if all other stockholders had united in opposition. The minority leader's task is not rendered any less difficult by the fact that a management group, intent on electing a full slate of directors, has a tremendous advantage, in that it is in position to forward its own proxy to stockholders along with notice of the stockholders' meeting at corporate expense, a general practice which is tolerated by the courts. As has been remarked, "stockholders in large corporations are, as a matter of common knowledge, generally uninformed and in a measure indifferent concerning the management of the corporation. Generally, without inquiry, they sign proxies as a matter of course so that directors and officers may be re-elected and their policies may be continued." It seems to be a fair conclusion, in view of the foregoing, that cumulative voting is likely to be most useful as a privilege in the case of corporations whose stock is concentrated in the hands of relatively few individuals divided or divisible into groups with aggregate holdings, in each case, constituting a respectable proportion of the total amount of stock outstanding.


Moody's Manual of Investments, Industrial Securities, (1929) p. 320 and (1930) p. 131. The 1936 edition of this manual lists United States Steel Corporation as having fifteen directors (p. 108) and indicates that at about March 7, 1936, there were 244,193 holders of its stock (p. 1913).


Cumulative voting enactments of the "mandatory" type seem to be preferable to those which fall within the "permissive" classification. While it is possible to conceive of situations in which the grant of the privilege of voting cumulatively might turn out to be valueless or a needless refinement, it is difficult to imagine any situation in which that privilege would be a burden or handicap to persons other than those comprising a majority group which desires to exclude the minority from any participation in the management of corporate affairs in derogation of the very purpose underlying such enactments. This being the case, if the privilege is to be granted at all, the grant should not be at the will of incorporators who may compose the majority group, nor should a majority be afforded the opportunity to withdraw any such grant at its pleasure by amending the corporate charter or by-laws.  

85In Maddock v. Vorclone Corporation, (1929) 17 Del. Ch. 39, 147 Atl. 255 it was held that Delaware law permitted amendment of the charter of a Delaware corporation so as to repeal a provision authorizing cumulative voting. Section 36 of the Minnesota Business Corporation Act (Laws 1933, ch. 300) appears to authorize holders of two-thirds of the outstanding stock to achieve the same result.