Opinion No. 242.

Insurance Corporations—Mutual Rural Insurance Companies—Election of Directors—Proxies.

HELD: 1. A by-law prohibiting proxy voting for directors is invalid.

2. A system of absentee voting by mail ballot could not supplant proxy voting for directors.

3. Except for election of directors, the stockholders may make any voting regulations they see fit.

February 4, 1938.

Hon. John J. Holmes
State Auditor
The Capitol Building

Dear Sir:

You have asked if a mutual insurance company organized under the provisions of Chapter 30, Civil Code, Laws of 1935, being Sections 6185, 6205, can validly provide in its by-laws that voting for directors by proxy shall not be permitted.

A stockholder's right to vote by proxy is not a common-law right (Market Street Ry. v. Hellman, 42 Pac. 225, at 233; McKee v. Home Savings Bank, 98 N. W. 609, 611), and in the absence of express statutory provisions the rule is still that all votes at corporate meetings should be cast in person (5 Fletcher Cyc. of Corporations (1931), Sec. 2050; Morowetz Private Corporations, Sec. 486), but it has been declared that, "The right to vote by proxy has become so universal a custom in this country that the right at the present may properly be held to exist in the absence of statutory provisions." (Spelling Private Corp., Sec. 387.) An inspection of the Montana Corporations laws shows that proxy voting has been recognized in this state. Article XV, Sec. 4, Montana Constitution, provides:

> "The legislative assembly shall provide by law that in all elections for directors or trustees of incorporated companies, every stockholder shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there are directors or trustees to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit, and such directors or trustees shall not be elected in any other manner."

That the organization in question is a corporation as the term is used in the Act is settled.

Section 6191, the section providing for the by-laws, uses the word "corporation" to designate the mutual insurance company created by Chapter 30. It is so used many times throughout the Act. But, if there is any doubt that a mutual insurance company is a corporation as the word is used by Section 4, Article XV, it is cleared up by reference to Section 18, Article XV, of the Montana Constitution, which reads:

> "The term 'corporation,' as used in this article, shall be held and construed to include all associations and joint stock companies, having or exercising any of the powers or privileges of corporations and not possessed by individuals or partnerships; * * *"

Section 6191, Revised Codes of Montana, 1935, provides:

> "A corporation, organized under the provisions of this act, may by its by-laws provide:
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> 2. The date of the annual meeting of the members, at which directors shall be elected; provided, that each member shall be permitted to cast one vote, either in person or by proxy, for each director to be elected, and each member shall be permitted to cumulate his votes for one or more directors, not exceeding the number to be elected."

It might be contended, under the provisions of Section 6191, supra, that the introductory sentence, "A corporation * * * may by its by-laws provide," by the use of the word "may" has made it permissive that the provisions enumerated be included in the by-laws. There would be merit in such contention and it may well be that, as to many of the subdivisions of Section 6191, it is discretionary whether

the items specified be included in the by-laws or not. But "may" has often been held to mean "must" (State ex rel. Griffin v. Greene et al., 104 Mont. 460), and cases therein cited, and it must be so held here as regards voting for directors.

The Constitution has declared that the legislature shall provide that every stockholder shall have the right to vote in person or by proxy for directors. The legislature has so provided by Section 6191 and the right cannot be taken away by any action of the stockholders. The share of stock is the unit of voting power for the election of directors by Article XV, Section 4, Montana Constitution, and the votes may be cast either in person or by proxy. Therefore, it is my opinion that any intent to circumvent the right of a stockholder to vote his stock by proxy would be unconstitutional and invalid. That this was also the understanding of the legislature is indicated by Section 6201.

You have also asked if the corporation could comply with the law by a ballot system for the election of directors.

The whole growth of the idea of proxy voting has occurred because of the desire to give each and every stockholder as full a voice as possible in the operation of the affairs of the corporation. A proxy is the granting of the general agency to another to vote (Tompers v. Bank of America, 217 N. Y. Supp. 67), and where the statute confers the right to vote by proxy, without limitations as to the persons who may be appointed (as does Montana's), the stockholder may appoint any person he sees fit to represent him (People's Home Savings Bank v. Super Court 38 Pa. 452), and a by-law limiting his rights in this respect is void. (Taylor v. Griswold, 27 Am. Dec. 33.) Therefore, there is an absolute right to vote by proxy, and even if a system of absentee voting by mail were set up, the stockholder could insist upon his right to vote by personal representative. It must be kept in mind, however, that the statutory constitutional provisions apply only to balloting for the directors of the corporation; the stockholders may incorporate any provisions into by-laws they choose in other respects. Section 6201 declares that no vote shall be by proxy except as prescribed by the by-laws. So that for any purpose other than voting for directors, proxies need not be accepted. For example, Section 6193 provides:

> "The general management of the affairs of the corporation shall be vested in the board of directors, who shall be members of the company, and such board shall elect, from their number, a president and vice-president, and shall also elect a secretary and a treasurer, who may or may not be members of the company, all of whom shall hold their offices until the first meeting of the directors following the annual meeting of the members, unless removed by the board of directors."

The proxies would have to be voted in electing directors, but the stockholders could set up any qualifications they choose for the officers and proxies would not need to be honored when that was voted on. Likewise, when by-laws are amended proxies need not be so honored. (See Smith v. Iron Mt. Tunnel Co., 46 Mont. 13.)