

Opinion No. 328.**Corporations — Articles—Stock Classification—Non-Voting Stock.**

HELD: Articles of Incorporation may provide for stock classification, even to the extent of a provision for non-voting stock.

August 31, 1938.

Honorable Sam W. Mitchell
Secretary of State
Capitol Building

Dear Sir:

Your request in brief is as follows: In view of recent legislation extending the purposes and powers of corporations, you have accepted for filing, Articles of Incorporation providing for establishment of preferred non-voting, or other stock classification, and the question arises, since Section 4 of Article XV of the Constitution provides for cumulative voting of the shares of stock, etc., are you justified in accepting for filing Articles of Incorporation which provide for non-voting stock?

Section 4 of Article XV of the Constitution of the State of Montana provides for cumulative voting, and specifically states that the stockholders shall have the right to vote the number of shares owned by him, etc., etc. It makes no provision as to classification of stock. Section 5905, Revised Codes of Montana, 1921, as amended by Chapter 35, Laws of 1931, and Section 5994 as amended by Chapter 33, Laws of 1931, provide for the classification of the capital stock of a corporation; that there may be more than one class of stock; and provision is made by the said amendments as to the designation of voting powers or rights accompanying the particular classification.

“In the absence of statutory, charter, or by-law restrictions which are not in conflict with charter or general statutes, the right to vote at a stockholders’ meeting is an incident to

ownership of stock, and to deprive a stockholder of the right to vote is to deprive him of an essential attribute of his property, which is ordinarily not permissible." (14 C. J. p. 898.)

In the classification of stock, however, a contractual relationship exists between the corporation and the stockholder whereby preferences are given agreeing to the classification of the stock, and several states, particularly Ohio, provide for a preferred issue, which stock by contract is non-voting, but upon failure to pay two successive interest payments the stockholder becomes a voting stockholder upon his preferred stock. The intention of the legislature of Montana in the amending of sections aforesaid certainly had in mind the creation of different classes of stock, and referred particularly to preferences, limitations, etc. We have every right to believe that the legislature had in mind also Section 4 of Article XV, and when provision is made in the articles of incorporation of a corporation, classifying a certain class of stock as non-voting, that it did not destroy the effect of the constitutional provision as to such stock of the corporation which was, and is, voting stock. In *People v. Koenig*, 133 Appellate Division, 756, 118 N. Y. S. 136, under provisions not unlike our own, the court said:

"Consol. L., p. 1381, c 23, Sec. 3, subd. 8, provides that the term 'member of a corporation' shall include every person having a right to vote for the election of directors, other than a person having the right to vote only on a proxy. Section 23 provides that 'unless otherwise provided in the certificate of incorporation,' every stockholder shall be entitled at every meeting to one vote for every share standing in his name on the books. Section 24 provides that the certificate of incorporation may provide that at all elections of directors each stockholder shall be entitled to as many votes as will equal the number of his shares multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director, or may distribute them among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be deemed

cumulative voting. It was held that the phrase 'unless otherwise provided in the certificate of incorporation,' at the beginning of Sec. 23, does not relate only to cumulative voting permitted by Sec. 24, but permits the certificate of incorporation to provide what voting right classes of stockholders shall possess; and as it is lawful for different classes to agree that one class shall have no right to vote on questions relating to the management, and public policy, the legislature did not intend to compel every class to hold the right to vote, nor prohibit formation of a corporation depriving preferred stockholders of voting power."

"It is the very general, if not almost universal, practice of legislatures and corporators to divide corporate stock into classes. * * * These classes are many and varied and are designed to facilitate the accomplishment of several differing ends, among which are the regulation and control of the issuance and sale of corporate securities, for the better protection of purchasers and stockholders." * * * (Fletcher on Corporations, Vol. 11, p. 43.)

"It is lawful by charter to give voting power to one class of stock and deny it to another, in the absence of some positive law against it." (Fletcher on Corporations, Vol. 5, p. 106.)

"In the construction of a statute the intention of the legislature must be given effect, if possible." (*Wibaux Improvement Co. v. Breitenfeldt*, 67 Mont. 206, 215 Pac. 222).

"* * * And the court will give a statute such construction as will render it operative if it is possible to do so." * * * (*Thomas v. Smith*, 1 Mont. 21.)

The legislature undoubtedly had in mind, in permitting classification of stocks, the contract existing between the purchaser of the stock and the corporation issuing such stock; that if the certificate of stock carried preferences, limitations, etc., it was a business transaction as between the purchaser and the corporation, and he was not deprived of any property rights in his purchase. The general law seems to be that provision must be made in the articles of incorporation

or the by-laws, or the terms of the contractual relationship must be evidenced on the certificate. (Allen v. Montana Refining Co., 71 Mont. 105, 119, 120; 227 Pac. 582.)

It is, therefore, my opinion that you were justified in accepting articles of incorporation for filing which provided for stock classifications, even to the extent of a provision for non-voting stock.