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Is the Voting Trust Agreement a "Dangerous Instrumentality"?

John Warren Giles
IS THE VOTING TRUST AGREEMENT A
"DANGEROUS INSTRUMENTALITY"?

by

JOHN WARREN GILES*

The object of this Article is to attempt to set out in detail (1) the opinions of various recent writers on voting trusts, (2) the attitude of the members of the Securities and Exchange Commission with respect to voting trusts, and (3) the attitude of the Interstate Commerce Commission, as reported in its decisions, relating to voting trusts.

Of all the various definitions in the books relating to voting trusts, probably one of the most comprehensive is that of Fletcher in which a voting trust is defined as follows:

A voting trust may be comprehensively defined as one created by an agreement between a group of the stockholders of a corporation and the trustee, or by a group of identical agreements between individual stockholders and a common trustee, whereby it is provided that for a term of years, or for a period contingent upon a certain event, or until the agreement is terminated, control over the stock owned by such stockholders, either for certain purposes or for all, shall be lodged in the trustee, either with or without a reservation to the owners or persons designated by them of the power to direct how such control shall be used.

No attempt is made here to discuss at length the leading decisions of the Federal or State Courts with respect to voting trusts, most of which, incidentally, are discussed at one place or another in the various text books and articles hereinafter referred to. However, in order to appreciate the importance of the voting trust with respect to the employment of large amounts of capital, it might be well, at the outset to mention the recent decision of a Federal Court affecting a large aggregation of capital supervised by the Pennsylvania Railroad. This is the case of Overfield v. The Pennroad Corporation.2 The case involves a derivative stockholder's action on behalf of the plaintiff and all other holders of voting trust certificates issued in respect to the stock of the Pennroad Corporation against the Pennroad Corporation, the Pennsylvania Railroad Company and others, to recover losses incurred by the Pennroad Corporation, on the ground that the Pennsylvania Railroad, through its officers and agents, and by means of a voting trust agreement, took and retained control of the Pennroad Corporation, although it invested nothing in Pennroad securities. The case is an

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*Member of the New York and Chicago Bars; Formerly Assistant General Solicitor of the Chesapeake & Ohio R.R.; Visiting Professor of Law at The Catholic University of America School of Law.

1 5 Fletcher Cyc. Corp. 2075 (1952).
example of the improper use of the voting trust and it is illustrative of how the voting trust was used as an instrumentality to assist the Pennsylvania Railroad in circumventing the Transportation Act of 1920 and the requirements of the Interstate Commerce Act. The sufferers in this transaction were the holders of the voting trust certificates, the majority of whom were stockholders of the Pennsylvania Railroad. The opinion of the Court does not comment adversely on voting trusts generally, but the effect of the decision is to make it apparent that this is a method by which voting trusts may be employed to the detrimental interest of stockholders. It is interesting to note the Court's statement on Page 612, to the effect that the plaintiff became acquainted with the facts suggesting the wrongful conduct by the defendants, as the result of the investigation made by Senator Wheeler in the United States Senate in 1938. Professor Ballantine, in his article on "Voting Trusts, Their Abuses and Regulation," says of this Case:

This case should demonstrate, even to the extreme advocates of freedom of contract for the surrender of all voting and other safeguards, the dangers of a device by which an inside group may wrest control from the shareholders and manipulate the invested funds of a great enterprise after it has securely 'trussed up' the investors.

Probably one of the most interesting and comprehensive books which has been produced on the subject of voting trusts is that of Mr. John A. Leavitt, which was published in 1941 and which reviews the entire history of voting trusts, and is supplemented by an extensive bibliography containing excellent references to books, articles, and official reports and investigations. Mr. Leavitt treats the subject from the nature and importance of voting trusts down to the case for and against voting trusts, and his book contains chapters on the history and early use of voting trusts, a chapter on voting trustees, a chapter on the position of security holders under a voting trust, and a resumé of the law of voting trusts. The book contains 215 pages, and its usefulness cannot be over-emphasized for any person, be he layman or lawyer, who may wish to gather a comprehensive picture of the development of the voting trust from early case of Brown v. Pacific Mail Steamship Co.,\textsuperscript{3} down to Overfield v. The Pennroad Corp.,\textsuperscript{4} a space of approximately seventy-seven years. In his chapter entitled "The History and Early Use of Voting Trusts," Mr. Leavitt divides the chapter into various subheadings: (1) the period from 1864 to 1880; (2) the period of Railroad Reorganizations, 1880 to 1927; (3) Industrial and Public Utility Reorganization; (4) voting trusts from 1924 to 1930; (5) voting trusts from 1931 to 1940. In the subdivision on railroad reorganization, Mr. Leavitt states that the trust "owes its popularity apparently to J. P.

\textsuperscript{3} Blatchford 524 (1864).
\textsuperscript{4} Supra, note 2.
Morgan & Co.” He calls attention to the fact that Mr. Morgan was personally trustee of the following railroads: (1) The Philadelphia & Reading Co. (1886); (2) The Chesapeake & Ohio (1888); (3) The Southern Railway (1894); (4) The Erie Railroad (1895); (5) The Northern Pacific Railroad (1896); and (6) The Reading Company (1896). It is interesting to note that in spite of the extended discussion by Mr. Leavitt of the use of the voting trust in connection with railroad operation, he makes no specific reference to the attitude of the Interstate Commerce Commission toward the voting trust.

Mr. Leavitt quotes Mr. Dewing on the “Financial Policy of Corporations,” at Page 388, wherein Mr. Dewing states that since the middle of the 90’s “very nearly every railroad reorganization of importance and most public utility and industrial reorganizations have enjoyed the voting trust for at least a short period.” Mr. Leavitt also points out that in the period between 1864 and 1923, out of the sixty-five voting trusts created, thirty-nine, or over half, were the result of corporate reorganizations, and that of these, seventeen were railroads in good part reorganized before 1900, and twenty-two industrial and public utilities in which the voting trust was formed after 1900. He further states that only eight of the sixty-five trusts were associated with new companies and most of these were created late in the period. Mr. Leavitt’s comment on the voting trust from 1931 to 1940 is especially interesting because of the effect of the depression on that period. He relates that the important use of the voting trust during that period was in connection with corporate reorganization and that only a single trust was established for a new company. His comment on the development of the last ten years with respect to the use of the voting trust in the field of real estate reorganization is very enlightening. On Page 34 he states:

The most significant development of the last ten years is the use of the voting trust in the field of real estate reorganizations. In terms of numbers, and perhaps even as measured by the value of the property controlled, this is now the most important use of the device. According to the report of a House committee investigating real estate reorganizations, companies selling almost $20,000,000,000 worth of securities during the twenties have been reorganized during the thirties, for the most part, with voting trusts. Assuming that each corporation is capitalized at $2,711,000 this would indicate that several thousand real estate trusts are now in existence. Ostensibly, the sample study of the Securities and Exchange Commission in finding that ‘of the 136 (real estate) reorganization plans analyzed, 71 per cent . . . contained provisions for voting trusts,’ substantiates this conclusion. But like the House investigation, the commission spent most of its time examining the few large ‘chain protective committees’ which were more likely to create trusts than those reorganizing a single property. A more conservative—and reasonable—estimate of the importance of real estate trusts places their number as somewhere between one and two thousand, and the amount of property in their control as in excess of a billion dollars.

Mr. Leavitt’s closing paragraph on the history and early use of voting trusts shows distinctly how the pendulum has swung back so
that the most recent use of voting trusts has been in connection with corporate reorganizations. The last chapter of Mr. Leavitt's book is not at all the least interesting. In that chapter he reviews the authorities for and against voting trusts, and the writer believes that it is one of the best resumés of the various writings on the subject. Mr. Leavitt, in speaking of the case against voting trusts, on Page 166, writes as follows:

In the case against voting trusts, the weightiest single factor is minority control. That the voting trust does involve such control over a corporation, in the sense that the trustees seldom own more than a small fraction of the voting stock, is undeniable. Any discussion of it, however, must begin with the statement that there is nothing unusual about the separation of ownership and control, and that, on the contrary, our whole corporate system is geared to just such an end. Since the modern corporation, sometimes involving the investment of several billion dollars, necessitates the cooperation of numerous individual investors, all of them cannot have a hand in its management. Probably, only a few are capable of expressing an intelligent opinion at a stockholders' meeting; while of these, only a part will wish to concern themselves with the active management of the corporation. This situation is unavoidable, and will, no doubt, continue so long as the present industrial and political system itself endures.

Mr. Leavitt reviews many of the leading Law Review Articles on the subject, and his recommendations, on Page 175, concerning the regulation of voting trusts are quite in line with the apparent thinking of the members of the Securities and Exchange Commission. He says in substance, that additional Federal and State regulations should be imposed upon voting trusts. He expresses the following opinion with respect to the present attitude of the Securities and Exchange Commission and says, on Page 177:

It is to be hoped that the Securities and Exchange Commission will continue to discourage the use of the voting trust in so far as it is now able, but in addition, it might be wise to amend the Chandler Act so as to give the commission absolute veto power over the reorganization plans of large companies. If this were done, standards for the use of the voting trust in reorganizations could then be set up.

On Page 178, he makes the following recommendations concerning a proposed future policy of the Securities and Exchange Commission:

In exercising the powers conferred by the Chandler Act and those here proposed, the commission might find it wise (1) to prohibit the use of the voting trust by new companies when the need is not obvious; (2) to prohibit any voting trust whose sole purpose is to strengthen an existing corporate control if there are no extenuating circumstances; (3) to require that the trustee vote the stock held by them as directed by the security holders for whose protection the trust is created, whenever this is possible (as in the case of a reorganization); (4) to prohibit the inclusion in the trust agreement of immunity clauses designed to protect the trustees from liability for negligence or ignorance, and clauses permitting trustees to trade with themselves as individuals; (5) to require that the ‘interested’ security holders be given the right to terminate the trust by a majority vote, machinery being created to take such a vote, possibly at regular referendums; (6) to demand that the interested security holders, whether their holdings are certificates or bonds, be permitted to examine the list of their fellow security holders; (7) to place some restrictions on trustees also acting as directors and officers; (8) to require trustees
to make public the amount of their compensation; (9) to prescribe that trustees return to the corporation any profit they may derive from the purchase and sale or sale and purchase of securities within six months and any profit derived from the sale of a trusteeship; and (10) to require that on the termination of a trust the stock should be returned to the certificate holders as soon as possible.

One is impressed, after reading Mr. Leavitt's book, with the complete contrast in point of view with that of Mr. Coleman Burke in his well known article entitled "Voting Trusts Currently Observed." This writer is inclined to agree rather heartily with Mr. Leavitt in his very intelligent approach to the regulation of the voting trust through the medium of the Securities and Exchange Commission, and it is submitted that Mr. Leavitt's recommendations would do well to be followed by the Commission in the course of its future consideration of the various types of voting trusts which will be presented to it.

The aforesaid article by Mr. Coleman Burke on the subject of voting trusts, presents an attitude toward voting trusts which is more favorable than any of the recent writers. Mr. Burke seems to be aiming his arrows at Mr. Justice Douglas' speech before the Bond Club of New York, on March 4, 1937, wherein Mr. Justice Douglas stated that the "voting trust as currently observed is little more than a vehicle for corporate kidnapping." Mr. Burke's article is divided into a history and analysis of the decisions, a discussion of State Statutes, a discussion of the problems in conflict of laws, and an excellent section on suggestions for drafting a voting trust agreement which is particularly helpful to practicing lawyers. In concluding his article and in a most optimistic view, Mr. Burke writes, on Page 378:

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. 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.

\[\text{24 Minn. L. Rev. 347 (1940).}\]
Professor Henry W. Ballantine, in his article entitled "Voting Trusts, Their Abuses and Regulation," has contributed a very valuable article to the Bench and Bar. This article represents what might be considered the middle ground point of view, with emphasis on reform. The article is divided into three main sections covering (1) voting rights and voting agreements, (2) irrevocable proxies and voting trusts, and (3) the legislative problem. One of the most valuable concepts in the consideration of this subject is a clear statement of the stockholder’s principal safeguards against mismanagement. No complete understanding of the benefits or evils of voting trusts may be had without calling to mind the vested rights of stockholders which the voting trust may tend to narrow or destroy. Professor Ballantine states the shareholder’s rights and powers as follows: (1) his voting rights (a) as to directors, (b) as to by-laws, (c) as to charter amendments and fundamental changes; (2) his power to bring a derivative suit to correct abuses of management and enforce liability for breach of fiduciary duty owed to the corporation; (3) his right of injunction against illegal and unauthorized corporate acts; (4) his right to notice of meetings, inspection of records and information; (5) his preemptive right to subscribe for new issues of shares. (Page 139)

In discussing the principal control devices by which various groups may seek to obtain control of an enterprise with little or no investment Professor Ballantine cites the following: (1) voting agreements, the formation of organized groups to obtain voting control; (2) voting trusts; (3) pyramiding, the use of holding companies or a series of holding companies holding controlling shares of their subsidiaries; (4) the classification of common shares into voting and non-voting, with the voting power vested in a small class of "management stock"; (5) management contracts, often with a parent or affiliated corporation; (6) classification of directors with "staggered" elections of only part each year. (Page 141)

On Page 146 of his Article, Professor Ballantine explains the raison d’etre of voting trusts and quotes Rohrlich on Law and Practice in Corporation Control wherein Mr. Rohrlich says: "To achieve irrevocable proxies the voting trust was developed." As Mr. Ballantine goes on to say: "Adroit lawyers, to meet business needs, have invented the ingenious device of a voting trust to give to what is in essence a joint irrevocable proxy for a long term of years the 'protective coloring' of a trust, so that the trustees may vote as owners rather than as mere agents. The legal form of a voting trust has in most jurisdictions met the formal objections to an irrevocable proxy." (Page 147)
After reviewing the scathing criticism of voting trusts delivered by Mr. Justice Pitney in the famous New Jersey case of *Warren v. Pim*, Professor Ballantine summarizes the purposes presently regarded as legitimate for which voting trusts may now be employed:

(1) To aid in reorganization plans and adjustments with creditors in bankruptcy or financial difficulty; (2) to assist financing, to procure loans, and to protect bondholders and preferred shareholders; (3) to accomplish some definite plan or policy for the benefit of the company and to assure stability and continuity of management for this purpose; (4) to prevent rival concerns or competitors from gaining control; (5) to apportion representation and protect minority interests or those with balanced holdings, as in corporations to exploit a patent, by putting the selection of directors in impartial hands; (6) in connection with mergers, consolidations or purchase of a business, in order that the predecessors or constituents, though in the minority, may have representation. (Pages 152-153)

In the section of his article devoted to the legislative problem, Professor Ballantine divides the subject into thirteen sub-headings wherein he suggests regulation might properly be invoked and he looks with favor on the attitude of the California Corporate Securities Act and the Securities Act of 1933. His suggestions are worthy of repetition and are all aimed to better protect the rights of the uninformed stockholder. There follows a portion of his recommendations with respect to various sub-divisions of the usual voting trust agreement:

(3) **Termination.** It should be provided in the voting trust agreement that such voting trust is terminable, both by majority vote or written consent of the voting trustees, or by the majority vote or written consent of the holders of voting trust certificates.

(4) **Purpose.** The statute might well provide that voting trusts or irrevocable proxy agreements may be created for legitimate business purposes. The specific purpose for which a trust or pool is formed should be clearly stated in the agreement. The irrevocable delegation of voting power for no definite purpose except to concentrate corporate control for its own sake should not be recognized. Mere general recitals of a disinterested purpose, that the organizers of the voting trust are seeking to promote the welfare of the corporation and of the security holders, should not be sufficient.

(5) **Duties of trustees.** The duties of the trustees or voting representatives should be set forth more definitely than is now customary in voting agreements and might well include the duty of supervising the administration and policies of the corporation and the work of individual directors to determine their fitness to continue in office.

(6) **Limits on authority.** The voting powers of the trustees or representatives should be limited to the election of directors. The power of the trustees or voting representatives to vote on fundamental changes should be given only by the authorization of the individual security holders. Such voting should be an individual matter and not one determined by majority vote of the beneficiaries.

(7) **Dealing of trustees.** The trustees or voting representatives should have no authority to deal with the corporation for their own profit or speculate in the securities of the corporation or those of its subsidiaries or affiliates or in the voting trust certificates. Any profits realized from purchases and sales of any securities should be made subject to recovery by the beneficiaries or the corporation in order to prevent profiteering and manipulation.

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66 N. J. Eq. 353 (1904).
Limitation of liability. The liability of the trustees or voting representatives should not be limited by the agreement to 'malfeasance,' but should be the same as that of trustees generally.

Construction. No power should be given to the trustees to construe the agreement or make modifications in it.

Compensation. Provision should be made for determination of the compensation of the voting representatives and for the supervision of their expense accounts.

Trustees as directors or officers. Restriction should be placed on voting trustees acting as director, officer or employee of the corporation or any affiliate. A voting trustee in his capacity as trustee could hardly be expected to remove himself from office for misconduct in his capacity as director.

Solicitation and disclosure. Disclosure should be made to the shareholders in connection with solicitations to become parties to a voting agreement of the promoter's reasons for the formation of the pool, its specific purposes and as to the provisions of the agreement. A copy of the agreement should be supplied to each shareholder before coming into the pool.

Extensions. Dissenting shareholders should not be held prisoners in a voting trust by a renewal or extension of the agreement voted by a majority of the certificate holders, but should be allowed to regain their freedom and withdraw at the end of the original period of duration, if they so desire.

The last paragraph of Professor Ballantine's Article sums up very completely the need for careful scrutiny of voting trust agreements by the legislatures and the various Securities Commissions:

Voting trusts, like proxies, are signed blindly by credulous investors and a plausible group is often able to seize and continue in the emoluments of corporate control at the shareholders' expense on their own terms. The necessity of greater regulation by statute and supervision by courts and administrative authorities of the misuse of corporate control devices has of late been more fully revealed. The main object of many voting trusts is to prevent a majority of the shareholders, present, or prospective, from combining to change the board of directors when a change may be needed. A voting trust does not automatically secure efficiency or honesty in management, but only assures fixity of control by the voting trustees often for a needlessly long period, without the rights to information, notice and disclosure and the power to vote for change of management and on fundamental changes which normally belong to corporate shareholders. (Page 168)

Messrs. Daugherty and Berry have compiled a very helpful cross-section of the present status of the laws of the various states effecting voting trusts. The article is particularly informative in its table showing the comparative provisions of the laws of twenty States regulating the use of voting trusts. The chart is extensively explained and the work has great merit in giving a comparative picture, especially of the duration of voting trusts in the various States wherein legislation has been passed. It is interesting to note from the table in the Article that California has the longest permissible period, to wit, twenty-one years, while the majority of the States now limit the duration of the voting trust to ten years. Nevada and Minnesota extend the period to fifteen years.

No reference to the text writers on the subject of voting trusts would be complete without a reference to an Article by Professor

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8The Voting Trust—Its Present Status, 28 Geo. L. J. 1121 (1940).
It is to be borne in mind that this Article by Professor Wormser was written before voting trusts came into such extensive usage, and Professor Wormser's comments are limited to the learning of that period. However, at that time, Professor Wormser was very kindly disposed toward voting trusts, and his Article contains an extended reference to the Pujo Committee Report in 1913 and to the reorganization of The St. Louis-San Francisco Railroad Company which was presented to the Public Service Commission of the State of Missouri and rejected by that Commission on the earlier authority of Shepaug Voting Trust cases. Professor Wormser quotes the portion of the opinion of the Public Service Commission of Missouri which is presented herewith:

The serious objection to the voting trust feature of the original plan of reorganization was that it placed the selection of the voting trustees, and consequently the election of the board of directors and the management and control of the company, in the hands of the bondholders instead of the stockholders, as provided by the Constitution and law of this State. The modified plan now considered proposes the substitution of the two names of voting trustees in lieu of two named in the original plan, but makes no change whatever as to the method of the selection of the trustees. It is apparent that a change of trustees does not relieve the voting trust of the objectionable feature to which attention was called in the former opinion. The Commission did not object to the personnel of the trustees first named, but rather to their selection by the bondholders, and as to the feature no change has been made in the plan as modified. (Page 132)

In view of the fact that the report of the Pujo Committee is mentioned by many of the text writers as having had considerable effect on the subsequent thinking of the legislatures and courts, it might be well to include herein the denunciation of voting trusts which was delivered in the report of the Pujo Committee in Section 5, at Page 142, as follows:

We regard the existence of voting trusts in financial institutions as highly inadvisable and prejudicial. The Directors of a corporation that is authorized to receive deposits should be accountable for the management of their institution directly to the owners and to the public. Their tenure of office should not be dependent on strangers in interest. The stockholders should not have the right to delegate any such duty. They, too, are in a sense trustees for the depositors and for the public, which is deeply concerned in maintaining the integrity of its financial system... we recommend that it be expressly declared unlawful for the controlling interest or any part of the stock of a national bank to be dealt with in that way. The action in respect of the trust companies in question is not within our province, but we venture to express the hope and expectation that the voting trusts in which their stock is held will be dissolved.

Professor Wormser sums up the arguments of that time for and against voting trusts and concludes with the following paragraph:

10 60 Conn. 553, 24 Atl. 32 (1890).
The correct rule to adopt is to uphold the legality of the voting trust or pooling agreement, provided the propriety and reasonableness of its object affirmatively appear, and provided that the arrangement itself is honest and equitable. The voting trust, in other words, should not be condemned as void per se, but should only be condemned in those instances where the trust or pooling agreement is created and carried out in order to effectuate an improper, unjust, or monopolistic object.

The motif of Professor Wormser's Article seems to be to the effect that the holding of voting trusts void per se is unprogressive and ignores business necessities. The argument is practical but loses sight of the fact that the entire purpose of the legislation to control voting trusts is aimed not so much at the protection of business as for the preservation of the rights of the uninformed stockholder. It is interesting to note that the attitude of Professor Wormser is more or less representative of the attitude of writers of that time, and Coleman Burke, although writing in 1940, seems to have been influenced by the attitude of Professor Wormser.

One of the unusual books of our times on corporation law is "The Modern Corporation and Private Property" by Berle and Means, of Columbia, and published in 1934. These authors have a chapter entitled "Evolution of Control" and on Page 77 of that work, they discuss the organization and effect of a voting trust. The comment on the Pennroad Corporation and the use of the voting trust is interesting particularly since it was made long before the litigation was instituted against the Pennroad Corporation, which resulted in the condemnation of the voting trust by the District Court. The authors predicted, rather accurately, the unfortunate features of the arrangement. They write as follows on Page 77 and 78:

In addition to these ways of securing legal control through direct or indirect ownership of the voting majority, a further device must be considered which does not involve even ownership of a voting majority. This is the familiar practice of organizing a voting trust. It involves the creation of a group of trustees, often a part of the management, with the complete power to vote all stock placed in trust with it. When a majority of the stock is held in trust, as is usually the case, the trustees have almost complete control over the affairs of the corporation yet without any necessary ownership on their part. The stockholders, meantime, receive, in place of their stock, trust certificates entitling them to share in such disbursements as the directors may choose to distribute. In the recent organization of the (then) ninety million dollar Pennroad Corporation, the organizing group—the Pennsylvania Railroad management, used this device to guarantee complete control. The stock of the newly formed corporation was placed in a voting trust and the stockholders of the railroad were offered the privilege of furnishing capital by purchase of voting trust certificates. The purchasers of these certificates acquired the position of owners without the power even as a group to control their own enterprise. The voting trust, more completely than any device we have hitherto considered, separates control from all ownership interest. Originally bitterly opposed by the law and held illegal by the courts on the ground that the vote could not be separated from the stock, it came to be permitted by statutory provision in most states. Such statutes, however, commonly limited the period during which the trust agreement could run to some term of years, in New
York State to a maximum of ten years. But even where the duration has been limited, the voting trustees might entrench themselves beyond the reach of the stockholders for a longer period by arranging for renewal of the trust for additional terms at their own discretion. The Interborough Rapid Transit Company is perhaps the most striking case. The voting trust agreement provided for a duration of five years, but was renewable for five successive periods of five years each without any further action on the part of the holders of voting trust certificates. Legal control could thus be prolonged for a period of thirty years.

Incidentally, it is the writer's opinion that this book is one of the best explanations of the evolution of control of corporations which has been written in many years and the chapter entitled "The Resultant Position of the Stockholder," though rather depressing, seems to accurately describe the present position of the average stockholder.

In 1922, Marion Smith, a highly respected member of the Georgia Bar, wrote an Article in which he reviewed the leading cases on voting trusts up to that time and stated what he believed to be the prevailing American doctrine in 1922. He states the same as follows:

The prevailing American doctrine is that a voting trust whereby the beneficial ownership in stock is separated from the voting power is contrary to public policy and illegal, except under certain circumstances, which the courts hold justify the creation of a trust. There are a few cases to the contrary, but this statement is in accord with the decided majority. (Page 630)

Mr. Smith, after stating his concept of the American doctrine, concludes with two paragraphs indicating that the American doctrine is, in his opinion, a good doctrine, but it is to be noted that he says, in substance, that it is not desirable to place the government of corporations in the hands of those not financially interested in the business results. Of course, the writer believes that that is exactly what a voting trust in many cases does accomplish, and should be the main objection, if any, to the perpetuation of voting trusts. The opinions of Marion Smith are summed up in the following two paragraphs of his Article:

Is it to the interest of the stockholders of a corporation that all of the stock should be voted by its real owners rather than by voting trustees who are without interest in the results of the corporation's business? After we allow for those cases where a special justification for such voting trusts is shown, there ought not to be any difficulty in answering this question. The common experience of mankind is the final argument in this respect. Undoubtedly there are many men who would strain every effort as voting trustees to give the corporation the best possible management; doubtless in many instances such voting trusts would work out satisfactorily, but ordinarily and as a general proposition, self interest is the surest guaranty in matters of this kind. Especially is this true with the development of large corporations with widely scattered ownership. If it is argued that in such instances the stockholders usually vote by proxy, the reply is that the revocable character of such proxies is a wholesome safeguard. It is the means by which the government of large corporate enterprises is kept subject to the power to approve or change in the real owners of the property. After allowing for the special situations and exceptions which have been discussed, it can hardly be argued that it is de-

11 Smith, The Validity of Voting Trusts, 22 Col. L. Rev. 627 (1922).
sirable to place the government of corporations in the hands of those not financially interested in the business results, who are to exercise an unrestrained discretion in the management of the companies, and who are not made subject to the approval of the stockholders for continuation in control. This is the state of facts presented by many of the cases, and frequently there are also shown in the trust agreements the broadest provisions, vesting in the trustees all of the rights of stockholders except the right to dividends, and relieving them from responsibility for the way in which their powers are exercised.

In 1915, Mr. Harry A. Cushing of the New York Bar, produced a book containing five chapters touching on the significance of voting trusts, the contents of voting trusts, the law of voting trusts, the statutory law of voting trusts and some well-known examples of voting trust agreements. I believe it is fair to say that Mr. Cushing is partial to the use of voting trusts. He says on Page 24 of his book:

The use of a voting trust has been criticized as readily tending to undue concentration of power, and while this criticism is in a measure correct, it is significant that in no important instance has power so acquired been abused.

Of course, it is to be borne in mind that Mr. Cushing commenced this work in 1915, and that the use of voting trusts had not advanced very far then, but it would seem that the author’s statement to the effect that "It is significant that in no important instance has power so acquired been abused" is not correctly descriptive of the record of voting trusts up to the present time.

Professor Dewing, who has written many books on corporate matters, reviews the unfavorable attitude toward voting trusts expressed by the Courts: 13

Obviously, the voting trust can be abused and a few men can, through the power and confidence placed in them, wreak great damage on the property surrendered to their control. On the other hand the dearth of cases in which this has been done should be compared to the many cases where three or four responsible men have executed the trust reposed in them to the evident satisfaction of all concerned. It is such a device whereby full responsibility for management is publicly acknowledged; and public opinion and law can exert an influence over the actions of men only when actual, not merely nominal, responsibility is acknowledged. The morale of corporate action can be improved only to the extent that the connection between action and actor can be made unequivocal and unmistakable. The voting trust is a device which accomplishes this end.

With all due respect to Professor Dewing, it is to be remembered that he was writing in 1941 and it was in that same year that Overfield v. The Pennroad Corporation Case was decided by the District Court of the Eastern District of Pennsylvania. Perhaps the decision did not come to the Professor’s attention. The writer must confess that he cannot follow the logic of Professor Dewing wherein the Professor seems to feel that voting trustees, having publicly acknowledged their

12 Cushing, Voting Trusts (1927) pp 257.
13 Dewing, Financial Policy of Corporations (1941).
14 Supra, note 2.
responsibility, may be subsequently influenced in their actions by public opinion. It seems obvious that the voting trustees are only bound by the terms and conditions of the voting trust agreement and that their responsibilities and duties are hardly influenced during the term of their office by public opinion. Their mistakes and misfeasances are only forcibly called to their attention by the Courts, when it may be too late to benefit the stockholders. It would seem that Professor Dewing had been considerably influenced in his opinion by Mr. Harry A. Cushing, of the New York Bar.

The Securities and Exchange Commission has provided Form F-1 for the registration of voting trust certificates and that form may be found in Volume 1 of The Federal Securities Law Service (C.C.H.), Paragraph 7101. There is also accompanying that form a set of rules and instructions for the registration of voting trust certificates. This Form F-1 is required to be filed in order to register the securities for sale, whether the certificates are to be issued in the course of a reorganization or otherwise. An examination of this Form with its twenty-seven questions and its requirement of exhibits makes it very apparent that the Commission expects to be fully informed concerning the relationship of the voting trustees to the corporation or any of its predecessors, within two years prior to the filing of the statement. Question 13 relates to the maximum period of duration of the trust agreement. Question 14 asks for a summary of the principal provisions of the agreement, including an inquiry as to whether or not the holders of the certificates have any power of determination. Question 15 relates to the principal provisions of the agreement for the removal of trustees. Question 17 concerns the limitation of liability of trustees. Question 20 inquires with respect to the powers of the trustees to deal with the securities in a way other than the voting thereof. Question 23 relates to the compensation of the trustees. The exhibits called for are: (1) a copy of the trust agreement, (2) a specimen of the form of voting trust certificates, (3) a copy of the prospectus, and (4) copies of any orders of government bodies by which any securities of the trust were denied the right to be sold.

There is another form required by The Securities and Exchange Commission which is known as Form 16 and may be found in Volume 2 of The Federal Securities Law Service (C.C.H.), Paragraph 28801. Form 16 must be filed with the Commission if it is desired that the trust certificates be listed on a National Stock Exchange. Form 16 must be filed by all the voting trustees and it contains eight general headings as follows: (1) voting trust certificates, (2) underlying securities, (3) organization, (4) designation of the voting trustees, (5) the voting
trustees, (6) the powers of the voting trustees, (7) compensation and limitation of liability of the voting trustees, (8) the holders of the voting trust certificates. The information generally required by Form 16 is similar in many respects to the information required by Form F-1 and it might be well to include herein a summarization of each Form by Professor Leavitt in his "Law of Voting Trusts" wherein, on Page 155, he summarizes the requirements to register a security for sale and the requirements for the purpose of listing trust certificates on a national stock exchange in the following manner:

First, in order to register a security for sale, the following items are required:

(a) the provisions of the voting trust agreement;
(b) the relation of the trustees to the corporation, their outside interest, etc.;
(c) the miscellaneous questions, mentioned above;
(d) a copy of the voting trust agreement;
(e) a copy of the voting trust certificate;
(f) certified copies of the orders of all governmental regulatory bodies by which any securities of the trust were denied the right to be sold; and
(g) a copy of the prospectus.

Only the information required under (a) to (c) inclusive, is required in the prospectus. All other items are a part of the exhibits attached to the registration statement and need not be included in the prospectus. Next, for the purpose of listing trust certificates on a national stock exchange the following items are required:

(a) the provisions of the voting trust agreement;
(b) the relation of the trustees to the corporation, etc.;
(c) miscellaneous questions of interest;
(d) a copy of the voting trust agreement and trust certificates;
(e) copies of any other contracts relating to the trustees, certificate holders or the corporation which are pertinent to the trust;
(f) and most important, 'Submit information as to the issuer of the underlying securities as required by the Form and Instruction Book appropriate for the permanent registration of securities of such issuer.'

It is important to note that the Securities and Exchange Act of 1934 provides for the filing of annual reports by the issuers of securities under that Act and under the Securities Act. The purpose of these reports is to keep the information in the registration statements current. Thus, it may be seen that one of the purposes of the Securities and Exchange Act was aimed to give the investor all the information possible concerning the nature of the provisions of the voting trust agreement and it is obvious that, in the future, voting trust agreements involving either the sale or the registration of securities on National Stock Exchanges must be drawn with the purpose of producing an agreement which will be satisfactory to the Securities and Exchange Commission.

Under Rule 221 of Regulation A of the General Rules and Regulations under the Securities Act of 1933, voting trust certificates are
What has been the attitude of the Commission toward voting trust agreements since the enactment of the Securities and Exchange Acts? We have already alluded to the famous speech of Mr. Justice Douglas when he was Chairman of the Securities and Exchange Commission. In a report issued in 1940, being a letter from the Acting Chairman of The Securities and Exchange Commission, (Part 2, House Docket 279, 76th Congress, 1st Session) the voting trust agreement was not spoken of in very complimentary terms. In order to make clear the attitude of the Commission, it would seem proper to quote the entire comment entitled “Voting Trust Agreements”, which reads as follows:

A voting trust agreement is an agreement which assembles in the hands of a person or group of persons the shares of several owners of stock, in trust giving the trustee or trustees the power of voting them and thereby of controlling corporate business and affairs. The agreement ordinarily confers upon the voting trustees the right to vote the stock transferred to them for such purposes irrevocably and for a definite period. The voting stock, itself, is transferred to the trustees who issue voting trust certificates to the stockholders as evidence of their beneficial ownership of the stock.

The avowed purpose of the voting trust is to disfranchise the stockholders. The pecuniary incidents of stock ownership, such as cash dividends and rights on dissolution, are usually reserved to the certificate holders by the voting trust. Although originally held illegal by the courts, voting trusts have in a number of states been legalized by statute. These statutes, however, usually limit the duration of voting trusts to a period of 10 years, in one instance permitting renewal of the trust for an additional 10 years.

The voting trust offers to promoters the opportunity for autocratic control without any personal investment. It thus constitutes a means by which the sponsors of investment companies may allocate to themselves all the emoluments of control such as salaries, management fees, underwriting, and brokerage business and other advantages without any financial loss if their management of the company is unsuccessful. The voting trust agreement usually is prepared by the organizers of the corporation prior to any public offering of its securities and all of the voting stock may be deposited with the voting trustees so that the public is offered only voting trust certificates. By this means, the selection of the personnel of the voting trustees and the scope and latitude of the powers placing in voting trustees usually is vested in the corporate promoters. This method is obviously more effective than the formation of voting trusts after the stock has been distributed to the public since it avoids the difficulties of persuading a widely scattered group of stockholders to deposit their shares with the trustees.

The sponsoring group having selected the initial trustees, the voting trust agreement usually empowers such trustees to fill vacancies in their membership. For example, in only one voting trust agreement of an investment company coming to the attention of this Commission were the stockholders empowered to elect the successors of resigning trustees. In addition to the power of the voting trustee to elect directors and officers and to appoint managers in the case of investment companies, they normally have the power to vote for sales of the entire corporate assets, for mergers and consolidation with other corporations, to effect reductions of capital and other corporate activities of vital consequence to shareholders. The voting trustees have the power in the case of investment companies without the concurrence of, or even the necessity of informing the certificate holders, to change radically the announced investment policies of the corporation. It may be doubted that voting trust certificate holders read or are fully aware of the
scope of the usual provisions of voting trust agreements which they are in law presumed to accept by purchasing a voting trust certificate.

Despite the broad powers of voting trustees over their controlled investment company, the voting trust agreements contain provisions designed to relieve them from any responsibility. In many cases the voting trustees are expressly empowered to deal freely with the investment company and its assets and usually are exculpated from all liability except for willful malfeasance.

The sponsors of Incorporated Investors, organized under the laws of Massachusetts on November 23, 1925, were among the first to employ the device of the voting trust with reference to the stock of an investment company. In this case the voting shares were deposited with the voting trust from the very beginning and only voting trust certificates were offered to the public. Such certificates were sold to December 31, 1936, for an estimated total of $103,261,000 at which date the investment company possessed assets of $77,000,000. The control of such considerable funds was thereby vested in a few individuals who were not required to make any substantial investment in the enterprise and who were absolved under the voting trust agreement from the consequences of their acts and omissions except for their 'willful malfeasance.' The sponsors, who were the voting trustees and the officers and directors of the investment company, allotted to themselves contracts for management and distribution services and derived total net profits from their affiliation of some $1,900,000 to December 31, 1935.

The desirability of such an unrestrained control of the highly liquid and easily negotiable assets of investment companies may be questioned. It is significant that in some jurisdictions voting trusts of the stock of analogous financial institutions such as banking corporations, are forbidden or regulated by statute. The common justification of voting trusts is that it assures a continuity of management to the enterprise. However, as has been stated, most voting trusts make it possible for the trustees to resign seriatim and for the remaining trustees to elect their successors. That this power in the voting trustees to surrender their trust may be of serious consequence to the disfranchised stockholders is illustrated by the case of Universal Shares, Ltd.

The Commission has had an opportunity to comment on voting trusts in two recent decisions wherein the Commission has approved the use of the voting trust, but these are both special situations involving, in one case, the protection of creditors and in the other case the perpetuation of the management of a small corporation. A portion of the opinion in the matter of the Great Lakes Utility Company contained in the reports of the Securities and Exchange Commission, Volume 2, Page 129, at Page 131, (April, 1937) is reproduced herewith:

In the instant case, however, the voting trust has been created at the request of representatives of holders of collateral trust bonds. Provision is made for nine voting trustees, of whom six are reported to represent the interests of collateral trust bond holders. The term of the voting trust is limited and cannot extend beyond the date when the collateral trust bonds mature in 1942. Under such circumstances we do not deem that the interposition of this voting trust constitutes an undue complication of the capital structure of the holding company system involved or one that is detrimental to the public interest or that of investors or consumers.

A portion of the opinion of the United Telephone and Electric Company case follows: 16

Our approval of the plan, however, is precluded by the inclusion in their present form of the voting trust provisions. Originally the plan provided that the stock of the new company would be issued to five voting trustees and would be held under this trust for a period of approximately 5 years, namely, until

16 3 S. E. C. 653 (1938).
January 1, 1944. By amendment, it was subsequently provided that at the end of 3 years, a referendum would be held, giving the holders of the voting trust certificates an opportunity, by a vote of holders of two-thirds in amount of the certificates, to terminate the trust on January 1, 1942. Nevertheless, the objections to voting trusts generally, and to this trust in particular, are obvious. Control of the voting stock of the Company is taken from the hands of its owners and concentrated in the hands of the persons named as trustees. In this case, for a period of 5 years, the stockholders would be denied any voice in the management of the Company. If they are unwilling to surrender this right, their only alternative is to vote against approval of the plan. They are not given an option to take the stock or the voting trust certificates, and therefore they will not have an opportunity to determine solely upon its own merits the question whether the voting trust is desirable. Nor would it appear likely, in view of the widely dispersed holdings of the stock, that at the end of 3 years a vote of the holders of two-thirds in amount of the stockholders could be mustered to terminate the voting trust if the management wished to continue it.

On the other hand, persuasive reasons have been advanced in justification of the voting trust on the particular facts before us. This is not the case of an existing management or of a particular group of security holders, seeking to perpetuate a control position. The Company, it appears, was organized and developed by one C. L. Brown, who until the time of his death was the dominant figure in its management. It is the judgment of the committees representing the security holders that there is no one within the organization qualified to perform the function of chief executive of the Company. It is contended that an executive of sufficient ability and experience to direct the varied affairs of the Company could not be obtained unless he could be given some assurance of continuity of service. But since the stock is so widely held, primarily by inexperienced holders, there would be considerable risk that until the management had an opportunity to prove its worth, some person could obtain control of a sufficient percentage of the stock, either by purchase or by an active proxy campaign, to change the directorate and the management. It has been asserted that in the face of this danger, men of the caliber desired as chief executive would not take the position. The voting trust is the only expedient suggested in this case whereby the necessary assurances of continuity of service would be given.

Moreover, while the proposal for the voting trust was initially advanced by a stockholders' committee, the principal creditors have also insisted upon it, at least in the absence of any suggestions as to a practicable alternative. We stress this fact. These creditors are not being paid their claims in cash, but are accepting new debentures which, as we have stated, embody certain sacrifices in their rights. If the interest and principal of these debentures are to be paid according to their terms, the management of the Company must be successful. The belief of the creditors in the desirability of the voting trust as a means of assuring sound management for the Company as it comes out of reorganization is entitled to great weight in our determination of the fairness of the plan to them.

It is also significant to note certain important respects in which this voting trust agreement has been amended to provide greater protection for the certificate holders than such agreements commonly provide. For example, the certificate holders are given the right upon written notice to the voting trustees stating the purpose thereof, to examine the list of the other holders of the certificates. Any profit realized by any voting trustee from any purchase and sale, or any company thereof within any period of less than 6 months is, subject to certain exceptions, recoverable by the Company. And (by a provision contained in the agreement prior to amendment) a voting trustee may not act as a director or officer of the Company or any of its subsidiaries. It is patent that these provisions give some guarantee against possibilities of abuse not present in the more conventional type of voting trust agreement.

Mr. Coleman Burke, in his article entitled "Voting Trusts Currently Observed", seems to be convinced that these decisions of the Commission
indicate great change of heart on the part of the Commission toward voting trusts, and he regards these decisions as "a very significant step in the right direction." The writer doubts that these decisions are indicative of such change of attitude and believes that they are based on the special circumstances of the two cases. The writer has not found any instance in the books where the Commission endorses the use of voting trusts.

In a Report recommending the disapproval of a plan of reorganization in the matter of Broadway Exchange Corporation, the Securities and Exchange Commission stated on Page 18 thereof, as follows:

We agree with those who are opposed to a voting trust as we see no reason for disenfranchising security holders by depriving them of their right to vote for directors annually. In a study of voting trusts created in real estate reorganizations, we reached the conclusion, after review of a number of cases, that the security holder who enters one of these voting trusts or liquidation trusts has for all practical purposes relinquished any real control which he may formerly have had. He is eliminated from the picture when it comes to policy formulation; he has at best a negative power to dissent under certain circumstances and only a cumbersome and unwieldy power to remove trustees or to terminate the trust if he thinks the proper policies are not being pursued. For all practical purposes he is out of control of the situation; the trustees are in a position of absolute power and dominion.

The directors to be selected here should be willing to submit their actions to the approval or disapproval of the security holders, through the democratic process of standing for election annually.

In a report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part III, Committees for the Holders of Real Estate Bonds, the Commission on Pages 198 to 216, discusses the voting trust. This report has restricted its detailed investigation to the defaulted Real Estate Bonds which have been sold to the public. On Page 205 of this report, the Commission makes the following comment on voting trust agreements with respect to Real Estate Reorganizations:

... But it is sufficient to indicate that the security holder who enters one of these voting trusts or liquidation trusts has for all practical purposes relinquished any real control which he may formerly have had. He is eliminated from the picture when it comes to policy formulation; he has at best a negative power to dissent under certain circumstances and only a cumbersome and unwieldy power to remove trustees or to terminate the trust if he thinks the proper policies are not being pursued. For all practical purposes he is out of control of the situation; the trustees are in a position of absolute power and dominion.

It is the rare, rather than the common, case where continuing court supervision or control is reserved over the definitive plans of reorganization or over the liquidation which these trustees effect. Only occasional instances may be cited. Usually the last contact of the courts with the situation will be its review of the plan under which the voting trust or liquidation trust is set up. To be sure, the courts or commissions in these situations sometimes make changes in the trusts or in the trustees proposed. But such scrutiny is more likely to be exercised by Federal courts acting under Section 77B of the Bankruptcy Act than by the state courts.

\[10\text{CCH Bankruptcy Law Serv. § 54,803 (3rd ed. 1945).}\]
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. Aside from the tenuous and somewhat negative control exercisable by the security holders under these agreements there is no check on the propriety and fairness of most of these prospective plans of reorganization or liquidation except the integrity and conscience of the voting trustees themselves. The history of reorganizations demonstrates the loss and extravagant exploitation which has resulted where there is power without responsibility. The history of reorganization likewise demonstrates that reorganizations cannot safely be left to the domination of the inner few without supervision and restraint. Potentials of abuse are, of course, latent whenever power over other people's money is not accompanied by commensurate responsibility. They are heightened in this instance by common provisions in the agreements which, among other things, would permit affiliated interests of the voting trustees to acquire the assets of the trust . . .

The report terminates on Page 215 with the following conclusions concerning voting trusts:

The foregoing matters are illustrative of the need for several corrective measures, lest the emoluments of control accruing to voting trustees be appropriated to the trustees themselves rather than to the beneficiaries of these trusts. The first is that the voting trusts and liquidation trusts emanating from the reorganization courts be refashioned in much the same fashion as deposit agreements, so that the powers expressed therein be veritable powers in trust. This means that careful scrutiny of these agreements be made in conjunction with the fairness of the plans and in light of strict legislative standards designed for protection of investors. The second is that the reorganization courts retain jurisdiction over the exercise of these powers until the trust is terminated so that at all times there may be a regular and proper accounting of these stewardships. Unless such steps are taken we will be apt to witness a tremendous concentration of power over urban properties without accompanying responsibility for exercise of that power . . .

In 1950, the Securities and Exchange Commission in its advisory report on plans of reorganization of the Silesian-American Corporation, filed pursuant to Section 173 of Chapter X of the Bankruptcy Act (Corporation Reorganization Release No. 83) refused to give its approbation to a voting trust agreement which would have a duration of ten years and provided for three voting trustees, one to be selected by the corporation created by the Swiss Banks and two to be selected by the Court. There was no provision as to the persons entitled to nominate the voting trustees to be selected by the Court, and no indications as to the method for selecting successor or substitute voting trustees. The comment of the Commission in its Release is “this drastic and complete disenfranchisement of the public holders of new securities, serving only to assist the Swiss banks in distracting attention from their dominant interest in the new Company, is undesirable and unfair.” In further substantiation of its position, the Commission refers to the fact that Chapter X “specifically prohibits the issuance of non-voting stock and the unfair and inequitable distribution of voting power among the various classes of securities” and concludes with these words “a voting trust of the type suggested by the Trustees plan is in clear conflict with the
objectives of the Statute.” Section 216(12)(a) of Chapter X provides that any corporation to be organized for the purpose of carrying out the plan of reorganization shall include in its charter, provisions prohibiting the debtor or such corporation so organized, from issuing non-voting stock.

In 1952, in Corporate Reorganization Release No. 90, the Commission again considered the advisability of a voting-trust in its advisory report to the District Court for the Eastern District of Kentucky. The companies involved were American Fuel & Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, being reorganized under Chapter X of the Bankruptcy Act. Here the duration of the voting-trust was one year. The purpose of the trust was to enable the stock to be held intact for delivery to a purchaser of the reorganized company, in the event the purchaser desired to acquire the capital stock of the Company rather than its assets directly. The plan proposed that the voting-trustees, appointed by the Court, be empowered to vote the stock held by them for the election of directors and in connection with any other matter which might be subject to action by the stockholders.

The Commission has this to say about the plan on page 35. “In our opinion this aspect of the plan is unfair and inequitable. The inherent vice of disenfranchisement of stockholders which is to be found in voting-trusts is not less objectionable because of the relatively short duration of the plan. Public security holders should be accorded, as was intended by Section 216(12)(a) of Chapter X which prohibits issuance of non-voting stock, the power of decision in the management and destiny of their Corporation.”

In a formal statement in 1949, in the 15th Annual Report of the Securities and Exchange Commission we find these words at page 146: “The use of the voting-trust as a control device has been suggested in various cases in which the Commission participated. Unless justified by the special and unusual circumstances of the case, the Commission has opposed the voting-trust because it disenfranchises stockholders who are entitled to a voice in the management of the enterprise. In those cases where the Commission has agreed that a voting-trust was necessary in the interests of security holders, or where the voting-trust was adopted over the Commission’s objection, the Commission has sought to have the voting-trust agreement contain appropriate safeguards in the interests of investors.”

Quite in contrast with the extended expressions of opinion by Judges and text writers and members of the Securities and Exchange Commission as to the merits or dangers of voting trusts, we find a number of decisions by the Interstate Commerce Commission which
either approve or disapprove of the employment of voting-trusts, but those decisions contain little editorial comment.

In the matter of the application of the New Orleans, Texas, and Mexico Railway Company, for authority, inter alia, to issue voting trust certificates, the Commission authorized the issuance of the same, representing an amount equal to the capital stock, to comply with the reorganization plan, without any comment.

In Louisiana & Northwestern Railroad Company Reorganization, provisions of the reorganization plan related to placing new stock in a ten year voting trust with the proviso that the voting trust terminate after the payment of all interest requirement for three successive years, said voting trust being intended to insure a unity of control during the initial period following reorganization, during which the company was not expected to earn interest on its funded debt. The Commission stated that, under the plan as modified, it was reasonably probable that the railroad would earn interest on the funded debt for the three years following its reorganization. In view of this, and in order to avoid the expense and delay incident to the formation and approval of the terms of the voting trust, the Commission stated that the plan should be modified so as to eliminate the provisions in regard to a voting trust.

In the reorganization of the Chicago & Northwestern Railroad Company the Commission considered various proposed plans for voting trusts, and on Page 667 of its decision, sets forth very definitely the terms and conditions of a voting trust which it approves. Among other things, the voting trust agreement provided that if any vacancies occurred among the trustees, those vacancies should be filled by a majority of the remaining trustees. The voting trust also continued for a period of ten years from the date of the confirmation of the plan by the Court or until such earlier time as dividends on the preferred stock should have been paid in full for each of three consecutive periods of twelve months.

In the Missouri-Pacific Reorganization the Commission approved the provisions of a voting trust embodied in a plan submitted for the Commission's consideration and outlined in detail at Page 63 in the report of the decision.

17 65 I. C. C. 682 (1921).
18 224 I. C. C. 580 (1937).
19 236 I. C. C. 575 (1939).
20 239 I. C. C. 138 (1940).
In Chicago, Milwaukee, St. Paul & Pacific Railroad Reorganization,\textsuperscript{21} the Commission states as follows:

> In our opinion the necessity for a voting trust for the new stock has not been demonstrated, and we think the interest of the security holders will be safeguarded if the debtors proposals with respect to the manner of electing the new board of directors and with respect to the voting rights of the stockholders are followed . . .

In Denver & Rio Grande Western Reorganization,\textsuperscript{22} the prior report and order of the Commission provided for the creation of a voting trust for the new common stock for the primary purpose of permitting a sale of control to the present proprietary companies or others, if the stockholders might desire, the terms and conditions of such sale to be subject to the Commission's approval. Upon further consideration, the Commission deemed it desirable that both the new preferred and the new common stock be deposited under an escrow agreement, since the two classes of new stock were to have the same voting rights.

In Chicago, Milwaukee, St. Paul & Pacific Railroad Reorganization,\textsuperscript{23} the Commission concluded that a voting trust would be desirable in order to insure continuity of managerial policy, protection to bondholders and proper maintenance of property, all of which are in the public interest. The Commission, however, was of the opinion that the termination of the trust should not be longer than five years, subject to earlier termination when full dividends on the preferred stock should have been paid in three consecutive years. The provisions and amendments of such a voting trust are outlined on page 280 of the report.

In New York, New Haven and Hartford Railroad Reorganization,\textsuperscript{24} the Commission finally consented to express in a few meager lines its attitude toward voting trusts. The Commission says:

> . . . In our opinion, provision in a plan of reorganization for the creation of a voting trust should be made only where there is reason to believe that the interest of the security holders of the reorganized company and the public interest require it. The record in this proceeding presents no such situation, and the requested modification is accordingly denied.

In Fonda, Johnstown and Gloversville Railroad Reorganization,\textsuperscript{25} the Commission approved a voting trust limited to ten years or until available net income during three consecutive income periods should have been sufficient to provide a dividend on the common stock after meeting prior requirements.

\begin{itemize}
\item \textsuperscript{21} 239 I. C. C. 485 (1940).
\item \textsuperscript{22} 239 I. C. C. 583 (1940).
\item \textsuperscript{23} 240 I. C. C. 257 (1940).
\item \textsuperscript{24} 244 I. C. C. 239 (1941).
\item \textsuperscript{25} 249 I. C. C. 453 (1941).
\end{itemize}
In Minneapolis, St. Paul & Sault Ste. Marie Railway Reorganization,20 the Commission approved the proposed voting trust, without comment.

In St. Louis-San Francisco Railway Company Reorganization,27 the Commission said:

We are not persuaded of the necessity of a voting trust and no change will be made in this respect.

In Chicago, Milwaukee & St. Paul Reorganization,28 the Commission reviews the reorganization plan providing for a voting trust. The Commission makes a rather extended comment on its policy with respect to voting trusts, and said comment is as follows:

That as a general rule power to control corporation management should rest in owners of share capital rather than in those who occupy a position of creditor and that the owners of share capital should thereunder exercise this control periodically and at reasonably frequent intervals, is commonly regarded as a sound principle. Any proposals which would result in a more or less complete alienation of such power over an extended period of time by its lodgment either with creditors or with an individual or small group of individuals, can be justified only by demonstration of facts of special application and sufficient weight to warrant us in departing from the rule. In the instant case the proposals above recited, involving, as they do, compulsory alienation of complete voting power from shareholders for a period of two years only, after which shareholders may resume this power, may be regarded as not unreasonable in view of the facts. The purpose of the proposed voting trust is stated to be the initial provision of capable management for the reorganized property. There is no apparent reason to doubt the bona fides of this statement, nor is there reason to suppose that this purpose will not be achieved. The instant application will, therefore, be granted in this respect without prejudice to the ruling principle above described, which principle should be kept clearly in mind by those who in the future may find it necessary to apply to this commission for powers similar to those requested in the instant application.

In Fort Dodge, Des Moines, & Southern Railway Company Reorganization,29 the Commission approves a voting trust of the common stock to continue for a period of three years from the date of the confirmation of the plan.

In Oregon Pacific & Eastern Railway Company Reorganization,30 the Commission considers the fact that the preferred and common stock will be distributed to a small group who have had no experience in railroad management and therefore, recommends that the stock shall be issued, subject to a voting trust for a period of five years from the date of the transfer of the debtor's properties to the reorganized company. The Commission states on Page 197 as follows:

20 252 I. C. C. 525 (1942).
27 242 I. C. C. 523 (1940).
28 131 I. C. C. 673 (1928).
29 254 I. C. C. 182 (1943).
30 233 I. C. C. 187 (1939).
Owing to the fact that the new preferred and common stock, except the directors' qualifying shares, will be distributed to a relatively small group of holders of the bonds of the lumber company who have had no experience in railroad management, all such stock should be issued subject to a voting-trust agreement for a period of five years from the date of the transfer of the debtor's properties to the reorganized company. The members of the board of directors of the reorganized company should be designated as the voting trustees under the trust.

In *Chicago, Milwaukee, St. Paul & Pacific Reorganization,* the Commission discusses various aspects of the reorganization plan involving a voting trust and, after some extended discussion, it approves the voting trust contemplated by the plan of reorganization. The Commission does not make any extended comment on the merits of voting trusts generally.

In the Reorganization of *St. Louis-San Francisco Railway Company,* the Commission approved a voting trust wherein the term of the voting trust was limited to five years.

In *Cincinnati & Lake Erie Transportation Company,* the Commission considered a plan involving a voting trust consisting of five trustees who were selected by the security holders. The trust extended for a period of ten years but was revokable at any time by a majority vote of the holders of the trust certificates or by a sale of a majority of the stock of the company. The Commission approved this plan without any general comment on voting trusts.

In 1946, in the Receivership of the Seaboard Air Line Co., the Commission says: "Altho we are aware of the objectionable features of the voting trust agreement herein set forth, we are of the opinion that it is desirable to have a stable unchanged policy and management of the new company during the early years of its existence to carry out effectively and efficiently the terms and purposes of the plan of reorganization. Accordingly, we will approve the acquisition of control effected by the voting trust agreement with Henry W. Anderson, * * * * upon condition however, that the voting trust shall not continue in effect after April 1st, 1951, except upon our authorization herein, and that no other voting trust shall be created to control the common stock of the new company, unless and until so authorized by us in an appropriate proceeding held for that purpose."

In 1948 in the reorganization proceedings of the Rutland Railroad Company, the Commission says "it appears that it is not only desirable, but also essential, that the stock of the new Company be placed in a

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81 257 I. C. C. 223 (1944).
82 257 I. C. C. 399 (1944).
83 36 M. C. C. 243 (1941).
84 261 I. C. C. 689 (1946).
85 271 I. C. C. 44 (1948).
voting trust or trusts in order to insure stability and continuity of management, during the critical early years of the reorganized Company's existence, as well as to avoid the probable danger of its control falling into the hands of persons whose primary interest might be in scrapping the road rather than its continued operation for the benefit of the people and the community now served by it. Therefore, we approve a modification of the plan previously approved by us, so as to provide for the establishment of a separate voting-trust for each class of capital stock to be issued by the new Company'. Here the voting trust was to last for not more than five years after the consummation of the reorganization plan.

In 1951, in the Florida East Coast Railway Reorganization,8 we find the Commission refusing to recommend a voting trust in these words: "To the suggestions that a plan could be formulated providing for an internal reorganization without St. Joe Company control, we see no practical or legal method by which the latter objective can be attained, and at the same time provide equitable treatment of the debtor's creditors, other than by a voting trust. Even then, the voting trust would have to be for an indefinite period. Provisions for voting trusts approved by us and the courts in other reorganization plans have been for relatively short periods, and have been directed toward seeing that the management of the reorganized debtors during formative years would not be disrupted thru acquisition of controls by speculative interests. Such a problem is not presented here."

It is apparent from an examination of the reports of the Interstate Commerce Commission wherein voting trusts are considered, that the Commission, in reviewing voting trusts, either adopts or rejects them without extended comment. The most complete statement brought to the attention of the writer of what approximates a policy with respect to voting trusts, is the statement of the Commission appearing in the opinion of the Commission in Chicago, Milwaukee & St. Paul Reorganization.9

Professor Ballantine's suggested reforms for the improvement of voting trusts as they generally exist today are set out hereinbefore, with the exception of his recommendations for administrative or judicial regulation and his suggestions for statutory determination. The need for administrative supervision of the issuance of securities under voting trust agreements is apparent and a long step has been taken as the result of the present requirements of the Securities and Exchange Commission, but the matter of statutory determination is still generally limited to five

8 282 I. C. C. 81 (1951).
9 Supra, note 31.
years, and Professor Ballantine's suggestion for a referendum every two years to security holders as to the continuation of the arrangement, would seem to be a forward step in protecting the interests of the security holders. It is submitted that the other recommendations of Professor Ballantine are all aimed at the continuance of the protection of the stockholder and are all of substantial importance. It seems to the writer that it depends entirely upon where you are standing. If you are standing in the shoes of the investment banker or the person who is supplying capital for an enterprise, the voting trust insures control; whereas, if you are in the position of a stockholder, the voting trust practically guarantees to put the stockholder in a place where he has completely surrendered control over his investment, a control which is one of the basic concepts of corporate organization.