

CORPORATIONS:  
NON-VOTING COMMON STOCK:  
CONSTITUTIONAL LAW:  
CONSTRUCTION OF CONSTITUTION:

A Missouri Corporation under or subject to the General and Business Corporation Law may validly issue a class of non-voting common stock. The issuance of such non-voting common stock is not in violation of Article XI, Section 6 of the Constitution or of any statutory provision.

March 18<sup>7</sup>, 1962

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Honorable Warren E. Hearnes  
Secretary of State  
State Capitol  
Jefferson City, Missouri

Dear Mr. Hearnes:

You have requested the opinion of this office with respect to the validity of Non-voting Common Stock in Missouri, as follows:

"This Department has recently received Articles of Amendment of Wren Electric, Inc., a Missouri Corporation wherein said Articles purport to create two types of Common Stock, one being Class A without voting rights and the other being Class B with voting rights. The original of said Articles of Amendment is attached for your inspection.

The problem involved, as this Department sees it, is; Is non-voting Common Stock permissible under Article XI, Section VI of the Constitution of Missouri, 1945 and Chapter 351, Revised Statutes of Missouri, 1959.

We are also enclosing a memorandum in reference to the above question presented to this office in conjunction with the proposed amendment.

Also in conjunction with this request, this writer feels he should advise you that the

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files of this office presently reflect that there are an excess of six hundred Missouri domestic corporations now in good standing that have authorized the above type of stock in question, the same being approved by this office from the years 1923 to date."

The Articles of Amendment of Wren Electric, Inc. submitted with your request disclose that the holders of all of the issued and outstanding capital stock of the corporation voted in favor of dividing the stock into two classes, Class A common shares and Class B common shares, each with a par value of \$1.00 per share. The proposed amendment provides as follows with respect to voting rights:

"The holders of Class 'A' common shares shall not, except as otherwise specifically provided herein, have any voting right as shareholders of the Corporation, nor shall they be notified of the meetings of the shareholders. All rights to vote and all voting power (including but not limited to the right to vote for directors and managers), and all management and control of the Corporation, except as otherwise hereinafter specifically provided, are vested exclusively in the holders of Class 'B' common shares."

"The holders of Class 'A' common shares shall only have the right to vote on any amendment to the Articles of Incorporation of said Corporation which would change the relative rights as fixed in this amendment between Class 'A' common shares and Class 'B' common shares. The holders of said Class 'A' common shares and Class 'B' common shares shall each vote as a class."

The issue thus presented is whether stockholders by unanimous agreement, either in the original Articles of Incorporation or by Articles of Amendment, may validly restrict the voting power of one class of common stock so that all right to vote and all voting power, including, but not limited to, the right to vote for directors and managers, is vested exclusively in the holders of the other class of common stock. It is noted that the Articles of Amendment do not attempt to deprive the holders of the non-voting stock of the right to vote on any amendment which would change the relative rights as between the two classes of stock.

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The question for resolution is twofold in nature:

(1) Is such Non-voting Common stock valid in view of Section 6, Article XI of the Constitution of Missouri? (2) Is such Non-voting Common Stock valid under the applicable provisions of the corporation code of Missouri? We will discuss these questions in order.

The relevant constitutional provision (Section 6, Article XI of the Constitution of Missouri, 1945) reads as follows:

"In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, and may cast the whole number of votes, either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner; provided, that this section shall not apply to co-operative associations, societies or exchanges organized under the law."

Except for the proviso relating to cooperatives, the identical constitutional provision, with slight and immaterial changes in phraseology, appeared in the 1875 Constitution as Section 6, Article XII. For purposes of comparison we quote the 1875 section as follows:

"In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company. multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner."

Both of the foregoing constitutional provisions are limited to elections for directors or managers and have no application to voting rights with respect to any other matters. The 1875 Section

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was construed by our Supreme Court in 1905 in the case of State ex rel Frank v. Swanger, 190 Mo. 561, 89 SW 872. That was an action in mandamus to compel the then Secretary of State to issue a certificate of incorporation. His refusal was based upon a provision in the Articles of Incorporation which vested the voting power exclusively in the common stock and contained the express statement that the preferred stock shall have no voting power. The Supreme Court en banc ordered the peremptory writ to issue. For over fifty years the interpretation given to the constitutional provision by the Swanger case has not been challenged in any appellate court of Missouri. And, significantly, the 1945 Constitution made no change in substance in the provision other than to exclude its application to cooperatives. What then was the interpretation placed upon Section 6 by the Supreme Court?

It is true that the Swanger case involved only preferred stock. However, the interpretation given to Section 6 can not, in our view, be limited to preferred stock as such, but on the contrary, the interpretation applies generally to all stock and to the voting rights of all stockholders. The precise point for decision in the Swanger case was whether Section 6 meant that each shareholder shall have the right to vote for directors or managers and in connection with such guaranteed right have the right of cumulative voting and the right to vote by proxy, or whether the provision pertained only to cumulative voting and the right to vote by proxy.

If each shareholder was guaranteed the right to vote in all events, then obviously this Section would apply to preferred stock as well as common stock. The Court conceded that if the Constitutional provision were given a literal construction there would be much force to the argument that it contained a guarantee to all stockholders of the right to vote. However, the Court reached the conclusion that the literal construction was not the proper one, basing its conclusion on what it held was "the obvious purpose" of inserting the section into our fundamental law. The interpretation given by the Court in the Swanger case appears in the opinion as follows (89 SW 1.c. 876):

" \* \* \*Its purpose was to introduce the principle of cumulative system of voting

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in elections of stockholders so as to secure the minority of stockholders a voice in the management of the affairs of the company in proportion to the number of his shares, in lieu of the common-law right to vote one vote, irrespective of the number of shares held by him.\* \* \*

Again, and to amplify and make more specific the foregoing interpretation, the Court stated (89 SW 1.c. 876):

"\* \* \* Properly understood, we think section 6, art. 12, of the Constitution means only that every stockholder entitled to vote at any corporate election is entitled to vote his share on the cumulative plan, but does not mean that the stockholders themselves in the organization of the company may not voluntarily agree that certain preferred stock shall be issued and that the holders thereof shall not have the right to vote. \* \* \*

Finally, and again emphasizing the restrictive interpretation placed by the Court upon Section 6, it was said (89 SW 1.c. 877):

"\* \* \* We hold, then, that the evident purpose of section 6, art. 12, of our Constitution was the guaranty to stockholders having the right to vote of cumulating their votes, and has no reference to the contractual right of the stockholders inter sese of providing that preferred stockholders shall or shall not have the right to vote such stock, and to hold that it has taken away this well-recognized common-law right would be to distort its obvious purpose."

As thus construed by the Court, the "obvious purpose", the "evident purpose", of Section 6 was to guarantee to every stockholder "entitled to vote" or "having the right to vote", for corporate managers, the right to vote his share "on the cumulative plan". Such being the "evident purpose" of the constitutional provision, the inquiry, therefore, is not whether the stock in question is preferred or common, but whether by agreement consistent with applicable statutes the holder of such stock is "entitled to vote". If the stock held by the shareholder is of a kind which entitles him to vote then, as construed in the

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Swanger case, the constitutional provision guarantees him the right of cumulating such vote and to vote by proxy. If the stock has no voting rights, then the constitutional provision simply has no application. In this connection, the comment of the Court in the Swanger case (89 SW 1.c. 876) is pertinent:

"\* \* \*We can discover no intention to take away a long-established right of stockholders at common law to make their own agreements, as long as they did not collide with some settled principle of law, organic or statutory, and which did not contravene public policy, but concerned themselves only. \* \* \*"

As we have pointed out, it is true that the Swanger case involved only preferred stock. It is also true that the Court discussed the reasonableness of charter provisions denying preferred stock the right to vote. And it is true that the Court ruled that by the constitutional provision in question, the people did not intend to change the "long established right of stockholders to make certain stock a preferred lien on the dividends of a business, and to agree that the holders of such stock should have no right to vote in the management of the business, but should content themselves with the preferences and priorities given them of first receiving the profits of the business." But as we read the case, all such statements and arguments are but reasons which demonstrate that the constitutional provision was not in fact intended to guarantee to any shareholder the right to vote in cases where the stockholders validly agreed otherwise.

The interpretation given the constitutional provision in Swanger, namely, that it merely guarantees the right of cumulative voting to each shareholder entitled to vote, necessarily eliminated any conceivable constitutional right to vote per se, and of itself operated to confine the language of section 6 to the right of cumulative voting. Any other conclusion would result in holding that the constitutional provision, in addition to guaranteeing the right of cumulative voting in person or by proxy, was also intended to guarantee the right to vote to some but not all classes of shareholders, in spite of the express use of the words "each shareholder." In the light of the Swanger ruling we do not believe that the constitutional provision is subject to the interpretation that it means that "each common shareholder and each preferred shareholder entitled to vote shall have the right to vote on the cumulative plan". In our view, Section 6 either guarantees to all stockholders, without regard to the nature of their stock,

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the right to vote for directors in addition to the right to vote on the cumulative principle or it simply guarantees the right to vote on the cumulative plan to those shareholders otherwise having the right to vote in accordance with the terms under which that stock was issued or acquired.

Even if it be accepted that the framers of the 1875 Constitution assumed that each shareholder had the basic right to vote, this would not mean that the provision was intended to guarantee in all instances such right to vote if the shareholders (in their Articles of Incorporation) entered into an agreement otherwise. Such was not the purpose of the constitutional provision, as the Swanger case ruled, and it is the purpose thereof which controls the construction to be given thereto.

Our attention has been directed to certain general principles to the effect that at common law the right to vote follows the ownership of stock. However, this rule means only that such right prevails in the absence of any common restriction upon a particular class of stock. See to this effect 2 Thompson on Corporations (3rd Ed) Section 949 and 5 Fletcher Encyclopedia Corporations (Perm. Ed) Section 2026. In the Swanger case, the Court quoted from Miller v. Ratterman, 47 Ohio St. 141, 24 N.E. 496 as follows: "It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential." As Thompson, above cited, points out, the legality of a restriction upon the voting rights of preferred stock "is not based on the theory that preferred stockholders are guaranteed a dividend; but rather on the inherent power of the corporation to restrict the voting power. It is simply a contract relation between two classes of stockholders, in which the public has no concern." And in Clark and Marshall, Private Corporations, Vol. 3 pp. 1996-1997 it is said: "A stockholder has no right to vote at corporate meetings, whether the stock is common or preferred, if it is so stipulated when the stock is issued, for the stipulation is then a term of his contract."

There are respectable authorities in other jurisdictions, as well as learned articles in law reviews, which are critical of the Swanger decision and the basic premise upon which it was ruled. If the question were for decision de novo a strong argument could be made against the validity of any class of non-voting stock, at least insofar as relates to the election of corporate managers. However, whether Swanger was ruled rightly or wrongly, or whether the court would have reached the same result today, having had the benefit of other cases and the comments in law review articles, is beside the point.

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The Swanger case has authoritatively construed Section 6 as it appeared in the 1875 Constitution. The framers of the 1945 Constitution having re-enacted the constitutional provision without change are presumed to have adopted the construction given to such section by our Supreme Court in the Swanger case.

It is well settled that where a Court of last resort has construed a statute and such statute is re-enacted or continued in force without any change in its terms, the presumption is that the construction theretofore given to the statute is adopted by the lawmakers. There are many cases to this effect. See Handlin v. Morgan County, 57 Mo. 114, 116; State ex rel Steed v. Nolte, 345 Mo. 1103, 138 SW2d 1016, 1019; Messick v. Grainger, 356 Mo. 1227, 205 SW2d 739; and State ex inf. Gentry v. Meeker, 317 Mo. 719, 296 SW 411, 413. The constitution, of course, as the fundamental law of the state, is subject to the same rules of construction as are other laws. See Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 10 SW 595, 597; State ex rel Jones v. Atterbury, Mo. Sup., 300 SW2d 806, 810; Brown v. Morris, 365 Mo. 946, 290 SW2d 160, 167. In Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 SW 196, 199, it was held:

"The rule is firmly settled that the adoption in a later Constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning."

To the same effect are State ex rel Board of Control v. St. Louis, 216 Mo. 47, 115 SW 534, 547; and Moore v. Brown, 350 Mo. 256, 165 SW2d 657.

The rule that the construction given a constitutional provision by our highest court becomes a part of the provision itself, is particularly applicable in situations of this kind where the entire subject is open to the constitutional convention for close study, redrafting, and the making of any changes deemed desirable. The only change in substance made in Section 6 was the addition of the provision excluding cooperatives from the operation thereof. No attempt was made to qualify, limit or overrule the Swanger decision by specifically guaranteeing the right to vote either to all stockholders or to any particular class thereof.

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In our opinion, therefore, Section 6, Article XI of the 1945 Constitution guarantees only to stockholders having the right to vote, the right to vote on the cumulative plan in person or by proxy. Nothing contained in the said section prohibits the issuance of any class of non-voting stock. In our view, the constitutional provision may not fairly be construed to prevent the issuance of any class of shares containing restrictions or limitations on the right to vote. The intention is simply to guarantee to a stockholder, with respect to voting rights acquired by him in the issuance or purchase of stock, the right of cumulative voting in person or by proxy, rather than to deny the right to freely contract with respect to the right to vote at all.

Although no mention thereof is made in the Swanger opinion, we believe it significant that Section 6 contains the provision that directors or managers shall not be elected "in any other manner", language which in our view relates to a guarantee of the method of voting rather than to the right to vote, per se.

The unsettling effect of a ruling adverse to the validity of non-voting common stock should not be overlooked. We have been informed that hundreds of corporations in good standing presently have provisions in their articles of incorporation providing for classes of non-voting common stock. Some of such corporations were organized prior to the adoption of the 1945 Constitution. Consistently, since the Swanger decision, every administrative officer concerned with the issuance of corporate charters and certificates of amendment thereto, has construed the Swanger decision and the fundamental law upon which that case was grounded, as authorizing the issuance of classes of non-voting common stock. It is to be assumed that the framers of the 1945 Constitution were aware of this practical construction given to the language of Section 6 and the interpretation of the Swanger case by such administrative officers as well as by the lawyers who assisted in the organization of such corporations. It is also to be assumed that the framers of the Constitution were aware of the provisions of the 1943 corporation code which, in our view, contains a legislative construction of the Constitution in accord with our construction of the Swanger ruling.

We are aware of no fundamental policy of this State which would be violated by continuing to construe Section 6 of Article XI as it has heretofore been construed and which construction is fully in accord with the interpretation of the language thereof as expressed in the Swanger decision. We rule and hold, therefore,

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that the Constitution of Missouri does not prohibit or invalidate the issuance of non-voting common stock.

We turn next to a consideration of the statutory provisions contained in our corporation code to ascertain whether a class of non-voting common stock is permissible thereunder.

We do not reach the question of whether stockholders may validly agree in their charter to limit, restrict, or prohibit the exercise of voting rights by any class of stock absent specific statutory authorization. In our view, our statutes properly construed authorize the issuance of non-voting common stock.

Section 351.180 RSMo 1959, provides in part as follows:

"1. Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designations, preferences, qualifications, limitations, restrictions, and such special or relative rights including the right of conversion into any other class of shares as shall be stated in the articles of incorporation."

The foregoing section, except for the words "including the right of conversion into any other class of shares" was copied verbatim from the Illinois Business Corporation Act (Smith-Hurd Ill. Annotated Statutes, Chapter 32, Section 157.14.). Significantly, the Illinois section contains the additional sentence immediately following the foregoing, which is omitted in the Missouri statute, as follows, "The Articles of incorporation shall not limit or deny the voting ~~power~~ of the shares of any class." This omission is clearly indicative of an intent to authorize non-voting shares.

Section 351.055, RSMo 1959, provides that the articles of incorporation shall set forth with respect to the shares of stock "a statement of the preferences, qualifications, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class."

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Section 351.085, RSMo 1959, provides with respect to amendments of articles of incorporation that such amendments may be made "to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued." Said section further permits the amendment of articles of incorporation "to create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes."

Section 351.245, RSMo 1959, provides in part:

"1. Each outstanding share entitled to vote under the provisions of the articles of incorporation shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders."

The comparable provision of the Illinois Business Corporation Act (Section 157.28, Smith-Hurd) reads: "Each outstanding share, regardless of class, shall be entitled to one vote on each matter submitted to a vote at a meeting of shareholders." It should also be noted that paragraph 3 of Section 351.245 provides that with respect to voting for directors the principle of cumulative voting is guaranteed but only to "voting shares."

It is also of significance that Section 351.090, RSMo 1959, prescribing the manner of making amendments to articles of incorporation, provides that at the meeting of shareholders "a vote of the shareholders entitled to vote thereat shall be taken on the proposed amendment." The statute then provides that said amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares "entitled to vote". However, the following provision is then included which extends the right to vote to any other class of stock which is adversely affected by the proposed amendment. The statutory language, paragraph 1 (3)(a) of Section 351.090 is as follows:

"(3)(a) That if any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving, in addition to the affirmative vote of the majority of all other outstanding shares entitled to vote, the following vote of each other class of shares, voting as a separate class, whether by the terms of the articles of incorporation such class be entitled to vote or not, over which such new or additional preferential shares

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would have a priority or with which such new or additional preferential shares would participate: . . ."

The foregoing statutory provision can only mean that even if there are no preferential shares then in existence, any other class of shares which may have no right to vote by the terms of the articles of incorporation shall nevertheless be entitled to vote as a class on the kind of proposition described in the foregoing quoted portion of the statute. This would clearly indicate that the Legislature contemplated a class of non-voting common stock, even if none of the other provisions of the statute above cited are taken into consideration.

In our view, the power of a corporation to issue different classes of shares and to provide for "preferences, qualifications, limitations, restrictions, and special or relative rights in respect of the shares of each class" clearly authorizes the creation of a class of common shares having no voting rights except to the extent required by the foregoing provisions of Section 351.090. The restriction with respect to voting is clearly comprehended within the "restrictions", "limitations", and "relative rights" which are authorized to be made in respect of any class of shares.

We find no language in the corporation code indicative of a legislative intent to prohibit the creation of a class of non-voting common stock or to permit restrictions upon voting rights to be made only with respect to preferred shares. We rule and hold, therefore, that the creation and issuance of non-voting common stock is permissible under our statutes and that such shares may validly be issued. It follows from the foregoing that the certificate of amendment to the articles of incorporation of Wren Electric Inc. conform to law, and that it is your duty to file the same upon the payment of the required taxes or fees.

#### CONCLUSION

It is the opinion of this office that a corporation organized under or subject to the provisions of the General and Business Corporation Law of Missouri may validly issue a class of non-voting common stock and that the issuance of such stock is not in violation of Section 6, Article XI of the Constitution of Missouri 1945 or of any statutory provisions.

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The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

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