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## Proxy Voting Power in Non-Profit Organizations

Howard L. Oleck\*

VOTING BY PROXY is a matter of practical necessity in the modern business corporation; only small and local corporations can operate effectively today without it. A modern business corporation shareholders' meeting cannot be conducted like a New England Town Meeting.<sup>1</sup> Even in small corporations lack of the proxy voting device may be a serious disability.

In business corporations, however, there now is a large and detailed body of law on proxy voting.<sup>2</sup> The law on business corporation proxy voting is quite complex in some respects, but there is no shortage of law on the subject.<sup>3</sup>

The same is not true of non-profit organizations. As to them the law is fragmentary and confused. Yet the power to vote by proxy may be just as important in a non-profit organization as in a business organization.

This note will briefly survey the state of American law as to proxy voting in non-profit organizations. It will not treat the analogous problem of the fiduciary holder of a membership certificate (which rarely occurs), nor the voting trust (which passes title to stock to the voting trustee and thus is distinguished from a proxy):<sup>4</sup>

\* Associate Dean, Cleveland-Marshall Law School of Baldwin-Wallace College.

[This is an expansion of an extract from *Oleck, NON-PROFIT CORPORATIONS & ASSOCIATIONS* (2d ed., publication scheduled for Fall, 1965; Prentice-Hall, Englewood Cliffs, N. J.).]

<sup>1</sup> Baker & Cary, *Cases & Materials on Corporations*, 179 (3rd ed., 1958); Mehren & McCarroll, *The Proxy Rules: A Case Study in the Administrative Process*, 29 *Law & Contemp. Prob.* 728 (1964).

<sup>2</sup> See, Axe, *Corporate Proxies*, 41 *Mich. L. R.* 38, 225 (1942); 5 Fletcher, *Cyclopedia of the Law of Private Corporations*, Secs. 2050-2063 (1952, with 1964 cum. supp.); 3 Oleck, *Modern Corporation Law*, c. 59 (1959 with 1965 supp.).

<sup>3</sup> See, *supra*, n. 1, 2, and materials referred to in the cited works, especially in Fletcher.

<sup>4</sup> As to this distinction see, *Tompers v. Bank of America*, 217 A. D. 691, 217 N. Y. S. 67 (1926), revg. 126 Misc. 753, 214 N. Y. S. 643; *Simpson v. Nielson*, 77 Cal. App. 297, 246 P. 342 (1926).

See, control of subservient non-profit cemetery association by trustees of a cemetery lot business trust, through proxies; held to be against public policy as a violation of the members' right to control association affairs. *Muth v. Maxton*, 119 N. E. 2d 162 (Ohio Com. Pl., 1954).

It will deal first with member voting by proxy, and then with proxy voting by representatives (delegates, committeemen, directors or trustees).

A *proxy* is the authority (agency) given by one having the right to do a certain thing (*e.g.*, to vote) to another to do it for him. The term also may refer to the instrument, paper or document which evidences the granting of such authority.<sup>5</sup> It is a grant of agency power to vote.<sup>6</sup>

The common law rule was that voting at corporate meetings basically must be done in person. Neither a stockholder nor a member of a non-profit corporation may grant a valid voting proxy, at common law, unless the right to do so is stated in the articles of incorporation, a general constitutional or statutory enactment, or in a valid bylaw.<sup>7</sup> But the power to use proxies is sufficiently stated by a general statute, even though the by-laws are silent on the subject.<sup>8</sup>

This common law rule in respect of voting by proxy had its origin in reasons peculiarly applicable to the earlier forms of corporations, namely, municipal and charitable corporations. Membership in these was coupled with no pecuniary interest. The voting privilege was in the nature of a personal trust, committed to the discretion of the member as an individual, and hence not susceptible of exercise through delegation.<sup>9</sup>

Even statutory authorization to provide for proxy voting in corporate bylaws does not assume inherent power in the members to do so, under this view. It contemplates only corporate decision to use or not use the power, unless there is an established custom of proxy voting already in being in the corporation.<sup>10</sup>

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<sup>5</sup> *Axe, supra*, n. 2; *Fletcher, supra*, n. 2.

<sup>6</sup> See cases *supra*, n. 4.

<sup>7</sup> See, *supra*, n. 2, as to business corporations. As to non-profit corporations see, *Lo Curto v. River Edge Girl Scouts Assn., Inc.*, 59 N. J. Super. 408, 157 A. 2d 862 (1960).

<sup>8</sup> *Vliet v. Smith*, 153 N. Y. S. 2d 1014 (1956), referring to N. Y. Gen. Corp. L. Sec. 19. Proxy voting historically has been a creature of statute; In re *Schwartz and Gray*, 77 N. J. L. 415, 72 A. 70 (S. Ct. 1909); *Green v. Holzmüller*, 1 Terry 16, 40 Del. 16, 5 A. 2d 251, 253 (S. Ct. 1939).

<sup>9</sup> *Walker v. Johnson*, 17 App. D. C. 144, 162 (1900).

<sup>10</sup> *Pohle v. Rhode Island Food Dealers Assn.*, 63 R. I. 91, 7 A. 2d 267 (1939); and one instance of voting by *directors* is not sufficient to establish a corporate custom of proxy voting. But see, *infra*, In re *Tidewater Coal Exchange*, at n. 108, 105.

Today statutes, charters or bylaws generally provide for proxy voting in business corporations.<sup>11</sup>

The best way to ascertain the state of the law as to proxy voting in non-profit organizations is to examine the provisions of the several states. References are to voting by members, except as otherwise noted.

- Alabama: Proxy voting allowed unless articles or bylaws provide otherwise (3 months maximum duration unless otherwise provided in the proxy).<sup>12</sup>
- Alaska: Corporation may "prescribe their respective voting rights" for members.<sup>13</sup>
- Arizona: Bylaws must be adopted and may provide for proxy voting by members.<sup>14</sup>
- Arkansas: One vote per member in elections of directors; in other voting of members, as the articles or bylaws may provide; and directors may vote by proxy.<sup>15</sup>
- California: Bylaws may provide manner of voting by members and whether proxy voting shall be allowed.<sup>16</sup>
- Colorado: No general provision; proxy voting prohibited in agricultural cooperatives, credit unions, and livestock coops., restricted in mutual benefit associations, and permitted in other non-profit coops.<sup>17</sup>
- Connecticut: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless limited to a particular future meeting).<sup>18</sup>

<sup>11</sup> See lists of case citations by states in 5 Fletcher, *Cyclopedia of the Law of Private Corporations* 207 (1952 with 1964 cum. supp.).

<sup>12</sup> Code of Ala., tit. 10, Sec. 217.

<sup>13</sup> Alaska St. Sec. 10.20.080.

<sup>14</sup> Ariz. Rev. St. Anno. Sec. 10-706A3.

<sup>15</sup> Ark. St. Anno. Secs. 64-1911, 64-406.

<sup>16</sup> Anno. Cal. Code, Corporations, Sec. 9402(d).

<sup>17</sup> Colo. Rev. St. Secs. 31-24-5, 38-1-7, 31-24-5, 72-10-21, 31-25-6.

<sup>18</sup> Conn. Gen. St. Anno. Sec. 33-471.

- Delaware:** Proxy voting allowed unless articles provide otherwise (3 years maximum duration unless proxy provides a longer period.<sup>19</sup> Members, officers, representatives or delegates of fraternal benefit society may not vote by proxy,<sup>20</sup> except Masons, Odd Fellows and certain named other societies.<sup>21</sup>
- District of Columbia:** Members or delegates may vote by proxy if bylaws so provide.<sup>22</sup> No proxy voting by members in cooperative associations.<sup>23</sup>
- Florida:** No provision as to proxies in general nonprofit corporations statute. Bylaws may provide for proxy voting in agricultural coop. marketing associations<sup>24</sup> and other cooperative associations,<sup>25</sup> but not in credit unions.<sup>26</sup>
- Georgia:** Proxies may be used by members of business corporations,<sup>27</sup> and non-profit corporations have generally similar powers.<sup>28</sup>
- Hawaii:** Members may vote by proxy; bylaws may provide the mode of voting of trustees, directors or managers.<sup>29</sup>
- Idaho:** Members may vote by proxy,<sup>30</sup> with limitations for water users' associations,<sup>31</sup> and bylaws may provide for proxy voting in cooperative marketing associations.<sup>32</sup>

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<sup>19</sup> Del. Code Anno. tit. 8, Sec. 215.

<sup>20</sup> Ibid. tit. 18, Sec. 1901(c).

<sup>21</sup> Ibid. Sec. 1903.

<sup>22</sup> D. C. Code Sec. 29-603.

<sup>23</sup> Ibid. Sec. 29-814.

<sup>24</sup> Fla. St. Anno. Sec. 618.09(3).

<sup>25</sup> Ibid. Sec. 619.06(6).

<sup>26</sup> Ibid. Sec. 657.07.

<sup>27</sup> Ga. Code Anno. Sec. 22-1863.

<sup>28</sup> Ibid. Sec. 22-1881.

<sup>29</sup> Rev. L. Hawaii Sec. 172-90.

<sup>30</sup> Idaho Code Secs. 30-134, 30-161.

<sup>31</sup> Ibid. Sec. 30-140.

<sup>32</sup> Ibid. Sec. 22-2610(c).

- Illinois:** Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).<sup>33</sup>
- Indiana:** Voting in person or by proxy, as the bylaws shall provide (11 months maximum duration unless the proxy provides a longer time).<sup>34</sup>
- Iowa:** No provision in non-profit statute;<sup>35</sup> no proxy vote in cooperatives.<sup>36</sup>
- Kansas:** Members may vote by proxy (3 year maximum duration unless proxy states a longer period).<sup>37</sup>
- Kentucky:** Directors must adopt bylaws, which may provide for proxy voting by members.<sup>38</sup>
- Louisiana:** Members may vote by proxy unless articles or bylaws prohibit it, and directors may vote by proxy if so provided (11 months maximum duration unless the proxy provides a longer period).<sup>39</sup> No proxy voting in credit unions.<sup>40</sup>
- Maine:** Proxy voting forbidden in fraternal associations<sup>41</sup> and consumers' cooperatives.<sup>42</sup> Otherwise they seem to be permitted (with maximum duration of one year),<sup>43</sup> or bylaws may provide for them.<sup>44</sup>

<sup>33</sup> Ill. Anno. St., ch. 32, Sec. 163a14. The right of members of non-profit corporation to vote is not protected by the constitution. *Westlake Hospital Assn. v. Blix*, 13 Ill. 2d 183, 148 N. E. 2d 471, app. dismd. 79 S. Ct. 44, 358 U. S. 43, 3 L. Ed. 2d 43 (1958).

<sup>34</sup> Ind. St. Anno. Sec. 25-515(e).

<sup>35</sup> Iowa Code Anno., ch. 504. Business corporation articles may deny right to vote by proxy. *Ibid.* Sec. 496 A. 32.

<sup>36</sup> *Ibid.* Sec. 498.18.

<sup>37</sup> Gen. St. Kans. Sec. 17-3304.

<sup>38</sup> Ky. Rev. St. Anno. Sec. 272.420 (3).

<sup>39</sup> La. St. Anno. Secs. 12:131; 12:35 (F).

<sup>40</sup> *Ibid.* Art. 6, Sec. 647.

<sup>41</sup> Rev. St. Me., c. 60, Sec. 170.

<sup>42</sup> *Ibid.* c. 56, Sec. 8.

<sup>43</sup> *Ibid.* c. 53, Sec. 28.

<sup>44</sup> *Ibid.* Sec. 23.

- Maryland:** Proxy voting by members may be provided for by articles or bylaws (use of proxies seems to be assumed).<sup>45</sup>
- Massachusetts:** Bylaws must provide rules for elections and the carrying out of purposes.<sup>46</sup> No specific provision.
- Michigan:** No provision as to proxies in the general statute.<sup>47</sup> Proxies prohibited in fraternal benefit societies.<sup>48</sup> Forbidden in non-profit corporations,<sup>49</sup> except seemingly in elections of directors in some types of corporations.<sup>50</sup>
- Minnesota:** Proxy voting is permitted at all meetings unless prohibited by the articles or bylaws (11 months maximum duration), but directors may not vote by proxy.<sup>51</sup>
- Mississippi:** Apparently voting by proxy is authorized generally,<sup>52</sup> and specifically may be provided in bylaws of coop. associations,<sup>53</sup> but is forbidden to credit unions.<sup>54</sup>
- Missouri:** Apparently voting by proxy may be provided for in the bylaws,<sup>55</sup> and is specifically provided for in elections of directors of cooperatives.<sup>56</sup>
- Montana:** Bylaws may provide rules for voting.<sup>57</sup> No specific provisions.

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<sup>45</sup> Anno. Code Md. Art. 23, Sec. 135.

<sup>46</sup> Anno. L. Mass. c. 180, Secs. 7, 17.

<sup>47</sup> Comp. L. Mich. Sec. 450.122.

<sup>48</sup> Ibid. Sec. 524.3.

<sup>49</sup> Ibid. Sec. 450.32.

<sup>50</sup> Ibid. Sec. 450.651.

<sup>51</sup> Minn. St. Anno. Secs. 317.22 (subd. 6), 317.20 (subd. 13).

<sup>52</sup> Miss. Code Anno. Sec. 5326.

<sup>53</sup> Ibid. Sec. 4502; and electric power assns. Sec. 5471.

<sup>54</sup> Ibid. Sec. 5402.

<sup>55</sup> Anno. Mo. St. Sec. 352.110.

<sup>56</sup> Ibid. Secs. 357.090, 357.110.

<sup>57</sup> Rev. Codes Mont. Sec. 15-1404.

- Nebraska: Proxy voting is permitted unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).<sup>58</sup>
- Nevada: No specific provisions; vague bylaw powers.<sup>59</sup>
- New Hampshire: No specific provisions; vague bylaw powers.<sup>60</sup>
- New Jersey: No specific provision<sup>61</sup>; in absence of statutory authority plus bylaw provisions, no proxy voting.<sup>62</sup>
- New Mexico: Bylaws may make voting rules.<sup>63</sup> No specific provision.
- New York: Proxy voting permitted, by inference.<sup>64</sup> Lack of a bylaw does not abridge the right.<sup>65</sup> Directors may not vote by proxy.<sup>66</sup>
- North Carolina: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).<sup>67</sup>
- North Dakota: Proxy voting allowed unless articles or bylaws provide otherwise (11 months maximum duration unless the proxy provides otherwise).<sup>68</sup> No proxy voting in credit unions and fraternal benefit societies.<sup>69</sup>
- Ohio: No proxy voting by members (except organizations which are members) unless the articles or bylaws so provide.<sup>70</sup>

<sup>58</sup> Rev. St. Nebr. Secs. 21-1914, 21-1915.

<sup>59</sup> Nev. Rev. St., c. 81.

<sup>60</sup> N. H. Rev. St. Anno. Sec. 295:5.

<sup>61</sup> N. J. St. Anno. Sec. 15:1-9.

<sup>62</sup> *Lo Curto v. River Edge Girl Scouts Assn.*, 59 N. J. Super. 408, 157 A. 2d 862 (1960).

<sup>63</sup> New Mex. St. Sec. 51-14-29.

<sup>64</sup> N. Y. Memb. Corp. L. Sec. 41.

<sup>65</sup> *Flynn v. Kendall*, 195 Misc. 221, 88 N. Y. S. 2d 299 (1949).

<sup>66</sup> *Craig Medicine Co. v. Merchants' Bank*, 59 Hun 561, 14 N. Y. S. 2d 16 (1891).

<sup>67</sup> Gen. St. No. Car. Sec. 55-A-32(b).

<sup>68</sup> No. Dak. Cent. Code Anno. Sec. 10-24-15.

<sup>69</sup> *Ibid.* Secs. 6-06-10, 26-12-03.

<sup>70</sup> Ohio Rev. Code Sec. 1702.20.



- Oklahoma: Proxy voting allowed (7 year maximum duration, but 11 months maximum unless otherwise provided in the proxy).<sup>71</sup>
- Pennsylvania: Proxy voting allowed if bylaws so provide (11 months maximum duration unless a longer period, up to 3 years, is provided therein).<sup>72</sup>
- Rhode Island: Proxy voting may be provided for by articles or bylaws.<sup>73</sup>
- South Carolina: Vague bylaw powers,<sup>74</sup> but proxy voting may be provided for by bylaws of cooperative marketing associations<sup>75</sup> and rural electric coops.<sup>76</sup>
- South Dakota: Proxy voting allowed, in vague provision<sup>77</sup>; must be in bylaws for existing communals<sup>78</sup>; various special provisions for specific types of organizations.
- Tennessee: Proxy voting allowed in elections.<sup>79</sup>
- Texas: Proxy voting by members permitted unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).<sup>80</sup>
- Utah: Members may vote by proxy unless articles or bylaws provide otherwise.<sup>81</sup>
- Virginia: Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).<sup>82</sup>

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<sup>71</sup> Okla. St. Anno. tit. 18, Secs. 1.60, 1.3.

<sup>72</sup> Pa. St. Anno., tit. 15, Sec. 2851-606.

<sup>73</sup> Gen. L. R. I. Sec. 7-6-12.

<sup>74</sup> Code L. So. Car. Sec. 12-758.

<sup>75</sup> Ibid. Sec. 12-951 (3).

<sup>76</sup> Ibid. Sec. 12-1034.

<sup>77</sup> So. Dak. Code Sec. 11.0711.

<sup>78</sup> Ibid. Sec. 11.1205, now replaced by new c. 11.12.

<sup>79</sup> Tenn. Code Anno. Sec. 48-1114.

<sup>80</sup> Tex. Civ. St. Art. 1396-2.13.

<sup>81</sup> Utah Code Anno. Sec. 16-6-30.

<sup>82</sup> Code Va. Sec. 13.1-217.

- Virgin Islands: Vague bylaw powers; apparently may provide for proxy voting.<sup>83</sup>
- Washington: Vague bylaw powers; apparently may provide for proxy voting.<sup>84</sup> Credit unions may not use proxy voting.<sup>85</sup>
- West Virginia: Vague provision, apparently permitting use of proxy voting.<sup>86</sup>
- Wisconsin: Members may vote by proxy unless articles or bylaws provide otherwise (11 months maximum duration unless otherwise provided in the proxy).<sup>87</sup> No proxy voting in credit unions<sup>88</sup> nor mutual benefit societies.<sup>89</sup>
- Wyoming: Voting by proxy allowed.<sup>90</sup>

The foregoing summaries of state statutes and rules should suffice to convey a fair idea of the present status of the law on voting by proxy. Many state statutes contain special additional rules applicable to certain specific types of organizations. The summaries here provided contain the major provisions on the subject.

One pattern is immediately apparent—that of the states whose statutes are based on the Model Non-Profit Corporations Act of the American Bar Association's Section of Corporation, Banking and Business Law.<sup>91</sup> These statutes are based on Section 15 of the Model Act. Close similarity to that section is found in the statutes of Alabama, Connecticut, Delaware, Illinois, Indiana, Kansas, Louisiana, Minnesota, Nebraska, North Carolina, North Dakota, Texas, and Wisconsin. But some of these states' provisions are not necessarily copied from the Model Act; they are only coincidentally similar.

<sup>83</sup> Virgin Islands Code tit. 13, Sec. 495.

<sup>84</sup> Rev. Code Wash. Secs. 24.04.060, 24.04.020.

<sup>85</sup> Ibid. Sec. 31.12.160.

<sup>86</sup> W. Va. Code Sec. 3016 (1) (1, 6).

<sup>87</sup> Wis. St. Anno. Sec. 181.16.

<sup>88</sup> Ibid. Sec. 186.06.

<sup>89</sup> Ibid. Sec. 208.02.

<sup>90</sup> Wyo. St. Sec. 17-122.16.

<sup>91</sup> (1964 revision) Committee on Corporate Laws of the A. B. A. (Joint Committee on Continuing Legal Education of the A. L. I. and A. B. A.). 133 South 36th St., Philadelphia 4, Pa.

The Model Act's provision<sup>92</sup> is as follows:

The right of members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the by-laws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of the members.

A member entitled to vote may vote in person or, unless the articles of incorporation or the by-laws otherwise provide, may vote by proxy executed in writing by the member or his duly authorized attorney-in-fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the by-laws may provide that such elections may be conducted by mail.

. . . (provisions as to cumulative voting) . . .

If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power.

The Model Corporation Acts of this section of the American Bar Association (more particularly the Model Business Corporation Act) have been severely criticized. The gist of the criticism is that these models are weighted in favor of directors and officers (management) as against members (shareholders).<sup>93</sup>

Similar criticism is warranted as to such provisions of the Model Non-Profit Corporations Act as the placing of bylaw powers in the directors rather than the members,<sup>94</sup> or the provision of cumulative voting for members<sup>95</sup> and vitiation of that provision by the provision elsewhere of classes of directors<sup>96</sup> (making bullet voting futile).

But the Model Act's provisions as to voting by proxy should not be summarily categorized as "pro-management," though proxies are forbidden *unless* granted by the articles or bylaws (which the original "management" may grant or withhold). After all, there must be an original managing group to organize the corporation, usually; and we must appeal to self-interest if we want to encourage entrepreneurs in non-profit as in business organizations.

<sup>92</sup> Ibid. Sec. 15.

<sup>93</sup> Harris, *The Model Business Corporation Act; An Invitation to Irresponsibility*, 50 U. Northwestern L. R. 1 (1955).

<sup>94</sup> Model Non-Profit Corp. Act Sec. 12.

<sup>95</sup> Ibid. Sec. 15.

<sup>96</sup> Ibid. Sec. 18.

The real question is "should there be proxy voting in non-profit organizations?", regardless of the defects of any particular statute or suggested statute.

In a case involving proxy voting in a political party committee organization recently, the New Jersey Superior Court held that proxy voting should not be permitted, reiterating the old arguments against it.<sup>97</sup> The court said

To permit unit rule and proxy voting in the absence of legislative approval is to permit an abdication from the position of trust ascribed to a committeeman. . .<sup>98</sup>

This refers to a *committeeman*, i.e., to a delegate or representative. It does not refer to a member generally. Indeed, the court specifically stated that it was referring to "the question of the duties of those with representative status."<sup>99</sup>

This, it is submitted, is the core of the old objection to proxy voting—it is an objection to proxy voting by *representatives*, meaning *delegates*, *trustees*, or *directors*, not by *members* as such.

The state non-profit corporation statutes almost uniformly omit any specific provision for directors' or trustees' powers to vote by proxy. Minnesota's statute seems to be the lone exception, permitting proxy voting at "all meetings,"<sup>100</sup> but then specifically forbidding *directors* to vote by proxy.<sup>101</sup> Some statutes specifically bar voting by representatives or delegates in certain types of organizations such as fraternal benefit societies or cooperative associations.<sup>102</sup> Other statutes specifically *permit* proxy voting in certain types of organizations.<sup>103</sup>

Yet, in practice many non-profit organizations blithely ignore the legal theories and *do* provide for proxy voting by delegates, trustees, or directors, in their articles or bylaws. It is difficult, sometimes, for a trustee to be physically present at a meeting, and yet he may be very anxious to vote for or against

<sup>97</sup> *Bontempo v. Carey*, 64 N. J. Super. 51, 165 A. 2d 222 (1960).

<sup>98</sup> *Ibid.*, at 228.

<sup>99</sup> *Ibid.*, at 229, citing *Schwartz v. City of Camden*, 77 N. J. Eq. 135, 75 A. 647 (Ch. 1910); *O'Brien v. Fuller*, 93 N. H. 221, 39 A. 2d 220, 224 (S. Ct. 1944).

<sup>100</sup> Minn. St. Anno. Sec. 317.22 (subd. 6).

<sup>101</sup> *Ibid.* Sec. 317.20 (subd. 13).

<sup>102</sup> See, *supra*, Colorado, Delaware, District of Columbia, etc.

<sup>103</sup> See, *supra*, Florida, Idaho, Mississippi, etc.

a specific proposal. Often the proposal is a narrow one, calling for a "yes" or "no" only, on a clear issue or choice. Most people see no real reason why such a *decision* cannot be voted by proxy.

On the other hand, case decisions, mostly old ones (and the Minnesota statute mentioned above<sup>104</sup>), have held that a trustee or director may not vote by proxy, because he may not delegate his control and management discretion.<sup>105</sup> But the Arkansas and Louisiana business corporation statutes *do* allow directors to vote by proxy.<sup>106</sup> And it is hard to see how a director delegates any discretion if he grants a proxy to vote "yes" or "no" on a specific question only.

Ohio's (and other) statutes governing decisions by members of the executive committee of a non-profit board of trustees permit decisions to be made "by a writing or writings signed by all of its members," unless otherwise provided in the bylaws or ordered by the trustees.<sup>107</sup> This is analogous to voting by proxy.

Grants of general proxy powers may be undesirable for trustees, or for members. But grants of specific, narrow proxy powers, limited to specific issues, seem to be reasonable. Undoubtedly the law should permit such specific grants of authority to vote by proxy. In fact, as has been remarked, many organizations do allow proxy voting by trustees (as well as by members), with no objections and no harm done.

The writer has advised inclusion of proxy voting power in bylaws of non-profit organizations for which he has served as counsel. No case of objection or abuse, or trouble of any kind, has resulted. The organizations concerned have found the provision to be convenient. Of course, the provision should be limited, not general, in nature.

What is said here of corporations is equally applicable to

<sup>104</sup> *Supra*, n. 101.

<sup>105</sup> *Craig Medicine Co. v. Merchants Bank*, 59 Hun 561, 14 N. Y. S. 16 (1891) re: New Jersey law; *Stevens v. Acadia Dairies, Inc.*, 15 Del. Ch. 248, 135 A. 846 (1927); *Paxton v. Heron*, 92 P. 15 (Colo., 1907); *Lippman v. Kehoe Stenograph Co.*, 11 Del. Ch. 80, 95 A. 895 (1915); *Perry v. Tuskalooza etc. Co.*, 93 Ala. 364, 9 S. 217 (1891); *In re Tidewater Coal Exchange*, 274 F. 1009, 1011, at 1014 (D. C., S. D., N. Y., 1921) (unincorporated association; proxy viewed as invalid though customarily employed by executive committee); *Greenberg v. Harrison*, 143 Conn. 519, 124 A. 2d 216 (1956).

<sup>106</sup> Ark. St. Anno. Sec. 64-406; La. Rev. St. Sec. 12:35 (F).

<sup>107</sup> Ohio Rev. Code Sec. 1702.33 (D). See, Note, *Extent to Which Corporate Directors May Act Without a Formal Board Meeting*, 11 Syracuse L. R. 68 (1959).

unincorporated associations. It is general practice to use corporation law and practice as analogous in unincorporated associations. Some court decisions expressly so state. In one case involving proxy voting by members of an executive committee of an unincorporated association, which was forbidden for corporation trustees, such voting was viewed as invalid even though customarily employed by that association.<sup>108</sup>

It is submitted that the modern statutes permitting directors to act by "a writing,"<sup>109</sup> the specific grant of authority for directors to vote by proxy by such statutes as those of Arkansas and Louisiana,<sup>110</sup> and the actual practice of many organizations mentioned above, are sound, provided that they are confined to narrow, specific vote issues. As the statutes pertaining to proxy voting by members clearly indicate,<sup>111</sup> it now is well established that members of non-profit organizations can (and should) be able to vote by proxy. The old rule, which is suspicious of proxy voting, has outlived its usefulness.

If it be argued that proxies make possible the "corralling" of votes, the answer is that attempts to corral votes are not prevented by proxy rules. Both sides, in a voting contest, are affected by proxy rules or their absence. And the argument that the granting of a proxy is delegation of deliberative obligations is vitiated when the proxy is confined to a single, narrow issue. Further confinement of a proxy, to a duration of perhaps 90 days maximum, should make certain that the proxy is employed as a valuable convenience rather than as an undesirable delegation of the duty to deliberate.

A rule which began as a law of personal voting obligation in municipal and truly charitable (trustee) corporations, and which is inapposite for general non-profit (*e.g.*, such as social) organizations, and very questionable even for charitable organizations, should not be perpetuated because of mere custom, when a better and more useful rule easily can be adopted.

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<sup>108</sup> *In re Tidewater Coal Exchange*, *supra*, n. 105. But see, *supra*, n. 10.

<sup>109</sup> *Supra*, at n. 107.

<sup>110</sup> *Supra*, at n. 106.

<sup>111</sup> *Supra*, n. 12-90.