statutory standards it is charged with applying.[45] It is equally interesting, however, as a problem in the coordination of judicial conviction with judicial convention.

SPECIFIC ENFORCEMENT OF SHAREHOLDER VOTING AGREEMENTS

An agreement was entered into in 1941 by two of the three shareholders in Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a family corporation, whereby they were to vote their stock jointly for a period of ten years. In the event that they could not decide to their mutual satisfaction how their shares were to be voted before any corporate election, the matter was to be submitted to an arbitrator whose powers were to be "exercised to the end of assuring . . . . good management [of the corporation] and such participation therein by the members of the Ringling family as the experience, capacity and ability of each [warranted]." The decision of the arbitrator in such a situation was to be binding on the contracting parties. The agreement also provided that each of the parties was to have first option to purchase the other's stock in the event of a decision to sell. Prior to the annual stockholders' meeting in 1946, the two shareholders could not agree as to how their votes should be cast in the election of directors. The arbitrator whose services were utilized at the request of the plaintiff, directed that the parties to the agreement vote for her choice.[1] The defendant refused to comply with the award and voted contrary to it. The present suit was brought to determine the validity of the election and the right of the elected directors to hold office.[2] The Delaware Supreme Court held that the agreement

[45] For an earlier enunciation of the principle, see FTC v. Keppel & Bro., 291 U.S. 304, 314 (1934). There the Court said, "While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, . . . in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience and careful study, of the business and economic conditions of the industry affected,' and it was organized in such a manner . . . as would 'give to [its members] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong. 2d Sess., pp. 9, 11." See also Pound, The Administrative Application of Legal Standards, 44 Reports of the American Bar Ass'n 445 (1919).

[1] The arbitrator first directed that the stock of both parties be voted for a 60-day adjournment. The plaintiff voted her shares in pursuance of this order, but the defendant voted against adjournment. Although the chairman ruled that the motion for adjournment had carried by virtue of the voting agreement, the meeting proceeded to the election of directors. The plaintiff stated that she would continue in the meeting "without prejudice to her position with respect . . . . to the fact that adjournment had not been taken."

[2] The plaintiff and the defendant had sufficient votes (under a cumulative voting scheme) to each elect two of the seven directors. By pooling their remaining votes they could elect an additional candidate regardless of how the third shareholder voted. If the agreement were not enforced, the third shareholder who held a slightly larger number of shares than either plaintiff or defendant would control the choice of three directors.

between the plaintiff and the defendant was a valid contract; that because of the breach of that contract, the defendant's votes at the contested election were to be rejected as of no effect; and that the directors voted for by the third shareholder and by the plaintiff were duly elected. The plaintiff, however, was not allowed to vote the defendant's shares, the court holding that in the absence of any provision in the agreement for a power of proxy, none could be implied where one party refused to comply with the arbitrator's decision. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling.*[3]

The refusal of the Delaware Supreme Court to specifically enforce the voting agreement, while upholding its validity on the basis of statutory provisions for voting trusts despite its unique arbitration provisions, reflects a curiously ambivalent attitude toward voting contracts. Voting agreements among shareholders of a corporation have been held valid at common law, where they have not attempted to limit the discretion of the directors, or in some way tended to injure the other shareholders.[4] In Delaware, shareholder voting agreements are not the subject of legislative action, although voting trusts established in accordance with certain specified requirements have been authorized by statute.[5] Voting trust statutes have generally been enacted to declare legislative approval of a complete separation of stock ownership from stock control in order to meet the practical demands of modern business practice.[6] The Delaware statute, however, does not expressly indicate that the voting trust is the only legal method by which this separation can be achieved.[7] In holding that the Delaware statute did not invalidate other methods, such as the instant contract, whereby voting power could be irrevocably separated from stock ownership, the court recognized the distinction between voting or stock-pooling agreements and voting trusts.[8] Since the ordinary pooling agreement involves considerably less relin-

[3] 53 A. 2d 441 (Del., 1947).

[4] Hart v. Bell, 222 Minn. 69, 23 N.W. 2d 375 (1946); Trefethen v. Amazeen, 93 N.H. 110, 36 A. 2d 266 (1944); Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641, (1936); Brightman v. Bates, 175 Mass. 105, 55 N.E. 809 (1900); Smith v. San Francisco & N.P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897); Faulds v. Yates, 57 Ill. 416, 11 Am. St. Rep. 200 (1870); Ballantine, Corporations 422 (rev. ed., 1946); Fletcher, 5 Cyclopedia of Corporations § 2064 (rev. & perm. ed., 1931).

[5] Del. Rev. Code § 2050 (1935).

[6] "In more than twenty states, statutes, most of them since 1926, have been enacted to establish the validity of voting trusts as a permissible form of pooling agreement against objections that have been raised that any such separation of voting power from beneficial ownership is invalid or revocable *per se.*" Ballantine, Voting Trusts, Their Abuses and Regulation, 21 Texas L. Rev. 139, 149 (1942).

[7] The statute merely makes the formation of a voting trust permissible under proper circumstances. Del. Rev. Code § 2050 (1935).

[8] In the voting trust, legal ownership of stock is passed to a trustee who often has complete control of it except for dividends which go to the beneficial owner. In the ordinary pooling agreement, each party retains complete ownership and control of his stock subject only to the terms of the contract. "[Voting] agreements are distinct from voting trusts and are not controlled by the same principles." Fletcher, 5 Cyclopedia of Corporations § 2064 at 199 (rev. & perm. ed., 1931).

quishment of control by the stockholder than does a voting trust, the argument for holding the former valid would be fortified (with respect to legislative approval) rather than negated by a statute approving the latter.

The use of arbitration as a deadlock-breaking device between parties to a voting contract had apparently not been specifically sanctioned prior to the *Ringling* decision.[9] In upholding the instant agreement, the court rejected the contention that the power to control corporate voting had been delegated to a non-interested third party, thus injuring the interests of the stockholders who were not parties to the contract.[10] Since the terms of the agreement gave no powers to the arbitrator to actually vote the stock himself, and since he had no personal interest in enforcing his award, no decision made by him could take effect unless at least one of the contracting parties wished to abide by the ruling. The use of arbitration under these circumstances resulted in no greater alienation of voting control than where three stockholders agree to vote their shares as the majority rules, and one of the three must comply with the wishes of the other two. Voting agreements of the latter type have usually been upheld.[11] The arbitration measures provided for in the *Ringling* case seem to be unobjectionable, since a reasonable method for reaching a determination is desirable where evenly balanced stockholder groups cannot decide how their votes should be cast jointly.

The instant decision is most notable in that the court, while vigorously upholding the legality of voting agreements, construed the one before it so narrowly and gave such peculiar relief as to render such agreements useless and perhaps dangerous. Rejection of the defaulting party's votes as the sole remedy for the breach of contract denied the plaintiff any affirmative relief, since it merely precluded the defendant from casting votes which might injure the former.[12] The primary purpose of the voting agreement, that of achieving corporate control through joint action, was frustrated, while at the same time the substitute remedy of money damages could not be afforded the non-defaulting

[9] Arbitration had previously been used for this purpose in Roberts v. Whitson, 188 S.W. 2d 875 (Tex. Civ. App., 1945) where the voting agreement was declared invalid, and in Sullivan v. Parkes, 69 App. Div. 221, 74 N.Y. Supp. 787 (1902) where the voting contract was held to be of no effect because an arbitrator could not be agreed upon.

[10] "It is argued that the voting power is not an assignable, independent right, but is a privilege appurtenant to the shares to be exercised for the protection of the interests of the beneficial owners of the shares, not for outsiders." Ballantine, Corporations 425,426 (rev. ed., 1946); cf. Warren v. Pim, 66 N.J. Eq. 353, 59 Atl. 773 (1904).

[11] Ballantine, Corporations 442 (1946). See, for example, Hart v. Bell, 222 Minn. 69, 23 N.W. 2d 375 (1946); Brightman v. Bates, 175 Mass. 105, 55 N.E. 809 (1900); Smith v. San Francisco & N.P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897); Ohio & M. Ry. Co. v. State, 49 Ohio 668, 32 N.E. 933 (1892); Faulds v. Yates, 57 Ill. 416, 11 Am. St. Rep. 200 (1870).

[12] The defendant was thus prevented from combining her votes with those of the third shareholder so as to defeat the plaintiff's candidates. An interesting comparison can be drawn between the relief granted in the instant case and the negative enforcement of a personal service contract in Lumley v. Wagner, 1 De G. M. & G. 604, 42 Eng. Rep. 687 (1852).

shareholder.[13] The relief given seems also inequitable in that the defaulting shareholder was deprived entirely of any voice in corporate management.[14] Moreover, had the third minority shareholder anticipated the court's construction of the voting agreement, he could have split his votes so as to elect a majority of the directors.[15] In lieu of decreeing specific performance, the court might at least have declared a completely new election, thereby giving each of the three shareholders an opportunity to vote their shares in light of the interpretation given the agreement. However, there appears to be no reason why the instant contract could not have been construed so as to warrant specific relief.

A result effectively the same as specific performance could have been reached by the court through the use of traditional agency doctrines, as in *Smith v. San Francisco & N.P. Ry. Co.*[16] There, in a factual situation similar to the instant one,[17] the California court held that the refusal of one party to vote in pursuance of the agreement's terms gave to the non-defaulting party an implied agency to cast the former's votes, irrevocable because coupled with an interest. The necessary "interest" was found in the fact that the contracting stockholders had purchased stock in reliance on the agreement to vote their shares toward a common end. The *Smith* case has been critized by text writers[18] on the ground that the existence of both the implied agency and the "interest" necessary for an irrevocable proxy was dubious. However, the holding of the case has not been repudiated by the courts,[19] and it was on the authority of that decision that the lower court in the *Ringling* case granted specific performance.[20]

It has long been conceded that a proxy to vote another's stock, is revocable

[13] Note 32 infra.

[14] The arbitrator had directed defendant to vote for three specified candidates, two of whom were the defendant herself and her husband. Since the defendant wanted to vote for the latter two and her refusal to comply with the award pertained only to the third candidate, the inequity of her having no representation among the corporation's directors is even more apparent.

[15] Under the cumulative voting scheme effected by the corporation, the third shareholder could have, under the circumstances, elected as many as five directors. (The plaintiff, who had 2,205 votes, cast 882 for each of two candidates and 441 for a third, depending on 441 additional votes from the defendant to elect the third candidate. The third shareholder, who had 2,590 votes, could have cast 518 for each of the five candidates, and in the absence of the defendant's votes, elected all five).

[16] 115 Cal. 584, 47 Pac. 582 (1897).

[17] Three persons had agreed to purchase a block of railway stock, the shares to be pooled for five years and voted as a unit at all meetings in accordance with majority rule.

[18] Ballantine, Corporations 410–11 (rev. ed., 1946); cf. note, 56 Am. St. Rep. 119 (1897).

[19] See, for example, In re Chilson, 19 Del. Ch. 398, 410, 168 Atl. 82, 86 (1933) for a recognition of the validity of the holding in the Smith case.

[20] Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 49 A. 2d 603 (Del. Ch., 1946), noted in 60 Harv. L. Rev. 651 (1947).

unless such power is coupled with an interest.[21] The latter concept is nebulous,[22] but the courts have steadily expanded the category of irrevocable powers to include a variety of voting situations.[23] According to a recent Delaware decision, an irrevocable proxy in a voting agreement can exist when "the person to whom the voting power is delegated by agreement or by proxy has some recognizable property or financial interest in the stock in respect of which the voting power is to be exercised by him as distinguished from an interest in the . . . . voting power or the results to be accomplished by the use of it."[24] The mutual option to purchase the other's stock, provided for in the Ringling agreement, could well be designated as the requisite "interest" under this definition, since such future property rights were secured for the purpose of retaining corporate control in the hands of the contracting shareholders.

The Delaware Supreme Court apparently recognized this interest, since the opinion implied that the contract would have been treated as an irrevocable proxy had the intentions of the parties as to a proxy power been clearly spelled out.[25] However, it is difficult to find any intention in the terms of the agreement other than that the votes of the parties be cast jointly. If the right to specific performance of a voting contract is to be based only on whether a power coupled with an interest exists, the failure of the court in the principal case to imply the

[21] In re Chilson, 19 Del. Ch. 398, 168 Atl. 82 (1933); Luthy v. Ream, 270 Ill. 170, 110 N.E. 373 (1915); Schmidt v. Mitchell, 110 Ky. 570, 41 S.W. 929 (1897); Ballantine, Corporations 409 (rev. ed., 1946); Fletcher, 5 Cyclopedia of Corporations § 2062 (rev. & perm. ed., 1931).

[22] "The traditional statement of the requirement for a power coupled with an interest is that the holder of the power must have a property interest in the subject matter of the power." Katz, Syllabus and Materials on the Law of Business Corporations 59 (1937). The Restatement of Agency, however, makes irrevocable all powers "given in security," that is, powers "held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration." Rest., Agency § 138 (1933). See also 97 A.L.R. 923 (1935) and 64 A.L.R. 380 (1929). General discussions of the corporate voting cases in which there has been a power coupled with an interest can be found in In re Chilson, 19 Del. Ch. 398, 168 Atl. 82 (1933) and in Axe, Corporate Proxies, 41 Mich. L. Rev. 225, 258, 260 (1942).

[23] Proxies have been held irrevocable in Groub v. Blish, 88 Ind. App. 309, 152 N.E. 609 (1926) (to carry out a contract for the acquisition of stock by the majority stockholders from the minority over a period of twenty years, during which the stock was to be held by the majority stockholders as depositaries); Craig v. Bessie Furnace Co., 19 Ohio N.P. (N.S.) 545, 27 Ohio Dec. (N.P.) 471 (1917) (proxies to vote stock for a named period given in order to secure a change of management and new capital); San Francisco & N.P. Ry. Co., 115 Cal. 584, 47 Pac. 582 (1897) (to carry out the terms of a contract for the acquisition and control of a corporation); Hey v. Dolphin, 92 Hun (N.Y.) 230, 36 N.Y. Supp. 627 (1895) (reciprocal proxies to joint owners) and in Mobile & O.R.R. v. Nicholas, 98 Ala. 92, 12 So. 723 (1893) (to secure the claims of creditors whose claims were secured by debentures).

[24] In re Chilson, 19 Del. Ch. 398, 409, 168 Atl. 82, 86 (1933).

[25] After holding the agreement to be unobjectionable, the court said, "assuming that a power in each party to exercise the voting rights of the other might be a relatively more effective or convenient means of enforcing a decision of the arbitration . . . . this would not justify implying a delegation of power in the absence of some indication that the parties bargained for that means." Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling, 53 A. 2d 441, 446 (Del., 1947).

power where the interest was present, and the intention of the parties obvious, seems an extremely strict construction of the agreement.

Specific performance of voting agreements, however, should depend neither on the finding of an elusive "interest," nor on the creation of a fictional implied voting agency. Rather, the criterion for granting specific relief should simply be its appropriateness as a remedy in the particular case. Text writers usually state that specific performance of voting agreements will seldom be granted,[26] but this "rule" has doubtful support in the cases. Of the few decisions in point, those that do deny specific performance are based on factual situations too narrow to justify broad holdings of law in a field that is unsettled.[27] On the other hand, there are dicta[28] to the contrary, and both the New York Court of Appeals[29] and an Illinois appellate court[30] have specifically enforced voting contracts in cases involving closely held corporations. Although there is no direct Delaware precedent for the principal case, Delaware courts have, in analogous situations, declared that the absence of an adequate remedy at law is sufficient to entitle the complainant to a decree of specific performance.[31] Since a suit for

[26] Fletcher, 5 Cyclopedia of Corporations § 2067 (rev. & perm. ed., 1931); 3 Cook, A Treatise on the Law of Corporations § 622 A (1923); cf. Specific Performance of Voting Agreements, 51 L.R.A. 785 (1914); 71 A.L.R. 1295 (1931).

[27] In Gleason v. Dawes, 78 Wash. 491, 139 Pac. 213 (1914), perhaps the strongest case standing for the doctrine of not granting specific performance of voting agreements, the court, in denying specific relief, laid considerable emphasis on the fact that the corporation there involved was a bank, and therefore was an institution with a public as well as a private trust. Gage v. Fisher, 5 N.D. 297, 65 N.W. 809 (1895) cannot be cited as a direct holding, since the pooling agreement was there declared void because of an illegal consideration. The Fisher case also is illustrative of the attitude of some courts in disapproving any type of arrangement whereby voting power could be separated from ownership. In Haldeman v. Haldeman, 176 Ky. 635, 197 S.W. 376 (1917) the court reiterated the rule against specific performance, but as in Gage v. Fisher, the agreement was declared invalid. The fact that difficulty in administering the corporation would result if specific relief was decreed heavily influenced the court's holding in the Haldeman case. See also Sullivan v. Parkes, 69 App. Div. 221, 74 N.Y. Supp. (1902), where specific performance was impossible in a voting agreement with arbitration provisions because no arbitrator could be decided upon, and Fremont v. Stone, 42 Barb. (N.Y.) 169 (1864).

[28] In one Illinois case, the court, in holding valid a contract by which owners of a majority of the stock agreed to vote to secure to themselves the management of a corporation, said that the contract was "of such a character that we think it could have been specifically enforced by any of the parties thereto in case of an attempted breach." Thompson v. Thompson Carnation Co., 279 Ill. 54, 61, 116 N.E. 648, 651 (1917).

[29] Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936) held that specific performance of a voting agreement was unobjectionable in a closely held corporation where the sole stockholders were directors; cf. In re Block's Will, 60 N.Y.S. 2d 639 (1946).

[30] In Fitzgerald v. Christy, 242 Ill. App. 343 (1926), the court sustained an injunction restraining any action in violation of a voting agreement.

[31] The lack of an adequate remedy at law was the exclusive test by which the court determined the right of the complainant to specific performance in a case involving assignment of a patent right. Satterthwait v. Marshall, 4 Del. Ch. 337 (1872); see Francis v. Medill, 16 Del. Ch. 129, 141 Atl. 697 (1928) and Baker Mach. Co. v. U.S. Fire Apparatus Co., 11 Del. Ch. 386, 97 Atl. 613 (1916), where the same test was applied in cases involving contracts for the sale of corporate stock which would give the vendee voting control.

damages in the *Ringling* case would obviously not be feasible,[32] this rule might well be applied to this family situation where no innocent shareholders would be injured by specific enforcement of the voting agreement.[33]

Although in the final analysis the result is generally the same whether the court prefers to find an irrevocable proxy,[34] or whether it simply grants specific performance, the *Ringling* decision points to the weakness of the former method. Because the mechanical requirements of the fiction were not met according to the court's interpretation of the agreement, the only type of relief that could actually remedy the breach was denied.

Whether or not specific performance of pooling agreements becomes a standard rule in Delaware is probably of not too great consequence to those who wish to achieve corporate control through joint action, since it can be achieved with certainty by the formation of a voting trust.[35] The immediate consequence of the *Ringling* decision will probably be a tendency away from voting agreements which may be so strictly construed as to destroy their purpose, and a greater use of the voting trust to achieve the same results. However, it is highly questionable whether the accelerated divorce of corporate control from stock ownership, which must occur as the voting trust becomes more popular, is desirable. Certainly the courts, which have traditionally been the brake on legislative action, are not the proper agency to force the use of the most drastic device available for achieving joint corporate control.[36] Specific enforcement of unobjectionable voting agreements such as the instant one seems therefore desirable as a matter of public policy as well as sound contract interpretation.

[32] The amount of damages incurred by the plaintiff would be extremely difficult, if not impossible, to ascertain since no measuring standard exists. Cook in his treatise on corporations, while stating that specific performance of voting agreements will seldom be granted, also says that an action at law for damages is unsatisfactory since, as a rule, no substantial damage can be proved. 3 Cook, A Treatise on the Law of Corporations § 622 A, at 2191 (1923).

[33] Note 29 supra.

[34] Some courts have indicated that voting agreements may be specifically enforced only where there is a consideration for the voting agreement other than mutual promises; see Johnson v. Spartanburg County Fair Ass'n, 41 S.E. 2d 599 (S.C., 1947); Roberts v. Whitson, 188 S.W. 2d 875 (Tex. Civ. App., 1945).

[35] "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." Ballantine, Voting Trusts, Their Abuses and Regulation, 21 Tex. L. Rev. 139, 147 (1942).

[36] The voting trust is a "more complete surrender of all legal rights and remedies by shareholders than any other control device. By it the beneficial owner ceases to be recognized as a shareholder of record and may be deprived not only of any right to vote for directors, but also of any right to inspection, notice or information as against the corporation or any voice in making most fundamental changes, such as mergers and consolidations, sales of entire assets, increase and reduction of capital, and by-law and charter amendments which may adversely affect him. There is ordinarily no justification for such a complete stripping of the shareholders of all the safeguards provided by law for his protection." Ballantine, Corporations 431 (rev. ed., 1946).