Remodeling, Merger and Dissolution of Louisiana Corporations: A Critical Survey

Dale E. Bennett
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The provisions of the Louisiana Business Corporation Act relative to the transfer of assets, amendment, merger, and consolidation represent a compromise of sharply conflicting interests. It is essential in an era of rapid industrial and economic changes that the corporate organization shall have a flexibility which will enable it to expand to incorporate new and allied businesses, or to tighten its financial belt in times of depression and repression. Such financial and structural readjustments were very difficult under the old system which required the assent of all shareholders. A handful of obstreperous or shakedown-minded shareholders could effectively block any fundamental change. The majority was forced to either forego the proposed action or to buy out the dissenters at a self-set nuisance value.

In common with most modern corporation statutes, the Louisiana Business Corporation Act has greatly liberalized the procedure. A two-thirds majority of the shareholders is empowered to make drastic and far reaching changes. It may sell, lease, or exchange all or a substantial part of the corporate assets; it may amend the articles so as to materially alter the corporate purpose, extend the term of corporate existence, or change the relative rights and privileges of the various classes of shareholders; it may authorize a merger or consolidation. Such changes are often necessary in order to carry out policies which are to the best interest of the corporation. To compensate for the extraordinary powers given to the majority, minority shareholders are given an opportunity to receive the fair cash value of their proportionate interest and retire from the enterprise. Arguments against this adjustment of the divergent interests may come from either side. Majority interests complain that the business may suffer serious financial impairment in raising cash to buy out the dissenters. Minority shareholders decry the power vested in the

† The author purports, by this and a companion article, The Louisiana Business Corporation Act of 1928 (1940) 2 Louisiana Law Review 597, to present a complete critical analysis of the Louisiana Business Corporation Act of 1928. (La. Act 250 of 1928 [Dart’s Stats. (1939) §§ 1080-1154].)

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majority, and urge that they are given the unenviable choice of being swept along with the two-thirds blitzkrieg or retiring from the business. While neither argument is wanting in merit, it is submitted that a pretty fair compromise has been struck—a compromise which is in keeping with present day needs and business conditions. The dissenters may no longer enjoin changes honestly approved by the majority, yet they may demand the right to withdraw their capital, rather than bear the risk of an objectionable fundamental change.

THE RIGHT OF APPRAISAL

A discussion of fundamental corporate changes will be simplified somewhat by putting the cart before the horse and first analyzing the appraisal section of the Louisiana statute. Section 521 of the Louisiana Business Corporation Act provides that a shareholder not assenting to a fundamental corporate change shall be entitled to demand the “fair cash value of his shares, as of the day before such vote was taken.” This right is subject to two important qualifications. First, the corporation must, at the time, be able to meet its liabilities then matured. This is necessary for the protection of corporate creditors. Second, where the action objected to is authorized by at least eighty per cent of the voting power, dissenting shareholders cannot demand the “fair value” of their shares. This is a serious restriction on the minority shareholder’s right and is not found in the Uniform Business Corporation Act. It means that if four-fifths of the shareholders honestly favor a fundamental change, the remaining shareholders must abide by the majority vote.

A very practical general objection to appraisal statutes is the fact that it will often be difficult to raise cash to buy out dissenters. Even a thoroughly solvent corporation may not have assets that are sufficiently liquid to enable it to meet appraisal demands without serious financial embarrassment. This consideration may have influenced the adoption of the eighty per cent limitation, which will undoubtedly cut down the number of vexatious demands by shareholders who seek only to establish a nuisance value for their holdings.

The appraisal section clearly and explicitly applies in cases of merger or consolidation, sale or lease of all corporate assets, and of any amendment authorizing an extension of the term of

1. La. Act 250 of 1928, § 52 [Dart’s Stats. (1939) § 1132].
corporate existence. However, where an amendment changes the corporate purposes or effects a capital reclassification, the court may have some rather difficult lines to draw. What constitutes a “material change” in the corporate purposes? When does an amendment “change the rights” of any class of shareholders? This uncertainty is due, not to faulty draftsmanship, but to the inherent nature of the subject matter. In interpreting a similar provision of its corporation statute, the New York Court of Appeal has held that the issuance of a new class of preferred stock which was given priority over the existing preferred did not “alter the preferential rights” of the latter so as to give a right of appraisal. This holding has been severely and properly criticized and it is hoped that the Louisiana courts will not follow the path of technical distinctions which has been charted by the New York decisions. One writer suggests that the seeming inconsistency of the New York decisions results from the fact that the equities of each particular case must be scrutinized by the court. Where the petitions for appraisal were obviously hold-up or nuisance claims which would impede the corporate body in the exercise of a necessary and legitimate function, or where such relief would give the dissenter an unfairly strategic position, it is to be expected that the statute will be strictly and literally construed. The provision in the Louisiana appraisal section restricting the right to cases where the change was not ap-

3. Matter of Kinney, 279 N.Y. 423, 18 N.E. (2d) 645 (1939). The holder of the old preferred was given an option to exchange it for the new stock. The technical nature of the decision is indicated by Justice Finch's conclusion: "Section 38 gave a right of appraisal only in cases of 'alterations,' and did not give such right of appraisal in case of 'authorization' of new shares .... Section 38 permits an appraisal only when an amended certificate alters the preferential rights of the outstanding stock of a corporation as between the different classes of stock and it does not apply to a case where such rights are left unchanged as between themselves, but are both made subject to a new issue of stock." (279 N.Y. at 430-431, 18 N.E. (2d) at 648-649.) Accord: Dresser v. Donner Steel Co., 247 N.Y. 553, 161 N.E. 179 (1928) (amendment adding two classes with superior preferences). The court in these cases was not bothered by the practical consideration that the petitioners' preferences were just as surely affected as if some existing class of stock had been given the preference.


5. Comment (1933) 42 Yale L.J. 952, 958. The comment contains a complete summary of the New York cases to date.
proved by eighty per cent or more of the shareholders will eliminate a great number of the so-called "hold-up or nuisance claims." This should facilitate the establishment of a more liberal and consistent judicial pattern.

The procedure outlined in Section 52 must be strictly and properly followed. The shareholder must, within twenty days after the vote authorizing the action was taken, object in writing to such action and must demand in writing the "fair cash value" of his shares, stating such value in his demand. The concluding sentence of subsection I expressly warns dissenting shareholders that if they do not make such written objection and demand they shall be "conclusively presumed to have acquiesced in the corporate action." The arbitrary requirement that the appraisal demand must be filed within twenty days is necessary for the protection of the corporation. It should know within a reasonably short time how many shareholders will insist on being bought out. Then if the number, and resultant drain on the treasury, is too great, the plan may properly be abandoned. The objecting shareholder, however, is entitled to the full twenty-day period after the vote authorizing the action was taken, even though the corporate action is to be perfected within that time.

If the corporation does not intend to pay the amount demanded, it must, within twenty days after receipt of the demand, give the shareholder written notice of its disagreement and state the value it will agree to pay. Otherwise the corporation becomes liable to pay the sum demanded by the shareholder. Interpreting a similar provision in the Ohio act, the supreme court of that state held in the recent case of Voeller v. Neilston Warehouse Company that an attempt by statute to bind the corporation to pay the value demanded without first notifying the consenting shareholders and affording them an opportunity to op-

7. Lattin, Remedies Under Appraisal Statutes (1931) 45 Harv. L. Rev. 233, 251-252. Suppose after the authorization, but before consummation of the action, the majority discovers that when it pays off the dissenters, there will be an insufficient amount of liquid assets to carry on the business successfully. Lattin raises this query—may it retract the authorization, or do the dissenters have a vested right of withdrawal and payment? He then points out that the New York courts have held that a retraction may be made any time before the consummation of the contemplated transaction. Matter of Millard, 221 App. Div. 113, 222 N.Y. Supp. 633 (1927) (opinion based upon phrasing of statute calling for a "sale"); Matter of O'Hara, 133 Misc. 184, 187, 231 N.Y. Supp. 60, 64 (Sup. Ct. 1928).
9. 136 Ohio St. 427, 26 N.E. (2d) 442 (1940).
pose directly the dissenters' claims is a deprivation of property without due process of law and hence unconstitutional. This decision was promptly criticized, and it was reversed by the United States Supreme Court which held that the corporation was sufficiently the representative of the majority shareholders to receive notice in their behalf.

Where the corporation gives notice of its disagreement, the shareholder has sixty days in which to petition the court to determine the fair cash value of his shares as of the day before the action was taken. If no petition is filed within that time, the shareholder becomes bound to accept the corporation's offer.

Courts and writers have encountered considerable trouble in fixing the point at which the dissenter ceases to be a shareholder (entitled to dividends, voting rights, et cetera) and becomes a creditor (entitled to the legal rate of interest on the unpaid value of his shares). Often in case of disagreement a period of several months may expire before an appraisal is complete and the value of the petitioner's shares is ascertained or paid. The New York courts have interpreted their loosely framed statute as meaning that the shareholder loses his status only upon final payment—an interpretation replete with practical problems and difficulties. The Louisiana act declares that the shareholder shall receive the cash value of his shares "as of the day before such corporate action . . . was taken," and it is submitted that the shareholder's status should be held to change as of that time. Thereafter he would receive interest on the unpaid value of his shares but would not be entitled to participate in the profits or control of the enterprise.

10. Lattin, A Reappraisal of Appraisal Statutes (1940) 38 Mich. L. Rev. 1165, 1175-1181, wherein it is pointed out that the Ohio court lost sight of the fact that the dissenters' right of action is against the corporation and not the majority shareholders, and that it is generally accepted corporate practice to act through the board of directors and duly appointed officers. Accord: Note (1940) 6 Ohio St. L.J. 308.


12. The varying factors which are considered in determining the "fair cash value" of dissenters' shares include: appraisal value of corporate assets, good will, advantageous location, and past earnings. Market value of stock and the book value of assets are relevant but not controlling as they do not always give a true picture of inherent values. See Lattin, supra note 7, at 258-270. Lattin concludes (after a thorough discussion) that, "There are no rock-bottom rules for the determination of the value of dissenters' shares." (Id. at 270.) Probably the soundest formula, if one is necessary, is "the fair market value of the property as an established and going business," used in American Seating Co. v. Bullard, 290 Fed. 896, 902 (C.C.A. 6th, 1923).


14. Lattin, supra note 7, at 253-258.
Subsection II expressly declares that the court shall not enjoin proposed corporate action upon petition of a dissatisfied stockholder. One eminent authority has suggested that this prohibition applies to the enjoining of unlawful, as well as lawful, corporate action.\(^{15}\) Professor Lattin, who has made an intensive study of the purpose and operation of appraisal statutes, advances the view that where the majority acts fraudulently or illegally, the minority still has the right to enjoin a proposed change and may still assert a common law cause of action for conversion of their shares even though no appraisal is demanded within the requisite twenty days.\(^{16}\) It is logical to conclude that the appraisal statutes were enacted to supplement, rather than to supplant, the minority shareholder's common law remedies, by affording him a measure of protection from oppressive, though lawful, exercise of the enlarged majority prerogative. Such an interpretation of the Louisiana provision is further necessitated by the fact that the right of appraisal is denied in cases where eighty per cent of the shareholders favor the action taken. Summarizing briefly—when a fundamental change is lawfully authorized, the right of appraisal is the only remedy available to a dissatisfied shareholder; in cases of unlawful and fraudulent majority action, the remedy is cumulative with existing forms of legal and equitable relief.\(^{17}\)

15. In discussing the Illinois Business Corporation Act, Ballantine suggests that, "This [the provision that a shareholder failing to file an appraisal demand within the stipulated period is conclusively presumed to have acquiesced in the action taken] would seem to make this remedy the exclusive remedy and there would be no right to litigate or contest such action on the ground of fraud or unfairness." Ballantine, A Critical Survey of the Illinois Business Corporation Act (1934) 1 U. of Chi. L. Rev. 357, 358.

16. Lattin, supra note 7, at 244-248; Lattin, supra note 10, at 1173. Among the cases cited by Lattin are: General Investment Co. v. Lake Shore & M. S. Ry., 250 Fed. 160, 174 (C.C.A. 6th, 1918), where the court declared: "This statute [appraisal provision], whose primary purpose was to provide just compensation to a stockholder dissenting from a consolidation lawfully made, does not, in our opinion, provide an adequate remedy for a stockholder who seeks in advance to restrain the corporation from entering into an illegal consolidation"; and Johnson v. Lamprecht, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938), in which the court declared: "In instances where fraud and illegality are involved it was never intended that the statutory remedy should be exclusive."

An early Louisiana case where the minority shareholder was granted relief from fraudulent majority action is Watkins v. North Amer. Land Co., 107 La. 107, 31 So. 683 (1902).

17. See Lattin, supra note 7, at 249-251, for a full collection of the conflicting authorities on, and discussion of, the question of election of remedies. In case of unlawful action the shareholder may sue in the alternative for...
Section 41 authorizes the corporation to sell, lease, exchange, or otherwise dispose of its entire assets and business upon a two-thirds vote of the shareholders with voting rights, at a meeting of the shareholders specially called for that purpose. The general effect of this provision is to deprive the individual shareholder of his right, previously existing at common law, to demand the continued operation of a going and profitable business. This is a sound change. The sale of a going business may often be a very judicious move, and a single or relatively small number of obstreperous or blackmail-minded shareholders should not be permitted to block such action.

Where the corporation is "unable to meet its liabilities then matured," the necessity of a shareholder vote is entirely dispensed with, and a sale of the corporate business and assets may be authorized by a two-thirds vote of the board of directors. The Louisiana Supreme Court adopted a liberal construction of this provision in Daly v. Opelousas Insurance Agency and upheld the validity of a transfer of all corporate assets where the authorizing resolution had not been adopted at a formal directors' meeting.

Injunction relief or an appraisal. Lattin suggests that a suit to enjoin what is believed to be illegal action should not preclude relief under the appraisal section (provided written demand is filed within the twenty day period), but that an action for appraisal, with notice of irregularities, should be treated as a waiver of those defects and bar other relief. But see Wall v. Anaconda Copper Mining Co., 216 Fed. 242 (D. C. Mont. 1914), affirmed 244 U.S. 407, 37 S. Ct. 609, 61 L. Ed. 1229 (1917).

Only six jurisdictions are without statutory provisions relating to the sale by a corporation of all its assets. In a few states the unanimous consent of all shareholders is required; in one state 80%; in six states 75%; in fifteen states 66%; in two states 60%; and in thirteen states a majority vote is sufficient." Commissioners' Notes to Section 37 of the Uniform Business Corporation Act, 9 U.L.A. 90 (Perm. ed. 1932).

Under such statutes, the prescribed shareholder consent is essential for a valid transfer of all corporate assets. Application of Valhalla Cemetery, 32 F. Supp. 616 (D.C. N.Y. 1940).

Most courts held that if the corporation was a going and prosperous concern a single shareholder could block a sale of all or substantially all of its assets. Des Moines Life & Annuity Co. v. Midland Ins. Co., 6 F. (2d) 228 (D.C. Minn. 1925). Contra: Beldenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 142 N.W. 434 (1913). For a collection and discussion of the earlier cases, see Hoshour, The Minnesota Business Corporation Act (1933) 18 Minn. L. Rev. 1, 4.

In Bowditch v. Jackson Co., 76 N.H. 351, 356, 82 Atl. 1014, 1017 (1912), the court said, "If the majority may sell to prevent greater loss, why may they not also sell to make greater gains? . . . there seems to be no substantial difference between the two cases, as a matter of principle. In each case, the sale is made because it is of advantage to the stockholders."

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18. La. Act 250 of 1928, § 41, 1, II(a) [Dart's Stats. (1939) § 1121, I, II(a)].

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21. La. Act. 250 of 1928, § 41, II(b) [Dart's Stats. (1939) § 1121, II(b)].

22. 181 La. 88, 158 So. 631 (1934).
meeting but had been signed by the respective board members at their homes or offices. There is respectable support for treating such informal action as valid, especially where, as in the Daly case, there was no overreaching and the directors unanimously agreed upon the action. Yet, by the weight of authority the directors are only empowered to bind the corporation when they act as a board at a formal meeting. This law proceeds upon the theory that directors shall act deliberately after a full opportunity for discussion and the interchange of ideas.\textsuperscript{22} A general approbation of informal action by directors would not promote safety and efficiency in corporate management.

A sale of all the property and assets of a corporation does not necessarily effect its immediate dissolution,\textsuperscript{24} and the purchaser does not automatically don the mantle of the seller and continue its corporate existence.\textsuperscript{25} Section 41, I, specifically permits the sale of all the assets of a corporation, "including its good will, franchise and/or other rights." This clearly authorizes the sale of a "going business" with the appurtenant secondary franchises; but it probably does not contemplate a transfer of the primary franchise, since no procedure is set out to be followed by a purchaser in taking over and continuing the corporate entity. Of course, it might be broadly construed as authorizing a sale and transfer of the corporation's primary franchise—the right to be a corporation. Under such an interpretation, the sale or transfer of all corporate assets and franchises would be, in legal effect, nothing

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    \item \textsuperscript{23} Ballantine, Private Corporations (1927) 326-328, § 100.
    \item \textsuperscript{24} Levin v. Pittsburgh United Corp., 330 Pa. 457, 199 Atl. 332 (1938). Cf. Graham v. New Mexico Eastern Gas Co., 141 S.W. (2d) 389, 391 (Tex. Civ. App. 1940), where it was held that the sale and transfer of all the corporation's assets to defendant company "was tantamount either to a voluntary liquidation, dissolution, or winding up of its affairs" and matured the shareholder's right to a preferential dissolution payment.
    \item \textsuperscript{25} 6 Fletcher, Corporations (Perm. ed. 1933) § 2953; and 1 id. at § 125, where the author declares: "The mere purchase of the property and franchises of a corporation, although there may be legislative authority for their sale . . . does not make the purchaser a corporation or authorize them to transact business as a corporation." Citing Memphis & Little Rock Ry. v. Berry, 112 U.S. 609, 5 S. Ct. 299, 28 L. Ed. 837 (1884), where the court pointed out the distinction between the railway property and secondary franchises which did pass and could be exercised by natural persons and the "franchise to be a corporation" which belonged to the corporators.
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more or less "than a surrender or abandonment of the old charter by the corporators, and a grant de novo of a similar charter to the so-called transferees or purchasers."26

The statute expressly provides that stock or securities of another corporation may be taken as consideration for a transfer of all corporate assets.27 Often the consideration received by the vendor is stock of the purchasing company, which is distributed among the shareholders of the vendor, who thus acquire an interest in the combined properties. Such a transaction may be substantially a merger.28 This method of combining corporate enterprises involves less expense and red tape than a formal merger or consolidation and is sometimes made necessary by the fact that one of the companies is a foreign corporation, organized under the laws of a state with no provision for such merger or amalgamation. In such cases the purchaser corporation does not directly assume the liabilities of the selling company; but, where the only consideration given is stock, the purchaser will take the property subject to such liabilities.29

Subsection III30 makes clear the fact that Section 41 does not authorize a transfer of the corporate business and assets in fraud of corporate creditors, or of minority or non-voting shareholders, and that it does not nullify the effect of the bulk sales and antimonopoly laws. It is axiomatic that a corporation purchasing the assets of another is not, by that fact alone, liable for the contracts, debts, or torts of the seller.31 Where, however, the transaction is in bad faith and without a real consideration, creditors of the seller company can set aside the purported transfer and levy upon the property in the hands of the new corporation as if no

26. Welch, C. J., in State ex rel. Sherman, 22 Ohio St. 411, 428 (1872). This ruling was approved and followed in Coleman v. Hagey, 252 Mo. 102, 158 S.W. 829 (1913).
28. For a full discussion of the sale of total assets as a method of effecting property owning consolidations, see Field, Procedure for Direct Property Owning Consolidations (1933) 5 Rocky Mt. L. Rev. 230, 241-247.
29. American Ry. Express Co. v. Commonwealth, 190 Ky. 635, 228 S.W. 433 (1920). For a full discussion of the numerous and conflicting decisions which followed the organization of the American Railway Express Company, see Note (1928) 26 Mich. L. Rev. 913. In general, see 6 Fletcher, Corporations, § 2953.
31. Sinclair Refining Co. v. Rayville Motor Co., 160 So. 179 (La. App. 1935), holding that a newly organized corporation, which purchased and paid a fair price for a major portion of the assets of another company, was not liable for the latter's debts.
The recent case of Walter v. Caffall affords a good illustration of fraudulent corporate manipulation. A debtor corporation transferred all its assets to a newly organized corporation, and the only consideration received was stock in the new company. The court found that there was not a single dollar of new capital in the purchasing corporation, which was simply a reincarnation of the old company "in a new dress," and it looked upon the transfer as part of a series of transactions, extending over a period of twelve years, for the purpose of holding at bay and harassing the plaintiff and other non-assenting creditors. Accordingly it decreed that the purported transfer should be set aside as a simulation, and that property in the hands of the new company should be seized and sold to satisfy the indebtedness of the old corporation.

In Whicher v. Delaware Mines Corporation the board of directors in a failing corporation sought to use a statute similar to Section 41 of the Louisiana act as a means of effecting a reorganization and of coercing shareholders into converting non-assessable into assessable shares. They organized a new corporation, without any additional capital, and transferred the assets of the old corporation to it. According to the plan, shareholders in the old corporation (with non-assessable shares) were to receive assessable shares in the new corporation. The court very properly held the transaction invalid, declaring that "a transfer of corporate property to its reorganized entity is not a sale, within the terms of this charter provision or the statutory enactment.... There is, in effect, simply a change of corporate habitation." Thus it appears that "sale of assets" may not be used as a substitute for a genuine sale.

32. Taylor Co. v. Gulf Land & Lumber Co., 119 La. 426, 44 So. 187 (1907), where the new corporation paid no substantial consideration for the assets received, and merely continued the business of the old company; Wolf v. Shreveport Gas & Elec. Lt. & Power Co., 138 La. 743, 70 So. 789 (1916), where a Louisiana corporation, liable in damages to plaintiff, had organized and transferred all its assets to a specially organized Delaware corporation for a grossly inadequate consideration.

33. 192 La. 447, 188 So. 137 (1939), discussed by the writer in The Work of the Louisiana Supreme Court for the 1938-1939 Term (1939) 2 LOUISIANA LAW REVIEW 31, 130. The court relied upon the leading Louisiana case of Alliance Trust Co. v. Streater, 182 La. 102, 161 So. 168 (1935) and cases cited therein. 34. 52 Idaho 304, 15 P. (2d) 610 (1932). The court concluded that the transaction amounted to constructive fraud since, "The obvious purpose of these defendants was to change non-assessable stock to assessable stock, and thus force the stockholders against their will to finance the corporation and pay its debts, the greatest portion of which were owing to these same persons, who were directors and officers of both companies." (52 Idaho at 320, 15 P. (2d) at 616.)
for shareholder consent in the reorganization of a failing corporation.

Subsection IV expressly restricts the application of Section 41 to those sales or other transfers which will "substantially limit" the corporate business. This is significant. Where the corporation is financially unembarrassed, a transfer coming within the purview of this section must be authorized by a two-thirds vote of the shareholders. Also, if the transaction is authorized by less than an eighty per cent vote, dissenting shareholders may demand the fair value of their shares. On the other hand, transfers of corporate assets, which do not seriously impair or interfere with a continuation of the corporate enterprise, are not classified as fundamental changes. They may be authorized by the board of directors or those officers charged with the normal operation of the business, and do not come within the scope of the appraisal sections. There has been considerable litigation in other jurisdictions arising out of sales of a substantial part, but not all, of the corporate property. For example, the New York court has held that a sale of the business, good will, and property of a department doing about one-thirteenth of the company's business was within the statute requiring a two-thirds shareholder vote, but that the sale of one drug store by a corporation operating a chain of stores and having charter authorization to sell real estate was not within the statute. Subsection 4 enunciates a simple and understandable test which should facilitate judicial decision. Even so, "substantial limitation" of the corporate business is a matter of degree—not a mathematical formula—and the particular circumstances will control borderline cases.

35. La. Act 250 of 1928, § 41, IV [Dart's Stats. (1939) § 1121, IV]: "Nothing in this section is intended to restrict the power of any corporation, without the authorization thereof by the shareholders, to sell, lease, exchange or otherwise dispose of, any of its property if thereby the corporate business be not substantially limited, or if the proceeds of such property be appropriated to the conduct or development of its remaining business." (Italics supplied.)


The Ohio court found that there was not a sale of the "entire property and assets" in the following cases: Krell v. Krell Piano Co., 23 Ohio N.P. (N.S.) 193 (1920), affirmed 14 Ohio App. 74 (1921) (the sale practically terminated customary operations of the manufacturing concern, but did not include cash, notes, accounts, etc., amounting to over $200,000); Painter v. Brainard-Cedar Realty Co., 29 Ohio App. 123, 163 N.E. 57 (1928) (sale by corporation organized to deal in real estate of all real estate owned at the time, but where other assets remained).
The celebrated *Dartmouth College* case, decided in 1819, established the proposition that the charter granted to a private corporation constitutes a contract between the state and the corporation and is within the protection of the constitutional mandate that no state shall pass any law impairing the obligation of contracts. Following a dictum suggestion of Mr. Justice Storey that the power to amend or repeal corporate charters might be reserved, many states immediately adopted such reservations, either by constitutional provision or by statute. The Louisiana Business Corporation Act contains no legislative reservation of the power to amend or repeal corporate charters. Similarly, no such provision is found in the Louisiana Constitution of 1921. Article 447 of the Civil Code confers a limited power of dissolution, but the Louisiana Supreme Court has followed the *Dartmouth College* case and definitely held that this article does not give the legislature authority to amend corporate charters.

The extent to which amendment by shareholder action is permissible presents the really important problem. In the absence of special statutory authorization, a majority of the shareholders cannot bind the minority by a fundamental amendment of the articles. The line of demarcation between those changes which are fundamental or material, and those which are auxiliary or incidental, has not been very clearly drawn.

The Louisiana Business Corporation Act confers very broad powers of amendment upon the shareholders. Section 42 pro-

39. For a collection of such provisions see 7 Fletcher, Corporations, §§ 3670-3671. With the development of modern general corporation laws, such a reservation has generally been incorporated in those statutes. Id. at 815-816, § 3668, n. 9.
40. The reservation clause in Art. 262, La. Const. (1913) was omitted.
41. Art. 447, La. Civil Code of 1870. This provision first appeared in La. Civil Code of 1808, 10.3.22, p. 92, which was eleven years before the famous *Dartmouth College* case. This article stipulates that the legislature may dissolve a corporation "if they deem it necessary or convenient to the public interest, and provided full reimbursement is made to those individuals who have advanced money or engaged their property in reliance upon the corporate contract."
44. 13 Fletcher, Corporations, § 5776.
45. The powers of amendment conferred upon two-thirds of the shareholders by La. Act 267 of 1914, § 6, were not so sweeping in nature. Corporations organized under the 1914 act should be governed by its provisions as to powers of amendment.
vides that a corporation may amend its articles “so as to include or omit any provision authorized by this act.” Such amendments may be adopted, at a meeting specially called for that purpose, by a vote of two-thirds of the voting stock; except that the articles may specify a larger or smaller vote, not less than a majority. A valuable check upon the broad powers of amendment is the class vote requirement of subsection III. Where an amendment would change the rights of any class of shares, a two-thirds vote of shareholders of the class affected, in addition to the general two-thirds vote, is necessary for an adoption of such change. This eliminates to a great extent the possibility of amendments by general vote, which may operate to the detriment of one class for the benefit of another. Often the common shareholders constitute all or more than two-thirds of the voting power in a corporation, and might, unless the preferred shareholders were permitted to vote as a class, take away or impair valuable rights and preferences of the smaller classes. Subsection IV adds a further check on oppressive group action by providing that where an amendment would make any change in the corporate name or a substantial change in the corporate purpose or purposes, it must be approved by a two-thirds vote of each class of shareholders, voting as a class, and even including those shares that are without general voting rights. Another safeguard of dissenting minority interests is the right, given by Section 52, to demand the appraised value of their shares and retire from the enterprise where an amendment approved by less than 80 per cent of the voting power, materially changes the corporate purpose, alters the rights of any class of shares, or extends the term of corporate existence.

Occasionally ingenious schemes to circumvent the minority safeguards have been devised by majority interests. In Sellers v. Bancroft & Sons Company the majority sought to change certain rights of preferred shareholders, but were blocked by a requirement in the articles that such change must be approved by holders of three-fourths of the class of stock affected. Not to be denied, they passed a general amendment to the article, reducing the class vote requirement from seventy-five to sixty per cent. (Al-

47. Id. at § 42, II [Dart's Stats. (1939) § 1122, III].
48. The courts may be forced to grope again in the judicial labyrinth to determine when a change is "material." See 13 Fletcher, Corporations, § 5776, for a collection and discussion of cases in point.
49. 2 A. (2d) 108 (Del. Ch. 1938), noted in (1939) 37 Mich. L. Rev. 803.
though this amendment was passed by the shareholders as an entire group, it was favored by only fifty-five per cent of the preferred shareholders to be affected.) Immediately thereafter, by a vote of less than seventy-five per cent of the class affected, an amendment was adopted changing the rights of preferred stockholders. The Court of Chancery of Delaware properly held that the amendment changing the proportion required for a class vote was invalid. It was an amendment which altered fundamental voting rights of the preferred shareholders on matters affecting their class of shares, and which could not be passed without the stipulated seventy-five per cent class vote.

As already noted, Section 42 confers broad powers of amendment and renders the "vested rights" and "contract" theories of share ownership largely ineffective. A stockholder purchases his share with notice of the fact that the corporate purpose may be substantially altered, and that the rights and preferences of any class of shares may be changed, provided shareholders of that group, voting as a class, approve the change. Is there any inherent limitation on this sweeping power of amendment? Certainly none is stated in the statute, and none should be read into it except upon the strongest policy considerations.

It appears well settled that a shareholder cannot object to an amendment which changes his voting rights or his preferential dividend rate.\(^5\) The difficulty arises in case of any amendment for the purpose of wiping out or shaving down accrued but undeclared cumulative dividends. It has been repeatedly held that an attempt to directly reclassify shares and wipe out dividend arrearages on preferred stock is invalid.\(^6\) The courts have declared

\(^5\) In Johnson v. Bradley Knitting Co., 228 Wis. 566, 280 N.W. 688 (1938), the court upheld an amendment which reduced the dividend rate on first preferred stock, stating that the amendment section of the Wisconsin Corp. Act [Wis. Stat. (1939) § 182.13(3)] was part of the shareholder's contract and constituted a consent in advance to such changes as might be made pursuant thereto.

\(^6\) Other cases sustaining an amendment requiring outstanding stock to be exchanged for an issue bearing a lower dividend rate include Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923); Williams v. National Pump Corp., 46 Ohio App. 427, 188 N.E. 756 (1935); Harbine v. Dayton Malleable Iron Co., 61 Ohio App. 1, 22 N.E. (2d) 281 (1939). In Peters v. United Mts. Co., 13 Del. Ch. 11, 114 Atl. 598 (1921), the court upheld an amendment which deprived preferred shareholders of the right to participate, along with common shareholders, in any surplus remaining after each class had received 7%.

that such accruals are in the nature of vested, or at least semi-
vested, rights which cannot be taken away by amendment.52

The desired result, however, may be accomplished in more
subtle and gentlemanly ways. The approved procedure for
indirect removal of accrued dividends is to create a new issue of
stock with priority over the old stock, both as to dividends and
as to liquidation. The old shareholder is given an opportunity to
exchange for this stock on condition that he releases accrued divi-
dends. As an added gentle persuader the voting rights of the old
preferred may be taken away. Such schemes very effectively ac-
complish the desired results, and their validity has usually been
sustained.53 It has been very aptly suggested, "The apple that
cannot be picked can, nevertheless, be shaken down."54

After the Court of Chancery of Delaware had definitely de-
clared that preferred dividend accruals were a vested right which
could not be wiped out by amendment of the articles,55 adroit
corporate manipulators hit upon the expedient of accomplishing
the same result by means of a corporate merger. After several
legal scrimmages they finally won out. The court, finding no evi-
dence of fraud or unfairness, reversed earlier decisions enjoining
the proposed plan which deprived shareholders in the merged

52. In Keller v. Wilson Co., 190 Atl. 115 (Del. Sup. Ct. 1936); Consolidated
Film v. Johnson, 197 Atl. 489 (Del. Sup. Ct. 1937); Roberts v. Roberts Wicks
Co., 184 N.Y. 257, 77 N.E. 13 (1906), the preferred shareholders accruals were
characterized as a "vested right," and "in the nature of a debt." Accord:
Harbine v. Dayton Malleable Iron Co., 61 Ohio App. 1, 22 N.E. (2d) 281 (1939),
the court could not quite subscribe to the "vested right" theory, but
did feel that there was "an existing substantial right" with a prospective
value.

(1923), where the court enjoined direct removal of accrued dividends, but did
nothing about the part of the amendment which coerced an exchange by
lowering the redemption price and taking away the voting rights of the old
stock; Thomas v. Laconia Car Co., 251 Mass. 529, 146 N.E. 773 (1925), where
the court sustained an exchange plan placing considerable pressure on dis-
senters; In re Duer, 270 N.Y. 343, 1 N.E. (2d) 457 (1936); Yoakam v. Provi-
dence Biltmore Hotel Corp., 34 F. (2d) 533 (D.C.R.I. 1929), upholding an
amendment insofar as it forced the preferred shareholders to release accrued
dividends and exchange for a new prior issue, by reducing the voting powers
of the old stock and making its future dividends non-cumulative. Cf. Patterson
v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939); Lonsdale Se-
curities Corp. v. International Mercantile Marine, 101 N.J. Eq. 554, 139 Atl.
50 (1927).

54. Becht, The Power To Remove Accrued Dividends by Charter Amend-
ment (1940) 40 Col. L. Rev. 633, 639. Becht suggests that the more drastically
the future rights of the old stock are altered, the greater will be the pressure
on dissenters to make the exchange and "voluntarily" release their accrued
dividends.

55. Keller v. Wilson Co., 190 Atl. 115 (Del. Sup. Ct. 1936); Consolidated
corporation of their accumulated dividend arrearages. Was the Delaware court naively permitting dividend accruals which had been previously characterized as "vested" to be neatly amputated by the merger device, or was it merely offsetting one doubtful rule of law by another? At any rate, the apple was again shaken down.

The vested or semi-vested right theory is not without a logical answer. The preferred shareholder has no "vested" right to a dividend, in the strict sense, until it has been declared by the board of directors. There is little real and substantial difference between the right to passed cumulative preferred dividends and his general right to a preferential future dividend. Each is essentially a claim to a preferential participation in any future distribution of profits. The preferred shareholder is not a creditor; he has merely a right to come in ahead of shareholders of the common variety.

Other practical considerations should not be ignored. Often the elimination of accrued dividends is necessary in order to secure the flow of additional capital into the business. Again, voluntary rearrangements of the corporate financial structure may avoid an expensive and protracted judicial reorganization proceeding. On the other hand, the exercise of such a power should be tested by rigid standards of good faith, lest it be used as a device to slice off the cumulative arrearages of the preferred class so that predominant common or other junior shareholders can immediately share future profits.

The authorization in Section 42 of the Louisiana act is sufficiently broad to admit of an interpretation authorizing an amendment directly eliminating arrearages in cumulative preferred dividends. Such an interpretation would obviate the necessity of resorting to mergers, so-called "optional exchange" plans, and such other subterfuges as the ingenious legal mind can concoct to satisfy the court's sense of propriety. The courts should apply a very strict standard of good faith, but should not ear-mark such


Immediately after the Harbine decision the Ohio legislature amended the corporation act so that it now unequivocally permits the "discharge, adjustment or elimination of rights to accrued undeclared cumulative dividends." Ohio Gen. Code (Page, Supp. 1940) § 8623-14(3)(i), discussed in Lattin, Streamlining the Ohio Corporation Act (1940) 6 Ohio St. L. J. 123, 126.
transactions as being illegal per se. It is significant that such an amendment cannot be enacted without the approval of two-thirds of the class of shareholders affected. 58

The procedure outlined in Sections 42 and 43 for the making and perfecting of an amendment should be carefully followed. Section 42, subsection I, provides that the articles may be amended “at a meeting of the shareholders called upon notice for that specific purpose.” Section 43 requires the filing of the articles of amendment with the Recorder of Mortgages for the parish where the corporation has its registered office. 60 A certified copy of the amendment, showing the date and hour when it was recorded, together with a certified copy of the minutes of the shareholders’ meeting at which it was adopted, must then be filed with the Secretary of State. 61 When all taxes, fees, and charges required by law have been paid, the Secretary of State shall file and record the certified copy and issue a certificate of amendment. This is a ministerial duty, and, where the amendment and papers are in conformity with the statute, a writ of mandamus is available to compel the Secretary of State to file the copy and issue a certificate of amendment. 62 Action authorized by an amendment should not be taken prior to the time of its filing with the Recorder of Mortgages, for that is expressly designated as the point at which the amendment shall become effective. 63

Section 44 enunciates special rules applicable to certain amendments making changes in the share structure of the corporation. Where the number of shares is to be increased or de-

58. It has been suggested that in this day of proxy voting there may be an approval by two-thirds of a class affected without any substantial percentage of the shareholders really knowing what is happening. In this connection Becht states, “The courts may and frequently do look to the approving majority as a justification for sustaining the amendment. But the most mystifying problem in many of the cases is how the majority happened to approve the amendment. What we see here, of course, is not so much the exercise of intelligent judgment by stockholders as the efficient functioning of proxy machinery.” Becht, supra note 54, at 649-650.

60. Id. at § 43, II [Dart’s Stats. (1939) § 1123, II].
61. Id. at § 43, I, III [Dart’s Stats. (1939) § 1123, I, III].
63. La. Act 250 of 1928, § 43, II [Dart’s Stats. (1939) § 1123, II], expressly stipulates that the amendment shall become effective at the date and hour when it was filed with the Recorder of Mortgages. In Davidson v. American Paper Mfg. Co., 188 La. 69, 175 So. 753 (1937), stock had been issued prior to the filing of the authorizing amendment. The court overruled the objection that the stock was invalidly issued, stressing the good faith of the parties issuing the stock and the fact that its validity had not been attacked until after a lapse of more than eight years. See also 7 Fletcher, Corporations, § 3735.
64. La. Act 250 of 1928, § 44 [Dart’s Stats. (1939) § 1124].
creased, subsection I requires a statement of the number of par value and the number of no-par shares, with a detailed description of the voting rights, preferences, et cetera, of the various classes of shares. Subsections II through IV prescribe the basis of exchangeable value where shares of one class are to be exchanged for shares of another. If par value shares are to be changed into no-par shares, their par value shall be deemed the consideration for allotment of the no-par shares; but where corporate assets have fallen off in value so that the intrinsic value of the shares is less than their par value, the consideration "may" be stated in terms of their "actual value." On the other hand, where no-par shares are to be changed into par value shares, the aggregate par value of the new shares must not exceed the "actual value" of the no-par shares at the time of the exchange. Changes of a corporation's stock from par to no-par value shares, or vice versa, do not constitute an "original issue" of stock within the meaning of the federal stamp tax statute.

**REDUCTION OR REDEMPTION OF CAPITAL STOCK**

The "capital stock" is defined in Section 1, subsection X, as the aggregate of the par value of all allotted shares having a par value, and of the cash or value of other consideration received in payment for all allotted shares having no par value. Where the capital is larger than the needs of the business demand, it may be expedient to withdraw such excess from the capital stock account and distribute it among the shareholders. Again, a reduction of capital stock is often necessary to absorb a deficit created by operating losses or a shrinkage in asset values. This releases current profits, which otherwise would be absorbed in such deficit,
and makes them available for dividends. A capital stock reduction may be accomplished by direct resolution of the shareholders; by redemption of shares held by the stockholders, pursuant to agreement; or by purchase of shares for retirement out of surplus.

Subsections I through III of Section 45 authorize reduction of the capital stock by a resolution adopted by a vote of two-thirds of the voting power of all shareholders, at a shareholders' meeting duly called for that purpose. The articles of reduction must be prepared and filed in the manner prescribed for articles of amendment in Section 43. The reduction does not become effective until the Secretary of State has filed the articles and issued the certificate of reduction. Here it differs from ordinary amendments which become effective at an earlier date—namely, upon the filing of the articles with the Recorder of Mortgages.

There is a serious danger of injustice in an unrestricted shareholder power to reduce capital stock. Creditors rely upon the stated capital as security for their advances. It is primarily for creditor protection that the paid-in capital requirements of Sections 8 and 9, I(b), and the requirement of Section 26 that cash dividends may only be paid from surplus, were included in the statute. The creditor's rights are not impaired by a book transfer of part of the "capital stock" to "surplus," which takes place when the capital stock is reduced. However, they may be very seriously affected by the subsequent payment of such "capital surplus" to the shareholders as dividends, without leaving sufficient current assets to meet or adequately secure creditors' demands.

Section 45, II, of the Louisiana statute provides that after reduction of the capital stock the actual value of corporate assets must not be less than the amount of its debts plus the amount of the capital stock thus reduced. Similarly, Section 46 prohibits any distribution to shareholders, upon a reduction of the capital stock, except from an excess of assets over corporate debts and liabilities plus the amount of capital stock as reduced. It has been suggested that such provisions do not fully safeguard the creditor,

69. In periods of depression, as after 1929, there is always much use of this device. Callahan, Statutory Protection of Creditors in Reduction of Capital Stock (1936) 2 Ohio St. L.J. 220, n. 1.
71. Id. at § 45, II [Dart's Stats. (1939) § 1125, II].
72. Id. at § 45, III [Dart's Stats. (1939) § 1125, III].
73. Id. at §§ 8, 9, I(b) [Dart's Stats. (1939) §§ 1088, 1089, I(b)].
74. Id. at § 26 [Dart's Stats. (1939) § 1106].
75. Id. at § 48 [Dart's Stats. (1939) § 1126].
in that they permit a distribution from the "reduction surplus."\textsuperscript{76} This reduction surplus represents a shaving down of the capital stock and net profits through operation of the business. To allow the free use of this fund for dividend payment may seriously impair the position of creditors, even where the corporation is legally solvent. Distribution is usually made from cash, and it is to cash and other current or liquid assets that the unsecured creditor looks for payment of his claim. A corporation may be left completely solvent and yet with assets of such a non-liquid nature that it will be unable to pay its debts as they mature. Possibly there should be an additional restriction to the effect that a distribution of "reduction surplus" may be made only where the "current" assets (including cash, accounts receivable, or other property which can be turned into cash within three to six months) remaining after the distribution will be at least twice the amount of current accounts payable.\textsuperscript{77}

A redemption clause is frequently included in the issuance of preferred shares. Such provisions may grant an option either to the corporation or to the shareholder, or to both, to redeem or demand redemption of the shares at a certain time. A clause retaining the option in the corporation has often been inserted with the idea that the corporation will be able, at a future time when interest rates may be lower, to repurchase the shares and eliminate the high fixed charges incident to the payment of the dividends promised the preferred shareholders.\textsuperscript{78}

The Louisiana Business Corporation Act, in Section 45, subsections IV through VIII, recognizes the corporation's right to issue redeemable shares and provides for the manner and conditions under which their redemption may be effectuated.\textsuperscript{79} Any amount of "surplus" may be applied to the redemption of such preferred or special shares.\textsuperscript{80} A corporation may also redeem its shares out of capital or borrowed money, provided the amount so used "shall not be greater than that part of the consideration received for such shares which constituted capital." If, as is often

\textsuperscript{76} Callahan, supra note 69, gives a very complete discussion of the problem of protection of creditors in cases of capital stock reduction.

\textsuperscript{77} Callahan suggests such a limitation. Id. at 238-239.

\textsuperscript{78} Note (1935) 83 U. of Pa. L. Rev. 888. For a full discussion of the various problems arising in connection with redemption clauses, see 11 Fletcher, Corporations, §§ 5308-5311.

\textsuperscript{79} La. Act 250 of 1928, § 45, IV [Dart's Stats. (1939) § 1125, IV]. The redemption must be at the price and at the time stated in the articles or resolution providing for the issuance of the shares.

\textsuperscript{80} Id. at § 45, V [Dart's Stats. (1939) § 1125, V].
the case, the redemption clause provides that the shares are re-
deeemable at a premium, "the premium can only be paid out of
surplus." Corporate creditors and other shareholders are pro-
tected by a provision that no redemption shall be made out of
capital or borrowed money, if it would render the corporate assets
insufficient to pay all debts of the corporation or would impair
the remaining capital stock. The cash redemption of preferred
stock, whether out of surplus, capital, or borrowed money, nec-
essarily involves a reduction of the capital stock. Duplicate cer-
tificates, setting forth the number and class of shares redeemed,
and the amount used for such redemption, shall be filed with the
Recorder of Mortgages and the Secretary of State," and there-
upon the capital stock of the corporation shall be deemed to be
and shall thereby be reduced by the amount so applied" without
the necessity of the usual proceedings for the reduction of capital
stock. The redeemed shares shall "be cancelled and not again
issued."

The third method of reducing capital stock is through the
purchase of corporate shares out of surplus, as permitted by Sec-
tion 23, and a cancellation of the same following the procedure
set out in subsection IX of Section 45. The necessity of strict and
immediate compliance with the requirements of Section 45, where
a capital stock reduction is intended, was forcibly illustrated in
State v. Stewart Brothers Cotton Company, Incorporated. A cor-
poration repurchased a large number of its shares for the pur-
pose of retiring them and reducing the capital stock, but delayed
for three years the preparation and filing of the necessary certifi-
cates of cancellation. As a result the State of Louisiana sued for
and recovered franchise taxes and penalties upon the shares in
question for the years prior to their formal retirement. Justice
Higgins declared that the shares purchased were "issued and out-
standing capital stock within the meaning of the Franchise Tax
Law," until they were formally retired or cancelled, and that Sec-
tion 45 provided "the only legal method" by which the capital
stock of a corporation may be decreased. This holding is in ac-

81. Id. at § 45, VI [Dart's Stats. (1939) § 1125, VI].
82. Id. at § 45, VII [Dart's Stats. (1939) § 1125, VIII].
83. Id. at § 45, VIII [Dart's Stats. (1939) § 1125, VIII].
84. Id. at § 45, V [Dart's Stats. (1939) § 1125, V].
85. Id. at § 23 [Dart's Stats. (1939) § 1103]. For a discussion of this sec-
tion, see Bennett, The Louisiana Business Corporation Act of 1928 (1940) 2
LOUISIANA LAW REVIEW 597, 619.
86. 193 La. 16, 190 So. 317 (1939), discussed in The Work of the Louisiana
Supreme Court for the 1938-1939 Term (1939) 2 LOUISIANA LAW REVIEW 31, 128.
87. 193 La. at 30-31, 190 So. at 321-322.
cord with the clear weight of authority in other jurisdictions having similar statutory provisions. 88

MERGER AND CONSOLIDATION

Section 47 89 authorizes the merger or consolidation of corporations formed for the purpose of carrying on the same or similar businesses. 90 Loosely speaking, both merger and consolidation are arrangements whereby two or more corporations may become united in interest; but there is a fundamental difference between the two. A merger takes place when one corporation absorbs one or more other corporations and thus retains its original name and corporate identity with the added capital, franchises, and powers of the absorbed corporation or corporations. Consolidation, on the other hand, is a union which necessarily results in the creation of a new corporate entity with the rights, privileges, and property of the constituent corporations, which are thereby dissolved. 91

The method of effecting a merger or consolidation is set forth in Sections 48 and 49, and this procedure should be carefully complied with. The first step is the preparation of a plan prescribing the terms and conditions of the union and the execution by the directors of the respective corporations of an agreement to carry it into effect. 92 Next, the agreement must be submitted to the shareholders of each of the merging or consolidating corporations at meetings specially and separately held and must be adopted by a vote of two-thirds of each class of shareholders having voting power in the combining corporations. 93 The agreement so adopted

89. La. Act 250 of 1928, § 47 [Dart's Stats. (1939) § 1127]. Such statutory (or charter) authorization is necessary for merger of consolidation. 15 Fletcher, Corporations, § 7048.
90. Corresponding Section 43 of the Uniform Business Corporation Act does not require similarity of purpose. 9 U.L.A. 95 (Perm. ed. 1932) § 43. Section 47 not only provides for merger or consolidation into a domestic corporation, but also permits the union of domestic and foreign corporations in a foreign corporation, provided the laws of the foreign state authorize such merger or consolidation. Reciprocity is essential where foreign corporations are involved.
91. 15 Fletcher, Corporations, §§ 7041, 7075. The Louisiana act expressly stipulates for these effects. La. Act 250 of 1928, § 51, I-III [Dart's Stats. (1939) § 1131, I-III].
92. La. Act 250 of 1928, § 48, I [Dart's Stats. (1939) § 1128, I]. The agreement will often be very comprehensive and set out full details of the proposed merger or consolidation. See 15 Fletcher, Corporations, § 7068, for a discussion of various matters often included.
must be certified, signed, and acknowledged by the proper corporate officers, and then filed with the Secretary of State. Copies thereof, certified by the Secretary of State, must then be filed with the Recorder of Mortgages in each parish in which any of the corporate parties shall have its registered office, and recorded in the conveyance records of each parish where any of the constituent corporations has immovable property, title to which will be transferred as a result of the merger or consolidation.\textsuperscript{94} Where there is a consolidation, Section 49\textsuperscript{95} provides that the articles for the new corporation shall be prepared substantially in the general form prescribed by Section 3,\textsuperscript{96} with the filing and recording in accordance with Section 5.\textsuperscript{97} The constituent corporations shall be named as incorporators of the new consolidated corporation.\textsuperscript{98} This is an exception to the requirement of Section 2\textsuperscript{99} that incorporators must be "natural persons."

Section 50,\textsuperscript{100} in line with the general incorporation provision,\textsuperscript{101} declares that the merger or consolidation shall be effective when the joint agreement or the new articles, as the case may be, have been filed in the office of the Recorder of Mortgages.

Subsections III and IV of Section 51\textsuperscript{102} specifically provide that the surviving or new corporation shall acquire all the rights, privileges, franchises, and property of every species of the several corporations, and that such property shall "be deemed to be transferred to and invested in such surviving or new corporation, as the case may be, without further act or deed." Through the application of similar statutory provisions, it has been held that a consolidated corporation has full title to a mortgage owned by one of the unifying corporations and is entitled to receive payment from the mortgagor,\textsuperscript{103} and that choses in action belonging to the original consolidating companies may be sued on by the new cor-

\textsuperscript{94} Id. at § 48, IV [Dart's Stats. (1939) § 1128, IV].
\textsuperscript{95} Id. at § 49 [Dart's Stats. (1939) § 1129]. The articles shall state the manner of converting shares of the consolidating corporations into shares of the new corporation. Id. at § 49, I(c) [Dart's Stats. (1939) § 1129, I(c)].
\textsuperscript{96} Id. at § 3 [Dart's Stats. (1939) § 1082]. For a discussion of this section, which enumerates those things which must and may be stated in the articles, see Bennett, supra note 85, at 599-600.
\textsuperscript{97} La. Act 250 of 1928, § 5 [Dart's Stats. (1939) § 1084].
\textsuperscript{98} Id. at § 49, I(a) [Dart's Stats. (1939) § 1129, I(a)].
\textsuperscript{99} Id. at § 2 [Dart's Stats. (1939) § 1081].
\textsuperscript{100} Id. at § 50 [Dart's Stats. (1939) § 1130].
\textsuperscript{101} Id. at § 5 [Dart's Stats. (1939) § 1084].
\textsuperscript{102} Id. at § 51 [Dart's Stats. (1939) § 1131].
\textsuperscript{103} Carpenter v. First Nat. Bk. of Birmingham, 236 Ala. 213, 181 So. 239 (1938).
corporation in its own name.\textsuperscript{104} Similarly, a cause of action against directors of one of the consolidating corporations,\textsuperscript{105} the right to file a mechanic's lien for materials furnished by a constituent corporation,\textsuperscript{106} and equitable rights, such as licenses under patents enjoyed by the consolidating companies,\textsuperscript{107} have been held to pass to the new or surviving corporation. Although it is expressly stipulated that franchise rights of the constituent companies vest in the consolidated or surviving corporation, the life of such franchises is not prolonged by the fact that the new company has been endowed with a corporate life of longer duration than that of the original corporation to which the franchise was granted.\textsuperscript{108}

Subsection V makes the surviving or new corporation “responsible for all the liabilities and obligations of each of the corporations merged or consolidated.”\textsuperscript{109} By virtue of this provision the creditor may proceed directly against the successor corporation, and the liability is not restricted to the amount of property derived from the constituent original debtor. The new corporation is answerable for “all liabilities and obligations,” which includes liabilities arising out of tort, as for fraud or negligence,\textsuperscript{110} as well as obligations arising out of contract.

Although subsection II expressly stipulates that the separate existence of constituent corporations shall cease upon the con-

\textsuperscript{104} Central University of Ky. v. Walter's Executors, 122 Ky. 65, 90 S.W. 1066 (1906); University of Vt. v. Baxter’s Estate, 42 Vt. 99 (1869).
\textsuperscript{106} After consolidation, a derivative stockholders' action against directors of a constituent corporation must be brought by stockholders of and in behalf of the consolidation corporation. The cause of action has passed to the new corporation.
\textsuperscript{110} Cf. Charity Hospital v. New Orleans Gas Light Co., 40 La. Ann. 382, 4 So. 433 (1888), where the obligation of a constituent corporation to furnish free gas to the Charity Hospital was held to continue for the longer duration of the new corporation. The majority decision was ably and properly criticized by dissenting Justice Fenner. (40 La. Ann. at 391, 4 So. at 439).
\textsuperscript{109} "The consolidated corporation not only assumes duties and obligations similar to those of the former corporations, but, as a general rule, will be held to the very identical liabilities and obligations incurred by either of the former companies." In re Clover Ridge Planting & Mfg. Co., 178 La. 302, 312, 151 So. 212, 215 (1933).
See discussion on liabilities of successor corporations, Comment (1940) 14 Tulane L. Rev. 273.
summation of a merger or consolidation, subsection V provides that a creditor or other person having a claim existing or proceeding pending against a constituent corporation may prosecute the same to judgment "as if such merger or consolidation had not taken place," or the surviving or new corporation may be proceeded against or substituted in its place." Of course, the logical procedure would be to file suit against the successor corporation. Probably the purpose of the seemingly anomalous clause preserving the right to sue the otherwise non-existent constituent corporations "was not to prescribe the manner in which demands against them were to be enforced, but, out of abundant caution, to make sure that no remedy for their enforcement should be lost or impaired by the amalgamation." Subsection IV of Section 52 makes it clear that the dissenting shareholder's right to demand the appraised value of his shares runs against the new or surviving corporation.

In mergers and consolidations of independent corporations the plan set out in the joint agreement should insure to each shareholder in the constituent corporations a proportionate interest in the resulting corporation which is substantially equal in quantity and quality to his original interest. Section 48, like similar provisions in other merger statutes, furnishes little indication as to what changes in capital structure are permissible. It appears to be fairly well settled that a minority group may enjoin the promulgation of a plan which operates oppressively upon them by unfairly diminishing their interest in the corporation. However, courts have been slow to interfere in such business matters and have permitted radical changes in the shareholder's interest, except in cases of clear unfairness or fraud. The new corporation may have entirely new classes of stock, with entirely different rights. The individual shareholder must accept stock repre-

111. If an action pending against one of the old companies should be prosecuted to final judgment without a substitution of the new corporation, there is little doubt but that the consolidated or merger corporation would be liable on such judgment. Chicago S.F. & C. Ry. v. Ashling, 160 Ill. 373, 43 N.E. 373 (1895).


113. The writer of an excellent comment on recapitalization by statutory merger and consolidation, Comment (1939) 38 Mich. L. Rev. 214, cites cases where unfair plans have been enjoined and declares (id. at 216): "Because the distribution of the stock among the stockholders of the constituent corporations is essentially a business matter involving estimation of past and future earning power, valuation of assets and liabilities, and other business factors, the courts are reluctant to interfere with merger or consolidation plans. The unfairness must amount to fraud, according to some courts."
senting this revised interest, or demand an appraisal if he comes within the provisions of Section 52.

A different situation is presented where a corporation merges or consolidates with a wholly owned or dummy subsidiary. Use of the merger device should not be permitted as a means of circumventing limitations upon the power to change the capital structure and shareholder's rights by amendment of the articles. Under Section 42, III, an amendment changing the rights of any class of shareholders, whether voting or non-voting, must be approved by a two-thirds vote of shareholders of the class affected. On the other hand, only those shareholders with voting powers are entitled to vote on a proposed merger or consolidation. Often preferred shareholders whose shares will be affected are without voting rights. In a bona fide merger of two separate corporations, changes of the rights of all classes of shareholders are justifiable as a necessary adjustment of the complicated interests in the constituent companies; but where a parent merges with a wholly owned subsidiary changes in the rights of a particular class of shareholders should be carefully scrutinized. The merger may be merely a device for effecting a capital stock readjustment which could not be made by amendment. Such a change would be in direct circumvention of the amendment requirements and hardly within the purpose of the merger provisions.

This distinction was disregarded in the recent case of Federal United Corporation v. Havender. The Delaware Supreme Court had previously held that accumulated dividends on preferred stock could not be wiped out by amendment of the articles. Ingenious corporate attorneys worked out a plan of technical corporate merger to accomplish the same end. A corporation with a paid-in surplus sufficient to pay arrearages of dividends on its cumulative preferred stock merged with a wholly owned subsidiary. Preferred shareholders in the merging corporation were to receive similar stock in the new corporation sans the accumulated dividend arrearages. The chancery court pierced the merger veil and found that the primary purpose was to readjust the capital structure of the merging corporation and deprive its preferred shareholders of the priority resultant from their dividend accumulations. It therefore enjoined payment of dividends on stock in the merger corporation until all accumulated dividends on the

114. See p. 493, supra.
116. 11 A. (2d) 331 (Del. Sup. Ct. 1940).
preferred stock in the old corporation were paid. However, the Delaware Supreme Court, in an unexpected decision, reversed the lower court and upheld the merger plan.

The Havender case can be partially explained by reference to the particular facts involved. The plan had been adopted by the holders of over ninety per cent of the stock. There was no suggestion that the terms of the plan adopted were unfair or inequitable. The plaintiff was guilty of laches in sitting inactively by "until the affairs had become so complicated that a resolution of former status was difficult if not impossible." Again, the court may have been seeking an escape from the rigor of a general rule prohibiting the elimination of preferences created by dividend accruals. Nevertheless, the doctrine enunciated by the Delaware court packs dynamite, and it is hoped that it will live, and perhaps be buried, entirely within the confines of the state of its birth.

**Dissolution**

**Voluntary Proceedings**

There had been considerable conflict, in the absence of a statutory provision, as to whether a majority of the shareholders were empowered to dissolve a going corporation against the wishes of the minority. The Louisiana court had been in accord with the probable weight of authority and better view that a majority, if they acted in good faith, could obtain a dissolution of the corporation.

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118. Havender v. Federal United Corp., 2 A. (2d) 143 (Del. Ch. 1938), noted in (1939) 27 Geo. L.J. 371. The Chancellor declared that (2 A. (2d) at 146) a merger may involve a reclassification of shares and revamping of the capital structure, but that "such reclassification or readjustment of capital, it is to be observed, is only incidental and collateral to the primary purpose of distributing the values to the contributing group of stockholders. Capital readjustments and stock reclassifications are not ends which it is the function of mergers to accomplish." (2 A. (2d) at 147.) "It is obvious that the defendant used its wholly owned subsidiary as a mere instrumentality under its control to go through the motions of a merger for the purpose of giving color of legality to what, under the cases hereinbefore cited, it was not permitted to do by way of an amendment of its certificate of incorporation."

119. Federal United Corp. v. Havender, 11 A. (2d) 331 (Del. Sup. Ct. 1940), noted in (1940) 24 Minn. L. Rev. 992, (1940) 88 U. of Pa. L. Rev. 624, (1940) 25 Wash. U.L.Q. 614. The court ignored any possible distinction as to the purpose of a merger and held that the "average intelligent mind" should know when he buys stock that dividend arrearages may be adjusted in case of merger.


121. See discussion supra p. 494 et seq.

122. 16 Fletcher, Corporations, § 8021, with complete collection of cases.

The Louisiana Business Corporation Act of 1928 contains comprehensive provisions for the dissolution of corporations. Pursuant to Section 54, proceedings for dissolution may be had by voluntary shareholder action without resort to the courts. The proceedings may be commenced by a resolution to dissolve adopted by the holders of at least two-thirds of the voting power, at a meeting duly called for that purpose, or by a unanimous written consent as provided in Section 64. Where the resolution contemplates a dissolution out of court, the shareholders must, at the same time, appoint a liquidator or liquidators. Only a vote of a majority of the shareholders, present and entitled to vote, is necessary for such appointment. The appointment does not become operative, however, until notice of the adoption of the resolution, the names of the liquidators, et cetera, have been duly published in a newspaper of general circulation, filed with the Secretary of State and the Recorder of Mortgages. These procedural requirements must be strictly complied with. In Putman and Norman v. Levee, characterized by the court as a “veritable comedy of errors,” there had been an attempt to place a corporation in liquidation without complying with the above formalities, as required by Section 54, II. The court held that the corporation had not been legally placed in liquidation, and that the purported

125. La. Act 250 of 1928, § 64 [Dart's Stats. (1939) § 1144]. For a discussion of shareholder action by unanimous consent, see Bennett, supra note 85, at 630.
127. Id. at § 54, III [Dart's Stats. (1939) § 1134, III]. Vacancies in the office of liquidator are filled by a majority vote of the shareholders at a meeting specially called for that purpose. Id. at § 60, I [Dart's Stats. (1939) § 1140, I].
128. Id. at § 54, II(a) [Dart's Stats. (1939) § 1134, II(a)]. In Beutelspacher v. Spokane Saving Bk., 164 Wash. 227, 2 P. (2d) 729 (1931), the court interpreted a similar publication requirement and held that a newspaper was of a “general circulation” although the total subscription was only about 450. The paper had circulated in the county and surrounding territory for many years, and there was evidence that the majority of legal notices in local probate and civil actions had been published therein.
129. La. Act 250 of 1928, § 54, II(b), (c) [Dart's Stats. (1939) § 1134, II(b), (c)].
130. The procedure of Section 54 relative to the appointment of liquidators must be followed even where the proceedings are by unanimous consent under Section 64. General Corporation Laws (1938) 63 (Ruling of Secretary of State).
131. 172 So. 406 (La. App. 1937). There had been no notice of the resolution of dissolution, and copies of the resolution had not been filed in the offices of the Secretary of State or the Parish Recorder.
appointment of liquidators was ineffective to empower them to sue on a corporate cause of action.\(^\text{132}\)

The liquidator in a voluntary, non-judicial proceeding is given very broad powers. Section 57, subsection I,\(^\text{133}\) provides that he shall be vested with full authority to collect and sue for the corporate debts and property, to compromise and settle claims of or against the corporation, to sell any or all property of the corporation, to collect unpaid share subscriptions, to temporarily carry on the corporate business when necessary, and to pay all corporate debts. In addition to this enumeration of specific powers, the statute adds that the liquidator may do "any and all things, which may be necessary, proper or convenient for the purpose of winding up and liquidating the affairs of the corporation."\(^\text{134}\)

Any surplus remaining, after payment of all corporate debts, shall be paid to the stockholders as their interests may appear.\(^\text{135}\) In *Munn v. Wadley*\(^\text{136}\) the Louisiana Supreme Court held that the title to property of a corporation dissolved in a voluntary proceeding out of court does not automatically pass to the stockholders but must be formally transferred by the corporation acting through its liquidator, or pass to them by virtue of a judicial decree. Chief Justice O'Neill relied largely on the analogous case of *Screwmen's Benevolent Association of Louisiana v. Monteleone*,\(^\text{137}\) where it had been held that a corporation whose charter had expired continued to own its property until actual distribution pursuant to law.

As a general rule the liquidator does not incur any personal responsibility for the debts, contracts, or torts of the corporation,

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\(^{132}\) Subsequent to the setting aside of the order permitting the liquidators to sue, copies of the shareholder's resolution, together with an affidavit of the publisher showing publication of the dissolution proceedings, were filed with the Secretary of State. The court remanded the case to permit a showing that all requirements of Section 54, II, had been complied with. (172 So. at 407.)

\(^{133}\) La. Act 250 of 1928, § 57, I [Dart's Stats. (1939) § 1137, I]. It is expressly provided that the liquidator cannot transfer shares or make any change in a shareholder's status which will affect any right of the corporation against a subscriber or shareholder. Id. at § 61, II(b)(1) [Dart's Stats. (1939) § 1141, II(b)(1)].

\(^{134}\) Id. at § 57, I(g) [Dart's Stats. (1939) § 1137, I(g)]. This clause is not found in corresponding Section 53, I, of the Uniform Business Corporation Act. 9 U.L.A. 100 (Perm. ed. 1932).

\(^{135}\) La. Act 250 of 1928, § 57, II [Dart's Stats. (1939) § 1137, II].


even though the cause of action may arise during the period of dissolution. He is, however, expressly obligated to exercise the care and prudence required of "fiduciaries and agents." While the liquidator should not ordinarily be held personally liable for mere errors of judgment in administering the corporate property and affairs, it has been fairly uniformly held that such statutory trustees are personally liable to a corporate creditor where they distribute all the assets of a corporation without making provision for its debts. It is no defense that they acted upon advice of counsel and believed that they had sufficient assets to meet all corporate obligations.

**Involuntary Proceedings**

Frequently, when future business prospects are so poor that the corporation should be dissolved and its assets distributed, those in control continue its operation. This may be because of a selfish personal salary benefit, or because of an obstinate and unwarranted optimism. As a result, the corporate assets, which might have been profitably liquidated, are frittered away in operating expenses, salaries, and taxes. The early rule that, in the absence of statute, a court had no power to order the liquidation of a corporation at the suit of a minority shareholder has given way to a rule that such relief can and will be given in appropriate cases.

The Louisiana act, like most modern corporation statutes, expressly authorizes and provides for the involuntary dissolution of corporations. The grounds for dissolution are set out in Section 55, I. Clause (c) authorizes dissolution on the same general principle upon which relief is given in the absence of statute, viz., where it is "beneficial to the interest of the shareholders." The court may look to the mass of equity jurisprudence in other jurisdictions for precedents. Out of abundant caution, the sta-

139. Stuart v. Chaney, 78 Colo. 421, 242 Pac. 638 (1925), holding that the director of a defunct corporation, acting as a trustee, cannot be held liable for refusal to sign a contract, even though advantageous, unless he acted wantonly, corruptly, or capriciously.
142. Hornstein, Judicial Power to Wind up a Corporation at the Suit of a Minority Stockholder (1940) 40 Col. L. Rev. 220, 220-221.
143. La. Act 250 of 1928, § 55, I [Dart's Stats. (1939) § 1135, I].
144. The English courts have uniformly held that a similar "just and equitable" ground covers all cases where a dissolution is authorized upon general equity principles. In re Newbridge Sanitary Steam Laundry, Ltd. [1917] 1 L. R. 67, 90; Loch v. John Blackwood, Ltd. [1924] A. C. 783, 789-790.
tute specifies additional grounds, most of which normally would fall within the more inclusive general basis of relief. The inclusion of these more specific grounds was a wise precaution.

Mere failure to pay debts as they mature is not enough to authorize a petition for involuntary dissolution under clause (a). It must appear that the corporation is virtually insolvent in the bankruptcy sense, in that its assets must be insufficient to "pay all just demands" or "to afford reasonable security to those who may deal with it." Of course, the last stated phrase might easily be so construed as to provide a loop-hole for a court with a liberal attitude toward the entertaining of involuntary dissolution proceedings.

Clause (b) authorizes dissolution where the objects of the corporation have failed, or have been abandoned, or their accomplishment has become impracticable. This may occur when the corporation cannot acquire the property or patents it was intended to operate, or where the corporation business becomes illegal, obsolete or generally impracticable.

Clause (d) provides for dissolution where the directors are deadlocked and the shareholders, being evenly divided, are unable to break the checkmate. Professor Ballantine has suggested that in such cases, as an alternative to liquidation, the court should appoint a "provisional director" to sit with the board of directors until such time as the deadlock be broken or until he be removed by order of the court or vote of the shareholders. Liquidation may often be a rather drastic remedy for a deadlock in management; and it would appear that a court might often, in the exercise of its discretion, refuse a dissolution for this cause. Then, even in the absence of special statutory authorization, it might adopt a practical equitable solution of the problem along the lines suggested.

Clauses (e) and (f) stipulate that failure to organize within the time prescribed, failure to commence business within one year from the date of incorporation, suspension of business for a year with no real intention of resuming operations, shall be grounds for dissolution. Clause (g) provides for involuntary dissolution where a corporation has been guilty of gross and persistent ultra vires acts.

It is significant that the statute does not command the court to act upon the grounds enumerated, but merely states that the

court "may" entertain the dissolution proceedings. Thus the petitioning shareholder, just as when he is seeking general equitable relief, must convince the court that his application is meritorious.¹⁴⁶

Subsection II expressly declares that the provision for involuntary dissolution shall not be so construed as to limit or impair the receivership remedy under Act 159 of 1898.¹⁴⁷ Where the two statutes overlap, the aggrieved shareholder or creditor is given a choice of petitioning either for a receivership or for an involuntary dissolution proceeding.

The grounds for involuntary proceedings in dissolution do not include fraudulent mismanagement and milking of the corporation by the officers and majority interests. Although specifically enumerated,¹⁴⁸ such activities have not always been the basis for the appointment of a receiver under Act 159 of 1898. The less drastic and less expensive remedy of a minority stockholder's suit to require repayment and enjoin further wrongs is usually considered adequate.¹⁴⁹

¹⁴⁶. In Blinn v. Almira Trading Co., 190 Wash. 156, 66 P. (2d) 1132 (1937) the court stressed the permissive nature of a statute which, like Section 55, I, of the Louisiana act, stated, "The court may, upon petition being filed, entertain proceedings . . . ." (Italics supplied.)

Likewise the Louisiana receivership statute (Infra note 147) has been interpreted as conferring a discretionary remedy. Even where one of the grounds of receivership is stated, the court will not appoint a receiver, "except in cases where it is evident that such appointment will serve some useful purpose." Duval v. T. P. Ranch Co., 151 La. 142, 151, 91 So. 656, 659 (1922).

¹⁴⁷. Dart's Stats. (1939) §§ 1209-1218. The statute is entitled, "An Act to authorize and regulate the appointment of receivers of corporations under articles 109 and 133 of the constitution."

¹⁴⁸. La. Act 159 of 1898, § 1 [Dart's Stats. (1939) § 1209] states eleven instances where a receiver may be appointed. The second is when the officers or directors are jeopardizing the rights of shareholders or creditors by grossly mismanaging the affairs of the corporation, committing ultra vires acts, or wasting or misusing the corporate property or funds.

¹⁴⁹. Carey v. Dalgarn Constr. Co., 171 La. 246, 130 So. 344 (1930). Payment of excessive salaries and commissions to themselves by the directors of a solvent corporation was held not to be a "wasting, misusing, or misapplying the property or funds of the corporations," which would justify the appointment of a receiver. Thompson, J., declared: "If the majority shareholders are guilty of paying themselves salaries out of proportion to the services rendered and have paid unto themselves illegal commissions, the plaintiff's remedy is a suit to bring such funds back into the treasury of the corporation and to prevent future excessive payments by injunction. It would be disastrous to the business of the corporation to throw it into an expensive receivership." (171 La. at 255, 130 So. at 348.) Accord: Mulqueeney v. Shaw, 50 La. Ann. 1060, 23 So. 915 (1898) (only general allegations of mismanagement and improper application of funds); Shelton v. Destrehan Mercantile Co., Inc., 151 La. 808, 92 So. 344 (1922) (the mismanagement and negligence was largely by local store managers).

Cf. Sincer v. Alverson, 51 La. Ann. 955, 25 So. 650 (1899) (receiver ap-
Involuntary dissolution is a very severe remedy and may become dangerous, or at least troublesome, if available to a single disgruntled or litigatious shareholder. The Louisiana statute is rather strict as to who may institute such proceedings. Section 56, I requires that the petitioning shareholders must be the registered owners of at least twenty per cent of the outstanding stock, and must have held their shares for a minimum period of six months. A judgment creditor may petition for dissolution proceedings only when execution has been issued and returned nulla bona.

Subsection II of Section 56 expressly provides that the commencement of voluntary non-judicial dissolution proceedings will not bar the institution, upon proper grounds, of involuntary proceedings. Turning back to Section 54, the shareholder’s resolution for a voluntary dissolution may authorize a dissolution under supervision of the court with the court appointing a shareholder or shareholders as liquidators. Also, in dissolution out of court, the liquidators, unless forbidden in the resolution appointing them, may, at any time, petition the court to supervise the proceedings.

Section 58 provides the method of appointment of judicial

pointed at the instance of holders of a majority of the stock, where the secretary-treasurer had assumed entire management of the corporation and had disposed of its stock at less than par, and the directors were unable to agree on anything, and the corporate business had been generally mismanaged; Davies v. Waterworks & Light Co., 107 La. 145, 31 So. 694 (1901) (receiver appointed where the directors and officers were grossly mismanaging the corporation by neglecting its property, misapplying its funds, and committing a number of ultra vires acts); Brusle v. Dunlap Elec. Co., 150 La. 1016, 91 So. 438 (1922) (receiver appointed where the president, and majority shareholder, was using corporate funds for the benefit of another company of which he was also president).

150. “The result of involuntary dissolution is a forfeiture of the corporate rights and a sacrifice or liquidation sale of all its assets and business. This is so severe a remedy that the mere threat of institution of such proceedings may give minority shareholders an unfair advantage and may be used as a method of forcing majority interests to purchase their shares at an exorbitant figure.” Ballantine, supra note 15, at 392.

151. La. Act 250 of 1928, § 56, I [Dart’s Stats. (1939) § 1136, I].

152. La. Act 58 of 1928, § 54, IV [Dart’s Stats. (1939) § 1134, IV]. “... the court shall appoint and confirm as judicial liquidator or liquidators the liquidator or liquidators, if any, appointed by the shareholders.” La. Act 58 of 1928, § 58, I(a) [Dart’s Stats. (1939) § 1138, I(a)].

153. La. Act 58 of 1928, § 54, V [Dart’s Stats. (1939) § 1134, V].

154. Id. at § 58 [Dart’s Stats. (1939) § 1133]. The Secretary of State should be notified of the inception of dissolution proceedings conducted under court supervision. General Corporation Laws (1938) 63 (Ruling of Secretary of State).
liquidators, and states that a liquidator pendente lite may be appointed where necessary, with his authority ceasing upon the appointment and qualification of the regular liquidator or liquidators. The authority of the judicial liquidator, set out in Section 59,15 is not as broad as that of the non-judicial liquidator, since he acts subject to the orders and supervision of the court. Vacancies in the office of judicial liquidator are filled by appointments of the court. 156 The dissolution proceedings are deemed to take effect upon appointment of the judicial liquidators or of a liquidator pendente lite. 157

**Effect of Dissolution Proceedings—Miscellaneous**

When proceedings for dissolution have taken effect all the powers and duties of the officers and directors of the corporation vests in the liquidators, and the authority of the officers and directors ceases, except insofar as it may be continued by the liquidators for the preservation of corporate assets, or may be necessary for the calling of shareholders' meetings. 158 Thus, where a resolution for voluntary dissolution proceedings has been adopted and liquidators elected, contracts entered into thereafter on behalf of the corporation by the former officers and directors are not corporate acts and do not create corporate liability. 159

When the corporation has been completely wound up, the court, if the dissolution is subject to its supervision, shall issue an order declaring the corporation to be dissolved, or if the proceedings are out of court, the liquidators shall sign and acknowledge a certificate stating that the corporation has been dissolved. 160 The order or certificate shall be delivered to the Secretary of State, who, after all tax claims have been paid, 161 shall file the same and issue a certificate of dissolution evidencing the termination of corporate existence. 162

In cases where the dissolution has been hurriedly and negli-

156. Id. at § 60, II-III [Dart's Stats. (1939) § 1140, II-III].
157. Id. at § 61, I(b) [Dart's Stats. (1939) § 1141, I(b)].
158. Id. at § 61, II(a) [Dart's Stats. (1939) § 1141, II(a)].
(claim for attorney's services rendered upon authority of corporate officers, after the dissolution proceedings had become effective).
161. General Corporation Laws (1938) 83 (Ruling of Secretary of State).
gently conducted with a result that suits pending against the corporation were not discovered,\textsuperscript{163} or that corporate debts were not paid,\textsuperscript{164} the certificate has been annulled and the proceedings treated as inoperative.

Injured creditors clearly have an action against the liquidators where corporate assets are distributed to shareholders in violation of the obligation to first pay the company’s debts.\textsuperscript{165} They may also recover from the shareholders who have received such unlawful payments. In \textit{Fudicar v. Inabnet}\textsuperscript{166} a creditor was permitted to bring a direct action against shareholders of a liquidated corporation to recover assets which had been distributed without the payment of corporate debts. The general provision of Section 27,\textsuperscript{167} that the liability of a shareholder receiving an unlawful distribution of corporate assets runs in favor of the corporation, was necessarily inapplicable since the corporation had been liquidated and ceased to exist. Similarly in \textit{Ortego v. Nehi Bottling Works}\textsuperscript{168} a plaintiff with an unsatisfied tort claim against a liquidated corporation was held to have a right of action against the shareholders who had received the corporate assets and were continuing the business under a partnership arrangement.

It is expressly provided that assets inadvertently or otherwise omitted from the dissolution proceedings shall vest in the liquidators and shall be distributed by them in the same manner

\textsuperscript{163} McCoy v. State Line Oil & Gas Co., 180 La. 579, 157 So. 116 (1934). Certificate of dissolution annulled because two suits were pending against the corporation at the time the certificate was issued. Overton, J., pointed out (180 La. at 585, 157 So. at 118) that "the liquidation was hurriedly had," being completed ten days after the liquidator was appointed; and that the liquidator should have ascertained the pending suits against the corporation, which information could easily have been secured at the Clerk’s office. This "obvious failure to discharge the duty imposed by law on the liquidator" was held to be a clear ground for annulling the certificate of dissolution.

\textsuperscript{164} In re Wolf Mfg. Industries, 56 F. (2d) 64 (C. C. A 7th, 1932).

\textsuperscript{165} Supra, p. 510, n. 140, 141.


\textsuperscript{167} La. Act 250 of 1928, § 27, II [Dart’s Stats. (1939) § 1107, II]. For a discussion of this provision see Bennett, supra note 85, at 625.

\textsuperscript{168} 182 So. 365 (La. App. 1938). Judge Hamiter properly pointed out that the shareholders "could not be individually liable for more than the value of the assets of the corporation which each had received." (182 So. at 369.) It should be noted that the shareholder’s liability is based upon the unlawful receipt of the corporate assets, and does not depend upon the additional fact that they continued operation of the business. Judge Hamiter’s theory (182 So. at 367) that defendant shareholders were liable as "successors of the corporation" cannot be taken too literally, in view of the fact that their liability was limited, as stated above, to the value of assets received.
and to the same parties as if they had been in their hands before dissolution of the corporation.\(^{169}\)

The corporate existence may be terminated by expiration of the stated period of duration, but the payment of all debts and a distribution of excess assets must precede actual dissolution. Thus the Louisiana Supreme Court properly held that a corporation whose charter had expired continued to own its property until actual distribution pursuant to law.\(^{170}\) The dissolution provisions of the corporation act do not cover this situation. In the recent case of *In re Koretke Brass & Manufacturing Company*\(^{171}\) the court declared that the applicable procedure, where a corporation having property rights or credits has ceased to exist, is a receivership pursuant to the provisions of Act 26 of 1900,\(^{172}\) and that the requirements of the statute must be strictly complied with.

### Compromise Arrangements and Reorganizations

A voluntary reorganization and debt adjustment often provides a happy alternative to liquidation, and is more expeditious and economical than a reorganization under the Federal Bankruptcy Act. In the absence of special statutory authority a minority creditor could block a plan for readjustment of the debt burden, regardless of its reasonableness and of the fact that a majority of his fellow creditors had voiced their approval.\(^{173}\)

Section 63\(^{174}\) of the Louisiana corporation statute sets out a procedure whereby the shareholders and creditors of a corporation which is in the process of dissolution subject to court super-


\(^{171}\) 195 La. 415, 196 So. 917 (1940).

\(^{172}\) Dart's Stats. (1939) §§ 1219-1220. The matter might have been clarified somewhat by inserting a special provision, for winding up such defunct corporations, in the general corporation statute. For such a provision, see Cal. Civ. Code (Deering, 1931) §§ 399, 400 (3).

\(^{173}\) Northern Pac. Ry. v. Boyd, 228 U. S. 482, 33 S. Ct. 554, 57 L. Ed. 931 (1912), holding that a reorganization plan adopted by the stockholders and bondholders was not effective against a dissenting creditor.

\(^{174}\) La. Act 250 of 1928, § 63 [Dart's Stats. (1939) § 1143]. For a complete discussion of the constitutionality and scope of state reorganization statutes, see Comment (1940) 49 Yale L. J. 1443. A note writer in (1940) 7 U. of Chi. L. Rev. 700 points out that the Federal Bankruptcy Act was not intended to suspend state laws dealing with the reorganization of corporations which, while unable to meet their debts as they matured and financially embarrassed, were solvent in the bankruptcy sense. Even the discharge feature of the reorganization agreement is not a discharge in the bankruptcy sense, in that it is a discharge by contract rather than by operation of law.
vision, or is being administered by a receiver, may enter into a compromise agreement providing for capital readjustments and a scaling down of the debt burden. The compromise or reorganization plan may be proposed by any party of interest, including the corporation, any shareholder or creditor, a liquidator or the receiver. The court may, upon application of such party, summarily call a meeting of shareholders and creditors. Since the creditors' claims are to be scaled down, or perhaps rendered illiquid by a substitution of stock, care should be taken to duly notify all creditors of the proceedings. The plan becomes binding on all creditors and shareholders when agreed upon by a majority in number representing three-fourths in amount of the creditors or of the class thereof affected and by a majority of the shareholders including the holders of three-fourths of the voting stock or of each class thereof. The quantity requirement takes into consideration actual proportionate interests, and the numerical requirement affords a voice to the small investors or creditors. Any possible unfairness to dissenters is substantially precluded by the additional stipulations that the plan must be sanctioned by the court and promulgated under court supervision.

It is unfortunate that Section 63 is limited to those corporations which have elected to make it applicable by expressly including its language in their articles of incorporation. Such a provision may be added through an amendment of the articles, but in such case it would only apply to subsequent creditors.

Action by State To Annul, Vacate, or Forfeit the Corporate Franchise

The right of a state to bring quo warranto proceedings to declare a forfeiture of a corporation's charter for misuse or non-use

175. La. Act 250 of 1928, § 63, I [Dart's Stats. (1939) § 1143, I].
176. Id. at § 63, II [Dart's Stats. (1939) § 1143, II].
177. The requirement of a numerical majority of both shareholders and creditors is a definite protection for the "little fellow," for one large shareholder or creditor might easily hold three-fourths of the shares or outstanding debts. It is suggested in a Comment (1940) 49 Yale L.J. 1443, 1454: "That this device may be more than a weapon of defense is apparent. By clubbing together, minority interests might defeat the statute's primary purpose of eliminating opportunistic obstructionism. While the majority might combat this by splitting their shares among dummy holders, it is questionable whether a court of equity would approve tactics which might shortly degenerate into a contest of fractionation."
of the corporate franchise has long been recognized. Section 65 enumerates certain acts or omissions as grounds for terminating the corporate franchise and designates the Attorney General to bring the action to procure the forfeiture. Use of the word "may" indicates an intent to codify the pre-existing rule that the institution of such proceedings is discretionary with the Attorney General and cannot be controlled by mandamus.

The grounds of forfeiture stated in the Louisiana statute are very broad and cover all the more important corporate sins. Fraud practiced upon the state in procuring the corporate franchise, and violation of express prohibitions of the corporation statute will justify an action to annul or cancel the articles upon the enumerated grounds (a) and (b). Such fraud and transgression has been found where the corporation did not receive proper payment for its shares, where the incorporators promulgated a scheme to evade a statutory requirement as to the minimum percentage of capital with which a corporation shall begin business,


Article 447(2), La. Civil Code of 1870, provides for a forfeiture "when the corporation abuses its privileges, or refuses to accomplish the conditions on which such privileges were granted, in which case the corporation becomes extinct by the effect of the violation of the conditions of the act of incorporation." Judicial action was necessary to determine the misuse or non-use of the corporate franchise, and such action could only be brought by the Attorney General, acting for the state. Atchafalaya Bank v. Dawson, 13 La. 497, 505 (1839) (the right to continue corporate existence is not subject to collateral attack); In re Louisiana Savings Bk. & Safe Deposit Co., 35 La. Ann. 196 (1883).


182. In State ex rel. Lannes v. Attorney General, 30 La. Ann. 954 (1878), Marr, J., declared that, "in the silence of the Legislature the discretion is vested in him [the attorney general]; and discretionary power cannot be controlled by mandamus." (30 La. Ann. at 959.)

183. La. Act 250 of 1928, § 65, I(a), (b) [Dart's Stats. (1939) § 1145, I(a), (b)].

184. New Orleans Debenture Co. v. Louisiana, 180 U.S. 320, 21 S.Ct. 378, 45 L.Ed. 550 (1900), affirming 51 La. Ann. 1827, 26 So. 586 (1899). The court overruled the corporators' claim that they were necessary parties and held that the corporation had a sufficient de facto entity to be sued as such.

185. See Randle v. Walker, 17 Ala. App. 211, 94 So. 551 (1919). The incorporators sought to evade a statutory requirement that a corporation must commence business with at least 25 per cent of its authorized capital, by organizing a $2000 corporation and immediately thereafter increasing its capital stock to $150,000. Although holding that the proceedings were not subject to collateral attack, the court declared (by way of dictum) that they "would constitute a fraud on the law, subjecting it to a proceeding by the state looking to a cancellation of its charter." The Louisiana Business Corporation Act has similar "paid-in capital" requirements. La. Act 250 of 1928, §§ 8, 9, I(b) [Dart's Stats. (1939) §§ 1088, 1089, I(b)]. For discussion, see Bennett, supra note 85, at 604.
and where the articles contained a false statement as to the amount of paid-in capital.186

Statutes applicable to corporations are sometimes given teeth by providing forfeiture of the corporate charter as a penalty for their violation. These may be the basis of an annulment proceeding under clause (c).187 Failure to pay license or franchise taxes is generally made a ground for forfeiture proceedings.188 The Louisiana franchise tax statute, however, provides only for seizure and sale of the corporate property and does not command a forfeiture of the charter for non-payment of the franchise tax.189

Clause (d) will probably be interpreted in accord with the general rule that ultra vires acts do not constitute ground for forfeiture unless they are of a substantial and continued nature.190 Certain excesses and abuses of authority may be such as to warrant injunctive relief at the suit of the state and yet not be ground for a forfeiture of the corporate franchise.191

Abandonment of the business of the corporation is not specifically stated as a ground for forfeiture or annulment of the franchise, but a complete abandonment would certainly come within clause (e) as an "act which amounts to a surrender of the corporate franchise."192

Failure to comply substantially with prescribed conditions precedent to incorporation is a ground for forfeiture under clause (f). Clause (g) re-enacts the substance of an existing constitutional provision which makes participation in an illegal combina-

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187. Examples of the type of statutes coming within this clause are found in People v. Blue Rose Oil Co., 360 Ill. 397, 196 N.E. 456 (1935) (corporation subject to dissolution for violation of Motor Fuel Tax law); People v. United Medical Service, 362 Ill. 442, 200 N.E. 157 (1936) (quo warranto by attorney general against corporation practicing medicine in violation of the Medical Practice Act). Cf. the Louisiana statute prohibiting the corporate practice of law imposing a fine but not declaring a forfeiture of the corporate charter. La. Act 202 of 1932, § 6 [Dart's Stats. (1939) § 4471].
188. 16 Fletcher, Corporations, 829, § 8052.
189. La. Act 10 of 1935 (1 E.S.) § 8 [Dart's Stats. (1939) § 8729].
190. State v. Minnesota Thresher Mfg. Co., 40 Minn. 213, 226, 41 N.W. 1020, 1025 (1889), where the court generalized that "to constitute a misuser of the corporate franchise, such as to warrant its forfeiture, the ultra vires acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." Accord: State v. Southern Building & Loan Ass'n, 132 Ala. 50, 31 So. 375 (1902). There is a complete collection of cases in 16 Fletcher, Corporations, § 8036.
192. For a full discussion of the problem, see 16 Fletcher, Corporations, § 8062.
tion in restraint of trade a basis of annulment proceedings by the Attorney General. Such a civil action is not conditioned upon a prior penal conviction under the anti-trust statute, but may be brought independently of criminal proceedings.

The failure to designate and maintain a registered office and resident agents, under the conditions and in the manner prescribed by Section 37 is stated in clause (h) as a ground for dissolution. It has been held that mere irregularities in the appointment of the statutory agent are not sufficient cause for a forfeiture of the corporation's franchise. Also, the proper appointment of such agent at any time before the hearing or trial would preclude a judgment of dissolution.

The generally accepted rule, that upon proof of facts which are expressly declared to be a ground for forfeiture, the state is entitled as a matter of law to a decree vacating the corporate charter, and the court has no discretion to refuse the same, is definitely modified by saving clauses in Section 65. Subsection II provides that where the cause of action is based upon a matter or act that can be corrected, the Attorney General shall demand such correction sixty days prior to instituting suit, and shall bring suit only in cases where the delinquent corporation has failed to correct the condition within that period. This "last chance" provision affords the corporation an opportunity to mend its ways or correct its error, rather than to confront the court with the unsatisfactory alternative of either imposing the extreme dissolution penalty for inadvertent irregularities, or of adopting an unduly narrow construction of the grounds of forfeiture as a means of

193. La. Const. of 1921, Art. XIX, § 14, as amended by La. Act 318 of 1936, § 1, prohibits combinations and monopolies in restraint of trade, and provides for enforcement by the Attorney General by injunction or other legal proceedings, "and particularly by suits for the forfeiture of the charters of offending corporations . . . ." This constitutional provision was applied in State v. American Sugar Refining Co., 138 La. 1005, 71 So. 137 (1916).


196. In Big 4 Advertising Co. of Phoenix v. Clingan, 15 Ariz. 34, 135 Pac. 713 (1913), the court held that while the appointment of a statutory agent by the president and secretary of the corporation, instead of by the board of directors as required by the statute, was irregular, it was not ground for dissolution.

197. 15 Ariz. at 37, 135 Pac. at 714. The court pointed out that the aim of the penalty (dissolution) was solely to compel obedience to the statute. Accord: Flowing Wells Co. v. Culin, 11 Ariz. 425, 95 Pac. 111 (1908). See Section 65, II, of the Louisiana Corporation Act, discussed infra.

198. 16 Fletcher, Corporations, 809, § 8035 (cases from all jurisdictions collected in n. 32).
escape.\textsuperscript{199} Also, subsection III expressly recognizes a judicial discretion, stating that "the court may grant the relief asked for, or such other or partial relief as to it seems just and expedient."

**CONCLUSION**

The sections in the Louisiana Business Corporation Act which govern the making of major adjustments in the corporate structure have been carefully and compactly worded. There are a few places, as indicated in the foregoing discussion, where a minor change or addition might be helpful. On the whole, however, the statute furnishes all the really essential rules, and the attorney who carefully studies its provisions should be able to advise his client safely and accurately. Corporations that have run into trouble have usually done so because of a failure to follow conscientiously the provisions governing the particular action taken.

\textsuperscript{199} This clause is not found in corresponding Section 61 of Business Corporation Act. 9 U.L.A. 103 (Perm. ed. 1932).

Without such a provision it has been generally held that when a corporation has been guilty of an act or omission authorizing a forfeiture, subsequent compliance with the law or correction of the misdeed will not preclude a judgment of dissolution. 16 Fletcher, Corporations, 817, § 8042, n. 57. Cf. Big 4 Advertising Co. of Phoenix v. Clingan, 15 Ariz. 34, 37, 135 Pac. 713, 714 (1913).