The 1968 Business Corporation Law of Louisiana

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PREFACE

The Law Reform Committee of the Louisiana State Bar Association in early 1962 interested the Honorable Wade O. Martin, Jr., Secretary of State of Louisiana, in a project to revise the corporation laws of Louisiana. The Committee recognized that the laws were badly in need of revision; that there was gross Louisiana income tax discrimination against a domestic corporation doing a multi-state business; and that Louisiana was losing its larger domestic multi-state corporations to other states, and was gaining no such new ones, because of this tax inequity and because our corporation laws did not meet the needs of modern business corporations. Mr. Martin became very interested. A committee to draft proposed revisions of the Louisiana Business Corporation Act and also of the Non-Profit Corporation Act and the Foreign Corporation Act was established.¹

The committee at the outset undertook to ascertain comments and suggestions from the bar of Louisiana. A questionnaire was mailed to the then 4350 members of the Louisiana Bar Association asking for comments as to the need for a revision of these laws and suggestions for any changes they deemed desirable. Seminars were held throughout the state² for the purpose of keeping the bar and the lay public abreast of the committee's work and to secure comments and suggestions. The research memoranda prepared by the Reporters were extremely helpful to the committee—as were the voluminous reports of the consultants to the "Joint Legislative Committee of the State of

1. This article has been adapted with the consent of the publisher, Claitor's Book Store, from a chapter in a forthcoming book, containing forms as well, authored by Ben R. Miller, Member of the Baton Rouge Bar.

2. Members of the Committee were: Wade O. Martin, Jr., General Chairman; Eberhard P. Deutsch, Chairman; Ben R. Miller, Vice-Chairman; Clarence L. Yancey, and Joseph Onebane. Reporters: David W. Robertson and Mrs. Leila Obier Cutshaw, Business Corporations; Robert N. Leavell, Foreign Corporations; Dennis L. Rousseau, Non-Profit Corporations; and René H. Himélé, Jr., Coordination. Staff Coordinators: J. Thomas Jewell and Ashton J. Mouton; State Staff: Chapman Sanford and C. C. Wood; Liaison with Louisiana Law Schools: Dean Cecil Morgan and Robert N. Leavell of Tulane; David W. Robertson and Mrs. Leila Obier Cutshaw of L.S.U.; and Dennis L. Rousseau of Loyola. Liaison with Society of Louisiana Certified Public Accountants: Leo P. Michiels.

New York to Study Revisions of [its] Corporation Laws,” (1956-61), and “The Joint Report of the New York State Bar Association and the Association of the Bar of the City of New York” (January 25, 1961) on the proposed revision of New York’s corporation laws.4 The committee in addition studied others of the recent corporation statutory changes, particularly those in Delaware, North Carolina, and Texas.

After thus seeking the views of the bar on reform of Louisiana’s corporation laws, the committee completed its task and the proposed revisions were submitted to the 1968 legislature. With but minor amendments—all acceptable to the committee—all were passed by an overwhelming vote of both branches of the legislature,5 as were two companion constitutional amendments.6

The new Business Corporation Law appears as Louisiana R.S. 12:1-178, and is divided into seventeen parts.

**PART I**

**Definitions**

There are twenty-six terms defined in the opening section of the new Business Corporation Law as compared to nineteen in the prior statute.7 The more significant ones added are these:

The definition of “assets” makes it clear that “Treasury Shares” are not considered an asset.

And “net assets,” a term used in the new act, is not necessarily equivalent to net book value of all assets: for example, where the actual value of certain of the assets has fallen so far below book value (cost less depreciation) that the directors would not be justified in relying on book value of assets in determining whether a dividend could be paid.

The prior statute used the term “capital,” “capital stock,” and “surplus”; whereas the new statute uses the more realistic and meaningful terms of “stated capital,” “surplus,” and “cap-

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4. This material is on deposit with the Law Library at Louisiana State University.
5. LA. R.S. 12:1-178 (Business Corporation Law) §§201-269 (Non-Profit Corporation Law), and §§301-321 (Foreign Corporation Law) (Supp. 1968).
ital surplus” in order to clarify the law in regard to dividends and other distributions to shareholders.

The new act employs the term, and defines, “stated capital” to avoid the ambiguity which can arise from use of the terms “capital” and “capital stock.”

“Stated capital” is an accumulation of building blocks, so to speak.

The first block in this assembly is the total amount received for all issued par value stock, up to the total par value.8

The second block is the amount if any which may be allocated by the board of directors or the shareholders to “stated capital” from the excess over par value which may have been received from the sale of issued par value stock9 (unless so allocated to “stated capital” such excess would go into “capital surplus”).

The third block is that portion of the total amount received from the sale of no par value stock10 which is not allocated by the board of directors or the shareholders to “capital surplus.”11

The fourth block is the amount, if any, which has been transferred by the board of directors to “stated capital” from “earned surplus” or “capital surplus.”12

From this total there would be deducted:

(1) Any amounts transferred from “stated capital” to “capital surplus.”13

(2) The amount of any distribution from “stated capital,” such as in connection with the redemption and cancellation of redeemable shares14 or by the cancellation of other re-acquired shares.15

The prior act used merely the term “surplus” as the customary source for dividends; and defined it as “the excess of assets over all liabilities plus capital stock.” As the term “capital stock” was ambiguous, the new act—as does the Model Act—defines “surplus” more properly as “the excess of assets over

9. Id.
10. Id.
11. Id.
12. Id. § 61B.
13. Id. § 61C, which also imposes restrictions on doing so.
14. Id. §§ 61E, 55.
15. Id. § 55.
liabilities plus stated capital.” But more importantly, the new act, as does the Model Act, uses two other terms: “capital surplus” and “earned surplus.” This is to clarify the law in regard to dividends and other distributions to shareholders. “Capital surplus” is all surplus that does not fall within the definition of “earned surplus” and includes any amount arising from a re-evaluation of assets to reflect the appreciation of actual value over book value of assets. “Earned surplus” is defined in the new act as “excess of surplus over capital surplus”; but it may be generally described as the current balance of undistributed net income from the time of organization. However, because “capital surplus” can be applied by the board of directors to reduce or eliminate a deficit if there is no earned surplus, the computation of earned surplus at any time after any such application must have as its starting point the date capital surplus was last so applied. Earned surplus, at any time, reflects current profits and losses and is not necessarily a year-end figure.

Earned surplus is one of the concepts employed in determining the right of a corporation to purchase its own shares; and normally it would be from “earned surplus” that the board of directors would declare dividends payable in cash or property. The board of directors may transfer earned surplus to stated capital or to capital surplus.

Capital surplus, as has been shown, may arise from the sale of par value shares for more than par or from all allocations thereto by the board or shareholders of any portion of the consideration received for no par shares. It may also result from a conversion of shares, or from a reduction of stated capital or a transfer from earned surplus. It may be decreased by a conversion of shares and by a distribution in partial liquidation to shareholders. It may be used as a measure of the power of the corporation to purchase its own shares when properly authorized, and to decrease or eliminate a deficit.

The term “reclassification of stock” in the new act means an amendment of the articles so as to authorize a new class or series of stock; or to change the authorized number of shares of an original class or series; or to change par value stock to no par value stock or vice versa, or increase or decrease par value; or make or modify the rights or restrictions on shareholders—including the cancellation or modification of accumulated but
undeclared dividends—provided, of course, any such change affecting rights of issued shares are made by whatever vote is prescribed in the articles or in the statutes for such action.

The term “insolvency” is not defined in its bankruptcy sense, but in its equity sense—as does the Model Act—“inability of a corporation to pay its debts as they become due in the usual course of business.” This affects the right of the corporation to pay dividends or repurchase its stock. To illustrate the difference: a corporation may have a true “balance sheet” solvency (show a “net asset” picture and hence not be “insolvent” in the bankruptcy sense) and still be unable to “pay its debts as they become due in the usual course of business.”

PART II

Incorporation

Most other jurisdictions require—as did Louisiana’s former statute—three or more natural persons as incorporators. The more recent statutes, however, particularly those of Delaware, Iowa, Kentucky, New York, North Carolina, and Wisconsin, permit a single natural person “21 years or older” to suffice as incorporator. The research report which led to New York so providing, read in part:

“More important than this demonstrated lack of reasons for having three incorporators, is the fact that there are good reasons to allow the use of just one man. The law to engender respect should itself respect reality. This is especially true, and does not import any sense of weakness, when no substantive policy of law argues to the contrary, as with incorporators. As stated by one qualified commentator ‘If a single individual is to own all the stock in the corporation, his signature to the charter and affidavit should be sufficient. . . . This may seem to be a matter of no importance, but I have a hunch that statutory insistence on meaningless red tape may leave in the mind of the incorporated individual . . . the notion that other, and more substantial requirements of the corporation statutes are equally meaningless.’ The same thought was expressed by the revisors in Wisconsin when they adopted the rule to allow one person to act as incorporator: ‘The real parties in interest will more readily qualify under this section if desired.’ Further, there is no indication to date that the one-man rule, as adopted in Iowa, Ken-
tucky and Michigan, beside Wisconsin, has had any ill effects whatsoever."\(^\text{16}\)

The new Louisiana act goes beyond that of New York, however, by permitting "one or more natural or artificial persons capable of contracting" to form a corporation.\(^\text{17}\) This retains the eligibility of emancipated minors as well as that of non-residents of Louisiana.\(^\text{18}\)

The new act retains the broad enumeration of purposes for which a corporation may be organized,\(^\text{19}\) and it also recognizes the legislative authorization to law firms of incorporating for tax purposes as a professional organization so as to have profit sharing and pension plans.\(^\text{20}\)

Substantial changes are effected in the new act with reference to the corporate name, and the reservation of a name. There is no longer a requirement that the name end with either the word (1) Corporation, or (2) Incorporated, or (3) Inc. It now suffices if the name shall "contain" either of these; or contains the word "Company" or the abbreviation "Co." if not immediately preceded by the word "and" or the symbol "&."\(^\text{21}\) This is in accordance with the modern trend of flexibility and it was felt creditors would not be misled unduly into thinking they were dealing with a partnership.

Although as a matter of courtesy the Secretary of State had established an administrative procedure for a limited reservation of a corporate name, the new act establishes this as a right of either a prospective domestic corporation or of a prospective or existing foreign corporation; and for a maximum period of 60 days with two extensions permitted—presumably for not more than 60 days for each extension.\(^\text{22}\) A phone call to the Corporation Division of the Secretary of State's office will disclose if

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\(^{16}\) Basic Research Memorandum No. 1 for the Committee on Revision of Louisiana Corporation Laws 2.


\(^{18}\) Most American jurisdictions do not require incorporators to be citizens or residents of the incorporating state, although Idaho, Pennsylvania, Texas, South Dakota, Vermont, Utah, and Washington either require all or some to be residents of the state.


\(^{20}\) As yet, among the professions only the medical and legal professions have such statutes; and as yet the Internal Revenue Service does not recognize these.


\(^{22}\) La. R.S. 12:23 (Supp. 1968).
a particular name is then available and if not what changes would make it acceptable. Customarily the name can then be informally reserved to allow time for a mail request for the reservation of name to be made, or the articles to be filed.

The problem of "names" being taken out of commerce, so to speak, though in fact unused, is handled in the new act as it was in the prior statute by an express provision that a failure to actively engage in business in this state for two years (and the failure to file a Louisiana corporate franchise tax for two years being prima facie evidence thereof) entitles the Secretary of State to allow a name to be used by others.23

The problem of regulating the use of one's own surname in a corporation competing with an established corporation having the same surname in it, will probably still be present under the new act, as it was under the prior ones.24

Although neither the Model Act nor the new New York act, among others, has a requirement that the articles be in the English language, this Louisiana requirement has been retained; but significant changes, however, are made by the new act as to the articles of incorporation.25

Of particular interest to attorneys is that now the articles may be by either an authentic act26 or an act under private signature before two witnesses and thereafter acknowledged before a notary public.

Illustrative of the policy of the committee to have fewer rigid requirements in the statute, to accord greater flexibility, and in general leave to the articles the matter of specific restrictions or limitations, the new act eliminates the need for "boiler plate" provisions in the charter in order to cover all possible objects and purposes; for the new act provides that the articles of a corporation may simply state its purpose is "to engage in any lawful activity for which corporations may be formed under this chapter."27

26. For the benefit of any out-of-state reader, an authentic act is one executed before a notary of this or any other state and two (other) witnesses. LA. CIV. CODE art. 2234; LA. R.S. 35:6 (Supp. 1968)
27. LA. R.S. 12:24B(2) (Supp. 1968). At present only a minority of states permit this, but the new act is in accord with the modern trend.
Some doubt has been expressed heretofore as to whether a Louisiana corporation can have an indefinite duration until dissolved voluntarily or involuntarily. The new act permits a provision for perpetual duration\(^2\) and the Louisiana Constitution has been amended by the electorate to clearly validate such a provision.\(^2\)

Other significant changes with respect to the articles are best stated in the portions of the Comment to Section 24:

1. The outmoded concept of assessable shares has been discarded.

2. The directors may be authorized to amend the articles to fix the preferences, limitations and relative rights of any class of stock, and to establish, and fix relative rights and preferences as between series of preferred or special shares.

3. The requirement that paid-in capital be stated has been eliminated as misleading. Since paid-in capital can immediately be paid out again, such a requirement provides only illusory protection to persons dealing with the corporation. Inclusion of a statement of paid-in capital is permissible though not required, however; and Section 26 provides that if the articles contain a statement of paid-in capital with which the corporation will begin business, it may not engage in business transactions until the stated capital has been paid in.

4. The location of the registered office, and names and addresses of directors and registered agents, heretofore stated in the articles, may now be stated in the initial report filed with the articles. Sections 25A and 101. The reason for this change is to retain in the articles only information of a relatively permanent nature.

5. Shareholders will hereafter have preemptive rights only to the extent, if any, that they are expressly pro-

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vided in the articles. See Section 72 for the meaning of a provision in the articles that 'Shareholders shall have preemptive rights.'

(6) Subsection C(3) authorizes insertion in the articles of appropriate provision for reversion to the corporation of unclaimed dividends and reclassification shares, which would otherwise be unproductive and possibly subject to the escheat.

(7) Subsection C(4) continues in effect the liberal policy of the former law, permitting all such deviations from 'normal' corporate rules and procedures as are not expressly prohibited by law. Such provisions could include a requirement that any specific corporate action be taken by a higher vote than that required by law or by a specified class vote. Authorization for inclusion of such provisions in the articles does not preclude their valid inclusion in an agreement among the shareholders. (See Section 29.)

One of the most significant changes effected by the new act was to establish the Office of the Secretary of State as a central place of recordation of all corporate documents, and to have corporate existence begin retroactively with the date of execution of the articles if filed within three days thereof (exclusive of legal holidays)—otherwise as of the time of filing with the Secretary of State. And pre-filing is possible now—so as to have an exact hour or even minute known in advance as the beginning of corporate existence. Local filing was preserved, but to be subsequently and not initially, and with a failure or oversight not to create any real problem. It is surprising, but a fact, that under the former law a sizable number of charters never reached the office of the Secretary of State.

The new act eliminates the requirement of a minimum "paid in capital" of $1000 as a requisite for commencement of business; and provides instead that only if the articles provide a minimum paid in capital, must it be paid as a condition precedent to beginning business. A bare majority of the states have no requirement of a statutory minimum paid in capital. In

30. This provision was for the purpose of preventing incorporators from being held personally liable for corporate obligations created—as is so often found necessary—simultaneously with executing the articles and before those articles can be actually filed. Southland Rentals, Inc. v. Scott Walker, 147 So.2d 73 (La. App. 2d Cir. 1962) imposed such liability under the prior statute.

the states which do require such a minimum, it ranges from $500 in Georgia to $1000 as under our former statute. The committee which drafted this new act agreed with those who drafted the new New York statute that such a requirement as was in our old statute was archaic; and, moreover, might "impose unwarranted and unlooked for hazards and liabilities upon organizers of business, if for whatever reason the amounts are not paid in or are only partially or informally paid in." A requirement that $1000 of capital be paid in before commencing business gives the illusory protection to third persons; as it could be, and often was, immediately withdrawn or spent on organization expense.

The new act reverses the statutory policy as to the authority to make and alter by-laws. Instead of requiring that the articles authorize directors to do this, that power in the board is implicit if not denied by the articles; but as under the prior statute shareholders may always "change or repeal any by-laws so made." The implicit authority to directors to make and alter by-laws includes those affecting their own offices, subject, however, to certain restrictions.

This is perhaps a middle position between the Model Business Corporation Act provision which vests power in the Board unless reserved in the articles to the shareholders, (which would appear to deny even shareholder right to repeal or amend unless so provided in the articles) and those states which, as under Louisiana's former statute, gave no authorization to the directors as to by-laws except as granted in the articles.

The Louisiana Supreme Court held in 1940 that when the board has the power to adopt by-laws it can also waive them; but that when the power to make or alter by-laws is exclusively vested in the stockholders, neither the board nor the officers can waive those made by the shareholders.

Although permissible under the prior statute, the new Act, in Section 29, recognizes the expanded development in recent

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32. 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 51, at 184-85 (1960).
33. Research Outline Analysis 3.05, by Robert S. Lesher, Consultant, to the Joint (N.Y.) Legislative Committee to Study Revision of Corporation Laws.
35. 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 25 (1960).
36. Id. § 25, 2.02(3) (b), at 418.
years of a contractual arrangement known as a “Shareholder Agreement.” The Comment to that section reads:

“This section makes it clear that any lawful provision, regardless of its conformity to ‘normal’ corporate rules and practice, may validly be set forth in a shareholders’ agreement, if not required to be set forth in the articles. The certificates of stock must contain a reference to any such agreement. See R.S. 12:57F. The requirements of this Section and of R.S. 12:57 do not preclude the validity, as among the parties signatory thereto only, of an agreement which does not meet those requirements.”

To affect third persons a duplicate original must also be available for inspection at the registered office if not included in the articles.

The full import of this section must await the extent of its utilization and judicial determination.

In 1961 a Federal District Court in Louisiana had these facts before it: Certain experts in oil exploration were employed by a newly reorganized Delaware Corporation which was to and did go public; they were given stock valued at about $75,000 for stock in a corporation which was a party to the reorganization worth but some $5000. In return, however, they executed a stock transfer restriction agreement that if they left the company voluntarily or were discharged for cause, the shareholders would sell their stock back to the company for a fixed low price per share. The court held this agreement was not contra bono mores under Louisiana law, as it was supported by valid consideration and was not “immoral.”

There are pertinent decisions in other jurisdictions, too, including one from New York but which New York decision

38. Law Review notes and articles discussing such protective agreements, so often important in close corporations, include these: Notes, 72 HARV. L. REV. 555 (1959); 74 HARV. L. REV. 1630 (1961); O’Neal, Arrangements Which Protect Minority Shareholders Against “Squeeze-Outs”, 45 MINN. L. REV. 537 (1961). See also 1 O’NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE 244 (1963).


40. Benitendi v. Kenton Hotel, Inc., 294 N.Y. 112, 60 N.E.2d 829 (1945), as summarized in 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 25, 3.05, at 423-24 (1960). The court there considered the validity of the following unanimously adopted shareholder by-laws that: “(1) Shareholders should not act except by unanimous vote; (2) Directors should not be selected except by unanimous vote; (3) Directors should not act except by unanimous vote; and (4) by-laws should not be amended except by unanimous vote of the shareholders. In a 4-3 decision, the first and second by-laws were held invalid on the ground that they contravened statutes which required less than unanimity for the election of directors and various other types of shareholder action. The third by-law was also held invalid.
is believed to be disapproved by, and would not be the rule under, Louisiana's new statute; and one from New Jersey.\textsuperscript{41}

Such a shareholder agreement will enable matters of primary personal concern (such as buy or sell agreements among those in a closely held corporation) to be binding without the necessity of public recordation.

As to any stock which is community property, the husband's signature on a shareholder agreement would not, however, bind the wife or her personal representative in event of separation, divorce, or death.\textsuperscript{42} Even by executing the agreement she could not bind herself or her personal representative to sell her community interest to her husband, for under Louisiana law the spouses may not "contract" with each other during marriage.\textsuperscript{43} It may well be, however, that if the wife executes such an agreement obligating her or her personal representative to sell her community interest to the corporation or to stockholders other than her husband, this would be enforceable. And carefully drawn charter provision might be enforceable against a wife even in favor of her husband.

The care with which such agreements must be drawn is illustrated by a 1964 decision of a Louisiana appellate court.\textsuperscript{44}

PART III

Amendments and Restatement of Articles

The new act reduces the statutory requirement (in the absence of the articles providing a smaller vote—not less, however,

on the ground that it conflicted with the statutory scheme of corporate management which contemplated majority vote of directors based on one-third to majority quorum. The fourth by-law however, was upheld because it did not contravene any statute. The majority of the court indicated that even if such provisions had been in the articles of incorporation the result would have been the same, and refused to enforce the invalid by-laws as a shareholders' agreement. The dissenting judges agreed that the first two by-laws were invalid as by-laws (but contended that they could be enforced as a shareholders' agreement), contended that the third by-law came within express statutory exceptions and should have been upheld, and agreed that the fourth by-law was valid.\textsuperscript{44}

\textsuperscript{41} Katcher v. Ohsman, 26 N.J. Super. 28, 97 A.2d 180 (1953), as summarized in 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 3.01 at 489 (1960), having before it a shareholders' agreement which specified that no 'binding action could be taken by shareholders or directors of a New York close corporation unless shareholders representing ninety percent of the stock voted in favor of such action, held the restriction valid; and a by-law in conformity therewith was also held lawful on common law principles.

\textsuperscript{42} Messersmith v. Messersmith, 229 La. 495, 86 So.2d 169 (1956).

\textsuperscript{43} LA. CIv. CODE art. 1790.

\textsuperscript{44} Phillips v. Newland, 166 So.2d 357 (La. App. 3d Cir. 1964) ; cf. Menke v. Gold Metal Oil Co., 47 Ohio App. 380, 191 N.E. 472 (1933), which held invalid a shareholder agreement which under the new Louisiana statute would probably have been valid.
than a majority present) from two-thirds the total voting
power; to "two-thirds of the voting power present." As in
prior law, if an amendment would adversely affect the rights
of a class or series there must be concurrence by that class or
series but by only two-thirds of the voting power of that class
or series present—rather than of the total outstanding. The
new act, moreover, expressly defines and limits what would thus
"adversely affect" a class or series:

"Except as otherwise provided in the articles, the rights of
a shareholder shall not be considered adversely affected
unless the amendment (otherwise than as permitted by the
articles) (a) alters or abolishes any preferential right of
his shares having preferences, (b) creates, alters or abolishes
any right in respect of redemption of his shares, (c) alters
or abolishes any preemptive right in respect of his shares,
(d) creates or alters (other than to abolish) any restriction
on transfer applicable to his shares, (e) excludes or limits
his right as a shareholder to vote on a matter, except as
such right may be limited by voting rights or new shares
then being authorized of an existing or new class, or (f)
alters or abolishes any right of his shares to receive divi-
dends, except as such right may be affected by dividend
rights of new shares then being authorized of an existing
or new class."

The new act makes it clear that if appropriate notice of the
proposal has been given, amendments may be made at annual
meetings of stockholders, and not merely at special meetings
"duly called upon notice for the specific purpose."

The provision in the former statute permitting an amend-
ment to extend the life of a corporation even after its duration
as fixed in the articles may have expired is retained; but with
the proviso that if by then the original name is no longer avail-
able there must be a name change. For corporations organized

4th Cir. 1964) cert. denied, 246 La. 717, 167 So.2d 301 (1964).
46. La. R.S. 12:31B (Supp. 1968). As submitted to the legislature a bare
majority of the voting power present would have sufficed in the absence of the
articles requiring more, but it was amended.
49. Id. § 31B; cf. La. Corp. Act of 1928, § 42A. Compare La. R.S. 12:42
(1950) with La. R.S. 12:31B (Supp. 1968). See also 2 ABA-ALI MODEL BUS.
CORP. ACT ANN. § 59 (1966).
under the new act which take advantage of the authorization for indefinite duration, this problem will not arise.

As with the articles and contrary to the procedure under the prior statute, amendments are filed first with the Secretary of State and thereafter with the Recorder of Mortgages of the Parish where the corporation maintains its registered office; amendments may also be prefiled; and may likewise be by private act duly acknowledged, as well as by an authentic act.\(^5\)

The prior statute required the act of amendment to be executed “by such person or persons as the shareholders may have directed,” and that there be annexed a “full copy of the minutes of the meeting” certified as a true copy by the secretary of the corporation.\(^6\) The new statute permits the act of amendment to be executed “in the corporation’s name by the president or a vice president or any other person thereto authorized by resolution or consent of the shareholders, and by the secretary or the treasurer or by any assistant secretary or assistant treasurer.”\(^7\) (Emphasis added.) If not executed by either the president or a vice president, a copy of the resolution or consent for the amendment, certified by a secretary or an assistant secretary as a true copy, must be annexed.\(^8\)

Although the new act does not expressly state—as did the former statute—that an amendment may be authorized by unanimous action of shareholders without a formal meeting,\(^9\) it is clear that this method was retained and even broadened.\(^10\)

The new act makes certain provision for automatic or ipso facto amendments. In a merger, “the articles of the surviving business corporation shall be deemed amended to the extent of any changes therein stated in the merger agreement.”\(^11\) Further, the new act provides that:

(1) Where subscription rights, warrants, stock options or conversion privileges are outstanding and there is not sufficient treasury stock available therefor, if the grant or issuance thereof had been authorized by such vote of the


\(^{52}\) La. R.S. 12:43A (1950).


\(^{54}\) Id. § 32.


\(^{57}\) Id. § 115F.
shareholders as would have sufficed to amend the articles to effect the necessary increase in such stock, the articles shall "be deemed amended to increase the authorized number of shares of the class involved";\textsuperscript{58}

(2) Should the articles provide that cancelled stock may not be reissued, and the cancelled stock had been shares which had been converted into other stock, the articles shall be deemed amended to reduce the authorized capital stock by the number of shares so cancelled.\textsuperscript{59}

Although the proper officers are required to "forthwith" execute and file appropriate formal articles of such an amendment, omission to do so "shall not derogate from the effectiveness of such automatic amendments.\textsuperscript{60}

If an amendment is to effect a reclassification of stock (which the new act permits with much more flexibility than the prior statute), it must state the number of shares, and par value of par value stock; the number of shares of no-par stock; and detailed information as to any classes or series of stock, rights, and preference; and the extent of the board's authority to modify or vary any rights between them.\textsuperscript{61}

The new act provides in much clearer and concise language the very worthwhile device which permits a corporation whose articles have been often amended, to restate them, giving effect to all prior amendments.\textsuperscript{62}

\textbf{PART IV}

\textit{Corporate Powers}

One of the most significant changes effected by the new statute was to unshackle corporations and give them such business "powers" as would be possessed by a natural person \textit{unless} limited by the articles. There are of course certain restrictions on the "rights" of both an artificial person (corporation) and a natural person in the exercise of business; but it can lead to undesired results to restrict—as did our former statute—the power of such an artificial person to a much greater extent than its natural person business competitor. Under the new statute,\textsuperscript{63}

\textsuperscript{58} Id. § 33B.
\textsuperscript{59} Id. § 33C, § 56E.
\textsuperscript{60} Id. § 33E.
\textsuperscript{61} Id. § 54.
\textsuperscript{62} Id. § 34; cf. La. Corp. Act of 1928, § 72.
therefore, *unless restricted* by its charter, a corporation may do such things as deal in governmental securities, guarantee the obligation of others; provide indemnity and insurance of or for its officers, directors, employees, and agents; establish employee benefit plans; and even shift from one type of operation to completely different and unrelated ones. Further, any doubt as to the power of a corporation to enter into partnerships or joint ventures, or to acquire and hold real estate for an indefinite time and even unrelated to whatever may be its existing or contemplated operations, or to have indefinite or perpetual existence, are now eliminated. The new act specifically authorizes donations by corporations for the public welfare, or for charitable, scientific, educational, or civic purposes, thus repealing by implication at least the provisions of an act of the Legislature of 1954 which had authorized corporate donation only as to a "corporation, trust, fund or founda-

64. LA. R.S. 12:41B (Supp. 1968). This is far different from the jurisprudential rule here in 1909, typified by the decision in Robert Gair Co. v. Columbia Rice Packing Co., 124 La. 103, 50 So. 8 (1909). The court quoted from an 1899 decision of our Supreme Court, that: "Implied powers, in corporations, are presumed to exist only to the extent that may be necessary to enable such bodies to carry out the express powers granted, and to accomplish the purpose of their creation; and an incidental power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it." The charter involved stated the "object and purposes" to be erection and operation of a rice mill and in connection with that "to buy and sell real estate, livestock, and all articles and commodities that such corporations are authorized to deal in under the statutes of the state." The charter also contained broad language: "and generally shall possess all the powers and privileges that corporations are or may be lawfully authorized to possess within the state." A guaranty of this corporation of a contract by an "independent" rice packing company was held ultra vires—though the shareholders of the milling corporation were also the shareholders of the packing corporation.


A partnership "in commendam" has been defined in Louisiana's Civil Code since its first Civil Code of 1808, substantially as currently defined in art. 2839:

"Partnership in commendam is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more."

The 1968 legislature by Act 304, added this additional paragraph to LA. CIV. CODE art. 2829:

"A partnership may have one or more partners in commendam who may be natural persons, partnerships or corporations, domestic or foreign, or formed under the laws of the United States, provided that at least one natural person, partnership or corporation act as an ordinary or commercial partner of the partnership."


of and operated exclusively for religious, charitable or educational purposes" and which were moreover subject to certain further restrictions.\textsuperscript{69}

But a long standing though as yet unpoliced and unenforced statute providing that no domestic corporation or foreign corporation engaged in business in Louisiana "shall directly or indirectly contribute, donate or lend any of its funds or property" to promote or advocate any political issue, party or candidate,\textsuperscript{70} would appear to remain in effect.

Coupled with these changes in corporation "power" there are important changes with respect to the "ultra vires" doctrine. Consummated transactions cannot be set aside. And causes of action founded on ultra vires acts are limited to civil actions for damages or injunction; or action by the state to enjoin or dissolve a domestic corporation or revoke the certificate of authority of a foreign corporation. The new act, moreover, contains a provision that a shareholder claiming an act was "ultra vires" has the burden of proving that "he has not at any time prior thereto assented to the act, conveyance or transfer in question, and that in bringing the action he is not acting in collusion with the officials of the corporation."\textsuperscript{71}

The new act also permits relief, when otherwise appropriate, from ultra vires Louisiana real estate transactions by foreign corporations.\textsuperscript{72}

\section*{PART V}
\textit{Shares}

The new act retains the flexible provisions authorizing shares to be issued in fractions; and to be divided into classes, with optional or conversion rights. The new act \textit{adds} authority to issue scrip in lieu of fractional shares. This is in accord with  

\textsuperscript{69} LA. R.S. 12:41(12) (Supp. 1968), implied repealing Act 638 of 1954, incorporated as R.S. 9:2280. At common law gifts by business corporations were required to fall within the express or clearly implied power of the corporation. The early judicial decisions required a showing of a definite and "business" benefit to the corporation or otherwise be held "ultra vires." Judicial liberality, however, soon sustained donations to charity as a "social obligation" in a sense due by, and in any event permitted to, the corporate citizens. Texas became the first state, in 1917, to recognize by indirection in its statute the right of corporations to make donations for charitable and similar purposes. When the Internal Revenue Service in 1936 first expressly permitted their deductions from taxable income, the states generally so amended their statutes and now all but a few specifically authorize certain corporate donations. 1 ALI \textit{Model Bus. Corp. Act Ann.} § 4(m), at 138 (1960).

\textsuperscript{70} La. Acts 1915 (1st E.S.), No. 20; LA. R.S. 18:1482-1496 (1950).

\textsuperscript{71} LA. R.S. 12:42A(1) (Supp. 1968).

\textsuperscript{72} Id. § 42B.
most jurisdictions which have revised their statutes in recent years. Most of these other statutes, however, give voting rights to the holders of fractional shares while denying voting rights to scrip holders. The new Louisiana statute continues to deny voting rights to fractional shares and to scrip as well.

The prior statute through the use of two terms in its sections treating with the consideration and payment for shares, possibly created an ambiguity. It spoke of "allotment" of shares and also of "subscription" for shares. The new act very closely in this respect and avoids the ambiguity; for the new statute speaks only of the "issuance" of shares and the "consideration" therefor.

As under the former statute, shares with no par value may be issued for the consideration expressed in dollars determined by the board unless the articles have reserved that power to the shareholders. When the power to fix the price of no-par stock is so reserved to the shareholders, the new act expressly states a majority of the voting power present suffices, whereas the former statute was ambiguous on this point too.

Under the new act, in contrast to the prior one, it would appear that the issuance of stock based on a valuation placed by the directors or shareholders on property given in exchange cannot be rescinded because of over-valuation. But an officer, director, or shareholder, as the case might be, who "without the exercise of reasonable care and inquiry" consented or voted therefor, incurs civil liability to the corporation for the benefit of creditors or shareholders for the loss or damage. To impose this liability there must have been "gross over-


The Louisiana Supreme Court in Johnson v. National Sand & Gravel Co., 172 La. 388, 134 So. 360 (1931), held that a resolution of the board authorizing the purchase of specific property for a specific amount of corporate stock was of itself a sufficient "appraisement" by the board of its value as the statute prescribed no specific "form" of "appraisal"; and that the corporation's failure to file with the Secretary of State and with the recorder the description and the appraisal of the property taken in exchange for stock did not prejudice that stockholder's rights—as this section of the statute was "purely directory."
valuation," although proof of fraud is not a prerequisite. The subscriber's own liability for civil damages, however, is conditioned on proof of "fraud."

Since "fraud" is essential to a recovery of an excess gross over-valuation from the subscriber, it would seem that the applicable prescriptive period (limitations) to that action would be one year; but since officers and directors occupy a fiduciary relation to the corporation and its shareholders it would appear that the applicable prescription (limitations) to an action against them would be ten years.

Under the Model Act treasury shares could only be sold for a consideration expressed in dollars but which may be for property or services. The prior Louisiana statute was in accord, as is the new statute. Under the prior statute, however, stock repurchased by the corporation could not be sold for less than the purchase price, but this restriction is not in the new statute. It should perhaps be noted that state banks are prohibited from having treasury stock except such as may have been acquired by virtue of execution against or forfeiture by a debtor and the bank must then dispose of it in a relatively short period and only for a money consideration.

The outmoded concept of "assessable shares" has been discarded.

A problem many attorneys have been concerned with is what happens when a corporation does not have the shares with which to meet the call of those having conversion and option rights. No doubt an action would lie for damages but the measure of the damages may be difficult. The new statute meets this problem in two effective and unique ways: the articles "shall be deemed amended to increase the authorized number of shares of the class involved," as required to meet such calls; and it points up affirmatively the duty of the officers

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82. LA. R.S. 12:95 (Supp. 1968).
84. LA. R.S. 12:91 (Supp. 1968); Dawkins v. Mitchell, 149 LA. 1038, 90 So. 396 (1922).
85. 1 ABA-ALI MODFL BUS. CORP. ACT ANN. § 17, at 317-20 (1960).
87. LA. Corp. Act of 1928, § 23C.
89. See LA. R.S. 12:24, 52 (Supp. 1968); cf. LA. Corp. Act of 1928, § 14(6).
and directors to reserve sufficient shares with which to meet all such commitment obligations. This first provision was adopted from the California statute. The prior statute was silent on the problem. It is of interest to note that the report of the New York Joint Legislative Committee had recommended to its legislature that the grant of stock options be limited to 25% of the authorized shares; and that provisions be made requiring a reservation of an adequate number of shares to meet the commitments. New York, however, failed to adopt either suggestion.

The provisions in the new act relating to reclassification of stock make some significant changes from the prior statute and clarify other provisions.

By a "reclassification of stock" amendment permitted by the new statute a corporation has great flexibility to meet changing conditions, and may:

1. Change the authorized number of shares;
2. Authorize shares of a new class;
3. Change the par value of par value stock;
4. Change from par value to no par, or vice versa;
5. Change the preferences, limitations, or relative rights of existing issues or authorized shares;
6. Cancel or modify the right of existing shares to accumulated but undeclared dividends;
7. Cancel any issue shares in connection with a reduction in numbers.

These provisions generally accord with the Model Act and the more recent statutes. The prior Louisiana statute permitted some, but not all, these changes to be made.

Tax consequences often dictate some reclassification of its stock by a corporation as, for example, to avoid a burdensome

91. Id. § 53.
93. Basic Research Memorandum 20, for the Committee on Revision of Louisiana Corporation Laws 4-6 (1964).
96. La. Corp. Act of 1928, §§ 42, 44. For example, Louisiana, under its prior statute was but one of 15 states which did not expressly authorize an amendment to increase or decrease the par value of its stock. Nor did the prior statute permit the cancellation or modification of an accumulated dividend.
and unrealistic franchise tax where there has been a real deple-
tion in true assets, and accordingly of the true value of its "par
value" stock.\textsuperscript{97} Safeguards against using this device unfairly
are built in. Stated capital remains unchanged except that con-
current transfers between stated capital and surplus may be
made to the extent permitted by Section 6. The aggregate allocated
value of issued shares may not exceed the amount of such
stated capital. Procedural requirements for an amendment to
"reclassify" the stock to these various ends have been discussed
previously.\textsuperscript{98}

The redemption, purchase, and cancellation of shares had
been dealt with in two sections of the prior statute,\textsuperscript{99} but are
covered by one section of the new act.\textsuperscript{100} In determining whether
to retain any redeemed or purchased shares as "treasury shares"
rather than cancelling them, the franchise tax and other-impli-
cations should be considered.\textsuperscript{101}

Under the prior statute there were several restrictions on
the right of a corporation to purchase or redeem shares even
though there was a surplus available for such a purchase or
redemption.\textsuperscript{102} The new act permits purchases and redemption
out of unreserved surplus and without stockholder approval, for
any purpose and with no restriction provided only (1) the price
paid does not exceed the redemption price if one had been
stated, and (2) shares having a preferential right in event of
liquidation are not prejudiced. This broad power is perhaps
susceptible of abuse, but it is believed the courts could prevent
gross inequities.

The new statute has devices whereby "surplus" may be
increased and thus facilitate share purchases or redemption:

\textsuperscript{97} State v. Louisiana Navigation & Fisheries Co., 8 So.2d 796 (La. App.
Orl. Cir. 1942) illustrates the necessity of full compliance with the procedural
requirements.


\textsuperscript{100} La. R.S. 12:55 (Supp. 1968).

\textsuperscript{101} State of Louisiana v. Stewart Bros. Cotton Co., 193 La. 16, 190 So. 317
(1939).

\textsuperscript{102} In Georesearch, Inc. v. Morriss, 193 F.Supp. 163 (W.D. La. 1961), af-
firmed, 298 F.2d 442 (5th Cir. 1962), the court construed a Delaware statutory
 provision that a repurchase of shares could not be made if there would result "any
impairment of the capital of the corporation." The court held this did not limit
repurchase only from an \textit{earned} surplus, for there was a "capital surplus" avail-
able. This would be permitted under the new Louisiana act. In Jackson v. Cola-
grossi, 50 Wash.2d 572, 574, 313 P.2d 697, 699 (1957) the Washington statute
prohibited a repurchase if it would "cause any impairment of the capital stock of
the corporation"—and the Washington court said this meant the repurchase could
only be from \textit{earned} surplus.
(1) by transfers from stated capital to surplus;\textsuperscript{103} or (2) by a re-evaluation of assets so as to increase surplus.\textsuperscript{104}

Where no surplus is available, a purchase or redemption may be made from stated capital provided (a) the corporation is not, nor would it thereby be made, insolvent; (b) shares having a preferential right in event of liquidation would not be prejudiced; and (c) stated capital would not be reduced below the aggregate allocated value of the remaining issued shares. But unless two-thirds in interest of each class has approved, a purchase or redemption out of stated capital must be for the purpose of:\textsuperscript{105}

1. redeeming and cancelling stock which is subject to redemption;
2. paying dissenting stockholders entitled to payment,\textsuperscript{106} in which event such shares are likewise to be cancelled;
3. eliminating fractions of shares, or to collect or compromise a debt to the corporation.

The prior statute had more restrictions and accorded less flexibility.

Convertible shares are shares which may be converted into another form of securities of the corporation. Issuance of convertible shares as additional consideration for loans to the corporation is sometimes advisable. And a corporation might find it helpful in attracting or retaining key personnel to offer them "rights" to convert less costly or attractive shares of the corporation into more valuable or attractive securities, in addition to granting them options to buy shares of the corporation at an attractive price.

The prior statute permitted the issuance of conversion rights and "the right or option to purchase" only "in connection with the issuance and sale" of any stock or securities to the grantee. The new statute eliminates this restriction or limitation.\textsuperscript{107} Under the new statute, therefore, conversion rights and stock options can be given independently of the sale of shares

\textsuperscript{103} LA. R.S. 12:61 (Supp. 1968).
\textsuperscript{104} Id. § 61.
\textsuperscript{105} Id. § 55.
\textsuperscript{106} Where there has been a sale, lease or exchange of all assets, or a merger or consolidation with less than a 90\% subsidiary, and at least 80\% of the stockholders had not approved. Id. §§ 112, 121, 131.
or securities. If the optionee is not a director and does not own or control as much as 10% of the voting power of the corporation, a two-thirds vote of the directors may grant such right—otherwise the grant must be authorized or approved by the shareholders. Shareholder approval is in fact one of the prerequisites to attain the tax benefits of option grants to employees.

Although some statutes which permit the granting of such "rights" limit the period within which the "rights" may be exercised, the new statute does not—nor did the prior statute, and neither does the Model Act, or the recent New York statute. There can of course be an abuse of an "unlimited" grant but the drafters of the new statute considered that the requirement of shareholder approval if the grantee was a director or controlled as much as 10% of the voting power, was sufficient protection to justify this flexibility.

**PART VI**

*Capital, Surplus, Dividends*

Significant changes have been made with respect to capital, surplus, and dividends. Unless the shareholders had made the original allocation to stated capital of the excess over par received from sale of par value stocks, or the allocation between stated capital and capital surplus of the price received for no-par stock, the board itself may make reallocations or transfers between capital and surplus as long as no deficit is created and sufficient stated capital remains to cover the issued par value shares and any liquidation preference. And such reallocations and transfers no longer have to be placed of record with the Secretary of State or Recorder of Mortgages.

Under the prior statute, unless the charter expressly provided otherwise, before using net profits from "wasting assets" (such as from oil wells, patents, or leases) there had to be a deduction for depletion. But pursuant to the general approach of granting broad statutory authority unless denied by the

108. La. R.S. 12:56A (Supp. 1968). This follows the Model Act (Section 18A) and the most recent statutes.
112. La. Corp. Act of 1928, § 26G.
articles, a corporation is not now obligated to make such a deduction unless required by the articles.\textsuperscript{113} And rather than making a statutory enumeration of the type of asset values which were to be excluded from "surplus" (unrealized appreciation or unaccrued or unearned profits on accounts of notes receivable, for example) the new statute leaves to the board this determination, unless denied by the articles.\textsuperscript{114}

Shareholder approval for the payment of dividends out of surplus is not required under the new act.\textsuperscript{115} And dividends may be paid out of net profits if there is no surplus provided liquidation preferences are not impaired and there is not or will not be a deficit or insolvency.\textsuperscript{116}

The general shape of the provisions in the new statute relating to capital, surplus, and dividends is to set forth three classes of capital accounts: stated capital, capital surplus, and earned surplus. The definitions of these terms have been previously discussed,\textsuperscript{117} but their importance justifies further elaboration. This Part VI of the new statute may be explained in this language:\textsuperscript{118}

Stated capital, in general, is the legal capital of the corporation which is set aside and permanently dedicated to the business of the corporation. It is usually considered to be the amount of stockholder-contributed funds which should be legally safeguarded against impairment. More specifically, stated capital is the money or property paid in for par value shares and, in the case of no-par shares, such amounts allocated to stated capital, increased by any amounts thereafter transferred from surplus (either capital surplus or earned surplus) and decreased by any amounts transferred therefrom to capital surplus as permitted by the new law.

Capital surplus is that part of the total consideration paid for the stock in excess of the value allocated to stated capital. The new statute, as did the prior one, gives statutory permission to credit a portion of paid-in capital to a capital surplus ac-

\textsuperscript{114} Id.
\textsuperscript{115} Id. § 63A.
\textsuperscript{116} Id. § 63B.
\textsuperscript{117} See page —— supra.
\textsuperscript{118} This explanation is taken from a letter dated Nov. 20, 1968, to Ben R. Miller by Leo P. Michiels, the certified public accountant who served as liaison from the Society of Louisiana Certified Public Accountants to the Committee which drafted the proposed revision of the Louisiana Business Corporation Law.
count. The reason generally is to permit payment of dividends in some future year in the presence of unrecovered losses (although notice to the shareholders would be required). The new statute also permits capital surplus to include surplus arising from revaluation of assets to reflect unrealized appreciation in value of assets.

Earned surplus is simply the excess of surplus over capital surplus (for example, the excess of assets over liabilities plus stated capital). It is therefore the cumulation of all undistributed profits earned by the corporation and not transferred by appropriate procedure to stated capital or capital surplus accounts. It is from this source that ordinarily dividends can be paid by the corporation which are entitled to be considered by the shareholders and the general public as coming from earnings of the corporation. This is because shareholders and share purchasers usually assume that dividends represent profits of the business and not a partial return of funds invested.

The significance of the above terms is to provide the sources from which dividends can legally be paid, and to provide the rules as to when dividends should be accompanied by notice that they are not ordinary dividends (for example, not out of earnings of the corporation).

The board is permitted to create reserves out of earned surplus. This is because the balance of earned surplus should not be the sole test of whether dividends should be paid. The board must also consider the financial position of the corporation in determining dividend policies because the enterprise may have no substantial amount of surplus available for disbursement to stockholders even though large earnings have been made in the past and not distributed. The use of reserves is to withhold amounts of earnings from dividend appropriations, a policy of retaining profit funds on a basis that is temporary, rather than to permanently transfer the earned surplus to stated capital. The reserves are usually to build up a "buffer" equity to absorb possible losses and permit stabilization of dividends. Where the reserves are decreased or abolished, they are returned to earned surplus.

121. Id. § 1E(3).
122. Id. §§ 62, 63 makes this significance apparent.
123. Id. § 62B.
For example: Assume X corporation is formed to go into the manufacturing business. The board of directors estimated that it will need $100,000 in capital funds and that the business will suffer losses for the first three years which will probably total $30,000-$50,000, after which it expects the product will become established, and that profitable operations will result. The board decides to issue no-par stock having a stated capital of $50,000, the balance of the money paid in to be allocated to capital surplus. After the third year of the corporation's operations, the net worth section of the balance sheet is, as follows:

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The fourth year of operations results in a profit of $10,000 and projections indicate that the fifth year profit will be $50,000. Some of the alternatives open to the board for dividend considerations would be the following:

(a) At any time during the first three years, the board could have decided to pay a dividend out of the excess of capital surplus over the deficit in earned surplus. However, any of such dividends would have had to have been accompanied by notice to the shareholders.

(b) In respect to the fourth year, the board could decide to pay a dividend up to $10,000 as an ordinary dividend (without notice) or up to $25,000 (with notice as to the status of the $15,000 portion of the dividends).

(c) In regard to the fifth year, if the company actually realizes the $50,000 net profit, the board could decide to pay a dividend of $60,000 (without notice) or up to $75,000 (with notice as to the $15,000 portion of the dividend).

**PART VII**

**Shareholders**

The only changes the new act makes with respect to "subscriptions for shares" are these:124

“(1) A pre-incorporation subscription, although normally irrevocable for a period of one year as before, can be revoked if all subscribers consent provided corporate existence has not begun;

“(2) If a subscriber is released after corporate existence is begun it is deemed a purchase by the corporation of those shares;\textsuperscript{125}

“(3) Calls for payment on subscriptions shall be uniform; and

“(4) In event of default on a subscription the corporation, as one of its options, may ‘cancel the subscription if payment of the \textit{full} price has not been made’—whereas the prior statute read ‘If \textit{no} payment has been made—the corporation may \textit{forfeit} the shares to itself.’"\textsuperscript{126}

(Emphasis added.)

Under the prior statute, unless \textit{denied} by the articles, stockholders had certain defined preemptive rights; but under the new statute shareholders have no preemptive rights unless the articles state they shall.\textsuperscript{127} It suffices, however, to simply state in the articles that “shareholders shall have preemptive rights” unless special rules are desired.

Even though the articles might not provide for preemptive rights it may well be that Louisiana courts would nonetheless exercise their equity jurisdiction and give shareholders quasi-preemptive rights in order to hold directors to high standards of good faith and fairness in the exercise of their power to issue

\textsuperscript{125} LA. R.S. 12:71C (Supp. 1968), \textit{but cf. id.} § 71E “Release” of a Subscriber (in which case the shares are considered as purchased by the corporation) must contemplate a mutual nonpayment (in which case the shares are considered as unsubscribed).

\textsuperscript{126} La. Corp. Act of 1928, § 6F. (Retained is its further option of a civil action to collect the full amount of any deficiency following a public auction of the shares).

\textsuperscript{127} LA. R.S. 12:72, 24C(1) (Supp. 1968); \textit{cf. La. Corp. Act} of 1928, § 28. The statutes of California, Delaware, Indiana, Massachusetts, Oklahoma, and Pennsylvania \textit{expressly} deny, as does the \textit{new} Louisiana Act, preemptive rights \textit{unless} granted by the charter. The statutes of Alabama, Arkansas, Connecticut, Florida, Georgia, Nevada, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, and Utah (as did Louisiana under the prior act) \textit{expressly} grant such rights \textit{unless} denied by the articles. The Model Act now gives both types of statutory provision. See 1 ABA-ALI \textit{Model Bus. Corp. Act} § 24 (1960).

Under the prior statute if all the authorized shares had been allotted to satisfy conversion or option rights, a shareholder would “have no preemptive right to subscribe for shares;” so it was perhaps possible to defeat preemptive rights. But as has been previously discussed, under the new act the charter is automatically deemed amended to increase the authorized shares to take care of such conversion and option rights.
shares. This is the rule in California, for example, where the statute expressly denies preemptive rights:128

"Although stockholders in California may no longer exercise pre-emptive rights in California corporations, ‘nevertheless they have the right to demand that directors and officers of the corporation do not use their positions for their own personal advantage, or to discriminate between stockholders, or to so cause stock to be issued as to make a profit for themselves or to obtain or retain control of the corporation.’ . . . Under these circumstances, a shareholder in California is said to have quasi-pre-emptive rights."

Little change is made by the new act with respect to shareholder meetings.

It seems clear that, as under the prior act, directors will not be able to continue themselves in office merely by failing to call an annual meeting when no date for the holding of an annual meeting is prescribed in the articles or in the by-laws.129

The prior statute did not expressly state that failure to hold the annual meeting “shall not affect or vitiate the corporate existence” as does the new statute130 and the statutes of thirty-four jurisdictions and the Model Act.131 The new statute deletes the authorization for a director to alone call a special meeting of shareholders but retains the authority of the president or the board, or a shareholder or shareholders holding one-fifth the voting power, to do so.132 And the new act adds a unique provision that as to shareholders with whom communication is unlawful (such as in time of war and some of the stockholders are nationals of the enemy nation), action at any meeting is valid “as if notice had been given to him as otherwise required.”133

Under the new act as under the prior one, a sufficient statement of purpose of any special meeting is necessary to validate action at such a meeting.134

131. 1 ABA-ALI MODEL BUS. CORP. ACT § 26, 2.04 (1960).
The new act makes a change with respect to the determination of a "quorum" for shareholder action. The prior statute merely said a "majority" should constitute a quorum unless otherwise provided in the articles or by-laws. This would appear to have permitted a provision that as little as two or three shares (or even one), irrespective of the number outstanding, would constitute a quorum. Unless the articles permit a lesser number, a majority of the voting power is now necessary for a quorum. Under the new statute, a quorum normally must consist of at least "one-fourth of the total voting power," but the new statute retains the provision that those present may adjourn the meeting and that if the purpose was election of directors those present at the second such adjourned meeting shall suffice for a quorum. And at a meeting of the shareholders to fill a vacancy in the office of liquidator, those present in person or by proxy constitute a quorum.

The new act makes these changes with respect to voting:

1. After notice of redemption of redeemable shares has been given and the funds therefor irrevocably placed "with a bank or trust company," those shares cannot be voted;

2. Instead of a proxy being revocable despite an agreement to the contrary, the new act permits an irrevocable proxy but for not longer than three years;

3. A proxy is not revoked by death until written notice is received;

4. When shares are owned by two or more persons (other
than a fiduciary, as to which no change is effected in the law) any one of the owners can give a proxy to vote all the shares until notice to the contrary is received;\textsuperscript{144}

(5) An executor, administrator, tutor or curator can vote the shares of the estate or person he represents without having them registered in his name;\textsuperscript{145}

(6) Unless the articles provide otherwise, voting rights may be given to creditors, whereas the prior statute denied such authority unless the articles permitted it;\textsuperscript{146}

(7) Shares in its parent cannot be voted by the subsidiary, or counted in determining the voting power of shareholders of the parent—on the same basic reasoning that precludes treasury shares from being voted.\textsuperscript{147}

(8) The outmoded concept of closing the transfer books but no earlier than 40 days prior to a meeting has been discarded; and in lieu a record date not more than 60 days prior to a meeting can be set as determinative of voting qualification; and if the board does not specify a date the act itself provides that the record date for voting at a meeting is the day before the notice is mailed, or the day before the meeting if notice is waived—and for all other purposes it would be the day on which the resolution was adopted.\textsuperscript{148}

(9) If the articles provide that consent by less than all suffices, a formal “meeting” of shareholders is not necessary if written consent to the action is given by whatever number would have been required by the articles or by-laws (whichever is higher) had there been a meeting properly held.\textsuperscript{149}

(10) The right of stockholders to place their shares in a “voting trust” which others have established must be

\textsuperscript{144} LA. R.S. 12:75C(5) (Supp. 1968).
\textsuperscript{145} Id. § 75G. Davidson v. American Paper Mfg. Co., 188 La. 69, 175 So. 733 (1937), had so held.
\textsuperscript{146} LA. R.S. 12:75H (Supp. 1968).
\textsuperscript{147} Id. § 75G. See also 1 ABA-ALI MODEL BUS. CORP. ACT § 31 (1960) and Comments, 28 U. CHI. L. REV. 151-54 (1960) and 76 HARV. L. REV. 1042-55 (1963).
\textsuperscript{148} LA. R.S. 12:77 (Supp. 1968). This, however, differs from the Model Act, and that of New York, for example, which authorizes either a closing of the transfer books or the fixing of a record date; but it is in accord with some jurisdictions, such as Connecticut and Florida. (§ 77B fixes a “record date” where the Board has not done so.).
\textsuperscript{149} Id. § 76.
expressly permitted by that agreement itself instead of being an inherent right. 150

(11) A voting trust is permitted for fifteen years, instead of only for ten, 151 with only one extension permitted not to exceed ten years—as previously. 152

The Court of Appeal for Orleans held that under the prior statute a duplicate original of the voting trust (and not a mere copy or even a photocopy) had to be available at the registered office for inspection; 153 and the new act makes such a requirement more certain. 154

PART VIII

Directors and Officers

Provision is made in the new statute for a board of as few directors as there are shareholders of record—so technically since there can be a single shareholder there could be a “board” of one. Counsel would no doubt caution any client wishing a board of but one on the danger of a court piercing the corporate veil. 155 In the Model Act 156 and in our former statute 157 a minimum of three were required; but neither prescribed a maximum term for directors. The new statute, however, fixes the maximum term of a director at five years. 158 A number of other states likewise fix a maximum term for directors. For instance, in Ohio, Indiana, Montana, and Tennessee, the maximum term is three years; in Pennsylvania, four years; in Connecticut, Maryland, Massachusetts, and New Jersey, five years, and in New Mexico, six years. 159

150. Id. § 78. Although 43 jurisdictions provide for voting trusts, only 8 (Arkansas, Connecticut, Idaho, Kentucky, Maryland, New Hampshire, New Mexico, and Washington) had the same requirement as did our prior statute, that such a voting trust be “open” to all. See 1 ABA-ALI MODEL BUS. CORP. ACT § 32 (1960).


154. Prior § 33B provided that a “duplicate copy” must be filed, whereas the new statute (LA. R.S. 12:78II (Supp. 1968)) states a “duplicate” must be so filed.


156. 1 ABA-ALI MODEL BUS. CORP. ACT § 34 (1960).


159. 1 ABA-ALI MODEL BUS. CORP. ACT § 34, 2.02(5) (1960).
The former statute expressed that a director need not be a shareholder unless the articles or by-laws so prescribed; but in addition stated that the "qualifications" of the director could be prescribed by the articles or the by-laws subject to the provisions of the chapter. And the Model Act contains the express provisions that directors need not be residents of the state, nor shareholders, unless the articles or by-laws so prescribe. It was the opinion of the drafters of our new statute, however, that such express language of negation was not necessary and that it sufficed for those purposes to merely state that the qualifications of directors were to be as may be prescribed in the articles or by-laws.

The provisions in the former statute that absence from the state for six months without leave granted by the board was a basis for declaring the position vacant, was deleted—as part of the effort to attract out-of-state people to organize in Louisiana.

Only a majority of the total voting power rather than a requirement of two-thirds, is required to oust a director, with or without "cause"; but if a director has been elected by the exercise of cumulative voting, he cannot be removed if the votes against his removal would suffice for election.

Provision is made for valid meetings of the board or of committees even though because of law or executive order "notice" cannot be given all members (for example—to a member in the military).

The new act expressly makes valid any committee or board action by unanimous written consent. Many other states now so provide, such as: Arkansas, California, Colorado, Connecticut, Delaware, Florida (for close corporations), Idaho, Illinois, Iowa, Maryland, Michigan, Mississippi, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, Oregon,

161. 1 ABA-ALI MODEL BUS. CORP. ACT § 83 (1960).
162. Wight v. Springfield & New London Ry., 117 Mass. 226, 19 Am. Rep. 412 (1875) held holding of shares not an indispensable qualification of a director unless required by statute or by laws. And North & South Rolling Stock Co. v. People ex rel. Schaefer, 147 Ill. 234, 35 N.E. 608 (1893) held that in the absence of statute directors were not required to be residents.
164. Daly v. Opelousas Ins. Agency, Inc., 181 La. 89, 158 So. 631 (1935) held unanimous consent signed by all members of the board separately at their homes, rather than at a formal meeting, sufficed as board authorization for a transfer of all assets to creditors (which the board was itself authorized to do since the corporation was "unable to meet its liabilities then matured"). See La. Corp. Act of 1928, § 41; cf. La. R.S. 12:121B (Supp. 1968).
Pennsylvania, South Carolina, West Virginia, Wisconsin, and Wyoming.\textsuperscript{165}

The authority of the board to fill vacancies only applies where the shareholders have elected less than the number fixed as constituting the board, or where a death, resignation, or removal of a member has occurred.\textsuperscript{166}

The prior requirement that at least the president of a corporation must be a director was eliminated. The new statute, further, makes it clear that if one person holds two offices, he alone cannot sign any certificate or instrument required by law to be signed by two officers.\textsuperscript{167}

The new act expressly states that election or appointment of an officer does not of itself create contract rights;\textsuperscript{168} and expressly states, what was no doubt implied before, that the discretion given the board to remove officers or agents appointed by it is with or without cause.\textsuperscript{169}

Although there was some opinion among those drafting the new statute that directors be permitted to vote by proxy given another director or shareholder unless prohibited by the articles, the new act retains the prohibition against this unless permitted by the articles.

Detailed provisions appear in the new act\textsuperscript{170} as to indemnification of officers, directors, employees, and agents; and for procuring insurance for their benefit against claims and losses. Briefly, while a corporation cannot provide indemnity to one not fairly and reasonably entitled to it, nonetheless the corporation may procure, and pay premiums on, insurance covering claims or losses which it would not have been permitted to indemnify.

\textsuperscript{165} 1 ABA-ALI MODEL BUS. CORP. ACT § 39A (1960) (Pocket Parts 1966).
\textsuperscript{166} Hackett v. Diversified Chemicals, Inc., 180 So.2d 831 (La. App. 3d Cir. 1965).
\textsuperscript{167} Id. § 82A (Supp. 1968).
\textsuperscript{168} Id. § 82C. A New York Court in 1890 held that the mere fact an officer was on an annual salary did not create "contract rights" for his employment. Douglas v. Merchants Ins., 118 N.Y. 484, 23 N.E. 806 (1890). But in 1916 the New York Court in Cuppy v. Stallwerek Bros., Inc., 216 N.Y. 501, 111 N.E. 249 (1916), distinguished the Douglas case by saying that Mr. Cuppy had been specifically hired for a year. Cf. Cohen v. Camden Refrigerating & Terminals Co., 129 N.J.L. 519, 30 A.2d 428 (1948) holding that a by-law provision giving right of removal with or without cause controlled even as to one who had been hired for a specific term.
\textsuperscript{169} The court in Ginter v. Heco Envelope Co., 316 Ill. 183, 147 N.E. 42 (1925) said that under language such as this only the board and not the president alone could thus remove an officer or agent without cause.
\textsuperscript{170} La. R.S. 12:83 (Supp. 1968).
Although the board generally has authority to fix the compensation of directors and officers, in 1963 one of Louisiana's intermediate courts of appeal held\(^{171}\) that resolutions fixing compensation to directors or corporate officers for the performance of the usual and customary duties of directors and officers could have no retroactive effect; but the court also ruled that if directors or officers render unusual or extraordinary services not within the line of their ordinary duties the circumstances may give rise to an implied promise to pay compensation.

**PART IX**

*Liability of Directors, Officers, Shareholders, and Subscribers*

The liability of directors in all various situations has been cumulated and stated in two sections.\(^{172}\) It is expressly stated that officers and directors stand in a fiduciary relation to the corporation and its stockholders.\(^{173}\) While the recent trend in Louisiana has been to find at least a quasi fiduciary relationship owed individual stockholders,\(^{174}\) nonetheless earlier cases perhaps indicated that no fiduciary relationship was owed individual shareholders unless the statute expressly said so.\(^{175}\)

This new act expressly provides that liability of directors or officers for certain actions such as an unlawful dividend, distribution of assets or purchase or redemption of shares, is not only to the corporation and its creditors but to shareholders. Under both the 1914 and 1928 acts such liability was only "to the creditors" and a trustee in bankruptcy of a corporation was held not entitled to assert such a liability.\(^{176}\) But for a creditor to assert a claim, he must have been a creditor at the time of the unlawful action.\(^{177}\)

The full effect of this express statutory declaration, that "officers and directors" stand in a "fiduciary relation" not only to the corporation but to "its stockholders" as well, must await

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171. Alexander v. Lindsay, 152 So.2d 261 (La. App. 4th Cir. 1963), writ refused, 244 La. 897, 154 So.2d 767 (1963).
173. Id. § 91. This was taken from N.C. GEN. STAT. 2B (1965 Replacement Vol.) §§ 55-35 (1955).
developing jurisprudence. For example, it is said that "By the weight of authority a director or officer has the same right to buy stock from a stockholder of the company as anyone else." But the same authority states that:

"Under the minority rule directors are considered trustees for individual stockholders with respect to their stock, and this rule goes to the extreme of holding that they cannot purchase stock from a stockholder without giving him the benefit of any official knowledge they possess which may increase the value of the stock. This view has been adopted by a substantial number of cases and has been approved by practically every legal writer in this field. And the same rule applies where the officer purchases the stock from the former stockholder's widow. Under the minority rule, it seems that the stockholder may recover from the officer, even though an examination of the books and records of the company would have revealed to the stockholder the real situation, on the ground that no duty to use diligence in discovering a fraud is imposed on the injured party. Thus, widows and others with little experience concerning business matters are not precluded from relief simply because the account books of the company contained all the information possessed by the officer purchasing the stock, and therefore the widow might have ascertained everything known to the defendant by resort to the books.

"Persuasive reasons may be given for applying the minority rule to the officers and directors of a large corporate organization, where its stock is widely distributed and held in comparatively small units. The officers and directors of such a corporation, because of their official connection therewith, have a knowledge of its assets and liabilities, the condition of its business, its prospects for the future, and the value of stock, which would be difficult if not practically impossible for the ordinary stockholder to obtain. In such a case it seems reasonable to require such officers or directors to make a full disclosure of all the pertinent facts when selling to, or purchasing individual stock from, a shareholder in the corporation."

178. 3 Fletcher, Cyclopedia Corporation § 1168.1 (rev. ed. 1965).
Louisiana is treated as following this minority rule. It would appear that the express provision in the new act that this fiduciary duty is owed to stockholders as well as to the corporation would clearly either place or keep Louisiana in accord with this so-called minority rule. In the light of the new act giving far greater power and authority to officers and directors, this was considered both wise and proper. Moreover, this is in full accord with the new federal corporation jurisprudential rules which are developing under the Securities and Exchange Act, and particularly under Rule 10b(5) of the commission.

The now famous Texas Gulf Sulphur Co. case and other prior and subsequent decisions appear to have established a rule in the federal courts that (1) even in the absence of the state's statute imposing such a strict fiduciary obligation on officers and directors to stockholders individually, and (2) even if the activities of the corporation are not such as to require registration with the SEC, and (3) even if the particular "security" is a so-called "exempt" security, such as bank stock, and (4) even if otherwise a wholly intrastate transaction, if any such officer or director buying or selling stock in his own corporation either "directly or indirectly by the use of any means or instrumentality of interstate commerce, or of the mails" should "either make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading" it is unlawful, and subjects such officers and directors to criminal penalties and also to private suits for damages.

Section 12 of the Securities Act of 1933 would appear to exempt certain securities including bank stock from that section (which imposes civil liability arising in connection with a prospectus or communication). But Rule 10b(5) of the Securities and Exchange Commission was promulgated under Section

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180. 3 Fletcher, Cyclopedia Corporation § 1108.1 (rev. ed. 1965).
10b of the Securities Exchange Act of 1934 which does not refer to any "security" being exempt from its application. Although Section 10 of the Securities and Exchange Act of 1934 and Rule 10b(5) promulgated thereunder are criminal in nature, do not expressly authorize civil damages and merely say the proscribed actions or inactions shall be "unlawful" conduct, the courts have held: (1) civil suits for damages as well as criminal prosecutions lie under this Section 10(b) and Rule 10b(5); and (2) that a civil suit or criminal action can lie under this Section 10(b) and Rule 10b(5) even though, (if a so-called "exempt" security was involved in an intrastate transaction) such suit or action would not have been permitted under the Security Act of 1933.

In this connection it is apparently significant to the courts that even Section 17(c) of the Securities Act of 1933 (which deals with interstate transactions involving either schemes to defraud or schemes to obtain money or property "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading") was made expressly applicable to all securities classified as "exempt" securities under Section 3 of the 1933 Act.

The distinction appears to be that fraud is not essential to the civil actions permitted by Sections 11 and 12 of the Securities Act of 1933 whereas Section 10(b) and Rule 10b(5) under the Securities & Exchange Act of 1934 are intended to, and do, extend the remedies where there is proven or implied fraud. As the Court of Appeals for the Second Circuit said in the Fischman case:

"Were this not true, Section 11 (and 12) of the 1933 Act, designed to protect investors even where there is no fraud, would afford a shelter or sanctuary for those who defraud investors."

The Court of Appeals in the Texas Gulf Sulphur Co. case, however, at least intimated that actual fraud is not even essential for imposition of Rule 10b(5) liability when it said that this rule

187. See note 184 supra.
188. 15 U.S.C. § 77q(c) (1964).
189. Id. § 77k.
190. Id. § 77k and l (1964).
191. Id. § 78j(b).
implements a standard of conduct that encompasses negligence as well as actual fraud.\textsuperscript{193}

On March 29, 1968, the United States District Court for the Southern District of New York—one of the country’s chief commercial courts—in the now famous \textit{Escott v. Barcris} case imposed these hazards of personal liability not only on an officer and any director (either an “inside” or an “outside” director) but on the company’s lawyer, accountants, and underwriter as well, who sign or certify a registration statement filed with the Securities and Exchange Commission of a company going public, which contains a material misstatement, omission or inaccuracy, \textit{unless} he made an independent investigation and had “reasonable grounds” (those of a prudent man in the management of his own affairs) to believe the statement accurate.\textsuperscript{194}

The Securities and Exchange Commission, incidentally, asserts it has a definite right to aid private litigants in their civil suits for damages, by participating amicus curiae.\textsuperscript{195}

\textit{Escott v. Barcris}\textsuperscript{196} involved a mushrooming business which outgrew both the managerial talents and finances of its originators—two men named Vitala and Pugliese, who began a small bowling alley construction business as partners in 1946. Bowling itself mushroomed following the introduction in 1952 of the automatic pin setting machines and so did their business—which they incorporated in 1955. Their sales increased dramatically but so did their need for cash to operate. In early 1961 there was a public sale of its debentures. By that time, however, matters had taken such a decided turn for the worse that by October 1962 it applied for an arrangement under Chapter XI of the Bankruptcy Act. This was soon converted into a regular bankruptcy proceeding. Later in November 1963, the company was placed in a Chapter X reorganization. At the time of the court’s decision in the \textit{Escott} case (March 1968) that proceeding was still pending.

\textit{Escott}, a purchaser of some of the 1961 debentures, sued the officers, directors (both “inside” and “outside” directors), the

\begin{itemize}
  \item \textsuperscript{195} Loomis & Eisenberg, General Counsel and Assistant General Counsel, Securities & Exchange Commission, \textit{The SEC as amicus curiae in Shareholder Litigation — A Reply}, 52 A.B.A.J. 749-753 (1966).
\end{itemize}
“inside” accountant, and the “outside” firm of public accountants, and also both the “house” counsel and a director who was also a member of a firm of attorneys which had been employed in connection with the SEC registration. The opinion of the federal district judge covers 54 pages. These excerpts are among the most significant:

“What are ‘matters as to which an average prudent investor ought reasonably to be informed’? It seems obvious that they are matters which such an investor needs to know before he can make an intelligent, informed decision whether or not to buy the security.

“Early in the history of the Act, a definition of materiality was given in Matter of Charles A. Howard, 1 S.E.C. 6, 8 (1934), which is still valid today. A material fact was there defined as:

“. . . ‘a fact which if it had been correctly stated or disclosed would have deterred or tended to deter the average prudent investor from purchasing the securities in question.’

“The average prudent investor is not concerned with minor inaccuracies or with errors as to matters which are of no interest to him. The facts which tend to deter him from purchasing a security are facts which have an important bearing upon the nature or condition of the issuing corporation or its business.

“Judged by this test, there is no doubt that many of the misstatements and omissions in this prospectus were material. This is true of all of them which relate to the state of affairs in 1961, i.e., the overstatement of sales and gross profit for the first quarter, the understatement of contingent liabilities as of April 30, the overstatement of orders on hand and the failure to disclose the true facts with respect to officers’ loans, customers’ delinquencies, application of proceeds and the prospective operation of several alleys.”

Of particular interest to attorneys is the court’s discussion and decision with regard to the defendants who were attorneys. One was a young lawyer, having only been admitted to the bar some four years prior to the debenture issue. He had been employed as “house counsel” and assistant secretary in October 1960. “Unfortunately for him,” said the court, “he became secre-
tary and a director on April 17, 1961, after the first version of
the registration statement had been filed with the Securities
and Exchange Commission. He signed the later amendments,
thereby becoming responsible for the accuracy of the prospectus
in its final form."

As to him, the court said:

"As a lawyer, he should have known his obligations under
the statute. He should have known that he was required to
make a reasonable investigation of the truth of all the state-
ments in the unexpertised portion of the document which he
signed. Having failed to make such an investigation, he did
not have reasonable ground to believe that all these state-
ments were true. [He] has not established his due diligence
defenses except as to the audited 1960 figures."

A second attorney was also sued as a director. His law firm
had been special counsel to Barcris. This is the court's opinion
holding him, also, liable for civil damages:

"He became a director of Barcris in October 1960. His
law firm was counsel to Barcris in matters pertaining to the
registration of securities. [He] drafted the registration state-
ment for the stock issue in 1959 and for the warrants in
January 1961. He also drafted the registration statement for
the debentures. In the preliminary division of work between
him and the underwriters' counsel, [he] took initial responsi-
bility for preparing the registration statement, while devot-
ing his efforts in the first instance to preparing the indenture.

"There is no valid basis for plaintiffs' accusation that [he]
knew that the prospectus was false in some respects and
incomplete and misleading in others. Having seen him testify
at length, I am satisfied as to his integrity. I find that [he]
honestly believed that the registration statement was true
and that no material facts had been omitted from it.

"In this belief he was mistaken, and the fact is that for
all his work, he never discovered any of the errors or omissions
which have been recounted at length in this opinion,
with the single exception of Capitol Lanes. He knew that
Barcris had not sold this alley and intended to operate it,
but he appears to have been under the erroneous impression
that [the CPA firm] had knowingly sanctioned its inclusion

198. Id. at 687.
in sales because of the allegedly temporary nature of the operation.

"[He] contends that a finding that he did not make a reasonable investigation would be equivalent to a holding that a lawyer for an issuing company, in order to show due diligence, must make an independent audit of the figures supplied to him by his client. I do not consider this to be a realistic statement of the issue. There were errors and omissions here which could have been detected without an audit. The question is whether, despite his failure to detect them, [he] made a reasonable effort to that end. . . .

"It is claimed that a lawyer is entitled to rely on the statements of his client and that to require him to verify their accuracy would set an unreasonably high standard. This is too broad a generalization. It is all a matter of degree. To require an audit would obviously be unreasonable. On the other hand, to require a check of matters easily verifiable is not unreasonable. Even honest clients can make mistakes. The statute imposes liability for untrue statements regardless of whether they are intentionally untrue. The way to prevent mistakes is to test oral information by examining the original written record."\textsuperscript{199}

The corporation's banker was brought on the board—the inducement if any was needed, said the court, was assurances that his bank would receive a deposit of $1,000,000.00 from the sale of the securities. Nonetheless, he was an "outside" director, \textit{i.e.}, one who was not an officer of Barcris. In holding him also liable for damages, the court said:

"As to the non-expertised portions, however, [he] is in a different position. He seems to have been under the impression that [the CPA firm] was responsible for all the figures. This impression was not correct, as he would have realized if he had read the prospectus carefully. [He] made no investigation of the accuracy of the prospectus. He relied on the assurance of Vitolo and Russo, and upon the information he had received in answer to his inquiries back in February and early March. These inquiries were general ones, in the nature of a credit check. The information which he received in answer to them was also general, without specific

\textsuperscript{199} Id. at 689-90.
reference to the statements in the prospectus, which was not prepared until some time thereafter.

"It is true that [he] became a director on the eve of the financing. He had little opportunity to familiarize himself with the company's affairs. The question is whether, under such circumstances, [he] did enough to establish his due diligence defense with respect to the non-expertised portions of the prospectus.

"Although there is a dearth of authority under Section 11 on this point, an English case under the analogous Companies Act is of some value. In Adams v. Thrift, (1915) 1 Ch. 557, aff’d, (1915) 2 Ch. 21, it was held that a director who knew nothing about the prospectus and did not even read it, but who relied on the statement of the company's managing director that it was 'all right,' was liable for its untrue statements. See also In the Matter of Interstate Hosiery Mills, Inc., 4 S.E.C. 706 (1939).

"Section 11 imposes liability in the first instance upon a director, no matter how new he is. He is presumed to know his responsibility when he becomes a director. He can escape liability only by using that reasonable care to investigate the facts which a prudent man would employ in the management of his own property. In my opinion, a prudent man would not act in an important matter without any knowledge of the relevant facts, in sole reliance upon representations of persons who are comparative strangers and upon general information which does not purport to cover the particular case. To say that such minimal conduct measures up to the statutory standard would, to all intents and purposes, absolve new directors from responsibility merely because they are new. This is not a sensible construction of Section 11, when one bears in mind its fundamental purpose of requiring full and truthful disclosure for the protection of investors."

A subsequent decision further extended this rule of severe liability on those in a fiduciary relationship who fail to use "due diligence" before lending their name to misleading material soliciting purchasers of their corporation's stock. For in Globus v. Law Research Service, Inc., a different judge from, however, the same experienced federal court, upheld a jury's award of

200. Id. at 688.
punitive damages in addition to compensatory damages. These are pertinent excerpts from that opinion:202

"... The question therefore comes down to whether actual knowledge of the misstatement alone is sufficient or whether, in addition, this knowledge must be coupled with intent to defraud. Support for the view that intent to defraud is unnecessary can be gleaned from the legislation itself. First, the action of deceit and its requisites have deep roots in the common law, see, e.g., Pasley v. Freeman, 3 Term Rep. 51, 100 Eng. Rep. 450 (1789); Prosser, Torts 699-700 (3d ed. 1964). It seems reasonable, in light of this history, to infer that if Congress had desired to use an 'intent to defraud' concept in these sections of the securities acts, it merely had to refer to time-honored classic phrases which were quite familiar, see The Mail Fraud Statute, 18 U.S.C. § 1341. Instead, words referring primarily to conduct, but implying premeditation with a view to gain at the expense of others, were employed, such as 'manipulative . . . device' or 'contrivance.' Second, the criminal penalties visited upon one who files a false and misleading statement only require wilfulness and intentional conduct, but do not require an intent to defraud, 15 U.S.C. §§ 77yyy, 78ff. To impose upon the civil plaintiff the burden of demonstrating intent to defraud when no such burden is imposed upon the Government in a related criminal case arising out of the same statement or document would create an anomalous result. Since the statutes in question, 17(a) and 10(b), do not force one to this rather odd conclusion, they should not be so read. See III Loss, Securities Regulation 1442 n. 45, 1766 (1961 ed.). Therefore the Court rejects defendants' contentions that intent to defraud is an essential element of a private cause of action under §§ 17(a), 10(b) and Rule 10b-5."

These decisions may be amended in part or even reversed on appeal or by later decisions; but, nonetheless, they illustrate a seemingly expanding doctrine.

The devolution of substantially unlimited power on the majority stockholders imposes on them a correlative fiduciary duty to exercise good faith towards the minority stockholders.203 This

202. Id. at 191, 192, 198.
is particularly true where the majority stockholders also constitute or control the board. Actions by a dominant majority of stockholders or of a board to issue stock to themselves at less than value or for less than the price at which it is made available to the minority, or to issue new shares only to themselves so as to gain permanent voting control, or to unreasonably and oppressively refuse to declare dividends so as to force minority stockholders to sell their stock, are all vulnerable to attack.204

The question of whether or not a stockholder's suit in the nature of a derivative action for money damages predicated on negligence and a breach of fiduciary duty is one for which the plaintiff would be entitled to a jury under the seventh amendment to the United States Constitution is not settled as of this writing. The Ninth Circuit has held:205

"Having in mind the necessity of scrutinizing, with utmost care, any seeming curtailment of the right to a jury trial, we hold that where a claim of breach of fiduciary duty is predicated upon underlying conduct, such as negligence, which is actionable in a direct suit at common law, the issue of whether there has been such a breach is, subject to appropriate instructions, a jury question. We therefore conclude that, in the context of this case, the question concerning


205. DePinto v. Provident Security Life Ins. Co., 323 F.2d 826, 837 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964); cf. Halladay v. Verschoor, 381 F.2d 100, 109 (8th Cir. 1967); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 491 (5th Cir. 1961); Doughty v. Nebel Towing Co., 270 F. Supp. 937, 961 (E.D. La. 1967). In a letter to Ben R. Miller, dated December 11, 1968, Thomas J. André, Jr., a Professor of Corporation Law at Tulane University, stated his opinion of the problem in this language:

"The difficulty with De Pinto is the highly conceptual view taken by that court. It is true of course in theory that a stockholder's derivative action merely asserts the right of the corporation, but if the action were not originally brought in equity, there would be no action at all.

"On the other hand, if one were to predict what the Supreme Court were to do, it would be my guess that the Court would follow De Pinto where the remedy sought is damages. This would be true, in my opinion, even though the corporation seeks for example, an accounting, which traditionally is an equitable remedy. Furthermore, because of the merger of law and equity, the Court is likely to say that the derivative action is not brought in equity as such, but merely as a civil action under the merged system.

"A major difficulty in allowing the jury to assess damages in these cases would of course be the extremely complex nature of corporate affairs for the average juror. Perhaps the court would take this into consideration, but the trend certainly is toward broadening the Seventh Amendment rights."
breach of fiduciary duty, as well as negligence, should have been submitted to the jury."

The reasoning of the court would appear to be:
1. Historically, a stockholder's derivative action was an invention of equity. Without such a remedy, the stockholder would have had no redress against breaches of fiduciary obligation.
2. But since it is a corporate right which is being asserted, and not the right of the shareholder, the nature of the corporation's cause of action against the directors and officers determines whether or not a jury is required.
3. If the nature of the cause of action is such that it would have been cognizable at common law, then the seventh amendment requires a jury trial.
4. Since the suit there asked for money damages against the directors, and was founded on allegations of gross negligence, it was one traditionally cognizable at common law, and a jury trial would be required.

But the Second Circuit, with a dissent, has summarily rejected this Ninth Circuit holding, and held that a stockholder's derivative action "analytically may be composed of two parts, but—has always been treated as one unitary action brought in equity" and hence without a jury.206

PART X

Reports, Records, Registered Office, and Agents

The new act calls for the filing of an "Initial Report" along with the articles, to be signed by each incorporator personally or through a duly appointed agent.207 A duplicate original of this report, or a copy certified by the Secretary of State, is required to be attached to the copy of the articles which are to be thereafter filed with the Recorder of Mortgages. This report should set forth the location and post office address of the registered office, the full name and post office address of each registered agent, and the names and post office addresses of the first directors. This information was heretofore generally included in the articles but it was not basic to the corporation and might

206. Ross v. Bernhard, 403 F.2d 909 (2d Cir. 1968) ; petition for cert. pending.
change from time to time—and hence the desirability of providing for the furnishing of this information in an "initial report."

The prior statute required a detailed and verified initial or original report with respect to the consideration paid or received for shares, known as the "90 day report." The new statute does not require this particular report. It does, however, as did the prior statute, require an annual report to be made to the Secretary of State.

In the original draft of the revision, it was proposed that for non-competing stockholders individually or as a group to be entitled to inspect the books and records, the demand had to be made by the holder or holders of at least 5% of the stock; but subsequently, to meet objections, the prior provision permitting as little as 2% to have this right was retained in the new statute. The new statute also retained the provision that business competitors must own at least 25% of the stock to be entitled to make such an inspection. Most of the statutes of other states do not have such a latter restriction and relegate the corporation to the courts to protect it against inspection abuse by stockholders who are business competitors. The Louisiana Supreme Court has held, however:

"The Act does not deny to a stockholder, who is interested in a corporation which may be authorized to engage in a competitive business, the right of examining the books of the corporation where he does not own 25% of the stock. It withholds the privilege of examination only where the stockholder is interested in a corporation that is actually engaged in a competitive business. The argument of counsel (that the stated corporate objects and purposes control) would lead to many absurd consequences for it is common knowledge that the objects and purposes of the business, as outlined in the charters of most corporations, cover a broad field so as to enable the company to engage in various enterprises if time and circumstances make it necessary or desirable."

A Louisiana appellate court recently held that while customarily such an "inspection" would have to be in the registered of-

210. La. R.S. 12:103D (Supp. 1968); cf. La. Corp. Act of 1928, § 38E. Retained also was the requirement of ownership for at least six months, as a prerequisite to this right of inspection.
211. Pittman v. Riverside Realty Co., 214 La. 71, 79, 36 So.2d 642, 644 (1948). This was decided under § 38 of the prior statute, now La. R.S. 12:103D (Supp. 1968).
office of the corporation, a court could require the books and records to be produced some other place:

“Our corporation statute being silent on the place of inspection, it is our opinion that the place of inspection is not restricted as a matter of law to the offices of the corporation, but that a Trial Court has discretion to order it held elsewhere just as it has discretion to fix the time of inspection and other incidentals connected therewith. But for many obvious reasons the inspection should ordinarily be ordered to be held at the place where the records are kept, that is, at the registered or principal office of the corporation, and ordinarily it would amount to an abuse of discretion to order the inspection held elsewhere. Our remarks are confined to domestic corporations having their principal offices within the territorial jurisdiction of the court.”\(^{212}\)

The defendant in that case, under the particular facts involved was required to take certain records to the office of the plaintiff’s attorney for duplicating by him.

Nonresident stockholders owning stock of a value in excess of $10,000 (the present money test for federal diversity jurisdiction) and who otherwise would have the right of inspection of the corporation’s books and records, may invoke the jurisdiction of a federal court to enforce that right.\(^{213}\) This is in addition of course, to the state court remedies of mandamus and civil damages.

A law firm itself may be agent for service of process, with service sufficient if made on any member of the firm.\(^{214}\)

**PART XI**

*Mergers and Consolidations*

The new statute eliminated the prior requirement that the constituent corporations to a merger or consolidation each have authority to carry on the same or similar business.\(^{215}\) This avoids

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the possibility of such decisions as that of a New Jersey court, which prohibited a manufacturer of fountain pens and pencils from merging with one making razor blades.

The new statute also eliminated the requirement of clearances from the Louisiana Revenue and Labor Departments before a merger is effective since obligations of the merged corporation can be enforced against the constituent corporation as well as against the surviving corporation.

In a merger, and also in a consolidation, the consideration can consist in part of stock of another, outside, corporation.

The new statute provides that dissenting stockholders who take the proper steps to protect their rights, must be paid the “fair cash” value of their shares if the merger or consolidation is not approved by “two-thirds” of the total voting power of that corporation—although the merger or consolidation will become effective if approved by two-thirds of the voting power present at the meeting (or such lesser number of a foreign corporation as the laws of the state of its domicile may require.)

The prior statute gave such rights to dissenters unless the action dissented from had been approved by eighty percent of the total voting power; and a legislative committee amendment sought to retain this. Through oversight two subsections of the new statute relating to the rights of dissenters to a voluntary transfer of corporate assets or to a merger of consolidation, were not similarly amended but it would appear clear that the eighty percent vote is required in both instances. Dissenters’ rights are discussed beginning at page 486 hereof.

If a plan of a merger would expressly make such a charter amendment as would require approval of other types of stock than common stock if submitted separately as an amendment, then that approval must also be obtained. (The new statute does not state this is required for a “consolidation.”) But approval of the stockholders of a subsidiary is not required for a merger with its parent corporation (either into the parent or

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217. LA. R.S. 12:115E (Supp. 1968); but cf. id. § 131B(3).
218. Id. §§ 112H, 113A(3). See also id. § 131B and Comment (c) to § 112.
219. Id. § 112C. See also id. § 131B(3) and pages 481-86.
220. Id. § 131. See pages 486-87 infra.
221. La. Corp. Act of 1928, § 52A.
223. Id. §§ 112C, 121B.
224. Id. § 112C.
into the subsidiary), if that parent corporation owns at least ninety percent of the stock of the subsidiary; but dissenting stockholders of the subsidiary would nonetheless have their rights to be paid the fair market value of their shares.

Unless the statute of a state makes it clear that the net surplus of the constituent corporations remains available for payment of dividends by the new or surviving corporation in the event of merger or consolidation, it perhaps could be argued, especially in cases of consolidation, that all assets with which the new corporation begins business is "capital"; and that dividends could be paid only out of the subsequent earnings. To avoid any such possibility the new Louisiana statute provides that:

"Following a merger into, or creation by consolidation of, a corporation, such corporation's earned surplus shall not exceed the sum of the earned surpluses of the merging or consolidating business corporations, nonprofit corporations and foreign corporations, as reduced by any distributions or transfers therefrom in connection with the merger or consolidation."

The prior statute required consideration of a proposed merger or consolidation by the shareholders to be at a meeting specially called for that purpose; but the new statute permits a merger or consolidation to be approved at an annual meeting too, provided of course proper notice has been given. Further, under the new statute, the merger or consolidation is to be filed with the Secretary of State, and becomes effective with that filing. Only a certificate of the merger or consolidation, certified by the Secretary of State (rather than a certified copy of the full agreement) need be filed with the Recorder of Mortgages of the parishes wherein the registered offices of the constituent corporation were located. Although not expressly so stated, it would appear that a failure to do this local filing, however, would not invalidate the merger or consolidation.

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225. Id. § 112F.
226. Id. § 131A, 131C (last sentence of each subsection).
227. Id. § 62C.
228. Id. § 112C; cf. La. Corp. Act of 1928, § 48B.
229. La. R.S. 12:114 (Supp. 1968); cf. La. Corp. Act of 1928, §§ 48, 49, 50, under which the agreement was first filed with the Secretary of State and then with the Recorder of Mortgages of the parish wherein the constituent corporation had their registered office and also in the conveyance records of any parish in which the constituent corporation owned immovable property. A consolidation into a new corporation, however, was filed first with the Recorder of Mortgages and then with the Secretary of State. But under the prior statute the merger or the consolidation became effective with the Recorder of Mortgages filing.
Neither the prior statute nor the new one defines "merger" or "consolidation"; and one of Louisiana's intermediate appellate courts has held that to be a "merger" the shareholders of the constituent companies must retain (or be given) a proprietary interest in the resulting corporation.\textsuperscript{321}

That decision reads in part:

"The indenture attached to the petition, being labeled as a merger, is nothing more than an outright sale of the corporation. The stockholders of the Osborn Life Insurance Company are to be paid $8,000, which amount is to be divided pro rata among them, upon the surrender and cancellation of their stock, and they are to have no interest or control in the new corporation. The refusal on the part of any stockholder of the Osborn Life Insurance Company to surrender his stock will not give the stockholder any right in the merged corporation but his pro rata share of the funds shall be held by the new corporation for the account of the stockholder.

"..."

"A merger of two corporations is formed by the stockholders placing their assets and liabilities into a common pool and forming one single corporate body wherein the interest of stockholders of the two corporations are retained in the newly created corporation.

"..."

"Where either a 'merger' or a consolidation of corporations is effected, the new corporation acquires all assets, property rights, and franchises of dissolved corporations, and their stockholders become its stockholders."\textsuperscript{322}

The facts in this case were these: The charter of the Osborn Life Insurance Company contained an agreement that no stockholder could sell his stock without first offering it to the others and each stockholder would have the right to purchase his share of the offered stock, plus his share of that part which other stockholders might not wish to acquire. Mrs. McCarthy owned ten shares. She objected to the efforts of the president and the board to sell the assets of the corporation to another corporation or its owners. Thereupon both corporations amended their char-


\textsuperscript{322} McCarthy v. Osborn, 223 La. 305, 311, 65 So.2d 776, 778-79 (1953).
ters to include the provisions of the prior statute dealing with mergers, and the two corporations then effected “an agreement to merge.” Mrs. McCarthy successfully attacked that effort to circumvent the buy and sell agreement.

There is also an interesting provision in the new act permitting a foreign corporation to become a Louisiana corporation, and vice versa, without the necessity of first organizing a new corporation and merging into it, provided the laws of the other state authorize such a change. This is believed to be a provision unique to Louisiana but if other states adopt a similar provision it could be very helpful.

**PART XII**

*Transfer of Corporate Assets*

A voluntary sale, lease, exchange or other disposition of all or substantially all the assets of a corporation requires stockholder approval by a vote of two-thirds of those present at the meeting—or such lesser number (not less than a majority) as the articles may provide. It is considered that this does not apply to a mortgage or pledge.

Dissenters’ rights to be paid the fair market value of their shares exist unless the transfer of assets has been approved by a vote of eighty percent of the total voting power.

Although there is no Louisiana jurisprudence on the point, it is believed that stockholder approval would not be necessary for a mortgage or pledge of all or substantially all the assets, under either our former statute or the new act; and the basic reasoning is that generally a sale of all assets means the corporation is going out of business whereas a mortgage of all assets without delay may be necessary for it to continue in business.

At common law, a board could mortgage all assets without stockholder approval. Prior to its 1962 revision, the Model Act however, required shareholder approval for the mortgage

235. Id. § 121.
236. See comment to id. § 121. Further, § 131A, speaking of rights of minority stockholders dissenting with respect to certain corporate actions to be paid the fair cash value of their shares, provided they follow the procedure set forth in § 131, refers to a “sale, lease or exchange of all its assets.”
237. La. R.S. 12:131A (Supp. 1968). Through oversight, a legislative committee amendment to § 131A was not incorporated in § 121B, nor in § 112C, but the legislative intent is clear.
238. 2 FLETCHER CYCLOPEDIA CORPORATIONS § 516 (rev. ed. 1954).
239. 2 ABA-ALI MODEL BUS. CORP. ACT §§ 71 & 72 (1960).
or pledge of all or substantially all assets if not in the usual and regular course of its business. But the 1962 revision of the Model Act\textsuperscript{240} provides expressly that the board alone (in the absence of contrary charter or by-law provisions, of course) has the authority to mortgage or pledge all or substantially all assets \textit{whether in or outside} the usual and regular course of business. New York at first was not in accord with this revision but now is—as are most modern statutes.\textsuperscript{241}

**PART XIII**

\textit{Dissenting Shareholders' Rights}

The new statute limits the corporate actions which are subject to dissenters' rights. Dissenting shareholders' appraisal rights are now limited to mergers and consolidations, and to a sale, lease or exchange of all or substantially all of its assets. Such rights no longer exist with respect to an amendment of the articles of incorporation which materially changes the corporate purposes, or which changes the rights of the holders of any outstanding shares.\textsuperscript{242} Except as to the dissenting shareholders of a subsidiary merging with a controlling parent corporation,\textsuperscript{243} dissenters' rights come into existence only if the action has not been approved by at least eighty percent of the total voting power.\textsuperscript{244} This is the same vote required under the prior statute to eliminate dissenters' rights, although as first drafted by the committee approval of the particular action by a two-thirds vote of the total voting power would have eliminated dissenters' rights.\textsuperscript{245}

Under the new statute, the right to dissent does not apply in the following situations:\textsuperscript{246}

1. A sale pursuant to an order of court having jurisdiction in the premises;

2. A sale for cash on terms requiring distribution of all or substantially all of the net proceeds to the shareholders

\textsuperscript{240} Id. § 71, 72 (Pocket Part 1966).

\textsuperscript{241} Id.


\textsuperscript{243} Who can demand they be paid the fair cash value of their shares irrespective of the size vote in favor of the merger if they themselves voted against the action.

\textsuperscript{244} La. R.S. 12:131A (Supp. 1968).

\textsuperscript{245} See pages 481-86 supra.

\textsuperscript{246} La. R.S. 12:131B (Supp. 1968).
in accordance with their respective interests within one year after the date of the sale;

(3) Mergers or consolidation by corporations (a) listed on a national securities exchange or (b) whose shares are held of record by at least 2,000 stockholders, unless the articles of the corporation issuing such stock provide otherwise or the shares were not converted solely into shares of the surviving or new corporation.

Under the prior statute, the dissenters' right arose merely by virtue of his not having voted in favor of the action taken at the shareholders' meeting and he could object to the action taken within twenty days after the voting.\(^\text{247}\) Under the new statute, a dissenting shareholder to exercise his rights must have actually voted against the corporate action involved and must have filed a written objection to the proposed corporate action prior to or at the meeting; and within twenty days of notice from the corporation that less than eighty percent had approved the action, made written demand to be paid.\(^\text{248}\)

The procedure prescribed for a dissenting shareholder has been more clearly set forth in the new statute.\(^\text{249}\) Those entitled to "dissenters' rights" who follow the required procedure to demand them, are entitled to be paid the fair cash value of their shares as of the day before the vote on which he had dissented. If the shareholder and the corporation do not agree on what is the fair cash value, the dissenter may sue but the action to which he dissented is not stayed.\(^\text{250}\)

**PART XIV**

*Dissolution*

If the corporation is a going concern, unless there is unanimous shareholder consent,\(^\text{251}\) the Model Act and most statutes require the board of directors first vote to dissolve and then have approval of two-thirds of all issued stock.\(^\text{252}\) But neither the prior Louisiana statute nor the new act requires board action first.\(^\text{253}\) And only the common or voting stock votes unless the articles give the vote on this question to other classes of stock.\(^\text{254}\) Further-

\(^{247}\) La. Corp. Act of 1928, § 52A.
\(^{249}\) Id. § 131.
\(^{250}\) Id. § 131E.
\(^{251}\) 2 ABA-ALI MODEL BUS. CORP. ACT § 76 (1960).
\(^{252}\) Id. § 77.
more, under the prior statute approval by two-thirds of the total voting power was required for a voluntary dissolution; but under the new statute approval by only two-thirds of the voting power present at the meeting is required. 255

The new statute provides that if no shares in fact have been issued the incorporators themselves may dissolve the corporation by unanimous action of the incorporators and apparently this power continues until shares have been issued. 256 Under this new statute corporate existence can begin before any shares are in fact issued; and such a corporation can in fact begin the transaction of ordinary business and incur debts, without there being any paid in capital unless the articles state there is to be a paid-in capital—for only if so stated is there a requirement of paid-in capital before transacting ordinary business. 257 Hence it would appear that a going business corporation which has incurred debts but has no shareholders or capital can be dissolved voluntarily merely by unanimous action of the incorporators; but a court would then most probably hold the incorporators personally liable.

The provision permitting incorporators to dissolve is taken from the Model Act; but it provides that if the corporation does not commence business and issue shares, a majority of the incorporators may dissolve—but only during the first two years of its organization. 258 Some statutes expressly state that “good faith” on the part of those seeking a voluntary dissolution, or some benefit to the stockholders, is a prerequisite for a voluntary dissolution by less than unanimous action. 259 Neither the prior statute, nor the new one, mentions “good faith” as a prerequisite, but the Louisiana jurisprudence seems in accord with the general rule that the court will not permit a voluntary dissolution by those in bad faith towards the minority. 260

The new statute also makes other changes with respect to dissolution. The prior one expressly permitted the court to order an involuntary dissolution if the corporation was insolvent in the

255. LA. R. S. 12:142A (Supp. 1968). This is in accord with the Model Act; 2 ABA-ALI MODEL BUS. CORP. ACT § 75 (1960); cf. La. Corp. Act of 1928, § 54A.
257. Id. 12:26.
258. Id. §§ 12:26, 12:142A.
259. 2 ABA-ALI MODEL BUS. CORP. ACT § 75 (1960).
bankruptcy sense.262 The new act omits this particular ground, although there is a provision263 for involuntary dissolution on the petition of a creditor whose claim has been reduced to judgment on which execution has been issued and returned "nulla bona," and also in instances where a receiver has been appointed.

The prior statute had a provision expressly making it discretionary with the court to order an involuntary dissolution if the court found it to be "beneficial" to the interest of the shareholders that the corporation should be liquidated and dissolved.264 It also had a provision for discretionary involuntary dissolution in the event of deadlock of directors or shareholders,265 but this broad general power above referred to would seem to have itself permitted dissolution in the event of deadlock. Nonetheless, the new statute not only retains the enumeration of additional express grounds for voluntary dissolution but clarifies and perhaps expands the provisions in the event of this deadlock; and also adds the appointment of a receiver as an express ground for dissolution.266

Some statutes dealing with the "deadlock" situation expressly permit the involuntary dissolution on this ground regardless of motives and even though the corporation is a profitable one. Under the new Louisiana statute: (1) if the shareholders are deadlocked in voting power for at least two consecutive annual meetings, and have failed to elect successors to directors whose terms would normally have expired, that very fact—regardless of motive or effect on the corporation—would seem to be an "absolute" ground for involuntary dissolution;267 or (2) a deadlock on the board which the shareholders "are unable to break" is a ground for seeking involuntary dissolution.268 As originally drafted by the committee, a deadlock on the board would have been a ground for involuntary dissolution only if "irreparable injury to the corporation is being suffered or is threatened by reason thereof;" but the quoted language was deleted from the bill before it was filed and that drafting "history" might persuade a court that this ground too is an "absolute" ground.

Both "deadlock" provisions come from the Model Act.269 Ore-

265. Id. 55a (4).
267. Id. § 143A(5).
268. Id. 143A(4).
269. 2 ABA-ALI MODEL BUS. CORP. ACT § 90(a) (1), (3) (1960).
gon has the same provisions, but in 1959 an Oregon court270 refused to appoint a liquidating receiver despite a deadlock and the inability for three years to elect successors to the board. The basis of the decision was that the old board was still functioning and the corporation was solvent though deadlocked. This is the minority rule, however,271 and it is believed that the new Louisiana statute follows the majority rule that deadlock is an absolute ground.

As has been pointed out, the new statute expressly permits corporations to enter into joint venture; and if one of those corporations has but two shareholders, each of which owns half the shares, then either may cause such a joint venture to be terminated.272

It has already been pointed out that the new Louisiana statute adds as an express ground for discretionary voluntary dissolution instances where a receiver has been appointed. The converse is also covered in the new statute,273 permitting the court to shift a dissolution into a receivership.

Statutes of most other states, and the Model Act,274 would preserve the corporate life of a corporation in process of dissolution, so as to enable the liquidators to fully complete the liquidation. Louisiana’s prior statute275 was not entirely clear on this point, nor was the jurisprudence.276 The new statute spells out fully and clearly the status of the corporation being dissolved and the duty and powers of the liquidators.277

The new statute also clears up the ageless problem of what to do with distributive shares of shareholders who could not be found, for it expressly states the liquidator should deliver these funds or assets to the Collector of Revenue.278 Previously the liquidator was often uncertain what to do with these unclaimed distributions—particularly as to Orleans Parish where any unclaimed funds were supposed to be delivered to the Public Administrator.279

273. Id. § 143E.
274. 2 ABA-ALI MODEL BUS. CORP. ACT § 79 (1960).
276. Cf. Munn v. Wadley, 182 La. 874, 189 So. 561 (1939); Brown & Son v. Wholesalers, Inc. in Liquidation 52 So.2d 321 (La. App. 1st Cir. 1951); LA. CODE CIV. P. art. 692.
278. Id. § 145.
279. Id. 9:1585.
The new statute expressly provides a method and procedure whereby liquidators, by notice of at least six months, can preempt against claims even by persons under legal disability—the latter to have their only recourse against their tutors and curators.

The new statute covers the troublesome situation of there being a need, following final dissolution, to revive the corporation (to handle inadvertently omitted assets by way of example), and the former liquidator is dead. In addition to retaining the provision in the former statute that inadvertently omitted property would vest in the original liquidator despite a “final certificate of dissolution,” the new statute expressly provides:

“E. Following cessation of the corporate existence, the liquidator shall still have power to take all action required to preserve the interests of the corporation, its creditors and shareholders; and the court shall have power, on application by any interested party, to appoint, ex parte or on such notice as the court may order, a new liquidator for any proper purpose in case of the death, disability or unwillingness to serve of the last previous liquidator.”

The new statute also provides that the court may dismiss a proceeding for dissolution which is under its supervision, at any time before the corporate existence has ceased (1) upon a showing that a cause for dissolution no longer exists, or (2) upon motion of those who instituted the proceeding.

The court “may” dismiss a voluntary dissolution upon the same affirmative vote of whatever number of the shareholders as was required to have begun it—and this would be two-thirds the voting power present unless the articles required a greater vote. Under the prior statute the vote required to dismiss a pending voluntary dissolution was five-sixths of all of each class of shareholders.

Under the new statutes dissolution is effective retroactive to the date of the filing of the liquidator's certificate, notwith-
standing there may be a delay in obtaining the customary clear-
ances from the Revenue and Labor Departments.\textsuperscript{287}

Liquidators in either a voluntary or involuntary liquidation\textsuperscript{288}
are expressly prohibited from having an inventory of the cor-
poration's assets "made by a notary public"—reflecting aware-
ness of the abuse which had been prevalent in certain areas and
which is also reflected in the Code of Civil Procedure.\textsuperscript{289}

The new statute, as did the prior one, contemplates a termi-
nation of the liquidation once all debts and liabilities have been
paid, including all costs and expenses of the liquidation, with the
liquidator turning over to the shareholders any net assets re-
remaining,\textsuperscript{290} and thereupon dissolving the corporation.\textsuperscript{291} There
may well have been, however, a desire by a majority of the share-
holders to continue the corporate existence for the purpose of ad-
ministering intact all or part of such remaining net assets for
the benefit of the shareholders; and this might well be more
beneficial to the shareholders than a distribution of assets to
them. The 1968 legislature made just such a provision with re-
spect to the liquidation of banks by adding to the applicable
banking statute a provision\textsuperscript{292} that after the Banking Commiss-
ioner (liquidator) had paid all debts and liability, including
costs and expenses of the liquidation and had called a meeting of
shareholders to deliver to them the net remaining assets, then:

"B. At the meeting called by the commissioner the share-
holders by majority vote of those present or represented
may elect to retain some or all of the assets in lieu of a
liquidation thereof, and upon election by the shareholders
to retain any of the assets, the corporate existence shall
continue solely for the purpose of administering the as-
sets for the benefit of the shareholders."

A similar result, of continuing corporate existence beyond
payment of all debts and liabilities, including costs and expenses
of the liquidation, would appear possible with respect to other
corporations under the provisions of the new statute permitting
termination of proceedings for dissolution at any time before the
corporate existence has ceased.\textsuperscript{293}

\textsuperscript{288} Id. §145C, 145D.
\textsuperscript{289} LA. CODE CIV. P. art. 3136.
\textsuperscript{290} LA. R.S. 12:145F (Supp. 1968); cf. La. Corp. Act of 1928, Title 12,
ch. 9.
\textsuperscript{291} Id. §148; cf. La. Corp. Act of 1928, tit. 12, ch. 9.
\textsuperscript{293} LA. R.S. 12:149 (Supp. 1968).
PART XV

Receivers

Under the new statute, to entitle appointment of a receiver continuance of the corporation's business should be of great concern to the public generally, or there should be a strong prospect of returning control of it to the shareholders as a profitable and going concern. Any other type of receivership as the term is sometimes understood, is contemplated to be effective through an involuntary dissolution under court supervision. The new statute, however, does empower the court to shift a receivership into involuntary dissolution or vice versa.

If unsuccessful petitioners for a receivership are found to be in bad faith, attorney's fees may be awarded against them.

PART XVI

Other Proceedings

The only change with respect to compromise arrangements or reorganizations of corporations which are in process of dissolution is that the new statute entitles any corporation to the benefit of the section unless the articles provide otherwise. This is in line with the general policy of giving corporations broad powers and rights unless denied in the charter, instead of requiring all the boiler plate provisions to be in the charter.

There is added, however, a new section to enable the trustees in any reorganization ordered by the courts under any applicable Act of Congress, to effectuate such a reorganization.

With respect to an action by the state to annul, vacate or forfeit corporate franchise: Such a “right” of action is given the Secretary of State in the new act rather than to the Attorney

294. LA. R.S. 12:143F, 151, 152 (Supp. 1968). This is in accord with prior jurisprudential rules. In Peiser v. Grand Isle, Inc., 221 La. 585, 60 So.2d 1 (1952), the court said: "While the provisions [of the statute] set forth the causes for which a receivership may be sought by a shareholder, the appointment of a receiver is not mandatory but is subject to sound judicial discretion. . . . In determining whether or not the facts justify and make advisable a receivership, in the absence of a clear showing of fraud or breach of trust the courts are slow to interfere, will order the appointment of a receiver only when it is manifest that it should be made, and are influenced by a consideration of whether such action would serve a useful purpose."


296. Id. § 151D.


What were four separately stated grounds are now embraced in one reading simply: "The corporation has continued to abuse authority conferred upon it." And the new statute omits as a ground for suit to annul, the fact of a corporation "being a party to an illegal combination in restraint of trade." The philosophy behind this omission is that capital punishment is too harsh a punishment—even for a corporation.

The new statute adds a new ground, however, for such a suit to annul, vacate, or forfeit: failure to file a franchise tax return or an annual report, for three consecutive years.

The new statute expressly makes an action to annul, vacate or forfeit a charter a summary procedure; and, finally it makes provision for a judgment of annulment or forfeiture to be set aside if within the appeal period the "ground" is cured.

**PART XVII**

*General Provisions*

Because of greater responsibility imposed on the Secretary of State, the new statute provides for a modest increase in his fees. More importantly, all penalty provisions are grouped in one section of the new act—and these are made more realistic.

Finally, in this concluding Part Seventeen, existing corporations are given the benefit of this statute and are also protected against it impairing any constitutionally protected right. But the effort is made to be certain that in the future the hands of the legislature are not tied in their regulation of existing corporations; and to make it clear that the state can make its future corporation statutes applicable to then existing corporations—to the extent the federal constitution would permit.

**ACT 106 of 1968**


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304. *Id.* § 163C.
305. *Id.* § 171.
306. *Id.* § 172.
307. *Id.* § 173.
308. *Id.* § 177.
This act was an integral part of the entire legislative effort to so modernize Louisiana's corporation laws as to not only retain the few remaining domestic corporations doing a multi-state business but be able to compete with Delaware, New York, North Carolina and the other states which have modernized their laws, in persuading multi-state business corporations to become Louisiana corporations.

This Act 106 of 1968 amends the Income Tax statute so as to eliminate the discrimination which was in the Louisiana income tax law against Louisiana corporations in favor of foreign corporations. Foreign corporations were taxed by Louisiana only on income allocable to Louisiana. But Louisiana corporations were taxed on the entirely of their income, with a credit for income taxes paid to other states. But in the case of income earned in Texas or in some other state having no income tax, a Louisiana corporation formerly paid a full tax to Louisiana on this Texas income, whereas a Delaware corporation doing business in Louisiana paid no income tax on that Texas income to either Texas or Delaware. By this new statute the Louisiana income tax on all corporations—domestic as well as foreign—is now imposed only on income earned in Louisiana.

Further, the imposition of a Louisiana income tax on a domestic corporation on upstream dividends received from its foreign subsidiaries on their earnings outside Louisiana is believed to have been eliminated by this Act 106 of 1968.

A domestic parent corporation was previously exempted from an income tax on dividends received from its subsidiaries if the income of those subsidiaries had been taxed to them by Louisiana. For example, a parent Louisiana finance company with subsidiary finance companies in, say, five Louisiana cities, would not have been taxed by Louisiana on dividends it received from these Louisiana subsidiaries. This section remains unchanged. But if that same parent Louisiana finance company had as its five subsidiaries, Mississippi corporations which earned their income from and in Mississippi, Louisiana would nonetheless have heretofore taxed that Louisiana parent on all dividends it received from those Mississippi subsidiaries.

R.S. 47:161 and 241 were significantly amended by Louisiana

310. Id. under La. Corp. Act of 1928, § 161A; under La. R.S. 47:63 (1950), the deduction not being applicable.
Acts of 1968, No. 106, § 5, as best illustrated by their text before and after the amendment:

"§ 161. Income from sources partly within and partly without the State of Louisiana

A. Resident individuals, and domestic corporations. In the case of a resident individual or domestic corporation, items of gross income, expenses, losses, and deductions, from whatever source received or incurred, not otherwise exempted by this Chapter, shall be included in the taxpayer's return and the amount of the tax shall be computed upon the entire income from whatever source derived; ....

B. Nonresident individuals, and foreign corporations. In the case of a nonresident individual or foreign corporation, items of gross income, expenses, losses and deductions, from whatever source received or incurred, not otherwise exempted by this Chapter, shall be included in the taxpayer's return; but, for the purpose of this Chapter, the amount of tax shall be computed only upon the net income earned within or derived from sources within this state, such net income to be computed as provided in Sub-part F of Part II of this Chapter."

Section 243(4) of Title 47, which remains unchanged, would appear to make certain the deduction or exemption, for it provides in part:

"... [p]rovided that dividends upon stock having a situs in Louisiana received by a corporation from another corporation which is controlled by the former, through ownership of 50% or more of the voting stock of the latter, shall be allocated to the state or states in which is earned the income from which the dividends are paid, such allocation to be made in proportion to the respective amounts of such income earned in each state ...."

Heretofore if a Louisiana Corporation wished to reincorporate elsewhere and make an exchange intended to be free of Louisiana income tax consequences, the Louisiana corporation had to first establish "to the satisfaction of the (Louisiana) Collector that such exchange is not in pursuance of a plan having

311. LA. R.S. 47:133C, D, E, F, and H.
as one of its principal purposes the avoidance of Louisiana income taxes." This is no longer required, as this section was repealed.\textsuperscript{313}

To prevent or lessen any loss in revenues resulting from these various changes, the act reduced the corporate income tax exemption very slightly—from $3000 to $2000.\textsuperscript{314}

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\textsuperscript{312} Id. 47:137.
\textsuperscript{314} Id. § 2, amending La. R.S. 12:32C (Supp. 1968).
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