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THE WISCONSIN BUSINESS CORPORATION LAW

KENNETH K. LUCE*

This article is written for the information of lawyers who advise corporate clients with respect to their status and problems under the new Wisconsin Business Corporation Law. It will not help the lawyer who has had the time to make a careful study of the law, but it is hoped it will be of some aid to the lawyer in general practice who often cannot find the time to make a careful individual study of each of the many tax and regulatory laws which may affect his clients, and which descend upon him in a confusing, befuddling and constantly increasing torrent.

The article presents a resume of the background of the law and of the reasons for its enactment. It attempts primarily to answer two questions which are being asked constantly: (1) should an existing Wisconsin corporation elect to become subject to the new law before July 1, 1953, and (2) what matters should be considered and what steps should be taken before an existing Wisconsin corporation becomes subject to the new law, either by election or automatically, on July 1, 1953?

The article does not attempt to discuss all aspects of the law. It will be enough for the present if it succeeds in saving some time for general practitioners in meeting their immediate problems with respect to the new law.

On August 19, 1951, Chapter 731, Wisconsin Laws of 1951, became effective as Chapter 180, Wisconsin Statutes, to be known and cited as the "Wisconsin Business Corporation Law." The sections of law previously contained in Chapter 180 were moved into Chapter 182 and renumbered 182.001, 182.002, etc.; those previously contained in Chapter 181 were moved into Chapter 182 and renumbered 182.101, 182.102, etc.; and the sections of Chapter 182 were renumbered 182.201, 182.202, etc.¹ Thus the old sections retain their numbers in the second and third digits after the decimal point, and the previous chapter location of an old section may be determined from the first digit after the decimal point in Chapter 182, which chapter now contains all of the sections of

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¹ Wis. Laws (1951), Ch. 731, Sec. 2, 3, 4.

law relating to business corporations formerly contained in Chapters 180, 181 and 182. Chapter 182 remains effective with respect to Wisconsin corporations in existence prior to August 19, 1951, and corporations may be organized under either Chapter 180 or 182 until July 1, 1953. After June 30, 1953, it will be possible to organize a Wisconsin business corporation only under the new law, Chapter 180. Existing Wisconsin corporations remain subject to Chapter 182 until July 1, 1953, when they become subject to the new law, Chapter 180; but they may become subject to the new law at any time prior to July 1, 1953, by electing to become subject through an article amendment passed by the shareholder vote required in the old law, sections 182.007 and 182.213.²

The purpose of postponing the effect of the Wisconsin Business Corporation Law with respect to existing corporations and of permitting organization of corporations under the old law until July 1, 1953, is to allow a period of time during which attorneys and business men may become familiar with the new law, and effect such organization changes and legal action as may appear necessary or advisable before their organizations become subject to the new law. In this period of time it is expected that attorneys and legislators will study the law and propose such amendments as they may consider advisable for enactment by the 1953 legislature, prior to the time when the new law will become effective as to all Wisconsin corporations. The Joint Committee of the Wisconsin and Milwaukee Bar Associations, which drafted the law in cooperation with the Judiciary Committee of the Wisconsin Legislative Council, has been continued as a standing committee for the purpose of receiving and considering proposed amendments, and such suggestions and proposals are sincerely invited. After all, common sense and experience demonstrate that no statute of the magnitude of the new Wisconsin Business Corporation Law can be expected to be perfect and completely free of bugs in its original form, and those who have participated in the work entertain no illusion that this statute is an exception.

I. BACKGROUND OF THE LAW

The Wisconsin Business Corporation Law was prepared pursuant to the direction of Joint Resolution 16S, passed by the Wisconsin legislature in May, 1949. This resolution directed the Legislative Council to present to the 1951 legislature its recommendations for revision of the business corporation statutes, and to give particular consideration to the Model Act published in 1946 by the American Bar Association, Section of Corporation, Banking and Business Law. The Legislative Council was directed to invite the cooperation of appropriate committees of the

² Wis. Laws (1951), Ch. 731, Sec. 8.

Wisconsin and Milwaukee Bar Associations. Committees of the two Bar Associations were appointed and worked together as a joint committee, meeting thirty-nine times with an average attendance of nine members, and spending over two hundred seventeen hours in committee session. Aid was received, through attendance at committee meetings and in many other ways, from representatives of the Legislative Council, the corporation division of the Department of State, and the Wisconsin Department of Securities.

The draftsmen of the law paid particular attention to the American Bar Association Model Act, in accord with the direction of Resolution 16S. However, the law contains many departures from the Model Act in basic theory, as well as in terminology and language. Existing Wisconsin organization and recording procedure was retained insofar as possible, and changes in management and other procedures were not made except where sound legal and business reasons for such changes were evident. The dominant purpose of a corporate enabling statute should be service to the business community through a realistic, workable basic law for the organization and conduct of business. The composition of the various groups which participated in drafting the law provided assurance that this purpose would not be sacrificed to experimentation simply for the sake of the new and untried. In the following respects the new law contributes much: (1) a logical and consistent organization of the business corporation statutes where there was no logic or organization before; (2) consistent terminology and clarity of statutory expression; (3) express provision for a great many useful and desirable corporate procedures which were entirely absent in the prior law, and (4) removal of several restrictions upon corporate organization for which reason no longer exists or never did exist.

The Model Act was prepared by an American Bar Association Committee which included a number of lawyers who participated in preparing the Illinois Business Corporation Law of 1933. For this reason, or for some reason, the Model Act more closely resembles the Illinois Business Corporation Law than it does any other of the several modern corporation codes enacted in the past twenty-five years. Since many sections of the new Wisconsin law are closely analogous to corresponding sections in the Model Act and the Illinois law, Wisconsin lawyers may find Illinois court decisions interpreting the Illinois law to be useful in some instances.

II. THE NECESSITY FOR A MODERN CORPORATION CODE

The courts could have interpreted corporation statutes initially to allow corporate organizers and managers broad discretion in the writing of the corporate contract contained in articles and by-laws. In other words the courts could have taken the position that any article or by-law

provision, and any corporate procedure, is within lawful corporate authority so long as it is not expressly restricted or prohibited by statute. Such a judicial approach to interpretation surely would have given corporate legislation a different appearance than it has today. The corporation statutes would have assumed a more negative character, restricting or prohibiting corporate procedures considered unfair to minority stock interests or against state policy for one reason or another.

This has not been the judicial approach to interpretation. Rather, the courts have taken the position on the whole that no organization requirement or procedure is lawful unless express authority for it can be found in the statute. This negative and restrictive judicial attitude has meant that corporate organization must operate in a strait-jacket unless the corporation statutes expressly provide broad detailed coverage with respect to all matters of management and corporate procedure necessary or convenient for efficient corporate organization. This is exactly what the legislature of New Jersey attempted in 1896, and the New Jersey Act of 1896 started a trend, often called the "race of laxity," in which the legislatures of many states sought to *liberalize* their corporation statutes—in other words, negatively to remove statutory restrictions upon organization, affirmatively to make express and detailed provision for organization and management procedures which business organizers and managers considered desirable for efficient operation. The fact that New Jersey and Delaware achieved the first substantial success in this direction explains the number of corporations organized under the laws of those states doing business in all parts of the nation today.

The "race of laxity" has been blamed for many of the abuses and evils which have developed as a consequence of separation of ownership from the control and management of industrial organization. Separation of ownership from control has come as an inevitable result of the tremendous expansion in the size and scope of industrial organization and investment in the last half century, and it seems unrealistic to assume that insistence upon restrictive corporate enabling statutes would have stopped or retarded this development. In the face of such statutory restrictions, corporate organizers simply would have turned to the joint stock company, the business trust, and other forms of unincorporated organization, and have left the uninited and ill-advised to carry on business under the corporate form. This would have made the regulatory job of the legislatures much more difficult than it actually has been.

The above paragraph is not simply speculation. It has historical support in the development of English corporate law. In 1720, as a result of the financial panic which followed the collapse of the South Sea

Company, Parliament passed what became known as the Bubble Act.³ This was a restrictive statute which forbade any use of transferable shares of stock or other corporate privileges to any business organization without a charter from Parliament or the Crown. Charters were difficult to obtain, and their issue was even more severely restricted in the years following the Bubble Act. Business organizers did turn to unincorporated forms of business organization, and in the following one hundred years developed the English joint stock company.⁴ Although the joint stock companies operated beyond the pale and protection of the law, the English courts tended more and more as the years passed to wink at their use of transferable shares and other corporate privileges, and Parliament parceled out corporate privileges one by one to the joint stock companies until the era ended with the English Companies Act of 1862. It was through this period that the judiciary developed its restrictive approach to interpretation of corporation statutes.

Examples of the judicial attitude are legion. A corporation may not hold shares in another corporation unless a statute expressly grants the power,⁵ and many cases hold that a solvent corporation may not dissolve and liquidate, or sell all its assets, against the objection of a single stockholder.⁶ Where the statute gives majority stockholders power to sell all the assets, courts have held this means for cash, and the consideration may not be stock in another corporation.⁷ Each shareholder has one vote regardless of the number of shares he owns unless the statute specifically gives a vote for each share,⁸ and proxy voting is proper only to the extent authorized by statute.⁹ Cumulative voting is proper only if clearly authorized by statute,¹⁰ and such devices as the voting trust are of questionable validity unless authorized by express statutory pro-

³ 6 Geo. I, c. 18 (1720); See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 211-220 (1926).

⁴ DuBois, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720-1800, Ch. 1 (1938); In re Agriculturist Cattle Insurance Co., L.R. 5 Ch. App. 725, 734 (1870): "But there were large societies on which the sum of royal or legislative favor did not shine, and as to whom the whole desire of the associates, and the whole aim of the ablest legal assistants they could obtain, was to make them as nearly a corporation as possible."

⁵ Even where the statute grants the power, it may not be used to acquire control of corporations with different business purposes, State v. Atlantic Railway, 77 N.J.L. 465, 72 Atl. 111 (1909).

⁶ Abbot v. American Hard Rubber Co., 33 Barb. (N.Y.) 578 (1861); Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 41 St.Ct. 209 (1911); Comment 35 MICH. L. REV. 626 (1937).

⁷ Geddes v. Anaconda Copper Mining Co., *supra*, note 6; noted 30 YALE L. J. 633 (1921).

⁸ Taylor v. Griswold, 14 N.J.L. 222, 238 (1834); 2 COOK, CORPORATIONS, Sec. 609 (6th ed., 1908).

⁹ People v. Crossley, 69 Ill. 195 (1873); Taylor v. Griswold, *supra*, note 8.

¹⁰ State ex rel. Baumgardner v. Stockley, 45 Ohio St. 304, 13 N.E. 279, 281 (1887); 18 Op. Atty. Gen. 429 (Wis., 1929); 5 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., sec. 2048 (1931).

vision.¹¹ These examples should be sufficient to illustrate the necessity for the detailed, carefully drafted modern statutes expressly authorizing the long list of organization and management procedures considered necessary or convenient in the conduct of modern corporate organization.

Until the Wisconsin Business Corporation Law was enacted in 1951, the Wisconsin business corporation statutes had developed over many years through a patchwork amending process. Procedure for merger and consolidation was added only in 1947.¹² The voting trust was never authorized, with the result that its status has always been in doubt. Section 180.11(2) was inadequate to cover the subject of sale by a corporation of all its assets, and provided no remedy to dissenting shareholders.¹³ Uncertain statutory language led to some anomalous results. For instance, Section 182.206 declares: "all fictitious increase of the capital stock of any corporation shall be void." In interpreting this language the courts held that if par stock is issued for less than par: (1) the shareholder may not vote his shares or receive dividends;¹⁴ (2) he may not recover back from the corporation what he did pay for the stock, because the contract was illegal;¹⁵ but (3) corporate creditors may recover from him the difference between what he paid and the par amount!¹⁶

Over many years there has been agitation for complete revision of the corporation laws. One study was reported in the Wisconsin Law Review in 1937.¹⁷ Other articles have appeared in the Wisconsin and Marquette Law Reviews from time to time.¹⁸ Resolution 16S of the 1949 legislature was the culmination of a long period of dissatisfaction with the corporation statutes in a state which has a national reputation for the calibre of its legislation.

III. STATUS OF EXISTING CORPORATIONS UNDER THE NEW LAW

A. FOREIGN CORPORATIONS

Foreign corporations became subject to the new law on its effective date, August 19, 1951.¹⁹ It was not necessary for a foreign corporation

¹¹ *Luthy v. Ream*, 270 Ill. 170, 110 N.E. 373 (1915); *Warren v. Pim*, 66 N.J. Eq. 353, 59 Atl. 773 (1904).

¹² Wis. Laws (1947), Ch. 15; WIS. STATS. (1951), sec. 182.106.

¹³ See *Avalon Realty Co. v. Gottschalk*, 249 Wis. 78, 23 N.W. 2d 606 (1946); *McDermott v. O'Neill Oil Co.*, 200 Wis. 423, 228 N.W. 481 (1930).

¹⁴ *First Avenue Land Co. v. Parker*, 111 Wis. 1, 86 N.W. 604 (1901).

¹⁵ *Thronson v. Universal Mfg. Co.*, 164 Wis. 44, 159 N.W. 575 (1916).

¹⁶ *Gogebic Iron Co. v. Iron Chief Mining Co.*, 78 Wis. 427, 47 N.W. 726 (1891); *Gager v. Paul*, 111 Wis. 638, 87 N.W. 875 (1901).

¹⁷ *Garrison, Proposed Redraft of the Wisconsin Corporation Laws*, 12 WIS. L. REV. 417 (1937).

¹⁸ *Levin, Blind Spots in the Present Wisconsin General Corporation Statutes*, 1939 WIS. L. REV. 173; *Shiels, Why Do Wisconsin Concerns Incorporate in Other States?*, 11 WIS. L. REV. 457 (1936); *Luce, Legislative Amendment of Corporation Statutes—The Wisconsin Problem*, 30 MARQ. L. REV. 20 (1946).

¹⁹ WIS. STATS. (1951), sec. 180.845(1).

previously licensed to do business in Wisconsin to take any action except to designate a registered office and agent at the time of filing its first annual report under the law on or before March 31, 1952,²⁰ since such corporation automatically became subject to the new law and was deemed to hold a certificate of authority under it.²¹

The term "foreign corporation" is defined to include corporations, joint stock companies, and associations organized other than under Wisconsin law, except railroad, religious, charitable, nonprofit, insurance and building and loan corporations.²² It is important to note that business trusts are excepted from the definition, and the old law remains in effect with respect to the qualification of business trusts.²³

The registered agent is agent for service of process, but if he cannot be found or if the corporation's certificate of authority has been revoked, process may be served upon the Secretary of State.²⁴ As under prior law, service can be made upon a foreign corporation only when it has property in the state, or the cause of action arose therein or out of business transacted therein, or exists in favor of a resident of Wisconsin.²⁵

The new law clears the air as to what amounts to the doing of business which will require an application for certificate of authority by defining specifically what does not constitute the doing of such business.²⁶ Among the activities listed are maintaining bank accounts, soliciting orders which require acceptance without the state, and holding directors or shareholders meetings.

The new law provides expressly that it shall not be construed to regulate the organization or internal management of a foreign corporation.²⁷

B. WISCONSIN CORPORATIONS

The writer sees no reason why anyone should organize a Wisconsin corporation henceforth except under the new law. Corporations may be organized under the old law until July 1, 1953, but will become subject to the new law on that date in any event.

Something already has been said of the status of Wisconsin corporations organized under the old law. From now until July 1, 1953, the principal problems of such corporations will be: (1) whether to elect to become subject to the new law prior to that time, and (2) what

²⁰ WIS. STATS. (1951), sec. 180.845(2).

²¹ WIS. STATS. (1951), sec. 180.845(1).

²² WIS. STATS. (1951), sec. 180.02(2).

²³ WIS. STATS. (1951), sec. 226.14; Wis. Laws (1951), Ch. 731, sec. 6.

²⁴ WIS. STATS. (1951), sec. 180.825(1).

²⁵ WIS. STATS. (1951), sec. 180.825(5).

²⁶ WIS. STATS. (1951), sec. 180.801(3).

²⁷ WIS. STATS. (1951), sec. 180.801(1).

steps should be taken in preparation for the time when they become subject to the new law.

1. ELECTION TO BECOME SUBJECT TO THE NEW LAW

The decision as to whether election should be made to come under the new law prior to July 1, 1953, necessarily must depend upon the organization and circumstances of the particular corporation. The election requires a shareholder resolution adopted by the same vote as was required for an amendment to articles under the old law, which resolution must be filed and recorded as prescribed.²⁸

If the corporation has preferred stock outstanding, the resolution will require a three-fourths vote of both common and preferred.²⁹ In a situation where the shares are widely held, the difficulty of obtaining such a vote may outweigh any advantages connected with becoming subject to the new law prior to July 1, 1953. If the securities of the corporation are listed on a national securities exchange and a proxy solicitation will be necessary, it might prove a difficult task to satisfy the requirements of Regulation X-14 with respect to a statement of material changes in outstanding securities which will result from election to come under the new law.³⁰

However, in the case of the small corporation with one class of shares outstanding, the mechanics of the election are simple—a shareholders meeting and passage of the necessary resolution by a two-thirds vote. In this situation the only questions presented for consideration concern the advantages to be gained through an election.

If such a corporation is considering expansion and raising of capital through issue of preferred shares, it may be advisable for it to elect first to become subject to the new law. Under the new law preferred shares may be authorized by a two-thirds vote of the common,³¹ as compared to a three-fourths vote under the old law. The preferred shares may be no par shares,³² whereas only par value preferred shares could be authorized under the old law.³³ The new law is more liberal with respect to what may be included in the preferred contract, and is also more specific and inclusive in its listing of authorized preferred

²⁸ Wis. Laws (1951), Ch. 731, sec. 8(1).

²⁹ Wis. Stats. (1951), sec. 182.213(3).

³⁰ SECURITIES EXCHANGE ACT OF 1934, Regulation X-14, Schedule 14 A. "Information required in proxy statement. . . . Item 13. If action is to be taken with respect to the modification of any class of securities of the issuer . . . furnish the following information: . . . State the reasons for the proposed modification . . ., the general effect thereof upon the rights of existing security holders, and the vote needed for approval. . . . Item 20. If action is to be taken with respect to any amendment of the issuer's charter, . . . as to which information is not required above, state briefly the reasons for and general effect of such amendment and the vote needed for its approval."

³¹ Wis. Stats. (1951), secs. 180.50(2) (j), 180.51.

³² Wis. Stats. (1951), secs. 180.45(1) (d), 180.50(2) (h) (i) (j), 180.12(1).

³³ Wis. Stats. (1951), sec. 182.214(1).

share provisions.³⁴ Under the old law it was necessary to place on all share certificates a complete statement of all the preferred share privileges and restrictions.³⁵ This requirement often resulted in a sizeable engraving cost, and a mass of fine print on the back of the certificates, readable only with the aid of a magnifying glass. The requirement has been eliminated in the new law, which provides that in lieu of such a statement the certificates may state simply: (a) the designation of each class of preferred shares; (b) "such other information concerning such shares as may be desired"; and (c) that the corporation will furnish any shareholder, free, upon request, information as to the number of shares authorized and outstanding and a readable copy of the portions of the articles of incorporation relating to the shares.³⁶

The new law makes specific provision for the issue of fractional shares or scrip, and defines certain conditions upon which such shares or scrip may be issued.³⁷ The old law was silent upon this subject, and the status of fractional shares or scrip under the old law was open to question.

The new law gives express authority to make donations for the public welfare or for charitable, scientific, educational or religious purposes.³⁸ Under the old law such donations could be defended only upon a showing of business advantage.

The new law gives clear authority to limit or deny pre-emptive rights by provision in the articles, placed there originally or through amendment.³⁹ Under the old law denial of such rights in an amendment to articles could become the basis of a dangerous or at least an annoying lawsuit.⁴⁰

In *Stoiber v. Miller Brewing Company*⁴¹ it was held under the old law that an enforceable contract for compensation of corporate officers could not be executed by a board of directors which contained a majority of members receiving compensation as officers. The new law provides expressly that the board may establish reasonable compensation for its members by majority vote, irrespective of any personal interest of any of its members.⁴²

Corporations considering merger with a wholly owned subsidiary may find it advisable to first elect to become subject to the new law. Contrary to the old law, the new merger statute expressly negatives the

³⁴ WIS. STATS. (1951), sec. 180.12(2).

³⁵ WIS. STATS. (1951), sec. 182.213(2).

³⁶ WIS. STATS. (1951), sec. 180.18(2).

³⁷ WIS. STATS. (1951), sec. 180.19.

³⁸ WIS. STATS. (1951), sec. 180.04(12).

³⁹ WIS. STATS. (1951), sec. 180.21.

⁴⁰ *Milwaukee Sanitarium v. Swift*, 238 Wis. 628, 300 N.W. 760 (1941).

⁴¹ 257 Wis. 13, 42 N.W. 2d 144 (1950).

⁴² WIS. STATS. (1951), sec. 180.31.

right of dissenting shareholders to appraisal of and payment for their shares where the merger is with a wholly owned subsidiary.⁴³

Under the new law any director or shareholder action may be taken without a meeting if a consent in writing setting forth the action is signed by all of the shareholders or directors entitled to vote.⁴⁴ Such procedure was not authorized under the old law.

These matters, singly or in combination, may be sufficient to prompt an existing corporation to become subject to the new law prior to July 1, 1953.

2. MATTERS FOR CONSIDERATION PRIOR TO BECOMING SUBJECT TO THE NEW LAW ON JULY 1, 1953, OR PRIOR TO THAT TIME BY ELECTION

Financial Standards—The provisions of the new law with respect to financial standards controlling declaration of dividends, and purchase by a corporation of its own shares, should be studied before the corporation becomes subject to the new law. They will require certain changes in the organization and terminology of the shareholders' equity portion of the balance sheet, and in general the standards for guidance of the board in these matters are more stringent and more clearly expressed than under the old law. For instance, it will no longer be proper to declare ordinary dividends and charge them against surplus resulting from revaluation of assets. These financial provisions will be discussed in detail in a later portion of this article.

Restated Articles—The new law contains a section which prescribes a procedure for the filing of restated articles of incorporation.⁴⁵ Such articles are adopted in the same manner as required for amendment of articles, and when filed and recorded they supersede and take the place of all prior articles and amendments. It is suggested that existing corporations consider the advisability of adopting and filing restated articles upon becoming subject to the new law. Such a step will accomplish a complete break with the past, and will force a careful overhaul of the old articles in the light of the requirements of and advantages to be gained under the new law. Such a step appears particularly advisable in the case of existing corporations which find it necessary or desirable to make changes in their articles upon becoming subject to the new law.

The new law contains a number of sections dealing with organization and management which may make changes in articles and by-laws necessary or desirable, depending usually upon existing organization and

⁴³ WIS. STATS. (1951), sec. 180.69(6).

⁴⁴ WIS. STATS. (1951), sec. 180.91. Such procedure is invalid unless expressly authorized by statute, *Audenried v. East Coast Milling Company*, 68 N.J.Eq. 450, 466-469 (1904).

⁴⁵ WIS. STATS. (1951), sec. 180.55.

circumstances of the particular corporation. Some of these sections will be considered in the following paragraphs.

Corporate Powers and Purposes—Everyone is familiar with the gibberish which has characterized the endless purpose clauses in corporate articles. In an effort to include everything the lawyer has exhausted the adjective and verb vocabulary of the language and then added that the corporation can do anything else he has happened to forget. The new law has eliminated the necessity for such clauses, because their purpose to inform investors, management and the state as to the limits of corporate authority has been defeated by the endless incomprehensible repetition of adjectives and verbs. It is doubtful if anyone ever relies upon the statement of purposes in any event. Investors depend upon financial statements, creditors upon credit and financial reports, and management reads the gibberish in search of a lurking limitation, shudders, and plunges ahead. The new law provides simply that it shall be sufficient to state in the articles, "*either alone or with other purposes, that the corporation may engage in any lawful activity within the purposes for which corporations may be organized under this chapter, and all such lawful activities shall by such statement be deemed within the purposes of the corporation, subject to expressed limitations, if any.*"⁴⁶

With the purpose clauses and the designation and duties of corporate officers removed, the length of corporate articles is easily reduced to a page and a half.

Place of Meetings—The new law provides that shareholder meetings shall be held at the registered office of the corporation in Wisconsin, but meetings may be held at such place, either within or without the state, as may be fixed in or pursuant to the by-laws.⁴⁷ This removes uncertainty under the old law as to the validity of meetings held outside the state, and practically requires some by-law provision upon the subject. Meetings of directors may be held anywhere, within or without the state, unless the articles or by-laws provide otherwise.⁴⁸

Voting Trusts—If any of the outstanding shares of the corporation are on deposit with a voting trustee, it will be advisable to conform the voting trust to the requirements of the new law.⁴⁹ The twenty-year limit upon duration of voting trusts may not be applicable to voting trusts created before the effective date of the new law,⁵⁰ but the requirement of the new law with respect to depositing a counterpart of the agreement with the corporation at its registered office should at least be satisfied.

⁴⁶ WIS. STATS. (1951), sec. 180.45(1)(c).

⁴⁷ WIS. STATS. (1951), sec. 180.23(1).

⁴⁸ WIS. STATS. (1951), sec. 180.37(1).

⁴⁹ WIS. STATS. (1951), sec. 180.27.

⁵⁰ The Delaware voting trust statute was held not retroactive, *Western Pacific Rd. Corp. v. Baldwin*, 89 F.2d 269 (8th Cir., 1937).

Consideration for No Par Shares—Under the old law the fixing of consideration at which no par shares should issue, required a two-thirds shareholder vote unless the articles delegated to the directors authority to fix the consideration.⁵¹ The new law places authority to fix the consideration in the directors, unless the articles reserve such authority to the shareholders.⁵² Where authority is reserved, only a majority vote of shareholders is required. When the articles of an existing Wisconsin corporation reserve the authority to fix the consideration to the directors, the new law will render the provision superfluous. Where the articles of the existing corporation are silent on the subject, the authority to fix the consideration will shift to the directors under the new law unless a provision reserving the authority to the shareholders is added in the articles, in which event the authority to fix consideration shall belong to the holders of a majority, instead of two-thirds, of the shares.

Quorum—The old law required a majority of directors, or the holders of a majority of the outstanding shares, to constitute a quorum.⁵³ The new law retains the same requirement as to directors, and adds that the articles or by-laws may require a greater number.⁵⁴ With respect to shareholder meetings, the new law allows the quorum to be reduced by article provision to not less than one-third of shares entitled to vote.⁵⁵

Officers—The articles of existing Wisconsin corporations contain extensive "boiler plate" with respect to the designation and duties of general officers. The new law eliminates the necessity for this by providing that officers' duties may be prescribed in the articles or the by-laws.⁵⁶ The requirement that the president must be a director has been eliminated.⁵⁷

Officers may be removed by the board of directors whenever the board considers removal in the best interest of the corporation. The removed officer may sue for damages for breach of any contract of employment, but election or appointment as an officer of itself does not create an employment contract right.⁵⁸

Directors—The new law retains the requirement in the old law that the number of directors shall not be less than three, and also the provision that the number shall be fixed in the by-laws where the articles so provide.⁵⁹

The old law authorized an "executive committee" of at least three directors to be elected by the board to exercise the powers of the board

⁵¹ WIS. STATS. (1951), sec. 182.214(1).

⁵² WIS. STATS. (1951), sec. 180.14(2).

⁵³ WIS. STATS. (1951), sec. 182.202(1).

⁵⁴ WIS. STATS. (1951), sec. 180.35.

⁵⁵ WIS. STATS. (1951), sec. 180.28.

⁵⁶ WIS. STATS. (1951), sec. 180.41(2).

⁵⁷ WIS. STATS. (1951), sec. 180.41(1), 182.013(1).

⁵⁸ WIS. STATS. (1951), sec. 180.42.

⁵⁹ WIS. STATS. (1951), sec. 180.32(1).

to the extent permitted the by-laws when the board is not in session.⁶⁰ The statute prohibited delegation of certain matters to the committee, namely action with respect to dividends, election of officers, and the filling of board vacancies. The new law retains the substance of this section and makes one important change.⁶¹ The new law permits creation of any number of such committees, while under the old law only one could be authorized. It was felt that a finance committee, for instance, might be desirable in addition to the "executive" committee in large organizations, and the board might desire to appoint a separate committee to handle a special project.

The old law contained a broad and somewhat meaningless provision with respect to classification of directors: "except that when classified by the articles of organization or by-laws they may be elected and hold accordingly."⁶² The new law contains a separate section which clearly defines what is meant by classification of directors and prescribes limitations which are designed to prevent abuse of the procedure.⁶³ It permits classification of directors according to their terms of office, and limits the possible number of classes to three. No class shall consist of less than three directors. Classification of directors is a device used to achieve continuity of management, and is more commonly used in membership than in business stock corporations. With a board of nine directors, the new law will permit three classes of three directors in each class, one class to be elected at each annual meeting of shareholders. The requirement that each class consist of at least three directors prevents an arrangement in which one director will be elected each year, an arrangement which would nullify any right of cumulative voting. Of course, this safeguard is meaningless at the present time since the new law does not contain any section authorizing cumulative voting.⁶⁴

By-Laws—Section 180.22 is intended to codify existing Wisconsin case law with respect to authority of directors and shareholders to make by-laws. The old law contained no express provision on the subject. Recent statutes in other states indicate a trend to place authority over by-laws in the board of directors, unless such authority is expressly reserved to shareholders in the articles.⁶⁵ The Wisconsin committee considered such broad authority in directors unnecessary, even in the interest of convenient and efficient corporate administration. The new law places control over by-laws in the shareholders at their annual or

⁶⁰ WIS. STATS. (1951), sec. 182.013(2).

⁶¹ WIS. STATS. (1951), sec. 180.36.

⁶² WIS. STATS. (1951), sec. 182.013(1).

⁶³ WIS. STATS. (1951), sec. 180.33.

⁶⁴ A separate bill with respect to cumulative voting was introduced, but did not pass.

⁶⁵ American Bar Association, Model Business Corporation Act, Sec. 25; under the Delaware Act complete authority over by-laws can be delegated to the directors through article provision. DEL. GEN. CORP. LAW, Sec. 12 (1935).

special meetings, but directors have authority to make by-laws which do not conflict with by-laws adopted by the shareholders.⁶⁶ This approach to the problem indicates the desirability of maintaining a record of by-laws according to whether they have been adopted by directors or shareholders.

Voting Lists—The new law requires the officer or agent having charge of stock transfer books to make a list of shareholders entitled to vote at least ten days before each shareholder meeting, and to keep it available for inspection at the registered office of the corporation during the ten day period and during the meeting.⁶⁷ However, failure to comply with this requirement does not affect validity of action taken at the meeting.

IV. THE FINANCIAL STANDARDS AND LIABILITIES OF DIRECTORS AND SHAREHOLDERS

The shareholders equity portion of the balance sheet is a yardstick upon which the measurements and the terminology are dictated by statute. Its purpose has been to enforce maintenance of some "cushion" of corporate assets in excess of corporate debts as a protection to creditors and shareholders with preferred liquidation rights against the inevitable evaporation of asset book value which occurs in any forced liquidation. The terminology generally used has been "capital" or "capital stock," "capital surplus," "earned surplus," or just "surplus." These terms rarely have been defined at all, and judicial construction of them has demonstrated that they have no commonly understood meaning.⁶⁸ The confusion in statutory and decision law on the subject indicates also that there has been a general lack of agreement as to what standards should control distributions to shareholders through dividends and purchase by a corporation of its own shares. For instance, in Wisconsin the rule has been that a corporation may purchase its own shares so long as assets exceed debts, not counting capital stock, in an amount vaguely defined as sufficient to protect creditors.⁶⁹

A. THE STATUTORY DEFINITIONS OF FINANCIAL TERMS

The Wisconsin Business Corporation Law provides some fairly clear definitions in connection with its financial terminology. The shareholders equity yardstick is written in terms of stated capital and surplus. Surplus is subdivided into capital surplus and earned surplus.

⁶⁶ WIS. STATS. (1951), sec. 180.22.

⁶⁷ WIS. STATS. (1951), sec. 180.29.

⁶⁸ See *Goodnow v. American Writing Paper Co.*, 73 N.J.Eq. 692, 69 Atl. 1014 (1908); *Peters v. United States Mtg. Co.*, 13 Del. Ch. 11, 114 Atl. 598 (1921); WIS. STATS. (1951), sec. 182.219(1) provides: "Dividends may be paid out of *net profits properly applicable thereto*, . . . or out of *capital surplus*; provided that the payment of such dividend shall not in any way impair or diminish the *capital applicable to its outstanding stock*, . . ." These terms are not defined in the old law.

⁶⁹ *Rasmussen v. Schweizer*, 194 Wis. 362, 216 N.W. 481 (1927).

Stated capital is defined to be the sum of: (1) the par value of issued shares with par value, including treasury shares, which are defined to be "issued" until canceled, even though not "outstanding"; (2) the consideration received for issued shares without par value, less the part thereof which has been allocated to capital surplus, which part cannot exceed one-fourth of the total consideration received; (3) amounts transferred from surplus to stated capital upon the issue of a share dividend or otherwise.⁷⁰

It is to be noted that treasury shares are included in stated capital until canceled or restored to authorized but unissued share status, at which time a reduction of stated capital will occur, and capital surplus will result to the extent that the purchase price of the shares is less than the stated capital represented by the shares canceled.⁷¹

This may be illustrated by the following example. Suppose Corporation X purchases, for \$5,000, one hundred of its shares with par value \$100, or if no par, which were issued for a consideration of \$100 a share. This purchase will require the following journal entries:

Outstanding Shares	\$10,000	
Treasury Shares		\$10,000
Earned Surplus	5,000	
Cash		5,000

Upon cancellation of the shares the following entries will be required:

Treasury Shares	\$10,000	
Earned Surplus		\$ 5,000
Capital Surplus		5,000

If purchase and cancellation occur simultaneously, as often occurs upon redemption of shares, the entries will be as follows:

Outstanding Shares	\$10,000	
Cash		\$ 5,000
Capital Surplus		5,000

This procedure prevents accounting for the transaction as a debit to treasury shares and a credit to cash, and entering the treasury shares as an asset on the balance sheet—a practice which permits a corporation to purchase its own shares without affecting either its surplus available for dividends or its stated capital. This practice is illegal under the new law, which requires a reduction of surplus upon purchase to the extent of cash expended, and a reduction of stated capital upon cancellation.

Surplus is defined as the excess of net assets over stated capital,⁷²

⁷⁰ WIS. STATS. (1951), sec. 180.02(10).

⁷¹ Stated capital includes the par value or consideration received for all issued shares, WIS. STATS. (1951), sec. 180.02(10). "Treasury shares shall be deemed to be 'issued' shares, but not 'outstanding' shares." WIS. STATS. (1951), sec. 180.02(8). Stated capital is reduced by that part of stated capital represented by the shares cancelled, WIS. STATS. (1951), secs. 180.58(1), 180.59(1). With respect to capital surplus, see WIS. STATS. (1951), sec. 180.61(1).

⁷² WIS. STATS. (1951), sec. 180.02(11).

net assets being the excess of total assets over debts.⁷³ Earned surplus is defined as that portion of surplus which has resulted from "net profits, income, gains and losses";⁷⁴ and capital surplus is surplus other than earned surplus.⁷⁵

It is evident that surplus resulting from revaluation of assets, for instance, will be capital surplus. The statute specifically recognizes the following sources of capital surplus: (1) issue of par value shares for a consideration in excess of par;⁷⁶ (2) allocation to capital surplus of not more than one-fourth of the consideration received for no par shares;⁷⁷ (3) cancellation of shares acquired by purchase or redemption, where capital surplus results to the extent that the cost of purchase or redemption is less than the stated capital represented by the shares purchased or redeemed;⁷⁸ (4) reduction of stated capital by majority shareholder action to an amount not less than the sum of preferred share liquidation preferences and the par of outstanding par shares;⁷⁹ (5) director resolution transferring earned surplus to capital surplus;⁸⁰ and (6) reduction of stated capital accomplished through an amendment to articles of incorporation.⁸¹

The directors may create and abolish reserves out of earned surplus for proper purposes, and it is improper to charge dividends against such reserved earned surplus.⁸²

The following hypothetical balance sheet will illustrate the financial definitions discussed above. It is based upon the following assumed facts: X Corporation has assets of \$1,500,000; liabilities of \$200,000; 10,000 cumulative preferred shares with par value \$50, all of which are issued and outstanding; and 10,000 no par common shares, all of which are issued. The no par common shares were issued for a consideration of \$50 a share, and one-fourth of the amount was allocated to capital surplus. After issue, 2,000 of the no par common shares were purchased by X Corporation, but have not been canceled.

⁷³ WIS. STATS. (1951), sec. 180.02(9).

⁷⁴ WIS. STATS. (1951), sec. 180.02(12).

⁷⁵ WIS. STATS. (1951), sec. 180.02(13).

⁷⁶ WIS. STATS. (1951), sec. 180.16(1).

⁷⁷ WIS. STATS. (1951), sec. 180.16(2).

⁷⁸ WIS. STATS. (1951), sec. 180.61(1).

⁷⁹ WIS. STATS. (1951), secs. 180.60, 180.61(1).

⁸⁰ WIS. STATS. (1951), sec. 180.61(2).

⁸¹ WIS. STATS. (1951), secs. 180.50, 180.52, 180.61(1).

⁸² WIS. STATS. (1951), sec. 180.61(4).

X Corporation Balance Sheet

<u>Assets</u>		<u>Liabilities</u>
Cash, etc. \$1,500,000		Accounts Payable, etc. \$200,000
	<u>Shareholders Equity</u>	
<u>Authorized Shares</u>		
(1) 10,000 cumulative preferred shares, par \$50.		
(2) 10,000 no par common shares.		
<u>Stated Capital</u>		
Outstanding Preferred shares (10,000)	\$500,000	
Outstanding Common shares (8,000)	300,000	
Common shares in Treasury (2,000)	75,000	
Total Stated Capital		\$875,000
<u>Surplus</u>		
Capital surplus	\$125,000	
Earned surplus:		
Reserve for expansion	100,000	
Unreserved Earned Surplus	200,000	
Total Surplus		\$425,000
Total Shareholders Equity		<u>\$1,300,000</u>
 Total Assets <u>\$1,500,000</u>		
Total Liabilities and Shareholders Equity		<u>\$1,500,000</u>

B. THE STANDARDS GOVERNING DISTRIBUTIONS TO SHAREHOLDERS

Any distribution of cash or property to shareholders under any circumstances not involving dissolution, whether by way of dividend or otherwise, is subject to two overriding limitations which are effective in all cases: (1) any restrictions upon payment of dividends contained in the articles of incorporation which are in addition to those contained in the statute,⁸³ and (2) no distribution properly can be made when the corporation is insolvent or when the distribution will render the cor-

⁸³ WIS. STATS. (1951), sec. 180.38(1).

poration insolvent.⁸⁴ Insolvency is defined in the commercial sense as inability of the corporation to pay its debts as they become due in the usual course of its business.⁸⁵

Subject to these overriding limitations the corporation may pay dividends in an amount no greater than its unreserved earned surplus,⁸⁶ and for practical purposes this means it earned surplus because the board of directors usually has power to abolish any reservation of earned surplus by resolution.

Dividends or other distributions cannot be charged against capital surplus except in three defined situations, in which the two overriding limitations stated above are also effective. These three situations are as follows:

1. *Cumulative Dividends*—Accrued cumulative dividends on preferred shares may be charged against capital surplus if there is no earned surplus, and provided the payments are identified as out of capital surplus.⁸⁷

2. *Purchase by Corporation of Its Own Shares*—A corporation may make payments to acquire its own shares where there is no earned surplus provided: (a) the payment will not reduce net assets below an amount sufficient to cover the liquidation preference rights of preferred shareholders, and (b) the acquisition of the shares has been authorized by a two-thirds class vote of the class of shares being purchased and of each other class of shares equal to or prior in rank on liquidation to the class of shares being purchased.⁸⁸ In lieu of this requirement the acquisition may be authorized by the articles of incorporation, but an amendment for this purpose will likewise require a class vote.

Shares may be purchased for the following purposes, subject to all the above limitations except the class vote requirement: (a) elimination of fractional shares, (b) collection or settlement of a corporate claim, and (c) payment of a dissenting shareholder entitled under the law to appraisal of and payment for his shares.⁸⁹

3. *Dividends in Partial Liquidation*—The statute provides for dividends in partial liquidation which must be identified as such to the recipients. Such distributions may be made provided: (a) net assets will not be reduced below an amount sufficient to cover the liquidation preferences of preferred shares, (b) all accrued cumulative dividends

⁸⁴ WIS. STATS. (1951), secs. 180.05(1)(a), 180.38(1), 180.39(1).

⁸⁵ WIS. STATS. (1951), sec. 180.02(14).

⁸⁶ WIS. STATS. (1951), secs. 180.38(2)(a), 180.61(4). In the case of a corporation exploiting natural resources, dividends may be paid out of depletion reserves created out of earned surplus, but the dividends must be identified as distributions of such reserves. WIS. STATS. (1951), sec. 180.38(2)(b).

⁸⁷ WIS. STATS. (1951), sec. 180.38(3).

⁸⁸ WIS. STATS. (1951), sec. 180.05(1)(b)(c).

⁸⁹ WIS. STATS. (1951), sec. 180.05(2).

on preferred shares are fully paid, and (c) the distribution has been authorized by a two-thirds class vote of outstanding shares of each class of shares, and on this question shares have voting power whether or not they are entitled to vote under the articles of incorporation.⁹⁰

A deficit may be eliminated by resolution of the board of directors reducing capital surplus by the amount of the deficit.⁹¹ If there is no capital surplus, then it will be necessary to reduce stated capital through (a) cancellation of treasury shares if there are any,⁹² or (b) by majority action of shareholders,⁹³ or (c) amendment to the articles of incorporation.⁹⁴

C. LIABILITIES OF DIRECTORS AND SHAREHOLDERS

1. *Directors*—Directors are jointly and severally liable to the corporation if they vote for, or assent to, any distribution to shareholders which violates the standards governing such distributions set forth above.⁹⁵ The liability is for the amount of the distribution which exceeds the amount which properly could have been paid. Upon dissolution and liquidation of the corporation, directors are liable to the corporation to the extent that distributions to shareholders cut into the amount necessary to pay known corporate debts.⁹⁶ Directors are sureties with respect to corporate loans to officers or directors, but have an affirmative defense if the loan was made for a proper business purpose.⁹⁷ Directors held liable to the corporation are entitled to contribution from fellow directors who voted for, or assented to, the illegal distribution, and to contribution from shareholders who received the distribution with knowledge that it was improper.⁹⁸

The director may have a defense to such liability. If he did not vote for the illegal action, he will not be liable if he did not assent to it; but he is presumed to have assented unless his dissent was entered in the minutes of the meeting, or unless he filed a written dissent with the secretary of the meeting before adjournment, or immediately after by registered mail.⁹⁹ Neither will the director be liable with respect to distributions to shareholders if he can prove he relied in good faith upon financial statements represented as correct by the president or officer having charge of the books, or certified by independent accountants, or if he acted upon the basis of his own examination of the books and in good faith accepted asset values as shown by the books.¹⁰⁰

⁹⁰ WIS. STATS. (1951), sec. 180.39.

⁹¹ WIS. STATS. (1951), sec. 180.61(3).

⁹² WIS. STATS. (1951), sec. 180.59.

⁹³ WIS. STATS. (1951), sec. 180.60.

⁹⁴ WIS. STATS. (1951), secs. 180.50-52.

⁹⁵ WIS. STATS. (1951), sec. 180.40(1)(a).

⁹⁶ WIS. STATS. (1951), sec. 180.40(1)(c).

⁹⁷ WIS. STATS. (1951), sec. 180.40(1)(d).

⁹⁸ WIS. STATS. (1951), sec. 180.40(4), (5)(a).

⁹⁹ WIS. STATS. (1951), sec. 180.40(2).

¹⁰⁰ WIS. STATS. (1951), sec. 180.40(3).

As under the old law the corporation has power to indemnify directors for expenses incurred in defense of actions in which director liability is alleged, except where it is adjudged in the action that the director was liable for negligence or misconduct.¹⁰¹

2. *Shareholders*—The status of shareholders with respect to liability to pay for shares has been clarified. For one thing, pre-incorporation subscriptions are made irrevocable for a period of six months, unless expressly conditioned or unless all subscribers assent to revocation.¹⁰²

Shareholders are liable to the corporation for the amount of any distribution received to the extent it exceeds the amount which properly could be paid.¹⁰³

Under prior statute and decision law, shareholders probably had no liability *to the corporation* to pay the par amount for shares, or the amount fixed for the issue of no par shares, and a contract to pay less was binding upon the corporation. Such liability was imposed only in favor of creditors in the event of insolvency.¹⁰⁴ Under the new law the shareholder's liability to pay par or the amount fixed for the issue of no par shares is to the corporation, and any contract to pay less will be void as in conflict with the statute.¹⁰⁵ In addition, the corporation may elect to declare void shares issued for less than par in an action against the person to whom the shares were issued, or any transferee unless the shares have been transferred to a purchaser for value without knowledge of the issue for less than par.¹⁰⁶

The liability of shareholders, up to the par amount of shares owned by them, for debts owing employes for services performed up to six months duration has been retained in the new law.¹⁰⁷

V. ORGANIZATION, REORGANIZATION AND DISSOLUTION OF CORPORATIONS

With the possible exception of the organization of a new corporation under the new law, the problems indicated in the above heading should not be of immediate concern to the practicing lawyer, and any detailed consideration of them may best be left to another day.

A. ORGANIZATION OF CORPORATIONS

It has been indicated that the requirements with respect to the contents of articles of incorporation have been simplified to the point where articles should not occupy more than a page and a half. The new

¹⁰¹ WIS. STATS. (1951), sec. 180.04(14).

¹⁰² WIS. STATS. (1951), sec. 180.13(1).

¹⁰³ WIS. STATS. (1951), sec. 180.40(5) (b).

¹⁰⁴ *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis. 427, 47 N.W. 726
Whitewater Tile and Pressed Brick Mfg. Co. v. Johnson, 171 Wis. 82, 175 N.W. 786 (1920).

¹⁰⁵ WIS. STATS. (1951), secs. 180.14(1) (2), 180.20(1).

¹⁰⁶ WIS. STATS. (1951), sec. 180.20(2).

¹⁰⁷ WIS. STATS. (1951), sec. 180.40(6).

law requires only one incorporator, who will sign and acknowledge the articles and who must be a natural person of the age of twenty-one years or more.¹⁰⁸ Most of the filing and recording procedure under the old law has been retained, because it was considered undesirable to inject confusion into a procedure which was working satisfactorily and which in most respects made good sense. Under the new law, *duplicate originals* of the articles are filed with the Secretary of State, and one is returned to be recorded with the register of deeds.¹⁰⁹ The old requirement of a verified copy for recording was abolished because unnecessarily cumbersome. Attention is directed to section 180.86 which prescribes a uniform procedure for filing and recording all documents which must be filed and recorded under the new law. The section expressly gives to the Secretary of State administrative authority to refuse to file a document where he finds it does not conform to law. A procedure is prescribed for testing an adverse decision by the Secretary of State in an action de novo against the Secretary of State to be tried without a jury in the Circuit Court of Dane County.¹¹⁰

The new law prescribes a procedure for reservation of the exclusive right to use a corporate name by filing an application with the Secretary of State.¹¹¹ The right to use the name may be reserved for a period of sixty days. The name must contain the word "corporation," "incorporated" or "limited," or an abbreviation of one of these words.¹¹² It will be noted that the word "company" is not included. However, this requirement as to the content of the name applies only to corporations organized after August 19, 1951, the date of enactment of the new law, and Wisconsin corporations existing before that time will not be affected even after they become subject to the new law.

The procedure for organizing the corporation after the articles are left for record with the register of deeds is essentially the same as under prior law. The incorporator or incorporators may hold a meeting, if desired, to perfect the organization and regulate share subscriptions, including the consideration to be paid for shares.¹¹³ The incorporator or incorporators issue the call for the first meeting of subscribers at which by-laws may be adopted, the first board of directors is elected, and such other action may be taken as is noticed in the notice of the meeting.¹¹⁴ After the subscribers' organization meeting, at which directors are elected, the first board of directors holds its organization meeting for the purpose of electing officers and such other business as

¹⁰⁸ WIS. STATS. (1951), sec. 180.44.

¹⁰⁹ WIS. STATS. (1951), sec. 180.46.

¹¹⁰ WIS. STATS. (1951), sec. 180.92.

¹¹¹ WIS. STATS. (1951), sec. 180.08.

¹¹² WIS. STATS. (1951), sec. 180.07(1).

¹¹³ WIS. STATS. (1951), sec. 180.49(3).

¹¹⁴ WIS. STATS. (1951), sec. 180.49(1).

passage of a bank resolution and the calling of subscriptions as may come before the meeting. Notice of the directors meeting, which may be waived, need state only the time and place of the meeting.¹¹⁵

B. REORGANIZATION OF CORPORATIONS

Reorganization usually is accomplished through (1) acquisition by one corporation of stock in another in exchange for stock or property or both, often followed by dissolution and liquidation of one of the corporations; or (2) statutory merger of one corporate entity into another, or creation of a new corporate entity to replace two or more others, without formal property transfers or dissolution and liquidation proceedings. Statutory merger and consolidation are not possible without statutory authority,¹¹⁶ and the traditional restrictive judicial approach to interpretation of corporate statutes has rendered transfers of corporate assets in exchange for stock subject to attack by dissenting shareholders where such transfers were accomplished under statutes which did not grant the power expressly and in detailed language. The new Wisconsin law provides clear authority and the procedural detail necessary for sale by a corporation of all or substantially all its assets in exchange either for cash or other property or for stock in the buying corporation.¹¹⁷ It also gives to shareholders who dissent from the sale a clear procedure and remedy in which they may obtain court appraisal of and payment for their shares in the selling corporation.¹¹⁸ And the new law continues in substantially the same form the authority for consolidation and merger of corporations, and the remedy of dissenting shareholders in the event of consolidation or merger, which was placed in the Wisconsin Statutes by the 1947 legislature.¹¹⁹

C. DISSOLUTION OF CORPORATIONS

In the absence of controlling statute, the decisions tell us that upon dissolution of a corporation the real estate reverts to the original grantor or his heirs, personal property escheats to the state, actions to which the corporation is a party abate, and debts due the corporation are extinguished.¹²⁰ The cases draw analogies to the death of a natural person.¹²¹ The trouble is that the statutes have failed to provide as ade-

¹¹⁵ WIS. STATS. (1951), sec. 180.49(2).

¹¹⁶ 15 FLETCHER, CYCLOPEDIA CORPORATIONS, rep. vol., Sec. 7048 (1938).

¹¹⁷ WIS. STATS. (1951), secs. 180.70, 180.71.

¹¹⁸ WIS. STATS. (1951), sec. 180.72.

¹¹⁹ WIS. STATS. (1951), secs. 180.62-180.69 inc.

¹²⁰ See discussion in Williston, *The History of the Law of Business Corporations Before 1800*, 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 232-234 (1909); 16 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., sec. 8113 (1942).

¹²¹ *Combes v. Keyes*, 89 Wis. 297, 62 N.W. 89 (1895): "After the dissolution of a corporation, the power to proceed judicially against it in an action is wholly divested, except as specially authorized by statute . . . From the very nature of things, the dissolution or death of a corporation defendant, like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation. . ."

quately for the administration of the deceased's estate as they have in the case of natural persons. Most corporation codes, including the old Wisconsin Statutes, state that the corporation, after its death by dissolution, shall nevertheless continue in a comatose condition for a period of three years before exhaling its last gasp.¹²² During this time its last directors continue as trustees for the purpose of winding up its affairs. The statute says nothing with respect to the consequences which ensue if the trustees have not completed the winding up at the end of three years. The cases reveal some weird and startling answers.¹²³ The corporation can be kept fully alive until liquidation is complete, and it would seem that the analogy to the unpredictable death of a natural person should be negated.

The new Wisconsin law defers legal dissolution until liquidation and winding up are complete, and no arbitrary time limit is placed upon the period for winding up. The shareholder decision to dissolve is followed by filing a statement of intent to dissolve.¹²⁴ Thereafter normal corporate operation continues, except that authority is restricted to business activity necessary for winding up.¹²⁵ When all property has been distributed, all debts have been paid or provision for payment made, and provision has been made for satisfaction of any pending litigation, then articles of dissolution are filed containing recitals that the required steps for winding up are complete.¹²⁶ Remedies against the corporation, directors, and shareholders are preserved for a period of two years after articles of dissolution are filed.¹²⁷

The new law makes no clear provision with respect to forgotten assets, corporate property which is forgotten in the winding up until after articles of dissolution have been filed. Questions could arise as to the treatment of title to such property, and an amendment to meet this situation is presently under consideration.

¹²² WIS. STATS. (1951), sec. 182.102; 16 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., sec. 8166 (1942).

¹²³ See *State ex rel. Pabst v. Circuit Court*, 184 Wis. 301, 199 N.W. 313 (1924); *West Milwaukee v. Bergstrom Mfg. Co.*, 242 Wis. 137, 7 N.W. 2d 587 (1943); payment to directors after three years does not discharge the note, *Drzewiecki v. Stempowski*, 232 Wis. 447, 287 N.W. 747 (1939); *Citizens' Bank v. Jones*, 117 Wis. 446, 94 N.W. 329 (1903); *Savin v. McNeill*, 244 Wis. 552, 13 N.W. 2d 82 (1944).

¹²⁴ WIS. STATS. (1951), secs. 180.751, 180.753, 180.755.

¹²⁵ WIS. STATS. (1951), sec. 180.757. Procedure is provided for revocation of voluntary dissolution proceedings, WIS. STATS. (1951), secs. 180.759, 180.761, 180.763.

¹²⁶ WIS. STATS. (1951), secs. 180.765, 180.767.

¹²⁷ WIS. STATS. (1951), sec. 180.787.