

**CRIMINAL LAW—SEIZURE OF ALLEGEDLY OBSCENE MATERIAL—REQUIREMENT OF A PRIOR ADVERSARY HEARING—***State v. Brooke*, 24 Ohio Misc. 125, 259 N.E.2d 760 (C. P. Montgomery County 1970); *State v. Miqdadi*, 24 Ohio Misc. 46, 263 N.E.2d 417 (Franklin County Mun. Ct. 1970).

In *Brooke*, a police officer purchased from the defendant at a local bookstore a reel of movie film.<sup>1</sup> The officer examined the film, determined that it was hard core pornography, and arrested the defendant for the sale of a lewd, obscene, and lascivious film.<sup>2</sup> Police then obtained a search warrant from a magistrate to search the trunk of the defendant's automobile for additional material. The affidavit in support of the warrant, offered by the officer who had made the arrest, was based on information and belief of fellow officers who had received their information from alleged confidential informants.<sup>3</sup>

The Common Pleas Court of Montgomery County held that both the arrest and the search were unlawful. The court said that the United States Supreme Court had mandated that a search warrant authorizing the seizure of all allegedly obscene material issued without a prior adversary hearing to determine whether the material is obscene is constitutionally deficient,<sup>4</sup> citing *A Quantity of Books v. Kansas*<sup>5</sup> and *Marcus v. Search Warrant*.<sup>6</sup> The court related a similar proscription to the arrest, saying that the police officer must first take the film that he purchased from the defendant to a magistrate. A hearing must be held at which the defendant is given an opportunity to be heard. If the magistrate then finds that the material is obscene, he may issue an arrest warrant.<sup>7</sup>

The defendant in *Miqdadi* also was arrested for a violation of Section 2905.34.<sup>8</sup> Three police officers had viewed the two magazines in question at defendant's bookstore. The arrest warrant was issued on the basis of an affidavit setting forth the officers' conclusion that the books were obscene.<sup>9</sup> The defendant sought to void the arrests and to quash the affidavits and the arrest warrants, contending that he was entitled to a judicial hearing before the arrest.<sup>10</sup> The Franklin County Municipal Court rejected that contention. The court said that *A Quantity of Books* and *Marcus*, relied on by the defendant, were not precisely in point because they involved search warrants.<sup>11</sup> In addition, the court objected to the fact that it was being asked to adopt a procedure not provided for by state statute or court rules.<sup>12</sup>

*Brooke* and *Miqdadi*, though quite disparate in their outcomes, are representative of the range of decisions that has been reached by lower courts under existing Supreme Court guidelines. Much of the confusion emanates from two Supreme

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<sup>1</sup> 24 Ohio Misc. 125, 126, 259 N.E.2d 760, 761 (1970).

<sup>2</sup> The actions in both *Brooke* and *Miqdadi* were brought under § 2905.34 of the Ohio Revised Code. See OHIO REV. CODE ANN. § 2905.35 (Page Supp. 1970) which superseded § 2905.34 shortly after the two cases were decided. The two statutes are essentially similar.

<sup>3</sup> *State v. Brooke*, 24 Ohio Misc. 125, 126, 259 N.E.2d 760, 762 (1970).

<sup>4</sup> *Id.* at 127, 259 N.E.2d at 762.

<sup>5</sup> 378 U.S. 205 (1964).

<sup>6</sup> 367 U.S. 717 (1961).

<sup>7</sup> *State v. Brooke* 24 Ohio Misc. 125, 127-28, 259 N.E.2d 760, 762-63 (1970).

<sup>8</sup> See note 2, *supra*.

<sup>9</sup> *State v. Miqdadi*, 24 Ohio Misc. 46, 47, 263 N.E.2d 417, 418 (1970).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* These cases were also distinguished as being aimed at the prevention of the seizure of quantities of material for destruction, rather than the seizure of a single copy for evidentiary purposes. *Id.* at 50-51, 263 N.E.2d at 420.

<sup>12</sup> *Id.* at 48, 263 N.E.2d at 418.

Court decisions of the early 1960's, *Marcus v. Search Warrant*<sup>13</sup> and *A Quantity of Books v. Kansas*.<sup>14</sup> Both decisions voided state procedures<sup>15</sup> for seizing allegedly obscene material. In *Marcus*, search warrants were issued which gave the police authority to seize any material which they considered obscene.<sup>16</sup> None of the publications that was subsequently seized had been seen by the judge who issued the warrant. Acting under the warrant the police seized 11,000 copies of 280 publications.<sup>17</sup> The Supreme Court of the United States said that the procedure lacked the safeguards which due process demands when constitutionally protected speech is involved.<sup>18</sup> The Court stated that the procedure used in such circumstances must be "designed to focus searchingly on the question of obscenity."<sup>19</sup> The procedure followed in *A Quantity of Books* was similar, except for the fact that the judge who issued the warrant had scrutinized some but not most of the titles that were seized.<sup>20</sup> The High Court said the procedure was inadequate because it allowed a mass seizure without a prior adversary hearing on the question of obscenity.<sup>21</sup>

Unlike *Brooke* and *Miqdadi*, however, *Marcus* and *A Quantity of Books* involved mass seizures for destruction, and this aspect of the two cases has been seized upon by lower courts that have distinguished them. The Supreme Court has not provided the needed clarification by spelling out in some detail the requisite procedure. It has chosen instead to strike down existing procedures which it determines fall short of constitutional requirements.<sup>22</sup>

Lower courts have taken a variety of positions on the validity of the actions involved in *Brooke* and *Miqdadi*. Not all courts have agreed that an arrest without a warrant or a prior adversary hearing, as in *Brooke*, is invalid.<sup>23</sup> Those courts which have held such arrests to be unconstitutional have done so on the ground that a judicial determination of some type is necessary to constitute due process.<sup>24</sup> Some of these courts would allow an exception, however, when there is not ample time for prior scrutiny of the material, as in the case of a one-night screening or in some other circumstance where there is a high probability that the evidence may be lost, destroyed, or removed.<sup>25</sup>

<sup>13</sup> 267 U.S. 717 (1961).

<sup>14</sup> 378 U.S. 205 (1964).

<sup>15</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 719 & nn.2, 3 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 208-09 (1964).

<sup>16</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 722-23 (1961).

<sup>17</sup> *Id.* at 723.

<sup>18</sup> *Id.* at 731.

<sup>19</sup> *Id.* at 732.

<sup>20</sup> *A Quantity of Books v. Kansas*, 378 U.S. 205, 208 (1964). In *A Quantity of Books* 1,715 copies of 31 books were seized. *Id.* at 205.

<sup>21</sup> *Id.* at 210.

<sup>22</sup> See *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), in which the Court held inadequate a procedure under which a search warrant had been issued solely on the basis of the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusion.

<sup>23</sup> *State v. Bongiorno*, 103 N.J. Super. 515, 247 A.2d 893 (1968); *People v. Lake Ronkonkoma Theater*, 59 Misc.2d 438, 299 N.Y.S.2d 545 (1969).

<sup>24</sup> *Flack v. Municipal Court for Anaheim-Fullerton J.D.*, 66 Cal.2d 981, 991, 429 P.2d 192, 198, 59 Cal. Rptr. 872, 878 (1967); *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232, 1234 (W.D. N.C. 1969); *People v. Kozak*, 56 Misc.2d 337, 340, 288 N.Y.S.2d 692, 695 (1968).

<sup>25</sup> *Flack v. Municipal Court for Anaheim-Fullerton J.D.*, 66 Cal. 2d 981, 991, 429 P.2d 192, 198, 59 Cal. Rptr. 872, 878 (1967).

When the arrest, search or seizure follows a determination of probable cause by a magistrate, the courts have been much more reluctant to strike down the action. The search warrant in *Brooke* and the arrest warrant in *Miqdadi* were issued after a finding of probable cause by a magistrate. Search warrants lacking particularity have been struck down, however, on the rationale that courts were allowing the police to usurp the role of the bench.<sup>26</sup> The Fourth Circuit has invalidated a search warrant issued by a magistrate who viewed the film in question, but did not conduct a prior adversary hearing.<sup>27</sup> Other courts, however, have found such a procedure adequate to protect nonobscene materials.<sup>28</sup> Some courts, moreover, have upheld warrants issued solely on the affidavit of a police officer.<sup>29</sup> The fact that the officer's supporting statement contained detailed descriptions of the material and not merely his conclusory assertions has been considered decisive.<sup>30</sup> If a fourth amendment violation was claimed, the usual motion for return or for suppression as evidence has been considered to be the appropriate remedy.<sup>31</sup> The search warrant in *Brooke* and the arrest warrant in *Miqdadi* were issued on the affidavits of police officers.

Courts that have accepted at least the approximation of a prior adversary hearing have encountered various problems in implementing that procedure. The court in *Miqdadi* dwells at considerable length on the potential procedural consequences and problems in conducting a prior adversary hearing. One approach has been to serve the accused with a witness subpoena ordering him to appear at a hearing and with a subpoena *duces tecum* ordering him to bring to the hearing copies of the allegedly obscene material.<sup>32</sup> When the contempt power was used to enforce the subpoena *duces tecum*, however, the Pennsylvania Supreme Court reversed, saying that before a subpoena can be issued there must be some pre-existing matter or cause before the court.<sup>33</sup> The Supreme Court said that broad as the jurisdiction of the lower courts may be, those courts are not possessed of the power to originate this "kind of judicial or investigatory proceedings."<sup>34</sup>

Courts that have gone on record as requiring a prior adversary hearing before material may be seized, have tempered that requirement by ordering the accused to make a copy available to the prosecution, upon request, for use in preparation

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<sup>26</sup> *U.S. v. Marti*, 421 F.2d 1263 (2d Cir. 1970); *People v. Rothenberg*, 20 N.Y.2d 35, 228 N.E.2d 379, 281 N.Y.S.2d 316 (1967). In *Marti* the warrant specified that police officers could seize any material which they thought to be obscene. The court went on to say, however, that the warrant could have specified material depicting natural or unnatural sex acts, implying that such broad language was particular enough to satisfy constitutional requirements. 421 F.2d 1263, 1268.

<sup>27</sup> *Tyrone, Inc., v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969). Even though the Fourth Circuit directed the return of the film in question, it also required the theater to make available a copy of the film for the preparation and the trial of the pending criminal cases. *Id.* at 641.

<sup>28</sup> *People v. Hall*, 60 Misc.2d 850, 304 N.Y.S.2d 379 (1969); *People v. Steinberg*, 60 Misc.2d 1041, 304 N.Y.S.2d 858 (1969).

<sup>29</sup> *Monica Theater v. Mun. Ct. for Beverly Hills J.D.*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970); *Commonwealth v. State Amusement Corp.*, 248 N.E.2d 497 (Sup. Jud. Ct. Mass. 1969).

<sup>30</sup> *Commonwealth v. State Amusement Corp.*, 248 N.E.2d 497 (Sup. Jud. Ct. Mass. 1969).

<sup>31</sup> *Monica Theater v. Mun. Ct. for Beverly Hills J.D.*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970).

<sup>32</sup> *Commonwealth v. Polak*, 438 Pa. 67, 263 A.2d 354 (1970).

<sup>33</sup> *Id.* at 69, 263 A.2d at 356.

<sup>34</sup> *Id.*

for the trial or in the trial in a criminal case involving the material in question.<sup>35</sup> This process for compelling production of the material has been held to impinge on the possessor's fifth amendment rights, however.<sup>36</sup>

Another approach has been for the magistrate to issue a warrant to seize material on the basis of an affidavit offered by an investigator, but to follow the seizure as soon as possible with a determination by the magistrate, with the exhibitor and his counsel present, as to whether the material is constitutionally protected.<sup>37</sup> If the material is not protected, the exhibitor still loses only a single copy with no restrictions on the use of material remaining in his possession until the matter is tried. This approach avoids the use of a subpoena *duces tecum* with the resulting problems. It also serves to maintain intact the usual method of handling criminal prosecutions, while providing for a timely judicial determination aimed at protecting first amendment values.

Procedures have been sustained that approximated the one approved by the Supreme Court in *Kingsley Books Inc. v. Brown*.<sup>38</sup> In *Kingsley*, the applicable state statute provided for a trial within one day after joinder of the issue and for a decision within two days after the conclusion of the trial. The availability of relief to the defendant in an obscenity action, whether in the form of a declaratory judgment,<sup>39</sup> writ of mandamus,<sup>40</sup> or temporary restraining order<sup>41</sup> has sometimes been considered to be an adequate safeguard. These remedies have been used to prevent self-censorship when criminal prosecution is threatened,<sup>42</sup> to allow for recovery of material when there is a strong showing of need such as lack of a duplicate film,<sup>43</sup> or to preclude confiscation of a film at its initial showing.<sup>44</sup>

Given what the Supreme Court has said and what lower courts have done, an argument can be advanced that both *Brooke* and *Miqdadi* are constitutionally justifiable. If one accepts the most constricted view of the proscription in *Marcus* and *A Quantity of Books*—a prohibition of mass seizures for destruction without a prior adversary hearing, then both *Brooke* and *Miqdadi* could have been distinguished on that basis. But *Marcus* and *A Quantity of Books* contain clear indications of the importance that the Supreme Court attaches to constructing procedures which will provide the safeguards that due process demands when constitutionally protected speech is involved. Whether the procedures involved in the two Ohio cases are adequate depends on one's view of the breadth of the constitutional safeguards laid down by the Court in *Marcus* and *A Quantity of Books*. The *Brooke* court obviously had little difficulty in deciding that the procedures in question were of the type which the Supreme Court sought to proscribe. The procedure in *Miq-*

<sup>35</sup> *Metzger v. Percy*, 393 F.2d 202, 204 (7th Cir. 1968); *Tyrone Inc. v. Wilkinson*, 410 F.2d 639, 641 (4th Cir. 1969), *cert. denied*, 396 U.S. 985 (1969).

<sup>36</sup> *People v. DeRenzy*, 275 Cal. App. 2d 380, 384, 79 Cal. Rptr. 777, 779 (1969).

<sup>37</sup> *Merritt v. Lewis*, 309 F. Supp. 1249, 1253 (E.D. Cal. 1970).

<sup>38</sup> 354 U.S. 536 (1957).

<sup>39</sup> *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152 (1963), 31 Cal. Rptr. 800, *cert. denied*, 375 U.S. 957 (1963).

<sup>40</sup> *Monica Theater v. Mun. Ct. for Beverly Hills J.D.*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71, 78 (1970).

<sup>41</sup> *Grove Press, Inc., v. Corrigan*, 21 Ohio Misc. 185, 186, 255 N.E.2d 642, 643 (1969).

<sup>42</sup> *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152 (1963), 31 Cal. Rptr. 800, *cert. denied*, 375 U.S. 957 (1963).

<sup>43</sup> *Monica Theater v. Mun. Ct. for Beverly Hills J.D.*, 9 Cal. App. 3d 1, 88 Cal. Rptr. 71 (1970).

<sup>44</sup> *Grove Press, Inc., v. Corrigan*, 21 Ohio Misc. 185, 186, 255 N.E.2d 642, 643 (1969).

*dadi* is only slightly further removed from those in *Brooke*, yet the court there took a contrary view. *Miqdadi* involved an arrest, not a search and seizure and, unlike the arrest in *Brooke*, the arrest was made pursuant to a warrant. The judge issued the warrant on the affidavit of a police officer, however, and did not scrutinize the allegedly obscene material. At a minimum, a procedure "designed to focus searchingly on the question of obscenity,"<sup>45</sup> would seem to require that a magistrate peruse the material that is the basis for the issuance of an arrest or search warrant. In neither *Brooke* or *Miqdadi* did the magistrate view the material in question.

The *Brooke* court, while accepting the need for a prior adversary hearing, does not say what it would do if a recalcitrant party refused to attend or bring the material in question to such a hearing. Perhaps the court is suggesting, when it says the accused must be given "an opportunity to appear and be heard,"<sup>46</sup> that if the party chooses not to attend the court will conduct an *ex parte* hearing. The court did point out that law enforcement officials have an alternative procedure which could have been used. The procedure provides the mechanism for seeking an injunction and entitles the defendant to a speedy trial on the merits.<sup>47</sup>

The proposed requirement for a prior adversary hearing was criticized in *Miqdadi* for putting the court "in the original position of the police officer."<sup>48</sup> As the court saw it, the officer is granted by statute the power to make arrests for violations of the obscenity laws<sup>49</sup> and the officer's judgment is the basis of that statute.<sup>50</sup> The right of the accused to prove his innocence and the constitutional rights of free speech and freedom of the press are amply protected, the court said, by that portion of the statute which provides for a speedy trial on the merits.<sup>51</sup> What the court apparently did not consider is whether a statute is valid that allows a police officer alone to judge what is obscene, when the High Court has mandated that such state procedures must be "designed to focus searchingly on the question of obscenity."<sup>52</sup>

The court in *Miqdadi* was dubious about the mechanics of prior adversary hearing. Could the court compel the attendance of the parties? Was it arbitrarily to apply the rules of evidence? Could the court act in a purely quasi-judicial capacity? The court answered its own questions by saying that it could assume its judicial function only when an action is pending and the parties are properly before it.<sup>53</sup> There are procedural uncertainties in conducting a prior adversary hearing, but the

<sup>45</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961).

<sup>46</sup> *State v. Brooke*, 24 Ohio Misc. 125, 127, 259 N.E.2d 760, 762 (1970).

<sup>47</sup> The court was referring to § 2905.343 of the Ohio Revised Code. See OHIO REV. CODE ANN. § 2905.37 (Page Supp. 1970) which superceded § 2905.343 shortly after *Brooke* was decided. Section 2905.343 provided in part:

"The court of common pleas has jurisdiction to enjoin the sale or distribution of obscene prints and articles. . . . (B) The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial."

Section 2905.37 extended the time limit in each phase to five days.

<sup>48</sup> *State v. Miqdadi*, 24 Ohio Misc. 46, 49, 263 N.E.2d 417, 419 (1970).

<sup>49</sup> See *supra* note 2.

<sup>50</sup> *State v. Miqdadi*, 24 Ohio Misc. 46, 50, 263 N.E.2d 417, 420 (1970). The court equated the obscenity statute with other statutes which permit police officers to act on their own judgment, such as those relating to drunken driving, vagrancy, and suspicious persons.

<sup>51</sup> See *supra* note 47.

<sup>52</sup> *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961).

<sup>53</sup> *State v. Miqdadi*, 24 Ohio Misc. 46, 49-50, 263 N.E.2d 417, 419 (1970).

court over-reacts to them. The foregoing discussion considered several procedures which may not equate precisely with a strict concept of a prior adversary hearing, but do go to minimizing the negative impact of obscenity prosecutions on first amendment values. They do not have the effect, however, of putting the judge in the position of a law enforcement officer or of raising insurmountable procedural barriers to the holding of an efficient hearing.

The issues raised in *Brooke* and *Miqdadi* are ones which numerous courts have considered. The courts' divergent handling of these issues points up the vagueness of Supreme Court guidelines in this area. This vagueness is not surprising, given the divergent opinions applying obscenity standards among members of the High Court. In 13 obscenity cases decided between 1957 and 1966, for example, the Justices wrote 55 separate opinions.<sup>54</sup> *A Quantity of Books* contains four opinions, though *Marcus* has only two opinions. Lower courts are not likely to generally embrace a single rule from these multi-faceted opinions, especially when that rule must embrace a proposition as controversial as the requirement for a prior adversary hearing. Most lower courts make known an awareness of the requirement but find it easy to accept significant variations from it. If the Supreme Court was in fact setting down a hard and fast requirement for a prior adversary hearing whenever first amendment values are touched upon, it did not make such an intention clear nor has it done so in subsequent holdings. Until the High Court presents its views in a much more clear and precise way than it has done thus far, lower courts will continue to deal with these issues in a patchwork fashion.

*John Charles*

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**CORPORATION LAW**—*The 1970 Amendments to the Ohio Corporation Law*—Amended Substitute Senate Bill No. 158 became effective July 17, 1970. The primary effect of this bill was to reorganize prior sections and consolidate in a few sections provisions which were formerly spread throughout the corporation code. However, a few of the changes have substantive effect and are not merely reorganizational. This recent development points out changes in the substantive law enacted by the bill. A detailed analysis of the reorganization has not been undertaken.

## I. CHANGES AFFECTING CORPORATIONS FOR PROFIT

### A. *Number and Qualification of Incorporators*

Section 1701.04 (A) of the Ohio Revised Code<sup>1</sup> was amended to allow incorporation by a single person, not necessarily a natural person, as was previously required. The incorporator need not be a resident of or domiciled in Ohio nor a United States citizen. If the incorporator is itself a corporation it need not be incorporated in Ohio. The statute prior to this amendment called for three incorporators, all of whom were natural persons and a majority of whom were United States citizens. Since the financially interested party may now incorporate alone this change in the law will eliminate the fairly common situation wherein the in-

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<sup>54</sup> See *Interstate Circuit v. Dallas*, 390 U.S. 676, 705 n.1 (1968) (Harlan, J., concurring and dissenting).

<sup>1</sup> OHIO REV. CODE ANN. § 1701.04(A) (Page Supp. 1970). All further references are to the Ohio Revised Code unless otherwise indicated.

corporators have no financial interest in the corporation. This provision follows the Model Business Corporation Act.<sup>2</sup>

### B. *Authorization of Broad Purpose Clause*

Section 1701.04 (A) (3) was amended to allow a so-called "omnibus purpose clause" in the articles of incorporation.

(A)rticles of incorporation which shall set forth:

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(3) The purpose or purposes for which the corporation is formed, which may consist of a statement that the purpose, either alone or with other specified purposes is to engage in any lawful act or activity for which corporations may be formed. . . .<sup>3</sup>

This type of purpose clause has been authorized in many jurisdictions and is a provision of the Model Business Corporation Act.<sup>4</sup> It removes any uncertainty as to what acts the corporation may undertake and avoids the necessity for lengthy detailed purpose clauses.

In connection with this authorization of a broad purpose clause section 1701.74 (D) was amended to deny relief to shareholders dissenting to a change in the purpose clause of a corporation incorporated after December 31, 1970. The reason given for this denial of relief is that with broad purpose clauses now common the minority shareholders should not be surprised by a change in purpose. The change must still be approved by a two-thirds affirmative vote of shareholders, or any proportion greater than a majority if so provided in the articles.

### C. *Payment of Stock Dividend on Treasury Shares*

Section 1701.33(G) as amended provides that a corporation may pay a stock dividend on treasury shares of the same class when dividends are to be paid in authorized but unissued shares of the corporation. This changes the prior law which held that treasury shares were not outstanding for dividend purposes. Payment of a stock dividend need no longer change the proportionate amount of the shares held by the corporation as treasury shares. The definition of "treasury shares," section 1701.01 (K), has been amended to include the shares paid as a stock dividend on treasury shares.

### D. *Minimum Number of Directors*

Section 1701.56 (A) as amended changes the pre-existing law to the extent that the minimum number of directors may now be less than three. If there are one or two record owners of all the shares of the corporation there may be less than three directors but no fewer than the number of shareholders. For example, if a corporation has a single shareholder of record the *minimum* number of directors allowable is one. If a corporation has three or more record shareholders there must be at least three directors. The Model Act also authorizes fewer than three directors.<sup>5</sup>

<sup>2</sup> ABA—ALI MODEL BUS. CORP. ACT § 53 (1969).

<sup>3</sup> OHIO REV. CODE ANN. § 1701.04(A)(3) (Page Supp. 1970).

<sup>4</sup> ABA—ALI MODEL BUS. CORP. ACT § 3 (1969).

<sup>5</sup> ABA—ALI MODEL BUS. CORP. ACT § 36 (1969).

### E. *Power of Directors to Amend Articles of Incorporation*

Section 1701.70 (B)(5) has been amended to clarify what provisions the directors may amend out of the articles of incorporation. If, after a merger or consolidation, the surviving corporation is a domestic corporation the directors may amend the articles to eliminate only such provisions pertaining exclusively to the merger or consolidation or which were required to be set forth in the agreement of merger or consolidation and would not be required in the original articles or amendments thereto. The previous wording allowed the directors to amend out "any statement or matter which was required or permitted to be set forth in the agreement of merger or consolidation."<sup>6</sup> The scope of this authority was unclear and could have been interpreted to allow the directors to amend out any matter not required by the original articles or amendments thereto. It is now clear that only those provisions incident to the merger or consolidation may be deleted by the directors.

### F. *Reorganization of Provisions Relating to Mergers and Consolidations*

In amending the Ohio Corporation Act the legislature has made extensive reorganizational, and some substantive changes, in those sections dealing with mergers and consolidations. Previous Revised Code sections 1701.78, 1701.79, 1701.80, 1701.81, 1701.82, 1701.83, 1701.831, 1701.84 and 1701.85 have been repealed. The new sections bearing those same numbers are better organized and slightly modified to conform with current corporate practices.

#### (1) Merger or Consolidation into a Domestic Corporation— Section 1701.78

New section 1701.78 combines previous Code sections 1701.78 and 1701.79 and deals with the merger or consolidation of foreign or domestic constituent corporations into a surviving domestic corporation. Subsection (B) of 1701.78 requires that the merger or consolidation agreement shall set forth: (a) the state under the laws of which each constituent corporation exists; (b) that one or more constituent corporations shall be merged or consolidated into a named domestic corporation; (c) all provisions with respect to the new corporation which would be required in the original articles of a domestic corporation; (d) all statements required to be set forth by each state under the laws of which any constituent corporation exists; (e) if a merger, a statement of the names of the continuing or new directors and, if a consolidation, the names of the first directors of the new corporation; (f) the regulations of the new corporation or a provision stating that the regulations of a specified constituent corporation shall become those of the surviving corporation; (g) the name and address of an agent upon whom process may be served; and (h) the terms of the merger or consolidation, the mode of carrying them into effect and the manner of making distributions to the shareholders of the constituent corporations.

Subsection (C) lists items which may be set forth in the merger or consolidation agreement. Subsection (D) provides that the agreement must be approved by the directors of each constituent corporation and by the directors and shareholders of each domestic constituent corporation. A merger agreement need not be approved by the shareholders of the surviving corporation unless one or more of the following conditions exist: (1) The articles of the surviving corporation require

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<sup>6</sup> OHIO REV. CODE ANN. § 1701.70(B)(5)(a) *as amended*, OHIO REV. CODE ANN. § 1701.70(B)(5)(a) (Page Supp. 1970).

such approval; (2) The agreement conflicts with or changes the articles or regulations of the surviving corporation then in effect or authorizes action which otherwise would require such approval; (3) The merger involves the issuance or transfer to the shareholders of the constituent corporations one-sixth or more of the voting power of that corporation in the election of directors; or (4) The merger agreement changes the directors of the surviving corporation in a manner which otherwise would require action by the shareholders.

Subsection (E) provides for the notice of the shareholder meetings for approval of the merger or consolidation agreement. Subsection (F) provides for a two-thirds majority vote of the shareholders of a constituent domestic corporation, or such different proportion, greater than a majority, as the articles may provide, in order to adopt the agreement to merge or consolidate. Subsection (G) permits the abandonment of the agreement by the directors of any constituent corporation prior to the filing of the certificate of merger, if authorized by the agreement, or by the same vote of shareholders as required to adopt the agreement. Subsection (H) provides that if the agreement does not have to be approved by the shareholders of the surviving corporation under subsection (D) then the approval of the directors constitutes approval by that corporation. Finally, Subsection (I) requires that foreign constituent corporations comply with the laws of the state under which they exist.

The procedures set forth in section 1701.78 are patterned after pre-existing law but some provisions have been omitted. The new law eliminates the provisions permitting shareholders to propose and adopt changes in the agreement without notice at the meeting called to vote on the agreement. The merger or consolidation agreement may no longer authorize directors to adopt regulations. Also eliminated is the requirement that the agreement specify the stated capital and earned surplus, or the method of determining them. The latter subject is now covered by section 1701.32.

(2) Merger or Consolidation into a Foreign Corporation—  
Section 1701.79

New section 1701.79 replaces prior section 1701.82. This section is similar to 1701.78 except that it focuses upon a merger or consolidation where the surviving corporation is a foreign corporation. Subsections (A) and (B) of section 1701.79 are nearly identical to those of 1701.78 except that subsection (B) requires that the agreement give the location of the principal office of the surviving corporation and the consent to be sued in Ohio by appointing the Secretary of State as its agent to accept service of process. The agreement also must state whether or not the new corporation desires to transact business in Ohio. The required approval of each domestic constituent corporation is the same as under 1701.78. Subsection (E) provides for abandonment of the agreement prior to the filing of such agreement by the directors of any constituent corporation, if authorized to do so by the agreement.

Subsection (G) marks the only substantial change from prior law. It provides that if the new corporation does not desire to transact business in Ohio the agreement shall be accompanied by the releases and certificates required by subsection (H) of section 1701.86 with respect to each constituent domestic corporation and each foreign corporation licensed to transact business in Ohio. This new section omits the prior provision requiring such releases and certificates by the new or surviving foreign corporation, as if it were a dissolving corporation, and requires them only from the constituent corporations.

(3) Merger into a Parent Corporation—Section 1701.80

Section 1701.80 replaces previous Code section 1701.831 and deals with cases of merger of a subsidiary into a parent corporation. This section applies regardless of whether or not the parent is a domestic or foreign corporation so long as at least one constituent corporation is a domestic corporation. The agreement for such a merger must set forth: (a) The state under the laws of which each constituent corporation exists; (b) that one or more constituents shall be merged into a specified surviving corporation; (c) the designation and the number of outstanding shares of each class of each constituent subsidiary and the numbers of shares of each class owned by the surviving corporation; (d) the terms of the merger and the manner of making distributions to the shareholders of each constituent subsidiary corporation; (e) all statements and matters required by the laws of the state of any constituent foreign corporation; and (f) if desired, the effective date of the merger, which may be on or after the date of filing the certificate.

Subsection (C) (1) requires that the agreement be approved by the directors of each constituent corporation but need not be so approved by the shareholders of any domestic constituent corporation. Foreign constituent corporations must follow the laws of the foreign state with regard to shareholder approval. Subsection (C) (2) requires the surviving corporation to deliver notice of approval to each shareholder of each domestic corporation, other than the surviving corporation, within twenty days of such approval.

The new section changes prior law in only one way. It reduces from one hundred per cent to ninety per cent, the amount of outstanding shares of each class of each subsidiary that need be owned by the parent for the parent to effect the merger without the approval of its shareholders. If the parent is a domestic corporation the conditions of 1701.78(D)(1), (2), (3) or (4) must not exist. If any of those conditions do exist, or if the parent owns less than ninety per cent of the subsidiary's outstanding stock then shareholder approval must be obtained.

(4) Certificate of Merger Or Consolidation—Section 1701.81

Section 1701.81 provides for the filing of merger or consolidation agreements with the Secretary of State. The certificate to be filed must be signed by the chairman of the board or a vice president and the secretary, assistant secretary, treasurer or assistant treasurer of each constituent corporation. It must also contain a signed copy of the agreement and an indication of the manner in which it was approved. Subsection (B) is new and requires each foreign constituent corporation to file the proper papers as required by the laws of the state under which it exists. Subsections (C) and (D) deal with the effective date of the merger, which will be the date of filing of the certificate unless otherwise stated in the agreement, and the furnishing of information by the Secretary of State upon the payment of a small fee, respectively. Other than subsection (B) no substantive change has been made in pre-existing law.

(5) Effect of Merger or Consolidation—Section 1701.82

Provisions previously found in sections 1701.81 and 1701.83 dealing with the effect of a merger or consolidation are now combined in section 1701.82. Subsection (A) of 1701.82 states that when the merger or consolidation becomes effective: (1) The separate existence of each constituent corporation ceases except to the extent that a conveyance, assignment, transfer, deed or other instrument or act is necessary to vest property or rights in the new corporation. In that case, the au-

thority of the officers and directors of each constituent corporation continues until such acts or conveyances are complete; (2) In the case of a consolidation, the new corporation is incorporated when the consolidation becomes effective. If the new corporation is a domestic corporation the agreement of consolidation operates as original articles; (3) The surviving corporation possesses all assets and interests of every description belonging to or due to each constituent corporation; (4) The surviving corporation is liable for all the obligations of each constituent corporation; and (5) All rights of creditors of each constituent corporation are preserved unimpaired.

Subsection (B) provides that, in the case of a merger into a surviving foreign corporation, and the agreement of merger states the intention to transact business in Ohio, the new corporation shall be considered to have complied with the requirements for procuring a license to transact business in this state. Subsection (C) establishes a ninety day statute of limitations, measured from the effective date of the merger or consolidation, for any action to set aside the merger or consolidation on the ground that any section of the Revised Code has not been complied with. Subsection (D) defines "corporation," as used in that section, to apply to both foreign and domestic corporations. It also states that the section is subject to the laws of other states under which any constituent corporation exists or has property.

Section 1701.82 makes only one major change in prior law. The provision requiring evaluation of the assets of the surviving corporation is omitted. The former provision invited the abuse of writing up the assets and earned surplus. The new law also recognizes that if foreign corporations are involved in the merger or consolidation they will be subject to the laws of the respective states pertaining to the effect of mergers and consolidations.

#### (6) Combinations or Majority Share Acquisitions—Section 1701.83

Combinations and majority share acquisitions, previously dealt with in section 1701.84, are now covered in section 1701.83. Subsection (A) provides that to effect a combination or majority share acquisition the directors of the acquiring corporation must authorize the transaction. The shareholders of the acquiring corporation must also approve the transaction if the articles or regulations so provide, or if the transaction involves the issuance or transfer of such number of shares as entitle the new holders to exercise one-sixth or more voting power in the election of directors. If shareholder approval is required then such approval must be by a two-thirds affirmative vote, or such different proportion as the articles provide, but not less than a majority. Subsection (A) also provides that notice of the shareholder meeting for approval be given to all shareholders whether or not they own voting shares of stock. Subsections (B) and (C) provide for abandonment of the agreement and establish a ninety day statute of limitations on actions to set aside the combination or acquisition and do not differ from previous sections in that regard.

Section 1701.83 effects no substantial change in prior law. Previous section 1701.84(B) is eliminated as it dealt with earned surplus which is now covered in new section 1701.32.

#### G. *Surplus or "Pooling of Interests" Provisions*

Amended section 1701.32 is a combination of previous provisions dealing with the determination of earned surplus in case of a merger, consolidation combination or dissolution of a subsidiary. Most of the changes are merely a reorganization of prior sections and do not involve changes in the law. However, the provision in

previous section 1701.32(a) relating to profits and gains from transactions in a corporation's own shares has been omitted as unnecessary. Section 1701.32(B) providing that the source of capital surplus shall be shown on the books of the corporation was formerly subsection (C). Section 1701.32(C), which was formerly (D), authorizes the directors to enter all or part of the fair value of property contributed to the corporation, other than the corporation's own shares, on the books as capital surplus. Subsection (D), which was formerly (E), authorizes the directors to create or add to capital surplus by a write up of the physical assets of the corporation. Subsection (E) which authorizes the creation or addition to capital surplus by writing up the value of shares held of another corporation is basically unchanged.

The new section 1701.32(H) consolidates the provisions relating to earned surplus as affected by various forms of "pooling of interests." Subsection (1) provides that in the case of a merger the earned surplus of the surviving corporation shall be the sum of the earned surpluses and/or deficits of the constituent corporations. The prior method of determining earned surplus in the merger or consolidation situation was contained in section 1701.78 (B) (7). The amendment removes the alternative method of determining earned surplus, which was the excess of the fair value of the assets of the new or surviving corporation over the liabilities and stated capital of the constituent corporations. The definitions of "surviving" and "constituent" corporations were added to section 1701.01 by the amendment and these terms are used throughout the corporation code.

Section 1701.32(H)(2) provides for the same method of determination of earned surplus in the case of a consolidation. The method provided for in former section 1701.81 (A) (10) is deleted. Section 1701.32(H)(3) provides for the determination of earned surplus in the case of a combination. The earned surplus of the acquiring corporation may be increased or diminished by adding the surplus or deficit of the acquired corporation. This is merely a restatement of former section 1701.83(B)(1) and once again the alternative method provided by former section 1701.84(B)(2) is deleted. Section 1701.32(H)(4) provides that earned surplus is to be determined in the same way in the case of a dissolution of a wholly owned subsidiary corporation into the parent corporation. The earned surplus of the subsidiary is to be added to the earned surplus or deficit of the absorbing parent.

Section 1701.32(H)(5) provides that any action taken by the directors in adding to earned surplus by a method authorized by section 1701.32(H)(1-4) must be taken within ninety days after the end of the fiscal year of such corporation in which the merger, consolidation, combination or dissolution becomes effective.

#### H. *Rights of Dissenting Shareholders*

New section 1701.84 gathers in one section the provisions for relief of dissenting shareholders that were previously scattered throughout various sections. The shareholders listed in divisions (A) through (D) are all entitled to relief under section 1701.85. Division (A) provides for shareholders of the non-surviving corporation which is being merged or consolidated into a new or surviving domestic or foreign corporation. Shareholders of a surviving domestic corporation are covered by division (B). Division (C) provides for 1701.85 relief for dissenting shareholders of a subsidiary corporation which is being merged into the parent corporation. Division (D) provides for the shareholders of the acquiring corporation who dissent to the acquisition of a majority of the shares of the acquired corporation or the combination of the two corporations. The new section 1701.84 is basically an index to those shareholders who are entitled to 1701.85 relief.

The new section 1701.85 revises the procedures for perfecting the rights of

dissenting shareholders. The dissenting shareholder must deliver his written demand for the fair cash value of his shares to the corporation no later than ten days after the shareholder vote on the proposal. Previously the shareholder had either ten days after the vote or thirty days from the notice of the meeting, whichever was later. In the case of a merger of a subsidiary into a parent under 1701.80, wherein no shareholder vote is necessary, the dissenting shareholders have twenty days from the notice of the approval of the merger in order to demand payment for their shares. This division is new and is necessitated by the change in what is now section 1701.80 which provides that the parent need own only ninety per cent of the subsidiary to merge it without a vote of the shareholders.

Section 1701.85(A)(5) provides that if the corporation, in answer to the demand of a dissenting shareholder, requests his certificates and he fails to deliver them to the corporation within fifteen days from the date the request was sent, the corporation may terminate his rights at its option. A court may preserve the rights of the dissenting shareholder if good cause is shown for his failure to deliver the certificates.

Section 1701.85(B) has been amended to provide that unless the dissenting shareholder and the corporation agree on the fair cash value of the shares either may file a petition in the court of Common Pleas within three months after the service of the demand by the shareholder. Under the previous statute the amount demanded was deemed to be the fair cash value of the shares unless the corporation notified the shareholder of its unwillingness to pay this amount and made a counter-offer within ten days after the expiration of the period for shareholders demands. The corporation no longer is bound by the demand of the shareholder in the absence of a counter-offer, and may file for a court determination of the fair cash value within three months of the shareholder's demand. The number of court appointed appraisers has been changed from a mandatory three to one or more and their duties are to be specified in the order of appointment.

Section 1701.85(D)(4) has added another situation in which the rights of the dissenting shareholder are forfeited. If no agreement has been reached nor a petition filed for a court determination of fair cash value within three months of the shareholder's demand, his right to payment of the fair cash value is terminated.

The changes to section 1701.85 require that a dissenting shareholder, in order to protect his right to receive the fair cash value of this shares, make his written demand within ten days of the vote or twenty days of his notice of a proposal for which no vote was required. He must also tender his certificates within fifteen days from the date of the sending of the corporation's request to him. Finally, he must file a petition for the court determination of fair cash value within three months of his original demand if no agreement has been reached in that time. The changes provide deadlines that must be observed by the dissenting shareholder if he is to protect his rights.

## II. NON-PROFIT CORPORATIONS

The amendments to the Ohio Corporation Act also make changes regarding non-profit corporations. These amendments have the aim and effect of making the non-profit corporation law parallel that which exists for corporations for profit.

### A. *Number and Qualifications of Incorporators*

Section 1702.04(A) has been amended to conform with section 1701.04 with regard to the number and qualifications of incorporators. The amended provision

is nearly identical to 1701.04 and thus reduces the required number of incorporators for non-profit corporations to a single natural person, corporation or partnership who need not be a resident of Ohio or a United States citizen.

*B. Contents of Regulations—Section 1702.11(A)*

Section 1702.11(A) has been amended to parallel the powers of corporations for profit with regard to the adoption of "emergency regulations" which only become effective before or during an emergency as defined in 1701.01(U). The emergency regulations may make practical or necessary changes with respect to meetings, committees, vacancies and temporary appointments of trustees, and the rank and succession of officers, the same as may be done by corporations for profit under section 1701.11(C).

Sections 1702.31 (Meetings of Trustees), 1702.32 (Quorum for Trustee's Meeting), and 1702.34 (Officers: Authority and Removal) have also been amended to include a provision subjecting them to the exceptions applicable under emergency regulations. The new provisions will enable non-profit corporations engaged in national defense research and non-profit corporations such as the Red Cross to function more effectively during a declared emergency situation.

*C. Authority of Non-Profit Corporations—Section 1702.12*

Under prior law it was not clear whether a non-profit corporation could form or control a foreign corporation. The amendment to section 1702.12(F) makes explicit that a non-profit corporation may acquire control of a foreign corporation.

*D. Voluntary Dissolution—Section 1702.47*

Under amended section 1702.47(F) the officers of a non-profit corporation are permitted to file the certificate of dissolution at a date later than thirty days after the adoption of the resolution. Previous law required such filings within thirty days of the adoption of the resolution to dissolve. Now the certificate may be filed upon the expiration of any period specified in the resolution as the period within which such certificate is to be filed, or the thirty day period, whichever is later.

### III. SECURITIES LAW

*(A) Institutional Investor—Section 1707.01*

The new law amends the definition of "institutional investor" found in section 1707.01 (S). In the prior provision the words "engaged, as a substantial part of its business or operation, in purchasing or holding securities" might have been read to modify "any corporation, bank, insurance company, pension fund," etc. The new section makes it clear that the clause modified only "any association."

*(B) Exempt Transactions—Section 1707.03*

Section 1707.03(G)(2) has been amended to exempt from the registration requirements of sections 1707.08 to 1707.11 the giving of a right to receive a security upon exchange if the right is; (1) the subject matter of an exempt transaction; (2) is registered by description or by qualification; or (3) is the subject matter of a transaction which has been registered by description. The giving of a subscription right, warrant, or option to purchase the security were exempt under pre-existing law. The amendment adds "giving a right to receive a security to the exemption."

The new law also reinstates as exempt those transactions in securities which within one year were purchased outside of Ohio or within one year transported into Ohio prior to the sale. Section 1707.03 (M)(3) (B), (C), (D) and (E) lists the new exemptions. They are (1) securities of the same class registered within one year on the basis provided in 1707.05 or which were qualified under 1707.09 for registration within one year; (2) those securities which, at the time of sale could be registered by description as provided in section 1707.05; (3) securities sold on behalf of a bona fide owner if the sale is made in good faith and; (4) those securities transported into Ohio in transactions previously exempted or under registered transactions. These listed transactions were exempt until 1967 but were deleted in that year. The new law, then, re-establishes their exempt status.

#### C. Dealers License Required—Section 1707.14

Under former section 1707.14(B)(3) only a licensed securities dealer or an issuer selling its own securities could sell securities to "a bank, corporation or insurance company."<sup>7</sup> The amended provision deletes the quoted phrase and substitutes "an institutional investor" in its place. The effect of such a change is to broaden the requirements to be licensed since the definition of institutional investor encompasses more than the three types of institutional investors listed under previous law.

#### IV. CONCLUSION

The 1970 amendments to the Ohio corporation law make few substantive changes in prior law. Their overall effect is reorganizational with emphasis on those sections dealing with merger and consolidation. Additionally, minor changes were made in the non-profit corporation law to bring it into line with the provisions regulating corporations for profit. Finally, portions of the securities law have been amended to provide new exempt transactions and to clarify the language therein.

*Michael P. Mahoney*  
*Robert L. Rauzi*

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<sup>7</sup> OHIO REV. CODE ANN. § 1707.14(B)(3) *as amended*, OHIO REV. CODE ANN. § 1707.14(B)(3) (Page Supp. 1970).