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## CURRENT DEVELOPMENTS IN STATUTORY CORPORATION LAW

by FLOYD A. WRIGHT\*

At the middle of the last century corporation statutes were callow and meager.<sup>1</sup> The composite of their omissions and limitations constricted the range of corporate endeavor to an exiguous course. The trickle from the headspring of the neoterical system of free enterprise had gradually expanded into a tiny rivulet, destined to progressively assume torrential proportions. The increasing demands of a rapidly-expanding enterprise gradually forced the floodgates further ajar, and the released floodwaters, turbulent and divagatious, meandered across an unsurveyed expanse. The topography was undelineated, the undulations unperiphrased, the thalweg obscured, the contour unscaled.

The primeval plats and formulas of the barnacle-encrusted manor rolls and yearbooks, pleas rolls and commentaries of a yesteryear proved unrevealing as to the thickness of the seams and the depths of the indentations in the terrene configuration. The tyro of legalistics was unassisted by leafing through his book of theorems or scanning his table of logarithms. The table of contents of his legalistic calculus was void of precedents. In the

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1. "The first book to treat private corporations as such was the American text, ANGELL AND AMES ON CORPORATIONS, published in 1831. . . . The development took place from 1800 to 1850 along rather definite lines. The most important of these developments were: (1) the evolving of the concept of the private corporation, an organization run purely for profit, and (2) the advent of the general incorporation statutes. . . . So, at the middle of the last century, we find in existence numerous corporations, made up largely as follows: (1) many municipal corporations, of course, (2) a number of eleemosynary (non-stock) corporations, (3) most important, the quasi-public companies, (4) numerous New England manufacturing companies, and (5) a small scattering of other corporations. . . . However, it was not until 1848 in New York and 1851 in Massachusetts that we find full-fledged general incorporation statutes enacted in these two states." Wright, *The Oklahoma Corporation Law—Does It Need Revision?* 7 OKLA. ST. B.J. 224, 225-26 (1937).

"By 1850 a general law permitting incorporation for a limited business purpose had become common. . . . The first constitutional provision requiring incorporation under general laws seems to be that in the New York Constitution of 1846—Art. 8, §1." Brandeis, J., in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-49 (1933).

Following the passage of the "Bubble Act" in 1719, little encouragement was offered to new English commercial companies until the adoption of the Companies Act of 1856. See Horowitz, *Historical Development of Company Law*, 62 L. Q. REV. 375 (1946); Wright and Baughman, *Past and Present Trends in Corporation Law: Is Florida in Step?* 2 MIAMI L. Q. 69 (1947); DuBois, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720-1800* (1938).

nullibicity of a dragoman and cicerone, his scroll of hieroglyphics was fallow and unportentious in gauging the necessary contour of the flume consigned to the conveyance of the spawning progeny of the newly formulated concept of the strictly private corporation. Moreover, the lentoral emanations of judicial decisions were much too laggard and phlegmatic to effectively serve in piloting the advance of the current—surging and rampant as it gradually became—in its uncharted course through an unexplored terrane.<sup>2</sup> As a consequence, the task of gybing the masted sails guiding *The Ship Enterprise* along the crest of the turgid flow became primarily legislative.

The initial channel was narrow, the bed shallow, the course winding, the banks agee. But at repeated stages the jostling particles of the swirling crest with accelerated momentum successively gnawed away the statutory banks, experimentally established (often without plan or prediction) in an effort to confine the ever-expanding current within its course. Thereby the protractile channel was accretively widened and deepened. Recurring outpourings, progressive and more magnitudinous each time as they were, compelled new and repeated charting and recharting of the channel's course. Each periodic dilation of the statutory channel—even disregarding the accompanying substantial lag—served to establish only a degree of equilibrium and conformity between a day-to-day folk-spirit of an expanding enterprise and a temporary legal pattern.

This process prevailed unchallenged for three-fourths of a century. But the banks had proved to be less repellent in some places and more adamant in others. Consequently, the erosion varied, causing greater and greater indentations, protuberances and other deformities. Depth and shallowness, eddies and rapids jargogled the current and ruffled the flow. The repetitious process of piecemeal statutory amendments failed to buttress the banks, but instead resulted in a patched-up, clumsy, incoherent mass of shoreline.<sup>3</sup> This patch-work of incongruities hampered the verity in predicting the rate of effusion or the route of descent.

There was, in the meanwhile, a growing consciousness that the height of the headwater recorded by the water gauge of the reservoir of our rapidly

2. "Legal sanctions directing a rapidly expanding industrial economy must by necessity be shaped by legislative enactment. Court-made law is too uncertain, too slow, too unwieldy, too expensive. Judicial precedents are lacking; customs and unwritten law are scant and uncrystallized. Ancient utterances of Bracton, Littleton, Coke, and Blackstone are of little value as a guide in working satisfactory judicial solutions of modern business problems. Statutes have become the prime medium of development." Wright and Baughman, *supra* note 1, at 98.

"Most of the outstanding changes in corporation law during the last fifty years have been due to or vitally affected by the legislative enactments which have come into being during that period, and an article covering in adequate fashion these statutory developments would tell a large part of the story of what has taken place in American business corporation law during the last half century." Dodd, *Statutory Developments in Business Corporation Law 1886-1936*, 50 HARV. L. REV. 27 (1936).

3. See n.2 *supra*. See also Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U.L.Q. 350 (1937); same, 3 U. OF PITT. L. REV. 273 (1937); Wright and Baughman, *supra* note 1.

expanding modern enterprise was with equal accuracy registering the state of our social progress, and with the hand of the hydraulic meter spinning faster and faster as the water, puissant and accelerative, poured from the spillway, the need for a more efficient method of controlling and guiding its patulous course became critically evident. Before the shadows of the dawn of the present century had appreciably shortened, the concept of a scientifically planned new channel was procreated, and plans for effecting its utilization were soon in the process of preparation. With plans drafted, course platted, and incline scaled, corps of engineers promptly had in progress the construction of an imposing canal, straight in contour, expansive in width and depth, smooth of surface, uniform in declivity. Thus, after much dint and toil through a tedious period of incubation an aggressive rival to the previously unchallenged maladroit method of development of statutory corporation law was established.<sup>4</sup> By a backward glance over a short quarter-century span, we observe the first of the series of such projects completed, and the surging current being shunted into the new chasmal raceway, architectural in design and scatheless in lineament. With the evulsive process consummated, the new channel utilized, the old course plenary abandoned, we are now shifting from a parable in hydraulics to a discourse in verities.

The first step in this swing from the accretive to the evulsive method of progress in the development of statutory formulas aimed at mastering unsolved legal corporate problems was the adoption of a modern business corporation act in Ohio in 1927.<sup>5</sup> The following year the final draft of the U.B.C.A. (Uniform Business Corporation Act) was released.<sup>6</sup> The sudden lunge of this new competitor already betokened an approaching state of stern rivalry between it and the established amendatory process for mastery of this field of jurisprudence. Before this struggle for dominance got well under way, a state of vigorous emulation among the respective new modern acts was also in the offing. Thus, as these acts vied with the pseudo-orthodox amendatory process, they in turn carried on a badgering contest for supremacy among themselves.

The Ohio B.C.A. was devoid of any national organizational support. This, at least in part, accounts for the fact that no future drafts were closely patterned after it, although it did exert much influence upon future

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4. "Although the first modern corporation act was not enacted into law until nearly two decades later, as early as 1909 the National Conference of Commissioners on Uniform Laws began preparing the groundwork for such a uniform act. A 'Model Act' was finally completed and was approved and released in 1928." Wright and Baughman, *supra* note 1, at 99.

5. See Marshall, *Experiences in the Revision of Corporation Laws*, Ky. S.B.A. 138 (1929); Davies, *Reflections of the Amateur Draftsmen of the Ohio General Corporation Act*, 12 Wis. L. Rev. 487 (1937). The Ohio Act was drastically revised in 1939 (see Lattin, *Streamlining the Ohio Corporation—The 1939 Amendments*, 6 OHIO ST. L.J. 123 [1940]) and again in 1949 (see Goldman, *Recent Developments in Ohio Corporation Law*, 24 OHIO BAR 180 [1951]).

6. See *Commissioners' Notes*, UNIFORM LAWS ANNOTATED 49 *et. seq.* (1951); Wilson, *The Uniform Business Corporation Act*, 1 TEX. L. & LEGIS. 309 (1947).

code-drafting committees. On the other hand, the U.B.C.A., with the backing of the National Conference of Commissioners on Uniform Laws, moved out well in front in the harrowing marathon. Moreover, its streamlined form, logical arrangement, articulate phraseology and neoterical nomenclature seasoned it with a flavor which was strongly appealing. In rapid succession acts closely patterned after it were adopted in Louisiana (1928),<sup>7</sup> Idaho (1929),<sup>8</sup> and Washington (1934).<sup>9</sup> Furthermore, the Minnesota Act (1933),<sup>10</sup> although to a lesser degree, followed it quite closely in form and content, while Kentucky (1946)<sup>11</sup> enacted a major portion of it with numerous changes. The trend, however, during the last few years seems to indicate that the U.B.C.A. has run its course. The blight of obsolescence has forced it to drop out of the competitive race, except as a moderate factor of influence.

In 1931 California adopted a modern B.C.A.<sup>12</sup> In planning it, the architects platted a new channel, the blueprints of which revealed a tectonic design quite dissimilar to the patterns displayed in prior cyanotypes. Like

7. See Bennett, *The Louisiana Business Corporation Act of 1928*, 2 LA. L. REV. 597 (1940).

8. See Hawley, *The New Corporation Code*, IDA. S.B.A. 69 (1929).

9. See Ayer, *The New Washington Business Corporation Act*, 8 WASH. L. REV. 97 and 147 (1934); 9 WASH. L. REV. 1 (1934); *Uniform Business Corporation Act and the Uniform Stock Transfer Act*, 5 WASH. L. REV. 170 (1930).

10. See Hoshour, *The Proposed Corporation Code*, 17 MINN. L. REV. (Supp.) 113 (1932); Hoshour, *The Minnesota Business Corporation Act*, 17 MINN. L. REV. 689 (1933); 18 MINN. L. REV. 1 (1933); Solesher and Jennings, *The Minnesota Business Corporation Act*, 12 WIS. L. REV. 419 (1937); Colman and Finn, *Comparison of the Business Corporation Law of Minnesota and Delaware*, 22 MINN. L. REV. 661 (1938).

11. The Kentucky Act followed substantially the provisions of Sections 1 to 48 of the U.B.C.A., but major variations and omissions were effected in drafting the other 21 sections of the Act. Many new amendments were also added in 1948.

12. See Ballantine, *Problems in Drafting a Modern Corporation Law*, 17 A.B.A.J. 579 (1931); Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 CALIF. L. REV. 465 (1931); Loeb, *Revision of the Corporation Laws of California: State Bar Completes Important Public Service*, 19 A.B.A.J. 679 (1933); Sterling, *Modernizing California's Corporation Laws*, 12 WIS. L. REV. 453 (1937); BALLANTINE, CALIFORNIA CORPORATION LAWS (1932); BALLANTINE AND STERLING, CALIFORNIA CORPORATION LAWS (1938 Ed.); *id.* (1949 Ed.).

In the middle twenties, steps were taken to get the process of the modernization of the California corporation laws under way. Numerous amendments were made in 1927 and 1929. See Ballantine, *Legislative Developments in Corporation Law*, 15 CALIF. L. REV. 422 (1927); Ballantine, *Plans for a Modernized Incorporation Law*, 16 CALIF. L. REV. 425 (1928); Ballantine, *Changes in the California Laws (1929)*, 17 CALIF. L. REV. 529 (1929); *California's New Corporation Amendments*, 16 VA. L. REV. 833 (1930). Because of drastic constitutional restrictions placed on corporations, it was necessary to effect an amendment of the California Constitution before enacting the general code of 1931. Moreover, numerous later amendments were added to the corporation statutes, including a complete rearrangement and renumbering of the corporation laws in 1947, since that time. See especially Buhler, *The 1947 California Corporation Code—and Other Corporation Legislation*, 35 CALIF. L. REV. 423 (1947); Loomis, *California Code Amendments: Work of the 1949 California Legislature*, 23 SO. CALIF. L. REV. 12 (1949).

New or drastically revised acts were adopted in several other states at about this time. Mississippi adopted a new corporation act in 1928. Although much less comprehensive than the truly "Modern Acts," it removed many archaic provisions contained in its former statutes. See Chambers, *The New Corporation Act*, 1 MISS. L. J. 54 (1928); Roberds, *The New Corporation Act*, 2 MISS. L. J. 179 (1929). In 1929, Tennessee also

the Ohio Act, it has not served as an archetype in drafting other codes, although its provisions exerted much influence in the formulation of portions of the Oklahoma Act.

By 1933 the tournament was well under way. That year, along with Minnesota, Illinois<sup>13</sup> and Pennsylvania<sup>14</sup> also entered the contest as challengers of the supremacy of the previous entrants. The Illinois model B.C.A. evidenced the qualities, temporary at least, of a favored contender. Already the Pennsylvania Committee had procured a copy of the preliminary draft of the Illinois Act and had, with various modifications, fashioned the features of the Pennsylvania model from this appropriated blueprint. The second state to accept the pattern formulated by Illinois was Missouri.<sup>15</sup> Although the modern act adopted in 1941 by that state contained a flood of amendments, some of which were added to escape the rigid constitutional limitations which had by necessity restricted the scope of the Illinois Act, its general contour and content was shaped after the Illinois draft.

In the meanwhile, George S. Hills released a stripped-down model act in 1935.<sup>16</sup> This new version contained many advanced features, especially in the way of safeguards aimed at protecting the corporate assets against unwarranted dissipation. Then, in 1937, the Kansas<sup>17</sup> corporation laws underwent a thorough revision, establishing a degree of modernity in the statutory law of that state. While Missouri was busy introducing its new code,

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adopted a new corporation act. It followed the Delaware provisions quite closely although it was less comprehensive and many of the more liberal features of the Delaware statutes were omitted. See Fowler, *Some Features of Tennessee's 1929 Corporation Act*, 8 TENN. L. REV. 3 (1929). The same year Michigan adopted a drastically revised corporation code, containing many advanced features. See James, *The New Michigan Corporation Act*, 11 MICH. S.B.J. 187 (1931). Indiana also enacted a semi-modern, streamlined corporation act in 1929. See Dix, *The Indiana General Corporation Act*, 5 IND. L.J. 107 (1929).

13. See Johnson, *Recent Judicial and Legislative Trends in Corporation Law*, 19 A.B.A.J. 631 (1933); same, ILL. S.B.A. 189 (1933); Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. OF CHI. L. REV. 357 (1934); Little, *The Illinois Business Corporation Act*, 28 ILL. L. REV. 997 (1934); Katz, *The Illinois Business Corporation Act*, 12 WIS. L. REV. 473 (1937); Fitzgerald, *Outstanding Developments in Corporation Law*, ILL. S.B.A. 108 (1937).

14. See Shockley, *Revision of the Corporation Laws of Pennsylvania*, 11 PENN. B.A.Q. 23 (1932); Sullivan, *Development of Corporation Law in Pennsylvania*, 7 AM. L. SCHOOL REV. 1170 (1934); Metzger, *The Business Corporation Law*, 38 DICK. L. REV. 77 (1934); Shockley, *The Business Corporation Law in Operation*, 19 PENN. B.A.Q. 197 (1934).

15. See Cowherd, *A Modern Corporate Business Code for Missouri*, 14 MO. B.J. 7-8, 14-15, and 24 (1943); Kallenbach and Cowherd, *The New General and Business Corporation Act: A Report to the Association*, 14 MO. B.J. 300-2, and 304-7 (1943); Cowherd, *Missouri Modernizes Her Business Corporation Code*, 12 KAN. CITY L. REV. 89 (1944).

16. *Model Corporation Act*, 48 HARV. L. REV. 1334 (1935). Any committee engaged in drafting a modern business corporation code cannot afford to overlook the many advanced provisions suggested by Mr. Hills.

17. See Lee, *Memorandum Explaining Differences between Corporation Code and Existing Statutes*, 7 J.B.A. KAN. 260 (1939); Lee, *Some Questions Which Have Arisen in Connection with the Corporation Code*, 8 J.B.A. KAN. 352 (1940); Litowich, *Practice Under the New Corporation Code*, 10 J.B.A. KAN. 134 (1941).

Nebraska,<sup>18</sup> in 1941, was also engaged in effecting a modernization of its corporation statutes. The Nebraska Act, subject to required modifications owing to restrictions in the Nebraska Constitution, followed closely the Delaware statutes.

With the addition of Kentucky to its list in 1946, the U.B.C.A. had marshalled a total of five adherents, counting Minnesota as such, while the Illinois B.C.A. could claim but two (three, by including Illinois). But efforts to breathe new life into the lagging influence of the latter were then well under way. The original Illinois draft had been prepared by a committee consisting mainly of representatives of the local Chicago bar, with the very able Mr. Millard B. Kennedy serving as chairman. In 1940 the personnel of this local committee assumed a new role.<sup>19</sup> With little change in membership it had become the Committee on Business Corporations of the American Bar Association, with Mr. Kennedy continuing as chairman. The Committee, operating under this new banner, revised the 1933 Illinois draft, and in its refurbished form, released it as a "Model for State Business Corporation Acts" of the American Bar Association in 1946.<sup>20</sup> The new version was more or less a restatement of the former act. Some of the restrictions which had been necessary in the Illinois Act in order to conform to the constitutional limitations in that state were eliminated. One desirable change in terminology was made by substituting "capital surplus" for the term "paid-in surplus." Some other additions and omissions were effected, but the process was largely a matter of re-editing, principally by rearrangements in phraseology; the general contour remained unchanged. The new product was little more than a revision by the Committee of its own draft enacted in Illinois thirteen years earlier. As later expressed by Mr. Ray Garrett, who had been advanced from a member of the Committee to the

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18. See Richie and Vold, *The General Corporation Law of Nebraska*, 21 NEB. L. REV. 197 (1942).

19. "Members of the Committee at that time [1943] were Alphonse A. LaPorte of New York, Charles N. Orr of St. Paul, and Millard B. Kennedy, Whitney Campbell and myself of Chicago. The drafting devolved upon the Chicago members who obtained approval of the other members through correspondence." Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAWYER 1 (1950).

"It must be said that the Committee of the Chicago Bar Association wrote the law in all of its essential provisions." Little, *The Illinois Business Corporation Act*, 28 ILL. L. REV. 997 (1934).

20. "Upon the completion of the Federal Act, the Committee was requested to prepare a similar act suitable for state use. After three more years of study, an initial draft was submitted in a report to the Section [of Corporation, Banking and Business Law of the American Bar Association] in 1946 and published under the title 'Model for State Business Corporation Acts.' The members of the Committee whose names appeared in that report were Professor William E. Britton of Illinois, Frederick W. Brune of Baltimore, Professor E. Merrick Dodd of Harvard, George C. Seward of New York, Greenberry Simmons of Louisville, Professor John E. Tracy of Michigan, and the three Chicago members [see note 19] already mentioned. Again, the drafting devolved upon the Chicago members, who consulted the other members largely by correspondence . . . . When the initial draft of the Model Act was reported to the Section, the Committee knew that it was incomplete in some respects and required much further intensive study and careful editing." Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 BUS. LAWYER 1 (1950).

chairmanship upon the death of Mr. Kennedy in 1947, "The drafting devolved upon the Chicago members who obtained approval of the other members through correspondence."

This revision did not seem to materially enhance the prestige of the original draft of the 1933 Illinois Act. Its promulgators, with some feeling of disappointment over their first revisionary attempt, immediately undertook a second diastemesis of the draft. The draft in its newly-revised form was released late in 1950 as the "Model Business Corporation Act (Revised)," by the American Bar Association.<sup>21</sup> This second revision composed another still more drastic process of re-editing consisting largely of a rearrangement of the context and phraseology. Only a few further changes in substantive content were effected, although some minor additions were made—especially in expanding the general corporate powers.

This 1950 reburnishment, coupled with the vigorous national support of the American Bar Association,<sup>22</sup> seemed to inject into the re-revised draft

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21. "Following Mr. Kennedy's death the Committee was reorganized, and assumed the task of editing and completing the initial draft. In the process, the entire Act has been revised and improved in language, coordination, style and arrangement. The result is the Model Act now before you. . . . The Chicago members again have acted as drafters of the revisions. . . . The three professors who were formerly members of the Committee felt obliged to retire some months ago and we have not had the benefit of their recent council and advice." *Ibid.*

22. There was a wide distribution of the November, 1950, issue (Vol. VI, No. 1) of the *BUSINESS LAWYER* (published by the Corporation, Banking and Business Law Section of the A.B.A.), carrying the full text of the 1950 Model Business Corporation Act, along with an enthusiastic introduction, entitled "History, Purpose and Summary of the Model Business Corporation Act," by the Committee Chairman, Mr. Garrett. On page 2 of his introduction, Mr. Garrett states, "Others may be assured that it is impossible to study and compare the statutes of all 48 states and, because of their wide diversity, almost impossible to select a mere few for the purpose."

In response to that, this author wishes to state that he, in preparing the Oklahoma draft, read, analyzed, and carded every provision in every section and subsection in all of the corporation statutes in 59 jurisdictions. The 17,000 summary cards completely covered the corporation statutes of the 48 states, the District of Columbia, and the four territories (Alaska, Puerto Rico, Hawaii, and Philippine Islands), and the Companies Acts of England, New Zealand, New South Wales, South Africa, India, and Canada. The cards were assembled according to subject matter, and no provision of the Oklahoma Act was drafted without having all of the cards relating to any matter pertaining thereto in the 59 jurisdictions spread out on a table and examined before reducing the provision to writing. See Wright, *The Proposed Florida Business Corporation Act—The Modus Operandi Employed in Preparing It and Other Similar Modern Codes*, 26 FLA. L.J. 259 (1952).

Mr. Garrett further states, "The Committee believes that the organization of subject matter in the Model Act is the best that can be devised." Further, on p. 5, he says, "There is no existing corporate statute comparable to the Model Act on this subject." Garrett, *History, Purpose and Summary of the Model Business Corporation Act*, 6 *BUS. LAWYER* 1 (1950).

This author is not a novice in drafting corporation codes, and he frankly admits that he does not believe that a single section that he has ever drafted has reached the *ultimate* and is "the best that can be devised." Nor does he agree with the second statement of Mr. Garrett.

The A.B.A. Committee seems to have dominated the Wisconsin Committee in preparation of the Wisconsin Act. That Committee's report (*The New Wisconsin Business Corporation Code: Comments by Drafting Committee*, 24 *WIS. B. BULL.* 30 [1951]) repeats much of the identical matter set out in Garrett's introductory statements.

The A.B.A. Committee seems to have exerted a like influence over the Texas



a more vigorous appeal, although its form and substantive content varied only slightly from the original 1933 Illinois Act. The original release of the U.B.C.A. antedated the Illinois Act by five years. However, the National Conference of Commissioners on Uniform Laws had failed to offer any form of a subsequently-revised draft.

This "new appeal" of the Illinois Act resulting from this added impetus seems to have supplied the Illinois progeny with the differential necessary for crowding out the early competitors. Although a Wisconsin committee, headed by Dean Lloyd K. Garrison of the University of Wisconsin Law School,<sup>23</sup> labored diligently through the middle thirties on a new business corporation draft for that state, the 1951 Wisconsin Legislature brushed that work aside and adopted without appreciable changes the A.B.A. revised version of the 1933 Illinois Act.<sup>24</sup> Also, the Maryland business corporation laws were thoroughly revised last year. The Maryland Committee, in preparing its new draft, relied heavily on the A.B.A. Model Act for its advanced provisions, but carried over, in revised form, a large portion of the provisions of the former Maryland statutes.<sup>25</sup>

In this field, as in the sphere of business, new competitors were certain

Committee. Mr. Carrington, Chairman of the Texas Committee, is also a member of the Committee on Corporate Laws of the A.B.A. In the letter addressed "To the Lawyers of the State of Texas," as an introduction to the *Proposed Texas Business Corporation Act, Revision of October 12, 1951*, the Texas Committee states (p. IV), "In April we had the benefit of spending two full days in discussion of the draft, article by article, with the members of the American Bar Association Committee heretofore mentioned, who came to Dallas for that purpose." Moreover, the A.B.A. Committee, upon hearing that Florida was considering the adoption of a modern business corporation code, wrote to this State urging that the A.B.A. Committee should help formulate the Florida proposed draft.

It is suggested that the American Bar Association is rendering a distinct disservice in its effort to choke off any further attempts to improve upon the development of statutory corporation law. The conceptual paragons of Ballantine and Dodd, Garrison and Crane, Jennings and James are more than a genre of a fabliau. Any concerted effort to beset or screen their etchings can but hamper a progressive statutory development. See CARDOZO, *THE GROWTH OF THE LAW*, pp. 11 *et seq.* (1924). Furthermore, the Committee on Continuing Legal Education of the American Law Institute has joined in the promotion of the A.B.A. Model Business Corporation Act. That committee's method of "continuing legal education" may meet with some opposition of the legal educators in the field of corporation law.

23. See Garrison, *Proposed Redraft of the Wisconsin Corporation Laws*, 12 Wis. L. Rev. 417 (1937).

24. "On August 6, 1951, the Governor signed Bill 763-S which enacts the new Business Corporation Code for Wisconsin recommended to the Legislative Council by committees of the State and Milwaukee Bar Associations. . . . The Code does not become effective as to Wisconsin corporations until July 1, 1953, unless prior to that date they elect to become subject thereto. New corporations may be organized under either the present law or under the new code until July 1, 1953." *The New Wisconsin Business Corporation: Comments by Drafting Committee*, 24 Wis. B. BULL. 30 (1951). See also Young, *Some Comments on the New Wisconsin Business Corporation Law*, 1952 Wis. L. Rev. 5.

25. Although the Maryland Act approaches an entirely new corporation code, owing to the fact that not more than 25 to 30 per cent of its content is new to the corporation laws of that state, it can better be classified as a "drastic revision." Some 40 or 50 per cent of the new matter comes from the A.B.A. draft, while the balance of the new provisions in part came from other sources and in part was formulated by the drafting committee. Thus, something like 12 per cent of fresh content came from the A.B.A.

to crop up. The latest rival in this realm was the 1947 Oklahoma B.C.A.<sup>26</sup> Although it was not afforded institutional support, such as the national backing supplied to the U.B.C.A. and A.B.A. Act by the National Conference of Commissioners on Uniform Laws and the American Bar Association, respectively, it may prove to be a worthy contestant. If this presumption is well-founded, the Illinois Act (as refurbished and supported by the A.B.A.) and the Oklahoma Code appear to be the only remaining principal contenders. Although the Oklahoma Act differs drastically in scope, form, arrangement, content, and nomenclature from any other one act, the rivalry results quite largely from the difference in the *modus operandi* employed in drafting the respective acts. Since this author has had an occasion to comment on the elaborate methods utilized in drafting the Oklahoma Code,<sup>27</sup> only a brief description of that process will be made herein.

The drafts of two new modern business corporation acts are now reposing in the hands of legislative interim committees of Florida<sup>28</sup> and Texas<sup>29</sup> awaiting consideration by the 1953 sessions of the respective legislatures. In the one instance, the committee that prepared the Florida draft has employed the same methods as followed in formulating the Oklahoma Act, while, in the other, the Texas Committee has resorted to a much simpler process. The latter committee selected the American Bar Association's 1950 version of the Illinois Act as the basis for its new act. It then, section by section, went through it, making revisionary changes by weaving

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provisions. The Act evidences a vigorous attempt by the Maryland Committee to formulate a code suited to the needs and traditions of Maryland.

26. The Oklahoma Act, like the proposed Florida B.C.A., is more in the nature of a "code" than a single "act." The aim of the Committee was to fully codify the general law relating to corporations. The scope of the code is articulate and comprehensive. However, the Oklahoma Act, as adopted by the Legislature, falls far short of being a "model" for a 1953 code. In fact, at the time of its enactment it was not in the best possible form. This resulted from several causes, viz., (1) many provisions were products of committee compromises, (2) several matters were by-passed owing to the fact that the Committee was unable to formulate provisions acceptable to a committee majority, (3) local concepts, (4) constitutional limitations not common in other states, (5) inconsistencies resulting from ill-advised amendments added by the legislators, and (6) future needs were not adequately anticipated.

27. Wright, *The Proposed Florida Business Corporation Act — The Modus Operandi Employed in Preparing It and Other Similar Modern Codes*, 26 FLA. L.J. 84 (1952).

28. The proposed Florida Act was introduced in the 1951 Session of the Florida Legislature, but, owing to the pressure of prior pending legislation, time did not permit a thorough study of the proposed code by the legislators. As a result, Concurrent Resolution No. 15, commending the work of the Committee and placing the draft in the hands of a joint committee for study and recommendation to the 1953 Session of the Legislature, was jointly adopted by the two Houses.

29. "As the only interim committee of the Texas Legislature, appointed at its last session, a strong committee on the subject is headed by John Ben Sheppard, Secretary of State. On this committee are seven lawyer members of the House appointed by the Speaker, and seven members of the State Bar Committee appointed by the Governor." State Bar Committee, *Corporation Act*, 14 TEX. B.J. 653 (1951).

See also State Bar Committee, *Revision of Corporation Laws*, 14 TEX. B.J. 345; Carrington, *Business Corporation Act*, 14 TEX. B.J. 399; Balsheim, *The Need for Revising the Texas Corporation Statutes*, 27 TEX. L. REV. 659 (1949); Baily, *Need for Revision of Texas Corporation Statutes*, 3 BAYLOR L. REV. 1 (1950); Bickel, *What a Model Corporation Act Should Contain* (Address), 13 TEX. B.J. 183 (1950).

in many provisions, in so far as deemed desirable, from the existing statutes of Texas and a few other states.<sup>30</sup> In nomenclature, form, arrangement and scope, it substantially follows the 1933 Illinois Act. Moreover, not to mention the current and predictable future demands of modern enterprise, it, in substantive content, reveals very little of the evolutionary progress in the development of statutory law during the last two decades.

Owing to the fact that the proposed acts of Florida and Texas are in the same stage of advancement, the lines of distinction between the Florida and Texas drafts will be hereinafter analyzed and compared. However, since the Wisconsin Act followed the A.B.A. draft more closely, the picture of these two theories of code drafting possibly might be slightly more clear-cut if we were to contrast the Florida draft with the Wisconsin Code.

Since the functional purposes to be attained in the formulation of a modern business corporation code has been adequately set out by this and other authors in previous comments,<sup>31</sup> that matter will be mentioned only casually here. However, there are what we might call *general objectives* which are to be pursued in formulating a comprehensive modern business corporation act. It is the belief of this author that *three* such general objectives must serve as the ultimate goal in such an undertaking. The first of these objectives should be to comb the entire field of statutory corporation law,<sup>32</sup> and, after analyzing, evaluating and sorting out the most accurate and complete existing concepts, to restate them in the best possible form and phraseology. The second step should be to study the new problems and

30. In addition to the A.B.A. and Illinois Acts, the Texas Committee lists statutes serving as sources of its provisions as follows: Texas 25, Ohio 7, Delaware 6, Oklahoma 6, New York 3, California 2, and Colorado, Maryland, Pennsylvania, Virginia, and Wisconsin 1 each. The Committee could well afford to give more attention to the U.B.C.A., Hills's Model Act, and the Oklahoma Code.

31. "The ideal corporation act should have the following characteristics: clarity, completeness, flexibility and adequate protection of the interests of the public and of minority shareholders against abuses of corporate power. The act should be clear so that practicing lawyers will not have to guess at its meaning nor indulge in litigation to obtain interpretations. It should be complete in the sense that it furnishes to lawyers and businessmen answers to all corporate questions for which statutory provision is feasible. It should be sufficiently flexible to meet the modern needs of business, but still provide adequate protection against abuses of corporate power." Bickel, *What A Model Corporation Act Should Contain*, 13 *Tex. B.J.* 183 (1950).

"A good corporation statute should observe the following principles: 1. . . . consistency. 2. . . . flexibility consistent with safety. . . . 3. . . . even balance between freedom of administrative control and safety for the shareholders' investment. 4. . . . safety of the shareholders' investment . . . not . . . at the expense of the . . . public. 5. Safeguards for shareholders and creditors . . . not constitute dangerous pitfalls for . . . shareholders. 6. . . . requiring intelligence, fidelity, and honesty in the administration . . . not scare away the very qualities it seeks to promote. 7. . . . preserving the just rights of the minority shareholders, . . . not . . . sacrifice the just rights of the majority. 8. . . . protecting creditors . . . not permit . . . destruction of the shareholders' property by . . . creditors. 9. . . . couched in language so precise that little is left for judicial interpretation." Little, *The Illinois Business Corporation Law*, 28 *ILL. L. REV.* 997, 998 (1934).

See also Wright, *Protection of Creditors Under the Proposed Florida Business Corporation Act*, 6 *MIAMI L.Q.* 192 (especially note 2) (1952).

32. Note the procedure set out in Wright, *The Proposed Florida Business Corporation Act—The Modus Operandi Employed In Preparing It and Other Similar Modern Codes*, 26 *FLA. L.J.* 259 (1952).

tension-points revealed by current cases, commentaries and commercial and industrial demands, and to draft provisions in an effort to work out a statutory solution as to each of these new problems, along with the older questions and queries remaining only partially answered or completely unsolved. The third objective is to be accomplished by making as complete a study of possible future trends in the evolution of the needs of our modern-day enterprise and then by projecting the mind out into the future try to develop statutory formulas which would at least give the businessman and industrialist a hint or clue for aiding them in predicting how they may safely proceed in meeting the problems in the offing as they arise.<sup>33</sup>

This broader theory was pursued in the formulation of the Oklahoma and Florida drafts, while all of the other drafts promulgated since Hills's Model Act of 1935 have been aimed almost entirely at accomplishing only the first of these objectives. In fact, Wisconsin did not attempt that much. The Wisconsin Committee made no endeavor to examine the entire field of existing statutory corporation law; nor was any effort made to sift out the best available provisions and weave them into a new formulation of statutory principles. It merely seized upon the A.B.A. 1950 draft and accepted it as the ultimate<sup>34</sup> and adopted it with few material changes. Thus, the Wisconsin Act cannot be considered as an up-to-date restatement of modern statutory corporation law. It was tainted with a shade of obsolescence at the date of its inception. The Texas diascuasts have accomplished a more pronounced revision of the A.B.A. draft, although it also falls far short of a truly modern synoptical corporation code.

On the other hand, the Oklahoma Committee started off by carding every provision in the corporation statutes of fifty-nine Anglo-American jurisdictions, along with the U.B.C.A. and Hills's Model Act. Not a single section, subsection, or provision of the preliminary draft was formulated without first examining and studying all the cards of the 59 jurisdictions that were assembled on the point involved. Moreover, included in this collection, were thousands of cards on case-materials and commentaries shedding light upon each provision drafted. Although the cards relating to the provisions in the modern acts were scanned most carefully, the source of the concepts adopted, along with the phraseology employed in expressing them, were not limited to any one particular source. Furthermore, all of the leading authorities skilled in the drafting of corporation codes were called upon to lend suggestions, constructive criticisms and other assistance in shaping the contents and arrangement of the subject matter in the proposed

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33. Lacking legal formulas to serve as a guide, modern corporations are placed in a position similar to what a football team would face if it were to be engaged in a game before the rules of the game had been formulated and a rule book compiled. It would be awkward indeed to proceed with a football game, leaving the governing regulations to be formulated after alleged infractions had been committed. It certainly would slow up the game. Is the result not the same with corporate enterprise?

34. See Young, *Some Comments on the New Wisconsin Business Corporation Law*, 1952 Wis. L. Rev. 5, 6.

code insofar as they could be induced to collaborate in the undertaking. Something like two-score of experts, including several members of the original Illinois Committee,<sup>35</sup> contributed valuable suggestions. As a result, the draft was much more comprehensive, more universal, more modern than it would otherwise have been.

The same method has been reemployed in formulating the Florida proposed draft except that the time element did not permit a general solicitation of criticisms and suggestions concerning its form, content, etc., by outside authorities. Professor Ballantine alone was called upon for assistance in aiding the Committee in its decisions on some controversial points. It must be born in mind, however, that the Florida draft is more than a diaskeuasis of the Oklahoma Act. All new developments, since the preparation of the Oklahoma draft, in the entire fields of statutory corporation law of Florida and the other fifty-eight jurisdictions and the four model acts (the U.B. C.A., Hills's and the 1946 and 1950 A.B.A. drafts) were analyzed and evaluated. Later comments and cases were examined, and problems, recent, current, and anticipatory, were fully considered. A few new features were borrowed from the 1950 A.B.A. draft<sup>36</sup> and from the more recent amendments in other acts. The general subject matter was rearranged and many new formulas were devised to serve as a guide in meeting new problems, present and of the near future. If no new developments concerning the particular topic, actual or anticipated, were discovered, corresponding provisions of the Oklahoma Act were transplanted without change, while others were restated so as to better conform to more recent concepts, and to meet new or changed circumstances. Accordingly, the Florida draft is more than a hash-over of the Oklahoma Act. Portions of the Oklahoma draft considered as questionable or unfitted to the legal and practical conditions of Florida were deleted, others were re-drafted, and many new features, untouched in other acts, were added. This draft is now undergoing a final revision so that it will in fact be a 1953-model when presented to next year's legislature.

Corporate management has been free in its criticism of law as being laggard. Such criticism is well-founded. *Uncertain* corporation law is *bad* law. If corporation laws are spotty, vague, and uncertain corporate management is stymied, and commerce and industry are retarded. Unnecessary litigation, with its attending expense and uncertainty, is shunned by corporate administrators. It must be kept in mind that, in the absence of a degree of predictability as to the legal consequences that may follow an act, corporations generally refrain from proceeding.

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35. The late Mr. Millard B. Kennedy, Chairman of the Illinois Committee, extended considerable assistance by personal interviews and correspondence. The extended assistance by the members of the Committees of California, Ohio and Minnesota was also of indispensable value.

36. Principal among these were the extension of the power of corporations to contribute to wartime, civic and eleemosynary activities. However, the Florida provisions are much more comprehensive than those found in the A.B.A. draft.

Enterprise is closely geared to the new developments in science and inventions. At least, the lag is slight. Accordingly, statutory corporation law should be kept, as nearly as possible, abreast of our commercial and industrial progress. This, it has tragically failed to do. Modern enterprise has progressed further since the adoption of the original Illinois B.C.A. than it had advanced during any previous period twice as great in length. Observe the various industrial advances in the various fields—aircraft, automotive, ordnance, radar, communications, refrigeration, air-conditioning, television, atomic power, etc. Today no automotive or aircraft company would consider reproducing a 1933-model craft. More than a reburnishing of the ancient model would be required if current demands were to be met. The principal fallacy in the procedure of the Texas Committee resulted from the selection of a draft, to a degree already obsolete, as a basis for its new work. If cyanotypes of previous decades do not serve as patterns in the aircraft or automotive industries, likewise, obsolete concepts have no place in shaping a modern corporation code. It is better to wipe the slate clean, start from scratch, select the best from every possible source, and build anew. Let's now shift from generalities to a more detailed comparison of the salient features of these two proposed acts.

*a. Form and Arrangement*

The *form* of the Florida and Texas drafts are not too dissimilar, except that the latter breaks the subject matter up into Parts, Articles, Sections, Paragraphs, and Subparagraphs while the corresponding subdivisions of the Florida Act are labelled Articles, Sections, Subsections, Paragraphs, and Subparagraphs. The Texas Act has only 136 articles (sections), while the Florida Act consists of 246 sections. The individual sections in the Florida draft are longer and more comprehensive on the average than are the articles in the Texas Act. However, the difference in the volume of the two codes results primarily from two other causes, viz., the Florida Act has incorporated in it the Uniform Stock Transfer Act, in revised form,<sup>37</sup> and seventy-five or more sections deal with new matter. Nearly a third of the Florida Code relates to current problems, many of which are entirely new in statutory law, while many others have not heretofore been reduced to statutory formulas except in the Oklahoma Act.

The principal difference in the *arrangement* of the two proposed acts is that the Texas draft attempts to separate the *substantive provisions* from the rest of the Act, placing 44 articles (sections) in Part Two. This would

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37. Sections 93 to 123 deal with the transfer of shares and certificates evidencing interests in shares. The Uniform Stock Transfer Act was drastically revised and incorporated into the Oklahoma B.C.A. See Sections 1.85 to 1.110 and 1.114 to 1.120 of 18 OKLA. STAT. ANN. The Oklahoma provisions on share transfers were again revised and made a part of this Act. Subsection *a* of Section 114 of this Act has revised and substituted 18 FLA. STAT. ANN. § 614.24 for 18 OKLA. STAT. ANN. § 1.109 (U.S.T.A. § 23), extending the application of the Act to shares whether allotted before or after this Act becomes effective and to share option warrants or other certificates evidencing the ownership or authority to represent shares.

seem to be undesirable as it is hard to say what provisions are "substantive" and what ones are "procedural." A careful examination of the Texas draft reveals that there are substantive and semi-substantive provisions scattered throughout the draft and many procedural matters are found in the substantive part. Only the Illinois Act and a few of the other acts patterned after it have followed this arrangement. The general arrangement used in the Florida draft and in the statutes of most jurisdictions is to follow a logical sequence in the arrangement of the subject matter closely corresponding to the developmental steps through which the life of the corporation passes. Except for the effort of trying to segregate the so-called "substantive provisions," the Texas Act pursues such a general plan of arrangement.

*b. Nomenclature*

The Florida Act utilizes many modern terms which are not used in the Texas draft. In the following contrast of corresponding terminology of the two drafts, the term used by Florida is set out first, followed by nomenclature employed by Texas: *allotment*<sup>38</sup> of shares, *issuance* of shares; *domestication*<sup>39</sup> of a foreign corporation, *procurement* by a foreign corporation of a *certificate of authority to transact business in this State*; *certificates evidencing*<sup>40</sup> shares, *certificates representing* shares; *attributes*<sup>41</sup> of shares, *designations, preferences, limitations and relative rights of shares*; *constituent corporations* of a merger or consolidation, *the several corporations parties to the plan* of a merger or consolidation; *resulting corporation* of a consolidation, *new corporation* of a consolidation. Both drafts use *surviving corporation* when referring to a merger. Also, both employ *shares* instead of *stock* and

38. The terms "allot" and "allotment" are employed in the Uniform Act, the Business Corporation Acts of Idaho, Kentucky, Louisiana, Minnesota, Oklahoma, Washington, and the Companies Acts of England and the English Commonwealths. "Issue" is an ambiguous variable. Note the various meanings of the term in the following phrases: *issue orders, issue process, issue bonds, issue share certificates, issue shares, issue writs, date of issue, general issue, collateral issue, feigned issue, common issue, birth of issue, issue in fact, issue in law, issue roll, issues and profits, and issues on sheriffs*. Confusion often arises in such legal expressions as "issue of stocks and bonds." Does "issue" there mean "allotment of the stocks" or "issue of the share certificates?" See note 66, *infra*. The Texas courts have construed "issue of stock," as used in Tex. Const., Art. 12, § 6, to mean *issue of the share certificates*. The term "allot" avoids such confusion.

39. "Domesticated" and "domestication" as applied to corporations is easily understood and adds brevity. These terms are common in legal language, and are employed in the Oklahoma Act and in legal parlance in many other states.

40. "Evidencing," when used in relation to share certificates, is more accurate in meaning than "representing." The California, Oklahoma and Florida Acts define the phrase "to represent shares" as meaning "to vote, to give written consent to corporate action, to dissent thereto, and/or to execute waivers of notices of shareholders' meetings." Applying such a definition, it would be incorrect to say that the share certificate "represents" the shares. As to the other terms and phrases contrasted, the matter resolves itself into a question of choice, as in each instance the different forms of terminology are in common use. The Florida Committee chose the terms combining greater clarity with brevity.

41. The term "attributes" is a novation in the Oklahoma Act and the Florida draft, serving the purpose of a general term to promote brevity.

each also follows quite generally the other nomenclature used in the other modern acts.

*c. General Content*

The Texas short title reads: "This Act shall be known and may be cited as the 'Texas Business Corporation Act'," while the short title of the Florida draft states: "This Act shall be known, and may be cited, as the 'Florida General Corporation Act', and is hereinafter referred to as 'this Act'." It is to be noted that in revising the Florida preliminary draft the term "General" has been substituted for "Business" in the title. The scope of the Florida Act is broad and general. It applies to all types of corporations, profit and non-profit, insofar as special provisions elsewhere in the statutes do not conflict with its terms. The law of corporations can well be contained in two chapters of the statutes. The first chapter should include *all* of the provisions relating to business corporations. There is no need for duplication. Therefore, to the extent that the provisions of this chapter are equally applicable to other corporations, the provisions should be extended over so as to govern all general matters relating to other types of corporations as well. Then, the second chapter should be broken up into articles dealing with non-profit, insurance, indemnity, banking, etc., corporations, and trust companies, credit unions, building and loan associations, cooperatives, etc., respectively. Each of such articles should only deal with matters specially relating to such type of corporation, etc., respectively, allowing all general matters concerning all corporations alike to be regulated by the first chapter. The drafting of the second chapter in Florida will follow immediately the adoption of the General Act. Then, in the future as any new class of corporation requiring special provisions is provided for, another article containing necessary special provisions may be added to the second chapter. The need for reducing the special provisions relating to the respective special types or classes of corporations to up-to-date form and content is equally as imperative as the formulation of a general corporation act.

The lengthy explanation of the divisions and subdivisions in framing the Act, as set out in Article 1 of the Texas Act, seems to be redundant. A glance at the Act reveals the divisional arrangement.

Section 2 of the Florida Act defines a total of 32 terms, while Article 2 of the Texas Act contains only 16 definitions. The Texas Committee could well afford to redraft several of its definitions and omit several others. "Corporation" and "domestic corporation" are defined as one and the same. Still the generic term, "corporation," is used over and over in the Act when not referring to domestic corporations. Notice, for instance Article 107. In the next definition, a "foreign corporation" is referred to as a *corporation*. Therefore a *foreign corporation* means a *domestic corporation* as the terms *corporation* and *domestic corporation* are defined as the same.

Florida defines "corporation," "domestic corporation," "foreign corporation," "domesticated corporation," "existing corporation," and "existing



domesticated corporation." If a term has a variable meaning, is not substantive, can be reduced to an accurate definition, and is used more than once in the Act, the verbiage will be reduced by defining it. If it is used but once, it can be defined where used. The 32 terms defined in the Florida Act are repeated several times in the Act. The Florida Committee felt that some terms such as "articles of incorporation" (which Texas defines) can well be omitted from the definitions section as the articles and their contents are fully described in the Act. Other terms defined by Florida, but not by Texas, are "promotion," "promoter," "incorporator," "allotment," "alotted shares," "outstanding shares," "series," or "series of shares," "pre-emptive right," "share certificate," or "certificate of shares," "to represent shares," "cumulative voting," "director," "dividend," "share dividend," "dividend preference," "redemptive price," "liquidation preference," "liquidation price," "assets," and "publication notice."

Florida defines a "subscription" as a *contract*, while Texas defines it as a piece of paper, viz., a *memorandum in writing*. Under the Texas Act, according to the definition, a *subscription* is only an offer and there could not be such a thing as a binding subscription contracted after incorporation. What is it if it isn't a subscription after an acceptance under Article 16, C? The Texas definitions of "subscription" and "subscriber" are indeed confusing. They should be either redrafted or omitted. In the Texas Act, "authorized shares" means the shares of all classes which a corporation is authorized to issue." In other words, "authorized shares" means "shares authorized." It is bad form to use the term defined in defining the term. Texas inaccurately defines "net assets," as there are deductions other than *debts*. Also, its definition of "insolvency" is faulty. A corporation may not be able to pay its debts the instant they become due and still not be *insolvent*. Suppose a debt becomes due at 3 P.M. on Friday and the corporation has a million dollars in a safety deposit box at a bank and the bank had closed for the weekend at 2 P.M. Moreover, a corporation might be insolvent when it is able to pay all its "debts as they become due" as there are many financial obligations other than debts. The accounting terms defined in the Texas Act are largely substantive and are variables which do not lend themselves to one accurate definition.<sup>42</sup> The Florida Committee did hazard the definition of "assets," by stating that "assets" means all of a corporation's properties and rights of every sort capable of being listed or estimated in terms of monetary value. This definition might offer some aid. At least, it is believed to be accurate. The Texas definition of "stated capital" is substantive and duplicates substantive provisions over in the Act. See Article 19.

42. Mr. Fletcher Lewis of the Illinois Committee, while collaborating with the Oklahoma Committee in the preparation of the Oklahoma B.C.A., in a letter of April 10, 1938, to this author, had this to say: "I should be inclined to proceed very cautiously in making any statutory definition of *earned surplus*. The American Institute of Accountants as yet, after some years of study, has not been able to agree upon a satisfactory accounting definition of earned surplus, and to get a hard and fast statutory rule is likely to lead to difficulty."

The scope of the Texas Act is limited to corporations run for profit other than banks, trust companies, insurance companies, cemetery companies, cooperatives, and labor unions.<sup>43</sup> Would it not be better to not except these, but instead deal with them as planned by Florida?<sup>44</sup> Many of the provisions in a business corporation act are apropos in providing statutory direction guiding and regulating other corporations and associations.

Section 4 of the Florida Act provides for the survival of existing corporations, and Section 5 brings all existing corporations under the terms of the Act. The failure of the Texas Act to include such provisions may lead to much confusion in that state. Section 7 of the Florida Act reserves to the legislature the power to alter, revoke, etc., corporate powers, rights, privileges and/or immunities of a corporation insofar as such are granted to it by the state. However, such reserved power can only be exercised when required by public policy and not when vested constitutional rights are thereby impaired. Nor can the state exercise any such reserved power in taking part in any disputes among groups within the corporation. Since the Texas Act contains no such limitations, it is possible that the Texas courts may allow the articles to be amended by the majority shareholders so as to forfeit accrued cumulative dividends of minority preferred shareholders. That uncertainty should be removed by adequate provisions. The Act at least reads that way, even though the Texas courts might hold that a delegation of such arbitrary power would be unconstitutional.<sup>45</sup> At best, uncertainty would prevail, and, if the provisions are upheld, a vicious circumstance would be

43. Art. 3.

44. Section 3 makes the Act applicable to all types of corporations except insofar as other statutory provisions specifically exclude special types or classes thereof.

45. The Texas Act in Article 53, Section B, provides: "In particular, and without limitation upon such general power of amendment, a corporation may amend its articles of incorporation, from time to time, so as:

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"(11) To cancel or otherwise affect the right of the holders of the shares of any class to receive dividends which have accrued but have not been declared.

"(12) To divide any preferred or special class of shares, whether issued or unissued, into series and fix and determine the designations of such series and the variations in the relative rights and preferences as between the shares of such series."

"One writer stated over twenty years ago that 'few branches of corporation law are in a more confused and unsatisfactory state than that relating to the right of minority stockholders to prevent amendments to the corporate charter, to which they have not given their assent, from being operative.' (Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. OF PA. L. REV. 585 [1927]). Unfortunately, the statement is still apropos today." Hart, *The Right to Accrued Cumulative Preferred Dividends*, 10 OHIO S.L.J. 383. (1949).

The scores of articles, comments and casenotes appearing in the legal periodicals evidence a grave concern as to the recklessly uncertain state of this phase of corporation law. One writer in particular has made an elaborate study of the general problems involved. See following articles of Arno C. Becht: *Power to Remove Accrued Dividends by Charter Amendment*, 40 COL. L. REV. 633 (1940); *Corporate Charter Amendments: Issues of Prior Stock and Alteration of Dividend Rates*, 50 COL. L. REV. 900 (1950); *Changes in the Interests of Classes of Stockholders by Corporate Charter Amendments Reducing Capital, and Altering, Redemption, Liquidation and Sinking Fund Provisions*, 36 CORNELL L.Q. 1 (1950); *Alteration of Accrued Dividends*, I, 49 MICH. L. REV. 363 (1951); *Alteration of Accrued Dividends*, II, 49 MICH. L. REV. 565 (1951).

created. As a protection to the investor in cumulative preferred shares and to retain future ready marketability of such shares, such confiscatory powers should only be exercisable when specifically so provided in the articles.<sup>46</sup>

Florida has authorized corporations to be organized "for any lawful purpose" since its 1868 Act. Heretofore, Texas has permitted incorporation only for specified purposes. Its proposed Act conforms to the general any-lawful-purpose rule found in all other states except Montana.

Both Acts extend to domestic corporations very broad general powers. The Texas Act includes the power "to make donations for the public welfare or for charitable, scientific, or educational purposes and in time of war to make donations in aid of war activities," and "in time of war to transact any lawful business in aid of the United States in the prosecution of the war." The Florida Act has similar provisions, except that it extends the power to aid in time of war to "the State or United States, or any subdivision thereof." It also validates such powers as to such previous acts. Moreover, it empowers the corporation to cooperate in or contribute to "boards of trade, chambers of commerce, commercial clubs, employee credit unions, company pension plans, annuity plans, or bonus plans . . . and that its directors or trustees may appropriate and expend corporate funds for any of such purposes as they deem expedient, and as in their judgment will benefit or contribute to the corporation or public welfare." The Texas Act does not deny corporations the power to make donations for political purposes, while the Florida Act does. The Florida Committee is debating whether it should specifically extend general corporate powers to reimburse corporate officers who are free from negligence or misconduct for expenses in defending derivative suits. Texas has included such a provision.

The two Acts differ widely on the power of a corporation to purchase its own shares. The Florida Act sets up minimum standards regulating such

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46. "If there is any economic reason for having preferred stock in the first place, there is also, it seems, every reason for keeping it preferred after it is sold, and for preserving it from losses which other classes have bargained to bear. Unless protection, both legislative and judicial, is given to it, it is greatly feared that preferred stock will become as much a risk-bearing security as common stock is, and will cease to appeal to those investors who, for reasons best known to themselves, prefer not to buy common stock." Becht, *Changes in the Interests of Classes of Stockholders by Corporate Charter Amendments Reducing Capital, and Altering, Redemption, Liquidation and Sinking Fund Provisions*, 36 CORNELL L.Q. 1, 30 (1950).

"One thing is clear. If the present course of decisions is continued, it is a serious question whether investors can safely purchase preferred stock at a price above the common stock of the same corporation. In all frankness, such certificates should now bear on their faces a statement that they are subject to alteration in a great variety of ways, all to their detriment, and that if business is bad, losses will be visited upon them, regardless of the liquidation and other preferences which they have on paper. It seems not unlikely that corporations will find that the temporary expedients which they have adopted will make it more difficult to attract that part of the market which prefers security to speculation. The short term solution contains the germs of a long term problem in threatening destruction of the value of preferred stock as an investment. Concerning the fear that present amendment policies will have dangerous effects upon preferred stock as an investment device, see notes: 26 MINN. L. REV. 387, at 394 (1942); 4 U. OF CHI. L. REV. 645, at 657 (1937); 54 YALE L.J. 840, at 852 (1945)." Becht, *Alterations of Accrued Dividends*, 11, 49 MICH. L. REV. 565, 594 (1951).

purchases, but authorizes further limitations to be fixed in the articles, while Texas establishes a rigid statutory standard.

Article 5, A (4), of the Texas Act contains a grave ambiguity. Does the phrase "subject to the other provisions of this Act" include the provisions in the first part of the article? The Texas Act places no restrictions on purchases of shares in eliminating fractional shares, compromising debts, or acquiring dissenting shares, and if not "effecting, subject to the other provisions of this Act," share redemption. Such "other provisions" would include restrictions found in Article 61, which were taken in part from Section 137 of the Oklahoma Act. Article 61 of the Texas Act provides that irrespective of provisions in the articles no shares shall be purchased or redeemed at a price greater than the redemptive price, or when the corporation is, or would be made insolvent, or its net assets reduced below the aggregate of liquidation preferences on voluntary dissolution, or would reduce the stated capital below one thousand dollars. However, Article 5 further provides that such shares may be purchased from earned surplus, and, upon a two-thirds vote of the shareholders entitled to vote thereon, out of capital surplus.<sup>47</sup> Or, if an open-end investment company, registered under the Federal Investment Company Act of 1940, and so provided in the articles, shares may be purchased from either earned or capital surplus without a vote of the shareholders.

The Florida provisions on such purchases or redemptions set up extra safeguards and allow more flexibility. Section 130 does not permit under any circumstances purchases or redemptions, if the company is, or would be made, insolvent, or the net assets are less, or would be made less, than the aggregate of the highest liquidation preferences of outstanding shares plus one-half of the amount that the stated capital exceeds such liquidation preferences, or when the net assets are, or would be made, less than 125 per cent of the aggregate of the gross debts and liabilities, other than share liability. In the absence of such conditions, subject to any further limitations in the articles, such shares may be purchased or redeemed out of earned surplus, out of capital surplus or stated capital if such shares: (a) have a liquidation preference, (b) are purchased to eliminate fractional shares, (c) are dissenting shares and are purchased as required by the provisions of this Act for purchasing such shares, (d) are purchased in order to collect or compromise in good faith a debt, claim, or controversial amount, or (e) are purchased upon the conversion of shares pursuant to the articles of incorporation.

Both Acts purport to eliminate the *ultra vires* doctrine as concerns

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47. This two-thirds vote provision is extremely bad. Should funds or assets set up to protect creditors and preferred shareholders (who often hold non-voting shares) ever be subject to dispersal at the whims and caprice of the holders of two-thirds of the voting shares outstanding?

parties without the corporation.<sup>48</sup> Both specifically abrogate the defense of lack of corporate capacity; the provisions in both acts are identical as both were taken from the Oklahoma Act. The prime difference in the *ultra vires* provisions in the acts is that in the Florida Act the general subject is broken up and its different phases dealt with separately, while the Texas Act treats them in a more general way.

The Texas Act offers no solution to the dilemma where the corporation asserts *ultra vires* as a defense to an action on a contract entered into by it through its agent when the other party had actual knowledge that the contract was entirely beyond the powers of the corporation. Since the articles define and limit the authority of the officers and agents of the corporation, some authorities contend that this is a question of agency law and a third party cannot recover from a principal on a contract when he knew at the time the contract was entered into that the agent was acting without authority from the principal. On the other hand, if the defense is barred, others point out that possibly the corporation might be making a practice of ignoring the scope of its powers and the management may have given the agent express authority to perform such acts. Therefore, this would reincarnate the *ultra vires* ghost and license it to again stalk its prey. The Florida draft, in its revised form, provides that such defense will be allowed only when the other contracting party is without the corporation and "had actual knowledge that the corporation through its representatives was then acting beyond or without the scope of its authorized powers, and who had reasonable cause to believe that the board of directors or shareholders of the corporation had not and would not authorize or ratify such contract."

Although the provisions aimed at protecting the corporate name are slightly more comprehensive in the Florida Code, both Acts quite fully safeguard interests therein.<sup>49</sup> Both drafts follow, to a considerable extent, the provisions in the Illinois Act. Texas permits a name to be reserved for 120 days, while Florida limits the time to 60 days. The Texas Act allows a foreign corporation to operate in that state under a registered assumed name, while the Florida Act only permits the domesticated corporation to add such words to its name as necessary to conform to the name requirements of the Act. Florida, unlike Texas, has no provisions for the registration in the state, or annual renewal thereof, of the name of an undomesticated corporation. The Texas Act deals with the procedure used in changing the regist-

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48. Compare Article 6 of the Texas Act with Sections 18, 19, 22, 23, and 24 of the Florida Act. Also see *Draftsman's Notes* under Sections 1.18, 1.27, 1.28, and 1.29, 18 OKLA. STAT. ANN.

"The provisions of the proposed Act purport to carefully single out each of the hypotheses supporting the outmoded *ultra vires* doctrine, and, after pronouncing each dead, to place each in its own little sepulchre, and in turn carve the respective obituaries above the portals of each. Already the law reports evidence an over-expanded graveyard of just claims of corporate creditors which have fallen the victims of a misconceived juridical fantasy." Wright, *Protection of Creditors Under the Proposed Florida Business Corporation Act*, 6 MIAMI L.Q. 192, 196 (1952).

49. Texas Act, Arts. 7-10; Florida Act, Secs. 11-13.

ered office and/or registered agent under its "substantive" provisions.<sup>50</sup> This would seem to be *procedural*. Since the specifications as to the registered office and registered agent are a part of the articles, the Florida Act logically treats a change thereof as a form of an amendment of the articles. Thus, Section 157 provides that "unless otherwise provided in the articles of incorporation, the board of directors of a domestic corporation may amend such articles of such corporation only in the following ways:

- (1) To change the registered office;
- (2) To change or appoint a registered agent; . . . "

The actual procedure in both Acts is quite similar. Under the Texas provision, the "corporation" effects the change, while Florida specifically states that the procedure is to be instigated by the board of directors. See Articles 12, 110 and 111 and Sections 197 and 205 of the respective Acts.

The Florida Act treats the service of process on corporations, domestic and domesticated, in one section,<sup>51</sup> while the Texas draft duplicates its provisions in two different articles.<sup>52</sup> That repetition seems to serve no useful purpose, and contributes additional verbosity.

The Texas Act is less specific, less articulate, less comprehensive, less exacting than the Florida Act as to the records to be maintained in the registered office.<sup>53</sup> Likewise, the Texas provisions, relating to the privilege of inspection of the corporate records by the shareholders, are subject to criticism. These provisions, along with the requirements for keeping records, were taken from the 1933 Illinois Act. The provisions of the Illinois Act have met with severe criticism.<sup>54</sup> However, a liberal construction placed on them by the Illinois Supreme Court has removed some of the uncertainty therefrom.<sup>55</sup> Article 46 of the Texas Act only extends to *shareholders* who have either been shareholders for six months or hold five per cent of all outstanding shares. On the other hand, the Florida Act extends the privilege to *all shareholders, share trust certificate holders and others entitled*

50. Art. 12.

51. Sec. 17.

52. Arts. 13 and 112.

53. Cf. Texas Act, Art. 46, and Florida Act, Secs. 16 and 73.

54. "The penalty fixed by Ill., Smith-Hurd Ann. St. ch. 32, § 157.45, is as ridiculous as are the conditions of percentage and time of share ownership precedent to the right of inspection. Let us observe how this Illinois provision might work out with a large corporation. Take, for instance, a corporation with 10,000,000 shares outstanding valued at \$1,000,000,000. To be allowed to inspect, the shareholder would have to own \$50,000,000 worth of shares (\$250,000,000 under La. § 38, if a competitor). He could have 499,000 shares worth \$49,999,900 and have no right of inspection. Now, if he buys one more share, he will have such right. Not only that, but he acquires with this one share the right to receive a penalty of \$5,000,000 if he is once refused the right to inspect one of the records. If refusal of the right warrants such a penalty, such a valuable right should not be denied to practically all shareholders." *Draftsman's Notes*, 18 OKLA. STAT. ANN. § 1.71, Subsection d.

See also Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. OF CHI. L. REV. 357, 383 *et. seq.* (1934); Wright and Baughman, *Past and Present Trends in Corporation Law: Is Florida in Step?* 2 MIAMI L.Q. 69, 112 (1947).

55. See *Sawyers v. American Penolic Corp.*, 404 Ill. 440, 89 N.E.2d 374 (1949), and other cases annotated under Section 157.45, ILL. STAT. ANN., c 32.

to represent shares. It further provides that the articles or by-laws may bestow such privilege upon bondholders and/or other creditors, or any class or classes thereof, absolutely or subject to any conditions or limitations contained in the by-laws.<sup>56</sup>

The Florida Committee is of the opinion that restrictions on bringing derivative suits in Section 142 of the Act, together with the provisions in subsection *b* of Section 74, that such inspection must be for a "proper purpose," and in subsection *d* providing, "It shall be a defense, among any others available, to any action for penalties under this Section, or for damages, or injunctive relief, that the person suing therefor, within two years immediately prior thereto, either has sold, or offered for sale, any list of shareholders of such corporation, or any other corporation, or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and record of such corporation, or any other corporation," serve as ample safeguards against unwarranted "fishing expeditions." Moreover, subsection *a* of Section 74 provides: "A list of the names and post-office addresses of the principal officers of every corporation shall be kept open to *public* inspection for any proper purpose at its registered office during usual business hours."

Furthermore, the penalties in the Texas Act assessed for denying to the shareholder the privilege to inspect the corporate records are ridiculously inconsistent with the restricted privilege of inspection. This variance has been discussed elsewhere by this author.<sup>57</sup>

Article 14 of the Texas Act, dealing with authorized shares, was taken from Section 14 of the A.B.A. Act, which in turn was copied from Section 14 of the 1933 Illinois Act, with no major changes except to allow for non-voting shares. The provisions stipulate that, when so provided in the articles, a corporation may create special classes of shares having different dividend, redemptive, voting (as to cumulative voting only), liquidation rights and conversion rights. Such conversion rights do not permit conversions to classes of shares having prior or superior dividend or liquidation preferences. Article 15, relating to allotment of shares in series, has as its source Sections 15 of the Illinois and A.B.A. Acts. This article is articulate and long. Under this article, the articles of incorporation may provide for dividing the classes of shares into series and fixing the relative rights of each series as to dividends, redemptive price and terms, liquidation price, sinking fund and conversion terms or the articles may delegate to the board the power to fix such relative rights. The balance of the article deals with procedural matter

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56. Sec. 74, *c.*

57. See note 54 *supra*.

relating to preparing and filing of the resolution by the board fixing such relative rights.<sup>58</sup>

The provisions of the Florida Act as to power and authorization of classes and series of shares in content do not vary widely from the Texas provisions. The chief differences are that the Florida Act does not permit any variation among the series of a class as to cumulative voting or as to a sinking fund. The Florida Act further specifies that the attributes of outstanding shares may not be altered, that there must be at least one class of shares with full voting rights, and redeemable shares are to be redeemed only at the option of the corporation.<sup>59</sup> It is believed that these three provisions are essential in order to remove any possible uncertainty as to each matter.

The Florida Act has also authorized a class of shares, referred to as "labor shares." This is an innovation in the statutory law in this country, although such shares have been authorized by the statutes of New Zealand and New South Wales for two decades or more. This new plan, which has operated very satisfactorily in the two jurisdictions above mentioned, allows, when so provided in the articles, such shares to be allotted to employees in consideration for their capitalized special skills or training. The dividends received thereon are received in lieu of the increased portion of wages normally paid to specially skilled or trained employees. It is predicted that this plan, if fully developed and utilized, will go far in solving many of our present day industrial problems resulting from conflicts between labor and capital.<sup>60</sup>

The Florida Act requires that a subscription for shares shall be in writ-

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58. This is another of the many examples in the Texas Act where *procedural* matter is commingled with substantive material under Part II of the Act which purports to contain only substantive provisions.

59. Secs. 79, b(1), 62, c and 80, a, and 80, c.

60. Section 39 authorizes the setting up of employees' share-ownership plans. Such provisions are now quite common in state corporation statutes. The use of such plans by corporations is equally common. However, these provisions do not supply the flexibility necessary to meet the demands to establishing true employee profit-sharing setups. The authorization of a new type of shares, known as "labor shares," aims to supply such flexibility. It must be borne in mind that *no corporation is required* to allot such shares; it is purely optional and is only permissible when so stipulated in the articles.

The concept of labor shares is not new in this country, although this is the first attempt to reduce such authorization to a statutory formula. However, New Zealand (New Zealand Companies Act of 1933, § 59 — see also N.Z. Cos. Acts of 1924, § 52 and of 1931, § 23) and New South Wales (New South Wales Companies Act of 1936, §§ 165-68) have had statutes in effect for many years authorizing such shares. Many periodicals and books have carried enthusiastic comments on the need for plans of this general nature. Gordon, *A Philosophy of Profit-Sharing*, 18 *ADV. MGMT.* 73 (1948); Cox, *Fifty Million Stockholders*, 12 *ADV. MGMT.* 148 (1947); MASON, BRANDEIS: A FREE MAN'S LIFE, p. 359 (1946); STEWART AND COUPER, *PROFIT SHARING AND STOCK OWNERSHIP FOR WAGE EARNERS AND EXECUTIVES*, pp. 55-79 (1945).

"Frank Gannett, newspaper publisher, told a senate committee Thursday general establishment of profit-sharing plans deserving the confidence of workers would 'mean the dawn of a new day for America.'

"'If most of our corporations would work out such a policy as I have described,' Gannett said in testimony before the senate profit-sharing committee, 'we would have



ing and signed by the subscriber.<sup>61</sup> The Texas Act has no such provision. Both Acts make pre-incorporation subscriptions irrevocable for a period of six months unless the subscription contract provides otherwise, or consent is given by all of the subscribers.<sup>62</sup> The Florida Act provides that, unless the terms of the subscription otherwise provide, pre-incorporation subscriptions lapse at the end of twelve months if no certificate of incorporation is theretofore issued. Both Acts provide for uniformity of calls, and that payment shall be determined by the board. The Texas Act further stipulates that calls shall be collected the same as other debts. Both Acts provide that the by-laws may provide other penalties, but the portion paid on such subscriptions shall not be forfeited until a default of twenty days.

The Florida Act combines the procedural remedies in collecting calls with the collection of assessments. Assessments are authorized under the Florida Act but not under the Texas Act. More than eleven sections of comprehensive, articulate provisions of the Florida Code are devoted to the procedures to be employed in effecting calls and assessments.<sup>63</sup> Shares may be assessable only when so provided in the articles, and the certificates evidencing such shares must be on blue paper or parchment and the fact that shares are assessable must be plainly stated in the share certificate. The articles may provide that the shares, or any specified class or series, shall be assessable to such amount and upon such terms, conditions and limitations as therein provided, or the power and authority to fix the assessability may, by the articles, be delegated to either the shareholders or the board. In delegating such power and authority to the shareholders, if so provided in the articles, the shareholders may be granted the further authority to either exercise such power and authority or redelegate them to the board.

Three cumulative remedies have been authorized in the collection of delinquent calls and assessments, viz., to proceed as in collecting any other

few strikes, for the worker would understand that to tie up the production of a factory would be to lessen his own reward.'" *Associated Press Report*, (Dec. 1, 1938).

Harold E. Stassen, in his proposed platform, has a plank favoring wide-scale profit sharing. *Profit Sharing and Freedom Saving* (Address before the Alexander Hamilton Club of Maryland, Baltimore, Feb. 7, 1952).

There seems to be no reason for any opposition to such provisions in a corporation act. On the other hand, such provisions may open the road to an entirely new distribution of ownership and control of our industrial corporations. I can conceive of nothing more needed or quite so important as the development of a joint interest which will bring about a closer cooperation in industry. The various types of sabotage by lockouts and sitdown strikes are not an ultimate solution; they are only symptoms of a diseased condition. The interests of the entrepreneur, the capitalist, and the laborer are joint and common. These provisions suggest and make possible a new avenue for a better approach to the basic problems facing our industrial life. Maybe, the industrial corporations will make use of them. New Zealand and Australia are much further advanced in dealing with labor problems than we are in this country.

61. Sec. 25, *a*.

62. Texas Act, Art. 16, A, and Florida Act, Sec. 25, *b*. The Florida Act (Sec. 2 [9]) defines a "subscription" as a *contract* between the corporation and the subscriber, while the Texas Act (Article 2, A[5]) describes it as an *offer* in the form of a *memorandum in writing*.

63. Subsections *c* and *d* of Sec. 25, and all of Sections 26 to 36, inclusive.

debt, to assert and foreclose a lien on the shares, or to levy on and sell the shares. If so provided in the by-laws other penalties, even a forfeiture of the amount already paid on the shares, may be evoked. Also, Section 33 provides for making and enforcing calls and assessments when the corporation has become insolvent. The aim in drafting the provisions of the Act relating to calls and assessments was to precisely and accurately set out the procedural steps and at the same time permit the greatest degree of flexibility.

Both Acts provide that par shares may be allotted for consideration fixed by the board at not less than the par value, and that the board shall fix the consideration for non-par shares unless the articles reserve such power to the shareholders. Thereupon the consideration shall be fixed by an affirmative majority vote of those entitled to represent the total outstanding shares entitled to vote thereon. The Texas Act states (Art. 7, B), "when the consideration is fixed by the shareholders, it shall be determined by a vote of the holders of a majority of all shares. . . ." This statement is very ambiguous. It should state "by an *affirmative* vote. . . ." Moreover, it defines a *shareholder* as a *holder of record*. Suppose the right to vote the shares resides in another. The phraseology of the Florida Act reads, "an affirmative vote of the persons entitled to represent a majority of all shares outstanding and entitled to vote thereon." Before any state should consider adopting the A. B. A. Act, it should engage a committee to re-edit it so that it would say what it purports to mean.

In general, the two Acts deal with the required consideration and payment for shares in about the same manner, although their arrangements differ, the Florida provisions being much more articulate and comprehensive. The Texas Act provides that treasury shares may be disposed of for such consideration as may be fixed by the board. The Florida draft has a like provision except that the consideration be "real or fair." Of course, the Florida Act contains further provisions relating to the fixing of consideration for its labor shares.<sup>64</sup>

The Florida Act provides that payment of promotional and underwriting expenses will not render the shares not fully paid. Article 20 of the Texas Act sets out a like provision except that the shares will be fully paid and non-assessable "only if the consideration still retained by the corporation after such disbursements is at least equal to the stated capital of the corporation represented by such shares." That would mean that these expenses must be off-set by the aggregate of the premium received on the shares if all are par shares. If such premium aggregate were insufficient to balance such disbursement the shares would be neither fully paid nor non-assessable. If not non-assessable, they would be assessable and the act makes no provision for assessable shares.

The Texas Act permits only one-fourth of the consideration received

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64. Texas Act, Art. 17, C; Florida Act, Secs. 82, f, and 132, b.

for non-par shares to be allocated to capital surplus while the Florida Act allows one-third to be thus allocated.<sup>65</sup>

The Texas Act refers to share certificates as *representing* the shares. The certificates don't represent; they *evidence* the shares. "To represent shares" is defined in the Florida Act as meaning "to vote, to give written consent to corporate action, to dissent thereto, and/or execute waivers of notices of shareholders' meetings." Similar definitions are found in the California and Oklahoma Acts.

The Texas Constitution, as construed by the courts of that state, prohibits the issuing of *share certificates* until the shares are fully paid, although *shares* may be *issued* (allotted) when not fully paid.<sup>66</sup> The Texas Act requires that shares be fully paid before either the shares or the share certificate is issued. It is not clear just what interest the *subscriber* has in the corporation, if any.

Considerable study is required to discover just what the step-by-step net results are when subscribing for and allotting the shares and issuing the share certificate under the Texas Act. Most certainly the stated legal formulas are out of conformity with the practical procedural concepts in the business world. Let us observe from a practical standpoint how the procedure is carried on in an every-day business way. The promotional functions are a series of acts essential or incidental to the initiation and launching of the new enterprise. The promoter first searches out a project or enterprise that appears to lend itself to corporate exploration and utilization. He must next interest investors therein and bring them together for the purpose of financing the proposed business unit. He then generally carries through the planning of its set-up and directs the launching of the new undertaking. How does the promoter go about this? The early stages of the process are factual in nature; legal formulas are often not injected

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65. Texas Act, Art. 19, B; Florida Act, § 85 b.

66. Article 12, § 6, of the Texas Constitution provides: "No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Subscriptions of shares may be had, shares may be allotted as partly-paid or as installment stock, and the allottee may be treated as a shareholder, without violating this constitutional provision, as long as the *share certificate* is not issued. *Smoot v. Perkins*, 195 S.W. 988 (Tex. Civ. App. 1917).

As late as 1949, Mr. Belsheim expressed the view that there was some doubt as to whether or not a subscriber for shares of a Texas corporation could exercise the rights of a shareholder before he has paid in full for the subscribed shares. *The Need for Revising the Texas Corporation Statutes*, 27 TEX. L. REV. 659, 667-68. But see TEX. REV. CIV. STAT. ANN. (Vernon 1925), Arts. 1308, 1336, and 1345. Since the Texas courts have evidenced much confusion in interpreting this simple constitutional limitation, it is hard to imagine what will result if they are forced to construe the many ambiguous provisions found in the proposed Texas Act. The purpose of the constitutional provision is to prevent the allotting of fictitious or "watered" stock. Certainly the provisions of the Florida Act could not logically be construed to be violative of such limitations. No corporation code more fully guards against the issuing of "watered" shares.

Under the new Texas Act much uncertainty will prevail as to the status of the holder of shares which are not fully paid. Such uncertainty will keep many incorporators from incorporating in Texas. The Texas Committee could well afford to redraft portions of its proposed Act following the general plan advanced in the Florida draft, especially as to subscriptions, allotment, and payment of shares.

into the configuration until he proceeds in shaping the corporate lay-out. He charts the contour by plotting a prospectus—which may only exist in the form of a conceptual asterism. With this as a procedural recipe, he draws up a subscription agreement, usually in the name of the proposed corporation by him as promoter, stating that each signer agrees to subscribe for the number of shares listed opposite his signature. Beneath this statement is a lineated space set off by vertical lines into columns. At the top of the first column is the word "Date," and the other columns are labelled "No. of Shares," "Class of Shares," and "Signature." The typed form may contain various stipulations which make up a part of the subscription contract; the pattern usually varies in each instance.

The promoter, or promoters, then proceeds to procure subscribers' signatures on the respective lines opposite the listing of the shares they have committed themselves to take. His name may or may not be included in the subscription list, and this procedure may be carried on before or after incorporation. However, it is usually initiated before the articles are filed. At least, commitments are generally set out in some form of a prospectus, subscription list, promoters' agreement, or what-not prior to incorporation. Suppose subscribers have signed the subscription list prior to incorporation and the statute provides, as both acts under consideration here do, that a subscription is irrevocable except upon consent of the other subscribers, for six months. What would the ordinary businessman consider the legal status of the parties to be at this stage? He would doubtless assume that the subscription agreement constituted a contract between the subscriber and the promoter and also among the subscribers. He also would doubtless regard the legal relations subject to other special terms set out in the contract among the parties about as follows:

1. As to the subscriber—
  - a) If he were incompetent to enter into contracts, the agreement would be revocable by him; otherwise,
  - b) He could not revoke the contract during a reasonable period from the date set opposite his signature without the consent of the other subscribers;
  - c) That when the corporation came into being a novation would be effected by the corporation being substituted for the promoter and the subscriber would *ipso facto* become a shareholder and from then on would owe certain new duties to the corporation;
  - d) That he would be required to pay in full for his shares as calls were made by the board of directors; and
  - e) That he could enforce the contract against the other parties thereto, and it could be enforced by them against him.
2. As to the promoter—
  - a) That he would owe a fiduciary duty, similar to that owed by an

- agent to his principal, and that he must diligently pursue the task of bringing the corporation into existence;
- b) That, in the event the corporation is not brought into being, he should be holding any funds collected from subscribers in trust for them, and, if the corporation is formed he should then hold such funds as trustee for the benefit of the corporation;
  - c) That he had implied authority to make expenditures and enter into contracts necessary in carrying out his promotional functions and that the birth of the corporation effected a novation whereby all of his legitimate, necessary promotional acts were automatically ratified by the corporation and all rights and liabilities resulting from such prior promotional acts, and future rights and duties, would be reposed in the corporation;
  - d) That all pre-incorporation contracts entered into by him on behalf of the corporation which were not reasonably necessary or expedient in successfully advancing the promotional steps in launching the corporate enterprise, but were entered into in good faith in gaining advantages or benefits in behalf of the corporation, would not *ipso facto* become corporate contracts, but that they would only become binding on it and effect a release of him when accepted as a novation by the corporation—possibly at the shareholders' organization meeting—and that a voluntary acceptance of the benefits could imply acceptance of the contract by the corporation, and that whether the promoter would continue to be personally bound by the contract, if the corporation refused to accept it, would depend upon the terms of the contract;
  - c) That all other pre-incorporation contracts, which were not urgent or would "keep" until the corporation became organized and in a position to speak for itself, entered into by him on behalf of the corporation, would in no way be binding on it unless and until the corporation entered into a new contract directly with the other contracting party (or by some form of a novation of the former contract), that whether he would be liable on a warranty that the corporation would substitute its contract for his, or whether he would continue to be bound by the contract, would depend upon its terms; and
  - f) That he would be able to enforce the contract against the subscribers up until the corporation replaces him in the contract relationships.
3. As to the Corporation—
- a) That until the corporation comes into being, it cannot be the object of any legal relations, and it cannot serve as a principal in an agency relationship, nor can it be a party to a contract, therefore it could have no pre-incorporation liabilities or duties;

- b) That pre-incorporation subscription contracts must exist between the promoter and the subscribers, and that such contracts generally contain an implied provision that a novation will be effected when the corporation comes into existence whereby the corporation replaces the promoter and from then on the contract becomes effective between the corporation and the subscriber, but the contract is *ipso facto* shifted from a subscription contract to a share contract between it and the person, who up to then, had retained the role of a prospective subscriber;
- c) That an *ipso facto* novation is also effected, by the corporation replacing the promoter as a party to all contracts reasonably necessary or expedient in promoting the corporation, as the corporation comes into being. The corporation has no option as to such novation, its creation operating as an automatic novation;
- d) That, as to contracts entered into on behalf of the corporation by the promoter, if the contract was aimed at gaining advantages in favor of the corporation in urgent matters which would not "keep" until the corporation had assumed a *sui juris* status, an option in favor of the corporation would by implication be made a part of the terms of such contract, giving the corporation the power to effect a novation of the contract by its own affirmative action; and
- e) That other pre-incorporation contracts entered into by the promoter, although they may be created by the promoter on behalf of the corporation, place no obligations on the corporation, as to such purely corporate matters, unrelated to the promotional functions.

The Florida Act purports to supply the legal formulas necessary to implement these concepts. Section 9 represents the first statutory attempt to establish such legal formulas establishing the rights, privileges, powers, and immunities of the promoter, the subscriber, the corporation, and third parties concerning pre-incorporation matters. All the provisions in the Florida Act conform to these conceptional suppositions.

Now, we shall attempt to analyze the corresponding results attained under the Texas Act. First, that Act defines a *subscription* as *an offer to receive and pay for shares*.<sup>67</sup> When the pre-incorporation subscriber signs

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67. "If the offerer stipulates that his offer shall remain open for a specified time, the first question is whether such stipulation constitutes a binding contract. . . . When such a stipulation is binding, the further question arises, whether it makes the offer irrevocable. It has been a common opinion that it does, but that is clearly a mistake. . . . An offer is merely one of the elements of a contract; and it is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has no power to revoke, is a legal impossibility. Moreover, if the stipulation should make the offer irrevocable, it would be a contract incapable of being broken; which is also a legal impossibility. The only effect, therefore, of such a stipulation is to give the offeree a claim

the subscription list circulated by the promoter, isn't there some sort of a contract with the promoter? Since they cannot withdraw the offer within six months without the consent of the other subscribers, isn't there a contract among the subscribers? To whom does the "offer" run? The corporation cannot be an offeree as it is non-existent.<sup>68</sup> A *subscriber* is defined as *an offeror in a subscription which has been accepted by the corporation*.<sup>69</sup> There is brought into existence a *subscription* when the *offer* is made. So, in the case of a pre-incorporation subscription, we have an *offer* without an *offeree* and a *subscription* without a *subscriber*. Can anyone *subscribe* for shares and not be a *subscriber*? Webster's Dictionary defines a *subscriber* as *one who subscribes*. Suppose the pre-incorporation subscriber revokes his subscription a week after signing the subscription list without obtaining the consent of the other subscribers. To whom is he liable? He can't be liable to a non-existent entity, the corporation. It is not a *contract*—only an *offer*—so neither the promoter nor the other subscribers would have a cause of action. Suppose S were the first to sign the subscription list and that he signed up on January 2 for fifty per cent of the authorized shares, and, that others, relying on his subscription, had signed up for the other fifty per cent on or before June 20, at which time S notified the promoter and the other subscribers that he revoked his subscription. Would a court of equity enjoin him from withdrawing? If so, who would bring the action? And in bringing a suit in equity, could equity decree specific performance of a contract when there was no contract? Assuming that S is financially competent, would there not be an adequate remedy at law, if there were any remedy at all? Is there any degree of uniqueness about the contract or its subject matter (assuming there had been a contract) which could possibly give equity a toe-hold? Moreover, does a person not have the power to breach an ordinary contract that has no uniqueness about it? It might be suggested that the matter could be solved by going ahead and filing the articles before July 2 and proceed to treat S as a subscriber.

But, suppose the other subscribers, after receiving notice that S was withdrawing, by unanimous consent all revoked their subscriptions. What then? Or we might further assume that the subscription provided that the articles were not to be filed until all of the shares were subscribed, or suppose that the promoter was discouraged and did not proceed to file the

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for damages if the stipulation be broken by revoking the offer." LANGDELL, SUMMARY OF CONTRACTS § 178 (2d Ed. 1880).

68. In making an offer, legal relations are created, and the existence of legal relations require at least two legal persons. The offer creates in the offeree certain legal powers, viz., to reject it, make a counter-offer, or accept it. He also is vested with a legal liability in that the offerer may withdraw it before acceptance. On the other hand, the offerer is vested with corresponding jural correlatives: he is subjected to the legal liabilities that the offeree may reject the offer, make a counter-offer, or accept the offer, and the offerer also is vested with the legal power to withdraw the offer before it is acted upon by the offeree. From this it is clear that it is nonsense to speak of the existence of an offer when there is no offeree.

69. Art. 2, A (6).

articles. What would be the legal consequences under these various suppositions?

What would be the results under the Florida Act? Of course, the subscriber could breach his subscription contract and withdraw. However, he would be liable to the promoter and the other subscribers for the damage they had suffered. The uncertainty of measure of damages would hardly warrant equitable relief through specific performance of the contract. Until the corporation comes into existence the only contracts are those between the promoter and the respective subscribers and among the subscribers. The parties certainly assume that binding obligations are originated by the signing of this subscription list; they were not purporting to be merely practicing penmanship.

Would the promoter be privileged to abandon the undertaking entirely? It would be implied that he must go forward in good faith, using a reasonable degree of skill and care in completing the organization of the company. Of course, the facts in each case would be the determining factors, and the terms, if any, of the contract, fixing the duties, etc., of the promoter normally would be conclusive. If there be no specific provisions thereon in the subscription contract, or other facts establishing a contrary intent, it should be implied that the promoter would not be liable if for some unforeseeable reason he could not carry out his endeavor. It would be implied from the fact that the subscriptions are made irrevocable for six months that the legislature intended that six months would be a reasonable time for completing the pre-incorporation functions. It would further be implied that he would not be allowed to escape liability if he acted in bad faith, and without cause abandoned the attempt or pursued it in a negligent or insincere manner.

One of the implied terms of the contract would be that it was mutually agreed that the parties (the promoter and subscribers) consented as between and among themselves that the creation of the corporation would effect a novation whereby it superseded the promoter as to the promotional contract, and that the status of the subscribers would be transmuted to that of shareholders. The *ipso facto* acceptance of the novation and the subscriptions by the corporation is effected by operation of the statute. The provisions of Section 9 of the Florida Act establishes a composite legal formula to be, in the absence of a different expressed intent of the parties, reposed upon a factual norm congruent with the customary understanding of the parties concerned in the pre-incorporation process as heretofore set out.<sup>70</sup>

Article 16 of the Texas Act states that a filing of the articles by the

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70. These observations further illustrate the need for statutory formulas fixing the relative rights of the promoter, the corporation, the pre-incorporation subscribers, and other parties dealing with a promoter acting on behalf of the corporation. See *Inadequacy of Traditional Concepts in the Treatment of the Promoter*, 81 U. OF PA. L. REV. 746, 753-54 (1933).



Secretary of State constitutes an acceptance by the corporation of the subscriptions contained on the subscription list filed with the articles. The subscription under that act is an anomaly in that it is an *offer* without an *offeree*. Here we also have another, the acceptance by a non-existent corporation. Article 50 provides, "Upon the issuance of the certificate of incorporation, the corporate existence shall begin." Then, Article 49 states that the Secretary of State shall "(2) File one of such duplicate originals (of the articles) in his office." "(3) Issue a certificate of incorporation. . . ." From this, since there is no statement in the provision saying that both acts are to be simultaneous or that they are deemed to be one continuous act, it is reasonable to assume that the articles are filed before the certificate of incorporation is issued. Certainly the certificate would not be issued prior to the filing of the articles which would be imperative if there is to be any corporation in existence which could accept the subscriptions when the articles are filed. Moreover, there is no statutory duty stipulated in the Act requiring the Secretary of State to issue the certificate of incorporation at any immediate time after the filing of the articles. In other words, we have a contract—an offer and an acceptance—with only one contracting party.

Article 2, Section A, Paragraph (7), of the Texas Act defines *shareholders* as *one who is a holder of record of shares in [of] a corporation*, while Article 18 provides that when full consideration for shares has been paid "the shares shall be deemed to have been issued and the subscriber or shareholder entitled to receive such issue shall be a shareholder with respect to such shares."

These two provisions are in conflict. If a subscriber were to pay the balance on his subscription to an authorized agent of the corporation, it would be a payment "to the corporation." At that instant he would become a shareholder but considerable time might elapse before his name is posted on the share ledger. In other words, he would be a shareholder who was *not* a "holder of record." Moreover, as used in the provision in Article 18, a *subscriber* and a *shareholder* are one and the same. The terms are used in apposition and the context indicates that a *subscriber*, as the word is there used, would by necessity have to be a *shareholder*, as otherwise he would *not* be "entitled to receive such issue." Again, in Article 23 a joint meaning is applied to these two terms. However, there the situation is reversed. A *holder of shares* certainly is a *shareholder*, and as the terms are used he would at the same time be a *subscriber*. But this *subscriber-holder-of-shares* concept employed in Article 23 differs from the *subscriber-shareholder* concept used in Article 18. Strictly speaking, the concept could not be confined to that of a *shareholder* in Article 18. Section A of Article 23 reads:

A holder of, or subscriber to, shares of a corporation shall be under no obligation to the corporation or its creditors with respect

to such shares other than the obligation to pay to the corporation the full amount of the consideration, fixed as provided by law, for which such shares were issued or to be issued.

If he is a *holder of shares*, he would be a *shareholder*, and if a *shareholder*, under the provisions in Article 18, Section A, he only becomes a *shareholder* when the consideration for the shares are fully paid, and then he would not be liable for any unpaid balance on his shares. Furthermore, if he is a *shareholder*, the shares must be fully paid, under Article 18, and then the shares shall be deemed to be issued and, therefore, there could be no "to be issued" about such shares.

It might be asked how the Texas Committee could have "loused up" these provisions in Articles 18 and 23 as they have. To this author, the answer is clear. It has resulted from a chain of errors dating back well over two decades. The Illinois Committee doubtless was working on this early part of its draft some time at least twenty years ago. That Committee depended largely upon the Delaware statutes for its source material. Since its draft, unlike the Delaware laws, did not purport to authorize the issuance of partly paid shares, it did not follow the Delaware statutes in drafting the first part of Section 18. However, in preparing the first part of Section 23, the Committee certainly drew heavily on the statutes of some jurisdiction which permitted the issuance of shares which were not fully paid. The phraseology has only a slight similarity to the Delaware provisions, so the wording may have had another source. Be that as it may, this provision in Section 23 of the Illinois Act certainly was formulated originally as a part of the statutes in a jurisdiction authorizing partly paid shares. Its content would then be appropriate.

These Illinois provisions were poorly drafted, measured in terms of standards of twenty years ago, not to mention the present. The A. B. A. Committee, the substantial part of the personnel of which had been moved up from its position on the Illinois Committee that had drafted the Illinois Act, carried these provisions of Sections 18 and 23 without change over into Sections 17 and 22 of its "Model" Act of 1946. The Committee again lifted these provisions over into Sections 18 and 23 of its 1950 "Model" Act. The Texas Committee in turn has taken the 1950 A. B. A. diaskewasis of the Illinois Act and adopted it after revising it in spots. Thus, these provisions, without any substantive change, passed from Sections 18 and 23 of the Illinois draft finally to Articles 18 and 23 of the Texas Act.

In summarizing, we must say that these provisions were poorly formulated when drafted in the late twenties, and they would be primeval now if they had been skillfully formulated then. Any business corporation act denying the allotment of partly paid shares is, indeed, archaic in that regard.

Then we find that the Texas Committee added the final degree of confusion by assigning new meanings to key terms used in the provisions. The Texas definition of *shareholder* was taken directly from the 1933 Illinois

Act, while a fallacious definition of *subscriber* was formulated. This new definitional concept is so foreign to logic, usage, and legal concepts in general that every provision in the Act in which the term *subscriber* appears, if they are to make sense, would have to be redrafted. Such a task would require the skill of a capable, experienced legal draftsman. The injection of such a delusive concept into the statutory corporation law of any state would lead to unlimited confusion.

The Texas Act is vague on the matter of control of the corporation during its formative stages. Article 33 provides that "the business and affairs of a corporation shall be managed by a board of directors." However, it can be implied from the provisions of Article 52 that the board of directors *does not control* the corporation before the organization of the board. Article 52 provides, "After the issuance of the certificate of incorporation, an organization meeting of the board of directors named in the articles of incorporation shall be held . . . at the call of a majority of the incorporators." Nothing is said about any shareholders' organization meeting. Thus, the incorporators, selected by the promoters, control until the board of directors is organized under the provisions in Article 52. Thereafter, the board named in the articles controls until a special, or the first annual, meeting of the shareholders is held and a new board is selected. Under Article 52, the board adopts the by-laws. And Article 26 provides that the time, place, etc., of the shareholders' meetings shall be "as may be provided in the by-laws." Therefore, the board has absolute control over the shareholders' meetings. Article 26, Section C, provides that special meetings of the shareholders may be called by the president (appointed by the board), the board of directors, or the holders of not less than one-tenth of all the shares entitled to vote at such meetings, or such other officers or persons as may be provided in the articles or by-laws. This would give the promoters a possible permanent dictatorial control of the corporation. Directors need not be shareholders unless so provided in the articles or by-laws, and the promoters control the content of both. The promoters can select themselves as incorporators and in the articles name themselves as directors. Under Article 34 the number of directors, other than the first board named in the articles, is fixed or may be reduced by the board-controlled by-laws. The board in like manner can control the fixing of dates of shareholders' meetings. There is nothing in the Act to *require* the board to ever provide in the by-laws for any shareholders' meetings, special or annual. The directors hold office until their successors are elected and qualified.

There can be no shareholders until their shares are fully paid, and subscription payments are subject to call by the board. There is nothing in the Act compelling the board to call, or even receive, full payment for the shares. Thus, the board could make a call for an eighty or ninety per cent payment and enforce such call "in the same manner as any debt due the corporation." Under these provisions as found in the Texas Act, a corpora-

tion is born without shareholders and the promoters who conceived it can fully manipulate a perpetual control over it. They can, by their control over the contents of the articles and by-laws, fix their own salaries and the salaries of the other officers. The board would naturally select the controlling officers from its membership, and then by its control over the subscription calls could perpetuate a corporation without any shareholders *ad infinitum*. All the board would need to do would be to see that no subscriber was allowed to pay in full for his shares. This would allow "racketeers" to move in and perpetuate the greatest "legal swindles" of all time. By use of the holding company as a device, the potentialities under such a statutory set-up are startling.

The Texas Act requires no shareholders' organization meeting. It gives unreasonably broad powers to the board of directors without any safeguards against arbitrary abuse of such powers. The board is given power over the adoption of by-laws and shaping of their contents. In fact, the board of directors is given a *carte blanche*. This is incongruous with the modern demand for more protection of shareholders against managerial abuses. The trend in present-day statutory corporation law is to vest more power in the shareholders, and classes thereof, which they may exercise in protecting their interests.

The Florida Act places drastic regulatory restraints upon the promoters. And in concluding, subsection *i* of Section 9 provides:

Promoters shall keep a complete, accurate record of all pre-incorporation subscriptions, contracts, accounts, expenditures and other transactions relating to their promotional activities. Such record, together with all documents, instruments, contracts or other writing evidencing all such transactions, shall become the property of the corporation, and shall be presented to the corporation at the shareholders' organization meeting and shall be filed as a part of the permanent records of such corporation.

Under the Florida provisions the promoters have control over the preliminary procedures up to the filing of the articles. Thereupon the authority of the direction of the affairs of the corporate fledgling shifts to the incorporators and resides in them until the election and qualification of the board of directors. They have full power and authority during this formative period, over the perfecting of the organization of the corporation, such as further procuring subscriptions and receiving payment of consideration thereon, and calling and conducting the shareholders' organization meeting. The initial board of directors is not named in the articles. The more democratic method of requiring that the directors be chosen by the shareholders is employed. Three or more incorporators are required and the only qualification is that they must be legally competent to enter into contracts under the laws of this state. The promoters and incorporators are burdened with the duties of fiduciaries. Other qualifications for directors may be fixed in the by-laws.

Up to this point less than one-fifth of the proposed Acts of Florida and Texas has been analyzed and contrasted. To continue on through in a like manner would protract this concatenation into a volume-length dissertation. A careful examination of the balance of the Texas draft reveals that its source, quality, and comprehensiveness do not appreciably vary from the portion covered. Except for a very limited number of modern concepts borrowed largely from the statutory laws of Delaware, Ohio, and Oklahoma, it is substantially a replica of the semi-antiquated 1933 Illinois Act. The duo-reburnishment of that Act at the hands of the Committee of the American Bar Association still leaves it too deficient in modern legal formulas and too circumscript in ken, for it to be attitudinized as a prototype for fashioning a business corporation code suited for governing and directing a progressive tomorrow.

The balance of this discourse will be confined to a compendious treatment of a few of the other more salient innovative features of the Florida draft which have been either slighted or entirely disregarded by the Texas Committee in formulating its proposed Act.

Unless its period of duration is limited in the articles, every corporation formed under the Act has perpetual existence, and its existence begins when the certificate of incorporation is issued by the Secretary of State. Except as against the State, the certificate of incorporation is conclusive evidence that a *de jure* corporation exists.<sup>71</sup> This abrogates the *de facto* corporation.

Unless otherwise provided in the articles, shareholders of outstanding shares have preemptive rights, except as to shares allotted: (1) for consideration other than cash, (2) as a share dividend, (3) to satisfy conversion rights, (4) under an employees' ownership plan, (5) as labor shares, (6) as shares of a class after they have been released from preemptive rights by an affirmative vote of the holders of two-thirds of the shares of that class, or (7) as shares which the particular holder has by waiver released his rights thereto or has refused to receive such shares when offered to him on terms as advantageous as offered to others. Existing shareholders may have preemptive rights as to shares allotted as described in these seven listings, or shares held as treasury shares, only if so provided in the articles, and then subject to conditions or limitations set out in the articles, if any.<sup>72</sup>

Subject to limitations or restrictions in the articles, conversion rights and options may be granted, but only in connection with the allotment of other shares or the issue of other securities. Sufficient authorized shares to satisfy all outstanding conversion rights and options must be reserved by the corporation.<sup>73</sup>

Corporations are allowed broad, flexible powers in setting up employees' share-ownership plans.<sup>74</sup> Notice of any meeting may be waived,

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71. Sec. 14.

72. Sec. 37.

73. Sec. 38.

74. Sec. 39.

either before or after the meeting, by any director,<sup>75</sup> or any shareholder<sup>76</sup> entitled to represent shares at such meeting. At least a third of the shares entitled to be voted at a shareholders' meeting must be represented to constitute a quorum, but, in the absence of provisions in the articles requiring otherwise, holders of a majority of the outstanding shares entitled to be represented at the meeting is required for a quorum.<sup>77</sup> The articles may provide for higher voting requirements than the minimum specified in the Act.<sup>78</sup> Transfers of shares on the corporate books may be "closed" for a period not exceeding forty days before any shareholders' meeting.<sup>79</sup>

The Act comprehensively provides for voting of shares by proxy.<sup>80</sup> Proxies must be in writing and may be for any period not over seven years. If no time limit is fixed in the proxy, it expires in eleven months. Provisions, equally as comprehensive and articulate, are formulated as a guide in voting of shares jointly held,<sup>81</sup> fractional shares,<sup>82</sup> and shares held by fiduciaries,<sup>83</sup> pledgees,<sup>84</sup> and by corporations.<sup>85</sup> Voting trusts and voting pools are fully provided for.<sup>86</sup> "Closed" voting trusts and voting pools are not permitted.<sup>87</sup> Also, the articles may authorize creditors, subject to such conditions, qualifications, and limitations expressed therein, to vote the same as or in lieu of the shareholders.<sup>88</sup> At least one class of shares must possess unrestricted voting privileges,<sup>89</sup> and, unless otherwise provided in the articles, all shares may be voted cumulatively.<sup>90</sup>

After the election of the board at the shareholders' organization meeting, the business and affairs of the corporation must be controlled by the board of directors, consisting of at least three persons legally competent to enter into contracts. Other qualifications, as also the powers and duties, of directors are fixed by the by-laws insofar as not established by the articles.<sup>91</sup> If the board consists of nine or more directors, the members may be divided into two or three classes and only one-half or one-third of the members, as the case may be, elected each year.<sup>92</sup> Salaries of directors as such must be fixed by an affirmative vote of a majority of all outstanding shares.<sup>93</sup> It is possible that the board may fill any vacancy in its membership, and also as

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75. Sec. 67, *b*(3).

76. Sec. 42.

77. Sec. 43.

78. Sec. 49.

79. Subject to any provisions in the articles or by-laws, Sec. 50, *b*.

80. Sec. 52.

81. Sec. 53.

82. Sec. 54.

83. Sec. 55.

84. Sec. 56.

85. Sec. 57.

86. Secs. 58-60.

87. Sec. 58, *f*.

88. Sec. 61.

89. Sec. 62, *c*.

90. Sec. 62, *d*.

91. Sec. 64.

92. Sec. 65, *c*.

low as one-third of the entire board may constitute a quorum if not less than two.<sup>94</sup> If the articles or by-laws so authorize, the board may, by a majority vote of the entire board, appoint an executive committee and delegate broad powers thereto. On the other hand, if the articles and/or by-laws neither forbid nor authorize the creation of an executive committee, such committee may be established by unanimous vote of the entire board.<sup>95</sup>

A share certificate must be issued to every bona fide shareholder, but such certificate may be withheld until the shares are fully paid if so provided in the by-laws. If the shares are fully paid, non-assessable, not in a voting trust or pool, not pledged, or not otherwise encumbered or subject to a lien or other impairment of the full right, title, and interest therein, the certificate shall be on white paper or parchment. Certificates evidencing only partly paid or shares otherwise encumbered must be issued on blue paper or parchment, and must contain a notation setting out the nature and terms of the impairment.<sup>96</sup>

The Uniform Stock Transfer Act, with some amendments, has been incorporated into the Act.<sup>97</sup> The principal amendment thereto concerns the attachment of shares. In addition to the procedure stipulated in the U.S.T.A., when the share certificate cannot be seized or is not surrendered up, an attachment may be effected through the corporation. A one-year statute of limitation between the date of levy and the sale gives due protection to the vigilant, bona fide holders of the original certificates.<sup>98</sup>

The provisions of the Act are meticulously formulated in regard to the protection of creditors and preferred shareholders against unwarranted dispersal of the corporate assets by way of dividend payments, redemption of shares, reduction of capital, etc.<sup>99</sup> However, when it is fully solvent a high degree of flexibility is afforded the corporation.

The provisions of the Act evidence a pronounced advancement in checking the filing of unwarranted derivative suits.<sup>100</sup> The procedural steps are

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93. Sec. 65, *d*. It is also possible to have directors' salaries fixed in the articles, or in the by-laws adopted by the shareholders.

94. Sec. 67.

95. Sec. 66.

96. Secs. 90-91.

97. See note 37 *supra*. The U.S.T.A., with some amendments, was adopted by the Florida Legislature in 1943, and became Chapter 614, 18 FLA. STAT.

98. Secs. 104-110.

99. Secs. 125-134.

100. Sec. 142.

With honest corporate management there would be no need for derivative actions. It is equally true that without "shyster" lawyers to file "strike suits" there would be no cause for alarm about shareholders' bills. But we are not free from either dishonest corporate officers or shyster attorneys. Without derivative suits the former thrives, and with such suits the latter flourishes. This dilemma has generated a "tension spot" in the field of corporation law. Legal formulas are lacking to check the "strike-suit" epidemic. The derivative-suit "drug" compounded to curb the ravages of the mismanagement malady has been converted into a vena of quackery.

The requirement that the instigator of the suit be the holder of the shares at the time of the alleged corporate mismanagement, as is provided in Sec. 23 (b) of the Federal Rules of Civil Procedure, helped some but did not serve to adequately check the

fully set forth to avoid any confusion as to what must be alleged, etc. Any holder of share and/or trust certificates evidencing a value of \$25,000 or five per cent of the shares of the corporation who either held such certificate, or certificates, at the time the alleged wrong was committed, or his title there-to evolved upon him by operation of law, may bring such action without posting security for costs and possible damage to the corporation, including attorney's fees. Otherwise, if upon hearing the court finds that there is probable cause that the suit may be groundless, it can require the plaintiff to put up such security.

The provisions relating to amendments of the articles are very articulate and comprehensive. The greatest possible flexibility is allowed insofar as consonant with ample protection of creditors and minority groups within the corporation. The incorporators may amend the articles, any time before the corporation has begun business or allotted any shares, upon approval of the subscribers of two-thirds of the then subscribed shares, if any.<sup>101</sup> If the amendment effects any material change in the corporation, non-assenting

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ruthless traffic in this form of "shake-down" litigation. Nor did the provisions in Sec. 23 (c) of the Federal Rules requiring the approval of the court before a compromise and dismissal of the action, fully halt the abuse. In view of this, a legislative movement requiring the instigator of the action to post security for costs, defense attorney's fees, and other possible damage constituted a body thrust at the counter-malady. In fact the harshness of the requirements in the statutes of Maryland, New Jersey, and New York practically eliminated the derivative suit, and as a result it is feared that dishonest corporate management may proceed to run rampant. Wolfson, *Striking Out "Strike Suits,"* 49 FORTUNE 137 (March, 1949); Hornstein, *Directors' Expenses in Stockholders' Suits,* 43 COL. L. REV. 301 (1943); Hornstein, *New Aspects of Stockholders' Derivative Suits,* 47 COL. L. REV. 1 (1947); Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York,* 32 CALIF. L. REV. 123 (1944); Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law,* 54 YALE L.J. 352 (1945); Remington and Kuehl, *Stockholders' Derivative Suits—Section 180.13(3) [Wis. Stat. 1945],* 1948 WIS. L. REV. 580; *Stockholders' Derivative Suits in New Jersey—Effect of Chapter 131,* P. L. 1945, 1 RUTGERS L. REV. 117 (1947). On the other hand, it has been suggested that such legislation is a step in the right direction. Carson, *Further Phases of Derivative Actions Against Directors,* 29 CORNELL L.Q. 431 (1944).

The problem boils itself down to the matter of devising a legal formula which can be employed in effectively sifting out the bona fide suits from the spurious actions. The many substitutes that have been offered seem to add to the belief that the problem has not yet been solved. Berlock, *Stockholders' Suits: A Possible Substitute,* 35 MICH. L. REV. 597 (1937); Stocker, *The Derivative Suit: Its Limitations and a Suggestion,* 29 GEO. L.J. 363 (1940); Bowes, *Should New York's "Security for Expenses" Act Be Amended?* 2 SYRACUSE L. REV. 37 (1950); Mullooly and Fuhrman, *A Proposed Reform in the Law Affecting Shareholders' Derivative Actions,* 24 ST. JOHN'S L. REV. 326 (1950); *Derivative Action—Corporation Entitled to Proceeds of Private Settlement,* 23 N.Y.U.L.Q. REV. 192 (1948); *Proposed Statutory Revision: Suggested Repeal of Section 61b New York General Corporation Law Requiring Security for Expenses in Shareholders' Derivative Suit,* 24 N.Y.U.L.Q. REV. 395 (1949); *Shareholders' Derivative Actions—Allowance of Counsel Fees to the Extent that Benefit Was Conferred on Corporation,* 35 VA. L. REV. 790 (1949); *Stockholders' Derivative Suits: A Federal Question?* 27 IND. L.J. 231 (1952).

The Florida Act simplifies the procedure, requires a holding of either 5% of the company's shares or securities of the corporation valued at \$25,000, places less burden on the plaintiff by requiring the defendants at a summary hearing to establish a probability that the action is groundless or not to the best interests of the corporation, and places less restrictions on the plaintiff's right to inspect the corporate records in order to search out others to join as party plaintiffs.

101. Sec. 147.



subscribers are released from their subscriptions. Moreover, the board of directors may, at any time, amend the articles in changing the registered office or agent, or in fixing or altering the attributes of and allotting new series of shares when provisions for such are set out in the articles.<sup>102</sup> Other amendments of the articles are effected by a resolution by the board and approved by the shareholders.<sup>103</sup> Such approval requires a two-thirds vote of all shareholders entitled to vote thereon and a majority vote of any class or classes entitled to vote thereon as a class.

Shares may be voted as a class when so provided in the Act or in the articles, or when the shares are affected adversely.<sup>104</sup> Shares thus adversely affected have the right to vote upon such amendment irrespective of any limitations placed upon its voting. Owing to the fact that the phrase "affected adversely" is employed in a literal sense, it seems unnecessary to repeat the long list of instances in Section 149 when shares are thus affected.

Even though an amendment is duly voted, unless the articles otherwise provide, the minority shareholder still has another method of escape; he may dissent and require that his shares be purchased before the amendment is consummated. Section 152 provides that a shareholder may dissent to an amendment if his shares are affected adversely, the corporate purpose is substantially altered, the number of directors are reduced, all or substantially all of the corporate assets are sold or otherwise disposed of, securities or other assets are distributed in kind, a consolidation or merger is effected, or a voluntary reorganization is undertaken. However, Section 153 permits the extension of the right to dissent to other shareholders by provisions in the articles. Also, if so provided in the articles, the right to dissent may be denied if the amendment is approved by a vote of ninety per cent of all outstanding shares and by three-fourths of the shares of the class of shares dissenting.

Section 165 provides for reorganization compromises. Unless otherwise provided in the articles, three-fourths of the shareholders, or creditors of a corporation, may submit to a chancery court for approval such a compromise agreement. Thereupon, the one-fourth minority waives the right to dissent unless such right is reserved in the articles. Section 166 sets out the procedure when a reorganization has taken place under federal laws.

Sections 169 to 191, inclusive, deal with the dissolution of domestic corporations. No other corporation statutes provide formulas offering more flexibility in dissolution and winding-up of a corporation. A dissolution may be either voluntary or involuntary. If voluntary, the proceedings may be conducted out of court or subject to the supervision of the circuit court, sitting in chancery. Before the allotment of shares or beginning business, the incorporators may, upon approval by a majority of the subscribers, if any, dissolve the corporation by filing with the Secretary of State articles of

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102. Sec. 157.

103. Sec. 148.

104. Sec. 148, *b*, *c*, and *d*.

dissolution. If the corporation is adjudged bankrupt or insolvent, articles of dissolution may be filed by the board of directors without a vote of the shareholders.

The ordinary voluntary dissolution in proceedings out of court may be accomplished by a unanimous vote of the shareholders, or by a resolution of the board of directors upon approval of an affirmative vote of two-thirds of the shares entitled to vote thereon. If any class of shares are entitled to votes as a class, there must also be an affirmative vote of at least a majority of the shares of such class.

Application is made to the court if the dissolution is to be carried on under its supervision. Moreover, at any stage, the proceedings may be shifted from a proceeding out of court to a proceeding under supervision of the court. Even after a dissolution is completed out of court, if any question arises as to possible liabilities, etc., the board of directors or trustees may, instead of filing articles of dissolution with the Secretary of State, petition the court for an order declaring the corporation dissolved and wound up after a ruling on any matters in dispute. Every phase of the various steps in the alternate methods of the procedures in dissolving, winding-up, and distribution of assets is comprehensively formulated.

Provisions and procedures in the domestication and withdrawal of foreign corporations are fully set out,<sup>105</sup> as are also the procedures in preparing, executing and filing of the various forms of articles, decrees and other documents.<sup>106</sup> All articles and other documents to be filed with the Secretary of State are prepared in triplicate, executed, and forwarded to the Secretary of State. The Secretary of State stamps them "filed," and issues an appropriate certificate, when such is required, in triplicate. The first copy of the articles or other document, along with the third copy of such certificate, is filed in the office of the Secretary of State. The second copy of each is mailed, by registered mail with return receipt requested, to the clerk of the circuit court of the county where the registered office of the corporation is located. Such clerk is to file these copies in his office. The return receipt is filed by the Secretary of State when received. The third copy of the

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105. Secs. 192-98.

106. Secs. 199-231.

The present statutes of a total of nine states (Florida, Massachusetts, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Texas) apparently require no public filing of corporate records in the county where the registered office or principal place of business is located. The proposed Florida Act provides for such filing, while the proposed Texas Act fails to require such modern procedure. From the standpoint of the public and the bar, such local filing is strongly favored. On the other hand, it means many more fees for the office of the Secretary of State if such filing is not required. Therefore, when the Secretary of State is able to exert control over the matter, it is quite possible that the attorneys and the public will be denied the benefits resulting from the filing in the county. Mr. John Ben Shepperd, Secretary of State of Texas, is serving as chairman of the Interim Committee of the Texas Legislature, so apparently the lawyers of Texas will be required to either depend upon correspondence or scud across the expansive "wide-open spaces" of that state to Austin for corporate information which should be right at hand in the county.

articles, or other document, and his original certificate, is delivered or mailed to the corporation. Such records of the Secretary of State and the clerk of the circuit court are subject to public inspection, and copies thereof, when duly certified by the Secretary of State or clerk of the circuit court, are receivable in evidence in any court of the state.

In the case of mergers and consolidations, enough extra copies of the articles, etc., must be supplied the Secretary of State so that a copy thereof, along with a copy of the appropriate certificate, will be available for forwarding to the clerk of the circuit court of each county where the registered office of each constituent corporation is located and to each constituent corporation insofar as the registered offices of such constituent corporations are located in this State.

For observing the procedure in filing corporate documents by the Secretary of State, let us use the articles of incorporation of a proposed corporation as an example. Upon receiving the articles in triplicate along with the necessary fees, he examines the articles and if they conform to law he proceeds to stamp them, etc., as heretofore set out.<sup>107</sup> If they do not conform to law, he returns them to the incorporators with a notation as to the deficiency. In the event he is uncertain as to a point of law raised by some questionable matter in the articles, he states the point of law involved and submits it, along with a written request to the Attorney General for a written opinion thereon. The Attorney General in turn checks the law on the issue involved and submits to the Secretary of State a written opinion setting out the interpretation of the law and its application to the problem at hand.<sup>108</sup> This opinion is binding upon the Secretary of State until it is overruled by a court of competent jurisdiction. The Secretary of State then makes a ruling in conformity with the opinion of the Attorney General. If the incorporators—or the board of directors, receiver, or other person, or groups presenting any articles or other documents to the Secretary of State for filing—wish to contest any ruling by the Secretary of State, they may effect an appeal directly to the circuit court.<sup>109</sup> The duties of the Secretary of State and other state officials relating to corporations are fully set out in the Act.

Owing to the many ramifications of a modern corporation code as articulate and comprehensive as the Florida Act purports to be, space only permits a treatment of its more important features. The relative comprehensiveness of this Act is brought into focus when it is mentioned that it, while stripped of all possible redundancy, contains, including its table of contents, something like seventy thousand words. Thus, it makes up approximately three times as much word-content as the Texas Act. The A. B. A. draft is of approximately the same length as the Texas Act. One

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107. Sec. 225.

108. Sec. 237.

109. Sec. 244.

of the prime complaints against the present Florida corporation statutes is that they fail to cover half as much of the field of corporation law as is covered by the corporation statutes of such states as California, Delaware, Michigan, New York, Ohio, and Oklahoma. The proposed Florida Act is comparable in length with the corporation statutes of the states above mentioned.