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PAST AND PRESENT TRENDS IN CORPORATION LAW: IS FLORIDA IN STEP?

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THE date of origin of the corporate concept is shrouded in uncertainty. However, it unquestionably dates back over 2500 years.³ In its evolution the concept passed through three rather distinct stages. The first stage extended up to approximately 1200 A. D. The original corporate concept was of Greek and Roman origin, and was limited strictly to public functions, which limitation carries

¹ Professor of law, University of Miami. Eleven years ago this co-author read before the annual meeting of the Oklahoma State Bar a paper on the need for revision of the corporation laws of that state. (Excerpts from the paper, as it later appeared in the Oklahoma State Bar Journal, are freely used in these footnotes.) The interest thereby developed put in motion a movement which resulted in the drafting of the most advanced modern business corporation act up to this time. That draft, with a few amendments, was enacted into law by the 1947 Oklahoma legislature.

² Senior law student at the University of Miami. Mr. Baughman also contributed materially in assisting the co-author of this article in preparing the annotations of the Oklahoma Act for the West Publishing Company.

³ "The genesis of the corporation dates back to a very ancient time; the early tribe and clan in primitive society were manifestations of the collective-entity concept. The Roman jurist, Gaius, recorded that the origin of the corporation dates from the reign of Solon, in Greece, about 600 years B. C.; while Blackstone quotes Plutarch for the statement

over into English legal history. There is evidence that the Roman church issued charters to ecclesiastical units on the Continent and in England much earlier, but it was not until some time after the Conquest that lay charters were granted in England.⁴ The first royal charters granted by the Norman Kings were to boroughs and other municipalities, and a little later charters were issued to educational groups. All of these units were public in nature and possessed the common attributes of separate entities and limited liability.

The beginning of the 13th Century marks the advent of the handicraft stage. This led to a new era of trade and commerce, and, in turn, laid the foundation for the extension of the corporate functions to quasi-public, semi-private activities, thus ushering in the second stage of corporate evolution.⁵ This epoch extended approximately

that the corporation was first employed a full century earlier by the Roman ruler, Numa Pompilius. Be that as it may, the *private* corporation as it exists today was never known in either Greece or Rome. *Public* corporate entities were known in the Grecian cities, and they became common in the Roman Law. The Roman *societates*, more definitely termed the *collegia* and the *universitates*, were *public* political units, possessing the substantial attributes of municipal and quasi-municipal corporations of today. They were public in nature and were treated as legal entities without personal liability." Wright, *The Oklahoma Corporation Law—Does it Need Revision?* (1937) 7 Okla. State B.J. 224.

⁴ "The conclusion of Blackstone as to the source of the corporate idea having been quite generally accepted, law writers have likewise followed him in tracing the earliest forms of English corporations to the Civil Law, crediting the church with being the medium of transfer across the black gap of the Middle Ages, although it is said that corporations existed in England before the Civil Law was known there. (. . . The English corporation, in its origin, was a product of local evolution . . .)" 1 Fletch. Cyc. Corp. 5.

⁵ "The first lay charters seem to have been granted to boroughs and other municipal groups by the early Norman kings. At about that time, or perhaps a little later, lay charters for educational or charitable purposes began to appear. Still later, as the handicraft stage began to emerge, we find the merchants and craftsmen organizing into guilds. Many charters were issued to these groups. Although the Weavers' Guild seems to have been chartered by Henry II (whose reign ended in 1189), most of the charters to the craft and the merchant guilds were issued during the 14th and 15th centuries. The Goldsmiths' Guild was chartered in 1327; the Mercers' Guild, in 1393; the Haberdashers' Guild,

1407; the Fishmongers' Guild, in 1433; the Vinters' Guild, in 1437; the Merchant Tailors' Guild, in 1466; the Pewterers' Guild, in 1482.

"Handicraftsmanship begat trading, commerce, exploration, colonization, and finally, colonial exploitation. The European rulers conceived the idea of using their chartering powers to promote these semi-political, semi-commercial activities. We soon, therefore, discover royal charters being issued to financial organizations and trading companies by England and the other commercial countries. Banks were essential to carrying on trade and commerce; therefore, we would expect them to keep pace with other commercial enterprises. The Bank of Barcelona was chartered in 1401; the Bank of Genoa, in 1407; the Bank of Venice, in 1587; the Bank of Amsterdam, in 1609; the Bank of Hamburg, in 1619; the Bank of Rotterdam, in 1635; the Bank of Stockholm, in 1638; the Bank of England, in 1694. Since noticing briefly the development of the guilds and the banks, we shall now pass to the more important business units, the trading companies.

"Lord Coke, speaking in the early 17th century, related that he had seen a charter granted by Henry I (whose reign ended in 1135) and later confirmed by Henry II, to the *Burgundians*, a company of traders. Other records state that the Burgundians were chartered on the Continent in 1248, and the charter later confirmed by the English Crown during the time of Edward I, whose reign ended in 1307. This is perhaps more accurate for the English trading companies did not begin to appear much until the 16th century. Some of the other more important English trading companies were the Russian Trading Company, chartered by Edward VI in 1553; the Eastland Company, the Turkey or Levant Company, and the East India Company, chartered by Elizabeth in 1579, 1581, and 1600, respectively; the Royal African Company, chartered in 1662; the Hudson Bay Company, in 1670; and the South Sea Company, in 1711. Many trading charters were also granted in other countries. In France from 1599 to 1789, more than seventy such companies came into existence.

"It must be remembered that all of these chartered companies were semi-public, politico-commercial in character. They were huge joint stock companies chartered to perform semi-public functions. Some were chartered by royal grant while others received their franchises from Parliament.

"Limited liability was a quite common incident of the chartered companies. However, many unchartered joint stock companies were developed—being created by contract and subject to unlimited liability; i.e., becoming only an enlarged form of the partnership. They engaged in purely private enterprises and were subject to unlimited liability.

"In the wake of the trading companies came marine and other insurance companies, wharf companies, ship-building companies, mining companies, and, finally, general manufacturing and merchandising companies." Wright, *The Oklahoma Corporation Law—Does It Need Revision?* *op. cit.*

600 years, coming to a close early in the 19th century.⁶ The beginning of the third and present stage of evolution is marked with the further broadening of the corporate concept to comprise the strictly private business enterprise. The early Colonial assemblies had chartered a scattering of business entities somewhat private in nature, but their functions were considered as being connected with public interests.⁷

"But up to the Declaration of Independence the modern corporation was never conceived. Blackstone, in his *Commentaries*, first published in 1765, mentions no corporation other than these semi-municipal organizations. Nor is any mention made of a purely private corporation in Kyd's treatise on corporations published in 1793. The first book to treat private corporations as such was the American Text, *Angell and Ames on Corporations*, published in 1831.

"The English were much slower in conceding to the entrepreneurial corporate group a purely private status. In 1827, an English legal writer, Willcock, in preparing a text on Corporation Law seems to have drawn no clear distinction between quasi-public and purely private corporate units." *Id.* p. 225.

English corporate development received a severe set-back at the hands of Parliament upon the passage of the "Bubble Act" in 1719. From then until the act was repealed in 1825 the formation of a joint stock company was illegal, and an indictable offense. In fact, little encouragement was offered to new English commercial companies until the passage of the Companies Act of 1856. See Horowitz, *Historical Development of Company Law* (1946) 62 L. Q. Rev. 375.

"The private corporation is of American origin and a product of the last century. In fact, it has developed mostly since the Civil War. Many of the legal rules and principles, however, which governed the quasi-public joint stock company have been carried over and applied to the private corporation.

"It is interesting to note that only six corporations were chartered by the Colonial Assemblies prior to 1776 -- a New York fishery company (1675), a Philadelphia trading company (1682), a New London (Conn.) trading company (1723), a New Haven wharf company (1760), a Philadelphia fire insurance company (1768), and a Boston wharf company (1772). About 20 corporate charters were granted from 1776 to the date of the adoption of the Constitution. One federal charter was issued under the articles of Confederation, in 1781, to the Bank of America. Something like 200 corporations were organized from 1789 to 1800, but these were mostly quasi-public corporations, in the nature of joint stock companies or limited partnerships. Up to 1800 there was only one case before the United States Supreme Court (2 Dall. 78) involving a corporation. This was the status of the law of corporations in 1800. Until then all incorporations were effected by special grants, by the Crown or Parliament in England and by the legislatures in America." *Id.*

The private corporate entrepreneurial unit, once conceived, became the prime factor in implementing the swift development of the so-called "Industrial Revolution." It can be truthfully said that the present "machine age" stems from that extended corporate concept. It would be idle to suggest that modern industrial progress could have put down the stanch roots necessary to nourish the leviathanic trunk and branches required to support and nurture the abundant fruits in supplying mankind's wants except for the sudden development of the fertile soil of **freedom**. This **birth of freedom** gushed forth as the last quarter of the 18th Century was launched. The Declaration of American Independence heralded a new **political freedom**; the same year Adam Smith's **Wealth of Nations** pronounced a new **economic freedom**; and at the same time James Watt was perfecting his invention of the steam engine which unleashed a new **industrial freedom**. This **trinity of freedom** served as a tripod, supporting our private corporate enterprise which was destined to bring to our present social order a more abundant life.³

The private enterprise operated purely for profit welled from the pioneer spirit of the American way of life. The new *laissez faire* psychology, coupled with an abundance of natural resources, created an ideal setting here in America for unprecedented corporate growth. Although the ground was readied and the seed sown, the trend up to 1800 was scarcely observable. An urgent impetus was supplied immediately after the turn of the century. The Embargo and Non-Intercourse Acts, enacted during Jefferson's Administration, served as a boom to new companies. The extension of the corporate concept over into the realm of strictly private entrepreneurial functions was inevitable, although the transformation was not fully

Neither in the Florida Constitution of 1838, nor in the statutes enacted immediately following statehood, is anything found to indicate even a remote concept of the strictly private corporation as such.

³ In a recent press report, the economist, Henry J. Taylor, made this statement: "In the past 150 years, American free enterprise has produced not only more goods than any other nation, but more than all of them combined have produced during the last 1,000 years! . . . Quite a record for people comprising less than 7 per cent of the world's population, and having only a fraction of the world's resources."

See, also, Editorial from *Fortune*, Note 48, *infra*.

recognized by the law commentators until as late as 1831.⁹ Owing to the limited industrial demands in Florida Territory, progress in this area developed much more slowly than in the northern colonies. As late as 1847, the Florida law contained nothing relating to strictly private corporations. The Florida statutes then only provided for public and semi-public corporations, such as towns, academies, religious and library societies, banks, and insurance companies.¹⁰

The number and scope of the semi-public entities expanded rapidly during the first half of the last century, while the purely private corporation was gradually emerging from its embryonic stage.¹¹

The modern private corporation did not begin to gain full momentum until after the close of the War Between the States, and did not reach crescendo proportions till

⁹ See Notes 5 and 6, *supra*.

¹⁰ Thompson, *Digest of the Statute Law of Florida* (1847) pp. 298-319.

¹¹ "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.

"Besides the springing up of a multiplicity of banking, bridge, turnpike, canal, and other transportation companies, and the granting of many charters for educational and other eleemosynary purposes, purely private corporations, after the turn of the century, were beginning to multiply—especially in Massachusetts. Only nine manufacturing companies had been created up to 1800—three in Massachusetts, three in New York, and one each in Connecticut, New Jersey, and Kentucky. The first manufacturing company of any considerable size, the Boston Manufacturing Company, was chartered in Massachusetts in 1817. Others followed in rapid succession. But, because of the profound economic needs of the new country, most interest naturally centered, up to about 1850, in developing the quasi-public business units. The demands for transportation and travel brought forth the bridge, turnpike, steamboat, and canal companies, followed in the thirties by the railroad companies; for expansion of credit and finance, the banking companies; for assumption of risks, insurance companies. 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." Wright, *The Oklahoma Corporation Law—Does It Need Revision?* *Op. cit.*

near the end of the century. The acceleration prior to the close of the Civil War had been retarded, and continued thereafter to be somewhat hampered, by four major factors; viz., 1) shortage of labor, 2) scarcity of capital, 3) lack of tool equipment and technically skilled personnel, and 4) tardy development of corporation laws. As corporate expansion progressed the first three of these retarding factors automatically corrected themselves. The corporation produced labor-saving machines which, in turn, released more and more manpower from agricultural and other pursuits; the increment resulting in surpluses enhanced the stockpile of capital; and the rewards for efficient mass production stimulated new inventions, improved methods, more productive plants, and greater skills.

Removal of the fourth obstacle progressed more slowly. The freedom-loving American naturally was suspicious of the vesting of unrestrained monopolistic power in uncontrolled corporate units.¹² But the ability of the corporation by mass production to supply human wants became an irresistible force. Accordingly, public interest gradually shifted from direct opposition to corporate enterprise to means of its regulation against corporate abuses.

¹² As early as the close of the eighteenth century corporations bore a bad repute. This is evidenced by their many verbal castigations in writing on political economy and in utterances by political statesmen. See Harvard Studies. *History of English Monopolies. Seventeenth Century.*

In 1840, the governor of Massachusetts, in a message to the legislature of that state, admonished that body to take steps to curb corporations. He proceeded upon the assumption that corporations were generally organized for fraudulent purposes.

That attitude strongly prevailed well up into the latter part of the nineteenth century. Justice Rutledge, while dean of the College of Law, University of Iowa, remarked: "Practically every general incorporation law in force prior to 1890 contained rigid limitations upon the scope and freedom of corporate activity. These reflected a general and all-prevailing attitude of suspicion, if not of fear, towards the corporate institution." *Significant Trends in Modern Incorporation Statutes* (1937) 22 Wash. U. L. Q. 305, 306.

Mr. Elwyn G. Davies, a member of the Ohio Corporation Code Committee, in commenting on the Ohio Convention Debates (1850-51, pp. 340 *et seq.*) stated: "The delegates to the Constitutional Convention were haunted and troubled by the spectre of a fictitious personality identified with monopolies and with the grant of special privileges. The debates of the Convention not only show hostility to corporations

but also genuine and serious concern that "they would usurp every trade and business, intrude themselves into every nook and corner of the state, override all private enterprise, and become as troublesome as the lice of Egypt'." *Reflections of the Amateur Draftsmen of the Ohio General Corporation Act* (1937) 12 Wis. L. Rev. 487.

A member of the California Corporation Code Committee noted the expression of similar sentiments in that state a quarter century later. He remarked: "When we say that they [the delegates] distrusted the corporate entity, we are understating their sentiments; it would be more accurate to say that they loathed it. In the debates of the Constitutional Convention in 1878, Mr. Wyatt made the following remarks (p. 398): 'Corporations are not creators of wealth; corporations do not go out and work. A corporation is a seine that runs around the State and seines in the hard-earned money of those who do work. We could live without corporations in the State of California, and, with nine-tenths of them wiped from existence, we would be much better off than we are now.'

"Mr. Dowling seemed to feel even more strongly on the subject (p. 402): 'The corporations of California appear to me to be like an immense boa constrictor, having the whole State gripped within its coils, squeezing faster and faster all the time, until the whole State trembles with agitation and bleeds from every pore.'" Sterling, *Modernizing California's Corporation Laws* (1937) 12 Wis. L. Rev. 453, 455, note 5.

The above examples are characteristic of views revealed in other Constitution Conventions throughout the land. Early in the present century, Mr. William Murray, who later became the colorful governor of Oklahoma, while serving as chairman of the Constitutional Convention of that state, vigorously opposed permitting the organization of private corporations other than utility companies in Oklahoma.

"Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes. (See Joseph S. Davis, *Essays in Earlier History of American Corporations*, Vol. II, pp. 16-18, 308-309. . . .) It was denied because of fear: fear of encroachment upon the liberties and opportunities of the individual; fear of subjection of labor to capital; fear of monopoly; fear of the absorption of capital by corporations; and their perpetual life might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations. So, at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable." Brandeis, J., in *Louis K. Liggett Co. et al., v. Lee, Comptroller of the State of Florida, et al.*, 288 U. S. 517, 548-49, 53 S. Ct. 481, 77 L.ed. 929, 85 A.L.R. 699 (1939).

Today, however, that notion has more or less vanished, except as manifested in utterances of misguided personages, self-serving groups, and political demagogues.

Two retarding elements were cast aside during the first half of the last century; viz., 1) restrictions upon limited liability, and 2) incorporation only by special legislative enactments.

Since a very early time, limited liability of stockholders was recognized as a common corporate attribute, dating back to the law of the Greeks and Romans. This limitation of liability was recognized under the English common law, but was not extended to commercial companies until the 16th century.¹³ It was effected by charter provisions, but it was normal to insert such terms in the charter. However, the principle of limited liability of present-day stockholders is of statutory origin. It, as a general feature, was not established in the statutory law of England until during the decade of 1850-1860, although it became a common incident in the statutory laws of this country much earlier. New York had fully provided for it as early as 1811, while Connecticut followed in 1817, and Massachusetts in 1829. Other states, although rather tardily in a few instances, joined the procession of this legislative trend. By 1850 the complete doctrine of general limited liability of share-

Perhaps it is not amiss to say that a careful distinction must be drawn between *direct opposition* to the corporate enterprise and necessary *legal regulations* against corporate abuses.

¹³ "The principle of limited liability was first introduced into English law of commercial associations in the sixteenth century when bodies which had started as large partnerships found it expedient to obtain corporate form and to carry on business as an incorporated joint stock company. Thus, the Society of Mines Royal, which was founded in 1561, was incorporated in 1568; the Society of Mineral and Battery Works, founded in 1565, was incorporated in 1568. Other companies, trading in foreign countries, also obtained corporate form, for example, the Russian Company in 1553, the Levant Company in 1581, the East India Company in 1600.

"It would appear that these companies incorporated by royal charter were, in essence, the first companies which afforded limited liability to their members. . . . Limited liability, however, was not the main purpose for which those companies sought incorporation." Horowitz, *Historical Development of Company Law* (1946) 62 L. Q. Rev. 375.

The "Bubble Act" of 1719 practically "blacked out" the organization of new commercial companies in England up to the passage of the Companies Act of 1856. The 1856 Act again established general limited liability. The Limited Liability Act of 1855 had provided for only a modified form of limited liability. *Ib.*

holders was firmly rooted in the statutory laws of many states.

Two pronounced exceptions long lingered, namely, in the laws of California and Minnesota. But this persistence finally was overcome, and these archaic restrictions ultimately—less than two decades ago—passed into the limbo.

The Constitution of California formerly provided that shareholders were subject to *pro rata* liability for all obligations of the corporation.¹⁴ This restriction was removed by constitutional amendment in 1929.¹⁵

The Constitution of Minnesota,¹⁶ before being changed by a 1933 amendment, fixed a double liability on shareholders in that state. The removal of the restrictions in these two states brought to a close the reign of harsh stock liability placed upon shareholders of private corporations in general.

Originally, corporations received their charters by royal grants. The power to "set up" corporations was considered a prerogative of the King. However, Parliament later engaged in creating corporations by special legislative acts. In America no royal prerogative existed. As a result,

¹⁴ Cal. Const. Art. XII, § 3. This constitutional provision was construed by the California courts as creating a direct and primary liability the creditor not having to first exhaust his remedy against the debtor corporation before pursuing his remedy against the shareholder. *Sonoma Valley Bank v. Hill*, 59 Cal. 107 (1881); *Ellsworth v. Bradford*, 186 Cal. 316, 199 P. 335 (1921). Moreover, the California Constitution further provided that foreign corporations could not engage in business in that state on more favorable terms than those accorded to domestic companies. Cal. Const. Art. XII, § 15. The courts interpreted this to mean that such stockholders' liability extended to the shareholders of foreign corporations doing business in California. *Peck v. Noee*, 154 Cal. 351, 97 P. 865 (1908); *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 P. 942 (1910).

¹⁵ See Sterling, *Modernizing California's Corporation Laws* (1937) 12 Wis. L. Rev. 453.

¹⁶ Minn. Const. Art. X § 3. Shareholders of corporations engaged in "manufacturing or mechanical business" were excepted from the constitutional double liability.

See, also, Solether and Jennings, *The Minnesota Business Corporation Act* (1937) 12 Wis. L. Rev. 419.

Dating back to a very early time, it was a general rule that shareholders of banks—both state and federal—were subject to statutory double liability. But in the recent thirties a strong trend developed towards removing such liability.

all charter-granting powers resided in Congress and the state legislatures. Thus, in this country before the arrival of general incorporation laws, all companies were created by special legislative enactment. This constituted the most serious of all handicaps to rapid corporate development. It was clearly obvious to the casual observer, that the delay, connected with the development of other concomitant evils, would result in a restraint upon normal economic expansion.

The prime objections to incorporation by special legislative act can be listed as follows: 1) unnecessary delay between legislative sessions; 2) overburdening of the legislature by the increasing demands for corporate grants; 3) political corruption and favoritism; and 4) development of non-uniformity in charter provisions, thus impeding all efforts to establish uniform legal standards applying to corporations.

These objections were overcome by the inauguration of the general incorporation law. The legislature thereby could establish uniform standards by a general act, leaving the charter-granting function to the secretary of state or other executive or administrative officers.

Although much earlier, several states had adopted limited types of general incorporation statutes,¹⁷ New York

¹⁷ "There is some dispute among the authors as to the exact dates of the first general incorporation statutes. This uncertainty results largely by the first acts being very limited in scope, some treating these first enactments as not truly general incorporation statutes.

"Massachusetts passed an act in 1784 providing, in a limited way, for the incorporation of *religious* corporations by administrative act. In 1791, there was further passed in Massachusetts a general incorporation statute for creating *literary, charitable, and religious* organizations, and, in 1807, for *manufacturing* companies. In 1796 New York enacted a general statute as to *literary* corporations, and in 1811 a limited statute concerning the general incorporation of *business organizations*, which act was extended to *corporations in general* in 1817. 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?* (1937) 7 Okla. State B. J. 224, 226.

The Florida Constitution of 1838 (which became effective when this state was admitted into the Union, Mar. 3, 1845) provided: "The General Assembly shall pass a general law, for the incorporation of all such churches, and religious, or other societies, as may accept thereof; but no special act of incorporation thereof shall be passed." Art. 15.

is credited with the adoption of the first full-fledged general incorporation act in 1848. The first English general incorporation statute was the Companies Act of 1856. Other American jurisdictions rapidly followed the example set by New York. One author, in commenting upon this advanced stride made by the New York legislature, remarked:

"This has been viewed as a consummation of the greatest triumph that our American experiment in equal rights has ever achieved in practical results."

The general incorporation laws gave every group the opportunity to incorporate as a matter of right, free from the necessity of political influence and delay, and independent of the whims of the individual legislators.

As could be expected, with the general incorporation statutes established, the beginning of the last half of the century was marked with a decided increase in the number of applications for charters. A positive acceleration in corporate development, except for minor interruptions by wars and business depressions, has been maintained down to the present time.

The corporate concept from its inception down through the centuries has been associated with the power of perpetual succession. In the absence of the stipulation of a limited period in their charters, all corporations were deemed to enjoy perpetual duration. Considerable perturbation developed in early England over the gradual concentration of land in the hands of these perpetual units. This was particularly true as to religious corporate entities. However, the opposition was directed against the alienation of lands to such units, rather than against the perpetuity of their duration. This opposition was ex-

Today state constitutions generally stipulate that private corporations shall be created only under general incorporation laws. See Fla. Const. Art. III, § 25. General incorporation statutes were generally followed by (in a few instances were preceded by) the adoption of such constitutional requirements. For dates of the earlier of such adoptions in various states, see Brandeis, J., in *Louis K. Liggett Co. et al. v. Lee, Comptroller of the State of Florida, et al.* 288 U. S. 517, 549 (footnote 4), 53 S. Ct. 481, 77 L.ed. 929, 85 A.L.R. 699 (1933).

pressed in Parliament in the first mortmain act, passed during the reign of Edward I.¹⁸

Mortmain provisions crept into the early constitutions and statutes of many American states, and, in many instances, still remain. Moreover, statutory limitations upon the maximum amount of property to be held—as to land, the limitations were usually stated in terms of acres, and as to chattels, in terms of value—were common. These never were a serious retarding factor, and were generally relaxed to meet the demands of corporate development. Many states have removed all restraints upon ownership of property, both real and personal. On the other hand, others still retain restrictions against the unlimited holding of land, especially agricultural land.

In 1819 the Supreme Court of the United States in rendering its decision in the Dartmouth College Case,¹⁹ held that a corporate charter constituted a contract between the incorporators and the sovereign, and that the Constitution prohibited the sovereign from arbitrarily revoking or impairing such contract. The implications arising from this decision resulted in much apprehension among the people of the various states. Dartmouth College had been granted a Royal Charter by King George III in 1769. Now, a full half-century later, it was revealed that its perpetual franchise was inviolable on the part of the state. Even more concern could be expected where perpetual charters were issued to strictly private corporations.

Legal opposition to further grants in perpetuity quickly manifested itself. The legislatures adopted a policy of placing strict time limitations in charters granted spe-

¹⁸ These acts were aimed at preventing lands getting into *mortua manu*. The "Mortmain Act" *par excellence*, enacted in 1736, superseded a series of prior acts dating from the reign of Edward I. This act in turn was superseded by the act of 1838. See Mitcheson, *Codification of the Law of Mortmain* (1889) 5 L. Q. Rev. 387.

These statutes have not been re-enacted or considered in force in this country except in Pennsylvania. In that state they are judicially recognized as prohibiting the dedication of property to superstitious uses. The term "mortmain" is often applied to statutes in some American states, limiting the taking and holding of land by charitable corporations.

¹⁹ *Dartmouth College v. Woodward*, 1 Wheat. (U.S.) 518, L.ed. 629 (1819). See Horton, *The Dartmouth College Case* (1942) 6 Lawyer 16.

cially, as most charters were during that stage in corporate development. Then, also, amendments were added to state constitutions, conforming with the suggestion of Justice Story in the Dartmouth College Case, that a state could easily retain control over the life of corporations by the simple expedient of reserving the power to alter, amend, or even repeal, the charter.²⁰ Accordingly, such reservations became a common feature in state constitutions generally. On the other hand, some states adopted constitutional provisions flatly forbidding the granting of any charters in perpetuity.²¹ Also at present, some states draw a distinction between business corporations and eleemosy-

²⁰ A similar suggestion is found in *Wales v. Stetson*, 2 Mass. 143 (1806).

Such a constitutional reservation does not mean that such alterations can be confiscatory; they must be reasonable. In *re Mt. Sinai Hospital*, 250 N. Y. 103, 164 N. E. 871 (1928).

"A minority of the state courts, led by New Jersey, have held that this reserved power extends only over the contract between the state and the corporation; whereas a great majority have adopted the view that it extends over the contract between the corporation and the stockholders and the contract among the stockholders as well, so long as the exercise of the power does not impair vested rights or defeat or impair the object of the grant. But when it comes to defining a vested right those courts have split on nearly every situation that has arisen." Note (1936) 34 Mich. L. Rev. 859, 860. See, also, Notes (1938) 36 Mich. L. Rev. 490, 660, and 662.

Another author has explained this divergence in view thusly: "A liberal view saw in the reserved power a special type of police power, operative upon the stockholder contract *inter se*, and justifiable on the basis of obvious factual differences between it and ordinary contracts. The narrow view restricted the scope of the power to cases falling within the facts of its origin." Luce, *Legislative Amendment of Corporation Statutes—The Wisconsin Problem* (1946) 30 Marq. L. Rev. 20, 35-36.

²¹ La. Const. Art. XIII, § 7.

There is some doubt as to whether or not the legislature of Oklahoma has the power to authorize perpetual charter grants in that state. In *Hawkes v. Hanill*, 238 U. S. 52, 53, S. Ct. 240, 77 L.ed. 610 (1933), the United States Supreme Court held that a *perpetual* franchise could not be granted under Art. II, § 32, of the Oklahoma Constitution. Justice Cardozo was influenced by the interpretation placed upon the constitutional provision. "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed . . ." in *Okmulgee v. Okmulgee Gas Co.*, 140 Okl. 83, 282 P. 640 (1929); In *re Okmulgee Power Co.*, 141 Okl. 98, 284 P. 70 (1930); In *Re Oklahoma Power Co.*, 141 Okla. 100, 284 P. 12 (1930). The Oklahoma Supreme Court had

nary associations, denying perpetual duration to the former and approving it as to the latter.²²

The general trend has been in the direction of perpetual corporate existence.²³ Professor Ballantine has strongly advocated perpetual duration for all corporations.²⁴ Doubtless the general constitutional provision giving the legislature power to revoke, amend, etc., corporate charters serves as an adequate safeguard. On the other hand, charters limited as to time offer a pronounced opportunity

suggested in these cases that a privilege or franchise is perpetual if indefinite in duration. Whether or not the pronouncements of the Oklahoma court were holdings or dicta, is not clear. However, Justice Cardozo was inclined to treat them as holdings, at least, that they were decisive enough to create a doubt which would warrant the United States Supreme Court in refusing to grant a federal injunction against "administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state."

In *Hawkes v. Hamill* the grant to individuals of a toll bridge franchise was involved. Likewise, in the other cases the Oklahoma court was not passing directly on corporate charter grants. Moreover, it is doubtful if the Supreme Court of Oklahoma ever meant that a perpetual grant of a corporate charter would be violative of Art. II, § 32, of the Constitution. Naturally, such constitutional restriction would apply equally to both business and eleemosynary corporations; both receive franchise grants. But the statutes of that state have uniformly provided for grants in perpetuity to charitable corporations. Scores of cases involving such corporations have come before that court, and upon no occasion has the court hinted that their perpetual charters might be violative of Art. II, § 32, of the Constitution.

²² See N. D. Rev. Code, 1943 § 10-0106; 18 Okl. S. A. § 1.14.

²³ Alaska, Puerto Rico, the District of Columbia, and thirty-four states allow perpetual corporate duration. The limitations in other American Jurisdictions vary from 20 to 100 years. These limitations stated in years are: N. D., and Okla., 20; Ariz., 25; Mich., 30; Ga., 35; Mont., 40; Hawaii, Ida., Miss., Tex., and Wyo., 50; Kan., N. M., and Utah, 100. Louisiana provides for no limitation of time except that the Constitution (Art. XIII, § 7) provides that it must not be in perpetuity. A like result has been reached under the Oklahoma Constitution, which result is very doubtful as to soundness. (See Note 21, *supra*.) The Michigan Constitution (Art. XII, § 3) limits duration to 30 years. In Idaho the initial charter is limited to 50 years, but it may be made perpetual upon renewal. In one state, Utah, a minimum duration is also provided; corporate existence is limited to from 3 to 100 years.

²⁴ In a letter to the draftsman of the Oklahoma Act, Professor Ballantine said: "Why should you permit the term of duration to be limited in the articles of incorporation? This is a bad and dangerous practice and not allowed under the California Act."

for fraud. They often permit minority shareholders to block a renewal of the charter, forcing the company into liquidation, with the sole motive of acquiring the assets of the business at a price below their real worth. Then there is the additional objection of unnecessary expense of such renewal, not to mention possible penalties and other dire results arising from the failure through inadvertence to extend the charter.

Another early restriction was the limitations placed upon the amount of authorized capital. These limitations came in with the general incorporation acts. No need for such prevailed as to special legislative charter-grants, as in those instances the fixing of the capital limit was determined by the will of the legislators in granting the charter in each case. But the general antipathy against corporations prompted the law-makers in passing general incorporation laws to withhold from the administrative officers unlimited control over the size of new corporate units.

The first general acts quite uniformly contained such restraints.²⁵ At first the limits were set rather low, such as \$100,000, or even less, although they varied widely in amount. There was a distinct trend to up these limits once or so each decade, as the demands of enterprise required. The raising of the limits followed a rather definite course by being stepped up to two or three hundred thousand dollars, then to a half million, then a decade or so later to five, ten, or even twenty-five millions. By 1900 all maximum capital restrictions were generally on their way out.²⁶

²⁵ There was one notable exception (apparently an oversight on the part of the legislators). The first general incorporation statute enacted in 1849 by Pennsylvania fixed no limit. Laws, 1849, No. 368, p. 563. However, the later statute of 1863 imposed a \$500,000 limitation. Laws, 1864, No. 949, p. 1102.

²⁶ The limits were quite commonly affected by the nature of the business. In 1811 New York fixed the limit at \$100,000 as to the limited types of business authorized under that early general act. It was not till 1881 that New York permitted capitalization of over \$2,000,000. In 1890 the limit of \$5,000,000 imposed in 1881 was removed. Total limits in other industrial states were removed as follows: Mass., 1903; Pa., 1905; Vt., 1915; Md., 1918; N. H., 1919; Ind. and Mich., 1921; Mo., 1927.

Florida seems to have placed no maximum limit on authorized capital. This is explainable, since Florida did not begin to become industrialized

Very strict limitations also were imposed on the total amount of corporate indebtedness, bonded and otherwise.²⁷ These, like other pointless restrictions, gradually faded out. Slightly over half of the respective states had abolished these restraints before 1903,²⁸ and today corporations in all states seem to have power to create indebtedness to any amount.

By the middle of the seventies we find another restriction, viz., the earlier rigid limitations upon the authorized corporate purposes, dwindling.²⁹ Now, in all states, except Montana and Texas, corporations may be formed for any lawful purpose. The Montana statutes still set out a few (eight in all) broad classifications of permissible purposes,³⁰ while Texas still clings to the archaic method of enumerating a long list of narrow specific authorized objects, about 120 in all.³¹

until other states had evidenced a trend towards removing such restrictions

²⁷ See: New York--Laws, 1825, § 3, p. 448; 1 Rev. St. 1852, Ch. 18, Tit. 4, § 3, p. 1175; Laws, 1875, Ch. 611, § 22. Illinois--Laws, 1849, § 22, p. 92; Laws, 1872, § 16, p. 300. Pennsylvania- Laws, 1874, § 13, p. 80. Maine- Laws, 1867, § 24, p. 75. New Jersey- Laws, 1846, § 28, p. 69; Laws, 1874, § 16, p. 129.

²⁸ See *Report of Committee on Corporation Laws of Massachusetts* (1903) pp. 165, 166.

²⁹ "Permission to incorporate for 'any lawful purpose' was not common until 1875; and until that time the duration of corporate franchises was generally limited to a period of 20, 30, or 50 years." Brandeis, J., In *Louis K. Liggett Co. et al. v. Lee*, Comptroller of the State of Florida, et al. 288 U. S. 517, 555, 53 S. Ct. 481, 77 L. ed. 929, 85 A. L. R. 699 (1933). See, also, footnotes 27-30, *ib.*

An 1868 Florida act provided: "Any number of persons may associate themselves and become incorporated for the transaction of *any lawful business* of a public or private character, including all works of internal improvements." This seems to be the first such provision in this state.

³⁰ The Oklahoma statutes, supplanted by the new Business Corporation Act, adopted in 1947, like the Montana provisions, set forth the authorized purposes under a few broad classes. Unfortunately the Attorney General of that state ruled that the wording of the statute required that a corporation must limit its activities to a singleness of purpose, that is, its authorized purpose must be limited to the scope of single class of activities. Accordingly, prior to 1947, a corporation could only be organized in Oklahoma for a single purpose and such single purpose must come within one of the categories listed in the statute. As a result scores of would-be incorporators in that state were turned away.

³¹ The statutes of Kansas, prior to 1939, like Texas, listed a long

It cannot be questioned but that investing in and holding of corporate securities would be classified as a **lawful business**. However, it cannot be said that holding companies, as such, entered the stage with the statutory any-lawful-purpose provisions. The legal sanction of the existence of holding companies prevailed some time before these giants entrepreneurial constellations invaded the business universe. The trust concept was born of economic necessity, as hereinafter noted. The search for a means of survival created in the minds of corporate promoters the awareness of the potentialities of these dinosauria as a novel method of effecting monopolistic control. It was doubtless a matter of chance that the trust device was the implement first employed in the drive to establish a concentration of corporate domination. But, be that as it may, the trust became the forerunner of the holding company.

Some authorities have erroneously assumed that the enactment of specific statutory provisions, conferring on corporations the power to purchase and hold stock of other companies, was the sole basis of the holding company. In this regard, Mr. Wiley B. Rutledge, Jr., remarked: "But in 1888 the Legislature of New Jersey adopted a little noted amendment to its general incorporation statutes. The provision referred to is the statute which conferred power upon New Jersey corporations to purchase and hold stock in other corporations. Limitations of space do not permit us to trace the full or even the major effects of this apparently minor amendment of the laws of one small state. Suffice it to say, however, that, whatever its original purpose, this seemingly simple extension of corporate power has become the foundation upon which subsequent generations of financiers and lawyers have erected the present holding company structure of industry and finance."³²

It is believed that Mr. Rutledge overemphasized the significance of this provision. The foundation had already

itemized array of narrow specific authorized purposes. Under such statutes many lawful businesses are denied the privilege to incorporate owing to the fact that they do not come within one of the listed categories.

³² *Significant Trends in Modern Incorporation Statutes* (1937) 22 Wash. U. L. Q. 305, 307.

been laid for holding companies. Moreover, the New Jersey provision did not mark the beginning of the practice of corporations actually holding stock in other corporations.³³ Dating back to 1800, and even earlier, the records of special charters granted to various types of corporations reveal that it was quite common to stipulate in the charter grants authority to hold stock in other companies. This was particularly true as to insurance companies. However, it was not limited entirely to them. The privilege was often extended to bank, road, bridge, canal, steamship, ferry, express, railway (the Pensacola and Mobile Railroad and Manufacturing Company was allowed to own stock in the Perdido Junction Railroad Company—Fla., Laws, 1866, p. 54), manufacturing, mining, telephone and telegraph, and improvement corporations.³⁴ Their number is legion. Two outstanding examples are the Carroll Company,³⁵ chartered in New Hampshire in 1853, and the Southern Pacific Company,³⁶ organized in Connecticut in the early eighties. The latter company seems to be one of the first corporations, if not the first, designed to effect a control combine. Stockholding by the earlier companies was employed more as a means of investment of surplus funds.

Although corporate charters often authorized such stock ownership, holding of shares in other corporations was not acceded as a power incidental to the general purpose of all corporations. The any-lawful-purpose provision paved the way for corporations to be organized for the primary purpose of holding stocks and other corporate

³³ "The orthodox history of stock ownership by corporations as usually described, begins with the passing by New Jersey in 1888, of a general statute conferring upon all corporations of that state the privilege of stock ownership in other corporations. Too often this has been hailed as the birthday of the modern holding company. It is to disprove this theory that a brief resume of corporate history prior to 1888, as it relates to stock ownership, is presented." Compton, *Early History of Stock Ownership by Corporations* (1940) 9 Geo. Wash. L. Rev. 125.

Professor Compton, through the collection of many examples and a careful analysis of the matter, clearly establishes his objective.

³⁴ See *ib.*, pp. 126 *et seq.* See generally Bonbright and Means, *The Holding Company* (1932) pp. 55-65.

³⁵ See Compton, *Early History of Stock Ownership by Corporations. op. cit.*, p. 129.

³⁶ *Ib.*

securities. However, it had not become customary to incorporate for such purpose. The delay resulted from a failure to exercise authority already granted rather than from lack of legal sanctions.³⁷ Nor does the fact that the sudden crop of holding companies first sprouted in New Jersey soil refute this conclusion. That state, as hereinafter set forth, had literally "let the bars down" as to all restraints, and incorporators were attracted by the general laxity afforded under the New Jersey laws. Not merely holding companies, but corporations in general flocked to this newly-created happy hunting ground for wildcat promoters.

The growing demands for concentration of voting control was unquestionably the impetus which pried open the gate. If corporate management were able to contrive some formula for maintaining such dominion, the respective industries could be cartelized sufficiently to afford control over production and distribution of economic goods. Such command over the supply would provide control over prices and in turn over profits, thus checking the number of corporate failures.

As an aftermath of the Civil War, a long period of declining prices extended over a twenty-year period, from the seventies up into the nineties. Declining prices resulted in an extraordinary high ratio of business failures. To stem this tide of corporate bankruptcy, corporate management sought some method of counteraction. Although the trust device was first employed to accomplish this end, corporation attorneys and promoters were not slow in discovering that an equally effective means of monopolistic control could be attained by crafty manipulation of the corporate unit through stock ownership.

³⁷ "Although many statutes of this period authorized the formation of a corporation for any lawful purpose, few attempts seem to have been made to make use of such statutes for the formation of holding companies. The attempted creation of a gas and electric holding company under such statute was invalidated in *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798 (1889)." Dodd, *Statutory Developments in Business Corporation Law, 1886-1936* (1936) 50 Harv. L. Rev. 27, 30, note 7.

At first glance one might have anticipated that the sequel to the broad panzer thrust of the "trusts"³⁸ would be a united counteractionary legislative response in the various states. However, no reaction of this sort ever materialized. It was quite apparent that the abuse could not be remedied by "Bubble Act" legislation on the part of the individual states. Industry had become nation-wide, and uniformity of action on the part of all forty-eight states was out of the question. Thus, public attention was directed to Congress.³⁹ This marked the beginning of a slowly accelerated era of federal regulation.⁴⁰

³⁸ The term "trust" soon became generic in meaning. In everyday parlance the term was applied to all forms of oppressive monopolistic combines, and carried with it a rancid odium.

³⁹ The "granger" movement, centering mainly in the Middle West and culminating in the six Granger Cases—the principal of which was *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 (1876)—did leave some lasting effects in state legislation. The granger legislation, like many of the federal provisions, was directed at regulation of corporate activities, rather than placing restrictions upon the corporate set-up and limitations on corporate powers.

⁴⁰ "The brief period from 1888 to 1890, therefore, presents one of the strangest and most profound paradoxes in American legal and industrial history. Just at the time when the Federal Government was coming to the aid of the states' historic policy towards corporations and was adopting strong measures to make that policy effective, the states themselves began to turn in the opposite direction and to throw their ancient policy aside." Rutledge, *Significant Trends in Modern Incorporation Statutes*, *op. cit.*, p. 308.

Principal among the federal regulatory acts are:

1887—Interstate Commerce Act, 49 U. S. C. A. §§1 *et seq.*

1890—Sherman Anti-Trust Act, 15 *ib.* §§ 1-7.

1903—Elkins Act, 49 *ib.* §§41-43.

1906—Hepburn Act, 49 *ib.* §§ 1 *et. seq. passim.*

1914—Federal Trade Commission Act, 15 *ib.* §§ 41-51.

1915—Federal Reserve Act, 31 *ib.* §§ 408-09, and 12 *ib. passim.*

1933—Securities Act, 15 *ib.* §§ 77a-77aa.

1934—Securities Exchange Act, 15 *ib.* §§ 77-78, *passim.*

1934—Communications Act, 15 *ib.* § 21, and 47 *ib. passim.*

1935—Motor Carrier Act, 15 *ib.* § 77c, and 49 *ib.* §§ 301-327, *passim.*

1935—Federal Power Act, 16 *ib.* §§ 791a-825r, *passim.*

1935—Public Utility Holding Company Act, 15 *ib.* §§ 79-79z.

During the middle thirties there was strong demand for general abolition of holding companies. The President urged Congressional legislation leading to that end. But, owing to the vigorous opposition manifested by corporate management, financiers, and investors, the proposal was not carried out, and, as the stress of depression gradually

Regardless of the significance of this New Jersey statutory innovation in 1888, similar provisions are now found in other states generally, especially in the jurisdictions having so-called "Modern Acts." Moreover, a careful examination of the statutory development in the various states during the late eighties reveals no signs of any inclination of any reversal in the general trend of liberalization. Instead, a marked acceleration in the opposite direction is manifested.⁴¹

Since its birth, the nation for well over a century had witnessed a gradual but continuous trend towards the removal of unnecessary limitations restricting progressive corporate development. In plotting this course of liberalization the law makers had carefully balanced the needs of industrial expansion against our recognized democratic safeguards. Necessary restraints had been retained; the corporate sphere remained circumscribed and hedged in by essential moderate restrictions. The natural current had been kept well channelled. The states had neither dammed up the flow of the stream of progress, thus reducing enterprise to a stagnant pool, nor had they thrown open the flood-gates. But in the late eighties this long era marked by the planned balancing of social values was abruptly ended.

At this time we come to a significant milestone in the chronology of corporate evolution. The marker is Janus-faced—on one side is stamped, "Federal Highway. The Newly-Opened Regulation Route. Drive with Caution!" with an arrow pointing straight ahead, while on the other side it is labelled, "State Highway. The Liberal Route Via

subsided, the agitation ceased. Irrespective of the social desirability of such legislation, it is evident that erasing of all holding companies would require industrial and financial readjustments of far-reaching proportions.

The inauguration of this policy of regulation injected a degree of incongruity into our overall federal formula. It is contended that the Sherman Act was aimed at restricting corporate size, yet we have maintained a long-standing tariff policy designed to nourish and fatten these American industrial behemoths.

"During the half-century in which the Federal Government has been extending its control over corporate enterprise, the states have been engaged simultaneously in abrogating their control." Rutledge, *Significant Trends in Modern Incorporation Statutes*, op. Cit. p. 309.

N. J. No Traffic Restrictions!" with an arrow pointing in that direction. We shall not further explore the flow of federal legislation, but shall direct our attention to the sudden revolutionary development in state statutes as we journeyed along this new "State" route.

At this juncture, New Jersey, and a few other states, initiated a policy of "charter mongering," which completely revolutionized modern corporate legislation.⁴² The object of this new policy was to remove all statutory inhibitions which might in any way retard promoters in electing to incorporate in those jurisdictions. The more obvious motive prompting this proselytic campaign was fiscal. Although increased revenue from corporation taxes and fees was an important element in New Jersey, and doubtless was the main factor in the other states which joined the procession, that alone does not fully account for the inauguration of such a radical impromptu departure from a century-long trend. The real explanation is that the concentration of economic and political power in the hands of the increasing number of corporations had enabled them to gain sufficient control in New Jersey to be able to dictate the policies of that state, and the matter of revenue was used only as a bait to allure the public into supporting the policy. Conditions in West Virginia approached those in New Jersey. In these states the pattern for all corporation legislation was shaped to suit the demands of business management, with little or no regard for the rights of the other more conservative states or for the public welfare in general.

By the removal of restrictions and limitations in one or more states the incorporators of new enterprises naturally search out these lax jurisdictions and incorporate therein, other matters being equally favorable there. This placed sister states in a dilemma. They must either cast aside their established restrictions and join in the mad competitive struggle, or stand by and see their just revenue and substantial control over their industrial units slip from

⁴² Maine was in the forefront along with New Jersey, and Delaware and West Virginia also adopted a like policy. Later Arizona and South Dakota joined in the mad race, and still more recently we find New Mexico and Nevada competing in the marathon. See Brandeis, J., in the *Liggett Case*, pp. 557 *et seq.* in 288 U. S. (*supra*, Note 29.)

their grasp. New York, the first-ranking industrial state, soon found a majority of all new corporations operating in that state organizing in New Jersey.⁴³ The effect upon other states was measured by the degree to which they had been willing to abolish statutory restrictions. As early as 1890, the Supreme Court of Maine rendered a decision⁴⁴ holding stockholders liable where it was found that property received for shares was not worth the full par value of such stock. This created a skepticism which caused incorporators to adopt an attitude of reluctance towards organizing in that state thereafter. In 1901, West Virginia more or less abandoned the chase by adopting a higher scale of corporate annual taxes. Also, the popularity of South Dakota and Arizona waned owing to investors becoming suspicious of securities of corporations organized under the ultra-lax laws in those two jurisdictions. A similar attitude later developed towards securities of Nevada companies. However, because of their territorial remoteness Nevada and New Mexico were never overly

⁴³ "Of the seven largest trusts existing in 1904, with an aggregate capitalization of over two and half billion dollars, all were organized under New Jersey law; and three of these were formed in 1899. During the first seven months of that year, 1336 corporations were organized under the laws of New Jersey, with an aggregate authorized capital of over two billion dollars. The Comptroller of New York, in his annual report for 1899, complained that 'our tax list reflects little of the great wave of organization that has swept over the country during the past year and to which this state contributed more capital than any other state in the union.' 'It is time,' he declared, 'That great corporations having their actual headquarters in this State and a nominal office elsewhere, doing nearly all of their business within our borders, should be brought within the jurisdiction of this State not only as to matters of taxation but in respect to other and equally important affairs.'" Brandeis, J., in the *Liggett Case*, p 563 in 288 U. S. (*supra*, Note 29.)

⁴⁴ *Libby v. Tobey*, 82 Me. 397, 19 A. 904 (1890). See also *Gillin v. Sawyer*, 93 Me. 151, 44 A. 677 (1899). In 1901 the Maine statutes were modified so as to relieve shareholders of liability to corporate creditors where property was taken in good faith in payment for stock at an overvaluation. *Auld v. Caunt*, 216 Mass. 381, 103 N. E. 933 (1914); *Rogers v. Dodge*, 243 Mass. 295, 137 N. E. 537 (1922). However, the 1901 statutory amendment did not seem to direct the flow of incorporations to Maine in any appreciable degree. In 1946 Maine corporations ranked eleventh among the states as to the number of corporations listed on the New York Stock Exchange. That year only 19 Maine corporations were thus listed.

successful in inducing promoters to incorporate in those jurisdictions.

As we approach the middle of the second decade of the present century, New Jersey began to recant.⁴⁵ This left the field of proselytism solely to Delaware which has vigorously pursued this expanding policy of laxity up to the present time. Although a relatively large number of huge corporations are domiciled in New Jersey, they are largely a hold-over from earlier incorporations. For the last third of a century Delaware has held the undisputed title of being the promoters' paradise.⁴⁶

Space will not permit the bare listing of all of the liberalizing features injected into the statutory laws of these states in their wild struggle for corporate revenue. Therefore, no attempt is here made to fully analyze these many innovations in their chronological order of development.

There are now twenty-seven corporation service companies currently advertising their services in aiding in organizing new companies in Delaware. In their advertisements they list, among others, the following advantages in incorporating in that state: No inheritance tax on non-resident shareholders; no corporation income tax; no stamp tax on issue or transfer of stock; low organization and annual tax; no Blue Sky act; simple report requirements that respect the privacy of business information; all meetings of incorporators, directors, and shareholders may be held outside the state; an incorporator need not

⁴⁵ "If I may speak very plainly, we are much too free with grants of charters to corporations in New Jersey. * * * I would urge, therefore, the imperative obligation of public policy and of public honesty we are under to effect such changes in the law of the State as will henceforth effectually prevent the abuse of the privilege of incorporation which has in recent years brought so much discredit upon our State." Gubernatorial Inaugural Address of Woodrow Wilson, *Minutes of Assembly of New Jersey*, Jan. 17, 1911, pp. 65, 69, 2 *Public Papers of Woodrow Wilson* (Baker and Dodd) 273. See, also, *Report of the Commission to Revise the Corporation Laws of New Jersey* (1917) pp. 7, 8.

⁴⁶ Although Delaware has only 1/5 of 1% of the population of the continental United States and occupies but 1/13 of 1% of its area, 235 of the 822 corporations listed on the New York Stock Exchange in 1946, or nearly 30%, were organized in that state. Ninety-seven, or nearly 12% of the listed companies, were domiciled in New Jersey, a state possessing slightly over 3% of the total population of the country and less than 1/3 of 1% of its area.

be a subscriber; books and records, with the exception of a duplicate stock ledger, may be kept without the state; directors may all live without the state; subsidiaries may be owned; restrictions and enlargements of voting power may be arranged for different classes of stock; cumulative voting may be provided for; voting trusts may be created; directors may be classified into one, two, or three classes to permit the election of one class each year; corporations may be formed for any lawful purpose or for any combination of many types of businesses; charters may be easily amended, even by the board of directors; provisions, which in many states must be placed in the charter, may be put in the by-laws; a small quorum of directors, as low as 1/3, may carry on the business; non-par stock may be issued—preferred as well as common—the consideration to be fixed by the directors unless this power is reserved to the stockholders in the charter; classes of stock may be issued with practically no limits on its attributes; classes of stock may be issued in series, each series to have such rights as the directors may determine; shares of different kinds may be “covered” by the charter and issued from time to time just as series of bonds with different interest rates, etc., may be “covered” by a single corporate mortgage; stock may be issued as fully paid for property, services, or cash, and the value of the consideration as approved by the directors is conclusive in the absence of fraud; stockholders may be free from all liability, except for unpaid subscriptions—which exception is negligible since the introduction of stock without par value; no limitations on par value of stock, or on the total authorized stock, or on the amount of indebtedness; corporations may merge or consolidate with other corporations, domestic or foreign; stockholders, who have acquired shares in good faith, without knowledge that they were not paid for in full, or that they were not paid to the extent stated in the stock certificate issued for such shares, are not liable either to the corporation or to its creditors for any amount beyond that shown by the certificate to be unpaid; directors may determine that only a part of the consideration received for shares of stock shall be capital; the charter may provide that the

business shall be managed otherwise than by a board of directors; no restrictions on the citizenship or residence of incorporators; family names may be used in the corporate name, and the corporate name may be reserved for thirty days with the Secretary of State; the resident agent may be either an individual or a corporation; there is no minimum of authorized capital stock—all that is necessary is that there be \$1,000 capital paid in before beginning business; all incorporators or directors may be "dummies"; no limitations upon the holding of real property; the charter may provide that a decree rendered by the court of chancery effecting a reorganization after a $\frac{3}{4}$ vote of the creditors and/or stockholders is binding on all creditors and/or stockholders; the charter may provide that shareholders shall have no pre-emptive rights; the charter may require the vote of a larger proportion of the stock of any class thereof than is required in the statutes for corporate action; waivers may be substituted for notice of meetings or other corporate action; a corporation has power to purchase, hold, sell, and transfer shares of its own stock, or stock in other corporations; stock may be voting or non-voting, and if non-voting, it, and bonds as well, may, upon the happening of some condition, become voting, or vice versa; voting rights may be "weighted," that is, certain shares may have the voting weight of several shares of another class; bondholders may be given the privilege to inspect the corporate books; the directors may close the books forty days before any election or before the payment of dividends; preferred stock may be redeemed at times and prices fixed by the charter; stock options and conversion certificates may be freely issued as provided in the charter; dividends may be paid from net profits from the current or preceding year although the capital is impaired; the directors, when authorized by a majority vote of the outstanding voting stock, may sell all of the assets and franchises of the company; a reduction of capital may be accomplished by a majority vote.

By observing the removal of so many of the restrictions and limitations formerly considered sacred, along with the other revolutionary changes in the modern statutory

corporation laws, normally would lead to the thought that all available protection to stockholders, creditors, and the public in general had "gone with the wind." One would normally expect that every manner of corporate managerial abuse would be rampant. It is true that some malconduct has resulted. However, corporate promoters and directors have constantly remained fully aware of the need for reasonable checks and restraints. Otherwise, investors would quickly become wary of all securities of corporations organized under the laws of such states. Moreover, gross abuses would bring down the wrath of the public upon the transgressors, resulting in reestablishment of rigid restraints and inhibitions. Therefore, this liberality was tempered with various restrictions, many of them new in statutory law. An example is the provisions protecting dissenting shareholders. The broad powers granted to the majority stockholders lent itself to the opportunity of oppression. To counteract this the privilege to dissent was afforded non-assenting shareholders, granting them the right to demand that their shares be purchased by the corporation at their market value upon the effecting of fundamental changes in the corporate set-up. This did not guarantee to the shareholders a static vested right, but it did offer him an equitable substitute as a method of escape. Moreover, it protected the majority against unwarranted opposition on the part of the "shareholder-blackmailer," as labelled by Mr. Rutledge.⁴⁷

When this revenue-snatching spree was launched by the few reckless states the most imaginary mind could not have predicted that it would run its course till the bulk of supposedly-sacred restraints were cast over-board. If the American public had envisaged that such a dire result was in the offing a clamor that would have eclipsed that manifested in England following the South Sea fiasco would have arisen. A retrospective glance over the last three-score years reveals that no such debacle followed; our industrial order has not run riot. Natural conservatism of the corporate entrepreneur was underestimated. His welfare was at stake. He was in the boat and it was

⁴⁷ *Significant Trends in Modern Incorporation Statutes* (1937) 22 Wash. U. L. Q. 305, 324.

to his interest to guide it so as to not cause it to capsize. This epoch has raised democratic capitalism to a plane that has more or less baffled the imagination. Our faith in the private corporation has made it possible for us to raise our standards to a level far beyond that ever experienced before in any land at present or in the past.⁴⁸ This nation holds a dominant position in peace and in war. Without this enlarged industrial concept we would not now be debating the pros and cons of a "Marshall Plan."

Thus, a few lesser important states, prompted by a questionable motive, have rendered an immeasurable service to mankind. As this epoch of liberalization unfolded, much misgiving was often experienced. Mild complaints arose in the more conservative states, but no strong effort was made to stem the tide. They could have excluded entirely all New Jersey and Delaware corporations from engaging in business within their borders, but they didn't see fit to do it. Since apparent benefits seemed to exceed the evils, until a threatened economic catastrophe appeared more immediate they elected to condone the reckless experiment although refusing to join in it. During this period of liberalization the statutory law in these other states remained relatively static. Although business was rapidly expanding, they adopted an attitude of watchful waiting. In the meantime, the shackles had been removed

⁴⁸ "In 1947, American statesmen made foreign commitments more far-reaching than any in diplomatic history. To make the commitments stick, they relied on the efficiency of an economic engine.

"The engine at hand was in one sense old-fashioned. It was called capitalism. It was bolted to private property; it operated according to no master plan but through millions of individual transactions based on prices, costs, and profits; it assumed strong government but a government of rule, not of unlimited discretionary power."

"Yet perhaps for these very reasons the American economic machine has exhibited a marvelous adaptive quality. In the one hundred and sixty years of the republic's history it has turned into something that could no more have been predicted beforehand than could the New York skyline. It has become the most powerful instrument ever devised by man for creating wealth within the moral and political framework of liberty under law. . . . In 1947 the power of this machine was everywhere in evidence. In the twelve months ending January 1, it turned in the greatest productive record in the peacetime history of this or any other nation." An Editorial from *Fortune*, Reprinted in *Life* (Feb. 9, 1948) 24:7. See, also Note 8, *supra*.

from corporate life in New Jersey and Delaware. This permitted the rapidly unfolding modern business enterprise with all of its ramifications to cut a new channel through an unexplored terrain. Without these liberalized statutes industrial expansion would have moved more slowly, and it probably would have taken this nation another century to reach its present stage of development.

Legal sanctions directing a rapidly expanding industrial economy must by necessity be shaped by legislative enactment.⁴⁹ 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.

The other states were forced to elect between adopting new corporation codes adjusted to the more liberal corporate philosophy or continuing to cling to their outmoded laws overburdened with unnecessary restraints and limitations. A continuation of the latter would only mean that local industrial development would continue to be retarded and the bulk of corporate revenue and control would further flow in the direction of Delaware. Several states elected to cast aside their time-worn restrictive policy and do an about-face. However, the reversed trend was not in favor of a policy of extreme laxity; safeguards were to be set up to protect against manifested abuses. Thus was germinated the so-called "Modern Business Corporation Acts." This brings us to the latest trend in corporate statutory evolution.

This new era of modernized codification got under way in the late twenties. However, during the preceding stage of development, we observe a statutory innovation quite worthy of mention; that is, the initiation of non par stock.

⁴⁹ "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* (1936) 50 Harv. L. Rev. 27.

Its development originated independently of the liberalization campaign but was readily absorbed into and made a part of it. New York first gave statutory authorization to stock without par in 1912. The advantages of this new type of securities is now too well known to require further comment.

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 ground-work for such a uniform act. A "model act" was finally completed and was approved and released in 1928. But prior to that date two states had adopted new acts which were modern in nature.

The modern business corporation act purports to fully recodify the law of business corporations. It is meant to be a complete, fully correlated, consistent corporation code, which is adopted as a whole, repealing the hodge-podge of statutes which have developed piece-meal over a period of decades and by necessity are lacking in harmony, consistency, and co-ordination.

The essential qualities of such a modern act are: 1) definiteness, 2) completeness, 3) consistency, 4) liberality which permits a broad and comprehensive corporate set-up, with liberal flexibility as to financing, powers, purposes, management, etc., and 5) rigid restraints against abuses.

It is interesting to note that Florida was the first state to enact legislation which resembled a modern, streamlined business corporation act. In 1925, the Florida legislature adopted an act relating to "Corporations for Profit, Generally," which, with subsequent minor amendments, now makes up Chapter 612 of the Florida Statutes Annotated. However, Florida did not go the entire route by drafting a complete code, fully covering the fields of corporations in general. Much of its former law on corporations was retained, including what are now Chapters 610 and 611, F.S.A. It is gratifying to know that this state was at one time in the vanguard among the states in this regard, even though that was nearly a quarter of a century ago. However, the first complete modern business corporation act was passed in Ohio in 1927.

The 1925 Florida Act, as far as it went, paralleled somewhat the U.B.C.A. (Uniform Business Corporation Act), as did also the Ohio Act. The Ohio code fully covered the field but was slightly less stream-lined than the U.B.C.A. The Ohio Committee had endeavored to retain as much of the former Ohio statutory provisions as could be fitted into the spirit of the new act. Other states are gradually joining the procession leading to the adoption of completely new acts.

In 1928, Louisiana adopted a new modern act closely patterned after the U.B.C.A. In 1929, Idaho followed suit. In 1931, California adopted a new act which was far in advance of any previous corporation code. It established an entirely new pattern. Two years later, Illinois adopted its modern act. The Illinois Act was entirely new, not being closely patterned after any existing act. The same year, Minnesota adopted a new act which, to a degree, was designed after the U.B.C.A., but in many regards was new. It is not as complete as either the California or Illinois acts. In 1933, Pennsylvania also adopted a new corporation code. The Pennsylvania Committee followed closely the preliminary draft prepared by the Illinois Committee. Accordingly, it does not show the refinements present in the final Illinois draft. Moreover, many later amendments were required to make it and other provisions of the Pennsylvania statutes conform.

In 1934, Washington adopted a new act patterned after the U.B.C.A., with many minor changes. Missouri, in 1943, adopted a new act patterned closely after the Illinois Act. In 1946, Kentucky adopted a substantial portion of the U.B.C.A., with slight modifications. In 1947, Oklahoma adopted a new act which doesn't follow closely any act throughout, although the Committee selected many provisions from the various existing acts. However, many innovations are found in it.⁵⁰

In 1935, George S. Hills prepared a proposed corporation

⁵⁰ In recent years many other states, including Indiana, Michigan, Mississippi, Tennessee, Kansas, Georgia, and Nebraska, have made drastic revisions in their corporation laws. All of these are in the direction of modernizing their statutes, but they have not adopted full modern acts like those enacted in the aforementioned states.

act⁵¹ which in many regards is far superior to any prior model act. It influenced the Oklahoma Committee considerably in its drafting of the recently-enacted Oklahoma Business Corporation Act, and doubtless will have a profound influence on draftsmen of future corporation statutes.

The Section of Corporation, Banking and Mercantile Law of the American Bar Association presented a "Model for State Business Corporation Acts" in its Report of Corporation Law Committee, released October 28, 1946. However, this proposed "model act" is no more than a slight hash-over of the Illinois Act. Only a few changes are made and these are minor in import; the same arrangement and phraseology is employed. As a result, this proposed act is disappointing. It would lead one to think that no substantial progress in the extension and refinement of corporation statutory concepts had been made during the intervening thirteen years.

The evolutionary trend in the new modern acts is in the direction of extension and refinement. New statutory adoptions and amendments show efforts to more fully chink up the minor gaps permitting abuses. Provisions which upon construction have restricted wholesome expansion and operation of corporate enterprise are being clarified and restated. Also, many extensions which are directive in nature are added. This is illustrated in many of the provisions in the Oklahoma Act, as are hereinafter more fully analyzed.

We can never hope for a static enterprise. Accordingly, corporation statutes must evidence a condition of continuous evolutionary growth, if they are to be kept abreast of modern business development.⁵² In 1939, the Ohio Gen-

⁵¹ Model Corporation Act (1935) 48 Harv. L. Rev. 1334.

⁵² "Company law can never reach a stage of 'finality'; it is in need of constant revision . . ." Kahn-Freund, *Company Law Reform* (1946) 9 Mod. L. Rev. 235.

The theme on how statutory law naturally develops is dramatically presented in *The Growth of the Law*, by Cardozo (1927).

"The year [of 1947] saw 44 legislatures in session. Well over a thousand bills affecting the corporation laws of the various states were introduced; several hundred survived to repeal, change or add to the existing law. This emphasizes anew the expanding, ever-changing character of modern corporation law. The new acts ranged from minor technical amendments to complete recodification." *Prentice-Hall Cor-*

eral Corporation Act underwent a drastic revision.⁵³ And this, in view of the fact that twelve years earlier it was believed to be the latest word in the way of business corporation statutes. Likewise, at the time it was released, the Uniform Act was thought to be an up-to-the-minute corporation code. Yet, it has never been adopted in toto without revision in a single jurisdiction. It was to a degree out of date before any state had time to enact it into law. This writer, who drafted the Oklahoma Act, is already conscious of many improvements which could be made in that act.⁵⁴ From this, it goes without saying that the 1925 Florida Act is rapidly becoming of ancient vintage indeed.

The balance of this article will be devoted primarily to a general comparison between the existing laws of Florida and the provisions in the Modern Acts. Particular attention will be given to the most recent draft, viz., the Oklahoma Act.

* * *

Short Title. Owing to the frequent reference to, and citation of, a business corporation act, a short title is desirable. This avoids the repeating of a long, descriptive title—which generally includes lengthy repealing clauses. Modern acts uniformly have a short title.⁵⁵ Florida corporation statutes have none.⁵⁶

poration Service, December 10, 1947, Report Bul. No. 7, p. 1.

⁵³ Mr. E. J. Marshall, Chairman of the Ohio Committee, in a letter dated January 10, 1938, to this author, remarked: "After ten years' experience with our Act, we are of the opinion that we unduly limited the rights of shareholders to confer authority upon directors, and in the revision of our Act we contemplate the enlargement of this right so that the directors can be given pretty nearly the authority which they have in Delaware."

⁵⁴ The final draft of the Oklahoma Act was completed and presented to the legislature of that state in 1943. That body passed the proposed act by an overwhelming majority without any changes whatsoever. But the Governor vetoed it without giving any reason therefor. It was re-introduced in 1947, was passed by the legislature, and signed by the present Governor. However, many stupid minor amendments to the draft were made by the 1947 legislature. This not only weakened the Act but injected many inconsistencies into it.

⁵⁵ The short title is set out in § 1 in most modern acts. This is true of the new Oklahoma Act of 1947. Its short-title section reads: "This Act shall be known, and may be cited, as the 'Business Corporation Act,' and is hereinafter referred to as 'this Act.'"

⁵⁶ Florida has adopted 12 of the Uniform Acts. A short title is normally included as a part of these acts.

Definitions. Likewise, the modern acts quite uniformly have a definitions section. This reduces ambiguity and repetition. Accuracy and brevity of statement are essential in scholarly statute drafting. The modern acts vary as to how many definitions should be employed, as well as the terms defined.⁵⁷ However, there is a distinct trend towards defining numerous words and phrases employed in the substantive provisions of the more recent acts.

Scope of Act. The modern acts carefully circumscribe their limits, and quite generally bring existing corporations within their purview.⁵⁸ The most disturbing feature of the Florida corporation statutes is the uncertainty of the respective scope of the various chapters on corporation law, especially Chapters 610, 611, and 612, F.S.A. Section 612.02 attempts to establish the scope of Chapter 612. However, there is much confusion as to what extent the varied and conflicting provisions running through the various chapters shall apply to a particular corporation. May a street railway company be incorporated as provided in Chapter 611 (see § 611.01), or **must** it be incorporated under Chapter 612 (see § 612.02)? If it is organized under Chapter 612, must the additional requirements set out in other chapters be complied with? If organizing a benevolent fraternal society (that is, non-profit but providing benefits for its members), then what? See §§ 611.01, 617.01, and 637.01. In organizing under Chapter 612, or later chapters, must incorporators comply with § 611.05? That section says **no corporation** shall transact any business until the conditions therein set out are complied with. Its wording is all-inclusive. Do the provisions in Chapter 610 apply to all corporations? These are but a few exam-

⁵⁷ "Foreign corporations" is defined in F. S. A. § 613.07. Also, a definitions section is contained in most of the 12 Uniform Acts adopted.

The number of terms defined in more recent acts is: Ohio (1927), 17; Uniform B. C. A. (1928), 15; La. (1928), 19; Ida. (1929), 15; Ind. (1929), 12; Cal. (1931), 21; Ill. (1933), 14; Minn. (1933), 12; Pa. (1933), 15; Wash. (1934), 15; Hills's Model Corporation Act (1935), 19; Neb. (1941), 8; Mo. (1941), 14; Ky. (1946), 13; Am. Bar Assn. B. C. A. (1946), 13; Okl. (1947), 34.

⁵⁸ See Cal. Civ. Code, § 279; F. S. A. § 612.01.

The Minnesota Act permits existing corporations to elect as to whether or not they are to come within the Act. This has resulted in considerable confusion in that state.

ples; scores more of similar conflicting provisions could be pointed out. In response to an inquiry, Secretary of State Gray, said, "Incorporating attorneys differ widely in their views as to what our statutes require. We allow them to interpret the statutes the best they can and simply file the papers they bring in. Some in incorporating under Chapter 612 ignore the other provisions, while others try to also comply with the general provisions in other chapters. Nobody knows what particular provisions apply as to requirements for filing."

From Chapter 610 over to and including Chapter 668, there is a hodgepodge of inconsistencies and conflicting provisions. The entire corporation laws of Florida need redrafting as hereinafter set out.

Purposes. Today statutes generally provide that corporations may be organized **for any lawful purpose.**⁵⁹ Section 610.03, F.S.A., so provides as to corporations organized under that chapter. Why all of the unnecessary rigmarole set out in the other chapters about purposes? The general corporation act should have such a provision, which is all-inclusive, and nothing more needs to be said about the power to incorporate.

There should be one general incorporation act applying to all corporations. Then, there should be a short special chapter dealing with each class of corporations where different or additional requirements are to be met. Each such chapter in starting off should provide that **any corporation being formed for the purpose** (or purposes) **of** (naming the purposes or businesses to be engaged in) **shall, in addition to the requirements set forth in the general corporation act, do so and so, or, instead of conforming to the provisions set out in sections so and so of the general corporation act, shall meet so and so requirements.** Nothing should be put in the chapters relating to special corporations which is covered by the general act.

Incorporators. Most states require three or more incorporators.⁶⁰ Section 612.03, F.S.A., says, "Three or more

⁵⁹ See Note 29, *supra*.

⁶⁰ "Nearly all of the new laws permit incorporation by three or more natural persons, and most of them have dropped the old requirements of residence and citizenship. An interesting variation appears in the

persons" may incorporate. Could one or more of the three be corporations? "Person" generally includes a corporation. In Michigan a corporation may be an incorporator. Also, is any age or other particular competency required for incorporators under the Florida provision? The statute should require incorporators to be legally competent to contract.⁶¹

Florida appears to have no citizenship or residence requirements for incorporators. This is in accord with the modern trend.⁶²

Corporate Name. The modern trend is to require that the corporate name include a word, or words, indicating that the members are not subject to unlimited liability—such as "company," "corporation," "incorporated," "limited," or an abbreviation of one of these.

Although the Florida statutes have provisions relating to the corporate name scattered through more than a dozen different sections, they do not adequately provide for reserving and otherwise protecting the use of a corporate name and guarding the public against being deceived by firm names improperly employed. Moreover, the

Michigan Act, which provides that: 'one or more persons, natural or corporate, may incorporate under this act,' a provision which goes further than that of any other state. It has, however, at least the merit of honest recognition of the facts which underlie and are evidenced by the practice of using 'dummy' incorporators. While Iowa permits incorporation by a single individual, it has not extended the privilege specifically to other corporations. Somewhat incongruously, the Michigan statute requires at least three directors, apparently even in the case of incorporation by a single individual." Rutledge, *Significant Trends in Modern Incorporation Statutes* (1937) 22 Wash. U. L. Q. 305, 314.

⁶¹ The Oklahoma Act so provides. 18 Okl. S. A. § 1.10.

"The statutes of Alaska, Louisiana, New Jersey, New Mexico, and New York require incorporators to be 'Natural Persons.' The thirteen states requiring incorporators to be of 'full age,' or 'adults,' certainly exclude a corporation as an incorporator. Under statutes providing that 'two or more persons' may form a corporation, the term 'person' has been construed as not including a corporation." Commissioners' Note, U. B. C. A. § 2, 9 U. L. A.

⁶² Professor Ballentine refers to such residence requirements as "useless." 17 Cal. L. Rev. 530, U. B. C. A. § 2, requires 2/3 of incorporators to be citizens.

"Only eighteen out of fifty-three states and territories require that at least one incorporator shall be a resident thereof." Commissioners' Note, *supra*, Note 61.

statutes of this state have several pointless provisions relating to corporate names. For instance, Section 610.05 F.S.A., forbids any unincorporated firm (or person) from using a trade name which implies that it is incorporated (that is, that its members are not subject to unlimited liability when in fact they are) under severe criminal penalty. That section exemplifies the height of nonsense. How can anyone dealing with a firm which he believes to be incorporated and its members subject only to limited liability be harmed if it develops that they are partners with unlimited liability? Moreover, why should such provisions as found in Sections 610.29-610.36, relating to the use of the word "club" in a corporate name, be included in the Florida statutes when other states have not considered the matter of sufficient import to be mentioned in their statutes?

Section 612.03 (1) provides that the name set out in the articles "shall include the word 'company' or 'corporation,' or have such word or words, abbreviation, affix or prefix therein or thereto as will clearly indicate that it is a corporation as distinguished from a natural person, firm or partnership and shall be such as to distinguish it from any other corporation authorized to engage in business in this state and shall be approved by the Secretary of State." Although this provision is subject to considerable criticism, it does purport to set a standard for names to be employed when incorporating under Chapter 612. Can it be implied from this provision that a corporate name might be reserved in advance of incorporation? It gives the Secretary of State power to approve, or disapprove, the use of a name without setting up any standard for him to follow in determining when he may approve, or disapprove, the use of a name. Since the provision is substantive and this is a procedural section, it would be better if the provisions were set out elsewhere in a substantive section. Furthermore, this provision, when considered with the provisions in Section 620.05, casts some doubt upon the use of the word "limited" as an acceptable term in indicating that the firm is a corporation.

Section 615.02 permits the term "association" to be used in the corporate name. That is subject to severe criticism,

as the term **association** implies unlimited liability. Also, why should the descriptive word in Section 616.01 be limited to "Inc."? Section 618.04 provides that the term "cooperative" need not be used in the corporate name. Must a word, such as required under Section 612.03, be used to establish its identity as a corporation?

Modern acts generally prevent new corporations from being organized, or foreign corporations from being licensed to engage in business in the state, under a name deceptively similar to names in use.⁶³ Although Florida statutes do not have one overall provision of that nature relating to all corporations, they do have several provisions suggesting such a limitation. See, in addition to the provision set out above in Section 612.03, Sections 613.08, 637.01.

The general corporation act should specifically provide for the reservation of a corporation name with the Secretary of State.⁶⁴ Florida has no such specific provision. In spite of the numerous provisions relating to the corporate name in the various sections of the Florida statutes, the matter is not adequately covered. The new Oklahoma Act fully and adequately sets out requirements relating to the corporate name in three sections.⁶⁵

Ultra Vires. Under modern acts the defense of ultra vires is distinctly abrogated.⁶⁶ Florida is left to struggle along with this troublesome problem.

De Facto Corporations. The modern acts have eliminated the de facto corporation.⁶⁷ The Florida statutes are deficient in this regard.

Conversion Rights and Options. The unrestricted use of conversion rights and options lends itself to gross frauds and other abuses. The California, Minnesota, and Okla-

⁶³ See 18 Okl. S. A. § 1.11.

⁶⁴ See *ib.* § 1.13. A.B.A.B.C.A. § 10, provides for a renewal of the reservation from year to year. That seems nonessential.

⁶⁵ 18 Okl. S. A. §§ 1.11-1.13. See, also, Draftsman's Notes under *ib.* §§ 1.11 and 1.13.

⁶⁶ See 18 Okl. S. A. § 1.18, 1.19, 1.27, 1.28, and 1.29, and Draftsman's Notes thereunder.

⁶⁷ See *ib.* § 1.14 c, and Draftsman's Note thereunder, especially the comment on the anomalous provision in the Minnesota Act (M. S. A. § 301.08).

homa acts⁶⁸ carefully regulate the issuing of security-purchase options. The Florida statutes have no provisions of this sort.

Employees' Share-Ownership Plan. The trend is to provide in corporation statutes for employees' stock-ownership plans. Such provisions are socially desirable since such methods tend to lessen destructive industrial strife.⁶⁹ Florida has no such provisions.

Voting of Shares. Florida statutes are extremely deficient, as compared with the more modern acts, in providing for matters of voting. No provision for a voting requirement higher than the general statutory minimum, when such higher requirement is set out in the articles, is contained in the Florida statutes.⁷⁰ Also, they do not adequately provide for the preparation of a voting list.⁷¹ Sections 611.22 and 612.27 provide for voting by proxies when duly authorized in writing. No proxy time limitation is provided for. Most statutes in authorizing proxies fix a time limit. Such period of limitation varies widely, ranging from six months in Massachusetts⁷² and New Hampshire⁷³ to seven years in California⁷⁴ and Oklahoma.⁷⁵ It is quite clearly against the best interests of the shareholders to permit the collection of proxies which may be exercised indefinitely. Possibly the two latter states have gone too far in extending the time to seven years; a limit of possibly three years might be better. Moreover, it seems desirable that the proxy be limited to

⁶⁸ See *ib.* § 1.46, and Draftsman's Note thereunder.

⁶⁹ See *ib.* § 1.47, and Draftsman's Note thereunder.

New South Wales and New Zealand have gone much further and provided for a type of *labor shares*. N.S.W. Cos. Act, 1936, §§ 165-68; N.Z. Cos. Act, 1933, § 59. By so providing in the charter the corporation may issue such shares to employees in consideration of and in proportion to the capitalized value of their skills, thus giving them an interest in the enterprise. It is believed that such a device may serve as a means of effecting a greater degree of co-operation between labor and capital.

⁷⁰ See 18 Okl. S. A. § 1.56, and Draftsman's Note thereunder.

⁷¹ See 18 Okl. S. A. § 1.59, and Draftsman's Note thereunder.

⁷² Mass. G. L. Ch. 156, § 32.

⁷³ N. H. R. L. Ch. 274, § 85.

⁷⁴ Cal. Civ. Code, § 321.

⁷⁵ 18 Okl. S. A. § 1.60. See, also, Draftsman's Note thereunder.

11 months, unless a longer period is specified in the authorization. This restricts the voting of a proxy, which does not specify a definite duration for a longer time, to one annual shareholders' meeting.⁷⁶

Florida statutes, unlike the more recent acts, do not provide for voting of shares jointly held,⁷⁷ fractional shares,⁷⁸ or shares held by fiduciaries,⁷⁹ pledgees,⁸⁰ or by the corporation.⁸¹ Also, many acts permit provisions to be inserted in the articles authorizing creditors to have voting rights on such conditions as expressly set out in the articles.⁸² Florida has no such provisions.

Most modern acts provide for voting trusts. They generally follow the example set by the U.B.C.A.⁸³ in limiting the life of voting trusts to ten years. Oklahoma⁸⁴ likewise limits the period of existence to ten years, while Minnesota⁸⁵ places the limit at fifteen years, and California⁸⁶ at twenty-one years. The Illinois Act has been criticised for failing to provide for voting trusts.⁸⁷

Although voting trusts were provided for in the 1925 Florida Act, prior to 1945 this State did not have comprehensive provisions on voting trusts. In 1945, the former section was drastically amended, bringing the Florida statutes on voting trusts well up to date.

In 1947, Florida transferred Section 612.19 (which formerly contained the provisions on voting trusts) to Sections 610.38, 610.39, 610.40 and 610.41, F.S.A.⁸⁸ How-

⁷⁶ See *ib.* and Cal. Civ. Code, § 321. Section 17, Del. Gen. Corp. Law, limits the proxy to three years unless a longer period is fixed in the proxy, but it can be for any length of time providing the period of duration is stated in the written authorization.

⁷⁷ See 18 Okl. S. A. § 1.61, and Draftsman's Note thereunder.

⁷⁸ See 18 Okl. S. A. § 1.62, and Draftsman's Note thereunder.

⁷⁹ See 18 Okl. S. A. § 1.63, and Draftsman's Note thereunder.

⁸⁰ See 18 Okl. S. A. § 1.64, and Draftsman's Note thereunder.

⁸¹ See 18 Okl. S. A. § 1.65, and Draftsman's Note thereunder.

⁸² See 18 Okl. S. A. § 1.67, and Draftsman's Note thereunder.

⁸³ Section 29.

⁸⁴ 18 Okl. S. A. § 1.66.

⁸⁵ M. S. A. § 301.27.

⁸⁶ Cal. Civ. Code, § 321a.

⁸⁷ Ballantine, *A Critical Survey of the Illinois Business Corporation Act (1934)* 1 U. Chi. L. Rev. 357, 393.

⁸⁸ Laws, 1947, Ch. 24,337.

ever, there is one notable, but not substantial, difference between the Florida act and other statutes. In Florida, the trustees under the voting trusts do not acquire legal title to the stock, but are vested with the legal right and title to the voting power only. A notation of the voting trust is made on the face of the certificate, and a purchaser thereof takes subject to the trust. Under most statutes, the shares are transferred to the trustee, and a trust certificate representing the transferred shares is, in turn, delivered to the beneficial owner.

Florida seems to stand by itself in providing for the procedure upon the cancellation or termination of a voting trust, whereby the secretary of the corporation indicates such cancellation or termination on the face of the certificate, or upon request, issues a substitute certificate bearing the same number as the original, and cancelling the latter. This state, as most jurisdictions, limits the period to ten years.⁸⁹

Florida statutes do not adequately provide for the method of voting,⁹⁰ although they do stipulate that shares may be voted cumulatively if so provided in the articles.⁹¹ Many recent statutes thusly deny such right unless the charter provides otherwise. However, since some states deem the right of cumulative voting so fundamental that it is required by constitutional provision,⁹² it would seem better to provide that such rights should exist unless taken away by charter provision. That is, cumulative voting is the usual incident, and therefore, should not need to be granted by stipulations in the articles. It is desirable to require as few provisions set out in the charter as possible in order to provide for a corporation with powers and attributes such as are normally desirable in the mill-run of corporations.

No provision for the supervision of elections is made in the Florida statutes. Several of the modern acts provide for inspectors of elections⁹³ and other general matters of procedure in conducting elections.

⁸⁹ Section 610.38 (d), F. S. A.

⁹⁰ See 18 Okl. S. A. § 1.68, and Draftsman's Note thereunder.

⁹¹ Section 612.28, F. S. A.

⁹² See Draftsman's Note under § 1.68, 18 Okl. S. A.

⁹³ See 18 Okla. S. A. § 1.69, and Draftsman's Note thereunder.

Inspection of Corporate Records. If a corporation is formed under Chapter 611, F.S.A., the "books, records, papers or other property" shall "at all times during business hours" be kept "ready to be exhibited to any officer, director or committee appointed by the shareholders representing one-tenth of all the subscribed stock."⁹⁴ But, in the event the corporation is organized under Chapter 612, only the stock-ledger is subject to inspection. It must be exhibited "daily, during at least three business hours," and may be inspected "by any judgment creditor of the corporation, or by any person who shall have been for at least six months immediately preceding his demand a shareholder of record of not less than one per cent of the outstanding shares of the corporation, or by any person holding or thereunto in writing authorized by the holders of at least five per cent of all of the outstanding shares."⁹⁵

Why should the requirements be so widely different between, say, a cemetery company organized under Chapter 611 and, say, a manufacturing firm formed under Chapter 612? Suppose the corporation organized under the former chapter were a telephone and telegraph company (we are thinking of the A. T. & T.) with, say, 3 billion dollars of subscribed stock. Then, a shareholder owning 10% thereof—which would involve an investment of a paltry \$300,000,000, assuming the stock were bought at par—could have a committee appointed by him inspect the company's records (although the statute does not say he could do it himself). He would not be restricted to a look at merely the stock-ledger (like the fellow who happened to own stock in a manufacturing company such as General Motors); he could have his committee (not himself) make a day-long (not just for three hours) perusal of all of the books, records, papers, and other property of the firm. But in the event he were a judgment creditor of the telephone and telegraph company, he couldn't have a peep at the company's stock ledger. This might lead one to ask, "Of what value would the right to look at an alphabetical list of shareholders be to a judgment creditor of the corporation?"

⁹⁴ Section 611.23, F. S. A.

⁹⁵ Section 612.60, F. S. A.

Moreover, the person who has been a shareholder of a "Corporation for Profit, Generally" for the immediately preceding six months can inspect the company's books, although he is not a stockholder at the time. These sections dealing with inspection of records illustrate the mass of illogicalities and incongruities extending throughout the Florida corporation laws.⁹⁶

The general trend is to allow shareholders to inspect the corporate records required by statute to be kept in the registered office⁹⁷ for any proper purpose at any reasonable time. Moreover, there is a distinct trend in requiring many more records to be kept in the registered office.⁹⁸

Although some of the modern acts require the ownership of a percentage of the outstanding stock to qualify to inspect the company's books,⁹⁹ such requirements may work an extreme injustice upon shareholders. Especially is that true as to large corporations. To require the ownership of even one per cent of the shares of the A. T. & T. would, in most instances, be paramount to completely denying the privilege. And so, even when many of the worst managerial abuses are committed by the officers of large companies, such as the Associate Gas & Electric and the Aviation Company of America.

There is a paramount statutory trend in the direction of requiring that more complete information be made available to shareholders. For instance, most of the modern acts require that an annual report be submitted to the shareholders,¹⁰⁰ and the S.E.C. is requiring the lifting of

⁹⁶ Compare the clear-cut provisions in 18 Okl. S. A. § 1.71. However, subsection d of this Oklahoma section follows very closely the provisions in the latter half of § 612.60, F. S. A.

⁹⁷ See 18 Okl. S. A. § 1.17, and the Draftsman's Note thereunder. This Oklahoma section extends the right to voting trust certificate holders, and allows the privilege to be extended to creditors by so stipulating in the articles or by-laws. Moreover, it requires that the names and post-office addresses of its principal officers must be kept open for *public* inspection.

⁹⁸ See 18 Okl. S. A. § 1.16.

⁹⁹ See Draftsman's Note under § 1.71, 18 Okl. S. A.

¹⁰⁰ See Cal. Civ. Code § 358, 18 Okl. S. A. § 1.72; Pa. 15 P. S. § 2852, B. C. L. § 318.

the "iron curtain" concealing material facts from shareholders.¹⁰¹

Shares — Allotment, Attributes, Consideration. The trend in modern corporation acts is to accept the extremely liberal provisions advanced by Delaware concerning matters relating to the issuing of shares and fixing the attributes thereof, except that the provisions have been modified and hedged in by additional safeguards against abuses. The manifested policy is to extend very broad powers to the corporate management—not to shackle it. But at the same time stringent penalties and other restrictions are provided for checking abuses and corruption.

In the up-to-date acts broad authority over the issuing of stock in series and fixing the attributes thereof may be extended to the board of directors when so provided in the articles.¹⁰² These acts require that a fair consideration must be received for shares issued. If the consideration is other than cash, a just evaluation must be placed

¹⁰¹ On information required by the S. E. C. to be supplied in soliciting proxies, see S. E. C. Regulation x-14 *et seq.* (Exchange Act Release No. 4037, effective Dec. 18, 1947), *Prentice-Hall Corporation Service*, §§ 3517 *et seq.*

¹⁰² See 18 Okl. S. A. § 1.74, and the references cited in the Draftsman's Note thereunder.

The more modern acts tend to give the directors a wide range of authority in respect to the creation, fixing of attributes, and issuance of shares. Such authority is generally subjected only to limitations and restrictions set forth in the articles, providing, of course, that attributes of outstanding shares are not altered.

Mr. E. J. Marshall, Chairman of the Ohio Corporation Code Committee, in a letter (dated January 10, 1938) to the draftsman of the Oklahoma Code and co-author of this article, said: "When we were drafting our Act about twelve years ago and came to the question as to the authority directors should have to fix and alter terms and provisions of shares, we were of the opinion that the Delaware Act was too broad. I think we were influenced by Mr. Berle's article written about that time, in which he disapproved the practice. * * * I incline to the view that the directors should have all the authority given in Delaware. As a practical matter, the directors have to manage the corporation and shareholders expect them to manage and handle questions of this sort. Further, as a practical matter, the corporation in need of capital has to go to the market and pay what the market demands or sell what the market will take. The shareholders may be seriously injured by the delay incident to the taking of formal shareholder action. . . ."

upon the property received as such consideration.¹⁰³ They uniformly provide that the judgment of the board in fixing the value of consideration for shares is conclusive in the absence of fraud. Also, in several states the law requires that a promissory note, or other promise to render services or deliver property in the future, will not suffice. Such is not the case under the Florida statutes.

In modern acts the amount of the stated (primary) capital is rigidly fixed.¹⁰⁴ A paid-in surplus (secondary capital) is provided for and carefully guarded.¹⁰⁵ And any amounts received as premiums upon the sale of par stock, along with any portion of the consideration received for non-par shares in excess of the amount allocated to the stated capital, become paid-in surplus. Of course, great freedom is accorded the corporation in transferring other sums to the paid-in surplus or stated capital at any time.

The Delaware statutes place no limit on the portion of consideration received for shares without par value to be assigned to capital. Moreover, the balance may be placed in the **general surplus**. On the other hand, the modern acts require that the portion not allocated to stated capital must be assigned to paid-in surplus. Also, they generally place a minimum on the percentage of the consideration that must be allocated to stated capital. The percentage required to become stated capital varies among the more modern statutes from 50 per cent upward. Michigan¹⁰⁶ places the minimum at 50 per cent, Oklahoma¹⁰⁷ sets it at two-thirds, and the American Bar Association's Model Act¹⁰⁸ requires 75 per cent. Other acts, like that of Indiana,¹⁰⁹ Florida,¹¹⁰ and New York,¹¹¹ require that all of the

¹⁰³ See 18 Okl. S. A. §§ 1.76 and 1.78, and Draftsman's Notes thereunder.

¹⁰⁴ See Okl. S. A. § 1.79, and Draftsman's Note thereunder. As far as it goes, § 612.21, F. S. A., is in line with modern provisions. See, also, § 610.15, F. S. A.

¹⁰⁵ The A. B. A. B. C. A. uses the term "Capital Surplus" which doubtlessly is preferable.

¹⁰⁶ Mich. Gen. Corp. Laws § 20.

¹⁰⁷ 18 Okl. S. A. § 1.80; Hills' *Model Corporation Act*, § VI, and Notes thereunder (48 Harv. L. Rev. 1359).

¹⁰⁸ A. B. A. B. C. A. § 18.

¹⁰⁹ Ind. Gen. Corp. Act, § 1 (h).

¹¹⁰ F. S. A. § 612.21.

¹¹¹ N. Y. Stock Corp. Law, § 12, 4, B.

consideration for shares, except the premium on par shares, must be allotted to capital.

The statutory policy should be to make it easy to assign funds to the stated capital and paid-in surplus, but, once the funds become a part of this primary and secondary capital, they are carefully guarded as to the matters of disbursement. Furthermore, in modern corporation law a more accurate concept of the nature of capital prevails. The trend is in the direction of treating it as a quantum or legal limit.¹¹² The capital of a corporation is no more than an amount fixed by law to be carried on the accountant's balance sheet.

Under modern acts, the officers, shareholders, and subscribers are subjected to rigid liabilities upon violation of statutory inhibitions.¹¹³ It is needless to say that the Florida statutes lack many of the refinements and safeguards relating to the share and capital structure found in the more modern acts.

Transfer of Shares. Florida, like the great majority of states,¹¹⁴ has adopted the Uniform Stock Transfer Act. Some states have enacted it as a separate act, while others, in adopting it, have incorporated it into and made it a part of their general corporation law, with or without making any major amendments thereto. The Oklahoma Committee in incorporating it into its draft, effected some needed changes in the U.S.T.A. provisions. Especially is that true as to the attachment and sale of shares when the share certificate cannot be levied upon by seizure thereof. The Oklahoma Act provides that "in the event it be impossible or inconvenient to proceed" in effecting an attachment through an actual seizure of the share certificate, or to enjoin the transfer thereof, an attachment may be made through the corporation. Corporate officers are required to furnish a certificate indicating the shares held by the debtor, whereupon an attachment may be made directly through the company. After due return has been made by the attaching officer, proper notice has been given,

¹¹² See Ballantine and Hills, *Corporate Capital and Restrictions upon Dividends under Modern Corporation Laws* (1935) 23 Cal. L. Rev. 229.

¹¹³ See 18 Okl. S. A. §§ 1.83, 1.84, and Draftsman's Notes thereunder.

¹¹⁴ All of the states, except Iowa, Kansas, and Vermont, have adopted the U. S. T. A. See F. S. A. §§ 614.01-614.24.

and one year has elapsed after the levy, the shares then, upon final judgment, may be sold. In the event of no intervention of a bona fide purchaser before the consummation of the sale, the purchaser takes good title as of the date of the original attachment.¹¹⁵

The need for such an amendment of the U.S.T.A. has long been apparent. The State Bankers' Associations, and investors in general, strongly indorsed this change in the law. It gives the creditor an opportunity of redress against a debtor who formerly could make himself judgment-proof by concealing his share certificates, or by transferring them to a friend, although he continued to secretly retain the full beneficial interest in the shares. This modification does not imperil the interests of security holders. It serves as a sort of statute of limitations, and the innocent transferee can protect his rights by giving notice to the company, or by having the stock transferred on the books of the corporation, within a year following the transfer to him.

Assessments. Florida, like many other states, makes no statutory provision for stock assessments. But some of the more modern acts have carefully-drafted provisions permitting such assessments.¹¹⁶ These statutes limit assessments to strict compliance with the statutes. If the stock is to be assessable the stock certificate must so state. Detailed provisions for enforcing payment of the assessments are set out in the acts. Statutory provisions authorizing assessments give a greater flexibility to the possible corporate set-up. The statutory authorization can result in no harm, as no corporation is required to avail itself of the right. A corporation might desire to extend to creditors the additional benefit afforded by greater financial stability of the company by providing for stock assessments.

Dividends, Distributions, Purchases and Redemption of Shares. Modern acts generally permit the closing of the transfer books up to a specified time—usually 40 or 50

¹¹⁵ See 18 Okl. S. A. §§ 1.96-1.102.

¹¹⁶ See Cal. Civ. Code, §§ 331 *et seq.* and 18 Okl. S. A. §§ 1.121 *et seq.*

days—preceding the date of dividend payment.¹¹⁷

The trend in statutes is distinctly in the direction of increasing restrictions upon dividend sources and payments, especially as to common stock.¹¹⁸ Delaware permits the payment of dividends from net earnings of the current or preceding years, although the capital may be impaired.¹¹⁹ Oklahoma doubtless has the most carefully devised formula for fixing limitations upon dividend disbursements. The Oklahoma Act permits dividend payments, when there is an impairment of stated capital, out of net profits but not to exceed one-half of such profits, and then only from such profits "earned during the preceding accounting period, which shall not be less than six months nor more than one year in duration." And then, if there be preferential shares outstanding, such net profits can only be used to pay dividends on such preferential stock. Moreover, dividends cannot then be paid on such preferred shares unless the remaining net assets equal the total highest aggregate of the liquidation preference of all shares outstanding, plus 50 per cent of the balance necessary to make up the capital impairment.¹²⁰

Modern acts allow distribution of assets of a "wasting-assets" corporation as liquidating dividends, although such payments do not leave the stated capital intact. No dividends whatsoever can ever be paid under any other conditions when the capital is impaired, or when such payments would impair it. Furthermore, no dividends can ever be paid under any condition if such payments reasonably might cause the corporation to be unable to meet its liabilities. Moreover, no dividends can ever be paid when the remaining "net assets of the corporation shall not equal an amount in excess of one-fourth its debts and liabilities, exclusive of stated capital as a liability." This 25 per cent margin serves as a safeguard against possible overvalua-

¹¹⁷ See 18 Okl. S. A. § 1.131; Minn. S. A. § 301.22, subd. 7; Del. Gen. Corp. Law, § 17. Statutes, also, generally have similar provisions for closing books before dates of voting at meetings.

¹¹⁸ See 18 Okl. S. A. § 1.132, and long Draftsman's Note thereunder. Much valuable information, set out in the Draftsman's Note, would bear quoting, but space requires that this comment be limited to its citation only.

¹¹⁹ Del. Gen. Corp. Law, § 34.

¹²⁰ 18 Okl. S. A. § 1.132.

tion of the corporate assets or a depreciation in their current value.¹²¹

The Florida statutes contain no such carefully-designed safeguards. Also, its law is deficient in not adequately setting up definite standards regulating the payment of share dividends.¹²²

Modern acts require a fair determination of the assets preparatory to paying dividends or purchasing shares to the same degree as in the fixing of the value of property received as consideration for shares.¹²³ They likewise contain detailed comprehensive provisions setting up a procedure for and regulating the purchase and redemption of shares.¹²⁴ In all of these regards the Florida statutes are extremely deficient.

Reduction or Change of Capital. The Florida statutory provisions relating to a reduction of capital are not extremely inadequate. However, they are subject to considerable improvement. Section 612.22 provides that the capital of a corporation shall not be reduced below an amount \$500 in excess of the aggregate par value of the par shares remaining outstanding. No mention is made of capital representing outstanding non-par shares. Accordingly, if no par shares are retained, the capital could be reduced to \$500. In such a case, or when both par and non-par shares remain outstanding and a maximum reduction is made, the \$500 would be the aggregate of the capital representing the total non-par shares left outstanding. Thus, the capital representing each non-par share would equal the quotient of \$500 divided by the total number of such shares. If there were 10,000 non-par shares remaining outstanding after such maximum reduction, each such share would be represented by a capital amount of five cents. What would be the effect if these shares were to have a distribution preference of \$10 each? No corporation should be permitted to reduce its capital below the aggregate of its par shares (or of the distribution

¹²¹ 18 Okl. S. A. § 1.133.

¹²² F. S. A. § 612.23, provides, "When the directors so determine, dividends may be paid in stock." See, also, 18 Okl. S. A. § 1.134.

¹²³ See 18 Okl. S. A. § 1.135, which follows Minn. S. A. § 301.22.

¹²⁴ *Ib.*

preference thereof if such is fixed above the share par) and of the distribution preference of the non-par shares.¹²⁵

If only par shares are left outstanding, upon such a reduction under the Florida statutes, the amount of the resulting capital would be incongruous with the provisions of Section 612.21. In such an event, a corporation with 1,000 shares of the par value of \$100 each remaining outstanding after the reduction would have a capitalization of \$100,500. Or is Section 612.22 to be construed to mean that when the capital of a corporation is reduced there must always be some non-par shares left outstanding? Further ambiguity appears in the last paragraph of Section 612.22. If the first clause of that paragraph is to be taken for what it says, a corporation could never reduce its number of shares. If the reduction is to be *inoperative*, the number of shares would remain as they were.

A Florida corporation may amend its articles by a majority vote of its voting stock, except where there is a reduction of capital and the corporation has preferential shares outstanding. In such a case a majority vote of each class of preferential shares is required even though such shares be classed as non-voting.¹²⁶ The trend is to require only a simple majority vote to consummate an amendment of the articles. The earlier rule requiring a unanimous vote of approval of an amendment no longer prevails. However, the modern acts generally establish higher requirements in many situations. The Oklahoma Act is rather moderate in this regard, adopting an intermediate course between extreme laxity and an unnecessary restrictive position. It, in authorizing an amendment reducing capital, in addition to a simple majority vote, requires also a majority vote of each class, voting as a class, whether such shares be voting or non-voting. To protect holders of classes of stock against discrimination, the trend is to require a vote of approval by each class, voting as a class, in authorizing any general changes in the corporate set-up.

The Florida statutes, Section 612.22, provide that any surplus arising from a stock reduction may be distributed among its shareholders. The Illinois and Minnesota Acts

¹²⁵ See 18 Okl. S. A. § 1.142, and Draftsman's Note thereunder.

¹²⁶ F. S. A. § 612.06.

throw such excess assets into paid-in surplus. This procedure has been criticised, and has been avoided in the California and Oklahoma Acts.¹²⁷

It is preferable to have the procedure required in effecting liquidating dividends, whether in connection with a reduction of capital or otherwise, carefully regulated by statutory provisions.¹²⁸

Liability for Unlawful Distribution of Assets. Modern acts generally provide for strict liabilities for unauthorized payments to shareholders. Under the Oklahoma code, the directors are made jointly and severally liable for any unlawful distribution of corporate assets resulting from their willful or negligent acts. Such liability is limited by the amount unlawfully withdrawn and the then current debts. No liability attaches to a director who in good faith relies upon a balance sheet or profit and loss statement of the corporation presented to him by the president or the officer of the corporation having charge or supervision of the accounts, or if the account relied upon is certified by a public accountant. Or is the director liable who is not present at the meeting when such disbursements are authorized, or, if present, who dissents to such authorization and has his dissent entered on the minutes of the meeting.¹²⁹ Such liability may be enforced by any judgment creditor, shareholder, or receiver of the corporation. Upon satisfaction of such claim, the director may require a reimbursement from the shareholders who received such distribution payments knowing that the payments were unlawful, or may enforce a pro rata contribution from other directors subject to liability for the unlawful distribution. Moreover, in the event the company is adjudged insolvent, the corporation, or its receiver, etc., may proceed against the shareholders to recover back the improper payments.¹³⁰

Amendment of Articles in General, Dissenters. If the procedure for effecting amendments of articles is not fully implemented by carefully drafted statutory formulae,

¹²⁷ See 18 Okl. S. A. § 1.145, and Draftsman's Note thereunder.

¹²⁸ *Ib.*

¹²⁹ See 18 Okl. S. A. § 1.146, and the statutory citations in the Draftsman's Note thereunder. See, also, F. S. A. § 612.47.

¹³⁰ See 18 Okl. S. A. §§ 1.146-1.150, and Draftsman's Notes thereunder.

many gross and fraudulent abuses are permitted. The modern acts evidence a very careful study in providing the necessary safeguards. Owing to the size of many modern corporations and the complexity of their set-up and management, many new formulae and devices must be developed to afford even a vestige of protection to the isolated shareholder.¹³¹ However, in the more modern acts a vigorous attempt has been made to solve the problem, while at the same time endeavoring to not throttle reasonable corporate development by destroying flexibility and denying a healthy degree of freedom to the management.

For instance, some acts permit some most simple charter amendments to be effected by the incorporators,¹³² and others by the board of directors.¹³³ The circumstances may be such that a general amendment can be authorized by a bare majority of the "voting" shares. However, higher requirements are set up where the amendment may threaten the rights of a portion of the shareholders. The Oklahoma Act requires the affirmative vote of the shares of any class, voting as a class, if the proposed change would affect the rights of the holders of the shares of such class **adversely**.¹³⁴ The statute enumerates the specific changes which are deemed to affect shareholders' rights adversely.¹³⁵

The statutes in a majority of the states afford shareholders the right to dissent to amendments of the articles affecting certain fundamental changes in the corporation. All provide that such dissenter may have his shares purchased by the corporation at the market or reasonable value before the amendment can be consummated. The

¹³¹ See Rutledge, *Significant Trends in Modern Incorporation Statutes* (1937) 22 Wash. U. L. Q. 305.

¹³² See 18 Okl. S. A. § 1.152. Cf. Cal. Civ. Code, § 362a (1); Del. Gen. Corp. Law, § 25.

In Oklahoma such amendment may be made before any shares are allotted or beginning business; in California, before shares are issued or any subscriptions, other than those set forth in the articles, are accepted; in Delaware before the payment of any part of capital.

¹³³ See 18 Okl. S. A. § 1.162, and Draftsman's Note thereunder.

¹³⁴ 18 Okl. S. A. § 1.153.

¹³⁵ See 18 Okl. S. A. § 1.154. There are many other situations, not herein mentioned, where higher vote requirements are necessary in authorizing amendments,

various statutes differ some as to the procedure to be followed in fixing the reasonable price of the shares, and vary extremely as to what changes a shareholder may dissent. A shareholder in a Florida corporation may dissent to a consolidation,¹³⁶ while a shareholder in an Oklahoma corporation may dissent to a very large array of changes.¹³⁷

Other Advanced Features of Modern Acts. It seems quite idle to proceed farther in contrasting the provisions of the Florida corporation laws with the content of the more recent modern acts. In each instance the inevitable conclusion would be that the Florida provisions are extremely deficient in practically every instance. We, therefore, shall conclude our comparative analysis by briefly touching upon a few of the other more important features of the modern acts.

The modern acts have detailed procedures and safeguards in effecting mergers, consolidations, reorganizations, revivals, reincorporations, sales of corporate assets, dissolutions, windings up, domestication of foreign corporations, withdrawals and ousters of foreign corporations, preparing and filing of articles, reports, etc.

In five widely scattered states¹³⁸ draftsmen phalanxed with able committees with foison and intrepitude grappled with a legion of legal problems, and wrestled with them until they, one by one, were reduced to theormatic form and in turn the solution of each patterned into a statutory formula.

The Oklahoma Committee owes much to its predecessive craftsmen; it benefited from what had gone before. Moreover, the members of the other committees gave invaluable assistance to that committee by offering pertinent

¹³⁶ F. S. A. § 612.40.

¹³⁷ 18 Okl. S. A. § 1.157.

¹³⁸ Only the committees in Ohio, California, Minnesota, Illinois and Oklahoma can be credited with original, independent operations in drafting new corporation codes. However, these authors are not unmindful of the monumental achievements of the U. B. C. A. Committee and John S. Hills. Most credit should go to the Buckeye pioneers who blazed the way. Later draftsmen profited by the earlier work done by others. Of course, each successive committee can point to many refinements and added features contributed by it.

suggestions and constructive criticism through the medium of scores of letters.

In the following regards, the Oklahoma Act has advanced the trend in statutory features in modern corporation laws:

1. Throughout, it materially adds to clarity, accuracy, and consistency of expression and concept.

2. It is more complete in content than any other act. It fills in many gaps, and details many provisions theretofore neglected.

3. It has provided a greater degree of flexibility in management and has increased essential safeguards.

4. It makes more information available to the shareholders.

5. It guards capital and assets more carefully than prior acts.

6. It provides a new method of attaching shares when the certificate cannot be reached.

7. It more fully protects shareholders upon changes in the corporate set-up.

8. It provides for adjusting the corporate set-up after reorganization under Federal laws.

9. For certain purposes it brings domesticated corporations, the principal portion of the property and assets of which is located in, or the principal portion of the business transactions of which is conducted in that state, under the supervision of that state the same as a domestic corporation.

10. It more fully provides for matters of consolidation and merger.

11. It more fully provides for voluntary and involuntary dissolution and gives great flexibility in shifting from one method to the other during all stages of procedure.

12. It provides more efficient methods for preparing and filing articles in the office of the Secretary of State and in the county.

Only two short decades ago corporate statutory evolution passed from the stage of laxity of restrictions to the modern stage of codification. During this score of years Florida corporation law has failed to keep pace with many of the other states. The solution? The drafting and enactment of a Florida B.C.A.

The potential productive capacities of Florida are grossly underestimated by people within the state as well as those without. We hear the common expression: "Well, you know Florida is predominantly a resort state, relying mainly upon tourist business. Yes, it produces substantial quantities of citrus and other fruits, and some vegetables. A limited amount of cattle grazing is done in the central part and some cotton is grown in the northern counties. But that's about all." Similar expressions could be heard daily in California prior to 1930. That state had become resigned to that condition of affairs. The average Californian was hedged in by a fatalistic psychology concerning industrial development. He thought nothing could be done about it, and therefore he never tried to bring about a change. But one man thought something could be done about it, and he set out to get it done. This man was Professor Ballantine of the University of California.

In 1929, California had fewer corporate enterprises in proportion to its population and wealth than any other state in the Union, and this, in view of the fact that that state had an ideal climate, plenty of resources, and was strategically located as to unlimited markets. It had but one limitation and that was the artificial barrier resulting from its archaic legal restraints. Its legal sanctions prevented corporations from entering the state.

It remained for Professor Ballantine to inaugurate a campaign to modernize the corporation laws of that state. He carried on a relentless battle which finally culminated in an amendment to the state constitution, removing the provision which subjected all shareholders to a *pro rata* liability for all debts of the corporation,¹³⁹ and the drafting and adoption of a complete and most modern business corporation code. Since that time industry has been flowing into California at an amazing rate. That state is far outstripping the other 47 states in the degree of growth of corporate enterprises. Now, after slightly over a decade and a half, it is rapidly becoming a great industrial empire. Huge new aircraft industries dotted her coast-line during the war. Some suggested that that was but a temporary mushroom-growth resulting from the war boom. But that

¹³⁹ See Note 14, *supra*.

was not the case. Those factories have been enlarged and converted into permanent peacetime production. And many more new plants have been built since the close of the war. Today many more industrial workers are employed in California than at the peak of war production. The rate at which new wealth is being created by this great galaxy of Pacific Coast industries is indeed baffling.¹⁴⁰

What has California got that Florida hasn't got! Industry is shifting southward at a rapid clip. Industrial production in the South has tripled since 1939. Is Florida getting her share? Consider the fertile markets right at her doorstep to the south. It is true that some corporate enterprises are invading the northern portion of this state,¹⁴¹ but any marked movement to the ideal setting in South Florida has not materialized. This state can well take a tip from the results accomplished by California. If the theme of this article meets with a satisfactory response, these authors are willing to take upon themselves the task of presenting to the next session of the legislature the most modern and complete business corporation act yet drafted. As asked in the title of this article: **Is Florida in step!**

¹⁴⁰ Life (June 10, 1946) 20:31.

¹⁴¹ Stephen Trumbull, in the February 12th, 1948, issue of the Miami Herald, stated that 250 new industrial firms had been established in Jacksonville since the close of the war.