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COMPARISON OF BUSINESS CORPORATION LAW OF
MINNESOTA AND DELAWARE

By JOSEPH H. COLMAN* and JOHN F. FINN, JR.†

ONE WHO contemplates organizing a corporation to do business in Minnesota must at the outset dispose of one important question—whether to incorporate under the laws of Minnesota or under the laws of some foreign state. This question, in the great majority of cases, is one of choosing between incorporating in Minnesota or in Delaware. For years, because of the broad powers of management conferred by Delaware statutes upon the board of directors, and because of other liberal provisions in statutes of that state, the Delaware corporation has been a conventional business entity. Recently, other states have enacted modern corporation codes which remove many of the reasons that originally made Delaware corporations preferable; but the practice of incorporating in Delaware persists to a large extent.

In a particular case, because of the location of the prospective corporation's assets or places of business, or because of desirable statutory provisions as to particular types of corporations, or to assist in minimizing taxation, it may be necessary to inquire into the laws of other states with a view to organizing in one of them. However, in the typical instance, for Minnesota attorneys and their clients the choice lies between Minnesota and Delaware. This discussion is limited to a comparison of the laws of these two states, particularly of the salient provisions of their respective business corporation statutes.¹ Generally speaking, there is no great difference between the common law of the two states with respect to business corporations.

I. EXPENSE OF INCORPORATION AND REPORTS

A corporation with authorized par value shares of \$25,000 can be organized under Minnesota law for a fee of \$25, the minimum

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¹Because the Business Corporation Acts of Minnesota and Delaware are referred to frequently in the ensuing discussion, much needless repetition has been avoided by use in the footnotes of the following abbreviations: Minn. Stat. (Mason's 1927 Minnesota Statutes, 1936 Supplement); Del. Code (1935 Delaware Revised Code).

fee, plus filing fees and the cost of publishing a notice of incorporation. Each additional \$1,000 par value of authorized shares adds fifty cents to the filing fee.² Shares without par value, for this purpose, are considered to have a par value of \$10 each.³ In many cases, the initial fee paid to the State of Delaware is lower.⁴ However, assuming that business is to be conducted in Minnesota, it is necessary to qualify in this state, which requires payment of at least the minimum fee of \$50.⁵ Furthermore, all Delaware corporations must pay an annual license fee to the State of Delaware⁶ and must maintain an office or resident agent there.⁷ The minimum annual charge of the corporations which ordinarily act as such resident agents is \$50.

A Delaware corporation must file an annual report in that state,⁸ and, if qualified to transact business in Minnesota, must also file an annual report here.⁹ Minnesota corporations, on the other hand, are not required to file such reports.

²Minn. Stat., sec. 7475 (1).

³Minn. Stat., sec. 7475 (a). The statute makes an exception where shares without par value have priority over other shares on involuntary liquidation. The involuntary liquidation price is the par value of such shares for this purpose.

⁴The minimum filing fee in Delaware is \$10. Fees based on par value stock are computed as follows: 1 cent per share of authorized capital stock up to 20,000 shares; ½ cent per share from 20,001 to 200,000 shares; ½ cent per share for shares in excess of 200,000; and each \$100 unit of par value stock is a taxable share. If stock is without par value, the following schedule applies: ½ cent per share up to 20,000 shares; ¼ cent per share from 20,001 to 2,000,000 shares; and ½ cent per share for shares in excess of 2,000,000. Del. Code, sec. 2104, 72.

⁵Minn. Stat., sec. 7495-6.

⁶Delaware, Revised Code 1935, sec. 98, 64, as amended by ch. 5, 1937 Laws. This annual franchise tax is computed upon the basis of the total number of shares of authorized capital stock as follows: 250 shares or less, \$5; 250 to 1,000 shares, \$10; 1,000 to 3,000 shares, \$20; 3,000 to 5,000 shares, \$25; 5,000 to 10,000 shares, \$50; and \$25 on each additional 10,000 shares or part thereof. This statute makes an alternative provision for calculating the tax by prescribing an arbitrary "assumed no-par capital." The annual tax is computed upon whichever of the two bases—total number of authorized shares or "assumed no-par capital"—yields the smaller amount.

⁷Delaware, Revised Code 1935, sec. 2064, 32.

⁸Del. Code, sec. 97, 63. This report must state the facts as to the corporation's officers, resident agent, places of business, annual meeting of stockholders, amount of stock, and capital investments in Delaware. A fee of \$2 is payable to the Secretary of State upon the filing of each report. Del. Code, secs. 2104, 72 and 95, 61. Unless this report also states the amount of the corporation's gross assets, good will being valued as on the corporation's books of account, the annual franchise tax will be computed on the basis of total number of authorized shares rather than on "assumed no-par capital." See footnote 6 and text thereto.

⁹Minn. Stat., sec. 7495-14. This report does not differ greatly from that required to be filed in Delaware, except that it must also contain a statement of the value of all property of the corporation and of its Min-

II. ARTICLES

Both Minnesota and Delaware permit perpetual existence of corporations.¹⁰ In both states, in the absence of qualifying provisions in the articles of incorporation, the common law rules prevail as to a stockholder's preemptive right — the right under certain conditions to subscribe ratably to additional issues of stock.¹¹ However, appropriate provisions in the articles of either Delaware or Minnesota corporations may qualify, or even eliminate entirely that right.¹²

The statutory provisions with reference to corporate names do not differ materially.¹³ None the less, a Minnesota corporation has practical advantages in this respect since, because of the greater number of Delaware corporations, it may be more difficult to obtain a desired corporate name in that state than in Minnesota.

Both states permit a provision in the articles of incorporation empowering the directors, without specific authorization by the stockholders, to fix the dividend rate, redemption price and liquidation price of unissued preferred stock, the Delaware law giving such permission also with respect to conversion, dividend participation, and other special rights.¹⁴ Delaware directors possess authority to grant options on unissued shares, whereas in a Minnesota corporation such power is lodged in the shareholders unless

nesota property and of the corporation's gross receipts from its total business and from its Minnesota business for the calendar year as to which the report is made.

¹⁰Minn. Stat., sec. 7492-3 (b); Del. Code, sec. 2034, 2 (1).

¹¹See *Van Slyke v. Norris*, (1924) 159 Minn. 63, 68, 198 N. W. 409; *Kingston v. Home Life Ins. Co.*, (1917) 11 Del. Ch. 258, 101 Atl. 898, 900.

¹²Minn. Stat., sec. 7492-3 (i); Del. Code, sec. 2037, 5 (10). If the corporation is to have shares of two or more classes, it is often advisable to qualify or eliminate preemption, for its theoretical justification is usually not present in such a situation, and it is more of a hindrance to the attainment of legitimate corporate ends than a guaranty of shareholders' rights. See *Drinker, The Preemptive Right of Shareholders*, (1930) 43 Harv. L. Rev. 586, 609-616. Such elimination of preemptive rights would not disturb the right of a stockholder to demand his proportionate share of a new issue of stock if such new issue amounts to a fraud upon him. See *Schwab v. Schwab-Wilson Mach. Corp'n.*, (Cal. App., 1936) 55 P. (2d) 1268; and compare Minn. Stat., sec. 7492-15 (II), for which see below, note 25.

¹³Minn. Stat., sec. 7492-4; Del. Code, sec. 2037, 5 (1).

¹⁴Minn. Stat., sec. 7492-3 (e); Del. Code, sec. 2045, 13. For a criticism of this provision of the Delaware laws as so broad in scope as to permit the directors to give the holders of a new series priority over the holders of existing series within the same class, see *Dodd, Statutory Developments in Business Corporation Law*, (1936) 50 Harv. L. Rev. 27, 47. As to the probably narrower scope of the Minnesota provision, see *Solether and Jennings, The Minnesota Business Corporation Act*, (1937) 12 Wis. L. Rev. 419, 425, note 27.

conferred upon the directors pursuant to shareholders' resolution or to express provision in the articles.¹⁵

Delaware corporations, even without the benefit of express provisions in their articles conferring such power, are permitted to hold stocks and other securities of other corporations.¹⁶ Minnesota corporations may enjoy an equally broad authority by express provision therefor in the articles of incorporation; but, in the absence of such provision, they may hold securities of other corporations only when reasonably necessary for or incidental to the accomplishment of purposes stated in their articles.¹⁷

III. BY-LAWS

The initial by-laws of a Minnesota corporation are adopted by the first board of directors, but power to make amendments thereto and all subsequent by-laws is reserved to the shareholders, unless the articles vest that power in the directors. In any event, the directors cannot be empowered to make or amend by-laws fixing their number, qualifications, classifications, or term of office, nor can the shareholders be deprived of their power to change or repeal any by-laws that are adopted.¹⁸ The initial by-laws of a Delaware corporation are adopted by the incorporators, and the articles may empower the directors to make, alter, or repeal by-laws thereafter.¹⁹ This latter provision appears to permit more absolute and unchecked power in the directors than is possible in Minnesota; for, once the articles confer that power upon the directors, it is unlikely that they will set in motion procedure to amend it out of the articles.²⁰

IV. STOCK AND STOCKHOLDERS

The uniform stock transfer act is in effect in Minnesota with

¹⁵Minn. Stat., sec. 7492-13 (VII); Del. Code, sec. 2046, 14. Under Minn. Stat., sec. 7492-13 (VI), such options may be given "only in connection with the allotment of shares or issuance of other securities," or by way of recognition of the pre-emptive rights of existing shareholders.

¹⁶Del. Code, sec. 2110, 78.

¹⁷Minn. Stat., sec. 7492-9. For a criticism of the apparent inconsistency of this provision of the Minnesota act as applied to corporate suretyship or guaranty, see Rutledge, Significant Trends in Modern Incorporation Statutes, (1937) 22 Wash. U. L. Q. 305, 321; and for a suggested explanation, see Solether and Jennings, The Minnesota Business Corporation Act, (1937) 12 Wis. L. Rev. 419, 431, note 52.

¹⁸Minn. Stat., sec. 7492-23 (II).

¹⁹Del. Code, sec. 2044, 12. The number of directors shall be fixed by the by-laws, rather than by the articles. *Gow v. Cons. Coppermines Corp'n.* (1933) 19 Del. Ch. 172, 165 Atl. 136.

²⁰Amendments to the articles of a Delaware corporation must be proposed by the board of directors. Del. Code, sec. 2058, 25 (1).

respect to all stock certificates issued on or after July 1, 1933.²¹ It is not a part of the Delaware law.²²

A stockholder in a Delaware corporation, regardless of his residence, can be sued in Delaware and his stock may be attached in such action by service upon the corporation's resident agent.²³ It is needless to suggest the inconvenience and expense to the stockholder that would accompany defense of such an action in Delaware.

At common law shareholders or directors of a corporation who authorize an issue of stock assume the risk of personal liability if that issue is held to be unfair to existing shareholders.²⁴ The Delaware statute is silent upon this question, while the Minnesota act clarifies it and somewhat alleviates its effect. The Minnesota statute expressly forbids an issuance of stock that is unfair to existing shareholders;²⁵ but it recognizes a method, probably sanctioned by the common law, of protecting good faith issues which, although they are for the benefit of the corporation, may to some extent infringe upon the rights of existing shareholders. It does this by an express statement that an offer of securities is not unfair if made ratably to shareholders who would be entitled to preemptive rights (whether or not such rights are waived in the articles), even though the unsubscribed portion of such issue is thereafter sold to others at the same price and terms.²⁶ A three-year statute of limitations, running from the date of the allegedly unfair allotment, is a part of the same section.²⁷ In the absence of such an express limitation upon actions, it is probable that the general statute of limitations does not begin to run until discovery by a plaintiff shareholder of the unfairness; and this often means, as a practical matter, that Delaware has no limitation of actions based upon such unfair issues of stock.²⁸ On the whole, therefore, it would seem

²¹Minn. Stat., sec. 7492-95.

²²6 U.L.A. Supp. 5.

²³Del. Code, sec. 2124, 92. See *Ryan v. Galliher*, (1933) 5 W. W. Harr. (Del.) 503, 168 Atl. 77, 78.

²⁴See *Bodell v. General Gas & Electric Corp.*, (1926) 15 Del. Ch. 119, 132 Atl. 442, 446, 447, aff'd (1927) 15 Del. Ch. 420, 140 Atl. 264.

²⁵Minn. Stat., sec. 7492-15 (I). Ordinarily, the shareholder's preemptive right, to subscribe to his proportionate share of a new issue, is sufficient protection for him in this situation; but where that right is abolished or qualified by the articles of incorporation, as it may be in Minnesota and Delaware, he still has protection against new issues that increase the rights and participation of others without a commensurate benefit to the corporation.

²⁶Minn. Stat., sec. 7492-15 (II).

²⁷Minn. Stat., sec. 7492-15 (IV).

²⁸It is clear that a stockholder of a Delaware corporation is entitled to

that the Minnesota law is more favorable to the management in this respect than is the Delaware law.

All subscriptions to stock of a Delaware corporation can be accepted by the directors.²⁹ Directors of a Minnesota corporation can accept only preincorporation subscriptions unless the articles or the shareholders grant them the additional power, otherwise reserved to the shareholders, to accept post-incorporation subscriptions.³⁰

The Minnesota statute is more definite than is that of Delaware as to the right of the subscriber to revoke his subscription.³¹ As to the corporation's rights in regard to the enforcement of subscriptions, the statutes are similar. Minnesota corporations have a lien upon their shares for the unpaid subscription price, until the certificate is issued.³² No Minnesota share certificate may be issued until the subscription price of the shares has been paid in full, and a check or note is not payment within this rule until it has been cashed.³³

Delaware maintains the common law distinction between a subscription for, and a purchase of, stock,³⁴ which distinction, it is submitted, is illogical and arbitrary. The Minnesota statute provides that contracts of purchase and subscriptions have the same

some relief if a new issue of stock impairs his rights and the value of his shares. See *Bodell v. General Gas & Electric Corp.*, (1926) 15 Del. Ch. 119, 132 Atl. 442, 446, 447, *aff'd* (1927) 15 Del. Ch. 420, 140 Atl. 264. The Delaware cases have not yet indicated the extent of the relief obtainable and the mode by which the relief may be secured. The *Bodell* Case and the case of *Atlantic Refining Co. v. Hodgman*, (C.C.A. 3rd Cir. 1936) 13 F. (2) 781, make the test of the fairness of a new issue of stock a question of business judgment. This is scant consolation to the directors, who have no assurance that what seems to them wise and a good business move at the time of the issuance of the new stock will appeal equally to the business judgment of a court when the transaction is challenged some time later.

²⁹Del. Code, sec. 2053, 21.

³⁰Minn. Stat., sec. 7492-16 (V).

³¹Minn. Stat., sec. 7492-16 (II). It has been held that a subscriber to stock in a Delaware corporation may revoke his subscription if it has not yet been accepted and if the corporation has not yet been formed. *Collins v. Morgan Grain Co.*, (C.C.A. 9th Cir. 1926) 16 F. (2) 253.

³²Minn. Stat., sec. 7492-16 (IX, X), is more explicit as to the procedure for selling a shareholder's stock to pay assessments due than is sec. 2054, 22, Del. Code.

³³Minn. Stat., sec. 7492-17 (I), (III).

³⁴See *Smith v. General Motors Corporation*, (C.C.A. 6th Cir. 1923) 289 Fed. 205, 207, where the court points out that, upon breach of a contract to purchase stock, the corporation must mitigate damages by selling at the market price, which is not true where there is breach of a subscription contract. For a general discussion of the differences between subscriptions and contracts to sell, see 4 *Fletcher, Corporations*, perm. ed., sec. 1372, pp. 27-33.

status,³⁵ and that the purchaser or subscriber is treated as a shareholder to the extent of the payments made by him, unless the contract or subscription agreement curtails such rights.³⁶

Stockholders' liability is substantially the same in the two states. In both, such liability, apart from the doctrine of the *Hospes Case* hereinafter mentioned, extends only to the unpaid portion of the subscription price, in the absence of actual fraud.³⁷ The *Hospes Case* is the leading case in Minnesota and, indeed, a leading case nationally, on the question of a shareholder's liability where his shares were issued to him for a consideration in cash, property, or services of a value less than the aggregate par value of such shares.³⁸ That case established the doctrine, recognized by statute in Delaware, that a creditor in becoming such will be presumed to have relied on the implied representation of the corporation that it received property equal in value to the par value of all its issued shares upon the issuance thereof, and hence, that a person becoming a creditor after the issue of stock for a consideration worth less than its par value may, in event of insolvency of the corporation, recover from the stockholder, or his assignee with notice, the difference between the par value of such stock and the value of the consideration received therefor. In practice, such presumption was conclusive and, since the statute of limitations began to run only upon insolvency,³⁹ it afforded little protection. In Minnesota this doctrine has been altered by the Minnesota Business Corporation Act to remove the presumption in favor of the creditor, and to

³⁵Minn. Stat., sec. 7492-16 (XI). But it is doubtful if this provision was intended to require the result that there can be no such thing as an executory contract to subscribe or conditional subscription in Minnesota. See Solether and Jennings, *The Minnesota Business Corporation Act, (1937)* 12 Wis. L. Rev. 419, 438.

³⁶Minn. Stat., sec. 7492-16 (VIII). But it would seem that the scope of this provision must be restricted to the subscriber's "rights," and not be construed to prevent the status of shareholder, as regards liabilities attached to that status, from arising in respect of shares subscribed but not fully paid for. See Solether and Jennings, *The Minnesota Business Corporation Act, (1937)* 12 Wis. L. Rev. 419, 439.

³⁷Minn. Stat., sec. 7492-18 (I); Del. Code, sec. 2052, 20.

³⁸*Hospes v. Northwestern Mfg. & Car Co.*, (1892) 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

³⁹See *Hospes v. Northwestern Mfg. & Car Co.*, (1892) 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, where the court points out that the creditor sues on his own behalf and that the corporation never had a cause of action against the shareholders. It appears that a creditor of a Delaware corporation sues on his own behalf also, and so the same rule would apply. Del. Code, sec. 2081, 49. See *John W. Cooney Co. v. Arlington Hotel Co.*, (1917) 11 Del. Ch. 286, 101 Atl. 879, 885, *aff'd, du Pont v. Ball*, (1918) 11 Del. Ch. 430, 106 Atl. 39.

make the shareholders or directors voting for such issue liable, as well as those receiving the shares; and, further, to relieve the shareholder of liability if he can prove that he did not know of the overvaluation.⁴⁰ Minnesota extends this modified *Hospes Case* doctrine to stock without par value, the stated capital assigned to such stock being deemed its par value for such purpose.⁴¹ The modification of the *Hospes* doctrine and the existence of a three-year statute of limitations running from the date of the share allotment would seem to make the Minnesota statute more favorable to directors and shareholders than is that of Delaware, and more nearly in accord with actualities.

There is no great difference between Delaware and Minnesota law as to the right of a shareholder to examine the corporation's books.⁴² Minnesota gives him an additional right—to obtain by request a condensed balance sheet and a profit and loss statement, showing separately the amounts of dividends paid from paid-in surplus.⁴³ The Minnesota statute gives creditors of corporations related rights. A creditor must be furnished, within thirty days of his request for the same, with a statement of all dividends paid by the corporation, and the number and purchase price of its own shares bought by the corporation, and a description and the valuation of any property or services received by the corporation upon

⁴⁰Minn. Stat., sec. 7492-14 (IV), (V). By these sections the *Hospes Case* doctrine is further modified to make the creditor's action one on behalf of the corporation rather than one in his own behalf. Del. Code, sec. 2052, 20, also relieves a stockholder of liability if he acquires his shares in good faith, not knowing of the underpayment. Under the provision of the Minnesota act the directors and other shareholders voting for the allotment are liable only if they did so "wilfully or without reasonable investigation."

⁴¹Minn. Stat., sec. 7942-14 (III). The Delaware statute cited in the previous footnote limits the liability of a holder of non-par stock to the amount of the consideration for which the stock was issued and which he knows to have been unpaid. For a discussion of the statute, see Harman v. Himes, (App. D.C. 1935) 77 F. (2) 375. The Minnesota statutes make express provision for relief only to creditors who have been damaged by the issuance of bonus shares. Quaere, whether shareholders who have been damaged do not have a similar right. It is clear that stockholders of a Delaware corporation are entitled to such relief. Scully v. Automobile Finance Co., (1920) 12 Del. Ch. 174, 109 Atl. 49. But under the Minnesota act such rights of stockholders might well be governed by the provision of Minn. Stat., sec. 7492-15 (II).

⁴²Minn. Stat., sec. 7492-33 (V). The common law of Delaware gives a stockholder the right to examine the corporate books. State ex rel. De Julvecourt v. Pan American Co., (1904) 5 Penn. (Del.) 391, 61 Atl. 398, aff'd (1906) 63 Atl. 1118. In the absence of a statute authorizing such modification, the corporation cannot by its articles remove the stockholder's right to examine the books and records. State ex rel. Cochran v. Penn-Beaver Oil Co., (1926) 4 Harr. (Del.) 81, 143 Atl. 257.

⁴³Minn. Stat., sec. 7492-34 (I).

allotment of any of its shares during the preceding three-year period. If these are wilfully refused, the obligation of the corporation to such creditor immediately becomes due.⁴⁴ The reason for the added rights that are conferred by the Minnesota statute lies in the three-year state of limitations, mentioned in connection with the discussion of the modification of the *Hospes Case* doctrine, which would bar some claims of even diligent creditors if such creditors were not given a chance to find out whether or not they had, through the corporation, a cause of action.⁴⁵

The Minnesota statute is more explicit as to notice and call of shareholders' meetings than is the Delaware statute.⁴⁶ In Minnesota shareholders and directors may act by a writing signed by all the members of their respective groups, without the necessity of a meeting.⁴⁷ This is a decided advantage to small corporations, and to corporations whose shares are closely held, for the necessity of meetings of directors and shareholders of such corporations in cases where sentiment is unanimous is so much red tape. In both Minnesota and Delaware corporations, shareholders or directors may make effective written waiver of notice of a meeting, even after the meeting is held.⁴⁸

Shareholders of a Minnesota corporation may cumulate their votes unless the articles negative such right,⁴⁹ but stockholders of a Delaware corporation do not have this right unless it is expressly authorized by the articles.⁵⁰

Shareholders of Minnesota corporations may remove directors without cause, and directors may remove officers without cause,

⁴⁴Minn. Stat., sec. 7492-34 (II, III, IV). Del. Code, sec. 2061, 29, permits a corporation, by its articles, to confer upon bond and debenture holders the same rights with respect to the inspection of corporate books and records, or in any other respect, that are conferred thereby upon the stockholders.

⁴⁵Note that this liability is to the corporation rather than to the creditor himself. See footnote 40. Cf. Minn. Stat., sec. 7492-22 (A) and -22 (B), which relate to unlawful dividends or illegal purchase of corporation's own shares where liability is also to the corporation.

⁴⁶Minn. Stat., sec. 7492-24; Del. Code, sec. 2064, 32. Minnesota also makes specific provision for notice and call of directors' meetings. Minn. Stat., sec. 7492-27 (IV, (d), (e)).

⁴⁷Minn. Stat., sec. 7492-25 (XI), 7492-27 (IV (g)). By a 1937 amendment a similar provision was made in the Delaware statute for the benefit of the stockholders. Del. Code, sec. 2113, 81, as amended.

⁴⁸Minn. Stat., sec. 7492-27 (IV (d)), directors' waiver; sec. 7492-24 (VI), shareholder's waiver; Del. Code, sec. 2113, 81.

⁴⁹Minn. Stat., sec. 7492-25 (III). See, generally, Bowes and DeBow, Cumulative Voting at Elections of Directors of Corporations. (1937) 21 MINNESOTA LAW REVIEW 351.

⁵⁰Del. Code, sec. 2049, 17.

subject to contract rights; but neither officers nor directors of Delaware corporations can be removed without cause.⁵¹

Minnesota has a comparatively liberal rule with respect to voting trusts, which may be created for a fifteen-year period or for the period of any indebtedness of the corporation that they may be given to secure.⁵² A voting trust of stock in a Delaware corporation can endure for ten years.⁵³

Holders of a majority of the voting shares may authorize the sale of all assets of a Delaware corporation, but its articles may require a greater percentage.⁵⁴ Such action must be approved by holders of not less than two-thirds of the voting shares of a Minnesota corporation, unless its articles provide for some other percentage not less than a majority. Minnesota also requires that notice of a meeting for such action be given to all non-voting shareholders.⁵⁵

V. DIVIDENDS

The "stated capital" of a Minnesota corporation is equivalent to the "capital" of a Delaware corporation.⁵⁶ The Delaware statute, however, makes no distinction between paid-in and earned surplus,

⁵¹Minn. Stat., sec. 7492-28 (1), directors' removal; sec. 7492-29 (III), officers' removal. See *Realty Acceptance Corporation v. Montgomery*, (C.C.A. 3rd Cir. 1930) 51 F. (2) 636. But under the provision of the Minnesota act a single director may not be removed, in the case of a corporation having cumulative voting, "if a sufficient number of shares are cast against his removal, which if then cumulatively voted at an election of the full board would be sufficient to elect him."

⁵²Minn. Stat., sec. 7492-26 (1).

⁵³Del. Code, sec. 2050, 18. Such a trust for a longer period than ten years is wholly invalid. *Perry v. Missouri-Kansas Pipe Line Co.*, (Del. Ch. 1937) 191 Atl. 823, noted in (1938) 22 MINNESOTA LAW REVIEW 276. On the question of the necessity of transfer upon corporation's books to empower trustee to vote, compare *In re Chilson*, (Del. Ch. 1933) 168 Atl. 82, with *Smith v. First Personal Bankers Corp.*, (Del. Ch. 1934) 171 Atl. 839.

⁵⁴Del. Code, sec. 2097, 65. This section expressly requires action by the directors, but it has been held that the officers may sell upon authorization of the stockholders where the directors take no action. *Bacich v. Northland Transportation Co.*, (1932) 185 Minn. 544, 242 N.W. 379.

⁵⁵Minn. Stat., sec. 7492-35. The Minnesota statute expressly permits a sale of all assets where the consideration for the sale is property. The Delaware statute makes no such provision. But in the case of a corporation in failing circumstances even though not insolvent, it would seem arguable that the requirement of a two-thirds vote of the shareholders, where the articles do not provide for less, should not be held applicable. See *Solther and Jennings*, *The Minnesota Business Corporation Act*, (1937) 12 Wis. L. Rev. 419, 442, and note 106.

⁵⁶Minn. Stat., sec. 7492-20; Del. Code, sec. 2046, 14. The capital of Delaware and Minnesota corporations must be equal to or in excess of the par value of its capital stock. Directors of both Delaware and Minnesota corpus have the power to determine what part of the consideration received for no-par shares shall constitute capital.

and this distinction is carefully maintained by the Minnesota law.⁵⁷ If both preferred and common shares are outstanding, dividends from paid-in surplus of a Minnesota corporation can be declared only upon shares entitled to preferential dividends,⁵⁸ although dividends upon either class of shares can be declared from earned surplus.⁵⁹ Minnesota requires that notice of the fact that dividends are being paid out of paid-in surplus be given concurrently with the payment of such dividends.⁶⁰ The Minnesota rule is as stringent where surplus is used to purchase shares, instead of being distributed in the form of dividends. If there are preferred and common shares outstanding, only shares entitled to preferential dividends or to a preference upon liquidation can be purchased with paid-in surplus, while shares of either class can be purchased with earned surplus.⁶¹

In both Minnesota and Delaware, dividends in cash or property are payable from either of two sources—surplus or current earnings.⁶² And both states require a valuation of the corporation's assets to determine whether a surplus exists, Minnesota expressly⁶³ and Delaware by clear implication.⁶⁴ It is questionable whether unrealized appreciation of the assets can be included in such valuation of the assets of a Delaware corporation.⁶⁵ The Minnesota statute forbids the inclusion of unrealized appreciation, except that readily marketable securities, other than those of the corporation itself, may be included at no more than their market value.⁶⁶

As to the second source of dividends—current earnings—Minnesota permits payment out of the corporation's net earnings for the current *or* the next preceding fiscal year,⁶⁷ while Delaware per-

⁵⁷Minn. Stat., sec. 7492-20, 7492-21 (II (a) (b), III (a) (b), VI (a) (b)).

⁵⁸Minn. Stat., sec. 7492-21 (II (b)). By subdivision III (b) of this section, this requirement is removed where a dividend payable in shares is declared.

⁵⁹Minn. Stat., sec. 7492-21 (II (a), III (a)).

⁶⁰Minn. Stat., sec. 7492-21 (II (b), III (b)).

⁶¹Minn. Stat., sec. 7492-21, VI.

⁶²Minn. Stat., sec. 7492-21, II, (c); Del. Code, sec. 2066, 34.

⁶³Minn. Stat., sec. 7492-21, I. Note, however, that this subsection of the statute also provides that if payment of a dividend is otherwise lawful, it shall not be unlawful for failure to determine the fair value of the corporation's assets.

⁶⁴Del. Code, sec. 2066, 34.

⁶⁵See *Vogtman v. Merchant's Mtge. & Credit Co.*, (1935) 20 Del. Ch. 364, 178 Atl. 99, 102.

⁶⁶Minn. Stat., sec. 7492-21 (I).

⁶⁷Minn. Stat., sec. 7492-21, II, (c).

mits payment from net earnings for the current *and/or* preceding fiscal year.⁶⁸

Both states make directors who wilfully or negligently vote in favor thereof personally liable for illegal dividends.⁶⁹ However, directors of Delaware corporations are protected by a statutory provision allowing them to rely upon statements of an officer of the corporation, both as to the corporation's net profits and as to the value of its assets.⁷⁰ In Minnesota, reliance can be placed only upon such statements as to earnings.⁷¹ Once again, however, Minnesota has a three-year statute of limitations as to actions based on illegal dividends,⁷² and the certainty and definiteness of this statute probably afford as much protection as do the provisions of the Delaware law.

VI. ULTRA VIRES ACTS, AMENDMENTS OF ARTICLES, MERGER AND CONSOLIDATION

There has been no statutory modification of the common law rules as to ultra vires in Delaware. This may be of little practical importance in Minnesota, as the effect of ultra vires actions in Minnesota may be determined by reference to Minnesota law even though the acting corporation be incorporated in Delaware.⁷³ The Minnesota law that would govern this situation is our common law as to the effect of ultra vires acts, which law applies also to those Minnesota corporations that have elected not to come under the Minnesota Business Corporations Act. The Minnesota common

⁶⁸Del. Code, sec. 2066, 34.

⁶⁹Minn. Stat., sec. 7492-22, I (b); Del. Code, sec. 2067, 35. The stockholder distributees of such dividends are also liable for their return under this provision of the Minnesota act, apparently without regard to their good faith in receiving them. The rule of the prior Minnesota case of *Mackall v. Pocock*, (1917) 136 Minn. 8, 161 N. W. 228, apparently is retained, so that subsequent as well as prior creditors will be entitled to share in the benefit of the corporation's right of recovery. The Minnesota act does not attempt to solve any question of primary liability as between the shareholder distributees and the directors "who wilfully or negligently voted in favor" of such distributions.

⁷⁰Del. Code, sec. 2066, 34. By this section, a director may rely upon "statements prepared by any of its [the corporation's] officials . . ." which indicates that such statements should be in writing. And Del. Code, sec. 2069, 37, apparently shifts the liability of a director who relied upon such a statement to the officer who, knowing it to be false, prepared the statement.

⁷¹Minn. Stat., sec. 7492-22, I, (b).

⁷²Minn. Stat., sec. 7492-22, III.

⁷³According to the Restatement, the effect of an ultra vires act is to be determined by the law of the state where the act is done. Restatement, Conflicts, sec. 166, c. But see *Building & Loan Ass'n v. Ebaugh*, (1902) 185 U. S. 114, 120, 22 Sup. Ct. 566, 46 L. Ed. 830; cf. *Grayson-Nashville Lumber Co. v. Goldman*, (C.C.A. 8th Cir. 1918) 247 Fed. 423, 428.

law as to ultra vires acts follows the liberal "general capacity" doctrine.⁷⁴

Minnesota common law rules as to the effect of ultra vires acts of Minnesota corporations subject to the Minnesota Business Corporation Act have been expressly modified by that act. In general, ultra vires acts of a Minnesota corporation under the act are enforceable by parties not officers or directors of the corporation, unless they had actual knowledge of the ultra vires character of such acts.⁷⁵ This may or may not be of advantage to the corporation, but it is felt that the rule is fairer to the public at large than were the stricter common law doctrines as to the effect of ultra vires acts.

Proceedings to amend articles of Minnesota and Delaware corporations do not differ very much. In the absence of other requirements in the articles of a Delaware corporation, a favorable vote of a majority of the voting shares will authorize an amendment, unless the amendment affects some class of shareholders in one of the respects cited in the statute, in which event the proposed amendment must also secure the favorable vote of the majority of shares of that class.⁷⁶ Amendments to the articles of a Minnesota corporation may be effected by a two-thirds vote of the voting shares, or by a majority thereof if one-fourth of the shares are not voted in opposition to the change, unless the articles fix some other percentage which may not be less than a majority. The same percentage rules apply to the vote required from adversely affected classes of Minnesota shareholders.⁷⁷

Delaware statutes expressly permit an amendment materially changing the purposes set forth in the corporation's articles, and such amendment may be made upon approval of a majority of the voting stock.⁷⁸ The Minnesota statute requires the favorable vote

⁷⁴See *Benson Lumber Co. v. Thornton*, (1932) 185 Minn. 230, 237-239, 240 N.W. 651.

⁷⁵Minn. Stat., sec. 7492-11, II. But if such person, even though having knowledge, has fully performed the ultra vires transaction on his own part, he would seem to have full contractual rights against the corporation under the prior case of *Marin v. Calmenson*, (1924) 158 Minn. 282, 197 N.W. 262. It is doubtful whether this provision of the Minnesota act was in any way intended to create the defense of ultra vires, in a situation in which it would not have been available under the Minnesota common law.

⁷⁶Del. Code, sec. 2058, 26. Amendments that change or alter adversely the preferences, special rights or powers of a particular class of stock or increase or decrease the amount or par value of authorized stock of such class must receive the approval of a majority of the shares of such class.

⁷⁷Minn. Stat., sec. 7492-36, 7492-37.

⁷⁸Del. Code, sec. 2058, 26.

of each class of stock, in the proportions mentioned in the preceding paragraph;⁷⁹ and provides for the purchase by the corporation of the shares of dissenting shareholders at their appraised value.⁸⁰ This right is also given to the dissenting shareholders who object to an amendment extending the corporation's existence.⁸¹ However, such dissent must be registered in writing before the meeting at which action is to be taken, so that, if too many shareholders dissent, the plan may be abandoned.

Statutory provisions as to merger and consolidation of Delaware corporations and of Minnesota corporations are much alike. However, a Delaware corporation may merge with a corporation of a foreign state to result in a foreign corporation.⁸² Before 1937 the Minnesota statutes made no provision for merger of a domestic with a foreign corporation. Under the Business Corporation Act, as amended, merger of a domestic with a foreign corporation must result in a Minnesota corporation.⁸³ One result of the amendment is that certain mergers or consolidations, which formerly might have resulted in liability to pay a federal income tax, may be made without such liability.

The Business Corporation Laws of both Minnesota and Delaware are subject to alteration, amendment, or repeal by virtue of statutory reservations of power so to change the laws. The statutory reservations of power are alike in the two states.⁸⁴

⁷⁹Minn. Stat., sec. 7492-36, III, (d).

⁸⁰Minn. Stat., sec. 7492-39. The Delaware statute also gives a stockholder who files written objection to a merger or consolidation the right to payment for his stock. Del. Code, sec. 2093, 61. Under the Minnesota act such purchase cannot be consummated if to do so would render the corporation insolvent in the assets-liabilities sense. Otherwise this situation creates an enforced exception to the rule of Minn. Stat., sec. 7492-21 (VI) that the corporation's own shares can be reacquired only from surplus.

⁸¹A 1935 amendment to this section (Minn. Stat., sec. 7492-39 IV), which removed this right as to shareholders of corporations now under the Minnesota Business Corporation Act but which had been organized prior to the effective date of the Act for the maximum period then permitted by statute, was held invalid in the case of *Warnock Co. v. Hudson Mfg. Co.*, (Minn. 1937) 273 N.W. 710, on the ground that the classification was unreasonable. For a discussion of this case, see (1937) 22 MINNESOTA LAW REVIEW 108.

⁸²Del. Code, sec. 2091, 59. By a 1937 amendment (Sec. 59A) Delaware authorizes the directors, by resolution, to merge the corporation with any subsidiary of which it owns all the stock, whether such subsidiary be a Delaware corporation or a foreign corporation organized under the laws of a state permitting such merger.

⁸³Minn. Stat., sec. 7492-30, as amended by Ch. 150, 1937 Session Laws.

⁸⁴Minn. Stat., sec. 7492-60; Del. Code, sec. 2115, 83. It has been suggested that this reserved power is not effective to authorize the state by amendment to authorize the corporation to impair the obligation of contracts

In summary, it may be said that the Delaware law was drafted on the principle of lodging comparatively extensive powers in the directors and the management. The Minnesota law, on the other hand, is based on the assumption that shareholders should be given a rather large element of control, unless they voluntarily relinquish a portion thereof by purchasing securities in a corporation whose articles expressly enlarge the powers of the directors and management. By appropriate provision in the articles of incorporation it is thought that sufficiently broad powers can be conferred upon the management and directors of a Minnesota corporation, and, at the same time, the Minnesota statutes do, as a whole, confer upon shareholders greater protection and control. The necessity of express provisions in the articles, if the powers of the directors are to be increased, should in itself constitute some protection to shareholders.

Problems of taxation, the residence of interested parties in other states, and contemplated sales of securities without Minnesota may dictate the choice of incorporation in Delaware rather than in Minnesota. In the typical case, however, of a corporation which will conduct its business chiefly in Minnesota and whose shareholders will be chiefly Minnesota residents, Minnesota incorporation, on the whole, seems preferable to incorporation in Delaware.

between it and its stockholders. *Yqakam v. Providence Biltmore Hotel Co.*, (D.C. R.I. 1929) 34 F. (2d) 533. This case criticizes the decision of *Davis v. Louisville Gas & Elec. Co.*, (1928) 16 Del. Ch. 157, 142 Atl. 654. For a reconciliation of these cases, on the ground that the charter of the corporation involved in the latter decision also reserved the right to amend pursuant to any authority later conferred by statute, see (1936) Del. Corporation Law Annotated, p. 219.

It has been held, without reliance upon express reservation of the right of alteration, amendment, or repeal, that a state has power to modify general corporate laws as to unexercised powers conferred thereby. *Warnock Co. v. Hudson Mfg. Co.*, (Minn. 1937) 273 N.W. 710.