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Nonprofit Corporation Statutes: A Critique and Proposal

Ralph E. Boyer

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NONPROFIT CORPORATION STATUTES: A CRITIQUE AND PROPOSAL

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NONPROFIT CORPORATION STATUTES: A CRITIQUE AND PROPOSAL

By

RALPH E. BOYER

Foreword

by

LAYLIN K. JAMES

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Foreword

NONPROFIT corporation statutes in the states of the United States all too frequently grew helter skelter with practically no attempt to systematize or correlate them into any simplified statutory pattern. Practicing lawyers have not had sufficient recurring problems to demand legislative action, which would make some orderly statement of the statutory law, as they have in the profit corporation field. Such lack of problems, the diversity of such problems, and the astonishing number of nonprofit statutes have made it a task of major proportions to examine the statutes systematically for purposes of simplifying and correlating the legislation. The Model Non-Profit Corporation Act sponsored by the American Bar Association eliminates no part of the examination of the laws of a particular jurisdiction where there are a substantial number of nonprofit corporation statutes. The legislative process, vested interests, prejudice, and general conservatism prevent repealing the present statutes en masse and substituting a completely new act. In Michigan, in addition to the provisions of the General Corporation Act which permits the incorporation of nonprofit corporations generally and covers some six special kinds of nonprofit corporations, there are eighty-six other acts covering various such corporations. To expect that all these statutory provisions could be summarily repealed and a completely new simple act substituted is unrealistic.

This study by Professor Boyer is directed first to a careful, accurate appraisal of the nonprofit corporation statutes of a particular state (Michigan) and a recommended statute which is primarily for the purpose of simplifying

the nonprofit statutory law in Michigan. The scope and magnitude of his task are staggering. By his comparative examination of the statutory and case law of the various states he has not only provided Michigan with the means of re-appraisal of its nonprofit statutes but has also furnished a basis for any state with a similarly complicated and duplicated set of such statutes to re-appraise its nonprofit statutory provisions. The synthesized recommended statute builds on the present general sections of the Michigan General Corporation Act but is complete and broad enough to be adaptable in any state.

The state of Michigan owes a debt of gratitude to Professor Boyer for his careful, painstaking examination of its nonprofit statutes and the understanding manner in which he has integrated this study into a proposed simplified statute.

LAYLIN K. JAMES

Preface

THE nonprofit corporation has become an important factor in the social and economic life of the American people. The American predisposition to organization and affiliation has led to an enormous number of such organizations, which in itself is a significant factor. Further, many nonprofit corporations have become national and international entities yielding tremendous economic and political influence. In spite of these factors, however, these organizations have largely escaped the serious study and academic analysis so generously bestowed upon the regular business corporation. This study is directed at an analysis of the legal framework within which such organizations operate. Its aim is to ascertain the sufficiency of the corporation statutes in view of nonprofit organizational operations, and to suggest appropriate changes. Controversial policy considerations concerning the wisdom of particular purposes, functions, or policies are not considered. The goal herein is simply a stimulation toward the achievement of an adequate, coherent, and logical code of nonprofit corporation statutes. The regulation of anti-social or undesirable activity is an additional problem beyond the scope of this study.

Special acknowledgment and appreciation are expressed to the many individuals who have lent aid, encouragement, and advice in the preparation of this material. In particular, deep appreciation is extended to Professor Lewis M. Simes and the members of the Graduate Committee of the University of Michigan Law School for the opportunity and privilege of participating in the University's stimulating program of graduate study which

gave rise to this thesis. To Professor Laylin K. James, together with his associate, Professor Marcus L. Plant, I am greatly indebted for valuable suggestions and careful examination of preliminary drafts. Appreciation is also extended to Dean Russell A. Rasco of the University of Miami School of Law for providing the opportunity of continuing and completing this work. Finally, special acknowledgment is extended my wife for her inspiration and stimulation, and particular appreciation is extended my colleague, Professor Richard A. Hausler, for his valuable aid in re-editing the final draft.

RALPH E. BOYER

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PART ONE

A CRITIQUE

CHAPTER I

The Need for Reform

I. IN PERSPECTIVE

THE twentieth century has witnessed great activity and considerable progress in the development of statutory business corporation law. State legislatures, one after the other, at first intermittently, and then with increasing rapidity, enacted modern corporation statutes.[1] After the enactment of such statutes, effort toward inprovement continued unabated, with constant studies testing the legislation against the needs of a dynamic society.[2] This resulted in continuous improvement as state legislatures vied for leadership in corporate law. The once popular fear of the economic ogres was replaced by an attitude of solicitation.

Similar activity in the field of nonprofit corporations has been virtually nonexistent. The law review article of Professor Chafee[3] more than twenty years ago is a lonely landmark in the study of the legal aspects of social organizations. Spasmodically, certain types of these nonprofit corporations have received considerable attention. Cooperatives, foundations, and educational institutions have occasionally been the objects of public interest. Usually, however, such interest has been confined to particular aspects of corporation activity or characteristics, as, for example, the merit of the applicable tax statutes,[4] an inquiry

[1] Wright, "Current Developments in Statutory Corporation Law," 7 MIAMI L.Q. 1 (1952).

[2] See any volume of the Index to Legal Periodicals.

[3] Chafee, "The Internal Affairs of Associations," 43 HARV. L. REV. 993 (1930).

[4] Magill and Merrill, "The Taxable Income of Cooperatives," 49

as to whether such organizations are fostering subversive ideologies,[5] or an investigation of whether they are guilty of other social abuses.[6] Recently, some awakening to the over-all problem is discernible. Minnesota,[7] Missouri,[8] and North Carolina[9] have enacted new general not-for-profit corporation acts, and the American Bar Association has promulgated a model act.[10] On the whole, however, little has been done in formulating a uniform and simplified

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MICH. L. REV. 167 (1950). For further citations on this matter see Ch. 2, n. 16, *infra*. Other aspects of cooperatives have also received attention. See "Symposium," 1954 WIS. L. REV. 533 (1954).

[5] H. R. Rep. No. 2514, 82nd Cong., 2d Sess.; H. R. Rep. No.2681, 83rd Cong., 2d Sess.

[6] Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 MICH. L. REV. 633 (1954); Bogert, "Recent Developments Regarding The Law of Charitable Donations and Charitable Trusts," 5 HASTINGS L. J. 95 (1954); Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N. Y. U. L. REV. 1069 (1954); Latcham, "Private Charitable Foundations: Some Tax and Policy Implications," 98 U. OF PA. L. REV. 617 (1950); Comment, "Supervision of Charitable Trusts," 21 U. OF CHI. L. REV. 118 (1953); Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950); Comment, "Recommending State Supervision of Charitable Trusts," 23 IND. L. J. 141 (1948); Note, "State Supervision of the Administration of Charitable Trusts," 47 COL. L. REV. 659 (1947).

[7] Minn. Stat. Ann. secs. 317.02 *et seq.* (West Supp. 1953).

[8] Mo. Ann. Stat. secs. 355.010 *et seq.* (Vernon Supp. 1954).

[9] Senate Bill 46, providing for a new chapter in the General Statutes of North Carolina to be designated as chapter 55A, providing for the organization, operation, and regulation of nonprofit corporations, was enacted into law by the 1955 session of the General Assembly of North Carolina. This Act will become effective on July 1, 1957, according to information obtained from personal correspondence, dated July 26, 1955, with the Honorable Thad Eure, Secretary of State of North Carolina. An examination of Senate Bill 46 leads to the conclusion that the North Carolina legislation follows the general pattern of the A. B. A. Model Act, *infra*. n. 10. The North Carolina Act is not hereinafter cited owing to the lack of an official copy of the legislation at the time this material was prepared for publication.

[10] Model Non-Profit Corporation Act (1951).

statute regulating the incorporation procedure of these multifarious organizations.

The diversity of treatment in the various states is startling. In some jurisdictions, such as New York[11] and Illinois,[12] a completely separate and independent act is provided for nonprofit corporations. In other states, such as Michigan[13] and California,[14] general nonprofit sections are included as a part of the general corporation act. In all of the states, however, whatever the general treatment, there is also a number of particular acts relating to specific types of nonprofit corporations.

In California the number of particular acts is rather limited. Provisions are added to the business act for nonprofit corporations generally,[15] corporations sole,[16] corporations for charitable or eleemosynary purposes,[17] trust funds,[18] and societies for the prevention of cruelty to children and animals.[19] In addition, there are special acts for the incorporation of nonprofit agricultural cooperative associations,[20] general cooperative organizations,[21] colleges,[22] cemeteries,[23] and chambers of commerce or similar organizations.[24]

In New York there is a general membership corporation

[11] N. Y. Membership Corporations Law.
[12] Ill. Ann. Stat. c. 32, secs. 163a *et seq.* (1954).
[13] Mich. Comp. Laws secs. 450.117 *et seq.* (1948).
[14] Cal. Corp. Code secs. 9000 *et seq.* (1953).
[15] Cal. Corp. Code secs. 9000 *et seq.* (1953).
[16] Cal. Corp. Code secs. 10000 *et seq.* (1953).
[17] Cal. Corp. Code secs. 10200 *et seq.* (1953).
[18] Cal. Corp. Code sec. 10250 (1953).
[19] Cal. Corp. Code secs. 10400 *et seq.* (1953).
[20] Cal. Ag. Code secs. 1190 *et seq.* (1950).
[21] Cal. Corp. Code secs. 12200 *et seq.* (1953).
[22] Cal. Ed. Code secs. 24201 *et seq.* (1952).
[23] Cal. Health and Safety Code secs. 8250 *et seq.* (1952).
[24] Cal. Corp. Code secs. 12000 *et seq.* (1953).

act for nonprofit corporations.[25] This general act has special provisions for cemetery associations,[26] fire corporations,[27] corporations for prevention of cruelty,[28] Christian associations,[29] soldiers' monument corporations,[30] medical societies,[31] alumni corporations,[32] historical societies,[33] agricultural and horticultural corporations,[34] and boards of trade.[35] Colleges and other institutions of learning must be incorporated under the Education Law,[36] and there is a special act for the incorporation of cooperatives.[37] In addition to these acts there is a general Religious Corporations Law[38] with detailed provisions for the incorporation of approximately twenty different types of denominations[39] as, for example, the Protestant Episcopal Parishes or Churches,[40] Presbyterian Churches,[41] Roman Catholic Churches,[42] Churches of Christ, Scientist,[43] and many more.

[25] N. Y. Membership Corporations Law.
[26] N. Y. Membership Corp. Law secs. 70 *et seq.*
[27] N. Y. Membership Corp. Law secs. 110 *et seq.*
[28] N. Y. Membership Corp. Law secs. 120 and 121.
[29] N. Y. Membership Corp. Law secs. 140 to 142.
[30] N. Y. Membership Corp. Law secs. 160 to 164.
[31] N. Y. Membership Corp. Law secs. 170 *et seq.*
[32] N. Y. Membership Corp. Law secs. 180 *et seq.*
[33] N. Y. Membership Corp. Law secs. 190 *et seq.*
[34] N. Y. Membership Corp. Law secs. 200 *et seq.*
[35] N. Y. Membership Corp. Law secs. 220 *et seq.*
[36] N. Y. Ed. Law sec. 216. Many N. Y. private colleges were incorporated by special act of the legislature. Graves, "Development of the Education Law in New York," XXIV and XXV, printed in the preface to McKinney's N. Y. Education Law (1953).
[37] N. Y. Cooperative Corporation Law.
[38] N. Y. Religious Corporations Law.
[39] N. Y. Religious Corp. Law secs. 40 *et seq.*
[40] N. Y. Religious Corp. Law secs. 40 *et seq.*
[41] N. Y. Religious Corp. Law secs. 60 *et seq.*
[42] N. Y. Religious Corp. Law secs. 90 *et seq.*
[43] N. Y. Religious Corp. Law secs. 184 *et seq.*

Indiana has a general not-for-profit act[44] and approximately thirty additional acts for the incorporation of particular types of organizations. These corporations include: cooperatives;[45] foundation or holding companies;[46] lodges, churches, and societies;[47] lodge buildings, Masonic Bodies;[48] lodge buildings, Knights of Pythias and similar organizations;[49] charitable organizations of lodges and societies;[50] gymnastic associations;[51] union of churches;[52] Episcopal Church;[53] camp meeting associations;[54] missions;[55] Young Men and Women's Christian Associations;[56] educational institutions;[57] hospital associations;[58] coliseum building associations;[59] poultry, dog, and cat breeding associations;[60] and symphony associations.[61]

Michigan is particularly well blessed with a multitude of corporation statutes in the nonprofit area. Basically, the Michigan approach is sound, but the repeal of particularized acts has been less than satisfactory. Appended to the General Corporation Act are special sections appli-

[44] Ind. Ann. Stat. secs. 25–507 *et seq.* (Burns 1948).
[45] Ind. Ann. Stat. secs. 15–1601 *et seq.* (Burns 1950).
[46] Ind. Ann. Stat. secs. 25–1101 *et seq.* (Burns 1948).
[47] Ind. Ann. Stat. secs. 25–1501 *et seq.* (Burns 1948).
[48] Ind. Ann. Stat. secs. 25–1601 *et seq.* (Burns 1948).
[49] Ind. Ann. Stat. secs. 25–1701 *et seq.* (Burns 1948).
[50] Ind. Ann. Stat. secs. 25–1901 *et seq.* (Burns 1948).
[51] Ind. Ann. Stat. secs. 25–2001 *et seq.* (Burns 1948).
[52] Ind. Ann. Stat. secs. 25–2801 *et seq.* (Burns 1948).
[53] Ind. Ann. Stat. secs. 25–2201 *et seq.* (Burns 1948).
[54] Ind. Ann. Stat. secs. 25–2301 *et seq.* (Burns 1948).
[55] Ind. Ann. Stat. secs. 25–2701 *et seq.* (Burns 1948).
[56] Ind. Ann. Stat. secs. 25–3101 *et seq.* (Burns 1948).
[57] Ind. Ann. Stat. secs. 25–3201 *et seq.* (Burns 1948).
[58] Ind. Ann. Stat. secs. 25–3501 *et seq.* (Burns 1948).
[59] Ind. Ann. Stat. secs. 25–3901 *et seq.* (Burns 1948).
[60] Ind. Ann. Stat. secs. 25–4001 *et seq.* (Burns 1948).
[61] Ind. Ann. Stat. secs. 25–4201 *et seq.* (Burns 1948).

cable to cooperatives,[62] nonprofit corporations generally,[63] fraternal societies,[64] trustee corporations,[65] church trustee corporations,[66] educational corporations,[67] ecclesiastical corporations,[68] Sunday school or religious societies,[69] and public building corporations.[70] In addition to these general provisions there are six special acts[71] for the incorporation of trade and labor associations; four acts[72] for the incorporation of certain types of cemetery, cremation, and vault associations; forty-five acts[73] for the incorporation of particular types of fraternal organizations, including the Elks,[74] Moose,[75] Odd Fellows,[76] and Eskimos;[77] nineteen acts[78] for the incorporation of particular church organizations; and twelve acts[79] for the incorporation of particular types of agricultural corporations. The mere recital of this multitude of acts and divergence of treatment indicates that simplification is in order.

[62] Michigan Comp. Laws secs. 450.98 *et seq.* (1948).
[63] Michigan Comp. Laws secs. 450.117 *et seq.* (1948).
[64] Michigan Comp. Laws secs. 450.133 *et seq.* (1948).
[65] Michigan Comp. Laws secs. 450.148 *et seq.* (1948).
[66] Michigan Comp. Laws secs. 450.159 *et seq.* (1948).
[67] Michigan Comp. Laws secs. 450.170 *et seq.* (1948).
[68] Michigan Comp. Laws secs. 450.178 *et seq.* (1948).
[69] Michigan Comp. Laws secs. 450.186 *et seq.* (1948).
[70] Michigan Comp. Laws secs. 450.186a *et seq.* (1948).
[71] Michigan Comp. Laws secs. 454.1 *et seq.*, 454.51 *et seq.*, 454.71 *et seq.*, 454.101 *et seq.*, 454.151 *et seq.*, and 454.201 *et seq.* (1948).
[72] Michigan Comp. Laws secs. 456.1 *et seq.*, 456.101 *et seq.*, 456.201 *et seq.*, and 456.251 *et seq.* (1948).
[73] Michigan Comp. Laws secs. 457.1 *et seq.* (1948).
[74] Michigan Comp. Laws secs 457.301 *et seq.* (1948).
[75] Michigan Comp. Laws secs. 457.401 *et seq.* (1948).
[76] Michigan Comp. Laws secs. 457.321 *et seq.* (1948).
[77] Michigan Comp. Laws secs. 457.701 *et seq.* (1948).
[78] Michigan Comp. Laws secs. 458.1 *et seq.* (1948).
[79] Michigan Comp. Laws secs. 453.1 *et seq.* (1948).

II. Scope of the Study

This study of nonprofit corporation statutes is undertaken with the twofold purpose of analyzing present statutes and determining their adequacy in light of present day practices. For purposes of concentration, the Michigan acts are the foci of investigation, but considerable reference and comparative inquiry is made of law in other states. Detailed analysis is made of sections 98 to 186e of the Michigan General Corporation Act,[80] these sections being general provisions for the incorporation of various types of organizations not for pecuniary profit, as well as a number of other statutes relating to the incorporation of particular types of nonprofit organizations.[81] Public utility corporations, banking institutions, and organizations subject to the Insurance Code are not included. In general, the policies of whether or not certain types of corporations should be encouraged or promoted will not be raised, but the desirability of changing, supplementing, or eliminating present provisions so as more effectively to carry out existing legislatively approved policies will be considered. The conclusions of the study will then be collated into a suggested act amenable to adoption in any state with a minimum of alteration.

III. History of the Michigan General Corporation Act

Although provisions were made for incorporation by both special and general acts under the Territorial and early Statehood regimes of Michigan,[82] incorporation by

[80] Michigan Comp. Laws secs. 450.98 to 450.186e (1948).

[81] See notes 71 to 79 *supra*.

[82] Wilgus, "Changes Effected by the New Michigan Corporation Act," 1 Mich. S. B. J. lvii and xcviii (1922).

special act was the preferred procedure. The persistence of this cumbersome method was undoubtedly in large part due to the invalidation in 1844 of the general banking incorporation law of 1837.[83] The Supreme Court, in *Green* v. *Graves*,[84] held that the banking law was contrary to the Constitutional provision: "The legislature shall pass no act of incorporation unless with the assent of two thirds of each house."[85] The court said that the Constitutional provision was motivated by a fear of the rapid growth of corporations and inserted with a purpose of restriction. Hence, it was held to forbid the creation of an indefinite number of banking corporations under one general law.[86] It is interesting to note that the Federal court had previously reached a contrary decision,[87] but apparently *Green* v. *Graves*[88] invalidated all the then existing general corporation laws.[89]

The Constitution of 1850 expressly provided for incorporation under general laws and prohibited incorporation by special act except for municipal purposes.[90] The legislature thereafter enacted a large number of general laws for the creation of specific types of corporations.[91] Apparently, however, the earlier Supreme Court decision cast doubt on the policy of broad general incorporation laws, and the practice continued of incorporating nearly every species of company by special act cast in general terms.[92] The

[83] Mich. Laws 1837, p. 76.

[84] 1 Doug. 351 (1844).

[85] Mich. Constitution, Art. XII, par. 2 (1835).

[86] Green v. Graves, 1 Doug. 351 (1844).

[87] Falconer v. Campbell, 2 McLean 195, 8 Fed. Cases No. 4,620, p. 963 (1840).

[88] 1 Doug. 351 (1844).

[89] Tripp v. Plank Road Co., 66 Mich. 1, 2, 32 N.W. 907, 907 (1887).

[90] Mich. Constitution, Art. XV, sec. 1 (1850).

[91] These are enumerated in Wilgus, *op. cit. supra* n. 82 at lix and lx.

[92] Pepper, "Revision of Corporation Laws," 30 MICH. S. B. ASSOCIATION 119 (1920); Wilgus, *op. cit. supra* note 82 at lx.

result was a tremendous number of corporation statutes. Revision and simplification began in 1873[93] with the railroad law. Other acts of limited scope followed, so that by 1921 more than 150 acts had been repealed.[94] In that year the predecessor of the present General Act was passed.[95] It repealed another one hundred corporation acts.[96] Ten years later the present General Corporation Act was passed.[97] It also repealed a large number of corporation statutes. Most of the progress in simplification has occurred in connection with the commercial or profit type of corporation. The nonprofit statutes have received little attention since 1921, and are therefore deemed worthy of consideration at this time. The various general statutes will be examined seriatim.

[93] Pub. Acts 1873, No. 198; Mich. Comp. Laws 1915, c. 157, secs. 8232 *et seq.*; Mich. Comp. Laws 1897, secs. 6223 *et seq.*

[94] Wilgus, *op. cit. supra* n. 82 at lxi.

[95] Pub. Acts 1921, No. 84.

[96] Wilgus, *op. cit. supra* n. 82 at lxi.

[97] Mich. Pub. Acts 1931, No. 327; Mich. Comp. Laws secs. 450.1 *et seq.* (1948).

CHAPTER II

Cooperatives

I. NATURE

IN ORDER to understand the statutory provisions in relation to cooperatives, it is desirable to make a cursory examination of the general characteristics of such organizations. In general, controversial policy considerations will not be pursued. The cooperative status in relation to antitrust and price fixing laws is beyond the scope of this study.[1] The taxation problem is only briefly referred to in order to highlight cooperative theory and practice.

Distribution of earnings. A cooperative is essentially a business enterprise much like other enterprises but differing primarily in underlying theory and in certain functional practices. The most outstanding feature distinguishing cooperatives from other business units, and perhaps

[1] See generally: Hulbert, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 199–232 (1942); Packel, THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES c. 10, sec. 63 (1947); Bunn, "Consumers' Co-Operatives and Price Fixing Laws," 40 MICH. L. REV. 165 (1941); Evans and Clawson, "The Trend of Judicial Decisions in Cooperative Marketing," 13 Law & CONTEMP. PROB. 473 (1948); Sieker, "Cooperatives and the Wisconsin Antitrust Laws," 1954 WIS. L. REV. 617 (1954); Hanna, "Antitrust Immunities of Cooperative Associations," 13 LAW & CONTEMP. PROB. 488 (1948); Hanna, "Cooperative Associations and the Public," 29 MICH. L. REV. 148 (1930); Hulbert, "Cooperative Principles and Law," AM. BAR ASS'N. Proceedings of the Section of Corporation, Banking, and Mercantile Law, 1947 meeting, Cleveland, Ohio, p. 34; Watkins, "The Regulation of Cooperatives by Government," 1954 WIS. L. REV. 645 (1954); Shampo and Susteren, "Special Position, if any, of Cooperatives Under Robinson-Patman Act," 1950 WIS. L. REV. 119 (1950); Ward, "Agricultural Cooperatives and Anti-Trust Laws," 30 DICTA 245 (1953); note, "Cooperatives and the Antitrust Laws," 27 IND. L. J. 430 (1952).

the only prerequisite of cooperative status, is the method of distributing "earnings."[2] Instead of a return to the investors in the form of profits or dividends, the surpluses accruing to the cooperative at the end of an accounting period are returned to the patron-members of the organization on the basis of the amount of business transacted with the cooperative. The fundamental theory of this method of distribution is that the cooperative is conduct-

[2] Although this is believed substantially true so far as the question of cooperative status alone is considered, it may not be a sufficient difference for all considerations. In Frost v. Corporation Commission of Okla., 278 U. S. 515, 49 S. Ct. 235 (1929), the Supreme Court held that this feature was itself not a sufficient basis for distinguishing a cooperative from other corporations and individuals, and at the same time indicated that a nonstock cooperative formed under a different act could validly be held subject to different treatment. At p. 524, the Court said: "A corporation organized under the Act of 1919, however, has capital stock, which, up to a certain amount, may be subscribed for by any person, firm, or corporation; is allowed to do business for others; to make profits and declare dividends, not exceeding eight per cent per annum; and to apportion the remainder of its earnings among its members ratably upon the amount of products sold by them to the corporation. Such a corporation is in no sense a mutual corporation."

In the same case, Justice Brandeis, dissenting, said: "That no one plan of organization is to be labeled as truly co-operative to the exclusion of others was recognized by Congress in connection with co-operative banks and building and loan associations." (Frost v. Corp. Comm., *supra* at 546).

As to the characteristics and requirements of cooperatives, see generally: Hulbert, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 2–3 (1941); Packel, *op. cit. supra* n. 1 at 3–4; Bakken, "Principles and their Role in the Statutes Relating to Cooperatives," 1954 WIS. L. REV. 549 (1954); Bunn, *op. cit. supra* n. 1 at 165–166; Hanna, "Cooperative Associations and the Public," 29 MICH. L. REV. 148, 149 (1930); Rumble, "Cooperatives and Income Taxes," 13 LAW & CONTEMP. PROB. 534, 536 (1948); and "Big Business Without Profit," FORTUNE MAGAZINE, Aug. 1945, 153, 155.

As to the Michigan statutory requirements, see text preceding note 37 *infra*.

ing at cost the performed services, and hence there are no profits but only savings to the members.

In addition to the return to the members on the basis of patronage, the cooperative is generally permitted to return a limited fixed amount to the investors in the enterprise.[3] This amount would seldom exceed eight per cent and usually would be somewhat lower. In the case of cooperatives organized on a stock plan basis, this return would closely resemble preferred dividends. If the cooperative were organized by the issuance of membership certificates, the return might be considered interest.

The returns to the members on the basis of patronage is accomplished by patronage dividends. In practice, the cooperative usually deals with its members on the basis of current prices rather than attempting at the moment to ascertain its exact cost of operations. Thus, at the end of a year or any other accounting period, the cooperative should have in its treasury some surplus funds derived from its commercial activities. These funds are then distributed by the officers of the enterprise. Without becoming involved in the controversy as to whether or not these funds are "profits," the problem confronting the cooperative is not dissimilar to that confronting the profit corporation in relation to its surplus. The directors may set aside certain reserves for contingencies. They will probably pay in cash the limited dividend authorized to be paid investment capital if in the particular cooperative such payments are authorized. They may then return the balance to the members in cash on the basis of patronage. They may decide to keep some or all of the balance in the business, in which case they may issue certificates of indebtedness or certificates of beneficial ownership to the member-

[3] See generally references in note 2 *supra*.

patrons.[4] If the cooperative deals commercially with both members and nonmembers, there is the further problem of whether or not such patronage dividends should be paid to the nonmembers. Either decision is consistent with cooperative theory, but the contingency will usually be controlled by provisions in the statutes, articles of association, or by-laws.

Organization. The cooperative may be organized in much the same manner as any other business unit, the particular manner of association generally having no special significance on whether or not it is cooperative.[5] The cooperative may incorporate and conduct its affairs much the same as any other corporation and be subject to essentially the same rules governing the conduct of corporations. It may organize as an unincorporated society and thus be subject to the rules and regulations of similar unincorporated societies. It conceivably could organize as a business trust, but in practice this type of organization is not greatly utilized. The mode of organization is not determinative of whether or not it issues stock. Thus, a cooperative corporation may be organized on a stock or non-stock basis. If stock is not issued, then certificates of membership

[4] As to the method of distributing patronage dividends, see generally: Hulbert, *op. cit. supra* n. 2 at 270–275; Packel, *op. cit. supra* n. 1 at 190–195; Adcock, "Patronage Dividends; Income Distribution or Price Adjustment," 13 LAW & CONTEMP. PROB. 505, 506–508 (1948); Jacobs, "Cooperatives and the Income Tax Law," 31 TAXES 49, 50–51 (1953).

[5] This statement is true insofar as it relates to the general question of the manner of organizing the cooperative, as, for example, whether to incorporate or not. As to the details of operation, the statement is probably too general. See, for example, Frost v. Corp. Comm. of Okla., *supra* n. 2. See generally the references cited in n. 2 *supra*.

The parties must, however, submit to the burdens as well as enjoy the benefits which inhere in the method or organization adopted. Schaffer v. Eighty One Hundred Jefferson Avenue East Corp., 267 Mich. 437, 255 N.W. 324 (1934).

or certificates of ownership may be issued instead. The use of stock or membership certificates as such is probably not of as great significance as the over-all structure of organization setting forth the rights and duties of the parties.

In a similar manner the particular mode of organization is not, except in a broad sense, determinative of the possible relations with other business enterprises. The cooperative may affiliate, cooperate, or combine with other units in a manner similar to that of business organizations generally. Of course, the corporate device and holding company technique are especially convenient for intercompany relations, and it is the corporate cooperative that is the chief object of our study.[6]

Relationship with members. The cooperative as distinguished from the ordinary business enterprise is organized primarily to do business with and for its members. The relationship of the members to the cooperative is somewhat unique and different from the relationship between a member and the organization of a non-cooperative enterprise. At the outset, however, it is apparent that the patron-members and the cooperative have a choice of several possibilities in the selection of this relationship. They can, for example, treat the cooperative as the agent of the members or as an independent contractor. This choice is available regardless of the type of activity carried on by the cooperative, but for purposes of illustration a marketing cooperative alone will be considered. If the agency relationship is adopted, then the cooperative acts only as the selling agent of the member who delivers products for sale. Title remains in the patron-member until

[6] A concise statement of the extent of concentration achieved by the Co-Operative Grange League Federation Exchange can be found in: "Comment on the Report Prepared by Dr. Jensen and Associates," 5 BUS. LAWYER 80 (1948); Starr, *infra* n. 9 at 434, n. 4.

the resale by the cooperative, irrespective of the fact that a substantial advance of the price may be made to the patron-member at the time of delivery to the cooperative, and the other rules of agency generally apply. If the cooperative is treated as an independent contractor, the usual incidents of a sale normally result upon delivery of the products to the cooperative. In this instance it generally is immaterial that the exact selling price is not determined at the time of delivery to the cooperative, but is, in effect, "kept open" for final adjustment until a resale by the cooperative or until the end of some accounting period.

Some doubt has been raised as to whether in the case of a technical sale to the cooperative the relationship is not really that of agency or trust, and contra, doubt can be raised whether in the case of technical agency, the relationship is not really that of a sale. Further study of this matter is available elsewhere[7] and need not be elaborated here. It might be observed, however, that it is not entirely illogical and inconsistent with legal treatment to denominate a relationship as belonging in one category for certain purposes and in another for other purposes. Thus, it might be desirable to classify the relationship as that of agency to determine whether or not the cooperative makes a profit

[7] Generally see notes: 98 A.L.R. 1406, 1413 (1935); 77 A.L.R. 405, 412 (1932); 47 A.L.R. 936, 946 (1927); 33 A.L.R. 247, 253 (1924); Adcock, *op. cit. supra* n. 4 at 520–521; Ballantine, "Co-Operative Marketing Associations," 8 MINN. L. REV. 1, 15–16 (1923); Fowler, "The Cooperative Yardstick," 13 LAW & CONTEMP. PROB. 445, 447 (1948); Jensen, "Cooperative Corporation Law on the Marketing Transaction," 22 WASH. L. REV. 1 (1947); Dunsdon, Marcovich and Ugent, "Economic and Legal Aspects of Pooling by Cooperative Associations," 1954 WIS. L. REV. 687 (1954); "Reports of Parts of the Committee on Classification and Terminology," 5 BUS. LAWYER 62–71, 71–80, and "Comments on the Report of Dr. Jensen's Group," 80–86 (1949); previous reports of the committee are found in 4 BUS. LAWYER 226–244 (1948); note, "Legal Aspects of Cooperative Organizational Structure," 27 IND. L. J. 377 (1952).

and, at the same time, classify it as a purchase and sale to determine whether the cooperative has such beneficial ownership of the commodities as to subject them to liability of attachment for debts of the organization.

Voting. The members of a cooperative are usually entitled to only one vote per person, irrespective of the number of shares owned in the enterprise.[8] Thus, all members have an equal voice in the management of the business, and, theoretically, minority control by substantial investors is more difficult. However, it is also common practice for cooperatives to limit the number of shares that a member may own, thus making it desirable, if not mandatory, to secure a large number of members and diversification of ownership. Hence, if voter apathy exists in such cooperatives in a manner similar to its existence among ordinary profit corporations, it may be equally easy for an organized minority to acquire factual control.[9] Hence, differences in fact may not be as great as differences in theory. This might be partly offset, however, by the rather common device of limitations upon the transfer of membership, which could tend to restrict membership to those who are actively interested.

Taxation. The taxation problem is briefly mentioned here to complete the cooperative picture and to focus at-

[8] See generally citations in n. 2 *supra.*

[9] Starr, "The Effects of Cooperation on the Profit Economy," 13 LAW & CONTEMP. PROB. 431, 435 (1948); note, "Development and Significance of Agricultural Cooperatives in the American Economy," 27 IND. L. J. 353, 368 (1952). But see Brandeis' dissent in Frost v. Corp. Comm. of Okla., *supra* n. 2, wherein he states: "Their sin is economic democracy on lines of liberty, equality and fraternity. To accomplish these objectives, both types of cooperative corporations provide for excluding capitalist control. As means to this end, both provide for restriction of voting privileges, for curtailment of return on capital and for distribution of gains or savings through patronage dividends or equivalent devices." 278 U. S. 515, 536–37 (1928).

tention on the relation of fundamental cooperative theories to at least one significant political-economic-legal problem. As a general rule, it can be stated with sufficient accuracy that cooperatives are subject to most of the usual property, sales, and other taxes in much the same manner as any other business.[10] It is in the field of income tax that the cooperative's status is unique.

There are in reality two separate aspects of the income tax problem—one is tax exemption and the other is tax applicability. The exemption problem will be considered first. Certain agricultural cooperatives are exempted from all income taxes whatsoever. The requirements for exemption are set forth in the statute,[11] and are rather onerous, so that not all of the farmers' cooperatives take advantage of the exemption. The exemption is not granted automatically; the cooperative must apply for and receive a letter of exemption from the Treasury Department. In order to qualify for such exemption, the agricultural cooperative must, among other things, do at least half of its business with its members, return all of its receipts in excess of costs to the patrons, must not discriminate between members and nonmembers in case there are dealings with nonmembers, and, if organized on a stock basis, must not pay more than the legal rate of interest in the state of incorporation or eight per cent, whichever is higher.[12] Tax exemption is primarily a question of legislative policy and is a competent subject for Congressional determination.

More controversial, and perhaps more significant in re-

[10] In Michigan a distinction is made between profit and nonprofit corporations in regard to franchise taxes. See n. 45 *infra* and text following n. 45.

[11] Int. Rev. Code sec. 521 (1954).

[12] *Ibid.* See generally note, 8 A.L.R. (2d) 927, 929–943 (1949), and references cited in n. 16 *infra*.

spect to the total revenues involved, the effect on the business economy, and also on the intensity of the feelings engendered, is the problem of taxing as income to the cooperatives the sums returned to the members as patronage dividends. The present practice, which is specifically applicable to farmers' cooperatives by statute,[13] is to exclude from gross revenues of the cooperative the sums which it is obligated by statutes, by-laws, or charter provisions to return to the patron-members.[14] Generally, if revenues are derived from transactions with patrons to whom there is no pre-existing obligation to return such revenues, there is a profit in the usual sense and the cooperative is subject to the income tax to that extent.[15] Whether the patronage dividends are returned in the form of cash or in certificates of one kind or another seems to be immaterial, the primary test being whether the cooperative is obligated to return those funds to the patron-members.

The controversial issue in this whole question depends upon the status as profits of these surplus funds which are returned as patronage dividends. The gist of the cooperative theory is that these funds are not profits but are either additional revenues withheld by the organization at the time of the sale of the members' products, or are savings withheld from the members at the time of purchase of products by the members. These additional revenues were retained, according to this theory, because of the impossibility of determining in advance the exact cost

[13] Int. Rev. Code sec. 522 (1954).

[14] See generally references in n. 15 *infra*. But in Fountain City Cooperative Creamery Ass'n. v. Comm'r. Int. Rev., 172 F. (2d) 666 (7th Cir. 1949), patronage refunds were held taxable. See note, 97 U. of PA. L. REV. 908 (1949).

[15] See generally note, 8 A.L.R. (2d) 927, 943 *et seq.* (1949), and references cited in n. 16 *infra*.

of operation and are in reality the revenues of the members, the obligatory nature of refunding to the patrons making it clear that the cooperative is operating at cost and without a profit. Of course, no corporation is required to pay an income tax if it did not make a profit.

The opponents of cooperative theory, however, argue that cooperative practices of doing business at current prices and accumulating surpluses are so similar to the general practices of ordinary business that these funds are in fact, if not in theory, so impressed with the nature of profits that they should be taxed as such. They further contend that not so to treat them gives the cooperative an unfair advantage over its business rivals. The merits of this controversy are explored by the combatants elsewhere[16] and need not be elaborated here.

II. History of Michigan Cooperative Statutes

The early cooperative statutes were general in nature but limited in scope. Before 1913, for example, statutes were passed providing for the incorporation of coopera-

[16] As to taxation problem generally, see: Adcock, "Patronage Dividends: Income Distribution or Price Adjustment," 13 Law & Contemp. Prob. 505 (1948); Bradley, "Classification for Tax Purposes of Reserves of Tax Exempt Cooperatives," 13 Law & Contemp. Prob. 526 (1948); Broden, "Taxation of Patronage Refunds," 23 Notre Dame Law. 342 (1948); Jacobs, "Cooperatives and Income Tax Law," 31 Taxes 49 (1953); Note, "Farmers' Cooperatives and the Federal Income Tax," 32 Minn. L. Rev. 785 (1948); Note, "Federal Taxation of Agricultural Cooperative Associations," 27 Ind. L. J. 430 (1952); Loos, "Cooperatives—Are They Entitled to Exemption from Income Taxes? Yes," 2 Bus. Lawyer 4 (1947); McCabe, "Cooperatives: Are They Entitled to Exemption from Income Taxes? No," 2 Bus. Lawyer 7 (1947); Magill and Merrill, "The Taxable Income of Cooperatives," 49 Mich. L. Rev. 167 (1950); Rumble, "Cooperatives and Income Taxes," 13 Law & Contemp. Prob. 534 (1948); Sowards, "Should Cooperatives Pay Federal Income Tax?," 19 Tenn. L. Rev. 908 (1947); Sutherland and Asbill, "Patronage Refunds by Exempt Cooperatives Under The Revenue Act of 1951," 30 Taxes 775 (1952); Hulbert, *op. cit. supra* n. 2 at 250; Packel, *op. cit. supra* n. 1 at 222.

tive booming and rafting companies,[17] mechanics' and laboring men's associations,[18] mutual benefit societies,[19] savings associations,[20] associations of growers of mint and other essential oil plants,[21] and associations to promote the selling and distribution of fruit and other farm products.[22] In 1913 a rather general cooperative corporation act was passed authorizing incorporation on the cooperative plan for the purpose of "conducting any agricultural, dairy, mercantile, manufacturing, or mechanical business"[23] within the state. This was followed in 1917[24] by

[17] Mich. Pub. Acts 1855, No. 40; Mich. Comp. Laws 1915, secs. 8621–8628. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134. It was held unconstitutional in so far as it authorized the taking over of logs of nonassenting parties in Ames v. Port Huron Log Driving and Booming Co., 11 Mich. 139, 83 Am. Dec. 731 (1863).

[18] Mich. Pub. Acts 1865, No. 288; Mich. Comp. Laws 1915, secs. 9837–9845. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[19] Mich. Pub. Acts 1869, No. 104; Mich. Comp. Laws 1915, secs. 9846–9852. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134. Mich. Pub. Acts 1879, No. 73; Mich. Comp. Laws 1915, secs. 9853–9857. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[20] Mich. Pub. Acts 1877, No. 206; Mich. Comp. Laws 1948, sec. 491.1 *et seq.* Sec. 15 was merged and superseded by Mich. Pub. Acts 1917, No. 256, Pt. 2, c. 1, sec. 10 (see Mich. Comp. Laws 1948, sec. 511.10n). The Act would seem to be no longer applicable since such associations are not excepted from the provisions of the General Corporation Act, Mich. Comp. Laws sec. 450.3 (1948).

[21] Mich. Pub. Acts 1887, No. 315. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[22] Mich. Pub. Acts 1899, No. 35; Mich. Comp. Laws 1915, sec. 11311 et seq. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[23] Mich. Pub. Acts 1913, No. 398; Mich. Comp. Laws 1915, sec. 9950 et seq. Repealed by Mich. Pub. Acts 1821, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[24] Mich. Pub. Acts 1917, No. 239. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

another act providing for the incorporation of the same type of cooperatives but with somewhat different provisions. The 1917 Act did not repeal the 1913 Act.

The General Corporation Act of 1921[25] repealed the Acts of 1913 and 1917[26] along with others and devoted a chapter to cooperatives.[27] Many of the provisions of the 1913 and 1917 Acts were incorporated into the 1921 Act. Provisions were made for two types of cooperatives: (1) cooperatives for "any lawful business"; and (2) cooperatives for carrying on any "agricultural, dairy, mercantile, manufacturing or mechanical business." These latter types of cooperatives were given the option of adopting the provisions of subdivision 3, which were on the whole more rigid that the provisions applying to the first category.

The General Corporation Act of 1931[28] substantially adopted the cooperative provisions of the 1921 Act. Incorporation of cooperatives for any lawful business was authorized, and the optional provisions applicable to "agricultural, dairy, mercantile, mining, manufacturing or mechanical business" were retained. Since 1931 several amendments have been made. The cooperative corporation has been more specifically defined;[29] such corporations have been classified as profit and nonprofit for purposes of making reports and paying taxes to the state;[30]

[25] Mich. Pub. Acts 1921, No. 84; Mich. Comp. Laws 1929, sec. 9943 *et seq.*

[26] Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1; Mich. Comp. Laws 1929, sec. 10134.

[27] Mich. Pub. Acts 1921, No. 84, Pt. 2, c. 4; Mich. Comp. Laws 1929, secs. 10027 *et seq.*

[28] Mich. Pub. Acts 1931, No. 327; Mich. Comp. Laws secs. 450.1 *et seq.* (1948).

[29] Mich. Pub. Acts 1931, No. 327 as amended; Mich. Comp. Laws sec. 450.98 (1948).

[30] Mich. Pub. Acts 1931, No. 327 as amended; Mich. Comp. Laws sec. 450.98 (1948).

provision has been added imposing liability on persons for inducing a breach of contract with an agricultural cooperative;[31] and the optional provisions mentioned above[32] have been repealed.[33] The provisions of the present Act will now be examined in more detail.

III. Integration with Other Provisions of the General Act of Michigan

The minimum requirements for a corporation to be classified as a cooperative under the Michigan statute do not vary materially from those set forth in the general discussion of cooperatives. Section 98[34] of the Act,[35] for example, sets forth as absolute requirements that dividends on stock or membership certificates be limited to not more than seven per cent and that not more than fifty per cent of the business be conducted with nonmembers. Section 99[36] defines cooperative plan as a "mode of operation where the earnings of the corporation are distributed on the basis of, or in proportion to, the value of property bought from or sold to shareholders and/or members or other persons, or labor performed for, or services rendered to, or by the corporation." This, in short, is a requirement that the earnings be distributed on the basis of patronage with allowances made, however, for the payment of limited dividends and the retention of reserves. Thus, the

[31] Mich. Pub. Acts 1931 as amended; Mich Comp. Laws sec. 450.109 (1948).

[32] Refers to the optional provisions of the 1921 Act. See text *supra* p. 21.

[33] Mich. Pub. Acts 1931, No. 327 as amended; Mich. Comp. Laws secs. 110–116n (1948).

[34] Mich. Comp. Laws sec. 450.98 (1948).

[35] *I.e.,* the present General Corporation Act. In this section references to statute collections only are cited. Significant Public Acts have already been cited and can easily be obtained from the statute collections.

[36] Mich. Comp. Laws sec. 450.99 (1948).

three requirements of limited dividends, if any, restricted operation in regard to nonmembers, and distribution of earnings on a patronage basis are the only absolute requirements of a cooperative. In addition to the absolute requirements, the Act specifically mentions certain optional provisions, such as per capita instead of stock voting,[37] and gives the members considerable freedom in setting up their organization.[38]

It is provided that unless otherwise specified the General Act will govern cooperatives as to the manner of corporate management, distribution of earnings, powers, and optional principles of doing business.[39] It is thus seen that a large portion of the questions concerning this type of enterprise, such as, for example, the authority of agents, powers of the organization, and commercial questions in general can be answered by resort to general principles of corporation law without the necessity of inquiring into the peculiarities of cooperatives. By and large, the eleven sections of the General Act[40] relating to cooperatives are provisions specifically applicable to such organizations and at variance with the statutes relating to regular commercial corporations.

It is expressly provided that the cooperative may engage in any lawful business.[41] This provision seems especially desirable in that it clarifies the status of nonagricultural cooperatives and makes plain the authority of such organizations. Although all of the states have statutes permitting

[37] Mich. Comp. Laws sec. 450.101 (1948).

[38] *Ibid.*

[39] Mich. Comp. Laws sec. 450.98 (1948).

[40] Mich. Comp Laws secs. 450.98 to 450.109 (1948).

[41] Mich. Comp. Laws sec. 450.99 (1948). See Mid-West Theatres Co. v. Co-Operative Theatres of Mich., 43 F. Supp. 216, 221 (E. D. Mich. 1941), for a recognition of the right of theater owners to form a cooperative association.

the incorporation of some kinds of cooperatives,[42] not all states expressly authorize the incorporation of cooperatives for any lawful purpose. This makes for uncertainity at the outset in those jurisdictions as to the validity of a cooperative corporation for a purpose not within the express terms of the statute. The general nonprofit corporation statutes providing for incorporation of social groups seem hardly applicable for incorporation of business cooperatives, and, on the other hand, use of the profit corporation statutes seems a little inconsistent with the basic cooperative theory of operating not for profit. The Michigan Act further provides that only corporations organized under the cooperative provisions are entitled to use the word "cooperative" in their name,[43] and although the statute does not expressly so provide, the use of the term in the corporation's name may be obligatory, as the Attorney General has concluded.[44]

Classification. Cooperatives under the Michigan Act are classified as profit and nonprofit[45] for the purposes of

[42] Packel, ORGANIZATION AND OPERATION OF COOPERATIVES 46 (1947).

[43] Mich. Comp. Laws sec. 450.99 (1948).

[44] 1945–46 Ops. Mich. Att'y. Gen. p. 129.

[45] Mich. Comp. Laws sec. 450.98 (1948). To the effect that payment of dividends upon stock would render a cooperative a "profit" corporation for tax purposes under the 1921 Act, see 1921–22 Ops. Mich. Att'y. Gen. p. 180.

Some doubt on the present applicability of this distinction may arise as a result of Mich. Pub. Acts 1954, No. 144, amending Mich. Comp. Laws sec. 450.303 (1948). The same ambiguity was present in the previous amendment effected by Mich. Pub. Acts 1952, No. 183. This amendment, dealing with the franchise fee for profit corporations, begins: "Every cooperative corporation and every domestic corporation hereafter organized for profit . . . ." Although the word "profit" is not specifically used with "cooperative corporation," it is believed that this tax statute applies only to such cooperatives as are classified as profit corporations. The principle of *eusdem generis* leads to this conclusion, namely, that the phrase "organized for profit" modifies both "cooperative corporation" and "domestic corporation." Furthermore, to hold otherwise would

paying fees and privilege taxes to the state. Under the classification set forth, a cooperative is classified as a profit corporation for these purposes if it pays limited dividends upon its stock or membership investment or if it discriminates between members and nonmembers in the distribution of its earnings. Note that either one of these provisions will result in the classification as a profit corporation. On the other hand, to classify as a nonprofit corporation, the cooperative must meet both of the following tests: (1) pay no dividends upon stock or membership investment, and (2) distribute all earnings or provide for the allocation of such earnings to members and nonmembers doing business with the corporation. It is to be noted that, although the statute does not say the distribution between members and nonmembers must be on the same basis in order to qualify as a nonprofit corporation, this necessarily must follow since it is also provided that, if the distribution is not on the same basis, the corporation is deemed a profit corporation. It is to be noted that the classification is for the purpose of making reports and paying taxes and fees and does not necessarily control other questions involving the problem of whether or not a corporation is organized for profit. At this point, it may be interesting to note that the filing fee for both profit and nonprofit corporations is two dollars per year,[46] but the nonprofit corporations have no other fees or privilege taxes to pay, whereas profit corporations must pay an annual franchise tax. In general, the organization fee of the nonprofit cor-

result in repeal by implication of the second paragraph of Mich. Comp. Laws sec. 450.98 (1948). Statutes are generally construed so as to give effect to all provisions.

[46] Mich. Comp. Laws sec. 450.81 (1948), as amended by Mich. Pub. Acts 1953, No. 6, for nonprofit corporations; Mich. Comp. Laws sec. 450.82 (1948), as amended by Mich. Pub. Acts 1954, No. 216, for profit corporations.

poration is just ten dollars,[47] while the organization fee of the profit corporation is one half mill upon the authorized capital stock.[48] The annual privilege tax for the profit corporation is four mills upon each dollar of its paid up capital and surplus but not less than ten dollars.[49] In addition, there are other provisions for particular types of corporations.[50]

Earnings. In addition to the previously mentioned requirement that the bulk of earnings must be distributed on a patronage basis,[51] the statute expressly provides that a portion of the earnings may be reserved for future distribution.[52] However, where this is done, there is a further requirement that the reserved earnings must be allocated or a means provided for such allocation before there can be a general distribution of earnings.[53] This would seem to require that, before any patronage dividends in cash could be distributed, there would have to be issued participating certificates, notes, certificates of indebtedness,

[47] Mich. Comp. Laws sec. 450.302 (1948). It will be noted that this section provides for an annual privilege fee of ten dollars. However, section 81 of the General Act (*supra* n. 46), as amended in 1953 (Mich. Pub. Acts 1953, No. 6), sets the annual fee at two dollars and voids contrary provisions in other statutes. As nothing is said about the organization fee in section 81, undoubtedly the ten dollar fee provided for in this section is still in effect.

[48] Mich. Comp. Laws sec. 450.303 (1948), as amended by Mich. Pub. Acts 1954, No. 144. Provision is made for valuation in case no par stock is issued. Mich. Comp. Laws sec. 450.303a (1948).

[49] Mich. Comp. Laws sec. 450.304 (1948), as amended by Mich. Pub. Acts 1954, No. 144.

[50] Mich. Comp. Laws sec. 450.304b, as amended by Mich. Pub. Acts 1952, No. 183, and Mich. Comp. Laws secs. 450.305 to 450.305e, as amended by Mich. Pub. Acts 1952, No. 183 and by Mich. Pub. Acts 1954, No. 35.

[51] See text *supra* p. 22.

[52] Mich. Comp. Laws sec. 450.106 (1948).

[53] *Ibid.*

or some other evidence of an interest in any reserved earnings to those entitled to such earnings. If the actual certificates were not issued at once, the plan of issuing them would have to be decided upon before there could be a general distribution of earnings. This requirement differs, of course, from the procedure in the ordinary profit corporation. In such an organization the directors have powers of wide discretion in transferring available earnings to reserve and surplus accounts to be carried there more or less indefinitely until they deem it desirable to declare a dividend to the stockholders of record at some future time.[54] The reason for the compulsory allocation of the reserves in the cooperative, however, is not obscure. The cooperative theory being that earnings so called should accrue to those who did business with the enterprise and thus made the earnings possible, it is manifestly proper that those whose business gave rise to the earnings should be assured of them. This makes it necessary for their share to be ascertained promptly, and the statute simply requires that this be done, at the same time permitting the organization to postpone the actual cash payment to some future date. The amount of the earnings that may be reserved is not limited.

Revolving fund. The reserve fund prompts a discussion of the revolving fund[55] method of financing coop-

[54] Of course, the court is not without power to police abuses of discretion. The classic example of a court compelling the declaration of a dividend is Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919). See generally, Fletcher, CORPORATIONS, sec. 5325 (1931).

[55] See generally: Evans and Stokdyk, THE LAW OF AGRICULTURAL COOPERATIVE MARKETING 174 (1937); Hanna, LAW OF COOPERATIVE MARKETING ASSOCIATIONS 281–282 (1931); Hulbert, *op. cit. supra* n. 2 at 276; Packel, *op cit. supra* n. 42 at 180; Eidam, "Reorganizing and Financing Agricultural Cooperatives," 13 LAW & CONTEMP. PROB. 420 (1948); Jensen, "The Collecting and Remitting Transaction of a Cooperative Marketing Corporation," 13 LAW & CONTEMP. PROB. 403, 407 (1948); Nieman, "Revolving Capital in Stock Cooperative Corporations," 13 LAW & CONTEMP.

eratives. Briefly stated, the revolving fund is a device whereby the bulk of the capital of the enterprise will be contributed by those members who most actively make use of the cooperative facilities. At the same time, it provides a mechanism for the gradual withdrawal of those members who cease to patronize the organization. It can be adapted to any type of cooperative corporation, but care must be used in setting up any particular revolving fund so as not only to avoid various legal pitfalls but also to circumvent many practical difficulties.[56]

In essence, the plan envisions withholding from the members a certain percentage of the "earnings." These withholdings are then credited to a fund which is used in the operation of the business. Generally, certificates of some sort may and should be issued to the patrons to evidence their interest in this fund, although such procedure is not absolutely necessary if detailed and accurate bookkeeping methods are followed. When the fund has been built up to the desired level, further withholdings are used to maintain it at that point while the earlier withholdings are returned to the patrons, or, in other words, the oldest certificates, if such were issued, are retired in chronological order while the new certificates furnish the necessary capital. Thus, a flexible capital structure is achieved and contributions are made in accordance with service rendered by the enterprise in harmony with cooperative theory.

Reference has been made to legal and practical diffi-

PROB. 393 (1948); Note, "Development and Significance of Agricultural Cooperatives in the American Economy," 27 IND. L. J. 353, 367 (1952); Note, "General Principles and Problems of Cooperatives," 1954 WIS. L. REV. 533, 541 (1954).

[56] See generally: Eidam, *op. cit. supra* n. 55; Jensen, *op. cit. supra* n. 55; and Nieman, *op. cit. supra* n. 55.

culties in setting up such a plan.[57] Without detailing these difficulties, which are discussed elsewhere,[58] a few of them will be pointed out by way of illustration. If the members' interest in this fund is made in the nature of a debt with fixed maturity dates, the cooperative may be compelled to pay out large sums of money at times when it would be most embarrassing and disadvantageous to do so. Likewise, there would at times arise problems of conflicting preference claims between members and third party creditors. Perhaps an equitable and desirable arrangement would be to make the members' claims junior to those of third party creditors, and also to make them payable at some distant future date, but at the same time reserving to the directors an option to pay them sooner. Such a hybrid interest as that suggested may, as in the case of many hybrid securities, give rise to considerable litigation if the rights of the parties are not sufficiently and definitely set out and if creditors' rights are not amply protected.

Other legal difficulties may likewise be encountered. If the stock itself is revolved there immediately arises the question of the corporation's power to redeem or purchase its own stock.[59] In cases of agricultural cooperatives, voting rights must be considered if the organization seeks income tax exemption[60] or borrowing privileges from banks for

[57] *Supra* p. 28.

[58] References cited in n. 56 *supra*.

[59] Problems herein mentioned and others are discussed in Nieman, *op. cit. supra* n. 55. In Michigan the right of a corporation to purchase and redeem its own stock is recognized and regulated by statute. Mich. Comp. Laws sec. 450.10 (1948), as amended by Mich. Pub. Acts 1953, No. 156, and Mich. Comp. Laws sec. 450.37 (1948).

[60] Int. Rev. Code sec. 521 (1954). This provision requires that substantially all of the voting stock be owned by producer members to entitle the cooperative to such exemption.

cooperatives.[61] Some of these difficulties could in part be offset by issuing two types of stock and revolving only the preferred or nonvoting stock. Corporate statutes generally provide for the method of changing the capital structure and in some instances may cause difficulty. However, as long as the capital stock or stated capital is not reduced but maintained at the designated level, there would seem to be no policy which should prohibit revolving the stock.

In the light of this general discussion, the possibility of adopting a revolving capital fund under the Michigan statutes will now be considered. There is no express statutory authorization of such a plan as there is in Iowa.[62] However, the authorization of the reserve fund which prompted this discussion suggests the possibility that it be used for this purpose. It will be recalled that there is no limitation upon the amount of earnings that can be reserved. In the case of the profit corporation, the amount would probably be limited to good faith discretion in providing for depreciation, obsolescence, and economic contingencies.[63] Would such a qualification be read into the cooperative statute? It would seem not, provided, of course, that the by-law or charter provisions made it clear that the reserve fund would be used for such purposes. This contract would then be binding on the member-patrons. Members of the cooperative are in theory using it as an agent to perform services for them and not simply investing a sum of money to procure a return on their in-

[61] The requirements of a cooperative to be eligible for loans from banks for cooperatives are set forth in 12 U.S.C.A. 1141j (1945). Power is conferred on the banks in 12 U.S.C.A. 1134c (1954 Supp.).

[62] Iowa Code Ann. secs. 499.30 to 499.35 (1949).

[63] See generally, Fletcher, CORPORATIONS, sec. 5325 (1931), on the problem of compelling the declaration of a dividend and p. 27 *supra.* The courts are very reluctant to interfere in the internal affairs of a corporation. Fletcher, sec. 2104.

vestment. The policy of the state should only require that the members' proportionate interest be seasonably ascertained, and the statute requires that this be done. Hence, if the members agreed to contribute such sums for the operation of the business for a certain period, there would seem to be no reason for not enforcing such an agreement.

This then suggests a practical method of setting up a revolving fund for a Michigan cooperative. A limited amount of membership capital or capital stock may be provided for in the articles of incorporation. Transfer of this membership interest may be regulated in accordance with the Act. This capital may be divided into small units so as to make possible a large membership. Apparently, section 5 of the corporation statute[64] would be applicable here so that at least one thousand dollars would have to be paid in before the corporation could commence business. Much of the operating capital in the beginning could be secured by loans. Such loans could be facilitated in part by the members' depositing accommodation notes with the cooperative.[65] As the business progressed, the loans could be repaid, the reserve fund built up, and the notes returned to the members. This plan would be relatively simple to establish and would be somewhat similar to that expressly authorized by the Iowa Code.[66] This is not to infer

[64] Mich. Comp. Laws sec. 450.5(3) (1948), as amended by Mich. Pub. Acts 1953, No. 155.

[65] In Gobles Co-Operative Association v. Albright, 248 Mich. 68, 226 N.W. 876 (1929); Taylor v. Rugenstein, 245 Mich. 152, 222 N.W. 107 (1928); and Runciman v. Brown, 223 Mich. 298, 193 N.W. 880 (1923), such notes were the subject of litigation. In the Taylor case the defense unsuccessfully urged the statute of limitations; the maker probably realized his liability since the note was pledged as collateral. In the other two cases the maker was not liable when the note was not transferred to a third party.

[66] Iowa Code Ann. secs. 499.30 to 499.35 (1949).

that the stock itself could not be rotated, but it is believed that the rotation of the reserve fund would be simpler.

Other provisions concerning earnings. Additional provisions concerning earnings require that regulations governing their distribution be contained in the by-laws.[67] Limited dividends not to exceed seven per cent are authorized, and such dividends may be made cumulative.[68] The by-laws shall provide what percentage over and above such dividends shall be kept as reserves, and shall determine the manner of distribution of the surplus. It is likewise optional whether these dividends, which must be on a patronage basis, be paid to members and nonmembers or simply to members.[69] In regard to cooperatives classified as profit, the balance of such reserve fund in excess of thirty per cent of the paid-up capital shall be considered as surplus for the purpose of determining the annual franchise tax.[70]

The time for the distribution of the surplus earnings shall be stated in the by-laws, but such a distribution must be made at least once a year.[71] It is further provided that, in case the cooperative fails to pay the dividend upon its paid-up capital stock for a period of five consecutive years,

[67] Mich. Comp. Laws sec. 450.106 (1948).

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.* See p. 24 *supra,* and notes 45 and 49 *supra.* There seems to be no specific statutory provision for the determination of paid-up capital in the non-stock profit cooperative. The problem is more apparent than real, however, since section 2 of the Act (Mich. Comp. Laws sec. 450.2 (1948), as amended by Mich. Pub. Acts 1949, No. 229), defines "share of stock" as synonomous with membership in a non-stock corporation. Hence, the determination of capital as provided for in section 20 (Mich. Comp. Laws sec. 450.20 (1948)), although mentioning only stock, would be applicable to non-stock corporations. Compare the apparent meaning of "capital" here with its meaning in section 104. See Investment of Reserves, *infra* p. 40.

[71] Mich. Comp. Laws sec. 450.107 (1948).

the circuit court of the county of its registered office may dissolve the enterprise on the petition of a majority of the shareholders.[72] This is a ground of dissolution unique to cooperatives. The statute undoubtedly refers to the optional limited dividend which may be authorized in the by-laws, because stock of cooperatives as such is not entitled to a dividend, surplus distributions being primarily based on patronage.

Membership. The Michigan statute clearly recognizes and approves the cooperative practice of limiting membership.[73] However, in order for restricted membership provisions to be effective, a condensed statement of the restrictions on transfer must be printed on the back of each stock certificate.[74] Also, limitations on voting rights and limitations on proxy voting, if any, must likewise appear on the stock certificate.[75] Although this section and others refer expressly only to shares of stock or stock corporations, the rules are applicable to membership cooperatives also. Section 2[76] of the Act defines stock and shareholders in a generic sense so as to include membership interest and

[72] *Ibid.* In regard to the dissolution problem, it was held in Michigan Wolverine Student Co-Operative v. Goodyear, 314 Mich. 590, 22 N.W. 2d 884 (1946), that pecuniary losses did not justify the director's selling all of the assets without the consent of the majority shareholders. Dissolution must be in conformity with statutory procedure.

[73] Mich. Comp. Laws secs. 450.100 and 450.102 (1948).

[74] Mich. Comp. Laws sec. 450.100 (1948). Failure to place the restriction on the stock certificate may render the limitation unenforceable although the transferee has notice. Sorrick v. Consolidated Telephone Co., 340 Mich. 463, 65 N.W. (2d) 713 (1954). In this case there was a restriction against any member owning more than five shares. It was held that the purchaser was entitled to have the share of stock in controversy transferred to his name although he had more than five shares at the time of purchase and had knowledge of the restriction.

[75] Mich. Comp. Laws sec. 450.100 (1948).

[76] Mich. Comp. Laws sec. 450.2 (1948), as amended by Mich. Pub. Acts 1949, No. 229.

members in a non-stock corporation. If the Uniform Stock Transfer Act[77] is inconsistent with such limitations, the provisions of that Act are held inapplicable.[78] It is to be noted, however, that restrictions on the transfer of stock in the ordinary profit corporation also are upheld if they are contained in the articles and printed on the stock certificate.[79] Thus, it would seem that, as far as the validity of such restrictions is concerned, the cooperative or profit character of the corporation would make little difference. There may be a difference, however, in underlying philosophy. Except in the rather closely held profit corporation, wherein the parties seek to maintain control for themselves and nominees, restrictions on the transfer of stock would be more of a detriment than a benefit. Marketability of such stock is essential to attract capital. In the cooperative, on the other hand, where the emphasis is on service to the members, there may be many reasons for restricting membership.[80]

Other provisions likewise recognize and authorize the cooperative practice of selecting members. It is provided,

[77] Mich. Comp. Laws secs. 441.1 to 441.25 (1948).

[78] Mich. Comp. Laws sec. 450.100 (1948).

[79] Mich. Comp. Laws sec. 441.15 (1948), requires the restriction to be stated on the stock certificate. Mich. Comp. Laws sec. 450.4(2) (1948), as amended by Mich. Pub. Acts 1953, No. 155, authorizes provisions in the articles for creating and defining rights of the shareholders among themselves.

[80] See p. 16 *supra*. Packel, *op. cit. supra* n. 1 at 92, stresses the personal character of the ownership interest in a cooperative, and asserts that restrictions on transfer are necessary in order to exclude undesirable or hostile persons. It may also be necessary to limit membership in order to receive governmental benefits. Int. Rev. Code sec. 521 (1954) requires that substantially all the voting stock be owned by producers in order for agricultural cooperatives to qualify for income tax exemption. A similar requirement would seem to exist for eligibility for loans from banks for cooperatives, 12 U.S.C.A. secs. 1141j and 1134c (1945 and 1954 Supp.).

for example, that either the articles or by-laws may provide for qualifications of shareholders or members, limitations or regulations on the transfer of such membership, and also for the terms or conditions under which, if at all, such membership or stock may be transferred.[81] It is further provided that no transfer, sale, or assignment shall be valid unless in conformity with such provisions, and even that no attachment or transfer by operation of law shall be valid unless in accordance with them.[82] These sections give the cooperatives extensive privileges in limiting membership to those who have an active interest in the enterprise.

An interesting case illustrating the flexibility of membership provisions and methods of cooperative operation is that of *Edmore Marketing Association* v. *Skinner*.[83] In this case the defendant signed a contract with the cooperative providing that the contract would take effect upon the signing of similar agreements by at least fifty per cent of the growers of commercial acreage of potatoes in the marketing area. After a number of years of compliance, defendant sold his potatoes to others, and the cooperative brought an action for breach of contract. It was held that the method of computation used by the cooperative in ascertaining that the required percentage of the growers had signed contracts was defective, and therefore the agreement was ineffective, plaintiff not having showed that the condition precedent had been met. The contract further stipulated that the defendant would become a member of the cooperative when his contract took effect. Since his contract never took effect, it was held that he was not a member, having exercised no other rights of membership,

[81] Mich. Comp. Laws sec. 450.102 (1948).
[82] *Ibid.*
[83] 248 Mich. 695, 227 N.W. 681 (1929).

and hence recovery by the cooperative could not be based on by-law provisions.[84]

Organization. The shareholders or members are given wide discretion in setting up the organization of their cooperative. They may adopt and amend by-laws, determine the manner of distributing earnings on a cooperative basis, limit and define the powers and duties, as well as determine the number of directors and officers, and, in short, determine practically all questions concerning the internal organization and functioning of the enterprise.[85] In addition, they may delegate all their powers to the directors, with the exception of the powers to amend the articles and to elect or dismiss directors.[86]

The construction and effect of the by-laws of a cooperative have been considered by the Michigan judiciary in several instances. A by-law giving the board of directors the power to remove an officer "for the best interest of the company" has been recognized as valid and given full effect as against one with knowledge.[87] Although in the particular case the complaining party was apparently a member, the by-law was said to be binding on both members and nonmembers alike so long as they had actual knowledge. It also was indicated that a managing officer would not be chargeable with knowledge as a result of his office.[88] It has been held that a by-law is not binding on a nonmember who has no knowledge of it,[89] but is enforceable

[84] *Ibid.*

[85] Mich. Comp. Laws sec. 450.101 (1948).

[86] *Ibid.*

[87] Rundell v. Farmers' Co-Operative Elevator Co. of Corunna, 210 Mich. 642, 178 N.W. 21 (1920).

[88] *Ibid.*

[89] Harley v. Hartford Fruit Growers and Farmers Exchange, 216 Mich. 146, 184 N.W. 507 (1921).

against the cooperative on the insistence of a member.[90] In a case involving this latter proposition, the by-laws provided that the cooperative should act as the agent of the members in marketing their produce. It was further provided that daily pools of products should be the method of disposition and that each member's interest should be ascertained daily upon the selling of the pool. The plaintiff member recovered his entire interest in such a pool after showing that his products were sold and cash received therefor. He did not have to share losses arising out of the sale of subsequent pools.[91]

In regard to the status of contracts entered into between the incorporators and third parties prior to the act of incorporation, the fact that the proposed corporation is a cooperative is of no significance. Section 8[92] of the General Act provides that such contracts shall not be deemed invalid because they were made prior to the filing of the articles. An earlier statute to the same effect was significant in *Hart Potato Growers Association* v. *Greiner*.[93] In this case, the court said that such a pre-incorporation contract would become effective at the time of signing by the incorporators or, if not then, at least at the time the corporation adopted or ratified it.[94] In construing the present statute[95] in another case[96] the court held that, when the corporation became liable, the contract was exclusively between it and the other party, the promoter incurring no

[90] Cole v. Southern Michigan Fruit Association, 260 Mich. 617, 245 N.W. 534 (1932).

[91] *Ibid.*

[92] Mich. Comp. Laws sec. 450.8 (1948).

[93] 236 Mich. 638, 211 N.W. 45 (1926).

[94] *Ibid.*

[95] Mich. Comp. Laws sec. 450.8 (1948).

[96] In re Montreuil's Estate, 291 Mich. 582, 289 N.W. 262 (1939).

liability in the absence of a personal pledge. In effect, a statutory agency[97] or possibly a novation is accomplished.

Amendment. An amendment to the articles or by-laws may be proposed by one tenth of the membership according to express statutory provision.[98] Since the provision refers to one tenth "of the entire number of shareholders"[99] it seems apparent that the required percentage refers to per capita membership and not to financial or stock interest. Although the required percentage approval necessary for adoption is not stated in this section, it would seem that a majority approval would be sufficient. In case of a stock plan cooperative, section 43 providing for approval by a majority of the voting stock would seem to apply.[100] In case of a non-stock cooperative, approval would be by a majority of the members.[101] Although these stat-

[97] See note, 38 MICH. L. REV. 1266 (1940).

[98] Mich. Comp. Laws sec. 450.103 (1948).

[99] *Ibid.*

[100] Mich. Comp. Laws sec. 450.43 (1948), as amended by Mich. Pub. Acts 1953, No. 155. This section also provides that if such an amendment changes the rights or preferences of the holders of any class of shares, then the amendment must be approved also by a majority of the shares so changed.

[101] Mich. Comp. Laws sec. 450.507 (1948). The significance of this section in relation to amendments is not clear. Although in express terms it relates to nonprofit corporations without capital stock, the same requirement of majority approval is reached by application of Mich. Comp. Laws sec. 450.43 (1948), as amended by Mich. Pub. Acts 1953, No. 155, and Mich. Comp. Laws sec. 450.2 (1948), as amended by Mich. Pub. Acts 1949, No. 229, section 2 equating share of stock with membership in a non-stock corporation. Mich. Comp. Laws sec. 450.507 is a carry-over from an older act, and the part dealing with amendments begins: "Where no other provision is especially made. . . ." In view of sections 2 and 43 of the General Act noted *supra,* it would seem that the application of Mich. Comp. Laws sec. 450.507 to amendments would be quite limited. In this regard, note also that amendments to profit corporations under this section would require a two-thirds approval, and that Mich. Comp. Laws sec. 450.43, as amended by Mich. Pub. Acts 1953, No. 155, requiring

utes confer the power to amend on the designated majorities without specifically authorizing the members to determine a different requirement in the articles or by-laws, a different provision in the articles requiring a higher percentage of approval would probably be valid. Paragraph 2 of section 4[102] authorizes the articles to contain "other provisions consistent with the laws of this state for regulating the business of the corporation and for the conduct of its affairs, and any provisions creating, defining, limiting and regulating the exercise of the powers of the corporation or of the directors or of the shareholders, or for the purpose of creating and defining rights and privileges of the shareholders among themselves."

It is to be noted that the statute providing for initiating the amendment is permissive in language. This suggests that the members might provide in the articles or by-laws other means by which amendments could be proposed, as, for example, by the board of directors. As for the time of voting, the statute provides that the amendment so proposed shall be voted on at the next annual meeting.[103] This language is not permissive and therefore seems to exclude approval at any other time. However, the statutes setting forth the percentage approval required for adoption refer to meetings "duly called and held"[104] and to "any regular meeting, or at any special meeting, called for that purpose."[105] Thus, construing all the statutes together, the following conclusions seem valid. One tenth

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only a majority approval, would supersede this section unless the corporation were existing by authority other than the General Act.

[102] Mich. Comp. Laws sec. 450.4(2) (Mason's Supp. 1954).

[103] Mich. Comp. Laws sec. 450.103 (1948).

[104] Mich. Comp. Laws sec. 450.43 (1948), as amended by Mich. Pub. Acts 1953, No. 155.

[105] Mich. Comp. Laws sec. 450.507 (1948).

of the membership may propose an amendment, and such amendment shall be voted on at the next annual meeting. The members are powerless to deny this right to one tenth of the membership or to provide any time for voting on such a proposed amendment other than at the next annual meeting. On the other hand, the members may provide in the articles or by-laws other methods of proposing amendments, and may also designate the time when such proposals may be submitted to the membership.

Investment of reserves. Cooperatives are authorized to invest a portion of their reserve fund in the capital stock or membership capital of another corporation or cooperative.[106] For such action a majority of those present or represented at the meeting is required.[107] Of course, there must be a quorum present; the number constituting a quorum is to be fixed by the by-laws and need not be a majority.[108] Although the statute is not explicit, it would seem that, if stock instead of per capita voting were practiced, the decision would be controlled by a majority vote in interest. It is to be noted that the amount of investment is limited to twenty per cent of the aggregate of the corporation's capital.[109]

The exact effect of this limitation is a little obscure owing to the ambiguity of the term capital. In section 20[110] of the Act, "capital" apparently signifies the item on the liability side of the balance sheet and is determined according to the procedure therein specified. On the other

[106] Mich. Comp. Laws sec. 450.104 (1948).

[107] *Ibid.*

[108] Mich. Comp. Laws sec. 450.101 (1948), as amended by Mich. Pub. Acts 1949, No. 232.

[109] Mich. Comp. Laws sec. 450.104 (1948).

[110] Mich. Comp. Laws sec. 450.20 (1948).

hand, section 5[111] of the Act, which specifies the minimum amount of capital with which the corporation may begin business, apparently uses the term to mean the assets which have been contributed by the shareholders. General usage is of little help because of the customary looseness[112] with which such terms as capital and capital stock are used, and also because it is the particular statutory meaning that is controlling.

If capital is used in the restricted sense to mean simply the balance sheet item, exclusive of reserves, surplus, and other possible accounts contributing to the net worth[113] of the company, then the amount that may be invested in other businesses will be somewhat limited and rigid. However, if capital is used in a broader sense so as to include substantially all of the net worth, the amount available for such investment will be correspondingly greater. Under this latter interpretation, the amount that could be invested, although limited to twenty per cent of the capital, would be restricted only by the cooperative's ability to make and retain surplus earnings. There would be even less restriction if capital were construed to mean all the assets irrespective of liabilities.

Of these possible interpretations, it is believed that the second is the one intended. The third is unlikely because "capital" generally connotes something less than the entire assets. The first is unlikely because of context. It is

[111] Mich. Comp. Laws sec. 450.5(3) (1948), as amended by Mich. Pub. Acts 1953, No. 155.

[112] See generally, Fletcher, CORPORATIONS sec. 5080 (1931).

[113] In this sense, net worth is equivalent to the difference between the assets and the liabilities exclusive of the shareholders' interest. *Cf.* "Net worth is equal to the difference between the assets and liabilities, which in the case of a corporation is equal to the capital stock plus surplus or minus deficit." Montgomery, FINANCIAL HANDBOOK 102 (1937).

to be noted that the statute in setting up the limitation refers to twenty per cent "in the aggregate"[114] of the corporation's capital. If capital simply meant the balance sheet item, the phrase "in the aggregate" would be surplusage. It seems that the statute envisions a totaling of the items representing net worth or assets contributed or produced by the shareholders. This conclusion is fortified by additional reasoning. Section 20[115] of the Act permits the capital item to be increased by transferring to it other portions of the net worth of the company. With such a provision in effect, it would be of no avail to restrict "capital" in section 104 to a specific balance sheet item when the corporation could by a resolution of the board increase it by transferring these other items to it. This result also seems most consistent with cooperative theory and practice of maintaining flexible capital structures and with the expressed legislative approval of permitting cooperation and coordination among cooperatives. The proposed Act avoids this ambiguity by the use of an appropriate definition.[116]

It is clear, however, that the statute does limit somewhat the amount of corporate pyramiding that can be done in the cooperative field. Although a cooperative can increase its holdings or control over other firms by increasing its capital, still only twenty per cent of such amount can be so invested. Thus, every cooperative must be an operating company, and the holding company[117] as such cannot exist in the cooperative field under Michigan statutes. The additional requirement that at least fifty per cent of its busi-

[114] Mich. Comp. Laws sec. 450.104 (1948).

[115] Mich. Comp. Laws sec. 450.20 (1948).

[116] Part II, Proposed Act, sec. 209.

[117] Obviously, this refers to the holding company whose sole purpose is to acquire stock in and control other corporations.

ness be conducted with members[118] makes this clear. This result is justified because of the cooperative concept which envisions performance of service for its members.

On the other hand, however, the statute under consideration does permit inter-company affiliations and co-ordinations to a fairly large extent. Thus, local cooperatives can collectively organize a regional cooperative for bulk selling, shipping, buying, or other services. Likewise, the initiative can be exerted in the opposite direction, the central cooperative encouraging the formation of intermediate and local organizations. The only restriction is the twenty per cent limitation on investment, the other eighty per cent being used to carry on business.

Purchase of business. The outright purchase of businesses is expressly authorized, and payment in stock instead of cash is approved.[119] The statute,[120] however, refers only to issuing par stock for the purchase and, therefore, apparently prohibits the issuance of no par stock for such a transaction. This conclusion seems correct since the legislature has made provision for no par stock elsewhere.[121] It would seem that the intentional inserting of the phrase "at par value" negatives any approval of consummating the transaction with no par stock. It is expressly provided that the issuance of such stock for the fair market value of the purchased business is equivalent to payment in cash.[122]

Although there is no express provision for the merger or consolidation of cooperatives, there would seem to be

[118] Mich. Comp. Laws sec. 450.98 (1948).

[119] Mich. Comp. Laws sec. 450.105 (1948).

[120] *Ibid.*

[121] E.g., Mich. Comp. Laws secs. 450.19 (1948) and 450.4 (1948), as amended by Mich. Pub. Acts 1953, No. 155.

[122] Mich. Comp. Laws sec. 450.105 (1948).

no reason why such corporations could not take advantage of section 52[123] of the General Act. Since there is no provision in the cooperative sections, there would seem to be no conflict, and hence the more general provisions would be applicable. However, in many cases, essentially the same results can be achieved by the outright purchase of another business, and this procedure is much simpler. Action taken under the merger statute,[124] for example, requires the approval of two thirds of all the shareholders in each corporation, whereas for the purchase and sale of assets there is required only a majority approval of the shareholders unless the articles provide otherwise.[125]

Mode of operations. The Michigan Act expressly permits an agricultural cooperative to conduct business with its members and others on any type of recognized basis that is desirable.[126] Thus, it may enter into "any and all necessary contracts with stockholders, members or other persons respecting the terms of such transaction, and may deal in such commodities upon commission or brokerage basis, by agency agreements, or upon a warehouse storage plan."[127] Outright buying and selling is also approved by the introductory clause: "Every cooperative corporation engaged in buying, handling, selling . . . ."[128]

The purpose and effect of this statute is a little obscure

[123] Mich. Comp. Laws sec. 450.52 (1948).

[124] Mich. Comp. Laws sec. 450.52 (1948).

[125] Mich. Comp. Laws sec. 450.57 (1948), as amended by Mich. Pub. Acts 1951, No. 239, for the sale of assets. As to the purchasing corporation, it would seem that the decision of the board would be sufficient unless the by-laws provided otherwise or the articles had to be amended. The amendment procedure is discussed p. 38 *supra.*

[126] Mich. Comp. Laws sec. 450.108 (1948).

[127] *Ibid.* See text discussion, "Relationship with members," p. 14 *supra.* For an example of an agency contract, see Cole v. Fruit Association, 260 Mich. 617, 245 N.W. 534 (1932).

[128] Mich. Comp. Laws sec. 450.108 (1948).

except in so far as it is thought necessary and desirable for the state expressly to approve institutional practices. A cooperative by nature must necessarily enter into business transactions with its members and, unless the power to enter into agency, brokerage, or warehouse storage agreements is otherwise restricted, there seems to be no reason why such power should be expressly conferred. There is also the question as to the reason for limiting these provisions to agricultural cooperatives, and the effect, if any, of such limitation. It seems unlikely that the express confirmation of such power in agricultural cooperatives necessarily denies it in other cooperatives. All cooperatives under the statute[129] must do at least fifty per cent of their business with members. This necessarily entails making contracts, and the type of such contracts is not limited. Furthermore, the statute does not solve the problem[130] as to whether such contracts constitute an agency, trust, or purchase relation, because it simply authorizes all types. It would seem that this statute could be repealed without any hardship on cooperatives, but, that if it were thought desirable to retain it, its application should not be restricted to agricultural organizations.

Inducing breach of contract. The Act gives to the cooperatives a cause of action against anyone who induces another to breach his contract with such a corporation.[131] Under these provisions, the cooperative is entitled to a five hundred dollar penalty assessed against the offender, reasonable attorney fees, costs arising out of the litigation, and also an injunction against further interference. This section is not limited to agricultural cooperatives. Insofar as the legislative policy is the furtherance of cooperatives,

[129] Mich. Comp. Laws sec. 450.98 (1948).

[130] See text discussion, "Relationship with members," p. 14 *supra.*

[131] Mich. Comp. Laws sec. 450.109 (1948).

a statute of this kind is desirable and advantageous. The express formulation of the basis for an action in this area concerning the interference with contractual relations[132] results in a high degree of certainty. Likewise, the setting forth of the remedies available increases certainty and undoubtedly results in a greater accumulation of remedial rights than might be available under the common law.

Miscellaneous. In this section consideration is given to a few problems not specifically covered by statute. The problem of the authority of the corporation and of its agents has received judicial attention. In general, it can be said that the question of ultra vires in these two instances is treated the same as in general corporate law. In *David Stott Flour Mills* v. *Farm Bureau,*[133] the organization was successful in avoiding liability because of the lack of authority of the agent. In this case, the court permitted a last minute change in pleading because it said a more liberal rule should apply to nonprofit corporations than to individuals. The justification of such an attitude is not apparent. The court approved the jury's finding of no estoppel on the part of the defendant corporation, and affirmed the requirement of the lower court that for an estoppel there must not only be an apparent authority of the agent, but reliance by the third party to his detriment after due diligence. For ratification, the court required that knowledge of the unauthorized acts be brought home to the corporation and an acceptance of their bene-

[132] See generally Prosser, TORTS 972 (1941); Hulbert, *op cit. supra* n. 2, at 194.

[133] 237 Mich. 657, 213 N.W. 147 (1927). The exact nature of defendant corporation is not clear. It was organized under Pub. Acts 1903, No. 171, which was a general act for the incorporation of nonprofit organizations and, although obviously including social and fraternal groups, apparently was not limited to organizations of that kind.

fit. Although the case[134] illustrates the applicability of general agency doctrines, the requirements to overcome the actual lack of authority seem rather stringent.[135]

The defense of ultra vires was successfully pleaded by a cooperative insurance company which had issued an endowment policy contrary to its authorized powers.[136] The court stated that, although the defense of ultra vires is not looked upon with favor, a contract clearly ultra vires statutory authority may not be enforced. The corporation in this case was organized under a general act authorizing incorporation only for designated purposes. Insurance is a matter of public interest and is closely regulated. Section 11 of the General Corporation Act restricts the availability of the defense of ultra vires.[137] In the first type of case under the statute, only the corporation can plead ultra vires in an action between it and an officer or director or other persons having actual knowledge. In the second type of case involving suits between the corporation and shareholders, either party can avail himself of the defense.[138]

The effect of this statute in the field of cooperation, where the bulk of business is done with members, is to leave many instances where the defense of ultra vires is still available. It is to be doubted that most members of cooperatives or of other corporations, particularly of the larger ones, have actual knowledge of the corporation's limited powers, and hence the advisability of allowing the

[134] *Ibid.*

[135] See also Michigan Wolverine Co-operative v. Goodyear, 314 Mich. 590, 22 N.W. (2d) 884 (1946); Harley v. Fruit Growers and Farmers Exchange, 216 Mich. 146, 184 N.W. 507 (1921).

[136] Anderson v. Conductors Protective Assurance Co., 266 Mich. 471, 254 N.W. 171 (1934).

[137] Mich. Comp. Laws sec. 450.11 (1948).

[138] *Ibid.* Note that this statute does not change the result in the Anderson case, note 136 *supra*.

defense simply on the basis of membership is to be questioned. Of course, the hostile attitude of the judiciary[139] may further limit the actual application of the doctrine, but, at least as to cooperatives, the present statute does not seem to go far enough in its restrictions. The proposed Act corrects this defect.[140]

The liability of a cooperative for the torts of its agents should be a foregone conclusion and would scarcely merit attention were it not for the case of *Flueling* v. *Goeringer*.[141] In this case, a cooperative taxicab company was held not liable for the negligence of its member-operator. The corporation, however, acted only as a service company for the owner-members. Its activities were confined to receiving service calls, fixing rates, apportioning territory, and maintaining equipment. The court stated that there were no funds out of which the corporation could satisfy a judgment. This proposition should be of no more consequence in determining liability here than in any other instance. The financial responsibility of the defendant is not the legal test of liability. In spite of the apparent poor reasoning, however, the case probably was decided correctly. It appears that the cooperative was not engaged in running the cabs but simply was performing service for the cab owners. The tort, therefore, did not occur in the course of the cooperative's activities, but instead occurred in a related but disconnected field of endeavor. Therefore, the nonliability of the cooperative correctly followed.[142]

That the above reasoning is the correct rationale of the

[139] See Anderson v. Conductors Protective Assurance Co., 266 Mich. 471, 254 N.W. 171 (1934).

[140] Part II, Proposed Act, sec. 216.

[141] 240 Mich. 372, 215 N.W. 294 (1927).

[142] See generally Packel, *op. cit. supra* n. 42, at 169; Hulbert, *op. cit. supra* n. 2, at 239.

Flueling case may be suggested by the older case of *Logan* v. *Agricultural Society of Lenawee County*.[143] In this case, a spectator at a horse race sponsored by the defendant recovered a judgment for injuries resulting from defendant's negligence. The fact that the defendant was not organized primarily to make money was of no consequence. The court pointed out that it was not a charitable or eleemosynary organization and asserted that, when it invited the public, it had the same duties as others similarly situated.[144]

There would seem to be no justification for holding cooperatives not liable for the torts of their agents or employees arising out of activities carried on by the cooperative. Insofar as the *Flueling* case has cast any doubt as to such liability, a specific statutory provision imposing liability is desirable.[145]

IV. Conclusion

The inclusion of separate cooperative provisions as an integral part of the General Corporation Act is a convenient and satisfactory method of providing for the incorporation of such organizations. By integrating the cooperative and regular corporation sections, much needless duplication is eliminated, since the cooperative sections need contain only provisions that are not applicable to other corporations.

Separate provisions for cooperatives serve a useful purpose and should be maintained so long as such organizations are approved. Lack of such express approval makes

[143] 156 Mich. 537, 121 N.W. 485 (1909). The fact that the defendant was not a cooperative but a nonprofit corporation for the advancement of agriculture does not detract from the validity of the comparison.

[144] *Ibid.*

[145] Part II, Proposed Act, sec. 201.

for uncertainty at the outset, and such uncertainty is not decreased as cooperative practices are forced into a profit corporation framework. The provision for the incorporation of cooperatives for any lawful purpose is desirable, as there would seem to be no more reason for restricting the purposes of such organizations than there is for restricting other corporations.

The foregoing analysis, however, does suggest a few ambiguities that might be eliminated. A specific attitude on the legality of a revolving capital fund would make for more certainty on this important item.[146] Section 103[147] concerning amendments could be clarified by stating whether or not the statutory method of proposing amendments is exclusive, and it should also state the required percentage of approval for adoption.[148] Section 104,[149] concerning the investment of reserves, seems sufficiently liberal to meet the legitimate requirements of cooperative operations, but the restriction is obscure owing to the uncertainty of the term "capital." The insertion of a definition would eliminate the difficulty.[150]

It is not clear that section 108,[151] authorizing the cooperative to enter into various types of contracts with its members, serves any necessary purpose. If it does, however, there would seem to be no valid reason for restricting its application to agricultural cooperatives.[152] Further limitations on the defense of ultra vires are thought desirable,[153]

[146] Part II, Proposed Act, sec. 212.
[147] Mich. Comp. Laws sec. 450.103 (1948).
[148] Part II, Proposed Act, sec. 208.
[149] Mich. Comp. Laws sec. 450.104 (1948).
[150] Part II, Proposed Act, sec. 209.
[151] Mich. Comp. Laws sec. 450.108 (1948).
[152] Part II, Proposed Act, sec. 214.
[153] Part II, Proposed Act, sec. 216.

and a statutory imposition of tort liability would do no harm.[154]

No provision is made in the Michigan Act for the withdrawal of members as there was in the Uniform Agricultural Cooperative Act.[155] This, however, is probably just as well, since such matters can conveniently be regulated by the parties themselves in their contracts, by-laws, or articles. No specific provisions are made concerning damages for breach of contract, although, as indicated,[156] provision is made for actions against those inducing the breach of such contracts. The Uniform Act contained provisions covering both of these situations,[157] but, unless there is some reason to believe that the common-law remedies are inadequate protection for the cooperative, additional provisions need not be added.

Provision was made in the Uniform Act for the recording of marketing contracts.[158] Recordation was constructive notice of the association's title or right to all subsequent purchasers, encumbrancers, or persons dealing with the members in reference to such product, and the association's right or interest was made superior to the subsequent interest.[159] The Michigan Act contains no such provision. The desirability of including such a statute is primarily a question of legislative policy and should be determined after a factual study of the economic status of agriculture

[154] Part II, Proposed Act, sec. 201.

[155] Uniform Agricultural Cooperative Act sec. 18. This act was withdrawn in 1943.

[156] See text, "Inducing Breach of Contract," p. 45 *supra*.

[157] Uniform Agricultural Cooperative Act secs. 18 II and 19. The act was withdrawn in 1943.

[158] Uniform Agricultural Cooperative Act sec. 18 IV. The act was withdrawn in 1943.

[159] *Ibid.*

and the advantages to be derived from such legislation. Two problems may be suggested.

Under Michigan law, a farmer may sell a crop to be grown in the future and title passes upon germination.[160] In the absence of a recording statute, a subsequent purchaser or mortgagee has no way of ascertaining the prior sale, and therefore apparently receives nothing from the transaction except a cause of action against the seller or mortgagor.[161] Insofar as the first sale is to a cooperative, a statute of the above type would cover this situation and

[160] Michigan Sugar Co. v. Falkenhagen, 243 Mich. 698, 220 N.W. 760 (1928); In re Miller, 244 Mich. 302, 221 N.W. 146 (1928); Dickey v. Waldo, 97 Mich. 255, 56 N.W. 608 (1893). That the Uniform Sales Act did not change this result is suggested by the Falkenhagen case which arose subsequent to the enactment of the Uniform Act. Section 5 of the Sales Act (Mich. Comp. Laws sec. 440.5 (1948)), treats a sale of future goods as a contract to sell the goods. The effect of section 25 of the Act (Mich Comp. Laws sec. 440.25 (1948)), was not discussed. For a discussion of this section see n. 161 *infra*.

[161] See Michigan Sugar Co. v. Falkenhagen, 243 Mich. 698, 220 N. W. 760 (1928). See generally, Hulbert, *op. cit. supra* n. 2, at 134, and particularly at 136 *et seq*. It is possible that section 25 of the Uniform Sales Act (Mich. Comp. Laws sec. 440.25 (1948)), providing that where a seller retains possession of goods after sale and then sells to a bona fide purchaser, the transaction shall have the same effect as if expressly authorized by the owner, would protect the second purchaser. On the other hand, it may be held inapplicable to a sale of future crops because of the impossibility of delivery. See Hulbert, p. 138, and Pacific Wool Growers v. Draper & Co., 158 Ore. 1, 73 P. (2d) 1391 (1937), holding that the second purchaser acquired title. There was also an element of estoppel against the association.

Presumably, section 7 of the Uniform Fraudulent Conveyance Act (Mich. Comp. Laws sec. 566.137 (1948)), would not change the result, because any presumption of fraud arising out of the seller's retention of possession would be rebutted by the nature of the subject matter, a growing crop. It is to be noted that this section provides for the recordation of bills of sale in those instances where the seller is to retain possession. Recording under this section does not charge anyone with constructive notice but simply rebuts the presumption of fraud. Thus, it is very likely that the second purchaser gets no title.

render certain the title of the cooperative. It would also include others as, for example, an executory contract to sell at a future time. In the absence of such a statute in this case, the cooperative may be left with a cause of action for breach of contract against the member, and legal title may be acquired by the second purchaser.[162]

The granting of such broad protection to agricultural cooperatives as was done in the Uniform Act primarily represents a policy based upon the desirability of furthering such organizations. Irrespective of the cooperative considerations, however, provision might well be made for the recordation generally of contracts involving the sale of future crops in order adequately to protect or warn subsequent bona fide purchasers and mortgagees.

In general, the present provisions are fairly adequate, sympathetic, and liberal toward cooperative practices. Cooperatives are given wide discretion in setting up their organization, in selecting a basis for the conduct of business, in the distribution or retention of earnings, and in the control over membership.

[162] This conclusion is supported by Tobacco Growers Co-Operative Association v. Harvey & Son Company, 189 N.C. 494, 127 S.E. 545 (1925), in which case subsequent lienors were held entitled to enforce their claims independently of the cooperative with which the growers had entered into contracts *to sell* their crops. See also Hulbert, *op. cit. supra* n. 2, at 135.

CHAPTER III

Nonprofit Corporations Generally

I. COVERAGE

THESE sections are the most comprehensive of all the statutory provisions herein studied. They encompass many types of corporations for which more specific statutes may also be provided. It will be readily apparent that churches, charitable foundations, labor organizations, secret fraternal societies, organizations of professional men, patriotic associations, cemeteries, and countless other groups either are or may be nonprofit organizations. The nature of these groups may range from a small bird-watching society with practically no funds to huge foundations or charitable trusts endowed with millions of dollars. They may vary from solitary units with a handful of members to vast international organizations with millions of members. They may encompass units whose sole purpose is social or cultural as well as those which control particular types of employment or exert vast political and economic influence. Clearly, the formulation of intelligent, flexible, and just provisions sufficiently comprehensive to provide adequately for this multitude of divergent groups is a challenging task.

The incorporation of the nonprofit social type of organization is governed in Michigan by the provisions of sections 117 to 132a of the General Corporation Act.[1] Practically all types of social, political, historical, cultural, scientific, literary, and similar organizations with a lawful

[1] Mich. Pub. Acts 1931, No. 327 as amended; Mich. Comp. Laws secs. 450.117 to 450.132a (1948).

and nonprofit purpose may be organized under these sections.[2] Burial and funeral benefit societies, except for three specific exemptions,[3] are excluded since such organizations must conform to the Insurance Code.[4] However, societies for the relief of distressed members which do not pay more than one hundred and fifty dollars on account of any one member may incorporate under these provisions.[5] Further, nonprofit organizations hereinunder incorporated may

[2] Section 132 provides in part: "The provisions of sections 117 to 131, both inclusive, of this act shall be held to apply to all associations, societies and corporations of the nature of clubs, boards of trade and commerce, associations of persons engaged in the same or allied professions, trades, occupations and industries, when such persons desire to associate for mutual benefit, comfort or instruction not involving direct pecuniary profit; and to societies for the advancement of particular scientific or sociological, political views or opinions, the collection and dissemination of historical or scientific facts, the advancement of literature, cultivation of art, the prevention of cruel and inhuman practices, and to any other such society, except . . . ." Mich. Comp. Laws sec. 450.132 (Mason's Supp. 1954).

[3] These are the Ladies Lutheran Benevolent Federation of Michigan, the Metropolitan Club of America, Inc., (National Spirit), and the Ladies Auxiliary of the Metropolitan Clubs of America National Spirit. The first two of these organizations were exempted by amendments in 1945 (Mich. Pub. Acts 1945, No. 229 for the Metropolitan Club of America, and Mich. Pub. Acts 1945, No. 326 for the Ladies Lutheran Benevolent Federation), after the Attorney General construed section 132 as prohibiting the Ladies Lutheran Federation from paying death benefits up to $500 in spite of an express exemption in the Insurance Code, Mich. Comp. Laws sec. 524.29 (1948). The Attorney General's opinion is found in 1945–46 Mich. Ops. Att'y. Gen. p. 246. The exemption in favor of the Ladies Auxiliary of the Metropolitan Clubs was passed in 1952. Mich. Pub. Acts 1952, No. 23.

[4] Mich. Comp. Laws secs. 501.1 *et seq.* (1948). See 1941–42 Mich. Ops. Att'y. Gen. p. 350; 1945–46 Mich. Ops. Att'y. Gen. p. 493.

[5] Mich. Comp. Laws sec. 450.132 (Mason's Supp. 1954). The Attorney General has concluded that this section includes benevolent societies whose relief payments are only incidental to the main purpose, but does not include organizations whose sole purpose is the payment of sick benefits. 1937–38 Mich. Ops. Att'y. Gen. p. 344.

buy and sell products for their members if without direct pecuniary profit.[6]

II. History of the Michigan Statutes

As was the prior practice with other corporations,[7] nonprofit organizations were incorporated either by specific act or by general acts of rather limited scope. Thus, for example, there were acts to incorporate teachers' associations,[8] musical societies,[9] companies for the detention and apprehension of horse thieves,[10] gymnastic societies,[11] boards of trade and chambers of commerce,[12] polytechnic associations,[13] eclectic medical societies,[14] firemen's associations,[15] engineering societies,[16] merchants' and traders' associations,[17] associations for the prevention of cruelty to

[6] Mich. Comp. Laws sec. 450.132 (Mason's Supp. 1954).

[7] See *supra* chapter 1, sec. 3, History of the Michigan General Corporation Act, p. 7.

[8] Mich. Pub. Acts 1855, No. 117. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[9] Mich. Pub. Acts 1857, No. 128. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[10] Mich. Pub. Acts 1859, No. 217. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[11] Mich. Pub. Acts 1861, No. 212. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[12] Mich. Pub. Acts 1863, No. 166. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec.1.

[13] Mich. Pub. Acts 1869, No. 95. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[14] Mich. Pub. Acts 1877, No. 58. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[15] Mich. Pub. Acts 1879, No. 111. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[16] Mich. Pub. Acts 1887, No. 232. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[17] Mich. Pub. Acts 1887, No. 299. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

animals,[18] and assocations for the prevention of cruelty to children.[19] In 1903[20] a rather brief act was passed providing for the incorporation of nonprofit organizations generally, and providing that in the future all nonprofit corporations without capital stock, except religious associations, were to organize under that act. Notwithstanding this provision, however, there were at least two subsequent acts of a limited nature. These provided for the incorporation of women's[21] and art clubs.[22] The General Incorporation Act of 1921[23] repealed these acts of limited scope and enacted general provisions for the incorporation of nonprofit organizations.[24] The substance of these provisions was adopted in the General Corporation Act of 1931[25] and, with minor amendments, constitute the present provisions.

III. Integration with Other Provisions of the Michigan General Corporation Act

Authorization. Any number of persons not less than three may incorporate a nonprofit organization for any lawful purpose not involving pecuniary gain to the mem-

[18] Mich. Pub. Acts 1877, No. 119. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[19] Mich. Pub. Acts 1893, No. 161 and Mich. Pub. Acts 1899, No. 206. Both repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[20] Mich. Pub. Acts 1903, No. 171. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[21] Mich. Pub. Acts 1905, No. 64. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[22] Mich. Pub. Acts 1913, No. 245. Repealed by Mich. Pub. Acts 1921, No. 84, Pt. 5, c. 3, sec. 1.

[23] Mich. Pub. Acts 1921, No. 84.

[24] Mich. Pub. Acts 1921, No. 84, Pt. 3, c. 1.

[25] Mich. Pub. Acts 1931, No. 327 as amended, sections 117 to 132a; Mich. Comp. Laws secs. 450.117 to 450.132a (1948).

bers.[26] The requirement of three incorporators may be noted. It is provided that one person, either natural or corporate, may incorporate a profit corporation.[27] This is a realistic approach, since many small businesses are in fact incorporated by one dominant stockholder, even in states that require more than one incorporator. The requirement of more than one incorporator can so easily be satisfied by having family members or attorneys hold a nominal interest for a short time that it serves no useful purpose in the business corporation. Similarly, a requirement that the incorporators be natural persons presents no effective barrier to a corporation being the real incorporator. It is a simple matter for the corporation's officers to sign the articles of incorporation of the new organization.

The Michigan statutes make no specific requirement as to the number of incorporators for cooperatives,[28] and, therefore, the general requirement of one incorporator would seem to apply. It is apparent that there must be more than one real party in interest in a cooperative, since the fundamental theory of the organization is mutual service for the members.[29] Furthermore, the statute requires that at least fifty per cent of the business be done with members.[30] Similarly, there must be more than one real party in interest in the case of these social nonprofit corporations since they originate from a felt need for the

[26] Mich. Comp. Laws sec. 450.117 (1948).

[27] Mich. Comp. Laws sec. 450.3 (1948). In speaking of this requirement in relation to the General Corporation Act of 1931, it was stated: "Lawyers will recognize statutory permission to do directly what in the past has been done by technical subterfuge." James, "The New Michigan Corporation Act," 11 MICH. S. B. J. 187, 187 (1931).

[28] Mich. Comp. Laws secs. 450.98–450.109 (1948).

[29] *Supra,* c. 2, sec. 1, Nature of Cooperatives, p. 10.

[30] Mich. Comp. Laws sec. 450.98 (1948).

society, companionship, or assistance of others. It might be argued, therefore, that there is good reason for requiring more than one incorporator. This is undoubtedly true, but the same argument can be made in the case of cooperatives, yet the statutes contain no such requirement. From a practical standpoint, it really makes little difference whether the statute requires one or several incorporators. There certainly could be no active club or social organization without active members regardless of the number of incorporators. The requirement of a sole incorporator, as is recommended in the proposed Act,[31] would simply make for greater ease of incorporation. The statutory provision[32] permitting just three of the incorporators to sign the articles in case there are more at the organizational meeting indicates legislative recognition that there is no special significance in the number of incorporators.

It is provided that any nonprofit corporation can be organized on either a stock or non-stock basis.[33] If it is organized on a non-stock basis, then the articles shall state, in lieu of the specified amount of capital stock, the amount of assets which the corporation possesses and the terms of any general scheme of financing the organization.[34] There is no such similar express requirement in the case of a non-stock cooperative.[35] In such a case, however, the provisions requiring a statement of the stock structure would be clearly inapplicable. It would seem advisable, although perhaps not absolutely necessary, to state in the articles

[31] Part II, Proposed Act, sec. 217.

[32] Mich. Comp. Laws sec. 450.117 (1948).

[33] The permission, although not express, is necessarily implied from references to both stock and non-stock nonprofit corporations. See Mich. Comp. Laws secs. 450.117 and 450.119 (1948).

[34] Mich. Comp. Laws sec. 450.117 (1948).

[35] Mich. Comp. Laws secs. 450.98 to 450.109 (1948).

of a non-stock cooperative the general scheme of original financing. The proposed Act achieves this by requiring a statement of the property rights of the members in a non-stock cooperative.[36] The requirement of section 5[37] that a minimum of $1000 be paid in before the corporation commence business would seem to be applicable to all cooperatives but not to these nonprofit corporations. It is therefore omitted in the proposed Act.[38] These organizations do not contemplate doing business, and, therefore, there would seem to be no public policy in requiring them to possess any minimum amount of capital. The statute, simply requiring a statement of their assets without specifying any minimum amount,[39] confirms this conclusion. Such result is not inconsistent with the further provision that the General Act shall govern except as otherwise provided.[40] The proposed Act clarifies these provisions by providing separate sections[41] for the articles in both the cooperative and nonprofit sections.

Capitalization. Excessive capitalization of these nonprofit corporations is expressly prohibited by statute.[42] Capitalization is limited generally to the amount necessary to carry out the corporate purposes, but such amount includes that necessary for the purchasing or leasing of corporate property, the salaries of officers for five years, and the estimated expenses of operation aside from the annual or periodic contributions from sources other than annual

[36] Part II, Proposed Act, sec. 204(e).

[37] Mich. Comp. Laws sec. 450.5(3) as amended by Mich. Pub. Acts 1953, No. 155.

[38] Part II, Proposed Act, sec. 219.

[39] Mich. Comp. Laws sec. 450.117 (1948).

[40] Mich. Comp. Laws sec. 450.117 (1948).

[41] Part II, Proposed Act, secs. 204 and 219.

[42] Mich. Comp. Laws sec. 450.118 (1948).

membership fees.[43] This limitation of capitalization does not apply to corporations organized to carry out the terms of any trust instrument or to corporations used in connection with trust property to carry out the intention of the maker of such instrument.[44] Thus, there is a general requirement limiting capitalization to the amount necessary to carry out the purposes of the organization, but such requirement is not applicable to corporations administering or supplementing trusts.

This limitation is probably indicative of similar restrictions formerly rather common and originating from a fear of economic corporate concentrations.[45] This limitation in its present form works no real hardship because no minimum or maximum amounts are specified, the only restriction being whatever is necessary to carry out the corporate objects. The exemption in favor of trusts is a safeguard against possible losses to society of the gifts of benevolent donors. No specific penalties for violations are provided. Presumably the Michigan Corporation and Securities Commission could refuse to file the articles in case of a clear violation, and, probably, if other relief were warranted, a court of equity would have inherent power to grant it. It is difficult to see how the statute serves any real purpose. It is eliminated in the proposed Act.[46]

[43] *Ibid.*

[44] *Ibid.*

[45] This present provision is the same as Mich. Pub. Acts 1921, No. 84, Pt. 3, c. 1, as amended by Pub. Acts 1929, No. 267, being Mich. Comp. Laws sec. 10051 (1929). Before the 1929 amendment, capitalization was limited to a maximum of $500,000 unless the former Michigan Securities Commission consented to a greater amount. Mich. Pub. Acts 1921, No. 84, Pt. 3, c. 1, sec. 6. A somewhat similar maximum restriction was provided for the corporation formed by Mich. Pub. Acts 1865, No. 233. See sec. 5 of that act which is Mich. Comp. Laws 1871, sec. 3191, Mich. Comp. Laws sec. 8208 (1897), and Mich. Comp. Laws sec. 10742 (1915).

Stock. If the corporation is organized on a stock plan basis, the shares may be issued for any amount which the articles provide but for not more than one hundred dollars per share.[47] No dividends are to be paid on stock or membership investment, and the members are not entitled to dividends, earnings, or to a pro rata share of any increment in value.[48] Of course, at dissolution the excess assets over liabilities belong to the members.[49] Accordingly, if there are any increments in value during the life of the corporation, such would naturally inure to the benefit of the members at that time. These provisions are certainly warranted and consistent with the nature of these organizations. They are, however, inadequate in so far as they purport to cover all types of nonprofit corporations. It is clear, for example, that rarely would church members or members of charitable corporations expect to receive a pro rata share of the assets at dissolution. A more comprehensive treatment of this matter should therefore be enacted.[50]

Membership. The members of these nonprofit corporations are given wide latitude in regulating, restricting, or otherwise prescribing qualifications for membership.[51] It is provided that membership shall be governed by such rules of admission, retention, and dismissal as the articles or by-laws shall prescribe, the only qualification being that such rules be reasonable, germane to the purposes of the corporation, and equally enforced as to all members.[52] The members are also empowered to fix membership fees

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[46] Part 11, Proposed Act, secs. 217 to 255. See Additional Notes following sec. 255.

[47] Mich. Comp. Laws sec. 450.119 (1948).

[48] *Ibid.*

[49] *Ibid.*

[50] Part II, Proposed Act, secs. 252 to 255.

[51] Mich. Comp. Laws secs. 450.120, 450.123, 450.128 and 450.119 (1948).

[52] Mich. Comp. Laws sec. 450.120 (1948).

or dues and to provide for their enforcement, such enforcement provisions including the cancellation and reinstatement of membership.[53]

It is expressly provided that membership may be limited to persons who are members in good standing in other incorporated associations, lodges, churches, clubs or societies.[54] Where such limitations are imposed, however, they must be defined in the articles of incorporation.[55] It is further provided that the articles may also state that failure to remain a member in good standing in such other organization shall be sufficient cause for expulsion or dismissal.[56] Such expulsion or dismissal, however, must be in conformity with the rules and regulations governing such action as may be defined in the by-laws.[57] It may be noted that this section expressly authorizes membership restriction only to members of other incorporated societies and not to other societies generally. It would seem, however, that similar restrictions also could be validly imposed limiting membership to persons who are members in other unincorporated organizations. The general provisions authorizing limitation of membership would seem sufficiently comprehensive.[58] The deletion of the word "incorporated" in this section of the statute, however, would eliminate any possible ambiguity.[59]

Auxiliary to this authorization of prescribing qualifications for membership are the provisions prohibiting the transfer of stock, even by inheritance or will, except in accordance with provisions in the by-laws.[60] The organi-

[53] Mich. Comp. Laws sec. 450.121 (1948).
[54] Mich. Comp. Laws sec. 450.123 (1948).
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Mich. Comp. Laws sec. 450.120 (1948).
[59] Part II, Proposed Act, sec. 225.

zation may exclude from further membership any person who fails to comply with the reasonable requirements of the rules and regulations of the corporation, and may cancel the stock or membership of any such offending member without liability for an accounting unless otherwise provided in the articles or by-laws.[61] If the Uniform Stock Transfer Act is inconsistent with any of these sections, that Act is held inapplicable.[62] The statute, in short, evidences an intention on the part of the legislature to give the members great freedom in running their organization. Such freedom, however, is not absolute, and, in some instances, the State, through the Judiciary, will interfere on behalf of an aggrieved member.[63]

Voting. By express statutory provision all members of a nonprofit corporation are given equality of voice and vote upon any proposition presented to the membership.[64] However, if the corporation is organized on a stock basis, the articles or by-laws may provide for stock voting.[65] It is also provided that in all nonprofit corporations the articles or by-laws may provide that only certain types or classes of members may vote.[66] Except in these two instances there shall be no preferences as between members

[60] Mich. Comp. Laws sec. 450.119 (1948).

[61] *Ibid.* Although this section refers specifically only to stock, it would be applicable to memberships also under section 2 (Mich. Comp. Laws sec. 450.2 (Mason's Supp. 1954)), which equates share of stock and membership in a non-stock corporation.

[62] Mich. Comp. Laws sec. 450.119 (1948). The Uniform Stock Transfer Act is found in Mich. Comp. Laws secs. 441.1 to 441.25 (1948). The basic difference in the transferability of shares in these corporations and the shares of business and cooperative corporations seems to be that the shares of the latter corporations are transferable unless restricted, whereas shares in these nonprofit corporations are nontransferable unless so provided.

[63] See *infra,* sec. 4, Nonprofit Corporations in the Courts, p. 72.

[64] Mich. Comp. Laws sec. 450.122 (1948).

[65] *Ibid.*

[66] *Ibid.*

or shareholders based upon obligations of the corporation to them.[67] These provisions are sound. In the social type of organization, normally each member should be entitled to one vote. If the group wishes to have stock voting, however, in order to encourage greater contributions by those who can afford it, there would seem to be no public policy against such a scheme of financing. Similarly, there is good reason for providing for voting and nonvoting membership generally. This is particularly true in the type of nonprofit corporation which is supporting a charitable, educational, or other socially desirable project. Such corporations seek contributions in varying amounts from a large number of donors. It frequently serves as an inducement for contributions to award the donor with membership in the corporation. However, it may be impractical to give voting rights to all the one dollar contributors, whereas to give such rights to the larger donors is not only practical but also a stimulant for greater benefaction. The proposed Act forthrightly provides for voting differentiation at the outset and also authorizes corporations without members.[68]

Provision is made for the calling of a special meeting in case the articles or by-laws fail to provide a method for calling one.[69] In that case notice is to be published in accordance with the provisions of section 68 of the Act.[70] If the articles or by-laws provide for a different method of calling the special meeting, such provisions supersede the statutory method.[71]

Trustees or directors. The above section dealing with

[67] *Ibid.*

[68] Part II, Proposed Act, secs. 224 and 233.

[69] Mich. Comp. Laws sec. 450.122 (1948).

[70] Mich. Comp. Laws sec. 450.68 (1948).

[71] This is a necessary inference from the wording of section 122, Mich. Comp. Laws sec. 450.122 (1948).

voting rights does not change the fundamental rule that the corporation is governed by its directors or trustees but, instead, simply regulates the voting rights among the members.[72] Section 124[73] provides that the corporation shall be governed by a board of trustees or directors of at least three persons. Generally, the number,[74] qualifications, classifications, terms of office, manner of election or removal, time and place of meetings, and the powers and duties of said trustees or directors may be prescribed by the articles or by-laws.[75] In case the term of the directors is fixed at longer than one year, at least one third of the board shall be elected each year.[76] Each director shall serve for his term or until his successor is duly elected and qualified. Vacancies in the board shall be filled by the remaining members until a successor is duly elected at a regular or special meeting.[77]

A majority of the board shall be necessary to constitute a quorum, and the acts of a majority of the trustees at a meeting at which a quorum is present shall constitute the acts of such board.[78] Provision is made, however, that if the trustees or directors, either collectively or severally, consent in writing to any corporate action, such action shall be valid as though it had been approved at a regular board meeting.[79] Presumably unanimous consent is necessary for such informal action. If the board consists of more

[72] Ayres v. Hadaway, 303 Mich. 589, 6 N.W. 2d 905 (1942).

[73] Mich. Comp. Laws sec. 450.124 (1948).

[74] Mich. Pub. Acts 1954, No. 124, added sec. 124a to the Corporation Act. This section authorizes the board of trustees of a nonprofit educational corporation to increase the number of trustees by not more than 50%.

[75] Mich. Comp. Laws sec. 450.124 (1948).

[76] *Ibid.*

[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.*

than seven members, the articles or by-laws may provide that a quorum shall consist of less than a majority but not less than one third.[80] The board may delegate interim authority to an executive committee, and meetings need not be held in any particular locality.[81]

The directors or trustees are held individually liable for the misapplication or misuse of the corporation's funds or property where such misuse is caused through the neglect to exercise reasonable care and prudence in the administration of corporate affairs, or through the willful violation of the laws governing the same.[82] The degree of care required of these directors is thus substantially the same as that required of directors generally under section 47.[83] In addition to the imposition of liability on behalf of directors, a court of equity can grant other appropriate relief as the case warrants.[84]

Provisions in the by-laws for a self-perpetuating board of trustees were upheld in *Detroit Osteopathic Hospital* v. *Johnson*.[85] That corporation was formed under a general nonprofit corporation act[86] which has since been replaced by the present provisions. The articles provided that members of the corporation should consist of all osteopathic physicians and other persons who should contribute to its support. The trustees were given power at their discretion to call meetings of the members, but at least one such meeting was to be called in each calendar year. The powers of the members were limited in the articles to that

[80] *Ibid.*

[81] *Ibid.*

[82] Mich. Comp. Laws sec. 450.126 (1948).

[83] Mich. Comp. Laws sec. 450.47 (1948).

[84] A deed was set aside for fraud in German Corp. v. Negaunee German Aid Society, 172 Mich. 650, 138 N.W. 343 (1912).

[85] 290 Mich. 283, 287 N.W. 466 (1939).

[86] Mich. Pub. Acts 1903, No. 171.

of making recommendations. The by-laws provided that the trustees were to serve for one year and then to select their successors. They were also empowered to fill vacancies.[87]

The court held that the nature of this corporation was so much in the nature of a trust that it would be inequitable and destructive of the original plan for the court not to act to preserve its original method of functioning.[88] It accordingly held invalid an attempt by the members to change the by-laws to provide for membership voting, and enjoined the defendants from attempting to amend them in such a manner as would prevent the trustees and their successors from exercising control over the execution of the corporate trust.[89]

The court found that there was no public policy against such a self-perpetuating board of trustees either at the time of organization or at the time of suit.[90] Although the court could have probably reached the same result solely on contractual grounds,[91] the result seems sound. It will be noted that the present statute does authorize nonvoting members and also permits the manner of selection of the trustees or directors to be governed by provisions in the by-laws.[92] There is a stipulation, however, that at least one third of the board be elected annually,[93] but so long as this is done, there is no statute preventing the old trustees from making the selection as was the practice in the *Osteopathic Hospital*[94] case. Such a method of operation is especially

[87] 290 Mich. 283, 287 N.W. 466 (1939).
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] The case is discussed in a note, 38 MICH. L. REV. 406 (1940).
[92] Mich. Comp. Laws secs. 450.122 and 450.124 (1948).
[93] Mich. Comp. Laws sec. 450.124 (1948).
[94] Detroit Osteopathic Hospital v. Johnson, 290 Mich. 283, 287 N.W. 466 (1939).

advantageous for similar charitable types of nonprofit corporations because it permits a greater selectivity of management, and, at the same time, encourages contributions by offering membership. Although it might be preferable to incorporate such organizations under the statutory provisions for trustee corporations,[95] there seems to be no reason why these sections cannot be used in case of doubtful applicability of the trustee provisions. The proposed Act[96] specifically authorizes a self-perpetuating board.

Powers. Nonprofit corporations are expressly authorized to transact business, collect and disburse money, purchase, sell and care for properties, and engage in any other incidental business if the purposes of the corporation so require.[97] They are likewise empowered to borrow money, issue promissory notes, and mortgage property as security for their debts.[98] If the by-laws expressly authorize such action, then no further authorization need be acquired. If such action is not expressly authorized in the by-laws, the corporation may still borrow and issue notes and mortgages, but in this case authorization must be granted by a resolution of the members at any duly called meeting at which a quorum was present.[99] It will be sufficient in this case if a general authority is granted; the resolution need not specify the particular sums, rates of interest, or maturities, as such items may be agreed upon and authorized by the directors.[100]

Local units. Grouping of nonprofit corporations into local units is expressly authorized if the corporation is formed on a membership and not a stock basis, if it con-

[95] Mich. Comp. Laws secs. 450.148 *et seq.* (1948).
[96] Part II, Proposed Act, sec. 233.
[97] Mich. Comp. Laws sec. 450.125 (1948).
[98] Mich. Comp. Laws sec. 450.127 (1948).
[99] *Ibid.*
[100] *Ibid.*

sists of more than five hundred members, and if it occupies a territory or district not less than a geographical county in extent.[101] This privilege is afforded only to those nonprofit corporations formed under this Act or under its predecessor, Act No. 84 of the Public Acts of 1921. This grouping into local units may be accomplished by the adoption of a by-law proposed by the board of directors.[102] The unit of division may be territorial or any other basis as determined in the by-laws.[103] The local units may, but need not, incorporate, and they are given power to do all things necessary to effectuate this subdivision.[104] The purpose, of course, is more effectively to give representation to the individual members and local groups in the larger organization.[105]

The board of directors is to determine the basis on which the local units are formed and also do all things necessary to insure representation of each local unit.[106] The board also determines the basis of representation and the number of delegates to which said local unit or units are entitled, but each local unit is entitled to at least one delegate, and no such delegate shall have a greater number of votes than the total membership of his local unit.[107]

It may be noted that these sections providing for local units apply only to non-stock corporations.[108] A similar result, however, can be obtained in the stock type of corporation. The ability of a nonprofit corporation to own stock in another such corporation is recognized, and the

[101] Mich. Comp. Laws sec. 450.128 (1948).
[102] *Ibid.*
[103] *Ibid.*
[104] Mich. Comp. Laws sec. 450.130 (1948).
[105] Mich. Comp. Laws sec. 450.128 (1948).
[106] Mich. Comp. Laws sec. 450.129 (1948).
[107] *Ibid.*
[108] Mich. Comp. Laws sec. 450.128 (1948).

corporate shareholder is given all the rights, powers, privileges, and liabilities of individual shareholders.[109] Further, the directors and officers of the corporate shareholder are specifically made eligible for the office of director of the other corporation the same as if they were individual shareholders.[110] Thus, a nonprofit stock corporation could issue its stock only to local nonprofit corporations or associations, and these local groups, through their stock ownership in the central corporation, would secure representation. The method would be slightly different, but the result substantially similar. The proposed Act broadens these statutory provisions and reduces duplication by eliminating many of the similar provisions dealing with fraternal organizations.[111]

Real estate corporations. Section 132a[112] specifically authorizes nonprofit corporations to own stock or memberships in nonprofit corporations whose purpose is the controlling or owning of buildings used as centers or homes of regularly organized fraternal organizations. This amounts to an express approval of the corporation's separation of its real estate from its social or other activities. There would seem to be no valid reason for not permitting such separation of activities, but, in view of the other sections of the statute, it is not clear that this added authorization is necessary. At any rate, a little broadening of the sections permitting local groups and inter-corporate stock ownership should render unnecessary this section. The proposed Act makes this change.[113]

[109] Mich. Comp. Laws sec. 450.131 (1948).

[110] *Ibid.*

[111] Part II, Proposed Act, secs. 236–248.

[112] Mich. Comp. Laws sec. 450.132a (1948).

[113] Part II, Proposed Act, sec. 248.

IV. Nonprofit Corporations in the Courts

Although these nonprofit corporations include a large number of dissimilar organizations, and although most of them have not been extensively involved in litigation,[114] a few principles can be gleaned from the reported cases. An apparent basic principle is that the articles of association and by-laws are binding on the members of the organization.[115] Membership alone charges the person with knowledge and makes him subject to the articles and by-laws.[116]

Since the articles and by-laws control the relationship between the corporation and its members, it follows that, if the organization provides for an internal method of settling disputes, that internal method must be exhausted before a complaining party can resort to the courts.[117] In

[114] Of these nonprofit corporations, organizations providing mutual insurance or benefits of one kind or another have been the most frequently involved in litigation.

[115] Bretzlaff v. Sick-Benefit Society, 125 Mich. 39, 83 N.W. 1000 (1900); Kern v. Arbeiter Verein, 139 Mich. 233, 102 N.W. 746 (1905); Harris v. Detroit Typographical Union, 144 Mich. 422, 108 N.W. 362 (1906); Bone v. Grange Mutual Fire Insurance Co., 215 Mich. 396, 184 N. W. 406 (1921).

[116] Harris v. Detroit Typographical Union, 144 Mich. 422, 108 N.W. 362 (1906); Mazurkiewics v. Aid Society, 127 Mich. 145, 86 N.W. 543 (1901); Bretzlaff v. Sick-Benefit Society, 125 Mich. 39, 83 N.W. 1000 (1900).

[117] Palmer v. Patron's Mutual Fire Ins. Co., 217 Mich. 292, 186 N.W. 511 (1922); Jackson v. State Mutual Rodded Fire Ins. Co., 217 Mich. 301, 186 N.W. 514 (1922); Bone v. Grange Mutual Fire Ins. Co., 215 Mich. 396, 184 N.W. 406 (1921); Patron's Mutual Fire Ins. Co., v. Att'y. Gen., 166 Mich. 438, 131 N.W. 1119 (1911); Bishop v. Brotherhood of L. F. & E., 204 Mich. 605, 171 N.W. 528 (1919), involving also the construction of provisions for the internal machinery; Larkin v. Modern Woodmen of America, 163 Mich. 670, 127 N.W. 786 (1910); Allen v. Patron's Mutual Fire Ins. Co., Ltd., 165 Mich. 18, 130 N.W. 196 (1911); Conley v. Supreme Ct., I. O. F., 158 Mich. 190, 122 N.W. 567 (1909); Harris v. Detroit Typographical Union, 144 Mich. 422, 108 N.W. 362 (1906); Derry v. Great

fact, if the articles and by-laws do not provide for judicial review after a final determination within the order, that final determination is conclusive on the party.[118] Of course, a court of equity can always nullify an award or determination for fraud, mistake, accident, or inequitable conduct.[119] In all of these instances, however, the complaining party must first exhaust his remedy within the order before resorting to the courts.[120]

The organization, moreover, must act within a reasonable time,[121] the provisions must not be void as contrary to law or public policy,[122] the complaining party must not be denied a hearing,[123] and he must not be denied a

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Hive, Maccabees, 135 Mich. 494, 98 N.W. 23 (1904); Barker v. Great Hive, Maccabees, 135 Mich. 499, 98 N.W. 24 (1904); Hoag v. Supreme Lodge, 134 Mich. 87, 95 N.W. 996 (1903); Van Poucke v. Netherland St. Vincent Society, 63 Mich. 378, 29 N.W. 863 (1886).

[118] Palmer v. Patron's Mutual Fire Ins. Co., 217 Mich. 292, 186 N.W. 511 (1922); Patron's Mutual Fire Ins. Co. v. Att'y Gen., 166 Mich. 438, 131 N.W. 1119 (1911); Derry v. Great Hive, Maccabees, 135 Mich. 494, 98 N.W. 23 (1904); Barker v. Great Hive, Maccabees, 135 Mich. 499, 98 N.W. 24 (1904); Van Poucke v. Netherland St. Vincent Society, 63 Mich. 378, 29 N.W. 863 (1886).

[119] Erd v. Bavarian Nat'l Aid & Relief Ass'n., 67 Mich. 233, 34 N.W. 555 (1887); People ex rel. Pulford v. Fire Dep't. of Detroit, 31 Mich. 457 (1875); People ex rel. Roehler v. Mechanics' Aid Society, 22 Mich. 86, McGrath No. 1225 (1870). The rule is dictum in the following cases: Patron's Mutual Fire Ins. Co. v. Att'y Gen., 166 Mich. 438, 131 N.W. 1119 (1911); Van Poucke v. The Netherland St. Vincent Society, 63 Mich. 378, 29 N.W. 863 (1886); Palmer v. Patron's Mutual Fire Ins. Co., 217 Mich. 292, 186 N.W. 511 (1922).

An award was set aside for waiver of a suspension in Rich v. State Mutual Fire Ins. Co., 235 Mich. 446, 209 N.W. 569 (1926).

[120] Cases cited in notes 117 and 119 *supra*.

[121] Shapiro v. Patron's Mutual Fire Ins. Co., 219 Mich. 581, 189 N.W. 202 (1922); Larkin v. Modern Woodmen of America, 163 Mich. 670, 127 N.W. 786 (1910), dictum.

[122] Worker's Educational Ass'n v. Renner, 218 Mich. 302, 188 N.W. 289 (1922). In Howe v. Patron's Mutual Fire Ins. Co., 216 Mich. 560, 185 N.W. 864 (1921), the by-law was in conflict with the articles of association. Hence, an award based on the by-law was not binding on the member.

[123] Rose v. Supreme Court, Order of Patricians, 126 Mich. 577, 85 N.

right to appeal within the order.[124] If any of these requirements are violated, the party may seek judicial relief. There is thus superimposed over the articles and by-laws judicial concepts of natural rights or due process of law.[125] A presumption in favor of the regularity of the organization's procedure, however, must first be overcome in order for the relator to get relief.[126]

Expulsion from membership can be one of the most effective ways for the organization to compel compliance with its regulations and at the same time can be of the most serious consequence to the expelled member. In case of strictly social organizations, the expelled member may suffer a slight loss of prestige, but he still has other friends and, in all probability, will bear no great burdens as a result of his ostracization. The forced withdrawal from a church group may cause great mental anguish; the expulsion from a mutual benefit or aid society may mean the loss of pecuniary assistance in the time of need; and the exclusion from a labor union may have the direst of consequences to the expelled member by effectively depriving him of the opportunity of plying his trade and earning a livelihood. These different consequences suggest that the court might have different attitudes toward judicial interference in these different cases of expulsion or exclusion. Apparently, however, such is not the case, or, at least, the

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W. 1073 (1901); People ex rel. Roehler v. Mechanics' Aid Society, 22 Mich. 86, McGrath No. 1225 (1870).

[124] Ruterbusch v. Supreme Court of The Independent Order of Foresters, 162 Mich. 213, 127 N.W. 288 (1910); Steiner v. Supreme Court Independent Order of Foresters, 149 Mich. 567, 113 N.W. 15 (1907).

[125] The conclusion is based on cases cited in notes 121 to 124 *supra*. A similar observation and critique is made by Chafee, "The Internal Affairs of Associations," 43 HARV. L. REV. 993, 1014 to 1020 (1930).

[126] Burton v. St. George's Society of Detroit, 28 Mich. 261, McGrath No. 1227 (1873).

court has not admitted it. The Michigan courts have granted mandamus to restore a person to membership after he has been illegally or improperly expelled.[127] These cases, however, turned on the regularity, fairness, or due process of the procedure.[128] Unexcused laches has been held a bar to reinstatement where no substantial rights were involved.[129]

It would thus seem that the legislature and the judiciary have both evidenced an intention to make these nonprofit corporations as independent as possible and to give them the maximum amount of freedom in regulating membership and in otherwise operating as autonomous bodies. If they act contrary to statute or public policy; if their dealings with the members are unfair, oppressive, contrary to rules of natural justice, or due process; if they act in disregard of their own regulations; or if their conduct is malicious, then the judiciary will grant the appropriate relief. Thus, the role of judicial review in these cases is not dissimilar to the role of judicial review in litigation involving administrative tribunals.[130]

V. Conclusion

The nonprofit organizations provided for in these sections are essentially different from both the cooperative and regular business corporations. It seems advisable, therefore, to have separate provisions for their incorpora-

[127] Erd v. Bavarian Nat'l. Aid & Relief Ass'n., 67 Mich. 233, 34 N.W. 555 (1887); People ex rel. Pulford v. Fire Dep't. of Detroit, 31 Mich. 457 (1875); People ex rel. Roehler v. Mechanics' Aid Society, 22 Mich. 86, McGrath No. 1225 (1870).

[128] Cases cited note 127 *supra.*

[129] Bostwick v. Fire Department of Detroit, 49 Mich. 513, 14 N.W. 501 (1883).

[130] The same observation is made by Chafee, *op. cit. supra* n. 125, at 1005.

tion. The statutes on the whole are sufficiently comprehensive to provide for all types of nonprofit nonbusiness corporations and to allow great diversity in membership and organizational structure. A few changes, however, may be suggested. The requirement of three incorporators[131] can be eliminated, and the requirement of one under the general provisions made applicable.[132] Since the prohibition against excessive capitalization[133] serves no useful purpose, it is recommended that the statutes be further simplified by eliminating this section.[134]

The authorization of membership limitations[135] and the transfer of stock provisions[136] are sound, but a few changes are suggested. Section 123,[137] specifically permitting membership limitations to members of other organizations, should be amended by deleting the word "incorporated" so as to authorize such limitations to members of other nonprofit organizations generally. The proposed Act[138] follows this procedure. The retention of this provision thus broadened results in more definitiveness than if the section were eliminated as unnecessary in view of section 120,[139] authorizing general prescription of membership.

The section on membership voting[140] is good but can be improved. The proposed Act changes this section both formally and substantively to authorize cumulative voting.[141] The sections on trustees or directors[142] are generally

[131] Mich. Comp. Laws sec. 450.117 (1948).
[132] Mich. Comp. Laws sec. 450.3 (Mason's Supp. 1952).
[133] Mich. Comp. Laws sec. 450.118 (1948).
[134] Part II, Proposed Act, Additional Notes following sec. 255.
[135] Mich. Comp. Laws secs. 450.120 and 450.123 (1948).
[136] Mich. Comp. Laws sec. 450.119 (1948).
[137] Mich. Comp. Laws sec. 450.123 (1948).
[138] Part II, Proposed Act, sec. 225.
[139] Mich. Comp. Laws sec. 450.120 (1948).
[140] Mich. Comp. Laws sec. 450.122 (1948).
[141] Part II, Proposed Act, sec. 224.

desirable, with most recommended changes being formal rather than substantive.[143] A provision specifically authorizing a self-perpetuating board of directors for corporations with or without members is included.[144] Provision for amending the articles of a nonmember corporation should be enacted.[145] The specific provisions giving the corporation authority to determine directors' qualifications and manner of selection[146] are retained in the proposed Act.[147]

The conferring of power to transact incidental business[148] is desirable and adequate. The authorization of local units[149] contravenes no public policy and should be retained. The proposed Act,[150] however, enlarges and broadens these provisions in the general nonprofit sections. They are made applicable to all types of nonprofit corporations. Simplification results from omitting unnecessary repetition in the fraternal sections. At the same time, maximum flexibility is achieved in central-subordinate groupings.

More detailed provisions on dissolution are recommended for general nonprofit corporations. A statutory cy pres doctrine[151] should be enacted for the disposition of the assets of religious and charitable corporations at their dissolution. Judicial rather than legislative dissolution[152] should be authorized upon the happening of cer-

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[143] Mich. Comp. Laws secs. 450.124 and 450.126 (1948).
[144] Part II, Proposed Act, secs. 226–232.
[145] Part II, Proposed Act, sec. 233.
[146] Part II, Proposed Act, sec. 249.
[147] Mich. Comp. Laws sec. 450.124(3) (1948).
[148] Part II, Proposed Act, sec. 227.
[149] Mich. Comp. Laws sec. 450.125 (1948).
[150] Mich. Comp. Laws secs 450.128–450.130.
[151] Part II, Proposed Act, secs. 236–248.
[152] Part II, Proposed Act, sec. 254(3).
[153] Part II, Proposed Act, secs. 252 and 253.

tain contingencies. Uniformity and simplicity can be achieved by putting these provisions in the general sections and omitting them from those sections dealing with specific types of nonprofit corporations.

The legislatively manifested laissez-faire policy seems desirable as it would be impracticable to describe detailed regulations in advance for so great a diversity of organizations. Instances of specific injustices can best be handled by the judiciary. Prima facie, it might seem that different rules and regulations should be prescribed for those organizations having more coercive power on their members, as, for example, a labor union which either does or might effectively control employment, than for a strictly social organization, membership in which carries no special significance either to the individual or the community. Should investigation disclose such provisions socially desirable, however, it is far from certain that they should be enacted as a part of the corporation act. The mischief, if such it be, applies equally to unincorporated associations.

One rather significant policy change should be made. Michigan is committed to the view that charitable organizations are not liable for the torts of their agents to beneficiaries of the charity.[153] This is generally considered an

[153] Erwin v. St. Joseph's Hospital, 323 Mich. 114, 34 N.W. 2d 480 (1948); De Groot v. The Edison Institute, 306 Mich. 339, 10 N.W. (2d) 907 (1943); 1939–40 Mich. Ops. Att'y. Gen. p. 534; Greatrex v. Evangelical Deaconess Hospital, 261 Mich. 327, 246 N.W. 137 (1933); Bruce v. Henry Ford Hospital, 254 Mich. 394, 236 N.W. 813 (1931); Robinson v. Washtenaw Circuit Judge, 228 Mich. 225, 199 N.W. 618 (1924); Pepke v. Grace Hospital, 130 Mich. 493, 90 N.W. 278 (1902); Downes v. Harper Hospital, 101 Mich. 555, 60 N.W. 42 (1894). See notes: 25 A.L.R. (2d) 29, Michigan cases at 163 (1952), 23 MICH. L. REV. 905 (1925), 9 MICH. L. REV. 151 (1910).

Liability was imposed in the case of a non-beneficiary in Bruce v. Central M. E. Church, 147 Mich. 230, 110 N.W. 951 (1907); Winslow v. V. F. W. Nat'l. Home, 328 Mich. 488, 44 N.W. (2d) 19 (1950). Liability

outmoded viewpoint and should be changed. A statute is therefore recommended.[154]

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was imposed for false imprisonment as the breach of a non-delegable duty in Gallon v. House of Good Shepherd, 158 Mich. 361, 122 N.W. 631 (1909). Apparently one falsely imprisoned is not a beneficiary, at least not a willing one.

[154] Part II, Proposed Act, sec. 201.

CHAPTER IV

Fraternal, Religious and Other Particular Types of Corporations

I. COVERAGE

SUPPLEMENTARY provisions are contained in sections 133 to 189[1] of the Michigan General Corporation Act relating to the incorporation of particular types of organizations, some of which may be organized for profit as well as not for profit. These corporations are classified into six main categories as follows: (1) fraternal societies; (2) trustee corporations; (3) foundations; (4) educational corporations; (5) ecclesiastical corporations; and (6) public building corporations. In addition, there are further sections for hospitals and church trustee corporations[2] as subdivisions of the trustee provisions, and a separate section provides that Sunday schools[3] shall be controlled by the general nonprofit provisions and not by the ecclesiastical sections.

Many of these sections, like those providing for other types of corporations, originated with the General Act of 1921[4] and were designed to eliminate and prohibit incorporation by particularized legislation.[5] The provisions are designed to meet any peculiar needs of the specified organizations and are not exclusive of the preceding sections dealing generally with profit and nonprofit corporations.

[1] Mich. Comp. Laws secs. 450.133 to 450.189 (1948).
[2] Mich. Comp. Laws secs. 450.157, 450.158 and 450.159 (1948).
[3] Mich. Comp. Laws sec. 450.186 (1948).
[4] Mich. Pub. Acts 1921, No. 84.
[5] See *supra* c. 1, sec. 3, History of the Michigan General Corporation Act, p. 7; c. 2, sec. 2, History of the Cooperative Statutes, p. 19; and c. 3, sec. 2, History of the Michigan Nonprofit Statutes, p. 56.

The desirability of providing for the incorporation of most of these organizations may be assumed. On the other hand, however, there need be determined such issues as: whether separate provisions are really necessary; whether the sections are unnecessarily repetitious; whether they are too heterogeneous; whether they are ambiguous; and whether they are constructed in the most logical, concise, and adequate manner. This chapter will seek answers to these questions by briefly comparing and analyzing the salient features of the respective statutes.

II. Fraternal Societies

General requirements. A minimum of three incorporators is required,[6] and a foreign parent organization must first domesticate before incorporating any state subordinate lodge or jurisdiction.[7] The objectives of the organization may be "benevolent, charitable, social, educational or mutual aid purposes or for any other similar purpose or purposes not prohibited by law."[8] Since the Corporation Act generally applies unless otherwise provided, it is evident that these sections are designed for the specialized problems of local incorporations of multi-unit fraternities.

Parent corporation. Specific sections are provided for state jurisdictions of foreign parent corporations.[9] These state jurisdictions in turn are empowered to incorporate local units, prescribe the secret ritual, visit and discipline local jurisdictions, and generally supervise and regulate society affairs uniformly throughout the organization.[10]

[6] Mich. Comp. Laws sec. 450.133 (1948).
[7] *Ibid.*
[8] *Ibid.*
[9] Mich. Comp. Laws sec. 450.134 (1948).
[10] Mich. Comp. Laws sec. 450.135 (1948).

The legislature has evidenced a liberal policy of noninterference in the government and functioning of the parent corporation. The statute simply states that such parent corporation shall be managed by the officers as the articles shall prescribe, and that such officials or committees shall have the powers and liabilities as prescribed in the articles or by-laws.[11] A specific requirement is that the articles shall designate the original committee of the parent corporation having authority to enact the by-laws and shall state the details of its composition and functioning.[12] It is also mandatory that every parent corporation shall designate a secretary whose powers and duties shall conform to those prescribed in this Act for secretaries generally.[13]

The parent corporation is prohibited from using the same name of a similar lodge or fraternity or from using a name so similar as likely to lead to confusion.[14] Quite naturally, however, the local lodge is required to use the same name as the parent corporation in addition to some suitable local designation.[15] The parent corporation is empowered to own real and personal property for the purpose of establishing a state headquarters and any charitable home or institution established or maintained by it.[16] It is also given power to engage in any auxiliary activities necessary to accomplish these purposes.[17]

It is required that every parent corporation have a representative form of government and that each subordinate

[11] Mich. Comp. Laws sec. 450.137 (1948).
[12] *Ibid.*
[13] *Ibid.*
[14] Mich. Comp. Laws sec. 450.138 (1948).
[15] *Ibid.*
[16] Mich. Comp. Laws sec. 450.139 (1948).
[17] Mich. Comp. Laws sec. 450.139 (1948).

organization shall send representatives or delegates to an annual or other convention or meeting of the fraternity.[18] The officers and committees of the corporation shall be elected by majority vote of the representatives at the convention.[19] The first annual meeting shall be held at a time and place designated by the executive committee of the parent corporation and subsequent meetings shall be held as designated by the convention itself.[20] This annual or periodic meeting of the lodge is the chief governing body and is empowered to elect officers, committees, or trustees, designate delegates to any higher jurisdiction within the lodge, alter or amend the articles or by-laws of such parent corporation, determine questions of discipline or policy, and act upon other matters as the articles or by-laws may permit or require.[21]

Local lodges. Incorporation of local lodges of state parent organizations is expressly authorized.[22] As no specific number of incorporators is designated, apparently one is sufficient. The incorporators must be members in good standing of the parent organization.[23] It shall be sufficient if the purposes of such local lodge are: to further the interest of the parent corporation in the community, to hold the property of such local lodge or society, and to make its members integral components of the parent lodge or society.[24]

The articles shall conform to the pattern prescribed for nonprofit corporations generally and may contain such

[18] Mich. Comp. Laws sec. 450.140 (1948).
[19] *Ibid.*
[20] *Ibid.*
[21] Mich. Comp. Laws sec. 450.141 (1948).
[22] Mich. Comp. Laws sec. 450.142 (1948).
[23] *Ibid.*
[24] *Ibid.*

further statements as the incorporators may wish to insert as to purposes and government.[25] The articles must state that the local lodge has been granted a charter or permit from the parent corporation.[26] Every such local lodge has the same right to hold and deal in real and personal property as nonprofit corporations generally,[27] and they are subject to the visitation, control, and discipline of higher jurisdictions within the lodge.[28] Both state and local lodges are expressly empowered to make provision for the visitation of the sick and afflicted, provide funds for relief of distressed members and families, and provide for the burial of indigent members.[29] However, no such funds shall be raised by dues based on insurance rates or tables, and no such money shall be paid except in accordance with the organization's authorized procedures.[30] Lodges are also empowered to establish and maintain homes or other charitable institutions for its aged, afflicted or infirm members under the provisions of the act applicable to trustee corporations.[31]

Appraisal. The secret lodge or fraternity is a specialized type of the nonprofit corporation. Apparently the chief characteristic justifying additional statutory provisions is the fraternal practice of having large national societies composed of innumerable local units. The local unit naturally is incorporated in the state where located but normally is subject to considerable control by the national organization which, in all probability, is incorporated in another jurisdiction. Thus, it is apparent that this prac-

[25] Mich. Comp. Laws sec. 450.143 (1948).
[26] *Ibid.*
[27] Mich. Comp. Laws sec. 450.144 (1948).
[28] *Ibid.*
[29] Mich. Comp. Laws sec. 450.147 (1948).
[30] *Ibid.*
[31] *Ibid.*

tice, if approved, should be officially sanctioned by statute. Likewise, the state may find it desirable to enact provisions giving it a minimum of control over the national organization.

The present Michigan statutes contain five sections[32] in the general nonprofit sections[33] dealing specifically with multi-unit fraternal organizations. It is apparent that many organizations other than fraternal societies operate on a regional, national or international basis by means of numerous local units. Churches, patriotic organizations, veterans' associations, agricultural societies, labor organizations, university alumni associations, and charitable drives and foundations are but a few examples of nonfraternal organizations operating on a similar basis. As detailed provisions for each of the divergent organizations are undesirable, the obvious solution is to expand and broaden the general nonprofit sections and reduce the specific ones. This is the procedure adopted in the proposed Act.[34] Additional recommendations are delineated in the explanatory notes to that Act.

The provision of section 133[35] concerning foreign corporations can be clarified. This section should be so worded as to leave no doubt that the parent corporation must domesticate whenever in fact a local unit is incorporated as an affiliate. Further, the statutes should be broadened to permit incorporation of local units of a foreign parent corporation without the necessity of first incorporating a state parent organization.[36] The limitation[37] on the right to hold and deal in property can certainly work no

[32] Mich. Comp. Laws secs. 450.128 to 450. 132a (1948).
[33] Mich. Comp. Laws secs. 450.134 to 450.159 (1948).
[34] Part II, Proposed Act, secs. 236 to 248.
[35] Mich. Comp. Laws sec. 450.133 (1948).
[36] Part II, Proposed Act, sec. 244.
[37] Mich. Comp. Laws secs. 450.139 and 450.146 (1948).

hardship on the organization or its members and can be justified from a policy viewpoint. The requirement of a representative form of government[38] would seldom give rise to any objections since most fraternal organizations operate on such a plan anyway. In the few instances in which a dictatorial group might usurp control, the statute stands as a bulwark of protection for the members. This restriction limited to fraternal organizations is retained in the proposed Act.[39]

Provisions for the incorporation of local lodges[40] add practically no new restrictions or authorizations not found in preceding sections. The only new limitation is that funds for the relief of distressed members shall not be raised by contributions based on insurance rates.[41] This is a necessary precaution since the insurance business is properly state regulated.

III. Trustee Corporations

The first eight sections[42] of the trustee provisions provide generally for trustee incorporations while the remaining sections cover some particular types of trustee organizations. The general sections in broad terms provide for the incorporation of the following classes of trustees: (1) trustees holding property for religious, charitable, benevolent, or educational institutions, or for any purposes of public benefaction; (2) trustees of existing corporations holding separate corporate property for specific eleemosynary purposes; and (3) trustees of a private trust. These corporations embrace both charitable and private

[38] Mich. Comp. Laws sec. 450.140 (1948).
[39] Part II, Proposed Act, sec. 242.
[40] Mich. Comp. Laws secs. 450.142 *et seq.* (1948).
[41] Mich. Comp. Laws sec. 450.147 (1948).
[42] Mich. Comp. Laws secs. 450.148 to 450.156 (1948).

purpose trusts and both profit and nonprofit classifications.[43] Declarations of trust are not of themselves sufficient to authorize the trustees to assume corporate powers, but all trustees desiring corporate powers must formally incorporate under the provisions of the Act.[44] Quite naturally, the trustees are prohibited from having any personal interest in the trust property except compensation for their labor and skill, reimbursement for actual expenses, and authority expressed in the original trust instrument.[45]

Additional requirements. Incorporation of trustees is authorized if there are three or more trustees who receive annual income in trust amounting to $1000 or more, or if they hold trust property worth $1000 or more.[46] Trust instrument is defined broadly to include "any lawful deed of gift, grant, agreement, or any last will and testament by which the donor, grantor, or testator shall give, grant, devise, or bequeath any property, real, personal or mixed, in trust for general or specific uses."[47] Lawful directions or conditions contained in such instrument of trust shall be effective. Constructive or resulting trusts are not included within the purview of these sections.[48]

The articles of incorporation, in addition to other requirements of the Act, shall contain verified copies of every trust instrument on which such trust is founded, and shall state: (a) the nature of the business, if any, in which such corporation is engaged, and the nature and value of the trust property; (b) the number of persons who shall constitute the permanent board of trustees, their

[43] Mich. Comp. Laws sec. 450.148 (1948). Wilgus, "The New Michigan Corporation Law," 1 MICH. S. B. J. xxv, xxviii (1921).

[44] Mich. Comp. Laws sec. 450.148 (1948).

[45] *Ibid.*

[46] Mich. Comp. Laws sec. 450.149 (1948).

[47] *Ibid.*

[48] *Ibid.*

term of office, and the mode in which their successors shall be appointed or elected; and (c) whether or not other persons than the incorporators are, or may become, members or stockholders thereof.[49]

Trustee corporations are given the same powers and rights as accorded corporations generally,[50] but the trust instrument can set up different requirements or regulations.[51] Trustees may be either elected or appointed as provided in the trust instrument.[52] These corporations are empowered to accept property from others than the original donors unless such action is prohibited in the trust instrument.[53] Also, two or more persons may unite in creating the trust by transferring property to the same trustees, but, of course, trustees of an existing corporation are forbidden to accept further gifts inconsistent with the terms of the original grant.[54]

The trustees are held to the same degree of accountability as if they were not incorporated, except where the trust instrument sets forth a lesser degree of accountability or where the trustees are subject to the control of shareholders in their corporation.[55] If the board is composed of more than five members, it may appoint executive and other committees to carry on the routine work of the corporation.[56] Investment of funds, unless otherwise restricted by the trust instrument, shall be in accordance with the laws of the state governing investments by trus-

[49] Mich. Comp. Laws sec. 450.150 (1948).
[50] Mich. Comp. Laws sec. 450.151 (1948).
[51] *Ibid.*
[52] *Ibid.*
[53] Mich. Comp. Laws sec. 450.152 (1948).
[54] *Ibid.*
[55] Mich. Comp. Laws sec. 450.153 (1948).
[56] *Ibid.*

tees, and no loan of corporate funds shall be made to any of the trustees, officers, or employees of the corporation.[57]

The circuit court is empowered to fill vacancies in the board of trustees where no other provisions are made,[58] and is also given jurisdiction to construe any doubtful or disputed question arising from any ambiguity in the trust instrument.[59] The donor may amend the trust instrument so long as such amendment does not alter the original purposes of the corporation in their entirety.[60]

Hospitals and asylums. Incorporation of hospitals or asylums as trustee corporations is authorized where land or property amounting to $5000 or more is given to three or more trustees.[61] Further, three or more persons may incorporate for such charitable purpose where the institution to be founded by such corporation is to be constructed and maintained principally by donations not made under any trust instrument, and every such corporation shall have authority to fix and prescribe the terms and conditions of membership therein.[62] The trustees are empowered to indenture or apprentice to responsible persons any children under their care, and to withdraw such apprenticed or indentured children when they deem it in the interest of the child to do so.[63]

Authorization is also conferred upon the board of control of any charitable institution to incorporate as a trustee corporation where the hospital or institution has been conveyed to one or more persons in trust but the manage-

[57] *Ibid.*
[58] Mich. Comp. Laws sec. 450.154 (1948).
[59] Mich. Comp. Laws sec. 450.155 (1948).
[60] Mich. Comp. Laws sec. 450.156 (1948).
[61] Mich. Comp. Laws sec. 450.157 (1948).
[62] *Ibid.*
[63] *Ibid.*

ment and control has been entrusted to a board consisting of five or more persons.[64] The trustee corporation may then receive gifts of real and personal property, and shall have power to sell and invest the funds as is provided for trustee corporations generally.[65]

Church trustee corporations. Incorporation of associations of religious denominational congregations or societies as trustee corporations is expressly authorized.[66] These sections are apparently designed to permit the incorporation of district organizations of all church groups such as presbyteries, diocesan conventions, dioceses, synods, conferences, and the like, or any quarterly conference of any religious denomination. The procedure for such incorporation is set out in the statutes with considerable detail.[67]

Vacancies among the trustees resulting from the expiration of their term of office shall be filled by elections of the representative body. Other vacancies may be filled by the appointing body at any regular or special meeting called pursuant to the rules of such body.[68] Trustees are empowered to take and hold all property transferred to them for the benefit of the religious denomination which they represent. In the management and disposition of property, they shall be governed by the terms of any instrument by which the property is given to them and by the directions of the body by whom they were elected. The trustees are given the usual powers of management of the property under their control except that they must get specific authorization from the representative body which appointed

[64] Mich. Comp. Laws sec. 450.158 (1948).
[65] *Ibid.*
[66] Mich. Comp. Laws sec. 450.159 (1948).
[67] *Ibid.*
[68] Mich. Comp. Laws sec. 450.160 (1948).

them for the sale, mortgaging, conveyancing, or leasing of real estate for a period longer than three years.[69] In the case of such conveyance, mortgage, or lease of real estate, the trustees must file in the county recorder's office a copy of such authorization duly certified by the secretary of the representative body, and the certificate when filed shall be prima facie evidence of the facts therein stated.[70]

Appraisal. Provisions for trustee corporations originated in Michigan with the Act of 1921.[71] Similar statutes are not common in other states, but Ohio has provisions for the incorporation of charitable trusts,[72] and Missouri has a provision for the incorporation of nonprofit trusts.[73] Insofar as there is no express policy against incorporation of trustees, it is sound for the statutes to recognize the practice. They should, however, be as concise and nonrepetitious as adequate treatment will permit. Advantages of incorporation include more security of continued existence, a degree of state control, and limited personal liability inherent in corporate operation. Of course, unincorporated trustees can contract against personal liability, but such procedures are more cumbersome and may occasionally result in unexpected liability from oversight. Obviously, however, trustees cannot contract against tort liability. Further, it is to be noted that the statutes impose on incorporated trustees the same degree of accountability as if they were unincorporated.[74] Hence, the limitation on liability in many instances will not be appreciably different.

Corporations organized under these provisions partake

[69] Mich. Comp. Laws sec. 450.162 (1948).

[70] *Ibid.*

[71] Mich. Pub. Acts 1921, No. 84. See Wilgus, "Changes Effected by the New Michigan Corporation Act," 1 MICH. S. B. J. lvii, lxix (1922).

[72] Ohio Rev. Code secs. 1719.01 *et seq.* (Baldwin 1954).

[73] Mo. Ann. Stat. sec. 352.030 (Vernon 1952).

[74] Mich. Comp. Laws sec. 450.153 (1948).

of the characteristics of corporations organized under other sections. Trustee hospitals, sanitariums, or children's homes, if not run for profit, partake of the nature of nonprofit corporations generally and may even be run as an adjunct of a lodge or fraternal organization. If run for profit they should be subject to the profit corporation provisions. Trustees of a private trust operating for the sole benefit of the settlor or his designated beneficiaries would partake of the nature of a profit corporation. It would even seem to be possible under these provisions to organize a business or Massachusetts trust type of organization and then incorporate the trustees.[75] The unique aspect of these organizations is simply the nature of their trust origin. The statutes, then, need contain little more than recognition of this fact.

There seems to be little justifiable criticism of the general requirements of these sections. Detailed objections and specific recommendations are reserved for the proposed Act[76] and the explanatory notes thereto. There are, however, some serious objections to the special provisions contained in these sections. There is no necessity for special sections for hospitals, asylums, or other charitable institutions. The present Act provides for these institutions under two separate sections[77] with divergent requirements. This is useless and confusing. Further, the power to apprentice and indenture foundling children[78] should be eliminated. This not only sounds archaic and cruel, but the problem should be dealt with separately under welfare legislation. Provisions for church trustee corporations[79]

[75] See Wilgus, "Changes Effected by the New Michigan Corporation Act," 1 MICH. S. B. J. lvii, lxxi (1922).

[76] Part II, Proposed Act, secs. 258 *et seq.*

[77] Mich. Comp. Laws secs. 450.157 and 450.158 (1948).

[78] Mich. Comp. Laws sec. 450.157 (1948).

[79] Mich. Comp. Laws secs. 450.159 *et seq.* (1948).

should be included in the religious or church sections and not here. Such organizations generally originate in a manner similar to the usual nonprofit corporation rather than by a declaration of trust. Their location in these sections is illogical and confusing. Further, many of the detailed requirements and limitations should be eliminated in the interests of uniformity.

In recent years there has been considerable discussion and progress in the field of state regulation of charitable trusts.[80] Such state regulation so far is directed primarily at the enforcement of dormant trusts so that society may be assured of obtaining the intended benefits. Antisocial activities have also received attention in recent years. The manipulation of such charities for the perpetuation of private control of industry has been demonstrated,[81] and suspicion has been cast that such organizations, and foundations in particular, may be promoting subversive ideologies.[82] State control of these and other possible

[80] New Hampshire Laws 1943, c. 181, amended N. H. Laws 1945, c. 92, N. H. Laws 1947, c. 94, N. H. Laws 1949, c. 39; Rhode Island Laws 1950, c. 2617, R. I. Laws 1951, c. 2852; Ohio Rev. Code secs. 109.11, 109.23 to 109.33, 109.99 (Baldwin 1954); S. C. Code secs. 67–71 to 67–75 (Supp. 1954).

Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 MICH. L. REV. 633 (1954); Bogert, "Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts," 5 HASTINGS L. J. 95 (1954); Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N. Y. U. L. REV. 1069 (1954); Latcham, "Private Charitable Foundations: Some Tax and Policy Implications," 98 U. OF PA. L. REV. 617 (1950); Comment, "Supervision of Charitable Trusts," 21 U. OF CHI. L. REV. 118 (1953); Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950); Comment, "Recommending State Supervision of Charitable Trusts," 23 IND. L. J. 141 (1948); Note, "State Supervision of the Administration of Charitable Trusts," 47 COL. L. REV. 659 (1947).

[81] Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950).

abuses is not recommended as a part of the corporation act. Such legislation, if determined advisable after thorough investigation, should be enacted under general welfare legislation and made applicable to unincorporated as well as incorporated organizations.

IV. Foundations

Provisions for the incorporation of foundations are derived from an act of 1917[83] and are apparently unique to Michigan.[84] In other states these charities can be incorporated under the general nonprofit provisions. They can also be organized as a trust. A minimum of three incorporators[85] are required, but the authorized purposes are practically without restraint so long as they are directed towards the betterment of human welfare. The authorization reads: " . . . for the purpose of receiving and administering funds for the perpetuation of the memory of persons, preservation of objects of historical or natural interest, or for educational, charitable or religious purposes, or for public welfare."[86] It is thus seen that the scope of the permissive purposes is indeed broad. This, however, is consistent with foundation practice of stimulating beneficial programs in divergent areas. They generally provide grants in aid without becoming obligated to sustain any particular charity. Their aim is catalytic rather than ameliorative.[87] It is obvious, therefore,

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[82] H. R. Rep. No. 2514, 82nd Cong., 2d Sess.; H. R. Rep. No. 2681, 83rd Cong., 2nd Sess.

[83] Mich. Pub. Acts 1917, No. 59. See Wilgus, "Changes Effected by the New Michigan Corporation Act," 1 Mich. S. B. J. lvii, lxix (1922).

[84] Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 Yale L. J. 477, 480 n. 26 (1950).

[85] Mich. Comp. Laws sec. 450.163 (1948).

[86] *Ibid.*

[87] H. R. Rep. No. 2514, 82nd Cong., 2d Sess., p. 3; Comment, "Modern

that the purposes must be broadly stated both in the statutes and charter for the continuation of the foundation as presently constituted.

Foundations are given unlimited power to hold property, either in trust or absolutely, without limitation as to the amount, and to expend the income in whatever manner the trustees decide.[88] The power to invest and reinvest the principal, however, is limited to the extent that such investments must be in accordance with the state laws governing investments of trustees.[89] Foundations are classified as nonprofit corporations[90] and governed by those provisions unless otherwise specified. The property and accumulations need only be used to effectuate the objects of the articles and to promote the general welfare. Admission charges to sustain the expense of maintenance are authorized if the foundation maintains a museum, park, or similar institution.[91]

As is the case with other nonprofit and charitable corporations, the statutes evidence a generous policy of noninterference in the internal management and organization of the foundation. Except for specifying that the number of trustees must be between three and fifteen,[92] there are no other legislative requirements as to the internal functioning of the organization. Terms and conditions of membership are controlled by the articles, and the members elect the trustees in accordance with the by-laws.[93] Although a self-perpetuating board of trustees is not ex-

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Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950).

[88] Mich. Comp. Laws sec. 450.164 (1948).

[89] *Ibid.*

[90] Mich. Comp. Laws sec. 450.165 (1948).

[91] *Ibid.*

[92] Mich. Comp. Laws sec. 450.166 (1948).

[93] *Ibid.*

pressly authorized, it is likely that such a type of organization can be provided.[94] A one year term for trustees is mentioned, but the statute authorizes the by-laws to set another term.[95]

Foundations are generally expected to last perpetually, and accordingly the statutes do not provide any specific procedure for dissolution. The Act does provide, however, that if a foundation cease to function, become unable to serve its purpose, or if its funds be diverted, that the legislature may provide for the winding up of its affairs and for the conservation and disposition of its property.[96] Chancery dissolution under such circumstances would be preferable and less cumbersome.[97]

The foundation provisions are made applicable to corporations providing scholarships for the University of Michigan and for the other publicly maintained schools or colleges of the state.[98] They are likewise made applicable to corporations which lend money or give assistance to students at any of the state colleges or universities.[99] Existing corporations are not required to change their charters or by-laws, but they are permitted to do so in order to conform to the Act. The rights, powers, and privileges of existing corporations are not affected by the Act, but all non-stock existing corporations for benevolent or charitable purposes are deemed foundations.[100] However, the provisions of the Act do not apply to such cor-

[94] See Detroit Osteopathic Hospital v. Johnson, 290 Mich. 283, 287 N.W. 466 (1939).

[95] Mich. Comp. Laws sec. 450.166 (1948).

[96] Mich. Comp. Laws sec. 450.167 (1948). The Henry Ford Trade School was dissolved by the legislature in 1952. Mich. Pub. Acts 1952, No. 23; Mich. Comp. Laws sec. 450.167a (Mason's Supp. 1954).

[97] Part II, Proposed Act, sec. 252.

[98] Mich. Comp. Laws sec. 450.168 (1948).

[99] Mich. Comp. Laws sec. 450.169 (1948).

[100] Mich. Comp. Laws sec. 450.168 (1948).

porations if they are in conflict with the articles or by-laws.[101]

The final provisions for foundations authorize the consolidation of corporations for student aid or scholarships to state colleges and universities.[102] The procedure for such consolidation is extremely simple. The trustees of the corporation wishing to consolidate simply vote to transfer their property and assets to the other corporation. A two-thirds vote of the trustees is required for consolidation. A notice is then filed with the Michigan Corporation and Securities Commission, and thereupon the corporation is deemed to have surrendered its rights.[103]

Appraisal. The present provisions evidence a very liberal attitude towards foundations and in fact give the incorporators practically unlimited discretion in setting up the organization and in providing for the disbursement of income. This is, of course, conducive to such benefactions and results in many socially desirable projects. A few observations, however, may be made. The utility of the limitation[104] that trustees shall be elected for a term of one year unless the by-laws provide otherwise is rather elusive. It would seem preferable to recognize foundation practices frankly by specifically authorizing a self-perpetuating board and a corporation without members as is recommended in the general non-profit sections of the proposed Act.[105] The special provisions relating to foundations providing for student aid and scholarships

[101] *Ibid.*

[102] Mich. Comp. Laws sec. 450.169 (1948).

[103] Mich. Comp. Laws sec. 450.169 (1948). Sec. 169 provides for the filing of the notice with the Secretary of State, but such duties were transferred to the Michigan Corporation and Securities Commission by virtue of Mich. Comp. Laws sec. 451.3 (1948).

[104] Mich. Comp. Laws sec. 450.166 (1948).

[105] Part II, Proposed Act, sec. 233.

for state schools should be eliminated as unnecessary, and the general purpose provisions broadened to authorize scholarships to all accredited colleges and universities.[106]

The desirability of unrestricted foundation activity is primarily a question of policy. Several significant issues have received attention in recent years. One, of course, is the present status of tax exemption[107] and the correlative problem of using the foundation as a subterfuge for accomplishing private gains.[108] The tax angle is primarily a question for the Federal Government and hence not within the scope of state statutes. Some suggestions have been made.[109] To some extent, however, the state might be able to control foundation practices so as to mitigate private manipulations for strictly private objectives. Public supervision of charitable organizations of this type in general has been proposed and could be worked out on a state level.[110] As in the case of trustee corporations, however, and for the same reasons,[111] such regulation is not herein recommended.

[106] Part II, Proposed Act, sec. 270.

[107] Latcham, "Private Charitable Foundations: Some Tax and Policy Implications," 98 U. OF PA. L. REV. 617 (1950); Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950).

[108] *Ibid.*

[109] *Ibid.*

[110] Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 MICH. L. REV. 633 (1954); Bogert, "Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts," 5 HASTINGS L. J. 95 (1954); Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N. Y. U. L. REV. 1069 (1954); Latcham, *op. cit. supra,* n. 107; Comment, "Supervision of Charitable Trusts," 21 U. OF CHI. L. REV. 118 (1953); Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950); Comment, "Recommending State Supervision of Charitable Trusts," 23 IND. L. J. 141 (1948); Note, "State Supervision of the Administration of Charitable Trusts," 47 COL. L. REV. 659 (1947).

[111] *Supra,* pp. 93–94.

V. Educational Corporations

Educational institutions may be organized either as profit corporations or as trustee corporations,[112] and trustee corporations, in turn, embrace both charitable and private purpose trusts.[113] Hence, it is logically required that educational corporations also comply with either the profit or trustee sections.[114] Obviously, also, the nonprofit sections must apply to those educational corporations not organized for profit.[115]

Educational corporations are classified according to their capitalization and according to their lay or religious sponsorship.[116] The smallest authorized capitalization is $100,000, the upper limit on this class being $500,000. The next classification starts at $500,000, and the third at $1,000,000.[117] Corporations of this third class have authority to establish colleges or universities of graduate rank with academic programs of five years or more.[118] Corporations of the intermediate class are authorized to conduct regular colleges or preparatory schools, while those in the lower class may conduct junior colleges, seminaries, and preparatory schools.[119] Denominational corporations may enjoy the privileges provided for corporations of the above classes when they satisfy the requirements of those respective classes.[120]

It is required as a condition precedent to the filing of the articles of incorporation that every educational in-

[112] Mich. Comp. Laws sec. 450.170 (1948).
[113] Mich. Comp. Laws sec. 450.148 (1948).
[114] Mich. Comp. Laws sec. 450.170 (1948).
[115] Mich. Comp. Laws secs. 450.170 and 450.148 (1948).
[116] Mich. Comp. Laws sec. 450.171 (1948).
[117] *Ibid.*
[118] Mich. Comp. Laws sec. 450.172 (1948).
[119] *Ibid.*
[120] *Ibid.*

stitution present a written certification by the State Board of Education that the proposed corporation has proper housing, adequate educational plan, adequate library and plant, proper staff, and at least fifty per cent of its capital reduced to possession.[121] It is further provided that no educational corporation can expand beyond the program specified in its articles unless it presents to the Michigan Corporation and Securities Commission an approval by the State Board of Education.[122]

Additional Regulations. The articles must set forth the type of institution to be founded and the character of degrees to be offered.[123] In cases of colleges or universities, the articles must set forth how many faculties are to be established and, if a religious school, the denomination supporting it.[124] A corporation may move to a higher classification on increasing its assets and amending its articles.[125] Articles are to be filed in accordance with section five of the General Act.[126]

The directors or trustees are empowered to accept gifts of real and personal property without limitation as to amount.[127] Such gifts shall be disposed of in accordance with the donor's instructions or, in the absence of such instructions, according to the articles or by-laws of the corporation.[128] The control of business and secular affairs of every educational corporation shall be vested in a board of directors or trustees.[129] This board shall have exclusive control over the educational affairs and policy of the in-

[121] Mich. Comp. Laws sec. 450.171 (1948).
[122] Mich. Comp. Laws sec. 450.171 (1948).
[123] Mich. Comp. Laws sec. 450.173 (1948).
[124] *Ibid.*
[125] *Ibid.*
[126] Mich. Comp. Laws sec. 450.173 (1948).
[127] Mich. Comp. Laws sec. 450.174 (1948).
[128] *Ibid.*
[129] Mich. Comp. Laws sec. 450.175 (1948).

stitution, including specifically the powers to (1) employ faculties and officials; (2) prescribe courses of study, rules of discipline, and fix tuition; (3) grant diplomas, certificates of graduation, or honors and degrees as contemplated in the articles or warranted by the nature of the institution; (4) delegate to various officials or faculty members such authority as the board may deem advisable; and (5) cooperate with other schools and educational institutions to promote the best interests of education.[130]

The lawful recipient of every diploma or certificate shall be entitled to the privileges and immunities which by custom or tradition are allowed to holders of similar diplomas or certificates granted by similar institutions in this country, except that in case of a statutorily regulated profession, no such diploma or certificate will entitle the holder to engage in practice until he has complied with the statutory requirements or qualifications.[131]

Every educational corporation shall be visited and inspected at least once every three years by the State Board of Education.[132] The inspectors shall then publish a report of their findings and file it with the Michigan Corporation and Securities Commission. Upon evidence that any corporation is not complying with the law, it shall be served with notice to remedy the defect, and, in case the deficiency is not remedied, proceedings at law shall be brought for the dissolution of such corporation.[133] It is also provided that the trustees shall file an annual report designating the school's officials and faculty, financial position, and other information tending to depict its conditions and operations.[134]

[130] *Ibid.*
[131] Mich. Comp. Laws sec. 450.176 (1948).
[132] Mich. Comp. Laws sec. 450.177 (1948).
[133] *Ibid.*
[134] *Ibid.*

Appraisal. The provisions for educational corporations deal primarily with matters peculiar to this type of corporation and are, therefore, not unduly repetitious. Furthermore, this type of corporation is sufficiently distinct so that there should be little doubt as to what corporations are subject to these provisions. Regular corporate matters are governed by the trustee, nonprofit, or profit sections of the General Act as the case may be. Education is obviously a matter of public concern, and hence regulations beyond routine corporate functioning are justified.

Classification of educational corporations according to their assets with corresponding restrictions on their academic programs is a reasonable and salutary measure. It is obviously desirable to provide some assurances that the proposed institution has adequate resources to carry out its contemplated program. The minimum requirements might appear unreasonably low, but additional safeguards are provided by requiring approval by the State Board of Education. This assures the desirable flexibility without sacrificing adequate regulation.

It is believed that on the whole the requirements pertaining to educational corporations are adequate, not unduly burdensome or cumbersome, and serve a useful purpose. Limitations on the amount of gifts or property permitted these corporations are wisely omitted. Recommended changes are concerned primarily with re-arrangement to improve clarity and consistency in relation to the rest of the Act.[135]

VI. Ecclesiastical Corporations

Provisions for the incorporation of ecclesiastical organizations under the present Michigan Act apply only to

[135] Part II, Proposed Act, secs. 274 *et seq.*

church and similar denominational units.[136] Sunday schools and other subordinate societies are governed by the ordinary nonprofit sections,[137] whereas church governing bodies operating at the higher level are controlled by the church trustee provisions[138] of the trustee corporate sections. This division is awkward and confusing. The proposed Act[139] more logically designates all of these organizations as religious corporations and classifies them according to their level of operation.

Requirements. Three incorporators are required.[140] A model form for the articles set out in section 179[141] facilitates the work of the organizer. Similar models are not supplied in the statutes for other corporations. Article requirements are fairly simple, the information consisting chiefly of the following: (1) the name of the corporation which must clearly indicate that it is a religious association; (2) the location of the church; (3) the duration for which it shall be created; and (4) the religious doctrine or principles to which the organization shall adhere.[142] Execution and filing of the articles shall be in accord with section 5 of the Act as is the case with corporations generally.[143]

Consistent with the general legislative policy of noninterference in internal government and organization, very few restrictions are imposed on either the articles or by-laws. General prohibitions assert that a religious corporation shall not be used to circumvent public policy,

[136] Mich. Comp. Laws sec. 450.178 (1948).
[137] Mich. Comp. Laws sec. 450. 186 (1948).
[138] Mich. Comp. Laws sec. 450.159 (1948).
[139] Part II, Proposed Act, sec. 285.
[140] Mich. Comp. Laws sec. 450.178 (1948).
[141] Mich. Comp. Laws sec. 450.179 (1948).
[142] *Ibid.*
[143] Mich. Comp. Laws sec. 450.180 (1948).

teach immoral practices, violate the sanctity of marital relations, disregard any federal or state law, acquire property through fraud, misrepresentation, or undue influence, deprive a member of his right to appeal to the courts, allow an official to hold corporate property in his own name, or allow an individual to exercise too much control over the by-laws and regulations.[144] Otherwise the corporation is free to decide the form of government and adopt by-laws prescribing the following: the qualifications of members, their manner of admission, suspension and expulsion; the number and titles of the persons who control the temporal affairs, their term of office, manner of selection and removal; the time and manner of calling and holding church business meetings; the number of members constituting a quorum; the degree of control exercised by a higher church body; the manner of acquiring, holding, and disposing of real and personal property; and any other provisions deemed necessary for the management of such corporation.[145] The by-laws may also contain provisions for their amendment or repeal.[146]

In the event that the corporation has exceeded its powers or abused its privileges by practicing or permitting any of the proscribed conduct, as, for example, the teaching of immoral practices, the attorney general may, in either a pending quo warranto or a separate proceeding, apply to the circuit court for the appointment of a receiver.[147] Substantial donors and other claimants may then

[144] *Ibid.*

[145] Mich. Comp. Laws sec. 450.181 (1948). By-law provisions authorizing the removal of church elders were upheld as against the contention that the New Testament authorizes life tenure for elders with divine right to rule in Holt v. Trone, 341 Mich. 169, 67 N.W. (2d) 125 (1954).

[146] Mich. Comp. Laws sec. 450.181 (1948).

[147] Mich. Comp. Laws sec. 450.180 (1948).

file claims seeking restitution. Any surplus funds not distributed to claimants shall escheat to the state.[148] Provision for chancery dissolution is sound, but a statutory cy pres doctrine rather than escheat is recommended.[149]

Amendment. Amendment of the articles is governed by section 182.[150] They can be amended at any meeting called for that purpose.[151] Since the statutes contain no requirements as to the calling of such meetings, this matter can be regulated by the by-laws. Undoubtedly, concepts of notice and fair play could be judicially imposed. This is inferentially recognized in the statute which requires the certificate of amendment to contain a copy of the call of the meeting.[152] An affirmative vote of a majority of the members present at the meeting and entitled to vote is required for passage.[153] However, a different majority may be required if provided by the rules of discipline or church policy in a particular case.[154] A certificate of amendment shall be signed and acknowledged in the same manner as the original articles, and filed in triplicate pursuant to section 5 for original filing.[155] The contents of the certificate of amendment are specified in the statute. The amendment usually shall become effective upon filing, but if the government of a particular church requires the approval of a higher body, then the amendment must conform to such practice.[156] The statutes can be simplified by providing amendment procedures under the general nonprofit

[148] *Ibid.*
[149] Part II, Proposed Act, secs. 253 and 254.
[150] Mich. Comp. Laws sec. 450.182 (1948).
[151] *Ibid*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*

provisions and making them applicable to all of the special types of nonprofit corporations.[157]

Property. Ecclesiastical corporations are given broad powers to acquire, hold, sell, and convey both real and personal property.[158] A provision denying the corporation the right to recover property or debts obtained by fraud or undue influence[159] would seem superfluous, as no court would permit such action anyway. Specific authority is granted in one section[160] to sell, mortgage, and encumber both real and personal property. Express approval is granted for the acquisition of a pastorate, cemetery, and church and Sunday school buildings.[161] This normally would seem to be unnecessary in view of the prior rather broad grant of authority in relation to property. The provision, however, may be explained. It apparently prohibits, at least by inference, such corporations from acquiring and maintaining any real estate not used in the immediate furtherance of the corporation's activities. It is, therefore, in accord with the spirit of the constitutional provision[162] limiting the power of corporations to hold unused real estate for a period of ten years.

An element of ambiguity is introduced by the provision that "the right to sell, convey or mortgage such real property shall be subject to such restrictions and conditions as may be prescribed by the rules of discipline, articles or by-laws pertaining to each such corporation. . . ."[163] Since this restriction follows closely the grant of authority to ac-

[157] Part II, Proposed Act, sec. 249.
[158] Mich. Comp. Laws sec. 450.183 (1948).
[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] Mich. Const. Art. XII, sec. 5.
[163] *Ibid.*

quire land for a pastorate, church buildings, and a cemetery, this provision is apparently limited to that kind of real property. Apparently other real estate, if any, could be sold or encumbered without regard to any special limitation contained in the by-laws or other internal regulations of the church. This provision may be justified from the viewpoint of protecting church members from a precipitous sale of their house of worship. However, it does introduce another hazard for the purchaser of such property. In addition to the usual records and aliunde matter, the purchaser must check the articles, by-laws, and rules of discipline of the vendor church. It is an added pitfall which might not be entirely justified. It would be preferable to have a general provision relating to all property of all nonprofit corporations. Such a uniform provision, along with the usual recording acts, should be sufficient protection for the corporate members, and it would have the added advantage of promoting security of transactions and making such property more alienable.

Gifts and Investments. Ecclesiastical corporations are authorized to receive, hold, and use gifts or bequests for special religious or social projects connected with the corporation, and may receive gifts to be invested and the income used for general charitable projects.[164] Real estate received for special projects and not used for such purposes shall be sold within ten years and the proceeds used or invested for such purposes.[165] This provision conforms to the constitutional prohibition[166] against corporations holding unused real estate for a period longer than ten years. It would appear preferable to incorporate such re-

[164] Mich. Comp. Laws sec. 450.184 (1948).
[165] *Ibid.*
[166] Mich. Const. Art. XII, sec. 5.

striction in a more general section, thus making it applicable to all corporations, and thereby dispensing with the necessity of repeating it as to each type.

Investments must be made in accordance with the laws governing investments for trustees.[167] This is a justified and reasonable restriction. The officials of the church may receive donations of money for investment upon bond and mortgage when the income is to be applied toward salary payments of the minister or similar official. The money thus invested must also be in accord with the laws governing investment of trustees.[168]

The property provisions for these corporations seem to possess somewhat of a Jekyl and Hyde characteristic. On the one hand, there seem to be practically no restrictions on the acquisition, transfer, or encumbrance of property; but, on the other, the grant of specific authority in regard to certain property suggests that other powers are inferentially denied. Further, clarity is not necessarily introduced by the subsequent provision that the Act shall be liberally construed in the interest of religion and morality.[169] It is recommended that a property provision be drafted for all nonprofit corporations. Such a provision should be in conformity with constitutional limitations but otherwise free from all unnecessary restrictions.[170]

Appraisal. The most obvious criticism of the present Act is the multiple treatment of religious corporations. According to their level of operation, they are governed by the church trustee provisions,[171] ecclesiastical sections,[172] or general nonprofit provisions.[173] Since their dis-

[167] Mich. Comp. Laws sec. 450.184 (1948).
[168] *Ibid.*
[169] Mich. Comp. Laws sec. 450.185 (1948).
[170] Part II, Proposed Act, sec. 234.
[171] Mich. Comp. Laws sec. 450.159 (1948).
[172] Mich. Comp. Laws sec. 450.178 (1948).

tinguishing characteristic is primarily their location in the religious hierarchy, they should be governed by the same provisions with specific authorization for all three types of corporations.[174] Ambiguity inherent in the present statutes is not lessened by section 178[175]which authorizes church units to incorporate a central organization as an ecclesiastical corporation. Such an organization might indeed be different from a conference or synod in some respects, but it could perform similar functions. Further, the present statutes make the ecclesiastical officials subject to the same liabilities as trustee corporate officials if their corporation holds any property in trust for religious or charitable purposes.[176] The proposed Act unifies the provisions for religious corporations.[177]

Some additional changes in the statutes are also desirable. The policy of denying the ecclesiastical corporation certain powers which, if exercised, would circumvent established state policies, as, for example, the teaching of immoral practices,[178] is, of course, a justifiable limitation. It may be doubted, however, that such precaution is necessary. Pretext of religious freedom could hardly be permitted to thwart public policy. Similar prohibitions are not thought necessary in the case of other nonprofit corporations, yet they are equally susceptible of abuse. The same observation applies to the limitation on the power of the corporation to recover property or debts obtained through fraud.[179] The proposed Act[180] wisely omits these provisions

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[173] Mich. Comp. Laws sec. 450.186 (1948).
[174] Part II, Proposed Act, sec. 285.
[175] Mich. Comp. Laws sec. 450.178 (1948).
[176] Mich. Comp. Laws sec. 450.183 (1948).
[177] Part II, Proposed Act, sec. 285.
[178] Mich. Comp. Laws sec. 450.180 (1948).
[179] Mich. Comp. Laws sec. 450.183 (1948).
[180] Part II, Proposed Act, sec. 253.

from the religious sections and makes them applicable to all of these special types of corporations.

The provisions granting powers in relation to property should be clarified by removing all sections which might suggest some limitation on the power of the corporation to deal with any specific kind of property.[181] Limitations on capitalization are wisely omitted. Similar limitations on property transactions, even by innuendo, should be removed. The interest of the state in such property transactions is rather remote, and the accountability of the church officials to their membership along with ordinary civil and criminal remedies available to aggrieved persons should be sufficient protection for everybody. A general authorization for property transactions, consistent with constitutional provisions, and applicable to all nonprofit corporations should be sufficient.[182]

VII. Public Building Corporations

The incorporation of public building organizations as nonprofit corporations was authorized by a 1947 act of the Michigan legislature.[183] The purpose of such corporations is the construction, operation, and maintenance of office buildings for the State of Michigan.[184] A precautionary provision requires a legislative approval by concurrent resolution before any contract or contracts shall become effective between such corporation and the state administrative board.[185]

Public building corporations are empowered to receive,

[181] *Supra,* p. 108.

[182] Part II, Proposed Act, sec. 234.

[183] Mich. Pub. Acts 1947, No. 316. Mich. Comp. Laws secs. 450.186a *et seq.* (1948).

[184] Mich. Comp. Laws sec. 450.186a (1948).

[185] *Ibid.*

purchase, and manage property without limitation as to amount unless the legislature subsequently imposes such limitations.[186] Naturally, the corporation is empowered to enter into contracts and leases with the State of Michigan, and is empowered to borrow money and issue revenue bonds for repayment.[187] The only restriction on such powers to deal with property and borrow money is that the by-laws authorize such action or that the trustees authorize it by resolution at any duly called meeting at which a quorum is present.[188] This is really no limitation at all but is reasonable so long as such corporations are authorized.

Public building corporations are nonprofit corporations and subject to those provisions of the General Corporation Act except as otherwise specifically provided.[189] All property and funds of these corporations are to be held and administered to effectuate the purposes stated in the articles and to serve the general welfare of the State.[190] Such corporations are specifically authorized to charge the State rent to pay the cost of construction and maintenance of the office buildings.[191]

The trustees shall provide in the articles the terms and manner in which members may be admitted.[192] The governing board shall consist of not less than three nor more than nine trustees, to be elected by the members as provided by the by-laws.[193] Trustees shall serve for a term of six years or for such other period as the by-laws shall de-

[186] Mich. Comp. Laws sec. 450.186b (1948).
[187] *Ibid.*
[188] *Ibid.*
[189] Mich. Comp. Laws sec. 450.186c (1948).
[190] *Ibid.*
[191] *Ibid.*
[192] Mich. Comp. Laws sec. 450.186d (1948).
[193] *Ibid.*

termine and until their successors are elected and qualified.[194] The designation of a six year term is thus without significance, since the by-laws may provide otherwise. No such trustee shall receive any compensation for his services as such.[195] In case the corporation ceases to operate or becomes unable to serve usefully the purpose of its organization, the legislature may provide for the winding up of its affairs and disposition of its property in such a way as may best promote and perpetuate the purposes for which such corporation was originally organized.[196]

Appraisal. The specific provisions of these few sections seem sufficiently clear and definite for the accomplishment of the expressed purpose. The desirability of specifically authorizing such corporations, however, may be questioned. The whole thing seems somewhat anomalous. Private parties are authorized to set up a nonprofit corporation for the purpose of erecting buildings to be leased to the state. Such a corporation will obviously be quite different from the ordinary club, social organization, church, or usual nonprofit group. Presumably, members of this corporation will invest their money and expend efforts to erect buildings with the prospect of simply getting their money back with a modest interest. Membership in such a corporation would hardly carry with it the same personal intangible benefits as might be derived from an ecclesiastical, social, labor, educational, or cultural corporation. Granted that it is desirable to have state agencies housed in adequate buildings, is this the best way to accomplish that objective? Is not this type of corporation expanding to the limits the justifiable purposes

[194] *Ibid.*
[195] *Ibid.*
[196] Mich. Comp. Laws sec. 450.186e (1948).

of nonprofit groups? Are these corporations nonprofit in the true sense of the word?

A degree of public protection is accorded by the provision that the legislature must approve all contracts[197] and that the trustees can receive no pay for their services as such.[198] However, the trustees can be hired as managerial officials of the corporation. Further, what would prevent an interested person from unloading property on the corporation at substantial profits? Any such profit would eventually be paid by the state as a whole. Similarly, the authorization of revenue bonds[199] may be questioned. Does this not make it possible for a few individuals with a small amount of capital to organize a corporation, finance substantially all of the building costs through the sale of revenue bonds, pledging only the income from the property, and wind up with substantial gains to themselves? Revenue bonds of such a nonprofit public building corporation might easily have a sales appeal out of all proportion to the security offered. In short, it appears that the public building corporation is entering a field that might well be left to the usual profit corporation if the state is unable to finance a sufficient number of buildings. Competition among landlords plus any additional safeguards the legislature might wish to enact concerning the approval of leases would secure for the state reasonable rentals and at the same time preserve the property for regular taxation. The proposed Act[200] retains the provisions simply because the Michigan legislature has already determined the policy.

[197] Mich. Comp. Laws sec. 450.186a (1948).
[198] Mich. Comp. Laws sec. 450.186d (1948).
[199] Mich. Comp. Laws sec. 450.186b (1948).
[200] Part II, Proposed Act, sec. 293.

VIII. Summation

Provisions for the special types of corporations discussed in this chapter should be retained because they all have some unique characteristics. From a policy viewpoint, the public building corporation might be questioned, but its retention is justified on the basis that the policy has already been determined. Major specific recommendations for improvement have already been made in the *appraisal* paragraphs discussed in this chapter in relation to each type of corporation. Additional recommendations are included in the proposed Act and the explanatory notes thereto. The proposals in general are aimed at improved clarity, consistency, conciseness and uniformity.

CHAPTER V

Cemetery and Related Corporations

I. PRESENT TREATMENT

PROVISIONS for the incorporation of cemetery, cremation, and related associations are not contained in the Michigan General Corporation Act. Instead, four distinct acts provide separately for (1) the incorporation of nonprofit cemetery organizations;[1] (2) the incorporation of cemetery companies for profit and also, since a recent amendment,[2] for nonprofit purposes;[3] (3) the incorporation of cremation companies;[4] and (4) the incorporation of vault associations.[5] The first two of these acts are rather detailed. They are also heterogeneous in that many corresponding provisions have divergent requirements. Further, they are overlapping in that nonprofit organizations may be incorporated under both acts. The latter two acts are very brief and in fact incomplete.

It is obvious that many matters concerning routine corporate functioning of all of these corporations need not differ in any respect from similar matters relating to other profit and nonprofit corporations. Such items, for example, as the required number of incorporators, the mechanics of organization, general corporate powers, the regulations

[1] Mich. Pub. Acts 1855, No. 87; Mich. Comp. Laws secs. 456.1 *et seq.* (1948).

[2] Mich. Pub. Acts 1953, No. 167.

[3] Mich. Pub. Acts 1869, No. 12, as amended by Mich. Pub. Acts 1953, No. 167; Mich. Comp. Laws secs. 456.101 *et seq.* (1948 and Mason's Supp. 1954).

[4] Mich. Pub. Acts 1915, No. 58; Mich. Comp. Laws secs. 456.201 *et seq.* (1948).

[5] Mich. Pub. Acts 1882, No. 13; Mich. Comp. Laws sec. 456.251 (1948).

concerning directors and their qualifications, membership, voting, and meetings are but some of the features that could and should be uniformly regulated as to all corporations. Providing independent acts results in either unnecessary repetition or incomplete statutes. Logic compels that these corporations be included in the general Act with special provisions pertaining only to their unique requirements.

Simplification can be accomplished by amalgamating these four acts into one. The continuation of two detailed acts for cemeteries is ridiculous. One is sufficient, with a simple statement that corporations organized thereunder may be either profit or nonprofit organizations. Further, cremation corporations, columbarium associations, vault societies, and other organizations providing facilities for the disposal and interment of the dead are performing essentially the same function. One act with an enlarged purpose clause and additional flexible provisions would accomplish the purpose.

II. The Solution

Detailing the separate provisions of each of these separate acts would emphasize in a monotonous fashion the aforementioned observations. Further, the explanatory notes to the proposed Act set forth in detail what portions of the present acts are recommended to be retained and what provisions are recommended to be changed.[6] Thus, it would seem more profitable to elaborate herein the scheme of the proposed Act and the considerations behind its essential features.

Consistent with the general theory that one group of provisions is sufficient for all types of burial corporations,

[6] Part II, Proposed Act, secs. 297 *et seq.*

section 297[7] lists in a comprehensive manner the purposes for which such corporations may be formed. By listing all of the purposes mentioned in the existing four acts in as broad a manner as possible, it is intended to make the sections fully comprehensive. Section 298[8] provides that any of these corporations may be organized either for profit or not for profit, and that they shall be governed accordingly by the applicable sections of the general Act. Thus is rendered unnecessary the repetition of provisions governing routine procedure. It is to be noted, however, that this section will necessitate an amendment to section 3[9] of the general Act, which at present excludes cemetery corporations.

Section 299 of the proposed Act[10] is in form a granting of power to acquire land in fee for cemetery and related purposes. It is in fact, however, also a limitation on the power of such corporations, as otherwise they would have power to acquire such land either in fee or in lesser estate under the general provisions.[11] An added provision that such land shall perpetually remain dedicated to burial uses until by law vacated is a further limitation. Both of these provisions are taken from the present acts and are justified. In choosing the provision of one existing statute[12] limiting the acquisition of such property to estates in fee, the contradictory provision of another,[13] authoriz-

[7] Part II, Proposed Act, sec. 297.

[8] Part II, Proposed Act, sec. 298.

[9] Mich. Comp. Laws sec. 450.3 (Mason's Supp. 1954).

[10] Part II, Proposed Act, sec. 299.

[11] Mich. Comp. Laws sec. 450.10 (1948), as amended by Mich. Pub. Acts 1953, No. 156 and Mich. Comp. Laws sec. 450.125 (1948). Sec. 234 of the proposed Act is the analogous section relating to powers of nonprofit corporations.

[12] Mich. Comp. Laws sec. 456.204 (1948), relating to cremation corporations.

[13] Mich. Comp. Laws sec. 456.2 (1948).

ing such acquisitions by lease, was rejected. Considering the permanence of a burial ground, the requirement that the corporation hold such land in fee is reasonable.

The burial ground. Both of the present cemetery corporation acts have provisions requiring the mapping or platting of the burial ground.[14] This is a reasonable requirement and is therefore continued in the proposed Act.[15] The recommended section,[16] however, is broadened to require also plats or plans of mausoleums, columbariums, or similar structures. One copy of the plat or map shall be retained by the secretary of the corporation, and another shall be filed with the clerk of the county court.[17] All land used for the burial of the dead is exempt from real estate taxation under both the present acts and the recommended provisions.[18] The exemption applies to profit as well as nonprofit corporations.[19] Land that is held in reserve and not yet used for such purposes, however, is subject to taxation.

Right of burial. The present four Acts contain a number of repetitious and nonuniform provisions relating to burial rights. The proposed Act retains the best of these provisions and broadens them to make them applicable to all corporations engaged in operating facilities for the repose of the dead. Section 303[20] broadly defines right of burial to include not only burial in the ground but entombment in a vault or crypt, as well as the storage of the ashes of a cremated body. The same section also recognizes the right

[14] Mich. Comp. Laws secs. 456.17 and 456.106 (1948).

[15] Part II, Proposed Act, sec. 300.

[16] *Ibid.*

[17] *Ibid.*

[18] Mich. Comp. Laws secs. 211.7, 456.108, and 456.205 (1948). Part II, Proposed Act, sec. 301.

[19] *Ibid.*

[20] Part II, Proposed Act, sec. 303.

of the corporation to enact regulations concerning such rights. These regulations might pertain to visitorial rights, erection of plaques or monuments, decorating resting places, payment for such rights, and similar matters.

Section 304[21] is patterned after a current provision[22] and restricts the corporation from mortgaging or otherwise encumbering land actually used for burial purposes. Similarly, interments are forbidden in land which is delinquent for taxes or special assessments.[23] Section 305[24] confers on the board of directors the power to determine the price of burial rights and requires the issuance of a certificate of burial upon full payment. This provision also is a consolidation of present provisions.[25] Provisions requiring a record of burial rights, burials, cremations, and disinterments are recommended.[26] The proposed Act[27] authorizes the corporation to enact regulations governing the transfer of burial rights, and makes such rights transferable only in accordance with those regulations. This is a sound method of treating the matter and is preferable to enacting rigid requirements. The parties should be free to choose the character of the locale of their final resting place, and reasonable restrictions on transfer should be recognized.

Perpetual care fund. Section 310 of the proposed Act[28] makes a perpetual care fund mandatory for all corporations engaged in interment activities. Under the present acts such a perpetual care fund is mandatory only for

[21] Part II, Proposed Act, sec. 304.
[22] Mich. Comp. Laws sec. 456.109 (1948).
[23] Part II, Proposed Act, sec. 304.
[24] Part II, Proposed Act, sec. 305.
[25] Mich. Comp. Laws secs. 456.31, 456.106 and 456.209 (1948).
[26] Part II, Proposed Act, secs. 306, 308 and 309.
[27] Part II, Proposed Act, sec. 307.
[28] Part II, Proposed Act, sec. 310.

columbarium corporations.[29] The acts for cemetery corporations[30] authorize such a fund on an optional basis. A compulsory fund is recommended to obviate periodic burdensome assessments and to insure the preservation of the grounds and buildings. Statutory recognition of such funds is desirable to preclude any possible conflict with the Rule Against Perpetuities. The proposed Act also authorizes burial corporations to act as trustees of private perpetual care funds.[31] The mandatory provisions of the perpetual care fund sections are not made applicable to existing corporations not having such funds.[32]

Cemeteries shall be vacated only upon authorization of the circuit court, which shall make reasonable and just orders concerning disinterment and reinterment.[33] Other provisions of the existing acts are not recommended for retention. These are set forth in the explanatory notes following section 313 of the proposed Act.

[29] Mich. Comp. Laws sec. 456.213 (1948).
[30] Mich. Comp. Laws secs. 456.35 and 456.115 (1948).
[31] Part II, Proposed Act, sec. 311.
[32] Part II, Proposed Act, sec. 310.
[33] Part II, Proposed Act, sec. 313.

Chapter VI

In Retrospect

ELUSIVE indeed is the perfect solution to the problem of the multiplicity and diversity of nonprofit corporation statutes. Initially there must be resolved fundamental questions on procedure: whether to have a completely separate and independent act for some or all of these organizations; whether to provide for them in supplementary provisions to the general business corporation act; or whether to attempt a complete amalgamation into the general corporate law. Michigan, of course, follows the second of these alternatives, and such procedure is believed basically sound.

Providing completely independent acts for one or more of these organizations results in unnecessary duplication as to routine corporate matters. On the other hand, to amalgamate completely the provisions into the general act invites ambiguity and cumbersomeness because of the many distinct characteristics and unique problems of these organizations. Using the general act for routine matters and adopting special provisions for the particular requirements, however, results in utmost flexibility with minimum duplication.

After determining the basic method of treatment, the next problem is to decide which corporations require special provisions. Undoubtedly, substantial agreement could be reached on a few of them. In practically all jurisdictions there are either separate sections of the general act or completely separate acts providing for the incorporation of nonprofit corporations generally, cooperatives, and church corporations. From here on, however, agreement ceases and divergence predominates. Perhaps the

significant issues are not so much how many different types of corporate provisions are enacted, but rather how concisely, how uniformly, how clearly, and how logically they are constructed.

It may appear that the recommendations herein provided are too modest and not sufficiently comprehensive to accomplish significant consolidations. It is true that all the chief categories of the special provisions of the present general Act are retained. Some important changes are proposed, however. The cooperative sections are modernized in many ways; the nonprofit sections are expanded considerably; the fraternal sections are greatly reduced; the educational and ecclesiastical sections are clarified and simplified; and the cemetery provisions are added to the general Act. Thus, the four burial corporation acts can be eliminated. Church trustee and religious society sections are consolidated into the ecclesiastical provisions, and many repetitious sections are omitted throughout the Act. Further, all the specific acts providing for the incorporation of the very many different types of lodges and churches can be repealed. Special acts for the incorporation of labor organizations are not needed in view of the comprehensive provisions of the nonprofit sections. Special acts for agricultural and horticultural societies, except possibly those that receive public aid and may be at least quasi-municipal corporations, are not needed. Thus, from seventy five to one hundred acts can be eliminated without detriment.

That this study and its proposed Act are neither the final solution nor the last word on so complex a matter is obvious. That it may act as a catalyst to stimulate capable minds to the challenge of statutory reform, however, is a hope which, if fulfilled, will amply justify the effort expended.

PART TWO

A PROPOSAL

PROPOSED NONPROFIT CORPORATION ACT

Draftsman's Introductory Note

THESE provisions are designed to fulfill completely and succinctly the requirements of corporations not generally falling into the category of the usual business corporation or organization motivated for the pecuniary profit of its shareholders. They are not offered as an integral or complete act in themselves but are designed as supplementary sections to the general business corporation act. In the interests of uniformity of procedures and consistency of substance, the general corporate law of the jurisdiction is applicable unless otherwise specified.

These sections are specifically formulated in reference to the Michigan Act but are believed to be adaptable to any state's general corporation act with very slight additions or changes.

The section numberings arbitrarily start with 200 and run consecutively to 319. This is done to allow ample additional sections for the general provisions and to avoid confusion between the proposed and existing sections. Changes and additions have been made only where they were thought necessary to clarify possible ambiguities, eliminate duplications, or make the statutes conform to routine practices of the type organization. Generally, existing sections taken from the Michigan Act were not changed just for purposes of reclassification, changes in style, or methods of expression.

202. Cooperative corporations.
203. Cooperative plan.
204. Articles of incorporation; contents.
205. Centents of certificate of stock.
206. By-laws.
207. Membership.
208. Amendments.
209. Investment of reserve fund.
210. Purchase of business of another corporation.
211. Distribution of earnings.
212. Revolving fund.
213. Surplus earnings.
214. Contracts and agreements.
215. Encouraging breach of contracts.
216. Ultra vires.
217. Corporations not for pecuniary profit.
218. Purposes, applicability.
219. Articles of incorporation.
220. Denomination of shares; dividends, etc.; dissolution.
221. Membership.
222. Membership fees, assessments.
223. Meetings of members.
224. Voting.
225. Limitations on membership.
226. Board of trustees or directors.
227. Qualifications and term of office of directors.
228. Directors, term of office.
229. Vacancies in board.
230. Meetings of the board.
231. Quorum of the board.
232. Board of directors; executive committee.
233. Self-perpetuating board of directors.
234. Rights and powers; power corporations, regulation.
235. Powers in relation to property; liability of directors.
236. Central and local units.
237. Name.
238. State parent unit of foreign association.
239. Ritual and rules; chartering of subordinate units.

240. Supervision of subordinate units.
241. Parent organization; management, secretary.
242. Representative form of government; first annual meeting.
243. Powers at annual meeting.
244. Local units; purpose.
245. Articles of incorporation.
246. Supervision of local units.
247. Officers and representatives.
248. Powers; membership in other nonprofit corporations; voting.
249. Amendment of articles.
250. By-laws; enactment or amendment.
251. Consolidation or merger.
252. Dissolution; chancery jurisdiction.
253. Unauthorized practices; dissolution.
254. Distribution of assets.
255. Plan of distribution.
256. Incorporation of fraternal societies.
257. Relief funds.
258. Trustee corporations.
259. Contributions; membership.
260. Trustee corporations; how organized; law governing.
261. Compensation of trustees.
262. When incorporation authorized; trust instrument defined.
263. Articles of incorporation.
264. Officers.
265. Powers in relation to property.
266. Use of property and funds; investments.
267. Vacancy among trustees; filling.
268. Construction of trust instrument; jurisdiction of court.
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SEC. 200. SPECIAL TYPES OF CORPORATIONS; APPLICABILITY OF ACT. Special types of corporations hereinafter provided for in sections 202 to 313 shall be governed by the provisions of this Act relating to corporations generally except as specifically otherwise provided.

Note. This section is added to prevent needless repetition existing in the current Michigan statutes. At present a similar provision is inserted for each special type of corporation, e.g., sections 98, 117, and 170 of the Michigan Act.

SEC. 201. LIABILITY FOR TORTS. The special types of corporations hereinafter provided for in sections 202 to 313 shall be responsible for the torts of their agents and employees committed within the scope of employment to the same extent as natural persons and general business corporations.

Note. This is a new provision changing the existing law applicable to many of these nonprofit corporations. Michigan law now generally provides that charitable corporations are not liable for the torts of their agents, Nonprofit Corporations Generally, *supra,* p. 78, and one case at least has inferred that cooperatives likewise would be immune from liability, Flueling v. Goeringer, 240 Mich. 372, 215 N.W. 294 (1927), discussed *supra* Cooperatives, p. 48. The immunity principle is now generally discredited.

SEC. 202. COOPERATIVE CORPORATIONS. Corporations organized to conduct any lawful business which limit the

dividends payable upon stock investment in the case of corporations with capital stock and membership investment in the case of membership corporations without capital stock to not in excess of 7 per cent per annum and/or which limit the voting rights of stockholders and/or members to 1 vote regardless of the number of shares of stock and/or membership held, and in any case do not conduct more that 50 per cent in annual value of their business or services with nonstockholders and/or nonmembers, shall be termed cooperative corporations.

CLASSIFICATION OF COOPERATIVE CORPORATIONS. Corporations organized under and operated in accordance with the provisions of sections 202 to 216, inclusive, of this Act, which pay limited dividends upon the stock and/or membership investment or which do not make distribution of earnings to nonstockholders or nonmembers upon the same basis as to stockholders and/or members shall, for purposes of making reports and payment of privilege fees or other taxes to the state, be classified as profit corporations. Corporations which do not pay dividends or interest upon stock and/or membership investment and which distribute all earnings to stockholders and/or members and other persons doing business with the corporation or provide for the allocation of such earnings to stockholders and/or members and other persons doing business with the corporation for future distribution shall, for the purposes of making reports and payments of privilege fees or other taxes to the state of Michigan, be classified as nonprofit corporations.

Note. The first paragraph providing for limited dividends, per capita voting, and restriction on business activities with

nonmembers is characteristic of cooperatives, *supra* Cooperatives, pp. 10–19.

Seven per cent is a fair return on investment capital. Massachusetts limits the return to 5%. [Mass. Ann. Laws c. 157, sec. 6(2) (1948).] California limits the return to 5% under the general cooperative act but permits an 8% return for agricultural cooperatives. [Cal. Corp. Code sec. 12201 (1953), and Cal. Agricultural Code sec. 1200(1) (1950)]. The following states limit the return on investment capital to 8%: New York (N. Y. Cooperative Corp. Law secs. 72 and 111); Utah (Utah Code Ann. sec. 3-1-11 (1953)); Ohio (Revised Code sec. 1729.10 (f) (Baldwin (1953)); Iowa (Ia. Code Ann. secs. 499.23 and 499.24 (1949)); Florida (Fla. Stat. sec. 618.15 (1953)).

Restriction on business activity with nonmembers is justified since the basic concept of a cooperative is the performance of service for members. Statutory restrictions are common but not universal. The Massachusetts Act, Mass. Ann. Laws c. 157, sec. 1 *et seq.* (1948) and the California Act for agricultural cooperatives, Cal. Ag. Code, sec. 1190 *et seq.* (1950), contain no such restrictions. The California Act for general cooperatives simply anthorizes "any lawful business primarily for the mutual benefit of its shareholders." [Cal. Corp. Code, sec. 12201 *et seq.* (1953)]. A New York statute provides that "nonmember products handled in any year must not exceed the total of similar products handled for its own members." [N. Y. Cooperative Corp. Law sec. 14(b).] Another New York Statute provides restriction against an agricultural cooperative dealing in farm products "in an amount greater in value than the total amount of such business transacted by it with or for members." [N. Y. Coop. Corp. Law sec. 116.]

An Ohio statute provides that if the cooperative handles the products of nonmembers, "the total of such nonmembers' products handled by it in any fiscal year must not exceed the total of similar products handled by the association for its own members during the same period." [Ohio Revised Code sec. 1729.03 (A) (Baldwin 1953).] Similar restrictions can be found in the statutes of Utah (Utah Code Ann. sec. 3-1-9 (IIh) (1953)), Florida (Fla. Stat. sec. 618.91(3) (1953)), and Iowa (Ia. Code Ann. sec. 499.3 (1949)). The Iowa statute forbids the handling of *any* nonmember's livestock in the case of a livestock ship-

ping association. [Ia. Code Ann. sec. 499.3 (1949).] It is believed that the present Michigan Act expresses the desired limitation as succinctly as possible. However, the existing limitation is expressed as 50% of the business or service without specifying either the time or commodity unit of measurement. The insertion of the words *in annual value* after *50 per cent* eliminates any ambiguity.

The provision in the first paragraph of section 98 of the present Michigan Act stating that cooperatives are subject to the General Corporation Act unless otherwise provided has been deleted from section 202 and made a separate provision under section 200 applicable to all special types of corporations provided for in sections 202 to 313. The differentiation between profit and nonprofit cooperatives for purposes of state taxation is sufficiently clear. This is simply a policy matter to be decided by the legislature. In view of the fact that this Act covers all cooperatives and permits considerable flexibility in their organization, such a classification is reasonable. The treatment in other states is not uniform. Assertions to the effect that such "associations shall be deemed nonprofit inasmuch as they are not organized to make profit for themselves as such," [Ohio Rev. Code sec. 1729.01 (Baldwin 1953); Cal. Ag. Code sec. 1192 (1950); Fla. Stat. secs 618.01, 619.03 (1953); N. Y. Coop. Corp. Law sec. 3 (d)] are common but are not necessarily determinative of what fees or taxes they pay. The Ohio Act, for example, provides that for the filing of the articles or amendments, and with respect to the issuance of shares of stock, the cooperative must pay the same fees as a profit corporation [Ohio Rev. Code sec. 1729.08 (Baldwin 1953)], whereas Iowa provides a separate filing fee schedule for cooperatives [Ia. Code Ann. sec. 499.45 (1949)]. The present Michigan Act clearly and adequately covers the matter.

SEC. 203. COOPERATIVE PLAN. Corporations may engage in any lawful business within this state upon any cooperative plan adopted by the incorporators, or by the shareholders at any annual or special meeting. For the purpose of this act, the term "cooperative plan" shall be deemed to mean a mode of operation whereby the earnings of the

corporation are distributed on the basis of, or in proportion to, the value of property bought from or sold to shareholders and/or members or other persons, or labor performed for, or services rendered to, or by the corporation: *Provided,* That the foregoing definition shall not be construed as prohibiting any such corporation from paying limited dividends to stockholders and/or members upon stock and/or membership investment, or from reserving a certain proportion of earnings for future operations or for future distribution. Earnings so reserved shall be allocated on the books of the corporation or a means provided for such allocation to the stockholders and/or members or other persons entitled to such earnings, before general distribution of earnings shall have been authorized and made. Corporations organized under a cooperative plan and governed by sections 202 to 216, inclusive, of this Act are hereinafter in this Act called cooperative corporations and they only shall use the term "cooperative" in their name.

Note. Authorization to engage in any lawful business is desirable, see *supra,* Cooperatives, p. 23 *et seq.* Some states expressly authorize only agricultural cooperatives: e.g., Utah Code Ann. sec. 3-1-4 (1953); some states have two or more acts, one providing for agricultural cooperatives and the other for more general cooperatives: Ohio Rev. Code secs. 1729.02, 1729.28 (Baldwin 1953), California Ag. Code sec. 1190, Cal. Corp. Code sec. 12201 (1953), Fla. Stat. secs. 618.06 and 619.01 (1953), Mass. Ann. Laws c. 157, secs. 1, 3 and 10 (1948); others simply list the purposes or objects for which a cooperative may be formed, e.g., Ia. Code Ann. sec. 499.6 (1949).

The definition of cooperative plan is precise and definite, sufficiently regulatory to compel the return of earnings to the patrons and sufficiently flexible to be adapted to the needs of a particular organization. See *supra,* Cooperatives, p. 26. *Cf.* the definitions in the following statutes: Cal. Corp. Code sec.

12201 (1953); N. Y. Cooperative Corp. Law sec. 3(d); Utah Code Ann. sec. 3-1-2 (1953); Ia. Code Ann. sec. 499.2 (1949).

SEC. 204. ARTICLES OF INCORPORATION; CONTENTS. 1. Articles of incorporation shall be signed in triplicate and shall be acknowledged by at least one of the incorporators if there are more than one, or by the sole incorporator if there are no more than one. The acknowledgement shall be executed before an officer authorized to take acknowledgements by the laws of this state and shall express, in the English language:

a. the name of the corporation which must include the word "cooperative";

b. the purpose or purposes for which the corporation is formed;

c. the location and post-office address of its registered office in this state;

d. the name of the corporation's first resident agent;

e. if the association is organized without capital stock, whether the property rights and interests of all members are to be equal or unequal; if unequal, the general rules applicable to all members by which the property rights and interests of each member are to be determined; and provision for the admission of new members entitled to share in the property of the association with the old members in accordance with such general rules;

f. if the corporation is organized with capital stock, the stock structure as prescribed in section 4(1)(e) of this Act relating to corporations generally;

g. the amount of capital with which the corporation will commence business, which shall not be less than $1000;

h. the names and places of residence or business of each

of the incorporators and the number and class of shares subscribed for by each;

i. the names and addresses of the first board of directors;

j. the term of the corporation existence.

2. The articles may also contain optional provisions as authorized in section 4, paragraphs 2 and 3, of this Act relating to corporations generally.

Note. This is essentially the same as section 4 of the Michigan Act relating to corporations generally except that a provision requiring the word "cooperative" to appear in the corporation's name has been added in paragraph 1(a), and a section has been added (par. 1(e)), for the cooperative without capital stock. Although the addition of this section makes for some repetition, it is believed that the interests of clarity justify such duplication.

The insertion of the requirement that these corporations employ the word "cooperative" in their name is suggested by the Attorney General in 1945–46 Mich. Ops. Att'y. Gen. p. 129. See *supra,* Cooperatives, p. 24. Similar provisions are not uncommon in other states; Ia. Code Ann. sec. 499.40 (1949), Mass. Ann. Laws c. 157, sec. 3 (1948), N. Y. Cooperative Corp. Law sec. 11. Utah and Florida provide that the use of the word "Cooperative" in the name is optional [Utah Code Ann. sec. 3-1-5 (1953), Fla. Stat. sec. 618.04 (1953)], while Ohio makes no specific provision [Ohio Rev. Code sec. 1729.06 (Baldwin 1953)].

Par. 1(e) providing for a statement of the property rights of members in case the cooperative is organized without capital stock is new. This provision is prompted by par. 1(e) of sec. 4 of the Michigan Act which obviously has reference primarily, if not only, to stock corporations. Although shares of stock and membership are equated in sec. 2(g), it is believed the application or sec. 4(1)(e) to non-stock cooperatives may be a little awkward. This new provision is substantially the same as the Ohio provision (Ohio Rev. Code sec. 1729.06(E) (Baldwin 1953)). Other statutes have similar provisions: Fla. Stat. sec. 618.04(6) (1953); Utah Code Ann. sec. 3-1-5(h) (1953); Ia. Code Ann. sec. 499.40(6)(b) (1949). The additional provision

in the Ohio statute that such provision in the articles concerning property rights "shall not be altered, amended or repealed except by the written consent or vote of two thirds of the members" [Ohio Rev. Code sec. 1729.06(F) (Baldwin 1953)], is not included. It is believed that the application of section 43 of the Michigan Act (providing generally for amendments), to nonstock cooperatives adequately covers this situation. In accord with this section, and construing shares of stock as synonomous with membership in accord with section 2(g), an amendment which changes the rights, privileges, or preferences of members must be approved by a majority of the members of the class affected. No further provision is needed.

A requirement stated in sec. 4(1)(f) of the present Michigan Act, that the articles contain in addition to the names and addresses of the incorporators the number and class of shares subscribed for by each, has been retained in the original language. The provision obviously applies to both stock and membership cooperatives as a result of the definition in sec. 2(g). Although this requirement does not seem to be common in other cooperative statutes [Ohio Rev. Code sec. 1729.06 (Baldwin 1953), Fla. Stat. sec. 618.04 (1953), N. Y. Coop. Corp. Law sec. 11, Ia. Code Ann. sec. 499.40 (1949), but see Utah Code Ann. sec. 3-1-5 (1953), requiring this information only if the cooperative is organized on a stock basis], it is believed desirable to make such a provision applicable to cooperatives. Although the earnings are distributed on the basis of patronage and not financial interest, the act permits unequal voting rights. Thus, requiring a statement of the incorporators' interest enables prospective members to determine the degree of control that may be acquired by the incorporators. Control may be more significant than the right to a portion of the distributable funds.

A separate provision is retained in par. 1(g) requiring a minimum of $1000 with which the corporation shall begin business. It is noted that sec. 5 of the Act, Mich. Comp. Laws sec. 450.5 (Mason's Supp. 1954), requires all profit corporations to have $1000 before commencing business. Since some cooperatives are classified as nonprofit corporations, this provision is included in this section to make the requirement apply to all cooperative corporations.

Paragraph 2 of this section incorporates by reference op-

tional provisions authorized in paragraphs 2 and 3 of section 4 of the Michigan Act relating to corporations generally.

Since no reference to the number of incorporators is made in these sections, the requirement of one or more as provided in sec. 3 is applicable. This is a reasonable approach; see Nonprofit Corporations Generally, Authorization, *supra,* p. 57.

No separate provision for filing the articles is included, as this is governed by section 5 of the General Act.

SEC. 205. CONTENTS OF CERTIFICATES OF STOCK. There shall be printed upon each share of stock issued by cooperative corporations a concise statement of every article or by-law which in anywise limits the shareholders' right to assign or transfer such shares or to vote the total number of shares held at meetings of the corporation, or which forbids voting by proxy.

The provisions of the Uniform Stock Transfer Act of this state shall not be held to apply to the shares of stock of such cooperative corporations in any manner or to any extent inconsistent with the provisions of sections 202 to 216, both inclusive, of this Act.

Note. See *supra,* Cooperatives, Membership, p. 33. Authority to place limitations on the transfer of cooperative stock and even rather rigid limitations on membership are common in other states. [Ia. Code Ann. sec. 499.17 (1949); N. Y. Cooperative Corp. Law sec. 40; Utah Code Ann. sec. 3-1-11 (1953); Mass. Ann. Laws c. 157, sec. 13 (Supp. 1954); Cal. Ag. Code, sec. 1206 (1950); Ohio Rev. Code, sec. 1729.09 (Baldwin 1953); Fla. Stat. sec. 618.15 (1953).] It is believed the present Michigan practice affords the greatest flexibility and is desirable in that it places no arbitrary rule on assignability of memberships but allows the interested parties to determine the question of transferability for themselves.

Similarly, the present Michigan Act permits the members to determine voting rights rather than arbitrarily asserting that there shall be per capita voting or otherwise rigidifying the mode of operations. Hence, each cooperative can determine the mode of operations best suited to its peculiar

requirements. Sec. 206 *infra*. Provisions in other states are not uniform. [Fla. Stat. sec. 618.15 (1953); Ohio Rev. Code sec. 1729.10 (G) (Baldwin 1953); Cal. Ag. Code sec. 1196 (e) (1950); Cal. Corp. Code sec. 12403 (1953); N. Y. Cooperative Corp. Law secs. 44 and 46 (1951).]

SEC. 206. BY-LAWS. The shareholders of any cooperative corporation shall have power: to adopt by-laws for the government and regulation of its business management, and to amend such by-laws; to determine the manner of distributing the earnings of the corporation upon a cooperative plan; to limit and define the powers and duties and the number of directors and officers; to delegate to the directors any particular power or authority which the shareholders themselves possess, excepting the right to elect or dismiss directors and to amend the articles; to fix the time for holding the elections of its directors, which shall be annual unless a longer term is prescribed in the articles or by-laws: *Provided,* That in the event directors are elected for a term of more than 1 year, the by-laws shall prescribe the length of term and the number of directors to be elected each year; to determine whether or not voting by proxy shall be allowed, and if so allowed, when and how; to provide the manner in which directors and officers may be removed and their successors elected at any time by vote of the shareholders; to determine whether or not shareholders shall be limited to 1 vote each, regardless of the number of shares held; to determine the number of shareholders attending any meeting, or the number of shares represented at any meeting of shareholders which shall constitute a quorum, which may be less than a majority; to determine the manner in which shareholders may vote by mail, if the articles or by-laws provide for such voting; and to provide a limitation upon the amount of

capital stock which may be owned by any 1 shareholder therein; all of which shall be included in the by-laws or in the articles.

Note. This section provides for the maximum flexibility in organization. See *supra,* Cooperatives, Membership, p. 33, and Organization, p. 36. This flexibility is desirable and should be retained. Unless abuses are evident, there is no need for more rigid requirements.

SEC. 207. MEMBERSHIP. The shareholders of every cooperative corporation may also provide in their articles or by-laws, the necessary qualifications of shareholders or members, together with provisions limiting, prescribing or regulating the transfer of such shares or memberships, and the terms and conditions under which, if at all, memberships or certificates of stock may be transferred. No sale, transfer or assignment of membership rights or of any stock in any cooperative corporation shall be valid unless made in accordance with its articles or by-laws; nor shall any purchase and sale of any such shareholder's stock or privileges in such corporation made under execution, or in the course of bankruptcy proceedings, or by any legal process or by operation of law, give any person any shareholder's or membership right, title or interest in and to such corporation, unless in accordance with its articles or by-laws.

Note. The desirability of these flexible provisions is discussed *supra,* Cooperatives, Membership, p. 33 *et seq.*

SEC. 208. AMENDMENTS. Any corporation formed or existing under this Act may at a meeting of the shareholders duly called and held amend its articles or by-laws in accord with sections 42, 43 and 16 of this Act: *Provided, however,* That only the shareholders shall have power to

amend the by-laws. In addition to the above procedure for amendments one tenth of the entire number of shareholders of any cooperative corporation may propose any desired amendment to the articles or to the by-laws of such corporation, and any amendment so proposed shall be voted upon by the shareholders at any meeting duly called and held but not later than the next annual meeting. Approval shall be by a majority of the shareholders either in interest or per capita as the case may be.

Note. This section includes section 103 of the present Michigan Act but adds additional provisons for clarity. The method of proposing amendments prescribed in sec. 103 is made optional and in addition to other procedures that may be prescribed in the articles or by-laws under authority of secs. 42, 43 and 16. The mandatory provision requiring the proposed amendment to be voted on at the next annual meeting is changed to permit such voting at any meeting duly called and held but not later than the next annual meeting.

Majority approval of all the members is clearly indicated. That the statutory method of proposing amendments as prescribed in sec. 103 is not at present exclusive is suggested by an analysis of the whole Act. See *supra,* Cooperatives, Amendment, p. 38. The proposed Act makes this clear. Permitting voting on such an amendment at any meeting duly called and held but not later than the next annual meeting is a change from the present Act which requires the voting to be at the next annual meeting. It is not apparent why the members should be compelled to wait until the next annual meeting to pass on fundamental changes. A prohibition against delaying a vote beyond the next annual meeting guarantees a seasonable opportunity to pass on the proposition.

The provision requiring approval of a majority either in interest or per capita as the case may be should cause no difficulty, the result depending upon whether stock or per capita voting is practiced in the particular cooperative. Sec. 43 of the General Act will also be applicable, so that if property rights of any class of members are changed, an approval by a majority of the class so affected will be required, see *supra,* sec. 204. Under the proposed Act only the members or shareholders shall have power to amend the by-laws.

Sec. 16 of the present Act, applying to corporations gener-

ally, gives both the directors and shareholders authority to amend the by-laws. It is believed that the change is more in accord with the other provisions of the cooperative Act conferring wide powers on the members, e.g., secs. 206 and 207, and may prevent prolonged disputes between the directors and shareholders.

Provisions in statutes of other states are not uniform. Idaho provides that the articles may be amended at any meeting by a 2/3 vote of the directors and a 2/3 vote of the members constituting a quorum present. By-laws can be amended by a 2/3 vote of the members at any meeting if a quorum is present. [Idaho Code Ann. sec. 22-2609 and 22-2610 (1948).] Iowa permits an amendment to the articles at any meeting called for that purpose and requires approval of 3/4 of all the votes cast providing at least 25% of the members vote thereon. By-laws may be amended by a majority vote of the members. [Ia. Code Ann. secs. 499.41 and 499.46.] The same state may have different provisions for different cooperatives. A Florida statute provides for amendments to the articles at any regular or special meeting called for that purpose and requires that it be approved by 2/3 of the directors and a majority of a quorum of the members attending. By-laws can be amended by a majority vote of a quorum of the members attending a meeting. [Fla. Stat. secs. 618.05 and 618.09 (1953).] Other Florida Statutes authorize an amendment to the charter by a 2/3 vote of all the members at any regular or special meeting called for that purpose. No specific provision is made for the amendment of the by-laws under these sections. [Fla. Stat. secs. 619.05 and 619.06 (1953).] California also has dual and different provisions. [Cal. Ag. Code secs. 1199 and 1200; Cal. Corp. Code sec. 12900 (1953).]

Such lack of uniformity suggests that the best procedure is the one that most nearly conforms to the particular state's prescribed procedure for corporations generally. It is believed that the proposed statute accomplishes this, and that the requirement of a majority approval of all the shareholders or members is not unduly burdensome.

SEC. 209. INVESTMENT OF RESERVE FUND. At any regular meeting, or any duly called special meeting, at which the quorum fixed by the by-laws shall be present, the shareholders of any cooperative corporation may by a majority vote of such shareholders present in person, subscribe for

shares and invest a portion of the reserve fund of such corporation, not to exceed at any time 20 per cent in the aggregate of its net worth, in the capital or membership capital of any other cooperative corporation or corporations with which it desires to cooperate or affiliate: *Provided, however,* That this provision shall not be construed to prevent such corporation from accepting patronage dividends in the form of stock or otherwise from such other corporation in any amount. In determining the amount available for such investment in other corporations, net worth shall be defined as the difference between total assets and liabilities exclusive of the members' and patrons' interest, members' and patrons' interest being defined as including any rights to deferred patronage dividends but not including any sums owing currently as a result of business transactions with the cooperative.

Note. This section is the same as the present Michigan section 104 except that the words "net worth" are substituted for the word "capital." Net worth is then defined to avoid any ambiguity and to clarify just what sums are available for investment in any other corporation. It is believed that the added definition does not change the existing law. see *supra,* Cooperatives, Investment of Reserves, p. 40. Owing to the fact that methods of financing cooperatives differ widely, it is wise to indicate specifically what sums are available for such investment. This section clearly limits such investments to 20 per cent of the net worth of the corporation. Note that investments are authorized only out of the reserve fund but that all of the members' contributions, including deferred patronage dividends as authorized in sec. 212, are taken into account in determining the 20% limitation. It is believed that this provides a direct and forthright yet flexible procedure discouraging circuity and concealment.

There is no statutory limitation on such investments in Ohio, New York, Utah, Florida, and California so far as agricultural cooperatives are concerned. [Ohio Rev. Code sec. 1729.03 (D&G) (Baldwin 1953); N. Y. Coop. Corp. Law sec. 14(f); Utah Code Ann. sec. 3-1-9 (IIe) (1953); Fla. Stat. sec. 618.20 (1953); Cal. Ag. Code sec. 1215 (1950).]

The general California cooperative statute limits such investments to 25% of the corporation's capital [Cal. Corp Code sec. 12804 (1953)], while Massachusetts makes no limitation on the amount of investments but places rigid restrictions on the type of investments [Mass. Ann. Laws c. 157, sec. 5 (1948)]. The Iowa statute makes no specific reference to investments. [Ia. Code Ann. secs. 499.1 *et seq.* (1949).]

SEC. 210. PURCHASE OF BUSINESS OF ANOTHER CORPORATION. Whenever any cooperative corporation shall purchase the business of another corporation, firm, or person or persons, it may pay for the same in whole or in part by issuing to the selling corporation, firm, person, or persons, shares of its capital stock to an amount which, at par value, would equal the fair market value of the business so purchased, and in such case the transfer to the purchasing corporation of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued.

Note. This section is the present Michigan section 105 and remains unchanged. It is sufficiently definite so as to cause no difficulty. It authorizes the purchase of another business and payment for it by the issuance of par stock. Under sec. 57 a business corporation can purchase other businesses and assets and pay for them by issuing stock and other securities and is not limited to the issuance of par value stock for such assets. If the requirement of payment in par value stock is thought too rigid, the provision can readily be changed by eliminating the phrase "at par value." Remarkably similar provisions exist in the statutes of New York, California and Ohio. [N. Y. Coop. Corp. Law sec. 71; Cal. Corp. Code sec. 12802 (1953); Cal. Ag. Code sec. 1212 (1950); and Ohio Rev. Code sec. 1729.21 (Baldwin 1953).] The Iowa statute permits the payment to be made by issuing preferred stock and designates the procedure for appraisal. [Ia. Code Ann. sec. 499.25 (1949).] Florida, Utah, and Massachusetts have no specific provisions. [Fla. Stat. secs. 618.01 *et seq.* (1953), Utah Code Ann. secs. 3-1-1 *et seq.* (1953), Mass. Ann. Laws c. 157 (1948).]

SEC. 211. DISTRIBUTION OF EARNINGS. The shareholders

of every cooperative corporation shall provide in the by-laws what per cent upon the paid-up capital stock of such corporation, not exceeding 7 per cent per annum, shall be first paid and distributed to the holders of such paid-up capital stock as dividends before dividing the surplus earnings or profits, as herein provided, and whether or not such dividends shall be cumulative. Said by-laws shall further provide what amount or percentage of the annual profit and earnings of the business, over and above such dividends to shareholders, shall be retained and kept in the treasury of such corporation as a reserve, and in what manner, method and proportion the surplus annual earnings and profits of the business of such corporation, in excess of such dividends and reserves, shall be divided up and distributed as a cooperative dividend, under the cooperative plan or principle adopted by such corporation among shareholders or members doing business with the corporation; and may also provide for cooperative dividends to nonstockholders or nonmembers: *Provided,* That for the purposes of determining the amount owing by such cooperative corporation as annual privilege fee, deferred patronage dividends and the balance of such reserve in excess of 30 per cent of the paid-up capital of such corporation, as the term capital is used in section 20, shall be considered as surplus.

Note. This section is substantially the same as the present Michigan section 106. In the last sentence, the word "for" following "annual privilege" has been changed to "fee" which is the word obviously intended. Other changes in this section also occur in the last sentence and consist of adding the words "deferred patronage dividends and" immediately preceding the words "the balance of such reserves," and the addition of the words "as the term capital is used in section 20" following the words "paid-up capital of such corporation."

This provision for the distribution of the earnings is sufficiently clear and flexible. Shareholders are authorized to de-

termine in the by-laws a fixed dividend on the stock not to exceed 7%, and to determine whether or not the dividend shall be cumulative. The by-laws shall then determine what percentage shall be distributed as a cooperative dividend, the by-laws to determine the procedure for such distribution, and whether or not nonmembers shall share in this distribution. This provision enables a great deal of flexibility rather than rigidly specifying the procedure for distribution of earnings, and at the same time preserves cooperative principles. The provision in the subsequent section authorizing a revolving fund authorizes the retention for a period of time of all or a part of the cooperative dividend as deferred patronage dividends.

The alteration of the last sentence concerning the annual privilege fee does not change the existing law but only clarifies it. Since the present Act only specifies a reserve in addition to the cooperative dividend which presumably will be paid in cash, the present section takes account of all retained earnings in computing the annual tax. Since the new provision (sec. 212) permits the retention of deferred patronage dividends in a revolving fund, obviously such dividends should be considered in determining the tax. The proposed amendment takes these sums into consideration. The addition of the phrase defining paid-up capital "as the term is used in sec. 20" is prompted in the interest of clarity. Unfortunately, the present Act does not definitely define the term in sec. 2. The term as used in sec. 20 obviously has reference to the balance sheet item, and obviously too, any other connotation here would make the computation of the tax more difficult. Unfortunately, however, in the interest of uniformity of definitions, paid-up capital here is used in a much more limited sense than capital is used in sec. 104 of the present Michigan Act. The proposed Act eliminates any conflict in definitions by substituting the words "net worth" for "capital" in sec. 209.

SEC. 212. REVOLVING FUND. The shareholders of any cooperative corporation existing under this Act may provide in the by-laws that the board of directors may allocate all or a portion of the cooperative dividends as ascertained in accordance with section 211 to a revolving fund, provided that such sums shall be credited to the account of each member or patron ratably in proportion to the busi-

ness he has done with the association during such year. Such credits are herein referred to as deferred patronage dividends and may be represented by transferable or nontransferable certificates in accordance with articles or by-law provisions.

The directors may use the revolving fund for all authorized corporate purposes. Deferred patronage dividends credited to members shall constitute a charge on the revolving fund and future additions thereto, and on the corporate assets, subordinate to creditors and preferred stockholders then or thereafter existing. Deferred patronage dividends for any year shall have priority over those for any subsequent year. Deferred patronage dividends may be made payable at a fixed or indefinite maturity date with option on behalf of the board to pay them whenever in its discretion the best interest of the corporation would be served by such payment, provided that the deferred patronage dividends shall always be retired or paid according to their seniority based on the length of time outstanding, and provided that such claims for dividends shall always be subordinate to claims of creditors and preferred stockholders. A revolving fund wherein the stock itself is rotated is not authorized.

Note. This section is prompted by the cooperative practice of financing the enterprise at least in part by means of a revolving fund (see *supra,* Cooperatives, Revolving fund, p. 27), and is patterned after the Iowa statutes (Ia. Code Ann. secs. 499.30, 499.33, 499.34, 499.35 (1949)). It authorizes the retention of patronage dividends for corporate purposes but requires that allocation of credits to the various patrons be seasonably ascertained. The sums retained thus assume the character of loans to the cooperative but are subordinate to claims of creditors and preferred stockholders.

As is the case with other sections, this one is designed to provide the utmost flexibility in organization. Most of the provisions are permissive: the stockholders may provide for a revolving fund; the board may allocate all or a portion of the

surplus earnings to this fund; certificates representing these credits may be issued and may be either transferable or non-transferable; and the funds may be used for all authorized corporate purposes.

The requirements are only that these funds shall be subordinate to claims of creditors and preferred shareholders, and that they be retired on the basis of seniority. Note also that they may be made payable at either a definite or indefinite future time, and that the board may elect to pay them sooner.

This flexibility permits adaptation to the needs of any cooperative and at the same time sacrifices no traditional corporate concepts or rights of individuals. See *supra,* Cooperatives, Revolving fund, p. 27. The statute prohibits a revolving fund based on stock rotation. This prohibition is based on the belief that there is no need for a stock rotation plan, since this revolving fund is so readily set up, easily administered, and creates no unnecessary problems as to redemptions of stock, change in corporate capitalization, accounting procedures, or other difficulties (see *supra,* Cooperatives, Revolving fund, p. 28).

SEC. 213. SURPLUS EARNINGS. The surplus earnings and profits of every cooperative corporation shall be distributed to those entitled thereto at such times as the by-laws may provide, which shall be at least as often as once in each year.

Note. This section is the same as the first part of sec. 107 of the present Michigan Act. The provision authorizing a chancery dissolution if the corporation fails to pay the dividend upon its paid-up capital stock is eliminated.

The retained provision requiring an annual but permitting a more frequent distribution of the surplus earnings is certainly justified. It is believed that the provisions concerning the dissolution of corporations generally (secs. 65 *et seq.*), are adequate for cooperative corporations. Although it is not too likely, it is possible that a cooperative corporation might be solvent and still unable to pay the limited authorized dividend on its stock. The creation of a new procedure for dissolution in this event seems unnecessary. That provision is eliminated in the interests of uniformity and consistency with provisions relating to other corporations. An examination of the statutes for cooperatives in Ohio, Utah, Iowa, California,

Massachusetts, New York, and Florida reveals no similar provision.

SEC. 214. CONTRACTS AND AGREEMENTS. Every cooperative corporation, in addition to the powers enumerated in section 10, may enter into any and all necessary contracts with stockholders, members or other persons in regard to the usual business activity of the corporation, and may conduct such business activity upon a commission or brokerage basis, purchase and sale relationship, agency agreement, or warehouse storage plan.

Note. This section is based on sec. 108 of the present Michigan Act but is enlarged to make it clear that the cooperative corporation has all the powers of corporations generally enumerated in sec. 10 of the Act, and to authorize specifically all cooperatives (not just agricultural associations as the present Act), to enter into contracts with the members and to conduct its business upon a commission or brokerage basis, purchase and sale relationship, agency agreement, or warehouse storage plan.

This statute concisely confers on the cooperative all the powers necessary and incidental to the conduct of business by referring to sec. 10 of the Act and expressly authorizes any cooperative to select the legal basis on which it will engage in business activity on behalf of its members. Similar statutes of other states seem more cumbersome or less complete. [See Mass. Ann. Laws c. 157, sec. 11 (1948); Idaho Code Ann. secs. 22-2606 and 22-2622 (1948); Ia. Code Ann. sec. 499.7 (1949); Fla. Stat. sec. 619.07 (1953); Cal. Ag. Code sec. 1194 (1950); N. Y. Coop. Corp. Law sec. 15; Utah Code Ann. sec. 3-1-9 (1953).]

SEC. 215. PERSONS LIABLE FOR DAMAGE FOR ENCOURAGING BREACH OF CONTRACTS AND AGREEMENTS. Any person, firm, association, or corporation who solicits or persuades or permits or aids or abets any stockholder and/or member or other person to breach a contract with a cooperative corporation, by accepting or receiving from such stockholder and/or member or other person, products for sale, marketing, manufacturing, or processing for sale, contrary

to the terms of any marketing agreement of which said person or any member, officer, or manager of said firm, association, or corporation has knowledge or notice, shall be liable to the cooperative corporation aggrieved in a civil suit in the penal sum of $500 for such contract; and such cooperative corporation shall be entitled to an injunction against such person, firm, association or corporation to prevent further breaches and a multiplicity of actions thereon. In addition, said person, firm, association, or corporation shall pay to the cooperative a reasonable attorney's fee and all costs involved in any litigation or proceedings at law or chancery.

Note. This section is the same as sec. 109 of the present Michigan Act. Provisions similar to this section giving the cooperative a cause of action for inducing the breach of contract with the corporation are common in other jurisdictions. Some of the statutes also prescribe damages for a breach of contract with the cooperative. Neither the present Act nor the proposed Act contain such provisions, as the ordinary rules applicable to breach of contract actions should be adequate. Similar statutes in other states are: Idaho Code Ann. secs. 22-2617 and 22-2614 (1948); Mass. Ann. Laws c. 157, sec. 17 (1948); Fla. Stat. sec. 619.07(7) (1953); Ia. Code Ann. secs. 499.8 and 499.9 (1949); Cal. Ag. Code secs. 1208–1210 (1950); Utah Code Ann. sec. 3-1-17 (1953); N. Y. Coop. Corp. Law sec. 70.

SEC. 216. ULTRA VIRES. Membership or stock ownership in a cooperative corporation shall not be a sufficient basis for raising the plea of ultra vires, and nothing in this section shall prevent the shareholders or members from enjoining unauthorized acts.

Note. The doctrine of ultra vires should be adequately and completely covered in the general corporation statutes and not repeated or modified as to special types of corporations. The Michigan Act, however, has a very short provision (sec. 11), and in terms allows the plea to be raised in any action between the corporation and a member. As pointed out in the general

discussion of these statutes, *supra,* Cooperatives, p. 46, the desirability of allowing the defense simply on the basis of membership is to be questioned. The above statute, obviously inadequately dealing with the problem as a whole, does preclude the corporation from raising the plea of ultra vires simply on the basis that the other party was a member of the corporation. The above section also expressly allows a member to enjoin the corporation from the commission of unauthorized acts. This latter provision is also consonant with sound principles.

Modern practice suggests a comprehensive statutory treatment of the doctrine of ultra vires by dividing the concept into its component parts. In this regard the Oklahoma statute merits special attention, Okla. Stat. Ann. tit. 18, secs. 1.18 and 1.29 (1953). In the absence of such comprehensive treatment in the general act and in view of the possibility that a member-patron could be denied relief in an action against the corporation simply on the basis of membership, the above statute is deemed justified.

Additional Notes

There are no express provisions in the cooperative sections concerning dissolution, as the general provisions of secs. 65 *et seq.* apply.

There is no provision explicitly stating the number of incorporators required, as the general provision of 1 or more in sec. 3 applies. In other states the required number of incorporators varies. Three incorporators are required under Fla. Stat. sec. 618.02 (1953), and under Cal. Ag. Code sec. 1193 (1950), while five are required under Utah Code Ann. sec. 3-1-3 (1953), N. Y. Coop. Corp. Law sec. 11, Ia. Code Ann. sec. 499.5 (1949), and under Ohio Rev. Code sec. 1629.05 (Baldwin 1953). Seven incorporators are required under Mass. Ann. Laws c. 157, sec. 3 (Supp. 1954), and ten required under Okla. Stat. Ann. tit. 18, sec. 421 (1953).

Statutes of other states regarding marketing contracts vary materially and include such items as the permissible duration of these contracts, the effect of such contracts on the title to the products, remedies for the breach of marketing contracts, and actions for inducing their breach. [Cal. Ag. Code sec. 1208 (1950), Fla. Stat. secs. 618.17 *et seq.* (1953), Ia. Code Ann. sec. 499.8 (1949), Ohio Rev. Code 1729.18 (Baldwin 1953), and Utah Code Ann. sec. 3-1-17 (1953).] The Utah statute also contains a provision for recording the marketing con-

tract. [Utah Code Ann. sec. 3-1-17(VI) (1953).] Express statutory provisions on many of these items are deemed unnecessary in the absence of a clear showing that the general law is inadequate. The present Act gives the members maximum discretion in determining the terms of their contracts and relationship with the cooperative. Provision for recording the marketing contract is not recommended as a part of the general corporation statutes. If such a statute is desirable it would be preferable to include it as a part of the general recording statutes. It would also seem preferable to enlarge the scope of the provisions so as to include all sales, mortgages, and agreements to sell future crops, rather than limit it to agreements with cooperatives.

No provision is recommended for withdrawal of members, as this can very readily be regulated by the articles or by-laws.

SEC. 217. CORPORATIONS NOT FOR PECUNIARY PROFIT. One or more persons, natural or corporate, may incorporate for the purpose of carrying out any lawful purpose or object not involving pecuniary gain or profit for its members or associates. Such corporations shall be known as "nonprofit corporations."

Note. This provision is a portion of section 117 of the present Michigan Act. The requirement of a minimum of three incorporators has been omitted since it serves no useful purpose. See *supra,* Nonprofit Corporaitons Generally, p. 58.

The number of incorporators required in other states is not uniform. California requires twenty five for charitable or eleemosynary corporations. [Cal. Corp. Code sec. 10200 (1953).] Florida and New Jersey require five. [Fla. Stat. sec. 617.01 (1953), N. J. Stat. Ann. sec. 15:1-1 (1939).] Indiana, Minnesota, and Oregon require three. [Ind. Ann. Stat. sec. 25.521 (Burns 1933), Minn. Stat. Ann. sec. 317.07 (West Supp. 1953); Ore. Rev. Stat. sec. 61.020 (1953).] Alabama has no minimum requirement for the incorporation of social clubs. [Ala. Code tit. 10, secs. 139 *et seq.* (1940).]

SEC. 218. PURPOSES, APPLICABILITY. Corporations may be organized under the provisions of section 217 to 255, inclusive, of this Act for any lawful purpose or purposes, including, without being limited to, any one or more of the

following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial, trade or labor association.

Burial associations, funeral benefit societies, and other organizations subject to the insurance laws of this state shall not be organized as nonprofit corporations: *Provided, however,* That any association or society, heretofore incorporated and now existing whose purpose is to provide for the relief of distressed members, visitation of the sick, and the payment of a voluntary sick benefit to or for members not exceeding in all the sum of $150 on account of any 1 member, or the buying and selling of products for its members without direct pecuniary profit to the association or its members may operate as a nonprofit corporation.

Note. This section replaces section 132 of the present Michigan Act but is moved from near the end of the nonprofit provisions to near the beginning. This is the more logical location as the researcher naturally looks to the beginning of corporation statutes to determine the type of corporations therein covered. The phraseology and style is altered considerably but it is believed that no fundamental change is involved. The specific provisions of the present section 132, Mich. Comp. Laws 450.132 (Mason's Supp. 1954), authorizing the Ladies Lutheran Benevolent Federation of Michigan, the Metropolitan Club of America, Inc. (National Spirit), and the Ladies Auxiliary of the Metropolitan Clubs of America National Spirit, all organized as nonprofit corporations, to pay death benefits in excess of $150 have been eliminated. These provisions are obviously examples of special legislation, and as general legislation does not repeal special legislation, there is no need to re-enact those provisions as part of a general act. Furthermore, no special legislation should appear in model acts as the legislature can attach any special provisions it wishes prior to enactment.

The style of the statement of purposes is patterned after section 4 of the Model Nonprofit Corporation Act (1951), but its scope is thought to be neither less nor more than that of sec. 132 of the present Michigan Act. The scope under either Act is very broad, and the enumerated purposes are illustrative rather than exclusive. This is made clear by the above provisions taken from the Model Act " . . . for any lawful purpose or purposes, including without being limited to, any one or more of the following . . . ." The phrase "whether enumerated herein or not" in section 132 of the Michigan Act undoubtedly achieves the same result, but it is possible that the word "such" in the preceding phrase "and to any other such society" may result in a restrictive interpretation. Furthermore, the Michigan statute is awkward, difficult, wordy, and obscure.

The exceptions from the coverage of the nonprofit provisions are patterned after both the Michigan and the Model Acts. The Model Act excepts labor unions, cooperative organizations, and organizations subject to the insurance laws from the coverage of the nonprofit provisions, Model Nonprofit Corporation Act, sec. 4 (1951), whereas sec. 132 of the Michigan Corporation Act excepts "burial associations and funeral benefit societies not otherwise provided for by statute." Such burial associations and funeral benefit societies are subject to the Michigan Insurance Code [Mich. Comp. Laws sec. 501.1 *et seq.* (1948).] Since cooperative corporations are provided for in sections 202 to 216, they would not come within the scope of these provisions. Although there are some particular acts for the incorporation of labor associations in Michigan [Mich. Comp. Laws. c. 454 (1948)], there seems to be no particular reason why they cannot organize under these provisions. The general provisions of sec. 132 of the present Michigan Corp. Act permit it, and no compelling necessity is seen for specific provisions. Public policy, however, requires that corporations engaging in any insurance activities conform to the insurance laws.

Other Jurisdictions

The diversity of legislation in the various states is tremendous. Some statutes state the authorized purpose very broadly and succinctly by permitting incorporation for any lawful purpose other than pecuniary profit. [N. J. Stat. Ann. sec. 15:1-1 (1939); Ind. Ann. Stat. sec. 25-509 (Burns 1948); Pa. Stat. Ann. tit. 15, sec. 2851-201 (Purdon 1938); Utah Code

Ann. sec. 16-6-1 (1953).] Frequently, however, other statutes in the same jurisdiction provide for incorporation of particular types of nonprofit organizations. [N. J. Stat. Ann. secs. 15:2-1, 15:3-1, 15:4-1, 15:5-1, 15:7-1, 15:8-1, 15:9-1, 15:10-1, 15:11-1, 15:12-1, 15:13-1, 15:14-1, 15:15-1, and 15:16-1, (1939); Ind. Ann. Stat. secs. 25-1101, 25-1501, *et seq.*, 25-1527, 25-1601, 25-1701, 25-1801, 25-1901, and 25-2001 (Burns 1948).] Other statutes state the authorized purposes in more detail and thus approximate the above proposed section. [Ia. Code Ann. sec. 504.1 (1949), and Fla. Stat. sec. 617.01 (1953).] The former Minnesota statute was even more detailed and quite lengthy [Minn. Stat. Ann. sec. 309.01 (West 1945)], but the 1951 Act conforms to the style of this section and lists a number of general purposes as illustrative and not exclusive. [Minn. Stat. Ann. sec. 317.05 (West Supp. 1953).]

SEC. 219. ARTICLES OF INCORPORATION. 1. Articles of incorporation shall be signed in triplicate and shall be acknowledged by at least one of the incorporators if there are more than one, or by the sole incorporator if there are no more than one. The acknowledgment shall be executed before an officer authorized to take acknowledgments by the laws of this state and shall express, in the English language:

a. the name of the corporation;
b. the purpose or purposes for which the corporation is formed;
c. the location and post-office address of its registered office in this state;
d. the name of the corporation's first resident agent;
e. if the association is organized without capital stock, whether the property rights and interests of all members are to be equal or unequal; if unequal, the general rules applicable to all members by which the property rights and interests of each member or class of members are to be determined; and provision for the admission of new members entitled to share in

the property of the association with the old members in accordance with such general rules;

f. if the corporation is organized with capital stock, the stock structure as prescribed in section 4(1)(e) of this Act relating to corporations generally;

g. the amount of assets classified as to real and personal property which such corporation possesses at the time of making the articles of incorporation, and the terms of any general scheme of financing such corporation;

h. the name and address of each incorporator;

i. the names and addresses of the first board of directors;

j. the term of the corporation existence.

2. The articles may also contain optional provisions as authorized in section 4, paragraphs 2 and 3 of this Act relating to corporations generally.

Note. This section is basically the same as section 4 of the present Michigan Act and section 204 of the proposed Act except for slight changes necessitated by the character of the corporations to be formed hereunder. It differs from section 4 in that paragraph 1(e) has been added requiring information concerning membership rights in non-stock corporations. The provision of former section 4 (now sec. 5(3) as a result of Mich. Pub. Acts 1953, No. 155), requiring a statement of the minimum amount of capital, has been replaced by section 1(g) calling for a statement of the corporation's property and its general method of financing. Since these corporations do not contemplate doing business, the requirement for a minimum amount of capital is inapplicable.

This section differs also from section 204 in that the word "cooperative" required in the names of those corporations obviously is inappropriate here. This section concerning the contents of articles is new insofar as it is inserted specifically for nonprofit corporations, but the inclusion, although somewhat repetitious, is desirable in the interest of clarity. No separate provision for the filing of the articles is included, as section 5 of the general Act is adequate.

The provision of section 117 of the present Michigan Act

authorizing three of the incorporators to sign and acknowledge the articles has been eliminated in favor of the general provision of section 4 empowering just one of the incorporators to sign and acknowledge the articles. This makes for more uniformity and contravenes no public policy, as there seems to be no special significance to the requirement of three signatures. See *supra,* Nonprofit Corporations Generally, p. 58.

Nonprofit corporations formed on both a stock and nonstock basis are authorized in accordance with existing sections 117, 118 and 119 of the Michigan Act. Section 26 of the Model Non-Profit Corporation Act (1951) forbids the issuance of stock by these corporations, and the Committee of the A.B.A. which prepared the Act recommends that nonprofit stock corporations be no longer recognized, Model Non-Profit Corporation Act, ii (1951).

Minnesota, Pennsylvania, and Iowa permit nonprofit corporations to be organized on a stock basis. [Minn. Stat. Ann. Sec. 317.08 (West Supp. 1953); Pa. Stat. tit. 15, sec. 2851-203 (1938); Ia. Code Ann. sec. 504.10 (1949) (referring to stockholders).] Oregon, Indiana, Massachusetts, and Idaho forbid nonprofit corporations to issue stock. [Ore. Rev. Stat. sec. 61.070 (1953); Ind. Stat. Ann. sec. 25-513 (Burns 1948); Mass. Ann. Laws c. 157, sec. 3 (1955); Idaho Code Ann. sec. 22-103 (1948) (applicable to agricultural fair corporations).] Florida, New Jersey and Alabama make no specific statutory reference to stock issuance. [Fla. Stat. secs. 617.01 *et seq.* (1953); N. J. Stat. Ann. secs. 15:1-1 *et seq.* (1939); Ala. Code tit. 10, secs. 139 *et seq.* (1940).]

Requirements as to the content of the articles vary considerably among the states. See the appropriate sections of the statutes cited *supra* this note. The provisions included in section 218 follow closely the present Michigan provisions and, except for authorizing the issuance of stock, are substantially similar to sec. 29 of the Model Non-Profit Corporation Act prepared by the A.B.A.

SEC. 220. DENOMINATION OF SHARES; DIVIDENDS; DISSOLUTION. If organized upon a stock share plan the shares of nonprofit corporations shall be of such denominations not exceeding $100 per share as the articles shall provide. No dividends shall be directly paid on any such shares nor shall the shareholders be entitled to any por-

tion of the earnings of such corporation derived from increment of value upon its property or derived from any other means: *Provided,* That upon dissolution of any such corporation, the shareholders, subject to the provisions of section 253, may be entitled to a pro rata distribution of the assets thereof after the payment of all debts and the liquidation of all liabilities of such corporation, based upon their several holdings therein as represented by the shares of stock standing in the name of such shareholders at the time of dissolution. Such shares of stock shall not be transferable by assignment or sale, nor be transferred to legal heirs or devisees, upon the death of the owner thereof, unless the by-laws of such corporation make express provision therefor. Such nonprofit corporations shall have the power to exclude from further membership any shareholder who fails to comply with the reasonable and lawful requirements of the laws, rules and regulations duly made by such corporation for the government of its members, and may cancel the stock of any such offending member without liability for an accounting, excepting as may be provided for in the articles or by-laws. The provisions of the Uniform Stock Transfer Act of this state shall not be held to apply to the shares of stock of nonprofit corporations in any manner or to any extent inconsistent with the provisions of sections 217 to 255, both inclusive, of this Act.

Note. This section is substantially the same as the present section 119 of the Michigan Act. As long as nonprofit stock corporations are recognized, the present section is justified. Clearly, no member should expect any dividends to be paid on his stock, and clearly, also, any increment in value of the corporate property should be distributed to the members on disolution unless the property is held for specified purposes, or the articles or by-laws otherwise provide. The provisions concerning the admission of new members on the basis of stock acquisition are certainly justified and consistent with the accept-

able policy of permitting these types of corporations to restrict membership in accordance with the desires of the members.

In other jurisdictions permitting incorporation of nonprofit organizations on a stock plan basis, a prohibition against dividends is quite common. [Ia. Code Ann. sec. 504.10 (1949); Minn. Stat. Ann. sec. 317.02 Subdiv. 5 (West Supp. 1953); Ind. Ann. Stat. sec. 25-519 (Burns 1948); and Pa. Stat. Ann. tit. 15, sec. 2851-304 (1938), a statute remarkably similar to the above provision and the present section 119 of the Michigan Act.] Oregon does not permit nonprofit stock corporations [Ore. Rev. Stat. sec. 61.070 (1953)], while the statutes of New Jersey and Florida are silent on the matter [N. J. Stat. Ann. secs. 15: 1-1 *et seq.* (1939), and Fla. Stat. secs. 617.01 *et seq.* (1953).]

This inclusion in this section of provisions making nonprofit corporative stock nontransferable by sale or assignment or inheritable or devisable unless permitted by the by-laws of the corporation is justified. This clearly places nonprofit corporative stock in a different category than profit corporative stock and is consistent with the generally recognized policy of permitting such organizations to restrict membership as they desire. The cautionary provision exempting this stock from the provisions of the Uniform Stock Transfer Act in case of conflicting provisions, although perhaps not absolutely necessary, is desirable from the standpoint of clearly manifesting the legislative policy of authorizing membership restrictions. See *supra,* Cooperatives, p. 33, for a discussion of similar provisions in relation to those corporations. More material concerning restriction of membership provisions is included in section 221.

SEC. 221. MEMBERSHIP. Membership in all nonprofit corporations shall be governed by such rules of admission, retention and dismissal, as the articles or by-laws shall prescribe: *Provided,* That all such rules shall be reasonable, germane to the purposes of the corporation, and equally enforced as to all members.

Note. This section is exactly the same as sec. 120 of the present Michigan Act. It is consistent with the general laissez-faire policy of permitting these nonprofit corporations to regulate membership as they desire. The proviso requiring that membership rules be reasonable, germane, and equally enforced

as to all persons is certainly justified. Remarkably similar provisions exist in the statutes of Minnesota and Pennsylvania. [Minn. Stat. Ann. sec. 317.25 Subdiv. 1 (West Supp. 1953); Pa. Stat. Ann. tit. 15, sec. 2851-601 (1938).] The statutes of many states are either silent or inadequate on this important matter by treating it inferentially. [Fla. Stat. 617.01 *et seq.* (1953); Ind. Ann. Stat. sec. 25.507 *et seq.* (Burns 1948); Ore. Rev. Stat. sec. 61.010 *et seq.* (1953); Ala. Code tit. 10, sec. 139 *et seq.* (1940).] The New Jersey statute inferentially reaches the result of the proposed statute by authorizing membership restrictions in the articles of incorporation. [N. J. Stat. Ann. sec. 15:1-2 (1939).]

SEC. 222. MEMBERSHIP FEES; ASSESSMENTS. Nonprofit corporations may levy dues or assessments, or both, upon their members, if authority to do so is conferred either by the articles or by-laws, and subject to any limitations therein contained. Such dues or assessments, or both, may be imposed upon all classes of members alike or in different amounts or proportions, or upon a different basis upon different classes of members. Members of one or more classes may be made exempt from either dues or assessments, or both, in the manner and to the extent provided either in the articles or by-laws. The amount of the levy and method of collection of such dues or assessments, or both, may be fixed in the articles or by-laws, or the articles or by-laws may authorize the board of directors to fix the amount thereof from time to time, and make them payable at such time and by such methods of collection as the directors may prescribe. Such corporations may make by-laws necessary to enforce the collection of such dues or assessments, including provisions for the cancellation of membership, upon reasonable notice, for nonpayment of such dues or assessments, and for reinstatement in such corporation.

Note. This section is similar to Pa. Stat. Ann. tit. 15, sec. 2851-602 (1938). It replaces sec. 121 of the present Michigan

Act because it is more complete. In substance the 1951 Minnesota statute provides the same thing. [Minn. Stat. Ann. sec. 317-25 Subdiv. 3 (West Supp. 1953).] The present Michigan Act, sec. 121, does not specifically authorize dissimilar dues or assessments based on membership classification. Although this would probably be inferred, it is thought desirable to make an explicit provision. The desirability of classifying membership according to contributions is pointed out *supra,* Nonprofit Corporations Generally, Voting, p. 64.

Many nonprofit corporation statutes are deficient in failing to provide specifically for such unequal contributions. [Fla. Stat. sec. 617.01 *et seq.* (1953); N. J. Stat. Ann. sec. 15:1-1 *et seq.* (1939); Model Non-Profit Corp. Act. sec. 11 (1951).]

SEC. 223. MEETING OF MEMBERS. Meetings of the members or shareholders shall be governed by the provisions of sections 38 and 39 of this Act except that if the by-laws so provide no notice of regular meetings other than those for the election of directors need be given. If the by-laws of any nonprofit corporation shall fail to provide a method for calling a special meeting of its members or shareholders the same may be called by the president, any vice-president, the secretary, treasurer, or by any 2 or more directors thereof by appropriate notice published in the manner provided in section 68 of this Act.

Note. This section is new as a section, but there is little change in substance. the present Michigan statutes contain no specific provision for the calling of regular meetings, and therefore the provisions of the general Act apply. This section makes that clear by providing specifically that sections 38 and 39 are controlling. One change is made, however, and that is that the notice requirement is eliminated as to regular meetings other than those for the election of directors. This is done because many nonprofit corporations have regular meetings recurring frequently, whereas profit corporations probably would have only one such meeting a year. Hence, to require formal notice of all such regular meetings of nonprofit corporations would be unduly burdensome. This section adheres to the main purpose of having the nonprofit corporation statutes conform as nearly as possible to the business corporation statutes.

SEC. 224. VOTING. The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the by-laws. In nonprofit stock corporations formed hereunder each shareholder may, if so provided in the articles or by-laws, be entitled to a number of votes equal to the number of shares of stock held by him and any nonprofit corporation may in its articles or by-laws provide that only certain specified classes of its members or shareholders shall have the right to vote. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members; and unless otherwise so provided, there shall be no preferences as between members or shareholders based upon obligations of the corporation to the members or shareholders therein.

The articles of incorporation or the by-laws may provide that in all elections for directors every member entitled to vote shall have the right to cumulate his vote and to give one candidate a number of votes equal to his vote multiplied by the number of directors to be elected, or by distributing such votes on the same principle among any number of such candidates.

A member may vote in person, or, unless the articles of incorporation or the by-laws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven months from the date of its execution unless otherwise provided in the proxy. Where directors or officers are to be elected by members, the by-laws may provide that such elections may be conducted by mail.

Note. This section replaces section 122 of the present Michigan Act. It is changed in both form and substance. Formally, it is changed thus: section 122 first states that all members have equal voice and vote, and then adds that the articles or by-laws

may provide for unequal voting, stock voting, and even a denial of voting to certain classes; this new section forthrightly states in the beginning that the articles or by-laws may provide for such unequal voting, and then adds that unless such provisions are made every member shall have equal voting rights. It is believed that this new form is more straightforward and honest. It is patterned after the 1951 Minnesota Act and the Model Act. [Minn. Stat. Ann. sec. 317.22 Subdiv. 7 (West Supp. 1953); Model Non-Profit Corp. Act. sec. 15 (1951).]

Substantively, the new section changes existing Michigan law by authorizing cumulative voting in nonprofit corporations. This section, if adopted in the above form, will necessitate an amendment to section 32 of the General Corporation Act, as section 32 prohibits cumulative voting in these types of corporations. This change is recommended for the following reasons: (1) the desire to amalgamate as much as possible the profit and nonprofit corporation law; (2) the belief that such corporations should have as much freedom as possible in setting up their internal organization; (3) the advantages to be derived from permitting unequal voting as discussed *supra*, Non-Profit Corporations Generally, Voting, p. 64; and (4) the newer and more complete nonprofit corporation statutes so provide. [Minn. Stat. Ann. 317.22 Subdiv. 7 (West 1953); Pa. Stat. Ann. tit. 15, sec. 2851-606 (Purdon Supp. 1953); N. J. Stat. Ann. sec. 15:1-10 (1939); Model Non-Profit Corp. Act. sec. 15 (1951); Cal. Corp. Code sec. 9402 (1953); Ind. Ann. Stat. sec. 25-515(e) (Burns Supp. 1953).] Of course, this is simply a policy matter on which views differ sharply.

The third paragraph of section 224 authorizing proxy and mail voting is also new so far as Michigan law is concerned. The existing Michigan statute, section 122, is silent on the matter, and section 32 prohibiting cumulative voting could possibly be interpreted as prohibiting proxy voting also, as that is the only statute mentioning proxy voting. The new section is deemed justified in the interests of unifying all corporate law to the greatest extent possible, in giving these organizations maximum flexibility, and in conforming statutes to practices. Paragraph 3 of section 224 is taken from the Model Non-Profit Corporation Act sec. 15 (1951). Similar provisions exist in Minn. Stat. Ann. sec. 317.22 Subdiv. 7 (West Supp. 1953); Pa. Stat. Ann. tit. 15, sec. 2851-606 (Purdon Supp. 1953); Cal. Corp. Code secs. 9402 and 9601 (1953).

The provision of sec. 122 of the present Michigan Act rela-

tive to calling special meetings has been incorporated into section 223.

SEC. 225. LIMITATIONS ON MEMBERSHIP. If the membership in any such corporation be limited to persons who are members in good standing in other associations, lodges, churches, clubs, or societies, the articles shall in each case define such limitations, and in such case it may further be provided that failure on the part of any such member to keep himself or herself in such good standing in such other corporation shall be sufficient cause for expelling or dismissing such member from the corporation requiring such eligibility, subject to such regulations as may be enacted in the by-laws as to the nature and formalities of evidence that shall be prima facie sufficient to justify such dismissal or expulsion.

Note. This section is the same as section 123 of the present Michigan Act except that the word "incorporated" preceding "associations, lodges, churches, clubs, or societies" has been deleted. Thus, membership may be limited to members of other associations whether incorporated or not. See *supra,* Non-Profit Corporations Generally, Membership, p. 62. Similar provisions exist in the statutes of Minnesota and New Jersey. [Minn. Stat. Ann. sec. 317.25 Subdiv. 4 (West Supp. 1953); N. J. Stat. Ann. sec. 15:1–2 (1953 Supp.).]

This section could probably be eliminated without changing the substantive law, as the provisions authorizing membership qualifications and restrictions in section 120 of the present Michigan Act (section 221 of the Proposed Act), should be adequate to accomplish this purpose.

The following statutes simply authorize membership restriction without specifically authorizing restrictions based on membership in other societies: Cal. Corp. Code sec. 9402 (1953); Mo. Ann. Stat. sec. 355.105 (Vernon Supp. 1954); Ill. Ann. Stat. c. 32, sec. 163a7 (1954).

The statutes of some states are silent on the matter. [Ala. Code tit. 10, sec. 138 *et seq.* (1940); Ind. Ann. Stat. sec. 25-507 *et seq.* (Burns 1948); Fla. Stat. 617.01 *et seq.* (1953); Ore. Rev. Stat. sec. 61.010 *et seq.* (1953).]

SEC. 226. BOARD OF TRUSTEES OR DIRECTORS. The property and lawful business of a nonprofit corporation shall be held and managed by a board of not less than 3 trustees or directors, each of whom shall hold office for the term for which he was named or elected and until his successor is elected and qualified. The board of directors shall possess such powers and authority, in addition to the powers and authority herein specifically prescribed, as may be necessary to the complete execution of the purposes of each such corporation, as limited by the articles, or by-laws duly made.

Note. Sections 226 to 232 inclusive are substantially the same as section 124 of the present Michigan Act. Section 124 was subdivided into a number of sections for purposes of simplification. Provisions similar to section 226 can be found in the statutes of many states. [Ill. Ann. Stat. c. 32, sec. 163a17 (1954); Minn. Stat. Ann. sec. 317.20 Subdiv. 1 (West Supp. 1953); Pa. Stat. Ann. tit. 15, sec. 2851-501 (1938); Fla. Stat. 617.04 (1953); N. J. Stat. Ann. sec. 15:1-7 (1953 Supp.) (no minimum number of directors specified); Cal. Corp. Code sec. 9302 (1953 Supp.) (no minimum number of directors specified).]

SEC. 227. QUALIFICATIONS AND TERM OF OFFICE OF DIRECTORS. Each trustee or director named in the articles shall hold office until the first annual meeting of the members or shareholders, and until his successor is elected and qualified.

The number, qualifications, classifications, terms of office, manner of election or removal, time and place of meeting, and the powers and duties of the trustees or directors may, subject to the provisions of this Act, be prescribed by the articles or by-laws. Trustees or directors need not be residents of this state or members of the corporation unless the articles of incorporation or the by-laws so require.

Note. This section and those immediately following are designed to give maximum flexibility in the conduct of the business of nonprofit corporations. Analogous legislation in other states: Pa. Stat. Ann. tit. 15, secs. 2851-501 and 2851-502 (1938 and 1953 Supp.); Minn. Stat. Ann. sec. 317.20 (West Supp. 1953); N. J. Stat. Ann. sec. 15:1-7 (1953 Supp.); Mo. Ann. Stat. secs. 355.130 and 355.135 (Vernon Supp. 1954); Ind. Ann. Stat. sec. 25-516 (Burns Supp. 1953). Provisions of the Model Non-Profit Corp. Act in relation to directors are in substantial agreement with these provisions, Model Act, secs. 17-20 (1951).

SEC. 228. DIRECTORS, TERM OF OFFICE. Except as otherwise prescribed in the articles or by-laws, a trustee or director shall be elected for a term of 1 year: *Provided,* That, if a term of more than 1 year shall be so prescribed, at least one third of the members of the board shall be elected each year.

Note. This is substantially the same as sec. 124(3)(a) of the present Michigan Act.

SEC. 229. VACANCIES IN BOARD. Vacancies in the board of trustees or directors and directorships to be filled by reason of an increase in the number of directors may be filled by the remaining members of the board, although less than a quorum, unless the articles or by-laws provide that vacancies or directorships so created shall be filled in some other manner, in which case such provision shall control. A person so selected shall hold office until his successor is selected and qualified.

Note. This section is substantially the same as sec. 124(3)(b) of the present Michigan Act, but the phraseology is varied. The scope is extended to include vacancies created by an increase in the number of trustees as well as those created by death, incapacity, or resignation. The phraseology is patterned in part after Ill. Ann. Stat. c. 32, sec. 163a18 (1954) and in part after Minn. Stat. Ann. sec. 317.20 Subdiv. 9 (West Supp. 1953).

SEC. 230. MEETINGS OF THE BOARD. Unless the articles or by-laws otherwise provide, the meetings of the board of

trustees or directors may be held at such place, whether in this state or elsewhere, as a majority of the board may from time to time determine.

Note. This section is identical with sec. 124(3)(c) of the present Michigan Act. It conforms to the state's general corporation law by permitting directors' meetings to be held without the state. [Mich. Comp. Laws sec. 450.13(4)(b) (Mason's Supp. 1954).] Similar statutes of other states are: Minn. Stat. Ann. sec. 317.20 Subdiv. 8 (West Supp. 1953); Pa. Stat. Ann. tit. 15, sec. 2851-502 (1953 Supp.); Ill. Ann. Stat. c. 32, sec. 163a21 (1954); Mo. Ann. Stat. sec. 355.145 (Vernon Supp. 1954).

SEC. 231. QUORUM OF THE BOARD. A majority of the board of trustees or directors shall be necessary to constitute a quorum for the transaction of business, and the acts of a majority of the trustees or directors present at a meeting at which a quorum is present shall be the acts of such board; *Provided,* That, if the trustees or directors shall severally or collectively consent in writing to any action to be taken by the corporation, such action shall be as valid a corporate action as though it had been authorized at a meeting of the board: *And Provided further,* That in any such corporation where the number of trustees or directors shall be more than 7 members, the articles or by-laws may provide that less than a majority but in no event less than one third of the members, shall constitute a quorum of such board.

Note. This section is substantially the same as sec. 124(3)(d) of the present Michigan Act. It is similar also to Mich. Comp. Laws sec. 450.13(4)(c) (Mason's Supp. 1954), relative to business corporations. It should therefore be retained in its present form to preserve the uniformity of law relative to both types of corporations. Similar provisions with minor differences exist in the statutes of other states. [Pa. Stat. Ann. tit. 15, sec. 2851-502(f) (1938); Minn. Stat. Ann. sec. 317.20 Subdivs. 8(3) and 12 (West Supp. 1953); Mo. Ann. Stat. sec. 355.150 (Vernon Supp. 1954); Ill. Ann. Stat. c. 32, sec. 163a19 (1954).]

The statutes of some states are less complete. [N. J. Stat. Ann. sec. 15:1-7 (1953 Supp.); Fla. Stat. 617.03 (1953); Ore. Rev. Stat. sec. 61.070 (1953).]

SEC. 232. BOARD OF DIRECTORS; EXECUTIVE COMMITTEE. The board of trustees or directors may, by resolution passed by a majority of the whole board, designate 2 or more of their number to constitute an executive or other committee, who to the extent provided in such resolution, shall possess and exercise the authority of the board in the management of the business of the corporation between the meetings of the board.

Note. This section is substantially the same as sec. 124(3)(e) of the present Michigan Act and is similar also to the provision relative to business corporations, Mich. Comp. Laws sec. 450.13(4)(d) (Mason's Supp. 1954). Similar statutes in other states are: Ind. Ann. Stat. sec. 25-516 (Burns Supp. 1953); Ill. Ann. Stat. c. 32, sec. 163a20 (1954); Mo. Ann. Stat. sec. 355.155 (Vernon Supp. 1954); Minn. Stat. Ann. sec. 317.20 Subdiv. 11 (West Supp. 1953); Pa. Stat. Ann. tit. 15, sec. 2851-502 (g) (1938).

SEC. 233. SELF-PERPETUATING BOARD OF DIRECTORS. A nonprofit corporation organized under the provisions of this Act may provide for a self-perpetuating board of trustees or directors. Such a nonprofit corporation may have members as the articles or by-laws may prescribe, or it may have no members.

Note. This section is new. It does not change the law, as the legality of a self-perpetuating board was upheld in Detroit Osteopathic Hospital v. Johnson, 290 Mich. 283, 287 N. W. 466 (1939). The desirability of such operation has been pointed out, Nonprofit Corporations Generally, Trustees or Directors, *supra* p. 67. The soundness of statutory authorization of such a board is obvious. Missouri has a similar statute. [Mo. Ann. Stat. sec. 355.105 (Vernon Supp. 1954).] The added provision permitting such corporations to function without members is sound and practical. Illinois and Missouri have such provisions. [Ill. Ann. Stat. c. 32, sec. 163a7 (1954); Mo. Ann. Stat. sec. 355.105 (Vernon Supp. 1954).] As a practical

matter many foundations and other nonprofit corporations promoting eleemosynary purposes operate either without membership or with membership conferring no privileges granted in return for contributions. It is sound to give statutory recognition to such practices.

SEC. 234. RIGHTS AND POWERS; POWER CORPORATIONS, REGULATION. Any nonprofit corporation the purposes of which permit the transaction of business, the receipt and payment of money, the care and custody of property, and other incidental business matters, shall have the right and power to transact such business, and to receive, collect and disburse monies, and to acquire, hold, protect and convey such properties as are naturally or properly within the scope of its articles: *Provided, however,* That no corporation shall hold any real estate for a longer period that 10 years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises.

Any nonprofit power corporation which is authorized to furnish electric service shall have the right and power to construct, maintain and operate its lines along, over, across or under any public places, streets and highways, and across or under any of the waters in this state, with all necessary erections and fixtures therefor, and to exercise the power of eminent domain, in the manner provided by the laws of this state for the exercise of such powers by other power corporations constructing or operating electric facilities: *Provided,* That as a condition to the exercise of any of the powers herein granted, such nonprofit corporations shall be subject to the same rules, regulations and requirements issued by the Michigan Public Service Commission as shall be applicable to other corporations engaged in furnishing and distributing electric power and energy.

Note. This is similar to section 125 of the present Michigan Act. Its scope is broadened by authorizing commercial transactions not only where the purposes *require* such business matters but also where the purposes *permit* them. The powers granted are ample and no further changes need be made. The limitation on holding unused real estate for a period longer than ten years is taken from section 5, Article XII, of the Michigan Constitution. It is included in this general statute applicable to all nonprofit corporations and not repeated as to each type. Perhaps it should also be repeated in section 10 applying to corporations for profit.

The second paragraph, added to the Michigan statute in 1951, Mich. Comp. Laws sec. 450.125 (Mason's Supp. 1954), granting public easements and the right of eminent domain to nonprofit power corporations, although not usually found in general corporation statutes, is retained in these provisions because it probably arose from a genuine need.

SEC. 235. POWERS IN RELATION TO PROPERTY; LIABILITY OF DIRECTORS. The funds and property of all nonprofit corporations shall be acquired, held and disposed of only for their lawful purposes, and the trustees or directors shall be individually liable for the misapplication or misuse of any such money or property caused through the neglect of such trustee or trustees or director or directors to exercise reasonable care and prudence in the administration of the affairs of such corporation or through willful violation of the laws governing the same.

Note. This section is identical with sec. 126 of the present Michigan Act. The degree of care required of directors is substantially the same as that required of directors of profit corporations under sec. 47, Mich. Comp. Laws sec. 450.47 (1948). It is sound practice to designate the degree of care required of the directors, although the statutes of many states do not do so. [Ala. Code tit. 10, secs. 139 *et seq.* (1940); Fla. Stat. secs. 617.01 *et seq.* (1953); Ore. Rev. Stat. secs. 61.010 *et seq.* (1953); N. J. Stat. Ann. secs. 15:1-1 *et seq.* (1939).] Compare the Pennsylvania statute which specifies that the directors shall discharge their duties "with that diligence, care and skill which ordinary prudent men would exercise under similar circumstances in

their personal business affairs." [Pa. Stat. Ann. tit. 15, sec. 2851-506 (1938).]

SEC. 236. CENTRAL AND LOCAL UNITS. Subject to the provisions in the next succeeding sections, any nonprofit corporation may provide in its articles or by-laws that it is to be a central or parent organization having subordinate or local branches, and similarly, any nonprofit corporation may provide in its articles or by-laws that it is to function as a subordinate body instituted or created under the authority of any central or parent organization for the purposes of furthering locally the interests of such parent organization.

Note. This section replaces sections 128 and 129 of the present Michigan Act. Its scope is broadened to permit parent and local units of both stock and non-stock corporations and similar organizations both inter and intra state. The scope is also broadened in that there is no minimum membership requirement before such divisional organization is permitted, and the manner of organization, territorial or otherwise, is left completely to the discretion of the corporation.

Express authorization for such a vertical type of organization is frequently omitted from the general nonprofit statutes of other states. See, for example, the statutes of Florida, Illinois, Minnesota and Missouri. Statutes somewhat less comprehensive than the above are: Cal. Corp. Code sec. 9203 (1953); N. J. Stat. Ann. sec. 15:16-1 to 16-6 (1939); Pa. Stat. Ann. tit. 15, sec. 2851-304 (1938).

SEC. 237. NAME. A nonprofit corporation shall not assume a name already in use by any other corporation, lodge, or society incorporated under the laws of this or any other state of the United States and admitted to do business in this state, nor any name which is so similar to that adopted by any other such corporation or society as to lead to confusion or deception: *Provided,* That local or other subordinate jurisdictions shall in all cases use the name of the parent corporation in addition to some suitable local designation.

Note. This section is similar to sec. 138 of the present Michigan Act, but its scope is broadened to include all nonprofit corporations and not just the state parent corporation of a lodge or fraternal society. Its location in the statutes is accordingly moved to near the beginning of the sections authorizing suborganization. Normally, section 6 of the general Act, Mich. Comp. Laws sec. 450.6 (Mason's Supp. 1954), would be ample to prohibit similar names, but it is probably desirable to authorize the subordinate units to use the name of the parent coupled with an appropriate local designation. Other provisions of sec. 6 not in conflict are still applicable. Protection afforded by this statute is adequate and its coverage sufficiently broad.

SEC. 238. STATE PARENT UNIT OF FOREIGN ASSOCIATION. If such corporation shall be intended to operate as a state jurisdiction of a nonprofit association having a parent organization without this state, then such persons so incorporating shall exhibit with their articles the charter or permit from such foreign parent association permitting such incorporation within this state. The persons so incorporating shall execute and file articles in the form prescribed in section 219 of this Act, as prescribed for nonprofit corporations generally, and in addition to the other requirements of said section 219, the incorporators shall state in such articles:

a. that such society or corporation shall have a secret ritual if such is the case;
b. that, in the case of a lodge, fraternal or similar society, it shall have a representative form of government whose purposes are not unlawful;
c. the executive officers within such society by such peculiar name as they shall be respectively known;
d. the principal features of organization, the distinguishing purposes and the name of the society by which all subordinate groups thereof shall also be known when organized; and,

e. a statement that the parent association has applied for and received permission to do business within this state as a foreign corporation.

Note. The sections 237 to 248 inclusive are taken from the provisions of the present Michigan Act relating to the incorporation of fraternal societies, secs. 133 to 147, and broadened in scope to include all types of nonprofit corporations. Only secs. 140 and 141 are retained as specifically applying only to lodge or fraternal type of organizations.

This change is prompted by the fact that many types of societies other than the secret lodge or fraternal association may find it convenient to be organized at different levels and in different communities. Charity drives, foundations, church organizations, university alumni associations, political parties, labor organizations, and civic societies are but a few that might find it convenient to have local, state, and even national units. Thus, it is more logical to have these provisions under the general nonprofit sections where all types of nonprofit groups can take advantage of them.

Sec. 238 is confined to a state headquarters unit of a foreign association. The two additional mandatory requirements for the incorporation of such a unit are simply: (1) that the incorporators have a permit from the foreign association; and (2) that the parent association has applied for and received permission to do business within the state. These provisions are certainly justified as they result in the proper amount of control by both the foreign parent association and the local state of incorporation. Note that maximum flexibility is attained. The foreign parent association need not be incorporated. The other provisions concerning a secret ritual, representative government, peculiar names of the officers, and the principal features of organization, are specifically aimed at the fraternal or lodge type of organization. Restrictions are reduced to a minimum, and any type of nonprofit corporation can take advantage of multi-unit organization.

SEC. 239. RITUAL AND RULES; CHARTERING OF SUBORDINATE UNITS. Every such parent corporation shall have the right to prescribe the ritual, if any, to be used in all the functions, secret or otherwise, of such organization, the

oath or other obligations to be taken by members or officers, and to enact by-laws, rules and regulations having uniform application throughout the organization. Such parent corporation shall have the right to organize and charter subordinate units thereof, and to enact a system of discipline to which all such subordinate groups and individual members may be compelled to conform under pain of expulsion therefrom; and to prescribe the terms and conditions under which such subordinate groups and members may be admitted, retained in good standing, or suspended or expelled from such membership. Such parent corporation may delegate to its officers, committees and to subordinate jurisdictions, such functions and powers as the articles or by-laws of such corporation may from time to time prescribe, not inconsistent with the laws of this state.

Note. This section is formerly section 135 of the Michigan Act, but it is enlarged in scope to permit a state parent corporation to charter subordinate lodge units. Maximum flexibility is attained and restrictions are practically non-existent.

SEC. 240. SUPERVISION OF SUBORDINATE UNITS. Every such parent corporation shall have the right to superintend, visit, instruct and guide its subordinate units and jurisdictions, through its duly appointed officers, agents and committees; may appoint its courts or judicial functionaries for the enforcement of its system of discipline within such organization; may prescribe the initiation fees, if any, and annual or other periodic dues or contributions upon which membership may be conditioned, and may prescribe the proportion of such funds that shall belong to such parent corporation for the work of organizing, maintaining and carrying out the purposes of the society as a whole.

Note. This is the same as sec. 136 of the present Michigan Act but is broadened to include all types of nonprofit corporations.

SEC. 241. PARENT ORGANIZATION; MANAGEMENT, SECRETARY. The fiscal and business affairs of every such parent corporation shall be managed by such executive officers, committees, directors or trustees as the articles shall prescribe, who shall severally have such powers and liabilities as may be prescribed in the articles or in by-laws made pursuant thereto. The articles shall in all cases state the name of the committee having authority to enact the original by-laws of the parent corporation, and when and how the members thereof shall be elected or appointed and for how long such committee shall hold office. Every such parent society shall designate an officer who shall be its secretary whose powers and duties shall conform to those prescribed in this Act for secretaries of corporations generally.

Note. This is the same as sec. 137 of the present Michigan Act.

SEC. 242. REPRESENTATIVE FORM OF GOVERNMENT; FIRST ANNUAL MEETING. Every such parent corporation of a lodge or fraternal type society shall adopt a representative form of government, under which form the subordinate lodges shall elect or appoint representatives to attend the annual or other convention, conclave or meeting of the parent corporation, by whatsoever name such meeting shall be known, and at which annual meeting the officers and committees of such parent or state society shall be elected by a majority vote of such representatives. The first annual meeting shall be held at a time and place to be fixed by the executive committee of the parent corporation; and thereafter such time and place shall be fixed by the convention itself.

Note. This section is substantively the same as section 140 of the present Michigan Act. Its scope is still limited to lodge or fraternal type of organizations. Fraternal organizations will normally be organized on a reperesentative basis, and, therefore, the above statute works no hardship and at the same time serves as a modicum of protection against dictatorial control. There are, however, other organizations of a nonprofit nature which may not be organized on such a basis and membership in which consists largely of honorary listing in return for contributions. Obviously, such organizations should not be required to have representative forms of government. The above statute wisely makes the distinction.

SEC. 243. POWERS AT ANNUAL MEETING. The annual convention, conclave or meeting of every such parent lodge or fraternal corporation when duly called to order, shall have power and authority to elect the officers and the executive committee or trustees thereof; to elect delegates to any higher jurisdiction within said lodge or society; to alter or amend the articles or by-laws of the parent corporation not inconsistent with the state charter of such lodge or society; to determine questions of discipline or policy; and to act upon such other matters as the articles or by-laws may require or permit to be presented to such convention for action.

Note. This section is formerly sec. 141 of the Michigan Act and is specifically and peculiarly applicable only to lodge or fraternal type of corporations. The scope is limited to fraternal organizations for the same reason that sec. 242 is so limited. See note sec. 242, *supra.*

SEC. 244. LOCAL UNITS; PURPOSE. Any number of persons who are members in good standing in any nonprofit parent association, society or lodge, within or without this state, and having a charter or permit from such parent organization, may incorporate as a local unit or branch thereof, upon complying with the provisions of this Act appropriate to such corporations. The purpose of all such local

corporations shall be to further the interest of the parent corporation in such community, to hold the property of such local unit and to become integral members of the parent association, lodge or society.

Note. This section is based on sec. 142 of the present Michigan Act but its scope is enlarged to permit: (1) the incorporation of local units of both state and foreign parent corporations; and (2) to include all types of nonprofit corporations and not just lodge or fraternal societies.

SEC. 245. ARTICLES OF INCORPORATION. The articles of such local unit or society shall follow the form prescribed for nonprofit corporations in this Act and shall contain such further statements as the incorporators may wish to insert therein as to purposes and government. Such articles shall state that such local unit has been granted a charter by the parent corporation.

The articles shall also state in case the parent association is without this state that it has applied for and received permission to do business within the state as a foreign corporation.

Note. This section is based on sec. 143 of the present Michigan Act but is enlarged to include all nonprofit corporations. As is the case under sec. 238, proper control by both the parent corporation and the state is assured by requiring the incorporators to obtain a charter from the parent corporation and by requiring a foreign parent corporation to domesticate.

SEC. 246. SUPERVISION OF LOCAL UNIT. Every such local unit shall be subject to the discipline, visitation and guidance of the parent corporation, or other higher jurisdictions as the plan of higher organization may prescribe.

Note. This section is based on sec. 144 of the present Michigan Act. It confirms the supervisory jurisdiction of the parent over the local unit. Again, the scope is enlarged to cover all types of nonprofit corporations. The provision relating to the powers of local units has been deleted as being superfluous. Sec. 248 confers similar powers to parent and local units.

SEC. 247. OFFICERS AND REPRESENTATIVES. Every such local unit shall have such officers, committees, trustees and agents as their articles may prescribe, who shall be elected or appointed and who shall have such duties, responsibilities and powers, as the articles or by-laws may prescribe.

Note. This section is based on sec. 145 of the present Michigan Act but is broadened to include all types of nonprofit corporations. Utmost flexibility is authorized.

SEC. 248. POWERS; MEMBERSHIP IN OTHER NONPROFIT CORPORATIONS; VOTING. Every nonprofit corporation, whether parent or local, shall have all the rights, powers, immunities and privileges granted by this Act to corporations generally. Every nonprofit corporation, subject to the limitations of the laws of this state and of the United States with respect to monopolies and illegal restraints of trade, shall have power in furtherance of the purposes of its existence to purchase and hold shares of stock or memberships of its own or of any other nonprofit corporation whose purposes are not unlawful. When any nonprofit corporation shall be a shareholder or member in any other nonprofit corporation, its president and other officers or any of its directors shall be eligible to the office of the director of such corporation the same as if they were individually shareholders therein, and the corporation being such shareholder shall possess and exercise all the rights, powers, privileges and liabilities of individual shareholders or members.

Note. This section replaces sections 127, 131, 132a, 139 and 146 of the present Michigan Corporation Act relating with various degrees of completeness to corporate powers and intercorporate relationships. This section succinctly and forthrightly states that nonprofit corporations shall have all the powers of corporations generally. These powers are enumerated in section 10 of the Act, Mich. Comp. Laws sec. 450.10 (Mason's Supp. 1954), and need not be repeated. The next sen-

tence permits inter-corporate relationships to any extent, provided no monopoly or unlawful restraint of trade results. This is a broadening of the scope of section 132a of the present Act, which in terms limits such relationships to real estate holding corporations of fraternal organizations. The necessity of such limitation is not apparent. This is particularly evident in view of sec. 131 which empowers nonprofit corporations to vote the shares held in other corporations. Sec. 248 of the proposed Act retains this provision but achieves, by including all of these provisions in one section and removing inconsistent restrictions, a coherent statement of corporate powers with maximum flexibility.

SEC. 249. AMENDMENT OF ARTICLES. The articles of any nonprofit corporation may be amended in accordance with the procedures established in section 42 and the sections immediately following thereafter, except, however, that in nonprofit corporations having no members, or having no members with voting rights, the articles may be amended at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

Note. In jurisdictions having completely separate statutes for the incorporation of nonprofit organizations, it is customary, of course, to have complete provisions governing amendments, dissolution, consolidation, and merger. Under the existing Michigan Act and the scheme of the proposed Act whereby the corporation law is unified to the greatest extent possible, such duplication is unnecessary. It is believed, however, that the application of sections 42 and 43 to certain nonprofit corporations, in particular those corporations having no members or having members with no voting rights, may be difficult. Until the general sections on amendments are enlarged to recognize these types of nonprofit corporations, it is believed wise to add the above statute dealing specifically with them. Statutes of other states dealing completely with the amendment procedure of nonprofit corporations are: Ill. Ann. Stat. c. 32, secs. 163a33 *et seq.* (1954); Ind. Ann. Stat. sec. 25-529 (Burns 1948); Minn. Stat. Ann. sec. 317.27 (West Supp. 1953); Mo. Ann. Stat. secs. 355.070 *et seq.* (Vernon Supp. 1954); N. J. Stat. Ann. sec. 15:1-14 (1939).

In applying sections 42 and 43 to nonprofit corporations, it

is to be noted that stockholders and members and membership and stock shares are equated in sec. 2, Mich. Comp. Laws sec. 450.2 (Mason's Supp. 1954).

SEC. 250. BY-LAWS; ENACTMENT OR AMENDMENT. The shareholders or the board of directors of a nonprofit corporation may make and alter any by-laws including the fixing and altering the number of its directors.

Note. This section is not included in the present provisions of the nonprofit sections of the Michigan Corporation Act. Normally, section 16 of the Act, Mich. Comp. Laws sec. 450.16 (1948), would apply and render an additional section unnecessary. This section is identical with the first part of sec. 16. However, sec. 16 also provides that the board shall not make or alter any by-laws fixing directors' qualifications, classifications, or terms of office. This would be obviously unworkable in nonprofit corporations having no members with voting rights, and it is therefore eliminated from the above section.

SEC. 251. CONSOLIDATION OR MERGER. Nonprofit corporations may consolidate or merge in accordance with the provisions of section 52 of this Act and the sections immediately following: *Provided, however,* That in case a merging or consolidating corporation does not have members, or does not have members with voting rights, then the plan of consolidation or merger shall be adopted at a meeting of the board of directors, upon receiving the vote of a majority of the directors in office.

Note. This section is not included in the present Michigan Act. It is added in the interests of clarity because the merger and consolidation provisions of the general Act, Mich. Comp. Laws secs. 450.52 *et seq.* (1948), make no provision for the corporation without shareholders or members or for the corporation with members who have no voting rights. The requirement for approval of a majority of directors in office is similar to the provisions of Illinois and Missouri. [Ill. Ann. Stat. c. 32, sec. 163a38 (1954); Mo. Ann. Stat. sec. 355.200 (Vernon Supp. 1954).]

SEC. 252. DISSOLUTION; CHANCERY JURISDICTION. Any

nonprofit corporation may be dissolved in accordance with the provisions of this Act set forth in section 65 and the sections immediately following: *Provided, however,* That in nonprofit corporations having no members, or having no members with voting rights, dissolution shall be authorized at a meeting of the board of directors upon the adoption of a resolution to dissolve by the vote of a majority of the directors in office.

Any nonprofit corporation founded for charitable, eleemosynary or public benefaction purposes of any kind, and any similar trustee corporation or foundation as hereinafter provided, may be dissolved by the circuit court in chancery in accordance with the provisions of this section. When any such corporation shall cease to operate, or its funds be diverted from the lawful purposes of its organization, or it becomes unable usefully to serve such purposes, any of the trustees or directors, any member, the attorney general, or the prosecuting attorney of the county in which the registered office of the corporation is located, may petition the circuit court for the winding up of its affairs and for the conservation and disposition of its property in such way as may best promote and perpetuate the purposes for which the corporation was originally organized.

Note. The first part of this section is added to provide for the dissolution of nonprofit corporations having no members with voting rights. The application of the existing dissolution sections of the Michigan Act requiring approval of the membership, e.g., sec. 67, to this type of corporation, could result in confusion and ambiguity.

The second paragraph is added to provide for dissolution of charitable types of corporations which may no longer be functioning. Lethargy of trustees and the absence of specific beneficiaries might result in dormancy with neither the public nor anyone else receiving benefits from the trust estate. This provision is suggested by sec. 167 of the present Michigan Act

which relates specifically and only to foundations. The scope of the provision is thus enlarged under sec. 252 to include similar trustee and other nonprofit charitable corporations.

The proposed provision also differs from sec. 167 of the present Michigan Act in that judicial rather than legislative dissolution is provided. The legislature is not well equipped for and should not be burdened with such specific issues as the dissolution of particular corporations and the distribution of their specific assets. Furthermore, such practice results in the useless cluttering of corporation statutes. See Mich. Comp. Laws sec. 450.167a (Mason's Supp. 1954), providing for the dissolution of the Henry Ford Trade School.

SEC. 253. UNAUTHORIZED PRACTICES; DISSOLUTION. Nonprofit corporations, whether of a religious, educational, eleemosynary, social, fraternal, or other nature, shall not by their articles or by-laws or system of discipline authorize, teach, permit or condone any of the following: immoral practices or conduct; anything that is contrary to public policy, that violates the sanctity of the marital relations, or that prohibits any member of such society from appealing to the courts of the United States or the courts of this state for the enforcement of personal or property rights; any provision that the by-laws or rules of discipline shall not be subject to civil law or decree; or anything that encourages the violation or disregard of any law of the United States or of this state. No provision shall be made in such by-laws or articles permitting such corporation to receive, accept, acquire or endeavor to secure property through fraud, misrepresentation or undue influence under the guise of religious teaching or discipline; and no provision shall be made which will permit any individual as such and not as an official of said society to acquire and hold property thereof in his own name, or which permits any official to dictate and construe the rules of discipline or by-laws of such society without the approval of the di-

recting board thereof, or require that such by-laws and rules be approved by him before becoming effective.

Whenever proceedings in the nature of quo warranto have been or may hereafter be brought against any nonprofit association or corporation and it shall appear in the information that such association or corporation has been guilty of any of the aforementioned types of misconduct, the attorney general may, in such proceedings, or in separate proceedings, apply to the circuit court for a decree of dissolution in accordance with the provisions of section 252. The circuit court shall have discretion either to enjoin the unauthorized practices and permit the delinquent corporation to amend its articles or by-laws to conform to law, or it may decree a dissolution and winding up of said corporation in accordance with the provisions of this Act.

Note. This section is taken from sec. 180 of the present Michigan Act relating to ecclesiastical corporations only. The type of conduct proscribed herein obviously would not be condoned even in the absence of such express prohibition. The statute is justified, however, in that it also provides for the eradication of the practices. The court may, if it thinks proper, simply enjoin the obnoxious conduct and require the recalcitrant corporation to make the necessary amendments and conform. This differs from sec. 180 of the Michigan Act. If, however, the corporation is so fundamentally bad in this respect that reform is deemed impractical, it is to be dissolved. Instead of the property escheating to the state as provided in sec. 180 of the present Michigan Act, sections 254 and 255, providing a statutory cy pres doctrine, control.

The location of this section in the general nonprofit provisions is logical and justified. Religious corporations are not the only ones that might attempt antisocial practices. By making the section applicable to all nonprofit corporations, uniformity is achieved without sacrificing any safeguards.

SEC. 254. DISTRIBUTION OF ASSETS. The assets of a nonprofit corporation in the process of dissolution shall be applied and distributed as follows:

1. All liabilities and obligations of the corporation shall be paid, satisfied, discharged, or adequate provision made for them according to their respective priorities;

2. Property and assets held by the corporation upon condition or subject to an executory or special limitation, if the condition or limitation occurs by reason of the dissolution of the corporation, shall revert, be returned, transferred, or conveyed in accordance with the condition or limitation;

3. Subject to subparagraph 4, property and assets held for or devoted to a charitable, religious, eleemosynary, benevolent, educational, literary, or other similar use or purpose, but not held upon a condition or subject to an executory or special limitation, shall not be diverted from the use or purpose for which it was granted, donated, devised, or bequeathed, and shall be transferred or conveyed to one or more persons, societies, organizations, or domestic or foreign corporations engaged in activities which will, as nearly as possible, accomplish the general purpose of the dissolving corporation;

4. Subject to prior compliance with subparagraphs 1 and 2, where the articles or by-laws of the dissolving corporation, or the rules or canons of a superior body or entity by which the dissolving corporation is bound, provide for a particular distribution of the property and assets of the dissolving corporation, the property and assets shall be distributed accordingly;

5. Any remaining assets may be distributed to such persons, societies, organizations or domestic or foreign corporations, whether for profit or not for profit, as may be specified in a plan of distribution adopted as provided in this Act.

Note. This section is new insofar as Michigan is concerned. It is desirable because the usual distribution provisions rela-

tive to business corporations (Mich. Comp. Laws secs. 450.70 and 450.73 (1948 and Mason's Supp. 1954)), are obviously inadequate for many types of nonprofit corporations. In many types of nonprofit corporations the assets will not be returned to the members at dissolution. Sound practice requires that the statutes recognize such conditions.

This section is based on the Illinois and Minnesota acts, the latter apparently being based in part on the former. Similarly, the Missouri Act and the Model Act follow closely the Illinois Act. [Ill. Ann. Stat. c. 32, sec. 163a64 (1954); Minn. Stat. Ann. sec. 317.57 (West Supp. 1953); Mo. Ann. Stat. sec. 355.230 (Vernon Supp. 1954); Model Non-Profit Corp. Code sec. 46 (1951).]

This section is comprehensive to cover all types of nonprofit corporations. Par. 1 provides for the payment of debts, and par. 2 recognizes the validity of transfers on condition. Perhaps these two provisions are not absolutely necessary, as the law would probably be the same in any event. The statute avoids ambiguity and is more complete by their inclusion, however. Par. 3 is a statutory enactment of the cy pres doctrine. This is the only practical method of distributing such property, and the statute should provide for it. Par. 4 is especially desirable in that it permits the corporations, either local or of higher jurisdiction, to provide in advance for the distribution of property of dissolved corporations. Hence, the property of a local church or lodge on dissolution might inure to the higher jurisdiction of the organization. Distribution to the corporate members or any other dispositions authorized in the articles or by-laws is permitted. In addition to the above four alternatives, it is conceivable that there may be some corporations on dissolution with undisposed assets to be distributed. Par. 5 provides for this contingency by authorizing a plan of distribution. The mechanics of this plan are set forth in sec. 255.

SEC. 255. PLAN OF DISTRIBUTION. A plan providing for the distribution of assets, not inconsistent with the provisions of this Act, may be adopted by a corporation for the purpose of authorizing any transfer or conveyance of assets for which this Act requires a plan of distribution, in the following manner:

a. Where there are members having voting rights, the

board of directors shall adopt a resolution recommending a plan of distribution and directing the submission thereof to a vote at a meeting of members having voting rights, which may be either an annual or a special meeting. Written or printed notice setting forth the proposed plan of distribution or a summary thereof shall be given to each member entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of members. Such plan of distribution shall be adopted upon receiving at least a majority of the votes entitled to be cast by members present or represented by proxy at such meeting.

b. Where there are no members, or no members having voting rights, a plan of distribution shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

Note. This section is added to provide for any distribution contingency that might arise which is not provided for under section 254. It is modeled after the Illinois statute. [Ill. Ann. Stat. c. 32, sec. 163a45 (1954).] Mo. Ann. Stat. sec. 355.235 (Vernon Supp.1954) is quite similar. This section requires approval of only a majority of the voting members and not two thirds as in the Illinois and Missouri acts. Majority approval will facilitate action.

Deviations in the procedure of adopting a plan of dissolution are not authorized. Such deviations are not necessary, because utmost flexibility for distribution is given the corporations in sec. 254. This section applies only to deficiencies in the articles, by-laws, or other provisions. Note also that provision is made for a plan of dissolution for corporations having no members or having no members with voting rights. In that case approval must be by a majority of the directors in office and not just by a majority of the directors at a duly held meeting.

Additional Notes

Section 118 of the present Michigan Act prohibiting excess capitalization of nonprofit corporations has been omitted as

it serves no useful purpose. See *supra,* Nonprofit Corporations, p. 60.

Sec. 127 of the present Michigan Act (Mich. Comp. Laws 450.127 (1948)), authorizing the nonprofit corporation to borrow money and mortgage its assets, and regulating the procedure therefor, has been eliminated as being unnecessary. Sec. 10 of the Act, Mich. Comp. Laws sec. 450.10 (Mason's Supp. 1954), conferring broad powers on corporations, specifically includes the power to borrow money and issue mortgages. It also states that the powers, unless otherwise provided, shall be exercised by the directors. This is believed preferable to the limitations added in sec. 127 requiring authorization by the members unless there is a by-law expressly authorizing such action. In view of the fact that the proposed Act specifically authorizes nonprofit corporations without members and also similar corporations without any voting members, such limitations could prove embarrassing. On the other hand, corporations with members can impose restrictions and safeguards in their by-laws as authorized under the broad provisions of section 10. Hence, the elimination of sec. 127 results in greater flexibility without sacrificing any safeguards where they are desired.

Nonprofit corporation statutes of other states which simply authorize borrowing and mortgaging without added restrictions are: Mo. Ann. Stat. sec. 355.090 (Vernon Supp. 1954); Ill. Ann. Stat. c. 32, sec. 163a4 (1954); Minn. Stat. Ann. sec. 317.16 (West Supp. 1953); N. J. Stat. Ann. sec. 15:1–4 (1939).

Sec. 139 of the present Michigan Act authorizing parent corporations to hold property and conduct incidental business transactions has been eliminated as being unnecessary. Sec. 234 of the proposed Act confers such powers on all nonprofit corporations.

No specific provision prohibiting or regulating loans to officers is included in these sections, as sec. 46, Mich. Comp. Laws sec. 450.46 (1948), covers the matter. Statutes of other states concerning loans to officers of nonprofit corporations are common. [Ind. Ann. Stat. sec. 25-520 (Burns 1948); Ill. Ann. Stat. c. 32, sec. 163a26 (1954); Minn. Stat. Ann. sec. 317.18 (West Supp. 1953); Mo. Ann. Stat. sec. 355.190 (Vernon Supp. 1954).]

SEC. 256. INCORPORATION OF FRATERNAL SOCIETIES. One or more persons, natural or corporate, may become incorporated for the purpose of forming a secret society or

lodge for benevolent, charitable, social, educational or mutual aid purposes or for any other similar purpose or purposes not prohibited by law. All societies, fraternal or otherwise, having for their principal purposes the teaching, practice, and extending of benevolence, charity and fraternity under the form of government as commonly understood, desiring to be incorporated to carry out more effectually such purposes, shall hereafter incorporate under the provisions of this Act. No such society or lodge whose parent organization is organized or incorporated under the laws of any other country or state shall be incorporated within this state without the parent organization first applying for and receiving permission to do business within this state as a foreign corporation.

Note. This section is based on sec. 133 of the present Michigan Act, authorizing the incorporation of lodge or fraternal societies. Changes are rather minor. The statement as to "what law governs" has been deleted as unnecessary in view of secs. 200 and 218. The requirement of three incorporators has been eliminated. The requirement that the foreign parent organization domesticate before local units are incorporated has been retained, but the scope is broadened. The new section makes it clear that the domestication requirement applies to foreign unincorporated as well as incorporated societies. The new section also applies to every instance of a local unit incorporation and not only to instances of such incorporations by the foreign parent corporation as expressed in the present statute.

SEC. 257. RELIEF FUNDS. Every lodge whether parent or local shall have authority to make provision for the visitation of the sick and afflicted members; to provide funds for the relief of distressed members and their families; to provide funds for the burial of indigent or other worthy members: *Provided,* That no such funds shall be raised or maintained in the way of dues, assessments or levies based upon an insurance rate, table or contract, express

or implied: *And provided further,* That no such money shall be paid out of the treasury of any such lodge without the express order of the lodge itself or a committee duly authorized to consider and act upon such cases; *And provided further,* That nothing contained in this Act shall be construed as prohibiting any such lodge from establishing and maintaining charitable homes or other institutions for its aged, afflicted or infirm members under the provisions of this Act applying to trustee corporations.

Note. This is the same as section 147 of the present Michigan Act authorizing fraternal societies to establish relief funds. As the section applies specifically only to fraternal organizations, its location in the statutes is proper. Adequate safeguards for the protection of the funds are provided.

The prohibition against dues based on insurance tables is a necessary precaution against circumvention of insurance laws.

No additional provisions for fraternal organizations are needed, since the general nonprofit provisions have been expanded to provide for all the peculiar requirements of these organizations.

SEC. 258. TRUSTEE CORPORATIONS. Corporations may be formed to carry out the terms of any written declaration, deed or testament making donations, grants, gifts or devises in trust for specific lawful purposes. Such corporations shall be known as "trustee corporations." Trustee corporations shall include, without being limited to, the following:

1. Incorporation of trustees and others lawfully associating with them for the purpose of carrying out the provisions of an express trust, testamentary or otherwise, appointing such trustees to have the title, care, custody, disposition of property or income in trust for the benefit of designated religious, charitable, benevolent or educational institutions, or for any public benefaction of whatsoever name or nature;

2. Incorporation of trustees of other corporations who hold in their name separate corporation property either (a) for specific purposes defined or limited by any written instrument donating, setting aside or devoting such separate property for charitable, religious, benevolent, educational or other beneficial purpose, or (b) for compliance with the terms of written instructions as to the use thereof from the governing body of any ecclesiastical, fraternal or charitable society, association or corporation;

3. Incorporation of trustees and others lawfully associating with them for the purpose of founding, endowing, maintaining or operating a hospital, asylum, home for the care of indigent, aged or infirm persons, institution for the care of minor orphans, crippled children or unfortunate women, or for any other charitable institution in this state;

4. Incorporation of any number of persons for any such charitable purpose where the hospital, home, asylum, or other institution to be founded by such corporation is to be constructed, equipped and maintained principally by donations not made under any trust deed or other instrument in writing declaring the uses and purposes to which such property shall be devoted; and

5. Incorporation of trustees appointed or provided for under the terms of any deed, will or other written instrument to have the title or management of any property, whether real or personal, for the benefit of the donor or grantor therein or the heirs, dependents or other beneficiaries of such donor or grantor, and not for charitable, religious, educational or benevolent purposes, if such incorporation be permitted, directed or contemplated in such instrument, and the business of such corporation, when organized, is one which a corporation might otherwise carry on under this Act.

Note. Provisions for the incorporation of "trustee corpora-

tions" are not common. See *supra*, Trustee Corporations, p. 91. The statutes of Alabama, Florida, Indiana, Illinois, Minnesota, Oregon, Pennsylvania, New Jersey and Tennessee contain no such provisions. Missouri has a single provision which authorizes incorporation for the execution of any trust for religious, charitable, and other nonprofit purposes. [Mo. Ann. Stat. sec. 352.030 (Vernon 1952).] This section and the others of which it is a part remain in effect for those corporations which do not accept the provisions of the new Missouri Non-Profit Corporation Act. [Mo. Ann. Stat. sec. 355.500 (Vernon Supp. 1954).] Ohio has provisions for the incorporation of charitable trusts. [Ohio Rev. Code secs. 1719.01 *et seq.* (Baldwin 1954).]

Section 258 is based on sec. 148 of the present Michigan Act, but it is restyled and changed in scope. Sec. 258 is limited to a statement for the purposes for which trustee corporations may be formed. As is the case with the present Michigan law, there is practically no limitation, but the phraseology of the new section makes this clear. The first sentence broadly authorizes incorporation for the purpose of carrying out the terms of any express trust. This is the same as the first sentence of sec. 148 of the present Act (Mich. Comp. Laws sec. 450.148 (1948)). The next 5 sub-paragraphs list specifically 5 types of trustee corporations, but it is stated that these are not the only types authorized. The types of corporations specified in paragraphs 1, 2 and 5 are taken from sec. 148 of the present Michigan Act. The phraseology is changed to make them more intelligible. The types specified in paragraphs 3 and 4 are taken from secs. 157 and 158 of the present Michigan Act. The retention of duplicate provisions for hospitals and asylums as at present is both illogical and confusing. Furthermore, different requirements are set forth in secs. 148, 157 and 158. The new Act, by making sec. 258 all inclusive, eliminates conflicting requirements and simplifies the provisions.

Although many of these corporations could be formed under the general nonprofit provisions, retention of these sections in as simplified a form as possible is desirable. It is to be noted that incorporation of trustees of a strictly private trust is also authorized.

SEC. 259. CONTRIBUTIONS; MEMBERSHIP. Unless restricted by the trust instrument, trustees of corporations formed for charitable, eleemosynary, educational, and

other purposes of public benefaction of any nature whatsoever, may unite in such incorporation with other persons contributing to the support of such corporation. As with nonprofit corporations generally, trustee corporations may prescribe in their articles or by-laws the terms and conditions of membership or they may provide that there shall be no members irrespective of contributions.

Note. This section is suggested by provisions in secs. 148, 152, and 157 of the present Michigan Act. Under those provisions it is apparently contemplated that others than the original settlors may contribute to and join in the incorporation of the particular charitable enterprise. Sec. 258 forthrightly authorizes such cooperation in the formation of all charitable trustee corporations unless the trust instrument otherwise prohibits it. This is wise in that many worthwhile projects may otherwise fail because of insufficient funds. The added provision makes it clear that the corporation may or may not award membership in return for contributions. Also, by reference to the general nonprofit sections, it is evident that any membership so conferred may have such privileges or no privileges as may be determined. The scope of this section is specifically restricted to nonprofit corporations.

SEC. 260. TRUSTEE CORPORATIONS; HOW ORGANIZED; LAW GOVERNING. Declarations of trust shall not be sufficient in themselves to authorize the trustees named therein to assume corporate powers, but all such trustees referred to in this Act shall be incorporated only in the manner prescribed in and by complying with the provisions of this Act. Trustee corporations shall be organized either for profit or not for profit as the case may be and governed accordingly by the applicable provisions of this Act.

Note. This section was formerly included in sec. 148 of the present Michigan Act. It wisely requires formal incorporation before the assumption of corporate powers is authorized. As both profit and nonprofit corporations are permitted, it is obvious that a particular corporation shall be governed by such law as is consistent with its nature.

SEC. 261. TRUSTEE CORPORATIONS; COMPENSATION OF TRUSTEES. Trustees of trustee corporations shall in no case have any personal interest in or title to any part or portion of such trust property, nor derive any personal benefit from the principal or income thereof, excepting in the way of just compensation for their labor and skill in executing such trust or by way of reimbursement for necessary and actual expenses incurred in the management of such property or in the performance of their duties as such trustees, or except upon authority expressed in the original deed or instrument of trust.

Note. This provision was formerly included in sec. 148 of the present Michigan Act. It is certainly warranted and consistent with general law.

SEC. 262. WHEN INCORPORATION AUTHORIZED; TRUST INSTRUMENT DEFINED. In any case mentioned in the foregoing sections where property, whether real, personal or mixed, amounting in value to $1000 or more, has been or hereafter shall be so given, granted, devised, or bequeathed to one or more trustees, or in any case where the income from any property or fund has been or hereafter shall be so given, or bequeathed to such trustees for any such purpose, where the annual amount of such income is $1000 or more, and where it shall, for the more effective and perfect administration of any such trust, be deemed expedient to organize as a corporation, then it shall be lawful for such trustees to become incorporated under this Act. The term "trust instrument" or "instrument of trust" as used in this Act shall be construed to mean and refer to any lawful deed of gift, grant, agreement, or any last will and testament by which the donor, grantor, or testator shall give, grant, devise, or bequeath any property, real, personal or mixed, in trust for general or specific

uses; and any and all conditions, terms or directions contained therein, and any act, declaration or instructions of a legal nature made by any corporation or body directing or authorizing trustees thereunder to take, receive, hold, manage or dispose of any of the property of such corporation for general or specific purposes for the benefit of such persons or objects as may be therein designated. Such terms shall not include constructive or resulting trusts.

Note. This section is taken from sec. 149 of the Michigan Act. The requirement of a minimum number of trustees has been eliminated and changed to one or more for all corporations. The Ohio and Missouri statutes do not specify any minimum number of trustees. [Ohio Rev. Code sec. 1719.01 (Baldwin 1954); Mo. Ann. Stat. sec. 352.030 (Vernon 1952).]

The pecuniary limitation of $1000 either in property or income is retained, although similar restrictions are not contained in either the Ohio or Missouri statutes. *Supra* this note. This amount is certainly small enough to cause no inconvenience. Anything less would probably be so little as to prevent the accomplishment of the trust purpose anyway.

SEC. 263. ARTICLES OF INCORPORATION. The articles shall, in addition to other requirements made in this Act, state:

1. The nature of the business, if any, in which such trustee corporation will be engaged and the nature and value of the trust property; and to all such articles, wherever filed, there shall be attached verified copies of every trust instrument or other written directions upon which such trust is founded;

2. The number of persons who shall constitute the permanent board of trustees of such corporation; the length of time for which the trustees are authorized to act after election or appointment as the case may be; and the mode in which their successors shall be elected or appointed;

3. Whether or not other persons than the incorporators are, or may become, members or stockholders thereof.

Note. This is formerly sec. 150 of the present Michigan Act. No substantive changes need be made. It can be compared with Ohio Rev. Code sec. 1719.07 (Baldwin 1954).

SEC. 264. OFFICERS. Every trustee corporation shall have officers corresponding to those prescribed for corporations generally in this Act, appointed or elected as such trustees may agree upon by a majority vote, or as may otherwise be provided for in the trust instrument. Such corporation shall have all the rights, powers, privileges, and immunities conferred by law upon corporations generally, excepting as limited in the trust instrument or by the provisions of this Act.

Note. This is formerly sec. 151 of the Michigan Act. No substantive changes need be made. Compare Ohio Rev. Code sec. 1719.10 (Baldwin 1954).

SEC. 265. POWERS IN RELATION TO PROPERTY. Unless otherwise prohibited or not contemplated in the trust instrument, such trustee corporation may by gift, grant, devise or bequest, take, receive and hold any property, real or personal, so given, granted, devised or bequeathed from other persons than the person or persons by whose deed, will or other instrument the trust was originally founded. Any 2 or more persons may by the same instrument or by separate instruments, give, grant, devise or bequeath property in trust, for any lawful purposes to the same trustees upon such terms and conditions as may in such instrument or instruments be agreed on, and such trustees, if authorized to incorporate, shall attach to the articles of incorporation each and every one of such agreements, and shall be governed by the conditions therein imposed upon them, if not incompatible one with the other. After incorporation to carry out the express directions or conditions of any such trust instrument, no such trustees shall thereafter accept any gift, grant, devise, or bequest upon any condi-

tion or conditions incompatible with the articles or with any instrument required to be attached thereto.

Note. This is formerly sec. 152 of the Michigan Act, the only change being that "any lawful purpose" is substituted for "any of the purposes mentioned in section 148 of this Act." In view of the fact that sec. 148, in addition to specified purposes, authorizes incorporation to carry out the terms of any express trust, it is believed that no substantive change is made. Creation of such trusts by two or more persons is authorized. Acceptance of donations by others than the donor or donors is also authorized as long as such donations are not coupled with conditions incompatible with the original trust. These provisions are certainly warranted.

SEC. 266. USE OF PROPERTY AND FUNDS; INVESTMENTS. The property and funds of every trustee corporation shall be faithfully and exclusively used for the purposes thereof as set forth in its articles or as required by the terms of the trust instrument; and such trustees shall be held to the same degree of responsibility and accountability with respect thereto as if not incorporated, excepting where a less degree or a particular degree of responsibility and accountability is prescribed in the trust instrument, or where such trustees remain under the control of shareholders in such corporation other than themselves who retain the right to direct and do direct the action of the trustees as to the use of such trust property from time to time. Nothing herein contained shall be construed as prohibiting any such board of trustees, having more than five members, from appointing an executive committee or such other committees as they may desire, with such powers and division of work and responsibility as such board may agree upon, not inconsistent with the trust instrument or with the general provisions of this Act governing the management and powers of corporations generally. Such corporation may, unless otherwise specifically directed in the trust instrument, invest its funds in accordance with the

laws of this state governing authorized investments for trustees: *Provided,* That no loan of such funds shall be made to any trustee, officer or servant of such corporation.

Note. Sec. 266 is substantially the same as sec. 153 of the present Michigan Act. It provides that the degree of care owed by the trustees shall, except in certain cases, be governed by trust law rather than corporation law. The effect of this provision is discussed *supra,* Trustee Corporations, p. 91. A lesser degree of accountability is authorized if the trust instrument so provides or if the trustees are under the control of the corporation members. An executive committee is authorized where there are five or more trustees, and loans to officers and trustees are prohibited.

SEC. 267. VACANCY, AMONG TRUSTEES, FILLING. In any case where the trust instrument fails to provide for the filling of vacancies among the trustees due to death, disability, resignation or other cause, and such vacancy occurs, the remaining trustees may apply to the circuit court in chancery of the county where the registered office of such corporation is located, for the appointment of some suitable and competent person to fill such vacancy, the circuit judge thereof may, upon such ex parte or other showing as he may require, make such appointment by an appropriate order, and the person so appointed shall, upon filing his written acceptance as such trustee, be and become a trustee of such corporation with the same powers as those originally appointed. A certified copy of every such order shall be forthwith filed in the same manner as provided for original articles.

Note. This section, the same as sec. 154 of the present Michigan Act, codifies and perhaps amplifies the general equitable doctrine that equity will not let a trust fail for the want of a trustee. 1 Scott, TRUSTS, secs. 565 and 108 (1939). Its retention is justified in the interest of clarity.

SEC. 268. CONSTRUCTION OF TRUST INSTRUMENT; JURIS-

DICTION OF COURT. In any case where the trustees of any such trustee corporation are in honest doubt and unable to agree as to the construction of any of the terms or conditions of any such trust instrument or their powers or duties thereunder, any or all of such trustees may file his or their petition in the circuit court in chancery for the county in which the registered office of such corporation is located, asking for the construction of the said court upon the whole or any part of such instrument, under and by the same procedure as is provided by law for the construction of wills. In case any public interest is involved, the prosecuting attorney of such county shall enter his appearance therein, and shall do so in all cases involving hospitals or charitable homes or similar institutions to which the general public may be admitted on application. If less than the entire board of trustees joins in such petition, the remaining members shall become defendants and shall be served with such notice or other process as the rules of the court may require. Such court shall have jurisdiction to determine every doubtful, or disputed question raised by such petition, and the opinion and directions of such court, when filed, shall be binding upon such corporation and the trustees thereof.

Note. Section 268 is the same as sec. 155 of the present Michigan Act.

SEC. 269. AMENDMENT OF TRUST AGREEMENT. If the donor or grantor in any such trust instrument has reserved the right to do so, he may alter, amend, enlarge or restrict the gift or grant or any of the terms or conditions thereof. In the event that the donor or grantor makes any such change or changes, it shall be the duty of such trustees to forthwith file a verified copy of such amended trust instrument in the same manner as provided for original ar-

ticles, and any amendments to such articles occasioned by such amended trust instrument shall likewise be forthwith made and so filed by such trustees, and no such amendments to the articles shall be valid that change the original purposes of the corporation in their entirety.

Note. This section is similar to sec. 156 of the present Michigan Act, but it is changed to make it clear that the donor or grantor may amend the trust instrument only if he had reserved the right to do so.

Additional Notes

No provision is herein recommended for state supervision of charitable trusts. New Hampshire has led the field in the United States in effective regulation of charitable trusts. [N. H. Laws 1943, c. 181; amended N. H. Laws 1945, c. 92; N. H. Laws 1947, c. 94; N. H. Laws 1949, c. 39.] Since then Rhode Island, Ohio, and South Carolina have enacted somewhat comparable legislation. [R. I. Laws 1950, c. 2617; R. I. Laws 1951, c. 2852; Ohio Rev. Code secs. 109.11, 109.23 to 109.33, 109.99 (Baldwin 1954); S. C. Code secs. 67-71 to 67-75 (Supp. 1954).]

See: Bogert, "Proposed Legislation Regarding State Supervision of Charities," 52 MICH. L. REV. 633 (1954); Bogert, "Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts," 5 HASTINGS L. J. 95 (1954); Bogert, "The Nathan Report and the Supervision and Enforcement of Charitable Trusts," 29 N. Y. U. L. REV. 1069 (1954); Latcham, "Private Charitable Foundations: Some Tax and Policy Implications," 98 U. OF PA. L. REV. 617 (1950); Comment, "Supervision of Charitable Trusts," 21 U. OF CHI. L. REV. 118 (1953); Comment, "Modern Philanthropic Foundation: Critique and Proposal," 59 YALE L. J. 477 (1950); Comment, "Recommending State Supervision of Charitable Trusts," 23 IND. L. J. 141 (1948); Note, "State Supervision of the Administration of Charitable Trusts," 47 COL. L. REV. 659 (1947).

Such state control, if enacted, should be based on policy determined after a thorough investigation. It should extend to both incorporated and unincorporated associations, and should also include foundations as well as any other similar type of organization. Inclusion of such provisions in statutes on general corporation law would appear awkward. If such

regulation were enacted, perhaps a reference to it should be included in the corporation statutes.

A portion of sec. 157 of the present Michigan Act authorizing certain trustee corporations to apprentice or indenture foundling children has been eliminated. Apprenticing and indenturing sounds somewhat archaic and inhumane in this enlightened age. Furthermore, such provisions should be a part of child welfare and adoption legislation and should not be included in general corporation statutes.

SEC. 270. FOUNDATIONS; INCORPORATORS; EXPENDITURE OF FUNDS. One or more persons, natural or corporate, may become incorporated as a foundation for the purpose of receiving and administering funds for the perpetuation of the memory of persons, preservation of objects of historical or natural interest, or for educational, charitable or religious purposes or for providing scholarships and fellowships in any university, college or school, or for public welfare. Such corporations are hereinafter called foundations.

Note. This section is similar to sec. 163 of the present Michigan Act except that the requirement of three incorporators has been eliminated. Included in the statement of authorized purposes is the furnishing of scholarships and fellowships in any university, college or school. This inclusion is prompted by sections 168 and 169 of the present Michigan Act specifically authorizing foundations to furnish such aid to the publicly supported educational institutions within the state. The proposed provision includes the word fellowships as well as scholarships, and does not limit the schools either to those publicly supported or those located within the state. It is submitted, however, that there is no change in the substantive law since the term "public welfare" obviously includes such purposes. Statement of purposes should necessarily be very broad to conform to standard foundation practices. See *supra,* Foundations, p. 94. Accordingly, sections 168 and 169 of the present Michigan Act are eliminated.

SEC. 271. GIFTS AND BEQUESTS; POWERS. Such foundations shall have power to take and hold by bequest, devise,

gift, purchase or lease, either absolutely or in trust, for any of its purposes, any property, real, personal or mixed, without limitation as to the amount or value, except such limitations, if any, as the legislature shall hereafter specifically impose; to convey such property and to invest and reinvest the principal thereof in accordance with the laws of this state governing authorized investments for trustees and deal with and expend the income of the foundation in such manner as in the judgment of the trustees will best promote its purposes.

Note. This is substantially the same as sec. 164 of the present Michigan Act. Note also that the general powers conferred on profit and nonprofit corporations also apply. Hence, no more detailed provisions need be added.

SEC. 272. FOUNDATIONS TO BE NONPROFIT. Every such foundation shall be a nonprofit corporation and subject to the provisions of this Act relating to nonprofit corporations except as specifically otherwise provided. All of such property and accumulations thereof shall be held and administered to effectuate the purposes stated in the articles and to serve the general welfare of the people: *Provided,* That this Act shall not prevent such foundations from charging an admission fee, or similar charge, to museums, forest reserves, parks and other institutions organized hereunder for the sole purpose of paying the expense of maintenance.

Note. This section is the same as sec. 165 of the present Michigan Act.

SEC. 273. MEMBERSHIP; BOARD OF TRUSTEES. The articles of such foundation may provide for membership and the manner in which members may be admitted. The articles may also provide that there shall be no members irrespective of contributions. The affairs of such foundations shall

be managed by a board of trustees or directors to be selected as provided by the by-laws, but in no case shall the number of trustees or directors be less than three. A self-perpetuating board of trustees is authorized.

Note. This section replaces sec. 166 of the present Michigan Act. Whereas sec. 166 provides that the articles "shall" provide regulations concerning membership, sec. 271 states that the articles "may" provide for membership. As with nonprofit corporations generally, sec. 233, and with trustee corporations, sec. 258, foundations may be organized without members. Inferentially also, membership without voting rights is authorized.

Instead of requiring the trustees to be "elected" as in section 166 of the Michigan Act, sec. 271 provides that they shall be "selected" as provided in the by-laws. Further, a self-perpetuating board of trustees is authorized. More detailed regulations, of course, are contained in the general nonprofit provisions which also govern these types of corporations. Hence, uniformity is achieved and maximum flexibility permitted.

Additional Notes

Sec. 167 of the present Michigan Act providing for legislative dissolution has been omitted. A somewhat similar provision providing for chancery dissolution under the same circumstances has been included in the general nonprofit provisions, sec. 252. Reasons for the change can be found in the note to sec. 252, *supra.*

Sections 168 and 169 of the present Michigan Act, applying specifically to corporations offering scholarships and student aid for the University of Michigan and other publicly supported schools, has been eliminated. Sec. 268 specifically lists student aid and grants as included within the authorized purposes of foundations.

As with trustee corporations, and for the same reason, no provision for state regulation is herein recommended. See *supra,* "additional notes" following Trustee Corporations, p. 198. An inkling of the magnitude of the policy considerations involved may be gleaned from the reports derived from two congressional investigations concerning subversive influences of foundations. H. R. Rep. No. 2514, 82nd Cong., 2nd Sess. (1953); H. R. Rep. No. 2681, 83rd Cong., 2nd Sess.

SEC. 274. EDUCATIONAL CORPORATIONS. One or more persons, natural or corporate, may incorporate for the purpose of conducting a school, academy, seminary, college or other institution of learning where preparatory subjects or the arts, sciences, professions, special occupations and higher learning may be taught. Such corporations are hereinafter called educational corporations.

Note. This section is similar to the first half of sec. 170 of the present Michigan Act. The requirement of three incorporators has been eliminated as is the case with all of these special types of corporations. Special provisions for the incorporation of educational institutions are common in other states. [Ind. Ann. Stat. secs. 25-3201 *et seq.* (Burns 1948); Ohio Rev. Code secs. 1713.01 *et seq.* (Baldwin 1954); N. J. Stat. Ann. secs. 15: 11-1 *et seq.* (1939); Neb. Rev. Stat. secs. 21-701 *et seq.* (1943, reissue 1954).] Such statutes are not universal, however. In many states the educational provisions are included within the general nonprofit provisions or combined with religious or other particular types of corporations. The statutes of Florida, Illinois, New York, Minnesota and Pennsylvania have very few, if any, statutes relating specifically to educational corporations.

The inclusion of some statutes relating specifically to educational corporations is justified in the interest of clarity. Such special provisions, however, should be kept to a minimum and should be concerned with the peculiar requirements of such corporations. Both the Michigan provisions and those herein proposed substantially fulfill these requirements.

SEC. 275. LAW GOVERNING. Educational corporations may be organized either for profit or not for profit, and they may but need not be organized as trustee corporations. Except as otherwise hereinafter specifically provided, they shall be governed by the appropriate profit or nonprofit provisions of this Act and, if applicable, the trustee provisions also.

Note. This section is substantially the same as the second half of sec. 170 of the present Michigan Act.

SEC. 276. EDUCATIONAL CORPORATIONS; CLASSIFICATION. For the purposes of this Act, educational corporations shall be classified as follows:

A. Those having a capital of $1,000,000 or more;

B. Those having a capital of no more than $1,000,000 and not less than $500,000;

C. Those having a capital of no more than $500,000 and not less than $100,000;

D. Those instituted and maintained by any ecclesiastical or religious order, society, corporation or corporations, retaining control of such institution for denominational purposes.

Note. This provision retains the classification provided in the first paragraph of sec. 171 of the present Michigan Act. The grouping is rearranged and the phraseology is changed to provide a clearer and more logical presentation.

Classification dependent on capital is not universal in other jurisdictions even though they may have separate provisions for the incorporation of educational institutions. The following educational corporation statutes have no such classificatory scheme: Ark. Stat. Ann. secs. 64-1401 *et seq.* (1947); Idaho Code Ann. secs. 33-3901 *et seq.* (1948); Ind. Ann. Stat. secs. 25-3201 *et seq.* (Burns 1948); Ohio Rev. Code secs. 1713.01 *et seq.* (Baldwin 1954); Okla. Stat. Ann. tit. 18, secs. 541 *et seq.* (1953); Neb. Rev. Stat. secs. 21-701 *et seq.* (1943, Reissue 1954); N. J. Stat. Ann. secs. 15:11-1 *et seq.* (1939); Tenn. Code Ann. secs. 4162 *et seq.* (Williams 1934); Tex. Rev. Civ. Stat. Ann. arts. 1410 *et seq.* (Vernon 1945).

The classification is retained because of its obvious reasonableness.

SEC. 277. CONDITIONS PRECEDENT TO INCORPORATION. Every educational corporation, before being authorized to file its articles, shall be required to present a statement to the Michigan Corporation and Securities Commission in writing from the State Board of Education that:

1. The housing space and administration facilities

which it possesses or proposes to provide for its declared field or fields of education are adequate;

2. Its proposed educational program leading to the diplomas or degrees which it proposes to offer is adequate;

3. Its laboratory, library, and other teaching facilities which it possesses or proposes to provide are adequate;

4. It has or proposes to employ an adequate staff, fully trained, for the instruction proposed; and

5. At least 50 per cent of its capital, whether of stock or in gifts, devises, legacies, bequests or other contributions of money or property, has been paid in or reduced to possession.

In determining whether any educational corporation satisfies conditions specified in classes (A), (B), (C), and (D) of sec. 276, the State Board of Education may treat as a credit to the capital of such corporations the guaranteed annual income of that corporation to the extent that it deems such guaranteed income the equivalent of all or any part of the required endowment.

Note. These provisions, taken from the second paragraph of sec. 171 of the present Michigan Act, are retained because of the wise policy involved. The public and prospective students are protected by the control of the State Board of Education, and the incorporators are immediately put on notice that they must satisfy the requirements of the State Board. Thus, the incorporators and donors are also protected in that the financial feasibility of the proposed institution is weighed by experts at the very outset.

The educational corporation statutes of Ohio and Arkansas contain similar provisions for control by a state education department. [Ohio Rev. Code secs. 1713.02 to 1713. 06 (Baldwin 1954); Ark. Stat. Ann. sec. 64-1409 (1947).] Although the corporation statutes of many states do not contain such provision for state control [Idaho Code Ann. secs. 33-3901 *et seq.* (1948); Ind. Ann. Stat. secs. 25-3201 *et seq.* (Burns 1948); Okla. Stat. Ann. tit. 18, secs. 541 *et seq.* (1953); Neb. Rev. Stat. secs. 21-701 *et seq.* (1943, Reissue 1954); N. J. Stat. Ann. secs. 15:11-1 *et*

seq. (1939); Tenn. Code Ann. secs. 4162 *et seq.* (Williams 1934); Tex. Rev. Civ. Stat. Ann. arts. 1410 *et seq.* (Vernon 1945)], such control is indeed warranted. Further, it is wise to mention the provisions in the corporation statutes so that the interested parties will be put on notice at the outset. This control by the State Board of Education serves as a guarantee against under-capitalization and improvident ventures which otherwise might result if the monetary limitations provided in sec. 276 were the sole restriction on these corporations.

SEC. 278. COLLEGE AND UNIVERSITY DEFINED. The use of the word "college" or "university" in the name of any group, organization or association hereafter formed in this state is limited to those educational corporations complying with the requirements for class (A) or class (B) educational corporations as provided in sec. 276 or to such educational corporations of class (D) as shall satisfy the requirements set up for classes (A) or (B); *Provided,* however, That the words "junior college" may be used by educational corporations of class (C). Whenever this provision is violated it shall be the duty of the prosecuting attorney, in the county where the organization is located, to bring proceedings to enjoin the further use of such name in violation of this Act.

No educational corporation shall be permitted to expand its program beyond that specified in its articles of incorporation until it has presented to the Michigan Corporation and Securities Commission a statement in writing from the State Board of Education approving the facilities, equipment and staff or the proposed facilities, equipment and staff as adequate for the offering of the additional educational program.

Note. The definitions and provisions of paragraph 3 of sec. 171 of the present Michigan Act are retained in substance in sec. 278. These provisions are obviously reasonable and yet flexible. Separate provisions for nonsectarian and religious educational corporations as well as educational corporations of

different academic rank are not uncommon in other states. [Ind. Ann. Stat. secs. 25-3201, 25-3211, 25-3212 and 25-3236 (Burns 1948); Ohio Rev. Code secs. 1713.01 and 1713.22 (Baldwin 1954); Neb. Rev. Stat. secs. 21-701, 21-706, 21-710 and 21-718 (1943, Reissue 1954); Tenn. Code Ann. secs. 4162, 4168 and 4177 (Williams 1934).] The provisions of sec. 276 are superior in matters of clarity, accessibility, completeness, uniformity, logic and conciseness to most of the companion legislation cited.

SEC. 279. ESTABLISHMENT OF COLLEGES AND UNIVERSITIES. Educational corporations, according to their classification as defined in section 276, shall have authority to establish and conduct colleges and other institutions of higher learning as follows:

1. Educational corporations of class (A) shall have authority to establish and conduct colleges or universities of a graduate rank with programs of studies of 5 years or more;

2. Educational corporations of class (B) shall have authority to establish and conduct general colleges for furnishing higher learning and to confer such degrees and honors as shall be approved by the State Board of Education prior to the filing of articles of incorporation; and the term "college" as herein used shall be construed to include any college, university or other institution where the arts, sciences, professions and higher learning are taught and degrees and honors therein conferred.

3. Educational corporations of class (C) shall have authority to establish and conduct junior colleges, seminaries, academies or preparatory schools, as determined and approved by the State Board of Education, but not general colleges or universities as defined in subsections (A) and (B) hereof;

4. Educational corporations of class (D) shall embrace

such schools, academies, or colleges as have been heretofore founded under Act 135, Public Acts 1899, known thereunder as "Ursuline academies;" those founded under Act 121, Public Acts 1915, and known thereunder as "ecclesiastical seminaries;" those founded under Act 28, Public Acts 1901, and known thereunder as "Evangelical Lutheran deaf mute institutions;" those founded under Act 135, Public Acts 1867, known as "industrial and charitable schools;" those organized under paragraph c, subdivision 1, chapter 2, part 4, of Act 84, Public Acts 1921, and such other schools, colleges and institutions of like character and purpose as may be formed under any law of this state for educational purposes. All such educational corporations shall have all the rights, powers, privileges and immunities enjoyed under its act of incorporation and without regard to the classification made in this Act, and upon complying with the provisions hereof shall have such additional rights, powers, privileges and immunities as are conferred hereunder according to the classifications prescribed in this Act. Any corporation of class (D) may enjoy the privileges provided under classes (A), (B), and (C) on condition that it satisfies the requirements set up for corporations of these respective classes.

Any corporation heretofore formed under Act 359, Public Acts 1913, and known thereunder as "kindergarten institutions" shall hereafter be classified under class (C) of section 276 of this Act.

Educational corporations of class (A) shall have the powers and privileges conferred on corporations of classes (B) and (C), and corporations of class (B) shall have the powers and privileges conferred on corporations of class (C). Conversely, however, corporations of classes (B) and (C) shall not have the powers and privileges conferred on corpora-

tions of a higher classification until they conform to the requirements specified for corporations of such higher classification.

Note. This section is substantially the same as sec. 172 of the present Michigan Act. The paragraphs have been rearranged to conform to the more logical grouping of sec. 276. Slight changes in phraseology and a few additions or deletions have been made in the interests of completeness and avoidance of redundancy. The last paragraph of this section, for example, makes it clear that any institution of a higher classification may conduct programs commensurate with those conferred on institutions of a lower classification. On the other hand, institutions of a lower classification are authorized to conduct programs of the higher level only when they conform to the higher requirements. This provision made it possible to delete from paragraph (B) the express provision that general colleges could also conduct preparatory schools. See Mich. Comp. Laws sec. 450.172 (a) (1948).

The provisions of sec. 172, par. (c) of the present Michigan Act classifying certain pre-existing corporations as religious educational institutions have been retained in paragraph 4 of sec. 279. Thus, all the educational corporations are brought within the coverage of the act in a concise and logical manner.

SEC. 280. ARTICLES OF INCORPORATION. In addition to the other requirements of this Act, the articles of every educational corporation shall clearly set forth the educational system of the institution to be founded and the character of the degrees, honors, diplomas, or certificates which it proposes to grant; and such educational system and other aforementioned items shall be approved by the State Board of Education prior to the filing of the articles of incorporation. If a college or university, the articles shall state the number and name of the faculties to be established; and if a denominational religious school or college, the name of such denomination and the body supporting or controlling the same. Such articles shall be filed as provided in section 5 of this Act. Any such corporation

may, by increasing its capital to a higher class and amending its articles, assume the powers and privileges of such higher classification as it may thereby be entitled to as defined in this Act.

Note. This is similar to sec. 173 of the present Michigan Act except that the whole provision is prefaced with "in addition to the other requirements of this act." Thus, the incorporators are advised at the outset to consult also the appropriate profit, nonprofit, or trustee provisions of this Act to determine the complete requirements of the articles.

SEC. 281. ACCEPTANCE OF PROPERTY. The directors or trustees of any such educational corporation may accept gifts, devises, legacies or bequests, of personal or real property, or the principal or interest of any money or other fund, either absolutely or in trust, for the benefit of such institution or particular faculties, departments or other special purposes thereof; and such trustees or directors shall hold and dispose of such trust funds in accordance with the directions and wishes of any of the donors in each case; and shall account for all such funds and property in such manner and at such times as may be appointed in the instrument, deed or will accompanying the donation or as provided by law or the articles or by-laws of such corporation, made pursuant thereto. Where no other provision is made with respect thereto, the directors or trustees of every such corporation shall be governed as to their duties, powers and responsibilities, by the general provisions of this Act respecting such boards; and as to their trusteeship of property they shall be governed by the provisions of this Act governing trustee corporations.

Note. The provisions of sec. 174 of the present Michigan Act authorizing acceptance of donations are retained but broadened to include donations not in trust. This is accomplished by the insertion of the words "either absolutely or" immediately

preceding the words "in trust" in the present Act. The justification of this provision is apparent.

SEC. 282. POWERS OF BOARD OF DIRECTORS OR TRUSTEES. The control of the business and secular affairs of every such educational corporation shall be vested in a board of directors or trustees. Such board, in addition to general corporate powers conferred by the appropriate provisions of this Act, shall also have exclusive control over the educational affairs and policy of such institution, and as such may:

First, Appoint, employ and pay the salary of a president, or principal, and such professors, tutors, assistants, and employees, as the board shall determine necessary;

Second, Direct and prescribe the course or courses of study and the rules of discipline for such institution, and enforce the same; and prescribe the tuition and other fees to be paid by students attending such institution;

Third, Grant such diplomas, certificates of graduation, or honors and degrees, as the nature of the institution may warrant, or as contemplated in the articles;

Fourth, Delegate to the president or principal, and the various professors and tutors, such authority over the educational affairs of the institution as the board may deem advisable;

Fifth, Co-operate with other schools, colleges and educational institutions in promoting the best interests of education.

Note. Sec. 282 is substantially the same as section 175 of the present Michigan Act. The first paragraph has been modified to make it clear that the enumerated powers are in addition to the general corporate powers conferred in other sections of the Act applicable to either profit, nonprofit or trustee corporations. Hence, those general powers need not be repeated. The enumeration of specific powers concerning a faculty, courses

of study, and conferring of degrees, are obviously unique to educational corporations and should be expressed. The fifth power enumerated in the Michigan Act authorizes these corporations to cooperate with other institutions "within this country" in promoting the best interests of education. In sec. 280 the phrase "within this country" has been eliminated as such restriction seems unnecessary. Arkansas, Idaho, Nebraska, Oklahoma and Texas have somewhat comparable statutes. [Ark. Stat. Ann. sec. 64-1405 (1947); Neb. Rev. Stat. sec. 21-703 (1943, Reissue 1954); Okla. Stat. Ann. tit. 18, sec. 573 (1953); Tex. Rev. Civ. Stat. Ann. art. 1411 (Vernon 1945).]

SEC. 283. PRIVILEGES OF HOLDERS OF DIPLOMAS OR CERTIFICATES. Every diploma, certificate of graduation, or other evidence of attendance at such institution, shall entitle the lawful recipient thereof to all the privileges and immunities which by custom or usage are allowed to holders of similar diplomas or certificates granted by similar institutions in this country: *Provided,* That as to any occupation or profession regulated by statute as to the requirements and qualifications necessary to the practice thereof, no such diploma or certificate of graduation shall entitle the recipient to any such privilege or immunity where such statutory requirements or qualifications have not been met.

Note. This section is substantially the same as sec. 176 of the present Michigan Act. Apparently many states, such as Arkansas, Idaho, Minnesota, Missouri, Nebraska, Oklahoma, Ohio, Pennsylvania, Tennessee and Texas, do not have similar provisions in their corporation statutes. The deletion of this section would seem to cause no harm because obviously nothing except the reputation of the issuing institution is or can be conferred on the recipients of degrees. Further, the prohibition against engaging in statutorily controlled occupations and professions prior to the satisfaction of such requirements hardly seems essential since such would be implied anyway. On the other hand, inclusion of the section works no hardship and it may be justified in the interests of completeness and clarity.

SEC. 284. INSPECTION BY STATE BOARD OF EDUCATION; ANNUAL REPORT. Every such educational corporation shall be visited and inspected by the State Board of Education, in person or through visitors or inspectors appointed by them, at least once every 2 years. Said State Board of Education shall at the time of visitation ascertain and publish information upon all matters pertaining to the condition, management, instruction and practices of such corporations, and shall file a copy of their report with the Michigan Corporation and Securities Commission. Upon evidence that the property is at any time less than required by law, or that any such educational corporation is not otherwise complying with the provisions of this Act, they shall serve notice on such corporation to remedy the defects within a reasonable time to be fixed in such notice, and in case the deficiency is not corrected within the time fixed by them, they may institute procedings at law for the dissolution of such corporation. Such trustees shall be required, on or before the first day of December, annually, to report to the State Board of Education, a statement of the name of each trustee, officer, teacher and the number of students of such institution, with a statement of its property, the amount of stock subscribed, donated and bequeathed, and the amount actually paid in, and such other information as will tend to exhibit its condition and operations.

Note. This section is the same as section 177 of the present Michigan Act. Supervision by the State Board of Education is certainly warranted and expected. The degree and frequency of such supervision should and naturally will conform to the set policy of the particular state. Hence, either a reference to other statutes providing such control or else a condensed repetition should be included in these corporation statutes. The present Michigan provisions seem reasonable and are therefore retained.

SEC. 285. RELIGIOUS CORPORATIONS; CLASSIFICATION. Religious corporations may be incorporated by one or more persons, natural or corporate, for the purpose of teaching and spreading religious beliefs and principles. Such corporations shall be classified as regional church corporations, ecclesiastical corporations, or religious societies according to their level of operation as hereinafter defined:

A. A regional church corporation shall consist of any incorporated presbytery, diocesan convention, diocese, synod, conference, district, court or other body which exercises jurisdiction over any two or more local churches, temples, parishes or congregations, or any incorporated conference of a station, mission, class, circuit or other organization of a religious denomination, or an association of congregations or societies, or any regional cooperative agency of affiliated religious associations.

B. An ecclesiastical corporation shall consist of any incorporated single church, denominational unit, parish, temple, or any church society as the term is generally used.

C. A religious society shall consist of any incorporated Sunday school, Young People's Fellowship, Young People's Union, Bible Class or similar society organized and affiliated with a parent church.

Note. This section is new insofar as Michigan law is concerned, although the present Michigan statutes do contain provisions for the incorporation of these particular types of religious corporations. [Mich. Comp. Laws secs. 450.159, 450.178 and 450.186 (1948).] The grouping of all the religious corporation statutes in one place results in a more logical arrangement and less duplication. This classification is analogous to the classification of educational corporations in section 276. The nomenclature adopted is somewhat different and is designed to be descriptive of the association's scope of operations rather than the manner of organization. Thus, the designation "regional church corporation" is substituted for "church trustee corporation," and it is later provided that such a corporation

may be organized either as a trustee or as a general nonprofit corporation. The appellation "ecclestiastical corporation" is retained for the single church unit, and the designation "religious society" is used for the subordinate unit instead of "Sunday school or religious society."

The definition of each class is expressed in broad terms so as to be all inclusive and non-restrictive. In general, the definitions follow the pattern of the present statutes except that efforts were made to broaden the coverage, reduce ambiguity and duplication, and present the material in a more emphatic manner. Definitions in the present statutes can be found in Mich. Comp. Laws secs. 450.159, 450.178 and 450.186 (1948). The Epworth League was omitted as an example of a religious society under class (C) corporations because that organization has been disbanded by the Methodist Church. The coverage of the section, however, is neither more nor less because of the change. The Epworth League is mentioned in section 178 of the present Michigan Act as a subordinate group and not constituting an ecclesiastical corporation.

A classificatory scheme somewhat analogous to section 285 is provided for in the statutes of Nebraska. [Neb. Rev. Stat. sec. 21-834 (1943, Reissue 1954).] The diversity of treatment accorded these corporations in the statutes of other states may be illustrated by a few examples. Florida and Oklahoma simply authorize the incorporation generally of religious organizations as nonprofit corporations. [Fla. Stat. sec. 617.01 (1953) and Okla. Stat. Ann. tit. 18, sec. 541 (1953).] Illinois authorizes incorporation of churches generally and incorporation of unit churches of an ecclesiastical system. [Ill. Ann. Stat. c. 32, secs. 164 and 176 (1954).] Indiana has authorization for the incorporation of at least seven distinct types of religious organizations: Synods, union of churches, missions, Episcopal Church Camp Meetings, church benevolent societies, Y.M.C.A. and Y.W.C.A. [Ind. Ann. Stat. secs. 25-2901, 25-2801, 25-2701, 25-2201, 25-2301, 25-2401 and 25-3101 (Burns 1948).] Ohio specifically authorizes incorporation of six different types of religious organizations: cathedrals, Y.M.C.A., state organization of Y.M.C.A., donation holding corporations, endowment fund corporations, and printing and publishing corporations. [Ohio Rev. Code secs. 1715.18, 1715.23, 1715.27, 1715.11, 1715.12 and 1715.15 (Baldwin 1954).] Minnesota recognizes nine such corporations: churches generally, parish corporations, Diocesan corporations, parish of the Protestant Episcopal Church,

cathedral, synod, camp meeting associations, Y.M.C.A. and Y.W.C.A. [Minn. Stat. Ann. secs. 315.01, 315.15, 315.16, 315.17, 315.20, 315.23, 315.41, 315.44 and 315.49 (West 1945).]

SEC. 286. REGIONAL CHURCH CORPORATIONS; PURPOSE; HOW INCORPORATED. A regional church corporation as defined in section 285 may be incorporated to effectuate the purposes of such organization or to create a corporate board to manage any endowment or other property of the denomination represented by such body. Such incorporation shall be first authorized and approved at a meeting duly called and conducted according to the rules and regulations of such organization, conference or association of congregations. The incorporators shall submit and file with the articles of incorporation a certificate certified by the presiding officer authorizing such incorporation and specifying the name thereof.

Note. Many of the detailed provisions concerning the incorporation of this type organization found in sec. 159 of the present Michigan Act have been eliminated in preference to the general requirements provided for nonprofit corporations. The restrictions requiring authorization conferred at a duly held meeting of the organization and a certificate of presiding officer are retained as reasonable and not unduly burdensome or diverse. Such flexible uniform provisions applicable to almost all of the diverse nonprofit corporations are preferable to detailed and diverse requirements for as many different types of organizations as can be imagined. See, for example, the specific and diverse requirements contained in the following statutes: Ind. Ann. Stat. secs. 25-2214 to 25-2216, 25-2703 and 25-2801 (Burns 1948); Minn. Stat. Ann. secs. 315.16, 315.20 and 315.23 (West 1945); Neb. Rev. Stat. secs. 21-816 and 21-848 (1943, Reissue 1954); Ohio Rev. Code secs. 1715.11, 1715.12, 1715.18 and 1715.21 (Baldwin 1954).

SEC. 287. LAW GOVERNING. Regional church organizations may incorporate either under the general non-profit or trustee provisions of this Act, but in no case may they be organized for profit purposes. They accordingly shall

be governed by the provisions and possess all the powers, rights, privileges and immunities of corporations formed as nonprofit trustee or general nonprofit corporations as the case may be.

Note. No substantive change in the present Michigan law is accomplished by this section. [Mich. Comp. Laws sec. 450.159 (1948).]

SEC. 288. ECCLESIASTICAL CORPORATIONS; HOW INCORPORATED; LAW GOVERNING; POWERS. An ecclesiastical corporation as defined in section 285 may be incorporated in accordance with the procedures established for nonprofit corporations generally and shall be governed by the provisions of those sections except as specifically hereinafter otherwise provided. An ecclesiastical corporation shall have all the rights, powers, privileges and immunities of such nonprofit corporations generally, and in particular the right to acquire real estate for its own use and occupancy, including a pastor's residence, a church cemetery, church and Sunday school buildings and grounds, school buildings and grounds, and church society buildings and grounds, and it may sell, lease or mortgage such real estate. An ecclesiastical corporation shall have in relation to cemeteries all the rights, powers, privileges and immunities afforded cemetery corporations.

Every ecclesiastical corporation insofar as it holds any property in trust for religious, charitable, benevolent, educational or social purposes, shall be deemed to be a trustee corporation within the meaning of this Act and governed by the provisions relating to trustee corporations. All investments made by such corporation shall be in accordance with the laws of this state governing authorized investments for trustees.

Note. This section incorporates in substance essential provisions not otherwise reenacted of sections 178 to 183 and 184 of

the present Michigan Act. The provision relating to cemeteries is broadened by providing that ecclesiastical corporations shall have all the powers accorded cemetery corporations. Some repetition and duplication is eliminated by simply permitting the general nonprofit provisions to control the manner of the exercise of the powers instead of enacting specific provisions. The requirement that unused real estate be sold within 10 years [Mich. Comp. Laws sec. 450.184 (1948)], has been eliminated as being unnecessary since section 5 of Article XII of the Michigan Constitution, imposing such a restriction on all corporations, necessarily applies. Further, the restriction is included in section 234, thereby making it applicable to all nonprofit corporations.

SEC. 289. BY-LAWS. Every such ecclesiastical corporation shall have authority to adopt by-laws prescribing the qualifications of members; the manner in which they shall be admitted, suspended or expelled; the number and official titles of the person or persons who control the temporal affairs of such corporation; their terms of office; the manner of their selection and removal from office; their respective official duties; the time and manner of calling and holding church business meetings and the number of members constituting a quorum, how far such corporation shall be subject to the approval or control of any other corporation or higher church body which corporation or body shall be named; the manner and condition under which property, both real and personal, may be acquired, held and disposed of; and such other by-laws as may be deemed necessary for the management of the affairs of such corporation. The by-laws may also prescribe how the same may be altered, amended or repealed.

Note. This section is the same as section 181 of the present Michigan Act. Although the section may not be absolutely necessary since it provides in substance for the utmost flexibility in the internal organization of these corporations, as is the case with nonprofit corporations generally, its retention may be justified in the interest of clarity. This section makes it clear

that the by-laws may provide for supervision and control by higher church authority and may require conformity to the discipline of such authority.

SEC. 290. AMENDMENT OF ARTICLES. The articles of an ecclesiastical corporation may be amended in accordance with the provisions of this Act relating to nonprofit corporations generally except that where the system of discipline or polity in any particular denomination or church requires the action, consent or vote of a conference, conclave or synod, presbytery or other body, or the approval of certain officers of such conference or other body or of a bishop or other hierarchical officer, to such amendments, then all such amendments shall be made in conformity to such practice and requirements and shall in all other respects conform to the customs, usages, beliefs, and discipline of the particular church body concerned.

Note. This section, in as concise a form as possible, re-enacts the essential provisions of section 182 of the present Michigan Act. The only limitation on the amendment power is that local units under the control of a higher church authority must get approval from such authority if required by the prescribed order of discipline and must otherwise conform to the established practices of such authority. To permit otherwise would be to sabotage established church organizations. In other respects the flexible amendment procedure of nonprofit corporations generally controls. Little would be gained by delineating the detailed requirements in effect in Michigan and other states for particular types of nonprofit corporations. The aim is uniformity, consistency and simplification.

SEC. 291. POWERS OF CHURCHES NOT RESTRICTED. Nothing in this Act shall be construed as limiting or restricting the rights, powers, privileges, immunities or the practices of any church heretofore established or incorporated under any law of this state; nor as requiring any such church to alter or change any rule of discipline, custom or usage in respect of its church policy or government; nor as interfer-

ing with the lawful acquisition, use or disposition of any property now owned or held by any such church corporation. The provisions of this Act relating to ecclesiastical corporations shall be liberally construed in the interests of religion and morality.

Note. This is essentially the same as section 185 of the present Michigan Act. [Mich. Comp. Laws sec. 450.185 (1948).]

SEC. 292. RELIGIOUS SOCIETIES. One or more persons, natural or corporate, may incorporate a Sunday school or other religious society as defined in section 285, not being a church, but having for its purpose the teaching of religious principles, or the associating together for religious work. The incorporators shall subscribe articles similar to those prescribed for nonprofit corporations generally, which articles shall also contain any special conditions or distinguishing principles upon which such corporation is founded, and, if connected with some organized church, the name of the church and a statement of the extent to which such church may exercise superintendence over the affairs of, or discipline of, the members of such Sunday school or other corporation. The corporations referred to in this section as religious societies shall have all the rights, privileges, immunities and powers granted by this Act to nonprofit corporations generally in their secular affairs; and in their religious affairs they shall be governed solely by their articles and by-laws, and the system of discipline therein adopted.

Note. This section is substantially the same as sec. 186 of the present Michigan Act but is slightly altered in phraseology to conform to the classificatory scheme of section 285.

Additional Notes

Section 160 of the present Michigan Act relating to vacancies in the board of trustees of church trustee corporations has

been omitted completely in favor of the general provisions governing this matter in the nonprofit sections of this Act. The limitation on the authority of such corporations to sell real estate contained in sec. 162 of the present Michigan Act has also been omitted. The general corporate provisions relating to sale of real estate and general conveyancing and recording acts should be adequate regulations for this matter. Diverse regulations for the sale of real estate enacted for every conceivable type of corporation would tend to have a disquieting effect on the marketability of titles.

Section 161 of the present Michigan Act relating to the powers of church trustee corporations over property held in trust has been omitted as unnecessary. The general trustee provisions contain the same material and control in this instance.

Section 179 of the present Michigan Act containing a form for the articles of incorporation of an ecclesiastical corporation has been omitted. This is done in the interest of uniformity as such forms are not included in the statutes for other corporations. The statutes prescribing the contents of the articles are believed adequate.

SEC. 293. PUBLIC BUILDING CORPORATIONS. One or more persons, natural or corporate, may become incorporated as a public building corporation for the purpose of constructing, operating and maintaining office buildings for the use of the State of Michigan: *Provided,* That no contract or contracts between the State Administrative Board and any such public building corporation shall become effective until approved by the legislature by concurrent resolution. Such corporations are hereinafter called public building corporations.

Note. This section is the same as sec. 186a of the present Michigan Act except that the requirement of three incorporators has been eliminated. Public building corporations as authorized in sections 293 to 296 were first expressly authorized in 1947. [Mich. Pub. Acts 1947, No. 316.] The wisdom of permitting such real estate corporations to be organized as nonprofit corporations might be doubted, and is discussed *supra,* Public Building Corporations, p. 110. The sections are retained, however, because of the fact that such a policy deter-

mination authorizing such corporations has already been made in Michigan. Thus, the task is limited to one of incorporating the provisions into the general law in a concise and logical manner.

SEC. 294. POWERS; CONTRACTS AND LEASES WITH THE STATE; BONDS; BY-LAWS. In addition to the powers granted to nonprofit corporations generally and consistent with the provisions of the articles and by-laws of such corporation, every such public building corporation shall have power to take and hold by bequest, devise, gift, purchase or lease, either absolutely or in trust, for its object and purpose, any property, real, personal or mixed, without limitation as to the amount of value, except such limitations, if any, as the legislature shall hereafter specifically impose; to convey such property and to invest and reinvest the principal thereof and deal with and expend the income of the corporation in such manner as in the judgment of the trustees or board of directors will best promote its purposes; to enter into contracts and leases with the State of Michigan; to borrow money and issue revenue bonds for the repayment thereof with interest, and may in like case mortgage its property as security for its debts.

Note. This section is substantially the same as sec. 186b of the present Michigan Act. Changes are in form only and not in substance. The express authorization herein granted is necessary for the accomplishment of the purposes of these corporations.

SEC. 295. LAW GOVERNING. Every such corporation shall be a nonprofit corporation and subject to the provisions of this Act relating to nonprofit corporations except as specifically otherwise provided. All of such property and accumulations thereof shall be held and administered to effectuate the purposes stated in the articles and to serve the general welfare of the state: *Provided,* That this Act shall not prevent such corporation from charging rent to

the state for the purpose of paying the cost of construction and maintenance of the office buildings constructed hereunder.

Note. This section is the same as sec. 186c of the present Michigan Act.

SEC. 296. DISSOLUTION. Should any such corporation cease to operate or become unable to serve usefully the purpose of its organization, it may be dissolved in accordance with the provisions of section 252.

Note. The provision for legislative dissolution provided in sec. 186e of the present Michigan Act, Mich. Comp. Laws sec. 450.186e (1948), has been changed to chancery dissolution in accordance with the provisions of sec. 252 relating to nonprofit corporations generally. A strong case might be made for legislative dissolution of these corporations in that the state has a much more direct interest in them than it has in other nonprofit corporations. However, the legislature is still ill-equipped to deal with the intricacies of such specific problems and the chancery court can be expected to be just as conscientious in looking out for the welfare of the state.

SEC. 297. CEMETERY, VAULT, CREMATION AND SIMILAR CORPORATIONS. Corporations may be formed under the provisions of this Act for any or all of the following purposes: acquiring land for a cemetery or burial ground for the dead; providing facilities for preserving and protecting bodies of deceased persons before burial; erecting mausoleums and providing crypts for the interment of deceased persons; building and maintaining crematoriums or columbariums; disposing of burial rights in such cemetery, vault, mausoleum or columbarium; providing the necessary appliances for the disposal by cremation of the bodies of the dead; and fencing, improving, laying out, ornamenting, and maintaining all such land in a suitable condition.

Note. Sections 297 to 312, providing for the incorporation of cemetery, vault, crematorium and columbarium corporations are included as part of the general corporation statutes instead of continued as separate acts as is the present Michigan practice. [Mich. Comp. Laws secs. 456.1 *et seq.*, 456.101 *et seq.*, 456.201 *et seq.*, and 456.251 *et seq.* (1948).] Thus, much duplication is eliminated and more uniformity achieved. See, for example, Act 167 of Michigan Public Acts of 1953, amending Act 12 of the Public Acts of 1869. The general requirements as to the procedure of organizaiton, meetings of members and directors, notices, and other matters can be governed by the general provisions. Only the unique aspects of these corporations need be covered in these separate sections.

The practice in other states is not uniform. Some states, such as Arkansas, Georgia, New Mexico and South Carolina, have no general statute authorizing the incorporation of cemetery companies. Statutes specifically authorizing nonprofit cemetery corporations are common. [Ia. Code Ann. secs. 504.1 and 504.8 (1946); Me. Rev. Stat. c. 54, sec. 1 (1954); Minn. Stat. Ann. secs. 306.01 *et seq.* (West 1945); N. D. Rev. Code secs. 10-1001 to 10-1011 (1943).] In other states it is expressly provided that cemetery corporations may be organized under either the profit or nonprofit statutes. [Fla. Stat. secs. 608.60 and 617.01 (1953); Mont. Rev. Codes Ann. secs. 9-101 *et seq.* and 15-104(7) (1949). See also, Jackson, Law of Cadavers, 296–304 (2nd ed. 1950).]

These statutes apply only to private corporations and in no way supersede or affect public cemeteries. [Mich. Comp. Laws. sec. 95.1 *et seq.*, 128.1 *et seq.*, 128.31 *et seq.*, 128.61 *et seq.*, 128.151 *et seq.*, (1948).]

SEC. 298. CEMETERY CORPORATIONS; LAW GOVERNING. Cemetery, cremation and other corporations authorized under section 297 may be organized under either the profit or nonprofit provisions of this Act, and, except as otherwise hereinafter specifically provided, shall be goverened by the appropriate profit or nonprofit provisions as the case may be.

Note. This section makes it clear that cemetery and related corporations may be organized either for profit or not for profit. As indicated in note 297, *supra,* the practice in other

states is not uniform. Present Michigan statutes recognize both types of cemetery corporations. [Mich. Comp. Laws sec. 456.1 *et seq.* and 456.101 (1948).] This latter Act was amended in 1953 to provide specifically that corporations organized thereunder may operate as nonprofit corporations [Mich. Pub. Acts 1953, No. 167, sec. 16.]

The existence of cemetery and related corporations for profit is quite common and hence should be given direct statutory recognition unless some evil exists which would warrant the prohibition of such corporations. The enactment of this section would necessitate a change in section 3 of the General Corporation Act which provides that cemetery, burial and cremation associations are excepted from the provisions of that Act. [Mich. Comp. Laws sec. 450.3 (Mason's Supp. 1954).]

SEC. 299. ACQUISITION OF LAND. Every such corporation shall have power to acquire and hold in fee so much land as may be necessary and appropriate for the purposes mentioned in section 297. All land used for cemetery, columbarium and other such purposes, once it has been so appropriated for those uses, shall remain so restricted to such uses unless and until it shall be vacated in accordance with the provisions of section 313 of this Act.

Note. This provision replaces Mich. Comp. Laws secs. 456.2, 456.106, 456.204 and 456.253 (1948). The replaced sections are similar in purpose but differ somewhat in substance from each other and from the proposed section. Also, they are integral parts of different acts. Under section 299 cemetery and similar corporations are allowed to acquire land only in fee for burial and related purposes. This differs from Mich. Comp. Laws sec. 456.2 (1948), which authorizes also the acquisition of such land by lease. In view of the fact that cemetery land after it is so appropriated is useless for anything else, it seems unwise to permit such activity on leased land. The added provision limiting the use of such land to burial purposes unless vacated in accordance with law conforms to existing practices and general morality.

Express authorization enabling these corporations to receive gifts, bequests, devises, and donations of lands or funds has been eliminated as unnecessary. Since these corporations have

the powers of corporations formed under either the general profit or nonprofit provisions, repetition of such general powers is not necessary. Hence, sec. 299 is in reality a restriction on their powers in that it permits land to be used for burial and related purposes only if it is owned in fee.

SEC. 300. LAYING OUT OF BURIAL GROUND; MAPS AND CERTIFICATE; FILING. Before any cemetery corporation organized under the provisions of this Act shall issue certificates of rights of burial, the directors shall cause the burial ground to be laid out in such form as they may choose, and cause 2 maps thereof to be made, which maps shall accurately describe the land belonging to such burying ground, its boundaries and location, with the lots or subdivisions named or numbered thereon, and also their size, situation and extent, with the width extent, and location of all the streets, alleys or walks in such burying ground, which maps shall be prepared under the supervision and direction of the president and secretary of such corporation, and certified by them to be a correct map of the corporation's burying ground. One of the above maps shall be filed with the secretary of the corporation, and the other with the county clerk of the county in which such burying ground is situated, whereupon said clerk shall give said corporation a certificate under his hand and seal of office, showing that such map has been received and duly filed by him, which certificate shall be filed with the secretary of said corporation.

Every corporation operating a mausoleum, crematorium, vault or similar structure for receiving the remains of the dead shall likewise provide a plan or plat in reference to which the crypts, niches, vaults or tombs can be designated and located. Every such corporation shall conform to the aforesaid provisions of this section in reference to such plan or plat.

Note. This section is similar to Mich. Comp. Laws sec. 456.17 (1948), but is broadened to include not only cemetery but all related corporations. A similar provision is included in sec. 456.106 of the present Michigan statutes. Although the present Michigan statutes on columbarium and vault corporations [Mich. Comp. Laws secs. 456.201 *et seq.* and 456.251 *et* seq. (1948)], do not specifically contain such provisions, it is not apparent why such requirements should not be applicable to them. The statute requires no more than that which they would have to do anyway in order to operate efficiently. The filing and recording of the plan in the county court is an added protection for the preservation of the plat.

SEC. 301. TAX EXEMPTION; ASSESSMENTS. All the lands of said corporation enclosed and set apart for cemetery, vault, crematorium or columbarium purposes, and all the buildings erected thereon, used for such purposes, as well as all rights of burial or inurnment therein, shall be wholly exempt from taxation of any kind whatsoever except special assessments for public improvements: *Provided,* That all stock owned by stockholders shall be taxed in the manner provided by law.

Note. This section granting real estate tax exemption to all lands used for burial and related purposes does not change existing Michigan law. [Mich. Comp. Laws sec. 456.36, 456.108 and 456.205 (1948).] It is to be noted that the lands of both profit and nonprofit corporations are granted the exemption. The stock of profit corporations is taxed, however. The exemption is based on the theory that the land is used for public or charitable purposes. Jackson, LAW OF CADAVERS 273 (2nd ed. 1950).

SEC. 302. ADDITIONAL LAND; TAXATION. Corporations organized or to be organized under this Act may own and hold land heretofore or hereafter acquired in anticipation of its future needs. Any land so acquired by any such corporation and held in reserve for future use in accordance with the corporation's purposes, such land not presently being used as a part of the burial ground or for crematory,

vault or columbarium purposes, shall not be exempt from taxation.

Note. This section is based on Mich. Comp. Laws sec. 456.36 (1948), but is broadened to include all cemetery and related types of corporations. The provision is sound in that there is no need or justification for granting tax exemption to land held in reserve and not incorporated into the burial ground or other land actually used for the repose of the dead.

SEC. 303. RIGHT OF BURIAL; DEFINITION. A right of burial is defined as including the right to bury the dead in and upon a parcel of land, the right to deposit the body of a deceased person in a vault, tomb or crypt of a mausoleum or similar structure, and the right to bury in the ground or store the ashes of a cremated deceased person in a niche of a columbarium in accordance with the regulations established in the by-laws of any such corporation organized under the provisions of this Act.

Note. Right of burial is broadly defined to include not only burial in the ground but also entombment, storage of cremated remains and any similar type of interment. The statute recognizes that the corporation may make appropriate regulations concerning such burial rights. These regulations might pertain to visitorial rights, erection of monuments, plaques and similar memorials, maintenance of the grounds, payment and related matters.

SEC. 304. BURIAL RIGHTS IN ENCUMBERED LAND; TAX DELINQUENCIES. No mortgage, or other lien or encumbrance, shall be executed upon any of the lands or structures of such corporation actually used for burial purposes, and no rights of burial upon any mortgaged lands of such corporation or lands which are delinquent for taxes or special assessment shall at any time be granted or sold.

Note. This provision is similar to Mich. Comp. Laws sec. 456.109 (1948). It is consistent with the policy of section 299 which requires land used for burial purposes to be held in fee.

The provisions are designed to insure the continued noninterference with the peaceful repose of the dead.

SEC. 305. PRICE OF BURIAL RIGHT; CERTIFICATE. The board of directors or trustees of corporations organized under this Act shall from time to time determine the price of burial rights. Upon payment to the treasurer of the corporation of the full price of any such right of burial, the corporation shall issue a certificate of right of burial signed by the secretary and countersigned by the president. Such certificate shall specify the location of such burial right in reference to the map of the burial ground prescribed in section 300 or by designation by number or otherwise of the crypt or niche according to a plan of the mausoleum or columbarium.

Note. This section is a combination of Mich. Comp. Laws secs. 456.31, 456.32 and 456.33 (1948), but is broadened to include all types of corporations engaged in burial activities. It recognizes that the board of directors may from time to time fix the price of burial rights.

SEC. 306. RECORD OF RIGHTS OF BURIAL. Corporations organized under this Act and operating a cemetery, vault, mausoleum or columbarium shall keep a record of the rights of burial granted by such corporation, setting forth the names and addresses of the owners or grantees of such burial rights as well as a description of the location of such rights in reference to the map of the burial ground, or designation by number or otherwise of the crypt or niche according to a plan of the mausoleum or columbarium. It shall be the duty of every such corporation to maintain an index in which shall be entered alphabetically the names of the purchasers of rights of burial in the grounds or structures of such corporation.

Note. Similar provisions are contained in the present Michigan acts. [Mich. Comp. Laws secs. 456.29 and 456.211 (1948).]

The exact form of such record as prescribed in Comp. Laws sec. 456.29 has been eliminated. The corporation may use whatever form it desires as long as the record contains the necessary information.

SEC. 307. BURIAL RIGHTS, TRANSFER. All grants of rights of burial shall be transferable only upon compliance with such conditions in reference thereto as shall be prescribed in the by-laws of such corporations.

Note. This section is similar to Mich. Comp. Laws sec. 456.112 (1948). It differs from sec. 456.4 and is made applicable to all corporations engaged in burial activities. The provision is sound in that it recognizes that such rights should be transferable but it also authorizes the corporation to regulate such transfer. This method is preferable and more flexible than that provided by sec. 456.4, which requires a relinquishment to the corporation and a new grant by the corporation to the transferee.

SEC. 308. RECORD OF BURIALS; DISINTERMENT. Every corporation operating under this Act and maintaining a final resting place for the remains of a deceased person shall keep a record showing the name, age, and last place of residence of every person interred by such corporation, as well as a sufficient description of the location of said remains. In the event of disinterment or removal of said remains, the corporation shall keep a record of the disposition thereof.

Note. The importance of keeping such records as herein specified is apparent. Such a duty is imposed by statute on Michigan columbarium corporations under Mich. Comp. Laws sec. 456.211 (1948), but not on cemetery corporations. Mich. Comp. Laws sec. 456.29 requires only that records of burial rights as distinguished from actual burials be kept, and the Act starting with Mich. Comp. Laws sec. 456.101 (1948), contains no provision at all on the matter. The proposed section thus achieves uniformity and simplicity.

SEC. 309. CREMATIONS; RECORDS. It shall be the duty of any company or association incorporated under this Act

and operating a crematorium to keep a record showing the name, age, and last place of residence of every person incinerated in the crematorium maintained by said corporation, as well as the number of the cremation permit and the name of the officiating undertaker.

Note. This is the same as Mich. Comp. Laws sec. 456.210 (1948).

SEC. 310. SALE OF BURIAL RIGHTS; PERPETUAL CARE FUND; APPLICATION TO EXISTING CORPORATIONS. One-half of the funds received from the sale of burial rights as defined in section 303 shall be transferred to an improvement or memorial fund, the income or proceeds from which shall be perpetually devoted:

First, To the care and maintenance of the burial ground, including the individual lots of the contributors thereto, and any monuments or shrubbery placed thereon, and the care, repair and maintenance of any vault, mausoleum or columbarium operated by such corporation, and the maintenance and repair of any other building used in connection with the authorized purposes of such corporation; and

Second, To the improvement and beautification of any portion of the grounds of such corporation reserved from sale and set apart for ornamental purposes.

After a sufficient amount has been accumulated in the perpetual care fund to insure the accomplishment of the aforementioned purposes, additional funds received from the sale of burial rights may be diverted to the treasury of the corporation. All funds received for the trust fund shall be invested only in such securities as are considered legal investments for banks and trust companies in this state. All interest received from such investments shall be payable to the treasurer of the corporation and be used

for any of the purposes mentioned in the preceding paragraphs of this section.

Corporations heretofore existing under other acts of this state for any of the purposes specified in section 297 shall not be required to conform to the provisions of this section unless such a perpetual care fund was mandatory under the act under which they were incorporated. Similar corporations heretofore existing under other acts of this state not requiring such a perpetual care fund may provide for such a fund if they so desire.

Note. This section makes a perpetual care fund mandatory for all corporations engaged in interment activities. It is thus similar to Mich. Comp. Laws sec. 456.213 requiring such a fund for columbarium corporations, but different from Mich. Comp. Laws secs. 456.35 and 456.115 (1948), which makes such a fund optional with cemetery corporations. This section exempts existing corporations which were not required to have such a fund, but permits them to establish one if they so desire. A perpetual care fund is desirable and should be made mandatory so that relatives of deceased persons will not be burdened with periodic assessments in perpetuity. Lack of such a fund may result in poor maintenance of the cemetery and deterioration to such an extent that it becomes a menace to health, morals and welfare. Statutory recognition of the perpetual care fund should be given so as to obviate any difficulty because of the Rule Against Perpetuities.

SEC. 311. INDIVIDUAL PERPETUAL CARE TRUSTS. Any corporation organized under this Act may also be named and constituted and may act as trustee of any gift, grant, bequest, or conveyance of personal property, to said corporation, in trust for the perpetual care, maintenance and preservation of, and the planting and cultivation of trees, shrubs, flowers and plants upon any cemetery lot or lots, or part of the cemetery owned or held and maintained by said corporation, and the care, preservation, repair, upkeep and replacement of any monument, tomb, fence,

mausoleum, columbarium, crypt, niche or other structure thereon or therein, or for any or all the above purposes upon such terms and conditions as may be provided in the instrument or writing creating such trust. No such trust shall be invalid because contravening any statute or rule of law forbidding accumulations of income, but shall be valid notwithstanding such statute or rule.

Note. This section is substantially the same as the second part of Mich. Comp. Laws sec. 456.35 (1948). It authorizes private perpetual care trusts and empowers the cemetery corporation to act as trustee. If the corporation itself has such a perpetual care fund, there would seem to be little need for such private trusts. However, some existing corporations might not have such funds and, if they do, some people might want private trusts for additional services.

SEC. 312. POTTER'S FIELD. Any corporation organized under this Act shall have power to set off a part of its burial ground as a potter's field, and under proper regulations permit the dead to be buried therein.

Note. This section is substantially the same as Mich. Comp. Laws sec. 456.34 (1948).

SEC. 313. VACATION OF CEMETERY. Whenever it may become necessary to vacate any burying ground, the property of any corporation organized under this Act, such corporation may, by a majority of its members present at any corporate meeting, direct the president and secretary of such corporation to petition the circuit court for the county in which such burying ground is situated, for leave to vacate the same; and such circuit court shall have plenary power to make such orders concerning disinterment, reinterment and compensation to interested parties as may be just and proper: *Provided,* No final order shall be made within 6 months from the time of filing such petition, and without due proof of publication of notice of

such petition, for 12 successive weeks, in such newspaper as may have been designated by said court for that purpose.

The provisions of this Act shall be in addition to and in no manner a restriction upon other legally provided methods of vacating cemeteries.

Note. This section is based on Mich. Comp. Laws sec. 456.21 (1948). No substantial change is made. This section expressly provides that the court shall make appropriate orders concerning disinterment, reinterment and compensation to interested parties. This is an elaboration of the present statute which simply states that the court "may make such order in the premises as shall be just and proper." The reference to other methods of vacating cemeteries refers specifically to Mich. Comp. Laws sec. 128.31 *et seq.*, 128.41 *et seq.* and 128.51 *et seq.* (1948). These statutes give additional reasons for vacating cemeteries and provide specifically for the procedure to be followed as well as for disinterment and reinterment. More detail in this statute is not needed because of the policy evidenced in these other statutes and in the inherent power of equity.

Additional Notes

No specific provision specifying what officers or employees are authorized is included in these sections. See Mich. Comp. Laws secs. 456.9 and 456.208 (1948). The applicable general corporation statutes provide utmost flexibility in this regard and specific authority need not otherwise be granted. The general acts likewise apply to elections, compensation, meetings, notices and other routine corporate matters.

Mich. Comp. Laws sec. 456.22 (1948), concerning the disposal of a forfeited right of burial has been eliminated. Sec. 303 defining the right of burial "in accordance with the regulations established in the by-laws of any such corporation"; sec. 305 authorizing the board to fix the price of burial rights; and sec. 307 authorizing the by-laws to prescribe regulations governing transfer are ample to indicate that the corporation necessarily can provide sufficient regulations concerning full payment, default and resale of forfeited burial rights.

No provisions concerning assessments [Mich. Comp. Laws sec. 456.24 (1948)] have been included, as the mandatory provision for a perpetual care fund renders assessments unnecessary. Existing corporations without such a fund may maintain their assessments in accordance with their original charter.

The restrictions on highways, canals and similar easements contained in Mich. Comp. Laws sec. 456.110 (1948), have been eliminated as unnecessary. Naturally, such construction could not take place without the consent of the corporation in the absence of eminent domain proceedings. Therefore, the statute serves no useful purpose. General laws governing these matters will control.

Mich. Comp. Laws sec. 456.111 (1948), concerning restrictions on saloons and other amusements in proximity to cemetery corporations, has been eliminated. Mich. Comp. Laws sec. 456.114 (1948), prohibiting firearms and hunting within cemetery grounds, has likewise been omitted. These types of restrictions are part of the general police regulations and need not be repeated in acts governing incorporation procedures and powers.

Mich. Comp. Laws sec. 456.113 (1948), conferring police powers on superintendents and other employees of cemetery corporations, has been eliminated. Such power seems unnecessary as the usual law enforcement personnel of the area should be adequate to handle any offenses committed in, on or about cemeteries. The corporation officials, as other individuals, can make complaints to the proper law enforcement officials.

SEC. 314. INCORPORATION UNDER ACT; NECESSITY. No corporation which may be incorporated under this Act shall hereafter be incorporated except under the provisions of this Act.

Note. Mich. Comp. Laws sec. 450.188 (1948).

SEC. 315. EXISTING CORPORATIONS; APPLICABILITY OF ACT. Every corporation heretofore organized and incorporated under any law of this state, which if now incorporated would be required to incorporate under and subject to this Act, shall hereafter be subject to the provisions of this Act without formal reorganization hereunder and such corporations shall be deemed to exist under this Act, and, except where otherwise provided in the Act under which any such particular corporation is incorporated, if

such Act has not been repealed, the provisions of this Act shall govern all corporations heretofore or hereafter incorporated in this state. Every foreign corporation heretofore admitted to do business in this state, which if seeking admission now would be required to comply with the provisions of this Act, shall hereafter be subject to the provisions of this Act. Nothing in this Act shall be construed as attempting to deprive any such corporation of any constitutional power, right, privilege or franchise which any such corporation now enjoys.

Note. Mich. Comp. Laws secs. 450.190 (1948).

SEC. 316. CATCHLINE HEADINGS NOT PART OF ACT. The catchline headings of sections of this Act shall in no way be considered to be a part of the respective sections of this Act but are inserted herein for purposes of convenience.

Note. Mich. Comp. Laws sec. 450.189 (1948).

SEC. 317. REPEAL. The following acts and parts of Acts amendatory thereto are hereby repealed:

Note. The content of this section would depend upon the circumstances existing in the particular state adopting the statute. In Michigan the following Acts and parts thereof are recommended for repeal: sections 98 to 186e, both inclusive, and sections 188 to 192, both inclusive, of Act 327 of the Public Acts of 1931, being parts of the General Corporation Act superseded by these provisions; Act 87 of the Public Acts of 1855, Act 12 of the Public Acts of 1869, Act 58 of the Public Acts of 1915, and Act 13 of the Public Acts of 1882, being acts relating to cemetery, cremation and related corporations; Act 134 of the Public Acts of 1871, Act 173 of the Public Acts of 1891, Act 41 of the Public Acts of 1877, Act 53 of the Public Acts of 1875, Act 84 of the Public Acts of 1879, Act 55 of the Public Acts of 1895, Act 99 of the Public Acts of 1871, Act 159 of the Public Acts of 1893, Act 35 of the Public Acts of 1897, Act 159 of the Public Acts of 1883, Act 9 of the Public Acts of

1885, Act 145 of the Public Acts of 1865, Act 1 of the Public Acts of 1895, Act 235 of the Public Acts of 1849, Act 48 of the Public Acts of 1895, Act 35 of the Public Acts of 1895, Act 63 of the Public Acts of 1917, Act 35 of the Public Acts of 1909, Act 256 of the Public Acts of 1897, Act 22 of the Public Acts of 1891, Act 90 of the Public Acts of 1905, Act 17 of the Public Acts of 1877, Act 85 of the Public Acts of 1905, Act 104 of the Public Acts of 1905, Act 291 of the Public Acts of 1913, Act 130 of the Public Acts of 1879, Act 143 of the Public Acts of 1881, Act 163 of the Public Acts of 1893, Act 120 of the Public Acts of 1891, Act 16 of the Public Acts of 1875, Act 83 of the Public Acts of 1887, Act 136 of the Public Acts of 1891, Act 116 of the Public Acts of 1889, Act 1 of the Public Acts of 1897, Act 26 of the Public Acts of 1875, Act 78 of the Public Acts of 1891, Act 106 of the Public Acts of 1891, Act 39 of the Public Acts of 1893, Act 49 of the Public Acts of 1893, Act 78 of the Public Acts of 1893, Act 208 of the Public Acts of 1895, Act 18 of the Public Acts of 1895, Act 179 of the Public Acts of 1897, Act 71 of the Public Acts of 1901, Act 80 of the Public Acts of 1909, Act 55 of the Public Acts of 1917, being acts relating to the incorporation of fraternal organizations; Act 11 of the Public Acts of 1899, Act 27 of the Public Acts of 1905, Act 26 of the Public Acts of 1907, Act 29 of the Public Acts of 1901, Act 54 of the Public Acts of 1899, Act 42 of the Public Acts of 1842, Act 32 of the Public Acts of 1929, Act 265 of the Public Acts of 1909, Act 40 of the Public Acts of 1899, Act 223 of the Public Acts of 1913, Act 53 of the Public Acts of 1901, Act 47 of the Public Acts of 1901, Act 303 of the Public Acts of 1913, Act 82 of the Public Acts of 1899, Act 148 of the Public Acts of 1901, Act 94 of the Public Acts of 1899, Act 225 of the Public Acts of 1899, being acts relating to the incorporation of various ecclesiastical organizations; Act 188 of the Public Acts of 1857, Act 167 of the Public Acts of 1869, Act 13 of the Public Acts of 1897, Act 42 of the Public Acts of 1887, Act 145 of the Public Acts of 1885, Act 28 of the Public Acts of 1891, being acts relating to trade and labor organizations; Act 68 of the Public Acts of 1875, Act 180 of the Public Acts of 1849, Act 197 of the Public Acts of 1849, Act 165 of the Public Acts of 1879, Act 54 of the Public Acts of 1889, Act 125 of the Public Acts of 1871, Act 106 of the Public Acts of 1895, Act 100 of the Public Acts of 1895, being acts relating to the incorporation of agricultural societies.

Related acts whose repeal is not suggested are as follows: Act 207 of the Public Acts of 1867 and amendatory Act 1 of the Public Acts of 1954, relating to the Roman Catholic Church which is generally considered a corporation sole; Act 189 of the Public Acts of 1941 which legislatively effected a change in name of certain Methodist churches; Act 96 of the Public Acts of 1849, Act 12 of the Public Acts of 1867, Act 80 of the Public Acts of 1855, Act 155 of the Public Acts of 1889, Act 106 of the Public Acts of 1893, Act 188 of the Public Acts of 1921, Act 8 of the Public Acts of 1862, Act 121 of the Public Acts of 1873, Act 220 of the Public Acts of 1861, being acts relating to county agricultural societies which receive public aid from taxation and thus acquire somewhat of a quasi-public character.

The repeal of the following acts is likewise not suggested: Act 230 of the Public Acts of 1897, Act 39 of the Public Acts of 1889, Act 134 of the Public Acts of 1905, Act 69 of the Public Acts of 1887, Act 137 of the Public Acts of 1929, Act 12 of the Public Acts of 1901, Act 55 of the Public Acts of 1911, Act 161 of the Public Acts of 1911, being acts relating to the incorporation of summer resort and similar associations partaking of a municipal or quasi-municipal character. Similarly, there is no attempt to alter, amend or repeal any corporation acts relating to any public utility, banking or insurance corporation, or any corporation engaged in activity that might come within the purview of such businesses affected with a public interest and subject to corresponding social control.

SEC. 318. SAVING CLAUSE. This Act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this Act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this Act had not been passed.

SEC. 319. EFFECT OF INVALIDITY OF PART OF THIS ACT. If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, para-

graph, section or part of this Act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this Act, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this Act so adjudged to be invalid or unconstitutional.

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