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# CORPORATION LEGISLATION IN WISCONSIN — 1947

KENNETH K. LUCE and RALPH I. HEIKKINEN

The recent session of the Wisconsin Legislature considered at least six, and enacted into law three, amendments of considerable significance to the future structure and development of Wisconsin business corporations. It is the purpose of this paper to sketch the outline of these amendments, to indicate their principal purposes and salient characteristics, as observed by the authors, and to discuss briefly some of the problems inherent in the legislation. Citations have been placed in the footnotes because they are leading cases or are usefully illustrative or recent. No attempt has been made to append the copious footnotes which, apparently, are the hallmark of scholarly research.

## BILLS INTRODUCED BUT NOT ENACTED INTO LAW

Three bills were introduced but not enacted into law. One of these proposed (1) to amend Wisconsin Statutes, section 180.14(1), to make clear the power of Wisconsin corporations to hold meetings of stockholders and directors outside the state and (2) to amend section 182.0-(5) to vest in the directors power to amend, adopt and repeal by-laws to the extent permitted by the articles of incorporation. Since by-laws often directly affect ordinary business operations, the necessity for amendments is likely to arise in periods between stockholders' meetings. Inasmuch as stockholders' meetings, especially with large corporations, involve delay as well as considerable expense, the latter provision would be helpful in adding some flexibility to normal business operations and, in fact, is permitted by the statutes of most states. Provision in the articles of incorporation that amendments made by directors may be repealed by the stockholders and provision for stockholders' meetings callable upon stockholder initiative would seem to provide ample safeguards against any abuse of power in the directors to amend, adopt and repeal by-laws.

A second bill proposed a new section 182.18 to spell out the procedure for determining stockholders entitled to vote and to receive dividends and a new sub-section 182.15 (3) to authorize provision in articles of incorporation for cumulative voting. This provision assuring minority interests, who wish it, representation on the board of directors is now so widely adopted and accepted as a part of modern corporate procedure that its inclusion in the Wisconsin Statutes should clearly be only a question of time.

A third bill, introduced but not passed, proposed to create section 182.01 (11) to clarify corporate power to make charitable contributions and to create section 182.16 to authorize director, executive committee and stockholder action by unanimous written consent upon any matter without the necessity of a formal meeting. As a general rule, directors have no authority or power to make gifts of corporate assets. The former provision would simply have put beyond possible stockholder question charitable contributions which are now normal practice. As to the latter provision, it is readily apparent that desirable flexibility in corporate procedure would be given some corporations by its inclusions in the Wisconsin Statutes without too much danger of abuse, so long as the unanimous consent requirement were retained.

## BILLS ENACTED INTO LAW

### (a) *Minimum Capital Requirements*

Chapter 575, Laws of 1947, amended Wisconsin Statutes, section 180.06 and related sections, to remove from organizational procedure the requirements that one-half the authorized capital stock be subscribed before the first meeting and that one-fifth thereof be paid in before any transaction of business. Section 180.10 was repealed. This latter section required that any amendment of the articles of incorporation increasing the authorized capital stock be accompanied upon its filing with the Secretary of State by an affidavit of the president and secretary that one half of the proposed increase had already been subscribed and one fifth paid in, thus imposing the odd requirement that increases in capital stock be partly subscribed and paid in before they could be legally authorized. These restrictive and confused requirements have been replaced by minimum capital requirements substantially similar to those widely adopted in other jurisdictions. Henceforth, the original articles of incorporation must contain a statement of "the minimum amount of capital with which the corporation will commence business which shall not be less than \$500," which minimum must be subscribed before the first meeting, and paid in before business is transacted. Amendments to articles increasing authorized capital stock will no longer be complicated by the necessity of affidavits of compliance with minimum capital requirements. The old requirements were cumbersome and overly restrictive, particularly in view of the fact that the extent to which they fulfilled their purpose of furnishing protection to creditors was questionable to say the least. The portion of section 180.06 (4) imposing liability for corporate debts incurred during existence of a violation of the minimum capital requirements upon "then existing" stockholders, signers of the articles,

etc., has been retained.<sup>1</sup> Liability suffered under this section comes from a legislative policy of paternalism toward corporate creditors, and has little or no basis in any actual reliance by such creditors upon publicly recorded recitals of compliance by corporate debtors with the statutes respecting minimum capital.<sup>2</sup> Such liability may well come as a wholly unexpected hardship to the stockholder who has not participated in the business otherwise than as investor, and as an equally unexpected windfall to the creditor. The creditor who demands assurance before extending credit will demand and rely upon a balance sheet and, perhaps, a report of examination by independent credit men or an accountant. This creditor will not lack for a remedy outside section 180.06 (4) if the assurances made him are false. The amendments to the statute, by making the minimum capital requirements nominal, have cut the creditor's possible windfall under section 180.06 (4) to a remedy in the extreme case of sloppy corporate organization.

*(b) Preferred Stock Changes — "Blank" stock*

By Chapter 492, Laws of 1947, the provisions relating to preferred stock contained in Wisconsin Statutes, section 182.13 (1), were extensively amended. First, the clause authorizing a corporation to provide "for a preference of such preferred stock not exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits", was amended to read: "for a preference of such preferred stock over the common stock in the distribution of the corporate assets." As judicially construed, the clause as previously worded rendered nugatory any provision in corporate articles awarding to holders of preferred stock any preference in assets upon liquidation, in excess of the par value of the stock, except to the extent that an earned surplus should be available against which such excess could be charged.<sup>3</sup> To state the matter more concretely, provision could not be made for payment to preferred stockholders in every case

<sup>1</sup> The liability of stockholders under this section is statutory, and independent of any corporate liability on the same debt. Payments of interest by a corporation on a note payable to a bank did not toll the statute of limitations against the stockholders: *Bank of Verona v. Stewart*, 223 Wis. 577, 270 N.W. 534 (1937).

<sup>2</sup> Consider the similar judicial and legislative policy underlying liability of stockholders to corporate creditors for stock not fully paid under the trust fund and similar theories: *Sawyer v. Hoag*, 17 Wall. (84 U.S.) 610, 21 L. ed. 731 (1873); *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N.W. 1117, 15 L.R.A. 470 (1892); *Gogebic Investment Company v. Iron Chief Mining Company*, 78 Wis. 427 (1891).

<sup>3</sup> *Hull v. Pfister & Vogel Leather Co.*, 235 Wis. 653, 294 N.W. 18 (1940), where a corporation in liquidation had capital surplus which had resulted from a reduction of the par value of outstanding stock, but had no earned surplus. The articles did not conflict with the statute. It was held, in an action for a declaratory judgment, that the preferred stock was not entitled to its premium, or to accumulated dividends, but only to the par amount. See also *Welch v. Land Development Company*, 246 Wis. 124, 16 N.W. (2d) 402 (1944).

upon liquidation of a premium above par or of undeclared cumulated dividends. This clause, together with the decisions interpreting it, acted as a distinct limitation upon the liquidation preference which could be given to preferred stock in the corporate articles. The amendment clearly eliminates all such limitation and makes enforceable any liquidation preference which the parties may care to include in the articles, originally or by amendment. Under the statute as amended it will be possible to authorize preferred stock with liquidation and redemption preferences much more attractive to investors, and therefore more marketable, than has been possible heretofore.

The amended section 182.13 (1) adds to the original section authority to provide in the articles: (1) "for one or more series of preferred stock within any issue thereof, and for the designation thereof;" (2) "for the conversion or exchange of such stock into or for the conversion or exchange of such stock into or for any other class of stock;" and (3) "for such other powers, preferences and rights and the qualifications, limitations or restrictions thereof not inconsistent with law as may be desired," the last omnibus clause being added, no doubt, to avoid so far as possible the *ejusdem generis* construction to which the original section was clearly subject.

Finally, the amended section 182.13 (1) adds to the original section authority to include in the articles, originally or through amendment, "an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions the designation, the dividend rate, the conversion basis or rate, the sum payable upon redemption, or any other power, preference and right, or qualification, limitation or restriction which is not fixed in the original articles, or such amendment." Provision is made for the filing of such resolution or resolutions, which when filed as outlined in the amended section are treated as an amendment to the articles of incorporation. Thus for the first time corporations organized under Wisconsin Statutes are in position to authorize so-called "blank" preferred stock by adding to the normal charter authority to issue preferred stock (1) authority to issue the same in series and (2) a delegation to the board of directors of power, by resolution, to designate each series and define, to the extent indicated, its preferences, powers, rights, limitations, etc.<sup>4</sup> On the surface the amendment to section 182.13 (1) is

<sup>4</sup> The corporation statutes of the following states authorize blank stock: California Civil Code, Sec. 290, paragraph 5; Illinois, Business Corporation Act, Sec. 15, Ill. Rev. Stat., (1945), Ch. 32, Sec. 157.15; Minnesota, Business Corporation Act, Sec. 3, I (e); Nebraska, General Corporation Act, Rev. Stat. Neb. (1943) v. 1, Ch. 21, Secs. 121-127 incl.; Maryland, Corporation Law, Public General Laws, Art. 23, Sec. 42 (2) (1945); New York, Stock Corporation Law, Secs. 5, 11 (1946); Delaware, General Corporation Law, Rev. Code, Ch. 65, Sec. 13: "Every corporation shall have power to issue one or more classes of stock or one or more series of stock within any class thereof, any

designed to promote the use of preferred stock as a completely pliable and flexible device in the hands of management for the raising of corporate capital through (1) elimination of statutory control of the terms and conditions of the preferred stock contract, and (2) creation of authority for article provisions delegating to directors a blank check authority to write, as of the time the stock is marketed, at least those terms and conditions of the contract which are directly affected by the financial market and cannot be satisfactorily written until that time. Such flexibility tends to make the preferred stock device at least as practical, attractive, and feasible a method of raising capital in many situations as is the debenture, the short or medium-long term collateral note issue, and other categories of purely creditor securities. In view

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or all of which classes may be of stock with par value or stock without par value, with such voting powers, full or limited, or without voting powers and in such series and with such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the Certificate of Incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the Board of Directors pursuant to authority expressly vested in it by the provisions of the Certificate of Incorporation or of any amendment thereto. The power to increase or decrease or otherwise adjust the capital stock as in this Chapter elsewhere provided shall apply to all or any such classes of stock. Any preferred or special stock may be made subject to redemption at such time or times and at such price or prices and may be issued in such series, with such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof as shall be stated and expressed in the Certificate of Incorporation, or any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the Board of Directors as hereinabove provided. \* \* \*". Compare the provisions quoted as follows from Ohio, General Corporation Act, General Code, Sec. 8623-4: "Any number of natural persons, not less than three \* \* \* may form a corporation for profit by subscribing, acknowledging and filing in the office of the secretary of state articles of incorporation, setting forth: \* \* \* 4. The maximum number and the par value per share of shares with par value, and the maximum number of shares without par value, which the corporation is authorized to have outstanding; and, if the shares are to be classified—(a) the designation of each class and the number and par value per share, if any, of the shares of each class; and (b) the express terms and provisions of the shares of each class. The express terms and provisions may include statements specifying \* \* \* the division of any class into series, the designation and number of shares of each series, and any other relative, participating, optional or other special rights and privileges of, and qualifications, limitations or restrictions on, the rights of holders of shares of any class or series.

"The express terms and provisions of shares of different series of any particular class shall be identical except that there may be variations in respect of any or all of the following: dividend rate, dates of payment of dividends and dates from which they are cumulative, redemption rights and price, liquidation price, sinking fund requirements, conversion rights, and restrictions on issuance of shares of the same series or of any other class or series.

"By the express terms and provisions of the shares of any class, the board of directors may be authorized, subject to such limitations as may be stated therein, to adopt amendments to the articles, in respect of any unissued or treasury shares of any class, to fix or alter the division of such shares of each series, the dividend rate, dates of payment of dividends and dates from which they are cumulative, redemption rights and price, liquidation price, sinking fund requirements, conversion rights, and restrictions on issuance of shares of the same series or of any other class or series."

of the trend indicated by this amendment to section 182.13 (1), it is interesting, if not wholly relevant, to note at least one statutory restriction upon preferred stock which still remains in Wisconsin. Stock preferred as to dividends or corporate assets, or subject to redemption at a fixed price, must still carry a par value.<sup>5</sup>

Preferred stock generally lies somewhere in the border land between the proprietor and creditor equities in corporate assets. It may be said to represent actually a creditor interest, but for two important qualifications: (1) receipt of income is dependent more or less upon corporate earnings and director discretion and (2) there is usually no maturity date except at the option of the corporation. Other distinctions tend to shade together. Preferred stock voting rights can usually be restricted or denied,<sup>6</sup> while on the other side of the dividing line between creditor and proprietor equities it is not too unusual to find voting power awarded to bondholders or debenture holders in certain defined contingencies. With this point of view considered, it appears natural enough to provide what has just been provided in the Wisconsin statute. Preferred stock carries obvious advantages in the corporate favor over mortgage bonds, collateral notes, or even debentures, and if the stock can be marketed at a particular time it is reasonable that the directors should find it as convenient to issue the preferred stock to raise the needed capital as to issue bonds or notes. Without the blank check power, the directors may face a money market demanding a seven per-cent return, and have available only unissued preferred stock carrying a five per-cent dividend. The alternatives will be to issue notes or bonds, to issue the preferred stock at a discount, or to amend the articles to authorize a new stock issue which will involve a stockholders' special meeting and related corporate procedure. Other portions of the preferred stock contract, in addition to the dividend rate, which are directly responsive to money market conditions, and as to which directors can make beneficial use of the blank check power, are redemption and liquidation prices, provisions for sinking fund, and perhaps for rights of conversion into other classes of stock.

The question arises as to whether it is advisable to permit delegation to directors of power to write the contract as to matters other than those enumerated above. It leads nowhere to talk in terms of

<sup>5</sup> Wis. Stats. 182.14(1); "Any corporation, \* \* \* may, if so provided in its articles of incorporation or in an amendment thereof, issue shares of stock (other than stock preferred as to dividends or preferred as to its distributive share of the assets of the corporation or subject to redemption at a fixed price) without any nominal or par value."

<sup>6</sup> Wis. Stats. 182.13(1): "Any corporation may, in its original articles, or by amendment thereto adopted by a three-fourths vote of the stock entitled to vote, provide for preferred stock; \* \* \* for denying or restricting the voting power of such preferred stock \* \* \*"; *Gottschalk v. Avalon Realty Co.*, 249 Wis. 78, 23 N.W. (2d) 606 (1946).

abuse of power. The point is that unlimited delegation will mean just what it says; power to write the contract in full, for instance to create dividend and liquidation preferences between different series of preferred stock within the same issue. Perhaps dangers of abuse will be minimized through enforcement by the Department of Securities of full disclosure to prospective investors of the scope of delegated director power.

Even under statutes such as the one in Delaware, which leave the door open for seemingly unlimited delegation in the articles of power to the directors, it has been the general practice in the preparation of article provisions authorizing serial preferred stock to limit the power of directors to the designation of the respective series and the number of shares to be included in each, and to the control of such matters as dividend rates, conversion rights, redemption and liquidation prices, and sinking fund requirements.<sup>7</sup> Many of the statutes authorizing

<sup>7</sup> Berle, "Corporate Devices for Diluting Stock Participations," 31 Col. L. Rev. 1239 at 1263 (1931). There follows an example of article provision governing director authority to write preferred stock rights by resolution, taken from an actual set of articles recently filed in another state:

"Except as otherwise provided by this Article Fourth or by the resolution or resolutions of the Board of Directors providing for the issue of any series of Preference Stock, the Preference Stock may be issued from time to time in any amount, not exceeding in the aggregate the total number of shares thereof hereinbefore authorized, as Preference Stock of one or more series, as hereinafter provided. All shares of any one series of Preference Stock shall be alike in every particular, each series thereof shall be distinctly designated by letter or descriptive words, and all series of Preference Stock shall rank equally and be identical in all respects except as permitted by the provisions of this Part III of this Article Fourth.

"Authority is hereby expressly granted to and vested in the Board of Directors from time to time to issue the Preference Stock as Preference Stock of any series, and in connection with the creation of each such series to fix by the resolution or resolutions providing for the issue of shares thereof the designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, of such series, to the full extent now or hereafter permitted by the laws of the State of \_\_\_\_\_, in respect of the matters set forth in the following subdivisions (a) to (h), inclusive:

- (a) the designation of such series;
- (b) the dividend rate of such series;
- (c) the redemption price or prices per share of such series;
- (d) the preference or preferences of the shares of such series over the Common Stock as to both earnings and assets in the event of any liquidation, dissolution or winding up of the Corporation;
- (e) whether or not the shares of such series shall be entitled to the benefits of a sinking fund to be applied to the purchase or redemption of such series, and if so entitled, the amount of such fund and the manner of its application;
- (f) whether or not the shares of such series shall be made convertible into, or exchangeable for, shares of any class or classes or of any other series of the same or any other class or classes of stock of the Corporation, and, if made so convertible or exchangeable, the conversion price or prices or the rates of exchange, and the adjustments, if any, at which such conversion or exchange may be made;
- (g) whether or not the issues of any additional shares of such series or any future series in addition to such series shall be subject to restrictions in addition to the restrictions on the issue of future series imposed by Subdivision



blank stock restrict to a definite list the matters which may be delegated by the articles to the directors, and some limit expressly the preferences which may be created between different series of stock within the same issue.<sup>8</sup>

The new Wisconsin statute is of the extremely liberal type, similar to that in Delaware,<sup>9</sup> under which it apparently is possible through

H of Part IV of this Article Fourth or in the resolution or resolutions fixing the terms of any series of Preference Stock theretofore issued pursuant to this Article Fourth; and

(h) any other voting powers, preferences and relative, participating, optional and other special rights, and the qualifications, limitations or restrictions thereof, of such series, not inconsistent with this Article Fourth.

"The Board of Directors may from time to time increase the number of shares of any series of Preference Stock already created by providing that any unissued shares of Preference Stock shall constitute part of such series and/or may decrease (but not below the number of shares thereof then outstanding) the number of shares of any series of Preference Stock already created by providing that any unissued shares previously assigned to such series shall no longer constitute part thereof. The Board of Directors is hereby empowered to classify or reclassify any unissued Preference Stock by fixing or altering the terms thereof in respect of the matters set forth above in subdivisions (a) to (h), inclusive, and by assigning the same to an existing or newly created series from time to time before the issuance of such Preference Stock.

"IV. The powers, preference and rights, and the qualifications, limitations and restrictions thereof, applicable to the Preference Stock of all series, except such as th Board of Directors is hereinbefore authorized to fix with respect to different series of Preference Stock, are as follows: \* \* \*".

<sup>8</sup> Attention is directed to the quoted provisions of the Ohio General Corporations Act, in footnote 4. See also: Illinois Business Corporation Act, Sec. 15, Ill. Rev. Stat. (1945) Ch. 32, Sec. 157.15, the pertinent provisions of which read: " \* \* \* Any or all of the series of any such class and the variations in the relative rights and preferences as between different series may be fixed and determined by th articles of incorporation, provided that all shares of the same class shall be identical except as to the following relative rights and preferences, in respect of any or all of which there may be variations between different series:

(a) The rate of dividend.

(b) The price at and the terms and conditions on which shares may be redeemed.

(c) The amount payable upon shares in event of involuntary liquidation.

(d) The amount payable upon shares in event of voluntary liquidation.

(e) Sinking fund provisions for the redemption or purchase of shares.

(f) The terms and conditions on which shares may be converted, if the shares of any series are issued with the privilege of conversion.

"If the articles of incorporation shall expressly vest authority in the board of directors, then, to the extent that the articles of incorporation shall not have established series and fixed and determined the variations in the relative rights and preferences as between series, the board of directors shall have authority to divide any or all of such classes into series and, within the limitations set forth in this section, fix and determine the relative rights and preferences of the shares of any series so established; provided that such authority of the board of directors shall be subject to such further limitations, if any, as are stated in the articles of incorporation and shall always be subject to the limitation that the board of directors shall not create a sinking fund in respect of any series unless provision for a sinking fund at least as beneficial to all issued and outstanding shares of the same class shall either then exist or be at the same time created \* \* \*". See also New York Stock Corporation Law, Sec. 11 (1946); California Civil Code, Sec. 290, paragraph 5; Minnesota, Business Corporation Act, Sec. 3, I (e).

<sup>9</sup> See the quotation in footnote 4 from the Delaware General Corporation Act. The Nebraska General Corporation Act, enacted in 1941, follows closely on this problem the provisions of the Delaware Act: Rev. Stat. Nebraska (1943) v. 1.,

provision in the articles to give the directors power to designate the various series within an authorized issue, the amount of stock in each series, and to write in full the terms of the stock contract in each series. As a practical matter the scope of delegation in any given situation will depend much upon respective bargaining positions. Where the taker of the first series of a preferred issue is to be a single large investor, it may be assumed that it will adequately protect its interests against prior preferences in subsequent series. Where the contemplated taker is the unorganized general public, the burden of supervision must fall upon the investment banker or ultimately upon the Department of Securities. It must be understood that unlimited delegation by provision in the articles means power in the directors to write the contract for each series free from the check of a stockholders' meeting and vote. Theoretically, no limitation appears in the statute against directors who hold such power creating broad differences between different series of preferred stock within a particular issue; for instance, voting power awarded to Series "B" which was denied to Series "A", conversion rights provided for Series "B" which Series "A" did not receive, or provision of a sinking fund for series "B" where none, or one less beneficial, had been provided for Series "A". Such a statute achieves the utmost in flexibility, so desirable to management, but at the same time may result, conceivably from careless or loose drafting of article provisions relating to preferred stock, in the placing of power to abuse, dangerous to investors, in the hands of an irresponsible board of directors in position to do considerable damage before the next annual stockholders' meeting.<sup>10</sup> The responsibility of the lawyer in the matter of careful draftsmanship is clearly indicated.

*(c) Consolidation and Merger*

Chapter 15, Laws of 1947, creating Wisconsin Statutes, section 181.06, provides a simple and effective means of accomplishing the unification of two or more corporate business organizations into one legal unit. The form of procedure adopted is similar to that enacted in numerous other states in the not too distant past, and is known as statutory consolidation or merger.<sup>11</sup> Generally the procedure begins

Ch. 21, Secs. 121-127 incl.; see also Maryland Corporation Law, Public General Laws, Art. 23, Sec. 42(2) (1945).

<sup>10</sup> It is interesting to note that the Model State Business Corporation Act, prepared by the Corporation Law Committee of the Section of Corporation, Banking and Mercantile Law of the American Bar Association (1946), does not contain any provision authorizing blank stock.

<sup>11</sup> With minor changes, for instance addition of a requirement that dissenting shareholders file objection with the corporation in writing at least forty-eight hours before the stockholders' meeting called to vote on the plan, the Wisconsin statute follows closely Sections 62-70 inclusive, of the Model State Business Corporation Act, submitted October 28, 1946, by the Corporation Law Committee of the Section of Corporation, Banking and Mercantile Law of the American Bar Association.

with director action upon a plan of merger or consolidation, setting forth the names of the corporations involved and the name of any new corporation contemplated in the plan, the manner and basis of converting the stock of the participating corporations into that of the surviving or new corporation, the matters normally required to be set forth in the articles of a new corporation by section 180.02, and such other provisions as are deemed necessary or desirable. Stockholder action then follows at a meeting called in the manner provided in the statute. If the plan is approved by at least two-thirds of the stock entitled to vote and by two-thirds of any class of stock entitled to vote as a class, then articles of merger or consolidation containing the material prescribed are filed with the Secretary of State and recorded in much the same manner as original articles of incorporation are filed pursuant to section 180.02 (2). Recording is required in the office of the Register of Deeds in each county where the original articles of a participating corporation are recorded, and in the county "where the merged or consolidated corporation is to be located", and the merger or consolidation becomes effective upon "the due recording". When the merger or consolidation becomes effective, the new or surviving corporation emerges, and the participating corporations cease to exist as separate entities. By operation of law, without other or further procedure or legal action, the new or surviving corporation is vested with the property and other legal rights of the participating corporations and subjected to all their obligations and liabilities. Provision is made also for merger or consolidation of Wisconsin corporations with foreign corporations under specified conditions.

#### REMEDIES OF DISSENTING SHAREHOLDERS

Both the amendment of section 182.13 (1), relating to preferred stock, and the consolidation and merger statute give to the majority stockholder interest in Wisconsin corporations powers with respect to the corporate contract which they did not have before these statutes were enacted. By amendment to the articles a two-thirds majority may give to preferred stockholders a preference in the distribution of the corporate assets upon redemption or liquidation without regard to the existence of earned surplus. The same majority may provide for apparently unlimited authority in directors to write the terms of preferred stock contracts for issues once authorized, and for the issue thereof in series. The same majority may make the preferred stock exchangeable or convertible into any other class of stock. Finally, it may proceed under statutory procedure to merge or consolidate the corporation into a surviving or a new corporation, either of Wisconsin or of another state, and make binding upon dissenting shareholders "the manner and basis of converting the shares of each merging (or consolidating)

corporation into shares or other securities or obligations of the surviving (or new) corporation." On the face of things the two-thirds majority is given power, through the merger or consolidation procedure, to eliminate accrued, cumulative dividends on preferred stock. The *Bradley Knitting Company* case<sup>12</sup> permitted several changes in the future preference rights of the preferred stock there involved, under authority given the majority in sections 180.07 (two-thirds), and 182.13 (1) (three-fourths), but did not hold that accrued cumulative dividends could be wiped out under the authority to amend articles contained in those sections. That question is so far undecided in Wisconsin, but sections 180.07, and 182.13, certainly contain no clear authority for such action. Power to make changes "in relation to any preferred stock referred to in this section" hardly seems adequate, especially in view of the cases holding that the preferred stockholder's claim to accrued cumulative dividends smacks sufficiently of a debt to make it something more than a mere preference.<sup>13</sup> Majority power to eliminate accrued dividends is more easily found in the statutory authority to provide for the manner and basis of converting the shares of the corporation into "shares, or other securities, or obligations" of another corporation in a merger or consolidation plan. And some support for this position is available in the amazing series of Delaware decisions, in which the Delaware Supreme Court held that it was unconstitutional to eliminate accrued cumulative dividends by majority action under the Delaware amending section (26), but constitutional to do it as a part of the consolidation or merger procedure provided in the Delaware statutes.<sup>14</sup>

The Wisconsin problem with respect to the constitutionality of the legislation discussed in this paper, as applied to the rights of stockholders who acquired their shares before its enactment, has been considered at length in a recent article in this Review.<sup>15</sup> Since that article was written, the Ohio Supreme Court, in a decision subscribing to the minority view as to the scope of legislative power to amend corporation statutes, has decided that a statute permitting the elimination of accrued dividends could not constitutionally be applied by the corporate majority against stockholders who acquired their shares before the

<sup>12</sup> *Johnston v. Bradley Knitting Co.*, 228 Wis. 566, 280 N.W. 688, 117 A.L.R. 1276 (1938), noted in 1943 Wis. L. Rev. 417, 1944 Wis. L. Rev. 65 at 66.

<sup>13</sup> *Morris v. American Public Utilities Co.*, 14 Del. Ch. 136, 122 A. 696 (1923).

<sup>14</sup> Unconstitutional: *Keller v. Wilson & Co.*, 21 Del. Ch. 391, 190 A. 115 (Sup. Ct., 1936), noted 35 Mich. L. Rev. 620 (1937); *Consolidated Film Industries v. Johnson*, 22 Del. Ch. 407, 197 A. 489 (Sup. Ct., 1937); constitutional: *Havender v. Federal United Corp.*, 24 Del. Ch. 318, 11 A. (2d) 331 (Sup. Ct., 1940); see discussion in *Hottenstein et. al. v. York Ice Machinery Corporation*, (C.C.A., 3rd, 1943), 136 F. (2d) 944.

<sup>15</sup> Luce, "Legislative Amendment of Corporation Statutes—The Wisconsin Problem," 30 Marq. L. Rev. 20 (1946).

statute was enacted.<sup>16</sup> So long as *Kenosha, R. & R.I. R.R. Co. v. Marsh*<sup>17</sup> remains unchallenged, the Ohio case is directly in point in Wisconsin against any attempt in a merger or consolidation under the new statute to eliminate accrued, cumulative dividends on stock acquired before the effective date of the new statute. In New York, where the majority view prevails as to the scope of the legislative reserved power, the opposite result has been reached recently.<sup>18</sup>

The remedies of the dissenter against majority action under the statutes considered may be classified broadly for discussion as follows: (1) Action for conversion of the stock interest, or to enjoin or set aside the proposed or accomplished action, (a) because, as to the dissenter, the statute under which the majority proceeded is unconstitutional, or (b) because, admitting the validity of the statute and majority authority to proceed under it, the majority action is illegal because of noncompliance with the statutory procedure or because of majority bad faith, unfairness, or other breach of equitable duty; (2) Action under the procedure provided in the merger and consolidation statute for appraisal of and payment for the dissenter's shares.

Shareholders who do not care to go along with the majority and accept securities in a new or surviving corporation pursuant to a plan of consolidation or merger may take advantage of the statutory appraisal provided in the statute. They may have the "fair value" of their shares as of the time of the stockholder action approving the plan determined in a circuit court appraisal proceeding, if prior agreement cannot be reached between the parties, and have the value so determined paid to them by the new or surviving corporation. The steps which the dissenting shareholder must take, as the merger or consolidation process moves along, in order to preserve his statutory right to appraisal of and payment for his shares are worthy of careful study by the lawyer. The right to appraisal and payment is statutory and dependent upon strict compliance with the prescribed statutory procedure.<sup>19</sup>

The appraisal remedy assumes affirmance by the dissenter of the authority of the majority to proceed with the plan of merger or consolidation. The statute requires the dissenting shareholder: (1) to express his objection in writing, filed with his corporation, at least forty-eight hours before the stockholder's meeting called to approve

<sup>16</sup> *Wheatley v. A. I. Root Co.*, 147 Ohio St. 127, 69 N.E. (2d) 187 (1946).

<sup>17</sup> 17 Wis. 13 (1863).

<sup>18</sup> *McNulty v. W. & J. Sloane*, 184 Misc. 835, 54 N.Y.S. (2d) 253 (1945).

<sup>19</sup> The cases have been strict in requiring precise compliance with the statutory conditions precedent to the appraisal remedy: *Stephenson v. Commonwealth & Southern Corp.*, 19 Del. Ch. 447, 168 A. 211 (1933); *In re Camden Trust Co.*, 121 N.J.L. 222, 1 A. (2d) 475 (1938); *Geiger v. American Seeding Machine Co.*, 124 Ohio St. 222, 177 N.E. 594 (1931).

the plan;<sup>20</sup> (2) not to vote for the plan, the statute apparently not requiring him affirmatively to vote against it; (3) to make demand in writing upon the surviving or new corporation within twenty days after the merger or consolidation is effected, for payment of the fair value of his shares, and (4) to wait out a conciliation period of thirty days following the effective date of the merger or consolidation, before his right matures under the statute to petition in circuit court within sixty days thereafter for the appraised value of his shares as of the day prior to the date of stockholder approval of the plan. Failure to express dissent in the mode prescribed has the effect of binding the stockholder to the terms of the merger or consolidation.

The appraisal remedy prescribed by the statute and outlined above must be distinguished from the shareholder's suit to enjoin the execution of the plan, to set aside proceedings already completed under the plan, or to recover damages for conversion of his stock interest, in which suit the stockholder denies the authority of the statutory majority to proceed with the plan because of its alleged illegality: (1) because of the invalidity of the merger statute itself; (2) because of the failure of the majority to follow the procedure prescribed in the merger and consolidation statute, or (3) because the majority in the exercise of its statutory power has in some manner violated its fiduciary duty of fair play and good faith toward the minority interest in the corporation.<sup>21</sup> The dissenter must commence an injunction action prior to, not

<sup>20</sup> This provision furnishes advance information to management, in time conveniently to withdraw from the proposed reorganization, of the number of stockholders who will demand cash for their shares and refuse shares in the proposed venture. However, the requirement goes far in forcing the doubtful stockholder so far in advance to dissent in order to protect his position, without much opportunity to make up his mind and without the benefit of discussion and the reports at the meeting.

<sup>21</sup> See *Stevens v. Hale-Haas Corp.*, 249 Wis. 205, 23 N.W. (2d) 620 (1946); *Tanner v. Lindell Ry.*, 180 Mo. 1, 79 S.W. 155 (1904). It is commonly held under such statutes as Ch. 15, Laws of 1947, that the statutory appraisal remedy is not exclusive, and that the shareholder's remedies remain in equity. *Cole et. al. v. National Cash Credit Ass'n.*, 18 Del. Ch. 47, 156 A. 183 (1931); *Johnson v. Lamprecht*, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938), interpreting Ohio General Corporation Act, General Code, Sec. 8623-72; *Vulcan Corp. v. Westheimer & Co.*, 27 Ohio Abs. 694, App. dismissed, 135 Ohio St. 136, 19 N.E. (2d) 901 (1939); *Goodisson v. North Am. Sec. Co.*, 40 Ohio App. 85, 178 N.E. 29 (1931); *Wick v. Sheet and Tube Co.*, 46 Ohio App. 253, 188 N.E. 514 (1932); Lattin, "Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders," 30 Mich. L. Rev. 645 (1932); Lattin, "Remedies of Dissenting Stockholders under Appraisal Statutes," 45 Harv. L. Rev. 233 (1931). The statutes governing the appraisal remedy, in at least two states, contain express provisions declaring the appraisal remedy to be exclusive: California Civil Code (Deering, 1937), Sec. 369(17); Michigan General Corporation Act (Act 327, P.A. 1931) Secs. 44, 54 (1943). For instance, Section 44(2) of the Michigan statute cited provides: "Objection by any such shareholder to any action of the corporation provided in this section and his rights thereafter under this section shall be his exclusive remedy." It has been held that such a provision legislates common law equitable remedies of the dissenter out of existence. See Lattin, "A Re-Appraisal of Appraisal Statutes," 38 Mich. L. Rev. 1165 (1940), discussing such a case: *Beechwood Securities Corporation, Inc. v. Associated Oil Company*, (C.C.A. 9th, 1939), 104 F. (2d) 537.

after, the effective date of the plan to make the action effective; and the weight of business convenience in favor of the plan will make a sizable bond likely as a condition to a temporary injunction.<sup>22</sup> If the dissenter loses on the hearing for permanent injunction, the same thing will be true if he desires to maintain his position pending the outcome of the appeal. The dissenter's most discouraging difficulty lies in his extremely difficult burden of proof, which invariably makes the outcome of such actions at least uncertain.<sup>23</sup> For instance, if a dissenter desires to enjoin or set aside a merger or consolidation plan because, he contends, its sole purpose is to freeze him and his minority group out of the business, will his burden of proof be to show the subjective bad faith of the leaders of the majority group, or can he satisfy the burden by demonstrating objectively the unfair operation of the plan? There appears to be authority both ways.<sup>24</sup> In the cases involving elimination of accrued cumulative dividends on preferred stock, it is arguable from the results of the cases that the plan will be considered illegal where, considering the business necessity for the recapitalization, what the preferred will receive is not a fair equivalent for what has been taken away.<sup>25</sup> The cases in one state illustrate the importance, in considering the issue of fairness, of the existence of earned surplus available to pay the accrued dividends at the time of the formulation of the plan.<sup>26</sup> The vagueness of such tests, and their uselessness as a basis for prediction in any given situation without close

<sup>22</sup> However, the dissenter may fail in an action for injunction filed too early in the merger process. A stockholder was held not entitled to a temporary injunction restraining the holding of a stockholders' meeting to pass on a proposed merger plan, because the holding of the meeting threatened no irreparable injury to him: *McEnany v. American Car & Foundry Company*, 56 F. Supp. 3 (D.C.E.D.Pa., 1944).

<sup>23</sup> There is a presumption that directors and majority stockholders based and formed their judgment upon valuation of assets included in a merger or consolidation plan in good faith, and did not abuse their discretion or consciously discriminate against the interests of minority stockholders: *Cole v. National Cash Credit Assoc.*, 18 Del. Ch. 47, 156 A. 183 (1931).

<sup>24</sup> "There also exists the inherent power of a court of equity, a power limited generally to the test of good faith rather than a test objective in character, a power the exercise of which may be circumscribed, because too often what is an accomplished fact is presented to the court; but it is a significant restraining influence nevertheless." Shientag, J. in *McNulty v. W. & J. Sloane*, 184 Misc. 835, 54 N.Y.S. (2d) 253 at 262 (1945). The Delaware cases state that unfairness must be so clearly demonstrated as to impel a conclusion of bad faith or reckless indifference to the rights of others: *Porges v. Vadsco Sales Corp.*, (Del. Ch., 1943), 32 A. (2d) 148; *Barrett v. Denver Tramway Corp.*, (D.C. Del., 1944) 53 F. Supp. 198; (C.C.A. 3rd, 1944) 146 F. (2d) 701; *Kochler v. St. Mary's Brewing Co.*, 228 Pa. 648, 77 A. 1016 (1910); *Wall v. Anaconda Copper Mining Co.*, 216 Fed. 242 (D.C.Mont., 1914), *aff'd*, *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407 (1917).

<sup>25</sup> Latty, "Fairness—The Focal Point in Preferred Stock Arrearage Elimination," 29 Va. L. Rev. 1 (1942); Dodd, "Fair and Equitable Recapitalizations," 55 Harv. L. Rev. 780 (1942).

<sup>26</sup> *Wessel v. Guantanamo Sugar Co.*, 134 N.J.Eq. 271, 35 A. (2d) 215 (1944), *app. den.* 135 N.J.Eq. 506, 39 A. (2d) 431; *Buckley v. Cuban American Sugar Co.*, 129 N.J.Eq. 322, 19 A. (2d) 830 (1940).

study of the facts in many cases, serve to illustrate again the uncertainty of the dissenter's remedy for illegal action.

The dissenter may prefer to forego the possibility of injunction, and contest the legality of the plan in an action for conversion of his stock interest. The same difficulties of proof are present as in the injunction action, but the reward may well be a higher measure of recovery than that afforded by the fair value measure used in the statutory appraisal remedy.<sup>27</sup> However, the conversion remedy is uncertain, and its loss will leave the dissenter with his statutory appraisal remedy forfeited through lapse of time; unless he is allowed to plead the conversion claim as an alternative cause of action in the statutory petition in circuit court for appraisal of his shares. The causes of action are logically inconsistent, and the problem of election of remedies is involved. The consolidation and merger statute does not contain express authority for such alternative pleading in the circuit court petition of such a logically inconsistent cause of action. However, general authority is available under the code for such alternative pleading.<sup>28</sup>

The significance of the short cut procedure provided by the consolidation and merger statute for the legal unification of two or more corporate business organizations, at least one of which is a Wisconsin corporation, can best be realized after a glance at the procedure available heretofore under Wisconsin statutes for such unification. It must be remembered that in the absence of enabling legislation, unification through such procedure as that provided in Chapter 15, Laws of 1947, is legally impossible, in the same sense that corporations themselves, as we define them, are inconceivable in the absence of state authorization in the form either of special or general legislation.<sup>29</sup> Unification of a Wisconsin corporation with one or more other corporations has been accomplished in the past through resort to other corporate powers, and has involved legal procedure far more complicated, time-consuming, and expensive than that necessary under Chapter 15. One corporation can make another its subsidiary by acquiring all of its stock pursuant to authority found in Wisconsin Statutes, Section 182.01 (10), and thus achieve a degree of unification.<sup>30</sup> A well known and used procedure is that of sale by a corporation of all its assets to another corporation in exchange for stock in the latter, to be followed by dissolution

<sup>27</sup> *Equitable Trust Company v. Columbia Nat. Bank*, 145 S.C. 91, 142 S.E. 811 (1927), where the court permitted recovery of the par value of plaintiff's shares, amounting to \$2,500, plus punitive damages in the amount of \$2,500; *Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765, (C.C.A. 8th, 1906); *Tanner v. Lindell Ry.*, 180 Mo. 1, 79 S.W. 155 (1904).

<sup>28</sup> *Bischoff v. Hustisford State Bank*, 195 Wis. 312, 218 N.W. 353 (1928); 36 Yale L. J. 711; 22 Col. L. R. 593; *Petry v. Harwood Elec. Co.*, 280 Pa. 142, 124 A. 302 (1924).

<sup>29</sup> *St. Thomas Gemeinde v. St. Matthews Church*, 191 Wis. 340, 210 N.W. 942 (1926).

<sup>30</sup> *Hoberg v. John Hoberg Co.*, 170 Wis. 50, 173 N.W. 639 (1919).



of the selling corporation and distribution to its members of the stock received in the sale of assets. Statutes in many states provide specially for this procedure, with provision for appraisal and payment for the shares of dissenters.<sup>31</sup> This procedure obviously involves numerous property transfers; often requires amendment of the articles of the buying corporation to authorize increase of capital stock, and finally dissolution proceedings to dispose of the selling corporation. It is not clear that such procedure is authorized in the case of business corporations under Wisconsin statutes. The only authority is found in Section 180.11 (2), which provides: "Every corporation may, by a vote of a majority of the stock entitled to vote, sell and convey \* \* \* all \* \* \* of the property owned by it, or mortgage or lease any such property whenever it shall be necessary for its business or the protection or benefit of its property." This section must be interpreted in the light of the so-called common law cases dealing with majority power to sell corporate assets in the absence of express statutory authority. Such cases held that the majority of stockholders had power to sell all the assets of a corporation for cash whenever the financial situation of the corporation was such that insolvency existed, or was threatened, and there were no reasonable prospects of future success.<sup>32</sup> The sale of all the assets of a solvent, going concern; and the sale of all the assets for stock in another corporation under any circumstances, were both under the general rule beyond majority power and required unanimous stockholder approval.<sup>33</sup> A few cases held that sale for stock could be authorized by the majority over minority dissent where financial exigencies made sale for cash permissible, provided the stock received had an established market value, and was the practical equivalent of cash.<sup>34</sup>

Section 180.11 (2) has recently been interpreted to effect a departure from the common law cases, and to authorize sale of all the assets through majority action in a solvent, going concern. The Court stated that the limitation in the statute: "'whenever it shall be necessary for its business or the protection or benefit of its property' refers to the mortgage or leasing of the corporate property and not to its sale."<sup>35</sup> However, it does not appear that the *Avalon Realty Company* case involved a sale other than for cash. The statute certainly does not

<sup>31</sup> Ohio, General Corporation Act, General Code, Sec. 8623-65, 8623-72; Delaware, General Corporation Law, Rev. Code, Ch. 65, Sec. 65.

<sup>32</sup> *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 120 A. 486 (1923); 6 *Fletcher*, *Cyclopedia Corporations*, perm. ed., Sec. 2946 (1931); 13 *Ibid.*, Sec. 5798; 15 *Ibid.*, Sec. 7216; Warren, "Voluntary Transfers of Corporate Undertakings," 30 *Harv. L. Rev.* 335 (1917).

<sup>33</sup> *Barry v. Interstate Refineries, Inc.*, 13 F. (2d) 249 (D.C.W.D.Mo., 1926); *American Seating Co. v. Bullard*, 290 Fed. 896 (C.C.A. 6th, 1923); but see *Treadwell v. Salisbury Mfg. Co.*, 7 Gray 393 (Mass., 1856).

<sup>34</sup> Comment, 35 *Mich. L. Rev.* 626 (1937); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 65 L. ed. 425, 41 S. Ct. 209 (1921).

<sup>35</sup> *Gottschalk v. Avalon Realty Co.*, 249 Wis. 78 at 84, 23 N.W. (2d) 606 (1946).

expressly authorize a sale for stock in another corporation under any circumstances, and judicial authority for such action by the majority is meager and unsatisfactory.<sup>36</sup> It might be noted here that such procedure is expressly authorized by Wisconsin statute in the case of cooperative associations.<sup>37</sup>

To examine still further into possible alternatives, the managers of a Wisconsin corporation, upon a two-thirds vote of stockholders, could dissolve the corporation; distribute the assets to the stockholders after paying debts, assuming distribution could be effected in kind; and have the stockholders convey the property to a new corporation in exchange for its stock. Besides involving an extra set of property transfers, such method of reorganization would involve difficulties arising from passage of titles through individuals, and loss of control over dissenters resulting in probable loss to the business of any property distributed to dissenters under the plan. Whether the managers of the winding up of the corporation could sell the assets to the new corporation in exchange for its stock under their power to "dispose of and convey all its property \* \* \* and divide the residue of the money and other property among the stockholders \* \* \*"<sup>38</sup>, seems at least questionable.

It becomes quite clear that the addition to Wisconsin corporation legislation of the consolidation and merger procedure, created by Chapter 15, Laws of 1947, may prove a valuable and useful one.

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<sup>36</sup> Consolidated Water Power Co. v. Nash, 109 Wis. 490, 85 N.W. 485 (1901); McDermott v. O'Neil Oil Co., 200 Wis. 423, 228 N.W. 481 (1930).

<sup>37</sup> Wis. Stat. (1945), Sec. 185.12; Pearson v. Clam Falls C-op. Dairy Ass'n, 243 Wis. 369, 10 N.W. (2d) 132 (1943).

<sup>38</sup> Wis. Stats., Sec. 181.02.