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Corporations: Analysis of the Wisconsin Statutory Provision Declaring Stock Issued for Less Than Par Value Void

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COMMENTS

ANALYSIS OF THE WISCONSIN STATUTORY PROVISION DECLARING STOCK ISSUED FOR LESS THAN PAR VALUE VOID

The Wisconsin statute, sec. 182.06, provides that corporations shall not issue par value stock except for a consideration equal to the par value thereof and shares issued contrary to this requirement shall be void.[1] Numerous other states have adopted similar provisions, which have often become the subject of criticism,[2] and it is the purpose of this paper to analyze the results obtained under such statutes with the thought of formulating an improved provision.

At common law a corporation and subscribers for its shares bound one another by the terms of their contract of purchase, which quite often provided for the issuance of shares at a price below the par value thereof, thus creating so called "watered" shares. As the practice of issuing watered shares became quite common the courts realized that certain unfairness to corporate creditors and stockholders, who had not assented to the contract, often occurred which at times required a remedy calling for either the cancellation of or the payment of the full par value of the watered shares. But no remedy can be based upon the contract of purchase if the corporation and subscriber have fulfilled its terms, and in order to effectuate a remedy this contract has to be either set aside or circumvented.[3] To aid the courts, constitutional and statutory provisions, referred to above, prohibiting watered or fictitious stock have been created to enunciate a public policy of protec-

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[1] WIS. STATS., sec. 182.06, (1947), "No corporation shall issue any stock other than dividend stock, except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof . . . and all stocks . . . issued contrary to the provisions of law and all fictitious increase of the capital stock of any corporation shall be void."

This provision appeared in substantially the same form when first enacted as Chapter 24, Laws of 1874.

[2] See 35 MICH. L. REV. 108 (1936) for a full disscussion of *Corporations — Statutes Declaring Watered Stock Void — Effect Upon the Stockholders Liability to Creditors.* For further summaries of these statutes see *Watered Stock — Commissions — Blue Sky Laws — Stock Without Par Value,* 19 MICH. L. REV. 583 (1921); Bonbright, *Shareholders' Defenses Against Liability to Creditors on Watered Stock,* 25 COL. L. REV. 408 (1925); and 3 U. OF CHI. L. REV. 331 (1936).

[3] At common law a shareholder of par value shares is bound for the benefit of creditors, upon insolvency of the corporation, to pay for his shares the par value thereof in full. The courts have developed two theories to support the the rule. The first is the so-called trust fund theory in which the capital stock is represented as a trust fund for the benefit of creditors. It originated with Justice Story in Wood v. Dummer, 3 Mason ,C.C.) 308 (1824). It has now been generally rejected and the prevailing theory is an *ex delicto* remedy based in fraud, in that there has been a deceptive holding out to the creditors that par value has been paid in full. A leading case is Hospes v. Northwestern Mfg. and Car Co., 48 Minn. 174, 50 N.W. 1117 (1892). See 13 FLECHER, ENC. OF CORPORATIONS, sec. 6052 et. seq.

tion of the corporate creditor.[4] The question arises as to whether such provisions do furnish a solution to the basic problem of setting aside or circumventing the contract of purchase.

A Review of the Wisconsin Cases

It is fundamental that an express statutory prohibition of a type of contract makes the contract illegal[5] with the consequence that neither party to the contract may rescind the agreement or base a cause of action upon it.[6] There are certain exceptions, as when the parties are not found to be in *pari delicto* or when a strong public policy interferes,[7] but for a contract between a corporation and a subscriber for the issuance of watered shares the parties are in *pari delicto*[8] and no public policy creating an exception to the rule is found in the reported cases. Thus, the Wisconsin provision prohibiting the transaction renders the contract illegal and it should follow that no rights are conferred upon either party to the contract or upon third parties. Not only does the statute prohibit the contract but it declares the stock void, which declaration should negative any theory that the shares would be of a voidable nature capable of creating rights in third parties.

Consider the result of the foregoing discussion as between the two contracting parties, that is, the corporation and the subscriber. The subscriber would have no incident of ownership in the corporation and the corporation would have no legal relationship to the subscriber. No Wisconsin decision directly supports such a conclusion, but the court has inferred that the corporation may not claim any further payments as due it, and defensively it can probably declare the stock void by interposing the statute.[9] It has been directly held in *Clark v. The Lincoln Lumber Co.* that a subscriber cannot rescind a partially executed contract for the issuance of watered shares. In that case there was a subscription contract to purchase $10,000 of stock for $5,000 and an attempt by the subscriber to rescind the agreement. The contract was held to be void by reason of sec. 182.06 and thus could not be a basis for an action by either party.[10] Then, if such is the law, should a case

[4] Clarke v. The Lincoln Lumber Co., 59 Wis. 655, 660, 18 N.W. 492 (1884); First Avenue Land Co. v. Parker, 111 Wis. 1, 7, 86 N.W. 604 (1901).
[5] RESTATEMENT OF CONTRACTS, sec. 580.
[6] RESTATEMENT OF CONTRACTS, sec. 598.
[7] 5 WILLISTON ON CONTRACTS, sec. 1632.
[8] Clarke v. The Lincoln Lumber Co., *supra,* note 4.
[9] Gager v. Paul, 111 Wis. 638, 649, 87 N.W. 875 (1901). That in the absence of fraud upon the creditors or non-assenting stockholders the corporation can not recover amounts in excess of the subscription contract appears well settled. Wells v. The Green Bay & Miss. Canal Co., 90 Wis. 442, 64 N.W. 69 (1895).
[10] Clarke v. The Lincoln Lumber Co., *supra,* note 4 wherein the court stated that the contract was ". . .a violation of the . . . statute . . . and void. Being void by statute, it is equally clear that neither party could maintain an action founded upon such contract to enforce the same, nor could one party recover damages from the other for a refusal to perform it on his part," and further ". . . the

arise in which the subscribers contracted to purchase all the authorized stock at watered values, with knowledge and acquiescence of one anothers' purchase, and in which friction subsequently developed between the shareholders so that an attempt is made by one faction to cancel the shares of another faction neither group would appear to have grounds upon which any action could be maintained. The corporation would appear, embarrassingly enough, to be without any shareholders! The New York Court when confronted with this situation was able to estop the parties from denying validity of one anothers' shares by concluding that the New York statute made the shares voidable and not void.[11] The problem need not arise if the statute neither prohibits the transaction nor attempts to declare the status of the shares. The purpose of prohibiting watered shares could be accomplished merely by affirmatively providing that a subscriber shall be liable for the payment in full of the par value of the shares issued to him.

Next, consider the situation wherein creditors of an insolvent corporation, which has issued watered shares, are seeking to have their debts satisfied. At common law they have a remedy that is based upon a presumed misrepresentation by the subscriber that he has paid full par value and the presumption of reliance thereon by the creditor. Such presumptions are necessary, for the burden of proving an actual fraud which in fact seldom exists would defeat most creditors. This is tacitly admitted by the courts.[12] The remedy therefore has no basis beyond constructive fraud for imposing liability upon the subscribers. Nevertheless it is a method whereby the courts may circumvent the contract between subscriber and corporation in order to effect a desired result. But it is a method which meets considerable difficulty upon the offering of evidence by the defendant subscriber that there has been no reliance

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respondent and the company are in *pari delicto,* both violators of the law . . ." and this is not an instance in which recission may be had; affirmed in Thronson v. Universal Mfg. Co., 164 Wis. 44, 159 N.W. 575 (1916).

[11] Kimmel Sales Corp. v. Lauster, 4 N.Y.S. (2d) 88 (1938).

[12] See Hospes v. Northwestern Mfg. and Car Co., *supra,* note 3 where it is stated: "It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the corporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and in pleadings no presumptions of fact are indulged in. This proposition is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and everyone who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital . . . he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for."

by the creditor,[13] or when the creditor is shown to have lent his credit prior to the issuance of the shares.

The purpose of the Wisconsin statute, as previously noted, is to aid the corporate creditor, but it expressly voids watered shares and prohibits the subscriber's contract of purchase, thus it can not provide a cause of action upon the contract as a substitute for the fictitious common law remedy. As a result the Wisconsin Court in granting relief to creditors has employed the common law remedy and accorded little discussion to the statute, merely indicating that it is probably a restatement of the common law.[14] The previously suggested statutory provision that a shareholder shall be liable for payment in full of the par value provides an additional term to the subscriber's contract of purchase. It is the basis for a liability based on the purchase contract itself and through its adoption the court need not struggle further to set the contract aside. The subscriber could not defeat the creditor by proof of non-reliance, and creditors both prior to and subsequent to the subscriber's purchase could avail themselves of the statutory remedy.

If shareholders who have already paid par value for their shares are neither informed of the issuance of watered shares nor assent to such issuance, it is manifest that they are injured. A remedy they probably may enforce is the cancellation of the watered shares, for it directly follows from the present Wisconsin provision that the shares are void. A second remedy at common law, similar to that of the corporate creditor, would be enforcement of payment of par value. This is not a right that the corporation has at common law, for it was a party to the subscription contract. Under the Wisconsin statute one may ask whether this remedy has been extinguished since the stock is declared void and the contract is illegel. In answer to this query the case of *Whitewater Tile and Pressed Brick Mfg. Co. v. Baker*[15] indicates that the right to enforce payment of par value rests in the corporation. In that case the defendant, director, subscribed for ten shares at a price equal to par value. He paid for the ten shares, but issued sixteen shares to himself. Other directors did likewise. These facts would indicate a breach of a director's fiduciary obligations, but the case was decided on the point of whether or not the six shares were void so as to preclude a recovery on the contract between subscriber and corporation. In refusing to allow the defendant to raise the statute as a defense the court noted that other statutes contemplate an issuance of shares on credit,

[13] At common law the fraud theory of recovery may be defeated by evidence that the creditors did not rely upon any representation that the shares were fully paid. Hirschfeld v. McKinley, 78 F.(2d) 124 (1935).

[14] Gogebic Investment Co. v. Iron Chief Mining Co., 78 Wis. 427, 47 N.W. 726 (1891).

[15] Whitewater Tile and Pressed Brick Mfg. Co. v. Baker, 142 Wis. 420, 125 N.W. 984 (1910).

therefore the word "void" as used in sec. 182.06 does not mean that the contract of issuance is incapable of ratification by a subsequent election of the corporation to treat the shares as valid and to sue for unpaid amounts of the par value. Although the apparent breach of directors' fiduciary obligations may weaken the holding of the case, it does indicate that the contract between subscriber and corporation provides a basis for recovery in spite of the statutory prohibition. The statute was a hindrance to a desired remedy. This difficulty would not exist if the statute stated the liability of a subscriber of watered shares to be the full par value thereof.

The case of *First Avenue Land Company v. Parker*[16] places bona fide transferees for value of watered shares in a difficult, if not undesirable position. The issue in that case concerned the liability of a surety for a corporate officer who had issued shares for no consideration in violation of sec. 182.06. These shares were compared to those of an *ultra vires* over-issue which are, it is well known, a complete nullity. As a consequence the corporation could not be estopped from asserting invalidity of the shares and a transferee was held to have acquired nothing of value. His redress would then lie against his transferor for a failure of consideration. Considering the policy of Blue Sky Laws to protect the investing public composed of many small individuals it is questioned whether the rule of the *Parker* case is desirable. The bona fide transferee for value seldom knows his transferor or has the ability to do so, nor does he desire to rely upon him. The suggested statute making the subscriber liable for payment of the full par value without a declaration as to the status of the shares would alleviate the rule of this case.

The cases dealing with secretly watered shares issued to promoters have not employed the statute as a means of cancelling the shares or securing payment of full par value, undoubtedly because the law is clear that in such instances the act of the promoter in obtaining a secret profit in shares is the basis of a cause of action which clearly rests in the corporation.[17] The present statute apparently does not touch upon these cases, but the provision heretofore suggested would insure the liability of the promoter.

Effects of Similar Statutes in Other States

As previously noted numerous states have enacted provisions similar to that of Wisconsin. The predominant type recites, in effect, that no corporation shall issue securities except for labor, money or property

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[16] First Avenue Land Co. v. Parker, *supra*, note 4.

[17] Pietsch v. Krause, 116 Wis. 344, 93 N.W. 9 (1903); Brahm v. M.C. Gehl, Co., 132 Wis. 674, 112 N.W. 1097 (1907).

actually received by it and any fictitious increase shall be void.[18] While Wisconsin sets a definite standard, i.e. consideration equal to par value, for the determination of voidness, the predominant statute employs the term "fictitious". Not unless a stock issue is intentionally fraudulent and thoroughly watered is it fictitious and on this point alone stockholders find a wealth of defenses to creditor's suits,[19] which is an undesirable situation if public policy intends to extend its protection to the corporate creditor.

Having determined a stock issue to be fictitious, what effect do courts place upon these statutes? As a summary of the cases, although considerable confusion appears, it may be stated that the subscriber fails to secure a contract which he may enforce, but his position may be attacked in several ways by both the corporation and non-assenting shareholders.[20] Creditors receive no aid from the statute and are forced to rely upon their common law remedies.[21]

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[18] A representative group of states that have adopted such a provision includes the following: Alabama, Arizona, Arkansas, California (This constitutional provision has been repealed), Colorado, Illinois (This was the first provision, adopted in 1870), Kentucky, Louisiana, Maine, Minnesota, Montana, Pennsylvania (This was the second provision, adopted in 1874), Texas and Utah. See Ettlinger v. Collins, 25 Ariz. 115, 213 Pac. 1002 (1923) and 11 FLETCHER, ENC. OF CORPORATIONS, sec. 5209 for additional states.

[19] Bonbright, *Shareholders' Defense Against Liability to Creditors on Watered Stock,* 25 COL. L. REV. 408 (1925). See the leading case of Memphis & Little Rock Ry. v. Dow, 120 U.S. 287 (1886) where bondholders representing over a $4,000,000 indebtedness foreclosed and a subsequent reorganization gave said bondholders stock equivalent to the railway assets plus $2,600,000 of bonds. There was a real transaction, the bondholders having a right to set their price in return for a surrender of their interests, and none of the securities were fictitious. If a contractor constructs roadway for a financially embarrassed railway in exchange for securities greatly in excess of the cost of construction there need not necessarily be a fictitious issue. Continental Trust Co., v. Toledo, St.L. & K.C. Ry. Co., 82 Fed. 642 (1897). Also see Atlantic Trust Co. v. Woodbridge Canal and Irrigation Co., 79 Fed. 842 (1897); Brown v. Duluth M. & N. Ry. Co., 53 Fed. 889 (1893); Coe v. East & W. Ry. Co. of Alabama, 52 Fed. 531 (1892); Bryan v. Northwest Beverages, 69 N.D. 274, 285 N.W. 689 (1939); and Lake St. El. Ry. Co., v. Ziegler, 99 Fed. 114 (1900).

[20] Mier v. Eaton, 46 S.D. 286, 192 N.W. 721 (1923) (A receiver of a corporation obtained judgment for secret profits realized by the issuance of fictitious stock, at page 722 the Court said, "Even with full knowledge of the facts, a South Dakota corporation is powerless to bind itself by an assent to a fictitious issue of corporate stock. . ."); Lee v. Cameron, 67 Okla. 80, 169 Pac. 17 (1917) (Fictitious stock may be canceled by another stockholder, such stock can not legally exist); Garret v. Kansas City Coal Min., Co., 113 Mo. 330, 20 S.W. 965 (1892) (Specific performance of a contract to issue watered shares denied, the contract was void in view of the statute.); Arkansas River Land, Town & Canal Co. v. Farmers L. & T. Co., 13 Col. 587, 22 Pac. 954 (1889) (Stockholders holding fictitious shares can not, in the name of the corporation, cancel fictitious shares of other stockholders.); Altenburg v. Grant, 85 Fed. 345 (1898) (Breach of a contract for the issuance of fictitious shares does not give rise to an action for damages. For a like holding see Webster v. Webster Refining Co., 36 Okla. 168, 128 Pac. 261 (1912); Ramsey v. Crevlin, 254 Fed. 813 (1918) (Wherein the Iowa statute was construed. The Court said, "The purpose of the legislators in enacting the statute was to secure to the corporation payment for its stock . . . That object will be attained more successfully . . . if the stock issued in violation of the statute is held to be voidable, than if it is adjudged to be absolutely void.").

[21] See note 2, *supra.*

Many cases express a marked deviation from the Wisconsin view as to rights of bona fide transferees for value. While stock may be fictitious and consequently void, as in the hands of an original purchaser, upon a sale to a transferee having no knowledge of any infirmity these cases hold that the corporation is estopped from asserting invalidity of the stock or that it is not fully paid as is recited in the stock certificate.[22] The Wisconsin Court in upholding a minority viewpoint does not however stand alone.[23] It is reiterated that its reasoning of a similarity to an *ultra vires* over-issue appears fallacious. An over-issue provides no basis for a creditor's recovery, nor may the corporation elect to ratify the transaction and proceed to enforce full payment of par value in absence of a retroactive amendment of its charter. Why then should the analogy of an *ultra vires* act have been resorted to in the situation of a transfer? The reason is certainly not clear and the better reasoned results of the majority of opinions ought to be followed.

Other Typical Statutory Provisions

From the statutes discussed it is apparent that a blanket declaration that stock shall be void lends little aid to the problem of setting aside or circumventing a contract between corporation and subscriber. It may be well to ask whether an affirmative declaration to the contrary would be desired. The National Conference of Commissioners on Uniform State Laws, in their model act, take the position that shares issued in violation of statutory requirements shall nevertheless not be thereby invalidated.[24] This doctrine has found the approval of but two states of the four that have adopted the uniform law.[25] This Act does not provide that a subscriber shall be liable for par value and in the

[22] Bankers Trust Co. v. Rood, 210 Iowa 289, 233 N.W. 794 (1930); Smith v. Martin, 135 Cal. 247, 67 Pac. 779 (1901); Taylor v. Citizens Oil Co., 182 Ky. 350, 206 S.W. 644 (1918); Houston F. & M. Ins. Co. v. Swain, 114 S.W. 149 (Texas 1908) (Where the corporation exchanged forged bonds for stock which subsequently came into the hands of a bonafide transferee); also see the following cases wherein no statutory provision appears that declares stock void, nevertheless the corporation would be estopped from asserting invalidity. Bowen v. Imperial Theaters, 13 Del. Ch. 120, 115 Atl. 918 (1922); Westminster Nat. Bk. v. New England Electrical Works, 73 N. H. 465, 62 Atl. 971 (1906); and First Nat. Bk. v. Alaska Airmotive, 119 F.(2d) 267 (1941).

[23] Overlock v. Jerome Portland Copper Min. Co., 29 Ariz. 560, 243 Pac. 400 (1926) (The court expressed dissatisfaction with the theory of its decision, but deemed bound by prior decisions.); Lee v. Cameron, *supra,* note 20 (The court pointed out that the Oklahoma provision requires a consideration equal to the par value of the stock, while other states merely require that money, labor or property be received by the corporation, and therefore decisions in other jurisdictions were not controlling. The illegal stock was construed as similar to an overissue, the same reasoning as employed by the Wisconsin Court.); Thompson v. Commonwealth Finance Corp., 46 S.D. 141 191 N.W. 447 (1922).

[24] MODEL BUSINESS CORPORATION ACT, sec. 19, 9 U.L.A. 105, "The fact that shares are alloted in violation of, or without full compliance with, the provisions of this act shall not make the shares so alloted invalid."

[25] Idaho and Louisiana omitted sec. 19 while Kentucky and Washington adopted the section.

Commissioners' Notes it is argued that a shareholder's liability should depend upon his contract alone, that any remedy of corporation, non-assenting shareholders, or creditors should be based on deceit and that such remedies are not negatived by the Act. The net result leaves only common law remedies, and a court is still faced with the problem of predicating a liability in the face of a valid contract. Adding the proviso to this model act that the subscriber shall be liable for payment of par value would provide the statute heretofore suggested, but it may not be desirable to have stock remain valid at all times. For instance, should the remedy of a corporation or of a non-assenting shareholder when the subscriber is a financially irresponsible party be an uncollectable judgment for the par value? Certainly not, and a further provision that the stock be subject to cancellation at the election of the corporation, if the rights of a bona fide transferee for value shall not intervene, would appear meritorious.

A second model act, the American Bar Association Model State Business Corporation Act, which is serving as a basis for a current study by the Milwaukee and Wisconsin State Bar Associations, attacks the problem by declaring that par value shares shall be issued for a consideration set by the board of directors not less than par, that a subscriber shall be under no obligation other than the payment of the full consideration which shall not be less than par value, and a bona fide transferee of watered shares shall not be liable for any unpaid portion of the consideration.[26] The first of these provisions, that par value stock shall not be issued for less than par value, is similar to that of New York as will be seen in the succeeding paragraph, and it raises the question whether shares issued in violation of the provision may be declared either void or voidable. New York holds such shares to be voidable. With the past Wisconsin cases as precedents the Wisconsin Court might say that the shares are at least voidable if not void, with the result that the problems to be overcome by new legislation would still latently exist. The provision is, however, necessary in that the power to fix the consideration must be lodged either in the board of directors or the stockholders and this is especially true in the use of nominal par stock. Thus it can hardly be deleted and proper qualifica-

[26] AMERICAN BAR ASSOCIATION MODEL BUSINESS CORPORATION ACT OF 1946, sec. 16, "Shares having a par value may be issued for such consideration, not less than the par value thereof, as shall be fixed from time to time by the board of directors." Sec. 22, "A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay to the corporation the full consideration for which said shares were issued or to be issued, which as to shares having a par value, shall not be less than the par value thereof. Any person becoming an assignee or transferee of shares or of a subscription for shares in good faith and without knowledge or notice that the full consideration therefor has not been paid shall not be personally liable to the corporation or its creditors for any unpaid portion of such consideration."

tions must appear in conjunction with this provision so that the question of voidability may not arise. Whether the further provisions of this Model Act, which closely parallel those heretofore suggested, would provide such qualifications is doubtful. However, the provision that shares issued for less than par would be subject to cancellation only at the election of the corporation would appear to remove the undesirable interpretation that a status of voidability has been created.

Another type of statute is exemplified in the New York provision that requires money equal to par value, labor or property as payment for the shares, but in which no reference is made to the validity of stock issued contrary to the provision.[27] Under such provision stock issued for a money consideration less than par is not *ipso facto* void. If all the subscribers acquiesce and consent to the issuance of watered shares they are estopped from having such shares cancelled.[28] But if the corporation which issued shares in violation of the statute desires to cancel them, it may do so since the shares are an absolute nullity in the hands of the subscribers,[29] but such a right does not extend to creditors for they have an adequate remedy at law.[30] A partially executed contract to purchase watered shares is unenforceable by the corporation in the absence of creditors' rights.[31] A holder of watered shares may not have a standing in court in order to set aside a transfer of corporate assets.[32] Bona fide transferees for value are protected, not on

[27] CONSOLIDATED LAWS OF NEW YORK, STOCK CORPORATION LAW, sec. 69, "No corporation shall issue either shares of stock or bonds, except for money, labor done or property actually received for the use and lawful purposes of such corporation. No shares of stock having par value shall be issued for money in an amount less than the par value of such shares. Any corporation may purchase . . . property . . . and may issue stock to the amount of the value thereof, and the stock so issued shall be full paid stock. . ."

[28] Kimmel Sales Corp. v. Lauster, *supra*, note 11.

[29] Fieldelman v. Paragon Paint and Varnish Corp., 64 N.Y.S. (2d) 385 (1946); Am. Macaroni Corp. v. Saumer, 174 N.Y.S. 183 (1919); B. & C. Electrical Constr. Co. v. Owen, 163 N.Y.S. 31 (1917).

[30] In re Stull v. Terry and Tench, 81 N.Y.S. (2d) 48 (1948). The common law of New York, as enunciated in the famous case of Christenson v. Eno, 106 N.Y. 97, 12 N.E. 648 (1887), restricted liabilities of a shareholder to the terms of his subscription contract and the *ex delicto* remedies of creditors were not allowed. Creditors are now afforded a remedy at law by sec. 70 of the STOCK CORPORATION LAW which reads in part, "Every holder of shares of stock not fully paid shall be personally liable to the creditors of the corporation, to an amount equal to the amount unpaid on the shares held by him for the debts of the corporation contracted while such shares were held by him. . ."

[31] Stone v. Young, 206 N.Y.S. 95 (1924) (Purchaser of shares can raise the statute as a defense upon suit of the corporate receiver to collect amounts on the contract, when creditors rights are not involved.)

[33] B. & C. Electrical Constr. Co. v. Owen, *supra*, note 29 where the Court said, "While a certificate of stock regular on its face, issued by officers or agents having authority to issue stock for the corporation, may in the hands of an innocent transferee become effective, as was held in the famous case of New York & New Haven Ry. Co. v. Schyler, 34 N.Y. 30, this certificate in the hands of the original holder was valueless. It was, in effect, like so much blank paper."

the theory of an estoppel, but that stock issued in violation of the statute is voidable and may thus confer rights upon transferees.[33] Thus, the decisions under the New York statute closely follow those of jurisdictions declaring watered shares void.

One other type of statute that should be mentioned is that in which par value shares shall be deemed as paid up shares regardless of the consideration paid therefore.[34] The reason for such a rule is to facilitate the sale of shares at a time when the corporation can not obtain a price equivalent to full par value. With the present day use of no par and nominal par shares there remains little reason for such provision. Also, it destroys the very meaning of the term "par", for if it no longer designates an amount paid to the corporation, it has no signifigance whatever.[35]

Conclusion

A statute providing for the issuance of par value stock in which it is attempted to incorporate the consequences of a failure to issue stock for a proper consideration might substantially include the following provisions: 1. shares having a par value may be issued for such consideration as shall be fixed by the board of directors (or vote of the shareholders); 2. the subscriber for such par value shares shall be liable to the corporation, or its creditors upon an insolvency of the corporation, for the payment in full of the consideration duly set by the board of directors (or vote of the shareholders), or of the par value thereof, whichever is the greater; 3. in the event of non payment after due demand has been made the shares shall be subject to cancellation at the election of the corporation unless such shares rest in the hands of a bona fide transferee for value.

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[34] Ballantine, *A Critical Survey of the Illinois Business Corporation Act,* 1 U. OF CHI. L. REV. 357, 360 (1934).
[35] Stone v. Young, *supra,* note 31 at page 99.