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Fifteen-Year Survey of Corporate Developments, 1944-1959

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FIFTEEN-YEAR SURVEY OF CORPORATE DEVELOPMENTS, 1944-1959

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I. INTRODUCTION

The post-World War II years hold a particular fascination for corporation lawyers. The end of armed conflict in the shadow of the atomic bomb was but the beginning of the cold war between East and West. The battle for men's minds overshadowed the conquest of territories. And in a very real sense the corporate system of economic activity became a symbol of the "American way of life" for a large sector of our population.

The tremendous wartime productive effort, the continued expansion of the civilian economy after the war, and the almost uninterrupted prosperity of the transitional years have all operated to solidify popular support of private enterprise as exemplified by the modern corporation. There is some evidence that the number of persons who have a proprietary stake in the corporate system through direct shareholding or indirectly through pension funds, insurance, annuities, etc., has been growing faster than the population as a whole.[1] Observers disagree as to whether this trend is sufficient to justify the inference that we have moved into an era of "people's capitalism," but the notion that the corporate system should be a "socially responsible" capitalism has undoubtedly gained broad acceptance. The process of divorcement of ownership from control has probably been accelerated; but the steady rise of professional management has also seen its leaders publicly express views concerning the obligations of modern corporate enterprise that before World War II were largely limited to academicians and New Dealers.[2] Nevertheless, the means

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1. Figures issued by the New York Stock Exchange show that in 1952 there were 6,490,000 shareowners in the United States; in 1956, 8,630,000; and in 1959, 12,490,000. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 470 (1959). Estimated population of voting age was 98,133,000 in 1952; 102,743,000 in 1956; 104,582,000 in 1958. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 357 (1959).

2. A current illustration is the 1959 steel strike, in which the social responsibility of corporate management to reverse the inflationary trend rather than the profits needed for shareholders, has been the main point on which

of achieving such social responsibility are not at all clear; in fact, the most widely followed modern corporation law has been characterized as an "invitation to irresponsibility."[3]

In brief, the corporation is today recognized as a valuable instrument of freedom and diversification of economic activity, in that it provides for decentralization of decision-making in economic affairs; but we have not by far solved the problems of keeping management honest and efficient and of coordinating the work of corporations, labor and government in the achievement of national objectives.

In this setting, the past fifteen years have witnessed a remarkable variety of important corporate developments. Control of corporate management for the protection of the investor and the public is a central theme; its counterpoint is the demand of management for freedom to manage. Perhaps the decade brought to an end in the mid-1930's by the impact of the new federal securities acts had a more dramatic significance; but it is hard to find another comparable period in the history of corporation law and practice in the United States that has been so rich in legislative, administrative, judicial and scholarly activity. It is possible in each year to find at least one statute, one decision, one administrative ruling, one article or book, that may fairly be regarded as a milestone along a tortuous road with many turns and cutbacks.

For example, this survey starts a year earlier than the cessation of hostilities of World War II because it was in 1944 that the state of New York ushered in a new era of restrictions upon shareholders' actions through the enactment of the first "security for expenses" statute.[4] There were other important developments at the time, of course,[5] but this was a major landmark. The next year, 1945, the United States Supreme Court, in the *International Shoe* case,[6] established new standards for subjecting foreign corporations to the service of process. In 1946 the *Kardon* case[7] sustained the principle of civil liability, under the rules of the Securities and Exchange Commission,[8] for failure to disclose material facts in the sale of

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the companies have relied to justify their position. See, also, STANDARD OIL COMPANY OF NEW JERSEY, 75TH ANNUAL MEETING 7 (1957), cited and quoted in Gibson, *How Fixed Are Class Shareholder Rights?*, 23 LAW & CONTEMP. PROB. 283, 305-06 (1958).

3. Harris, *The Model Business Corporation Act—Invitation to Irresponsibility?*, 50 NW. U.L. REV. 1 (1955).

4. N.Y. GEN. CORP. LAW § 61-b (Supp. 1959).

5. *E.g.*, the 1944 amendment of N.Y. GEN. CORP. LAW § 61 (Supp. 1959) (establishing "contemporaneous ownership" rule); Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944) ("double derivative" action).

6. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

7. Kardon v. National Gypsum Co., 69 F. Supp. 52 (E.D. Pa. 1946) (decision on demurrer), 73 F. Supp. 798 (E.D. Pa. 1947) (decision on merits).

8. SEC Rule X-10B-5, 17 C.F.R. § 240.10B-5 (1949).

securities. In 1947 the *Remington Rand* case[9] outlined some public policy limitations upon the business judgment of directors in the management of corporations. In 1948 the enactment of section 9 of the New York Stock Corporation Law constituted the first important legislative recognition of the special management problems of close corporations. And 1949 was notable for at least one important event: the dissolution of Alexander Hamilton's celebrated Society for Establishing Useful Manufactures (incorporated in New Jersey in 1791), reputed to be the last surviving corporation whose legislative charter and exemption from taxation were, under the doctrine of the *Dartmouth College* case, not subject to amendment or repeal.[10]

The "first complete edition" of the American Bar Association's Model Business Corporations Act, which was to have a profound effect on later revisions of state corporation laws, was published in 1950.[11] The next year, 1951, marked the appearance of the outstanding treatise on securities regulation.[12] In 1952 a trial court in the *Fairchild Engine & Airplane* case[13] for the first time sustained the right of *both* incumbents and successful insurgents to obtain reimbursement of their campaign expenses out of the corporate treasury. In 1953 the legal vindication of corporate support to education was particularly significant.[14] In 1954 came the first major revision of the federal securities laws, designed to liberalize filing requirements and to facilitate offers to buy and sell between the time of filing of a registration statement and its effective date.[15]

The principle of absolute accountability for profits realized from the sale of corporate control was announced for the first time in 1955 in *Perlman v. Feldmann*.[16] In 1956 while the dominant theme of scholarly writings was "corporate democracy,"[17] the SEC laid down

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9. Abrams v. Allen, 297 N.Y. 52, 74 N.E.2d 305 (1947).

10. Grobart v. Society for Establishing Useful Manufactures, 65 A.2d 833 (N.J. 1949).

11. 6 Bus. Law. 1, 7 (1950). The Model Act has been published. ABA-ALI Model Bus. Corp. Act (1953). Revisions, alternative provisions and optional sections approved through 1957 are published as a supplemental leaflet. The A.B.A. Model Act must be distinguished from the Uniform Business Corporation Act published in 1928 by the Commissioners on Uniform State Laws and later designated a "model" act.

12. Loss, Securities Regulation (1951, Supp. 1955).

13. Rosenfeld v. Fairchild Engine & Airplane Corp. 116 N.Y.S.2d 840 (Sup. Ct. 1952), *aff'd*, 284 App. Div. 201, 132 N.Y.S.2d 273 (1954), *aff'd*, 309 N.Y. 168, 128 N.E.2d 291 (1955).

14. See A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581 (1953), *appeal dismissed*, 346 U.S. 861 (1953), noted in 1953 Annual Surv. Am. L. 403-404.

15. Securities Act of 1933, 68 Stat. 684 (1954), 15 U.S.C. § 77b (Supp. 1958).

16. 219 F.2d 173 (2d Cir. 1955), *cert. denied*, 349 U.S. 952 (1955).

17. See, *e.g.*, Garrett, *Attitudes on Corporate Democracy—A Critical Analysis*, 51 Nw. U. L. Rev. 310 (1956); Slavin, Book Review, 33 U. Det. L.J. 421 (1956); Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U.L. Rev. 875 (1956).

its "Marquis of Queensberry" (proxy) rules to govern the struggle for power.[18] In 1957 *Greene v. Dietz*[19] invalidated the SEC rule exempting restricted stock options from the "insiders' profits" provisions of the Securities Act.[20] In 1958 came the first comprehensive treatise and manual on close corporations.[21] In the spring of 1959 variable annuities were brought under SEC regulation as "securities";[22] and, as this article goes to press, a distinguished scholar and practitioner, George D. Hornstein, has brought out a two-volume treatise on *Corporation Law and Practice* that in my judgment will become the basic tool of corporation lawyers.[22a]

It is recognized, of course, that the foregoing list represents personal choices, the wisdom of which leaves room for considerable disagreement. Nevertheless, a similar effort will be made to summarize in a few pages the discernible trends in a number of areas of corporation law, particularly those which are not especially covered in other articles of this symposium.

II. MAJOR STATUTORY REVISIONS

The post-war period has produced some fifteen major statutory revisions in the corporation laws of the United States: Kentucky (1946), Oklahoma (1947), Maryland and Wisconsin (1951), Florida and Oregon (1953), District of Columbia (1954), North Carolina, Ohio, and Texas (1955), Pennsylvania and Virginia (1956), Alaska and North Dakota (1957), and Colorado (1958). Eight of the thirteen enacted since 1950[23] follow, without change or with relatively minor variations, the American Bar Association's Model Business Corporation Act.[24] The Model Act has influenced the other five[25] and probably will affect in substantial degree the current projects for revision of the corporation laws of New York and New Jersey.[26]

On the whole it is clear that the new statutes embody what has been called the "enabling act" theory that would impose a minimum of *a priori* conditions and limitations on the privilege of incorporation. Although the trend is generally deplored by the academic fra-

18. 17 C.F.R. § 240.14a (Supp. 1959).
19. 247 F.2d 689 (2d Cir. 1957).
20. SEC Rule X-16B-3, 17 C.F.R. § 240.16b-3 (Supp. 1959).
21. O'NEAL, CLOSE CORPORATIONS (1958).
22. SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65 (1959), *reversing* 257 F.2d 201 (D.C. Cir. 1958).
22a. HORNSTEIN, CORPORATION LAW AND PRACTICE (1959).
23. Alaska (1957), Colorado (1958), District of Columbia (1954), North Dakota (1957), Oregon (1953), Texas (1955), Virginia (1956), and Wisconsin (1951).
24. Note 11, *supra*.
25. Florida (1953), Maryland (1951), North Carolina (1955), Ohio (1955) and Pennsylvania (1956).
26. For detailed analysis of the extent to which the A.B.A. Model Act has influenced corporation laws, see Katz, *The Philosophy of Mid-Century Corporation Statutes*, 23 LAW & CONTEMP. PROB. 175 (1958).

ternity,[27] it may be reasonably argued that this theory becomes a practical necessity so long as the corporation laws are intended to apply equally to the incorporated partnership and the giant enterprise. In this view regulation in the public interest is more effectively spelled out in the securities acts, the antitrust laws and similar statutes related to the behavior of corporations rather than in the organic act.

III. Close Corporations

The post-war years have witnessed a tremendous growth of interest in the special problems of close corporations. From a practical point of view, perhaps the most siguificant development has been Subchapter S of the Internal Revenue Code, which is the subject of a separate article in this symposium.[28]

Among legal writers there has been a renewal of the pioneer pleas for wider legislative recognition of the differences between close corporations and public-issue corporations,[29] but thus far no state has enacted a separate statute for the close corporation. The nearest approach to such a statute is to be found in the new North Carolina Corporation Law, enacted in 1955, which contains a number of permissive provisions to meet the special managerial needs of close corporations[30] and may well become the model for future legislation in this area.

As a rule partnership operation within the corporate shell demands restrictions upon the transfer of shares to keep the corporation "close," special voting arrangements to carry out the understanding of the partners as to their respective share of control and enterprise income, and some method of resolving problems of dissension and deadlock. To achieve these objectives within the framework of most of the existing corporation laws is a task that often challenges the ingenuity of competent and well-trained lawyers to the utmost. There are several possibilities with respect to "first refusal" options and "buy-sell" agreements; variations in the voting rights of classified shares; high quorum and high voting requirements; irrevocable proxies and voting trusts; arbitration and dissolution provisions.

The situation is further complicated by the curious fact that, over the years, the courts of the leading commercial states, and particularly

27. See, *e.g.*, Jennings, *The Role of the States in Corporate Regulation and Investor Protection*, 23 LAW & CONTEMP. PROB. 193 (1958).

28. Caplin, *Subchapter S and Its Effect on the Capitalization of Corporations*, 13 VAND. L. REV. 185 (1959).

29. *Symposium—The Close Corporation*, 42 NW. U. L. REV. 345 (1957); Note, *Statutory Assistance for Closely Held Corporations*, 71 HARV. L. REV. 1498 (1958); Note, *A Plea for Separate Statutory Treatment of the Close Corporation*, 33 N.Y.U.L. REV. 700 (1958); Comment, *Shareholders' Agreements and the Statutory Norm*, 43 CORN. L.Q. 68 (1957).

30. N.C. GEN. STAT. §§ 55-29, 55-63, 55-73, 55-125(3) (Supp. 1959).

the New York Court of Appeals, in dealing with these problems have not been generally sympathetic to "variations from the statutory norm," so that legislative relief becomes necessary. For example, it was the *Benintendi*[31] case, invalidating high-quorum and high-vote provisions in the by-laws of a close corporation, that led to the enactment of section 9 of the New York Stock Corporation Law in 1948. At the present time, on the other hand, there seems to be no way of resolving dissension and deadlock in a profitable corporation under recent New York decisions: Controversies cannot be arbitrated,[32] and dissolution is impossible because the courts will not find that such a step would be beneficial to the shareholders.[33] The extent to which this and other troublesome problems can be resolved through properly drafted shareholders' agreements is an open question.

It is also difficult to predict the extent to which the courts will use their equity powers to prevent abuse or over-reaching by the participants in a close corporation. For example, one method of "freezing out" minority shareholders is to issue new shares at bargain prices but in quantities that make it financially impossible for the minority to preserve their proportionate interest by exercising their pre-emptive rights. North Carolina has granted relief in such a case;[34] Missouri and Pennsylvania have not.[35] New York has indicated that the only relationship between the participants in a corporation is that arising from their being shareholders since "a joint venture may not be carried on by individuals through the corporate form";[36] but the United States Circuit Court for the District of Columbia has perceptively pointed out that the fiduciary duties between shareholders of a close corporation are analagous to those between partners.[37]

The main point of this brief survey is to emphasize that this important area of corporate practice has within the past fifteen years become a technical specialty requiring greater skill and experience than is commonly realized. Fortunately for the profession, the current literature on the subject is extensive and helpful.[38]

31. Benintendi v. Kenton Hotel, 294 N.Y. 112, 60 N.E.2d 829 (1945), 159 A.L.R. 280 (1945).
32. On application of Burkin, 1 N.Y.2d 570, 136 N.E.2d 862 (1956), *reversing* 286 App. Div. 740, 147 N.Y.S.2d 2 (1955).
33. See, *e.g.*, *In re* Radom & Neidorff, Inc., 307 N.Y. 1, 119 N.E.2d 563 (1954). *Cf. In re* Security Fin. Co., 49 Cal. 2d 370, 317 P.2d 1 (1957); Krall v. Krall, 141 Conn. 325, 106 A.2d 165 (1954).
34. Gaines v. Long Mfg. Co., 234 N.C. 340, 67 S.E.2d 350 (1951).
35. Maguire v. Osborne, 388 Pa. 121, 130 A.2d 157 (1957), criticized in 1957 ANNUAL SURV. AM. L. 283, 284; Bellows v. Porter, 104 F. Supp. 648 (W.D. Mo. 1952).
36. Weisman v. Awnair Corp. of America, 3 N.Y.2d 444, 449, 144 N.E.2d 415, 418 (1957).
37. Helms v. Duckworth, 249 F.2d 482 (D.C. Cir. 1957).
38. See *e.g.*, O'NEAL, CLOSE CORPORATIONS (1958). See also, sources cited at note 29 *supra;* Hornstein, *Arbitration in the "Incorporated Partnership,"* 12

IV. Corporation Finance

The most striking development in corporate finance in recent years has been the widespread custom of issuing common shares at prices well in excess of a low or nominal par value. Only in the case of preferred shares is the issue price likely to correspond to the par value, which in turn is probably equal or close to the redemption price. In consequence, the benchmark of residuary legal capital, which in the traditional lore of the corporation law stands as the cushion of creditors and senior shareholders against loss, has tended to lose its significance. The situation is accentuated by the liberal provisions of the influential A.B.A. Model Act permitting both "stated capital" and "capital surplus" to be returned to the shareholders as "distributions in partial liquidation."[39] The net result is a fundamental change in the law of dividends, which in effect substitutes the test of solvency for the time-honored concepts of profits and surplus. Although this development has been viewed with alarm by many writers,[40] it is perhaps appropriate to mention that staid Massachusetts has navigated very well for many years with the solvency test for legal dividends.[41]

The modern statutes tend to distinguish between true "dividends," paid out of accumulated earnings (earned surplus), and distributions out of capital surplus which in the main represent return of invested capital. This is a definite improvement in proper labeling, but its implications have not yet been extended to the law of stock dividends and split-ups. There is still no statute which protects the integrity of the earned surplus account when stock dividends are issued in shares of low par value, with the result that a large stock dividend often has the effect of a split-up. Apart from its importance with respect to subsequent dividends, the situation presents special difficulties in connection with trust administration.[42] The New York Stock Exchange, the Securities and Exchange Commission, and the American Institute of Certified Public Accountants have recognized the problem, but their recommended solutions are probably not suitable for general statutory enactment.[43]

Arb. J. 28 (1957); *Symposium: Close Corporation,* 18 Law & Contemp. Prob. 433-583 (1953).

39. ABA-ALI Model Bus. Corp. Act § 41 (1953).

40. See, *e.g.,* Hackney, *The Financial Provisions of the Model Business Corporation Act,* 70 Harv. L. Rev. 1357 (1957), and sources cited.

41. Mass. Ann. Laws c. 156, § 37 (1948).

42. See, *e.g., In re* Fosdick's Trust, 4 N.Y.2d 646, 152 N.E.2d 228 (1958); Comment, 32 N.Y.U.L. Rev. 878 (1957).

43. American Institute of Accountants, Accounting Research Bull. No. 43 at 49 (1953) makes the distinction that a *stock dividend* is essentially motivated by a desire to retain earnings in the enterprise while giving stockholders evidence of the absolute increase of their interest in the corporation, while a *stock split-up* refers to an issuance of shares designed to reduce the unit price of shares and thus increase marketability.

Of more limited interest is the history of New Jersey's "dividend credit" doctrine which in effect would make non-cumulative preferred stock cumulative to the extent of earnings. A number of post-World War II decisions seemed to indicate that the doctrine was about to be discarded,[44] but in 1956 the New Jersey Supreme Court in a powerful dictum reaffirmed the doctrine as a rule of construction.[45] A federal court has rejected the doctrine with respect to an Illinois corporation;[46] but North Carolina has enacted it in its new corporation law.[47]

The traditional principle that the declaration of dividends is a matter entirely within the discretion of directors has been consistently upheld in most jurisdictions. However, North Carolina has preserved the substance of its mild compulsory dividend provisions,[48] Maine has continued to interpret preferred stock provisions in favor of compulsory dividends,[49] and an unambiguously drafted mandatory-dividend charter provision has been sustained under New Jersey law.[50]

With respect to federal regulation of securities, the most important development of the post-war period was the decision that SEC Rule X-10B-5, under section 10(b) of the Securities and Exchange Act of 1934, can be the basis of a civil action for misrepresentation or omission of facts relevant to the sale of securities.[51] The 1954 amendments previously mentioned have tended to simplify registration requirements,[52] but the SEC proposal to raise the registration exemption from $300,000 to $500,000 failed of adoption.[53] Proposals for extending the coverage of the securities acts to unlisted securities also failed of enactment.[54]

On the other hand, there has been a resurgence of the movement toward reasonable uniformity in state regulation of securities. A

44. See particularly, Agnew v. American Ice Co., 2 N.J. 291, 66 A.2d 330 (1949); Dohme v. Pacific Coast Co., 5 N.J. Super. 477, 68 A.2d 490 (Ch. 1949); 1949 Annual Surv. Am. L. 567-68 (criticizing both cases).

45. Sanders v. Cuba R.R., 21 N.J. 78, 120 A.2d 849 (1956). *Cf.* Leeds & Lippincott Co. v. Nevins, 51 N.J. Super. 343, 144 A.2d 4 (Ch. 1958).

46. Guttmann v. Illinois Cent. R.R., 189 F.2d 927 (2d Cir.), *cert. denied,* 342 U.S. 867 (1951).

47. N.C. Gen. Stat. §§ 55-40(c), 55-2(5) (Supp. 1959).

48. N.C. Gen. Stat. § 55-50(i) (Supp. 1959). The former provision was N.C. Acts 1901, ch. 2, § 52.

49. New England Trust Co. v. Penobscot Chem. Fibre Co., 142 Me. 286, 50 A.2d 188 (1946).

50. Arizona W. Ins. Co. v. L.L. Constantin & Co., 247 F.2d 388 (3rd Cir.), *cert. denied,* 355 U.S. 905 (1957). *But see* L. L. Constantin & Co. v. R. P. Holding Corp., 153 A.2d 378 (N.J. Super. 1959).

51. Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951); Kardon v. National Gypsum Co., 69 F. Supp. 52 (E.D. Pa. 1946) (decision on demurrer), 73 F. Supp. 798 (E.D. Pa. 1947) (decision on merits).

52. *Supra* note 15.

53. See Loss, Securities Regulation 379-87 (1951, Supp. 1955) for the legislative history and sources on this proposal.

54. *E.g.,* S. 1168, 85th Cong., 1st Sess. (1957).

new Uniform Act, drafted by Louis Loss and Edward Cowett, appeared in 1956 and within two years was said by its draftsmen to have influenced the laws of at least ten jurisdictions.[55]

V. Executive Compensation and Tenure

The basic patterns of executive compensation have not materially changed during the past fifteen years, *i.e.*, bonuses, profit-sharing contracts, retirement and dependents' benefits plans, and stock-purchase options. However, the continuing high rates of personal income taxes have greatly increased the popularity, in both close and public-issue corporations, of schemes to defer taxes or to take advantage of the lower rates applicable to capital gains. The classical legal problems—adverse interest, lack of consideration, waste of corporate assets—are still present, and new problems have arisen as to the applicability of the federal securities acts to stock-option plans.

There is evidence that the concept of "incentive" compensation has gained wide acceptance both in business and in the courts. At least in Pennsylvania, the question of consideration for cash bonuses, reasonable in amount and approved by a majority of the shares, has recently been brushed aside on the ground that such payments to officers have become established business practice.[56] Nevertheless, many a stock-option plan has been scuttled by the absence of "consideration"—not contractual consideration but the type that is required for valid issue of the shares themselves.[57] A number of states have enacted statutes making the directors' judgment "as to consideration and the sufficiency thereof," in connection with stock option plans, conclusive in the absence of fraud.[58] But careful draftsmen will, of course, study the adverse decisions as well as the features of successful plans.

The tax aspects of "restricted" stock options are beyond the scope of this paper. Attention should be called, however, to the potential liability of "insiders" for short-swing profits[59] and the possibility that executives who borrow money to exercise their options and later sell the stock to repay the loan may be considered as underwriters under the securities acts.[60]

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55. Loss & Cowett, Blue Sky Law 421-31 (1958).
56. Chambers v. Beaver-Advance Corp., 392 Pa. 481, 140 A.2d 808 (1958).
57. See, *e.g.*, Dow v. River Farms Co., 110 Cal. App. 2d 403, 243 P.2d 95 (1952); Elster v. American Airlines, Inc., 106 A.2d 202 (Del. Ch. 1954), 128 A.2d 801 (Del. Ch. 1957) (decision on jurisdictional issue) (summary judgment denied); Kerbs v. California E. Airways, Inc., 90 A.2d 652 (Del. 1952); Moore v. Keystone Macaroni Mfg. Co., 370 Pa. 172, 87 A.2d 295 (1952) (involving payments to the widow of an executive).
58. See, *e.g.*, N.Y. Stock Corp. Law § 69; Del. Code Ann., tit. 8, § 157 (1953).
59. Securities and Exchange Act of 1934 § 16(b), 48 Stat. 896 (1934), 15 U.S.C. § 78(p)(a) (1952). See also, Greene v. Dietz, 247 F.2d 689 (2d Cir. 1957).
60. This was a major topic of discussion at the Round Table on Securities

Specific statutory amendments to overcome the adverse interest problem have been enacted in a few states.[61] On the issue of waste of corporate assets, the most important test is the reasonableness of the compensation in relation to the services rendered.[62] Shareholder approval, even if not unanimous, seems to make a difference, although the rationale is not entirely clear.[63]

On the question of tenure, there is conflict between a by-law permitting removal of directors without cause at any time and a charter provision for cumulative voting.[64] If both features are desired, the conflict may be resolved by a further provision that removal of any director without cause shall require a new election of the entire board.

VI. Corporate Management

The problem of adverse interest of directors is, of course, far broader than self-dealing in the matter of compensation. The general trend has been toward a practical solution of this problem by the test of "fairness," even where the vote of interested directors is necessary to authorize the transaction in issue. The leading case of the post-war years on this point is probably *Sterling v. Mayflower Hotel Corp.*,[65] upholding the validity of a by-law permitting interested directors to vote despite the lack of statutory authorization and the prohibition against counting such votes at common law. The directors and majority shareholders had approved a merger proposal in which their interest in the other corporation was widely known and fully disclosed; the interested directors were needed to make a quorum and their vote was necessary to bring the merger plan (which passed the test of "fairness") before the shareholders.

Before going into the problems of managerial violation of fiduciary duties, it is appropriate to mention the widespread adoption in recent years of statutes authorizing corporate reimbursement of litigation expenses of directors who have not been guilty of negligence or

Regulation, Association of American Law Schools meeting in San Francisco, December 1957, stimulated by an excellent paper by Professor Alfred F. Conard.

61. See, *e.g.*, Wis. Stat. Ann. § 180.31 (1957), superseding the case of Stoiber v. Miller Brewing Co., 257 Wis. 13, 42 N.W.2d 144 (1950). *Cf.* Cal. Corp. Code § 820 (1947).

62. Berkwitz v. Humphrey, 163 F. Supp. 78 (N.D. Ohio 1958).

63. It is at least arguable that such approval supports the good faith of the directors in fixing the consideration to be received for shares. On the statutory side, *compare* ABA-ALI Model Bus. Corp. Act § 18A (1953) *and* N.C. Gen. Stat. § 55-45 (Supp. 1959), requiring such approval, *with* Ohio Rev. Code § 1701.17 (Page Supp. 1956) *and* Pa. Stat. Ann., tit. 15, § 2852-612 (1958) (amended in 1957 to eliminate stockholders' approval requirement).

64. *In re* Rogers Imports, Inc., 202 Misc. 761, 116 N.Y.S.2d 106 (Sup. Ct. 1952).

65. 93 A.2d 107 (Del. 1952), *affirming* 33 Del. Ch. 20, 89 A.2d 862 (1952).

misconduct.[66] But the courts have tended to construe these statutes strictly, both as to the type of actions to which they apply[67] and as to the effect of successful defense other than "on the merits."[68]

In a broad social sense, perhaps the most significant decisions of the past fifteen years are those of the New York Court of Appeals holding that the traditional business judgment of directors must be subordinated to the public policy expressed in statutes involving economic regulation. The significance of these decisions is highlighted by the fact that in 1944 the court had exonerated directors who, in the exercise of their business judgment, had technically compounded a felony by yielding to a racketeer's extortion.[69] In 1947, however, the same court announced that the business judgment rule would not protect the directors from personal liability for corporate losses arising from anti-union activities and other alleged violations of the federal labor-relations acts,[70] even if the directors honestly believed these statutes to be unconstitutional. Some years later, the same principle was applied to alleged violations of the federal antitrust laws, with the further result that a director who had pleaded *"nollo contendere"* was disqualified from reimbursement of his litigation expenses, regardless of whether the cartel agreement in question might have been profitable to the corporation.[71] The rationale of these cases raises certain difficulties. Of course, labor relations statutes and antitrust laws should be enforced according to their terms. The question is whether additional civil liabilities or disabilities should be imposed upon the directors who in good faith are seeking to protect the corporation's interests, particularly as economic legislation proliferates in an atmosphere of sharp political conflict and even legal experts are in disagreement concerning the scope of permissible business conduct. There have been important voices raised in support

66. Among the jurisdictions which have adopted such statutes are: Delaware, District of Columbia, New York, Pennsylvania, Puerto Rico, Texas, and Wisconsin. See Frampton, *Indemnification of Insiders' Litigation Expenses,* 23 LAW & CONTEMP. PROB. 325 (1958), which lists and discusses these statutes.

67. Sorensen v. Overland Corp., 242 F.2d 70 (3d Cir. 1957), *affirming* 142 F. Supp. 354 (D. Del. 1956); Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953); McNeill v. Succop, 10 Misc. 2d 608, 169 N.Y.S.2d 506 (Sup. Ct. 1957).

68. *Compare* Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888 (3d Cir. 1953), *and* Dornan v. Humphrey, 278 App. Div. 1010, 106 N.Y.S.2d 142 (1951) (statute of limitations), *and* Tichner v. Andrews, 193 Misc. 1050, 85 N.Y.S.2d 760 (Sup. Ct. 1949), *aff'd without opinion,* 275 App. Div. 749, 90 N.Y.S.2d 920 (1951) (plaintiff failed to post security for expenses), *with* Diamond v. Diamond, 307 N.Y. 263, 120 N.E.2d 819 (1954) (plaintiff estopped by participation in wrongdoing).

69. Hornstein v. Paramount Pictures, Inc., 292 N.Y. 468, 55 N.E.2d 740 (1944).

70. Abrams v. Allen, 297 N.Y. 52, 74 N.E.2d 305 (1947). On the trial of this case on the merits, however, the directors were exonerated. 113 N.Y.S.2d 181 (Sup. Ct. 1952).

71. Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953).

of the view that directors are fiduciaries not only for the shareholders but also for the public at large.[72] With the exception of the widespread approval of corporate gifts to charity,[73] this view seems to have made little headway in the statutes or in the courts;[74] but if the cases discussed in this paragraph imply that directors are personally responsible for seeing to it that the corporation act as a "good citizen" in the Socratic sense, the possibilities for the future may well stagger the imagination.

The significant developments in the more traditional areas of fiduciary obligations involve transactions by "management" in the stock of the corporation. Judicial decisions have reaffirmed the fiduciary duties of the controlling shareholders to the minority[75] and have generally followed the "special facts" doctrine of the United States Supreme Court[76] in holding the directors liable for breach of duty to the individual shareholders. It may be fairly stated, as one reviewer has done, that the modern view imposes upon an "insider" who purchases stock from a shareholder the affirmative duty to disclose facts known to him that may affect the value of the stock.[77] In this area, section 10(b) of the Securities and Exchange Act has had an enormous impact. Civil actions for fraud can now be brought in the federal courts, thus providing flexibility in bringing in parties from other states even if the shares are not traded in an organized exchange or in the "over-the-counter" market, provided the transaction involves interstate commerce or any use of the mails.[78] Furthermore, the statutory right of the corporation to recover the short-swing profits of "insiders" has undoubtedly tended to discourage

72. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 164, 168-188 (1954); GOYDER, THE FUTURE OF PRIVATE ENTERPRISE—A STUDY IN RESPONSIBILITY 92-93 (1954); Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

73. See Latty, *Some Miscellaneous Novelties in the New Corporation Statutes*, 23 LAW & CONTEMP. PROB. 363, 369 (1958), and sources cited.

74. It will be recalled that Henry Ford's defense of his limited dividends against minority stockholders on the ground of his desire to reduce car prices and create more jobs was rejected in Dodge v. Ford Motor Co., 204 Mich. 459, 505-06, 170 N.W. 668, 683-84 (1919). *Cf.* Katz, *The Philosophy of Mid-century Corporation Statutes*, 23 LAW & CONTEMP. PROB. 177, 188-92 (1958).

75. See, *e.g.*, Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947); Johnson v. Mansfield Hardwood Lumber Co., 159 F. Supp. 104 (W.D. La. 1958).

76. Strong v. Repide, 213 U.S. 419 (1909).

77. Note, *Insider's Duty to Disclosure When Purchasing Stock from a Shareholder*, 43 IOWA L. REV. 109 (1957).

78. See, *e.g.*, Stadia Oil & Uranium Co. v. Wheelis, 251 F.2d 269 (10th Cir. 1957); Schillner v. H. Vaughan Clarke & Co., 134 F.2d 875 (2d Cir. 1943); Dupler v. Simmons, 163 F. Supp. 535 (D. Wyo. 1958); Northern Trust Co. v. Essaness Theatres Corp., 103 F. Supp. 954 (N.D. Ill. 1952); Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951). *Cf.* Creswell-Keith, Inc. v. Willingham, 160 F. Supp. 735 (W.D. Ark. 1958). See note, 49 COLUM. L. REV. 1018 (1949).

misuse of inside information to the detriment of unsuspecting shareholders.[79]

The most dramatic extension of the range of fiduciary obligations of controlling shareholders to other shareholders, however, was made in *Perlman v. Feldmann.*[80] The case was tried, probably incorrectly, as a derivative action on the theory that the "sale of control" is an unlawful appropriation of a "corporate asset."[81] Theory aside, the decision of the court was that the seller of controlling shares must account to the other shareholders for the premium received in excess of the value of the shares divorced from control. The earlier precedents had proceeded on tort principles, imposing liability only when the seller of control knew or should have known that the purchaser was likely to "loot" the corporation.[82] The new doctrine apparently is based on trust concepts, although its rationale is by no means clear.[83] In any event, the case indicates that sellers of controlling shares will do well, where possible, to persuade the buyer to make the same offer to minority shareholders.

VII. "Corporate Democracy"

For two or three years during the period under study, there was quite a flurry of writing on the subject of "corporate democracy," chiefly in support of the efforts of the SEC to improve its proxy rules. To the extent that greater shareholder participation in the government of publicly held corporations was expected to result from the rules on the submission of "shareholders' proposals," the gain has been insignificant.[84] However, there is little doubt that the rules have led to fuller disclosure to the shareholders on matters of corporate policy, with consequent improvement in the standards of corporate management.

Perhaps of even greater importance is the potential impact of the new rules upon proxy campaigns. There were several dramatic struggles for control during the post-war years, and the tactics involved in some contests (*e.g.,* Montgomery Ward and New York Central Railroad) can conservatively be described as flamboyant. The new SEC rules require fuller disclosure of behind-the-scenes

79. See Cole, *Insiders' Liabilities Under the Securities Exchange Act of 1934,* 12 Sw. L.J. 147 (1958) and cases cited.
80. 219 F.2d 173 (2d Cir.), *cert. denied,* 349 U.S. 952 (1955).
81. *Id.* at 174-75. This theory was suggested by Berle & Means, The Modern Corporation and Private Property 244 (1933). *Cf.* Comment, 22 U. Chi. L. Rev. 895, 897 n.13 (1955).
82. See, *e.g.,* Insuranshares Corp. v. Northern Fiscal Corp., 35 F. Supp. 22 (E.D. Pa. 1940); Benson v. Braun, 141 N.Y.S.2d 286 (Sup. Ct. 1955); Gerdes v. Reynolds, 28 N.Y.S.2d 622 (Sup. Ct. 1941).
83. Hill, *The Sale of Controlling Shares,* 70 Harv. L. Rev. 986 (1957). See de Capriles & Prunty, *Corporations,* 1955 Ann. Survey Am. L. 332, 340-42 (1955).
84. Based on a review in each of the past several years of the proxy statements of over 100 of the larger corporations in the United States.

operations and the cost of proxy campaigns, and exclusion from proxy statements of charges of immoral conduct, unsupported accusations, etc. Speeches, press releases and radio and TV scripts are subject to the rules against misleading statements.[85]

Proxy contests can be a heavy burden upon the corporate treasury. The right of incumbents to reimbursement for the cost of soliciting proxies for their re-election has usually been sustained on the theory that management is entitled to explain to the shareholders its position on questions of policy.[86] During the past fifteen years, a new principle has been adopted for the reimbursement of the election expenses of successful insurgents, at least when policy questions are involved and shareholder approval is obtained.[87] In the leading case on this subject, the treasury of an important, but by no means "giant," corporation was tapped for more than \$260,000—\$134,000 for the expenses of incumbents and \$127,500 for those of the successful insurgents.[88]

The Montgomery Ward contest resulted in the invalidation of staggered elections of directors (through division of the board into classes) on the ground of conflict with Illinois' constitutional guarantee of cumulative voting.[89] The following year, Pennsylvania adopted what was essentially a contrary position,[90] although the two constitutional provisions are distinguishable on their exact language. Since then West Virginia[91] has followed Illinois, and Arizona[92] has followed Pennsylvania. Ohio has superseded an ill-advised decision that had upheld single-director classes despite a statutory requirement of cumulative voting;[93] the new corporation law provides that each class must consist of at least three directors.[94] Notwithstanding the Illinois view, this is a sensible compromise of the apparent policy conflict.[95]

When fundamental changes are involved, the approval of a majority or more of the shares is usually required.[96] With minor exceptions,

85. Current rules are published at 17 C.F.R. § 240.14 (1949). The 1956 amendments are set forth separately at 21 FED. REG. 577-581 (Jan. 26, 1956).

86. See, *e.g.*, Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78, 171 Atl. 226 (1934).

87. Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950) (applying Delaware law); Rosenfeld v. Fairchild Engine and Airplane Corp., 309 N.Y. 168, 128 N.E.2d 291 (1955).

88. Rosenfeld v. Fairchild Engine & Airplane Corp., *supra* note 87.

89. Wolfson v. Avery, 6 Ill.2d 78, 126 N.E.2d 701 (1955).

90. Janney v. Philadelphia Transp. Co., 387 Pa. 282, 128 A.2d 76 (1956).

91. State *ex rel.* Syphers v. McCune, 101 S.E.2d 834 (W. Va. 1958).

92. Bohannan v. Corporation Comm'n, 82 Ariz. 299, 313 P.2d 379 (1957).

93. Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E.2d 780 (1956).

94. OHIO REV. CODE ANN. § 1701.57 (Page Supp. 1956).

95. A single-director class is unacceptable to the minority because it completely frustrates cumulative voting; a two-director class is unacceptable to the majority because it permits holders of one share more than one-third of the stock to elect half of the directors.

96. For summary and discussion of the statutes, see Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROB. 307 (1958).

however, dissenting shareholders may not enjoin such changes;[97] their only effective remedy as a rule is the statutory right of appraisal which varies considerably from state to state. The most comprehensive statute is that of New York, which extends to employee stock plans, sales of assets other than in the regular course of business, mergers and consolidations, and changes affecting adversely the preferences, redemption rights, pre-emptive rights, or voting rights of outstanding shares.[98] There are also wide differences in the procedure to be followed and in the rights and liabilities of the parties at various stages of the appraisal process. In general, when the stock is listed and actively traded on a national securities exchange, the New York courts have regarded market value as controlling;[99] but other factors may enter into the appraisal value when the market is not sufficiently broad.[100]

VIII. SHAREHOLDERS' ACTIONS

Up to World War II, the most effective weapon of the small stockholder against abuses of power by self-perpetuating management was the derivative action.[101] Since 1944, however, the usefulness of the derivative action has been greatly reduced in some states by statutes ostensibly enacted to curb the evils of the "strike suit," and in other states by a court-imposed requirement of demand upon the shareholders to undertake the litigation against the accused directors. There have been also some judicial decisions tending to soften the burden of the new legislation; other decisions tend to aggravate it. It is fair to say, however, that the past fifteen years have seen a significant change in this aspect of shareholder control of management.

The pioneer New York statute, which in principle has been adopted in a half-dozen other important jurisdictions, combined the old federal "contemporaneous ownership" rule (originally adopted to reduce the burden of derivative litigation in the federal courts) with a new "security for expenses" provision. The former required the plaintiff to show that he was a shareholder at the time of the wrong of which he complained, or that the stock had since devolved upon

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97. *Ibid.* See also Gibson, *How Fixed Are Class Shareholder Rights?*, 23 LAW & CONTEMP. PROB. 283 (1958).

98. N.Y. STOCK CORP. LAW § 21 (1951) and sections referred to therein.

99. Application of Deutschmann, 281 App. Div. 14, 116 N.Y.S.2d 578 (1952). Application of Marcus, 273 App. Div. 725, 79 N.Y.S.2d 76 (1948).

100. Application of Silverman, 282 App. Div. 252, 122 N.Y.S.2d 312 (1953). For the Delaware view, see Heller v. Munsingwear, 33 Del. Ch. 593, 98 A.2d 774 (1953); Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 74 A.2d 71 (1950).

101. See Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944); Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1 (1947).

him by operation of law. The latter entitled the corporation, as a technical defendant, to demand that the stockholder plaintiff, if he owned less than five per cent or $50,000 worth of any class of stock, post security to reimburse the corporation for its litigation expenses (including attorney's fees) and similar expenses of any person that the corporation may be required to indemnify. (It is significant that New York's first indemnification statute for directors was enacted simultaneously.) By 1949, the constitutionality of "security for expenses" statutes, as well as their applicability in the federal courts, had been established.[102] The risk to the plaintiff inherent in security orders for many thousands of dollars reduced the number of derivative actions to a small percentage of the annual average before the war.[103]

One may wonder whether this restrictive legislation would have been enacted in New York if *Clarke v. Greenberg*[104] had been decided a few years earlier. In 1947, this case took the profit out of the "strike suit" by requiring the plaintiff in an earlier derivative action, who had sold his shares worth about $50 to the defendant directors for $9,000, to account to the corporation for the proceeds of the sale. Another possible loophole for private profit, *i.e.*, settlement in the form of payment of attorney's fees to plaintiff's counsel, was closed by the Second Circuit Court of Appeals the following year.[105]

In 1950, the hardship of the security requirement was tempered by a notable opinion of the highest New York court upholding "conditional" security orders, which allow the plaintiff a period of grace within which he may solicit the joinder of enough other shares to avoid the posting of security.[106] This decision was followed by holdings in the federal district court for the Southern District of New York (1) that the additional shareholders who join the action need not meet the "contemporaneous ownership" rule,[107] and (2) that identity of citizenship between such additional plaintiffs and the defendants will not destroy federal diversity jurisdiction.[108] Unfortunately, recent cases in the same court have imposed the *federal* "contemporaneous ownership" rule upon the additional plaintiffs.[109]

The California security statute differs from New York's in making

102. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).
103. Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 12 n.61, 31 (1947).
104. 296 N.Y. 146, 71 N.E.2d 443 (1947).
105. Certain-Teed Products Corp. v. Topping, 171 F.2d 241 (2d Cir. 1948).
106. Baker v. MacFadden Publications, Inc., 300 N.Y. 325, 90 N.E.2d 876 (1950).
107. FED. R. CIV. P. 23 (b). Fuller v. American Mach. & Foundry Co., 95 F. Supp. 764 (S.D.N.Y. 1951).
108. Weinstock v. Kallett, 11 F.R.D. 270 (S.D.N.Y. 1951).
109. Elkins v. Bricker, 147 F. Supp. 609 (S.D.N.Y. 1956); Kaufman v. Wolfson, 136 F. Supp. 939 (S.D.N.Y. 1955).

no distinction between large and small shareholders, and in requiring the posting of security only upon a pre-trial determination (a) that there is no reasonable probability that the action will be of benefit to the corporation, or (b) that the individual defendant who makes the motion did not participate in the transaction complained of.[110] However, the motion for security can be made by any defendant whether or not the corporation is liable to reimburse him,[111] and the plaintiff is denied the normal discovery process at the pre-trial hearing.[112] Thus a statute that in its face looks fairer than New York's turns out to be more harmful to the legitimate derivative action.

In states which do not have "security for expenses" legislation, such as Massachusetts and Delaware, the chief threat to the legitimate derivative action is an indiscriminate insistence that the plaintiff make a demand upon the shareholders before instituting his suit. The orthodox view is that such demand is necessary only if the subject matter of the derivative action is within the area of effective ratification by majority vote of disinterested shareholders. The early Massachusetts cases omitted this limitation,[113] but there is some indication of progress in the right direction.[114]

These restrictions on the derivative action have underscored the modern importance of sound analysis of the theory upon which the shareholder proceeds. In many situations a given state of facts may support either a derivative action asserting a right of the corporation (to which the above mentioned restrictions apply) or an "individual" action asserting the personal right of the plaintiff and other shareholders (to which those restrictions do not apply). The courts have not always made the correct distinction,[115] but the fault may lie with inadequate argument of counsel.[116]

To complete this part of the post-war survey, it is necessary to mention briefly two developments in the federal courts that will tend to facilitate certain derivative actions. The first is a long over-

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110. CAL. CORP. CODE ANN. § 834 (Deering 1953).

111. CAL. CORP. CODE ANN. § 834(b) (Deering 1953). Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 265 P.2d 1 (1954).

112. Melancon v. Superior Court, 42 Cal.2d 698, 268 P.2d 1050 (1954).

113. See, *e.g.*, Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951); S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E.2d 241 (1950).

114. Braunstein v. Devine, 149 N.E.2d 628 (Mass. 1958); Mayer v. Adams, 141 A.2d 458 (Del. 1958).

115. See Gordon v. Elliman, 306 N.Y. 456, 119 N.E.2d 331 (1954) (holding that a suit to compel declaration of dividends is derivative). For the better view, see Knapp v. Bankers Securities Corp., 230 F.2d 717 (3d Cir. 1956); Conviser v. Simpson, 122 F. Supp. 205 (D. Md. 1954).

116. See discussion of Gordon v. Elliman, 280 App. Div. 655, 116 N.Y.S.2d 671 (1952), in de Capriles, *Corporations*, 1952 ANN. SURVEY AM. LAW 388, 407 (1952). De Capriles & Reichardt, *Corporations, 1952 Survey of N.Y. Law*, 27 N.Y.U.L. REV. 1041, 1044 (1952).

due elimination of the procedural obstacles to the triple-damage derivative suit under the antitrust laws.[117] The second is the revision of the rules on the alignment of the corporation as plaintiff or defendant for the purposes of diversity jurisdiction.[118]

IX. FOREIGN CORPORATIONS

In a space of twelve years, 1945-1957, the United States Supreme Court has for all practical purposes eliminated, as to federal due process, the "doing business" test for jurisdiction over foreign corporations. The standard of "fair play and substantial justice," enunciated in the *International Shoe* case,[119] has expanded to the point where a single contact with the forum, as in the *McGee* case,[120] may be sufficient to sustain service of process.[121] The factual rationale of this development lies in the growth of national corporations, operating in a nation-wide market; conceptually, the acceptance or rejection of state jurisdiction is based on *forum non conveniens* considerations. Some states have taken full advantage of this concept;[122] others, notably New York, have continued to apply the "doing business" test, using the mechanical "solicitation plus" standard for this purpose.[123]

On the whole, the tradition against interference by the courts of a state in the internal affairs of foreign corporations has been observed. There is still concern, however, with the problem of the pseudo-foreign corporation, organized in another state but functioning in all respects as a domestic corporation.[124]

X. CONCLUSION

The foregoing survey, it is believed, amply demonstrates the kaleidoscopic variety of the corporate developments of the past fifteen years, even though for obvious reasons much of the detail has had to be omitted. General conclusions are difficult to draw.

It seems likely that the success of capitalist enterprise in this period and the self-imposed improvement in standards of corporate

117. Fanchon & Marco, Inc. v. Paramount Pictures, 202 F.2d 731 (2d Cir. 1953), *reversing* 107 F. Supp. 532 (S.D.N.Y. 1952), which relied on United States Supreme Court precedents decided prior to the 1938 enactment of the Federal Rules of Civil Procedure.

118. See Swanson v. Traer, 354 U.S. 114 (1957); Smith v. Sperling, 354 U.S. 91 (1957).

119. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

120. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

121. See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

122. See, *e.g.*, MD. ANN. CODE art. 23, § 88(b) (1951); N.C. GEN. STAT. § 55-38:1 (Supp. 1957); VT. STAT. § 1562 (1947). See also Gordon Armstrong Co. v. Superior Court, 160 Cal. App. 2d 211, 325 P.2d 21 (1958), for a good example of the application of modern principles.

123. See Miller v. Surf Properties, Inc., 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

124. See Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955).

management have retarded the underlying trend toward expansion of the role of government in the regulation of economic affairs. There has been no occasion for new dramatic statutory enactments of the type that were born out of the great depression; academic pleas for mild but tighter controls over managerial power have evoked little response from state legislatures. A few judicial decisions have suggested new directions in the path of managerial accountability, but it cannot be said that substantial progress has really been made toward a "socially responsible" capitalism. Nevertheless, it would be a mistake to suppose that corporation law and practice have become stable or static subjects. The evidence of their dynamic quality, whether for good or evil, is clear from the record.