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Edward R. Hayes

EXTENT OF THE LEGISLATURE'S RESERVE POWER TO CHANGE COMMON LAW ATTRIBUTES OF CORPORATIONS

EDWARD R. HAYES*

Two recent cases, substantially similar in many facts but reaching opposite results, raise questions as to what the common law attributes of corporations are and whether they may be changed either by action of the legislature itself or with legislative permission by action of less than all stockholders of a corporation. In the first, *Farris v. Glen Alden Corp.*,[1] a minority shareholder of Glen Alden sued to enjoin what in form was the purchase by it of all assets of List Industries. Glen Alden was paying for these assets with its stock and by assuming List's liabilities. The Pennsylvania court held this transaction was a *de facto* merger and should be enjoined because of noncompliance with the state's statutory procedure for effecting a merger. While some support for this holding can be found in earlier decisions,[2] the Corporation Committee of the Pennsylvania Bar Association had persuaded the state legislature in 1957 to amend the corporation law so, it was hoped, a different conclusion would be reached.[3] This amendment denied the rights and remedies of a dissenting stockholder to stockholders of a corporation purchasing assets of another by issuance of stock. The lower court had held the amendment inapplicable to the Glen Alden "purchase," but it had intimated that the amendment would be unconstitutional if it eliminated the common law right of a shareholder to dissent from a purchase by his corporation of the assets of another corporation and to then have his stock repurchased. The supreme court agreed that the amendment was inapplicable but did not pass on its constitutionality.[4]

*Professor of Law, Drake University.

1. 393 Pa. 427, 143 A.2d 25 (1958). Comments on the case appear in 59 COLUM. L. REV. 366 (1959), and 107 U. PA. L. REV. 420 (1959); it is also the principal case discussed in Note, *Corporations: Sale of Assets or De Facto Merger?* 47 CALIF. L. REV. 180 (1959), and is referred to in De Capriles, *1958 Annual Survey of American Law: Corporations*, 34 N.Y.U.L. REV. 337, 362 (1959).

2. Troupiansky v. Henry Disston & Sons, Inc., 151 F. Supp. 609 (E.D. Pa. 1957); Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954); Bloch v. Baldwin Locomotive Works, 75 Pa. D. & C. 24 (C.P. 1950).

3. Hackney, *The Pennsylvania Business Corporation Law Amendments*, 19 U. PITT. L. REV. 51 (1957); Mulford, *Corporate Distributions to Shareholders and Other Amendments to the Pennsylvania Business Corporation Law*, 106 U. PA. L. REV. 536, 561 (1958). Both authors are members of the Committee. Hackney, at 84, wrote: "[The amendments] have been added to make it clear that an issue of stock for assets is not a *de facto* merger so as to give the stockholders of the *acquiring* corporation appraisal rights, thus overruling Bloch v. Baldwin Locomotive Works. . . ." See also 61 ANN. REP. PA. BAR ASS'N 277, 284 (1957).

4. The court said that whatever the committee's intent there was no evidence the legislature had the same intent and, furthermore, that the

Several months later a minority stockholder in Sun Chemical Corporation, a Delaware corporation, sued to compel it to rescind a purchase, for its stock, of all assets of another corporation.[5] Delaware law permits the corporation to sell its stock for property, with the judgment of the board of directors conclusive as to value, absent actual fraud.[6] The Delaware courts denied the stockholder any relief, refusing to consider the transaction as a *de facto* merger and, by implication, suggesting either that the stockholder has no common law right to dissent from such a transaction and obtain repurchase of his stock or that statutes have served to eliminate that right.[7]

Does a stockholder have a right, at common law, to dissent and have his stock repurchased when his corporation purchases the assets of another business? If he does, is this a common law attribute of corporations? What other common law attributes may there be? To what extent has a legislature power to alter or modify these attributes, or to authorize alteration or modification by the holders of a majority of a corporation's stock? The discussion will be directed first to what attributes a corporation has apart from those bearing on its relations with its stockholders; next, to what attributes are connected with that relationship; then, to what powers the legislatures may have to affect those attributes; and thereafter, to consider whether the two cases introducing this article are in conflict and how legitimate complaints of minority stockholders might better be handled.

I. CORPORATE ATTRIBUTES

Concepts of the corporation vary from legal to socio-economic. There are a number of legal theories as to the nature of a corporation.[8] And there is not entire agreement as to the attributes of a corporation as such.

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language used was inapt to achieve the committee's purpose. It would be necessary, thought the court, to have the statute provide that a purchase of assets which, under the circumstances, amounted to a *de facto* merger entitled the dissenting stockholder of the purchaser to no appraisal rights. See 107 U. PA. L. REV. 420 (1959).

5. The corporation whose assets Sun was purchasing, Ansbacher-Siegle Corporation, was wholly owned by Sun's president, who also owned 2.8% of Sun's common stock. Sun was approximately fourteen times as large as Ansbacher-Siegle.

6. DEL. CODE ANN. tit.8, § 152 (1953).

7. Heilbrunn v. Sun Chemical Corp., 150 A.2d 755 (Del. 1959), *affirming* 146 A.2d 757 (Del. Ch. 1958). Both courts denied defendant's motion to dismiss a second alleged cause of action charging breach of fiduciary duty on the part of the firm's president.

8. *Compare* CARTER, THE NATURE OF THE CORPORATION AS A LEGAL ENTITY (1919), *with* DRUCKER, CONCEPT OF THE CORPORATION (1946). See also BERLE, STUDIES IN THE LAW OF CORPORATE FINANCE 23 (1928); Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 347 (1911).

Blackstone said there are five powers inseparably incident to every corporation:

> 1. To have perpetual succession. . . . 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors: which two are consequential to the former. 4. To have a common seal. . . . 5. To make by-laws for the better government of the corporation . . . .[9]

According to Dewing, the corporation embodies four ideas:

> It is the formal expression of an agreement by two or more persons; it receives the creating touch of a sovereign power—the king, the state or a representative of the state; it has, in itself and apart from its members, such reality that it can acquire and hold money and property, enter into contracts, sue and be sued both in law and equity, and otherwise assume the responsibilities of a property-owning human being; and finally, it has a length of life not subject to the mortal limitations of human beings.[10]

Assuming, at this point, that a corporation results from a contract between incorporators, and with the state of incorporation, the other attributes mentioned by Blackstone and Dewing can often be obtained by unincorporated associations and may be denied to corporations or rejected by the associates on behalf of the corporation.[11] A seal may once have been a necessity, but is no longer essential.[12] Corporate powers to hold property, especially real estate, have been limited;[13] the power to contract may be restricted.[14] The power of perpetual succession has not necessarily meant unlimited life but refers to the ability of the corporation to exist though a stockholder should die and the thought that ownership interests are freely alienable without termination of the organization. In many states corporate existence has been limited to a definite term of years, although

9. 1 BLACKSTONE, COMMENTARIES 475-76 (7th ed. 1773).

10. 1 DEWING, FINANCIAL POLICY OF CORPORATIONS 4-5 (4th ed. 1941).

11. 1 FLETCHER, PRIVATE CORPORATIONS §§ 5-14 (perm. ed. 1931); Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 347, 350-51 (1911); Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 116 (1888).

12. 1 FLETCHER, *op. cit. supra* note 11, § 9; Williston, *supra* note 11, at 118.

13. 1 FLETCHER, *op. cit. supra* note 11, § 11. In some states corporations could not own real estate other than that used in connection with their manufacturing, mining, retailing or similar activities. In Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 3 A.L.R. 413 (1919), noted for its holding compelling declaration of a dividend, the plaintiff unsuccessfully argued that a Michigan statute which limited the capital stock of a corporation to not over $50,000,000 meant that corporate capital and surplus could not exceed that amount.

14. This most commonly occurs as a restriction of foreign corporations doing business in a state without properly qualifying to do business. STEVENS, CORPORATIONS § 207 (2d ed. 1949). See Hudson, *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3, 6 (1958).

renewal of life is permitted.[15] The associates may agree to restrict transferability of stock and probably could agree that corporate existence would cease upon the death of any or of a specified stockholder.[16]

II. CORPORATE-STOCKHOLDER ATTRIBUTES

Many attributes have been suggested as arising from the relationship of the corporation to its stockholders and the stockholders' relation *inter sese*. These include: limited liability for corporate debts; pre-emptive rights in additional issues of stock; the right to insist that the purposes of the corporation be confined to those stated in the charter; the right to make or approve amendments to the charter; the right to dissent from attempts to alter the corporation through merger, consolidation or sale or acquisition of substantially all the assets of a business; power to dissolve and to share in assets on dissolution; power to examine books and records of the corporation; power to vote, sometimes to cumulate votes; a right to dividends; a right to sell one's own stock; and power to act for the corporation either as plaintiff in a derivative suit or by defending actions against the corporation.[17]

Limited liability of stockholders for corporate debts is a statutory matter today and for many years has been covered either in general statutes or in charters granted specially by legislatures. There appears to be little or no direct authority as to the existence of a common law limited liability. Writers are not in complete agreement on the point.[18] Most courts which considered the question have assumed the

15. BALLANTINE, CORPORATIONS § 307 (rev. ed. 1946).
16. 2 O'NEAL, CLOSE CORPORATIONS §§ 7.01-7.29, 9.06 (1958).
17. See SEARS, THE NEW PLACE OF THE STOCKHOLDER 198-202 (1929); Schmidt, *Constitutional Limitations upon Legislative Power to Alter Incidents of the Shareholder's Status in Private Corporations*, 21 ST. LOUIS L. REV. 12 (1935).
18. Note, *The Iowa Nonprofit Corporation: Personal Liability of Members; Dissolution*, 8 DRAKE L. REV. 142, 143-44 n.10 (1958) states: "Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*, 9 COLUM. L. REV. 285 (1909), at 302, refers to the 'so-called "common-law" rule of limited liability,' and at 302-05 discusses unlimited liability companies. Stevens, *Stock Issues Under the Uniform Business Corporation Act*, 13 CORNELL L. Q. 399 (1928), cites Myers v. Irwin . . . [note 19 *infra*] and at 400 says: 'However, the limitation of the individual liability of shareholders is by no means an inseparable incident of incorporation. Immunity from individual liability has not always been the rule, and today there are statutes under which full liability of shareholders is either optional or compulsory.' Warren, *Safeguarding the Creditors of Corporations*, 36 HARV. L. REV. 509 (1923), at 519, says: 'Members are not even liable to a limited extent. The corporation is liable, and it is the only legal unit that is liable. There has never been a decision by an English court in violation of this principle.' Warren does point out, however, that according to 1622 minutes of the Virginia Company, which had no provision regarding member liability or non-liability, the directors disagreed as to the legal consequence; and he implies that the rule might be different for joint stock corporations than for other chartered companies. Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149 (1888) says, at 160, 'No doubt it has been settled for a long time that individual members are not liable for the debts of a

common law rule to be one of limited liability, but the assumption usually has been unnecessary to the ultimate decision.[19]

The stockholder's pre-emptive right is a prior right or option to subscribe to stock being issued by the corporation, in proportion to his holding, before the stock is issued to the public. This right has usually

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corporation,' and cites Myers v. Irwin, but at 162 he says, 'Indeed, there is no case decided before the present century which is inconsistent with the theory that members of a corporation are thus liable, though very possibly that idea became contrary to the general understanding.' None of the articles cite either Terry v. Little or Pollard v. Bailey [note 19 *infra*]."

Machen, *Corporate Personality,* 24 HARV. L. REV. 347, 350 (1911), says that limited liability is not a criterion of corporateness.

The satirical comments of Sir W. S. Gilbert, in his ballad on "limited liability," written after passage of the British Companies Act of 1863, indicated that some people in England did not consider limited liability automatically to result from incorporation. The ballad is reprinted in BERLE & WARREN, CASES AND MATERIALS ON THE LAW OF BUSINESS ORGANIZATIONS (CORPORATIONS) 206 (1948).

19. In several cases in which the court stated or assumed that limited liability was the common law rule, the only issue before the court was interpretation of a statutory or legislatively granted charter provision relating to limited liability. Terry v. Little, 101 U.S. (11 Otto) 216, 217 (1879); Pollard v. Bailey, 87 U.S. (20 Wall.) 520, 526 (1874); Deming v. Bull, 10 Conn. 409 (1835) (charter provided for unlimited liability; stockholder contended this meant his liability on any one claim was proportional to his percentage of stock ownership, but court held his liability unlimited so far as creditors were concerned although as between all the stockholders his responsibility might be pro rated); Shafer v. Moriarty, 46 Ind. 9 (1874); Corning v. McCullough, 1 N.Y. (1 Comst.) 47 (1847) (six-year statute of limitations pertaining to contract actions, rather than three-year statute pertaining to claims founded on statutes providing for forfeiture or cause where the benefit is limited to the party aggrieved, held applicable to claim based on limited liability statutes); New England Commercial Bank v. Stockholders of the Newport Steam Factory, 6 R.I. 154 (1859). The two Supreme Court cases cited were both written by Chief Justice Waite; the second cites the first as authority, but the first cites no authority. In People *ex rel.* National Exp. Co. v. Coleman, 133 N.Y. 279, 31 N.E. 96 (1892), a joint-stock company sought review of an assessment taxing its capital as if it were a corporation. It was argued that as the legislature had granted so many corporate attributes to joint-stock companies, they were corporations; the court said this was not so, for limited liability of members was an essential, and common law, attribute of a corporation, and the legislature had not eliminated individual liability of the joint-stock associate. The case most frequently cited for common law limited liability is Myers v. Irwin, 2 S. & R. 367 (Pa. 1816), a case which turned on whether a particular unincorporated bank had become incorporated by implication by a statute which provided that if any association be formed for banking purposes, every member should be individually and personally liable for its debts. The court thought that the statute did not have the effect contended for "because the personal responsibility of the stockholder is inconsistent with the nature of a body corporate." 2 S. & R. at 371.

On the other hand, a South Carolina chancellor in 1826 and the appellate court reviewing his decision in 1828, assumed that the individual shareholder was fully liable unless the legislature provided otherwise. Hume v. Winjaw & Wando Canal Co., 1 Car. L. J. 217 (1830), reprinted in 4 AMER. L. MAG. 92 (1844). IOWA CODE § 491.5 (1958) in part provides that articles of incorporation shall contain a provision "whether private property is to be exempt from corporate debts," which may imply a belief that there is no common law limited liability. The new Iowa Business Corporation Law, Iowa Laws 1959, ch. 321, § 24, limits shareholder liability to the unpaid portion of the consideration for which his shares were issued or are to be issued.

been held to extend only to newly authorized issues of shares.[20] The court in the first case recognizing a right of this type said the stockholders were partners and when the capital of the corporation was increased all shareholder-partners should share in the beneficial opportunity presented.[21] The pre-emptive right is usually considered as a protection against dilution of voting power and against issuance of shares at an inadequate price to favored persons. In the closely held corporation the right is especially important to prevent dilution of an interest, although not always effective to accomplish that objective.[22] Where the stock of a corporation is widely held, dilution of voting power may be inconsequential, and the right may serve only to provide financial bargains to existing stockholders.[23] Proper recognition by the publicly held corporation of the varied rights in a new issue belonging to shareholders of different classes becomes difficult. Because of this fact and of a feeling by some that claims to pre-emptive rights are often raised by "pirates," the doctrine has been

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20. BALLANTINE, CORPORATIONS § 209 (rev. ed. 1946); 11 FLETCHER, PRIVATE CORPORATIONS § 5136 (rev. ed. 1958); LATTIN, CORPORATIONS 424 (1959); 1 O'NEAL, CLOSE CORPORATIONS § 3.39 (1958); STEVENS, CORPORATIONS § 111 (2d ed. 1949); Morawetz, *The Pre-emptive Right of Shareholders*, 42 HARV. L. REV. 186 (1928); Comment, 5 ST. LOUIS U. L. J. 297 (1958). Usually no pre-emptive right is recognized where the stock issued is treasury stock, or is issued in connection with a merger or to pay for property purchased by the issuer. At one time it was thought that originally authorized but unissued stock could later be issued without recognition of pre-emptive rights, but several cases suggest otherwise. Ross Transp., Inc. v. Crothers, 185 Md. 573, 45 A.2d 267 (1946); Dunlay v. Avenue M Garage & Repair Co., 253 N.Y. 274, 170 N.E. 917 (1930); Drinker, *The Pre-emptive Right of Shareholders to Subscribe to New Shares*, 43 HARV. L. REV. 586, 603 (1930). Questions of applicability of pre-emptive rights also arise when the stock issued is of a new class, or is of one class and the corporation has several classes outstanding, or when the security issued is convertible into stock.

21. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156 (1807).

22. The owner of 20% of the outstanding stock in a corporation failed to exercise his pre-emptive right to subscribe to new shares, which would have cost $136,000, and he attempted to enjoin the new issue, alleging that he did not have the necessary funds. The issue was permitted, even though his interest was thereby reduced to 1/175. Hyman v. Velsicol Corp., 342 Ill. App. 489, 97 N.E.2d 122 (1951). See also Bellows v. Porter, 201 F.2d 429 (8th Cir. 1953); Note, *Close Corporations—Bad Faith of Majority*, 35 N.C.L. REV. 271, 272n.11 (1957), refers to a comment, attached to a bill introduced in the North Carolina legislature, that "actually, perhaps more 'squeezes' of shareholders (particularly the family of a deceased substantial shareholder) have been engineered by use of pre-emptive rights, at far below value, than by their denial." See Morawetz, *The Pre-emptive Right of Shareholders*, 42 HARV. L. REV. 186, 188 (1928); Note, 1959 DUKE L. J. 116.

23. Some corporations, such as those in the Bell Telephone System, frequently utilize pre-emptive rights in issuing new securities, even though state law may permit denial of such rights. As the issue price often is less than the market price for the security, the pre-emptive right may be sold at a profit. This opportunity to profit may also tend to maintain a good market for the corporation's already outstanding shares.

criticized,[24] and statutes in many states permit corporations in their charters to limit or deny pre-emptive rights.[25]

Corporate assets should not be used for purposes other than those explicitly or impliedly agreed to in the corporate contract. As Ballantine puts it:

> Each shareholder or member is entitled to say to the others and to the corporation: "I became a member in a concern formed for certain purposes, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, or to hold me to any other terms."[26]

An early American exposition of this view is in *Zabriskie v. Hackensack & N. Y. R.R.*[27] The company, originally chartered to build a five-mile railroad between Hackensack and an existing railroad, which it had completed and was operating, obtained an amendment to its charter authorizing a twelve-mile extension of the road from Hackensack through more difficult terrain to a little used branch of the Erie Railroad. Zabriskie, an objecting stockholder, successfully enjoined building of the extension. The New Jersey court in holding for him relied in part on an English decision, *Natusch v. Irving.*[28] Both cases argue that in a partnership fundamental changes in the nature of the business may not be made except with unanimous consent of the partners and that the same rule applies to corporations. Some courts used similar reasoning to prevent corporate contributions to charitable or civic organizations.[29] These decisions indicate that the stockholder has the common law right to insist that the corporate purposes be confined to those stated in the charter and that his con-

24. 1 O'NEAL, CLOSE CORPORATIONS § 3.39 (1958); Ballantine, *Questions of Policy in Drafting a Modern Corporation Law,* 19 CALIF. L. REV. 465 (1931); Drinker, *The Pre-emptive Right of Shareholders to Subscribe to New Shares,* 43 HARV. L. REV. 586 (1930); Frey, *Shareholders' Pre-emptive Rights,* 38 YALE L. J. 563 (1929); Note, 5 ST. LOUIS U. L. J. 297 (1958).

25. BALLANTINE, CORPORATIONS § 209 (rev. ed. 1946); LATTIN, CORPORATIONS 425, 429 (1959); 1 O'NEAL, CLOSE CORPORATIONS § 3.39 (1958). In some states the statute eliminates pre-emptive rights unless specifically provided in the articles. *E.g.,* CAL. CORP. CODE § 1106 (1953). In others, the statute merely permits the articles to contain provisions eliminating pre-emptive rights. *E.g.,* DEL. CODE ANN. tit. 8, § 102(b)(3) (1953). See Ballantine, *Questions of Policy in Drafting a Modern Corporation Law,* 19 CALIF. L. REV. 465, 469 (1931); Note, 5 ST. LOUIS U. L. J. 297 (1958).

26. BALLANTINE, CORPORATIONS § 103 at 258 (rev. ed. 1946).

27. 18 N.J. Eq. 178, 90 Am. Dec. 617 (1867). *Accord,* Kenosha, R. & R.I. R.R. v. Marsh, 17 Wis. 13 (1863).

28. 2 Coop. T. Cott. 358, 47 Eng. Rep. 1196 (Ch. 1824); GOW, PARTNERSHIP, App. II, at 404 (2d Eng. ed. 1825).

29. Davis v. Old Colony R.R., 131 Mass. 258, 41 Am. Rep. 221 (1881); BALLANTINE, CORPORATIONS § 85 (rev. ed. 1946). See cases on corporate giving listed in ANDREWS, CORPORATION GIVING 317-27 (1952). See also Crane, *Enlargement of Corporate Authority Under the Reserved Power,* 15 U. PITT. L. REV. 427 (1954).

sent must be obtained to amendments to the charter which fundamentally change the stated purposes.[30]

The character of the enterprise in which a stockholder invested may be changed in various other ways. His corporation may merge or consolidate with another. That other may be active in the same, in related or in different business endeavors. His corporation may sell its assets to another, for stock in the other. Or his corporation may purchase the assets of another. Has the stockholder any common law right to object to any of these transactions? Many years ago the Pennsylvania legislature passed a statute authorizing a specially chartered railroad (the charter was not subject to any reserved power to alter, amend or repeal) to merge with another railroad, but the statute failed to provide that stockholders dissenting from the merger were entitled to have their stock repurchased. One stockholder sued to enjoin the merger, arguing that this fundamental change required his consent so that he could not be compelled to become a stockholder in a different company. In *Lauman v. Lebanon Valley R.R.*,[31] the state court refused to enjoin the merger but held that the dissenter did have a common law right to be paid the value of his stock. The court's theory was that unanimous consent is not necessary to dissolution, that merger would result in dissolution of the old corporation, and therefore unanimous consent to merger was unnecessary.[32] However, the court assumed it would be unconstitutional to compel the dissenter to take stock in the new corporation[33] and for this reason held that he was entitled to have his old stock repurchased even though the statute did not provide such a remedy. As most states now have merger statutes which permit a majority to authorize merger and provide for repurchase of dissenters' shares, the question

30. See Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. Q. 420 (1930). Warren points out that in Black v. Del. & Raritan Canal Co., 22 N.J. Eq. 130 (1871), the author of the *Zabriskie* opinion said a majority could dissolve. Warren, *Voluntary Transfers of Corporate Undertakings*, 30 HARV. L. REV. 335, 357 (1917).

31. 30 Pa. 42 (1858).

32. Unanimous consent to dissolve is unnecessary where the association is a partnership, although in some circumstances dissolution by the action of one partner may be a breach of contract for which damages will lie. UNIFORM PARTNERSHIP ACT § 31; CRANE, PARTNERSHIP §§ 74-75 (2d ed. 1952). It is not so clear that this is true where the association is a corporation. See notes 48-51 *infra*, and text supported thereby. *But see* Warren, *Voluntary Transfers of Corporate Undertakings*, 30 HARV. L. REV. 335 (1917).

The *Lauman* court's refusal to enjoin the merger has been criticized. 2 COOK, CORPORATIONS § 502 (8th ed. 1923); Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. Q. 420, 423 (1930).

33. In Lauman v. Lebanon Valley R.R., 30 Pa. 42 (1858), the court, discussing compelling a dissenter to take the stock of the surviving corporation, said at 47: "We cannot presume that the legislature intended to assume or exercise any unconstitutional power over private contracts, but only that, supposing that they were granting a valuable privilege, they omitted to make provision for those who should refuse to accept it."

of common law rights in connection with mergers usually is limited to cases involving corporations organized prior to merger statutes.[34] Fewer states have statutes concerning sales of substantially all assets of a corporation, and several that have statutes do not provide for the purchase of stock of dissenters.[35] Usually where there is no statutory authority to merge, acquisition of assets is used to accomplish the same objectives.[36] There is a definite split among courts on the question of whether a stockholder objecting to a sale of all assets of his corporation has the common law right to prevent such a sale.[37] Some courts say that he cannot be compelled to become a stockholder in the purchasing corporation; and, therefore, even though the assets were sold for the purchaser's stock, the dissenter must get cash.[38] Ballantine feels the better view is to deny power to object to a sale of substantially all assets, at least where the sale was not to freeze out a minority shareholder.[39] In most states the stockholder's objections to a good faith sale will be ignored where

34. The argument has been made that merger involved dissolution and that under his statutory appraisal right the dissenter with preferential rights on dissolution should receive the amount called for under those rights rather than the lower current value of his shares. This argument was upheld in Petry v. Harwood Elec. Co., 280 Pa. 142, 124 Atl. 302, 33 A.L.R. 1249 (1924), but was rejected in Anderson v. Cleveland-Cliffs Iron Co., 87 N.E.2d 384 (C.P. Ohio 1948). Apparently since *Petry* it has been the practice in Pennsylvania to provide in the corporate contract that merger shall not be treated as a dissolution. DODD & BAKER, CASES ON CORPORATIONS 1332 n.7 (2d ed. 1951).

See discussion of cases which allowed appraisal without statutory authority and interpretative problems present in various statutes authorizing appraisal in Lattin, *Remedies of Dissenting Stockholders under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931).

MD. ANN. CODE art. 23, § 73 (1957), denies appraisal to shareholders of the "surviving corporation" in a merger unless there is a substantial effect upon their contract rights.

35. BALLANTINE, CORPORATIONS §§ 282, 286 (rev. ed. 1946); Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 CALIF. L. REV. 465, 482 (1931); Hills, *Consolidation of Corporations by Sale of Assets and Distribution of Shares*, 19 CALIF. L. REV. 349 (1931); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROB. 307, 311 (1958); Weiner, *Payment of Dissenting Shareholders*, 27 COLUM. L. REV. 547 (1927); Note, 67 YALE L. J. 1288 (1958); 47 CALIF. L. REV. 180 (1959).

36. See authorities cited in note 35 *supra*.

37. BALLANTINE, CORPORATIONS §§ 281, 283 (rev. ed. 1946). See Warren, *Voluntary Transfers of Corporate Undertakings*, 30 HARV. L. REV. 335, 353-66 (1917); Note, 67 YALE L. J. 1288 (1958).

38. Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 Atl. 54 (1928); Inhabitants of Waldoborough v. Knox & L. R.R., 84 Me. 469, 24 Atl. 942 (1892); Ringler v. Atlas Portland Cement Co., 301 Pa. 176, 151 Atl. 815 (1930); Koehler v. St. Mary's Brewing Co., 228 Pa. 648, 77 Atl. 1016, 139 Am. St. Rep. 1024 (1910). Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921) permitted a stock distribution over a dissenter's objections where the stock to be distributed was listed and actively traded on a national exchange—it could be treated as the equivalent of money. See BALLANTINE, CORPORATIONS § 283 (rev. ed. 1946).

39. BALLANTINE, CORPORATIONS § 281 (rev. ed. 1946). See LATTIN, CORPORATIONS 511 (1959).

his corporation is in failing condition.[40] Until recently there was little authority regarding a stockholder's right to object when his corporation purchased substantially all the assets of another, and it seems generally to have been doubted that he could object. However, a recent federal district court decision in Pennsylvania, following a theory derived from the *Lauman* case, held that the shareholder of the purchaser did have a common law right to dissent.[41] One of the objectives of the Pennsylvania Bar Association's proposed amendments, which as mentioned earlier were adopted, was to overrule this decision.[42] In the *Glen Alden* case the lower court said the statute would be unconstitutional if it had this effect,[43] but the supreme court by treating the transaction as a *de facto* merger avoided the question. Actually, in *Glen Alden* it might have been argued that although the transfer of assets was in form a *purchase* by Glen Alden, in substance it was a *sale* instead—for Glen Alden issued so much stock that the selling corporation, List, owned more than half the shares of Glen Alden.[44] List was a highly diversified holding company, none of whose activities was similar to Glen Alden's. As a result the interest of the Glen Alden stockholder would be much diluted and he would own stock in a much different company. Perhaps *Sun Chemical* is distinguishable in this aspect. There the company purchased was smaller, engaged in related activities, and stock ownership was not so severely diluted.[45] (Or is this just a little bit pregnant?)

Although *Natusch v. Irving* and *Zabriskie* drew parallels between

40. Price v. Holcomb, 89 Iowa 123, 56 N.W. 407 (1893); Phillips v. Providence Steam-Engine Co., 21 R.I. 302, 43 Atl. 598 (1899); BALLANTINE, CORPORATIONS § 281 (rev. ed. 1946). *Contra* (at least as to railroad corporations), South W. R.R. v. Benton, 206 Ga. 770, 58 S.E.2d 905 (1950).

41. Bloch v. Baldwin Locomotive Works, 75 Pa. D. & C. 24 (C.P. 1950); see also Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954).

42. See note 3 *supra*.

43. Only a concurring justice so held, but the majority opinion intimates that the statute if so interpreted would be unconstitutional. Brief for the Committee on Corporation Law of the Pennsylvania Bar Ass'n, p.1, Farris v. Glen Alden Corp., 393 Pa. 427, 143 A.2d 25 (1958).

44. Prior to the attempted sale List owned 38.5% of Glen Alden's outstanding shares, and had placed three directors on Glen Alden's board. The acquisition of these shares had been financed and Glen Alden was to assume the obligations remaining under the financing arrangement. After the sale List would own 76.5% of Glen Alden's stock (its original acquisition not being included in the assets sold) and would have eleven of the seventeen directors. If the transaction had been in form a purchase by List, several adverse tax consequences would have followed. See 47 CALIF. L. REV. 180 (1959); 59 COLUM. L. REV. 366 (1959); 107 U. PA. L. REV. 420 (1959).

45. List Industries was considerably larger than Glen Alden, and engaged in fields different from those in which Glen Alden operated. Both Delaware courts attempt to distinguish *Glen Alden* in part on these grounds. Heilbrunn v. Sun Chemical Corp., 150 A.2d 755, 758 (Del. 1959); 146 A.2d 757, 759 (Del. Ch. 1958). Plaintiffs, who owned 1,000 shares of Sun, had their interest diluted from a 1/1, 196,283 holding to 1/1, 421,283.

partnership and corporation law[46] with respect to unanimous consent to fundamental changes, a similar parallel has not been drawn with respect to the right of one of the associates to have the organization dissolved. A partner has the absolute right to have his partnership dissolved at any time, although in some circumstances dissolution may be a breach of a contract for which damages will lie.[47] But no stockholder has the right at common law to compel dissolution of his corporation unless permitted by the corporate agreement.[48] Perhaps the concept of corporate immortality has been influential here. Equity courts have frequently held also that they lack power to decree dissolution of a solvent corporation on the demand of a minority shareholder where no statute provides such power.[49] There was even some uncertainty in early decisions whether dissolution could be effected by majority vote of stockholders, at least absent provision therefor in the charter.[50] If dissolution does occur, the shareholders are to be treated alike and to receive their pro rata share of assets where distribution is in kind or cash, unless the corporate agreement or statute provides otherwise.[51]

At common law the shareholder has the right to inspect corporate books and records, either in person or through representatives such as an accountant or an attorney. In order to protect the interests of other shareholders and of the corporation this right is limited rather than absolute. The inspection must be at a reasonable time, and the shareholder must be acting in good faith for legitimate purposes, which can be either in the corporate interest or in protection of

46. Courts have spoken of corporations as partnerships and of stockholders as partners in various instances where the corporation was recognized as a separate entity, and seemingly considered them to be treated similarly. Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156 (1807); Jones v. Concord & M. R.R., 67 N.H. 119, 131, 38 Atl. 120, 121 (1892) (Doe, C.J., said: "Before the [merger, each], being business corporations, were partnerships, with common-law partnership rights and liabilities, modified in some respect by statute."); Dow v. Northern R.R., 67 N.H. 1, 36 Atl. 510 (1887) (Doe, C.J.). But see: Livingston v. Lynch, 4 Johns. Ch. 573 (N.Y. 1820) (Kent, Chancellor).

47. See note 32 *supra.*

48. BALLANTINE, CORPORATIONS §§ 301-06 (rev. ed. 1946); LATTIN, CORPORATIONS 551, 556 (1959); STEVENS, CORPORATIONS §§ 198-99 (2d ed. 1949); Note, *Rights of the Minority Stockholders to Dissolve the Closely Held Corporation,* 43 CALIF. L. REV. 514 (1955). The Note suggests allowing a minority stockholder even broader powers to have the corporation dissolved than are presently recognized.

49. BALLANTINE, CORPORATIONS § 304 (rev. ed. 1946); LATTIN, CORPORATIONS 556 (1959); STEVENS, CORPORATIONS § 199 (2d ed. 1949).

50. LATTIN, CORPORATIONS 551 (1959).

51. BALLANTINE, CORPORATIONS § 319 (rev. ed. 1946); LATTIN, CORPORATIONS 568 (1959). Where an objective of the dissolution is sale of the assets to the majority shareholders to exclude the minority from a profitable business, an attempt to satisfy the minority by a cash payment may be unsuccessful. See Tanner v. Lindell Ry., 180 Mo. 1, 79 S.W. 155 (1904); Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 123 N.E. 148 (1919); 2 O'NEAL, CLOSE CORPORATIONS § 8.07 (1958).

his own interest as a stockholder.[52] Several attempts by Delaware corporations to include provisions in their articles waiving this right have been held ineffective.[53] Some states have adopted statutes which merely restate the common law rule; other statutes name records that may be inspected, or make inspection absolutely available, or absolutely available to stockholders owning a specified percentage of the stock. In some instances the common law rule has been applied to records or to stockholders not covered by the statute.[54]

Only in Illinois are all stockholders, whether owners of preferred or of common stock, entitled to vote in corporate elections.[55] Other states permit nonvoting shares.[56] In some the nonvoting stock is entitled to vote on matters directly affecting rights and privileges pertaining to its class of stock.[57] In most instances a shareholder may cast his vote on the basis of one vote per share in person or through proxy. The early common law view, however, apparently was that each shareholder had but one vote no matter how many shares he owned and that vote could be cast only in person. The change in attitude has been effected by statute in some instances, but more commonly by provisions in either charter or by-laws.[58] There is no common law right to vote cumulatively. In some states cumulative voting is required by constitution; in some it is authorized by statute; and in some where there is no authority, articles or by-laws may as a matter of contract provide for it.[59]

When a corporation declares and pays a dividend, its stockholders are entitled to insist that their contractual preferences be observed and that all shareholders in the same class participate pro rata.[60]

52. BALLANTINE, CORPORATIONS § 159-65 (rev. ed. 1946); LATTIN, CORPORATIONS 286-94 (1959); STEVENS, CORPORATIONS § 108 (2d ed. 1949); Note, *Shareholder Inspection Rights,* 12 SW. L. J. 61 (1958); 11 VAND. L. REV. 609 (1958).

53. State *ex rel.* Cochran v. Penn-Beaver Oil Co., 34 Del. (4 W. W. Harr.) 81, 143 Atl. 257 (1926); Des Moines Bank & Trust Co. v. Bechtel & Co., 243 Iowa 1007, 1020, 1079-80, 1098, 51 N.W.2d 174, 182-3, 215, 226 (1952); BALLANTINE, CORPORATIONS § 165a (rev. ed. 1946); Koenigsberg, *Inspection of Books by Stockholders,* 30 GEO. L. J. 227 (1942).

54. BALLANTINE, CORPORATIONS § 161 (rev. ed. 1946); LATTIN, CORPORATIONS 289-94 (1959); STEVENS, CORPORATIONS § 108 (2d ed. 1949).

55. ILL. CONST. art. XI, § 3; People *ex rel.* Watseka Tel. Co. v. Emmerson, 302 Ill. 300, 134 N.E. 707 (1922).

56. BALLANTINE, CORPORATIONS § 182 (rev. ed. 1946); LATTIN, CORPORATIONS 295 (1959); STEVENS, CORPORATIONS § 112 (2d ed. 1949).

57. STEVENS, CORPORATIONS § 112 (2d ed. 1949).

58. BALLANTINE, CORPORATIONS § 178 (rev. ed. 1946); LATTIN, CORPORATIONS 295 (1959); STEVENS, CORPORATIONS §§ 112, 118 (2d ed. 1949).

59. BALLANTINE, CORPORATIONS § 177 (rev. ed. 1946); LATTIN, CORPORATIONS 295-96 (1959); STEVENS, CORPORATIONS § 117 (2d ed. 1949); Note, 7 N.Y.U.L. REV. 487 (1929); Note, 42 VA. L. REV. 107 (1956).

60. Segerstrom v. Holland Piano Mfg. Co., 160 Minn. 95, 199 N.W. 897 (1924); Scott v. P. Lorillard Co., 108 N.J. Eq. 153, 154 Atl. 515 (1931), *aff'd,* 109 N.J. Eq. 417, 157 Atl. 388 (1931). See State *ex rel.* Sorenson v. Nebraska State Bank, 123 Neb. 289, 294, 242 N.W. 613, 615 (1932).

Ordinarily no shareholder is entitled to demand that any dividend be paid, for this usually is held to be a matter within the discretion of the board of directors. However, if the stockholder can show abuse of discretion, he may persuade a court to order payment of a dividend.[61] The effect of the general rule is to permit the directors to plow corporate earnings back into the business without immediate approval[62] of the shareholders, either to expand the corporation's activities or to revamp its existing facilities and operations.

One "advantage" which the corporation is frequently asserted to have over many other forms of business organization is that its ownership interests are property interests which are freely transferable without any legal effect on the business.[63] (Some minority stockholders in small corporations have found their legal right to transfer is illusory because of the difficulty of finding a purchaser.) Many courts have rejected attempts to deny any right of transfer or to limit transfer to specific persons only.[64] But restrictions on transfer in the form of options to the corporation or to other stockholders to repurchase the stock, or of other nonabsolute limitations, have been permitted by most courts.[65]

Many times a corporation which has a cause of action against other firms, or its directors, officers or employees either will not assert its claim or will settle the claim for considerably less than the full measure to which it may be entitled. Where this has happened for good business reasons, a stockholder should not be entitled to interfere.[66] But where the reasons are unsound, as where based on favoritism, fraud or undue influence, an objecting stockholder should

61. BALLANTINE, CORPORATIONS §§ 231-32 (rev. ed. 1946); LATTIN, CORPORATIONS 459-60 (1959); STEVENS, CORPORATIONS § 99 (2d ed. 1949). A classic case in this area is Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668, 3 A.L.R. 413 (1919). See Note, 1959 DUKE L. J. 116; Note, 10 RUTGERS L. REV. 723 (1956).

62. Disapproving stockholders may oppose reelection of the directors who refused to vote for dividend payments, and, if enough votes can be obtained, may replace those directors. Often this is not an easy task.

63. BALLANTINE, CORPORATIONS § 1 (rev. ed. 1946). See FREY, CASES ON CORPORATIONS AND PARTNERSHIPS 4-5 (1951); LATTIN, CORPORATIONS 9 (1959); 1 O'NEAL, CLOSE CORPORATIONS § 2.03 (1958).

64. Greene v. E. H. Rollins & Sons, Inc., 22 Del. Ch. 394, 2 A.2d 249 (1938), 87 U. PA. L. REV. 482 (1939); 2 O'NEAL, CLOSE CORPORATIONS §§ 7.05, 7.06, 7.08 (1958); Cataldo, *Stock Transfer Restrictions and the Closed Corporation,* 37 VA. L. REV. 229, 232-33 (1951); Hayes, *Corporation Cake with Partnership Frosting,* 40 IOWA L. REV. 157, 160, 162 (1954); O'Neal, *Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting,* 65 HARV. L. REV. 773, 777-78 (1952). *Compare* Farmers' & Merchants' Bank v. Wasson, 48 Iowa 336, 340 (1878), *with* Mason v. Mallard Telephone Co., 213 Iowa 1076, 1087, 240 N.W. 671, 676 (1932).

65. 2 O'NEAL, CLOSE CORPORATIONS § 7.06, 7.09 (1958). See also the law review articles cited in the preceding footnote.

66. S. Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E.2d 241 (1950); LATTIN, CORPORATIONS 353-55 (1959); Landstrom, *Ratification by Majority Stockholders—A Problem in Corporate Democracy,* 31 B.U.L. REV. 165 (1951).

have some remedy. While there is no common law right to assert the corporation's cause of action in such circumstances, in equity the shareholder may be able to do so in what is known as the "derivative suit."[67] This type of action often may be the principal check against a rapacious management. But belief that its use has been abused has induced a number of states to impose limitation, principally by requiring some plaintiff-shareholders to post security for costs of the defendants to be paid from security in the event the defendants win.[68]

An action against the corporation may be inadequately defended, or sometimes no defense at all may be made. There could be good reasons from the corporation's standpoint not to defend. But if there are none, or if the defense is inadequate, a stockholder may be permitted to intervene on behalf of his corporation. He will not be required to go into equity to act.[69]

III. Power of Legislature Over Alteration or Modification

Several judges have assumed that a legislature could not constitutionally authorize the majority of shareholders in a corporation to alter common law rights of the shareholders unless all consented.[70] Is this correct? If not entirely correct, to what extent is it true? An answer requires consideration of three constitutional doctrines: police power, due process and obligation of contracts. With respect to the latter it is necessary to consider the effect of a reservation to the legislature of the power to alter or amend corporate law.

Many judges and others who have written in this area begin with the *Dartmouth College* case.[71] Its facts, result and consequences are commonly said to be the following: Before the American Revolution a royal charter of incorporation for Dartmouth College was granted under which the trustees became a self-perpetuating body. Early in

67. BALLANTINE, CORPORATIONS §§ 143-57a (rev. ed. 1946); LATTIN, CORPORATIONS 346-93 (1959); STEVENS, CORPORATIONS §§ 167-74 (2d ed. 1949). Many of the "common law attributes" discussed in this paper seem to have originated in decisions of an equity court and often are involved in litigation in equity.

68. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) involves the constitutionality of the New Jersey statute. The first statute of this type was N.Y. GEN. CORP. LAW § 61-b, enacted in 1944. See BAKER & CARY, CASES ON CORPORATIONS 678-82 (3d ed. 1958); BALLANTINE, CORPORATIONS § 157a (rev. ed. 1946); LATTIN, CORPORATIONS 384-88 (1959); STEVENS, CORPORATIONS § 171 (2d ed. 1949); Ballantine, *Abuses of Shareholders' Derivative Suits: How Far is California's New "Security For Expenses" Act Sound Regulation?* 37 CALIF. L. REV. 123 (1949); Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York*, 32 CALIF. L. REV. 123 (1944); Hornstein, *New Aspects of Stockholder's Derivative Suits*, 47 COLUM. L. REV. 1 (1947).

69. Eggers v. National Radio Co., 208 Cal. 308, 281 Pac. 58 (1929); BALLANTINE, CORPORATIONS § 153 (rev. ed. 1946).

70. In *Glen Alden* one judge of the Court of Common Pleas so held, and the majority so intimated. See note 43 *supra*. See also Craddock-Terry Co. v. Powell, 180 Va. 242, 249, 22 S.E.2d 30, 34 (1942).

71. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819).

the 1800's New Hampshire politicians, desiring control of the college either for themselves or for the state, attempted by legislation to change the charter by providing for selection of a substantial part of the trustees by the state officials. With Daniel Webster as counsel the school resisted this change, appealing to the Supreme Court, and upset the legislation. The theory of Chief Justice Marshall was that a contract resulted from the charter grant, which in part was between the state (as successor to the king) and the corporation, and that the contract could not be changed unilaterally by one of the parties to it because this would be an unconstitutional impairment of the obligation of a contract. Justice Story suggested that had the charter contained a clause reserving to the state the power to alter or amend the charter, the action might have been constitutional; and every state, seizing upon that suggestion, thereafter inserted in its constitution or corporation law a reservation of power to alter, amend or repeal corporate charters thereafter granted.

The *Dartmouth* legend may be inaccurate in several respects; it has been subjected to considerable criticism.[72] It is clear now that the legislature would be able to change or repeal corporate charters under the police power for health, safety and general welfare purposes even though no power to do so was reserved as part of the contract between the corporation and the state.[73] Perhaps had the fourteenth amendment been available, *Dartmouth* would have been decided under the due process clause.[74] But despite the criticism of the case, its impact must be considered in deciding what changes in corporate attributes may be made with legislative sanction. Three principal approaches have been suggested. One is that under its reserved power the legislature may not make or authorize a majority to make any changes that will affect the contract between the shareholders themselves (unless perhaps as to matters where public interest overrides) but may change or authorize changes only in the contract between the state and the corporation. A leading spokesman for this view is Justice Stern. A second approach is that the legislature may make or permit a majority of the stockholders to make any changes

72. Dow v. Northern R.R., 67 N.H. 1, 36 Atl. 510 (1887) (Doe, C.J.); Attorney General v. The Railway Companies, 35 Wisc. 425, 563-69 (1874) (Ryan, C.J.); Doe, *A New View of the Dartmouth Case*, 6 HARV. L. REV. 161 (1893); Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. PA. L. REV. 585, 592 (1927); Gibson, *How Fixed Are Class Shareholder Rights?* 23 LAW & CONTEMP. PROB. 283, 284-85 (1958); Polasky, *Book Review*, 57 MICH. L. REV. 1261, 1266-67 (1959); Note, 31 COLUM. L. REV. 1163 (1931).

73. Stern, *The Limitations of the Power of a State Under the Reserved Right to Amend or Repeal Charters of Incorporation*, 53 AMER. L. REG. 1 (1905); Note, 31 COLUM. L. REV. 1163 (1931).

74. See Stern, *The Limitations of the Power of a State Under the Reserved Right to Amend or Repeal Charters of Incorporation*, 53 AMER. L. REG. 1, 2 (1905).

except those which will deprive a stockholder of some vested right. Among those supporting this view was Justice Layton. The third approach is that the reserved power of the legislature is part of the tripartite contract between state, corporation and shareholders, and therefore the state or a majority of the shareholders when authorized by the state may make any change as to corporate attributes without impairing any obligation of any aspect of that contract.

Justice Stern's thesis was first stated by him in a 1905 law review article, written shortly after he began practicing law,[75] and was restated in several of his judicial opinions.[76] He argued that the contract between the shareholders is separate from any contract between the state and the corporation, indeed that it may have arisen before the corporation was chartered and the second contract came into being. The state could not by general law provide that *any* contract of any type is subject to the state's power to alter or amend and thereby authorize some parties to a contract (such as a partnership contract) to change it over objections of other contracting parties. Why should the shareholders' contract be treated differently? To him the objective of the reserved power was to quiet fears *Dartmouth* had raised in some minds that a state granting a charter with no reservation of power to alter, amend or repeal had surrendered some of its police power and the corporation was beyond any supervisory legislative control. Stern admitted that many decisions, including several of the United States Supreme Court,[77] were contrary to his thesis. These he said were erroneous, failing to recognize the problem or glossing over it with unsatisfactory observations of "glittering generality" and lacking logical analysis.[78] Some, including *Lauman*, supported his thesis to an extent although they permitted the majority to make legislatively approved changes if the dissenters were paid the value of their stock.[79] But three opinions, he thought, held out promise of a

75. Stern, *The Limitations of the Power of a State Under the Reserved Right to Amend or Repeal Charters of Incorporation,* 53 AMER. L. REG. 1, 73, 145 (1905). Justice Stern, who received his law degree and was admitted to the Pennsylvania bar in 1902, practiced law in Philadelphia until 1920; was a judge on the Court of Common Pleas, 1920-1935; a justice of the Pennsylvania supreme court, 1935-1952; and then was chief justice of that court until his retirement in 1956.

76. Schaad v. Hotel Easton Co., 369 Pa. 486, 87 A.2d 227 (1952); Malamount v. Wilson Bldg. & Loan Ass'n, 16 Pa. D. & C. 187 (C.P. 1932).

77. *E.g.*, Looker v. Maynard, 179 U.S. 46 (1900) (compulsory cumulative voting); Sherman v. Smith, 66 U.S. (1 Black) 587 (1861) (removal of limited liability); see Stern, *The Limitations of the Power of a State Under the Reserved Right to Amend or Repeal Charters of Incorporation,* 53 AMER. L. REG. 73, 90-106 (1905).

78. Stern, *The Limitations of the Power of a State Under the Reserved Right to Amend or Repeal Charters of Incorporation,* 53 AMER. L. REG. 1 (1905).

79. See also Clearwater v. Meredith, 68 U.S. (1 Wall.) 25 (1863); McCray v. Junction R.R., 9 Ind. 358 (1857) (subscriber to stock released from subscription because of extension of line). Stern's concept of the several con-

more rational and saner exposition of the law.[80] In an opinion written in 1952 Stern said many courts, if not most, were in accord with his approach.[81] But several of the cases he cited seem instead to apply a "vested rights" approach.[82] Several writers are in accord with Stern's thesis,[83] but others have considered and rejected it.[84] Several decisions since 1905 are in accord,[85] but many others have permitted

tracts has been accepted by many courts for years. An early opinion doing so is Upton v. Englehart, 28 Fed. Cas. 835 (No. 16,800) (C.C.S.D. Iowa 1874).

80. The three opinions to which he referred, 53 AMER. L. REG. at 106-09, all involved attempts by less than unanimous stockholder consent to adopt fundamental changes in railroad corporation contracts that had been authorized by the legislature where the legislature had the reserved power to alter, amend, or repeal. Dow v. Northern R.R., 67 N.H. 1, 36 Atl. 510 (1887) (lease); Zabriskie v. Hackensack & N.Y. R.R., 18 N.J. Eq. 178, 90 Am. Dec. 617 (1867) (extension of line); Kenosha, R. & R.I. R.R. v. Marsh, 17 Wis. 13 (1863) (relocation of terminal point and part of line).

81. Schaad v. Hotel Easton Co., 369 Pa. 486, 497, 87 A.2d; 227, 232 (1952). In 369 Pa. at 497-98, 87 A.2d at 232-33, he said: "[T]he preferable view would seem to be that this reserved power of the State to alter or amend charters of incorporation . . . can properly be exercised only to amend a charter so far as it represents a contract between the corporation and the State, and not in respects as to which it constitutes a contract between the corporation and the shareholders or between the shareholders themselves. . . . Any attempted statutory authorization of a corporation to destroy the preferential right to the accrued dividends [on preferred stock] would seem to involve either an unconstitutional deprivation of property, or an impairment of the obligation of contracts, or both, and this notwithstanding the reserved power of amendment."

See Crane, *Enlargement of Corporate Authority Under the Reserved Power,* 15 U. PITT. L. REV. 427 (1954).

82. Consolidated Film Industries, Inc. v. Johnson, 22 Del. Ch. 407, 197 Atl. 489 (1937); Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936); Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946).

83. 2 COOK, CORPORATIONS § 501 (8th ed. 1923); Schmidt, *Constitutional Limitations Upon Legislative Power to Alter Incidents of the Shareholder's Status in Private Corporations,* 21 ST. LOUIS L. REV. 12 (1935). See BERLE, STUDIES IN THE LAW OF CORPORATE FINANCE 23 (1928). Compare with Stern's thesis, MORAWETZ, THE LAW OF PRIVATE CORPORATIONS §§ 1095-99 (2d ed. 1886).

84. Note, 101 U. PA. L. REV. 663 (1953). See Crane, *Enlargement of Corporate Authority Under the Reserved Power,* 15 U. PITT. L. REV. 427 (1954); Dodd, *Dissenting Stockholders and Amendments to Corporate Charters,* 75 U. PA. L. REV. 585, 596, 603 (1927); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes,* 23 LAW & CONTEMP. PROB. 307 (1958); Note, 7 N.Y.U.L. REV. 487 (1929).

85. Avondale Land Co. v. Shook, 170 Ala. 379, 54 So. 268 (1911); Sutton v. Globe Knitting Works, 276 Mich. 210, 267 N.W. 815, 105 A.L.R. 1447 (1936); Allan v. White, 103 Neb. 256, 171 N.W. 52 (1919) (change of elevator corporation from profit to cooperative not permitted even though legislature had subsequently authorized organization of cooperatives); Yukon Mill & Grain Co. v. Vose, 201 Okla. 376, 206 P.2d 206 (1949); Garey v. St. Joe Milling Co., 32 Utah 497, 91 Pac. 369, 12 L.R.A., N.S. 554 (1907). In Hueftle v. Farmers Elevator, 145 Neb. 424, 16 N.W.2d 855 (1944), the majority had voted to change an elevator corporation, organized as a business corporation, into a cooperative and argued that this was permissible under a provision in the articles permitting amendments by majority vote. The court upheld a dissenter seeking to invalidate the change, saying that this was a fundamental change—an impairment of contract rights. See Yoakam v. Providence Biltmore Hotel, 34 F.2d 533 (D.R.I. 1929).

Earlier cases include: Byrne v. Schuyler Elec. Mfg. Co., 65 Conn. 336, 31 Atl. 833 (1895) (sale of assets; no laches); Dow v. Northern R.R., 67 N.H. 1, 36 Atl. 510 (1887) (lease); Intiso v. State, 68 N.J.L. 588, 53 Atl. 206 (1902) (fee for withdrawing shares from building and loan association; subsequent

majority modification.[86] Certainly Stern's views have been important in Pennsylvania decisions, although the *Glen Alden* case may eventually lead to their rejection.[87]

One recent federal district court decision illustrates what possibly may be an unfortunate consequence of Stern's approach.[88] It involved dissenter objection to sale of all corporate assets, which the dissenter contended was a *de facto* merger entitling him to appraisal rights under the merger statute[89] and which the majority argued was a

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statute removing fee held unconstitutional as to pre-existing memberships); Loewenthal v. Rubber Reclaiming Co., 52 N.J. Eq. 440, 28 Atl. 454 (Ch. 1894) (by-law provision called for amendments to by-laws only by two-thirds vote; attempt to change to majority vote in order to change by-laws as to election of directors which had insured minority representation on the board); Zabriskie v. Hackensack & N.Y. R.R., 18 N.J. Eq. 178, 90 Am. Dec. 617 (Ch. 1867) (change in charter authorizing substantial extension of line); Kenosha, R. & R.I. R.R. v. Marsh, 17 Wis. 13 (1863) (change in charter authorizing variation in construction of line). See also Note, 31 COLUM. L. REV. 1163, 1167 (1931).

86. Somerville v. St. Louis Mining & Milling Co., 46 Mont. 268, 127 Pac. 464 (1912); Craddock-Terry Co. v. Powell, 180 Va. 242, 22 S.E.2d 30 (1942); Germer v. Triple-State Natural Gas & Oil Co., 60 W. Va. 143, 54 S.E. 509 (1906). Swan v. Barnes, 117 W. Va. 147, 150, 184 S.E. 257, 258 (1936), involves a shareholder in a state bank which, pursuant to a federal statute adopted after he acquired his shares, consolidated with a national bank at a time when he was mentally incompetent. As the federal statute provided for double liability, which the state law had not, the receiver of the consolidated bank sued him. But the court held for the stockholder, who contended he had not consented to the change and so was not a stockholder in the resulting bank. The court said: "If . . . the statute under which the consolidation or merger was effected was not in force at the time the shares of the objecting stockholder in the constituent company were issued, then his shares are not subject, over his objection, or without his consent, either express or implied, to be carried into the consolidation or merger." But this does not necessarily support Stern's thesis or contradict the earlier West Virginia case for the statutory authority came from Congress, which never had reserved a power to alter or amend. (However, Congress is not constitutionally limited by the contract clause.) See also Note, 31 COLUM. L. REV. 1163, 1166-67 (1931).

In C. H. Venner Co. v. United States Steel Co., 116 Fed. 1012 (C.C.S.D.N.Y. 1902), the court refused to enjoin Steel's retirement of its preferred stock by exchanging bonds therefor, under authority of a New Jersey statute passed after Steel's incorporation. The court did not discuss the New Jersey cases which support Stern's views but said the state had the reserved power to amend and affect the stockholder contract. This case should be contrasted with American Smelting Co. v. Bullard, 290 Fed. 896 (6th Cir. 1923), involving sale of assets of a New Jersey company without unanimous consent.

87. See Troupiansky v. Henry Disston & Sons, 151 F. Supp. 609 (E.D. Pa. 1957); Marks v. Autocar Co., 153 F. Supp. 768 (E.D. Pa. 1954); Oechsle v. Lodge Bldg. & Loan Ass'n, 119 Pa. Super. 597, 181 Atl. 375 (1935). The reference to the possible effect of *Glen Alden* is based on the court's comment in that case, 143 A.2d at 31: "To divest shareholders of their right of dissent under such circumstances would require express language which is absent from the 1957 amendments." See Note, 47 CALIF. L. REV. 180 (1959); Comment, 107 U. PA. L. REV. 420, 425 (1959).

88. Troupiansky v. Henry Disston & Sons, Inc., 151 F. Supp. 609 (E.D. Pa. 1957).

89. One criticism of the case was that although the court held a *de facto* merger would occur it did not require the dissenter to comply with the requirements of the merger statute to obtain his rights. DeCapriles, *1957 Annual Survey of American Law—Business Organization*, 33 N.Y.U.L REV. 527, 542 (1958). In *Glen Alden* the court seemed to think that the merger

sale of assets permitted by statute but for which no dissenter's remedy was provided. Although the court talked in terms of *Lauman* and *de facto* merger, it noted in a footnote that Pennsylvania since 1933 had had a statute permitting the majority to authorize sale of assets for the purchaser's stock—thus overcoming one of the objections of the *Lauman* court, and it suggested that those who became shareholders after the 1933 statute was effective could be compelled to take their pro rata shares of the purchaser's stock rather than elect their rights as dissenters.[90] This decision has been criticized.[91] But it suggests that some dissenters may be treated differently from others in the same corporation, depending on the date on which their stock was acquired.

In states which follow Stern's view, the effect may be watered down by assuming that the state cannot authorize changes in *fundamental* aspects of the shareholders' contract but by narrowing the interpretation of what is fundamental, or broadening the interpretation of public interest which will justify state interference with the shareholders' contract.[92] If at the time of incorporation the state would permit a majority of stockholders to make a particular change, it could also be argued that this is part of the shareholders' contract and (at least absent contrary agreement in the charter or contract) no objector could insist that unanimous consent to make that particular change was necessary.[93]

One major objection to the view that the legislature cannot authorize a majority in interest to make changes in the contract between shareholders is that the majority, seeking to act in the best interests of the corporation, may be required to pay toll to an unscrupulous minority before proceeding; however, the majority doesn't

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statute should be complied with, and the original transaction was abandoned in the form projected and started over in a manner complying with the merger statute. See note 115, *infra*.

90. Troupiansky v. Henry Disston & Sons, 151 F. Supp. 609 (E.D. Pa. 1957). If this is a merger as to some, why not as to all?

91. DeCapriles, *1957 Annual Survey of American Law—Business Organization*, 33 N.Y.U.L. REV. 527, 542 (1958); Note, 46 CALIF. L. REV. 283 (1958). *But see* Mulford, *Corporate Distributions to Shareholders and Other Amendments to the Pennsylvania Business Corporation Law*, 106 U. PA. L. REV. 536, 563 (1958).

92. Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070 (1911); In re Collins-Doan, 3 N.J. 382, 70 A.2d 159 (1949), *reversing* 4 N.J. Super. 385, 67 A.2d 353 (1949), which had reversed 1 N.J. Super. 441, 61 A.2d 913 (Ch. 1948); Bingham v. Savings Investment & Trust Co., 101 N.J. Eq. 413, 138 Atl. 659 (1927); Rankin v. Newark Library Ass'n, 64 N.J.L. 265, 45 Atl. 622 (1900); Opdyke v. Security Sav. & Loan Co., 157 Ohio St. 121, 105 N.E.2d 9 (1952). See Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. PA. L. REV. 585, 587-91, 723, 730-34 (1927).

93. General Inv. Co. v. American Hide & Leather Co., 98 N.J. Eq. 326, 129 Atl. 244, 44 A.L.R. 60 (1925); Berger v. United States Steel Corp., 63 N.J. Eq. 809, 53 Atl. 68 (1902); Lord v. Equitable Life Assur. Soc'y, 194 N.Y. 212, 87 N.E. 443 (1909); see Traer v. Lucas Prospecting Co., 124 Iowa 107, 99 N.W. 290 (1904).

always have the true vision. Where the state provides that changes authorized at the time of incorporation can be made, a further objection is that some majorities can make changes and others can't, with little justification for the distinction other than, perhaps, maintaining the sanctity of a supposed legal theory.

In some opinions the court seems to be arguing both that there are separate contracts, the legislature being unable to authorize changes in the shareholders' contract, and that the minority shareholder's rights are vested so that they can not be changed without his consent.[94] Usually where the court's principal reliance is on a vested right argument, however, it has held or assumed that the legislature does have power to authorize some changes in the shareholders' contract. Justice Layton's opinion in *Keller v. Wilson*[95] is well-known for its holding that a holder of cumulative preferred stock had a "vested right" to unpaid dividends "already accrued" which could not be cancelled by majority action even with legislative permission. Several of the vested rights cases involve the unpaid, accrued, cumulative dividend.[96] Unfortunately for that particular right Layton subsequently demonstrated how easily it could be destroyed indirectly.[97] A principal difficulty with the "vested right" approach is the uncertainty of its application. It has been suggested that a "vested right" in this area is one which a court feels should not be taken away without the loser's consent; the court's emotional attitude

94. See Coombes v. Getz, 285 U.S. 434 (1932); Sutton v. Globe Knitting Works, 276 Mich. 200, 267 N.W. 815, 105 A.L.R. 1447 (1936); Loewenthal v. Rubber Reclaiming Co., 52 N.J. Eq. 440, 28 Atl. 454 (Ch. 1894); Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946); Schaad v. Hotel Easton Co., 369 Pa. 486, 87 A.2d 227 (1952). In Berger v. Amana Society, 95 N.W.2d 909, 914-15 (Iowa 1959), the court, invalidating an amendment which eliminated the corporation's mandatory obligation to repurchase Class A stock, stated its conclusion with no real explanation and with no reference to either theory.

95. Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936).

96. Consolidated Film Industries, Inc. v. Johnson, 22 Del. Ch. 407, 197 Atl. 489 (Ch. 1937); Patterson v. Henrietta Mills, 216 N.C. 728, 6 S.E.2d 531 (1940); Schaffner v. Standard Boiler & Plate Iron Co., 150 Ohio St. 454, 83 N.E.2d 192 (1948); Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946); see Lonsdale Sec. Corp. v. International Mercantile Marine Co., 101 N.J. Eq. 554, 139 Atl. 50 (V. C. 1927); Note, 7 N.Y.U.L. REV. 487 (1929).

In Schaad v. Hotel Easton Co., 369 Pa. 486, 87 A.2d 227 (1952), Justice Stern was not clear whether this was a vested right, although he was certain it was a contract right which could not be impaired. See also Lake Shore & Mich. So. Ry. v. Smith, 173 U.S. 684, 699 (1899) (fares); Shields v. Ohio, 95 U.S. 319 (1877) (fares).

97. Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (1940), permitting a merger of two corporations, parent and subsidiary, which had the effect of cancelling accrued dividends. This has been carried to its extreme in Hottenstein v. York Ice Machinery Corp., 136 F.2d 944 (3d Cir. 1943), where the subsidiary into which the parent merged, sloughing off accruals as it went, seems to have been organized principally for that purpose. See Dodd, *Accrued Dividends in Delaware Corporations—From Vested Right to Mirage*, 57 HARV. L. REV. 894 (1944); Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3 (1949).

being an unpredictable reaction makes uncertain any prediction as to the "law." The reasoning of courts in other "vested right" cases has been severely criticized, and the usefulness of the approach challenged.[98]

Several well-reasoned opinions reject the "vested right" approach.[99] These assume that the reserved power of the legislature does permit legislative authorization of majority changes. It is more difficult to find an opinion that explains with logical articulation why the reserved power can have such effect, although many courts seems to reach that conclusion. Some simply state that "better reasoned" cases, or more cases, so hold, with no discussion of reasons and no consideration of the contrary arguments.[100] The thought that reservation of power to alter or amend was intended to do more than simply protect legislative police power seems to be involved. There may also

98. Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3 (1949), especially criticizing the two Ohio cases cited in note 95 *supra*. Other material may be found collected in BAKER & CARY, CASES ON CORPORATIONS 1499 (3d ed. 1959). Note, 42 VA. L. REV. 107 (1956) assumes the "vested rights" approach is the majority view. See Note, 31 COLUM. L. REV. 1163, 1168-69 (1931).

99. See, *e.g.*, McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. Sp. T. 1945). Other cases rejecting the "vested rights" label for accrued dividends are: McQuillen v. National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939), *aff'd*, 112 F.2d 877 (4th Cir. 1940); Western Foundry Co. v. Wicker, 403 Ill. 260, 85 N.E.2d 722, 8 A.L.R.2d 878 (1949); Sherman v. Pepin Pickling Co., 230 Minn. 87, 41 N.W.2d 571 (1950), 35 MINN. L. REV. 90. See BALLANTINE, CORPORATIONS § 277 (rev. ed. 1946); LATTIN, CORPORATIONS 501-07 (1959); STEVENS, CORPORATIONS § 127 (2d ed. 1949); Gibson, *How Fixed Are Class Shareholder Rights?* 23 LAW & CONTEMP. PROB. 283 (1958); Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. PA. L. REV. 585, 610-13 (1927); Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3, 25 (1949); Note, 1 DRAKE L. REV. 8 (1951); Note, 5 ST. LOUIS U.L.J. 297 (1958).

In Bowman v. Armour & Co., 160 N.E. 2d 753 (Ill. 1959), the Illinois court was asked again to apply the vested rights approach but was able to decide for the stockholder without doing so by holding that the legislature had not authorized an amendment to a provision in the corporate articles for redemption of preferred stock, which would have permitted redemption by exchange of income debentures in lieu of paying cash.

The ultimate decision is that a shareholder's right to his shares is not vested. Under the Delaware short-merger statute a parent corporation which owned over ninety percent of the stock of a subsidiary was permitted to vote for a merger of the subsidiary into the parent, with minority shareholders of the subsidiary getting cash over their objection that they were entitled to retain their interest in the subsidiary. Coyne v. Park & Tilford Distillers Corp., 154 A.2d 893 (Del. 1959). *Accord*, Beloff v. Consolidated Edison Co. of New York, 300 N.Y. 11, 87 N.E.2d 561 (1949).

100. Market Street Ry. v. Hellman, 109 Cal. 571, 42 Pac. 225 (1895) (action by consolidated corporation to compel other party to contract to buy its bonds; he defends that some of the corporations included in the consolidation did not have unanimous consent of their stockholders; court says it assumes the legislature under its reserve power can authorize a majority to approve consolidation); Somerville v. St. Louis Min. & Mill. Co., 46 Mont. 268, 127 Pac. 464 (1912) (relying on next case; involves less than unanimous consent to make non-assessable stock assessable); Allen v. Ajax Min. Co., 30 Mont. 490, 77 Pac. 47 (1904) (sale of assets); Germer v. Triple-State Natural Gas & Oil Co., 60 W. Va. 143, 54 S.E. 509 (1906) (sale of assets). See Note, 31 COLUM. L. REV. 1163, 1166 n. 21 (1931).

be the thought that the majority could attain the desired objective in other ways, without much difficulty, thus the method utilized should not be denied.[101] In some cases, courts seem satisfied because the legislature has enabled dissenting stockholders to obtain purchase of their stock by the corporation at its "value"—which smacks of condemnation through eminent domain.[102] But statutes permitting sale of assets by the majority have been upheld even though there was no provision for dissent.[103]

One advantage of the third approach is that it is unnecessary to determine when a particular shareholder acquired his interest. Only if the corporation involved was incorporated before the statutory or constitutional reservation of power to the legislature became effective would a minority shareholder be able to argue that a legislatively authorized majority lacked power to adopt fundamental changes in the shareholders' contract.[104] No longer can an unreasonable dissenter hamstring the majority. The majority does not have absolute power to ride roughshod over an objector, however, for he may be able to assert successfully arguments of fraud or unfairness and, more uncommonly, lack of due process.

A number of possible common law attributes of corporations and of stockholders were described earlier. To what extent have attempts to change them, by legislatures or by legislatively authorized stockholder majorities, succeeded? The first series of attributes, those relating to the corporation itself, would seem under any of the three approaches to be subject to change under the reserved power, although for the most part it is unlikely that changes would be thought necessary. Certainly it is not necessary that a corporation have a seal or by-laws. Perhaps more controversy arises when a legislature acts to recapture a franchise, and some courts have objected unless compensation be given, although it may be better to allow compensation only if the property used in connection with the privilege is

101. See Lord v. Equitable Life Assur. Soc'y, 194 N.Y. 212, 87 N.E. 443 (1909); Lauman v. Lebanon Valley R.R., 30 Pa. 42 (1858); Note, 101 U. PA. L. REV. 663, 675 (1953).

102. See BALLANTINE, CORPORATIONS § 290 (rev. ed. 1946); STEVENS, CORPORATIONS § 128 (2d ed. 1949); Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420, 421-22 (1930); Gibson, *How Fixed Are Class Shareholder Rights?* 23 LAW & CONTEMP. PROB. 283, 292 (1958).

103. BALLANTINE, CORPORATIONS § 281 (rev. ed. 1946); BALLANTINE & STERLING, CALIFORNIA CORPORATION LAWS § 346 (rev. ed. 1949); Warren, *Voluntary Transfers of Corporate Undertakings*, 30 HARV. L. REV. 335, 353, 358 (1917); Gibson, *How Fixed Are Class Shareholder Rights?* 23 LAW & CONTEMP. PROB. 283, 292 (1958); Note, 46 CALIF. L. REV. 283 (1958); see Weiner, *Payment of Dissenting Stockholders*, 27 COLUM. L. REV. 547 note 2 (1927).

104. Central R.R. & Banking Co. v. Georgia, 92 U.S. 665 (1875); see Shields v. Ohio, 95 U.S. 319 (1877); Union Pacific R.R. v. Trustees, Inc., 8 Utah 2d 101, 329 P.2d 398 (1958).

also taken.[105] Changes affecting several of the second series have been readily accepted. Limited liability is sufficiently a matter of public interest that legislative destruction of limitations or broadening of limitations, at least as to future obligations, is permitted.[106] Legislatures have removed pre-emptive rights or permitted their removal, apparently with no challenge that this is beyond the reserved power.[107] Legislative changes regarding dissolution have tended to expand the ability of a minority stockholder to obtain dissolution where dissension is present; there may be sufficient public interest in this area that no change could be challenged as beyond the reserved power. Most legislation relating to the right to inspect books and records has restated the common law rule; none has absolutely denied this right to a stockholder who would have been entitled to it. Several attempts by incorporators or by majority stockholders to deny the right on the authority of statutes giving broad powers to include provisions in articles have been challenged successfully on the basis that the statute did not authorize such provisions.[108] Public interest would also seem to justify legislative limitations on the bringing of derivative actions.

Changes which legislatures or majority stockholders seek to justify on reserved power grounds are more frequently challenged when they affect voting rights, dividends, corporate purposes, mergers and consolidations, and sale of assets. There seems to be sufficient public interest in protecting a minority stockholder to justify a change

105. Greenwood v. Freight Co., 105 U.S. 13 (1881). Repeals of grants of exemption from taxation have been upheld where the corporation was subject to the state's reserved power. Tomlinson v. Jessup, 82 U.S. (15 Wall.) 454 (1872); Northern Central Ry. v. Maryland, 187 U.S. 258 (1902). Such repeals without the aid of the reserved power have been unsuccessful. State Bank v. Knoop, 57 U.S. (16 How.) 369 (1853); Central R.R. & Banking Co. v. Georgia, 92 U.S. 665 (1875); see Note, 31 COLUM. L. REV. 1163, 1166 (1931). But an attempt under the reserved power to require a railroad to supply 1,000-mile tickets at not more than a certain price was rejected, the Court saying: "It [the state] has no right even under such circumstances [having a right to amend, or power to legislate on rates] to take away or destroy the property or annul the contracts of a railroad company with third persons." Lake Shore & Mich. So. Ry. v. Smith, 173 U.S. 684, 690 (1899).

106. Sherman v. Smith, 66 U.S. (1 Black) 587 (1861): A bank statute containing reserved power to repeal or change provided for limited liability at time particular bank was incorporated and was amended to provide unlimited liability if bank continued to issue notes. It was held constitutional since it affected only debts incurred after statute effective. See Coombes v. Getz, 285 U.S. 434 (1932): A constitutional provision making directors liable to creditors for money embezzled by officers was repealed while the case, a suit against a director, was pending and the Court held that this impaired the obligation of contract to the creditor or destroyed his vested right.

107. See Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 CALIF. L. REV. 465 (1931); Drinker, *The Pre-emptive Right of Shareholders to Subscribe to New Shares*, 43 HARV. L. REV. 586 (1930); Note, 5 ST. LOUIS U.L.J. 297 (1958).

108. State *ex rel.* Cochran v. Penn-Beaver Oil Co., 34 Del. 81, 143 Atl. 257 (1926); see note 53, *supra*.

to compulsory cumulative voting[109] and adoption of cumulative voting by the majority where permissive is not likely to be challenged by the minority. In most instances where permissive cumulative voting had been adopted, removal of the cumulative voting feature could be challenged only as destruction of a vested right, and such challenges have been unsuccessful.[110] However, an attempt to mutualize an insurance company so that the policyholders would elect a majority of the directors, which was based on a statute enacted after incorporation, was said to involve a "vested right" but was sustained because the original contract provided for mutualization.[111]

Although rights to already accumulated accruals of dividends has been held by some courts to be vested, usually the right to a future dividend at a particular rate or with a particular preference is not considered vested.[112] Such changes might be held beyond the reserved power to change if that power is interpreted not to allow changes affecting only the contract between the shareholders, but courts following that approach as to other rights have not dealt with this situation.

The principal decisions refusing to permit adoption of changes by a legislatively authorized majority have been in situations where the authorization was adopted after incorporation, and the change proposed involves a substantial change in corporate purpose, merger, consolidation or sale of the bulk of the corporation's assets. Often these are called fundamental changes. Rarely does a court speak of these changes as destroying vested rights.[113] But a substantial number of courts have permitted even these changes though the contract between the shareholders is thereby altered without unanimous consent.[114] The ultimate in destruction of rights of shareholders

109. Looker v. Maynard, 179 U.S. 46 (1900); Note, 54 HARV. L. REV. 1368 (1941); Note, 7 N.Y.U.L. REV. 487 (1929).

110. Note, 7 N.Y.U.L. REV. 487 (1929); Note, 42 VA. L. REV. 107 (1956).

111. Lord v. Equitable Life Assur. Soc'y, 194 N.Y. 212, 87 N.E. 443 (1909). See Ballantine, *Questions of Policy in Drafting a Modern Corporation Law*, 19 CALIF. L. REV. 465, 471 (1931).

112. Peters v. U. S. Mortgage Co., 13 Del. Ch. 11, 114 Atl. 598 (1921); Schmidt, *Constitutional Limitations Upon Legislative Power to Alter Incidents of the Shareholder's Status in Private Corporations*, 21 ST. LOUIS L. REV. 12 (1935); Note, 31 COLUM. L. REV. 1163, 1169 (1931). *Contra*, Allen v. White, 103 Neb. 256, 171 N.W. 52 (1919). See Note, 10 RUTGERS L. REV. 723 (1956), referring to a proposed law which would give a minority stockholder in a closed corporation a right to compel dividend payments under several circumstances. Would this apply to corporations organized at the time such a law becomes effective?

113. See Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 Atl. 54 (1928) (refusing to enjoin sale of assets for stock because of laches but allowing dissenter cash).

114. Tanner v. Lindell Ry., 180 Mo. 1, 79 S.W. 155 (1904) (dicta that dissenting stockholder seeking only to enjoin sale for cash cannot be compelled to take stock); Koehler v. St. Mary's Brewing Co., 228 Pa. 648, 77 Atl. 1016 (1910); Hills, *Consolidation of Corporations by Sale of Assets and Distribution of Shares*, 19 CALIF. L. REV. 349 (1931).

are two recent decisions which permit a corporation owning a majority of the shares of its subsidiary to oust the minority by merging the subsidiary into the parent and compelling the minority to accept cash in place of their shares—the contract itself can be terminated by unilateral action.[114a]

IV. Glen Alden vs. Sun Chemical

As pointed out in the introduction, two rather similar cases recently reached opposite results. Are they in conflict? Clearly they would be if the Pennsylvania court in *Glen Alden* had adopted Stern's thesis and had held unconstitutional the legislation permitting purchase of assets without giving the purchasing corporation's dissenting stockholder an opportunity to have his stock repurchased. But the court avoided such a holding and may have rejected it. *Glen Alden* can be distinguished factually from *Sun Chemical,* as was indicated earlier. For Glen Alden, though nominally the purchaser, could in substance be treated as the seller; in any event it would have been a greatly enlarged enterprise engaged in many new fields of activity. There may even have been a feeling that the majority interests failed to make sufficient showing of good faith and fairness to the minority.[115]

V. Conclusion

Stern's thesis, that under the legislature's reserved power to alter, amend or revoke corporate charters the legislature cannot change or authorize a majority to change rights obtained by a stockholder through his contract with other stockholders, has much logic in its favor. However its usefulness would become less as more legislatures provide authority for majority changes, for dissenting stockholders in corporations organized thereafter (or possibly those acquiring their stock thereafter)[116] would not be able to take advantage of his

114a. Coyne v. Park & Tilford Distillers Corp., 154 A.2d 893 (Del. 1959); Beloff v. Consolidated Edison Co. of New York, 300 N.Y. 11, 87 N.E.2d 561 (1949).

115. See Note, 47 Calif. L. Rev. 180 (1959). After the *Glen Alden* decision, the "purchase of assets" plan was abandoned, and it was proposed to merge List into Glen Alden. This proposal which permitted dissenting stockholders to obtain repurchase of their shares was approved and the merger became effective April 22, 1959. List shareholders received one share of Glen Alden for each share of List they owned; Glen Alden shareholders received 1¼ new shares for each share held. Following the merger, shareholders of List owned 4,227,859 shares of the resulting company, former List subsidiaries owned 993,300 shares, and the original Glen Alden shareholders other than the List subsidiaries owned 1,331,075 shares. See Standard & Poor, Corporation Record 2583 (1959).

116. Troupiansky v. Henry Disston & Sons, Inc., 151 F. Supp. 609 (E.D. Pa. 1957); Intiso v. State, 68 N.J.L. 588, 53 Atl. 206 (1902); Yukon Mill & Grain Co. v. Vose, 201 Okla. 376, 206 P.2d 206 (1949); Note, 46 Calif. L. Rev. 283 (1958). Stern apparently would require the corporation to be organized

view. Rather than a mechanical result determined by the nature of the change and the time of incorporation or of acquisition of shares, a better solution would seem to be one in which each change is analyzed in terms of good faith and fairness. Equitable limitations on the power of a majority should be utilized. Unfortunately some courts seem to have been overly restrained in their analysis of fairness,[117] but as has been said elsewhere, "there is no good reason why able judges without the aid of additional legislation cannot remedy this matter."[118] Some courts have.[119] If the equity courts do not, on their own, then the legislature should enable them to do so.

after the statutory change. Schaad v. Hotel Easton Co., 369 Pa. 486, 495, 87 A.2d 227, 231 (1952); Note, 101 U. PA. L. REV. 663, 672 (1953).

117. Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 32 A.2d 148 (Ch. 1943); see Barrett v. Denver Tramway Corp., 53 F. Supp. 198 (D. Del. 1943), *aff'd*, 146 F.2d 701 (3d Cir. 1944); BAKER & CARY, CASES ON CORPORATIONS, 1516-21 (3d ed. 1959); Dodd, *Accrued Dividends in Delaware Corporations—From Vested Rights to Mirage*, 57 HARV. L. REV. 894 (1944); Dodd, *Fair and Equitable Recapitalizations*, 55 HARV. L. REV. 780 (1942).

118. Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3, 26 (1949). See also Gibson, *How Fixed Are Class Shareholder Rights?*, 23 LAW & CONTEMP. PROB. 283, 295-306 (1958); Lattin, *A Reappraisal of Appraisal Statutes*, 38 MICH. L. REV. 1165, 1183 (1940); Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination*, 29 VA. L. REV. 1 (1942); Note, 101 U. PA. L. REV. 663, 675 (1953).

119. Outwater v. Public Service Corp., 103 N.J. Eq. 461, 143 Atl. 729 (Ch. 1928), *aff'd*, 104 N.J. Eq. 490, 146 Atl. 916 (Ct. Err. & App. 1929); BAKER & CARY, CASES ON CORPORATIONS 1551-54 (3d ed. 1959); Meck, *Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine*, 55 HARV. L. REV. 71 (1941). See Jones v. Missouri-Edison Elec. Co., 144 Fed. 765 (8th Cir. 1906).