CORPORATIONS

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THIS was a notable year in corporation law. New organic acts were approved in New York,[1] Utah,[2] and Wyoming.[3] Two distinguished works appeared: a three-volume revision of Professor Loss' classic on Securities Regulation,[4] and Professor Henn's hornbook on Corporations.[5] Other useful works published late in 1960 received deserved recognition.[6] Considerable attention in legal literature was given to some broader aspects of corporate behavior,[7] comparative corporation law,[8] specialized use of the corporate form,[9] and its continued ex-

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1. N.Y. Sess. Laws 1961, ch. 855, approved April 24, 1961, effective April 1, 1963. It is expected that this statute will be amended in several respects before its effective date. See Anderson and Lesher, The New Business Corporation Law, Parts I & II, 33 N.Y.S.B.J. 308, 428 (1961); deCapriles and McAniff, The Financial Provisions of the New (1961) New York Business Corporation Law, 36 N.Y.U.L. Rev. 1239 (1961); Kessler, The New York Business Corporation Act, 36 St. John's L. Rev. 1 (1961); Rohrlich, What's New in New York's New Business Corporation Law, 145 N.Y.L.J. Nos. 93-96, P.4 Cals. 1-4 (May 15-18, 1961), reprinted in 3 Corp. Practice Commentator No. 2, at 100 (Aug. 1961).

2. Utah Laws 1961, ch. 28, approved March 1, 1961, effective Jan. 1, 1962. See Note, Corporate Amendment Process in Utah; Present and Prospective, 6 Utah L. Rev. 217 (1958).

3. Wyo. Sess. Laws 1961, ch. 85, approved February 16, 1961, effective July 1, 1961. See Rudolph, The New Wyoming Business Corporation Act, 15 Wyo. L.J. 185 (1961).

4. Loss, Securities Regulation (2d ed. 1961).

5. Henn, Corporations (1961), reviewed by Priest, 16 Record of N.Y.C.B.A. 485 (1961). This one-volume treatise on general corporation law successfully includes basic securities regulation and tax materials.

6. See, e.g., ABA Committee on Banking Corporations and Business Law, Model Business Corporation Act Annotated (1960), reviewed by Haller, 28 U. Chi. L. Rev. 779 (1961); Lattin, 59 Mich. L. Rev. 1298 (1961); Rohrlich, 16 Record of N.Y.C.B.A. 157 (1961); Stevens, 46 Cornell L.Q. 498 (1961): Stocker, 16 Bus. Law. 748 (1961); Seward, Basic Corporate Practice (rev. ed. 1960), reviewed by Henn, 47 Cornell L.Q. 127 (1961).

7. See Carb, The Lawyer in Society, 16 Bus. Law. 1066 (1961); Katz, Responsibility and the Modern Corporation, 3 J. Law & Econ. 75 (1960); Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539 (1960); Note, Corporate Political Affairs Programs, 70 Yale L.J. 821 (1961); Symposium, Corporations in the Fair Society, 38 U. Det. L.J. 557 (1961).

8. Eckert, Shareholder and Management: A Comparative View of Some Corporate Problems in the United States and Germany, 46 Iowa L. Rev. 12 (1960); Kitagawa, Some Reflections on the Corporate Theory—Including a Japanese Perspective, 1960 Duke L.J. 535 (1960). See also Bloemsma, Recent Developments in the Netherlands, 16 Bus. Law. 713 (1961); Devadason, Indiana Law as Applicable to Corporations Incorporated Outside India, 16 Bus. Law. 1070 (1961); Totum & DuVivier, Corporation and Tax Laws of Monaco, 16 Bus. Law. 1053 (1961); Symposium, The Formation and Operation of Foreign Subsidiaries and Branches, 16 Bus. Law. 403 (1961).

9. See Norman, Industrial Development Corporations, 23 Georgia B.J. 444 (1961);

tension to professional associations.[10]

The cases, as usual, covered the entire spectrum of our subject. The most important feature of 1961 was the increased availability of private remedies for violations of the Securities Acts, which, according to Judge Biggs, constitutes "far reaching federal substantive corporation law" which provides "stockholders with a potent weapon for enforcement of many fiduciary duties."[11] This year's survey will begin with this aspect of the field of federal regulation, and the discussion of the work of the Securities and Exchange Commission will be found in the section on Corporate Finance.

I

Private Remedies Under Federal Law

Insiders' Profits.—Any review of the growth of private remedies under the federal securities acts must of course begin with a consideration of the shareholder's derivative action for recovery of insiders' short-swing profits, through which the statute attempts to discourage misuse of inside information.[12] This year the ubiquitous Mr. Blau continued to develop this aspect of the law in a case in which the Second Circuit, splitting three ways, affirmed the lower court's holding that a partner cannot insulate himself from liability under Section 16(b) of the Securities Exchange Act by waiving his

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Report, The Development Corporation in Africa, 16 Record of N.Y.C.B.A. 445 (1961); Symposium, Agricultural Corporations, 17 Bus. Law. 221 (1961); Symposium, Family Farm Corporations, 1960 Wis. L. Rev. 555 (1961).

10. E.g., Note, The Corporate Practice of Veterinary Medicine, 46 Iowa L. Rev. 844 (1961). Considerable Attention has been given to a means of securing corporate tax status for professional associations under Internal Revenue Regulation 301.7701 (1960), so that "pension contributions" for the member-employees will be deductible. See Carrington & Sutherland, Articles of Partnership for Law Firms 73-75 (1961); Ohl, Corporate Tax Status for Lawyers, 33 N.Y.S.B.J. 165 (1961); White & Peterson, Corporate Tax Advantages for Attorneys, 35 Cal. S.B.J. 167 (1961). In 1961, in response to the Revenue Regulations, fourteen states passed legislation authorizing professional corporations or corporation-like associations, the majority applying to substantially all licensed professions previously barred from corporate practice. Colorado, which had no statutory bar against corporate professional practice, amended its Rules Governing Admission to the Colorado Bar to permit use of the corporate form by lawyers. For details of these laws, see CCH, New Professional Corporation Laws Explained, No. 1, 230 Pension Plan Guide, Part 1 (1962). See Matter of the Florida Bar, 133 So. 2d 554 (Fla. 1961).

11. McClure v. Borne Chem. Co., 292 F.2d 824, 834 (3d Cir.), cert. denied, 368 U.S. 939 (1961). This was a major focus of New York University's 1961 summer workshop for law school teachers of Corporations under the direction of Professor L. C. B. Gower, Louis Loss and Harold Marsh.

12. Securities Exchange Act, § 16(b), 48 Stat. 896 (1934), 15 U.S.C. § 78 p(b) (1958). See Magida v. Continental Can Co., CCH Fed. Sec. L. Rep. ¶ 90,725 (S.D.N.Y. 1955), aff'd, 231 F.2d 843 (2d Cir.), cert. denied, 351 U.S. 972 (1956). See also Loss, Securities Regulation 1040-54 (2d ed. 1961).

share of the partnership's short-swing profits in the securities of a company in which he served as a director. However, the court limited recovery to the share of profits allocable to the partner-director.[13]

Mutual Funds.—Last year we noted the institution of approximately fifty derivative actions attacking mutual-fund management fees.[14] There is no specific provision in the Investment Company Act governing such actions. This year the Courts of Appeal for the Second and Eighth Circuits rendered conflicting opinions as to the bases of federal jurisdiction over such actions.

In *Brown v. Bullock*[15] the shareholder-plaintiffs' essential allegations were that the fees paid by the mutual fund to the defendant management company were excessive; that the directors of the mutual fund were under the domination and control of the management company; and that the excessive fees were caused by the failure of the directors to properly discharge their duties due to such domination and control. The Second Circuit sitting en banc, concluded that the complaint sufficiently alleged violations of Section 37 of the Investment Company Act, which makes conversion of the property of a registered investment company a criminal offense, and section 15 of the Act, which prescribes annual approval by the board of directors or the shareholders of the management contract. The court concluded that while the Act does not expressly create it, a federal remedy exists for injury caused by violations of the Act. In so holding, the court expressly noted its disagreement with the Eighth Circuit's decision in *Brouk v. Managed Funds, Inc.*[16] to the extent that it was inconsistent. The allegations of the complaint in *Brouk* were substantially the same as those in *Brown*. However, after an extensive review of the cases accepting and rejecting private causes of action for violation of provisions of the federal securities acts, the Eighth Circuit concluded that failure of the directors of an investment company to discharge their duties in compliance with the standards of the Investment Company Act does not give rise to a private cause of action for the resulting damages to the investment company.

Since the defendants in *Brown* conceded the private cause of action for injury caused by violation of the Act, examination of the reasoning underlying the conflicting results in *Brown* and *Brouk* is

13. Blau v. Lehman, 286 F.2d 786 (2d Cir. 1960), aff'd, 368 U.S. 403 (1962).

14. deCapriles, Bosine ss Organization, 36 N.Y.U.L. Rev. 579, in 1960 Ann. Survey Am. L. 286, 305 (1961).

15. CCH Fed. Sec. L. Rep. ¶ 91,046 (2d Cir. 1961).

16. 286 F.2d 901 (8th Cir.), cert. granted, 366 U.S. 958 (1961). See Lutz v. Boas, CCH Fed. Sec. L. Rep. ¶ 91,032 (Del. Ch. 1961) holding the defendants in Brouk liable for damages for substantially the same acts.

of little aid to the reviewer. Moreover, as a practical consideration, it seems desirable to follow the general rule that breach of a statutory duty gives rise to a right of action on behalf of the injured person for whose benefit the statute was enacted, notwithstanding the fact that the statute does not expressly purport to grant such right.[17]

Other aspects of the mutual-fund derivative suit problem have received attention from the courts. A provision in a mutual-fund trust agreement requiring security-for-costs to be posted as a condition precedent to a shareholder's action for an accounting was held not violative of Section 17(h) of the Investment Company Act which invalidates instruments purporting to protect directors from liability for their misconduct.[18] In a state court action it was held that minor changes at two-year intervals in the underwriting contract between a mutual fund and its distributor would not satisfy the requirement of Section 15(b)(1) of the Investment Company Act which requires shareholder or director approval of such contracts when in effect for more than two years.[19]

Proxy Rules.—Another major decision this year recognized the right of a private investor who has been injured by a violation of the SEC proxy rules to bring an action *in his own behalf*, even if he himself did not give a proxy. However, the federal court of appeals would merely render a declaratory judgment that the proxies were invalid It would not, in the absence of diversity jurisdiction, determine the effect of such invalidity upon corporate action already completed, since this was a question which the court felt should be decided by the state courts.[20] On the other hand, where a plaintiff alleged that a proxy statement violated SEC rules, a New York trial court refused to enjoin a shareholders' meeting called to approve consolidation with another corporation on the ground that the jurisdiction of the federal courts on proxy-rule violations is exclusive.[21] If separate federal and state actions are required to establish the fact and effect of such violation, it is obvious that this private remedy has important practical limitations.

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17. Restatement, Torts § 286. See, e.g., Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).

18. Cabot v. Empire Trust Co., 189 F. Supp. 666 (S.D.N.Y. 1960). See text, accompanying note 25 infra.

19. Saminsky v. Abbot, CCH Fed. Sec. L. Rep. ¶ 91 047 (Del. Ch. 1961).

20. Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961). A concurring opinion by Judge Shackelford Miller, Jr., disagrees on the jurisdictional issue but agrees with the result on the merits. For an excellent critique of this case see Loss, Securities Regulation 2029-32 (2d. ed. 1961).

21. Malkan v. General Transistor Corp., 27 Misc. 2d 677, 207 N.Y.S.2d 345 (Sup. Ct. 1960).

Fraud in Sale and Purchase of Securities.—The scope of the now well-recognized private remedy for damages arising from a violation of Rule X-10b-5 under Section 10(b) of the Securities Exchange Act was the subject of several well-reasoned opinions. In *Matheson v. Armbrust*,[22] and, six months later in *Ellis v. Carter*,[23] the Ninth Circuit adopted the position of the Second Circuit[24] that the defrauded buyer as well as the defrauded seller has a cause of action under Rule X-10b-5. The court recognized the logic of the argument that Sections 11 and 12 of the Securities Act are more limited than Rule X-10b-5, and that without express evidence to the contrary, we should not presume that Congress intended to undo one year later what it did in 1933. The court, however, rejected this argument on the ground that it does less violence to Congressional intent to create the additional remedy than to be blind to the use of the words "purchase or sale" in Section 10(b). The full impact of the decision in favor of buyer's rights under Rule X-10b-5 is illustrated by two decisions rendered shortly after *Ellis v. Carter*. In *McClure v. Borne Chemical Co.*,[25] the Third Circuit held the right of a shareholder to bring a derivative action under Sections 10(b) and 29(b) of the Securities Exchange Act of 1934 to be a federally created right that may not be limited by state security-for-expenses statutes, either in the state where suit is brought or in the state of incorporation. In *Phillip v. J. H. Lederer Co.*,[26] a district court held that while the cause of action for violation of the Securities Act of 1933 and Rule X-10b-5 was barred by the three-year statute of limitations contained in Section 13 of the Securities Act, nevertheless, insofar as the action was based solely on a violation of Rule X-10b-5, the local six-year period for fraud actions would apply and the plaintiff could have his day in court.

Basically Rule X-10b-5 requires disclosure of special knowledge by insiders as well as avoidance of active fraud and misrepresentation. While the interstices of Rule X-10b-5 have been fairly well filled by the decisions dealing therewith, the full effect of the rule is yet to be realized. Many questions remain to be answered. For example,

22. 284 F.2d 670 (9th Cir. 1960), cert. denied, 365 U.S. 870 (1961).

23. 291 F.2d 270 (9th Cir. 1961).

24. Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).

25. 292 F.2d 824 (3d Cir.), cert. denied, 368 U.S. 939 (1961). It is apparent that the state security-for-expenses statutes have had a limited effectiveness. Evidence of this is the fact that during the seventeen years in which the New York statute has been in effect not a single plaintiff has actually posted security when required to do so as a condition to prosecuting the action. Testimony of Mr. Abraham Pomerantz, Public Hearings on New York Business Corporation Law (Oct. 7, 1960).

26. CCH Fed. Sec. L. Rep. ¶ 91,039 (S.D.N.Y. 1961).

is a company which is not subject to the proxy rules safe in using anything less than a proxy statement substantially complying with the rules in connection with solicitation of shareholder proxies for a merger vote or other transaction amounting to an exchange of securities constituting a sale? Are institutional investors well advised to obtain representation on boards of directors and special reports from companies as to financial and business results when the possibility exists that purchases or sales will be based on the information so obtained? Caution dictates a negative answer to these and similar questions.

Margin Requirements.—Finally, in another private remedy case based on a violation of the margin requirements of Section 7 of the Securities Exchange Act, the question presented was whether Section 29 of the Act voiding waivers of compliance applied to the usual arbitration provision in the agreement between customer and brokerage firm. Following *Wilko v. Swan*,[27] wherein the Supreme Court held an arbitration clause violative of the similar provision of Section 14 of the Securities Act, the court held that the same result was required under the Securities Exchange Act.[28] Of somewhat more significance is the extension of private remedies to violations of margin requirements which are designed less for the protection of individual investors than for the protection of the investing public and the market as a whole.[29]

With the exception of the Eighth Circuit decision in the *Brouk* case, the year under review witnessed a general judicial attitude of affording a private remedy for any violation of the securities acts. While widening abuses in the securities industry may fairly be considered the unarticulated reason behind this judicial attitude, nevertheless, the results seem sound and, as noted above, consistent with the general Congressional intent.

II

Corporate Finance

Sources of Funds.[30]—It is interesting to note that during 1961 licensed small business investment companies more than doubled in

27. 346 U.S. 427 (1953).

28. Reader v. Hirsh & Co., CCH Fed. Sec. L. Rep. ¶ 91,044 (S.D.N.Y. 1961).

29. The Committee reports, as the court notes, do recognize one purpose of the margin requirements to be protection of the margin purchaser. S. Rep. No. 1455, 73d Cong., 2d Sess. 11 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 8 (1934).

30. See generally Fleischer & Meyer, Tax Treatment of Securities Compensation: Problems of Underwriters, 16 Tax L. Rev. 119 (1960); Vancil, Lease or Borrow, Steps in Negotiation, 39 Harv. Bus. Rev. No. 6, at 128 (Nov.-Dec. 1961); Vancil, Lease or Borrow—New Method of Analysis, 39 Harv. Bus. Rev. No. 5, at 122 (Sept.-Oct. 1961); Note, 1961 U. Ill. L.F. 151.

number (from 175 to 445), with an even more dramatic increase in the number publicly owned (from 15 to 41, with 16 others in the process of registration). By the end of the year, available capital had reached $435 million, of which $150 million had been invested in some 2,000 small business concerns.[31] This rapid expansion is due mainly to private rather than government sources.[32] Needless to say, it has awakened considerable professional interest on the part of attorneys acting for both investors and potential clients.[33]

The trend toward "going public" among established enterprises has also continued.[34] The resulting burden on the staff of the Securities and Exchange Commission has given rise to some practical housekeeping rules and policy statements designed to expedite the review of registration and proxy statements.

Federal Registration and Exemptions.—Responding to the criticism of the Landis Report that much of the delay attending the registration of securities could be eliminated by the use of simpler forms and the abolition of deficiency letters in the case of seasoned securities,[35] the Commission adopted some new rules and policies. Rule 473 was amended to provide for a method of eliminating the 20-day telegraphic delaying amendment,[36] which, in view of the increase in filings and the delay in the review process, has become a sizeable administrative problem. In a policy statement the Commission has requested that filings updating previously filed material be accompanied by marked copies showing changes so as to expedite review.[37] Finally, without formally adopting a rule governing the procedure, the Commission is giving expeditious review to registration statements covering seasoned securities when the issuer and underwriter represent to the Commission that a careful investigation has been made and they believe the Act and Regulations have been complied with.

The popularity of mortgages as an investment medium continues to be a problem. The *Los Angeles Trust Deed* case, noted in last

31. N.Y. Times, National Economic Review, N.Y. Times, Jan. 8, 1962, p. 44, col. 3. The 12 largest companies had assets ranging from $33,300,000 to $9,600,000. An earlier study reported that in June the 265 companies then in operation had aggregate funds of $225 million. Evans, Developments in Small Business Law, 16 Bus. Law. 893 (1961).

32. In June, federal loans to investment companies were reported at $31 million; in December, governmental commitments amounted to $56 million, but only $28 million had been drawn down.

33. See Symposium, 20 Fed. B.J. 292 (1960).

34. See Backus, A Timetable for Public Financing, 7 Prac. Law. No. 6, at 13 (Oct. 1961).

35. See CCH Fed. Sec. L. Rep. ¶ 76736 (Dec. 1960).

36. Sec. Act Rel. No. 4329 (Feb. 21, 1961).

37. Sec. Act Rel. No. 4359 (April 24, 1961).

year's Survey,[38] was followed by a Commission release emphasizing that servicing or guaranteeing the mortgage by the offeror would make it an investment contract requiring registration as a security. In addition, the offeror would have to comply with the broker-dealer requirements of the Securities Exchange Act.[39] However, the Commission does recognize a limited exception for FHA mortgages, and has indicated a willingness to expand the exception.[40]

A Commission release reiterated its position that the short-term paper exemption provided by Section 3(a)(3) of the Securities Act does not apply to demand notes or to notes extendable by the issuer beyond nine months. The exemption is subject to a further qualification which requires the essential purpose of the financing to be the carrying of liquid inventory.[41] The intrastate exemption provided by Section 3(a)(11) was also the subject of a release emphasizing its extremely narrow limits.[42]

Withdrawal of Registration.—In 1936 the Supreme Court in the *Jones*[43] case held that withdrawal of a registration statement after commencement of a stop-order proceeding was an absolute right. Subsequent decisions[44] have all but overruled the *Jones* case and now the Fifth Circuit has refused to follow it in connection with the withdrawal of an application for a broker-dealer registration under the Securities Exchange Act.[45]

Fraud and Unregistered Securities.—The vagaries of judicial interpretation are illustrated by two cases involving claims under Section 12(1) of the Securities Act to recover damages arising from the purchase of unregistered securities. The Ninth Circuit, following its usual liberal attitude toward defrauded investors, has ruled laches unavailable as a defense to a section 12(1) claim.[46] Another federal court held the privity requirement of section 12 precluded recovery against participants, other than the direct seller and those in privity with or control of the seller. The case involved a scheme to revive

38. Los Angeles Trust Deed & Mortgage Exch. v. SEC, 264 F.2d 199 (9th Cir. 1959), 36 N.Y.U.L. Rev. 580, in 1960 Ann. Survey Am. L. 306 (1961).

39. Sec. Litigation Rel. No. 1876 (Jan. 9, 1961).

40. Letter Ruling of SEC to FHA of Nov. 3, 1960, CCH Fed. Sec. L. Rep. ¶ 76,746.

41. Sec. Act Rel. No. 4412 (Sept. 20, 1961).

42. Sec. Act Rel. No. 4386 (July 12, 1961).

43. Jones v. SEC, 298 U.S. 1 (1936).

44. Columbia Gen. Inv. Corp. v. SEC, 265 F.2d 559 (5th Cir. 1959); Comico Corp., Sec. Act Rel. No. 4050 (April 27, 1959).

45. Peoples Sec. Co. v. SEC, 289 F.2d 268 (5th Cir. 1961).

46. Straley v. Universal Uranium & Milling Corp., 289 F.2d 370 (9th Cir. 1961). Without discussion of Section 14 of the Securities Act, the court, after finding laches to be no defense, recognized that waiver may be a defense.

a pre-1933 corporation and sell its stock to the public without registration, in ill-fated reliance on section 3(a)(1).[47] In a well-reasoned opinion sustaining the constitutionality of essential provisions of the basic registration Form S-1 and the proxy rules against a void for vagueness attack in a criminal case, Judge Weinfeld seems to have laid to rest similar arguments in civil fraud cases.[48]

Promotion.[49]—A provocative case in Oregon held that "a promoter is a person who from the beginning of his preliminary negotiations looks to the formation of a corporation as a vehicle for the consummation of his enterprise."[50] From this definition the court reasoned that the liabilities of a promoter would not attach to an organizer of an economic unit, originally intended as a partnership, but cast in corporate form upon advice of counsel. Another recent decision dealt with the dwindling area of pre-incorporation subscriptions, Laches denied specific performance to a pre-incorporation subscriber who had waited four years to attempt to complete the transaction.[51]

Consideration for Shares.[52]—The leading case on this subject in 1961 was the decision of a federal district court directing the cancellation of controlling shares in Doeskin Products on the ground that they had been issued without consideration and as a part of a "bold and outrageous corporate swindle" by the defendant Birrell. The shares ordered cancelled included a large number which had in fact been purchased for value, but which in the opinion of the court, had been purchased with knowledge of the fraudulent issue. The purchaser was a family corporation owned by the man selected by Birrell to be Doeskin's president.[53] In another recent case an Arkansas court upheld "services" consisting of the obtaining of bank credit for the corporation as proper consideration for the issuance of shares.[54]

Pre-emptive Rights.—The Supreme Court of Iowa has properly decided that a by-law providing for pre-emptive rights "when the outstanding capital is increased" is applicable to the issuance of shares,

47. Wonneman v. Stratford Sec. Co., CCH Fed. Sec. L. Rep. ¶ 91,034 (S.D.N.Y. 1961).

48. United States v. Pope, 189 F. Supp. 12 (S.D.N.Y. 1960).

49. See Kessler, Promoters' Contracts: A Statutory Solution, 15 Rutgers L. Rev. 566 (1961); Comment, 38 U. Det. L.J. 334 (1961).

50. Daly v. Jackson, 360 P.2d 542, 546 (Ore. 1961).

51. Welborne v. Preferred Risk Ins. Co., 340 S.W.2d 586 (Ark. 1960).

52. See Winton, Private Corporate Stock Subscription Agreements, 33 So. Cal. L. Rev. 388 (1960); Comment, 33 Rocky Mt. L. Rev. 197 (1961).

53. McDonnell v. Birrell, 196 F. Supp. 496 (S.D.N.Y. 1961). The case contains a detailed description of the "swindle," including an attempt to validate the issue of shares through "settlement" of a derivative action. For other aspects of the litigation, see text accompanying note 178 infra.

54. Town & Country Trailer Sales, Inc. v. Godwin, 344 S.W.2d 338 (Ark. 1961).

within the original authorization, which had remained unissued for forty years.[55] Alabama's constitutional reservation of power to amend corporate charters has of course been held sufficient to sustain the validity of an amendment to the general corporation law authorizing denial or limitation of pre-emptive rights, since these cannot be considered "vested" rights.[56] When pre-emptive rights have been eliminated by a bylaw amendment in accordance with the applicable statute, there is no duty upon the corporation or majority shareholders to preserve the pro-rata interest of the minority when new shares are issued.[57]

Corporate Accounting.—The growing importance of accounting concepts and methods in modern corporation statutes raises the issue of possible conflict between the organic acts and the accounting provisions of tax and regulatory statutes. The Supreme Court of North Carolina, finding "substantial compliance" with the requirements of the corporation law in the corporation's use of acceptable tax accounting methods, commented: "It is not, we think, logical to conclude that the Legislature, in adopting the Business Corporation Act, intended to require a corporation to keep two sets of books, one for its stockholders, the other for the government."[58]

On the technical side, a current Pennsylvania case concerning the calculation of income available for payment of contingent annual interest on the corporation's bonds, spells out in modern accounting terms the principles of cost-deferment applicable to a transportation company's obsolete trackage and related intangible assets upon conversion from street cars to buses.[59] Also of interest is a North Dakota case in which the president of a close corporation tried to maintain his right to a bonus based on corporate earnings, by determining the amount of corporate profits each year *before* writing down certain inventories to the figures carried forward to the next year.[60] In Georgia, an appellate court has held that the book value of corporate stock on a given date, for purposes of a repurchase agreement, is sufficiently proven by evidence of the corporation's balance sheets as

55. Carlson v. Ringgold County Mut. Tel. Co., 108 N.W.2d 478 (Iowa 1961).

56. Mobile Press Register, Inc. v. McGowin, 271 Ala. 414, 124 So. 2d 812 (1960).

57. Shaw v. Empire Sav. & Loan Ass'n, 186 Cal. App. 2d 401 (1960); 49 Calif. L. Rev. 561 (1961).

58. Watson v. Watson Seed Farms, Inc., 253 N.C. 238, 242, 116 S.E.2d 716, 719 (1960). For an interesting analysis of the tax aspect of monthly dues to a co-operative corporation, designated as "capital contributions," see United Grocers, Ltd. v. United States, 186 F. Supp. 724 (N.D. Cal. 1960).

59. Fidelity-Philadelphia Trust Co. v. Philadelphia Transp. Co., 404 Pa. 541, 173 A.2d 109 (1961).

60. Universal Motor Co. v. Tucker, 110 N.W.2d 497 (N.D. 1961).

of a date several months before and several months after the given date.[61]

Dividends.[62]—Although there were no major cases on the substantive law of dividends, two current New York decisions are worthy of note on this topic. One case spells out the showing of financial ability as well as accounting surplus required to be made in the complaint to sustain an action to compel the declaration of a dividend.[63] The other case construing a stock option that contained an anti-dilution provision for stock-splits but not for stock dividends, held that the capitalization of surplus upon declaration of a stock dividend did not constitute a "change" in the common stock capitalization of the corporation.[64] The opinion does not give sufficient facts to support the result; but no mention is made of the possibility that a stock-split may be effected in the form of a stock dividend.[65]

III

SHAREHOLDERS

Corporate Entity.[66]—An unusually large number of recent cases raise the question whether the separate corporate entity will be respected.[67] Two of the more interesting decisions in the affirmative involve the import of the signatures of corporate officers who are also shareholders; in both, the New York courts refused to impute any personal consequences to such signature. In the first case, the plaintiff-director argued that his contract of employment had been ratified by "written consent" of the shareholders when he and the president of the corporation who together owned a majority of the shares, signed the contract without first convening a shareholders' meeting.[68] In

61. Drennon Food Prod. Co. v. Drennon, 104 Ga. App. 19, 120 S.E.2d 902 (1961).

62. See Note, Common Stock Dividends in Iowa, 46 Iowa L. Rev. 582 (1961).

63. Tomasello v. Trump, 30 Misc. 2d 643, 217 N.Y.S.2d 304 (Sup. Ct. 1961).

64. Amdur v. Meyer, 28 Misc. 2d 855, 212 N.Y.S.2d 765 (Sup. Ct. 1961).

65. N.Y.S.E. Company Manual § A13, at 235 (Aug. 15, 1955); A.I.C.P.A., Accounting Research and Terminology Bull. No. 43, at 53 (Final Ed. 1961).

66. See Cavanaugh, "Automatic" Forfeiture of Corporate Charters, 16 Bus. Law. 676 (1961).

67. See, e.g., Everly Enterprises, Inc. v. Altman, 54 Cal. 2d 761, 356 P.2d 199, 8 Cal. Rptr. 455 (1960); National Advertising Co. v. Sayers, 144 Colo. 356, 356 P.2d 483 (1960); W. D. Miller Lumber Corp. v. Miller, 357 P.2d 503 (Ore. 1960); Moore & Moore Drilling Co. v. White, 345 S.W.2d 550 (Tex. Civ. App. 1961); Shaw v. Bailey McCune Co., 11 Utah 2d 93, 355 P.2d 321 (1960). But see Paul v. Palm Springs Homes, Inc., 13 Cal. Rptr. 860 (Dist. Ct. App. 1961); Claremont Press Publishing Co. v. Barksdale, 187 Cal. App. 2d 813, 10 Cal. Rptr. 214 (1960); Five Star Transfer & Terminal Warehouse Corp. v. Flusche, 339 S.W.2d 384 (Tex. Civ. App. 1960). A more unusual case, involving an accounting for joint ventures, was Combs v. Haddock, 11 Cal. Rptr. 865 (Dist. Ct. App. 1961).

68. Salton v. Seaporcel Metals, Inc., 27 Misc. 2d 301, 208 N.Y.S.2d 60 (Sup. Ct. 1960).

the second and less controversial case, the plaintiff union sought to hold the defendant shareholder as an individual party to a supplemental arbitration agreement which he had signed as "president" of the corporation.[69] A more extreme case arose in California, where the individual defendants had agreed, when they sold certain lands to plaintiff for use as a service station, that any other land which they might sell nearby would be restricted against a similar use. A corporation, almost wholly owned by the individual defendants, then sold nearby land to X, who in turn leased it to an oil company for a service station. Plaintiff was unable to persuade the court that the corporation was the alter ego of the individual defendants, or that the latter had conspired with it to circumvent the restrictive agreement.[70]

On the other side is a disturbing case for lawyers. A tort claim against an attorney was recognized on the ground that the corporation, of which he was both secretary-treasurer and director, was his alter ego. At the time of incorporation, the lawyer was to receive one of the three proposed shares, but no effort was made to provide adequate capitalization for the corporation.[71] More dramatic was a case wherein the majority shareholders siphoned the earnings of two corporations into three other corporations wholly owned by them. The court treated the multiple corporations as "chartered partnerships" in order to enable the minority shareholders to obtain relief against the individual "partners" as well as the corporations.[72]

Transfer of Shares.[73]—The Delaware Supreme Court has sustained the right of a corporate pledgee to have shares transferred to it on the corporate books as a bona fide purchaser under the Uniform Transfer Act, even though its president knew, at the time of making the loan for which the shares were pledged, that the borrower had a criminal record. The court said that such fact was not sufficient to put

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69. Matter of Arbitration between Rosenblum and Southeastern Clothing Corp., 28 Misc. 2d 1016, 216 N.Y.S.2d 444 (Sup. Ct. 1961).

70. Macpherson v. Eccleston, 190 Cal. App. 2d 24, 11 Cal. Rptr. 671 (1961).

71. Minton v. Cavaney, 364 P.2d 473, 15 Cal. Rptr. 641 (1961) (by implication). The dissent argued that the alter ego doctrine should not have been applied because the attorney was not engaging in business; he was merely "practicing law" in becoming a nominal officer and director and a subscriber for a qualifying share in the corporation.

72. Hill v. Bellevue Gardens, Inc., 190 F. Supp. 760 (D.D.C. 1960). On the tax aspect, see Simmons, The Future of Multiple Corporations and Related Business Entities—The "Golden Age" of Sections 269, 482 and 1551, 47 A.B.A.J. 425 (1961).

73. See Austin & Nelson, Attaching and Levying on Corporate Shares, 16 Bus. Law. 336 (1961); Note, Corporate Shares: Attachment and Execution; Conflicting Policies of Negotiability and Collection of Judgments, 12 Hastings L.J. 335 (1961). See Also 33 Rocky Mt. L. Rev. 222 (1961); 8 U.C.L.A.L. Rev. 458 (1961).

the lender on notice of some possible infirmity in the issuance of the pledged shares.[74] A former stockholder, who allegedly consented to a fraudulent transfer of an insolvent corporation's assets, cannot escape liability on the ground that he is no longer a shareholder; the transfer of his stock is void if made in contemplation of the corporation's insolvency.[75] Other important cases involve the validity of a stock transfer even though certificates are not issued,[76] attempted acquisition of jurisdiction over a non-resident having an equitable interest by attachment of certificates in someone else's possession,[77] and the scope of liability of a transfer agent for refusal to transfer the stock.[78]

Shareholders' Agreements.[79]—Among the decisions sustaining transfer restrictions in shareholders' agreements,[80] of special interest is a civil law analysis of a provision giving a corporation the option, at a fixed low price, to buy half of the shares of corporate officers who resign or are discharged for cause. The Louisiana requirements of "cause" and "sufficient consideration" for the agreement were satisfied by the original issuance of the stock to the plaintiff at less than its value.[81] Also worthy of note is a federal appellate decision upholding the Graybar Electric Corporation's thirty-year-old plan for retaining ownership of its shares exclusively by active and retired employees, against attach on the ground that the low option price constituted a restraint on alienation.[82]

Proxies, Meetings and Elections.[83]—In addition to the earlier mentioned cases, concerning federal proxy rules,[84] of interest is the running fight between the Dyers and the SEC over what constitutes proper proxy materials, as well as certain procedural problems

74. Twinlock, Inc. v. Continental Thrift, 167 A.2d 735 (Del. 1961).

75. Bartle v. Warren-Jefferson Properties, Inc., 27 Misc. 2d 328, 210 N.Y.S.2d 736 (Sup. Ct. 1960) (validity of transfer upheld).

76. Smallwood v. Moretti, 128 So. 2d 628 (Fla. App. 1961).

77. Holly Corp. v. Dobell, 401 Pa. 307, 164 A.2d 331 (1960) (jurisdiction not obtained).

78. Lenhart Altschuler Assoc. v. Benjamin, 28 Misc. 2d 602, 215 N.Y.S.2d 541 (Sup. Ct. 1961).

79. See Note, 15 Wyo. L.J. 207 (1951).

80. In re Farah's Estate, 28 Misc. 2d 573, 215 N.Y.S.2d 908 (Surr. Ct. 1961); Stovel v. Samuels Glass Co., 346 S.W.2d 935 (Tex. Civ. App. 1961).

81. Georesearch, Inc. v. Morriss, 193 F. Supp. 163 (W.D. La. 1961).

82. Martin v. Graybar Elec. Co., 285 F.2d 619 (7th Cir. 1961).

83. See Blewer, Quorum and Voting Requirements, 6 Prac. Law. 79 (1960); Pittman, Nonvoting Shares—in Missouri, 26 Mo. L. Rev. 117 (1961); Seamans & Barger, Multiple Votes per Share, 16 Bus. Law. 400 (1961); Sneed, The Factors Affecting the Validity of Stockholder Votes in Adverse Interest, 13 Okla. L. Rev. 373 (1960); Sturdy, Mandatory Cumulative Voting: An Anachronism, 16 Bus. Law. 550 (1961).

84. See notes 20, 21 supra.

connected therewith.[85] Also worth mentioning are two decisions which refused to apply the federal proxy rules to a corporation listed on the Honolulu Stock Exchange,[86] and to an unlisted Oregon corporation.[87]

Two New York cases invalidated corporate elections for failure of a shareholder to make written oath, upon demand, that he had not been paid for his vote;[88] and for failure of the president to permit a vote by shareholders upon a bylaw amendment adopted by the directors which affected the election of directors.[89] The Supreme Court of Texas has construed its new corporation law[90] to imply waiver of notice, or of irregularities in notice, by attendance at the meeting in person or by proxy.[91] In California, a notice which fails to specify the hour of the meeting is defective, and the meeting is invalid if attended by less than all the shareholders.[92]

Inspection of Books and Records.—Two cases in Pennsylvania defining the inspection rights of shareholders properly indicate that not all "books and records" stand on the same footing. Bad faith sufficient to deny inspection is much more readily established with respect to financial records than to shareholder lists.[93] Even as to the stock list, however, a showing that inspection is sought for the purpose of harassment in the interest of another corporation is sufficient to establish bad faith.[94] Inspection for discovery purposes is legitimate;[95] although this is often not as broad as the shareholder is entitled to for other purposes.[96] Furthermore, the right to inspect the stock list

85. Dyer v. SEC, 289 F.2d 242, Dyer v. SEC, 290 F.2d 541, Dyer v. SEC, 291 F.2d 774 (8th Cir. 1961).

86. Sawyer v. Pioneer Mill Co., 190 F. Supp. 21 (D. Hawaii 1960) (listing on Honolulu Stock Exchange not listing on a national exchange and does not subject corporation to federal proxy rules under SEC orders of Nov. 5, 1935 and March 6, 1943).

87. Carter v. Portland Gen. Elec. Co., 362 P.2d 766 (Ore. 1961). Cf. Note, Standards of Disclosure in Proxy Solicitation of Unlisted Securities, 1960 Duke L.J. 623.

88. Holzer v. Federal Television Corp., 26 Misc. 2d 934, 209 N.Y.S.2d 846 (Sup. Ct. 1960). The oath is required by N.Y. Gen. Corp. Law. § 20, applicable to business corporations.

89. Matter of Scharf v. Irving Air Chute Co., 28 Misc. 2d 869, N.Y.S.2d 775 (Sup. Ct. 1961). The action was based on N.Y. Gen. Corp. Law. § 27.

90. Tex. Bus. Corp. Act Ann. arts. 2.25, 9.09 (1956).

91. Camp v. Shannon, 348 S.W.2d 517 (Tex.), reversing 344 S.W.2d 755 (Tex. Civ. App. 1961).

92. Grant v. Hartman Ranch Co., 14 Cal. Rptr. 531 (Dist. Ct. App. 1961).

93. Hagy v. Premier Mfg. Corp., 404 Pa. 330, 172 A.2d 283 (1961); Goldman v. Trans-United Indus. Inc., 404 Pa. 288, 171 A.2d 788 (1961).

94. Young v. Columbia Broadcasting Sys. Inc., 28 Misc. 2d 512, 215 N.Y.S.2d 950 (Sup. Ct. 1959).

95. Skutt v. Minneapolis Basketball Corp., 110 N.W.2d 495 (Minn. 1961) (per curiam).

96. Weistrop v. Necchi Sewing Machine Sales Corp., 30 Misc. 2d 174, 216 N.Y.S.2d 261 (Sup. Ct. 1958).

includes the right to make extracts therefrom;[97] and the corporation may be required to furnish, at reasonable intervals and at the shareholders' expense, copies of the daily transfer sheets until the next annual or special meeting.[98] The scope of inspection may include records other than the formal books and statements, including analyses of accounts; but where the stockholder testifies that he is able to understand these special records, he has no need for, and therefore no right to have accountants, stenographers, or attorneys to assist him.[99] In an interesting "reverse twist" on equitable conversion, a New York trial court has denied inspection rights to a shareholder of record who was under contract to sell his shares.[100]

Fundamental Changes.[101]—Last year's case holding that certain Missouri corporations had charters not subject to amendment[102] has now been reversed. The supreme court of that state has unanimously ruled that the provisions of the 1875 Constitution, which the lower court had no authority to construe,[103] and which prohibit the creation of corporations and the amendment of corporate charters by special laws, by necessary implication authorize such action by general laws. This was held to constitute sufficient reservation of power to sustain the validity of a statute changing the method of extending the life of existing corporations created while the 1875 Constitution was in effect.[104] A second Missouri case held that the lease of a corporation's sole major asset is "in the usual and regular course of its business," and does not require approval by three-fourths of the shares, when the corporation's business consists only of leasing out that proper and collecting the rents.[105] In the District of Columbia, it has been held that the transfer of the franchise of a baseball

97. Panhandle Co-op. Royalty Co. v. McLain, 355 P.2d 1047 (Okla. 1959).

98. Murchison v. Allegheny Corp., 20 Misc. 2d 290, 210 N.Y.S.2d 153 (Sup. Ct. 1960), aff'd mem., 12 App. Div. 2d 753, 210 N.Y.S.2d 975 (1st Dep't 1961).

99. State v. Ralston Purina Co., 343 S.W.2d 631 (Mo. App. 1961) (shareholder previously employed by corporation).

100. Dierking v. Associated Book Serv. Inc., 222 N.Y.S.2d 729 (Sup. Ct. 1960).

101. Chambers, How Not to Sell Your Company, 39 Harv. Bus. Rev. No. 3, at 105 (May-June 1961); McCarthy, Premeditated Merger, 39 Harv. Bus. Rev. No. 1, at 74 (Jan.-Feb. 1961); Note, 74 Harv. L. Rev. 393 (1960); see Comment, 28 Tenn. L. Rev. 529 (1961).

102. State v. Holekamp Lumber Co., 331 S.W.2d 171 (Mo. App. 1960), 36 N.Y.U.L. Rev. 577, in 1960 Ann. Survey Am. L. 303 (1961).

103. Mo. Const. art. 5, § 3.

104. State v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo. 1960), appeal dismissed, 366 U.S. 715 (1961).

105. Santa Fe Hills Golf & Country Club v. Safehi Realty Co., 349 S.W.2d 27 (Mo. 1961).

corporation to another city is not a "disposition" of it requiring approval by two-thirds of the shares.[106]

A Delaware case, reminiscent of the celebrated *Lebold v. Inland S.S. Co.*,[107] has been remanded for a determination of whether the sale of assets was for a fair and adequate price; if not, the fiduciary duty of controlling shareholders in sale-of-assets cases may be extended to include a common parent company.[108] The Third Circuit has decided that, in a purchase of assets for stock, the assumption by the buyer of the seller's liabilities did not include "voluntary" pension benefits for nonunion employees.[109] And in New York, on the ground that the FCC has sole jurisdiction, a state court has refused to determine the adequacy of the consideration received by Western Union upon divestiture of its international business in the course of consummating a merger under the Federal Communications Act of 1934.[110]

The merger of parent and subsidiary companies has given rise to some interesting questions. One is the extent to which voting shares can extract a premium for approving a merger beneficial to the nonvoting shares.[111] Another is whether the parent is entitled to conjunctional billing for electrical service in buildings formerly owned by the subsidiary. In the latter case the court, answering in the negative, stated not too persuasively, that this was not a case of legal succession but one of identity, and that the "uniquely personal" privilege of preferential utility rates may be lost to a successor upon a change of status.[112] A third question yet unanswered is whether Delaware's "short merger" statute encompasses the merger of a domestic and a foreign corporation. A federal decision that a three-judge district court is not appropriate to determine the issue, since the constitutionality of the state statute is not involved, sheds little light on the issue.[113] Finally, a trial court in New York has sustained the validity of a plan whereby 100 shares of the merged corporation were to be exchanged

106. Murphy v. Washington Am. League Base Ball Club, 293 F.2d 522 (D.C. Cir. 1961).

107. 82 F.2d 351 (7th Cir. 1936).

108. Abelow v. Symonds, 173 A.2d 167 (Del. Ch. 1961). Cf. Luckenback S.S. Co. v. Grace & Co., 267 Fed. 676 (4th Cir. 1920).

109. Gerhart v. Henry Disston & Sons, 290 F.2d 778 (3d Cir. 1961).

110. Franklin v. Barr, 28 Misc. 2d 486, 210 N.Y.S.2d 541 (Sup. Ct. 1961).

111. Manacher v. Reynolds, 165 A.2d 741 (Del. Ch. 1960), appeal docketed sub nom Barroway v. Manacher, Nos. 51, 52, Del. Sup. Ct., Nov. 14, 1960; 109 U. Pa. L. Rev. 887 (1961).

112. First Sterling Corp. v. Lundy, 14 App. Div. 2d 193, 217 N.Y.S.2d 646 (3d Dep't 1961).

113. Voege v. American Sumatra Tobacco Corp., 192 F. Supp. 689 (D. Del. 1961). On the British counterpart of the short-merger statute, see Weddeburn, A Corporations Ombudsman? 23 Modern L. Rev. 663 (1960).

for each share of the surviving corporation; persons owning less than 100 old shares were given scrip redeemable in new shares for a limited period only, and thereafter only out of the proceeds of the sale of the unredeemed fractions.[114]

Valuation of Dissenters' Shares.—California's thirty-year-old statutory provision for the payment upon merger of the fair value of dissenters' shares has been construed, apparently for the first time by an appellate court, in a case wherein the plaintiff unsuccessfully offered to show the existence of an informal oral understanding among directors that they would never call the corporation's callable participating preferred stock. The court held this evidence properly excludable in the absence of an amendment making the stock noncallable, and so long as there was an active market for the shares and no indication of any manipulative activities by management.[115] Another recent case in Illinois decided that dissenters make an election when they demand payment for their shares, and that "market value" and "asset value" are proper factors to be considered in determining the "fair value" of such shares.[116]

Deadlock and Dissolution.[117]—The most instructive case on the subject of deadlock and dissolution comes from Illinois. The Illinois Statute authorizes dissolution of a deadlocked corporation "when the acts of the directors or those in control are illegal, oppressive or fraudulent."[118] The case record, which was developed by a referee over a three-year period, showed that the corporation's president, who was the head of one of the two quarreling family factions, had been in control for some ten years during which the board of directors had failed to function, that the 50% owners on the other side had been deprived of any participation in management although they constituted half of the board, and that the president had usurped board functions by hiring other "employees" who, without title, served in the capacity of corporate officers, determining the salaries of employees who were officers under the corporation's by-laws, by organizing a subsidiary, and borrowing money from corporations in which he had a personal interest. These activities, in the opinion of the court, were sufficiently "oppressive" to warrant a judgment of dissolution.[119]

114. Rubel v. Rubel Corp., 25 Misc. 2d 388, 206 N.Y.S.2d 396 (Sup. Ct. 1960).

115. Gallois v. West End Chem. Co., 185 Cal. App. 2d 765, 8 Cal. Rptr. 596 (1960).

116. Bauman v. Advance Aluminum Castings Corp., 27 Ill. App. 2d 178, 169 N.E.2d 382 (1960).

117. See Schoone, Shareholder Liability Upon Voluntary Dissolution of Corporations, 44 Marq. L. Rev. 415 (1961).

118. Ill. Bus. Corp. Act. § 86(a)(3), Ill. Rev. Stat. ch. 32, § 157.86 (1957).

119. Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131 (1960), 74 Harv. L. Rev. 1461 (1961).

In Georgia, deadlock between two equal owners of a corporation was sought to be resolved by the judicial appointment of a receiver under a statute[120] authorizing such appointment for a fund or property "having no one to manage it," notwithstanding the fact that one of the shareholders was "General Manager" of the Corporation.[121] However, one of the corporate operations entailed heavy losses, and the question as to how long the receiver should continue to run the company was left for future determination.[122] In New York, where the Deadlock Statute requires an affirmative showing that dissolution would be beneficial to the shareholders,[123] a recent case has held that a solvent corporation will not be dissolved on the ground of alleged deadlock where the surviving 50% owner is willing to purchase the shares of his deceased partner in accordance with the terms of a shareholders' agreement.[124]

A minority shareholder may obtain a preliminary injunction against dissolution of a solvent corporation, notwithstanding the majority shareholder's statutory right, if he can make out a prima facie case of breach of the majority shareholder's fiduciary duty. In a New York decision, plaintiff prevailed on this theory by showing that he was the "inside" or production man, and the two defendants the "outside" salesmen, and that dissolution would enable the outside men to take the corporation's accounts and good will with them leaving plaintiff with only a pro rata share of inventory and plant, rather than the asset value of a going concern.[125] But a preliminary injunction will not issue where there is alleged only a "strong indication" of bad faith, while the record shows that the corporation had received a better offer for its assets than might be obtained if dissolution were delayed.[126]

IV

Corporate Management

Close Corporations.[127]—Significant among the many cases involving close corporations, are the following holdings: In the absence

120. Ga. Code Ann. § 55-301 (1935).

121. Farrar v. Pesterfield, 216 Ga. 311, 116 S.E.2d 229 (1961) (by-laws provided for management by a three-director board).

122. Tri-State Broadcasting Co. v. Pesterfield, 216 Ga. 381, 116 S.E.2d 556 (1960).

123. N.Y. Gen. Corp. Law. §§ 103-06. The court has discretion to appoint a referee to inquire into all the relevant facts. In re Clements Bros., Inc., 12 App. Div. 2d 694, 207 N.Y.S.2d 821 (3d Dep't 1960) (mem.).

124. Matter of Topper's Hamburger of Distinction, Inc., 28 Misc. 2d 626, 213 N.Y.S.2d 117 (Sup. Ct. 1961).

125. Levine v. Styleart Press, Inc., 217 N.Y.S.2d 688 (Sup. Ct. 1961).

126. Slott v. Plastic Fabricators, Inc., 402 Pa. 433, 167 A.2d 306 (1961).

127. See generally O'Neal, Agreements Which Protect Minority Shareholders Against

of a showing of fraudulent conspiracy, a corporate election will not be invalidated on the ground that the bylaws failed to provide a 50% shareholder with the 50% control he had expected, where such shareholder participated in the adoption of the bylaws and served as director and president thereunder for two years.[128] The call by a director of a special meeting cannot be validated by the alleged failure of shareholders to elect directors at the annual meeting, when in fact there had been no shareholder meetings in the twelve years since the corporation was organized.[129] Contracts entered into informally by the shareholders-directors are binding on close corporations, and may not be avoided on a plea of ultra vires under modern statutes.[130] On the other hand, informal salary accruals on the books of account, designed to circumvent a feared salary freeze that never materialized, do not constitute binding obligations of a close corporation to its shareholder-officers.[131] Finally, in New York, a shareholders' agreement requiring unanimous consent to the sale or other disposition of corporate property is unenforceable for noncompliance with the statutory requirement that such a provision be embodied in the certificate of incorporation.[132]

Action by Directors[133] *and Officers*.[134]—Some interesting cases

"Squeeze-Outs," 45 Minn. L. Rev. 537 (1961); Oppenheim, The Close Corporation in California—Necessity of Separate Treatment, 12 Hastings L.J. 227 (1961); Polasky, Planning for the Disposition of a Substantial Interest in a Closely Held Business, Part III—The Corporation: Stock-Purchase Agreements and Redemption of Shares, 46 Iowa L. Rev. 516 (1961); Zimmerman, Buy-Sell Agreements in Close Corporations: A Summary for the New York Lawyer, 10 Buffalo L. Rev. 1 (1960); Note, 74 Harv. L. Rev. 1630 (1961).

128. Gwin v. Thunderbird Motor Hotels, Inc., 216 Ga. 652, 119 S.E.2d 14 (1961).

129. In re Capital Bias Products, Inc., 28 Misc. 2d 987, 212 N.Y.S.2d 807 (Sup. Ct. 1961). The opinion is interesting for its dicta as to the inadequacy of the General Corporation Law in respect to the close corporation and its condemnation of prearranged election results.

130. B-F Bldg. Corp. v. Coleman, 284 F.2d 679 (6th Cir. 1960) (per curiam), reversing 182 F. Supp. 602 (N.D. Ohio 1960) (contract guaranteeing obligations of affiliated corporation). The lower court opinion is criticized in 12 W. Res. L. Rev. 634 (1961). See also Brewer v. First Nat'l Bank, 202 Va. 807, 120 S.E.2d 273 (1961) (lifetime employment contract with former majority shareholder).

131. Herring v. Kennedy-Herring Hardware Co., 290 F.2d 270 (6th Cir. 1961) (per curiam).

132. Fromkin v. Merrall Realty, Inc., 30 Misc. 2d 288, 215 N.Y.S.2d 525 (Sup. Ct. 1961). Cf. N.Y. Stock Corp. Law § 9.

133. See generally Gaenzle, Corporate Management by an Executive Committee: Proposed New York Business Corporation Act, 25 Albany L. Rev. 93 (1961); Kessler, The Statutory Requirement of a Board of Directors: A Corporate Anachronism, 27 U. Chi. L. Rev. 696 (1960); Note, 47 Va. L. Rev. 278 (1961). On status of de facto director who failed to comply for four years with the by-law requirement that he be a shareholder, see Popperman v. Rest Haven Cemetery, Inc., 345 S.W.2d 715 (Tex. 1961).

134. On method of trying out title to corporate office in New York, see Matter of Porea, 29 Misc. 2d 48, 215 N.Y.S.2d 881 (Sup. Ct. 1961). On ratification of employment

concerning the extent and limitations of directorial authority have been decided this year.[135] Perhaps the most provocative case is one purporting to sustain the right of directors to enter into a collective bargaining agreement which included featherbedding provisions.[136] A second question to receive answer from the courts was whether a director may deliberately stay away from a meeting in order to prevent the forming of a quorum to fill a vacancy on the board. This question arose in a case involving a close corporation, the bylaws of which made provision for four directors and for the filling of vacancies by the directors remaining in office without safeguarding the rights of shareholding groups to specific representation on the board. The trial court sustained the right of the absent director to challenge a rump meeting at which the vacancy was filled, notwithstanding a strong argument by defendant that her breach of duty to attend directors meetings should work an estoppel against her.[137]

With respect to the authority of officers, the most unusual case of the year held the corporation liable on its president's promise to resell corporate shares for the account of the buyer within three months at twice the purchase price. A split Utah Supreme Court found some precedent in the theory that a security salesman has actual or implied authority to bind his principal on a promise to repurchase or to resell the shares for the account of the buyer.[138] The rest of the current decisions take the orthodox position that corporate officers have no "inherent" authority to act for the corporation, whether the office held is that of president,[139] treasurer,[140] or secretary-treasurer.[141]

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contracts, see Clyserol Lab., Inc. v. Smith, 362 P.2d 99 (Okla. 1961); Collins v. Parkton Compound Boiler Co., 195 Pa. Super 364, 171 A.2d 576 (1961).

135. Terwilliger v. Graceland Memorial Park Ass'n, 35 N.J. 259, 173 A.2d 33 (1961) (a cemetery corporation may not, for reasons of public policy, sell grave markers even if certificate of incorporation includes this power); Lippman v. New York Water Serv. Corp., 25 Misc. 2d 267, 205 N.Y.S.2d 541 (Sup. Ct. 1960) (power to invest in securities of other corporations, not included in original legislative charter, acquired by merger with other corporations having such power).

136. Halpern v. Pennsylvania R.R., 189 F. Supp. 494 (E.D.N.Y. 1960).

137. Gearing v. Kelly, 29 Misc. 2d 674, 215 N.Y.S.2d 609 (Sup. Ct. 1961).

138. White v. Western Empire Life Ins. Co., 11 Utah 227, 357 P.2d 483 (1960).

139. Bloomberg v. Greylock Broadcasting Co., 174 N.E.2d 438 (Mass. 1961) (employment of broker for sale of corporation's principal asset). On authority of president who is also the dominant shareholder, see Schoettle v. Sarkes Tarzian, Inc., 191 F. Supp. 768 (E.D. Pa. 1961).

140. Brede Decorating, Inc. v. Jefferson Bank & Trust Co., 345 S.W.2d 156 (Mo. 1961) (bank on inquiry notice where secretary endorses with rubber stamp for deposit in another account).

141. M & E Luncheonette, Inc. v. Freilich, 30 Misc. 2d 637, 218 N.Y.S.2d 125 (Sup. Ct. 1961) (authority to sue in corporate name). See also Seal and Inv. Corp. v. Emprise, Inc., 190 Cal. App. 2d 305, 12 Cal. Rptr. 153 (1961). In the latter case, costs were levied on officer as true plaintiff, Sealand Inv. Corp. v. Shirley, 190 Cal. App. 2d 323, 12 Cal. Rptr. 164 (1961).

Liabilities of Officers and Directors.—The New York Court of Appeals unanimously refused to give effect to a paragraph in a conditional sales contract, signed by the defendant as president of a corporation, which provided that "where the purchaser is a corporation . . . the officer(s) signing . . . personally guarantee . . . payment."[142] The court took the position that an officer's intent to bind himself personally must appear more clearly, as for example, through a second signature. On the other hand, while a corporate officer is usually not personally liable for inducing a breach of contract by his corporation, it is becoming increasingly evident that such immunity may be lost if the officer acts in bad faith and for an ulterior personal purpose.[143]

Executive Compensation and Tenure.[144]—Delaware has ruled that a bylaw permitting removal of directors without cause is inconsistent with a certificate provision for a classified board and staggered election of directors.[145] Under the new Texas corporation law, a bylaw provision that corporate officers are to be "elected" for one year prohibits the hiring of officers for longer periods; but a president hired for two years has enforceable "contract rights" with respect to the first year.[146]

Employee stock options continue to be the most discussed form of executive compensation.[147] The most recent development in the American Airlines plan is the approval given by the Delaware Chancery Court to the administration of the plan by a committee of directors, with determination of the committee subject to board approval.[148] On the other side is the declaration of a federal circuit court that the

142. Salzman Sign Co. v. Beck, 10 N.Y.2d 63, 64, 176 N.E.2d 74, 75, 217 N.Y.S.2d 55, 56 (1961), affirming 11 App. Div. 2d 1068, 206 N.Y.S.2d 525 (2d Dep't 1960) (mem.).

143. Slavenburg Soelling Corp. v. W. A. Assomull & Co., 29 Misc. 2d 232, 213 N.Y.S.2d 308 (Sup. Ct. 1961).

144. See generally Patton, Executive Compensation In 1960, 39 Harv. Bus. Rev., No. 5, at 152 (Sept.-Oct. 1961); Patton, What is an Executive Worth?, 39 Harv. Bus. Rev., No. 2, at 65 (March-April 1961); Steadman, Capital Gains as Applied to Executive Compensation, 16 Bus. Law. 643 (1961); Trimble, Executive Compensation: Corporate Considerations, 6 Prac. Law., No. 8, at 45 (1960); Note, 109 U. Pa. L. Rev. 224 (1960).

145. Essential Enterprises Corp. v. Automatic Steel Prods., Inc., 159 A.2d 288 (Del. Ch. 1960), 59 Mich. L. Rev. 640 (1961). That illegally removed directors are entitled to compensation for the period of their tenure, see Essential Enterprises Corp. v. Automatic Steel Prods., Inc., 164 A.2d 437 (Del. Ch. 1960).

146. Pioneer Specialties, Inc. v. Nelson, 161 Tex. 244, 339 S.W.2d 199 (1960).

147. See generally Campbell, Stock Options Should be Valued, 39 Harv. Bus. Rev., No. 4, at 52 (July-Aug. 1961) (accounting aspects); Ford, Stock Options Are in the Public Interest, 39 Harv. Bus. Rev., No. 4, at 45 (July-Aug. 1961); Note, Deferred Compensation—The Phantom Stock Plan Materializes, 12 W. Res. L. Rev. 63 (1960); Comment, 49 Calif. L. Rev. 373 (1961).

148. Elster v. American Airlines, Inc., 167 A.2d 231 (Del. Ch. 1961).

Oklahoma statute governing stock options does not permit their issue as compensation for incorporators or officers.[149]

Fiduciary Duties of Management.[150]—The well-publicized accusations of conflict of interest in Chrysler Corporation's management have elicited a great deal of interest in the subject,[151] as well as in the device of employing law firms of high repute to investigate the alleged irregularities, ostensibly in connection with professional advice to the board as to whether the corporation has a cause of action.[152] The current crop of cases include transactions between the corporation and its directors or officers;[153] between corporations having common directors;[154] and breach of duty in the organization of a competing corporation.[155]

Of practical importance is the holding of an appellate court in New York that reliance on advice of counsel may exonerate directors from civil liability in connection with the interpretation of a statute. Reversing recovery of nearly $120,000 damages against directors who made the wrong choice in the method of combining two corporations (the celebrated Glen Alden de facto merger case), the court said:

149. Emerson v. Labor Inv. Corp., 284 F.2d 946 (10th Cir. 1960) (statute allowing options "only in connection with the allotment of shares," and limits "allotment" to subscriptions and stock dividends).

150. See generally, Austin, Code of Conduct for Executives, 39 Harv. Bus. Rev., No. 5, at 53 (Sept.-Oct. 1961); Baumhart, How Ethical are Business Men?, 39 Harv. Bus. Rev., No. 4, at 6 (July-Aug. 1961); Note, 36 Notre Dame Law. 373 (1961); Note, 70 Yale L.J. 308 (1960).

151. Note, Wadmond, Seizure of Corporate Opportunity, 17 Bus. Law. 63 (1961); Wadmond, Conflicts of Business Interest, 17 Bus. Law. 48 (1961); Watt, Formalizing the Corporate Policy and Minimizing Exposure to Conflicts of Interest, 17 Bus. Law. 42 (1961); Note, Corporate Opportunity, 74 Harv. L. Rev. 765 (1961); Note, 34 Temp. L.Q., 290 (1961); Comment, Purchase of Corporate Indebtedness by a Fiduciary, 1960 Duke L.J. 613 (1960).

152. Reports to the Chrysler directors were made by the firms of Kelley, Drye, Newhall, Maginnes & Warren on Oct. 2, 1960, and Dewey, Ballantine, Bushby, Palmer & Wood on Oct. 3, 1960. For one aspect of the derivative actions instituted in behalf of that corporation, see Dann v. Chrysler Corp., 166 A.2d 431 (Del. Ch. 1960).

153. Geominerals Corp. v. Grace, 338 S.W.2d 935 (Ark. 1960) (burden on director to prove transaction was fair); Armstrong Manors v. Burris, 14 Cal. Rptr. 338 (Dist. Ct. App. 1961) (shareholder ratification with full knowledge); Doyle v. Omundson, 28 Ill. App. 2d 499, 171 N.E.2d 659 (1961) (alleged adverse interest on stock option); Johnson v. Duensing, 340 S.W.2d 758 (Mo. App. 1960) (sale of treasury stock to director voidable "on the ground of constructive fraud"); Beadle v. Daniels, 362 P.2d 128 (Wyo. 1961) (corporation entitled to recover secret profit of director).

154. Colorado Management Corp. v. American Founders Life Ins. Co., 359 P.2d 665 (Colo. 1961) (partly performed management contract voidable irrespective of fairness); Thomas v. Satfield Co., 363 Mich. 111, 108 N.W.2d 907 (1961) (reformation of lease granted to give effect to savings in cost of building).

155. Craig v. Graphic Arts Studio, Inc., 166 A.2d 444 (Del. Ch. 1960) (limited market a reason for finding breach of duty); Evangelista v. Queens Structure Corp., 27 Misc. 2d 962, 212 N.Y.S.2d 781 (Sup. Ct. 1961) (conflict of interest good defense and counterclaim in suit for salary).

"The judgment below determines in effect that these financiers . . . knew or should have known more Pennsylvania law than eminent Pennsylvania counsel."[156]

The Supreme Court of Georgia has properly ruled that directors' purchase of shares for the purpose of acquiring majority ownership and liquidating the corporation did not constitute breach of duty *to the corporation.*[157] Less persuasive is the view of an intermediate court in Florida that there is no duty of disclosure by the president who purchases shares knowing that a wealthy and famous businessman "might be" interested in investing in the corporation.[158]

Directors' Right of Inspection.—This year's New York cases restate the basic rule that the director's right to inspect the corporate books and records is absolute during his tenure in office.[159] A director may also have a qualified right after discharge to inspect the books and records for the period during which he served as a director.[160] However, this qualified right terminates after the corporation has been dissolved and the winding up is in the hands of escrowees.[161] In Delaware, a trial court decision of questionable logic has held, apparently for the first time, that a director does not have the right to examine even the stock ledger if the corporation can show that his motives are improper.[162]

Indemnification.—The question whether directors are entitled to reimbursement for litigation expenses in successfully defending *title* to their offices (as distinguished from the successful defense of their acts as directors) under the Delaware indemnification statute,[163] has been considered for the first time by a state court and answered in the affirmative.[164] A more difficult question was presented to an intermediate appellate court in New York. Defendants in two civil actions brought under the Martin Act to enjoin the sale of fraudulent secu-

156. Gilbert v. Burnside, 13 App. Div. 2d 982, 983, 216 N.Y.S.2d 430, 432 (2d Dep't 1961) (mem.).

157. King Mfg. Co. v. Clay, 216 Ga. 581, 118 S.E.2d 581 (1961).

158. Rogers v. Riddle, 128 So. 2d 409 (Fla. App. 1961) (per curiam). Cf. Conant, Duties of Disclosure of Corporate Insiders Who Purchase Shares, 46 Cornell L.Q. 53 (1960).

159. Application of Goldman, 207 N.Y.S.2d 309 (Sup. Ct. 1960).

160. Demos v. Capps & Co., 28 Misc. 2d 415, 212 N.Y.S.2d 858 (Sup. Ct. 1961).

161. Schor v. Barshor Realty Co., 218 N.Y.S.2d 11 (Sup. Ct. 1961).

162. State v. Seiberling Rubber Co., 168 A.2d 310 (Del. Super. 1961).

163. Del. Code Ann. tit. 8, § 122 (1953). "Every corporation . . . shall have power to . . . (10) Indemnify any and all of its directors . . . against expenses . . . incurred by them in connection with the defense of any action . . . in which they . . . are made parties . . . by reason of being or having been directors."

164. Essential Enterprises Corp. v. Automatic Steel Prods., Inc., 164 A.2d 437 (Del. Ch. 1960). Cf. Sorenson v. Overland Corp., 242 F.2d 70 (3d Cir. 1957), 33 N.Y.U.L. Rev. 546, in 1957 Ann. Survey Am. L. 296 (1958).

rities had been personally exonerated, although there was judgment against the corporation and others. Application of the director of defendants for reimbursement of their litigation expenses was resisted by the receiver for the corporation. Reimbursement was denied on the ground that the two directors had not acted in good faith.[165] The usual practice in New York is to refer motions for reimbursement to the trial judge.[166]

V

Derivative Actions

Status of Plaintiff.[167]—An unusual problem of status was raised in a New York case. A three-man corporation in New York had a certificate provision requiring unanimous action. Before the issue of shares, one of the three men left the enterprise. His wife claimed status as a "nominee" of the shares which were to be, but never were, issued to her husband. The trial court held that she did not have standing as an equitable shareholder to prosecute a derivative action.[168] In New Hampshire, loss of status to sue was the consequence of a shareholder's deposition stating that he waived any personal benefits from the derivative action brought by him in the interest of a liquidating corporation, even if this meant discontinuance because all other shareholders were either disqualified or unwilling to intervene in the action.[169]

The defense of "unclean hands," based on plaintiff's approval of and benefit from the corporate disbursements complained of, is legally sufficient to bar him from prosecuting a derivative action.[170] But adverse interest arising from share ownership in a competing corporation is not enough to deprive the shareholder of his status to prosecute a derivative action.[171]

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165. People v. Uran Mining Corp., 13 App. Div. 2d 419, 216 N.Y.S.2d 985 (4th Dep't 1961), 14 App. Div. 2d 481, 216, N.Y.S.2d 992 (4th Dep't 1961) (mem.) affirming 26 Misc. 2d 957, 206 N.Y.S.2d 455 (Sup. Ct. 1960).

166. Tharaud v. James Bros. Realty Co., 28 Misc. 2d 921, 216 N.Y.S.2d 1012 (Sup. Ct. 1961).

167. See Painter, Double Derivative Suits and Other Remedies with Regard to Damaged Subsidiaries, 36 Ind. L.J. 143 (1961).

168. Cavanagh v. L & R Trucking & Warehouse Co., 29 Misc. 2d 576, 215 N.Y.S.2d 902 (Sup. Ct. 1961).

169. Bowker v. Nashua Textile Co., 103 N.H. 258, 169 A.2d 630 (1961).

170. Evangelista v. Longo, 13 App. Div. 2d 835, 216 N.Y.S.2d 196 (2d Dep't 1961) (mem). The wrongs complained of did not spell out a non-derivative cause of action as previously alleged. Evangelista v. Longo, 13 App. Div. 2d 834, 216 N.Y.S.2d 194 (2d Dep't 1961) (mem.).

171. Malkan v. General Transistor Corp., 27 Misc. 2d 275, 210 N.Y.S.2d 289 (Sup. Ct. 1960), appeal dismissed sub nom., Malkan v. Fialkov, 14 App. Div. 2d 693, 219, N.Y.S.2d 936 (2d Dep't 1961). The complaint was dismissed for insufficiency, but

Action by Shareholders.[172]—The principal case considering shareholder action is also of importance in anti-trust law. The M corporation allegedly had a cause of action for treble damages against C corporation. The directors of M had refused to sue. Plaintiff requested his co-shareholders in M corporation to instruct the directors to sue, but he was outvoted. Plaintiff then instituted a derivative action in behalf of M against C, and C moved to dismiss on the ground that the shareholders' vote constituted a business decision by them not to sue. A federal trial court sustained the complaint holding the shareholders' vote an invalid attempt to ratify the directors' illegal acts and does not bar a derivative action, particularly if there is a continuing wrong.[173]

Procedural Problems.[174]—The various actions related to the financial manipulations of Lowell M. Birrell in Doeskin Products have given rise to several federal-state conflicts. The Second Circuit this year affirmed the federal trial court's refusal to stay the federal suit which was broader in scope than an earlier state action. It also upheld the impounding of certain shares offered in settlement, and the appointment of a "fiscal agent" and receiver.[175]

Other procedural cases involve the construction of the federal venue statute,[176] emphasize that the appointment of a receiver is an extraordinary remedy subject to judicial discretion,[177] that diversity jurisdiction will not be lost by the intervention of additional parties,[178]

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the status of the plaintiff was sustained with leave to plead over an analogy to the "guardian ad litem" principle developed with respect to directors' actions by Judge Fuld in Tenney v. Rosenthal, 6 N.Y.2d 204, 189 N.Y.S.2d 158 (1959). See Note, 36 N.Y.U.L. Rev. 199 (1961). An earlier stage of the principal case is reported at 27 Misc. 2d 677, 207 N.Y.S.2d 345 (Sup. Ct. 1960).

172. See Leavell, The Shareholders as Judges of Alleged Wrongs by Directors, 35 Tul. L. Rev. 331 (1961); Note, 47 Cornell L.Q. 84 (1961).

173. Rogers v. American Can Co., 187 F. Supp. 532 (D.N.J. 1960), appeal docketed No. 13493, 3d Cir. Jan. 12, 1961, 109 U. Pa. L. Rev. 1179 (1961). See also Comment, 59 Mich. L. Rev. 904 (1961).

174. On Security-for-expenses, see notes 18, 25 supra.

175. Ferguson v. Tabah, 288 F.2d 665 (2d Cir. 1961), affirming, Ferguson v. Birrell, 190 F. Supp. 506 (S.D.N.Y. 1960). The same shares were ordered to be deposited with the clerk of the state court in Weinberger v. Bradley, 28 Misc. 2d 382, 210 N.Y.S.2d 658 (Sup. Ct. 1961). These and other shares were ordered cancelled in McDonnell v. Birrell, 196 F. Supp. 496 (S.D.N.Y. 1961). Other Birrell cases include: Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960); Grubbs v. Pettit, 282 F.2d 557 (2d Cir. 1960); Pettit v. Doeskin Prods., Inc., 270 F.2d 95 (2d Cir. 1959); Claude Neon, Inc. v. Birrell, 177 F. Supp. 706 (S.D.N.Y. 1959); Saltzman v. Birrell, 156 F. Supp. 538 (S.D.N.Y. 1957); Birnbaum v. Birrell, 17 F.R.D. 409 (S.D.N.Y. 1955).

176. Industrial Waxes, Inc. v. International Rys., 193 F. Supp. 783 (S.D.N.Y. 1961).

177. Coleman v. La Salle Creosoting Co., 129 So. 2d 311 (La. App. 1961); Saull v. Seplowe, 218 N.Y.S.2d 777 (Sup. Ct. 1961).

178. Himmelblau v. Haist, 195 F. Supp. 356 (S.D.N.Y. 1961).

and that there may be sound reasons for allowing two similar derivative actions in different states to proceed independently.[170]

Two recent cases help to define the proper limits of discovery in derivative actions. In the first case plaintiff's motion for pre-trial examination in order to frame his complaint was denied.[180] In the second case, defendant's questions concerning the identity of informers on alleged corporate irregularities were disallowed, probably to avoid fears of economic reprisals.[181]

A California decision holding that discontinuance of a derivative action without approval of the court is invalid seems undesirable in principle since the result is dismissal of the action with prejudice.[182]

Settlement.—The Supreme Court of Delaware has sustained a settlement valued at $500,000 in an action seeking to recover $78 million, where the warrants and options under attack were prima facie valid and the principal cause of action seemed to be based on the theory that they had become unconscionable because of the great prosperity of the corporation.[183]

Counsel Fees.—A good rationale of the contingent fee in derivative actions will be found in a current decision of the Appellate Division of the Supreme Court of New York,[184] which only a few years ago took a dim view of the whole subject.[185] The decision is also interesting because of the different appraisal of the judges as to the contribution made by the several attorneys in a complicated lawsuit, and because of the comparison of attorneys' fees with the fees of other experts. In the state of Washington, where a derivative action involved a two-man corporation, and the plaintiff alone benefited from the suit, there was no abuse of discretion in the trial court's refusal to allow recovery of attorneys' fees and other expenses.[186] Worthy of reporting is the upward adjustment of counsel fees in the *Goldfine* case,[187] and the

179. Kaufman v. Baker, 11 App. Div. 2d 1013, 206 N.Y.S.2d 320 (1st Dep't 1960) (mem.).

180. Markewich v. Newberg, 27 Misc. 2d 1040, 210 N.Y.S.2d 299 (Sup. Ct. 1960).

181. Dann v. Chrysler Corp., 166 A.2d 431 (Del. Ch. 1960).

182. Ensher v. Ensher, Alexander & Barsoon, Inc., 187 Cal. App. 2d 407, Cal. Rptr. 732 (1960).

183. Forman v. Chesler, 167 A.2d 442 (Del. 1961).

184. Marine Midland Trust Co. v. Forty Wall St. Corp., 13 App. Div. 2d 213 N.Y.S.2d 689 (1st Dep't 1961).

185. See Eisenberg v. Central Zone Property Corp., 1 App. Div. 2d 353, 149 N.Y.S.2d 840 (1st Dep't 1956), 32 N.Y.U.L. Rev. 687-88, in 1956 Ann. Survey Am. L. 261-62 (1957).

186. Leppaluoto v. Eggleston, 57 Wash. 2d 393, 357 P.2d 725 (1960). But see Mencher v. Sachs, 164 A.2d 320 (Del. Ch. 1960) (allowance of counsel fees).

187. Matter of Pomerantz, 186 F. Supp. 412 (D. Mass. 1960). Cf. Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959), 36 N.Y.U.L. Rev. 574, in 1960 Ann. Survey Am. L. 300 (1961).

automatic elimination of an unusually large award upon reversal of the *Glen Alden* case.[188]

VI

Foreign Corporations[189]

Service of Process.[190]—In an important derivative action challenging the fees charged by investment managers and advisers to mutual funds,[191] a New York trial court found a foreign investment company amenable to process in that state because of its close identification with an investment adviser, itself a foreign corporation licensed to business in New York. The investment adviser serviced defendant as well as other mutual funds.[192] The reasoning of the court followed the modern trend toward a liberal basis of jurisdiction but not the New York precedents, which generally have declined jurisdiction over a foreign corporation conducting its business in the state through an agent who serves other principals.[193]

Minnesota's "single act" statute has been invoked to sustain service on a foreign corporation which executed and delivered in Minnesota certain promissory notes payable in that state.[194] A single sale of infected cattle at public auction in the state has also subjected a foreign corporation to service of process in Oregon.[195] However, several borderline cases have failed to find a sufficient basis for local jurisdiction.[196]

An interesting Pennsylvania decision sustained service of process

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188. Gilbert v. Burnside, 13 App. Div. 2d 982, 216 N.Y.S.2d 430 (2d Dep't 1961), reversing 197 N.Y.S.2d 623 (Sup. Ct. 1959) which had awarded $40,000 counsel fees a recovery of $118,000. The lower court case was criticized in 36 N.Y.U.L. Rev. 568, in 1960 Ann. Survey Am. L. 294 (1961).

189. See Comment, The Status of Foreign Corporations: Effect Given "Equal Treatment" Statutes, 1961 Duke L.J. 274.

190. On appointment of receiver for non nationalized foreign corporation, see Schwartz v. Compania Azucarera Vertientes-Camaguey, 14 App. Div. 582, 217 N.Y.S.2d 711 (2d Dep't 1961).

191. See note 14 supra.

192. Ackert v. Ausman, 29 Misc. 2d 963, 218 N.Y.S.2d 822 (Sup. Ct. 1961). The court paid only lip service to New York's old-fashioned "solicitation plus" test for "doing business." Current cases following the traditional rule include Dana v. Fontainebleau Hotel Corp., 215 N.Y.S.2d 938 (Sup. Ct. 1961); James Talcott, Inc. v. J. J. Delaney Carpet Co. Inc., 28 Misc. 2d 600, 213 N.Y.S.2d 354 (Sup. Ct. 1961).

193. See de Capriles Business Organization, 34 N.Y.U.L. Rev. 371, in 1958 Ann. Survey Am. L. 351, 385 (1959).

194. Dahlberg Co. v. Western Hearing Aid Center, 259 Minn. 330, 106 N.W.2d 381 (1961), cert. denied, 366 U.S. 961 (1961).

195. Nichols v. Bellavista Farms, Ltd., 186 F. Supp. 270 (D. Ore. 1959).

196. Town of Eunice v. Trinity Universal Ins. Co., 123 So. 2d 583 (La. App. 1960) (failure to pay on performance bond); Benson v. Brattleboro Retreat, 103 N.H. 28, 164 A.2d 560 (1960) (occasional directors' meetings in state); Frank v. Getty, 29 Misc. 2d 115, 216 N.Y.S.2d 15 (Sup. Ct. 1961) (internal affairs of foreign corporation).

upon a foreign corporation as sole shareholder of a domestic corporation on the "alter ego" doctrine, where the cause of action involved alleged fraud in the state.[197] But a switchboard operator at a telephone answering service and maildrop is not "an agent or person for the time being in charge of . . . any office or usual place of business" for the purpose of service of process on a foreign corporation in Pennsylvania.[198]

Florida has a statute which provides that any corporation which fails to designate an agent for the service of process may be brought before the courts of the state by service of process upon any agent of the corporation transacting business for it in Florida.[199] The highest court of that state has now held that this statute applies to foreign corporations, whether or not qualified to do business, but not on causes of actions arising outside the state.[200]

Qualification.—Kansas has held that a business trust is a corporation and not an unincorporated association within the meaning of its statute on foreign corporations, and may be enjoined from trading in the state or disposing of its property until it complies with the Kansas Corporation Code and Blue Sky Law.[201] Failure to qualify, however, does not bar a corporation from access to the Florida courts for the purpose of resisting local tax on alleged interstate commerce.[202] In New York, failure to qualify does not prevent a corporation from enforcing its right to arbitration, which is a special proceeding and not an "action."[203] Finally it should be noted that under the New Business Corporation Law, Foreign Corporations "Doing Business" in New York will have access to the state courts upon retroactive qualification.[204]

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197. Williams v. Rose, 403 Pa. 619, 170 A.2d 577 (1961).

198. Paramount Packaging Corp. v. H. B. Fuller Co., 190 F. Supp. 178 (E.D. Pa. 1960).

199. Fla. Stat. Ann. § 47.171 (Supp. 1961).

200. Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961).

201. State v. United Royalty Co., 188 Kan. 43, 363 P.2d 397 (1961).

202. Frederick B. Cooper Co. v. Overstreet, 126 So. 2d 744 (Fla. App. 1961).

203. General Knitting Mills, Inc. v. Rudd Plastic Fabrics Corp., 212 N.Y.S.2d 783 (Sup. Ct. 1961).

204. N.Y. Bus. Corp. Law § 1312 (effective April 1, 1963). See also Keeffe, Practicing Lawyer's Guide to the Current Law Magazines, 47 A.B.A.J. 1015, 1016 (1961), listing states permitting retroactive qualification.