

Delaware Journal Of Corporate Law

VOLUME 1

1976

NUMBER 1

© Copyright Delaware Journal of Corporate Law, Inc., 1976

A HISTORY OF DELAWARE CORPORATION LAW

By S. SAMUEL ARSHT*

THE PRESENT POSITION of Delaware's General Corporation Law as the most popular of such laws in the United States¹ is attributable to many of factors, some of which have their roots in the distant past. The authors of a number of recent articles critical of the General Corporation Law,² to the extent they have traced the history of corporation law in Delaware, have alluded to sinister motives and methods in its development. It is not the thesis of this article to rebut such allegations and the arguments for federal chartering,³ nor is it my purpose to deny that the motivation for change in Delaware's corporation laws over their 189-year history is unrelated to the interests of American business and industry. On the other hand, I do not believe that enough emphasis has been given to the positive aspects of the development of the Delaware law. This article will endeavor to right the balance in tracing the history and development of the corporation law in Delaware. In so doing, I hope that the reader will be provided with a background which will make future articles on the Delaware corporation law in this review the more interesting.

* Samuel Arsht is a member of the Delaware Bar and a senior partner in the Wilmington, Delaware law firm of Morris, Nichols, Arsht & Tunnell. He has been a member for more than 25 years of the Delaware Corporation Law Committee of the Delaware Bar Association and a member, since 1967, of the American Bar Association Committee on Corporate Laws, which is responsible for the Model Business Corporation Act. The author gratefully acknowledges the assistance of his colleagues William C. Anderson, III, A. Gilchrist Sparks, III, and Martin P. Tully in the preparation of this article.

1. 15 FORBES, No. 10, 45-56 (1975).

2. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW 1101 (1975); Cary, *Federalism and the Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969).

3. My rebuttal to Professor Cary's articles cited at note 2, *supra*, was presented at a 1975 Symposium on Federal and State Roles in Establishing Standards of Conduct for Corporate Management sponsored by the American Bar Association and will appear in a forthcoming issue of *The Business Lawyer*.

The Early Years 1776-1899

The history of corporate legislation in Delaware begins with the Delaware Constitution of 1776, which made no mention of corporations but did provide that the common law of England and so much of the English statutory law as had been theretofore adopted in practice in the state remained in force.⁴ The British Parliament, in the Bubble Act of 1720,⁵ had declared illegal "presuming to act as a corporate body" and the issue of transferable shares of stock except under authority of an Act of Parliament or a charter granted by the Crown. Special act incorporation by Parliament or the Crown curtailed the free and unregulated company organizations which had prevailed in the late seventeenth and early eighteenth centuries, whose existence was seized upon by Parliament as the scapegoat for the 1720 financial crash known as the South Sea Bubble.⁶ The prohibitions of the Bubble Act were extended to the American colonies in 1741 and remained in effect until the American Revolution.⁷ Inasmuch as the British Parliament did not act to form any corporations in Delaware, none existed during the colonial period.

The first special incorporation act in Delaware, enacted on February 2, 1786, granted a charter to the Bank of North America.⁸ Only two additional incorporations took place under the 1776 Constitution.⁹

The Delaware Constitution of 1792 was the first to make specific mention of corporations, providing that the rights, privileges, immunities and estates of corporate bodies "shall remain as if the constitution of this state had not been altered."¹⁰ The number of incorporations by special act increased gradually in the period immediately following passage of the Constitution of 1792. While only one incorporation took place between 1792 and 1800,¹¹ twelve incorporations, excluding those of municipalities and educational and religious groups,

4. DEL. CONST., art. 25 (1776).

5. 6 GEO. I, c. 18 (1719).

6. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1292-93 (1952).

7. *Id.* at 1293.

8. Act of Feb. 2, 1786, ch. 1296, 2 DEL. LAWS 838. The Bank of North America was incorporated by Congress and by the Pennsylvania legislature prior to its incorporation in Delaware, which incorporation was sought as a result of some doubts with respect to the legality of the federal charter and the fact the Pennsylvania legislature was considering revocation of the central bank's state charter. *See generally* W. Whitman, *Business and Government in Nineteenth Century Delaware, 17-19*, June, 1964 (unpublished thesis on file at Delaware Historical Society) [hereinafter cited as Whitman].

9. The Wilmington Library Company was incorporated in 1788, Act of June 11, 1788, ch. 1876, 2 DEL. LAWS 931, and the physicians of the State of Delaware were incorporated in 1789, Act of February 3, 1789, ch. 195b, 2 DEL. LAWS 944.

10. DEL. CONST. art. VIII, § 8 (1792).

11. See 2 DEL. LAWS 1025-1379 and 3 DEL. LAWS 3-113.

took place from 1800-1810.¹² Almost all of the businesses incorporated in this period were either banks or bridge, canal or turnpike companies. It was also during this period that Delaware recognized the principle of limited liability with respect to corporations.¹³

From 1820 until the enactment of the Delaware Constitution of 1831, eighteen business incorporations took place.¹⁴ The three business corporations formed in 1829 included a coal company, a navigation company and a manufacturing company, suggesting not only an increasing volume of incorporations but also a wider use of the corporate form by different types of businesses.¹⁵

The Delaware Constitution of 1831, the first to impose substantive restrictions on the legislature's powers of incorporation, provided:

"No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without the concurrence of two-thirds of each branch of the Legislature, and with a reserved power of revocation in the Legislature; and no act of incorporation which may be hereafter enacted, shall continue in force for a longer period than twenty years, without the re-enactment of the Legislature, unless it be an incorporation for public improvement."¹⁶

The twenty-year limitation upon the period of existence of corporations not for public improvement is an indication of the Constitutional Convention's awareness of the shift which was taking place from the incorporation only of public improvement companies to the incorporation of private manufacturing and business concerns.¹⁷ The reservation of a power of revocation is directly traceable to the concerns raised by the 1819 decision of the United States Supreme Court in *Trustees of Dartmouth College v. Woodward*,¹⁸ which held that a corporate charter was a contract between the state and the corporation and that it could not be changed unilaterally by the state because Article I, Section 10 of the United States Constitution specifically barred any state from enacting a law which would impair the obligations of contract.

Incorporation by special act, subject to the provisions of the 1831 Constitution, remained as the only method of incorporation in Delaware

12. See 3 DEL. LAWS 119-399 and 4 DEL. LAWS 3-343.

13. Livesay, *The Lobdell Car Wheel Co. 1830-1867*, XLII BUS. HISTORY REV. 173 (1968). See also Whitman, 67.

14. See 6-7 DEL. LAWS and 8 DEL. LAWS 1-66.

15. See 7 DEL. LAWS 163-496. See generally Whitman, *supra* note 8, at 31-38.

16. DEL. CONST. art. II, § 17 (1831).

17. The coal company and the manufacturing company incorporated in 1829. Each had thirty-year charters, which suggests that the Delaware Constitutional Convention imposed the more stringent twenty-year limitation as a result of its concern with the growing trend to incorporation of private businesses. See generally Whitman, *supra* note 8, at 35-36, suggesting that this attitude was the result of losses in the 1816-1819 financial collapse.

18. 17 U.S. (4 Wheat) 518 (1819).

until after the Civil War. The first significant post-war change in Delaware's Corporations laws took place in 1875,¹⁹ when Article II, Section 17 of the Constitution of 1831 was amended to give to the legislature the power "to enact a general incorporation act to provide incorporation for religious, charitable, literary and manufacturing purposes, for the preservation of animal and vegetable food, building and loan associations, and for draining low lands. . . ."²⁰

Two reasonably detailed and comprehensive general corporation laws were passed under authority of the Constitution of 1831, as amended in 1875. The first, that of 1875,²¹ was in force until 1883, when it was repealed and the second law was enacted.²² The need for these laws was apparent by 1873, there having been 144 special acts passed in the legislature in that year alone either granting, renewing, amending or supplementing corporate charters, other than those of municipalities.²³ The scope of these laws was limited, however, to the purposes enumerated in the Constitution of 1831, as amended. The policy of exclusive incorporation under general law did not exist; corporations organized for the purposes set forth in the amendment to the 1831 Constitution could be formed under the provisions of the general laws or by special act, as incorporators might prefer.²⁴

The procedure for incorporating under the foregoing general laws was both cumbersome and time-consuming. In order to incorporate under the 1875 Act, it was necessary to submit a certificate of incorporation, signed by not less than three persons, two-thirds of whom were required to be citizens of the State of Delaware, to an associate judge of the Superior Court in the county in which the corporation intended to be situated or have its principal business transacted. The application could only be submitted during a vacation of the Court and was required to be preceded by a newspaper notice, published at least thirty days before the application was submitted, indicating the incorporators' intent to so apply. The associate judge, upon receipt of the proposed certificate of incorporation, was required to examine it, and if the objects, articles and conditions therein set forth appeared to

19. A cursory general corporation law was passed in 1871 requiring only that a certificate stating the corporate name, amount of capital, and principal place of business be certified to the Recorder of Deeds of the county where the business was established in order to form the corporation, but its application was limited to companies engaged in "drying, canning, manufacturing and preparing fruits and other products of the State for Sale." Act of March 21, 1871, ch. 152, 14 DEL. LAWS 229.

20. Act of January 28, 1875, ch. 1, 15 DEL. LAWS 3.

21. *Id.* ch. 119.

22. Act of March 14, 1883, ch. 147, 17 DEL. LAWS 212.

23. See 14 DEL. LAWS 473-569 and 693-714.

24. See generally LARCOM, *THE DELAWARE CORPORATION* 4 (1937).

the judge to be lawful and not injurious to the community, the judge was required to direct that the certificate be filed in the records of the Superior Court and to order the Prothonotary to publish in a newspaper of the county in which the judge was sitting, for at least three weeks, a notice setting forth that an application had been made to said judge to grant the certificate of incorporation. If no sufficient reason was shown to the contrary, the judge was then permitted, at the ensuing term of the court, to declare and decree the existence of the corporation and direct that the certificate, with the judge's endorsement thereon, be delivered to and filed in the office of the Secretary of State, and a copy of the same, furnished and certified by the Secretary, be recorded in the Recorder's office of the county in which the application was made. Only upon such recording did corporate existence commence.

The 1883 Act did little to simplify this process, although it did make it somewhat more rapid. For example, the statute no longer required that the application for a certificate of incorporation be presented to an associate judge of the Superior Court during a vacation of the Court, that the judge order a publication of the fact that the application had been made, or that he wait until the next term of Court to approve a charter. Nevertheless, review by the associate judge was still required and the effective date for a charter continued to be governed by the date it was recorded.

Notwithstanding the existence of the above-mentioned general incorporation laws, the Delaware legislature continued to be swamped with bills for special incorporations, no doubt due in part to the cumbersome nature of the general act incorporation process. In 1897, no fewer than 115 special act incorporations, amendments and renewals, other than those relating to municipal charters, were enacted into law,²⁵ as compared to approximately 10 incorporations or amendments effected that year under the general law of 1883.²⁶

Since most promoters continued to use the special act procedure of incorporation, a great burden was placed on the time and resources of the Delaware legislature.²⁷ Furthermore, the special act procedure had been taken over by permanent lobbyists who would, for a fee, secure the necessary votes in the legislature for their clients.²⁸ Because the expense and corruption attendant upon the procedure of incorporation by special act, a majority of the members of the Constitutional

25. See 20 DEL. LAWS 548-601 and 761-778.

26. See CORPORATIONS PRIOR TO MARCH 10, 1899 (n.d.) (on file in the office of the Secretary of State of the State of Delaware).

27. See generally LARCOM, *supra* note 24, at 5-7.

28. *Id.* at 407; Whitman, *supra* note 8, at 115-18.

Convention of 1897 agreed that it was necessary to eliminate the special act process.²⁹ Accordingly, the 1897 Constitution provided that:

“No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law; but the foregoing provisions shall not apply to municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State. The General Assembly shall, by general law, provide for the revocation or forfeiture of the charters of all corporations for the abuse, misuse, or nonuse of their corporate powers, privileges or franchises. Any proceeding for such revocation or forfeiture shall be taken by the Attorney-General, as may be provided by law. No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly.”

In addition, the 1897 Constitution eliminated prior limitations on the length of corporate existence and on permissible business purposes and required that all existing corporations accept the Constitution as a prerequisite to a renewal or amendment of their charters.³⁰ A Special Session of the General Assembly was called in 1897 to draft a new corporation law to carry out the provision of the 1897 Constitution. The proposed bill died in the Senate, however, and thus it was not until the regular 1899 session of the General Assembly that Delaware enacted its first general incorporation law under the new Constitution.³¹

During the interval between 1898 and 1899, a small group of individuals perceived the possibilities of large revenues if new enterprises could be induced to incorporate in Delaware.³² This group is generally credited with the drafting of the 1899 General Corporation Law.³³ Their efforts were not altogether altruistic, however, since they planned to organize their own corporation, modeled upon similar ones operating in New Jersey, to engage in the business of incorporating companies under the new law and representing them in Delaware.

29. See LARCOM, *supra* note 24, at 7.

30. DEL. CONST. art. IX, § 2 (1897). Article IX also contained sections specifying lawful consideration for the issuance of stock; continuing the vested rights, privileges and immunities and estates of existing corporations; and requiring that foreign corporations designate an agent for service of process.

31. LARCOM, *supra* note 24, at 8.

32. *Id.* at 9. Larcom cites as authority for this account, *James L. Wolcott, THE DEVELOPMENT OF THE DELAWARE CORPORATION LAW*, an unpublished, undated thesis submitted to the Harvard Graduate School of Business Administration. As best as can be determined, no copy of this treatise still exists.

33. *Id.*

The 1899 Act³⁴ was a "general" act, consistent with the constitutional provisions adopted in 1897. Two immediate benefits were to be realized by the passage of the new Act. In the first place, the time of the legislature (and the concomitant expense) would no longer be taken up by the consideration of special incorporation laws. Secondly, the legislature would no longer be subjected to the untoward pressures of lobbyists.

The new law drew heavily from New Jersey's General Corporation Law, then the nation's most popular.³⁵ It was broadly affirmative in its statement of corporate powers, in response, no doubt, to the strict construction given corporation laws by the judiciary.³⁶ The Act quickly achieved popularity based upon three principal features: a simple procedure for formation,³⁷ low corporate taxes;³⁸ and a broad statement of the powers granted to the corporation by the State.³⁹

Pursuant to the 1897 Constitution, the Act of 1899 was, after its enactment, the exclusive means of incorporating a private business (other than a bank) in Delaware. The Act contained special sections covering building and loan associations,⁴⁰ railroads,⁴¹ telegraph and telephone companies,⁴² electric companies⁴³ and gas companies,⁴⁴ and granted to corporations specific powers as well as any powers expressly set forth in their certificates of incorporation to the extent that such powers were necessary or convenient to the attainment of the business purposes set forth therein.⁴⁵ The Act also granted to corporations the express power to do business in any other state, territory, colony or foreign country,⁴⁶ the power to hold stocks and bonds of other companies⁴⁷ and the power to merge,⁴⁸ and protected shareholders from liability except to the extent of the par value of their holdings.⁴⁹

Thus, by the end of the nineteenth century, the age of the special act method of incorporation had passed, and Delaware began the twenti-

34. Act of March 9, 1899, ch. 273, 21 DEL. LAWS 445.

35. H. HENN, HANDBOOK ON THE LAW OF CORPORATIONS, 19 (2d Ed. 1970).

36. See generally LUCE, *supra* note 6, at 1295.

37. The 1899 statute eliminated the requirements of judicial approval and publication contained in the 1875 and 1883 Acts.

38. The annual franchise taxes were imposed by and computed in accordance with the Act of March 10, 1899, ch. 166, DEL. LAWS 303.

39. Act of March 10, 1899, ch. 273, § 2, 21 DEL. LAWS 445.

40. *Id.* § 68, 470.

41. *Id.* §§ 69-95, 470-83.

42. *Id.* § 102, 487.

43. *Id.* §§ 98-99, 484-85.

44. *Id.* § 101, 486-87.

45. *Id.* § 3, 446.

46. *Id.* § 6, 447.

47. *Id.* § 133, 500-501.

48. *Id.* § 54, 461.

49. *Id.* § 14, 449.

eth century with a general corporation law which was as modern as any existing at that time. The remainder of this article will concern itself with the development of that statute.

*The Development of the Corporation
Law 1899-1967*

Although the 1899 Act was largely silent with respect to the standards to be adhered to by officers and directors in the performance of their duties, the Court of Chancery and the Supreme Court promptly asserted the power of the Delaware judiciary to prevent corporate fraud and the inequitable use of corporate machinery by management. In 1900, in *Martin v. D. B. Martin Co.*, one of the first corporation cases to be decided after the passage of the 1899 Act, the Court of Chancery observed:

“It is well settled that a court of equity may disregard formalities and break through the shell of fictions in order to prevent, or undo fraud. . . .”⁵⁰

In 1917 the statute was amended to authorize the creation of stock without nominal or par value. The new provision set no standard, however, for the consideration to be received for no-par stock.⁵¹ Notwithstanding that the statutory language was unqualified, the Court of Chancery did not hesitate to exercise its equitable powers to circumscribe the discretion granted to the directors:

“So far as the literal language of the section is concerned, the directors may from time to time issue no par stock for any consideration they may see fit, even though the price they fix is far below its actual value. . . . What I am now pointing out is simply this — that the statute does not impose any restraint upon the apparent unbridled power of the directors. Whether equity will, in accordance with the principles which prompt it to restrain an abuse of powers granted in absolute terms, lay its restraining hand upon the directors in case of an abuse of this absolute power, is another question which will be presently considered and answered in the affirmative.”⁵²

From the earliest days of the corporation law, the Delaware courts have repeatedly declared that directors, officers and controlling stockholders are subject to the highest fiduciary standards in their relations

50. 88 A. 612, 613 (Del. Ch. 1900).

51. Act of March 20, 1917, ch. 113, 29 DEL. LAWS 327, amended by Act of April 2, 1925, ch. 112, 34 DEL. LAWS 274-75.

52. *Bodell v. General Gas & Elec. Corp.*, 132 A. 442, 446 (Del. Ch. 1926), aff'd, 140 A. 264 (Del. Supr., 1927).

to the corporation and all its stockholders. In 1922, the Supreme Court stated in *Lofland v. Cahall*:

“Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing, especially where their individual interests are concerned.”⁵³

That same year, the Court of Chancery stated in *Bowen v. Imperial Theatres, Inc.*:

“Directors of a corporation are frequently spoken of as its trustees. Their acts are scanned in the light of those principles which define the relationship existing between trustee and cestui que trust. Tested by these familiar principles, the [acts of the] three directors who thus conspired to take from the company enough stock to fix themselves in undisputed control of its affairs, is reprehensible.”⁵⁴

The foregoing statements by the Delaware courts, dating from the beginning of the 1899 Act, should be borne in mind by those who view the development of the Delaware statute by legislative amendment as a process aimed solely at freeing management from restrictions at the expense of stockholder rights.⁵⁵

As early as 1901, the legislature committed the State to a program of close attention to its then revolutionary general corporation law by amending 48 of its 139 sections.⁵⁶ The single most important amendment that year was the addition of a new section permitting the certificate of incorporation to “contain any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any classes of the stockholders, provided, such provisions are not contrary to the laws of this State.”⁵⁷ This broad delegation by the State of the right to structure the distribution of power within the corporation in any fashion not demonstrably in violation of law encouraged the use of the corporate form by business enterprises. Since the corporation law, as originally enacted, had granted to the directors the power to manage the business of the corporation⁵⁸ and had permitted the certificate of incorporation

53. 118 A. 1, 3 (Del. Supr. 1922); see also *duPont v. duPont*, 242 F. 93 (D.C. Del. 1918).

54. 115 A. 918 (1922).

55. W. L. Cary, “A Proposed Federal Corporate Minimum Standards Act,” 29 *Bus. Law.* 1101 (1974).

56. Act of March 7, 1901, ch. 166, § 1, 22 DEL. LAWS 255.

57. Act of March 7, 1901, ch. 167, § 5, 22 DEL. LAWS 287-89.

58. Act of March 10, 1899, ch. 273, § 20, 21 DEL. LAWS 451-52.

to empower the directors to make, alter or repeal the by-laws of the corporation,⁵⁹ this new flexibility in the distribution of corporate power also no doubt aided those promoters who were determined to assure to management the dominant position in the corporation.

Other significant amendments to the corporation law in 1901 eliminated the defense of usury, thus permitting corporations and lenders to arrive at suitable financing arrangements without the imposition of artificial ceilings which might have otherwise chilled the flow of needed funds,⁶⁰ permitted the board of directors to appoint an executive committee to exercise the powers of the whole board in the management of the corporation,⁶¹ lowered the number of shares required to approve amendments of the certificate of incorporation from two-thirds to a simple majority,⁶² and permitted any person to waive notice to which he was entitled under any section of the corporation law by a signed writing.⁶³

In the years following the first flurry of amendments in 1901, the legislature continued to expand and clarify the powers of corporate managers, often in response to court decisions limiting the exercise of a power granted by the certificate of incorporation but not mentioned in the statute. In 1917, for example, the statute was amended to grant to the board of directors the power to sell all or substantially all corporate assets so long as such action had been approved by a vote of a majority of the issue and outstanding stock at a meeting called for that purpose.⁶⁴ This change was prompted by a decision of the Court of Chancery two years earlier that had raised doubt as to the power of the directors to sell corporate assets even where the certificate of incorporation permitted a sale if approved by three-fourths of the stockholders.⁶⁵

Relatively few amendments were made to the General Corporation Law by each session of the General Assembly from 1902 until the late

59. *Id.* § 26, 453.

60. Act of March 7, 1901, ch. 166, § 40, 22 DEL. LAWS 283-84. As enacted in 1899 this section applied only to railroad corporations. Act of March 10, 1899, ch. 273, § 83, 21 DEL. LAWS 479.

61. Act of March 7, 1901, ch. 166, § 1, 22 DEL. LAWS 255.

62. *Id.*

63. *Id.*

64. Act of April 9, 1917, ch. 114, § 20, 29 DEL. LAWS 336. The waiver of notice section was also amended in 1917 for the same reason—a restrictive judicial construction in *Lippman v. Kehoe Stenograph Co.*, 11 Del. Ch. 80, 95 A. 895 (1915)—to make it clear that a person could waive notice after the time or event to be noticed had passed.

65. *Butler v. Keystone Copper Co.*, 10 Del. Ch. 371, 93 A. 380 (1915). The sale of assets section was again amended in 1929, Act of March 22, 1929, ch. 135, § 19, 36 DEL. LAWS 380-81, in response to dictum in Chancellor Wolcott's February, 1928 decision in *Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch.). See *Alcott v. Hyman*, 184 A.2d 90, 94 (Del. Ch. 1962).

1920's, when the legislature enacted major changes in the statutory provisions governing corporation finance.⁶⁶ In 1927 the legislature granted power to the board of directors to issue stock "with such designations, preferences and relative, participating, optional or other special rights, or qualifications, limitations or restrictions thereof, as shall be stated . . . in the resolution or resolutions providing for the issue of such stock adopted by the Board of Directors pursuant to authority expressly vested in it by the provisions of the Certificate of Incorporation or of any amendment thereto."⁶⁷ Theretofore, all designations, preferences or restrictions of authorized stock were required to be set forth in the certificate of incorporation. A change in the terms of any authorized stock, whether or not issued, necessitated a meeting and vote of the stockholders to approve an amendment to the certificate of incorporation. The new "blank stock" procedure permitted corporate managers to tailor the rights and preferences of any class of stock to meet market conditions prevailing immediately before the stock was issued.

That same year the statute was amended to authorize corporations to create and issue, whether or not in connection with the issue and sale of stock or other securities, options to purchase stock.⁶⁸ Options could be of unlimited duration and all of the terms for exercise of the option could be fixed, as with the new blank stock procedure, in a resolution adopted by the board of directors.

Between 1929 and the overall revision of the statute in 1967, the legislature continued to amend and update the statute at the urging of the Delaware Bar Association and its standing committee on the General Corporation Law without disturbing the basic structure of the law or its reputation for stability.⁶⁹

In 1937 the legislature added a new section permitting Delaware corporations to dispense with stockholder votes at meetings if all of the stockholders who would be entitled to vote consented in writing to

66. For a contemporary article critical of the 1927-29 amendments to the Delaware law, see Berle, *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563 (1929).

67. Act of March 2, 1927, ch. 85, 35 DEL. LAWS 226-29.

68. Act of March 22, 1929, ch. 135, § 6, 36 DEL. LAWS 374-76.

69. The General Corporation Law was reorganized and rearranged, but not substantively changed, in 1953 in connection with a complete codification of the general and public laws of the State of Delaware. The 1953 Delaware Code changed the style of all prior Delaware Codes from an omnibus format to a series of titles, each concerned with a related area of the law. As part of the 1953 codification the General Corporation Law was reorganized and rearranged into logically related subchapters and sections within each subchapter and many sections were divided into multiple sections. All sections were renumbered. The present General Corporation Law follows the 1953 format.

the action to be taken.⁷⁰ This change, like many other changes in the statute over the years, simply confirmed the way in which most close corporations were actually being run.

The legislature also continued to amend the statute, from time to time, if a particular judicial construction was perceived to be unnecessarily strict. For example, the statute was amended in 1949⁷¹ to grant to the directors the power to fill "newly created directorships" in view of the then prevailing judicial construction that had excluded newly created directorships from the statutory definition of director "vacancies."⁷²

Many of the additions to the statute during this period can fairly be characterized as protective provisions, intended to insulate officers and directors from liability in particular situations. Officers and directors gained the statutory right to rely in good faith upon the books and records of the corporation or on reports made to the corporation;⁷³ and, most importantly, the corporation was empowered to indemnify any of its officers and directors against expenses incurred by them in connection with the defense of any action in which they were made parties by reason of being officers or directors of the corporation.⁷⁴

Other provisions were added during this period permitting the corporation to lend money to, guarantee any obligation of, or otherwise assist any officer or employee of the corporation so long as in the judgment of the board of directors such action could reasonably be expected to benefit the corporation.⁷⁵ Prior law had prohibited such loans.⁷⁶

The legislative development of the statute obviously increased its attractiveness to management. But it is also true that throughout the thirties, forties and fifties the Delaware courts showed no inclination to retreat from their early assertions of broad equitable powers in the corporate sphere. In 1938, in *Topkis v. Delaware Hardware Com-*

70. Act of April 13, 1937, ch. 131, § 6, 41 DEL. LAWS 283-84.

71. Act of May 23, 1949, ch. 136, § 4, 47 DEL. LAWS 207-09.

72. See, e.g., *Automatic Steel Products v. Johnston*, 31 Del. Ch. 469, 64 A.2d 416, 6 A.L.R.2d 170 (1949); *Belle Isle Corp. v. MacBean*, 30 Del. Ch. 373, 61 A.2d 699 (1948); *Gow v. Consolidated Coppermines Corp.*, 19 Del. Ch. 172, 165 A. 136 (1933).

73. 47 DEL. LAWS, *supra* note 71.

74. Act of April 15, 1943, ch. 125, § 1, 44 DEL. LAWS 422. Not all of the amendments of this period could be characterized as "promanagement." For example, in 1949 the statute was amended to provide greater protection to a dissenting shareholder in a merger or consolidated proceeding. Act of May 23, 1949, ch. 136, § 7, 47 DEL. LAWS 211.

75. Act of October 10, 1963, ch. 143, § 1, 54 DEL. LAWS 422.

76. 8 Del. C. § 143 (1953).

pany,⁷⁷ the Court of Chancery reaffirmed its power to act notwithstanding an absolute grant of statutory power by the legislature:

“. . . a power conferred by the statute upon a majority of the stockholders or upon the directors, though conferred in terms that are absolute, is nevertheless subject to restraint by a court of equity if it be inequitably exercised.”⁷⁸

Perhaps the most famous statement of the policy of the Delaware courts respecting the fiduciary duties of management came one year later. In *Guth v. Loft, Inc.*, the Supreme Court brought new vitality to the law of fiduciary duties:⁷⁹

“Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy existing through the years, and derived from a profound knowledge of human characteristics and motives, had established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.”⁸⁰

Other leading decisions in this period such as *Brophy v. Cities Service Co.*,⁸¹ decided in 1949, and *Kors v. Carey*,⁸² and *Lank v. Steiner*,⁸³ decided in 1960 and 1966 respectively, continued to expand the duties owed by corporate insiders to their corporation.

The 1967 Revision

Unlike the normal process of corporation law amendment in Delaware, the 1967 revision of the statute was not formulated by the

77. 23 Del. Ch. 125, 2 A.2d 114 (1938).

78. *Id.* at 135, 119.

79. 5 A.2d 503 (Del. Supr. 1939).

80. *Id.* at 510. *Guth v. Loft, Inc.*, *Keenan v. Eshelman*, 2 A.2d 904 (Del. Supr. 1938) and *Johnson v. Greene*, 121 A.2d 919 (Del. Supr. 1956) also established the rule that directors, officers or controlling stockholders who engage in transactions with their corporation must carry the burden of proof that the transaction is intrinsically fair to the corporation and the minority stockholders.

81. 70 A.2d 5 (Del. Ch.).

82. 158 A.2d 936 (Del. Ch.).

83. 224 A.2d 342 (Del. Supr.).

Delaware Bar Association's Corporation Law Committee; instead the new statute was the product of a committee created as a result of special legislation sponsored by Elisha C. Dukes, then Delaware's Secretary of State. The legislature appropriated \$25,000 in 1963 to be used by the Secretary of State for a comprehensive review and study of the corporation laws of the State of Delaware and for preparation of a report to the General Assembly containing recommended revisions to the law.⁸⁴ The appropriation bill also authorized the Secretary of State to spend the funds for such consultants and assistants as he deemed necessary.⁸⁵

The Secretary of State formed the Delaware Corporation Law Revision Committee, which was chaired by Clarence A. Southerland, a former Chief Justice of the Delaware Supreme Court. Its initial members included Daniel L. Herrmann, the present Chief Justice of the Delaware Supreme Court, who was at that time in private practice,⁸⁶ Richard F. Corroon, Henry M. Canby, Irving Morris and myself, all of whom were Delaware attorneys in private practice, and Alfred Jervis and David H. Jackman, representing Corporation Trust Company and United States Corporation Company (two leading corporate service companies), Elisha C. Dukes, the Secretary of State, and Margaret S. Storey, the Director of the Corporation Department within the office of the Secretary of State.

The Revision Committee's mandate was summarized in the preamble to the bill authorizing its creation:

"WHEREAS, the State of Delaware has a long and beneficial history as the domicile of nationally known corporations; and

WHEREAS, the favorable climate which the State of Delaware has traditionally provided for corporations has been a leading source of revenue for the State; and

WHEREAS, many States have enacted new corporation laws in recent years in an effort to compete with Delaware for corporation business; and

WHEREAS, there has been no comprehensive revision of the Delaware Corporation Law since its enactment in 1898; and

WHEREAS, the General Assembly of the State of Delaware declares it to be the public policy of the State to maintain a favorable business climate and to encourage corporations to make Delaware their domicile. . . ."⁸⁷

84. Act of December 31, 1963, ch. 218.

85. Less than half of the \$25,000 appropriation was spent.

86. Chief Justice Herrmann resigned from the Committee upon his appointment to the Supreme Court and was succeeded on the Committee by Clair J. Kiloran, a Delaware lawyer in private practice.

87. *Id.* Act of December 31, 1963, ch. 218, 54 DEL. LAWS 724.

The objectives of the Revision Committee, in summary, were to update and clarify the language of the existing corporate law, to simplify the mechanics for corporate action, and to make substantive changes where experience indicated that improvements could be made.⁸⁸

It is important to understand the way in which the Revision Commission accomplished its revision in order that appropriate weight can be given to the written materials generated by its work.⁸⁹ The full Revision Committee commenced meeting in January of 1964 and retained Professor Ernest L. Polk, III for the purpose of making an overall survey of the then-existing statute so there would be no conflict between various sections, to ascertain what other states had to attract corporations that Delaware did not have, and to give his recommendations for amending Delaware's law.⁹⁰ Upon receipt from Professor Folk of segments of his report,⁹¹ the Chairman assigned them for critical study to Committee members who reported back to the full Committee at its next meeting with their recommendations. The Revision Committee then acted on those recommendations. Such action took various forms, including the approval *in haec verba* of certain of Folk's proposals,⁹² the rejection of certain of Folk's proposals,⁹³ the approval of draft statutory language prepared by members of the Revision Committee,⁹⁴ and approval in principle of changes suggested by Folk or by members of the Revision Committee, but without consideration of specific statutory language.⁹⁵

After thirty-three meetings spanning a sixteen-month period, the Revision Committee completed its study of the statute, section by section, and probably considered that its work was substantively and substantially completed inasmuch as it had decided with respect to each statutory section what was to remain unchanged, what was to be

88. See Arshnt & Stapleton, *Delaware's New General Corporation Law: Substantive Changes*, 23 BUS. LAW. 75 (1967).

89. The records relating to the 1967 revision cannot properly be termed legislative history, none of them being records of the Delaware General Assembly or its committees.

90. Minutes of Delaware Corporation Law Revision Committee, Second Meeting, February 25, 1964 at 2. (The Complete Minutes of the Delaware Corporation Law Revision Committee are on file in the New Castle County Law Library.)

91. See, E. Folk, *Review of the Delaware Corporation Law (1965-67)* (hereinafter cited as Folk Report) (on file in New Castle County Law Library). Some months later, Professor Folk was also asked to draft a close corporation statute, which served as a basis for Sections 341-356 of the General Corporation Law, 8 DEL. C., §§ 341-56, which were added to the statute by the 1967 Amendments. This also forms a part of the Folk Report.

92. See, e.g., Minutes of Delaware Corporation Law Revision Committee, 17th Meeting, May 18, 1965 at 1.

93. See, e.g., *id.* at 1-2.

94. See, e.g., *id.* at 2.

95. See, e.g., Minutes of Delaware Corporation Law Revision Committee, 14th Meeting, April 6, 1965 at 2.

changed and precisely how it was to be changed. The Revision Committee's decisions are memorialized in the minutes of the proceedings.

A drafting subcommittee, consisting of myself and Messrs. Canby and Corroon, assisted by three young lawyers from our respective law firms who had also been serving as law clerks for the Revision Committee,⁹⁶ began the task of putting the Revision Committee's decisions into bill form. As soon as this project began, it became clear that much work remained to be done and that a satisfactory bill could not be drafted without making numerous substantive decisions that the full Committee had not made and reversing some that it had made.⁹⁷ In making the necessary changes, the subcommittee looked again to the Folk Report, to the minutes of the Revision Committee and to other sources such as the Model Business Corporation Act for guidance.

After meeting each Saturday for the better part of a year, the subcommittee presented a draft bill to the full Revision Committee for its consideration. The Revision Committee unanimously approved the draft bill without change. Subsequently, the proposed bill was approved by the Bar Association and the legislature and became effective July 3, 1967.⁹⁸

Given the mechanics of the revision process, no single record can be looked to to reconstruct the deliberations of the Revision Committee and its drafting subcommittee. In some cases, the Folk Report and the Revision Committee's minutes together will show that certain suggested changes were considered and rejected by the Revision Committee,⁹⁹ while in other cases, where a change is substantially similar or identical to recommended provisions in the Folk Report and there is no change called for by the Revision Committee's minutes, one can assume that the drafting subcommittee acted for one or more of the reasons discussed in the Folk Report. There is a major gap in the records relating

96. Walter K. Stapleton, since 1970 a judge of the United States District Court for the District of Delaware; Charles F. Richards, Jr.; and Charles S. Crompton, Jr., currently chairman of the Delaware Bar Association Corporation Law Committee.

97. For example, the Revision Committee rejected Professor Folk's proposed section relating to the doctrine of *ultra vires*, see Minutes of Delaware Corporation Law Revision Committee, 18th Meeting, June 8, 1965, at 1, but the subcommittee reversed that position and Professor Folk's suggested section was reinserted into the statute as Section 124, 8 DEL. C. § 124. Similarly, the drafting subcommittee reversed the original position of the Revision Committee and eliminated the distinctions in Section 153 of the General Corporation Law between corporations incorporated prior to and after April 1, 1929 with respect to the power to issue no par stock. See Act of July 3, 1967, ch. 50, § 153, 56 DEL. LAWS 175 and Minutes of the Delaware Corporation Law Revision Committee, 20th Meeting, July 14, 1965 at 1.

98. Act of July 3, 1967, ch. 50, 56 DEL. LAWS 151.

99. For example, using those two sources one can conclude that bearer shares are not authorized by the General Corporation Law, which is silent as to their status. See FOLK REPORT, 290 and minutes of the Delaware Corporation Law Revision Committee, 15th Meeting, April 20, 1965.

to the 1967 revision in those cases where changes depart both from the Folk Report and the Revision Committee's conclusions. While negative inferences may be drawn if the drafting subcommittee's position, as enacted into law, was in opposition to a position of the Folk Report or of the Revision Committee, an affirmative record of the reasons for the subcommittee's actions is unavailable.¹⁰⁰

The Development of the General Corporation Law Since 1967

Following the enactment of technical amendments to the corporation law in 1968,¹⁰¹ the Revision Committee's work came to an end and the Delaware Bar Association's standing committee on the General Corporation Law resumed its traditional role as the initiator of amendments to the law. Although the Bar Association has had a standing committee on the General Corporation Law during my forty plus years at the bar, the Committee is now quite large when compared to its predecessors in the years prior to the 1967 revision. At present, the Committee includes twenty-three private practitioners from all three Delaware counties and inside counsel from two large Delaware-based corporations. In addition, representatives of the Corporation Department of the Secretary of State's office and of the corporation service companies regularly attend Committee meetings.

In discharging their responsibility to improve the corporation law, Committee members draw on their own experience as practitioners,¹⁰² on suggestions received by them from corporate attorneys throughout the United States and on experience gained as members of American Bar Association committees such as the Committee on Corporate Laws and the Committee on Securities Laws.

It has been the practice of the Committee since 1967 to seek amendments to the corporation law on a yearly basis.¹⁰³ Amendments pro-

100. In two previous articles that I co-authored with Judge Stapleton, we did attempt to provide a guide to, at least, the major substantive changes adopted in 1967. See Arshnt & Stapleton, *Analysis of the New Delaware Corporation Law*, 2 P-H CORP. 311-45 (1967); Arshnt & Stapleton, *Delaware New General Corporation Law: Substantive Changes*, 23 BUS. LAW. 75 (1967).

101. Act of January 2, 1968, ch. 186, 56 DEL. LAWS 610.

102. The Committee's roster includes members from what is known as the plaintiffs-stockholders bar — a group not generally associated with the aspirations of management.

103. Some members of the Committee have suggested that the yearly amendment process may detract from the perceived stability of the Delaware General Corporation Law. For a narrative summary of the 1969, 1970, 1973 and 1974 amendments see Arshnt & Stapleton, *The 1969 Amendments to the Delaware Corporation Law*, 2 P-H CORP. 347 (1969); Arshnt & Stapleton, *The 1970 Amendments to the Delaware Corporation Law*, 2 P-H CORP. 359 (1970); Arshnt & Black, *Analysis of the 1973 Amendments to the Delaware Corporation Law*, 2 P-H CORP. 365 (1973); Arshnt & Black, *The 1974 Amendments to the Delaware Corporation Law*, 2 P-H CORP. 375 (1974).

posed by the Committee are first approved by the Bar Association and then submitted to the legislature in bill form.¹⁰⁴ Within the Committee, suggested changes in the law are, in most cases, first raised by a letter from a Committee member to the Chairman. The Chairman then places the suggested change on the agenda for a forthcoming meeting.¹⁰⁵ If the change is one of substance rather than a minor change in language and if the Committee does not disapprove the suggested change on initial consideration, the Chairman usually names a subcommittee to draft a suggested revision to the statute. On a major substantive change, the subcommittee will meet separately from the full Committee and work through numerous drafts before presenting its proposal to the full Committee. The full Committee may accept the work of the subcommittee for submission to the Bar Association and the legislature, retain the work of the subcommittee for revision by the full Committee or return the proposal to the subcommittee for further drafting. Minor changes in the law, on the other hand, are usually assigned to the member who suggested the change for drafting and presentation to the full Committee.

A few examples will illustrate how members of the Committee come to propose changes in the General Corporation Law. Although these examples are taken from my experience, they are by no means unique.

Recent federal legislation encouraged major banks and trust companies throughout the United States to form holding companies.¹⁰⁶ Understandably, trust company directors often chose a name for their new holding company that would identify the new parent with the long history of its subsidiary. Since 1911, Section 395 of the Corporation Law had prohibited a corporation not under the supervision of the Delaware Bank Commissioner from using the word "trust" in its corporate name.¹⁰⁷

104. Beginning with the proposed 1973 amendments to the General Corporation Law, the Committee prepared a brief commentary for distribution to the members of the Bar Association and, in turn, to the legislature. In 1973 several corporation service companies asked the Committee for permission to publish the commentary for distribution to the corporate bar throughout the United States. The Committee granted those requests with the proviso that publication of the text of the commentary reflect that it is the product of the Committee on the General Corporation Law. Unlike the comments accompanying the Delaware version of the Uniform Commercial Code, the Committee's commentary is not official nor was it intended to be. Its purpose is to aid in the legislative process and not to function as a definitive guide to statutory construction.

105. The Committee has on occasion circulated minutes of its meetings although that practice has not been followed uniformly.

106. The Bank Holding Company Act of 1956, 12 U.S.C. § 1841, et seq.

107. 8 DEL. C. § 395 (1953) (originally enacted as Act of March 31, 1911, ch. 190, 26 DEL. LAWS 397), construed in *State ex rel Lucey v. Terry*, 196 A. 163 (Del. Super. 1937).

In 1971 I was asked to assist a large out-of-state trust company in forming a Delaware holding company. In naming the new company my client had invented a single word ending in "trust," much as First National City Bank of New York formed a holding company named Citicorp. After some discussion with the Secretary of State's office, the certificate of incorporation was accepted for filing, it being my view that Section 395 did not preclude my client's name any more than it would preclude the use of words such as "trustworthy" in a corporate name. A later trust company client varied the pattern of the first by capitalizing the "t" in the one-word name it had invented for its holding company. The Secretary of State balked this time and would only file the certificate of incorporation after being reassured by a favorable opinion from the Attorney General. As a result of these experiences, it was apparent to me that Section 395's original purpose — i.e., to prevent the unscrupulous from misleading people into believing that they were dealing with a bank or trust company — would not be violated by the recent phenomena of federally regulated bank holding companies. Accordingly, I suggested to the Committee that Section 395 be amended to delete the prohibition against the use of the word "trust" in corporate names. My suggestion was opposed, however, by the Bank Commissioner. A subcommittee was appointed by the Chairman to study the matter and to prepare a revision to Section 395. A compromise was reached with the Bank Commissioner and Section 395 was amended in 1974 to except from its scope companies regulated under the Bank Holding Company Act of 1956.

On many occasions, my firm and other Delaware firms had been asked by out-of-state attorneys who counsel Delaware corporations for our advice on the meaning of old Section 242(b)(2):

"If any proposed amendment would alter or change the preferences, special rights or powers given to any one or more classes of stock adversely, or would increase or decrease the amount of the authorized stock of such class or classes of stock, or would increase or decrease the par value thereof, then the holders of the stock of each class of stock so affected by the amendment shall be entitled to vote as a class upon such amendment whether by the terms of the certificate of incorporation such class be entitled to vote or not, and the affirmative vote of a majority in interest of each such class of stock so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of a majority of all other stock entitled to vote thereon."¹⁰⁸

Out-of-state counsel were unsure whether in a matter giving rise to a class vote of stockholders the corporation needed to obtain a class

108. Act of July 3, 1967, ch. 50, § 242(b)(2), 56 DEL. LAWS 199.

vote only of the series affected or a vote of the entire class. This was a case where the language of the statute was ambiguous although the policy of the statute indicated to all of us on the Committee that only a class vote of the affected series was necessary. Accordingly, the Committee revised the statute to state exactly that:

"If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph."¹⁰⁹

Although critics of Delaware may believe that every change in another state's corporation law which works a significant shift in the balance of corporate power from the stockholders to management will, of necessity, find favor with the Committee,¹¹⁰ my experience is otherwise. That is not to say that the Committee does not monitor changes in the corporation laws of other states and in the Model Act. We do. Yet, we have considered and rejected so-called "pro-management" changes in the corporation laws of other states as incompatible with the long-term interests of the stockholders and managers of Delaware corporations.¹¹¹ For example, eleven states, led by Ohio and Virginia, have recently enacted so-called "little Williams Acts" as part of their general corporation laws for the ostensible purpose of defeating tender offers.¹¹² Such legislation has generally been viewed with favor by management and has reportedly led to many new incorporations in Virginia.¹¹³ Similar proposals designed to aid management in tender offer battles were considered and rejected by the Committee as not in the interest of the stockholders.¹¹⁴

109. Act of June 23, 1969, ch. 148, § 242(b) (2), 57 DEL. LAWS 443.

110. W. L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

111. Indeed, the Committee has recently made change which confirm the fundamental rights of stockholders. See Arshat & Black, *The Delaware General Corporation Law: Recent Amendments*, 30 BUS. LAW 1021 (1975).

112. Ohio (Ohio Rev. Code Ann. § 1707.041; effective October 9, 1969); Virginia (Va. Code Ann. §§ 13.1-258 to 541); Colorado (Senate Bill No. 284 amending Title 11, Colorado Revised Statutes 1973, by the addition of a new article 51.5; effective July 1, 1975); Hawaii (Enacted by A. 47, L. 1974; effective May 24, 1974); Idaho (Senate Bill No. 1214 amending Title 30, Idaho Code, by the addition of a new Chapter 15; effective July 1, 1975); Indiana (Senate Bill No. 188 amending IC 1971, 23-2, by the addition of a new Chapter 23-2-3; effective May 1, 1975); Kansas (Added by Laws 1974, S.B.N. 390; effective July 1, 1974); Minnesota (MINN. STAT. §§ 80B.01-13); Nevada (Nev. Rev. Stat. § 78.376-.3778); and South Dakota (Senate Bill No. 178, An Act To Regulate Corporate Take-overs; effective July 1, 1975).

113. Vaughn, *Tender Offers in Virginia*, 7 THE REVIEW OF SECURITIES REGULATION, 879 (1974).

114. *Take the Money and Run: Tender Offers Invariably Benefit Shareholders*, BARRON'S, Dec. 8, 1975, at 11.

In sum, it is my view that the evolution of the statute under the direction of the Bar Association Committee on the General Corporation Law has added to its clarity, fairness and flexibility. If a provision in the Corporation Law has been shown to be ambiguous, the Committee has attempted to remove the ambiguity;¹¹⁵ if a provision in the Corporation Law has been shown to be ill-suited to a change in the structure and conduct of American business, such as the enactment of the Bank Holding Company Act, the Committee has proposed amendments consistent with the public interest.

Throughout this brief history of the Delaware General Corporation Law, I have sounded the trumpet for the Delaware judiciary and to some extent for those of us who have worked over the years to keep the Delaware statute attuned to the needs of the modern corporation. While some may argue with the way in which the statute has been treated by the Committee in the years since the 1967 revision, a fair reading of the current decisional law will attest to the continued high standards and competence of our judiciary in corporation matters. In the same year that the legislature enacted the new Delaware General Corporation Law, Vice-Chancellor Marvel, in *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769 (Del. Ch. 1967), reaffirmed basic principles of corporate democracy. In setting aside an issue of stock intended to perpetuate management's control, the Vice-Chancellor stated:

"I am persuaded on the basis of the evidence adduced at trial that the transaction here attacked unlike situations involving the purchase of stock with corporate funds was clearly unwarranted because it strikes at the very heart of corporate representation by causing a stockholder with an equitable right to a majority of corporate stock to have his right to a proportionate voice and influence in corporate officers to be diminished. . . ."¹¹⁶

The Vice-Chancellor's disapproval of corporate legerdemain by management in *Condec v. Lunkenheimer* was followed four years later by Chief Justice Herrmann's landmark exposition on corporate democracy in *Schell v. Chris-Craft*, 285 A.2d 437 (1971):

"[M]anagement has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are in-

115. Not always with success, as in the case of Section 243. See Arshnt & Black, *The Delaware General Corporation Law: Recent Amendments*, *supra* at 1039-1042.

116. 230 A.2d at 777.

equitable purposes, contrary to established principles of corporate democracy.

* * * *

“Management contends that it has complied strictly with the provisions of the new Delaware Corporation Law in changing the by-law date. The answer to that contention, of course, if that inequitable action does not become permissible simply because it is legally possible.”¹¹⁷

Later articles in this new law review may criticize or applaud particular decisions of our courts as well as legislative changes in the General Corporation Law, but I am confident that our history in this important area of American life bodes well for the future.

117. 285 A.2d at 439.