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# The South Carolina Corporation Law: Reconsiderations and Prospects

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# THE SOUTH CAROLINA CORPORATION LAW: RECONSIDERATIONS AND PROSPECTS

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The preceding articles provide a useful picture, both in general and in detail, of the Corporation law. The purpose of this "concluding unscientific postscript"—to borrow Kierkegaard's phrase—is to note developments since enactment of the new Law, to comment on points raised in the articles, and to point to amendments which the Joint Committee[1] has recommended to the General Assembly.[2]

## I.

The new Corporation law was enacted by the 1962 General Assembly, and on March 30, 1962, the Governor's signature completed the legislative process. The effective date of the statute was purposely postponed to January 1, 1964, for two reasons: to permit necessary amendments, and to afford the bar and business an opportunity to become familiar with the new law and to recognize the many changes it effects. Both of these objectives have been largely implemented.

When the South Carolina Bar Association, at its Charleston convention in May 1962, authorized a Continuing Legal Education Program for the Bar, a summer course in the new Corporation law was featured as one of the two initial offerings in this "pilot program."[3] A 24 hour course was presented for six weeks during June and July 1962, at the Law School in Columbia,[4] with attendance by many attorneys from all parts of the State. Besides concentrated lectures on

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1. "Joint Committee" refers to the Committee, chaired by Senator Richardson of Sumter, to Investigate the Feasibility of Revising the Securities and Corporations Laws of this State.

2. References to the amendments are to sections of the Technical Amendments Bill (cited as TECH. AMEND. BILL), introduced in the General Assembly in February, 1963.

3. Professor Charles H. Randall offered a course in estate planning, including tax problems of small estates.

4. The class, taught by the author of this article, met on Wednesday and Thursday of each of six weeks.

the main features of the new law, the class provided a forum for vigorous discussion and debate. Thus, not only did the course make a breakthrough in familiarizing the bar with the new statute, but the searching study, analysis, and criticism of the law afforded an unparalleled opportunity to learn what amendments might be desirable, to clarify statutory language, remove hidden ambiguities, or add new substantive provisions. And, indeed, from this course came a number of recommendations for changes, all of which were carefully scrutinized. During the autumn, the Reporter continued the study of these suggestions, and drafted for the Joint Committee a group of amendments. Most of these merely alter details, since, on a whole, the new statute survived well the searching analysis of the fifty or more attorneys in the summer course.

Two major problems, fully discussed later, were sharply highlighted as the study progressed. First, the vague language of the constitutional provision requiring cumulative voting for directors[5] has emerged as a potential threat to many provisions of the new statute, even though the 1962 Act, like the old law, makes cumulative voting mandatory. The focal question is whether the constitutional section may indeed outlaw *all* non-voting stock, including non-voting preferred shares, and, less frequently, non-voting common shares.[6] Secondly, although the 1962 Act requires that corporate documents be filed only with the Secretary of State, there is agitation to require that they also be recorded locally, that is, with the clerk of court of the county in which the corporation locates its registered office. These two problems have been considered by the Joint Committee. As for the constitutional provision, it seem likely that some change in the constitutional provision will be submitted to the voters in the 1964 elections. As for the local filing proposals, there is, at present, no firm decision by the Joint Committee.

The Joint Committee has prepared a bill amending the Act primarily on technical points. These are virtually all matters of detail, clarifying uncertain terminology, removing latent ambiguities, and adding several substantive provisions

5. S. C. CONST. art. IX, §11.
6. Uncertainties as to the legality of non-voting common stock prompted a large South Carolina corporation to reincorporate in Delaware. This event, more than any other single occurrence, spurred wide demands for corporation law revision in this State.

which should appear in the new law. The significant proposals will be discussed later.

## II.

Both the articles and law notes in this Symposium issue, besides describing the provisions of the new act, perform a law review article's vital function of offering criticisms and suggestions. It is appropriate to consider these points, especially since some of them are dealt with as proposed amendments to the act.

1. *Local Filing of Corporate Documents*: Mr. Blackwell's article reflects the view of many practitioners that the absence of any requirement for filing corporate documents with the county clerk is a "weakness in the new act." In the Draft Version, the act did require that all corporate documents be recorded locally, that is, with the clerk of court of the county in which the corporation locates its registered office. The mechanics for doing so were that the Secretary of State would receive two copies of the corporate document; one of these would be filed in his office at Columbia, and he would forward the other to the appropriate county clerk for recordation.[7] It was generally accepted that our modern new statute should not retain the old procedure by which the corporation must undertake to record the document locally, since failure to record locally was not infrequent, and non-recordation of the appropriate document threw doubt upon the validity of the action taken. Especially in the case of articles of incorporation, the failure to record locally may cloud the legal status (*de jure* existence) of the corporation, and thus compel reliance on that judicial makeshift, the doctrine of *de facto* corporations. For these reasons, the choice was reduced to two alternatives: either require the Secretary of State to send the document to the clerk for recordation, or drop the recordation requirement entirely. When the bill was offered to the 1962 General Assembly, recordation was dispensed with, for two reasons: (1) conviction of some members of the Joint Committee that local filing served no useful purpose justifying a recordation requirement, but merely added an addi-

7. The Secretary of State would also collect local recording fees and forward them periodically to each court clerk. Of course, there must be a uniform state-wide recording fee schedule, since it would be impractical for the Secretary of State to ascertain different fees for each county.

tional formality to a procedure which should be as simple, short and inexpensive as possible, and (2) assertions that the responsibility on the Secretary of State would be unduly burdensome, if he were required to forward documents for local recordation.

Some attorneys believe that corporate documents should be recorded locally, because of asserted advantages in title-searching. Initially, one wonders why it is insuperably difficult to ascertain, by a telephone call typically, whether a document has been filed with the Secretary of State. Even if local recording is required, it is by no means certain that, as to any given corporation, there will be on file all of the documents that an attorney may wish, since the corporation may have neglected to record locally. Again, all corporate documents will not be recorded in every county in which the corporation has real property; for it would be intolerable to put any corporation to the expense and trouble of filing documents in possibly every county of the state.

If the bar insists upon requiring local recordation, the expedited procedure set forth in the Draft Version of the corporation law certainly should be used. This would require the Secretary of State to accept two copies of the document: one for filing in his office, the other to be sent to the clerk of court of the county in which the corporation locates its registered office. Thus, at the time the charter is issued (*i.e.*, when the Secretary of State endorses the original document for filing in his office), he would initiate the mechanical process eventuating in local recordation of the document. In sum, if documents must be locally recorded, it is imperative, if we are to have a streamlined, convenient corporation statute, that the recordation be effected through the office of the Secretary of State;[8] and the appropriation by the General Assembly for such additional help as may be needed in the Secretary's office would pay rich dividends, in efficiency, and

8. Several states, including several which have recently enacted excellent new corporation statutes, require the Secretary of State to forward the document to the county clerk. See IOWA CODE ANN. §496A.53: "If in this Act, it is required that any document be . . . filed and recorded in the office of the county recorder, the secretary of state upon recording such document in his office shall forward the same to the county recorder of the county wherein the registered office of the corporation is located" and to any other county recorders if multiple recording is required. Similar duties are imposed on the Secretary of State by N. Y. BUS. CORP. LAW §104(g); VA. CODE ANN. §13.1-51; and MINN. STAT. ANN. §§301.06-07.

in the reputation of the State among corporate counsel, both here and elsewhere, for modern expedited procedures benefitting business. If we wish to facilitate business and industry, we can ill afford to continue inconvenient and antique filing procedures.[9]

2. *Corporate Name*:[10] Several changes have been proposed in section 3.1 which states the basic requirements as to the name of the corporation. First, as enacted, the 1962 statute, following the Model Act,[11] required that each foreign and domestic corporation indicate its corporate character in its name, either by using some word unmistakably connoting corporateness (such as "limited" or "incorporated" or "corporation") or an abbreviation of one of these words (*viz.*, "ltd.", "inc.", or "corp."). In addition, the 1962 Act required existing domestic corporations to amend their charter by adding such a word or abbreviation if the corporate name was deficient in this respect; a like requirement was made for foreign corporations authorized to do business in South Carolina, at least for purposes of operations in South Carolina. Although there is no substantial question of South Carolina's power to make these requirements, even as to authorized foreign corporations, the practical application and enforcement of these provisions as to existing domestic and authorized foreign corporations, made them seem not worth the expense and delay. Moreover, many corporations thought that such requirements extended to office signs, names on trucks, stationery, etc. Obviously, the requirement applied only to the official corporate name as it appears on the records of the Secretary of State, and did not prevent the customary shortening of corporate names for other uses (short of fraud or misrepresentation). To sidestep practical administrative problems and avoid confusion, an amendment is proposed

9. Since the 1962 act does not require acknowledgement of corporate documents, but a verification procedure (see §1.5), several unnecessary references to acknowledgement are deleted. See, *e.g.*, TECH. AMEND. BILL §27, amending §4.2 of the 1962 act.

10. *Corporate Powers.* A number of minor word changes which are clarifying rather than substantive changes, have been proposed to §2.1, the corporate powers provision. However, one amendment (TECH. AMEND. BILL §17) would expand §2.2(a)(17) to make explicit corporate power to take out "key-man" insurance "on the life of any shareholder for the purpose of reacquiring at his death shares owned by such shareholder," since stock repurchase options or contracts are particularly desired in close corporations.

11. MODEL ACT §§7(a) (domestic corporations); 101(a) (foreign corporations).

which will delete section 3.1's requirements for some indicia of corporateness as to all corporations, domestic or foreign, existing or holding authority on the effective date of the act, nor will "new" foreign corporations be required to designate a word or abbreviation when qualifying under the new act to do business in South Carolina.[12] However, a new domestic corporation must designate some word or abbreviation unmistakably indicating its corporate character. And partnerships and other non-corporate enterprises continue to be forbidden to use these symbols of corporateness. This compromise admittedly rests upon practical administrative considerations, certainly not on demands of consistency; but there is scarcely any invidious discrimination since it is an easy matter for new domestic corporations to select the word or abbreviation they wish to use and insert it in the corporate name set forth in the articles of incorporation.[13] Needless to say, a creditor who has been misled into believing that an enterprise has unlimited liability when in fact it is incorporated has a right of action for fraud.

A provision,[14] originally appearing at the end of section 3.1(a)(3)(D), permitted one corporation to use another corporation's name if the latter expressly consented and filed a document of consent with the Secretary of State. Because such permission could mislead third parties, contrary to public interest, its omission from the act has been proposed as an amendment.[15] Mr. Monteith's law note rightly suggests that otherwise there are inroads upon the principle, embodied in section 3.1(g), that the rules regarding corporate name do not "abrogate or limit" the law of unfair competition.

3. *Corporate Finance*: Chapter 5 of new new act, broadly treating issue of shares as well as dividends, distributions,[16] and share purchases, largely rests on the Model Act. These provisions evidently have not generated undue concern among attorneys although they mark a significant departure from prior law by following the contemporary trend to

12. See TECH. AMEND. BILL §23.
13. In contrast, a foreign corporation must amend its charter in its jurisdiction of incorporation or take other action to comply with the required name change; existing domestic corporations would find it necessary to amend their charter.
14. Based on OHIO STAT. ANN. §1701.05(a).
15. Deleted by TECH. AMEND. BILL §23.
16. The term "distribution" is a word of art which distinguishes certain corporate outlays of funds which cannot qualify as a dividend under §§5.14 and 5.15.

declare legal rules, especially as to dividends and other distributions, in terms of corporate accounting concepts. Although this achieves greater accuracy, these provisions demand careful study and an understanding of at least the elementary techniques and concepts of corporate accounting. Earned surplus as the basic dividend test[17] is the pre-eminent example of invoking accounting concepts as legal test.

Several criticisms offered by Mr. Nexsen's article are well taken and will be corrected by proposed amendments to the 1962 Act. For example, an amendment will remove any potential conflict between sections 4.3(b) and 5.2, so that it is clear from both provisions that series of shares within a class may not vary as to par or no-par value, but must be identical on this point.[18]

Mr. Nexsen analyses various provisions dealing with the status of shares not fully paid. The act's relevant provisions, briefly stated, are that (1) only shares fully paid in lawful consideration are non-assessable,[19] (2) promissory notes and other stockholder indebtedness are not lawful consideration for shares,[20] (3) shareholders continue liable only for unpaid consideration,[21] and (4) no certificate may be issued until shares are fully paid.[22] As to subscriptions for shares, the corporation has a statutory lien attaching to the shares subscribed.[23] No recital on a share certificate is needed to perfect this lien, since (1) no certificate may be issued until the shares are fully paid,[24] and (2) section 7.18's required recital of a "lien in favor of a corporation" applies only to "shares represented by a certificate issued by such corporation,"[25] that is, to shares fully paid and thus entitled to be "represented by a certificate." Hence, there is no inconsistency on the question of the lien. Underlying these provisions, and

17. Section 5.14(a)(1) and the definition of earned surplus in §1.2(q).
18. TECH. AMEND. BILL §28, which strikes from §5.3(b)(1) the phrase "or any series within a class of shares" wherever it appears.
19. Section 5.9(a).
20. Section 5.7(b).
21. Section 6.23(a).
22. Section 5.10(a).
23. Section 5.5(d).
24. Section 5.10(a).
25. Section 7.18 is part of the Uniform Stock Transfer Act, long in force in this State as S. C. CODE §12-320 (1962). If the UNIFORM COMMERCIAL CODE, presently under study for possible adoption in South Carolina, is enacted, it will, of course, repeal Chapter 7 of the 1962 Corporation Act, although U. C. C. §8-103 continues the essence of §7.18 of the 1962 act.

making them consistent, is the premise that shares may be outstanding (*i.e.*, for dividend and voting purposes) although not fully paid, and therefore not entitled to the stock certificate which is the readily transferable evidence of ownership of shares.[26] Indeed, it is well established that shares may be outstanding although not fully paid. The prohibition on issuing a certificate for shares not fully paid is a real sanction, since the transfer of stock without a certificate, even if theoretically possible, would never be done in practice. Hence, this prohibition should eliminate the abuse by which a shareholder, having paid little or nothing on his shares, transfers them at a profit measured by the sale price less the amount (if any) he paid. Even in this situation, should it arise, the transferor remains liable for the unpaid portion of the consideration.[27] The other potential abuse, control or domination through ownership by insiders of shares only partly paid for, or received for less than the public offering price, may better be remedied by section 305(g) of the Uniform Securities Act permitting the Securities Commissioner to place insiders' shares in escrow.[28]

As to fractional shares, Mr. Nexsen accurately observes that section 5.11 is exclusive, and therefore should bar the abuse, apparently not unknown in South Carolina, of disregarding fractional share interests. Obviously, in a prosperous corporation whose shares have been rarely if ever split, a fractional share interest may be valuable,[29] and disregarding such an interest seems unwarranted and contrary to public policy.[30]

4. *Shareholders*: Mr. Moore's article criticizes many provisions in the chapter on shareholders; some of these points merit response.[31]

26. A stock certificate is merely evidence of ownership of stock and not the stock itself. Richardson v. Shaw, 209 U. S. 365, 378 (1908); BALLANTINE, CORPORATIONS 466 (1946). Hence, one can be a shareholder without having a certificate.

27. Section 6.23(b).

28. S. C. CODE §62-165 (1962). See the Securities Commissioner's Rules No. R-305(g)-1 and R-305(g)-2 ,17 S. C. CODE p. 457 (1962).

29. Certainly, one would gladly have owned a fraction of a share of Christiana Securities stock which, before the 100-1 split, traded from $14,000 to $18,000 per share.

30. A corporation need not worry indefinitely with small fractional interests since it may, under §5.11(c), issue scrip, having a limited life, for fractional share interests.

31. As to the by-laws, Mr. Moore notes that while the Draft Version of §6.1 permitted directors to change a shareholder-adopted by-law only if specifically so authorized, the provision as enacted is the reverse, *viz.*,

(A) *Shareholder Meetings.* Mr. Moore's chief objections aim at (I) the statutory treatment of adjourned shareholder meetings, and (II) voting by a corporate shareholder, although additional comments are made on substitute annual meetings[32] and waiver of notice of a shareholder meeting by attendance at the meeting.[33]

(I) *Adjourned Meetings*: Briefly the 1962 Act provides that when a meeting is adjourned, fresh notice must be given if the later meeting is more than 30 days after the earlier meeting, but need not be given if less than 30 days;[34] the same record date may be used for both the earlier and later meetings;[35] and if a quorum is present at the earlier meeting, the later meeting may proceed even if part of the original quorum withdraws.[36] It is suggested that an adjourned meeting for which fresh notice is required (that is, a meeting more than 30 days after the earlier meeting) may transact business other than that which could have been transacted at the earlier meeting thus "making the adjourned meeting a new meeting" and negating the idea that an adjourned meeting merely continues the earlier meeting. But since the purpose

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the directors may change the by-law unless prohibited from doing so. The objective is greater flexibility. Especially in a large corporation, it may be inconvenient to summon the shareholders each time a by-law needs to be changed. Clear from the section, however, is a prohibition on the directors' amending the by-laws in certain ways prejudicial to shareholder interests, *viz.*, increasing the quorum or vote requirement for shareholders to act on a by-law (§6.1(c)) or, "deny[ing], limit[ing], or impair[ing]" the shareholders' by-law power (§6.1(d)).

32. Apparently accepting the principle of a substitute annual meeting on call of anyone entitled to call a special meeting, Mr. Moore fears multiple meetings summoned by different persons, and urges "clarifying this point" but without specifying how. The chance of litigation, Mr. Moore admits, is remote. Normally, the need for such a meeting will arise when the directors, either through oversight or negligence, postpone the meeting. If it arises in the context of an intra-corporate struggle for control, it is likely that the issue must be resolved by the courts in any event, as such struggles normally produce litigation. Apart from the unlikelihood of multiple meetings and litigation on that point, the complexities of drafting a statutory provision would seem real. Even so seemingly simple a rule as preferring the first meeting called has its problems. For suppose inadequate notice is given by those who first call the meeting. Should a later meeting then be "the" meeting, or should a court intervene to cure the defects of notice in the first meeting? It seems wiser to declare a general rule, and let the courts work out problems if some oddball situation should arise.

33. The §6.5(b) phrase which would permit a shareholder to wait until the end of the meeting to object to defective notice is deleted by TECH. AMEND. BILL §55. Mr. Freeman's objection to the same provision in §8.9(c) (directors' meetings) is similarly met by TECH. AMEND. BILL §69 which amends out the phrase.

34. Section 6.4(c).

35. Section 6.6(e).

36. Section 6.8(c).

and business of an *annual* meeting need not be stated in the notice, anyway, it would seem that any business proper at such a meeting would be equally proper at an adjournment. In contrast, since a special meeting requires notice of its purpose, it would follow that an adjournment could only take up the business specified in the notice convening the special meeting. And in all events, if adjourned more than thirty days, the corporation must give the usual statutory notice,[37] which would mean notice of the purpose of the adjourned special meeting.

Section 6.6(e) permits, but does not require, fixing a new record date for an adjournment of a meeting. It is suggested that the directors could alter the character and results of a meeting by setting a new record date and thus bring in new shareholders whose shares have been transferred of record between the old and the new record date. But this is precisely what is intended: if there are new shareholders of record, they, and not their predecessors who are no longer shareholders, should be able to vote. In all events, it would seem that equity would compel the predecessor shareholders of record (as of the old record date) to give a proxy to the new shareholders.[38] Of course, this procedure might be manipulated by insiders to further their personal advantage, but if so there is a breach of fiduciary duty.[39]

(II) *Voting by Corporate Shareholders*: In the best of all possible worlds, which ours *pace* Leibniz is not, Corporation A,[40] when voting shares it owns in Corporation B,[41] would designate the person or proxy to vote its shares, either in its by-laws or a board resolution. In default of such perfection, section 6.12(b) allows Corporation B to presume certain

37. Section 6.4(c).

38. Indeed, the pertinent question is whether to amend §6.6(e) to require a new record date when any meetings are adjourned so that old shareholders (that is, shareholders as of an earlier record date) may not vote at all.

39. A similar observation would apply to any efforts by insiders to turn to their personal use and benefit the rule of §6.8(c) (which Mr. Moore observes is the "modern and better view") that a quorum once established continues although broken by withdrawal of shareholders or despite adjournment. Its purpose is, of course, to prevent an obstructive minority from withdrawing and breaking quorum at the prospect of action distasteful to them; for if they could do so, they would have an effective veto over action desired by a large number of shareholders.

40. Corporation A, the shareholder-corporation, may be a foreign or domestic concern.

41. Corporation B is, of course, a domestic corporation, and our law may constitutionally (and properly) declare what it may presume.

authority, so that it may get on with its shareholders' meeting. In effect, the presumption becomes conclusive after the vote is taken, since the presumed authority must be denied prior to taking the vote. This is the latest moment for authorized corporate personnel to present credentials. Hence, there is no uncertainty as to the result once the vote is taken. True, an imposter might claim authority to vote the corporation's shares, or someone in Corporation A might fail or refuse to get the meeting notice to the proper persons. But then a proxy might be unauthorized or forged. These risks seem outweighed by allowing Corporation B to rely, to the extent permitted by section 6.12 (b), on appearances.[42] In all events, disenfranchising Corporation A seems an unnecessarily harsh sanction for not presenting evidence of authority in proper form.[43]

(B) *Shareholder Control Devices*: Mr. Moore doubts whether section 6.15, achieves its purpose of broadly authorizing voting agreements among shareholders which were left in doubt by intimations in *Johnson v. Spartanburg County Fire Ass'n*,[44] that such agreements might violate public policy[45] Specifically, since section 6.15 endorses only those pooling agreements, which are "otherwise valid," a court might conclude that such agreements were not "otherwise valid" because of *Johnson*. Although it seems unlikely that courts would strain to reach so curious a result in light of the patent legislative intent to authorize pooling agreements, doubt should be removed by amending out this phrase.[46]

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42. *Cf.* §6.14(b): "a telegram or cablegram *appearing* to have been transmitted by a shareholder" constitutes a valid proxy.

43. In the case of conflicting representation of Corporation A, voting inspectors would, of course, perform a useful role in determining who is entitled to vote, and in, perhaps, certifying what the vote would be counting each faction's vote. This would pave the way for any necessary judicial review. See §6.17 of the act. In this connection, Mr. Moore believes that voting inspectors should be required by statute to preserve the evidence (including proxies) on which they base their certificate. We can assume, however, that inspectors will take their duties seriously, realizing the fiduciary nature of their post (see the last sentence of §6.17(a)), and would preserve evidence, especially when there is a contest in which event the inspectors may well operate under court orders. Undoubtedly, they would be liable in damages for destruction or concealment of evidence if this were shown to be wilful or fraudulent or otherwise improper.

44. 210 S. C. 56, 41 S. E. 2d 599 (1947).

45. *Johnson* suggested that mutual promises are insufficient consideration, 210 S. C. 56, 72-73. One wonders what other consideration would be thought proper, since §6.14(a) specifically provides that "[a] shareholder shall not sell his vote to any person."

46. TECH. AMEND. BILL §57.

(C) *Judicial Review of Director Elections*: Under section 6.19, a shareholder or a director may secure judicial review of a contested election of directors. However, a defeated candidate (who is obviously not a "director" within the section's meaning) has no standing as such, and it seems proper to deny him standing, since this would only encourage litigation by defeated candidates. However, in practice, a defeated candidate who feels strongly enough about the matter to seek judicial review can probably get it, either in his likely capacity of a shareholder, or through suit by a friendly shareholder (if the candidate himself has no shares). The inconvenience of permitting every person seeking a post as a corporate officer to contest his failure to get it would seem evident.

(D) *Pre-Emptive Rights*: Section 6.21(b) requires a non-discriminatory price to all shareholders when shares are offered them in satisfaction of their pre-emptive right. Mr. Moore urges a like parity of price as between shareholders and any other purchaser to whom the shares are offered—typically, "outsiders" or the investing public after expiration of the pre-emptive right period. Clearly, the later price may be higher than that to the shareholders, as is often true when a corporation makes a new issue available first to existing shareholders, even when they have no pre-emptive rights. The fear is that the price to shareholders having pre-emptive rights may exceed that to others. But if the lower (and later) offering price to the public flows from a market price drop between the two offering dates, there is no wrong to shareholders. If the price disparity is a device to defeat shareholder pre-emptive rights, there is a violation of fiduciary duties for which the courts may give adequate redress. Hence, any amendment on this point seems unnecessary.

In discussing stock options, Mr. Nexsen correctly suggests that pre-emptive rights should not attach to shares issued by the corporation to cover stock options given to directors and officers, as well as to employees (as presently limited); an amendment before the General Assembly will correct this omission.[47]

47. TECH. AMEND. BILL §64. Other clarifying changes in §6.21 of the 1962 act appear as TECH. AMEND. BILL §§59-63. Neither the Reporter nor the Joint Committee share the view expressed by Mr. Nexsen that §6.21 should be deleted in favor of MODEL ACT §24's blanket permission to abolish pre-emptive rights. The justification for §6.21, even if "long, cumbersome and complicated," as Mr. Nexsen describes it, is to declare a

5. *Directors and Officers*: A variety of points under this topic call for brief discussion, including several important issues raised by Mr. Freeman's article.

(A) *Duties of Directors and Officers*: Section 8.15 declares a standard of duty of directors and officers, but as presently worded makes that duty run only to the corporation. There may be a negative inference that directors owe no duties to shareholders as such. But this is contrary to established law on the fiduciary duties of directors. For example, it is clear that directors may not take advantage of their inside knowledge to exact a price favorable to themselves in purchasing shares owned by a shareholder of their corporation. Even assuming that the courts of this State would not infer any purpose to reduce the customary scope of director duties, it would be necessary to examine the case law to find the principle established. The object of section 8.15 is to codify director duties so that one knows of their existence from the face of the statute. Accordingly, to clarify and relieve uncertainty in an important area, the Technical Amendments Bill proposes that director duties extend to "the corporation" and to "the shareholders."[48]

(B) *Transactions Between a Corporation and Its Directors and Officers*: Section 8.16 of the 1962 Act sets forth standards validating transactions between directors and officers and their corporation since, especially in a close corporation, these may be indispensable to the enterprise—indeed a chief source of its assets and funds. This section, of course, both codifies and modifies *Gilbert v. McLeod Infirmary*.[49] Several amendments improve this section. First, the three alternative tests for the validity of interested director transactions have been clarified by adding certain words.[50] Sec-

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rule of law applicable to the varied situations in which pre-emptive rights may arise, subject to variation in the articles of incorporation. New York's recent corporation law takes precisely the same approach as does South Carolina. N. Y. BUS. CORP. LAW §622 (1961).

48. TECH. AMEND BILL §73.

49. 219 S. C. 174, 64 S. E. 2d 524 (1951).

50. Section 8.16(a), italicizing the language of TECH. AMEND. BILL §74 reads as follows:

"(a) No transaction in which a director or officer has a personal or adverse interest, as defined in subsection (b), shall be void or voidable solely for this reason or solely because he is present at or participates in the meeting or his vote is counted, if

(1) The material facts as to his interest and as to the transaction are disclosed or are known to the board of directors or committee and are noted in the minutes, and the board or committee authorizes, approves or

ondly, Mr. Freeman criticizes a clause in the definition in section 8.16(b) of "transaction in which a director or officer has a personal or adverse interest." As presently worded, this definition includes transactions "between a corporation and any of its parent, subsidiary, or affiliated corporations." Mr. Freeman's article sets forth concisely the problems which this presents. This has been corrected by deleting this provision from the definition and implementing the statutory objectives by dealing with inter-corporate transactions in a special provision which prescribes a more liberal rule,[51] reflecting the case law.[52]

Thirdly, Mr. Freeman criticizes extending section 8.16(b)'s definition of "adverse interest" to include "a contract or any other transaction between a corporation and any corporation . . . in which one or more of its directors or officers . . . have a financial interest, direct or indirect,"[53] fearing its invalidation of contracts between a corporation and, say, General Motors in which a director may own shares. In such cases, typically the vote of the director who happens to have a stockholder's investment in such a company will not be decisive, (complying with the first test,[54]) and even if it were, fairness could probably be proved easily by showing that the contract was negotiated at arm's length with the other corporation (thus meeting the third test[55]). In all events, however, cor-

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ratifies the transaction by a vote sufficient for such purpose without counting the vote of the interested director or directors; or if

(2) *Although the vote of the interested director or directors is decisive of approval or disapproval of the transaction,* the material facts as to his interest and as to the transaction are disclosed or known to the shareholders, and the transaction is specifically approved by vote of the shareholders without counting the votes of the shares owned or controlled by the interested director or directors; or if

(3) *Notwithstanding the limitations contained in subparagraphs (1) and (2) of this subsection,* the transaction is fair and equitable as to the corporation at the time it is authorized or approved, and the party asserting the fairness of the transaction establishes fairness."

51. TECH. AMEND. BILL §76 would add the following provision to §8.16: "(c) No contract or other transaction by a corporation with (1) any of its subsidiary, parent, or affiliated corporations, or (2) with another corporation in which there is a common director, shall be void or voidable solely for this reason, if the contract or other transaction is fair and equitable as of the date it is authorized, approved, or ratified. The party asserting the unfairness of any such contract or transaction shall establish unfairness."

52. Everett v. Phillips, 288 N. Y. 227, 43 N. E. 2d 18 (1942); Chelrob v. Barrett, 293 N. Y. 442, 57 N. E. 2d 825 (1944).

53. Section 8.16(b)(3). This provision will appear as §8.16(b)(2) if TECH. AMEND. BILL §75 is enacted.

54. Section 8.16(a)(1).

55. Section 8.16(a)(3).

porate lawyers are today deeply concerned with the ethical questions raised by contracts between Corporation A and Corporation B in which Corporation A directors own stock.[56] Disclosure by Corporation A directors of their interest in Corporation B seems appropriate and simple, and would doubtlessly be done by the director sensitive to something above the standards of the market place.[57] No corporation statute need apologize for imposing high standards of ethical conduct, and especially disclosure, upon those holding positions of trust.

(C) *Director Liabilities for Improper Dividends*: Mr. Freeman poses a "provoking problem" whether, under the new act, a shareholder who has received an unlawful dividend may sue derivatively to compel the directors to restore the dividend to the corporation thereby benefiting the suing shareholder. If the shareholder knowingly received the unlawful dividend, he would himself be liable to restore the amount he received.[58] If the shareholder did not receive the dividend under circumstances implying his knowedge of the impropriety, there seems no reason why he should not enforce the corporate cause of action by suing derivatively. In all events, since derivative actions are equitable in nature, a shareholder with hands dirtied by knowing receipt of an improper dividend would likely have no standing to press the action. And finally, equity courts can and do determine the recipients of funds restored in a derivative action so as not to work a windfall to a wrongdoer.[59] Similarly, court control of a derivative suit would probably preclude a shareholder suing derivatively to compel directors to restore a dividend, technically unlawful, if approved by a creditor, provided that no injury from the unlawful dividend resulted to other creditors or to preferred shareholders.

56. It has been suggested that a useful test is whether Corporation A's director would care to see fully stated in the *Wall Street Journal* his stock interest in Corporation B with which Corporation A has contracted. See Cary, *Corporate Standards and Legal Rules*, 50 CALIF. L. REV. 408, 418 (1962). The president of Chrysler Corporation resigned upon public disclosure of his stock interest in a Chrysler supplier. Similarly in issue is the propriety of contracts between Hughes Tool Co. and Trans World Airlines in which Hughes Tool (and ultimately Howard Hughes) held a large stock interest, now sterilized through a voting trust. *But cf.* Findley v. Garrett Corp., 109 Cal. App. 2d, 240 P. 2d 421 (1952).

57. Cardozo, J., in Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546 (1928).

58. Section 6.24.

59. See, *e.g.*, Perlman v. Feldmann, 219 F. 2d 173 (2d Cir. 1955), and Keenan v. Eshleman, 23 Del. Ch. 234, 2 A. 2d 904 (S. Ct. 1938).

Finally, no director will find himself liable for an unlawful dividend of which he had no knowledge. Thus section 8.19(e) states a rule of liability for the director who is *present* at the meeting. Section 8.12(b) applies to the *absent* director who is presumed to ratify action, such as an unlawful dividend, unless "after learning of the action taken" he objects in proper form. Clearly, the absent director who never knew of the improper action is not liable, since (1) at common law there is no ratification unless there is knowledge of the material facts, and (2) section 8.12(b) in terms requires knowledge by using the phrase "after learning of the action taken."[60]

(D) *Cumulative Voting and Election of Directors*: Both Mr. Freeman, Mr. Nexsen and Mr. Moore rightly stress doubts engendered by the mandatory cumulative voting provision of the South Carolina constitution, recognizing that it shadows many important sections of the new statute. True, cumulative voting is required in the 1962 Act, although the Draft Version had recommended that it be permissive, *viz.*, subject to abolition if so provided in the articles of incorporation. Attorneys fear that the broad language of the constitutional provision might have two adverse effects. (1) It may render suspect any procedure, however reasonable, for regulating the exercise of the mandatory cumulative voting right, such as the requirement that one who proposes to cumulate his votes give notice of his intention either before the shareholders' meeting or at the meeting before voting begins.[61] (2) Some think it renders suspect, in varying degrees, any provision which arguably cuts down the cumulative voting right. Thus, a few question, as does Mr. Freeman's article, whether the limited permission to classify directors unconsti-

60. In several particulars, not pertinent to the point discussed in the text, §8.12 has been reworded to clarify its validation of director action without a meeting. The very nature of the conditions for validating informal director action will normally confine its application to close corporations.

61. Section 6.20(b). Mr. Moore's article observes that the wording of this subsection may imply that unless each shareholder individually and separately gives notice, before or at the meeting, of his intention to vote cumulatively *his* shares, he may not cumulate his votes. The intention of §6.20(b) is to give advance warning so that one faction will not spring cumulative voting on an unwary group of shareholders who may have customarily voted straight (since cumulative voting is a right, not a compulsion). TECH. AMEND. BILL §§59-60 proposes a rewording which will make the meaning unmistakably clear on the face of the provision.

tutionally impairs the right.[62] A more general concern is that it may be constitutionally impermissible ever to deprive any shares, including preferred shares, of the right to vote for directors—a doubt which would cast a shadow over provisions of the old law, and the almost universal practice of making preferred stock non-voting, not to mention the possibility of issuing non-voting common stock. Other attorneys, including the Reporter, take the view that the courts of this State would be reluctant to strain the language of the ancient constitutional provision to negate an established practice with regard to the issue of stock. But the significant point is not who is the better prophet of the probable outcome of litigation. Rather it is the fact of any uncertainty making responsible attorneys unwilling to give a firm opinion that a normal type of security issued by innumerable corporations in nearly every state of the union is also constitutional in this State. One objective of the 1962 Act was to eliminate the uncertainties inherent in the old law. Emerging now is the even more important objective of eliminating a damaging uncertainly in the constitution itself. There is apparently no dissent to the proposition that corporations should be able, as the new law permits, to issue non-voting shares of preferred or special classes. There seems to be wide agreement that the constitutional provison ought either to be repealed outright (thus making cumulative voting a statutory right only,[63] or, at the least, reworded so that it does not prevent issuing the types of non-voting stock ordinarily marketed in this country.[64]

62. Mr. Freeman fears that director classification may be unconstitutional. Of course, no one can project the outcome of a court decision when and if the question is presented, if only because of the unpredictable factual context in which the issue appears. It would seem surprising if the courts were to strike down a well established business practice both in South Carolina and elsewhere, since most, but not all, courts in other jurisdictions have sustained director classification even when cumulative voting is a constitutional right. See the cases cited in Reporter's Note, p. 146, DRAFT VERSION, S. C. BUS. CORP. ACT OF 1962.

63. The Reporter's personal view is that, at the least, the constitutional provision should be repealed entirely, and that the General Assembly alone should determine by statute (as it has in the new Corporation law) whether cumulative voting should be mandatory. Thus, even if S. C. Const. art. IX, §11 were repealed, cumulative voting would remain mandatory in this State since §6.20 of the 1962 act so requires.

64. The Reporter has proposed the following language to reword S. C. CONST., art. IX, §11. Because of the extreme importance of the wording of any constitutional provision closest scrutiny and criticism of this proposal is urged:

"Each holder of shares entitled to vote at an election of directors of a corporation organized under the laws of this State shall have the right, whether voting his shares in person or by proxy, to cast as many votes as shall equal the number of shares which he owns multiplied by the

Stated otherwise, at a minimum, the constitutional provision should be confined to its proper sphere of operation: to guarantee cumulative voting rights to the holders of all shares which, by the articles of incorporation, are entitled to vote for directors, which, in practice, means the holders of common stock.

6. *Mergers and Asset Sales*: The discussion by Mr. Johnstone and Miss Galloway on mergers, assets sales, and appraisal rights raises two points of great importance. First, they suggest that the comprehensive provisions of section 6.27 dealing with appraisal rights should include, as did the Draft Version, the Model Act provision permitting a shareholder to vote some of his shares for, the other shares against, corporate action, and not forfeit appraisal rights as to shares voted against the proposal because some are voted for it. At first blush, this appears to be a device for shareholders to hedge by voting some but not all shares for mergers, consolidations, and asset sales. The dominant purpose of the provision is, however, to aid the broker who has registered in his "street name" the shares of many different customers some of whom may wish to vote for, others against, corporate action. In order to perform his duties to a customer, the broker must be able to vote the shares as the client directs. Absent statutory sanction for a registered shareholder to split his vote, the broker must have transferred on the corporate books the shares of the dissenting customers so that they may vote against the proposed corporate action and claim dissenter's appraisal rights. This may prove an unwieldy and inconvenient procedure. Recently, both the New Jersey[65] and Delaware[66] courts have affirmed, on slightly different grounds, that the registered shareholder (in each case, a broker carrying shares in a street name) may split the vote and seek appraisal rights as to shares voted negatively. In order to ef-

number of directors for whose election he is entitled to vote. Any such shareholder may cast the votes so cumulated for any one candidate, or distribute the votes so cumulated among any number of candidates, for whose election as director he is entitled to vote. The foregoing provisions shall not be interpreted to preclude any corporation from issuing shares of any preferred or special classes having voting rights only to the extent provided by the articles of incorporation or any amendment thereto or otherwise as required or permitted by statute."

65. Bache & Co. v. General Instrument Co., 74 N. J. Super. 92, 180 A. 2d 535, certification denied, 38 N. J. 181, 183 A. 2d 87 (1962); see the comment in this issue on the *Bache* case, *infra* at 579.

66. Colonial Realty Co. v. Reynolds Metals Co., 185 A. 2d 754 (Del. Ch. 1962).

fect this obviously desirable procedure, an amendment to the 1962 Act has been proposed,[67] adopting the language of the Draft Version,[68] which in turn derives from Model Act section 73.[69]

Secondly, a provision of the 1962 Act,[70] introduced from the floor of the House of Representatives, and unique in American corporation statutes, keeps alive certain derivative actions by a shareholder despite his dissenting to proposed corporate action. This provision does not interfere with the customary dismissal of derivative actions upon settlement of a case. Rather it keeps alive only those actions which have been instituted on or before a merger, consolidation or asset sale, and provides only that the act of dissenting does not interfere with the pendency of the action. Generally, on dissenting, the shareholder loses all rights "of a shareholder" including the right to vote.[71] This provision is not inconsistent, since it keeps alive a cause of action on behalf of the corporation, *viz.*, an action where the shareholder is a sort of guardian *ad litem* for the corporate interests. It apparently overrules *Johnson v. Baldwin.*[72]

67. TECH. AMEND. BILL §67.

68. The Johnston-Galloway article suggests that the permission for split voting by registered shareholders might be limited to fiduciaries, in order to exclude the shareholder who is obviously only hedging. Apart from whether such hedges are inherently undesirable (except as it may increase the number of dissenting shares and hence the probable cash outlay) and the infrequency of individual shareholder hedging, it is difficult to find language suitably confining the provision to its purpose, the accommodation of brokers. To confine it to fiduciaries generally is not helpful since some fiduciaries, *viz.*, trustees, ought not to hedge any more than individuals. It might be feasible to limit it to any broker or dealer in whose name are registered securities for more than one customer, although no State seems so far to have adopted this form of limitation. However, this formula would not be broad enough to accommodate a voting trustee who, under §6.16(g) of the new act, must permit certificate holders the right to seek appraisal rights.

69. In connection with the preceding footnote, it is to be observed that Mr. Moore's article criticises §6.16(g) which preserves appraisal rights to voting trust certificate holders, unless the voting trust otherwise provides. This provision cannot prejudice the corporation. It need only give notice to the voting trustees as registered shareholders. The voting trustee should, as in the case of a broker holding shares for many clients in his name, determine whether any certificate holders wish to demand appraisal rights, and take the necessary steps. His failure to do so would not prejudice the validity of the corporate action, but presumably he would be liable in damages for breach of the fiduciary duty which he owes to certificate holders. Brown v. McLanahan, 148 F. 2d 703 (4th Cir. 1945).

70. Section 6.27(k).

71. Section 6.27(d).

72. 221 S. C. 160, 69 S. E. 2d 594 (1952).

Mr. Johnston and Miss Galloway raise the question whether the appraisal procedure excludes the jurisdiction of courts to enjoin a fraudulent or bad faith merger. Clearly, under well established cases, at least in other states, the residual equity jurisdiction continues in force. The Delaware courts, however, have narrowed the scope of equity powers so that it is extremely difficult, perhaps practically impossible, to infer fraud from the valuation of interests by directors in a merger or consolidation.[73] Thus, if the shareholder thinks that his interest has not been fairly valued in a transaction to which he may dissent, his remedy is to get out by demanding the fair value (ultimately for court determination, if contested,) of his shares. The approach of the Delaware courts is thus to require a showing of fraud in some area other than valuation of share interests, at least in the absence of some flagrant or obviously bad-faith under-valuation of shareholder interests amounting to fraud or breach of duty. Thus, equitable relief would seem proper if the directors of a corporation effected a sale of corporate assets (an event giving rise in South Carolina to appraisal rights) to a corporation controlled by the directors at a valuation which enhanced their position but compromised that of the other shareholders. In all events, it seems unnecessary specifically to reserve equitable jurisdiction in this area since the courts would not infer its exclusion merely by the presence of appraisal rights which, after all, is just a device to modify the effect of the old common law rule requiring unanimous shareholder consent to major corporate changes.

Finally, the South Carolina statute, by providing appraisal rights both on mergers and consolidations and on asset sales, sidesteps the *de facto* merger problems, common to jurisdictions awarding such rights only on mergers but not on asset sales. Hence, the incentive in such states is to contort a transaction into the form of an asset sale. Although some courts have held that such transactions are *de facto* mergers and give rise to appraisal rights, Delaware which gave its

73. Stauffer v. Standard Brands, Inc., 178 A. 2d 311 (Del. Ch. 1962), holding that as to the short-form merger, at least, appraisal remedies are the exclusive remedy even if the "outsiders'" shares in the merged subsidiary are allegedly grossly undervalued. For "it was obviously the intention of the Legislature that disputes as to the value of minority stockholders should be settled by an appraisal proceeding." 178 A. 2d at 314. This reasoning would apply beyond the specific context of a short form merger. *Stauffer* was foreshadowed by Bruce v. E. L. Bruce Co., 174 A. 2d 29 (Del. Ch. 1961).

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*nihil obstat* to evading appraisal rights in the *Heilbrunn* case[74] formally placed its *imprimatur* on the practice in *Hariton v. Arco Electronics, Inc.*,[75] thereby, for all practical purposes, abolishing appraisal rights altogether. In South Carolina, the possibilities are limited. The only area for maneuvering shareholders out of appraisal rights results from the fact that appraisal rights on asset sales apply only to the shareholders of the selling, but not of the purchasing, corporation.[76] Hence, appraisal rights might be avoided if the larger of the two corporations, or more exactly the corporation having the larger number of shareholders likely to dissent, assumes the posture of purchaser rather than seller of assets. But even so, an obvious upside-down sale-purchase transaction may be treated as evasive of shareholder rights, and the court might either (1) define the purchaser and seller as they really are, and award appraisal rights to the true seller,[77] or perhaps go so far as (2) declare the entire transaction to be a *de facto* merger, and give appraisal rights to all parties.[78] A similar result may occur in the case of a stock acquisition —what the English term a "takeover bid."[79]

In conclusion, it is essential to recall that the South Carolina court has observed that a sale of assets may constitute a "merger in fact" even though the corporate entity of the selling corporation remains intact, *i.e.*, the selling corporation is not dissolved.[80]

7. *Dissolution of Corporations*: A significant amendment to section 12.15(a), which specifies the grounds on which a shareholder may invoke equity jurisdiction to dissolve a corporation, makes this relief available when the acts of those in control are "illegal or fraudulent or dishonest," or when these acts are "oppressive or unfairly prejudicial" to the corporation or to a shareholder whether in his capacity as a

74. Heilbrunn v. Sun Chem. Corp., 150 A. 2d 755 (Del. S. Ct. 1959).
75. 31 U. S. L. WEEK 2362 (Del. S. Ct. 1-24-1963). Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 Atl. 54 (1928) and Argenbright v. Phoenix Fin. Co., 21 Del. Ch. 288, 187 Atl. 124 (1936) were said by the court in *Hariton* to "assume [the] legality" of the practice of using asset sales to "achieve the same result as a merger."
76. Section 11.5.
77. Farris v. Glen Alden Corp., 393 Pa. 427, 143 A. 2d 25 (1958) (alternative holding).
78. *Ibid.*
79. Applestein v. United Bd. & Carton Corp., 159 A. 2d 146 (N. J. Super. 1960).
80. Beckroge v. South Carolina Power Co., 197 S. C. 184, 194-95, 15 S. E. 2d 124 (1941).

shareholder, director or officer.[81] This latter clause recognizes that in close corporations a shareholder's position as an officer or director is often more significant than his shareholder status, since most of his compensation may be received as a salary (which the corporation may deduct for tax purposes) rather than as dividends (which the corporation may not deduct). Depriving the shareholder of his officer status, and thus interfering with its prerequisites, may be the most serious injury which can be done to him, and should give rise to a right to seek relief. Besides the right to seek dissolution, such a wrong would entitle a shareholder to seek the alternative relief afforded by section 12.23.[82]

In his article on dissolution of corporations, Mr. Smythe expresses concern that section 12.12(b)'s provision that reinstatement of a corporation whose charter has been forfeited has "no effect upon any issue of personal liability" of directors during the interim between forfeiture and reinstatement, may give an undeserved windfall to creditors who dealt with corporate officers in good faith believing that enterprise had limited liability, and correspondingly impose an unexpected liability on those officers. The intent of this section is negative. Whether or not the directors and officers of the dissolved corporation are personally liable is a matter of common law; the statutory provision is merely a saving clause which precludes restoration of corporate status from destroying whatever common law liability arises from transactions during the interim period. It is impossible to see how any legitimate interests are improperly affected. Since dissolution does not occur until after notice of impending dissolution has been sent to the corporation by the Secretary of State, the directors, in contracting with creditors, obviously know what they are doing, and they are not acting for an

81. TECH. AMEND. BILL §89: "(4) The acts of the directors or those in control of the corporation (A) are illegal or fraudulent or dishonest, or (B) are oppressive or unfairly prejudicial either to the corporation or to any shareholder whether in his capacity as a shareholder, director, or officer of the corporation."

82. Section 12.23 is modeled upon §210 of the English Companies Act of 1946, 11 & 12 Geo. VI, c. 38. An important Scottish decision, Elder v. Elder & Watson, [1952] Sess. Cas. 49, narrowly construed the English provision as affording relief only if the shareholder showed some injury to his status as a shareholder. In this case, since he had been seriously damaged by being ousted from his position as an officer of the corporation, relief was denied. This technical reading has been roundly criticized, and the Jenkins Committee, proposing revisions of the English Companies Act, recommended rewording of §210 to assure equal protection to a shareholder's interest as an officer or director.

enterprise of limited liability. And although the creditor has the advantage of personal liability, this liability results from the fact that he extended credit to what is in effect a partnership, although he did not know it at the time.

8. *Foreign Corporations*: As Mr. Evans notes, section 13.14(d), continuing the long-standing provision of section 10-424, permits extra-territorial personal service of process on unauthorized foreign corporations. He suggests, however, that this technique should be avoided as an "exclusive method" of process service, and viewed only as a "helpful supplemental procedure." There would seem to be no real doubts as to the validity of South Carolina judicial action grounded solely on extra-territorial service. Two problems must always be distinguished: (1) whether the local courts have jurisdiction of the subject matter of some action against the foreign corporation, and (2) whether the statutory method of serving process is adequate.[83] The first depends upon the constitutional sufficiency of local contacts with the out-of-state corporation.[84] As to the second, the Supreme Court of the United States has said that the adequacy of service, "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give [defendant] actual notice of the proceedings and an opportunity to be heard."[85] Thus, in *Millikin v. Meyer*,[86] domicile alone gave a state jurisdiction over an individual domiciliary, and extra-territorial process service sufficed to give the court jurisdiction of the person. By analogy, if a foreign corporation's local contacts are sufficient to ground the court's jurisdiction, extra-territorial process service should be adequate for due process purposes.[87] Indeed, the Secretary of State constantly effects extra-territorial service of process when he sends a copy of process by registered mail to the foreign corporation.

83. See Springs Cotton Mills v. Machinecraft, Inc., 156 F. Supp. 372, 376 (W. D. S. C. 1957).

84. International Shoe Co. v. Washington, 326 U. S. 310, 90 L. Ed. 95 (1945).

85. Millikin v. Meyer, 311 U. S. 457, 463, 85 L. Ed. 278, 283 (1940).

86. 311 U. S. 457. 85 L. Ed. 278 (1940).

87. Erlanger Mills, Inc. v. Cohoes Fiber Mills, 239 F. 2d 502 (4th Cir. 1956) held that a single interstate shipment of goods from New York to North Carolina under a contract made in New York was insufficient under International Shoe's "minimum contacts" test to sustain the jurisdiction of North Carolina courts over the New York shipper. The adequacy of process service was not in question, only "whether there is legal power in the [North Carolina] courts over the [New York] corporation."

In principle, so far as assuring notice is concerned, there is no difference between this admittedly constitutional procedure and notice delivered to any out-of-state corporation by personal service.[88] Although the Supreme Court of the United States has yet to rule squarely on the adequacy of this procedure, its decisions point to its validity, and state supreme courts, taking the cue, have upheld extra-territorial process service on a foreign corporation.[89]

Mr. Evans' article observes that when foreign corporations are sued locally, venue must be proper even though the court has jurisdiction of the subject matter and of the person. As he indicates, the general venue provisions of section 10-303 would normally govern. However, the Corporation Act, while not specifying venue in actions by and against foreign corporations,[90] implies that for authorized foreign corporations *a proper*, although probably not exclusive, venue would be the county in which the corporation's registered office is located (and its registered agent resides). And since under section 13.13 process is ordinarily served on the foreign corporation's local registered office, probably venue will often be laid in the same county. Otherwise, there seems no basis for disturbing the generally applicable venue rules.

## III.

The enactment of the Technical Amendments Bill will complete the initial phase of work on the Corporation Law. We say "initial phase," for no statute is complete which must

88. To make doubly sure that the foreign corporation receives actual notice when extra-territorial service is made, the attorney should see to it that service is made on a corporate officer or other person clearly appropriate for receiving service. Thus, one might serve process on any officer or other person who is entitled to receive service under the statutes in the corporation's home jurisdiction. See also the list of persons who may receive service for a South Carolina corporation in S. C. CODE §10-421 (1962).

89. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N. E. 2d 761 (1961). *Cf.*, Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957). See also Allen v. Superior Court, 41 Cal. 2d 306, 259 P. 2d 905 (1953). The general problem is discussed in Ehrenzweig & Mills, *Personal Service Outside the* State, 41 CALIF. L. REV. 383 (1953), and McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CALIF. L. REV. 331, 342-43 (1946).

90. As to domestic corporations, the act frequently specifies the venue as the county in which the corporation's registered office is located. See, *e.g.*, §§6.26 (d) (enforce inspection rights); 6.3 (c) (2) (order shareholder meetings); 6.19 (review of director elections); 6.27 (i) (shareholder appraisal rights); 8.7 (d) (removal of directors); 12.15 (dissolution of corporation by court order); 12.23 (relief alternative to dissolution).

deal with an ever-growing area of the law such as corporations. Of one thing we can be certain: problems unforeseen by anyone will emerge, ambiguities will turn up in the most flawlessly drafted act, new business techniques will appear, and judicial decisions will occasionally distort the meaning or pervert the intention of any statute. For these reasons, no statute is finished.

The new South Carolina statute now places it in the forefront of states with modern, up-to-date corporate laws. To retain that position, there must be a continuous monitoring of the corporation laws of this state: to add new provisions, make needed amendments, discourage unethical practices, promote sound corporate operations, and the like. This can best be accomplished through a permanent committee, such as the Joint Committee which secured enactment of the new Securities and Corporations Acts. Such a committee can best keep watch over the new statutes and keep them up with the changing times. It is to be hoped that the Bar, which has such a vital interest in these matters, will take the needed steps to promote such a project.