April 28, 1966

SUBJECT: Modification of Sequestration and Attachment Laws

TO: Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
Honorable Elisha C. Dukes
Clair J. Killoran, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey
Walter K. Stapleton, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire

FROM: Henry M. Canby

I

It is proposed to amend 10 Delaware Code, § 366 (a) so as to provide that an individual cannot be forced to appear by the seizure of securities owned by him in a corporation other than the particular corporation involved in the lawsuit. Two alternative forms of amendment are submitted for your consideration. Form "A" is briefer but might give rise to spurious joining of other corporations merely for the purpose of establishing a basis for sequestration. Added language is underlined.

FORM "A"

§ 366 (a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, provided, however, except where the certificate itself is seized, no corporate securities of any sort whatsoever, nor any interest therein, owned by a non-resident defendant other than securities or interests therein of a corporation which is a party to the particular action shall be subject to seizure hereunder. Any property which has been lawfully seized may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the

Present limit to seizure reasonable?

In cases where Corp. is a party?

Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a resonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

FORM "B"

§ 366 (a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a non-resident of the State of Delaware, the Court may make an order directing such non-resident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such non-resident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than

once a week for three consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, provided, however, except where the certificate itself is seized, no corporate securities of any sort whatsoever, nor any interest therein, owned by a non-resident defendant other than securities or interests therein of a corporation for whose benefit the action has been brought or against which relief, other than injunctive relief against the transfer of securities, is sought, shall be subject to seizure hereunder. Any property which has been lawfully seized may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant, whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such

petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

II

The question remains as to whether or not § 324 which provides for attachment of stock for debt or other demands should be amended. Since this statute is dealing with personal claims against an individual in an action of law, it is difficult to see any logic in distinguishing between stock of a corporation in which the individual may be an officer or director and stock of any other corporation. Furthermore, since in this state bank accounts are not subject to attachment, to severely limit the right to attach stock for debt would create a rather broad haven for defaulters. Finally, the volume of transactions under 8 Del.C., § 324 is not large and it is doubtful if it has anything to do with the problem posed by the Secretary of State and the representatives of the corporation companies.

Accordingly, I recommend that no change be made in this section.

APRIL 28, 1966

SUBJECT: MERGER STATUTES

TO: Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
Honorable Elisha C. Dukes
Clair J. Killoran, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey
Walter K. Stapleton, Esquire
Charles F. Richards, Jr., Esquire
Charles S. Crompton, Jr., Esquire

FROM: Henry M. Canby

I.

At the Thirtieth Meeting of the Committee held on March 23, 1966, the undersigned was requested to redraft § 251 (c) (new designation) so as to remove the requirement that directors must sign the merger agreement. The redraft follows:

§ 251 (c) The board of directors of each corporation which desires to merge shall adopt a resolution approving an agreement which shall prescribe the terms and conditions of merger, the

mode of carrying the same into effect, and shall state such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation as can be stated in the case of a merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation resulting from or surviving such merger, with such other details and provisions as are deemed necessary. Any such agreement may provide for the payment of cash in lieu of the issuance of fractional shares of the resulting or surviving corporation. The agreement so adopted shall be signed by the Chairman of the Board or by the President or by a Vice-President and by the Secretary or an Assistant Secretary.

II.

Recently a Pennsylvania parent wished to create a Delaware subsidiary and then effect a merger between it and another Delaware corporation. It wished to exchange shares of the Pennsylvania parent for shares of the Delaware corporation. It was unable to do this

because of the wording of § 251 (b) and consequently created a California sub instead, this apparently being permissible under California law. In connection with Mr. Corroon's memorandum which is to be furnished to the Committee regarding the possibility of paying cash under § 251, I would appreciate it if he would consider the feasibility of amending § 251 to permit:

> "converting the shares of each of the constituent corporations into shares or other securities of a corporation resulting from or surviving such merger or into shares or securities of any corporation which, prior to the merger, owns at least 90% of the voting stock of the corporation which shall survive the merger."

At the present time this can be done in a § 253 merger.

HMC/mm

RICHARDS, LAYTON & FINGER

4072 DUPONT BUILDING

WILMINGTON 1, DELAWARE

TELEPHONE OLYMPIA 8-6541

AREA CODE 302

ROBT H RICHARDS
1897-1951

AARON FINGER
ROBT H RICHARDS, JR.
HENRY M CANBY
LOUIS J. FINGER
RODNEY M. LAYTON
EDMUND N. CARPENTER, II
JAMES T. McKINSTRY
E NORMAN VEASEY
MAX S. BELL, JR
WILLIAM E. WIGGIN
RICHARD J ABRAMS

JOHN E. LEWIS
R. H. RICHARDS, III
WILLIAM T. QUILLEN
CHARLES F RICHARDS, JR
JANE R. ROTH

CALEB S. LAYTON
COUNSEL

WASHINGTON COUNSEL

SUTHERLAND, ASBILL
& BRENNAN
FARRAGUT BUILDING
WASHINGTON, D. C.

May 25, 1966

Walter K. Stapleton, Esquire
Morris, Nichols, Arsht & Tunnell
3000 DuPont Building
Wilmington, Delaware 19801

Charles S. Crompton, Jr., Esquire
Berl Potter & Anderson
350 Delaware Trust Building
Wilmington, Delaware 19801

Re: Delaware Corporation Law Study Committee

Gentlemen:

Enclosed are the latest revisions and additional changes for Sections 261 and 258. The new card of new text for Section 261 should replace the old card, and the new Page 2 of Section 258 should replace the old card.

The other revised sections for which we are responsible will be completed and sent to you as soon as possible.

Very truly yours,

Charles F. Richards, Jr.

CFRjr:lm
Enclosures

COHEN, MORRIS AND ROSENTHAL
ATTORNEYS AT LAW
1101 BANK OF DELAWARE BUILDING
WILMINGTON, DELAWARE 19801

PHILIP COHEN
IRVING MORRIS
JOSEPH A. ROSENTHAL

OLYMPIA 6-4433

April 15, 1966

The Honorable Clarence A. Southerland
Chairman Delaware Corporation Law Study Committee
350 Delaware Trust Building
Wilmington, Delaware

Dear Mr. Chief Justice:

I shall not attend the meeting scheduled for this morning because of my commitment to my wife to take her to New York for the week end leaving this morning. Although my other explanations for failure to attend meetings for some time and to file my report on sequestration seem to me to have had merit when I proffered them, none of them has the compelling merit which the present one does.

The purpose of this letter is to express briefly my personal views on the matter of sequestration. In putting them forth I do so, as you know, without prior discussion with you and I do not intend that these remarks be understood to reflect your views as the co-worker with me on the matter of sequestration.

Professor Folk has summarized the arguments in his Report pages 264-279. I strongly favor the retention of our sequestration procedure as we presently have it. In doing so I would stress the significance of one or two points made by Professor Folk and make reference to some other factors which occur to me.

1. Apart from providing a single forum for litigation and retaining control over the developing law affecting all Delaware corporations, the chief significance for retaining sequestration, in my opinion, is that it provides the procedure through which a stockholder may compel observance of fiduciary duties by officers and directors. Our State has a responsibility and duty to insure that the managers of corporations which are formed in our State adhere to proper standards of conduct. The derivative action serves this function. Without sequestration the procedural problems might well prove to be insurmountable in bringing to account those who would violate the trust placed in them by stockholders.

2. If I am correct that without sequestration the viability of derivative litigation would be drastically lessened if not extinguished, doing away with sequestration only invites in time further efforts probably on a federal level to meet the need of protecting stockholders which is presently filled by derivative litigation. At a time when we seek to strengthen local control over our interest, it seems to me to be a step backward to invite federal legislation.

3. The various suggestions which some make to replace sequestration discussed by Professor Folk do not commend themselves to me, since each, as Professor Folk has noted, has disadvantages.

4. Those who would do away with sequestration because of its possible "harassment" over managers of Delaware corporations completely ignore the protections built up through the years to prevent harassment. While the Courts sit, the abuse of sequestration and derivative litigation cannot occur. Only those who would want to leave management unrestrained have anything to fear either from sequestration or derivative litigation.

I respectfully urge that the Committee vote to retain sequestration in its present form.

Respectfully yours,

IM:G

R E P O R T

TO: MEMBERS OF THE CORPORATION LAW REVISION COMMITTEE

FROM: S. SAMUEL ARSHT

RE: "PRE-EMPTIVE RIGHTS" Folk Report, Pages 260-262.

April 1, 1966

Section 102(b)(3) allows the certificate of incorporation to limit or deny pre-emptive rights. A similar provision appears in the Model Act and in many other state statutes. Professor Folk points out that there are three alternative ways to deal with pre-emptive rights: (1) As § 102(b)(3) does; (2) A statutory denial of all pre-emptive rights which may, however, be granted by the certificate of incorporation, either by a general provision that pre-emptive rights exist in all stock issues and for whatever purpose, or by enumerating situations where the pre-emptive right exists; and (3) A statutory enumeration of the circumstances when pre-emptive rights do and do not exist, subject to any certificate provision expanding or contracting them.

Professor Folk's second alternative is found in California, Indiana, Oklahoma and Pennsylvania and is an optional alternative to Section 24 of the Model Act. The third alternative is found in New York and other states.

Professor Folk suggests that, while Delaware's present § 102(b)(3) provision is not wholly satisfactory, it is probably preferable to its alternatives. His chief objection to § 102(b)(3) is that it assumes the continued existence of a

common law pre-emptive right, the scope of which is not clearly defined, even in the case law both in Delaware and elsewhere. Professor Folk believes the most satisfactory alternative to § 102(b)(3) is a statutory denial of all pre-emptive rights which may, however, be granted by the certificate. The major effect of this alternative is to clear away all common law uncertainty by abolishing the right which would then exist, if at all, as a matter of contract in the certificate of incorporation.

Professor Folk believes that the third alternative adopted in New York, is the least attractive alternative.

My preference is the second alternative, i.e., a statutory denial of all pre-emptive rights, except to the extent granted by the certificate of incorporation. In my opinion, this would make Delaware's law more attractive by eliminating a problem as to which there is great uncertainty and which would put the burden of defining the scope of the pre-emptive right that is desired on the corporation which desires it. It seems to me that there is no public policy which dictates either the existence or the non-existence of pre-emptive rights in shareholders and that so far as the State of Delaware is concerned it should be left entirely to the corporation's discretion or selection, both as to its existence and scope.

R E P O R T

TO: MEMBERS OF THE CORPORATION LAW REVISION COMMITTEE

FROM: S. SAMUEL ARSHT

RE: " SURPLUS AND RESERVES " Folk Report, Pages 257-260

April 1, 1966

Professor Folk discusses "surplus and reserves" on pages 257-260 of his report. I approve each of his recommendations on this subject. However, in a sense, his recommendations introduce new concepts in the Delaware corporation law in that they adopt the "accounting" terminology of "stated capital", "capital surplus" and "earned surplus". These terms do not appear in the existing Delaware law, which uses only the terms "capital" and "surplus". See § 154, "Determination of the Amount of Capital", which defines both "capital" and "surplus". Since our Committee, by approving definitions of "stated capital", "capital surplus" and "earned surplus" has given legal recognition to these previously accounting terms, Professor Folk's recommended statutes are, in effect, the implementing and substantive provisions.

Professor Folk states that his recommended new statutes "validate various accounting procedures which give the directors flexibility and certainty in the handling of corporate accounts" and that "provisions of this sort would be attractive to existing and would-be Delaware corporations". I agree.

1. Consolidated Earned Surplus. Professor Folk recommends the adoption of a new section which, he says, is "an important and widely adopted statutory provision" which "automatically carries forward the aggregate earned surplus accounts of constituent corporations in a merger, consolidation, or pooling-of-interests; and thus makes the combined surplus available for normal earned surplus uses." He also points out that a deficit in one corporation's earned surplus will reduce the plus figure in the other corporation's earned surplus on merger, etc. Professor Folk recommends the adoption of the following section, which is substantially similar to Section 19 of the Model Act and to statutes in Pennsylvania, New York and elsewhere:

> "After merger, consolidation, or combination of two or more corporations by purchase of all or substantially all of the outstanding shares or of the property and assets of another corporation, domestic or foreign, the amount of earned surplus of the surviving, new, or purchasing corporation shall not exceed the aggregate net earned surplus of the constituent corporations as it existed immediately prior to such merger, consolidation, or combination, reduced by such distributions to shareholders and transfer of earned surplus to stated capital or capital surplus as were made in connection with the issue of shares or otherwise at the time of merger, consolidation, or combination."

2. Quasi-Reorganization. Professor Folk states that most corporation statutes now specifically validate what he called accounting reorganization by which capital surplus is used to reduce or eliminate a deficit in the earned surplus

account so that undistributed future earnings build up a plus figure in earned surplus, rather than gradually reduce a minus figure. Absent indenture restriction, any type of capital surplus, e.g., reduction surplus, revaluation surplus, paid-in surplus, etc., may be so employed. He points out that many states require a shareholder vote, usually a majority of voting shares (as in New York and Pennsylvania), although sometimes the percentage is fixed at two-thirds (Ohio) or preferred shareholders must also vote. Other states only compel disclosure of the action taken by directors. Sometimes, both a shareholder vote and disclosure of the effect on accounts is required, as in Ohio and New York. Professor Folk suggests that "the most flexible technique is to authorize director action without a shareholder vote but require prompt disclosure to shareholders of the effect of the quasi-reorganization". Professor Folk suggests the following provision, and I approve:

> "A corporation may, by action of its board of directors, apply any part or all of its capital surplus to reduce or eliminate any deficit in the earned surplus account. Each such application of capital surplus shall, to the extent thereof, effect a reduction of capital surplus. Each such application of capital surplus shall be disclosed in the next financial statement furnished by the corporation to its shareholders or in the first notice of dividend or other distribution that is furnished to shareholders between the date of such application and the next financial statement, and in any event within six months of the date of such application."

3. Transfers to Stated Capital. Section 154 (third sentence) now authorizes the board of directors to increase capital by directing transfers from surplus to capital. Professor Folk recommends that the sentence be reworded as follows to use the new or contemporary terminology:

> "The board of directors may at any time transfer all or any part of earned surplus to capital surplus or to stated capital, or transfer all or any part of capital surplus to stated capital."

If the third sentence of section 154 is revised as recommended by Folk, then the fourth sentence should be correspondingly amended as follows:

> "The board of directors may direct that all or any part of earned surplus or capital surplus transferred to stated capital shall be treated as capital in respect of any shares of the corporation of any designated class or classes."

4. Reduction Surplus. Professor Folk recommends, and I approve, the inclusion of the following statute dealing with reduction surplus:

> "Any surplus resulting from reduction of stated capital, however effected, shall be capital surplus."

5. Reserves. Professor Folk points out that if any foregoing statutory provision recommended by him should be adopted it would "not preclude a corporation from restricting or creating reserves in any surplus account, or increasing,

decreasing or eliminating any such reserves or lifting any restriction." He says that Section 171 of the Delaware law (in the dividend context) eliminates any possible implication that statutory provisions of the sort recommended by him might hinder directors' discretion with respect to reserving or restricting surplus accounts. I agree.

MEMORANDUM

To: ~~Members of the~~ Delaware Corporation Law Revision Committee

From: Clair John Killoran, Esquire

Purchase and Redemption of Corporation's Own Shares */

I would recommend that section 122 be amended by transferring from section 160 power to purchase, sell, etc. shares and that the following language be adopted:

Amend 160 Bytes No Transfer

"(5) To purchase, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares."

Section 122 should be renumbered such that paragraphs (5), (6), (7), (8), (9) and (10) will become paragraphs (6), (7), (8), (9), (10) and (11). (See Folk Report, pages 249 and 250.)

I recommend that section 160 be rewritten to read as follows:

"§160. Corporation's powers respecting ownership, etc. of its own stock

"(a) No corporation organized under this chapter shall use its funds or property for the purchase of its own shares of capital stock when such use would cause any impairment of the capital of the corporation. Shares of its own capital stock belonging to the corporation shall not be voted upon directly or indirectly nor counted for quorum purposes. Nothing in this section

*/ Suggested provisions are underlined.

shall be construed as limiting the exercise of the rights given by section 243 of this title nor limiting the right of the corporation to vote its own stock held by it in a fiduciary capacity."

"(b) Neither the retention of reacquired shares as treasury shares nor their subsequent distribution to shareholders or disposition for a consideration shall change the stated capital of the corporation. Upon sale or other disposition for a consideration, the full consideration received for such shares shall be capital surplus, but if the shares were purchased out of earned surplus the directors may restore to earned surplus all or any part of the amount by which earned surplus was reduced at the time of purchase."

(See Folk Report, pages 140, 250 and 251.)

Directors' Liability in Respect of Purchase of Shares of Corporation

I recommend that sections 172 and 174 be amended, as suggested by Doctor Folk at page 251, paragraph numbered 6. of his Report. The amendment suggested would protect a director, not only as to dividends, but in respect of purchase of shares of the corporation, as well as providing a director with the section 174 defense in respect of any such purchases.

Redemption of Shares

Doctor Folk does not recommend any revision of section 243. However, E.N. Carpenter, II, Esquire, has pointed out an ambiguity which

now exists in section 243(b). A description of this ambiguity and his recommendation are as follows:

> "Section [243(b)] is evidently designed to relate only to the redemption, purchase or retirement of preferred or special stock. However, Section 243(b), while it starts out by referring to 'Any such shares' (presumably preferred and special stock) goes on to say that '***any shares of the corporation surrendered to it on the conversion or exchange thereof into or for other shares of the corporation shall ***'. I believe the intention of the draftsmen was to refer only to preferred or special shares and that this latter reference should also read 'any such shares'."

Reduction of Capital: Redeemed and Other Reacquired Shares

Under this heading, beginning on page 252 of the Report, Doctor Folk recommends:

> (a) Section 244 should be amended to eliminate shareholder vote to retire or cancel ~~redeemed~~ reacquired shares, whether reacquired out of surplus or stated capital. The law should permit the directors alone to retire or cancel redeemed shares.

Doctor Folk states that by dispensing with shareholder approval on retiring or cancelling shares, real safeguards remain in the Delaware statutes providing for restrictions on funds available for such purpose. I recommend an appropriate amendment encompassing Doctor Folk's recommendation.

(b) That shareholder action to reduce capital be eliminated and recommends that we adopt the New York statute which permits the directors alone to reduce stated capital with the following safeguards: (1) prompt disclosure of the effect of director action; and (2) requiring that stated capital not fall below the aggregate par value of all par shares and the liquidating preferences of all preferred shares.

I do not follow Doctor Folk's reasoning that such procedure "is a logical step". In my opinion, section 244 requiring shareholder action to reduce capital should be retained.

RICHARDS, LAYTON & FINGER
4072 DUPONT BUILDING
WILMINGTON 1, DELAWARE
TELEPHONE OLYMPIA 8-6541
AREA CODE 302

ROBT H. RICHARDS
1897-1951

AARON FINGER
ROBT. H. RICHARDS, JR.
HENRY M. CANBY
LOUIS J. FINGER
RODNEY M. LAYTON
EDMUND N. CARPENTER, II
JAMES T. McKINSTRY
E. NORMAN VEASEY
MAX S. BELL, JR.
WILLIAM E. WIGGIN
RICHARD J ABRAMS

JOHN E. LEWIS
R. H. RICHARDS, III
WILLIAM T. QUILLEN
CHARLES F. RICHARDS, JR.
JANE R. ROTH

CALEB S. LAYTON
COUNSEL

WASHINGTON COUNSEL

SUTHERLAND, ASBILL
& BRENNAN
FARRAGUT BUILDING
WASHINGTON, D. C.

March 23, 1966

Chief Justice Clarence A. Southerland
Berl Potter & Anderson
Delaware Trust Buildi ng
Wilmington, Delaware 19801

Re: Corporation Law Revisions

Dear Chief Justice Southerland:

I am writing to you in your capacity as Chairman of the Delaware Corporation Law Revision Committee. I understand that the Committee has already reviewed and considered amendments to 8 Del. C. §213, but I wonder if it is possible for another minor change to be brought up at this time.

It has been brought to my attention that there is a need for an increase in the maximum period permitted between the record date and the dividend payment dates and stockholders' meetings. Although cash dividends do not present a problem, extreme time pressure results from having merely fifty days as the maximum period permitted between stock dividend record and payment dates. In the case of stock dividends, companies appear to be increasingly adopting the procedure of soliciting instructions for the purchase and sale of fractional interests in the fifty day interval, in order to be able to combine in a single certificate the rounded-out share resulting from a purchase order with the full shares to which the stockholder is entitled as a result of a dividend. This procedure results in cost savings to the corporation involved through issuance of fewer stock certificates, and it is

appreciated by the stockholders since it saves them the inconvenience of handling a multitude of one share certificates resulting from the purchase of fractional interests.

In spite of the advantages of this procedure, adoption of this system was not even feasible for certain large corporations until the stock records were put on a computer, and even with the computer's speed it is a substantial burden to accomplish this within the fifty day time limit. Authorization of a sixty day period between record and payment dates for stock dividends would greatly relieve the work pressure.

If you would like me to collect some additional information on this I will be glad to undertake to do so.

Yours truly,

E. N. Carpenter, II

ENC/bd
cc Henry M. Canby, Esquire

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

March 23, 1966

MEMORANDUM TO MEMBERS OF THE COMMITTEE

A meeting of the Delaware Corporation Law Revision Committee will be held on Thursday, March 31 at 10:30 a.m. at 350 Delaware Trust Building, Wilmington.

The subjects to be considered are:

1. Report of Mr. Killoran (now in preparation and soon to be filed) on the Folk Report, pages 249-256, concerning purchase and redemption of capital stock and reduction of capital.

2. Sequestration (the report has not been filed; but I think we are all probably prepared to discuss the subject).

C.A.S.

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

CLARENCE A. SOUTHERLAND
CHAIRMAN
RICHARD F. CORROON
VICE CHAIRMAN
S. SAMUEL ARSHT
HENRY M. CANBY
ELISHA C. DUKES
SECRETARY OF STATE OF DELAWARE
DANIEL L. HERRMANN
DAVID H. JACKMAN
ALFRED JERVIS
IRVING MORRIS
MRS. MARGARET S. STOREY
DIRECTOR CORPORATION DEPARTMENT
DEPARTMENT OF STATE OF DELAWARE
SECRETARY

March 16, 1966

MEMORANDUM TO THE MEMBERS OF THE CORPORATION COMMITTEE

A meeting of the Committee will be held at 350 Delaware Trust Building, Wilmington, on Wednesday, March 23 at 10:30 a.m. for consideration of the following matters:

1. A review of Mr. Canby's draft of amendments to the merger sections of the law, together with the changes enclosed with his memorandum of February 22. This includes the two questions listed on page 2 of his February 22 memorandum.

2. The draft of provisions regarding the execution, etc. of corporate instruments attached to Mr. Crompton's memorandum of February 22.

3. The report of Professor Folk, pages 264-279 respecting sequestration. No member's report is filed but I am inclined to think that if the members will read again Professor Folk's discussion of the matter we can profitably discuss it next Wednesday if we have the time.

CAS

MEMORANDUM RE UNIFORM EXECUTION, ACKNOWLEDGMENT, FILING, AND RECORDING OF CORPORATE INSTRUMENTS

February 22, 1966

TO: HON. CLARENCE A. SOUTHERLAND
RICHARD F. CORROON
S. SAMUEL ARSHT
HENRY M. CANBY
HON. ELISHA C. DUKES
CLAIR J. KILLORAN
DAVID H. JACKMAN
ALFRED JERVIS
IRVING MORRIS
MRS. MARGARET S. STOREY
WALTER K. STAPLETON
CHARLES F. RICHARDS

FROM: CHARLES S. CROMPTON, JR.

At the request of the Chairman, I have prepared a draft of statutory provisions regarding the execution, acknowledgment, filing, and recording of corporate instruments. I enclose copies of these provisions with pertinent comments by Professor Folk and committee members who have previously considered some aspect of the problem.

I. EXECUTION

1. The following draft is basically that suggested by Chief Justice Southerland in his report of July 17, 1964. His comments in that report explain the changes he made in the draft at pp. 3-5 of the Folk Report, Each of these new provisions would require a new section number. They perhaps could be inserted following present section 109 and thereby avoid a reshuffling of the present, familiar numbers.

2. It seems to me the word "chapter" should be changed to "title" in line two of the Folk-Southerland drafts if these uniform provisions are to apply to the new close corporations chapter also.

3. Reference should also be made to the list of present sections (about thirty in number) affected by this change prepared for the committee by Mr. Jervis.

Section 103. Execution of Instruments. Unless otherwise specifically provided in this Chapter and subject to any applicable provisions of this chapter: Whenever ~~A. Corporate instruments required by~~ any provision of this Chapter, to be filed with the Secretary of State by any corporation organized under this Title, ~~shall, unless otherwise specifically provided and subject to any other applicable provision of this Chapter,~~ be executed as ~~provided below~~ follows.

(a) The Certificate of Incorporation, and all other instruments executed before election of the initial Board of Directors, shall be signed by the incorporator or incorporators.

(b) All other instruments shall be signed -

(i) By the Chairman of the Board of Directors, or by the President, or by a Vice-President, and by the Secretary or an Assistant Secretary; or

(ii) If it shall appear from the instrument that there are no such officers, then by all the directors or by such directors as may be designated by the Board; or

(3) If it shall appear from the instrument that there are no such officers or directors, then by the holders of record, or such of them as may be designated by the holders of record, of a majority of all outstanding shares of stock.

(b) Notwithstanding the provisions of sub-paragraphs (1), (2) and (3) above, any such other instrument referred to in sub-paragraph (a) may be signed by the holders of all the outstanding shares of stock.

(4) The name of any signatory shall be printed, typed or otherwise legibly set forth beneath or opposite his written signature.

II. ACKNOWLEDGMENT

1. This draft is taken from the Folk draft at pp. 5-6 of his report. I have changed the word "chapter" to "title" as in the prior section and I have changed the words "this state" to "the place of execution" as the committee earlier had done in connection with the acknowledgment provisions of § 242(d)(1) to remove doubts as to what officials may acknowledge documents.

~~Section _____. Acknowledgment of Instruments~~

5. Whenever any provision of this Title requires any instrument to be acknowledged, ~~unless otherwise specifically stated in this Title and subject to any additional provisions of this Title,~~ such requirement means that:

(1) the person signing the instrument as provided by subsection (2) of section _____, ~~[new execution section]~~ acknowledges that the instrument he signs is his act and deed, and that the facts stated therein are truly set forth, and

(2) the instrument shall be acknowledged before any officer authorized by the laws of the place of execution to take acknowledgment of deeds.

III. FILING AND RECORDATION

1. I have used the alternative draft presented at pp. 6-7 of the Folk Report preserving the recording requirement which the committee has agreed to retain.

2. The proposal does make the significant change that the Secretary of State shall collect recording fees and forward them with the instrument to the correct office. If such provision is not subject to the same objections as the elimination of recordation, it would seem to be a more convenient method than the present one. Whether this change is to be made is a policy question for the committee to determine.

Section ____. ~~Filing and Recordation~~ of Instruments

(a) Whenever any provision of this Chapter requires any instrument to be filed in accordance with this section, ~~unless otherwise specifically stated in this Chapter and subject to any additional provisions of this Act,~~ such requirement means that:

(1) The original executed instrument, together with the conformed copy, shall be delivered to the office of the Secretary of State.

(2) All fees and taxes, including any fees and taxes which may be lawfully assessed for recording the instrument with the recorder of the county in which the principal office of the corporation is to be located, shall be tendered to the Secretary of State.

(3) Upon delivery of the instrument, and upon tender of the required fees and taxes, the Secretary of State shall certify that the original has been filed in his office by endorsing upon the original the word "Filed", and the hour, day, month and year thereof. This endorsement is the "filing date" of the instrument, and is conclusive of the date of filing in the absence of actual fraud. The Secretary of State shall thereupon file and index the original.

(4) The Secretary of State shall compare the conformed copy with the original, and if he finds that they are identical, he shall certify the conformed copy by making upon it the same endorsement which is required to appear upon the original, together with a further endorsement that the conformed copy is a true copy of the original.

(5) The certified conformed copy shall be transmitted by the Secretary of State to the recorder of the county where the principal office or place of business of the corporation is to be located in this State.

(6) The recorder of the county shall, upon receipt of the instrument, record and index it in a book kept for that purpose.

~~(b) Unless otherwise provided or permitted by this chapter,~~ any instrument filed as provided by this section shall be effective as of its filing date, notwithstanding any failure or defect in recording the instrument as required by subsections (~~b~~)(5) and (~~b~~)(6).

~~provided it is recorded as required by law within 10 days~~

~~c. The provisions~~

February 18, 1966

TO: Delaware Corporation Law
Revision Committee

FROM: Henry M. Canby

I enclose proposed amended sections 251 - 253 of the merger statute for your consideration.

254 through 258 require merely formal changes. I will supply copies of amended 259 - 262 by noon on Monday to those members in Wilmington so that they will have a chance to go over them before the Tuesday's meeting.

HMC/mm

February 22, 1966

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

TO: Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
Honorable Elisha C. Dukes
Clair J. Killoran, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey
Walter K. Stapleton, Esquire
Charles F. Richards, Jr., Esquire
Charles S. Crompton, Jr., Esquire

1. Members whose names are red checked will find enclosed:

(a) Revised pages to be substituted in Sections 251, 252 and 253 previously furnished.

(b) Redrafts of Sections 254 - 262 inc.

2. Members whose names are blue checked will find enclosed:

(a) Revised pages to be substituted in Sections 251, 252 and 253 inc. and 259 - 262 inc. previously furnished.

(b) Redrafts of Sections 254 - 258 inc.

3. Members whose names are green checked will find enclosed:

(a) Revised pages to be substituted in Sections 257 and 258 previously furnished.

(b) Redrafts of Sections 257 and 258.

Two important problems remain for Committee consideration in addition to suggestions as to further revisions of the submitted sections. They are:

(a) Whether or not the right to use cash as well as "shares or other securities" should be included in section 251(b), and

(b) Whether or not the proposal of Dewey-Ballantine drafted at the bottom of page 195b and 195c of the Folk report should be included either as Section 251(f) or as a new section (since it would also refer to Section 252).

HMC/mm

SUBCHAPTER IX. MERGER

§ 251. Merger of domestic corporations

(a) Any two or more corporations existing under the provisions of this chapter, or existing under the laws of this State, for the purpose of carrying on any kind of business, may merge into a single corporation which may be any one of the constituent corporations or a new corporation to be formed by means of such merger as shall be specified in the agreement required by subsection (b) of this section. The term merger as used in this subchapter shall be construed to include the term consolidation.

(b) The directors, or a majority of them, of the corporations which desire to merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation, as can be stated in the case of a merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation resulting from or surviving such merger, with such other details and provisions as are deemed necessary. Any such agreement may provide for the payment of cash in lieu of the issuance of fractional shares of the resulting or surviving corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at a meeting thereof,

called [redacted] for the purpose of taking the same under consideration, or at the next annual meeting of the said stockholders. Due notice of the time, place and object of the meeting shall be mailed to the last known post office address of each stockholder of each such corporation at least 20 days prior to the date of the meeting. At the meeting the agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote. If two-thirds of the total number of shares of the capital stock of each such corporation shall be voted for the adoption of the agreement, then that fact shall be certified on the agreement by the secretary or assistant secretary of each such corporation, under the seal thereof; and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of such corporations under the corporate seals thereof and acknowledged by the president or vice-president of each of such corporations before any officer authorized by the laws of this State to take acknowledgments of deeds to be the respective act, deed and agreement of each of the corporations. The agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and a copy of the agreement and act of merger, certified by the Secretary of State, shall be recorded in the offices of the recorders of the counties of this State in which the respective corporations so merging shall have their original certificates of incorporation recorded, or if any of the corporations shall have been specially created by a public act of the Legislature, then the agreement shall be recorded in the county where such

corporation shall have had its principal place of business. The agreement, when so filed, shall become effective and shall thenceforth be taken and deemed to be the agreement and act of merger of the corporations. Such record, or a certified copy thereof, shall be evidence of the agreement and act of merger of the corporations, and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such merger. An agreement of merger may provide that it is not to become effective until a date to be specified in the agreement, which date may be the date of filing, or a date not later than ninety (90) days after the date of filing.

(d) Any agreement of merger may contain a provision that at any time prior to the filing of the agreement with the office of the Secretary of State, the agreement may be abandoned by the Board of Directors of any participating corporation notwithstanding approval of the agreement of merger by the shareholder of the participating corporations.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

Summary of Changes:

(1) Elimination of the word "consolidation" and inclusion of definition of "merger" as embodying consolidation;

(2) Substitution of filing date or stated effective date for recording date;

(3) Revision of language a two-thirds vote; and

(4) Addition of paragraphs (d) and (e).

§ 252. Merger of domestic and foreign corporations; service of process upon surviving corporation

(a) Any one or more corporations organized under the provisions of this chapter, or existing under the laws of this State, may merge with one or more other corporations organized under the laws of any other state or states of the United States, if the laws under which the other corporation or corporations are formed shall permit such merger. The constituent corporations may merge into a single corporation, which may be any one of the constituent corporations or they may form a new corporation, which may be a corporation of the State of incorporation of any one of the constituent corporations as shall be specified in the agreement required by subsection (b) of this section. In addition, any one or more corporations organized under the laws of any jurisdiction other than one of the United States may merge with and into one or more corporations existing under the laws of this State if the surviving or resulting corporation shall be a corporation of the State of Delaware, and if the laws under which the other corporation or corporations are formed shall permit such merger.

(b) All the constituent corporations shall enter into an agreement in writing which shall prescribe the terms and conditions of the merger, the mode of carrying the same into effect, the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation resulting from or surviving such merger and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in the agreement such other facts as shall then be required to be set forth in certificates of incorporation by the laws of the state which are stated in the agreement to

be the laws that shall govern the resulting or surviving corporation and that can be stated in the case of a merger. Any such agreement may provide for the payment of cash in lieu of the issuance of fractional shares of the resulting or surviving corporation.

(c) The agreement shall be authorized, adopted, approved, signed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed and, in the case of a Delaware corporation, in the manner provided in section 251 of this title. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the Secretary of State, and a copy thereof, certified by the Secretary of State, shall be recorded as provided in section 251 of this title with respect to the merger of corporations of this State. The agreement, when so filed, shall thenceforth be taken and deemed to be the agreement and act of merger of the constituent corporations for all purposes of the laws of this State, provided, however, the right to specify the effective date of such merger, as provided in section 251 (c), shall apply to mergers consummated under this section.

(d) If the corporation resulting from or surviving such merger is to be governed by the laws of any state other than the laws of this State, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, as well as for enforcement of any obligation of the resulting for surviving corporation arising from the merger, including any suit or other proceeding to enforce the right of any stockholder as determined in appraisal proceedings pursuant to the provisions of section 262 of this title, and shall irrevocably appoin the

Secretary of State as its agent to accept service of process in any such suit or other proceeding and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Service of such process shall be made by personally delivering to and leaving with the Secretary of State duplicate copies of such process. The Secretary of State shall forthwith send by registered mail one of such copies to such resulting or surviving corporation at its address so specified, unless such resulting or surviving corporation shall thereafter have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated.

§ 253. Merger of parent corporation and subsidiary

(a) Any corporation organized or existing under the laws of this State, or under the laws of any other state or jurisdiction subject to the laws of the United States, if the laws of such other state or jurisdiction shall permit such a merger, owning at least 90 per centum of the outstanding shares of each class of the stock of any other corporation or corporations organized or existing under the laws of this State, or under the laws of any other state or jurisdiction subject to the laws of the United States, if the laws of such other state or jurisdiction shall permit such a merger, may file in the office of the Secretary of State a certificate of such ownership and merger in its name and under its corporate seal, signed by its president or a vice-president, and its secretary or treasurer or assistant secretary or assistant treasurer, and setting forth a copy of the resolution of its board of directors either to merge such other corporation or corporations into it and to assume all of its or their obligations, or to merge itself, or itself and one or more of such other corporations, into one of such other corporations, and the date of the adoption thereof; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the

subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash or other consideration to be issued, paid or delivered by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation. If the parent corporation be not the surviving corporation, said resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of the certificates therefor, and said certificate of ownership and merger shall state that the proposed merger has been approved by the holders of a majority of the stock of the parent corporation at a meeting of such stockholders duly called and held after 20 days' notice of the purpose thereof mailed to the last known post office address of each such stockholder. A certified copy of the certificate shall be recorded in the office of **the recorder of deeds of all counties of this State in which the respective corporations so merging shall have their original certificate of incorporation recorded. If the surviving corporation is organized or exists under the laws of any state or jurisdiction, other than the laws of this**

State, the provisions of section 252(d) of this title shall also apply to a merger under this section. The right to specify the effective date of such merger, as provided in section 251(c) of this title, shall apply to mergers consummated under this section.

(b) Upon the effective date of the merger, all of the estate, property, rights, privileges and franchises of the corporation or corporations which did not survive the merger shall vest in and be held and enjoyed by the surviving corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by the corporation or corporations which did not survive the merger, and be managed and controlled by the surviving corporation, and except as hereinafter in this section provided, in its name, but subject to all liabilities and obligations of the corporation or corporations which did not survive the merger and the rights of all creditors thereof. The surviving corporation shall not thereby acquire power to engage in any business or to exercise any right, privilege or franchise, of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which the surviving corporation is organized. The

surviving corporation shall be deemed to have assumed all the liabilities and obligations of the corporation or corporations which did not survive the merger, and shall be liable in the same manner as if it had itself incurred such liabilities and obligations. [Reference to recording date eliminated in line one].

(c) If the surviving corporation is a Delaware corporation, it may relinquish its corporate name and assume in place thereof the name of a corporation which did not survive the merger by the inclusion of a provision to that effect in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the change of name shall be completed, with the same force and effect and subject to the same conditions and consequences as if such change had been accomplished by proceedings under the appropriate section of this chapter. [Reference to filing and recording eliminated. Reference to effective date substituted].

(d) Any plan of merger which requires or contemplates any changes other than those herein specifically authorized with respect to the parent corporation, shall be accomplished under the provisions of sections 251 and 252 of this title. The provi-

sions of section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (e) of this section.

(e) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the surviving corporation shall within 10 days after the effective date of the merger, notify each stockholder of such Delaware corporation that the certificate of ownership and merger has become effective. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If the subsidiary corporation is a corporation the stockholders of which are entitled to a right of appraisal pursuant to the provisions of section 262(k) hereof and if any such stockholder shall, within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation, payment for his stock, such surviving corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the

the value of his stock on the effective date of the merger, exclusive of any element of value arising from the expectation or accomplishment of said merger. If during the period of 30 days provided for herein the surviving corporation and any such objecting stockholder fail to agree as to the value of such stock, any such stockholder or the corporation may file a petition in the Court of Chancery as provided in subsection (c) of section 262 of this title and thereupon the parties shall have the rights and duties and follow the procedure set forth in subsections (d) to (j) inclusive, of said section 262. ["Effective date of merger" substituted for "filing, recording and or effective date provision". Sentence added to make appraisal apply only if provided for under 262].

§ 254. Merger of domestic corporation and jointstock or other association

(a) The term "joint-stock association" as used in this section, shall include any association of the kind commonly known as joint-stock association or joint-stock company and any unincorporated association, trust or enterprise having outstanding shares of stock or other evidences of financial or beneficial interest therein, whether formed by agreement or under statutory authority or otherwise, but does not include a corporation. The term "stockholder", as used in this section, includes every member of such joint-stock association or holder of a share of stock or other evidence of financial or beneficial interest therein.

(b) Any one or more corporations organized under the provisions of this chapter, or existing under the laws of this State, may merge with one or more joint-stock associations, except a joint-stock association formed under the laws of a State which forbids such merger. Such corporation or corporations and such one or more joint-stock associations may merge into a single corporations which may be any one of such corporations, or a new corporation to be formed by means of such merger which new corporation shall be a corporation of this state.

(c) All of such corporations and such joint-stock association or joint-stock associations shall enter into an agreement in writing which shall prescribe the terms and conditions of the merger, the mode of carrying the same into effect, the manner of converting the

shares of each of the corporations and of the stock or shares of each of the joint-stock associations or financial or beneficial interests therein into shares or other securities of the corporation resulting from or surviving such merger and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in the agreement such other facts as shall then be required to be set forth in certificates of incorporation by the laws of this State and that can be stated in the case of such merger.

(d) The agreement shall be authorized, adopted, approved, signed and acknowledged by each of the corporations in the manner provided in section 251 of this title, and in the case of the joint-stock associations in accordance with their articles of association or other instrument containing the provisions by which they are organized or regulated or in accordance with the laws of the State under which they are formed, as the case may be. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the Secretary of State and a copy of the agreement certified by the Secretary of State, shall be recorded as provided in sections 251 and 252 of this title with respect to the merger of corporations of this State. The agreement, as of the effective date thereof, shall thenceforth be taken and deemed to be the act of merger of the corporation or corporations and of the joint-stock association or joint-stock associations, for all purposes of the laws of this State.

(e) The provisions of sections 259-262 and 328 of this title shall, in so far as they are applicable, apply to mergers between corporations and joint-stock associations; the word "corporation", where applicable, as used in those sections being deemed to include joint-stock associations as defined herein. The personal liability, if any, of any stockholder of a joint-stock association existing at the time of such merger shall not thereby be extinguished, shall remain personal to such stockholder and shall not become the liability of any subsequent transferee of any share of stock in such merged corporation or of any other stockholder of such merged corporation.

[Consolidation reference eliminated and "effective date" substituted for recording and filing]

§ 255. Merger of domestic non-stock, non-profit corporations

(a) Any two or more non-stock, non-profit corporations organized under the provisions of this chapter, or existing under the laws of this State, may merge into a single corporation which may be any one of the constituent corporations or a new non-stock non-profit corporation to be formed by means of such merger as shall be specified in the agreement provided for in subsection (b) of this section.

(b) The members of the governing body, however called, or a majority of them, of such corporations as desire to merge, may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation for non-stock, non-profit corporations, as can be stated in the case of a merger, stated in such altered form as the circumstances of the case required, as well as the manner of converting the memberships of each of the constituent corporations into memberships of the corporation resulting from or surviving such merger, with such other details and provisions as are deemed necessary.

(c) The agreement shall be submitted to the members of each constituent corporation who have the right to vote for the election of the members of the governing body of their corporation, at a meeting thereof, called separately for the purpose of taking the same into consideration. Due notice of the time, place and object of the meeting shall be given by publication at least once a week for four successive weeks in one or more newspapers published in the county wherein each such corporation either has its principal office or conducts its business, and a copy of such notice shall be mailed to the last known post office address of each member of each such corporation who has the right to vote for the election of the members of the governing body of his corporation at least 20 days prior to the date of such meeting, and at such meeting the agreement shall be considered and a vote by ballot, in person or by proxy, taken for the adoption or rejection of the same, each member who has the right to vote for the election of the members of the governing body of his corporation being entitled to one vote. If the votes of two-thirds of the total number of members of each such corporation who have the voting power above mentioned shall be for the adoption of the agreement, then that fact shall be certified on the agreement by the officer of such corporation performing the duties ordinarily performed by the

secretary or assistant secretary of a corporation, under the seal of each such corporation. The agreement so adopted and certified shall be signed by the officers of each of such corporations performing the duties ordinarily performed by the president or vice-president and secretary or assistant secretary of a corporation, under the corporate seals thereof and acknowledged by the officer of each such corporation performing the duties ordinarily performed by the president or vice-president of a corporation before any officer authorized by the laws of this State to take acknowledgements of deeds, to be the respective act, deed, and agreement of each of the corporations. The agreement so certified and acknowledged shall be filed in the office of the Secretary of State, and a copy thereof certified by the Secretary of State, shall be recorded in the offices of the recorders of the counties of this State in which the respective corporations so merging shall have their original certificates of incorporation recorded, or if any of the corporations shall have been specially created by public act of the Legislature, then the agreement shall be recorded in the county where such corporation had its principal place of business. The agreement, when so filed, shall henceforth be taken and deemed to be the agreement and act of merger of the corporations. Such record, or a certified copy thereof, shall be evidence

of the agreement and act of merger of the corporations and of the observance and performance of all acts and conditions necessary to have been observed and performed preceding such merger.

(d) If, under the provisions of the certificate of incorporation of any one or more of the constituent corporations, there shall be no members who have the right to vote for the election of the members of the governing body of the corporation other than the members of that body themselves, the agreement duly entered into as provided in subsection (b) of this section shall be submitted to the members of the governing body of such corporation or corporations, at a meeting thereof, called separately for that purpose. Notice of the meeting shall be published and mailed to the members of the governing body in the same manner as is provided in the case of a meeting of the members of a corporation. If at the meeting two-thirds of the total number of members of the governing body shall vote by ballot, in person, for the adpption of the agreement, that fact shall be certified on the agreement in the same manner as is provided in the case of the adoption of the agreement by the vote of the members of a corporation and thereafter the same procedure shall be followed to consummate the merger.

§ 256. Merger of domestic and foreign non-stock, non-profit corporations; service of process upon surviving corporation

(a) Any one or more non-stock, non-profit corporations organized under the provisions of this chapter, or existing under the laws of this State, may merge with one or more other non-stock, non-profit corporations, organized under the laws of any other state or states of the United States, if the laws under which the other corporation or corporations are formed shall permit such merger. The constituent corporations may merge into a single corporation, which may be any one of the constituent corporations, or they may merge to form a new non-stock, non-profit corporation, which may be a corporation of the state of incorporation of any one of the constituent corporations as shall be specified in the agreement provided for in subsection (b) of this section.

(b) All the constituent corporations shall enter into an agreement in writing which shall prescribe the terms and conditions of the merger, the mode of carrying the same into effect, the manner of converting the memberships of each of the constituent corporations into memberships of the corporation resulting from or surviving such merger, and such other details and provisions as shall be deemed necessary or proper. There shall also be set forth in the agreement such other facts as shall then be required to be set forth in certificates of incorporation by the laws of the state which are stated in the agreement to be the laws that shall govern said resulting or surviving corporation and that can be stated in the case of a merger.

(c) The agreement shall be authorized, adopted, approved, signed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed and, in the case of a Delaware corporation, in the manner provided in section 255 of this title. The agreement so authorized, adopted, approved, signed and acknowledged shall be filed in the office of the Secretary of State, and a copy thereof, certified by the Secretary of State, shall be recorded as provided in section 255 of this title with respect to the merger of corporations of this State. The agreement, when so filed, shall be taken and deemed to be the agreement and act of merger of the constituent corporations for all purposes of the laws of this State.

(d) If the corporation resulting or surviving such merger is to be governed by the laws of any state other than the laws of this State, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in an action for the enforcement of payment of any such obligation and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. Service of such process shall be made by personally delivering to and leaving with the Secretary of State duplicate copies of such process. The Secretary of State shall forthwith send by registered mail one of such copies to such resulting or surviving corporation at its address so specified, unless such resulting or surviving corporation shall thereafter

have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated.

H. Carey
7/8/66

COMMENTS ON FOLK' REPORT

PAGES 182-202

Page of Folk

182 - 184 — He proposes that for corporations under jurisdiction of the S.E.C. the two-thirds requirement be dropped to a majority. I see no purpose in this and believe that to have different vote requirements for different types of corporations will only promote confusion.

185 — He recommends that the present provision that all stock shall have the right to vote remain as is, apparently conditions this on the abolition of appraisal rights and the change in the required percentage. I believe it should be left as is regardless of other changes.

186 - — He suggests the adoption of a class vote provision to counter-balance elimination of appraisal rights. I feel that inclusion of a class vote in the merger procedure deprives our corporation law of a needed flexibility, and will result in inhibiting mergers.

Page of Folk

188 - 189	I recommend that the proposed revision be disapproved in its entirety.
189	He suggests that the power of abandonment after stockholder approval be included in the statute. Delaware corporations frequently include such a provision in merger agreements, and it should be legalized.
190	I approve the language at the top of page 190 as subparagraph (d) to § 251.
190	Procedure for execution, etc. should conform with action taken by committee.
191	I suggest adoption of the language at the top of this page as § 251 (e) with the addition of the phrase "of the surviving corporation" after the phrase "certificate of incorporation" in the first line.
192	I heartily agree that § 252 (a) should be amended so as to include foreign corporations.
193	Sections 251, 252, 254, etc. refer to merger consolidation. Should not § 253 be amended to include consolidation?

Page of Folk

194 The proposed addition has merit.

195 The reference to § 251 in line 4 should be § 259. In the interests of clarity, I believe the suggested change from (a) to (b) should be adopted.

195 I don't see the necessity for the change suggested in § 261.

195B I recommend the adoption of the language appearing at the bottom of page 195B and the top of 195C. This will keep us abreast of New York and provided added flexibility to the law. Note that the phrase "the percent" on line 4 of page 195C should be "ten percent".

195D I recommend the change suggested in § 251 b to allow cash to be used in addition to securities as payment for the shares of the non-surviving corporation. This would require the adoption of the language appearing at the top of 195E.

196 I feel that the appraisal remedy should be retained. However, if the committee is of a contrary opinion, I favor alternative 2 on page 197.

Page of Folk

200 Certain changes are suggested in the appraisal procedure. I assume the change suggested in paragraph 1 is existing law and not necessary. The change in 2 (page 201) seems burdensome and not particularly beneficial. I believe the court already has the power defined in 3 (page 202).

§ 257. Merger of domestic stock and non-stock corporations

(a) Any one or more non-stock corporations, whether organized for profit or not organized for profit, organized under the provisions of this chapter, or existing under the laws of this State, may merge with one or more stock corporations, whether organized for profit or not organized for profit, organized under the provisions of this chapter, or existing under the laws of this State, into a single corporation which may be any one of the constituent corporations or a new corporation to be formed by means of such merger as shall be specified in the agreement provided for in subsection (b) of this section. The new corporation or the surviving constituent corporation may be organized for profit or not organized for profit and may be a stock corporation or a membership corporation.

(b) The directors, or a majority of them, of such stock corporations as desire to merge and the members of the governing body, however called, or a majority of them of such non-stock corporations as desire to merge may enter into an agreement signed by them and under the corporate seals of the respective corporations, prescribing the terms and conditions of merger, the mode of carrying the same into effect, and stating such other facts required or permitted by the provisions of this chapter to be set out in certificates of incorporation, as can be stated in the case of a merger, stated in such altered form as the circumstances of the case require, as well as the manner of converting the shares of stock of a stock corporation and the interests of members of a non-stock corporation into shares or other securities of

the corporation resulting from or surviving such merger or of converting the shares of stockholders in a stock corporation and the interests of members of a non-stock corporation into membership interests of the non-stock corporation resulting from or surviving such merger, as the case may be, with such other details and provisions as are deemed necessary. In such merger the interests of members of a constituent non-stock corporation may be treated in various ways so as to convert such interests into interests of value, other than shares of stock, in the proposed new or resulting stock corporation or into shares of stock in the proposed new or resulting stock corporation, voting or non-voting, or into creditor interests or any other interests of value equivalent to their membership interests in their non-stock corporation. The voting rights of members of a constituent non-stock corporation need not be considered an element of value in measuring the reasonable equivalence of the value of the interests received in the new or resulting stock corporation by members of a constituent non-stock corporation, nor need the voting rights of shares of stock in a constituent stock corporation be considered as an element of value in measuring the reasonable equivalence of the value of the interests in the new or resulting non-stock corporations received by stockholders of a constituent stock corporation, and the voting or non-voting shares of a stock corporation may be converted into voting or non-voting regular, life, general, special or other type of membership, however designated, creditor interests or participating interests, in the non-stock corporation resulting from or surviving such merger of a stock

corporation and a non-stock corporation.

(c) The agreement, in the case of each constituent stock corporation, shall be authorized, adopted, approved, signed and acknowledged by each of said constituent corporations in the manner prescribed by section 251 of this title and, in the case of each constituent non-stock corporation, it shall be authorized, adopted, approved, signed and acknowledged by each of said constituent corporations in the manner prescribed by section 255 of this title. The agreement so authorized, adopted, approved, signed and and acknowledged shall be filed in the office of the Secretary of State, and a copy thereof duly certified by the Secretary of State, shall be recorded as provided in section 251 (c) of this title. The agreement, when so filed, shall thenceforth be taken and deemed to be the agreement and act of merger of the constituent corporations for all purposes of the law of this State.

(d) Nothing in this section shall be deemed to authorize the merger of a charitable non-stock corporation into a stock corporation, whereby the charitable status of such non-stock corporation would be lost or impaired; but a stock corporation may be merged into a charitable non-stock corporation which shall continue as the surviving corporation.

§ 258. Merger of domestic and foreign stock and non-stock corporations

(a) In the merger of Delaware and foreign stock and non-stock corporations, any one or more corporations, whether stock or non-stock corporations and whether organized for profit or not organized for profit, organized under the provisions of this chapter, or existing under the laws of this State, may merge with one or more other corporations, whether stock or non-stock corporations and whether organized for profit or not organized for profit, organized under the laws of any other state or states of the United States, if the laws under which the other corporation or corporations are formed shall permit such merger. The constituent corporations may merge into a single corporation, which may be any one of the constituent corporations, or they may merge to form a new corporation, which may be a corporation of the state of incorporation of any one of the constituent corporations, and the new or surviving corporation may be either a stock corporation or a membership corporation as shall be specified in the agreement provided for in subsection (b) of this section.

(b) The method and procedure to be followed by the constituent corporations so merging shall be as prescribed in section 257 of this title in the case of Delaware corporations. The agreement of merger shall also set forth such other facts as shall then be required to be set forth in certificates of incorporation by the laws of the state which are stated in the agreement to be the laws which shall govern the resulting or surviving corporation and that can be stated in the case of a merger and the agreement, in the case

of foreign corporations, shall be authorized, adopted, approved, signed and acknowledged by each of the constituent foreign corporations in accordance with the laws under which each is formed.

(c) The requirements of section 252 (d) of this title as to the appointment of the Secretary of State to receive process and the manner of serving the same in the event the new or surviving corporation is to be governed by the laws of any other state shall also apply to mergers effected under the provisions of this section.

(d) The provisions of section 257 (d) shall apply to all mergers effected under this section.

"Crompton"
350 Del. Smart

§ 259 Status, rights, liabilities, etc. of constituent and surviving corporations following merger

(a) When an agreement of merger shall have been signed, acknowledged and filed, in accordance with the requirements of this sub-chapter, or upon the effective date of the merger if otherwise stated in the certificate, for all purposes of the laws of this State the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agreement, possessing all rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging

to each of such corporations shall be vested in the corporation resulting from or surviving such merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituents corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constitutent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver,

trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger: provided, however, that any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the resulting corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

§ 260 Powers of corporation resulting from or surviving merger; issuance of stock, bonds or other indebtedness

When two or more corporations are merged, the corporation resulting from or surviving such merger may issue bonds or other obligations, negotiable or otherwise, and with or without coupons or interest certificates thereto attached, to an amount sufficient with its capital stock to provide for all the payments it will be required to make, or obligations it will be required to assume, in order to effect such merger. For the purpose of securing the payment of any such bonds and obligations, it shall be lawful for the resulting or surviving corporation to mortgage its corporate franchise, rights, privileges and property, real, personal or mixed. The resulting or surviving corporation may issue certificates of its capital stock and other securities to the stockholders of such constituent corporations, in exchange or payment for the original shares, in such amount as shall be necessary in accordance with the terms of agreement of merger in order to effect such merger in the manner and on the terms specified in such agreement.

(Consolidation eliminated; language slightly revised in line 7)

§ 261. Effect of merger upon pending actions

Any action or proceeding, whether civil or criminal, pending by or against any of the corporations merged shall be prosecuted as if such merger had not taken place, or the corporation resulting from or surviving such merger shall be substituted in its place.

["whether civil or criminal" added]

§ 262. Payment for stock or membership of person objecting to merger.

(a) No change.

(b) The corporation resulting from or surviving any merger shall within 10 days after the effective date of the agreement, notify each stockholder in any corporation of this State so merging, who objected thereto in writing and whose shares were not voted in favor of such merger, and who filed such written objection with the corporation before the taking of the vote on such merger, that the agreement has been filed. The notice shall be sent by registered mail, return receipt requested, addressed to the stockholder at his last known address as it appears on the books of the corporation. If any such stockholder shall within 20 days after the date of mailing of the notice demand in writing, from the corporation resulting from or surviving such merger, payment for his stock, such resulting or surviving corporation shall, within 30 days after the expiration of the period of 20 days, pay to him the value of his stock on the effective date of the merger, exclusive of any element of value arising from the expectation or accomplishment of such merger.

(c) If during the period of 30 days provided for in subsection (b) of this section, the corporation and any such objecting stockholder fail to agree as to the value of such stock, any such stockholder, or the corporation resulting from or surviving such merger, may by petition filed in the Court of Chancery within four months after the expiration of the period of 30 days demand a determination of the value of the stock of all such objecting stockholders by an appraiser to be appointed by the Court.

(d) No change.

(e) No change.

(f) No change.

(g) No change.

(h) No change.

(i) Any stockholder who has demanded payment of his stock as herein provided shall not thereafter be entitled to vote such stock for any purpose or be entitled to the payment of dividends or other distribution on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the date of the recording of the agreement) unless the appointment of an appraiser shall not be applied for within the time herein provided, or the proceeding be dismissed as to such stockholder, or unless such

stockholder shall with the written approval of the corporation deliver to the corporation a written withdrawal of his objections to and an acceptance of such merger, in any of which cases the right of such stockholder to payment of his stock shall cease.

(j) The shares of the surviving or resulting corporation into which the shares of such dissenting stockholders would have been converted had they assented to the merger shall have the status of authorized and unissued shares of the surviving or resulting corporation.

(k) The provisions of this section shall not apply to any class of stock which, at the record date established for the meeting of stockholders provided for in § 251(c) hereof, was either (1) registered on a national securities exchange, or, (2) held by a minimum of 2,000 shareholders, unless the certificate of incorporation of the corporation issuing such stock shall otherwise provide. [Reference to consolidation removed; effective date provision revised (b); new paragraph added (k)]

M E M O

TO: MEMBERS OF THE CORPORATION LAW REVISION COMMITTEE

FROM: S. SAMUEL ARSHT

RE: FOLK REPORT, Pages 211 - 222. DISSOLUTION - INSOLVENCY - RENEWAL, ETC., OF CHARTER. SECTIONS 274 - 314 OF CORPORATION LAW.

Professor Folk does not recommend that Delaware undertake a thorough revision of its dissolution procedures, but he suggests what he calls "improving procedure within the existing framework, thereby preserving relevant case-law". These suggestions are hereinafter considered.

1. Dissolution Before Beginning Business and Payment of Capital.

Section 274 of the Corporation Law authorizes a majority of the incorporators to surrender all their corporate rights and franchises before the payment of any part of the capital and before beginning business by filing a certificate with the Secretary of State, and the corporation is then dissolved.

Section 274 applies only if no capital has been paid in. Professor Folk mentions that a number of states and the Model Act [§ 73(A)(c)] permit the incorporators (or directors) to dissolve even if some capital has been paid in, provided that any payments are refunded. The Model Act provides that in such a case the certificate of dissolution must recite that;

> the amount, if any, actually paid in on subscriptions for its shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto.

here, a corporation which has collected some money on subscriptions, but has not commenced doing business (or issued shares to subscribers), may dissolve by act of the incorporators or directors alone. This may be a useful addition to Section 274. I see no objection to it.

If this change is approved, then Section 274 might be revised as follows:

§ 274. Dissolution before beginning business.

Before beginning the business or activity for which the corporation was organized, a majority of the incorporators named in its certificate of incorporation, or, if directors have been elected, a majority of the directors may surrender all of their and the corporation's rights and franchises by filing in the office of the Secretary of State a certificate, verified by the oath or affirmation of a majority of the incorporators or directors, that the business or activity for which the corporation was organized has not been begun; that no part of the capital of the corporation has been paid or, if any capital has been paid, that the amount actually paid in on subscriptions for the corporation's shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto; and that all rights and franchises of the corporation are surrendered. Upon filing of such certificate the corporation shall be dissolved. A certified copy of the certificate shall be recorded in the county where the original certificate of incorporation was recorded.

See discussion of § 276, infra, for comment on another change in § 274.

2. Dissolution by Vote of Directors and Shareholders.

Section 275 is the general dissolution section. Professor Folk says it requires no changes, but he mentions the following points for the Committee's consideration.

(a) Mandatory election judges - Section 275(b) and (c) require the appointment of two judges to conduct and certify the stockholders' vote on dissolution. Election judges are required in only two other instances - amendment of charter (§ 242) and election of directors (§). I see no persuasive reason for requiring judges for a vote on dissolution and would have the vote on dissolution conducted and certified in the same manner as a vote on merger (§ 251 .

(b) Publication of certificate of dissolution - Section 275(c) requires the Secretary of State to publish his certificate once. This serves only a theoretical function of notice to creditors and stockholders of an already accomplished dissolution. I see no persuasive reason for continuing the publication requirement.

(c) Execution, acknowledgment, filing, recordation requirements in subsection (c) should be eliminated and a cross reference substituted if the Committee approves having a general provision dealing with these procedural matters.

(d) Required minimum vote - Section 275(c) requires for dissolution a two-thirds vote of the stock having voting power. Professor Folk suggests the Committee may wish to consider specific recognition of a class vote if the charter requires it on dissolution, as do some other states and § 77 of the Model Act. However, this is unnecessary

(b)(4)
or § 102[4] of the Delaware Corporation Law permits inclusion in the charter of a requirement for a class vote on any matter and such charter provision would increase the minimum requirement of § 275, without the necessity for specific recognition in § 275.

I suggest that the Committee consider reducing the minimum vote required for dissolution from two-thirds to a majority of the voting stock. My reason is that if a majority of the voting stock wants to discontinue business and dissolve it should be permitted to do so. It seems unwise to make a majority continue a business which it wants to discontinue. A sale of all assets, which usually accompanies dissolution, requires only a majority vote of voting stockholders, and it would seem that the same vote should be required for each.

3. Dissolution of Non-Profit, Non-Stock Corporations.

Section 276 purports to prescribe the procedure for dissolving a non-stock corporation. However, it seems that § 274 was amended in 1959 to have it apply to the dissolution of a non-stock corporation before beginning business by the addition after "directors" of the words, "the board of managers, or other governing body, however named", and the addition in two other places of the qualifying phrase, "if the corporation is authorized to issue stock". I think that the words, "board of managers or other governing body, however named", should be deleted from § 274 as they are clutter. If it is thought necessary to insert those words after "directors" in § 274, then, perhaps, they should be added in every section where "directors" appears. I recommend that § 276 be the only section under which dissolution of a non-stock, non-profit corporation may be effected, whether dissolution occurs before or after business or activity has begun.

The Model Non-Profit Corporation Act (§45) includes a sentence which makes clear that the directors alone vote on dissolution if there are no members or member entitled to vote on dissolution. I have added that sentence, which Professor Folk approves, to the following suggested revision of § 276. (New matters underlined.)

§ 276. Dissolution of non-profit, non-stock corporation; procedure.

Whenever it shall be desired to dissolve any corporation not for profit and having no capital stock, organized under this chapter, the board of directors, board of managers or other governing body, however named, having in charge the administration of the business or affairs of the corporation, shall exercise, assume and fulfill all of the functions, rights, privileges and duties, looking toward, involved in or concerned with the dissolution of the corporation, which are by section 275 of this title imposed or conferred upon the board of directors of a corporation having capital stock in and upon its dissolution. If the members of the corporation not for profit and having no capital stock are entitled by its certificate of incorporation, its by-laws, or by its conditions of membership or otherwise, to vote for the election of members of its board of directors or managers or other controlling or managing body, or upon any of the affairs or conduct of the corporation, they shall exercise, assume and fulfill all of the functions, rights, privileges, and duties looking toward, involved in or concerned with the dissolution of the corporation, which are by section 275 of this title imposed or conferred upon the stockholders of a corporation having capital stock, in and upon its dissolution.

if there are no members, or no member, entitled to vote thereon, the dissolution of the corporation shall be authorized at a meeting of its board of directors, board of managers, or other governing body upon the adoption of a resolution to dissolve by the vote of a majority of the directors or managers then in office. In all other respect , it., as in present section.

4. Payment of Franchise Taxes Before Dissolution.

§ 277 forbids dissolution until all franchise taxes due or collectible have been paid. No change is recommended.

5. Continuation of Corporation After Dissolution.

§ 278 continues the existence of corporations for three years after dissolution for purposes of suits and winding up its affairs

Folk points out that many newer statutes eliminate any express requirement that winding up be completed in three years and substitute the requirement of "proceeding expeditiously to complete liquidation". Folk feels the present Delaware provision of three years is, perhaps, preferable. I agree. He suggests that it may be desirable to take care of the occasional situation where more than three years are required for liquidation by adding the following underlined words in present § 278:

All corporations . . . shall nevertheless be continued, for the term of three years, or for such longer period as the Court of Chancery in its discretion shall, from time to time, direct, from such expiration or dissolution, bodies corporate, . . .

I think this is a desirable change which gives reasonable flexibility to § 278.

Folk mentions that the Committee may want to consider in connection with dissolution the treatment of assets owing to a creditor or distributable to a stockholder who cannot be found. This is a troublesome question, and I agree with Folk that our Committee should think about it. The Model Act (§ 97) provides for escheat of undistributed funds to the state. The North Carolina Statute provides for payment of such funds to the State University. I believe that, in Delaware, such funds would escheat to the State if dissolution receivers or trustees were appointed by the Court of Chancery.

6. Trustees or Receivers for Corporation in Dissolution.

Sections 279 - 282, inclusive, of the Corporation Law deal with dissolution proceedings in Chancery. Professor Folk believes they are adequate and suggests no changes. I agree.

7. Revocation or Forfeiture of Charter - Section 283.

Professor Folk suggests that, at the very least, a cross-reference should be made in § 283 to other grounds of judicial dissolution, including § 136(c) (non-appointment of new resident agent) and § 323 (disobedience to writ of mandamus). In both § 136(c) and § 323 the charter forfeiture would be decreed by the Superior Court in quo warranto proceedings. This can be done by changing the first sentence of § 283(b) as follows: (substitute underlined words for those in brackets)

(b) The Court of Chancery shall have power, by appointment of receivers or otherwise, to administer and wind up the affairs of any corporation, whose charter shall be revoked or forfeited by any court under any section of this title or otherwise, [under the provisions of this section,] and to make such order and decree . . .

Professor Folk also suggests that § 283 might be more specific by stating the types or kinds of "abuse" which may result in forfeiture of charter. These, from the New York statute, are set forth on page 218 of the Folk report. I make no recommendation regarding this suggestion.

SUBCHAPTER XI - Insolvency, Receivers and Trustees.

Folk Report, p. 219 - Sections 291 through 300 of Delaware Corporation Law.

Professor Folk considers Sections 291 through 300 adequate, but he makes the following two suggestions:

1. Section 293 provides that notices to stockholders and creditors in a receivership "shall be given by the register in chancery unless otherwise ordered by the Court of Chancery". Professor Folk suggests that the rule be revised to provide that the trustee or receiver shall give all notices to stockholders and creditors unless the Court orders the register in chancery or someone else to do the job. I agree with Folk's suggestion.

2. The Model Act and a number of states specifically authorize the court to discontinue liquidation proceedings when there is no longer cause therefor. I agree that the following provision, based on the Model Act and somewhat revised by Folk, would be a desirable new section:

> The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation

no longer exists. In such event the Court of Chancery in its discretion, and subject to such conditions as it may deem appropriate, may dismiss the proceedings and direct the receiver or trustee to redeliver to the corporation all of its remaining property and assets.

Sections 295 and 296 have been superseded by Chancery Court rules.

SUBCHAPTER XII - Renewal, Revival, Extension and Restoration of Charter - Sections 311 through 314.

Section 311. - Revocation of voluntary dissolution. No change suggested.

Section 312. Renewing, reviving, etc., charter. Professor Folk suggests the first part of subsection (a) be changed from:

> Any corporation existing under the laws of this State may, at any time before the expiration of the time limited for its existence . . . and any corporation existing under the laws of this State whose charter has expired by reason of failure to renew the same . . .

to:

> Any domestic corporation whose period of duration is other than perpetual and which has not amended its certificate of incorporation to make its duration perpetual may, at any time before or after the expiration of its period of duration . . .

This makes clear that a corporation with a limited term may, and probably will, amend its certificate, so that § 312 will apply only in the unusual

instance where, either deliberately or by oversight, it has not made the amendment. The following numbered clause should be added to § 242(a) to expressly authorize a corporation to amend its certificate:

(6) Changing the period of duration.

Professor Folk says that subsection (e) of § 312 "appears to go rather far in retroactively validating all acts, contracts, etc., during the period when the corporation's charter was inoperative". He points out that the "literal language suggests that any individual liabilities, accrued during the period, are lost and corporate liabilities are automatically substituted". We feels this may be unfair and suggests the insertion in subsection (e) of the following provision, now in the Virginia law:

> Such reinstatement shall have no effect on any question of personal liability of the directors, officers, or agents in respect of the period when the charter had lapsed.

A question Professor Folk's permits that "individual" liabilities accrued during the period of lapse or, if they did, that it would be unfair to substitute retroactively a corporate liability. Presumably, persons doing business with a "lapsed" corporation were doing so on the basis of a corporate liability and not on the basis of any individual liability of its officers, agents or stockholders. If Professor Folk's suggestion should be approved by the Committee, then the word, "exclusive", in the fourth line from the end of subsection (e) should be deleted.

Subsection (h) of § 312 requires a minimum of three directors after election, if necessary, of officers to file the reinstatement certificate. Professor Folk says this is too rigid and inconsistent, in any

ovant, with § 141(b) which permits a corporation to have fewer than three directors if it has fewer than three stockholders. I agree with Professor Folk's observation and suggest that subsection (h) of § 312 be revised as follows:

> (h) If only one or none of the last acting officers of any corporation desiring to renew or revise its charter is available by reason of death, unknown address or refusal or neglect to act at the time of its renewal, the directors of the corporation, or those remaining on the board, although less than a quorum, may elect a successor to the officer or officers who are dead, or whose addresses are unknown, or who refuse or neglect to act. If there shall be no director of the corporation available for the purposes aforesaid, by reason of death, unknown address, or refusal or neglect to act, the stockholders of the corporation may elect as many directors as may be necessary, or they may elect a full board of directors, as provided by the by-laws of the corporation, and the board may elect successors to the officers who are deceased, or whose addresses are unknown, or who refuse or neglect to act. (Remainder of subsection is unchanged.)

February 8, 1966

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Henry M. Canby, Esquire ✓
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Clair John Killoran, Esquire
Irving Morris, Esquire
Mrs. Margaret S. Storey

The attached comments covering pages 21-22 and 26-29 of the Folk report represent our views concerning the suggested revision of Sections 106, 107 and 108.

David H. Jackman

Alfred Jervis

Attachment

Pages 21 and 22 of the Folk Report

In his Report Professor Folk makes three proposals in reference to Section 106 and sets forth a revision of the Section.

(1) Whether or not recording is required, corporate existence should begin when a certificate of incorporation or any other certificate is filed with the Secretary of State. Recordation, if required, should be a condition subsequent not affecting corporate existence.

(2) The fact of filing should be conclusive, not merely presumptive, evidence of the due performance of all conditions with an exception in the case of Section 283 proceedings by the Attorney General. Professor Folk points out that making corporate existence conclusively date from filing virtually eliminates all possibility of defective incorporation requiring resort to the de facto doctrine.

(3) Existing Section 106 refers to "paying the license tax therefor to the Secretary of State". The revised section omits this language.

Recommendation. We strongly recommend approval by the Committee of Professor Folk's revision of Section 106 which will make these proposals effective. Consideration could be given to shortening paragraph (a) to read as follows:

> "(a) The existence of the corporation shall begin as of the date endorsed by the Secretary of State upon the original filed copy of the certificate as provided by Section ____ (Filing of Instruments)".
>
> (The reference to the Section identified as "Filing of Instruments" is appropriate only if there is approval of such a section. See page 6 of the Report. Possibly, also, in paragraph (b) the words "incorporator or" should be inserted before "incorporators".)

Comment.

(1) Recording. The practice of requiring recording is an antiquated one which serves no useful purpose. It is best omitted. However, there are likely practical reasons why it is not feasible to do so. The desirable alternative is to make recording a condition subsequent so that corporate existence commences upon filing with the Secretary of State. The present

requirement has resulted in difficulties when a Delaware corporation qualifies in other states, especially if filing with the Secretary of State is on one date, recording on a later date as sometimes happens. The recording date in an application does not coincide with the filing date in the certified copy so that delays in completing qualification may occur:

> (Note: It is important that all other filings, such as amendments, be made effective upon filing of the document with the Secretary of State, recording, if required, to be a condition subsequent. This applies also to mergers and consolidations. While in most of the applicable Sections a deferred effective date may be provided for it is still desirable that recording be made a condition subsequent. In the provision with reference to the deferred effective date there is reference to "date of recording". This should be changed to "date of filing in the office of the Secretary of State".)

(2) License tax. There is no reference anywhere in the law to payment at the time of incorporation of a tax called a "license tax". There is a tax based on authorized capital stock and various fees which must be paid when the certificate is presented for filing. If the certificate is filed, it follows these have been paid. (Also note Professor Folk's proposal that one section provide uniform filing procedure. See page 6, paragraph (a) (2) of proposed new section.)

* * * * * * * * * * * * *

Pages 26, 27, 28 and 29 of the Folk Report

Professor Folk's Report (pages 26 and 27) mentions that there is a marked trend in corporation law revisions to name the members of the initial board of directors in the certificate of incorporation. After discussing the advantages of this procedure, he concludes:

> "In any state other than Delaware, this Report would unqualifiedly recommend the newer procedure by which the "management" role of incorporators is eliminated, directors are designated by the articles, and a single organizational meeting is held. In most cases principals do not hesitate to reveal themselves when the incorporation papers are filed. But in some situations, anonymity is a substantive interest to be protected, and the present procedure in Delaware well serves that interest. Moreover, incorporators may be completely "controlled" in a manner raising serious doubts in case of directors. Again, corporation service companies might be reluctant affirmatively to assume the role of "directors," even temporarily.
>
> "Accordingly, it is suggested that, despite the strong contrary trend in the United States,

> the present Delaware procedure employing incorporators be retained. It is significant that New York also has the same provision. N. Y. Bus. Corp. Law Section 404."

However, he proposes clarifying revisions of Sections 107 and 108.

Recommendation. We strongly and emphatically support and urge the Committee to approve Professor Folk's conclusion that the present Delaware procedure be retained. It is in the interests of service companies and lawyers using Delaware to do so.

The proposed revision of Section 107 is satisfactory and should be adopted. The proposed revision of Section 108 is also satisfactory except that (1) in paragraph (a) "to adopt by-laws" should be omitted, (2) in paragraph (a) the word "shareholders" should be changed to "stockholders" to conform with the language of the present law and in the fifth line "incorporation" should be changed to "corporation", and (3) paragraph (d) should be added to read as follows:

> "(d) When there are two or more incorporators, if any dies or is for any reason unable to act, the other or others may act. If there is no incorporator able to act, any person for whom an incorporator was acting as agent may act in his stead, or if such person also dies or is for any reason unable to act, his legal representative may act."

Comment.

(1) Organization procedure. Often parties in interest for a variety of compelling reasons do not wish to be identified with a newly formed corporation. Naming of directors in the certificate of incorporation would require designating dummy directors. If temporary, accommodation directors are named the substitution of permanent directors is bothersome. Either stock subscriptions must be accepted to enable successors to be elected by stockholders or an awkward resignation of each director and election of his successor, one by one, is necessary.

Service companies and out-of-state lawyers find present long established and familiar procedures to be preferable. By-laws are generally adopted at the incorporators' meeting at which directors are elected, so that rules governing internal affairs are promptly in effect.

Moreover, there are definite advantages in placing management of a corporation in the hands of the incorporators until directors are elected. Amendments of the certificate of incorporation or surrender of corporation franchise (dissolution) before payment of capital are simplified and accomplished without delay, frequently by a mere telephone call to the service company.

(2) Section 108. The situation regarding adoption of the original by-laws should be left as it is in the present law -- that is, the by-laws may be adopted by the incorporators as provided in Section 109. Section 108 should not require that by-laws be adopted by the incorporators. Many lawyers direct that the by-laws be adopted by the directors at their first meeting and usually the minutes of the incorporators' meeting contain a brief statement that the directors will adopt by-laws. A requirement that the incorporators adopt by-laws would be found objectionable in a substantial number of cases.

The situation covered by paragraph (d) seldom occurs but, when it does, it is troublesome and it is easily dealt with if this provision is in the law. In his footnote (page 29) suggesting this procedure as a possibility, Professor Folk mentions analogous provisions covering dissolution of a domestic corporation or loss of Delaware authority of a foreign corporation acting as an incorporator. These are extremely remote contingencies but an appropriate provision could be worked out if desired to round out this provision.

* * * * * * * * * * * *

While dealing with the subject to recording, we wish to mention a change which is desirable, although it was not brought up by Professor Folk in his Report. Whether or not recording is made a condition subsequent, inconsistencies in various Sections as to the place of recording should be corrected. Recording may be required where the original certificate of incorporation was recorded (e.g. Sections 243 (c) and 244(a)); where the principal place of business is located (Section 245(c)); and where the principal office was maintained (Section 275(e)). Thus a corporation which has changed its principal office from one county to another may find that it is required to record in the county where the original certificate of incorporation was recorded long after its principal office is no longer located there.

A suggestion would be that recording be required in the county where the principal office of the corporation is located.

WILLIAM H. ECKERT
FRANK L. SEAMANS
CARL CHERIN
MILTON W. LAMPROPLOS
CLOYD R. MELLOTT
W. GREGG KERR, JR.
RODERICK G. NORRIS
JOHN H. MORGAN
CARL F. BARGER
EDWARD J. GREENE
DONALD C. WINSON
ROBERT C. McCARTNEY
WILLIAM B. MALLIN
WILLIAM H. PENTZ
BARTON Z. COWAN
WILLIAM B. REES
EDWIN L. KLETT
THOMAS D. WRIGHT
C. ARTHUR WILSON, JR.
C. KENT MAY

ECKERT, SEAMANS & CHERIN
ATTORNEYS AT LAW
10 TH FLOOR, PORTER BUILDING
SIXTH AVENUE AND GRANT STREET
PITTSBURGH, PA. 15219
261-6000

WILLIAM WATSON SMITH
COUNSEL
(DECEASED 1964)

February 1, 1966

Linwood E. Gray, Esq.
The Corporation Trust Company
120 Broadway
New York, New York 10005

Dear Mr. Gray:

Act 519 of the 1965 session of the Pennsylvania General Assembly, which was signed by the Governor on January 18, 1966, amends Section 302 of the Pennsylvania Business Corporation Law by adding a new clause (18) conferring on every Pennsylvania business corporation the power:

"To be a promoter, partner, member, associate or manager of any partnership, enterprise or venture."

A similar provision is included in the New York Business Corporation Law which became effective September 1, 1963 (Section 202 (a)(15)). Several other states have adopted corporation laws containing similar provisions, or have amended their corporation laws to do so, as you will see on page 4 of the enclosed Memorandum which was submitted to members of the Pennsylvania legislature in connection with the new Pennsylvania amendment.

Having worked with you and your associates on many occasions in connection with the formation and operation of Delaware corporations, I knew that you would have a particular interest in seeing that the Delaware law is also kept up-to-date in this respect. The assurance of corporate power to become a member of a partnership is an important factor in the formation of partnerships for Urban Redevelopment and other real estate purposes, in order to qualify the members for Federal tax benefits as depreciation, etc. The encouragement of such enterprises was one important point which the Pennsylvania Legislature had in mind in adopting the new Pennsylvania amendment.

I would think that the simplest way to include such a provision in the Delaware law, would be to amend Section 122 of the Delaware General Corporation Law to add a new clause (11) as follows:

"Be a promoter, partner, member, associate or manager of any partnership, enterprise or venture."

This would follow the format of the Pennsylvania and New York statutes, which are the most recent enactments on the subject.

I would appreciate anything which you could do to further the objective of having such an amendment adopted in Delaware. Such an amendment is desirable in every respect, and would be particularly advantageous to have in Delaware where so many of our clients are now chartered.

Very truly yours,

Roderick G. Morris

RGN:csc

Enclosure

MEMORANDUM

Re: Capacity of a Corporation to be a Partner under Pennsylvania and Delaware Law

The New York Business Corporation Law which became effective on September 1, 1963, provides, in Section 202(a)(15), that corporations shall have the power in furtherance of their corporate purposes: "To be a promoter, partner, member, associate or manager of other business enterprises or ventures . . .". This new Business Corporation Law was drafted by the Joint Legislative Committee to Study Revision of Corporation Laws. This Committee has published the following Comment on Section 202(a)(15), insofar as it relates to the power of corporations to become partners:

> "This subparagraph has no counterpart in existing New York statutes. It changes existing New York case law (Frieda Popkov Corp. v. Stack, 198 Misc. 286, 103 N.Y.S.2d 507 (Sup. Ct. N.Y. Co. 1950) by empowering a corporation to be a partner, general, limited or otherwise, to the extent permitted by applicable partnership law: see §§ 2, 10 and 90 of the Partnership Law."

Section 4(g) of the Model Business Corporation Act, drafted by the Committee on Corporate Laws of the Section on Corporation, Banking and Business Law of the American Bar Association, would grant the following powers to corporations:

> "(g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and

otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof".

The drafting committee of the American Bar Association and a committee of the American Bar Foundation have jointly published the following comment on this provision, insofar as it relates to the power of corporations to become partners:

"The power with respect to 'interests . . . in partnerships' would enable a corporation to be a partner to the extent permitted in applicable partnership laws.

"Although the Uniform Partnership Act includes corporations within the persons entitled to carry on as co-owners a business for profit, the general rule has been that they have no such power, absent provisions therefor in the corporation statute or articles of incorporation. The two primary reasons given by the courts for restricting a corporation's ability to become a partner are: first, that the partnership agreement would deprive the directors of the management powers placed in them by the statute, and second, that it would subject the interests of the shareholders to unanticipated risks. There has been general adherence to this rule, but the courts have been increasingly more willing to find that the arrangement was merely a joint venture, not subject to such objections. Also the first objection can be minimized by giving the corporation a veto over partnership actions; the latter by getting unanimous shareholder approval. Frequently in a joint venture the operation is carried on by the corporate member so that there is no delegation of authority by the corporate member. Furthermore, even in a partnership, any problem of delegation is obviated if the agreement requires authorization from a sufficiently large percentage of the partners to assure

that no substantial action will be taken without the consent of all the corporate members.

"In many jurisdictions the power to participate in a partnership is now recognized by statute and it frequently appears in the articles, even in the absence of statute.

"Similarly, the early rule was that a corporation could not acquire shares in other corporations except to the extent permitted by statute. As indicated above, the power is now generally granted by statute, sometimes with specific restrictions."

(see 1 Model Business Corporation Act Annotated, § 4(g), Paragraph 4 (West Publishing Co. 1960)).

While the Pennsylvania Business Corporation Law (§ 302(6)) and the Delaware General Corporation Law (§ 123) have provisions corresponding to Section 4(g) of the Model Act, these provisions do not contain the power to be a partner which would be granted by Section 4(g) of the Model Act. In Pennsylvania, there is a 67-year old Supreme Court dictum in Boyd v. The American Carbon Black Company, 182 Pa. 206 (1897) to the effect that it is ultra vires for a corporation to be a partner. There appears to be no court decision holding directly on this point in either Pennsylvania or Delaware.

In addition to New York, the following other States have also adopted corporation laws empowering corporations to become partners:

Alaska	-	Alaska Stats. § 10.05.009(18)
Colorado	-	Colo. Rev. Stats. § 31-28-1(r)
District of Columbia	-	D.C. Code, Title 29, Ch. 9, § 4(g)
Iowa	-	Iowa Code § 496A.4(18)
Maryland	-	Md. Code, Art. 23, § 9(a)(7)
Nebraska	-	Neb. Business Corporation Act, § 4(18)
Nevada	-	Nev. Rev. Stats. § 78.070(8)
North Carolina	-	N.C. Gen. Stats. § 55-17(b)(5)
Utah	-	Utah Code § 16-10-4(g)
Virginia	-	Va. Code § 13.1-3(g)
Wisconsin	-	Wis. Stats. § 180.04(6)
Wyoming	-	Wyo. Business Corporation Act, § 4(s)

In view of the fact that further revisions of the corporation laws of Pennsylvania and of Delaware are now under active consideration in each State, it would appear that those interested in this matter should bring their views to the attention of the appropriate bodies responsible for drafting such revisions, in order that Pennsylvania and Delaware can catch up with the modern trend of corporation legislation in this area.

The provisions which have been enacted or proposed seem to fall into two categories -- those employing the language of the New York Business Corporation Law and those employing the language of

the Model Business Corporation Act. Employing the language of the Model Business Corporation Act would involve amending the existing provisions of the Pennsylvania and Delaware corporation laws which correspond to Section 4(g) of the Model Act. Employing the language of the New York statute (or similar language employed in like statutes) would involve the addition of a new clause to the existing provisions of the Pennsylvania and Delaware corporation laws describing the powers of corporations.

NJ 807 5 7-65-25M

THE CORPORATION TRUST COMPANY
277 PARK AVENUE
NEW YORK, N. Y. 10017

February 3, 1966

Roderick G. Norris, Esq.
Eckert, Seamans & Cherin
10th Floor, Porter Building
Sixth Avenue and Grant Street
Pittsburgh, Pa. 15219

Dear Mr. Norris:

With reference to your letter of February 1, 1966 you will be interested to know that over a year ago the Governor of Delaware obtained a special appropriation for the purpose of retaining an attorney to make a complete review of the Delaware Corporation Law and to make recommendations to a special committee appointed by the Governor as to any amendments or revisions which he felt would improve the law. This review was completed last year, and the recommendations have been submitted to the Committee. Among those recommendations was one to authorize a Delaware corporation to enter into a partnership or joint venture, and he favored the language contained in the Conn.Gen.Stat. Sec. 33-291 (3)(4); N.C.Gen.Stat. Sec. 55-17(b)(6), and S.C.Code Sec. 12-12.2(a)(16). We understand that the Committee is presently engaged in consideration of the various recommendations made to them for the purpose of preparing a Bill to be presented to the State Legislature this year.

We are sending your letter with attachment to Mr. Alfred Jervis, Manager of our Wilmington Office in order that he may inform the Committee of your interest in this subject.

Very truly yours,

THE CORPORATION TRUST COMPANY

L. E. Gray
Assistant Vice President

LEG:KG
cc: Mr. Alfred Jervis
Wilmington Office

Form approved on 10/26

Section X-8. Involuntary Termination of Close Corporation Status

(a) If any event occurs as a result of which one or more of the conditions included in ~~its~~ a certificate of incorporation pursuant to Section X-2 (Definition of "Close Corporation") has been violated, the corporation's status as a close corporation under this chapter shall terminate unless

(1) within thirty days ~~of~~ after the occurrence of the event, or within thirty days after the event has been discovered, whichever is later, the corporation files with the Secretary of State a certificate setting forth the fact that one of the conditions included in its certificate of incorporation pursuant to Section X-2 has ~~ceased to~~ been violated ~~be applicable~~, and furnishes a copy of ~~each~~ such certificate to each stockholder, and

(2) the corporation concurrently with the filing of such certificate takes such steps as are necessary to correct the situation which threatens its status as a close corporation, including, without limitation, refusal to register transfer of shares which have been wrongfully transferred as provided by Section X-7 (Transferees of Shares of Close Corporations; Notice to Transferees), or a proceeding under

subsection (b) of this section.

(b) The Court of Chancery upon the suit of the corporation or any stockholder shall have jurisdiction to issue all orders necessary to prevent the corporation from losing its status as a close corporation or to restore its status as a close corporation by enjoining or setting aside any act or threatened act on the part of the corporation or a shareholder which would be inconsistent with any of the conditions required by Section X-2 (Definition of "Close Corporation") unless it is an act approved in accordance with Section X-6 (Voluntary Termination of Close Corporation Status). The Court of Chancery may enjoin or set aside any transfer or threatened transfer of securities contrary to the terms of the certificate of incorporation or of any transfer restriction permitted by Section X-9, and may enjoin any public offering or threatened public offering of securities of the corporation.

WILLIAM H. ECKERT
FRANK L. SEAMANS
CARL CHERIN
MILTON W. LAMPROPLOS
CLOYD R. MELLOTT
W. GREGG KERR, JR.
RODERICK G. NORRIS
JOHN H. MORGAN
CARL F. BARGER
EDWARD J. GREENE
DONALD C. WINSON
ROBERT C. McCARTNEY
WILLIAM B. MALLIN
WILLIAM H. PENTZ
BARTON Z. COWAN
WILLIAM B. REES
EDWIN L. KLETT
THOMAS D. WRIGHT
C. ARTHUR WILSON, JR.
C. KENT MAY

ECKERT, SEAMANS & CHERIN
ATTORNEYS AT LAW
10 TH FLOOR, PORTER BUILDING
SIXTH AVENUE AND GRANT STREET
PITTSBURGH, PA. 15219
261-6000

WILLIAM WATSON SMITH
COUNSEL
(DECEASED 1964)

February 1, 1966

Linwood E. Gray, Esq.
The Corporation Trust Company
120 Broadway
New York, New York 10005

Dear Mr. Gray:

Act 519 of the 1965 session of the Pennsylvania General Assembly, which was signed by the Governor on January 18, 1966, amends Section 302 of the Pennsylvania Business Corporation Law by adding a new clause (18) conferring on every Pennsylvania business corporation the power:

"To be a promoter, partner, member, associate or manager of any partnership, enterprise or venture."

A similar provision is included in the New York Business Corporation Law which became effective September 1, 1963 (Section 202 (a)(15)). Several other states have adopted corporation laws containing similar provisions, or have amended their corporation laws to do so, as you will see on page 4 of the enclosed Memorandum which was submitted to members of the Pennsylvania legislature in connection with the new Pennsylvania amendment.

Having worked with you and your associates on many occasions in connection with the formation and operation of Delaware corporations, I knew that you would have a particular interest in seeing that the Delaware law is also kept up-to-date in this respect. The assurance of corporate power to become a member of a partnership is an important factor in the formation of partnerships for Urban Redevelopment and other real estate purposes, in order to qualify the members for Federal tax benefits as depreciation, etc. The encouragement of such enterprises was one important point which the Pennsylvania Legislature had in mind in adopting the new Pennsylvania amendment.

I would think that the simplest way to include such a provision in the Delaware law, would be to amend Section 122 of the Delaware General Corporation Law to add a new clause (11) as follows:

"Be a promoter, partner, member, associate or manager of any partnership, enterprise or venture."

This would follow the format of the Pennsylvania and New York statutes, which are the most recent enactments on the subject.

I would appreciate anything which you could do to further the objective of having such an amendment adopted in Delaware. Such an amendment is desirable in every respect, and would be particularly advantageous to have in Delaware where so many of our clients are now chartered.

Very truly yours,

Roderick G. Morris

RGN:csc

Enclosure

MEMORANDUM

Re: Capacity of a Corporation to be a Partner under Pennsylvania and Delaware Law

The New York Business Corporation Law which became effective on September 1, 1963, provides, in Section 202(a)(15), that corporations shall have the power in furtherance of their corporate purposes: "To be a promoter, partner, member, associate or manager of other business enterprises or ventures . . .". This new Business Corporation Law was drafted by the Joint Legislative Committee to Study Revision of Corporation Laws. This Committee has published the following Comment on Section 202(a)(15), insofar as it relates to the power of corporations to become partners:

> "This subparagraph has no counterpart in existing New York statutes. It changes existing New York case law (Frieda Popkov Corp. v. Stack, 198 Misc. 286, 103 N.Y.S.2d 507 (Sup. Ct. N.Y. Co. 1950) by empowering a corporation to be a partner, general, limited or otherwise, to the extent permitted by applicable partnership law: see §§ 2, 10 and 90 of the Partnership Law."

Section 4(g) of the Model Business Corporation Act, drafted by the Committee on Corporate Laws of the Section on Corporation, Banking and Business Law of the American Bar Association, would grant the following powers to corporations:

> "(g) To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and

otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships, or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof".

The drafting committee of the American Bar Association and a committee of the American Bar Foundation have jointly published the following comment on this provision, insofar as it relates to the power of corporations to become partners:

"The power with respect to 'interests . . . in partnerships' would enable a corporation to be a partner to the extent permitted in applicable partnership laws.

"Although the Uniform Partnership Act includes corporations within the persons entitled to carry on as co-owners a business for profit, the general rule has been that they have no such power, absent provisions therefor in the corporation statute or articles of incorporation. The two primary reasons given by the courts for restricting a corporation's ability to become a partner are: first, that the partnership agreement would deprive the directors of the management powers placed in them by the statute, and second, that it would subject the interests of the shareholders to unanticipated risks. There has been general adherence to this rule, but the courts have been increasingly more willing to find that the arrangement was merely a joint venture, not subject to such objections. Also the first objection can be minimized by giving the corporation a veto over partnership actions; the latter by getting unanimous shareholder approval. Frequently in a joint venture the operation is carried on by the corporate member so that there is no delegation of authority by the corporate member. Furthermore, even in a partnership, any problem of delegation is obviated if the agreement requires authorization from a sufficiently large percentage of the partners to assure

that no substantial action will be taken without the consent of all the corporate members.

"In many jurisdictions the power to participate in a partnership is now recognized by statute and it frequently appears in the articles, even in the absence of statute.

"Similarly, the early rule was that a corporation could not acquire shares in other corporations except to the extent permitted by statute. As indicated above, the power is now generally granted by statute, sometimes with specific restrictions."

(see 1 Model Business Corporation Act Annotated, § 4(g), Paragraph 4 (West Publishing Co. 1960)).

While the Pennsylvania Business Corporation Law (§ 302(6)) and the Delaware General Corporation Law (§ 123) have provisions corresponding to Section 4(g) of the Model Act, these provisions do not contain the power to be a partner which would be granted by Section 4(g) of the Model Act. In Pennsylvania, there is a 67-year old Supreme Court dictum in Boyd v. The American Carbon Black Company, 182 Pa. 206 (1897) to the effect that it is ultra vires for a corporation to be a partner. There appears to be no court decision holding directly on this point in either Pennsylvania or Delaware.

In addition to New York, the following other States have also adopted corporation laws empowering corporations to become partners:

Alaska	-	Alaska Stats. § 10.05.009(18)
Colorado	-	Colo. Rev. Stats. § 31-28-1(r)
District of Columbia	-	D.C. Code, Title 29, Ch. 9, § 4(g)
Iowa	-	Iowa Code § 496A.4(18)
Maryland	-	Md. Code, Art. 23, § 9(a)(7)
Nebraska	-	Neb. Business Corporation Act, § 4(18)
Nevada	-	Nev. Rev. Stats. § 78.070(8)
North Carolina	-	N.C. Gen. Stats. § 55-17(b)(5)
Utah	-	Utah Code § 16-10-4(g)
Virginia	-	Va. Code § 13.1-3(g)
Wisconsin	-	Wis. Stats. § 180.04(6)
Wyoming	-	Wyo. Business Corporation Act, § 4(s)

In view of the fact that further revisions of the corporation laws of Pennsylvania and of Delaware are now under active consideration in each State, it would appear that those interested in this matter should bring their views to the attention of the appropriate bodies responsible for drafting such revisions, in order that Pennsylvania and Delaware can catch up with the modern trend of corporation legislation in this area.

The provisions which have been enacted or proposed seem to fall into two categories -- those employing the language of the New York Business Corporation Law and those employing the language of

the Model Business Corporation Act. Employing the language of the Model Business Corporation Act would involve amending the existing provisions of the Pennsylvania and Delaware corporation laws which correspond to Section 4(g) of the Model Act. Employing the language of the New York statute (or similar language employed in like statutes) would involve the addition of a new clause to the existing provisions of the Pennsylvania and Delaware corporation laws describing the powers of corporations.

NJ 7-65-25M

THE CORPORATION TRUST COMPANY
277 PARK AVENUE
NEW YORK, N. Y. 10017

February 3, 1966

Roderick G. Norris, Esq.
Eckert, Seamans & Cherin
10th Floor, Porter Building
Sixth Avenue and Grant Street
Pittsburgh, Pa. 15219

Dear Mr. Norris:

With reference to your letter of February 1, 1966, you will be interested to know that over a year ago the Governor of Delaware obtained a special appropriation for the purpose of retaining an attorney to make a complete review of the Delaware Corporation Law and to make recommendations to a special committee appointed by the Governor as to any amendments or revisions which he felt would improve the law. This review was completed last year, and the recommendations have been submitted to the Committee. Among those recommendations was one to authorize a Delaware corporation to enter into a partnership or joint venture, and he favored the language contained in the Conn.Gen.Stat. Sec. 33-291 (3)(4); N.C.Gen.Stat. Sec. 55-17(b)(6), and S.C.Code Sec. 12-12.2(a)(16). We understand that the Committee is presently engaged in consideration of the various recommendations made to them for the purpose of preparing a Bill to be presented to the State Legislature this year.

We are sending your letter with attachment to Mr. Alfred Jervis, Manager of our Wilmington Office in order that he may inform the Committee of your interest in this subject.

Very truly yours,

THE CORPORATION TRUST COMPANY

L. E. Gray
Assistant Vice President

LEG:KG
cc: Mr. Alfred Jervis
Wilmington Office

October 26, 1965

Walter K. Stapleton, Esquire
duPont Building
Wilmington, Delaware

Charles F. Richards, Jr., Esquire
duPont Building
Wilmington, Delaware

Dear Walt & Charley:

At the committee meeting this morning, § X-8 was approved with many changes which will be very hard to glean from the minutes. I copied the changes in triplicate so that each of us would have a copy for reference.

Very truly yours,

CSCJr:cj

Charles S. Crompton, Jr.

Enclosure

September 28, 1965

MEMORANDUM TO THE MEMBERS OF THE DELAWARE
CORPORATION LAW REVISION COMMITTEE

There was less than a quorum at the meeting this morning and in view of the extent of the problems raised by Professor Folk's suggested close corporation law Draft B, it was decided to adjourn.

The next meeting of the Committee is scheduled for Tuesday, October 12, at 10:30 A.M. for the further consideration of Professor Folk's report on close corporations.

Enclosed is a list of approximately seventy joint venture corporations, each of which is equally held by the company listed as its parent.

Also enclosed is a copy of two memoranda prepared by The Corporation Trust Company regarding Mr. T. W. D. Duke's proposals with respect to escheat law. I assume that the April/May, 1965 issue of The Corporation Journal which is referred to in Mr. LePage's memorandum is available to each member of the Committee. If not, I suggest you ask Mr. Jervis for a copy.

R.F.C.

Joint Venture Companies

Corporation	Equal Parents
A-B Chemical Corp.	National Distillers & Chemical Corp. Phillips Petroleum Co.
Act Oils Ltd.	Canada Southern Petroleum Ltd. United Canso Oil & Gas Ltd.
Alamo Polymer Corp.	National Distillers & Chemical Corp. Phillips Petroleum Co.
Alplate, Inc.	National Distillers & Chemical Corp. Aluminium Ltd.
American Chemical Corp.	Stauffer Chemical Co. Richfield Oil Corp.
American Gilsonite Co.	Standard Oil Co. of California Barber Oil Corp.
Arizona Chemical Co.	American Cyanamid Co. International Paper Co.
Arkansas Chemicals, Inc.	Great Lakes Chemical Corp. Houston Chemical Corp.
A. O. Smith Corp. of Texas	Armco Steel Corp. Smith (A.O.) Corp.
Asahi Dow Ltd.	Dow Chemical International A.G. (Sub. of Dow Chemical Co.) Asahi Chemical Industry Co. Ltd. of Japan
Beatrice Pocahontas Co.	Island Creek Coal Co. Republic Steel Co.
Bishop Coal Co.	Inland Steel Co. Consolidation Coal Co.

Corporation	Equal Parents
Boulevard Baking Co.	Penn Fruit Co., Inc. General Baking Co.
Brunswick Pulp & Paper Co.	Scott Paper Company Mead Corp.
Clupak, Inc.	Cluett, Peabody & Co., Inc. West Virginia Pulp & Paper Co.
Condea Petrochemie-Gesellschaft M.B.H.	Continental Oil Co. Deutsche Erdoel A.G. (DEA)
Consolidated Datametrics Corp.	SCM Corporation Taller & Cooper Inc. (Sub. of Apollo Industries.)
Decatur Aluminium Co.	Fruehauf Corp. American Metal Climax, Inc.
Des Plaines Chemical Co.	Stauffer Chemical Co. Swift & Company
Donner-Hanna Coke Corp.	Hanna Furnace Corp. (Sub. of Nat. Steel Corp.) Republic Steel Corp.
Dow Corning Corporation	Dow Chemical Co. Corning Glass Works
Economy Fuel & Supply Corp.	Hanna Furnace Corp. (Sub. of Nat. Steel Corp.) Republic Steel Corp.
Enenco, Inc.	National Lead Co. National Dairy Products Corp.
Ethyl-Dow Chemical Co.	Dow Chemical Co. Ethyl Corp.
Federated Pipe Lines Ltd.	Home Oil Co., Ltd. Texaco Canada Ltd.

Corporation	Equal Parents
General American-Pfaudler Corp.	Pfaudler Permutit, Inc. General American Transportation Corp.
Gibraltar Coal Corp.	Ayrshire Collieries Corp. Peabody Coal Company
Goodrich-Gulf Chemicals, Inc.	B. F. Goodrich Company Gulf Oil Corp.
Gulf & South American Steamship Co.	W. R. Grace & Co. Lykes Bros. Steamship Co., Inc.
Harbison-Carborundum Corp.	Harbison-Walker Refractories Co. Carborundum Co.
Hawaiian Australian Concrete Pty. Ltd.	H.C. & D., Ltd. (Honolulu Construction & Draying Co.) Ready-Mixed Concrete Ltd.
Hawkeye Chemical Company	Swift & Company Skelly Oil Company
Humboldt Mining Co.	The Cleveland-Cliffs Iron Co. Ford Motor Co.
Hurlbut Calcium & Chemical Co.	Inland Steel Co. F. Hurlbut Co.
Illinois Lead Shot Co.	Inland Steel Co. Division Lead Co.
International Research Corp.	Cluett, Peabody & Co., Inc. Heberlein & Co. A.G.
International-Stanley Corp.	International Paper Co. Stanley Works
Kimberly-Stevens Corp.	Kimberly-Clark Corporation J. P. Stevens & Co., Inc.
Ketona Chemical Corp.	Hercules Powder Co. Alabama By-Products Corp.

Corporation	Equal Parents
Meredith-Avco, Inc.	Avco Corporation Meredith Publishing Co.
Michigan Mineral Land Co.	Inland Steel Co. Cleveland-Cliffs Iron Co.
Mobay Chemical Company	Monsanto Company Farbenfabriken Bayer A.G.
Monsanto Chemicals of India, Private Ltd.	Monsanto Chemical Co. Monsanto Chemicals Ltd. (66-2/3 held by Monsanto)
Montrose Chemical Corporation	Stauffer Chemical Co. Baldwin-Montrose Chemical Co., Inc.
Mountaineer Carbon Co.	Consolidation Coal Co. Standard Oil Co. (Ohio)
Mountain Tree Farm Co.	Weyerhaeuser Company Scott Paper Company
National Helium Corp.	National Distillers & Chemical Corp. Panhandle Eastern Pipe Line Co.
National Petro-Chemicals Corp.	National Distillers & Chemical Corp. Owens-Illinois Glass Co.
National Potash Co.	Consolidation Coal Co. Freeport Sulphur Co.
Near East Development Corp.	Standard Oil Company (N.J.) Socony-Mobil Oil Co., Inc.
N.V. Nederlandse Aardolie Mij. ("NAM")	Standard Oil Company (N.J.) Royal Dutch Petroleum Co.
Ormet Corp.	Olin Mathieson Chemical Corp. Revere Copper & Brass, Inc.

Corporation	Equal Parents
Pan American Grace Airways Inc.	W. R. Grace & Co. Pan American World Airways Inc.
Penn-Olin Chemical Co.	Penn Salt Chemicals Corp. Olin Mathieson Chemical Corp.
Philbin Mining Co.	Inland Steel Co. Butler Bros. (Independent Iron Ore Operators)
Pittsburgh Corning Corp.	Corning Glass Works Pittsburgh Plate Glass Co.
Railroad Friction Products Corp.	Westinghouse Air Brake Co. Johns-Manville Corp.
Reserve Mining Co.	Armco Steel Corp. Republic Steel Corp.
R-N Corp.	Republic Steel Corp. National Lead Co.
Solar Nitrogen Chemicals, Inc.	Atlas Chemical Industries, Inc. Standard Oil Co.
Texas Alkyls, Inc.	Hercules Powder Co. Stauffer Chemical Co.
Titanium Metals Corp. of America	National Lead Co. Allegheny Ludlum Steel Corp.
United Metallurgical Corp.	Phelps Dodge Corp. Temescal Metallurgical Corp.
Upper Peninsula Generating Co.	The Cleveland-Cliffs Iron Co. Upper Peninsula Power Co.
Watauga Stone Company	American Zinc, Lead & Smelting Co. Vulcan Materials Co.
Witfield Chemical Corp.	Richfield Oil Corp. Witco Chemical Co.
Wittmar Oil & Gas Corp.	Wiser Oil Co. Petroleum Exploration

INTER OFFICE CORRESPONDENCE

NEW YORK OFFICE SEPTEMBER 27, 1965
(CITY AND DATE)

THE CORPORATION TRUST COMPANY, WILMINGTON, DEL.
SEP 28 10 05 AM '65

TO: WILMINGTON OFFICE ATT.: MR. ALFRED JERVIS

COPIES TO: MR. A.L. DEMPSEY MR. J.P. GARRIGAN MR. RALPH CREWS MR. C.G. DEDERICK

SUBJECT: AMENDMENT TO THE DELAWARE LAWS CONCERNING ESCHEAT

Referring to my memorandum of September 20, Mr. Dempsey prepared a statement on this subject which I think could contribute substantially to any consideration given to the matter by the Study Committee or anyone else who is charged with responsibility of making a decision. A copy of this memorandum is enclosed. It happens that Mr. Dempsey recently did a good deal of research in preparation for an article which appeared in the April-May 1965 issue of The Corporation Journal, copy of which is enclosed.

In reviewing Mr. Dempsey's statement with him, we agreed that the reference in several places to "shares that have been distributed * * * upon dissolution" is not entirely accurate. Upon dissolution shareholders will likely receive the cash proceeds resulting from a conversion of the company's assets into cash, rather than shares of stock. The latter would likely be received only in the event of a distribution in kind where shares of stock form part of the corporate assets which are being distributed.

Rather a better illustration here would be shares of stock to be issued in connection with a merger or consolidation. Frequently shares of one of the constituent corporations (or even of the surviving corporation in the event of a change in the share structure) are unclaimed for considerable periods of time and could be made subject to an Escheat Law.

With this exception I think Mr. Dempsey's memorandum is a very excellent statement on the subject.

We agree here most emphatically that Mr. T. W. D. Duke's proposal that there be a cancellation of shares with appropriate reduction of capital is most unwise. It will be noted that it calls for the filing by a State officer of a certificate which has the effect of cancelling shares and reducing capital; this simply means that someone unconnected with the corporation and without any responsibility to the directors and shareholders is dealing with the corporate structure.

Equally unwise in our judgment -- and as I mentioned to you in my previous memo -- is the suggestion that the Delaware corporation's annual report list the names and number of shares, etc. I would say that every Escheat Statute which calls for the filing of a report requires the filing of a separate report to disclose information required by that Statute. This is the proper procedure. A Delaware annual report, which is now relatively simple, should not be complicated by listing information required in connection with an Escheat Statute. However, I think that the Secretary of State, who is now charged with the administration of the annual report requirement and the franchise tax will be sufficiently alert to dispose of this suggestion in short order.

G. F. DePAGE

ELM
enc.

NJ 298 7-64 60M-c

INTER OFFICE CORRESPONDENCE

NEW YORK SEPTEMBER 24, 1965
(CITY AND DATE)

TO: MR. LR PAGE ATT.:

COPIES TO: MR. C. G. DEDERICK, MR. J. GARRIGAN, MR. RALPH CREWS

SUBJECT: AMENDMENT TO THE DELAWARE LAWS GOVERNING ESCHEAT

Mr. Duke's proposal for a Delaware escheat law is very interesting. However, it violates the generally accepted concept of corporate law that a stockholder may not obtain a return of his investment in exchange for his shares except in certain extraordinary circumstances. Of course, his proposal is not unlike the common provision for appraisal of shares, a statutory creation, and no doubt could be done constitutionally. However, as a general rule the remedy of appraisal is available only to dissenting stockholders in situations involving substantial changes in the corporate structure such as mergers and consolidations and not available ordinarily in the regular course of business. To give the state the right to a return of the investment represented by escheated shares could have a serious detrimental effect on the capital structure of a corporation if a substantial number of shares were involved.

Mr. Duke's proposal takes from the corporate directors and stockholders the exclusive right to make decisions affecting the corporate structure, and for this reason as well seems to violate the traditional concepts of corporate law.

It seems highly doubtful that Mr. Duke's stated intention of increasing the revenue of the State of Delaware by virtue of his proposal would come to pass. It would probably be fair to say that a great percentage of shareholders of Delaware corporations are not residents of Delaware. In view of the Supreme Court's recent decision in Texas v. New Jersey, 85 Supreme Court 626, February 1, 1965, there is no doubt that the State of Delaware would have the right to escheat shares, the last known addresses of the owners of which were outside Delaware, only where the state of the last known address had no escheat law. The Supreme Court has apparently said the final word on the question, and under this decision the state of the last known address has the prior right. The Supreme Court also held that where there is no record of any address, the state of the corporate domicile does have the right to escheat the property until some other state asserts and proves a superior right.

To answer your specific question, we have not been able to find any state which goes as far as Mr. Duke's proposal with reference to cancellation of shares and reduction of capital where the shares have become subject to escheat. The usual practice appears to be that such shares escheat to the state after the specified holding period and are then sold by the state, compliance being made with all of the special notice requirements to the owner. It is also our understanding that, as you indicated in your memo, many of the state escheat laws are custodial in nature and provision is made for restoring the property to the owner if at some future time a valid claim can be made. Mr. Garrigan tells me that he is looking into this question more specifically.

Mr. Duke's proposal touches on a rather troublesome area of escheat law. The escheat of shares of stock to the state has been treated in different ways in different jurisdictions. There appear to be three basic approaches to the problem.

(Continued)

TER OFFICE
DRRESPONDENCE

(CITY AND DATE)

ATT.:

PIES TO:

UECT: Page 2

ypical of one of the approaches is the provision of the Uniform Disposition of nclaimed Property Act which has been adopted by thirteen states (Arizona, alifornia, Florida, Idaho, Illinois, Montana, New Mexico, New Hampshire, Oregon, tah, Vermont, Virginia and Washington). That act appears to treat shares of tock as escheatable only when the shares are either distributed as stock dividends r upon dissolution of the corporation.

> "Undistributed dividends and distributions of business associations. Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven years after the date prescribed for payment or delivery, is presumed abandoned if: (a) It is held or owing by a business association organized under the laws of or created in this state; or (b) It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state."

he key phrase is the heading "Undistributed dividends and distributions of business ssociations." It seems clear that this provision contemplates escheat only of shares ha ave been distributed as stock dividends or upon dissolution.

everal state escheat statutes, Hawaii, Arkansas, New Jersey and Rhode Island, do ot provide at all for the reporting of unclaimed shares but merely give the attorney eneral the right to institute escheat proceedings when he becomes aware of the existence of the unclaimed shares.

ther state escheat statutes set some kind of standard for the determination of hether or not shares have become abandoned property. Not surprisingly, New York as by far the most complete and lucid provision:

> "Any security issued by a domestic or foreign corporation and held for a resident by such issuing corporation or by a fiduciary, other than a broker or dealer as defined in section five hundred ten of this chapter, shall be deemed to be abandoned property where, for ten successive years: (a) All amounts, if any, payable thereon or with respect thereto have remained unpaid to such resident, and (b) No written communication has been received from such resident by the holder, and (c) Where the security is held by the issuing corporation, all regular corporate notices required by law to be given to security holders which have been sent, via first class mail, to such resident at his last known address have been returned to the corporation by the

(Continued)

postal authorities for inability to locate such resident." (Sec. 501, Art. V, Abandoned Property Law, McKinney's Consolidated Laws of New York)

Mr. Duke's proposal is somewhat similar to the New York provision but does not go as far in defining exactly when shares become abandoned.

The statute closest to the proposal is that of New Mexico which contains several unique provisions as to the escheat of shares:

"22-22-17.1. Preferential right of a business association to purchase its issued stock when presumed abandoned.—A. Immediately upon receipt of stock or other certificates of ownership delivered to him by a holder other than the issuing business association under the provisions of the Uniform Disposition of Unclaimed Property Act (22-22-1 to 22-22-29), the commissioner shall give notice of that receipt by registered mail to the issuing business association.

B. The notice required under subsection A shall include:

(1) The number of shares or certificates received;

(2) The type of shares or certificates received including any par or stated value and voting rights;

(3) The indicated date of issue of the shares or certificates; and

(4) The last owner of the shares or certificates as indicated on the certificates.

C. Within thirty [30] days from the time of receiving notice under this section an issuing business association shall have a preferential right to purchase the stock or certificates of ownership from the commissioner at their market value.

D. If the stock or certificates of ownership are not purchased by the issuing business association within thirty (30) days from the date of notice the commissioner shall dispose of them as he would any other property under the provisions of the Uniform Disposition of Unclaimed Property Act.

"22-22-17.2. Ownership in a business association presumed abandoned—Issuing business association may cancel and reissue in certain cases.—A. When issued stock or other certificates of ownership held by the issuing business association are presumed abandoned or when ownership in a business association is presumed abandoned due to failure of the record owner to claim any distributions or payments, the treasurer of the business association shall forward the required report to the commissioner under the provisions of the Uniform Disposition of Unclaimed Property Act (22-22-1 to 22-22-29) but shall not be required to transfer any stock or

(Continued)

certificates of ownership to the commissioner within the time required under section 22-22-14 New Mexico Statutes Annotated, 1953 Compilation if the provisions of subsection B of this section are complied with. All distributions and payments held and presumed abandoned shall be delivered to the commissioner as required by the Uniform Disposition of Unclaimed Property Act.

B. At the time the report is forwarded by the treasurer of a business association under the provisions of subsection A the treasurer of the business association may request that the business association be allowed to cancel any issued stock or certificates of ownership presumed abandoned and issue and sell new stocks or certificates of ownership to replace those presumed abandoned.

C. If the commissioner determines that it is in the best interests of the state, the record owner of the property presumed abandoned, and the business association involved, he shall allow the request for cancellation and reissue; Provided, that the issuing business association shall remit to the commissioner the fair market value of any stocks or certificates of ownership canceled under the provisions of this subsection.

D. If the commissioner determines that it will not be in the best interest of the state, the record owner of the property presumed abandoned, and the business association involved to allow cancellation of the stock or certificates of ownership under this section he shall immediately notify the treasurer of the business association of his decision by registered mail and require the property to be delivered to him and shall dispose of it in the same manner as any other abandoned property. "
Secs. 22-22-17.1 and 22-22-17.2, New Mexico Statutes.

Briefly, the New Mexico statute provides that where shares are turned over to the Commissioner by a holder other than the issuing corporation, the issuing corporation has a preferential right to purchase the shares at their market value. When abandoned shares are held by the issuing corporation, they must be reported to the Commissioner but the corporation may request permission to cancel the shares and issue new ones in their place. If permission is granted, the corporation remits to the Commissioner the fair market value of the shares. If permission is denied, the shares are turned over to the Commissioner who disposes of them as in the case of any other abandoned property. This is the only reference we have found in the statutes to cancellation of shares.

In addition to New York and New Mexico, the New Hampshire statute, for a different reason, presents a very interesting treatment of the problem. This statute falls in that group which treats shares as abandoned only when they constitute stock dividends or shares distributable upon dissolution. However, the New Hampshire statute goes into effect in 1966 and is the newest of the escheat laws. It was obviously prepared with the Supreme Court's recent decision in mind, and reflects all of the important rulings of the court. Every other escheat statute, including the statutes in those states which have adopted the Uniform Disposition of Unclaimed Property Act, is in direct conflict with the Supreme Court decision in one respect

(Continued)

INTER SYSTEM OFFICE
CORRESPONDENCE

(CITY AND DATE)

TO: ATT.:

COPIES TO:

SUBJECT: Page 5.

or another. Incidentally, we have circularized the states to try to find out if they plan substantial revisions to reflect the Supreme Court's decision, and not too surprisingly we have found that very few states consider that there is any necessity for a revision.

In summary, although there is no state escheat statute which goes as far, Mr. Duke's proposal shows some similarity to the pertinent provisions in New York and New Mexico. No doubt, an excellent provision for the escheat of shares could be constructed from the New York provisions defining exactly when shares are abandoned, the New Mexico provision granting the corporation the right to request permission to cancel the shares, and the New Hampshire provisions reflecting the recent decision of the Supreme Court.

ALD:po

A. L. DUMPEY

Draft to Conner

LAW OFFICES
BERL POTTER & ANDERSON
DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

WILLIAM S. POTTER
DAVID F. ANDERSON
WILLIAM POOLE
RICHARD F. CORROON
JAMES L. LATCHUM
JOHN P. SINCLAIR
C. WAGGAMAN BERL, JR.
BLAINE T. PHILLIPS
JOSEPH H. GEOGHEGAN
HUGH L. CORROON
CONVERSE MURDOCH
H. STANLEY LYNCH
RICHARD L. McMAHON
THOMAS G. HUGHES
DAVID NICOL WILLIAMS
CHARLES S. CROMPTON, JR.
ROBERT K. PAYSON

CLARENCE A. SOUTHERLAND
COUNSEL

TELEPHONE
OLYMPIA 8-6771
AREA CODE 302

CABLE ADDRESS
WARDGRAY

September 13, 1965

Clarence A. Southerland, Esq.
Chairman
Delaware Corporation Law Revision Committee
350 Delaware Trust Building
Wilmington, Delaware

Dear Sir:

I have had an opportunity to read Professor Folk's draft of the "Close Corporations" sections of the proposed revisions of the corporation law. Professor Folk's draft does not cover the corporate joint venture situation. There are many Delaware corporations which have been formed for the purpose of carrying forward a joint venture between other corporations resulting in effect in a corporate partnership. The dissolution of the corporate partnership is and will become increasingly important.

Enclosed you will find a draft of proposed amendment to Section 275, Title 8, Delaware Code, which I have prepared with a view to the problem presented where the two joint venturers can no longer agree. The problem covered by the enclosed draft is not covered by Professor Folk. I am submitting this to your committee with the thought and hope that you will incorporate in the statute a provision to facilitate the dissolution of the corporate partnership found in the many joint ventures which are presently extant.

Very truly yours,

WSP.mla
Enclosure

Arsht to redraft all §271

September 14, 1965

MEMORANDUM TO: Corporation Law Revision Committee

FROM: S. Samuel Arsht

Re: Folk Report, pages 208 to 211
Subchapter X. Sale of Assets, Dissolution and Winding Up §§ 271, 272 and 273 of the Corporation Law

A. Sale of Assets - §271 of Corporation Law

I. Folk points out many states and Model Act expressly dispense with stockholder approval for sales of all assets in usual course of business and for mortgages or pledges, unless charter requires it. He suggests appropriate language to this effect at page 209.

I approve this change as it settles a question that is often raised.

II. §271 does not refer to money as consideration for a sale of assets. I approve inclusion of words "money or property, real or personal, including shares or other securities of any other corporation", as Folk suggests.

III. Folk points out that §271, unlike other sections of the Corporation Law which provide for stockholder approval, does not specify a notice period for stockholder action. I approve inclusion of either a 10 or 20 day notice requirement.

IV. Folk suggest addition of a sentence authorizing directors to abandon a proposed sale notwithstanding stockholder approval. A number of states have such a provision. I think this is a desirable provision.

V. §271 requires vote of a majority of the voting shares. Folk does not recommend any change in this voting requirement, but he points out that other states vary considerably, both in percentages required and in the shares which

may vote. The Committee might consider requiring a majority vote of holders of shares not havigg a preference on liquidation. Thus, if a corporation has both voting and non-voting common stocks, both of such classes would vote on a sale of assets.

VI. §271 deals only with a sale of all of a corporation's assets. I think most lawyers believe §271 applies also to a sale of "substantially all" of a corporation's assets, although I know of no Delaware case on the point. Folk suggests §271 should expressly refer to a sale of "all or substantially all" of a corporation's assets not in the usual and regular course of its business.

VII. If point A. I., above, is approved, §271 will require rather substantial revision.

Sections 272 and 273

No changes suggested in these sections.

LAW OFFICES

BERL POTTER & ANDERSON

DELAWARE TRUST BUILDING

WILMINGTON, DELAWARE 19801

WILLIAM S. POTTER
DAVID F. ANDERSON
WILLIAM POOLE
RICHARD F. CORROON
JAMES L. LATCHUM
JOHN P. SINCLAIR
C. WAGGAMAN BERL, JR.
BLAINE T. PHILLIPS
JOSEPH H. GEOGHEGAN
HUGH L. CORROON

CONVERSE MURDOCH

H. STANLEY LYNCH
RICHARD L. McMAHON
THOMAS G. HUGHES
DAVID NICOL WILLIAMS
CHARLES S. CROMPTON, JR.
ROBERT K. PAYSON

CLARENCE A. SOUTHERLAND
COUNSEL

TELEPHONE
OLYMPIA 8-6771
AREA CODE 302

CABLE ADDRESS
WARDGRAY

September 13, 1965

Clarence A. Southerland, Esq.
Chairman
Delaware Corporation Law Revision Committee
350 Delaware Trust Building
Wilmington, Delaware

Dear Sir:

I have had an opportunity to read Professor Folk's draft of the "Close Corporations" sections of the proposed revisions of the corporation law. Professor Folk's draft does not cover the corporate joint venture situation. There are many Delaware corporations which have been formed for the purpose of carrying forward a joint venture between other corporations resulting in effect in a corporate partnership. The dissolution of the corporate partnership is and will become increasingly important.

Enclosed you will find a draft of proposed amendment to Section 275, Title 8, Delaware Code, which I have prepared with a view to the problem presented where the two joint venturers can no longer agree. The problem covered by the enclosed draft is not covered by Professor Folk. I am submitting this to your committee with the thought and hope that you will incorporate in the statute a provision to facilitate the dissolution of the corporate partnership found in the many joint ventures which are presently extant.

Very truly yours,

WSP.mla
Enclosure

August 12, 1965

MEMORANDUM TO THE MEMBERS OF THE DELAWARE
CORPORATION LAW REVISION COMMITTEE

Enclosed are a revision of Section 218 of the Corporation Law and an addition to Section 212. You are asked to consider the addition to Section 212 as against the more elaborate proposal of Professor Folk (Folk Report, pages 160-162). I am simply trying to avoid the effect of the Chilson decision, which is out of line with the majority in that it unduly restricts the definition of "interest".

HENRY M. CANBY

HMC/mk

Enclosures

Draft
8/11/65

REVISION OF SECTION 218 OF THE CORPORATION LAW

§ 218. Voting trusts and stockholder agreements

(a) One or more stockholders may by agreement in writing deposit capital stock of an original issue with or transfer capital stock to any person or persons, or corporation or corporations authorized to act as trustee, for the purpose of vesting in such person or persons, corporation or corporations, who may be designated voting trustee, or voting trustees, the right to vote thereon for any period of time determined by such agreement, not exceeding ten years, upon the terms and conditions stated in such agreement. The validity of a voting trust agreement, otherwise lawful, shall not be affected during a period of ten years from the date when it was created or extended as provided herein by the fact that under its terms it will or may last beyond such ten-year period. Such agreement may contain any other lawful provisions not inconsistent with said purpose. After the filing of a copy of such agreement in the principal office of the corporation in the State of Delaware, which copy shall be open to the

inspection of any stockholder of the corporation or any beneficiary of the trust under said agreement daily during business hours, certificates of stock shall be issued to the voting trustees to represent any stock of an original issue so deposited with them, and any certificates of stock so transferred to the voting trustees shall be surrendered and cancelled and new certificates therefor shall be issued to the voting trustees, and in the certificates so issued it shall appear that they are issued pursuant to such agreement, and in the entry of such voting trustees as owners of such stock in the proper books of the issuing corporation that fact shall also be noted. The voting trustees may vote upon the stock so issued or transferred during the period in such agreement specified. Stock standing in the names of such voting trustees may be voted either in person or by proxy, and in voting the stock, such voting trustees shall incur no responsibility as stockholder, trustee or otherwise, except for their own individual malfeasance. In any case where two or more persons are designated as voting

trustees, and the right and method of voting any stock standing in their names at any meeting of the corporation are not fixed by the agreement appointing said trustees, the right to vote said stock and the manner of voting the same at such meeting shall be determined by a majority of the trustees, or if they be equally divided as to the right and manner of voting the same in any particular case, the vote of the stock in such case shall be divided equally among the trustees.

(b) At any time within two years prior to the time of expiration of any such voting trust agreement as originally fixed or as extended as herein provided, one or more beneficiaries of the trust under such voting trust agreement may, by agreement in writing and with the written consent of such voting trustees, extend the duration of such voting trust agreement for an additional period not exceeding ten years. from the expiration date of the trust as originally fixed or as extended as herein provided. The voting trustees shall, prior to the time of expiration of any such voting trust agreement, as originally fixed or as previously extended, as the case

may be, file in the principle office of the corporation in the State of Delaware a copy of such extension agreement and of their consent thereto, and thereupon the duration of such voting trust agreement shall be extended for the period fixed in such extension agreement; but no such extension agreement shall affect the rights or obligations of persons not parties thereto.

(c) An agreement between two or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them. No such agreement shall be effective for a term of more than ten years, but the parties may extend its duration for as many additional periods, each not to exceed ten years, as they may desire.

(d) This section shall not be deemed to invalidate any voting or other agreement among shareholders or any irrevocable proxy which is not otherwise illegal.

§ 212.

(b) A duly executed proxy shall be irrevocable if it is specified that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power coupled therewith. A proxy may be made irrevocable regardless of whether the interest with which it is coupled is an interest in the stock itself or an interest in the corporation generally.

June 8, 1965

TO THE MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE

Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Henry M. Canby, Esquire
Honorable Elisha C. Dukes
Mr. David H. Jackman
Mr. Alfred Jervis
C. J. Killoran, Esquire
Irving Morris, Esquire
Mrs. Margaret S. Storey
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

There is enclosed a proposed new section on fractions of shares and scrip which I believe reflects the conclusions reached at the meeting this morning. It is in lieu of the new section suggested by Professor Folk at pages 241 and 242 of his report.

R.F.C.

Section ____. Fractions of Shares and Scrip. A corporation may issue certificates for fractions of a share or scrip subject to such terms and conditions as the board of directors may determine. In lieu of issuing fractions of a share, a corporation may pay, in cash, the fair value thereof as of the time when those entitled to receive such fractions are determined.

REPORT ON PAGES 156 THROUGH 164 OF THE FOLK REPORT

1. At page 157, Folk proposes that Section 218(b) be amended by increasing the period, prior to expiration, within which a voting trust may be extended from one to two years and by specifically stating that the renewal period runs from the date of expiration of the original trust.

Both of these suggestions are recommended.

2. At page 158, Folk proposes that the statute be amended so that a voting trust which could exceed 10 years will, nevertheless, be valid during the allowed statutory period.

This amendment is a valid attempt to carry out the intention of the parties and is recommended.

3. On pages 159 through 164 Folk recommends that the Delaware substantive law be changed so as to widen the areas within which stockholder agreements regarding the voting of shares are recognized. There appears to be some trend toward this result in other states and, although it does involve the overturning of several existing decisions, I believe it is meritorious because of the additional elasticity which will result. The changes recommended are, briefly, as follows:

A. The enactment of a new statute for the purpose of recognizing the validity of irrevocable proxies and defining them in some detail. If this statute is approved, the limitation of irrevocability to 10 years (page 163) should be adopted.

B. Recognition of shareholder voting agreements which do not comply with the provisions of the voting trust statute (page 164).

Henry M. Canby

June 8, 1965

MEMORANDUM

To: Delaware Corporation Law Revision Committee

From: Clair John Killoran

Re: The Folk Report, pages 224 to 236, concerning present Sections 151 to 156 of the present corporation statute.

My comments on the proposed changes and additions to the Delaware Corporation Law dealing with the issuance of stock and the formulation of definitions are as follows:

A. Definitions.

I agree that it is desirable that standard accounting terms be used consistently throughout the financial portions of the corporation law. The definitions proposed on pages 226-227 of the Folk Report appear to be conventional and satisfactory. The critical issue is not the definitions themselves, but the manner in which the various terms are used in the substantive portions of the proposed statute, particularly in the sections dealing with dividends. The definitions should therefore be reviewed again when these sections are under consideration.

In connection with the definition of "Earned surplus" on page 227, it would seem desirable to add the additional language of

the Model Act referred to in the footnote. This would provide that earned surplus is determined from the date of incorporation or the latest date when a quasi-reorganization occurred.

B. Corporate Authority to Issue Stock.

As the Report points out, section 151 of the present statute permits the issuance of the various types of securities which are in general use today. For this reason it appears unnecessary and undesirable to modify this section of the statute.

On page 228 of the Folk Report there is the suggestion that the statute be amended to prevent "upstream" conversions of junior securities into senior securities. It is suggested that under the present Delaware statute it would not be illegal for common stock to be convertible, at the holder's option, into preferred stock or even into some form of creditor securities. It would seem that such a conversion of common stock to creditor securities might well be prohibited as a redemption under the present Delaware statute (see Folk Report, page 229). Moreover, there is nothing improper about the conversion of one class of preferred into another senior class of preferred if the terms of conversion are fair. Under the circumstances, my suggestion is that the statute remain as it is, with any abuses which may develop being handled judicially.

It is also suggested on page 228 of the Report that the shareholders of a corporation be permitted to grant to the Board of Directors the power to increase the total authorized shares of the corporation when needed. This would enable a corporation to issue convertible securities, but to defer increasing the authorized capitalization of the corporation until the shares are actually needed for the purposes of conversion. The only objection to this arrangement would seem to be that it could result in a decrease in franchise taxes collectible by the State.

On page 229 of the Folk Report it is suggested that the revised statute provide that shares be redeemable only at the option of the corporation and not at the option of a stockholder. This problem would normally be resolved by the language of the certificate of incorporation, which would presumably set out specifically any right of redemption granted the stockholders. For this reason,a statutory provision appears unnecessary.

The discussion on page 230 concerning the possibility of an amendment to permit the redemption of common shares [now prohibited by section 151(b)] suggests that such a provision might create more problems than it would solve. The prohibition against

redemption of common shares provides a necessary and dependable method of protecting the interests of several classes of stockholders in a close corporation situation.

C. Consideration for Shares

On page 231 it is suggested that section 152 of the present statute be amended by adding language which permits a corporation to charge reasonable expenses of organization and sales and underwriting commissions against the proceeds of the sale of its stock without thereby impairing the stock's full paid and non-assessible status. In Yasik v. Wachtel, 17 A. 2d 309 (1941) the court indicated on page 312 that the requirement that par stock be issued for not less than its full par value does not prevent the payment of reasonable commissions to selling agents for marketing the stock. The same rule would seem to apply to organization expenses. The proposed amendment therefore does not appear to alter the present law in Delaware.

With respect to proposed section 153, there does not seem to be any objection to changing the phrase "capital" to "stated capital" in accordance with the definitions which are discussed above.

The proposed draft of section 153 does not include the distinction between corporations incorporated before and after April 1,

1929. Under the old statute, consideration for the issuance of capital stock is, in the case of pre-1929 corporations, fixed by the stockholders unless the certificate of incorporation grants the power to the Board of Directors, whereas in the case of post-1929 corporations, consideration is fixed by the Board of Directors unless the certificate of incorporation reserves the power to the stockholders. Since there are undoubtedly a number of pre-1929 corporations still active in Delaware, it would appear advisable to maintain this distinction in any new statute.

The suggestion that consideration for the issuance of capital stock be fixed by a majority rather than two-thirds of the stockholders (when reserved to the stockholders) is a desirable change. The proposed language of section 153 (d) would permit the certificate of incorporation to require a larger vote, if deemed desirable.

The proposal that stockholders be permitted to set the consideration for the issuance of par stock as well as no par stock seems reasonable. This is contained in new section 153 (a).

Two aspects of proposed section 153 found on page 232 of the Folk Report should be considered. The first of these is the provision in sub-paragraphs (a) and (b) that consideration for the

issuance of both par and no par shares should be "expressed in dollars". This would appear to prohibit the practice, believed to be reasonably widespread in the case of no par stock, of issuing a specified number of shares in exchange for property conveyed to the corporation without fixing a specific dollar value for the property. While there is some doubt that this practice would achieve its aim of reducing the liability of directors for overvaluing the assets received, its prohibition might have an unsettling effect upon out-of-state lawyers who use the Delaware statute.

It is also suggested that the provision now appearing in the last sentence of present section 153, which permits the directors to fix the consideration for ten per cent of the authorized stock, even where the certificate of incorporation reserves the power to fix consideration to the stockholders, should not be deleted. It is true, as is pointed out in the footnote on page 233, that this problem could be handled in the certificate of incorporation. But its inclusion in the statute is not harmful and might prove useful under some circumstances.

As noted in the Report, proposed section 154 on page 234 is a restatement of present section 154, with the exception of the last sentence of sub-paragraph (b) concerning the freezing of the consideration received for no par preferred, up to its liquidation preference, in

stated capital. Since section 154 has worked well and its provisions are familiar to the bar, I recommend that it be retained in its present form.

If the proposed language is adopted, the word "constitute" in subparagraph (a) should be substituted for the phrase "be allocated to", since no actual allocation to capital surplus should be required in the case of par shares.

It is understood that no amendment is offered with respect to present section 155 of the corporation statute.

On page 236 of the Folk report it is suggested that language be added to present section 156 to provide that upon transfer of certificates issued for partly paid shares, the new certificates would bear a statement that they were issued for partial consideration. While this would seem to be required by the present statute, there does not seem to be any objection to including the additional language to make the requirement more explicit.

An interesting question is raised with respect to voting rights of holders of partially paid shares. The committee might wish to consider whether the voting rights with respect to partially paid shares should be reduced in proportion to the percentage of consideration actually paid. This would require a modification of present section 212.

MEMORANDUM

To: Delaware Corporation Law Revision Committee

From: Clair John Killoran

Re: The Folk Report, pages 30 to 35, concerning sections 109(a) and 122 (6) of the present corporation statute.

I agree with the conclusion in the Folk Report that the power to amend by-laws should remain in the stockholders of a corporation unless delegated to the Board of Directors by the certificate of incorporation. In my opinion, the revised statute should make it clear that while the power to amend by-laws may be delegated to the Board of Directors in the certificate of incorporation, the stockholders still retain the power to amend.

The suggestion made on page 32 of the Folk Report that section 122 (6) be redrafted to broaden its language and to codify the ruling that the by-laws of a corporation are subordinate to the certificate of incorporation is desirable. The present reference in section 122 (6) to changing the number of directors should be deleted and the reference to stock transfer penalties should be moved elsewhere in the statute.

The suggestion on page 32 of the Folk Report that the revised statute provide that the certificate of incorporation may contain

any provision required or permitted in the by-laws is desirable. This would permit the number of directors to be fixed in the certificate of incorporation, a desirable provision in some close corporations. Also, the provisions that the certificate of incorporation may grant the stockholders exclusive power to amend the by-laws and may require either the stockholders or directors to act by a greater-than-majority vote in amending the by-laws are all desirable changes.

It is agreed that there is no reason to change the provision found in present section 109 (b) and (c) concerning emergency by-laws and that these provisions should appear in a single separate section.

Finally, it is agreed that the by-law provisions of section 109(a) and 122(6) should be combined in a single section of the statute.

NO

May 19, 1965

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE

Hon. Clarence A. Southerland
S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Hon. Elisha C. Dukes
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey
Charles S. Crompton, Jr., Esq.
Charles F. Richards, Jr., Esq.
Walter K. Stapleton, Esq.

In accordance with directions given at yesterday's meeting, I enclose a revision of § 219. The words in brackets can be deleted if it is the final decision of the Committee to eliminate the requirement of § 220 that a duplicate stock ledger be kept in this State.

Richard F. Corroon,
Vice Chairman

§ 219. List of Stockholders Entitled to Vote; Penalty for Refusal to Produce.

The officer who has charge of the stock ledger of a corporation shall prepare and make, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at said meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten days prior to the meeting, either at a place within the city, town or village where the meeting is to be held ~~and a~~ Which place shall be specified in the notice of the meeting, or, if not so specified, at the place where said meeting is to be held, and the list shall be produced and kept at the time and place of meeting during the whole time thereof, and subject to the inspection of any stockholder who may be present. The [original or duplicate] stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list required by this section or the books of the corporation, or to vote in person or by proxy at any meeting of stockholders. Upon the willful neglect or refusal of the Directors to produce such a list at any meeting for the election of directors, they shall be ineligible for election to any office at such meeting.

May 14, 1965

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Clair John Killoran, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey

My comments on pages 237 to 249 of the Folk report are attached.

Henry M. Canby

mk

Attachment

Pages 237 to 249 of the Folk Report

1. The suggested amendment to Section 157, which appears on page 237 of the Folk report, appears meritorious. Section 194 requires that any restrictions on the transfer right of shares must be printed on the certificate and this language will accomplish the same purpose for the option agreement which might otherwise be deemed assignable.

amended

2. The suggestion at page 238 that the provision of the New York law which in effect provides that stockholder approval of the issuance of rights and options constitutes authorization to the board to amend the charter to increase the number of shares is not recommended. As a practical matter, when the question of issuance is put to the stockholders, it is a simple matter to also include an amendment to the number of authorized shares if necessary.

disapproved

3. The proposed change in the second section of 158 (Report, p. 239) does constitute a clarification and is recommended.

approved as modified see some text

4. The suggested revision of the third sentence of 158 (Report, p. 239) is highly recommended as a substitute for the tortured present sentence.

approved

5. The suggestion that Section 151(f), insofar as it deals with certificate recitals, should be moved into Section 158 is not recommended.

6. The suggestion contained in paragraph 4 at page 240 of the Report that the word "stolen" be added following the phrase "lost or destroyed" in Sections 167 and 168(a) is recommended.

7. At page 241 of the Folk report, a proposed statute providing for the issuance of fractional shares and script is set forth. Although we do not have any such statute at the present time, it has been the general opinion in the Bar that the issuance of both fractional shares and script are permitted. However, I believe the suggested statute would be an accommodation to house counsel or officers of Delaware corporations and I recommend its inclusion in the statute.

8. At page 243, Professor Folk proposes a revision of the law regarding unpaid subscriptions. The basic change is to increase the liability of a subscriber to par stock from the amount of par to the full consideration for the shares. This seems logical, but it can be accomplished by simply removing the phrase "up the the par value thereof" from the present Section 163. The changes suggested at (b) and (c) on

page 243 would deprive the corporation of its right to proceed against the stock in the case of a bona fide transfer or pledge. There seems to be no reason why this burden should not rest on the transferee or pledgee rather than on the corporation. Adoption of (b) and (c) are not recommended.

9. The recommendations at 3. and 4. on page 244 of the Report are that a statutory provision be inserted making subscriptions irrevocable for six months and further providing that a subscription shall not be enforceable unless in writing. I see no reason why these questions cannot be handled by general law and recommend that the changes not be made.

10. Professor Folk recommends (p. 246) that Section 170(b) be amended to enlarge the definition of a "wasting asset" corporation. I am aware that this has been a problem and recommend that the language of the New York statute included in the last paragraph on page 246 be inserted in the statute in place of the phrase "corporation engaged in the exploitation of wasting assets".

11. I believe that the provisions of Section 173 regarding stock dividends are well understood by our Bar and I do not feel that any explanatory language of the type suggested at page 247 is necessary.

12. Of the two sub-paragraphs suggested at the bottom of page 248 of the Report, I do not feel that (b) is necessary since we do have a joint tortfeasor law. The second suggestion, (c), giving directors the right to reclaim from stockholders amounts paid out by directors as a result of unlawful declarations of dividends, appears meritorious and I recommend its adoption.

May 14, 1965

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Clair John Killoran, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey

In accordance with the instructions of the Committee at the April 20th meeting, I have redrafted a revision of Professor Folk's suggestion for a postponed effective date for amendments to corporate charters (p. 178). It is attached hereto.

Henry M. Canby

mk

Attachment

AMENDMENT

Amend Section 242 by changing the period at the end of the eighth sentence to a semicolon and adding the following:

> "provided, however, any amendment may, by its terms, be made effective at any time within thirty (30) days after the date of recording."

May 6, 1965

TO: ALL MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE

Re: Stockholder's Right of Inspection

As a result of the discussion at our meeting on May 4, 1965, I have prepared and there is enclosed herewith two additional drafts of proposed Section 220 concerning a stockholder's right of inspection.

Draft No. 3 provides for an equitable owner of stock as well as a legal or equitable owner of a voting trust certificate to have a right of inspection. As we know, granting an equitable owner of stock or a voting trust certificate holder (legal or equitable) a right of inspection would introduce a new right in our law. Draft No. 4 would confine the right of inspection to stockholders of record or their attorneys or other agents.

Despite the vigor with which I opposed the excision from Draft No. 2 of the right of the equitable stockholder and voting trust certificate holder to inspect, on reflection I would no longer persist in my opposition and would recommend the adoption of Draft No. 4. I reach this conclusion for three reasons:

1. The equitable holder could have his nominee who has legal title authorize him or his attorney, etc., to make the demand and inspection under the proposed Draft No. 4.

2. The equitable stockholder has it within his power to put his stock into his own name of record and thereafter comply with Draft No. 4 in seeking inspection.

3. As a practical matter, the fact that an equitable stockholder has never before had a right of inspection has not apparently created such a problem as would warrant the interjection into our law of this further right.

Irving Morris

cc. The Honorable Collins J. Seitz
Charles S. Crompton, Jr., Esq.
Charles F. Richards, Jr., Esq.
Walter K. Stapleton, Esq.

DRAFT NO. 3.

§220. Stockholder's Right of Inspection.

(a) As used in this section, a stockholder shall mean (1) a stockholder of record; (2) an equitable owner of stock; (3) a legal or equitable owner of a voting trust certificate.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, list of stockholders, and its other books and records and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In the case of any equitable stockholder or equitable voting trust certificate holder, there shall be set forth in the demand under oath such facts as shall establish the status of such person as an equitable stockholder or voting trust certificate holder and the demand under oath shall be accompanied by such documents as would evidence such status. In addition, in every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which shall authorize the attorney or other agent to so act on behalf

of a stockholder as herein defined. The demand under oath shall be directed to the corporation at its principal office in this State or at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to sub-section (b) hereof or does not reply to the demand within five business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, list of stockholders, and its other books and records and to make copies or extracts therefrom; provided, however, that the stockholder shall first establish (1) that he has complied with the provisions of this statute respecting the form and manner of making demand for inspection of such documents; and (2) that the inspection he seeks is for a proper purpose. The court may, in its discretion, prescribe any limitations or conditions with reference to the inspection or award such other or further relief as the court may deem just and proper. The court may upon such terms and

conditions as the court may prescribe order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in such place in this State and for such time and purposes as the order may prescribe.

DRAFT NO. 4.

§220. Stockholder's Right of Inspection.

(a) As used in this section, a stockholder shall mean a stockholder of record.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, list of stockholders, and its other books and records and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which shall authorize the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its principal office in this State or at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to sub-section (b)

hereof or does not reply to the demand within five business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, list of stockholders, and its other books and records and to make copies or extracts therefrom; provided, however, that the stockholder shall first establish (1) that he has complied with the provisions of this statute respecting the form and manner of making demand for inspection of such documents; and (2) that the inspection he seeks is for a proper purpose. The court may, in its discretion, prescribe any limitations or conditions with reference to the inspection or award such other or further relief as the court may deem just and proper. The court may upon such terms and conditions as the court may prescribe order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in such place in this State and for such time and purposes as the order may prescribe.

MEMORANDUM TO MEMBERS OF
THE DELAWARE CORPORATION
LAW REVISION COMMITTEE

April 27, 1965

RE: STOCKHOLDER'S RIGHT OF INSPECTION

There is enclosed herewith a verifax copy of Chancellor Seitz' letter to me of April 22, 1965, containing his comments on the proposed statute concerning inspection rights. In making his comments, the Chancellor had before him Professor Folk's report and recommended statute as well as my prior report of April 19 and the proposed statute I had attached to it.

After considering the Chancellor's comments, I have redrafted the proposed statute and I am enclosing herewith to each of you a copy of the proposed draft which I have denominated Draft No. 2.

Irving Morris

cc. The Honorable Collins J. Seitz
Charles S. Crompton, Jr., Esq.
Charles F. Richards, Jr., Esq.
Walter K. Stapleton, Esq.

DRAFT NO. 2

§220. Stockholder's Right of Inspection.

(a) As used in this section, a stockholder shall mean (1) a stockholder of record; (2) an equitable owner of stock; (3) a legal or equitable owner of a voting trust certificate.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect in good faith for any proper purpose the corporation's books and records of account, minutes of meetings of directors, committees and stockholders, and record of stockholders, and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In the case of any equitable stockholder or equitable voting trust certificate holder, there shall be set forth in the demand under oath such facts as shall establish the status of such person as an equitable stockholder or voting trust certificate holder and the demand under oath shall be accompanied by such documents as would evidence such status. In addition, in every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing

which shall authorize the attorney or other agent to so act on behalf of a stockholder as herein defined. The demand under oath shall be directed to the corporation at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to sub-section (b) hereof or does not reply to the demand within five business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The court may, in its discretion, order the corporation to permit the stockholder to inspect the corporation's books and records of account, minutes of meetings of directors, committees and stockholders, and record of stockholders and to make copies or extracts therefrom; provided, however, that the stockholder shall first establish (1) that he has complied with the provisions of this statute respecting the form and manner of making demand for inspection of such documents; (2) that the inspection he seeks is for a proper purpose; and (3) that such inspection shall be made in good faith. The court may, in its discretion, prescribe

any limitations or conditions with reference to the inspection or award such other or further relief as the court may deem just and proper. The court may upon such terms and conditions as the court may prescribe order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in such place in this State and for such time and purposes as the order may prescribe. The Court of Chancery is empowered to promulgate such rules as will expedite the procedure in bringing before it the issues to be resolved in determining a stockholder's right of inspection as authorized by this statute.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COLLINS J. SEITZ
CHANCELLOR

April 22, 1965

COURT HOUSE
WILMINGTON, DELAWARE

Irving Morris, Esquire
Cohen and Morris
Bank of Delaware Building
Wilmington 1, Delaware

Dear Irving:

I acknowledge your letter of April 20, enclosing material concerning the proposed new statute of Stockholder Inspection Rights.

Some of the matters discussed by Professor Folk and you involve policy decisions and I do not feel that it is particularly appropriate for me to talk about them. For example, whether a stockholder should be required to have been such for a period prior to the demand or whether some percentage of stock ownership should be required.

I do not intend to get involved in the question as to whether the inspection should not apply to equitable owners. Under the present law, as administered in the Superior Court, an equitable owner does not have standing. I do think that there is some slight misunderstanding by Professor Folk on one aspect of this matter.

Although he does not say so, he seems to assume that an equitable owner could obtain inspection in Chancery. I am not sure that this is the law. I believe that inspection in Chancery either has to be incidental to a pending case in Chancery or in the law court. Thus, although I could be wrong, I believe the granting of a right to inspect to an equitable owner, apart from pending litigation, would amount to the granting of a new right.

I do believe that as to any material a stockholder would be called upon to supply the corporation, he should be required to supply it in his initial demand. In this way the proceedings will be expedited.

I don't know whether the statute should contain any provision concerning the consequences of filing a false affidavit.

I think perhaps the statute should contain some language making it clear that this type of case should be given expeditious treatment. I believe the statute concerning elections does contain some pertinent language.

I do think that you have pointed out the important distinction in burden between cases where a stockholders' list is sought and cases where other records are sought. It does seem to me that whatever decision is reached with respect to burden should be spelled out in the statute. I say this because it may

have some importance in decisions by the parties concerning discovery, etc.

As to the proposed statute, I have the following queries:

1. Paragraph (a)(4), I doubt that this is needed because it really is not defining a stockholder. Anyway, this authority is created by Paragraph (b).

2. Paragraph (b), do you think the five days needs any refinement to make it clear that it means business days? Is a failure to reply tantamount to a refusal? I suppose there is no way to set up mechanics by which a refusal could be conveyed so that the party need not go through the ritual of showing up pursuant to the demand. In this connection a question arises as to what office of the corporation he should go to in implementation of his written demand.

I suppose the words "reasonable" and "proper" constitute different requirements. Have you thought about that?

You say that a proper purpose "includes" a purpose which you go on to delineate. The use of the word "includes" seems to suggest that there could be other proper purposes. Was this intended?

I am not certain you need the words "or any attorney or other agent for such persons". I say this because you use the

language thereafter, "the status of such person", and, of course, you are not referring to the attorney or agent.

3. Paragraph (c), in the findings by the court you appear to include the requirement that the court determine that the inspection is for a specified reasonable proper purpose. I assume that such a finding would be required before the court could determine that the person is entitled to inspection and so this would seem to be a surplusage in this paragraph.

I appreciate your sending me the material and I hope that these suggestions may be of some assistance. Certainly they are only intended as thoughts and not directions.

Sincerely,

Chancellor

CJS/mb

Deliver to Mr. Nielsen
801 Bank of Delaware Bldg.

MEMORANDUM TO MEMBERS OF THE
DELAWARE CORPORATION LAW
REVISION COMMITTEE

April 19, 1965

I am enclosing my comments on Professor Folk's material concerning Stockholder Inspection Rights which appears at pages 165-174 of his draft. Professor Folk recommends the adoption of a new section to govern a shareholder's right of inspection. Draft pp. 173-174. Our present statutes appear in 8 Del. C. Sections 219-220.

Professor Folk's proposed statute would introduce certain prior conditions to a stockholder's right of inspection which do not presently exist under Delaware law: (1) The stockholder must have been a stockholder of record for at least six months immediately preceding his demand for inspection; (2) The stockholder or other stockholders joining with him must own at least 5% of the outstanding shares of any class of stock (ownership of at least 5% of the outstanding shares would eliminate the time condition of six months); (3) Inspection could be denied if the stockholder refuses to furnish an affidavit that he does not seek the inspection for an improper purpose and that he has not within five years sold or offered for sale any list of shareholders; (4) Holders of voting trust certificates

would also be entitled to the right of inspection provided they satisfy either the six months' requirement or their voting trust certificates represent shares aggregating at least 5% of the outstanding shares.

If the right of inspection is to be recognized under Delaware law (and I certainly think it should be), I see no reason why an equitable stockholder and a legal or an equitable voting trust certificate holder should not be entitled to the same right as a stockholder of record provided they accompanied their written demand for inspection with an affidavit as to the facts of ownership, appending to the affidavit such documents as would evidence equitable ownership, e.g., a broker's statement, etc.

With reference to the duration of time and percentage of ownership of stock which Professor Folk would make alternative prerequisites to the right of inspection, I am not satisfied that either is necessary. The key to inspection is that the inspection be sought for a specified, reasonable and proper purpose. If a stockholder holding less than 5% of the stock meets the test so far as his purpose is concerned, it should not make any difference that his total holdings or those acting in concert with him are less than 5%. Professor Folk notes with reference to the percentage requirement

that "it seemingly serves no useful purpose but normally appears in the statutes." Folk Report, page 167. Similarly, I see no reasonable objective served in requiring a stockholder to be a stockholder for six months before he is entitled to the right of inspection. Unlike the bringing of a derivative action where the stockholder must have been a stockholder at the time the wrong occurred, there is no overall policy objective which seems to me to require a six month holding. The stockholder who buys one day and the next day receives an annual report which causes him concern as to the activities of his corporation should not be required to wait a six month period before he can secure an inspection of documents to make a judgment as to whether or not wrongdoing has occurred.

Thus, as to proposed sub-section a of Professor Folk's proposed statute (Folk Report, page 173), I would recommend that we broaden the definition of stockholder but reject the holding period and percentage of ownership requirement suggested by Professor Folk.

Professor Folk is concerned with what he deems to be an apparent conflict in Delaware cases which on the one hand require the stockholder seeking mandamus to allege and prove proper purpose and those cases on the other hand which require

the corporation to show an improper purpose as a defense to mandamus. He attempts to resolve the problem as he sees it by recommending that in the first instance the stockholder make a written demand stating the purpose of his inspection and, upon doing so, by statute the stockholder would have "the right... to examine for any specified, reasonable and proper purpose, the corporation's books and records of account, etc." Folk Report, pages 165-166, 173. Professor Folk would give the corporation the right to refuse inspection (Folk Report, page 174, sub-section c of proposed statute) and if the stockholder sought judicial relief to compel the inspection, the corporation would "have the burden of establishing that the purpose for which inspection is sought is not a proper purpose." Folk Report, page 174.

The problem which arises from the conflict in the cases does not really exist since, I suggest, that there is no conflict and the cases on their facts are consistent. The Nodana, Jessup & Moore, and Miller-Wohl cases are all cases where books and records were being sought. Our courts have been uniform so far as I can find in holding that where a stockholder seeks inspection of books and records the burden is upon him to prove his good faith and proper purpose. The Sentry Safety and Insuranshares Corporation

cases are cases where the stockholder sought to examine merely the list of stockholders and in those cases our courts have been equally clear in placing the burden upon the corporation to show that the stockholder is attempting to exercise the statutory right for a purpose not connected with his interest as a stockholder or that his purpose is otherwise improper or unlawful.

Once the factual distinction in the cases is noted, there is no problem as to burden.

We might desire, however, at this time to consider whether or not there should be any distinction between a stockholder seeking books and records and a stockholder seeking a list of stockholders. I am inclined to the view that as a practical matter there should not be any distinction and that in both instances a stockholder should have the burden of demonstrating that he wants what he seeks for a proper purpose. If we take this view, we should do so with the clear recognition that we are changing the law in theory and placing upon a stockholder a burden which he has not had to shoulder heretofore when he seeks merely a list of stockholders.

As a practical matter I do not think that placing upon a stockholder any increased burden in theory when he seeks a list of

stockholders creates a problem since in the reported cases and in those instances with which I am familiar from my own practice, a stockholder who seeks a list of stockholders always states his purpose in seeking it which is generally his desire to communicate with his fellow stockholders concerning a matter having to do with the corporation. Thus, the stockholder assumes the burden anyway.

If we should decide to leave this area alone (i. e., do nothing with reference to "burden" but let the reported cases speak for themselves) I do not think that any harm results. If we do attempt to revise our statute (I have attached hereto a proposed draft of a statute), under no circumstances in my judgment should we adopt Professor Folk's recommendation that the corporation have the burden of establishing that the purpose for which inspection is sought is not a proper purpose where a stockholder seeks books and records. See Folk Report, page 174, sub-section d.

I think we make a serious error if we throw the burden of proof upon the corporation especially where books and records are sought. After all, the directors of a Delaware corporation have the responsibility of management and merely because a stockholder might say that his examination is for a specified, reasonable and proper purpose, his saying so does not make it so. It would seem

to me that the burden problem is not that serious a problem for us to codify in perhaps an inflexible fashion the requirement of inspection which may then have the effect of fettering the discretion of a court in determining whether or not in a particular factual setting, inspection should or should not be permitted. Accordingly, I would recommend that we not adopt proposed sub-sections c and d in the precise form recommended by Professor Folk.

I would require a demand for books and records as well as a list of stockholders to be made and I would require the demand to be under oath which may have the effect of reducing the number of demands for inspection.

With reference to Professor Folk's sub-section c (page 174), by requiring that the demand be under oath and that it include a statement of the purpose for which the inspection is sought, the essence of his recommendation is included within the suggested statute appended to this report. As to an affidavit re non-sale of a list of stockholders, etc.. if the corporation shows to the court's satisfaction that the purpose of the stockholder is to get a list for this purpose, the stockholder will not be successful and the matter will end; the key should be and is under our cases and would be under the appended suggested statute that a proper purpose exist.

What concerns me more in this particular area (i.e., right of inspection) is that there should exist a remedy which can be pressed by a stockholder and expeditiously resolved by a court after all interested parties have been heard or given the opportunity to be heard.

To that end I would recommend that the demand by the stockholder for books and records and/or a list of stockholders be spelled out as Professor Folk recommends (sub-section b, page 173), and that jurisdiction of the stockholder's action in the event the corporation refuses inspection be vested in the Court of Chancery. I would specifically delete the recommendation of Professor Folk concerning the burden of proof in his proposed sub-section d, page 174.

Since as I view it we would not have a duration of holding or percentage requirement, Professor Folk's sub-section f, page 174, is not necessary. Note that there is no sub-section e proposed by Professor Folk.

I have attached hereto a proposed statute concerning the right of inspection which incorporates what I think is viable of Professor Folk's recommendations and the ideas I have heretofore set forth.

In the statute I have suggested, you will note that I have proposed it as a replacement to present Section 220 which deals with the stock ledger, inspection and evidence. I would recommend that the first sentence of present Section 220 be changed slightly and added to present Section 219. I suggest the revision of the sentence be as follows: "The original or duplicate stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger or to vote in person or by proxy at any election of directors."

The second sentence of present Section 220 I suggest be eliminated since I believe the fact is that few Delaware corporations whose principal place of business is outside of Delaware comply with this statutory requirement. Since our courts would have the power to compel production in Delaware if it found that a stockholder was entitled to inspect the corporation's books and records, etc., I do not see that any useful purpose is served by retaining the requirement that a stock ledger by physically present in Delaware at all times.

§220. Stockholder's Right of Inspection.

(a) As used in this section, a stockholder shall mean (1) a stockholder of record; (2) an equitable owner of stock; (3) a legal or equitable owner of a voting trust certificate; (4) an attorney or other agent of any of the foregoing persons.

(b) Any such stockholder, in person or by attorney or other agent, shall, upon at least five days written demand under oath stating the purpose thereof, have the right during official business hours to examine for any specified, reasonable and proper purpose the corporation's books and records of account, minutes of meetings of stockholders, and record of stockholders, and to make copies or extracts therefrom. A proper purpose includes a purpose reasonably related to such person's interest as a stockholder. In the case of any equitable stockholder or equitable voting trust certificate holder or any attorney or other agent for such persons, there shall be set forth in the affidavit such facts as shall establish the status of such person as an equitable stockholder or voting trust certificate holder and shall be accompanied by such documents as would evidence the status. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand shall be accompanied by a power of attorney or such other writing which shall

authorize the attorney or other agent to so act on behalf of the stockholder as herein defined.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder pursuant to sub-section (b) hereof, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with jurisdiction to determine whether the person seeking inspection is entitled to the inspection sought, including whether or not the inspection is for a specified, reasonable and proper purpose. The court may prescribe any limitations or conditions or award other or further relief, which to the court may seem just and proper. The court may upon such terms and conditions as the court may prescribe order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in such place in this State and for such time and purposes as the order may prescribe. The Court of Chancery is empowered to promulgate such rules as will expedite the procedure in bringing before it the issues to be resolved in determining a stockholder's right of inspection as authorized by this statute.

April 19, 1965

MEMORANDUM TO: Members of the Corporation Law Revision Committee

FROM: S. Samuel Arsht

Re: Folk Report, pages 36 to 49
Subchapter II. Corporate Powers
(§§ 121 to 126 of the Corporation Law)

I. Folk Report, pages 36 and 37, deals with § 121 of the Corporation Law, which is as follows:

"§ 121. General powers

In addition to the powers enumerated in section 122 of this title, every corporation, its officers, directors and stockholders, shall possess and exercise all the powers and privileges contained in this chapter, and the powers expressly given in its charter or in its certificate under which it was incorporated, so far as the same are necessary or convenient to the attainment of the objects set forth in such charter or certificate of incorporation. Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter, so far as the same are appropriate to and not inconsistent with its charter or the act under which the corporation was formed. No corporation shall possess or exercise any other corporate powers, except such incidental powers as are necessary to the exercise of the power so given."

Folk generally approves § 121, points out three flaws or ambiguities, and suggests it be restated as follows:

"§ 121. General Powers

(a) In addition to the powers enumerated in Section 122 of this title, every corporation, its officers, directors, and stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law ~~and~~ by the certificate or incorporation, ~~and~~ together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the attainment of the objects or purposes set forth in its certificate of incorporation.

(b) Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter, unless otherwise provided by its certificate of incorporation to the extent permitted by this chapter."

I agree that Folk's restatement of § 121 is a desirable improvement and I recommend its approval.

II. Folk report, pages 38 to 43, deals with § 122 of the Corporation Law.

Pages 38 and 39 deal with the 10 specific powers

1/ It would be useful to collect together various terms for general definition in a section at the beginning of the chapter. For example, "certificate of incorporation" could be defined to include, both the original and an amended certificate, besides the ordinary certificate, or charter, or special legislative act conferring a charter or granting powers. From time to time, footnotes will refer to terms which could be given a general definition. See Model Act Section 2; N.Y.Bus.Corp.Law § 102.

now enumerated in § 122; pages 40 to 43 deal with 7 specific powers not now enumerated in § 122, but suggested by Folk as additions.

Folk generally approves § 122 but suggests minor modifications in clauses (2), (4), (6), (8), and (9). I see no objection to these modifications and recommend their approval.

Clause (10), Indemnification of Directors, is dealt with in another section of the Folk report.

The seven additional specific powers suggested by Folk at pages 40 to 43 of his report are as follows:

(a) Wartime or Emergency Business

(b) Contracts, Guaranties, Borrowing, etc.

(c) Investing Funds

(d) Power to be Incorporator or Promoter

(e) Power to be Partner

(f) Compensation

(g) Power to Insure Directors, Officers, Employees and Stockholders

While no one would seriously doubt the existing power of a Delaware corporation to do the things authorized by these seven provisions, they appear in the Model Act and in other corporation statutes, and their inclusion in

the Delaware statute may give it an appearance of modernity, liberality, or permissiveness that may add to its appeal. I see no objection to the suggested powers, but I cannot say they are necessary additions.

III. Folk report, pages 44 and 45, deals with § 123 of the Corporation Law, "Powers respecting securities of other corporations", which is as follows:

> "§ 123. Powers respecting securities of other corporations
>
> Any corporation organized under the laws of this State, whether created by this chapter, special act of the Legislature or general law, may guarantee, purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidence of indebtedness created by any other corporation of this State or any other state, country, nation or government, and while owner of such stock may exercise all the rights, powers and privileges of ownership including the right to vote thereon."

Folk suggests that § 123 be revised (expanded and clarified) as follows:

> "§ 123. Powers respecting securities not issued by the corporation
>
> Any corporation organized under the laws of this State, whether created by this chapter

> or by special act of the legislature or general law,[1] may guarantee,[2] purchase, take, receive, subscribe for or otherwise acquire; own, hold, use or otherwise employ; sell, lease, exchange, transfer, or otherwise dispose of; mortgage, lend, pledge or otherwise deal in and with, bonds and other obligations of, or shares or other securities or interest in, or issued by, any other domestic or foreign corporations, partnership, associations, or individuals, or by any government or agency or instrumentality thereof. A corporation while owner of any such securities may exercise all the rights, powers and privileges of ownership, including the right to vote thereon.[3]

I approve Folk's revision of § 123.

IV. Folk report, page 45A, suggests the following sentence be added at the end of § 102:

---

[1] The use of the term "corporation" or "domestic corporation," defined to include a Delaware corporation however created, would simplify this and other sections, by eliminating lengthy and repetitious language.

[2] If a specific power of guaranty is inserted in Section 122, as suggested on p. , it could be deleted from Section 123.

[3] N.Y.Bus.Corp.Law § 202(a)(6) states the power somewhat more generally: "To purchase . . . bonds and other obligations, shares or other securities or interests, issued by others, whether engaged in similar or different business, governmental, or other activities." N.Y.Bus.Corp.Law § 102(a)(1) defines "bonds" to include "secured and unsecured bonds, debentures, and notes."

"It shall not be necessary to set forth in the certificate of incorporation any of the powers enumerated in this Title."

I concur. This was suggested by a letter received from an out-of-state lawyer and is in the Model Act and N. Y. law.

V. Folk report, page 46, deals with § 124, Creditor & Stockholder Readjustments; § 125, Conferring Academic Degrees; and § 126, Banking Powers.

I concur in each of Folk's recommendations respecting these three sections.

VI. Folk report, pages 47 to 49, deals with the ultra vires doctrine. Folk suggests that a new section, to be designated § 127, be added to our statute. It is set forth on pages 47 to 49 of his report. I concur, but invite discussion.

S. Samuel Arsht

Copies

April 19, 1965

MEMORANDUM TO: Members of the Corporation Law Revision Committee

FROM: S. Samuel Arsht

Re: Folk Report, pages 8 and 9
(§ 105 of the Corporation Law)

§ 105 of the Corporation Law now provides:

"§ 105. Certificate of incorporation: evidence

A copy of a certificate of incorporation or a composite certificate of incorporation certified by the Secretary of State, accompanied by the certificate of the recorder of the county wherein the same is recorded under his hand and the seal of his office, stating that it has been recorded, the record of the same in the office of the recorder aforesaid, or a copy of the record duly certified by the recorder aforesaid, shall be evidence in all courts of law and equity in this State."

Prof. Folk suggests § 105 be revised as follows:

"Unless otherwise provided in this Chapter, all copies of instruments relating to a domestic or foreign corporation, which have been filed in the office of the Secretary of State as required by any provision of this Chapter shall, when certified by him, be received in all courts, public offices, and official bodies as prima facie evidence of

(a) due execution, acknowledgment, and filing of the instrument;

(b) observance and performance of all acts and conditions necessary to have been observed and performed; and of

(c) any other facts required or permitted by law to be stated in the instrument."

I suggest Folk's draft be revised as follows:

"§ 105. Certificate of incorporation and other certificates as evidence

A copy of a certificate of incorporation, or a composite certificate of incorporation, or of any other certificate which has been filed in the office of the Secretary of State as required by any provision of this ~~Chapter~~ title shall, when duly certified by the Secretary of State and accompanied by the certificate of the recorder of the county in which it has been recorded under his hand and the seal of his office stating the fact and record of its recording in his office, be received in all courts, public offices, and official bodies as prima facie evidence of

(a) due execution, acknowledgment, filing and recording of the instrument;

(b) observance and performance of all acts and conditions necessary to have been observed and performed precedent to the instrument becoming effective; and of

(c) any other facts required or permitted by law to be stated in the instrument.

Comments:

I agree generally with Prof. Folk's comments regarding § 105.

His introductory clause ("Unless otherwise provided in this Chapter") gives priority to his suggested revision of present § 106 (erroneously stated "105") discussed at pages 21 and 22 of his report by which due filing of the certificate of incorporation (without

recording) would be conclusive (not merely prima facie) evidence of performance of all conditions for incorporation. I am not sure whether our committee considered § 106 in the context in which it is here relevant, but if we did, I think we decided to retain recording as a condition precedent to commencement of corporate existence. If that was our decision, Prof. Folk's introductory clause should be deleted.

Prof. Folk's draft deletes § 105's present requirement of a recorder's certificate for an instrument to be admissible as evidence. He suggests such deletion even if recording is continued because, he says, the evidentiary effect of filed instruments should depend only on filing with the Secretary of State. However, I question this if the instrument is to be prima facie evidence of all that Folk's draft proposes (see his clause (b)).

S. Samuel Arsht

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE March 30, 1965

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Clair J. Killoran, Esq.
Irving Morris, Esq.
David H. Jackman
Alfred Jervis
Hon. Elisha C. Dukes
Mrs. Margaret S. Storey

This report supplements my report of September 16 dealing with Secs. 211-230, Meetings, Elections, etc., Folk report pp. 110-155. I seem to have overlooked the discussion under headings L to Q, pp. 145-152. My comments follow.

L. Inspectors or Judges of Election. Report, pp. 145-150. Folk points out that although several states require inspectors for all meetings, Delaware requires them only for charter amendments (Sec. 242 d) and for dissolution (Sec. 275). A statute making an inspection report prima facie evidence he thinks undesirable, and recommends against it. I agree.

He suggests that the provisions for judges in the two sections referred to be eliminated. I doubt the importance of this.

M. Voting Rights of Bondholders. Sec. 221. Report pp. 149-150. Folk recommends no change except to insert after the word "debentures" in the fifth line of the section the phrase "or other obligations". This seems desirable. If made, the same insert should be made in the eleventh line after the word "debentures", and the phrase "such bondholders or debenture holders" in the twelfth and thirteenth lines should read: "such holders of bonds, debentures, or other obligations".

N. Review of Elections. Secs. 225 and 227. Report, pp. 150-151. Folk recommends no change, and I agree.

A provision that the corporation or a director might file the petition raises procedural and other questions. I do not think it desirable.

O. Court-ordered Election to Fill Vacancies. Sec. 223, Report, p. 151.

No change suggested.

P. Stockholder Action without meeting. Sec. 228, Report, p. 151. The only change recommended is to broaden the language of the second sentence to include all other instances of majority written consent in addition to that in Sec. 271 (sale of assets).

Are there any other instances?

Also, may the certificate provide for written consent in lieu of a meeting if the statute requires a meeting? Presumably the suggested amendment was not intended to do this, since the language is - "not inconsistent with this chapter [title?]".

Is there any need for the amendment?

Q. Comment unnecessary.

C.A.S.

Discussed at meeting 7
4/20/65-ac

February 18, 1965

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Mr. David H. Jackman
Mr. Alfred Jervis
Clair J. Killoran, Esquire
Irving Morris, Esquire
Mrs. Margaret S. Storey

My comments on Professor Folk's report relating to charter amendment procedure are attached.

Henry M. Canby

mk

Amendment Procedure
Pages 175-182 of the Report

1. Assuming we adopt the uniform execution-acknowledgment-filing procedure, I approve the proposed change in Section 241 appearing on page 175 of the Report. This is simply a matter of form.

2. Professor Folk suggests (at page 175) that we may be interested in adopting the procedure of some of the newer laws and elaborate the listing of the types of certificate amendments. I see no point in this. I note that the New York statute is cluttered up with fourteen different categories of which seven merely refer to the power to amend the charter so as to change the various rights, par values, numbers, etc. of outstanding shares. I think our statute is preferable.

NO

3. Professor Folk recommends, at page 176, that if we adopt the recommended provision on notice of meetings and record date, a cross reference to these provisions be made in Section 242(d)(1). I agree with this, provided we adopt the notice of meeting and record date provisions, a subject which we have not yet considered. The same situation exists to the recommendation on page 176 in paragraph 2(c). If we do adopt the general provision on required vote, then a cross reference should be made as indicated. Otherwise, it is not necessary to do anything.

notice of meetings and record date, 7/11 pp 1/15 to 12/1 Days not yet adopted

Have not yet adopted

DO NOT

4. I recommend the adoption of the class vote provision appearing at page 177 of the Folk Report. approved

In addition, I recommend a further change in the provisions of Section 242(d)(1). The language of the 9th sentence in that Section refers to "preferences, special rights or powers given to any one or more classes of stock" and then provides that any amendment which would affect "such" class adversely or would increase the authorized stock of "such" class shall be entitled to be submitted to the class for approval. The question has arisen as to whether this applies to an increase in the amount of common stock. Since the phrase "such class or classes of stock" appears to refer back to those classes with preferences, etc., and thus excludes the common, it would seem that the answer would be no, but I am aware of one occasion in which corporations have felt it wise to have a class vote of the common when the common is to be increased. This will not be a problem in many cases, but it has occurred. The following language is recommended in substitution of the present language of sentence 9:

approved

> "If any proposed amendment would alter or change the preferences, special rights or powers given to any one or more classes of stock by the certificate of incorporation . . . or would increase or decrease the number of authorized shares of any class or classes of stock having such preferences, special rights or powers, or would increase or decrease the par value thereof, ..."

~~amend if~~ ~~authorized~~ change Sec D

Approved

Caby keeps Folk asks if class protects Class A common and B Common who each elect 4 of Directors - Yes

5. The suggestion contained in paragraph (e) on page 177 is recommended if the uniform execution, etc. provisions are adopted.

6. The recommendation in paragraph (3) on page 178 that the effective date of an amendment may be set is recommended as providing additional flexibility of the type which we have already provided in the case of merger. The other suggestion as to effective date of amendment, that it become effective on filing and not on recording, brings up again the whole subject of whether or not we can do away with recording. I believe the present answer is in the negative.

7. Professor Folk's proposal as to a Restated Certificate of Incorporation, which appears on pages 179 and 180, appears to fill one void in the present statute (Section 104) in that it will supersede the original certificate as amended, thus doing away with a problem which presently exists since other states will not accept a restated certificate in lieu of the original certificate and the amendments. However, the power of an individual to procure a restated certificate from the Secretary of State, presently contained in Section 104, should not be done away with. In many cases, a stockholder or other interested individual may wish a composite charter, although the corporation may never have restated the certificate. Accordingly,

I recommend that the first two sentences of Section 104 be retained as Section (e) of the proposed new statute, as follows:

Approved

> "(e) The Secretary of State shall prepare and furnish upon request therefor a certified composite certificate of incorporation which shall contain only such provisions as are in effect at the time of certification by reason of the certificates and agreements referred to in subsection (c) of section 102 of this title. The Secretary of State shall make in each case such reasonable charge therefor as he deems proper."

November 23, 1964

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Daniel L. Herrmann, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey

My comments on Professor Folk's report relating to incorporation procedure in general are attached.

Henry M. Canby

Incorporation Procedure in General
Pages 11-21 of the Report

Most of the suggestions made by Professor Folk are directed toward simplification of incorporation and as such seem to me to fall within the purpose of our Committee, that is, to seek out and rectify or eliminate those procedures which are unduly complex or which are simply unnecessary.

The first change suggested by Professor Folk is to eliminate the requirement that there must be three incorporators. This suggestion has already been adopted in a number of other states, appears to me eminently practical, and, in my opinion, should be adopted. The other change suggested in Section 101 involves a more exact definition of the term "person" so as to make it plain that a corporation may be the incorporator. I believe the proposed new language as set forth on page 13 should be used in toto.

Professor Folk suggests the retention of the language of Section 102(a)(1), with the exception of an addition to protect the names of foreign corporations doing business in Delaware as well as names reserved. It is my understanding that the Secretary of State will, at the present time, make a thirty-day reservation. This matter is handled at page 23 of the Report. An exception in the statute for reserved names and for names of qualified foreign corporations appears

to be a reasonable and desirable change in the existing law. Mention is made of the possibility of extending the statutory protection to prevent a corporation from using terminology falsely suggesting that it is engaged in certain lines of business. I do not favor such a change since I believe it would create numerous semantic problems and I also believe that the present law does not create any hardship.

The suggested change in sub-section (a)(2) is dependent upon the adoption of the uniform provisions for execution and acknowledgment and filing of instruments. If this section is not adopted, I would advise that (2) remain unchanged.

No change is recommended in (a)(3).

The report recommends the elimination of the $1,000.00 minimum capital provision from Section 102(a)(4). I have always considered this provision useless and agree with Professor Folk that since it serves no purpose it should be eliminated.

The elimination of (a)(5) is recommended, contingent upon the adoption of the uniform execution provision. If the execution provision is favored, I agree with Professor Folk. If not, (a)(5) should remain as is.

The change suggested in (a)(6) is minor, but in the interest of not making changes merely for the purpose of switching words

around, I recommend that the wording of this section remain as is.

Professor Folk recommends the removal from the Corporation Law of (a)(7), the provision negating shareholder liability on the ground that it serves no purpose. Although it may serve no purpose legally, I believe it should be retained for whatever satisfaction it may give the less sophisticated practitioner.

The changes suggested by Professor Folk in the various sub-sections of Section (b) are minor and, in the interest of retaining rather than revamping unless some purpose is served, I suggest that sub-sections (1), (2), and (3) remain as they are at the present time.

Professor Folk suggests that (b)(4) be amended to clarify the necessity of providing in the charter that other than a majority vote is required for director action under certain circumstances. This would appear to be a desirable change.

November 13, 1964

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE

The Honorable Clarence A. Southerland
S. Samuel Arsht, Esquire
Henry M. Canby, Esquire
The Honorable Elisha C. Dukes
Daniel L. Herrmann, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esquire
Mrs. Margaret S. Storey

My comments on Professor Folk's report insofar as it relates to indemnification of directors and officers are attached.

R. F. Corroon

Indemnification of Officers and Directors
Pages 76 through 96 of the Report

I heartily agree with Professor Folk and Chancellor Seitz that Section 122(10) needs clarification, and, for the most part, I agree with the comments and suggestions in Professor Folk's report. Since I am not entirely satisfied with Professor Folk's draft of an indemnification statute, however, I have redrafted it and a copy of the redraft is attached. My comments on the redraft will point up the differences between Professor Folk and me:

1. In subparagraph (a) of his draft, Professor Folk provides that it shall apply to any person "who is threatened to be made a party" to any action, etc. If this is a worthwhile provision, I see no reason why it should not also be made applicable to persons who are threatened to be made parties in derivative suits and I have so provided in subparagraph (b) of my draft. See Mooney v. Willys-Overland Motors, Inc., 106 F. Supp. 253. Nevertheless, a question is raised as to whether a person who is, in effect, standing at the sidelines should receive the same rights of indemnification as one who is actually in court.

2. In his subparagraph (a), Professor Folk provides that in all cases the person shall have been acting in good faith for a purpose which he reasonably believed to be in the best interests of the corporation, but he does not explain who shall make such determination. I have attempted to take care of this in my redraft.

3. Also in his subparagraph (a), Professor Folk apparently would provide that even where a person has not paid any judgments, fines or amounts in settlement but has incurred legal expenses, he still must have acted in good faith for a purpose which he believed to be in the best interests of the corporation. I am not sure whether his subparagraph (c) is to the contrary, but, in any event, I believe that in such case there is no need for a showing of good faith and I have attempted so to provide in my redraft.

4. Subparagraph (b)(2) of Professor Folk's draft and his discussion of the problem covered thereby raise difficult questions. However, subparagraph (b)(2), as drawn, is stricter than the present statute, at least as it has been consistently interpreted by competent lawyers in practice. Accordingly, I recommend that subparagraph (b)(2) be deleted. The necessity

? If chr approves pattern he is able to approve fee

of obtaining court approval of settlement of derivative actions should afford sufficient protection. In the Chrysler suit, Chancellor Seitz required the corporation to state for the record at the hearing the amount of counsel fees incurred on behalf of the individual directors which would be paid by Chrysler under its indemnification by-law. To my knowledge, this is the only case in which this happened, but perhaps the practice should be adopted regularly.

5. I do not favor Professor Folk's subparagraph (d). Except to the extent provided by subparagraph (c), I believe the right to indemnification should be left to the directors and shareholders.

6. My draft does not contain a separate subparagraph such as (e) of Professor Folk's draft, but instead I have attempted to incorporate the substance of that subparagraph in subparagraphs (a) and (b) of my draft.

(a) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he, his testator or intestate is or was a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, officer or employee of another corporation, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding, provided that there shall be no indemnification for judgments, fines and amounts paid in settlement or expenses, including legal fees, incurred in connection therewith, unless a majority of the disinterested directors of the corporation or, in the absence of any disinterested directors, independent legal counsel selected by the corporation shall determine that the director, officer or employee acted in good faith for a purpose which he reasonably believed to be in the best interests of the corporation. The termination of any criminal, civil or administrative action by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the director or

officer did not act in good faith for a purpose which he reasonably believed to be in the best interests of the corporation.

(b) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, officer or employee of another corporation, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, except that no indemnification shall be made ~~in any case in relation to~~ any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of duty to the corporation, unless and only to the extent that the Court of Chancery shall determine in the pending suit or upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the Court of Chancery shall deem proper.

(c) A director, officer or employee who has been wholly successful on the merits or otherwise in defense of any action, suit or proceeding or in defense of any claim, issue or matter therein shall be entitled to indemnification, as provided by subsections (a) and (b) of this section.

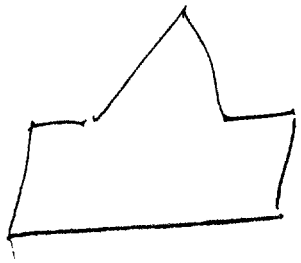
MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE November 4, 1964

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Hon. Elisha C. Dukes
Daniel L. Herrmann, Esq.
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey

I refer to the latest installment of Professor Folk's suggestions on the corporation law.

I have drafted a series of comments on the topics covered by him and enclose a copy herewith.

C.A.S.



Subchapter VI - Secs. 181-202.
Transfer of Stock

No change recommended.

Note is made of the effect of the Uniform Commercial Code, if adopted; and the possible need for more amendments to the corporation law. It seems to me premature to discuss this now.

Subchapter XIII - Secs. 321-332.
Suits vs. Corporations, Stockholders, Directors, etc.

No change recommended.

Subchapter XIV - Secs. 341-353
Foreign Corporations

6 changes considered (not necessarily recommended).

1. Limitation of power to avoid favoring foreign over domestic corporations. P. 281 I question the need for this. I have never heard any complaints of this sort against foreign corporations.

2. Statement of purpose of Delaware business. Same comment. P. 281.

3. Exemptions from qualifications. Pp. 282-283. This suggestion concerns a statute spelling out the things that a foreign corporation may do without "doing business" in the State.

   This is frequently a close and vexing question. I seriously doubt the wisdom of such a statute. Surely no statute is needed for the four exemptions under (a). As for (b), it attempts to lay down a rule of thumb which might be undesirable in special cases.

   Pp. 282-3(c), as Professor Folk indicates, is also unnecessary.

4. Injunction against unqualified corporation. Pp.283-4. This might be useful in some cases. I see no

objection to it.

5. Barring suit by unqualified corporation. P. 284 I am under the impression that this is now the law; but perhaps a statute would be helpful.

P. 285 - (5) Statute defining foreign corporation. This would make it clear that "foreign" includes "alien", i.e., a corporation of a foreign country. This is probably desirable. The suggested definition (p. 285) is very simple.

6. Procedure for reinstatement of foreign corporation. Pp. 285-6. A statute spelling out procedure is suggested. This seems to be desirable, except that I do not see the purpose of limiting the time of the application to one year from the date of the termination notice.

Bearer Shares. New. Pp. 282-293.

I think this is undesirable. I am under the impression that the prevalence of these shares in Europe reflects the desire of the holders to evade income taxes. They can probably be issued now through the mechanics adopted by the Franco Wyoming Co., a Delaware corporation. See Aldredge vs. Franco Wyoming, 24 Del. Ch. 126, 145-151.

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE October 1, 1964

The Honorable C. A. Southerland, Chairman
S. Samuel Arsht, Esquire
Henry M. Canby, Esquire
Richard F. Corroon, Esquire
The Honorable Elisha C. Dukes
Daniel L. Herrmann, Esquire
Mr. David H. Jackman
Mr. Alfred Jervis
Mrs. Margaret S. Storey

I am enclosing herewith my comments on Professor Folk's material concerning Shareholder Derivative Suits which appears at pages 97 through 109 of his draft.

Preliminarily, I set forth some personal views which should be made known to the other members of the Committee in order to put my comments in proper perspective:

1. As an overall policy concerning all recommendations which may be made as a result of this survey, I believe that we should not make any changes in our corporate law unless each change satisfies two objectives which I believe are implicit in our assignment: (a) the change will be helpful in solidifying Delaware's position as a "good" State in which to incorporate, thus promoting Delaware's reputation as the first State to be considered by those who contemplate forming a corporation;

(b) the change will not adversely affect the reputation which our State now justifiably enjoys in having a body of corporate law enacted by the General Assembly and interpreted by our Courts which is sound and which has enabled Delaware corporations and their advisors to act in corporate matters with a substantial degree of certainty as to our law. Thus, I would reject suggestions for statutory changes which would merely attempt to codify decisions of our Courts since such changes, although they may well have the advantage of "neatness", would not necessarily meet either of the objectives which I have stated; at the same time, such codifications might not only work mischief and necessitate litigation to clarify the codifications, but as a practical matter, as Chief Justice Southerland has pointed out, might arouse criticism and irritation needlessly.

2. With reference to the subject matter of Shareholder Derivative Suits, as many of the members of the Committee are aware, I have represented and do presently represent many stockholders who have initiated such litigation. In short, I have an "interest", so to speak, in the maintenance of our present law in this field. Having disclosed that which probably was not in need of disclosure, I hasten to add that I am thoroughly and entirely convinced quite apart from my "interest"

that the stockholder's derivative action is the only practical, efficacious tool which has been developed in our system to curb excesses in corporate management. The legislation enacted by the Congress in the field of securities regulation (including the 1964 amendments) does not lend itself readily to the recovery of damages which may have been sustained by Delaware corporations and their stockholders as a result of wrongdoing by those in a fiduciary capacity. Derivative litigation, including settlements, has had a beneficial effect in redressing corporate wrongs; moreover, the existence of a practical method to bring alleged wrongdoers to account serves to keep somewhat in check those who would otherwise be unmindful of their fiduciary responsibilities. Finally, I suggest that absent the mechanism of derivative litigation, there would quickly arise a demand for governmental regulation (most probably at the Federal level) which would, in my judgment, be far less welcome to corporations and their management.

I proceed now to the specifics of Professor Folk's suggestions.

1. Professor Folk believes that stockholder suits are desirable and should not be discouraged. Report, p. 97.

In his judgment the existing Delaware controls are adequate to bar abuse of derivative actions. Report, p. 97. I concur in both of these views.

2. Professor Folk suggests that the rule announced in Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A. 2d 106 (an equitable stockholder may bring a derivative action provided, of course, he was a stockholder at the time of the wrongful act of which he complains as required by Section 327) be codified. Report, p. 98. Since the case law is as clear as it is, I do not see the need of the suggested codification.

3. Professor Folk suggests that in the codification of the Rosenthal v. Burry Biscuit Corp. rule there should also be added a provision which would clarify the right of a holder of a voting trust certificate to sue derivatively. Report, pp. 98-99. Although the precise issue has not been resolved, it is my opinion that based upon the Rosenthal case and the others which have followed it (cited by Professor Folk at page 98 of his Report), our Courts would give recognition to the right of a holder of a voting trust certificate to sue since he is the beneficiary of the trust and has that kind of interest and standing which our Courts would protect. I do not think it necessary to adopt this particular suggestion.

4. Professor Folk also suggests that the "continuing wrong" theory be codified. Report, p. 99. Again, I see no need to enact by legislation what is sufficiently clear by judicial decision. I agree

5. Professor Folk suggests that our present Chancery Rule 23(b) is sound and should not be changed. I agree.

6. With reference to the demand upon shareholders, Professor Folk believes that the interpretation by our Supreme Court in Mayer v. Adams, 37 Del. Ch. 298, 141 A. 2d 458, is adequate and does not recommend any statutory change. Report, p. 99. I agree. I add that on April 27, 1961 by order of Chancellor Seitz our Rule 23(b) was amended to delete from the language of the Rule any necessity by a stockholder to allege a demand upon the other shareholders.

7. Professor Folk regards Chancery Rule 23(c) and its requirement of Court approval before a class action may be dismissed or compromised as "the most effective and fairest method of discouraging groundless suits and barring secret settlements." Report, p. 100. Since he believes that Rule 23(c) is sufficient protection, it is his judgment that a supplemental provision such as a security-for-expense statute

is not needed. Report, p. 100. He does not recommend any change with reference to Rule 23. I agree entirely with his views.

8. Professor Folk comments that in some jurisdictions it is provided by statute that a successful plaintiff's expenses, including attorneys' fees, may be awarded by the Court "out of the proceeds of the action". Since such a statute, as Professor Folk points out (Report, p. 100), is declaratory of our present Chancery practice, there is no need for any codification.

9. Although Professor Folk does not recommend any changes in the present Delaware law on derivative actions (Report, p. 101), he reviews in some detail security-for-expense statutes in other jurisdictions and comments upon the theory and policy considerations behind such statutes. Report, pp. 101-108. Since I am in agreement with Professor Folk's views expressed under the heading "Policy Considerations" at pages 103-107 of the Report, I do not add any additional comments concerning such statutes.

Respectfully submitted,

IM:EB

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION LAW
REVISION COMMITEE September 16, 1964

I enclose a series of brief comments on the suggestions contained in pp. 110-155 of the Folk report.

Although many of these suggestions appear sound and logical, I think that we should be wary in approving (1) changes that merely codify decisional law and hence are not really required, and (2) changes that require rearrangement of the sections of the law, such as the transfer of part of the language of one section to another section.

I say this because I am fearful that this approach to a revision of the law will result in a statute which may arouse criticism. Its language and arrangement would be quite unfamiliar to one who has "lived with" the existing statute, and might cause irritation.

For example, we have received at least two criticisms from law firms of the 60-day provision in Section 222 for change of place of annual meeting. Folk would delete it. Why not simply reduce the period of time?

- -

We should, I suppose, have another meeting as soon as possible, but not until some, if not all, of our "home work" has been done. May I suggest that as each member's report is completed, a copy be sent to each of the other members? I can then determine when we shall have enough material for a productive meeting.

C.A.S.

Subchapter VII - Secs. 211-230
Meetings, Elections, Voting & Notice
Report - Pp. 110-155

§211 Place of Meetings - Report pp. 111, 113-114

Suggested amendment - may hold meetings at place designated "by or in the manner provided in the by-laws" p. 113

Suggests transfer to §141(b)

Comment: The amendment would permit the directors to fix place by resolution. Mr. Corroon tells me that some companies already do that. This is probably desirable. As for transfer to §141(b), I see no necessity for it. Also, such unnecessary changes are apt to be annoying to one familiar with the statute.

§212 Proxies - Report pp. 123-126

Suggested amendments:

(1) Proxy may be used to express consent or dissent without a meeting. See N.Y. statute p. 124. This seems desirable. Our section would have to be redrawn.

(2) Definition of a proxy as including telegram "appearing to have been transmitted" etc. p. 124. Qu.: In light of Standard Power case, is this necessary?

(3) Revocation - notice required to corporation. Draft statute pp. 125-126. This seems proper and desirable.

(4) Miscellaneous provision - Conn. statute p. 126. I see no necessity for this.

§213 Record date - Closing transfer books. Pp. 119-121

§212 Dead Stock (last clause)

Suggested amendments:

(1) Deletion of provision for closing transfer books.

(2) Deletion of dead stock provision.

(3) Changes in language.

See draft pp. 120-121.

I question the desirability of eliminating the book-closing provision simply because it is seldom used.

I also question the elimination of the "dead-stock" provision. Might it not be useful to small corporations who do not fix a record date?

§214 Cumulative Voting. Pp. 134-135

Suggested amendment:

Addition of provision requiring notice of intention to exercise right. See draft pp. 134-135.

This is a novel idea to me, and I am not sure I understand it. Would the notifying stockholder be required to announce how he intends to cumulate his vote?

It is seldom, in my opinion, that Cumulative Voting accomplishes any good. I am doubtful about the suggested amendment.

§215 Voting in non-stock corporations.

§216 Certificate of Incorporation or by-laws may specify number of shares for quorum, or number of members in non-stock corporation.

Suggested amendment:

(1) Unimportant re-wording.

(2) Transfer to §215 the phrase in §216 respecting quorum in non-stock corporations.

These suggestions appear good.

§217 Voting rights of fiduciaries, pledgees, etc. Pp. 136-145.

§160 Corporation voting its own stock.

A series of amendments are suggested:

(1) An addition to the "fiduciary" clause, adding a clause - "without registering transfer" etc. See p. 137. This seems to me wholly unnecessary.

(2) A sentence defining Voting Rights of Parties in partnerships. See draft at p. 138.

The first clause of the sentence is unnecessary; the second, relating to limited partnerships, might in theory be useful. I am very doubtful, however, of inserting this sentence because it may suggest the necessity for proving authority. As it is, brokers' proxies if regular on their face, are accepted without question, as they should be.

(3) The model act provision for voting by corporations. Pp. 139-140. I doubt if this is necessary; and I have the same objection.

(4) Transfer to §217 the prohibition against corporation voting its own shares, make it specific to include shares of a 51% subsidiary, include the quorum rule in Atterbury, and relax prohibition to permit corporation to vote its own shares if it is acting in fiduciary capacity. See drafts on pp. 139-140 and on p. 140.

I see no real objection to printing these suggestions, although the only one really helpful is the subsidiary clause. But I have misgivings about the last one. In case of a fight for control, the inevitable support of the "ins" seems inconsistent with the performance of the fiduciary duty. In other cases, the permission to vote is probably desirable.

Query: A limited relaxation, attempting to exclude conflict of interest? Would it be feasible?

(5) Disfranchisement of shares called for redemption with irrevocable deposit of price. See draft p.141.

I was under the impression that this was in the law; but evidently it is probably only a customary charter provision. The suggestion is probably a good one. Certainly such stock should not vote.

(6) Multiple interests and tenancies. Pp. 141-145. Suggested amendment (draft p. 144, from Connecticut) is to fix definite rule designed to permit liberal counting of shares and avoid disfranchisement.

This suggestion impresses me as good. The voting of shares held in joint or common tenancy, or entirety, or by executors or trustees, have given rise to troublesome questions. See cases cited on pp. 142-143.

§222 Annual Meeting, failure to hold, requirements for notice, etc. Report pp. 111-113

Sections

Suggested Changes:

(1) New provision - legal requirement for annual meeting. See draft p. 114.

It seems odd that our statute has never included a specific command for the holding of an annual meeting for the election of directors. Of course, it is implied. I see no objection to prefixing to the suggestion.

(2) Amendment to §224 adding to the second sentence a clause providing that failure to elect directors shall not affect the validity of otherwise valid acts. See draft p. 114. I see no objection to this.

(3) New section governing special meetings, providing that they be called by the board or as authorized by the by-laws.

I really see no purpose in this. Of course, it only codifies Delaware decisional law.

(4) Amendment deleting the 60-day provision, in §222, allowing the whole matter to be governed by a statute governing notice. See p. 112.

New section providing for (a) notice of all meetings, and (b) a statement of the purpose of special meetings. See discussion pp. 115-119, and draft pp. 118-119.

(a) As I understand the law, notice of the annual meeting is not required; or, at least, notice of business to be transacted is not required. However, this would add an additional requirement, but it would not, I suppose, change the practice. I should think it a proper change.

(b) As for stating the purpose of special meetings, this would merely codify the law.

§224 Court-ordered Annual Meeting.

The language of §224 has been expanded and the suggestions above considered have been incorporated. See draft p. 113-115, and par(c).

I question the desirability of the rearrangement, because I see no need to spell out the Chancellor's plenary jurisdiction, as is suggested.

RULES AND FORMULAE FOR CUMULATIVE VOTING

FIRST RULE.-- To ascertain how many votes a stockholder may cumulate on a particular number of directors, multiply the whole number of directors by the number of shares held and divide by the number to be cumulated on.

This may be put in a simple algebraic formula as follows:

FIRST FORMULA.-- Let d represent the whole number of directors; h, the number of shares held; n, the number of directors upon whom it is desired to cumulate votes; and x, the number of votes which may be cumulated on n.

$$\text{Then } x = \frac{dh}{n}$$

For example, there are 5 directors to be elected, a person holds 200 shares, and he desires to cumulate his votes on 2 directors

$$x = \frac{5 \times 200}{2} = 500$$

SECOND RULE.-- To determine the minimum number of shares a person must hold or control to elect a certain number of directors, multiply the whole number of shares by the number of directors it is desired to elect and divide by the whole number of directors plus one.

The following formula may be used:

SECOND FORMULA.-- Let s represent the whole number of shares entitled to vote at the election; d, the whole number of directors to be elected; n, the number of directors it is desired to elect; and x, the number of shares required to elect n.

$$\text{Then } x = \frac{sn}{d \neq 1}$$

For example, there are 1000 shares outstanding; five directors to be elected; it is desired to know how many shares are needed to elect two directors.

$$x = \frac{1000 \times 2}{5 \neq 1} = \frac{2000}{6} = 333\ 2/3$$

But as a fraction of a share cannot be voted, the number required is 334.

THIRD RULE.--To determine how many directors a stockholder or group of stockholders holding a certain number of shares may elect, multiply the whole number of directors plus one by the number of shares held and divide by the whole number of shares.

The following formula may be used:

THIRD FORMULA.-- Let s represent the whole number of shares entitled to vote; d, the whole number of directors to be elected; h, the number of shares held; and x, the maximum number of directors h may elect.

$$\text{Then } x = \frac{h\,(d \neq 1)}{s}$$

For example, in the case supposed, it is desired to know how many directors a stockholder or combination of stockholders holding 400 shares may surely elect.

$$x = \frac{5 \neq 1}{1000} \times 400 = \frac{2400}{1000} = 2$$

and applying the second rule and formula, it being found that only 334 shares are needed to elect 2 directors, the 66 additional shares held may be cumulated on one or more other candidates.

There are many opportunities for surprise where cumulative voting is allowed, and, unless careful, the holders of a majority of the stock may lose control of the company. Thus in the case supposed, if the holders of 600 shares should cast a straight vote for five directors and the holders of the other 400 shares should cumulate their votes on three candidates, they would be successful, as they could cast 666 votes for each man on their ticket as against the 600 votes received by each of the majority candidates.

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE July 29, 1964

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Hon. Elisha C. Dukes
Daniel L. Herrmann, Esq.
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey

Sec. 142 - Officers

Subsection (a) No. of Officers, Selection, etc. P. 66

No suggestions.

(b) Multiple Office Holding P. 66

Simplified provision suggested.
I see no objection.

(c) (d) No suggestions P. 66

(e) Vacancies in Office P. 66

It is suggested that a vacancy in office be filled by stockholders if they elected the office. This would mean either no filling until annual meeting, or a special meeting. I seriously doubt the wisdom of this. If this is desirable in some cases the by-laws can take care of it.

New Provisions Transaction with Interested Directors Pp. 67-75

I think there is merit in some of these suggestions. However, I should prefer the burden of proof to remain upon the director. Moreover, I fear that (1) and (2) are too broad. Note that

Perhaps OK

Note - No present Statute

(1), (2) and (3) are in the alternative. Hence an unfair transaction would be valid if either (1) or (2) were complied with.

Perhaps my criticism is carping, but why would it not be satisfactory to take paragraph (a) on p. 68 (lst 9 lines) and add (3) and (b)? This would, I think, merely codify the law as it is now, except for the quorum provision.

C.A.S.

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE July 29, 1964

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Hon. Elisha C. Dukes
Daniel L. Herrmann, Esq.
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey

I have set out below a few comments on the first part of the latest section of the Folk report. This memorandum deals only with Section 141, Directors. I have identified each topic by the letter of the subsection, subject matter and the pages of the Folk report.

Subsection (a) Management Page 52

No change is recommended. The subsection seems all right.

Subsection (b)
1st sentence Number of Directors Pp. 52-53

Folk approves of the provision but suggests an addition permitting the corporation, if it desires, to anchor the number in the certificate itself. Since this is in the interest of flexibility it seems all right. The suggested language is on page 52.

Folk also suggests that no decrease in the number of directors shall deprive anyone of office. I see no objection to this and it might be desirable in the interest of avoiding litigation.

Folk also suggests a provision relating to the maximum and minimum number of directors. I am not sure that I see any need for this.

Subsection (b)
2nd Sentence Qualifications P. 53

Folk suggests that the statute codify the general understanding that the by-laws or certificate may fix directors' qualifications. I do not think there is any doubt about this and I query whether the amendment is needed. In this instance, as in several others, I think we should be wary in attempting to take provisions from the model act or the New York act. As Mr. Jackman suggested, we do not want publicity to the effect that Delaware has adopted the model act. As a matter of psychology the emphasis should be on the Delaware act.

Subsection (b)
3rd sentence Term of Office P. 54

I question whether any cross reference is needed to Section 222 dealing with resignations. If resignations, why not death or removal? The more detailed we get on a subject like this the greater the chance to argue that something that is not specifically mentioned is implicitly excluded.

Subsection (b)
3rd sentence Quorum Pp. 61-62

I am in favor of adopting the changed language set forth on page 62, as in the interest of clarity.

Subsection (c) Committees P. 65

Folk suggests an addition authorizing the board to appoint alternate committee members. I see no objection to this nor do I see any objection to striking out the last sentence with respect to names of committees.

Subsection (d) Classes of Directors Pp. 54-55

I agree with Professor Folk's recommendation not to follow the model act. I doubt the wisdom of attempting to combine this subsection with part of Section 223.

As to the suggestion about the equality in numbers. I had always

supposed that equal numbers were implicit in the statute, because of the use of the verb "divided"; but I realize that this may not be so. The idea is a new one to me and I do not have any definite opinion about it.

Subsections (e), (f) and (g) P. 61. See Folk's need

These subsections deal with corporations without capital stock, director's reliance on books; and action taken by written consent of all board members.

No changes recommended.

Section 223 Vacancies Pp. 55-56

Folk suggests two changes, neither of which seems objectionable and may be in the interest of clarity. I question the need for any further amendments to Section 223.

New Provisions Recommended

1. Removal of Directors Pp. 56-59

The suggested amendment seems to me to be somewhat complicated. Chancellor Seitz' opinion in the Loew case seems to settle the general principle. It may, of course, be desirable to attempt to provide for different cases involving class elections, etc. but again there is danger of getting into too much detail.

How about a provision permitting the stockholders to remove directors for cause in the manner to be specified in the certificate of incorporation?

2. Classification Other Than Staggering Pp. 59-60

There may be some real need for the amendment suggested on page 60, but I am not sufficiently familiar with the subject to have a definite opinion about it. It does seem that if there is a vacancy in a class of directors who represent a particular class of stockholders the vacancy should be filled by such directors or stockholders.

3. Super-statutory Vote for Directors Pp. 62-63; 20-21

I see no objection to the amendment suggested on page 63.

4. Notice of Director's Meetings Pp. 63-64

This is a sort of detail that I fear might cause difficulty. There may be a point to the fact that a director who attends a meeting waives notice unless he protests, but it at once opens the door to arguments about the nature and form of the protest and whether any real protest was made.

Is there any real need for an attempt to deal with these questions specifically? I have in mind the general attitude of the Courts toward corporate meetings, that is, if they are conducted fairly and the directors are given a reasonable notice of special meetings technical errors should not be allowed to defeat them.

I have not had an opportunity to deal with the remaining part of the report dealing with Officers.

I take this occasion to remind you all of a meeting now scheduled for August 3 at 10:30 a. m.

C. A. S.

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE July 20, 1964

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Hon. Elisha C. Dukes
Daniel L. Herrmann, Esq.
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey

I have reviewed pages 10-11 of the Folk draft dealing with §101, "Corporate Purposes".

I agree with the conclusion in the first paragraph.

I see no objection to repeating in the section the list of excluded corporations.

In looking at the language of §101 (his subsection (a)), it seems to me that it is inept. One does not "conduct" an "object" or "purpose".

I suggest the following:

(a) A corporation may be created under this Chapter to transact or conduct any lawful business, or to promote any legitimate objects or purposes.

Subsection (b) seems all right, except that the comma after the word "State" in the fourth line (although appearing in the Constitution) should be deleted; and the word "with" in the sixth line should be "within".

C. A. S.

MEMORANDUM TO MEMBERS OF THE DELAWARE CORPORATION
LAW REVISION COMMITTEE July 17, 1964

S. Samuel Arsht, Esq.
Henry M. Canby, Esq.
Richard F. Corroon, Esq.
Hon. Elisha C. Dukes
Daniel L. Herrmann, Esq.
Mr. David H. Jackman
Mr. Alfred Jervis
Irving Morris, Esq.
Mrs. Margaret S. Storey

I have made an attempt at rewriting the proposed new section of the Corporation Law suggested on pages 3 and 4 of the Folk report under the heading of "Execution of Instruments". A copy is herewith.

I have the following comments to make:

1. The general idea of a uniform provision of this kind seems good.

2. According to the reporter's note on page 5 the proposed section deals with instruments required to be filed with the Secretary of State. Professor Folk's draft refers to subsequent provisions of the law which will in turn refer back to this new section. It would seem a simpler method of handling it simply to provide that instruments to be filed with the Secretary of State shall be executed as provided in the section.

3. As suggested I have included the Chairman of the Board of Directors as a signatory.

4. Folk's paragraph (c)(2)(B) refers to "a majority of directors then in office". I do not like this. If the directors are to act they should act as a Board. I have accordingly limited this provision to require all of the directors or such of them as may be designated by the Board. As Folk has worded it, a minority of a minority, without any meeting, could execute and file a paper.

5. Folk's (c)(2)(C) refers to execution by majority stockholders "entitled to vote thereon." On what? The demonstrative pronoun understood in the word "thereon" has no antecedent. Aside from this question of grammar, it seems to me that Folk is in error in assuming that the instrument must refer to a resolution on which the stockholders may vote. This is obviously not correct; for example, a resolution of the directors specifying a rate of dividend on a series of preferred stock. It would be getting into too much refinement to attempt to spell out for the purpose of this section the difference between voting and non-voting stock. Consequently, I have merely referred to a majority of all outstanding stock.

6. As tentatively agreed, I have omitted subsection (e).

C.A S.

Execution of Instruments

Section _____.

Corporate instruments required by any provision of this Chapter to be filed with the Secretary of State shall, unless otherwise specifically provided and subject to any other applicable provision of this Chapter, be executed as provided below.

(a) The Certificate of Incorporation, and all other instruments executed before election of the initial Board of Directors, shall be signed by the incorporator or incorporators.

(b) All other instruments shall be signed -

(1) By the Chairman of the Board of Directors, or by the President, or by a Vice-President, and by the Secretary or an Assistant Secretary; or

(2) If there are no such officers, then by all the directors or by such directors as may be designated by the Board; or

(3) If there are no such officers or directors, then by the holders of record, or such of them as may be designated by the holders of record, of a majority of all outstanding shares of stock.

(c) Notwithstanding the provisions of sub-paragraphs (1), (2) and (3) above, any such other instrument referred to in sub-paragraph (b) may be signed by the holders of all the outstanding shares of stock.

(d) The name of any signatory shall be printed, typed or otherwise legibly set forth beneath or opposite his written signature.

SECTIONS OF THE DELAWARE CORPORATION LAW WHICH MIGHT BE AFFECTED BY THE PROPOSED GENERAL STATUTE RELATING TO "EXECUTION OF INSTRUMENTS"

	SEC.	PAGE	DOCUMENT
	103	15	Certificate of Incorporation
	133	42	Change of Location of Principal Office and/or Change of Resident Agent
(1)	134	42	Change of Address of Resident Agent
	135	43	Resignation of Resident Agent coupled with Appointment of Successor
(1)	136	44	Resignation of Resident Agent <u>not</u> coupled with Appointment of Successor
	(151	76	Certificate of Designation
	(151	76	Certificate of Increase or Decrease of the Number of Designated Shares
	165	120	Certificate of Payment of Capital Stock
(2)	218	160	Voting Trust Agreement
	241	194	Amended Certificate of Incorporation Before Payment of any Capital
	(242	197	Certificate of Amendment of Incorporation (a) After Payment of any Capital
	(242	198	or (b) Where Corporation has no Capital Stock
	243	212	Certificate of Retirement or Redemption
	244	215	Certificate of Reduction of Capital
	245	219(c)	Any Certificate (Amendment, Reduction of Capital, Merger, Consolidation or Dissolution) filed under Plan of Re-organization
	251	222	Agreement of Consolidation or Merger of Domestic Corporations
	252	227	Agreement of Consolidation or Merger of Domestic Corporations and Foreign Corporations

SEC.	PAGE	DOCUMENT
253	228	Ownership Certificate - Merger of Parent and Subsidiary
254	233	Agreement of Consolidation or Merger of Domestic Corporation or other Association
255	235(c)	Agreement of Consolidation or Merger of Domestic Non-Stock, Non-Profit Corporations
256	236(c)	Agreement of Consolidation or Merger of Domestic Non-Stock, Non-Profit Corporations
257	238 and 239(c)	Agreement of Consolidation or Merger of Domestic Stock and Non-Stock Corporations
258	239 and 240(b)	Agreement of Consolidation or Merger of Domestic and Foreign Stock and Non-Stock Corporations
259	240	Refers to execution under Subchapter IX only
272	263	Certificate of Incorporation (Private Sale of Assets or under Judgment of Court)
274	264	Certificate of Surrender of Corporate Franchise before Payment of Capital and beginning business
(275	266(c)	Dissolution by 2/3 Vote of voting Stockholders
(275	266(d)	Dissolution by Unanimous Consent of voting Stockholders
276	269	Dissolution of Non-Profit, Non-Stock Corporations
(311	285(a)(4)	Revocation of Voluntary Dissolution (2/3 Vote)
(311	285(b)(1)	Revocation of Voluntary Dissolution (Unanimous Consent)
(312	287(b)	Renewal, Revival, Extension and Restoration of Charter
(312	291(j)	Renewal and Revival of Non-Stock, Non-Profit Corporation
344	312	Annual Report - Foreign Corporation
348	314	Resignation of Agent for Service of Process
352	315(a)(1)	Certificate of Withdrawal of Foreign Corporation

(1) Requires execution by Resident Agent only and acknowledgment.
(2) Manner of execution by Stockholders and Trustees not specified.

30 Different Sectionsof the Law
35 Different Certificates

Note: Page numbers refer to "Delaware Corporation Law, Annotated - 1963".

pg 2 only

§ 145. Indemnification of officers, directors and employees.

(a) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any pending or threatened action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he, ~~his testator or intestate~~ is or ~~was~~ a director, officer, ~~or~~ employee present of the corporation, or is or was serving at the request of the corporation as a director, officer or employee, present or agent of another corporation, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding, if provided that there shall be no indemnification for judgments, fines and amounts paid in settlement or expenses, including attorneys' ~~legal~~ fees, incurred in connection therewith, unless the director, officer or employee he acted in good faith ~~for a purpose~~ and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation. The termination of any criminal, civil or administrative action by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the director or officer did not act in good faith ~~for a purpose~~ in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation provided that etc no knowingly if

(b) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any action

Replace page 2 of §145

or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he, ~~his testator or intestate~~, is ~~or was~~ a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, officer or employee of another corporation, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of duty to the corporation, unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the Court of Chancery or such other court shall deem proper.

(c) A director, officer or employee who has been wholly successful on the merits or otherwise in defense of any action, suit or proceeding or in defense of any claim, issue or matter therein shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith

(d) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled, under any by-law, agreement, vote of

stockholders, or otherwise.

M E M O R A N D U M

TO: S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
The Honorable Charles A. Southerland
Walter K. Stapleton, Esquire

FROM: Henry M. Canby, Esquire

I enclose a copy of a communication from Bill Kenney of Shell Oil Company, which contains some interesting criticisms which we can consider when we have our session on Section 146.

HMC:pas

12/21/66

THE UNIVERSITY OF NORTH CAROLINA
AT
CHAPEL HILL

SCHOOL OF LAW

December 20, 1966

Dear Dick:

First of all, I shall be delighted to see you before the roundtable gets underway. But since your letter and the draft materials answer all questions which I might have had, I look forward to our visit as an opportunity to renew our acquaintance. By the way, please plan to stay long enough after our roundtable to attend the 5:30 P.M. cocktail party which the University of North Carolina Law School is giving for its friends and guests. Dean Phillips has already sent an invitation to you, and we all hope that you can be with us at this time.

Thank you very much for the copy of the draft statute which arrived late last week together with further pages received yesterday morning. Needless to say, I am flattered that so many of my suggestions commended themselves to the Committee. I fully expected that many of the recommendations would not, for various policy reasons, be adopted; but I wanted the Committee to have the benefit of as wide a range of alternatives and ideas as I could supply.

I have been studying the materials over the week-end. Although you did not request comments, it occurred to me that I should pass on the following observations. This is not to suggest any policy changes, but only to mention a few technical matters and one or two ideas which have come to mind since last writing you.

(1) You probably have already noted that Sections 155 and 175 (both entitled Fractions of Shares and Scrip) duplicate each other, although Section 175 contains the more complete statement.

(2) The Committee may wish to consider expressly validating the use of directors' liability insurance. For instance, the ABA Committee which watches over the Model Business Corporation Act is considering adding the following corporate power to its statute:

> To maintain insurance on behalf of any such person (i.e., any incumbent or former director or officer) against any liability asserted against it incurred by him in any such capacity, whether or not the corporation would have power to indemnify him against such liability under the provisions of this Act.

The November 1966 issue of The Business Lawyer (p. 92) contains a good article by Joseph W. Bishop, Jr., entitled New Cure for An Ailment: Insurance Against Directors' and Officers' Liability.

(3) The last sentence of Section 218(a) seems to have been drafted without full consideration of its relationship to Section 217(b), although there is no necessary inconsistency.

(4) In connection with new section 231 (Form of Records; Reproduction), you may be interested in the 1963 California statute tacked on to the section entitled "Share Register":

The above specified information may be kept by the corporation on punchcards, magnetic tape or other information storage device related to electronic data processing equipment, provided that such card, tape, or other equipment is capable of reproducing the information in clearly legible form for the purposes of inspection as provided in Section 3003.

(5) I notice that Section 168, with its judicial procedure for securing a new stock certificate, is continued despite Delaware's enactment of the Uniform Commercial Code and the repeal of the Uniform Stock Transfer Act (formerly Sections 181-202 of the General Corporation Law before repeal). Since Article 8 of the UCC provides a non-judicial procedure for issuing new certificates, I wonder whether the Committee still wishes to continue Section 168, at least after the Code's effective date in Delaware. Section 168 is similar to the procedure under the Uniform Stock Transfer Act for replacing lost certificates, but for some reason it was never inserted in the General Corporation Law at the point where it should have appeared as part of the Stock Transfer Act. I draw it to your attention, as it may have been overlooked because of this displacement of the lost certificate provision.

(6) I note the contraction of the appraisal right in Section 262(k). The number of shareholders--in this instance, 2000--is, of course, a policy matter. I wonder whether this should specifically refer to shareholders of record. Section 12(g) of the Securities Exchange Act of 1934, as amended in 1964, uses the number of shareholders of record as part of the test for applying certain sections of the statute; and the SEC has issued its Rule 12g5-1 to define the term "held of record" as used in the 1934 Act. To avoid almost certain litigation over the scope of the term, you might want to be explicit on whether the section refers to 2000 record or beneficial holders.

I am somewhat puzzled by the import of the final clause of 262(k): "except that this subsection shall not be applicable," etc. I take it to mean that if stockholders do not receive shares (or securities) of the surviving or new corporation, then "this subsection", which denies the appraisal remedy in certain circumstances, "shall not be applicable"; and therefore that such shareholders are entitled to the appraisal remedy. I must be missing something, but I wonder if this is the intent of the provision?

yes - preserve for 253. But now 251 says also "other corp."

I gather that the Committee decided not to eliminate the sequestration procedure since Section 169 has been continued according to the draft materials. I am glad that Delaware will retain the established method of keeping corporate litigation in the Court of Chancery. I take it that the Committee did not venture into the "foreign resident corporation" statute, as has New Brunswick; perhaps this is just as well since the type of international conflict which would invoke corporate use of such a procedure is likely to engulf us as well as the country from which the foreign corporation would wish to "emigrate."

I look forward to seeing you in Washington and again hope that you will plan to stay for the Thursday afternoon party.

Sincerely,

Ernest L. Folk, III

Richard F. Corroon, Esq.
Berl, Potter & Anderson
350 Delaware Trust Building
Wilmington, Delaware 19801

§ 350. Banking powers denied

(a) No foreign corporation shall, within the limits of this State, by any implication or construction, be deemed to possess the power of discounting bills, notes, or other evidence of debt, of receiving deposits, of buying gold or silver bullion or foreign coin, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt upon loan for circulation as money, anything in its charter or articles of incorporation to the contrary thereof notwithstanding.

(b) All certificates issued by the Secretary of State under section 341 of this title shall expressly set forth the limitations and restrictions contained in this section.

No change suggested

HUGH M. MORRIS
1878-1966

ALEXANDER L. NICHOLS
S. SAMUEL ARSHT
JAMES M. TUNNELL, JR.
GEORGE TYLER COULSON
ANDREW B. KIRKPATRICK, JR.
WILLIAM S. MEGONIGAL, JR.
JOHN T. GALLAGHER
WALTER K. STAPLETON
RICHARD L. SUTTON
DAVID A. DREXLER
JOHANNES R. KRAHMER
CLIFFORD B. HEARN, JR.

LAW OFFICES
OF
MORRIS, NICHOLS, ARSHT & TUNNELL
DU PONT BUILDING
WILMINGTON, DELAWARE 19801

TELEPHONE OL 8-9201

February 15, 1967

Richard F. Corroon, Esquire
Henry M. Canby, Esquire

Dear Dick and Henry:

Enclosed is a copy of a letter that I received today from Orvel Sebring advising that the American Bar Association Committee on Corporate Laws, which is responsible for the Model Business Corporation Act, met in Houston on February 10 and decided to follow our draft of section 145 on director indemnification, with a few minor changes. Also enclosed are copies of the papers which were enclosed with Sebring's letter; namely, a marked-up copy of our next-to-last draft of section 145, showing the changes therein made by his committee, and a copy of the draft of section 4A of the Model Business Corporation Act, as approved by the ABA committee on February 10, 1967.

Also enclosed is a copy of my reply of this date to Sebring. You will note from my reply that Carroll Wetzel, who was here with Sebring, called me to express the hope that we would go along with the minor changes made by the ABA committee because uniformity with Delaware was an important factor in the ABA committee's decision to go along with us. Most of the changes seem to me to have obvious merit and do not involve any policy or substantive change. The deletion from subsections (a) and (b) of the phrase "or not opposed to" resulted from the fact that all members of the ABA committee, other than Wetzel and Sebring, said they didn't know what it meant, and Wetzel and Sebring knew what it was intended to mean only because they were present when Frank Zugehoer suggested it. In this connection, we have had precisely the same reaction from one of our clients who studied our draft carefully. The ABA committee felt, according to Wetzel, that if a corporation wants to indemnify a director for conduct which is "not opposed to" the best interests of the corporation or for sections 16(b) and 10(b)

cases (Texas Gulf), it may do so by a by-law under subsection (f). The change in subsection (c) makes indemnification mandatory "to the extent that" a director has been successful in defense of an action and does not, as our draft did, limit mandatory indemnification to the case where the director has been wholly successful. I have some reservations about this change, but I do not feel strongly about it.

I would not go along with the Model Code changes if I had any strong feeling that they are not desirable changes substantively. However, absent any such feeling, I am inclined to feel that there is some merit in maintaining uniformity with the Model Act provision; first, because they have paid us the real compliment of substantially adopting our version, and some reciprocation may be in order, and, secondly, because there is real advantage to Delaware in not having a less liberal law of indemnification than the Model Act. As we have discovered, this is a very sensitive and most important area of the law, at least in the minds of those who have something to say about choosing the state of incorporation.

On balance, I think I would go along with the Model Act changes. Wetzel and Sebring are working on John Mulford to change the Pennsylvania proposal to accord with the Model Act approved draft, notwithstanding the Pennsylvania Bar Association approved the earlier Model Act draft.

Our manuscript copy of our proposed law has been forwarded to West for printing in galley form. We should have it back in two weeks.

Sincerely,

S. Samuel Arsht

SSA:fw
Enclosures
cc: Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

MORGAN, LEWIS & BOCKIUS

COUNSELORS AT LAW

2107 FIDELITY-PHILADELPHIA TRUST BUILDING

PHILADELPHIA PENNSYLVANIA 19109

TELEPHONE [illegible]
CABLE ADDRESS [illegible]

1120 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE: 202 FEDERAL 8-6131

500 N. THIRD STREET
HARRISBURG, PENNSYLVANIA 17101
TELEPHONE: 717-238-1787

February 12, 1967
(Written en route Houston-Tucson)

S. Samuel Arsht, Esq.
Morris, Nichols, Arsht & Tunnell
3000 du Pont Building
Wilmington 1, Delaware

Dear Sam:

Our Committee on Corporate Laws met in Houston on February 10 and you will be interested, and I hope pleased, to know that it was decided to follow your draft of §145 for the revised Delaware Corporation Law on the subject of indemnification. We found this not difficult to do as your draft had followed ours in so many particulars and as we were apart only on the three points of (1) indemnification for settlement payment, (2) indemnification as a matter of right where a defendant is successful, and (3) putting indemnification both for third party actions and derivative actions in one paragraph.

We took this step as we felt the corporate law of the country might be most advantageously served by a uniform approach on a subject which is complex to say the least, and confusing in many cases to the practitioner.

Enclosed is a redraft of our Section 4A which will supplant present 4(o) of the MBCA, which will require relettering of subsequent paragraphs under Section 4.

Please note in the copy enclosed of your last draft of §145 that we have made a few minor changes. These I am sure you will find self-explanatory with the possible exception of those in subparagraph (f). Certain of our members felt that the Section 16(b) and 10(b) cases (Texas Gulf) should not be excluded if the corporation wanted to indemnify.

I am writing this, as you have noted, many miles from home base, but I have done so as I wanted to get this word, and our few changes, to you promptly.

As our Committee has, in the interest of uniformity, taken your Delaware version, may I now ask, again in the interest of uniformity, that you do your best to accept our changes?

I hope you can do this with the goals we all have in mind.

Kindest regards and best wishes.

Sincerely yours,

Orvel Sebring

Orvel Sebring

dcm
Enclosures

cc: Carroll R. Wetzel, Esq.
Eugene J. Conroy, Esq.
George A. Blackstone, Esq.
Willard P. Scott, Esq.
George D. Gibson, Esq.

Delaware 1/27/67

§ 145. Indemnification of officers, directors, employees and agents; insurance

(a) A corporation shall have power to indemnify any person who was a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in ~~or not opposed to~~ the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in ~~or not opposed to~~ the

best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was a party or is threatened to be made a party to any threatened, or pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in ~~or not opposed to~~ the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case,

such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) A director, officer, employee or agent of a corporation who has been ~~wholly~~ successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b), or in defense of any claim, issue or matter therein, shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the stockholders.

(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action,

suit or proceeding as authorized by the board of directors in the manner provided in subsection (d) upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation shall have power to purchase andmaintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

, better to obtain in his official capacity and not action in another capacity while holding such office?

(As approved by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association at Houston, Texas on February 10, 1967; to supplant and in substitution for Section 4(o) of the Model Business Corporation Act.)

Section 4A. Indemnification of officers, directors, employees and agents; insurance.

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in the best interests of the corporation, and, with respect

to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b), or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

(d) Any indemnification under subsections (a) and (b) (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because he has met the applicable standard of conduct set forth in subsections (a) and (b). Such determination shall be made (1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to such action, suit or proceeding, or (2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or (3) by the stockholders.

(e) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors in the manner provided in subsection (d) upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any by-law, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this section.

HUGH M. MORRIS
1878-1966

ALEXANDER L. NICHOLS
S. SAMUEL ARSHT
JAMES M. TUNNELL, JR.
GEORGE TYLER COULSON
ANDREW B. KIRKPATRICK, JR.
WILLIAM S. MEGONIGAL, JR.
JOHN T. GALLAGHER
WALTER K. STAPLETON
RICHARD L. SUTTON
DAVID A. DREXLER
JOHANNES R. KRAHMER
CLIFFORD B. HEARN, JR.

LAW OFFICES
OF
MORRIS, NICHOLS, ARSHT & TUNNELL
DU PONT BUILDING
WILMINGTON, DELAWARE 19801

TELEPHONE OL 8-9201

February 15, 1967

Orvel Sebring, Esquire
Morgan, Lewis & Bockius
2107 Fidelity-Philadelphia Trust Building
Philadelphia, Pennsylvania 19109

Dear Orvel:

I received today your letter of February 12, written en route Houston-Tuscon, and its enclosures.

I am indeed pleased that the American Bar Association Committee on Corporate Laws decided to follow the Delaware committee's draft of section 145, dealing with director indemnification.

As I told Carroll Wetzel this afternoon, our draft of the proposed Delaware corporation law is now in the hands of West Publishing Co. for printing, and Messrs. Canby, Corroon and I promised each other after our last meeting that we would make no further changes. However, since your committee has gone along so far with Delaware, and your committee's suggested changes in our draft have obvious merit, I will recommend to Dick Corroon and Henry Canby (and do so by the copies of this letter being sent to them) that we adopt your changes in our draft of section 145.

Incidentally, at the last meeting of our committee we did make one change in section 145 of which you have not been advised. We added in subsection (b), in line 18, after the word "duty", the phrase "to the corporation". We felt that the addition of that phrase improved the clarity of subsection (b).

Let me assure you that Dick Corroon, Henry Canby and I will give serious and sympathetic consideration to the acceptance of your committee's changes in our draft. I agree with you that uniformity on the subject of director indemnification has virtue (particularly where, as here, we agree that the proposed rule is the best one) and is in the best interest of the practitioner, the corporations and their directors and officers.

I hope that your Tuscon trip is not all business and is most enjoyable.

With kindest regards, I am

Sincerely yours,

S. Samuel Arsht

SSA:fw

cc: Carroll Wetzel, Esquire
Richard F. Corroon, Esquire
Henry M. Canby, Esquire

Address to Association of General Counsel
Clayton, Missouri, October 20, 1966

by Royall Victor

I am pleased and honored to address this distinguished group of corporate counsel this morning on the subject of indemnification of directors and officers. The subject ties in very closely with that of directors' liability insurance, which is the topic assigned to subsequent speakers, and, accordingly, I will try to avoid getting into the insurance subject in any detail.

I have distributed a number of copies of the International Harvester By-law which I propose to use as a frame of reference later on. But first let me say that the International Harvester By-law was the joint work product--and I mean "blood, sweat and tears" work over an extended period of time--of: Doc Oldaker, General Counsel of International Harvester whom you all know; Fran Thomas of the Stryker firm in Newark, counsel for International Harvester as a New Jersey corporation, myself and my associate Roland Paul. We examined all the precedents, I hope. We had plenty of arguments and we evolved several new approaches, which I will mention later and which I hope you will find at least interesting.

This whole subject of attempting to protect directors and officers against legal claims of various kinds, is of course, not by any means a new one. However, I have noticed in the last year or so that it has become a very "hot" item. Taking my own office as an example, I have been personally involved or consulted by my partners on this subject as applied to at least a dozen different corporations in the last year--and I might add it is still going on. I suppose the highly publicized situations, with potentially astronomical exposure for the individuals involved--I have in mind the Philadelphia electric antitrust cases, American Express and the salad oil machinations, Billie Sol Estes and his grain elevators and others--have had a good deal to do with the current interest. I think also that the efforts towards obtaining increased protection do not necessarily come from us lawyers. I personally know of several situations where outside directors have, apparently for the first time (why, I don't know) realized that yes, indeed, there is really something to what we lawyers have been telling them for years about possible personal liability, and quote "we ought to get this new insurance I've heard about" unquote.

In any event, I would imagine that every lawyer in this room either has faced up to the problem, or shortly

will have to. Incidentally, I wonder if we lawyers at least wouldn't be better off if every state had a New York-type of indemnification statute (broadened in some respects) with its prohibition against any broader indemnification and accompanied by a statutory prohibition against the corporation participating in any way in insurance coverage of individual directors and officers. I can imagine the Lloyds' lawyers here are wincing but they need have little fear because I doubt this is going to happen.

My conclusions on this whole subject for your consideration are, in broad brush and as related to the average Delaware industrial corporation:

1. Formulate as broad a By-law as you can, consistent with the state law, and have it approved by your stockholders.

2. Obtain insurance on a 90-10 basis provided it does not cost more than $200-300 a head for the individual protection. 90-10 is subject to adjustment, in my view, on account of such factors as nature of the business, history of stockholder and antitrust litigation, state of incorporation--I think it is hard to generalize. In any event, I am in the 90-10 school and not in the 50-50 or 60-40 school on this insurance question, subject as aforesaid. That's all I will say

about insurance now except I hope later to get my licks in on Mr. Lloyds of London as to just what some of his language means--and now back to indemnification.

What we are trying to provide is reasonable and proper protection for directors and officers so that people will not shy away from taking on the responsibilities of directors and officers for fear of being financially clobbered through no fault of their own. Now just what is "reasonable and proper". Let me just list some situations that might arise and in which opinions in this room might well basically differ as to whether the director-officer should be protected.

A. Corporation X desperately needs additional equity capital which is obtainable only through a public offering of its common stock. In order to sell the stock, the directors and officers take considerable liberties with the truth in the required 1933 Act prospectus. They get "nailed". Should they be protected--after all, they were working for the common stockholders, and they put their own names at stake?

B. A director of Corporation Y, a genial stock broker type, has heard (from some other brokerage firm's market letter) that his corporation's profit

margins are declining. After the next directors' meeting, at the usual 3-martini session, he sidles up to the General Sales Manager and says: "Joe, I don't like these profit margins". Joe says: "Mr. Director, I know they are off but that's just temporary because we will all raise our prices soon under our arrangement". The director staggers off and two years later he is an individual defendant in an antitrust criminal prosecution--to his amazement he is involved because the Government says he was on notice of the conspiracy and did nothing about it. Should he be protected--after all, he didn't know any better and he faithfully attended all directors' meetings?

C. The President (and a director) of Corporation Z has a very tough decision. He knows that his Financial Vice President has been using Company funds to gamble on the horse races, the President spoke to the VP about it but despite his promises, the Company is out $5 million and the publicity breaks. The President, however, had taken a calculated risk because he knew that this kind of loss, if announced, would have hurt the Company badly. He was hoping that the VP would recover, return the funds to the Company, and nobody would be the wiser and the Company would continue successfully with its

on-going program. He lost. Should he be protected, in the ensuing stockholder's suit?

These are just a few examples, maybe far-fetched maybe not, that I hope none of us have had to cope with. I do not know the answers but I do believe that it is our job to provide the maximum protection that is available, pending the decision of some future court which none of us can anticipate.

We are dealing with an area of law which at present has few guideposts. Several states have recently revised their laws governing indemnification. New York added an extensive provision in 1963. Other states to act recently in this area include Arizona, Arkansas, Maine, Nebraska, Oregon and South Carolina. The case law with respect to indemnification is fairly limited. There have not been more than a half dozen reported cases in Delaware interpreting the indemnification provisions of the law of that state, where nearly half of the country's 100 largest corporations are incorporated.

The statutory provisions governing indemnification in many states are cryptic and ambiguous. In the Delaware statute, for example, the first sentence authorizes indemnification for "expenses actually and necessarily incurred" except with respect to matters as to which the director or

officer is adjudged "to be liable for negligence" or for "misconduct in the performance of duty"--whatever that means. And what are "expenses . . . necessarily incurred"? Does this term include judgments? More importantly, the second sentence of the Delaware statute states that the indemnification authorized by the first sentence is not exclusive of any other right to indemnification under a By-law provision or otherwise. Whether the second sentence can be used to expand the limitations set forth in the first sentence is yet undecided--we think so, with stockholder approval, but cannot be sure. A number of other states have statutes either identical with, or very similar to, the Delaware statute.

Handicapped by the unpredictable state of corporation law in this regard, and worried about the apparent increase in exposure of directors and officers to criminal penalties as well as stockholder derivative actions, a number of prominent corporations have been trying to redraft their indemnification By-law or charter provisions in order to provide directors and officers with the maximum protection feasible under such circumstances. Some examples, and I am just picking some out of the hat at random, are Bethlehem Steel which revised its indemnification provisions in 1964, Firestone, Goodyear, Monsanto and Standard Oil of New Jersey,

which did so in 1965 and International Harvester, Southern Pacific and Texaco, which did so this year.

I would like to use our International Harvester work product as a working paper on which to talk this morning and to concentrate my remarks on some of the problems which we considered in drafting this language.

This provision is only appropriate in a jurisdiction such as Delaware, where the statute itself does not spell out in substantial detail the scope of indemnification which a corporation may provide for its directors and officers. Other states besides Delaware where I think the law provides considerable breadth for a corporation to determine by By-law or charter provision the scope of indemnification for its directors and officers are Colorado, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, West Virginia and Wisconsin.

In a state such as New York the provision which you have before you would be totally inappropriate because there the state law is comprehensive and exclusive. In fact, in New York, a By-law provision can be risky, since it may inadvertently limit indemnification for directors and officers of the corporation to something less than that permitted by the statute. A number of New York corporations

have recently enacted By-law provisions. Incidentally, I am not quite sure what happens where a New York corporation say 3 or 4 years ago got stockholder approval for less liberal indemnification than the New York law now provides--which applies, the By-law or the statute?

Turning to the specific language of the provision before you, I would start by directing your attention to lines 53 to 69, which contain the core of the provision. These lines state in effect, first, that every director and officer who has been wholly successful in the relevant litigation shall, as of right, be entitled to indemnification; and, second, that every director and officer who has not been wholly successful shall be entitled, as of right, to indemnification if he meets a specified standard, in the opinion of an independent arbiter.

The most fundamental feature in this passage, I would say, is that in every instance to which this By-law is applicable the director or officer is entitled to indemnification <u>as of right</u>, and not merely at the discretion of the Board of Directors of the corporation. We felt that the only way to protect both the director or officer seeking indemnification and the rest of the Board in according such indemnification was to provide such indemnification as of right. By doing so, first, even if there should be a change

in the management of the corporation as a result of a proxy fight or otherwise, the director seeking indemnification would be able to enforce his right against a reluctant management. Second, and perhaps more important, only by giving the director a right to his indemnification could we protect the rest of the Board from being caught in the middle, so to speak. That is, if indemnification were discretionary, the uninvolved directors could never be sure in authorizing indemnification in a doubtful case whether they were thereby exposing themselves to a derivative action for waste of corporate assets. On the other hand, where indemnification is mandatory--and you will not find the following point spelled out in the words of the provision, but it is nevertheless a crucial feature--the Board can, on advice of counsel, decline to provide indemnification to the director seeking it, and thereby require him to take his legal right to such indemnification into court to obtain such relief. If the court decides in his favor, I believe that the Board in thereafter paying indemnification would be very well protected against a subsequent derivative action charging it with waste of corporate assets. I doubt if this system of insulating the Board through court action could be achieved where indemnification is discretionary, because a court may well refuse to

determine a case where the relief is still within the power of the Board to grant or deny regardless of the court's decision.

I can foresee at least three situations which could be considered doubtful cases, and which the Board might want to have the protection of a court decision before paying indemnification. One case would be the director or officer seeking reimbursement for a criminal fine. Another would be where a corporate official seeks reimbursement for a judgment paid to the corporation itself by way of a derivative action. Third is the situation where a director or officer is found liable for misinterpreting a point of law--could that be considered misconduct?

Now a word with respect to the standard which the director must meet. I stated that if he is wholly successful he is entitled to indemnification without meeting any further requirement. Lines 78 to 85 set forth the definition of the term "wholly successful". In this definition you will note that it is not necessary for the director or officer to be successful on the merits. It is sufficient that he be successful on a defense such as the statute of limitations or some other so-called procedural ground. Our definition also includes the expiration of a reasonable period of time after the making of a claim without the

claimant proceeding further, but it excludes any amount paid by way of settlement. All settlements would be thrown into the other type of indemnification, the indemnification payable only upon the determination of the independent arbiter. The standard which the arbiter must apply in determining whether indemnification is appropriate is found back at lines 10 to 14: It is acting in good faith, in what the director or officer reasonably believes to be the best interest of the corporation and, with respect to criminal actions, having no reasonable cause to believe that one's conduct is unlawful. We adopted this language because it is very close to the standards set forth in the New York and California statutes with respect to indemnification. Therefore, if our standard is ever challenged, we can start one defense by pointing out that it seemed reasonable enough to the legislatures of these two states.

Now turning back to the beginning of the provision, the very first words state that the entire provision is limited "to the extent [to which it is] not inconsistent with Delaware law as in effect from time to time". This language was not inserted merely to recite the obvious fact that any By-law provision must be subject to the law of the state of incorporation. It was intended rather to establish the elasticity which the whole provision must have in light

of the uncertainty of the current law governing indemnification. The rest of the provision grants directors and officers what we believe to be the broadest indemnification that is reasonably defensible under the present state of the law, but this introductory phrase recognizes that the law may develop in such a way that portions of the provision may be rendered inoperative. There is no intention, as demonstrated by this phrase, to accord relief beyond that which is legally available. This we hope will forestall a judge from declaring the entire provision illegal because a portion of it turns out to be beyond the scope of indemnification permitted by state law.

Now I would like to point out several places in the provision to illustrate our effort to make the scope of the provision as broad as possible, so that no instance may occur in which the By-law does not provide indemnification for directors and officers to the full extent permitted under the relevant state's law. In lines 2 to 3 you will notice that the right to indemnification survives the term of service or death of the relevant director or officer. In lines 14 to 22 you will notice that the definition of "claim, action, suit or proceeding" includes both derivative and nonderivative actions and civil, criminal, administrative and investigative actions and all threats of such

actions and proceedings. With the growth of administrative agencies relief for administrative proceedings may well become increasingly more important. In adding the word "investigative" in this clause we were thinking of the possibility of Congressional investigations for instance.

You will notice in lines 23 to 38 that the corporation may indemnify anyone who is a director or officer of the corporation for any acts he may do not only as such director or officer but also for any acts in any capacity in which he serves at the request of the corporation in other corporations or in any partnership, trust or similar organization. In this regard we were thinking, for example, of a man who acts as a trustee under the corporation's pension fund.

We deliberately departed from many precedents in not providing indemnification for persons other than directors and officers of the parent, along with the indemnification for the "higher ups". We do not think it necessary to have stockholder approval of indemnification for the lower echelon people simply because there is no conflict of interest involved, i.e., we think it is properly within the powers of a board to authorize indemnification of employees, just as salary and fringe benefits are passed upon. However, we did not want any possibility to arise by implication

that this power of indemnification of subordinates was in any way being taken away. Therefore, you will notice toward the end of the By-law, at lines 97 to 102, that there is a general enabling sentence which authorizes the Board of Directors to indemnify other employees of the corporation and persons who are directors and officers of subsidiaries (but who are not also directors or officers of the parent itself).

With respect to employees below the rank of officer of the corporation, we believed that where the indemnification is mandatory, the class of persons to which such right is accorded should be rather narrowly drawn. Otherwise, if all employees were entitled as of right to indemnification, the corporation could well be faced with countless lawsuits brought under such a provision.

At lines 39 to 46 you will notice that the terms "liability" and "expense" include counsel fees, judgments--specifically including fines and penalties--and settlements. Some of you may raise the question whether reimbursement for fines is against public policy and accordingly a nullity. Perhaps so in certain instances, but as I have indicated earlier, I believe that this provision has the elasticity to meet such a contingency. Moreover, as a matter of principle, I can readily envisage a number of situations where

criminal sanctions are imposed in which the culpability of the director or officer is no greater than that involved where he must stand responsible for some civil judgment. The antitrust field provides a number of instances where this is true. Philosophically, indemnification of a man found guilty in a split decision may well be justified.

With respect to directors and officers held liable in derivative actions, Professor Folk, in his report to the Delaware Corporation Law Revision Committee in 1964, presented a very persuasive argument that in many instances a director should at least be entitled to indemnification for his expenses. Mr. Folk pointed out that in a number of areas of corporation law the line between legality and illegality is quite ambiguous at present, such as the law governing stock options, the rules with respect to the purchase by a corporation of its own stock to prevent shifts of control, and the area of corporate expenditures generally in connection with proxy fights. The leading treatise on indemnification prepared by Washington and Bishop also supports this proposition.

Now, if I may, I would direct your attention to the paragraph beginning at line 86, which in essence authorizes the Board to advance expenses to a director prior to the final disposition of the litigation brought against him,

with the obligation on his part to reimburse the corporation for such advances if it ultimately turns out that he is not entitled to indemnification. This in many instances could be a crucial provision because, as you well know, any substantial lawsuit can be enormously expensive. This paragraph may make it possible for a director or officer to retain better legal counsel than he would otherwise be able to do--more importantly, it tells a man that if he gets in trouble his corporation will see to it that he is properly defended. The New York statute provides precedent for authorizing such advances.

The sentence beginning at line 94, which reads "the rights of indemnification provided in this Article shall be in addition to any rights to which any such director or officer may otherwise be entitled by contract or as a matter of law", and the paragraph beginning at line 103, which authorizes the Board of Directors to approve indemnification to the full extent permitted by Delaware law irrespective of the other portions of this By-law provision, are back-up passages in case the rest of the By-law does not fit the situation, or has been declared illegal for one reason or another or has otherwise failed to serve the indemnification needs of the corporation. For instance, it could turn out that the provision which we have prepared is less liberal

than the Delaware law itself, and does not provide for indemnification in every instance where indemnification is legally permitted. Another contingency, against which this back-up language provides, is the possibility that a court, for some reason, may choose to declare all of the rest of the By-law provision illegal. In such a situation, hopefully, this general authorization to the board of directors to provide indemnification to the full extent permitted by law, will prevent the lapse of any time during which there is no authorization in the By-laws for indemnification.

Stockholder approval of a matter such as indemnification seems highly desirable to me, since it could be of personal benefit to each of the directors. Stockholder approval precludes successful challenge to the provision on the ground that it was adopted by the board of directors in conflict with the best interests of the corporation.

If you do seek stockholder approval for a By-law provision, I suggest that you make it clear in your proxy statement that the directors still have the power to change the provision at any time.

In conclusion, I have been asked to comment briefly on the current draft of the proposed Delaware statute concerning indemnification which may be forthcoming from the Delaware Corporation Law Revision Committee. I believe

copies have been distributed to you.

In summary, the proposed statute would explicitly accord indemnification as of right to any director, officer or employee who is wholly successful in the relevant litigation. It would further permit a corporation with respect to non-derivative actions to authorize indemnification for expenses, judgments and settlements paid by any director, officer or employee who acts in good faith for a purpose which he reasonably believes to be in the best interests of the corporation. With respect to derivative actions, a corporation would be authorized to indemnify a director, officer or employee for expenses only, but not even those where he is adjudged liable for negligence or misconduct, unless such payment is authorized by a court. Finally, the proposed statute would preserve what is now the last sentence of the present Delaware indemnification provision, which announces that the indemnification provided by the rest of the provision is not exclusive of any other right to indemnification to which the director, officer or employee may be entitled under a By-law provision or otherwise.

With respect to directors and officers who are wholly successful in litigation brought against them, the proposed statute and our International Harvester By-law seem to have the same coverage. The statute does, however, extend

mandatory indemnification to non-executive employees, whereas our By-law makes indemnification for such employees discretionary with the Board.

In non-derivative actions where the director or officer is not wholly successful, the reach of the proposed statute and our By-law is about the same. However, the standard of conduct in the proposed statute is less stringent than in our By-law with respect to criminal actions. The revised statute would not require that the director or officer have no reasonable cause to believe his conduct to be unlawful. I would personally question deleting this portion of the standard of conduct required of a director or officer seeking indemnification.

With respect to derivative actions in which the director or officer is not wholly successful, there are several differences between our By-law and the proposed statute. First, under the proposed statute there is no indemnification permitted for expenses in connection with matters as to which the person is adjudged "liable for negligence or misconduct in the performance of [his] duty to the corporation", unless specifically authorized by a court. I think the term "misconduct in the performance of [one's] duty to the corporation" can be ambiguous in many situations, particularly where the question of liability

is one of law rather than fact. I believe that even where there is a judgment against the director or officer in a derivative action he should be entitled to reimbursement for his expenses, without the necessity of court approval, if he can meet the standard set forth in the statute for reimbursement in non-derivative actions.

Second, with respect to a director's or officer's expenses in a derivative action which is settled, the proposed statute appears not even to require him to meet the standard of acting in good faith in what he reasonably believed to be the best interests of the corporation--the standard required by the statute for settlements in non-derivative actions. This strikes me as a very surprising result.

Third, the statute precludes the recovery of amounts paid to the corporation itself by way of judgment or settlement. Our By-law does not specifically exclude the possibility of reimbursement for judgments and settlements paid to the corporation itself. However, it is hard to foresee a situation where such reimbursement would be appropriate, although it might be in a situation where a 3-judge court split on the question of culpability.

Finally, I think that on balance the ambiguities presented by the continuation of the exclusivity disclaimer,

the last sentence in the present Delaware statute, outweigh any tenuous benefits that may be derived from it in the face of such a comprehensive statute as is proposed by the Law Revision Committee, and that if the rest of the proposed statute were cleared up in the few respects I have mentioned above, I think it would serve all concerned more effectively if it were exclusive in the same way that the present New York statute is.

I hope that the foregoing comments will be helpful to you in reviewing your own corporation's situation with regard to indemnification, and I look forward to your comments and those of the other members of the panel in this regard.

Thank you.

MORRIS, NICHOLS, ARSHT & TUNNELL
DU PONT BUILDING – WILMINGTON 1, DELAWARE
TELEPHONE OL 8-9201

January 19, 1967

Henry M. Canby, Esquire
Richard F. Corroon, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

Re: Corporation Law Revision Committee

Gentlemen:

Enclosed is some recent correspondence on our director indemnification section.

Sincerely yours,

S. Samuel Arsht

SSA:fw

Enclosures

Hughes, Hubbard, Blair & Reed
One Wall Street
New York 10005

TELEPHONE: WHITEHALL 3-6500
CABLE: HUGHREED NEW YORK
TELEX: 12-6557

EUROPEAN OFFICE
13, RUE QUENTIN-BAUCHART
PARIS 8e
TELEPHONE: ELYSÉES 9484
CABLE: HUGHREED PARIS

AXEL H. BAUM
EDWIN FOSTER BLAIR
EDWARD S. DAVIS
JOHN WESTBROOK FAGER
JOHN C FONTAINE
N THOMAS GILROY, JR
ALLEN S. HUBBARD
ALLEN S. HUBBARD, JR.
OTIS PRATT PEARSALL
POWELL PIERPOINT
EDWARD S. REDINGTON
FRANCIS C. REED
ROBERT SCHEFF
ORVILLE H. SCHELL, JR.
JEROME G. SHAPIRO
ROBERT J. SISK
HAROLD L. SMITH
ROWLAND STEBBINS, JR.
JOHN NELSON STEELE
L. HOMER SURBECK
DAVID R. TILLINGHAST
JOSEPH TRACHTMAN

JAN 12 1967

January 11, 1967

S. Samuel Arsht, Esq.
3000 duPont Building
Wilmington, Delaware 19801

Dear Mr. Arsht:

Enclosed find my redraft of the proposed Delaware indemnity statute and a memorandum discussing my suggested changes. In my draft additional material is underlined and deletions are indicated by brackets.

The Subcommittee of the Committee on Corporation Law of the Association of the Bar of the City of New York, of which I am a member, appreciates having an opportunity to give you our suggestions.

Please do not hesitate to call on Bob McDowell or me if we can be of any further help to you.

Very truly yours,

Fred Klink

Fredric J. Klink

Enclosures

PROPOSED AMENDMENT OF DELAWARE LAW IN LIEU OF SECTION 122(10)

§ 146. Indemnification and insurance of officers, directors, employees and agents.

(a) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any pending or threatened action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he [his testator or intestate] is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding, provided that there shall be no indemnification for judgments, fines and amounts paid in settlement or expenses, including legal fees, incurred in connection therewith, unless [the director, officer or employee] such person acted in good faith for a purpose which he reasonably believed to be in the best interests of the corporation and, in criminal actions, suits or proceedings, in addition had no reasonable cause to believe that his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent,

shall not, of itself, create a presumption that the director or officer did not act in good faith for a purpose which he reasonably believed to be in the best interests of the corporation or that he had reasonable cause to believe that his conduct was unlawful.

(b) A corporation shall have power to indemnify any person who is a party or is threatened to be made a party to any pending or threatened action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he [his testator or intestate] is or was director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, except that no indemnification shall be made in respect of any claim, issue or matter (i) as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation, unless and only to the extent that [the Court of Chancery or the court in which such action or suit was brought] a court having appropriate jurisdiction shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to

indemnity for such expenses as [the Court of Chancery or such other court] such court shall deem proper, (ii) which has been settled, unless a court having appropriate jurisdiction shall determine that, under all the circumstances, such person is entitled to indemnity, or unless it shall be determined that such person was not guilty of negligence or misconduct in the performance of his duty to the Corporation:

(A) by the Board of Directors by a majority vote of a quorum consisting of directors who were not parties to such action or proceeding, or in the absence of such a quorum,

(B) by independent legal counsel selected by the Board of Directors, or

(C) by the stockholders.

(c) A director, officer, employee or agent who has been wholly successful on the merits or otherwise in defense of any action, suit or proceeding or in defense of any claim, issue or matter therein shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him [therein] in connection therewith.

(d) Expenses incurred in defending any pending or threatened action, suit or proceeding, whether civil, criminal, administrative or investigative, may be paid by the corporation in advance of the final disposition thereof if authorized by the Board of Directors or the stockholders.

(e) A corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation against any liability asserted against him in any such capacity, whether or not the corporation would have the power to indemnify him against such liability under this Section.

(f) The indemnity authorized or required under this Section shall not be deemed exclusive of any other rights to which any director, officer, or employee/or agent may be entitled under any by-law or resolution adopted by the stockholders, any agreement [vote of stockholders], or otherwise and shall inure to the benefit of the heirs, executors and administrators of such a person.

HHB&R

MEMORANDUM

To: S. Samuel Arsht, Esq. January 11, 1967

From: FJK

Re: Proposed Delaware Indemnity Statute

1. I have added the words "pending or threatened" in paragraphs (a) and (b) so as to make it clear (although it is probably already the case) that indemnity may be afforded, particularly in the case of threatened derivative actions.

2. I have deleted the words "his testator or intestate" from paragraphs (a) and (b) and have redrafted paragraph (d) (my paragraph (f)) to cover heirs, etc.

3. I have included agents to the class of persons to whom indemnity or insurance may be afforded.

4. I believe that it is desirable, in the case of criminal actions, to require that the person seeking indemnity "had no reasonable cause to believe that his conduct was unlawful". It seems to me that a corporation which afforded indemnity to a person who wilfully violated a criminal statute would be subject to considerable criticism. As you know, the New York Business Corporation Law imposes such a requirement.

5. I agree with the position taken as to derivative

actions, i.e., affording indemnity only for expenses where there has been an adjudication of liability in order to avoid the circularity problem as to judgments and settlement payments discussed by Professor Bishop and others. However, it seems to me that it is desirable to specify the method of determining whether or not there has been a breach of duty in the case of settled derivative actions and, accordingly, I have added clause (ii) to paragraph (b).

6. I have added a new paragraph (d) which authorizes the advance of expenses prior to final disposition.

7. I have also added a clause authorizing the purchase of insurance. The insurance purchased by a corporation ought not be limited in coverage to matters as to which the corporation could indemnify. As you know, there has been a debate with respect to so-called directors' liability insurance policies as to the allocation of premiums paid by the corporation (90%) and directors and officers (10%). Such policies normally are written in two parts covering both the corporation (to the extent it indemnifies) and directors and officers to the extent the corporation does not indemnify them (with certain exclusions). I don't think anyone really knows what a proper allocation of the premiums should be, and this raises the question of whether or not a corporation is in effect paying part of the individual's share and thereby indirectly indemnifying where it could not do so

directly. It seems to me that a corporation ought to be able to pay for what is essentially directors' malpractice insurance — it is really a form of additional compensation.

YALE UNIVERSITY
LAW SCHOOL
NEW HAVEN, CONNECTICUT

JOSEPH W. BISHOP, JR.

January 16, 1967

S. Solomon Arsht, Esq.
3000 du Pont Building
Wilmington, Delaware

Dear Mr. Arsht:

Through the courtesy of Fredric I. Klink of the Association of the Bar of the City of New York I have been furnished a copy of the proposed revision of the present section 122 (10) of the Delaware Corporation Law. The language of the draft in respect of indemnification of expenses incurred in connection with the settlement of derivative suits seems to me to raise interesting questions. For example, are amounts paid the corporation within the meaning of the term "expenses"? Who will make the decision whether to grant or withhold indemnification in a particular case? Will judicial approval of settlements be required, and, if so, will the court be empowered to restrict the corporation's power to indemnify expenses connected with such a settlement?

I realize, of course, that the answers to some or all of these questions may be contained in other sections of the draft statute which I have not seen. I should be very grateful if you could furnish me a copy of the draft in its present form. If there is any charge for such a copy, please let me know.

Sincerely yours,

Joseph W. Bishop, Jr.

Joseph W. Bishop, Jr.
Professor of Law

JWB:bp

YALE UNIVERSITY
LAW SCHOOL
NEW HAVEN, CONNECTICUT

JOSEPH W. BISHOP, JR.

January 17, 1967

S. Samuel Arsht, Esq.
Du Pont Building
Wilmington, Delaware 19801

Dear Mr. Arsht:

First, let me apologize for getting your name wrong in the letter I sent you yesterday. I can only explain the slip by saying that an old friend of mine named Solomon had just died and that the name was uppermost in my thoughts at the moment.

Fred Klink has sent me a copy of the latest edition of the draft revision of Section 122 (10) of the DELAWARE CORPORATION LAW, which answers one of the questions which I posed in my letter to you. However, I would still be very grateful if you could let me have a copy of the rest of the proposed new statute.

Sincerely yours,

Joseph W. Bishop, Jr.

JWB:bp

LAW OFFICES

DRINKER BIDDLE & REATH

1100 PHILADELPHIA NATIONAL BANK BUILDING

BROAD AND CHESTNUT STREETS

PHILADELPHIA 19107

CABLE ADDRESS
DEBEMAC

TELEPHONE
AREA CODE 215
563-8700

January 18, 1967

S. Samuel Arsht, Esq.
3000 duPont Building
Wilmington, Delaware

Dear Mr. Arsht:

Thank you for your letter of January 16 and the enclosed draft section dealing with director indemnification.

I enclose half a dozen copies of our latest draft on the subject, which I hope to get approved by the Bar Association this week and promptly introduced in the Legislature.

We have decided to differ from your draft in two major and a few minor respects.

1. We treat direct actions against a person and derivative actions in the same way and permit indemnification against amounts paid to the corporation itself in settlement. We feel that today, under the Securities Exchange Act of 1934 and otherwise, many actions are brought which could be either derivative or direct. Some times they are both. We do not think that the procedure chosen by a plaintiff should make any difference in the substantive right of indemnification.

2. We have omitted your exception for cases where there is an adjudication of negligence or misconduct. Instead we have inserted in the standards that must be met by an indemnified person that he must act not only in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, but that he be found to have acted with reasonable care. Obviously if there is an adjudication for negligence or misconduct there can be no determination that he acted with reasonable care, and there could hardly be a determination that he complied with the other standards set forth.

3. We have put the insurance clause at the end so as to make it clear that the corporation can maintain insurance against liabilities where the indemnification is not under the statute but under a by-law, shareholders' resolution, etc.

4. I changed the section on advance payments by a corporation to make it clear that advances are authorized if he agrees to repay them unless it shall be ultimately determined that the corporation is not authorized to indemnify him against them. Your language says he must repay them unless he is entitled to be indemnified, which would limit the agreement to cases where there is a successful defense.

5. Certain other minor changes in phraseology have been used in the interests of brevity and clarity, such as the reference to "eligible person" in quite a number of places in lieu of repeating the lengthy language used in the first clause to describe the persons entitled to indemnity.

Sincerely yours,

John Mulford

JM:W

cc: Mr. Sebring

48 WALL STREET
NEW YORK 5

January 18, 1967

S. Samuel Arsht, Esq.,
Morris, Nichols, Arsht & Tunnell,
Du Pont Building,
Wilmington, Delaware 19801.

Dear Sam:

Thank you for your January 11 letter. There is a typo at the end of the first paragraph of the last page: "suit" should be "Section." Otherwise, it seems to me that this draft is a step in the right direction.

Despite the circular argument which Professor Bishop has so eloquently promulgated, there seems to be a respective segment of the Bar -- although I don't think that anyone on my Committee is persuaded to that view -- who believe that even where there has been a settlement or judgment in a derivative action, with the payment to the corporation, such payment as well as the related legal and other expenses should be reimbursable by the corporation directly to the director and officer in question, provided a court determines that he acted in good faith and, in view of all the circumstances, should fairly and reasonably be indemnified. Perhaps this is best illustrated by the indemnity provision included in the By-Laws of American Sugar Company set forth in the enclosed Proxy Statement. While, as indicated above, I do not adhere to this view, and doubt that it is sound, you should appreciate that some thoughtful lawyers are still espousing it.

Sincerely yours,

RAMcDowell

Robert A. McDowell

§ 410. INDEMNIFICATION OF DIRECTORS, OFFICERS AND [OTHER PERSONS] AUTHORIZED REPRESENTATIVES - [Unless the articles provide otherwise, a business corporation shall have power to indemnify any and all of its directors or officers or former directors or officers, or any person who may have served, at its request, as a director or officer of another corporation in which it owns shares of capital stock or of which it is a creditor, against expenses actually and necessarily incurred by them in connection with the defense of any action, suit or proceeding in which they, or any of them, are made parties or a party by reason of being or having been directors or officers or a director or officer of the corporation or of such other corporation, except in relation to matters as to which any such director or officer or former director or officer or person shall be adjudged, in such action, suit, or proceeding, to be liable for negligence or misconduct in the performance of duty. Such indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any by-law, agreement, vote of shareholders, or otherwise.]

A. A business corporation shall have power to indemnify in the manner and to the extent provided in this section any person who at any time has served or serves as a director or officer of the corporation, or as a director or officer of another corporation at the request of the corporation because of its interest in such other corporation, or who at any time has

served or serves in any other capacity as a duly authorized representative of the corporation.

B. Whenever any such eligible person is made or threatened to be made a party to an action or proceeding, whether civil or criminal, by reason of action or inaction in such capacity, the corporation may indemnify him against judgments, fines and reasonable expenses (including attorneys' fees) reasonably incurred by him in connection with such action or proceeding or threatened action or proceeding, or any appeal therein, as well as amounts paid in settlements, if the matter is disposed of by judgment or settlement or otherwise, and it is determined by a court having appropriate jurisdiction, or as provided in paragraph C below, that such eligible person acted in good faith with reasonable care and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, in criminal actions or proceedings, in addition, that he had no reasonable cause to believe that his conduct was unlawful.

If such eligible person is successful in the defense of such an actual or threatened action or proceeding, on the merits or otherwise, the corporation shall so indemnify him totally if successful in whole and proportionately if successful in part.

The termination of any such action by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that

any such eligible person did not act in good faith, with reasonable care and in a manner which he reasonably believed to be in or not opposed to the best interests of such corporation, or that in criminal actions or proceedings he had reasonable cause to believe that his conduct was unlawful.

C. Any indemnification under subsection B of this section (unless ordered by a court) shall be made by the corporation only if authorized in the specific case:

(1) by the board of directors upon its determination that the eligible person has met the applicable standard of conduct set forth in subsection B of this section, made by majority vote of a quorum consisting of directors who were not parties to such action or proceeding, except that if such a quorum is not obtainable, or if the board so provides, such determination may be made by independent counsel in a written opinion that indemnification is proper in the circumstances because the applicable standard of conduct set forth in subsection B of this section has been met by such eligible person or

(2) by the shareholders upon their determination (which may be based upon the written opinion of independent counsel as provided in clause (1) of this section) that the eligible person has met the applicable standard of conduct set forth in subsection B of this section.

D. Expenses incurred in defending a civil or criminal action or proceeding may be paid by the corporation in advance

of the final disposition of such action or proceeding if authorized by the board of directors or shareholders in the manner provided in subsection C of this section upon receipt of an undertaking by or on behalf of the eligible person to repay such amount unless it shall ultimately be determined that the corporation is authorized by this section 3 to indemnify him against such expenses.

E. The indemnification authorized hereunder shall not be exclusive of other rights to which any eligible person may be entitled under articles or by-laws, resolution of shareholders or otherwise, shall continue as to a person who has ceased to be such an eligible person and shall inure to the benefit of the heirs, executors and administrators of such a person.

F. A business corporation shall have power to maintain insurance on behalf of any such eligible person against any liability asserted against him in such capacity whether or not the corporation would have power to indemnify him against such liability.

SHELL OIL COMPANY
50 WEST 50TH STREET
NEW YORK, N.Y. 10020

December 15, 1966

W. F. KENNEY
VICE PRESIDENT AND GENERAL COUNSEL

Mr. Henry M. Canby
Richards, Layton and Finger
4072 DuPont Building
Wilmington, Delaware 19801

Dear Henry:

Belatedly, here are my comments to proposed Section 146.

After talking with you on the telephone, I re-read the proposed draft and must agree with you that subparagraph (d) probably means that a corporation by by-law may provide a right of indemnification independently of subparagraphs (a) and (b). As so read, the only limitation on subparagraph (d) would be (i) the mandatory right of indemnification provided by subparagraph (c), and (ii) any public policy limitation proscribed by the Delaware courts.

As to the latter, the legislature should have a paramount power over the courts to establish public policy with respect to the power of a corporation to indemnify its directors, your stock option cases notwithstanding.

Despite the foregoing comment on subparagraph (d), I am still concerned whether a court might not hold under an unfavorable factual situation (and this is where public policy would probably come in) that a corporation by by-law cannot provide for indemnity against a lower standard of conduct than that required under subparagraphs (a) and (b). If subparagraph (d) means anything, it must mean that a corporation has that right, but if this is the intent of the legislature perhaps it should be made clearer so that a court could easily reconcile subparagraph (d) with subparagraphs (a) and (b) and thus avoid the problems which we have had with it. One way this might be accomplished would be to introduce subparagraph (d) with: "Notwithstanding the provisions of paragraphs (a) and (b) of this subsection..."

Further, I think the statutory mandatory right of indemnification (subparagraph (c)) should be restricted to one who has been wholly successful on the merits. I think "or otherwise" should be stricken. A corporation should not be required to indemnify a crook merely because he was successful on some technical defense. If a corporation by by-law wishes to provide such a broad indemnity, it is free to do so by reason of subparagraph (d).

At a meeting which I attended about a month ago, the comment was also made that subparagraph (a) should be expanded to cover an additional standard of conduct commonly found in some of the newer by-laws in dealing with criminal proceedings, typical: "and with respect to any criminal action or proceeding, had no reasonable cause to believe that his conduct was unlawful". If this is more than definitive of "good faith", it can always be superimposed by a by-law provision written within the liberties of subsection (d).

We further note that section 141(f) of the current statute provides, inter alia, that a director shall be fully protected in relying in good faith upon the books of account or reports made to the corporation by any of its officials. In our view, this section affords a director broad protection when he acts in a representative capacity and relies in good faith on corporate reports. It permits exoneration from liability to the corporation in many, if not all, areas of board activity when the board is of a type which is not actively involved in the day-to-day management of the corporation. We think that this provision should be retained (i) as a statutory right of exoneration, and (ii) as a statutory recognition that a by-law provision containing such a right of exoneration conforms with the public policy of the state.

The foregoing notwithstanding, I think a good job of drafting has been done with the proposed new Section 146. I leave to your good judgment as to whether any of the foregoing comments are deserving of consideration.

With best regards.

Very truly yours,

W. F. Kenney

M E M O R A N D U M

TO: S. Samuel Arsht, Esquire
Richard F. Corroon, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

FROM: Henry M. Canby, Esquire

I attach a recent paper which bears on the subject of indemnification. I call your attention especially to pages 18 through 22.

HMC:pas

1/5/67

11/22/66
(To Sanction on February 9, 1967)

COMMITTEE ON CORPORATE LAWS

Re: Proposal to revise Section 4(o) of the Model Business Corporation Act concerning indemnification of directors and officers by (1) providing Alternative Section 4(o) authorizing indemnification "as permitted by this Act", and granting the power to maintain insurance, and (2) providing a companion Alternative Section 4A which would deal specifically with indemnification. Section 4A, pursuant to action of the Committee, provides the same standard of conduct for both derivative suits and third party actions.

[Alternative] §4. GENERAL POWERS

Each corporation shall have power:

. . . (o) to indemnify, as permitted by this Act, any person who at any time has served or serves as a director or officer of the corporation, or as a director or officer of another corporation at the request of the corporation because of its interest in such other corporation, or who at any time has served or serves in any other capacity as a duly authorized representative of the corporation against any liability asserted or incurred in that capacity; and to maintain insurance on behalf of any such person against any liability asserted against him in any such capacity, whether or not the corporation would have power to indemnify him against such liability under any other provision of this Act.

Partly to be revised to support present § 4(o)

* * *

[Alternative] SECTION 4A. PROVISIONS CONCERNING INDEMNIFICATION OF DIRECTORS, OFFICERS AND AUTHORIZED REPRESENTATIVES.

Each corporation shall have power to indemnify any person who at any time has served or serves as

a director or officer of the corporation, or as a director or officer of another corporation, at the request of the corporation because of its interest in such other corporation, or who at any time has served or serves in any other capacity as a duly authorized representative of the corporation as follows:

A. Whenever any such person is made or threatened to be made a party to an action or proceeding, whether civil or criminal, by reason of action or inaction in such capacity, the corporation may indemnify him against judgments, fines and reasonable expenses (including attorneys' fees) reasonably incurred by him in connection with such action or proceeding or threatened action or proceeding, or any appeal therein, as well as amounts paid in settlements, (i) if such director, officer or authorized representative is successful in the defense of such action on the merits or otherwise, totally if successful in whole and proportionately if successful in part; or (ii) in the event that the matter is disposed of by judgment ~~(other than as set forth in (i) above)~~ or settlement or otherwise, it is determined

by a court having appropriate jurisdiction or as provided in B below that such director, officer or authorized representative acted in good faith ~~for a purpose~~ in a manner which he reasonably believed to be in the best interests of the corporation and ~~that his conduct equitably and fairly merits~~ such indemnity, and, in criminal actions or proceedings, in addition, that he had no reasonable cause to believe that his conduct was unlawful.

The termination of any such action by judgment, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not in itself create a presumption that any such director, officer or authorized representative did not act in good faith, ~~for a purpose~~ in a manner which he reasonably believed to be in the best interests of such corporation, or ~~that his conduct did~~ not equitably ~~and fairly merit such~~ indemnity, or that in criminal actions or proceedings he had reasonable cause to believe that his conduct was unlawful.

B. Any indemnification under paragraph A (unless ordered by a court) shall be made by the corporation only if authorized in the specific case:

1. by the Board of Directors upon its determination that the director, officer or authorized representative has met the applicable standard of conduct set forth in paragraph A, made by majority vote of a quorum consisting of directors who were not parties to such action or proceeding, except that if such a quorum is not obtainable with due diligence, or if the Board so provides, such determination may be made by independent legal counsel in a written opinion that indemnification is proper in the circumstances because the applicable standard of conduct set forth in paragraph A has been met by such director, officer or authorized representative, or

2. by the shareholders upon their determination (which may be based upon the written opinion of independent legal counsel as provided in clause 1) that the director, officer or authorized representative has met the applicable standard of conduct set forth in paragraph A.

C. Expenses incurred in defending a civil or criminal action or proceeding may be paid by the corporation in advance of the final

disposition of such action or proceeding if authorized by the Board of Directors in the manner provided in paragraph B upon receipt of an undertaking by or on behalf of the director, officer or authorized representative to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation as authorized in this Section.

D. Any indemnification which may be authorized hereunder shall not be exclusive of other rights to which any director, officer or authorized representative may be entitled, shall continue as to a person who has ceased to be such director, officer or authorized representative and shall inure to the benefit of the heirs, executors and administrators of such a person.

E. Notwithstanding the foregoing, the corporation shall have power to make any other indemnification that shall be authorized by the Articles of Incorporation or by any by-law or resolution adopted by the shareholders after notice.

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

December 13, 1966

Memorandum for Messrs. Arsht and Canby

I have reviewed pages 1 through 19 of Folk's Report on Close Corporations. I make the following suggestions:

1. The suggested revision of § 141(b) appearing in Section 1 of the Report at page 5 already appears in the revision of § 141(b).

2. I favor the adoption of Folk's suggestion in Section 2 of his Report at page 5 and propose that the last sentence of our presently revised § 141(b) be changed to read as follows:

"The directors shall hold office until their successors are respectively elected and qualified. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation requires a greater number. Unless otherwise required, the by-laws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than one-third of the total number of directors nor less than two directors, except that when a board of one director is authorized under the provisions of this section, then one director shall constitute a quorum. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board unless the certificate of incorporation shall require a vote of a greater number."

3. I favor the recommendation contained in Section 3 at page 6 of the Report and suggest that § 223(a) be further revised as follows:

> "(a) Unless otherwise provided in the certificate of incorporation or by-laws, vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office, though less than a quorum, or by a sole remaining director. If by reason of death or resignation or other cause a corporation should ~~at any time~~ at any time have no directors in office, then any officer or any stockholder or an executor, administrator, trustee or guardian of a stockholder, or other fiduciary entrusted with like responsibility for the person or estate of a stockholder, may call a special meeting of stockholders in accordance with the provisions of the certificate of incorporation or the by-laws, or may apply to the Court of Chancery for a decree summarily ordering election as provided in § 224. Officers are

4. Folk's recommendation in Section 4 at page 7 of his Report already appears in revised § 141(f). At page 18 Folk suggests some language which would permit less than all the directors to consent to action. He favors the requirement of unanimous consent and I agree. Query, however, whether my position is inconsistent to the revision now contained in § 228(b)?

5. The subject matter of Folk's discussion in Section 5 at page 8 has been dealt with in our revision of § 228(b).

6. I would follow Folk's recommendation in Section 6 at page 10 of the Report and insert "or of any other securities having voting power" after "thereof" in the second line of § 102(b)(4).

7. I agree with Folk's comment in Section 7 at page 11 of the Report.

8. I would add a new § 242(d)(4) in accordance with the recommendation in Section 8 at page 11 of the Report as follows:

> "(4) Whenever the certificate of incorporation shall require for action by the board of directors, by the holders of any class or series of shares or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote."

9. The substance of Folk's recommendation in Section 9 at page 12 of the Report already appears in subsection (c) of revised § 218.

10. I favor expanding § 218 to include reference to irrevocable proxies as discussed in Section 10 at page 13 of the Report. I would reletter present subparagraph (d) of § 218 and insert a new subsection (d) as follows:

> "(d) A duly executed proxy shall be irrevocable if it states that it is irrevocable and if and only so long as it is coupled with an interest sufficient in law to support an irrevocable power coupled therewith. Without limiting the general provision of the foregoing, a proxy is coupled with an interest and is irrevocable if it is held by any of the following persons or his nominee:
>
> "(1) A pledgee under a valid pledge;
>
> "(2) A person who has agreed to purchase shares under an executory contract of sale;

"(3) A creditor who extends or continues credit to the corporation in consideration of the proxy if the proxy states that it is given in consideration of the extension or continuation of credit, the amount thereof and the name of the creditor;

"(4) A person who has contracted to perform services for the corporation if his contract of employment requires such a proxy as part of the consideration therefor and if the proxy states that it was given in consideration of the contract of employment and states the name of the employee and the period of employment contracted for; or

"(5) A person, including an arbitrator, who has been designated to vote shares by or in the manner provided in a voting agreement authorized by subsection (c) of this section.

"Any proxy which is irrevocable under the provisions of subparagraphs (1), (2), (3), (4) or (5) of this subsection shall become revocable, as the case may be, when the pledge is redeemed, or the executory contract of sale of shares is performed, or the debt of the corporation is paid, or the period of employment is terminated, or the voting agreement is terminated. An irrevocable proxy permitted by this section shall not be effective beyond ten years from the date of its execution, but the parties may extend the duration for as many additional periods, each not to extend ten years, as they may desire. The validity of an irrevocable proxy, otherwise lawful, shall not be affected during a period of ten years from the date when it was created or extended as provided herein by the fact that under its terms it will or may last beyond such ten-year period. Any extension of the proxy shall not affect the rights or obligations of persons not parties

thereto. A purportedly irrevocable proxy may be revoked by a purchase of shares subject to this proxy unless the existence of the proxy and its irrevocability is conspicuously noted on the certificate representing the shares or is actually known to the purchaser."

11. The substance of Section 11 at page 15 of the Report is already included in § 218(b) and (d).

12. I see no necessity for this provision in view of other provisions in § 218.

Richard F. Corroon,
Vice Chairman.

RFC:mp

c.c. C. S. Crompton, Jr., Esq.
C. F. Richards, Jr., Esq.
W. K. Stapleton, Esq.

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

December 21, 1966

Memorandum to Messrs. Arsht and Canby

I enclose copy of a letter I have received from Ernie Folk. It seems to me that his comments are helpful.

Dick

Richard F. Corroon

Enc.

c.c. C. S. Crompton, Jr., Esq. (Enc.)
C. F. Richards, Jr., Esq. (Enc.)
W. K. Stapleton, Esq. (Enc.)

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

November 16, 1966

Memorandum to Messrs. Arsht and Canby

I enclose my attempt to simplify § 244. I have made the following changes:

1. As I read present subsection (b), there are at least fourteen different manners in which capital can be reduced. I think that many of these manners overlap and that they can be consolidated into a smaller number. Subsection (a) of the enclosure represents my efforts in this regard. I have not attempted to change the substance of present subsection (b) and any such change is inadvertent.

2. I have changed the order of present subsections (a) and (b) in the interest of logic.

3. I have made some minor language changes in present subsection (a).

4. There are minor language changes in subsection (b).

5. I have changed subsection (e) to provide for publication only once instead of three times. The concept of protecting creditors by publishing notice seems slightly archaic. I would be willing to eliminate the requirement of publication, but, if it is to be kept, I believe a single publication should be sufficient.

Richard F. Corroon,
Vice Chairman

RFC:mp
c.c. Charles S. Crompton, Jr., Esq.
Walter K. Stapleton, Esquire
Charles F. Richards, Jr., Esq.
Encs.

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

January 4, 1967

Memorandum for Messrs. Arsht and Canby

Sometime ago, I was given the task of revising § 366 of Title 10 to eliminate the possibility of another Breech situation, where Mr. Breech had his shares of Ford Motor Company sequestered to compel his appearance in an action involving TWA, which had no connection with Ford. I have prepared a draft so providing.

Jim Latchum also thinks the statute should be changed with respect to the release of property after a general appearance has been entered. The draft also covers this point.

The first change may raise constitutional questions. As revised, the statute would permit an individual plaintiff to sequester whatever he could find in this State, whereas a corporate plaintiff would be limited to seizing shares of its own stock. I gave considerable thought to limiting seizure to property which bears some relation to the controversy. However, this raises extremely difficult questions of drafting and administrative and statutory problems.

Richard F. Corroon

RFC:mp
c.c. C. S. Crompton, Jr., Esq.
C. F. Richards, Jr., Esq.
W. K. Stapleton, Esq.
Encs.

How about class actions?

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

February 20, 1967

S. Samuel Arsht, Esquire
Morris, Nichols, Arsht & Tunnell
3000 DuPont Building
Wilmington, Delaware 19801

Dear Sam:

Your letter of February 15 to Henry and me arrived while I was out of town. Naturally, we should be flattered that the American Bar Association Committee has decided to follow the Delaware draft. I agree with all the changes suggested by Orvel Sebring, except for one. I think "or not opposed to" means exactly what it says and am surprised that the members of the ABA Committee were confused by the phrase. I think the quoted language adds something to the draft. Although I do not feel strongly on this point, I would vote to keep the phrase in the proposed Delaware statute.

Sincerely yours,

Dick

RFC:mp
c.c. Henry M. Canby, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

June 21, 1966

1. Still Open

1) 143, 144, 145
2) 159
3) 243, 244, 245
4) 284
5) 311, 313, 314
6) Subchapter XII through XV
7) § 251 - R. F. Corroon to propose amendment to permit cash squeeze-out. H. M. Canby requests foreign domestic 90% power in 251 or 253.
8) § 255 - R. F. Corroon requested at 30th meeting to change (b) and (c) to provide for case where all "members" are same as "governing body" so two votes are not required.

2. New Chapter II - Close Corporation

§ 7 - Open - discussed at W. K. Stapleton meeting (23rd meeting.

Chairman of the Board

§ 132
§ 251-256

Subparagraphs of § 251 as relettered where referred to in other Sections

§ 252
§ 253

MORRIS, NICHOLS, ARSHT & TUNNELL
DU PONT BUILDING - WILMINGTON 1, DELAWARE
TELEPHONE OL 8-9201

January 16, 1967

Henry M. Canby, Esquire
Richard F. Corroon, Esquire
Charles F. Richards, Jr., Esquire
Charles S. Crompton, Jr., Esquire
Walter K Stapleton, Esquire

Re: Corporation Law Revision Committee

Gentlemen:

Enclosed are copies of the November 28, 1966, draft of amendment to the Pennsylvania Business Corporation Law and the January issue of the Pennsylvania Bar Association quarterly which contains the Pennsylvania committee's report beginning at page 201.

The enclosed papers were sent to me by Mr. John Mulford, of Drinker, Biddle and Reath, who is chairman of the Pennsylvania Bar Association corporation law committee which is sponsering the new statute.

Sincerely yours,

S. Samuel Arsht

SSA:fw

Enclosures

Mr Crompton

341

Current Section Number

New Section Number

NEW TEXT

SUBCHAPTER XIV. FOREIGN CORPORATIONS

§ 341.1 Definition; Qualification to do business in State; procedure

(b) No foreign corporation ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~, shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have filed in the office of the Secretary of State of this State a certified copy of its charter and the name ~~or names~~ of its authorized agent ~~or agents~~ in this State, who shall be resident of this state when appointed, together with a sworn statement of the assets and liabilities of the corporation, and shall have paid to the Secretary of State, for the use of the State, $25.

(c) The certificate of the Secretary of State, under his seal of office, of the filing of the charter shall be delivered to the agent ~~or agents~~ upon the payment to the Secretary of State of the usual fees for making certified copies, and the certificate shall be prima facie evidence of the right of the corporation to do business in this State.

(d) The Secretary of State, after issuing the certificate prescribed in subsection (c) of this section, and delivering it to the agent ~~or agents~~ of the foreign corporation shall issue a certificate to the prothonotary of each county of this State containing the name of the agent ~~or agents~~ of the foreign corporation, and the state in which it is incorporated.

REFERENCES

1. Folk recommendation at p. 285.
2. Committee approved at meeting of April 6, 1965.

New Provision

341(?)
New Section Number

NEW TEXT

Section _____. Definition of Foreign Corporations.

(a) "Foreign corporation" ~~, as used in this subchapter,~~ means a corporation organized under the laws of any jurisdiction other than this state.

REFERENCES

1. Folk recommendation p. 285.
2. Committee approved at meeting of April 6, 1965.

§342. Additional requirements in case of amendment of charter, merger ~~or consolidation~~

Every foreign corporation admitted to do business in this State which shall amend its charter from time to time or shall be a party to a merger ~~or consolidation permitted by the laws of the state under which it is organized~~, shall, within 30 days after the time the amendment or merger ~~or consolidation~~ becomes effective, file with the Secretary of State of this State a copy of the amendment or a copy of the articles of merger or consolidation, duly certified by the proper officer of the ~~State by~~ Jurisdiction in which the corporation shall have been incorporated or under the laws of which the merger ~~or consolidation~~ was effected.

~~No change suggested.~~

343
Current Section Number

New Section Number

CURRENT TEXT

§ 343. Exceptions to requirements

No corporation created by the laws of any other state, or the laws of the United States, shall be deemed to be doing business in this State, nor shall the corporation be required to comply with the provisions of sections 341 and 342 of this title, under the following conditions, or any of them—

(1) If it is in the mail order or a similar business, merely receiving orders by mail or otherwise in pursuance of letters, circulars, catalogs, or other forms of advertising, or solicitation, accepting the orders outside this State, and filling them with goods shipped into this State from without same;

(2) If it employs salesmen, either resident or traveling, to solicit orders in this State, either by display of samples or otherwise (whether or not maintaining sales offices in this State), all orders being subject to approval at the offices of the corporation without this State, and all goods applicable to the orders being shipped in pursuance thereof from without this State to the vendee or to the seller or his agent for delivery to the vendee, and if any samples kept within this State are for display or advertising purposes only, and no sales, repairs, or replacements are made from stock on hand in this State;

(3) If it sells, by contract consummated outside this State, and agrees, by the contract, to deliver into from without this State, machinery, plants, or equipment, the construction, erection or installation of which within this State requires the supervision of technical engineers or skilled employes performing services not generally available, and as a part of the contract of sale agrees to furnish such services, and such services only, to the vendee at the time of construction, erection or installation;

(4) If its business operations within this State, although not falling within the terms of paragraphs (1), (2), and (3) of this section, or any of them, are nevertheless wholly interstate in character;

(5) If it is an insurance company doing business in this State.

The provisions of this section shall have no application to the question of whether any foreign corporation is subject to service of process and suit in this state under Section 353 of this Title.

018

343
Current Section Number

New Section Number

NEW TEXT

§ 343. Exceptions to requirements

No foreign corporation ~~[illegible] shall be deemed to be doing business in this State, nor shall the corporation be~~ required to comply with the provisions of sections 341 and 342 of this title, under any of the following conditions ~~or any of them~~:

(1) If it is in the mail order or a similar business, merely receiving orders by mail or otherwise in pursuance of letters, circulars, catalogs, or other forms of advertising, or solicitation, accepting the orders outside this State, and filling them with goods shipped into this State from without same;

(2) If it employs salesmen, either resident or traveling, to solicit orders in this State, either by display of samples or otherwise (whether or not maintaining sales offices in this State), all orders being subject to approval at the offices of the corporation without this State, and all goods applicable to the orders being shipped in pursuance thereof from without this State to the vendee or to the seller or his agent for delivery to the vendee, and if any samples kept within this State are for display or advertising purposes only, and no sales, repairs, or replacements are made from stock on hand in this State;

(3) If it sells, by contract consummated outside this State, and agrees, by the contract, to deliver into from without this State, machinery, plants, or equipment, the construction, erection or installation of which within this State requires the supervision of technical engineers or skilled employes performing services not generally available, and as a part of the contract of sale agrees to furnish such services, and such services only, to the vendee at the time of construction, erection or installation;

(4) If its business operations within this State, although not falling within the terms of paragraphs (1), (2), and (3) of this section, or any of them, are nevertheless wholly interstate in character;

(5) If it is an insurance company doing business in this State.

The provisions of this section shall have no application to the question of whether any foreign corporation is subject to service of process and suit in this state under Section 353 of this Title.

REFERENCES

1. Folk recommendation p. 285.
2. Committee approved at meeting of April 6, 1965.

§344. Annual report

On or before the 30th day of June in each year, a foreign corporation doing business in this State shall file a report with the Secretary of State. The report shall be made on behalf of the corporation by its president, secretary, treasurer, or other officer duly authorized so to act, or by any two of its directors, or by any two of its incorporators in the event its board of directors shall not have been elected. The fact that an individual's name is signed on a certification attached to a corporate report shall be prima facie evidence that such individual is authorized to certify the report on behalf of the corporation; however, the official title or position of the individual signing the corporate report shall be designated. The report shall be on a calendar year basis and shall state with the degree of particularity required by section 102a (2) of this title, the location of its principal office in this State; the name of the agent upon whom service of process against the corporation may be served; the location or locations (city or cities, town or towns, street or streets, and number of same, if number there be) of the place or places of business of the corporation without this State; the names and addresses of all the directors and officers of the corporation and when the term of each expires; the date appointed for the next annual meeting of the stockholders for the election of directors; the number of shares of each class of the capital stock which is ~~to be~~ issued, ~~if any,~~ and the par value ~~and the amount of the par value stock~~, and the number of shares actually issued ~~of each class of the capital stock which is to be issued, if any,~~ and the amount of par value actually issued; the amount of capital invested in real estate and manufacturing in this State, and the tax paid thereon; and, if exempt from taxation for any cause, the specific facts entitling the corporation to exemption from taxation.

No change suggested.

---

*So enacted.

§345. Failure to file report

Upon the failure, neglect or refusal ~~on the part~~ of any foreign corporation to file an annual report as required by section 344 of this title, the Secretary of State shall investigate the reasons therefor and shall terminate the right of the foreign corporation to do business within this State upon failure of the corporation to file an annual report within any two-year period.

~~No~~ change ~~suggested~~.

Repealed

§346. Record of agents of foreign corporations; prothonotaries' duties and fee

The prothonotary in each county of this State shall procure and keep a book, to be known as "Record of Agents of Foreign Corporations," and shall enter and record therein the name of every foreign corporation, certified by the Secretary of State as provided in section 341 of this title, the name of its agent or agents, the name of the state in which the corporation is incorporated, and the date of the filing of the certificate in the office of the Secretary of State. For making the above entries the prothonotary making the same shall receive from each foreign corporation a fee of one dollar, to be collected from each corporation and paid over by the Secretary of State.

No change suggested, but is this section necessary at all?

§347. Service of process ~~upon~~ upon qualified foreign corporations

All process issued out of any court of this State, ~~against any corporation which has qualified to do business in this State~~, all orders made by any court of this State, all rules and notices of any kind required to be served on or given to any foreign corporation which has qualified to do business in this State may be served on or given to the agent of the corporation designated in accordance with section 341 of this title, and such service or notice shall be as effectual and shall operate as if it had been served on or given to the corporation.

10 Del. C., §3111 provides that process is to be served on the president or head officer if residing in the State and, if not, on any officer, director or manager. It provides that in the case of a foreign corporation, if none of the aforementioned people are residents and there is no certified agent, process may be served on any agent then in the State.

§ 348. Change of agent upon whom process may be served

(a) Any foreign corporation, which has qualified to do business in this State, by filing a certificate of the same kind and nature, and executed as required by section 341 of this title, may change its agent and substitute another agent for the purposes of this subchapter. ~~Every agent shall at the time of his appointment be a resident of this State.~~

(b) Any individual or corporation ~~that has been~~ designated by a foreign corporation as its authorized agent for service of process may resign by filing with the Secretary of State a signed statement that he or it is unwilling to continue to act as the agent of the corporation for service of process, including in the statement the post office address of the corporation. Upon the expiration of 30 days after the filing of the statement with the Secretary of State, the capacity of the individual or corporation, as agent, shall terminate. Upon the filing of the statement, the Secretary of State forthwith shall give written notice, ~~by mail~~, by mail to the corporation of the filing of the statement, which notice shall be addressed to the corporation at the post office address given in the statement.

(c) If any agent designated and certified as required by section 341 of this title shall die or remove from this State, or resign, then the foreign corporation for which the agent had been so designated and certified shall, within ten days after the death, removal or resignation of its agent, substitute, designate and certify to the Secretary of State, the name of another agent for the purposes of this subchapter, and all process, orders, rules and notices mentioned in section 347 of this title may be served on or given to the substituted agent with like effect as is prescribed in said section.

~~No change~~ suggested

§ 349. Violations and penalties

Any foreign corporation ~~engaging in, prosecuting, or transacting any~~ doing business of any kind ~~within the limits of~~ this State without first having complied with sections 341-348 of this title shall be fined not less than $200 nor more than $500 for each such offense. Any agent of any foreign corporation that shall ~~transact any~~ do business ~~within the limits of~~ this State for any foreign corporation before the foreign corporation has complied with all of said sections, shall be fined not less than $100 nor more than $500 for each such offense.

No change suggested

New Provision

New Section Number
(After § 349)

NEW TEXT

Section 346. Foreign Corporations Illegally Doing Business; Injunctions.

The Court of Chancery shall have jurisdiction to enjoin any foreign corporation, or any agent thereof, from ~~engaging in, prosecuting or~~ transacting any business ~~of any kind within the limits of~~ this State if such corporation has failed to comply with sections 341-348 of this title or if such corporation has secured a certificate of the Secretary of State under Section 341 of this title on the basis of false or misleading representations. The Attorney General shall, upon his own motion or upon the relation of proper parties, proceed for this purpose by complaint in any county in which such corporation is doing business.

New Provision

New Section Number
(After § 349)

REFERENCES

1. Folk recommendations at pp. 283-4.
2. Committee approved meeting of April 6, 1965.
3. Do we need more as to procedure for service (etc.)?

DELAWARE CORPORATION LAW REVISION COMMITTEE
350 DELAWARE TRUST BUILDING
WILMINGTON, DELAWARE 19801

January 26, 1967

S. Samuel Arsht, Esquire
Henry M. Canby, Esquire
Charles S. Crompton, Jr., Esquire
Charles F. Richards, Jr., Esquire
Walter K. Stapleton, Esquire

Gentlemen:

I have talked to Margaret Storey about §§ 133 and 134. She believes that upon the change of address or resignation of a resident agent the filing of a single certificate is preferable.

Sincerely yours,

Dick

RFC:mp