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entitled a "Memorandum" which in effect stated that the property of the Consolidated should be considered as a whole for the purpose of determining its rate base. Subsequently, Rustless Iron & Steel Corporation, an intervenor before the Commission, filed a bill of complaint in the Circuit Court of Baltimore City, which sought a reversal of the so-called "Memorandum". One of the arguments urged by the plaintiff (or more accurately the Appellant) was that it was entitled to relief under the new Declaratory Judgments Act. The Court denied this contention on two grounds, i. e. that the litigation was of a type for which a statute provided a special form of remedy, and that the present case was an appeal which was not regulated or controlled by the Act. With respect to the first point, it should be observed that where another statute has *specifically* provided for a method of procedure that the Act may not be used. This results from the obvious fact that the General Assembly did not intend that a declaratory judgment should be sought where it had previously provided a specific form of proceeding for a special type of case. Where such a statute exists, therefore, litigants should be bound to seek relief thereunder, and in such cases the alternative argument that if relief cannot be obtained thereby it should be forthcoming under the Declaratory Judgments Act should not be countenanced.

RECENT CHANGES AFFECTING MINORITY STOCKHOLDERS' SUITS

It is a familiar principle that the right to control the affairs and management of a corporation and to dictate its policies can be exercised by the majority of the holders of stock having voting power in that corporation. The rights of the minority stockholders are not many. In general they are protected only against fraudulent, illegal and ultra vires acts of the majority.[1] This protection can be obtained by the use of the device known as the minority stockholders bill. Recently in Maryland, the use of this device has been limited by a decision of the Court of Appeals and by legislative enactment.

In *Eisler v. Eastern States Corporation*,[2] the Court of Appeals was faced with the problem of the right of a

[1] 18 C. J. S. (Corporations) §496.

[2] 182 Md. 329, 35 A. (2d) 118 (1943).

minority stockholder to complain of a transaction occurring prior to his acquisition of stock.[3] The plaintiff, a stockholder in the defendant corporation, sought the appointment of a receiver for the defendant with full power to sue its officers and directors for violation of their trust duties as officers and directors. The plaintiff alleged that in 1930 he purchased two hundred shares of common stock of the defendant and in the same year he purchased three hundred shares of similar common stock as president of The Leshire Corporation. It was alleged in the bill that the defendant corporation was organized as an investment company in 1925 for the purpose of raising money for the St. Regis Paper Company and in 1928 the defendant transferred $18,577,593.69 to the St. Regis Paper Company for which it received 1,000,000 shares of the common stock of St. Regis. It was charged that the directorate of the defendant and St. Regis was interlocking and that the purpose of the transaction was to further the individual interest of the common officers and directors of St. Regis and the defendant and not to promote the interests of the defendant corporation. A statement of the defendant's investments as of December 31, 1941, showed total investments of $19,834,111.33 with a market value of $1,956,258. It was alleged that since the plaintiff had acquired his stock, the changes in the defendant's portfolio had been relatively insignificant and would not exceed $150,000. The lower court sustained a demurrer to the second amended bill of complaint without leave to amend. The opinion of the lower court pointed out that no imminent danger of waste or loss by reason of contemplated acts of the officers or directors was charged by the plaintiff. The court further stated that the defendant had no funded debt, was clearly solvent and that the essence of the complaint was that 90% of the assets of the defendant were used to purchase $18,500,000 worth of stock of St. Regis which had depreciated in value to $1,750,000. The Court held[4] that although an elaborate scheme to mulct the corporation and to waste and dissipate its assets was charged, there were not sufficient facts alleged to sustain the charges; and since the power to appoint a receiver was

[3] The case was previously before the Court of Appeals on a question involving the use of the Discovery Rules. Eastern States Corporation v. Eisler, 181 Md. 526, 30 A. (2d) 867 (1943). On the question of whether the premium on a surety bond filed to stay an order of the lower court pending an appeal is taxable as costs, see Eisler v. Eastern States Corporation, Baltimore Daily Record, April 21, 1945, on appeal Court of Appeals of Maryland, October Term, 1945, No. 94.

[4] Record pp. 30-33.

discretionary, the Court would not exercise its discretion in the absence of a clear showing why it should do so.[5]

On appeal, the Court of Appeals affirmed. Its decision was placed on two grounds, approval of the reasons given by the lower court and a holding that the plaintiff, who was not a stockholder at the time when the transaction of which he complained took place, had no standing to object. About the latter, the lower Court had said, "It is not necessary to decide, at the present time, whether or not this stockholder can complain of acts which took place prior to his acquisition of stock" but the Court of Appeals *held* "* * * the Appellant (stockholder) does not have the standing to complain of acts and management of the Corporation prior to the time that he became a shareholder thereof."

In reaching this result, the Court relied on the case of *Matthews v. Headley Chocolate Company*[6] which in turn had quoted with approval from the leading case of *Home Fire Insurance Company v. Barber*.[7] While on its facts the *Headley* case held merely that a corporation could recover excessive salaries paid to former officers for the benefit of minority stockholders to the extent that the minority stockholders were not barred by laches, limitations, acquiescence or by the disqualifications of prior holders of the stock, the Court cited with approval the rule barring all stockholders from complaining of transactions which took place prior to their acquisition of stock. Naturally this decision lead to some confusion as to the exact status of the rule in Maryland. One text writer and the United States Circuit Court of Appeals for the Fourth Circuit[8] regarded the case as a flat denial of the right of a stockholder to complain of transactions occurring prior to his purchase of stock. A contra view was taken in the REVIEW.[9] There it was strenuously argued that the *Headley* case could and should be distinguished from those cases in other jurisdictions which denied the right to sue to all subsequent stockholders, because it was thought that the less stringent rule was more desirable. An examination of the cases at that time disclosed that the numerical weight of authority was in favor of the rule permitting

[5] The court relied on Williams v. Salisbury Ice Company, 176 Md. 13, 3 A. (2d) 507 (1939).

[6] 130 Md. 523, 100 Atl. 645 (1917).

[7] 67 Neb. 657, 93 N. W. 1024 (1903).

[8] BRUNE, MARYLAND CORPORATION LAW (1933) 176; McQuillen v. National Cash Register Co., 112 F. (2d) 877, 882 (C. C. A. 4th, 1940).

[9] Sykes, *Right of Stockholder to Attack Transactions Occurring Prior to His Acquisition of Stock* (1940) 4 Md. L. Rev. 380.

suits by stockholders who did not acquire their stock until after the transaction of which they complained.

A reexamination of the cases discloses that since 1940 no jurisdiction has joined the states permitting suits by subsequent stockholders. Indeed the Illinois Court, which had been considered in accord with the weight of authority has construed its prior holding as authority for the rule that a subsequent stockholder has no standing to complain.[10] The action of the Illinois Court seems indicative of the trend, for courts in Florida, Maryland and South Dakota have recently decided in favor of the view that a stockholder cannot complain of a transaction occurring prior to his acquisition of stock.[11] By statute, Delaware, New York, New Jersey and Pennsylvania have joined this group;[12] and Kansas and Louisiana should probably be classed with the states holding to this view.[13] The present weight of authority is 11 jurisdictions (counting England) permitting subsequent stockholders to complain[14] and 19 jurisdictions (counting the Federal courts) not permitting subsequent stockholders to complain.[15]

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[10] Goldberg v. Ball, 305 Ill. App. 273, 27 N. E. (2d) 575 (1940), citing Bilhuber v. Bilhuber-Wawak Co., 245 Ill. App. 552 (1927).

[11] Journal Corp. v. Gore, 147 Fla. 217, 2 So. (2d) 741 (1941); Eisler v. Eastern States Corporation, 182 Md. 329, 35 A. (2d) 118 (1943); Jepson v. Peterson, 10 N. W. (2d) 749 (S. Dak. 1943).

[12] Delaware Corporation Law §51A; N. Y. General Corporation Law §61; N. J. Statutes Ann. 14:3-16; Pennsylvania, Laws of 1945, Act. No. 114.

[13] Mitchell v. Beachy, 110 Kan. 60, 202 Pac. 628 (1921); Mullins v. DeSota Securities Co., 45 F. Supp. 871 (D. C. W. D. La. 1942), citing Von Schlemmer v. Keystone Life Ins. Co., 121 La. 987, 46 So. 991 (1908).

[14] Seaton v. Grant, L. R. 2 Ch. 459; Parsons v. Joseph, 92 Ala. 403, 8 So. 788 (1891); Harvey v. Meigs, 17 Cal. App. 353, 119 Pac. 941 (1911); Just v. Idaho Canal Co., 16 Idaho 639, 102 Pac. 381 (1909); Mason v. Carrothers, 105 Me. 392, 74 Atl. 1030 (1909); German Corp. v. Negaunee German Aid Soc., 172 Mich. 650, 138 N. W. 343 (1912); Forrester v. Boston Mining Co., 21 Mont. 544, 55 Pac. 229 (1898); Windsor v. Bailey, 55 N. H. 218 (1875); Dissette v. Publishing Co., 9 Ohio Circ. Ct. (N. S.) 118; North v. Union Savings & Loan Assn., 59 Ore. 483, 117 Pac. 822 (1911); Robertson v. Draney, 53 Utah 263, 178 Pac. 35 (1919).

[15] Boldenweck v. Bullis, 40 Col. 253, 90 Pac. 634 (1907); Journal Corp. v. Gore, 147 Fla. 217, 2 So. (2d) 741 (1941); Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630 (1889); Goldberg v. Ball, 305 Ill. App. 273, 27 N. E. (2d) 575 (1940); Clark v. American Coal, 86 Iowa 436, 53 N. W. 291 (1892); Mitchell v. Beachy, 110 Kan. 60, 202 Pac. 628 (1921); Neff v. Gas & Electric Shop, 232 Ky. 66, 22 S. W. (2d) 265 (1929); Mullins v. DeSota Securities Co., 45 F. Supp. 871 (D. C. W. D. La. 1942); Eisler v. Eastern States Corp., 182 Md. 329, 35 A. (2d) 118 (1943); Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024 (1903); Rankin v. Brewery & Ice Co., 12 N. M. 54, 73 Pac. 614 (1903); Moore v. Silver Mining Co., 104 N. C. 534, 10 S. E. 679 (1890); Jepson v. Peterson, 10 N. W. (2d) 749 (S. Dak. 1943); Pitcher v. Lone Pine-Surprise Consol. Mining Co., 39 Wash. 608, 81 Pac. 1047 (1905); Delaware Corporation Law §51A; N. Y. General Corporation Law §61b; N. J. Statutes Ann. 14:3-16; Pennsylvania, Laws of 1945, Act. No. 114; Fed. Rules of Civil Procedure, rule 23(b).

As if to remove any doubt regarding the conclusiveness of the holding in the *Eisler* case the General Assembly, at its 1945 session, enacted as the law of Maryland the Federal rule which requires a stockholder, in bringing suit on behalf of his corporation, to establish that he owned his stock at the time of the transaction of which he complains or that it thereafter devolved on him by operation of law.[16] This statute is similar to those passed in Delaware, New York, New Jersey and Pennsylvania.[17] Apparently it adds nothing to the rule of the *Eisler* case except in permitting suits by subsequent stockholders whose shares have devolved on them by operation of law. It, of course, removes from the courts the inherent power to make exceptions when faced by unusual and special circumstances, except as a matter of statutory interpretation. In the Federal courts, the phrase devolution of law has been interpreted by inference to encompass such situations as title acquired by a trustee who is appointed to that office after the transaction complained of but where the trust estate owned the stock prior to the transaction complained of;[18] and where the complaining stockholder acquired his stock by gift or inheritance after the transaction complained of but from someone who owned it prior to the transaction complained of.[19]

The reasons for the Federal rule (and thus, indirectly, the reasons for the Maryland rule) have been much debated. In *Quincey v. Steel*,[20] the rationale of the rule was described as an attempt to prevent the practice of transferring stock to a non-resident for the purpose of acquiring Federal diversity jurisdiction. Dean Pound in *Home Fire Insurance Co. v. Barber*,[21] ascribed a broader reason behind the rule which has been widely accepted as follows:

> "The rule that a suit for mismanagement cannot be maintained by one who was not a stockholder at the time has been criticized as based on jurisdictional considerations peculiar to the Federal courts and on obsolete common-law doctrines as to champerty and maintenance. . . . In our judgment it does not depend upon

[16] Md. Laws 1945, Ch. 1072.

[17] Delaware Corporation Law §51A; N. Y. General Corporation Law §61; N. J. Statutes Ann. 14:3-16; Pennsylvania, Laws of 1945, Act. No. 114.

[18] McQuillen v. Nat'l Cash Register Co., 22 F. Supp. 867 (D. C. Md. 1938), *aff'd*, 112 F. (2d) 877 (C. C. A. 4th, 1940).

[19] Whitaker v. Whitaker Iron Co., 249 Fed. 531, 536 (C. C. A. 4th, 1918), *cert. denied*, 248 U. S. 564, 39 S. Ct. 8, 63 L. Ed. 423 (1918).

[20] 120 U. S. 241, 7 S. Ct. 520, 30 L. Ed. 624 (1887).

[21] 67 Neb. 657, 93 N. W. 1024 (1903).

either. The Federal Equity rule, while designed in part to prevent collusive proceedings in fraud of jurisdiction of those courts, goes far beyond the requirements of such a purpose. . . . *The rule has its foundation in a sound and wholesome principle of equity, namely that the rules worked out by chancellors in furtherance of right and justice shall not be used, because of their technical character, as rules to reach inequitable or unjust results.*[22] Resting on that basis, the value and importance of the rule . . . are constantly manifested. . . . The right of a stockholder to sue exists because of special injury to him for which he is otherwise without redress. If his interest is trifling, and the injury thereto of no consequence, he cannot sue or compel righting of wrongs to the corporation. . . . Hence there is obvious reason for holding that one who held no stock at the time of the mismanagement ought not to be allowed to sue, unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner."

These explanations should be contrasted with the reasons said to be behind the rule which permits a stockholder to complain of transactions occurring prior to his acquisition of stock. It is said that any cause of action which can be asserted on behalf of the corporation becomes part of the corporate estate and should be considered as a corporate asset. Each stockholder has an interest in the entire concern and each stockholder is entitled to his proportionate share of the corporate estate regardless of when he acquired his stock. Thus a stockholder acquires an interest in all the corporate assets whether they came into being before or after he acquired his shares, and the right to assert a claim arising out of a transaction occurring before his purchase of stock is no exception to this rule.[23]

The Maryland legislature in 1945 passed another act which also affects the right of a minority stockholder to maintain suit.[24] This act provides that in any action brought on behalf of a foreign or domestic corporation the corporation may require the plaintiff at any time before final judgment to give security for the reasonable expenses, excluding counsel fees, which may be incurred by the corporation unless the plaintiff or plantiffs own (1) 5% of the

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[22] Italics supplied.

[23] 1 MORAWETZ, PRIVATE CORPORATIONS (2 ed. 1886) 254, sec. 265.

[24] Md. Laws 1945, Ch. 989.

corporation's stock of any class or (2) stock of any class having a market value in excess of $25,000. Upon the termination of the action, the corporation is given recourse to the security in an amount fixed by the court having jurisdiction.

This action on the part of the Maryland legislature is not entirely original. New York passed a similar statute in 1944 [25] and the New York statute was adopted in New Jersey and Pennsylvania in 1945,[26] after the passage of the Maryland statute. In order to gauge the effect of the Maryland statute, it is helpful to compare it with the New York statute. The New York statute provides that in any action brought on behalf of a foreign or domestic corporation the corporation may require the plaintiff at any time before final judgment to give security for the reasonable expenses, *including* counsel fees, which may be incurred by the corporation unless the plaintiff owns (1) 5% of the outstanding stock of any class or (2) *$50,000* worth of stock of any class. Recourse to the security is to be fixed by the court at the termination of the action.

It will be seen that the New York and Maryland statutes differ in two important respects. One of the provisos in the Maryland statute whereby the plaintiff is excused from posting security is the ownership of $25,000 worth of stock in the corporation in whose behalf suit is brought. In the New York statute, this is fixed at $50,000. Moreover the New York statute requires the posting of security for the reasonable costs *including* counsel fees incurred by the corporation while the Maryland statute *excludes* counsel fees.[27] This distinction is doubly important when it is borne in mind that by an earlier statute a corporation, in New York, is made liable for counsel fees incurred by its officers and directors in successful defense of a suit brought against them on behalf of their corporation.[28]

It is interesting to note the curious history of judicial determination of the constitutionality of the New York

[25] New York General Corporation Law, §61-b.

[26] N. J. Statutes Ann. 14:3-15.

[27] The New Jersey statute exemption is fixed at $50,000 and requires security for expenses, *including* counsel fees. The Pennsylvania exemption is 5% of stock, of any class, and security for expenses *including* counsel fees is required.

[28] New York General Corporation Law, §64. Until 1945, this provision was found in §61-a, which differed from the present statute by permitting reimbursement to party plaintiffs as well as to party defendants. It is claimed that the amendment makes no change because §61-a was held only declaratory of the common law in Neuberger v. Barrett, 180 Misc. 222, 39 N. Y. S. (2d) 575 (1942), and §5 of the amending act preserves the common law right.

statute. In *Shielcrawt v. Moffett*,[29] a derivative stockholders suit was instituted in 1940 in which an accounting was sought for money paid out from 1934-1939 in an allegedly illegal profit-sharing plan. After passage in 1944 of the New York statute requiring security for reasonable expenses, including counsel fees, a motion was made to require such security. The motion was granted and the plaintiffs then assailed the constitutionality of the statute. The statute was held constitutional on the theory that there had admittedly been abuses of minority stockholders suits, that this was a regulation aimed at correcting those abuses and that the determination by the legislature of the "reasonableness" of the regulation was binding on the Court. As a subsidiary question the Court also decided the statute applied to proceedings which were pending when it was passed. An appeal was allowed to the Court of Appeals. Before the decision of that Court, the statute was both held unconstitutional in *Citron v. Mangels Stores Corp.*[30] on the theory that it was a deprivation of property without due process of law, with no appeal to the Court of Appeals allowed, and held constitutional in *Wolf v. Atkinson* [31] on the authority of the *Shielcrawt* case. When the Court of Appeals decided the *Shielcrawt* case, it held the statute not applicable to actions pending at its passage and refused to pass on the question of constitutionality. That question is still open for determination by the Court of Appeals. Meanwhile much confusion exists.[32]

The New York statute has been very rigorously attacked.[33] It is pointed out that the New York statute was designed to correct certain "abuses" of the minority stockholders suit; but as a practical matter, the New York statute effectively cuts off any further use of the minority stockholders suit. The reason for this is easy to understand, even in the absence of the convincing statistical evidence presented by other writers. First, it is obvious that very few, if any, potential litigants are exempted from the operation of the statute because 5% of the stock of a cor-

[29] 49 N. Y. S. (2d) 64 (1944), *aff'd*, 268 App. Div. 352, 51 N. Y. S. (2d) 188 (1944), *reversed*, 61 N. E. (2d) 435 (1945).

[30] 50 N. Y. S. (2d) 416 (1944), *aff'd*, 268 App. Div. 905, 51 N. Y. S. (2d) 754 (1944), *appeal denied*, 268 App. Div. 978, 52 N. Y. S. (2d) 579 (1944).

[31] 182 Misc. 675, 49 N. Y. S. (2d) 703 (1944).

[32] New Jersey has avoided this difficulty by expressly making its statute applicable to actions "not reduced to final judgment" at the time of passage. N. J. S. A. 14:3-17.

[33] Hornstein, *The Death Knell of Stockholders' Derivative Suits in New York* (1944) 32 Calif. L. Rev. 123; Zlinkoff, *The American Investor and the Constitutionality of §61-b of the New York General Corporation Law* (1945) 54 Yale L. J. 352.

poration is more than the usual amount of stock owned by a minority stockholder. Similarly $50,000 worth of stock is a prohibitive figure. If then it can be safely assumed that the minority stockholder will be required to comply with the statute, the result is that he will have to post security for the reasonable expenses, *including* counsel fees, to which the corporation will be subjected, and he must be prepared to forfeit this security if he loses the suit if only on a technical defense. These "reasonable expenses" include not only costs of the corporation but the costs of the other party defendants for which the corporation is liable by another statute. Clearly the New York statute, and for that matter the Maryland statute, is discriminatory in that strict compliance by the stockholder owning less than the required minimum of stock is required, while the large stockholder, who is more likely to have participated in the transaction complained of, is excused from posting security in the event he wishes to bring suit, even though his stock may be pledged to the hilt and his equitable interest be less than that of one who must bear the burden of the statute. It goes without further comment that the statute is an actual "death knell" of derivative stockholders suits when the enormous potential expense to the plaintiff is compared with the slight individual benefit. It has been suggested that the New York statute is procedural and hence its only effect will be to drive the litigation affected by it unto the Federal Courts,[34] and a recent decision of a United States District Court bears out this view.[35]

Fortunately the Maryland statute is not so drastic. It is not thought that the lower exemption ($25,000) in the Maryland statute is any real relief. But, unlike the New York statute, the Maryland statute does not require security for counsel fees incurred by the corporation on whose benefit suit is brought. Unless the term "expenses" as used in the statute has a meaning more comprehensive than the usual meaning of "costs",[36] the total effect of the Maryland statute seems to be only to require security for costs in derivative stockholders suits brought by resident minority stockholders since an earlier statute provided generally

[34] Hornstein, *A New Forum for Stockholders* (1945) 45 Col. L. Rev. 33, 36.
[35] Boyd v. Bell, et al, D. C. S. D. N. Y., June 29, 1945.
[36] There is serious doubt in regard to the validity of this assumption. "Expenses" as used in the New York statute has been construed to include more than "costs" even if counsel fees are excluded, and it would seem to follow that the same meaning was adopted in Maryland. Needless to say it is to be desired that the Court of Appeals rule that "expenses" is synonymous with "costs".

for security for costs in suits brought by non-residents.[37] However the experience of New York and other states should point up the potential danger in our own statute. This danger is more than fanciful because the bill as introduced would have required security for reasonable expenses, *including* counsel fees.[38]

A third legislative enactment has effect on the use of the minority stockholders bill by removing one of the grounds of complaint that the minority stockholders bill has been used to correct.[39] This act provides that a corporation, unless prohibited by its charter, may make reasonable gifts out of profits (1) to the State, its institutions, agencies or political sub-divisions or (2) to any organization for religious, charitable, scientific, civic, literary or educational purposes. A preamble to the act contains the recitals that it has been the legislative intent and understanding that corporations formed in Maryland have always had such powers and the purpose of the act is simply to clarify existing law. Section 2 of the act also states that nothing in the act shall be construed to require a prospective construction only since the act does no more than clarify and declare the law as it has always existed.

The form of this statute immediately raises the question is there a reasonable basis for believing that under prior law a corporation had power to make gifts for the above named purposes. There was certainly no express statutory authority and the Court of Appeals never passed on the question. Authority from other jurisdictions indicates, however, that a corporation probably did not have such power. It is the consensus of opinion among text writers that an ordinary business corporation, in the absence of express charter or statutory authorization, has no power to make purely gratuitous gifts and donations for which no consideration is received and where no pecuniary or business interest is served.[40] There is, however, authority that even in the absence of statutory or charter authority a corporation may make a gift when some business or pecuniary interest is directly or indirectly served.[41] Although a tendency on the part of the courts to sustain charitable gifts under this theory is noticeable, the two rules are separate and distinct.[42]

[37] Md. Code (1939) Art. 16, §195.

[38] First Reading File Copy, S. B. 612.

[39] Md. Laws 1945, Ch. 1018.

[40] 6 FLETCHER, CORPORATIONS (Perm. Ed. 1931) §§2938, 2939; 19 C. J. S. (Corporations) §768.

[41] FLETCHER, CORPORATIONS (Perm. Ed. 1931) §§2938, 2940.

[42] FLETCHER, *supra*, notes 40 and 41.

In a number of jurisdictions there are statutes dealing with the power of a corporation to make gifts. Such statutes are in effect in Delaware, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, and Texas.[43] The National Banking Act[44] permits a national bank located in a state which permits corporations to make gifts to make a gift within certain limits. An examination of these statutes discloses that some of them may be considered as codifications of the rule that a corporation may make a gift when some business or pecuniary interest is directly or indirectly served. Thus, the statutes in Delaware, New Jersey and Ohio, and the provision in the National Banking Act, expressly limit gifts to those which will benefit or contribute to the protection of the corporate interests. Other statutes have similar limitations on the types of gifts authorized. In Massachusetts and New York, the gifts are limited to those used for the betterment of social and economic conditions in the community in which the corporation does business. In Illinois, Missouri, New York and Pennsylvania, the power to make gifts is restricted to donees who are aiding in war activities. It is only in Maryland, Michigan, North Carolina, Tennessee and Texas that no such limitations exist on the type of gifts which are authorized.

Other aspects of the Maryland statute which should be considered relate to the funds out of which gifts may be made and the donees to whom they may be made. The statute as enacted permits gifts only out of profits; although, as introduced, the bill contained no such safeguard.[45] Among other statutes this provision is not usual since it is contained only in the North Carolina and Tennessee statutes. If the authorization to make gifts is made dependent on protection or advantage to business interest, the requirement that only profits be used would seem unnecessary; since it is accepted as good business practice that a corporation may use capital as well as earnings to protect its business interests by means other than gift. However in

[43] Delaware Rev. Code §2(9); Illinois Bus. Corp. Act §5(m); Massachusetts (Gen. Laws, c. 155 §12A; Michigan Gen. Corp. Act §10(1); Missouri Gen. and Bus. Corp. Act §4; New Jersey Statutes Ann. 14:3-13; New York General Corporation Law §34, Laws of 1942, chs. 3, 507, 528, Laws of 1943, c. 48, Laws of 1945, c. 256; North Carolina General Corporation law §55-26(12); Ohio General Corporation Act §8623-119; Pennsylvania Business Corporation Law §314; Tennessee General Corporation Law §4085; Texas General Corporation Law art. 1349. In addition to these statutes, many states have provisions prohibiting the making of gifts for political and campaign purposes.

[44] 12 U. S. C. A. §24.

[45] First Reading File Copy, H. B. 496.

view of the absolute authority to make gifts granted by the Maryland statute, it is submitted that it is a wise provision to require that only earnings and not capital be used for those purposes. Even if it can be assumed that the stockholders of a corporation would want to give away the earnings of their company without benefit to themselves, it is inconceivable that they would also want to give away the means of producing those earnings. This assumption is a difficult one to make since, by the Maryland statute, the stockholders are neither given the opportunity to amend the corporate charter to authorize gifts, nor to vote on the desirability of any particular gift.

The Maryland statute is absolutely unique in respect to the donees to whom gifts may be made. It is true that the Michigan statute is silent in regard to the donees to whom gifts are authorized; but no other statute, except that in Maryland, expressly authorizes gifts to the State, its institutions, agencies or political subdivision. All other statutes seem only to authorize gifts to corporations, associations or individuals of a strictly private although charitable nature.

Viewed in the light of the common law, the Maryland statute seems to be more an attempt to confer new powers on existing corporations than to clarify existing law. If the legislature is in reality granting new power to existing corporations, the problem arises whether the legislature may constitutionally do so. It is possible that the recitals and findings of the legislature that it has always intended prior law to include the power to make gifts, among the other powers that a corporation already possessed, are binding on the courts. It is equally possible that the courts will be willing to look through form to substance and find a fruitful ground for constitutional attack on the application of the statute to existing corporations.

The burden of the potential minority stockholder litigant in Maryland has been increased threefold. He must establish that he owned his stock at the time of the transaction of which he complains or that it devolved on him by operation of law. He must be prepared to post and to forfeit security for the reasonable expenses incurred by the corporation in whose benefit he brings suit. He can no longer complain if the majority stockholders make reasonable gifts from the profits of the corporation. The first rule was reached by the Court of Appeals which clarified an earlier opinion, and it was then codified with a slight amendment. This rule has received the sanction of the majority of jurisdictions in which the question has been raised. The second rule which was established by statute, probably does not, in its present form, materially alter existing law; although, in other jurisdictions, it has become the instrument which defeats any protection which minority stockholders can invoke against absolute domination by the majority stockholders. For that reason, any extension of the second rule is to be guarded against. The third rule apparently alters existing law in spite of elaborate assurances by the legislature that it does not. The means by which the prior law has been altered is almost certain to bring into question the legality of the statute as applied to existing corporations. Certainly the Maryland statute embodies greater liberality in permitting gifts by corporations than similar statutes in other states both in respect to the types of gifts authorized and the donees to whom they may be made.