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fairly contracted with the passenger, since he will at least have an opportunity to notice it. The difficulty remains, however, that most passengers are unaware of the binding contractual conditions printed on the transportation ticket.

In the realm of the international air carrier, over which the rules of the Warsaw Convention may govern, the amendment will have a similar effect. Such a carrier may still effectively include time provisions on the face of the transportation ticket, but not in its filed tariff.

Although aviation law is still in its infancy, struggling for recognition in the legal world, it is, through the process of trial and error, gradually achieving stability. The amendment under consideration is another cautious step toward the attainment of that end.

THE REACQUISITION OF SHARES UNDER THE NEW YORK STOCK CORPORATION LAW

Introduction

The manner in which a corporation may deal with its own reacquired shares has been a controversial problem for many years. To properly preface a discussion of this subject, it will be necessary to enumerate and explain some of the methods of, and the reasons for, corporate reacquisition of both common and preferred shares.

One method of reacquisition is by corporate purchase of its own shares from surplus or capital. While it is well settled by decisional law in New York that a corporation may repurchase its own shares of stock from *surplus*,[1] several states recognize this right by express statutory provisions.[2] Such regulatory provisions were enacted, not because of a corporation's lack of inherent power to repurchase its own shares, but rather to safeguard corporate creditors against a possible depletion of assets.[3] In addition, many states,[4] including New York,[5] also permit the purchase of preferred or special shares from

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[1] See notes 23, 24 *infra*.

[2] See statutes collected in PRASHKER, CASES AND MATERIALS ON CORPORATIONS 282-283 (2d ed. 1949). See also ARK. STAT. § 64-603 (1947); DEL. CODE ANN. tit. 8, § 243 (1953); LA. REV. STAT. tit. 12, § 23 (1950); W. VA. CODE ANN. §3052 (1949).

[3] See BALLANTINE, CORPORATIONS 605 (Rev. ed. 1946).

[4] DEL. CODE ANN. tit. 8, § 243 (1953); MICH. COMP. LAWS § 450.37 (1948); MO. REV. STAT. § 351.200 (1949); NEB. REV. STAT. § 21-153 (1943); W. VA. CODE ANN. § 3052 (1949).

[5] N.Y. STOCK CORP. LAW § 28(1). The preferred shares must be re-

capital. In such a case, however, greater statutory restrictions are necessary to safeguard against impairment of capital.[6]

A second method of reacquisition, almost universally used today,[7] is redemption. By this method, a corporation may issue redeemable stock which, at some future time, may be called in for retirement and cancellation at the option of the corporation.[8] This right springs from the certificate of incorporation, the by-laws or the stock certificate itself,[9] and, once the option has been exercised, a binding contract is formed.[10] By including this redemptive feature, the corporation reserves to itself a means, at a subsequent date, of refinancing the corporation by calling in and cancelling those outstanding shares which call for payment at a high dividend rate. This method is also an efficient means of effecting a capital reduction when such action becomes necessary or advantageous.[11]

Another established method of reacquisition is by conversion of shares. Broadly speaking, this involves the exchange by the corporation of shares or securities of a certain class, at a fixed ratio, for shares or securities of another class held by shareholders.[12]. Invariably, the security is convertible into a junior security: as preferred stock into common stock;[13] or bonds or debentures into preferred or

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deemable at the option of the corporation. Capital can only be applied to the redemption or purchase if ". . . the effect of any such redemption or purchase and application of capital thereto shall not be to reduce the actual value of its assets to an amount less than the total amount of its debts and liabilities, plus the amount of its capital reduced by the amount of capital so applied." *Ibid.*

[6] *Id.* § 28 (amended by the Laws of N.Y. 1953, c. 862). In instances where the stock is redeemable at the option of the corporation, if the redemption were limited to surplus, it would prevent the execution of an advantageous refunding operation, as the process could not be carried out on a large scale until the surplus equalled the amount of the outstanding shares. See Dodd, *Purchase and Redemption by a Corporation of Its Own Shares: The Substantive Law*, 89 U. OF PA. L. REV. 697, 724 (1941).

[7] See Dodd, *supra* note 6, at 724.

[8] See BALLANTINE, CORPORATIONS § 218 (Rev. ed. 1946).

[9] See Note, 83 U. OF PA. L. REV. 888, 889 (1935).

[10] *See* Borst v. East Coast Shipyards, Inc., 105 N.Y.S.2d 228, 231-232 (Sup. Ct. 1951) (if its enforcement would not result in a violation of the law).

[11] A corporation may wish to reduce its capital for several good reasons: to remove an impairment of capital; to reduce an overcapitalization and continue on a reduced scale; to create a capital surplus (a) for the payment of dividends or (b) against which a depreciation of the valuation of corporate assets may be made when their value declines, so they may correspond to actual value. See BALLANTINE, CORPORATIONS § 267 (Rev. ed. 1946); Becht, *Changes in the Interest of Classes of Stockholders by Corporate Charter Amendments Reducing Capital, and Altering Redemption, Liquidation and Sinking Fund Provisions*, 36 CORNELL L. Q. 1, 2 (1950).

[12] See Hills, *Convertible Securities—Legal Aspects and Draftsmanship*, 19 CALIF. L. REV. 1, 2 (1930).

[13] See ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES 364 (Rev. ed. 1953).

common shares.[14] New York expressly permits the issuance of par and non-par value shares which are convertible at the holder's option into shares of any other class or classes or another series of the same class.[15] The statute, however, places the onus on the corporation to maintain sufficient shares unissued to satisfy all outstanding conversion privileges.[16] The danger of shareholder speculation at the expense of the corporation, by waiting for an advantageous situation to arise before the privilege is exercised, may be obviated by the use of a sliding scale arrangement whereby share prices are increased yearly.[17] The conversion privilege makes the shares of stock more attractive to the prospective purchaser by allowing him, at some future date, to exchange limited income-bearing securities for shares which may yield higher dividends.

Shares may also be reacquired by gift[18] or bequest. Similarly, a surrender of shares, or a forfeiture of stock for default in payment of the subscription price, will result in corporate reacquisition.[19]

There are several additional reasons why a corporation may want to purchase or redeem its own shares. It may want to reduce its outstanding obligations in the form of dividend or liquidation claims, to eliminate internal dissension by retiring one of the quarrelsome factions,[20] or to make shares of stock available for employee-stockholder employment plans.[21]

Status of Reacquired Shares

Effective September 1, 1953, substantial changes were effected in the Stock Corporation Law concerning the status of reacquired shares.[22] Although a corporation has the inherent power to purchase shares of its own stock,[23] the purchase must be made from surplus[24] unless the application of capital thereto is permitted by statute. Such a statute is found in Section 28 of the New York Stock Corporation Law which expressly sanctions the application of capital, but only to

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[14] See BALLANTINE, CORPORATIONS 513 (Rev. ed. 1946).
[15] N.Y. STOCK CORP. LAW § 27 (1).
[16] *Id.* § 27 (6).
[17] See BALLANTINE, CORPORATIONS 513 (Rev. ed. 1946).
[18] *See* Lake Superior Iron Co. v. Drexel, 90 N.Y. 87, 94 (1882).
[19] See BALLANTINE, CORPORATIONS 604 (Rev. ed. 1946).
[20] *See* Moses v. Soule, 63 Misc. 203, 209, 118 N.Y. Supp. 410, 414 (Sup. Ct.), *aff'd mem.*, 136 App. Div. 904, 120 N.Y. Supp. 1136 (3d Dep't 1909); see Levy, *Purchase by a Corporation of Its Own Stock*, 15 MINN. L. REV. 1 (1930).
[21] See Comment, 30 MARQ. L. REV. 138, 141 (1946).
[22] Laws of N.Y. 1953, c. 862 amending Sections 27 and 28 and adding Section 29.
[23] *See* Cross v. Beguelin, 226 App. Div. 349, 351, 235 N.Y. Supp. 336, 339 (1st Dep't), *aff'd*, 252 N.Y. 262, 169 N.E. 378 (1929).
[24] *See* Greater N.Y. Carpet House, Inc. v. Herschmann, 258 App. Div. 649, 652, 17 N.Y.S.2d 483, 486 (1st Dep't 1940). See N.Y. PENAL LAW § 664(5).

the purchase or redemption of *preferred* shares *redeemable at the option of the corporation.* The term "capital", hereafter employed in its strict statutory sense, is the amount of money represented by all *issued* shares of a corporation, par and non-par value, plus any amounts transferred to capital by resolution of the board of directors.[25]

Prior to any discussion of the effect on the capital structure of the reacquisition of shares from either capital or surplus, a few words are pertinent to consider the definition of the word "retirement" as used in the statute as it existed before the amendment under discussion. It should be noted that nowhere in the statute, in its present amended form, does the word retirement appear. The precise interrelation of the terms redemption, retirement and elimination with respect to the instant statute has never been defined. Elimination, however, has a fixed meaning and connotes the actual subtraction of shares from the number authorized in the certificate of incorporation, with a consequent impossibility of subsequent reissuance. Such shares are, in legal effect, destroyed and are treated as if they had never existed. Redemption and retirement, on the other hand, are used interchangeably by the authorities,[26] although the statute specifically differentiates the effect of redemption as distinguished from that of retirement. The distinction, in any event, is important only insofar as it relates to capital reduction.

Although no cases have interpreted the prior section, one basic distinction would appear to have existed. Whereas stock which had been retired was required to be eliminated, stock which had merely been repurchased or redeemed did not suffer that same fate unless reacquired out of capital. To effect a retirement, some further action of the board of directors was necessary. This and other differences will be considered *infra* in the discussion of the effect of redemption or repurchase on the capital structure of the corporation.

Repurchase from Surplus

Whenever shares of *any type* were repurchased by the corporation from surplus, they could be held as treasury shares or could subsequently be resold at a consideration fixed by the board of directors.[27] If, however, such stock were preferred shares redeemable

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[25] N.Y. STOCK CORP. LAW §§ 12, 13.

[26] See, *e.g.*, circular definition in 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 760 n.35 (1932): "Redemption means retirement of the stock redeemed. . . ." For discussion of the confusing terminology, see 1947 LEG. DOC. No. 65(I), REPORT, N.Y. LAW REVISION COMMISSION 167, 187 (1947).

[27] City Bank of Columbus v. Bruce, 17 N.Y. 507 (1858); *see* Vail v. Hamilton, 85 N.Y. 453, 458 (1881); Joseph v. Raff, 82 App. Div. 47, 54, 81 N.Y. Supp. 546, 552 (1st Dep't), *aff'd mem.*, 176 N.Y. 611, 68 N.E. 118 (1903). See also ARK. STAT. § 64-603 (1947); DEL. CODE ANN. tit. 8, § 243(2)(e) (1953); LA. REV. STAT. tit. 12, § 23 (1950); W. VA. CODE ANN. § 3052 (1949).

at the option of the corporation, and were reacquired from surplus, an additional or third alternative was open to the board of directors: the shares could not only be kept in the treasury or subsequently resold,[28] but they could also be retired. If the shares were thus voluntarily retired, they had to be eliminated from the number of shares originally authorized[29] and corporate capital had to be reduced accordingly.[30] This was so because, recalling the statutory definition of capital, once shares had been retired and eliminated, they could no longer be deemed "issued".

Insofar as repurchase or redemption out of surplus is concerned, there was but one standard for capital reduction. Since such stock could be eliminated only after it had been retired, the statute required a reduction of capital by the amount of capital represented by the shares so eliminated,[31] and a reduction surplus would therefore result. However, mere reacquisition out of surplus would in no way affect corporate capital or the number of authorized shares[32] since such shares, although no longer *outstanding,* were still deemed *issued* until they had been retired and eliminated. Likewise, since the shares were purchased out of surplus, the capital had not in fact been reduced.

Thus far, except for the annihilation of the distinction between elimination and retirement, the present law remains unchanged. However, under the amendment, a fourth alternative is presented to the corporation. Whereas formerly it was necessary to eliminate the repurchased shares where a capital reduction was sought to be effected, the new law permits the restoration of such shares to the status of authorized but unissued shares.[33]

Another significant change effected by the new law is that relative to common stock. Since common stock can only be repurchased out of surplus, and since the prior law did not permit either restoration to the status of authorized but unissued or elimination of common shares reacquired by the corporation, no problem as to capital reduction arose. Under the amended law, however, common stock is accorded the same privileges as those enjoyed by preferred redeemable, namely, the alternative between elimination or restoration.[34] Whereas preferred redeemable enjoys those privileges *unless* the certificate of incorporation provides otherwise, common stock enjoys them *only if*

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[28] See 1953 N.Y. LEGIS. ANNUAL 94.
[29] N.Y. STOCK CORP. LAW § 28(3).
[30] *Id.* § 28(1).
[31] *Id.* § 28(1),(3).
[32] See Note, 27 HARV. L. REV. 747, 748 (1914).
[33] N.Y. STOCK CORP. LAW § 29(1). In addition thereto, a certificate of reduction or elimination must be filed to serve as an amendment to the certificate of incorporation. *Id.* § 29(3). As originally enacted, the amendment required that the certificate must be filed within twelve months after reacquisition. *Id.* § 28(2). However, this requirement was deleted by Laws of N.Y. 1954, c. 468.
[34] *Id.* § 29(1).

the board of directors is authorized by the certificate of incorporation to effect the elimination or restoration.[35] If pursuant to the power granted in the certificate, the board elects either of these alternatives, a capital reduction to the extent of the amount represented by such shares must be effected.[36] Here again, a reduction surplus will result. The changes thus enacted are similarly applicable to preferred non-redeemable shares, but as to them there need be no express authority in the certificate of incorporation to eliminate or restore.[37]

Acquisition out of Capital

As indicated above, shares redeemed or repurchased out of surplus, prior to the amendment, could be dealt with in three ways—retained, resold or eliminated. With respect to redeemable preferred shares purchased or redeemed out of capital, however, there was but one course, namely, elimination.[38] This requirement was a distinct disadvantage since it caused a forfeiture of the corporate right to have issued and outstanding an amount equal to the number of shares originally authorized upon incorporation. Many states, realizing that there was no valid reason why shares purchased or redeemed out of capital had to be eliminated, permitted corporations to restore such shares to the status of authorized but unissued.[39]

The recent amendment secured to New York corporations the advantages enjoyed by the other states with respect to preferred shares which are redeemable at corporate option. Where such shares are repurchased or redeemed out of capital, they must now either be eliminated or, if reissuance is not otherwise prohibited, be restored to the status of authorized but unissued.[40] While the law no longer requires the elimination of such shares, another section of the Stock Corporation Law prohibits an employment of capital which may result in the depletion or impairment of capital below the minimum statutory safeguard.[41] Assuming, however, that capital is available for such a venture, an elimination or restoration will effect a capital reduction.[42]

At this point, the distinction in the prior law between mere elimination, on the one hand, and retirement, on the other, became per-

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[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.*
[38] *Id.* § 28(3).
[39] ARK. STAT. § 64-603 (1947) (redeemed from capital); DEL. CODE ANN. tit. 8, § 243(b) (1953) (retired); MD. CODE ANN. art. 23, § 32(a) (Flack, 1951) (retired); NEB. REV. STAT. § 21-154 (1943) (redeemed from capital or surplus); R.I. GEN. LAWS c. 116, art. II, § 53, cl. D (1938) (retired).
[40] N.Y. STOCK CORP. LAW §§ 28(2), 29(1).
[41] Capital may be applied ". . . provided that the effect . . . shall not be to reduce the actual value of its assets to an amount less than the total amount of its debts and liabilities, plus the amount of its capital reduced by the amount of capital so applied." *Id.* § 28(1).
[42] *Id.* § 29(1).

tinent. That law provided generally that, where such shares were *eliminated,* ". . . the capital of the corporation shall be reduced by an amount *equal to the amount so applied* to the redemption or purchase. . . ." [43] However, where they were *retired,* the law required that the capital should be reduced ". . . by an amount *equal to the amount of capital represented* by the shares so retired." [44] Thus, assuming that the share had a par value of $100, and that it was redeemed or repurchased at a discount for $95, different results would follow. In the case of retirement, the capital would be reduced by $100, the amount "equal to the amount of capital represented by" the share so retired, and a capital surplus of $5 would be effected. On the other hand, if the share had been merely eliminated, capital would be reduced by $95, "the amount so applied to the redemption or repurchase" and no surplus would result.

The amended law has abolished this distinction and provides a single standard of capital reduction applicable to all classes of stock. Whether the shares are eliminated or restored, common or preferred, the statute requires that ". . . the capital of the corporation shall be reduced by an amount equal to the amount of capital . . . represented by the shares eliminated or restored to authorized but unissued status." [45] Thus, where shares are repurchased at a discount and eliminated or restored, a reduction surplus will always result and be distributed according to the method prescribed in the certificate of reduction.[46] Conversely, the corporation may wish to repurchase or redeem shares for which they must pay a premium. Under both the old and new law, however, purchase at a premium is permitted only where the premium is available out of surplus, since the amount of capital available for redemption or repurchase cannot exceed the capital represented by such shares.[47]

Convertible Shares

Whereas the prior law did not permit a restoration of any class of shares reacquired by purchase or redemption, slightly different

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[43] *Id.* § 28(1) (emphasis added).

[44] *Ibid.* (emphasis added).

[45] *Id.* § 29(1).

[46] *Id.* § 36(4): "If it is proposed to reduce capital, the certificate shall

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"(c) provide that the surplus, if any, resulting from such reduction shall be available for any one or more of the following purposes: (i) to be used for any purpose for which surplus may be used; or (ii) to be reserved and used for specified purposes; or (iii) to be returned to the stockholders, according to their respective rights, at the times and in the manner specified." Section 29(3)(d) requires this statement, among others, to appear in the stock certificate if shares are to be restored to the status of authorized but unissued. This subdivision, however, does not apply to converted shares.

[47] N.Y. STOCK CORP. LAW § 28(1); see 1947 LEG. DOC. No. 65(I), REPORT, N.Y. LAW REVISION COMMISSION 167, 187 (1947). See also LA. REV. STAT. tit. 12, § 45 (F) (1950).

treatment was accorded converted shares. As to them, an alternative course was permitted. The shares could be eliminated,[48] but such elimination would not result in a capital reduction [49] since the capital was allocated to the shares issued pursuant to the conversion. In default of so acting, the shares would automatically revert to the status of unissued.[50] Under no circumstances, however, could these converted shares be reissued.[51] No practical difference, therefore, existed between the two alternatives except that, in the latter, it was not necessary to file a certificate of stock reduction.

Under the amended law, however, the alternative has significance. Converted shares must now be either eliminated from the authorized number of shares, or, if they are of a class which may be issued in series, and reissuance is not prohibited, they may be restored and can thereafter be reissued.[52] They may no longer lay dormant in corporate hands.

Some Further Considerations Under the Statute

The restoration of shares to the status of authorized but unissued stock, though not effecting an increase in the authorized capital stock of the corporation,[53] must be treated as an original issue. If the shares had a par value, on restoration and subsequent reissuance, the same par value received on the original issue must now be received for these shares. Any other construction would be in disregard of the mandate of the Stock Corporation Law which authorizes an increase or decrease in the par value of shares only after the certificate of incorporation has been amended pursuant to the required stockholder consent.[54] On restoration of these shares to the status of authorized but unissued, the capital of the corporation is reduced by the amount of capital they represent,[55] and on reissuance at par value they again

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[48] N.Y. STOCK CORP. LAW § 27(5).

[49] *Id.* § 27(4).

[50] *Id.* § 27(5).

[51] *Ibid.*

[52] *Ibid.* For authorization to issue shares in series, see New York Stock Corporation Law Section 11. Shares of the same class issuable in series may vary in some respects, thus making them more attractive to a potential shareholder. See STEVENS, PRIVATE CORPORATIONS 426 (2d ed. 1949).

[53] N.Y. STOCK CORP. LAW § 29(4).

[54] *Id.* § 35(2)(C). "The certificate of incorporation of any stock corporation may be amended . . .

". . .

"(4) to reduce the par value of any previously authorized shares, whether issued or unissued, that have a par value. . . ." The required shareholder consent for such an amendment is described in detail in Section 37 of the New York Stock Corporation Law.

[55] *Id.* § 29(1). The capital represented by shares having a par value is deemed to be the par value plus any amounts the board of directors *may* have allocated to such shares from amounts transferred to capital. Shares

make their contribution to capital.[56]

Another problem created by the restoration of such stock is the stockholder's right of pre-emption. Does the stockholder have a pre-emptive right to subscribe, on a pro rata basis, to shares which have been so restored? The pre-emptive right statute would seem to give him such a privilege.[57]

By a complementary amendment to the Tax Law,[58] the shares restored to the status of authorized but unissued, though obviously not an increase of authorized capital stock, nevertheless are made subject to an organization tax just as are all shares previously and subsequently authorized.

Another facet of the statute worthy of note is the possible creation of further conversion rights on convertible stock which has been restored to the status of authorized but unissued. It has been previously noted that the restoration of convertible shares is limited to those issuable in series. The problem is whether or not such a restoration brings into being further conversion rights. The statute provides that the certificate of restoration must state that the converted shares ". . . shall cease to be shares of the particular series and shall become authorized but unissued shares of the class subject to reissuance in series. . . ." [59] Therefore, in the absence of affirmative stockholder action to amend the certificate of incorporation so as to allow such shares to be reissued in series,[60] the restored shares will not carry with them conversion privileges. Redemption, furthermore, is said to destroy the conversion privilege.[61] Therefore, absent the amendment last mentioned, the reissuance of these converted shares would not

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without par value present slightly different considerations. If the stock is true non-par stock, the capital represented by these shares is the aggregate amount of consideration received by the corporation for the total number of *issued* shares. If the stock is stated non-par stock, the capital represented by the shares is the dollar amount per share specified in the certificate of incorporation. In both instances of non-par value shares, any amounts of unallocated capital or amounts transferred to capital by resolution of the board of directors, may be allocated to the capital already represented by such shares to determine the amount of capital reduction on an elimination or restoration of these shares. *Id.* § 29(2)(b),(c).

[56] See Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. OF CHI. L. REV. 357, 367 (1934).

[57] The statute states that the pre-emptive right will not attach to shares or securities ". . . theretofore reacquired by the corporation after having been duly issued *and not restored to the status of authorized but unissued shares. . . .*" N.Y. STOCK CORP. LAW § 39(4)(c) (italicized matter represents 1953 amendment). The inference is inescapable that if the shares have been restored to this status, the stockholder right of pre-emption will attach.

[58] N.Y. TAX LAW § 180(1).

[59] N.Y. STOCK CORP. LAW § 29(3)(e).

[60] *Id.* § 11.

[61] See Hills, *Convertible Securities—Legal Aspects and Draftsmanship*, 19 CALIF. L. REV. 1, 16 (1930).

impose the duty on the corporation of maintaining a sufficient number of unissued shares to satisfy the former conversion privileges.

Conclusion

It is submitted that the existing New York rule permitting, but not requiring, the restoration of shares purchased from surplus to the status of authorized but unissued is a sound one. On the other hand, there should be no compulsion to eliminate shares which have been purchased from surplus. Such shares may be quickly restored to the status of authorized but unissued when the corporation finds itself in need of additional capital. A compulsory elimination of such shares would result in a reduction surplus, and any subsequent increase of capital stock would necessitate stockholder action to amend the certificate of incorporation.[62] Thus, the process of periodic capitalization would be unduly hampered by unnecessary expense and delay. Conversely, a compulsory restoration of such shares to the status of authorized but unissued would require the capitalization of the consideration received for these shares on reissuance or, at least, a ratable allocation between capital and paid-in surplus if non-par value shares were involved. It is conceivable that instances will arise where it would be of greater benefit to the corporation to restore and reissue such shares rather than to resell them as treasury shares.[63] Presently, a beneficial reduction of capital may be effected without, at the same time, effecting a reduction of the authorized number of shares.

Initial capital is acquired by a corporation through stock subscriptions. Any subsequent growth or expansion will invariably require periodic financing. This capital is supplied by the issue of additional stock or by corporate loans. If redeemable preferred shares, purchased from capital, were required to be eliminated, a refinancing procedure would depend on subsequent authorization by the stockholders to increase the number of shares, quite possibly, to the same number which the corporation was originally authorized to issue. By permitting the restoration of such shares to an authorized but unissued status, the statute should greatly facilitate refinancing procedures.[64] In many instances, the necessity for procuring corporate loans would be obviated, and though an outstanding corporate obligation would be created, the money so advanced would not be due at any fixed future time.

However, it is submitted that the pre-emptive right should not attach to shares restored to the status of authorized but unissued. The statute itself states that once shares have been reacquired by the corporation and not restored to the status of authorized but unissued, no

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[62] See N.Y. STOCK CORP. LAW §§ 35(2)(C)(1),37.
[63] See 1953 N.Y. LEGIS. ANNUAL 94.
[64] *Id.* at 93.

pre-emptive right will attach on their resale.[65] This is so because the voting and dividend rights have not been altered on the resale of these treasury shares. The only effect of such resale is to restore to these shares the voting and dividend participation privileges which had attached to them upon original issue.[66] However, the statute imposes the right of pre-emption on treasury shares which have been restored to the status of authorized but unissued. Since the authorized capital stock has not been increased, the issuance would in no way alter voting or dividend rights which existed prior to the reacquisition and restoration.

[65] N.Y. STOCK CORP. LAW § 39(4) (c). But see Drinker, *The Preemptive Right of Shareholders to Subscribe to New Shares*, 43 HARV. L. REV. 586, 603 (1930).

[66] *See* Borg v. International Silver Co., 11 F. 2d 147, 151 (2d Cir. 1925).