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NEW YORK'S CHANGING CONCEPT OF VESTED INTERESTS
IN REGARD TO SHAREHOLDERS

Introduction

In an early Court of Appeals case¹ it was said that in order to increase the capital stock of a stock corporation, which increase provided for issue of preferred stock, it was necessary to have the consent of *all* the common stock holders. Today such unanimous consent is not required,² and many other changes in the capital structure of a corporation, by a vote of the holders of two-thirds or a majority of the outstanding stock, are legal which fifty years ago any single stockholder could have prevented by objecting on constitutional grounds that he was being denied a property right without due process of law, or that his contractual rights were impaired.

The present discussion will be limited to: (1) Rights which at one time were not subject to alteration without the consent of the stockholder himself, (2) the subsequent nullification of the view that these rights were changeless, and (3) the present rights of a minority stockholder.

I

The Constitution of the United States declares that "no state shall . . . pass any . . . Law impairing the Obligation of Contracts."³ In 1819 the United States Supreme Court in the celebrated *Dartmouth College* case⁴ held that when the legislature of a state grants a charter to a private corporation the charter constitutes a contract between the state and the corporation. Although the doctrine has been ". . . reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence,"⁵ it was limited from the moment of its inception by the concurring opinion of Mr. Justice Story. He suggested that if a state desired to reserve the right to alter or repeal a corporate charter it could do so by inserting a clause to that effect in the charter itself.⁶ Since the decision such reservation has become practically universal, the legislatures retaining the right to alter, amend, or repeal through appropriate constitutional or statutory enactment.⁷ "It is now settled that such a

¹ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159 (1879).

² N. Y. STOCK CORP. LAW § 37.

³ U. S. CONST. Art. 1, § 10.

⁴ *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 463 (U. S. 1819).

⁵ *Brown, J.*, in *Pearsall v. Great Northern R.*, 161 U. S. 646, 660 (1896).

⁶ *Trustees of Dartmouth College v. Woodward*, *supra* note 4 at 533.

⁷ FLETCHER, *CYCLOPEDIA OF PRIVATE CORPORATIONS* § 3656 (perm. ed. 1933). The New York State amending clause is contained in N. Y. CONST. Art. X, § 1, and N. Y. GEN. CORP. LAW § 5.

reservation is not repugnant to the grant, but is a valid limitation on the powers and privileges granted.”⁸

The nature of a corporate charter as a contract within the protection of state and federal constitutional provisions embraces not only the relations of the corporation and the state, but the obligations of the corporation to the stockholders as well.⁹ “The certificate of stock is the muniment of the shareholder’s title and evidence of his right. It expresses the contract between the corporation . . . and himself.”¹⁰

II

Regarding the contractual rights of the shareholder as against the corporation, we are here concerned with the power of a corporation to change the terms of its obligations to the stockholders by virtue of statutory authority.

The power of the state to alter or amend a corporate charter may be delegated to the corporation by appropriate statutory enactment.¹¹ The ultimate test as to the validity of such statutes depends upon whether the change can be said to come within the reserved power of the legislature to alter or amend the corporate charter.¹² In turn, the applicability of the reserved power has been supposed by many courts to be determined by the nature of the “right” of the stockholder that the corporation proposes to alter. Certain rights, it was thought, were constitutionally *vested* against change; and as to them the legislature could not exercise its reserved power to alter or amend the corporate charter or certificate. By extension, where the vested right was not subject to change by the state, the legislature could not enact a statute authorizing such change at the discretion of the corporation itself.

Professor Ballantine submits that the doctrine of vested rights in relation to shareholders’ contracts is an illusory one. “Some . . . rights . . . have been supposed [to have] the peculiar sanctity to be vested and so to be immune from the power of amendment.”¹³ The

⁸ 13 AM. JUR., CORPORATIONS § 90.

⁹ *Breslav v. New York and Queens Electric Light and Power Co.*, 249 App. Div. 181, 291 N. Y. Supp. 932 (2d Dep’t 1936), *aff’d*, 273 N. Y. 593, 7 N. E. 2d 708 (1937); *McNulty v. W. & J. Sloane*, 184 Misc. 835, 839, 54 N. Y. S. 2d 253, 258 (Sup. Ct. 1945).

¹⁰ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 180 (1879).

¹¹ “It is well settled that any change or alteration the legislature might make by direct act may be made by delegating to the corporation, or a majority or some other percentage of its stockholders the power to do so.” *Breslav v. N. Y. & Queens Electric Light & Power Co.*, 249 App. Div. 181, 184, 291 N. Y. Supp. 932, 935 (2d Dep’t 1936), *aff’d*, 273 N. Y. 593, 7 N. E. 2d 708 (1937).

¹² *Hinkley v. Schwartzchild & Sultzberger Co.*, 107 App. Div. 470, 473, 95 N. Y. Supp. 357, 360 (1st Dep’t 1905).

¹³ BALLANTINE, CORPORATIONS § 277 (2d ed. 1946).

cases referred to immediately hereafter are mentioned to emphasize, in comparison with the material treated in Section III of this article, the shift in attitude concerning the vested rights doctrine. To Mr. Justice Cardozo the term vested right was a "deceptive label" in connection with this problem. To the court, in *McNulty v. W. & J. Sloane*,¹⁴ "vested right" was indeed a term, ". . . which had not been clearly defined in the cases. Whenever the court was of the opinion that certain rights of stockholders could not be interfered with, they characterized those rights as 'vested.'"

For example, in *Roberts v. Roberts-Wicks Co.*,¹⁵ the New York Court of Appeals declared that a corporation could not eliminate accrued dividends on preferred stock through the procedure of a reduction of capital stock. The ". . . valid contract between the company and the preferred stockholders . . ." created rights in the stockholder which were "inviolable."¹⁶ The court based its decision not alone on the absence of any specific statutory power to do this but indicated that the right to accumulated dividends was a vested right.¹⁷

The leading New York case of *Lord v. Equitable Life Assurance Society of America*¹⁸ has been cited for the proposition that an amendment which deprived the stockholders of the right to vote for all the directors was invalid. It was held that ". . . the right of a stockholder to vote for directors is property and he cannot be deprived of it without his consent."¹⁹

In *Breslav v. New York and Queens Electric Light and Power Co.*,²⁰ it was held that a statute authorizing a corporation to "classify" or "reclassify" any shares by a vote of the holders of two-thirds of the outstanding stock did not authorize an amendment making non-callable preferred stock callable. The stockholder's interest in a corporation as a holder of non-callable stock was a vested interest. It was not a defeasable right subject to be extinguished by a majority vote. Speaking of the reserved power of amendment the court said: ". . . its exercise is subject to the restrictions and restraints imposed by the other provisions of the State and Federal Constitutions. Due process of law must be observed, and vested property rights and the obligations of contracts must not be destroyed or impaired."²¹

In *Hoyt v. Great American Ins. Co.*,²² it was held that stockholders, in the absence of laches or acquiescence, have a vested right

¹⁴ 184 Misc. 835, 841, 54 N. Y. S. 2d 253, 259 (Sup. Ct. 1945).

¹⁵ 184 N. Y. 257, 77 N. E. 13 (1906).

¹⁶ *Id.* at 263, 77 N. E. at 15.

¹⁷ *Accord*: *Wiedersum v. Atlantic Cement Products, Inc.*, 261 App. Div. 305, 25 N. Y. S. 2d 496 (2d Dep't 1941); *Lonsdale Securities Corp. v. International Mercantile Marine Co.*, 101 N. J. Eq. 554, 139 Atl. 50 (Ch. 1927).

¹⁸ 194 N. Y. 212, 87 N. E. 443 (1909).

¹⁹ *Id.* at 239, 87 N. E. at 453.

²⁰ 249 App. Div. 181, 291 N. Y. Supp. 932 (2d Dep't 1936).

²¹ *Id.* at 185, 291 N. Y. Supp. at 937.

²² 201 App. Div. 352, 194 N. Y. Supp. 449 (1st Dep't 1922).

to take their proportionate share of an increase in the capital stock. This preemptive right, it was said, is not statutory but rests upon principles of the common law.

In *Yoakam v. Providence Biltmore Hotel Co.*,²³ the defendant corporation had provided in its charter that it would create a sinking fund for the future redemption of preferred stock. The corporation attempted to eliminate the sinking fund obligation. The court held that the sinking fund stipulation created a contractual right "... more fully answering the requirements of a vested right than did an expectancy of future payments of undeclared dividends."²⁴

In *Sutton v. Globe Knitting Works*,²⁵ plaintiff had bought 100 shares of preferred stock, the certificate of which contained the following provision: "This stock is subject to redemption and shall be redeemed at par on January 25, 1932. . . ." The action was precipitated because of the corporation's refusal to redeem the stock on the named day. The defense was based upon an amendment to defendant's articles of incorporation in consequence of which the corporation claimed the redemption date of plaintiff's stock had been extended to January 25, 1957. The court held that plaintiff's right to redeem the stock on a named date was a definite contractual undertaking; and hence a corporation could not, under constitutional provisions relating to the reserved power over the corporation, change the redemption date of the stock.

III

In a relatively short period of time the law relating to amendment of corporate charters has changed considerably. In 1937, the date of the *Breslav* case, the law authorizing a corporation to amend its charter was to be found in Section 36 of the Stock Corporation Law. Paragraph G of the section authorized the corporation to "... classify or reclassify any shares." It will be recalled that the decision turned on the refusal of the court to construe the legislative authority to reclassify shares as a right to make non-callable stock callable. The court said the vested rights doctrine did not admit of such construction.

In 1941, however, the Court of Appeals in a unanimous decision took a long step forward in the direction of nullifying the vested rights approach. *Davison v. Parke, Austin & Lipscombe, Inc.*,²⁶ though it held that preferred holders could not be deprived of their rights in accumulated dividends and in a cumulative sinking fund for

²³ 34 F. 2d 533 (D. C. R. I. 1929), cited with approval in *Breslav v. New York and Queens Electric Light and Power Co.*, *supra* note 10, and *Davison v. Parke, Austin & Lipscombe, Inc.*, 285 N. Y. 500, 35 N. E. 2d 618 (1941).

²⁴ *Id.* at 554.

²⁵ 276 Mich. 200, 267 N. W. 815 (1935).

²⁶ 285 N. Y. 500, 35 N. E. 2d 618 (1941).

the redemption of their stock, pointed out that the vested right issue was not material to the problem. There it was said in relation to the alteration of stockholders' rights by less than a unanimous vote of the stockholders that, "The judicial problem is not whether a particular preferential right is vested or not, but rather what was the legislative intent as to it."²⁷ The plaintiff prevailed in this case because the court found no *specific* authority in Section 36 to make the amendment in question. Implicit in the above quotation, however, is the view that the legislature did have the power to authorize an amendment touching on the so-called vested right of a shareholder.

Courts were quick to adopt the step forward that the *Davison* case had taken. In *Longson v. Beaux Arts Apartments*,²⁸ the appellate division and the Court of Appeals relied upon the reasoning in the *Davison* case. Both courts approved of the statement in the *Davison* case that: "The inadequacy of the vested rights test is further demonstrated by the fact that new stock may be issued with preferential rights to the assets of the corporation upon dissolution and to dividends superior to the preferential rights of the then outstanding shares . . .²⁹ even superior to the right of preferred stockholders to dividends in arrears. . . ." ³⁰

The call to the legislature, as made in the *Davison* case, to specify more definitely the changes that a corporation could make was not left unanswered. In 1943 the section was amended. The holdings in the *Breslaw* and *Davison* cases were made obsolete. The paragraph authorizing reclassification in general terms was made more explicit.³¹

²⁷ *Id.* at 509, 35 N. E. at 622.

²⁸ 265 App. Div. 951, 38 N. Y. S. 2d 605 (2d Dep't 1942), *aff'd*, 290 N. Y. 845, 50 N. E. 2d 240 (1943).

²⁹ *Matter of Dresser*, 247 N. Y. 553, 161 N. E. 179.

³⁰ *Matter of Duer*, 270 N. Y. 343, 1 N. E. 2d 457. The quotation from the principal case is found in 285 N. Y. at 509, 35 N. E. at 622. It is interesting to note in both the *Dresser* and *Duer* cases, that the complaining stockholders were not seeking a preservation of their preferences, and therefore the vested rights issue was never raised. The importance of the *Davison* case in this regard therefore lies in its *interpretation* of *Matter of Duer* and *Matter of Dresser* as two cases weakening the vested rights view.

³¹ The section read as follows: "Section 36. Changes in respect to shares, capital stock or capital; . . . (E) To classify or reclassify any shares whether with or without par value the creation, alteration or abolition, in whole or in part, of designations, preferences, privileges or voting powers of any shares previously authorized, or the restrictions or qualifications thereof (including the creation, alteration or abolition of any provisions or rights in respect of (a) the redemption of any shares, or (b) any cumulative or non-cumulative dividends, whether or not accrued, which shall have not been declared, or (c) any accumulated but unexpended installment of any sinking fund whether or not set aside for the redemption or purchase of any shares, or (d) any preemptive right to subscribe for shares or other securities of the corporation whether existing at law or contained in the certificate of incorporation or other certificate filed pursuant to law), shall be deemed to be a classification or reclassification of such shares for the purpose of this section. . . ." This sec-

In defining the term "reclassify" it eliminated all conjecture as to whether or not the six vested rights outlined above were subject to change, at least prospectively.

Still in 1943 the influence of the vested rights view had not subsided. The appellate division used this type of reasoning in *Jay Ronald Co. v. Marshall Mortgage Corporation*.³² The litigation arose out of the demand of plaintiff for distribution of a surplus created by a reduction of the capital stock of defendant corporation pursuant to Section 36(G)(15) of the Stock Corporation Law as amended in 1939.³³ The corporation maintained that the surplus thus realized could be legally transferred to the surplus account, relying on the very section under which it acted.³⁴ The court held, however, that the statute could have no retroactive effect. And, since the class of stock had been issued before the amendment of the statute, plaintiff's right to a pro-rata share of the surplus was, ". . . fixed, vested, and inviolable. . . ." ³⁵

The ruling of the appellate division was reversed, but not on the ground that the statute operated retroactively.³⁶ This decision then seemed to leave open the question as to whether the legislature had the constitutional power to amend Section 35 effectively, so as to eliminate pre-existent rights which the courts had held vested and beyond the reach of the law-making body.

Finally in 1945 the issue was squarely presented in a New York trial court. The decision is the now famous *McNulty v. W. & J. Sloane*.³⁷ The issues there to be decided were (1) did the legislature have the power to authorize by a vote of the holders of two-thirds of each class of stock, an amendment to a certificate of incorporation which the courts had previously held not subject to change; (2) assuming such constitutional power, would the statute

tion may now be found in N. Y. STOCK CORP. LAW § 35(3) as rewritten and renumbered in 1949.

³² 265 App. Div. 622, 40 N. Y. S. 2d 391 (1st Dep't 1943).

³³ Now N. Y. STOCK CORP. LAW § 36(4)(c).

³⁴ This section now reads: "If it is proposed to reduce capital, the certificate shall . . . (c) provide that the surplus if any, shall be used for the following purposes: (1) to be used for any purpose for which surplus may be used; or (2) to be reserved and used for specified purposes; or (3) to be returned to the stockholders, according to their respective rights, at the times and in the manner specified."

³⁵ *Jay Ronald Co. v. Marshall Mortgage Corp.*, 265 App. Div. 622, 629, 40 N. Y. S. 2d 391, 399 (1st Dep't 1943).

³⁶ 291 N. Y. 227, 52 N. E. 2d 108 (1943). An historical analysis of New York statutes, dating back to 1897, regarding the disposition of reduction surplus led the court to conclude, ". . . that from the year 1901 to the present time no distribution of a surplus created by reduction of capital of a stock corporation has been required by the law of New York." The 1939 amendment, therefore, was ". . . in essence what had been the law from a time long antecedent to the organization of the corporate defendant in 1926." *Id.* at 234, 52 N. E. 2d at 110.

³⁷ 184 Misc. 835, 54 N. Y. S. 2d 253 (Sup. Ct. 1945).

allow elimination of undeclared cumulative dividends which have accrued *before* its enactment? The court answered both of these questions in the affirmative with the decision definitely destroying the old vested rights concept. In 1946 the Court of Appeals approved the *McNulty* case.³⁸ It has since then been cited with approval by the appellate division³⁹ and in two lower court opinions.⁴⁰ The court in one case saying, "The extent of the legislative power is portrayed clearly in the learned opinion of Mr. Justice Shientag in *McNulty v. W. & J. Sloane*. . . ." ⁴¹

IV

It has been seen that in New York the legislative and judicial policy has been toward giving the corporation greater flexibility, by permitting basic and numerous changes in the "contract" between the shareholder and the corporation. The resulting liberality could only have been, and was, achieved by reasoning that the minority shareholder does not have any constitutionally vested rights which are beyond the reach of the legislature.

But this policy does not mean that the minority shareholder is at the mercy of the majority shareholder, for he does have certain rights. The minority stockholder may apply to courts of equity for aid. The general rule is that a court of equity will enjoin the majority from amending a certificate only where fraud or bad faith is shown on the part of the majority.⁴² Where, however, no fraud or bad faith is shown the plaintiff will be remitted to his right of appraisal, for in such case his remedy at law would be adequate.⁴³ A

³⁸ *Anderson v. International Minerals & Chemical Corp.*, 295 N. Y. 343, 67 N. E. 2d 593 (1946).

³⁹ *Leibschutz v. Schaffer Stores Co., Inc.*, 274 App. Div. 847, 80 N. Y. S. 2d 771 (4th Dep't 1948).

⁴⁰ *Arstein et al. v. Robert Reis & Co.*, 77 N. Y. S. 2d 303 (Sup. Ct. 1948); *Beloff et al. v. Consolidated Edison Co. of N. Y., Inc.*, 81 N. Y. S. 2d 440 (Sup. Ct. 1948).

⁴¹ *Beloff et al. v. Consolidated Edison Co. of N. Y., Inc.*, *supra* note 40 at 442.

⁴² *McNulty v. W. & J. Sloane*, 184 Misc. 835, 844-5, 54 N. Y. S. 2d 253, 258 (Sup. Ct. 1945); the court here saying: "There also exists the inherent power of a court of equity, a power limited generally to the test of good faith rather than a test objective in character, a power the exercise of which may be circumscribed, because too often what is an accomplished fact is presented to the court; but it is a significant, restraining influence nevertheless." *See also Zobel v. American Locomotive Co.*, 182 Misc. 323, 328, 44 N. Y. S. 2d 33, 35 (Sup. Ct. 1943); where the court said: "True the plaintiffs say the plan is so unfair to the preferred stockholders, in favor of the common stockholders, that it amounts to fraud, but, . . . that is . . . nothing more than an emphatic way of saying that as a matter of business judgment plaintiffs would rather keep what they now have. No actual bad faith is shown, and neither is there such unfairness, if any as would justify an inference of fraud."

⁴³ *Wilson v. Waltham Watch Co.*, 293 Fed. 811 (D. C. Mass. 1923); *Skelly v. Dockweiler*, 75 F. Supp. 11 (S. D. Cal. 1947)—the latter case citing many

stockholder is also permitted an action in equity to have the amendatory certificate cancelled where he was not given proper notice,⁴⁴ for the procedure provided for by the statute in amending the certificate is mandatory.⁴⁵ But the stockholder may by laches, estoppel or waiver surrender his rights to equitable relief.⁴⁶

The second and by far the most important remedy that the dissenting shareholder has is his right of appraisal. The governing New York statute⁴⁷ makes provision for a majority⁴⁸ of shareholders to amend the certificate of incorporation so as to alter or abolish preferences and voting rights of shares.⁴⁹ When such action is taken, to protect objecting minority shareholders,⁵⁰ provision is made for the appraisal of their shares.⁵¹ It is settled that the right of appraisal is absolute and cannot be denied notwithstanding the fact that a shareholder has a negligible amount of shares, which could readily be sold in the open market, or that he is acting in bad faith, so long as there is compliance with the conditions set forth by the legislature.⁵²

cases. See Notes, 47 MICH. L. REV. 81 (1948) and 15 U. OF CHI. L. REV. 225 (1947), which treat the problem of whether the right of appraisal is an adequate remedy. A factual study of the inadequacies of the statutory right of appraisal can be found in the SEC REPORT ON REORGANIZATION COMMITTEES, Part VIII, 590 *et seq.* (1938).

⁴⁴ See N. Y. STOCK CORP. LAW § 37(1)(C)(4) and § 45.

⁴⁵ *Danzig v. Lacks*, 235 App. Div. 189, 256 N. Y. Supp. 769 (1st Dep't 1932); N. Y. STOCK CORP. LAW §§ 36-38.

⁴⁶ *Davison v. Parke, Austin and Lipscombe, Inc.*, 285 N. Y. 500, 35 N. E. 2d 617 (1941).

⁴⁷ N. Y. STOCK CORP. LAW §§ 35-38.

⁴⁸ N. Y. STOCK CORP. LAW § 37(1)(3) requires a vote of the holders of record of two-thirds of the outstanding shares which are adversely affected and are entitled to vote.

⁴⁹ N. Y. STOCK CORP. LAW § 35(2)(c) and (3).

⁵⁰ *In re Eaton*, 189 Misc. 303, 69 N. Y. S. 2d 846 (Sup. Ct. 1947); see also Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931); and Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. OF PA. L. REV. 585 (1927).

⁵¹ N. Y. STOCK CORP. LAW § 38(11). Providing that where the amendatory certificate alters or abolishes any preferential rights; creates, alters or abolishes rights to redemption of shares; or provisions for sinking funds; or limits or denies or abolishes preemptive rights, any holder adversely affected may object and demand payment for his stock. The statute does not require that the shareholder demand that the corporation abandon the proposed amendment before he may exercise his right of appraisal. See in conjunction with this section, N. Y. STOCK CORP. LAW § 21.

⁵² *Matter of Marcus (Macy & Co.)*, 279 N. Y. 38, 74 N. E. 2d 228 (1947). *But cf.* *Matter of Leventhall*, 241 App. Div. 277, 271 N. Y. Supp. 493 (1st Dep't 1934), where the court held good faith to be material when the stockholder became such after notice had been sent of the proposed change for the purpose of obtaining approval by the holders of record. That the right of appraisal is not limited to stockholders of record, see *Application of Bazar*, 183 Misc. 736, 50 N. Y. S. 2d 521 (Sup. Ct. 1944); *Matter of Rowe*, 107 Misc. 549, 176 N. Y. Supp. 753 (Sup. Ct. 1919).

The New York courts have distinguished between amendments to the charter which allow the issuance of new shares of stock having preferences and altering preferential rights in outstanding shares.⁵³ Hence, it has been held that an amendment which permitted a new and previously unauthorized issue of stock, did not of itself give a stockholder a right of appraisal within the meaning of the statute.⁵⁴ Relief was denied even though the value of the previously outstanding shares was lowered as where a new issue of preferred was to have preference over the old preferred stock.⁵⁵ Therefore ". . . the alteration, if any, must be as between the preferences of the existing stock in relation to each other and not as between the existing stocks and the stock proposed to be issued."⁵⁶ if the shareholder is to have the right of appraisal. This view was affirmed by the later statutory amendment.⁵⁷ However, because of the shareholders' preemptive rights⁵⁸ allowing him to maintain proportionate control in the corporation, there seems to be no need for affording the right of appraisal as against new shares.⁵⁹

As to other amendments to the corporate charter, for example, in regard to voting rights, the courts do not seem to limit the right of appraisal to alteration of rights *inter se*,⁶⁰ mainly because the statute uses differing terminology,⁶¹ and, as has been seen, these cases pertaining to the right of appraisal hinge upon the wording of the statute; the right being a purely statutory one.⁶²

⁵³ Matter of Dresser, 247 N. Y. 553, 161 N. E. 179 (1928).

⁵⁴ Matter of Kinney, 279 N. Y. 423, 18 N. E. 2d 645 (1939).

⁵⁵ In referring to Matter of Dresser, *supra* note 52, where appraisal was refused the court stated that ". . . the value of the old stock may have been affected, [but] the preferential rights remained the same, subject only to the preferences of the new class." Matter of Kinney, 279 N. Y. 423, 428, 18 N. E. 2d 645, 648 (1939).

⁵⁶ Application of Woodruff, 175 Misc. 819, 821, 26 N. Y. S. 2d 679, 680 (Sup. Ct. 1941). That the right of appraisal only exists where preferences are changed as between the shareholders *inter se*, see also Matter of Silberkraus, 250 N. Y. 242, 165 N. E. 279 (1929); *In re Gohn*, 174 Misc. 188, 20 N. Y. S. 2d 254 (Sup. Ct. 1940); holding that the superimposing of a new class of stock upon existing classes does not in and of itself give the right of appraisal; but where new preferred stock is issued in exchange for the old, the new stock eliminating the right to accrued dividends, cutting the rate of return from two dollars to one dollar per share, a right of appraisal existed.

⁵⁷ Formerly N. Y. STOCK CORP. LAW § 38(9)(d) and now § (35)(11)(a).

⁵⁸ N. Y. STOCK CORP. LAW § 39.

⁵⁹ Matter of Dresser, *supra* note 52; Matter of Silberkraus, 250 N. Y. 242, 165 N. E. 279 (1929); see also Albrecht v. General Plastics, 280 N. Y. 840, 21 N. E. 2d 887 (1939). *Quaere*, as the new preemptive statute was passed after these cases, and limiting preemptive rights to (a) voting shares acquiring proportionate share of new voting shares, (b) unlimited dividend paying shares acquiring share of the new dividend shares, could not the corporation avoid the preemptive statute by creating new preferred shares which are not subject to the stockholders preemptive rights?

⁶⁰ See Matter of Marcus (Macy & Co.), 297 N. Y. 38, 74 N. E. 2d 228 (1947).

⁶¹ N. Y. STOCK CORP. LAW § 38(11). But see subd. (6).

⁶² See 13 FLETCHER, CYCLOPEDIA CORPORATIONS § 5906 (rev. ed. 1932).

Conclusion

If the corporation could not change its structure by amending its certificate, it could resort only to dissolution. Today, as we have seen, flexibility in the corporation's capital structure has replaced the static vested rights concept of the past. There may be, and have been, abuses by the majority toward the few; but, to a large extent, they have been minimized by giving the dissenter: (1) the right of appraisal, and (2) access to courts of equity in certain instances. Still, the minority stockholder may not be amply protected. In the *McNulty* case the court recognized such difficulty, but said that: "The problem was one of balancing intertwining and conflicting interests and of determining what was conducive to the good of society."⁶³ This the legislature has determined.

JOSEPH W. CAMPANELLA,
JOSEPH M. NAKRIN.

THE VALIDITY OF THE 1945 AMENDMENT TO SECTION 52
OF THE NEW YORK VEHICLE AND TRAFFIC LAW

Although the invention of the automobile has been instrumental in bringing about the high standard of living that exists in America today, nevertheless, it has created serious problems that counteract this good. Although the gravest of these are in the social field, perplexing problems have arisen in the legal field as well. The everyday use of the automobile, in which the crossing of state lines is continuous and commonplace, has made our concept of statewide jurisdiction cumbersome, if not impossible. The prime instance of this is the difficulty in acquiring jurisdiction over a non-resident motorist, the tort-feasor in an accident, so that he can be forced to account for the damage done to the person and property of a resident.

Originally the only manner of obtaining jurisdiction over the non-resident was through service of a summons on him while he was temporarily in the state. This was inadequate, though, for the non-resident left the state as soon after the accident as he could; and he made sure that he did not return while there was any possibility of action being brought against him. Of course the injured party could always bring the action in the state of the non-resident; but this was

⁶³ *McNulty v. W. & J. Sloane*, 184 Misc. 835, 844, 54 N. Y. S. 2d 253, 261 (Sup. Ct. 1945).