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THE MINNESOTA BUSINESS CORPORATION ACT†

By Harvey Hoshour*

POWER TO HOLD STOCK IN OTHER CORPORATIONS65

The power of corporations to hold stock in other corporations has been the subject of many decisions and much legislation. Some courts hold that corporations have the power to take and hold the shares of other corporations without express statutory or charter authorization.66 On the other hand, the Illinois courts held in a series of decisions, of which People v. Chicago Gas Trust Co.67 is typical, that the holding of stock in one corporation by another is contrary to public policy, and that a corporation's articles may not provide for such holding in the absence of express statutory authority.68

Between these two extreme views the weight of judicial au-

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†Continued from 17 Minnesota Law Review 689, 703.
65Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300.
66"Sec. 9. When so provided in its articles of incorporation a corporation may acquire, hold, mortgage, pledge or dispose of the shares, bonds, securities and other evidences of indebtedness of any domestic or foreign corporation; and, without such authority in its articles, may guarantee, acquire, hold, mortgage, pledge or dispose of the shares, bonds, securities and other evidences of indebtedness of any domestic or foreign corporation when reasonably necessary or incidental to accomplish the purposes stated in its articles."
67(1889) 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497.
68It should be noted that the Illinois General Corporation Act, adopted in 1919, provides that Illinois corporations shall have power "to own, purchase or otherwise acquire, whether in exchange for the issuance of its own stock, bonds, or other obligations or otherwise, and to hold, vote, pledge, or dispose of the stocks, bonds, and other evidences of indebtedness of any corporation, domestic or foreign." Illinois Laws 1919, p. 318, sec. 6 (6). It is thus apparent that the Illinois rule referred to has been changed by statute.
Minnesotan law review authority in this country is to the effect that: (1) a corporation may take and hold stock in another corporation when it is expressly authorized in its articles so to do; and (2) a corporation has implied power so to take and hold stock in another corporation if (but only if) the purchase is a necessary or reasonable means of carrying out its stated purposes.

It should be added that the tendency of the more recently adopted codes is to broaden the rules of the decided cases in this connection. Thus the California law provides that every corporation shall have power "to acquire, subscribe for, hold, own, pledge and otherwise dispose of and vote shares of stock, bonds and securities of any other corporation, domestic or foreign." Substantially similar provisions are found in the Delaware, Ohio, Louisiana, Michigan and Indiana laws.

The Minnesota committee, however, thought that the recent tendency last referred to has gone perhaps too far in making all corporations in effect holding corporations without reference to their articles or purposes. From a reading of its provisions it is apparent that what has been done in the Minnesota Act is to incorporate therein what is the weight of judicial authority on this question. While there are no Minnesota decisions contra to the provisions of the new act in this connection, it was thought desirable definitely to state the rules in the statutes as to a matter of so great importance. The result here reached, while more conservative than that followed in the other recently adopted codes, is believed by the committee to go as far as is necessary in this connection in the public interest.

71California General Corporation Law, Sec. 341 (10), California, Civil Code, (Deering's 1931) sec. 341 (10).
72General Corporation Law of Delaware, pp. 79 and 80.
73Ohio, General Code, (Page 1931) sec. 8623-8.
75Michigan General Corporation Act, sec. 10 (i), Michigan, Public Acts 1931, p. 572 sec. 10 (i).
76Indiana General Corporation Act, sec. 3 (7), Indiana Laws 1929, p. 727 sec. 3 (7).
77See cases cited in notes 69 and 70, supra.
78See Baldwin v. Canfield, (1879) 26 Minn. 43; 1 N. W. 261; Hunt v. Hauser Malting Co., (1903) 90 Minn. 282, 96 N. W. 85; Olson v. Warrod Mercantile Co., (1917) 136 Minn. 310, 161 N. W. 713.
By the common law rule a corporation has the capacity of perpetual succession, and the new Minnesota Act follows the Uniform Act and the recently adopted codes which our committee used for comparison in reenacting the common law rule. Prior to the adoption of the new Act, with an exception as to savings banks and railroad companies, Minnesota business corporations might be formed for a period "not exceeding thirty years in the first instance" but with the right of renewal from time to time for further like periods upon a three-fourths stock vote approval "when those desiring it [the renewal] shall have purchased at its value the stock of those opposed thereto."

Curiously enough the supreme court has not had to determine what constitutes "value" in connection with the statute authorizing renewals. It seems certain, however, that the lack of definiteness in the statutory language in this connection, added to the fact that no procedure is set out for determining value in those cases where an agreement cannot be reached, must have had at least some influence in the incorporation of Minnesota businesses elsewhere. But, these things aside, there is still the question of the propriety of permitting perpetual succession to corporations. To permit such succession is not believed to be contrary to any fundamental policy of the state, and in view of the liberal provisions of sections 48 and 49 of the new Act permitting shareholders to institute involuntary proceedings for dissolution it will not prejudice shareholders where there have been managerial abuses. All things considered the committee thought it desirable to obviate this cause of incorporation elsewhere, and thus to place Minnesota in accord

79 Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300. "Sec. 8. Every corporation shall have power: (a) To continue as a corporation for the time limited in its articles of incorporation, or, if no such time limit is specified, then perpetually." 80 See Fletcher, Cyc. of Law of Private Corporations, rev. ed., sec. 6 and 8 ibid., sec. 4081.

81 Uniform Business Corporation Act, sec. 11 (II) (b).


83 Minnesota Laws 1927, ch. 32, provides that social and charitable corporations "may have perpetual succession whenever it shall be so provided in the certificate of incorporation." Minnesota Laws 1929, ch. 233 provides that "religious, social, fraternal and charitable corporations shall have perpetual succession unless the duration thereof is specifically limited in the certificate of incorporation."

84 Mason's 1927 Minn. Stat., sec. 7455.
with the modern statutes as well as with the common law rule in this connection.

SALE OF A CORPORATION'S ENTIRE ASSETS

The question as to whether less than all the shareholders of a corporation may authorize the sale of all its assets has given rise to much litigation and varying rules. Where the corporation is insolvent or a losing venture, the decided cases are in agreement that such sale may be authorized by a majority of the shareholders. Conversely, most courts hold that if the corporation is prosperous and a going concern a single shareholder may prevent such sale, on the ground that there is an implied contract between the shareholders that the business for which the corporation was organized shall be carried on so long as profits are being realized. To this latter rule there has been vigorous dissent, some courts taking the position that all shareholders have agreed to be bound by the will of the majority acting in good faith, and that this rule should apply where all the assets of the corporation are sold just as to any other transaction of the corporation. The earlier Minne-

85Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300. "Sec. 35. A corporation may, by action taken at any meeting of its board of directors, sell, lease, exchange or otherwise dispose of all or substantially all of its property and assets, including its good will, upon such terms and conditions and for such considerations, which may be money, shares, bonds, or other instruments for the payment of money or other property, as its board of directors deems expedient, when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal, or the vote of such other proportion, not less than a majority, or vote by classes, as the articles may require, at a shareholders' meeting called for that purpose, or when authorized upon the written consent of the holders of such shares. Notice of any such meeting shall be given to all shareholders of record whether or not they shall be entitled to vote thereat."


88See (1929) 14 MINNESOTA LAW REVIEW 58, 61.

89In Beidenkopf v. Des Moines Life Insurance Co., (1913) 160 Iowa 629, 142 N. W. 434, the court said: "But the doctrine has by no means the unanimous support of the precedents, and it has frequently been held that its strict enforcement would neutralize the efficiency of that other and necessary rule to which every stockholder impliedly agrees in becoming a member of a corporation, that the management and control of the corporate business and interest shall be vested in the majority."

90In Bowditch v. Jackson Co., (1912) 76 N. H. 351, 82 Atl. 1014, the court said:

"If the majority may sell to prevent greater loss, why may they not also
sota cases tend to support the majority rule here, but there is a pretty clear indication in a late case, in which the precise point was not in issue however, that the court may now prefer the minority, or, as it calls it, "the liberal rule," in this connection.

Doubtless because of the harsh results which the majority rule referred to reaches in some situations nearly all of the States have enacted statutes permitting the holders of less than all of its stock to authorize the sale of a corporation's entire assets, whether or not the corporation is a going concern at the time of the sale. Since 1925 Minnesota has had such a statute, which authorizes the sale upon the approval of the holders of two-thirds of the shares having voting power. The new act in this connection is substantially like the 1925 statute, but it follows the provisions of the Ohio Act in permitting the articles to provide for approval by a less proportion than two-thirds (but not less than a majority) of the voting power. Particularly in view of the recent attitude of the Minnesota court toward the "liberal" rule above referred to, this addition was thought desirable. It is believed that the statutory method is probably not exclusive, and it would seem that a majority, whether or not the articles so provide, may still authorize the sale of the entire assets of a losing concern.

Provisions Relating to Directors

Since the traditional and uniform policy is to vest the management of a corporation in its board of directors, the statutory provisions relating to directors are of great importance. Several provisions of the new Minnesota Act as to directors which seem to the writer to be of particular interest will be discussed briefly herein.

sell to make greater gains? Bearing in mind that this is a purely business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case, the sale is made because it is of advantage to the stockholders.

91Particularly Small v. Minneapolis Electro Matrix Co., (1891) 45 Minn. 264, 47 N. W. 797.
92Paterson v. Shattuck Arizona Copper Co., (1932) 186 Minn. 611, 244 N. W. 281.
93Minnesota Laws 1925, ch. 320.
94Ohio General Code, (Page 1931) sec. 8623-65.
95See note 92, supra.
97See Minnesota Revised Laws 1905, sec. 2858; Minnesota G. S. 1913, sec. 6171; Minnesota G. S. 1923, sec. 7458.
THE APPOINTMENT OF AN EXECUTIVE COMMITTEE. It has long been the practice in Minnesota for the directors to appoint an executive committee from their number, provisions for this procedure commonly being included in the by-laws of the corporation. Most courts hold that since the directors are vested by statute with the management of the corporation they do not come within the rule prohibiting the delegation of authority by an agent, and that therefore they may delegate to an executive committee of their own number the power to do any act for the corporation which they might perform themselves. Some courts, however, hold that this power may not be conferred by by-laws so as to permit the delegation by the directors of the complete management of the corporation to an executive committee.

In view of the practice in Minnesota and the more or less conflicting judicial rules elsewhere as to the appointment of an executive committee, it was thought desirable that the Minnesota Act should cover this matter. Our Act is more strict here than the Uniform Act and the other codes recently enacted in requiring that the action of the board in appointing an executive committee be unanimous. This limitation was thought proper to protect the directors representing minority interests; without it much of what is believed to be the salutary effect of cumulative voting might be done away with. Also our Act includes provisions similar to those contained in the Ohio and California Acts that the executive committee "shall act only in the interval between the meetings of the board, and shall be subject at all times to the control and direction of the board." Perhaps this is implied in the usual statutes authorizing the appointment of an executive committee, but it is believed better to include it specifically. Otherwise some

98Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300.
99Hoyt Thompson, Executors, (1859) 19 N. Y. 207.
100Temple v. Dodge, (1895) 89 Tex. 69, 32 S. W. 514, 33 S. W. 222.
101See Sec. 31, III (e) Uniform Business Corporation Act; Ohio General Code, (Page 1931) sec. 8623-60; Louisiana Laws 1928, Act. 250, sec. 34 (c).
102California General Corporation Law, sec. 308, California Civil Code (Deering 1931) sec. 308, Ohio General Code, (Page 1931) secs. 8623-60.
boards of directors might think they could wholly abdicate to an executive committee.

(b) Removal of Directors. The Minnesota Act contains provisions for the removal of the directors by the shareholders with or without cause. By the common law rule directors could not be removed except for cause. Our committee, however, believed that where the directors are not following the wish of a majority of the investors whom they are representing that majority should have the power of removal.

Accordingly our Act follows that of California in providing for the removal of one or more directors, with or without cause, upon a majority vote of the shareholders. Lest the majority use this method to make impossible minority representation through cumulative voting on the board the Act provides that no director may be removed if a sufficient number of votes are opposed to his removal "which if then cumulatively voted at an election of the full board would be sufficient to elect him." So limited the provisions in the new Act as to removal of directors represent a policy that seems fair and in line with the modern tendency toward a more direct control of officers and agents.

(c) Relation to Corporation. Another question of interest in connection with directors is that as to their measure of duty toward the corporation. This problem has caused consid-

108 Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300.

"Sec. 28. I. The entire board of directors or any individual director may be removed from office, with or without cause, by a vote of shareholders holding a majority of the shares entitled to vote at an election of directors; provided, in the case of a corporation having cumulative voting, unless the entire board be removed, no individual director shall be removed in case the votes of a sufficient number of shares are cast against his removal, which if then cumulatively voted at an election of the full board would be sufficient to elect him.

II. In case the board or any one or more directors be so removed, new directors may be elected at the same meeting. In the case of a corporation having cumulative voting, if such election is held at the same meeting, the notice of intention to cumulate votes provided for in subdivision III of Section 25 of this Act may be given at any time prior to the voting at such election, and in such case announcement of the giving of such notice shall be made prior to said voting and said cumulative voting provisions shall be applicable."
erable difficulty in the decided cases. Some courts have held that directors should be held to that degree of care which an ordinarily prudent man would exercise in his own business;\textsuperscript{107} others hold that the proper measure is that degree of care which an ordinarily prudent director would use under the circumstances.\textsuperscript{108} In cases involving defaults of others than the directors, where the directors involved are sought to be held for failure to supervise adequately, the two rules may well lead to opposite results. The rule last stated is the weight of authority,\textsuperscript{109} and it probably represents the case law of Minnesota,\textsuperscript{110} although some language in the opinions makes this not altogether sure.\textsuperscript{111}

After careful consideration the committee concluded to approve what in effect is the majority rule above stated. It is true that the minority rule may in some cases protect shareholders where the majority rule will not do so. Some members of the committee doubted the fairness to the directors of a rule requiring them to exercise the same degree of care as that required of a trustee.\textsuperscript{112} But the controlling reason why the committee did not approve the minority rule is that such rule would inevitably tend to keep men of financial responsibility (and, assuming that financial responsibility bears a relationship to ability, perhaps some men of extraordinary ability) off boards of directors, to the disadvantage of the shareholders. A cause of action against a solvent director

\textsuperscript{107}Hun v. Carey, (1880) 82 N. Y. 65.
\textsuperscript{109}See Ballantine, Corporations 362.
\textsuperscript{111}Thus in Horn Silver Mining Co. v. Ryan, (1889) 42 Minn. 196, 44 N. W. 56, the court used the following language, seemingly approving both rules:

"The measure of care and diligence required of directors is generally held to be such as a prudent man exercises in his own affairs. Scott v. Depeyster, 1 Edw. Ch. 547. But, as Morawetz (1 Corp. sec. 552) justly observes, the plain and obvious rule is that directors impliedly undertake to use as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances."

\textsuperscript{112}This view is perhaps a bit overstated by Judge Sharswood in the leading case of Sperings Appeal, (1872) 71 Pa. 11, 10 Am. Rep. 684:

"... It is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentleman of character or responsibility would be found willing to accept such places."
under the majority rule is vastly more valuable to the shareholders than a cause of action under the minority rule against a director who is insolvent. All things considered the committee thought the interests of the shareholders and the public best served by following the substance of the Uniform Act\textsuperscript{118} approving the majority rule here, and, since the Minnesota cases are not altogether clear as to the law on this point, it seemed best to ask the legislature to make that rule a part of the new Act.

**Compensation to Dissenting Shareholders.**

Under the provisions of the Minnesota statutes prior to the new Act the articles of a corporation might be amended by majority vote of the shareholders "in respect of any matter which an original certificate of a corporation of the same kind might lawfully have contained,"\textsuperscript{115} and the duration of a corporation might be extended by a three-fourths stock vote.\textsuperscript{116} The statute as to amendments provided no method for compensating dissenting shareholders, and as to renewal\textsuperscript{117} set forth no method for determining value when the parties disagreed.

The new Act provides that where amendments which substan-

\textsuperscript{118}Sec. 33, Uniform Business Corporation Act.
\textsuperscript{114}Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300: "Sec. 39. I. If a corporation has authorized an amendment which substantially changes the corporate purposes or extends the duration of the corporation, a shareholder who did not vote in favor of or consent in writing to such corporate action may, within twenty days after the date upon which such amendment was authorized, object thereto in writing and demand payment for his shares.

"II. If, after such a demand by a shareholder, the corporation and the shareholder cannot agree upon the fair cash value of the shares at the time such amendment was authorized, such value shall be determined by three disinterested appraisers, one of whom shall be named by the shareholder, another by the corporation and a third by the two thus chosen. The determination of a majority of the appraisers in good faith made shall be final, and if the amount so determined is not paid by the corporation within thirty days after it is made, such amount may be recovered in an action by the shareholder against the corporation. The corporation shall not be required to make payment of such amount except upon transfer to it of the shares for which such payment was demanded and upon surrender of the certificate or certificates evidencing the same.

"III. A shareholder shall not be entitled to payment for his shares under the provisions of this section unless the value of the corporate assets which would remain after such payment would be at least equal to the aggregate amount of its debts and liabilities exclusive of stated capital."

\textsuperscript{117}Mason's 1927 Minn. Stat., sec. 7455.

\textsuperscript{117}See notes 83 and 84 supra.
tially change the corporate purposes or extend the duration of the corporation are authorized dissenting shareholders may have their shares appraised and receive the fair cash value thereof from the corporation. Procedure for the transfer of the shares is set up, and the rights of creditors are protected by the provision that dissenting shareholders shall not receive payment unless the value of the remaining assets of the corporation "would be at least equal to the aggregate amount of its debts and liabilities exclusive of stated capital." These provisions, which follow in substance the corresponding provisions of the Uniform Act are believed adequately to protect the interests of both majority and minority shareholders as well as those of the corporation's creditors. It should be noted in this connection that the Minnesota Act (in this respect otherwise than the Uniform Act) does not provide for cash payments to dissenting shareholders where all the assets of a corporation have been sold. Here a majority of the committee thought it best to follow the former law which does not provide for such payment. Possibly some basis for compensation in this situation will be worked out by the courts without the aid of statutes. Also it should be noted that the provisions of Section 39 here under discussion are made applicable to dissenting shareholders in cases of consolidation and merger.

**INeOLYNTA£_ DISSOLUTION**

There is a great deal of conflict in the decided cases as to the

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118 Uniform Business Corporation Act, sec. 42.
119 Minnesota 1925 Laws, chap. 320.
120 See Paterson v. Shattuck Arizona Copper Co., (1932) 186 Minn. 611, 244 N. W. 281.
121 Minnesota Business Corporation Act, Minnesota Laws, 1933, ch. 300, sec. 43.
122 Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300: "Sec. 48. A corporation may be dissolved by involuntary proceedings in the discretion of the court when it is made to appear:
(a) That the corporate assets are insufficient to pay when due all just demands for which the corporation is liable; or
(b) That the objects of the corporation have wholly failed or are entirely abandoned or their accomplishment is impracticable; or
(c) That the directors or those in control of the corporation have been guilty of fraud or mismanagement or of abuse of authority, or of persistent unfairness toward minority shareholders; or
(d) That there is internal dissension and that two or more factions of the shareholders in the corporation are so deadlocked that its business cannot longer be conducted with advantage to its shareholders; or
(e) That the period for which the corporation was formed has terminated without extension."

"Sec. 49. I. A petition for involuntary dissolution of a corporation
persons who may institute and the grounds for the involuntary
dissolution of a corporation. It has not been the general rule to
permit creditors to obtain a dissolution "since a mere creditor of
a corporation has nothing to do with the question whether a cor-
poration shall be dissolved." But the Minnesota sequestration
statute sets up a procedure which Judge Mitchell aptly said "almost always results in practical dissolution," and the late Min-
nesota cases permit substantially the same result under the stat-
ute authorizing the appointment of a receiver where a corpora-
tion is "insolvent or in imminent danger of insolvency."

Also the Minnesota courts have not followed the early rule
that equity will not decree the dissolution of a corporation upon a
shareholders' suit, but have held that where there has been "pre-
judicial mismanagement" by those in control of a corporation the
minority shareholders may seek and obtain a dissolution in equity,
even though the corporation be solvent.

The committee believed that, particularly since the new Act fol-
lows to some extent the trend of the modern statutes in permitting
wide powers to be vested in the management, the provisions for
dissolution should be liberal where there have been managerial
abuses or the business has failed. As is indicated from the Minne-
sota decisions referred to above, this has been the tendency of the
recent cases in this jurisdiction. The general set-up of the Uniform
Act has been followed here, but our Act requires that if the dis-
solution be based on a deadlock between opposing factions there
also be a finding that the business of the corporation "cannot longer

be conducted with advantage to its shareholders," and requires that the creditor bringing suit for involuntary dissolution have a judgment with a return unsatisfied thereon.

**Compromise Arrangements**

To the committee it seemed desirable that some method should be provided to compel minority creditors and minority shareholders to accept reasonable plans for corporate reorganizations where such plans have received court approval. Possibly this power exists even in the absence of a statute, but so that there may be no doubt about it the new Act provides that upon a three-fourths vote of the group affected and the sanction of the court a compromise arrangement looking to a corporate reorganization shall be binding on all the members of the group affected. Our Act here is largely founded on the Uniform Act which in turn follows the English Companies Act.\(^{136}\)

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\(^{133}\)Minnesota Business Corporation Act, Minnesota Laws 1933, ch. 300:

"Sec. 54. I. When a compromise or arrangement is proposed between a corporation and its creditors or any class of them, or between the corporation and its shareholders or any class of them, or between the corporation and both creditors and shareholders or any class or classes of them, the court may, upon the application of the corporation or of a liquidating trustee or receiver thereof, order a meeting of the creditors or class of creditors, or of the shareholders or class of shareholders, as the case may be, to be called in such manner as the court may direct.

II. If the majority in number representing three-fourths in value of the creditors or class of creditors, or if the shareholders or class of shareholders holding three-fourths of the voting power of all shareholders or of the class of shareholders, as the case may be, agree to any compromise or arrangement or to a reorganization of the corporation as a consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court, be binding on all the creditors or class of creditors, and on all the shareholders or class of shareholders, as the case may be, and also on the corporation and its liquidating trustee or receiver, if any.

III. If the articles of incorporation so provide, the corporation shall not be subject to the provisions of this section."


\(^{135}\)Uniform Business Corporation Act, sec. 59.

\(^{136}\)Sec. 120, English Companies Act, 1908; sec. 153 Companies Act, 129.
Conclusion

Limitations of both time and space have precluded the discussion of all or nearly all the provisions of the new Act. Those discussed here, however, indicate the manner in which the committee which drafted the Act proceeded, and to some extent the reasons for the conclusions reached. It is not thought that the Minnesota Act represents the final word on the subject nor that changes in the Act will not have to be made. Other states where the committees have proceeded as carefully as ours have found amendments necessary, and Minnesota's experience will not be otherwise. But the Minnesota Act is believed to contain much of what experience to date has proved helpful in this very important field, and possibly it may prove to be of real value to the state in the changing period through which it is going. If such should prove to be the case, the primary purpose of those engaged in the preparation of the new Act will have been served.