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SHARES WITH NO PAR VALUE

By RAYMOND F. RICE* and ALBERT J. HARNO†

WITH the growth of modern business corporations many of the attributes, which had once been considered inherent to the corporate idea, have broken down in practice. But unmindful of this fact legislatures have industriously passed laws the object of which has been to restrict the corporation within the confines of former approved notions. Witness the various laws directed at the "watered stock" evil. An abundance of litigation has resulted. The chief difficulty has arisen over the attempt to make par value of stock correspond to the actual value of the assets of the corporation.

The relation existing between a corporation and its members was once believed to be that of trustee and cestuis que trust.¹ The custom of dividing the joint stock of the corporation into shares made its appearance in connection with ventures of the early English trading companies.² A par value was subsequently given to each share to indicate that an amount equal to that represented on the face of the shares had been contributed to the venture.³ That the par value idea should so quietly

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¹"The legal interest of all the stock is in the Company, who are the trustees for the several members." Child v. Hudson's Bay Company (1723) 2 P. Wms. 207.

²"The idea of a share of stock as Americans hold it has been artificially deduced from the dominant theory of joint venture which underlay the English Trading incorporations of the sixteenth, seventeenth and eighteenth centuries." Address by Shepard, Corporate Capitalization and Public Morals, (1907) Illinois Bar Association Reports, Part II, 29, 44.

³For a history of these companies see 2 Davis, Corporations Their Origin and Development, 114.

⁴See Shares Without Par Value, (1921) 21 Col. L. Rev. 278.
creep in, then promptly to be accepted as a corporate incident, and almost immediately become the subject of heated contention is enigmatical.4

The par value standard once having been accepted in the law of corporations, certain far-reaching consequences developed. It was held that a creditor in dealing with a corporation could assume that the corporation had actually received assets equal to the par value of the shares issued. Consequently if the shareholders on the original issue had paid for their shares in money or property which did not equal in value the par value of the shares, and bona fide claims of creditors had accrued subsequent to the issue, which claims on the liquidation of the corporation remained unsatisfied, these original shareholders could be compelled to pay the difference between the actual value of the assets received by the corporation and the face value of the shares.5 The strictness of the rule being only varied in degree depending on whether the “good faith rule” or the “actual value rule” had been adopted in the jurisdiction where the question arose.

A competent authority has said that this custom of so fixing the capital of a corporation “has not worked well in practice, except as applied to corporations, like banking corporations, whose business is to deal in money, credits and securities, and whose assets are kept in liquid form.”6 That the practice is arbitrary there can be little doubt. The par value of shares even at the inception of a corporation rarely equals the assets of the corporation. Yet as against the claims of creditors it is no defense that the shares were not worth more on the market than the amount paid for them. The numerous laws passed seeking to sustain this artificial standard by imposing penalties for stock watering have resulted in prolific litigation but in no solution of the problem.

Moreover, the reason given for the rule, that the par value of shares serves as an indication of the amount of capital in the corporation on which creditors can and do rely, is inadequate. It is believed, as a matter of fact that little, if any, reliance is placed by a creditor on the nominal capital of a corporation.7

4See article by Dwight, Par Value of Stock, (1907) 16 Yale L. J. 247.
6Morawetz, Shares Without Nominal or Par Value, (1913) 26 Harv. L. Rev. 729.
7“The creditor who is sane considers not the nominal, but the actual situation; his concern is with the company's realizable property, its mort-
Further, even if the full par value of shares has been paid, this rarely remains for long any safe test of the amount of actual capital. As it recently has been said:

"Even in cases, however, where stock with par value is fully paid in cash or in property taken at its actual value, practical experience has shown that it is quite impossible to maintain a constant equilibrium between the nominal capitalization of a corporation and its assets. A fortiori, when such intangible and problematical assets as good will and expectancies are capitalized, a share can represent only an aliquot part of the total assets whatever its par value may be. The nominal face value then is always a fiction and one which the courts themselves disregard when recognition of it would be inequitable."

All the exigencies of business would tend to vary the capital rather than to stabilize it. Business losses frequently occur which depreciate the capital, or the corporation may have its capital invested in property such as mines, oil wells and the like which are ever depreciating in value. It is a safe assumption that the nominal capital is seldom a true indication of the actual assets of a corporation and that often it is utterly unreliable as such.

Another example of the impracticability of the par value standard occurs when a going concern finds itself in difficulties and undertakes to increase its capital by a new issue of stock or a bond issue with a stock bonus. Some courts have held in such cases that the corporation may issue shares at their market value irrespective of this par value, or may issue bonus stock in aid of the sale of bonds. Policy is given as a reason for this deviation from the rule. But if the nominal capital can ever be relied on by a creditor, there surely is no good reason why it would not be as misleading in this case as where the shares were sold for less than par on the first issue.

On facts similar to those just instanced other courts have applied the strict rule holding that it is just as much of a fraud on creditors to sell at less than par to increase the capital of a going concern as on the original issue. These courts are logarithm or lien debts, its floating debts, its gross income, its net income." Shepard, Corporate Capitalization and Public Morals, (1907) Illinois Bar Association Reports, Part II, 29, 50.

Shares Without Par Value, (1921) 21 Col. L. Rev. 278.


"For if the creditors have any right, there would seem to be no basis for any distinction between the original issue and any subsequent issue." Wickersham, The Capital of a Corporation, (1906) 22 Harv. L. Rev. 319, 331.

See Jackson v. Traer, (1884) 64 Iowa 469, 20 N. W. 764, 45 Am. Rep. 449.
cal but the rule is impolitic. Where the capital of a corporation is impaired its stock, as a rule, is selling on the market at less than par. No one will pay more for shares than their market value. The anomaly is apparent.\(^{12}\)

The practice of dividing the joint stock of a corporation into shares and of assigning to each share a definite value has been so generally accepted by our legislatures and courts as sound in theory and practical in operation that it is difficult to appreciate the fact that the share idea is of comparatively recent development. In the list of attributes of a corporation, some ten in number, laid down by Lord Coke in the *Case of Sutton’s Hospital*, no reference is made to shares of stock,\(^{13}\) nor does Blackstone, writing more than a hundred and fifty years later, make mention of the share idea in his enumeration of the incidents of a corporation. Even in this country, the earlier state and colonial charters prescribed no capital or share value, but with the unparalleled expansion of corporate activities and development of the law of corporations which characterized the nineteenth century, the par value theory speedily received universal acceptance as an essential feature of the recognized scheme of corporate organization and financing. In many jurisdictions definite limits were specified for the fixing of such par value, some statutes making provision for a minimum value only, varying from one to twenty-five dollars, and others fixing a certain maximum par value, which was usually placed at one hundred dollars. A few states undertook to prescribe both maximum and minimum limits, while others, although requiring some par value to be annexed to certificates of stock, assumed the more liberal attitude of permitting such value to be fixed by the articles of incorporation. In some states authority was given for the issuance of shares of stock “of any par value,” but such provisions were uniformly construed as merely delegating to the incorporators the

\(^{12}\)“To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares if the original stock has fallen below par.” Handley v. Stutz, (1891) 139 U. S. 417, 430, 35 L. Ed. 227, 11 S. C. R. 530.

But see Machen, Modern Law of Corporations, (1908) 631, where he says: “The proper course to pursue in such a case would be, first, to reduce the nominal capital until it corresponds with the actual capital as diminished by losses, and then the old shares will be worth par, and the new shares may likewise be issued at par.” This solution, would, no doubt, frequently be found difficult if not impracticable.

\(^{13}\)(1612) 10 Co. Rep. 1.
authority to value the stock proposed to be issued, and that the way was thus opened for the formation of corporations with unvalued shares was not even suggested. Even in those jurisdictions whose statutes were wholly silent so far as the par value of shares was concerned, it was apparently taken for granted that some value must be assigned to each share and that a certificate without the dollar mark was as incomplete as one which failed to specify the number of shares represented by it. Despite the fact that there were modern precedents for the issuance of participation certificates of indeterminate value, both in foreign jurisdictions and in this country as well, it was not until the closing years of the last century that the logic and expediency of the annexation of a nominal value to certificates of stock was seriously challenged.

Whatever may be the ultimate conclusion as to the soundness of the theory and its practicability in operation, it must be conceded that the introduction of non par value stock represents a departure from the hitherto accepted scheme of corporate capitalization of so sweeping and revolutionary a character that its effect upon the future trend and development of the law of corporations cannot but be tremendously far reaching. Already no less than eighteen states have sanctioned the formation of domestic corporations having shares of stock without nominal or par value, and of the remaining states the vast majority, either as a result of judicial decisions or without such compulsion, admit without question corporations organized on this basis under the laws of other commonwealths.

14White, Corporations, 8th Ed., p. 371:—"For several years this method of issuing shares of stock has been in practical use by one of the voluntary joint stock associations organized in the State of New York. In 1907 another practical example of the working of the plan was given in the 'ore certificates' issued by the trustees of the Great Northern Iron Ore properties, which are now listed and dealt in on the New York Stock Exchange."

15The following is submitted as a fairly complete and accurate list of the non par value stock acts:

The investigator cannot but be impressed with the strength and vitality of a movement which, finding its first legislative sanction in 1912, has, in less than a decade, without organized support or concerted effort, spread from coast to coast and made possible the entrance of non par value stock corporations, either as domestic or foreign organizations, into all of our states, with the exception of a scant half-dozen, and into the Dominion of Canada as well.\(^6\) It must not be supposed, however, that the legislative action has been hasty or ill-advised, for not less than twenty years of agitation and discussion preceded the enactment of the initial statute, and in the first five years following its passage but four states were added to the list.

In 1892 a special committee of the New York State Bar Association, in a report to that body on various matters pertaining to the law of corporations, included a recommendation that provision be made for the organization of a "distinct class of corporations, whose capital stock may be issued as representing proportional parts of the whole capital, without any nominal or money value."\(^7\) While this recommendation was adopted by the association, no immediate effort appears to have been made to translate it into legislation and for the next fifteen years we find only scattered and occasional references to the subject, for the most part by members of the committee of 1892 and by other members of the Bar Association whose interest appears to have been challenged through the medium of the report above referred to. Mr. Francis Lynde Stetson, one of the members of the original committee, in testifying before the United States Industrial Commission, in 1899, directed the attention of that body to the theory that certificates of stock should purport to represent merely proportionate interests in the assets of the corporation, and should not attempt to indicate any monetary value.\(^8\) Another member of the New York Bar who became an early advocate of non par value stock was Mr. Edward M. Shepard. His address at the October, 1906, session of the Bar Association of New Hampshire constitutes a most valuable contribution to the literature on the subject,\(^9\) and in the annual address

\(^{16}\)Statutes of Canada, 1917, 7 and 8 Geo. V, an act to amend the Companies Act (assented to Sept. 20, 1917).
\(^{17}\)Proceedings of New York State Bar Association, January 1892, 138.
\(^{19}\)Publications of the Bar Association of New Hampshire, N. S. Vol. 2, 273-297; also published in (1906) 18 Green Bag 601 et seq.
shares of stock without nominal or par value. This bill, with the sanction of the Association, was introduced in the Legislature of 1912, and formed the basis of the initial non-par value stock act, which went into effect on April 15, 1912. While subsequently amended in some particulars, all of the essential provisions of the act remain unchanged, and, although many of the subsequent statutes are much less elaborate and detailed in their provisions, the influence which the New York act has exerted upon the trend of later legislation is plainly apparent from even the most cursory examination and comparison of the statutes. While a comparative study of the various acts is not within the scope of the present article, it may be of interest to note, in passing, a few of their most striking features of similarity and dissimilarity.

It is worthy of note, at the outset, that the provisions of the several acts are permissive rather than mandatory. While some of the more ardent advocates of non par value stock would require the immediate removal of the dollar mark from all certificates of stock, with the possible exception of those issued by banks and other moneyed corporations, the consensus of opinion appears to be that, at the present time, such extreme action would be inexpedient. At the 1911 meeting of the New York State Bar Association, Mr. Elihu Root, then president of that body, in response to the inquiry whether he would make it mandatory upon corporations to refrain from valuing their stock, said:

"I think that is a matter purely of expediency. It may be, the wisest course at first is to make it permissive and thus avoid the difficulty of forcing people to conduct their business in a way which many of them may not approve in the first instance. I am confident that . . . if, under a permissive provision, it once gets into operation, that you will soon see an end by voluntary action of this representation by corporations as to the value of their assets."

Mr. Arthur W. Machen, in his letter transmitting to the Committee on Uniform Incorporation Act of the National Conference of Commissioners on Uniform State Laws, the Seventh Ten-

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27 Laws 1912, c. 351.
28 Laws 1917, cc. 484, 500, 501; Laws 1920, cc. 606, 608.
For a more complete statement relating to the endeavors to inaugurate no par value legislation previous to the passage of the initial law in New York, see article, Corporations With Shares Having No Par Value (1921) 3 Illinois Law Bulletin, 71.
29 Reports of New York State Bar Association, 1911, Vol. 34, 78.
before the Illinois State Bar Association in 1907, he further amplified the idea of the substitution of non par value stock for shares having a money denomination.20

In 1908 the New York State Bar Association again gave its approval to the principle of unvalued stock and manifested its renewed interest in the proposition by the appointment of a Special Committee on Corporation Law21 for the preparation and presentation to the Legislature of "amendments to the corporation laws permitting the formation of corporations having capital stock divided into shares without assignment thereto of any value in money."22 The resultant bill, with the recommendation of the Bar Association,23 was introduced in the Legislature in 1909, and passed both houses, but was disapproved by the governor on account of certain objections suggested by the state comptroller in connection with the imposition and collection of the stock transfer taxes and annual franchise assessments provided for in the existing corporation laws. It is of interest to note, in this connection, that Governor Hughes offered no objection to the principle embodied in the bill, but stated, in his memorandum of disapproval that "it had received the approval of public spirited students of corporate problems." In 1910, the bill, with amendments drafted to meet the objections of the state comptroller, was again introduced in the Legislature and was passed by the Assembly, but failed in the Senate through the opposition of a single member, who felt constrained to withhold his support for no other reason than that of the novelty of the proposition.24 Again in 1911, after having for the third time received the stamp of approval of the State Bar Association, the bill was introduced in the Legislature, but failed to reach a vote in the Assembly after having been passed by the Senate.25 Undismayed by these repeated failures, the Committee on Corporation Law presented at the 1912 meeting of the Bar Association its fourth draft of a bill to amend the stock corporation law by making provision for the organization of corporations having

20Reports of Illinois Bar Association, 1907, Part II, 29-60.
21This Committee included Francis Lynde Stetson, Chairman, Edward M. Shepard and Victor Morawetz, and was continued without change in personnel until 1911, when, upon the death of Mr. Shepard, he was succeeded by Louis Marshall.
22Reports of New York State Bar Association, 1908, Vol. 31, 43-45.
25Reports of New York State Bar Association, 1911, Vol. 34, 54, 80.
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tative Draft of a Uniform Incorporation Act, expresses substan-
tially the same opinion, adding the suggestion that some restric-
tive measures be taken to discourage the issuance of par value
stock. He says:

"The present draft also provides for stock without nominal
or par value. I wish it were feasible to require all stock to be
issued without par value. To do so would emphasize actualities
rather than fictions, but unfortunately would be at the present
time too great a departure from the business practice. I would,
however, encourage the issue of stock without par value by lay-
ing some discriminatory tax on any corporation whose stock has
a par value."30

While the statutes thus far disclose no disposition to force the
adoption of unvalued stock, there is no such uniformity of their
provisions specifying the classes of corporations which may be
organized with such stock. The tendency of the more recent
acts appears to be in the direction of permitting the issuance of
such stock by all corporations, except banks, trust companies and
other moneyed corporations. This limitation is to be found in the
New York Act of 1912 and is apparently based on sound con-
siderations of public policy, but there appear in the above act and
in not a few of the statutes modeled thereafter other limitations
which seem to restrict unnecessarily the application of the doc-
trine. Such a restriction is that excepting from the operation of
the act corporations under the jurisdiction of the public service
or public utilities commissions of the respective states. This ex-
ception, it should be noted, was not embodied in the drafts of
bills prepared by the Committee of the New York State Bar
Association and recommended by that body for adoption, but was
engrafted upon the bill after its introduction in the Legislature.
The wisdom of this limitation may well be doubted in view of
the frequency with which competent and disinterested author-
ities have given expression to the opinion that non par value
stock is particularly adapted to the exigencies of public service
corporations. The Public Service Commission for the Second
District of the State of New York, in an opinion delivered
through its chairman, F. W. Stevens, on July 21, 1908, in the
Matter of the Application of The New York Central & Hudson
River Railroad Company for leave to acquire certain stocks, dis-
cussed at considerable length the advantages of non par value

30Report of the Committee on a Uniform Incorporation Act to the
Thirtieth Annual Meeting of the National Conference of Commission-
ers on Uniform State Laws, held in August, 1920, p. 7.
stock, with particular reference to public utilities. The following is a brief excerpt from the opinion:

"The harmfulness of excessive issues of capital stock of corporations serving the public arises from the fact that stock of a given face value has not behind it property equal in actual value to the face value of the stock. The result is that the owners of the stock naturally assume the value of the corporate assets to be at least equal to the face value of the stock, demand an adequate return for the same, and in the effort to secure such return both demand excessive prices for services rendered, and unduly impair and cheapen the service."

Similar views are expressed in the report of the commission appointed by President Taft in 1910 "to investigate questions pertaining to the issuance of stocks and bonds by railroad corporations."

The report of this commission, which was transmitted to Congress by the President, with his hearty concurrence therein, under date of December 11, 1911, after recommending a federal statute encouraging the formation of railroad corporations with shares having no par value, and the reorganization of such corporations on the same basis, continues as follows:

"All of these considerations seem to apply with equal force to the securities of railroads under state incorporations, and we believe the law of the several states could with advantage be modified so as to provide for the issuance of stock without par value."

Another limitation which appears to restrict unnecessarily the application of the principle of unvalued stock is to be found in the provisions incorporated in many of the acts prohibiting the issuance without nominal value of stock "having a preference as to principal" or, as expressed in other statutes, "stock preferred as to its distributive share of the assets upon dissolution." A few of the statutes go so far as to except from the operation of the act stock preferred as to dividends or subject to redemption at a fixed price. It is submitted that no controlling reason exists why preferred stock, whether it enjoys a preference as to principal or dividends or as to both, should not be issued without the annexation thereto of a par value. If the preference is as to dividends, the certificate may fix the preferential amount in money instead of on the basis of a percentage of the par value,

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32The personnel of this commission included Arthur T. Hadley, Chairman, Frederick N. Judson, Frederick Strauss, Walter L. Fisher and B. H. Meyer.
as has heretofore been the practice, whereas, if the preference is as to principal, the extent and amount thereof may be set out in the body of the certificate without the necessity of imparting to it a definite par value. Weight is lent to this argument by the fact that even in those jurisdictions which prohibit the issuance, without nominal value, of stock preferred as to principal, it is conceded that no necessary relationship exists between the par value of stock and the amount to which the shareholders are entitled upon the distribution of the surplus assets of the corporation. Thus, in a recent case construing the provisions of the New York statute, which does not sanction the issuance, without nominal value, of stock preferred as to principal, the court says:

"These provisions show that the par value of the stock is not the precise amount which the holder may receive from the surplus assets upon dissolution, but that the matter may be controlled by the certificate of incorporation."

Despite the lack of uniformity in detail so far as the various non-par value acts are concerned, the vital principle which is common to them all has been accepted in so many of our jurisdictions and has commanded such distinguished support, that it may be confidently anticipated that unvalued stock will, at no distant date, be expressly sanctioned in the great majority if not in all of the states. In the meantime, however, interesting and difficult problems are being presented for solution in connection with the attempted entrance of corporations having shares without par value into commonwealths which have not as yet accorded them recognition.

One of the questions so arising is whether express legislative sanction is a condition precedent to the organization of a corporation having shares of stock without nominal value. As has already been noted, in the majority of the states, either by express statutory provisions or by necessary implication, par value constitutes an essential feature of the accepted plan of capitalization. Even in those states whose statutes are wholly silent so far as the nominal value of shares is concerned, no attempt appears to have been made to organize corporations with unvalued shares, although it might well be argued that, inasmuch as valued shares do not constitute one of the essential attributes of a corporation, the incorporators should be permitted, in the absence of some statutory inhibition, to provide for the issuance.

\(^{34}\text{People ex rel. v. Hugo, Secretary of State, (1920) 191 App. Div. 628, 182 N. Y. S. 9.}\)
of shares without nominal value. While this question does not as yet appear to have been presented to the courts for decision, it is highly improbable that they will sanction such a wide departure from the time-honored scheme of capitalization in the absence of express legislative authority.

Another problem presents itself when a corporation organized with no par value shares seeks to do business as a foreign corporation in a state where such organizations are not authorized. The question has recently come up for decision before the courts of last resort of Kansas and Missouri. The Kansas court was first to pass on it. A Delaware company sought by mandamus to compel the state charter board to consider its application to do business in Kansas. The case arose on original proceedings before the supreme court and came to issue on the demurrer of the attorney general. The court held that the company should be admitted to do business in Kansas.

The Kansas court said in answer to the argument that the state would have great difficulty in determining the amount of fees such a corporation should pay:

"The problem of determining the solvency and bona fide capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock, even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate business as a fair basis for its business credit and upon which its hope of profits is rationally founded."

The Missouri case arose in much the same manner as the one in Kansas. A Delaware corporation with 130,000 shares of stock divided into 30,000 shares of preferred stock of a par value of $100 a share, and 100,000 shares of common stock without par value, sought to obtain a license to do business in Missouri as a foreign corporation. The secretary of state having refused to grant it permission, it proceeded against him by mandamus.

\[35\]As previously noted, laws were passed by the 1921 Sessions of both the Kansas and Missouri legislatures making provision for the organization of corporations having shares without par value. The cases here referred to were decided before these acts were passed.

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court ordered that a license should be granted. The argument was again raised that such a corporation could not be taxed in a manner provided by the laws of Missouri. This objection was held to be untenable, the opinion citing with approval the language of the Kansas court above quoted. The court found "nothing inherently fraudulent or contra bonos mores in that species of stock or in corporations organized with it," nor were the interests of the public affected adversely by it for "in every case a person dealing with such a company could ascertain the amount of actual assets before giving credit, as readily as if the stock had a nominal value, for the value of assets, not the par value of stock, is the essential fact."

In view of the growing importance of this question an effort has been made by the writers to obtain an expression from the secretaries of state, or other proper officials, in the various states relating to their attitude toward the admission of such foreign corporations to do business in their respective states. To these inquiries a decided majority have given a favorable answer. A few have replied in the negative. It may well be doubted, in view of the Kansas and Missouri decisions, whether the position of the latter would be sustained by the courts.

Among the states admitting such corporations there is, however, no uniformity in the means employed in finding a basis for computing the franchise fee. The question recently came up before the supreme court of Michigan. A corporation organized under the laws of Delaware with no par value stock had qualified to do business in Michigan. The question having arisen as to the method that should be followed in computing the franchise tax for this corporation in the latter state, the Michigan court held that the no par stock of the corporation must for franchise fee purposes be taken to be of a par value of $100 a share.


38 The following states, which have not adopted the non par value stock act, nevertheless admit foreign corporations having shares without nominal value: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Oregon, South Dakota, Texas, Utah and Vermont. In all states which have adopted the non par value stock act foreign corporations organized on this basis are admitted.

39 The following states are refusing admission to such corporations: Georgia, Nebraska, New Mexico, South Carolina, Tennessee, and Washington.

In reaching this conclusion the court adopted the basis of valuation placed on such shares (for computing the tax) by the laws of the state where the corporation was domiciled.41

As distinguished from the Michigan view the Kansas court held that the capital of a foreign corporation with shares of no par value should be computed on the basis determined by the act relating to foreign corporations in Kansas, namely, that the fee should be based on that proportion of its lawfully issued capital which the corporation proposed to invest and use in the exercise of its corporate privileges within the state.42 This method of valuation for taxing purposes was also sanctioned by the Missouri court.43 In Illinois it is provided by statute that "if a foreign corporation has a capital stock of no par value, its shares for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be considered to be of the par value of one hundred dollars per share."44

While not prescribed by its proponents as a panacea for all corporate ills connected with the issuance of stock, certain distinct advantages are claimed to accrue from the omission of the dollar mark from certificates of stock. Perhaps the most forceful and convincing argument in favor of the innovation is that it gives expression to a fundamental principle of the law of corporations, namely, that a certificate of stock is not a promise to pay to the holder thereof the amount expressed on its face or a reasonable rate of interest thereon, nor is it even evidence that such a sum or its equivalent has been received by the corporation from the original holder; but that, on the contrary, it is a mere participation certificate entitling the owner to share, ratably with the other stockholders, in the net profits of the corporation, if any, and in the event of its dissolution, to share

41The writers are informed that the same basis of valuation is followed in Utah.

"An interesting question will arise when a state like Michigan comes to tax no par value stock of a foreign corporation whose state of nativity sets no value on such stock for franchise fee purposes." (1920) 19 Michigan Law Review, 96.

42North American Petroleum Co. v. State Charter Board, (1919) 105 Kans. 161, 181 Pac. 625. Colorado has adopted a like basis. In Florida such corporations must pay a maximum fee of $250. In Minnesota a minimum fee of $50 is exacted unless it be shown that the company has more than $50,000 of capital employed in the state.


44General Corporation Act, (1919) Sec. 101. In Massachusetts a similar statutory provision prevails. Acts of 1918, Chap. 235. Indiana and Nevada, without statutes, we are advised, follow the same practice.
similarly in the assets of the corporation remaining after the payment of its debts and any preferences to which the other shareholders may be entitled. This fact has been too often overlooked by the purchaser of corporate securities, and evidence is not lacking that the impressive figures emblazoned on the certificate, more frequently than any of the other allurements of those masterpieces of the engraver's art, have enticed the unwary to financial disaster.

The argument that a certificate of stock having a nominal value does not speak the truth but is misleading and delusive, has been employed by the advocates of unvalued stock from the very inception of the movement. In the report of the committee of the New York State Bar Association submitted to that body in 1892 and recommending an amendment to the corporation laws providing for the formation of a class of business stock corporations whose capital stock might be "issued as representing proportional parts of the whole capital without any nominal or par value" appears this statement:

"The effect of such amendment would be to provide for measurement of the interest or shares of the members of such a corporation by a statement of proportion, as in the case of the part owners of a ship, and not by an arbitrary assignment of money value, which is delusive in the case of every corporation whose capital stock has a market value either more or less than its nominal par value. . . . It would relieve any possibility of injury to the public from misleading representations as to the money value of corporate stock, . . . ."

Mr. Edward M. Shepard, in the address before the New Hampshire Bar Association above referred to, gave forceful expression to the same idea in the following language:

"Everything which tends to obscure the fact that the corporation in reality is a joint venture or partnership with nothing of value except its assets and the ability and character of those who run it, is an injury to truth and to the sound interests of legitimate corporations. Either corporations and those who promote them do or they do not influence the public by their capitalizations. If they do not the capitalizations are superfluous and irrelevant; if they do, then the capitalizations are deceitful. The change we are considering would make impossible accusation of such deceit. The burden would be upon the investor of ascertaining actual value; and the liability of misrepresentation of actual value or facts bearing upon actual value would be precisely the same with respect to corporate property as with respect to

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other property. . . . The advantage of the change may be summed up, therefore, in that one word which generally signifies the nearest approach to a cure of public evils: Truthfulness."

Reference has previously been made to an opinion delivered in July, 1908, by the Public Service Commission of the State of New York for the Second District. The commission, speaking through its chairman, F. W. Stevens, thus commented upon the deceptiveness of the par value fetish:

"If once the public mind could be brought to regard shares of stock, not as property in themselves, but as evidence of a right in property, we might hope to be rid of the deceptive notion that the par value of a share of stock is the slightest evidence of its real value, or is any evidence of the dividend returns to which the owner is entitled."

The Report of the Railroad Securities Commission, to which reference has previously been made, after setting its stamp of approval upon the non par value stock principle in the following language:

"We do not believe the retention of the hundred dollar mark, or any other dollar mark, upon the face of the share of stock, is of essential importance. We are ready to recommend that the law should encourage the creation of companies whose shares have no par value, and permit existing companies to change their stock into shares without par value whenever their convenience requires it."

continues as follows:

". . . the creation of shares without par value . . . has the cardinal merit of accuracy. It makes no claims that the share thus issued is anything more than a participation certificate."

For more than a decade the Commissioners on Uniform State Laws have had under consideration the formulation of a proposed uniform incorporation law, and no less than seven tentative drafts of such an act have been prepared. In the draft of the act submitted by the commissioners at the meeting of the American Bar Association in 1912, there was embodied a provision for non par value stock, and the reasons given for the recommendation were as follows:

"The purpose of removing the par valuation from certificates of shares of stock was to make the certificates show more clearly
the real and basic value of a share, as representing a right of proportionate ownership in the net earnings of the corporation and in the unliquidated and unstable sums describable as the excess of assets over liabilities. The plausible hypothesis upon which the plan is based is that the designation of a par value on the face of the certificate tends to produce upon the mind of an intending investor the impression that the return upon his investment as expressed in dividends should be an adequate percentage of the value of the stock, as shown on its face by the par valuation."

A further argument in support of unvalued stock which has not infrequently been advanced by its advocates is that it will afford a possible remedy, or at least a means of relief, so far as the evils of over-capitalization and stock watering are concerned. An interesting illustration of the extreme view that par value stock is solely responsible for over-capitalization is to be found in the following excerpt from the Third Annual Message of Governor Edward C. Stokes to the Legislature of the State of New Jersey:

"The problems growing out of capitalization in business corporations are predicated entirely upon the fixed par value of the issues. Par value is the basis of discussion concerning this subject. If the shares of the stock in certain classes of corporations were issued without a value fixed by the dollar mark, the difficulty would be eliminated. If a corporation should be organized, not with a thousand shares of stock of a value of $100.00 per share, but simply with the issue of one thousand shares of stock without any determined par value, the question of over-capitalization could never arise. . . . Dividends could be declared upon the shares, not in rate per cent, but in fixed amounts, and the question of over-capitalization would be entirely eliminated for all parties concerned—for the corporation that sells, for the public that buys its products and for the holders of its stock."

As has heretofore been noted, a Special Committee on Corporation Law was named at the 1908 session of the New York State Bar Association for the purpose of formulating an amendment to the corporation laws authorizing the organization of business corporations without requirement of money denomination for their shares of capital stock. The report of this committee, together with a draft of bill, was submitted to the association at its session in 1909. With reference to the "fixed money valuation, which has led to the abuses of nominal as distinguished from actual capitalization," the committee expressed itself as follows:

40New Jersey Legislative Documents, Vol. 1, 1907, pp. 39, 41.
"The abolition of the money denomination of shares would, we believe, deprive those who promote corporations of the advantages, real or seeming, of that exaggerated capitalization which undoubtedly is possible under the existing laws of every or nearly every American state, and, at the same time, would compel investors to fix attention upon actual value, free of the influence of what, as overwhelming experience shows, tends to become nominal or symbolic valuation."50

Though the spread of the no-par-value idea throughout the various parts of the country has been rapid since the passage of the initial law in New York in 1912, it must not be assumed that there has been no opposition. So well known an authority on corporations as Mr. William W. Cook has raised his voice in protest. In a recent issue of the Michigan Law Review51 Mr. Cook has said as follows:

"We come now to the most peculiar remedy of all, namely, the issue of stock without any par value whatsoever. This can hardly be called a remedy. It is quite the reverse. It legalizes instead of restricting large issues of stock for property. The theory of this recent innovation is that the American public should be educated up to the idea that a share of stock represents but a proportion of the corporate property. The American public, however, is incurably imbued with the idea that a share of stock represents or should represent a fixed sum, instead of imagination or machinations of promoters. As a matter of fact, the public generally has no definite idea of the value of property turned in for stock, and hence if unlimited stock may be issued for all kinds of property the danger of fraud is greatly increased. Unreliable men may issue stock without par value to an amount, limited only by their capacity to induce the public to buy it. It is of course safer for promoters to issue stock without par value for choice assortments of property, but how the investor and the public benefit has not yet appeared. Stock without par value adds to the mystery as to what the stock really represents, and the public still compares the market price of such stock with $100 par, without regard to whether or not the stock is without par value."52

Later in the same article Mr. Cook continues:

"On the whole stock without par value looks like a skillfully devised scheme for issuing a maximum of watered stock at a minimum risk. In the hands of reliable men it may be all right, but not needed; in the hands of unreliable men it is all wrong. It conceals the mystery of 'water.' . . . Investors

52Id., 591, 592, 593.
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will grow wary of stock which dares not state on its face how much money or property it represents. The old law, even with its feeble liabilities, had some restraining influence on the cupidity of promoters; this law has none. While investors do not object to liberal profits to promoters, yet they object to unfair profits in the way of too many shares to pay reasonable dividends. Investors do not know, and have no means of knowing what a promoter pays for the property he capitalizes. Shares without par value conceal what money or property a share really represents.\textsuperscript{53}

Since that portion of the public that is interested in the affairs of a corporation is made up of investors and creditors, the fraud Mr. Cook refers to must be visited on either or both of these. Taking up first then the case of the creditor who deals, or has dealt, with a corporation which has issued shares without par value.

The creditor is above all a business man, and as such we must endow him with business sense. To assume that this man of experience will lend his money or transfer his property under the spell of the dollar sign on a share of stock is to build one's case on pure fiction and to close one's eyes to facts. Mr. Machen has well said:

"Corporations do not in fact get credit on any such theory; and money lenders have proved themselves to be much too hard-headed to act on any such legal fiction. Corporations get credit either on the actual value of their assets, or on the integrity and standing of their officers and managers, and not at all on the nominal value of stock.\textsuperscript{54}"

Furthermore, were it possible to have the nominal capital of a corporation originally to equal the actual value of its assets, yet, as previously observed, this can at best be only temporary. The nominal capital of a going concern cannot long equal the corporate assets whether the corporation is in normal or abnormal operation. Even more does this constant fluctuation in the value of the assets make par value an impossible guide to creditors. The fact is that the creditor is not misled by this fiction of par value; he seeks out the assets. And this he can do with equal facility when the fiction is abolished.

But how about the case of the investor? The fear is that the removal of the dollar sign from the shares will make it yet more easy to mislead the gullible public. It is not contended that

\textsuperscript{53}Id., 595.
\textsuperscript{54}Report of the Committee on a Uniform Incorporation Act (1920) 6.
no-par-value is a cure for all the evils incident to the promotion of corporations. But it is claimed that it is truthful, and that fewer opportunities exist, when properly supervised and regulated, to defraud the investor. Further, "the substitution for shares with a par value, of shares without nominal valuation, would put the investor on guard, and would dispel misunderstanding on the part of the public."

In commenting on the New York law authorizing the creation of corporations with shares having no par value, Mr. Morawetz has said:

"A corporation formed under this statute must state in its certificate of incorporation the amount of capital with which it will carry on business, and it is prohibited from engaging in business or incurring debts until the stated amount of capital shall have been received by the corporation in money or in property at its actual value. However, the shares issued by the corporation would have no nominal or par value, and the corporation should be permitted to issue and sell them at their actual or market value.

"The policy of the New York Statute is sound. It recognizes that shares in a corporation represent only aliquot interests in its capital, whatever that may be, and that their nominal or par value is no indication of their actual value or of the actual capital of the corporation. It requires the amount of actual capital of a corporation formed under the law to be stated in the certificate of incorporation, and imposes a severe penalty upon the directors in case of the creation of indebtedness before receiving the prescribed capital. Thus it furnishes to creditors and the public generally a measure of protection greater than that furnished by the generally prevailing incorporation laws. At the same time it is in furtherance of sound business methods by enabling corporations to raise money by selling shares at their actual value instead of by borrowing or otherwise increasing their indebtedness."

For further precautions it might be well to provide:

"That officers of corporations be required to draw up estimates of their resources, plans for future operations, etc., and publish them to the stockholders at frequent intervals."

Mr. Machen in his tentative draft of an act to make uniform the law of business corporations has inserted as a protection to the public the following provision:

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55Ignatius, Financing of Public Service Corporations (1918) 78-83.
56Shares Without Par Value, (1921) 21 Col. L. Rev. 278.
57Shares Without Nominal or Par Value, (1913) 26 Harv. L. Rev. 729, 730, 731.
58Shares Without Par Value, (1921) 21 Col. L. Rev. 278, 281.
"Any share of stock having no par value may be issued subject to the payment of any sum of money, or in exchange for any property or rights which the corporation is authorized to acquire or hold, or for services rendered to, or inuring to the benefit of the corporation, provided a certificate setting forth the number of shares in question, and the amount to be paid thereon, and describing with reasonable definiteness the property or rights or services to be accepted in payment thereof shall have been, prior to the issue thereof, executed, acknowledged and recorded as amendments to the Articles of Incorporation are required to be executed, acknowledged and recorded. Shares of stock having no par value shall not be issued until such a certificate shall have been executed, acknowledged and recorded and then only pursuant to the terms of such certificate. Such certificate may as to any shares which have not been actually issued pursuant thereto be amended by a new certificate executed, acknowledged and recorded in like manner as the original certificate."

The further objection raised by Mr. Cook that the American public is incurably imbued with the idea that a share of stock represents, or should represent, a fixed sum finds an answer in the fact that the "stocks of corporations organized under these statutes are quoted on the exchange side by side with those with a par value and are dealt in without seeming discrimination. The number of corporations taking advantage of this statute is increasing, as confidence in the benefits of the change is established."60

Every fair-minded advocate of the theory of unvalued stock will welcome discussion and criticism of the principle, for the fact must be recognized that legislation embodying such a radical innovation and extending over a period of only ten years cannot be wholly adequate or free from imperfections. Moreover, the unscrupulous promoter will as certainly seek to serve his own selfish ends through the manipulation of unvalued shares as he has through the use of valued shares in the past, and the necessity of further safeguards will doubtless develop with the increasing use of non par value stock. However, the fact remains that it is a condition rather than a theory with which we are confronted and that the question is no longer one for academic discussion. The spread of the movement continues unabated, and the fact that foreign corporations with shares of no

59Report of the Committee on a Uniform Incorporation Act (1920) 16.
60Shares Without Par Value, (1921) 21 Col. L. Rev. 278, 280.
par value are being freely admitted into all but a few of the states will unquestionably hasten the adoption of the act in the jurisdictions where the formation of domestic corporations on this basis is not now permissible. Otherwise, foreign corporations will possess an advantage denied to domestic corporations. This proved to be one of the most forceful and convincing arguments in favor of the passage of the non par value stock act by the 1921 legislatures of Kansas and Missouri, into which states, as has previously been noted, foreign corporations having unvalued shares had previously forced their entrance through proceedings in mandamus.

It is submitted, therefore, that the theory, having received such widespread legislative sanction, is now entitled to a fair trial in actual practice, and that the most valuable criticism at the present time will be constructive rather than destructive. If, after such trial, it shall develop, as Mr. Cook suggests, that stock without par value is merely "a skillfully devised scheme for issuing a maximum of watered stock at a minimum risk," it must fail, and its failure would mark the passing of a movement remarkable both for the distinguished and disinterested character of its proponents and the rapidity of its spread.