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CORPORATION LAW

FLOYD A. WRIGHT*

The number of Florida decisions relating to corporation law has been quite limited during the last two years. On the other hand, the legislature in its 1953 session enacted an unprecedented mass of statutes in that field of the law. Therefore, our primary concern will be centered on an examination of the legislative efforts in this regard.

Back through the annals of legislative history, it is doubtful if any general assembly ever ground out a grist of legislation on corporation law as varied and illogical as that of the 34th Florida Legislature. After enacting a series of separate acts, amending and repealing numerous sections of the then existing corporation statutes, the legislature finally attempted to effect a general revision of the corporation laws. But that final attempt, when compared with the results achieved heretofore by the legislatures of a third of the states in adopting modern business corporation acts, resulted in a fiasco.

Although the final purported general revision¹ effected a few desirable changes in the former hodgepodge of antiquated corporation statutes of the state, the new confusion and uncertainty thereby injected into the law will more than offset any benefits that may accrue from these bizarre, misguided legislative endeavors.

Four objectives will be pursued in this article. First, the few improvements in the Florida corporation statutes accomplished by the numerous special enactments and the ultimately attempted general revision will be examined; second, the mischievous features resulting from the new legislation will be scrutinized; third, the salient deficiencies in the statutory corporation law of Florida left uncorrected by the legislature in its abortive undertaking will be reviewed; and, fourth, the development in Florida corporation law through court decisions will be analyzed. Owing to the fact that a drastic need for a thorough, modern revision of our corporation statutes has been fully treated elsewhere by this author,² that element will not be elaborated upon to any great extent.

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1. Fla. Laws 1953, c. 28170, FLA. STAT. c. 608 (1953).

2. *Oklahoma Corporation Law—Does it Need Revision?* 7 OKLA. ST. B.J. 224 (1937); *Past and Present Trends in Corporation Law: Is Florida in Step?* 2 MIAMI L.Q. 69 (1947); *Protection of Creditors Under the Proposed Florida Business Corporation Act*, 6 MIAMI L.Q. 192 (1952); *Need for a Drastic Revision of the Florida Corporation Laws*, 26 FLA. L.J. 84 (1952); *The Proposed Florida Business Corporation Act—The Modus Operandi Employed in Preparing It and Other Similar Codes*, 26 FLA. L.J. 259 (1952); *Current Developments in Statutory Corporation Law*, 7 MIAMI L.Q. 1 (1952).

I. IMPROVEMENTS EFFECTED BY THE 1953 LEGISLATURE

The most noteworthy accomplishment resulted from the repealing of numerous undesirable provisions found in the former statutes. All of Chapter 611 and a major portion of Chapters 610 and 612³ were repealed, and several of the baneful provisions and procedures provided for therein were not carried over into the new enactments. Hereafter it will not be necessary to follow a separate, outmoded procedure when organizing types of corporations listed in former Section 611.01. The antiquated letters patent as a device for organizing corporations, as provided in Chapter 611, were abrogated. All strictly private corporations from now on will be organized under the new Chapter 608,⁴ and the general regulations and procedures (with a few exceptions⁵) will apply equally to all corporations. Special mention should be made of the elimination of the vicious potential liability under Section 611.05.⁶ Many other obsolete, ambiguous, conflicting, duplicitous provisions scattered throughout Chapters 610, 611, and 612 were in the repealed sections. In many, many instances it formerly was difficult to ascertain if the provisions in one of the chapters would apply to corporations organized under another chapter.

Many of the provisions in Chapters 610 and 611 were carried down from Florida's first general corporation statutes, adopted in 1868. These ancient concepts had been amended and added to from time to time during the span of 85 years until both chapters had become an uncorrelated hodgepodge. In 1825, Chapter 612 was added. This served to modernize procedures somewhat. On the other hand, much of the content of that chapter dealt with the same subject matter as did Chapters 610 and 611, thereby creating further duplicities, conflicts, and ambiguities. It would have been better if the legislature had waited three years and adopted the Uniform Business Corporation Act when it was released in 1928, repealing all of the existing general corporations statutes, as Louisiana did.

Another improvement resulted from the provisions (although they fall woefully short of much more comprehensive provisions found in the statutes

3. FLA. STAT. (1951).

4. See note 1 *supra*.

5. See FLA. STAT. §§ 608.01, 608.03(1)(b), 608.03(3), 608.13(12), and 608.60 (1953). Some confusion may result from the fact that § 608.05(2) refers to banks being organized under c. 608, while Fla. Laws 1953, c. 28016, sets up a new banking code, providing exclusive procedures for organizing banks.

6. There was much confusion as to whether corporations organized under c. 612 must do the filing required under § 611.05 to escape the possible liability provided otherwise therein. The provisions in the section set out that they applied to "every corporation." Apparently, the legislature, in adopting c. 612, assumed that the requirements were all-inclusive, as they excepted, in the original 1925 act, corporations organized under c. 612 from the requirements in § 611.05. Later the provision so excepting corporations from the requirements was repealed. That would seem to mean that all corporations thereafter organized under c. 612 would be subject to the requirements in § 611.05.

of many other states)⁷ allowing minority groups of shareholders to vote as a class in authorizing a charter amendment when the rights of such groups are affected adversely.⁸ Also, some betterment was attained by setting forth more fully the procedure to be followed in affecting a merger or consolidation,⁹ including the steps to be taken by dissenting shareholders and the procedure to be followed in fixing the value of their shares.¹⁰

These enumerations just about exhaust all the revisionary features of the new legislation which could possibly be placed on the credit side of the ledger. Any other advancements are too meager and doubtful to justify a favorable listing. Moreover, a large portion of the aforementioned benefits were negated, as hereinafter discussed, by reenacting similar, or even more pernicious, provisions in the new acts adopted.

II. MISCHIEVOUS FEATURES OF NEW ACTS

It seems well to repeat that the legislature during its last session adopted a fanciful series of bills; repealing, amending, and reenacting (restated and often expanded) portions of the former statutes which it had repealed. The whole gamut evidences no logical method, plan, or system. Without rhyme or reason a number of piecemeal, isolated bills were enacted, one after another, repealing and amending various unrelated sections of the former statutes. The procedure employed, until late in its course, seemed to be void of any general objective. Finally, a substantial revision of the statutes relating to corporations was effected, but the ultimate bill was so poorly planned and so slovenly drafted that the present statutory corporation laws of Florida are left in a chaotic state. As antiquated as our corporation laws were and as urgently as the need for a modern Florida business corporation code was, the present laws will serve only to further retard corporate development in the state. Only time will tell the extent of the resulting injury to the economy of Florida.

During the last three weeks of the session,¹¹ the legislative cleaver was busily employed in chopping away at the corporation statutory structure of the state. No less than fifteen different bills, changing our corporation

7. Modern business corporation acts have been adopted as follows: Ohio (1927), La. (1928), Idaho (1929), Cal. (1931), Ill., Minn., and Pa. (1933), Wash. (1934), Neb. (1941), Mo. (1943), Ky. (1946), Okla. (1947), and Md. and Wis. (1951). Many of these acts have been revised from time to time since their original adoptions. Moreover, several other jurisdictions, such as Indiana, Kansas, Michigan, Mississippi, Tennessee, and the District of Columbia, have adopted corporation codes which are semi-modern in content. The latest to take this step was the District of Columbia in 1953. It also should be mentioned that Delaware, New Jersey, New York, and several other states have kept their corporation statutes quite well up to date by repeated piecemeal amendments, while not effecting any single drastic, wholesale revision. See articles published by this author, listed in note 2 *supra*.

8. FLA. STAT. § 608.18(1) (1953).

9. FLA. STAT. §§ 608.20-608.23 (1953).

10. FLA. STAT. § 608.23 (1953).

11. The session was adjourned May 6, 1953.

laws, were enacted. These new acts became effective at various intervals from May 19th to October 1st. Thus, for a period of over four months our corporation statutes shifted like the sands of the Sahara.

These series of enactments became law, as follows: May 19—H.B. 24,¹² lowering the minimum par of shares, and H.B. 43¹³ providing for organization of savings banks; May 27—S.B. 158,¹⁴ relating to share certificates, S.B. 159,¹⁵ concerning amendments of certificates of incorporation, and S.B. 160,¹⁶ regarding power of corporations to issue shares; June 2—H.B. 21,¹⁷ pertaining to corporate gross receipt taxes, H.B. 88,¹⁸ respecting proof of incorporation, H.B. 366,¹⁹ validating instruments executed by directors or trustees of dissolved foreign corporations, and H.B. 513,²⁰ relating to corporate power to change number of directors; June 15—S.B. 306,²¹ concerning capital stock tax; August 5—H.B. 45,²² extending, etc., eminent domain to certain classes of corporations, H.B. 46, S.B. 34,²³ adopting a new banking code, Sections 660.09 and 660.10 of which contain provisions relating to other types of corporations, and H.B. 809,²⁴ giving the secretary of state supervisory and administrative powers over the corporation laws; October 1—H.B. 1125,²⁵ purporting to effect a general revision of matters relating to domestic corporations for profit, and S.B. 1090,²⁶ pertaining to taxes and fees on foreign corporations. This period of rapid and unpredictable changes in the Florida corporation statutes naturally resulted in extreme confusion among corporate attorneys and business management.

It would be confusing indeed for a football team if rules were to be changed a dozen or fifteen times during a game, or even during the playing season. Definite rules are as essential to the *captains* of commerce and industry as to football *captains*. This author has been unable to find one instance in legislative history where a legislative body has engaged in an onslaught on any branch of the law comparable with this.

One hundred and thirty-one of the 143 sections contained in Chapters 610, 611, and 612 were repealed. Two sections were twice repealed,²⁷ five

12. Fla. Laws 1953, c. 28010, amending FLA. STAT. §§ 625.02 and 611.06 (1951).

13. Fla. Laws 1953, c. 28012, adding FLA. STAT. § 654.01 (1953).

14. Fla. Laws 1953, c. 28051, amending FLA. STAT. § 612.17 (1951).

15. Fla. Laws 1953, c. 28049, amending FLA. STAT. § 612.05 (1951).

16. Fla. Laws 1953, c. 28050, amending FLA. STAT. § 612.09 (1951).

17. Fla. Laws 1953, c. 28091, adding FLA. STAT. § 203.01 (1953).

18. Fla. Laws 1953, c. 28077, amending FLA. STAT. § 612.23 (1951).

19. Fla. Laws 1953, c. 28078 (new provision).

20. Fla. Laws 1953, c. 28089, amending FLA. STAT. § 610.03 (1951).

21. Fla. Laws 1953, c. 28248, amending FLA. STAT. §§ 610.07, 610.08, 610.10 and 610.15, and repealing §§ 610.13 and 610.14 (1951).

22. Fla. Laws 1953, c. 28007, adding new FLA. STAT. §§ 74.141, 74.142 (1951).

23. Fla. Laws 1953, c. 28016, adding four new chapters, viz., FLA. STAT. c. 658, 659, 660 and 661 (1953).

24. Fla. Laws 1953, c. 28086, adding FLA. STAT. § 15.13 (1951).

25. Fla. Laws 1953, c. 28170, repealing major portions of FLA. STAT. §§ 610, 611 and 612, (1951), and revising and consolidating greater portions of sections repealed, thus creating new FLA. STAT. c. 608 (1953).

26. Fla. Laws 1953, c. 28285, amending FLA. STAT. c. 613.03 (1951).

27. FLA. STAT. §§ 610.13 and 610.14 (1951), repealed by Fla. Laws 1953, c. 28248 and again c. 28170.

were amended and later repealed,²⁸ five were amended but not repealed,²⁹ and seven were retained without change.³⁰

The new legislation leaves the arrangement and content of our corporation statutes in as bad a mess as existed under the former statutes. House Bill 1125 created a new Chapter, 608. Eight sections of Chapter 610 have been left,³¹ all of Chapter 611 has been repealed, and four sections³² of Chapter 612 have been amended and retained. Previously, we had Chapters 610, 611, and 612. Now we have Chapter 608, followed by Chapter 609, which deals with business trusts, and then comes Chapter 610 and 612, further dealing with corporations for profit. There is no justification for not repealing the remaining eight sections of Chapter 610 and the remaining four of Chapter 612. If any of the provisions contained therein were to be retained they should have been reincorporated into the newly-created Chapter 608. Then it would have been better to have numbered the new chapter as Chapter 610, or 612, thus keeping the corporation statutes grouped together.

Moreover, most of these sections retained in Chapters 610 and 612, should, for other reasons, have been repealed. Section 608.13 covers the same subject matter as Section 610.03. It is silly to have two sections on corporate powers, each worded differently and varying in content, while covering the same matter—and especially so when much of the new section (608.13) was copied verbatim from the prior unrepealed section (610.03).

The retained Section 610.29 relates to the protection of the names of veterans' associations and has little relation to corporation law in general. This section should have been repealed or transferred to the chapter on eleemosynary corporations, or possibly assigned to the part of the statutes relating to the protection of names against unfair trade practices. There is really no need for such provisions in state legislation as the matter is more fully regulated by federal statutes.

Sections 610.31 to 610.36, inclusive, should have been repealed. This author has found no such provisions dealing with the regulation of clubs in the corporation statutes of other jurisdictions. The value of such provisions is nil. If a "club" is organized as a corporation for profit, it would come under the general provisions the same as other corporations. If it is not run for profit, any regulations relating thereto belong in the chapter on eleemosynary corporations. On the alternative, since these

28. FLA. STAT. §§ 610.07, 610.08, 610.10 and 610.15 (1951), amended by Fla. Laws 1953, c. 28248; FLA. STAT. § 611.06 (1951), amended Fla. Laws 1953, c. 28010, and all later repealed by Fla. Laws 1953, c. 28170.

29. FLA. STAT. § 610.03 (1951), amended Fla. Laws 1953, c. 28089; FLA. STAT. § 612.05 (1951), amended Fla. Laws 1953, c. 28049; FLA. STAT. § 612.09 (1951), amended Fla. Laws 1953, c. 28050; FLA. STAT. § 612.17 (1951), amended Fla. Laws 1953, c. 28051; FLA. STAT. § 612.63 (1951), amended Fla. Laws 1953, c. 28077.

30. FLA. STAT. §§ 610.29, 610.31-610.36 (1951).

31. § 610.03 (amended), and the sections listed in note 30 *supra*.

32. §§ 612.05, 612.09, 612.17, and 612.63 (all amended).

six sections are penal in nature, they could well be grouped in the chapter on crimes and punishment, or possibly be placed with other provisions relating to unfair trade practices and protection of other trade names. It is extremely illogical to have these few sections retained, making up the sole content of Chapter 610, entitled "Corporations, General Provisions," sticking out like a sore thumb. Therefore, it is conclusive that all of the retained sections of Chapter 610 should have been repealed.

Section 612.05 (amended and retained) relates to the same subject matter as, and conflicts with the content of, new Section 608.18. The same is true as to Sections 612.09 (amended and retained) and 608.14 (new), 612.17 (amended and retained) and 608.41 (new), and 612.63 (amended and retained) and 608.06 (new). Section 612.63, as amended in H.B. 88, C. 28077, and left unrepealed, refers back to and is dependent upon the procedures set out in eight sections in Chapter 612 (612.03, 612.06, 612.22, 612.36, 612.37, 612.38, 612.46, and 612.64), which sections were repealed by H.B. 1125, C. 28170. Sections 612.05, as amended in S.B. 159, C. 28049, and 612.09, as amended in S.B. 160, C. 28050, were not repealed. Section 612.63, as amended, also refers back to the procedures in those two sections. Such grotesque folderol cannot be justified under any circumstances, and especially not, when the Attorney General's Office and the two Houses of the Legislature had before them a draft of a comprehensive modern business corporation code which for unfounded reasons they brushed aside without giving it due consideration.

At this point the general contents of the revisionary act, H.B. 1125, Fla. Laws 1953, C. 28170, which makes up Chapter 608 of the 1953 Florida Statutes, will be examined and evaluated. This is the general corporation act which became effective October 1, 1953. It was passed, and filed in the office of the secretary of state on June 15, 1953, after the legislature had adopted, as mentioned above, a series of special acts, amending and repealing scattered sections of the former Chapters 610, 611, and 612. Section 608.01 is more or less a restatement of former Section 610.01, with the addition of redundant verbiage. It provides that Chapter 608 shall apply to all corporations, except in instances where special acts relating to special types of corporations contain provisions which conflict with its provisions, whereupon the provisions in the special acts shall govern. It further provides that the chapter will not invalidate or affect existing corporations or acts thereof. The content and substance of the section is not seriously objectionable although it is poorly worded.

Section 608.02 is new. It makes up a "definitions" section,³³ defining "articles of incorporation" and "certificate of incorporation." Both of these

33. All modern business corporation acts contain a definition section, defining a long array of terms which are repeated several times in the bodies of the acts. See the elaborate Draftsman's Note in the annotations under Oklahoma Business Corporation Act. 18 OKLA. STAT. ANN. tit. 2, § 1.2. This author was the draftsman of both the Oklahoma Act and the annotations therein.

terms are defined as one and the same thing. In both instances the instrument defined makes up the charter. Prior to the time that corporate existence begins,³⁴ it is defined as "articles of incorporation," but thereafter it is known as a "certificate of incorporation." In other words, the *certificate of incorporation* is the *articles of incorporation with the approval of the secretary of state stamped thereon*. This will cause much confusion. How will the incorporators know what heading to use on the document? Should they label it "Articles of Incorporation," or "Certificate of Incorporation"? It could be argued that the former title should be used, as Section 608.03 states that the incorporators shall file the articles in the office of the secretary of state for approval. It further sets out how the instrument is to be executed and what it is to contain; and refers to it as the *articles of incorporation*. But such a title would be a misnomer after the instrument had shifted to the category of a *certificate* of incorporation. Possibly the secretary of state could scratch out the word "Articles" and write in the word "Certificate." That would not quite solve the problem, as Section 608.04 states that the original copy of the articles is to be filed in the records of the office of the secretary of state. Nowhere in the act is the instrument referred to as "Articles of Incorporation" after such filing.

At this point the words, "file" and "filing" inject ambiguity and confusion into the matter. As a general rule, when *filing the articles* is referred to in statutes, it means the placing of the articles in the official file (usually by the secretary of state) where they are to be kept as public records. However, in Chapter 608 the word "file" or "filing" seems to take on three different connotations in relation to the articles (or certificate of incorporation). Certainly the *certificate of incorporation* would be filed of record. Then, as before mentioned, the original articles are filed of record, while Section 608.03 (1) refers to a filing of the articles in the office of the secretary of state by the incorporators. This filing by the incorporators seems to come prior to the approval by the secretary of state. If there are to be three filings, would there be three different filing fees charged? It is believed that this rigmarol about *filing* could have been stated in a less ambiguous manner.

Section 612.63 was amended by H.B. 88,³⁵ but was not repealed by H.B. 1125, C. 28170 (i.e. Chapter 608). The second paragraph of Section 612.63, as amended, reads:

The terms *certificate of incorporation* as used in this chapter unless the context shall otherwise require, shall include all certificates filed pursuant to sections 612.03, 612.05, 612.06, 612.09, and 612.22, respectively, and any agreement of merger or consolida-

34. Corporate existence begins "when the articles of incorporation have been filed in the office of the secretary of state and approved by him and all filing fees and taxes have been paid." FLA. STAT. § 608.04 (1953).

35. Fla. Laws 1953, c. 28077.

tion filed pursuant to sections 612.36, 612.37 or 612.38 and any certificate of dissolution filed pursuant to section 612.46 of this chapter and any certificate of re-incorporation filed pursuant to section 612.64 of this chapter.

The rule of *res ipsa loquitur* applies to this. As heretofore mentioned, all of these sections in Chapter 612 referred to, except Sections 612.05 and 612.09, were repealed. These two sections, and Section 612.63, as amended by H.B. 88, were retained. The interpretations of this tangle will be left to the reader—or possibly to the courts.

The provisions in both Sections 608.02 and 608.06(2), and in Section 612.63 (as amended) are too broad in providing that any agreement or documents permitted to be filed in the office of the secretary of state become a part of the certificate of incorporation. Especially is that true, when *filed* connotes the meaning which it does in Section 608.03(1), namely, when the instruments are presented to the secretary of state. A corporation is privileged to *file* in that sense, any sort of document with the secretary of state. The only requirement in the act is that it must concern the corporation. Suppose it is an agreement among the shareholders that members of the board of directors are to be shot at sunrise. Once it were filed with the secretary of state, it would become a part of the certificate of incorporation. Of course, the secretary of state would refuse to file it of record. But it would be *filed* with the secretary of state by the corporate officers presenting it, as the term is used in Section 608.03, and once thus presented it could not be said that it was not filed.

The articles or certificate of incorporation becomes the charter of a corporation. The Supreme Court of the United States, in the *Dartmouth College Case*,³⁶ held that a corporate charter was a contract between the state and the corporation. Thus, the charter only includes those provisions which make up that contract. Section 608.18 sets out definite mandatory procedures to be followed in amending the charter (certificate of incorporation).³⁷ Sections 608.02, 608.14 (3), and 612.63 make it permissive for the corporation to file all sorts of instruments. And, as above mentioned, when *filed* is given the meaning which is conferred upon it in the act, a corporation could file any document it chose. Then, taking the provisions as found in Sections 608.02, 608.14(3), and 612.63, we find that the certificate of incorporation is amended every time any instruments relating to the corporation are filed with the secretary of state.

It is suggested that in defining terms it would have been well if this act had defined "filing," and, once the term had been defined, to have uniformly used it to depict the concept set out in its definition. That is one of the important skills in efficient drafting of statutes. The draftsman must first have very definite concepts and then he must manifest an

36. *Dartmouth College v. Woodward*, 4 Wheat. 518 (U.S. 1819).

37. FLA. STAT. § 608.18 (1953).

ability to employ proper words, phrases, clauses, and sentences which clearly convey the scope and limitations of such concepts. Then, these well-delimited concepts, by means of appropriate nomenclature and phraseology, must be uniformly applied throughout the draft. No other element will more glaringly reveal a touch of amateurishness, or unwarrantably cause more extensive litigation, than the loose, inconsistent use of words and phrases in drafting legislation.

The multitude of ambiguous, inappropriate, indefinite, vague, inconsistently-employed verbiage scattered throughout this new corporation act (H.B. 1125) reveals the puerile accomplishment of unskilled novices. The defects become glaringly evident when a comparison is made between such an abortive effort and the contents of the dozen or more modern business corporation codes of other states. It means the contrasting of the work of tyros with the product of professional giants. Each of the respective modern business corporation acts evidence the wisdom, training, and years of dint and toil employed in formulating it. In each instance, the master hands and minds of the draftsmen are divulged in their delectable product—Marshall and Davies in the Ohio Act, Ballantine and Sterling in the California Act, Millard B. Kennedy in the Illinois Act, Judge Solether in the Minnesota Act, etc., etc. These men in their respective committees were phalanxed with the most highly-skilled technicians available in the field of corporation law.

Attention will now be called to the following words and phrases in the new act (Chapter 608). "Approval,"³⁸ in the last line of Section 608.02; "purpose,"³⁹ in the second line of Section 608.03(1); "persons,"⁴⁰ in the same sentence; "natural person,"⁴¹ in Section 608.03(2) (a); "kind,"⁴² and "all shares,"⁴³ in Section 608.03(2)(c); "capital,"⁴⁴ in Section

38. Approval by the incorporators, or by the secretary of state?

39. Does this mean that a corporation can have only one purpose? If so, the provision conflicts with other provisions in the Act. Why was the singular form used?

40. Must such "person" be of any special age, or possess any special competence? Could such "person" be another corporation?

41. Does this mean a "physical" person? If so, he could be freeman or slave, adult or infant, a live person or a dead one. Or, does it mean a "psychological" person? If so, it could be a slave, infant, or even a corporation, excluding the dead person. Possibly, it means a "legal" or "juristic" person. If so, it could mean any competent individual person or a corporation. Also, the word *competent* is a variable when referring to a person. *Competent* for what—to inherit property (if so, he may be unborn), or to become president of the United States (if so, he must have reached the age of 35)? A corporation is as much a "natural person," in a legal sense, as is an individual person. A slave is a *natural person*, but is not a *legal person* until emancipated. All *legal persons* are created by operation of law, and so, whether speaking of an individual or of a corporation. Such legal personality is as *natural* when possessed by a corporation as when the possessor is an emancipated slave. Why didn't the draftsman say, "an individual person competent to contract"?

42. This new term in stock nomenclature is discussed further on in the body of this article.

43. Must *all* the characteristics and attributes of all par shares be listed in the articles?

44. Does *capital* here mean capital as defined in § 608.17?

608.03(2)(d); "principal office,"⁴⁵ in Section 608.03(2)(f); "subscribers,"⁴⁶ in Section 608.03(4); "subscriber,"⁴⁷ in Section 608.04; "composite certificate of incorporation,"⁴⁸ in Section 608.06; "he deems proper,"⁴⁹ at the end of Section 608.06; "and the laws of the United States and of this state,"⁵⁰ at the end of Section 608.07; "full age,"⁵¹ in Section 608.09(1); "chosen,"⁵² near the end of Section 608.12; "guarantee,"⁵³ in Section 608.13 (9); "man,"⁵⁴ in Section 608.13(12); "special stock,"⁵⁵ in Section 608.14(2); "fully paid and non-assessable,"⁵⁶ at the end of Section 608.15; "amount of capital,"⁵⁷ in Section 608.17; "having capital stock,"⁵⁸ in the first line of Section 608.18;

45. Does that mean the *registered* office?

46. Does that mean *subscribers to shares* or *subscribers* of the articles? If the latter, why not use "incorporators"? That term is employed in line 1, § 608.03(2)(i).

47. What does this word, singular in form, mean? Such "subscriber thereof, their successors and assigns shall constitute a corporation." The statement, taken as a whole, is nonsense. A person, or persons, don't become the corporation. In a legal sense, the corporation is a separate entity.

48. What is a *composite* certificate of incorporation? Elsewhere, throughout the act, the phrase, *certificate of incorporation*, is used by itself.

49. There should be a statutory schedule of charges. Such fees should not be left to the whims and caprice of any administrative officer.

50. This would always be implied, so, at least, it would be redundant.

51. Full age for what purpose? See note 41 *supra*.

52. "Chosen" by whom?

53. The provisions do not state that the guaranty business need be incidental to the corporate purposes.

54. Suppose the shareholder is a *woman*, or another *corporation*, then what?

55. What shares would come under such a classification? "Special" stock is not defined or referred to in other parts of the act.

56. Does this provision, as set out in the act, mean that a Florida corporation may not have assessable shares? This provision was carried over from former § 612.10. Several attorneys have expressed to this author the view that this barred the issuing of assessable shares by Florida corporations. However, in the case of *Milton v. Bergstrom*, 71 Fla. 197, 70 So. 1008 (1916), the shareholders of the Florida Trust Co. voted a resolution providing for a 25% assessment on their shares, which were all fully paid. The Supreme Court held that the resolution was valid as a contract where there was ample consideration, and could be enforced by a trustee of the Trust Co. If a resolution by all the shareholders of a corporation is a contract and the promise for a promise is good consideration, it would seem that a provision in the articles authorizing assessability of the shares would be equally as effective. The charter is often referred to as a contract among the corporate officers and shareholders. A well-drafted statute would state whether or not shares may be made assessable.

Such uncertainty in corporation statutes is very harmful. Since the meaning of the provision is doubtful, most corporations, although they might desire to strengthen the credit of the corporation by making the shares assessable, would refrain from attempting it. Any who might attempt it, could be faced with a lot of expensive litigation if the matter were contested. Then, also, if assessability were to be allowed, there would be no provisions establishing a guide as to procedures and limitations. Stupid people are inclined to insist on corporation codes being "very brief." The better corporation codes, such as those in California and Oklahoma, add flexibility to corporate management by allowing assessability of shares, and, at the same time, provide adequate formulas for definite procedures and adequate safeguards against abuses where shares are made assessable.

57. The inane definition of "Amount of Capital," set out in § 608.17, is commented upon in several instances in the body of this article. It was taken largely from former § 612.21. All modern business corporation acts have substituted "stated capital" and "capital surplus" or "paid in surplus" for such primitive concepts as stated in § 608.17.

58. Is it to be implied from this that corporations without capital stock may be organized under c. 608?

"otherwise provided,"⁵⁹ in the first line of Section 608.18(7); "in writing,"⁶⁰ in Section 608.22(2); "circuit court,"⁶¹ in Section 608.29(1); "estate and effects,"⁶² in Section 608.29(1); "sworn report,"⁶³ "home office,"⁶⁴ "main line of business,"⁶⁵ "number of shares,"⁶⁶ "capital stock allocated,"⁶⁷ and "banking and trust companies,"⁶⁸ all in Section 608.32; "maintain an office with a resident agent thereat,"⁶⁹ in Section 608.38; "duties as may be prescribed by the certificate of incorporation or determined by the board of directors,"⁷⁰ in Section 608.40; "kind, class or series,"⁷¹ in Section 608.42(2); "voting trusts,"⁷² in Section 608.43; "married women,"⁷³ in Section 608.46; and "intent of the parties,"⁷⁴ in Section 608.48 are glaring examples.

This list is not all-inclusive. It includes only a few of the more obvious examples which stick out like a wart on a man's nose.

Section 608.03, like most of the sections in Chapter 608, as a whole

59. "Otherwise provided" where? In the by-laws, the articles, the Constitution of the United States, the Treaty of Paris, or the Koran?

60. Suppose the shareholder registers a negative vote on a written ballot cast at the shareholders' meeting. Would that satisfy the requirement?

61. Could this be any circuit court, say the one in Leon County, the one in the county where the registered office is located, or the one where a branch office is located?

62. This phrase is an oddity in the nomenclature of corporation law and accounting. A modern dictionary or thesaurus lists the noun "effects" as having some 60 different meanings, while "estate" is a variable with nearly half that many connotations. Is it possible that the person who drafted the provision had never heard of the term "assets"?

63. Doubtless means in the form of an affidavit, and not expressed in profane language.

64. Suppose this were a Miami firm that had gone to Delaware to incorporate. Which would be its "home office," the office of its resident agent in Dover or Wilmington where only its duplicate stock ledger is kept, or its registered office in Miami?

65. Suppose it lists several principal purposes in its articles and carries on many lines of business.

66. *Authorized shares, outstanding shares, fully paid shares, or what?*

67. What does this mean? Capital stock is carried on the corporate books as a liability. Certainly, it does not mean the stock certificates. If it refers to corporate assets in this state, when would such be *allocated*? Would it be when resolved by the board? When the funds are set aside for that purpose by the treasurer? Or, only when the corporate assets are located in Florida?

68. Are not banking and trust companies governed by the Banking Code?

69. Must the corporation have one "registered office" with a registered agent thereat? Or does § 608.38 mean that it may have another small office off in some out-of-the-way place and locate the registered agent there?

70. Does this mean that the terms of office and duties of the corporate officers and agents could not be fixed in by-laws adopted by the shareholders?

71. Would a holder of shares in a series have a preemptive right as to new shares of the same class, or of the same "kind," when not of the same series?

72. This phrase is critically analyzed further over in the body of the article.

73. All of § 608.48 serves no purpose, and can only lead to confusion. Under the Florida law, marriage does not destroy a woman's competency to contract if she would be competent if single. Under this section, all married women become *sui juris* and competent to contract in all matters concerning corporations. If married, she can be an incorporator, director, president, shareholder, etc., although she may be a 12-year-old bride, an alien, or a lunatic.

74. This short section is very ambiguous, especially as to what intent the parties must have.

is poorly drafted. In setting out the provisions which must be stated in the articles, paragraph (2)(h) of Section 608.03, provides:

The names and post office addresses of the members of the first board of directors, the president, the secretary and the treasurer, who, unless otherwise provided by the articles of incorporation or by the by-laws, shall hold office for the first year of existence of the corporation or until their successors are elected or appointed and have qualified.

Some corporation statutes provide that the initial board of directors shall be named in the articles and shall control the corporate affairs from the beginning of corporate existence until the shareholders' organization meeting is held and a board is elected by a vote of the shareholders, while others state that the *incorporators* have charge until a board is elected at the shareholders' meeting. Some of the latter statutes limit the functions of the incorporators during this interim to conducting necessary affairs, including the calling and conducting of the shareholder's organization meeting. The latter procedure is more democratic and much more desirable. A corporation is run for the benefit of the shareholders, and, therefore, they should control in establishing the policies and internal set-up of the organization. It would follow that justice would require that they be allowed to act in this regard as early as possible.

It is extremely illogical to name the officers in the articles, as is provided in Section 608.03(2)(h). At the time the articles are drawn up, there is no corporation. Moreover, there is no grave need for officers, normally appointed by a board of directors, before the internal organization is effected. No reference to such a thing as a shareholders' organization meeting is mentioned in Chapter 608. Moreover, no provisions fixing the time of, or requirements for, pre-incorporation subscribers becoming shareholders are present. The act is likewise as deficient in matters for which it does not provide as it is in what it provides.

The provision, that the three officers, president, secretary, and treasurer, shall hold office for one year, or until their successors are elected or appointed and have qualified, unless otherwise provided in the articles or by-laws, is absurd. The drafters of this provision seemed to have no knowledge of the sequence of procedural steps normally taken in the creation and internal organization of a corporation.

Such sequence normally follows a procedure in the following order: (1.) The promoters perform the pre-incorporation functions of planning the organization, securing pre-incorporation subscriptions, and executing any other promotional activities; (2.) The promoters often become the incorporators, at least an agreement is reached between them and the principal pre-incorporation subscribers as to who are to be the incorporators; (3.) Then the promoters and/or the persons selected to serve as incorporators prepare the articles, which are duly executed and delivered

to the secretary of state by the incorporators; (4.) The incorporators, after the articles are approved by the secretary of state, then have control of the affairs of the new corporation, and are to continue the preliminary procedures, including the acceptance of any further subscriptions, receiving any consideration from the shareholders or subscribers, and the calling of the shareholders' organization meeting; (5.) The incorporators then conduct the shareholders' meeting up to the time the by-laws have been adopted and the board of directors have, under the terms of the by-laws, been elected; (6.) The newly-elected board members, during a brief recess of the shareholders' meeting, assemble and organize the board, electing the officers; (7.) The board then adjourns and the new president, as chairman, re-convenes the shareholders' meeting, and any unfinished business is consummated. Although this is the usual order of procedure, provisions in the statutes, charter, or choice of the parties may modify it.

It would be nonsense to have the affairs of the corporation, during the first year of its existence, managed by a board appointed by the promoters and/or incorporators without regard to the desires or interests of the shareholders in general. For over a quarter of a century this author has been teaching the most thorough and comprehensive course in corporate procedure offered in any law school, and is the author of two books on the subject. Thus, he feels competent to offer criticism of the sloppy, inconsistent procedures set out in Chapter 608.

Section 608.03(2)(i) requires that the articles must provide that incorporators agree "to take" the total "amount of capital with which the corporation will begin business." The provision implies that the person drafting it did not have the vaguest concept of the meaning of the word, "capital." Certainly he never mastered an elementary course in either accounting or corporation law.

Corporation statutes almost uniformly require that a certain minimum of shares must be subscribed and the consideration therefor be paid in before the corporation shall begin business and/or create any indebtedness other than indebtedness for organizational expenses.⁷⁵ Such provisions are substantive and should be provided for in the substantive portion of a corporation code. The new act does not contain either any substantive provisions suggesting that before beginning business a corporation must have an amount of capital paid in or that there need be any allegation in the articles that any amount must be paid in before it begins business. This changed the former law of Florida. The former statutes had no mandatory substantive provisions containing such minimum paid-in amount, but the procedural provisions required the filing of an allegation that such had been done or would be done before the corporation could commence business.

75. See annotations under 18 OKLA. STAT. ANN. § 1.15.

Section 608.03(2)(d) provides that the articles shall contain a statement that "the amount of *capital* with which the corporation will begin business which shall not be less than five hundred dollars." That could only mean that a corporation could not begin business unless the par value of outstanding par shares, plus the consideration received for non par shares outstanding (whether fully paid or not) aggregated at least five hundred dollars. It does not mention that any amount must be paid in. It uses the word "capital" and that, as described in Section 608.17, means the aggregate amount as set out above. The nonsensical provision in paragraph (i) of Section 608.03(2), referred to above, does not require that the articles state that the incorporators have or shall pay in *any* amount before the corporation shall commence business. It does not even require that they even subscribe for shares of a value of that amount or of any amount. Section 608.03(2)(i) states that it must be alleged in the articles that the subscriber of the articles *agrees to take* the aggregate of shares "which shall not be less than the amount of capital with which the corporation will begin business." Agrees with whom? Must they allege that there is a binding contract to take certain shares? Even if there were such a binding contract, it would be an executory contract to subscribe for such shares in the future.

Moreover, the provision, as worded, is ridiculous. Very often people organizing a corporation know that all or a large amount of the authorized shares must be subscribed for and the consideration therefor paid in before the business is launched if the enterprise is to be assured of success. It doubtless would be impossible to interest such persons in the enterprise unless they were assured that the necessary funds to successfully launch the company would be available before business was begun. Their best means of assurance would be to demand that the articles provide that the amount be all paid in prior to commencing business. If we assume that the authorized capital of the company were \$1,000,000, and the demanded allegation in the charter be that all the authorized capital be paid in before the company could begin business, what would we have? We would have a situation where it would have to be alleged in the articles that the "subscriber of the articles of incorporation" [whoever he is meant to be in Section 608(2)(i)] agrees to take the entire \$1,000,000 of shares.

In a single article it would be impossible to thoroughly analyze and discuss the multitude of foibles appearing in House Bill 1125. Thus, from here on it will be necessary to limit the discussion to a summary form, and, even then, space will not permit a mention of many of the peccabilities lurking in almost every sentence throughout Chapter 608. The most wary corporation attorney will not be able to decipher many of these enigmas when he detects them; a solution can only come, in each

instance, through court interpretation, which means much delay and much expense.

Section 608.07 provides that the board may adopt by-laws unless the articles provide otherwise. Since the board's function is to conduct the affairs of the corporation and the by-laws are to serve as a guide in fixing policies of the corporation, including the scope of the authority to be exercised by the board, the board should have authority to tamper with the by-laws only when such authority is specifically delegated to it by the shareholders. Such blanket authority should not be crystalized in the charter, but should be left to the shareholders to determine from time to time to meet current circumstances. Of course, this might all be set out in the articles. However, the articles should be kept as short as possible, and furthermore, the matter might be overlooked in drafting the articles. After all, a corporation is run for the benefit of the shareholders, so why give a self-serving group—which the board often turns out to be—the right to fix the rules regulating its authority and conduct?

Section 608.07, however, does provide that the board's power in adopting or amending the by-laws is limited to such changes as are "not inconsistent with any by-laws that may have been adopted by the stockholders." This provision is ambiguous in two ways. First, it does not extend the power of the board to amend or adopt all by-laws that are not inconsistent with those which *actually had been* adopted by the shareholders. The shareholders have authority to adopt, and *may have* adopted, in so far as is lawful, any or every by-law imaginable. Then, the directors would not have the power or authority to adopt or amend any by-law, as there would be none other than those which the shareholders could (*may*) have adopted. Second, it does not indicate whether or not the shareholders would have the authority to amend or repeal a by-law previously adopted by the board. When the board has authority to meet and adopt a self-serving by-law and then proceed to exercise authority thereby granted to it without any approval by the shareholders, an opportunity to commit abuse is presented. Much harm could result before the next shareholders' meeting from acts which were entirely contrary to the desire of the shareholders in general. It would especially be vicious if the shareholders could not, when they did meet, change or repeal the by-law adopted by the board. The act doesn't say that they can.

Then to add more to this "comedy of inconsistencies," Section 608.57 provides that in the event the directors hold over beyond the first year without adopting by-laws "to enable the stockholders to hold the annual election of directors," any corporate acts performed by them during the hold-over "shall be fraudulent and void." In what sort of a situation would that leave the corporation, as well as innocent parties who may have dealt with the corporation during that time? Moreover,

if the directors are authorized to adopt by-laws, does that mean that there could be no shareholders' meeting until the directors authorized such a meeting by so providing in a by-law adopted by the board? That is super-nonsense. The well-established principle that there should be a shareholders' organization meeting as soon after incorporation as reasonably possible should not be abrogated. At that meeting the shareholders have the opportunity to complete the internal set-up of the corporation, including the adopting of by-laws (or delegating the power to adopt them to the board), electing directors, approving (or disapproving) promoters' contracts, etc., etc. The shareholders should have control over the fixing of the date of the annual shareholders' meeting. That is a matter that concerns the shareholders directly and should not be transferred to the board. Moreover, the shareholders should have the right to call a general shareholders' meeting at any time by giving proper notice, etc. Apparently, under the new act directors can *only* be elected at an annual shareholders' meeting, since Section 608.08 states that the directors of every corporation shall be chosen at the annual meeting of the shareholders.

More nonsense is contained in Sections 608.11 and 608.12. The provisions in the former section are more than nonsense; they are dangerously bad. Such provisions are not found in the statutes of any other jurisdiction and have no place in any corporation statutes. These provisions were carried over from the repealed section, Section 611.20. Section 608.11 reads:

Unless otherwise provided in the certificate of incorporation, or in the by-laws, when stockholders who hold four-fifths of the voting stock having the right and entitled to vote at any meeting shall be present at such meeting, however called or notified, and shall sign a written consent thereto on record of the meeting, the acts of such meeting shall be as valid as if legally called and notified.

These provisions, as they appear in the new act, are in one way less mischievous than those in Section 611.20, while in other ways they are more culpable. The stipulation that says that their effect may be negated by providing otherwise in the articles or by-laws is in favor of the new section, but, on the other hand, the old section only applied to the limited types of corporations organized under Chapter 611. Since 1925 most corporations have been formed under Chapter 612, and that chapter contained no such provisions. The new act applies to all types of corporations which were formerly controlled by Sections 610, 611, and 612. Moreover, the new act requires the attendance and consent of the holders of four-fifths of only the voting stock, while the former provisions appeared to require the presence and consent of the holders of four-fifths of all the shares. It is a well-established principle of law that there cannot be a valid meeting without a valid call and notice of such meeting.

Even under the new provisions the incorporators might deliberately

refrain from negating the evil effects possible under such provisions by failing to "otherwise provide" in the articles. They might then name themselves as the first board of directors (as is possible under Chapter 608), and then refuse to "otherwise provide" in the by-laws. This would give them the power to disfranchise the holders of an entire class of stock which did not exceed twenty per cent of the voting shares. Under normal statutes where cumulative voting is provided, that percentage of shares could elect one member of a five-member board. In a situation, which is permitted under this act, they could be denied the right to even be present so as to know what was going on. Moreover, by oversight the incorporators, the board, or shareholders might omit any "otherwise" provisions. Then, the section is also ambiguous as to how the holders of proxies are to be treated and what is to be the effect of waivers of notice of meeting. Could proxies be counted in making up the four-fifths? That is, would the shareholder be "present" when represented by proxy? Also, would a waiver be considered the same as having notice and being present? Usually that is the effect of the waiver of notice. The shareholders signing a waiver could at the same time sign a record of their consent.

The provisions in Section 608.12 are equally undesirable. They do not state whether the holders of thirty per cent of the shares required for petitioning a county judge to force the calling of a shareholders' meeting are to be the holders of thirty per cent of all of the outstanding shares or just thirty per cent of the voting stock; whether the county judge must be of the county where the registered office is located or whether he might be any other county judge in or out of the state, that is, a county judge in a far corner of Florida or a county judge in Maine, Oregon, or Hawaii; nor does the wording indicate by whom the presiding officer is to be "chosen." Ten per cent of the shareholders should be enough to validly call a shareholders' meeting. Thirty per cent is too much. Such a percentage would make it impossible to thus call a meeting when there are a large number of shareholders who are widely scattered.

Now we come to the questions as to whether or not cumulative voting now may be had in Florida? If so, must it be provided in the articles? Or would a shareholder have the right to vote his shares cumulatively unless forbidden in the articles? Such voting is important, and in most states and territories, there may be cumulative voting if so provided in the articles. Many states grant the right unless denied in the articles, and twenty states deem that public policy requires that voting be cumulative, and therefore require it by law. Some, like Illinois, have a constitutional provision requiring it.

Section 608.03(2)(g), provides that the articles must set out "the number of directors, which shall not be less than three," and Section

608.09(1) provides that "the business of every corporation shall be managed and its corporate powers exercised by a board of not less than three directors." Then in Section 608.09(2) it is provided that the board may designate two or more of its members as an executive committee which "shall have and may exercise the powers of the board of directors." If that be true, the corporation would not be managed by a board of three. It is a well-settled principle of corporation law that an executive committee does not exercise the powers of the board. The executive committee is made up of members who are agents of and accountable to the board the same as the members of any other committee, or other agents. Moreover, unless it is so provided in the articles, the board should not be permitted to appoint an executive committee except by a unanimous vote of the board. Board members are elected to manage the corporation and Section 608.09 so requires. The board should not be allowed to circumvent that principle by delegating its authority to a minority group. Suppose there are five or more members, say, nine members, on the board; then if five members were present there would be a quorum. Now, suppose a majority of those five present voted to appoint two of themselves as an executive committee. That would disqualify the other seven members. At least six of them may have not wanted an executive committee. The two that were there at the meeting may have voted against it and the other four may not have favored it, while by some necessity they were unable to attend the meeting. Thus, the control of the corporation would be in the hands of two directors and the seven other members might be held responsible for malfeasance in the corporate management while being unable to prevent it. Moreover, the act provides no method whereby the directors may dissolve the executive committee, once it is appointed.

The provisions as to publication notices upon calling meeting and closing of the corporate books are more or less valueless. Especially is that true where it is not required as in Section 608.10, that the newspaper carrying the notice have any circulation in the city or county where the corporation's registered office is located.

Section 608.10(3) provides that unless otherwise provided in the articles, each shareholder shall have one vote for each share recorded in his name on the books of the company. Under Section 608.43, providing for so-called "voting trusts," the title to shares placed in such a so-called voting trust remains in the owner and he is listed as owner on the records of the company. From those combined provisions it must be implied that the *owner* would have the right to vote the shares in spite of the voting trust. The so-called voting-trust arrangement in Section 608.43, is not a *voting trust*; it is in the nature of a *voting pool*. How could there be a trustee when he did not have the legal title? A trust implies the separation of the legal title from the equitable ownership.

Subsection (5) of Section 608.10 is likewise ambiguous and inconsistent in its provisions relating to voting by proxy. Thereunder, may a voting trustee execute a valid proxy? No time limit is placed on proxies. This is out of line with statutes in other states. When no time limit is fixed in a proxy, it should be limited to voting in one annual shareholders' meeting. Statutes in some states have accomplished this by limiting the life of the proxy to eleven months when no time is specified in the proxy. Also, no provision is made as to how shares are to be voted if there is a joint proxy and the proxy holders are evenly split on how the shares are to be voted. Statutes should provide that, where there is a deadlock, each faction could vote his fraction of the shares. That is, if the deadlock were between two, each would vote one-half of the shares, and if deadlocked three ways, each would vote a third.

Section 608.13, dealing with *corporate powers*, is a monstrosity in more than a dozen ways. First, it covers the same general scope as Section 610.03, which was not repealed. In fact, much of it was copied from 610.03. Second, it provides that the corporate powers (which are listed in Section 610.03 as "inherent corporate powers") may be altered or limited in the by-laws. Corporate powers are granted by the state and cannot be altered *ex parte*. They are a part of a contract with the state, and can only be limited by provisions in the articles. The by-laws are not filed with the state nor are they a part of the contract between the corporation and the state, while the articles are. Such a provision indicates that the party drafting the provision had no concept of the functions of the by-laws. The by-laws serve to regulate the internal affairs of the corporation. A knowledge of their contents are imputed to the shareholders but not to the state. The draftsman of the provision did not know the difference between powers granted by the state and authority extended to the officers, etc., by the corporation. Section 610.03 merely stated, "Unless otherwise provided," certain corporate powers were to be had. This was somewhat ambiguous, that is, would be to the layman, but anyone with a slight knowledge of corporation law would know that it meant, "Unless otherwise provided in the certificate of incorporation."

Third, the way Section 608.13(2) reads, it would be implied that a corporation could appear in court, through its agents (although they be laymen), and prosecute and defend suits involving the corporation the same as a "natural person." Imagine courts permitting that! Fourth, the word "natural," when referring to a physical persons is fallacious. A physical person is no more a natural legal person than is a corporation. A slave is a *natural* person and only becomes a *legal person* when he is emancipated. His legal personality originates from the *operation of law*. The same is true of a corporation; the law simply attaches a legal personality to a group. When we speak of a "separate legal personality," it means that the group, like an individual, may, through its agents, commit acts which

will have legal consequences, without attaching liability to individuals in the group.

Fifth, in the first subsections of the section, powers which are inherent in all corporations are listed. That is, all corporations have those powers irrespective of the provisions in the articles setting out its purpose or purposes. The balance of the powers are incidental powers—incidental to the carrying out the object or objects for which the corporation is organized; the section should so state.

Sixth, subsection (6) implies that the number of directors may be increased or decreased by stipulations in the by-laws. The number of directors are fixed in the articles and cannot be changed except by an amendment of the articles. It's nonsense to suggest the number of directors can be altered by a change in the by-laws.

Seventh, subsection (8)(a) states that corporations may deal in corporate franchises in this state and other jurisdictions. Could a peanut vending corporation buy the franchise of the Seaboard Railway, of the WTVJ television station, of a Florida state bank, of the City of Miami, or of Attorney X or Doctor Y? It is absurd to say that a corporation can traffic in franchises granted to individuals or corporations. A franchise is a grant by the sovereign to a group, association, or other unit. It is a contract between the sovereign and such grantee. Does this provision mean that the State of Florida is surrendering up all control over such franchises and throwing them on the market to be bought and sold by corporations the same as cans of beans or sacks of meal? Paragraph (b) states that the purchase of the assets of a firm also passes the franchise to engage in that business, and paragraph (c) further provides that corporations can traffic in licenses. The same objections apply to the latter as to bartering in franchises. Could the board of directors of a corporation organized to print and distribute bible tracts purchase and operate a whiskey distillery?

Eighth, subsection (9)(a) states that a corporation may guarantee all kinds of securities of other corporations. All of these should be limited to those that come under powers incidental to carrying out the purpose or purposes stated in the articles. Suppose a corporation chartered to manufacture lollipops were to engage in the guaranty business. Would that be incidental to producing lollipops? Certainly not. Moreover, such guaranty operations would clash with the provisions in the laws relating to banking, insurance, and guaranty companies. The reasons why courts have uniformly denied to corporations the power to enter into general partnerships is that it would be hazarding the investments of the shareholders to the risk resulting from the company's becoming a surety.

Ninth, subsection (9)(b) authorizes a corporation to purchase its own shares, but such purchase must be paid from surplus. Suppose

the shares are redeemable shares and the company cancels them. Would the surplus be that over the liabilities and outstanding capital before the shares are retired or the liabilities plus the outstanding capital liability after they are retired? Here again the act uses the single word, "capital," which is described in Section 608.17. "Capital" as defined there, as heretofore stated, means the aggregate of the par value of outstanding par shares, whether paid for or not, plus the aggregate of consideration actually received for outstanding non par shares, whether they are fully paid or not.

Tenth, subsection (11)(a), coupled with the repeal of Section 612.62, has created uncertainty which is already in the Florida courts for solution. Paragraph (a), in part, provides that a corporation shall have power to "contract debts and borrow money at such rates of interest and upon such terms as it, or its board of directors, may deem necessary or expedient." This provision was taken from Section 610.04, which in turn, except for slight changes in wording, dates back to the Laws of 1903, Chapter 5219. In 1925, Section 612.62, which provides that corporations could not plead usury as a defense, was adopted. In 1935, the case of *Matlack Properties, Inc. v. Citizens' & Southern National Bank*⁷⁶ came before the Florida Supreme Court. The question presented was whether a corporation organized prior to the adoption of the 1925 act could plead usury as a defense. The court held, that since Section 5970, Comp. Gen. Laws, 1927, empowered corporations "to borrow such sums of money at such rates of interest, and upon such terms as the company or its board of directors shall authorize or agree upon and may deem necessary and proper," the corporation had the legal right to borrow money at any interest rate that it deemed proper, and therefore usury could not be pleaded. The court could have reached the same result by holding that Section 612.62 was general in scope and procedural in nature, and, therefore, it barred the defense of usury.

House Bill 1125 repealed Section 612.62, and re-enacted the provision giving power to corporations to borrow money and fix the interest rates, from the earlier statutes as set out above. Now the question has to be carried to the supreme court to determine whether a corporation organized under Chapter 612 can plead usury as a defense in a cause of action which arose since H.B. 1125 became effective on October 1.

In a Dade County case a corporation on October 1 executed and delivered notes providing for a rate of interest which was usurious under the general usury statutes of Florida. The notes were demand instruments and the payee demanded payment on them and then brought suit. The defendant corporation set up the plea of usury. The circuit court ruled against the defendant corporation, and its attorney has advised this author that the case is being appealed to the supreme court. If the provision

76. 120 Fla. 77, 162 So. 148 (1935).

in 612.62 were substantive, the defendant does not have a chance to win. But if it were procedural, the corporation may win,—unless the Supreme Court holds that the *powers* provision in Section 608 (11)(a) excludes corporations from coming under the general usury statute. Why was this matter “left up in the air” when one short sentence, stating whether or not a corporation might plead usury as a defense, inserted in Chapter 608, would have settled it?^{76a}

It is believed that the general content of Section 608.14 establishes an all-time high in ridiculous inconsistencies. After providing that a corporation may issue only such shares as are authorized in the certificate of incorporation, it further stipulates that such authorized shares may be par common with the value fixed in the certificate of incorporation, non par common, and preferred, each of which “may consist of two or more kinds, which may be divided into classes and classes into series, and each kind, class and series may have such distinguishing characteristics, including designations, preferences or restrictions as regards dividends, redemption, voting powers or restrictions or qualifications of voting powers as shall be stated in the certificate of incorporation.”

Does this mean that corporations can have par and non par common stock but not so with preferred? Also, what is meant by “kinds” of shares? It might be said that par and non par, or common and preferred, might be “kinds” of stock. But here each of these may be divided into “kinds.” “Classes” is a common designation of shares, but this author does not recall any statutory provision stating that par or non-par, or common or preferred, shares may be divided into *kinds*, followed by subdivisions into classes and series.

If all of the attributes of the shares are set out in the articles, as provided in subsection (1), there would be no attributes to be fixed by the board or shareholders as to any series. The author of the provisions in this subsection apparently had no concept of the connotation of series of shares. If all the attributes of shares are set out in the articles, it would be impossible to divide the shares into *series*, as the term is used in modern business corporation acts. In series attributes (although

76a. The Supreme Court reversed the decision of the circuit court in the case referred to. *Sodi, Inc. v. Salitan*, 68 So.2d 882 (decided Dec. 8, 1953, and reported in the Southern Reporter advance sheet of Jan. 28, 1954, while the manuscript of this article was in the hands of the publisher). The trial court had overruled the plaintiff's motion to strike the affirmative defense of usury set up by the defendant to defeat recovery on the obligation and a foreclosure of a chattel mortgage securing same. In his opinion Justice Drew failed to discover the real issue involved, and based his holding on an imaginary distinction between the provisions in § 608.13 and those in § 610.04. There was no fundamental difference between the law applied in the Matlack Properties case, see note 76 *supra*, and that in the applicable provisions in c. 608. The provision, “unless otherwise provided by its certificate of incorporation or by law,” added nothing. All corporate powers are granted by law, and any limitations in law will impliedly limit such powers, and so in the absence of any specific declaration of such rule being specifically set out in the statutes. The reasoning in the case is based upon extremely illogical grounds.

sometimes limited to those attributes which directly affect the price and marketability) are left, as to each respective series, to be fixed by the shareholders or directors—usually by the latter. The fixing of the attributes is governed largely by the market. *Series* implies that the attributes of the shares are left “open” and not fixed in the articles. Similar provisions, as those in this subsection, are also found in Sections 608.03 (2)(c) and 608.18 (6).

Then when we come to subsection (2) of Section 608.14, we find that preferred and *special*⁷⁷ stock may be issued in series. Such a provision is contrary to the provisions in subsection (1); the provisions of the two subsections can in no way be reconciled. Subsection (1) states that “characteristics, including designations, preferences or restrictions as regards dividends, redemption,” etc., must be stated in the articles, while subsection (2) gives *carte blanche* authority to *not* only the board but to an executive committee in fixing the attributes as to dividends and redemption of the respective series. How could such be done if the attributes are established in the articles? Also, it mentions that the shares “of any class may be divided by number from time to time into and issued in designated series . . . as shall be stated . . . in the certificate of incorporation.” How could this be done without amending the charter in each instance? The author who formulated the provisions in this section, indeed, had an imagination. However, it may have resulted from what he *lacked*, rather than from what he had.

The provisions of subsection (3) are equally absurd. Section 608.18 provides that *every amendment* of the certificate “shall be approved by the board of directors, proposed by them to the stockholders and approved at a stockholders’ meeting by such proportion, not less than a majority, of the stock entitled to vote thereon as may be provided in the certificate of incorporation.” Then, in subsection (3) of Section 608.14, it is provided that *the certificate of incorporation may be amended by a resolution of an executive committee, which may be made up of as few as two numbers, who need not be shareholders of the corporation or even citizens of the United States.*

Another example of ludicrousness is the provision in subsection (3), leaving it optional as to whether or not the board or executive committee is to file with the secretary of state the resolution fixing the attributes of series. Apparently, there would be no difference in the legal effect whether such filing were done or not. After reading Section 608.14, this author wonders if any of the group of assistants in the attorney general’s office who worked on the draft ever had taken a course in corporation law.

Space will not permit the setting out of the multitude of foibles contained in all of the sections from Section 608.15 to the end of the

77. See note 55 *supra*.

act. The entire act, section by section, has been fully examined, and about the same quality of draftsmanship with equivalent inanity of content prevails throughout the entire balance of Chapter 608.

III. VOID SPOTS LEFT IN NEW STATUTES

The deficiencies, void spots, and omissions remaining in the Florida corporation statutes are quite as noisome as the inane provisions constituting the portions adopted. In listing such insalubrious deficiencies, the fragmentary structure of House Bill 1125, (Chapter 608, Florida Laws 1953, Chapter 28170), a contrast will be drawn between the completeness of the new act and the comprehensiveness of the draft presented by this author to the legislature for consideration. Although this author's draft is the latest and more comprehensive than any of the modern business corporation codes now in effect in any of the states, its streamlined form, advanced legal concepts, unambiguous phraseology, safeguards against abuses, modern procedures, and thorough coverage follow the general pattern of the other dozen or more existing modern acts. It contains a very, very few innovations which have not been tested and tried by actual operations in the statutory law of other jurisdictions. Its characteristics, distinguishing it from many of the other modern business corporation codes, are its comprehensiveness and the more corefully-formulated provisions dealing with the more recent developments and modern day "tension points" in the field of corporation law. The author's draft and other modern business corporation codes will be used *as a standard*, and only matters fully covered in them will be referred to as deficiencies in the new Florida act.

The new Florida corporation act unlike the modern business corporation codes, is deficient in the following matters:⁷⁸

1. It has no short title.
2. It has no definitions section worthy of consideration.
3. It has no "savings clause."
4. It has no provisions reserving and limiting the power of the state to alter or revoke charter powers.
5. It contains no regulatory provisions relating to promoters, as to—
 - a) their functions,
 - b) their duties,
 - c) their authority,
 - d) their liability, and
 - e) the records of their transactions.

78. Space will not permit a footnote setting out the citation and discussion of each provision in the draft of the proposed Florida Business Corporation Code prepared by this author, and other modern acts, dealing with the matters which are omitted in c. 608 but included in the other codes. Most of the deficiencies are taken care of in the Oklahoma Act, and the respective provisions therein are followed, in each instance, by elaborate notes and annotations. See 18 OKLA. STAT. ANN. §§1.1 to 1.250 (1953).

6. It contains no regulatory provisions pertaining to the incorporators, as to—
 - a) their duties,
 - b) their authority, and
 - c) their liability.
7. It contains no provisions for changing the corporate name.
8. It contains no provision for reserving a corporate name.
9. It does not afford adequate protection of the corporate name.
10. It has no provision for the transfer of the corporate name.
11. It sets out no well-stated formula concerning condition precedents to beginning business or creating corporate indebtedness.
12. It does not contain adequate provisions for keeping of corporate records, and providing penalties for failing to do so.
13. It has no provision denying the right to use lack of corporate capacity as a defense.
14. It has no provisions stating that public corporate records shall not constitute constructive notice concerning limitations upon corporate powers as to third parties.
15. It does not limit the general corporate powers to acts incidental or expedient to carrying out the purposes expressed in the articles.
16. It does not extend to corporations the authority and power to make donations to public or eleemosynary causes.
17. It does not provide that corporations shall have authority and power to contribute to civic, business, and trade associations.
18. It does not deny to corporations the authority and power to make political contributions.
19. It does not authorize a corporation to reimburse its officers who successfully defend in a derivative suit.
20. It does not adequately state the powers and authority granted by the articles.
21. It does not adequately state the scope of the authority limited by the articles.
22. It contains no provision definitely denying to corporations the privilege to plead usury as a defense.
23. It does not purport to abrogate ultra vires as a defense.
24. It has no provision relating to the terms, revocability, payments and calls as to subscriptions.
25. It does not adequately provide for the enforcement of payment upon calls and assessments.
26. It has no provisions regulating and fixing the procedure in authorizing, levying, and enforcing assessments.
27. It is vague on whether shares may be made assessable.
28. It does not adequately fix and protect pre-emptive rights of shareholders.

29. It does not duly regulate the issuing of conversion rights and options.
30. It makes no provisions for employees' share-ownership plans.
31. It fails to provide for a shareholders' organization meeting.
32. It does not provide for the preparation of voting lists.
33. It is deficient in not providing for voting—
 - a) shares jointly held,
 - b) fractional shares,
 - c) shares held by fiduciary,
 - d) pledged shares,
 - e) by creditors when articles so provide, and
 - f) shares cumulatively.
34. It does not provide for inspectors of elections.
35. It does not adequately set out the duties and liabilities of directors.
36. It contains no provisions for removal of directors or other officers and agents.
37. It does not adequately provide for and regulate inspection of corporate records—
 - a) by the state,
 - b) by the directors and officers,
 - c) by the shareholders,
 - d) by others entitled to represent shares,
 - e) by trust certificate holders,
 - f) by creditors, and
 - g) by the public.
38. It does not adequately provide for levying upon shares when the share certificate cannot be attached.
39. It does not provide for labor shares.
40. It does not adequately provide for the payment of consideration for shares.
41. It does not provide for promotional or reorganizational expenses.
42. It does not provide for a true "stated capital" and "capital surplus," or for safeguards and distribution thereof.
43. It does not authorize allocation of portions of consideration or non par shares to capital surplus.
44. It does not adequately provide for liability of directors and shareholders for unlawful issue of shares.
45. It does not adequately provide for the execution and contents of share certificates.
46. It lacks in providing adequate formulas permitting flexibility in payments of dividends, while at the same time giving adequate protection to creditors and preferred shareholders.
47. It inadequately regulates redemptions of shares.
48. It does not adequately regulate the purchase of treasury shares.

49. It is woefully deficient in not setting up safeguards to protect creditors and holders of preference shares against unwarranted payments to shareholders.
50. It encourages under-capitalization without giving adequate protection to creditors and preferred shareholders.
51. It does not allow ample flexibility in conducting corporate affairs.
52. It does not provide for payment of dividends or capital distribution when wasting assets.
53. It does not adequately fix liability and provide for penalties when corporate funds are unlawfully paid out or received.
54. It does not set out definite procedures for recovery when types of malfeasance have been committed.
55. It does not purport to discourage unfounded derivative suits by requiring either—
 - a) the plaintiff to have been a shareholder when the alleged wrong was committed,
 - b) the plaintiff to either own a certain amount of shares or put up a bond for costs and damages if the suit proves to be groundless,
 - c) a verified allegation that there was no collusion, or
 - d) that such suit could not be compromised or dismissed without approval of the court.
56. It does not deny or regulate loans and other dealings between the corporation and the directors.
57. It does not abolish the troublesome de facto corporation.
58. It does not authorize the incorporators to amend the articles any time before the corporation has allotted any shares and/or commenced business.
59. It does not require a sufficiently large enough affirmative vote of the shareholders to afford adequate safeguards against abuses in authorizing an amendment of the articles.
60. It does not properly authorize shares of a class to vote as a class in authorizing an amendment of the articles.
61. It does not authorize all shares to have voting rights, any limitations on voting in the articles notwithstanding, when shareholders are voting on the authorization of an amendment of the articles which make such specified changes in the corporate set-up as to affect fundamentally all shareholders' rights.
62. It does not enumerate fundamental changes effected by amendments of the articles which affect the shares of a class adversely so as to authorize the holders of shares of such class to vote as a class in authorizing such amendment.
63. It does not require that the written notice of any meeting at which the shareholders are to vote on the authorization of an amendment

of the articles shall include a copy of the amendment, or a summary thereof, to be voted upon.

64. It does not extend to shareholders the right to dissent when the voting on amendments of the articles effecting fundamental changes in the corporate set-up, other than when authorizing a merger or consolidation.
65. It does not authorize the extending or limiting, with safeguards being provided, the right to dissent by so providing in the articles.
66. It does not require that the value of the dissenters' shares must be fixed and such shares paid for before the corporate change can be consummated.
67. It does not provide for an amendment of the articles by the board of directors in such matters as—
 - a) to change the registered office,
 - b) to change or appoint a registered agent, or
 - c) to fix the attributes of and allot new series of shares.
68. It does not place adequate limitations on the sale, etc., of all or substantially all of the corporate assets.
69. Although its provisions on mergers and consolidations are not as inane as most of the balance of the chapter's content, they are woefully deficient when compared with most other modern drafts.
70. It contains no provisions authorizing a compromise arrangement in effecting a reorganization.
71. It does not provide for an adjustment of the articles to conform to a reorganization decree of a federal court.
72. It does not provide for a revival and restoration of a corporation after it has expired.
73. It does not provide for an extension of the period of duration.
74. It does not provide for a reincorporation upon the purchase of the assets and franchise of another corporation.
75. It does not adequately provide for different methods in effecting a dissolution.
76. It does not provide for dissolution by the incorporators before any shares have been allotted and/or the corporation has begun business.
77. It does not set out a simple method of dissolving and winding up a corporation upon the expiration of the corporate existence.
78. It does not adequately provide for dissolution when bankruptcy or insolvency.
79. It does not provide an alternative method of dissolution, viz., by unanimous consent of the shareholders, and by approval of the shareholders upon a resolution of the board.

80. It does not provide for the execution and filing of an intent to dissolve.
81. It does not provide for a decree of dissolution by a court after winding up.
82. It does not provide for a revocation of steps in voluntary dissolution.
83. It does not provide for the removal and appointment of directors during dissolution proceedings.
84. It does not adequately provide for distribution of assets upon dissolution and the protection of creditors, shareholders, etc.
85. It does not provide for deposit and distribution upon dissolution of portions of assets belonging to claimants when proceeds disputed, unclaimed, or claimants unknown.
86. It does not fix liability of parties for malfeasance in the winding up.
87. It does not specify grounds and proceedings for involuntary dissolution.
88. It does not state who may institute involuntary dissolution proceedings.
89. It does not set out a definite statutory procedure for involuntary dissolution.
90. It does not fix the jurisdiction and supervision in an involuntary dissolution.
91. It does not state the grounds authorizing a proceeding by the state to forfeit a corporate franchise, or outline the procedural steps.
92. It has no provisions for allowing a broad flexibility in shifting the proceeding into or out of court at expedient stages during the process of dissolution.
93. It leaves the archaic statutory provisions relating to foreign corporations without revision or modernization.
94. It does not state the effect or any penalties for transacting business in the state without domestication.
95. It is very deficient in not adequately setting out the requisites as to the content, execution, and filing of the various corporate instruments.
96. It does not require that duplicate copies of instruments filed in the office of the secretary of state be filed in the county where the registered office is located.
97. It does not require a final report upon the expiration of corporate existence, or specify its contents or method of execution.
98. It does not provide that in a civil action corporate existence is presumed unless a verified denial.
99. It does not provide for judicial notice of matters concerning corporations.
100. It does not require the attorney general to supply opinions to

the secretary of state or otherwise fix the duties of the attorney general in matters relating to interpretation of corporation laws.

101. It, and other acts passed by the 34th Legislature, leave matters to be administered by state officials, rather than governing them by statutory law.
102. It does not provide for a direct appeal, to the circuit court when adverse rulings are made by the secretary of state.
103. It does not employ modern terminology or lawyer-like phraseology.
104. It lacks a logical, orderly arrangement; its subject matter is badly jumbled.⁷⁹

79. All of these conflicting provisions and void spots in the Florida corporation statutes are certain to have a retarding effect upon corporate development in this state. It would be well for the citizens of Florida to investigate the effects which modern business corporation codes are having on the commercial and industrial progress in other states. Let us notice California, for instance. In *Past and Present Corporation Law: Is Florida In Step?* 2 MIAMI L.Q. 69, 124 (1947), this author had this to say about corporate development under the California Business Corporation Code:

In 1929, California had fewer corporate enterprises in proportion to its population and wealth than any other state in the Union, and this, in view of the fact that that state had an ideal climate, plenty of resources, and was strategically located as to unlimited markets. It had but one limitation and that was the artificial barrier resulting from its archaic legal restraints. Its legal sanctions prevented corporations from entering the state.

It remained for Professor Ballantine to inaugurate a campaign to modernize the corporation laws of that state. He carried on a relentless battle which finally culminated in an amendment to the state constitution, removing the provision which subjected all shareholders to a *pro rata* liability for all debts of the corporation, and the drafting and adoption of a complete and most modern business corporation code. Since that time industry has been flowing into California at an amazing rate. That state is far outstripping the other 47 states in the degree of growth of corporate enterprises. Now, after slightly over a decade and a half, it is rapidly becoming a great industrial empire. Huge new aircraft industries dotted her coast-line during the war. Some suggested that that was but a temporary mushroom-growth resulting from the war boom. But that was not the case. Those factories have been enlarged and converted into permanent peacetime production. And many more new plants have been built since the close of the war. Today many more industrial workers are employed in California than at the peak of war production. The rate at which new wealth is being created by this great galaxy of Pacific Coast industries is indeed baffling.

What has California got that Florida hasn't got! Industry is shifting southward at a rapid clip. Industrial production in the South has tripled since 1939. Is Florida getting her share? Consider the fertile markets right at her doorstep to the south. It is true that some corporate enterprises are invading the northern portion of this state, but any marked movement to the ideal setting in South Florida has not materialized. This state can well take a tip from the results accomplished by California. If the theme of this article meets with a satisfactory response, these authors are willing to take upon themselves the task of presenting to the next session of the legislature the most modern and complete business corporation act yet drafted. As asked in the title of this article: *Is Florida in step!*

According to the November 1953 issue of "Dunn's Statistical Review" at page 6, during the last quarter of 1952 and the first three quarters of 1953, a total of 9,248 new corporations were organized in that state. California now ranks second to New York in the number of new firms being incorporated. Moreover, most of the new California corporations have a sizable capital structure; they are not "chickadee" corporations with a total capitalization of \$500 each.

In conclusion, this author does not agree with the contention which has been advanced by several persons that the Florida statutory corporation law was deliberately fouled up from beginning to end in order to create more litigation so as to provide more fees for attorneys. The causes lie deeper than that. Most corporate litigation will be handled by the more competent corporate lawyers, and as far as this author knows such lawyers had no part in the formulation of the new revisionary act. First, it must be admitted that the act was very poorly drafted, and, second, in the form it was in, it should never have been enacted into law. We shall now attempt to analyze the causes of these two foibles.

Two main elements contributed to the faulty drafting in this instance. First, there was the time element. The matter was delayed until there was not available time for the drafting of a competent corporation code. And, second, the task was assigned to persons lacking in experience in statutory drafting and very limited in their knowledge of modern statutory corporation law. Of course, no harm would have resulted, except for a waste of an amount of the tax-payers' money, had the draft not been enacted into law. Thus, the legislative function requires examination.

This author is well aware of the fact that the entire blame for the adoption of the faulty legislation cannot be charged entirely against the legislature. The blame must be attributed to several factors, some of which are beyond legislative control. This author is far from being critical of legislators as a group. He has had the privilege of working with legislators a great deal, and, in doing so, he has found them to be a diligent, conscientious group of citizens. The real fault lies in the defective set-up in the administrative and legislative machinery into which our state government has drifted. The time allotted to our legislative sessions is entirely too short when the broad ramifications of modern-day legislative problems are to be carefully considered. Hundreds of bills are dumped into the legislative hopper. Most of the bills are backed by various pressure-groups. The individual legislators, irrespective of their conscientious efforts, are overwhelmed by the pressure of all of the pending legislation. As a result, the legislature is left to the mercy of having to rely upon recommendations of incompetent, and often self-serving, state administrative officials. In most instances, the legislators are to be commended on their accomplishments, as limited as they often are, while struggling under such adverse circumstances.

It may be well to mention some of the problems confronting the courts when they are called upon to interpret faulty legislation. Much litigation is bound to arise under this new legislation, and a large part of the problems involved will fall within the multitudes of enumerated void spots left in the sphere of corporation law. The courts will be left without any sort of a statutory yardstick to use as a guide

in working out the solution in such instances. Moreover, problems will be quite as difficult when they fall squarely within the statutory regulations which are ambiguous and conflicting. Courts are supposed to interpret statutes as they read, and should not be forced to try to guess what may have been in the mind of an incompetent novice when he was writing down, in drafting the bill, a lot of words under a misconception as to their legal meaning. The intent of the legislature prevails in construing statutes, and the legislature is presumed to mean what the statute says.

When a statute is so poorly worded that the courts cannot determine from its wording and phraseology what the legislature intended, it is confronted with a vexing problem. Especially is it vexing when the courts are aware that the legislature doubtless waived the reading of the bill when it was presented and the individual legislators, when voting an enactment of it, had no actual knowledge whatsoever as to what the provisions were in the bill. The individual legislators have not been polled on the matter, so it is impossible to know how many of them thought, when they voted on House Bill 1125, that they were voting for the adoption of the draft prepared by this author. Two legislators have already informed him that that was their belief at the time their votes were cast. This author is quite positive that the legislators would not have voted the adoption of House Bill 1125 if they had been familiar with its contents. Certainly, those who have a reasonably broad knowledge of modern statutory corporation law would not have.

This author has discussed the passage of House Bill 1125 with a total of six of the legislators who voted for it and all but one of the six stated that they had no knowledge of what the content of the bill was when it was enacted. The sixth one stated that he studied it, but admitted that he did not know anything about corporation law. Possibly the Governor, or one of his advisers, read it as it became a law *without* his signature.

A news report stating that a major portion of the new act was taken from the draft of a proposed Florida business corporation code prepared by the Corporation Code Drafting Committee appeared in a Miami newspaper. The newspaper item gave credit, for supplying the information, to the legislator who served as Chairman of the Legislative Committee which favorably voted out House Bill 1125 with its recommendation for passage. Certainly, if the Chairman of that committee believed that the bill was substantially taken from the draft prepared by the Corporation Code Drafting Committee, many of the legislators who voted for its enactment into law may have acted on a like belief.

This author was appointed Chairman and Draftsman of the Corporation Code Drafting Committee by the Statutory Revision Committee of the Attorney General's Office, the Law Reporting Committee of the Florida State Bar, and the Joint Statutory Revision Committees of the House

and Senate in January, 1951. This author as Chairman and Draftsman worked gratuitously for two years in completing a modern, comprehensive proposed Florida Business Corporation Code which was available in its perfected form for consideration of the 1953 Session of the Legislature. But in making a thorough study of House Bill 1125, he has not found even *one clause or sentence* in it which was taken from the draft prepared by him, in spite of the fact that he was the draftsman of the Business Corporation Code adopted by the Oklahoma Legislature in 1947, drafted all of the annotations on the Oklahoma act for West's Oklahoma Statutes Annotated, and has written more articles on the modern trends in statutory corporation law than any other living person.

IV. ANALYSIS OF BIENNIAL COURT DECISIONS

Slightly more than a score of decisions on Florida corporation law have been rendered by appellate courts during the last biennium, and these dealt with only a few segments of the law in that field.

Because of its significance, the case of *State ex rel. Losey v. Willard*⁸⁰ is mentioned, although it dates back slightly over two years. In that case the relators, Losey and the Rolfe Armored Truck Service, Inc., a Florida corporation, as two of several defendants, were charged on an information based exclusively upon an indictment returned by a grand jury of Dade County.⁸¹ The Rolfe Truck Service, Inc., contended that the criminal court of record should be prohibited from proceeding on the information since the indictment returned by the grand jury was based solely upon evidence obtained from an examination of the books and records of the corporation which it was commanded to produce under a subpoena *duces tecum* and that because of the use of such evidence the corporation had been compelled to give evidence against itself before the grand jury, in violation of its constitutional right against self-incrimination and hence was entitled to immunization from prosecution, under Florida Statutes, Section 932.29, 1941; and that the relator, being a corporation and not a natural person, was not subject to prosecution under the gambling laws of the state.

The Supreme Court held: (1) that a corporation could not evoke the plea of self-incrimination, and (2) that a corporation is not a "person" within constitutional provision that no person can be compelled in a criminal case to give evidence against himself and hence it cannot claim any personal privilege against self-incrimination, nor could it claim immunization against criminal prosecution.

80. 54 So.2d 183 (Fla. 1951).

81. On the validity of the information, see *State ex rel. Byer v. Willard*, 54 So.2d 179 (Fla. 1951).

In *Sarasota Kennel Club v. Shea*,⁸² the question presented was whether the word "Seal" typewritten following the names of the corporation, its president, and another, as makers of a promissory note, made it a sealed instrument. The court held that it did, stating that there need be no impression to constitute a corporate seal. Justice Matthews stated that "this question was settled many years ago in the case of *Campbell v. McLaurin Investment Co.*, 74 Fla. 501, 77 So. 277."

Two questions were presented in *Brensinger v. Margaret Ann Super Market*.⁸³ Two minority shareholders, one owning 15 shares and the other owning one share out of a total of 16,470 shares of common, filed a derivative suit against the management. As to the first question, the court held that a complaint, alleging that defendant Pentland, by belittling the value of the shares of the corporation, had acquired for himself and his associates, partially with corporate funds, at ridiculously low prices below market value a total of 7,184 of the voting common shares, had used the power thus acquired to cause the directors to vote the defendants excessive funds, and had committed other fraudulent acts, was not adequate, under Federal Rules of Civil Procedure 9(b) and 23(b), in that the allegations merely set out generalities and conclusions. On the second point, the court ruled that the complaint was also defective in that it showed on its face that the cause of action was barred by the Florida statutes of limitation and the plaintiffs would, therefore, be estopped and barred from bringing the action.

The Florida Supreme Court⁸⁴ held that when the defendant corporation actually received the benefit of the loan, it was a proper party in equity in an action on a note, and the complaint was adequate when it alleged: that the individual defendant had formed three corporations as his *alter egos*, that the plaintiff lent money on the note of one of the corporations, with additional security of an assignment of any interest the individual defendant had or might receive in a hotel being built, that the individual defendant was insolvent, that the corporation that made the note was bankrupt, and that the defendant corporation was in fact an undisclosed principal and had received full benefit of the loan.

It was held that the circuit court of the county where the defendant corporation was authorized by its charter to maintain a branch office and where it did maintain such office, had, under the provisions of Florida Statutes, Section 46.04, 1951, venue in an action against the defendant filed in the court of such county.⁸⁵

In *Hanes v. Watkins*,⁸⁶ the plaintiff and defendant entered into a

82. 56 So.2d 505 (Fla. 1952).

83. 192 F.2d 458 (5th Cir. 1951).

84. *Gross v. Cohen*, 58 So.2d 702 (Fla. 1952).

85. *Central Life Insurance Co. of Fla. v. Afro-American Life Insurance Co.*, 61 So.2d 653 (Fla. 1952).

86. 63 So.2d 625 (Fla. 1953).

contract to purchase the shares of and take over a Florida corporation. The contract fully set out the terms of the agreement, including the interest and functions of each. The purchase was made and they arranged the internal set-up of the corporation, electing themselves as officers. The business prospered and expanded, the only important change being the change in the name of the corporation. The final result was that the plaintiff owned 49 per cent of the shares and the other 51 per cent were owned by the defendant. For a reason not stated in the case, the plaintiff filed an action seeking to have the court declare that the relationship between the parties was that of a partnership, and, if it were found to be a shareholders' relationship, then that the corporation be wound up. The trial court found that the relationship was that of shareholders of a corporation and that there were no grounds alleged justifying the court to order that it be wound up. The holding was affirmed on appeal, Justice Drew stating that the facts supported the trial court's decision as to the relationship between the parties and that there was no showing that the corporation had reached such a stage that the purposes for which it was formed were impossible of attainment, or that it had practically discontinued all its business, or that there was such a deadlock among the shareholders that the affairs of the corporation could not be legally transacted.

In another very recent, somewhat similar case,⁸⁷ the same two elements were presented, and the ruling on each was the same as in *Hanes v. Watkins*. The parties to the suit each owned one-half of the stock of a Florida corporation which operated a hotel under a leasehold. The parties had their little differences—about such matters as leaving the television set in disrepair, playing cards, failing to provide Christmas parties, and other small incidences repulsive to the hotel guests. The plaintiff contended that since there were but the two parties, each owning a one-half interest, a partnership relation resulted, and, if the organization was a corporation, a dissolution thereof should be decreed. The court pointed out that the organization was incorporated and was a going concern, and expressed its reasoning in language similar to that stated in the *Hanes* case.

Generally an equity court will not interfere with internal management of a private corporation, unless the acts thereof are ultra vires, fraudulent, or otherwise illegal.⁸⁸ In application of this rule, Justice Mathews decreed that the management of a strictly private hospital corporation had the authority to exclude any physician from practicing therein. On the other hand, a Florida corporation cannot seek and obtain benefits from the laws of the state and at the same time escape liabilities imposed thereby.⁸⁹

87. *Freedman v. Fox*, 67 So.2d 692 (Fla. 1953).

88. *West Coast Hospital Ass'n v. Hoare*, 64 So.2d 293 (Fla. 1953).

89. *Gay v. Inter-County Tel. & Tel. Co.*, 60 So.2d 22 (Fla. 1952).

The Supreme Court reaffirmed the general rule that a corporation's check which requires that it be countersigned by the corporation's comptroller was invalid until so countersigned.⁹⁰ However, the court went on to hold that such countersigning executed when the check was presented for payment validated the instrument by a form of ratification by the comptroller.

The largest single mass of cases has involved actions seeking a rescission of sales of corporate stock on the grounds of fraud or duress. A total of six such cases were decided during the last two years,⁹¹ and in each instance relief was denied because of laches of the party seeking to set the contract aside or the lack of proof of actual fraud or duress. Since these cases involve corporate securities, a fuller analysis of them is left to the article on corporate finances elsewhere in this issue of the Quarterly.

Three cases involved the interpretation of Florida Statutes, Section 47.17, 1951, as applied to service in this state on agents of foreign corporations. In one,⁹² the defendant in a tort action was a Georgia corporation, and process was served on one Futch, who resided in Florida, had formerly marketed the defendant's products in this state, and had been appointed as the defendant's agent exclusively for acceptance of process served by the Commissioner of Agriculture pursuant to regulations under the Commercial Feed Law, Florida Statutes, Chapter 580, 1941. In holding the service inadequate, Acting Chief Justice Terrell said,

A business agent as contemplated by the law means more than one appointed for a limited or particular purpose. It has reference to one having general authority to act for the corporation within the state. Its duties must be closely related to the duties of the officers of the corporation. He must be authorized to manage the business of the corporation or some branch of it within the state and stand in the shoes of the foreign corporation.

Another case⁹³ reached a like result. The defendant was a New York corporation and service was had on a minor agent of a local branch of the defendant. The court pointed out that the purpose of Section 47.17 is to have service made upon one who is held responsible by the corporation, and it contemplates that service shall be made whenever possible upon the more responsible officers before resorting to service upon one of the inferior officers or agents of the corporation.

90. *Black v. Howard Lober*, 60 So.2d 538 (Fla. 1952).

91. *McCormick v. Lewis*, 102 F. Supp. 624 (N.D. Fla. 1952), *aff'd*, 201 F.2d 861 (5th Cir. 1953); *Street v. Bartow Growers Processing Corp.*, 67 So.2d 228 (Fla. 1953); *Gerken v. Streit*, 66 So.2d 245 (Fla. 1953); *Ft. Myers Hardware Co. v. Stock*, 65 So.2d 477 (Fla. 1953); *Gordon v. Citizens and Southern Nat. Bank*, 56 So.2d 531 (Fla. 1952); *Nam Han v. Yedlin*, 56 So.2d 133 (Fla. 1952).

92. *Valdosta Milling Co. v. Garretson*, 54 So.2d 196 (Fla. 1951).

93. *National Organization Masters, Mates and Pilots of America, Inc. v. Banks*, 196 F.2d 428 (5th Cir. 1952).

In the third case,⁹⁴ the sheriff's return of process stated that service was made on a named person as director of the defendant foreign corporation in the absence of superior officers. The court held that under the provisions of Section 47.17, the return on its face was valid, but when evidence was presented showing that the person served was not a director, it then could not stand. However, as here, where it was further proved that such person was an agent of the defendant transacting business within Florida and that all superior officers and directors, mentioned in the first four enumerations in Section 47.17, were absent from the state, the service would still be valid upon the return being amended so as to speak the truth.

Three cases were considered involving the matter of corporations being barred from maintaining an action because of failing to file required reports and pay the required taxes. Such objections must be raised in due time, and a motion to dismiss duly filed, in order to be recognized.⁹⁵ Moreover, if the plaintiff corporation makes such filing and pays the required fees before final disposal of the case the compliance corrects the defect.⁹⁶

In *Advertects v. Sawyer Industries*,⁹⁷ the question was presented as to whose agent the receiver of a corporation was. Justice Mathews pointed out that the receiver was subject to the orders and control of the court and was not the agent of the corporation that petitioned for his appointment.

94. *Largay Enterprises v. Berman*, 61 So.2d 366 (Fla. 1952).

95. *1825 Collins Ave. Corp. v. Rudnick*, 67 So.2d 424 (Fla. 1953).

96. *Matanzas Packing Co. v. Rayonier*, 195 F.2d 523 (5th Cir. 1952); *Broadway Builders v. W. W. Arnold Construction Co.*, 59 So.2d 26 (Fla. 1952).

97. 64 So.2d 300 (Fla. 1953).