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FORMATION OF CORPORATIONS IN FLORIDA

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Since 1948 Florida has advanced in population from twenty-first among all the states to thirteenth in 1957,[1] and it is still growing. To the particular good fortune of our legal profession is the fact that even greater than Florida's population increase has been its business incorporation growth. In 1957 its twelve months' total of 9,891 new domestic corporations was exceeded only in New York and California.[2] It had surpassed ten larger states and Delaware. During the ten-year period commencing in 1948, when 3,279 Florida corporations for profit were formed, the annual number of incorporations more than tripled.[3] It is quite apparent, therefore, why corporation law has become so significant a part of the legal practice within the state.

SOURCE OF AUTHORITY**

There are three basic sources of authority for the formation of Florida corporations: the state constitution, the state statutes, and the common law.

The State Constitution

Corporations cannot be created simply by agreement among associates. It is necessary first to obtain sovereign sanction, since they can be formed only by or under legislative authority.[4] The Florida Constitution has expressly authorized the legislature to "provide by

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**A table of headings and subheadings is appended at the end of this article.

[1]According to official estimates of the Department of Commerce.

[2]Survey conducted by Corporation Law Committee, The Florida Bar, Sept. 1958.

[3]From the office of Hon. R. A. Gray, Sec'y of State.

[4]1 FLETCHER, PRIVATE CORPORATIONS 36-37 (perm. ed. 1933).

general law for incorporating such educational, agricultural, mechanical, mining, transportation, mercantile and other useful companies or associations as may be deemed necessary . . . ."[5] And, contrary to earlier practice, since 1900 it has provided that special laws on the subject are prohibited except as to "a university or the public schools, or as to a ship canal across the state."[6]

Statutory Provisions

No useful purpose would be served here by detailing the legislative history prior to 1953 of the various corporate enactments,[7] other than to note that from 1941 to 1953 there were three concurrently applicable statutes to which attorneys were regularly required to refer. Chapter 612 contained provisions of the 1925 law, described as the first legislation in the country "which resembled a modern, streamlined business corporation act."[8] Many of the earlier provisions covering corporations, together with later amendments and additions, were carried in chapters 610 and 611.

It was therefore welcome legislation when in 1953 the present chapter 608 was adopted.[9] The result was a consolidation of the three prior chapters into a single law, which included or modified provisions in each of the earlier laws and added others. By express provision[10] it extends "to all corporations whether chartered by special acts or general laws," except when in conflict with special statutes.[11]

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[5]Art. III, §25.

[6]*Ibid.*

[7]For such a history see 5 FLA. LAW & PRAC. 126-129 (1956); Wright, *Introduction to the Statutory Corporation Law of Florida*, 18 FLA. STAT. ANN. 51 (1956).

[8]Wright and Baughman, *Past and Present Trends in Corporation Law*, 2 MIAMI L.Q. 69, 99 (1947).

[9]There are other statutory provisions applicable to special type corporations, but these are not too numerous. They include the following chapters: 618 (agricultural co-operative marketing associations), 625 (insurance, indemnity and surety companies), 632 (domestic mutual fire insurance companies), 637 (fraternal benefit societies), 654 (savings banks), 656 (industrial savings or Morris Plan banks), 657 (credit unions), 659 (general banking or trust companies), and 665 (domestic building and loan associations). Also within the general provisions of c. 608 itself are special provisions relating to co-operative associations, §608.03 (1) (b); cemetery companies, §608.60; and veterans' associations, §608.61.

[10]FLA. STAT. §608.01 (1957).

[11]*But see* Wright, *supra* note 7, wherein, based upon the provision in FLA. STAT. §608.01 (1957) that "the validity of no corporation heretofore created nor the

Common Law

In addition to the constitutional and statutory provisions, the common law existing in Florida is similar to that which prevailed in England on July 4, 1776.[12] The Florida Supreme Court has expressly noted its applicability when appropriate.[13] One author, who advocates a more complete codification, has expressed the opinion that "today, owing to the meagerness of Florida statutes, at least half of the legal problems arising in corporate litigation is required to be decided, at least in part, upon common law precepts."[14]

PRELIMINARY CONSIDERATIONS

The first consideration of every Florida lawyer consulted as to a proposed incorporation is common to practitioners everywhere — should the client's business be conducted in a corporate form?

The constitutional prohibition against state income taxes[15] removes one element of the usual tax disadvantage, but an annual capital stock tax has to be paid,[16] and a state documentary stamp tax is assessed on the original issue[17] and subsequent transfers of shares.[18]

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validity of any provision of any existing charter or certificate of incorporation or by-laws or any corporate action heretofore taken thereunder shall be in any way affected hereby; nor shall the effectiveness nor validity of any property, grant, right, franchise or privilege heretofore acquired by any such corporation, or of its right thereto or possession thereof, be in any way affected hereby," the author concludes (p. 52) that "the newly-adopted Florida Statutes quite generally . . . have not brought existing corporations within the scope of their application, thereby leaving many more legal problems concerning them yet to be solved," and (p. 68) that "the provisions [in Chapter 612], as well as the provisions in Chapters 610 and 611, will, to a large extent, remain in force as to corporations organized prior to October 1, 1953. . . . In the event a case should arise involving a corporation chartered, say in 1950, the bench and bar will need to know what the law was of that year in order to determine what its charter powers, etc., are. They must remember that Section 608.01, if it means what it says, does not bring existing corporations within its scope."

[12]Sec. 1 of the Act of a Territorial Legislative Council, Nov. 6, 1829.

[13]Willard v. Barry, 113 Fla. 402, 152 So. 411 (1933); Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927).

[14]Wright, *supra* note 7, at 54.

[15]FLA. CONST., art. IX, §11.

[16]FLA. STAT. §608.33 (1957).

[17]*Id.* §201.05.

[18]*Id.* §201.04.

As will be observed, chapter 608 is a reasonably liberal statute which affords a fair exercise of discretion in financing, powers, purposes, and management. With few exceptions, it offers as much as will be found in the most liberal of corporation statutes.[19] Ultimately the decision regarding incorporation should turn upon the desirability under all other circumstances of acquiring "limited liability, perpetual existence or easy transferability of interests."[20]

If the corporate form appears desirable, it is also important initially to consider how many corporations should be formed. Each corporation has a $25,000 exemption from the corporate surtax and a $100,000[21] exemption from the accumulated earnings penalty. The desirability of these additional exemptions should be determined in the initial planning,[22] since once the entire business operation has been put into a single corporation it is often difficult under federal tax regulations[23] to divide.

This article proceeds upon the assumption that at least one corporation has been found desirable and is to be organized.

ARTICLES OF INCORPORATION

A corporation for profit is incorporated in Florida upon securing approval of the articles of incorporation from the secretary of state[24] and paying the prescribed filing fees and taxes.[25]

The "articles of incorporation" form the agreement among the subscribers as to organizational details *before* approval by the secretary of state. They are distinguished in the statute from the "certificate of incorporation," which is the articles *after* corporate existence has begun and which includes the endorsement of approval by the secretary of state.[26]

The articles may commence with a statement: "The undersigned subscribers to these Articles of Incorporation, each a natural person

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[19]Compare the advertised advantages of a Delaware incorporation as detailed in Wright and Baughman, *supra* note 8, at 93-95, and CCH: 1958 Digest of the Delaware Corporation Law 4-5.

[20]See Israels and Gorman, *Corporate Practice,* PRACTISING LAW INSTITUTE 3 (1957).

[21]Increased from $60,000 under the 1958 amendment.

[22]1 INSTITUTE FOR BUSINESS PLANNING, TAX CONTROL §2705.2 (1958).

[23]INT. REV. CODE OF 1954, §355.

[24]FLA. STAT. §608.03 (1) (a) (1957).

[25]*Id.* §608.05.

[26]*Id.* §608.02.

competent to contract,[27] hereby associate themselves together to form a corporation under the laws of the State of Florida."[28] The statute prescribes the items to be thereafter included.[29]

Name

Choice of a name is subject to approval of the secretary of state.[30] Therefore, prior to drafting the articles of incorporation, the choice, and advisably an alternate, should be communicated to the secretary of state and his preliminary approval obtained. Since there is no statutory provision for reserving a name, the articles should then be filed as soon as practicable.

The statute also provides certain requirements that must be met if use of a particular name is to be approved. The principal requirement is that the name chosen must be easily distinguishable from that of any other corporation authorized to do business in the state,[31] so that no deception, confusion, or unfair competition may result. It is also necessary that it include the word *company, corporation,* or *incorporated,* or such other word or abbreviation or affix as will clearly show the corporate status.[32]

On the other hand, there are restrictions on the use of certain words in a corporate name. The word *club* may not be used in the name of a corporation for profit[33] except for racing, jockey, and kennel clubs under supervision of the State Racing Commission[34] and country clubs, baseball clubs, and golf clubs.[35] *Legion, Foreign, Spanish,* or *Disabled* may not be used by a veterans' organization being incorporated unless approval is first obtained from the national headquarters of the related organization.[36]

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[27]See "Incorporators" under heading "Other Considerations" *infra.*

[28]THE FLORIDA BAR, LEGAL FORMS AND WORK SHEETS, CORPORATIONS (1956).

[29]FLA. STAT. §608.03 (2) (1957).

[30]Even after approval by the secretary of state the legality of the name chosen may ultimately become a matter for judicial determination. Children's Bootery v. Sutker, 91 Fla. 60, 107 So. 345 (1926).

[31]FLA. STAT. §608.03 (2) (a) (1957).

[32]*Ibid.*

[33]*Id.* §608.62.

[34]*Id.* §608.63.

[35]*Id.* §608.66. See also OPS. ATT'Y GEN. FLA. 052-255 (1952) to the effect that organizations using the word *club* in their name for two years prior to June 1941 may continue to do so without penalty but cannot incorporate for profit under such name.

[36]FLA. STAT. §608.61 (1957).

A new corporation may acquire the name of a prior corporation that has been dissolved for failing to file its annual report or pay its corporate taxes,[37] and if the dissolved corporation wishes to become reinstated it will have to adopt a new name.[38]

Should the corporation prefer to operate its business under a name other than its incorporated name it must register the fictitious name with the clerk of the circuit court in the county in which it is transacting its business.[39]

Business to Be Transacted

The articles must state the "general nature of the business or businesses to be transacted."[40] Usually combined within the same numbered article are the purposes and objects for which the corporation is formed and the powers that it shall have.

Purposes. The general corporation statute permits the formation of a corporation "for any lawful purpose."[41] However, despite this apparently unrestricted authorization, there are several statutory and judicial provisions precluding the transaction of business by corporations in several fields.[42] These include dentistry,[43] architecture,[44] funeral directing or embalming,[45] certified public accounting,[46] and law.[47] A corporation may engage in the practice of professional engineering, but it must have at least one of its principal officers registered as a professional engineer.[48]

The prevailing practice seems to be to set forth, in appropriate

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[37]*Id.* §608.36 (3).

[38]*Id.* §608.37 (2) (b).

[39]*Id.* §865.09. See also OPS. ATT'Y GEN. FLA. 050-379 (1950).

[40]FLA. STAT. §608.03 (2) (b) (1957).

[41]*Id.* §608.03 (1) (a).

[42]Although the secretary of state may refuse to approve the articles of incorporation if the stated purpose is clearly forbidden, yet, as in the case of approval of the name, issuance of the certificate of incorporation is not conclusive adjudication of the legality of the business to be transacted. Children's Bootery v. Sutker, 91 Fla. 60, 107 So. 345 (1926).

[43]FLA. STAT. §466.36 (1957).

[44]*Id.* §467.08. *But see* Weed v. Horning, 33 So.2d 648 (Fla. 1947).

[45]FLA. STAT. §470.10 (1957).

[46]*Id.* §473.26.

[47]Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954).

[48]FLA. STAT. §471.06 (1957).

language and as simply as possible, the particular field or fields within which the corporation is principally to engage, using general terms and having firmly in mind the doctrine of *expressio unius est exclusio alterius.* Formerly it was customary to follow this brief statement with a lengthy recital of clauses containing the "general objects" or "general purposes," which are special or additional powers which the corporation is to possess. There seems to be a growing tendency, however, to omit these "general objects" or "general purposes" in favor of the statutory powers, due perhaps to recognition within the statute that every corporation can do "all and everything necessary and proper for the accomplishment of the objects enumerated in its certificate of incorporation or necessary or incidental to the benefit and protection of the corporation, and to carry on any lawful business necessary or incidental to attainment of the objects of the corporation whether or not such business is similar in nature to the objects enumerated in its certificate of incorporation."[49]

Powers. Closely connected with the "purposes" or "objects" of the corporation are the powers that it shall have to carry out its purposes.

Every Florida corporation has only the powers that are expressly enumerated in its certificate of incorporation or in the statute, together with such implied powers as are reasonably necessary for the purposes of exercising its express powers and for performing its authorized functions.[50] The present statute grants to every corporation, unless otherwise limited by its certificate of incorporation or by law, most of the powers that a corporation may lawfully exercise.[51] It is not necessary to spell out these statutory powers in the articles, but it may be considered advisable. If included, they, of course, become a convenient guide for corporate personnel. Also, since it is the law in effect at the date of incorporation that determines the extent of the powers possessed by a corporation[52] — unless a subsequent statute specifically brings the corporation within its scope — the inclusion of the powers may minimize the possibility of later misunderstandings resulting from intervening changes in the statute.

However, should the attorney prefer not to list each statutory

[49]*Id.* §608.13 (10) (1957).

[50]Orlando Orange Groves Co. v. Hale, 107 Fla. 304, 144 So. 674 (1932).

[51]See FLA. STAT. §608.13 (1957).

[52]Matlack Properties, Inc. v. Citizens and So. Nat'l Bank, 120 Fla. 77, 162 So. 148 (1935).

power specifically but should wish to include others not provided for by statute, following the "specific purpose" clause may be added a paragraph reading substantially as follows: "In furtherance and not in limitation of the general powers conferred by the laws of Florida and of the purposes hereinabove stated, the corporation shall have all and singular the following powers . . . ."[53]

Capital Stock

The articles should recite the amount of capital stock to be authorized, showing the maximum number of shares of each type that may be issued, with any distinguishing characteristics, and the par value of all shares having par value.[54]

Distinguishing characteristics that, if they are to exist, should be provided for in the articles include "designations, preferences or restrictions as regards dividends, redemptions, voting powers or restrictions or qualifications of voting powers . . . ."[55] Too frequently the capital structure is not given the attention that it deserves, and the client's interests suffer accordingly. The problems involved, however, are not wholly peculiar to the Florida practitioner, and they are discussed here only briefly.[56]

Initial Considerations. Before any determination as to the nature of the capital stock can be made, certain basic information must be obtained. This should include the number of persons interested and the proposed function of each, the investments to be made in cash or in property and by whom,[57] how profits are to be divided among the interested parties, any preferences or limitations in claims to earnings or assets, voting control, the best estimate of initial corporate earnings, and salaries proposed to be paid to participants.

The form that the capital structure will ultimately take may be determined as a matter of bargaining between those who will provide financing and those who will furnish services. Usually those who are to contribute tangible investments will want some superior pro-

[53]Adapted from 19 FLETCHER, PRIVATE CORPORATIONS §8901 (perm. ed. 1933).

[54]FLA. STAT. §608.03 (2) (c) (1957).

[55]*Id.* §608.14 (1).

[56]See Israels and Gorman, *supra* note 20, at 9-17.

[57]It is of course possible that the corporate financing will not come exclusively from funds or property of the clients and that a flotation of securities may be contemplated, either through bonds or stock interests.

tection as against those who will not. There is no set pattern as to division of expected profits between those contributing money and those contributing talents, although frequently in new businesses each is accorded fifty per cent.

When the decision as to the classes and kinds of stock to be authorized has been reached, if more than one type is to be provided for, care should be taken to give each issue a definite name, for example, "7% Cumulative Preferred Stock," and to adhere constantly to the use of that name.

Common or Preferred Stock. By far, most of the corporations organized in this state have common stock as the only authorized stock interest. That type of structure is usually entirely adequate in two instances: when only a single individual is interested,[58] or when several individuals are interested and are to be entitled to profits, assets, and control in direct proportion to their investments.

However, when profits, voting control, or assets are not to be distributed in direct proportion to tangible investments, the use of more than one type of stock is usually best. Although certain preferences as to income, assets, and voting can be accomplished by private contractual provisions, the procedure often brings on problems with the Internal Revenue Service or transferees without knowledge and should be avoided.

A single illustration of a variety of possible advantages in the use of two classes of stock is the following. Suppose certain individuals desire to build and operate a motel at an initial cost — exclusive of available financing — of $50,000, and the organizers are able to provide the entire cash required. Capitalization can satisfactorily be accomplished by the issuance of common stock only. Suppose, however that $100,000 is required and the organizers can provide only $50,000. In such event they may sell additional shares of common stock to the value of $50,000 to interested investors. But this procedure would more than likely be objected to by those investors if

[58]There is of course always a danger of a corporation having one or two stockholders being held for the alter ego of its stockholders, but in Advertects v. Sawyer Industries, Inc., 84 So.2d 21, 23 (Fla. 1955), it was said: "The mere fact that one or two individuals own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud or that it is necessarily the alter ego of its stockholders to the extent that the debts of the corporation should be imposed upon them personally." The Court then discussed the circumstances under which such a result would obtain.

they felt that the venture was speculative, since they are given no preferences on their investment. Likewise, the original organizers conceivably would object to having the investors share equally in the profits, since the latter are to contribute capital only and will provide none of the necessary thought or hard work. Both objections are easily curable by issuing seven per cent cumulative preferred stock to those advancing money and common stock to the organizers. The preferred stockholders, with relative safety, can realize a reasonable return; and those whose efforts ultimately make substantial profits available will receive the principal benefits of their efforts.

The priority features of preferred stock may extend singularly to assets or earnings, but usually they extend to both. And, generally, payment of the preferential dividend stated in the certificate completely satisfies the preferred shareholders' claim to earnings for the year. When the preferred stockholder holds a priority as to assets, he ordinarily is entitled to receive on liquidation the par or stated value of his preferred share, plus accumulated dividends at a stipulated rate, before any distribution can be made to common shareholders. The remainder of the assets are then distributed to the common stockholders.

In the absence of any provision to the contrary, holders of preferred stock have the same right to vote as holders of common stock,[59] but usually the right is limited by the articles of incorporation. If the parties are content that their respective claims to assets and earnings shall be similar in all respects but desire that voting control vest in one group or individual rather than another, preferred stock is not necessary. In such event, common stock might be divided into Class A, which has no vote or, perhaps as a class, elects a minority of the board, and Class B, which carries sole voting power or, as a class, elects a majority of the board.

Stock interests may have other distinguishing features under the Florida statute, but it will generally be found that common stock and cumulative preferred stock, giving preference both as to assets and earnings but without any participation features,[60] are sufficient for most occasions.

Par or No-par Value. Every share of stock is just an interest in the assets and business of the corporation and, whether par or no-par

[59]FLA. STAT. §608.10 (3) (1957); 2 FLETCHER, *op. cit. supra* note 53, §5301.

[60]Participation features provide for sharing by preferred stockholders of additional dividends with common stockholders.

value, simply represents its proportionate part of the corporate assets. Thus, if there are only 100 shares of one class of stock outstanding and the corporate assets are worth $5,000, each share is worth $50 regardless of whether it has a par value of $1 or $100 or $1,000 or no-par value. Actual value or selling price is not affected by whether the stock is par or no-par value.

The issuance of par value shares, however, frequently raises problems not present when no-par stock is used. For example, to issue stock with par value for property,[61] the directors must place a valuation on the property equal in dollars to the par value of the stock to make it fully paid and nonassessable.[62] Although the statute makes the judgment of the directors conclusive in the absence of fraud, creditors, in the event of insolvency, may nevertheless claim gross or fraudulent overvaluation and attempt to subject the stockholders to an assessment.

In the case of no-par stock, the directors place no dollar value on the property to be acquired but simply vote to issue an agreed number of shares in consideration of the conveyance to the corporation of such property. The result is a division of ownership of the property among the shareholders according to their holdings. There is no estimate of value required and no possible fraud on creditors. The stock is fully paid beyond question.

Another real problem in both initial and subsequent issues of par value stock results because it cannot be issued as fully paid for less than par,[63] although frequently it cannot be sold for par. This can lead to the well-known practice of "stock watering" by overvaluation of corporate property. With no-par stock, however, there is no watering, since it can be freely issued fully paid and nonassessable from time to time at varying prices according to its then present value.

Despite these and other advantages, there are good reasons in Florida — as in other states — to be cautious before recommending the use of stock having no-par value.

If no-par stock is to maintain an actual and stated value of $100 per share, state tax considerations between par and no-par value stock are equal. More often, however, no-par value shares will have a value substantially less than $100 each. Under those circumstances, let us examine the Florida taxes of a corporation that will have

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[61]Adams, *Valuation of Property Paid for Stock,* 3 MIAMI L.Q. 26 (1948).
[62]FLA. STAT. §608.15 (1957).
[63]*Ibid.*

authorized and issued capital stock of $100,000.

If the stock is to be represented by 500 shares of *no-par* preferred[64] valued at $50,000 and 10,000 no-par common valued at $50,000, the filing tax will be $688.75;[65] but if capitalized with a similar issue of *par value* stock, the tax will amount to only $200.

The state documentary tax on the original issue of certificates for *no-par* stock will be $1,050,[66] for *par value* $100. An identical tax disparity will result on the transfer if the certificates are subsequently sold.[67]

The capital stock tax payable annually for *no-par* stock will total $750,[68] unless actual proof is furnished to the secretary of state of a lower value than the presumed $100 per share; in the case of *par value* the tax will be $75.

But even greater tax savings may result from the use of par value if the shares are issued at a price *above par*. As an illustration, suppose that our corporation is capitalized by the issuance of 50,000 shares having a *par value* of $1 each, which will be sold for a total consideration of $100,000, so that $50,000 will be assigned to capital stock and the remaining $50,000 to "paid in surplus." The filing tax will then be $100 instead of $688.75 for no-par, and the original issue state tax will be only $50 instead of $1,050.

On the other hand, had the corporation been similarly capitalized with *no-par value* shares, the secretary of state would properly include the amount of paid-in surplus in determining the value of shares for the purpose of assessing the annual capital stock tax, and the tax would be assessed on the basis of the full $100,000 invested.[69] Although some state statutes permit a portion of the consideration received for no-par shares to be assigned to paid-in surplus, this is not permitted under the Florida statute.[70]

Nor are the benefits taxwise of par value stock available only to larger corporations. A total authorization of 5,000 shares of $1 par

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[64]*Id.* §608.14 (1) authorizes the issuance of "common stock of a par value stated in the certificate of incorporation, common stock of no par value, and preferred stock." There is no express authorization for the issuance of no-par preferred; however, it is generally accepted that it may be properly issued.

[65]FLA. STAT. §608.05 (4) (1957).

[66]*Id.* §201.05.

[67]*Id.* §201.04.

[68]*Id.* §608.33.

[69]OPS. ATT'Y GEN. FLA. 050-292 (1950). See also Wright and Baughman, *supra* note 8, at 114.

[70]FLA. STAT. §608.17 (1957).

value stock, which qualifies for the minimum tax rate, will often be found preferable in many ways to an issue of no-par value stock for even the smallest corporation.

Number of Shares to Be Authorized. Tax cost and requirements of flexibility are the principal factors influencing a decision on the number of shares to be authorized. The various taxes on no-par stock are assessed primarily on the *number* of shares authorized or issued.[71] Consequently, authorization of an unnecessarily large number of no-par value shares is to be avoided. Par value stock is assessed on the basis of value of the authorized or issued stock, and the number of shares is of no tax importance.

Consideration for Issuance of Shares. The articles of incorporation may prescribe the consideration for which no-par value stock may be issued,[72] but more often the right to fix it is conferred by the articles on the stockholders or board of directors. Par value is of course always specifically stated in the articles.

If the certificate of incorporation so authorizes, shares may be issued under the Florida statute as partly paid, subject to calls until the whole consideration has been paid.[73] In such event, the corporation may declare and pay dividends only upon the basis of the amount actually paid on the respective shares. This provision not only provides the means of installment payment but also provides an acceptable procedure for the issuance of shares to be paid for by future services.

The issuance of stock for services always presents a problem. Shares can not be issued for a promise to render services in the future, since a contract to render services is not "property." Stock is sometimes issued for promotional services already rendered in organizing the corporation, bringing the partners together, arranging for financing, and the like. However, even this practice is subject to question[74] and should be avoided.

Generally it is customary, when issuing preferred stock, to assign to it a par or stated value of $100 a share, and it should be issued only for cash or tangible property the value of which can be fairly determined. Issuance of preferred stock in exchange for services or

[71] *Id.* §§201.04,.05, 608.05.

[72] *Id.* §608.15.

[73] *Id.* §608.16 (1).

[74] 11 FLETCHER, PRIVATE CORPORATIONS §5187 (perm. ed. 1932).

property of questionable value is always to be avoided. On the other hand, common stock may be issued for almost any amount and frequently will have a nominal value of $1 or even less. It should be used in exchange for considerations of an intangible nature or debatable value.

Priorities on Dissolution. Upon dissolution a preference in the corporate assets is usually given to the holders of preferred stock to the extent of par or stated value of the shares, plus accumulated dividends if cumulative.

Dividends on Preferred Stock. Dividends on no-par preferred shares are stated in dollars per year. Dividends on par value preferred shares may be stated either as a percentage of par value — usually, but not necessarily, six or seven per cent — or in dollars per year. Preferred stock dividends must be paid in the current year, upon declaration by the directors, before payment of any dividend on common stock.

Cumulative or Noncumulative Dividends. Usually, noncumulative preferred shares should be avoided; they often encourage litigation as to the propriety of action by directors in deciding to forego dividends for the particular year.

Provisions for Redeeming. Preferred stock should usually be callable to permit the corporation to take advantage of lower money rates if subsequently available; the redemption price is usually fixed at least at par or stated value, plus accumulated dividends if cumulative.

Voting Rights of Preferred Stockholders. The statute provides that each stockholder shall be entitled at each meeting and upon each proposal presented at each meeting to one vote for each share of *voting* stock he holds.[75] Usually voting rights are given by the articles only to common stockholders; however, the articles may permit preferred stockholders to elect a minority of the board; more often they are authorized to elect a majority of the board upon a prescribed number of dividends not being paid and until the default is ended.

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[75]FLA. STAT. §608.10 (3) (1957).

Distribution and Exercise of Voting Power. Voting may be by either "ordinary" voting – one per share – or "class" voting – by which a class of stockholders may elect a minority of the board. The statute authorizes the creation of voting trusts when desired and establishes the procedure,[76] and there is no necessity to include any such provision in the articles. Voting may also be "cumulative,"[77] which will assure representation of minority interests on the board. Cumulative voting, *if authorized by the articles,* may entitle each share to cast for the election of directors as many votes as there are places to be filled. Thus, if five directors are to be elected, minority stockholders holding one fifth of the stock may, by casting all of their votes for a single individual, insure his election, regardless of majority opposition.

Restrictions on Transfer. These restrictions are frequently desired, particularly on voting shares and shares of closely held corporations involving more than a single party in interest.[78] Transfers may be restricted by providing that before selling or encumbering his shares, a shareholder must give the others an opportunity for a stipulated period to purchase them. Care should be exercised to insure compliance with the Uniform Stock Transfer Law, which requires that the restriction be stated on the certificate.[79] Any such restriction should be authorized by the articles of incorporation.[80] There are also restrictions providing that should a shareholder die or resign from employment by the corporation or become disabled for a stipulated length of time, he or his personal representative must offer his shares for purchase by the other stockholders. Restrictions of this type, however, are usually made as part of stockholders' agreements and are not included in the articles or on the face of the certificates.

Pre-emptive Rights. Attention should be directed to the question of pre-emptive rights in additionally authorized shares. Unless otherwise provided by the articles of incorporation, every stockholder, upon

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[76]*Id.* §608.43.

[77]*Id.* §608.03 (2) (j).

[78]Note, 10 U. FLA. L. REV. 54 (1957).

[79]FLA. STAT. §614.17 (1957).

[80]See Weissman v. Lincoln Corp., 76 So.2d 478, 481 (Fla. 1954), which raises, without deciding, the necessity of including authorization for the restrictions in the articles of incorporation.

the sale for cash of any new stock of the same kind, class, or series as that which he already holds, will have the right to purchase his prorata share before it is offered to outsiders.[81] Existence of this right is usually desirable in the case of any close corporation; on the other hand, it is usually best to waive it initially in the articles when future public offerings may be contemplated and when later agreement for waiver might be difficult to obtain.

Thin Incorporation. Advantage sometimes may be realized from reduced capitalization, or, as it is better known, "thin incorporation." This process involves a splitting of the investment between equity capital, represented by stock interests, and loans, usually represented by notes. The problems and considerations involved are influenced principally by federal tax laws and are not peculiar to a corporation organized under the statutes of this state, and they have been ably considered in prior articles.[82]

Thin capitalization offers at least three advantages:

(1) Its principal advantage is to permit repayment – assuming the corporation prospers – of all or part of the amount of the loan in the form of nontaxable return of capital. If the same amount were represented by capital stock, it would be taxable as ordinary income,[83] regardless of whether the sum is paid as a regular dividend or by redemption of a portion of the stock on a prorata basis.

(2) Deductible interest on the loans, rather than nondeductible dividends, may be paid by the corporation. However, the savings taxwise on interest alone would hardly justify the procedure unless the amount invested was quite substantial. For example, if stock is to be issued for $5,000 and the parties are to lend the corporation an additional $10,000, six per cent – which is about as high as interest could go without inviting inquiry from the Internal Revenue Service – on the $10,000 loan would amount to $600, which would not be taxed at corporate rates but would be taxable to the individuals.

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[81]FLA. STAT. §608.42 (2) (1957).

[82]Bittker, *Thin Capitalization: Some Current Questions,* 10 U. FLA. L. REV. 25 (1957); Schlesinger, *Acceptable Capital Structures: How Thin Is Too Thin?,* 5 U. FLA. L. REV. 355 (1952).

[83]Under INT. REV. CODE OF 1954, §302 (d).

(3) It offers a possible means of salvaging from a corporation that has failed some part of the investment that could not be recovered in the case of stock investments before all other claimants had been satisfied.

As might be expected, there are certain requirements to be met before any benefit can be assured. The ratio of debt to equity cannot safely exceed three and one half to one,[84] and actually the tax advantages in excess of two to one are so small as compared to the risk of having the debt treated as stock that a ratio above that amount should ordinarily be avoided. Additionally, to obtain recognition as a valid loan, there must be a business reason for issuance of the debt securities; the obligations must have a definite fixed maturity; they should provide for a reasonable rate of interest payable regardless of earnings and must be enforceable on default; the holders of the debt should have no voting right as holders of the debt; and the debt must be treated as such in the financial statements of the corporation.[85]

Usually it prejudices corporate credit to have outstanding "loans from officers" appearing on the balance sheet. Some attorneys have attempted to offset this disadvantage by subordinating loans from officers to commercial loans and having a notation to this effect also appear on the balance sheet. However, the *Gooding Amusement Co.* case[86] emphasized the danger of this practice. In that case the husband, his wife, and daughter transferred partnership assets into a newly formed corporation and took stock and certain notes in exchange. The corporation subsequently paid off a portion of the notes but defaulted on others, while at the same time borrowing substantial amounts from banks, which were all promptly repaid. The court held that the subordination of the stockholders' notes was too marked to permit the finding of a bona fide debtor-creditor relationship. It denied the interest deduction claimed by the corporation and taxed the payment of notes as equivalent to distribution of a dividend. In substance it appears to be the holding of the case that unless a real business reason exists for issuing notes rather than additional stock, the notes may be declared a sham, issued for tax avoidance only.

[84]See Rusyn Corp., 18 T.C. 769 (1952); the slightly higher percentage of 4-1 was disapproved in Talbot Mills v. Commissioner, 326 U.S. 521 (1945).

[85]1 INSTITUTE FOR BUSINESS PLANNING, TAX CONTROL §2403 (1958).

[86]23 T.C. 408 (1954), *aff'd*, 236 F.2d 159 (1956), *cert. denied*, 352 U.S. 1031 (1957).

Other Considerations

Initial Capital. The articles must recite the amount of capital with which the corporation will begin business, which shall be not less than $500,[87] unless by reason of the special purposes of the proposed corporation a greater amount may otherwise be required by law.[88]

The directors may be held personally liable for the debts of the corporation until the amount of capital specified has in fact been paid in,[89] and some attorneys, for this reason, regularly provide that the corporation will commence business with only the $500 minimum required by the statute. This, of course, has no limiting effect upon the amount of capital that may in fact be initially invested over and beyond the statutory minimum.

It of course is not necessary that the capital be confined to cash; it may consist of other property, but adequate precautions should be taken against "watering."

Terms of Existence. The articles must state whether the corporation is to have perpetual existence and, if not, the length of its existence.[90] Generally, perpetual existence should always be authorized. If limited to a term of years there is always the possibility that an extension by amendment may become necessary.

Post Office Address. The post office address of the principal office of the proposed corporation in this state must be stated in the articles of incorporation.[91]

To avoid unnecessary amendments, the statement as to location is usually followed by a recital akin to "or at such other place within the state as the board of directors shall, by appropriate action, hereafter from time to time determine." In recognition of the possibility of subsequent moves, the statute expressly requires that the corporation shall keep the secretary of state informed of the current address of the corporation's principal office.[92]

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[87]FLA. STAT. §608.03 (2) (d) (1957).

[88]Examples are banking corporations in which the required amount of capital is dependent upon the population of the area to be served by the corporation, FLA. STAT. §656.051 (1957), and insurance companies, *id.* §§625.02, 638.02.

[89]FLA. STAT. §608.56 (1957).

[90]*Id.* §608.03 (2) (e).

[91]*Id.* §608.03 (2) (f).

[92]*Id.* §608.38.

Number of Directors. The articles must designate the number of directors, which shall not be less than three.[93]

It is customary in designating the number of directors either to state a minimum and a maximum, such as "not less than three or more than seven," or a fixed number may be set initially, with provision included in the articles in either case for increases or decreases by the stockholders. The statute expressly gives to each corporation the power to change the number of its directors through action of its stockholders[94] if such action is not precluded by an inflexible provision of the articles.

The articles may also divide the directors into two or more classes, whose terms of office shall respectively expire at different times. No term may continue longer than three years, however, and at least one fourth of the directors must be elected annually.[95]

Unless a contrary provision is inserted in the articles, any vacancy in the board, including one resulting from increase in number, will be filled until the next annual meeting by the directors remaining in office.[96] Also, unless a contrary provision is inserted in the articles, the directors may, by resolution, designate two or more of their number to constitute an executive committee, which may be permitted to exercise the powers of the full board.[97]

Initial Directors. The articles must list the names and post office addresses of the members of the first board of directors, who, unless otherwise provided by the articles or bylaws, will hold office for the first year of existence of the corporation or until their successors are qualified.[98]

In most instances the incorporators, three or more in number, are named in the certificate as the first directors. It is not necessary that a director be a stockholder[99] unless required by the articles or by law for corporations engaged in the several businesses regulated by special statutes. At least one of the directors must be a citizen of the United States, and all shall be of full age.

The 1957 Legislature dispensed with the former requirement that

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[93] *Id.* §608.03 (2) (g).
[94] *Id.* §608.13 (6).
[95] *Id.* §608.08 (1).
[96] *Id.* §608.08 (2).
[97] *Id.* §608.09 (2).
[98] *Id.* §608.03 (2) (h).
[99] *Id.* §608.09 (1).

the names and addresses of "the president, the secretary and the treasurer" should also be listed in this paragraph of the articles.[100]

Incorporators. The articles should be subscribed by not less than three natural persons competent to contract,[101] which of course excludes another corporation, a minor whose disabilities have not been removed by court order or marriage, or an incompetent. A married woman may be an incorporator,[102] and there is no requirement of citizenship or residence in Florida or the United States.

The articles must contain the name and post office address of each subscriber to the articles and a statement of the number of shares of stock, and the value of the consideration therefor, that he agrees to take.[103] Principally because of the frequent practice of using dummy incorporators, this latter provision has perhaps become the most controversial portion of the statute. In many instances, either for convenience or to prevent unnecessary disclosures of real parties in interest, the incorporators are the attorney who drafted the articles and two of his associates or employees. The question raised is whether the statute requires that all incorporators must agree to take stock.[104]

It is the position of the secretary of state that each of the three or more subscribers of the articles of incorporation must agree in the articles to take at least one share. Consequently, when dummy incorporators assign their rights to the real parties in interest, the assignments carry stock subscription rights and are subject to the documentary stamp tax, which is immediately followed by the tax on the original issue.[105] If only the minimum capital amount required by the statute is subscribed in the articles, the tax on the assignments is not a great deal; however, if the full amount of stock to be actually issued is subscribed by the incorporators, the tax may be quite substantial. The tax on the assignment would be unnecessary if the

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[100]Fla. Laws 1957, c. 57-8, §1.

[101]FLA. STAT. §608.03 (4) (1957). Co-operative associations shall have not less than 10 incorporators, *id.* §608.03 (1) (b), and Morris Plan banks and general banking and trust corporations must be organized by at least 5 persons, *id.* §§656.021, 659.01.

[102]FLA. STAT. §608.46 (1957).

[103]*Id.* §608.03 (2) (i).

[104]See discussion under *Comments Concerning Form 5.10* entitled "Subscribers of Articles of Incorporation" in THE FLORIDA BAR, LEGAL FORMS AND WORK SHEETS, CORPORATIONS (1956).

[105]FLA. STAT. §§201.04-.05 (1957).

statute omitted, as, for example, does the Delaware act,[106] any requirement that the subscribers to the articles be subscribers to capital stock. This is an instance in which further legislative consideration would appear desirable.

Additional Provisions

In addition to the foregoing, the articles may contain any other lawful provision that the incorporators may choose to insert "for the regulation of the business and for the conduct of the affairs of the corporation," as well as any provision affecting corporate powers, directors, or stockholders,[107] including but not limited to the following.

List of Officers. The statute provides that corporate officers shall, in the absence of special provisions, consist only of a president, a secretary, and a treasurer.[108] Since one or more of these are too frequently beyond reach, it is best to provide specifically in the articles that the corporation shall have as its officers a president, one or more vice presidents, a secretary, a treasurer, and such other officers, agents, and factors as may be provided for by the bylaws, who shall be chosen, serve for such term, and have such duties as may be prescribed by the bylaws or determined by the board of directors.

Replacement of Lost or Destroyed Certificates. The statute states that the articles may include a provision as to lost or destroyed certificates.[109] However, this is usually provided for by the bylaws, and there appears to be no necessity for additionally including it in the articles.

Special Type Corporations. Certain additional requirements are called for if the articles of incorporation are for a railroad, canal, telephone, or telegraph company.[110]

Amendments

The articles usually conclude with a recital that they may be amended "in the matter provided by law."

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[106]DEL. CODE ANN. tit. 8, §§101, 103 (1953).
[107]FLA. STAT. §608.03 (2) (j) (1957).
[108]*Id.* §608.40.
[109]*Id.* §608.03 (2) (j).
[110]*Id.* §608.03 (3).

Prior to 1957 it was required that every amendment be approved by the board of directors, proposed by them to the stockholders, and approved at a stockholders' meeting.[111] Thereafter a copy of the proposed amendment, with appropriately executed certificate, was required to be filed with the secretary of state in the manner required for articles of incorporation.[112]

That procedure is still permissible, but the 1957 Legislature added an alternative means available when unanimous approval of the proposed action can be obtained.[113] Under this latter procedure, all directors and stockholders may simply sign a written statement manifesting their intention that a certain amendment to the certificate of incorporation be made. Then, upon the filing of the statement in the office of the secretary of state and upon approval by him and payment of the required fees and filing taxes, the certificate of incorporation is amended.

Filing

Upon completion and execution, the articles of incorporation are forwarded to the secretary of state, together with a check for the filing fees and taxes.[114] Approval of the articles of incorporation by the secretary of state is then indicated by his endorsement on the original, and the original is filed among the records in his office.

When the articles have been filed in the office of the secretary of state, approved by him, and the filing fees and taxes paid, the subscribers, their successors and assigns, technically constitute a corporation. It is still, however, "necessary to endow the legal entity with capacity to transact the legitimate business for which it was created."[115]

BYLAWS

Probably no part of the work of organizing a corporation is ordinarily so carelessly done and receives so little deserved attention from clients and counsel as the drafting of the bylaws.

Unless limited by its certificate of incorporation, every Florida corporation has the power to "adopt, change, amend and repeal"

[111] *Id.* §608.18 (1).
[112] *Id.* §608.18 (2).
[113] *Id.* §608.18 (8).
[114] *Id.* §608.05 (1).
[115] 8 FLETCHER, PRIVATE CORPORATIONS §3738 (perm. ed. 1938).

bylaws not inconsistent with law or its certificate of incorporation. In scope, the bylaws should cover the exercise of the corporate powers, the management, regulation, and government of its affairs and property, the transfer on its records of its stock or other evidence of interest or membership, and the calling and holding of meetings of its stockholders.[116]

They in fact provide the rules for the government of the corporation and are subordinate in that respect only to the certificate of incorporation, the laws of the United States, and the laws of Florida.[117] Their principal purpose is to provide a general guide or pattern within which the business will be conducted and operated pursuant to resolutions of the board of directors.

Names and Offices

The bylaws ordinarily commence by stating the corporate name and the location of the principal office. It is also usually provided that other offices for the transaction of business may be located at such place or places as the board of directors may from time to time determine.

Stockholders' Meetings

Meetings of the stockholders, other than the organizational meeting,[118] may be held either within or without the state.[119] These meetings include both the annual meeting and special meetings.

Annual Meetings. The statute clearly contemplates that there shall annually be a meeting of the stockholders when it states that upon such occasions the directors of every corporation shall be chosen.[120] However, there is no provision in the statute[121] *requiring* that at least one meeting of the stockholders be held each year. The statute expressly provides that failure to elect directors or appoint officers on the designated day will not affect the existence of the corporation, and that the incumbents simply hold over until their

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[116]FLA. STAT. §608.13 (5) (1957).
[117]*Id.* §608.07.
[118]See "Organizational Meetings" *infra.*
[119]FLA. STAT. §608.10 (1) (1957).
[120]*Id.* §608.08 (1).
[121]*Compare* Uniform Business Corp. Act, §27.

successors have qualified.[122] From this it may reasonably be concluded that annual meetings are intended but that their omission is not fatal to continued corporate existence, provided that the annual capital stock tax is paid.

In any event, the bylaws should always fix the date, time, and location of the annual meeting, having in mind the expiration of the corporation's fiscal year and the availability of financial summaries of corporate operations during the past year.

Special Meetings. The attorney general has ruled that whenever action of stockholders is required in corporate management, such action must be accomplished at a stockholders' *meeting,* and that this requirement may not be avoided even by charter provision purporting to substitute informal written action signed by all stockholders.[123] This is in keeping with the accepted principle that stockholders can act only through a regularly called meeting and that even the act of a majority expressed elsewhere than at a stockholders' meeting, as by separate approval, is not binding on the corporation.[124]

In addition to the usual means that may be contained in the bylaws for calling meetings, the statute also provides for call by the county judge on the written application of stockholders holding one third or more of the stock when, because of neglect or refusal of the officers or because of any other impediment, a legal meeting of the corporation cannot otherwise be called.[125]

Notice. The bylaws should provide that notice of all annual and special stockholders' meetings, signed by the secretary or other designated officer, shall be mailed to each stockholder having the right and entitled to vote at such meeting, at his address as it appears on the records of the corporation, not less than ten or more than sixty days before the date of the meeting.[126] Either the certificate of incorporation or the bylaws may also require that the notice be published in one or more newspapers.

The notice shall state the purpose of the meeting and the time and place it is to be held. Such notice is sufficient not only for the meeting but also for any adjournment, unless otherwise provided in either

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[122]FLA. STAT. §608.51 (1957).

[123]OPS. ATT'Y GEN. FLA. 056-197 (1956).

[124]13 AM. JUR., *Corporations* §515 (1938).

[125]FLA. STAT. §608.12 (1957).

[126]*Id.* §608.10.

the articles or the bylaws.[127] If any stockholder transfers any of his stock after notice, it is not necessary to notify the transferee.[128] Notice of meeting may be waived before, at, or after a meeting;[129] this is almost invariably done in the case of closely held corporations.

Record Date. In the absence of any contrary provision in either the articles or the bylaws, the directors may fix a date not more than forty days prior to the date of any meeting as the "record date," on which the stockholders of record who have the right to notice of and to vote at such meeting shall be determined. In such case, notice that the date has been fixed must be published at least five days prior to the meeting in a newspaper published in the town or city where the principal office of the corporation is located and in any town where an agency for transfer is maintained.[130]

Voting. The bylaws may make appropriate provision as to voting rights. Absent any contrary provision, every stockholder shall be entitled at each meeting, and upon each proposal presented, to one vote for each share of voting stock recorded in his name on the books of the corporation on the record date fixed, or, if no record date was fixed, on the day of meeting.[131] The books of record of stockholders may be required to be produced at any stockholders' meeting upon the request of any stockholder.

Quorum. Unless provided otherwise by either the articles or the bylaws, a quorum consists of a majority of the stock entitled to vote.[132]

Proxies. The statute provides that at any meeting of stockholders any stockholder of record having a right and entitled to vote may be represented and vote by a proxy appointed by an instrument in writing.[133] No proxy time limitation is contained in the statute, but it may be provided by the bylaws.

Validation. Unless otherwise provided by the certificate of in-

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[127]*Id.* §608.10 (1).
[128]*Ibid.*
[129]*Ibid.*
[130]*Id.* §608.10 (2).
[131]*Id.* §608.10 (3).
[132]*Id.* §608.10 (4).
[133]*Id.* §608.10 (5).

corporation or the bylaws, stockholders holding four fifths of the voting stock having the right and entitled to vote at any meeting and present at such meeting, however called or notified, shall, by signing a written consent on the record, validate the acts of such meeting as if legally called and notified.[134]

Miscellaneous. The bylaws may also designate the officer or officers to preside at meetings, may provide for the removal of officers or directors before the expiration of their terms — this is sometimes a highly desirable provision when differences arise between those who control the stock and those who are serving as officers or directors — and may contain any other provision not prohibited by law or by the articles.

Directors

The business of every Florida corporation is managed and its corporate powers exercised by the board of directors.[135] The bylaws should prescribe the exact number of directors that the corporation shall have. As previously noted, it is necessary that the directors be of full age and that at least one be a citizen of the United States, but it is not necessary that they be stockholders unless required by the bylaws.[136]

Election and Term. The directors are chosen at the annual meeting of the stockholders by a plurality of the votes cast. If the articles authorize, the directors may be divided into two or more classes whose terms of office expire at different times, but no term may continue longer than three years, and at least one fourth of the directors must be elected annually.[137] The bylaws should always provide that the directors shall hold office until the election and qualification of their successors. Vacancies in the board are filled until the next annual meeting of stockholders by the directors remaining in office unless otherwise provided in the articles, and an increase in the number of directors creates a vacancy for the purpose of this provision.[138]

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[134] *Id.* §608.11.
[135] *Id.* §608.09.
[136] *Ibid.*
[137] *Id.* §608.08 (1).
[138] *Id.* §608.08 (2).

Quorum. Unless the articles or bylaws provide otherwise, the presence of a majority of all the directors is necessary at any meeting to constitute a quorum to transact business; and the act of a majority of the directors present is the act of the board of directors.[139]

Meetings. Except for the organizational meeting, directors' meetings may be held either within or without the state.[140] The statute does not fix any particular time for the meeting of directors. Often the bylaws provide that a meeting shall be held immediately following the annual meeting of stockholders and at such times thereafter as the directors themselves may fix or upon the call of the president.[141] Provision should be made whereby notice of each meeting is given by the secretary to the directors not less than a prescribed number of days before the meeting, unless each director shall waive notice either before, at, or during the meeting.

Executive Committee. A very practical provision of the statute — when the circumstances warrant — is that which states that unless otherwise provided in the articles, the board of directors may, by resolution, designate two or more of their number to constitute an executive committee, which, to the extent provided in the resolution or in the bylaws of the corporation, shall have and may exercise the powers of the board of directors.[142] If the board of directors is to consist of more than the minimum of three, it is often desirable to affirmatively provide for the designation of an executive committee.

Officers

As previously noted, the statute provides that every Florida corporation shall have a president, who shall be a director; a secretary; and a treasurer.[143] If the certificate permits, the bylaws may well provide for one or more vice presidents or one or more assistant secretaries or assistant treasurers. Provision is sometimes also made for a chairman of the board, a comptroller, an auditor, a general manager, or a general counsel.

Officers should be chosen by the board of directors at its first meet-

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139*Id.* §608.09 (1).

140*Ibid.*

141THE FLORIDA BAR, LEGAL FORMS AND WORK SHEETS, CORPORATIONS (1956).

142FLA. STAT. §608.09 (2) (1957).

143*Id.* §608.40.

ing following each annual meeting of the stockholders, and provision should be made for their serving until their successors are chosen and qualified. Provision should also be made for the subsequent designation by the directors of assistant secretaries, assistant treasurers, and other officers, agents, or factors, who may serve for such terms and have such duties as are determined by the directors.

Any person may hold two or more offices except that the president may not also be the secretary or assistant secretary.[144] The statute also prohibits any person holding two or more offices from signing any instrument in the capacity of more than one office.[145]

The bylaws should prescribe the specific duties of each of the designated officers.

Stock Certificates

Every corporation may issue those shares of stock authorized by its certificate of incorporation and none other.[146]

Issuance of Certificates. Every stockholder is entitled to have, for each kind, class, or series of stock held, a certificate certifying the number of shares thereof held of record by him.[147] Certificates are signed by the president or a vice president and the treasurer or an assistant treasurer or the secretary or an assistant secretary, and sealed with the seal of the corporation. The seal may be facsimile, engraved, or imprinted.

If the certificate is signed by a transfer agent or an assistant transfer agent, or by a transfer clerk acting on behalf of the corporation and a registrar, the signature of the named officers may be facsimile.[148]

A discussion of the consideration for issuance of the stock is contained under "Articles of Incorporation," *supra.*

Form of Certificate. It is not necessary to set forth in the stock certificates the provisions of the articles of incorporation showing the class or classes of stock authorized to be issued by the corporation or their distinguishing characteristics. If the corporation so elects, these provisions may be either summarized on the face or back of the

144 *Ibid.*
145 *Ibid.*
146 *Id.* §608.14 (1).
147 *Id.* §608.41 (1) (a).
148 *Ibid.*

certificate or incorporated by reference made on the face or back of the certificate, provided that the reference states that a copy of the provision, certified by an officer of the corporation, will be furnished by the corporation or its transfer agent without cost upon request of the certificate holder.[149]

Transfer of Certificate. The stock of every Florida corporation is transferable on the books of the corporation in the manner provided in the bylaws.[150] Until registered upon the corporation's books, no transfer of stock is valid as against the corporation, its stockholders — other than the transferor — or its creditors for any purpose except to render the transferee liable for debts of the corporation to the extent otherwise provided.[151]

In providing for transfers, the requirements of the Uniform Stock Transfer Law[152] must be observed. Frequently, and in accord with these requirements, the bylaws provide that the stock may be transferred only by the person appearing on the certificate to be the owner, or by his attorney in fact under a written power of attorney, surrendering the stock certificate and in writing directing the transfer.[153]

Stock Book. Every Florida corporation must keep at its office in this state, or in the office of its transfer agent, a stock book or books when more than one kind of stock is outstanding. The stock book contains the names, alphabetically arranged, and addresses of all stockholders, and shows the number of shares of each kind of stock held of record by each.[154] When the stock book is kept in the office of the transfer agent, the corporation must keep at its office in this state copies of the stock list prepared from the book and currently sent by the transfer agent.[155]

Replacement of Certificates. The general corporation law makes no provision governing the issuance of stock certificates to replace lost or destroyed certificates other than to state that the articles of

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[149]*Id.* §608.41 (1) (b).

[150]*Id.* §608.42 (1).

[151]See *id.* §608.44, which limits a stockholder's liability for debts of the corporation to an amount equal to the amount unpaid on shares held by him.

[152]FLA. STAT. c. 614 (1957).

[153]*Id.* §614.03.

[154]*Id.* §608.39 (1).

[155]*Ibid.*

incorporation may include a provision therefor.[156] However, the Uniform Stock Transfer Law provides that when a certificate has been lost or destroyed the court may order issuance of a new certificate upon satisfactory proof of loss or destruction and upon the giving of a bond.[157] Frequently the bylaws recite that no new replacement certificate shall be issued in lieu of one purportedly destroyed or lost except upon satisfactory proof to the directors of the loss or destruction and upon the giving of satisfactory security, by bond or otherwise, against loss to the corporation.

The new certificate should be marked "Duplicate" upon its face.

Dividends

Dividends may be paid to stockholders only from the net earnings or from the surplus of the assets over liabilities, including capital, of the corporation.[158] When the directors so determine, dividends may be paid in stock.

The statute makes provision for wrongful action of directors in knowingly declaring and paying dividends;[159] if the affirmative direction of the statute relating to payment of dividends is included in the bylaws, there would seem to be no necessity for additionally reciting the penalty in the bylaws.

Seal

The Florida statute does not prescribe any particular form of corporate seal. It simply states that every corporation may adopt and use a common corporate seal and alter the same.[160] Normally, though, the seal includes the corporate name, the year of incorporation, the word *Florida* and the word *seal,* but these distinguishing features are usually described only in the organizational meeting minutes.

Fiscal Year

There are no special statutory provisions relating to the fiscal year.

[156] *Id.* §608.03 (2) (j).
[157] *Id.* §614.19 (1).
[158] *Id.* §608.52.
[159] *Id.* §608.53.
[160] *Id.* §608.13 (3).

Ordinarily the bylaws fix it, having in mind the particular seasonal or other peculiar characteristics of the business to be conducted. If there is a natural business year different from the calendar year, it is usually a convenience to all concerned if the corporation closes its books at the end of its natural business year rather than on December 31st.

A one-time tax advantage may be obtained the first year by bringing the fiscal year to a close before the income goes over $25,000, so as to avoid the corporate surtax for the short year. A new year can then be started with a complete new $25,000 exemption available.

Miscellaneous Provisions

Any specific provisions that may be desired, for example, regarding the indemnity of the officers and directors against any expense to which they may be put in derivative actions brought against them or on behalf of the corporation, or any other matters peculiar to the particular corporation and permissible under the statute, may also be included within the bylaws.

Amendments

Usually it is provided that amendments may be made to the bylaws either by a majority vote of the directors or by majority vote of the directors present and voting, at any annual directors' meeting or at any special directors' meeting if notice of the special meeting contained the nature of the proposed amendment, or if notice was waived by a majority of the directors. The bylaws may additionally provide for amendment by the stockholders, but this is not customary.

ORGANIZATIONAL MEETINGS

The statute states that the subscribers to the articles of incorporation, their successors and assigns, actually constitute a corporation from the time of the filing of the articles in the office of the secretary of state and their approval by him, concurrent with the payment of all filing fees and taxes.[161] Nevertheless, the incorporators constitute only a quasi corporation[162] until an organizational meeting is held to elect officers, subscribe and pay for capital stock, adopt bylaws, and

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[161] *Id.* §608.04.

[162] 13AM. JUR., *Corporations* §42 (1938).

take such other action as is required for the corporation to transact business. These meetings usually include a first meeting of incorporators and a first meeting of directors. They should always be held in Florida,[163] even though later meetings of stockholders or directors are authorized to be held outside the state.

Incorporators' Meeting

Upon being advised by the secretary of state that the certificate of incorporation has been filed, the organizational meeting or meetings should be held. The statute does not state who should hold the meeting, and there is some basis for doubt as to the proper procedure.[164]

Since the incorporators are also required to be subscribers to shares of the corporation, they presumably are vested with the statutory rights of subscribers to stock at an organizational meeting. These include the authority to elect directors,[165] to adopt bylaws,[166] to fix the consideration to be paid for no-par value shares of stock if it is not prescribed in the certificate of incorporation,[167] and to vote on other proposals.[168] Likewise, the initial directors, already named in the certificate, have statutory authority to fix the consideration for no-par stock if authorized by the certificate,[169] to adopt bylaws,[170] and to manage the corporation and exercise its corporate powers.[171]

Actually, therefore, a single organizational meeting of either the incorporators or the directors would appear to be sufficient under the Florida statute.[172] Nevertheless, unless expressly waived by statute,

[163]Duke v. Taylor, 37 Fla. 64, 19 So. 172 (1896); Taylor v. Branham, 35 Fla. 297, 17 So. 552 (1895); 8 FLETCHER, PRIVATE CORPORATIONS §3742 (perm. ed. 1931); 13 AM. JUR., *Corporations* §42 (1938).

[164]See discussion "Who Holds Organizational Meeting" under *Comments Concerning Form 5.13,* THE FLORIDA BAR, LEGAL FORMS AND WORK SHEETS, CORPORATIONS (1956).

[165]FLA. STAT. §608.08 (1957).

[166]*Id.* §608.07.

[167]*Id.* §608.15.

[168]*Id.* §608.10.

[169]*Id.* §608.15.

[170]*Id.* §608.07.

[171]*Id.* §608.09 (1).

[172]19 FLETCHER, PRIVATE CORPORATIONS 176 (perm. ed. 1933): "In . . . Florida . . . the first board of directors is required to be named in the charter, so that apparently they may immediately function as such on the incorporation being made complete, but there is no express provision as to a first meeting of directors or of incor-

it is the practice historically that the first meeting should be conducted by the incorporators,[173] although they may presumably act by proxy.[174] Particularly when the incorporators are dummies, the real parties in interest sometimes jointly attend, but it is the general rule that only those persons who are incorporated may take part in the first meeting.[175]

The incorporators usually meet on waiver of notice, although they may, of course, meet on call. One of the incorporators is designated as chairman of the meeting and another as secretary. The waiver of notice or call of the meeting should be presented and filed with the minutes.

It is probably advisable, in view of the uncertainty under the statute, to first note that the total number of shares subscribed in the articles of incorporation is represented by those present in person or by proxy and that the meeting is competent to proceed with the transaction of business for which it was called. It should be reported that the certificate of incorporation has been filed with the secretary of state and the required filing fees paid. Upon motion, a copy of the certificate, together with the original receipt showing payment of the tax and filing fee, may be directed to be placed in the minute book of the corporation.

The bylaws should either be adopted, or the authority to adopt, change, amend, and repeal bylaws should be delegated to the directors.

Action may be taken authorizing the directors to issue each class of the capital stock of the corporation to the amount authorized by the certificate for an appropriate consideration.

If the incorporators are dummies, they may present their resignations as directors, and the chairman may call for nominations by them to fill the vacancies on the board of directors. The real parties in interest may then be nominated and elected to serve until the first annual meeting of the stockholders or until their successors are duly elected. The secretary may then report the execution of assignments of subscription rights from the dummy incorporators to the real parties in interest, and such transfers and subscriptions may be

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porators."

[173]8 FLETCHER, PRIVATE CORPORATIONS §3756 (perm. ed. 1931).

[174]Lippman v. Kehoe Stenograph Co., 95 Atl. 895 (Del. 1915); 8 FLETCHER, *op. cit. supra* note 173.

[175]See 8 FLETCHER, *op. cit. supra* note 173, §3756.

formally approved. The written resignations and assignments of subscription rights should also be attached to the minutes.

Directors' Meeting

The first meeting of directors is held immediately after the first meeting of incorporators and generally also with waiver of notice. One member of the board is designated as chairman and another as secretary of the meeting, and the notice or waiver is presented and filed with the minutes of the meeting.

The next order of business is usually the election of officers and, perhaps, the determination of their salaries, the adoption of a corporate seal and forms of stock certificates. Sometimes a stockholders' agreement has been entered into prior to the organization of the corporation, and if the agreement is valid it need only be approved and the corporation made a party to it. Pursuant thereto, employment contracts may be entered into, and stock may be issued.

Particular attention should always be paid to the fixing of salaries of stockholder-officers, since in a close corporation the allowance of larger salaries is a possible means of minimizing the double taxation of corporate profits. However, the Internal Revenue Service will disallow salary deductions in excess of the market value of the services of a stockholder-officer, upon the ground that it constitutes distribution of profits.[176] Since the future earnings of corporations are an unknown quantity, it is usually desirable to leave the salaries of these parties reasonably flexible. There are several types of devices used,[177] none of which is completely satisfactory. Perhaps the best is to fix each salary at a reasonable minimum figure that the corporation can surely meet, plus percentages of profits up to but not exceeding the full market value of the contemplated services.

If there is no prior subscription agreement, it is preferable for the subscribers to present a written offer for a definite number of shares for a specified consideration, which subscription would also include those shares for which rights were assigned by the incorporators. If the offer is for payment by cash in the proper amount, the minutes would then recite that the offer was considered by the directors, who resolved to accept it and authorized the officers to issue certificates upon receiving payment.

[176]See Israels and Gorman, *Corporate Practice,* PRACTISING LAW INSTITUTE 5-6 (1957).

[177]*Id.* at 6.

When the subscription is not to be paid for in cash, the situation requires more attention. As previously noted, the statute provides that, in the absence of fraud, the judgment of the directors as to the value of the consideration paid for the stock is conclusive, and that all shares issued for not less than the consideration fixed by the board are "fully paid and nonassessable."[178] Shares not fully paid and nonassessable and not meeting the statutory provisions for partly paid shares are, of course, "watered"; and, if fraud is shown, both the recipient of such shares and the directors who voted for their issuance may be held personally liable for the differences. Consequently, when the consideration is something other than cash the subscription offer should always recite all pertinent facts on the question of value, and the minutes should indicate acceptance by unanimous vote of those present other than the subscriber, who should neither vote nor be necessary to a quorum.

Consideration may also be given by the prospective principal stockholder of a closely held corporation — provided that at least twenty per cent of the stock is held outside the family of the principal stockholder — to the advisability of paying a capital gains tax on the transfer to the corporation of any depreciated property that has substantially appreciated in value since acquisition. This may give the corporation a bigger deduction to offset future income and may, under particular circumstances, be desirable.[179]

Other business usually transacted at the first directors' meeting includes authorizing the renting of an office, the opening of a bank account, adoption of bylaws if not done by the incorporators, authorizing payment of incorporation expense, directing the secretary to procure all corporate books, designation of resident agent,[180] and authorizing the officers in general terms to do all things necessary to conduct the business for which the corporation was organized.

Miscellaneous Matters

The "corporation kit" is usually ordered when the articles are

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[178] Fla. Stat. §608.15 (1957).

[179] 1 Institute of Business Planning, Tax Control §2402.2 *et seq.* (1958).

[180] The resident agent may be either an individual or a corporation. Fla. Stat. §608.38 (1957). Certificate designating the office and agent for service of process within the state must be filed with the secretary of state within 30 days after filing the articles of incorporation. *Id.* §47.34.

executed and ready for filing. This includes the seal, the stock book, the stock certificates, and the minute book.[181]

The minute book should contain, following the minutes of the first meeting of the incorporators, a conformed copy of the certificate of incorporation and the receipt of the secretary of state for payment of the filing fees and taxes. If the incorporators have adopted the bylaws, a copy should follow the minutes of their meeting; otherwise the bylaws should follow the minutes of the first directors' meeting. The assignment of any subscription rights should be included, with required state and federal documentary stamps attached.

When the shares of stock have been issued, the name and address of the stockholder should be entered on the stub with the number of shares held and the appropriate amount of documentary stamps attached to the reverse side of the stub. The identifying information called for by the stock book should then be entered as to each stockholder.

Frequently the attorney will be asked to serve as an officer or director of the corporation. Serving as secretary or assistant secretary may be mutually beneficial both to the lawyer and to the client, since it may better enable counsel to keep the minutes and other corporate records. Other than in that capacity, the lawyer is usually wise to avoid accepting an office or directorship unless he is to be actively engaged in the affairs of the business.

CONCLUSION

One of Florida's most distinguished public servants has characterized chapter 608 as a "fairly brief and simple" law and recalls that he had "opposed vigorously in the past an attempt to enact a corporation 'code' which was exceedingly voluminous and to [his] way of thinking unnecessarily complicated and would certainly have been a cause of a great deal of difficulties for the attorneys for a long time after its enactment."[182]

Chapter 608 unquestionably has its shortcomings and is by no stretch of the imagination a perfect piece of legislation.[183] Neverthe-

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[181]See "Mechanics of Forming a Corporation" in THE FLORIDA BAR: LEGAL FORMS AND WORK SHEETS, CORPORATIONS (1956).

[182]Letter to author from Hon. R. A. Gray, Secretary of State, Mar. 20, 1958.

[183]For a thorough discussion see Wright, *Introduction to the Statutory Corporation Law of Florida,* 18 FLA. STAT. ANN. 51 (1956).

less, in so far at least as the subject matter of this article is concerned, it seems to be serving its intended purpose quite well. Complaints regarding particular statutes usually find their way to responsible agencies of The Florida Bar, but there have been only infrequent and minor suggestions from practicing attorneys relative to the present law. If their reaction is an acceptable criterion, it would appear that changes in the immediate future may justifiably be directed toward a further refinement of the present law and not toward any complete revision or codification.

TABLE OF HEADINGS AND SUBHEADINGS