assumed that many small entrepreneurs have made similar concessions, detrimental not only to their own interests but also to those of the public, rather than incur the animosity of powerful labor groups. Since the union frequently occupies a dominant economic position, attempted opposition may occasion financial ruin before legal refuge can be secured. Hence, the small businessman may voluntarily submit to burdensome impositions and attempt to pass on to the public ensuing losses. He is compensated for his concessions by the monopolistic competition which characterizes such an industry.

That the public is vitally concerned with the contacts between unions and the self-employed cannot be refuted. Their frequent controversies indicate the necessity of devising a formula flexible enough to accommodate the interests of society with those of the adversaries. A constructive remedial program would include legislation withdrawing this unique problem from the scope of those enactments designed to cope with typical labor-management disturbances.[48] It should embody a provision specifically authorizing the courts to analyze all ramifications of union-self-employed disputes. Assuredly, this would entail delegation of broad discretion to the judiciary. However, the widely divergent circumstances giving rise to such discord demonstrate the importance of a flexible process of decision. Similar in form to the early illegal purpose doctrine but unrestricted by its array of precedent, this approach would permit judicious reconciliation of all the interests involved.

Where the need for protection of the public interest arises out of union-self-employer combination, the problem is one of augmenting inadequate natural competitive forces. Vigorous application of state antitrust provisions presents a convenient solution. That a labor organization is a participant in the alliance does not vitiate this conclusion. Likewise the fact that a localized trade, rather than a nationwide industry, is involved does not mitigate the cumulative ill-effects upon the consumer.

FAIRNESS TO SAVINGS AND LOAN ASSOCIATION SHAREHOLDERS DISSENTING FROM CONVERSION TO FEDERAL CHARTER

Saving and loan associations,[1] in order to fulfill their primary functions as savings institutions, uniformly arrange the greater part of their

48. See 34 MARQ. L. REV. 45, 48 (1950-51).

1. They are frequently referred to as building and loan associations in many states and as cooperative banks in Massachusetts.

ownership equity into shares which the holders may withdraw with little difficulty.[2] However, the capital structures exhibited by many of these associations, operating under state charters, are varied and often quite complex. The patterns range from those in which all shares are withdrawable and have equal rights to associations with permanent capital stock, withdrawable preferred stock, and/or deposits.[3] Congress, in 1933, authorized the Federal Home Loan Bank Board to charter savings and loan associations which fulfill the requirements of membership in a Federal Home Loan Bank.[4] With the exception that preferred stock may be sold to the United States Treasury,[5] federally chartered associations must be entirely mutual in character with all shares withdrawable.[6]

Associations previously chartered by a state may acquire a federal charter if the state has given its consent.[7] The Federal Act requires that

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2. The shareholder receives the value of his shares plus dividends minus any penalty for withdrawal before maturity. However, if there are not enough liquid assets to meet the demand, the association may pay according to a statutory schedule. Generally the schedule provides for payments up to $1000 to the shareholders in order of application. The application is then refiled as of the date of payment for any remaining claims. Reserves generally must not fall below six percent. See, *e.g.*, CAL. GEN. LAWS act 986, § 6.01 (Supp. 1949); ILL. ANN. STAT. c.14, § 13 (1947); IND. ANN. STAT. § 18-2110 (Burns Repl. 1950); N.Y. BANKING LAW § 390; OHIO CODE ANN. § 9651 (1938).

3. Building and loan associations may have permanent capital stock in many states. The permanent stock usually serves as security for preferred withdrawable stock or deposits. See CAL. GEN. LAWS act 986, §§ 3.01, 3.02 (Supp. 1949); ME. REV. STAT. c.55, § 144 (1944); N. Y. BANKING LAW §§ 378, 382; OHIO CODE ANN. § 9645 (1938). Permanent associations are expressly prohibited in Iowa. IOWA CODE ANN. §§ 534.18, 534.24 (1949). For an analysis of the various types of shares in building and loan associations, see BODFISH AND THEOBOLD, SAVINGS AND LOAN PRINCIPLES 131 (1938).

4. 48 STAT. 132 (1934), as amended, 12 U.S.C. § 1464 (1946).

5. The Secretary of the Treasury may subscribe to preferred shares in a federal association not to exceed $10,000 if recommended by the Home Loan Bank Board. The association must make provision for retirement of such shares within five years after investment. 48 STAT. 128 (1934), as amended, 12 U.S.C. § 1464(g) (1946).

6. 24 C.F.R. 144.1. (Supp. 1951)

7. The court in Hopkins Federal Savings and Loan Association v. Cleary, 296 U.S. 325 (1935), held that the conversion of a state chartered association to a federal savings and loan association without the consent of the state was a violation of the powers reserved to the states under the Tenth Amendment to the United States Constitution. It is doubtful that this would hold today in light of the Court's change in the interpretation of the Tenth Amendment in United States v. Darby, 312 U.S. 100 (1941). However, Justice Cardozo indicated by dicta in the *Cleary* case that if the suit had been brought by a dissenting shareholder, the transformation of property interests might be a violation of due process under the Fifth Amendment. Hopkins Federal Savings and Loan Assoication v. Cleary, *supra* at 336. The question is almost moot today since all states except Louisiana have consented to such conversions. An area where conflict may arise is presented by the differences between state and federal requirements in the amount of votes needed for conversion. However, at the present time the Home Loan Bank Board abides by the state requirement. See note 8 *infra*. It is not believed that the federal act gives voting rights in consideration of the conversion to non-voting shareholders in state associations. See State v. Phoenix Bank, 34 Conn. 205 (1867) (conversion of a state bank to a national bank).

at least 51% of the voting shareholders favor the conversion,[8] but most states have conditioned their permission upon larger or class majorities.[9] The first case testing the rights of stockholders dissenting from a plan of conversion to a federal charter by a state savings and loan association places in focus the considerations involved in protecting minority interests when charter alterations are proposed by these financial institutions. An Ohio Appellate Court, in *Opdyke v. Security Savings and Loan Ass'n,*[10] limited its judicial review to that afforded ordinary corporate charter amendments. The court held that the conversion, which the dissenting shareholders alleged substantially reduced the voting power and value of their shares without justification, would not be blocked absent a showing of fraud or gross unfairness.[11]

The application in the *Opdyke* case of rules developed in corporate charter amendment cases is not surprising. Such charter revisions involve questions of minority rights analogous to those encountered in a switch by a state chartered association to a federal charter, and the rules to be followed in the former situation are rather well established. The state legislatures originally extended broad powers of charter amendments to corporations.[12] Because of the legislative failure to specifically curtail the exercise of these powers, the courts have erected equitable limitations for the protection of minority interests.[13] However, charter

8. "Any member of the Federal Home Loan Bank may convert itself into a federal association . . . upon a vote of 51% of the votes cast at a legal meeting to consider such action . . . . Such member shall comply with all laws if any, of its jurisdiction which expressly provide for conversion. . . ." 24 C.F.R. 143.8 (Supp. 1951).

9. *E.g.,* ILL. ANN. STAT. c. 14, § 46 (1947) (three fourths of outstanding shares); MASS. ANN. LAWS c. 170, § 50A (1948), N.Y. BANKING LAW § 409 (two thirds of outstanding shares. Indiana requires that the conversion be done by sale of assets, IND. ANN. STAT. § 18-2102 (Burns Repl. 1950), and a vote of two thirds of the outstanding shares is necessary to effect the sale. *Id.* § 18-804.

10. 99 N.E.2d 84 (Ohio 1951). The case was being appealed to the Ohio Supreme Court, Case No. 32,631, at the time this note was written.

11. For some excellent articles on judicial review of charter amendments, see Becht, *Changes in Interests of Stockholders,* 36 CORNELL, L.Q. 1 (1950); Curran, *Minority Stockholders and Amendments to the Corporate Charter,* 32 MICH. L. REV. 743 (1934); Dodd, *Dissenting Stockholders and Amendments to the Corporate Charter,* 75 U. OF PA. L. REV. 585 (1927). The elimination of accrued dividends on preferred stock through charter revision has given rise to the greatest comment. See Dodd, *Fair and Equitable Recapitalizations,* 55 HARV. L. REV. 780 (1942); Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination,* 29 VA. L. REV. 1 (1942); Meck, *Accrued Dividends on Cumulative Preferred Stock: The Legal Doctrine,* 55 HARV. L. REV. 71 (1942).

12. Although the corporate charter has been held to be a contract between the state and the corporation, the corporation and the stockholders, and the stockholders *inter se* since Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819), the courts continuously have held that such changes could be made where the state has expressly or impliedly reserved this power. BALLANTINE, CORPORATIONS 653 (3rd ed. 1946).

13. *Ibid.*

amendments ordinarily will be enjoined only if the dissenters prove fraud, gross unfairness, or bad faith on the part of the majority over a presumption of good faith. Except in New Jersey, unfairness or prejudice to minority stockholders short of constructive fraud will not be judicially prevented.[14] Under the contract theory of corporate charters all shareholders are said to agree, at least constructively, to changes adopted by the required majority vote.[15] Moreover, in many instances dissenters may force the corporation to purchase their shares upon proper demand in accordance with state appraisal statutes.[16]

The approach as crystallized by these rules has been severely criticized, even when applied to non-financial institutions, as not adequately protecting minority interests.[17] Some charter amendments, while not openly fraudulent, seemingly represent attempts by the corporate management to fortify its position with the indorsement of the majority stockholders at the expense of a minority too small to prevent the change.[18] Recognizing the desirability of holding the majority to a higher standard of conduct, a line of federal cases has found a fiduciary duty owing by the majority to minority groups. These cases, stemming from *Lebold v. Inland Steel Co.*,[19] accept as settled law that a stockholder may vote in furtherance of his own interest and that charter amendments cannot be enjoined short of fraud. But if any substantial interests of the minority are harmed, the concomitant breach of the majority's fiduciary duty may be redressed in money damages.[20]

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14. *Id.* at 656. In Barrett v. Denver Tramway Corp., 53 F. Supp. 198 (D. Del. 1943), *aff'd*, 146 F.2d 701 (3rd Cir. 1944), the district judge found the amendment unfair and prejudicial to the minority but was powerless to intervene since Delaware law controlled and the evidence did not support "gross unfairness" or "fraud."

Professor Latty quotes a Wall Street banker as saying that many of the explanations for removing accrued arrearages are simply "hocus pocus" disguising the exploitation of the financial innocence of the preferred holders. Latty, *supra* note 11, at 13.

15. See Dodd, *supra* note 11, at 589.

16. For a collection of these statutes and a discussion of apportionment of the costs of appraisal, see Note, 60 YALE L.J. 337 (1951). "Fair value" is a very indefinite standard but it is generally construed to mean the fair value in a going concern. It is usually near the market price of the stock. For a discussion of the effectiveness of these statutes, see BALLANTINE, CORPORATIONS 704 (3rd ed. 1946); Lattin, *A Reappraisal of Appraisal Statutes*, 38 MICH. L. REV. 1165 (1940); Lattin, *Remedies of Dissenting Shareholders Under Appraisal Statutes*, 45 HARV. L. REV. 233 (1931).

17. See articles cited in note 11 *supra*.

18. *Ibid.* BALLANTINE, CORPORATIONS 656 (3d ed. 1946).

19. 125 F.2d 369 (7th Cir. 1941).

20. After refusing to enjoin the dissolution of the company because there was no showing of fraud, Lebold v. Inland S.S. Co., 82 F.2d 351 (7th Cir. 1936), the court allowed the minority damages because of the failure of the majority to obtain a fair value for the assets of the corporation upon dissolution. Lebold v. Inland Steel Co. 125 F.2d 369 (7th Cir. 1941). See also Zahn v. Transameriea Corporation, 162 F.2d

Although this fiduciary duty concept is perhaps based upon faulty logic,[21] its extension would do much to protect minority interests when damages are relatively ascertainable, as in liquidations, or where the market value of the dissenters' stock has been visibly reduced. However, damages are a difficult and uncertain remedy when the affected values are not primarily monetary, such as a loss of voting power or security. Nevertheless, more thoroughgoing judicial remedies are improbable, in the absence of legislative action,[22] due to the restraint of stare decisis and reluctance to interfere with managerial business judgment.

Stare decisis, however, need not constitute a bar to a full consideration of the judicial review to be given charter conversions by savings and loan associations. In addition to technical and theoretical divergence from corporate charter amendments, and the arguments advanced against the lenient review afforded in such cases,[23] there are cogent reasons for applying a stricter standard in the conversion situation. Savings and loan associations are quasi-public corporations providing depositories for the savings of the general public.[24] The shareholders are concerned primarily with security for their savings rather than the relatively small profit which they may receive on their investment.[25] The states have sought to assure this security through close regulation of the business practices of the associations.[26] Judicial approval of charter conversions detrimental to the interests of any of the shareholders is hardly consistent with this policy, or with the function of savings and loan associations.

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46 (3d Cir. 1947) breach of fiduciary obligation when minority uninformed of pending dissolution, was induced to redeem stock at a premium).

As yet this fiduciary doctrine has been applied only when there has been a single dominant stockholder. However, the principle could logically be extended to cases where the controlling group has obtained a majority through proxy votes. This is especially true when the directors propose the amendment and gain the necessary majority from management votes and proxies.

21. See Notes, 36 CALIF. L. REV. 325 (1949), 10 U.OF CHI L. REV. 77 (1942).

22. The proposed Model Business Corporation Act of the American Bar Association requires that two thirds of the shareholders in any class affected by the change in the charter must approve the plan. While this would be a step in controlling exploitation, it does not protect against the effect of management proxies or establish improved procedures for judicial review. Administrative review of corporate recapitalizations is discussed in Note, 26 MINN. L. REV. 387, 395 (1942).

23. See articles cited in note 11 *supra*.

24. Hopkins Federal Savings & Loan Ass'n. v. Cleary, 296 U.S. 325 (1935); Klein v. Jefferson County Building and Loan Ass'n, 239 Ala. 460, 195 So. 593 (1940); People *ex rel.* Barrett v. Logan County Building & Loan Ass'n, 369 Ill. 518, 17 N.E.2d 4 (1938); *In re* Eleventh Ward Building & Loan Association of Newark, 130 N.J. Eq. 414, 21 A.2d 746 (1941), *cert. denied*, Schoff v. Eleventh Ward Building & Loan Ass'n of Newark, 315 U.S. 799 (1941).

25. BODFISH AND THEOBOLD, SAVINGS AND LOAN PRINCIPLES 1 (1938).

26. See statutes cited in note 34 *infra*.

Association members subject to the greatest threat of detriment from a conversion are the holders of non-withdrawable stock. Ordinarily, withdrawable shareholders can liquidate their holdings with little if any loss should they dislike a prosposed federal incorporation. On the other hand, permanent stockholders in a state association would be forced to accept withdrawable shares in the federal organization in order that federal charter requirements may be met.[27] Thus, the character of their investment would undergo considerable change and a possible substantial interest in surplus and reserves would vanish.[28] Although non-withdrawable stocks are perhaps a more speculative investment than withdrawable shares or deposits, investors in permanent stocks normally must accept a lower potential rate of return, in exchange for increased security, than regular corporate stockholders may expect. Furthermore, the policy of protecting savings and loan investors, evidenced by strict governmental supervision, extends to all shareholders.

Preservation of the legitimate interests of all stockholders could be more readily achieved by requiring fairness to all affected parties in the plan of conversion. Under the standard of fairness, advocated by some leading writers for all corporate charter revisions,[29] the majority could not deprive a minority of a substantial interest without good business reasons, *i.e.*, purposes designed to benefit the organization as a whole, and unless a fair equivalent is given in return.[30] The dissenters first would have to establish the approximate extent to which their position has been changed.[31] This could be a decrease in voting power, a reduction in the relative value of their shares, or the loss of a preferred position.

The alleged reduction in the value of the dissenters' shares did not alone raise the question of unfairness in the *Opdyke* case, since there any decrease also affected the majority. However, only permanent stockholders had voting rights under the state charter, while all were to have votes proportionate to the value of their shares in the mutual federal association. The voting power of all the permanent shares was accordingly reduced from 100 percent to four percent[32] and that of each

27. 24 C.F.R. 144.1 (Supp. 1951). A few states expressly give a right of appraisal and purchase of shares to stockholders who do not wish to continue in the new association. See FLA. STAT. § 665.42 (1949); PA. STAT. ANN. tit. 15, § 1074-1009 (1938).

28. In permanent stock associations, generally only the permanent stockholders have rights to surplus and reserves upon dissolution. In the mutual association all shareholders participate in the distribution of these funds.

29. See articles cited in note 11 *supra*.

30. Latty, *supra* note 11, at 21.

31. *Id.* at 50; Becht, *supra* note 11, at 30.

32. Transcript of Record, pp. 266-67, Opdyke v. Security Savings and Loan Ass'n, 99 N.E.2d 84 (Ohio 1951).

permanent stockholder, including the dissenters who sought to enjoin the conversion, was decreased proportionately. The court rejected the plaintiffs' contention that the large increase in voting members better enabled the current management to perpetuate its control. Nevertheless, the right to vote was newly conferred principally upon the small shareholders who usually vote by proxy. And in practice the proxy vote has operated to strengthen the control of the management because of its advantageous position in soliciting proxies.[33]

Even if conversion does cause a significant change in the position of some shareholder groups, the majority should be able to prove sufficient justification and the offering of a fair equivalent if the plan was adopted in good faith. This could consist of a potential increase in earning power or some general public benefit, such as significantly increased protection to the savings investors. The latter would rarely occur in savings and loan association conversions since federal regulations provide no greater security than is true in most states.[34] Moreover, both the state and federal associations may become members of a Federal Home Loan Bank and the Federal Savings and Loan Insurance Corporation.[35] Therefore, in most instances, any justification must lie in the business advantages of the conversion.

It is frequently asserted that the word "Federal" in the name of an association is a business advantage in that it has a magical attraction, inspiring investor confidence. The generally better financial position of

33. BALLANTINE, CORPORATIONS 412 (3d ed. 1946). See Friedman, *Expenses of Corporate Proxy Contests,* 51 COL. L. REV. 951 (1951).

34. It is recognized that this observation cannot be supported by only a few facts, but by way of illustration there follow representative citations concerning the comparative reserve requirements and lending restrictions on real estate loans.

Reserve requirements. California: 10% of outstanding investment certificates, CAL. GEN. LAWS act 986, § 2.10 (Supp. 1949); Illinois: not less than five nor more than ten percent of profits until reserves amount to 7½% of dues capital, ILL. ANN. STAT. c. 145, § 31 (1947); Indiana: 3% of gross profits until 10% of total assets, IND. ANN. STAT. § 18-2122 (Burns Repl. 1950); Massachusetts: 1-5% of net profits until 10% of total liabilities, MASS. ANN. LAWS. c. 170, § 45 (1948); New York: 5% of net profits until 10% of capital or 50% of real estate whichever is higher, N.Y. BANKING LAW § 387; Ohio: 5% of net earnings until 10% of total assets, OHIO CODE ANN. § 687 (1938). Federal associations: 5% of net earnings until 10% of capital, 24 C.F.R. 144.1 (Supp. 1951).

Per cent of value of real estate on which mortgages may be made. California: 80%, CAL. GEN. LAWS act 986, § 910 (Supp. 1949); Indiana: 80%, IND. ANN. STAT. § 18-2125 (Burns Repl. 1950); New York: 60%, N.Y. BANKING LAW § 380; Massachusetts: 80%, MASS. ANN. LAWS c. 170, § 27 (1948); Ohio: 75%, OHIO CODE ANN. § 9657 (1938). Federal Associations: 80%, 24 C.F.R. 145.6-1 (Supp. 1951).

35. Membership in the Federal Savings and Loan Insurance Corporation is permissive with state associations and mandatory for federal associations. 48 STAT. 1285 (1934), as amended, 12 U.S.C. § 1726 (1946). The same is true regarding membership in the Federal Home Loan Bank. 47 STAT. 725 (1932), as amended, 12 U.S.C. § 1424 (1946).

the federal associations is cited in support of this theory.[36] However, it seems probable that the more aggressive management of the federal associations accounts for their great financial strength.[37] The name alone is seldom an important factor.

A possible justification and basis for the substitution of a satisfactory equivalent in the form of increased earnings is the greater flexibility of federal loan and reserve policies than those of some states.[38] Another is a conceivable increase in income available for distribution to shareholders following changes in the capital structure.[39] Although not a consideration when the *Opdyke* case was decided, the Internal Revenue Act of 1951 adds possible important tax advantages when conversion from an association with permanent shares is sought. The exemption from federal income tax of both state and federal associations was removed,[40] but specific allowances were made for deduction of dividends paid to mutual shareholders[41] and for bad debt reserves.[42] In addition, exemption from excess profits tax is granted to associations without capital stock.[43] Hence, upon conversion to a federal mutual association larger earnings may become available for distribution to those who previously held permanent stock.

The procedure utilized in the *Opdyke* case did not clearly reveal whether the management had good business reasons for converting, or was merely attempting to prevent an aggressive minority from gaining control of the association. It was simply established to the court's satisfaction that neither the reduction in the plaintiffs' voting power nor the value of the shares they were alloted in the federal association to replace their permanent stock was fraudulent or so grossly unfair as to constitute constructive fraud.

Failure to exact fairness to minority interests in charter conversions by savings and loan associations probably raises no serious constitutional question today despite the intimation in the *Cleary* case that arbitrary

36. Of the 5,980 associations which were doing business at the end of 1948, 1505 were federal associations and the remainder were state-chartered institutions. The former group accounted for $7.1 billion, or nearly 50%, of the $14.7 billion of the total assets of all associations. HOME LOAN BANK BOARD, 1946-1948 STATISTICAL SUMMARY, TABLE 4 (1949).

37. PARTEE, THE SAVINGS AND LOAN BUSINESS 71 (Unpublished thesis in the Indiana University School of Business Library, 1949).

38. See statutes cited in note 34 *supra*.

39. See Transcript of Record, *supra* note 32, at 208-211.

40. Revenue Act of 1951, § 313, 65 STAT. 490 (1951). See SEN. REP. No. 781, 82d Cong., 1st Sess. 26-29 (1951).

41. INT. REV. CODE § 23(r).

42. *Id.* § 23(k)(1).

43. *Id.* § 454.

changes in stockholder interests could violate due process.[44] However, the Home Owners Loan Act subjects these conversions to "such rules and regulations as the [Federal Home Loan Bank] Board may prescribe."[45] Presently, the Board exercises slight supervision over the manner in which interested groups are affected, and the dissenters in the *Opdyke* case were refused a hearing before approval of the plan of conversion by the Board.[46] However, a regulation specifies that nonwithdrawable shareholders must receive savings accounts equivalent to the value of their stock,[47] and the Board could well condition approval of future conversions upon the fairness of the plan of conversion to all concerned.

Adoption of the proposed standard of fairness to test all corporate charter amendments, as well as savings and loan conversions, would necessitate a clear revelation of the purpose behind a proposed change and thus facilitate critical evaluation. There would be increased assurance that the broad power of charter amendment and rechartering are employed only when beneficial to the corporation as a whole, and not for the selfish advantage of the group in control. And especially in regard to savings and loan associations, the security expectations of investors would be more adequately safeguarded. Finally, there can be no possible constitutional or statutory question of the equitable nature of the change if it can satisfy a requirement of fairness.

An unfair corporate charter revision should not be permitted merely because the dissenters may have the choice of forcing the corporation to purchase their shares under an appraisal statute. Such acts are intended to afford, not a complete remedy, but a privilege of withdrawal to those who for personal reasons do not wish to continue in the corporation.[48] Additionally, there is little warrant for compelling the minority to choose between withdrawing from a business in which it may have a considerable interest and being unfairly discriminated against. Similarly, interference with managerial business judgment resulting from a more stringent standard of review is not an unanswerable objection. Inasmuch as business judgment is exercised reasonably for the benefit

44. See note 7 *supra.*

45. 48 STAT. 132 (1933), as amended, 12 U.S.C. § 1464(i) (1946).

46. Transcript of Record, *supra* note 32, at 17, 22, 89, 267.

47. 24 C.F.R. 143.9(b)(4) (Supp. 1951).

48. Many states hold that appraisal is a privilege granted to dissenters, and the absence of appraisal statutes does not make the charter amendment unconstitutional. Beechwood Securities Corp. v. Associated Oil Co., 104 F.2d 537 (9th Cir. 1939); *In re* Interborough Consolidated Corp., 288 Fed. 334 (2nd Cir. 1923); Mayfield v. Alton R.R. Gas and Electric Co., 198 Ill. 582, 65 N.E. 100 (1902); Thompson v. Indiana Union Traction Co., 183 Ind. 690, 110 N.E. 121 (1915). *Contra:* Nice Ball Bearing Co. v. Mortgage Building and Loan Association, 310 Pa. 560, 166 Atl. 239 (1933).

of the corporation and all of its owners, little difficulty in justifying a charter amendment should be experienced.

A third, and perhaps more valid, criticism of adherence to a standard of fairness is the possible resulting increase in vexatious litigation against the corporation by opportunistic stockholders. The management logically might be more eager to settle such suits rather than suffer the expense and delay of litigation and the greater risk that the proposed change will be disallowed because of the closer judicial review. However, vexatious litigation is a danger whatever the standard of review, and the delay and expense which it engenders will be much the same. Requiring the plaintiff to show that the proposed charter is unfair to him before the corporation need prove justification and the offering of a fair equivalent would cause the early termination of completely unreasonable suits. In any event, legitimate dissenters should not be penalized merely to alleviate occasional perversions of the judicial process, especially since some remedies against mere contentiousness are available.

A party obtaining a temporary restraining order must post a bond sufficient to reimburse the one restrained for losses occasioned by the resulting delay, if the order should eventually prove to be unjustified.[49] Also, corporations may resort to the same tort remedies against vexatious litigation as are open to others. Most American jurisdictions permit an action in the nature of malicious prosecution to be maintained for unjustifiable civil proceedings resulting in actual damages.[50] A suit for abuse of process may be brought should the stockholder have reasonable grounds for his action, but has instituted it to attain some unjust end, such as a personal settlement.[51] The courts place a heavy burden upon plaintiffs in these actions to avoid discouraging adverse parties from legitimately testing their questionable rights,[52] and they are remedies seldom attempted by corporations. Nevertheless, it seems preferable to relegate business organizations to these devices rather than overlook abuses of the charter amendment and conversion powers.

49. *E.g.* FED. R. CIV. P. 65(c); ILL. ANN. STAT. c. 109, § 357 (1947); OHIO CODE ANN. § 11882 (1938); N.J. R. CIV. P. 3:65-4.

50. PROSSER, TORTS 866 (1941). In order to sustain such an action one must prove malice and lack of probable cause for bringing the action. Malice on the part of the dissenter may be a primary motive of ill will, lack of belief in the success of the action, or an attempt to obstruct for personal gain; but this may be inferred from lack of probable cause. *Id.* at 886-890.

51. *Id.* at 892.

52. *Id.* at 886. It is generally thought that the actions of abuse of process and wrongful civil proceedings should not be allowed by counterclaim. The deterrent to reasonable litigation outweighs procedural advantages. If counterclaims were allowed almost every complaint would be answered with a counterclaim for wrongful civil proceedings. See Note, 58 YALE L.J. 490 (1949).

While any extensions of judicial limitation on misuses of the charter amendment power is more likely to follow the fiduciary duty approach of the *Lebold* decision, charter conversions by savings and loan associations present an opportunity to institute a standard of fairness unhampered by the restraints of stare decisis. Minority investors will then be better safeguarded against discriminatory treatment and deprivation of their security expectations under the guise of managerial "business judgment."[53]

RIGHTS OF INTERIM CREDITORS UNDER CHAPTER XI OF THE BANKRUPTCY ACT

Federal bankruptcy legislation, continuously in effect since 1898, has played an important role in clearing the wreckage left by business failures. Following the havoc wrought by the depression during the early nineteen thirties, the emphasis has shifted from liquidation of insolvent firms to reorganization and rehabilitation. It is thought that greater benefit will inure, in the long run, to the debtor, his creditors, and the economic system if the organization is permitted to continue operation under a readjusted financial structure.[1]

An important segment of the Federal Bankruptcy Act implementing this restorative purpose is Chapter XI.[2] The Chapter provides machinery whereby embarrassed debtors, individual or corporate, may work out an arrangement with creditors.[3] The debtor alone may propose the plan of arrangement,[4] perhaps with the assistance of a creditors' committee.[5] After acceptance by the creditors, the plan must be submitted

53. Following this writing the Supreme Court of Ohio affirmed 4-2, the decision of the Court of Appeals. Opdyke v. Security Savings and Loan Ass'n, 105 N.E.2d 9 (Ohio 1952). The court confined itself largely to constitutional questions and held that the problems raised by the valuation of the shares and the change in voting rights were of fact and there was sufficient evidence for the courts below to find an absence of fraud. *Id.* 25-26. They held that a determination of violation of the contract clause need not be decided since the merger of another association with Security in 1943 constituted the formation of a new corporation subsequent to the statute granting the power to convert to a federal association.

1. See AMERICAN LAW INSTITUTE, BANKRUPTCY AND ARRANGEMENT PROCEEDINGS 1 (1951).

2. 11 U.S.C. §§ 701-799 (1946).

3. See Rickles, *Chapter XI Arrangements,* 55 COM. L.J. 173 (1950).

4. This should be contrasted with a Chapter X proceeding where the plan is generally instituted by the trustee or others such as a creditors' committee. 11 U.S.C. §§ 569, 570 (1946); AMERICAN LAW INSTITUTE, BANKRUPTCY AND ARRANGEMENT PROCEEDINGS 131 (1951).

5. The creditors' committee may act only in an advisory capacity since it is solely the function of the debtor to finally propose a satisfactory plan. The debtor must include a plan as part of his original petition. 11 U.S.C. § 723 (1946).