evidence showed no attempt to monopolize in fact, the possibility of it was sufficient to sustain a statute requiring ownership of theaters to be separated from the production of the films.[85] But this has been the limit of judicial tolerance; where the possibility of a monopoly was wholly lacking, a statute prohibiting a public utility from selling gas and electrical appliances has been held unconstitutional.[86] The Ohio provision thus necessarily falls without the area of judicial approbation, for its very purpose is to restrict rather than to enlarge the group engaged in selling motor cars. So long as courts continue to nurture the monopoly complex and to determine constitutionality in terms of the perspective it affords, so long will limitation formulae of the Ohio type, like those most recently proposed on analogy to utility control, remain in the shadow of the judges' guillotine.

HENRY M. THULLEN

CORPORATIONS

CORPORATIONS — AMENDMENTS TO ARTICLES — ABOLISHING ACCRUED DIVIDENDS — A POSSIBLE SOLUTION

In the unanimous opinion of the board of directors of the National Refining Company, payment in cash of the accrued dividends on its preferred stock would seriously impair the company's working capital. The board, therefore, submitted to its stockholders for approval an amendment providing for the issuance of a prior preferred stock with an option in the present preferred stockholders to exchange each share of their stock for one and one-third shares of the new prior preferred stock and three-fourths of a share of common stock. The amendment was approved by more than the required two-thirds vote of each class of the outstanding stock.

An action was brought by the dissenting minority holders of the preferred stock to enjoin the board of directors from putting into operation this amendment. The Court refused to grant the injunction. *Johnson* v. *Lamprecht*, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938).

By this decision the Supreme Court of Ohio has not only adopted the progressive view but has forged ahead on the trail that other states have solicitously tried to clear since the famous case of *Trustees of Dart-*

[85] *Paramount Pictures Inv.* v. *Langer*, 23 F. Supp. 890 (1938).

[86] *Capital Gas & Electric Co.* v. *Boynton*, 137 Kan. 717, 22 Pac. (2d) 958 (1933). Petition for certiorari was granted by the Supreme Court of the United States but later dismissed because of a procedural defect. *Boynton* v. *Hutchinson Gas Co.*, 292 U.S. 601, 78 L. Ed. 1464 (1934).

mouth College v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629 (1819), wherein it was decided that a charter was a contract between the corporation and the state that could not be impaired by legislative action in violation of Article I Section 10 of the Constitution of the United States which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts. . . . "

An escape from the patent rigidity of this decision was suggested by Mr. Justice Story who, in his concurring opinion, suggested that a state insert in every charter it granted a provision whereby it reserved the power to alter, amend, or repeal such charter or any provisions thereof, at will. Today there is no state which does not reserve to itself such power either by constitution or general statutory law.

In Article XIII Section 2 of the Ohio Constitution, Ohio has reserved to the General Assembly the power to alter or repeal the laws under which a corporation may be formed. This reserved power has been delegated to the corporation by sections 8623-14 and 8623-15 of the Ohio General Code.

Two lines of irreconcilable authority have developed concerning the power of a corporation to amend its articles solely by virtue of the reservation of such power to the state.

The strict view espoused by New Jersey in *Zabriskie* v. *Hackensack & N.Y.R. Co.*, 18 N.J. Eq. 178, 90 Am. Dec. 617 (1867), is to the effect that such reservation could not give a majority of the stockholders a power to alter or amend which had been reserved to the state; that "it was a reservation to the State, for the benefit of the public, to be exercised by the State only." This view is followed in a few states including Utah. *Garey* v. *St. Joe Mining Co.*, 32 Utah 497, 91 Pac. 369 (1807); but see *Salt Lake Automobile Co.* v. *Keith O'Brien Co.*, 45 Utah 218, 143 Pac. 1015 (1914). The basis of the decisions taking this view is the theory that the contract relations existing between the shareholders *inter sese* do not come within the contemplated scope of the power reserved to the state.

The broad view, which is founded on the postulate that a stockholder is bound by the rule of the majority when the corporate charter contains a stipulation that it is subject to amendment and alteration, is the view accepted by most courts. 7 FLETCHER, CYCLOPEDIA OF CORPORATIONS, perm. ed., sections 3695-3697. Such power is broad enough to give the corporation the right to alter the contract existing between it and the stockholders. It constitutes nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. *Durfee* v. *Old Colony R. Co.*, 5 Allen (87 Mass.) 230 (1862).

In Ohio the lower courts adopted the strict view. It was held in *Gerber* v. *American Seeding Co.*, 28 Ohio N.P. (N.S.) 20 (1930), that the power to alter and amend, reserved to the General Assembly, did not apply to contractual rights existing between corporations and their stockholders. This ruling was supported by a reference to *County of Santa Clara* v. *Southern Pacific R. Co.*, 18 Fed. 385 (1883), which in turn was based flatly on the New Jersey view.

Fortunately, the Court of Appeals in *Williams* v. *National Pump Co.*, 46 Ohio App. 427, 188 N.E. 756 (1933), reversed the lower court which had followed the *Gerber* case, *supra*. It held that the reservation to the state, by the constitution, and to the corporation by Ohio G.C. secs. 8623-14 and 8623-15, is an integral part of the stockholders contract and may be exercised by the corporation. By adopting the broad view the court placed Ohio in line with the majority and preserved for Ohio corporations a greater facility to meet economic demands of the day through desired changes in the capital structure. When a corporation is checked in its efforts to regiment its finances, by antiquated concepts, premature senility is forced upon it, and continued existence is often a lingering death.

In *Johnson* v. *Lamprecht* the articles of incorporation of the National Refining Co., contained the following provisions pertinent to the preferred stock:

"(2) The corporation shall not be at liberty, without consent in writing first obtained of the holders of 2/3 in amount of the preferred stock issued and outstanding—

"(a) To create or issue any other or further shares ranking in any respect *pari passu* with or in priority to the aforesaid issue of preference shares.

"(3) The said preference shares shall carry and be entitled to a fixed cumulative preferential dividend not to exceed 8% per annum on the par value thereof.

"If in any year dividends amounting to eight per centum (8%) per annum shall not be paid on such preferred stock, the deficiency shall be a charge on the net profits and be payable, but without any interest before any dividends shall be paid or set apart for the common stock."

Admitting that a corporation has the power to amend its articles and so affect the contract of the existing stockholders (Curran, *Minority Stockholders and the Amendment of Corporate Charters*, 32 Mich. L. Rev. 743; 1934) the issue remains: may a corporation so amend its articles as to divest the minority holders of the preferred stock of their

accrued, but undeclared, dividends? Stated in another way the problem is, how far may the corporation go in altering the contract existing between it and the stockholders?

It was the admitted purpose of the amendment in *Johnson* v. *Lamprecht* to eliminate payment of the accumulated and unpaid dividends on the preferred stock. In effect, though not in theory, the decision does eliminate such accumulated and unpaid dividends, for even though the holders under the amendment have the option of retaining their stock or of exchanging it for the proposed new issue, the stock which they hold is now second preferred and by contract their only right to preferential payment is to be paid before any payments are made to the common stockholders.

One of the leading cases on the problem involved here is *Morris* v. *Public Utilities Co.*, 14 Del. Ch. 136, 122 Atl. 696 (1923). After an extensive review of virtually all the authority the court concluded that in the issuance of new classes of prior preferred stock only a preference was involved, and this was clearly permitted by the Delaware Corporation Law. But the court refused to carry the broad view to the extent of its possible ramifications by refusing to allow an amendment to the articles which attempted to destroy the right of an objecting holder of preferred stock to accrued and unpaid dividends thereon.

Although the framers of the Delaware Corporation Law, as it existed at the time of the *Morris* case, had drafted it broadly enough to meet just such a situation as was presented in the *Morris* case, the court did not see it that way. In 1927, section 26 of the Delaware Corporation Law was amended to read that a Delaware corporation " . . . may, from time to time, when and as desired, amend its Certificate of Incorporation . . . by increasing or decreasing its authorized capital stock or reclassifying the same by changing the number, par value, designations, preferences, or relative participation, optional *or other special rights of the shares*. . . . " Del. Rev. Code (1935). The majority of the court in *Harr* v. *Pioneer Mechanical Corp.*, 65 Fed. (2d) 332 (1933), was convinced that the law as amended was broad enough to justify the abolition of the rights of the holders of the present preferred stock to receive accrued dividends before any dividends were paid on any other stock. Judge Learned Hand dissented. He felt that the decision in the *Morris* case was controlling in spite of the amendment.

It was not long thereafter, however, that the case of *Keller* v. *Wilson*, 190 Atl. 115 (Del. Ch., 1936), raised the same general problem in the Delaware Court. Again, in the face of the amended law the court followed the decision of the *Morris* case. It intimated that since

the corporation was formed prior to the amendment of 1927 the amendment could not have any effect on the contractual rights created at the time of incorporation. Apparently, the loophole which the court left for subsequent decisions was not substantial for when it had before it another case with the same problem it again followed the *Morris* case even though the corporation was created after the 1927 amendment. *Johnson* v. *Consolidated Film Industries*, 194 Atl. 844 (Del. Ch., 1937). It is submitted that under this broad statute the decision should have gone the other way.

If an amendment to the articles is such as to divest the holders of the preferred stock of a vested right it is invalid. *Morris* v. *Public Utilities Co., supra*; *Keller* v. *Wilson, supra*; *Johnson* v. *Consolidated Film Industries, supra*; *Louis Pronick* v. *Spirits Distributing Corp.*, 58 N.J. Eq. 97, 42 Atl. 586 (1899); *Gen'l Investment Co.* v. *American Hide and Leather Co.*, 97 N.J. Eq. 214, 127 Atl. 529 (1925), *Aff'd.* 98 N.J. Eq. 326, 129 Atl. 244 (1925). The consideration in the liberal decisions is no longer based on the "contract clause" of the Constitution of the United States but on the 14th amendment thereto, "No State shall . . . deprive any person of . . . property, without due process of law. . . . "

All courts will permit the alteration of mere preferences as distinguished from vested rights. *Morris* v. *Public Utilities Co., supra*; *Davis* v. *Louisville Gas & Electric Co.*, 16 Del. Ch. 157, 142 Atl. 654 (1928); *Pennington* v. *Commonwealth Hotel Construction Corp.*, 17 Del. Ch. 394, 155 Atl. 514 (1931); *Hinckley* v. *Schwarzschild & Sulzberger Co.*, 107 App. Div. 470, 95 N.Y.S. 357 (1905); *Breslav* v. *N. Y. & Queens Electric Light & Power Co.*, 249 App. Div. 181, 291 N.Y.S. 932 (1936), *Aff'd* w/o op. 273 N.Y. 593, 7 N.E. (2d) 708 (1937); *In re Kinney et al.*, 18 N.E. (2d) 645 (New York, 1939). What constitutes a vested right is the mooted question the answer to which is dependent upon the statutes of the state and the attitude of the court construing them.

Those courts which seek to delimit the class of vested rights have gone so far as to say, but not to hold, that the reserved power of the state gives the state the unqualified right to alter or amend the articles or confer upon the stockholders the right to do so, irrespective of the nature and character of the change involved. In short, all rights of the stockholder are made subservient to corporate needs. *Hinckley* v. *Schwarzschild & Sulzberger Co., supra.* A similar attitude was expressed in Delaware. *Davis* v. *Louisville Gas & Electric Co., supra.* Subsequent decisions in both states failed to carry out the expressions.

Breslav v. *N. Y. & Queens Electric Light & Power Co.*, *supra*; *Keller* v. *Wilson*, *supra*.

To the writers of THE MODERN CORPORATION AND PRIVATE PROPERTY (Berle and Means) such a policy is apparently not socially desirable. They seem to be unduly solicitous of the possible harm and injustice that will inure to the rights of the minority stockholders. With all due respect to the opinion of the authors, it is submitted that the possible injury to the minority stockholders will be more than compensated by the increased benefits to the corporation, its creditors, and those dependent upon it. For the benefit of the corporation a dissenting minority of the stockholders should not have the power to enjoin a necessary and desirable amendment.

The Ohio General Corporation Act which was adopted in 1927 was based on the contractual theory with regard to the rights and relationship of the stockholder to the corporation. Dodd, *Amendment of Corporate Articles under the New Ohio General Corporation Act* (1930) 4 Univ. of Cincinnati L. Rev. 129. The spirit to be drawn from its broad provisions is not unlike that of the Delaware Corporation Law. It was the intention of the framers to give great latitude to the corporations in altering the capital structure to meet economic demands. *Johnson* v. *Lamprecht*, *supra*, was properly decided in accord with the desired effect of the Ohio act.

With the decision of the principal case at hand, counsel and corporate directors may well speculate as to the extent of the changes contemplated as being within the scope of the decision. The action of a majority of the stockholders in changing preferred stock into common stock was upheld in Ohio. *Williams* v. *National Pump Corp.*, *supra*. Conversely, paragraph (f) of section 14 of the Ohio Corporation Act would seem to be broad enough to permit the change of common stock into preferred stock. With a statute quite as broad, New Jersey, following its commitment to the strict view, refused to sanction a change of common stock into preferred. *Grausman* v. *Porto-Rican American Tobacco Co.*, 95 N.J. Eq. 155, 121 Atl. 895 (1923), *Aff'd* 95 N.J. Eq. 223, 122 Atl. 815 (1923).

In the course of the opinion in the principal case, the court held that the minority dissenting preferred stockholders were at liberty to retain their present preferred stock on the *same terms* and conditions as they now held it, thus emphasizing the fact that no rights were invaded. Later, in discussing the right of dissenting shareholders to ask for an appraisal of their stock under section 72 of the Ohio General Corporation Act, the court held that the stockholders have a right to ask for

appraisal if the purpose of the amendment is to change the *express* terms and provisions of any of the outstanding shares having preference in dividend, redemption price, or liquidation price over any other class of shares and implied that the express terms had been varied so as to warrant appraisal under said section.

It is submitted that the court was inconsistent in holding that the stockholders might both retain the stock upon the same terms or consider the express terms varied by the amendment so as to justify an appraisal. Having cautiously maneuvered the amendment through the labyrinth of the provisions pertinent to the preferred stock as heretofore set out, the court left little doubt as to the fact that no vested interest, preferences, or other rights of the dissenting prefered stockholders had been violated. Thus it would seem that *ipso facto* no express terms could have been varied. It is submitted that section 72 should not have been held applicable. Perhaps the court was straining the point in order to avert the possibility of future litigation in deference to Professor Dodd, *supra*, who suggested that a literal construction of "express terms" as defined in section 4 of the Ohio General Corporation Act would narrow the rights of appraisal and result in much litigation. See Senate Bill 47 section 8623 (8) which reads: "The term 'express terms and provisions' with reference to a class of shares means only the statements expressed in the articles with respect thereto."

In conclusion it is significant to note that the Ohio State Bar Association Committee on Corporation Law in its December 26, 1938 report on proposed amendments to the General Corporation Act deemed it necessary to include provisions specifically providing for the power to eliminate accrued, undeclared, cumulative dividends and also for the right of appraisal of shares where the accrued dividends on preferred shares are eliminated by such amendment to the articles. (See Senate Bill No. 47, 93rd General Assembly, Regular Session, 1939-1940).

ARTHUR E. ORLEAN

CRIMINAL LAW

CRIMINAL LAW — SPRING GUN, LIABILITY FOR USE OF

To prevent repetition of a destructive forage on his melon patch, defendant concealed two spring guns on his land, one at each end of the patch. One Wagoner, attempting to repeat a prior sortie, touched a wire and received numerous body wounds. An indictment under Section 12420 of the Ohio General Code, shooting with intent to wound,