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AMENDMENT OF CORPORATE CHARTERS

In 1819, the United States Supreme Court in Dartmouth College v. Woodward\(^1\) declared that a charter granted by a state to a corporation is a contract; that any attempt by the legislature to amend or repeal that charter is an impairment of the obligation of contracts forbidden by the Federal Constitution.\(^2\) In his concurring opinion, Mr. Justice Story advised that this result might be obviated by the states’ reserving power to amend or repeal.\(^3\) The states have taken his advice by reservations in the charter itself,\(^4\) in general statutes,\(^5\) or in the state constitutions.\(^6\)

\(^1\) 17 U. S. 518, 4 L. ed. 629 (1819).
\(^3\) 17 U. S. 518, 712, 4 L. ed. 629 (1819).
"As it rests in the legislative will to repeal the charter of a corporation and destroy its life, so it may prescribe such conditions as it chooses to the continued enjoyment of its franchise. It is readily seen that by means of this control, the legislature may regulate any and all affairs of a corporation through the simple medium of conditioning its right to exist as a corporation."

Although some cases⁷ seem to bear out this observation, it is generally admitted that there are limits to the states' amendatory rights,⁸ more particularly the states' rights to endow the majority of stockholders in a corporation with the power to effect changes binding on a dissenting minority. These limits, however, are hazy. Several tests have been laid down, but applying them to almost any state of facts, at first instance, one may reach whichever conclusion he favors. These tests might be classed: the "public policy" test, the "fundamental change" test, and the "vested rights" test.⁹ It may be seen that these tests are in fact incidents of due process, which is the ultimate test; for whereas the "Dartmouth College clauses"¹⁰ remove the prohibition against the impairment of contracts, they do not affect the protection of the due process clause.¹¹

In Hinkley v. Schwartzchild & Sulzberger Co.,¹² the New York court collates the decisions of its own and other courts on the subject of amendments and from these evolves the rule that although there is a limit to the states' power to amend, a state may empower any amendment which is necessary for the public good. Applying its test to the set of facts before it, the court held that two-thirds of the stockholders could change the financial set-up of the corporation although the law at the time the corporation was formed required unanimous vote to effect this type of change. The court felt that the statute authorizing the amendment evidenced the state's policy to promote corporate purposes, enhance their welfare and extend their businesses; that methods of financing came within this policy. This principle is applied and broadened

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¹⁰ Looker v. Maynard, 179 U. S. 46, 52, 21 S. Ct. 21 (1900).
¹¹ Savings clauses adopted after the Dartmouth College case.
by the Delaware court\textsuperscript{14} to include all amendments authorized by
general statutes, reasoning that the state by dealing with the sub-
ject by statute, rather than by leaving it to the corporation, im-
pliedly decides what is to the best public interest. In Keller v. Wil-
son,\textsuperscript{15} the Delaware court stems the tide by pointing out that the
state is also interested in protecting the rights of minority stock-
holders. Two questions arise from these decisions that leave this
paternal approach a rationalization rather than a test. What is the
public policy? And what affects public rather than private inter-
ests?

The case establishing the fundamental change test is the Eng-
lish partnership case of Natusch v. Irving,\textsuperscript{16} in which a holder of a
£150 interest in a £5,000,000 partnership was permitted to enjoin
a life and fire insurance company from going into the marine in-
surance business. The change was attempted after a prohibition
on partnerships to write marine insurance had been removed. The
court said that the statute was permissive only. The complainant
had bought an interest in a comparatively safe investment. His
interest was not to be forced out or endangered by a change in the
purpose of the company. The American cases\textsuperscript{17} say that no change
may be effected under the reserved right to amend or repeal that
would change the fundamental purpose of the corporation. Courts
disagree as to what constitutes a fundamental change.\textsuperscript{18}

A series of Delaware cases dealing with cumulative dividends
illustrates the vested rights doctrine. What is a vested right has
always been a "puzzler."\textsuperscript{19} "The tendency of the courts to dis-
cover a vested right has varied directly with the practical impor-

\textsuperscript{14} Davis v. Louisville G. & E. Co., 16 Del. Ch. 157, 142 Atl. 654 (1928).
\textsuperscript{15} 190 Atl. 115 (Del. 1936).
\textsuperscript{16} Gow, Partnership (2d ed. 1830) 576.
\textsuperscript{17} Germer v. Oil & Gas Co., 60 W. Va. 143, 54 S. E. 509, 522 (1906) (dis-
sent); Looker v. Maynard, 179 U. S. 46, 52, 21 S. Ct. 21 (1900); Berea Col-
\textsuperscript{18} Consolidation: fundamental change: 3 COOK, CORPORATIONS (8th ed.
1923) § 671; Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac.
Mass. 230 (1863). Change in capital stock: held fundamental change: Randle
Schwartzchild & S. Co., 107 App. Div. 470, 95 N. Y. S. 357 (1908); Whatman
\textsuperscript{19} Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696
(1923) holds right to accrued cumulative dividends vested right. Harr v.
932 (1936) finds vested right to have stock remain uncancellable because can
find no case which holds otherwise.
tance of the interest destroyed by the alteration and inversely with
the advantage of the change.220 Morris v. American Public Utilities21 established that accrued unpaid dividends are a debt between
stockholders and therefore are a vested right which cannot be
divested by amendment. Succeeding cases deal with the effect of
the 1927 amendment to section 26 of the Delaware corporation law23 on
this holding. The statute provides for changes in preferences, participation, or any other special rights of stocks. The federal
court23 and the lower Delaware court24 held the Morris case over-rulled by the statute. These cases would lead to the result that all
rights are defeasible since each person takes rights in a corporation
knowing that they are subject to being divested. Keller v. Wilson26
disagrees with that conclusion, holding that the statute was not
meant to get around the Morris case, and if it were, it was uncon-stitutional to the extent that it purported to affect rights vested be-
fore it was passed. A similar case,28 concerning a corporation
formed after the 1927 amendment, came to the Delaware Chan-
cellor in 1937. He applied the Keller case notwithstanding. The
upper court refused to pass upon the applicability of the Keller
case, dismissing the appeal on a procedural consideration.

West Virginia by liberalizing her laws to conform with the
corporation code of Delaware,27 has opened her courts to this type
of litigation. The stand our court takes on this question will no
doubt have a great deal to do with whether or not the state will
draw corporate business. On the one hand there is the consider-
ation that minority stockholders are today predominantly small
investors.28 They know nothing of corporate finance. Therefore,
courts should not allow such amendments as would hazard or de-
preciate the value of stocks owned by these investors. On the other
hand is the warning uttered by the federal court in Harr v. Pioneer
Mechanical Corporation,29 let he who takes advantage of the Dela-

20 Note (1931) 31 Col. L. Rev. 1163.
22 34 Del. Laws, c. 34, art. 112, § 7. See W. VA. REV. CODE (Michie, 1937)
c. 31, art. 1, § 11.
24 Keller v. Wilson, 180 Atl. 584 (Del. Ch. 1935).
25 190 Atl. 115 (Del. 1936).
27 Committee’s note, W. VA. REV. CODE (Michie, 1937) c. 31, art. 1, § 11.
28 STEVENS, CORPORATIONS (1936) 453.
29 65 F. (2d) 332 (C. C. A. 2d, 1933).
ware corporation laws take heed of its burdens. To base limitations on power of amendment on the latter principle would be to penalize stockholders for the sins of the corporation, for the average investor does not investigate the laws of the incorporating state.

F. W. L.

DERIVATIVE STOCKHOLDER'S SUITS
IN WEST VIRGINIA

Our courts have shown no inclination to depart from the rules laid down by the cases which are generally recognized as authority in this country. Statutes have played little or no part in the development of this topic in West Virginia, and it is probable that a consultation of the leading texts\(^1\) will give as accurate a picture of the future position of the court as any case study. The chief difficulty lies in the fact that the subject of stockholder's suits, while very important, is not a very controversial one, and where the authorities split we are as likely to follow one side as the other, and it is not easy to make a prediction in these cases on the basis of a general attitude or trend.

There are about a dozen leading cases in this state, a study of which will perhaps help to clarify the general outlines of the subject, and to determine our court's probable approach to any new problem in it.

1. **Who May Sue.** If the suit involves dissolution of the corporation not less than one-fifth in interest of the stockholders must sue under our statute,\(^2\) but a receiver may be appointed for sufficient cause at the suit of any stockholder. In general it seems

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1. *Fletcher, Cyclopedia of the Law of Private Corporations* (Rev. ed. 1931); *Thompson, Corporations* (3rd ed. 1927); *Cook, Corporations* (8th ed. 1933). These texts are cited in almost all the West Virginia cases on stockholder's suits.


3. *W. Va. Rev. Code* (1931) c. 31, art. 1, § 82. See also on the appointment of receivers for corporations, *id.* c. 56, art. 6, §§ 1, 2.