

1969

Book Reviews

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Recommended Citation

Morris Ploscowe, *Book Reviews*, 38 Fordham L. Rev. 143 (1969).
Available at: <http://ir.lawnet.fordham.edu/flr/vol38/iss1/17>

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BOOKS REVIEWED

The Crime War. By Robert M. Cipes. New York: The New American Library. 1968. Pp. xiv, 207. \$5.50.

It is a little difficult for me to sympathetically review a book that does not admit that there is a real problem of crime in the streets, especially since my wife was mugged while I was attending a crime conference at New York University. Nevertheless, I shall try to be as objective as possible in dealing with Cipes' *The Crime War*.

This is a small book of 190 pages (with another 17 pages devoted to bibliography and index), yet within these 190 pages, Cipes covers a multitude of subjects. He deflates the crime wave, sees little use in crime commissions, criticizes vice and vagrancy laws, defends the Miranda Rule against law enforcement attacks, lashes out at prosecutors who make headlines and become headline hunters, damns the press for not showing more restraint in dealing with crime news, and professes to be shocked by the widespread use of informers by law enforcement agencies. Furthermore, the author finds no justice in the lower criminal courts, sheds tears over the "captives of the crime war" who are victims of an obsolescent penal and correctional system, detects a sour note in Gideon's trumpet, in the abuses of the adversary system of criminal trials and the Kangaroo Court, and pre-Gault juvenile court proceedings.

Cipes has not written a scholarly work. He has written an angry book—a book of polemics. He is simply mad at many things which are wrong with our criminal justice system and our methods of controlling crime. However, the evils which have stirred the wrath of Cipes have been around for a long time and change does not come easily. Nevertheless, one sometimes needs hot words much more than scholarship to bring about changes. Tom Paine would have been a forgotten pedant had he turned out scholarly articles on the causes of American unrest during the reign of George III.

Nevertheless, Cipes would be more effective in bringing about changes if he would plough each subject deeper, analyze his evidence more carefully and come up with concrete remedies for old evils. The love of humanity expressed in his last paragraph is not enough to alter a creaking, antiquated system of law enforcement and criminal justice:

America is facing a crisis in distribution—not simply of material goods but also of human and legal rights. We have inflated the importance of due process in a limited class of cases, while neglecting the massive needs of others. What is needed is a radical revision of social priorities. There is something terribly wrong with a system which shows a humane facade, while it sweeps its ugly problems under the rug—which in the juvenile court, for example, "saves" people from punishment by finding them "delinquent" and then commits them to institutions where there are no facilities to treat them; a system which gets a defendant "off" only to send him back into the revolving door of despair. This is the sour note on Gideon's trumpet.¹

Assuming all this is true, where do you go from there Mr. Cipes?

MORRIS PLOSCOWE*

1. R. Cipes, *The Crime War* 190 (1968).

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Corporate Practice. By Carlos L. Israels. New York: Practising Law Institute. 2d Edition 1969. Pp. v, 811. \$25.00.†

Envy is, or at least until recently was (one can never be sure nowadays), one of the seven deadly sins. I must confess to years of guilt of this sin with regard to Carlos Israels' work.

I never met Mr. Israels, but I first encountered his work many years ago, when, as a young lawyer with a corporations problem, I turned to one of the monograph predecessors of this last volume. I was especially impressed by the forms he included. I am even more impressed by those set forth in the new edition. Most practitioners who purchase the book will probably find these (which take up about a quarter of the book) to be the most valuable part of the work. They include a shareholder's agreement, an employment contract, a certificate of incorporation, by-laws, forms for the organization and annual meetings of shareholders, an amendment of the certificate, merger papers, forms for the financial disclosure required on certain distributions to the shareholders under the New York law, and a certificate of dissolution. Alternate provisions are, of course, included where appropriate to meet the needs of different business bargains.

Both text discussion and forms are in terms of the New York and the revised Delaware statute. The text is largely devoted to an exposition of the statutes of these two states. While a mere summary of the statutes would have been justified, since statutes (and corporation laws are hardly an exception) are difficult to read and can always profit by clarification, Mr. Israels went far beyond a mere summary of the statutes. He treated them functionally as they impinge on the various problems in setting up, running (corporate "housekeeping" is his apt phrase), and changing (through amendment of the certificate, merger, consolidation or sale of assets) the business entity. Chapters on special problems, *e.g.*, accounting, derivative actions, and the impact of the federal securities laws are also included.

Because of the emphasis on New York and Delaware law, the book will be of greatest utility to lawyers from those states. However, since Delaware is still *the* state for incorporating "public issue" corporations, *i.e.*, those intending to market their securities nationwide, the book will obviously also be of interest to lawyers for those corporations in every state. Naturally, a discussion of the individual statutes of each of the states would have been impossible in a book of this size. However, the one other important statute is given rather extensive treatment: a seventy-two page appendix, prepared by Professor Ernest L. Folk III of the University of Virginia (who served as consultant to the revisers of the Delaware statute) compares, in tabular form, the significant provisions of the New York and Delaware statutes with those of the Model Business Corporation Act (1966 revision). The Model Act, proposed by the Committee on Corporate Laws (Section of Corporation, Banking and Business Law) of the

† This review was written before the reviewer learned of Mr. Israels' death. The reviewer hopes that, under the circumstances, his levity will be excused by the members of the corporate bar who, with the reviewer, will sorely feel the loss of Mr. Israels.

American Bar Association has been substantially enacted by twenty states, and has had an effect, varying in degree, on a number of other states' revisions. Accordingly, by adding this comparison with the Model Act, the book is given a nationwide significance.

Taken together, then, the text and forms provide a complete guide to the practitioner in the solution of his practical corporate problems. He can acquire the background from the text and find the language to implement the indicated decision in the forms. This, of course, is exactly what the practitioner wants.

I could continue this praise, and, personally, I am inclined to do so, but the author of a book review is expected to point out defects in the work. There are two reasons for doing so: (1) to prove how clever the book reviewer is, and (2) to prove that he has read the book. I tried very hard to do what was expected of me. Unfortunately, I could only come up with a few typographical errors and a couple of minor differences of opinion with the author. Since it is *de rigueur* that I do so, I shall set them forth (from widely separated parts of the book, as further proof of (2)).

At one point the printer has not set the cumulative voting formula correctly.¹ Elsewhere reference is made to the "Uniform Act for the Registration of Fiduciary Security Transfers."² I believe "Registration" should read "Simplification." In a third location, introductory language to paragraph two of the shareholders' agreement form has been omitted.³ There are of course other typographical errors, as in every book, but they are not even as serious as these.

As to differences with the author: Mr. Israels suggests that the irrevocable proxy device can be used as a substitute for a voting trust to avoid problems with a Subchapter S tax election.⁴ Although I hope the ruling does not stand up, an irrevocable proxy would not seem safe in view of Revenue Ruling 63-226⁵ where the participants want to utilize that special tax treatment. I am also not sure that Delaware would protect a director elected by cumulative voting from removal by a mere majority of the shareholders, as Mr. Israels suggests.⁶

As you can see, I've had to dig pretty deeply to find anything to complain about. I think you'll have just as much trouble. The Director of the Practicing Law Institute, publisher of the book, stated in the forward:

1. C. Israels, *Corporate Practice* 154 (2d ed. 1969) [hereinafter cited as C. Israels]. The dots should be a solid bar, since the number of shares present multiplied by the number of directors to be elected must be divided by the number of directors to be elected plus one.

2. *Id.* at 285. Another typographical error is the omission of the phrase "or fraudulent" from the statutory quote of N.Y. Bus. Corp. Law § 623(k) (1963). *Id.* at 427.

3. C. Israels at 473. Presumably this agreement should read something like this: "2. The shareholders each hereby subscribe for and agree to purchase the following numbers of shares of the corporation at \$100 per share for the preferred shares and \$1 per share for the common shares: . . ." C. Israels & X. Gorman, *Corporate Practice* 93 (1962).

4. C. Israels at 104.

5. 1962-63 Cum. Bul. 341.

6. C. Israels at 155 n.35. But see *Campbell v. Loew's, Inc.*, 36 Del. Chanc. 563, 134 A.2d 852 (1957).

[T]his book, the Institute believes, will be of value to lawyers in every state in the union. It places at the fingertips of all such lawyers the analysis, guidance and techniques of a truly skilled practitioner in that field.

I wholeheartedly concur.

ROBERT A. KESSLER*

New York Close Corporations. By Robert A. Kessler. Mundelein, Ill.: Callaghan & Company, 1968. Pp. xii, 654. \$37.50.

New York Close Corporations by Professor Robert A. Kessler,¹ of the Fordham University School of Law, most adequately fills a gap in the reference libraries of both corporation lawyers and general practitioners which has existed since September 1, 1963, the effective date of the New York Business Corporation Law.

"Close corporations,"² for more than a century of American corporate statutes, have been the neglected stepchild of our corporate system. All of the state corporate statutes until 1955 imposed essentially the same basic "statutory norms" for all business corporations. Shareholders, having one vote per share, had two primary management functions: (1) to elect by plurality vote from their number at least three directors at a shareholders' meeting; and (2) to approve by a larger prescribed vote, usually two-thirds, extraordinary corporate matters such as amendments of the certificate of incorporation, dissolution, etc. Management was vested by the statute—not by the shareholders—in the board of directors, which acted by majority quorum and per capita vote at a board meeting. Two of the board's primary functions were (1) to appoint, remove, and supervise the officers who then executed the policies set by the board; and (2) to declare dividends for the shareholders.

The result was that close corporations had to be formed, operated, and dissolved under the same paradigm as larger corporations whose shares were publicly issued and traded. Furthermore, there was little room for variations from state to state. Most of the leading cases arose in New York,³ but these

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1. Professor Kessler's credentials are impressive. For more than ten years he has taught corporation law and written extensively on the subject. He served as a consultant to the New York State Joint Legislative Committee to Study Revision of the Corporation Laws, from which the New York Business Corporation Law emerged.

2. "[A] close corporation is every corporation other than a 'public issue' one. Although some very large corporations are close corporations under this definition, the vast majority are also small financially, or at least start that way." R. Kessler, *New York Close Corporations* 1-2 (1968) [hereinafter cited as R. Kessler].

3. E.g., *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d 633 (1948) (New Jersey corporation); *Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 60 N.E.2d 829 (1945) (New York corporation); *Clark v. Dodge*, 269 N.Y. 410, 199 N.E. 641 (1936) (New Jersey corporation); *McQuade v. Stoneham*, 263 N.Y. 323, 189 N.E.

precedents—which allowed only slight impingement on the “statutory norms”—were respectfully cited by the courts of other jurisdictions.⁴ Thus, textwriters and commentators could easily approach the subject of close corporations almost as a matter of national law, discussing the judicial gloss on relatively uniform “statutory norms.”⁵

North Carolina, in 1955, was the first to change its “statutory norms” to permit close corporations to function more like partnerships.⁶ New York, after several years of research and drafting, passed its new Business Corporation Law in 1961, effective in 1963. This legislation was more innovative, with the most comprehensive statutory provisions available for close corporations.⁷ Subsequently, Florida,⁸ South Carolina,⁹ Maryland,¹⁰ Delaware,¹¹ and other states,¹²

234 (1934) (New Jersey corporation); *Manson v. Curtis*, 223 N.Y. 313, 119 N.E. 559 (1918) (New York corporation). Delaware had two landmark cases involving large business corporations: *Abercrombie v. Davies*, 36 Del. Ch. 371, 130 A.2d 338 (Sup. Ct. 1957), modifying 36 Del. Ch. 102, 125 A.2d 588, 35 Del. Ch. 599, 123 A.2d 893 (Ch. 1956), on remand, 36 Del. Ch. 445, 131 A.2d 822 (Ch. 1957). The only significant case in a jurisdiction with a corporate statute like the Model Business Corporation Act did not arise until 1964. See *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). See also *Galler v. Galler*, 95 Ill. App. 2d 340, 238 N.E.2d 274 (1968); *Galler v. Galler*, 69 Ill. App. 2d 397, 217 N.E.2d 111 (1966).

4. See, e.g., *Abercrombie v. Davies*, 36 Del. Ch. 371, 130 A.2d 338 (Sup. Ct. 1957); *Galler v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964).

5. See F. O’Neal, *Close Corporations: Law and Practice* (1958). This two volume work, supplemented by cumulative annual pocket parts, contains substantial materials republished with modifications. See *id.* at vi-vii.

6. N.C. Gen. Stat. §§ 55-16(c), -24(a), -27(f), -28(d), -29, -53(e), -63, -64(d), -65(a), -66(b), -73(b), -125(a) (1955). The Act has a very academic flavor and style. See Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C. L. Rev. 432 (1956).

7. N.Y. Bus. Corp. Law §§ 401, 402(b), 404, 514, 609(f)(5), 615, 617, 618, 706, 707, 715, 716, 1002, 1104, 1111 (1963); N.Y. Bus. Corp. Law §§ 616, 620, 630, 701, 709 (Supp. 1968). See Henn, Checklist 9—Close Corporations, in *N.Y. Bus. Corp. Law App. 4*, at 626-35 (1963); Hoffman, *New Horizons for the Close Corporation in New York Under Its New Business Corporation Law*, 28 Brooklyn L. Rev. 1 (1961); Stevens, *Close Corporations and the New York Business Corporation Law of 1961*, 11 Buffalo L. Rev. 481 (1962). See also Macchiarola, *The Close Corporation and the New York Business Corporation Law—After Five Years*, 6 Am. Bus. L.J. 655 (1968).

8. Fla. Stat. Ann. §§ 608.0100-0107 (Supp. 1969); see Dickson, *The Florida Close Corporation Act: An Experiment That Failed*, 21 U. Miami L. Rev. 842 (1967); Comment, *Statutory Recognition of the Close Corporation in Florida*, 16 U. Fla. L. Rev. 569 (1964); Note, 77 Harv. L. Rev. 1551 (1964).

9. S.C. Code Ann. §§ 12-16.8, -16.10, -16.14(f)(5), -16.15, -16.16, -16.18, -16.22, -18.1, -18.3, -18.10, -18.12, -18.13, -22.14 (1962, eff. 1964); see Myers, Part I—*The Close Corporation Under the New South Carolina Corporation Law*, 16 S.C. L. Rev. 577 (1964). This reviewer was unable to find Part II.

10. Md. Ann. Code art. 23, §§ 100-11 (1957, as amended, Supp. 1968); see Bradley, *Comparative Evaluation of the Delaware and Maryland Close Corporation Statutes, 1968 Duke L.J.* 525; Hall, *The New Maryland Close Corporation Law*, 27 Md. L. Rev. 341 (1967).

11. Del. Code Ann., tit. 8, §§ 101(a), 102(b)(4), 103(a)(2)(iv), 103(c), 141(b),

enacted special provisions for close corporations, but these did not follow specifically the New York provisions.¹³

Generalized national treatment of close corporations obviously is no longer sufficient in New York,¹⁴ which accounts for some one-fifth of business corporations. The need for an adequate exegesis on the New York statutory provisions was beyond question. And equally beyond question, the need is well filled by Professor Kessler's functional, problem-oriented manual.

The manual comprises more than 650 pages: 18 chapters (565 pages);¹⁵ four appendices (56 pages);¹⁶ a table of New York statutes;¹⁷ a table of

(f), (i), 142(a), 202, 212(c), 218(c), 226(a)(1)-(3), 228, 242(d)(4), 273, 341-55 (1967) (as amended 1968). See S. Arshat & W. Stapleton, *Analysis of the New Delaware Corporation Law* 343-45 (1967); E. Folk, *Amendments to the Delaware General Corporation Law* (Effective July 15, 1969) and *Technical Amendments Act* (Effective Jan. 2, 1968); E. Folk, *The Red Book Digest of the New Delaware Corporation Law—1967* at 43-48 (45th ed. 1968); Arshat & Stapleton, *Delaware's New General Corporation Law; Substantive Changes*, 23 *Bus. Law.* 75, 82-84, 90-93 (1967); Comment, *Delaware's Close Corporation Statute*, 63 *Nw. U.L. Rev.* 230 (1968).

12. See, e.g., Bowman, *An Introduction to the New Georgia Corporation Law*, 4 *Ga. St. B.J.* 419, 444-47 (1968); Comment, *Part I—The Close Corporation Comes of Age in Pennsylvania: Article III, Chapter B of the Business Corporation Law*, 73 *Dick. L. Rev.* 273 (1969).

13. So widespread is the trend in favor of statutory accommodation of the special problems of the close corporation that a section in this reviewer's text on corporation law captioned "Lack of Statutory Differentiation" in the 1961 first edition is being entitled "Statutory Differentiation" in the second edition scheduled for early 1970 publication. See H. Henn, *Law of Corporations and Other Business Enterprises* § 259 (1961).

14. See note 5 *supra*.

15. Chapter 1—Introduction (8 pp.); Chapter 2—What To Do When the Client Enters the Office (9 pp.); Chapter 3—To Be or Not To Be a Corporation (10 pp.); Chapter 4—Outline of Taxes, Fees, and Costs of Carrying on Business in Corporate Form (7 pp.); Chapter 5—Setting Up the Corporation (97 pp.), republished in modified form in Kessler, note 21 *infra*; Chapter 6—Preincorporation Contracts (15 pp.), modified from Kessler, note 22 *infra*; Chapter 7—Skeleton of Close Corporation Provisions of the BCL (32 pp.); Chapter 8—Shareholder Agreements (69 pp.), reproduced from Kessler, note 26 *infra*; Chapter 9—Share Transfer Restrictions (38 pp.); Chapter 10—A Close Corporation Checklist for Drafting the Certificate of Incorporation Under the New York Business Corporation Law (23 pp.), modified from Kessler, note 29 *infra*; Chapter 11—The Purpose Clause (14 pp.); Chapter 12—Certificate of Incorporation for a New York Close Corporation: A Form (53 pp.), reproduced from Kessler, note 31 *infra*; Chapter 13—Bylaws for a New York Close Corporation (56 pp.); Chapter 14—The One-Man Corporation (19 pp.); Chapter 15—Resolving Disputes (12 pp.); Chapter 16—Arbitration of Intracorporate Disputes Under New York Laws (43 pp.), modified from Kessler, note 36 *infra*; Chapter 17—Tax Pitfalls (42 pp.); Chapter 18—Securities Laws Problems (18 pp.).

16. Appendix I—Subchapter S Tax—IRS Forms and Instructions (29 pp.); Appendix II—New York State Corporation Tax Return (2 pp.); Appendix III—Commercial Arbitration Rules of the American Arbitration Association, as Amended and in Effect, June 1, 1964 (12 pp.); Appendix IV—State of New York Department of State, Division of Corporations and State Records, Bureau of Corporations—Rules and Regulations (5 pp.). Since most business corporations are close corporations and only some 180,000 of the some 1,500,000 filing corporations have elected Subchapter S, the omission of forms, etc., for non-electing

Internal Revenue Code sections, regulations and rulings;¹⁸ a table of cases;¹⁹ and an index.²⁰

After a short introductory paragraph, the attorney is told "what to do when the client enters the office." After reference to the amenities and mundane concern over the attorney's fee—without any mention of how to calculate it—the advice is to avoid representing parties with potential conflicts of interest, gather the facts, obtain other information and prepare any necessary documents. If such advice from an academic lawyer to a practicing lawyer seems supererogatory, the discussion is blissfully brief.

To be or not to be a corporation is the concisely covered topic of Chapter 3. Then follows another short chapter containing an outline of taxes, fees, and costs of carrying on business in corporate form.

Chapter 5, entitled "Setting Up the Corporation," surveys financial structure aspects, and then concentrates on acquiring business run as a corporation, partnership, and sole proprietorship, respectively. Included are forms of agreements for purchase of assets and for sale of shares.²¹

corporations is disappointing. See note 39 *infra*. Quare: why the New York Rules and Regulations are "Reproduced with the Approval of Secretary of State John P. Lomenzo"?

17. Including not only the New Business Corporation Law, but the New York Banking, Cooperative Corporations, Education, Executive, General Business, General Construction, General Corporation (superseded), Insurance, Judiciary, Labor, Membership Corporation, Partnership, Personal Property, Railroad, Real Property, Penal, Social Services, former Stock Corporation, Tax, Transportation Corporations, and Workmen's Compensation Laws; former Civil Practice Act; Civil Practice Law and Rules; Uniform Commercial Code; and New York City Administrative Code.

18. Most of the Internal Revenue Code sections so listed are quoted verbatim in the footnotes to the text. See note 40 *infra*.

19. Of the some 275 cases listed, nearly all of the corporation law cases predate the New York Business Corporation Law. Many are out-of-state cases. Federal cases, especially those under the Federal Securities Act of 1933 and Federal Securities Exchange Act of 1934, are, of course, included. See text accompanying notes 41-44 *infra*.

20. The 12 page index contains some 300 entries, keyed to section numbers. The entries are not nearly as specific as they should be. The index directs the user to the sections of principal coverage of a topic which sections include cross-references to subsidiary discussions within the context of the principal coverage of other topics—a satisfactory technique to include repetitious treatments (see note 54 *infra*) of different completeness (see note 49 *infra*). In addition to relying on the index and cross-references, the user should also consult the table of New York statutes (see note 17 *supra*) and table of cases (see note 19 *supra*) for full assurance that nothing has been overlooked. These, too, are keyed to section numbers. Since many of the sections are long—at least two being 45 pages in length—with sometimes voluminous footnotes, considerable hunting is required before the quarry is found. Such browsing promotes a well-rounded approach to the subject. The fact that the table of contents is not paginated presents no problem since the section numbers on the top of each page and running heads provide an adequate substitute.

21. Chapter 5 was prepublished in modified form in Kessler, *Setting Up a Close Corporation* in New York, 17 *Buffalo L. Rev.* 237 (1968). The modifications appear minor, involving changes in headings and lettering, incorporating appendices to the article into the text of the chapter, and elevating some footnotes to text. The forms are reprinted, as modified and annotated, with permission and credit from G. Seward, *Basic Corporate Practice* (1966) (based on Delaware law).

Preincorporation "contracts"—sometimes they are mere "agreements"—are next. The chapter is a modified portion of a 1961 law review article by Professor Kessler.²² Emphasis is on the older texts,²³ encyclopedias,²⁴ and leading out-of-state cases—only four New York cases being cited—and reference to the English rule. Ignored is the more modern analysis found in the *Restatement (Second) of Agency*.²⁵ No forms are included. But at least the pitfalls are delineated by Professor Kessler for the practitioner who might require recall of this conceptualistic tangle Socratically treated by his law school teacher—perhaps in the dim past—in the agency or corporation course.

From Chapter 7 on, the manual is a treasury of information and justifies its inclusion in any selective list of high-grade useful corporation law books. By way of orientation, Chapter 7 begins with a schematic skeleton of the close corporation provisions of the Business Corporation Law, followed by sections on the problems of operation of corporations formed under the old New York law and on taking advantage of the present New York law for new close corporations. Especially interesting is the ingenious table of management structures for two, three, four, etc., man corporations under varying control and financial participation goals.

Chapter 8 conveniently reproduces an extensive law review article by Professor

22. Kessler, *Promoters' Contracts: A Statutory Solution*, 15 Rutgers L. Rev. 566 (1961). This article discussed the common law rules and a proposed statutory solution. Chapter 6 reprints the first part, inserts sectional subheadings, adds a paragraph on an 1810 New York religious corporation case, and revises and concludes with a few new short paragraphs. Discussion of the statutory solution, of course, has been omitted. Otherwise, nothing new, not even one of the several post-1961 out-of-state cases, has been added.

23. E.g., H. Ballantine, *Corporations* (rev. ed. 1946); R. Stevens, *Law of Private Corporations* (2d ed. 1949); 2 S. Williston, *Contracts* § 306 (3d ed. 1959), 3 S. Williston, *Contracts* § 411 (3d ed. 1959).

24. E.g., 18 Am. Jur. (2d ed. 1965).

25. 2 *Restatement (Second) of Agency* § 326, Comment (1958): "When a promoter makes an agreement with another on behalf of a corporation to be formed, the following alternatives may represent the intent of the parties: (1) They may understand that the other party is making a revocable offer to the nonexistent corporation which will result in a contract if the corporation is formed and accepts the offer prior to withdrawal. This is the normal understanding.

(2) They may understand that the other party is making an irrevocable offer for a limited time. Consideration to support the promise to keep the offer open can be found in an express or limited promise by the promoter to organize the corporation and use his best efforts to cause it to accept the offer.

(3) They may agree to a present contract by which the promoter is bound, but with an agreement that his liability terminates if the corporation is formed and manifests its willingness to become a party. There can be no ratification by the newly formed corporation, since it was not in existence when the agreement was made. . . .

(4) They may agree to a present contract on which, even though the corporation becomes a party, the promoter remains liable either primarily or as surety for the performance of the corporation's obligation.

Which one of these possible alternatives, or variants thereof, is intended is a matter of interpretation on the facts of the individual case."

Kessler on share-holder agreements.²⁶ Included is an elaborate form of shareholders' agreement.²⁷

Few drafting problems in the close corporation are more challenging than those encountered in connection with share transfer restrictions. Of invaluable assistance to any lawyer with such a problem is Chapter 9.²⁸

A very detailed checklist for drafting the certificate of incorporation of a New York close corporation, modified from another article by Professor Kessler, constitutes Chapter 10.²⁹

Practical advice on drafting the purpose (or objects) clause is next provided. Included is a succinct summary of the present New York ultra vires doctrine.³⁰ Happily, the usual law publishers' tendency to expand the size (and price) of a book with endless forms of such clauses for an infinite variety of businesses is not evident.

Of incalculable value to the practitioner is a most comprehensive annotated form of certificate of incorporation, reproduced from another Kessler article.³¹ The form has been "cleared" with the New York Department of State.³²

26. Kessler, *Drafting a Shareholders' Agreement for a New York Close Corporation*, 35 *Fordham L. Rev.* 625 (1967). The reproduction, except for the insertion of sectional subheadings, slight updating (e.g., note 56), the addition of a short appendix on where to place the various provisions, appears to be verbatim.

27. R. Kessler at 200-44. Omitted is any suggestion to make the agreement binding on the successors, personal representatives, heirs, and assigns of the parties. Cf. *id.* at 345 n.19.

28. R. Kessler at 248-85. Actually, share transfer restrictions can have more than the twofold purposes of (1) keeping outsiders out, and (2) insuring a fair return to a retiring member or the family of a deceased member (*id.* at 248), such as maintaining the proportion of interests of the present members, and avoiding Subchapter S termination and possible loss of exemption under the Federal Securities Act of 1933. Also, emphasis on (1) corporation law and (2) tax law overshadows Uniform Commercial Code § 8-204, successor to Uniform Stock Transfer Act § 15.

29. Kessler, *A Close Corporation Checklist for Drafting the Certificate of Incorporation under the New York Business Corporation Law*, 31 *Fordham L. Rev.* 323 (1962). After omitting the opening paragraph of the article, the reproduction, except for converting some headings into sectional titles, slight updating (e.g., note 90), and insertion of an occasional cross-reference, appears to be verbatim.

30. See *711 Kings Highway Corp. v. F. I. M.'s Marine Repair Serv., Inc.*, 51 *Misc. 2d* 373, 273 *N.Y.S.2d* 299 (Sup. Ct. 1966) (holding *N.Y. Bus. Corp. Law* § 203, notwithstanding title "Defense of Ultra Vires," precludes action against corporation to annul or rescind ultra vires executory contract).

31. Kessler, *Certificate of Incorporation for a New York Close Corporation: A Form*, 33 *Fordham L. Rev.* 541 (1965); Kessler, *Certificate of Incorporation for a New York Close Corporation: A Form—An Addendum*, 35 *Fordham L. Rev.* 111 (1966). The addendum listed some objections raised by the New York Department of State to the form and a few more changes in verbiage by the author. Chapter 12 incorporates these changes. Otherwise, the reproduction, except for slight updating (e.g., R. Kessler at 331 n.1, 354 n.42) appears to be verbatim.

32. See Kessler, *Certificate of Incorporation for a New York Close Corporation: A Form—An Addendum*, 35 *Fordham L. Rev.* 111 (1966). See also note 31 *supra*. Such "clearance," of course, does not assure acceptance for filing. Although the *New York Business Corporation Law*, unlike the former *New York Stock Corporation Law* § 5, does not require that the

Bylaws for a New York close corporation then are discussed, followed by illustrative full-length bylaws for a New York close corporation. Provisions which require a similar provision in the certificate of incorporation for validity are so indicated.³³

Chapter 14 focuses on the one-man corporation,³⁴ supplying forms for its certificate of incorporation and bylaws with accompanying explanation of the reasons behind the suggested drafting.³⁵

Possible methods of resolving the almost inevitable disputes which can arise at the shareholder and board of directors levels in close corporations receive general treatment in Chapter 15, followed by a lengthy analysis of one such method—arbitration—in Chapter 16, which is modified from still another Kessler article.³⁶

The scope of Chapter 17 is to note "a few of the tax pitfalls that a close corporation may fall into."³⁷ Briefly outlined are (1) personal holding companies;³⁸ (2) collapsible corporations; (3) preferred share bailouts; (4) accumulated earnings tax; (5) related taxpayers; and (6) thin incorporation.³⁹ Several

certificate of incorporation be endorsed, see New York Rules and Regulations § 150.1 (requiring endorsement on paper backer of exact title of document and name and address of filer). R. Kessler at 622. Where such endorsement is missing, however, the Department of State will add it.

33. Numerous statutory provisions apply unless otherwise provided in the bylaws—called by Professor Kessler the "default law." Even when no provision providing otherwise is desired, longer forms of bylaws repeat the statutory provisions which would otherwise apply. Professor Kessler is also an advocate of locating key provisions in as many instruments as possible under what he calls the "bulwark principle." This results in much repetition in his manual since similar provisions are discussed in the separate chapters on each of such instruments. See note 54 *infra*.

34. Separate chapters on two man, three man, and four man corporations, as well, might have been included. Some attention to this, however, is given in the tables of management structures for two, three, four, etc. man corporations under varying control and financial participation goals in Chapter 7.

35. R. Kessler at 432-35 (certificate of incorporation), 438-50 (bylaws). In effect, all board of directors' functions are given to the president (the sole shareholder), who also is empowered to appoint and remove the only other officer, the secretary, and to dissolve the corporation at will. Such drafting retains control in the sole shareholder, even if he transfers some of his shares—so long as he adheres to certain requirements. As Professor Kessler recognizes, the forms could be simpler if no transfer of shares is foreseeable.

36. Kessler, *Arbitration of Intra-Corporate Disputes under New York Laws*, 19 *Arb. J.* (n.s.) 1-22, 85-97 (1964). The reproduction introduces a few new paragraphs and footnotes (e.g., 473-74, 480, 484-91), some cross-references, a few suggestions to the form of arbitration agreement, and sectional titles, and incorporates a "postscript."

37. R. Kessler at 506.

38. No statement is made that because the personal holding company tax is imposed at the corporate level it is inapplicable to corporations electing under Subchapter S. A comparable statement to such effect is made concerning the accumulated earnings tax. *Id.* at 536.

39. Quare, as to the statements: A debt obligation "should definitely be preferred to all stock, and, certainly, if a bond or debenture, to other creditors, as well." "The ratio of the debt securities to the stock should be reasonable, i.e., a much higher investment in stock than debt." *Id.* at 545. About one-third of the some 1,500,000 filing corporations report no

pages contain no more than single line of text, followed by footnotes quoting the applicable provisions of the Internal Revenue Code of 1954, presumably as amended to press time.⁴⁰

The manual, except for appendices, etc., ends with an 18 page chapter on securities law problems. As one would expect, primary emphasis is on the intrastate⁴¹ and private offering⁴² exemptions from registration and small issues "exemption" under the Federal Securities Act of 1933 (with the sound practical advice of avoiding the Act altogether by offering and selling securities apart from anything remotely resembling interstate commerce or the mails);⁴³ SEC Rule 10b-5 under the Federal Securities Exchange Act of 1934;⁴⁴ and state "blue sky" laws.⁴⁵

"Throughout the book the emphasis is on procedures and forms necessary in *setting up* the close corporation."⁴⁶ Professor Kessler recognizes that "these will

net income, thus avoiding tax at the corporate level, many by maximizing corporate deductions, usually more by salaries than by interest payments.

40. Such extensive quotation of the Code would seem unnecessary, since lawyers invariably have ready access to up-to-date copies and revisions are frequent. Missing, here, as well as in other discussions of federal income tax aspects, is any reference to the leading text on the subject, B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* (2d ed. 1966).

41. An invaluable concise article worthy of mention is Owen, *The Private Offering and Intrastate Exemptions under the Securities Act of 1933*, ABA Law Notes (July, 1967), reprinted in H. Wander & W. Grienberger, *Selected Articles on Federal Securities Law* 165 (1968).

42. The Owens article, note 41 supra, is also worthy of mention in this context.

43. Professor Kessler warns against paying for securities by check rather than cash, using the mails for any part of the transaction—including payment or delivery of the securities—and making local telephone calls, since the telephone is part of an interstate instrumentality.

44. Not cited are such more recent authorities as A. Bromberg, *Securities Law: Fraud-SEC Rule 10b-5* (1967); W. Painter, *Federal Regulation of Insider Trading* (1968).

45. Not mentioned is N.Y. Gen. Bus. Law § 359-ff. (Supp. 1968) (effective Nov. 1, 1968) (requiring New York registration of securities offered and sold only to New York residents unless securities are registered under Federal Securities Act of 1933 or no such federal registration is required for reasons other than intrastate exemption. See note 41 supra). See also note 43 supra.

46. R. Kessler at 7. More advice might have been tendered the attorneys for the hundreds of thousands of New York close corporations already existing on the effective date of the Business Corporation Law than that contained in one section. *Id.* at 162. Such corporations, of course, may amend their certificate of incorporation, bylaws, shareholder agreements, share certificate legends, etc., but questions remain as to whether they should do so. To do so involves expense and bother, including the problem of recalcitrant parties. Especially bothersome is what should be done with preexisting shareholder agreements in the light of N.Y. Bus. Corp. Law § 620 (Supp. 1968) (agreements as to voting; provision in certificate of incorporation as to control of directors). N.Y. Bus. Corp. Law § 620(b) makes valid a provision in the certificate of incorporation otherwise prohibited by law because it improperly restricts the board of directors in its management of the business of the corporation, or improperly transfers to one or more shareholders or to one or more persons or corporations to be selected by him or them, all or any part of such management otherwise within the authority of the board, if certain conditions are met. One of the conditions is not met if

also determine its mode of operation."⁴⁷ Properly omitted are corporation law aspects not of peculiar concern to close corporations.⁴⁸ Extensive are footnote citations to the leading texts, especially some of the more specialized texts, including the valuable, practical and often revised practice texts and handbooks published by the New York Practising Law Institute and the American Law Institute. Looseleaf services, the more significant commentary in the legal periodicals, and even lesser known works are also cited.

The cases, which are up-to-date,⁴⁹ are described and analyzed. Since most of these predate the New York Business Corporation Law, their basis within the context of the superseded New York General Corporation Law and former Stock Corporation Law is discussed, as is their relevance and viability under the new Business Corporation Law.

The manual is a mine of information—full of ideas, suggestions, warnings, drafting precedents, and citations to more sources of the same. Even the expert will receive enlightenment, as Professor Kessler walks the tight rope between overcautiousness⁵⁰ and extreme daring,⁵¹ only occasionally making those "other errors" to which he confesses at the start.⁵²

shares are transferred or issued to persons other than those who have knowledge or notice of such provision or who consent in writing to such provision. The existence of any such provision must be noted conspicuously on the face or back of every share certificate. *Id.* at § 620(g). Written consent would seem to presume knowledge. *Quaere*, as to whether constructive notice is sufficient either from the share certificate legend or from the provision in the certificate of incorporation, a public document. R. Kessler at 329. Professor Kessler discusses § 620(b) in at least 24 sections. Presumably, restrictions, etc., on the board of directors' functions not improper under pre-1963 case law will be upheld even if not in the certificate of incorporation, or if in the certificate of incorporation, where the conditions of § 620(b)-(g) are not met.

47. *Id.*

48. *Id.* at 8. Most of the forms, except for a few expressly designated as "skeleton forms," are as they should be, complete. The forms are very comprehensive and detailed, on the theory presumably that such an approach pinpoints most questions requiring resolution and it is far easier to delete unwanted provisions than to draft new ones from scratch.

49. Insertion of the most recent, presumably in the proof stages, required the adding of letters to several footnotes. E.g., 94a, 94b, etc. In some cases, the recent cases were inserted in some places but not in other places discussing the same matter. E.g., *Model, Roland & Co. v. Industrial Acoustics Co.*, 16 N.Y.2d 703, 209 N.E.2d 553, 261 N.Y.S.2d 896 (1965) (cited in several sections but omitted from § 13.01, n.10). Cf. § 13.04, nn.19, 20a.

50. To this reviewer, for example, mention of irrevocable proxies (*id.* at 307) or denial of authorization of series preferred shares (*id.* at 297) in the certificate of incorporation seems unnecessary.

51. Examples would be the effect of a bylaw denial of the express and implied powers of the president (*id.* at 411) in the light of problems of the apparent authority of one held out as president and the implied power of one serving as general manager; power of director "automatically" lost upon a director's ceasing to be a shareholder where directors are required to be shareholders (*id.* at 398 n.24) in the light of the *de facto* doctrine and the concept that a director continues as such until resignation, removal, or succession, and in the light of *Walkovszky v. Carlton*, 23 N.Y.2d 714, 244 N.E.2d 55, 296 N.Y.S.2d 362 (1968) (upholding, after remand, amended complaint against shareholder of defendant

There is, as Professor Kessler states, "a certain amount of repetition . . . done intentionally as a convenience to readers."⁵³ Nevertheless, "extensive cross references have been utilized anyhow, because of the inter-relationship of so much of the material."⁵⁴

Professor Kessler's writing style, even on very technical aspects, is readable, with minor lapses,⁵⁵ and is occasionally informal and entertaining.⁵⁶ His venial

corporation as containing particularized statements that he was conducting business in his individual capacity, sufficient to justify disregarding corporate entity and imposition of personal liability upon him), the statement that "The Walkovszky and Bartle cases indicate that there is little danger of this [personal liability for conducting business in an under capitalized corporation] in New York." *Id.* at 186, n.14.

52. E.g., the statement that there must be a president and a secretary because of N.Y. Bus. Corp. Law § 715(e) (1963): "Any two or more offices may be held by the same person; except the offices of president and secretary." R. Kessler at 168, n.52, 385 n.34. See N.Y. Bus. Corp. Law § 715(e) (1963): "The board may elect or appoint . . . a secretary . . . or as may be provided in the by-laws." See also *id.* at § 104(d) (requiring certificate to be signed by chairman of the board, president, or a vice president and by secretary or an assistant secretary or "if there are no such officers. . ."); the statement that the Department of State will return a certificate of incorporation stating the number of directors. Actually, the Department silently regards such statement as surplusage. However, it will not permit the initial directors to be named in the certificate of incorporation; the statement that professional corporations are recognized in "some states" other than New York (R. Kessler at 20). Actually all other states except Iowa and West Virginia now recognize them; the statement that a purpose clause sufficiently specific in initial expression followed by a phrase like "and all other lawful business purposes" will "probably result in rejection" by the Department of State (*id.* at 313). It will be rejected as an "all-purpose" clause not allowed by New York law; the statement that the Department of State is required to transmit a certified copy of the certificate of incorporation to the appropriate county clerk (*id.* at 378 n.14) is literally true. Nevertheless, the original certificate is micro-filmed and the microfilm is retained in the files of the Department of State. The original is then sent to the county clerk. See also notes 27, 30, 32, 51 *supra*.

53. R. Kessler at iii. The dual "bulwark principal" and "default law" approach (*id.* at 191, 382, see note 33 *supra*) promotes repetition. The same topics under different headings are discussed at varying degrees of intensity, such as, for a technical subject, share certificate legends, as to which the discussion in a few sections is less than complete. Even some of the caveats are reiterated. E.g., Never rely on a form! All generalizations are dangerous, always subject to exceptions.

54. *Id.* The cross-references, within a particular section are sufficiently specific. Otherwise, they are to chapters (the longest being 97 pages, see note 15 *supra*) or to sections (two of them being 45 pages). Because of Professor Kessler's "bulwark principle," the same provisions are discussed, at varying degrees of intensity, under separate topics. See note 33 *supra*.

55. E.g., "Form corporate papers, included in the corporate outfit which the attorney will order for his corporation, from a legal stationery company, once the certificate of incorporation has been filed (or the decision to incorporate has been firmly made, the name has been secured, and the capital and management structure have been agreed upon, i.e., after the name reservation and shareholder agreement), often include a form resolution authorizing reimbursement by the corporation of the attorney's fees and disbursements for setting it up, or at least a suggestion that such a resolution be considered." *Id.* at 9.

56. E.g., "The typical partnership agreement—ordinarily the ideal arrangement for the close corporation as well—must be moulded, rather like a woman being squeezed into a

sin, for which he can be forgiven, is his failure to adhere strictly to the terminology, phraseology, and spelling of the New York Business Corporation Law.⁵⁷

Although much of the more significant material has been published elsewhere, as indicated above,⁵⁸ the convenience of having it all within one binding,⁵⁹ along with the new material on share transfer restrictions and the other new material to complete the coverage, all subject to future updating and supplementation, make the manual a necessity for anyone dealing with New York close corporations.

Paradoxically, the attorney's task of adequately setting up the close corporation, as demonstrated by Professor Kessler, is far more sophisticated than that of incorporating other businesses. Despite the challenge of the task, the fees, as a practical matter, can hardly be commensurate in most cases. This is the dilemma facing *most* attorneys who are asked to incorporate most businesses. And yet if the task is not adequately performed, the client might well lend his name to a leading case! Reliance on Kessler will help to avoid that.

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girle" *Id.* at 183; "But Pinocchio was not the only dummy who ever came to life." *Id.* at 292.

57. E.g., Use of "stock" and "shares" inconsistently even though the New York Business Corporation Law consistently uses "shares," justified by the Delaware usage of "stock" (*id.* at iv), the understanding of the older members of the bar, and the awkwardness of stating so many "shares of common shares." The last objection is readily obviated by simply stating so many "common shares." Use of the Delaware forms, note 21 *supra*, was facilitated by not changing the Delaware terminology. "Fractional shares" is also used (e.g., 161-62) instead of "fraction of a share" (N.Y. Bus. Corp. Law § 509). "Bylaws" is used, despite the preference for "by-laws" by both New York and Delaware. A text on New York law might well adhere to New York terminology, phraseology, and spelling.

58. See notes 15, 21, 22, 26, 29, 31, 36 *supra*. Prepublished material accounts for some 300 out of 565 pages of text and, of course, the 48 pages of appendices.

59. The compression-binding for easy updating and supplementation does not make for relaxed reading, since when opened, only the middle portions lie flat.

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