by the state. If the choice of what aspects of transactions to tax were made by one taxing authority, that fact would be some guarantee of consistency and harmony; but where the choices are made by two or more taxing authorities, as is the situation in an interstate sale, not only is there no such guarantee but experience seems to indicate that the states would tax as many subjects as possible without considering previous taxation in other states. Perhaps the solution of the already too complicated taxable aspect problem lies in federal legislation.[14]

Corporations—Amendment of Charter—Power of Illinois Corporation to Issue Prior Preferred Stock—[Illinois].—An Illinois corporation, organized under the General Corporation Act of 1919,[1] amended its articles of incorporation in 1928. Clause (e) of this amendment provided, "the corporation shall not at any time create any stock having rights or preferences superior to the .... preferred stock .... without the affirmative vote of at least two thirds of the preferred stock then outstanding." Thereafter the corporation issued shares of eight per cent cumulative preferred stock with a par value of $50.00 a share, of which the plaintiff acquired 622 in 1930. In 1933, the General Corporation Act was repealed by enactment of the Business Corporation Act,[2] permitting authorization of prior issues of preferred stock by two-thirds vote of the outstanding preferred shares.[3] In 1936, when approximately $20.00 in unpaid dividends had accrued on each share of the preferred stock, the articles of incorporation were amended by a vote exceeding two-thirds of the preferred shares outstanding to authorize the issuance of a new class of stock, having preference over the outstanding preferred shares in respect to dividends and distribution of the assets upon dissolution or liquidation. By this amendment the par value of the outstanding preferred shares was reduced from $50.00 to $10.00 but the dividend return, redemption price, rights upon dissolution or liquidation, and priority over the common remained unchanged. The holders of shares of preferred stock were given the option to exchange each of these together with accumulated arrearages for one and four-tenths prior preferred shares.[4] The plaintiff's stock was not voted on the proposed amendments, and an

[14] See Justice Black dissenting in Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938), and in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939); Justices Black, Frankfurter, and Douglas dissenting in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176,183 (1940). For comments on this position see Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253, 1259 (1940); Traynor, State Taxation and the Commerce Clause in the Supreme Court, 1938 Term, 28 Calif. L. Rev. 168, 177 (1940); Barnett, Mr. Justice Black and the Supreme Court, 8 Univ. Chi. L. Rev. 20 (1940).

[1] Ill. Rev. Stat. (1929) c. 32, §§ 1–157. [2] Ill. Rev. Stat. (1939) c. 32, §§ 157.1–157.167.

[3] Ibid., §§ 157.52(n), 157.53(c), 157.54(h).

[4] The owner of each share of preferred stock was entitled to an annual dividend of $4.00. If he exchanged for prior preferred stock under the plan, he would receive one and four-tenths shares, entitled to a maximum dividend, if earned, of $3.00 a share; a minimum dividend, whether earned or not, of $1.00 a share. Thus, the maximum annual income on the one and four-tenths shares would be $4.20; the minimum, $1.40. The shareholder would have given up accrued dividends of approximately $20.00 a share for the possible annual dividend increase of $.20, a net increase in income of one per cent of the book value of the accrual surrendered. If he wished to retain his preferred shares, he would not receive annual dividends or payment on arrearages until dividends on prior preferred stock were paid or provided for, a possible maximum of $60,000.00.

action was brought in the Superior Court of Cook County, Illinois, seeking to have them declared null and void, to enjoin the corporation from paying dividends on prior preferred stock, and for an accounting. From a decree dismissing the complaint for want of equity, upon appeal prosecuted directly to the Supreme Court of Illinois,[5] *held*, that "the election to exchange was not compulsory" and that the "appellant did not have any vested rights that were impaired by the [1936 charter] amendments." Decree affirmed. *Kreicker v. Naylor Pipe Co.*[6]

Several sections of the General Corporation Act of 1919 form the background for the discussion of the instant case. Section 6(4) of that act listed among the powers of corporations created under it the power to divide capital stock "into such classes, with such preferences, rights, values and interests" as might be provided in the articles of incorporation or in any amendment to them.[7] Under Section 59 amendments to the charter were authorized ". . . . changing the . . . . number, par value or character, class or preference, of the shares of the capital stock, ... or to provide the right to issue preferred stock in series, ... or . . . . increasing or decreasing the capital stock."[8] Section 62 required for such amendments the affirmative vote of two-thirds in amount of all the stock outstanding and entitled to vote.[9] No section of the act provided for class voting. Section 61 prohibited "change in the character or class, or increase or decrease in the amount of authorized capital stock entitled to any preference over any other stock . . . . *contrary to the charter provisions creating such preferred stock.*"[10]

Section 61 was for the first time construed in the instant case. Two possible interpretations of that section have been suggested. First, the clause was inserted in the act only to assure that a corporation must comply with any provision of the articles of incorporation establishing voting requirements for the adoption of this type of amendment more stringent than those fixed by the act. The phrase ". . . . contrary to . . . ." is construed under this view as "without compliance with." As a result, if no such requirements were set forth in the articles, then the proposed amendment affecting preferred stockholders might be adopted by the procedure set forth in Section 62. The second interpretation is that Section 61 was included to assure that rights of preferred stockholders could be altered only pursuant to terms set forth in the articles and that in the absence of any provisions in the articles no alteration was possible without the unanimous approval of the outstanding shares. Under this view the phrase ". . . . contrary to . . . ." is construed as "unless provided for in, and, if provided for, in accordance with." The second interpretation is reinforced by the absence of provisions for class voting in the statute and the consequent inadequate protection of the rights of preferred stockholders. Thus the distinction between the two views rests on the interpretation of the phrase ". . . . contrary to . . . ." so that in the absence of any provisions in the charter, changes in the rights of preferred stockholders might be accomplished in one case by a two-thirds vote of all stockholders and in the other only by unanimous vote. The latter result was reached by the Attorney General in 1932 in an opinion which advised that the section forbade adoption by less than unanimous vote of an amendment authorizing the issuance of prior preferred stock

[5] The constitutionality of § 52 of the Business Corporation Act of 1933 was raised in the pleadings, Ill. Rev. Stat. (1939) c. 110, § 199(1) authorized direct appeal in such a case.

[6] 374 Ill. 364, 29 N.E. (2d) 502 (1940).

[7] Ill. Rev. Stat. (1929) c. 32, § 6(4).

[8] Ibid., § 59.

[9] Ibid., § 62.

[10] Ibid., § 61. Italics added.

when no provisions for such an amendment were contained in the articles of incorporation.[11] In the present decision, the court has approved this second construction of Section 61. After indicating that Sections 6(4) and 59 of the statute specifically gave the corporation the power to amend its charter as it did in 1936, the court next considered the limitations upon this power imposed by Section 61 and stated, "That section is directed at the power of amendment where stock carrying a preference is involved, and *restricts the power of amendment to the charter provisions.*"[12] The clear inference from this language, repeated several times in the opinion, is that in the absence of any provision in the charter and apart from the Act of 1933 an amendment such as that of 1936 would have necessitated the unanimous approval of the stockholders.

Section 61 was held to present no difficulties in the principal case because of the charter provisions inserted in 1928 authorizing further amendment by vote of two-thirds of the preferred shares. It was contended, however, that the 1936 amendment was not merely an authorization of an issue of prior preferred shares and an offer of exchange; that, in effect, it was a plan to force conversion of the old preferred shares into shares of the new class with resulting abolition of the dividend accumulations. The court apparently assumes that this result could not have been accomplished directly[13] under the 1919 act. It assumes, furthermore, that a plan superficially "voluntary" might so seriously prejudice the preferred shareholder who does not make the exchange as to justify a finding that the plan is, in effect, compulsory.[14] The court held, however, that the plan was truly a voluntary one,[15] noting that no important changes were made in the incidents of the old preferred stock. With respect to the dividend priority given to the new shares over the old preferred shares, the court noted the

[11] Ill. Att'y Gen. Rep. & Ops., No. 3969 (1932).

[12] 374 Ill. 364, 373, 29 N.E. (2d) 502, 507 (1940). Italics added.

[13] This is the view adopted by most courts in the absence of specific statutory provisions permitting the direct abrogation of arrearages. Harbine v. Dayton Malleable Iron Co., 61 Ohio App. 1, 22 N.E. (2d) 281 (1939); Consolidated Film Industries, Inc. v. Johnson, 197 Atl. 489 (Del. Ch. 1937); Keller v. Wilson & Co., 190 Atl. 115 (Del. Ch. 1936); Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923); Einstein v. Raritan Woolen Mills, 74 N.J. Eq. 624, 70 Atl. 295 (1908); Roberts v. Roberts-Wicks Co., 184 N.Y. 257, 77 N.E. 13 (1906); cf. Romer v. Porcelain Products Inc., 2 A. (2d) 75 (Del. Ch. 1938). Contra: McQuillan v. Nat'l Cash Register Co., 27 F. Supp. 639 (Md. 1939). But see N.J. Rev. Stat. (1937) tit. 14, c. 11, § 1(n).

[14] See Yoakam v. Providence Biltmore Hotel Corp., 34 F. (2d) 533, 537 (D.C. R.I. 1929); Becht, The Power to Remove Accrued Dividends by Charter Amendment, 40 Col. L. Rev. 633 (1940).

[15] Plans found voluntary have been permitted in the following cases: Shanik v. White Sewing Machine Corp., Prentice-Hall Corp. Serv. ¶ 20,986 (Del. Ch. 1940); Johnson v. Bradley Knitting Co., 228 Wis. 566, 280 N.W. 688 (1938); Johnson v. Lamprecht, 133 Ohio St. 567, 15 N.E. (2d) 127 (1938); In re Duer, 270 N.Y. 343, 1 N.E. (2d) 457 (1936); Ainsworth v. Southwestern Drug Co., 95 F. (2d) 172 (C.C.A. 5th 1938); Thomas v. Laconia Car Co., 251 Mass. 529, 146 N.E. 775 (1925); cf. In re Kinney, 279 N.Y. 423, 18 N.E. (2d) 645 (1939); Patterson v. Durham Hosiery Mills, 214 N.C. 866, 200 S.E. 906 (1939); Wilcox v. Trenton Potteries Co., 64 N.J. Eq. 173, 53 Atl. 474 (1902); see Blumenthal v. DiGiorgio Fruit Corp., 30 Cal. App. (2d) 11, 85 P. (2d) 580 (1938); Yoakam v. Providence Biltmore Hotel Corp., 34 F. (2d) 533 (D.C. R.I. 1929); Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696 (1923).

absence of any evidence that earnings were likely to be insufficient to cover dividend requirements on both classes. The opinion did not indicate the extent of "proof" as to the likelihood of future earnings which might be held to establish coercion, forcing the preferred shareholders to make the exchange. At least until the standard is clarified, it will be difficult in many cases for counsel to advise as to the legality of proposed "voluntary" plans.

Had the plan been held to involve a compulsory elimination of accumulated dividends, two additional questions might have been considered: Is such action authorized by the Business Corporation Act of 1933 and, if so, may a corporation organized under the 1919 act exercise the power granted by the new act. Section 52 of the act of 1933 permits a corporation by amendment of its articles of incorporation "to exchange, classify, reclassify, or cancel all or any part of its shares, ... [and] to change the designation . . . . preferences, qualifications, limitations, restrictions, and the special or relative rights in respect of all or any part of its shares, ..."[16] Such amendments must be approved by the affirmative vote of at least two-thirds of the shares of preferred stock outstanding,[17] voting as a class.[18] This language may be construed as falling short of authorizing a compulsory plan abrogating arrearages on preferred stock. This was the position taken by the Supreme Court of Delaware in *Consolidated Film Industries, Inc. v. Johnson*,[19] construing a similar provision in the Delaware Corporation Act.[20] The Illinois court, however, might conceivably take a position contrary to that of the Delaware court and construe the phrase ". . . . special or relative rights . . . ." as including dividend arrearages and thus as permitting compulsory plans. But even if this view is taken there remains the argument based on Section 163 of the 1933 act which provides "the repeal of a law by this Act shall not affect any right accrued or established . . . . prior to the repeal thereof."[21] This language might be construed as including rights of outstanding preferred stock, generally, or perhaps only dividends accrued prior to passage of the 1933 act. It is very doubtful, however, whether this section was intended to apply to any such rights.

It is only if both Sections 52 and 163 of the 1933 act are construed as authorizing the abolition of dividend accruals that there will arise the question of the constitutionality under the "impairment of contracts" clause[22] of the grant of such broad powers to corporations organized under the 1919 act. This question may take the form of a construction of Section 142 of the 1919 act, by which the legislature reserved the power to "amend, repeal, or modify the Act at pleasure."[23] Some courts have distinguished the contract between the corporation and the state from the contract between the stockholder and the corporation and that between the stockholders inter sese,[24] holding that rights accrued under the latter two might not be impaired by

[16] Ill. Rev. Stat. (1939) c. 32, § 157.52(f), (g).

[17] Ibid., § 157.53(c).

[18] Ibid., § 157.54(c), (d).

[19] 197 Atl. 489 (Del. Ch. 1937).

[20] The statute authorized amendments of certificates of incorporation "by increasing or decreasing its authorized capital stock or reclassifying the same, by changing the number, par value, designations, preferences, or relative, participating, optional or other special rights of the shares, or the qualifications, limitations, or restrictions of such rights." Del. Rev. Code (1935) § 2058.

[21] Ill. Rev. Stat. (1939) c. 32, § 157.163.

[22] Ill. Const. art. 2, § 2. Cf. also U.S. Const. art. 1, § 10.

[23] Ill. Rev. Stat. (1929) c. 32, § 146.

[24] Cook, Corporations § 492 (8th ed. 1923); 7 Fletcher, Cyc. Corp. § 3657 (perm. ed. 1932).

exercise of the reserved power to amend the general statute.[25] In the instant case, the court indicated its acceptance of this approach but the finding that the plan was voluntary made it unnecessary to consider the problem.

Criminal Law—Criminal Conspiracy—"Wharton's Rule" as Exception from Charge of Criminal Conspiracy—[Illinois].—Indictments were returned against two defendants for conspiring to gamble for money with cards. Gambling with cards was prohibited by an Illinois statute.[1] Upon writ of error by the state[2] from a judgment quashing the indictment, *held*, conspiracy will not lie for agreement to commit an offense which by its nature involves a plurality of agents. Judgment affirmed. *People v. Purcell.*[3]

The holding in the instant case is the first application in Illinois of Wharton's rule[4] that necessary parties cannot be indicted for conspiracy to commit a crime which by its nature requires a concert of agents.[5] Whether the crime planned was or was not consummated, the effect of the rule is the same. The general acceptance of Wharton's rule[6] as a qualification to the conspiracy charge suggests that an explanation for it may be found in an examination into the purposes underlying the crime of conspiracy.

[25] See Buckley v. Cuban Sugar Co., Prentice-Hall Corp. Serv. ¶ 20,997 (N.J. Eq. 1940); Marshall County Bank v. Wheeling Dollar Savings & Trust Co., 119 W. Va. 383, 193 S.E. 915 (1937); Avondale Land Co. v. Shook, 170 Ala. 379, 54 So. 268 (1911); Pronick v. Spirits Distributing Co., 58 N.J. Eq. 97, 42 Atl. 586 (1899); In re Election of Directors of Newark Library Ass'n, 64 N.J.L. 217, 43 Atl. 435 (1899); cf. Crotty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N.E. 707 (1906). A larger number of courts do not draw this line so arbitrarily, but grant greater discretion to the legislature in exercising the reserved power, although some limitations are fixed in every jurisdiction. Looker v. Maynard, 179 U.S. 46 (1900); Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 Atl. 654 (1928); Lord v. Equitable Life Assurance Society, 194 N.Y. 212, 87 N.E. 443 (1909). Language in this group of opinions indicates that the basis of the decisions is the application of notions of due process—evaluation of the proposed change by comparing the interests of the public and the state with the interests of the complainant in the particular case. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N.Y. Supp. 357 (1905); 4 Univ. Chi. L. Rev. 139 (1936). See, in general, Berle and Means, The Modern Corporation and Private Property 148–51 (1932); Dodd, Dissenting Stockholders and Amendments to Corporate Charters, 75 U. of Pa. L. Rev. 585 (1927); Curran, Minority Stockholders and the Amendment of Corporate Charters, 32 Mich. L. Rev. 743 (1934); Stern, The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation, 53 Am. L. Reg. (44 n. s.) 1, 73, 85 (1905); 34 Mich. L. Rev. 859 (1936).

[1] Ill. Rev. Stat. (1939) c. 38, § 324.

[2] This is permitted by Ill. Rev. Stat. (1939) c. 38, § 747.

[3] 304 Ill. App. 215, 26 N.E. (2d) 153 (1940).

[4] 2 Wharton, Criminal Law § 1604 (12th ed. 1932). The rule is applicable to such crimes as adultery, incest, dueling, rebating, bribery, selling liquor and Mann Act violations.

[5] When, however, more persons participate than are necessary for the substantive offense, the conspiracy count should be available. State v. Clemenson, 123 Iowa 524, 99 N.W. 139 (1904); State v. Martin, 199 Iowa 643, 200 N.W. 213 (1924). But see People v. Wettengel, 98 Colo. 193, 58 P. (2d) 279 (1935).

[6] Shannon v. Commonwealth, 14 Pa. 226 (1850); Miles v. State, 58 Ala. 390 (1877); United States v. Dietrich, 126 Fed. 664 (C.C. Neb. 1904); State v. Law, 189 Iowa 910, 179 N.W. 145