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THE BUSINESS CORPORATION LAW

LEON D. METZGER*

The purpose of this article is to be briefly informative rather than critical. It is felt that it may be useful to point out some of the principal differences between the new Business Corporation Law1 and the Incorporation Act of 1874.2 Reference will not be made to all minor changes.

SCOPE OF CODE

The Code applies to all business corporations, foreign and domestic, with the exception of cooperative associations, banks, trust and insurance companies, public utilities, and, of course, corporations not for profit3 now embraced within the new Nonprofit Corporation Law.4 A "business corporation" is defined as a corporation for profit, and a "corporation for profit" is defined as one organized for the direct or indirect pecuniary advantage of its shareholders.6

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1 Act of May 5, 1933, P. L. 364: 15 P. S. 2852. The act became effective on July 3, 1933. The Business Corporation Law will be referred to as the "Code". Save where otherwise indicated, footnotes refer to the "Code".

2 Act of April 29, 1874, P. L. 73, hereafter referred to as the "Act of 1874".

3 Section 4—.

"Section 4. SCOPE OF ACT. This act does not relate to, does not affect, and does not apply to:

(1) Cooperative associations, whether for profit or not for profit.

(2) Any corporation which may be organized under the Nonprofit Corporation Law, or which, if not existing, would be required to incorporate under that act.

(3) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Department of Banking, the Insurance Department, the Public Service Commission, or the Water and Power Resources Board."

4 Act of May 5, 1933, P. L. 289; 15 P. S. 2581.

5 Section 2.

6 Ibid.
Doubtless, difficult questions will arise as to whether certain types of corporations for profit should be organized under the new Code or the Act of 1874. For instance, if a motor transportation company is to carry under special contract for the X Stores Company, and Y Stores, exclusively, it will organize under the new Code. But, if it is to carry under special contract for the Z Stores Company as well, incorporation under the new Code might be improper.\(^7\)

It will be recognized, therefore, that the Act of 1874 is still very much alive, though in this article it is usually referred to in the past tense, since, primarily, we are contrasting the old and the new law in relation to "business corporations". Until new laws are enacted embracing profit corporations not included in the Code, every practicing attorney in Pennsylvania must be familiar with the provisions of the Act of 1874.

APPLICABILITY

As to domestic corporations already in existence, the Code applies automatically to all such corporations of the second class formed under the Act of 1874, and every corporation for profit heretofore organized under any other act, special or general, which has accepted the Constitution. Business corporations, organized under special or general act prior to 1874 and which have not accepted the Constitution, are permitted to do so and thus come under the provisions of the Code. All foreign business corporations already admitted become subject to the Code upon securing a certificate of authority which must be obtained not later than October 3, 1933.\(^8\)

It will be noted that in its applicability to corporations already organized under the Act of 1874 the Code is specifically limited to corporations of the

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\(^7\) The Public Service Commission takes the position that a motor transportation company which carries for more than two shippers is a common carrier, subject to its jurisdiction. However this rule is arbitrary and seemingly without legal sanction, especially in view of the fact that the United States Supreme Court, in Mich. P. U. Comm. v. Duke, 266 U. S. 570, 45 S. Ct. 191 (1925), specifically held that a carrier who had three contracts to transport the products of three manufacturing concerns was not a common carrier. The essential factor characterizing a common carrier, as distinguished from a private or contract carrier, is that the former holds himself out to serve the public, while the latter confines his carriage to those whom he chooses to serve, and enters into a contract for an individual transaction or group of transactions. It is the manner in which the carrier holds himself out, rather than the specific number of patrons he serves at any particular time, that determines his status. See also, Terminal Taxicab Co. v. Kutz, 241 U. S. 256 (1916); Film Transportation Co. v. Mich., 17 Fed. (2nd) 857 (where the court held one not a common carrier though hauling pursuant to over one hundred written contracts). The cases are discussed in: Brown & Scott, "Regulation of the Contract Motor Carrier Under the Constitution", 44 Harv. L. R. 530, 535 (1931); and, E. N. Cameron, "What Constitutes a Common Carrier", 15 Marquette L. R. 67 (1931).

\(^8\) Section 3. Of course, none of the foregoing applies to banks, insurance companies, etc. Supra note 3.
second class. This may cause some difficulty, in view of the fact that the principal criterion as to the scope of the Code is whether the corporation in question is organized for the direct or indirect profit of its shareholders. The line of demarcation between corporations for profit and those not for profit was not as sharply defined in the Act of 1874. Corporations for profit are not limited invariably to those of the second class, under the Act of 1874. Many corporations for profit now in existence were incorporated by the courts under the Act of 1874 as corporations of the first class. The question will doubtless arise, therefore, as to the status under the Code of a previously existing first-class corporation for profit. As a first-class corporation, it becomes subject to the provisions of the Nonprofit Corporation Law; but, under the provisions of that law, it may not continue to operate for the profit of its members, and it cannot exist under the Code because it is not a corporation of the second class. It seems that such a corporation, subject to possible constitutional limitations on the power of the State to alter, amend or revoke, must now refrain from paying dividends to shareholders, or abandon its charter and organize as a new business corporation under the Code.

In one very important respect the change which draws the line sharply between corporations for profit and those not for profit is highly desirable. Corporations of the first class, whether for profit or not, are not liable for capital stock and corporate loans tax. As previously shown, some first-class corporations have all the characteristics of ordinary profit-making corporations, and there is no reason why such corporations should not pay the customary corporation taxes. The Code closes this avenue of escape.

FORMATION

It is no longer necessary that at least one incorporator be a citizen of Pennsylvania; it is sufficient if at least two-thirds of them are citizens of the United States. This requirement as to United States citizenship is new.

One of the most progressive changes in the Code is the elimination of

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9Section 3 A.
10Text, page 77.
11Though several earlier cases were to the contrary, in Players' National League Baseball Club v. 25 W.N.C. 187 (1889), it is said that "Cemetery companies are corporations for profit and are chartered by the courts. * * * The legislature did not intend to take away from the stockholders of corporations that come within the first class * * * the rights to profits." The court held that a baseball club, though organized for profit, could be incorporated by the court because it came within one of the objects enumerated in class one.
12Supra note 4, Section 3 A.
13Id. Section 3 D.
14Act of June 1, 1889, P. L. 420, Section 21, as amended; Act of June 30, 1885, P. L. 193, Section 4, as amended.
15Section 201.
the singleness of purpose requirement.\textsuperscript{16} It is impossible to estimate the number of charters lost to Pennsylvania by this narrow and obsolete provision which has heretofore persisted in the Pennsylvania law.

The corporate title must contain the word "corporation", "company", "incorporated", or some abbreviation thereof. The word "and" may not immediately precede the word "company" or "Co.", since that is held to be indicative of a partnership.\textsuperscript{17}

Section 202 also prohibits the use of certain words in the title; such as, "National", "United States", "security", and other words which are suitable only in names of corporations which must be formed under other statutes.

Express provision is made for the reservation for a period of sixty days of the corporate title of a proposed corporation. Previously this could not be done as a matter of right.\textsuperscript{18}

Under the Code, the words "certificate", "certificate of incorporation", and "charter" are no longer used interchangeably as in the Act of 1874. The incorporators present "articles of incorporation", which become the "charter" when approved by the Department of State. The "certificate of incorporation" is similar in purpose to the old "letters patent" and merely evidences the granting of the charter.\textsuperscript{19}

It is of utmost importance to note the Code definitions of "authorized capital stock" and "stated capital". The former refers to the aggregate number of shares of all classes rather than a dollar-marked capital fund.\textsuperscript{20} This conception is carried into Section 5 of the articles of incorporation and has resulted in some confusion, since the new meaning is a departure from former practice.\textsuperscript{21} "Stated capital", as now defined, is the old capital stock concept.\textsuperscript{22}

Prior to incorporation, it is no longer necessary to pay in cash to the treasurer of the proposed corporation ten per cent of the authorized capital

\textsuperscript{16}Section 201.
\textsuperscript{17}Section 202.
\textsuperscript{18}Section 203.
\textsuperscript{19}Section 204.
\textsuperscript{20}Section 2.
\textsuperscript{21}Section 3 of the Act of 1874 required the articles of incorporation to state, inter alia, "The amount of its capital stock, if any, and the number and par value of shares into which it is divided." The forms now furnished by the Department of State, under the Code, for articles of incorporation, require incorporators to state, inter alia, "The authorized capital stock of the corporation" and how the same is divided, as to par or no par, classes, etc. Thus, under the Act of 1874, "capital stock" is stated in terms of dollars; whereas, under the new law, "authorized capital stock" means the number of shares of all classes and kinds. The confusion resulting from this change in meaning could be avoided, in part, by showing on the form that the blank opposite "authorized capital stock" is to be filled in with a figure representing the total number of shares of all kinds which the corporation is authorized to issue.
\textsuperscript{22}Section 2. See also text, pages 94 and 95.
It is necessary only to state in the articles of incorporation the amount that will be paid to the treasurer. This amount may not be less but need not be more than five hundred dollars ($500). The certificate of incorporation may be issued and corporate existence acquired before the amount is actually paid, but it must be paid before the corporation engages in business.

An incorporator need subscribe for only one share; thus, a corporation may be formed with subscriptions for but three shares.

Considerable latitude as to contents of the articles of incorporation is afforded by paragraph 12 of Section 204, which provides for the inclusion of:

"Any provisions not inconsistent with law which the incorporators may choose to insert for the regulation of the internal affairs of the corporation and the business of the corporation."

Furthermore, throughout the Code there are numerous provisions "unless otherwise provided in the articles." Examples of this are found in Sections 503 and 504. Thus, a great many provisions may be inserted in the articles, if desired. Opinions of the Department of Justice construing the Act of 1874 have been to the effect that the certificate of incorporation (articles of incorporation) might contain no matter or paragraphs other than specified in the statute. The departure from former practice is not desirable. None but organic provisions should appear in the articles. All administrative provisions should be covered in by-laws and resolutions of the board of directors.

ADVERTISEMENT

The Code follows the former law and deviates sharply from the Uniform Act and the laws of such states as New York, Delaware, New Jersey, Maryland, California, Michigan, Indiana and Illinois in requiring advertisement of intention to apply for a charter.

Advertising can no longer serve any very important purpose. The Code adequately protects titles of corporations of record in Pennsylvania, both domestic and foreign, from infringement by new corporations. Names of proposed incorporators never did and do not now need to be set forth in the advertisement. Other grounds of objections were almost never lodged with the Secretary of State, as a result of advertisement.

23 "Authorized capital stock" is here used in its former sense.
24 Sections 204 (8), 208 A (1). See also text, pages 83 and 84.
25 Section 204 (10).
26 Section 201.
28 Section 205.
29 Section 202.
It is suggested that the advertisement requirement is obsolete and a real deterrent to incorporation in Pennsylvania. It means that five or six days must be exhausted in the incorporation process in Pennsylvania, while it takes from one to two days in many sister states. It also adds greatly to the expense of incorporating. The result is a loss to Pennsylvania in incorporation fees, in bonus and in capital stock tax, and even corporate loans tax. Naturally, all necessary reforms in the law could not be accomplished in a single swoop. The fact that so much was accomplished at one legislative session is almost miraculous.\(^3\) It is to be hoped that the advertising requirement will be eliminated by an early amendment.

APPROVAL AND RECORDING OF ARTICLES OF INCORPORATION

Two important changes are made:

1. The Governor no longer approves incorporation papers; it is done by the Secretary of the Commonwealth.

2. No recording of the articles of incorporation with the recorder of deeds of the home county is necessary; the office of the Secretary of Commonwealth is the sole record office for corporate papers.\(^4\)

Apparently, mandamus will lie against the Secretary of the Commonwealth to enforce approval when the articles "conform to law". No such proceeding was available against governors under Pennsylvania statutes.

BEGINNING OF CORPORATE EXISTENCE

Under the Act of 1874, corporate existence begins with the recording of the articles of incorporation in the office of the recorder of deeds of the proper county.\(^5\)

Under the Code, corporate existence begins with the issuance of the certificate of incorporation by the Department of State.\(^6\)

The change is advisable. Mere inadvertence in failing to record the articles with the recorder of deeds, as required under the Act of 1874, may cause partnership liability. This also does away with the trouble and expense incurred by both the corporation and the Commonwealth at nearly every ses-

\(^1\)Section 206.


\(^3\)Section 206.

\(^4\)Advertising was not specified in the original draft of the Code. Frequently, sponsors of our best and most progressive legislation are, from practical considerations, faced with the necessity of seeing their whole program fail or accepting compromises on relatively minor details. Once the program is set on its way, subsequent legislatures can further amend toward the ideal objective.

\(^5\)Section 207.
sion of the Legislature of having a statute enacted to validate acts done by corporations after the issuing of letters but before the recording of the certificate with the recorder of deeds, as required by the Act of 1874.

Any persons who subscribe to shares before incorporation, whether in the articles or in a separate subscription paper, become shareholders immediately upon the issuance of the certificate of incorporation, without any formal acceptance on the part of the corporation. As to preincorporation subscriptions, this is a codification of case law.

The Code also makes the certificate of incorporation conclusive evidence of corporate existence, except as against the State itself in cases where there has been less than a substantial compliance with essential provisions of the act, or where the act does not authorize the creation of such a corporation. This eliminates collateral attacks, regardless of irregularities, once the State has issued the certificate of incorporation. Thus, no collateral attack is possible today even where, under the old case law tests, less than a de facto corporation has resulted. This is a very sensible change. It eliminates an entire field of technical defenses and incurrence of personal liability out of line with the contracts made and the equities of the cases.

CONDITIONS PRECEDENT TO BEGINNING BUSINESS

Under the Act of 1874, ten per cent of the capital stock fixed in the articles of incorporation must be paid to the treasurer of the corporation, in cash, before the charter is granted.

Under the Code, the "amount of paid in capital with which the corporation will begin business" must be stated in the articles and, while it need not be paid in as a condition precedent to incorporation, it must be fully paid in before the corporation begins to do any of the business for which it was incorporated. The significance of this change should not be over-

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88An example of this is found in the Act of April 11, 1929, P. L. 482.
84Section 207.
85"There is a well-recognized distinction between original subscriptions for stock in a corporation to be formed and subscriptions for shares in an existing corporation. In the one case (the former) the engagement between the subscribers is created directly by the act of subscription which, when once the corporation has been created by letters patent issued on the strength of the subscription, becomes absolute, not subject to recall, and dischargeable only by actual payment. By the act of incorporation, without more, the original subscribers become members of the corporation." Bole v. Fulton, 233 Pa. 609, 610. See also Schmidt v. Kulamier, 267 Pa. 1.
86Section 207.
87(1) The existence of a law under which such a corporation could have been formed; (2) colorable compliance with such law in a real attempt to incorporate; and (3) user.
88Act of 1874, Section 3.
89Section 204 (8).
90Section 208A (1).
looked. Previously, ten per cent of the authorized capital stock had to be paid in cash before corporate existence was acquired. In practice, this restriction was avoided by originally incorporating with a nominal capital stock as low as the Secretary of the Commonwealth permitted, regardless of the size of the enterprise. Immediately thereafter, the capital structure could be adjusted, by way of increase, to the true financial set-up contemplated from the outset, as the consideration for shares issued by way of increase could be other than cash. While the full amount stated in the articles as the contemplated initial capital must now be paid in cash, this amount need not be more than five hundred dollars, and the corporation, after it comes into existence, may then issue its remaining shares for consideration other than cash. Thus, under the Code, an unincorporated going concern may incorporate with a small cash fund, without taking the two steps formerly necessary, and the anomaly of paying cash to the treasurer of a nonexistent corporation is avoided. Creditors are protected to the same extent that they were under the former practice. The change is obviously desirable.

A majority of the directors must make affidavit as to capital paid in and file it with the Department of State. If the corporation fails to comply with this requirement, the officers and directors participating in the unwarranted conduct of corporate business are liable personally for debts incurred as a result, whether or not the creditor has been deceived.

CORPORATE CAPACITY AND AUTHORITY

Section 301 vests in corporations created under the Code the capacity of natural persons to act. The change is consistent with the so-called "general capacities" trend.

GENERAL POWERS

Under the Act of July 2, 1901, as amended, corporations created under the Act of 1874 for profit are authorized to hold the stocks and bonds of other corporations just as an individual may. This power is carried into the Code for business corporations, with a limitation. The power exists only to the extent "appropriate to enable it to accomplish any or all of the purposes for which it is organized". The limitation is an adoption from Section 12 of

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41Act of 1874, Section 3.
42In practice, the Department of State has not permitted an authorized capital stock of less than $5,000, so that not less than $500 had to be paid in cash before incorporation.
43Section 208A (2).
44Section 208B.
45P. L. 603.
46Section 302 (6).
the Uniform Code. In practical result the difference would seem to be this. A corporation, under the Code, may acquire stocks of other corporations for purposes of control, only when the businesses of the other corporations are in a sense similar or auxiliary to the business of the purchasing corporation. If, however, the principal object is not control, but, rather, the investment of idle funds, or the taking of stock in payment of a debt or as security, the general power exists, because the action is in furtherance of the general corporate object, which is to return profits to stockholders.47

DEFENSE OF ULTRA VIRES

Section 303 follows the lead of the 1931 California Code and abolishes the defense of ultra vires as between the corporation and third parties and as between shareholder and third parties.

This provision is consistent with present public policy and with the growing trend of court decisions in Pennsylvania. The exercise of a power in a manner not authorized is not necessarily a public sin. Greater public policy is served by the elimination of technical defenses and liabilities. It is better to admit that the power exists and to control or punish its abuse.

There is properly saved to the shareholder the right to enjoin the corporation from doing an unauthorized act, the right to the corporation to prevent directors and officers from exceeding their authority, and the right to the Commonwealth to enjoin or dissolve a corporation for doing an unauthorized act.

ADOPTION OF BY-LAWS

The articles of incorporation may confer authority on the directors to make by-laws, but the power is retained in the shareholders to change or repeal them. The shareholders are the primary possessors of the power to make by-laws in the absence of charter provision to the contrary.48

CHANGE OF REGISTERED OFFICE

The registered office of a corporation, under the Code, may be changed by a majority vote of the directors.49 The Act of June 8, 1893,50 required a two-thirds vote of directors and a two-thirds vote of stockholders.

47 Section 302 (9).
48 Section 304. This accords with the Uniform Code and the Act of 1874. Some states vest this power primarily in directors.
49 Section 307.
50 P. L. 355.
INSPECTION OF CORPORATE RECORDS

The Pennsylvania common law rule with respect to shareholders' rights to inspect corporate records accords with the provision of the Uniform Act and has been written into the Code.54

INCREASE OF INDEBTEDNESS

Indebtedness may be increased by adoption of a resolution by the board of directors proposing such increase to the shareholders, followed by an affirmative vote of the holders of at least a majority of the outstanding shares after sixty days' written notice of the purpose of the meeting55 at which the vote is taken.

It is no longer necessary to file with the Secretary of the Commonwealth copies of the corporate proceedings taken, or to publish notice of the shareholders' meeting called to vote on the proposed increase.

Indebtedness contracted in the usual course of business requires no such formal proceedings.56

SALE OF CORPORATE ASSETS

A corporation may sell all its property and assets in the usual and regular course of business, upon the vote of a majority of its directors.54

It may sell all its property and assets not in the usual or regular course of business, upon the vote of a majority of its shareholders, as well as directors.55

Such sales may, of course, not be made in fraud of creditors or minority shareholders.56

The right of inspection is not absolute as in some states; it may be made at a reasonable time for a proper purpose. The shareholder must resort to a peremptory writ of mandamus.

55Section 309. This section purports to be in conformity with the constitutional mandate found in Article XVI, sec. 7, which reads, """"The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained """""""" (Italics added.) Sec. 309 requires merely the consent of the persons holding the larger amount, in number, of the outstanding shares. It is submitted that there is no necessary correspondence between the two requirements and that this section should be amended to include the value requirement as was present in the Act of Feb. 9, 1901, P. L. 3, amended by Act of April 22, 1905, P. L. 280, section 1.

56This has been the rule. See West v. Dyson, 230 Pa. 619.

57Section 311 A.

58Section 311 B. Where this article uses the term, "vote of the majority of its shareholders" it means the affirmative vote of the holders of at least a majority of the outstanding shares entitled to vote on the question.

59Section 311 C.
Generally speaking, this is only a codification of our Pennsylvania decisions. However, franchises may not be sold to another corporation. Hence, the "short merger" proceeding available under Section 23 of the Act of 1874, as amended, does not exist under the Code. It was included in the first draft of the bill, but not in the act as passed. Where transfer of franchises is desired, the regular proceedings in merger and consolidation must be used.\textsuperscript{57} It is regrettable that the "short merger" proceeding was not retained in the Code. It was a simple, inexpensive procedure, free of red tape and unnecessary delays.

**REORGANIZATION UPON FORCED SALE**

Prior to the Code, the purchasers at judicial sale of the franchises, property and assets of a corporation were, by statute,\textsuperscript{58} constituted a corporation, upon the filing of a certificate of reorganization in the office of the Secretary of the Commonwealth.

Under the Code, such purchasers are afforded the privilege of forming a new corporation,\textsuperscript{59} in the manner provided in Article II. It may be asked why they would not have this same right if nothing were said about it under the reorganization section. They, no doubt, would have the right, but not all the old franchises and privileges. For instance, under the wording of the reorganization section, no new bonus will need to be paid by the purchasers until the stated capital of the new corporation exceeds the capital stock or stated capital of the one whose franchises and property have been purchased.

**FINANCIAL REPORTS**

A financial report must be prepared and sent to each shareholder within ninety days after the close of each fiscal year. The statement must be verified by a certified public accountant or by a firm of accountants, one member of which is a certified public accountant. The verifying accountant may not be a director or employee. The only relief from these requirements must be by express provision in the by-laws. Some question has been raised whether accountants or shareholders will benefit most from these provisions.

**DIRECTORS**

Directors need not be citizens or residents of Pennsylvania.\textsuperscript{60} This apparently has been the law in Pennsylvania, except where a corporation has

\textsuperscript{57}Article VIII.
\textsuperscript{58}Act of April 8, 1861, P. L. 259, as amended, and Act of May 25, 1878, P. L. 145, 148. In Republic Bank Note Co. v. Northwestern Pa. Railroad Co., 65 Pa. Super. Ct. 72 (1916), it was held that the new corporate body has no corporate existence until the certificate is filed.
\textsuperscript{59}Section 312.
\textsuperscript{60}Section 401.
brought itself within the provisions of the Act of March 31, 1887, or where qualifications as to citizenship or residence have been imposed by the Act of Incorporation, the articles of incorporation, or the by-laws.

**DIRECTORS' MEETINGS AND COMMITTEES**

Directors' meetings of all kinds may be held as freely without the Commonwealth as within. In the case of corporations not created under the Code, meetings may be held outside the State only when a majority of the directors are citizens of another state; except that annual meetings to elect officers must always be held in Pennsylvania.

The Code provides "that, if the directors shall severally or collectively consent in writing to any action to be taken by the corporation, such action shall be as valid corporate action as though it had been authorized at a meeting of the board of directors."

Authority is vested in the board of directors to appoint an executive committee, from among its own members, which may exercise such discretionary powers as are expressly conferred by resolution. This insures flexibility and prompt action in many matters where time is of the essence.

**REMOVAL OF DIRECTORS**

The Code permits any or all directors to be removed from office, without assignment of cause, by a majority vote of the shareholders.

Shareholders to the extent of ten per cent of the outstanding shares may have the proper court of common pleas remove a director for any fraudulent or dishonest act touching the affairs of the corporation.

In case of adjudged insanity, conviction of a felony, failure to accept the

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61 P. L. 281. 15 P. S. 44.
63 Section 402 (4).
64 Act of November 27, 1865, P. L. (1866) 1228; 15 P. S. Section 59.
65 Section 402 (5). This provision is taken from the Michigan Act. Section 13 (4) (d). This is a statutory exception to the general rule that directors as such have authority to represent their corporation only as a board at a meeting duly convened. Allegheny County Workhouse v. Moore, 95 Pa. 408; Curry v. Claysville Cemetery Assn., 5 Pa. Super. Ct. 289.
66 Section 402 (6).
67 Section 405 A. This is new in the statutory law of Pennsylvania. Under the case law, the shareholders could not remove directors, except for cause, prior to the expiration of their fixed terms.
68 Section 405 C.
office of director within sixty days after election thereto, or other proper cause, the board of directors may declare vacant the office of a director.69

PRESIDENT

No officer of the corporation under the Code need be a director.70 Under the Act of 1874 the president only is required to be a director.71

RELATION OF DIRECTORS TO CORPORATION

Section 408 of the Code changes the Pennsylvania rule relative to a director's duty and responsibility to his corporation. It provides that: "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and shall discharge the duties of their respective positions in good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in their personal business affairs."

In Spering's Appeal72 the Supreme Court of Pennsylvania took the view that a director was a gratuitous mandatory and that as such he was not required to use that degree of care which an ordinarily prudent man would use in his own business, but only that amount of care which an ordinarily prudent director would use. This meant, in effect, that generally speaking a director was personally liable for fraud, for such gross negligence as amounts almost to fraud, and for ultra vires acts.73

The Pennsylvania rule has been severely criticized by the courts of many other states, the leading case being Hun v. Carey.74 It has been responsible for the loss of thousands of dollars to stockholders and creditors of Pennsylvania corporations. The Code correctly codifies the rule of Hun v. Carey for business corporations. The Pennsylvania Supreme Court has been unduly solicitous of the director who serves without compensation. An adequate answer is that he need not serve at all unless he chooses to give the affairs of management the attention necessary.

69Section 405 B. The board of directors may fill such vacancy until a successor is elected by the shareholders. Section 402 (3). Under our case law a board of directors could not create such a vacancy. Com. v. Detwiller, 131 Pa. 614.
70Section 406.
71Section 5 of Act of 1874.
7271 Pa. 11.
73As stated in Swentzel v. Penn Bank, 147 Pa. 140: "The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation." The reference to "other persons" shows how remotely the court related the director to his own corporation.
7482 N. Y. 65.
SHAREHOLDERS' MEETINGS

The by-laws may provide for shareholders' meetings outside of Pennsylvania.\(^7\)

A single shareholder may, after a delay of six months in holding an annual meeting for the election of directors, call a meeting for such purpose.\(^7\) This insures against intrenchment of directors through their failure to call election meetings. Less than a quorum of stockholders may elect directors at a second adjourned meeting called for the purpose of electing directors, when the previous meetings were adjourned for lack of a quorum.\(^7\)

Special meetings of shareholders may be called by the president, the board of directors, or the holders of at least one-fifth of the shares. By-laws may vest a similar power in others.\(^7\)

NOTICE OF MEETINGS—WAIVER

The Code requires at least five days' written notice of all shareholders' meetings.\(^7\) Directors' meetings, on the other hand, may be held upon such notice as the by-laws may prescribe; at least, five days' written notice being required only where the by-laws are silent.\(^8\)

The Code adopts an opinion of the Attorney General\(^8\) to the effect that any written notice required by the Constitution, or otherwise, may be waived by a consent signed by each and every person entitled to such notice. The consent may be given before or after the notice is required.\(^8\)

PROXIES

Under the prior law,\(^6\) a proxy was good for only two months. Under the Code,\(^8\) the limit is extended to eleven months where no time is specified in the proxy. It is permissible to specify any time up to, but not exceeding.

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\(^7\)Section 501 A. This changes the Pennsylvania law for business corporations. Under the Act of November 27, 1865, P. L. (1866) 1228, 15 P. S. Section 59, annual meetings of directors or shareholders for the election of officers were required to be held in Pennsylvania; other meetings of either body might be held outside of Pennsylvania, if a majority of directors or shareholders were citizens of another state.

\(^8\)Section 501 B.

\(^8\)Section 503 (3).

\(^8\)Section 501 C.

\(^8\)Section 502.

\(^8\)Section 404.

\(^8\)In re Bellefonte and Buffalo Run R. Co., 2 Chester 128 (1883).

\(^8\)Section 8 B.

\(^8\)Act of March 5, 1903, P. L. 14, 15 P. S. Section 109.

\(^8\)Section 504.
three years. If the power to vote the stock is coupled with an interest, there is no statutory time limit.

VOTING PLEDGED SHARES

Previously, the pledgor of pledged shares was entitled to vote the shares unless the agreement provided otherwise. The Code changes this by providing that the pledgor shall be entitled to vote such shares until the shares are transferred on the books of the corporation, and that thereafter the pledgee shall be entitled to vote them. This change is doubtless advisable and conforms to what is customarily the understanding of the parties. Confusion is avoided by confining voting to shareholders of record.

VOTING LISTS

The officer or agent of the corporation in charge of its stock transfer books is required, at least five days before each meeting of shareholders, to make a complete list of shareholders entitled to vote. Any shareholder has a right to inspect this list during the five-day period and at the meeting. The list is prima facie evidence of those entitled to vote.

VOTING TRUSTS

The Code gives statutory recognition to voting trust agreements. The old idea of its being against public policy to separate voting rights from beneficial interests has long since been discredited in most jurisdictions, but apparently there was still some doubt about the validity of such agreements in Pennsylvania unless the power was coupled with an interest. The doubt is now removed for business corporations and it is not necessary to validity that provision be made to afford all shareholders the right later to come into the agreement.

JUDGES OF ELECTION

Judges of election at stockholders' meetings are now required only when the directors, in advance of the meeting, so specify, or when at the meeting

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85Act of May 26, 1893, P. L. 141, Section 3, 15 P. S. Section 106.
86Section 506.
87Section 510.
88Section 511.
some shareholder or his proxy requests them.\textsuperscript{90} Formerly, they were essential in all cases, were required to take a statutory oath, and were subject to the penalties prescribed in the Pennsylvania election laws.\textsuperscript{91} This was ordinarily too much formality for a small corporation, or for any corporation whose stock was closely held.

INFORMAL ACTION OF SHAREHOLDERS

An innovation in Pennsylvania law is found in the authority granted to effect corporate action by shareholders without holding a meeting.\textsuperscript{92} It has long been the rule that notice of a meeting may be waived by each and every shareholder, but to permit waiving the meeting itself is entirely new. Now, all that is necessary is that each and every shareholder sign a consent setting forth any action informally taken. This paper is filed with the secretary of the corporation.

SHARES OF STOCK

The Code requires that share structure, including all changes, be set forth in the articles of incorporation.\textsuperscript{93} This was not necessary under the Act of 1874. Preferred shares could be created without amending the articles\textsuperscript{94} or even filing papers with the Secretary of State, unless an increase in capital stock was involved. A corporation could at any time change or convert its shares from par to no par or from no par to par, of any kind or class desired, by filing with the Secretary of State evidence of proceedings similar to those used in increasing capital stock.\textsuperscript{95}

Certificates for shares may not be issued until shares are fully paid for.\textsuperscript{96} This adequately protects the public from purchasing shares against which the corporation has a lien for any unpaid portion of the subscription price.\textsuperscript{97} The corporation's lien is limited to the amount due upon the shares; it does not extend to cover general indebtedness from the shareholder to his corporation.

\textsuperscript{90} Section 512.
\textsuperscript{91} Act of 1874, Section 8. 15 P. S. Section 102: Act of March 24, 1903, P. L. 50, 15 P. S. Section 101.
\textsuperscript{92} Section 513. There is, of course, the constitutional exception in the case of increasing capital stock and indebtedness, where a meeting must be held. Pa. Constitution, Article XVI, Section 7.
\textsuperscript{93} Sections 204, 601, 801.
\textsuperscript{94} Act of April 25, 1921, P. L. 1159.
\textsuperscript{95} Act of May 21, 1923, P. L. 288. Act of May 3, 1933 (No. 80) for corporations still comprehended by Act of 1874.
\textsuperscript{96} Section 607 D. The rule was otherwise under the Act of June 24, 1895, P. L. 258, as amended.
\textsuperscript{97} Section 604.
The articles of incorporation do not fix the consideration for which no par value shares may be issued. To do so would tend to give them too much of a fixed or nominal value. Such shares are "payable with consideration of the character and value determined by" the incorporators, upon subscriptions before incorporation, or by the shareholders, or directors acting under authority of the shareholders, upon subscriptions after incorporation. This insures the creation of a share which actually has no par value. It also keeps the shareholders in control in determining the fair value of the consideration for which no par shares are issued when it is other than cash.

Shares fully paid are expressly made nonassessable. A transferee of shares or an assignee of a subscription to shares which purport on the face of the papers to be full paid but which, in fact, are not, is not liable for any amount still due on them, provided he acted in good faith, without knowledge that full consideration had not been paid.

PREEMPTIVE RIGHTS

Shareholders of business corporations have no preemptive rights, unless they are provided for in the articles as a matter of contract. This is doubtless a fortunate solution to a troublesome problem. In view of modern corporate practice, it is no longer shocking to consider that voting control, though an attribute of proprietorship, is surrendered to directors along with management. In the average case, the advantages incident to unified control outweigh the disadvantages incident to loss of the preemptive right.

The words "preemptive right" are used in this section apparently to describe every right of shareholders to have new shares offered to them before they are offered to others, regardless of the ground on which such right might be based. The opening sentence confers the right on directors to offer new shares to outsiders, in the first instance, subject to restrictions as to consideration as provided in Section 603, and subject, of course, to further restrictions contained in the articles. As to par value shares, Section 603, relating to consideration, provides a minimum of par, for less than which par value shares may not be issued. Read together, these sections, it might be

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86Section 603.
89Sections 604, 609. This has been the law in Pennsylvania since the passage of the Act of May 25, 1887, P. L. 273.
100Section 609.
101Section 611.
102Harry S. Drinker:—"Preemptive Rights of Shareholders to Subscribe to Stock", 43 H. L. R. 586.
103Section 611.
argued, authorize the issuance of par value shares to strangers at any price not less than par, regardless of fair sale value, at least in cases where the articles are silent as to preemptive rights. Obviously, if given this literal meaning, directors might, in effect, distribute assets to strangers by issuing new shares at a price which would impair the monetary equity of existing shareholders. Heretofore, such action on the part of directors has been disposed of on the ground of fraud. Perhaps the answer is, as a matter of construction, that Section 603 fixes merely the minimum consideration for par value shares in conformity with the true par value concept, and the Code is silent on the specific case being discussed.

**STATED CAPITAL**

As previously noted, "stated capital" is so defined as to fit the old concept of "capital stock". If only par value shares are created, the stated capital is the aggregate par value of the shares so issued. If no par shares with preferential rights in assets upon involuntary dissolution are issued, the stated capital may not be less than the aggregate amount of value of the agreed consideration received for such shares. If no par shares have no such preferential rights, the stated capital is the total consideration received for them less such part as may be allocated by the board of directors to paid in surplus.

Thus, for the first time, we have written into the Pennsylvania statutes a clear concept and definition of stated capital. It may be increased from time to time by resolution of the board of directors and decreased by the action of the directors and the shareholders without any corresponding change in share structure.

The definition of stated capital under the Act of July 12, 1919 never was satisfactory or clear. It was defined as the capital with which the corporation began business, as stated in the charter, plus any net additions there to, or minus any net deductions therefrom. It did not include any net profits or surplus earnings until transferred to capital account, and could not be larger in amount than the excess, as shown by the books, of assets over liabilities other than capital stock liabilities. Under this definition, it was never

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105Section 2. Text, page 80.
106Section 614 (1).
107Section 614 (2).
108Section 614 (3) (4).
109Section 614 (4).
110Section 706. Statement of reduction must be filed with the Secretary of the Commonwealth.
111P. L. 914, Section 3, 15 P. S. Section 183.
clear just what stated capital was. It might even be a changing amount. Neither was it certain that the directors had authority to change the amount without some corresponding change in the number of shares.

The Bonus Act of April 20, 1927, which is still in effect for business corporations as well as others, still further complicated the "stated capital" conception. It is, of course, pertinent only for bonus purposes, but it accepted the definition of the 1919 Act without going the whole way. It defined it as "the capital with which the corporation begins business * * * or as stated or set forth in the proceedings under which such stock is issued." It is submitted that the 1927 Bonus Act should be amended to adopt the Code definition of "stated capital." "Stated capital" should mean the same thing for all purposes.

DIVIDENDS

Dividends may be paid from the surplus of the aggregate of assets over the aggregate of liabilities, including stated capital. Cash or property dividends may not be paid from a surplus created by a write-up of unrealized appreciation in assets, or other "paper" profits. The rule is otherwise as to share dividends, since no harm can result to creditors from a mere capitalization of unrealized appreciation.

Share dividends of par value shares obviously call for the transfer from surplus to stated capital account of an amount equal to the aggregate par value of such shares and the Code so provides. If the share dividend consists of no par value shares, the amount to be transferred from surplus to stated capital is fixed by a resolution of the board of directors. Thus, all share dividends are fully paid and nonassessable. A split-up, or division in issued shares, as distinguished from a share dividend, may be made without disturbance of the surplus or capital accounts.

119Section 9 of Act of 1919, supra. The statutes were silent about increases and decreases in stated capital as such.
114P. L. 322.
115Section 701.
116Sections 701 A (1), 702.
117Section 701 A (2).
118Section 703. The share dividend, generally speaking, gives to creditors greater protection than they had before it was declared, because it merely accomplishes a transfer from surplus account to capital account, thus increasing the shareholders' permanent investment interest and decreasing the amount of assets available for cash dividends.
119Section 703.
120Section 703.
Except in the case of "wasting asset" companies, i.e., those engaged in the exploitation of natural resources, patents and the like, proper allowance must be made in the valuation of assets for depreciation and depletion in the computation of surplus available for dividends.¹²¹

It is permissible to pay dividends from paid in surplus only upon shares having preferential rights. The source of payment must be made known to such shareholders.¹²² This is a departure from the former statutory provisions in Pennsylvania, which permitted dividends to be paid only from "net profits" or "surplus earnings".¹²³

The necessity for the provision permitting dividends on preferential shares to be paid out of paid in surplus is suggested by the difficulty of financing certain types of business which are slow in reaching the profit making stage. Take, for instance, a real estate development company. It may take several years to realize sufficient profits to pay dividends on preferred shares. On the other hand, the security is good and many conservative investors will buy preferential shares if dividends can be assured from the outset. If part of the consideration for the common shares is allocated to paid in surplus, it can be made available to pay dividends at once on the preferential shares. In cases of reorganization, also, it is desirable to permit some part of the consideration to be made available for dividends on preferred.

While the foregoing illustrations perhaps justify the change giving legal recognition to the payment of dividends from paid-in surplus made up in part, at least, from the sale of nonpreferred no par shares, some question remains as to the position in which this leaves the common shareholder. Generally speaking, "the practice of crediting a portion of paid-in subscriptions to surplus available for dividends is * * * to be unqualifiedly condemned."¹²⁴ The usual reasons assigned for this are that technically it conflicts with accounting principles and, in practice, enables unscrupulous promoters to unload a failing enterprise on the public by paying dividends out of shareholders' contributions until their holdings have been disposed of. Of course, the Code does not leave this field wide open. The directors must determine what allocation is to be made at the time or before the shares are issued, if the consideration is cash; and within sixty days thereafter, if the consideration is other than cash.¹²⁵ But the determination is made by directors' resolution.¹²⁶ Even if the allocation of consideration for certain shares were fixed by the articles of

¹²¹Section 701 C.
¹²²Section 701 B.
¹²³Section 704.
¹²⁴Act of July 12, 1919, P. L. 914, Section 8, as to no par value shares; Act of May 23, 1913, P. L. 336, Section 1, as to par value shares.
¹²⁶Section 614.
¹²⁷Id.
incorporation, as a practical matter, the purchasers of such shares would not be aware of it.\textsuperscript{128} The Code requires that the preferred shareholders be notified as to the source of the dividend, if paid from paid-in surplus.\textsuperscript{129} This goes a long way, of course, in preventing the evil just mentioned. But the common shareholder is without notice other than what he might discover if cautious enough to investigate directors' resolutions before purchasing. In the absence of actual notice, should not a purchaser of any class of shares be entitled to assume that no part of his contributions will be available for dividends?

**REDEMPTION AND CANCELLATION OF SHARES**

If the articles\textsuperscript{130} make any class of shares subject to redemption and provide for their cancellation upon redemption, the board of directors may, without further authority from the shareholders, effect such redemption and cancellation by resolution.\textsuperscript{131} This will result in a reduction of authorized capital stock (shares\textsuperscript{132} ) and also of stated capital, unless the redemption consideration is all taken from surplus.

It is necessary that the corporation file a statement of redemption and cancellation with the Department of State within thirty days after such redemption and cancellation take place.\textsuperscript{132} The filing of such statement is given the effect of an amendment to the articles.

Thus, where the articles make provision for it, we find that authority exists in the directors alone to reduce authorized capital stock, as well as stated capital.\textsuperscript{134}

**AMENDMENT OF CHARTER**

The authorized capital stock of a corporation, under the Code, may be increased or decreased only by amending the articles.\textsuperscript{135}

\textsuperscript{128}\textsuperscript{128}The distinction between contributed capital which is to be called capital and that which is to be called surplus probably rests on the contracts between stockholders which are expressed in certificates of incorporation and similar legal instruments, with which attorneys for the corporation are familiar * * * because they wrote them. But who ever heard of a stockholder who read a certificate of incorporation? Is it not rather silly to say that paid-in capital may be paid out in dividends because the stockholders decided that should be so?"—Accountants' Handbook, (2nd ed., 1932) 927, quoting Montgomery, "Auditing Theory and Practice".

\textsuperscript{129}Section 704.

\textsuperscript{130}Section 204, (6) (12).

\textsuperscript{131}Section 705 A.

\textsuperscript{132}Section 2.

\textsuperscript{133}Section 705 B and C.

\textsuperscript{134}Corporations created under the Act of 1874 could reduce capital stock only upon the approval of a majority in interest of the shareholders. Act of June 8, 1893, P. L. 351, as amended, 15 P. S. Sections 281-285.

\textsuperscript{135}Section 801 (4). With the exception of the redemption and cancellation procedure, supra.
This requires advertisement in two newspapers one time, just as in the case of original incorporation, instead of once a week for three weeks in two newspapers, as formerly in case of amendment. Changing the par value; converting from par to no par and vice versa; and changing kinds, classes, designations and preferences are likewise accomplished by amendment proceedings under the Code. Logically, all these proceedings should be by amendment, but the advertising requirement is unfortunate, particularly as to an increase proceeding. Stockholders are the only persons interested and, unless they waive notice of the meeting at which the vote to increase is taken, they are assured of at least sixty days' notice of it. For all other proposed amendments the stockholders receive a ten-day notice of the meeting at which they will be voted upon. It is, however, consistent to require advertisement so long as advertisement of intention to form a corporation is necessary.

Besides increases and decreases of capital stock and other changes in capital structure, the corporate title must now be changed by amendment, and the charter renewal proceeding is technically an amendment. As formerly, the corporate purpose is still changed by amendment. However, under the Code a change in original purpose may be accomplished; also, any number of amendments may be joined in a single proceeding.

In a broad general sense, the Code reverts to the former practice under the Act of 1874, and its earlier supplements, of requiring all changes to be by amendment. The requirement is logical, but the necessity for advertisement

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136 Sections 807, 205.
138 Section 803.
139 Corporations remaining under the Act of 1874 must advertise once a week for three weeks, upon amending their charters (Act of June 13, 1883, P. L. 122), but the scope of amendment proceedings for corporations under the Act of 1874 is much narrower.
140 Under the Act of July 2, 1901, P. L. 606, the par value of shares could previously be changed without amendment. Under the Act of May 21, 1923, P. L. 288, conversions could be made in share structure in kinds and classes and from par to no par and vice versa, without amendment. Under the Act of May 25, 1921, P. L. 1159, preferred stock could be created from an increase in capital stock or from already authorized capital stock, without amendment. The procedures under these acts are now open only to corporations embraced within their terms other than “business” corporations.
141 Section 801 (1). Under the Act of April 22, 1903, P. L. 251, the corporate title could be changed without amendment and may still be for other than “business” corporations.
142 Section 801 (2). To extend period of corporate existence. Section 40 of the Act of 1874 set forth the former procedure to accomplish this.
is a new burden in many instances. Of course, where amendment was the appropriate proceeding formerly, there had to be advertisement once a week for three weeks in two newspapers. At least, the requirement is cut to one insertion in two newspapers, but with the scope of amendment so broadened the benefit in the long run is more than negatived.

Amendments are proposed by resolution of the board of directors, adopted by a majority vote of the shareholders, unless the articles require a greater vote, and articles of amendment, together with proof of advertisement, are filed with and approved by the Department of State.

MERGER AND CONSOLIDATION

Merger and consolidation procedures are now clearly distinguished. The Act of May 3, 1909, used the terms interchangeably, but actually provided for what appears to have been more technically in the nature of consolidation. The courts held, for instance, that the proceeding under the 1909 Act was a method of incorporation.

Now that merger has been definitely provided for, the so-called "short merger" proceeding, under Section 23 of the Act of 1874, as amended, is no longer available for "business corporations". It was, however, a very convenient and inexpensive device, requiring little paper work.

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144 Act of 1883, supra.
145 Section 802.
146 Section 805. Certain amendments will also be affected by Article XVI, Sec. 7, of the Constitution of 1874 in increasing the stock of a corporation. In this section the phrase, "unless the articles require a greater vote," may preclude the necessity of amending the section, for this impliedly incorporates the constitutional provision in regard to consent of the persons holding the larger amount, in value, of the stock, into the section.
147 Section 806.
148 Section 808. If the articles of amendment are in proper form and all fees, taxes, bonus and charges due have been paid, the Department of State approves them and issues a certificate of amendment. Under the Act of 1883, the amendment had to be approved by the Governor and a copy of the certificate filed with the recorder of deeds.
149 P. L. 408.
150 In the case of consolidation, no constituent survives; a new corporation is formed. In a merger, in the technical sense, one corporation survives.


"* * * It is clear the ultimate effect of this act is to provide a method of incorporation, and, as individuals are associated to form a corporate entity, so two or more corporations may be associated to form a single corporation entity. Upon consolidation thereunder the constituent companies are deemed dissolved and their powers and faculties to the extent authorized are vested in the merged company as a new corporation. It is an entity entirely distinct from that of its constituents. It draws its life from the act of consolidation. The fact that to ascertain the powers and faculties of the new company you must be referred to what existed in the old companies does not affect this result. * * *"
It is no longer a prerequisite that the corporations consolidating or merging be engaged in "the same or a similar line of business." If the laws of the other state permit it, a foreign corporation may merge into or consolidate with a Pennsylvania corporation, or a Pennsylvania corporation may merge into or consolidate with a foreign corporation. This is a very liberal forward step.

Incidentally, there is no provision in the Code for domestication of a foreign business corporation. It was seemingly deliberately omitted, both because there is no longer much occasion for such a proceeding and because since the amending Act of June 10, 1931, it was possible to get full bonus credit in the domestication proceeding for the amount upon which bonus had been paid by the foreign corporation. The Act of 1931 introduced an anomaly into the law, since foreign corporations pay bonus at one rate on capital invested in Pennsylvania and domestic corporations at another rate on authorized capital stock, regardless of situs of assets.

The board of directors now adopt a "joint plan" rather than a "joint agreement" of merger or consolidation, which must receive a majority vote of the shareholders of each of the merging or consolidating corporations. Articles of merger or consolidation, rather than the former "joint agreement", are then filed with the Secretary of the Commonwealth, who, upon approval, issues a certificate of merger or consolidation.

An important kink in the old law is eliminated by permitting the capital stock to be increased in the merger or consolidation proceeding to an amount in excess of the aggregate authorized capital stock of the several constituents.

151 Act of May 3, 1909, supra, note 149, Section I.
152 Act of June 9, 1881, P. L. 89.
153 P. L. 490. Changed the rule of National Metal Edge Box Co. v. Comm., 30 Pa. C. C. 273. In a formal opinion rendered September 22, 1933, E. Russell Shockley, Deputy Attorney General, held that the domestication act of 1881, supra note 152, as amended by the Act of 1931, is no longer available to foreign business corporations, and that while such a corporation may domesticate itself by incorporating under the Code, without enabling legislation, it will not be entitled to bonus credit.
154 Ruslander and Main, Pennsylvania Corporation Taxes (3rd ed. 1933), Sections 303, 320, 321.
155 Section 902.
156 Act of 1909, supra.
157 Sections 903, 905. As in the case of formation and amendment, the Governor's approval is no longer necessary.
158 Section 902. If an increase in capital stock is involved, the stockholders must receive the constitutional sixty-day notice of the meeting at which the vote is taken, rather than the usual ten-day notice. Section 902. The notice to shareholders must carry a summary of the entire plan or proposal of merger or consolidation. All bonus, fees and taxes must be paid before the certificate of merger or consolidation will be issued. Section 905.
It is unfortunate, but, of course, logical, to require the same newspaper advertising of intention to merge or consolidate as to form a corporation in the first instance.\textsuperscript{158}

A dissenting shareholder is very amply protected in his rights. He must, however, pursue them in a timely manner against the surviving or new corporation, rather than against the old constituent in which he was interested, as formerly. If the shareholder and the corporation cannot agree on a settlement, an equitable proceeding is provided for the Court of Common Pleas to have the benefit of an appraisement made by three disinterested persons. Appreciation or depreciation, in consequence of the merger or consolidation, is ignored.\textsuperscript{160}

**Dissolution**

Entirely new procedures are provided for dissolution and winding up. For the most part, they are taken from the Uniform Act and recent codifications in other states.

If the incorporators desire voluntarily to dissolve before business has been commenced or shares issued, they may do so by filing with the Department of State articles of dissolution.\textsuperscript{161} Such articles must be verified by a majority of the incorporators. If the articles are in proper form and all bonus, taxes, fees and charges due the State have been paid, the Department of State issues a certificate of dissolution, whereupon corporate existence ceases.

If a corporation has commenced business and has issued shares, it may.

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\textsuperscript{158}Section 904. The Act of 1909 required no notice to shareholders other than the one by publication once a week for two weeks, in at least one newspaper. Now that the statute requires complete and adequate notice to shareholders, the notice by publication is surplusage, since no particular public policy is served.

\textsuperscript{160}Section 908.

\textsuperscript{161}Section 1101. No similar procedure heretofore existed in Pennsylvania. Under the Act of June 13, 1883, P. L. 122, a self-executing forfeiture took place if a corporation of the second class failed to proceed in good faith to organize and do the things contemplated by its charter within two years from the date of incorporation. Com. v. Lykens Water Co., 110 Pa. 391. If the corporation did start to acquire property, structures and other improvements, it had to complete the acquisition within five years or suffer forfeiture. Act of April 17, 1876, P. L. 30, Section 11, as amended. A self-executing forfeiture provision is objectionable. It is often questionable whether a given set of circumstances are sufficient to satisfy the statute, or whether they are insufficient and will result in automatic forfeiture. Furthermore, there is no official record of such a forfeiture. It is better to hold, as the courts of most states do, that the failure to do the things specified in the statute merely furnishes grounds for forfeiture; the forfeiture itself resulting only from a proceeding instituted in some court of record or in some public office. See Attorney General v. Superior & St. C. R. Co., 93. Wis. 604, 67 N. W. 1138; People v. Hudson River Connecting R. Co., 228 N. Y. 203, 126 N. E. 801.
nevertheless, voluntarily dissolve without the necessity of a court decree. The procedure is either to have all the shareholders sign a written agreement consenting to the dissolution, or to have the board of directors adopt a resolution recommending dissolution to the shareholders, which the latter adopt in meeting by a majority vote. The corporation then files with the Department of State a certificate of election to dissolve, which is approved, provided all bonus, taxes, fees and charges due the Commonwealth have been paid.

Thereafter the corporation proceeds to wind up, but conducts no new business. The directors cause notice of the winding up proceedings to be mailed to all known creditors and to be published once a week for two weeks, in two newspapers of the proper county.

When all debts have been paid, credits collected, and remaining assets, if any, distributed to shareholders, articles of dissolution are filed with the Department of State. If in proper form, the Department of State approves them and issues a certificate of dissolution, whereupon corporate existence ceases.

Involuntary dissolution still results only from a decree of court. Although a copy of the decree must be filed by the prothonotary with the Department of State, corporate existence ceases when the decree is made.

The causes for which a single shareholder may petition the Court of Common Pleas for a winding up and involuntary dissolution are specifically set forth. Chief among them are failure, abandonment or impossibility of accomplishment of objects; oppressive, illegal or fraudulent action or dead-locking of directors, and misapplication or wasting of corporate assets.

A creditor may similarly petition, when execution on a judgment claim against the corporation has been returned unsatisfied or the corporation is unable to pay an admitted debt.

In either of these involuntary dissolution proceedings, the court entertaining the petition can, in a proper case, appoint a receiver.

In addition, the Code grants express statutory authority for the appointment of liquidating receivers, or receivers pendente lite, in all dissolution

162Section 1102. Previously, the Act of April 9, 1856, P. L. 293, provided the only method of voluntary dissolution other than the little used "amicable quo warranto" proceeding. The Act of 1856 required a petition to the Court of Common Pleas and a decree of dissolution.

163Section 1103.

164Section 1104.

165Section 1105.

166Section 1110.

167Under the Act of 1856, supra, corporate existence did not cease until the copy of the decree was filed by the corporation's agent in the Department of State.

168Section 1107.

169Act of June 16, 1836, P. L. 784, Section 13, which gives Courts of Common Pleas equity jurisdiction over corporations.
proceedings, whether voluntary or involuntary.\textsuperscript{170} The court may require all creditors of the corporation, after notice given, to file proof of their claims within a specified period, which may not be less than four months from the date of the order or be forever barred.

The winding up incident to involuntary dissolution proceedings may be halted at any time by the court, upon proof that the causes for which the petition was filed have been corrected.\textsuperscript{171} Creditor interests and shareholder interests are each bound by a three-fourths vote as to any reorganization plan.\textsuperscript{172}

Except where a court has liquidated its assets, the liabilities of a corporation, its officers or directors, accrued prior to dissolution may be sued upon within two years after the date of dissolution.\textsuperscript{173}

All existing quo warranto proceedings are made available against business corporations.\textsuperscript{174}

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The Code is a great step forward. For the most part, the best has been taken from recent codifications in other states. Its sponsors did not include the many objectionable features in the laws of certain sister states, which openly bid for incorporation business solely as a source of revenue.

No code can be enacted, however, which will in the first instance work smoothly in every conceivable situation. There may be unanticipated rough spots. Practicing attorneys and others who discover them are invited to make known the difficulty to the Attorney General who will act as a clearing house to assemble all complaints and work all necessary corrections into a single amendment in 1935.

\textsuperscript{170}Section 1108. There have been few statutory provisions in Pennsylvania relative to the appointment of receivers. McDougall et al. v. Huntingdon and Broad Top R. & C. Co., 294 Pa. 108.

\textsuperscript{171}Section 1109.

\textsuperscript{172}This is a statutory insurance against the results of the decision in Northern Pacific Ry. v. Boyd, 228 U. S. 482, where it was held that a reorganization plan, however seemingly fair, is invalid which includes an offer to stockholders and not to unsecured creditors.

\textsuperscript{173}Section 1111.

\textsuperscript{174}Section 1112.