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The New Washington Business Corporation Act [Part 3]

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THE NEW WASHINGTON BUSINESS CORPORATION ACT*

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SECTION 34 provides that every corporation shall maintain an office in this State to be known as its registered office; provides for a change in the location of the registered office, and provides a penalty for failure to comply with the requirements of the section. "Registered office" was defined in Section 1, Subdivision 13, supra, to be that office where the corporation's minute and stock books are kept, the address of which is kept on file in the office of the Secretary of State. Section 3, Subdivision 1, (c), further provides that the location and postoffice address shall be stated in the articles of incorporation. The principal section supplements the former sections.

As adopted, this section departs from the section of the Uniform Business Corporation Act in that provision is made for registration in the event of the change of the registered office to another county in this State. This is in accord with provisions of recent corporation acts adopted in other states.[109] It is to be noted that a change of the location of the registered office may be authorized by a vote merely of the board of directors and consequently can be changed without the formality of an amendment of the articles. The nature of the section is such as to make it applicable to existing corporations and as it carries a substantial penalty it should be complied with, particularly in those cases where the "registered office" may not be located at "the principal place of business" or where it becomes necessary in order to locate the minute and stock books. This section will repeal the former section providing for removing the principal place of business and the publication of notice thereunder.[110]

It should finally be noted that while the penalty is imposed upon the corporation, that directors and officers in turn, charged with the duty to fulfill these requirements would undoubtedly be liable

*Continued from last issue.

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[109] Ill. Laws of 1933, Business Corp. Act, sec. 13; Minn. Laws of 1933, Ch. 300, sec. 32 (III).

[110] Wash. Rem. Rev. Stats., 1932, sec. 3835.

to the corporation for their failure to comply with these requirements.

SECTION 35 provides that certain books and records shall be kept by the corporation, provides for right of inspection by every shareholder, his agent or attorney, and provides a penalty for a failure to keep the records specified. Former provisions of the statutes[111] were piecemeal, indefinite, and unsatisfactory, and have led to much unsatisfactory litigation.[112]

The corporation is by this section required to keep at its registered office the records of the proceedings of the shareholders and of the directors, and a share register except where the corporation keeps a share register in another state. As it is stipulated that the share register is to contain the names of the shareholders in alphabetical order, and is to show their respective addresses, the number and classes of shares held by each, and the dates on which they acquired the same, the customary method of keeping this record in the stubs of the stock book employed by the smaller corporations will hardly satisfy the requirements of the statute. And, as the penalty provides for a fine of up to fifty dollars each day the corporation neglects to keep any or all of the books or records required it becomes a matter of some importance to comply with this provision. Subdivision 2 of this section requires that the corporation keep appropriate and complete books of accounts. Contrasted with Subdivision 1 these books of account need not be kept at the registered office, it presumably being intended that they were to be kept at that place at which the corporation is actually doing business, even though outside the State.

As desirable as the purpose and end to be attained by these subdivisions may be, it is submitted that they will be largely ineffective. The penalty provided renders the corporation liable to the State and it is quite improbable that the Attorney General will bring action either on this section or under Section 60, infra. The maintenance of books and records is a matter primarily of concern only to the corporation and its members. If it is a matter of concern to the public, as where fraud is to be prevented or revenue to be secured, the State will either require reports or see that the records are maintained. It is even questionable whether legislation of this kind should be given teeth to be enforced by the shareholders as the method of conducting business is largely a matter of internal regulation and control. As to creditors being empowered

[111] Wash. Rem. Rev. Stats., 1932, secs. 3827, 3828—set forth in detail.
[112] See citations to sections of statutes cited in previous note.

to enforce such provisions, it would seem an undue interference and discrimination by the State in the regulation of the conduct of private business as conducted by corporations.

Subdivision 3 provides for what is usually termed the right of inspection. It provides in substance that the shareholder may by his agent or attorney at any reasonable time for any reasonable purpose examine the share register, books of account and records of proceedings of the shareholders and directors and to make extracts therefrom. No penalty is provided for the failure or refusal to grant this right and it may be assumed that the former section[113] has been repealed. It may be observed that the enforcement of such statutory penalties has usually been unsatisfactory and unavailing.

This suggests a brief review of the right every shareholder had at common law, enforceable by writ of mandamus, to inspect the corporate books and records to obtain information as to its condition and affairs. This writ was never issued as a matter of right but always in the discretion of the court. The courts generally in the exercise of their discretion did not issue the writ when the stockholder's motives and purposes were improper, or for speculative purposes, or to satisfy a mere idle curiosity It was accordingly held that the right was subject to the qualifications that the shareholder's purpose must be germane to his interest as a shareholder, and that it must be exercised at proper and reasonable times, considering the business and convenience of the corporation.[114] Subsequently constitutional and statutory provisions were passed which provided for the right of inspection. These raised the question as to the right of the court to exercise its former discretion. Statutes were also passed which provided for penalties in case the inspection was denied. These raised the question as to whether they provided an exclusive remedy The courts, however, usually continued to grant relief either through mandamus or in equity by injunction, exercising their discretion subject to the qualifications that the purposes be proper and the right be exercised at reasonable times. This is in effect what is secured by Subdivision 4 of this section. The generality of the subdivision with the determination of its exercise left to the court seems desirable legislation.

Recent statutes in various states provide in somewhat more

[113] Wash. Rem. Rev. Stats., 1932, sec. 3839.

[114] See 22 A. L. R. 24 and cases cited; Ballantine, Corporations, 1927, secs. 164, 165; 20 Cal. L. Rev. 449 (1932) 27 Ill. L. Rev. 828 (1933) 30 Mich. L. Rev. 769 (1932) 17 Va. L. Rev. 714 (1931).

detail for the exercise of the right. For example, in California[115] provision is made that the proceedings of the "executive committees of the directors" shall be open to inspection upon the written demand not only of a shareholder but the holder of a "voting trust certificate." It is further provided that this right may not be limited in the articles or by-laws. Again, it is provided[116] that the right to inspect shall extend to subsidiary corporations. In Illinois the restriction is made that the shareholder must have been of record for at least six months immediately preceeding his demand or shall be the holder of record of at least five percent of the outstanding shares of the corporation.[117] It is provided in Minnesota that a shareholder may obtain a statement of profit and loss in detail and that a creditor may demand a statement of dividends paid within the last three years preceding.[118] Various penalties are exacted. These statutes suggest specific difficulties which have been encountered.

SECTION 36 provides for a voluntary transfer of corporate assets, subdivision 1 provides for a voluntary sale, lease or exchange of all the assets of a corporation. This may be accomplished upon such terms and conditions as the corporation deems expedient, including an exchange for shares in another corporation, domestic or foreign. Subdivision 2 distinguishes between the cases where a corporation can meet its matured liabilities and where it cannot meet them and, accordingly, sets forth the provisions for making a transfer. Where a corporation is able to meet its matured liabilities in the absence of any provision in the articles of incorporation the holders of two-thirds of the voting power of all shareholders may effect the transfer. If the corporation is unable to meet its liabilities then matured, the board of directors may authorize the transfer. Subdivision 3 is to the effect that the section is not to be construed to authorize transfers otherwise fraudulent.

This section will settle a much mooted question in the law While most jurisdictions have statutory provisions relating to the sale by a corporation of all its assets, Washington had no such statute prior to the adoption of the above section. These statutes vary from a requirement of a majority vote to a requirement of a unanimous consent of the shareholders. Further, a number of the statutes required that such action be initiated by the board of direct-

[115] Cal. Laws, 1933 Supplement, sec. 355, Deering.
[116] Sec. 356, citation last note.
[117] Ill. Laws of 1933, Bus. Corp. Act, sec. 45.
[118] Minn. Laws of 1933, sec. 34 (1), (2).

ors.[119] As the directors are more likely to be cognizant of the condition of the corporation this seems a desirable procedure.

Where the corporation is insolvent or a losing venture most of the courts agree that the transfer may be authorized by a *majority* of the shareholders. Under such circumstances the board of directors are probably in a better position to pass upon the financial condition of the corporation and it seems advisable and reasonable to recognize their authority to liquidate and pay debts by a sale of the corporate assets. This is the effect of the present section. On the other hand, where the corporation is a going corporation and no exigency of its business requires the sale or transfer of its entire assets, the great weight of authority in the absence of statute required the unanimous consent of the shareholders.[120] The reason usually assigned was that such a sale would defeat the implied contract among the stockholders to pursue the business for which the corporation was organized. This view, however, which gives one dissenting shareholder the power to hold up a sale no matter how advantageous, has led to so much abuse that legislation similar to the foregoing section is now quite general. These statutory provisions like the similar ones of alteration, merger, dissolution, and consolidation confer the power in each instance upon certain proportions of the shareholders, usually two-thirds of the voting power. Under such statutes, accordingly, a shareholder may not enjoin a fair transfer of the corporate assets, for he purchases his shares subject to the exercise of such power.

While, as stated, there was no prior statute in Washington authorizing the sale of all of the assets of a corporation it should be noted that there was a provision for the dissolution of any corporation by a vote of two-thirds of all the stockholders to disincorporate and dissolve the corporation.[121] And while it is true that the sale of the entire assets of a corporation may be distinguished from a dissolution, the sale is often designed merely to effect a liquidation of the selling corporation and a distribution of the proceeds to its shareholders with an abandonment of the old corporation. It is also quite common to resort to the device of selling assets in exchange for stock of a purchasing corporation in order to avoid the effect of statutes requiring the assumption

[119] Cal. Laws, 1933 Supplement, sec. 343, Deering; Ill. Laws of 1933, Bus. Corp. Act, sec 72 (a) Minn. Laws of 1933, ch. 300, sec. 35, are some of the latest statutes.

[120] Ballantine, Corporations, 1927, secs. 59, 177, and cases cited. For a minority view see 14 Minn. L. Rev. 58 (1929) and Warren, "Voluntary Transfers of Corporate Undertakings." 30 Harvard L. Rev. 335 (1917).

[121] Wash. Rem. Rev. Stats. sec. 3834.

of liabilities by the merged or consolidated corporation.[122] It would accordingly seem that Washington might well have taken the view that a sale of all the assets could be accomplished by a vote of two-thirds of all the stockholders. In any event this is now settled by the foregoing section.

The distinction between a sale and an exchange should be emphasized, for the sale of all the assets with liquidation and distribution can be treated as a dissolution whereas the receipt of stock in another corporation in exchange contemplates a continuance of the investment. This may well be considered a fundamental change of the original contract of investment. Such a provision however like similar statutes providing for merger and consolidation may be justified, when an exercise of honest judgment, as being for the welfare of the larger part of the shareholders in what primarily is an investment for making profit. In recognition however of the minority's contention they may object to such action and receive in payment the appraised value of their shares. This will be discussed under Section 41, *infra*. It is sufficient to state here that the dissenting shareholder may refuse to exchange his stock and insist that he be paid the fair value for the stock which he holds.[123]

Finally it should be noted that this section requires a vote of the holders of two-thirds of the *voting power* of all shareholders. Under Section 41, *infra*, a shareholder who does *not vote* in favor of such corporate action may object and take advantage of the appraisal clause. Undoubtedly Subdivision 2 of the principal section, while it limits action to the voting power, did not intend to preclude the rights of non-voting shareholders. Such shareholders are expressly protected by Subdivision 3, where reference is made to shareholders without voting rights. Commenting on Subdivision 3 it may be observed that an early decision in the State of Washington held in the analogous case of a dissolution authorized by two-thirds of the stockholders, that the dissolution could not be effected for the purpose of enabling the majority to get control of the business by a sale of the property and the organization of a new corporation.[124]

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[122] See Hill's "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 Cal. L. Rev. 349 (1931).

[123] See 17 Cornell L. Quart. 269 at 272 (1932).

[124] *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004 (1904). For a general consideration of the questions involved in this section see 17 Cornell L. Quart. 269 (1932), 28 Mich. L. Rev. 202 (1929) 32 Mich. L. Rev. 743, 748 (1934) 14 Minn. L. Rev 58 (1929) 18 Va. L. Rev. 37 (1931).

SECTION 37 provides for amendments of the articles of incorporation. Subdivision 1 is a statement of the general power to amend and in the words used is all inclusive as it provides that articles may be amended "in any respect so as to include any provision authorized by this Act." The general problems involved in the amendments of articles of incorporation have already been treated in an earlier installment of this article.[125] The provision for extending the period of its duration for a further definite time or perpetually has also been considered.[126] The former statute provided that "amendments may be made to the articles of incorporation by a majority vote of its trustees and the vote or written assent of two-thirds of the capital stock of such corporation."[127]

Subdivision 2 provides for changing the name of the corporation by amendment by vote of a majority of the voting power or by such vote as the articles of incorporation may require. Subdivision 3 provides that an amendment altering the articles of incor poration in any other respect may be adopted by vote of the holders of two-thirds of the voting power of all shareholders, or by such vote as the articles of incorporation require. The prior statute contains no provision authorizing the articles of incorporation to provide what voting power may effect an amendment. Subdivision 4 provides that if an amendment would make any change in the rights of the holders of shares of any class, or would authorize shares of preferences in any respect superior to those of outstanding shares of any class, then the holders of each class of shares affected by the amendment shall be entitled to vote as a class upon such amendment, whether such class be entitled to vote or not and in addition to the vote required by Subdivision 3, the vote of the holders of two-thirds of the shares of each class so affected shall be necessary for the adoption of the amendment.

This last subdivision is in accord generally with the recent acts adopted in the various states. It is a new provision in the Washington law and taken in consideration with Section 41, *infra,* providing for the appraisal of shares and payment to non-assenting shareholders in the event of such amendments, represents another

[125] See 8 Wash. L. Rev. 97 (1934). See also citations under note 11, p. 98, to which should be added a well organized and exhaustive treatment in 32 Mich L. Rev. 743 (1934), entitled "Minority Stockholders and the Amendment of Corporate Charters," by Edw. O. Curran. See also 11 Cornell L. Quart. 78 (1925) 15 Cornell L. Quart. 279 (1929) 43 Harvard L. Rev. 656 (1929) 28 Ill. L. Rev. 422 (1933) 28 Mich. L. Rev. 1009 (1929).

[126] See 8 Wash. L. Rev. 108 and note 37.

[127] Wash. Rem. Rev. Stats. 1932, sec. 3805.

instance of an attempt to adjust the conflicting interests between the majority and minority shareholders in a corporation. Further it makes definite and settles the conflict of authority heretofore existing as to the right of the State to provide such legislation with respect to existing corporations under the reserved power. It would seem that such amendments insofar as they affect all the outstanding shareholders in the same way, and without discrimination, and look forward primarily to the raising of additional capital, should and will, be justified. A more serious question, however, is presented when an amendment is adopted whereby a new class of stock seeks to increase the rights and privileges of an existing class of stock at the expense of another existing class. This, perhaps, may be accomplished where expressly and definitely provided for in the articles if the action is bona fide. It should not, however, be inferred or implied from general provisions.[128] However, Subdivision 4 by its requirements in light of Section 41, *infra,* would seem to warrant such priorities as to corporations formed under this Act. As to corporations heretofore existing it may be questioned whether such changes can be secured through the adoption of such amendments. They are possibly so extraordinary as not to be contemplated by the reserved power.

Subdivision 5 provides that any amendment which might be adopted at a meeting of shareholders as provided in this section, may be adopted without a meeting if written consent has been given by all shareholders entitled to vote thereon. This may be contrasted with the former statute.[129]

With respect to the validity of amendments generally the following summary by Mr. Curran may be helpful

> "It is obvious from this review of the cases that there is no helpful general test for determining the validity of amendments to corporate charters adopted by a majority of the stockholders. Their validity will depend upon a variety of questions. First to consider is the question whether or not there is a reservation of power to amend contained either in the state statutes or the charter. Next to consider is the question whether the reservation of power be general or specific. Perhaps next in importance is the degree or the character of the change proposed, whether it is fundamental or formal, whether it affects

[128] Ballantine, Corporations, 1927, sec. 282, notes 83 and 85 11 Cornell L. Quart. 78 (1925) 15 Cornell L. Quart. 279 (1929) 43 Harvard L. Rev. 656 (1929) 28 Ill. L. Rev. 422 (1933) 28 Mich. L. Rev. 1009 (1929).

[129] Wash. Rem. Rev. Stats. 1932, sec. 3805, which provided that "Amendments may be made by a majority vote of the trustees and the written assent of two-thirds of the capital stock of the corporation."

primarily the internal arrangements of the corporation or radically changes the scope of the corporate enterprise. Then there is the tendency of the jurisdiction in question—whether it is inclined to stress individual proprietary rights of stockholders or is inclined, on the contrary, to emphasize the need for flexibility in corporate action and development. Also, the effect of the amendment is important, whether it does or does not produce discriminatory or unfair results as between stockholders or types of stockholders. And the decision on validity may depend on the question whether the amendment is coupled with an opportunity for dissenters to withdraw from the corporate enterprise on fair terms. And finally, the validity of the amendment may depend on what is usual, and therefore to be anticipated, as a matter of business practice. All these and perhaps other considerations have to be weighed in predicting the decision on a specific amendment. They are the only helpful aids for prediction which we have."[130]

SECTION 38 provides for filing and recording amendments. Subdivision 1 requires that the amendments be "signed and sworn to by the president or vice-president and the treasurer or secretary or assistant secretary" The prior statute provided that the president and secretary of the corporation should certify the amendments.[131] Subdivision 2 provides for the filing of amendments similar to the procedure in the filing of the articles of incorporation.[132] Subdivision 3 also follows the procedure of the filing of the articles of incorporation. It should be noted that they are filed for record. It may finally be observed that Section 3807 of Remington's Revised Statutes providing for the procedure in the case of the change of name is superseded by this section as this section sets forth procedure applicable to all amendments.

SECTION 39 deals with provisions relating to certain amendments. Subdivision 1 provides that if the total number of shares is to be increased or decreased the amendment shall state the total number of shares, including those previously authorized, those which the corporation will thenceforth be authorized to have, the number of shares that have a par value and the par value thereof, and the number of shares that have no par value, and if shares are divided into more than one class, a description of the classes, and a state-

[130] 32 Mich. L. Rev. 778, 779 (1934).

[131] Wash. Rem. Rev. Stats. 1932, sec. 3805. This provision is as follows: "The president and secretary of such corporation shall certify said amendments in triplicate under the seal of said corporation to be correct and file and keep the same as in the case of original articles."

[132] See sec. 5, *supra*.

ment of the number of shares in each class and of the relative rights, voting power, preferences and restrictions granted to or imposed upon the shares of each class. This subdivision is merely to make clear and definite what has been done. It should be observed that while customarily the increase or decrease of the number of shares will increase or decrease the capital stock, this does not necessarily follow, as in the case of par value stock the par value of stock may be changed and in the case of non-par stock, there is no fixed share value.

Subdivision 2 provides that par value shares may be changed to no par value. As par value shares may be treated as either of their original par value or of their actual value at the time of the change, the question arises as to the amount of consideration to be allotted to the no par value shares based on the value of the par value shares given in exchange. It is provided that the consideration may be stated in the articles of amendment either as the par value or the actual value of the par value shares at that time.

Subdivision 3 provides that no par value shares may be changed into par value shares. Although somewhat clumsily expressed this subdivision in effect requires that the no par value shares shall be exchanged at their actual or intrinsic value for the par value shares. Subdivisions 2 and 3 are taken from the New York Stock Corporation Laws. It is stated in the commissioner's note to this section that the effect of these subdivisions is "that if a corporation starts with shares having a par value of $100, it can call these in and substitute new shares without par value, using $100 as the exchange value, notwithstanding that the intrinsic value of the outstanding shares is $75 at the time of the exchange. If then it later wishes to turn its non-par shares into shares with a par of $100, it cannot exchange share for share, but must not let the aggregate par of the shares to be issued exceed the intrinsic value of the outstanding shares without par value."

Subdivision 4 provides for shares of no par value to be changed into a different number of the same class or of any other class having no par value. In making such exchange it is required that the capital of the corporation shall not be changed. The prior statute in Washington specified that "the number of shares of non-par value stock may be increased or diminished from time to time by complying with the provisions of law relating to increases and reduction in capital stock, so far as the same may be applicable."[133]

[133] Wash. Rem. Rev. Stats. 1932, sec. 3805.

SECTION 40 provides for the reduction of capital stock. Subdivision 1 provides that the capital stock may be reduced by the vote of the holders of two-thirds of the voting power of all shareholders or by such vote as the articles of incorporation require. This in substance complies with the former law [134] Subdivision 2 specifies the procedure and requires that the articles of reduction shall state the financial condition of the corporation and that the proposed reduction will not reduce the fair value of the assets of the corporation to an amount less than the total amount of its debts and liabilities plus the amount of its capital stock as so reduced. This in effect requires that the corporation shall have assets over and clear of liabilities equal to and representing the capital stock as so reduced. This subdivision also substantially complies with the former law.[135] Subdivision 3 provides that the reduction of capital stock shall not be effective until the Secretary of State has filed the articles of reduction and issued a certificate, and even then it will not be effective if the reduction does not comply with the provisions of Subdivision 2. As Subdivision 1 of this section provides for a resolution adopted at a meeting of the shareholders duly called and Section 27 provides for the calling of shareholders' meetings, it would seem that the former statute[136] so far as it provides for the giving of notice of such meetings has been repealed.

Some may question why this section for reduction of capital stock was not included in the section on amendments. If the Act permitted only shares with par value, "capital stock" and the number of shares would be synonymous and a reduction of one would be the reduction of the other. In the present Act, however, the articles of incorporation are required to state the number of shares which the corporation is authorized to allot. Its "capital stock" is not controlled by the articles of incorporation, but as defined in Section 1 will be the aggregate of all allotted shares having par value plus the aggregate of the value at which all shares have a no par value have been allotted. Therefore, while the number of shares are to be increased or reduced by amending the articles of incorporation, the "capital stock" not being covered by the articles, could not be appropriately reduced by an amendment. It is to be observed further that the number of shares may be reduced without reducing the "capital stock," or that the "capital stock" might be reduced without altering the number

[134] Wash. Rem. Rev. Stats. 1932, secs. 3823, 3831.
[135] Wash. Rem. Rev. Stats, 1932, sec. 3830.
[136] Wash. Rem. Rev. Stats. 1932, sec. 3831.

of shares authorized or outstanding. This distinction is the result of the use of non-par shares.[137]

SECTION 41 provides for the rights of a shareholder not assenting to certain corporate action. Subdivision 1 specifies the instances or cases as well as the conditions upon which the shareholder may object to the action of the corporation and demand payment for his shares. These specifically include the sale, lease or exchange of all the assets of the corporation, an amendment which changes the corporate purposes, an amendment which extends the duration of the corporation, and an amendment which changes the rights of the holders of any outstanding shares. It will be recalled that in the case of sale, lease or exchange of all the assets of the corporation under Section 36, *supra,* that in case the corporation is unable to meet its liabilities then unmatured the *directors* may then exercise this power and accordingly the shareholder cannot object except in case of fraud. The right to object is by this section restricted to a shareholder who did not vote in favor of the particular corporate action and he must within twenty days after the date upon which the action was authorized object in writing and demand payment. A number of questions suggest themselves. Does it apply to the reduction of capital stock by reason of the fact that Section 40, *supra,* is not mentioned in the specific sections included in this subdivision? Certainly the changing of the capital stock is a matter usually of material concern to the investing shareholder.[138]

It will be noted under Section 47, *infra,* that in the case of the merger or consolidation the rights of a dissenting shareholder are similarly protected. Again the question may be raised that the right to object is restricted to a shareholder who "*did not vote* in favor of such corporate action." Under Sections 36, *supra,* and 37, *supra,* except subdivisions 4 of the latter applying to changes in the rights of shareholders, the right to vote is limited to the *voting power* It would seem that the non-voting shareholder should clearly be in the purview of this statute, and it is unfortunate that it is not so specifically provided. Further, it may be observed that Section 27, Subdivision 4, provides for notice in calling shareholders' meetings to be given to all shareholders *entitled to vote* at such meetings. If the non-voting shareholder is not given such notice, even though he is authorized under the principal section to object it is quite likely that he may not have knowledge of the

[137] See commissioners' note to sec. 41 of the Uniform Bus. Corp. Act.
[138] 15 Cornell L. Quart. 420, 442 (1929) 17 Cornell L. Quart 470 (1932).

date upon which the action was taken in time to make his objection within twenty days.

Subdivision 2 provides for the appraisal of the value of the shares of the dissenting shareholder in the event the corporation and the shareholder cannot agree upon the value after demand. Some questions may be raised here as to how this value may be determined. The time is fixed by this subdivision as at the time the corporate action was authorized, but the elements which should enter into its consideration are not specified. The generality of the statute in this respect is probably to be recommended. Statutes which attempt to specify particularly a valuation are likely to exclude in the many varying situations elements which are material and justly to be considered.[139]

Subdivision 3 places a further limitation upon the right of the shareholder to secure payment. He is not entitled to payment unless the value of the corporate assets remaining after the payment would be at least equal to the debts and liabilities exclusive of capital stock. The chief merit of this provision is that it makes certain that which might otherwise be a matter of doubt. While the shareholders should certainly not be paid at the expense of the creditors the policy of protecting the creditors with respect to a fixed surplus raises the usual conflict.

Commenting on this section generally, it injects a new provision into the law of the State of Washington. It finds precedence, however, in varying statutes prior to the Uniform Business Corporation Act. It is necessarily a substitute for specific relief. It does not afford the dissenter an entirely satisfactory choice, for he must either accept the stock and enter a new enterprise or must get out and find another investment. On the other hand, the welfare of the corporation and of the majority safeguarded by a two-thirds vote justifies this section as one which most adequately protects both the the majority and minority in their conflict of interests. Furthermore, the presence of such an alternative has and is likely to influence decisions in favor of its constitutionality, and, similarly courts will find it applicable to already existing corporations under the reserved power clause.[140]

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[139] See Robinson, "Dissenting Shareholders, Their Rights to Dividends and the Valuation of Their Shares," 32 Col. L. Rev. 60 (1932) Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 Cornell L. Quart. 420 (1930) 17 Cornell L. Quart. 485 (1931) Lattin, "Remedies of Dissenting Stockholders Under Appraisal Statutes," 45 Harvard L. Rev. 233 (1931), and articles, notes and cases cited in the foregoing.

[140] 14 Cornell L. Quart. 85, 87-88 (1928) Dodd, "Dissenting Stockholders and Amendments to Corporate Charters," 75 Univ. of Pa. L. Rev. 723,

SECTIONS 42 to 48, inclusive, provide for the merger and consolidation of corporations. The distinction is recognized between a merger, where a corporation is merged into another corporation, and a consolidation where existing corporations are consolidated into a new corporation. Obviously there could be neither merger nor consolidation of a domestic with a foreign corporation unless the laws of the foreign government permit. The Act authorizes such a merger or consolidation when there is such a foreign law. In a general sense merger and consolidation raise problems similar to those involved in the sale of corporate assets. However, it has been consistently held that neither could be accomplished unless expressly authorized by statute.[141]

Prior to the present Act there was no provision for merger or consolidation of business corporations.[142] Accordingly the usual device resorted to in order to effect a merger or consolidation was through the sale of assets or by the purchase of stock of the corporations to be merged or consolidated. Almost insuperable difficulties presented themselves in the inability to protect preemptive rights[143] along with the customary objection of the minority that they were being forced into a corporation fundamentally different from that which they contemplated. These objections made imperative the provisions of the Act for merger or consolidation with an appraisel clause for the dissenting shareholder. Even then in the case of foreign corporations, in the absence of a foreign statute, the merger or consolidation is impossible except through a sale or sales of the assets of the various corporations.[144]

The many questions involving the rights, powers, franchises, privileges and property of the various corporations involved as well as the rights of the creditors against the various corporations

735-737 (1927) Hills, "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 Cal. L. Rev. 349, 361-366 (1931) 16 Va. L. Rev. 484 (1930) 42 Yale L. Jour. 952 (1933). It is quite likely that further legislation will become desirable in view of the many questions suggested. A study of the provisions in the more recent statutes is both interesting and valuable. See particularly the detailed provisions in California. Cal. Laws, 1933 Supplement, sec. 369, Deering.

[141] Ballantine, Corporations, 1927, sec. 241, 17 Minn. L. Rev. 328 (1933) 19 Va. L. Rev. 166 (1932).

[142] There was a provision for the consolidation of railroads, Wash. Rem. Rev. Stats. 1932, sec. 10463. This statute in its provisions is similar to the one here enacted except a vote of three-fourths was required in favor of the consolidating contract instead of two-thirds.

[143] 30 Col. L. Rev. 569 (1930).

[144] See Hills, "Consolidation of Corporations by Sale of Assets and Distribution of Shares," 19 Cal. L. Rev. 349 (1931). This article contains an excellent analysis and discussion of the question involved with a practical solution which was enacted by the California Legislature.

and the procedure, are both vital and interesting, but cannot be given further consideration here.[145]

SECTION 43 provides for the joint agreement by the boards of directors to be submitted to the merging or consolidating corporation for their adoption. In the case of consolidation SECTION 44 provides for articles of incorporation and procedure similar to that usual in the formation of corporations except the corporations consolidating are the incorporators and in lieu of the matter required by subdivisions (f) and (h) of Subdivision 1 of Section 3 under the Act the articles must state the manner of converting the shares of each consolidating corporation into the shares or obligations of the new corporation. The merger or consolidation in the case of domestic corporations becomes effective when the joint agreement is filed in the case of a merger and when the certificate of incorporation is issued in the case of consolidation.[146]

SECTION 47 provides for the effect of the merger or consolidation. The surviving or new corporation possesses the rights, privileges and franchises of the former corporations, takes over all the property and becomes responsible for the liabilities and obligations of the former corporations. This latter provision is specified to be without prejudice to the rights of creditors and peculiarly enough although the Act provides that the separate existence of constituent corporations shall cease, they are kept alive for this purpose. Finally it is provided that dissenting shareholders may object, demand payment, and secure same through appraisal, which shall be a liability of the surviving or new corporation.

SECTIONS 48 to 59, inclusive, provide for proceedings for dissolution and reorganization. Obviously, it is not within the province of this article to enter into a detailed discussion of the problems and policies involved in this vital subject. Its importance and present significance are reflected and emphasized by recent legislation and the many articles and discussions in recent legal periodicals.[147]

[145] Ballantine, Corporations, 1927, secs. 237 to 247, inclusive; see citation in foregoing note and the following: 30 Col. L. Rev. 569 and 732 (1930) 44 Harvard L. Rev. 260 (1930) 30 Mich. L. Rev. 1074 (1932) 17 Minn. L. Rev. 328 (1933) Martin, "Concerning Mergers and Sales of Entire Corporate Assets," 18 Va. L. Rev. 37 (1931) 19 Va. Law Rev. 166 (1932) and articles, comments, notes and cases cited in the foregoing.

[146] Section 46 of the Act.

[147] Bonbright and Bergerman, "Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization," 28 Col. L. Rev. 127 (1928) Israel, "Reorganization Sales." 32 Col. L. Rev. 668 (1932) 45 Harvard L. Rev. 1394 (1932) Colin, "Why Upset Price? An Argument for Reorganization by Decree," 28 Ill. L. Rev. 227 (1933) Sargent and Zelkowich, "The Problem of Reorganizing Solvent Corporations," 29 Ill.

The Washington Act provides for either voluntary or involuntary dissolution and in the event of voluntary dissolution for proceedings out of court. If involuntary they must be subject to the supervision of the court.[148] Voluntary proceedings may be instituted upon a resolution adopted by the holders of two-thirds of the voting power of the shareholders and if the resolution provides that the corporation shall be wound up out of court it must designate a trustee or trustees to conduct the winding up. Before the appointment of the trustee or trustees becomes operative duplicate copies of the resolution, signed and acknowledged by a majority of the directors or by a majority of the voting power of the shareholders, must be filed for record, one with the Secretary of State and the other with the Auditor of the county in which the corporation has its registered office.[149] Thereupon the trustee or the trustees must collect all sums, convert all assets into cash, pay all debts and liabilities according to their priority and make distribution of the surplus according to the respective rights of the shareholders.[150] The proceedings for dissolution are deemed to commence at the time of the passage of the resolution and at that time the authority and duties of the directors cease except insofar as may be necessary to preserve the corporate assets or insofar as they may be continued by the trustee.[151] When the corporation has been completely wound up the trustee must make and file a certificate to this effect with the Secretary of State and file a copy in the office of the Auditor in the county in which the corporation had its last registered office.

Commenting on the foregoing voluntary proceedings it may first be observed that prior to this Act there was no provision for voluntary proceedings for dissolution out of court.[152] Some criticism

L. Rev 137 (1934) 30 Mich. L. Rev. 934 (1932) Billig, "Corporate Reorganization," 17 Minn. L. Rev. 237 (1933) Garrison, "Corporate Reorganization—An Amendment to the Bankruptcy Act—a Symposium," 19 Va. L. Rev. 317 (1933) Frank, "Some Realistic Reflections on Some Aspects of Corporate Reorganization," 19 Va. L. Rev. 541 (1933) Payne, "Fair and Equitable Plans of Corporate Reorganization," 20 Va. L. Rev. 37 (1933) 39 Yale L. Jour. 425 (1930). The foregoing articles and notes with their citations are interesting, not only the problems discussed, but in many incidental problems suggested for future consideration.

The recent California Act contains a much more detailed treatment than that of the Uniform Business Corporations Act. See Cal. Laws, 1933 Supplement, secs. 400 *et sequa*, Deering.

[148] Wash. Act, sec. 48.

[149] Wash. Act, sec. 49.

[150] Wash. Act, sec. 52.

[151] Wash. Act, sec. 56.

[152] Wash. Rem. Rev. Stats. 1932, sec. 3834. It will be noted that this section of the former statute provides for notice by publication and that the publication contemplates the interests of creditors as well as stock-

may be directed against this proceeding on the basis that no provision is made for notice to creditors other than the provision requiring the filing of the copies of the resolutions for winding up and designating the trustees with the Secretary of State and County Auditor as mentioned. Again there is no provision for a bond. On the other hand, the proceeding for dissolution out of court does not preclude involuntary proceedings for dissolution being brought at any time upon the grounds specified.

Grounds for involuntary proceedings[153] exist when (*a*) the corporate assets are insufficient to pay all just demands or to afford reasonable security to those who deal with it, (*b*) the objects of the corporation have wholly failed or are abandoned or their accomplishment is impracticable; (*c*) it is beneficial to the interests of the shareholders that the corporation be wound up, (*d*) or when the voting power is so divided that action cannot be secured. In any of these events a petition for involuntary proceedings may be filed by either a shareholder or a creditor whose claim has been reduced to judgment or admitted by the corporation. It may be questioned whether the creditor at least is not given too much power in view of the grounds stated and that the authority and duties of the directors and officers cease at the time of the filing of the petition. Provisions are further made for the appointment of receivers and their qualifications and duties.[154] It is provided that in proceedings subject to the supervision of the court that questions in respect to proof, allowance, payment and priority of claims and preferences be governed by the same rules as are applicable in bankruptcy proceedings under the National Bankruptcy Act.

Finally a notable provision is the one which provides for compromise arrangements in the event of reorganization.[155] This in substance provides that if a majority in number representing three-fourths in value of the creditors or class of creditors, or if the shareholders or class of shareholders holding three-fourths of the voting power of all shareholders or of the class of shareholders, as the case may be, agree to any compromise or arrangement or to a reorganization of the corporation as a consequence of such compromise or arrangement, the said compromise or arrangement and

holders. As the provision of the new statute contemplates notice only for the shareholders it is doubtful whether sec. 3834 is repealed so far as it respects publication in dissolution proceedings subject to the supervision of the court.

[153] Wash. Act, sec. 50.

[154] Wash. Act, secs. 53, 54 and 55.

[155] Wash. Act, sec. 58.

the said reorganization shall, if sanctioned by the court, be binding on all the creditors or class of creditors, and on all the shareholders or class of shareholders, as the case may be, and also on the corporation and its liquidating trustee or receiver, if any This is based on the English Companies Act and the Delaware Corporation Law and is intended to follow up the decision in the Boyd case.[156]

SECTION 60 provides that the Attorney General may bring an action to annul, vacate or forfeit the corporate franchise specifying the grounds therefor. SECTIONS 61, 62 and 63 provide for the application, repeal and saving clause, respectively SECTION 64 provides as to constitutionality SECTION 65 provides as to the effect of the Act upon monopolies and restraint of trade. SECTION 66 provides for the interpretation clause customary to uniform acts. The two remaining sections provide as to the time the Act shall take effect and the name under which it may be cited.

CONCLUSION

Without attempting to enumerate the specific changes in the law existing prior to the Act it is submitted that the Act is a distinct improvement in that it abrogates former unreasonable limitations and includes more effective provisions in favor of investors and persons dealing with a corporation. The changes provided for the corporate structure should no longer necessitate incorporation under such liberal corporation statutes as the State of Delaware. While the adoption of this Act is an advancement in our law it must be apparent that there exist many problems still not provided for, and it is submitted that in many respects the present Act may and will be improved. This may come only as a result of experience, but it is hoped that the studies instituted and resulting in the adoption of this Act will lead to a continued study of our problems with a view to obviating changes at the costly price of experience.[157]

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[156] *Northern Pac. R. R. Co. v. Boyd*, 228 U. S. 482, 57 L. Ed. 931 (1912). See also commissioners' note to sec. 59 of the Uniform Bus. Corp. Act.

[157] Some valuable suggestions may be secured from an article by Professor Ballantine, "Questions of Policy in Drafting a Modern Corporation Law," 19 Cal. L. Rev. 465 (1931). Also Ballantine, "A Critical Survey of the Illinois Business Corporation Act," 1 Univ. of Chicago L. Rev. 357 (1934).