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## 1959 AMENDMENTS TO THE COLORADO CORPORATION CODE

BY DAVID J. CLARKE AND CLAUDE M. MAER, JR.

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David J. Clarke received his LL.B. degree at the University of Montana in 1938. He was admitted to practice in Colorado in 1946. Prior to entering private practice in Denver in 1953, he served as attorney with the Anti-Trust Division of the U. S. Department of Justice, with the U. S. Atomic Energy Commission, and with the Wage Stabilization Board. He was elected to the Colorado House of Representatives in 1954, and is now serving in the State Senate. Mr. Clarke wrote an article on The New Colorado Corporation Act, 35 DICTA 317 (1958), which this article brings up to date. He is a member of the Colorado and Denver Bar Associations.



### INTRODUCTION

Despite the history of work which is associated with it, the Corporation Act of 1958<sup>1</sup> was too long and too technical to be flawless. Amendments were found to be necessary during the 1959 session.<sup>2</sup>

Following approval of the 1958 act, the Corporation and Business Law Committee of the Colorado Bar Association, of which Claude M. Maer, Jr. of Denver was chairman, held several meetings at which the new act and proposed amendments thereto were con-

<sup>1</sup> Colo. Sess. Laws 1958 ch. 32 [hereinafter called the 1958 code].

<sup>2</sup> Colo. Sess. Laws 1959 ch. 83 [hereinafter called the amending act].

sidered. Institutes and panel discussions were held at the annual meeting of the Colorado Bar Association in Colorado Springs on October 17, 1958, and in various meetings throughout the state. At these meetings, a number of proposals for amendments originated. Other amendments which were made by the legislature in 1959 were adopted from recommendations of the ABA Committee on Corporate Laws in its 1957 Addendum of Revisions to the Model Act.<sup>3</sup>

Amendments which were merely clarifying or corrective in nature will not be mentioned.<sup>4</sup> Significant amendments are discussed according to the order of their arrangement by the Revisor of Statutes.<sup>5</sup>

#### CORPORATE POWERS AND LIMITATIONS

Section 2 of the amending act revised Section 5<sup>6</sup> of the 1958 code in two principal respects. First, since the purchase by a corporation of its own shares has many aspects of the payment of a dividend, Section 5 was amended to make it possible for a corporation to acquire its own shares subject to essentially the same limitations as those governing the payment of dividends under the provisions of Section 42.<sup>7</sup> Thus, Section 42(d)<sup>8</sup> permits the payment of dividends out of a corporation's net assets in excess of its stated capital (with certain exceptions) which is in essence the "surplus" of the corporation as defined in Section 2(k).<sup>9</sup> This amendment to Section 5 permits the corporation to acquire its own shares out of "unreserved and unrestricted surplus," rather than only to the extent of "earned" or "capital surplus" available therefor.<sup>10</sup> These terms of art are defined in the 1958 code in Sections 2(l), (m), and (n).<sup>11</sup>

The second principal change in Section 5 of the 1958 code is to apply the insolvency restriction of Section 5(a)<sup>12</sup> (1958 code) to all corporate purchases of, or payments for, its own shares. Hence the restriction will apply to purchases by a corporation of its shares to compromise an indebtedness or to pay dissenting shareholders, and so forth.

Section 3 of the amending act makes two changes in Section 11<sup>13</sup> of the 1958 code as to registered office and registered agent. First, it requires that domestic or foreign corporations which desire to act as registered agents must have a specific provision in their articles of incorporation permitting them to act as resident or statutory agents. This amendment is intended, among other things, to prevent a corporation from acting as its own registered agent; a

<sup>3</sup> ABA-ALI Model Bus. Corp. Act (Addendum 1957).

<sup>4</sup> Falling into this category are §§ 1 and 13 of the amending act, which amended 4(f) and 87(e) of the 1958 code.

<sup>5</sup> See 35 DICTA 366 for a table of comparative section numbers. The proposed 1959 Supplement which the Revisor has prepared for enactment during the 1960 session of the General Assembly follows the arrangement there shown. Footnote citations are to the proposed 1959 Supplement, and are included because of their usefulness after the 1959 Supplement is published.

<sup>6</sup> Colo. Rev. Stat. § 31-28-2 (Proposed Supp. 1959).

<sup>7</sup> Colo. Rev. Stat. § 31-31-10 (Proposed Supp. 1959).

<sup>8</sup> Colo. Rev. Stat. § 31-31-10(5) (Proposed Supp. 1959) (this provision is not contained in the Model Act).

<sup>9</sup> Colo. Rev. Stat. § 31-27-2(11) (Proposed Supp. 1959).

<sup>10</sup> This amendment was suggested by the ABA-ALI Model Bus. Corp. Act (Addendum 1957), but does not conform to the entire revision which the ABA Committee on Corporate Laws approved.

<sup>11</sup> Colo. Rev. Stat. §§ 31-27-2(11)-(13) (Proposed Supp. 1959). For a discussion of this subject see Comment, 31 Rocky Mt. L. Rev. 49 (1958).

<sup>12</sup> Colo. Rev. Stat. § 31-28-2(4) (Proposed Supp. 1959).

<sup>13</sup> Colo. Rev. Stat. § 31-28-10 (Proposed Supp. 1959).

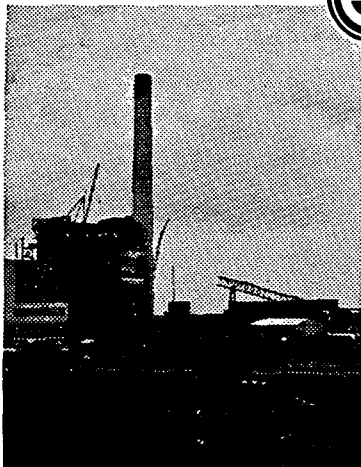
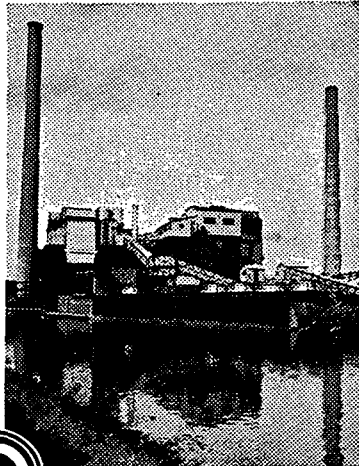
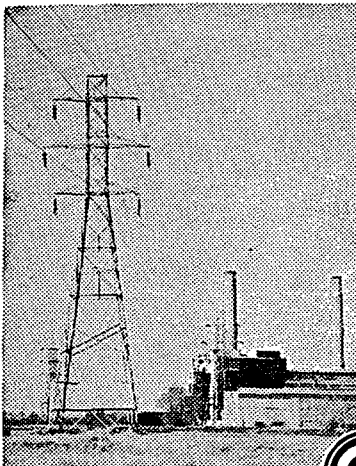
number of corporations have attempted this since the effective date of the 1958 code.

The second change in Section 11 is to exempt non-profit corporations from the requirements contained in the section. Thus, a non-profit corporation can act as a registered agent for other corporations free of the restrictions of Section 11.

**ARTICLES OF INCORPORATION—AMENDMENTS**

Section 9 of the amending act was suggested by the 1957 Addendum of Revisions to the Model Act<sup>14</sup> and amended Section 50 (i)<sup>15</sup> of the 1958 code. The amendment merely makes express the authority already granted by the general language in the subsection. This section, before amendment, provided that the articles of incorpora-

<sup>14</sup> ABA-ALI Model Bus. Corp. Act (Addendum 1957).  
<sup>15</sup> Colo. Rev. Stat. § 31-29-2(i) (Proposed Supp. 1959).



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tion may contain any provision not inconsistent with law which the incorporators desire to set forth therein. However, the 1957 Addendum of Revisions proposed giving specific power to include in the articles any provision restricting the transfer of shares. That revision was adopted in the amending act. The Colorado Bar Association Committee recommended that there also be included a corresponding provision which would permit the corporation itself, if empowered in the articles, to impose restrictions on the transfers of its shares. Under this latter provision, restrictions on the transfer of shares could be imposed by action of the board of directors if general provisions permitting such action were included in the articles. In small, closely held corporations it is often desirable to impose restrictions on the transfer of shares to maintain ownership in the family or within the managing group, and this amendment gives specific sanction to such provisions. That revision also was adopted.

Section 10 amends Sections 56<sup>16</sup> of the 1958 code by the addition of a new clause. The effect of the clause is to give shareholders of a preferred or special class of stock, not otherwise entitled to vote on an amendment to the articles of incorporation, the right to vote as a class on the proposed amendment, if the amendment would divide their shares into series, *or would permit the board of directors to do so*. The original version would allow a vote to the affected class only if the articles were being amended to set forth specifically the differences in the rights of the various newly-created series. This amendment conforms to the recommendations of the 1957 Addendum of Revisions.

Section 25 of the amending act added a new section<sup>17</sup> to the corporation code, and was requested by the Secretary of State's office. It is taken from the old law<sup>18</sup> and requires the Secretary of State to record and preserve certificates of incorporation and amendments thereto which, when duly certified, shall be evidence of the existence of the corporation and prima facie evidence of the contents of the certificate of incorporation or amendments thereto.

#### SHAREHOLDERS AND SHARES OF STOCK

Section 4 of the amending act conforms Section 14<sup>19</sup> to changes recommended in the 1957 Addendum of Revisions. By the addition of a clause, it authorizes a corporation in its articles to limit or deny the voting rights of "or provide special voting rights for" the shares of any class to the extent not inconsistent with the provisions of the 1958 code.

Section 5 makes substantial revisions in Section 25<sup>20</sup> of the 1958 code concerning shareholders' pre-emptive rights and employee stock plans. Under prior Colorado corporation law, shareholders were not deemed to have pre-emptive rights in treasury shares. A proviso was added to the first paragraph of the section in the amending act to continue this rule as to corporations organized prior to January 1, 1959, the effective date of the new Colorado corporation code. Of course, if the articles of incorporation of a corporation organized under the old law specifically gave shareholders pre-emptive rights

16 Colo. Rev. Stat. § 31-29-8(i) (Proposed Supp. 1959).

17 Which will become Colo. Rev. Stat. § 31-29-14 (Proposed Supp. 1959).

18 Colo. Sess. Laws 1945, ch. 102, §1.

19 Colo. Rev. Stat. § 31-30-1(1) (Proposed Supp. 1959).

20 Colo. Rev. Stat. § 31-30-10(1) (Proposed Supp. 1959).

in treasury shares, the second clause of the proviso continues such specific rights.<sup>21</sup>

The second amendment to Section 25<sup>22</sup> was intended to continue the validity without further stockholder action of stock rights, options, stock bonus and other incentive plans which were lawfully adopted by corporations under prior Colorado corporation law before January 1, 1959. It was thought that the wording of the second paragraph of Section 25 as originally enacted might require the revalidation or reapproval by stockholders of such plans even though the plans had been validly adopted prior to the enactment of the new law.

Unfortunately, a part of the amendatory language was omitted, so that the clause as enacted and approved reads, "as shall have been or otherwise lawfully provided for before January 1, 1959." The omission occurs after the words "shall have been"; the words "approved by its shareholders" were included in the House amendment,<sup>23</sup> but were inadvertently omitted from the engrossed bill and from the bill signed by the Governor.

It was thought necessary to have the twofold provisions in this clause ("approved by its shareholders or otherwise lawfully provided for") because under prior law such stock options and other similar plans in some corporations could have been approved by its shareholders and in others legally adopted in some other manner. In any event, it is hoped that if called upon to do so, the Supreme Court can by some means divine the "intent" of the legislature in this instance. An amendment probably will be offered during the 1960 session in connection with the enactment of the 1959 Supplement to restore the missing words.

Section 6 eliminates the "except" clause at the end of Section 29<sup>24</sup> of the 1958 code relating to closing of transfer books. The amendment is one of the 1957 Addendum of Revisions. The effect of the amendment is apparent from the sentence from which the exception was stricken. Prior to being stricken it read:

"When a determination of shareholders entitled to vote at any meeting of shareholders has been made as provided in this section, such determination shall apply to any adjournment thereof except where the determination has been made through the closing of the stock transfer books and the stated period of closing has expired."

Section 7 of the amending act amends Section 33<sup>25</sup> of the 1958 code to make it clear that a voting trustee need only maintain the necessary books and records showing the names and addresses of the holders of interests in the voting trust. The original section specified that a voting trustee should maintain the same books and records as required of the corporation. Such duplicate record keeping was not thought necessary.

#### DIRECTORS—OFFICERS—RECORDS

Section 8 amends Section 38<sup>26</sup> of the 1958 code to limit the

<sup>21</sup> See discussion on the subject of pre-emptive rights under the new Colorado corporation code in Clarke, *The New Colorado Corporation Act*, 35 DICTA 317, 338-39 (1958).

<sup>22</sup> Colo. Rev. Stat. § 31-30-10(2) (Proposed Supp. 1959).

<sup>23</sup> 42d Gen. Assembly of Colo., 1st Sess., H.R. Jour. 1077 (April 13, 1959).

<sup>24</sup> Colo. Rev. Stat. § 31-30-13 (Proposed Supp. 1959).

<sup>25</sup> Colo. Rev. Stat. § 31-30-17 (Proposed Supp. 1959).

<sup>26</sup> Colo. Rev. Stat. § 31-31-5 (Proposed Supp. 1959).

power of shareholders of pre-1959 corporations to remove classified directors. A new concept was added to Colorado law in the original enactment of Section 38, in that removal of the directors of a corporation by a majority vote of the shareholders was specifically provided in the statute. If a pre-1959 corporation had provided for classification of directors in its certificate of incorporation, it was thought appropriate to grant such corporation an added assurance, so far as continuity in the board of directors is concerned, by providing that while it would take a majority of shareholders to remove directors whose terms expire at the next annual meeting, a two-thirds vote of the shares would be required to remove all directors in one fell swoop. Holders of a bare majority would have to vote for removal at least twice to obtain majority control of the board of such a pre-1959 corporation.

#### MERGER OR CONSOLIDATION

Section 11 amends Section 71<sup>27</sup> of the 1958 code to conform to the recommendations in the 1957 Addendum of Revisions, and permits an abbreviated procedure in the case of the merger of a 95% owned subsidiary. The change allows a waiver of the thirty-day waiting period if the holders of all the outstanding stock of the subsidiary agree. This change further simplifies the merger procedure under these circumstances, but cannot prejudice the rights of any minority shareholders because all of the stock must agree to the waiver.

Section 12 amends Section 73<sup>28</sup> of the 1958 code to conform to the recommendations in the 1957 Addendum of Revisions by permitting the abandonment of a merger or consolidation of a domestic and foreign corporation at any time prior to the filing of the articles of merger or consolidation with the Secretary of State. A similar provision is contained in Section 69<sup>29</sup> of the 1958 code permitting the abandonment of a proposed merger or consolidation, under certain circumstances, of domestic corporations, and the amendment to Section 73 merely permits a similar procedure in the case of the merger or consolidation of domestic and foreign corporations.

Section 12 of the amending act also makes a practical change in Section 73<sup>30</sup> by requiring that the Secretary of State be furnished an address to which the service of process in a merger or consolidation proceeding shall be mailed.

#### DISSOLUTION—VOLUNTARY AND INVOLUNTARY

Section 14 of the amending act eliminates the ambiguity in the paragraph numbering of Section 90<sup>31</sup> of the 1958 code and adds certain language<sup>32</sup> from the Model Act which had been omitted. The additional provisions permit involuntary dissolution proceedings to be commenced in the district court by a creditor under certain circumstances, by the corporation itself if it has filed a statement of intent to dissolve and have the liquidation continued under

27 Colo. Rev. Stat. § 31-33-6(4) (Proposed Supp. 1959). For a discussion of the new Colorado law on merger or consolidation, see Comment, 31, *Rocky Mt. L. Rev.* 66 (1958).

28 Colo. Rev. Stat. § 31-33-7 (Proposed Supp. 1959).

29 Colo. Rev. Stat. § 31-33-3(3) (Proposed Supp. 1959).

30 Colo. Rev. Stat. § 31-33-7(3)(c) (Proposed Supp. 1959).

31 Colo. Rev. Stat. § 31-34-13 (Proposed Supp. 1959).

32 Colo. Sess. Laws 1958 ch. 32, §§ 90(2)(b)-(d), as amended, Colo. Sess. Laws 1959, at 334-35, Colo. Rev. Stat. §§ 31-34-13(2)(c), (d), (e)(3), (4) (Proposed Supp. 1959).

the supervision of the court, or by the Attorney General under certain circumstances. Subsection (5)<sup>33</sup> was added at the request of the Secretary of State to dissolve by operation of law all corporations which were defunct for at least five years as of January 1, 1959. This latter provision will permit the Secretary of State to eliminate from its files many thousands of defunct corporations which have had no significance for many years.

Section 15 amends Section 92<sup>34</sup> of the 1958 code by clarifying its language. In the original version the section seemed to say that all actions for involuntary dissolution of a corporation shall be commenced by the Attorney General, whereas the intent of the original section was to provide a venue for actions which the Attorney General actually brings. The venue for actions for involuntary dissolution of a corporation brought by others than the Attorney General is the county in which the registered office of the corporation is situated.<sup>35</sup>

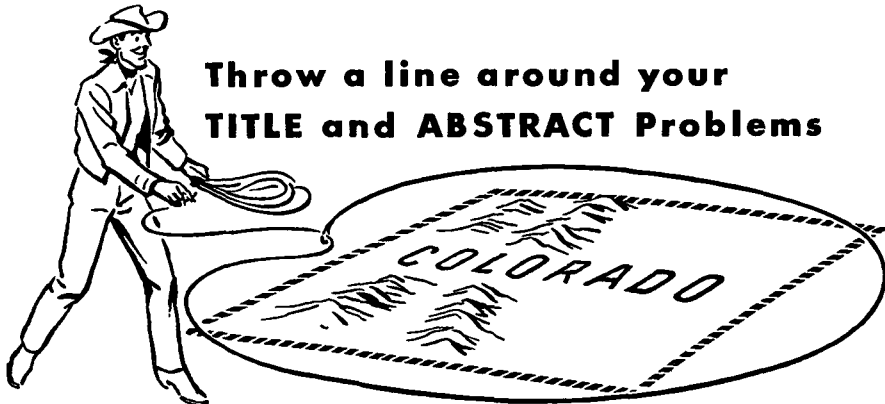
Section 16 amends Section 100<sup>36</sup> of the 1958 code, relating to survival of remedy after dissolution, in several respects. Subsection (1) makes the application of the section more general by the provision that it applies in the case of a dissolution "in any manner" rather than the dissolution under certain specified circumstances as originally provided. A clause is added at the end of subsection (1) to exclude the two-year statute of limitations from operation in the case of any action affecting the title to real estate. Subsection (2)

<sup>33</sup> Colo. Sess. Laws 1959, at 335.

<sup>34</sup> Colo. Rev. Stat. § 31-34-15 (Proposed Supp. 1959).

<sup>35</sup> Colo. Sess. Laws 1958, ch. 32, § 90(3), as amended, Colo. Sess. Laws 1959, at 335, Colo. Rev. Stat. § 31-34-13(3) (Proposed Supp. 1959).

<sup>36</sup> Colo. Rev. Stat. § 31-34-23 (Proposed Supp. 1959).



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was added in its entirety to provide a procedure for the recovery or disposition by the corporation of any property not disposed of in the liquidation proceedings. These amendments were proposed and drafted by the members of the Title Standards Committees of the Colorado and Denver Bar Associations and provide a workable and concise solution to the clearing of the title of corporately owned property not properly disposed of in the liquidation of the corporation. The somewhat similar, although less exact, provisions on this subject contained in Section 145 of the original act were repealed by the amending act.<sup>37</sup>

#### FOREIGN CORPORATIONS

Section 17 amends Sections 101<sup>38</sup> of the 1958 code by providing that foreign banking and insurance corporations can come into Colorado to transact banking and insurance business, only if the banking or the insurance laws of Colorado will permit such activities. Also, the amendment provides that foreign banking and insurance corporations can come into Colorado under this code and qualify to conduct any corporate business which a foreign business corporation is permitted to conduct except the business of banking or insurance.

Section 18 amends Section 102<sup>39</sup> of the 1958 code to provide that foreign corporations which qualify to do business in Colorado before January 1, 1959 and which therefore did not receive a "certificate of authority under this act" will not be required to obtain such a certificate in order to enjoy all the powers set forth in their articles at the time of their qualification prior to January 1, 1959.

Section 19 amends Section 103<sup>40</sup> of the 1958 code to make it clear that foreign corporations can qualify to do business in Colorado under an assumed name. This change was deemed necessary because if a foreign corporation were not allowed to use an assumed name, it could not do business in Colorado if a domestic corporation already had the name which the foreign corporation desired to use. This was a fairly common occurrence under prior practice, and there seemed to be no reason why an opportunity to do business under an assumed name should not be granted. Section 20 of the amending act makes a corresponding change in Section 105<sup>41</sup> of the 1958 code.

<sup>37</sup> Colo. Sess. Laws 1959, ch. 83, § 26, at 341.

<sup>38</sup> Colo. Rev. Stat. § 31-35-1 (Proposed Supp. 1959).

<sup>39</sup> Colo. Rev. Stat. § 31-35-4 (Proposed Supp. 1959).

<sup>40</sup> Colo. Rev. Stat. § 31-35-5 (Proposed Supp. 1959).

<sup>41</sup> Colo. Rev. Stat. § 31-35-7(1)(c) (Proposed Supp. 1959).

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Section 21 amends Section 106<sup>42</sup> of the 1958 code to permit a qualifying foreign corporation to file restated or composite articles of its incorporation with the Secretary of State of Colorado if the state of incorporation permits a corporation to have restated or composite articles.

Section 22 amends Section 108<sup>43</sup> of the 1958 code, relating to the registered office and registered agent of foreign corporations, in a manner which corresponds to the amendment to Section 11 of the 1958 code which was made by Section 3 of the amending act.<sup>44</sup>

Section 23 of the amending act changed Section 110<sup>45</sup> of the 1958 code by adding a section which provides that if a foreign corporation transacts business in Colorado without first having obtained a certificate of authority to do so, such corporation shall be deemed to have automatically appointed the Secretary of State as its agent for service of process.<sup>46</sup> The court having jurisdiction of the cause, upon verified motion giving the last known address of such corporation and stating facts showing that it transacted business in Colorado, may *ex parte* authorize service to be made upon the Secretary of State. The statement of facts should be in sufficient detail to make out a prima facie case of transacting business based on prior case law.<sup>47</sup> Since the matter is jurisdictional and can be raised at any time, it would seem that a foreign corporation would not be prejudiced by such a prima facie showing. If, on the other hand, the foreign corporation appears specially with a motion to quash the summons and complaint on the ground that it does not transact business in Colorado, a full-fledged argument on the jurisdictional issue would be made at that point and it would seem unduly burdensome on the plaintiff to require him to present a prima facie case to the court in the first instance. The Secretary of State is required to send notice of such service to the foreign corporation at its last known address and to file with the clerk of the court a certificate showing such mailing. Service is complete when such certificate is filed with the clerk.

Section 24 of the amending act revised Section 119<sup>48</sup> of the 1958

42 Colo. Rev. Stat. § 31-35-8 (Proposed Supp. 1959).

43 Colo. Rev. Stat. § 31-35-17 (Proposed Supp. 1959).

44 See text accompanying note 14 *supra*.

45 Colo. Rev. Stat. § 31-35-19 (Proposed Supp. 1959).

46 The language of the amendment is substantially the same as Colo. Sess. Laws 1957, at 301, codified as Colo. Rev. Stat. § 31-10-2(6) (Supp. 1957).

47 See 35 Dicta 360 n. 244 (1958) for a discussion of Colorado cases.

48 Colo. Rev. Stat. § 31-35-3 (Proposed Supp. 1959).

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code, making it clear that any bona fide successor or assignee of a foreign corporation may sue on a claim arising out of the transaction of business in this state by such foreign corporation even though it did not qualify to transact business in the state. However, the amendment provides that a foreign corporation cannot avoid the necessity of qualifying to transact business by merely assigning such a claim to its nominee or agent.

#### REPEALED

Section 26 of the amending act repealed the following sections or subsections of the 1958 code:

Sections 12 (g) and 109 (g), which required a change of registered office or registered agent of domestic or foreign corporations to be authorized by resolution duly adopted by the board of directors.

Section 116 (f), which authorized the Secretary of State to revoke the certificate of authority of a foreign corporation if the corporation has been defunct for a period of five years.

Section 145, relating to the title of property on dissolution. Repeal of this section was required by reason of the amendment to Section 100 of the 1958 code which is discussed in connection with Section 16 of the amending act.<sup>49</sup>

**ERRATUM:** In 35 *DICTA* 339 (1958) it is stated that the requirement for publication for notice of meeting of shareholders in the present law will be dropped. The exception contained in Colo. Rev. Stat. § 31-12-3 (1953), relating to mining companies, should have been noted.

<sup>49</sup> At text accompanying note 37 *supra*.

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