VOLUNTARY DISSOLUTION—A NEW DEVELOPMENT IN INTRACORPORATE ABUSE

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BLACKSTONE described dissolution of a corporation by surrender of its franchise as "a kind of suicide." [1] Voluntary corporate death,[2] however, if not for the benefit of *all* the stockholders, may perhaps be more realistically described as "murder"; yet it is not readily recognized as such because the motivation is not always apparent. The purpose of this article is to view the setting of and to analyze the motives for such dissolution as a form of corporate manipulation.

Voluntary corporate death may at present be effected through any one of a number of procedures. It may occur not only through simple dissolution, but also through merger or consolidation, since the last two also involve dissolution and the corporate death of at least one pre-existing corporation.[3] However, liquidation, *i.e.*, sale of all the assets of a corporation, is not corporate death [4] and is therefore not within the scope of this article, unless the liquidation is followed by technical dissolution.[5]

When dissolution is accomplished by a vote of all the stockholders, no issue arises. This is outright "suicide." But if we consider the power of *less* than all of the stockholders to dissolve [6] a solvent, prosperous corporation when no statute controls, we find that the issue has long been subject to a division of authority both in judicial decisions [7] and among legal

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1. 1 BL. COMM. *485.

2. By definition, dissolution is "corporate death." See People v. North River Sugar Ref. Co., 121 N. Y. 582, 608, 24 N. E. 834 (1890); Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 29–30, 74 Pac. 1004, 1006 (1904).

3. Merger results in survival of one corporation and dissolution of those which are absorbed. Consolidation results in dissolution of all the old corporations and creation of a new corporation. Problems raised by merger or consolidation, and not found in simple dissolution, are discussed in SEC REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1938) Pt. VII, p. 526 ff.; (1935) 45 YALE L. J. 105.

4. See National Bank v. Insurance Co., 104 U. S. 54, 73–74 (1881). But see Combes v. Keyes, 89 Wis. 297, 311, 62 N. W. 89, 93 (1895).

5. Compare Meyerhoff v. Bankers' Securities, Inc., 105 N. J. Eq. 76, 147 Atl. 105 (Ch. 1929).

6. The power to merge or consolidate is strictly statutory. SEC REPORT, *supra* note 3, Pt. VII, p. 526.

7. The leading case sustaining this power is Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014 (1912). *Contra:* Kean v. Johnson, 9 N. J. Eq. 401, 422–23 (Ch. 1853).

writers.[8] Where the charter sets no time limit for the existence of a corporation,[9] most jurisdictions permit a majority (unless the charter prescribes a greater percentage) to vote dissolution of the corporation, just as they are empowered to make any other corporate decision which binds the minority. Good faith, of course, is required in this as in all actions which may be authorized by less than the whole of the stockholders. But the question of whether the dissolution is in good faith, naturally a grave issue when the corporation is a prosperous business concern, is a matter entirely independent of the question of the power of the corporation to dissolve.[10]

The problem of the power to dissolve by less than a unanimous vote of the stockholders has been met by legislation in every state but one.[11] In a dozen states, if a specified percentage of the stockholders seek dissolution, the statute requires that they apply to a designated court whose approval is a prerequisite.[12] The court may then consider objections to the proposal, and may decline to order dissolution, although the careless language of some statutes may seem to make the court's approval mandatory.[13] Another type of statute authorizes a stated percentage to vote dissolution and provides that the matter be then brought before a court for confirmation, but expressly limits the function of the court to a deter-

8. Warren, *Voluntary Transfers of Corporate Undertakings* (1917) 30 HARV. L. REV. 335, 346. For a contrary position, see Fain, *Limitations of the Statutory Power of Majority Stockholders to Dissolve a Corporation* (1912) 25 HARV. L. REV. 677, 678.

9. Even courts which sanction power in a majority to dissolve where the corporate existence is unlimited rule otherwise where the charter prescribes a definite period of existence. See Black v. Delaware & Raritan Canal Co., 22 N. J. Eq. 130, 403-04 (Ch. 1871).

10. Parenthetically, it should be noted that the power in a majority of the stockholders to act without resort to the courts is not to be confused with the power of either majority or minority to invoke the aid of an equity court to dissolve a corporation when dissolution is in the interest of all the stockholders. See Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind up a Corporation at the Suit of a Minority Stockholder* (1940) 40 COL. L. REV. 220.

11. Iowa appears to have no provision authorizing less than all the stockholders to vote dissolution prior to the period fixed in the articles of incorporation unless a lesser vote is authorized therein. IOWA CODE (1939) § 8363. However, a statute authorizes the court to order dissolution "on good cause shown." *Id.* at § 8402. The result is no different from that in states requiring application to the court after a specified percentage vote in favor of dissolution.

12. MASS. ANN. LAWS (Lawyers' Co-op., Supp. 1940) c. 155, § 50 (majority vote) is illustrative of the type of statute which requires either a majority or a two-thirds vote before application may be made to the court. An interesting statute in Missouri varies the percentage of vote required with the grounds upon which dissolution is sought. MO. STAT. ANN. (Vernon, 1932) c. 32, § 4562.

13. Compare Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 28, 74 Pac. 1004, 1005 (1904).

mination of compliance with the provisions of the statute.[14] Most statutes do not require resort to the courts at all, but authorize the stockholders to accomplish dissolution simply by a majority vote or better.[15] Scattered statutes permit a choice of either of the latter two procedures, *i.e.*, either formal supervision by the court,[16] or action solely by a vote of the stockholders, requiring a larger percentage of the stockholders under this second method where there is no resort at all to the courts.[17] Many statutes require that a majority of the directors must first decide to dissolve and then call a stockholders' meeting to vote and concur thereon;[18] other statutes do not call for a preliminary meeting of the directors.[19] For practical purposes this variation is immaterial, since in every case where the statute requires that the directors vote first, if a majority or more of the stockholders wish to dissolve, they can, at the next election, insure a cooperative directorate. One state avoids this complication by requiring the directors to submit the question of dissolution to a vote of the stockholders if requested to do so by a simple majority of the stockholders, although a two-thirds vote of the stockholders is then essential to effect dissolution.[20]

Statutes authorizing dissolution by less than a unanimous vote of the stockholders usually do not mention the necessity of good faith.[21] A conflict in interpretation results: one isolated holding gives the statutory majority (the percentage fixed by the statute) an absolute right to dissolve;[22] the overwhelming mass of decisions, however, hold that the power of the statutory majority is subject to equitable limitations to prevent abuse.[23] The latter ruling produces virtually the identical situation which we have noted exists in most jurisdictions in the absence of a statute. Thus, a majority (unless the charter or statute prescribes a greater

14. IDAHO CODE ANN. (1932) §§ 29-301 to 29-307; N. D. COMP. LAWS ANN. (1913) § 4565; OKLA. STAT. (Harlow, 1931) § 9779.

15. Majority vote: CAL. CIV. CODE (Deering, Supp. 1939) § 400. 60% vote: W. VA. CODE ANN. (Michie, Supp. 1939) § 3092. 66⅔% vote (the percentage required in most states): DEL. REV. CODE (1935) § 2071, as amended DEL. LAWS 1941, c. 132; N. Y. STOCK CORP. LAW § 105. 75% vote: CONN. GEN. STAT. (1930) § 3470; MICH. COMP. LAWS (Mason, Supp. 1940) § 10135-73; The Companies Act, 1929, 19 & 20 GEO. V, c. 23, §§ 117, 225. 80% vote: TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 1387.

16. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) § 6020 (majority).

17. *Id.* at § 6570 (66⅔%).

18. See, *e.g.*, Connecticut, *supra* note 15.

19. See, *e.g.*, Michigan, *supra* note 15.

20. IND. STAT. ANN. (Burns, 1933) § 25-241(b).

21. A few do: *e.g.*, Delaware and Florida statutes cited *supra* notes 15 and 17 ("*and* most for the benefit of any corporation . . . that it should be dissolved.").

22. Windmuller v. Standard Distilling & Distributing Co., 114 Fed. 491 (C. C. N. J. 1902).

23. A number of cases are cited *infra* notes 30, 31, 36, and 37.

percentage) may vote dissolution of the corporation much as they may decide any other corporate matter binding the minority. Hence, the only material effect of the statute is that it may require more than a simple majority or even more than the larger majority specified by the charter.

It is beyond the scope of this article to analyze in detail the circumstances under which dissolution is proper. Undoubtedly there are many situations in which it is not only justified but desirable.[24] Thus, in England, a governmental official has the duty of striking off the rolls corporations which have outlived their usefulness.[25] On the other hand, there are equally clear cases where a proposed dissolution is fraudulent, as, for instance, where the sales price is grossly inadequate.[26] There are other flagrant cases where dissolution will not promote the welfare of *all* the stockholders of the corporation, but will subserve some other purpose such as "freezing" small stockholders out of a good enterprise. This may occur, for instance, where the corporation is obviously earning money and prospering in every way, and it is proposed, not to discontinue the business, but to turn it over to a new corporation with a slightly different name but with the same powers and some of the original owners.[27] Were this type of procedure to be tolerated, a minority could be ejected from every successful venture it had helped finance.[28] Furthermore, it must be made clear that the vote in favor of dissolution may not be a result of a democratic process. In dissolution, as in any corporate action determined by a majority of the *voting* stock, where the voting stock represents little or no capital investment in the corporation, the vote often does not indicate approval by those equitably entitled to determine the question.[29]

It is unpredictable at what stage the court will intervene in a dissolution proceeding and what remedy it may be expected to grant. Although the

24. See note 10 *supra*.

25. RIPLEY, MAIN STREET AND WALL STREET (1927) 62. Nevertheless, voluntary action accounts for 90% of the corporations wound up in England. PALMER, COMPANY LAW (16th ed. 1938) 428.

26. Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 577 (C. C. S. D. N. Y. 1884), 27 Fed. 625 (C. C. S. D. N. Y. 1886), *appeals dismissed*, 136 U. S. 645 (1889).

27. Stevenson v. Sicklesteel Lumber Co., 219 Mich. 18, 29, 188 N. W. 449, 453 (1922); Paine v. Saulsbury, 200 Mich. 58, 166 N. W. 1036 (1918); Doe Run Lead Co. v. Maynard, 283 Mo. 646, 223 S. W. 600 (1920). See also cases cited *infra* notes 30 and 31.

28. It would seem that this can be done in California. See Beechwood Securities Corp., Inc. v. Associated Oil Co., 104 F. (2d) 537, 540 (C. C. A. 9th, 1939).

29. This fact is recognized in some statutes which specifically give to non-voting stock a right to vote upon certain proposals (*e.g.*, amendments to charter, proposed merger, or consolidation). SEC REPORT, *supra* note 3, Pt. VII, pp. 473-75, 533-35. Also see BERLE, STUDIES IN THE LAW OF CORPORATION FINANCE (1928) 56, suggesting that the voting of management stock be subjected by the courts to the same fiduciary limitations as apply to directors in the exercise of management powers.

judicial power to enjoin [30] or to set aside a dissolution [31] is by this time clearly established, the courts are reluctant to grant an injunction [32] and still more reluctant to set aside a dissolution already effected.[33] Once the dissolution is a *fait accompli,* the court may decline to set it aside either because of the smallness of complainant's stock interest [34] or because of some allegedly irretrievable action taken by the corporation after the dissolution.[35]

As a matter of fact, judges prefer to take the easiest way out, which is to relegate the complainant to a simple action for money damages. They do not hesitate to give this form of redress to those aggrieved by the vote to dissolve,[36] merge or consolidate,[37] because such relief has been made familiar to the court in the simple situation where assets have been fraudulently sold at an inadequate price.[38] Practical considerations, however, may make redress after the event illusory. In the first place, whereas before the dissolution has been accomplished the court sometimes demands justification from those who have proposed the change, after dissolution the court will invariably place the burden of establishing its wrongfulness on the complainant stockholder. And who has the burden of coming forward with evidence is a particularly important factor because the complainant frequently does not have access to the books and records of the corporation. In addition, the expense of litigation may be another insurmountable obstacle since after dissolution it is no longer certain to be recoverable on the theory of a derivative suit.[39] Furthermore, though it is true that in cases of dissolution effected through merger or consolida-

30. Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919); Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 74 Pac. 1004 (1904). *A fortiori,* temporary injunctions against dissolution should be more freely granted, since rarely can any harm, much less irreparable harm, come to the corporation from dissolution being enjoined until a court can investigate the situation; after liquidation, delaying dissolution simply delays paying over cash to the stockholders.

31. Jones v. Missouri-Edison Elec. Co., 144 Fed. 765, 777 (C. C. A. 8th, 1906).

32. Lebold v. Inland S. S. Co., 82 F. (2d) 351 (C. C. A. 7th, 1936); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 178, 157 Atl. 396, 398 (1928).

33. This is clearly revealed by an occasional "Scotch verdict." Lazenby v. International Cotton Mills Corp., 174 App. Div. 906, 160 N. Y. Supp. 1 (1st Dep't 1916).

34. Compare Tanner v. Lindell Ry., 180 Mo. 1, 22, 79 S. W. 155, 160 (1904).

35. Jones v. Missouri-Edison Elec. Co., 233 Fed. 49 (C. C. A. 8th, 1916). *Contra:* Doe Run Lead Co. v. Maynard, 283 Mo. 646, 694, 223 S. W. 600, 614 (1920).

36. Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 577 (C. C. S. D. N. Y. 1884), 27 Fed. 625 (C. C. S. D. N. Y. 1886), *appeals dismissed,* 136 U. S. 645 (1889).

37. Jones v. Missouri-Edison Elec. Co., 144 Fed. 765, 199 Fed. 64 (C. C. A. 8th, 1906 and 1912), *on rehearing,* 203 Fed. 945 (1913), *cert. denied,* 229 U. S. 615 (1913).

38. Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391 (C. C. A. 8th, 1908).

39. Hornstein, *Counsel Fee in Stockholder's Derivative Suits* (1939) 39 COL. L. REV. 784. See also the section of this article on "Expenses of Litigation," *infra* p. 79.

tion the dissident stockholder is usually given a right of appraisal,[40] this right is limited, costly, and often impracticable.[41] Moreover, inasmuch as it is within the power of the directors to choose the procedure to be followed from among a number of devices—sale of assets, merger, consolidation, or simple dissolution—they may, and frequently do, select simple dissolution, a device where the remedy of appraisal is not available to the stockholder.[42]

Even though the dissenting stockholders[43] are paid the full value of their pro rata interest in the corporation's tangible assets, they may still be seriously prejudiced. In the case of a publicly financed corporation, they are inevitably forced to sacrifice their contributions toward the cost of organizing and promoting the corporation. Stockholders are obviously not made whole when all they receive is their pro rata share of the corporation's assets, exclusive of the expense of promotion. The cost of floating a stock issue, which is paid by the public to the promoters or underwriters when the corporation's capital is first accumulated, is substantial. Were a corporation to be dissolved the day after organization, and before the corporation had done any business whatsoever, the stockholder would not receive back what he had paid, but rather a lesser sum, the amount paid less the proportionate cost of floating the venture. Unjustified dissolution results in the loss of the value inherent in an accumulation of capital—the life-breath of corporate enterprise. Thus, the distribution of tangible assets can never give the stockholder his full proportionate interest in the property of the corporation because the asset of "accumulated capital" ceases to exist on dissolution.

Frequently, not even the stockholders opposing dissolution realize all the implications of or the real motivation for the dissolution. Complainants' usual objection is fraud, readily discernible where the proposed extinction of the corporation involves a transfer of assets to the controlling stockholders without payment or at an inadequate price, as a result of which the other stockholders receive less than the fair value of their share

40. Twenty-six of the thirty-one states which by general statute authorize corporations to merge or consolidate upon approval of a specified majority of stockholders provide appraisal rights for dissenters. SEC REPORT, *supra* note 3, Pt. VII, pp. 526-27, 593. A few states now provide that resort to the appraisal statutes shall be an exclusive remedy. CAL. CIV. CODE (Deering, 1937) § 369 (17); MICH. COMP. LAWS (Mason, Supp. 1940) § 10135-54.

41. SEC REPORT, *supra* note 3, Pt. VII, pp. 590-610. *Hearings before Subcommittee of the Committee on Banking and Currency on S. 3580*, 76th Cong., 3d Sess. (1940) 983.

42. SEC REPORT ON INVESTMENT TRUSTS AND INVESTMENT COMPANIES, H. R. Doc. No. 279, 76th Cong., 1st Sess. (1939) Pt. III, c. 4, pp. 480-81.

43. The term "dissenting stockholders" is no longer synonymous with "minority stockholders." Separation of ownership and control may result in a majority of those who have invested in the enterprise falling under the description of "dissenting stockholders."

of the corporate property.[44] A second most common ground of opposition is that the object of the dissolution is the ousting of an "uncongenial" minority from a prosperous corporation.[45] But just as important as these flagrant, provable objections may be a motivation which, by its nature, cannot be the subject of proof, namely, a desire on the part of the management to avoid being held accountable for misdeeds. Wrongdoers can no longer expect dissolution of the corporation to bar completely suits against themselves for misconduct. But although dissolution no longer gives them immunity, its effects may be almost as desirable from their point of view. In the first place, in some states it cuts down the ordinary statute of limitations. Secondly, it permits defendants to invoke the doctrine of *forum non conveniens,* which, if applied, bars suit outside the state of incorporation. This is, in practice, an effective deterrent, since few stockholders will undergo the expense and inconvenience of asserting their claims in a foreign jurisdiction. Finally, it reduces the likelihood of suit to redress a wrong to a corporation since the possibility exists that the individual stockholder may recover only the damage to himself personally and that he will then be obliged to bear alone the entire expense of the litigation. These possibilities we shall now consider in some detail.

Statute of Limitations

The first unsuspected motive to be studied arises from the fact that in some states dissolution enables the delinquents to cut down the statute of limitations on claims against themselves. No longer can it be doubted that in many corporations causes of action against the management and controlling interests are concealed.[46] The ordinary statute of limitations

44. Jones v. Missouri-Edison Elec. Co., 144 Fed. 765 (C. C. A. 8th, 1906); Kavanaugh v. Kavanaugh Knitting Co., 226 N. Y. 185, 123 N. E. 148 (1919). States which bar reclassification of stock (*e.g.,* elimination of accumulated dividends) by direct amendment of the corporate charter [Keller v. Wilson, 190 Atl. 115 (Del. 1936)] permit the same result to be accomplished if the device of merger or consolidation is employed, even though the merger be with a wholly-owned subsidiary. Federal United Corp. v. Havender, 11 A. (2d) 331 (Del. 1940).

45. Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 74 Pac. 1004 (1904). Recently, a number of investment trusts utilized the practice of acquiring a controlling interest in corporations and then dissolving them; the large number of dissolutions, and the Securities and Exchange Commission's study thereof, resulted in the official conclusion that "the device of dissolution becomes essentially a method by which minority stockholders of the acquired corporations may be eliminated from the enterprise and the bulk of its assets absorbed by the parent company." SEC Report, *supra* note 42, Pt. III, c. 4, p. 480. Generally, see *id.* at pp. 459–512; *Hearings, supra* note 41, at 976.

46. SEC Report, *supra* note 3 (1937) Pt. I, pp. 4, 157–60, 191, 863–74, 885, 899; Pt. II, pp. 14, 187, 225, 246, 496. In England, the corporation law expressly provides that on the winding up of a company, whether voluntary or involuntary, the court may, on the application of the liquidator or any contributory (*e.g.,* stockholder), examine into the affairs of the company and determine whether any misfeasance or breach of trust

starts running only when such causes of action are discovered,[47] the ordinary period on legal claims being six years, and on equitable claims ten years.[48] Where a state statute places a special limit on the period of time after dissolution within which suits on behalf of the corporation can be instituted, a new shorter period of limitations results from dissolution.

At common law, dissolution terminates the corporation's existence as an entity. Pending actions abate[49] and new actions cannot be begun.[50] Statutes, therefore, have been enacted in most states extending the corporate existence for certain specified purposes, usually for all purposes other than continuing the business for which the corporation was originally established. Such legislation, which is constitutional even if enacted after creation of the corporation,[51] simply makes the dissolution of the corporation conditional. The corporate existence is not immediately extinguished but is protracted for a period (limited or unlimited as the statute may provide) with special reference to the prosecution of suits by or against it and the settlement of its affairs.[52] These statutes, as may be expected, differ considerably in the various states.

Many states, including California,[53] New York,[54] and Ohio,[55] have statutes directing that a dissolved corporation shall continue as an entity *without any time limit,* for the purpose of enabling it to wind up its affairs

has been committed by any of its officers or directors. The Companies Act, 1929, 19 & 20 GEO. V, c. 23, §§ 276-77. An occasional American statute endeavors to preserve books and records of a corporation by prohibiting their destruction within ten years from charter expiration or dissolution. MICH. COMP. LAWS (Mason, Supp. 1940) § 10135-77.

47. Compare MICH. COMP. LAWS (Mason, Supp. 1940) § 10135-47 (six years from the date of delinquency or two years from the time when delinquency is discovered, whichever shall sooner occur).

48. See (1941) 41 COL. L. REV. 686.

49. See Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 259 (1927); The Greyhound, 68 F. (2d) 832, 834 (C. C. A. 2d, 1934).

50. At early common law, upon the dissolution of a corporation, debts to or from it were totally extinguished, realty in the name of the corporation reverted to the grantor, and personalty escheated to the sovereign. 1 BL. COMM. *484; see Fox v. Horah, 36 N. C. 358, 361 (1841). This common law doctrine originated in the days of municipal and ecclesiastical corporations, when modern business corporations with stockholders were unknown. "And it is now well settled, both in England and in this country, that equity will, upon the dissolution of a corporation by the expiration of its charter or otherwise, impound its property real and personal and appropriate it, first to the payment of its debts, and then for the benefit of the stockholders. The law now is, independently of statute, that upon the civil death of a corporation, its real estate does not revert to the original owners, the debts due to and from it are not extinguished, and its personal property does not vest in the State." O'Connor v. City of Memphis, 74 Tenn. 730, 732 (1881).

51. "The truth is, there is no such thing as a vested right to do wrong." See Foster v. President of The Essex Bank, 16 Mass. 245, 273 (1819).

52. See Partan v. Niemi, 288 Mass. 111, 113, 192 N. E. 527, 528 (1934).

53. CAL. CIV. CODE (Deering, 1937) § 399.

54. N. Y. GEN. CORP. LAW § 29, and N. Y. STOCK CORP. LAW § 105(8).

55. OHIO CODE ANN. (Throckmorton, 1940) § 8623-80.

and of prosecuting and defending suits, whether begun before or after dissolution.[56] A typical form, which appears in New Jersey, reads as follows:

> All corporations, whether they expire by their own limitation or be annulled by the legislature or be otherwise dissolved, shall be continued bodies corporate for the purposes of prosecuting and defending suits by or against them, of enabling them to settle and close their affairs, of disposing of and conveying their property and of dividing their capital, but not for the purpose of continuing the business for which they were established.[57]

Other statutes, not quite so explicit, simply authorizing the corporation to continue to act for the purpose of winding up its affairs,[58] have sometimes been interpreted to have the same effect.[59] Another variation empowers the court, on application by a creditor or stockholder of a dissolved corporation, to appoint a receiver to "prosecute and defend *in the name of the corporation* or otherwise all such suits as may be necessary or proper." [60]

A second group of states,[61] including Delaware,[62] has statutes imposing a time limit—three years—for continuation of the corporate entity

56. Similar statutes are CONN. GEN. STAT. (1930) § 3373; TENN. CODE ANN. (Michie, 1938) § 3757; W. VA. CODE ANN. (Michie, 1937) § 3095. (The Tennessee statute is limited to *prosecution* of suits by the corporation.)

57. N. J. STAT. ANN. (West, 1939) tit. 14, § 14:13-4; N. M. STAT. ANN. (Courtright, 1929) § 32-162; S. C. CODE (1932) § 7709.

58. ARIZ. CODE ANN. (1939) § 53-308; IOWA CODE (1939) § 8392; Ky. Acts 1938, c. 94, p. 467.

59. Continental Oil Co. v. United States, 14 F. Supp. 533, 537 (Ct. Cl. 1936), *cert. dismissed,* 299 U. S. 510 (1936); Castle's Adm'r v. Acrogen Coal Co., 145 Ky. 591, 140 S. W. 1034 (1911); *cf.* Stearns Coal & Lumber Co. v. Van Winkle, 221 Fed. 590 (C. C. A. 6th, 1915), *cert. denied,* 241 U. S. 670 (1916) (statutory extension held limited to a "reasonable time").

60. Italics supplied. KAN. GEN. STAT. ANN. (Corrick, Supp. 1939) § 17-3607. Other statutes, while permitting the prosecution of suits *at any time,* unfortunately throw in doubt the important procedural question whether the suit is to be on behalf of the corporation as an entity, or on behalf of the complainant stockholders as individuals. "In and by the corporate name of such dissolved corporation for the use of the party entitled to receive the proceeds of any such suit." NEB. COMP. STAT. (1929) § 24-112; NEB. COMP. STAT. (Supp. 1939) § 24-113; WYO. REV. STAT. ANN. (Courtright, 1931) § 28-1109. *Cf.* Schmitt & Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. 99 (1900).

61. ARK. DIG. STAT. (Pope, 1937) § 2203; Ga. Laws Extra Session 1937-1938, § 36, p. 242; MASS. ANN. LAWS (Lawyers' Co-op. 1933) c. 155, § 51; MICH. COMP. LAWS (Mason, Supp. 1940) § 10135-75; R. I. GEN. LAWS (1938) c. 116, § 63; VT. PUB. LAWS (1933) § 5867. But *cf.* DEL. REV. CODE (1935) § 2075; see Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 411, 423, 84 Atl. 229, 235 (1912).

62. DEL. REV. CODE (1935) § 2074, as amended by Del. Laws 1941, c. 132, reads as follows:

> "All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three

after dissolution. Such statutes expressly continue the corporate existence until final judgment in actions begun within the three-year period.

A third group of state statutes limits the time allowed for the action even more severely than would appear on their face.[63] This type of statute continues the corporation as a body corporate—usually for the term of three years—for the purpose of prosecuting and defending suits, but, unlike the Delaware type, does not expressly authorize prosecution to a final judgment of actions begun within the three-year period. Several courts have held that, unless the statute expressly provides otherwise, all suits not concluded prior to the expiration of the three years must be held to abate, leaving responsibility for the unreasonableness of this procedure to the legislature.[64]

Some comparable statutes may be included in this last group. One statute, while specifying three years after dissolution as the period for which the existence of a corporation is to be continued to settle its affairs, permits the court to extend this period upon petition by the corporation;[65] another, upon petition by a creditor or stockholder;[66] another, if a receiver has been appointed.[67] Still another statute (designating five years as the period) permits the court to extend this period for an additional five years,

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years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock but not for the purpose of continuing the business for which said corporation shall have been established; provided, however, that with respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to such expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

63. FLA. COMP. GEN. LAWS ANN. (Skillman, 1927) §§ 6021, 6571; ME. REV. STAT. (1930) c. 56, § 82; NEV. COMP. LAWS (Hillyer, 1929) § 1664; N. H. PUB. LAWS (1926) c. 225, § 76; WIS. STAT. (1939) § 181.02. The period is five years in ORE. COMP. LAWS ANN. (1940) § 77-259.

64. Maine Shore Line R.R. v. Maine Central R.R., 92 Me. 476, 43 Atl. 113 (1899); Boston Tow Boat Co. v. Medford Nat. Bank, 228 Mass. 484, 117 N. E. 928 (1917); Thornton v. Marginal Frt. Ry., 123 Mass. 32 (1877); G. M. Standifer Constr. Corp. v. Comm'r of Int. Rev., 78 F. (2d) 285 (C. C. A. 9th, 1935) (applying a five-year Oregon statute).

65. N. C. CODE ANN. (Michie, 1939) § 1193 (3 years unless so extended).

66. VA. CODE ANN. (Michie & Sublett, 1936) §§ 3810, 3813.

67. TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 1389. Massachusetts and North Carolina at one time had similar provisions. See Thornton v. Marginal Frt. Ry., 123 Mass. 32, 34-35 (1877); VonGlahn v. DeRosset, 81 N. C. *467, 475 (1879).

without specifying who may make the application.[68] The English Companies Act may also be classed in this group since it directs that the court may, at any time within two years after the date of the dissolution, declare the dissolution void on application by any person who appears to the court to be interested. Such a person may thereupon institute such proceedings as he might have taken had the company not been dissolved.[69]

A fourth group of states makes no provision for continuance of the life of a corporation after dissolution. In this class are the statutes based on the Uniform Business Corporation Act,[70] and similar statutes which merely authorize those who were directors at the time of dissolution to sue as trustees on any claim of the corporation, and to be sued to the extent of the corporate property that shall come into their hands.[71] These statutes simply restate the equity principle of the so-called "trust fund" theory, which would now probably prevail even in the absence of the statute, namely, that the surviving assets are a trust fund for the creditors and stockholders.[72] The last mentioned situation, where there are no statutory provisions with respect to survival of rights of the corporation after dissolution, apparently prevails in a number of states. This includes some statutes whose provisions, in other respects comprehensive, fail to extend the corporate existence of corporations *voluntarily* dissolved,[73] and others which direct that dissolution "shall not take away or impair any remedy

68. ALA. CODE ANN. (Michie, 1928) § 7069. This statute excludes from its operation dissolution by judicial decree. See Roe v. Durham, 195 Ala. 584, 586, 71 So. 109, 110 (1916).

69. The Companies Act, 1929, 19 & 20 GEO. V, c. 23, § 294.

70. Sections 49–60; LA. GEN. STAT. ANN. (Dart, 1939) §§ 1133–1142; MINN. STAT. (Mason, Supp. 1940) §§ 7492–45 to 7492–55; WASH. REV. STAT. (Remington, Supp. 1940) §§ 3803–48 to 3803–59.

71. COLO. STAT. ANN. (Michie, 1935) c. 41, § 62; MO. STAT. ANN. (Vernon, 1932) c. 32, § 4561; N. D. COMP. LAWS ANN. (1913) § 4567; OKLA. STAT. (Harlow, 1931) § 9788; S. D. CODE (1939) § 11.0903. The foregoing provisions resemble § 400 of the California Civil Code prior to an amendment in 1929 [CAL. CIV. CODE (Deering, 1931) § 400 n.].

72. See Crossman v. Vivienda Water Co., 150 Cal. 575, 579, 89 Pac. 335, 336 (1907); see also note 50 *supra*.

73. Statutes extending the period for corporations whose corporate existence is terminated in a specified manner may be interpreted not to apply to other types. IND. STAT. ANN. (Burns, 1933) § 25-243 ("whose term of existence as fixed by the articles of incorporation has expired"); MISS. CODE ANN. (1930) § 4171 ("after its charter has expired or been annulled"); UTAH REV. STAT. ANN. (1933) § 18-1-2 ("expire by limitation or by forfeiture"). This may also be the interpretation where the language of a statute intended to be remedial is not perfectly clear. A statute which purported to extend the corporate existence of "all corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture *or otherwise*" (italics supplied) was held not to include a corporation voluntarily dissolved. Jacobs v. E. Bement's Sons, 161 Mich. 415, 126 N. W. 1043 (1910); the statute has since been reworded, MICH. COMP. LAWS (Mason, Supp. 1940) § 10135–75.

given *against* such corporation," [74] but leave uncovered the question of suits on *behalf* of the corporation. In statutes of the second and third groups (either expressly authorizing or omitting to provide for prosecution to a final judgment of suits begun within the limited period of time), after the expiration of the period within which suits might be brought in the name of the corporation, the similar question of suability is resolved by the above-mentioned "trust fund" theory.[75]

Statutes frequently make provision not only for suits instituted after dissolution but also for the continuance of suits pending at the time of dissolution. While a few states make no provision whatsoever for this contingency,[76] most states either provide that the dissolution be "suggested on the record" and the action continued,[77] or simply direct that pending actions shall not abate.[78] Under the former type of statute, where the corporation ceases to be a party to the action, the question arises of who will bear the expense of the suit. If judgment is to be in favor only of the complainant stockholder, reimbursement for his expenses is questionable.[79] Moreover, if the pending suit be compromised, as so often occurs, another stockholder, attempting to bring suit subsequently, may be barred in the absence of a statute authorizing suits subsequent to dissolution.[80]

These statutory variations present a problem in conflict of laws. The rule is far from settled as to which law governs where there is a difference between the law of the forum and the law of the state of incorporation with respect to the power of a corporation, as such, to sue or be sued after

74. Italics supplied. ILL. STAT. ANN. (Callaghan, 1934) § 32.096; PA. STAT. ANN. (Purdon, Supp. 1941) tit. 15, § 2852-1111. These statutes contain additional provisions that such suits may be prosecuted *against* the corporation in its corporate name, but, on the other hand, require that they be brought within two years from the date of dissolution. The present state of the Illinois law is reviewed in Billiard Table Mfg. Corp. v. First-Tyler Bank & Trust Co., 16 F. Supp. 990 (N. D. W. Va. 1936); Chicago Riding Club v. Avery, 305 Ill. App. 419, 27 N. E. (2d) 636 (1940).

75. Diamond State Iron Co. v. Husbands, 8 Del. Ch. 205, 220, 68 Atl. 240, 244 (1898); see Lehrich v. Sixth Avenue Bancorporation, Inc., 251 App. Div. 391, 393, 296 N. Y. Supp. 358, 362 (1st Dep't 1937).

76. So in Louisiana and presumably the other states following the Uniform Business Corporation Act. McCoy v. State Line Oil & Gas Co., 180 La. 579, 157 So. 116 (1934). To prevent injustice, the court may, however, annul the certificate of dissolution. *Id.* at 582, 157 So. at 118. This procedure is expressly authorized in the English statute. See note 69 *supra.*

77. See, *e.g.*, KAN. GEN. STAT. ANN. (Corrick, Supp. 1939) § 17-3609; MD. ANN. CODE (Flack, 1939) art. 23, § 102. "Suggestion on the record," oral or written, is the prescribed practice in some states for advising the court of the death of a party; opposing counsel admit the fact, if true, and the court then issues the appropriate order.

78. DEL. REV. CODE (1935) § 2074, as amended DEL. LAWS 1941, c. 132; N. Y. STOCK CORP. LAW §§ 90, 91(6).

79. See the section of this article on "Expenses of Litigation," *infra* p. 79.

80. Compare (1941) 50 YALE L. J. 1474.

dissolution.[81] The forum may permit post-dissolution suits, and the domicile make no provision therefor, or *vice versa*. Both may permit suits but may differ as to the period within which suits must be brought. Courts' opinions on this issue derive from different theories. For one thing, it is uniformly believed that if the state of incorporation provides for continuance of the corporation as a juristic person for the purpose of suit, no problem arises, since such a domiciliary law is as much a part of the corporate charter as if it were actually included in the charter, and it has as much extraterritorial effect as the charter itself and the statute under which the corporation was created.[82] On that theory, however, termination as well as continuance of the corporation for the purpose of suit might be regarded as the fundamental law of the corporation and solely within the domain of the state of incorporation.[83] Yet the Supreme Court of the United States has recently held that a state may declare, as a condition upon which a foreign corporation is admitted to do business, that all causes of action, maintainable by or against the corporation in the corporate name, shall survive dissolution.[84] The result of these conflicting views is that some courts consider only the law of the state of incorporation,[85] even though the forum has a statute prescribing a shorter period or makes no provision at all for post-dissolution suits;[86] other courts consider also the law of the forum,[87] sometimes on the ground that the terms laid down by the local legislature constitute the conditions upon which the foreign corporation was permitted to do business;[88] and occasional decisions consider only the law of the forum,[89] but they are clearly

81. Compare RESTATEMENT, CONFLICT OF LAWS (1934) § 158.

82. Waite, C. J., in Relfe v. Rundle, 103 U. S. 222, 225-26 (1880).

83. Compare Taft, C. J., in Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 259-60 (1927).

84. Clark v. Williard, 292 U. S. 112, 119, 128 (1934). The question was presented under U. S. CONST. Art. IV, § 1.

85. Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257 (1927); see Stentor Elec. Mfg. Co. v. Klaxon Co., 23 F. Supp. 351, 352 (D. Del. 1938), *aff'd*, 115 F. (2d) 268, 270 (C. C. A. 3d, 1940).

86. Dundee Mtge. Co., Ltd. v. Hughes, 89 Fed. 182 (C. C. D. Ore. 1898); Perry v. Western Motor Car Co., 279 Ill. App. 195 (1935).

87. See Castle's Adm'r v. Acrogen Coal Co., 145 Ky. 591, 595, 140 S. W. 1034, 1036 (1911); Olds v. City Trust Safe Deposit Co., 185 Mass. 500, 505, 70 N. E. 1022, 1024 (1904); Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34, 38, 42 N. E. 515, 516 (1895); Lehrich v. Sixth Avenue Bancorporation, Inc., 251 App. Div. 391, 395, 296 N. Y. Supp. 358, 363 (1st Dep't 1937); DuPont Engineering Co. v. John P. Harvey Constr. Co., 156 Va. 582, 591, 158 S. E. 891, 894 (1931). N. Y. C. P. A. § 977b(19) is an illustrative statute.

88. Clark v. Williard, 292 U. S. 112, 119 (1934); see Sinnott v. Hanan, 214 N. Y. 454, 458, 108 N. E. 858, 859 (1915).

89. See Sturges v. Vanderbilt, 73 N. Y. 384, 389 (1878); Sinnott v. Hanan, 156 App. Div. 323, 325, 141 N. Y. Supp. 505, 507-08 (2d Dep't 1913), *rev'd*, 214 N. Y. 454, 108 N. E. 858 (1915).

erroneous and will probably not be followed. Of course the consequence of these variations in conflict of laws rules is, in some instances, to give the wrongdoer a significant tactical advantage.

The general theory of limiting the time within which suits must be commenced is in furtherance of a policy to discourage litigation. Whatever be the merits of this policy in general, to put it within the power of a wrongdoer to cut this time down still further in situations where it is also in his power to conceal from those injured knowledge that any wrong has been committed constitutes a most regrettable violation of our notions of justice.

FORUM NON CONVENIENS

To the fairly predictable consequence of dissolution—a shorter statute of limitations in certain states — must be added a second possible effect inspiring dissolution. This is the chance that, either as a matter of power or as a matter of expediency, suit on behalf of a dissolved corporation may not be entertained except in the courts of the state of incorporation.

Where the applicable statutory authority, either in the state of incorporation or in the forum, empowers a corporation to sue after dissolution, and the corporation, through its duly authorized representatives, the Trustees in Dissolution, refuses or fails to do so, a stockholder of the dissolved corporation may maintain a derivative suit in the name of the corporation, either in the state of incorporation [90] or in any state where jurisdiction can be obtained. The long line of New York cases so holding [91] is, however, striking evidence of the persistence of defendants' attempts to induce the courts to change this ruling. An occasional lower court decision declining to entertain jurisdiction [92] encourages malefactors

90. See Michel v. Betz, 108 App. Div. 241, 248, 95 N. Y. Supp. 844, 848 (1st Dep't 1905).

91. Druckerman v. Harbord, 174 Misc. 1077, 22 N. Y. S. (2d) 595 (Sup. Ct. 1940) (N. J. corp.); Hamm v. Christian Herald Corp., 236 App. Div. 639, 260 N. Y. Supp. 743 (1st Dep't 1932) (N. J. corp.); Guggenheimer v. Beaver Board Co., 136 Misc. 511, 240 N. Y. Supp. 15 (Sup. Ct. 1930), *aff'd*, 229 App. Div. 717, 241 N. Y. Supp. 877 (1st Dep't 1930) (Del. corp.); Major v. American Malt & Grain Co., 110 Misc. 132, 181 N. Y. Supp. 152 (Sup. Ct. 1920) (N. J. corp.); Holmes v. Camp, 186 App. Div. 675, 175 N. Y. Supp. 349 (1st Dep't 1919), *aff'd*, 227 N. Y. 635, 126 N. E. 910 (1919) (Mo. corp.).

92. See, *e.g.*, Hamm v. Christian Herald Corp., *rev'd in Appellate Division*, 236 App. Div. 639, 260 N. Y. Supp. 743 (1st Dep't 1932). As late as 1919, a leading text did state the rule to be: "Where, however, a foreign corporation has ceased to exist, a resident stockholder cannot maintain on its behalf an action to compel a restoration of its property, but relief should be sought in the courts of the state of its creation." FLETCHER, CORPORATIONS (1st ed. 1919) § 5805, pp. 9693-96. The case cited as authority for this rule was distinguished in Holmes v. Camp, 186 App. Div. 675, 175 N. Y. Supp. 349 (1st Dep't 1919), and this rule does not appear in the corresponding section (§ 8444) of the current (1933) edition of FLETCHER.

to employ dissolution in the hope that they may win a similar ruling and thereby bar a suit to redress past wrongs.

But even if the stockholder can sue, it must not be forgotten that the corporation must be made a party to the suit,[93] and that dissolution makes much more difficult service of process upon it.[94] Even the question of whom to serve in order to perfect jurisdiction is often unsettled. In the absence of statutes directing the manner of service,[95] it is a perplexing question whether service should be made upon the liquidating trustees of the dissolved corporation,[96] or upon the persons upon whom process could have been served before the dissolution.[97] Still more uncertain is the question whether jurisdiction over a foreign corporation can be obtained by service upon some previously designated representative such as the Secretary of State.[98]

The question of power in the forum to entertain a suit after dissolution suggests its inevitable corollary, the question of expediency. Dissolution does increase the likelihood that the court may be persuaded, as a matter of expediency, to relegate jurisdiction over the subject matter to another forum—the courts of the state where the corporation was technically created. Almost invariably, in derivative suits on behalf of a dissolved corporation, the defendants plead as an affirmative defense the doctrine of *forum non conveniens,* namely, that upon dissolution there should be relegated to the courts of the state of incorporation both the question of the propriety of dissolution and of the duty of the Trustees in Dissolution to bring action. It must be remembered that it is usually impossible to obtain jurisdiction over the person of *any* of the guilty parties in a state such as Delaware, where so many corporations are incorporated, but where the directors rarely reside. Thus, recognition of this plea

93. Security Trust Co. of Rochester v. Pritchard, 201 App. Div. 142, 194 N. Y. Supp. 486 (4th Dep't 1922); Camp v. Taylor, 19 Atl. 968 (N. J. Ch. 1890). Indications *contra* that the dissolved corporation need not be joined are collected in Comment (1931) 40 YALE L. J. 1081, and in Winer, *Jurisdiction over the Beneficiary Corporation in Stockholders' Suits* (1935) 22 VA. L. REV. 153, n. 2. Non-joinder of a foreign corporation would be expressly authorized by the passage of proposed N. Y. C. P. A. § 193a, suggested in LAW REVISION COMM'N LEGIS. DOC. (1941) No. 65 (I).

94. Lack of jurisdiction over the person of the defendant corporation was among the objections urged in a number of the cases cited notes 90 and 91 *supra.*

95. See, *e.g.,* CAL. CIV. CODE (Deering, 1937) § 402a. The statute may authorize service by publication. Fairfax Bldg. Co. v. Oldknow, 46 Ga. App. 281, 167 S. E. 538 (1933).

96. Holmes v. Camp, 227 N. Y. 635, 126 N. E. 910 (1919); *cf.* O'Brien v. King, 258 App. Div. 504, 17 N. Y. S. (2d) 44 (1st Dep't 1940).

97. See Castle's Adm'r v. Acrogen Coal Co., 145 Ky. 591, 596, 140 S. W. 1034, 1036 (1911).

98. U. S. Truck Co. v. Pennsylvania Surety Corp., 259 Mich. 422, 243 N. W. 311 (1932) (service invalid). *Contra:* Kelly v. International Clay Products Co., 9 Pa. D. & C. 704 (1927), *aff'd,* 291 Pa. 383, 140 Atl. 143 (1928) (Del. corp.).

would effectively destroy the corporation's claim. Even in those rare cases where the individual defendants are residents of a state such as Delaware, they could leave that state immediately upon the dissolution, and then be immune from suit in every other state where this doctrine is recognized.

Despite the increasing unpopularity of the doctrine of *forum non conveniens,* some misfeasant directors doubtless determine to dissolve a corporation on the chance that even if a remedial suit be brought, the dissolution will cause it to be dismissed by a judge receptive of the plea that the action seeks to involve the court in the internal management of a foreign corporation. Since stockholders ordinarily will not undertake the expense and greatly increased risk[99] of asserting their claims in a foreign jurisdiction, refusal by the court of the forum to entertain a derivative suit will usually frustrate all attempts to redress even the most flagrant wrongs.

Expenses of Litigation

A third consideration which may inspire dissolution is that suits against the wrongdoers will be discouraged because a complainant may be required to bear the entire cost of suit himself. This may result if the court, instead of awarding judgment to the corporation, ultimately should hold that judgment be given to the complainant stockholder as an individual, and thereby prevent him from receiving contribution towards the expense of the suit from his fellow stockholders.

In the case of a corporation which will not itself bring suit to redress a wrong to it, courts originally had the choice of granting relief to the stockholders either (a) by permitting each stockholder to maintain an individual suit for his aliquot share of what the corporation would have received, or (b) by permitting any stockholder to institute suit on behalf of the corporation to recover the funds for it, thus benefitting *all* the stockholders. French law employs the first alternative,[100] even though it must result, if successful, in a multiplicity of suits.[101] The second alternative is the principle, ordinarily applied in Anglo-American law, that if a corporation has been injured and should sue, but refuses to sue because it is under the control of those who have wronged it, a stockholder may maintain a suit in equity on behalf of the corporation to recover the funds for it; and conversely a stockholder may not sue individually to recover

99. In states where statutes cater to incorporators, the courts are reluctant to render decisions which may lessen the state's popularity. See, *e.g.*, Davis v. Louisville G. & E. Co., 16 Del. Ch. 157, 142 Atl. 654 (1928); Federal United Corp. v. Havender, 11 A. (2d) 331 (Del. 1940).

100. Houpin, C. et Bosvieux, H., Traité Général Théorique et Pratique des Sociétés Civiles et Commerciales et des Associations (7th ed. 1935) II, §§ 1364–1369; David, La Protection des Minorités dans les Sociétés par Actions (1929) 102-68.

101. Other consequences of disregarding the corporate entity are suggested in Gallagher v. Germania Brewing Co., 53 Minn. 214, 54 N. W. 1115 (1893).

his proportionate share of the loss sustained by the corporation.[102] This general principle is not without exception, however. In a few instances where the exigencies of the case required it, a court has granted the plaintiff stockholder individual relief in the form of a decree that his recovery be an aliquot share of the total damage to the corporation. So, for example, individual relief is given where necessary to avoid a benefit to a party not entitled to it,[103] or where necessary to assure relief to the complainant, yet avoid circuity of action.[104]

In the case of an undissolved corporation the exceptions to this general principle have been rare and strictly limited.[105] Will dissolution constitute another exception? Some decisions hold that after a corporation has been dissolved, a suit on its behalf is still the only type of action which can be maintained for damage to the corporation, and that a suit by a stockholder in his individual capacity must be dismissed.[106] The overwhelming mass of decisions, however, simply state that the stockholder of a dissolved corporation *may* maintain a derivative suit.[107] And a few hold that, at the request of the complaining stockholder, individual redress may be given directly to him.[108]

Defendants naturally urge that after a corporation has been dissolved, a stockholder (if he can still be so called) can recover only his pro rata share, and cannot recover assets for a corporation which has no use for them. One state statute seems to require this interpretation,[109] and it may be the logical ruling where suit is begun after expiration of the period set by statute for continued corporate existence.[110]

102. See Hornstein, *supra* note 39, at 785.

103. Brown v. DeYoung, 167 Ill. 549, 47 N. E. 863 (1897); Matthews v. Headley Chocolate Co., 130 Md. 523, 100 Atl. 645 (1917); Joyce v. Congdon, 114 Wash. 239, 195 Pac. 29 (1921).

104. Dill v. Johnston, 72 Okla. 149, 179 Pac. 608 (1919); Eaton v. Robinson, 19 R. I. 146, 31 Atl. 1058, 32 Atl. 339 (1895).

105. Some of the exceptional cases were analyzed and limited in Eshleman v. Keenan, 194 Atl. 40 (Del. Ch. 1937), *aff'd*, 2 A. (2d) 904 (1938).

106. Watts v. Vanderbilt, 45 F. (2d) 968 (C. C. A. 2d, 1930); Anderson v. Derrick, 26 P. (2d) 463 (Cal. 1933), *aff'd on rehearing*, 220 Cal. 770, 32 P. (2d) 1078 (1934). *Cf.* Brock v. Poor, 216 N. Y. 387, 111 N. E. 229 (1915) (corporation not technically dissolved).

107. See, *e.g.*, cases cited *supra* note 91.

108. Ervin v. Oregon Ry. & Nav. Co., 20 Fed. 577 (C. C. S. D. N. Y. 1884); Ward v. Graham-Jones Motor Co., 74 Colo. 145, 219 Pac. 776 (1923); Alexander v. Quality Leather Goods Corp., 150 Misc. 577, 269 N. Y. Supp. 499 (Sup. Ct. 1934). Similarly, where complainant asks restitution to the corporation, or, in the alternative, direct relief to himself. Sale v. Ambler, 335 Pa. 165, 6 A. (2d) 519 (1939).

109. MISS. CODE ANN. (1930) § 4172.

110. Compare Baldwin v. Johnson, 95 Tex. 85, 88, 65 S. W. 171, 172 (1901); Ramsey v. Rosenthal, 242 App. Div. 526, 275 N. Y. Supp. 783 (1st Dep't 1934) (after expiration of period of prolonged existence, former stockholder may bring a *representative* suit on behalf of all former stockholders).

The practical import of this problem [111] is shown in an early ruling in *Jones v. Missouri-Edison Electric Co.*,[112] a case so frequently cited that a brief statement is in order. The majority stockholders of Corporation *A* owned all the stock of Corporation *B*, and voted the consolidation of the two corporations to form Corporation *C* on a basis grossly inequitable to the minority stockholders of Corporation *A*. Minority stockholders of Corporation *A* instituted a derivative suit and sought (1) the dissolution of Corporation *C*, an accounting of all property belonging to Corporation *A* in the hands of Corporation *C*, a decree for the recovery of the same from Corporation *C* on behalf of and for the use and benefit of Corporation *A*, and the rehabilitation of Corporation *A*; or (2) in the alternative, that an accounting be taken and the true value of complainants' stock in Corporation *A* be ascertained and adjudged a lien upon the property of Corporation *C*. The court said that the action of the majority stockholders had been a fraud upon the minority stockholders of Corporation *A* and that it "was not so irrevocably dissolved that its rehabilitation is beyond the power of a court of chancery."[113] The Master to whom the case was referred reported, however, that rehabilitation of Corporation *A* was, as a practical matter, impossible since the corporations were public utilities, and he simply ordered paid to the minority a sum supposed to constitute the fair value of their share.[114] But at the conclusion of the litigation, which had lasted thirteen years, the court, with respect to compensation for plaintiff's counsel, declined to award counsel fees and expenses upon the basis of a recovery of $3,225,000 in the name of Corporation *A*, saying it "is not restored or rehabilitated, and the ascertainment of the proportion to be assigned to it of the value of the consolidated properties is but a step in the process of determining the individual rights of appellants." [115] The result was that the successful plaintiffs were forced to pay their counsel over $100,000 out of their own pockets. Since the complainants were held entitled to have the corporation rehabilitated, they might well have been compensated as if the original corporation had received the money to which it was entitled.

A recent New York decision, *DiTomasso v. Loverro*,[116] has again exposed this pitfall for complainant stockholders in derivative suits. The record on appeal discloses that at the conclusion of the trial the trial court

111. It is difficult to determine whether this problem should be classified in the field of adjective or of substantive law. It partakes of both fields.

112. Jones v. Missouri-Edison Elec. Co., 144 Fed. 765 (C. C. A. 8th, 1906), *rev'g*, 135 Fed. 153 (C. C. E. D. Mo. 1905).

113. See 144 Fed. 765, 777 (C. C. A. 8th, 1906). This ruling on a demurrer to the bill was repeated after trial. 199 Fed. 64 (C. C. A. 8th, 1912), *rehearing denied*, 203 Fed. 945 (C. C. A. 8th, 1913), *cert. denied*, 229 U. S. 615 (1913).

114. See 233 Fed. 49, 50 (C. C. A. 8th, 1916).

115. See *id.* at 53.

116. DiTomasso v. Loverro, 276 N. Y. 551, 12 N. E. (2d) 570 (1937).

ruled in favor of the plaintiff and pointed out in a written opinion: "The damages, of course, are not to be paid to the plaintiff, as he sues in but a representative capacity, but they go to the [nominal] defendant Paramount Company."[117] To avoid the possibility that certain defendants who were also stockholders would thereby profit by their own wrongdoing at the expense of non-stockholder defendants, the court, in a supplemental opinion, computed the total damages sustained by the corporation on whose behalf suit had been brought, and awarded complainant only his allocable share; the court also awarded an additional sum to the corporation "out of which the fees of plaintiff's attorney and the expenses of the litigation may be paid."[118] But the appellate court held that once a pro rata share had been awarded to the plaintiff, the trial court had no power to make any additional provision for the benefit of plaintiff's counsel.[119]

The tremendous amount of work performed by plaintiff's attorneys in these cases[120] presents a most significant problem. Where a suit on behalf of the corporation is successful, the stockholder's attorneys and accountants will be compensated out of the total sum recovered by the corporation. But if the individual award and the statutory costs represent the maximum the small stockholder can receive, the actual expenses of suit will usually exceed his total recovery, since he must go to the expense of proving all he would have been obliged to prove to get redress for the corporation before his allocable share is determined. This practice, carried to a logical but socially undesirable conclusion, would enable dishonest directors to tender a complainant stockholder his proportionate share of the loot and then interpose this tender as a complete defense, on the theory that all the plaintiff may recover is his proportionate share of the damages, out of which he must personally pay his attorney's fees.

The social desirability of encouraging meritorious stockholder's suits—and only in the case of a successful suit is any recovery and any counsel

117. *Ibid.*, Record on Appeal, ff. 1440.

118. *Id.* at ff. 1441–52.

119. DiTomasso v. Loverro, 250 App. Div. 206, 293 N. Y. Supp. 912 (2d Dep't 1937), *aff'd*, 276 N. Y. 551, 12 N. E. (2d) 570 (1937), *reargument denied*, 276 N. Y. 610, 12 N. E. (2d) 601 (1937), 51 HARV. L. REV. 164. The trial court's pro rata award was based upon similar procedure in a related case where the plaintiff took no appeal from the pro rata award and where the issue of counsel fees was never raised. Jacobellis v. Prudential Ice & Coal Corp., 244 App. Div. 255, 279 N. Y. Supp. 44 (2d Dep't 1935), *modified*, 269 N. Y. 632, 200 N. E. 32 (1936).

120. For a summary of legal work performed in the *Jones* case, see Thompson v. Bomar, 258 Fed. 339 (C. C. A. 8th, 1919). In the 54 cases cited in Hornstein, *supra* note 39, at 794, n. 68, the litigation lasted an average of 5 years; this does not mean merely lapse of time as in ordinary litigation; in stockholders' suits the work is usually continuous as long as the litigation lasts, and ordinarily requires the work of several lawyers working at once.

fee awarded—plus the patent inconvenience and undesirability of separate suits by each stockholder to redress the same wrong[121] might well lead to a uniform rule that in the case of the dissolved, as well as the undissolved corporation, recovery must be on behalf of and for the benefit of the corporation. Otherwise, the inability of lawyers to predict with reasonable certainty who will ultimately pay the enormous expense of suit, coupled with the possibility that a successful complainant may be obliged to pay it out of his own pocket, will usually be sufficient to deter the complainant from action.

CONCLUSION

The first motivation considered in this article, *i.e.*, the possibility of cutting down the statute of limitations, can be readily eliminated by enactment of statutes of the California or New Jersey type which do not further shorten the time limitation in authorizing suits by or against a dissolved corporation. The second and third incentives, based upon the doctrine of *forum non conveniens* and the cost of suit respectively, can be obviated by the judiciary without the need for any enabling statute. Proper action, however, on the question of who shall bear the expense of suit can be guaranteed by a proviso in the dissolution statutes that "award shall be in favor of the dissolved corporation and not of any individual stockholder."

An effective and dynamic solution substantially disposing of all three dangers and uniformly applicable in all states would be the prohibition of dissolution until after clearance by a federal agency which could be empowered to require from those advocating dissolution proof that it is sought for a proper purpose. At the present time, the SEC may not act except in the case of merger or consolidation and then only if the "sale" of new securities is involved; it usually is not.[122] Since those contemplating wrongdoing naturally do not employ methods which require them to resort to judicial proceedings, federal legislation is the only practicable solution. Such legislation has been recommended[123] and suggestive pro-

121. The complications resulting when each stockholder may maintain a separate, individual suit are indicated in Harris v. Pearsall, 116 Misc. 366, 190 N. Y. Supp. 61 (Sup. Ct. 1921), following an earlier individual judgment in Harris v. Rogers, 190 App. Div. 208, 179 N. Y. Supp. 799 (4th Dept. 1919). Where the complainants are the *only* stockholders other than defendants, there is no fear of multiplicity of suits and complainants are awarded only their share of the total damage. Boothe v. Summit Coal M. Co., 72 Wash. 679, 131 Pac. 252 (1913); Tefft v. Schaefer, 136 Wash. 302, 239 Pac. 837 (1925); Silversmith v. Sydeman, 305 Mass. 65, 25 N. E. (2d) 215 (1940).

122. SEC REPORT, *supra* note 3, (1938) Pt. VII, p. 135, n. 61; p. 249, n. 172.

123. SEC REPORT, *supra* note 3, (1940) Pt. VIII, pp. 308 ff., 318 ff.

visions were included in the original bill for the regulation of investment trusts,[124] as was also the following Declaration of Policy:

> "The national public interest and the interest of investors are adversely affected . . . when investment companies are . . . dissolved . . . without the consent of their security holders and without adequate public supervision."[125]

124. S. 3580, same as H. R. 8935, 76th Cong., 3d Sess. (1940) § 25.

125. *Id.* at § 1(6). Both "Declaration of Policy" and specific measures were omitted in the final Act. INVESTMENT COMPANY ACT OF 1940, 54 STAT. 789 (1940), 15 U. S. C. § 80a-1 *et seq.* (Supp. 1940).