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# The Death of Private Corporations Having Capital Stock

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# T H E S I S.

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## PREFATORY NOTE.

In considering the causes of the Death of Private Corporations and the effect of such death, it has not been my aim to collect innumerable cases and decisions, but to set forth the general principles underlying this branch of corporation law ; and to reduce to a logical basis the theory deduced from the decisions of the various courts, which theory has, hitherto, been in much confusion and obscurity. The sole object has been to clear away the clouds and mists which overhang and obscure the true nature of this interesting subject.

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# C O N T E N T S.

# THE DEATH OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK.

## PART I.

### Causes of the Death of a Private Corporation.

Concerning this branch of corporation law there is much confusion in the cases and text books, from the fact that the distinction between the dissolution of a corporation and its death is not strictly observed. Dissolution is used in two distinct senses :--

1. It is applied to the actual termination of the corporate existence, or the extinguishment of its franchise of being a corporation ; and

2. It is applied where the corporation, by act of its shareholders or directors, suspends business and sells all its property, but without terminating its franchise of corporate life.

Where the death of a corporation is spoken of, it means the actual termination of the corporate life or franchise of being. Since a corporation can be created only by "operation of law", its existence can be terminated only by "operation of law." Dissolution, therefore, is a broader term than death,- the two being synonymous only in one sense.

A corporation that is dissolved without its franchise of existence being terminated is dormant and not dead. Hence, the corporation may be dissolved de facto before it is de jure. Thus, where all the shareholders of a corporation, by unanimous agreement, should wind up the company's business and disband the organization before the time limited in the charter had expired, the association would no longer exist as a matter of fact ; yet the courts would still consider the corporation in existence as a matter of law. (Russell v. McClellan, 14 Pick. 68 ; Knowlton v. Ackley, 8 Cush. 95.)

But where a corporation is dissolved de jure before it is de facto, peculiar conditions arise. Leaving aside the right to continue business after de jure death for the purpose of settling the corporate affairs, and considering the case where the corporate life has been terminated by act of law and the continuing of business operation being without attempt to

"wind up" the affairs, it is found that the common law prohibited such continuance, and the validity of acts and transactions under such circumstances would be affected by this prohibition. Such power as that of condemning property for the construction of a railroad, or a ferry, could not be exercised by a corporation (if such it be) in that condition. (In re Brooklyn, etc. R. R. Co., 72 N. Y. 245 ; 75 N. Y. 335 ; 81 N. Y. 69 ; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524.)

Though, if the existence of such a corporation is an immutable fact, the courts cannot reasonably ignore it ; nor would acts and dealings with such a corporation necessarily be ineffective and its contracts of no binding force, for the doctrines of estoppel would apply, and the question whether the charter has expired or been extinguished is a question which cannot be inquired into collaterally in any proceeding but must be adjudicated in a direct proceeding instituted by the State for that purpose. (St. Louis Gas Light Co. v. St. Louis, 11 Mo. App. 55 ; Briggs v. Cape Cod, etc. Canal Co., 137 Mass. 71.)

The different ways in which the death of a corporation is effected,-- that is, the actual extinguishment of the fran-

chise of existence,-- as generally given in the text books may be classified as follows :--

1. Death by operation of statute ; either by expiration of charter, or by legislative enactment, provided no constitutional provision be violated.

2. Death by winding up and surrender of the franchise of life with the consent of the State.

3. Death by forfeiture of franchises and judgment obtained in a proper judicial proceeding ; and

4. Death by "failure of an essential part" of the corporate organization, provided it cannot be restored.

This fourth division is clearly the result of a confusion of what really constitutes the death of a corporation and its dissolution. The great case given in support of this proposition is the case of Philips v. Wickham (1 Paige, 596-7), where reference is made to the case in Rolle's Abridgement. Chancellor Walworth said : "If a corporation consists of several integral parts, and some of those parts are gone and the remaining parts have no power to supply the deficiency, the corporation is dissolved. As in the case in Rolle (1 Rolle Abr. 574, I) where the corporation was to be composed of a certain number of brothers and a certain number of sisters,

and all the sisters were dead, and it was admitted that all the acts done by the brothers afterwards were void ; for, after the sisters were dead, it was not a perfect corporation. But the case which is immediately afterwards stated by Rolle shows that if the brothers had possessed the power to appoint other sisters in the place of those who were dead the corporation might have been revived." The question of dissolution is a question of law, and the consideration of death in this case was not that the legal existence of the corporation had been extinguished, but that circumstances had transpired which prevented the operation of the functions of the corporation. Its franchise of being was still in existence.

The rule stated by Chancellor Walworth was first applied to those organizations which ordinarily consisted of several distinct parts and which could be perpetuated only by prescribed methods --- municipal and ecclesiastical corporations. The rule, however, is not applicable to stock companies, with their transferable shares and their officers and agents appointed by vote of the shareholders. Such officers and agents, though necessary for the management of the company, are not essential to its franchise of existence, nor do they form an integral part of it. The shareholders may, by a duly called

meeting, again elect officers and resume business. (Rose v. Turnpike Co., 3 Watts, 48 ; Commonwealth v. Cullen, 13 Pa. St. 133 ; 2 Morawetz's Private Corporations, Sec. 1008.)

At an early day it was held that if all the members of a corporation should die, the corporation was necessarily dissolved. Mr. Kyd said (2 Kyd on Corporations, 447-8) that it is a "proposition so plain that it seems ludicrous to mention it." The corporation may have been dissolved but it is not dead in law. This rule is still applied to clubs and societies whose members must be elected by vote of the existing members. But in the case of corporations whose membership is represented by shares of stock the rule does not apply. Such a corporation can never be without members, for the shares of the several members pass by assignment, bequest or descent, and they must ever belong to some person, who, for the time, will be considered one of the corporate members. (Boston Glass Mfg. Co. v. Langdon, 24 Pick. 52 ; Russell v. McClellan, 14 Pick. 69.) Therefore the decease of all the shareholders does not terminate its existence ; nor does the fact that all the shares are held by a single individual. If such sole owner continues the business under the corporate name without notice to the public, he may still be sued as a

corporation. (Newton, etc. Co. v. White, 42 Ga. 148.)

Returning now to the classification of the different ways in which a corporation may be dissolved, and recognizing the principle that the franchise of existence must be actually extinguished, the subject naturally divides itself into : (1) death voluntary ; and (2) death involuntary. By voluntary death is meant the termination of existence by the act of the members of the corporation themselves without any interference on the part of the State. This comprises the "surrender" of the old classification. By involuntary death is meant the extinction of life by some external means --- by judgment of forfeiture, limitation of charter or legislative enactment. The "failure of an essential part" under the old classification, as we have seen, is erroneous and consequently has no place in this classification.

## 1. Voluntary Death.

The rule has become well settled in this country that a corporation may be dissolved by a surrender of its corporate rights and franchises. (Penobscot Boom Co. v. Lamson, 16 Me. 224 ; Enfield T. R. Co. v. Conn., etc. Co., 7 Conn. 29, 45 ;

McLaren v. Pennington, 1 Paige, 102, 107.) Though this cannot be effected by the officers of the corporation without the assent of the great body of the society. (Ontario National Bank v. Onondaga Co. Bank, 7 Hun, 549.) It is essential to a valid dissolution that the surrender be accepted by the State granting the franchise. And this acceptance is ordinarily manifested only by act of the legislature. (Wilson v. Proprietors, etc., 9 R. I. 590 ; Boston Glass Mfg. Co. v. Langdon, 24 Pick. 49.)

There are indications of some difficulty in determining whether or not a majority of the stockholders can dissolve the corporation, though upon principle it would seem reasonable that they could do so. The will of the majority rules the corporation in every other case, yet some would make this an exception, though not without good reason. They hold that a tyrannical majority ought not to be able to dissolve the corporation to the prejudice of the minority. Though, on the contrary, the majority may deem a business unprofitable, it would be equally unjust to allow an obstinate minority to work harm to so large an interest in the corporation. The rule, however, is unquestioned that all the stockholders may by unanimous consent effect a dissolution by a surrender of its fran-

chise. (Denike v. N. Y., etc. Co., 80 N. Y. 599, 606 ; Webster v. Turner, 12 Hun, 264.) While the law is unsettled in some of the States, there are precedents at least in Massachusetts and Pennsylvania. In the case of Tredwell v. Salisbury Mfg. Co. (7 Gray, 405), it was the opinion of the court that there was "no doubt of the right of a corporation . . . . by a vote of a majority of their stockholders to wind up their affairs and close up their business, if in the exercise of a sound discretion they deem it expedient so to do." And in the case of McCurdy v. Myers (44 Pa. St. 535), it was held that a majority of the stockholders of a corporation have power to dissolve it. And the holding of a court in Rhode Island was that the dissent of one stockholder should not be allowed to prevent a surrender desired by all the other members of the company. (Wilson v. Proprietors, etc., 9 R. I 590.)

After a long continued non-user, it may be presumed that a corporation has surrendered its franchise to the State. But the mere fact that a corporation has been without officers or organization, and has performed no corporate act for a number of years, does not terminate its existence, although there may be good ground for declaring its franchise forfeited by ju-

dicial proceedings. (Brandon Iron Co. v. Gleason, 24 Vt. 324 ; State v. Vicenne University, 5 Ind. 777 ; Russell v. McClellan, 14 Pick. 63 ; Rollins v. Clay, 33 Me. 132.)

A surrender may be implied from acts suffered by a corporation to be done, which destroy the end and objects for which it was created. (Slee v. Bloom, 19 Johns. 456 ; People v. Bank of Hudson, 6 Cowen, 217 ; Moore v. Whitcomb, 48 Mo. Strickland v. Pritchard, 37 Vt. 324 ; Webster v. Turner, 12 Hun, 264.) Thus, in the case of Moore v. Whitcomb (supra) it was held that where there was a seizure and sale of a railroad under the State lien, the railroad company was extinguished, as such seizure and sale destroyed the objects for which the corporation was instituted.

## 2. Involuntary Death.

In England the Crown may create but cannot at pleasure dissolve a corporation, or without its consent alter or amend its charter. (Dartmouth College v. Woodward, 4 Wheat. 657 ; Smith's Case, 4 Mod. 54.) Parliament, being theoretically omnipotent, may do so, although there are but few instances of the power ever being exercised. (Rex v. Amery, 2 Term

Repts. 568 ; Lee v. Amer. Canal Co., 3 Abb. Pr., N. S. 1,10.)

In this country the legislature cannot dissolve a private corporation without the corporation's consent. (Dartmouth College v. Woodward, 4 Wheat. 518 ; Plank Road Co. v. Woodhull, 25 Mich. 99 ; Mobile Ry. Co. v. Mosely, 25 Miss. 127 ; Woodfork v. Union Bank, 3 Cold. 488.) This rule applies except in cases where the power to repeal has been expressly reserved. (Snyder v. Moore, 8 Barb. 358 ; In re Reciprocity Bank, 22 N. Y. 9 ; Bangor Ry. Co. v. Smith, 47 Me. 34 ; Erie Ry. Co. v. Casey, 26 Pa. St. 287.) The expression of this reserved power may be found either in the charter itself, or in the general act of incorporation, or in the general laws, or even in the constitution of the State. (Delaware Ry. Co. v. Thorp, 5 Har. 454 ; State v. Commissioners, etc., 37 N. J. L. 228 ; Hyatt v. McMahon, 25 Barb. 457 ; Holyoke Co. v. Lyman, 15 Wall. 500 ; People v. Walker, 17 N. Y. 502. This power, however, whether qualified or unqualified, should be exercised only with great moderation and caution. (Commonwealth v. Essex, etc. Co., 13 Gray, 239.)

The Federal Government cannot annul a franchise conferred by a State, and within its proper jurisdiction, unless to accomplish some federal purpose. Such franchises can be with-

drawn or annulled only by authority of the State granting them. (2 Morawetz on Private Corporations, p. 973, Note 2.)

A corporation may be so limited that its term of life expires upon the happening of any prescribed event or contingency. (Brooklyn Transit Co. v. Brooklyn, 73 N. Y. 524; Struger v. Vanderbilt, 73 N. Y. 384.) There is, however, a distinction to be observed between the words limiting the existence of a corporation until the happening of a prescribed event and a provision making the happening of an event a cause for declaring a forfeiture of the charter, or upon condition subsequent. This distinction is very clearly put by Judge McLellan in the case of La Grange, etc. R. R. Co. v. Rainey (7 Cald. 432), where he says, "If the act of incorporation fixes a definite time in which the charter shall expire, as, for instance, in twenty years, there can be no doubt that when the period of time expires the corporation is dissolved. But when the continuance of a corporation beyond a fixed time is made to depend upon the performance of a given condition there can be no doubt that the non-performance of the condition is a mere ground of forfeiture. This, however, can be taken advantage of only by the State in a proceeding in the nature of a quo warranto and the existence of a corporation can never be

collaterally called in question."

On the subject of misuser and non-user, Mr. Justice Story, in the case of Terrett v. Taylor (9 Cranch, 51), said : "A private corporation created by the legislature may lose its franchises by a misuser or a non-user of them ; and they may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land and is a tacit condition annexed to the creation of every such corporation."

But acts which are improper do not of themselves work a dissolution. Its legal existence nevertheless continues until the government which created the corporation, through proper judicial proceedings, procures an adjudication and enforces the forfeiture of the charter. (Ormsley v. Vt. Mining Co., 65 Barb. 360.) Even where the terms of the charter are that the corporation shall be dissolved upon the non-performance of a condition, the mere failure to perform is not ipso facto a dissolution. It is a cause of forfeiture to be judicially determined. (In re Reformed Church, 7 How. Pr. 475 ; People v. Manhattan Co., 9 Wend. 351 ; La Grange Ry. Co. v. Rainey, 7 Cald. 420.)

It requires something more than ordinary negligence, or

excess of power, or mere mistake in the mode of exercising an acknowledged power, on the part of a corporation to warrant a forfeiture of its charter. There must be in general a plain abuse of power by which the corporation fails to fulfil the design and purpose of its organization. (Harris v. Miss. Valley Ry. Co. 51 Miss. 602 ; Ward v. Sea Ins. Co., 7 Paige, 294 ; State v. Pawtuxet Turnp. Co., 8 R. I. 182.)

To cause a forfeiture, the act of misuser or non-user must relate to the matters which are of the essence of the contract between the State and the corporation, and they must be wilful and repeated. (Harris v. Miss. Valley Ry. Co., 51 Miss. 602.) An isolated act, not producing mischievous consequences to any one nor contrary to the express requisitions of the charter, and not wilfully committed, is no ground for forfeiture. (People v. Bristol Turnp. Co., 23 Wend. 222 ; State v. Turnpike Co., 8 R. I. 182.) All that is requisite to defeat a claim of forfeiture is a reasonable and substantial performance of the conditions in the charter. (People v. Williamsburg Turnp. Co., 47 N. Y. 586 ; People v. Kingston Turnp. Co., 23 Wend. 193.)

Where there is an abuse of a particular department of an entire franchise it is a cause of forfeiture of the whole

franchise, but if this particular franchise was added to the corporation subsequent to its creation, such particular franchise may be forfeited and the residue remain. (People v. Bristol Turnp. Co., 23 Wend. 222.)

There are two ways of enforcing a forfeiture : by a scire facias, and by an information in the nature of a quo warranto. "A scire facias is proper where there is a legal existing body capable of acting, but who have been guilty of an abuse of power entrusted to them ; . . . . and a quo warranto where there is a corporate body de facto, who take upon themselves to act as a body corporate, but for some defect in their constitution they cannot legally exercise the powers they affect to use." (Per Ashurst, J., in Rex v. Pasmore 3 Durnford & East. 244.)

In New York these writs have been abolished, and by Section 1786 of the Code of Civil Procedure, the Attorney-General of the State may maintain an action as prescribed by Section 1785 for the dissolution of a corporation by forfeiture of its franchise, in the name and on behalf of the people of the State. The same section also makes a provision by which, on the omission of the Attorney-General to commence the action within a specified time, a creditor or a stockholder may main-

tain such an action himself. But grounds of forfeiture cannot be inquired into collaterally, or in any other way than by a direct proceeding instituted for that purpose. (President, etc. v. Hamilton, 34 Ind. 506 ; In re N. Y. Elevated Ry. Co., 70 N. Y. 327 ; N. Y. Ry. Co. v. Long Branch Com., 39 N. J. L. 28.)

The State may waive the grounds of forfeiture, either by express legislative enactment or by acts which recognize the existence of the corporation after the cause of forfeiture has accrued. (People v. Manhattan Co., 9 Wend. 351 ; Commonwealth v. Union Ins. Co., 5 Mass. 230 ; People v. Phoenix Bank, 24 Wend. 431.) Nevertheless, an act of the legislature will not be deemed a waiver unless the legislative intent in that respect be expressly declared or is necessarily implied from its action. (Pierce v. Somersworth, 10 N. H. 375 ; Heard v. Talbot, 7 Gray, 120 ; People v. Kingston Turnp. Co. 23 Wend. 190.)

The forfeiture of a charter can be enforced only in the courts of the State by which the corporation received its corporate existence. (Importing Co. v. Locke, 50 Ala. 332.) Whether a corporation has forfeited its charter is a question to be determined by a court of law ; a court of equity, un-

less specially empowered by statute, cannot decree a forfeiture. (Doyle v. Peerless Co., 44 Barb. 389 ; Slade v. Merchant's Ins. Co., 8 Humph. 253.)

It was at one time thought that insolvency was a ground of forfeiture ; but as the possession of property is not essential to the existence of a corporation, it follows that insolvency would not have that effect, and its legal existence would not thus be terminated. (Boston Glass Mfg. Co. v. Langdon, 24 Pick. 49.) So at the present time insolvency of a corporation and an assignment of all its property for the benefit of creditors, or the appointment of a receiver, will not extinguish its franchises or put an end to its corporate existence. (Town v. Bank of River Basin, 2 Dough. 530 ; Hollingshead v. Woodward, 35 Hun, 410 ; Kincaid v. Dvinelle, 59 N. Y. 548 ; Bank of Bristol v. Paliquinoque Bank, 14 Wall. 383 ; Green v. Wallkill Bank, 7 Hun, 63.)

## PART II.

### The Effect of the Death of a Private Corporation.

There are three parties interested in the workings of every private corporation : the State, the stockholders and "third parties", as creditors and persons having a cause of action against the company as for tort. The interests of the "third parties" and the stockholders are antagonistic, while the function of the State is to look after the welfare of both parties, by properly regulating the action of the corporate body.

Hence the interests of the State may be considered as being centered in the corporation as an entity, and in its just and equitable management, as the means best adapted to the performance of the State's duty. It cannot be claimed, however, that the interests of the State are on the same foundation,-- pecuniary gain,-- as those of either the stockholders or creditors, or even the pecuniary interests of the English monarchs. While the State needs a revenue, it does not resort, in these modern times, to those crude methods that were in vogue a century ago ; as, for example, the rule that

the personal estate of a dissolved corporation escheated to the Crown,-- for the sole purpose of increasing the Crown revenues. No such selfish interests can be attributed to the State in this country. Its interests are those of the people, and hence are vested in that corporate entity which, in the best manner, protects them from the fraud or imposition of a few by being wisely and justly supervised.

None of the authors upon the subject of corporation law seem to make any logical classification of the effects of the death of such bodies. From what has been said concerning the three interested parties, it will be seen that there is a logical basis, and, as well, a convenient one. Then, upon the death of a private corporation, there will be a consideration, in due order, of the effect upon the rights and liabilities of :--

1. The corporation, considered as representing the interests of the State, and in regard to its real and personal property, debts, contracts and pending suits ;

2. The stockholders, concerning the assets, debts and property of the corporation ; and

3. Third parties, as creditors, either against the company or stockholders, and persons other than creditors, having

rights in the corporate assets.

## 1. The Rights and Liabilities of the Corporation.

By the strict rules of the common law, all real estate held by a corporation at the time of its dissolution reverted to the grantor and his heirs, while all the personal property vested in the Crown, in England, and, in this country, in the people of the State in their sovreign capacity. (Attorney-General v. Gower, 9 Mod. 224 ; Note in 7 Am. St. Rep. 717 ; Coulter v. Robertson, 57 Am. Dec. 170 ; State Bank v. State, 1 Blatch. 267.) But to a great extent modern legislation has modified these common law rules. In this country they have been generally rejected, even in the absence of statutory provision upon the subject. (Mumma v. Potomac Co., 8 Peters, Bacon v. Robertson, 18 How. 480 ; Reed v. Frankfort Bank, 23 Me. 318 ; Tower v. Hale, 46 Barb. 361.)

The prevailing rule of the present day seems to be that upon the dissolution of a corporation all its real and personal property constitute the assets for the payment of the corporate debts, and after such debts are paid, the remainder, if any, is distributed pro rata among the stockholders. (Kribs

v. Carlisle Bank, 2 Wall. Jr. 33 ; Burrall v. Bushwick Ry. Co., 75 N. Y. 211 ; 8 N. Y. R. S. 2683-4, and cases supra.)

Where a corporation owns a right of way or other franchise by the exercise of the power of eminent domain, there seems to be, upon dissolution, some difficulty in determining its disposition. In a late case in New York (People v. O'Brien, 111 N. Y. 1), where the legislature, exercising its reserved right of repeal, annulled the charter of a railroad company, it was held that the right of way and the right to use the same did not revert to the State, but passed as property to the receiver for the benefit of the creditors and stockholders of the corporation. This decision seems to be sound upon theory, and the principle that it is a property right has become the general rule so far as one has been established. (New Orleans Ry. Co. v. Delamore, 114 U. S. 501 ; Marshall v. Western N. C. Ry. Co., 92 N. C. 322 ; Bailey v. Platt, etc. Co., 21 Pac. Rep. 35.) But in Pennsylvania, upon the death of a railway corporation, the franchise of the right of way vests in the State, and the State may grant it to another railroad company. (Erie Ry. Co. v. Casey, 26 Pa. St. 287.) While in Ohio the right of way reverts to the original owner of the land or his assignee in fee. (N. Y., etc. Ry. Co. v. Parme-

Lee, 1 Ohio C. C. Rep. 239, 246.)

Where a corporation has been dissolved by a judgment rendered in a court of competent jurisdiction, the property right of such corporation cannot be confiscated by the State, or affected in any way. The judgment terminates only the franchise of existence. (Bacon v. Robertson, 18 How. 486 ; State Bank v. State, 1 Blatch. 267.)

At common law, all debts due to and from the corporation upon dissolution became extinguished. This is a harsh and inequitable rule, and it seems has never to a great extent been adopted and acted upon as the rule in this country. In fact the contrary seems to be the tendency ; so that, as a general proposition, debts are not destroyed, but may be enforced and utilized for the benefit of those interested, although the corporation may not sue in its own name. (Mallory v. Mallett, 6 Jones Eq. (N. C.) 345 ; Owen v. Smith, 31 Barb. 641 ; Greenwood v. Union Freight Co., 105 U. S. 13 ; Mumma v. Potomac Co., 8 Peters, 281 ; Bacon v. Robertson, 18 How. 480 ; People v. O'Brien, 111 N. Y. 1 ; Note in 7 Am. St. Rep. 717 ; Bank of La. v. Wilson, 19 La. Ann. 1.)

A corporation, for convenience, changing its name, continuing the same general business, with the same officers, is

still responsible under its new name for all debts previously contracted. (Doan v. La Motte Lead Co., 59 Mo. 523 ; Stewart's Appeal, 72 Pa. St. 291 ; Montgomery, etc. Ry. Co. v. Baring, 51 Ga. 582.)

The fact that a private corporation has private contracts does not force upon it perpetuity of existence. It must be presumed that the parties understood the nature and incidents of such a body and made their contracts with reference to them. (Mumma v. Potomac Co., 8 Peters, 281.) Hence it was held in an early case in Tennessee (White v. Campbell, 5 Humph. 38) that a dissolution operates to rescind all existing contracts entered into either by or with the corporation, and no further right could have been acquired by or against it. This appears to have been the early general doctrine and is in accordance with the old common law principles of corporation law. But modern legislation has done away with this by providing for the appointment of receivers to wind up the affairs of the corporation,-- to perform all existing contracts, collect debts, &c. It is in conformity with this modern doctrine that a lease to a corporation is not terminated by dissolution, and its covenant to pay rent does not thereupon cease to be obligatory. (People v. National Trust Co., 82 N. Y.

283.)

Suits by and against a corporation were abated by its death. This was the common law doctrine. It has been largely modified by statute, either by general legislative enactment or by provision in the charter itself. (McCullough v. Norwood, 58 N. Y. 562 ; National Bank v. Colley, 21 Wall. 609 ; Tuscaloosa Ass'n. v. Greene, 48 Ala. 348 ; Ramsey v. Peora Ins. Co., 59 Ill. 311 ; Greenbrier L. Co. v. Ward, 30 W. Va. 43 ; In re International Pulp Co., L. R. 3 Ch. Div. 594 ; In re Lloyd, etc. Co., L. R. 6 Ch. Div. 339.)

Where a corporation consolidates with others, changing its name, yet having a suit pending against it, it has been held that this was no such dissolution that the suit abates. (East Tenn. Ry. Co. v. Evans, 6 Heisk, 307 ; E. & S. Ry. Co. v. Musselman, 2 Grant's Cases, 348 ; Booth v. Bruce, 33 N. Y. 139.) Nor does the consolidation impair the existence of either corporation for the purpose of prosecuting suits previously commenced. (Shackleford v. Miss., etc. Ry. Co., 52 Miss. 159 ; E. & S. Ry. Co. v. Musselman, 2 Grant's Cases, 348.) And a corporation may be restrained from taking steps in a State court for its dissolution while a suit is pending against it in the Federal courts. (Fisk v. Union Pac. Ry. Co., 2 Blatch. 518.)

Where a corporation has been deprived of its legal existence, in the absence of statute, no valid judgment can be rendered against it subsequent to the time of its dissolution. (Murrill v. Suffolk Bank, 31 Me. 57 ; Thornton v. Freight Co. 123 Mass. 32 ; In re Demson's, etc. Co., L. R. 19 Eq. 202.) So, even on judgments in favor of the corporation, no execution can issue regularly in the corporate name, and if one be sued out it may be quashed ; and judgments rendered against the corporation may be impeached by a party interested in the administration of its assets. (May v. Bank of N. C., 2 Rob. 56 ; Dolson v. Simonton, 86 N. C. 492 ; Murrill v. Suffolk Bank, 31 Me. 57.) But, however, when a judgment is rendered for or against a corporation after its dissolution, without that fact having been regularly brought before the court, it seems the judgment is valid, on the ground that the parties would be estopped from setting up the fact as long as the judgment is unreversed. (May v. Bank of N. C., 2 Rob. 56 ; Cf. 40 Am. Dec. 725.)

In most of the States there are statutes relating to the dissolution and winding up of corporations, which provide for the continuance of the capacity to sue and be sued, so that the assets may be collected and claims against the company may

be enforced. Receivers or trustees are also sometimes appointed for this purpose. A private business corporation which fails to wind up its business when its charter expires, but continues in its charter name to carry on its corporate business, may be sued in the corporate name for a tort committed by it after the expiration of its charter. (Miller v. Coal Co., 31 W. Va. 836.) But this is a diversion into de facto corporation law.

## 2. The Rights and Liabilities of the Stockholders.

It is a principle of law well settled that, unless otherwise provided by statute, "a stockholder, the full par value of whose stock has been paid in, is not liable and cannot be made to pay any sums in addition thereto." (Cook on Stock, etc., Sec. 241.) This principle lies at the foundation of the rights and liabilities of stockholders, and many problems are solved by its proper application, whether the corporation is solvent or insolvent.

Upon the dissolution of a solvent corporation, the stockholders are entitled to share in the surplus assets remaining after the claims of creditors have been satisfied, and this in

proportion to the amounts contributed by them to the capital stock. (Kribs v. Carlisle Bank, 2 Wall. Jr. 33 ; Short v. Beaudry, 56 Cal. 446 ; Burrall v. Bushwick Ry. Co., 75 N. Y. 211 ; Hill v. Glasgow Ry. Co., 41 Fed. 610.) In making the distribution of the assets each stockholder is to be charged with the debts due from him to the corporation. (James v. Woodruff, 10 Paige, 541 ; 2 Denio, 574.)

Each shareholder who is also a creditor is to have his claims paid, and then to share in the pro rata distribution afterward. Otherwise it would work injustice. Also, when a stockholder's subscription is fully paid and others are not, he has a right to a return of the excess paid by him above the others before any division of the balance is made. This is in accordance with the doctrine of pro rata distribution. (Kribs v. Carlisle Bank, 2 Wall. Jr. 33.)

But in the case of an insolvent corporation, the stockholders have no rights as stockholders, for the whole assets are to be used in a pro rata payment of corporate debts,--there being nothing left for a surplus distribution. But it would seem that a stockholder who is also a creditor of the corporation has a right to have that claim settled as a creditor, though he can have no preference shown him by virtue of

his being a stockholder.

In the case of officers of the company, it has been held that they are not entitled to payment of their salaries in preference to the debts of other creditors, but must come in with the latter for their ratable proportion of the assets ; though it seems that if one of them is indebted to the company he can have his salary set off against that debt. (In re Croton Ice Co., 3 Barb. Ch. 642 ; Cf. Re Imperial Wine Co. L. R. 14 Eq. 41.)

A debt due a shareholder from the company and assigned by him after commencement of "winding up" proceedings is subject to a right of set off by the company of all calls made subsequent to the assignment and previously to the payment of the debt. (Re China S. S. Co., L. R. 7 Eq. 240 ; Cf. Re Duckworth, L. R. 2 Eq. 578.)

It has been held in California that corporate property after dissolution is to be treated as partnership assets and divided accordingly. (Short v. Beaudry, 56 Cal. 446.) This is but another way of expressing the principle that the assets of a corporation is a fund for the benefit of creditors and stockholders. And, in accordance therewith, if the property be divided among the stockholders leaving debts unpaid, every

stockholder having his share of the property is liable pro rata to contribute for the discharge of such debts out of the property in his hands or its proceeds. (Hastings v. Drew, 50 How. Pr. 202.)

Although the minority of the stockholders cannot complain merely because the majority of the stockholders have dissolved the corporation and sold its property, it has been held that they may justly complain because the majority have exercised their powers in a way to buy the property for themselves, and exclude the minority from a fair participation in the proceeds of the sale. "When a number of the stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation toward its shareholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and a power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders, who have a joint interest in all its property and effects, and the relation between it and its several mem-

bers is for all practical purposes that of a trustee and cestui que trust." (Per Wallace, J., in Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625 ; Cf. 28 Fed. 833.)

A person may in payment for stock convey property to the corporation ; and he may also contract that upon dissolution he shall receive back that property. Though this cannot be done to the prejudice of creditors. (Fisk v. Nebraska Co., 25 Fed. 795.)

There are one or two distinctions between the holdings of the English and the American Courts, that it may be well to consider at this point. The courts in both countries hold that the capital stock of a company is a fund in which both the stockholders and the creditors are interested. But here is where a division takes place. The American courts consider that this fund is for the benefit of creditors and incidentally the stockholders, while in the English courts there are no traces of such a doctrine. On the contrary, the object of the English "Winding Up" Act of 1848, as stated by one of its own authors, Sir John Romilly, "was to obtain a proper contribution between the members of the partnership and to have their rights and liabilities ascertained inter se. The creditors have nothing to do with this, and they may have

execution against the company in any manner they may think fit." (Re Phillips, 18 Beavan, 629, 630.)

Even under the Companies Act of 1862, which was formed with a view to the winding up of companies for the benefit of creditors as well as of stockholders, it is obvious from the expressions of the judges in winding up proceedings that the rights of the shareholders are looked to rather than the rights of creditors. (Spackman v. Evans, L. R. 3 H. of L. 171.)

The rights of creditors are so carefully guarded by the American courts that persons will be held to the liability of stockholders if they suffer themselves to be held out to the public as such. (In re Reciprocity Bank, 22 N. Y. 17 ; McIlore v. Wheeler, 45 Pa. St. 32 ; Chase v. Merrimac Bank, 19 Pick. 564 ; Hoyer v. Cleveland, 36 Md. 476.) As in the case of the Reciprocity Bank (supra), where a woman bought shares of stock while a feme sole and afterward married, the stock remaining in her name, it was held that she was liable as a stockholder upon the bank becoming insolvent, and could not escape such liability under her common law disability.

Under the English law, however, she would not have been held liable. The House of Lords and the English Lords

Justices of Appeal seem to have settled upon the doctrine that the rights of creditors against shareholders exist only "in the right of the company" ; that they can, in general, only claim to be paid out of the assets of the company, which assets are limited to what the company had a right to bring into the assets. (Smith's Case, L. R. 2 Ch. 604, 616 ; Directors v. Kirsch, L. R. 2 H. of L. 99 ; Waterhouse v. Jamison, L. R. 2 H. of L. S. C. 29 ; Carling's Case, 1 Ch. Div. 115.) In the Reciprocity Bank case (supra), the company could not have enforced its claim against the married woman, under the English law, and the creditors would have had no right against her.

Another distinction between the courts of the two countries is found in the application of a rule which both recognize. The rule is that the stockholders have a right to transfer their shares of stock. Mr. Thompson, in his work on the "Liabilities of Stockholders" (Sec. 211), gives the English doctrine as follows : "After much consideration of this subject, the English courts have settled upon the rule that a man may transfer his shares to a man of straw, at a time when the company is in a failing condition, for the sole purpose of escaping liability, and for a nominal considera-

tion merely, or as a mere gift ; and, if the transfer is out and out --- is not merely colorable, a sham, the transferee remaining a trustee for the transferor --- the device will be successful ; the transferor will escape liability as a contributory and honest shareholders and creditors will suffer accordingly." (Masters's Case, L. R. 7 Ch. 292 ; Hakin's Case, L. R. 7 Ch. 296 & Note ; Harrison's Case, L. R. 6 Ch. 286 ; Williams's Case, L. R. 1 Ch. Div. 576.)

Mr. Thompson (Sec. 215, supra), sums up the American doctrine as follows : "A transfer of shares in a failing corporation, made by the transferor, with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other stockholders, although as between the transferor and the transferee the transfer may have been out and out." (Nathan v. Whitlock, 3 Ed. Ch. 215 ; Provident S. I. v. Jackson Rink, 58 Mo. 567 ; Miller v. G. P. Ins. Co. 50 Mo. 55 ; Marcy v. Clark, 17 Mass. 330.)

The writer of an article in the Albany Law Journal (Vol. 20, p. 344) criticises Mr. Thompson's statement of the doctrine of the American courts, by showing that most of the

cases cited in support of it are obiter and not directly decisions upon the point. He further says that the doctrine "can hardly be regarded as authoritatively settled in this country, . . . . whatever we may think upon principle." Be that as it may, it is a strong indication of the drift of the judicial minds of the country. The American doctrine will stand the test of principle and equity. Under it fraud and subterfuge cannot be practiced --- shares of great nominal value cannot be transferred, when a corporation is in failing circumstances, to mere "men of straw", for perchance a pound or a shilling, or even where the transferee has been paid for the taking of them, thus an escape of just liability.

### 3. The Rights and Liabilities of Third Parties.

"It is a rule well settled and generally observed", says Mr. Beach (2 Beach's Private Corporations, Sec. 1228), "that the death of a corporation leaves unimpaired the rights of creditors to its property in payment of their debts, in whatever manner the dissolution may have been brought about." The capital stock and assets form a fund in the hands of the directors, as trustees, for the payment of their claims. (High-

town v. Thornton, 8 Ga. 486 ; Blake v. Railway Co., 39 N. H. 435 ; Sawyer v. Hoag, 7 Wall. 610 ; Miller v. Mellen Iron Works, 131 U. S. 352 ; Chicago, etc. Ry. Co. v. Chicago National Bank, 134 U. S. 276.)

Most of the States have statutes regulating the rights of creditors upon the dissolution of a corporation. But even in the absence of such statutory provisions, creditors are sufficiently protected by the equitable rule that the corporate funds are held in trust for creditors, and such funds may be followed into the hands of any party, except bona fide creditors, or purchasers without notice. (Sawyer v. Hoag, 7 Wall. 610 ; Shamokin Valley Ry. Co. v. Malone, 85 Pa. St. 25 ; Hastings v. Drew, 60 How. Pr. 254, aff. 76 N. Y. 9.)

A State law which deprives creditors of their satisfaction from the effects of a corporation, and which appropriates such property to other uses, impairs the obligations of the contracts of such corporations, and consequently is invalid. (Curran v. State, 15 How. 304 ; Gillett v. Moody, 3 N. Y. 479.)

As a general rule, a creditor must first exhaust his remedy against the corporation before he can proceed against the stockholders. (Shillington v. Howland, 53 N. Y. 374 ;

Lindsley v. Simonds, 2 Abb. Pr. N. S. 69 ; Priest v. Essex Hat Co., 115 Mass. 380 ; Cambridge Water Works v. S. D. & B. Co. 86 Mass. 239.) When all the property of a corporation has been sold on execution, and the corporation as such has ceased to do business, there is no need of resuscitating the company in order that the creditors may have their remedy against the stockholders individually --- their liability becomes primary and absolute. (Penniman v. Briggs, 1 Hopk. Ch. 300 ; 8 Cowen, 387 ; Kerr's Business Corporations, 305.)

If there are several creditors, and the assets are sufficient to discharge all debts, there should be a pro rata distribution. (Briggs v. Penniman, 8 Cowen, 387.) And the surety of the corporation, who pays as such surety, is only entitled to come in ratably with the other creditors. (In re Croton Ins. Co., 2 Barb. Ch. 360.) But where a creditor of the company obtains a lien upon its real and personal property by judgment or by the levying of an execution thereon, before the order of a court is obtained for the appointment of a receiver, and for the dissolution of such corporation, such creditor cannot be deprived of the preference he has thus acquired. (In re Waterbury, 8 Paige, 380.)

In early times it was thought that a corporation was in-

capable of committing a tort. But it is a principle now well settled that a corporation may commit most varieties of torts and they are held liable to the same extent as natural persons. (Bissell v. Southern Ry. Co., 22 N. Y. 258 ; Smith v. Rathbun, 56 Barb. 402 ; Titus v. Turnpike Road, 61 N. Y. 237 ; Johnston v. St. Louis Dep. Co., 2 Mo. App. 565 ; Hayes v. Houston Ry. Co., 46 Texas, 272 ; Vinas v. Merchants Ins. Co., 27 La. Ann. 367 ; Yarborough v. Bank of England, 16 East. 6.) This liability extends to every grade and description of forcible, malicious or negligent tort or wrong which they commit, however foreign their nature or beyond their granted powers the wrongful transaction or act may be. (N. Y., etc. Ry. Co. v. Schuyler, 34 N. Y. 30 ; Western Union Tel. Co. v. Eyser, 2 Cal. 141 ; Peeble v. Patapsco Guano Co., 77 N. C. 233 ; Pittsburg Ry. Co. v. Shisser, 19 Ohio St. 157 ; Cook on Stock, etc., Sec. 698.)

When companies consolidate, the act under which they do so generally provides for the continuance of the separate existence of the old companies in regard to all outstanding obligations to third parties, including those arising out of tort. (In re Selma, etc. Ry. Co., 40 Ga. 706 ; Warren v. Mobile Ry. Co., 49 Ala. 582. For tort, see Shaw v. Norfolk

Ry. Co., 16 Gray, 407 ; N. Y. Railroad Law, Sec. 73 --- L. 1890, Chap. 565 ; Business Corp. Law, Amendment of 1893, Sec. 12 ; Gen. Laws of Cal., 1850 - 1864, p. 136 ; Iowa Code, Sec. 1275 ; Code of Ala., Sec. 542 ; East Tenn. Ry. Co. v. Evans, 6 Heisk. 607 ; Rome, etc. Co. v. Ont., etc. Ry. Co., 16 Hun, 445 ; Penn'a. College Cases, 16 Wall. 190.)

But what becomes of such actions when a corporation goes out of existence seems never to have been before the highest courts of the land ; either State or Federal courts, or even the English courts. At common law it is clear that such actions were abated,-- and this gives us a hint of a reason why such a case has never come before the higher courts. In New York the question is coming up, apparently for the first time, in a couple of cases in which the Union Ferry Co. of Brooklyn are defendants. Both were actions for the tort or negligence of the Union Ferry Co., or its employees, before the expiration of the charter of the company, it having expired by lapse of time during the pendency of the suits. A motion was made by the plaintiff to continue the actions against those directors who were in office at the time of the corporation's death. Grafton v. Union Ferry Co. (13 N. Y. Supp. 878) was the first case. The motion was argued in the City Court of

Brooklyn before Judge Clement, and on April 10th, 1891, the motion was denied. In 1832 a law was passed (L. 1832, Chap. 290, Sec. 4) by which such actions as the one in question could have been continued to final judgment. But in 1880 (L. 1880, Chap. 245), the Law of 1832 was repealed and part of it incorporated into the Code of Civil Procedure, but Section 4 of that Law was never re-enacted. So, in the language of the learned Judge, "There is, therefore, no statute in force in this State for the continuance of this action, unless the directors are to be treated as trustees for the plaintiffs. An action abates when no statute exists for its continuance. Greeley v. Smith, 3 Story, 607 ; National Bank v. Colby, 21 Wall. 609.)" And, continuing the discussion, --- "Therefore, the only question on this motion is whether or not the plaintiff is a 'creditor' of the defendant within the meaning of the statute before referred to, as to the power of directors in office at the date of the expiration of the charter. I have examined the definitions of the word 'creditor', and can find no definition and no authority that a party who has an action pending for injuries to the person can be considered as such." The motion was denied, thus adhering to the proposition that such actions abated under present New York

law.

But in a similar motion before the Special Term of the Supreme Court for the Second Department, in the case of Hayworth v. Union Ferry Co., the motion was sustained. This case was decided in May, 1891, and was argued before Judge Cullen, who said, in support of his decision : "The claim made on behalf of the defendant is that the plaintiff, whose action is for a personal tort, is not a creditor. Strictly speaking, a creditor is one whose claim springs out of contract. In Stewart v. Crosstown R. R. Co. (90 N. Y. 588), a common carrier of passengers was held to be a guarantor against misconduct on the part of its employee to its passenger, and it is said that any such misconduct on the part of the employee is a breach of the contract of the employer. So this liability may be said to spring out of contract. I do not think it necessary, however, to rest this decision on that point. In my judgment, the provision of the Revised Statutes above quoted (Secs. 9 & 10, Title III, Part I, Chap. 18) should be construed liberally, so as to include the claims of all persons against the corporation arising out of the ordinary conduct of its business. . . . . The power given to the trustees by the statute is broad, 'to settle its affairs';

a term comprehensive enough to include all its liabilities. Liability for personal injuries, in the operations of a large carrier, are as much a part of the running expenses as contract expenditures. . . . . Nor do I think the rule of actio personalis moritur cum persona applies to this case. The defendant was simply an artificial being. The claim which the plaintiff had was in reality against the property and assets of that corporation ; it was from those that he was to obtain satisfaction. That property still remains and is in the hands of the defendant's trustees. It certainly would be inequitable to deprive the plaintiff of satisfaction of his claim, if he has one, when by the voluntary act of the real parties in interest, the stockholders, and end has been put to the corporation, for under the statute its corporate existence might have been continued had the stockholders seen fit to do so."

A few remarks may be pertinent here before considering the appeal to the General Term. From the facts of this particular case, the statement that the stockholders might have continued the existence of the corporation had they seen fit to do so, is unfounded, as the charter of this company had been renewed once, and according to the statute further re-

newal could not be had. The learned Judge seems to think that corporations are exceptions to the old maxim that action for personal injury dies with the person, but this evidently is in conflict with the fundamental theory of these "creatures of the law." From the fact that these "artificial beings" are created for the purpose of exercising such functions and becoming responsible for such liabilities as are exercised by and attached to natural persons, which are adaptable to these "creatures" there is no valid reason why this particular case should be excepted. In fact, if allowed, it would be in conflict with the whole theory of the death of corporations as already established and set forth in this discourse. For the corporation, under modern rules, is treated in exactly the same way that a natural person would be under the same circumstances. As far as is applicable, the laws governing natural persons are made to govern corporations. Such actions as the one in question do not survive the death of a natural person, then why should a corporation be an exception when the law concerning the one is equally applicable to the other ?

The appeal from this decision was argued at the General Term in the Second Department, Dec. 14th, 1891, before Bar-

nard, P. J., and Dykman and Pratt, JJ. ; Dykman, J., dissenting. Reported in 16 N.Y. Supp. 692. Barnard, P. J. wrote the opinion, and among other things he says : "Tort stands upon the same basis as contract. (Martain v. Walker, 12 Hun, 46 ; Ford v. Johnston, 7 Hun, 563 ; Baker v. Gilman, 52 Barb. 26 ; Lichenberg v. Herdtfelder (N. Y. App.) 8 N. E. Rep. 526.) These cases either hold or approve of the principle that a conveyance made during a pending litigation, to defeat the collection of a judgment for a tort, can be set aside as if it was a contract debt. In other words, the statute creditors embraces those persons whose claims are based upon torts." The fallacy of this reasoning need hardly be mentioned. And, continuing, he says : "The charter pledges the property of the corporation to pay all damages for misfeasance of the company's employees. The law makes the directors trustees to settle the affairs of the corporation, and to pay all debts against the corporation. The court has the power to continue the action which was pending at the dissolution of the corporation of necessity. Such power existed before the Act of 1832, and exists since the repeal of 1880."

The last proposition, that the right existed before the Act of 1832, and continues to exist, is not sustained in the

case of McCullough v. Norwood (58 N. Y. 562), which is relied upon by the Judge for the support of his proposition. In that case the Act of 1832 was expressly relied upon, and in speaking of the Fourth Section of that Act, Rappallo, J. said: "Unless such an order be made, there is nothing in our statutes interfering with the common law rule that the dissolution of the corporation puts an end to the action, and that all subsequent proceedings therein are void."

The arguments presented by Dykman, J., in the dissenting opinion, are so strong that it is a great temptation to quote the whole of his opinion, but only the following extracts will be given :--

"A cause of action for a tort is not an indebtedness, and it would be contrary to all analogies of law to consider it so. If it was a debt, it would survive the death of the claimant ; whereas the universal rule is that it dies with him. It required a special statute to enable actions for wrongs to the property rights or interests of another to be maintained against the executors or administrators of a deceased wrong-doer, and from that statute is expressly excepted actions for slander, libel, assault and battery, false imprisonment and actions for injury to the person. (3 R. S.,

5th Ed., p. 746, Secs. 1, 2.) The claim of the plaintiff is not assignable, as it would be if it created a liability against the company. So it required a statute to prevent the abatement of an action for the recovery of damages for personal injuries by the death of a party after verdict or decision. (Code, Sec. 764.) Provision is made by law for the enforcement of payment of liabilities of deceased persons by a sale of their real property, but that law could never be applied in favor of a person who held an unliquidated claim for damages sounding in tort."

"Assault and battery was committed upon the plaintiff by a servant of the defendant, and, if the plaintiff had not been a passenger of the defendant, the company would have incurred no liability for the act ; but because the plaintiff was a passenger, the defendant is responsible for the assault and battery, and the action of the plaintiff is for the wrong perpetrated upon him. The assault furnishes the plaintiff with a cause of action, and his suit is based thereon.

"In the case of Stewart v. Railroad Co. (90 N. Y. 590), it was the object of the court to show in the opinion that common carriers are responsible for injuries resulting to passengers from the negligence and wilful misconduct of their

servants while engaged in the performance of duties which the carrier owes to passengers, and to manifest the reasons for such responsibility. The court there decided that wilful misconduct of the servant imposed the same liability as negligence, but that action was for a personal assault upon the plaintiff, and there is nothing in the case which conflicts with the views we have expressed, and nothing to indicate that the court considered the action itself to be based upon contract. In that case, as in this, the damages are claimed for the wrong, and not for a breach of contract.

"It would be considered a great abuse of legal terms, if not a perversion of law, to say that an equitable action in behalf of a judgment creditor to set aside a conveyance for the fraud of a judgment debtor in its execution was an action in tort, because it was based upon fraud, and fraud is a wrong ; and yet it would be equally as plausible as the argument of the plaintiff.

"It seems plain, therefore, that the plaintiff is not a creditor of this corporation, and that his action is not based upon contract in any legal sense. It is equally plain that the statute which constitutes the directors trustees of the creditors and stockholders of the dissolved corporation is not

sufficiently comprehensive to include this cause of action among the liabilities to be discharged by such trustees. These trustees are no more than appointed executors of the dead corporation, and, as the cause of action does not survive the death of the company, the suit cannot be continued against the trustees. There is no provision in the Code for the continuance of an action after the death of a sole plaintiff or a sole defendant, unless the cause of action survives, and, as this suit is based upon a cause of action which does not continue after death of either party, there is no provision for its continuance."

This case was taken to the Court of Appeals, but that court refused to hear the argument, upon the ground that a "substantial right" was not involved. It is almost lamentable that the case could not have been passed upon by the highest court of the State, and especially so, when there is evidently an erroneous holding of the lower courts. The weight of argument, without doubt, being in favor of the defendant in these cases.

Mr. Beach, in his valuable work on Private Corporations (Sec. 151), maintains that, "The debts of a corporation, for which its members are made liable by statute, are such claims

against it as arise from contract, and do not include a judgment against the company for a tort, even though the tortious act might have been considered a breach of contract." And in a late case in Rhode Island it was held that debts contracted, for which directors of a corporation are made liable, do not include damages ex delicto, or a judgment in tort. (Leighton v. Campbell, 17 R. I. ____.)

## CONCLUSION.

The fundamental ideas,-- the underlying principles,-- to be deduced from the foregoing discourse may be enumerated as follows :--

1. A corporation is dead only when its legal existence is terminated.

2. A corporation can never be dissolved so as to defeat the just rights of creditors.

3. The assets and capital stock form a fund for the benefit of creditors primarily, and the stockholders secondarily.

4. Persons having claims against a corporation on grounds of tort are not creditors until their claims are in

judgment, and the damages ascertained --- decisions to the contrary notwithstanding.

And, as a general proposition, it may be stated that, subject to their peculiar organization, corporations have the same protection and rights, and are held to the same liability and responsibility, as are natural persons, under the same circumstances and in the same situation.

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