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Notwithstanding the fact that they may validly be given authority to impose penalties, administrative boards have not yet been given the power to order imprisonment. There is little need for administrative boards to operate in this area, and public opinion would be strongly against executive officials prescribing such punishment.<sup>26</sup> In the *Wong Wing* case<sup>27</sup> the Court felt that a person should have a judicial trial before he could be punished by having his liberty taken away.

MARSHALL T. SPEARS, JR.

### Corporations—Foreign—Suability After Dissolution

Under the common law the dissolution of a corporation extinguished its debts, actions against it were abated, its real property reverted to its grantors, and its personal property escheated to the King.<sup>1</sup> The event was likened to the death of a natural person.<sup>2</sup> This rule was tolerated so long as there were only municipal, ecclesiastical, and eleemosynary corporations in existence. But with the growth of business corporations, accompanied by their shareholders and creditors, the harshness of such a rule was manifest, and the equity courts were persuaded that the assets of a dissolved corporation should be declared a trust fund for the satisfaction of claims by creditors and other interested parties.<sup>3</sup> A later development was the almost universal adoption of statutes which extended the life of a corporation after dissolution so that it could bring and defend actions in the corporate name for the purpose of "winding up" its affairs.<sup>4</sup>

But extension statutes have not been completely effective, for much confusion still exists when an action is brought involving as a party a foreign corporation which has been dissolved by the state which created it. In such a case the general rule is said to be that the law of the creating state governs, and that when the corporation's very existence is terminated by the state of domicile it cannot be a party to a suit elsewhere.<sup>5</sup> Similarly, if the law of the creating state extends the life of the corporation after dissolution for a winding up period, it may generally sue or be sued in other jurisdictions because it still exists as an entity for that purpose.<sup>6</sup> On the other hand, these extensions may be

<sup>26</sup> GELLHORN, *op. cit. supra* note 25, 348.

<sup>27</sup> 163 U. S. 228 (1895).

<sup>1</sup> See *Life Ass'n. of America v. Fassett*, 102 Ill. 315 (1882); 2 BEALE, *CONFLICT OF LAWS* 742 (1935); 17 FLETCHER *CYCL. CORP.* 775 (1942); Note, 97 A. L. R. 483 (1935).

<sup>2</sup> See *Chicago Title Co. v. Wilcox Bldg. Corp.*, 302 U. S. 120, 124 (1937).

<sup>3</sup> Marcus, *Suability of Dissolved Corporations*, 58 HARV. L. REV. 675 (1945).

<sup>4</sup> 16 FLETCHER *CYCL. CORP.* 930 (1942).

<sup>5</sup> 2 BEALE, *op. cit. supra* note 1, at 742; Note, 47 A. L. R. 1288, 1557 (1927).

<sup>6</sup> *Harris-Woodbury Lumber Co. v. Coffin*, 179 Fed. 257 (W. D. N. C. 1910), *aff'd*, 187 Fed. 1005 (4th Cir. 1911).

termed only procedural remedies, to be controlled by the law of the forum.<sup>7</sup> When the law of the forum expressly extends the life of a dissolved foreign corporation, a judgment obtained under it will be good, at least within the jurisdiction,<sup>8</sup> on the theory that a state may exclude foreign corporations completely or impose what conditions it chooses to their admittance. Consequently, the state may force the submission to suits after dissolution as a requisite to entrance.<sup>9</sup> This power may also derive from the absolute control a state has over property within its jurisdiction, which control is not subject to the laws or acts of another state.<sup>10</sup> Difficulties arise because the majority of the extension statutes do not expressly state whether they are applicable to foreign corporations or only to domestic corporations. Further, in many states an important exception to the statutory control is the rule that local creditors may get at local assets of the dissolved foreign corporation by *in rem* proceedings.<sup>11</sup>

In a recent District of Columbia case,<sup>12</sup> the plaintiff sought to enforce a money claim in the District's municipal court against a Pennsylvania insurance corporation which had been dissolved under Pennsylvania law; and at the same time the plaintiff attached automobiles and funds of the corporation in the District of Columbia. Under the Pennsylvania law, title to the corporation's property was vested in a statutory liquidator without providing for any subsequent actions in the corporate name.<sup>13</sup> The District of Columbia Code provided that dissolved corporations might be sued in their corporate name for causes accruing

<sup>7</sup> Peoria Engineering Co. v. Streator Cold Storage Door Co., 221 Iowa 690, 266 N. W. 548 (1936).

<sup>8</sup> Life Ass'n. of America v. Fassett, 102 Ill. 315 (1882); Hanger v. International Trading Co., 184 Ky. 794, 214 S. W. 438 (1919); Stetson v. City Bank of New Orleans, 2 Ohio St. 167 (1853); Dupont Engineering Co. v. John P. Harvey Const. Co., 156 Va. 582, 158 S. E. 891 (1931); *cf.*, Rogers v. Adriatic F. Ins. Co., 148 N. Y. 34, 42 N.E. 515 (1895) (New York refused to give full faith and credit to an Illinois judgment because taken against a dissolved New York corporation, but the court recognized the validity of the judgment in Illinois); RESTATEMENT, CONFLICT OF LAWS §158, Comment d (1934). For a suggestion that such judgments should be entitled to full faith and credit everywhere, see Marcus, *supra* note 3, at 694.

<sup>9</sup> See Washington v. Superior Court, 289 U. S. 361 (1933). There are exceptions to this power in the case of interstate commerce and federal business.

<sup>10</sup> McGoon v. Scales, 9 Wall. 30 (U. S. 1870); City Ins. Co. v. Commercial Bank, 68 Ill. 348 (1873).

<sup>11</sup> Clark v. Williard, 294 U. S. 211 (1935); Watts v. Southern Surety Co., 216 Iowa 150, 248 N. W. 347 (1933) (garnishment); Hibernia Nat. Bank v. Lacombe, 27 Hun. 166 (N. Y. 1880), *aff'd*, 84 N. Y. 367 (1881). The *in rem* proceedings also involve a determination by the local court that the corporation exists, to the extent that it owns the property, and the cases make no distinction in the reasoning between this and an *in personam* proceeding in so far as the existence of the corporation as a party is concerned.

<sup>12</sup> Sedgwick v. Beasley, 173 F. 2d 918 (D. C. Cir. 1949); *cf.*, Beasley v. Fox, 173 F. 2d 920 (D. C. Cir. 1949) (abatement of an action against the same defendant though it was pending at the time of dissolution).

<sup>13</sup> 40 P. S. PA. §206 (1930).

prior to dissolution.<sup>14</sup> The Pennsylvania liquidator had an ancillary receiver appointed in the Federal District Court for the District of Columbia, who attacked plaintiff's action on the ground that the corporation was not suable because of its dissolution in Pennsylvania. The District Court ordered that the receiver take over the attached property and that plaintiff not proceed with his action, but this to be "without prejudice to any lien, priority or preference" he might assert in the receivership. On appeal the order was affirmed on the ground that plaintiff's suit and attachment was null and void because the Pennsylvania statutes did not preserve a right of action, and that in the absence of such an extension, the corporation was "dead," just as if it were a natural person. The District of Columbia Code was held not applicable to foreign corporations.

The Court cites leading cases likening dissolution to the death of a natural person, but none involved foreign corporations.<sup>15</sup> The only case cited holding that the law of the creating state controls involved an action *brought by* a dissolved foreign corporation in the District of Columbia,<sup>16</sup> and that Code by its terms applies only to suits *against* dissolved corporations; therefore, it could not have been applicable. The case is silent regarding *which* receivership plaintiff is relegated to, and the general rule has the ancillary receiver transmit assets direct to the primary receiver in Pennsylvania.<sup>17</sup> This is subject to the court's right to protect local creditors,<sup>18</sup> but at best the plaintiff has lost some rights, because he is not in the same position that he would be in if he had obtained a judgment. An attachment should constitute a prior lien if made before the foreign liquidator asserts his title, even though subsequent to the vesting of his title at the corporation's domicile.<sup>19</sup> It is interesting to note that had the court looked to the Pennsylvania law applicable to such a situation, with a mind to the retaliatory decisions prevalent in this intergovernmental sphere, it would have found that the Pennsylvania local law would have been applied to permit the action against the dissolved foreign corporation.<sup>20</sup>

<sup>14</sup> D. C. CODE §29-718 (1940).

<sup>15</sup> *Chicago Title Co. v. Wilcox*, 302 U. S. 120 (1937) (dissolution as a bar to a bankruptcy petition); *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257 (1927) (domestic corporation); *National Bank v. Colby*, 21 Wall. 609 (U. S. 1874) (a federal corporation).

<sup>16</sup> *Glennan v. Lincoln Inv. Corp.*, 110 F. 2d 130 (D. C. Cir. 1940) (policy considerations favoring local creditors are not involved when the action is by the dissolved foreign corporation).

<sup>17</sup> *In re Stoddard*, 242 N. Y. 148, 151 N. E. 159 (1926). See Note, 45 A. L. R. 632 (1926).

<sup>18</sup> See note 17 *supra*.

<sup>19</sup> *Clark v. Williard*, 294 U. S. 211 (1935); *Kruger v. Bank*, 123 N. C. 16, 31 S. E. 270 (1898). See Note, 98 A. L. R. 351 (1935).

<sup>20</sup> *Nazareth Cement Co. v. Union Indemnity Co.*, 116 Pa. Super. 506, 177 Atl. 64 (1935) (Louisiana dissolution receiver has no extraterritorial powers except through comity, and that not extended when local creditors would be hurt); *Dehue v. Hillman Inv. Co.*, 110 F. 2d 456 (3d Cir. 1940).

The basic dispute stems from a conflict between the desire to insure a pro rata distribution of the assets among all creditors by a central receiver, and a desire to protect local creditors so that they will not have to go to a foreign jurisdiction to prove their claim. The courts that apply the law of the forum to permit suits against the dissolved foreign corporation are not uniform in their reasoning. The law of the forum may be termed remedial and thus controlling;<sup>21</sup> the court may presume the foreign law is similar when it is not shown otherwise in the record;<sup>22</sup> the constitutional provision for equal protection of the laws may be held to require the same treatment for foreign as for domestic corporations;<sup>23</sup> the public policy of the forum in protecting its citizens may deny effect to the foreign law;<sup>24</sup> or a general statute may prohibit any discrimination in favor of foreign corporations.<sup>25</sup> Suability is also obtained by: attacking the jurisdiction of the dissolving court;<sup>26</sup> declaring the dissolution not effective until judicially enforced in the forum;<sup>27</sup> ruling that the receiver's appearance waives his objection,<sup>28</sup> allowing the action as an *in rem* proceeding, attachment, or garnishment;<sup>29</sup> or by refusing to accept the analogy to death and cessation of existence, and thereby allowing suit against those who stand in the corporation's place in the corporate name.<sup>30</sup>

Much of the authority cited as holding that the foreign law governs

<sup>21</sup> *Peoria Engineering Co. v. Streator Cold Storage Door Co.*, 221 Iowa 690, 266 N. W. 548 (1936); *Stetson v. New Orleans City Bank*, 2 Ohio St. 167 (1853).

<sup>22</sup> *Baid's, Inc. v. Frankel*, 56 Ohio App. 305, 10 N. E. 2d 787 (1937).

<sup>23</sup> *Crown Central Petroleum Corp. v. Speer*, 206 Ark. 216, 174 S. W. 2d 547 (1943).

<sup>24</sup> *Vladikovkazski R. R. v. New York Trust Co.*, 263 N. Y. 369, 189 N. E. 456 (1934).

<sup>25</sup> *Van Schaick v. Parsons*, 11 F. Supp. 654 (D. Mont. 1935) (Nebraska judgment against dissolved New York corporation enforced in Montana); *Castle v. Acrogen Coal Co.*, 145 Ky. 591, 140 S. W. 1034 (1911); *Frink v. National Mut. F. Ins. Co.*, 90 S. C. 544, 74 S. E. 33 (1912); *McCrary Refrigerator Sales Corp. v. Davis*, 140 S. W. 2d 477 (Tex. Civ. App. 1940), *rev'd on other grounds*, 136 Tex. 296, 150 S. W. 2d 377 (1941) (action proper until the corporation's ten year certificate expired); *DuPont Engineering Co. v. John P. Harvey Const. Co.*, 156 Va. 582, 158 S. E. 891 (1931).

<sup>26</sup> *Olds v. City Trust, S. D. & Surety Co.*, 185 Mass. 500, 70 N. E. 1022 (1904).

<sup>27</sup> *Hammond v. National Life Ass'n.*, 58 App. Div. 453, 69 N. Y. S. 585 (1901).

<sup>28</sup> *McGoon v. Scales*, 9 Wall. 23 (U. S. 1870); *Trounstone v. Baur, Pogue & Co.*, 44 F. Supp. 767 (S. D. N. Y. 1942), *aff'd*, 144 F. 2d 379 (2d Cir. 1944), *cert. denied*, 323 U. S. 777 (1944).

<sup>29</sup> *Clark v. Williard*, 294 U. S. 211 (1935); *Alwart Bros. Coal Co. v. Pittsburgh F. Ins. Co.*, 253 Ill. App. 361 (1930); *City Ins. Co. v. Commercial Bank*, 68 Ill. 348 (1873); *Watts v. Southern Surety Co.*, 216 Iowa 150, 248 N. W. 347 (1933); *Zacher v. Fidelity Trust & Safety Vault Co.*, 109 Ky. 441, 59 S. W. 493 (1900); *Rawlins v. American Oil Co.*, 173 Miss. 683, 161 So. 851 (1935); *Hibernia Nat. Bk. v. Lacombe*, 27 Hun. 166 (N. Y. 1880), *aff'd*, 84 N. Y. 367 (1881); *Nazareth Cement Co. v. Union Indemnity Co.*, 116 Pa. Super. 506, 177 Atl. 64 (1935); *Davis v. Amra Grotto M.O.V.P.E.R.*, 169 Tenn. 564, 89 S. W. 2d 754 (1936); 8 THOMPSON, CORPORATIONS §6518 (3d ed. 1927).

<sup>30</sup> *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 146 N. E. 369 (1925).

is found to come from cases in which the foreign law applied extends the corporation's existence,<sup>31</sup> or is in agreement with the local law in doing so, thus conforming to a policy of suability and actually leaving some sort of entity to sue or be sued.<sup>32</sup> Of the few cases holding that the foreign law works a bar to suits by or against the dissolved foreign corporation in the local courts, the great majority specifically point out that the local claimant has an equitable remedy against local assets.<sup>33</sup> One California case denied an action to a Nevada corporation, which would have had capacity under California law, because its Nevada dissolution was by way of a penalty for law violations, but this theory should not be applicable to suits *against* the corporation.<sup>34</sup> Michigan denied an action against a corporation because it deemed full faith and credit must be accorded its Pennsylvania dissolution,<sup>35</sup> but the United States Supreme Court has held that this does not prevent local attachment of the corporation's property even though title to it has passed to a statutory liquidator by operation of the foreign law.<sup>36</sup>

North Carolina has a statute which extends dissolved corporations for a winding up period of three years,<sup>37</sup> but no state case has decided

<sup>31</sup> *Pendleton v. Russell*, 144 U. S. 640 (1892); *Tremond Co. v. Schering Corp.*, 122 F. 2d 702 (2d Cir. 1941); *Dundee Mortg. Trust Inv. Co. v. Hughes*, 89 Fed. 182 (C. C. Ore. 1898); *Action v. Washington Times Co.*, 12 F. Supp. 257 (D. Md. 1935); *Kratky v. Andrews*, 244 Minn. 486, 28 N. W. 2d 624 (1947); *Lehrich v. Sixth Ave. Bancorporation*, 250 App. Div. 391, 296 N. Y. S. 358 (1937); *Kelly v. Internat'l. Clay Products Co.*, 239 Pa. 383, 140 Atl. 143 (1928); *Riddell v. Rochester German Ins. Co.*, 35 R. I. 45, 85 Atl. 273 (1912); *STEVENS, CORPORATIONS 851* (1936); *BALLENTINE, CORPORATIONS 731* (1946).

<sup>32</sup> *Lyman v. Knickerbocker Theatre Co.*, 5 F. 2d 538 (D. C. Cir. 1925); *Forcite Powder Co. v. Herdien*, 162 Ill. App. 425 (1911); *New England Auto Inv. Co. v. Andrews*, 47 R. I. 108, 130 Atl. 863 (1925); *Floerchinger v. Sioux Falls Gas Co.*, 68 S. D. 543, 5 N. W. 2d 55 (1942); *Miller Management Co. v. State*, 140 Tex. 370, 167 S. W. 2d 728 (1943); *Swing v. Parkersburg Veneer & Panel Co.*, 45 W. Va. 288, 31 S. E. 926 (1898).

<sup>33</sup> *Marian Phosphate Co. v. Perry*, 74 Fed. 425 (5th Cir. 1896); *U. S. to use of Colonial Brick Corp. v. Federal Surety Co.*, 72 F. 2d 961 (4th Cir. 1934), *cert. denied*, 294 U. S. 741 (1934); *Ex parte, Davis* 240 Ala. 668, 162 So. 306 (1935); *Fitts v. Nat'l. L. Ass'n.*, 130 Ala. 413, 30 So. 374 (1901); *Trust Co. v. Mortgage-Bond Co.*, 203 Ga. 461, 46 S. E. 2d 883 (1949) (domestic statute not used because the New York corporation had not done business in Georgia); *United States Truck Co. v. Pennsylvania Surety Co.*, 259 Mich. 422, 243 N. W. 311 (1932); *Hirson v. United Stores Corp.*, 263 App. Div. 646, 34 N. Y. S. 2d 122 (1942); *Note*, 27 ILL. L. REV. 310 (1932). Cases not mentioning any relief; *Ralfe v. Rundle*, 103 U. S. 222 (1880); *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 115 Minn. 491, 132 N. W. 992 (1911); *McDonald v. Pacific States Life Ins. Co.*, 344 Mo. 1, 124 S. W. 2d 1157 (1939).

<sup>34</sup> *Fidelity Metals Corp. v. Risley*, 77 Cal. App. 2d 377, 175 P. 2d 592 (1946).

<sup>35</sup> *United States Truck Co. v. Pennsylvania Surety Corp.*, 259 Mich. 422, 243 N. W. 311 (1932).

<sup>36</sup> *Clark v. Williard*, 249 U. S. 211 (1935).

<sup>37</sup> N. C. GEN. STAT. §55-132 (1943) "All corporations whose charters expire by their own limitation or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been dissolved, for purpose of prosecuting and defending actions . . . to settle and close their concerns. . . ."

whether it covers foreign corporations.<sup>38</sup> One federal case from North Carolina held the statute was not applicable to a dissolved New Jersey corporation suing here, but that corporation was extended indefinitely for winding up by the law that dissolved it and the result was to permit the suit here six years after dissolution, whereas the North Carolina statute would have barred the action if it had been held applicable.<sup>39</sup> A federal court in New York disallowed North Carolina judgments presented there as having no extraterritoriality because they were taken against a dissolved foreign corporation, but presumably they would have been good in North Carolina and perhaps in a third state against assets of the corporation.<sup>40</sup> North Carolina refers to foreign corporations as being *domesticated* when they do business here and might use that theory to apply our statute to foreign corporations.<sup>41</sup> Certain foreign corporations are required to deposit funds with the state before being admitted, and these funds should be available to local creditors even after the foreign dissolution of their depositor.<sup>42</sup> North Carolina freely allows statutory service of process against foreign corporations which have withdrawn from the state, and might do the same when they are dissolved on the theory that the agency for service, *i.e.*, the Secretary of State, is not revocable as to prior causes of action.<sup>43</sup> Our statutory service of process has been applied in the case of dissolved

<sup>38</sup> In *Kruger v. Bank of Commerce*, 123 N. C. 16, 31 S. E. 270 (1898), the court held that a New York dissolution and appointment of receiver had no effect on an attachment by local creditors of the corporation's property in North Carolina. Judge Clark concludes with this: "This sums up the doctrine as almost universally recognized, and especially is this so in states like ours, in which by statute the existence of corporations is continued for the benefit of creditors and winding up affairs, for a prescribed time after the charter has expired or been declared forfeited. *Life Asso. v. Fossett*, 102 Ill., 315." The case cited expressly applies a domestic extension statute to a foreign corporation.

<sup>39</sup> *Harris-Woodbury Lumber Co. v. Coffin*, 179 Fed. 257 (C. C. W. D. N. C. 1910), *aff'd*, *Coffin v. Harris-Woodbury Lumber Co.*, 187 Fed. 1005 (4th Cir. 1911).

<sup>40</sup> *Robinson v. Mutual Reserve Life Ins. Co.*, 182 Fed. 850 (C. C. S. D. N. Y. 1910), *aff'd*, 189 Fed. 347 (1911); *Van Schaick v. Parsons*, 11 F. Supp. 654 (D. Mont. 1935).

<sup>41</sup> *John P. Nutt Corp. v. Southern Ry.*, 214 N. C. 19, 197 S. E. 534 (1938); *Smith-Douglass Co. v. Huneycutt*, 204 N. C. 219, 167 S. E. 810 (1933); *Troy & N. C. Gold Mining Co. v. Snow Lumber Co.*, 173 N. C. 593, 92 S. E. 494 (1917). In *Debnam v. Southern Bell Tel. Co.*, 126 N. C. 831, 36 S. E. 269 (1900), the court said that our license statute in effect created a new domestic corporation, so as to deny it removal to the federal court. This holding was limited in *Southern Ry. Co. v. Allison*, 190 U. S. 326 (1903), but that opinion is carefully limited in scope to the issue of denial of federal jurisdiction. Cf. *Central Motor Lines, Inc. v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. 2d 271 (1945), where our court speaks of the *Debnam* case as being over-ruled, in deciding that a New Jersey corporation which had withdrawn from the state could not be served on a cause of action that arose elsewhere.

<sup>42</sup> N. C. GEN. STAT. §54-37 (1943) (bldg. & loan ass'n.); N. C. GEN. STAT. §58-188.4 (1947 Cum. Supp.) (alien life insurance company).

<sup>43</sup> *Harrison v. Corley*, 226 N. C. 184, 37 S. E. 2d 489 (1946); *State Highway Comm. v. Diamond Steamship Transportation Corp.*, 225 N. C. 198, 34 S. E. 2d 78 (1945).

domestic corporations, and since it expressly covers foreign corporations, service would be no problem if the corporation was found to be extended, either by the North Carolina statute or the foreign law.<sup>44</sup>

The consideration of federal jurisdiction of these cases is important because nearly all of them could go to the federal courts on diversity of citizenship. If Federal Rule of Civil Procedure 17(b)<sup>45</sup> is controlling, the question presented here is foreclosed because the rule provides that the capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. The principal case refers to this as being "merely expressive of the general law," pointedly refraining from citing it as controlling. The difficulty arises from the dictum of *Angel v. Bullington*<sup>46</sup> that a Federal court in a diversity case is just another state court and cannot entertain causes that the state court would not entertain.<sup>47</sup> Similar reasoning would not allow removal on diversity of citizenship to defeat a remedy which the plaintiff had in the state court.<sup>48</sup> If, under its conflict of laws rule, North Carolina regarded its local statute as controlling the extension of the local existence of a dissolved foreign corporation, then the Federal court in North Carolina would be bound by the rule of the forum<sup>49</sup> and *Rule 17(b)* would again be of doubtful value as a defense to the dissolved corporation. And though constitutional questions of full faith and credit, equal protection of laws, and impairment of contracts have been raised in these actions, they would not be in the complaint against a foreign corporation in the state court; therefore, the corporation could not get removal to the Federal court on the grounds of a federal question at issue in order to defeat the diversity difficulty.<sup>50</sup> There is the additional possibility that removal on diversity grounds might also be lost if the suggestions made in federal bankruptcy cases are followed to the effect that when a corporation is dissolved it can be brought in as an unincorporated association,<sup>51</sup> as every member might not have complete diversity. This approach is exemplified by the treatment of a dissolved foreign corporation as a domestic de facto corporation to allow suit.<sup>52</sup>

<sup>44</sup> *Sisk v. Old Hickory Motor Freight*, 222 N. C. 631, 24 S. E. 2d 488 (1943). N. C. GEN. STAT. §55-38 (1943) (if foreign corporation fails to appoint a process agent, service may be had on the Secretary of State). N. C. GEN. STAT. §58-50 (1943) (statutory process agent for a foreign insurance company is irrevocable).

<sup>45</sup> See 58 HARV. L. REV. 675, 691 for criticism of the rule.

<sup>46</sup> 330 U. S. 183 (1946).

<sup>47</sup> In *United States v. Standard Oil Co.*, 332 U. S. 301, 307 (1947), the court carefully limits the scope of this rule.

<sup>48</sup> 3 MOORE'S FEDERAL PRACTICE 1397-98 (2d ed. 1948).

<sup>49</sup> *Klaxon Co. v. Stentor Elec. Co.*, 313 U. S. 487 (1941).

<sup>50</sup> *Tennessee v. Union and Planter's Bank*, 152 U. S. 454 (1894).

<sup>51</sup> *Peer Manor Bldg. Corp.*, 143 F. 2d 769 (7th Cir. 1944), *cert. denied*, 323 U. S. 757 (1944). *Contra: Matter of Midwest Athletic Club*, 161 F. 2d 1005 (7th Cir. 1947). 6 COLLIER, BANKRUPTCY ¶4.05 [5] (14th ed. 1942).

<sup>52</sup> *Life Ass'n of America v. Fassett*, 102 Ill. 315 (1882); *Rogers v. Adriatic F. Ins. Co.*, 148 N. Y. 34, 42 N. E. 515 (1895).

The free dissolution, both voluntary and involuntary, of modern corporations should not defeat their suability in other sovereign states.<sup>53</sup> The analogy of dissolution to natural death in its old aspect is fallacious, in that it carries forward the common law conception of evaporation of the corporation, whereas today there are shareholders, assets, and successors to wind up its affairs and they should answer to suits brought in the corporate name. The corporate entity does not extend beyond the borders of its creating state until another state admits it, and when so admitted, *some* new sort of entity is *reincorporated* which should not be said to "die" when the other state dissolves that which it created.<sup>54</sup> The local forum can subscribe to pro rata distribution of assets and still protect local creditors by giving them their share out of local assets, and thus not force them to go to the creating jurisdiction with their claim.<sup>55</sup> Corporations should no longer be able to defeat civil and criminal actions brought against them by working a dissolution in the creating state, only to reappear the next day in identical form with a new charter.<sup>56</sup> With the present ability of corporations to shop for the most advantageous state corporation law, the only other real solution would be the drastic legislation already introduced in Congress requiring a federal charter for all corporations engaging in interstate commerce.<sup>57</sup>

EDWARD B. HIPPIE.

### Corporations—Taxation—Status of Payments to Hybrid Security Holders

It often becomes necessary for a court to determine whether certain hybrid securities are in fact stocks or bonds.<sup>1</sup> This determination is frequently essential in order to ascertain whether periodic payments by a corporation to the holders of its securities should be classified as interest on indebtedness, which is deductible from gross income for income tax purposes,<sup>2</sup> or as dividends to stockholders, which are not

<sup>53</sup> See note 3 *supra*.

<sup>54</sup> HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 278 and 313 (1923).

<sup>55</sup> Notes, 35 CALIF. L. REV. 306 (1947), 13 N. Y. U. L. Q. REV. 283 (1936).

<sup>56</sup> See note 3 *supra*.

<sup>57</sup> U. S. News & World Report, Oct. 14, 1949, p. 30. Cf. English Companies Act (1929) §338(2) (providing that foreign corporations be wound up as unregistered companies despite dissolution by the creating state).

<sup>1</sup> The distinction between these securities must in many cases be ascertained in order for the court to establish the priority between a certificate holder and general unsecured or subsequent secured creditors of the corporation. *Warren v. King*, 108 U. S. 389 (1883) (foreclosure proceeding); *Mathews v. Bradford*, 70 F. 2d 77 (6th Cir. 1934) (receivership proceeding); *Spencer v. Smith*, 201 Fed. 647 (8th Cir. 1912) (bankruptcy proceeding); *Phoenix Hotel Co.*, 13 F. Supp. 229 (E. D. Ky. 1935) (reorganization proceeding).

<sup>2</sup> INT. REV. CODE §23. "In computing net income there shall be allowed as deductions: (b) Interest.—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obli-