

## CORPORATE DISSOLUTION AND THE ANTI-TRUST LAWS

## I

A corporation fears prosecution under the criminal provisions of the anti-trust laws.<sup>1</sup> As a defense measure it dissolves under state law to prevent the institution of such proceedings. Alternatively, the corporation may dissolve after a prosecution has commenced and then move to abate the action.

In either case, it has been held that the corporation is immune from criminal responsibility. In fact, until a recent decision handed down by the Court of Appeals for the Seventh Circuit,<sup>2</sup> the cases were uniform in holding the corporation absolved of liability,<sup>3</sup> since dissolution was held indistinguishable from the death of an individual.

Dissolution, however, does not defeat a civil action brought by the government for an injunction. Equity proceedings may be brought subsequent to dissolution, and pending proceedings do not abate.<sup>4</sup> Thus the corporation is found in the interesting position of being "alive" for the purposes of civil suits, yet legally "dead" for the purposes of the criminal prosecution.

The rule concerning abatement and survival of criminal actions is not based on a vagary of the anti-trust laws, but apparently applies to all criminal proceedings. The Supreme Court, however, has never held explicitly that a corporation may escape criminal liability by dissolution. A further possible limitation may be found in the fact that apparently no cases involving bad faith dissolutions have reached the courts. Were the courts faced with a dissolution undertaken for the sole purpose of escaping criminal liability, it is not unreasonable to assume that they would search carefully for a way to maintain control over the defendant. But the motives of the defendants have not appeared important in

<sup>1</sup> 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1-3 (1951) (Sherman Anti-trust Act).

<sup>2</sup> *United States v. Collier & Son*, 208 F. 2d 936 (C.A. 7th, 1953).

<sup>3</sup> Attempted prosecution after dissolution: *United States v. Safeway Stores, Inc.*, 140 F. 2d 834 (C.A. 10th, 1944); *United States v. Borden Co.*, 28 F. Supp. 177 (N.D. Ill., 1939). See, for an excellent general discussion, Marcus, *Suability of Dissolved Corporations*, 58 *Harv. L. Rev.* 675 (1945). Abatement: *United States v. Line Material Co.*, 202 F. 2d 929 (C.A. 6th, 1953); *United States v. Leche*, 44 F. Supp. 765 (E.D. La., 1942) (*Connally Hot Oil Act*). Consult: *State v. Arkansas Cotton Oil Co.*, 116 Ark. 74, 171 S.W. 1192 (1914) (*Arkansas Anti-trust Act*); *Mason v. Adoue*, 30 Tex. Civ. App. 276, 70 S.W. 347 (1902) (*Texas Anti-Trust Act*).

<sup>4</sup> Such actions fall within state statutes discussed at pages 482-85 *infra*. *United States v. Bates Valve Bag Corp.*, 39 F. 2d 162 (D.C. Del., 1930); *United States v. American Optical Co.*, 97 F. Supp. 71 (N.D. Ill., 1951). Cf., e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 307-10 (1897) (unincorporated organization). The successors to the dissolved corporation may be brought into court as parties in interest under the Federal Rules of Civil Procedure, Rule 25(c). *United States v. American Optical Co.*, 97 F. Supp. 71 (N.D. Ill., 1951). It is probable that successors are bound by an order affecting by its terms the dissolved corporation only. Cf. Rule 65(d) of the Federal Rules of Civil Procedure; *Le Tourneau Co. v. N.L.R.B.*, 150 F. 2d 1012 (C.A. 5th, 1945), *rev'd* on other grounds, 324 U.S. 793 (1945) (injunction binding the corporation held to bind agents and successors in privity with the corporation who receive actual notice of the order).

the reported cases. In *United States v. Leche*<sup>5</sup> and *United States v. Line Materials Co.*<sup>6</sup> the dissolutions were in "good faith," i.e., not for the express purpose of avoiding the impending prosecution. In the remaining cases, the motives for dissolution were not mentioned.<sup>7</sup>

In a recent case, however, a proposed corporate dissolution was enjoined because a criminal action was pending against the corporation. In *United States v. Western Pennsylvania Sand and Gravel Association*,<sup>8</sup> the government prosecuted a dozen sand and gravel producers for criminal and civil contempt of a 1940 consent decree. While the contempt proceeding was pending, one corporate defendant moved to abate the prosecution against it on the grounds that it planned to dissolve. The court granted the government's motion to restrain the completion of the dissolution in order to insure continued criminal responsibility. This appears to be the first modern instance in which a federal court has issued such a restraining order.<sup>9</sup> Perhaps the infrequency of such orders may be explained by the fact that the court seldom knows of the proposed dissolution in advance, and it loses its jurisdiction upon completed dissolution.

The *Western Pennsylvania Sand and Gravel* case refuses to apply the rules concerning a completed dissolution to one that is impending. While this limitation is desirable as a matter of policy, it does not affect the major area of the law.

## II

The present state of the law has resulted from a failure of the courts to treat corporate dissolutions realistically when the corporation is involved in criminal proceedings. The common law rules concerning abatement and survival of actions have been narrowed or obliterated in all areas other than the area of criminal prosecutions of corporations.<sup>10</sup> This lag may perhaps be attributed to the relative infrequency of such actions.

At common law all criminal actions abated upon the death of an individual defendant.<sup>11</sup> The same rule applied to civil actions except in a few specific situations.<sup>12</sup> Similarly, actions against a corporation abated upon its dissolution,

<sup>5</sup> 44 F. Supp. 765 (E.D. La., 1942).

<sup>6</sup> 202 F. 2d 929 (C.A. 6th, 1953).

<sup>7</sup> In *United States v. Safeway Stores, Inc.*, 140 F. 2d 834 (C.A. 10th, 1944), the last of five dissolutions occurred barely three days before the indictments were served, yet the court dismissed the suits without commenting upon this suspicious circumstance.

<sup>8</sup> 114 F. Supp. 158 (W.D. Pa., 1953).

<sup>9</sup> Suits to restrain corporate dissolution have seldom been in the federal courts, particularly since dissolution has little effect on bankruptcy proceedings. See note 53 *infra*. But cf. *Fisk v. Union Pac. R. Co.*, 9 Fed. Cas. 166, No. 4830 (C.C. S.D. N.Y., 1873) (dissolution restrained to prevent fraud on creditors).

<sup>10</sup> The development has been almost completely statutory. 1 C.J.S. Abatement and Revival § 116 et seq. (1936).

<sup>11</sup> *United States v. Pomeroy*, 152 Fed. 279 (C.C. S.D. N.Y., 1907), rev'd on other grounds, 164 Fed. 324 (C.A. 2d, 1908).

<sup>12</sup> 1 C.J.S. Abatement and Revival § 115 (1936).

which the courts refused to distinguish from the death of an individual.<sup>13</sup> The rule applied to corporations was understandable, since corporate assets escheated to the Crown upon formal dissolution.<sup>14</sup>

The common law rules of abatement of civil actions have been drastically limited by statutory enactment, both in England and in the United States. Survival statutes have been enacted in most common law jurisdictions.<sup>15</sup> However, the statutes widening survival of civil actions have not been applied to corporations, to which the common law rules continue to apply.<sup>16</sup> Thus, while the common law rules of corporate dissolution have been rationalized by a comparison to the death of an individual, dissolution has not been held to be so similar that the new statutory rules of survivability of actions could be applied to it.

With the emergence of the modern business corporation it became evident that the law led to harsh results. The whole concept of the corporation had changed. Modern procedures of corporate organization bear little resemblance to the special grant of power from the Crown required in earlier days.<sup>17</sup> Dissolution now can be achieved without a formal court decree.<sup>18</sup> The return of the charter to the incorporating state authority is normally a routine procedure and receives little public attention.<sup>19</sup> But because easy methods of incorporation and dissolution were too readily abused to avoid payment of just claims, all states have adopted remedial legislation or devised other means of affording some protection to creditors. By far the most common devices are statutory enactments<sup>20</sup> which provide that either "suits,"<sup>21</sup> "actions,"<sup>22</sup> or "proceedings"<sup>23</sup> may be

<sup>13</sup> 9 Holdsworth, *History of English Law* 69-71 (1926). Probably this statement arose since the same rule applied in both the individual and corporate person situation. Certainly the two were not treated as identical for all purposes. *Ibid.*, at 49 and 69.

<sup>14</sup> *Ibid.*, at 69-71.

<sup>15</sup> 1 C.J.S. *Abatement and Revival* § 116 (1936). See Note, *Inadequacies of English and State Survival Legislation*, 48 *Harv. L. Rev.* 1008 (1935).

<sup>16</sup> *Torry v. Robertson*, 24 *Miss.* 192 (1852).

<sup>17</sup> 9 Holdsworth, *History of English Law* 45-48 (1926).

<sup>18</sup> Ballantine, *Corporations* § 316 (1946); 16 *Fletcher, Cyclopedia of Corporations* 8025 (Perm. Ed., 1942).

<sup>19</sup> Consider, for example, the situation in *In re Peer Manor Bldg. Corp.*, 134 F. 2d 839 (C.A. 7th, 1943), cert. denied 320 U.S. 211 (1942). Creditors started involuntary bankruptcy proceedings against a corporation, only to discover it had forfeited its charter to the state seven years earlier. See also 16 *Fletcher, Cyclopedia of Corporations* 8013 (Perm. Ed., 1942). Notice by publication is required by several states. Ballantine, *Corporations* § 316 (1946).

<sup>20</sup> Idaho, Iowa, Kentucky, Louisiana, and Washington do not have such statutes. These states achieve the same result by other means. See, for example, *Ky. Rev. Stat. (Baldwin, Supp., 1953) § 271.515 et seq.*; 5 *La. Rev. Stat. (West, 1951) § 12:57(1)*, and commentary, *Dunbar and Nabors, The Louisiana Business Corporation Law, Ibid.*, at pp. XXXI, LXIV; 2 *Wash. Rev. Code (1951) § 23.44.050*.

<sup>21</sup> *Ala. Code Ann., Tit. 10 § 110 (West, 1941)*; 1 *Alaska Comp. Laws (1949) § 36-1-148*; 4 *Ariz. Code Ann. (Supp., 1951) § 53-309*; 6 *Ark. Stat. Ann. (1948) § 64-806*; 2 *Fla. Stat. (1951) §§ 611.32, 612.47, 612.53*; *Ga. Code Ann. (Harrison, Supp., 1951) § 22-1874*; *Kan. Gen. Stat. Ann. (Corrick, 1949) § 17-3606*; 1 *Me. Rev. Stat. (1944) c. 49, § 99*; 1 *Md. Ann. Code (Flack, 1951) Art. 23, §§ 74(b), 78 (sue or be sued)*; 5 *Mass. Ann. Laws (Michie, 1948) c. 155, § 51*; 15 *Mich. Stat. Ann. (Henderson, 1937) § 21.75*; 4 *Miss. Code Ann. (1942) § 5353*

brought by or against the corporation for a specified time<sup>24</sup> after dissolution.<sup>25</sup> The federal courts have ruled that these state statutes determine the suability of dissolved corporations for federal purposes.<sup>26</sup> Since there are no state authorities passing on the applicability of these statutes to criminal actions, the federal courts were faced with a problem of first impression.

In the leading case of *United States v. Safeway Stores*,<sup>27</sup> indictments charging violations of the criminal provisions of the Sherman Act were returned shortly after the dissolution of five subsidiary co-defendants. The subsidiaries had been incorporated in California, Nevada, Delaware, and Texas. The court held that the California statute,<sup>28</sup> which provides that "actions" may be brought subsequent to dissolution, did not permit institution of a criminal proceeding since

[a] criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner. It is not an action at all. That is defined to be "the legal demand of one's rights, or the form given by law for the recovery of that which is due." Bouvier's Law Dictionary.<sup>29</sup>

The court read the Nevada<sup>30</sup> and Delaware<sup>31</sup> statutes as providing that "suits"

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(of suing and being sued); 2 Mont. Rev. Code (1947) § 15-1102(16) (sue or be sued); 1 Neb. Rev. Stat. (1943) § 21-186; 2 N.H. Rev. Laws (1942) c. 274, § 97; 1 N.J. Rev. Stat. (1937) § 14:13-4; 4 N.M. Stat. Ann. (1941) § 54-503; N.Y. Gen. Corp. Law (22 McKinney, 1951) § 29; N.Y. Stock Corp. Law (58 McKinney, 1951) § 105(8); 2 Ohio Rev. Code Ann. (Baldwin, 1953) Tit. 17, § 1701.87 (sue and be sued); R.I. Gen. Laws (1938) c. 116, § 58; 1 S.C. Code (1952) § 12-601; Tenn. Code (Michie, 1938) § 3757; 2 Utah Code Ann. (1953) § 16-1-2; VI. Stat. (1947) § 5841; Va. Code Ann. (1950) § 1370; W.Va. Code Ann. (1949) § 3095.

<sup>22</sup> Corp. C.A. (Calif., Deering, 1953) § 5400; 2 Minn. Stat. (1949) c. 300.59; 2B Gen. Stat. N.C. (Michie, 1950) § 55-132; 15 Pa. Stat. (Purdon, 1938) § 2852-1106; 1 S.D. Code (1939) § 11.0903; 3 Wyo. Comp. Stat. (1945) § 44-1103 (suit or action).

<sup>23</sup> 5 Ore. Comp. Laws Ann. (Supp., 1947) § 77-259 (action, suit, or proceeding); Wis. Stat. (1951) § 180.787 (suit or proceeding). A few states provide that a dissolution will not take away or impair any "remedy" against the corporation: 2 Colo. Stat. Ann. (Michie, 1935) c. 41, § 68; Ill. Ann. Stat. (Smith-Hurd, 1935) c. 32, § 157.94; 6 Ind. Ann. Stats. (Burns, 1948) § 25-241(2); 17 Mo. Ann. Stat. (Vernon, 1949) § 351.565.

<sup>24</sup> Most states provide a period of two to five years. A few have no stated time period, which means actions will be barred only by the statute of limitations. See Ballantine, Corporations § 316 (1946), who argues that the latter form of statute is more desirable.

<sup>25</sup> There are similar provisions to the effect that pending actions will not abate on dissolution. These statutes employ similar words, but are sometimes broader.

<sup>26</sup> *Defence Supplies Corp. v. Lawrence Co.*, 336 U.S. 631, 634 (1949); *Chicago Title & Trust Co. v. Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937); *Oklahoma Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927). For discussion of this rule, see page 487 infra.

<sup>27</sup> 140 F. 2d 834 (C.A. 10th, 1944).

<sup>28</sup> Corp. C.A. (Calif., Deering, 1953) § 5400.

<sup>29</sup> *United States v. Safeway Stores*, 140 F. 2d 834, 839 (C.A. 10th, 1944). However, the court weakens its case somewhat by using the term "criminal action" earlier in its opinion. *Ibid.*, at 836.

<sup>30</sup> 1 Nev. Comp. Laws (Hillyer, 1929) § 1664, amended, Nev. Comp. Laws (Supp., 1949).

<sup>31</sup> Del. Corp. Law Ann. (1947) § 42. The statute more recently has been construed differently. See *United States v. Collier & Son*, 208 F. 2d 936 (C.A. 7th, 1953).

may be brought subsequent to dissolution. It was held that these statutes did not permit the institution of criminal prosecutions either:

But irrespective of lexicographers and precise technical definition, the expression "criminal suit" is unnatural and awkward to the professional ear, and is seldom used, even in common parlance. "Suit" in its general, unqualified use in legal documents, such as the one before us, naturally means, and should be construed as intended to include, the mode or manner authorized and adopted by law to redress civil injuries.<sup>32</sup>

Finally the Texas statute, which provides that "judicial proceedings" may be brought subsequent to dissolution, likewise was held not to permit criminal proceedings. The court admitted that the term "judicial proceeding" may be more broadly construed than the terms "actions" or "suits." But it relied on another section of the statute which provides that no criminal action by the state of Texas shall be lost by dissolution, and from this drew the negative inference that prosecutions by other sovereigns are excluded.<sup>33</sup>

In *United States v. Line Materials Co.*,<sup>34</sup> the defendant had dissolved in good faith after the institution of criminal proceedings under the Sherman Act. Hence the case concerned the abatement of a pending action rather than the possibility of instituting future prosecutions. The applicable Delaware statute provides that:

All corporations . . . shall nevertheless be continued for the term of three years . . . for the purpose of prosecuting and defending suits by or against them . . . ; 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 for the purposes of such actions suits or proceedings so begun or commenced be continued bodies corporate beyond said . . . period and until any judgments, orders, or decrees therein shall be fully executed.<sup>35</sup>

The court, nevertheless, held that the action abated upon dissolution, since "The dominating term of the section is the word 'suits' which stands alone in the enabling language of the section. . . ."<sup>36</sup>

In the recent case of *United States v. Collier & Son*,<sup>37</sup> the Seventh Circuit refused to follow the preceding cases. A criminal proceeding was brought under the Fair Labor Standards Act<sup>38</sup> eight months after the defendant had dissolved under Delaware law. The court construed the Delaware statute to permit the institution of such a proceeding, and refused to follow the *Line Materials* case:

<sup>32</sup> *United States v. Safeway Stores*, 140 F. 2d 834, 838 (C.A. 10th, 1944).

<sup>33</sup> *Ibid.*, at 839. 3 Tex. Stat. Ann. (Vernon, 1945) §§ 1388, 1374.

<sup>34</sup> 202 F. 2d 929 (C.A. 6th, 1953).

<sup>35</sup> Del. Corp. Law Ann. (1947) § 42.

<sup>36</sup> *United States v. Line Material Co.*, 202 F. 2d 929, 931 (C.A. 6th, 1953).

<sup>37</sup> 208 F. 2d 936 (C.A. 7th, 1953).

<sup>38</sup> 52 Stat. 1060 (1938), 28 U.S.C.A. § 201 (1947).

We agree that the word "suit" or the word "action" standing alone might reasonably be held as not including a criminal prosecution, but when the word "proceeding" is added we think a combination is presented which is well near conclusive of all forms of litigation.<sup>39</sup>

This interpretation of the Delaware statute appears to rest on firm grounds. However the effect of the case is limited. Only a handful of the states provides that "proceedings" may be brought subsequent to dissolution. In the majority of the states, the *Safeway* result still holds.

### III

It is difficult to reconcile the *Safeway* and *Line Materials* cases with policy considerations. There appears to be little basis on which one can argue that the drafters of the corporate survival statutes intended to differentiate between criminal and civil actions. The intent of the drafters seems clear. Corporations should not be able to escape liability by the voluntary act of dissolution. Criminal actions against corporations are relatively rare, and it is reasonable to suppose that the drafters did not consider them, much less realize that they were not, in terms, included within the statute. The *Safeway* case fails to go beyond the express wording of the statutes and restricts their apparent intent.<sup>40</sup> The *Line Materials* case goes even further, and expressly refuses to apply a proviso of the statute. There is no consideration of the policy underlying either the criminal or the survival statute; rather, the courts constrict the meanings of words in an effort to follow an ancient common law rule of dubious origin and doubtful merit.

The basic idea underlying the two decisions is a supposed similarity between corporate dissolution and the death of an individual. Criminal actions should abate upon the demise of the individual; imprisonment is rather ineffective, and the levying of a fine in effect punishes the defendant's heirs.<sup>41</sup> It is apparent, however, that these reasons against continued criminal liability do not apply to a corporate defendant.

In other fields of the law the fictional character of the corporation as a legal person has long been realized.<sup>42</sup> The corporation is a legal entity separating cer-

<sup>39</sup> 208 F. 2d 936, 939 (C.A. 7th, 1953).

<sup>40</sup> It has often been stated that these statutes are remedial and to be liberally construed. E.g., *Eastman, Gardiner & Co. v. Warren*, 109 F. 2d 193 (C.A. 5th, 1940).

<sup>41</sup> *United States v. Pomeroy*, 152 Fed. 279 (C.C. S.D. N.Y., 1907), rev'd on other grounds, 164 Fed. 324 (C.A. 2d, 1908); *Singer v. United States*, 323 U.S. 338, 346 (1945); *United States v. Mook*, 125 F. 2d 706 (C.A. 2d, 1942); *Rossi v. United States*, 21 F. 2d 747 (C.A. 8th, 1927); *Pino v. United States*, 278 Fed. 479 (C.A. 7th, 1921); *Dyar v. United States*, 186 Fed. 614 (C.A. 5th, 1911); *United States v. Mitchell*, 163 Fed. 1014 (C.C. Ore., 1908), aff'd *United States v. Dunne*, 173 Fed. 254 (C.A. 9th, 1909).

<sup>42</sup> For example a dissolved corporation may enter into voluntary bankruptcy proceedings. *Bache v. Louisiana Oil Ref. Corp.*, 97 F. 2d 445 (C.A. 5th, 1938). Dissolved corporations remain personally liable for taxes on income earned prior to dissolution. *Carter v. Commissioner*, 9 T.C. 364 (1947). A corporation may enter into a personal service contract after dissolution. *Application of Peters*, 271 App. Div. 518, 67 N.Y.S. 2d 305 (3d Dep't, 1947).

tain assets from a group of people who control them through the corporation; it is organized to limit the entrepreneurial liability, and it conducts business in its own name. Dissolution of a corporation does not ipso facto affect the assets, the controlling group, or the controlling group's control of the assets. Since the control may be exercised through other legal media, corporate dissolution may have little or no significance. Thus, having once established that a corporation may be criminally liable, it is difficult to see why criminal responsibility should terminate merely because the corporation has voluntarily dissolved. A fine against a dissolved corporation may be just as effective as a fine against a corporation not dissolved.

After dissolution the controlling group may retain control over all or substantially all of the corporate assets and continue the business through the medium of a different corporation, as a partnership, or individually. In this situation liability for the corporation's crimes should be visited upon the successor organization. In the alternative situation of a sale of the corporate assets to outsiders, criminal liability should ultimately rest on the stockholders of the original corporation. Where, after dissolution, the assets or the proceeds therefrom are retained by a trustee, fines or penalties should be levied against the assets before distribution to the shareholders. Where the proceeds have been distributed, the shareholders should assume pro rata liability to the extent of their distributed shares. A distinction is made between dispositions en bloc and piece-meal dispositions in the decisions under the equitable provisions of the anti-trust laws which, as civil actions, do not abate upon dissolution.<sup>43</sup> If the assets have been widely distributed so that future violations are improbable, no injunction will be issued.<sup>44</sup> There appears, however, to be no reason for following a similar distinction in criminal actions, since their primary function is the punishment of past violations.

The results of all the cases have been reached by the application of the state laws of survival of actions against corporations. "Thus the question, as to whether a corporation is continued for the purpose of prosecuting or defending civil suits or criminal actions, depends upon the law of the state of its incorporation."<sup>45</sup> This result is predicated on the fact that a corporation is a creature of the state and exists only by the operation of state law.<sup>46</sup> If the state so decrees, the existence of the corporation is determined; hence it follows, so the argument goes, that the state must have the sole voice in determining when its

<sup>43</sup> *United States v. Bates Valve Bag Corp.*, 39 F. 2d 162 (D.C. Del., 1930); *United States v. American Optical Co.*, 97 F. Supp. 71 (N.D. Ill., 1951).

<sup>44</sup> Compare *United States v. William S. Gray & Co.*, 59 F. Supp. 665 (S.D. N.Y., 1945), with cases cited note 43 *supra*.

<sup>45</sup> *United States v. Safeway Stores*, 140 F. 2d 834, 836 (C.A. 10th, 1944).

<sup>46</sup> The Supreme Court has been so clear on this point that it is improbable that any lower court would refuse to apply the state law. See cases cited note 26 *supra*. However, these are all civil cases.

creature has died sufficiently to be no longer criminally or civilly responsible.<sup>47</sup> In fact, however, upon voluntary dissolution the state usually determines only whether the corporation may still legally transact business as a corporation;<sup>48</sup> often the business is continued as a partnership or other unincorporated business venture, retaining the same name.<sup>49</sup> The question whether a corporation may continue to transact business should not be determinative of its continued criminal liability, and the policy for leaving this determination solely to the state appears doubtful.

The cases have applied the state law without serious discussion, and all the authorities cited involve civil rather than criminal actions. While Rule 17(b) of the Federal Rules of Civil Procedure<sup>50</sup> provides that in civil cases in the federal courts the state law controls the suability of dissolved corporations, there is no analogue to Rule 17(b) in the Federal Rules of Criminal Procedure.<sup>51</sup> Further, while the rule of *Erie v. Tompkins*<sup>52</sup> may establish a policy for the application of state law in most civil cases, that rule, again, does not apply to criminal actions arising solely under federal statutes.

There are good reasons against the application of the state law of survival of corporate actions in cases arising under federal statutory law. A state statute which permits a corporation by dissolution to escape federal liability may seriously limit the effect of federal statutes. The state should not be able to do indirectly what it cannot do directly.<sup>53</sup>

*United States v. Leche*<sup>54</sup> is the only authority to the effect that the state law does not apply in federal criminal proceedings. The case involved an indictment under the Connelly Hot Oil Act<sup>55</sup> which was returned before dissolution of the

<sup>47</sup> The matter is usually not stated so starkly. In *Oklahoma Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927) the Court reaches this conclusion: "But corporations exist for specific purposes . . . so that if the life of the corporation is to continue even only for litigating purposes, it is necessary that there should be some statutory authority for the prolongation."

<sup>48</sup> 16 Fletcher, *Cyclopedia of Corporations* 8132 (1942).

<sup>49</sup> In *United States v. Safeway Stores*, 140 F. 2d 834 (C.A. 10th, 1944), for instance, the same subsidiaries were owned after dissolution by the same parent corporation. The dissolution merely affected a simplification of the corporate structure in the Safeway hierarchy. The identical pattern occurred in *United States v. Borden Co.*, 28 F. Supp. 177 (N.D. Ill., 1939). In *Walling v. James Reuter, Inc.*, 321 U.S. 671 (1944), the corporation continued in business as an unincorporated entity, using the same name.

<sup>50</sup> 28 U.S.C.A. Fed. Rules Civ. Proc. (1950).

<sup>51</sup> 18 U.S.C.A. Fed. Rules Crim. Proc. (1951).

<sup>52</sup> 304 U.S. 64 (1938).

<sup>53</sup> In the field of bankruptcy, the federal courts have quite uniformly prevented dissolutions from affecting the paramount jurisdiction of the Federal Courts. The United States Bankruptcy Laws are "paramount." *International Shoes Co. v. Pinkus*, 278 U.S. 261 (1929). If the federal court has obtained jurisdiction, a subsequent dissolution by operation of state law will be ignored. *Bache v. Louisiana Oil Ref. Corp.*, 97 F. 2d 445 (C.A. 5th, 1938); In re *Adams & Hoyt Co.*, 164 Fed. 489 (N.D. Ga., 1908); In re *Pacific Alloy & Steel Co.*, 299 Fed. 952 (C.A. 9th, 1924).

<sup>54</sup> 44 F. Supp. 765 (E.D. La., 1942).

<sup>55</sup> 49 Stat. 30 (1935), 15 U.S.C.A. § 715 (1948).

corporate defendant. The Louisiana District Court refused to apply the Texas statute, and held the federal law controlling. Since it found no federal statutory law on the subject, the court, holding that "there is no federal general common law,"<sup>56</sup> applied the common law of 1790, and the action abated.<sup>57</sup>

It has been suggested<sup>58</sup> that a dissolution under state law should not bar prosecution of the corporation under the federal anti-trust laws. It is argued that since the federal statute is explicitly made applicable to corporations and since it attempts to punish "every contract, combination . . .," it constitutes an express statutory enactment superseding the state law on corporate dissolution and continuing the federal liability of the dissolved corporations. The courts, however, have not accepted this argument.

Since it is doubtful whether the *Safeway*, *Line Material*, and *Collier* cases will be overruled, the most feasible way of changing the present law appears to be by federal statute, expressly superseding state law and continuing federal liability after corporate dissolution. Such a statute should not meet with serious constitutional objection. Despite occasional dicta to the contrary,<sup>59</sup> there should be little trouble in upholding its constitutionality under the plenary federal powers to regulate interstate commerce. To forestall possible arguments under the Due Process Clause, the statute might be limited to situations where the assets of the dissolved corporation remain substantially intact.

#### IV

It is difficult to determine the importance of the present loophole in the anti-trust laws. To the corporation the practical expense and inconvenience of dissolution may be formidable, but if the sanctions are severe the corporation may still prefer this alternative. Since a successful anti-trust action by the government may be presented as evidence in private suits,<sup>60</sup> which do not abate upon dissolution,<sup>61</sup> the actual cost of a successful prosecution may be considerably greater than the criminal penalties involved. Where, however, individuals as well as the corporation are criminally charged, these individuals will remain liable notwithstanding the dissolution, and the action will be continued against them.

The effect of defeating an anti-trust prosecution becomes serious when the heavy burden and expense of preparing such actions are considered. In addition, effective relief to wronged parties may be impeded by the abatement of the

<sup>56</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>57</sup> See Marcus, *Suability of Dissolved Corporations*, 58 *Harv. L. Rev.* 675, 676-83 (1945), for a criticism of the *Leche* case. The case has virtually no precedent value, having been decided by a District Court fully two years before the *Safeway* case.

<sup>58</sup> *Ibid.*, at 698 et seq.

<sup>59</sup> See *Missouri ex rel. Darr v. Collins*, 34 *F. Supp.* 549 (W.D. Mo., 1940).

<sup>60</sup> 38 *Stat.* 731 (1914), 15 *U.S.C.A.* § 15 (1951), and annotations.

<sup>61</sup> *Imperial Film Exchange v. General Film Co.*, 244 *Fed.* 985 (D.C. S.D. N.Y., 1915).

criminal prosecution. In view of these practical considerations, the present rule appears to encourage violations of the law. On the other hand, the civil action is not affected by a dissolution, and in numerous cases this relief is sought without a concomitant criminal prosecution.

While there appear few reported cases in which a corporate defendant has gained immunity by dissolution, there exists no record of actual incidents which did not go beyond the trial court. At least one writer has indicated that it is not an infrequent occurrence, but that few cases are appealed.<sup>62</sup>

<sup>62</sup> Marcus, *op. cit.* supra note 57. See also, Note, 32 Col. L. Rev. 347, 360 (1932).

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### "CONSERVATION"—A NEW AREA FOR URBAN REDEVELOPMENT

The most recent legal problem in the growing field of urban redevelopment is presented by an amendment to the Illinois Neighborhood Redevelopment Corporation Law<sup>1</sup> authorizing groups of citizens to incorporate<sup>2</sup> in order to exercise the power of eminent domain for a unique purpose: the "conservation" of deteriorating urban areas. The effect of this new legislation is to arm with a substantial weapon groups most interested in preventing further neighborhood deterioration. Its premise is that such groups, by acquiring and rebuilding isolated dilapidated structures, may be best able to restore a declining neighborhood and prevent its becoming a slum.

The amendment makes available for neighborhood "conservation" the procedures which the original 1941 act set up for the redevelopment of areas already deteriorated to the "slum" or "blight" stages.<sup>3</sup> There are three procedural steps which must be carried out before actual reconstruction of the area may begin. First, a group of at least three citizens, presumably including, in most cases, residents of the neighborhood, must incorporate. This requires filing with the Secretary of State certain organizational information and a statement of proposed redevelopment objectives.<sup>4</sup> Second, a "development plan" meeting specific statutory requirements<sup>5</sup> must be approved by the appropriate local Rede-

<sup>1</sup> The Neighborhood Redevelopment Corporation Law, Ill. Rev. Stat. (1941) c. 32, §§ 550.1-550.44, approved July 9, 1941, amended July 13, 1953, Sen. Bill 627, 68th Assemb. Reg. Sess. (1953).

<sup>2</sup> Private redevelopment corporations were authorized by the 1941 Act, *ibid.*, and similar legislation of the earlier type is found today in a number of states, including Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Virginia, and Wisconsin.

<sup>3</sup> Sen. Bill 627, *op. cit.* supra note 1, at § 3-9.

<sup>4</sup> Ill. Rev. Stat. (1941) c. 32, § 550.7.

<sup>5</sup> *Ibid.*, at § 550.17 (1). Such plan must contain a legal description of the proposed Development Area; present use of property therein; structures to be demolished, repaired, or altered; new structures contemplated; contemplated recreation areas; zoning changes; method of financing the development; time estimates of developing the area and other pertinent information.