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Corporations--DeFacto Corporations--Right to Sue in Own Name after Dissolution

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open to collateral attack. *Held,* that while *P* is not a *de facto* corporation and cannot continue to do business under the corporate guise, the winding up of corporate affairs is not "doing business"; and that for the purposes of this suit collateral attack against the corporate existence will be denied. *Peora Coal Co. v. Ashcraft.*[1]

"*De facto*" is not a term used to designate a legal entity as is the term "*de jure*", but is used rather to describe a result arising when for some reason collateral attack is denied against an imperfectly formed corporation or a corporation whose corporate existence has been forfeited or has expired.[2] Under the general rule, upon expiration or revocation of the corporate charter, there can be no *de facto* corporation; and collateral attack against the existence of the corporation is allowed[3] unless prevented by a statute.[4] Such statutes are generally so worded as to allow a corporation, whose charter has expired, to wind up their corporate affairs, but not to carry on any further business.[5] These statutes have been construed as intending to enable the dissolved corporation to wind up its affairs without the intervention of a receiver.[6] Such a statute, enabling a dissolved corporation to sue in its own name, exists in West Virginia,[7] but in the instant case a special receiver had been appointed by the court; and it would seem that the suit should

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[1] 17 S. E. (2d) 444 (W. Va. 1941).

[2] STEVENS, CORPORATIONS (1936) 121: "When incorporation is so defective that it is subject to successful attack in a direct proceeding by the state and yet not open to collateral attack in private litigation or even in suits to which the state is a party, for reasons other than those of pure estoppel, it is said that there is a de facto corporation. To say that there is a de facto corporation is to say merely that, in the particular litigation, the application of the de facto doctrine calls for a denial of collateral attack upon the corporate personality of the associates even though they have failed to perfect incorporation." The theory that the term "*de facto*" denotes a result is generally accepted. The term does not mean a corporation *in fact,* but signifies the legal effect attributed to certain facts. It is respectfully submitted that the court's definition, that a *de facto corporation* is a perfect corporation with all its powers except strict legality of existence, which can be questioned only by the state, is not wholly correct. For a more complete definition and classification of *de facto* corporations see WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION (1929) 683 *et seq.*

[3] Supreme Lodge, K. of P. v. Weller, 93 Va. 605, 25 S. E. 891 (1896); Greely v. Smith, 3 Storey 657, Fed. Case No. 5748 (1845); Sturges v. Vanderbilt, 73 N. Y. 384 (1878).

[4] Sturges v. Vanderbilt, 73 N. Y. 384 (1878).

[5] See VA. CODE (Michie, 1936) c. 147, § 3810; Bache v. Louisiana Oil Refining Corp., 97 F. (2d) 445 (C. C. A. 5th, 1938) *aff'g* 20 F. Supp. 580 (W. D. La. 1938).

[6] M. H. McCarthy Co. v. Dubuque Dist. Court, 201 Iowa 912, 208 N. W. 505 (1926); Von Glahn v. De Russet, 81 N. C. 467 (1879).

[7] W. VA. CODE (Michie, 1937) c. 31, art. 1, § 83.

have been instituted by the receiver.[8] The retiring of the case from the docket will offer no obstacle to such procedure, since the recent case of *Largent v. Bouchelle*[9] allows the receiver to continue liquidation even after the deliquent taxes have been paid.

The case of *Miller v. Newburg Coal Co.*,[10] cannot be relied upon as authority for holding that a corporation whose charter is forfeited for nonpayment of taxes may continue to do business as a *de facto* corporation, since in that case the *defendant* was not allowed to use the expiration of its charter as a defense because, having held itself out to be a corporation, it was estopped to deny it.[11]

Considering, then, the general rule and the statute purporting to change the rule, it would seem that the statute should not extend further than to allow a dissolved corporation to sue and be sued in its own name where the charter has expired or there has been a voluntary dissolution. The circumstances under which the corporation in the instant case was dissolved differs greatly from voluntary dissolution or expiration of a charter. Here a corporation failed to pay taxes needed for the maintenance of the government under which it was created. In view of the clear public policy against such failure to pay expressed by the legislature,[12] it is submitted that no consideration should be given such a corporation.

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[8] Whether W. VA. CODE (Michie, 1937) c. 31, art. 1, § 83, applies to a corporation dissolved for nonpayment of taxes is a debatable question. This provision, by its language, pertains to dissolved corporations "as prescribed in this article". The article touches only upon voluntary dissolution and expiration of the corporate charter, but the first section of c. 31, art. 1 provides: "Except as therein otherwise provided, the sections of this article shall become and be effective from the date fixed in the act of the Legislature adopting the same, and the provisions thereof shall apply to and govern all corporations then existing or thereafter formed and all corporate acts thereafter done." However, regardless of the above question, section 82 of the same article sets up the machinery for the appointment of a special receiver. The aforesaid section 83 was enacted to allow corporations, otherwise prevented from doing so, to wind up their affairs. Thus, after the appointment of the special receiver, it would seem that the provisions of section 83 are no longer necessary.

[9] 120 W. Va. 364, 198 S. E. 148 (1938). This important decision was not mentioned in the opinion of the instant case.

[10] 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903 (1888).

[11] WARREN, *op. cit. supra* n. 2, at 839.

[12] W. VA. CODE (Michie Supp. 1941) c. 11A, art. 3, § 1.