Corporations—Effects of Dissolution Under Statute Continuing Dissolved Corporations—Power to Commit Act of Bankruptcy

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is suggested by the dissent, that the states should have the same power as respects federal taxation? It is significant that the Chief Justice went out of his way to exhum this doctrine from some dicta of Chief Justice Chase in *Thompson v. Union Pacific Railroad Co.*,\(^{23}\) and it is not impossible that future cases may bring about a complete resurrection, but it is submitted that the logic of *Collector v. Day* would not, for reasons of political expediency, be carried to the extent of allowing states to nullify acts of Congress.

The root of the difficulty in the field of intergovernmental immunities was aptly stated by Mr. Justice Holmes in a dissenting opinion in *Panhandle Oil Co. v. Mississippi ex rel Knox*,\(^{24}\) which overruled the holding of a state supreme court that a tax of one cent per gallon on retailers of gasoline was valid as applied to sales to the Federal Government:

"It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits."

H. A. W., JR.

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**Corporations — Effect of Dissolution Under Statute Continuing Dissolved Corporations — Power to Commit Act of Bankruptcy.** — *A*, a Virginia corporation, had its charter revoked in 1935 for failure to pay its registration fee and franchise taxes. Thereafter, the corporation continued to carry on business with no indication that it was winding up its affairs. In November, 1936, *B* company secured a judgment against *A* in *A*'s corporate name, on a debt contracted prior to the charter revocation. In December, 1936, *A* made a general assignment for the benefit of its creditors. Alleging this assignment as an act of bankruptcy,

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\(^{23}\) 9 Wall. 579, 19 L. Ed. 792 (U. S. 1870).

the creditors petitioned to have A adjudicated a bankrupt. To this petition, B filed an answer denying the right to an adjudication in bankruptcy on the ground that A had no corporate existence when the petition in bankruptcy was filed against it. A Virginia statute provided that any corporation, upon dissolution, might be continued for such length of time, not exceeding three years, as might be necessary to settle the business, but not for the purpose of continuing the business for which the corporation was established. Held, that under such a statute, a corporation, upon dissolution, does not immediately cease to live but retains for a specified period a qualified existence. Acting within its restricted powers, such a corporation can commit an act of bankruptcy which will suffice to warrant its being adjudicated bankrupt. *In re Booth's Drug Store, Inc.*

Under the old general rule, the revocation or expiration of a corporate charter terminated absolutely the legal existence of the corporation — there remained no corporate entity of which a court could take cognizance. To prevent the manifest inequity which adherence to this rule brought about, legislatures enacted laws designed to give dissolved corporations some standing in the courts, and a limited power to deal with the property in their possession at the time of dissolution. In other words, the legislatures sought by statute to prevent corporate dissolution from bringing about the effect of immediate corporate "death.”

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5 16 FLETCHER, CORPORATIONS § 8166. VA. CODE (Michie, 1936) § 3810 is a representative example of these statutes. It reads as follows: "All corporations, whether they expire by their own limitations or are otherwise dissolved, shall, nevertheless, be continued for such length of time, not exceeding three years, from such dissolution or expiration, as may be necessary for the purpose of prosecuting and defending suits by or against them, and enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital, but not for the purpose of continuing the business for which said corporation shall have been established . . . .” See also W. VA. REV. CODE (Michie, 1937) c. 31, art. 1, § 83.
Since these statutes established a departure from the common law rule, there naturally has arisen a considerable volume of litigation in which the courts have been called upon to determine just what is the legal status—what are the powers and liabilities—of a dissolved corporation under such statutes. In the federal courts, the question of the status of a corporation which has been dissolved by virtue of the revocation or expiration of its charter, has arisen frequently in connection with the question of bankruptcy jurisdiction. In such cases, the usual argument urged is that dissolution so terminates the existence of the corporation that there remains no corporate being against which a court can enter a decree of bankruptcy. This argument the federal courts have answered by saying that the bankruptcy laws of the United States are paramount and will supersede any state laws which would otherwise have the effect of ousting the federal court of jurisdiction in a bankruptcy proceeding, and that, therefore, a dissolved corporation may be adjudicated bankrupt. On this point, the principal case is in line with the holdings of the decided cases.

The unusual feature of the principal case lies in the fact that it holds that a dissolved corporation may, after dissolution, commit an act of bankruptcy. Apparently, this question has not often been raised, as is indicated by the fact that the court in the present case cited on the point only one prior case, In re Munger Vehicle Tire Co. However, it is doubtful if even the Munger case can be said to embody a holding on the question. There is no indication in the report of that case that the question here under discussion was raised either by the pleadings or in arguments of coun-

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7 For a general discussion of the powers of a dissolved corporation: see 16 FLETCHER, CORPORATIONS §§ 8170 to 8172.
9 See note 8, supra.
10 In re Storck Lumber Co.; In re Adams & Hoyt Co.; Hammond v. Lyon Realty Co.; In re 211 East Delaware Place Bldg. Corp., all supra n. 8.
11 The apparent reason for the fact that this question has not often been raised is that the act of bankruptcy has usually occurred prior to, or contemporaneously with, the dissolution of the corporation.
Therefore, the broad language used by the district court in the *Munger* case appears to embody nothing more than a dictum.

Nevertheless, the holding in the principal case and the dictum in the *Munger* case would seem to be correct on principle. Under a statute such as the Virginia statute relied upon in the present case, there remains a legal entity even after dissolution has been effected. By the express terms of the statute, such a corporation continues to possess the power to deal with the property in its possession, for the purpose of winding up the corporate business. Hence, any act which is consistent with the winding up of the business is an act within the delimited powers of the dissolved corporation. Thus, even after dissolution, there remains in existence an entity cognizable by the courts and vested by statute with the express power to perform certain acts. The dissolved corporation has by its dissolution suffered only a delimitation of its former powers, and if, while acting within the scope of its delimited powers, it commits an act of bankruptcy, it would appear to be as amenable to bankruptcy proceedings as any other corporation acting within its full corporate powers.

Since an assignment for the benefit of creditors is consistent with the winding up of a business, the dissolved corporation in the principal case was acting within its statutory powers. Such an assignment also constitutes an act of bankruptcy. Therefore, a legal entity acting within its legal powers had committed an act

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13 The question which the appellate court was called upon to decide was whether or not a dissolved corporation was "... like a deceased person, incapable of being adjudged a bankrupt ..." *In re Munger Vehicle Tire Co.*, 159 Fed. 901, 904 (C. C. A. 2d, 1908).

14 *In re Munger Vehicle Tire Co.*, 159 Fed. 901, 903 (C. C. A. 2d, 1908) "If a legal entity is capable of being adjudicated a bankrupt, it is necessarily capable of committing an act of bankruptcy ..." This language is quoted with approval in *In re Booth's Drug Store, Inc.*, 19 F. Supp. 95 (D. C. Va. 1937).

15 The opinion of the district court is reported with that of the circuit court of appeals in 159 Fed. 901. The appellate court says of the opinion of the lower court, "... we fully concur in the same ..."


17 VA. CODE (Michie, 1936) § 3810.


19 11 U. S. C. A. § 3(a) (1937); COLIER, BANKRUPTCY (13th ed. 1923) 158, 163.
of bankruptcy. The bankruptcy jurisdiction of the federal court could properly be exercised.

However, it is important to note that in the light of a very recent decision of the United States Supreme Court, a holding such as the one in the present case appears to be limited to cases containing the following factors: (1) a statute extending the period of corporate existence after dissolution; (2) an act by the dissolved corporation within the period of the statutory extension; (3) a clear indication that the act was within the powers of the dissolved corporation as delimited by the statute. In the Supreme Court case referred to, persons purporting to be stockholders of X, an Illinois corporation, filed a petition for a 77B reorganization four years after the corporation had been dissolved by court decree. An Illinois statute continued corporate existence, for certain purposes, for a period of two years after dissolution. The Supreme Court held that the duration of corporate existence and its continuation after corporate dissolution are dependent on the laws of the state of incorporation, and that therefore, the federal courts can recognize the existence of a dissolved corporation only during the time and for the purposes determined by state statutes. Therefore, the existence of the X corporation had ceased absolutely with the expiration of the statutory two year period and there existed no legal entity capable of bringing proceedings for a 77B reorganization.

While this decision of the Supreme Court does not appear to be inconsistent with what has been said in discussion of the holding in the principal case, it does indicate a very definite limit to the extension of that holding.

V. V. C.

22 ILL. REV. STATS. (Smith-Hurd, 1929) c. 32, §§ 14, 79.
23 This was a six-three decision. Cardozo, J., wrote a dissenting opinion in which Stone and Black, JJ. joined. The essence of the dissent is contained in these two points: (1) After the end of the two year period, the dissolved corporation could continue to litigate, in its corporate name, suits which were pending prior to expiration of that period; therefore, there still existed a sort of corporate entity cognizable by the courts. (2) A 77B reorganization may be a type of liquidation proceeding.