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SHAREHOLDER LIABILITY UPON VOLUNTARY DISSOLUTION OF CORPORATION

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INTRODUCTION—SCOPE OF DISCUSSION

The Wisconsin Business Corporation Law,[1] which revised, modernized and codified the Wisconsin law on business corporations, became generally effective as to all Wisconsin corporations with capital stock on July 1, 1953. The Code was patterned after the Model Business Corporation Act as drafted by the Committee on Corporate Laws of the American Bar Association.[2] One of the many objectives of the draftsmen of the Code appears to be the limiting of liability of directors and shareholders following voluntary dissolution of the corporation,[3] and the result of this objective is Section 180.787.[4] Although almost eight years have passed since enactment of this statute, the Wisconsin Supreme Court has not yet had opportunity to construe it. The long-awaited revised Model Business Corporation Act Annotated has recently been published[5] and contains a section[6] substantially similar to 180.787.[7] The purpose of this article is to examine the statutes and

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[1] WIS. STAT. ch. 180 (1959), hereinafter sometimes referred to as the "Code."

[2] 1 MODEL BUS. CORP. ACT ANN. V (1960).

[3] See *Introduction to the Business Corporation Law,* 22 WIS. STAT. ANN. XXXV (1957).

[4] WIS. STAT. §180.787 (1959): *"Survival of remedy after dissolution.* The dissolution of a corporation shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing or any liability incurred, prior to such dissolution if suit or other proceeding thereon is commenced within 2 years after the date of such dissolution. Any such suit or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of 2 years so as to extend its period of duration."

[5] Published for American Bar Foundation by West Publishing Company (1960).

[6] 2 MODEL BUS. CORP. ACT ANN. §98 (1960).

[7] The MODEL ACT contains the following language *after* the words "The dissolution of a corporation" and *before* the words "shall not take away . . .": "either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the

cases in states having a similar law to determine the efficacy of 180.787 in purporting to abate remedies against shareholders of a dissolved corporation after the expiration of the two year period following the filing of articles of dissolution.[8]

Common Law Governing Corporate Dissolution and Liquidating Distributions to Shareholders

In discussing the effect of liquidation and dissolution of a business corporation on the liability (to its creditors) of shareholders receiving assets of the dissolved corporation, it is well to briefly review terminology. *Dissolution,* as in partnership law, means the termination of corporate existence so that the corporation may no longer carry on its business, since it lacks legal authority to do so. *Liquidation* is the process of collecting assets, paying creditors, and distributing residual assets, less liquidation expenses, to the shareholders in accordance with their preferences.[9]

It was decided early in the course of the common law that a creditor had no right to prevent the dissolution of a corporation even though the legal authority to dissolve was granted after the debt was created.[10] There was some dispute regarding the right of the creditor to pursue the property in the hands of shareholders of the dissolved corporation. Early treatises indicated that upon dissolution the corporate debts ceased to exist, the corporate real property reverted to the grantors, and the state was entitled to the personal property.[11] However, the validity of this was questioned at an early date.

> It may be doubted whether it was ever the law that equitable rights to property held by a corporation were lost by a dissolution of the company. The doctrine that the property of a dissolved corporation belongs to the King or to the original donors, was first applied in the case of ecclesiastical and municipal corporations. In these cases there were no shareholders, and seldom creditors; the property was in reality without an owner, after the particular use for which it had been given had come to an end by the dissolution of the corporation. But modern business companies differ essentially from ecclesiastical and municipal corporations, both in purpose and organization. The shareholders or corporators in an ordinary business company are themselves the donors of its property; each member contributes his share of the capital for the common benefit of all; and the corporation it-

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assets and business of the corporation as provided in this Act, or (3) by expiration of its period of duration, . . ."

[8] See *Introduction to the Business Corporation Law, supra* note 3, at XXXV.

[9] See Latin, Corporations 550 (1959).

[10] Dodd, American Corporations Until 1860 142 (1954), citing Mumma v. The Potomac Company, 33 U.S. (8 Pet.) 281 (1834).

[11] *Cf.* Blackstone 484-85 (1765) *with* 2 Morawetz, Private Corporations §1031, p. 988 (2d ed. 1886).

self holds the property given it merely as trustee for its shareholders.[12]

American courts traditionally drew an analogy to a deceased natural person and his inability to hold property, sue or be sued, in considering the status of a creditor holding the obligations of a dissolved corporation. Just as the representative of the estate of a deceased natural person could sue and be sued on behalf of the deceased and hold his property, the courts held that, in equity,[13] the property of a dissolved corporation passed to the shareholders subject to the payment of the corporate debts and other liabilities.[14] The United States Supreme Court speaking through Mr. Justice Curtis expressed the law in *Curran v. State of Arkansas.*

> We are of opinion, that the dissolution of the Corporation, under the Acts of Virginia and Maryland, cannot in any just sense be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the Company by those States, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the Corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the Company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws.
>
> Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows that a court of equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by the dissolution of the corporation, the legal title to its property had been changed. . . .[15]

The theory that the assets of a corporation whose right to do business had expired constituted a "trust fund" for the benefit of creditors was the product of Mr. Justice Story's pen.[16] It has sometimes been criticized as a misleading label since it is not the same doctrine as expressed in early cases that stockholders of going corporations held their capital stock in trust for creditors.[17] Under proper application of

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[12] MORAWETZ, *supra* note 11, at 1032; See also Lindemann v. Rusk, 125 Wis. 210, 230, 104 N.W. 119 (1905).

[13] 2 MODEL BUS. CORP. ACT ANN. §98, para. 4, p. 538 (1960).

[14] Mumma v. The Potomac Company, *supra* note 10; LATTIN, *supra* note 9, at 553; 19 C.J.S. *Corporations* §1760 (1940); BALLANTINE, CORPORATIONS §318, pp. 732-733 (1946); Warren, *Safeguarding the Creditors of Corporations,* 36 HARV. L. REV. 509, 545 (1923).

[15] 55 U.S. (15 How.) 304, 311 (1853).

[16] See Wood v. Dummer, 3 Mason 308, 30 Fed. Cas. 435, No. 17,944 (C.C.D. Me. 1824).

[17] See Warren, *Safeguarding the Creditors of Corporations,* 36 HARV. L. REV. 509, 545 (1923).

the common law, creditors of a dissolved corporation were permitted to reach all assets of the corporation, and not simply a fraction of the assets equal to the amount of its capital.[18] Whatever trust there was arose from the equitable rights of the stockholders in the corporate property and their conditional liability to corporate creditors. It was rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the benefit of creditors.[19]

The importance of limiting the meaning of the dissolution-trust fund theory stems from early Wisconsin cases ruling that the assets of an insolvent corporation are not a trust fund for the benefit of creditors in such a sense that a creditor knowing of such insolvency cannot acquire a valid lien by attaching the corporate property.[20] As will be seen as the discussion develops, Wisconsin is a leading jurisdiction holding that, after the dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporation debts.[21]

The proper rationale for this early-established rule permitting creditors to trace assets into the hands of transferee shareholders seems grounded in constitutional principles. The United States Supreme Court, per Mr. Justice Story, held in *Mumma v. The Potomac Company*[22] that the obligation of a contract made by a corporation survived after it had been dissolved, and state laws governing the dissolution procedure could not effectively impair the obligation of the contract.[23] Wisconsin hastily accepted the warning of the United States Supreme Court.[24]

Because of constitutional prohibitions against severing the claims of creditors, courts were charged with responsibility for supervising the liquidating distributions. Since shareholders were not entitled to a share of the assets of the corporation until corporate debts were paid, if the assets were divided, leaving any debts unpaid, every shareholder receiving his share was in equity liable pro rata to contribute to the discharge of such debts out of the funds he had received.[25] But this

[18] *Ibid.*

[19] Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371 (1893); Graham v. La-Crosse & M. Railroad Company, 102 U.S. 148 (1880).

[20] See Ballin v. Merchants' Exchange Bank, 89 Wis. 278, 61 N.W. 1118 (1895); Ford v. Hill, 92 Wis. 188, 66 N.W. 115 (1896); Hinz v. Van Dusen, 95 Wis. 503, 70 N.W. 657 (1897); Marvin v. Anderson, 111 Wis. 387, 87 N.W. 226 (1901); Atlanta & Walworth Butter & Cheese Association, 141 Wis. 377, 123 N.W. 106 (1910). *Cf.* In re Sparta Canning Co., 73 F. 2d 732 (7th Cir. 1934).

[21] See text at *infra,* note 32.

[22] *Supra* note 10.

[23] See Lake Shore & M.S.R. Co. v. Smith, 173 U. S. 684 (1899); Annot., 47 A.L.R. 1288, 1355 (1927).

[24] Whiting v. The Sheboygan & Fond du Lac Railroad Company, 25 Wis. 167, 206-207 (1870).

[25] 16 FLETCHER, CYCLOPEDIA CORPORATIONS §8224 (Rev. Vol. 1942); Marshall v. Fredericksburg Lumber Co., 162 Va. 136, 173 S.E. 553, 557 (1934).

transferee liability was secondary and limited by the amount of the liquidating dividend, not merely by the pro rata share of the corporation's obligations in the ratio which the transferee shareholder's stock bore to the total outstanding stock at the time of the liquidation. And the shareholder, although severally liable for the corporate debts, had a right of contribution from other shareholders.[26]

The availability of this equitable remedy was something of a "consolation award" for the creditor holding a claim against a corporation that took the notion to dissolve. Upon dissolution and termination of the legal existence of the corporation, no action could be maintained against it.[27] This was true whether the action was one *in personam* or one *in rem*.[28] The corporation could not carry on except for the purpose of liquidating its assets, paying its creditors, and distributing what remained to the shareholders.[29]

This arrangement was soon recognized as unsatisfactory and statutes were enacted to preserve the life of the corporation during the winding-up period, designating certain representatives to supervise the process of liquidating.[30] The statutory granting of extended life served the double purpose of permitting the corporation to prosecute and defend claims in its own right. This permission has generally been limited to a specified number of years.[31] What the effect of the expiration of the time period had on the creditor remedy under the common law "trust fund" doctrine was the next question before the courts.

The Prelude to Wis. Stat. §180.787

The Wisconsin solution to the common law doctrine of abatement of creditors' remedies against dissolved corporations was the enactment of a statute that resuscitated the dissolved corporations to the extent that the corporations "shall nevertheless continue . . . for three years thereafter for the purpose of prosecuting and defending actions, and of enabling them to settle and close up their business, dispose of and

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[26] Comm. v. Switlik, 184 F. 2d 299 (3rd Cir. 1950); Phillips v. Comm., 283 U.S. 589, 603 (1931), citing: Benton v. American National Bank, 276 Fed. 368 (5th Cir. 1921); McWilliams v. Excelsior Coal Co., 298 Fed. 884 (8th Cir. 1924); U. S. v. Boss & P. Auto Co., 285 Fed. 410 (D. Ore. 1922), *aff'd.*, 290 Fed. 167 (9th Cir. 1923); Capps Mfg. Co. v. U. S., 15 F. 2d 528 (5th Cir. 1926); Adams v. Perryman, 202 Ala. 469, 80 So. 853 (1919); Singer v. Hutchinson, 183 Ill. 606, 620, 56 N.E. 388 (1900); Kimbrough v. Davies, 104 Miss. 722, 61 So. 697 (1913); Bartlett v. Drew, 57 N.Y. 587 (1874).

[27] Marion Phosphate Co. v. Perry, 74 Fed. 425 (5th Cir. 1896); Nelson v. Hubbard, 96 Ala. 238, 11 So. 428 (1892); National Pahquioque Bank v. First Nat. Bank of Bethel, 36 Conn. 325 (1870); Venable Bros. v. Southern Granite Co., 135 Ga. 508 (1910); Renick v. Bank of West Union, 13 Ohio 298 (1844); Combs v. Keyes, 89 Wis. 297, 62 N.W. 89 (1895); Annot., 47 A.L.R. 1380 (1927); 97 A.L.R. 483 (1935).

[28] 13 Am. Jur. *Corporations* §1354 (1938).

[29] See Leibson v. Henry, 356 Mo. 953, 204 S.W. 2d 310, 315 (1947).

[30] Note, 23 Mo. L. Rev. 82 (1958).

[31] 13 Am. Jur. *Corporations* §1363 (1938).

convey their property and divide their assets and for no other purpose. . . ."[32]

In *Lindemann v. Rusk*[33] the Wisconsin Supreme Court heard an argument to the effect that the enactment of the statute was intended by the legislature to furnish an exclusive remedy for creditors and to abrogate the common law equitable remedy previously available against shareholders. The Court emphatically rejected this suggestion.

> . . . The contention seems an unwarranted construction of this statute, in view of the requirements for the protection of private rights and interests in its assets. This section, in effect, extends the life of a corporation for three years to accomplish final liquidation of its affairs through its directors, and there is nothing which suggests that the usual equitable remedies should not be resorted to at the expiration of such period, if the directors fail to accomplish this object within that time. . . .[34]

When given another opportunity to construe the statute, the Court was more explicit.

> However, the debts of the corporation, if any, were not extinguished because the corporation ceased to exist. The creditors of the corporation may follow its assets into the hands of the stockholders, who may be required to respond to the extent of their distributive shares thereof. Lindemann v. Rusk, 125 Wis. 210, 229, 104 N.W. 119.[35]

And the Court thereafter continued their assertions that the creditor had his remedy against the transferees of the dissolved corporation, until the enactment of the new Code in 1953.[36] Among the criticisms directed at Chapter 181, the former Business Corporation chapter, was a request for a revised dissolution statute dealing with the status of contracts executory at the time the carrying on of regular business ended.[37] While remedial legislation was suggested, it was also urged that it was "unjust for a corporation by its own act to detract from contractual benefits it has conferred for consideration received. . . ."[38]

Construction of 180.787 and Its Counterparts—Limiting the Cause of Action Rather than Corporate Existence

As discussed above, Section 181.02 of the old Code limited corporate existence to three years *after* dissolution. This provision thus had

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[32] Wis. Stat. §181.02 (1949).
[33] 125 Wis. 210, 104 N.W. 119 (1905).
[34] *Id.* at 231, 104 N.W. at 125.
[35] State *ex rel.* Pabst v. Circuit Court, 184 Wis. 301, 307, 199 N.W. 213, 215 (1924).
[36] West Milwaukee v. Bergstrom, 242 Wis. 137, 7 N.W. 2d 587 (1943). See also Metropolitan Casualty Ins. Co. v. Industrial Comm.. 260 Wis. 298, 50 N.W. 2d 399 (1951).
[37] Comment, 33 Marq. L. Rev. 114 (1949).
[38] *Id.* at 118.

the rather anamolous effect of reincarnating what was thought by definition to be dead—the dissolved corporation. The basis for the anomaly was the conceived analogy between the death of an individual and the dissolution of a corporation. But the legislative creation resulting from this drawn resemblance did restrict the likeness to a three year period, making no provision for claims presented thereafter. The *Pabst* case[39] and the subsequent decisions[40] following its rationale demonstrably illustrated the inadequacy of the statutes. And commentators readily suggested that the revival of the dead corporation approach be abandoned in favor of legislation deferring the death until the completion of liquidation, so as to settle corporate rights and liabilities prior to demise.[41]

The result of the suggestions and criticisms is the "two-step" procedure for voluntary dissolution contained in Chapter 180. Upon reaching a decision to dissolve,[42] the corporation "publicizes" it by filing and recording a statement of intent to dissolve with the Secretary of State and Register of Deeds of the appropriate county.[43] Thereupon the corporation is no longer authorized to carry on business, except that necessary for the proper winding up of its affairs.[44] No specific time limit has been placed upon the period of winding up, and when provision has been made for the payment of all debts and all property has been distributed, articles of dissolution are filed and recorded, "and thereupon the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action of shareholders, directors and officers as provided in this chapter. . . ."[45]

The filing and recording of both the statement of intent to dissolve and articles of dissolution has been rather appropriately termed a "two-step dissolution" by the draftsmen of the Model Business Corporation Act.[46] Alaska,[47] California,[48] Colorado,[49] Illinois,[50] Iowa,[51] Kentucky,[52] Louisiana,[53] Minnesota,[54] North Carolina,[55] Oklahoma,[56] Oregon,[57]

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[39] *Supra* note 35.
[40] *Supra* note 36.
[41] See Comment, 33 MARQ. L. REV. 114 (1949).
[42] See WIS. STAT. §180.753 (1959).
[43] WIS. STAT. §180.755 (1959).
[44] *Ibid.*
[45] WIS. STAT. §180.767 (1959).
[46] See 2 MODEL BUS. CORP. ACT ANN. §§85, 86, para. 2.02(1) (1960).
[47] ALASKA COMP. LAWS ANN. §§36-2A-114 to 36-2A-116, 36-2A-121, 36-2A-122 (1958 Supp.).
[48] CAL. CORP. CODE ANN. §§4602 to 4604, 4605, 4607 to 4617, 4619, 5000 to 5008, 5200 to 5201.5.
[49] COLO. CORP. ACT §§80 to 82, 87, 88, COLO. LAWS, S.B. 14.
[50] ILL. REV. STAT. ch. 32, §§157.77-157.79, 157.80, 157.81.
[51] IOWA CODE ANN. §§496A.2-496A.84, 496A.89, 496A.90.
[52] KY. REV. STAT. ANN. §§271.505-271.515, 271.535-271.545.
[53] LA. REV. STAT. ANN. §§12:53-12:54, 12:57-12:62.
[54] MINN. STAT. ANN. §§301.46-301.48, 301.51-301.56.
[55] N.C. GEN. STAT. §§55-4, 55-114 to 55-119, 55-121.

Pennsylvania,[58] Texas,[59] Virginia,[60] Washington,[61] and the District of Columbia[62] all have provisions substantially similar to Wisconsin. Among those states providing for dissolution immediately on filing with or acceptance by the secretary of state of a form stating that the prerequisites for voluntary dissolution have been met[63] are Alabama,[64] Arizona,[65] Arkansas,[66] Connecticut,[67] Indiana,[68] Maryland,[69] Michigan,[70] Nebraska,[71] Nevada,[72] New Jersey,[73] Ohio,[74] South Carolina,[75] Tennessee[76] and West Virginia.[77]

Under the "two-step" liquidation procedure, there is no necessity to continue the existence of a corporation following its dissolution for the purpose of settling its affairs. Under Section 180.787 and its counterpart in the Model Business Corporation Act,[78] it is provided that, while the dissolution of a corporation shall not destroy any remedy available either to or against the corporation, suit must be commenced within two years after the date of dissolution.[79] The intention of the draftsmen apparently was to place the limitation, not on the corporation's existence, but on the cause of action.[80] The hoped-for result was the abating of causes of action against shareholders after the expiration of two years from the date of filing of articles of dissolution.[81] Some of

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[56] OKLA. STAT. TIT. 18, §§1.178 to 1.185, 1.186, 1.189 to 1.192, 1.194, 1.219, 1.220, 1.223, 1.225, 1.226.
[57] ORE. REV. STAT. §§57.526, 57.541-57.551, 57.575, 57.580.
[58] PA.. STAT. ANN. TIT. 15, §§2852-1101, 2852-1103, 2852-1104, 2852-1105.
[59] VERNON'S TEX. BUS. CORP. ACT, ART. 6.04 to 6.06, 6.11, 6.12.
[60] VA. CODE ANN. §§13.1-79, 13.1-82 to 13.1-84, 13.1-89, 13.1-90.
[61] WASH. REV. CODE §§23.01.530, 23.01.560, 23.01.570 to 23.01.620, 23.01.630.
[62] D.C. CODE ANN. §§29-930c to 29-930e, 29-930j, 29-930k.
[63] *I.e.*, the "one-step" procedure. See 2 MODEL BUS. CORP. ACT ANN. §§85, 86, para. 2.02(2) (1960).
[64] ALA. BUS. CORP. ACT §§76, 77, ALA. LAWS 1959, ACT 414.
[65] ARIZ. REV. STAT. ANN. §§10-362, 10-367.
[66] ARK. STAT. ANN. §64-805.
[67] CONN. GEN. STAT. ANN. §§33-285, 22-376 (Effective January 1, 1961).
[68] IND. ANN. STAT. §25-241(b)(4).
[69] MD. ANN. CODE, ART. 23, §§76(b), 77(c), 77.
[70] MICH. COMP. LAWS §§450.71 and 450.72 (1948), 450.73, 450.74 (Supp. 1956).
[71] NEB. REV. STAT. §§21-183 to 21-185 (1954).
[72] NEV. REV. STAT. §§78.580(2), 78.620.
[73] N.J. STAT. ANN. §§14:13-1, 14:13-2.
[74] OHIO REV. CODE ANN. §§1701.86(F) to 1701.86(I).
[75] S.C. CODE §§12-642, 12-643.
[76] TENN. CODE ANN. §§48-513 to 48-515.
[77] W. VA. CODE ANN. §3092.
[78] 2 MODEL BUS. CORP. ACT ANN. §98 (1960).
[79] Other states having substantially similar provisions are Alaska—ALASKA COMP. LAWS ANN. §36-2A-134 (1958 Supp.); Colorado—COLO. CORP. ACT §100, COLO. LAWS (1958), S.B. 14, as amended, COLO. LAWS (1959), S.B. 216; Illinois—ILL. REV. STAT. ch. 32, §157.94; Iowa—IOWA CODE ANN. §496A.192; Kentucky—KY. REV. STAT. ANN. §271.585; North Dakota—N.D. REV. CODE §10-2124 (1957 Supp.); and District of Columbia—D.C. CODE ANN. §29-931.
[80] See Young, *Some Comments on the New Wisconsin Business Corporation Law*, 1952 WIS. L. REV. 5, 15.
[81] See *Introduction to the Business Corporation Law*, 22 WIS. STAT. ANN. XXXV (1957).

the draftsmen carefully avoided a prediction as to the proximity of their creation to the desired result.[82] To make such determination at the present time requires an examination of the cases in other jurisdictions since the Wisconsin Supreme Court has not construed the statute since its passage.

The neighboring state of Illinois has been most active in litigating questions arising under its counterpart[83] of 180.787. The vital ruling handed down by the Illinois courts is that the statute limits capacity to sue or be sued to two years, in contradistinction to the typical statute of limitation bearing only upon *remedy* and not *right*. The first case so holding was decided by an Illinois Court of Appeals. In *Dukes v. Harrison & Reidy*,[84] suit was brought against a dissolved corporation and its shareholders, on the allegation that the latter had not paid the full subscription price of their shares. The suit was based on a section of the Illinois corporation statutes providing that after the dissolution of a corporation, any creditor could bring suit in equity against all persons in any way responsible for the dissolution, "by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his pro rata share of such debts and liabilities to the extent of the unpaid portion of the stock. . . ."[85] The defendant representatives of the corporation made a special appearance and objected to the jurisdiction of the court based on the fact that under the forerunner to the present statute,[86] the time for suit had expired.

The plaintiff argued in rebuttal that because he had previously brought a suit of the same nature, following which the two year period expired prior to the present action, he could rely on Illinois law providing that where the statute of limitation expires prior to the time the action is dismissed, a plaintiff may have another year within which to reinstitute his action. The defendant corporation replied that the two year period for bringing suit under the corporation statutes was not a period of limitation, but rather a definite limit on corporate capacity to sue and be sued. The Illinois appellate court accepted the construction of the statute submitted by the defense.[87] And the Illinois courts have persisted in this construction.[88]

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[82] *Contrast* Young, *supra* note 80, *with* Luce, *The Wisconsin Business Corporation Law*, 36 MARQ. L. REV. 1, 23 (1952): ". . . Remedies against the corporation, directors, and shareholders are preserved for a period of two years after articles of dissolution are filed." *Quaere* as to the extent of shareholder liability thereafter.

[83] ILL. REV. STAT., ch. 32, §157.94.

[84] 270 Ill. App. 372 (1933).

[85] CAHILL'S REV. ILL. STAT., ch. 32, para. 53.

[86] *Supra* note 83.

[87] The Appellate Court relied on Bishop v. Chicago Ry. Co., 303 Ill., 273, 135 N.E. 439 (1922), which did not deal with a question of corporation law.

[88] See Sarelis v. McCue & Co., 291 Ill. App. 540 (1937); Ruthfield v. Louis-

The effect of the *Dukes* case was to negate an earlier decision of the Seventh Circuit Court of Appeals which held that where the informational data filed with the Secretary of State contained a positive misstatement of fact as to tax liabilities, the federal government was not barred from collecting its claim.[89] The Court of Appeals seemed to admit as much in *Reconstruction Finance Corporation v. Teter*,[90] where suit was brought against a dissolved corporation and its stockholders to recover upon certain guaranties. Motions to dismiss the complaint, and to quash the summons and the return thereof against the dissolved corporation were sustained by the trial court. The plaintiff argued on appeal that although the defendant company was dissolved more than two years prior to the filing of the action, it yet had an equitable remedy against the shareholders, since "in equity the assets of a dissolved corporation passing to its stockholders constitute a trust fund which can be reached in their hands by the corporation's creditors for the purpose of satisfying claims. . . ."[91] The Court of Appeals rejected the argument as it interpreted the two-year limit statute as controlling both the substantive and procedural rights of the parties, to the exclusion of any common law equitable remedy.[92]

But the court went on to weaken this ruling by alternatively deciding that since the defendant stockholders were sued as representatives of all the stockholders of the dissolved corporation, and the plaintiff had failed to plead impracticability as justification for his omission of the others, the complaint was procedurally deficient.[93]

Thus, the *Teter* case does not wholly support any notion that the two-year statute will bar a common-law remedy against shareholders after the expiration of such period. Other dictum came as close. In *Markus v. Chicago Title & Trust Co.*,[94] the Illinois Supreme Court stated that

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ville Fuel Co., 312 Ill. App. 415, 38 N.W. 2d 832 (1942); Chicago Title & Trust Co. v. Wilcox Bldg. Corp., 302 U.S. 102 (1937); McNeill v. Savin, 244 Wis. 552, 13 N.W. 2d 82 (1944); Gordon v. Loew's Incorporated, 147 F. Supp. 398 (D.N.J. 1956).

[89] *In re* Wolf Mfg. Industries, 56 F. 2d 64, 66 (7th Cir. 1932): ". . . there having been no compliance with the statute by the corporation, and the dissolution being void as to the government, the two-year limitation provided for actions against a dissolved corporation where dissolution is perfected does not apply." The case was cited approvingly in Missouri State Life Ins. Co. v. Langreder, 87 F. 2d 586, 593 (7th Cir. 1937): ". . . A suit against a corporation does not abate if there is a local policy expressed by statute or decision, that the corporation, although dissolved, shall continue for a given period for the purpose of winding up its affairs. . . ."

[90] 117 F. 2d 716 (7th Cir. 1941).

[91] *Id.* at 726.

[92] *Id.* at 727.

[93] *Id.* at 727-28.

[94] 373 Ill. 577, 27 N.E. 2d 463, 128 A.L.R. 567 (1940). See also O'Neill v. Continental Illinois Co., 341 Ill. App. 119, 93 N.E. 2d 160 (1950).

> The dissolution of the corporation in this case, therefore, did not have the effect of destroying the mortgage lien against the premises though it did bar, after two years, any action against the corporation itself. . . . It follows that the limitation provided in section 94 of the Corporations act, III. Rev. Stat. 1939, chap. 32, par. 157.94, limiting suits against the corporation, its officers or stockholders, to a period of two years after dissolution, is not applicable here, though it barred any remedy against the corporation, its officers or stockholders. . . .[95]

The most recent important case dealing with the meaning of Section 94 of the Illinois Business Corporation Act was decided in 1956.[96] Stockholders of a dissolved Kentucky corporation brought suit on a deficiency judgment entered in favor of the corporation prior to dissolution. The defendant, a resident of Illinois, relied on a Kentucky statute[97] which was almost identical to Section 94, since the dissolution had occurred long before the suit was brought. The Court of Appeals did not clearly specify whether Illinois or Kentucky corporate law applied, but did state the conflicts question was "perhaps not material."[98] At any rate, it did apply the limitations law of Illinois, and made short shrift of the defense of want of capacity to sue because of expiration of the two-year period.

> As noted, Imperial filed its Certificate of Dissolution November 28, 1942, and it appears plain that under the provision just quoted any action for or against it was limited to a two-year period. On expiration of that period it became extinct for all purposes and it no longer had the capacity to sue or be sued. We are unable to agree, however, . . . that this provision had a like effect or any effect upon the rights of plaintiffs as former shareholders of Imperial. The provision by its express language applies to "any right or claim existing, or any liability incurred prior to such dissolution." It is obvious that the right or claim of Imperial in the Chicago judgment against defendant existed prior to the time of its dissolution, but it is equally obvious that the right or claim of plaintiffs in suit was not in existence prior to that time.[99]

Applying the converse of the reasoning of the Seventh Circuit, one can argue that the effect of *Levy* is to render Section 94 and similar statutes ineffective to bar creditor claims against shareholders. The statutes speak of barring liabilities, along with rights, "incurred *prior* to . . . dissolution." If the derivative liability of a shareholder receiving assets of a corporation does not arise until dissolution,[100] since prior to

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[95] *Id.* at 562, 27 N.E. 2d at 465.
[96] Levy v. Liebling, 238 F. 2d 505 (7th Cir. 1956).
[97] KY. REV. STAT. §271.585.
[98] *Supra* note 96, at 506.
[99] *Id.* at 506-7.
[100] See 13 AM. JUR. *Corporations* §1352, pp. 1197-98 (1938): ". . . *after the*

that time the primary liability of the corporation can be enforced, the two-year statute may be ineffectual to limit shareholder liability since it did not arise "prior to dissolution"!

To defeat such construction, one might argue that the words "prior to such dissolution" refer to any point in time before the date the articles of dissolution are filed and recorded. Since the shareholders would of necessity receive assets prior to that date because of the recital in the certificate,[101] and any ignored creditor would as a practical matter be frustrated in suing the "shell" corporation thereafter, a court might so construe the statute.[102] Section 180.787 itself speaks of suing "within 2 years after the *date* of such dissolution."[102a] And the legislative history indicates quite clearly that that date does not occur until all corporation-ending business is completed.[103] Indeed, the *Levy* case may be restricted to its facts and shareholders may be able to rest without disturbance from that case.

But this does not resolve the broader issue of the effect of 180.787 on the transferee liability of shareholders without regard to the exact point in time at which the liability arises. The *Teter* case came close to holding the statute efficacious in abolishing the common law remedy predicated on the "trust fund" theory.[104] But no case has been located which squarely decides the question. An early North Carolina case did hold that a counterpart of old Wis. Stat. §181.02 had the effect of abolishing all common law remedies. In *Von Glahn v. De Rosset*,[105] an action was brought against shareholders of a dissolved bank by virtue of a personal liability clause in the charter of the bank providing that in the event of insolvency or inability of the bank to pay, the shareholders would be liable to creditors in an amount double the value of the stock held by them. The shareholders relied on a limitation statute preventing corporate liability from abating for three years after dissolution, since the period had expired prior to the action. The plaintiff countered with the argument that an equitable remedy was effective irrespective of statute. The Supreme Court of North Carolina carefully discussed the

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dissolution of a corporation, its property passes to its stockholders subject to the payment of the corporate debts." [Emphasis supplied.]

101 See WIS. STAT. §180.765(4) (1959).

102 But in Bank of Alameda County v. McColgan, 69 Cal. App. 2d 464, 159 P. 2d 31 (1945), the court held that the effective date of dissolution for *franchise tax purposes* in California, a jurisdiction with a "two-step" dissolution procedure, is when the state is notified of intent to dissolve and not when the final certificate of dissolution is issued.

102a [Emphasis supplied.]

103 See Revision Committee Note, 1951: ". . . under the new chapter, in voluntary dissolution, articles of dissolution are not filed and the corporation is not dissolved until after the winding up process has been completed. See 180.755, 180.757 and 180.765. . . ." 23 WIS. STAT. ANN. 252 (1957).

104 *Supra* note 90.

105 81 N.C. 467 (1879).

validity of the "trust fund" doctrine, but ruled it was no longer available.

> As the law-making power has thus undertaken to regulate the settlement of the affairs of an expired corporation and provide the mode in which it shall be done, the statutory remedy must be considered as superseding and substituted for all others directed to the same end. The relief is within reach of each and every creditor, and of the stockholders and members of the corporation, during the space of three years, next ensuing the dissolution and no longer. The limitation is reasonable and proper in itself and an inseparable condition of the remedy.[106]

Shareholders who would be quick to seize upon this case as a panacea for the problem are reminded that many cases in addition to those of Wisconsin[107] construing similar "one-step" dissolution statutes are contra.[108]

Notice to Creditors—A Minimum Necessity for Effectiveness of 180.787

Clearly, the efficacy of statutes molded in the pattern of the Model Business Corporation Act[109] is unclear. But merely because the adjudicated cases indicate that a shareholder may not be free from the long arm of the corporate creditor after the expiration of the statutory period, there is not necessarily cause for legislative upheaval of the statutes. There may be a serious question of fundamental policy as to whether a shareholder receiving a liquidating distribution is entitled to legislative protection to the detriment of the creditor.[110] However, the present confused state of the law is not a happy one. The draftsmen of 180.787 approached their task with the avowed purpose[111] of limiting shareholder liability to two years after dissolution. The legislative enactment of their labors is the recognition of policy favoring a limitation of shareholder liability. How to bolster the legislation to make it efficacious before courts is the present problem.

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[106] *Id.* at 476. See also Heggie v. Building & Loan Association, 107 N.C. 581, 12 S.E. 277 (1890); Sisk v. Old Hickory Motor Freight, Inc., 222 N.C. 631, 24 S.E. 2d 489 (1945).

[107] See footnotes 35 and 36 *supra.*

[108] See, *e.g.*, Miller, *The Status of Choses in Action of Dissolved but Unadministered Corporations After Expiration of the Statutory Period for Winding Up,* 9 Miss. L. J. 455, 476 (1937); Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 411, 84 Atl. 229 (1912); Slaughter v. Moore, 82 Atl. 963 (Del. Ch. 1912); Addy v. Short, 81 A. 2d 300 (Del. Sup. 1951), 47 Del. 157, 89 A. 2d 136 (1952); Kratky v. Andrews, 224 Minn. 386, 28 N.W. 2d 624 (1947); Stensvad v. Ottman, 123 Mont. 158, 208 P. 2d 507 (1947); Elk River Mill & Lumber Co. v. Georgia-Pacific Corp., 164 Cal. App. 159, 330 P. 2d 404 (1958); Connecticut Mutual Life Insurance Co. v. Dunscomb, 108 Tenn. 724, 69 S.W. 345 (1902); Standard Oil Co. of Louisiana v. Apex Oil Corp., 244 S.W. 2d 176 (Tenn. App. 1951).

[109] 2 Model Bus. Corp. Act Ann. §98 (1960).

[110] See Warren, *Safeguarding the Creditors of Corporations,* 36 Harv. L. Rev. 509 (1923).

[111] See footnotes 80-82 *supra.*

Without an effective statute, transferee shareholders will be relegated to limitation defenses predicated upon the normal six year statute of limitation.[112] The special limitation statute[113] governing actions against "stockholders . . . to enforce a liability created by law . . ." should be inapplicable to a creditor's action predicated upon the "trust fund" theory evolved through the course of the common law. Section 330.51 has been construed as affecting only statutory liability and not obligations grounded in the common law.[114]

Even though Section 330.19 be applicable to the case the cause of action may be interpreted as not "accruing"[115] until the dissolution of the corporation,[116] and the statute would thus begin to toll from that period.[117] Of course the primary liability of the corporation must still be outstanding at the time of the dissolution.[118]

The discussion of what statute of limitation will apply may well be academic in the event the tax collector unexpectedly extends his talons in the direction of the transferee shareholder. It is fundamental that governments are usually bound only by their self-imposed limitation of time. In point of fact, the transferee liability for taxes imposed on shareholders of dissolved corporations[119] may well be the policy justification for the creation of statutes nobly attempting to solve the problems resulting from that liability in terms of defining it, rather than barring it after lapse of time.

The threat of unexpected suit against the transferee shareholder does seem grave enough to warrant legislative attention. There is no doubt but that statutory provisions for dissolution of corporations do not violate constitutional prohibitions against the impairment of contracts.[120] It might be argued that the very basis for sustaining the con-

[112] WIS. STAT. §330.19(3) (1959).

[113] WIS. STAT. §330.51 (1959).

[114] Gores v. Field, 109 Wis. 408, 84 N.W. 867, 85 N.W. 411 (1901); Musback v. Schaefer, 115 Wis. 357, 91 N.W. 966 (1902); Bank of Verona v. Stewart, 223 Wis. 577, 270 N.W. 534 (1937). *Cf.* G.M.C. Hotels, Inc. v. Hanson, 234 Wis. 164, 290 N.W. 615 (1940). An astute lawyer might argue that WIS. STAT. §180.40(5)(b) (1959) is the basis for any creditor's action against a transferee shareholder, especially in view of WIS. STAT. §180.765(3) (1959) (recital that all debts of which the corporation has knowledge have been provided for). The importance of utilizing 330.51 is because the limitation period does not begin to toll until discovery of the facts creating the shareholder liability.

[115] WIS. STAT. §330.14 (1959).

[116] See 19 C.J.S. *Corporations* §1762 (1940).

[117] Abercrombie v. United Light & Power Co., 7 F. Supp. 530 (D. Md. 1934).

[118] *Ibid.*

[119] Such shareholders often are charged with notice of a subsequently levied tax constituting a potential tax liability at the time of dissolution. See 9 MERTENS, LAW OF FEDERAL INCOME TAXATION §53.15; Scott v. Comm., 117 F. 2d 36 (8th Cir. 1941); United States v. Armstrong, 26 F. 2d 227 (8th Cir. 1928); Updike v. United States, 8 F. 2d 913 (8th Cir. 1925), *cert. denied*, 271 U.S. 661 (1926); United States v. Seyler, 142 F. Supp. 408 (W.D. Pa. 1956).

[120] Mumma v. The Potomac Company, 33 U.S. (8 Pet.) 281 (1834); Crossman

stitutionality of dissolution statutes is the remedy surviving against the shareholders. But it should be within legislative province to limit that remedy to a certain period, since the setting of a time limit in a statute of limitation appears to be a matter of legislative discretion.[121] Discounting the effect of Illinois construction[122] of such legislation as not properly a statute of limitation, but rather a limitation on capacity to sue or be sued, the legislature seems empowered to limit the liability if it so sees fit and takes proper action to do so.[123] However, any change to limit liability should probably be made prospective in effect to withstand judicial scrutiny.[124]

Irrespective of the desirability of change in the language of 180.787, the Wisconsin legislature may wish to consider the enactment of legislation providing for mailing to creditors a notice of intention to dissolve by the dissolving corporation.

The Model Act contains such a provision[125] as do many states.[126] Affording notice to all known creditors should enhance the validity of the legislative attempt to limit time for presenting creditor claims.[127] Decisions have been found in which courts were unimpressed with the fact such notice was given.[128] But providing for notice and clearly expressing an intention of making the statute the exclusive remedy—defining shareholder liability in terms of the statute—could go a long way in effectuating the purpose of 180.787 and its counterparts.

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v. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335 (1907); Nelson v. Hubbard, 96 Ala. 238, 11 So. 428 (1892); In re Courtney Bros., Inc., 110 Mont. 289, 100 P. 2d 471 (1942).

121 Nadstanek v. Trask, 130 Ore. 669, 281 Pac. 840 (1929).

122 Dukes v. Harrison & Reidy, 270 Ill. App. 372 (1933), discussed above.

123 See Miller, *The Status of Choses in Action of Dissolved but Unadministered Corporations After Expiration of the Statutory Period for Winding Up*, 9 MISS. L. J. 455 (1937).

124 See Casey v. Trecker, 268 Wis. 87, 66 N.W. 2d 724 (1954); Guardianship of Blenski, 226 Wis. 361, 276 N.W. 626 (1937); Gianella v. Bigelow, 96 Wis. 185, 71 N.W. 111 (1897); Hasbrouck v. Shipman, 16 Wis. 296 (1862).

125 2 MODEL BUS. CORP. ACT ANN. §80(a) (1960).

126 *Id.* at 446. See, *e.g.*, WEST'S ANN. CAL. CORP. CODE §4605 as amended by L. 1957, ch. 2261, §34; N.C. GEN. STAT., 1957 Cum. Supp. §55-119.

127 LATTIN, CORPORATIONS 569 (1959).

128 Bates v. Miss. Ind. Gas Co., 173 Miss. 361, 161 So. 133 (1935); 19 C.J.S. *Corporations* §1760 (1940).