

## N.Y. General Corporation Law--Revival of Corporate Existence After Expiration of Charter

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## CURRENT LEGISLATION

N. Y. GENERAL CORPORATION LAW—REVIVAL OF CORPORATE EXISTENCE AFTER EXPIRATION OF CHARTER.—On April 6, 1944 the New York Legislature, on the recommendation of the Law Revision Commission,<sup>1</sup> added Section 49<sup>2</sup> to New York General Corporation Law. This new section provides for the revival of corporate existence at any time after the term of duration, as provided in the charter of a corporation, has expired.

Under the prior enacted law, provision had been made, by Section 45<sup>3</sup> of the New York General Corporation Law, for extending the term of corporate existence by corporate action at any time before the expiration of the charter. However, under this prior statute a failure to act before the expiration date would have been fatal, and the defunct corporation could have regained its original legal existence only by the application of one of two alternate remedies. Either it would have had to go through the process of liquidation and start *de novo* with reincorporation, or else it would have been forced to seek a special act of legislature authorizing its revival.<sup>4</sup> Section 46<sup>5</sup> of the New York General Corporation Law provided that a limited corporate revival might be obtained at the request of any interested party, as for example a creditor, through a judicial authorization which would permit the stockholders to vote on the question of such revival.

The method of revival under the new law is substantially the same procedure as prescribed for the extension of the corporate existence under Section 45. There is, however, an important exception. In order to execute and file the certificate of revival, in the case of a stock corporation, authorization must be given by the vote or written consent of holders of record of at least a majority of the shares of each class of stock, whether such classes are by the corporate charter entitled to vote, or not.<sup>6</sup> Former New York law dealing

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<sup>1</sup> See *Report of the Law Revision Commission*, LEGIS. DOC. NO. 65(A) (1944).

<sup>2</sup> N. Y. GEN. CORP. LAW § 49, added L. 1944, c. 591, § 1 (April 6, 1944).

<sup>3</sup> N. Y. GEN. CORP. LAW § 45, L. 1929, c. 650, § 1 (Oct. 1, 1929).

<sup>4</sup> Twenty-three corporations were revived by special act of legislature in New York in 1941 and 1942. See *Report of the Law Revision Commission*, LEGIS. DOC. NO. 65(I) (1943).

<sup>5</sup> N. Y. GEN. CORP. LAW § 45, enacted 1929, providing for limited revival where any domestic corporation has bonds outstanding, which are payable subsequent to the expiration of its term of corporate duration, and such bonds are unmatured and unpaid at such subsequent period, or where the corporation is a bank which has issued any obligation or incurred any indebtedness unpaid at the time application for revival is made.

<sup>6</sup> N. Y. GEN. CORP. LAW § 49, subd. 3, requiring that a meeting be called for the purpose of obtaining the stockholders' consent in writing or by vote. Notice of such meeting must be given to all holders of record of shares of the corporation.

with extension or limited revival of corporate existence secured only to holders of certain voting classes of stock the privilege of voting for such extension or revival. In order to safeguard the stockholders' rights the new law allows holders of those classes of stock which are by the corporate charter not normally entitled to vote, the right of participating in the important question of corporate revival. This safeguard is reflected in the amendment to Section 51<sup>7</sup> of the New York Stock Corporation Law passed to prevent a conflict with this new law. The intended result of such legislation is to invalidate any provision in a corporate charter which authorizes revival by less than the majority vote, or which excludes any class of stockholders from voting on such a question.

The new Section 49 applies to domestic corporations, but does not include those corporations where the intent of either the legislature<sup>8</sup> or of the corporation itself<sup>9</sup> is such that those who control the corporate existence have effectively prevented revival. A corporation which has been dissolved by the order, judgment or decree of any court, may, naturally, have no recourse to any revival statute.

The constitutionality of legislation involving corporate existence is based on a "contract theory" as first introduced into the field of corporation law by the decision in *Trustees of Dartmouth College v. Woodward*,<sup>10</sup> whereby any material change in the charter made without the consent of the parties constituted an impairment of the contract, and was, on that ground, held to be unconstitutional.<sup>11</sup> This led to a reservation by the states<sup>12</sup> of a sovereign power to amend and repeal corporate laws, and it is subject to this reservation that charters<sup>13</sup> are obtained. Therefore it may be assumed that a statutory revival provision will be held constitutional on the ground that it leaves intact the end and purposes of the corporation as declared in its original charter, with the sole effect of enlarging the time for its corporate existence.<sup>14</sup>

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<sup>7</sup> N. Y. STOCK CORP. LAW § 51, L. 1944, c. 591, § 2 (April 6, 1944). The new amendment reads: "Notwithstanding any of the provisions of this section, the consent or vote required for revival of corporate existence under section forty-nine of the general corporation law shall be governed solely by the provisions thereof."

<sup>8</sup> N. Y. GEN. CORP. LAW § 49, subd. 11. The provisions of this section shall not apply to corporations created by special law; nor to corporations incorporated under section fifty-nine of the education law. . . .

<sup>9</sup> *Id.* subd. 11. . . . nor to any corporation whose stockholders have passed a resolution for dissolution or liquidation; . . .

<sup>10</sup> *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629 (U. S. 1819).

<sup>11</sup> U. S. CONST. ART. I, § 10.

<sup>12</sup> *Cf.* 8 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (Perm. ed. 1932) § 3658; N. Y. CONST. ART. X, § 1; N. Y. GEN. CORP. LAW § 5 (L. 1895, c. 672, § 2).

<sup>13</sup> *Lord v. Equitable Life Assurance Soc.*, 194 N. Y. 212, 87 N. E. 443 (1909).

<sup>14</sup> *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am. Rep. 536 (1880), where an extension of a corporation, incorporated by special act of the State

With regard to dissenting stockholders' rights, although no provision<sup>15</sup> has been made in Section 49 for an appraisal of their stock, the legislature should consider their statutory protection in this regard rather than leave them mere equitable relief.<sup>16</sup> The present New York appraisal statutes<sup>17</sup> are not applicable to the new revival statute since they are enforceable only in specified types of corporate readjustment.

The present statute<sup>18</sup> provides that a corporation revived under it is "deemed to have had a continuous legal existence as a corporation, and all its acts are as valid as if the corporation never expired." This retroactive provision presents the question of the legal status of a corporation in the *interim* between the expiration of its charter and its revival. A corporation is, *per se*, capable of perpetual succession<sup>19</sup> until legally dissolved. However, the life of the corporation may be fixed and limited to a definite term by constitutional, statutory or charter provisions, and where it is so limited the corporation ceases to exist and is dissolved, *ipso facto*, at the expiration of the fixed term of its duration,<sup>20</sup> unless by statute such term is prolonged for the adjustment or closing of its business.<sup>21</sup> If the corporate charter is not so extended the corporation has no legal status either *de jure* or *de facto*.<sup>22</sup>

It seems clear that the legislative intent in the present revival statute is its application principally to those corporations which have

of New York, was held valid and within the "reserved power" as against a corporate subscriber claiming that such extension was a violation of his contract. The court held that such a change was not organic. *Hinkley v. Schwarzschild and Sultzberger Co.*, 107 App. Div. 470, 95 N. Y. Supp. 357 (1905).

<sup>15</sup> In approving the new section (L. 1944, c. 591, § 1) the Governor stated, in part: "There is still one safeguard which is lacking. Under the present bill a dissenting stockholder has no remedy in the event of a revival. He should be permitted to have an appraisal of his stock, and obtain the value thereof in a manner similar to the situation in which other dissenting stockholders find themselves in accordance with the provisions of section 21 of the N. Y. Stock Corporation Law . . . I do urge, . . . that at the next session of the Legislature, this additional remedy and safeguard be carefully considered, and the law amended appropriately."

<sup>16</sup> See Dodd, *Amendments to Corporate Charters* (1927) 75 U. OF PA. L. REV. 585, at 735.

<sup>17</sup> N. Y. STOCK CORP. LAW §§ 14, 20, 36, 38, 85, 86, 87 and 91.

<sup>18</sup> N. Y. GEN. CORP. LAW § 49, subd. 8.

<sup>19</sup> *Snell v. Chicago*, 133 Ill. 413, 428, 24 N. E. 532 (1890).

<sup>20</sup> *In re Friedman*, 177 App. Div. 755, 164 N. Y. Supp. 892 (1917).

<sup>21</sup> N. Y. GEN. CORP. LAW § 29; N. Y. STOCK CORP. LAW § 105, subd. 8.

<sup>22</sup> In *Meramec Spring Park Co. v. Gibson*, 268 Mo. 394, 188 S. W. 179 (1916), the court held that the view that a *de facto* corporation could be kept alive indefinitely by user and usurpation, apart from statutes, would render nugatory all organizational corporate law and would be tantamount to saying to the corporation, "Observe the law, become a *de jure* corporation, and die of old age in twenty years; refuse to follow the law, become a *de facto* corporation, and live forever." See annotation: POWER OF CORPORATION AFTER EXPIRATION OR FORFEITURE OF ITS CHARTER, 47 A. L. R. 1288, 1298.

continued to exercise corporate powers after their term of duration has expired. Under this statute a corporation which has so continued in business is deemed to have had a continuous legal existence as a corporation and all its acts are thereby validated. It would therefore seem that the so called revival provision is little more than an extension. There are authorities<sup>23</sup> which recognize a corporation as *de facto* if it continues in business after the expiration of its charter. There is no other legal basis on which to place the retroactive effect of Section 49 than on the theory of *de facto* existence after the expiration of the charter. In a New York case<sup>24</sup> where a corporation continued in business for three years after its alleged dissolution, it was estopped to set up its dissolution as a ground for dismissing an action against it for the performance of an executory contract to which it had become a party after its dissolution. The reason for the estoppel was based upon the ground that the other party, a private individual, was not chargeable with constructive notice of the expiration date of the corporate charter, and so was not in *pari delictu* with the corporation. It may be said that the better legal basis for the *nunc pro tunc* provision of the present revival statute seems to be the *de facto* doctrine. This doctrine should be employed as to permit flexibility in working out the real equities of contending parties, and, if possible, the rights of stockholders should be further protected by legislation.

There are already some sixteen other states<sup>25</sup> in which corporate revival statutes have proven successful without much litigation. This may be ascertained from the lack of reported decisions in this field.

JOHN E. PERRY.

#### AN ACTION FOR THE REMOVAL OF ENCROACHING STRUCTURES.—

An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify.

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<sup>23</sup> Brady v. Delaware Mut. Life Ins. Co., 2 Penne. 415, 45 Atl. 345 (Del. 1899); Bushnell v. Consolidated Ice Machine Co., 138 Ill. 67, 27 N. E. 596 (1891); Campbell v. Perth Amboy Mut. Loan, Homestead & Bldg. Ass'n, 76 N. J. Eq. 347, 74 Atl. 144 (1909). However, there is contrary authority which holds that after a corporation is dissolved by judicial decree, or by the expiration of the period fixed for its existence in the law under which it was organized, it is not even a *de facto* corporation. Clark v. American Coal Co., 165 Ind. 213, 73 N. E. 1083 (1905); Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. 891 (1896); Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622 (1916); Venable Bros. v. Southern Granite Co., 135 Ga. 508, 69 S. E. 822 (1910).

<sup>24</sup> Wilkins v. Siraal Realty Corp., 174 Misc. 1002, 21 N. Y. S. (2d) 1017 (1940).

<sup>25</sup> Report of the Law Revision Commission, LEGIS. DOC. NO. 65(I) (1943).