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Dead Or Revived? An Examination Of California Revivor Law’s Terminal Void In The Corporate Existence

Arthur F. Coon*

INTRODUCTION

California statutes have long provided for the suspension and revivor of the corporate powers of tax delinquent corporations. Generally, the corporate rights, powers and privileges of a domestic corporate taxpayer are suspended, and those of a foreign corporate taxpayer forfeited, for nonpayment of franchise and other taxes. A corporation may gain relief from suspension by paying back taxes with penalties and interest. Such reinstatement or “revivor” is, however, with certain exceptions with respect to contracts entered into during suspension, “without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.” By statute, certain corporate contracts,

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4. Id. §§ 23305a, 23304.1, 23304.5, 23305.1 (West 1992).

5. Id. § 23305a (West 1992); Damato, 214 Cal. App. 3d at 671, 674, 262 Cal. Rptr. at 880, 882. As shall appear, a fundamental judicial misunderstanding of the legislative history of this key language has created serious problems in the development of the law. See infra notes 40-44 and
including those made during suspension, are voidable by the other party to the contract (through rescission with full payment of restitution) if not "cured" by obtaining statutory relief from voidability.\(^6\) Aside from the provisions concerning contracts, California's suspension and revivor statutes provide unclear guidance about what corporate actions taken during suspension are retroactively validated by revivor.\(^7\)

The lack of clear guidance regarding when non-contractual interim acts will be retroactively validated by revivor has generated extensive litigation. The result has been a logically inconsistent body of case law lacking (1) practical guiding principles,\(^8\) (2) employs outmoded legal concepts and crude as well as unhelpful analogies,\(^9\) and (3) relies heavily on prevailing judicial perceptions accompanying text.


7. The 1991 legislative amendments to the statutes (see 1991 Cal. Legis. Serv., ch. 1052, at 4366-4572 (West)), while undoubtedly well intentioned, only compound the confusion because they fail to address the problem of retroactive validation in other than a piecemeal manner. After 1990 amendments (see 1990 Cal. Legis. Serv., ch. 926, at 3457-3463 (West)), for example, the statutes stated that, without limitation, the consequences of tax suspension included that "the taxpayer shall not be entitled to sell, transfer, or exchange real property in California. . . ." CAL. REV. & TAX. CODE § 23302(d) (West 1992). The 1991 amendments to section 23305.1, governing relief from contract voidability, expressly provided retroactive validation for unrescinded sales, transfers or exchanges upon relief, stating such transfers "shall be valid as if the taxpayer had not been subject to [the suspension] at the time of the sale, transfer, or exchange." Id. § 23305.1(c)(1)(B) (West 1992). This step in the right direction was counterbalanced by another amendment implying that revivor is not retroactive in effect by injecting the new concept of "restoration" where the Franchise Tax Board ("FTB") has acted in error in suspending a corporation. In such cases, the statute provides the FTB "shall, in connection with the revivor, indicate that the taxpayer is 'restored.' The status of the restored taxpayer shall be retroactive to the date of suspension or forfeiture as if there has been no suspension or forfeiture." Id. § 23305(c) (West 1992). Since this provision deals with relief from contractual voidability rather than the general effect of revivor, it raises the issue whether transfers not part of any contract (such as gifts) would be retroactively validated.

Corporate acts undertaken in the interim between suspension and revivor will be referred to herein at times as "interim acts," a useful shorthand phrase borrowed from the Corporate Charter Reinstatement annotation, supra note 1.

8. See infra text accompanying notes 37-115, 328-39 (addressing the development of and logical flaws in this inconsistent body of case law).

9. Courts have variously characterized a suspended corporation as "dead," "defunct," or "a corpse." See Damato, 214 Cal. App. 3d at 673, 262 Cal. Rptr. at 882 (citing Van Landingham v. United Tuna Packers, 189 Cal. 353, 370, 208 P. 973, 979 (1922). Courts have also characterized such corporations as being in a state of "suspended animation." See Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 397, 205 P. 446, 448 (1922). More modernly, courts have referred to
The basic purposes of the tax collection statutes and the prevailing "judicial attitude" toward suspended corporations. Under California case law, fully revived corporations that operated during suspension are plagued with uncertainty about the validity of numerous types of interim acts. Wasteful litigation by opportunistic third parties challenging virtually every such "offending" interim act is thus encouraged.

While the holdings of the reported California decisions usually validate the challenged interim acts and thus confirm the broad curative powers of revivor, their rationales for doing so are inconsistent, poorly-reasoned, ignore relevant legislative history, and perpetuate the use of unhelpful concepts, analogies, and principles. As a result, the law has no predictive value, and

A suspended corporation as "an unconscious person [capable of being] revived by artificial respiration." See Diverco Constructors, Inc. v. Wilstein, 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851, 855 (1970). It would seem more accurate and helpful to recognize that a suspended corporation performing interim acts is a de facto corporation lacking legal capacity. Such a corporation's actions are not void, but, as a matter of public policy, are not legally authorized. A suspended corporation's acts will not be recognized by the courts to confer any rights on the corporation until the acts are retroactively validated by revivor, which restores legal capacity. This analysis is very similar to the familiar doctrine of estoppel. It could well be said that a suspended corporation is estopped from asserting the validity of its interim acts until it regains through revivor its full legal status and capacity. See infra text accompanying notes 345-46 (suggesting estoppel analysis).

10. See infra text accompanying notes 45-46.

11. See Damato, 214 Cal. App. 3d at 672, 262 Cal. Rptr. at 881 (noting the "harsh attitude" of the Ransome-Crummey era, which viewed delinquent corporate taxpayers as "pariahs," has changed and that "the present judicial attitude is positively benign.").

12. Under present law, virtually all of a revived corporation's myriad types of interim acts are subject to at least a tenable legal challenge. As correctly noted by the high court of one of California's sister states:

The powers of a corporation are many--the power to sue and to be sued, the power to deed real estate; the power to carry on a business, et cetera. Furthermore, corporate activity consists of a flow of many acts, some beginning, some ending, and some in process at a given instant. A corporation hires, fires, manufactures, trades, sells, and engages in corporate activities until such time as the suspension is invoked.


13. See infra text accompanying notes 76-104 (discussing the various rationales employed by the courts to recognize the restorative effect of revivor).

14. California courts use three basic rationales to validate interim acts: (1) The challenge based on suspension is a disfavored "plea in abatement" which becomes an invalid objection if the corporation is revived before the hearing on the plea; (2) the revivor operates retroactively to validate merely "procedural" interim acts (while not curing "substantive" ones); and (3) suspension causes a corporate "incapacity" which only affects the corporation's power to proceed in a judicial forum, and not, for example, its ability to obtain and benefit from administrative decisions of bodies
encourages unnecessary litigation. Reform aimed at providing a measure of certainty is needed.

This Article (1) explores the development and status of the law concerning revivor's effect on the validity of interim acts in California (and, to a lesser extent, in other states), (2) criticizes the approach California courts have taken in this area, and (3) recommends legislation expressly providing that revivor retroactively validates all interim acts.15 A rule of retroactively-validating revivor would be desirable for several reasons. First, such a rule is consistent with the legislative history and prevailing judicial holdings in California. Second, retroactive validation is the majority and better view of the matter on a national scale. Finally, validation of all interim acts comports with basic fairness and the essentially non-punitive nature of the relevant tax collection statutes.16

Part I of the Article uses four brief hypotheticals to illustrate "real life" contexts in which serious suspension and revivor problems may arise.17 It then explores the development and present state of California case law.18 It reveals an early judicial misreading of legislative intent, followed by a nearly complete turnabout in the California Supreme Court's views on the purpose and effect of the relevant statutes within a fifty-year period and without the overruling of a single precedent or the enactment of a significantly different statute.19 It examines the Supreme Court's
unsatisfactory plea in abatement and substantive-versus-procedural act rationales, and also discusses the well-settled but logically inconsistent statute of limitations exception to the general rule retroactively validating interim acts in the litigation context. Finally, it reviews the few California opinions which address (with wildly divergent rationales) the effect of corporate suspension and revivor in the troublesome non-contract, non-litigation context.

Part II of the Article examines leading out-of-state authorities in the corporate suspension and revivor area in search of trends, helpful insights, and possible solutions to the problems caused by California’s unclear law.

393, 396, 205 P. 446, 447 (1922)). The Court of Appeal in Damato v. Slevin, 214 Cal. App. 3d 668, 672, 262 Cal. Rptr. 879, 881 (1989), struggled to discern a gradual relaxation of "the Legislature's hostility" toward suspended corporations by focusing on certain language of supposedly stricter predecessor suspension statutes in an attempt to partially explain this almost complete reversal in the law. Damato, 241 Cal. App. 3d at 672 n.8, 262 Cal. Rptr. at 881 n.8. But in reality, the substitution of "may" for "shall" in the operative statutory language with respect to actual suspension is of little import in light of the Franchise Tax Board’s mandatory duty to effectuate the suspension. See CAL. REV. & TAX. CODE § 23302 (West 1992). The apparent scope of suspension has actually been broadened in the modern statutes by the deletion of a suspended corporation’s right to defend itself in court. Compare former 1917 CAL. STAT. ch. 214, sec. 26, at 358-361 (enacting CAL. PENAL CODE § 366910 with CAL. REV. & TAX. CODE § 23301 (West 1992). It would also seem that the former language specifying that a suspended corporation’s powers were "incapable of being exercised for any purpose or in any manner," while stronger in tone than the word "suspended" standing alone in the modern statutes, was probably simply deleted as being logically redundant and not intended to speak at all to the issue of revivor’s effect. Moreover, the Legislature has more recently expressly pointed out in greater detail certain acts suspended corporations are not entitled to perform. See supra note 7 (discussing specific acts prohibited while a corporation is suspended). But see id. (noting that recent legislation, as a result of its failure to deal with the problem of retroactive validation in a comprehensive manner, has only compounded the uncertainty). Nevertheless, the Damato court’s gallant attempt to make some sense of the developing law is admirable. The more likely explanation of the modern trend lies in the probable recognition by the courts that the seminal doctrine of Ransome-Crummey was erroneous, poorly reasoned, and not in keeping with the Legislature’s intention either when written or today. See infra notes 50-75 and accompanying text (discussing the Ransome-Crummey decision).

20. See infra notes 76-115, 134-55, 163-73 and accompanying text. As shall appear, the great majority of the cases not dealing with the effect of revivor on interim contracts (which is addressed in detail by statute) deal with its effect on steps taken by a corporation in pending litigation. With the exception of the filing of complaints by a corporation not revived until after expiration of the statute of limitations, litigation acts are routinely labelled by the courts as procedural, and are held to be retroactively validated by a revivor.

21. See infra notes 116-47 and accompanying text.

22. See infra notes 177-327 and accompanying text.
Part III of the Article, guided by the earlier analyses, recommends curative legislation, or at the very least a cogent judicial interpretation based on the doctrine of estoppel, to address and eliminate the problems earlier identified. The object of the suggested legislative reform is to (1) correct, simplify and clarify the law in this area, (2) to eliminate its useless and confusing analytical framework, (3) to affirm and strengthen the trend toward giving revivor a completely retroactive effect as to all interim corporate acts, and (4) to provide much-needed certainty that would reduce litigation.

I. ANALYSIS OF CALIFORNIA LAW REGARDING CORPORATE SUSPENSION AND THE RETROACTIVE EFFECT OF A REVIVOR

A. Hypotheticals

The problems created by a revived corporation’s inability to rely on the validity of its interim acts can be quite serious. Far from being merely matters of academic interest, these problems can prove financially devastating to the unfortunate corporation. The following four hypothetical fact patterns illustrate the nature of the retroactive validity problem in the particularly troublesome area involving interim acts which do not involve contracting or steps taken in litigation.

23. See infra notes 328-48 and accompanying text.
24. See, e.g., Benton v. County of Napa, 226 Cal. App. 3d 1485, 277 Cal. Rptr. 541 (1991) [Benton II] (challenging validity of use permit and related construction permits to build a 450,000-gallon per year winery on a 856 acre parcel based on corporation’s tax suspension during administrative approval of use permit extension); Benton v. County of Napa, 226 Cal. App. 3d 1467, 1473, 277 Cal. Rptr. 481 (1991) [Benton I] (providing facts regarding extent of project size); Sado Shoe Co. v. Oschin & Snyder, 217 Cal. App. 3d 1509, 266 Cal. Rptr. 619 (1990) (loss of revived corporation’s right to continue lawsuit for interference with prospective business advantage and interference with contractual relations based on running of statute of limitations due to nonpayment of $90.85 in penalties and interest).
1992 / An Examination Of California Revivor Law

1. Hypothetical Number One

Assume Corporation A holds mining claims in land situated in a sparsely-populated northern California county. Unbeknownst to Corporation A, its corporate powers have been suspended under Revenue and Taxation Code section 23301 for inadvertently failing to pay its franchise taxes. During the period of suspension, Corporation A’s employees performed legally-required annual labor necessary to maintain its mining claims and prevent their relocation.


26. Despite the Legislature’s efforts in recent years to protect the rights of taxpayer, it was unclear until 1991 whether a corporate taxpayer was entitled to notice before a section 23301 suspension became effective. Section 21020, enacted as part of 1988 legislation now known as the “Taxpayers’ Bill of Rights,” provides in pertinent part that:

[A] taxpayer shall not be suspended pursuant to Section 23301, 23301.5, or 23775 unless the board has mailed a notice preliminary to suspension which indicates that the taxpayer will be suspended by a date certain pursuant to section 23301, 23301.5, or 23775, as the case may be. The notice preliminary to suspension shall be mailed to the taxpayer at least 60 days before the date certain.

CAL. REV. & TAX. CODE § 21020 (West Supp. 1992). Section 23302, as later revised by 1990 amendments (1990 Cal. Stat. ch. 926, § 5, at 3), however, casted doubt upon this “right” by providing in pertinent part:

(a) Forfeiture or suspension of a taxpayer’s powers, rights and privileges pursuant to Section 23301, 23301.5, 23571, or 23775 shall occur and become effective only as expressly provided in this section.

(b) The notice requirements of Section 21020 shall apply to any suspension of a taxpayer’s corporate powers, rights, and privileges pursuant to Section 23571, and to any forfeiture of a taxpayer’s corporate powers, rights, and privileges pursuant to Section 23301, 23301.5, 23571, or 23775.

CAL. REV. & TAX. CODE §§ 23302(a)-(b) (West 1992) (emphasis added). While subdivision (b) may have simply been a poorly drafted attempt to augment the notice requirement, former section 23302’s failure to expressly provide, in subdivision (b), that the notice requirements of section 21020 applied to section 23301 and 23301.5 suspensions could, in light of the emphasized language in subdivision (a), have been construed to abrogate those rights entirely, a seemingly unintended and unfair result. Happily, these problems were addressed by 1991 amendments to section 23302, which now provides that suspension “shall occur and become effective only as expressly provided in this section in conjunction with section 21020, which requires notice prior to the suspension of a taxpayer’s corporate powers, rights and privileges.” Id. § 23302(a) (West 1992). In any event, given the ever-present potential for bureaucratic errors and the maze-like nature and complexity of the statutory scheme at issue, it is still not difficult to conceive of corporations commonly—and for totally innocent reasons— inadvertently failing to pay their taxes.
by a competitor's labor. Unfortunately, a claim jumper who has also worked the mines has discovered the suspension. The claim jumper contends Corporation A's acts of annual labor were invalid.

27. See CAL. PUB. RES. CODE § 3912 (West Supp. 1992) ("The amount of work done on improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, which is one hundred dollars ($100) annually.") Mining claims which have lapsed, or been abandoned or forfeited for failure to perform the required annual labor, may be relocated by another party in the same manner as an original location is required to be made. Id. § 3903 (West Supp. 1992); cf. Thornton v. Phelan, 65 Cal. App. 480, 484, 224 P. 259, 260 (1924); see Depuy v. Williams, 26 Cal. 309 (1864) (failure to perform legally-required work on mining claim amounts to abandonment and subjects claim to occupation by another). The Thornton court affirmed a trial court's judgment for respondent in a quiet title action between competing parties claiming to have relocated a mining claim abandoned by a corporation (the Santa Ana Mining Company). Thornton, 65 Cal. App. at 484, 224 P. at 260. The Corporation's rights to do business in the State of California had previously been forfeited in February 1915 for failure to pay corporation taxes, as a result of which forfeiture the corporation's directors had become its trustees. Id. at 482-83, 224 P. at 260. Appellant claimed to have relocated the claims on January 1, 1917, based on his contentions that as of that date the claims were subject to relocation because (1) the Santa Ana Mining Company had abandoned its claims prior to 1916, and (2) that as a factual matter, no required labor for its use or benefit was performed thereon. Id. Respondent claimed that required labor was performed for the corporation's benefit in 1916 and that, as a result, appellant's purported 1917 relocation was invalid and that respondent held title to the claim as a result of its April 10, 1920 relocation. Id. The court of appeal rejected appellant's testimonial evidence as insufficient and conclusory on the issue of the corporation's intent to abandon. Id. at 483, 224 P. at 260. While affirming the trial court's judgment for respondent based on the performance of the 1916 labor "done for the uses and purposes of the Santa Ana Mining Company," the court avoided squarely addressing the issue whether acts by the corporation itself following forfeiture would have been invalid:

The court having found that the annual assessment work for the year 1916 was done for the uses and purposes of the Santa Ana Mining Company, it is immaterial whether the cost of said work was or was not paid by the Santa Ana Mining Company. This court has held in the case of Anderson v. Caughey, 3 Cal. App. 22 (1906), that if the work is done to the amount required by law, the effect thereof would be the same, even though the labor has been gratuitous. Id. at 485, 224 P. at 261 (emphasis added). Perhaps appellant's failure to better articulate its forfeiture argument explains the Thornton court's complete failure to analyze how a corporation, which had forfeited its right to do business, could hold a mining claim or receive the benefit of a third party's gratuitous annual labor thereon. The trial court's alternative findings "that the [1916] assessment work had been done by the Santa Ana Mining Company or for its benefit," were supported by the fact that under the scheme at issue "the directors of said company [upon forfeiture] became the trustees of said corporation." Id. at 482, 224 P. at 260 (emphasis added). Although some uncertainty is caused by the Thornton court's failure to focus on the issue of forfeiture's effect on corporate acts or powers (or even to cite the forfeiture statute involved), it appears that the corporation's property rights in the mining claims in that case were held in trust for it by its directors (rather than extinguished) and were subject to the corporation's potential rehabilitation or revivor effecting a recovery of such rights. See generally Rossi v. Caire, 186 Cal. 544, 547-52, 199 P. 1042, 1044-46 (1921) (discussing rights and procedures under apparently analogous statutory scheme concerning corporate license tax forfeiture and rehabilitation).
and that he has obtained, through his own labor, intervening ownership rights to the mining claims. Corporation A immediately pays its back taxes with interest and penalties, and obtains a certificate of revivor. Nevertheless, the claim jumper insists the acts of labor performed by the suspended corporation cannot be retroactively validated, and that the "rights" which "accrued" to him by reason of the suspension cannot be prejudiced by revivor. Is he right?

2. Hypothetical Number Two

Suppose Corporation B holds a valuable patent, trademark, or some other intellectual property right which is being violated or infringed by a competitor. Assume Corporation B brings suit for infringement or to cancel its competitor's invalid registration, and that the competitor then discovers Corporation B was suspended for tax delinquency during a period in which the appropriation accrued. Assuming Corporation B was promptly and fully revived, is the competitor correct in asserting that the corporation's temporary suspension resulted in an abandonment such that he can fully (and perhaps exclusively) use the mark, patent or other right without legal violation?

28. Generally, patents are governed by federal law. Issuance of a patent gives the patentee and her heirs or assigns the exclusive right to make, use or sell the patented invention in the United States, upon payment of fees, for a term of 17 years. 35 U.S.C. § 154 (1988).

29. See Educational Dev. Corp. v. Economy Co., 562 F.2d 26, 28 (10th Cir. 1977) ("A trademark is a distinctive mark, symbol or emblem used by a producer or manufacturer to distinguish his goods from those of others."). For procedures concerning federal registration of trademarks, see 15 U.S.C. §§ 1051-1127 (1988). Such registration is prima facie evidence of the validity of the registered mark and its registration, and of the registrant's ownership of and exclusive right to use the mark in commerce or in connection with the goods or services as specified in the registration. 15 U.S.C. § 1115(a) (1991).

30. See, e.g., Stock Pot Restaurant, Inc. v. Stockpot, Inc., 737 F.2d 1576 (Fed. Cir. 1984); infra notes 182-87 and accompanying text (discussing the Stock Pot case).
3. Hypothetical Number Three

Assume that Corporation C is a corporate real estate broker under whom several licensed salesmen are employed. Corporation C's corporate powers are suspended for inadvertent failure to pay franchise taxes, and during the suspension its broker's license is renewed and several real estate purchase contracts are "brokered" by its agents. During the suspension, Corporation C advertised the relevant properties through its agents, listed them on the Multiple Listing Service, and otherwise acted as broker. A commission dispute develops between Corporation C and one of the sellers, and the seller discovers the corporate suspension. The seller avoids arguing that the commission agreement is void or voidable under California Revenue and Taxation Code sections 23304.1 and 23304.5, to avoid giving Corporation C the chance to cure the contract and collect its substantial commission. Instead, the seller argues that the contract is unenforceable against it because Corporation C was not validly licensed when the contract was made or when the buyer was produced because of its suspension at the time of license.

31. See Cal. Bus. & Prof. Code § 10130 (West 1987). Section 10130 states that it is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a license. Id. A corporation is a "person" within the meaning of the broker's licensing law. See Estate of Baldwin, 34 Cal. App. 3d 596, 604, 110 Cal. Rptr. 189, 194 (1973). A real estate agent, or salesman, "is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts [specified in provisions of the Real Estate regulations as defining activities of real estate brokers]." Cal. Bus. & Prof. Code § 10132 (West 1987). "No real estate salesman shall be employed by or accept compensation from any person other than the broker under whom he is at the time licensed." Id. § 10137 (West 1987); see Grand v. Griesinger, 160 Cal. App. 2d 397, 405, 325 P.2d. 475, 480 (1958) (real estate salesman cannot contract in own name or accept compensation other than from broker under whom he is licensed; entire statutory scheme requires broker to actively conduct his brokerage business and supervise salesmen).

32. See Cal. Civ. Code § 1087 (West Supp. 1992). Section 1087 provides that "[a] multiple listing service is a facility of cooperation of agents, operating through an intermediary which does not itself act as an agent, through which agents establish express or implied legal relationships with respect to listed properties . . . ." Id.
Although Corporation C hastily becomes revived through payment of back taxes with interest and penalties, the seller insists Corporation C is entitled to no commission from its "unlicensed" brokerage efforts effecting the sale. Who wins?

4. Hypothetical Number Four

Assume Corporation D is a corporate developer planning a large condominium/golf course project on a tract of desert land it owns in Southern California. Corporation D faces fierce opposition from Save Our Rattlesnakes Eternally (SORE), a group of wealthy neighboring desert dwellers vehemently opposed to the project. SORE brings a lawsuit attacking the adequacy of the county's environmental review of the project. While Corporation D is busy defending this lawsuit as the real party in interest and obtaining the necessary development approvals and permits to proceed with the project, it unknowingly becomes suspended under California Revenue and Taxation Code section 23301 for inadvertently failing to pay franchise taxes.

After a full trial, in which SORE has challenged the validity of all necessary permits and governmental approvals for the project as issued without an adequate environmental impact report, SORE

33. See CAL. BUS. & PROF. CODE § 10136 (West 1987) (providing that "no person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging or proving that he was a duly license real estate broker or real estate salesman at the time the alleged cause of action arose"); see also Consul Ltd. v. Solide Enter., Inc., 802 F.2d 1143, 1149 (9th Cir. 1986) (neither unlicensed corporation nor its president could enforce agreement which contemplated corporation to perform brokerage services).

34. See CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1992) (California Environmental Quality Act or CEQA). In general, and "[w]ith narrow exceptions, CEQA requires an EIR [Environmental Impact Report] whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." Laurel Heights Improvement Ass'n v. Regents of Univ. of California, 47 Cal. 3d 376, 390, 764 P.2d 278, 281, 253 Cal. Rptr. 426, 429-30 (1988). When the lead public agency proposing to approve or carry out a project properly determines it will not have such a significant effect on the environment, it need not prepare an EIR, but may issue a negative declaration to that effect. See CAL. PUB. RES. CODE § 21080(c) (West 1986).
discovers Corporation D’s suspension.\(^3\)\(^5\) Bringing it to the court’s (and the surprised Corporation’s) attention for the first time, SORE argues that every single permit and approval issued to Corporation D during the suspension, as well as every step undertaken by Corporation D during the environmental litigation, is null and void, and that judgment must issue in favor of its members.

Even though Corporation D hastily pays its back taxes, with all interest and penalties, and obtains a certificate of revivor, SORE continues to argue that the damage is done and that the relevant permits, approvals, and court appearances cannot be retroactively validated by the revivor. Assuming it is now too late for the Corporation to reapply for the permits and approvals under local law, or that new zoning or political conditions preclude them from being granted anew, the Corporation’s entire project and millions of dollars in development costs are at stake because of its inadvertent (and now completely remedied) failure to timely pay its taxes. Assuming the county has complied with CEQA,\(^3\)\(^6\) will Corporation D be able to build its project?

* * *

Unfortunately for suspended corporations, there are no clear answers under California law to the questions posed. Many substantial rights of revived corporations in good standing and acting in good faith are imperiled under present law solely as a result of seemingly insignificant and quickly remedied tax payment lapses. The issues raised by the hypotheticals above are too serious

\(^3\)\(^5\) The scenario and issues posed by this hypothetical are similar, though in a crucial respect not identical to, those presented in *Benton I*, 226 Cal. App. 3d 1467, 277 Cal. Rptr. 481 (1991), and *Benton II*, 226 Cal. App. 3d 1485, 277 Cal. Rptr. 541 (1991). See supra note 24 (discussing *Benton I* and *Benton II*). While *Benton II* (under current California doctrine) recognized retroactive validation of a winery use permit extension as a “procedural act” without reaching the fundamental question whether a corporation’s incapacity from suspension had any effect outside the judicial arena in the first instance, it did not purport to decide whether the initial granting of a permit during suspension would have been retroactively validated as a merely “procedural act.” Indeed (and unfortunately), its reasoning invites further litigation to resolve that particular issue, which is raised by Hypothetical Number 4.

and important to leave to the muddled and unhelpful existing case law for resolution. Keeping these hypotheticals in mind, the next section analyzes the development and present status of California law concerning revivor's effect on the validity of interim acts.

B. Development and Present State of California Suspension and Revivor Law

1. Statutory Provisions Governing Suspension and Revivor

As previously noted, California Revenue and Taxation Code section 23301 provides that, except for the ability to (1) apply for exempt status or (2) amend articles of incorporation to perfect such application or change a corporate name, the corporate rights, powers, and privileges of a domestic taxpayer may be suspended, and those of a foreign taxpayer forfeited, for nonpayment of franchise and other taxes. The suspension is mandatory in nature, but not self-executing, since it may become effective only when the Franchise Tax Board transmits the delinquent corporation's name to the Secretary of State.

A corporation can gain relief from suspension by obtaining a certificate of revivor and paying taxes owed with penalties and

37. See CAL. REV. & TAX. CODE § 23301 (West 1992) (except for filing an application for tax exempt status or amending articles of incorporation to perfect an application or change the corporate name, the corporate powers of a domestic taxpayer may be suspended, and those of a foreign taxpayer forfeited, for specified delinquencies in the payment of any tax, penalty or interest); CAL. CORP. CODE §§ 1502, 2117, 2205, 2206 (West 1990) (similar suspension and forfeiture of corporate rights for failure to file with Secretary of State required annual statements setting forth general corporate information and designating in-state agent for service); CAL. REV. & TAX. CODE § 23301.5 (West 1992) (similar suspension and forfeiture of corporate rights for failure to file tax return); id. §§ 23772, 23774, 23775 (West 1992) (similar suspension and forfeiture for tax-exempt corporations for failure to file required annual information returns or statements).

interest. The reinstatement is, however, "without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture[.]" Modern courts have wholly ignored the origins of this language as a "savings clause" intended to validate interim acts, despite the fact that substantially identical language first appeared in early statutes governing the penalty of charter forfeiture whereby a corporation "died" and its directors,

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39. See Cal. Rev. & Tax. Code §§ 23305, 23305a, 23305b, 23305c (West 1992). Section 23305 provides that taxpayers suffering the suspension or forfeiture prescribed by section 23301 or 23301.5 may be relieved upon written application by an interested party to the Franchise Tax Board [FTB], payment of all taxes, penalties, interest or other obligation owing, and the FTB's issuance of a certificate of revivor. Id. § 23305 (West 1992). Section 23305a provides in pertinent part:

Upon the issuance of the certificate [of revivor] by the [FTB] the taxpayer therein named shall become reinstated but the reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture, except that contracts which were voidable pursuant to section 23304.1, but which have not been rescinded pursuant to section 23304.5, may have that voidability cured in accordance with section 23305a and 23305b (West 1992). Section 23305b gives the FTB discretion to revive a corporation to good standing, either partially or totally and with conditions, without full payment of taxes, penalties and interest if it determines the revivor will enhance its tax collection prospects. Id. § 23305b (West 1992). Section 23305c, among other things, requires the FTB to transmit to the Secretary of State the revived taxpayer's name and corporate number and makes this information and the fact and date of revivor a matter of public record. Id. § 23305c (West 1992).

40. Id. § 23305a (West 1992). The quoted language is derived from 1929 legislation, but the original appearance of similar language in California revivor statutes appears to have been in 1909. See 1909 Cal. Stat. ch. 297, sec. 6, at 455 ("provided, the rehabilitation of a corporation under the provisions of this act [the corporate license tax act] shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture . . ."). This language was carried over in further 1911 and 1913 amendments to the original 1905 License Tax Act, and was thereafter repealed with the rest of the Act, but was reenacted in the subsequent repealing statutes. See Rossi v. Caire, 186 Cal. 544, 546-47, 199 P. 1042, 1044 (1921) (tracing history of legislation and amendments); see also 1913 Cal. Stat. ch. 336, sec. 1, at 680-681. The effect and intent of the 1913 statutes containing this language, and the intended effect of the language itself, was discussed in Rossi, 186 Cal. at 551-52, 199 P. at 1046; see id. (indicating that "crudely drawn" amendments containing key "without prejudice, etc." language "contemplated that the rehabilitated corporation should proceed exactly as if no forfeiture had occurred" and that "whole intended scope" of key language "undoubtedly was to save such actions, defenses and rights as had accrued in the management of the affairs of the former corporation by the trustees . . ."). According to Rossi's reasoning, the Legislature's concern in including the key language was to ensure that rights accruing to and against trustees acting for a corporation whose charter had been forfeited would not be lost when the corporation became rehabilitated. Id. Such a "savings clause" was apparently not originally intended to confer new and additional rights on third parties to object to interim acts because of a forfeiture, but to preserve rights accruing as a result of management by the trustees of the "dead" corporation's affairs. Id.
1992 / An Examination Of California Revivor Law

as trustees, succeeded to its powers, rights, and property.41 Instead, the courts have almost universally attempted to attribute an opposite and antagonistic meaning to this language on the erroneous assumption that it must refer to special rights conferred on third parties to nullify "corporate" action because it was taken during forfeiture or suspension.42 The Legislature unfortunately appears content to acquiesce in the confused state of the case law, and has provided no clear guidance as to the effect of revivor on interim acts.43 By statute, contracts entered by a corporation

41. See supra note 40; see also infra notes 44, 53, 59-75 and accompanying text (discussing origins of "without prejudice, etc." language in statutes arguably intended to validate interim acts).

42. See, e.g., Schwartz v. Magyar House, Inc., 168 Cal. App. 2d 182, 190, 335 P.2d 487, 492 (1959) ("Although no reported case has, as yet, construed the language quoted above, it would appear to have application, for instance, to a situation where a contract made by the corporation is voidable because entered into while the corporation's powers, rights and privileges were suspended [citation], and the fact of reinstatement does not deprive the other party of the right to avoid the contract."); Ransome-Crummey Co. v. Superior Court, 188 Cal. 383, 205 P. 446 (1922) (invalidating new trial motion); Cleveland v. Gore Bros., 14 Cal. App. 2d 681, 58 P.2d 931 (1936) (invalidating complaint); Belle Vista Inv. Co. v. Hassen, 227 Cal. App. 2d 837 39 Cal. Rptr. 184 (1964), disapproved by Traub Co. v. Coffee Break Service, Inc., 66 Cal. 2d 368, 372, 425 P.2d 790, 792, 57 Cal. Rptr. 846, 848 (1967) (invalidating judgment); Smith v. Lewis, 211 Cal. 294, 295 P. 37 (1930) (invalidating judgment); Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp., 155 Cal. App. 2d 649 (1957) (invalidating defense); Sade Shoe Co. v. Oschin & Snyder, 217 Cal. App. 2d 619 (1990) (invalidating judgment).

43. The 1991 amendments to section 23305 added subdivision (c) thereto providing that where the FTB has determined a suspension or forfeiture to have been in error, the FTB shall indicate in connection with the revivor that the taxpayer has been "restored." See CAL. REV. & TAX. CODE § 23305c (West 1992). The statute further provides: "The status of the restored taxpayer shall be retroactive to the date of suspension or forfeiture as if there had been no suspension or forfeiture." Id. The legislature thus, though probably unintentionally, implies there may be a distinction between "restoration," which retroactively validates the interim acts of a corporate victim of the FTB's mistake, and "revivor." The substance of such an important and critical distinction is the very focus of this article, and should not be left to chance or guesswork. But see CAL. REV. & TAX. CODE § 23305.1(c)(2)(B) (West 1992) (retroactively validating certain interim real property transfers).

The signals from the Legislature regarding the intended effect of revivor on interim acts have been unclear, to say the least. In the early case of Rossi v. Caire, the court stated: "[T]here is clear that it was contemplated [by the Legislature] that the rehabilitated corporation [previously dissolved under license tax law charter forfeiture] should proceed exactly as if no forfeiture had occurred, with all its former powers owning all the property remaining in the hands of the trustees, subject, of course, to all obligations lawfully incurred by the trustees during the corporation's lapse of life." Rossi v. Caire, 186 Cal. 544, 551, 199 P. 1042, 1046 (1921) (emphasis added). The Rossi court further noted that the "crudely drawn" legislative amendments to the statutes at issue, including a provision that the rehabilitation of a corporation whose charter was forfeited for failure to pay license tax "shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture," were not intended to refer to a stockholder's purported "right" to prevent rehabilitation in order to obtain distribution of corporate property held by the directors as statutory trustees in
during suspension are not void, but (if not cured) are voidable at the other party's instance by obtaining recessionary relief from a proper tribunal.\textsuperscript{44}

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\textit{Pacific Law Journal / Vol. 24}
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liquidation; rather, "the whole intended scope thereof undoubtedly was to save such actions, defenses and rights as had accrued in the management of the affairs of the former corporation by the trustee for the benefit of the former stockholders." Id. (emphasis added). But see Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 396-98, 205 P. 446, 447-48 (1922) (citing Rossi in acknowledging change in the statutory penalty for corporation's nonpayment of franchise and license taxes from charter forfeiture, which was characterized by Rossi as "absolute death," to "only a suspension of its rights, powers, and privileges, with a provision for revivor," which Rossi characterized as "suspended animation"). \textit{Ransome-Crummey} nevertheless ignored Rossi's statements regarding rehabilitation and concluded that a suspended corporation's interim acts, "save those expressly reserved by the statutes," were void. Id.

The irony of these seminal cases is the supreme court's questionable conclusion that revival of a merely \textit{suspended} corporation did \textit{not} validate its interim acts, while revival of a \textit{moribund} corporation (which had "risen from the dead") \textit{did} validate its interim acts. \textit{The Ransome-Crummey} court's discussion of the effects of revivor and suspension were not only contrary to the more thoughtful analysis of the matter in Rossi's dicta, but were unsupported by citation to any case law or demonstration of legislative intent, except for the observation that the statutes did not expressly make revivor retroactive and did make an individual's performance of interim acts for a suspended corporation a misdemeanor, a criminal provision supposedly evidencing the Legislature's intent to withhold retroactive validation of interim acts as a "penalty" for tax delinquency. \textit{Id.} at 398, 205 P. at 448.

Three significant Legislative amendments to the Corporate franchise tax laws followed \textit{Ransome-Crummey}: (1) Interim contracts were made merely \textit{voidable} rather than \textit{void}; (2) the following phrase was added to the revivor statute section which was the first predecessor of modern California Revenue and Taxation code section 23305a: "The revivor shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture," and (3) the "without prejudice" language was extended to revivor of subsequently suspended corporations. \textit{Compare} 1929 Cal. Stat. ch. 13, sec. 32, at 33 with 1917 Cal. Stat. ch. 214, sec. 26, at 360 (interim contracts made voidable); \textit{see} 1929 Cal. Stat. ch. 13, sec. 33, at 33 (addition of "without prejudice" language); \textit{see also} Historical Notes to Cal. Rev. & Tax. Code §§ 23305, 23305a (West 1992) (derivation); 1929 Cal. Stat. ch. 13, sec. 33, at 33 (extension of "without prejudice" language to subsequently suspended corporations). This is some evidence of the Legislature's subsequent rejection of \textit{Ransome-Crummey}'s view that revivor did not retroactively validate interim acts in favor of Rossi's contrary view. Unfortunately, \textit{Ransome-Crummey} became a leading case which would shape the law for decades to come, and which, having not yet been overruled, continues to exert a deleterious influence. The Legislature, also unfortunately, no longer seems to understand the origins of its statutes and does not seem to appreciate the magnitude of the "retroactive validation" problem.

2. Legislative Purpose

One logical way to determine the intended scope of revivor is to examine the intended purpose of suspension. The California Supreme Court, in an opinion which can be read as an endorsement of broad retroactive validation following revivor, has "held that the purpose of section 23301 . . . is to put pressure on the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation's tax delinquencies, after correction, as mere irregularities . . . ." The court further stated that "there is little purpose in imposing additional penalties after the taxes have been paid." This rather benign view of the Legislature's intent, however, was reached only after a long and painful evolution of the case law following the supreme court's earlier and contrary view of the statutes as punitive in nature, articulated in the case of *Ransome-Crummey Co. v. Superior Court.* Since the supreme court has thus far been unwilling to expressly overrule the flawed

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In substantial 1990 revisions to the suspension and revivor statutes the California legislature repealed former section 23304 ("Every contract made in violation of this article is hereby declared to be voidable, at the instance of any party other than the taxpayer.") and replaced it with section 23304.1, which expressly enlarges its scope to include certain contracts made during periods of corporate suspension, forfeiture or default under additional provisions of the Revenue and Taxation Code. See generally 1990 Cal. Stat. ch. 926, sec. 7, at 4.; see also Gardiner, 232 Cal. App. 3d at 1543 n.2, 284 Cal. Rptr. at 209 n.2. Section 23304.5 apparently adopts and refines a holding of *White Dragon,* 196 Cal. App. 3d at 670-72, 242 Cal. Rptr. at 85-86, by declaring that rights to void such contracts may only be exercised in judicial proceedings culminating in a final judgment expressly addressing the issue and, even then, only after the taxpayer corporation has been allowed a reasonable opportunity to cure the voidability defect by complying with section 23305.1. CAL. REV. & TAX. CODE § 23304.5 (West 1992). Section 23304.5 further specifies rescission as the exclusive remedy if a court finds a contract voidable under section 23304.1, and rescission may not be granted unless the taxpayer receives full restitution of benefits provided under the contract. Id. Section 23305.1 is a new section setting forth the conditions and requirements of obtaining from the FTB a "certificate of relief from voidability." Id. § 23305.1 (West 1992). See also *Damato,* 214 Cal. App. 3d at 671-72, 262 Cal. Rptr. at 880.


47. 188 Cal. 393, 205 P. 446 (1922); see infra text accompanying notes 50-75 (discussing the *Ransome-Crummey* decision).
Ransome-Crummey decision containing its earlier view, the case law has evolved in inconsistent and confusing fashion, and has encouraged excessive litigation of positions clearly contrary to the modernly recognized legislative purpose.

In short, the tension between (1) the modern judicial desire to temper the perceived harshness of section 23301 as to ultimately complying corporations, and (2) the much misunderstood legislative directive of section 23305a that revivor "shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture," has resulted in case law and legislation which incorrectly assume the existence of, yet severely restrict the scope of, third party "rights" to invalidate interim acts. The case law thus operates from the flawed premise that, despite the Legislature's general intention not to further penalize tax delinquent corporations following revivor, there still exist unspecified "actions, rights or defenses" which enable third parties to challenge the validity of such interim acts simply because they happened while the corporation was suspended.

Having developed from irreconcilable assumptions, the case law makes it very difficult to predict whether particular interim corporate acts (such as those in this Article's four hypotheticals) will be retroactively validated by revivor.\footnote{Despite the extensive 1990 and 1991 legislative revisions of the relevant suspension and revivor statutes, primarily in the area of contracts, the relevant language concerning suspension and revivor outside the contract context has not significantly changed. See, e.g., CAL. REV. & TAX. CODE § 23305a (West 1992). Thus, judicial decisions under the predecessor versions of these statutes still accurately reflect the law in this area. Most California decisions deal with the effect of revivor on interim acts undertaken by a corporation as steps in a pending lawsuit.} Though the trend in California (to the extent one is discernible) appears to be a salutary one toward broad validation of interim acts regardless of the context in which they occur, neither the language nor the holdings of the cases are explicit, and the principles employed are too abstract to provide anything but vague and uncertain guidelines for new fact situations.\footnote{See, e.g., Peacock Hill Ass'n, 8 Cal. 3d at 373, 503 P.2d at 287, 105 Cal. Rptr. at 31, ("matters occurring prior to judgment [and after]" validated by revivor); Welco Constr., Inc. v. Modulux, Inc., 47 Cal. App. 3d 69, 73, 120 Cal. Rptr. 572, 575 (1975) ("Procedural acts in the prosecution or defense of a lawsuit may be validated retroactively by the corporate revival.");} At best, the precedents encourage needless
1992 / An Examination Of California Revivor Law

litigation. At worst, they actually threaten a judicial relapse into a regressive and unsupported view which would destroy revivor’s beneficial curative effects, and place California out of step with the better trends of judicial and legislative development in this area. A review of some of the leading California cases illustrates the development of this confused area of law.

3. Leading Cases

The seminal case holding interim acts of a corporation suspended for nonpayment of taxes to be absolutely void, even following revivor, is Ransome-Crummey Co. v. Superior Court.\(^{50}\) In Ransome-Crummey, the plaintiff corporation sought to foreclose an assessment lien on the defendant’s property. After judgment for the defendant, but before notice of the judgment was served, the plaintiff’s corporate powers were suspended for nonpayment of license and franchise taxes.\(^{51}\) The plaintiff then gave notice of its intention to move for a new trial and so moved. The defendant called the plaintiff’s suspension to the court’s attention. Despite the plaintiff’s subsequent reinstatement only a day after the new trial motion, the trial court dismissed the plaintiff’s motion.\(^{52}\)

Denying the plaintiff’s request for a writ of mandate directing the trial court to accept jurisdiction of the new trial motion, the California Supreme Court, interpreting suspension and revivor

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Rooney v. Vermont Inv. Corp., 10 Cal. 3d 351, 359, 515 P.2d 297, 302, 110 Cal. Rptr. 353, 358 (1973) ("[R]evival . . . validated the procedural steps taken on behalf of the [suspended] corporation . . . .''); ABA Recovery Servs., Inc. v. Konold, 198 Cal. App. 3d 720, 724, 244 Cal. Rptr. 27, 30 (1988) ("procedural acts" are validated, while "substantive defenses" are not); see also Benton v. County of Napa, 226 Cal. App. 3d 1485, 1492, 277 Cal. Rptr. 541, 546 (1991) ["Benton II"] (corporation’s "application for and obtaining of [administrative] extension and tolling [of use permit] were procedural acts [and, hence, retroactively validated by revivor]."). The unsatisfactory nature of these vague guidelines, as well as "plea in abatement" analysis, is undoubtedly a result of their troubled origins.

50. 188 Cal. 393, 205 P. 446 (1922).
51. Id. at 394, 205 P. at 447.
52. Id. at 394-95, 205 P. at 447.
statutes then in force under the state’s Political Code, held that because the right to institute or maintain actions was not expressly reserved by statute to suspended corporations, the receipt of notice of entry of judgment and the motion for new trial were ineffective exercises of corporate power and thus nullities.  

53. Id. at 395-96, 205 P. at 447-48. The statutes then in force provided in pertinent part that “the corporate rights, privileges and powers of every domestic corporation which has failed to pay said [franchise or other] tax and money penalty shall . . . be suspended, and incapable of being exercised for any purpose or in any manner, except to defend any action brought in any court against such corporation, until said tax with all accrued penalties . . . are paid[.]” 1917 Cal. Stat. ch. 214, sec. 26, at 359-60 [Political Code § 3669(c), subd. (2)]; see Ransome-Crummey, 188 Cal. at 396, 205 P. at 447. The statutes also provided that “the corporate rights, privileges and powers of every domestic corporation which has failed to pay the [license] tax and money penalty . . . imposed by this act shall . . . be suspended and incapable of being exercised for any purpose or in any manner, except to execute and deliver deeds to real property in pursuance of contracts therefor made prior to such time, and to defend in court any action brought against such corporation, until said tax with all accrued penalties . . . are paid[.]” 1917 Cal. Stat. ch. 215, sec. 11, at 377; see Ransome-Crummey, 188 Cal. at 395, 205 P. at 447 (providing legislative history). Both of the above statutory suspension schemes allowed for revivor in almost identical terms. See 1917 Cal. Stat. ch. 214, sec. 26, at 360 (“All corporate powers, rights and privileges suspended or forfeited may be revived and restored to full force and effect by the payment of all accrued taxes and penalties . . . .”); 1917 Cal. Stat. ch. 215, sec. 12, at 377 (“All corporate powers, rights and privileges, suspended or forfeited under the provisions of this act may be revived and restored to full force and effect upon application therefor by any stockholder or creditor thereof and upon payment of all accrued taxes and penalties . . . .”). Both relevant statutory schemes also contained an identical proviso, pertaining to revivor of corporations which had prior to their enactment suffered forfeitures, that “the revivor of a corporation under the [relevant section] shall be without prejudice to any action or proceeding, defense or right, which has occurred by reason of the forfeiture.” 1917 Cal. Stat. ch. 214, sec. 27, at 362; 1917 Cal. Stat. ch. 215, sec. 14, at 378-79; see also Rossi v. Caire, 186 Cal. 544, 546, 199 P. 1042, 1044 (1921) (discussing similar earlier provisions “provid[ing] for . . . revivor [only] as to corporations that had failed to pay.”). While, perhaps, the proviso was intentionally overlooked because the court deemed it by its express terms to apply only to forfeitures (not mere suspensions), and only to rights forfeited prior to its enactment, such a reading would promote form over substance and render the revivor of long dead corporations more effective than that of more recent tax delinquent corporations. In any event, any such legislative omissions were subsequently cured by amendments slightly revising the proviso’s language, making it applicable to both suspensions and forfeitures, and making it applicable to corporations subsequently suffering a suspension or forfeiture. The amendments provided:

Any corporation which has suffered the suspension or forfeiture referred to in the preceding section may be relieved therefrom upon making application [for revivor] and paying the tax and the interest and penalties for nonpayment of which the suspension of [sic] forfeiture occurred. . . . The revivor shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.


54. Ransome-Crummey, 188 Cal. at 397-98, 205 P. at 448. Significantly, the current suspension and revivor statutes, with minor exceptions, continue to fail to expressly reserve any rights to suspended corporations.
Turning to the question whether revivor operated retroactively or prospectively, the court noted that the statute did not make revival retroactive.\textsuperscript{55} The court then opined that \textquote{\textquote{[t]he suspension of the rights, powers, and privileges is a disability imposed on a corporation as a penalty,\textquoteright}\textsuperscript{56} and reasoned that the right to bring or maintain actions, not being expressly reserved, \textquote{is denied to corporations as part of the penalty.\textquoteright}\textsuperscript{57} The \textit{Ransome-Crummey} court cited no cases or other authority in support of this reasoning, except statutory provisions making an individual\textquoteright s unauthorized exercise of a suspended corporation\textquoteright s powers punishable as a misdemeanor.\textsuperscript{58} \textit{Ransome-Crummey\textquoteright}s rule and rationale, though harsh and unsupported, were clear: interim acts were absolutely \textit{void} as part of the \textquote{\textquoterightpenalty\textquoteright} the Legislature supposedly intended to impose on tax-delinquent corporations.

\textit{Ransome-Crummey\textquoteright}s approach seemingly stands in direct opposition to that employed in \textit{Rossi v. Caire},\textsuperscript{59} a case decided by the California Supreme Court during the preceding year. In \textit{Rossi}, a domestic corporation (the Santa Cruz Island Company) had suffered a forfeiture of its charter in 1911 for nonpayment of its license tax.\textsuperscript{60} The relevant statute declared that in such circumstances the corporation\textquoteright s directors became its trustees for purposes of its liquidation.\textsuperscript{61} The corporation\textquoteright s directors took no

\begin{itemize}
  \item \textsuperscript{55} \textit{Id.} at 398, 205 P. at 448.
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Id.} at 397, 205 P. at 448. It is interesting to observe that the \textit{Ransome-Crummey} court\textquoteright s position that (1) the disability of corporate suspension \textit{was absolute} but for rights expressly reserved, (2) the statutory revival was \textit{not} made retroactive and was \textit{part of the penalty} imposed for corporate tax delinquency, and (3) any other reading of the statutes would weaken their punitive force and encourage corporate tax delinquency, was essentially the same position taken by Justice Mosk in his strong dissent in \textit{Peacock Hill Ass\textquoteright n v. Peacock Lagoon Constr. Co.}, 8 Cal. 3d 369, 374-78, 503 P.2d 285, 288-90, 105 Cal. Rptr. 29, 32-34 (1972) (Mosk, J., dissenting).
  \item \textsuperscript{58} \textit{Ransome-Crummey\textquoteright}s reasoning was unsound, out of sync with the Legislature\textquoteright s probable intent, and later legislatively superseded in any event. Additionally, what is perhaps the leading out-of-state case in the area has reasoned that the presence of a misdemeanor provision such as that relied on by \textit{Ransome-Crummey} mitigates \textit{against} the finding of a need for additional penalties or remedies for tax delinquency following revivor. See \textit{J.B. Wolfe, Inc. v. Salkind}, 70 A.2d 72, 76 (N.J. 1949); \textit{infra} note 260. Finally, the presence of the misdemeanor provision is common even in states where all interim acts are clearly retroactively validated by statute.
  \item \textsuperscript{59} 186 Cal. 544, 199 P. 1042 (1921).
  \item \textsuperscript{60} \textit{Id.} at 545, 199 P. at 1043.
  \item \textsuperscript{61} \textit{Id.} at 547, 199 P. at 1044.
\end{itemize}
steps to liquidate its assets and, following 1913 legislation authorizing its revivor, proceeded to revive the corporation, thereafter delivering all assets held by them back to the corporation. A stockholder's successor-in-interest opposed this action, and timely sued the directors to obtain an accounting and distribution of the corporation's assets to the stockholders. The plaintiff stockholder's successor lost; the plaintiff and one director appealed from the adverse judgment and an order denying their motion to set aside the same.

The supreme court reversed on the ground that the 1913 revivor amendment could not constitutionally impair the stockholder's previously vested property right to enforce a complete liquidation by the directors as trustees in liquidation. Concededly, under the "loosely" and "crudely drawn" 1913 amendments, the Legislature intended to enable the directors to rehabilitate the corporation and "contemplated that the rehabilitated corporation should proceed exactly as if no forfeiture had occurred, with all its former powers and owning all the property remaining in the hands of the trustees, subject, of course, to all obligations lawfully incurred by the trustees during the corporation's lapse of life." Moreover, the court rejected appellants' argument that the statutory "proviso that such rehabilitation 'shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture' showed an intent to save a stockholder's right to prevent rehabilitation. Rather, "the whole intended scope [of such language] undoubtedly was to save such actions, defenses and rights as had accrued in the management of the affairs of the former corporation by the trustees for the benefit of the former stockholders." Nevertheless, this astute observation of the intent behind the 'without prejudice' clause was fated to become soon-

62. Id. at 547-48, 199 P. at 1044.
63. Id. at 545-48, 199 P. at 1043-44.
64. Id. at 545, 199 P. at 1043.
65. Id. at 550-54, 199 P. at 1045-47.
66. Id. at 551, 199 P. at 1046.
67. Id. at 552, 199 P. at 1046.
68. Id. (emphasis added).
forgotten *dicta*. The 1913 amendment could not be given effect in contravention of the former stockholder's vested right to force a liquidation, which right accrued under a prior statutory scheme (in effect on the 1911 date of forfeiture) that did not provide for revivor.69

While *Rossi* involved a forfeiture rather than a suspension, that distinction is insignificant to its applicable teachings about (1) the intended effect of revivor70 and (2) the ‘without prejudice’ proviso, which are common to both areas. The first teaching of *Rossi*, totally ignored by *Ransome-Crummey*, is that the Legislature intended a revived corporation to "proceed exactly as if no forfeiture had occurred, with all its former powers and owning all property remaining in the hands of the trustees, subject, of course, to all obligations lawfully incurred by the trustees during the corporation's lapse of life."71 This indicates that those acting as agents for a suspended corporation do so as *trustees* with corresponding fiduciary duties, rights, obligations, and liabilities. Logic dictates that the onerous liabilities and obligations of a trustee should be sufficient to encourage compliance with the tax laws and a revivor. This, in turn, should shift such duties (along with any corresponding rights) back to the revived corporation, which would then proceed *just as if no forfeiture had occurred*. If the corporation is not revived, the trustees could be held liable in that capacity for any obligations incurred in its name—a just result.

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69. *Id.* at 552-53, 199 P. at 1046-47. As stated by the court:
The corporation was dead, and had died without any existing provision of law for its revivification... The status with relation to the property [i.e., held in trust for liquidation purposes only by directors] had been created, and the terms of the trust upon which it was held defined. We do not see how it can be held that the rights of former stockholders under the trust defined by the statute, the rights subject to the payment of the former corporation debts and expense of liquidation, to have the property distributed among them, was not a vested property right secure against impairment by subsequent act of the legislature.

*Id.*

70. It seems safe to assume that the Legislature did not intend for revivor to operate in such a fashion that interim acts taken during "absolute death" (i.e., forfeiture) would be given greater effect that those taken while in mere "suspended animation" (i.e., suspension).

The second teaching of Rossi is that the "without prejudice" proviso is nothing more than a saving clause meant to assure that interim acts of the trustees are preserved and confirmed as those of the corporation upon revivor.\textsuperscript{72} It would obviously be unfair for the temporary void in the corporate existence to prejudice rights, actions or defenses accruing in favor of or against trustees or third parties dealing with them as a \textit{de facto} corporation. Unfortunately, Rossi's teachings were completely lost on the \textit{Ransome-Crummey} court. The court seemed to recognize that suspension was, if anything, a milder penalty than forfeiture.\textsuperscript{73} Nevertheless, \textit{Ransome-Crummey} did not attempt to save (and thus "prejudiced") an interim act undertaken for the revived corporation's benefit.\textsuperscript{74} The court reasoned that the act was void and beyond cure as a penalty.\textsuperscript{75} 

Forty-five years after \textit{Ransome-Crummey}, the supreme court revisited the issue and reached a different result under a different "plea in abatement" theory. In \textit{Traub Co. v. Coffee Break Service, Inc.},\textsuperscript{76} a corporation was sued and filed an answer and cross-complaint against appellant while in good standing.\textsuperscript{77} Thereafter, its corporate powers were suspended for nonpayment of taxes.\textsuperscript{78} During this suspension, it won judgment against the appellant on its cross-complaint and the period for appeal from that judgment expired.\textsuperscript{79} The appellant then discovered the suspension, unsuccessfully moved to vacate the final judgment, and appealed from the order denying the motion to vacate.\textsuperscript{80} Only following the appeal was the corporation reinstated.\textsuperscript{81}
The supreme court affirmed the order denying the motion to vacate the judgment in favor of the suspended corporation. Because the corporation's lack of capacity did not appear on the face of the judgment roll, the judgment itself was not void.\(^8\) Invoking the common law concept of a "plea in abatement,"\(^3\) the court further noted that "a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of its taxes is a plea in abatement which is not favored in law, is to be strictly construed, and must be supported by facts warranting the abatement at the time of the plea."\(^4\)

For this proposition the court cited (1) appellate cases in which a corporate plaintiff, suspended before commencing a lawsuit, had been reinstated before trial and allowed by the court to proceed,\(^5\)

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8. Id. at 370, 425 P.2d at 847, 425 Cal. Rptr. at 791.
83. See BLACK'S LAW DICTIONARY 1037 (5th ed. 1979) (plea in abatement does not go to merits of plaintiff's claim, but to place, mode or time of asserting it, and does not destroy claim, but merely postpones its prosecution).
84. Traub, 66 Cal. 2d at 370, 425 P.2d at 791, 57 Cal. Rptr. at 847 (emphasis added) (citations omitted).
85. Id. The Traub court relied on the following cases: Maryland Cas. Co. v. Superior Court, 91 Cal. App. 355, 357-58, 360-64, 267 P. 169, 170-72 (1928) (plaintiff corporation/mechanic's lien claimant when contract executed and when suit filed was suspended but revived a year before trial on merits; held even if defense of incapacity of plaintiff to sue was not waived by defendant's failure to assert it in answer, defendant's motion to dismiss based thereon was "plea in abatement which is not favored in law, is to be strictly construed, and must be supported by facts warranting the abatement at the very time of the plea."); Hall v. Citizens Nat'l Trust & Sav. Bank, 53 Cal. App. 2d 625, 630-31, 128 P.2d 545, 548-49 (1942) (permitting suspended corporation revived subsequent to interposition of plea in abatement question, but before the hearing of the plea, to proceed with action commenced during suspension); Pacific Atl. Wine, Inc. v. Duccini, 111 Cal. App. 2d 957, 967, 245 P.2d 622, 628 (1952) (permitting suspended corporation which was revived subsequent to filing of action, but prior to trial, to proceed).
86. Id. The most interesting of these cases is Maryland Cas. Co., which relies heavily on a 1916 Court of Appeal decision in Kehrlein-Swinerton Constr. Co. v. Rapheen, 30 Cal. App. 11, 156 P. 972 (1916), and somewhat disingenuously characterizes Ransome-Crummey as a case "indicat[ing] that after a corporation has properly instituted a suit, its corporate power to maintain the action may be suspended for failure to pay license and franchise taxes for a period of time while the action is pending and then go forward with full vigor when reinstated." Maryland Cas. Co., 91 Cal. App. at 362, 267 P. at 171. The Court of Appeal decision in Kehrlein-Swinerton, which preceded the Supreme Court decision in Ransome-Crummey by six years, involved the same type of statutory forfeiture scheme later dealt with in Rossi, one in which a corporation's forfeiture for failure to pay its license tax resulted in its directors becoming trustees of its property. See Kehrlein-Swinerton, 30 Cal. App. at 16, 156 P. at 974. The case involved the issue of whether the plaintiff (a corporation suspended prior to its filing of the action) had the right to have its directors substituted as real parties upon motion made at trial. Id. at 13-14, 156 P. at 972-72. Noting a conflict in the cases, the court
and (2) other cases, including two of its own pre-Ransome-Crummey decisions, holding lack of corporate capacity to be an affirmative defense. Accepting the holdings of these cases, which ran directly contrary to its earlier Ransome-Crummey

stated:

There are two lines of cases which seem to run parallel bearing upon this question. The courts of last resort in this state have gone far in holding that corporations which have permitted themselves to come within the ban of the statute by failing to pay their license tax cannot be permitted to do business in this state while under such disability, and it has also been definitely decided that the institution and maintenance of an action is embraced within the inhibition of the statute with respect to doing business after such forfeiture of a corporate charter.

On the other hand, it has been held in a long line of well-considered cases bearing upon the rights of partnerships or of corporations to commence or maintain actions until they have complied with certain requirements of the Legislature restricting such right, that the plea and proof that such partnerships and corporations may not maintain actions while under the disabilities provided in such statutes are matters of affirmative defense, and are in the nature of dilatory pleas, which are waived by the failure on the part of the defendant to make the required averments and proof; and that in the absence of such plea and proof a partnership or a corporation, although subject to such disabilities, may still maintain an action and recover and enforce a judgment therein in its own name.

Id. at 14-15, 156 P. at 973 (citations omitted). Following the latter line of cases, and relying on the statutory "winding-up" powers of former directors/trustees, the Kehrlein-Swinerton court held that the trial court abused its discretion in disallowing the substitution and reversed the order of dismissal and judgment. Id. at 15-17, 156 P. at 974. Maryland Cas. Co. follows Kehrlein-Swinerton's holding that actions filed by corporations whose franchises are forfeited are not ipsofacto nullities and adopts "plea in abatement" analysis. Maryland Cas. Co., 91 Cal. App. at 362-63, 267 P. at 171-72. The court ties this analysis into the pertinent 'without prejudice' proviso of the relevant statute by stating:

The only defense or right petitioner ever had to dismiss the action by reason of the original suspension, as distinguished from its right to prevail in the action upon its merits, was a plea in abatement which under established law and precedent was a temporary right that could only be availed of during the period of plaintiff's incapacity. The revivor of the corporation does not prejudice the defense, which petitioner was at full liberty to use during the period of suspension, but restores the corporation so that no future defense can be made on that ground. After the corporation is restored, it has power to maintain an action not previously dismissed. This interpretation is in harmony with section 11, which suspends the corporate powers only until such tax is paid in accordance with the act. A different construction would extend the period of suspension beyond that expressly fixed by the act.

Id. at 363-64, 267 P. at 172.

86. Traub, 66 Cal. 2d at 370-71 n.3, 269 P. at 791 n.3, 57 Cal. Rptr. at 847 n.3 (citing Schwartz v. Magyar House, Inc., 168 Cal. App. 2d 182, 187-89, 335 P.2d 487, 490-91 (1959) (holding a court may grant litigant's motion for continuance, or order same sua sponte, in order to allow litigant to secure reinstatement so as to participate in trial), Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 570, 112 P. 454, 455 (1910) (concluding that "extraneous fact" of corporate plaintiff's incapacity is affirmative defense), and California Sav. & Loan Ass'n v. Harris, 111 Cal. 133, 43 P. 525 (1896) (holding corporation's failure to file certified copy of its articles of incorporation with county clerk was likewise matter in abatement)).
analysis, the court then reasoned that because corporate incapacity at the time a corporation files an action does not deprive a court of jurisdiction to proceed, neither does incapacity occurring after filing but before judgment. The court was careful to distinguish its holding with respect to the final judgment from cases holding an unreinstated corporation lacks the right or capacity to defend or appeal, cases involving the effect of dissolution or forfeiture, rather than mere suspension, and cases involving the running of the statute of limitations against an unreinstated plaintiff corporation.

Down playing that aspect of Traub which emphasized that corporate incapacity resulting from suspension and not appearing on the record does not ipso facto deprive a court of jurisdiction to render a final judgment, the supreme court, a mere five years later, in Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., chose to emphasize (in the context of a motion to dismiss a

87. Traub, 66 Cal. 2d at 371, 425 P.2d at 792, 57 Cal. Rptr. at 848.
88. Id.
89. Id.
90. Id. at 372, 425 P.2d at 792, 57 Cal. Rptr. at 848. The Traub court also simply distinguished Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446 (1922), as dealing with "the special jurisdictional problems incident to a motion for new trial[.]" Traub, 66 Cal. 2d at 372, 425 P.2d at 792, 57 Cal. Rptr. at 848; see Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 8 Cal. 3d 369, 373-74, 503 P.2d 285, 287, 105 Cal. Rptr. 29, 31 (1972) (acknowledging limitation of Ransome-Crummey by Traub to motion for new trial context). As shall appear below, it is crystal clear that Ransome-Crummey's entire approach, if not its so-called "limited" holding, has been effectively (though not expressly) overruled by Peacock Hill. See infra notes 92-101 and accompanying text. The Traub court also expressly disapproved any contrary views expressed in Belle Vista Inv. Co. v. Hassen, 227 Cal. App. 2d 837, 39 Cal. Rptr. 184 (1964), a case which relied on Ransome-Crummey in holding revivor was not retroactive. Traub, 66 Cal. 2d at 372, 425 P.2d at 792-93, 57 Cal. Rptr. at 848-49. In the final analysis, of course, it remains unexplained why the jurisdictional problems incident to a motion for new trial are more "special" or problematic than those associated with incapacitated corporations filing complaints, taking judgments, or appealing. See, e.g., cases cited by Benton II, 226 Cal. App. 3d 1485, 1490-91, 277 Cal. Rptr. 541, 545 (1991).

While it is possible that Ransome-Crummey could have been logically distinguished if its facts showed the revivor therein had occurred only after the running of the "jurisdictional" period in which to move for a new trial, its facts indicate that this was not the case and its rationale clearly indicates such was not the basis for its rejection of any retroactive effect of revivor. Ransome-Crummey, 188 Cal. at 394, 397-98, 205 P. at 446-48. It can only be concluded that Ransome-Crummey is a doctrinal relic whose rule, if still vital, should not be since it depends on a distinction without a difference.

91. Traub, 66 Cal. 2d at 371, 425 P.2d at 792, 57 Cal. Rptr. at 848.
92. Peacock Hill, 8 Cal. 3d 369, 503 P.2d 285, 105 Cal. Rptr. 29.
suspended corporation’s post-judgment appeal) that portion of Traub which “cited with approval several court of appeal decisions in which the corporate plaintiff was allowed to maintain a lawsuit even though it had been suspended at the time it filed its complaint.”93 As noted above, this line of decisions and its “plea in abatement” analysis are in irreconcilable conflict with the doctrine of Ransome-Crummey that interim acts are void notwithstanding revivor.

The Peacock Hill court, in the complete turnaround from the discredited Ransome-Crummey approach94 signaled by Traub, adopted the reasoning of the lower appellate court decisions “that the plea of lack of capacity of a corporation because of its suspension for failure to pay taxes, is a plea in abatement which is not favored in law and must be supported by the facts at the time of the plea.”95 Peacock Hill also cited with approval other lower court cases applying the so-called Traub rule in other situations.96

93. Id. at 372, 503 P.2d at 286, 105 Cal. Rptr. at 30. The Peacock Hill court cited the following cases: Pacific Atl. Wine Inc. v. Duccini, 111 Cal. App. 2d 957, 967, 245 P.2d 622, 628 (1952) (holding suspended plaintiff corporation could proceed after pre-trial revivor); Hall v. Citizens Nat’l Trust & Sav. Bank, 53 Cal. App. 2d 625, 631, 128 P.2d 545, 549 (1942) (concluding that revival of suspended corporate plaintiff after defendant’s answer and plea in abatement based on suspension, but before a hearing of the plea, was sufficient to avoid the plea of incapacity), and Maryland Cas. Co. v. Superior Court, 91 Cal. App. 356, 361-63, 267 P. 169, 171-72 (1928) (finding denial of motion to dismiss or abate based on suspended corporate plaintiff’s incapacity was proper where plaintiff had been revived by time of motion). Id.; see supra note 85 (discussing the reasoning underlying the court’s holding in Maryland Cas. Co.).

94. See supra text accompanying notes 50-75.

95. Peacock Hill, 8 Cal. 3d at 372, 503 P.2d at 286, 105 Cal. Rptr. at 30. See Benton II, 226 Cal. App. 3d 1485, 1491, 277 Cal. Rptr. 541, 545 (1991) (concluding the underlying rationales of these cases is based on the concept of a plea in abatement).

96. Peacock Hill, 8 Cal. 3d at 372-73, 503 P.2d at 286-87, 105 Cal. Rptr. at 30-31. All the cases cited involved the effect of revivor on corporate acts undertaken in the litigation context. In addition to the decisions discussed above, the court cited: A.E. Cooke Co. v. K.S. Racing Enter. Inc., 274 Cal. App. 2d 499, 500, 79 Cal. Rptr. 123, 123-24 (1969) (holding suspended corporate plaintiff’s writ of attachment validated where revivor occurred after suit filed and attachment obtained, but prior to filing of defendant’s motion to dissolve attachment); Duncan v. Sunset Agric. Minerals, 273 Cal. App. 2d 489, 493, 78 Cal. Rptr. 339, 342 (1969) (concluding that since corporate defendant, suspended during period from before commencement of action and through trial, was revived while cause was under advisement, lower court therefore abused its discretion by granting plaintiff judgment based on “technicality” of defendant’s lack of capacity rather than deciding case on its merits); and Diverco Constructor’s Inc. v. Wilstein, 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851, 855 (1970) (plaintiff corporation, suspended after it filed action and during period in which it moved to accelerate trial to avoid five year dismissal statute, was reinstated two days before defendant’s motion
The supreme court, referring to all these cases, stated “[t]he foregoing authorities make clear that as to matters occurring prior to judgment the revival of corporate powers has the effect of validating the earlier acts and permitting the corporation to proceed with the action.”

The supreme court then applied this rather broad and amorphous “rule” of retroactive validation of interim acts to the case before it to validate the appeal taken by the suspended corporation before its revivor, stating “that the same rule should ordinarily apply with respect to matters occurring subsequent to judgment.”

The easy adoption and extension of the reasoning of *Traub* was aided by the court’s assertion of a non-punitive legislative purpose for the tax collection and suspension statutes—a purpose of merely pressuring a delinquent corporation to pay its taxes. This newly perceived purpose was, of course, completely at odds with the punitive purpose the court had perceived half a century earlier in *Ransome-Crummey*, the latter also being the view urged in Justice Mosk’s stinging dissent.

A new and unfortunate analytical wrinkle began to appear in the supreme court’s analysis with the advent of its decision in *Rooney v. Vermont Investment Corp.*, the year following

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98. *Id.*
99. *Id.* at 371, 503 P.2d at 286, 105 Cal. Rptr at 30 (“[T]he purpose of section 23301 . . . is to put pressure on the delinquent corporation to pay its taxes, and that purpose is satisfied by a rule which views a corporation’s delinquencies, after correction, as more irregularities . . . There is little purpose in imposing additional penalties after the taxes have been paid.”). The court’s assertion is undoubtedly correct and is remarkable only in light of the *Ransome-Crummey* doctrine, which it did not expressly overrule. See *supra* notes 50-75 and accompanying text (discussing the *Ransome-Crummey* doctrine).
100. See *supra* notes 55-58, 99 and accompanying text. The newly perceived non-punitive legislative purpose was, however, completely consistent with the view of section 23305a’s “without prejudice,” etc. language as a savings clause. See *supra* notes 40-44 and accompanying text (suggesting section 23305a may be viewed as a “savings clause”).
101. See *Peacock Hill*, 8 Cal. 3d at 374-78, 503 P.2d at 288-90, 105 Cal. Rptr. at 32-34 (Mosk, J., dissenting).
Peacock Hill. Rooney followed Peacock Hill in validating an appeal taken by a suspended corporation which was revived at some point following the commencement of the filing of appellate briefs.\textsuperscript{103} It also proved, however, to be the unwitting catalyst for an entirely new "procedural /substantive" analysis of revivor's effect on interim acts when it stated: "The revival of corporate powers validated the procedural steps taken on behalf of the corporation while it was under suspension and permitted it to proceed with the appeal."\textsuperscript{104} Subsequent appellate courts, ever alert for a key to understanding this confused area, mistook this apparently gratuitous descriptive statement for a substantive doctrinal signal.

Two years later, the court of appeal in \textit{Welco Construction, Inc. v. Modulux}\textsuperscript{105} seized on Rooney's use of the word "procedural" in an attempt to harmonize the "plea in abatement" line of cases with those cases still following the \textit{Ransome-Crummey} doctrine in the statute of limitations area. The court stated:

It is clear from these holdings that \textit{procedural acts} in the prosecution or defense of a lawsuit may be validated retroactively by the corporate revival. It is equally clear that the recent holdings [retroactively validating interim acts] do not apply to substantive defenses that have accrued during the corporate suspension. The statute of limitations is not a procedural right but is a substantive defense.\textsuperscript{106}

103. \textit{Id.} at 359, 515 P.2d at 302, 110 Cal. Rptr. at 358.
104. \textit{Id.} (citing \textit{Peacock Hill}, 8 Cal. 3d at 373, 503 P.2d at 287, 105 Cal. Rptr. at 31).
106. \textit{Id.} at 73, 120 Cal. Rptr. at 575; see \textit{id.} at 74, 120 Cal. Rptr. at 575 ("The statute of limitations was a substantive defense which accrued by its running during that period of appellant's suspension, and cannot be prejudiced by revival of the suspended corporation."). The \textit{Welco} court buttressed its analysis by observing that "[s]tatutes of limitation are 'vital to the welfare of society' and are favored by the law ... to be viewed as statutes of repose, and as such constitute 	extit{meritorious defenses}.") \textit{Id.} at 73-74, 120 Cal. Rptr. 575 (citations omitted).
Later court of appeal decisions have accepted and echoed the *Welco* court's reasoning with little additional analysis.\(^\text{107}\)

One recent decision, *Sade Shoe Co. v. Oschin & Snyder*, \(^\text{108}\) exemplifies the modern courts' uniform failures to (1) trace the statute of limitations exception to the discredited *Ransome-Crummey* doctrine, \(^\text{109}\) (2) recognize the incompatibility of *Ransome-Crummey* and "plea in abatement" analysis, \(^\text{110}\) and (3) recognize the Legislature's original intent that the "without prejudice" proviso serve solely as a savings clause. *Sade Shoe*, in affirming a summary judgment for the defendant against a corporate plaintiff based on the running of the statute of limitations subsequent to the filing of the action but prior to the plaintiff's substantial compliance with the revivor statutes, stated:

If the statute of limitations runs out prior to revival of a corporation's powers, the corporation's action will be time barred even if the complaint would otherwise have been timely. [citations] A corporation is so barred because, under Section 23305a, the issuance of a certificate of revivor is

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107. *See* Electronic Equip. Express, Inc. *v.* Donald H. Seller & Co., 122 Cal. App. 3d 834, 845, 176 Cal. Rptr. 239, 245 (1981) ("[W]here a substantive defense accrues during a corporate suspension, it cannot be prejudiced by revival of the suspended corporation." Nevertheless, the court held that defendants voluntarily filing cross-complaint against suspended corporate plaintiff before running of statute of limitations waived that affirmative defense); ABA Recovery Services, Inc. *v.* Konold, 198 Cal. App. 3d 720, 725 n.2, 244 Cal. Rptr. 27, 30 n.2 (1988) (recognizing *Welco*'s standard that "procedural acts in the prosecution or defense of a lawsuit may be validated retroactively by the corporate revival, but substantive defenses accruing during the corporate suspension may not" and, nevertheless, questioning *Rooney*'s characterization of filing a notice of appeal as a merely "procedural step"); *Benton II*, 226 Cal. App. 3d 1485, 1490, 277 Cal. Rptr. 541, 545 (1991) ("The cases have created a distinction between procedural and substantive acts. The revival of corporate powers validates any procedural step taken on behalf of the corporation while it was under suspension."); *id.* at 1491, 277 Cal. Rptr. at 545 ("However, substantive defenses accruing during corporate suspension may not be applied [sic] to the benefit of the now-revived corporation. [citation] For example, the statute of limitations is regarded as a substantive defense, not a procedural right.").


without prejudice to any action, defense or right which has accrued by reason of the original suspension of forfeiture. [citations] 111

The invalidity and absurdity of this reasoning is manifest to anyone who attempts to reconcile how obtaining a judgment or taking an appeal can be merely "procedural," and thus, retroactively validated, while the filing of a complaint is "substantive" and cannot be retroactively validated outside the limitations period. Heightening this absurdity is the fact that the successful defendant in Sade Shoe (as in similar cases) was not prejudiced at all, was fully, timely, and formally notified of the plaintiff's claims by an actually filed and served complaint, and simply received an unearned windfall totally unrelated to the merits in securing dismissal.

Potentially more troublesome even than the problems created by this body of law in the litigation area are the problems it creates outside that area. While Peacock Hill is perhaps the most significant recent supreme court decision on revivor retroactivity issues, its holding, strictly read, is limited to the factual context of litigation, and thus leaves open many questions (such as those posed in this Article's four hypotheticals) about the effects of suspension and revivor outside the contract and litigation areas. 112

111. Sade Shoe Co. v. Oschin & Snyder, 217 Cal. App. 3d 1509, 1513, 266 Cal. Rptr. 619, 622 (1990) (citing CAL. REV. & TAX. CODE § 23305a (West 1990)); Welco Constr., Inc. v. Modulux, 47 Cal. App. 3d 69, 120 Cal. Rptr. 572 (1975); ABA Recovery Serv., Inc. v. Konold, 198 Cal. App. 3d 720, 244 Cal. Rptr. 27 (1988). The Sade court rejected plaintiff's argument that the filing of its complaint was a procedural step retroactively validated by revivor, reciting the Welco shibboleth that "the statute of limitations is not a procedural right but a substantive defense and not subject to revival." Sade Shoe Co., 217 Cal. App. 3d at 1513 n.2, 266 Cal. Rptr. at 622 n.2.

112. While the Court of Appeal in Benton II answered the important question whether the curative doctrine of retroactive validation would extend to interim acts outside the litigation context, in doing so it begged the even more fundamental and important conceptual question whether the acts of an administrative or legislative body outside of the judicial context are rendered infirm in the first place by a suspended corporation's lack of "capacity". Benton II, 226 Cal. App. 3d 1485, 1491-92, 277 Cal. Rptr. 541, 545-46 (1991); compare Sale v. Railroad Commission, 15 Cal. 2d 612, 617-18, 104 P.2d 38, 41-42 (1940) (holding Railroad Commission's acts authorizing transfer of suspended corporation's trucking rights unaffected by judicial procedure doctrine of lack of capacity because Commission, unlike court, could act sua sponte) with Benton II, 226 Cal. App. 3d at 1492 n.6, 277 Cal. Rptr. at 546 n.6 (declining to decide correctness of trial court's "alternative" holding that county
While *Peacock Hill* certainly expresses at least receptivity to (and a sound policy rationale to support) a comprehensive rule of retroactive validation, neither its language nor its holding explicitly address corporate acts outside of the litigation context, an equally or more important area in which clarification is badly needed. The supreme court's failure to expressly overrule *Ransome-Crummey* (which held interim acts void based on the perceived punitive purposes of the tax collection statutes) and its progeny is clearly the source of much, but not all, of the problem. The lack of California revivor cases with facts significantly similar to any of our hypotheticals, combined with the complete lack of logical analysis and firm guiding principles in the modern cases or statutes, renders conclusions in this area necessarily tentative and wasteful litigation inevitable.

4. **California Decisions in the Non-Contract, Non-Litigation Context**

The California suspension/revivor decisions which are most analogous to any of our hypotheticals are *Sale v. Railroad Commission* and *Benton v. County of Napa [Benton II]*. These decisions focus, respectively, on (1) the nature of suspension
(Sale), and (2) the effect of revivor (Benton II) in the non-litigation, non-contract context.

Sale, which did not actually involve a revivor, addressed the effect of suspension on corporate acts occurring in the non-judicial, administrative context with a result just as favorable to the suspended corporations as a rule of broad retroactive validation. Sale recognized the validity of non-litigation interim acts notwithstanding the absence of a revivor, but under an outmoded method of analysis. In Sale, petitioners (highway carriers) challenged a decision of the California Railroad Commission permitting a competing carrier (whose corporate powers, unbeknownst to the Commission, had been suspended for nonpayment of franchise taxes) to sell its operative rights to another trucking company. After reopening the proceedings and hearing facts concerning the transferror-corporation’s suspension, the Commission concluded the public convenience and necessity would not be served by prohibiting the transferee trucking company from using the old routes and refused to rescind its order.

After concluding that petitioners had standing under the Public Utilities Act and that the Commission’s order was not res judicata, the supreme court addressed the primary issue of whether “because the [transferor’s] corporate existence was suspended, it had no power either to transfer its operative rights . . . or to invoke [the Commission’s] jurisdiction to approve the transfer.” After conceding the validity of the now-discredited Ransome-Crummey approach, the court nonetheless significantly limited that doctrine’s application by characterizing it as a rule of “judicial procedure” grounded in the fundamental judicial rule that only parties with capacity can bring a controversy.

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118. 15 Cal. 2d 612, 104 P.2d 38 (1940).
119. Id.
120. Id. at 613-14, 104 P.2d at 39.
121. Id. at 614, 104 P.2d at 39-40.
122. Id. at 615-16, 104 P.2d at 40-41 (reasoning that where the Commission retained jurisdiction to alter the order and the petitioners claimed the incapacity defect was jurisdictional, the Commission’s order was not res judicata).
123. Id. at 616, 104 P.2d at 41.
124. Id. at 617, 104 P.2d at 41.
before a court and invoke its powers. The supreme court distinguished the nature, jurisdiction, and duties of the constitutionally-created Railroad Commission from those of law courts, in holding "that the transferor's legal incapacity to transfer its operative rights does not affect the validity or regularity of the [Commission's] order . . . ."125

The court first distinguished the passive role of law courts in adjudicating disputes brought before them from the more active role of the Railroad Commission, an administrative agency legislatively granted powers and functions of a clearly non-judicial character, such as "the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries."126 In recognizing the rule that a court acquires no jurisdiction over a controversy until invoked by a party with capacity to act, is one of judicial procedure not automatically applicable in the administrative context,127 the court held it inapplicable to the Railroad Commission's proceedings "because the Railroad Commission, unlike a court, may act sua sponte and is not dependent upon the appearance of a party to 'invoke' its jurisdiction."128 Even though the Commission's own procedural rules required an application by all involved parties to consider ruling on a transfer of operative rights, the rule was not jurisdictional; rather, the Commission's "powers of surveillance and supervision over all public utility matter are inherent."129

125. Id. The court's "lack of capacity/judicial procedure" analysis was perhaps a convenient way to avoid expansion of the poorly-reasoned Ransome-Crummey doctrine outside of the judicial arena, while appearing to respect the doctrine of stare decisis.

126. Id. at 618, 104 P.2d at 41.

127. Id. at 618-19, 104 P.2d at 42.

128. Id. at 619, 104 P.2d at 42; see Benton II, 226 Cal. App. 3d at 1492 n.6, 277 Cal. Rptr. 541, 546 n.6 (1991) (illogically declining to reach question of correctness of trial court's similar ruling on this threshold issue).

129. Sale, 15 Cal. 2d at 619, 104 P.2d at 42. While discussing the Commission's fall-back argument that its scope of inquiry, based as it was on questions of public convenience and necessity, deprived it of the authority to consider the legal status of the parties before it, the court recognized that while generally the Commission usually lacked authority to decide the legal rights of private parties between themselves, issues such as capacity to transact business would surely impact on, and be properly decided in the course of, the Commission's decisions. Id. at 620-21, 104 P.2d at 43.
Although the result in *Sale* appears sound, the continued vitality of the major assumptions underlying *Sale*’s reasoning (in light of the demise of the Ransome-Crummey doctrine) is clearly questionable. Expressly crediting the reasoning of Ransome-Crummey, while actually limiting that case’s holding and reasoning quite significantly, *Sale* viewed the defect stemming from suspension as a “lack of capacity,” which it essentially characterized as a jurisdictional defect operative *only in law courts*. Modern cases, which implicitly reject the Ransome-Crummey doctrine, treat complaints of defects arising from suspension in the litigation context as mere pleas in abatement, ineffective if not raised prior to revivor.

As a practical matter, in light of the obvious unresolved tension between “jurisdictional/lack of capacity” and “plea in abatement” analysis, practitioners dealing with the issue of the validity of corporate acts occurring within the context of administrative agency proceedings or anywhere in the non-litigation context must be prepared to deal with both approaches. For example, should modern lawyers encounter the argument that approvals, licenses or permits issued by administrative agencies are *void*, they should argue that *Sale* controls if the agency had the power or “jurisdiction” to make the decisions or take the actions at issue sua sponte (and was

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130. While a suspension clearly prevents a corporation from legally exercising its own powers, nothing in any of the suspension and revivor statutes prevents a third party from acting so as to affect a suspended corporation; this is one situation where the “unconscious person” metaphor actually has some merit. While courts, as a matter of public policy, may refuse to lend their aid or recognition to suspended corporations, such a rule need not apply to others. CAL. REV. & TAX. CODE § 23301 (West 1992) (preventing a suspended corporation from exercising its own corporate powers).

It should be noted that *Sale*’s analysis largely ignores the issue of capacity to transfer and is unsatisfactory for that reason. *Sale*’s characterization of the rule denying effect to interim acts as one of “‘judicial procedure’” focused on a jurisdictional argument going to the validity of the Commission’s order and, thus, did not adequately analyze the issue of whether the trucking company’s *transfer of operative rights* which the Commission approved was itself a void or voidable act as undertaken by a corporation without corporate powers. That issue (assuming a subsequent revivor, also absent in *Sale*) would more closely resemble the types of issues raised in this Article’s four hypotheticals and would require a thorough analysis of the purposes of the tax collection statutes and the effect of their suspension and revivor provisions in non-litigation and non-contract contexts. This analysis, unfortunately, is something present case law does not provide.

131. *See supra* notes 124-29 and accompanying text.

132. *See supra* notes 76-95 and accompanying text.
thus not without power to render such decisions even absent parties having capacity to instigate the proceedings). Additionally, they

133. Carried to its logical conclusions, the argument based on Sale is somewhat complex due to the unclear line separating the inherent from the statutorily-bestowed powers of local governmental administrative and legislative bodies. For example, it has been held that a County Board of Supervisors "has no inherent power to grant [a] use permit regardless of the terms of the applicable ordinance." Johnston v. Board of Supervisors, 31 Cal. 2d 66, 74, 187 P.2d 686, 691 (1947); see Pettitt v. City of Fresno, 34 Cal. App. 3d 813, 822-23, 110 Cal. Rptr. 262, 268 (1973) (granting of permit by board contrary to ordinance's express terms is of no effect). Johnston and its progeny are arguably distinguishable because Johnston involved an explicit substantive requirement that the Planning Commission approve a use permit application before the Board of Supervisors could grant such a permit. Johnston, 31 Cal. 2d at 71-73, 187 P.2d at 690-91. Under the predecessor statute to the present California Government Code section 65010, it was held that Johnston did not control the procedural irregularity of a Board of Supervisors' failure to formally transfer a conditional use permit matter to itself before referring it back to the Planning Commission for further conditions. The statute cured the "possible procedural technicality," absent a showing of prejudice by the complaining party. See Ward v. County of Riverside, 273 Cal. App. 2d 353, 78 Cal. Rptr. 46 (1969), passim.

*Government Code section 65010, essentially provides that* [formal rules of evidence or procedure applicable in judicial actions and proceedings shall not apply in [administrative] proceeding[s] ... except to the extent that a public agency otherwise provides" and that "no action, inaction, or recommendation by ... [such] agencies ... shall be held invalid or set aside ... by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters or procedure subject to this title, unless ... the error was prejudicial[,] ... the party complaining or appealing suffered substantial injury from that error and ... a different result would have been probable if the error had not occurred ... .

*Cal. Gov't Code § 65010(a)-(b) (West Supp. 1992).*

This statute might go far toward supporting a Sale-based argument in opposition to a claim that a corporation's suspension prevented its compliance with an allegedly "jurisdictional" administrative rule. Further, the Legislature, in enacting statutes providing for the adoption and administration of zoning laws, has declared "its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." *Cal. Gov't Code § 65800* (West 1980). Authority construing this section in conjunction with section 65010's predecessor indicates a trend away from the Johnston-Pettitt doctrine and toward an approach recognizing more inherent power and fewer jurisdictional defects in connection with local agency decisions. See, e.g., Tashchner v. City Council, 31 Cal. App. 3d 48, 61-63, 107 Cal. Rptr. 214, 225-26 (1973).

Also, where it is argued that a local time provision (such as an application or appeal period) has run because a suspended corporation's acts were insufficiently valid to toll it and cannot be retroactively validated, Edwards v. Steele, 25 Cal. 3d 406, 599 P.2d 1365, 158 Cal. Rptr. 662 (1979), and its progeny provide guidance. That line of cases holds that "requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed." *Id.* at 410, 599 P.2d at 1368, 158 Cal. Rptr. at 665 (emphasis added). In Edwards, the court held that the 40-day period provided by the San Francisco Municipal Code for the Board of Permit Appeals to act on an appeal was not jurisdictional, and that the Board's noncompliance by acting outside of the period was not a jurisdictional defect which would invalidate its decision. *Id.* at 412-13, 599 P.2d at 1369-70, 158 Cal. Rptr. at 666-67.
should argue the acts undertaken by the corporation in applying for, and obtaining, the permits and approvals were merely "procedural" (i.e., like steps in a lawsuit) and were thus retroactively validated by subsequent revivor.

The second important California case bearing significantly on resolution of the questions posed by this Article’s hypotheticals is Benton v. County of Napa [Benton II]. In Benton II, a suspended corporation (Whitbread) applied in July 1988 to the County of Napa for an administrative extension and tolling of the life of its already-granted use permit for construction of a winery and related facilities in Napa County. The extension and tolling were necessary to allow the permit, which would otherwise have expired on September 1, 1988, to remain valid until the resolution of another lawsuit between Benton, a neighboring landowner, and real party Whitbread. The County granted the requested extension and tolling in August of 1988. After first learning of its suspension in December of 1988, Whitbread became revived in just over a week. Ultimately, Benton sought a mandate to invalidate the extension and tolling granted by the County, as well as all related permits, on the theory that Whitbread was without authority to request or obtain the same during its suspension, and that the original use permit thus expired on schedule on September 1, 1988. The trial court issued an amended judgment denying the writ of mandate and Benton appealed.

The court of appeal affirmed the trial court’s judgment, finding (without citing either Ransome-Crummey or Sale) that Benton’s attempts to analogize the situation to a statute of limitations problem and to characterize Whitbread’s acts as “substantive” and hence incapable of retroactive validation were

135. Id. at 1487-89, 277 Cal. Rptr. at 543-44.
136. Id. at 1488, 277 Cal. Rptr. at 544.
137. Id at 1488, 277 Cal. Rptr. at 543.
138. Id.
139. Id. at 1489, 277 Cal. Rptr. at 544.
140. Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 204 P. 446 (1922).
meritless. Unfortunately, the court of appeal relied on the troublesome "substantive/procedural" distinction which has emerged from the recent case law, and failed to grapple with either the continued vitality of the Ransome-Crummey doctrine or the prima facie effect of suspension on non-litigation interim acts. The court substituted a familiar labelling game for more cogent analysis:

As Whitbread argued to the trial court,

[i]f taking a judgment is a procedural act, if appealing is a procedural act, then by definition seeking an extension of time for use permits has got to be procedural." The trial court agreed with this assessment of the matter and so do we. The extension does not establish any new substantive rights; it merely extends rights already granted for a longer period of time. We are satisfied that Whitbread’s application for and obtaining of the extension and tolling were procedural acts. As its corporate status has been revived, we deem these interim acts to be as valid as if Whitbread’s status had never been suspended.

Aside from the obvious definitional problems stemming from its use of "substantive/procedural" labelling, Benton II’s analysis actually invites further unnecessary and wasteful litigation regarding the effect of suspension and revivor in the non-litigation context. The decision can easily be read to suggest the result might have been different (and adverse to the corporation) had the interim act of obtaining an initial permit (rather than an extension of an

143. Id. at 1490-92, 277 Cal. Rptr. at 544-45; see supra notes 102-14 and accompanying text (discussing recent case law in California employing "substantive/procedural" distinction).
144. Benton II, 226 Cal. App. 3d at 1492 n.6, 277 Cal. Rptr. at 546 n.6.
145. Id. at 1492, 277 Cal. Rptr. at 546.
existing permit) been involved.\textsuperscript{146} Thus, while it intuitively seems absurd that obtaining, for example, a use permit could be a more "substantive" act than obtaining a judgment (just as it seems absurd that obtaining a judgment is merely "procedural"!), the unfortunate reasoning of \textit{Benton II} might be read by a corporation's litigious opponent to suggest just that.\textsuperscript{147} While the corporation in \textit{Benton II} won the battle, the court provided ample ammunition for future litigants opposed to corporations' interim acts to carry on the wasteful "war."

5. \textit{Summary of General Principles}

At present, the few principles that can be extracted with any degree of certainty from the pertinent California cases and statutes are:

(a) A suspension of corporate powers is not self-executing,\textsuperscript{148} has been characterized as going to the "capacity" of a corporation to proceed in litigation,\textsuperscript{149} and does not deprive a court of jurisdiction to render

\textsuperscript{146} \textit{Benton II} thus leaves unresolved the questions posed in hypothetical number four involving a suspended corporation's obtaining original development permits and approvals. Much potential litigation might have been averted had the \textit{Benton II} court simply abandoned the "substantive/procedural" analysis and recognized that all interim acts should be retroactively validated by revivor as a matter of legislative intent. Alternatively, it could have affirmed the trial court's judgment under a \textit{Sale} analysis—holding that suspension does not affect the acts of a non-judicial body with sua sponte powers. It did not do so; rather, it illogically treated that threshold question concerning the effect of suspension as an alternative ruling of the trial court which it declined to address at all in light of its revivor and retroactive validation analysis. \textit{Id.} at 1492 n.6, 277 Cal. Rptr. at 546 n.6.

\textsuperscript{147} Dicta in the \textit{Ransome-Crummey}-era federal decision of \textit{McLaughlin Land & Livestock Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n}, 94 F.2d 491 (9th Cir. 1938), suggest the court there would have held a suspended corporation incapable of farming, so as to qualify as a farming corporation under the Bankruptcy Act provision at issue; however, in that case, the corporation's president had made a conclusive admission that no interim farming, had been done during the suspension period in any event, so the court's discussion of the issue was unnecessary to its holding. \textit{Id.} at 493.

\textsuperscript{148} See \textit{supra} note 38 and accompanying text (suspension not self-executing).

\textsuperscript{149} See, e.g., \textit{supra} notes 84-90, 94-95 and accompanying text (discussing "capacity" of suspended corporation to proceed in litigation).
judgment or take action with respect to the suspended corporation.\textsuperscript{150}

(b) Suspension, when raised in an attempt to void a corporation's actions is often characterized as a disfavored plea in abatement.\textsuperscript{151} In other words, it is said to be a formal and technical objection not going to the substance or justice of the cause which must be supported by facts existing at the time of the court's decision on the plea, thus giving corporations a chance to revive and proceed (unless precluded by an "action, defense or right" which has accrued to the other party);\textsuperscript{152}

(c) The revival of a suspended corporation normally retroactively validates its actions as to "matters" both prior to and subsequent to judgment in the litigation context,\textsuperscript{153} except to the extent substantive defenses or rights (such as the running of a statute of limitations in favor of a defendant sued by the corporation) have accrued in the interim (i.e., before revivor);\textsuperscript{154}

(d) Acts which a court considers to be "procedural" as opposed to "substantive" should be validated retroactively in both the litigation and non-litigation contexts;\textsuperscript{155}

(e) Before the recent trend toward broader retroactive validation (stemming from the California Supreme

\begin{footnotes}
\begin{itemize}
\item[150.] See supra notes 76-90 and accompanying text (demonstrating courts have jurisdiction to render judgment with respect to a suspended corporation).
\item[151.] See supra notes 76-101 and accompanying text (discussing "plea in abatement" characterization).
\item[152.] See supra note 83-85 and accompanying text (discussing "suspension" as a technical objection of plea in abatement); see also BLACK'S LAW DICTIONARY 1447 (6th ed. 1990); supra notes 5, 40-44, 53-75 and accompanying text (discussing origin and effect of language preserving "action, defense or right" of other party).
\item[153.] See supra note 97 and accompanying text (discussing retroactive validation in general terms).
\item[154.] See supra notes 105-11 and accompanying text (discussing accrual of substantive rights such as statute of limitations prior to revivor).
\item[155.] See supra notes 102-47 and accompanying text (discussing retroactive validation of "procedural" acts).
\end{itemize}
\end{footnotes}
Court's modern view of the tax suspension statutes as non-punitive in nature), administrative decisions involving suspended corporations were more likely than court decisions to be upheld against the "jurisdictional" lack of capacity objection because of the inherently different nature and powers of administrative fora which allows them to act on suspended corporations sua sponte. With the advent of Benton II and in light of the prevailing "substantive/procedural" analysis, however, the matter is considerably more uncertain even if the harsh Ransome-Crummey doctrine of no retroactive validation has been effectively overruled;

(f) The purpose of the tax suspension statutes is to pressure corporations to pay their taxes, and that purpose is not served by imposing additional penalties after taxes have been paid with penalties and interest;

(g) Corporate transfers of real property pursuant to contract are retroactively validated by obtaining relief from voidability; and

(h) Corporations mistakenly suspended are "restored" upon revival, with complete retroactive effect.

C. Exceptions To California's Doctrine of Retroactive Validation

The one clear "substantive" defense or "right" which it is held cannot be prejudiced by a corporation's revival is the right of an opposing defendant to assert the running of the statute of

156. See supra notes 122-33 and accompanying text (comparing and contrasting administrative decisions to court decisions involving suspended corporations).
157. See supra notes 134-47 and accompanying text (discussing Benton II).
158. See supra notes 102-13, 143-47 and accompanying text.
159. See supra notes 99-101 and accompanying text.
161. Id. § 23305c (West 1992).
limitations as an affirmative defense. In other words, when the statute runs on an action filed by a suspended corporation before the corporate plaintiff is revived, the action will normally be barred by the corporation's supposed failure to timely file a valid complaint.

The statute of limitations exception was, of course, originally based on Ransome-Crummey's doctrine that all interim acts were void and incapable of validation. Since the complaint filed by a suspended corporation was a "void" act, the statute was not tolled. The apparent rationale modernly offered for this anachronistic exception, as indicated by Welco Construction, Inc. v. Modulux, Inc., is that statutes of limitation are crucial to society's welfare, favored by the law, properly viewed as statutes of repose, and constitute complete and meritorious defenses.

162. See, e.g., Community Elec. Serv. v. National Elec. Contr., 869 F.2d 1235, 1238-41 (9th Cir. 1989) (dismissing plaintiff electrical contracting company's antitrust action against various defendants where plaintiff was suspended at time of filing initial complaint, but was revived one month and two days after antitrust statute of limitations had run; court held that although "[n]o California Supreme Court decision has addressed the situation where the revivor issues after the statute of limitation has expired," California Court of Appeal decisions were unanimous and relied on the case of Traub Co. v. Coffee Break Serv., Inc., 66 Cal. 2d 368, 425 P.2d 790, 57 Cal. Rptr. 846 (1967), which distinguished Cleveland v. Gore Bros. Inc., 14 Cal. App. 2d 681, 683, 58 P.2d 931, 932 (1936) as presenting "statute of limitations problems," and thus precluded conclusion that California Supreme Court would rule differently); see also Electric Equip. Exp., Inc. v. Donald H. Seiler & Co., 122 Cal. App. 3d 834, 845-47, 176 Cal. Rptr. 239, 245-47 (1981) (also holding substantive defense of statute of limitations is waived where defendant files cross-complaint against suspended corporate plaintiff before statute runs); Welco Constr., Inc. v. Modulux, Inc., 47 Cal. App. 3d 69, 73, 120 Cal. Rptr. 572, 574-75 (1975) (distinguishing procedural acts validated by revivor from substantive defenses); Hall v. Citizens Nat'l Trust & Sav. Bank, 53 Cal. App. 2d 625, 630-31, 128 P.2d 545, 548 (1942) (explaining that the statute of limitations is not tolled by complaint filed during corporate incapacity, and where statute runs before revival, defense based thereon is "not one in abatement but a defense to the action on the merits."); Cleveland v. Gore Bros., Inc., 14 Cal. App. 2d 681, 58 P.2d 931 (1936) (seminal case holding to same effect under authority of Ransome-Crummey where affirmative defense raised in answer); Benton II, 226 Cal. App. 3d 1485, 1491-92, 277 Cal. Rptr. 541, 545-46 (1991).

163. Community Elec. Serv., 869 F.2d at 1241.

164. See Cleveland, 14 Cal. App. 2d at 683, 58 P.2d at 932 (discussing Ransome-Crummey decision); see also supra notes 50-75 and accompanying text.


166. Id. at 72-74, 120 Cal. Rptr. at 573-75. It should be noted that the justification for the statute of limitations exception has largely shifted, following Ransome-Crummey's demise, from that case's doctrine that interim acts are "void" as part of the "penalty," to the "action, defense or right" language in section 23305a of California Revenue and Taxation Code. As already shown above. However, this new rationale depends on a misreading of the legislative purposes underlying
This line of reasoning, which happily has been recently questioned, apparently views statutes of limitation as vesting in defendants' substantive "rights," (pleadable as affirmative "defenses" if within the meaning of section 23305a) to be free of stale claims not brought within the statutorily prescribed time period. These characteristics, though they hardly justify the exception either as a matter of policy or of statutory interpretation, may nevertheless prove helpful to practitioners as a practical matter to distinguish statutes of limitation from other merely "procedural" time periods or provisions which cut off one party's rights but do not vest a "right" or "defense" in another party. Examples of such non-substantive time periods would seem to include the development permit deadlines involved in this Article's fourth hypothetical, and the period in which to apply for a use permit extension involved in Benton II. Ultimately, the statute of limitations exception fails to offer a logical and satisfactory rationale why a complaint, which usually is retroactively validated by revivor, is not in this sole instance.

167. See supra notes 40-44, 59-172 and accompanying text (discussing interpretation of the "without prejudice" language).


170. The absurdity of the exception can be illustrated by an equally absurd, but equally "logical" example. The Federal Rules of Civil Procedure require a plaintiff to effect service of process on all defendants within 120 days of the filing of the complaint or the action will be dismissed, unless good cause for the failure can be shown. FED. R. CIV. P. 4(j). If a suspended corporation files a complaint and serves the defendant within the 120-day period, but does not become revived until after the period has run, is the action subject to dismissal because a suspended corporation cannot validly effect service or receive its benefit? Is the defendant's "right" to timely and valid service of the complaint any less important than the right to the complaint's timely and valid filing? The obvious objection that service was actually made on defendant, and its purpose of
Another “right” which formerly accrued under section 23305a of the Revenue and Taxation Code, without vulnerability to destruction by revivor, was the right of another contracting party to void at its option a corporation’s contract entered into during its suspension.171 This non-self-executing section dealing with contracts was clearly penal in nature, except perhaps where the other contracting party had relied somehow to its detriment on contracting with a non-suspended corporation. It was, thus, out of step with the general purposes of the suspension statutes as expressed by the supreme court in Peacock Hill,172 and that might explain its codification in a separate statutory provision. As discussed above, section 23304 was repealed in 1990 and replaced with provisions which now provide specific procedures for a corporation to cure its voidable contracts and limit the impact of suspension in any event to a conditional right of the other party to rescind the contract upon payment of full restitution.173 Older cases of doubtful vitality held that a judgment in favor of a corporation in an action brought by the corporation while under the suspension is not validated by revivor.174

By way of contrast to the above, outstanding examples of so-called “procedural” steps expressly held not to be encompassed within the “rights” and “defenses” of section 23305a are (1) the ability to take a default judgment based on an opponent’s lack of capacity,175 and (2) the ability to dismiss an opponent’s untimely appeal.176 It should be noted that such “procedural” steps have

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173. See supra note 43 and accompanying text (discussing relevant statutory provisions).

174. See Smith v. Lewis, 211 Cal. 294, 300-01, 295 P. 37, 40 (1930) (relying on Ransome-Crummey in dicta stating acts during suspension not validated). Like Ransome-Crummey, Smith has undoubtedly been effectively overruled, if only sub silentio by subsequent supreme court decisions.


tremendous "substantive" impact, further underscoring the unsatisfactory nature of the amorphous "substantive/procedural"
distinction.

Having explored California statutory and case law in the corporate suspension and revivor area, this Article now turns its
attention to the law of other states in search of helpful insights, reasoning, and trends in the area.

II. ANALYSIS OF OUT-OF-STATE AUTHORITIES ON CORPORATE SUSPENSION AND REVIVOR

Out-of-state decisions as to the validity of interim corporate acts are conflicting. Significantly, as pointed out by the most comprehensive annotated survey of the subject available to date, which still deals with fewer than half the states, the "different results [reached in different jurisdictions on the issue of validation of interim acts] are generally attributable to the differences in statutes as between jurisdictions . . . ." 177

The relevant statutes can broadly be classified into two general types: (1) Statutes completely silent about the effect of a corporation's reinstatement on its interim acts ("Type 1"); and (2) statutes specifying to some degree the effect of revivor on interim acts ("Type 2"). 178 Judicial interpretations of the various types of corporate suspension and revivor statutes, particularly with respect to their underlying policies and purposes, are, of course, also crucial to any analysis of out-of-state law.

This section attempts to analyze trends in the out-of-state authorities from three different perspectives: (1) "trends" in leading decisions and those with facts most similar to our

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178. Id.; see infra notes 292-304 and accompanying text (surveying the relevant statutes of important jurisdictions, and revealing that the assessment of whether a statute is "silent" or speaks to some degree on the subject of retroactive validation is somewhat subjective). The Corporate Charter Reinstatement annotation classifies California's statute as "silent," which was probably an accurate characterization up until the 1991 statutory revisions. See John P. Ludington, Annotation, Corporate Charter Reinstatement, 42 A.L.R 4th § 22[b], at 434 (1985).
hypothesicals;179 (2) "trends" in states with statutes and policies similar to California's;180 and (3) "trends" in "important" states.181

A. Trends in Leading and Factually Similar Cases

In Stock Pot Restaurant, Inc. v. Stockpot, Inc.,182 a leading case from the Federal Circuit Court of Appeals which is factually similar to hypothetical number two, the court affirmed a decision of the Trademark Trial and Appeal Board (TTAB) granting the appellee Stockpot, Inc.'s petition to cancel two of the appellant Stock Pot Restaurant, Inc.'s registrations of "STOCK POT" for commercial services based on the appellee's prior continued use.183 Along with asserting factual claims challenging the sufficiency of the evidence before the TTAB to support its findings, the appellant claimed that the appellee corporation's temporary dissolution for failure to file required forms invalidated the appellee's prosecution of the proceedings and constituted an abandonment of the trademark.184 Relying on the applicable Massachusetts revivor statute, which provided that on revival "the corporation shall stand revived with the same powers, duties and obligations as if it had not been dissolved" and that "all acts... which would have been legal and valid but for such dissolution,

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179. See supra text accompanying notes 24-36 (discussing hypotheticals).
180. See infra notes 258-91 and accompanying text.
181. See infra notes 254-88 and accompanying text. While the author has chosen approximately one dozen of the most "important" states to survey for this purpose, based on criteria discussed further below, and has not undertaken an exhaustive state-by-state survey in search of the "majority view" of statutes and case law in every state and the territories, it has been stated by several authorities that the "majority" of states recognize retroactive validation of interim acts. See, e.g., G. Van Ingen, Annotation, Reinstatement of Repealed, Forfeited, Expired or Suspended Corporate Charter As Validating Acts In Interim, 13 A.L.R. 2d 1220 (1950); Kemeys v. Cobb, 658 S.W.2d 128, 131 (Tenn. App. 1983) ("majority view"); Mayflower Restaurant Co. v. Griego, 741 P.2d 1106, 1110-11 (Wyo. 1987) ("[M]ajority view is that... reinstatement... will validate interim acts..." citing G. Van Ingen, supra).
182. 737 F.2d 1576 (Fed. Cir. 1984). This case was, in fact, the inspiration for the second hypothetical.
183. Id. at 1578.
184. Id. The dissolution occurred before appellee initiated the cancellation proceedings, and appellee was revived during the proceedings. Id. at 1578, 1580.
shall, except as aforesaid, stand ratified and confirmed[;]” the court held “that provision gave retroactive effect to the revival, including the propriety of the appellant’s continued use of the mark.”

The *Stock Pot* decision was based on Massachusetts law (and much more clear, explicit and descriptive statutory language than exists in California), but it is pertinent to our hypothetical fact patterns for several reasons: (1) It is a “leading” case from an “important” state; (2) it involves retroactive validation of continued use of a *trademark*, a non-litigation, non-contract act; and (3) it can be persuasively argued that the same broad rule of retroactive validation resulting from Massachusetts’ statutory scheme has been mandated through judicial interpretation in California under the rationale of *Peacock Hill.*

Other states, too, recognize that revivor erases the void in the corporate existence created by suspension. In the leading Colorado

185. *Id.*, citing MASS. ANN. LAWS ch. 156B, § 108 (West 1992). The Massachusetts revivor statute provides:

If the state secretary finds that the existence of a corporation has terminated in any manner and that such corporation ought to be revived for all purposes or for any specified purpose or purposes with or without limitation of time, he may, upon application by an interested party, file in his office a certificate in such form as he may prescribe reviving such corporation. The state secretary may subject the revival of such corporation to such terms and conditions, including the payment of reasonable fees, as in his judgment the public interest may require. Upon the filing of a certificate reviving a corporation for all purposes, said corporation shall stand revived with the same powers, duties and obligations as if it had not been dissolved, except as aforesaid, stand ratified and confirmed. If such a corporation is revived as aforesaid for a limited time or for any specified purpose or purposes, it shall stand revived for such time or for the accomplishment of such purpose or purposes in accordance with the terms of the state secretary’s certificate. For cause shown to his satisfaction, the state secretary may, by certificate filed as aforesaid, extend the time for which a corporation revived for a limited time shall stand revived. A certificate filed by the state secretary pursuant to this section shall constitute an amendment of the articles of organization of the corporation, effective when filed.


186. As the *Stock Pot* court noted, “by its very terms Section 108 . . . shows that, after revival, the corporation normally stands, with respect to the acts done during the interim period, as if it had not been dissolved.” *Stock Pot*, 737 F.2d at 1580.

decision of *Micciche v. Billings*, for example, the Colorado Supreme Court held a corporation’s suspension for failure to file a required biennial report did not render its officers personally liable for a workmen’s compensation award entered against the corporation during its period of suspension under a state statute imposing joint and several liability on persons assuming to act as a corporation without authority. The court stressed that the pertinent suspension statute specifically allowed the suspended corporation to effect certain real estate transactions, and that “[u]nder case law, a corporation reinstated after suspension is deemed to have had continuous existence throughout the period of suspension, with the result that the corporation’s loss of authority to transact business does not affect its continued existence as a legal entity.”

This principle was further explained in *Dominion Oil Co. v. Lamb*, in which the Colorado Supreme Court held (under a statute silent on the issue) that a contract entered into by a corporation during suspension was valid after revival because “the revived corporation is regarded as having had continuous existence.” *Dominion Oil* quotes a treatise to the following effect on corporate revival:

The corporation, if revived or reinstated pursuant to statute, is the same corporation since another corporation cannot be created by such proceedings. It becomes reinvigorated with all its old powers and franchises, and with its duties and obligations. Thereafter, it may sue and be sued.

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188. 727 P.2d 367 (Colo. 1986).
189. Id.
190. Id. at 370; see COLO. REV. STAT. § 7-10-109(2) (West Supp. 1991) (Colorado suspension and revivor statute; subdivision (2) provides in pertinent part, that despite the fact that a suspended corporation is inoperative, its shareholders may continue to meet and the “corporation may hold or continue to hold, encumber, sell, or convey real estate. . . .”). This is not the case in California, where the 1990 revisions to Revenue and Taxation Code section 23302 state a contrary rule. See supra note 7 (discussing the California statute).
192. *Dominion Oil*, 201 P.2d at 372.
193. Id. at 375.
Reinstatement of the corporation validates previous corporate acts, unless under the terms of the statute the delinquent corporation is, during the period of suspension, wholly without power to act or contract and its attempted acts or contracts are entirely void.194

The *Dominion Oil* court noted that no Colorado statute voided interim acts or made them misdemeanors.195 It also noted that, in addition to the explicit legislative penalties, refusal to enforce the contract would have the effect of enabling the judiciary to further penalize the corporation in the sum of $32,000, contrary to the primary purpose of the statutory penalties to collect public revenue for the support of the government, and not to collect the same in the interest of private litigants.196

In the Massachusetts case of *Barker-Chadsey Co. v. W.C. Fuller Co., Inc.*,197 a decision addressing an officer liability problem similar to that in *Micciche*, the plaintiff wholesaler sued the defendant corporate buyer, a retail hardware business, for sums owed under a promissory note made by the defendant’s treasurer for purchased goods. Following the defendant’s voluntary private inventory sale on the plaintiff’s account, the plaintiff learned that, when the note was made, the defendant had been dissolved for failure to file annual reports or pay franchise taxes. (In fact, the defendant had been dissolved for many years and was never reinstated).198 The plaintiff then sought to add claims against the treasurer and another officer on the theory that they were

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194. *Id.* at 376 (emphasis added). The court cited WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7998, at 706 (1st ed. 1931). *Dominion Oil*, 201 P.2d at 376. Although the broad language emphasized above no longer appears in the *Fletcher* treatise, the current section of that treatise, along with its extensive annotations reflecting the case and statutory law of various states on the issue, is to the same general effect. See WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7998, at 91-107 (3d ed. 1990) (current version).

195. *Dominion Oil*, 201 P.2d at 375.

196. *Id.* at 374-75.

197. 448 N.E.2d 1283 (Mass. App. 1983); *see supra* notes 185-86 and accompanying text (discussing the Massachusetts statute).

198. *Barker-Chadsey*, 448 N.E.2d at 1284.
personally liable because they represented no corporation in the transaction.\textsuperscript{199}

Looking first to the mutual understandings and representations of the parties as to who would be liable for the note, and finding that: (1) Liability was understood to be corporate, not individual, (2) there was no unfair dealing, and (3) the corporate officer was ignorant of the dissolution, the court next examined the policy of the statutes dealing with the dissolution and revival of corporations.\textsuperscript{200} Finding the statutes gave the Secretary of State broad discretion to act in the public interest to revive corporations and validate (either completely, conditionally or selectively) their past acts, the court took the unusual steps of (1) conditioning its relief of the defendants from personal liability on their securing "a revival . . . sufficient to validate the transactions here involved as corporate acts[,]" and (2) charging the defendants as trustees for the plaintiff's benefit of properties they held to which the corporation would become entitled upon revivor.\textsuperscript{201} Perhaps significantly, the Barker-Chadsey court cited California's leading Peacock Hill case in a footnote to support its unusual relief.\textsuperscript{202} It also found support for its recognition of the validity of the existence and acts of a seemingly long dead corporation in a quote from the Delaware case of Frederic G. Kapf & Son v. Gorson.\textsuperscript{203} The latter case stated that "[f]ailure to pay franchise taxes is an issue solely between the corporation and the State since the franchise tax statutes are for revenue-raising purposes alone. This being so, if the creditor dealt in good faith with the corporation as a corporation, and if no fraud or bad faith on the part of the

\textsuperscript{199} Id. at 1284-85.
\textsuperscript{200} Id. at 1285.
\textsuperscript{201} Id. at 1286-87. It is perhaps significant that California's statutes also confer a broad discretion on the Secretary of State to revive even noncomplying corporations if that would enhance the State's collection prospects. See supra note 39 (discussing CAL. REV. & TAX. CODE § 23305(b)). This statute supports the view that, as in the Dominion Oil case, the main purpose of California's scheme is to collect taxes, not to promote the interests of private litigants. See supra notes 192-96 and accompanying text (discussing Dominion Oil). As stated in Peacock Hill, once that purpose is served, there is little reason to assess additional penalties. Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 8 Cal. 3d 369, 371, 503 P.2d 285, 286, 105 Cal. Rptr. 29, 30 (1972).
\textsuperscript{202} Barker-Chadsey, 448 N.E.2d at 1287 n.15.
\textsuperscript{203} 243 A.2d 713, 715 (Del. 1968).
corporate officers is involved, the creditor's remedy is against the
corporation.\textsuperscript{4}\textsuperscript{204}

A number of principles relevant to the retroactive validation
problem are discussed in \textit{Spector v. Hart},\textsuperscript{205} a Florida appellate
court affirmed a decision which the lower court's validation of a
lease executed by a dissolved corporation's president on its behalf
during the period of suspension where the corporation had later
been revived.\textsuperscript{206} The revival restored the corporate status and
allowed the president to win summary judgment on the claim
against him for personal liability on the lease.\textsuperscript{207}

The \textit{Spector} court relied on a number of authorities\textsuperscript{208}
reasoning that: (1) The "acts and doings" of a corporation during
suspension of its corporate powers are "confirmed" by its
subsequent revival; (2) a corporation is treated as a de facto
corporation while suspended but still subject to revival;\textsuperscript{209} (3)
penalties for franchise tax delinquency are simply designed to
produce revenue and that reinstatement is "usually permitted \textit{nunc}
pro tunc} upon payment of the tax arrears;"\textsuperscript{210} and (4)
"restoration shall have effect \textit{ab initio} from date of
dissolution."\textsuperscript{211} The court also quoted a leading New Jersey case
reasoning in part that "(I)n good conscience the defendants, who
are strangers to the dealings between plaintiff and the State, should
not be allowed to take advantage of the plaintiff's default in paying
its taxes to escape their own obligations to the plaintiff, when its
default has been cured by its subsequent compliance with the

\begin{footnotes}
\footnote{204. Barker-Chadsey Co., 448 N.E.2d at 1287 n.16.}
\footnote{205. 139 So. 2d 923 (Fla. App. 1962).}
\footnote{206. \textit{Id.} at 923-24.}
\footnote{207. \textit{Id.} at 924. The specific Florida statute then in effect provided in part that "restoration
shall be effective from the date of dissolution or cancellation of permit." \textit{Id.} at 924-25 (citing
\textit{FLORIDA STAT. ANN.} § 608.37(1) (West 1977)).}
\footnote{208. \textit{Id.} at 925-26.}
\footnote{209. \textit{Id.} at 925. The court cited the annotation at 13 A.L.R. 2d 1220 (1950), which has been
\footnote{210. \textit{Id.} at (citing 2 \textsc{Hornstein, Corporation Law and Practice} § 812, at 354 (1959)).}
\footnote{211. \textit{Id.} at 926 (citing McClung v. Hill, 96 F.2d 236 (5th Cir. 1938)).}
\end{footnotes}
statutory requirements." The current Florida revivor statute at least implicitly provides for retroactive validation of interim acts.

Relevant to this Article's hypotheticals, the effectiveness of a non-litigation, non-contact act—transfer of a deed—was discussed in *New Hampshire Fire Insurance Co. v. Virgil & Frank's Locker Services, Inc.*, a diversity case applying Missouri law to an insurance company is appeal of a judgment in favor of the insured corporation. The corporation sued on its fire insurance policy after its building was destroyed by fire. Prior to the fire, the corporation's charter was forfeited for failure to file required antitrust affidavits. In the interim between the forfeiture and its rescission, the corporation executed a deed purporting to convey title to the insured building to the holders of an existing deed of trust. After the building burned down, the corporation submitted proofs of loss; these were rejected, and the forfeiture was subsequently rescinded. In a twist on the usual scenario, the

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212. *Id.* at 927 (citing J.B. Wolfe, Inc. v. Salkind, 70 A.2d 72 (N.J. 1949)). This rationale, which is basically that as to third party corporate opponents the assertion of "rights" stemming from a corporate suspension is a hypertechnical argument the courts would prefer not to deal with, was expressed in Barker-Chadsey Co. v. W.C. Fuller Co., Inc., 448 N.E.2d 1283, 1287 n.16 (Mass. App. 1983), and Frederic G. Knapf & Son v. Gorson, 243 A.2d 713, 715 (Del. 1968).

213. *Fla. Stat. Ann.* § 607.1422(3) (West Supp. 1992) ("When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred."). Spector's specific holding was temporarily superseded by Florida legislation specifying that (1) persons assuming without authority to act as a corporation are personally liable for resulting liabilities, and (2) reinstatement of an involuntarily dissolved corporation has no effect on the personal liability of corporate agents for actions taken during dissolution. See Anderson v. Hillsborough Sheet Metal, Inc., 513 So. 2d 1359 (Fla. App. 1987) (affirming summary judgment holding corporate president personally liable on contract with plaintiff entered while corporation involuntarily dissolved for failure to file annual report). The statutes were revised again in 1989, however, and now provide that in order to be held personally liable, persons acting on behalf of a corporation must have actual notice of the administrative dissolution and that such liability is terminated upon ratification of the action taken by the corporation's directors or shareholders subsequent to dissolution. 18 *Fla. Stat. Ann.* § 607.1421(4) (West Supp. 1992).

214. 302 F.2d 780 (8th Cir. 1962).

215. *Id.* at 781.

216. *Id.*

217. *Id.*

218. *Id.* at 782.

219. *Id.* at 781-82.
principal argument the opposing party (the insurer) advanced on appeal was that the transfer of the deed in question was an effective interim act and the corporation therefore had no insurable interest. 220

The court of appeals affirmed the lower court's ruling that the deed was void despite the rescission of the forfeiture. 221 The relevant Missouri statute then governing forfeiture of corporate rights had been construed to effect a complete dissolution, making the corporation a non-entity. 222 The court noted: "It is elementary that purported acts of a non-entity are without legal effect and that a corporation's deed, executed while the corporation has no legal existence, is a worthless thing." 223 It then reasoned that the subsequent rescission of the forfeiture was not retroactive because the relevant statute did not evidence a clear legislative intent to defeat the general rule that statutes operate prospectively only. 224

In Bar Bea Truck Leasing Co., Inc. v. United States, 225 a leading case in the relevant area of non-contract, non-litigation interim acts, the United States Court of International Trade applied New Jersey law and rejected the government's contention that a corporation's suspension while it held a Customhouse license (CHL) caused the license to permanently expire despite the corporation's subsequent revivor. 226 The court relied on the

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220. Id. at 781.
221. Id. at 780.
222. Id. at 783.
223. Id.
224. Id. at 783-84. This case is discussed mainly because it contravenes the apparent majority rule and its reasoning is quite similar to that of the Ransome-Crummey court. See supra text accompanying notes 50-75 (discussing Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446 (1922)).

Although factually analogous to the extent it involved the validity of an interim act not strictly within the litigation or contract context (i.e., conveying real property by deed), New Hampshire Fire is also distinguishable from our hypotheticals because (1) it involved a complete forfeiture and dissolution, rather than a mere suspension, and (2) California courts have already construed the relevant California revivor statutes to have substantial retroactive reach without apparent regard for the rules concerning the prospective operation of statutes generally. Most importantly, as discussed further below, non-retroactivity is no longer the law in Missouri, having been legislatively abrogated. See infra note 257 and accompanying text.

226. Id. at 558-59.
leading decision of *J.B. Wolfe, Inc. v. Salkind* in expounding the New Jersey rule "that the reestablishment of a repealed corporation when the unpaid taxes (which caused the revocation) are paid, is retroactive and validates all prior acts of the corporation during the period the corporate charter was null and void." The effects and policies (suspension and revenue raising, respectively) of the New Jersey and California statutory schemes, as interpreted by those states' highest courts, are the same. The reasoning of the *Wolfe* case is still cited as persuasive by many newer cases, and *Wolfe* was decided under a "Type 1" (i.e., silent) statutory scheme, also analogous to California's scheme. Of particular interest is the following language in *Wolfe*:

The object of these [suspension and revivor] statutes being solely the raising of revenue for the State (the police aspects of the situation being covered by separate statutory provisions hereinafter referred to), it would be inequitable to permit third persons, such as the defendants here, who

227. 70 A.2d 72 (NJ. 1949).
228. *Bea Bar Truck Leasing*, 546 F. Supp. at 563. The court further stated:
In *Wolfe*, plaintiffs sued to recover a commission, and defendant resisted on the ground that plaintiffs' corporate charter had been revoked seven years earlier. The unanimous New Jersey Supreme Court held that the effect of repeal was mere suspension of corporate powers until the corporation has complied with the revenue raising provisions of the statute. "[W]hen default has been cured by subsequent compliance . . . reinstatement relates back to the date of the proclamation [of repeal] and validates corporate action taken in the interim." [70 A.2d at 76]

Id.


230. *See, e.g., supra* notes 212, 228-29; *infra* note 231 and accompanying text.

231. *See supra* note 178 (explaining a "Type 1" statutory scheme). Of *Wolfe*, it has been noted:

The relevant statute in that case provided that the power granted by law to a corporation would be "inoperative and void" if the corporation did not pay its State taxes. Upon payment of delinquent taxes, the corporation would be reinstated "and entitled to all its franchises and privileges." . . . *The New Jersey statute did not indicate whether reinstatement would relate back to the date of dissolution and validate corporation action taken during the interim.*

Regal Package Liquor v. J.R.D., Inc., 466 N.E.2d 409, 411 (1984) (emphasis added). While it is noteworthy as well, in light of this article's third hypothetical, that *Salkind* validated a brokerage commission agreement involving a corporate broker, no argument was made there that a license was necessary and/or defective (it was a personal, not real property brokerage contract), only that the contract was void. *Wolfe*, 70 A.2d at 73-75.
had dealt with the corporation in the period when its charter had been forfeited to defend suits against them on this ground after the corporation had . . . been reinstated as a corporation and entitled to all its franchises and privileges. In good conscience the defendants, who are strangers to the dealings between plaintiff and the state, should not be allowed to escape their own obligations to the plaintiff, when its default has been cured by its subsequent compliance with the statutory requirements. [¶] Nor does this view leave the State without adequate remedies against a corporation that persists in exercising its corporate powers despite the Governor’s proclamation of repealer for the nonpayment of taxes.232

The Wolfe court went on to note that the State’s remedies included statutory provisions making it a misdemeanor to exercise a suspended corporation’s powers.233 Additionally, the statutes grant the attorney general authority to petition to obtain a receiver for the corporation, or to obtain and execute a judgment on the taxes due.234

Turning to an out-of-state decision which is factually similar to the first hypothetical, in Golden Condor, Inc. v. Bell,235 the Idaho Court of Appeals, vacating and remanding for further proceedings, rejected various attacks by an individual (Bell) on a corporation’s ownership of four unpatented mining claims.236 Bell claimed that she had contract rights to the disputed claims, that the corporation had abandoned or forfeited them, and that she had then “relocated” the mining claims.237 State law required the performance and proof of annual labor by a claim’s record owner to protect it from such competing claims based on relocation.238

232. Wolfe, 70 A.2d at 76.
233. Id.
234. Id. at 76-77.
235. 678 P.2d 72 (Idaho App. 1984). This case is nearly identical to, and inspired, this Article’s first hypothetical.
236. Id. at 74.
237. Id.
238. Id. at 77.
Among Bell’s many assertions was a “technical attack” based on the fact that the corporation’s charter had been forfeited for approximately two years for failure to file annual statements.239 Obviously, if the corporation’s revivor did not retroactively validate the required annual labor on its behalf, the claim was forfeited and subject to relocation. Without belaboring the point, the court simply stated: “[T]his temporary forfeiture of the corporate charter did not, of itself, result in forfeiture of the mining claims.”240

Golden Condor recognizes retroactive validation of interim acts outside the contract and litigation contexts, and would resolve this Article’s first hypothetical if controlling. Moreover, Golden Condor’s result was reached by following a case decided under statutory language very similar to California’s “without prejudice” proviso.241

Illustrating a contrary view of the retroactive effect of revivor in a non-litigation, non-contract factual context is Giselmann v. Stegeman,242 a decision which, without extended discussion, held void the issuance of capital stock authorized by a corporation’s board of directors after its charter was forfeited for failure to renew its registration and antitrust affidavits.243 That case was decided under a no longer effective “Type 1” statute construed as not retroactively validating interim acts.244 The court held the rescinding of the forfeiture did not validate the illegal meetings and elections leading to the stock issuance.245 As previously indicated,

239. Id. at 78.
240. Id. To support this point, the court cited Pacific Northwest Bell Tel. Co. v. Rivers, 398 P.2d 63 (Idaho 1964), a case holding that the temporary loss of a corporate charter does not cause the loss of its trade name. Id.
241. See infra note 281 and accompanying text (setting forth the text of then-effective Idaho statute and discussing its relevant language’s similarity to California’s “without prejudice” proviso). The relevant statute, IDAHO CODE § 30-608 (1980), was repealed as part of an entire chapter effective in 1981. Effective July 1, 1981, and continuing in effect to the present day, is the provision contained in IDAHO CODE § 30-1-138 (1992), which provides simply that “[f]rom and after the granting of the reinstatement, the corporation’s powers and authority to do business shall be restored.”
242. 443 S.W.2d 127, 135-36 (Mo. 1969).
243. Id. at 132, 135.
244. Id. at 131-32, 137.
245. Id. at 135; see John P. Ludington, Annotation, Corporate Charter Reinstatement, 42 A.L.R. 4th § 8, at 410-11 (1985) (discussing statutes which do not retroactively validate interim acts).
the result, however, would be different today under a change in Missouri law.\textsuperscript{246}

More typical of the usual result in the context of non-litigation, noncontract interim acts is the decision in \textit{Greenville Law Library Association v. Village of Ansonia},\textsuperscript{247} in which the Ohio Court of Common Pleas held that the nearly eight year cancellation of a law library association's corporate charter had "no adverse effect" on its statutory right to funds created from certain fines collected by municipal corporations in the same county.\textsuperscript{248} The court concluded that because the library continued its operation and functioning the same as it had prior to the cancellation of its charter, and the same as it had done since reinstatement, the library's right to receive funds as a county library association should not be denied.\textsuperscript{249}

The above cases illustrate varying approaches in different jurisdictions and the importance of the relevant statutory language, as well as its case law interpretation, in each jurisdiction. \textit{Stock Pot},\textsuperscript{250} \textit{Barker-Chadsey},\textsuperscript{251} and \textit{Spector},\textsuperscript{252} illustrate a broad, retroactively-validating \textit{nunc pro tunc} approach, retroactively validating contracts, trademark rights, and steps in litigation. The \textit{Barker-Chadsey} court, took into account the apparent presence or absence of good faith on the part of the corporation and its agents, and the \textit{Spector} court recognized that nonpayment of corporate taxes commonly inadvertently occurs.\textsuperscript{253} Attribution of a good

\begin{itemize}
\item \textsuperscript{246} See infra note 257 and accompanying text.
\item \textsuperscript{247} 275 N.E.2d 883 (Ohio Comm. Pl. 1971), rev'd on other grounds, 292 N.E. 2d 880 (1973). Ohio's statutory suspension and revivor scheme is not a model of clarity, but has apparently been interpreted to retroactively validate interim acts upon a corporation's revivor. See infra note 301.
\item \textsuperscript{248} Id. at 888.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} 737 F.2d 1576 (Fed. Cir. 1984).
\item \textsuperscript{251} 448 N.E.2d 1283 (Mass. App. 1983).
\item \textsuperscript{252} 139 So. 2d 923 (Fla. App. 1962).
\item \textsuperscript{253} See Barker-Chadsey, 448 N.E.2d at 1287 n.16; Spector, 139 So.2d at 927 (considering good faith of corporate officers). With respect to the potential for an inadvertent tax payment lapse in California, see supra note 24. It further appears that courts seem more willing to employ a retroactive validation approach where the policy of the suspension and revivor statutes is, as in California, merely to ensure payment of taxes, not levy punitive sanctions. The presence of punitive, penalizing statutory provisions, however, can even be construed to \textit{support} a retroactive revivor analysis, as demonstrated by the Wolfe court. See, e.g., J.B. Wolfe, Inc. v. Salkind, 70 A.2d 72, 76
\end{itemize}
faith forgetfulness to delinquent corporations is conducive to interpretations finding revivor to operate retroactively; as stated by one sympathetic court, "A large number of corporations...overlook the payment of taxes and the filing of various required forms with the Secretary of State."²⁵⁴

Examples of other states' generally liberal revival rules provide evidence of a trend in that direction.²⁵⁵ In summarizing the results of the reported cases dealing with roughly similar factual situations to those of this article's hypotheticals, the trend appears to be to retroactively validate the interim acts of a suspended corporation, at least where there is no judicial authority interpreting a silent statute as not operating in such retroactive fashion.²⁵⁶ It is interesting to note that the only factually similar cases discussed which do not uphold retroactive validation of the interim acts apply Missouri law based on judicial interpretation which was subsequently superseded by that state's legislature in order to effect retroactive validation of interim acts.²⁵⁷
B. Results Under Similar Statutes

In a broad sense, California’s suspension and revivor statutes are similar to those of a large group of jurisdictions whose statutes the Corporate Charter Reinstatement annotation classifies as “silent as to intervening acts,” and whose courts have taken the view that reinstatement retroactively validates interim acts. In a number of cases decided within this group, several principles and lines of thought consistently emerge as supporting rationales:

dwindling; the trends therein are away from non-retroactivity, or toward a weaker version of it. The Corporate Charter Reinstatement annotation somewhat inaccurately lists the following six jurisdictions as having case law construing “Type 1” statutes as not validating interim acts: Arkansas, the District of Columbia, Missouri, New York, Oklahoma and Oregon. John P. Ludington, Annotation, Corporate Charter Reinstatement, 42 A.L.R. 4th 392 § 5[b], at 408-09 (1985). Even this small list is highly questionable if deemed to refer to any general rule. The Missouri non-retroactivity rule, as noted above, was legislatively abrogated. New York case law holds that interim acts, including contracts, are validated by reinstatement. See Bowditch v. 57 Laight Street Corp., 111 Misc. 2d 255, 257, 443 N.Y.S. 2d 785, 788 (1981); infra text accompanying notes 323-27. Moreover, while the minority view of non-retroactivity appears well entrenched in Arkansas and the District of Columbia, the sole Oklahoma case cited by the annotation involved an interim contract and was decided under a statute expressly making such contracts voidable. State Dep’t of Highways v. Martin, 572 P.2d 611, 614 (Okla. Ct. App. 1977). Furthermore, the annotation itself notes there is retroactive validation under Oklahoma law. Also cited in the annotation were R.V. McGinnis Theaters v. Video Independent Theaters, Inc., 262 F. Supp. 607, 613 (N.D. Okla. 1967), cert. denied, 390 U.S. 1014 (1968), and J.D. Simmons, Inc. v. Alliance Corp., 79 F.R.D. 547, 548 (W.D. Okla. 1978). The Oregon case cited, while recognizing a rule of non-retroactivity (apparently under a prior decision’s dictum), also sanctions the application of the doctrines of ratification and estoppel under equitable principles to validate such acts, at least under some circumstances. High v. Davis, 584 P.2d 725, 729-30 (Or. 1978). The Corporate Charter Reinstatement annotation might well have added Michigan to its list. See Stoneleigh Homes, Inc. v. Jerome Bldg. Co., 188 N.W.2d 152, 157-56 (Mich. Ct. App. 1971) (concluding statute prohibits enforcement of interim contracts by corporation). Even California, for that matter, may have been added, because the states listed (probably among many others) also somewhat limit corporate enforcement of interim contracts, but this would ultimately be misleading because interim contracts are treated differently than other interim acts in California and elsewhere. Numerous California and Michigan authorities amply demonstrate that the general rule in both states would appear to be that reinstatement validates interim acts, although obviously in California the rule is far from clear in many important contexts. See, e.g., supra text accompanying notes 7-161.


259. See infra notes 298-302 (providing examples of jurisdictions with silent states whose courts have concluded reinstatement validates interim acts).
1992 / An Examination Of California Revivor Law

1. The issue of corporate capacity is one solely between the taxpayer and the state, and not the concern of third parties who are strangers to their dealings;\textsuperscript{260}

2. A general rule of non-retroactivity would cast doubt on all business transactions and create an undesirable void in the corporate existence;\textsuperscript{261}

3. A rule of non-retroactivity would unjustly benefit third parties by permitting them to escape their obligations, especially where these parties deal with corporations as valid corporations;\textsuperscript{262}

4. Statutes making exercise of a suspended corporation's powers a criminal misdemeanor, exacting monetary penalties, and limiting enforcement of contracts are sufficient and adequate penalties and, once a corporation had paid its taxes for its delinquent years, actions taken during those years should also be upheld;\textsuperscript{263} and

5. Persons dealing with corporations are charged with knowledge that corporate acts invalid when done may later be validated by revival.\textsuperscript{264}

All of these principles support the fullest possible extension and application of the general rule of retroactive validation of interim acts.

Under a stricter criterion of statutory similarity, the inquiry must focus on other state courts' interpretation of language

\textsuperscript{260} J.B. Wolfe, Inc. v. Salkind, 70 A.2d 72, 76 (N.J. 1949).

\textsuperscript{261} Stutzman Feed Serv., Inc. v. Todd & Sargent, Inc., 336 F. Supp. 417, 418 (S.D. Iowa 1972). This is a compelling rationale when its consequences are fully pondered. Unless the purpose of the suspension is to punish at the state's expense and for the benefit of private parties, a flood of litigation challenging all business transactions and interim acts should not be encouraged.

\textsuperscript{262} Wolfe, 70 A.2d at 76. This rationale could be augmented by noting that a rule of non-retroactively could also provide non-contracting third parties with unjust windfalls in disputes with corporations totally unrelated to the suspension.

\textsuperscript{263} See, e.g., Joseph A. Holpuch Co. v. United States, 58 F. Supp. 560, 563 (Ct. Cl. 1945) ("It would be inequitable for the State to collect taxes levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise the privilege. So when it accepted payment of taxes in default together with penalties, and set aside the dissolution decree, we think it intended to validate the exercise of the corporate franchise in the years for which the taxes were paid.").

\textsuperscript{264} See, e.g., Held v. Crosthwaite, 260 F. 613, 616-17 (2d Cir. 1919).
substantially similar to the “without prejudice” proviso found in California Revenue and Taxation section 23305a: “reinstatement shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture.” Very similar statutory language was involved in the Idaho statute involved in Pacific Northwest Bell Telephone Company v. Rivers. Michigan’s similar, but broader, statutory scheme was discussed in Industrial Coordinators, Inc., v. Artco, Inc. Both cases reached results of retroactive validation.

In Pacific Northwest Bell, cited as pertinent authority in the factually similar Idaho case (Golden Condor) discussed above, the court held that a corporation whose charter was forfeited for failure to pay its annual license tax did not lose the right to its corporate name for that reason. The suspended corporation, Hell’s Canyon Excursions, Inc. (HCE), was incorporated by Wilkins and Shaughnessy in 1956, and thereafter conducted Snake River boat excursions. It ceased active river operations in 1960. At that time, Rivers, operator of another boat excursion business called Rivers Navigation Company, started using the name “Hell’s Canyon Excursions” as well. He docked his boat under a sign he obtained from Wilkins bearing that name.

265. 398 P.2d 63 (Idaho 1964). Quite similar language was also involved, but found not pertinent to the issues in the case, in Manufacturers Acceptance Corp. v. Krusl, 438 P.2d 657, 673-744 (Mont. 1968) (affirming summary judgment against assignee of accounts receivable of tax delinquent foreign corporation under factoring agreement in action by assignee against contractors who had levied on contract accounts before tax delinquencies were cured by assignee. The statute provided: “The revivor shall be without prejudice to any action, defense or right which occurred by reason of the original suspension or forfeiture” and was not “germane” since it addressed issue of right to do business while case involved different statutory disability concerning enforceability of contracts). The statutory provisions referred to in Manufacturers Acceptance Corp. have been revised and are presently codified at MONT. CODE ANN. § 15-31-524 (1991).
266. 115 N.W.2d 123 (Mich. 1962).
267. Pacific Northwest Bell, 398 P.2d at 67; Industrial Coordinators, 115 N.W.2d at 125.
269. See supra notes 235-41 and accompanying text.
270. Pacific Northwest Bell, 398 P.2d at 66.
271. Id. at 64.
272. Id.
273. Id.
274. Id.
In 1961, one Harvey, pursuant to negotiations with Wilkins concerning purchase of the corporation, began making river trips and using the name "Hell’s Canyon Excursions."\textsuperscript{275} In late 1962, HCE’s charter was forfeited for failure to pay the annual license tax.\textsuperscript{276} Thereafter, and before HCE’s subsequent reinstatement, Rivers filed notice of an intent to incorporate under HCE’s name pursuant to Idaho Code section 30-107(3).\textsuperscript{277} In a declaratory judgment action brought by the plaintiff telephone company to determine Harvey’s and Rivers’ competing claims to the right to a listing under HCE’s name, the trial court held that HCE’s attempted reinstatement under its old name was void because Rivers had already appropriated that name.\textsuperscript{278}

The Idaho Supreme Court reversed, construing the corporate name statutes to protect a suspended corporation’s name, if not already “adopted” by another corporation before reinstatement, as fully as that of a non-suspended corporation.\textsuperscript{279} The court stated that any other construction “would render the restorative provisions of Idaho Code section 30-608 [Idaho’s revivor statute] ineffectual.”\textsuperscript{280} The latter statute bears striking similarities to California’s revivor statute with respect to its “without prejudice” language.\textsuperscript{281}

\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 65.
\textsuperscript{279} Id. at 66.
\textsuperscript{280} Id.
\textsuperscript{281} Id. (describing the Idaho statute as providing that “[A]ny corporation which failed to pay the license tax and penalty required by this chapter may pay all the said license taxes and penalties prescribed by section 30-603, and the license taxes and penalties that would have accrued, if such corporation had not forfeited its charter or right to do business, and any such corporation making such payment shall be relieved from the forfeiture prescribed by this chapter, . . . provided, the rehabilitation of the corporation under the provisions of this chapter shall be without prejudice to any action, defense or right which accrued by reason of the original forfeiture . . . provided, that in case the name of any corporation which has suffered the forfeiture prescribed by this chapter has been adopted by any other corporation since the date of said forfeiture, or a name which so closely resembles the name of such corporation as it will tend to deceive, then said corporation, having suffered said forfeiture, shall be relieved therefrom, pursuant to the terms of this section of this chapter, only upon the adoption by said corporation seeking reinstatement of a new name . . .”) (emphasis added).
While the specific language dealing with the corporate name was found dispositive on the facts of Pacific Northwest Bell, the principles of that case were extended to Golden Condor's fact situation even under a new statute impliedly sanctioning nonretroactivity by providing that the corporation's powers will be restored "'[f]rom and after the granting of the reinstatement[']"282 Clearly, whatever "'rights" or "'defenses" which may arguably exist in Idaho post-revivor do not include the "'right" to claim that an unpatented mining claim is forfeited merely by operation of a corporate suspension.

Michigan reached the same retroactively validating result under its similar statute. In Industrial Coordinators, Inc. v. Artco, Inc.,283 the plaintiff corporation sued the defendant during an approximately twenty-five day period during which the plaintiff's powers were suspended for failure to file an annual report.284 The plaintiff promptly filed its report and paid the necessary fees, and thereafter the defendant moved to dismiss the action on the ground that the plaintiff had no capacity to sue when it filed.285 The relevant Michigan statute provided that the "'penalties" imposed on the corporation for failure to comply with the annual report provisions are:

(a) Its powers shall be suspended thereafter, until it shall file such report.

(b) It shall not maintain any action or suit in any court of this State upon any contract entered into during the time of such default.286

The trial court denied defendant's motion to dismiss, and the Michigan Supreme Court affirmed on appeal.287 The court's
discussion of the nature of the statutory suspension and its interplay with the nature of corporate operations is illuminating:

The contrast between penalty (a) and penalty (b) is significant. The statute flatly states that a contract entered into during the period in default cannot be enforced by the corporation in any court in the State of Michigan. This is a specific, punitive provision. [citations] But while penalty (b) deals with a single act of a corporation—entering into a contract—penalty (a) is an all-inclusive reference to the powers of a corporation.288

The court thereafter discussed the Legislature’s intention with respect to the general penalty (a), seemingly employing a “plea in abatement” analysis:

The suspension here intended is to deny to the corporation the benefit of the use of its powers until the default is cured. So, a corporation cannot carry on a suit while it is in default if the defense is raised [citation], but once the default has been corrected, there is no bar to the action. [citation] [¶] . . . [D]efendant states that plaintiff can reinstate its suit if defendant’s motion is granted. But this would further discommode third parties and necessitate a second journey through the court. [¶] . . . [T]he defense of failure to comply having not been . . . raised by the defendant

288.  Id. The court explained:
The powers of a corporation are many—the power to sue and to be sued; the power to deed real estate; the power to carry on a business, etcetera. Furthermore, corporate activity consists of a flow of many acts, some beginning, some ending, and some in process at a given instant. A corporation hires, fires, manufactures, trades, sells, and engages in corporate activities until such time as the suspension is invoked. In this connection, Turner v. Western Hydro-Electro Co., 241 Mich. 6, 216 N.W. 476 [1927], is of interest for holding that the failure to pay fees does not cancel the charter even though the statute under consideration in that case declared the charter to be “absolutely void.” The court said that such a provision is not self executing and that a judicial inquiry would be required in order to forfeit the corporate charter.

Id.
[before revival], was no longer available. The suspension of plaintiff’s corporate powers was at an end.\textsuperscript{289}

The Michigan statutory suspension and revivor scheme is broadly similar to California’s. California has a similar, though much less harsh, "specific punitive provision" regarding contracts, and its statutes also provide for a general suspension of corporate powers by "an all-inclusive reference to the powers of a corporation."\textsuperscript{282} It can certainly be argued that if the California Legislature had any other specific punitive sanctions of nonretroactivity or additional prerequisites for validation in mind, it would have spelled them out just as it did with the contract provisions.\textsuperscript{291} The Michigan court’s reasoning that a contrary construction would defeat the statute’s curative purpose, adversely impact third parties, and waste judicial resources is equally applicable in California.

\textsuperscript{289} Id. at 125 (emphasis added).

\textsuperscript{290} Id. The 1990 revisions to California’s statutes now also specify that, among other things, suspended corporations are "not . . . entitled to sell, transfer, or exchange real property . . . ." \textsc{Cal. Rev. & Tax. Code} § 23302(d) (West 1992).

\textsuperscript{291} See \textsc{Cal. Rev. & Tax. Code} §§ 23304.1, 23304.5, 23305.1 (West 1992).
C. Trends in Important States

Among the states whose statutes expressly validate interim acts are Delaware, Illinois, Maryland, Massachusetts.

292. 4 DEL. CODE ANN. tit. 8, § 312(a)-(e), (g) (1991) (the statute provides for extension, restoration, renewal or revival of the certificate of incorporation [i.e., corporate charter] of a corporation for which the same has become inoperative by law for nonpayment of taxes is accomplished by payment of all franchise taxes and penalties due as of the certificate's forfeiture). Except for ability to use its former corporate name where another corporation has adopted a virtually indistinguishable name during the forfeiture, id. § 312(f) (1991), the revivor is expressly complete and plenary:

Upon the filing of the certificate in accordance with § 103 of this title, the corporation shall be renewed and revived with the same force and effect as if its certificate of incorporation had not been forfeited pursuant to subsection (c) of § 136 of this title, or inoperative and void, or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters, and things made, done and performed within the scope of its certificate of incorporation by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited pursuant to subsection (e) of § 136 of this title, or was inoperative or void, or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect.

All real and personal property, rights and credits, which belonged to the corporation at the time its certificate of incorporation become forfeited pursuant to subsection (c) of § 136 of this title, or inoperative or void, or expired by limitation and which were not disposed of prior to the time of its revival or renewal shall be vested in the corporation, after its revival and renewal, as fully and amply as they were held by the corporation at and before the time its certificate of incorporation became forfeited pursuant to subsection (c) of § 136 of this title, or inoperative or void, or expired by limitation, and the corporation after its renewal and revival shall be as exclusively liable for all contracts, acts, matters, and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its certificate of incorporation had at all times remained in full force and effect.

Id. § 312(e) (1991).

293. See infra notes 305-14 and accompanying text (discussing Illinois law).

294. For Maryland law concerning corporate forfeiture and revival for tax delinquency, see generally Md. CODE ANN., CORPS. & ASS'NS §§ 3-305-3-519 (Supp. 1992). The revival provision states:

The reinstatement and extension of a corporation's existence under § 3-501 of this subtitle or the revival of a corporation's charter under § 3-507 of this subtitle has the following effects:

(1) If otherwise done within the scope of its charter, all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them;

(2) All the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter.

Id. § 3-512 (Supp. 1992); see Arnold Developer v. Collins, 567 A.2d 949, 952 (Md. 1990) (recognizing "clear legislative intent to be that the revival of a corporate charter relates back to the
Among the states reaching the same result with silent or unclear statutes are California (arguably), Michigan, New Jersey, New York, Ohio, and Pennsylvania. Among the states reaching the same result with silent or unclear statutes are California (arguably), Michigan, New Jersey, New York, Ohio, and Pennsylvania.296

295. The Massachusetts revival statutes provide in pertinent part:

(5) Upon the filing of a certificate reviving a corporation for all purposes, said corporation shall stand revived with the same powers, duties and obligations as if it had not been dissolved, except as otherwise provided in said certificate; and all acts and proceedings of its officers, directors and stockholders or members, acting or purporting to act as such, which would have been legal or valid but for such dissolution, shall, except as aforesaid stand ratified and confirmed . . . .


296. Pennsylvania's recently enacted revivor statute, which adds a "new procedure" according to the committee comment following it, provides in pertinent part:

(a) General Rule - Any business corporation whose charter or articles have been forfeited . . . .

(b) Filing and Effect - Upon the filing of the statement of revival, the corporation shall be revived with the same effect as if its charter or articles had not been forfeited or expired by limitation. The revival shall validate all contracts and other transactions made and effected within the scope of the articles of the corporation by its representatives during the time when its charter or articles were forfeited or expired to the same effect as its charter or articles had not been forfeited or expired.


297. See supra notes 37-115 and accompanying text.

298. Michigan has statutes proving for (1) forfeiture of all a corporation's "corporate or chartered rights and privileges" for failure to pay any overdue taxes within a certain period after execution and levy on corporate property produce insufficient revenues to pay the same, MICH. COMP. LAWS ANN. § 207.442 (West 1986), and for (2) automatic corporate dissolution (for two
years' annual report or filing fee defaults), or revocation of its certificate of authority (for one year's defaults). Under the last-cited statutory scheme, "[u]pon compliance . . . the rights of the corporation shall be the same as though a dissolution or revocation had not taken place, and all contracts entered into and other rights acquired during the interval shall be valid and enforceable." Id. § 450.1925(2) (West 1990); see also Industrial Coordinators, Inc. v. Artco, Inc., 115 N.W.2d 123 (Mich. 1962); Michigan Rural Dev., Inc. v. El Mar Hills Resort, Inc., 191 N.W.2d 733 (Mich. Ct. App. 1971); see also Cardinal-Franklin Collections, Ltd. v. Department of Licensing and Regulation, 443 N.W. 2d 176 (Mich. Ct. App. 1989) (although corporate collection agency was dissolved for failure to file annual reports at time it petitioned to quash subpoena of its records, upon its subsequent compliance with statutory requirements it had standing and dissolution was to be treated as if it had not taken place), appeal denied, Grossberg v. Cardinal-Franklin Collections, Inc., 433 Mich. 912 (1989). Under the first-cited statutory scheme, dealing with taxes, there are no apparent revivor provisions, probably because the scheme presumes all of a corporation's property, whether real or personal, has already been sold, making revivor somewhat pointless in that case. Mich. Comp. Laws Ann. § 207.1 (West 1986).

299. See supra notes 227-34 and accompanying text (discussing J.B. Wolfe, Inc. v. Salkind, 70 A.2d 72 (N.J. 1949)); see also 54 N.J. STAT. ANN. § 54:11-5 (West 1992) (providing that upon reinstatement, formerly tax-delinquent corporation is "entitled to all its franchises and privileges"); Ticktron, Division of Control Data Corp. v. Record Museum, Inc., 92 F.R.D. 6, 7 (1981) (granting motion to reopen default judgment on the issue of whether reinstatement of a corporate charter suspended for tax delinquency presented meritorious defense, stating "it is arguable that reinstatement [under the New Jersey statute] related back to the date of the proclamation of repealer, validating corporate action taken in the interim" and citing Wolfe, 370 A.2d 72, 76, Higi v. Elm Tree Village, 274 A.2d 845, 848 (1971) and Malavasi v. Villaseehin, 163 A.2d 214, 216 (1960)).

300. For New York's statutory scheme of dissolution and charter forfeitures of corporations delinquent in paying corporation or franchise taxes, see 59 N.Y. TAX LAW §§ 203-9 (McKinney 1986 & Supp. 1991) (corporation tax); id. § 217 (McKinney 1986) (franchise tax). The publication of the Secretary of State's proclamation declaring such dissolution and forfeiture has the effect of dissolving the tax delinquent corporations without further proceedings, but the revivor provisions provides in pertinent part that:

Any corporation so dissolved may file in the department of state a certificate of the tax commission that all franchise taxes, penalties and interest charges accrued against it have been paid. The filing such certificate shall have the effect of annulling all of the proceedings theretofore taken for the dissolution of such corporation under the provisions of this section and it shall thereupon have such corporate powers, rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force and effect as if such proclamation had not been made or published . . . .


301. Ohio's revivor statute states in pertinent part:

Any corporation whose articles of incorporation or license certificate to do or transact business in this state has expired or has been canceled or revoked by the Secretary of State as provided by law for failure to make any report or return or to pay any tax or fee, upon payment to the Secretary of State of any additional fees and penalties required to
Texas. Other significant states reaching the same result include Colorado, Tennessee and Washington. Many of these states are

be paid to him, and upon the filing with the Secretary of State a certificate from the tax commissioner that it has complied with all the requirements of law as to franchise or excise tax reports and paid all franchise or excise taxes, fees or penalties due thereon for every year of its delinquency, and upon the payment to the Secretary of State of an additional fee of ten dollars, shall be reinstated and again entitled to exercise its rights, privileges, and franchises in this state, and the Secretary of State shall cancel the entry of
cancellation or expiration to exercise its rights, privileges, and franchises...

Ohio Rev. Code Ann. § 5733.22 (Anderson 1991). The Ohio case law under this, and related and predecessor statutes, indicates that in the interim between suspension and revivor a corporation is considered a de facto corporation. See Goldstein Co. v. Mitchell, 14 Ohio App. 231, 233-34 (1921) (statutory cancellation of charter "is merely a measure for the purpose of collecting a revenue for the state from corporations" which "must be construed in connection with [section providing] that upon the payment of the taxes... and a penalty... the entry of cancellation may be canceled and set aside... [U]nder this state of the law and facts it is clear... that the cancellation of the charter amounted in effect only to a suspension of the corporation from its power to act until it had complied with the provisions of [the section] authorizing the cancellation of the suspension of that power.")

Thus, corporation was a de facto corporation during suspension and defendant having contracted in error with it as such cannot raise its inability to act); see also GMS Management Co. v. Axe, 449 N.E.2d 43 (Ohio 1982) (regarding continued de jure existence of suspended corporation). There seems to be no authority directly on point, but the cases, especially Mitchell, suggest that section 5733.22 would retroactively validate any and all challenged interim acts.

302. Texas' silent statute provides:

A corporation whose charter or certificate of authority is forfeited under this chapter by the Secretary of State is entitled to have its charter or certificate revived and to have its corporate privileges revived if:

(1) the corporation files each report that is required by this chapter and that is delinquent;
(2) the corporation pays the tax, penalty and interest that is imposed by this chapter and that is due at the time the require under Section 171.313 of this code to set aside forfeiture is made; and
(3) the forfeiture of the corporation's charter or certificate is set aside in a proceeding under Section 171.313 of this code.


usually considered to be important and prestigious "barometers" in assessing legal trends.\footnote{304}

A brief discussion of the law in Illinois illustrates modern judicial and legislative trends on the subject of validation of interim acts. Under the Illinois suspension scheme, a corporation is subject to "administrative dissolution" by the Secretary of State for failing to pay its franchise taxes or file its annual report.\footnote{305} Such a dissolution "terminates its corporate existence and such a dissolved corporation shall not thereafter carry on any business . . . ."\footnote{306} However, within a five year period following the date of issuance of the certificate of dissolution, the corporation can be reinstated by filing an application with the Secretary of State, filing all due reports, paying all back fees and franchise taxes with penalties, and obtaining a tax clearance letter from the Illinois Department of Revenue.\footnote{307} When the dissolved corporation has satisfied the prerequisites for reinstatement, the Secretary of State must issue a certificate of reinstatement,\footnote{308} and upon that issuance "the corporate existence shall be deemed to have continued without interruption from the date of the issuance of the certificate of dissolution, and the corporation shall stand revived with such powers, duties and obligations as if it had not been dissolved; and all acts and proceedings of its officers, directors and shareholders, acting or purporting to act as such, which would have been legal and valid but for such dissolution, shall stand ratified and confirmed.\footnote{309} The language of this section, which became effective July 1, 1984, is explicit and clear enough to resolve most post-enactment questions regarding retroactive validation without

\footnote{304} The process of selection of "important states" is obviously subjective to a large extent. Population and intangible prestige factors played a large part in the author's selection of the following states (not including California) to survey for purposes of this portion of this Article: Delaware, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Texas. For approximated populations and civil procedural systems of these states, see John B. Oakley & Arthur F. Coon, \textit{The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure}, 61 WASH L. REV. 1367, 1429 (1986) (Appendix, Table II).
\footnote{305} 32 ILL. ANN. STAT. § 12.40 (Smith-Hurd 1992).
\footnote{306} \textit{Id.} § 12.40(c) (Smith-Hurd 1992).
\footnote{307} \textit{Id.} § 12.45(a) (Smith-Hurd 1992).
\footnote{308} \textit{Id.} § 12.45(c) (Smith-Hurd 1992).
\footnote{309} \textit{Id.} § 12.45(d) (Smith-Hurd 1992).
litigation. Judicial interpretation of the law prior to this clarifying legislation is also instructive on Illinois trends in this area.

The *Regal Package* case, as the leading Illinois authority on the subject of corporate dissolution and reinstatement (i.e., suspension and revivor) both prior to and after enactment of the statutory scheme discussed above, is also illuminating. The *Regal Package* court held that a reinstated corporation could maintain a forcible entry and detainer action filed when the corporation was dissolved and based on a real estate installment contract entered during dissolution, if the action was brought within certain time limits. The court cited statutory and case law allowing dissolved corporations to institute actions within two years of dissolution even if not reinstated before the expiration of the applicable statute of limitations and outside of two years following dissolution if reinstated within the appropriate limitations period.

The court then addressed the "more difficult question" (not a problem in California, or under Illinois' new statute) whether the contract entered into during the period of corporate dissolution was retroactively validated. Relying on the reasoning of *J.B. Wolfe, Inc. v. Salkind*, and similar cases cited in a superseded annotation on the subject, the court held that the contract was

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311. *Id.*
312. *Id.*
315. *Regal Package Liquor*, 466 N.E.2d at 410. It is interesting to note that the situations in California and Illinois are in some respects completely transposed: In California, the *statute of limitations* problem is not specifically addressed by statute and has generated confusion and bad law, while in Illinois, that area is addressed in detail by statute. The *contract* situation, on the other hand, a "difficult question" under Illinois' old statutory scheme, has long been specifically addressed by statute in California. Despite this ironic factual juxtaposition of specific problem areas, the comparison is nevertheless instructive with respect to legal analyses and reasoning concerning the operation of revivor on interim acts.
316. 70 A.2d 72 (N.J. 1949).
retroactively validated, and that in general the statutory reinstatement scheme would relate back to validate such interim contracts. The *Regal Package* court observed that the New Jersey statute at issue in *Wolfe* was similar to the old Illinois statutory scheme, and "did not indicate whether reinstatement would relate back to the date of dissolution and validate corporate action taken during the interim." Emphasizing that part of *Wolfe*'s rationale which looked to the purpose of the suspension statutes (to raise revenue for the state) and the lack of nexus between the party asserting them against the reinstated corporation, on the one hand, and the dealings between the corporation and the state on the other, the court noted:

The purpose of those provisions of the Business Corporation Act of 1933 relating to corporate reports and fees are for the benefit of the state and public. It would not serve that purpose to allow those provisions to be used as a defense to an action brought by a delinquent corporation to enforce a contract. As a result, we decide that reinstatement of a dissolved corporation... relates back to the date of dissolution, in general, so as to validate corporate contacts entered into during the interim.

Finally, the court observed, as noted above, that the problems of statutory interpretation imposed by the case before it would not have arisen under the newly enacted, but not then effective, statutory scheme discussed above.

A final example of pertinent legal thought on revivor in an important state is found in the New York case of *Bowditch v. 57 Regal Package Liquor*, 446 N.E.2d at 411-12.

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319. *Id.*
320. See *id.* (calling the objecting party a "stranger to the dealings").
321. *Id.* at 412. The court also noted that the rule had exceptions, as for instance, where a former officer attempts to use the reinstatement procedure to substitute worthless corporate liability for valuable personal liability. *Id.* (citing *Estate of Plepel v. Industrial Metals, Inc.*, 450 N.E.2d 1244 (Ill. App. Ct. 1983)).
Laight Street Corporation.\textsuperscript{323} That case, decided under a statute impliedly but not expressly validating interim acts,\textsuperscript{324} held that, as a matter of law, revocation of a lessee corporation’s dissolution would validate its exercise of an option during the period of its dissolution if the exercise of the option were otherwise proper.\textsuperscript{325} Narrowly read, the Bowditch case held that, under New York law permitting a dissolved corporation to sue and defend suits in its own name and to collect and distribute its assets for “winding up” purposes, the corporation would be entitled to exercise the option if that were its only remaining valuable asset.\textsuperscript{326} However, the court also went out of its way to liberally interpret the revivor statute to provide for retroactive validation, adding:

Even if this court were to accept plaintiff’s argument that the exercise of the option had been prohibited new business for a dissolved corporation, we find that the 1980 reinstatement of the corporation annulled the dissolution and gave the corporation back all of its powers, nunc pro tunc. By statute, “the corporate powers, rights, duties and obligations” were reinstated nunc pro tunc, as if “such proclamation had not been made or published.” [Tax Law 203-A[7][8].] Under this view, defendant’s exercise of its option or renewal rights in 1979 remains a valid use of corporate powers. Moreover, such retroactive validation is not inconsistent with the purpose of the statute. Tax Law 203-A is designed to encourage payment of delinquent taxes even as it permits corporations dissolved on account of delinquency to wind up their affairs.

An additional rationale exists for crediting defendant corporation with power to exercise the option. New York recognizes that a corporation which carries on its affairs and exercises corporate powers as before dissolution is a de

\textsuperscript{323} 443 N.Y.S.2d 785 (1981).
\textsuperscript{324} See supra note 300 (discussing applicable New York statutes).
\textsuperscript{325} Bowditch, 443 N.Y.S.2d at 788-89.
\textsuperscript{326} Id. at 788.
facto corporation, as well, and, ordinarily, no one but the state may question its corporate existence.\textsuperscript{327}

In all the important states discussed above, broad retroactive validation of interim acts is the rule. The California Legislature desperately needs to recognize the importance of retroactive validation and take action to become part of the salutary trend, thereby removing the uncertainty which currently plagues revived corporations in California.

* * *

In the final analysis of out-of-state authorities, (1) those dealing with situations roughly factually similar to this Article's hypotheticals, (2) those decided under statutes similar to California's, and (3) those in "important" states all show trends toward a broad, logical rule of retroactive validation of interim corporate acts upon a corporation's revivor.\textsuperscript{328} California's courts and Legislature should follow the teachings of its sister states and explicitly affirm California's adherence to a rule of comprehensive retroactive validation of all interim acts upon revivor.

III. LOGICAL FLAWS IN CALIFORNIA LAW, AND SUGGESTED LEGISLATIVE AND JUDICIAL REFORM

A. Review of Logical Flaws

The "procedural/substantive" act distinction which California courts presently use to determine which interim acts are validated by revivor\textsuperscript{329} has no logical basis and is difficult to apply. This is aptly illustrated by examining it in the context of the statute of limitations exception to retroactive validation.\textsuperscript{330} As one

\textsuperscript{327} Id. at 788 (citations omitted).

\textsuperscript{328} See supra notes 182-323 and accompanying text (presenting out-of-state authority).

\textsuperscript{329} See supra notes 134-47 and accompanying text (discussing the "procedural/substantive" analysis).

\textsuperscript{330} See supra notes 162-70 and accompanying text.
California court of appeal astutely remarked (while noting that an appeal taken by a suspended corporation may be validated by revivor after the time to appeal has run), "we question why the timely filing of a notice of appeal, which is jurisdictional and cannot be waived, is a procedural action unaffected by a corporation's suspension, while the statute of limitations, which is not jurisdictional and can be waived, is a substantive defense fatal to a suspended corporation's cause of action. However, we leave the resolution of this apparent inconsistency to the Supreme Court."

The inconsistency noted above by the court of appeal in *ABA Recovery Services, Inc. v. Konold* is real, not apparent, and the differing results cannot be logically reconciled or explained.

Certainly unconvincing and specious rationales may be offered by creative advocates (whose clients' interests are served by the status quo) to distinguish the situations. It might be said that an appeal is merely a "procedural" step in the life of an existing lawsuit, whereas the statute of limitations in theory bars the very birth of the right to bring a lawsuit, if not waived, and is thus a "substantive" defense. Further, statutes of limitations are favored in the law, they vest rights of repose in particular defendants to be free of stale claims, and protect litigants and courts from lost evidence, missing witnesses and faded memories. Statutory or court-created appeal periods, on the other hand, are designed primarily to benefit judicial administration and promote the finality of judgments. The non-waiveability of the appeal period limit might even be argued as supporting the analysis that it is not a "right" or "defense" accruing to a particular person within the meaning of California Revenue and Taxation section 23305, as is.

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331. *ABA Recovery Serv., Inc. v. Konold*, 198 Cal. App. 3d 720, 725 n.2, 255 Cal. Rptr. 27, 30 n.2 (1988) (emphasis added) (commenting on the result in *Rooney v. Vermont Inv. Corp.*, 10 Cal. 3d 351, 515 P.2d 297, 110 Cal. Rptr. 353 (1973)). It is interesting that the *Konold* court's plea was to the *supreme court*, rather than the *legislature*. Perhaps it was evident from the *Konold* court's review of the cases that the supreme court's failure to expressly disapprove the old statute of limitations cases, beginning with *Cleveland v. Gore Bros., Inc.*, 14 Cal. App. 2d 681, 58 P.2d 931 (1936), is responsible for this glaring logical flaw in the present case law, but it did not further elaborate.

a statute of limitations. Further, as supported by the somewhat more apt plea in abatement/plea in bar distinction, the late filing of an appeal says nothing about the merits or justice of a cause, whereas the filing of an action outside the limitations period may indicate that it is conclusively presumed stale and be a complete defense on the merits.

Ultimately, however, such attempted distinctions lack logical merit, and are without any real difference. A duly served complaint places defendants on notice of the claims against them, and fully satisfies all purposes of the statute of limitations whether or not the corporate plaintiff has paid its taxes. The defendant is indeed a "stranger to the dealings" between the plaintiff and the state, and those tax dealings obviously have nothing to do with the merits of the lawsuit against the defendant. As aptly noted by a fairly recent depublished opinion in a related, but not totally analogous, context:

[W]hile the statute of limitations is considered a meritorious defense, its underlying purpose is not further by cutting off an action filed within the statutory period by a foreign corporation later determined to have conducted intrastate business so as to need to qualify under [Corporations Code] section 2105. Such a case is not one in which a claim has been 'allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared' . . . Nor is this a case where the adversary has not been put on notice of the claim within the applicable period of limitation and has gained the right to be free of stale claims.333

333. American Retail Management, Inc. v. Bakersfield Food City, Inc., 201 Cal. App. 3d 1312, 1326, 247 Cal. Rptr. 589 (1988), reh'g denied and ordered depub'd, Aug. 25, 1988 (depublished opinion affirming trial court's denial of defendants' post-trial motion to amend their answer to assert the statute of limitations against the plaintiff foreign corporation which had not qualified to do business in California; court held statute was tolled by corporation's filing of complaint and distinguished corporate suspension statutes barring corporation from bringing suit from the narrower disability scheme at California Corporations Code section 2203(e), which expressly contemplates foreign corporations necessity for them to qualify). Unfortunately, this case's depublished status makes it uncitable by corporate practitioners in their legal briefs and memoranda. See CAL. R. CR. 977.
As indicated by the supreme court in *Peacock Hill*, once a corporation has paid its taxes, little purpose would be served by imposing an additional penalty of dismissal.\(^{334}\) If the nonpayment was inadvertent, further penalties would not likely serve any deterrent purpose. With the exception of the statutory right to void uncured interim contracts, any “defenses” constituting exceptions to the retroactive validation rule are merely results of unfortunate doctrinal unclarity. As demonstrated above, this unsatisfactory doctrine results from a judicial reluctance to overrule existing precedents, though those precedents are based in part on a mistaken view of the intended effect of the suspension and revivor statutes, and even though the recognized policy underlying the suspension statutes has been completely transformed since those decisions.\(^{335}\)

In addition to the logical inconsistencies resulting from the California Supreme Court’s failure to overrule the doctrine of *Ransome-Crummey*,\(^{336}\) the unfortunate (and apparently accidental) development of the “substantive/procedural” distinction seems destined to produce arbitrary and unfair results. This distinction has proved unworkable in the legal contexts of (1) applicable rules of decision in federal diversity cases as reflected by *Erie Railroad Co. v. Tompkins*\(^{337}\) and its progeny, and (2) the field of conflict of laws, in which a forum state’s “procedural” laws are generally deemed applicable.\(^{338}\) It would seem naive to believe that this

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\(^{335}\) *See supra* text accompanying notes 45-101.

\(^{336}\) *See supra* text accompanying notes 50-75 (discussing the *Ransome-Crummey* doctrine).

\(^{337}\) 304 U.S. 64 (1938).

\(^{338}\) While this is the general rule, see, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 862-66, 264 P.2d 944, 946-49 (1953), California has, of course, adopted the “governmental interest” approach to choice-of-law problems. *See generally* Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). Although arguments can be made that the traditional substance/procedure distinction mandating application of the forum’s “procedural” limitations was not abandoned by this adoption, the weight of recent authority and scholarship in this volatile field of law now holds that interest analysis applies with equal force to statutes of limitation. *See Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482 (9th Cir. 1987) (diversity action applying California choice-of-law rules under mandate of *Klaxon Co. v. Stenor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and thus applying California “governmental interest” approach with its “comparative impairment” component to resolve a “true conflict” of laws by applying Arizona’s longer statutes of limitation rather than California’s); *but see* Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 486-87 (9th Cir. 1987) (Noonan, J., dissenting)
unreliable standard could prove helpful in the confused area of California corporate suspension and revivor law.\textsuperscript{339}

B. Suggestions For Legislative and Judicial Reform

It is desirable for the Legislature to act as soon as reasonably possible to provide a measure of certainty to this area. If the Legislature agrees with Peacock Hill and the trend of out-of-state authorities,\textsuperscript{340} that the purpose of the suspension and revivor statutes is to prompt the payment of taxes, not to punish revived corporations which have paid with penalties, the Legislature should clearly specify exactly which, if any, "actions, defenses or rights" accruing to third parties by reason of the suspension it wishes to preserve. If the Legislature believes, as does Justice Mosk,\textsuperscript{341} that the purpose of a tax suspension is punitive and that Ransom-
Crummey\(^{342}\) should thus retain vitality, it should then clearly specify which acts undertaken by a suspended corporation are void and incapable of retroactive validation through revivor and which are not.

As evidenced by this Article's delineation of the problems created by California's present approach, and its examination of the trends of out-of-state authorities,\(^{343}\) the author believes the Legislature should opt for the first approach.\(^{344}\) Such a statute, which would have the salutary effect of reducing arbitrary risk and encouraging in-state corporate investment and activity, could be modeled after the pertinent language in the statutes of Delaware, Maryland, Massachusetts, Michigan, or Pennsylvania, discussed above,\(^{345}\) or even after the "restoration" provision of California Revenue and Taxation Code section 23305c, which presently applies only to mistakenly suspended corporations.\(^{346}\) The goal is simple: Revivor should place the corporation in exactly the same position as if suspension had never occurred. Rather than receiving undeserved windfalls from pointless and wasteful litigation, parties pointing out a corporation's suspension would simply be acting as good citizens, reporting (and, no doubt, initiating a rapid cure of) a corporation's tax delinquencies. Any rewards that they gain for so doing should be specified by the tax code, not left to the chance and caprice of business dealings.

Alternatively, if the Legislature does not act, the courts should, by jettisoning the doctrine of Ransome-Crummey, as well as the equally unhelpful "substance/procedure" and "plea in abatement" analyses. Rather than focusing on analogies involving "corpses"

\(^{342}\) Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446 (1922).
\(^{343}\) See supra text accompanying notes 177-327.
\(^{344}\) The Legislature could adopt a middle ground, punishing purposefully delinquent corporations by rendering their acts void, while allowing inadvertently delinquent corporations the ability to retroactively validate most or all of their interim acts through revivor. However, such a middle approach would still have the disadvantage of injecting a mini-trial on a largely extraneous and difficult to prove factual issue into any proceeding in which a once tax-delinquent corporation is involved. It seems wise, therefore, and much more practical, to have a uniform, readily understood rule about retroactive validation which affects all tax delinquent corporations in the same fashion and validates without exception all interim acts of a revived corporation.
\(^{345}\) See supra notes 292, 294-96, 298 and accompanying text.
\(^{346}\) See supra note 7.
or "unconscious persons," the capacity of a corporation to invoke jurisdiction, or the elusive distinction between "substantive" rights and "procedural" acts, the courts should go back to Rossi v. Caire and recognize the "without prejudice" proviso simply as a savings clause intended to ensure retroactive validation of all interim acts, except as otherwise specifically provided by statute. Suspended corporations will be estopped or legally barred from asserting the validity or claiming the benefit of acts undertaken during suspension, but the estoppel or bar will be annulled, or lifted, upon revival nunc pro tunc, just as if it had never existed.

V. CONCLUSION

Scant statutory guidance in California has spawned an unworkable, illogical and confusing body of case law on the subject of the validity of interim corporate acts following revivor. The present law, in addition to unwisely following outmoded precedents decided under invalid rationales and outdated policies, and employing an unworkable "substantive/procedural" distinction, at best leaves an unsatisfactory void outside the litigation and contract contexts in which virtually every interim act of a suspended corporation is ripe for challenge by litigious opponents. This "void in the corporate existence" can be fatal to a corporation's important interim acts and is an undesirable catalyst to wasteful court-clogging litigation as well.

The apparent trend in California, as expressed by its highest court, however, as well as the manifested trend in the relevant statutes and case law of other important states and states with similar statutes, is to hold that revivor works a broad retroactive validation of all interim acts (except contracts, which are often subject to special rules) once a delinquent corporation has paid its overdue taxes with all penalties and interest.

347. 186 Cal. 544, 199 P. 1042 (1921); see supra notes 41-44, 59-72 and accompanying text (discussing Rossi's view of the "without prejudice" proviso as a savings clause intended to preserve the validity of interim acts).
In order to clarify that California is indeed part of this desirable trend (which would reduce needless litigation in California’s already overburdened courts, promote business, and aid more efficient, inexpensive and productive corporate planning) and to remedy the defects presently inhering in the poorly reasoned case law, California’s Legislature should amend the relevant statutes. The amended statutes should provide that all interim acts are validated by revivor just as if no suspension had ever occurred. Under such an amendment, each interim act and right discussed in the hypotheticals in the Article’s first part (i.e. the mining claim labor, the intellectual property rights, the broker’s license renewals, and the land use permits and approvals) would clearly be valid. At the very least, the Legislature should specify precisely which, if any, interim corporate acts are void and incapable of validation by revivor. Alternatively, if the Legislature does not act, the supreme court should act decisively at the first opportunity to clarify that all interim acts are retroactively validated by revivor, except as specifically provided by statute.

Only when appropriate and explicit statutory guidance (or decisive and logically coherent judicial clarification) is brought to this muddled area of law will a fair and noncapricious approach to the effects of temporary corporate suspension prevail. Until that time, excessive and frivolous litigation over collateral matters between the state and taxpayer litigants will continue to proliferate.

348. See supra notes 24-37 and accompanying text.
349. This would, for example, force the Legislature to either explicitly adopt or reject the ill-reasoned rule that complaints cannot be retroactively validated when a corporate plaintiff is revived after the running of the statute of limitations.