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# Incorporation under the Civil Code of Montana Chapter 42

Jasper C. De Dobbeleer

method the appellant would be secure, and at the same time would be enabled to avoid needless expense."[27]

Harry H. Jones.

[27]At the present time, the R. C. M. 1935, §9746, as to abbreviated records, provides:

"The appellant may present to the Supreme Court or any justice thereof, a copy of the record from which are omitted those parts thereof which appellant believes to be immaterial to any question arising on the appeal, and thereupon, if it shall appear, prima facie, that the parts omitted are so immaterial, the court or justice shall make an order allowing such abbreviated record to be served and filed as the transcript on appeal, and directing the clerk of the district court to certify to such transcript, which order shall save to the respondent the right to suggest a diminution of the record in case he can show that without the parts omitted the appeal cannot be fairly and fully heard and determined."

A similar procedure might be followed in dealing with appeals from a part of a judgment, permitting appellant to prepare a record applicable to the portion of the judgment appealed from and submit it to the Supreme Court, or any justice thereof, for an order allowing it to be filed. Such abbreviation might avoid necessity of printing the record or save expense of printing the entire record. See Supreme Court Rules, Rule VI, Transcripts, page xxi, 101 Montana Reports.

## INCORPORATION UNDER THE CIVIL CODE OF MONTANA CHAPTER 42

Does R.C.M. 1935, Chapter 42 of the Civil Code, and especially Section 6455, permit the successful incorporation of an organization, the activities of which will not extend beyond the county wherein it is located, by filing its articles of incorporation with the clerk and recorder only of the county wherein such organization is located?

An example of the type of association which it is contended in this article should incorporate by filing with the county clerk and recorder where located and *also* with the Secretary of State, is a "flying club" organized for the purpose of owning planes and teaching its members how to fly. Another is a "fire department relief association." The latter type is elsewhere referred to in this article.

A corporation is a creature of the law and can exist only with the permission of the State,[1] and furthermore, the right to engage in business can be exercised through the agency of a corporation only by express permission of the State, and only for such purposes as may be authorized.[2]

Section 6455, which is the section dealing with the forma-

[1]Boca Mill Company v. Curry (1908) 154 Col. 326, 97 P. 1117.
[2]Bank of California v. San Francisco (1904) 142 Col. 276, 75 P. 832.

tion of corporations under Chapter 42, as revised by Laws of 1937, Chapter 88, is as follows:

> "The trustees or directors, of whom there must be not less than three nor more than thirteen in the aggregate, named in such resolution or resolutions, may thereupon, make, file and record in the office of the county clerk of the county where such association or associations is or are located, if such association or associations be *local or subordinate* associations, or in the office of the Secretary of State, if such association be a state, representative, supervisory, governing or grand organization or body, articles of incorporation . . . "

The pertinent part of this section, insofar as it affects the subject under discussion, is the phrase, "local or subordinate." There can be no doubt that the word "or" as here used, is ambiguous. Our own courts have recognized that the word "or" has been used rather loosely and inaccurately in statutory enactments.[3] Other courts have given the word "or" the meaning of "that is to say," or "to-wit".[4] There can be no doubt that the word "or" is frequently used in statutes in the sense of "to-wit," that is, in explanation of what precedes —and so gives to that which precedes the same signification as that which follows it.[4]

It is to be noted that this section seems primarily to be concerned with that type of association which has a parent organization, with local and subordinate chapter associations, as for example, the various types of lodges, granges, and fraternal organizations regularly incorporated hereunder. This conclusion becomes the more apparent when one considers that there is no comma inserted between the words "local or subordinate," in Section 6455. Apparently the state legislature intended by this to permit subordinate *chapters* of a grand or governing body to incorporate by filing articles with the county clerk and recorder only, *providing* the parent organization had

[3] In re Weed (1902) 26 Mont. 241, 67 P. 308.

[4] *Anderson* in his dictionary of law, page 733, says " 'or' may be used in the sense of 'to wit' explaining what precedes."
*Bouviers Law Dictionary*, on page 2422 has this to say: "The word 'or' is used in the sense of 'to wit,' that is, in explanation of what precedes, and making it signify the same thing."
In accord is Brown v. Commonwealth (1811) 8 Mass. 59, where "Bank bills and promissory notes" were held to be the same. See also People v. Latham (1903) 203 Ill. 9, 67 N.E. 403, where in construing a statute the court held the word "or" to mean "that is to say." In People v. Rice (1893) 136 N. Y. 151, 33 N.E. 846, the court gave "or" the meaning of "to wit," "that is to say," in construing a statute.

properly filed its articles of incorporation with the proper state official.

Where the first direct relation of the incorporators to the State is their filing of the incorporation papers with the Secretary of State or other state officers, it is a condition precedent to corporate existence[5] and this even though there is a requirement of recording a duplicate in a local office fully complied with.[6]

Seemingly, the Secretary of State or other state official of corresponding dignity, is required in all states to pass on incorporation papers. In Montana it has been held that the Secretary of State has been clothed with quasi judicial functions in the organization of corporations[7] and has the statutory duty of refusing to file articles of incorporation where in the *judgment of the Secretary of State,* the name is the same or similar to that of an existing corporation.[8]

Where the Secretary of State has a statutory duty to refuse a certificate of incorporation under the "same name" as one already assumed, he has the *discretionary duty* of deciding if a similar name is so nearly the same as to create confusion, since wherever a positive duty is imposed, requiring a determination of fact, it carries with it a corresponding duty and authority of investigating and determining.[9]

If this were not the rule, profit corporations would be continually attempting to file as not-for-profit corporations with no one to check their articles to determine their status. In Illinois it has been held that if a corporation is apparently formed for profit, the articles for a non-profit corporation were properly rejected.[10]

It is necessary that we determine the intent of the legislature as expressed in Section 6455, for in the construction of a statute, the intention of the legislature must control, and to ascertain that intention, recourse must first be had to the language employed and the apparent purpose to be subserved.[11] The language used has been discussed previously.[12] To determine the purpose to be subserved, it is necessary to examine

[5]FLETCHER ON CORPORATIONS Vol. 11, p. 524, note 3.
[6]FLETCHER ON CORPORATIONS Vol. 11 p. 524, note 32.
[7]Barnett Iron Works v. Harmon (1930) 87 Mont. 38, 285 P. 191.
[8]R. C. M. 1935, §5908.
[9]State v. McGrath (1887) 92 Mo. 355, 5 S. W. 29.
[10]Bonney v. Rose (1900) 188 Ill. 268, 59 N. E. 432.
[11]McNair v. School District No. 1 (1930) 87 Mont. 423, 288 P. 188; Campbell v. City of Helena (1932) 92 Mont. 366, 16 P. (2d) 1; O'Connell v. State Board of Equalization (1933) 95 Mont. 91, 25 P. (2d) 114.
[12]See note 4, *supra.*

in connection with Chapter 42, Chapter 12 of the Civil Code or the general corporation statutes. This is necessary because many problems affecting the corporate existence of a corporation formed under Chapter 42 can be solved only by recourse to the law as set forth in the chapter on general corporations.

In the construction of a particular statute, all acts relating to the same subject or having the same general purpose, should be read in connection with it, as together constituting one law, it being the duty of the courts to reconcile them if possible, and make them operative.[13] Chapter 12 and Chapter 42 being in pari materia, we must construe them as being uniform in application insofar as the apparent purpose to be subserved is the same.[14] To be sure, the wording is changed in Section 6455, but this of itself does not indicate a change of intent.[15] All corporations in Montana, with the exception of

[13]State v. Certain Intoxicating Liquors (1924) 71 Mont. 79, 227 P. 427. P. 427.

[14]"Statutes which are not inconsistent with one another and which relate to the same subject matter, are in pari materia, and should be construed together; and effect should be given to them all, although they contain no reference to one another and were passed at different times."

Mitchell v. Witt (1900) 98 Va. 459, 36 S.E. 528.

Acts in pari materia should be construed together, so as to harmonize and give effect to their various provisions.

Peters v. Vawter (1890) 10 Mont. 201, 25 P. 438;
State v. Rotwitt (1895) 17 Mont. 41, 41 P. 1004;
State v. Page (1897) 20 Mont. 238, 50 P. 719.

Statutes constituting a system should be so construed as to make that system consistent in all its parts and uniform in its operation.

Harris v. State (1896) 96 Tenn. 496, 34 S.W. 1017;
Board of Supervisors v. People (1893) 49 Ill. App. 369;
MacVeagh v. Royston (1897) 71 Ill. App. 617, affirmed (1898) 172 Ill. 515, 50 N.E. 153.

Judge Williams expresses this proposition in the following manner: "It is to be presumed that a code of statutes relating to one subject was governed by one spirit and policy, and intended to be consistent and harmonious in its several parts, and where in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy."

Cincinnati v. Conover (1896) 55 Ohio ST. 82, 44 N.E. 582.

On this same subject, the Supreme Court of Massachusetts has said, "where statutes are part of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish."

Sheldon v. Boston & A. R. R. Co. (1898) 172 Mass. 180, 51 N. E. 1078.

Statutes must be construed with reference to the whole system of which they form a part.

McDougald v. Dougherty (1854) 14 Ga. 674;
Noble v. State (1848) 1 Greene (Iowa), 325.

[15]Every change of phraseology, however, does not indicate change of substance and intent. The change may be made to express more clear-

such as may be included in "local or subordinate" are required either to file or get the approval of some state officer and nowhere is the duty of examining articles of incorporation delegated to one not functioning as a state official.[16]

The Supreme Court of Montana in speaking of the existence of corporations, has said,

> "It is an artificial person, and necessarily can have no legal being until it has been fully created."[17]

The general rule on corporate existence is that a corporation begins its existence when all the imposed statutory conditions precedent have been substantially complied with.[18] Where a statute provides that upon the articles of incorpora-

ly the same intent or merely to improve the diction. The intent to change the law must be clear and certain; there must be a substantial change as to clearly show such intention, or it must be otherwise manifested from other guides of interpretation, or the difference of phraseology will not be deemed to express a different intention. State v. Dotson (1902) 26 Mont. 305, 67 P. 938.

[16]R. C. M. 1935, §6471—Cemetery Association—Both;
§6463—Religious Corporation Sale—Secretary of State;
§6465—All non-profit except Local or Sub.—Both;
§6450-6451—Incorporation of Colleges and Seminaries (no provision for any filing);
§6435—Cooperative Marketing—as in General Corporation Laws;
§§6398 and 6400—Agricultural Corporation—Clerk of District Court and Secretary of State.
§6378—Co-operative Associations—Both;
6355.6—Building & Loan Associations—Both and Superintendent of Banks;
Ch. 36—Title Insurance Company—Conform to insurance laws;
§6317—Fraternal Benefit Societies—Certificate from insurance commissioner;
§6294—Assessment Life Insurance Companies—approval State Auditor and as in §5908;
§6257—Life Insurance—State Auditor, Attorney General and §5908;
§6237—Assessment Accident Insurance Company—Secretary of State and State Auditor and County Clerk;
§6211—Deposit Articles and Statement with Insurance Commissioner issue license for one year;
§6187—Mutual Rural Insurance Company—State Auditor and County Clerk;
§6171—Mutual Hail Insurance and Mutual Fire, Lightning and Other Casualty Insurance on farm property and stock. File State Auditor—approval of Attorney General and then filed or recorded as in §5908;
§6129—Insurance Other than Life—State Auditor and approval of Attorney General and as provided in General Laws; Ch. 26—Credit Unions—Superintendent of Banks and Secretary of State and County Clerk;
§6109.2—Morris Plan Companies—both;
§§6014.10—Bank and Banking—Superintendent of Banks, Secretary of State, County Clerk;
§5908—Secretary of State and County Clerk.

[17]Merges v. Altenbrand (1912) 45 Mont. 355, 123 P. 21.

[18]THOMPSON ON CORPORATIONS, §§171, 243, 265.

tion being filed, the Secretary of State must issue his certificate to the corporation stating that the articles have been filed, and "thereupon" the persons signing the articles of incorporation shall be a body corporate, the corporation has no legal existence until the issuance of such certificate.[19]

Since such sections of Chapter 42 as apply to the type of corporation herein discussed do not state when corporate existence shall begin, we must again look to the general laws regulating this procedure. This general system of laws regulating the formation of corporations requires the issuance of a certificate of incorporation by the Secretary of State.[20]

Chapter 42 makes no provision for extending the period of corporate existence of a corporation which has incorporated under this chapter and which corporation has limited its period of existence. Again, resort must be had to the general laws and we find that notice of such extension of corporate existence must be given to the Secretary of State.[21] A change of the principal place of business of the corporation requires the same filings and the proper fees for these filings are due the Secretary of State.[22] A similar situation prevails regarding amendments. To say that amendments to articles of incorporation are to be filed with the Secretary of State[23] but that the original articles need only be filed with the county clerk and recorder is indeed illogical.

The only authority the writer found on this point in Montana is an opinion of an attorney general of the State of Montana[24] to the effect that a fire department relief association should be incorporated under the provisions of Chapter 42, Civil Code of Montana, 1935, and a certified copy of the articles of incorporation filed with the county clerk and recorder should be filed with the Secretary of State, because of a long-standing interpretation to that effect by certain state officials. However, the opinion leaves undecided the question of what are the *general* filing requirements for incorporating under Chapter 42 of the Civil Code.

The author has, with the aid of notes made by a former student, searched the statutes of the other states of the Union, and nowhere in the United States, are organizations permitted to achieve corporate status by the ministerial act of filing the

[19]See note 16, *supra.*
[20]R. C. M. 1935, § 5908.
[21]R. C. M. 1935, §5917.2 and §5926.2.
[22]R. C. M. 1935, §5917.3.
[23]R. C. M. 1935, §§5923, 5924.
[24]19 Attorney General Reports (1941-1942) Opinion No. 509.

necessary papers. In all states, examination and approval is required by some officer having a duty and authority to investigate and determine.[25]

For the foregoing reasons, it is the opinion of the author that an organization such as is mentioned in the example, cannot successfully incorporate under the Civil Code of Montana, Chapter 42, by filing its articles of incorporation with the clerk and recorder so as to relieve its members of unlimited liability.

Though it is beyond the scope of this comment to determine the legal consequences of failing to comply with the statutory requirements for incorporating, the importance of proper incorporation is demonstrated by the fact that a substantial failure to comply with the requirements will result in personal liability of each member of the corporation for the obligations of the corporation.[26] The example of the flying club, introducing this study, suggests how serious to the members that contingency might be.

Of course, a failure to file with the proper officials in some states has been held to result in at least a de facto corporation, giving personal immunity to liability.[27] However, there is a very real danger that failing to file with the Secretary of State in Montana would be considered a failure to "substantially" comply, resulting in a defective corporation and personal liability, since it is only by his act in issuing a certificate of incorporation that the corporation can possibly come into existence. Since there is at least a serious doubt as to the sufficiency of filing only with the county clerk, wise counsel surely will advise their clients that it is worth the additional filing fee to file with the Secretary of State in all cases.

Jasper C. De Dobbeleer.

[25]In Iowa there existed some confusion as to whether or not Corporations not for pecuniary profit should file their incorporation papers with the Secretary of State under §8589 of the Code of Iowa 1939. However this question was clarified by Chapters 229 and 230 of the FIFTIETH GENERAL ASSEMBLY LAWS, in 1943. Section 8589 of the Code of Iowa 1939 as amended now expressly requires that articles of incorporation of corporations not for pecuniary profit be filed with the Secretary of State and with the Recorder of the County wherein the principal office of the Corporation is located.

[26]*Dodd, Stockholders in Defective Corporations*, 40 HARV. L. REV. 561 (1926-1927).

[27]THOMPSON in his authorative work on CORPORATIONS says, ". . . It is impossible to formulate a rule on the subject of defacto corporations, which will be applicable in all American jurisdictions or which will receive uniform support from the decisions in any one such jurisdiction. . . . " 1 THOMPSON ON CORPORATIONS 495. The requisites for a de facto corporation as set out by the United States Supreme Court are as follows: ". . . . (1) A charter or General law under which such a corporation as it perports to be might lawfully be organized, (2)

an attempt to organize thereunder, and (3) actual user of the corporate franchise. . . ." Tulare Irrigation Dist. v. Shepard, (1901) 185 U. S. 1.

## DOUBLE JEOPARDY:
### Appeal by the State as subjecting Defendant to double jeopardy.

The Federal Constitution and most State Constitutions contain provisions which declare, "No person shall be twice put in jeopardy for the same offense." This ancient maxim of the criminal law originated as a principle of English Common Law and was first used by Blackstone about the time the pleas of autrefois acquit and autrefois convict were formulated. At the time of its inception no appeal was given to the King or the defendant from a judgment of guilty or acquittal. In England and the United States now, the defendant may appeal and in some jurisdictions the State is awarded the right of a new trial. The granting of this right to the State has given rise to a great deal of discussion over the question of whether or not the defendant by being subjected to a new trial following an appeal is also being subjected to a second jeopardy.

There seem to be two distinct views, which explains the conflict.[1] The first clings to the old Common Law concept of jeopardy and holds the right of appeal unconstitutional; the other allows the State the right of appeal. Those who accept the second view justify it upon the theory that the original jeopardy has not terminated at this stage of the procedure and the appeal is merely a continuation of the original jeopardy.

[1]In Conn., the State may appeal and bring the defendant back into court for a new trial, even after acquittal. State v. Lee (1894) 65 Conn. 265, 30 A. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202; State v. Garvey (1875) 42 Conn. 232.

In some States the right of appeal is refused in all cases. City of Valdosta v. Goodwin (1918) 21 Ga. App. 664, 94 S. E. 812; Commonwealth v. Cummings (Mass. 1849) 3 Cush. 212; State v. Morgan (1878) 4 Tex. App. 33; Prescott v. State (1907) 52 Tex. Cr. App. 35, 105 S. W. 192.

A statute granting the right of appeal to the State from an acquittal after the trial of the crime is unconstitutional in some jurisdictions. People v. Miner (1893) 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342; State v. Harville (1930) 171 La. 256, 130 S. 348; People v. Erickson (1900) 39 Ore. 1, 62 P. 753.

An appeal by the State merely to determine questions of law has been allowed in some States. State v. Stunkard (1911) 28 S. D. 311, 133 N. W. 253; Pa. Commonwealth v. Bienkowske (1939) 137 Pa. Super. 474, 9 A. (2d) 169; Ex Parte Dexter (1919) 93 Vt. 304, 107 A. 134.