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A STUDY OF MISSOURI CASES, AND SOME OTHERS, WHICH TREAT OF DE FACTO CORPORATIONS

A principle which widely pervades the law is deference to an established fact, even when it has not been established in the precise mode prescribed by law. It has been found necessary for the convenient, and even for the practicable conduct of affairs, to accord, in some instances, a measure of legality to a status that, in strictness, is illegal. Thus in the feudal law of real property a disseisor in the possession of a freehold estate, enjoyed the rights of ownership and his heir the right of inheritance until the true owner recovered possession, a rule yet partly in force. A person in possession of chattels, though without title, has the prerogatives of title as against every one but the owner or those claiming under the latter. Governments founded by revolution or conquest are treated as lawful and their acts as valid, after they seem to be stable; and the actual incumbents of public offices, albeit without a true election or appointment, are regarded as so far entitled to their places as to render their acts valid. With the like hope of facilitating the transaction of business, courts have made use of this principle in the law of corporations, and thereby have introduced the doctrine of corporate bodies de facto—a doctrine which some commentators have questioned as an unwise extension of the de facto principle (20 Harvard Law Review, p. 456 et seq.) and which all will admit has proved difficult to use, as is shown by the discordant views as to when it should be applied. As corporations de jure in this country must be created by, or pursuant to, legislation, the statute under which it is endeavored to form them, whether the statute be a general law or special act, must be complied with, or else

they will have no right to exist as against the State which may, at any time, put an end to them by a direct proceeding for that purpose.¹

Private parties litigant sometimes seek to avail themselves of omissions to observe statutory requirements in forming a corporation, and then the question arises, granting there has been a failure in some particular to observe the law, whether the intended corporation has become one de facto and invulnerable to collateral attack, or whether there was no corporation either de jure or de facto, so that everything done in the corporate name was a nullity.

It is commonly said that three conditions are essential to the existence of a de facto corporation:

First, there must have been in existence at the time of the effort to form a corporation a law by compliance with which a corporation de jure of the class intended to be formed could be created; for example, if the one intended was to be formed for mercantile purposes, there must have been either a general law for the creation of such companies, or a special act creating the particular one;

Second, there must have been an attempt, and usually it is said an attempt in good faith, to comply with the law;

Third, there must have been corporate acts done by the company, or in technical terms, a user of corporate powers.

In Missouri corporations must be formed now under general statutes enacted for that purpose (Mo. Const. sec. 2, art. 12); but prior to the adoption of the Constitution of 1875 they could be created by a special act of the Legislature, and corporate bodies still exist under special charter granted before that date. If they were chartered for a limited duration, the Constitution of 1875 forbade the amendment, renewal or extension of their charters by a special act (Constitution, sec. 53, art. 4, clause 25).

The rule that there must be a general or special statute for the formation of a corporation de jure of a particular kind, before one will be recognized as existing de facto, is probably uniformly followed by the Courts.² This rule is reasonable and does not push the presumption that everyone knows the law so far as to defeat the purpose of the de facto doctrine. The proposition was determined by the Supreme Court in *Douthitt v. Stinson*, 63 Mo. 268, an ejectment action involving the validity of a deed made in 1839 to the "Board of Directors of the Town of Lancaster and Lancaster Seminary," the deed being a link in the defendant's chain of title. Said association

¹ State ex rel v. Medical College, 59 Mo. App. 264; Franklin Bridge Co. v. Wood, 14 Georgia, 80.

² Indiana, etc., Co. v. Ogle, 22 App. Div. 536.

was not chartered by a special act; neither was there a general statute in force at the time for the formation of corporations. The opinion is an interesting one on the question of whether a corporation can exist in this State by prescription, a point not adjudicated, but there was a strong intimation against the possibility of corporation. The question of whether the said grantee in the deed was a corporation de facto and as such capable of taking title, arose on the following facts: certain persons had set about to form the company in 1839, had signed articles, afterwards purchased the lot described in the deed, built a school house on part of it, sold off parts for residence lots, and in other particulars had acted as a body corporate down to 1852. Nevertheless, in default of a law to authorize such a corporation, it was held not to have existed de facto when the deed was made, which was therefore void, and the defendants, who claimed under it, took no title. The opinion shows the need of a period of limitation, either prescriptive or statutory, against an attack on corporate acts as ultra vires; for here the Association had been transacting business in good faith for 13 years and yet one of its transactions was held an utter nullity and that, too, against persons who were not a party to it, but only claimed under it.

A corporation cannot be said to exist in fact in Missouri unless a statute has been enacted under which it might exist in law.

Suppose a statute authorizing a particular kind of company was on the books when a corporation was formed, but the statute was unconstitutional, so that the company could not exist de jure by virtue of it—may one nevertheless exist de facto? This is a question the Courts differ about, with the weight of decision favoring the rule that an unconstitutional law will not support a de facto company.³ On the other side may be cited *Coxe v. State*,⁴ *Commonwealth v. Philadelphia Co.*,⁵ *Richards v. Savings Bank*.⁶ The question has never been adjudicated in Missouri, but it has been twice the subject of dicta of the Supreme Court. In the *Board of Commissioners v. Shields et al.*,⁷ the plaintiff sued as a body corporate, organized under an act assailed by the defendants as special, a class of statutes prohibited by the Constitution except when they were passed for municipal purposes. The right of the plaintiff to maintain the action, which was on a bond to per-

³ *Eaton v. Walker*, 76 Mich. 579; 6 L. R. A. 102; *Brandenstein v. Hoak*, 101 Calif. 131; *Clark v. Cannel Coal Co.*, 165 Ind. 213; 112 Am. St. Rpts. 217; *Norton v. Shelby Co.*, 108 U. S. 442.

⁴ 144 N. Y. 396.

⁵ 193 Pa. 236.

⁶ 75 Minn. 196.

⁷ 67 Mo. 247.

form a contract for street improvement, was contested on the ground of lack of corporate capacity of any character in the plaintiff. The Court held the statute in question was constitutional because, though special, it was enacted for a municipal purpose; it held, also, the defendants were estopped to deny the corporate capacity of the plaintiff as they had executed a bond of it. It thus appears, the point of whether the plaintiff could exist as a *de facto* body lay outside the decision; but the Court took occasion to quote from Cooley's work on "Constitutional Limitations," an excerpt to the effect that when a corporation is acting under color of the law, its existence cannot be collaterally attacked, and further that "the rule would not be different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such under legislative action, would be sufficient evidence of right except as against the State, and private parties could not enter into any question of irregularity."

In *Catholic Church v. Tobbein*,⁸ the plaintiff, as a body corporate, sued to establish a will whereby one-half of the testator's estate had been devised to the Catholic Church in the City of Lexington, Missouri. The testator died prior to the incorporation of the church and, of course, the will therefore took effect before that date, and whatever title passed by the will, vested in the unincorporated congregation. As to the title in the corporate body after its formation, the Court held that as our Constitution forbade the incorporation of a religious society except to hold the title to real estate for church edifices, parsonages and cemeteries, the incorporated body could not take under the will even though it were constitutionally created; meaning, of course, it could take no property other than for the three objects named in the Constitution; hence that the unincorporated congregation, or society, would take the devise. It was not decided, however, that the incorporated body could be given no recognition whatever if formed in violation of the Constitution. On the contrary, the opinion quoted from the Shields opinion, *supra*,—the passage therein quoted from Cooley—approved its doctrine; saying, further, the existence of a body acting in a corporate capacity was not open to question except by the State in a direct proceeding "although the act incorporating it or authorizing its organization is violative of the Constitution of the State."

A dictum in *St. Louis Colonization Association v. Hennesy*,⁹ looks to be in conflict with the foregoing dicta, but perhaps is not. The

⁸ 82 Mo. 418.

⁹ 11 Mo. App. 555.

Court decided the plaintiff was other than a religious body and hence had been constitutionally created, but remarked that if it had been created in violation of the Constitution, the defendant could take advantage of the fact as a defense to the action, which was brought to collect the subscription price of stock. If the subscription for the stock was an original one and made with a view to organizing, then, according to the general rule, the subscriber was not liable for the price of his stock until the company was formed *de jure*.¹⁰ The Court may have meant that the unconstitutionality of the corporation could be urged as a defense in that sort of action, to which the *de jure* status was essential, without meaning to say a *de facto* status is impossible under an unconstitutional law.

Whether or not there may be a *de facto* company under an unconstitutional statute for the formation of *de jure* companies, has never been determined in this State; *but whatever weight dicta on the subject have, favors the proposition that de facto status is possible.*

The theory of cases to the contrary is that an unconstitutional law is really no law, and therefore in such instances a statute to authorize a corporation was lacking. Logically considered, this view is sound; but when we consider the purpose of the *de facto* doctrine, we will perceive the Courts will be hampered in realizing the purposes by adhering to the logical rule, for the reason that it is so often impossible to say whether a statute is constitutional or not until the court of last resort has passed on it. Otherwise stated, the members of the company, persons dealing with it, and persons affected by its transactions, for example, those claiming title under its conveyances, are charged with a much more difficult task if they must decide at their peril whether a statute is constitutional, than when they must merely find out if there was a statute.

Suppose a law is in force for the formation of a company of a particular kind, but by mistake the organizers formed the company under a different law; is *de facto* status acquired? There is no decision on this question in Missouri, but the Supreme Court of Georgia held that a company organized under an unconstitutional special law, when it might have been organized under a valid general one, was a *de facto* company;¹¹ a case which held, however, to the rule that if there is no statute but an unconstitutional one, an association organized under it acquires no status.

Another point not decided in this State is whether or not a new company formed by a consolidation without statutory authority of

¹⁰ *Dorris v. Sweeney*, 60 N. Y. 463; *Capps v. Hasting, etc., Co.*, 40 Nebr. 470.

¹¹ *Georgia, etc., Railway Co. v. Mercantile, etc., Co.*, 94 Ga. 306.

two constituent companies, has de facto capacity. Though there is a decision that it has¹² the clear weight of authority and of principle, is that it has not.¹³ The question was considered by a Federal Court in a case turning on the Missouri law, but a decision on it was not called for, for the reason that the statute was held to authorize the consolidation, but the Court treated the rule as "firmly settled by authority" that "*if ample statutory power is found wanting for either constituent company to consolidate with the other, the entire consolidation is unauthorized and void.*" The contrary rule would permit the formation of a new company by the bare act of the constituent companies, which is contrary to the fundamental law that corporations cannot be formed except by the sovereignty, or with its permission.

Cases conflict as to whether a company chartered under general law, or special act, for a definite period, can continue to exist de facto after the expiration of the period. That they can, see *Bushnell v. Ice Machine Co.*¹⁴ and *Miller v. Noerenberg, etc., Co.*,^{14a} the decision in the latter case being put partly on a statute, but with the language broad enough to sustain the general proposition. Contra, *Venable Bros. v. Granits Co.*¹⁵ and *Grand Rapids Bridge Co. v. Prange*.^{16a}

The point was presented to the Supreme Court of Missouri in *Bradley v. Rappell*,¹⁶ an ejectment action wherein it was contended the trial court had erred in excluding from the evidence two deeds of the West Kansas City Land Company, under which the plaintiff claimed title. The company had been created by a special act of the Legislature, which fixed no term for its duration, but the general statutes in force at the time provided that every business corporation should continue for 20 years if no limit was prescribed in its charter. The excluded deeds were executed by the company more than 20 years after the date of its charter, and on trial it was argued they should have been admitted because a conveyance by a corporation de facto is good against collateral attack. This proposition was conceded, but it was held that after the lapse of the statutory period, the company could perform no act because it had ceased "to be a corporation de jure et de facto, for the reason that there was no law in force authorizing its existence and no law by virtue of which it might exist; and no person, unless estopped by his own action, ought to be, or can be, prevented from showing this fact apparent on the face of the law itself,

¹² *Shadford v. Detroit, etc., Railway*, 130 Mich. 300.

¹³ *American Loan & Trust Co. v. Minnesota, etc., Railway Co.*, 107 Ill. 641.

¹⁴ 138 Ill. 67.

^{14a} 31 W. Va. 836.

¹⁵ 135 Ga. 508; 32 L. R. A. (N. S.) 446.

^{16a} 35 Mich. 400.

¹⁶ 133 Mo. 545.

without the necessity of any judicial investigation, in an issue involving his own personal rights and interests." The ruling is as strong as could be for it was made against a party who was neither connected with the corporation, nor had dealt with it.

Therefore, a corporation cannot exist de facto in Missouri after the lapse of the period fixed either by its charter, if it has a special charter, or by general law as the limit of its duration; and if acts are done in the corporate name thereafter, they are nullities and will be disregarded in collateral litigation.

The rule imposes on the purchaser of land the title to which included a conveyance by or to a corporation, the task of ascertaining if, at the date of such conveyance, the term of corporate life was yet unexpired, and requires a like investigation as to any other act of the company. The rule is not necessary corollary of the doctrine that there can be no de facto corporation in the absence of a law for the formation of one de jure.

In *State ex rel v. Medical College*, 59 Mo. App. 264, the proceeding was quo warranto to put an end to the defendant because it had been in existence as long as the law permitted, namely 20 years. If that period ran from the date of the decree incorporating the College, which was one of the corporations to be formed by judicial decree, the State was right. But the Court held the period began with the filing of articles in the Secretary of State's office, in accordance with the general statute on that subject; and further held that prior to such filing and from the date of the Court decree, the College was a de facto corporation.

By that case, therefore, a statutory limitation of the life of a company begins to run with its de jure life unless otherwise provided and not with its de facto life, if it exists de facto before it does de jure.

The subject of most difficulty and disagreement is the second requisite for de facto existence, namely, there must be an attempt to incorporate de jure, or, as is commonly said, a bona fide attempt—that is, a sincere effort to comply with the law for the organization of such companies. Not all the cases use the words "bona fide," or, "in good faith," in this connection, but merely say there must have been an attempt to incorporate de jure.¹⁷

The question of whether acts have been done which will constitute an attempt, has been presented on various groups of facts, but falls naturally into two principal classes:

¹⁷ *Finnegan v. Noernberg*, 52 Minn. 239; *Toledo v. Trust Co.*, 95 Fed. 497; *Owensboro Co. v. Bliss*, 132 Ala. 253.

First, where the element of good faith in any particular was not involved in the decision, and the inquiry was whether enough of the formal acts prescribed by law for forming a corporation de jure had been done, for the company to possess de facto capacity; or, otherwise stated, whether the statutory acts which had been omitted were a prerequisite to such status.¹⁸

Second, where the element of good faith was involved, and this class of cases may present several aspects, for example:

(a) Those where the question was, was there a sincere purpose to form a body corporate, or was it intended from some motive to stop short of incorporation?¹⁹

(b) Cases where the intention to incorporate was clear, but false statements were made in the preliminary articles, like representing the stock to have been all subscribed and paid, when it was not, in order to procure a charter or certificate of incorporation.²⁰

(c) Where the intent was to incorporate, but with a view to evade some law; in other words, to work a fraud on the law.²¹

(d) Where there was an attempt to incorporate, but with a purpose to use the corporate body for fraudulent transactions.²²

Taking up the first cases where the point to be decided was as to the effect upon the de facto capacity of the failure to observe some legal requirements, it is to be remarked that the results of the cases diverge widely, principally for two reasons; namely, differences in the respective statutes construed as indicating more or less clearly an intention on the part of the Legislature to prohibit de facto capacity if some formal act or other was not done.²³

Also, the disposition of some courts to interpret such statutes strictly, and of others to interpret them liberally in respect of according de facto capacity.²⁴

If the language of the statute leaves no doubt that the intention was to prohibit not only a de jure but also a de facto company from arising unless certain requirements were met, the Court must, of course, carry out the intention; but in as much as the doctrine of de facto capacity had become a settled part of the common law of this country, incorporation statutes are presumed to be passed with knowl-

¹⁸ *Hurt v. Salisbury*, 55 Mo. 310 and other cases cited *infra*.

¹⁹ *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18 and other cases cited *infra*.

²⁰ *Bank v. Rockefeller*, 195 Mo. 15 and other cases cited *infra*.

²¹ *Cleaton v. Emery*, 49 Mo. App. 345 and other cases cited *infra*.

²² *Boatmen's Bank v. Gillespie*, 209 Mo. 217.

²³ *Jones v. Aspen Hardware Co.*, 21 Colo. 263, and other cases cited *infra*.

²⁴ *Bergeron v. Hobbs*, 96 Wis. 641; *Bigelow v. Gregory*, 73 Ill. 197, and other cases cited *infra*.

edge on the part of the legislators of the doctrine, and any enactment tending to derogate from it should be strictly construed.²⁵

Moreover, it is easy for the Legislature to make the intent plain that such and such a formality must be observed or no capacity de facto will arise. Hence many courts construe statutes which prescribe acts in the nature of conditions precedent to the formation of a corporation, as intended merely to prescribe them as conditions precedent to the formation of a de jure company and not a de facto one.²⁶

Other courts exhibit a more technical tendency, which finds its acme perhaps in *Bergeron v. Hobbs*,²⁷ where a statute which provided that a company should have the powers of a corporation when it filed its certificate of organization and a copy of its constitution with the Register of Deeds. The Court held the word "filing" meant leaving on file, and that lodging the documents with the Register and afterwards taking them out of the office was insufficient to confer even de facto status, and left the organizers liable as partners. The association was denied even color of legal right, though the articles and certificate had actually been recorded in the proper office. The dissent of Marshall, J., is a luminous exposition of the de facto doctrine, accompanied by a careful review of numerous cases.

Although, at first blush, equally as technical as the foregoing, much may be said for the soundness of the decision in *Jones v. Aspen Hardware Company*,²⁸ because of the strong prohibitory language of the statute, which declared that a company should not "have, or exercise, any corporate powers, or be permitted to do any business in the State, until the fee (meaning the organization fee) shall have been paid," and further that the Secretary of State should not file a certificate, or articles of association, until the fee was paid. The Court held this language prevented de facto status while the fee was unpaid, as a de facto corporation could not exist in violation of a positive law. The point was presented in a manner to make the ruling as strong as could be, for it denied the title to property acquired in good faith. It was ruled that taking property was the exercise of a corporate power, and hence prohibited. It would be a strained construction of such a statute to hold that the exercise of corporate power before the condition precedent has been performed was valid except as against the State.

²⁵ *Perry v. Strawbridge*, 209 Mo. 621; *Reed v. Goldneck*, 112 Mo. App. 310.

²⁶ *Gartside Coal Co. v. Maxwell*, 22 Fed. 195; *Clark on Corporations*, 34d Ed., p. 102, and cases cited in note.

²⁷ 96 Wisc. 641.

²⁸ 21 Colo. 264.

A few cases have made the question of status turn on whether or not the incorporators have entirely neglected to comply with one of the statutory requirements for affording notice to the public of the attempt to incorporate. In one case, where the organizers had signed articles but had not given them publicity by filing for record, as the law prescribed, de facto capacity was denied.²⁹ A case to the like effect is *Stevens v. Episcopal Church Historical Company et al*,³⁰ wherein at the date of certain transactions the organizers had executed the articles, or certificate of incorporation, but had neither filed them with the Secretary of State, nor a copy of the certificate by that official in the office of the county clerk, nor paid the incorporation fee and taxes, the steps prescribed by law. The Court held the bare execution of the certificate "without any action directing or authorizing the filing thereof, and without the filing thereof, did not constitute even an attempt to comply with the requirements of the statute, and created no liability and imposed no obligation on the part of the parties who signed it to perfect the incorporation," further, that it was a mere agreement among the members and they transacted business as partners. The Court said that some of the statutory steps must be taken in an attempt to comply with the law, and the mere execution of a paper which was not filed and did not become a public record, was insufficient and might be questioned collaterally.

The rule as to what steps must be taken towards incorporating for de facto status to arise, is not clear in this State, for the reason that the most oft-cited case on the point has been somewhat discredited, and is probably unsound. In *Hurt v. Salisbury*,³¹ and two cases which followed it, *Richardson v. Pitts*³² and *Martin v. Fewell*,³³ the decisions were that an act done in the name of a manufacturing and business corporation before it had filed articles of association in the office of the Secretary of State, was a nullity and left the members liable as partners, or if not as partners, at any rate personally liable. In *Martin v. Fewell*, the ruling was that they were partners, whereas in *Richardson v. Pitts*, the Court said whether they occupied that relation or not they were individually responsible for the act which had been done in the corporate name. The facts of these cases, so far as they bear on the point in hand are similar and it will be sufficient to examine the first and leading one.

²⁹ *Johnson v. Corser*, 34 Minn. 355.

³⁰ 140 Ap. Div. 570; 125 N. Y. Sup. 573.

³¹ 55 Mo. 310.

³² 71 Mo. 128.

³³ 79 Mo. 401.

An attempt had been made to incorporate the North Missouri, etc Agricultural and Mechanical Association under section 2 of article 7, 1st Wagner Statutes, 332, or the General Statutes of 1865, chapter 62, section 2, page 367. That was the article for the formation of business companies, and pursuant to it, articles of association were duly acknowledged and recorded in the Recorder's Office of the proper county, but were not filed with the Secretary of State as required by section 4 of article 1, page 289, 1st Wagner Statutes, or section 2, chapter 62, page 367 of the General Statutes of 1865. The latter section provided that a copy of the articles of association of any corporation organized under the laws of the State, should be filed with the Secretary of State "and the corporate existence of such corporations should date from the time of filing of such articles; and a certificate by the Secretary of State under the seal of the State that said corporation had become duly organized shall be taken by all courts in this State as evidence of the corporate existence of such corporations." A note had been executed for the North Missouri, etc Agricultural and Mechanical Association and it was held to be the note of the members who had signed it as directors, and not the note of the company, because when it was signed, the corporation was not capable of borrowing money or executing a note; that the statute intended, in saying "the corporate existence of such corporation shall date from the time of filing the copies of said articles" to fix a date the opinion said, "when the corporation was fully authorized to transact all business for which it was created." But at that time, the particular statutes under which the Association had been formed provided for the signing and acknowledgment of a certificate (i. e. articles of association) by the incorporators and for recording it in the Recorder's Office of the proper county; and then proceeded as follows: "the persons so acknowledging and giving said certificate, and their associates and successors, shall for a term not exceeding twenty years next succeeding the recording of such certificate, be a body corporate and by such name they and their successors shall be entitled to have and possess and enjoy all the rights and privileges conferred by law upon corporations subject to the provisions of this chapter, as hereinafter specified," 1, Wagner Statutes, section 2, article 7, page 332. The language which is quoted has been altered since, to harmonize it with the general section above quoted for the filing of articles of association of all corporations with the Secretary of State; and instead of saying that after the recording of the signed and acknowledged articles, the associates shall enjoy all the privileges

conferred by law upon corporations for a specified term, requires the Secretary of State to give a certificate that the corporation has been duly organized, and says the associates shall, for a term running from the date of said certificate of the Secretary of State, be a body corporate.³⁴ It seems clear that at the time the association in question in *Hurt v. Salisbury* was formed, it became a corporation under the provisions then in force, at the date of recording its articles; and not only an organized corporation, as was said in the opinion in the *Hurt* case, but one which possessed and enjoyed "all the rights and privileges conferred by law on corporations." Hence, it was competent to execute the note sued upon. The case has never been overruled, but in *Granby Mining, etc. Co. v. Richards*,³⁵ the Supreme Court says its doctrine ought not to be extended. In point of fact, the decision was extreme even if there had been no statute to consider on the inquiry of when the power to do business began except the one for recording the articles with the Secretary of State; for not only had the articles been properly signed and acknowledged, but notice of them had been given by one of the required recordings, namely in the office of the Recorder of Deeds. It should be noted that in none of the three cases last cited, was the *de facto* doctrine discussed under that name, the court confining itself to deciding when a corporate act would be treated as void for want of capacity in the supposed corporation, but the *de facto* principle was, of course, involved. The tone of the opinion in *Granby Mining Co. v. Richards* is opposed to that of *Hurt v. Salisbury*, but the two decisions are not necessarily in conflict. The action was on promissory notes and an open account. Some of the notes had been signed by the Missouri Zinc Company by "Eben Richards, president," and he was the defendant. The evidence was clear that the plaintiff believed, when the notes were taken, the Missouri Zinc Company was a corporation and extended credit to it as such; also that the defendant supposed the same and had no thought he was doing business as a partner with his associates. The contention against the existence of the Missouri Zinc Company was that its articles had not been filed in the office of the Circuit Clerk of the county where the business was to be transacted but only a duplicate in the office of the Secretary of State, whereas both filings were required. The case was distinguished from *Hurt v. Salisbury* on the ground that the special act under which the Granby Mining Company has formed did not make filing in the Circuit Clerk's office a condition precedent to corporate capacity.

³⁴ 1 Revised Statutes, 1909, sections 3340 and 3341.

³⁵ 95 Mo. 106.

The case of *Finch v. Ullman*,³⁶ called for a decision of whether the Springfield Hotel Company could be a grantor and grantee of land, no certificate having been issued by the Secretary of State, and, in fact, as appears from the briefs, the article had not been filed in his office. The rule in *Hurt v. Salisbury* was invoked that the company could not exist *de facto* or *de jure* until this filing occurred. The opinion speaks of lack of a certificate from the Secretary of State, omitting to remark upon the more important fact of neglect to file the articles with that office. Hence the decision does not, in words, clash directly with *Hurt v. Salisbury*, but in truth it does. The point in decision was that a statute authorized the incorporation of hotel companies, and as the one in question had been formed and had exercised corporate functions its right to do so could not be tested in a collateral proceeding, in short, that it possessed *de facto* capacity. This judgment was according to sound *de facto* principles and most precedents in this State.

The most that can be said on the question of what are the formal steps required by the statute that must be taken for the de facto status to arise, there being no point made about good faith, is that according to Hurt v. Salisbury and its congeners, the proceedings must go as far as filing articles with the Secretary of State; at any rate in the instances of a manufacturing and business company; but that it is doubtful, if the point were squarely presented, whether that doctrine would be maintained.

The case of *St. Joseph, etc. Railway Co. v. Shambaugh*,³⁷ ought to be noticed because it draws a clear distinction, which is sometimes lost sight of between the effect of a statute which prescribes condition precedent to be performed before a corporation can come into existence, and the effect of a statute which merely prescribes condition precedent to the right of the company to transact business, or exercise certain corporate powers. The plaintiff was seeking to condemn the defendant's property under a statute which began by saying "A company is hereby incorporated called the St. Joseph and Iowa Railway Company," etc. One defense interposed was that the company was unincorporated and consequently lacked authority to exercise the franchise of eminent domain, the reason assigned being that the company had failed to perform certain conditions precedent contained in the act. No fact is mentioned in the opinion which indicates the basis of this contention, as no condition precedent, either to corporate life or to the transaction of business, appears. However,

³⁶ 105 Mo. 255.

³⁷ 106 Mo. 577.

the Court said "where the act of incorporating does not in and of itself, confer corporate capacity, but provides for the doing of certain things, upon the doing of which the company shall become a body corporate, the performance of these things constitutes conditions precedent, and until performed the company has no corporate existence. If, however, the charter confers corporate capacity without any conditions precedent, acceptance of the charter is all that need be shown." The particular point at issue should be kept in mind, namely, whether the Railway Company could exercise eminent domain; for there are cases holding that this can be done only by a de jure corporation. If the Supreme Court meant that no company could be one de jure until it had complied with conditions precedent, the proposition is sound by all the authorities; and in view of the opinion in *Granby Mining Co. v. Richards*, *supra*, written by the same Judge who wrote the opinion in the *Shambaugh* case, this is probably all that is meant. In other words, it was meant to hold that none but a de jure company could make use of eminent domain, and that there could be no de jure company until conditions precedent to the formation of a corporation had been performed, if such were prescribed.

The particular point to be noted, however, is that where a charter confers corporate capacity in so many words and afterwards prescribes acts to be done before the corporation can engage in any business, the latter conditions do not prevent the company existence as a corporate body.

The same doctrine is more fully expounded in *Wells Co. v. Gastonia Cotton Co.*,³⁸ cited and approved in the *Shambaugh* case.

A point undecided in this State is whether the certificate of the Secretary of State is conclusive that articles of association have been filed with him, and that they sufficiently comply with the statutes. May the certificate be relied on as a determination that the law has been so far observed, as regards formal steps, as to make possible the de facto character? In the *Rockefeller* and *Gillespie* opinions³⁹ and in others remarks are made that the incorporation proceedings involved were regular on their face as though such appearance of regularity was essential to the de facto defense, even when the official certificate had been issued. But it is declared in the *Rockefeller* opinion that the certificate takes the place of a special act of the Legislature, chartering a company; and if this be true in the widest sense, the certificate will *create a company*. It is reasonable that the filing of something in the nature of articles with the Secretary of State should be required,

³⁸ 198 U. S. 177.

³⁹ 195 Mo. and 209 Mo.

as a basis for the exercise of his authority and in default for which his actions would be void; it is reasonable, too, that what is filed should not wholly lack the statutory requirements; for example, that it must be in the form of articles of agreement and signed and acknowledged by enough persons to constitute the minimum number that may form a corporation. Even in courts of general jurisdiction there must be pleadings for the court to act upon in a case.

It has proved difficult to find a decision directly in point on the question, such as have been found being those wherein it did not appear that an official certificate was required by statute, but only the filing in the proper office of articles. These cases hold that where no articles of agreement are filed, or only such as do not comply with essential requirements there can be no *de facto* character. *Alk v. Crandall*,⁴⁰ *Abbott v. Smelting Co.*;⁴¹ *Lusk v. Riggs*;⁴² *Kaiser v. Bank*.⁴³ In the last case a Kansas statute was construed which required the articles to be acknowledged before filing with the Secretary of State, and it seems they were neither acknowledged nor appeared to be. The court held the bank could not be a corporation in any capacity without the acknowledgment to the articles of at least as many signers as the statute required for the formation of a banking company. See, however, *Buffalo etc. Railway Co. v. Cary*.⁴⁴

In view of what is said in *Bank v. Rockefeller* about the Secretary of State's certificate taking the place of a special character, and the observations in that and other cases, to the effect that the papers on which the Secretary acted were apparently regular, no effort will be made to state what the rule in Missouri is on this question. The difficulty of ascertaining from adjudged cases to what extent compliance with statutory regulations and forms prescribed for forming corporations, is necessary to create *de facto* capacity, is noticed in *De Witt v. Hastings*,⁴⁵ a case well worth reading. The Court said "How much must be done to make a colorable charter, or how much may be omitted, it has not been found necessary in the cases to decide. In the cases to which our attention has been called, the defect was of minor importance. Most of the steps had been taken, and it has generally been called an irregularity. What particular step in the process, designed by law to be complete wholly, is essential; and what may be deemed not essential, has not been decided."

⁴⁰ 1 Sandf. Ch. 177.

⁴¹ 4 Neb. 416.

⁴² 70 Neb. 718.

⁴³ 56 Ia. 104.

⁴⁴ 26 N. & 71.

⁴⁵ 40 N. Y. Super. 463.

We will now turn our attention to cases which involve consideration of how far the acquisition of de facto status depends on the good faith of the incorporators, premising what is to be said with the statement that to concede good faith is a factor in the problem, is to introduce a confusing element. According to practically all the authorities, a de facto corporation is a real entity and its acts just as valid as those of one de jure as against every party but the State. Now, if you allow that, whether an association has de facto capacity, or not, turns on the good or bad faith of the incorporators, then a difference must be made as to the validity of any particular transaction accordingly as it is with an innocent party, or with one who had knowledge of the fraudulent intent of the incorporators; which is to say, there may be a corporation de facto as against one person and not as against another. This difference appears in *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*,⁴⁶ a case frequently cited. The action was against the defendants as partners, who insisted they did not sustain that relation but were doing business as a company de facto. The decision turned on the bona fides of the defendants in their effort to form the corporation and the matter was treated as a question of fact for the jury, and that upon the issue evidence tending to prove the following facts was competent; no fee had been paid, as the statute required, before the Secretary of State could issue a certificate; no money nor property of value was paid in for the capital stock; no meeting of directors had been held; the affidavits as to subscriptions of stock made and paid, were false; the pretended corporation was a sham; the purpose in forming it being to enable the defendants to carry on business without incurring liability as partners and without the company possessing any assets wherewith to meet its debts.

It is obvious that one jury might find one way, and another another way, and so whether or not there was a corporation would depend on the particular verdict. No harm might result from this in the case cited, but suppose the Fruitdale Lumber Company had been grantee in a deed and in litigation that deed had formed a link in the title of a party to a piece of property as occurred in *Stinson v. Douhitt* and many other cases. The party claiming under the deed would be liable to have his title defeated on the ground that the company had never acquired capacity to take as grantee, because it was never a de facto company by reason of fraud in its organization. Of course, no court would tolerate such a result, but it only could be

⁴⁶ 121 Ala. 340.

escaped by holding that a person who took in ignorance of the fraud was unaffected by it. In other words, that, for the purpose of protecting an innocent party, the company would be held to have been a corporation and a competent grantee, though it would be denied *de facto* status in an action against the incorporators. But this result violates the whole theory of the *de facto* doctrine, which is that such a corporation is a good one against everyone but the State, and protects the members from personal liability for acts done in its name.

The first sub-division of the good faith cases consists of those where there was no real purpose on the part of the persons engaged in the enterprise to bring into existence the corporate body, but, on the contrary, an intention to do enough to enable them to carry on business under the corporate guise while stopping short of actual incorporation, or if there was at first the purpose to incorporate it was abandoned.

In *Card v. Moore*,⁴⁷ it appeared that Card and Moore, who were residents of Connecticut, and Crandall, a resident of New York, agreed to form the Salisbury Carbonate Iron Company under the laws of Connecticut, and to that end executed and filed articles in conformity to Connecticut Law, the filing being in the office of the clerk of the town of Salisbury, where the company was to be located. They also published them in a newspaper of the county, as the law provided, but did not file them with the Secretary of State of Connecticut. Said law declared that a copy of the articles of association of a corporation certified by the Secretary of State and on file in his office, should "be *prima facie* evidence of the due formation or existence and capacity of such corporation." The promoters of the enterprise did not file with the Secretary of State, because their purpose was merely to secure a company name, under which Card & Moore might transact business as partners, in accordance with a partnership agreement they had previously made. Their defense to the action, the facts of which need not be further stated, was that the company was so far organized as to constitute one *de facto*; but the point was ruled against them, for the reason that they had been acting in bad faith; that is, they had never intended to form a *de jure* company, but had intended to stop short of that result.

In *Weir Furnace Co. v. Bodwell*,⁴⁸ the contract in suit was made in the name of "Kansas City Bale Tie Co., by A. G. Bodwell, president," Bodwell having been authorized to make it by the promoters of an intended company. Twenty days later than the company was formed

⁴⁷ 68 Ap. Div., N. Y. 327.

⁴⁸ 73 Mo. Ap. 389.

under the name of Standard Manufacturing Company. *Martin v. Fewell* and other cases were followed in holding the associates answerable on the contract made prior to incorporation. The opinion states that at the date of the making "no articles of corporate association had then been signed or acknowledged; or if so, the same were never filed with the Secretary of State as required by statute." This shows only a bare intent to organize a company, and action in its name before taking steps towards organizing does not give de facto protection.

In *Simmons v. Ingram*,⁴⁹ the defendant was made to answer on a contract as a partner for the reason that he and others had agreed to form a corporation but never did, yet conducted business under the guise of Charles H. Gage Mining and Smelting Company, a corporation. It does not appear the associates took any step towards incorporating.

It was said in *Queen City Furniture, etc. Co. v. Crawford*,⁵⁰ "under the facts disclosed in this case the corporation had no existence; there was simply an immatured intention of the parties to form a corporation." There had been articles signed, but the original project was abandoned and subsequently, after the purchases in suit, a different company was formed.

To the like effect is *Ellis v. Brand*,⁵¹ wherein one of the defendants was exonerated from a liability sought to be imposed on him, upon the theory that he was a partner of the man who had contracted the debt in suit, because they did business as an incorporated company after they had abandoned their purpose to form the company. It was conceded the defendant would have been liable had this been true, but the court held no business was transacted by the two as a company after abandonment of the intention to incorporate.

From those cases it is clear that *a mere intention to incorporate will not protect associates from personal liability on obligations contracted in the name of the intended company, and that this is true whether the company is never formed, or is formed shortly after the obligation was contracted.*

In *Sexton v. Snyder*,⁵² a judgment was affirmed against the defendants as partners for services rendered the plaintiff after the defendants had tried to incorporate but had failed because the Secretary of State refused to grant a certificate. The defense was, as to the immediate point, that the defendants had continued to conduct

⁴⁹ 78 Mo. App. 603.

⁵⁰ 127 Mo. 356.

⁵¹ 176 Mo. App. 383.

⁵² 119 Mo. App. 668.

business as and in the name of a corporation, subsequent to their abortive effort to obtain corporate capacity.

Therefore under that authority associates do not acquire de facto capacity by persisting in the exercise of corporate powers after the official charged with the duty of granting them de jure capacity has refused to do so.

Regarding the effect on de facto capacity of fraud in procuring a charter or a certificate of incorporation, from the Secretary of State or other official authority charged with the duty of passing on preliminary proceedings, our Supreme Court from first to last has refused to treat such fraud as a factor, holding instead that it affords ground only for a proceeding by the State to end the further exercise of its franchises by the company. This proposition was declared first in *Kayser v. Trustees of Bremen*,⁵³ a suit to enjoin the defendants from collecting a tax; the opinion in which said, by way of dictum, it "cannot be shown in defense to the suit of a corporation that the charter was obtained by fraud." Courts more readily uphold public corporations against attacks for irregular or illegal creation, because they are instrumentalities or agencies of government, like officers; but the stated doctrine prevails as to private corporations.

In *Bank v. Rockefeller, et al.*,⁵⁴ the object of the action was to hold the defendants liable as individuals on obligations of the Siegel, Saunders Commission Company, upon these allegations: the defendants had attempted in bad faith to incorporate said company, which therefore had never become a corporation either de jure or de facto; the articles of association were not acknowledged by two persons named as incorporators; further, the articles showed the capital stock had been fully paid when none had been, and the incorporators had agreed among themselves it should not be. On the face of the articles, the subscribers appeared to have acknowledged them. The case went off on a demurrer to the petition and, in passing on the demurrer, the court construed the sections of the statutes bearing upon the point.⁵⁵ Section 955 reads: "Whenever any corporation shall be organized under the laws of this State it shall be the duty of the officers of said corporation to file with the Secretary of State a copy of the Articles of Association or incorporation, and the corporate existence of such corporation shall date from the filing of said copy of such articles; and a certificate by the Secretary of State, under the Seal of the State,

⁵³ 16 Mo. 88.

⁵⁴ 195 Mo. 15.

⁵⁵ R. S. 1899, sec. 955, now sec. 2975 of R. S., 1909, and sections 1313 and 1314, R. S. 1899, now sections 3340 and 3341, R. S. 1909.

that said corporation has become duly organized, shall be taken by all the courts of this State as evidence of the corporate existence of such corporation; a certified copy of said certificate of the Secretary of State shall be filed and recorded in the office of the Recorder of Deeds of the county in which the company is organized."

That section occurs in the article providing generally for the formation of corporations, and the other two in the article for forming manufacturing and business companies. To form that kind of company, two sections relating thereto provide for acknowledgment of the articles by all subscribers; recording them in the office of the proper Recorder of Deeds; filing a certified copy in the office of the Secretary of State; a certificate by said Secretary that the company has been duly organized, and the amount of its capital, which certificate is made evidence of corporate existence. The statutes further say "The persons so acknowledging such articles of association, and their associates and successors, shall, for the period not to exceed fifty years next succeeding the issue of such certificate by the Secretary of State, be a body corporate," etc. Considering the effect of the statutes for forming manufacturing and business companies, the Court said that after the prescribed steps have all been taken, there is no incorporation until the Secretary of State issues his certificate, "which takes the place of a special Act of the Legislature prior to our Constitution of 1875." And further: "This certificate is a grant of a franchise to become a corporation and without it there can be no corporation de jure under our laws; and, when once issued and accepted by the company, no one can dispute the corporate existence except the State in a direct proceeding." To the same effect is *Webb v. Rockefeller*.⁶⁸

Those cases established these rules:

There can be no corporation de jure under our laws without the certificate of the Secretary of State (Bank v. Rockefeller, loc. cit. 42).

When the certificate is once issued and accepted by the company, no one can dispute the corporate existence except the State in a direct proceeding (Ibid).

When the certificate is issued, the fact that some of the incorporators had not acknowledged the articles as they appeared to have done and as the statute required, and the further fact that the capital stock had not been paid as represented in the articles, did not prevent the company from being one de facto (Ibid, loc. cit. 51).

The fraudulent incorporators were not liable on the company's obligations either as partners or to the creditors of the company in an

⁶⁸ 195 Mo. 57.

action of deceit; but were only liable for the amounts unpaid on their shares of stock.

Suppose there is a genuine intention to incorporate completely by complying with all legal requirements and thereby obtain a decree or certificate from the proper public authority, but the purpose of so doing is to evade some responsibility imposed by law; what then? In such cases there are precedents for the proposition that no status, either de jure or de facto, pertains to the company. The theory is that a company cannot exist if organized in violation of a positive statute; and clearly it could not exist of right. A striking example of this kind of cases is *Montgomery v. Forbes*.⁵⁷ In order to limit his personal liability, Forbes wished to do business under the corporate form, and because the tax laws of New Hampshire were lighter on corporations than those of Massachusetts, where he lived and had his factory, Forbes procured some nominal associates in Nashua and organized a company there, he taking all the capital stock. The laws of New Hampshire required companies formed under them to do their principal business in the State, but Forbes had no intention to comply with that requirement. The case was treated as one for the jury, like *Craft & Grocery Co. v. Fruitdale Lumber Co.*, and the jury found against Forbes on issues regarding his good faith in organizing to carry on business in Nashua, but found, also, he believed there was a valid organization when he bought goods from the plaintiffs in its name; and the plaintiffs sold the goods to the company believing it to be a corporation. The court held none had ever been created and that Forbes was personally liable for the price of the goods.

Booth v. Wonderly,⁵⁸ referred to in *Boatmen's Bank v. Gillespie*, contained these facts: The Legislature of New Jersey had chartered a company called "The Mariners Mutual Insurance Company," to do business at Trenton, but no company was formed at Trenton, nor stock subscribed. Two men, Noble and Logan (seems the former claimed said charter), fraudulently planned to organize under the charter at Jersey City and carry on business there. No connection was shown between Noble and the persons named as incorporators in the charter, though the charter "was in the market at Trenton." It was required a cash capital of \$50,000 should be paid in before operations on other than the mutual plan should begin. It should be said that the charter authorized special insurance as well as mutual; that is, of parties not members as well as those who were. The incorporators, who were sued as partners on a policy of nonmutual insurance issued

⁵⁷ 148 Mass. 249.

⁵⁸ 7 Vroom. 250.

after the organization at Jersey City, were not guilty of actual fraud as Logan and Noble had been. It was held there was no de facto company, as the law contemplated a Trenton company and an organization there on the Mutual plan; whereas the Jersey City company was a "stock" company and the word "mutual" was omitted from the company's name: held further, there was an attempt to pervert the charter from the purpose intended by the Legislature; that the charter contemplated as bank charters do, a company of a local variety; and held, further, "that the doctrine that the validity of incorporation cannot be inquired into collaterally was not applicable, because the charter does not fit the Jersey City company and was not intended for it; that the organization was entirely outside the act and had no existence as a corporation real or de facto."

In *Cleaton v. Emery*,⁵⁹ defendants were sued individually for debts contracted in name of "The National Railway Electric and Industrial Exposition Company," a corporation that was regularly organized on the papers, under the laws of Colorado, with a nominal capital of one million dollars, but with a subscription of only \$43,000. The laws of Colorado permitted capital stock to be named in any sum and held incorporators only for amount of their subscription. The purpose, as stated in the article, was to conduct an Exposition in St. Joseph, Missouri, but with power to establish branches in Denver and elsewhere. The incorporators were residents of St. Joseph, and the object of going to Colorado to organize was to evade the Missouri Constitution about subscribing and paying for stock. It was held State comity did not require the recognition of this company as it was organized in fraud of the laws of both Missouri and Colorado, and statutes of the latter State were pointed out which impliedly forbade the creation of such a company to do business in another State. The incorporators were held liable as partners against the defense that, as the laws of Colorado permitted non-residents to incorporate there, no fraud was committed on the laws of that State, and the company was therefore a corporation. The Kansas City Court of Appeals said the laws of Colorado never meant to permit a company to form under them to do its entire business in another State without even maintaining its principal office in Colorado; further, that Missouri was not bound to concede the existence of a foreign company formed by Missouri residents to do business here.

Journal Company v. Nelson,⁶⁰ was an action against the defendants as partners for a debt due the plaintiff, incurred as the obligation

⁵⁹ 49 Mo. App. 345.

⁶⁰ 133 Mo. App. 482.

of "The Brant Independent Mining Company." That company was formed in Arizona ostensibly to mine in Colorado. The Court held that it was organized in fraud of the laws of both those States, as the organizers did not intend the company should do any business in Arizona or mine in Colorado, but merely that its stock, which was represented as five million dollars when only five hundred had been paid, should be sold in Missouri; that it was not an industrial enterprise as it purported to be, but a commercial one. The Court applied the maxim that "fraud vitiates everything," held, State comity did not require recognition of a company thus organized and that the defendants were liable for the debt.

Therefore in this State a corporation formed in fraud of the laws of Missouri or a sister State, has no status to protect its members from personal responsibility for its obligations. But we may doubt if it would be denied de facto status, if it were necessary to accord it to protect an innocent party. There are decisions in New York not in harmony with the foregoing, except perhaps with *Wonderly v. Booth*.⁶¹ Those cases hold that the motive of organizers in incorporating in one State to do business in another, cannot be inquired into collaterally, a view consonant to the de facto doctrine and tending to preserve its symmetry, instead of permitting exceptions to be introduced which lead to the conclusion that a company may possess de facto capacity as to persons who are not aware of the bad faith in which it was formed, but not as to those who do.

The fourth class of cases wherein the lack of good faith in forming a company was considered with reference to its effect on de facto character, are those where the organizers actually intended to form a corporation, but for the purpose of using it to defraud. Of this class is *Boatmen's Bank v. Gillespie*,⁶² wherein was developed a thoroughly fraudulent scheme to form the A. J. Gillespie Commission Company, for the purpose of floating a large amount of worthless notes made in its name. The names of two of the pretended incorporators had been signed to the articles by a person who assumed to sign as their trustee, but without authority, and the signatures never had been ratified. The Supreme Court held the defendants were not individually liable to the plaintiff on the endorsement by the corporation of certain notes, which the plaintiff had purchased, resting the decision on the proposition that the certificate of the Secretary of State of the formation of The A. J. Gillespie Commission Company, constituted

⁶¹ *Demarest v. Flace*, 128 N. Y. 205; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576.

⁶² 209 Mo. 217.

it a de facto company, notwithstanding the unauthorized signing of the names of two men as subscribers to the articles and to the capital stock, and notwithstanding, also, the fraudulent scheme to be carried out by means of the corporation. The opinion said: "As to the motives and intentions of the incorporators in obtaining from the Secretary of State the certificate, we are of the opinion that that cannot be inquired into in this action"; a thoroughly sound decision, but if that kind of fraud does not lay the company's existence open to collateral attack, why should a fraud on the law? In either case the State has redress through a direct proceeding.

Therefore incorporating to use a company as a means of perpetrating fraud if the plan is so far carried out as to procure the Secretary of State's certificate, does not prevent de facto capacity.

It is not easy to reconcile *Farmers State Bank v. Kuchs*,⁶³ with the *Gillespie* decision, but if the two are in conflict the latter is the law. In the *Kuchs*' case an unincorporated creamery company owned by numerous farmers had made a note to the plaintiff bank on which E. H. Ralston was surety. H. E. Ralston, brother of E. H., in order to protect the latter and for other dishonest motives, promoted the formation of an incorporated creamery company to take over the business and assets of the unincorporated one and operate under the same name. He meant to have the note, on which his brother was surety, taken up by the corporation and the note of the latter given instead. He induced the defendants to become subscribers for stock, articles were signed, acknowledged and recorded, but not filed with the Secretary of State, an omission that under *Hurt v. Salisbury* and *Martin v. Fewell* would make the defendants liable, in that the supposedly incorporated company was powerless to make a note or otherwise exercise corporate power. Its note was given to the bank, of which E. H. Ralston was president; but he appeared to have been acting in good faith and no force is given to either his being a brother of H. E. Ralston, or President of the bank. The decision was put on the fact that the defendants and the other incorporators had agreed no business should be done by the company until the Secretary of State's certificate had been obtained; that is until the company was one de jure. How this agreement could affect the right of the bank, which was no party to it, to look to the organizers of the abortive company, is not perceived. They could be relieved only on the ground that

⁶³ 163 Mo. App. 606.

the company had de facto capacity and therefore power to make the note, but this would be contra *Hurt v. Salisbury*.

The third prerequisite of the de facto character is the exercise of corporate powers or user; of which but little need be said for the question of what amounts to user has not been much discussed in Missouri cases; and furthermore, by the general current of authority, not much need be done as a corporation to satisfy this requirement of the law. In one opinion we find this statement: "Very slight evidence of user beyond this (meaning beyond a bona fide effort to incorporate) is all that can be required."⁶⁴ The mere use of the corporate name by a body of men does not suffice, if they have done nothing towards complying with the law for the formation of bodies corporate. To hold otherwise would be to set aside the prerogative of the State to create such bodies."⁶⁵ This rule is not to be taken as inconsistent with the rule according to which a company acting under a corporate name may be estopped to deny corporate character.⁶⁶ The de facto doctrine must be discriminated from the doctrine of estoppel to deny corporate existence, for the two are different in principle and one may be applicable to a set of facts to which the other may not be. It has been held that merely electing officers and the passage of a single resolution about an executory affair, is insufficient evidence of user;⁶⁷ and, on the contrary, it has been held that the organization of the company, that is electing officers and setting about its business, are essential, and that no de facto character will exist prior to organization.⁶⁸ In one case it was ruled that the action relied on to prove user must point to corporate capacity and not be merely such action as a partnership might take.⁶⁹ This looks extreme, for many acts done in the character of a corporation could as well be done by a firm; and if they were performed as an exercise of corporate power, the simple fact that they might have been performed by a firm ought not to render them nugatory as evidence of user. It has been decided that the acts relied on to prove user must have been performed after the attempt to incorporate, not before, and this looks reasonable.⁷⁰ Proof of user may be made

⁶⁴ *Eaton v. Walker*, 86 Mich. 579, and see to same purport *Merriman v. McGiveny*, 12 Heisk. 494.

⁶⁵ *Bash v. Gold Mining Company*, 7 Wash. 122.

⁶⁶ *Stoutimore v. Clark*, 70 Mo. 471; *National Insurance Company v. Bowman*, 60 Mo. 17; *Farmers, etc., Insurance Co. v. Needles*, 52 Mo. 17.

⁶⁷ *Emery v. De Peyster*, 78 N. Y. Suppl. 1055.

⁶⁸ *Martin v. Deetz*, 102 Calif. 368.

⁶⁹ *Green v. Dennis*, 6 Conn. 293.

⁷⁰ *DeWitt v. Hastings*, 40 N. Y. Super. 463.

from books and records of the corporation, by showing therefrom the enactment of by-laws, the passage of resolutions, and the holdings of meetings of shareholders and directors. Documents, deeds and contracts reported to have been executed in the corporate character, are also evidence.

In *Boatmen's Bank v. Gillespie*,⁷¹ it was suggested that where incorporation was applied for under general statutes, the filing of articles with the Secretary of State may be sufficient to show acceptance of franchises, and, as the opinion implies, may be enough to create *de facto* status; the question before the court being whether such a status had been acquired.

The rule prevails in Missouri, and generally, that if after an attempt to incorporate de jure, the associates perform acts as a corporation the de facto character will exist, and that such acts need not be numerous.

In fact, it is not perceived why a single act, if clearly an exercise of corporate power, should not constitute user.

Finally, we ask what is the legal effect of the *de facto* character. As to this question the authorities in Missouri, and elsewhere, are, for the most part, clear and harmonious. The existence of such a corporation cannot be questioned collaterally. It is not open to attack by any party except the State, and only by the State in a direct proceeding in *quo warranto* to test its right to existence. This was substantially the language of our Supreme Court in *First National Bank v. Rockefeller*.⁷² A *de facto* corporation is almost, if not quite, as much a legal body as one *de jure*. As was said in *Society Perun v. Cleveland*,⁷³ "A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a *corporation*." It follows that such a corporation may take contracts, convey and transfer real and personal property, commit torts, and in fact, do all things that a *de jure* corporation of the particular class is authorized to do, as long as the State does not choose to put an end to its career; the theory of the law being that whatever wrongful usurpation of franchises there is, is a wrong to the sovereignty and to no one else. Some courts hold that the powers of such a corporation do not extend to the exercise of extraordinary franchises in derogation of common right, like the power of eminent domain.⁷⁴ This was the

⁷¹ 209 Mo. *loc. cit.* 257.

⁷² 195 Mo. *loc. cit.* 44.

⁷³ 43 Ohio St. 481.

⁷⁴ *Hudson v. Greenhill Seminary Corporation*, 113 Ill. 626, Brooklyn W. & N. R. Co., 72 N. Y. 245.

doctrine in Missouri until recently. In *St. Joseph & Iowa Ry. Co. v. Shambaugh*,⁷⁵ a condemnation proceeding, the Court said: "The corporate existence of the plaintiff is an issue which may be made in a proceeding to condemn property, for if the plaintiff has no corporate existence it has no right to prosecute this suit," citing *City of Hopkins v. Railway*,⁷⁶ and *Matter of Railways*.⁷⁷ That remark, however, was a dictum, for the court went on to show that the plaintiff had been incorporated de jure. The question was squarely presented in *Orrick School District v. Dorton*,⁷⁸ a proceeding by the plaintiff to condemn a site for a school house. An answer was filed which put in issue the existence of the plaintiff as a corporation, but its right to condemn was sustained in the court below. The Supreme Court held that its de jure status must appear for it to condemn, citing in support of the proposition, the three cases last cited *supra*, and remarking that the rule was different in some other states where it had been "held that a de facto corporation might exercise the right of eminent domain."

In *School District of Columbia v. Jones*,⁷⁹ the proceeding was the same as in the *Orrick School District*, namely to condemn land for a school house site, and the rule announced in the latter case was invoked against the power of the plaintiff to do so. Without overruling the *Orrick* case formally, the court refused to go into the record to ascertain whether or not the plaintiff had been organized de jure, saying: "The corporate capacity of the plaintiff cannot thus be assailed in this collateral proceeding. A corporation of this character cannot be called upon to defend its corporate life every time it brings a law suit in its corporate capacity. Its corporate existence and its right to exercise corporate powers can only be inquired into at the call of the State in proceedings of quo warranto."

Hence we may say that the rule is now in Missouri that a public corporation of merely de facto capacity may use the right of eminent domain as freely as one de jure may. It will be observed that the opinion in *School District v. Jones* said: "*A corporation of this character cannot be called upon to defend its corporate life, etc.*" That statement leaves open, in some degree, the question of whether a private corporation, not organized de jure, can condemn property. Nor is there any direct adjudication of the point in this

⁷⁵ 106 Mo. 557.

⁷⁶ 79 Mo. 100.

⁷⁷ 72 N. Y. 245.

⁷⁸ 125 Mo. 439.

⁷⁹ 229 Mo. 510.

State. *School District v. Hodgin*,⁸⁰ was likewise a proceeding to condemn for a school house site, in which, contrary to the rule declared in the *Orrick District* case, the court held the corporate capacity of the plaintiff could not be assailed. But remarks were made which would extend the rule to cases of private corporations endeavoring to use the power of eminent domain. The opinion says: "It would be a most ruinous proposition of law to announce that any corporation of the State, whether public or private, can be required every time it attempts to assert a right in the courts of justice of the State to prove the regularity of every preliminary step taken by its promoters looking to its formation and creation, as a preliminary test of its right to prosecute its actions begun, and if, perchance, the action is one at law, to have this issue so raised determined by a jury." Many cases were reviewed in *Black v. Early*,⁸¹ which was a suit by taxpayers of a school district to enjoin the collection of taxes levied for the support of a public school and to pay the interest on its bonds, on the ground that the district had not been regularly formed. Of course, it was rightly held in this particular case that the matter could not be inquired of; and, though the case did not involve the question of whether *de jure* status was essential to enable the corporation to condemn property, the opinion quoted with approval the above excerpt of *School District v. Hodgin*, wherein, by way of dictum, it is said that neither in the instance of a public nor of a private corporation can its power of eminent domain be restricted on the score that it only exists *de facto*. That view is maintained in *Central, etc. Ry. Co. v. Ry. Co.*,⁸² as it is in various other cases, many of which are collected in *Morrison v. Ry. Co.*⁸³

It is the doctrine of some courts, perhaps of many, that no corporation except one *de jure* can enforce payment of *preliminary* subscriptions to corporate stock, on the theory that the subscriber agreed to take stock only in a regularly organized company, and not to risk his money in one liable to extinction at the suit of the State for usurpation of franchises.⁸⁴ The rule is different as to subscriptions made after the *de facto* corporation is organized and doing business.⁸⁵ In the latter case the subscriber is supposed to

⁸⁰ 180 Mo. 70.

⁸¹ 208 Mo. 281.

⁸² 144 Ala. 639.

⁸³ 166 Ind. 511, 527.

⁸⁴ *Capps v. Hastings Prospecting Co.*, 40 Nebr. 470; *Williams v. Enterprise Co.*, 153 Ind. 496; *Columbia Electric Co. v. Dixon*.

⁸⁵ *Farmers Mutual Telephone Co. v. Howell*, 132 Ia. 22.

be estopped by contracting with a corporation to dispute its capacity.⁸⁶ And a preliminary subscriber, by taking part in the formation of a company, may thereby debar himself from contesting his liability on a subscription for lack of de jure capacity. This was decided in *Home Stock Insurance Company v. Sherwood*,⁸⁷ and in *Ohio & M. Ry. Co. v. McPherson*.⁸⁸

The question of whether a corporate capacity can be raised in an action upon a contract of subscription to stock made prior to incorporation, was touched upon in *Haskell v. Worthington*,⁸⁹ which was an action on such a contract, and among other defenses, it was denied that the company was properly organized, for the reason that the entire capital stock had not been subscribed, as required by its articles of association. The corporation in question was the Missouri Cotton Seed Company, and, it having fallen into insolvency, its assignee sued the defendant for the price of the shares he had subscribed. The court merely said: "The company was incorporated under Sections 1 and 2, Article 7, Chapter 37, Wagner Statutes, and in conformity with the requirements of those provisions and its corporate existence cannot be questioned in this collateral proceeding." That remark can hardly be taken as a decision on the point, for the court went on to hold that *Worthington* was not liable, for the reason that he had agreed to venture his money upon the understanding that the full capital stock should be subscribed and paid, and might have been unwilling to venture it in a company of less capital. In this connection the court said: "For while the defendant cannot question the corporate existence of the company * * * yet there is one thing he had a right to rely upon, and that was that his subscription should not be put to the hazard of the venture until the capital stock deemed necessary to the success of the enterprise had been taken, or subscribed for * * *. The right of the company to enter upon the business for which it was incorporated and to call in subscriptions to its capital stock, was upon condition that its capital stock, as stated in the recorded certificate, had all been taken, or subscribed for." That is a different proposition entirely from saying a corporation cannot collect preliminary subscriptions if the proceedings to form it have been irregular so that it only acquired de facto status. In the *Haskell* case, it happened that the irregularity was in not having the full capacity stock taken; which, as said, was held to be a defense, not because the company had failed to become

⁸⁶ *Dorris v. Sweeney*, 60 N. Y. 463.

⁸⁷ 72 Mo. 461.

⁸⁸ 35 Mo. 13.

⁸⁹ 94 Mo. 500.

one de jure, but because the condition upon which it might call for payment upon the preliminary subscriptions, whether it had de jure or merely de facto capacity, had not been performed. But it might as well happen that the irregularity was in some other particular; for example, in not having the certificate of the Secretary of State, or not properly acknowledging its articles, and the question be raised that as the company was not one de jure, it could not enforce the preliminary subscription. There is much reason in the argument that none but a de jure company ought to be permitted to enforce such subscriptions, because men, presumably, subscribe for shares understanding that a company will be formed which can make good its right to live not only against individuals, but against the State as well. *However, the intimation, or decision, in the Haskell case, is the other way.*

In studying the doctrine of de facto corporations, one is apt to doubt whether, on the whole, it has made for clearance in the law, and for justice in its administration; whether a few simple statutory requirements for the formation of corporations rigidly enforced by the courts and allowed to stand without too much tampering by legislature, would not be more practical, especially when aided by the rules of estoppel. The principal cause of the introduction into American law of the de facto doctrine, has been the numerous and constantly changing legislative requirements for the formation of corporations; but it is reasonable to believe that in time these would become simplified and also generally understood, so that they would be observed by the promoters of companies.

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