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## Defective Incorporation: De Facto Corporations, Corporations by Estoppel, and Section 21-2054

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# Defective Incorporation: De Facto Corporations, Corporations by Estoppel, and Section 21-2054

## I. INTRODUCTION

Private litigants have often attempted to call into question the legal existence of a corporation which is an opposing party to a lawsuit. In Nebraska, corporate existence begins when the articles of incorporation are filed and recorded with the secretary of state.<sup>1</sup> Almost all states have similar statutes identifying the commencement of corporate existence.<sup>2</sup> The major incidents of corporate existence are the ability of the corporation to sue and be sued and the limited liability of the shareholders.<sup>3</sup> Through the use of the common law doctrines of de facto corporations and corporations by estoppel, a corporation may be held to exist in certain circumstances in which the statutory conditions precedent to corporate existence have not been achieved. However, recent statutory changes<sup>4</sup> have been construed as precluding the application of these two common law doctrines.<sup>5</sup> This comment will discuss

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1. "Upon the filing and recording in the office of the Secretary of State of the original articles of incorporation, corporate existence shall commence." NEB. REV. STAT. § 21-2054 (Reissue 1977).
  2. See, e.g., CAL. CORP. CODE §§ 200, 209 (West 1977); COLO. REV. STAT. § 7-2-104 (1973); DEL. CODE tit. 8, § 106 (1974); IOWA CODE § 496A.51 (1962); KAN. STAT. §§ 17-6005, -6006 (1974); MO. ANN. STAT. § 351.075 (Vernon Supp. 1979); N.Y. BUS. CORP. LAW § 403 (McKinney 1963); S.D. COMPILED LAWS ANN. § 47-2-7 (1967); WYO. STAT. § 17-36.48 (1965). See also 2 AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT ANNOTATED § 56 (2d ed. 1971) [hereinafter cited as MODEL ACT ANN.].
  3. 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE §§ 15-20 (1959). Conversely, if there is no de jure or de facto corporation, the shareholders are generally liable as partners. 8 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3772 (rev. perm. ed. 1966). Cf. *Elson v. Schmidt*, 136 Neb. 778, 287 N.W. 196 (1939) (an association lacking corporate existence takes title as a partnership to property transferred to it).
  4. See 2 MODEL ACT ANN. §§ 56, 146 (discussion of identical or comparable state statutes).
  5. *Robertson v. Levy*, 197 A.2d 443 (D.C. 1964). See 8 W. FLETCHER, *supra* note 3, § 3890:

One of the reasons for enacting the modern corporation statutes was

these two common law doctrines, their application under the Model Business Corporation Act,<sup>6</sup> and the possible effect of Section 21-2054 of the Nebraska Statutes.<sup>7</sup> In particular, the analysis will focus on the situation in which a plaintiff creditor attempts to challenge the legal existence of a corporate debtor and thereby hold the shareholders individually liable.<sup>8</sup>

## II. BACKGROUND

Early in our history distrust of corporations led to the enactment of statutes which set forth detailed prerequisites to recognition of corporate status.<sup>9</sup> These statutes presented a problem for courts when corporate existence was challenged for failure to comply with all formal requirements. In order to uphold the existence of the challenged corporation, the *de facto* corporation and corporation by estoppel doctrines came into being.<sup>10</sup>

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to eliminate problems inherent to the *de jure*, *de facto* and estoppel concepts. Moreover, the authorities which have considered the problem are unanimous in their belief that the section of the Model Business Corporation Act which states that the certificate of incorporation will be "conclusive evidence" that all conditions precedent have been performed eliminates the problems of estoppel and *de facto* corporations once the certificate has been issued.

*Id.* at 191-92. But see note 64 & accompanying text *infra*.

6. 2 MODEL ACT ANN. § 56, ¶ 4.04, at 210; *id.* § 146, ¶ 2., at 908 (Comment).

7. NEB. REV. STAT. § 21-2054 (Reissue 1977). See note 1 *supra*. The Nebraska Supreme Court has not construed the effect of this statute on the *de facto* corporation and corporation by estoppel doctrines.

8. This comment will not deal with the problem of which shareholders and/or directors will be held liable. See, e.g., *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973). Throughout this comment the term "shareholders" will be used to refer to the parties that the court may hold liable for the debts of the defective corporation. For an analysis of whether the shareholders should be liable as co-partners, see Dodd, *Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 521 (1927); Lewinsohn, *Liability To Third Person Of Associates In Defectively Incorporated Associations*, 13 MICH. L. REV. 271 (1915); Magruder, *A Note On Partnership Liability of Stockholders In Defective Corporations*, 40 HARV. L. REV. 733 (1927). See generally H. BALLANTINE, *BALLANTINE ON CORPORATIONS* 91-96 (rev. ed. 1946).

9. N. LATTIN, *THE LAW OF CORPORATIONS* 197 (2d ed. 1971). Nebraska, for example, required recording the articles of incorporation with the clerk of the county where the business was to be transacted and with the secretary of state. A corporation was also required to publish notice of the name, principal place of business, general nature of business, amount of and conditions on the capital stock authorized, time of commencement and termination, amount of indebtedness to which the corporation would subject itself, and the names of the officers. In addition, the corporation was required to post the by-laws in a conspicuous place where it transacted business. Finally, the corporation was required to annually publish notice of its existing debts. See NEB. COMP. STAT. ch. 16, §§ 126, 130-136 (1881) (repealed). For a discussion of statutory requirements imposed in Nebraska today, see § IV-A of text *infra*.

10. *Robertson v. Levy*, 197 A.2d 443, 444-45 (D.C. 1964).

A *de jure* corporation is one created in substantial conformity to the governing corporation statutes and whose corporate existence is therefore invulnerable to both an attack by private litigants and a *quo warranto* attack by the state.<sup>11</sup> The focus of the definition depends upon substantial, and not necessarily total, compliance with all mandatory conditions precedent to incorporation.<sup>12</sup> A *de facto* corporation, on the other hand, is one in which the statutory requirements of incorporation have *not* been substantially complied with, yet is recognized as a corporation for all purposes except a direct attack by the state.<sup>13</sup> The significance of applying the *de facto* doctrine is that the corporation may still sue and be sued while its shareholders retain their limited liability.<sup>14</sup>

The traditional elements of the *de facto* doctrine are (1) a valid law under which such a corporation may be formed; (2) a bona fide or good faith attempt to organize thereunder; and (3) an actual user of the corporate franchise.<sup>15</sup> In addition, it is sometimes stated that there must be "colorable compliance" with the requirements of such incorporation statutes.<sup>16</sup> However, to require "colorable compliance" is just another way of stating, in different terms,

11. 8 W. FLETCHER, *supra* note 3, § 3760, at 38 & n.5. Cf. *Parks v. James J. Parks Co.*, 128 Neb. 600, 602, 259 N.W. 509, 510-11 (1935) ("A corporation *de jure* has been defined by this court as one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings.").
12. H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* 239 (2d ed. 1970); N. LATIN, *supra* note 9, at 183-84. Although the corporation may have complied with all conditions precedent, it may still be subject to a suit by the state for noncompliance with conditions subsequent to incorporation. *Id.* at n.11. See also notes 70-71 & accompanying text *infra*.
13. 8 W. FLETCHER, *supra* note 3, § 3761, at 38; *id.* § 3846, at 139-40; H. HENN, *supra* note 12, at 239. The *de facto* doctrine should not be confused with any theory of ultra vires. The latter relates only to the powers of a corporation, assuming already that the corporation "exists." 8 W. FLETCHER, *supra* note 3, § 3764, at 43.
14. *But see* Frey, *Legal Analysis and the "De facto" Doctrine*, 100 U. PA. L. REV. 1153, 1154 (1952): "[O]ne cannot logically determine that the members of an association are or are not personally liable for their association's debts by first arriving at a conclusion that the association should or should not be labelled a corporation . . . ."
15. *Tulare Irr. Dist. v. Shepard*, 185 U.S. 1, 13 (1902); *Theis v. Weible*, 126 Neb. 720, 727, 254 N.W. 420, 423 (1934); *H.J. Hughes Co. v. Farmers Union Produce Co.*, 110 Neb. 736, 739, 194 N.W. 872, 873 (1923); *Lusk v. Riggs*, 70 Neb. 713, 721, 102 N.W. 88, 89 (1904); *Haas v. Bank of Commerce*, 41 Neb. 754, 757, 60 N.W. 85, 86 (1894).
16. *See, e.g., Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954); *Hansen v. Village of Ralston*, 147 Neb. 251, 22 N.W.2d 719 (1946); *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N.W. 509 (1935). *But see* 53 MICH. L. REV. 283, 285 (1954) (suggesting that after *Baum*, Nebraska courts no longer require the elements of bona fide attempt to organize or colorable compliance with the law).

that there must be a bona fide or good faith attempt to organize.<sup>17</sup>

The de facto doctrine is founded upon two main public policy considerations.<sup>18</sup> First, the merits of a controversy are seldom affected by the corporate existence of a party to the suit where all of the traditional elements of the de facto doctrine have been met. Second, if any rights and franchises have been usurped, they are the rights and franchises of the state, and only the state may object.<sup>19</sup> The de facto doctrine enables the court to balance the policy of discouraging unauthorized assumptions of corporate status against the conflicting policy of upholding the security of transactions with a corporation.<sup>20</sup> In *Theis v. Weible*,<sup>21</sup> the Nebraska Supreme Court offered the following rationale:

The rule is in the interest of the public and is essential to the safety of business transactions with corporations. It would produce disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn into question in every suit in which it is a party or in which rights were involved springing out of its corporate existence.<sup>22</sup>

Although the de facto doctrine appears to be flexible in its application,<sup>23</sup> it has been the subject of severe criticism.<sup>24</sup> There are at least two major difficulties with the de facto corporation analysis.<sup>25</sup> First, the de facto doctrine and its composite elements<sup>26</sup> fail to reveal what acts will be sufficient to constitute "substantial com-

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17. See 8 W. FLETCHER, *supra* note 3, § 3777, at 51-52; H. HENN, *supra* note 12, at 240.

18. H. HENN, *supra* note 12, at 240; 53 MICH. L. REV. 283, 284 (1954). See 1 G. HORNSTEIN, *supra* note 3, § 27: "The decisions and the de facto doctrine are based on the theory that fairness to the parties as well as normal business activities require that a purported corporation shall be treated as such . . ." *Id.* at 27.

19. See, e.g., *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, 420 (1876) ("This doctrine seems to be founded upon the principle, that the existence of such corporation, acting under color of a franchise, cannot be questioned in a suit where it would only arise collaterally, because the state, the party chiefly concerned, could not be heard by counsel.").

20. Note, *Corporations—De Facto Corporations—Estoppel—Model Business Corporation Act*, 43 N.C. L. REV. 206, 207 (1964).

21. 126 Neb. 720, 254 N.W. 420 (1934).

22. *Id.* at 727, 254 N.W. at 423.

23. *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954) (finding a de facto corporation when the law authorizing such a corporation did not occur until 19 years after the other elements satisfying the de facto doctrine—a bona fide attempt to organize and user of the corporate franchise—were achieved).

24. See H. BALLANTINE, *supra* note 8, at 71 ("a discouraging and baffling maze"); Frey, *supra* note 14, at 1180 ("legal conceptualism at its worst"); Note, *supra* note 20, at 207 ("confusing and unpredictable state of the law"); 2 MODEL ACT ANN. § 146, ¶ 2, at 908 (Comment) ("concept of de facto incorporation, which at best was fuzzy").

25. Frey, *supra* note 14, at 1156.

26. See text accompanying note 15 *supra*.

pliance" with the corporation laws. Moreover, if there is not substantial compliance, the doctrine does not specify what acts are sufficient to constitute a "bona fide attempt" to organize or "colorable compliance" with the corporation laws. Second, the *de facto* doctrine does not give any indication of the legal consequences of failure to meet one of the traditional elements. It has been suggested that it is not possible to predict all the legal attributes of a corporation by simply looking to one defect in the incorporation process and deciding whether the acts done were sufficient for a *de jure* or *de facto* corporation to come into being.<sup>27</sup> A major consideration, fairness to the parties,<sup>28</sup> evidenced by the factors of whether or not the creditor dealt with the association on a corporate basis and whether the individual shareholders were active in the management of the corporation,<sup>29</sup> is seldom mentioned by the courts as an underlying rationale, yet appears to affect the ultimate decision on shareholder liability.<sup>30</sup>

The *de facto* corporation doctrine is entirely separate and unconnected with the doctrine of corporation by estoppel.<sup>31</sup> A *de facto* corporation "is a reality . . . and [has] substantial legal existence."<sup>32</sup> A corporation by estoppel is, on the other hand, no corporation at all; it applies only to a particular transaction. The corporation by estoppel doctrine states simply that private litigants may, by their agreements, admissions, or conduct, place themselves in situations in which they will be estopped to deny the legal existence of a corporation.<sup>33</sup> It has been held that there

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27. Frey, *supra* note 14, at 1156:

This traditional approach blandly assumes that merely by considering the character or extensiveness of the defect in the effort to incorporate, it is possible to predict *all* of the legal attributes which courts will ascribe to the associates . . . . But I suspect that it is not possible to foretell with assurance even the presence or absence of a single attribute, such as limited liability of the associates, merely by dwelling upon the factual content of a particular defect in the attempt to incorporate and the policies underlying the unfulfilled statutory requirement.

28. H. HENN, *supra* note 12, at 241.

29. Frey, *supra* note 14, at 1157-58.

30. *Id.* at 1175: "[I]t appears that the factor of dealings on a corporate basis is of major importance. . . . Moreover, . . . where the dealings were on a corporate basis, it develops that the managing associates fare to a minor degree discernably worse than those inactive in the management."

31. 8 W. FLETCHER, *supra* note 3, § 3763, at 42-43. *Cf.* note 30 *supra* (dealings on a corporate basis). The corporation by estoppel doctrine, however, has been held to depend on whether a *de facto* corporation was created. *See* text accompanying notes 34-35 *infra*.

32. Kleckner v. Turk, 45 Neb. 176, 188, 63 N.W. 469, 472 (1895); 8 W. FLETCHER, *supra* note 3, § 3762, at 40. A corporation cannot be both *de jure* and *de facto* at the same time. *Id.* § 3766, at 44.

33. 8 W. FLETCHER, *supra* note 3, § 3889, at 191. The corporation by estoppel doc-

can be no estoppel where there is not even a de facto corporation.<sup>34</sup> However, commentators agree that the better rule is to allow estoppel without reference to whether a de facto corporation exists because to do otherwise would render the corporation by estoppel doctrine superfluous.<sup>35</sup>

The corporation by estoppel doctrine is typically applied in three different fact situations:<sup>36</sup> (1) where the defective corporation is being sued and the shareholders attempt to deny its corporate existence at the time the contract was executed;<sup>37</sup> (2) where

trine may also be defined as follows: one who contracts and deals with an association as a corporation is estopped to deny its corporate existence. *See* United States Tire Dealers Mut. Corp. v. Laune, 139 Neb. 26, 28, 296 N.W. 333, 335 (1941); Retail Merchants' Serv. v. John Bauer & Co., 125 Neb. 61, 64, 248 N.W. 813, 814 (1933); Societe Titanor v. Paxton & Vierling Iron Works, 124 Neb. 570, 573, 247 N.W. 356, 358 (1933); American Gas Constr. Co. v. Lisco, 122 Neb. 607, 609-10, 241 N.W. 89, 90 (1932); Crete Bldg. & Loan Ass'n v. Patz, 1 Neb. Unoff. 768, 769, 95 N.W. 793, 793 (1901); Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. Unoff. 179, 180, 95 N.W. 327, 328, (1901); Equitable Bldg. & Loan Ass'n v. Bidwell, 60 Neb. 169, 82 N.W. 384 (1900) (court syllabus); Nebraska Nat'l Bank of York v. Ferguson, 49 Neb. 109, 114, 68 N.W. 370, 372 (1896) (dicta); Livingston Loan & Bldg. Ass'n v. Drummond, 49 Neb. 200, 68 N.W. 375 (1896) (court syllabus). *Cf.* N. LATTIN, R. JENNINGS & R. BUXBAUM, CORPORATIONS CASES AND MATERIALS 105-06 (4th ed. 1968) (distinguishing promoters' contracts on the ground that in a normal promoter's contract the third party creditor is advised that incorporation has not yet occurred). In this regard, see *Sherwood & Roberts—Oregon, Inc. v. Alexander*, 269 Or. 389, 525 P.2d 135 (1974).

34. *Trenton Dressed Poultry, Inc. v. Jamson, Inc.*, 116 N.J. Super. 327, 282 A.2d 405 (1971) (per curiam); *Puro Filter Corp. v. Trembley*, 266 A.D. 750, 41 N.Y.S.2d 472 (1943); *Conway v. Samet*, 59 Misc. 2d 666, 300 N.Y.S.2d 243 (1969); *James v. Unknown Trustees*, 203 Okla. 312, 220 P.2d 831 (1950).

35. 8 W. FLETCHER, *supra* note 3, § 3902, at 201; N. LATTIN, *supra* note 9, at 190 ("The justification of this view may well be that the state is not as much concerned with a good faith assumption of corporateness as it is in seeing that justice is done between the parties concerned."); Comment, *Estoppel To Deny Corporate Existence*, 31 TENN. L. REV. 336, 338 (1964) ("[D]ecisions requiring de facto existence before allowing an estoppel argument are more likely to be disguised repudiations of the doctrine . . ."). *See, e.g.,* *Bukacek v. Pell City Farms, Inc.*, 286 Ala. 141, 145, 237 So. 2d 851, 853, cert. denied, 401 U.S. 910 (1970); *Willis v. City of Valdez*, 546 P.2d 570, 574 (Alas. 1976); *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Assocs., — Ind. App. —*, 338 N.E.2d 707, 710 (1975). *See also* *Edward Shoes, Inc. v. Orenstein*, 333 F. Supp. 39 (N.D. Ind. 1971); *Childs v. Philpot*, 253 Ark. 589, 487 S.W.2d 637 (1972); *Cranson v. IBM*, 234 Md. 477, 200 A.2d 33 (1964) (possibility of de facto corporation not mentioned by the court); *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 514 P.2d 1109 (1973).

36. *See* H. BALLANTINE, *supra* note 8, at 69; Comment, *supra* note 35, at 336.

37. *See, e.g.,* *Gilligan v. John Gilligan Co.*, 94 Neb. 437, 143 N.W. 457 (1913). *See also* *Caroline Realty Inv., Inc. v. Kuniansky*, 127 Ga. App. 478, 194 S.E.2d 291 (1972) (no dealings on a corporate basis); *Pacific Intermountain Express Co. v. Best Truck Lines, Inc.*, 518 S.W.2d 469 (Mo. App. 1974); *Schneider v. Best Truck Lines, Inc.*, 472 S.W.2d 655 (Mo. App. 1971).

the corporation is suing and the defendant denies the corporation's legal existence at the time the contract was executed,<sup>38</sup> and (3) where the shareholders are sued individually by a third party creditor of the alleged defective corporation.<sup>39</sup> Distinguishing these situations is crucial in determining when the corporation by estoppel doctrine will be applied by the courts. The first two situations have been dealt with by statute in some jurisdictions,<sup>40</sup> although this type of provision is not prevalent today.<sup>41</sup> It is apparent that only the first situation involves the elements of a true estoppel, *i.e.*, reliance induced by the misrepresentation of the party against whom the estoppel is asserted.<sup>42</sup> However, the cor-

38. *See, e.g.*, United States Tire Dealers Mut. Corp. v. Laune, 139 Neb. 26, 296 N.W. 333 (1941); Societe Titanor v. Paxton & Vierling Iron Works, 124 Neb. 570, 247 N.W. 356 (1933); American Gas Constr. Co. v. Lisco, 122 Neb. 607, 241 N.W. 89 (1932); Lincoln Butter Co. v. Edwards-Bradford Lumber Co., 76 Neb. 477, 107 N.W. 797 (1906); Crete Bldg. & Loan Ass'n v. Patz, 1 Neb. Unoff. 768, 95 N.W. 793 (1901); Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. Unoff. 179, 95 N.W. 327 (1901); Equitable Bldg. & Loan Ass'n v. Bidwell, 60 Neb. 169, 82 N.W. 384 (1900); Livingston Loan & Bldg. Ass'n v. Drummond, 49 Neb. 200, 68 N.W. 375 (1896). *See also* Childs v. Philpot, 253 Ark. 589, 487 S.W.2d 637 (1972) (no estoppel); Namerdy v. Generalcar, 217 A.2d 109 (D.C. 1966); Zimmerman Ford, Inc. v. Cheney, 132 Ill. App. 2d 871, 271 N.E.2d 682 (1971).

39. *See, e.g.*, H.J. Hughes Co. v. Farmers Union Produce Co., 110 Neb. 736, 194 N.W. 872 (1923); Nebraska Nat'l Bank of York v. Ferguson, 49 Neb. 109, 68 N.W. 370 (1896); Kleckner v. Turk, 45 Neb. 176, 63 N.W. 469 (1895); Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416 (1876). *See also* Harris v. Stephens Wholesale Bldg. Supply Co., 54 Ala. App. 405, 309 So. 2d 115 (1975) (no dealings on a corporate basis); Robertson v. Levy, 197 A.2d 443 (D.C. 1964); Akel v. Dooley, 185 So. 2d 491 (Fla. Ct. App. 1966); Jolley v. Idaho Sec., Inc., 90 Idaho 373, 414 P.2d 879 (1966); Anzalone v. Durchslag, 1 Ill. App. 3d 125, 273 N.E.2d 752 (1971) (no dealings on a corporate basis); Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Assocs., — Ind. App. —, 338 N.E.2d 707 (1975) (contract action against successor to "shareholder" liabilities); Cranston v. IBM, 234 Md. 477, 200 A.2d 33 (1964); Timberline Equip. Co. v. Davenport, 267 Or. 64, 514 P.2d 1109 (1973) (no dealings on a corporate basis).

40. *See, e.g.*, NEB. REV. STAT. § 21-1,117 (Reissue 1962) (repealed by the 1963 Nebraska Business Corporation Act, discussed at § IV-A of text *infra*):

No corporation operating or organized under this act shall be permitted to set up, or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense. This section shall not be construed to prevent judicial inquiry into the regularity or validity of the organization of the corporation or its lawful possession of any corporate power it may undertake to assert in any other suit or proceeding where its corporate existence or the power to exercise corporate rights it asserts is challenged, and evidence tending to sustain such challenge shall be admissible in any such suit or proceeding.

*See also* DEL. CODE tit. 8, § 329 (1974); Ch. 49, § 21, 1912 Ariz. Sess. Laws (repealed ch. 69, § 1, 1975 Ariz. Sess. Laws) (effective July 1, 1976).

41. *See* 2 MODEL ACT ANN. § 56, ¶ 3.03(3)(d), at 208.

42. *See* H. BALLANTINE, *supra* note 8, at 92-93; N. LATTIN, *supra* note 9, at 190.



poration by estoppel doctrine may still be applied in the latter two situations under what one commentator has termed a "loose" estoppel.<sup>43</sup> By dealing on a corporate basis, the third party is held to have "admitted" the legal existence of the corporation.<sup>44</sup> It has been suggested that a more realistic analysis of the third situation, in which a creditor of the defective corporation attempts to hold the shareholders individually liable, is to consider the limited liability of the shareholders as an implicit term of the contract.<sup>45</sup> Under this analysis, the use of the term "company"<sup>46</sup> or "corporation" implies limited liability on the part of the shareholders. Therefore, execution of the contract includes a concurrent agreement to look only to the corporation for the specified performance. This analysis, however, may also be questioned.

The state of mind of one who agrees to limit the liability of another, which but for such agreement would be absolute, is plainly different from the state of mind of one who accepts as true another's erroneous statement that his liability is limited by law and deals with him on that assumption.<sup>47</sup>

Under either analysis, there can be no corporation by estoppel where the conduct of the shareholders is just as consistent with the status of an unincorporated association as with that of a corporation.<sup>48</sup>

The corporation by estoppel doctrine is founded on principles

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43. N. LATIN, *supra* note 9, at 190. In the second situation, in which a corporate plaintiff is suing a third party, the defendant cannot be said to have made any representation to the corporation that the corporation had legal existence or that the shareholders have relied on any such representation. Yet it would be unfair to the parties and against public policy if the defendant could assert lack of corporate existence to escape liability. This result is expressed by stating the defendant is "estopped" to raise the issue. In the third situation, in which a creditor is suing the individual shareholders, the creditor made no representation that the corporation was duly incorporated and had legal existence; but the defendant shareholders have been protected from liability in some cases by finding that the creditor is "estopped" to deny the legal existence of the corporation.

44. *Retail Merchants' Serv. v. John Bauer & Co.*, 125 Neb. 61, 63, 248 N.W. 813, 814 (1933) (citing W. FLETCHER, *supra* note 3, § 3910, at 245).

45. Comment, *Corporations*, 10 VILL. L. REV. 166, 167 (1964). See Dodd, *supra* note 8, at 554; Lewinsohn, *supra* note 8, at 284.

46. The term "company" is sufficient to charge a person with notice that the business may be incorporated and imports a corporation until the contrary is shown. See, e.g., *Caroline Realty Inv., Inc. v. Kuniansky*, 127 Ga. App. 478, 194 S.E.2d 291 (1972).

47. Dodd, *supra* note 8, at 554.

48. *Retail Merchants' Serv. v. John Bauer & Co.*, 125 Neb. 61, 64, 248 N.W. 813, 814 (1933) (use of the name, "Retail Merchants' Service," was just as consistent with an unincorporated association as with a corporation). Cf. *Societe Titanoir v. Paxton & Vierling Iron Works*, 124 Neb. 570, 247 N.W. 356 (1933) (admission of the corporation's legal existence may occur subsequent to the execution of the contract). See generally H. BALLANTINE, *supra* note 8, at 89.

of equity. As such, it should not apply where the result would be inequitable.<sup>49</sup> Although application of the corporation by estoppel doctrine, like the de facto doctrine, avoids inquiry into often irrelevant formalities and fosters procedural convenience, it too has been criticized in the situation in which the individual shareholders of a defective corporation are sued by a third party creditor.<sup>50</sup> Besides the fact that the creditor extended credit on a misunderstanding of fact for which the shareholders were responsible,<sup>51</sup> the criticism is founded on the policy that it is unjust to place the burden on the non-negligent party.<sup>52</sup> In other words, the persons who form a corporation to insulate themselves from individual liability should bear the responsibility of seeing that the corporation has complied with all conditions precedent to legal existence. Moreover, it would appear unreasonable to require third party creditors to examine corporate records every time they deal with a corporation. Finally, it would be contrary to public policy to encourage shareholders to be ignorant or indifferent to the formalities of

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49. The corporation by estoppel doctrine should not apply when the person asserting the estoppel knows of the defect. 8 W. FLETCHER, *supra* note 3, § 3914, at 232-34. Assuming ignorance of the defect, the first of the two situations described at notes 37-39 & accompanying text *supra*, the equities are fairly obvious. In the first, the true estoppel situation, the corporation has obtained the benefit of the contract and is attempting to escape its liability. It also seems equitable in the second situation for a third party who has benefitted from a contract to be held liable for its just debts owed the corporation, whether defective or not.

50. See Comment, *supra* note 45, at 111; Comment, *De Facto Incorporation and Estoppel to Deny Corporate Existence in Louisiana*, 37 LA. L. REV. 1121, 1144-49 (1977); Note, *Liability Under Defectively Organized Corporations*, 26 MD. L. REV. 354, 359 (1966). Cf. Folk, *Corporation Statutes: 1959-1966*, 1966 DUKE L.J. 875, 886 (due to the minimal acts necessary to form a corporation today, statutes should be enacted to make filing an absolute prerequisite to limited liability, thereby abolishing the de facto and estoppel doctrines). *Contra*, N. LATTIN, *supra* note 9, at 170-75; Note, *supra* note 20, at 210.

51. See, e.g., *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 71-72, 514 P.2d 1109, 1112 (1973):

The creditor-plaintiff contracted believing it could look for payment only to the corporate entity. The associates . . . believed their only potential liability was the loss of their investment in the supposed corporate entity and that they were not personally liable. . . .

From the plaintiff-creditor's viewpoint, such reasoning is somewhat tenuous. The creditor did nothing to create the appearance that the debtor was a legal corporate entity. The creditor formed its intention to contract with a debtor corporate entity because someone associated with the debtor represented, expressly or impliedly, that the debtor was a legal corporate entity.

See also note 43 *supra*.

52. Although situations could exist in which the failure of the corporation to attain legal existence may be due totally to the negligence of someone other than the shareholders, the third party creditor is still the "least negligent" party.

forming a corporation when they could achieve limited liability to creditors<sup>53</sup> by merely carrying on business in a corporate-sounding name.<sup>54</sup>

The remainder of this comment will explore the possible effects of the Model Act<sup>55</sup> and Section 21-2054 of the Nebraska Statutes<sup>56</sup> on the situation in which a third party creditor attempts to hold the shareholders of a defective corporation individually liable.<sup>57</sup>

### III. THE VALIDITY OF THE DE FACTO CORPORATION AND CORPORATION BY ESTOPPEL DOCTRINES UNDER THE MODEL BUSINESS CORPORATION ACT

Section 56 of the Model Act provides that corporate existence begins upon issuance of the certificate of incorporation and that that certificate is conclusive evidence that all conditions precedent have been performed.<sup>58</sup> The effect is twofold. First, any acts taken short of obtaining a certificate of incorporation would not constitute a bona fide attempt to organize, thus precluding application of the de facto doctrine.<sup>59</sup> Second, any pre-recording defects or irregularities are cured since issuance of the certificate signifies compliance with all conditions precedent. There is, therefore, no

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53. The shareholders would, however, be interested in complying fully with the corporation laws when the business entered into carried with it the potential of great tort liability since the injured plaintiff will not have dealt with the association as a corporation and could not be estopped.

54. Dodd, *supra* note 8, at 556-57. See, e.g. Akel v. Dooley, 185 So. 2d 491 (Fla. Ct. App. 1966).

55. 2 MODEL ACT ANN. § 56, at 205.

56. NEB. REV. STAT. § 21-1054 (Reissue 1977). See note 1 *supra*.

57. The corporation by estoppel doctrine should remain viable in the first two typical situations, where the defective corporation is named as the defendant and where the corporation is the plaintiff. See Comment, *supra* note 50, at 1149-51. MODEL ACT § 146 has no application under these circumstances, see note 61 *infra*, and equity requires application of the doctrine. Courts which have interpreted the Model Act provisions and broadly stated that the corporation by estoppel doctrine is eliminated have caused confusion on subsequently recognizing the doctrine in the two circumstances described above. See text accompanying notes 84-86 *infra*.

58. 2 MODEL ACT ANN. § 56, ¶ 1., at 205 (Model Act Provision):

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

59. *Id.* ¶ 2., at 205 (Comment): "Under the unequivocal provisions of the Model Act, any steps short of securing a certificate of incorporation would not constitute apparent compliance. Therefore a de facto corporation cannot exist under the Model Act."

need to apply the de facto doctrine to protect shareholders from pre-recording defects.<sup>60</sup> Furthermore, section 146 of the Model Act mandates joint and several liability for all persons who act as a corporation without first obtaining the certificate of incorporation provided for under section 56.<sup>61</sup> The comment to section 146 puts to rest any notion that the de facto doctrine remains viable:

[T]he effect of section 146 is to negate the possibility of a de facto corporation.

Abolition of the concept of de facto incorporation, which at best was fuzzy, is a sound result. No reason exists for its continuance under general corporate laws, where the process of acquiring de jure incorporation is both simple and clear. The vestigial appendage should be removed.<sup>62</sup>

The states that have enacted provisions identical or comparable to the Model Act<sup>63</sup> and have considered the issue, have, for the most part, agreed with the Model Act commentary that the de facto doctrine has been abolished.<sup>64</sup> It is important to note that there

60. 8 W. FLETCHER, *supra* note 3, § 3762.1, at 41.

61. 2 MODEL ACT ANN. § 146, ¶ 1., at 908 (Model Act Provision): "All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."

62. *Id.* ¶ 2., at 908-09 (Comment).

63. See 2 MODEL ACT ANN. § 56, ¶ 3., at 206-8; *id.* § 146, ¶ 3., at 909 (Statutory Provisions).

64. *Cargill, Inc. v. American Pork Producers, Inc.*, 415 F. Supp. 876, 880 (D.S.D. 1976) (dicta) (statute comparable to § 146 held designed to preclude de facto doctrine); *Swindle v. Kelly*, 499 P.2d 291, 299 n.28 (Alas. 1972) (dicta) (statutes comparable to §§ 56, 146); *Robertson v. Levy*, 197 A.2d 443, 447 (D.C. 1964) (statutes comparable to §§ 56, 146); *Cahoon v. Ward*, 231 Ga. 872, 874, 204 S.E.2d 622, 624-25 (1974) (statutes comparable to §§ 56, 146); *Sherwood & Roberts—Oregon, Inc. v. Alexander*, 269 Or. 389, 393, 525 P.2d 135, 137 (1974) (statute comparable to § 146 held designed to preclude de facto doctrine); *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 69, 514 P.2d 1109, 1110-11 (1973) (statutes comparable to §§ 56, 146). See also 8 W. FLETCHER, *supra* note 3; 1 G. HORNSTEIN, *supra* note 3, § 29 at 30-31; Folk, *supra* note 50, at 886. But see *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Assocs.*, — Ind. App. —, 338 N.E.2d 707 (1975) (dicta) (statute comparable to § 56; recognition of de facto doctrine without discussion); *Montana Ass'n of Underwriters v. State*, 563 P.2d 577 (Mont. 1977) (statutes comparable to §§ 56, 146; recognition of de facto doctrine without discussion); *Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683 (1965) (statutes comparable to §§ 56, 146; recognition of de facto doctrine). See also N. LATTIN, *supra* note 9, at 220 ("[I]f the statute merely makes the filing with an administrative official, such as the secretary of state, or the obtaining of a certificate presumptive or prima facie evidence of corporateness, the whole business of de facto corporations and of estoppel remains except that the burden of proof has been shifted."); Ballantine, *A Critical Survey of the Illinois Business Corporation Act*, 1 U. CHI. L. REV. 357, 380 (1934) (discussing Illinois statute comparable to § 56):

This provision by which the certificate of incorporation establishes corporate existence largely supersedes the necessity of resorting to the common law doctrines of de facto corporations and of

may be other statutory conditions to the *commencement of business* by the corporation,<sup>65</sup> yet these do not affect the courts' determination of corporate *existence*. For example, in *Robertson v. Levy*,<sup>66</sup> the court, in discussing state laws identical to sections 56 and 146 of the Model Act,<sup>67</sup> stated that other corporation laws requiring payment of minimum capital into the corporation<sup>68</sup> (which could be no less than \$1,000<sup>69</sup>) played no part in determining whether a de jure corporation had been formed.<sup>70</sup> These are conditions precedent to doing business, but are conditions subsequent to corporate existence. The de jure and de facto corporation distinctions are appropriate when the corporate existence is challenged; they are not applicable to additional requirements that must be complied with before the "commencement of business."<sup>71</sup> The state may, of course, require the corporation to comply with

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corporations by estoppel where there is some defect or irregularity in the incorporation papers or proceedings leading up to the issue of the certificate. In the case of foreign corporations, however, and corporations which attempt to organize but fail to file the articles with the secretary of state or to obtain a certificate of incorporation, such doctrines may need to be invoked.

65. See, e.g., ABA-ALL, MODEL BUS. CORP. ACT § 51, at 183 (1960):

A corporation shall not transact any business or incur any indebtedness, except such as shall be incidental to its organization or to obtaining subscriptions to or payment for its shares, until there has been paid in for the issuance of shares consideration of the value of at least one thousand dollars.

This provision was later eliminated; however, section 56 and section 146 [then sections 49 and 139] were then construed as eliminating the de facto doctrine. See also ILL. BUS. CORP. ACT ANN. § 49, Comment at 355. Section 49 (ILL. ANN. STAT. ch. 32, § 157.49 (Smith-Hurd 1954)) is comparable to section 56 of the Model Act. Illinois requires a county filing (ILL. ANN. STAT. ch. 32, § 157.48 (Smith-Hurd 1954)), yet the failure to record the certificate of incorporation with the county does not affect the de jure status of the corporation.

66. 197 A.2d 443 (D.C. 1964).

67. D.C. CODE § 29-921c (1973) (see section 56, note 58 *supra*); D.C. CODE ANN. § 29-950 (1973) (see section 146, note 61 *supra*).

68. D.C. CODE § 29-921d (1973).

69. *Id.* § 29-921a(f).

70. *Robertson v. Levy*, 197 A.2d 443, 446 n.13 (D.C. 1964). See also *Folk*, *supra* note 50, at 886 ("Assuming that a corporation is duly formed, the newer statutes usually disable it from doing business before a minimum amount of capital is paid in.") (emphasis added).

71. See H. HENN, *supra* note 12, at 239:

The corporation assumes a *de jure* character once there is substantial compliance with all mandatory conditions precedent to corporateness—such as filing the articles of incorporation. This is true even though conditions classified as conditions precedent to carrying on business—such as election of directors, or subscription and/or payment of minimum capital—are not met.

See also W. FLETCHER, *supra* note 3, § 3737, at 4-10; N. LATTIN, *supra* note 9, at 200 ("[T]he statute may set up other conditions precedent before commencing business with the imposition of a penalty if the condition is violated.

these provisions; but this would not appear to be an attack on the corporation's legal existence.<sup>72</sup>

At the same time, jurisdictions that have statutes requiring the filing and/or recording of the articles of incorporation or some other document before commencement of corporate existence<sup>73</sup> have generally held that even if the *de facto* doctrine has not been vitiated, at least there could be no *de facto* corporation without such filing.<sup>74</sup> As under the Model Act,<sup>75</sup> there can be no colorable compliance or bona fide attempt to organize when such a minimal requirement is not met. And where the filing of the articles of incorporation or other document is the only act specified by statute as a condition precedent to corporate existence, it is submitted that the *de facto* doctrine no longer has any application.<sup>76</sup>

The Model Act comments to sections 56 and 146 do not state how those sections might affect the doctrine of corporation by estoppel. In *Robertson v. Levy*,<sup>77</sup> however, the court construed provisions identical to sections 56 and 146 as putting "to rest *de facto* corporations and corporations by estoppel."<sup>78</sup> There, a contract and note for the sale of a business was executed between a seller and a corporate purchaser nine days prior to the issuance of the certificate of incorporation. The corporation became insolvent. Although the seller believed he was dealing with a corporation and intended to do so, the court held the shareholder of the defective corporation liable:

We hold, therefore, that the impact of [sections 56 and 146], *when considered together*, is to eliminate the concepts of estoppel and *de facto* corporateness . . . It is immaterial whether the third person believed he was dealing with a corporation or whether he intended to deal with a cor-

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Under these statutes the corporation already has acquired its legal existence, or should have.").

72. H. HENN, *supra* note 12, at 239 n.11. See, e.g., ILL. ANN. STAT. ch. 32, §§ 157.82, .100 (Smith-Hurd 1954) (failure to file articles with the county may result in fine or dissolution). See also 2 MODEL ACT ANN. § 94, at 531.

73. See 2 MODEL ACT ANN. §§ 56, 146 (Statutory Provisions).

74. See *Terrell v. Industrial Comm'n*, 19 Ariz. App. 468, 472, 508 P.2d 355, 359 (1973) (dicta) (in 1976, Arizona adopted statutes comparable to the Model Act); *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 36, 402 P.2d 394, 397 (1965); *John Davis & Co. v. Cedar Glen Four, Inc.*, 75 Wash. 2d 214, 220-21, 450 P.2d 166, 170 (1969). See generally Annot., 37 A.L.R. 1319 (1925); Annot., 22 A.L.R. 376 (1923). See also *Harris v. Stephens Wholesale Bldg. Supp. Co.*, 54 Ala. App. 405, 309 So. 2d 115 (1975); *Childs v. Philpot*, 253 Ark. 859, 487 S.W.2d 637 (1972).

75. 2 MODEL ACT ANN. §§ 56, 146. See notes 58 & 61 *supra*.

76. See *Folk*, *supra* note 50, at 885 ("Particularly in a jurisdiction which only requires central filing, invoking the *de facto* doctrine on the basis of something less than filing would violate the statutory purpose.").

77. 197 A.2d 443 (D.C. 1964).

78. *Id.* at 446.

poration. The certificate of incorporation provides the cut off point; before it is issued, the individuals, and not the corporation, are liable.<sup>79</sup>

Although the result appears equitable, a great deal of gloss has been added to the *Robertson* decision with regard to the Model Act provisions. In *Timberline Equipment Co. v. Davenport*,<sup>80</sup> a creditor attempted to hold the shareholders liable on a contract executed by the corporation before the certificate of incorporation was issued. One defense asserted was the corporation by estoppel doctrine. Offered the opportunity of confirming what Fletcher has stated to be the "unanimous" authority,<sup>81</sup> the court declined to decide the validity of the doctrine in Oregon, finding instead that even if the doctrine were recognized, the creditor had not believed it was contracting with a corporate entity.<sup>82</sup> The court seemed to question the *Robertson* decision on the grounds that the District of Columbia court had later recognized the corporation by estoppel doctrine.<sup>83</sup> In *Namerdy v. Generalcar*,<sup>84</sup> the court that decided *Robertson* stated that by dealing with a corporation, one is estopped to deny its legal existence.<sup>85</sup> However, it is important to recognize that in *Namerdy*, a defendant debtor was attempting to deny the existence of a corporate plaintiff creditor, a situation in which application of the corporation by estoppel doctrine appears to reach the equitable result.<sup>86</sup>

Other jurisdictions have also continued to recognize the corporation by estoppel doctrine, often without reference to corporation laws determining corporate existence.<sup>87</sup> For example, in *Cranson v. IBM*,<sup>88</sup> the court applied the doctrine of corporation by estoppel

79. *Id.* at 447 (emphasis added). *Accord*, *Cahoon v. Ward*, 231 Ga. 872, 875, 204 S.E.2d 622, 625 (1974) (dicta) ("Without the re-enactment of . . . [a specific estoppel statute], we perceive that the doctrine of corporation by estoppel as well as de facto corporations would have been eliminated and 'put to rest.'"). See also 8 W. FLETCHER, *supra* note 3; Comment, *supra* note 50, at 1138 ("the two sections probably eliminate estoppel").

80. 267 Or. 64, 514 P.2d 1109 (1973).

81. 8 W. FLETCHER, *supra* note 3.

82. *Timberline Equip. Co. v. Davenport*, 267 Or. 64, 72, 514 P.2d 1109, 1112-13 (1973).

83. *Id.* at 69 n.1, 514 P.2d at 1111 n.1.

84. 217 A.2d 109 (D.C. 1966).

85. *Id.* at 112.

86. See notes 36-39, 49 & accompanying text *supra*. The elimination of the corporation by estoppel doctrine in the District of Columbia was subsequently reaffirmed in *Democratic Nat'l Comm. v. McCord*, 416 F. Supp. 505, 506 (D.D.C. 1976).

87. See *Edward Shoes, Inc. v. Orenstein*, 333 F. Supp. 39 (N.D. Ind. 1971) (dicta); *Harris v. Stephens Wholesale Bldg. Supply Co.*, 54 Ala. 405, 309 So. 2d 115 (1975); *Allen Steel Supply Co. v. Bradley*, 89 Idaho 29, 402 P.2d 394 (1965); *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Assocs.*, — Ind. App. —, 338 N.E.2d 707 (1975); *Cranson v. IBM*, 234 Md. 477, 200 A.2d 33 (1964).

88. 234 Md. 477, 200 A.2d 33 (1964).

to prevent liability on the part of a corporate shareholder who had contracted in the corporate name for the purchase of typewriters prior to the filing of the corporation's certificate of incorporation. Maryland laws contained a provision somewhat similar<sup>89</sup> to section 56 of the Model Act, but nothing similar to section 146.<sup>90</sup> Although the court failed to mention its own corporation laws, it has been suggested that the absence of a Maryland statute similar to section 146 was, and is, important in determining the validity of the corporation by estoppel doctrine:

[The *Cranson*] result seems appropriate so long as the statute does not impose partnership liability. . . . Absent legislative clarity on the matter, section [56] should be read only as stating that after a certain event the corporation "exists," but not as implying that, in all other circumstances, limited liability is precluded. Without the equivalent of section [146], section [56] should not be construed as ipso facto removing the traditional discretionary power of courts to decide particular cases so as to implement reasonable expectations and promote the security of transactions.<sup>91</sup>

Absent the possible distinction above, there appears to be no clear authority on when the corporation by estoppel doctrine will be applied. Courts and commentators have "gone all over the lot"<sup>92</sup> in defining and applying the doctrine, and its application in Nebraska requires further inquiry into Nebraska statutes and case law.

#### IV. THE VALIDITY OF THE DE FACTO AND CORPORATION BY ESTOPPEL DOCTRINES IN NEBRASKA

##### A. The Nebraska Statutes

After five years of study, the Nebraska Business Corporation Act was enacted in 1963.<sup>93</sup> Its purpose was to revise and modernize

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89. MD. ANN. CODE art. 23, § 131(b) (1957).

Upon acceptance for record by the Department of any articles of incorporation, the proposed corporation shall, according to the purposes, conditions and provisions contained in such articles of incorporation, become and be a body corporate by the name therein stated. Such acceptance for record shall be conclusive evidence of the formation of the corporation except in a direct proceeding by the State for the forfeiture of the charter.

90. See notes 58 & 61 *supra*.

91. Folk, *supra* note 50, at 885-86.

92. Timberline Equip. Co. v. Davenport, 267 Or. 64, 70, 514 P.2d 1109, 1111 (1973).

93. L.B. 173, ch. 98, 1963 Neb. Laws. The last major revision of the corporation laws had occurred in 1941. These prior statutes required dual filing, but there was no provision expressly stating when corporate existence commenced. See NEB. REV. STAT. §§ 21-107 to -109 (Reissue 1962) (repealed by L.B. 173, ch. 98, 1963 Neb. Laws). The ambiguous wording of the statutes in regard to corporate existence caused confusion among lawyers. Bloomingdale, *Articles of Incorporation Under the New Act*, 43 NEB. L. REV. 426, 436 (1964).



the general Nebraska statutes on corporations.<sup>94</sup> The Nebraska act was patterned generally after the Model Act.<sup>95</sup> However, unlike the Model Act, Nebraska originally required dual filing to achieve corporate existence. Section 21-2054 provided that "[u]pon recording in the office of the county clerk the duplicate original of the articles of incorporation bearing the date of filing in the office of the Secretary of State, corporate existence shall commence."<sup>96</sup> It seems possible that, as originally enacted, section 21-2054 provided a situation that could require the courts' use of the de facto doctrine. Assume, for example, that a corporation filed its original articles of incorporation with the secretary of state, but failed to subsequently file a certified duplicate original with the county clerk. The act of filing with the secretary of state would seem to indicate a bona fide attempt to organize, or a colorable compliance with the law. Assuming there was a valid law under which to incorporate and user of the corporate franchise,<sup>97</sup> a de facto corporation could result. The legislative history indicates there was some question of whether dual filing was an appropriate condition precedent to corporate existence. Senator Luedtke, speaking at a Judiciary Committee meeting, appeared to recognize the de facto problem.

Sections 54 and 62 of the act: They have spelled out what the effect of the recording of the articles of incorporation in the County Clerk's office is—it is contrary to the Model Act. In many instances it will carry out the Nebraska law today, rather than the Model Act. It makes it mandatory that the Articles of Incorporation be filed in the County Clerk's office before it

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94. *Comm. on Judiciary, Introducer's Statement of Purpose*, L.B. 173, Neb. Leg., 73d Sess. (Feb. 6, 1963):

The objective of this committee has been to provide Nebraska with a modern, up-to-date complete business corporation act which will meet today's requirements and contribute to the economic development of our state. The committee feels that the recommended Act embodies and adapts to our needs the developments and improvements that have occurred in this field during the last twenty years.

See L.B. 173, floor debate at 1012. Senator McGinley, the introducer, stated that the concern over the prior corporation laws was brought about, in part, by the following article: Luedtke, *Nebraska Corporation Law, A Statutory Jungle*, 36 NEB. L. REV. 368 (1957).

95. L.B. 173, floor debate at 1012 (Senator McGinley, introducer); *Comm. on Judiciary, Minutes*, L.B. 173, Neb. Leg. 73d Sess. 3 (Feb. 11, 1963) (remarks by Mr. Bert Overcash, chairman of bar association committee that drafted the act): "The states around us have adopted similar acts: Wyoming, Iowa, Colorado, Utah and others." The states specifically noted have statutes identical or comparable to sections 56 and 146 of the MODEL ACT.

96. NEB. REV. STAT. § 21-2054 (1963) (amended 1965). See Bloomingdale, *supra* note 93 at 436: "Section 54 makes it clear now that corporate existence commences upon the completion of the dual requirement of filing and recording."

97. See note 15 *supra*. In addition, since Nebraska did not enact a statute similar to section 146 of the MODEL ACT, there would be no statutory mandate of joint and several liability for "corporate" acts prior to legal existence.

shall become effective. *There is doubt today as to whether this should be done.* The Secretary of State's office is asked every day for a certificate as to whether or not a corporation is in good standing. *It is possible that the incorporators failed to file their articles of incorporation in the county court house and it may be in jeopardy if it is not done.*<sup>98</sup>

Senator Luedtke's statement typifies the reason for criticizing the de facto doctrine:<sup>99</sup> its unpredictability.

Although it is unclear whether the possible confusion in the dual filing system led to its change,<sup>100</sup> section 21-2054 was amended in 1965 to read as it does today: "Upon the filing and recording in the office of the Secretary of State of the original of the articles of incorporation, corporate existence shall commence."<sup>101</sup> The statutes continue to require the filing of a duplicate copy of the articles of incorporation with the county clerk;<sup>102</sup> however, this is not made a condition precedent to corporate existence.<sup>103</sup> It is clear that it would not be possible to file first with the county clerk as that copy

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98. *Comm. on Judiciary, Minutes*, L.B. 173, Neb. Leg., 73d Sess. 3 (Feb. 11, 1963) (remarks by Mr. Roland Luedtke) (emphasis added).

99. See text accompanying notes 24-30 *supra*.

100. *Comm. on Judiciary, Comm. Statement on L.B. 877*, Neb. Leg., 75th Sess. (April 28, 1965): "Legislative Bill 877 merely reinstates some matter inadvertently omitted when a new Business Corporation Act was passed in 1963 and makes other refinements in the statutes in order to harmonize one section with another." See also *Comm. on Judiciary Minutes*, L.B. 877, Neb. Leg., 75th Sess. 2-3 (April 27, 1965) (remarks by Mr. Warren C. Johnson):

These amendments will basically do two things. They get rid of the real question of duplications. For instance, [a new company] had to go to two or three different places to get their Articles signed, then they only sent one copy—technically, under the old law, you could not file a duplicate copy, or [only?] duplicate original. This new company couldn't start in Nebraska until they went over to get these new papers signed.

This statement, however, does not explain why dual filing as condition precedent to corporate existence was repealed. If the only problem was one of duplicates, the statute could have simply been amended to allow the filing of a duplicate copy with the county clerk.

101. NEB. REV. STAT. § 21-2054 (Reissue 1977).

102. *Id.* § 21-2053.

The articles of incorporation shall be signed by each incorporator. The original and a duplicate copy of the articles of incorporation shall be delivered to the Secretary of State, who shall, when all fees provided by law shall have been paid:

(1) File the original in this office; and

(2) Return to the incorporators or their representative the duplicate copy, stamped with the date of filing in the office of the Secretary of State.

The duplicate copy of the articles of incorporation bearing the date of filing in the office of the Secretary of State shall be recorded in the office of the county clerk of the county where the registered office of the corporation is located in this state.

103. The state could require the corporation to file with the county clerk, but this would not be a challenge to its legal existence. See notes 71-72 *supra*.

must bear an indication of its prior recording with the secretary of state. Therefore, the situation could not exist in which the court might feel compelled to find a *de facto* corporation where the incorporators had filed only with the county clerk.<sup>104</sup>

Similarly, section 21-20,125 imposes a publication requirement upon corporations.<sup>105</sup> This too is not designated as a condition precedent to corporate existence. In addition, that statute provides that any subsequent publication will relate back to cure any "invalid" corporate acts.<sup>106</sup> Thus, although other requirements may be imposed upon a corporation, they are conditions subsequent to legal existence;<sup>107</sup> only the filing and recording of the articles of incorporation with the secretary of state is a condition precedent to corporate existence.

Section 21-2054 differs from section 56 of the Model Act in three respects. First, section 56 states that issuance of the certificate of incorporation acts as conclusive evidence that all conditions precedent to incorporation have been performed. Section 21-2054, on the other hand, does not specifically state whether the filing and recording of the articles of incorporation acts as evidence of compliance with all conditions precedent.<sup>108</sup> Prior to the 1963 revision, section 21-108 provided that articles of incorporation, duly certified by the secretary of state and the county clerk, acted as evidence of

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104. Note, however, the possibility of the articles being accepted by the secretary of state but not recorded through some oversight. The court might feel compelled to protect the shareholder from liability and would hold the act of filing alone was sufficient to constitute a *bona fide* attempt to comply. Even under this remote possibility, however a Model Act analysis would require filing and recording for corporate existence.

105. NEB. REV. STAT. § 21-20,125 (Reissue 1977).

In the event any notice required to be given pursuant to this section is not given, but is subsequently published for the required time, and proof of the publication thereof is filed in the office of the Secretary of State and in the office of the county clerk . . . the acts of such corporation prior to, as well as after, such publication shall be valid.

*Id.* (emphasis added). Thus, even if a private litigant attempted to challenge the existence of a corporation for its failure to publish notice of incorporation, any publication after the suit was instituted would relate back and render the action moot.

106. *Id.*

107. See also NEB. REV. STAT. §§ 21-301 to -304 (Reissue 1977) (annual report). But see *Elson v. Schmidt*, 136 Neb. 778, 287 N.W. 196 (1939) (subscription of the capital stock is a condition precedent to corporate existence). Under the present laws, however, and in the absence of a provision in the articles of incorporation stating that subscription of all stock is a condition precedent to existence, whether the stock is subscribed or not should not affect corporate existence. See NEB. REV. STAT. § 21-2052 (Reissue 1977) (contents of the articles of incorporation).

108. Cf. 2 MODEL ACT ANN. § 56, ¶ 2.1, at 205-06 (Comment) (articles of incorporation in Nebraska act "as evidence" of corporate existence).

incorporation.<sup>109</sup> It is fair to assume today that filing and recording the articles of incorporation act, at least, as evidence of incorporation. Otherwise, proof of corporate existence would be impossible. Although it is often emphasized that section 56 of the Model Act renders issuance of the certificate of incorporation *conclusive evidence*, this aspect should not play a role in determining whether the de facto doctrine is eliminated. The import of section 56 is that corporate existence commences *only* upon issuance of the certificate. Because this is all that is required, anything short of obtaining the certificate would not constitute a bona fide attempt to organize.<sup>110</sup>

Second, section 56 of the Model Act requires issuance of a certificate of incorporation. This implies some discretionary review of corporate articles and/or acts prior in time to insure that all the conditions precedent have been met.<sup>111</sup> Section 21-2054 requires only filing and recording of the articles of incorporation which, on its face, might imply that only a clerical function is involved in the Nebraska system.<sup>112</sup> However, this implication is false.<sup>113</sup> The articles of incorporation are accepted for filing and recording only after a review which reveals compliance with all the information required by section 21-2052.<sup>114</sup> In addition, all fees must be paid before filing.<sup>115</sup>

Third, section 56 of the Model Act specifies the right of the state to cancel or revoke the corporation's certificate of incorporation. Thus, de jure status is complete upon the issuance of the certificate,<sup>116</sup> but the corporation may be involuntarily dissolved under section 94 for failure to pay its franchise tax, to file the annual report, to appoint and maintain a registered agent in the state, to file notice of change of the registered office, and for procuring the articles of incorporation through fraud.<sup>117</sup> Although this caveat is not contained in section 21-2054, other Nebraska laws provide for invol-

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109. NEB. REV. STAT. § 21-108 (Reissue 1962) (repealed by L.B. 173, ch. 98, 1963 Neb. Laws).

110. See text accompanying notes 15-16 *supra*. Similarly, since corporate existence in Nebraska begins upon filing and recording the articles of incorporation, any action taken short of this minimal condition precedent would not seem to constitute a bona fide attempt to organize.

111. See 2 MODEL ACT ANN. § 55, at 197 ("[i]f the Secretary of State finds that the articles of incorporation conform to law").

112. Moldenhauer, *Advantages of the New Nebraska Business Corporation Act and Changes From the Previous Law*, 43 NEB. L. REV. 303, 314 (1964).

113. Letter from Corporate Division, Secretary of State's Office, to Robert Rieke (Jan. 23, 1979).

114. NEB. REV. STAT. § 21-2052 (Reissue 1977).

115. *Id.* § 21-2053.

116. 2 MODEL ACT ANN. § 56, 2., at 205 (Comment).

117. 2 MODEL ACT ANN. § 94, at 531.

untary dissolution for failure to file the annual report<sup>118</sup> and for procuring the articles of incorporation through fraud, or exceeding or abusing the authority conferred by law.<sup>119</sup>

The Nebraska corporation laws, like the Model Act, contain no specific statute in regard to the corporation by estoppel doctrine.<sup>120</sup> This has not always been true. As early as 1873, the defense of "want of legal organization" was not allowed.

No body of men acting as a corporation under the provisions of this subdivision, shall be permitted to set up the want of legal organization as a defense to any action brought against them, *as a corporation*, nor shall any person *sued on a contract made with such corporation*, or for an injury to the property of such corporation, be permitted to set up the want of legal organization in a defense of such an action.<sup>121</sup>

The italicized portions of the statute indicate that it literally applied only in the first two of the three typical situations: where a defective corporation is being sued and attempts to deny its own legal existence, and where a third party is being sued and attempts to deny the legal existence of the corporate plaintiff.<sup>122</sup> For this reason, and the fact that the Model Act does not contain a like provision,<sup>123</sup> the failure to reenact the above statute should not be considered indicative of the legislature's intention concerning the corporation by estoppel doctrine.

## B. The Nebraska Supreme Court's Position on the De Facto Doctrine

The Nebraska Supreme Court has long recognized the doctrine of de facto corporations. In *Abbott v. Omaha Smelting & Refining Co.*,<sup>124</sup> the plaintiff creditor sought to hold Abbott individually liable for a corporate debt, claiming he was in reality a co-partner in

118. See NEB. REV. STAT. §§ 21-301, -313 (Reissue 1977).

119. *Id.* § 21-2093.

120. *Id.* § 21-2006 (defense of ultra vires; discussed at note 13 *supra*).

121. NEB. STAT. ch. 11, § 144 (1873) (emphasis added) (want of legal organization, no defense) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89). For cases applying the statute, see note 38 *supra*. In 1941, the statute was amended and the title changed to "Ultra Vires; no defense, when." See note 40 *supra*. The first sentence of the amended statute remained substantially identical to the 1873 statute cited in the text. Query whether the added second sentence leaves open the option of a plaintiff creditor challenging the *existence* of the corporation in an action to hold the individual shareholders liable or relates instead to challenging corporate *acts* or *powers*. See N. LATTIN, *supra* note 9, at 199 (the additional sentence supports conclusion that the former type of suit was contemplated).

122. See notes 36-40 *supra*. See also N. LATTIN, *supra* note 9, at 199: These provisions are "badly framed . . . if . . . meant to cover the case of a suit by a person transacting business with the supposed corporation against the individual members of the defectively formed corporation."

123. The Nebraska act was patterned after the Model Act. See note 96 *supra*.

124. 4 Neb. 416 (1876).

an association. One defense asserted was the existence of a de facto corporation. Abbott and others had executed articles of incorporation, elected officers, and transacted business as a corporation.<sup>125</sup> The corporation statutes at that time required filing the articles of incorporation with the county clerk before the "commencement of business."<sup>126</sup> Unlike present Nebraska laws, there was no statute expressly providing when corporate "existence" commenced. Former section 132 did, however, provide that a corporation would be "valid" if the articles were filed with both the county clerk and the secretary of state and if notice of incorporation was published.<sup>127</sup> It is obvious that statutes requiring numerous conditions precedent to a "valid" corporation offered fertile ground for the application of the de facto doctrine. In *Abbott*, however, the corporation had not filed its articles of incorporation with either the county clerk or the secretary of state. In defining a de facto corporation,<sup>128</sup> the court did not include the "bona fide attempt to organize" element;<sup>129</sup> however, its decision recognized that the failure to file the articles precluded both a de jure and a de facto corporation:

[I]f the articles of incorporation are not filed in the office of the county clerk, the parties acting in the matter do not bring themselves within the purview of the statute, because the filing of the articles as required, is a condition precedent to the existence of the corporate franchise, or corporate powers in any respect whatever; this prerequisite, I think, must be complied with.<sup>130</sup>

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125. *Id.* at 418-19.

126. NEB. STAT. ch. 11, § 126 (1873) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89):

Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, and have them recorded in the office of the county clerk of the county or counties in which the business is to be transacted, in a book kept for that purpose.

127. NEB. STAT. ch. 11, § 132 (1873) (emphasis added) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89).

Any corporation formed without legislative enactment, may *commence business* as soon as its articles of incorporation are filed by the county clerks of the counties, as required by this subdivision, and shall be *valid*, if a copy of its articles be filed in the office of the secretary of state, and the notice required to be published within four months from the time of filing such articles in the clerk's office.

128. 4 Neb. at 420 ("[I]t is necessary to show the existence of a charter, or some law under which the assumed powers are claimed to be conferred, and the user of the franchise claimed under such charter or law.").

129. See text accompanying note 15 *supra*. But see *H.J. Hughes Co. v. Farmers Union Produce Co.*, 110 Neb. 736, 739, 194 N.W. 872, 873 (1923) ("The syllabus of the *Abbott* case . . . omits the element of an attempt, at least colorable, to comply with the statute, but the opinion and the cases cited recognize the necessity of such an attempt, as by filing the articles.").

130. 4 Neb. at 422.

In addition, the court relied on section 139 as further evidence that filing the articles of incorporation was a condition precedent to corporate existence. Section 139 provided that "[i]f any corporation fail to comply, substantially, with the provisions of this subdivision, in relation to giving notice, and other requisitions of organization, the property of all the stockholders shall be liable for the corporate debts."<sup>131</sup> The court questioned why section 139 imposed liability for failure to give notice and other requirements, but not for failing to file the articles of incorporation. "Perhaps the only satisfactory answer to the question is that, according to the legislative intent, no corporate franchise or power exists until the articles are filed as required."<sup>132</sup> This somewhat confusing use of section 139 as a basis for the court's decision was clarified in *Globe Publishing Co. v. State Bank of Nebraska*.<sup>133</sup> The court there stated that the result in *Abbott* did not depend on any interpretation of section 139. The liability of the shareholders was based on the common law.<sup>134</sup>

In *Abbott*, the articles of incorporation had not been filed with either the county clerk or the secretary of state. The application of the de facto doctrine when the articles are filed in only one of the above places is illustrated by *Kleckner v. Turk*.<sup>135</sup> There the plaintiff depositor attempted to recover from the shareholders of a banking corporation. Plaintiff asserted that the corporation did not exist because the articles of incorporation were not filed with the secretary of state as required by section 132.<sup>136</sup> The court held, in accordance with *Abbott*, that sections 126 and 132 imposed a condition precedent to corporate existence,<sup>137</sup> yet held that in filing with the county clerk "the conditions precedent had been per-

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131. NEB. STAT. ch. 11, § 139 (1873) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89). Similarly, NEB. STAT. ch. 11, § 136 (1873) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89), imposed joint and several liability on the shareholders for the failure of the corporation to publish annual notice of existing debts.

132. 4 Neb. 416 at 422.

133. 41 Neb. 175, 59 N.W. 683 (1894).

134. *Id.* at 188-89, 191, 59 N.W. at 687-88:

Where a statute provides that until certain things are done by persons forming a corporation, such as the filing of its articles of association in the office of a public officer, the stockholders in such corporation shall be liable for the debts thereof, such a statute is only declaratory of the common law. . . .

. . . [T]he conclusion reached in [*Abbott*] resulted not alone from the statute, but could and would have been the same had no statute on the subject existed.

135. 45 Neb. 176, 63 N.W. 469 (1895).

136. See note 127 *supra*.

137. 45 Neb. at 186, 63 N.W. at 471 ("It seems to have been contemplated by the lawmakers that the acts prescribed by [sections 126 and 132] must precede the commencement of the existence of the corporation as an organization.").

formed.”<sup>138</sup> A de facto corporation resulted since filing the articles of incorporation was held, in effect, to be the only condition precedent to corporate existence that would constitute a bona fide attempt to organize.<sup>139</sup>

Subsequent to the above decisions, section 126<sup>140</sup> was amended to place primary focus on a state filing. As amended, section 126 required that the articles of incorporation be filed with the secretary of state and, in addition, required that domestic corporations file with the county clerk, all before the “commencement of business.”<sup>141</sup> The first case to explore the possible effect of the new dual filing requirement prior to the “commencement of business” was *Lusk v. Riggs*.<sup>142</sup> The court originally held that although the corporation’s articles had been filed with the county clerk, section 126 now required filing with the secretary of state and “[u]ntil such filing was had the company, under the terms of [section 126], was not authorized to transact business.”<sup>143</sup> Therefore, even a de facto corporation could not exist.<sup>144</sup> One might logically infer that section 126 was amended to harmonize with section 132 in defining what acts were necessary to achieve the status of a “valid” corporation. Dual filing might, therefore, become a condition precedent to corporate existence and thereby negate the confusion of the earlier statutes. On rehearing, however, the court found that section 132 had not been amended or repealed and still provided that a corporation could commence business when its articles of incorporation were filed with the county clerk. The court held that this filing would still be the only condition precedent to corporate existence.

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138. *Id.* at 187, 63 N.W. at 471. At the same time the court noted that all conditions, precedent and subsequent, must be complied with to constitute a de jure corporation. Query whether under this definition the de facto doctrine could be eliminated, or whether the label of “de facto” has merely been changed to “de jure” with the right of the state to challenge legal existence.

139. The court made no mention of that part of section 132 which required dual filing to achieve the status of a “valid” corporation. *See* note 127 *supra*.

140. *See* note 126 *supra*.

141. NEB. STAT. ch. 16, § 126 (1897) (repealed L.B. 250, 1941 Neb. Laws, ch. 41, § 89).

Every corporation, previous to the commencement of any business, except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, and have them filed in the office of the secretary of state and recorded in a book kept for that purpose, and domestic corporations must also file with the county clerk in the county where their headquarters are located

142. 70 Neb. 713, 97 N.W. 1033 (1904), *rev'd on rehearing*, 70 Neb. 718, 102 N.W. 88 (1905).

143. *Id.* at 717, 97 N.W. at 1034.

144. *Id.* “[A] corporation can not be deemed to exist, even *de facto*, where the adventurers never had any charter at all.”



[I]n view of the apparent existence of the two sections of the statute, it may be said that the [corporation] has colorably complied with the requirements of the law, and this is all that is necessary to show to constitute it a *de facto* corporation, and secure it against a collateral attack.<sup>145</sup>

Thus, although it appeared that filing the articles of incorporation with either the county clerk or the secretary of state would constitute a bona fide attempt to organize under the new statutes, filing in neither place was again held in *H.J. Hughes Co. v. Farmers Union Produce Co.*<sup>146</sup> to preclude application of the *de facto* doctrine. In *Hughes*, the defendant shareholders introduced evidence which showed adoption of the corporate constitution and by-laws, the election of directors and officers, the holding of meetings with corporate minutes, and business transactions carried on in the corporate name. However, because the articles of incorporation were never filed, there was a failure of a condition precedent to existence and thus no bona fide attempt to organize:

[T]he filing of the articles . . . is the first step to initiate a franchise. Up to the filing of the articles the power and authority of the state is not invoked, and the body has not received the breath of life necessary to its existence as a legal entity, defective or perfect.<sup>147</sup>

The brief summary of Nebraska case law above indicates that under previous statutes, filing the articles of incorporation in at least one location was a condition precedent to corporate existence, and necessary to achieve the bona fide attempt element under a traditional *de facto* doctrine analysis. The confusion as to corporate "existence" was brought about through the ambiguous "commencement of business" and "valid" wording of the statutes,<sup>148</sup> which was not clarified until the 1963 revision.<sup>149</sup> Other requirements under the previous statutes, such as posting of by-laws and annual publication of debts, were held to be conditions subsequent to corporate existence. The absence of a clear statute showing when corporate existence commenced allowed the courts to make use of the *de facto* doctrine when they felt it improper to hold the shareholders individually liable.

### C. The Nebraska Supreme Court's Position on the Corporation by Estoppel Doctrine

The Nebraska Supreme Court has yet to clearly recognize and apply the corporation by estoppel doctrine where a creditor of a

145. *Id.* at 721, 102 N.W. at 89.

146. 110 Neb. 736, 194 N.W. 872 (1923).

147. *Id.* at 740, 194 N.W. at 874. *Accord*, *Elrod Slug Casting Mach. Co. v. O'Malley*, 57 F. Supp. 915 (D. Neb. 1944).

148. See notes 93, 126-27, 131 *supra*.

149. NEB. REV. STAT. § 21-2054 (Reissue 1977). See text accompanying notes 96-106 *supra*.

defective corporation attempts, after recognizing and dealing with the corporation as a corporation, to hold the shareholders liable for a corporate debt. Early case law indicates that a corporation by estoppel would not be recognized if a de facto corporation was not found to exist,<sup>150</sup> or at least the doctrines were confused and merged together.<sup>151</sup> One such example, however, revealed the rationale of the corporation by estoppel doctrine. In *Kleckner v. Turk*,<sup>152</sup> the court recognized that the creditor dealt with the corporation without a thought or expectation of holding the individual shareholders liable and the shareholders, in turn, did not agree, intend, or contemplate that they would be held liable. To hold the shareholder liable would be creating, in effect, a new and different contract.<sup>153</sup>

The court's attitude was indicated by its decision in *Nebraska National Bank of York v. Ferguson*.<sup>154</sup> There a creditor attempted to hold the shareholders liable for the debts of a corporation. The articles of incorporation had been filed with the county clerk but not with the secretary of state. It thus appears that a de facto corporation could have been found to exist.<sup>155</sup> There was no doubt that the creditor recognized and dealt with the corporation as a corporation;<sup>156</sup> in fact, the creditor had previously brought suit and obtained a judgment against the corporation. It was this earlier judgment that proved to be the deciding factor. The court stated it was unnecessary to determine whether a de facto corporation existed.<sup>157</sup> Assuming no de jure or de facto corporation, the plaintiff was estopped to deny the existence of the corporation by bringing an action and obtaining a judgment against it. Moreover, and more important to the scope of this comment since a judgment will not usually be first obtained against a defective corporation, the court stated, in dicta: "In addition to the recovery of judgments against the [corporation] upon the indebtedness made the foundation of

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150. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, 423 (1876) ("[P]ersons who have contracted in writing with such an association, without any color of franchise, are not estopped from denying its corporate capacity.").

151. *Kleckner v. Turk*, 45 Neb. 176, 189, 63 N.W. 469, 472 (1895) ("[P]ersons who have contracted with a *de facto* corporation . . . as did the plaintiff, and thus recognized and acknowledged its existence as a corporation, may not afterward be heard to deny its corporate capacity . . .").

152. 45 Neb. 176, 63 N.W. 469 (1895).

153. *Id.* at 187-88, 63 N.W. at 472.

154. 49 Neb. 109, 68 N.W. 370 (1896).

155. See text accompanying notes 135-39 *supra*.

156. All notes had been signed, "York Butter and Cheese Company, by F.A. Bidwell, president, J.D. White, Secretary." 49 Neb. at 112, 68 N.W. at 371.

157. *Id.* at 113, 68 N.W. at 372. See also *Crete Bldg. & Loan Ass'n v. Patz*, 1 Neb. Unoff. 768, 95 N.W. 793 (1901) (use of estoppel without necessity of finding a de facto corporation).

this suit, plaintiff actually dealt with said company as a corporation, and therefore its corporate existence cannot be assailed by plaintiff in this action."<sup>158</sup>

The most cogent statement of the corporation by estoppel doctrine where a creditor attempts to sue the shareholders of a defective corporation was offered by the court in *American Gas Construction Co. v. Lisco*:<sup>159</sup> "When a party contracts with an imperfectly organized corporation, he is estopped to deny its corporate existence and is precluded from recovering from its members individually as if they were partners."<sup>160</sup> However, the facts of the case indicate that the court's holding was incorrectly applied. An action was brought by a corporate creditor to recover the balance due on a contract executed between the corporation and the defendant individual.<sup>161</sup> The defendant attempted to set off the contract sued upon with one executed between himself and a shareholder/officer of the plaintiff corporation. To accomplish this result, the defendant asserted that the corporation's legal existence had expired prior to the execution of the contract. The court was faced with a situation which merely required the literal application of section 24-221: "[N]or shall any person sued on a contract made with such corporation . . . be permitted to set up the want of legal organization in defense of such action."<sup>162</sup>

The paucity of Nebraska case law concerning the corporation by estoppel doctrine where a creditor attempts to hold the shareholders liable makes a conclusion difficult. Besides the confusion of the early cases,<sup>163</sup> procedural considerations have sometimes precluded consideration of the issue. For example, in *H.J. Hughes Co. v. Farmers Union Produce Co.*,<sup>164</sup> the court refused to consider the shareholders' defense that the creditor had contracted with the corporation and was now estopped from denying its existence because a general denial was held insufficient to plead the defense.<sup>165</sup> It appears that the corporation by estoppel doctrine has been recognized by the Nebraska courts when the shareholders are being sued, but has yet to be fully applied to preclude a creditor who has intended to and believed he was contracting with a validly formed

158. 49 Neb. at 114, 68 N.W. at 372 (dicta).

159. 122 Neb. 607, 241 N.W. 89 (1932).

160. *Id.* at 609, 241 N.W. at 90 (emphasis added) (citing *Nebraska Nat'l Bank of York*).

161. See text accompanying notes 36-39 *supra*.

162. NEB. COMP. STAT. § 24-221 (1929) (repealed).

163. See text accompanying notes 150-52 *supra*.

164. 110 Neb. 736, 194 N.W. 872 (1923). See text accompanying notes 146-47 *supra*.

165. Similarly, by making the corporation a party defendant, corporate existence is recognized by the plaintiff. *Baum v. Baum Holding Co.*, 158 Neb. 197, 62 N.W.2d 864 (1954).

corporation from holding the shareholders individually liable.<sup>166</sup>

## V. CONCLUSION

For the first time in Nebraska statutory history, the corporation laws contain a provision expressly stating when "corporate existence" shall commence. Under previous statutes, other conditions precedent, such as dual filing and recording of the articles of incorporation and notice of incorporation by publication, were required to achieve the status of a "valid" corporation, yet not all were required before the "commencement of business."<sup>167</sup> These statutes presented a problem for the courts and led them to make use of the de facto doctrine but, in so doing, to always hold that a de facto corporation could not result unless the articles of incorporation were filed with either the secretary of state or the county clerk.<sup>168</sup> Section 21-2054 has put to rest any need for the de facto doctrine in Nebraska today. Filing and recording the articles with the state is the only condition precedent to corporate existence. No act short of this could be sufficient to constitute a bona fide attempt to incorporate, and once this is done the association achieves the status of a de jure corporation. Stated differently, if the court persists in using the label "de facto" for corporations which have not also complied with conditions subsequent,<sup>169</sup> at least the problem inherent in the de facto doctrine is eliminated. Before the articles are filed and recorded with the state, the shareholder is liable.

While elimination of the de facto doctrine has been brought about through statutory change, the same cannot be said for the corporation by estoppel doctrine. First, because Nebraska laws do not contain a provision imposing joint and several liability on those who act as a corporation without authority from the state, there is no legislative intent concerning its elimination.<sup>170</sup> Therefore, the court must decide whether it would be equitable to allow a creditor of a defective corporation to hold the shareholders liable. Here it will be important for the court to separate the different situations in which the corporation by estoppel doctrine is typically applied.<sup>171</sup> The equitable arguments that have been presented apply only where a creditor is attempting to sue the

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166. Because the corporation by estoppel doctrine is an equitable one, the courts' failure to apply it in some situations may be due to its determination, without explanation, that it would yield an inequitable result. See note 49 & accompanying text *supra*.

167. See notes 126-27 & accompanying text *supra*.

168. See text accompanying notes 124-30 & 146-47 *supra*.

169. See note 138 *supra*.

170. See 2 MODEL ACT ANN. § 146 (quoted at note 61 *supra*).

171. See text accompanying notes 36-39 *supra*.

shareholders. Any broad holding by the court that the corporation by estoppel doctrine has been eliminated will result in confusion, as illustrated by the District of Columbia cases.<sup>172</sup>

Second, assuming the court takes the position that the creditor should be able to recover from someone when he contracts with a defective corporation that subsequently becomes insolvent—be it officers, directors, or shareholders<sup>173</sup>—does the fact that Nebraska has no statute similar to section 146 of the Model Act preclude elimination of the doctrine? It is submitted it does not.

The absence of a Nebraska provision similar to section 146 allows the courts to retain its discretionary power to apply the corporation by estoppel doctrine, and it is evident that it is not firmly entrenched in Nebraska case law. The doctrine has been recognized in few decisions, and has yet to be correctly applied. In relevant situations, procedural grounds have precluded its consideration. Similar to holding that a corporation by estoppel cannot result unless a de facto corporation exists, these decisions may actually reflect a rejection of the doctrine on the part of the courts.<sup>174</sup>

This comment has examined how other jurisdictions have treated the de facto corporation and corporation by estoppel doctrines under statutes similar to those of Nebraska. It has attempted to provide the practitioner with, perhaps, an alternate theory of liability when representing a creditor who had contracted with a corporation at a time when its articles of incorporation had not yet been filed with the state and which has since become insolvent.<sup>175</sup>

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172. See text accompanying notes 83-86 *supra*.

173. See note 8 *supra*.

174. See text accompanying notes 79 & 91 *supra*.

175. See Comment, *supra* note 35.